CHIEF JUSTICE, DESIGNATE
LAHORE HIGH COURT, LAHORE

FOREWORD

There is no cause more sacred than serving mankind. However, only a few are blessed enough to get the opportunity to do something for the people, and even fewer are those who owned an eager heart and compassionate soul to transform the opportunity into reality and bring actual and tangible change in the lives of so many. His Lordship, the Chief Justice Muhammad Qasim Khan is certainly an epitome of this kind who lived up to his resolve and made a difference through his words and deeds.

Given my close acquaintance with His lordship, that goes back over decades, I can say with utmost conviction that his lordship is one of those persons who devoted their selves for the amelioration of others. I developed a deep sense of someone who is a very balanced person, someone who has great convictions about his responsibilities and concerns for the colleagues and especially for poor people striving for justice. I always find him genial, and quick to talk about issues and always ready to offer solutions. I have always find him brave, forthright and valiant in the defence of the judicial institution.

His lordship has a knack for making judicial analysis and left a legacy of hard work, commitment, dedication and unwavering resolve in his abilities. His lordship has always been able to decipher the rules applicable in a situation, comprehend nuance connections among precedents, identify relevant principles and apply them in articulate manner. His intellectual capabilities remained steadfast in highly sensitive cases. He rendered remarkable judgments in criminal jurisprudence wherein he thoroughly broached the subject of registration of second FIR (PLJ 2011 Lah. 897), liability for offences committed outside Pakistan (2011 YLR 2882), Reinvestigation after submission of challan (2013 P.Cr.LJ 920; PLJ 2013 Lah. 186) , difference

between registration of case and initiation of criminal proceedings (KLR 2015 Cr.C. 211), powers and functions of justice of peace (2012 PCr.LJ 138, 2012 PCr.LJ 776, 2012 PCr.LJ 1082, PLJ 2014 Lah. 161, 2021 CLR 329) and quashing of the FIR (PLJ 2013 Lahore 606).

His lordship has also rendered significant contribution to service and election matters. His lordship issued judicial direction for blocking social media pages sharing Blasphemous material (2017 [M]PCrR 566, 2018 SLR 122, 2018 PCr .L J. 1133). In his recent Judgment, his lordship while deciding a case titled as "Shahzana Kazmi Versus Federation of Pakistan" (Writ Petition No. 59484), directed the Government of Pakistan to formulate a policy for auctioning articles of Tosha Khana. Through scores of judgments, his lordship evolved imitable legal principles and ensured enforcement of the rule of law. He has set high standards of professional excellence and moral uprightness. His invaluable and qualitative contributions to legal fraternity are not only source of knowledge but also a beacon of light. The Honorable Chief Justice will always be remembered for his abundant energy and unbounded intellectual actions to safeguard oppressed, persecuted or subjugated segments of the society.

On behalf of all my brother and sister colleagues, I extend his lordship, our heartfelt gratitude for his invaluable contribution to the Judiciary and to this prestigious institution of Lahore High Court. We wish him a very happy, healthy and fulfilling retirement.

JUSTICE MUHAMMAD AMEER BHATTI,
(CHIEF JUSTICE, DESIGNATE)

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2010 C L D 888
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD AKMAL---Petitioner
Versus
TRUST LEASING INVESTMENT BANK through General Manager and 4 others---Respondents

Writ Petition No.2369 of 2006, decided on 9th June, 2010.

(a) Transfer of Property Act (IV of 1882)---
----S.12---Agreement to sell---Validity---Such agreement would not create any title in favour of vendee.

(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---
----S.17---Transfer of Property Act (IV of 1882), S.12---Constitution of Pakistan (1973), Art.199---Constitutional petition--Non-payment of instalments of vehicle by original purchaser to Bank---Seizure of vehicle and its sale by Bank without intervention of court---Petitioner claimed to have purchased vehicle from original purchaser through agreement to sell and paid instalment to Bank, thus, Bank was bound to consider him as its owner instead of original purchaser and deliver him its possession---Validity---Such agreement would not create any title in favour of petitioner---Bank was not party to such agreement---Nothing on record to show that original purchaser could sell out vehicle to any other person without permission of Bank---High Court dismissed constitutional petition as petitioner had no locus standi to file the same.
Raja Muhammad Sohail Iftikhar for Petitioner.
Muhammad Saleem Iqbal for Respondents Nos. 1 and 2.

ORDER
MUHAMMAD QASIM KHAN, J.---Learned counsel for the petitioner prays that act of the respondents Nos. 1 and 2 by which they have impounded/taken the possession of vehicle Cuore Engine No.R-018379, Chassis -No.751245, Registration No.MLC/9700 owned by the petitioner may kindly be declared illegal, based on mala fide and without any lawful authority and as a consequential relief respondents Nos. 1 and 2 be directed to deliver the possession of said vehicle to the petitioner.

2. Learned counsel for the petitioner argued that actually the vehicle was leased out by respondents Nos. 1 and 2 to respondent No.4 and later on respondent No.4 handed over it to respondent No.3 through an un-registered agreement to sell and petitioner purchased the same from respondent No.3 through another agreement to sell which is part of the file. Further contends that he paid the installments to the respondents Nds.1 and 2 and amount received by them prima facie establish that impliedly respondents Nos.1 and 2 accepted the sale hence, the petitioner is competent to challenge the order passed by respondents Nos.1 and 2. Further contends that letter dated 30-11-2005 written to one Sardar Abdul Hameed Khan respondent No.4 is

against facts and hence as the petitioner neither defaulted of any installment nor committed illegality so, respondents Nos. 1 and 2 be directed to deliver the possession of above-mentioned vehicle to him.

3. On the other hand, learned counsel for respondent No.2 opposed this petition on the ground that petitioner has no locus standi to file this petition as neither he is customer nor borrower, as per section 2(c) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 the petition is not maintainable. On facts argued that as respondent No.4 was defaulter and so many installments were not paid by him and then the respondents Nos. 1 and 2 after adopting all legal formalities at last impounded/took into possession the above-mentioned vehicle and further contends that same vehicle was sold out in open auction held on 26-12-2005 against an amount of Rs.3,75,000 and this amount was adjusted against the loan up to the extent of vehicle.

4. Heard. Record perused.

5. On Court query, whether any agreement to sell creates any right the learned counsel for the petitioner frankly admitted that agreement to sell does not create any title in favour of any party. On further query, he admitted that in said agreement the respondents Nos.1 and 2 were not party,' however, again stressed that the installments were paid by the petitioner which were received by respondents Nos.1 and 2 and copies of the receipts are on the file which establish the implied consent of respondents Nos. 1 and 2 to consider the petitioner as owner of the vehicle instead of Abdul Hameed.

6. I have gone through the lease agreement regarding above vehicle between respondents Nos. 1 and 2 and 4. Learned counsel for the petitioner could not point out any condition which permits respondent No. 1 to sale out the same through an agreement to sell to any other party without permission of Bank. Hence, I am of the view that petitioner has no right to file this petition. Same is dismissed.

S.A.K./M-358/L Petition dismissed.

PLJ 2010 Cr.C. (Lahore) 899
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
M. JAVED alias Jaidi--Petitioner
versus
STATE and another—Respondents

Crl. M. No. 2717-B of 2010, decided on 18.8.2010.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860)--Ss. 324, 337-A(i), 337-F(v), 337-L(2), 427, 148 & 149--Bail, grant of--Further Inquiry--Not nominated in FIR--Joint role of firing at victim--No specification as to whose fire hit the victim--No repetition of fire on the part of accused--Applicability of offence u/S. 324, PPC was a matter requiring further inquiry--At the most injury caused to the victim was covered by
S. 337-F(v), PPC, which offence does not fall within prohibitory clause of S. 497, Cr.P.C.--Opinion of doctor about one of the injury having been caused with blunt weapon also makes the case against the accused one of further inquiry--Accused was behind the bars without any substantial progress in the trial--Bail was allowed. [P. 900] A
Mr. Altaf Ibrahim Qureshi, Advocate for Petitioner.
Mr. Muhammad Amjad Rafique, DPG for State.
Date of hearing: 18.8.2010.

Order
Petitioner seeks post arrest bail in case FIR No.88 dated 15.2.2010 registered with Police Station Qutabpur, Multan.

2. Briefly the allegation against the petitioner is that he along with co-accused stopped the car, where after, Shahid co-accused inflicted Rifle butt blow on the car towards driver's side and then Javed petitioner and Shahid co-accused made firing at the car, hitting Asif Abbas driver.

3. It is argued by learned counsel that petitioner has been falsely involved in the case. Further argued that two accused have been attributed fire shots without any specification as to whose fire hit the victim. The learned counsel further argued that in the medical report one injury has been shown to be result of blunt weapon, which fact negates the prosecution case. It is next contended that offence under Section 324-PPC is not applicable and at the most it is case of Section 337-F(v) PPC which offence does not fall within prohibitory clause, as such, petitioner is entitled for the grant of post arrest bail.

4. The learned DPG opposed the bail by contending that petitioner is nominated in the FIR with specific attribution of causing fire arm injury to the victim.
5. Heard. Record perused.

6. Although the petitioner is nominated in the FIR but a joint role of firing at the victim has been assigned to him along with co-accused. There is no specification as to whose fire hit the victim. Admittedly, there is no repetition of fire on the part of the petitioner, as such applicability of offence under Section 324 PPC is a matter requiring further inquiry. At the most the injury caused to the victim is covered by Section 337-F(v) PPC, which offence does not fall within prohibitory clause of Section 497 Cr.P.C. Furthermore, opinion of the doctor about one of the injury having been caused with blunt weapon also makes the case against the petitioner one of further inquiry. The petitioner is behind the bars without any substantial progress in the trial. Therefore, this petition is allowed and petitioner is admitted to post arrest bail on furnishing bail bond in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(R.A.) Bail allowed.

2011 P Cr. L J 1997
[Lahore]
Before Muhammad Qasim Khan and Mazhar Iqbal Sidhu, JJ
MUHAMMAD SHAKEEL SHAH---Petitioner
Versus
THE STATE---Respondent

Criminal Miscellaneous No. 604-M of 2011 in Appeal No. 1086 of 2001, decided on 4th October, 2011.

Criminal Procedure Code (V of 1898)---
----Ss.35, 382-B & 561-A---Penal Code (XLV of 1860), Ss.302(b)/109---Anti-Terrorism Act (XXVII of 1997), S.7---Several sentences---Accused was convicted by Trial Court under Ss. 109/302, P.P.C. and S.7 of Anti-Terrorism Act, 1997, and sentenced to life imprisonment in both the offences---Contention of accused was that sentences imposed upon him should be ordered to run concurrently---Validity---Accused was granted benefit of provisions of S.382-B, Cr.P.C. but nowhere in the judgments handed down by Trial Court, High Court as well as by the Supreme Court, it was directed that the certitude of the sentences would run concurrently/simultaneously--- High Court directed the jail authorities to count the quantum of sentences in each offence concurrently/simultaneously with the benefit of provisions of S.382-B, Cr.P.C., which had already been granted to accused---Application was allowed accordingly.

Aurangzeb and 2 others v. The State PLD 2011 Lah. 25; Zubaida v. Falak Sher and others 2007 SCMR 548 and Shah Hussain v. The State PLD 2009 SC 460 **fol.**
Qazi Misbah-ul-Hassan for Petitioner.
Ikhlaq Ahmad, D.P.-G. for the State.
Malik Ijaz Hussain for the Complainant.

ORDER
By filing instant petition under section 561-A read with sections 35 and 397, Cr.P.C., petitioner being condemned has prayed that sentences imposed upon him vide judgment dated 9-7-2001 under sections 109/302, P.P.C. and section 7 of Anti-Terrorism Act, 1997 may be ordered to run concurrently/simultaneously and the jail authorities may also be directed to reckon the quantum of sentences in all the offence at once/concurrently instead of consecutively.

2. Learned counsel upon this has relied upon **case titled AURANGZEB AND 2 OTHERS v. THE STATE** (PLD 2011 Lahore 25), case **titled Mst. ZUBAIDA v. FALAK SHER and others** (2007 SCMR 548), case **titled SHAH HUSSAIN v. THE STATE** (PLD 2009 SC 560 (FB).

3. Learned DPG has not been ale to rebut the arguments but has candidly conceded the instant point of law relying upon the Full Court judgment titled Shah Hussain v. The State.

4. Hearkened and record perused.

5. Petitioner was convicted and sentenced by the learned trial Court vide order dated 9-7-2001, his appeal was dismissed by this court vide judgment dated 15-5-2002 and then he could not succeed in obtaining any relief from the Hon'ble Supreme Court of Pakistan, ultimately, he withdrew his appeal from there on 31-10-2002. Petitioner was granted the benefit of provisions of section 382-B, Cr.P.C. but nowhere in the judgments handed down by the learned trial Court, by this court as well as by the Hon'ble Supreme Court of Pakistan, it was directed that the certitude of the sentences shall run concurrently/simultaneously. The codified law is very much clear upon it and the case law referred to supra and relied upon has explicitly provided the benefit to the accused that his sentences should run concurrently. In these circumstances, by accepting the instant petition, jail authorities are directed to count the quantum of sentence in each offence concurrently/simultaneously with the benefit of provisions of section 382-B, Cr.P.C. which has already been granted to the petitioner.

M.H./M-336/L Petition allowed.

2011 P L C (C.S.) 732
[Lahore High Court]
Before Muhammad Qasim Khan, J
Mst. YASMEEN BEGUM
Versus
TECHNICAL EDUCATION AND VOCATIONAL TRAINING AUTHORITY, GOVERNMENT OF PUNJAB through Chairman TEVTA and 3 others

Writ Petitions Nos.510 of 2006/BWP, 3125 and 1564 of 2006 decided on 26th January, 2011.

Constitution of Pakistan---
----Art. 199---Constitutional petition---Civil service---Appointment---Petitioners in response to an advertisement for recruitment against vacant seats of different categories, submitted their candidatures and after going through the entire recruitment process, were appointed---Pursuant to their respective appointment letters they joined their places of postings---Subsequently Authority issued letter directing to advertise said posts---Said letter had been impugned through constitutional petition on the ground that petitioners had fulfilled the requisite criteria, and after going through the entire recruitment process, they were validly issued appointment letters and that they apprehended that they would be thrown out of their jobs without assigning any reason, whereas they were protected by the principle of locus poenitentiae---Petitioners had further alleged that impugned action of the authorities was also violative of principle of audi alteram partem---Representative of the respondent department, in clear terms stated that department would be ready to proceed against the petitioners afresh by adopting all the legal formalities---Impugned action having been taken by the department without issuing any show-cause notice to the petitioners, nor they had been given opportunity of hearing, same being violative of principle of audi alteram partem, impugned letter to the extent of the petitioners was set aside, in circumstances.

Shamshair Iqbal Chughtai and Syed Masood Ahmad Gillani for Petitioner.
Malik Muhammad Mumtaz Akhtar, Additional Advocate-General with Zafar Hayat, Assistant Manager (Legal) TEVTA, Bahawalpur.

ORDER
MUHAMMAD QASIM KHAN, J.--- This single order shall dispose of three matters i.e. W.P. No.510 of 2006 "Mst. Yasmeen Begum v. General Manager TEVTA", W.P. No.3125 of 2006 "Syeda Naurin Gilani v. TEVTA" and W.P. No.1564 of 2006 "Asma Noureen v. TEVTA", as all these arise out of almost similar facts and circumstances.

2. Briefly the facts are that pursuant to advertisement for recruitment against vacant seats of different categories the petitioners also submitted their candidatures and after going through the entire recruitment process, Mst. Yasmeen Begum (petitioner in W.P. No.510 of 2006) was appointed as Junior Trade Instructor (Beautician), Mst.

Syed Noureen Gillani (petitioner in W . P. No.3125 of 2006) was appointed as Junior Trade Instructor (Sewing) and Mst. Asma Noureen (petitioner in W.P. No.1564 of 2006) was issued appointment letter as Junior Trade Instructor (Tailoring). Pursuant to their respective appointment letters, all the three petitioners individually joined their places of postings against their specific posts. Subsequently anyhow the General Manager (Operations)/respondent issued a letter bearing No.TEVTA/G.M(0)/DM/13 dated 11th of February, 2006 with the subject. "Induction of Staff" and directed the District Manager, Bahawalpur/ Lodhran as under:--

"You are required to advertise the under mentioned posts forthwith. However, staff already working against these posts, will continue to work until the fresh injunction is made. They will also be allowed to allowed to compete provided they are eligible under the rules"

This letter has been impugned through these writ petitions on the ground that petitioners fulfilled the requisite criteria and after going through the entire recruitment process, they were validly issued appointment letters and they also joined their respective places of postings, whereas, by way of impugned letter the petitioners were intended to be thrown out of job without assigning any reasons whatsoever, whereas, the petitioners were protected by the principle of locus poenitentiae. Further it is argued that impugned action of the respondent is also violative of principle of audi alteram partem and further more the petitioners have also been treated discriminately as forty four appointments were made against different posts but only the posts of twenty five persons (including the petitioners) were sought to be re-advertised. It is next argued that petitioners have been victimized just for the reason that they had approached this Court in these writ petitions and were working on an injunctive order.

3. The learned Additional Advocate-General on the other hand argued that petitioners were appointed on contract basis, as such, they could not file writ petitions. Further argued that one of the petitioners did not hold the diploma of three years, which was basic requirement for appointment. When this query was put to the official of the respondent present before the Court he remained unable to produce any documentary proof about requirement of such diploma. The learned Law Officer contended that there were numerous complaints about recruitment process by District Manager, Bahawalpur, a proper inquiry was held and Committee held that twenty nine appointments were illegal and irregular, therefore, action was taken for issuance of fresh recruitment process.

4. Heard. Record perused.

5. On court query from the learned Additional Advocate-General and the official of the respondents present before the Court that when some employee is removed from service even on the allegation that their recruitment was illegal and they did not possess the required criteria, would it not amount to imposing a stigma on his service career and in such circumstances whether such employee is not required to be served

with show-cause notice before passing an adverse order, they remained unable to come up with any rebuttal and Assistant Manager (Legal)/ representative of the department in clear terms stated that respondent department would be ready to proceed against the petitioners afresh by adopting all the legal formalities. The learned Additional Advocate-General also came forward with the stance that these matters may be disposed of in the light of above statement made on behalf of the official respondents. In any way, as the impugned action has been taken by the respondent without issuing any show-cause notice to the petitioners, nor they have been given opportunity of hearing, as such, the same being violative of principle of audi alteram partem, these writ petitions are allowed and the impugned letter dated 11-2-2006 to the extent of these petitioners is set aside. The` respondents may however, if so advised, proceed against the petitioners afresh, of course strictly in accordance with law.

H.B.T./Y-4/L Petition allowed.

2011 P L C (C.S.) 1323
[Lahore High Court]
Before Muhammad Qasim Khan and Mazhar Iqbal Sidhu, JJ
ISLAMIA UNIVERSITY OF BAHAWALPUR
Versus
Dr. ABDUL QADUS SIAL and others

I.C.As. No.78, 79 and 81 of 2010, decided on 10th March, 2011.

(a) West Pakistan General Clauses Act (VI of 1956)---
----S. 26---Service of court's notice issued by post---Such notice, if not returned unserved after passage of reasonable time between date of issuance and date of hearing, would be presumed to have been served.

(b) Islamia University of Bahawalpur Act (II of 1975)---
----Ss. 11(3), 11(a), 15(4)(iv), 21, 42 & Sched. to S.48, para.3---Order of Vice-Chancellor punishing an employee of University---Right of appeal---Scope---Comma would be used to separate phrases or clauses---Phrase "other than the Vice-Chancellor" used in S.42 of Islamia University of Bahawalpur Act, 1975 begun with comma and ended with comma, which not only separated Vice-Chancellor from teachers and other employees of University, but excluded him from definition of officer for purposes of filing appeal before Syndicate---If there was intention of legislature to exclude teachers or other employees of University from filing an appeal, then any conjunctive word like "and" could be used between phrase "other than the Vice-Chancellor" and phrase "teacher or other employees of the University"---Other officials, teachers and employees of University had a right of appeal before Syndicate.

2003 MLD 507; Oxford Advanced Learner's Dictionary (7th Edition); 2006 PTD 386; 2006 PTD 204 and 2006 PTD 515 **rel.**

(c) Appeal (Civil)---
----Right of---Scope---Right of appeal must be provided so as to add check and balance against illegal orders or actions taken in sheer abuse of jurisdiction by authorities sitting on helm of affairs or for correct application of law.

(d) Maxim---
----"Interpretatio talis in ambiguis smper fienda est ut evitetur inconveniens et absurdum" (in case of ambiguity, a construction should be found such that what is unsuitable and absurd may be avoided).

Muhammad Ashraf Sheikh and Bilal Ahmad Qazi for Appellants.
Eejaz Ahmad Ansari for Applicant (in C.M. No.2398 of 2010).

Malik Mumtaz Akhtar, Addl. A.-G.

ORDER

This Intra-Court Appeal No.78 of 2010 "THE ISLAMIA UNIVERSITY AND OTHERS v. DR. ABDUL QUDDUS SIAL AND OTHERS I.C.A. No.79 of 2010 "THE ISLAMIA UNIVERSITY AND OTHERS v. MUHAMMAD ARSHAD KHAKWANI AND I.C.A. No.81 of 2010 "PROFESSOR DR. SHAMS UL BASHIR v. ISLAMIA UNIVERSITY BAHAWALPUR AND OTHERS" have been directed to assail the order dated 18-5-2010 passed by learned Single Judge in chamber accepting Writ Petitions Nos.4213 of 2009 and 4836 of 2009 respectively.

2. During the pendency of these I.C.As., Muhammad Arshad Khakwani filed a contempt petition Crl. Org. No.212 of 2010 and also filed C.M. No.3417 of 2010 in I.C.A. No.79 of 2010 under Order VII, Rule 11, C.P.C. and similar C.M. No.4372 of 2010 was brought in I.C.A.No.81/2010. So far as applications under Order VII, Rule 11, CPC are concerned, it has been asserted that the original impugned order dated 13-10-2009 against which Writ Petitions had been filed and then I.C.As. were preferred, has subsequently been recalled vide another order dated 6-1-2010 passed by the University authorities. At this stage the learned counsel for the appellant contended that original order was not recalled during pendency of writ petitions, rather, it was withdrawn on 6-1-2010. In this view of the matter, we find no substance in these Civil Miscellaneous Applications Nos.3417 and 4372 of 2010 and both are dismissed, whereas, the main I.C.As. and other allied petitions are being decided by this single judgment.

3. The learned counsel for the respondent/application referred to Section 42 of the Islamia University of Bahawalpur Act and contended that a right of appeal against the order passed by the Vice-Chancellor is available, as the impugned order is covered by the word "disadvantage" to the prescribed terms and conditions of service in the light of para 3(1) and amended para 3(2) of 1st Schedule of the statute framed under section 48 of the Act, ibid, as such I.C.As. are not maintainable. Even after the decision of appeal by the syndicate a right of review before the same forum i.e. Syndicate or right of review before the Chancellor under sections 11(3) and 11(a) of the Act is available, hence, I.C.As. are liable to be dismissed on this score alone.

4. The learned counsel for appellant on the other hand argued that impugned order was passed under section 15(4)(vi) of the Islamia University Bahawalpur Act, 1975 and according to section 42 of the said Act, the case of the appellant is not covered, as this Section excludes Vice-Chancellor, Teacher as well as employees and moreover, as the impugned order was passed under special powers of the Vice-Chancellor under section 15(4)(vi), therefore, the said order was not reviseable before the Chancellor. The learned counsel in this respect referred to section 11 subsection (3) and section 11(a) of the said Act and contended that Vice-Chancellor alone does not fall within the definition of authority as defined in Section 21, ibid. The learned counsel further argued that section 48 provides that statutes set out in the Schedule appended to the Act shall be deemed to be the Statues framed under section 48 of the Act to regulate and prescribe the provisions of section 30 of the Act and any legislation under section 48 thereof is delegated legislation and has no overriding effect on the main statute,

hence, it could not be said that the impugned order passed by the Vice-Chancellor is covered by the word "disadvantage" to the prescribed terms and conditions of service, hence, objection raised by learned counsel for the applicant has no force and is liable to be thrown out of consideration. The learned counsel further contended that although impugned order has been withdrawn by the University Authorities but as interpretation of statute is involved and it may materially affect the future prospects of the individuals, therefore for this reason also the I.C.As. are required to be decided on merits.

5. The learned counsel for appellant in I.C.A.No.81 of 2010 argued that writ petition was in the nature of quo warranto and petitioner has been condemned unheard, neither any notice was issued nor served upon him. The learned counsel took the stance that as the impugned order has been withdrawn by the University authorities, therefore, he would not assail the said order on merits, however, remarks recorded in the impugned order of learned single Judge in chamber qua the present appellant may be hazardous to his future career, same according to the learned counsel even otherwise are not sustainable, as such, the same may be ordered to be expunged.

6. Heard. Record explored.

7. We have given our anxious consideration to the contentions of learned counsel for appellant in I.C.A.No.81 of 2010 and have gone through the record, which shows that a notice was issued to Professor Dr. Shams-ul-Bashar appellant/respondent in the writ petition, despite that he did not appear before the Court. Under section 26 of West Pakistan General Clauses Act, 1956, if a notice is issued and even if it is not returned un-served, after passage of reasonable time between date of issuance and date of hearing, it will be presumed that notice has been served. Moreover, an important case was fixed before the Court in which University was defending the cause; it is not believable that appellant was not aware of such an important matter, which ultimately could even affect his own future prospects. Therefore, we find no force in his plea.

8. For ready reference the relevant sections of The Islamic University of Bahawalpur Act, 1975 are reproduced hereunder:---

"Section 3(1) of Schedule to section 48.--- There shall be a teaching Department for each subject or a group of subjects, as may be prescribed by Regulations and each teaching department shall be headed by a Chairman."

In paragraph 3 above, for sub-paragraph (2), following amended was inserted:---
"The Chairman of a Teaching Department and the Director of an Institute shall be appointed by the Syndicate on the recommendation of the Vice-Chancellor from amongst the three senior most Professors of the Department for a period of three years and shall be eligible for re-appointment:
Provided that in a Department where there are less than three Professors the appointment shall be made from amongst the three senior most Professors and Associate Professors of the Department:

Provided further that in a Department, in which there is no Professor or Associate Professor, no such appointment shall be made and the Department shall be looked after by the Dean of the Faculty with the assistance of the senior most teacher of the Department."

Section 30 of the said Act, settles that subject to other provisions of the Act, statutes may be made to regular or prescribe all or any of the matters, specified there-under:--- "Section 48.--- Notwithstanding anything to the contrary contained in this Act, the Statutes set out in the Schedule appended to this Act shall be deemed to be the Statutes framed under section 30 of this Act and shall continue to remain in force until amended or repealed."

Now, section 42 of The Islamia University of Bahawalpur Act, 1974 is reproduced, the interpretation of which is in fact the moot point in these Intra Court Appeals.
"Where an order is passed, punishing any officer, other than the Vice-Chancellor, teacher or other employee of the University or altering or interpreting to his disadvantage the prescribed terms or conditions of his service, he shall, where the order is passed by the Vice- Chancellor or any other officer or teacher of the University, have the right to appeal to the Syndicate against the order and where the order is made by the Syndicate have the right to apply to that Authority for review of that order. The appeal or applications for review shall be submitted to the Vice Chancellor and he shall lay it before the Syndicate with his views"

9. A bare reading of paras-3(1) and 3(2) as amended in 1st schedule prepared under section 48 of the Islamia University of Bahawalpur Act, 1975 would make it clear that impugned order was covered by the word "disadvantage" to the prescribed terms and conditions of service to the respondent. In the light of case reported in MLD 2003 Lahore 507, it could not be said that 1st schedule is delegated schedule and could not create any right. Use of commas in section 42-ibid needs to be considered carefully for interpretation of this section. In Oxford Advanced Learner's Dictionary (7th edition), use of comma has been explained so as to separate phrases or clauses. A plain reading of section 42 would show that after the 1st phrase "where an order is passed", by inserting comma it has been separated from the entire remaining sentence and then comma has been used after the phrase "punishing any officer", thereafter the phrase "other than the Vice-Chancellor" has been used by inserting commas before and after this phrase. As such, the phrase "other than the Vice-Chancellor" begins after comma and ends with comma, making it clear that in this section the Vice-Chancellor had been excluded from the definition of officer for the purposes of filing of appeal before the syndicate. After the phrase "other than Vice-Chancellor", there is comma and then phrase "teacher or other employees of the University" appears. If there was intention of the legislation to exclude the teacher or other employees of the University from filing an appeal any conjunctive words like "and" could be used between the two phrases in order to join the teachers or other employees of the University with Vice-Chancellor, but in this section after the Vice-Chancellor comma has been used, which separate it from teacher and other employees of the University. While interpreting statute the words should be read in their plan meaning and no

word should be added or deleted to interpret it. Reliance in this respect is placed on the case reported in 2006 PTD 386, 2006 PTD 204 and 2006 PTD 515. In this section the language used is very much clear and declare the intention of the legislation, hence, the interpretation advanced by learned counsel for the appellant has no force. Moreover, if such an interpretation is adopted, it will be harmful for the employees/officers/teachers of the University, as they would be deprived of a remedy against the orders passed by the Vice Chancellor under section 15(4) of the Islamia University of Bahawalpur Act, 1975, whereas, there is consensus amongst the jurists that right of appeal must be provided so to add check and balance against the illegal orders or the actions taken in sheer abuse of jurisdiction by the concerned authorities sitting on the helm of affairs or for correct application of law. It is settled principle of interpretation of statutes "Interpretatio talis in ambiguis smper fienda est ut evitetur inconveniens et absurdum" that in case of ambiguity, a construction should always be found such that what is unsuitable and absurd may be avoided and the law is the science of what is good and just, the words have to be taken so as to have effect and in all affairs indeed, especially in those that concern the administration of justice, equity should be regarded. Therefore, we are of the considered view that section 42-ibid only excludes the Vice-Chancellor from the word "officer" and other officials, teachers and employees of the University, have a right of appeal before the Syndicate.

10. For what has been discussed above, all these I.C.As are dismissed and other allied miscellaneous applications are disposed of accordingly.

S.A.K./I-21/L Appeals dismissed.

2011 P L C (C.S.) 1558
[Lahore High Court]
Before Sh. Ahmad Farooq and Muhammad Qasim Khan, JJ
SOHAIL NASIR and others
Versus
GOVERNMENT OF PAKISTAN and others

Writ Petition No.5451 and Civil Miscellaneous No.2 of 2011, decided on 26th May, 2011.

(a) National Accountability Ordinance (XVIII of 1999)---
----Ss. 7, 28(f) & 34---National Accountability Bureau (NAB) Employees Terms and Conditions of Service (TCS) Rules, 2002, R.3.35---Contract appointment--Additional charge---Deputy Chairman, powers of---Respondent was appointed as Director General NAB Rawalpindi on contract for a period of one year and was also given additional charge of Director General NAB Punjab---Despite termination of contractual period, respondent had been performing his functions-- Validity-- Deputy Chairman did not possess any delegated power to appoint any officer in Basic Scale-21 much less than extending tenure of contract of an officer, who was initially appointed by Chairman NAB, with the approval of Prime Minister of Pakistan---Additional charge of a vacant post could only be given for an initial period not exceeding three months with specific approval of Chairman, according to rule 3.35 of National Accountability Bureau (NAB) Employees Terms and Conditions of Service (TCS) Rules, 2002---Additional charge could be extended for another three months (i.e. not beyond a total period of six months), with the approval of government--Respondent was given additional charge of Director General NAB Punjab vide order dated 22-7-2010 and the period of six months had already expired---Period of contractual appointment of respondent as Director General NAB Rawalpindi as well as period of his additional charge as Director General NAB Punjab had expired on 20-4-2011 and 21-1-2011 respectively---High Court restrained the respondent from performing his duties as Director General NAB Rawalpindi with additional charge of Director General NAB Punjab, with immediate effect---Petition was allowed accordingly.

Bank of Punjab and another v. Haris Steel Industries (Pvt.) Limited PLD 2010 SC 1109 **rel.**

(b) Public functionary---
----Power and authority---Exceptional circumstances---Effect---Existence of exceptional circumstances do not vest any power or authority on a public functionary, knowingly to pass an illegal and unauthorized order.

Muhammad Azhar Sidiqui for Petitioner.
M. Asad Manzoor Butt for Respondent No.10/Rana Zahid Mehmood in person.
Muhammad Ashraf Khan, Dy.A.-G. for Pakistan.

Bashir Ahmad, Deputy Prosecutor, NAB and Mian Muhammad Hanif Tahir, Legal Expert for National Accountability Bureau.

ORDER

Civil Miscellaneous No.2 of 2011.

Through the instant petition, the petitioner has prayed For Restraining the respondent No.10/Rana Zahid Mehmood from performing his duties as Director General NAB, Punjab as well as Director General NAB, Rawalpindi, till the decision of the main writ petition

.

2. The learned counsel for the petitioner submitted that Rana Zahid Mehmood was appointed as Director General (BPS-21), National Accountability Bureau (Rawalpindi) on contract basis for a period of one year vide Notification dated 21-4-2010 and after expiry of the said period on 20-4-2011, he cannot perform his duties as such. He further submitted that respondent No.10 was given additional charge of Director General, NAB (Punjab) vide Officer Order dated 22-7-2010 and the said arrangement could not exceed three months. However, the initial period of additional charge of three months could be extended for another three months with the approval of the Government according to the Rule No.3.35 of National Accountability Bureau (NAB) Employees Terms and Conditions of Service (TCS), 2002. He maintained that the appointing authority of the Director General (BPS-21), National Accountability Bureau, is the Chairman, NAB, who has not extended the period of the present incumbent after 20-4-2011 and as such, respondent No.10 could not legally perform his duties.

3. Conversely, the learned counsel for respondent No.10 contended that the tenure of contract of Rana Zahid Mehmood for one year was not specifically mentioned in the summary, which was approved by the Prime Minister of Pakistan. He claimed that only the terms and conditions of appointment on contract of respondent No.10 was sent to the Prime Minister under section 28(C) of National Accountability Bureau Ordinance, 1999. He contended that neither provisions of Civil Servant Act, 1973 nor National Accountability Bureau (NAB) Employees Terms and Conditions of Service (TCS), 2002 are applicable to the appointment of respondent No.10. He maintained that in the absence of Chairman, NAB, the Deputy Chairman, NAB being delegatee, was empowered to authorize respondent No.10 to continue to perform his duties temporarily vide order dated 20-4-2011.

4. Arguments heard. Record perused.

5. Appointment of members of the staff and officers of the National Accountability Bureau are governed by section 28 (a) of the Ordinance, ibid, which empowers the Chairman NAB or an Officer of the NAB duly authorized by him, to appoint such officers and staff as he may consider necessary for the efficient performance of the functions of the NAB. Similarly, the Chairman, NAB has been authorized to determine the salaries, allowances and other terms and conditions of service of the officers and members of the staff of the NAB, with the approval of the President, in

view of section 28(c) of the NAB Ordinance, 1999. As far as the mode of appointment of Deputy Chairman, NAB is concerned, the same is provide in section 7 of the National Accountability Bureau Ordinance, 1999, which envisages the said appointment by the President in consultation with the Chairman, NAB. Likewise, Section 6(iv) and section 34(A) of National Accountability Ordinance, 1999, empower the Chairman to delegate by an order in writing any of his powers to and authorize performance of any of his functions by, an officer of the NAB as he may deem fit and proper.

6. From the record, it is evident that the Chairman NAB vide order dated 15-10-2010 had delegated certain powers in terms of sections 7-A and 34(A) of the NAB Ordinance, 1999 to the Deputy Chairman, which included the service and other matters pertaining to the officers up to BS-20/D.G. or equivalent. The Chairman, NAB had also delegated the power to the Deputy Chairman to preside over all the departmental boards for the appointment and promotion of all officers up to BS-20 as per National Accountability Bureau (NAB) Employees Terms and Conditions of Service (TCS), 2002 and appointments of Experts in terms of section 28(f) of NAB Ordinance, 1999. A plain reading of the order dated 15-10-2010 would reveal that the Deputy Chairman did not possess any delegated power to appoint any officer in B.S.21 much less than extending the tenure of contract of an officer, who was initially appointed by the Chairman, NAB, with the approval of the Primer Minister of Pakistan.

7. It is also worth consideration that at present the office of the Chairman NAB is vacant. It has been held in the case of "BANK OF PUNJAB and another v. HARIS STEEL INDUSTRIES (Pvt.) Limited" (PLD 2010 SC 1109), that provisions of section 6(C) of the National Accountability Bureau Ordinance, 1999 permit a Deputy Chairman to act as Chairman NAB only when the Chairman is available but is temporarily absent or is temporarily unable to perform functions of his office e.g. on account of illness, etc. and the said provision did not allow a Deputy Chairman to act as the Chairman, when the said office was vacant.

8. Admittedly, Rana Zahid Mehmood/respondent No.10 was appointed as Director General NAB, Rawalpindi in BPS-21 by the Chairman NAB with the approval of the Prime Minister of Pakistan vide Notification dated 21-4-2010 for a period of one year. The said period of his appointment as Director General NAB (Rawalpindi) has expired on 20-4-2011. However, the Deputy Chairman NAB temporarily allowed Rana Zahid Mehmood to function as Director General NAB (Rawalpindi) with additional charge of Director General NAB (Punjab) as an interim arrangement vide order dated 20-4-2011. Interestingly, despite conceding the legal position in the order dated 20-4-2011 that the extension in the contract of the Director General could only be granted by the competent authority i.e. Chairman NAB, the Deputy Chairman NAB has allowed Rana Zahid Mehmood to continue to perform duties temporarily. Apparently the impugned order dated 20-4-2011 has been passed on the basis of exceptional circumstances and compelling administrative reasons. Suffice it to observe that the existence of exceptional circumstances, whatsoever, do not vest any

power or authority on a public functionary knowingly to pass an illegal and unauthorized order.

9. Moreover, the additional charge of a vacant post could only be given for an initial period not exceeding three months with the specific approval of the Chairman, according to Rule 3.35 of National Accountability Bureau (NAB) Employees Terms and Conditions of Service (TCS), 2002. However, the same may be extended for another three months (i.e. not beyond a total period of six months), with the approval of the government. Admittedly, respondent No.10/ Rana Zahid Mehmood was given the additional charge of Director General NAB (Punjab) vide order dated 22-7-2010 and the aforementioned period of six months has already expired.

10. Finally, the Deputy Attorney General submitted a report in the court today, on behalf of respondent No.1/Government of Pakistan, wherein it is conceded that Rana Zahid Mehmood has got no right to act as Director General NAB Punjab after the expiry of period of his contract.

11. In view of the above, it is established that period of contractual appointment of respondent No.10/Rana Zahid Mehmood as Director General NAB (Rawalpindi) as well as period of his additional charge as Director General NAB (Punjab) has expired on 20-4-2011 and 21-1-2011, respectively. The instant civil miscellaneous petition is accordingly, allowed and respondent No.10/Rana Zahid Mehmood is restrained from performing his duties as Director General NAB Rawalpindi with additional charge of Director General NAB Punjab, with immediate effect.

M.H./S-139/L Application allowed.

PLJ 2011 Cr.C. (Lahore) 153 (DB)
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Qasim Khan and Mazhar Iqbal Sidhu, JJ.
MUHAMMAD ARIF etc.--Appellants
versus
STATE—Respondent

Crl. Appeal No. 53 of 2008 & 121-J of 2007 and M.R. No. 24 of 2007, heard on 18.5.2010.

Pakistan Penal Code, 1860 (XLV of 1860)--
----Ss. 302(b)/34--Conviction and sentence recorded against appellant by trial Court--Challenge to--Benefit of contradictions--Appellant was not directly related to the motive part of the case--He was a fast friend of co-appellant--He remained fugitive from law for quite a long period but abscondence cannot be considered to be a circumstances against the appellant, especially when the prosecution has failed to prove its case--Recovery of crime weapon was not to be believed on ground that ocular evidence has not been believed by Court--Appeals allowed. [P. 159] A

Mr. Muhammad Sharif Bhatti & Syed Asim Ali Bukhari, Advocates for Appellants.
Mr. Mumtaz Hussain Bazmi, Advocate for Complainant and Ch. Haq Nawaz, DDPP for State.
Date of hearing: 18.5.2010.

Judgment
Muhammad Qasim Khan, J.--Safdar Ali and Muhammad Arif were tried by learned Additional Sessions Judge, Bahawalpur in case FIR No. 240 dated 31.12.2004 under sections 302/109/34 PPC registered with Police Station Head Rajkan, Bahawalpur and on conclusion of the trial vide judgment dated 12.05.2007 both were convicted under Section 302-B/34 PPC and sentenced to death. They were further ordered to pay Rs. 100,000/- each as compensation to the legal heirs of the deceased, in default thereof each one had to suffer six months simple imprisonment. Criminal Appeal No. 53/2008 has been filed by Muhammad Arif, whereas, Criminal Appeal No. 121-J/2007 has been filed by Safdar Ali as well as said Muhammad Arif through Superintendent Jail, and Murder Reference No. 24/2007 has been sent by the learned trial Court in terms of Section 374 Cr.P.C. All these matters are being taken up for decision by this single judgment.

2. Briefly the facts are that on 31.12.2004 at 10.15 p.m. through written complaint Ex.PA Mst. Nasim Bibi (PW-1) complainant reported the matter to the police to the effect that on the fateful day she along with her husband Iftikhar Ahmad as well as brother Muhammad Saleem deceased was returning home from the house of in-laws of Muhammad Saleem who was about 20-yards ahead of them. At about Maghrab Vela when they reached in front of house of Safdar Ali (accused/appellant), Muhammad Arif (accused/appellant) suddenly came forward and caught hold of Muhammad Saleem. Meanwhile, Safdar Ali also came and simultaneously fired a

pistol shot hitting the head of Muhammad Saleem and second fire shot by Muhammad Arif hit his chest. On hearing hues and cries and also fire reports, Saeed Akhtar and Zafar Iqbal were attracted to the place of occurrence, whereupon, accused fled away from the spot by brandishing their weapons of offence. Muhammad Saleem succumbed to the injuries at the spot.

Motive was stated that about two years ago Muhammad Saleem deceased had contracted Nikah with Mst. Um-e-Kalsoom sister of Safdar Ali and rukhsati had not taken place. Safdar and others had a grudge that their sister had arranged Nikah without their consent. Subsequently Mst. Ume-e-Kalsoom died and Muhammad Saleem moved an application for disinterment of her dead body, whereupon, Muhammad Younas and Amjad Farooq co-accused (since acquitted) had also instigated Safdar Ali and on their conspiracy Safdar Ali and Muhammad Arif committed the murder of Muhammad Saleem.

3. On receipt of written complaint PW-8 Syed Muhammad Ikram Shah Inspector/SHO Police Station City Ahmadpur East proceeded to the place of occurrence, examined the dead body, prepared injury statement Ex.PH/4, inquest report Ex.PH/3 and then inspected the spot, where he prepared rough site-plan Ex.PL, collected blood-stained earth and made it into sealed parcel vide memo. Ex.PJ, collected five empties of 30-bore vide memo. Ex.PK and recorded statements of the witnesses. On 1.1.2005 last worn clothes of the deceased were produced before him which consisted of Shalwar P-6, Qameez P-7, Bunyan P-8, Jersey P-9 and Sweater P-10, which all were stained with blood and were taken into possession through memo. Ex.PM. Safdar accused/appellant was arrested on 2.1.2005 who was in injured condition and his injury statement Ex.PN was prepared. On the same day blood-stained clothes of Safdar Ali accused were taken into possession vide memo. Ex.PO. On 16.1.2005 Safdar got recovered pistol P-13 which was seized vide memo. Ex.PP. As Arif accused appellant was not being traced, necessary proceedings including issuance of proclamation were initiated by the Investigating Officer. Muhammad Arif was however, arrested on 17.5.2006 by Ghulam Sarwar SI PW-9 on whose pointation 30-bore pistol O-14 was recovered and secured into possession vide memo. Ex.PB. After completion of other formalities and on conclusion of investigation challan was sent to Court.

4. The accused persons when charge sheeted, they denied the prosecution case and claimed to be tried. The prosecution examined its witnesses in order to prove the case, apart from tendering certain reports in evidence. The accused in their statements under Section 342 Cr.P.C. refuted the prosecution evidence and ultimately the learned trial Court convicted and sentenced them as detailed in the opening paragraph of this judgment.

5. Learned counsel for the appellants has argued that in fact the occurrence took place during dark hours of the night and the time of occurrence has been stretched by the prosecution towards day light. It has been argued that, motive mentioned in the prosecution case has not been proved as Mst. Um-e-Kalsoom sister of Safdar

appellant contracted marriage about two years before the happening of this incident and during that period no person from the family of Mst. Um-e-Kalsoom including Safdar appellant ever forced Mst. Um-e-Kalsoom to get divorce from Saleem deceased by way of Khulla or otherwise. It has been argued that it was in the knowledge of the appellant and his family members that Muhammad Saleem appellant had already been married with Mst. Ghulam Fatima even then there was no effort or force by the appellant or his family for repudiating the marriage of Mst. Um-e-Kalsoom from Muhammad Saleem deceased. It has been argued that had the motive been with Safdar appellant then situation would have been different, either case of false and fabricated Nikah might have been got registered or some fight might have occurred during the period of those days, therefore, motive does not appeal to reasons.

6. Learned counsel has argued that PWs did not see the occurrence and in all probabilities the presence of eye-witnesses at the place of occurrence is doubtful on the ground that attribution of injuries which has been made by them in not in consonance with the numbers of fire shots received by the deceased Muhammad Saleem. According to the ocular version one fire has been attributed to each appellant but the post-mortem reveals that deceased received five fire shots, out of which Injuries No. 1, 2, 3 and 4 were individually sufficient to cause the death of the deceased. It is not understandable as to how the remaining injuries were omitted by the eye-witnesses in the FIR or in their statements under Section 161 Cr.P.C. Allegedly Injury No. 1 has been attributed Safdar appellant and Injury No. 2 has been attributed to Arif appellant but about the remaining, injuries which were found on the dead body of the deceased at the time of post-mortem examination, these have been omitted by the eye-witnesses. It has been argued that during trial the eye-witnesses have dishonestly made improvements in their statements and those portions have been duly confronted with their earlier statements. It has been argued that these improvement cannot be considered as explanatory or supplementary, but these are to be considered as dishonest and mala fide improvements. The learned counsel has referred to Column No. 10 of the Inquest Report, wherein five injuries have been mentioned by the Investigating Officer. This diversity/contradiction in the ocular evidence as well as the medical evidence cannot be reconciled, which uproots the prosecution case. Learned has argued that medical evidence is in conflict with the ocular account, in this respect learned counsel has referred to the statement of Dr. Asif Ali (PW-5) as secondary evidence who in his statement got exhibited the post-mortem report as Ex.PH and diagram of the injuries Ex.PH/1 and Ex.PH/2. Learned counsel has taken the Court to the text of the injuries on the person of the deceased. According to the ocular version two injuries have been mentioned by the eye-witnesses, whereas, doctor deposed five injuries; this contradiction cannot be reconciled. During trial Mst. Naseem Bibi complainant/eye-witness appeared as PW-1, whereas, Iftikhar Ahmad was examined as PW-2 have improved upon their statements vis-a-vis injuries and those portions of their statements were duly confronted. Numerical contradictions primarily occur to demonstrate that PWs did not see the occurrence and medical evidence does not corroborate the ocular account. Learned counsel further argued that recovery of pistol from Safdar which has been

shown to have been affected on 8.3.2005 is false piece of evidence and the report of ballistic expert was also manoeuvered by the prosecution in order to strengthen its case. Learned counsel contended that evidence of recovery is always to be considered as corroborative piece of evidence and if the primary evidence is not believed then on the basis of recovery conviction and sentence cannot be upheld. With regard to recovery of five crime empties of .30-bore pistol from the spot, it is argued that all these empties were shown to have been fired from the barrel of the pistol of Safdar, which by itself creates doubt in the veracity of prosecution case, as according to the eye-witnesses two persons Safdar and Arif made firing at the deceased and it was not one person who committed the murder of Muhammad Saleem deceased, whereas, report of the Forensic Science Laboratory also negates this fact. It was next argued that Muhammad Saleem deceased was involved in a case registered vide FIR No. 225 dated 17.12.2004 on the statement of one Shoukat, certified copy of the said FIR is Ex.DD. In this nexus, learned counsel referred to the statement of Safdar appellant recorded under Section 342 Cr.P.C. where, in answering to Question No. 11 he stated that complainant party of the said hurt case had enmity with Muhammad Saleem deceased. In fact the murder was committed by that party but appellants have been falsely implicated in this case. Lastly, it was argued that prosecution has miserably failed to prove the case and appeals may be accepted.

7. On the other hand, learned DDPP assisted by learned counsel for the complainant opposed the contentions of learned counsel for the appellants by arguing, that in the situation of panic it is not possible for the witnesses to adjudge the correct and precise number of fire shots having been caused by the accused on the person of the deceased, therefore, this contradiction about numbering of the injuries may not be taken for providing benefit of doubt to the appellants. Learned counsel for the complainant has adopted the arguments of learned DDPP and adds that prosecution has proved its case beyond any shadow of doubt by arguing that it is a case of prompt lodging of FIR, specific injuries have been attributed to the appellants, recovery to the extent of crime weapon of Safdar appellant is proved, Muhammad Arif co-appellant remained fugitive from law and this fact may also be used against him as a circumstances showing his involvement, therefore, appeals may be dismissed.

8. We have considered the arguments of learned counsel for the parties and perused the record.

9. The occurrence took place on 31.12.2004 at about evening time, whereas, FIR was lodged on the written application of Mst. Naseem Bibi Ex.PA by presenting the same in the police station at 10.15 p.m. Mst. Naseem Bibi is an illiterate woman who had thumb marked Ex.PA. It appears from the circumstances that FIR was lodged at some belated stage. The time of registration of case has been given wrongly and if Mst. Naseem Bibi could not have got written Ex.PA then some body else did so who is not in picture and when this is the situation then possibility of consultation in jotting down Ex.PA cannot be ruled out.

10. Motive in this case is very important. Prosecution has set up a motive that Mst. Um-e-Kalsoom contracted Nikah with Muhammad Saleem deceased about two years

prior to the happening of this incident but later on she died. During subsistence of this Nikah neither appellant nor any other member from the family of Mst. Um-e-Kalsoom forced her to get divorce from him, although departure of bride had not taken place. The record is silent that during this period ever any attack, bickering or fight had taken place between the appellant and Muhammad Saleem deceased. It is also proved on the record that prior to the Nikah of Muhammad Saleem deceased with Mst. Um-e-Kalsoom; he was already married with one Ghulam Fatima. If any grudge was nourishing in the mind of the appellant then at least some sort of fight might have been taken place between the deceased and Safdar appellant. Again one thing is very important that Mst. Um-e-Kalsoom died in the house of her parents but the deceased tried to get exhumed her dead body for post-mortem by moving an application and tried to establish that she was murdered by the appellant, but he failed. In the said application Ex.DB dated 29.8.2004 in Para-1 it has been mentioned by the deceased that Mst. Um-e-Kalsoom deceased remained with him at Bahawalpur for some time and thereafter, the deceased has been visiting in the house of Safdar appellant and kept on seeing Mst. Kalsoom who ultimately became pregnant, but strange enough that after about sixteen months of death of Mst. Um-e-Kalsoom an application for registration of case was submitted by deceased Muhammad Saleem. Furthermore, it is mentioned in the FIR that Mst. Um-e-Kalsoom died her natural death " ", whereas, Mst. Naseem Bibi complainant/eye-witness PW-1 has stated in this context that Safdar appellant, killed Mst. Um-e-Kalsoom. This is material dishonest improvement vis-a-vis motive and this portion of her statement, was duly confronted during cross-examination.

11. Iftikhar Ahmad PW-2 who is real brother of the deceased Muhammad Saleem has deposed in his statement that on the eve of death of Mst. Um-e-Kalsoom, Muhammad Saleem deceased entered doubt that she was murdered, whereupon, Muhammad Saleem submitted an application for disinterment of her dead body in order to prosecute the appellant for her murder. He also improved upon on the motive part of the prosecution case. In the ray of motive another aspect is very important that some days prior to the happening of this occurrence, an incident took place of murderous assault about which one Shoukat got lodged a case through FIR No. 225/2004 dated 17.12.2004 under sections 324/34, 337-A(ii) PPC and in that FIR deceased Muhammad Saleem was nominated as an accused. This circumstance leads us to believe that deceased Muhammad Saleem had enmity in the vicinity with some other people as well and if we notice the time of occurrence that too lead us that incident might have taken place during dark hours. Appellant Safdar also tendered documents in his defence as to exhumation of dead body of Mst. Um-e-Kalsoom; therefore, due to reasons mentioned above we do not believe the motive of the prosecution in this case.

12. The prosecution case hinged upon the statements of two eye-witnesses i.e. Mst. Naseem Bibi PW-1 and Iftikhar Ahmad PW-2. Both are related to the deceased. Their statements are contradicted by the medical evidence as to number of injuries. These PWs during the trial tried to bring their statements in line with the medical evidence

but were confronted by the learned defence counsel in this respect. Therefore, their evidence is disbelieved.

13. While discussing the medical evidence in this case, as it has been mentioned above that according to the prosecution's ocular account each injury has been caused by each of the appellant but the post-mortem examination reveals that five fire shot injuries were present on the dead body of Muhammad Saleem deceased. This disparity cannot be reconciled. Had the PWs been present at the time of occurrence and had seen the occurrence then this disparity could not have occurred in their statements vis-a-vis number of injuries. It is not the case of prosecution that police recorded the statement of Mst. Naseem Bibi PW-1 and it was not recorded as per her version, as it is the case of the prosecution that a written application was moved before the Investigating Officer for registration of case, upon which the case was registered. Therefore, in view of this we seek guidance from a legal precedent reported as "GHULAM RASUL vs. WAZIR KHAN and others" in (1989 SCMR 1172):

"Benefit of doubt--Contradictions in the FIR, ocular account and medical evidence existed--Eye witness account was furnished by only two witnesses who were son and relative of the deceased--Recoveries of crime weapons had not been proved--F.I.R. revealed that each of the accused had fired one shot each and the deceased had died as a result of two fire shots, whereas medical evidence showed that there were five fire-arm injuries on the dead body of the deceased out of which one was on the back of the deceased which was definitely the result of one shot--Distance between two injuries on the one side of the shoulder and one on the other side of the thigh was such that it could not be the result of one shot, deceased, therefore, had received more than two shots--Such material contradictions, held, were only beneficial to the accused and led the prosecution case towards dark and doubt and also considering other pieces of evidence acquittal of accused was found justified in circumstances."
Therefore, the benefit of these contradictions is to be resolved in favour of the appellants. Muhammad Arif appellant is not directly related to the motive part of this case, he was a fast friend of co-appellant Safdar. Though he remained fugitive from law for quite a long period but abscondence alone cannot be considered to be a circumstance against the appellant, especially when the prosecution has failed to prove its case. Recovery of crime weapon from Safdar is also not to be believed on the ground that ocular evidence has not been believed by us.

14. For what has been discussed above, we allow both these appeals, set-aside the conviction and sentences of the appellants and order their immediate release from jail if not required in any other case. The record of the trial Court be returned, whereas, case property is ordered to be disposed of in accordance with law.
MURDER REFERENCE IS ANSWERED IN THE NEGATIVE.
SENTENCE OF DEATH IS NOT CONFIRMED.
(A.S.) Appeals allowed.

PLJ 2011 Cr.C. (Lahore) 320
Present: Muhammad Qasim Khan, J.
SAFARASH ALI--Petitioner
versus
STATE and another—Respondents

Crl. M. 2499-B of 2010, decided on 2.9.2010.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497(2)--Pakistan Penal Code, 1860, Ss. 302, 452(i), 109 & 34--Bail, grant of--Further inquiry--Specific injuries attributed--Caused death to both the deceased as per post-mortem report--Real mother of deceased lodged another FIR in which petitioner was neither accused nor any role has been attributed to him rather four other persons were nominated as accused and injuries were attributed to accused--As per this FIR father of deceased was not present at place of occurrence and later on mother of deceased filed a private complaint on similar allegations in which accused were summoned and they will face the trial--Father and mother have two different versions and both are closely related to deceased on this sole ground--Case of petitioner become one of further inquiry--Bail admitted. [P. 321] A

Rana Asif Saeed, Advocate for Petitioner.
Malik Muhammad Jaffar, DPG for State.
Mr. Tariq Muhammad Iqbal Chaudhry, Advocate for Complainant.
Date of hearing: 2.9.2010.

Order
Petitioner seeks his post arrest bail in case FIR 27 dated 5.02.2009, under Sections 302/452/109/34 PPC Police Station Kameer, District Sahiwal.

2. Precise allegation against the petitioner is that he along with his co-accused opened fire on the belly of complainant's son and also on the chest of Mst. Shakeela Bibi and both the injured succumbed to the injuries; hence, this case.

3. Learned counsel for the petitioner argued that petitioner has been involved on fabricated story. Actually, complainant party took forcibly Mst. Shakeela Bibi and tried to confine her who tried to come out from the room and Yahya son of the complainant tried to caught hold her and in the meantime his companions inflicted fire upon Mst. Shakeela as well as Muhammad Yahya, ultimately both died and complainant in league with police got registered above said case but subsequently Mst. Shehnaz Bibi also got lodged a case FIR No. 47/09 under Section 302/34 PPC with the same Police Station. Mst. Shehnaz also filed a complaint under Sections 302/364/34 PPC. Moreover, the petitioner did not involve in the murder of complainant's son; hence, he is entitled, for the concession of bail.
4. On the other hand, learned DPG assisted by learned counsel for the complainant vehemently opposed this petition and argued that petitioner is nominated in FIR.

Specific role has been attributed to him. Challan has been submitted before the Court; therefore, he is not entitled for the concession of bail.

5. Heard. Record, perused.

6. Although this case has been registered on the complaint of father of the deceased in which Safarash Ali and one Riaz co-accused attributed specific injuries to Yahya and Mst. Shakeela which as per post-mortem report caused death, to both the deceased. On the other hand, Mst. Shahnaz Bibi real mother of deceased lodged another FIR No. 47/2009 in which petitioner is neither the accused nor any role has been attributed to him rather four other persons are nominated as accused and injuries are attributed to Ahmad Ali, Yahya, Zulfiqar and Abdul Ghaffar accused. As per this FIR father of deceased was not present at the place of occurrence and he was in his way to Okara and later on Mst. Shahnaz filed a private complaint on similar allegations in which accused are summoned and they will face the trial. Considering that father and mother have two different versions and both are closely related to the deceased, on this sole ground case of the petitioner becomes one of further inquiry. Therefore, he is admitted to bail subject to furnishing bail bond in sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court. However, if the petitioner would try to hamper with the evidence or create hurdle in conclusion of trial or absents himself from the proceedings, the trial Court will be at liberty to proceed against him strictly in accordance with law.

(A.S.) Bail admitted.

PLJ 2011 Cr.C. (Lahore) 557
[Bahawalpur Bench, Bahawalpur]
Present: Muhammad Qasim Khan, J.
MUHAMMAD HANIF--Appellant
versus
STATE—Respondent

Crl. A. No. 185 of 2007, heard on 29.11.2010.

Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--Injured eye-witnesses appeared and did not identify the appellant as accused--Abscondence could not be established by prosecution--Recovery was disbelieved and act of complainant by nominating the appellant was not established without any shadow of doubt--All these aspects create serious doubt in prosecution story--Appeal allowed. [P. 552] A

Mr. Muhammad Asif Saeed, Advocate for Appellant.
Malik Muhammad Abdul Latif, D.P.G. for State.
Date of hearing: 29.11.2010.

Judgment
The appellant Muhammad Haneef, was tried by Additional Sessions Judge, Sadiqabad in case FIR No. 310 of 2003 for offence under Sections 302/392/394/411 PPC registered at Police Station City, Sadiqabad. Vide judgment dated 25.07.2007 the learned trial Judge convicted and sentenced the appellant under Section 302(b) PPC for imprisonment of life and also to pay Rs. 10,00,000/- as compensation to the legal heirs of the deceased, in default thereof to further undergo for six months SI. He is also convicted and sentenced under Section 392 PPC to ten years rigorous imprisonment and a fine of Rs. 5,000/-, in default of payment of fine to further undergo three months SI. He was also convicted and sentenced under Section 411 PPC to three years rigorous imprisonment and a fine of Rs. 2,000/- and in default of payment of fine to further undergo one month SI. Benefit of Section 382-B Cr.PC was also extended to him and all these sentences were ordered to be run concurrently. Being aggrieved the appellant has filed this appeal.

2. Brief facts of the case as per complaint Ex.PD, got lodged by Ali Asghar, complainant of the case, are that on 09.07.2003, at about 6« p.m. his brother Ali Ashraf along with his son Adeel, were going to his house, on motorcycle, situated in Mustafa Town from Sadiqabad. They passed near Azad Nursery where the complainant along with Qari Shahid Iqbal and Maqsood was standing. When they reached at KHAM Road, three persons armed with fire-arm weapons stopped them, tried to snatch the motorcycle and grappled with the brother of complainant. When the complainant and witnesses reached there, the accused persons threatened them to kill. Meanwhile, Muhammad Haneef/convict/ appellant fired upon the brother of complainant with his .12-bore pistol which hit on the right flank of his brother who fell down. On hue and

cry, the witnesses namely Muhammad Ali alias Papu and Abdul Sattar alias Bholi attracted at the spot and witnessed the occurrence. All the three accused persons fled away on the motorcycle of injured Ali Ashraf. Complainant asked Maqsood Ahmad-PW.5 and Qari Shahid lqbal-PW.6 to take his brother Ali Ashraf to hospital and complainant along with PWs. Muhammad Ali and Abdul Sattar on motorcycle Yamaha chased the accused persons and when they reached near canal bridge, Basti Samdani, the distance in between the accused persons, complainant and his witnesses became shorten. The accused party started firing upon them, resultantly, Muhammad Ali alias Papu sustained injuries by the firing of Muhammad Haneef, accused, whereas, the unknown accused persons gave butt blow on the head of Abdul Sattar alias Bholi. They also beat the complainant and Abdul Sattar with kick and fists blows. The accused snatched Yamaha Motorcycle 100-CC and fled away. When the complainant along with injured/PWs., Muhammad Ali and Abdul Sattar reached to the hospital, Ali Ashraf brother of the complainant succumbed to the injuries; hence, this case.

3. Investigation was conducted. Challan to the extent of Muhammad Haneef was sent up to Court while perpetual warrants of arrest against co-accused Muhammad Akram alias Sultan and Muhammad Sharif were issued.

4. Charge was framed against Muhammad Haneef, accused to which he pleaded not guilty and claimed to be tried.

5. At the trial, prosecution produced almost 13 PWs including Dr. Muhammad Muslam, Medical Officer, THQ Hospital, Sadiqabad. Whereas Ghulam Rasool, Zulfiqar Ali Constable No. 283-C and Muhammad Akbar No. 707/C, PWs have been given up by the prosecution being unnecessary. PW.8, Dr. Muhammad Muslim, who conducted the post-mortem of the dead body of the deceased, opined that:

"The Injury No. 1 (only injury) was ante-mortem inflicted by fire-arm. The injury was sufficient to cause death in ordinary course of nature due to damage to the vessels of blood in abdomen including abdominal aorta leading to severe haemorrhage and shock. The probable time elapsed between injury and death was within 15 minutes and that of between death and post-mortem was about 12 hours."

Statement of accused under Section 342 Cr.PC was recorded in which he deposed that he is innocent and has falsely been involved. He did not opt to record his statement under Section 340(2) Cr.PC. However, produced Muhammad Ali alias Papu and Abdul Sattar alias Bholi as DW.1 & DW.2 in his defence.

6. Learned counsel for the appellant contends that appellant has been falsely involved in this case and allegedly occurrence took place at 6:30 p.m and FIR was registered at 7:30 p.m. at Tehsil Head Quarter Hospital but as this occurrence was in two steps and after second step complainant along with injured-PWs went

to Tehsil Head Quarter Hospital where he came to know that his brother namely Ali Ashraf has succumbed to the injuries and statement of complainant was recorded at the hospital in which the appellant was nominated but if series of acts be considered then it does not appeal to reason that the complaint was written at 7:15 p.m. at Civil Hospital, Sadiqabad and it appears that Roznamcha was stopped, concocted story was cooked and under the instruction of police officials the appellant was nominated in the case. The presence of eye-witnesses Ali Asghar-PW 4 and Maqsood Ahmad-PW.5 and Qari Shahid Iqbal-PW.6 is highly doubtful as the PWs in their statements has stated that their statements were not recorded by the police and they signed the recovery memoes at the police station which establishes that they were falsely introduced in the complaint to cook up a story against the appellant. The presence of complainant-PW.4 is also highly doubtful at the place of occurrence as during cross-examination he states that:

"I do not remember whether the accused persons gave slaps to Ali Ashraf deceased at the time of occurrence".

Moreover, his conduct at the spot is unnatural and he further admits that:

"I did not take into lap my brother Ali Ashraf deceased after he had sustained fire short injury".

PW.4 further admits that he did not remember the colour of the dress of Muhammad Hanif, accused. The statement of complainant reveals that he did not know Muhammad Hanif accused personally as during cross-examination he states that:

"I do not know for how much period the accused Muhammad Hanif had been working in Sabzi Mandi, Sadiqabad I do not know at whose shop he used to work. I and my family members do not work in Sabzi Mandi Sadiqabad".

The other PWs have categorically denied during the cross-examination that the local police did not record their statement regarding the occurrence and moreover, the evidence of these witnesses PW.5 and PW.6 with regard to the memoes allegedly prepared at the place of occurrence have no value at all as both the witnesses during cross-examination have stated that they have signed these memoes at the Police Station which establishes that they were not present at the place of occurrence. Moreover, the appellant Muhammad Hanif was only known to the Investigating Officer-PW.11, Riasat Ali, SI and under his instructions the name of appellant was introduced in the complaint as during cross-examination he admitted that Muhammad Hanif was known to him prior to the registration of present case and in the year, 2002 when he was posted at Police Station Bhong he arrested said Muhammad Hanif in a criminal case. With regard to the recovery of weapon of offence, learned counsel for the appellant contends that recovery after lapse of more than one year is highly doubtful. Moreover, there is no report of Forensic Science Laboratory to connect the recovered weapon of offence with the commission of offence. The PWs have contradicted to each other on material aspects of the case and also with regard to the allegedly recovered weapon. Further contends that as per complaint Ex.PD two witnesses who were admittedly present at the place of occurrence and as per FIR they chased the accused persons and they were injured by the accused persons and they have no relationship and friendship with the accused persons. They have been given up by the prosecution and only interested and related

witnesses have been produced who are admittedly relatives and friends. Both the eye-witnesses Muhammad Ali DW.1 and Abdul Sattar-DW.2 appeared and categorically state that they could not identify the accused at the place of occurrence and accused present before the Court was not identified by them, this fact creates a serious doubt in the prosecution story. Lastly contends that prosecution has miserably failed to prove its case; hence, the convict/appellant be acquitted from the charge. Reliance is placed on 2007 YLR 1234 titled as "Muhammad Amin versus The State", PLD 2008 Supreme Court 349 titled as "Allah Bachaya and another versus The State" & 2009 MLD 49 titled as "Ghulam Nabi and others versus The State".

7. On the other hand, learned DPG assisted by learned counsel for the complainant states that appellant is nominated in FIR and prosecution has proved its case on the basis of ocular evidence, medical evidence and recovery of weapon of offence and moreover, the accused remained absconder for a considerable period. Minor contradictions could not stand in the way of conviction. Already a lenient view is taken by the learned trial Court; hence, the appeal may kindly be dismissed.

8. Heard. Record perused.

9. Although the appellant is nominated in the FIR and FIR, as shown by the prosecution, is promptly lodged but the presence of PW.6 and PW. 7 at the place of occurrence is highly doubtful as they admit during cross-examination that their statements were not recorded by the police about the occurrence. Further states that they station signed the memoes of possession proceedings at police station, although these proceedings were taken at the place of occurrence which establishes that they were not present at the place of occurrence and their names were added by the complainant just to establish a concocted story as per his own wishes and under the instruction of police officials.

10. I have gone through the Police Karwai at the end of Exh.PD which shows that at that time, at emergency of the hospital where the dead body of Ali Ashraf was present, only Muhammad Ali and Abdul Sattar were present, where statement of Ali Asghar PW.4 was recorded as in the Karwai Police it has not been mentioned that Qari Shahid Iqbal and Maqsood Ahmad were present there as per Exh.PD. On the other side, the complainant states in complaint that he directed Maqsood Ahmad and Qari Shahid Iqbal to take his brother to Hospital and he along with other PWs. Muhammad Ali and Abdul Sattar chased the accused persons, if these witnesses would have taken the deceased in Hospital, their names must be incorporated in the Police Karwai. It shows that these names were added by the complainant by joining hands with the police in order to support his concocted story.

11. Although the appellant is nominated in FIR with complete detail of parentage, caste, address and place of business but during cross-examination when the complainant-PW.4, Ali Asghar was questioned with regard to the antecedent of the appellant his answer created sufficient suspicion that he did not know the appellant before the date of occurrence. The complainant-PW.4 was not aware for how long the appellant was working in Sabzi Mandi and at whose shop he worked and he could not

satisfactorily answer about the other antecedents. On the other side, Investigating Officer-PW.13, Munir Haidar SI, during his cross-examination admits that Muhammad Hanif, appellant is known to him and earlier he arrested him when he was posted at police station Bhong. In this background, it appears that the appellant was nominated by the complainant on the asking of SI/Investigating Officer/PW.13, on the basis of suspicion, as otherwise, the appellant admittedly was not known to him earlier.

12. As regard abscondance of the accused, PW.11 himself admits that appellant is Khana Badosh. He has no permanent address nor any immovable property. Moreover, the police constable to whom warrants of arrest of the appellant was handed over for execution had not appeared before the trial Court as PW and nor police constable to whom proclamation was handed over for its execution had not appear before the Court as prosecution witness in order to ascertain the veracity of their statements whether they executed the warrants of arrest and proclamation in accordance with law or not? For the same reason the abscondance of appellant carries no weight, neither it is proved by the prosecution that appellant was fugitive from law with guilty conscience in this case.

13. Moreover, recoveries of the weapons on the pointation of the appellant carries no weight as independent recovery witnesses did not support the recovery and also the recovery memoes were signed at police station. These facts are sufficient to discard the recovery so, I disbelieve the recovery of weapon of offence on the pointation and custody of appellant.

14. Prosecution gave up two injured witnesses Muhammad Ali and Abdul Sattar who appeared as DW.1 and. DW.2 and they did not support the prosecution story and appellant Muhammad Hanif while present before the trial Court was not identified by them nor at the place of occurrence and these two statements are sufficient to create dent in the prosecution story, identification of the appellant at the place of occurrence is highly doubtful.

15. In the light of above discussion, as the presence of eye-witnesses PW.5 & PW.6 at the place of occurrence does not appeal to reason, the injured eye-witnesses appeared as DW.1 & DW. 2, did not identify the appellant as accused, abscondance could not be established by the prosecution, recovery is disbelieved and act of the complainant, by nominating the appellant in the case is also not established, without any shadow of doubt. All these aspects create a serious doubt in the prosecution story and prosecution has miserably failed to prove its case against the appellant beyond any shadow of doubt; hence, the appeal is allowed. Appellant is acquitted from the charge. Case property and file of the case including decision of appellate Court shall be sent back and kept intact till arrest and trial of the proclaimed offender.

(A.S.) Appeal allowed.

PLJ 2011 Lahore 787
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Qasim Khan, J.
ZAFAR IQBAL--Petitioner
versus
CHIEF ADMINISTRATOR AUQAF PUNJAB, LAHORE and 6 others—Respondents

W.P. No. 2821 of 1998, decided on 19.5.2010.
Punjab Waqf Properties Ordinance, 1979—

----S. 9--Conditions of auction or rent deed--Restriction of draft rent deed--Power to terminate a lease or resume a tenancy for breach of conditions--Petitioner subleted the shops to respondents--Administrator rented out the shop to respondent--Petitioner filed an appeal before Chief Administrator Auqaf who entrusted to Regional Administrator Auqaf--Appeal was allowed--Assailed--Case was remanded--Appeal was dismissed--Question of authority to decide the appeal by Regional Administrator--Challenge to--Although there is specific condition of auction that property rented out to the petitioner could be used for his personal business--Auqaf authorities were under a legal obligation to follow the procedure given in S. 9 of Punjab Waqf Properties Ordinance, 1979, by giving the petitioner being the tenant an opportunity to appear and state his objections and if the breach was capable of rectification the administrator could not order resumption of tenancy without issuing a notice in writing requiring the petitioner rectify the breach within a reasonable time, not being less than thirty day in the notice--Held: Administrator could resume passion subject to payment of compensation for crops or for the improvement--Petition was allowed. [Pp. 789 & 790] A, B & C

Mian Ahmad Nadim Arshad, Advocate for Petitioner.
Mr. Nadim Iqbal Chaudhry, Advocate for Respondents.
Date of hearing: 19.5.2010.

Order
Briefly the facts are that in an open auction the petitioner obtained a specific plot on monthly rent of Rs. 125/- and thereafter constructed five shops and a residential room over it. It so happened that petitioner sublet those shops to Respondents No. 3 to 7 and the said respondents moved application to Respondent No. 2 with the prayer that those shops may be rented out by the department directly to them and Respondent No. 2 recommended the said application to Administrator on 13.6.1993 who ultimately rented out the shops to Respondents No. 3 to 7 virile order dated 24.7.1993. Aggrieved of the above action of Respondent No. 2, the petitioner filed an appeal before the Chief Administrator Auqaf Punjab/Respondent No. 1 who entrusted the same to Regional Administrator Auqaf Multan for its decision and ultimately the said appeal was allowed on 23.9.1993. This order was assailed in W.P. No. 2167/1994 which was allowed by this Court on 25.9.1997 and matter was remanded to the Chief Administrator Auqaf for decision of the matter afresh, as the Regional

Administrator had no authority to decide the appeal of the petitioner. In post remand proceedings the Chief Administrator Auqaf vide order dated 16.2.1998 dismissed the appeal of the petitioner. Hence, this writ petition.

2. It is argued by learned counsel for the petitioner that plot in question had been obtained by the petitioner in an open auction and there is no restriction in the auction conditions that said property could not further be sublet to any other person; after getting the plot in open auction the petitioner filed an application whereupon No Objection Certificate was issued as a result of which the petitioner raised constructions by spending huge amount; before impugned recommendation of Respondent No. 2 the petitioner was not heard and shops were illegally rented out to Respondents No. 3 to 7, as there was no violation of any condition by the petitioner. In this behalf the learned counsel referred to Section 9 of the Punjab Auqaf Properties Ordinance, 1979 to contend that entire proceedings were carried out at the back of the petitioner, as such, are liable to be set-aside.

3. On the other hand, learned counsels appealing, for the respondents argued that petitioner has obtained the plot an monthly rent of Rs. 125/- but he further sublet five shops to Respondents No. 3 to 7 on monthly rent of Rs. 1000/- per shop, as such loss had occurred to the government. Further argued that said act of the petitioner was also in violation of the terms of tenancy and that Respondents No. 1 and 2 were competent to pass the order, as such there is no illegality or irregularity in the orders passed with jurisdiction, therefore, this petition may be dismissed.
4. Heard. Record perused.

5. A perusal of the document annexed with this petition purportedly showing the conditions of auction, its clause (4) reads as under:--

There is yet another document containing the approved draft of rent deed, its paras No. (7) and 13) are to the following effect:--

I have also gone through Section (9) of the Punjab Waqf Properties Ordinance., 1979 which reads as under:--

"9. Power to terminate a lease or resume a tenancy for breach of conditions.--(1) If the Administrator is satisfied that a lessee or tenant of any immovable waqf property has committed a breach of the conditions of the lease or tenancy the Administrator may, after giving such less or tenant an opportunity to appear and state his objection, order the termination of lease or resumption of tenancy:

Provided that if the breach is capable of rectification the Administrator shall not order the termination of the lease or resumption of the tenancy unless he has issued a written notice requiring the lessee or tenant to rectify the breach within a reasonable time, not being less than thirty days, to be stated in the notice, and the lessee or tenant has failed to comply with such notice.

(2) Where an order terminating the lease or resuming the tenancy has been passed under the provisions of sub-section (1), the Administrator may forthwith re-enter upon the waqf property and resume possession of it, subject to the payment of compensation to be fixed by the Administrator for un-cut and un-gathered crops or for the improvements, if any, that may have been made by the lessee or tenant under the terms of the lease or tenancy or with the permission of the Chief Administrator.

Keeping in mind the above reproduced portions from certain documents available on the file and also Section 9 of the Punjab Waqf Properties Ordinance, 1979, it is clear that although there is specific condition of auction that the property rented out to the petitioner could be used for his personal business, however, there is also some restriction in Clause (13) of the draft rent deed, as reproduced above, which clause prima facie has been breached by the petitioner. But at the same time, it is observed that in case the petitioner was guilty of breach of any condition, the Auqaf authorities were under a legal obligation to follow the procedure given in Section 9 of the aforesaid Ordinance, by giving the petitioner being the tenant an opportunity to appear and state his objections and if the breach was capable of rectification the Administrator could not order resumption of the tenancy without issuing a notice in writing requiring the petitioner to rectify the breach within a reasonable time, not being less than thirty days mentioned in the notice. Further, under sub-section (2) of Section 9, ibid, after resumption of the land in terms as provided above, the Administrator could resume passion subject to payment of compensation for the crops or for the improvements, if any. But I am afraid none of the above legal requirement has been fulfilled by the respondents/Auqaf Authorities before passing the impugned orders. Resultantly, this writ petition is allowed and all the impugned orders are set aside. However, if the petitioner is found guilty of breach of any of the condition of auction or of the rent deed, Respondents No. 1 and 2 are at liberty to proceed against him, but strictly in accordance with law.

(R.A.) Petition allowed

PLJ 2011 Lahore 897
Present: Muhammad Qasim Khan, J.
MUHAMMAD YASEEN--Petitioner
versus
STATION HOUSE OFFICER, P.S. SARAI MUGHAL, DISTRICT KASUR and 4 others—Respondents

W.P. No. 7394 of 2011, decided on 22.7.2011.

Second FIR--
----Registration--Justice of Peace in refusing to issue a direction for registration of case was that already an FIR had been registered on the statement of the respondent, but such ground was not tenable in law--Even if, already some case had been registered, there was no bar regarding registration of another FIR regarding the same occurrence, as held by High Court in case 2010 MLD 128. [P. 898] A

Criminal Procedure Code, 1898 (V of 1898)--
----S. 22-A--Justice of Peace--Real daughter of the petitioner was murdered by respondents but they while distorting the real facts got lodged the earlier FIR and also implicated (father of the victim) as an accused--Allegations leveled by the petitioner were very serious in nature--Matter which he was intending to report, contained altogether different set of accused as well set of the witnesses--Proper course for the SHO was to record statement of the petitioner or he would have received written complaint, and then he had to register a separate case on the basis of written application/statement of the petitioner, which otherwise, contained all necessary ingredients about the commission of a cognizable offence. [P. 898] B

Mr. Muhammad Ehsan Nizami, Advocate for Petitioner.
Ch. Muhammad Ahmad Man, Advocate for Respondents.
Mian Hamayun Aslam, DPG for State.
Date of hearing: 22.7.2011.

Order
Through the instant petition, the petitioner has assailed the order dated 7.3.2011 passed by learned Justice of Peace, whereby his application for registration of second FIR, has been dismissed.

2. It is argued by learned counsel for the petitioner that from the contents of the application moved by the petitioner under Section 22-A Cr.P.C. before the learned Justice of Peace, commission of a cognizable offence was disclosed. Further argued that although earlier an FIR had been got lodged by the respondents, but the set of accused as well as set of witnesses in the occurrence which was reported by the petitioner, are different. As such, even in the existence of earlier FIR there was no bar in the registration of second FIR. The learned counsel therefore, argued that this petition be allowed, impugned order be set-aside and an order for registration of second FIR on the complaint of the petitioner be ordered to be registered.

3. On the other hand, learned counsel for respondent argued that already an FIR has been registered; wherein the present petitioner is accused for an offence under Section 109 PPC, therefore, instead of registration of the second FIR the petitioner may get records his version in the earlier FIR. The learned counsel for the complainant has further argued that the petitioner earlier divorced the mother of the deceased and the deceased along with her mother was residing with her paternal uncle and the act of the petitioner for lodging FIR, is his mala fide attempt to raise a claim regarding the property left by the deceased. The learned counsel therefore, defended the impugned order of learned Justice of Peace.

4. Arguments heard. Record perused.

5. Whatever may be the factual position of the matter, it is not for this Court to comment on the same. The sole ground which weighed with the learned Justice of Peace in refusing to issue a direction for registration of case is that already an FIR had been registered on the statement of the respondent, but this ground is not tenable in law. Even if, already some case has been registered, there is no bar regarding registration of another FIR regarding the same occurrence, as held by this Court in the case "Muhammad Afif versus Umar Farooq Khan, Inspector Police and 5 others" (2010 M.L.D 128).

6. In the case in hand, it is the categorical stance of the petitioner that real daughter of the petitioner has been murdered by Muhammad Siddique, Asghar Ali and Sakhawat respondents but they while distorting the real facts got lodged the earlier FIR and also implicated the present petitioner (father of the victim) as an accused. The allegations levelled by the petitioner are very serious in nature. Furthermore, according to the petitioner, the matter which he was intending to report, contained altogether different set of accused as well set of the witnesses. Therefore, the proper course for the SHO was to record statement of the petitioner or he should have received written complaint, and then he had to register a separate case on the basis of written application/statement of the petitioner, which otherwise, contained all necessary ingredients about the commission of a cognizable offence. In this respect, reliance is placed on the case report in `Mushtaq Hussain versus The State' (2011 SCMR 45).

7. For what has been discussed above, this petition is allowed and the petitioner is directed to appear before the respondent/SHO along with a written complaint, who on the basis of said application shall register an FIR against the culprits and then investigate the case strictly in accordance with law.

8. With above directions, this writ petition is disposed of.

(A.S.) Petition disposed of.

PLJ 2011 Cr.C. (Lahore) 908 (DB)
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Qasim Khan and Mazhar Iqbal Sidhu, JJ.
SHAHAB-UD-DIN--Appellant
versus
STATE—Respondent

M.R. No. 69/2006, Crl. A. Nos. 173, 177-J/2006, Crl. Rev. Nos. 192 & 193 of 2006, heard on 26.4.2010.

Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 302(b)--Conviction and sentence--Challenge to--Allegation of abduction--Murder of deceased--Modification is sentence--Promptness of FIR has been established beyond any shadow of doubt and no doubt is left in our mind about the abduction of abductee-cum-deceased--Extra Judicial confession--Dead body was recovered from a put allegedly made in front of the house of the appellant and appellant pointed out the place where dead body had been buried although he did not lead to the recovery of the dead body--Charge has been proved for murder of deceasaed--No evidence available on the file about the murder--Two factors--No direct evidence of commission of murder of the deceased and motive appearing to be fabricated sentence of appellant was commuted to life-imprisonment--Convictions and sentences shall remain intact--Appeal dismissed with above modification in sentence. [Pp. 912 & 913] A, B & C

Mr. Sadiq Mahmood Khurram, Advocate for Appellant.
Syed Asim Ali Bukhari, Advocate D.D.P.G. Advocate for Respondent.
Date of hearing: 26.4.2010.

Judgment
Muhammad Qasim Khan, J.--Shahab-un-Din and Muhammad Bilal were tried by learned Sessions Judge, Bahawalpur in case FIR No. 397/2002 under Sections 302/364/201/34 PPC registered with Police Station Civil Lines, and on conclusion of the trial vide judgment dated 22.5.2006 they both were convicted under Sections 364/34 PPC and sentenced to rigorous imprisonment for seven years each with a fine of Rs. 10,000/- each, in default to further undergo six months simple imprisonment each; convicted under Section 201/34 PPC and sentenced to seven years RI each with a fine of Rs. 10,000/- each in default to further undergo six months SI. Both were also convicted under Sections 302-b/34 PPC and Shahab-ud-din was sentenced to death plus imposition of compensation of Rs. 100,000/- to be paid to the legal heirs of the deceased and in default to further undergo six months SI. As regards Muhammad Bilal though he was also convicted under Section 302-b PPC but he was sentenced to imprisonment for life with a compensation of Rs. 100,000/- to be paid to the legal heirs of the deceased and in default to further undergo six months SI. All the sentences were ordered to run concurrently and benefit of Section 382-B Cr.P.C. was extended. Against their above convictions and sentences Shahab-ud-Din has filed Criminal Appeal No. 173/2006 whereas, Muhammad Bilal preferred Criminal Appeal

No. 177-J/2006. The complainant has also filed Criminal Revision No. 192/2006 seeking enhancement in the amount of compensation against Shahab-ud-din and Criminal Revision No. 193/2006 seeking enhancement of sentence qua Muhammad Bilal, whereas. Murder Reference No. 69/2006 has been sent by the learned trial Court with regard to sentence of death of Shahab-ud-Din for confirmation or to be decided otherwise. All these five matters are being decided by this single judgment.

2. Muhammad Ashfaq (PW-1) complainant got lodged the above FIR on 1.11.2002 at 3.50 a.m. to the effect that on 29.10.2002 he along with other family members was present in the house when at about 1.30/2.00 noon. Shahab-ud-din along with his driver Muhammad Bilal came on Corolla Model-1986 and asked his brother Hafiz Muhammad Fayyaz that after his kidney operation he was laying in the house and took him along for outing and told the complainant that they would come back after taking night meal. As Hafiz Muhammad FAyyaz did not return till late at night, the next morning the complainant along with his other brother Altaf went to the house of Shahab-ud-Din who on knock of the door came out and showed lack of knowledge about non-return of Fayyaz and told that Fayyaz had left him before Maghrib, and Shahab-ud-Din also accompanied the complainant in search of Fayyaz. Muhammad Arshad and Muhammad Ijaz (cousins of the complainant) told that on the night of 29.10.2002 at about 8.00 p.m. they had seen Fayyaz coming out of the Car along with Shahab-ud-din, Muhammad Bilal and Muhammad Arif and saw them entering the house of Shahab-ud-din. They further disclosed that next morning they heard that Shahab-ud-din and his driver Muhammad Bilal were search for some laborer for laying some sewerage line. As whereabouts of Fayyaz were not known the complainant laid suspicion over Shahab-ud-din. On the night of 1.11.2002 at about 2.30 (mid night) the complainant along with Altaf, Mushtaq and Maqbool went to the house of Shahab-ud-din, who confessed that he with the help of servants Muhammad Bilal and Muhammad Arif had murdered Muhammad Fayyaz by throttling and had hidden the dead body on the night of 29.10.2002 in a drum and next day they buried the dead body in a pit in front of door of the house. It was further alleged in the FIR that Shahab-ud-din had disclosed that as he had to return Rs. 50,000/- to Fayyaz who was repeatedly demanding the same, therefore, he was done to death.

3. After recording of the FIR Abid Akhtar SHO PW-11, Shahab-ud-din led him to the place of occurrence and pointed out the place where dead body of Fayyaz had been buried and dead body was recovered identified by Altar and Riaz PWs. The I.O. prepared recovery memo. Ex. PB and took into possession kassi vide memo. E.PC. Thereafter, Shahab-ud-din led to the recovery of pillow P-4, carpet P-3, tablets P-5/1-10 and empty packet of tablets P-6, which were taken into possession vide memo. Ex. PE. Shahab-ud-din also got recovered string P-7 which was taken into possession vide memo. Ex. PF, sleeper P-8/1-2 Ex.PG, wrist watch P-9 vide memo. Ex.PH and drum P-10 which was secured into possession vide memo. Ex.PJ. After post-mortem the last worn clothes of the deceased Shalwar P-12, Kameez P-13, Vest P-14 and Durri P-15 which were taken into possession vide memo. Ex. PL. On 2.11.2002 Shahab-ud-din also got recovered car P-1 taken into possession vide memo. Ex. PM, identity card of the deceased P-16 and registration book P-17 taken

into possession vide memo. Ex. PN. Shahab-ud-din also led to certain other recoveries, whereas, Muhammad Bilal was arrested on 20.12.2002 and Arif on 22.12.2002. The site-plan of the place of occurrence was brought on the record as Ex.PK whereas, site-plans of the place of recovery of Car, place of recovery of identity card and recovery of cushion, etc. are PM/1, Ex.PN/1 and Ex.PO/1, respectively. The I.O also prepared injury statement Ex.PR and inquest report Ex.PQ. After other usual investigation and completion of other formalities challan was sent to Court. The accused were charge sheeted, to which they pleaded not guilty and prosecution produced eleven witnesses, apart from tendering the report of bacteriologist Ex.PT/1. On close of the prosecution case, the accused/appellants when examined under Section 342 Cr.P.C. refuted the prosecution evidence and stated that evidence was falsely fabricated against them. They however, did not opt to make statements under Section 340(2) Cr.P.C. on oath in disproof of allegation nor produced any defence witness. Ultimately, above conviction and sentence was recorded against him by the learned trial Court.

4. Learned counsel for the appellant Shahab-ud-din has argued that it was a blind occurrence and there is no evidence on the file vis-a-vis murder of deceased Muhammad Fayyaz. It has also been argued that false evidence was fabricated during investigation of this case and the appellant did not either point out the place from where the dead body of the deceased was recovered or pointed out the place where the deceased was buried after having murdered him. It has been argued that mere pointing out of the appellant where the dead body was buried cannot be treated as admissible piece of evidence because in consequence of the pointing out of the appellant no fact was discovered, therefore, this piece of evidence is hit by Article 40 of the Qanoon-e-Shahadat Order, 1984. It has been further argued that evidence of extra-judicial confession made by the appellant Shahab-ud-din does not appeal to reasons because when the appellant made statement no case was registered against the appellant nor the appellant was suspected to be involved in the commission of the crime. It has been argued that no motive has been mentioned in the FIR but during investigation a false motive was brought on the record. Learned counsel for the appellant has vehemently contended that the prosecution story is inconsistent inter-se as PW-4 Sajid Cheema has deposed before the learned trial Court that the appellant along with his co-accused Arif (since been acquitted) put poisonous tablets in a bottle and got it administered to the deceased, where after the deceased died, while in the report of the Chemical Examiner no poisonous substance was found in the visceras of the dead body. It has been argued that evidence of extra-judicial confession is always taken as weakest type of evidence and there was no occasion with the appellant to make any extra-judicial confession before the complainant and other PWs. It has been further contended that prosecution has concocted the story that Shahab-ud-din appellant was apprehended by the complainant and the PWs when he made extra-judicial confession before them and that he was taken to the Police Station. The learned counsel referred to police proceedings written on the foot of the FIR Ex.PA to the effect that I.O did not make mention about the above fact therein. It has been contended that the dead body was not taken into possession on the pointing out of the appellant and the recoveries have also been planted upon the appellant. Lastly, it has

been submitted that the entire case of the prosecution is replete of doubts; therefore, appeal may be accepted.

5. The learned counsel appearing for Muhammad Bilal convict/appellant argued that there is no evidence either of murder or of causing of disappearance of dead body, against the appellant. Learned counsel has commenced upon the statement of PW-4 Sajid Chemma by arguing that the appellant did not make any extra-judicial confession before him and the statement made by him is inconsistent with the report of the Chemical Examiner. According to the learned counsel this is a big factor the benefit of which must be given to the appellant. Lastly, it has been argued that the prosecution has miserably failed to bring home the charge against the appellant under Sections 302 and 201 PPC. With reference to the motive, it has been argued that no evidence has been brought on the record by the prosecution that Muhammad Bilal was party to the motive in this case or he was in league with co-appellant Shahab-ud-din in abducting the deceased Muhammad Fayyaz, therefore, his appeal may be accepted and he be acquitted.

6. We have heard the learned counsel for the parties and have gone through the evidence available on the file.

7. In this case the occurrence took place on 1.11.2002 at about 2-2« a.m. (night) and on the same night while appearing at Police Station Muhammad Ashfaq PW-1 made statement at about 3.50 a.m. in which he nominated both the appellant along with Muhammad Arif (since been acquitted). Muhammad Ashfaq PW-1 gave detailed of the abduction of the deceased as he was appraised by Ijaz Ahmad PW-3 and Muhammad Arshad (not produced). We are mindful of the situation that FIR was not recorded with deliberations or consultations, therefore, promptness of the FIR has been established beyond any shadow of doubt and no doubt is left in our mind about the abduction of Muhammad Fayyaz abductee-cum-deceased. We are also of the view that none of the PWs examined by the prosecution has any ill-will, animosity or enmity against the appellants to become a false witness. Therefore, the prosecution has fully proved its case, so far as abduction of the deceased is concerned against Shahab-ud-Din and Muhammad Bilal appellants. Accordingly, their convictions and sentences as imposed by the learned trial Court are sustained by dismissing their appeals to the extent.

8. There is no evidence against Muhammad Bilal appellant on the record that either he participated in the commission of the murder of deceased Fayyaz or he was party to laying the dead body of the deceased in a pit along with his co-appellant Shahab-ud-din and also there is no evidence on the record that he either pointed out the place where the dead body was buried or dead body was recovered on his pointation, therefore, to the extent of his conviction under Sections 302 and 201 PPC, the same is set-aside and he is acquitted of the said charges. Criminal Appeal No. 177-J/2006 is partly allowed in the above terms.

9. Coming to the case of Shahab-ud-din appellant with regard to the murder of the deceased, we have deeply explored the file and gone through the entire material and

have failed to search any piece of evidence through which the prosecution has proved that at what time, place and by which manner the deceased Muhammad Fayyaz was murdered by Shahab-ud-din. Anyhow, there is only extra-judicial confession of appellant Shahab-ud-din made by him before the complainant Muhammad Ashfaq PW-1, Altaf Hussain PW-2 before Mushtaq (not produced). It is not understandable that PWs including the complainant came in the house of the appellant where he made extra-judicial confession before them. However, the dead body was recovered from a pit allegedly made in front of the house of the appellant and the appellant pointed out the place where the dead body had been buried, although he did not lead to the recovery of the dead body. Therefore, these circumstances make us persuaded that the charge has been proved for the murder of deceased Muhammad Fayyaz against Shahab-ud-din appellant, but it remains a mystery that at what place, at what time and by which manner the deceased was put in a pit and earth was put on the deed body, as there is no evidence on the file about the same.

9. The motive that the deceased had to take Rs. 50,000/- from the appellant appears to be fabricated, therefore, on two factors i.e. there being on direct evidence of commission of murder of the deceased and motive appearing to be fabricated, sentence of Shahab-ud-din appellant is commuted to life imprisonment. So far as convictions and sentences imposed upon him by the learned trial Court for the remaining offences i.e. 364 PPC, 2001 PPC, the same shall remain intact. Criminal Appeal No. 173/2006 filed by Shahab-ud-din is dismissed with above modification in sentence. Both the appellants are given the benefit of Section 382-B, Cr.P.C. and sentences of each of the appellants shall run concurrently. Record of the trial Court be returned immediately and the case property, if any, be disposed of in accordance with law.

10. For the same reasons as detailed above, Criminal Revision Nos. 192/2006 and 193/2006 fail and are accordingly dismissed.

MURDER REFERENCE IS ANSWERED IN THE NEGATIVE. SENTENCE OF DEATH IS NOT CONFIRMED.

(A.S.) Appeal dismissed.

2011 Y L R 1660
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD ZAFARULLAH---Appellant
Versus
MATLOOB HUSSAIN and others---Respondents

Criminal Appeal No.857 of 2010, decided on 10th December, 2010.

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

----S.506---Criminal Procedure Code (V of 1898), S.417(2)---Criminal intimidation---Special leave to appeal against acquittal, refusal of---Parties were already at daggers drawn---Despite the occurrence having taken place in a market, where also the workshop of the complainant was situated, not a single witness from the locality had been produced to support his version---Eye-witnesses admittedly were chance witnesses, who had failed to justify their presence at the place of occurrence at the relevant time---Again the eye-witnesses had contradicted the day of incident, which was not a minor contradiction---Showing the day as "Sunday" i.e. a holiday, the witnesses had tried to establish their presence at the spot---According to the complainant himself the accused were armed with sophisticated weapons, but neither any aerial firing was made nor any injury was caused to the complainant---Case of complainant was doubtful, benefit of which had to be given to accused---Conviction could not be recorded on mere hypothesis---Accused after their acquittal had earned a double presumption of innocence, which could only be rebutted if the order of acquittal on the face of it appeared to be perverse, arbitrary and illegal---Impugned order did not suffer from any illegality, irregularity, perversity, misreading or non-reading of evidence---Petition was dismissed in limine in circumstances.

(b) Criminal Procedure Code (V of 1898)---
----S.417---Appeal against acquittal---Appreciation of evidence---Interference by appellate court---Principles stated.

Ch. Jamil Ahmad Sindhu for Appellant.

ORDER
At the very outset, it may be noted that office has numbered and listed out this matter as a criminal appeal, whereas, the complainant has assailed the judgment of acquittal passed in a private complaint under section 506, P.P.C. and section 417(2), Cr.P.C. provides a specific procedure that in such an eventuality a Petition seeking Special Leave to Appeal had to be filed by the complainant. I have gone through the file and observed that on the index as well as on the memo of parties the learned counsel had rightly mentioned it as PSLA but for unknown reasons the office cut the words PSLA and wrote it as Criminal Appeal, which does not appear to be correct approach. Therefore, the office is directed to remain careful in future and this court would proceed to decide this matter as PSLA.

2. Briefly the facts are that complainant filed a private complaint against the private respondents before the Judicial Magistrate section 30, Model Town, Lahore, precisely with the allegation that he (the complainant) along with Abdul Qadus and Ghulam Mustafa witnesses was present in his workshop when private respondents extended him threats, slapped him and attempted to get him lodged in the car by dragging, but he was rescued by the witnesses. The motive is said to be that complainant was pursuing his applications against the private respondents with regard to Awaisia Colony. After recording of cursory evidence the accused/respondents were summoned and during trial Muhammad Zafar Ullah complainant himself appeared as P.W.1., produced Hafiz Abdul Qadus P.W.2. and Ghulam Mustafa P.W.3. On conclusion of the trial, the accused/respondents have been acquitted of the charges against them vide impugned judgment dated 23-2-2010 handed down by learned Judicial Magistrate section 30, Model Town, Lahore.

3. It is argued by learned counsel that the complainant had fully proved its case by producing Hafiz Abdul Qadus P.W.2. and Ghulam Mustafa P.W.3., apart from appearing himself as P.W.1., but the learned trial Court acquitted the accused persons on flimsy grounds and discarded statements of the witnesses, despite the fact that mere relationship of witnesses is no ground to disbelieve their statements and contradiction with regard to day of happening of occurrence was a minor discrepancy as statements of the witnesses were recorded after two years of occur-rence. Further, contends complainant's case also could not be brushed aside merely on the ground that witnesses of the locality did not appear in the witness box. As such, the learned counsel prayed that by allowing this petition, it may be converted in to appeal and respondents be summoned.

4. I have heard the arguments and perused the impugned judgment.

5. It is an admitted fact that parties are already at daggers drawn, as the matter agitated by the complainant was under consideration before the Registrar Co-operative Housing Society. The place of occurrence, according to the complainant's own version, is a market where also the workshop of the complainant is situated, but not a single witness from the locality was produced to support the complainant's version.

6. P.Ws.2. and 3 were produced by the complainant who admittedly are chance witnesses and they have not given any reasonable justification which would appeal to a prudent mind, about their presence at the place of occurrence at the relevant time, which fact by itself is sufficient to create doubt. Furthermore, P.W.2. and P.W.3. while attempting to justify their presence at the place and time of occurrence stated that it was "SUNDAY" and they being in good terms with the complainant had come to him to spend time, but the learned trial Court took notice of the fact that on the date of occurrence i.e. 1-7-2007 it was not "SUNDAY", rather it was "SATURDAY", so there was no other justifiable reason for the witnesses to have accompanied the complainant on a working day. Perhaps they told the occurrence day as "SUNDAY" because it is holiday; otherwise, they had to explain whether they were on leave or on

duty on their respective jobs. This is not a minor contradiction, rather by showing the day as "SUNDAY" i.e. holiday, the witnesses had tried to establish and justify their presence at the place of occurrence, even otherwise, naturally the witnesses always or at least for years remember the day when some untoward incident occurs in their sight. But, here in this case it is not believable that witnesses would forget the day of occurrence just after two years.

7. Further according to the complainant himself the accused were armed with sophisticated weapons and Matloob Hussain also directed his sons Tahir Matloob and Umar Matloob to teach a lesson to the complainant, but neither any aerial firing was made by either of the respondent, nor any injury was caused to the complainant and these circumstances were more than sufficient to create doubt about veracity of the complainant's case and benefit was bound to have been extended to the accused, and conviction could not be recorded on mere hypothesis. The superior courts have been found to be reluctant in interfering with the orders of acquittal primarily for the reason that after acquittal an accused earns a double presumption of innocence which only can be rebutted if the order on the face of it appears to be perverse, arbitrary and illegal. It is settled principle of law that there is a marked difference between appraisal of evidence in an appeal against conviction and in an appeal against acquittal. In the appeal against conviction appraisal of evidence is done strictly and in appeal against acquittal the same rigid method of appraisal is not to be adopted as there is already finding of acquittal given by the learned trial Court after proper analysis of the evidence. In appeal against acquittal interference is made only when it appears that there has been some grave misreading of evidence which amounts to miscarriage of justice and until and unless it is demonstrated with certainty that none of the grounds of acquittal is supportable, superior courts will not interfere only because a different view was possible. The fact that there can be a contrary view on reappraisal of evidence by the court hearing the appeal, simpliciter is not sufficient to justify interference in the acquittal order. Having gone through the impugned judgment, I find no illegality, irregularity, perversity, misreading or non-reading of evidence therein. This petition, therefore, is dismissed in limine.

N.H.Q./M-72/L Petition dismissed.

2011 Y L R 2276
[Lahore]
Before Muhammad Qasim Khan, J
ABDUL JALIL---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No.2927/B of 2010, decided on 25th August, 2010.

Criminal Procedure Code (V of 1898)---
----S. 497(2)---Penal Code (XLV of 1860), Ss.255, 258, .259, 260, 467, 468, 471, 472, 473, 474, 475 & 109---Counterfeiting and recovery of government stamps---Bail, grant of---Further inquiry---Accused was not nominated in the F.LR. and he was involved in the case on the statement of his co-accused, evidentiary value of which would be seen during trial---Nothing had been recovered from the person of accused, and alleged recovery of forged stamps, were found lying in the files kept in the window in the office of accused---Such piece of evidence required further inquiry about the guilt of accused---Alleged recovered stamps had been sent to the concerned department for verification, whether those were forged or not and so far there was no report to that effect---No allegation was there to the effect that accused had prepared those forged stamps---Accused was behind the bars, but there was no substantial progress in the trial---Accused was admitted to bail, in circumstances.

Fazal Ellahi and another v. The State 2004 SCMR 235 ref.
Ch. Shehzad Aslam for Petitioner.
Abdul Wadood, Deputy Prosecutor-General.

ORDER
MUHAMMAD QASIM, J.---Petitioner seeks post-arrest bail in case F.I.R. No.56 dated 11-6-2010 under sections 255, 258, 259, 260, 467, 468, 471, 472, 473, 474, 475 and 109, P.P.C. read with section 30 NADRA Ordinance, 2002 registered with Police Station FIA, Multan.

2. It is argued by learned counsel for the petitioner that he has been falsely involved in this case on the statement of co-accused, otherwise, there is no evidence against him to connect with the commission of the offence. Further argued that nothing was recovered from the personal search of the petitioner. Lastly, it is argued that petitioner is behind the bars without any progress in the trial.

3. On the other hand, learned Deputy Prosecutor-General has opposed the bail application.

4. Heard. Record perused.

5. The petitioner is not nominated in the F.I.R. and has been involved in this case on the statement of his co-accused, the evidentiary value of which shall be seen during

trial. Nothing has been recovered from the person of the petitioner and alleged recovery of forged stamps, were found lying in the files kept in the window in the office of the petitioner. This piece of evidence required further inquiry about the guilt of the petitioner. Furthermore, the alleged recovered stamps have been sent to the concerned department for verification whether these are forged or not and so far there is no report to this effect. Even otherwise, there is no allegation that petitioner had prepared those forged stamps. The petitioner is behind the bars but there is no substantial progress in the trial. In such like offence the Hon'ble Supreme Court of Pakistan in the case "Fazal Ellahi and another v. The State" (2004 SCMR 235), allowed bail to the accused, considering that accused were in custody, investigation had been completed and further detention was held to be of no use to the prosecution. Respectfully following the above dictum of the apex Court, this petition is allowed and as a necessary consequence the petitioner is admitted to bail subject to his furnishing bail bond in the sum of Rs.50,000 with one surety in the like amount to the satisfaction of learned Special Judge Central/Sessions Judge, Multan.
H.B.T./A-214/L

Bail granted.

2011 Y L R 2882
[Lahore]
Before Muhammad Qasim Khan, J
ARSHAD IQBAL and another---Petitioners
Versus
S.H.O. and 6 others---Respondents

Writ Petition No.6558 of 2011, decided on 2nd June, 2011.

(a) Penal Code (XLV of 1860)---
----Ss. 406, 3 & 4---Criminal Procedure Code (V of 1898), Ss.188, 154, 22-A & 22-B---Constitution of Pakistan, Art.199---Criminal breach of trust---Constitutional petition--- Offence committed outside Pakistan---Registration of F. I. R. ---Additional Sessions Judge as Justice of Peace had directed the S.H.O. to discharge his obligation vide impugned order---Validity---Allegation of criminal breach of trust and dishonest misappropriation of 55,000 Saudi Riyals had been levelled against the accused---Complainant had specifically alleged that he had handed over the said money to the accused in Saudi Arabia with an undertaking that the same would have to be delivered to him in Pakistan, which was ultimately refused by the accused---Allegations made against the accused definitely required investigation before reaching some definite conclusion---Prima facie, the application moved by the complainant against the accused for registration of the case even on a cursory glance had disclosed commission of a cognizable offence under S.406, P.P.C.---Pakistani citizen was liable to punishment under the Penal Code, for every act contrary to its provisions, done or omitted to be done on the high seas or elsewhere out of Pakistan---Rules enunciated under S.3 and S.4 P.P.C. and S.188, Cr.P.C. were based on the principle that qua citizens the jurisdiction of courts was not lost by reason of the venue of the offence beyond their territory---Certificate required by S.188, Cr.P.C. could be produced when the matter was placed before the. court or even after indictment---Section 188, Cr.P.C. did not create any bar on registration of case under S.154, Cr.P.C. and Police was competent to register a criminal case when any information with regard to the commission of a cognizable offence was received by them and then to conduct investigation into the offence notwithstanding the place of occurrence beyond the territorial jurisdiction of Pakistan, because the accused was said to be a citizen of Pakistan---Word "found" used in S.188, Cr.P.C. meant "found by the court" at the time when the matter would come up for trial---Any competent court could take seizin, the moment the accused would appear before it--Impugned order did not suffer from any illegality or irregularity---Constitutional petition was dismissed accordingly.

Shujah Tariq v. Messrs Chaudhry and Company and 2 others 2002 PCr.LJ 351; Shahbaz ud Din Chaudhry v. S.H.O. Police Station Garden Town, Lahore 1999 SD 217; Abu Bakar v. The State 1989 PCr.LJ 369 and Jaffar Ali Alvi v. Sessions Judge, Islamabad PLD 2006 Lah. 434 ref.

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

----Ss. 188 & 154---Penal Code (XLV of 1860), Ss.406, 3 & 4--- Criminal breach of trust---Liability for offences committed outside Pakistan by citizen of Pakistan---Scope and applicability of S.188, Cr. P. C.--Registration of F.I.R.---Sanction in terms of S.188, Cr.P.C. can be produced even after submission of challan in the court---Section 188, Cr.P.C. does not create any bar on registration of the case under S.154, Cr.P.C.-Police is competent to register a criminal case on receipt of information with regard to the commission of a cognizable offence and to conduct investigation into the offence, notwithstanding the place of occurrence beyond the territorial jurisdiction of Pakistan, because the accused is said to be a citizen of Pakistan.
Shujah Tariq v. Messrs Chaudhry and Company and 2 others 2002 PCr.LJ 351; Shahbaz ud Din Chaudhry v. S.H.O. Police Station Garden Town, Lahore 1999 SD 217; Abu Bakar v. The State 1989 PCr.LJ 369 and Jaffar Ali Alvi v. Sessions Judge, Islamabad PLD 2006 Lah. 434 ref.

(c) Criminal Procedure Code (V of 1898)---
----S. 188---Liability for offences committed outside Pakistan---Word 'found" used in S.188, Cr.P.C.---Connotation-Word "found" used in S.188, Cr.P.C. means `found by the court at the time when the matter came up for trial," i.e., any court competent to try the offence can take seizin, the moment the accused appears before it.

Muhammad Arif Gondal for Petitioners .
Muhammad Azeem for Respondents.
Miss Salma Malik, A.A.-G. with Sikandar Sub-Inspector.

ORDER
MUHAMMAD QASIM KHAN, J.---Through this writ petition, the petitioners have assailed the order dated 18-3-2011 passed by learned Additional Sessions Judge, Phalia, whereby, on the application of Sarfraz Ahmad/respondent No.3, the respondent S.H.O. was directed to discharge his obligation.

2. Briefly the facts of the case are that Sarfraz Ahmad respondent No.3 moved an application under section 22-A(6), Cr.P.C. with the contents that he (Sarfraz Ahmad) along with his brothers Irshad, Imtiaz and Riaz Ahmad were residing in Saudi Arabia to earn their livelihood, whereas, Arshad who is their close relative, was also residing there. About one year prior, Sarfraz Ahmad returned to Pakistan and about three months before the filing of complaint, Irshad Ahmad in the presence of Imran Ahmad and Imtiaz Ahmad gave 5500-Saudi Riyal to Arshad, which amount had to be given to the petitioner here in Pakistan. When Sarfraz along with Muhammad Arif and Safdar Iqbal went to get back the amount, Arshad Iqbal and his father Bashir Ahmad both admitted to have taken the amount, but asked some time for its return. After about one month Irshad Ahmad (brother of the complainant) also came back to Pakistan and on 27-2-2011, the complainant along with brother Irshad, Muhammad Arif and Safdar Iqbal went to the house of Bashir Ahmad and Arshad Iqbal, they flatly refused to return the amount. With this background, Sarfraz Ahmad moved application under section 22-A(6), Cr.P.C. whereupon, the impugned order has been passed by the learned Justice of Peace.

3. It is contended by learned counsel for the petitioner that no cognizable offence has been made out from the application of respondent No.3 before the Justice of Peace; the occurrence took place at Saudi Arabia, the witnesses also reside there, as such, in view of the bar contained in section 188, Cr.P.C. a certificate by the political agent or the Federal Government was required before proceeding under section 154, Cr.P.C. for registration of a case. In support of his arguments, learned counsel placed reliance on the case "SHUJAH TARIQ v. Messrs CHAUDHRY AND COMPANY through its properitor and 2 others" 2002 PCr.LJ 351.

4. On the other hand, learned counsel representing respondent Sarfraz Ahmad argued that bare reading of his application moved before the learned Justice of Peace, disclose thee commission of a cognizable offence, as such, the learned Justice of Peace had no other option except to direct the S.H.O. to proceed in term of section 154, Cr.P.C. The learned counsel further argued that although 55000-Saudi Riyal were handed over to the petitioner in Saudi Arabia, but same had to be delivered to him, in Pakistan, where the petitioner refused to return the money, therefore, F.I.R. could be registered and investigation could be initiated and courts in Pakistan have ample jurisdiction to take cognizance and can proceed with the trial, and section 188, Cr.P.C. does not create any bar on registration of case. As regards requirement of certificate, such certificate can be obtained even after submission of report under section 173, Cr.P.C., this being procedural requirement and only an irregularity cannot uproot the entire case. The learned counsel in support his arguments has placed reliance on the case "SHAHBAZ UD DIN CHAUDHRY v. S.H.O. Police Station Garden Town, Lahore (1999 SD 217), "ABU BAKAR v. THE STATE" (1989 PCr.LJ 369), "JAFFAR ALI ALVI v. SESSIONS JUDGE, ISLAMABAD" (PLD 2006 Lahore 434).

5. Heard. Record perused.

6. The entire controversy raised in this writ petition boils down to following two points:-

(i) Whether from the contents of the application moved by Sarfraz Ahmad under section 22-A(6), Cr.P.C., any cognizable offence is made out? And
(ii) Whether section 188, Cr.P.C. imposed restrictions for the registration of case in the facts and circumstances of the present case?

7. I have gone through the contents of the application filed by Sarfraz Ahmad respondent under section 22-A(6), Cr.P.C, before the learned Justice of Peace, wherein, allegation of criminal breach of trust and dishonest misappropriation of property (55000 Saudi Riyal) has been levelled against the petitioner. According to the definition of "criminal breach of trust" as provided in section 405 of Pakistan Penal Code, 1860, provides that there must be entrustment of property, dishonest misappropriation of the same or its conversion to his own use by the person in whom the confidence was reposed, there shall be dishonest use or disposal of the said property in violation of any direction of law or in violation of any legal contract. Here

in this case, as narrated above, a specific allegation has been levelled with regard to handing over of money to the petitioner in Saudi Arabia with an undertaking that same had to be delivered to Sarfraz Ahmad complainant/respondent in Pakistan. The above allegations as levelled against the. petitioner definitely require .an investigation before reaching at some definite conclusion about its truth or falsehood, but from the cursory glance of the said application, prima facie, commission of a cognizable offence under section 406, P.P.C. is made out. However, this is a tentative assessment of the facts, not binding on any court or forum, where the matter is yet to be thrashed on the basis of material collected or brought. The question (i) is answered accordingly.

8. Before discussing the applicability of section 188, Cr.P.C. sections 3 and 4 of the Pakistan Penal Code have to be considered. Section 3 of the Code, ibid, extends the jurisdiction of the courts of Pakistan beyond Pakistan if the offence is committed by a Pakistan citizen outside Pakistan. This section envisages that so far as the Pakistan citizen is concerned, he should be deemed to have committed the offence in Pakistan even if it was committed outside the Pakistan territory and even if the act complained of does not constitute an offence under the law prevailing in the place in which the offence was committed. Section 4 of Pakistan Penal Code extends the applicability of the Pakistan Penal Code as to any offence committed by any citizen of Pakistan beyond Pakistan. Terms of section 4 of the Pakistan Penal Code are very wide and there is no restriction on them. A Pakistan citizen is liable to punishment under the Penal Code for every act contrary to its provisions done or omitted to be done by any citizen on the high seas or elsewhere out of the Pakistan.

9. The rules enunciated in sections 3 and 4 of the Pakistan Penal Code and section 188 of the Code of Criminal Procedure are based on the principle that qua citizens the jurisdiction of Courts is not lost by reason of the venue of the offence beyond its territory. No doubt, sections 188 concerns as to how to deal with a person who has committed an offence outside Pakistan. Since the proviso of section 188 of the Code of Criminal Procedure casts an obligation to obtain previous sanction of the Central Government to inquire into and try such person, a careful study of this section would show that it has a message, for the pre-inquiry stage no such sanction 'is needed. If during pre-inquiry stage any offender can be dealt with (without such sanction), then what will be the stage for the requirement of Certificate by Central Government as required by this section? There is no doubt that the pre-inquiry stage substantially relates to investigation of the crime. If there is any stage in which an offender can be dealt with before commencement of inquiry, it must be the investigation stage. So, the Certificate required by section 188 of the Code of Criminal Procedure can be produced when the matter is placed before the court of competent jurisdiction or even after indictment. The upshot is that this section does not create any bar on registration of case under section 154, Cr.P.C. and police is competent to register a criminal case when any information with regard to a cognizable offence is received by them and then to conduct investigation into an offence notwithstanding the place of occurrence beyond the territorial jurisdiction of Pakistan, because a person on whom the focus of suspicion turns is laid to be a citizen of Pakistan. The word "found" used in section

188, Cr.P.C. means found by the Court at the time when the matter came up for trial, that is to say, any court which is otherwise competent to try the offence can take seizin, the moment the accused appears before it.

10. In such like cases, it was a painful sight in Court to see the poor workers of Pakistan, whose money has been allegedly misappropriated and the State response to their agony was mere meek correspondence signifying nothing. These deprived people may not be unjustified if they harbour an impression that Pakistan has become "safe heaven" for persons accused of serious fiscal crimes. In my view, I am fortified by the judgments "JAFFAR ALI ALVI v. SESSIONS JUDGE, ISLAMABAD" (PLD 2006 Lahore 434) and "SHEHBAZ UD DIN CHAUDHARY v. S.H.O. POLICE STATION GARDEN TOWN, LAHORE" (1999 SD 217) and "ABU BAKAR v. THE STATE and another" (1989 PCr.LJ 369).

11. For what has been discussed above, I see no illegality or irregularity in the impugned order of learned Additional Sessions Judge/Justice of Peace. This petition is dismissed accordingly.
N.H.Q./A-146/L

Petition dismissed.

Journals	K.L.R.(Key Law Reports)
Court	Lahore High Court
Bench	Lahore High Court Bahawalpur Bench
Judge	MUHAMMAD QASIM KHAN, J.
Citation	**K.L.R. 2011 Civil Cases 100**
Other Citations:	
Appellant & Respodent	Safdar Hussain and another vs Water & Power Development Authority (WAPDA) through its Chairman WAPDA, WAPDA House, Lahore and 16 others
Appeal/Case No	Writ Petition No. 701, 703 and 705/BWP of 2010
Date of Hearing	2010-06-17
Date of Decision	2010-06-17
Councling	For the Petitioner: Jamshaid Akhtar Khokhar, Advocate. For the Respondents Nos. 1 to 4: Syed Mujahid Ayub Wasti, Advocate. Malik Mumtaz Akhtar, Addl. A.G. Mian Iftikhar Ahmad, HR (Admn. Director) MEPCO, Raja Ishtiaq Ahmad (Manager Legal) and Mian Suhail Ahmad Deputy Manager.
Published On:	2011-05-01
Result	Petition allowed.

JUDGMENT

MUHAMMAD QASIM KHAN, J. --- This single judgment shall dispose of three matters *i.e.* W.P. No. 701/2010 titled "*Safdar Hussain, etc. Vs. Water & Power Development Authority, etc.*", W.P. No. 703/2010 titled "*Samia Jabbar Vs. Water & Power Development Authority, etc.*" and W.P. No. 705/2010 titled "*Khurram Shehzad, etc. v. Water & Power Development Authority, etc.*"

2. Briefly the facts necessitating filing of the above writ petitions are that an advertisement was published in daily "Nawa-i-Waqt, Multan in its issue dated 3.11.2008, whereby applications were invited for appointment against posts of about fifteen various categories, on contract basis and in the said advertisement it was specifically mentioned that services of candidates having domicile of MEPCO jurisdiction were required.

3. It has been argued by learned counsel for the petitioners that in violation of their own advertisement, the respondents/authorities appointed a large number of persons against the above advertised posts who did not belong to the MEPCO territorial jurisdiction, as they in fact were recommended by the Minister for WAPDA and other Members of the National and Provincial Assemblies, in this way, according to the

learned counsel the deserving local candidates like the petitioners were deprived of their fundamental rights. The learned counsel further argued that even the quota reserved for women has not been observed by the official respondents and no merit list was prepared in that respect. It has been further argued that purported merit list was prepared by ignoring the merit policy, recruitment procedure mentioned in the advertisement and law applicable thereto, as such, the appointments made in violation thereof, are liable to be struck down.

4. On the other hand, learned counsel for respondents and senior official present on behalf of the respondent/department have argued at length that although advertisement was published, wherein it was mentioned that after short listing of the candidates written examination will be held and then after interview final merit list will be prepared, and for that purpose Selection Boards were also constituted, but later on *vide* circular dated 15.10.2009 it was advised by the concerned authorities to appoint 50% of the posts by relaxing the recruitment policy upto the extent of interview and numbers of the written test were directed to be added in the interview. The contention of learned counsel for official respondents is that criteria had been changed and written test had been abolished just keeping in view the law and order situation prevailing in the country, as a large number of candidates had applied, therefore, it was difficult for the department to handle such crowed and to arrange for their written test in the security point of view. It has further been argued that the Selection Board after adopting the complete amended procedure as directed by the WAPDA authorities, prepared the merit list and the candidate who were on top of the said list, were issued appointment letters. However, on Court query, the learned counsel has not been able to answer that how the applications of the candidates outside MEPCO territorial jurisdiction were entertained and he came forward with novel arguments that in the light of directions of the WAPDA high-ups after approval of the concerned Minister procedure of walk in interview was adopted, every candidate was considered and then merit list was prepared and on Court query whether any fresh advertisement for walk in interview was published, the answer was in the negative. When further questioned, Mian Iftikhar Ahmad, Director MEPCO informed that for the post of Assistant Line Man total marks were 100, which all were reserved for interview and for other fourteen categories of different posts out of total 100 marks, 90 were fixed for interview and 10 were reserved for one step higher education. The learned counsel has also shown the merit list prepared by the department for different categories of the candidates and on the direction of this Court photocopy of the result of interview for the posts of Commercial Assistant has been brought on the file, just to keep record as to how the interview marks were awarded and the said merit list has been prepared. As the same procedure has been adopted in the appointments of other categories, hence, there is no need to burden the file by placing other lists. When questioned about the original individual list of each member showing award of interview marks by individual member with their handwriting, it has been replied that the list attached above is the whole material available with the respondent department and no separate list of each member was prepared.

5. I have considered the arguments of learned counsel for the parties at length and have perused the entire available record before me.

6. The Constitution of a country is a sacred document by which a Government is run and is controlled. Constitution of a country is also a kind of social contract which would bind people, society and a State. Honest commitment to the goals set out in Constitution would ensure promotion of nationhood and stability of social system, so, in the Preamble of Constitution of Islamic Republic of Pakistan, 1973 (hereinafter shall be called as "the Constitution"), it has been mentioned "*WHEREAS sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust; and further it has been provided that "WHEREIN shall be guaranteed Fundamental Rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality*". It has been settled that Preamble is brief statement affixed to a statute indicating the principles used as guidelines by its framers. It usually states the general object and intention of the Legislature in enacting the same. All the principles laid down in the Preamble find expression in the enactment and provide guiding light for true appreciation and understanding of the document. One of the objects of the Constitution of a Government is to protect the life, liberty and property of the individuals. To this end, the Constitutional system may be a Government of laws and not of men, it is necessary to limit the powers of Government and thereby operates as bulwarks of liberty for the protection of private rights, the political institutions and social structure rest on the theory that all men have certain rights of life, liberty and the pursuit of happiness, which are unalienable, fundamental and inherent. When these "unalienable" rights are protected by Constitutional guarantees, they are called "fundamental rights because they have been placed beyond the power of any organ of the State, whether executive or legislative to act in violation of them. These rights are a part of invaluable treasure of the citizens and in the absence of reasonable restriction imposed by law, every citizen has the right to enjoy them to their maximum. The essential characteristic of Fundamental Rights is that they impose limitations, express or implied, on public authorities, legislative, executive and judicial, prohibiting them from interfering with their exercise and no right can be properly described as fundamental if the Legislature can take it away by a law not involving an amendment of the Constitution, or unless its suspension or surrender in a national emergence as specifically provided by the Constitution itself. The Islamic Republic of Pakistan has a written Constitution, which is an organic document designed and intended to cater to the needs for all times to come. It is a living organism and has to be interpreted to keep alive the traditions of the past blended in the happening of the present and keeping an eye on the future and it provides a method of legitimacy to the Government. It is the power behind the organs and institutions created by it. It is like a living tree; it grows and blossoms with the passage of time in order to keep place with the growth of the country and its people. Thus the approach while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation which has arisen, effectively.

7. In a system of Constitutional governance guaranteeing the Fundamental Rights, and based on trichotomy of powers, such as ours, the Judiciary plays an important role in interpreting and applying the law and adjudicating upon disputes arising among Governments or between State and citizens or citizens *inter se*. The Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights. This calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law be upheld in the society. The Constitution makes it the exclusive power/responsibility of the Judiciary to ensure sustenance of system of "separation of powers" based on checks and balances. This is a legal obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals and such Judicial system can foster an appropriate legal and judicial environment where there is peace and security in the society, safety of life, protection of property and guarantee of essential human rights and fundamental freedoms for all individuals and groups, irrespective of any distinction or discrimination on the basis of caste, creed, colour, culture, gender or place of origin, etc., except in accordance with law. It is indeed such a legal and judicial environment, which is conducive to economic growth and social development. Judiciary is heart of freedom and independent judiciary represents the difference between civilization and savagery.

8. As I have discussed the Constitution, its needs in a civilized society and its salient features with regard to the rights of the citizen and liabilities/duties of the Court in a civilized society under the Constitution of Islamic Republic of Pakistan, 1973. Now again I would advert to the facts of the case in hand. In the advertisement published in the newspaper a specific procedure for recruitment was provided requiring that *"The services of suitable candidates having domicile (MEPCO jurisdiction) for the following posts (Contract Basis) are required on the following terms and conditions"* and in Note (2) it has been provided that *"only short listed candidates will be called for written test/interview".* It is admitted during the course of arguments on behalf of the respondents that earlier recruitment policy was framed for appointment in WAPDA from Grade 1-15 and the same was adopted by the MEPCO, which provided a comprehensive guideline for appointments but in the case in hand after advertisement fresh instructions were issued by PEPCO on 15.10.2009 directing that process was not likely to be completed within 4-5 months, the job had become difficult on account of overwhelming response of the candidates for the advertised vacancies and that law and order situation as prevalent in the country holding of written test in assemblage of thousands of candidates is not without serious life threats, therefore, in para 3 of the said instructions it was observed that *"the position has been discussed and brought in the notice of Minister of Water & Power and in the view of the afore-mentioned circumstances, it has been advised to full 50% of the vacancies in BPS 1-16 on immediate basis in accordance with the Recruitment Policy with unavoidable exception, where required".* With this excuse the criteria settled since 1992 and mentioned in the advertisement was curtailed without any fresh advertisement showing change of such procedure whereas, it is now a settled law that no recruitment could be made without advertisement and it is obligatory on all the

Government departments that advertisement shall consist of complete relevant/necessary details with regard to the matter in issue. As advertisement is a public notice, hence, public-at-large should be provided complete information and if this procedure is not adopted, this action of the respondents will be derogatory to the fundamental rights. At the same time, it may be pointed out that right within the MEPCO territorial jurisdiction the Multan Board, Dera Ghazi Khan Board and Bahawalpur Board are successfully and repeatedly making arrangements, where thousand of students take exams. Furthermore, the Baha-ud-Din Zakariya University and the Islamia University Bahawalpur are also taking exams of the students at large scale, without there being any law and order situation. Therefore, the ground taken by the respondents for bypassing a lawful recruitment process has no legs to stand.

9. Further, the act of the respondents appointing the persons from outside the MEPCO jurisdiction, is sheer transgression of their powers and the allegations levelled in the writ petitions and also during arguments that respondent authorities molded the selection criteria and by doing so they appointed the blue-eyed persons of the members of the Parliament and Minister concerned, could not be categorically denied by the respondents. As such, impliedly the respondents/authorities had nothing to defend themselves about those specific allegations and there being nothing on the contrary, this Court would hold that political influence was very much a reality in the impugned recruitments. In the case "Muhammad *Akhtar Shirani and others Vs. Punjab Text Book Board and others*" (2004 SCMR 1077) the Hon'ble Supreme Court of Pakistan held as under:--

"Supreme Court had noted with concern that departmental authorities responsible to run its affairs submitted to whims and wishes of their superiors and had never felt hesitation in implementing even an illegal order, knowing well that it had no legal sanction and if such order was implemented it was bound to give rise to a number of complications in future---Supreme Court, time and again, had emphasized that the departmental functionaries were only obliged to carry out lawful orders of their superiors and if they were being pressurized to implement illegal order, they should put on record their dissenting note and if such practice was following chances of issuing/passing illegal orders would be minimized."

10. It is settled by now that all public powers are in the nature of trust and public functionaries must act as custodian of such act, whereas, in this case the respondent have blindly acted under the advice of political figures *i.e.* Minister and others. The specific allegations levelled by the petitioners in respective paragraphs of their writ petitions about political interference in the impugned appointments, have not been categorically denied by the respondent authorities with proof and while submitting report and parawise comments they took it very casually by simply stating "legal" or "incorrect". I am afraid this was not the proper reply and it on the contrary reflects that as a matter of fact the respondent had nothing to defend and moreover during arguments not a single sentence has been advanced by the representative official of respondent or their counsel. The allegations of the petitioners seek further strength from the fact that in para No. 7 of the writ petition, it was specifically alleged by the petitioners that a person who had the domicile of Gujjar Khan was appointed and the

said place is known to be the area of Federal Minister for Water and Power and in reply to this para the respondents have only mentioned "incorrect", whereas, the respondent must have come out with specific defence to controvert the said allegation. Even otherwise, factually it is correct that Gujjar Khan falls in the constituency of Federal Minister for Water & Power. Apart from that so many other candidates were alleged to have been appointed against the posts of Commercial Assistant, Account Assistant and ALM, etc. from outside the MEPCO jurisdiction. The Hon'ble Supreme Court of Pakistan in the case "*Munawar* Khan *Vs. Niaz* Muhammad *and 7 others*" (1993 SCMR 1287), held as under:--

"Appointments of both the parties contesting the appointments were made without advertisement, publicity and information in the locality from which the recruitments were to be made---Supreme Court in view of Constitutional requirement expected that in future, all appointments would be made after due publicity in the area from which the recruitments had to be take place, except in case of short-term leave vacancies or the contingent employment."

"Allocation of quota of posts of local MPAs or MNAs for requirement to the posts was offensive to the Constitution and the law on the subject---Minister, Members of National and Provincial Assemblies all were under oath to discharge their duties in accordance with the Constitution and the law---Service laws designate, in the case of all appointments, a departmental authority competent to make such appointments, whose judgment and discretion has to be exercised honestly and objectively in the public interest and could not be influenced or subordinated to the judgment of anyone else including his superior---Allocation of quotas to the Ministers/MNAs or MPAs and appointments made thereunder were all illegal *ab initio*, and have to be held so by all Courts, Tribunals and Authorities."

Further the apex Court in the case "*Abdul Hafeez Abbasi and others Vs. Managing Director Pakistan International Airlines Corporation, Karachi and others*" (2002 SCMR 1034) held as under:--

"Appointments made by Departmental Authorities on the directives of the persons at the helm of affairs/governing the country---Subsequent termination of services on the ground that such appointments were contrary to law as well as prevailing Rules and Regulations---Effect---Besides proceeding in such situation against the beneficiaries of so-called illegal appointments the officers responsible for implementing such illegal directive should also be held equally responsible and severe action should be taken against them, so that in future, it may serve as a deterrent for other like-minded person."

Reliance is also placed on the case "*Abdur Rashid Vs. Riazuddin and others*" (1995 SCMR 999) and "Muhammad *Aslam Vs. Government of the Punjab and another*" (1992 PLC (CS) 962).

11. Apart from the above, as noted above the respondents by their own whims and also under instructions of high-ups altered the selection criteria in contravention to the advertisement and interviewed the candidates. The respondents also could not

establish from the record as to how the information was laid to the candidates with regard to the dates of interview and if the interview was in the shape of walk-in, the respondents have no document with them to show that it was held as such and for this specific altered criteria how the candidates were informed, the respondents could not establish from any publication or issuance of notice to the respondents. On Court's direction a list of about 1678 candidates for the posts of Commercial Assistant who had been allegedly interviewed by the respondents' has been placed on the file and it is admitted by the respondents that entire interview process was completed within six days. If it is taken to be true then obviously about 279 candidates had to be interviewed on one day for the post of Commercial Assistant. If at least four minutes are reserved for each candidate that naturally it would consume eighteen hours per day, if the members of the committed constantly take interview without any interval, which is not humanly possible.

12. According to the learned counsel for the respondents, same procedure was observed with regard to the recruitment against other posts as well and the selection committee consisted of three members. When questioned about the original individual list of each member showing award of interview marks by individual member with their own handwriting, it has been replied that the list attached above is the whole material available with the respondent department and no separate list of each member was prepared and in most of the cases directly this computerized list was prepared and in one or two cases separate list was prepared which was destroyed. This is ridiculous on the part of the respondents, definitely each member of the committee must have an independent list to score the interview marks against each candidate and only thereafter a final merit list could be prepared by tabulating the interview marks awarded by each of the members. The above reply to the Court query indicates that no such procedure was ever carried out by the respondents, otherwise, there was no reason for them to have destroyed the most important and relevant part of the selection/recruitment process, whereas, such document was about to determine the rights in favour of the candidates. This circumstance alone is sufficient to throw out the entire interview process, being tainted with sheer violation of the settled principles and the procedure for obvious reason to accommodate the favourites of the politicians including concerned Minister for WAPDA and the MNAs or MPAs. The Hon'ble Supreme Court of Pakistan in the case "*Chief Secretary Punjab and others Vs. Abdul Raoof Dasti"* (2006 PLC (CS) 1278), held as under:--

"Choosing persons for public service is not just providing a job and the consequent livelihood to the one in need but is a sacred trust to be discharged by those charged with it, honestly, fairly, in a just and transparent manner and in the best interest of public. Individuals so selected are to be paid not out of the private pocket of the persons appointing them but by the people through the public exchequer---Not selecting the best as public servants is a gross breach of public trust and is an offence against public, who has a right to be served by the best; it is also blatant violation of the rights of those who may be available and whose rights to the posts are denied to them by appointing unqualified or even less qualified persons to such posts---Such practice and conduct is highly unjust and spreads as message from those in authority

that might is right and not *vice versa*, which message gets gradually permeated to grass-root level leading ultimately to a society having no respect for law, justice and fair play---Evil norms ultimately lead to anarchic and chaotic situations in a society---Such like evil tendencies should be suppressed and eliminated before the same eliminate us all."

13. Moreover, it has been noticed that procedure of appointment has been changed after advertisement and that too secretly as certainly it was not in the knowledge of each and every interested candidate. Although the officials are bound that each and every post must be filled according to the recruitment policy framed for that purpose and no subsequent instructions or directions could change the same, which is based on established principles and even if any change is compulsory to be made then it was incumbent upon the respondents to have re-advertised the same. Therefore, the impugned recruitment of the candidates being against the prescribed criteria advertised in the print media is considered to be no recruitment at all. The Hon'ble Supreme Court of Pakistan in the case "*Munawar* Khan *Vs. Niaz* Muhammad, *etc.*" (NLR 1994 Service 1), held as under:--

"(a) Appointments to posts in Government offices, other than short-term leave vacancies or contingent employment should be made after inviting applications from those eligible, deserving and desirous, and after due publicity in area from which recruitments are to take place. Appointments made without open advertisements would *prima facie* be violative of Fundamental Right 18 of the Constitution, 1973.

(b) Art. 18. Fundamental right of freedom of trade, business or profession. Appointments to posts in Government offices made without open advertisement violative Art. 18."

(c)

By holding so I am fortified by the judgment 2004 PLC (CS) 278 and 580, 1987 PLC (CS) 419, "*Mst. Nusrat Fatima and others Vs. Deputy Director (Admn.) Directorate of Elementary Education and others*" (2005 SCMR 955).

As discussed above, Mian Iftikhar Ahmad, Director MEPCO admitted before the Court that for the posts of Assistant Line Man total marks were 100, which all were reserved for interview and for other fourteen categories of different posts out of total 100 marks, 90 were fixed for interview and 10 were reserved for one step higher education. This again is a glaring example how the respondents wanted to almost totally oversight the qualification or the experience of the candidates and adopted a novel practice for reserving such excessive marks for interview to extend favour to those who otherwise, were not able to compete on merit with regard to the qualification criteria. As such it is sheer case of nepotism and arbitrary exercise of authority. This Court in the case "*Amjad Latif Vs. C.B.R. and others*" (1996 CLC 1422) in almost similar circumstances strike down such-like action by holding:--

"No transparency was visible and attempt had been made by Members of Selection Committee to upset the merit list prepared on the basis of written test---Selection Committee, had, thus, adopted methodology in a *mala fide* manner to upset merit of

candidates and 33.3 percent marks being available to them, they were successful in upsetting the merit and subjective assessment prevailed *ex facie*."

By holding so the Constitutional petition was accepted only to the extent of merit list prepared on the basis of *viva voca* and was declared to be no legal effect. In another case reported in "*1994 MLD 1647*", this Court had observed as under:--
"Reservation of marks for interview should not be of such high percentage which could lead to arbitrariness and unfairness."

Hence, I hold that in this case a higher percentage for interview marks was reserved with obvious intent to bring up the favourites, irrespective of their qualification standards. Thus, the respondents authorities have intentionally destroyed the entire scheme of law just for their ulterior motives on the directions of their high-ups, and such-like practice giving birth to arbitrariness and resulting in miscarriage of justice cannot be allowed to continue for an indefinite period. All official functionaries are bound to perform their duties within the ambit of law and where they act with *mala fide* or in violation of law; their actions are certainly amenable to Constitutional jurisdiction of this Court.

14. The respondents by their acts through which they over-looked the advertisement, their own policy and the procedure for recruitment of the employees, deprived a large number of society members from their basic rights. It is settled principle of interpretation of statute that the fundamental rights are not static documents and should be interpreted in the light of needs of the day and after insertion of Article 2(a) *i.e.* Objectives Resolution in the Constitution, the Holy Quran and Sunnah have become the guideline for the people of all walks of life. The Holy Quran teaches the human beings to seek divine assistance in repentance and awe, asks for allegiance to God Almighty without any distinction of colour, cred, race and status. The foundation of Islam is on justice. The concept of justice in Islam is different from the concept of the remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo-Saxons. Justice in Islam seeks to attain a higher standard of what may be called "absolute justice" or "absolute fairness". There are repeated references to the importance of justice and of its being administered impartially in Holy Quran. The fundamental rights are those provided by the Quran and Sunnah, adopted by the whole society and enshrined in the Constitution of Islamic Republic of Pakistan, 1973. The last Sermon of Holy Prophet (Peace Be Upon Him) is a landmark in the history of mankind which recognizes the inalienable Rights of a man conferred by Islam which are known as Fundamental Rights. The following extract from the farewell Sermon can be reproduced for reference:--

"*...O Ye People, Allay says*: O People We created you from one male and one female and made you into tribes and nations, so as to be known to one another. Verily in the sight of Allah, the most honoured amongst you is the one who is most God-fearing. There is no superiority for an Arab over a non-Arab and for a non-Arab over an Arab, nor for the white over the black nor for the black over the white except in God-consciousness."

"All mankind is the progeny of Adam and Adam was fashioned out of clay. Behold' every claim of privilege whether that of blood or property, is under my heels except that of the custody of the Ka'ba and supplying of water to the pilgrims…"

"Behold' all practices of the days of ignorance are now under my feet. The blood revenges of the days of ignorance are remitted…..All interest and usurious dues accruing from the times of ignorance and wiped out…"

"O people, verily your blood, your property and your honour are sacred and inviolable of this day of yours, the month of yours and this very town (of yours). Verily you will soon meet your Lord and you will be held answerable for your actions."

In "Law Justice & Islam" Justice Dr. Nasim Hasan Shah while referring to the farewell Sermon has observed:--

"The farewell Sermon of the Holy Prophet (P.B.U.H.) was a comprehensive charter founded on the basic, fundamental, inalienable and residual rights of Man guaranteed in written form, under the Holy Quran which constitute the 'Spoken Word of Allah'. These rights, according to the belief of Muslims, cannot be obscured or eradicated by any mortal power."

15. After becoming part of the Constitution by insertion of Article 2A "Objectives Resolution", it has become duty cast upon the Executive, Legislature and the Judiciary to be more careful with regard to the fundamental rights of the citizens as these are the rights which are awarded by divine, respected and announced by Holy Prophet (P.B.U.H.), but in this case, it is observed that the respondents authorities have ignored the fundamental rights of the citizens and acted under the advice of political high-ups, playing with the miseries of the poor people of the locality. Thus, the respondents have abused their powers, ignored their duties imposed upon them by law, Holy Quran and the Sunnah of Holy Prophet Muhammad (P.B.U.H.) and their above acts show that they are not answerable to any person except the political high-ups and by ignoring the dictates of Islam, they have shown by their conduct that they are not even answerable to Allah Almighty. The Hon'ble Supreme Court of Pakistan in the case "*Sardar Ali and others Vs.* Muhammad *Ali and others*" (PLD 1988 SC 287), held as under:--

"Besides being of Constitutional importance, Objectives Resolution represents very important part of Ideology of Islam and in turn that of Pakistan also. It contains the progressive elements of an Islamic polity---Sovereignty of Allah, Democracy, Social Justice, Fundamental Rights, Independence of Judiciary, the protection of the rights of minorities etc. It is important to note that the exercise of power and authority by the State through the 'chosen representatives', though appears as the second important Constitutional mandate in the Resolution, this concept is so important that it is included in the first one also---The "Sovereignty of Allah Almighty" as interpreted by Supreme Court in the case of Asma Jilani. It is also of no less

importance that Federal Structure of the State has also been guaranteed with necessary safeguards for the federating units as also the Federation. Indeed it is a remarkable Instrument which is very rarely made by the Founding Fathers of a new Nation."

16. Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 although is not part of the fundamental rights and is part of Chapter-I of the Constitution "Introductory". This is highly important provision. A bare reading of Article 4, Constitution of Pakistan, 1973 will show that it incorporates the doctrine of equality before law or equal protection of law. This jurisprudential concept is the fruit of ceaseless efforts of citizens to have supremacy of rule of law. It is even available as shield against tyranny and excess in emergency. It ensures the rule of law and rule of equality as against the rule of arbitrariness, whims and caprice. This Article is actually supplementary and complementary to Article 2 and Articles 8 to 26 in our Constitution. It casts obligation upon functionaries of Federation and the Federating Units/Legislatures to ensure the doctrine of rule of law and embody the principle of equality. This Article embodies the concept of dignity, equality of law and save citizens from arbitrary/discriminatory laws and actions by the Governmental Authorities. Article 4 provides protection of law, treatment in accordance with law and in particular protection of life, liberty, property, trade, business and profession, subject to law and the right is an interest which is not only recognized by law, but also enforceable at law. It included the personal as well as statutory rights. Inalienable rights are those rights which are non-tranferable, cannot be relinquished, abridged or usurped. Such rights are conferred by the Constitution and cannot be taken away or modified except by the Constitution itself. When such rights are given Constitutional guarantees they are called 'fundamental rights' because they have been placed beyond the power of any organ of the State, whether Executive or Legislative to act in violation of them. The provision of Article 4 provides Constitutional guarantee to the people that the Executive cannot take their right of life, liberty, property and reputation unless it has the support of some legal provisions for doing so. Every statutory body or public functionary is supposed to function in good faith, honestly and within precincts of its powers so that person concerned should be treated in accordance with law and guaranteed by Article 4 of the Constitution of Islamic Republic of Pakistan, 1973. Reliance in this respect is placed on the case "Muhammad *Aslam Vs. Government of the Punjab and another*" (1992 PLC (CS) 962). Departure from that grand norm would render actions of public functionary without validity and would be struck off as illegal and without lawful authority, and in the present case the respondents functionaries by violating their own policy and ignoring the terms and conditions mentioned in the advertisement basically have tried to snatch the rights guaranteed to the petitioners and others, under Article 4 of the Constitution, whereas, they being the citizens of Pakistan had to be treated in accordance with law and no action detrimental to their life, liberty, body, reputation or property of any person shall be taken except in accordance with law, hence the act of the respondents is declared to be in violation of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973.

17. Article 9 of the Constitution of Islamic Republic of Pakistan, 1973 provides that no person shall be deprived of life or liberty save in accordance with law. Here the Constitution guarantees against any attack on life or liberty of a person subject to law. The word 'life' is not restricted to animal life or vegetative life. It carries with it the right to live in a clean atmosphere, a right to live where all Fundamental Rights are guarantees, a right to have rule of law a right to have clean and incorruptible administration to govern the country and the right to have protection from encroachment on privacy and liberty. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legality and Constitutionally. The fundamental right of "right of life" recognized in the entire civilized world and enshrined in Article 9 of the Constitution of Pakistan has been given expanded meaning over the years. With the passage of time the role of the State has become more pervasive. Its actions, policies and laws affect the individuals in a variety of ways and the Courts have accordingly given a more comprehensive and dynamic interpretation of the fundamental rights including the right to life. Right to life is no longer considered as merely a right to physical existence or a right not to be deprived of life without due process of law. It means a sum total of rights which an individual in a State may require to enjoy a dignified existence. In modern age a dignified existence may not be possible without giving an extensive and wide meaning to the word 'life', which includes such rights which are necessary and essential for leading a free life.

18. The Hon'ble Supreme Court of Pakistan in the case *2000 CLC 633*, has held as under:--

"…….Thus, apart from the wide meaning given by US Courts, the Indian Supreme Court seems to give a wider meaning which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence. The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Under our Constitution, Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the word. The Constitution guarantees dignity of man and also right of 'life' under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment."

19. The Courts are bound, while examining any act of the Government functionaries, in the light of fundamental rights to see if deprivation of life and liberty of a person is under any law or not and to see whether the law is followed and to put this role in other words every public functionary or a person must show the legal authority for his interfering with the right of life of any other person and as discussed above, the word

'life' has been given wider meaning. Hence, to deprive a person from his legal right to be appointed is equal to deprive him of his right to life. Therefore, on this touchstone alone, the act of the respondents depriving the petitioners and a lot of other similarly placed persons residing in MEPCO jurisdiction, have deprived them all from their right of life and this act is violation of Article 9 of the Constitution of Islamic Republic of Pakistan, 1973.

20. Article 14 of the Constitution of Islamic Republic of Pakistan, 1973 deals with dignity of man. It is for the first time that provisions have been made to safeguard dignity of man in the Constitution of Pakistan. The dignity of man is inviolable right. It in clear terms guarantees to protect the dignity of man and this provision is unparallel in the Constitutions and hardly Constitutions of a few countries provide for it. Dignity of man is not only provided by Constitution of Pakistan, but according to history and belief under Islam great value has been attached to the dignity of man. This principle is required to be extended further to the cases where any defamation is caused, because the human dignity, honour and respect is more important than physical comforts and necessities. No attempt on the part of any person individually, jointly or collectively to detract, defame or disgrace another person, thereby diminishing, decreasing and degrading the dignity, respect, reputation and value of life, should be allowed to go with impunity. There are six basics which are to be protected *i.e.* protection of faith, protection of life, protection of honour and dignity and protection of paternity, as discussed by the Muslim jurists and in this case the respondents by ignoring the petitioners and other applicants from MEPCO jurisdiction, entertained applications from the outsiders and went on the appoint, in sheer disregard to the dignity of the citizens of this area, which practice in fact is bound to create a sense of hatred in the minds of these deprived people and by this act the respondents have tried to establish that poor people of this territory (having domicile of MEPCO territory) don't have the capacity, knowledge or the qualification to be appointed on particular posts and for this reason the act of the respondents is hit by Article 14 of the Constitution of Islamic Republic of Pakistan, 1973.

21. Article 18 of the Constitution of Islamic Republic of Pakistan, 1973 relates to the freedom of trade, business or profession subject to qualification or regulated by law. This Article proclaims that very citizen of Pakistan is entitled to enter upon any lawful profession or occupation and to conduct in lawful trade or business. It is important to point out that the word "lawful" qualifies the right of citizen in the relevant field. In the case in hand, the petitioners and other applicants having domicile of MEPCO territorial jurisdiction and having other requisite qualifications to contest the posts advertisement and to be recruited in accordance with law, policy and the procedure but the respondents have violated the conditions mentioned in the advertisement and policy as well as procedure for recruitment, this way they also infringed the right of profession guaranteed by Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, therefore, the same calls for interference by this Court to strike down the same to ensure protection of rights to the citizens. The Hon'ble Supreme Court of Pakistan in Re: *Abdul Jabbar Memon and others* Human Rights Case (1996 SCMR 1349), held as under:--

"Arts. 184 and 18---Human Rights case---Irregular appointments---Supreme Court while inquiring the various complaints of violation of Fundamental/Human Rights, found that Federal Government, Provincial Governments, Statutory Bodies and Public Authorities had been making initial recruitments, both and *ad-hoc* and regular, to posts and offices without publicly and properly advertising vacancies and at times by converting *ad-hoc* appointments into regular appointments---Such practice was *prima facie* violative of Fundamental Rights (Art. 18) guaranteeing to every citizen freedom of profession---Supreme Court, after notice to all concerned and after full hearing in the matter ordered that violation of such Fundamental/Human Right should be discontinued forthwith. Authorities were directed to take immediate steps to rectify so as to bring such practice in accord with the Constitutional requirement."
Reliance is also placed on the cases "*Jamil Ahmed Virk and another Vs. Secretary Education, Government of Punjab and 8 others*" (2005 PLC (CS) 154) and "*Government of N.-W.F.P. through Secretary, Forest Department, Peshawar and others Vs.* Muhammad *Tufail* Khan" (2004 PLC (CS) 892).

22. Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 is analogous to the provisions contained in Article 7 of the Declaration of Human Rights. It prohibits discrimination within the class but does not prohibit the classification as such. The criteria for reasonable classification is to see as to whether the basis of differentia has any rational nexus with its avowed policy. The Hon'ble Supreme Court of Pakistan in the case "*Lt. Muquddus Haider Vs. Federal Public Service Commission through Chairman, Islamabad*" (2008 SCMR 773) observed as under:--
"Reservation/quota system has been introduced to secure adequate representation in the service of qualitative inadequacy of representation for the persons belonging to socially and educationally backward class or area, so that they should have adequate representation in the lowest rung of service for which they aspire to secure adequate representation in the selection posts in the services as well, as such quota is being approved……."

Proviso in Article 27 of the Constitution of Islamic Republic of Pakistan, 1973 also permits for reserving the posts for persons belonging to any class or area to secure adequate representation in the service of Pakistan. In the cases in hand the respondents made reasonable classification and advertised the posts to be filled by the persons having domicile of MEPCO jurisdiction. Keeping in view the principle of reasonable classification laid down by the apex Court, the above classification of the respondents was well within the ambit of law, as in the advertisement only application were called from the candidates of MEPCO jurisdiction, sensing this area to be underdeveloped and almost totally ignored and deprived region with regard to education, health, entertainment and other allied facilities. Moreover, all the distributing companies have adopted uniform policy to fill up the posts amongst the candidates of their own territorial jurisdiction and as such, GESCO, LESCO, etc. fulfilled the vacancies amongst the candidates having domicile of their jurisdiction. Furthermore, before establishing the procedure of these companies earlier the WAPDA being their mother company adopted the same procedure and non-gazetted post were fulfilled on regular basis. Therefore, so far as calling of applications from

MEPCO jurisdiction is concerned, it was a very reasonable attempt, but the respondents themselves went on to violative their said policy, for the reasons discussed above. Uneven state of economic development and educational opportunities in different parts of country stands recognized right from the formation of Pakistan, therefore, the need for affirmative action in aid of people from less developed areas is recognized and it is with the object that quota system is introduced in services and the same tends to provide weightage to residents of certain areas on the basis of disadvantages and lack of opportunities that such people have faced because of inadequacy or inequality of educational, economic or cultural opportunities.

23. At the same time, it stood admitted position that although the Government had issued notification about reserving 5% quota for women which was being implemented in all departments of the country, but the respondents failed to observe the same and on Court query it was admitted that this quota was only observed for gazetted posts of BS-17 and not for the post advertised. Article 25(3) of the Constitution of Islamic Republic of Pakistan, 1973 provides that *"nothing in this Article shall prevent the State from making any special provision for the protection of women and children".* Thus, at higher level appropriate steps were taken to safeguard the interests of women and children and it was for this reason that above-mentioned notification with regard to 5% quota for women was reserved, but respondents departments did not care about it and thus violation of Article 25(3) of the Constitution is apparent. It may be reiterated that as held above the respondents may make reasonable classification of the posts and reserve the quota for women against the posts suitable for them keeping in view the dignity of womenfolk in the light of Article 27 of the Constitution of Islamic Republic of Pakistan, 1973 by declaring that such and such posts may be filled only amongst the men, but totally ignoring a limb of the State is absolutely ridiculous. Guidance is sought from the case "*Mst. Fazal Jan Vs. Roshan Din and 2 others*" (PLD 1992 SC 811).

24. Article 27 of the Constitution of Islamic Republic of Pakistan, 1973 provides safeguards against discrimination in service. But in this case the respondents against their own condition mentioned in the advertisement, accepted and entertained the applications from the candidates outside the MEPCO territory, and such outsider candidates have in face been appointed as well, but the persons of this area *i.e.* MEPCO territory were totally ignored by violating the existing policy and mentioned in the advertisement, while other companies advertised posts to be filled amongst the candidates having domicile of their territorial jurisdiction like GESCO, LESCO, ISCO, etc., and the persons from MEPCO were not allowed to apply for the posts and to compete the same in other companies.

25. In the case "*Shahid Mahmood* Khan, *Advocate, High Court Vs. Government of Punjab through Chief Secretary, Punjab, Lahore and 4 others*" (2008 PLC (CS) 4), a learned Division Bench of this Court held as under:--

"Art. 27---Expression "service"---Connotation---Expression "service" does not mention a permanent service or a contractual service, therefore, it would include all kinds of service whether permanent, temporary or on contract, etc."
The proviso to Article 27 is to the effect "provided that, for a period not exceeding [forty] years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan" and second proviso provides "provided further that, in the interest of the said service, specified posts or services may be reserved for members of either sex it such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex". Therefore, while discussing Article 27 in the light of first proviso, in the present cases the respondents authorities have deprived the petitioners and others of their valuable rights and outsiders have been appointed, which is violation of Article 27 of the Constitution of Islamic Republic of Pakistan, 1973.

26. Employment for a common person is source of livelihood and right of livelihood is an undeniable right to a person. If work is sole source of livelihood of a person, then right to work is not less than a fundamental right which has to be given protection. Such appointments are trust in the hands of public authorities and it is their legal and moral duty to discharge their functions as trustee with complete transparency as per requirement of law so that no person who is eligible to hold such post is excluded from the process of selection and is deprived of his right of appointment in service. Each and every organ of the State has to perform its functions freely, without interference by any other organ of the State. Said principle alongwith Articles 2-A, 4, 5(2), 37 and 38 of the Constitution lead to a conclusion that each and every organ of the State should remain within its spheres and the superior Courts should set aside actions which are not within the domain of the authorities.

27. At this stage it may be pointed out that respondents officials were directed to produce the detailed list of the candidates appointed from outside the MEPCO jurisdiction and they filed the list and those mentioned in the list were inserted as party and they appeared before this Court in person. On Court question whether they needed some time to engage counsel or they may argue the case of their own, all such respondents intended to adopt the arguments advanced on behalf of the respondents officials and also by the representative of the MEPCO, hence, right of hearing has been provided to them. But I am of the view that respondents officials have not yet filed the complete list of the appointees belonging to outside the territorial jurisdiction of MEPCO and have only filed a list of those appointees against whom the petitioners had filed these writ petitions, hence, although the principle of natural justice required that no person should be condemned unheard, but seeking guidelines from the principles set in the celebrated judgment of the Hon'ble Supreme Court of Pakistan in Constitution Petitions Nos. 8 and 9 of 2009 (judgment on emergency), it was not considered necessary to issue notices to all the affected appointees, as they themselves filed applications for appointment in an area, which was not open for them according to the advertisement published in the newspaper by the respondents authorities. As such they equally contributed to the illegal and unconstitutional

exercise of the respondents authorities in derogation to the conditions mentioned in the advertisement; therefore, the impugned actions of the respondents being void *ab initio*, the principle of "*audi alteram partem*" would not be applicable to the appointees, subject-matter of these writ petitions.

28. The Hon'ble Supreme Court of Pakistan in the case "*Government of Sindh V. Raeesa Farooq*" (1994 SCMR 1283) held as under:--

"Provisions which confer fundamental rights on a citizen, whenever violated and complaint is made to a High Court about their violation, the Court must step in to investigate such facts under the discretionary jurisdiction conferred on it under Article 199 and pass such order as may be found just, legal and equitable taking into consideration the facts and circumstances of each case."

29. In another case "*Government of N.-W.F.P. through Secretary, Forest Department, Peshawar and others Vs.* Muhammad *Tufail* Khan" (2004 PLC (CS) 892), the Hon'ble Supreme Court of Pakistan held as under:--

"Civil servant was selected on political dictation---Neither any advertisement was made to fill the vacancy nor any interview was held---Codal formalities for the appointment of the post were flagrantly violated---Effect---Such-like entrants in civil service could not be countenanced as it might generate frustration and despondency among all persons who were having excellent merit but every time they were by-passed through suck-like back door entries on political interference---Everybody who matters in the functioning of the society has always propagated for the adoption of transparency and merit in appointments which are cardinal principles of good governance---When it comes to actual practice, such principles are blatantly ignored---Courts are duty bound to upheld the Constitutional mandate and to keep up the salutary principles of rule of law---In order to upheld such principles it has been stated time and again by the superior Courts that all appointments are to be made after due publication in a transparent manner after inviting applications through Press from all those who are eligible deserving and desirous. In spite of all these directions, such salutary principles are being frustrated within impunity---Such malady which has plagued the whole society has to be arrested with iron hands and the principles of merit have to be safeguarded, otherwise, it would be too late to be correct."

29. The transparency is the hallmark of any effective system. Transparency and fairness of actions of Governmental functionaries can be assessed only on the touchstone of fundamental rights and here in these cases their actions have not been found protecting the Constitutional guarantees. As I have discussed in detail the act of the respondents in the light of Articles 2-A, 4, 9, 14, 18, 25 and 27 of the Constitution of Islamic Republic of Pakistan, 1973, and it has been observed that the actions of the respondents by which they appointed the persons who did not belong to the MEPCO territory, have violated their own recruitment policy earlier followed by them for about two decades, procedure and the conditions mentioned in the advertisement, reserving disproportionate interview marks by ignoring the qualification criteria.

30. The narrative of the facts and circumstances of the case in hand would make it abundantly clear that the actions of the respondents were violative of the provisions contained in Articles 2-A, 4, 9, 14, 18, 25 and 27 of the Constitution of Islamic Republic of Pakistan, 1973. In the case "*Asad Ullah Mandi and others Vs. Pakistan International Airlines Corporation and others*" (2005 SCMR 445), the Hon'ble Supreme Court of Pakistan held as under:--

"An action which is *mala fide* or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Therefore, action taken upon no ground at all or without proper application of the mind of an authority would also not qualify as an action in accordance with law and would, therefore, have to be struck down as being taken in an unlawful manner."

31. Accordingly, the above contumacious actions of the respondent are declared to be *ultra vires* to the Constitution and are set aide on the ground:--

(i) The respondents made impugned recruitments beyond the scope of advertisement;
(ii) No stipulated and transparent procedure for recruitment has been followed;
(iii) Amendment in the recruitment procedure after publication of advertisement was not permissible in law;
(iv) The respondents reserved higher percentage of interview marks, in derogation to the judgment of this Court as discussed above; and
(v) The actions of respondents are against the principle of natural justice and fundamental rights, enshrined in Articles 2(a), 4, 9, 14, 18 and 27 of the Constitution of Islamic Republic of Pakistan, 1973.

32. For what has been discussed above, I allow these writ petitions in the following terms:--

(I) All appointments made amongst the candidates from outside the MEPCO territorial jurisdiction, pursuant to the advertisement of the respondents, subject-matter of these writ petitions, are declared to be *mala fide* and *ultra vires* of the Constitution of Islamic Republic of Pakistan, void *ab initio*, and are set aside accordingly;

(II) The persons appointed against respective posts having domicile of within the MEPCO territorial jurisdiction shall provisionally continue as such. These appointments are being provisionally protected on two grounds, as:--
(a) These appointees otherwise, *prima facie* fulfill the basic criteria of being the residents of the same MEPCO territorial jurisdiction, as advertised; and
(b) By their immediate expulsion from service, there may occur unnecessary vacuum in MEPCO which may even result in adding to the miseries of general public in these days of scorching heat, searching for electricity.
(III) The respondents authorities are directed to short list the applications received from the candidates from within the MEPCO territory by making a transparent and

fair criteria and then arrange for written test whereafter, at least five candidates shall be called for interview for each post. In case of less number of candidates apply/qualify/pass for any post, this condition shall not apply;
(IV) The interview marks, as discussed above, shall not be more than 25%; and
(V) For women quota as notified by the Federal Government shall strictly be observed considering the suitability of such posts keeping in view the dignity of the women, but this classification should not be based on arbitrariness.

Petition allowed.

2011 C.L.R. 1047
[Bahawalpur]
Present: **MUHAMMAD QASIM KHAN and CH. SHAHID SAEED, JJ.**
Maqbool Ahmad and another
Versus
WAPDA (SCARP) *through* Chairman, WAPDA and 5 others

R.F.A. No. 43 of 1999, decided on 20th April, 2011.

CONCLUSIONS

(1) Acquiring authority cannot compel owner of land to accept compensation according to its own whim and caprice.
(2) A party is bound by evidence of his witnesses.

(a) Appreciation of Evidence---
---Party would be bound by the evidence of live witnesses.
(Para 7)
Ref. PLD 2007 SC (AJK) 63.
LAND ACQUISITION PROCEEDINGS --- (Deviation from legal requirements)

(b) Civil Procedure Code (V of 1908)---
---S. 100---Specific Relief Act, 1877, Ss. 8/9/56---Land Acquisition Act, 1894, S. 4---Constitution of Pakistan, 1973, Arts. 23, 24, 25---Proceedings in acquisition of land by WAPDA/appellant---Deviation from statutory requirements---Trial Court decreed suit for possession/Mandatory Injunction and damages---Issues---Appreciation of evidence---Validity---WAPDA authorities/appellant had taken over land without following legal steps, necessary for acquisition and complying with mandatory provisions of law, thus fundamental Constitutional rights of land-owners were breached---Said act of WAPDA was highly improper and illegal, therefore WAPDA could not compel owners to accept the compensation according to its own whim and caprice---Amounts which respondents were entitled should have been the market value---Moreover, there were also discrimination on part of appellant/WAPDA---Appellants/WAPDA failed to give any reasonable classification for not awarding compensation to respondents equal to others---Both of the Civil Misc. for appointment of local commission and additional evidence filed by appellants during pendency of appeal was also dismissed by High Court holding that additional evidence could be allowed only in exceptional circumstances in a case in which evidence required to be brought on record was essential for just decision of the case and such evidence either was not available or was beyond the reach of party concerned at relevant time or if pertaining to official record was not in his knowledge---No such ground was available to appellant/WAPDA---R.F.A. dismissed.
(Paras 7,8)

[WAPDA authorities/Appellant had acquired land of the plaintiff/respondent without complying with legal requirement Trial Court correctly decreed suit for possession, and damages. R.F.A. was dismissed by High Court].
For the Appellants: Hafiz Abdul Qayyum and **Muhammad** Uzair Qayyum, Advocates.
For the Respondents: Sh. Karim-ud-Din and Raja **Muhammad** Sohail Iftikhar, Advocates.
Date of hearing: 20th April, 2011.

JUDGMENT

Through this single judgment both the connected regular first appeals No. 43-1999 and 34-1999 are being decided together as both the appeals are out come of the impugned judgment & decree dated 23.12.1998 passed by the learned Civil Judge 1st Class, Bahawalnagar.

2. The brief facts giving arise to the instant connected appeals are that plaintiffs Maqsood Ahmed etc. were owners of the land measuring 37 kanals, 17 marIas, situated in Chak Abdullah Utaar, Tehsil Bahawalnagar, fully described in headnote, para No. 1 and prayer clause of the plaint. Defendants/WAPDA issued notification under Section 4 of the Land Acquisition Act on 13.1.1988 regarding this land for the construction of Chishtian waterlogging drain. That notification became infractuous for want of further proceedings. Another notification dated 3.2.1990 was made. Defendants took forcible possession of the impugned land constructed drain over it. The proceedings for acquisition of land were not completed and this second notification was also rendered infructuous. The third one was issued on 8.7.1992 which met the same fate and became infructuous for want of further proceedings. Plaintiffs were not paid any compensation and rent. They were entitled to return of possession of the land in original shape. Private negotiations offering the proposed price and compensation to plaintiffs were rejected by them. 3 kanals, 10 marlas of plaintiffs land were commercial having the rate of Rs. 50,000/- per marIa while the remaining 34 kanals, 7 marlas were residential in nature having the price of Rs. 5000/-. Plaintiffs were entitled to the price of Rs. 69,35,000/-. They were further entitled to 15% compensation for forcible possession and 80/0 compound interest till the realization of this amount from the date of possession. Defendants were asked to submit to plaintiffs rights but they refused to do so. Hence, the plaintiffs filed a suit for possession and mandatory injunction with recovery of Rs. 69,35,000/- + 15% compensation + 8% compound interest in alternative.

3. Defendants appeared before the learned Trial Court and contested the suit by tooth and nail while submitting their written statement. The learned Trial Court out of the divergent pleadings of the parties framed the following issues.
(1) Whether property of the plaintiffs has been duly acquired for drain purposes and price of the property is available with the defendants? OPD.
(2) Whether the plaintiffs have no cause of action? OPD.

(3) Whether the plaintiffs have never objected digging of the drain and he has no *locus standi* to file this suit? OPD.
(4) Whether the plaintiffs have not filed any objection regarding acquisition of the property and they are estopped to file this suit by their act and conduct? OPD.
(5) Whether the suit is not maintainable in its present form? OPD.
(6) Whether the plaintiffs are entitled for possession of property in dispute and notification dated 13.1.1988, 3.2.1990, 8.2.1992 are illegal and void? OPP.
(7) Whether the plaintiffs have not received any compensation of the property in dispute and the plaintiffs are entitled to possession of the property in dispute? OPP.
(7-A) Whether the plaintiffs are entitled to receive compensation to the tune of Rs. 69,35,000/- from the defendants and they are also entitled to receive 15% interest and 8% compound interest till final payment of compensation? OPP.
(7-B) What is the market value of the suit property if so its effect? OPP.
(8) Relief.

4. Both the parties got recorded their oral as well as documentary evidence. The learned Trial Court after hearing the arguments of both the parties at length decreed the suit of the plaintiffs *vide* judgment and decree dated 23.12.1998. Feeling aggrieved by the said judgment and decree both the parties have preferred two separate appeals.

5. Learned counsel for the appellants/WAPDA contends that the judgment and decree passed by learned Trial Court is illegal, void, against the law and facts and also based upon surmises and conjectures; there is misreading and non-reading of evidence; that the learned Trial Court has drawn wrong conclusion of oral and documentary evidence on issue No. 3 because it was proved through evidence that the respondents never objected at the time of digging of the drain, actually the land was barren and there was no value of land at the time of digging of the drain; further submits that the price of the land in dispute was fixed as Rs. 1,19,225/- per acre by the Private Negotiation Committee before the institution of the suit on 30.4.1995, the date of delivery of possession declared by the Trial Court is 3.2.1990, whereas the suit filed in the year of 1995 after construction of drain. Learned counsel further argued that the land can be acquired through three legal methods (i) Under Land Acquisition Act 1894 (ii) Punjab Land Acquisition Rules 1983 (iii) Standing orders 28 of Land Acquisition Act; further maintained that the land can be acquired in one or two ways (i) By Private Negotiation (ii) By compulsory acquisition under the provision of Land Acquisition Act, 1894 and the land can be acquired Under Land Acquisition Act only in case of failure of private negotiation. The District Collector is legally bound under Punjab Land Acquisition Rules, 1983, Rule 11(IV) that before issuance of notification, he may acquire the land through private negotiation, if he failed, then he may issue the certificate that the private negotiation failed. That according to Section 23 of Punjab Land Acquisition Act, it is incumbent upon the land Acquisition Judge to determine the average price of the period of land through documentary evidence and not to determine it by oral evidence. Further argued that the learned Acquisition Judge himself determined the area of land as 3-kanals, 10 marlas commercial and 34 kanals, 7 marlas residential and admittedly no evidence

and detail is mentioned in the suit and evidence on behalf of the respondent that which land is commercial and residential. Learned counsel further argued that the appellant WAPDA submitted C.M. 180-2000 for additional evidence and C.M. 169-2001 for appointment of Local Commission for determination of area utilized by the appellant/WAPDA for the construction of drain alongwith mutations and sale deed of the land of Maqbool Ahmed land owner but no order yet has been passed in the said CMs; further argued that the general powers and duties of WAPDA are enumerated in Section 8 of the WAPDA Act, 1958. The prevention of water logging, reclamation of water logged lands and construction of drainage channels are some of the functions of WAPDA. It can frame sachems for the performance of its statutory functions and it can also acquire land not only under the Land Acquisition Act, but also by purchase of lease, exchange or otherwise clause 9(b) of Sub-section (2) of Section 13 of WAPDA Act +does authorize WAPDA to purchase land by private negotiation Sub-section (3) of Section 13 declares that the acquisition of any land for the WAPDA Authority shall be deemed to be acquisition for public purpose. Lastly learned counsel for the appellant WAPDA argued that the decretal amount has already been deposited in a profitable scheme with the permission of this Court.

6. On the other hand, learned counsel for the respondent in R.F.A. No. 43/1999 and appellant in R.F.A. No. 34-1999 argued that the learned Trial Court while granting partial relief to the respondents/appellants has committed error of law in as much as the findings on determination of market price are based on misreading of evidence; further maintained that the market price claimed by the respondent was Rs. 69,35,000/- but the learned Acquisition Judge decreed the suit of the respondent for recovery of Rs. 55,61,000/- without considering the documentary evidence of the respondents; further states that respondents in their suit also claimed 8% compound interest and 15% as compulsory charges but the learned Trial Court has also overlooked their said claim. Learned counsel further argued that the Trial Court has failed to appreciate law and facts in correct perspective while determining the actual market price of the land under acquisition by attending factors relating to potentialities of the land including its location, use, and surroundings blessed with civic amenities.

7. We have heard the learned counsel for the parties and perused the record and have given our utmost muse to the respective arguments advanced by the learned counsel for the parties. Issues Nos. 1, 3, and 7 -A were the vital issues which were argued before this bench. After taking into consideration all the material aspects of the case we are of the considered view that admittedly the WAPDA authorities have taken over the land without following legal steps, necessary for acquisition and complying with the mandatory provisions of law, thus, the fundamental rights of the citizens enshrined in Articles 23 and 24 of the Constitution of Islamic Republic of Pakistan were breached. This act of the WAPDA was highly improper and illegal, therefore, WAPDA cannot compel the owners to accept the compensation according to its own whim and caprice. The amount which the respondents were entitled, should have been the market value, as has been admitted DW.2 Nazir Hussain Girdawar who was the witness of the appellant/WAPPDA. He categorically admitted in his cross-

examination that the price of the commercial land in mouza Chandowala was Rs. 50,000/- per marla whereas the rate of the residential property in the said mouza was Rs. 5000/- per marla at that time. The appellant did not make any request before the learned Trial Court for declaring the said PW as hostile and the admission of the said PW reflects that the claim of the respondents Maqbool Ahmed etc. owners were genuine. The contention of learned counsel for the appellants WAPDA that the learned Acquisition Judge has himself determined the area of land as commercial and residential, has no force and the same is repelled because in paragraph No. 5 of the plaint respondents have clearly mentioned the area of land as 3 Kanals and 10 Marlas Commercial and 34-Kanals, 7 Marlas as residential. It is pertinent to mention here that in paragraph No. 4 of the written statement appellants/WAPDA admitted that 8% compound interest and 15% compulsory charges were being paid to the land owners/ effectees from the date of the possession of the land but the learned Trial Court has not considered this important aspect of the case. The learned Acquisition Judge has also misread the statement of DW.2 while deciding the case, whereas the party would be bound by the evidence of his witnesses as has been laid down in *PLD 2007 Supreme Court (AJ&K) 63*. Moreover there is also discrimination on the part of the appellants WAPDA because they have not provided the same price of land to the respondents which earlier was given to the others. Under Article 25 of the Constitution of Islamic Republic of Pakistan the case of the respondents is on the same footing to that of the other persons from whom the land was acquired by the WAPDA. The appellants WAPDA failed to give any reasonable classification in this regard for not awarding the compensation to the respondents equal to the others.

8. Appellants WAPDA during the pendency of the R.F.A. in hand filed C.M. No. 1180-2000 for additional evidence and C.M. No. 169-2001 for appointment of local Commission for determination of the area utilized by the appellants for the construction of drain alongwith mutations and sale-deed of the land of Maqbool Ahmed land owner. The additional evidence can be allowed only in exceptional circumstances in a case in which the evidence required to be brought on record was essential for the just decision of the case and such either was not available or was beyond the reach of the party concerned at the relevant time or if pertaining to the official record was not in his knowledge but no such ground is available to the appellant WAPDA. Whereas suit was filed on 30.4.1995 and sufficient opportunity for production of evidence was given to the appellant WAPDA. The appellant-WAPDA has filed the instant application just to fill up the lacunas in evidence at latter stage. The other application of the appellant-WAPDA for appointment of local Commission has also no force because sufficient evidence is available on record to determine the market price of the property in dispute. Both the C.M.S. No. 1180-2000 and 169-2001 are dismissed being without any substance.

9. For the foregoing reasons, the R.F.A. No. 43-1999 filed the appellant-WAPDA has no force and the same is dismissed. Whereas the other R.F.A. No. 34-1999 filed by Maqbool Ahmed is accepted and the impugned judgment & decree passed by the learned Trial Court is modified with the following terms:---

(i) The value of the land residential land measuring 34 kanals, 7 marlas is determined to be Rs. 5000/- instead of Rs. 3000/- per marIa.

(ii) The appellant-WAPDA shall also pay 15% compulsory charges to the respondents from the date of possession to the date of final payment of the decretal amount.

The claim of the respondents to the extent of 8% compound interest is turned down because the learned Trial Court has already fixed 8% simple interest at the bank rate from the date of possession of the impugned land *i.e.* 3.2.1990 till the realization of amount.

Order accordingly.

2012 C L C 1034
[Lahore]
Before Muhammad Qasim Khan, J
ATIA KANWAL----Petitioner
versus
UNIVERSITY OF HEALTH SCIENCES, LAHORE through Vice-Chancellor and 11 others----Respondents

Writ Petition No.6009 of 2010/BWP, decided on 21st April, 2011.

(a) University of Health Sciences, Lahore Ordinance (LVIII of 2002)---
----Ss. 35 & 36---Prospectus of University of Health Sciences, Lahore Rules and Regulations For Various Categories of Seats, Cls. (d) & (g)---Constitution of Pakistan, Art.199---Constitutional petition---Admission to medical college---Reserved seats for disabled persons---Disability, percentage of---Grievance of petitioner (candidate) was that despite producing disability certificate issued by Chairman, Assessment Board for Disabled Person, the University (respondent) refused her admission on the ground that she did not fulfil the criteria of 20% disability, when minimum percentage fixed by the University for the eligibility of admission against seats reserved for disabled candidates was neither mentioned in the advertisement or admission form nor in the Prospectus---Validity---Objection of petitioner was not tenable, as according to clause (d) of Rules and Regulations for Various Categories of Seats, the Medical Board constituted by the Chairman Admission Board was final authority to make the final decision about suitability of the candidate for admission against reserved seats and according to clause (g) of the said Rules and Regulations, the Medical Board constituted under the Regulations was to fix the minimum disability for the purpose of admission in medical college by considering as to what level of disability would deprive a candidate to compete with the other normal colleagues in carrying out day to day work and impediments faced by disabled persons in getting their professional education---Such power had been rightly exercised by the experts and the threshold of disability had been properly judged by the Medical Board, according to the structures criteria made by the Experts---Record showed that even candidates with 19% disability were not considered for admission, as compared to the petitioner who only caried 15% of disability---Petitioner had not challenged her percentage of disability declared by the Medical Board and neither it was contended in the constitutional petition nor argued before the Court that members of the Board were inimical towards the petitioner, or that same had been refused admission on account of some mala fide or ulterior motives---University authorities having neither committed any illegality, irregularity nor having violated any of the terms and conditions set down in the Prospectus, constitutional petition was dismissed accordingly.

(b) University of Health Sciences, Lahore Ordinance (LVIII of 2002)---
----Ss. 35 & 36---Prospectus of University of Health Sciences, Lahore Rules and Regulations For Various Categories of Seats, Cls.(b), (c), (d) & (j)---Constitution of Pakistan, Art.199---Constitutional petition---Educational institution---Admission to

medical college---Reserved seats for disabled persons---Competency of Medical Board to determine disability---Principle of estoppel---Grievance of petitioner (candidate) was that she was declared disabled by Chairman, Assessment Board for Disabled Person by issuing her a disability certificate, which document had to be considered by the University (respondent) as conclusive proof of disability---Validity---Petitioner had applied for admission against the reserved seats for disabled persons, being fully acquainted with the conditions/regulations mentioned in the Prospectus---Petitioner's contention that against disabled seats only a certificate issued by District Assessment Board for Disabled Persons was relevant, had no force at all, for the reason that according to the Prospectus, the certificate of District Assessment Board for Disabled Persons was only for the purpose of eligibility for applying against such quota, and final decision regarding disability was to be determined by the Medical Board constituted by the Chairman Admission Board---Petitioner herself applied for admission in the presence of such condition set down in the Prospectus, therefore, principle of "estoppel" would apply to her case and she could not raise any objection now---University authorities having neither committed any illegality, irregularity nor having violated any of the terms and conditions set down in the Prospectus, constitutional petition was dismissed accordingly.

(c) University of Health Sciences, Lahore Ordinance (LVIII of 2002)---

---Ss. 35 & 36---Constitution of Pakistan, Art.199---Constitutional petition---Rules and Regulations---Educational institution---Admission to medical college---Reserved seats for disabled persons---Candidate from different District---Clerical error in merit list---Grievance of petitioner (candidate) was that one of the candidates (respondent) whose name appeared in the merit list belonged to a different district and for such reason was disentitled for admission, but he had still been accommodated---University and respondent candidate had clarified that it was just a clerical error, which error had been subsequently rectified by the University---Constitutional petition was dismissed accordingly.

Mukhtar Ahmad Malik for Petitioner.
Abdul Manan for Respondent No.6.
Muhammad Hayat Hiraj for Respondent.

ORDER

MUHAMMAD QASIM KHAN, J.--- Precisely the facts are that petitioner applied for admission in University of Health Sciences against the reserved seats for disabled persons, she produced a disability certificate issued by the Chairman, Assessment Board, District Bahawalpur, before the Admission Board, but the respondent refused her admission on the ground that she did not fulfil the criteria of 20% disability.

2. The contention of learned counsel is that petitioner had applied for specific quota reserved for disable persons. The minimum percentage fixed by the respondents, for the eligibility of admission against seats reserved for disabled candidates was neither mentioned in the advertisement or admission Form, nor in the prospectus, so the same is against the law. Further contends that as name of the petitioner was missing in the merit list, she filed a representation, before the authority and the same has dismissed

on 2-12-2010, merely on the ground that disability of the petitioner was found to be only 15%, as against the required percentage of 20%. According to the learned counsel such percentage could not be attached to the case of the petitioner, being not part of the advertisement, etc. The learned counsel for the petitioner next contended that petitioner was declared disabled by the Chairman, Assessment Board for Disabled Persons, District Bahawalpur, which document had to be considered by the respondent/University as a conclusive proof of disability. The learned counsel finally argued that the person appearing at Serial No.10 of the merit list (respondent No.6) belonged to District Muzafarabad, as such, was disentitled for admission, but he has also been accommodated.

3. The learned counsel appearing for respondent-University argued that it is very clearly mentioned in the Prospectus that disability for the purpose of admission to medical and dental institution is defined as a physical or mental impairment that has a substantial and long-term, adverse effect on candidate's ability to carry out normal day-to- day activities and puts him/her at disadvantage as compared to a normal person for acquiring education before entering a medical or dental institution. Further argued that Medical Board constituted for same purpose consisted of senior professors and the said Board had settled the criteria that a candidate having less then 20% of the disability will not' be eligible for admission on the reserve quota of disabled persons. In order to further strengthen his arguments learned counsel produced on record certain documents to establish that the candidates with 19% disability were not considered for admission, as compared to the petitioner who is only 15% disabled. With regard to the contention of learned counsel for the petitioner about admission of respondent No.6, it has been replied that it was purely a typographical mistake, the said candidate had the domicile of Rawalpindi, but inadvertently it had been shown to be of Muzafarabad by the concerned officials of the University, which error has been rectified.

4. The learned counsel appearing for respondent No.6 has appended a copy of his client's domicile to establish that respondent No.6 belongs to Rawalpindi District, and contended that respondent No.6 was fully eligible for admission, therefore, no illegality has committed qua his admission.

5. I have considered the respective arguments of learned counsel for the parties and perused the available record with their assistance.

6. So far as the contention of learned counsel with regard to admission of a candidate (respondent No.6) from District Muzafarabad is concerned, the position has been clarified by learned counsel for the University as well as the counsel representing respondent No.6, that it was just a clerical error, in fact respondent No.6 hailed from District Rawalpindi (in this respect attested copy of his domicile has been brought on the record), which error has subsequently been rectified by the University.

7. The petitioner had applied for admission against the reserved seats for disabled persons, being fully acquainted with the conditions/ regulations mentioned in the

Prospectus. The contention of learned counsel for the petitioner that respondent-University shall consider the disability certificate issued, by the Chairman, Assessment Board District Bahawalpur, is not of any avail to him, for the reason that the Prospectus of the respondent/ University at Page-28 under the heading RULES AND REGULATIONS FOR VARIOUS CATEGORIES OF SEATS, against serial No.(ii) it has been specified:---

"(a) .....
(b) The candidate will be required to produce a certificate from a Government certified specialist as per Appendix-V in the Admission Form.
(c) Such certificate will only make him/her eligible to apply against the reserved seats.
(d) A Medical Board constituted by the Chairman Admission Board will make final decision about the suitability of the candidate for admission against the reserved seats.
(e) .....
(f) Disability for the purpose of admission to medical and dental institutions is defined as a physical or mental impairment that has a substantial and long-term, adverse effect on candidate's ability to carry out normal day-to-day activities and puts him/her at disadvantage as compared to a normal person for acquiring education before entering a medical or dental institution. Here:
* 'substantial' means neither minor nor trivial.
* 'long-term' means that the effect of the impairment has lasted or is likely to last for at least 12 months or for the rest of the person's life.
* 'normal day-to-day activities' include mobility, manual dexterity, speech, hearing, seeing, understanding danger, and memory.
(g) The threshold of disability will be judged by the Medical Board, according to the 'structured criteria made by experts.
(h) .....
(i) .....
(j) The decision of the Medical Board shall be final."

8. On the touchstone of relevant regulations, reproduced above, the contention of learned counsel for the petitioner that against the disable seats only a Certificate issued by the District Assessment Board is relevant, has no force at all, firstly for the reason that according to the Prospectus the District Assessment Board will be only the purpose of eligibility for applying against such quota, and finally it has to be determined by the Medical Board constituted by the Chairman Admission Board and decision of this Board will be final; secondly, the petitioner herself had applied for admission in they presence of the above condition set down in the Prospectus, therefore, now the principle of "estopple" would apply to her case and now she cannot raise any objection.

9. As regards the objection of learned counsel for the petitioner that percentage fixed by the Medical Board is not applicable to her case as it was neither mentioned in the advertisement, in the Admission Form or in the Prospectus, the said objection of the

learned counsel is not tenable, as according to clause (d), above the Medical Board constituted by the Chairman Admission Board is final authority to make the final decision about suitability of the candidate for admission against reserved seats. According to clause (g), the Medical Board is constituted under the Regulation mentioned in the Prospectus to fix the minimum disability for the purpose of admission in medical college by considering as to what level of disability will deprive a candidate to compete the other normal colleagues in carrying out day to day work and impediment faced by the disabled persons in getting their professional education, and this power has been rightly exercised by the Experts and the threshold of disability has been properly judged by the Medical Board, according to the structured criteria made by the Experts.

10. It has come on the record that even the candidates with 19% disability were not considered for admission, as compared to the petitioner who only carries 15% of disability, and the petitioner has not challenged her percentage of disability declared by the Medical Board and neither it is contended in the writ petition nor argued before the Court that members of the Board were inimical towards her, or that she had been refused admission on account of some mala fides or ulterior motives.

11. For what has been discussed above, I am of the considered view that in refusing admission to the petitioner, the concerned authorities in the respondent-University have neither committed any illegality, irregularity nor violated any of its terms and conditions, set down in the Prospectus. This writ petition, therefore, is dismissed.

M.W.A./A-17/L Petition dismissed.

2012 M L D 120
[Lahore]
Before Muhammad Qasim Khan and Mehmood Maqbool Bajwa, JJ
SHABBIR and 5 others---Petitioners
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No.3216-B of 2011, decided on 25th August, 2011.

Criminal Procedure Code (V of 1898)---
----S. 497---Penal Code (XLV of 1860), Ss.365-A & 201---Anti-Terrorism Act (XXVII of 1997), S.7---Abduction, causing disappearance of evidence of offence and act of terrorism---Bail, grant of---Supplementary statement---Value---Scope---Accused were not nominated in the F.I.R. and were implicated by way of supplementary statement made by complainant which was second in series and that too made after six months---Evidentiary value of supplementary statement was always subject to legal reservation---Said supplementary statement did not disclose source of information in order to connect accused persons with the offences under which accused were charged---Abductees in their respective statements also did not attribute any overt act to accused persons---Nothing was recovered at the instance of accused persons---Co-accused who was also implicated in the second supplementary statement having same role, was admitted to bail by the High Court---Registration of case under the provisions of the Anti-Terrorism Act, 1997, by itself was not sufficient to decline bail in the absence of sufficient incriminating evidence---Accused were no more required---Further detention of accused, in circumstances, would not serve any useful purpose as the bail could not be withheld as punishment---Accused were admitted to bail, in circumstances.

Abid Hussain Bhutta for Petitioners.
Malik Muhammad Jafar, D.P.-G.
Zafar Khan S.I. with record.

ORDER
The petitioners six in number seek post-arrest bail in case F.I.R. No.85 of 2009 registered under sections 365-A, 201 of the Pakistan Penal Code, 1860 read with section 7 of the Anti-Terrorism Act, 1997 at Police Station Sadar Duniapur, District Lodhran.

2. Briefly the prosecution version contained in the F.I.R. recorded on the strength of written complaint of Muhammad Asim is that his brother, Muhammad Hazim along with his four friends proceeded to Lahore on car and at about 10-00 p.m., in the area of Police Station Sadar Duniapur were abducted by some un-known persons.

3. Heard adversaries and perused the record.
The learned counsel for the petitioners maintained that petitioners are not nominated in the F.I.R. who later on were implicated by way of supplementary statement with

malice-in-fact but even then no role was ascribed to them. Further contended that nothing was recovered from the petitioners.

Opposing the bail petition, the learned D.P.-G. though admitted that petitioners are not nominated in the F.I.R. but argued that they were implicated at the instance of complainant by way of supplementary statement dated 18-8-2009. Submitted that complainant had no bias, animosity prompting him to implicate the petitioners falsely. Further argued that petitioners are involved in heinous offence and being hardened and desperate criminals no premium can be granted to them.

4. Admittedly, the petitioners are not nominated in the F.I.R. and were implicated by way of supplementary statement made by complainant on 18-8-2009, which is second in series and that too made after six months. The complainant got recorded first supplementary statement on 10-5-2009 nominating as many as 15 persons to the exclusion of present petitioners. Evidentiary value of supplementary statement is always subject to legal reservation. Even otherwise, perusal of the said statement does not disclose source of information in order to connect the petitioners in the offences under which they have been charged. The abductees in their respective statements also did not attribute any overt act to the petitioners. Nothing was recovered at the instance of petitioners. Co-accused Musharaf Abbas, who was also implicated in the second supplementary statement dated 18-9-2009 having same role was admitted to bail by this Court vide order dated 18-5-2011.

5. Argument advanced by the learned D.P.-G. that petitioners are desperate and hardened criminal cannot advance plea of prosecution at this stage in view of non-availability of convincing evidence to suggest in a like manner. Registration of case under the provision of the Anti-Terrorism Act, 1997 by itself is not sufficient to decline bail in the absence of sufficient incriminating evidence. The petitioners are in judicial lock up and no more required. Further detention of petitioners as such will not serve any useful purpose as the bail cannot be withheld as punishment.

6. Pursuant to above discussion we are inclined to accept the petition and as such while allowing the bail application, the petitioners are admitted to bail subject to furnishing of bail bonds in a sum of Rs.100,000 (one lac) each with one surety each in the like amount to the satisfaction of learned trial Court.

H.B.T./S-166/L Bail granted.

2012 M L D 319
[Lahore]
Before Muhammad Qasim Khan, J
ZIA ULLAH---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous Petition No.6077-B of 2011, decided on 17th June, 2011.

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

(b)

----S. 497(2)---Penal Code (XLV of 1860), Ss.302/324/148/149---Qatl-e-amd, attempt to commit qatl-e-amd---Bail, grant of---No motive was attributed to accused---Nomination of the accused with a specific role in the F.I.R. was not sufficient for refusal of bail---Accused during investigation was found present at the spot empty handed---No weapon of offence had been recovered from the accused---Ocular account, prima facie, was in conflict with medical evidence, which had created doubt about the prosecution version and benefit of every doubt, howsoever slight, might be given to accused even at bail stage---Such fact alone was sufficient to make out the case of accused of further inquiry within the meaning of S.497(2), Cr.P.C.---Accused was admitted to bail, in circumstances.

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

----S. 497---Penal Code (XLV of 1860), Ss.302/148/149---Bail---Benefit of doubt---Scope---Benefit of every doubt, howsoever slight, should always be extended to accused even at bail stage.

Abid Saqi for Petitioner

Nisar Ahmad Virk, Deputy Prosecutor-General for the State along with Irshad, A.S.-I with record

Rai Zameer-ul-Hassan for Respondent No.2/Complainant

ORDER

MUHAMMAD QASIM KHAN, J.---Petitioner seeks post-arrest bail in case F.I.R. No. 246 of 2010 under sections 302/324/148/149, P.P.C. registered at Police Station Jalalpur Bhattian, Hafizabad.

2. Briefly the allegation against the petitioner is that he armed with 44-bore, along with co-accused variously armed, knocked at the door and shouted to open the door as Cow had been taken away by the thieves and on his asking Akhtar Ali opened the door, whereupon, all the accused entered inside the house. Mansha co-accused raised lalkara and all the accused started firing, and the fire short by Zia Ullah (present petitioner) hit the right side of belly of complainant's brother.

3. It is argued by learned counsel for the petitioner that petitioner has been Involved falsely in this case, occurrence took place in the dark hours of the night; from bare reading of the F.I.R. the story of prosecution appears to be concocted, as how it is

possible that complainant while standing on the roof, saw the occurrence in such a way that she categorically explained each and every injury caused by nine accused persons. Further argued that petitioner remained on physical remand but no weapon was recovered from him and the police had come to the conclusion that at the time of occurrence the petitioner was empty handed and did not cause any injury to the deceased. Further contended that injury attributed to the petitioner is on right side of abdomen but as per post mortem report no injury exist on the right side or the abdomen and even Injuries Nos.4 to 7 present on the left side of the body are 1 cm x 1 cm, which could be attributed only by pellets and not by bullet and the medical evidence did not support the ocular account. Co-accused Ghazanfar and Mansha attributing the similar role have been enlarged on bail and as the case of the petitioner is at par with them, hence, he is also entitled for bail. Lastly, submits that there is no progress in the trial and the motive is not attributed to the petitioner.

4. On the other hand, the learned D.P.-G. assisted by the learned counsel for the complainant argued that the petitioner is nominated in the F.I.R. with specific role, whole occurrence had taken place for involvement of the petitioner, otherwise there was no chance to open the door of the house; the complainant and eye-witnesses fully support the prosecution story; adds that although the injury as per post-mortem report is not on the right side of the abdomen, but Injury No. 6 on the upper part of the abdomen is caused by the petitioner and opinion of the police is not binding on the court; challan has been submitted; the petitioner is involved in a heinous offence and two innocent persons were murdered and petitioner is not entitled for bail. Further submits that although motive of earlier murder case is attributed to the co-accused of the petitioner yet as the deceased Akhtar Ali left his village due to earlier murder and started residing at the place of occurrence and the petitioner developed grudge against the deceased and for the same reason on his invitation the co-accused under his command and control committed this occurrence and lastly submitted that Ghazanfar was declared innocent by the police on his plea of alibi and the allegation against Mansha was of abetment, hence, case of the petitioner is distinguishable from the case of both the aforesaid co-accused who have been granted bail by the trial court.

5. Heard. Record perused.

6. The motive as alleged in the F.I.R. is not attributed to the petitioner and the motive alleged against the petitioner during the arguments by the learned counsel for the complainant could not be established by any independent evidence as if the petitioner who was nephew of Shahnaz Bibi (deceased) wife of Akhtar Ali deceased and he had developed any grudge there must be some material establishing the same or he had to report this matter to his elders but nothing is available on the file, which establish that prima facie no motive was attributed to the petitioner.

7. Even the prosecution story up to the extent of co-accused Ghazanfar is not believed by the I.O. although he was attributed specific fire arm injury on the left side of mouth of the deceased Akhtar Ali but his plea of alibi was found correct by the I.O. and believing the same he was granted bail by this Court vide order dated 4-5-2011

passed in Criminal Miscellaneous No. 4843-B of 2011 and co-accused Mansha was also attributed specific injury on the deceased Akhtar Ali but later on the complainant changed his stance and involved him in the abetment and he was also admitted to bail and even the stance of the complainant is not found correct with regard to the petitioner by the I.O. and as per investigation report he was present simply empty-handed at the place of occurrence.

8. Although the petitioner is nominated in the F.I.R. with a specific role yet only nomination of the accused in the F.I.R. is not sufficient for refusal of bail to him. During the investigation, as per report of the police, petitioner was present empty handed and even no weapon of offence was recovered from him. In the F.I.R. the injury attributed to the petitioner is on the right side of the abdomen of the deceased Akhtar Ali. After careful examination of the post-mortem report and injury statement no injury is available on the right side of the abdomen. Although the learned counsel for the complainant now shifts the stance that injury on the upper left side of the abdomen is attributed to the petitioner, I am mindful of the situation that at the time of occurrence it could not be said that target should be still as he is alive man and after receiving the injuries he could move either side but in the peculiar circumstances of this case when there is photographical reproduction of the events by the complainant and she has mentioned the details of each and every accused with his weapon of offence and kind of injury, and as per her own story it appears that the deceased remained quiet till he received last injury, then the prosecution has to prove its case as per its own version. Prima facie there is a conflict between the ocular account and the medical evidence which creates some sort of doubt and the benefit of every doubt how slightest, may be even at bail stage, should always be extended to the accused. This fact alone is sufficient to make out the case of the petitioner one of further inquiry.

9. All the above discussion, make out petitioner's case one of further inquiry under section 497(2), Cr.P.C. The petitioner is therefore, admitted to bail subject to his furnishing bail bond in the sum of Rs.2,00,000 with two sureties each in the like amount to the satisfaction of trial court.

N.H.Q./Z-27/L Bail allowed.

2012 M L D 374
[Lahore]
Before Muhammad Qasim Khan, J
KAUSAR PARVEEN---Petitioner
Versus
THE STATE---Respondent

Crimnal Miscellaneous No.7233-B of 2011, decided on 7th July, 2011.

Criminal Procedure Code (V of 1898)---
----S. 498---Penal Code (XLV of 1860), Ss.302/109/148/149---Qatl-e-amd, abetment, rioting armed with deadly weapons---Ad interim pre-arrest bail confirmation of---Accused was alleged to have been present at the spot of occurrence where she raised lalkara to provoke her two sons (co-accused) who were carrying fire-arms, for the commission of the alleged crime---Role of raising lalkara attributed to accused appeared to be quite unnatural as her sons (co-accused) were present at the spot carrying fire-arms with pre-meditation and in such situation, there was hardly any occasion for the accused to provoke her sons for the commission of the crime---Accused's husband had already been murdered and through the present case, she along with her two sons as well as brother-in-law had been involved to humiliate and disgrace her, being a woman and elder of her family---Accused could have been implicated to use her attempted arrest as a tool for effecting the arrest of her absconding sons---Complainant in his statement during trial had made a statement to the effect that he did not nominate accused and other co-accused and the police had itself incorporated the names of said persons---Accused's arrest in the light of such statement of complainant appeared to be tainted with mala fides of the police---Accused remained fugitive from the law for some time, but she had sufficiently explained the reasons for the absconsion by stating that her husband had been murdered, her two sons and brother-in-law had been involved in the case and as such she genuinely apprehended danger to her life at the hands of the complainant---Accused's involvement and attempted arrest appearing to be tainted with mala fides, interim pre-arrest bail granted to her was confirmed.

Mst. Zakia Begum v The State 1991 SCMR 297; Meeran Bux v The State and another PLD 1989 SC 347; Mitho Pitafi v The State 2009 SCMR 299 and Saeed v The State and another 2008 PCr.LJ 726 ref
Shehbaz Ali Khan for Petitioner
Naveed Inayat Malik for the Complainant
Mian Hamayum Aslam, D.P.-G with Akram Khan S.H.O

ORDER
MUHAMMAD QASIM KHAN, J.---Petitioner seeks pre-arrest bail in a case arising out of F.I.R. No.133 dated 20-7-2009 under sections 302/109, 148/149, P.P.C. registered at Police Station Yakee Gate, Lahore.

2. Briefly the allegation against the petitioner is that she exhorted lalkara, when her two co-accused (sons) committed the murders of Muhammad Shafique and Mst. Saba Bibi.

3. It is argued by the learned counsel that petitioner has been falsely involved in this case. Further argued that main accused in this case are Ehsan Butt and Zeeshan, both are sons of the present petitioner and in order to rope in the whole of the family the petitioner has been implicated in the case along with Javed Iqbal (their paternal uncle), just to disgrace and humiliate, whereas, her husband has already been murdered. It has been contended by the learned counsel that when according to the F.I.R., Ehsan Butt and Zeeshan both were present at the spot while armed with fire arms and this act shows their pre-meditation, there was hardly any need for the petitioner to have raised lalkara. The learned counsel next argued that even otherwise, just a simple lalkara is attributed to the petitioner and furthermore, while appearing in the witness box as P.W.3 the complainant has categorically stated that he had not named any of the accused in the F.I.R. and this fact alone is sufficient to hold that arrest of the petitioner is tainted with mala fide. The learned counsel further maintained that as husband of the petitioner had already been murdered, two sons along with her brother in law had been involved in this murder case, she out of fear absconded as she was apprehending her murder at the hands of the complainant party. The learned counsel further argued that mere abscondence of the petitioner is no ground to refuse her bail, to which she otherwise, has become entitled.

4. On the other hand, learned D.P.-G. assisted by learned counsel for the complainant opposed the bail application by arguing that petitioner is nominated in the F.I.R., with specific attribution of raising lalkara, because of which her co-accused committed the murders of two innocent persons. The learned counsel for the complainant added that although during trial the complainant did not make the correct statement and was declared hostile, but earlier in his statement under section 164 Cr.P.C. he had made categorical statement implicating the petitioner and other co-accused. Learned counsel for the complainant lastly added that petitioner remained fugitive from law and this fact alone is sufficient to disentitle her for the grant of bail.

5. Arguments heard. Record perused.

6. According to the contents of the F.I.R. itself, two sons of the present petitioner, were present at the spot while carrying fire arms with pre-meditation, in such a situation, hardly there was any occasion for the petitioner to have raised lalkara to entice her sons for the commission of the alleged crime. It has come on the record that husband of the petitioner has already been murdered and through the instant case, the petitioner along with her two sons as well as brother in law, prima facie, have been involved, as a result of widened net, for obvious reason to humiliate and disgrace the petitioner being the elder of family and also a woman. This possibility also cannot be ruled out that she might have been implicated in the case, to use her attempted arrest as a tool for effecting the arrest of her absconding co-accused/sons. Furthermore, a certified copy of the statement of the complainant recorded during

trial as P.W.3. has been placed on the record, and in his said statement the complainant has made a categorical statement that "I did not nominate the present accused Javaid Iqbal and Zeeshan, Ahsan and Kausar Perveen (since P.Os.) and police itself incorporated the names of the above said accused in this case." In the presence of above explicit statement of the complainant, arrest of the petitioner on the face of it appears to be tainted with mala fides of the police. Although, the complainant has been declared hostile and cross-examined by the DDPP, but this would by no means advance the case of the prosecution.

7. Even otherwise, the petitioner is only attributed a proverbial lalkara, which allegation prima facie appears to be quite unnatural, in the presence of the facts and circumstances of the present case, as discussed above. Almost all the legal systems, and all enlightened philosophies of life including prevalent social systems, religions and sociologies manifestly behold a liability of an individual only for the acts and omissions for which he is personally responsible. Furthermore, the Hon'ble Supreme Cburt of Pakistan in the case "Mst. ZAKIA BEGUM v. THE STATE" (1991 SCMR 297), confirmed pre-arrest of an accused, who had been imputed a proverbial lalkara in the F.I.R. The Hon'ble Supreme Court of Pakistan in its celebrated judgment "MEERAN BUX v. THE STATE and another" (PLD 1989 SC 347), set aside an order of the High Court cancelling pre-arrest bail granted to accused, in the circumstances where accused had pointed out that complainant had involved in the case all members of his family i.e. all the three brothers and their cousin. Almost, similar is that position in the instant case, husband of the petitioner has already been murdered, her two sons and a brother in law, including the petitioner herself have been roped in the instant F.I.R. This attempt on the part of the complainant by throwing a widened net is a glaring example of mala fide and ulterior motives on his part.

8. Although the petitioner remained fugitive from law for some time, but she has quite sufficiently explained the reasons for her absconding, by stating that her husband had been murdered, two sons had been involved in this double murder case, her brother in law had also been implicated in the same case, as such, she genuinely apprehended danger to her life at the hands of the complainant, soon after registration of the case, and she opted to knock the doors of the court, when the emotions of the complainant side, by the passage of time, must have cooled down. Even otherwise the Hon'ble Supreme Court of Pakistan in the case "MITHO PITAFI v. THE STATE" (2009 SCMR 299), held that "Bail could be granted, if accused had good case for bail on merits and mere his absconsion would not come in the way while granting him bail." The Hon'ble Peshawar High Court in the "SAEED v. THE STATE and another" (2008 PCr.LJ 726), held that "Mere absconsion of an accused, could not be a ground for refusal of bail to him because that was not the proof of the guilty of accused. Disappearance of a person charged in a murder case, after the occurrence was but natural and presumption of guilt as well as of innocence could be scanned from the absconsion subject to the proof at the time of trial of the case."

9. For what has been discussed above, prima facie the involvement and attempted arrest of the petitioner, appears to be stained with mala fide, as such, the instant petition is accepted and interim pre-arrest bail earlier granted to her, is hereby confirmed subject to her furnishing bail bond in the sum of Rs.500,000 with two sureties each in the like amount to the satisfaction of DR(J) of this Court.

10. Neeldess to add that in case the petitioner absents herself or in any other way tries to hamper the trial, the trial Court will be at liberty to proceed against her, in accordance with law.

M.W.A./K-2/L Bail confirmed.

2012 M L D 677
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD ARIF SABRI and another---Petitioners
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No.11675-B of 2011, decided on 14th October, 2011.

Criminal Procedure Code (V of 1898)---
----S. 497(2)---Penal Code (XLV of 1860), S.365-B---Abduction---Bail, grant of---Further inquiry---Benefit of doubt---Complainant despite having been informed by the witnesses about the abduction of his two daughters by the accused, had kept on searching them without informing the police for twenty one days---Said inordinate delay of 21 days in lodging the F.I.R. had cast serious doubts about the veracity of the complainant---Both the alleged abductees had completely contradicted each other in their statements recorded under S.161, Cr.P.C.---One abductee had stated that the accused had not abducted her or her sister and that she had contracted Nikah with a person with her free-will---Other abductee had levelled allegation of abduction and zina against the accused---Both these statements when juxtaposed had, prima facie, made the case against the accused doubtful requiring further inquiry into the matter---Benefit of doubt, howsoever slight, had to be given to accused even at bail stage---Nothing was to be recovered from the accused and their further detention behind the bars would not be useful for the prosecution---Bail was allowed to accused in circumstances.

Ch. Tariq Ali for Petitioners.
Gohar Razzaq Khan for the Complainant.
Mian Hamyun Aslam, D.P.-G. with Arshad Ali A.S.-I.

ORDER
MUHAMMAD QASIM KHAN, J.---Through this petition, the petitioners (Arif and Razzaq, sons of Shameer), seek post arrest bail in a case arising out of F.I.R. No.238 dated 8-7-2011 under section 365-B, P.P.C. registered on the complaint of Zafar Iqbal son of Muhammad Yar, at Police Station Saddar Kamalia, District Toba Tek Singh.

2. Briefly the case of the prosecution case as set up in the F.I.R. is that, on 17-6-2011 at 2-00 (noon) Mst. Zakia Bibi daughter of Naik Muhammad came to see the complainant's daughters namely Mst. Kalsoom Bibi and Mst. Zakia Bibi and requested that as there was some work at her home, therefore, complainant's daughters may be allowed to go, for which the complainant agreed, thus, she took both the daughters of the complainant with her. As her daughters did not return till evening, the complainant inquired about them, on the way, Ghulam Ali son of Allah Ditta and Muhammad Yasin son of Allah Yar met him and on inquiry by the complainant they told that accused persons namely Arif, Razzaq, Nazir Muhammad, Shoukat Ali, Azhar, Mst. Zakia Bibi, Hasnain and two unknown persons were

forcibly taking her daughters on gun points, in two un-numbered white colour Cars, towards Cheechawatni Morr. The complainant therefore, alleged that accused had abducted her daughters for the purposes of commission of zina.

3. It is argued by learned counsel for the petitioners that they have falsely been involved in this case by the complainant due to his mala fide and ulterior motives, otherwise, neither any such occurrence ever took place nor the petitioners participated in the commission of alleged crime. The learned counsel further argued that there is inordinate and unexplained delay of about twenty one days in the lodgment of the F.I.R. The learned counsel further contended that the story as set up in the F.I.R. is not only improbable but also ridiculous, as according to the learned counsel Muhammad Arif and Muhammad Razzaq both are real brothers, similarly, Shoukat Ali and Azhar are real brothers, as such, it is highly unnatural that brothers would jointly involve themselves in such an offence. The learned counsel argued that as a matter of fact Mst. Kalsoom Bibi daughter of the complainant had herself left her house and contracted marriage with Shoukat Ali son of Nazir Muhammad (co-accused of the petitioners), and as the complainant had the apprehension that Mst. Kalsoom Bibi may not support his case, therefore, he with mala fide intention mentioned his other daughter Mst. Zakia Bibi as second victim of the occurrence, on the basis of self created story. The learned counsel further urged that medico legal certificate of alleged victim Mst. Zakia Bibi was conducted after twenty seven days of her alleged abduction, even otherwise, medico legal certificate does not lend corroboration to the prosecution case as no mark of violence could be found on private parts of her body. It has strenuously been argued that fact of nikah between Mst. Kalsoom Bibi has been admitted by the said lady herself and she had also filed a writ petition, wherein, she totally refuted the contents of the F.I.R., admitted her valid and wilful nikah with Shoukat Ali and sought quashment of the F.I.R. It has further been contended by the learned counsel that during investigation the case of the prosecution was found to be incorrect and a cancellation report was submitted but the same was not agreed by the learned Ilaqa Magistrate. Lastly, argued that petitioners are behind the bars, after completion of investigation the report under section 173, Cr.P.C. has been submitted but there is no progress in the trial, therefore, petitioners may be released on bail.

4. The learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposed this bail application and argued that petitioners are nominated in the F.I.R. with a role of forcibly abducting two young daughters of the complainant and subjecting them to Zina Bil Jabr, as such, the persons with such a serious allegation of immoral act, are not entitled for any leniency at this stage. The learned counsel for the complainant argued with vigor that the Investigating Officer had not properly investigated the case and even otherwise, since the cancellation report has been disagreed by the learned Ilaqa Magistrate, the petitioners cannot be extended benefit on the basis of findings of the Investigating Officer and opinion of the Investigating Officer even otherwise, is not binding on the court. The learned counsel further argued that although Mst. Kalsoom Bibi is not supporting the prosecution case, but Mst. Zakia Bibi another victim of the same occurrence is fully implicating

the petitioners in the commission of the offence and even, the statement of Mst. Zakia Bibi alone is sufficient to record conviction against the accused persons. The learned counsel for the complainant concluded his arguments by contending that since report under section 173 Cr.P.C. has been submitted the petitioners may prove their innocence during the trial, and for the present they are not entitled for the concession of bail.

5. I have considered the arguments of learned counsel for the parties at full length and perused the available record with their able assistance.

6. There is no doubt that in the F.I.R. serious allegations have been levelled against the accused persons and the accused persons have also been nominated in the F.I.R. with their full addresses and joint roles. Firstly, it has been observed by this Court that according to the F.I.R. the alleged occurrence took place on 17-6-2011 and the complainant on the same day was told by the witnesses that his daughters were seen being abducted by specific accused persons on gun point in two white colour unnumbered cars. In such a situation, when the complainant himself knew that his daughters were taken away by Mst. Zakia Bibi daughter of Naik Muhammad to her house and subsequently the names of other accused persons had also been told to him by the witnesses, there was no reason left for the complainant to have still kept on searching for his daughters for about twenty one days, without informing the police and getting police assistance. With such a background, prima facie this delay cast serious doubts about the veracity of the complainant.

7. I am in agreement with the argument of learned counsel for the petitioners that it is quite unnatural in our society that two real brothers would join themselves to commit such an immoral offence. Furthermore, a copy of Nikah Nama entered between Mst. Kalsoom Bibi and Shoukat Ali (cited as one of the accused) has been placed on the file and this nikah nama so far remains unquestioned by the complainant party. At the same time, this court has observed that Mst. Kalsoom Bibi not only refuted the prosecution case before the police during the course of investigation, she also filed a writ petition before this Court, wherein, she while admitting her wilful nikah with Shoukat Ali, categorically stated that no such occurrence ever took place. It also could not be denied by the prosecution that during investigation the case was found to be false, whereupon, cancellation report was submitted, although the same was disagreed by the learned Ilaqa Magistrate. In this respect a report by the senior police officer i.e. ASP/SDPO has been brought on the record which clarifies that Mst. Kalsoom Bibi had voluntarily contracted marriage with Shoukat Ali and due to that grudge false case was got lodged by the complainant. This report is also part of the record and could not be controverted by the complainant side.

8. Although Mst. Kalsoom Bibi is totally denying the prosecution case, but Mst. Zakia Bibi still sticks to her stance and she while making statement before the police under section 161, Cr.P.C. has fully implicated the accused persons including the present petitioners in the commission of the offence. There is also no cavil to the proposition that statement of this alleged victim alone, may be sufficient to record

conviction and sentence against the accused persons, if it otherwise, finds support from other incriminating material. Without giving my in-depth analysis about the statement Mst. Zakia Bibi, the alleged victim recorded before the police or its evidentiary value, it may be observed here that statement of Mst. Zakia (alleged abductee/victim) is absolutely silent as to where she remained during the period of her abduction, she does not disclose where she was left by the accused persons, how she reached the police station and what was the name of the police station. In the absence of such necessary details and non-existence of marks of violence on the body of Mst. Zakia, the involvement of the petitioner in the case, requires further probe.

9. In this case, there are two prosecution witnesses. One Mst. Zakia Bibi and second Mst. Kalsoom. Mst. Kalsoom Bibi is totally throwing out the prosecution case in her statement recorded under section 161, Cr.PC. and she categorically denied that none has abducted her nor Mst Zakia Bibi was abducted by the accused nominated in the F.I.R. She further stated that she contracted Nikah with one Shaukat as per her freewill. On the other side, Mst. Zakia Bibi levelled allegation of abduction and zina against the petitioner and others and fully supported the prosecution story. As prosecution itself alleged the abduction of Mst. Kalsoom bibi and she categorically denied the allegation levelled against the petitioners and other co-accused; hence, these two statements are when juxta-posed prima facie, makes out the case against the petitioners doubtful, requiring further inquiry into the matter and benefit of doubt, how so minor, has to be extended to the accused persons, even at bail stage. The petitioners are behind the bars, further detention of the petitioners would definitely not serve any useful purpose for the prosecution, as even otherwise, nothing is to be recovered from them. As cumulative effect of all above discussion, this petition is allowed and petitioners are admitted to post arrest bail on their furnishing bail bonds in the sum of Rs.200,000 each with two sureties each in the like amount to the satisfaction of learned trial court.

10. Before parting with this order, it is made clear that whatever has been observed above is purely a tentative assessment of the material available before this Court and any of the above observation shall not prejudice the case of either side at any subsequent stage or proceedings.

N.H.Q./M-357/L Bail allowed.

2012 M L D 770
[Lahore]
Before Sh. Ahmad Farooq and Muhammad Qasim Khan, JJ
Mst. NASREEN BIBI---Appellant
Versus
THE STATE---Respondent

Criminal Appeal No.250 of 2006, decided on 5th July, 2011.

(a) Control of Narcotic Substances Act (XXV of 1997)---
----Ss. 9(c), 21 & 2(t), (v), (w)---Appreciation of evidence---Assistant Sub-Inspector of Police was fully competent, in given circumstances, to conduct raid and seize the narcotics---Section 21 of the Control of Narcotic Substances Act, 1997, being directory in nature, any violation thereof was not fatal to prosecution case---Requirement to obtain search warrant could be dispensed with where a quick action was required to be taken---Delay in sending the recovered narcotic substance to Chemical Examiner for analysis could not be fatal in the absence of an objection regarding the same having been tampered with---Poppy straw and poppy heads included all parts of the poppy plant---"Phakki" (post) recovered from the accused was a narcotic substance as defined in Ss.2(t), 2(v) & 2(w) of the Control of Narcotic Substances Act, 1997---Law did not require sending the whole narcotic substance to Chemical Examiner, only a small quantity thereof would be enough to prove that the entire recovered material was contraband---Both the recovery witnesses were consistent on the point of time, date and place of raid, search, recovery of "post" from the accused, preparation of sample and its dispatch to the Office of Chemical Examiner---Investigating Officer had clarified that persons present at the place of recovery had refused to become witnesses in the case---Police Officials were as good witnesses as public witnesses, until and unless defence would establish some specific enmity or malice against them---Non-association of any witness from public, therefore, was not fatal to prosecution case---Report of Chemical Examiner was positive---Conviction and sentence of accused were upheld in circumstances.
Muhammad Akram v. The State 2007 SCMR 1671 and Niaz Muhammad v. The State 2006 PCr.LJ Pesh. 228 ref.

(b) Control of Narcotic Substances Act (XXV of 1997)---
----S. 21---Entry, search, seizure and arrest without warrant---Dispensation of---Requirement to obtain search warrant can be dispensed with in cases where a quick action is required to be taken and it would be difficult to obtain search warrant where due to paucity of time apprehension of narcotics being removed or culprits having chance to escape are eminent.
Muhammad Akram v. The State 2007 SCMR 1671 ref.

(c) Control of Narcotic Substances Act (XXV of 1997)---
----S.9(c)---Appreciation of evidence---Delay in sending the incriminating articles to the concerned quarters for expert opinion cannot be treated fatal in the absence of objection regarding the same having been tampered with.

Niaz Muhammad v. The State 2006 PCr.LJ (Pesh.) 228 ref.

(d) Control of Narcotic Substances Act (XXV of 1997)---
----S. 9(c)---Appreciation of evidence---Police witnesses, credibility of---Police officials are as good witnesses as public witnesses until and unless the defence establishes some specific enmity or malice against them.

Zubair Afzal Rana for Appellant.
Muhammad Ikhlaq Ahmad, Deputy Prosecutor-General for the State.
Date of hearing: 1st June, 2011.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---Mst. Nasreen Bibi (accused/appellant) faced trial in case F.I.R. No.526 of 2004 for an offence under section 6/9 of the Control of Narcotic Substances Act, 1997 Police Station Hanjerwal, Lahore and on conclusion of the trial vide judgment dated 5-1-2006 handed down by learned Additional Sessions Judge, Lahore, she was convicted under section 9-C of the Control of Narcotic Substances Act, 1997 and sentenced to imprisonment for life, with a fine of Rs.100,000, in default thereof, to further suffer simple imprisonment for two years, benefit of section 382-B, Cr.P.C. was however, extended. Through the instant appeal, the above conviction and sentence has been assailed by the appellant.

2. The case of the prosecution as narrated in the complaint Exh.PA, is that on 18-10-2001 at about 4-15 p.m., Abdul Razzaq A.S.-I. (complainant/P.W.2), along with other police personnel was on patrol duty near Shezan Factory Bund Road, Lahore, when received a tip-off, conducted raid and on the pointation of the informer they saw the accused/appellant standing at Niazi Flying Coach Adda, carrying four bags. On search, 40-kilograms of PHAKKI (POST) was recovered from those bags. For sample, the complainant separated 500-grams of PHAKKI (POST) and prepared sealed parcel. The case property consisting of four bags (P-1/1-4) was taken into possession vide memo Exh.PB. On the basis of said complaint, formal F.I.R. was chalked out.

3. After usual investigation, the accused was sent to face trial. She was charge sheeted, to which she pleaded not guilty, as such, the trial commenced, wherein the prosecution examined Abdul Razzaq A.S.-I./ P.W.2 whose statement in brief has been mentioned above while narrating the facts of the case. Further, the prosecution examined Gulzar Hussain 2945/C a member of the raiding party as P.W.3, Abdul Ghafoor P.W.6 who is the Investigating Officer, whereas, rest of the witnesses are formal in nature and they performed usual functions towards completion of investigation. The prosecution placed on record the report of the Chemical Examiner Exh.PD and closed its case. Thereafter, the accused/ appellant was examined under section 342, Cr.P.C. in response to a question "why this case against her and why the P.Ws. deposed against her", she made the following reply:--
"This false case has been planted upon me. In fact nothing was recovered from my possession. I was sitting in the waiting room along with other lady passengers and my

single bag of clothes was with me. On that day I was going to Faisalabad to give Eid gift to my daughter. Meanwhile, some police persons entered in the waiting room and saw here and there and then one police man called me and asked me to go to police station. I inquired from them that why I was being taken to police station but they forcibly made me sit in the rickshaw and demanded Rs.20,000 as illegal gratification but I refused that I committed no crime and I am poor woman and I cannot arrange this huge amount for you and on my refusal this false case has been registered against me and alleged recovery of post has been planted upon me in the police station. The P.Ws. deposed against me being subordinate of Abdul Razzaq. I am quite innocent."
The accused/appellant, however, neither produced any witness in her defence nor herself appeared in the witness box within the meaning of section 340(2), Cr.P.C. On conclusion of the trial, she was convicted and sentenced, as narrated in the opening paragraph of this judgment.

4. It is argued by learned counsel that appellant has been falsely involved in this case, in fact she was sitting in the waiting room of the bus stand for traveling to Faisalabad, nothing was recovered from her and police in order to show its KARVAI planted the POST on her. Further contended that raid was conducted by an A.S.-I. who under section 21 of the Control of Narcotic Substances Act, 1997 is not competent. Added that bus stand was situated in a thickly populated area, but none from public was associated in the alleged recovery or raid proceedings. It is argued that police sent only 500-grams of PHAKKI/POST for chemical analysis, therefore, according to the learned counsel at the most sentence could be recorded against the appellant with regard to recovery of said 500-grams of PHAKKI/POST alone and stressed on the point that even said sample was sent to the office of Chemical Examiner with a delay of ten days, although it had to be dispatched within seventy two hours. Lastly, it is argued that as per F.I.R., POST (PHAKKI) was recovered from the appellant and PHAKKI is not covered by the definitions provided in the Control of Narcotic Substances Act, 1997, hence, no offence against the appellant is made out, therefore, this appeal may be allowed.

5. Conversely, the learned Deputy Prosecutor-General argued that prosecution had fully established its case against the appellant through ocular account as well as recovery and the positive report of the Chemical Examiner. Further argued that P.Ws. were subjected to cross-examination but nothing beneficial to the accused could be extracted from their statements. The learned D.P.-G. strenuously argued that conduct of raid by an A.S.-I. at the most may be an irregularity but in the circumstances, where there is a chance that accused may escape, the A.S.-I. is not supposed to keep on waiting for his superiors to come and conduct raid and similarly, when there is nothing on the record that parcels of sample were tampered, delayed sending of the sample to the office of Chemical Examiner is not fatal to the prosecution. The learned D.P.G with reference to the different sections of the Control of Narcotic Substances Act, 1997 argued that PHAKKI is very much covered by the Control of Narcotic Substances Act, 1997.
6. Arguments heard. Record perused.

7. Firstly, we would take up the argument of learned counsel for the appellant with regard to conduct of raid by an A.S.-I. Although section 21 of the Control of Narcotic Substances Act, 1997 provides that no officer below the rank of Sub-Inspector is competent to enter into any premises, seize the drugs, etc. detain, search or arrest a person, but we find no other provision in this Act, which provide any consequence for not abiding by the above conditions i.e. raid, seizure and arrest by an official below the rank of Sub-Inspector. Furthermore the requirement to obtain search warrant or wait for the senior officer, could be dispensed with in case where quick action was required to be taken and it would be difficult to obtain a search warrant or call any senior officer and wait till his arrival, where due to paucity of time the apprehension of narcotics being removed or culprit having a chance to escape, were imminent. As such, we observe that in this case the A.S.-I. was fully competent to conduct raid and seize the narcotics. Even otherwise, section 21 of the Control of Narcotic Substances is directory in nature and any violation thereof, is neither fatal to the prosecution case, nor it can result in uprooting the entire prosecution case. In this regard, we are fortified by the judgment reported as "MUHAMMAD AKRAM v. THE STATE" 2007 SCMR 1671, wherein, the Hon'ble Supreme Court of Pakistan held that "Requirement to obtain search warrant could be dispensed with in cases where a quick action was required to be taken and it would be difficult to obtain search warrant where due to paucity of time apprehension of narcotics being removed or culprits having chance to escape were eminent."

8. As regards the argument of learned counsel with respect to delayed sending of sample, again we see no time limit in the Control of Narcotic Substances Act, 1997, itself. However, relevant rules provide that within seventy two hours, the samples of the seized narcotic substance should be sent to the office of Chemical Examiner, but these rules are not mandatory, rather directory in nature and its violation is not destructive for the prosecution case. The Control of Narcotic Substance (Government Analyst) Rules, 2001 cannot override the substantive provisions of Control of Narcotic Substances Act, 1997, and should be applied in such a manner that its operation would not frustrate the purpose of the Act, ibid. Control of Narcotic Substance (Government Analyst) Rules, 2001, being directory, substantive compliance thereof was sufficient and even where there was no compliance at all, it would not invalidate the act, which otherwise was done in accordance with law. Delay in sending the incriminating articles to the concerned quarters for expert opinion, could not be treated fatal in the absence of objections regarding the same having been tempered with. Reliance is placed on "NIAZ MUHAMMAD v. THE STATE" (2006 PCr.LJ Peshawar 228), wherein, it had been held that "Delay in sending incriminating articles to concerned quarters for expert opinion could not be treated fatal in absence of objection regarding same having been tampered with or manipulated." Even otherwise, if the samples remain intact and chain of evidence is not broken, then no adverse presumption can be drawn in the case of delayed sending of samples. In the instant case it has never been the stance of the appellant during trial or even before this Court that the samples had either been replaced or tampered, therefore, this ground of the learned counsel is also devoid of any legal force.

9. Coming to the question whether "PHAKKI" is covered by the Narcotic Substance Act, we have seen the report of the Chemical Examiner, wherein it is mentioned that sample contained broken pieces of poppy heads and straws. In this regard, we would refer to the definition of opium as provided in section 2(t) of the Control of Narcotic Substances Act, 1997, i.e. "poppy straw that is to say, all part of the poppy plant (papaver somniferum or any other species of papaver) after mowing, other than the seeds." Section 2(v) of the Act, ibid, defines "opium poppy" as plant of all the species Papaver Somniferum, and section 2(w) defines the "poppy straw" as all the parts, except seeds of the opium poppy after mowing. By careful reading of the above provisions of sections 2(t), 2(v) and 2(w) of the Control of Narcotic Substances Act, 1997, it becomes clear that post is covered by the definition of "poppy straw", which includes all the parts of the poppy plant except seeds. In this case the Chemical Examiner in his report Exh.PD, after physical examination of the sample, opined as broken pieces of poppy head and straws. In view of the above discussion and report of the Chemical Examiner Exh.PD, it is clear that poppy straw and poppy heads include all parts of the poppy plant, hence, it is proved beyond any shadow of doubt that narcotic substance (POST) recovered from the appellant is covered by the Control of Narcotic Substances Act, 1997 and the substance recovered and sent to the office of Chemical Examiner was found to be narcotic substance (POST), as defined in sections 2(t), 2(v) and 2(w) of the said Act.

10. Although the learned counsel for the appellant has laid much stress that only 500-grams of the recovered narcotic was sent to the office of Chemical Examiner, as such, the appellant at the most could be convicted for the said quantity i.e. 500-grams. But, this argument is of no benefit to the appellant for the reason that it is no where the requirement of law to send the whole of the narcotic substance to the Chemical Examiner, only a small quantity is sufficient and it would be enough to prove that entire recovered material was contraband. Therefore, the above argument of the learned counsel is repelled. As regards the ocular account, we have noted that while appearing in the witness box Abdul Razzaq A.S.-I. (P.W.) made statement in line with the narration of the F.I.R. and his statement was toed by Gulzar Hussain 2945/C, both these witnesses were cross-examined but nothing beneficial could be elicited from their testimony, which could damage the prosecution case. Both the witnesses remained consistent with each other on the point of time, place and date of raid, search, recovery of POST from the appellant, preparation of sample and its dispatch to the office of Chemical Examiner, and their testimony could not be shattered during the test of cross-examination. Although there is an objection of learned counsel for the appellant that no witness from public was associated in these proceedings, but in this behalf there is a specific clarification by P.W.6 Abdul Ghaffor S.-I./Investigating Officer during cross-examination that he asked the persons present at the place of occurrence for their statements, but they refused. Even otherwise, it has been general tendency in our society that normally people avoid to become witnesses in narcotic cases either because of fear of the narcotic dealers or to avoid the pangs of lengthy trials. Furthermore, police officials are as good witnesses as public witnesses until and unless the defence establishes some specific enmity or malice against them. As such, non-association of any witness from public is also not fatal to the prosecution.

11. For what has been discussed above, we are of the considered view that prosecution has been fully successful in proving its case against the appellant beyond any shadow of doubt, by ocular account and evidence of recovery, substantiated by the positive report of Chemical Examiner Exh.PD. Hence, the instant appeal, being devoid of any merit, is dismissed accordingly.

N.H.Q./N-65/L Appeal dismissed.

2012 M L D 1173
[Lahore]
Before Muhammad Qasim Khan, J
GHULAM QADIR---Petitioner
Versus
STATION HOUSE OFFICER, POLICE STATION CANTT., BAHAWALPUR and 4 others---Respondents

Writ Petition No.5032-Q of 2010/BWP, decided on 22nd February, 2011.

(a) Criminal Procedure Code (V of 1898)---
----S. 195(1)(c)---Prosecution for certain offences---Applicability and scope.
S.195(1)(c), Cr.P.C. does not apply to cases in which the forgery was committed before the institution of a suit or other proceedings in which the forged document was produced or given in evidence.
As the two interpretations of clause (c) of subsection (1) of section 195 of the Cr.P.C. are so evenly balanced, the one that does not deprive the ordinary Criminal Courts of their ordinary jurisdiction and persons of the right of redress must be adopted. On that view of the matter also, the view that clause (c) of subsection (1) of section 195 of the Cr.P.C. does not apply to cases in which the forgery was committed before the institution of a suit or other proceedings in which the forged document is produced or given in evidence should be preferred.

Muhammad Shaffi v. Deputy Superintendent of Police (Malik Gul Nawaz), Narowal and 5 others PLD 1992 Lah. 178 ref.

(b) Constitution of Pakistan---
----Art. 199---Penal Code (XLV of 1860), Ss.468/471/420---Forgery, using as genuine a forged document, cheating---Constitutional petition---Maintainability---Quashing of F.I.R.---Offence under S.420, P.P.C. was, prima facie, made out from the contents of the F.I.R.---Report under S.173, Cr.P.C. had been submitted in the court and many alternate remedies were available to accused under the Criminal Procedure Code, 1898, including those under Ss.249-A and 265-K, Cr.P.C.---In the presence of other legal remedies, constitutional petition was incompetent and not maintainable---Disputed questions of facts requiring detailed inquiry or recording of evidence, could also not be decided by High Court in exercise of its constitutional jurisdiction---Petition was dismissed in circumstances.
Mrs. Zara Shah through his Attorney v. S.H.O., Police Station Defence Area Lahore and 2 others 2002 YLR 390; Iftikhar Ali v. Abdul Hafeez Awan 1999 PCr.LJ 1239; Muhammad Ashfaq v. State and 2 others PLJ 2010 Lah. 506; Mohabat Khan and 5 others v. SSP Faisalabad and 5 others 1999 MLD 2243; Muhammad Shaffi v. Deputy Superintendent of Police (Malik Gul Nawaz), Norwal and 5 others PLD 1992 Lah. 178; Haji Sardar Khalid Saleem v. Muhammad Ashraf and others 2006 SCMR 1192; Mst. Kaniz Fatima through Legal heirs v. Muhammad Salim and 27 others 2001 SCMR 1493 and Mir Zaman v. Mst. Sheda and 58 others 2000 SCMR 1699 ref.

(c) Constitution of Pakistan---
----Art. 199---Penal Code (XLV of 1860), Ss.468/471/420---Forgery, using as genuine a forged document, cheating---Constitutional jurisdiction---Scope---Factual controversies, decision of---Disputed questions of facts requiring detailed inquiry or recording of evidence, cannot be decided by High Court in exercise of its constitutional jurisdiction.

(d) Constitution of Pakistan---
----Art. 199---Constitutional jurisdiction---Scope---Adequate remedy, non-availing of---Effect---Where a particular statute provides self-contained machinery for determination of questions arising under the statute and law provides a remedy by appeal or revision to another tribunal fully competent to give any relief, any indulgence to the contrary by High Court is bound to produce a sense of distrust in statutory tribunals.
Mst. Kaniz Fatima through Legal heirs v. Muhammad Salim and 27 others 2001 SCMR 1493 ref.

(e) Constitution of Pakistan---
----Art. 199---Constitutional petition---Maintainability---Adequate remedy, non-availing of---Effect---In the presence of other legal remedies, constitutional petition is incompetent and not maintainable.

Mir Zaman v. Mst. Sheda and 58 others 2000 SCMR 1699 ref.
Sardar Muhammad Aslam Khan Dhukkar for Petitioner.
Sardar Mehmood Iqbal Khakwani for the Complainant.
Malik Mumtaz Akhtar, Additional Advocate General with Farman A.S.-I.

ORDER
MUHAMMAD QASIM KHAN, J.---Briefly the facts are that Ghulam Rasool complainant/respondent No.2 who also happens to be the real brother of Ghulam Qadir/petitioner, got lodged F.I.R. No.401 of 2010 dated 22-9-2010 registered under sections 468, 471, 420 P.P.C. at Police Station Cantt, Bahawalpur, with the narration that out of wedlock of Mst. Zarina Bibi (daughter of Ghulam Qadir) and Abdul Rasheed (son of Ghulam Rasool) for the last about 22-years no issue was born, as such, Abdul Rasheed asked permission for another marriage and divorced Mst. Zarina Bibi on 21-7-2009. Because of this reason, Ghulam Qadir was unhappy and with a view to cause loss to the complainant, he prepared anti dated forged and fictitious agreement to sell with regard to 10-kanal and 4-1/2 marlas of land. According to the complainant the said agreement neither contained his signatures nor thumb impressions and furthermore, Ghulam Qadir also prepared a forged receipt dated 3-11-2007 regarding Rs.300,000. According to the F.I.R., in a panchayat before Ghulam Farid and Haji Zahoor Ahmad the accused/petitioner admitted his guilt and begged for pardon.

2. Through this writ petition, Ghulam Qadir petitioner/accused seeks quashing of above F.I.R. It is argued by learned counsel that a bare reading of the contents of the

F.I.R. would show that offence under section 420, P.P.C. as defined in section 415, P.P.C. is not made out, whereas, remaining sections are non-cognizable and the police just to make the case cognizable added section 420, P.P.C. The learned counsel further contended that instant F.I.R. has been got lodged against the petitioner due to mala fide and ulterior motives on the part of the complainant, as before the registration of the case a civil suit for specific performance filed by the petitioner was pending wherein the complainant also appeared on numerous dates but subsequently he absented himself from the court and twisting the facts he tried to convert the civil litigation into criminal offence. In support of his assertions learned counsel placed reliance on the case "Mrs. ZARA SHAH through his Attorney v. S.H.O, POLICE STATION DEFENCE AREA LAHORE and 2 others" (2002 YLR 390), "IFTIKHAR ALI v. ABDUL HAFEEZ AWAN" (1999 PCr.LJ 1239) and "MUHAMMAD ASHFAQ v. STATE and 2 others" (PLJ 2010 Lahore 506).

3. The learned Additional Advocate General assisted by learned counsel for the complainant rebutted the above assertions and argued that factual controversy cannot be resolved and as the challan has been sent to court the petitioner has an alternate remedy before the learned trial court, as such this Court lacks jurisdiction.

4. Heard. Record perused.

5. I have given my anxious consideration to the arguments of learned counsel for the parties and have carefully gone through the contents of the F.I.R.

6. Section 420, P.P.C. relates to offence of cheating and dishonest delivery of property and definite of word "cheating" has been given in section 415, P.P.C., as under:-

"415. Cheating: Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person or any other person] in body, mind, reputation or property, is said to "cheat".

The reproduced provision of section 415, Cr.P.C. therefore, requires that, there should be fraudulent or dishonest inducement; the person induced should be deceived; the deception should be of the nature to prompt the person induced to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. Hence, prima facie in the light of alleged forged agreement to sell the property and receipt of Rs.300,000 along with other evidence, is sufficient to establish the offence of cheating and dishonestly inducing the delivery of property as contemplated in section 420, P.P.C., against the accused of the case in hand. Unfortunately, in our country in cases of dishonest and fraudulent inducement, no

effective remedy exists with the person aggrieved to seek redress, because there is a thin line of distinction between civil and criminal liability and very cleverly criminal act of cheating is painted as a civil liability. This distinction is a question of fact and the determination thereof, depends upon the nature of the evidence to be adduced in the trial Court. Therefore, criminal proceedings should not be quashed before giving the accused an opportunity to produce evidence.

7. In almost similar circumstances when an agreement to sell was executed with the help of marginal witnesses, a suit was filed, the respondent appeared in suit proceedings before the learned trial court and thereafter, got lodged an F.I.R. under sections 420, 467, 468 and 471 P.P.C., that matter came up before this Court for quashing of the said F.I.R. and in reported judgment "MOHABAT KHAN and 5 others v. SSP FAISALABAD and 5 others" (1999 MLD 2243), the writ petition for quashing of F.I.R. was dismissed. The matter about interpretation of section 195(1)(C), Cr.P.C. with reference to a document executed before institution of civil suit, was settled by a Full Bench of this Court in the case "MUHAMMAD SHAFFI v. DEPUTY SUPERINTENDENT OF POLICE (Malik GUL NAWAZ), NAROWAL and 5 others" (PLD 1992 Lahore 178), wherein, their lordships made the following observations, which are of utmost importance for the decision of controversy, as has been agitated in this case:--

"Now can it be said that the offence of forgery was against the administration of justice in a case in which the offence was committed, say, ten or twenty years before the suit in which the forged document was produced or given in evidence? The answer must obviously be in the negative. The forger must have, before the suit, used the forged document on a number of occasions in deceiving a number of persons. And when his fraud and forgery came to light and the real owner or the persons defrauded were preparing to take criminal proceedings, he hit upon the clever device of instituting a civil suit and producing the forged document in the civil suit. He would, then, on the view contended for by the petitioner, be able to say" 'Well, I have produced the document in the Civil Court; you have to wait till that Court has finally decided the genuineness or otherwise of the document, for unless that is done, that Court will not be in a position to say whether an offence of forgery was committed or not and to lodge a complaint under section 105'. Unfortunately, civil suits usually take very long to decide and, in practical terms, it may amount to completely defeating the ends of justice. On this view, therefore, the Civil Courts will become a place for the protection of criminals. This obviously could not have been the intention of the law. The cause of action for proceeding against the forger arose immediately when the offence of forgery as defined in section 463 of the P.P.C. was committed. The commission of that offence was not only intended to deprive the real owner of his property but had also enabled the forger to deceive others and to deprive them of none. No proceedings were pending in any Court at that time. There was, therefore, no question of the offence, at the date of its commission, being against the Court or the administration of justice; nor did it, then, in any way sully the proceedings of the Court, for none were pending."

After discussing the practical aspect of the facts and circumstances, their lordships in the above celebrated judgment held:--

"S.195(1)(c), Cr.P.C. does not apply to cases in which the forgery was committed before the institution of a suit or other proceedings in which the forged document was produced or given in evidence.

As the two interpretations of clause (c) of subsection (1) of section 195 of the Cr.P.C. are so evenly balanced, the one that does not deprive the ordinary Criminal Courts of their ordinary jurisdiction and persons of the right of redress must be adopted. On that view of the matter also, the view that clause (c) of subsection (1) of section 195 of the Cr.P.C. does not apply to cases in which the forgery was committed before the institution of a suit or other proceedings in which the forged document is produced or given in evidence should be preferred.]"

As such, in the light of above valuable references, there is no ambiguity left to observe that in the case in hand from perusal of the contents of the F.I.R. as detailed above prima facie an offence under section 420, P.P.C. is made out.

8. There is yet another aspect of the case i.e. the petitioner definitely has more than one alternate remedies and in such a situation the Hon'ble Supreme Court of Pakistan in the case "Haji SARDAR KHALID SALEEM v. MUHAMAMD ASHRAF and others" (2006 SCMR 1192), wherein, it has been held that "petitioner had alternative remedy to raise objection at the time of framing charge against him by the Trial Court or at the time of final disposal of the trial by the Trial Court after recording evidence. Even otherwise petitioner had more than one alternative remedies viz. before, the Trial Court under Criminal Procedure Code, 1898 i.e. section 265-A or 249-A, Cr.P.C." Moreover, the disputed questions of facts cannot be decided by this Court in exercise of its constitutional jurisdiction, which requires detailed inquiry or recording of evidence. In this case admittedly report under section 173, Cr.P.C. has been submitted, therefore, a number of alternate remedies under the Criminal Procedure Code have become available to the petitioner. The Hon'ble Supreme Court of Pakistan in the case "Mst. KANIZ FATIMA through Legal heirs v. MUHAMMAD SALIM and 27 others" (2001 SCMR 1493) has held that "Where a particular statute provides self-contained machinery for determination of questions arising under the statute and law provides a remedy by appeal or revision to another Tribunal fully competent to give any relief, any indulgence to the contrary by High Court is bound to produce a sense of distrust in statutory Tribunals". Furthermore, in the case "MIR ZAMAN v. Mst. SHEDA and 58 others" (2000 SCMR 1699), the apex court of the country held that in the presence of other legal remedies, constitutional petition was incompetent and un-maintainable. Therefore, on this score as well this petition is not maintainable.

9. As regards the case-law "MUHAMMAD ASHFAQ v. STATE and 2 others" (PLJ 2010 Lahore 506), "IFTIKHAR ALI v. ABDUL HAFEEZ AWAN" (1999 SD 491) "Mrs. ZARA SHAH through his Attorney v. S.H.O., POLICE STATION DEFENCE AREA LAHORE and 2 others" (2002 YLR 390), cited by learned counsel for the

petitioner, with all respect to these reported judgments, I am of the view that, same are distinguishable from the judgment of the Hon'ble Full Bench of this Court referred above and while sitting in Single Bench, I have to follow the judgment of the Full Bench, especially when the interpretation made by the Full Bench is applicable to the case in hand. Moreover, on the aspect of alternate remedies and factual controversies, the judgments of the apex Court of the country provide guidelines as referred above and this Court has to follow the dictum laid down by the Hon'ble Supreme Court and the Full Bench of this Court and the same dictums have to prevail.

10. For what has been discussed above, I see no merit in this petition and the same is therefore, dismissed.

11. Needless to add that whatever has been held above with regard to applicability of offence under section 420, P.P.C., it is a tentative assessment and if at the time of framing of charge or at any subsequently stage after recording evidence the learned trial court reaches to a conclusion otherwise, it may proceed as provided by law.

N.H.Q./G-4/L Petition dismissed.

2012 M L D 1265
[Lahore]
Before Mazhar Iqbal Sidhu and Muhammad Qasim Khan, JJ
KARIM BAKHSH---Appellant
Versus
THE STATE---Respondent

Criminal Appeal No.91 and M.R. No.52 of 2006/BWP, decided on 24th March, 2010.

Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---Medical evidence was in conflict with ocular version, which had negated the presence of eye-witnesses at the scene of occurrence---Gun recovered at the instance of accused and the crime empties secured from the spot had been sent to Forensic Science Laboratory after an unexplained considerable delay---Fabrication of crime empties, therefore, could not be ruled out and positive report of Forensic Science Laboratory could not be relied upon---Benefit of doubt was extended to accused and he was acquitted in circumstances.

Talat Mehmood Kakazai for Appellant.
Muhammad Afzal Wattoo for Respondent.
Date of hearing: 24th March, 2010.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---Karim Bakhsh accused/ appellant was tried by learned Additional Sessions Judge, Bahawalnagar in case F.I.R. No.161 under sections 342/302/34, P.P.C. registered with Police Station Mandi Sadiq Gung and vide judgment dated 29-3-2006 he was convicted under section 302(b), P.P.C. and sentenced to death; further ordered to pay Rs.100,000 as compensation to be paid to the legal heirs of the deceased, which shall be recovered as arrears of land revenue, in case of non-realization to further undergo six months simple imprisonment. Criminal Appeal No.91 of 2006 has been filed by the convict/appellant challenging his above conviction and sentence, whereas, the trial court has sent reference. Both these matters are being decided by this single judgment.

2. Imam Ali complainant P.W.5 reported the matter to Muhammad Arshad Nadeem S.-I./S.H.O. P.W.13 on 28-10-2005 at about 8-30 a.m., to the effect that he had married his son Qasim Ali (deceased) with Mst. Muqadas daughter of Karim Bakhsh (appellant) and in WATTA Mst. Shumaila (daughter of the complainant) had been married with Manzoor Ahmad son of the appellant, but rukhsati had not taken place because of tender age of Mst. Shumaila. Two days before the occurrence, there occurred a quarrel between Qasim Ali son of complainant and Mst. Muqadas and Karim Bakhsh appellant took Mst. Muqadas to his house. On the fateful day at about 7-30 a.m. Muhammad Nadim son of the complainant was going to drop Mst. Shumaila to school and when he was passing from in front of the house of the accused, Karim Bakhsh, Mst. Manzooran and Mst. Muqadas came out of the house

and they dragged Mst. Shumaila inside the house by her hair and arms. Muhammad Nadim immediately rushed back to house and told the incident to the complainant whereupon, he (the complainant) and Qasim Ali went to the house of Karim Bakhsh but the door was lock and Mst. Shumaila was weeping inside and Mst. Manzooran and Mst. Muqadas were giving her fist and kick blows. The complainant raised cries, whereupon, Muhammad Shan and Muhammad Sarwar also came and they also entreated Karim Bakhsh from outside but he did not agree. He, however, suddenly got infuriated, opened the door and made two .12-bore gun fires hitting Qasim Ali on his right shoulder, right chest and left elbow and left arm, who succumbed to the injuries at the spot

.

3. On the basis of above information laid by the complainant, formal F.I.R. Exh.PD was registered and the I.O. proceeded to the place of occurrence along with other officials, inspected the dead body of deceased Qasim Ali, prepared injury statement Exh.PH, inquest report Exh.PI and sent the dead body through Khurshid Ahmad Constable for post mortem examination at RHC Mandi Sadiq Gung. The I.O. prepared rough site plan of the occurrence Exh.PJ, took into possession blood stained earth from underneath the dead body and prepared memo Exh.PT. He also collected two empty cartridges P-5 and P-6 of .12-bore gun from the place of occurrence vide memo Exh.PG. Thereafter, the I.O. went to the Hospital, where last worn clothes of the deceased Shirt P-1, Shalwar P-2 and Vest P-3 all blood stained were handed over to him and took the same into possession vide memo Exh. PA. He recorded statements of the witnesses under section 161, Cr.P.C. Karim Bakhsh accused in this case was arrested on 6-11-2005, whereas, Mst. Manzooran Bibi and Muqadas accused were arrested on 9-11-2005. During custody, Karim Bakhsh on 11-11-2005 led to the recovery of .12-bore gun from room of his house, secured vide memo Exh. PE. The accused also produced licence of the said weapon to the Investigating Officer. He prepared the rough site plan of the place of recovery Exh.PE/ 1. On completion of the investigation, challan was sent to court against all the three accused, to which they pleaded not guilty and claimed to be tried, whereupon, the prosecution led its evidence and accused were also examined under section 342, Cr.P.C. Ultimately on conclusion of the trial, Mst. Manzooran and Mst. Muqadas were acquitted of the charge against them, whereas, Karim Bakhsh accused/ appellant was convicted and sentences, as detailed above.

4. In support of this appeal the learned counsel for the appellant has argued that the motive in this case does not appeal to reason because some time back Muhammad Qasim, son-in-law of the appellant, was married with Mst. Muqadas Bibi, daughter of the appellant and Mst. Shumaila sister of the deceased and daughter of Imam Ali married with Manzoor Ahmad, son of the appellant; no body wants to kill his own son-in-law, when there was no such type of dispute which had compelled a person to commit the murder. It has been argued that if Mst. Muqadas Bibi daughter of the appellant was living happily with the deceased Qasim Ali then why to make her widow by the appellant. It is contended that something has been concealed by the complainant party and the motive is mysterious, in this case which cannot be believed. It has been argued that P.W.5 Imam Ali is the real father of the deceased,

Mst. Shumaila P.W.6 is real sister of the deceased, whereas, Muhammad Shan P.W.7 is brother in law of the complainant, therefore, these three persons are not only related to the deceased but they are also inimical towards the appellant. It has been vehemently contended that had the P.Ws. been present at the place of occurrence at the relevant time they could have saved the deceased because the occurrence had not taken place all of a sudden. The learned counsel for the appellant argued that in the F.I.R. it is very much mentioned that firstly Mst. Shumaila was dragged to the house of the appellant and she was under attack, therefore, the P.Ws. and the deceased came there and incident took place. Therefore, if the P.Ws. were three in number then it was easy for them to have overpowered the appellant or at least to snatch weapon from him. It has been argued that presence of the P.Ws. has not been established because the medical evidence does not corroborate the version of the P.Ws. According to the statement of the witnesses the deceased and the appellant were standing on same pedestal, whereas, doctor P.W.4 as categorically mentioned in the dimension of the injuries that tracks of Injury Nos. I and 3 were from up to downwards. It has been argued that it is a natural phenomenon that fire travels straight unless and until any substance on the way may cause any hurdle to it. The learned counsel for the appellant led us to the diagram of the injuries of the deceased Exh. PC and post mortem report Exh. PC/1 to contend that the injuries were caused on the right shoulder of the deceased and these injuries went downwards and made exit wound downwards the body. We have also seen Column No.18 of the inquest report against which the height of the deceased has been mentioned as 5 feet and 7 inches. We have also examined the identification slip of the appellant, wherein, his height has been mentioned as 5 feet and 6 inches. Therefore, we have observed that deceased as well as the appellant were of the same height and it is noted that place of deceased in the site plan had not been raised upon which the deceased was standing at the time of making of fires. It has been argued that had the P.Ws. been present there then this contradiction would not have arisen in this case. It has been next contended that medical contradictions in this case cannot be reconciled by the prosecution and the doctor has to be taken as independent P.W. who had no animosity with any of the parties and whatever was seen by him on the body of the deceased, he had brought it on the post mortem report; it has been argued that during cross-examination the doctor has admitted that injuries on the person of the deceased i.e. Injuries Nos.1, 2 and 3 were result of single shot of .12-bore gun and the assailant was on the right upper side of the deceased when fire was made. The learned counsel also drew our attention to unscalled site plan of the place of occurrence and also the scaled site plan and we have also seen the first inspection note of the place of the occurrence by using our powers under section 172, Cr.P.C. and it has been observed by us that deceased and the appellant were shown standing on equal pedestal and more so according to the site the appellant was inside the room, whereas, the deceased was present in the street immediate to the outer gate of the house of the appellant. The learned counsel has assailed the positive report of Forensic Science Laboratory about the weapon of offence, on the ground that two crime empties of 12-bore gun were taken allegedly into possession from the spot on 28-10-2005 and were sent to the office of Chemical Examiner on 8-11-2005 i.e. with a delay of ten days and gun allegedly recovered from the appellant on 11-11-2005 was sent to the office of Chemical Examiner on 9-

12-2005 with a bad delay of twenty eight days. It has also been argued that licensed gun of the appellant was in fact taken into possession from the house of the appellant immediate after the occurrence; it was kept by the Investigating Officer and thereafter empties were prepared from it and on suitable dates these two parcels were sent to the office of Forensic Science Laboratory, Lahore and got positive reports in order to strengthen the prosecution case. The learned counsel for the appellant has contended that mere happening of the incident in front of the house of the appellant does not mean that the deceased was murdered by his father in law. According to the learned counsel, all these contradictions have made the prosecution case doubtful, therefore, by extending the benefit of doubt the appellant be acquitted.

5. On the other hand, learned D.D.P.-G. assisted by learned counsel for the complainant opposed the appeal and contended that F.I.R. had been lodged with promptness and it was a day light occurrence. The appellant is the sole perpetrator and it is not a case of substitution. It was argued that report of the Forensic Science Laboratory is positive. Merely on the basis of some technicalities or delayed deposit of the parcel in the office of the Forensic Science Laboratory, the credibility of the Forensic Science Laboratory report could not be shattered. It has been vehemently argued that there is no contradiction in the ocular and the medical evidence as nobody can assess the exact posture of any person who is under attack. It has been contended that if the presence of the eye-witnesses is believed then the evidence of doctor cannot be given much consideration as compared to the ocular evidence because the doctor is not the eye-witness. It has been argued that appellant was a callous who committed the murder of a young chap and his son in law. It has been argued that the deceased was the high hope of his family and after his murder the family of the complainant has been ruined. It has been contended that neither this is a case of mitigation nor this is a case of benefit, therefore, the learned trial court has imposed the normal sentence upon the appellant, as such, the appeal may be dismissed.

6. We have considered the arguments of learned counsel for the parties and have examined the record.

7. The most important aspect in this appeal is the medical evidence which does not corroborate the ocular account of the occurrence. This is the case of the prosecution that at the time of occurrence the appellant and the deceased were standing on equal pedestal and when fires were made on the appellant the deceased was in standing position. We have minutely gone through the record and failed to explore from the record that the deceased had ever duck down at the time of firing or the deceased was present on a lower pedestal as compared to the standing place of the appellant. We have also minutely seen the scaled site plan of the place of occurrence and non-scaled site plan, of the place of occurrence. From both these documents it is manifest that the deceased and the appellant were sanding on equal pedestal at the time of firing E have also taken note of the height of the deceased as well as of the appellant, both were found to be on the same height, therefore, it is not understandable how the fire shots were received by the deceased from upwards and dimension of the fires was found by the doctor from upwards to downwards, therefore, this inconsistency between that the

medical and the ocular evidence cannot be reconciled by the prosecution and this fact also negates the presence of the P.Ws. Although the report of the Forensic Science Laboratory in this case is positive, we have taken it exceptional because parcel of the alleged recovered gun and that of the crime empty were sent to the Office of Forensic Science Laboratory, Lahore with a considerable delay, about which no explanation has been given by the prosecution. We have also taken into consideration that the alleged recovered gun was licensed one and possibility cannot be ruled out that it might have been taken into possession from the house of the appellant either on the day of occurrence or 2/3 days later, it might have been kept by the I.O. in Police Station and thereafter, empties were fabricated and sent to the office of Forensic Science Laboratory, Lahore and thereafter the gun was sent in order to procure positive report.

8. We are mindful of the situation that in this case, the deceased was a young chap and was also son-in-law of the appellant but we do not believe the presence of the P.Ws. at the place of occurrence at the relevant time, therefore, the prosecution has miserably failed to disprove its case against the appellant beyond any shadow of doubt. We, therefore, allow this appeal and by extending him the benefit of doubt, set aside his conviction and sentence and order his immediate release from jail, if not required in any other case.

MURDER REFERENCE IS ANSWERED IN THE NEGATIVE. SENTENCE OF DEATH IS NOT CONFIRMED.

N.H.Q./K-3/L Appeal accepted.

2012 M L D 1330
[Lahore]
Before Muhammad Qasim Khan and Mazhar Iqbal Sidhu, JJ
Professor MUNAWAR HUSSAIN and others---Petitioners
Versus
THE STATE and others---Respondents

Criminal Miscellaneous No. 205-B of 2011, decided on 6th April, 2011.

Criminal Procedure Code (V of 1898)---
----S. 497---Penal Code (XLV of 1860), Ss.324/353/186/148/149---Explosive Substances Act (VI of 1908), Ss.3/4/5---Anti-Terrorism Act (XXVII of 1997), S.7---Bail, refusal of---Accused had been apprehended at the spot, not only along with his weapon but also with his co-accused, pre-concertedly having heavy weaponry in order to cause huge loss to innocent people or property by act of terrorism---Role played by accused mentioned in the F.I.R. could not be played by an ordinary person, except the trained one---Nothing had been brought on record to indicate false implication of accused---Investigation had revealed involvement of accused in the case---Prima facie, overwhelming evidence was available on record to connect the accused with the commission of offence falling within the prohibitory clause of S.497(1), Cr.P.C.---Bail was declined to accused in circumstances.

Sardar Mehmood Iqbal Khan Khakwani for Petitioners.
Malik Muhammad Latif, Deputy Prosecutor-General for the State with Muhammad Rafiq Sub-Inspector.

ORDER
Petitioner Professor Munawar Hussain (Mufti Munawar Hussain alias Doctor Professor) seeks post arrest bail in a case registered on the complaint of Muhammad Jamil Inspector/S.H.O. vide F.I.R. No.317 dated 13-10-2010 Police Station Saddar Ahmadpur Sharqia, Bahawalpur under sections 148/149, 186, 324, 353, P.P.C., under sections 3/4/5 of Explosive Substances Act, 1908 and offence under section 7 of the Anti-Terrorism Act, 1997.

2. In brevity the prosecution case is that on 13-10-2010 the complainant along with heavy police contingent, on the direction of DSP/SDPO-Ahmadpur Sharqia by way of special team proceeded for search of the proclaimed offenders and when reached the Check Post Chak Wanbi, received spy information that on the road side an automobile Suzuki Mehran of white colour without number plate was present, in which five persons carrying fire arms were seated and on a motorbike three persons were present, out of whom two were armed with fire arm and were going for terrorism, if chased, they can be apprehended along with weapons. The complainant, after seeking instructions from the DSP/SDPO mentioned above, reached on the pointed place near the dune where the culprits on seeing the police party commenced indiscriminate firing in order to keel the policemen, whereupon, the complainant loudly addressed them to put down their weapons and surrender themselves before

the police, but the accused party continued firing and the complainant as well as other policemen retaliated by firing. In this process one of the accused persons threw hand grenade towards the policy party, which burst but the police party remained safe. Police party bravely on the stake of their lives, apprehended two culprits whose names came to the knowledge of the complainant as Hafiz Suleman alias Amjad and Malik Manzoor along with .30-bore pistol and four live bullets. Irshad Haider Bokhari Inspector/S.H.O. Police Station Channi Goth along with Muhammad Miraj S.-I., Faryad and Munir Ahmad/Constables apprehended Abdul Rahim alias Talha alias Saeed alias Khalid alias Mustafa son of Muhammad Bakhsh along with one live hand grenade, one Kalashnikov and five live bullets. Muhammad Aamir Ghouri Inspector/S.H.O. Police Station Baghdad-ul-Jadeed with the help of Sikandar Hayat/HC apprehended Muhammad Afzal alias Muhammad Din, Asad Ullah Mukaram, Nasrullah and Qari along with weapons. Muhammad Afzal A.S.-I. apprehended Sajjad Ahmad with the help of other police officials along with weapons, whereas, Khalid Majeed A.S.-I. with the help of Muhammad Rafiq and Akbar Ali/Constables apprehended Muhammad Saleem son of Allah Bakhsh and took into possession pistol .30-bore with four live bullets. Irshad A.S.-I. with the help of other employees captured the petitioner with a cut barrel .12-bore gun and eight live cartridges. Bashir Ahmad A.S.-I. apprehended Muhammad Bilal accused with the help of his party men along with YAMAHA motorbike without number. The names of the culprits were known to the police party on inquiring from them. All the weapons and other articles were taken into possession by the police. Co-accomplices of the petitioner Muhammad Zubair, Farooq, Muhammad Ibrahim alias Akram alias Bucha while boarding the Car and making firing slunk away from the place of occurrence.

3. The petitioner having remained unsuccessful to get the relief of post arrest bail from the learned trial court has knocked the gateway of this Court for the said relief.

4. It is argued by learned counsel for the petitioner that he is not an ex-con and has no credentials of his involvement either in criminal activities or in subversive movements, whereas, he is a post graduate and being Professor was on duty in Government Degree College, Ahmadpur Sharqia and is also Ph.D in Islamic studies with special course of FAZAL MUFTI. In this background the learned counsel advanced his arguments by contending that such like persons of high educational status cannot even think to participate in such like activities. The learned counsel further contended that petitioner has been falsely involved due to ulterior motives by the police in order to ruin his enterprising future. It has been maintained that weapon allegedly recovered from the petitioner is of no consequence as no positive report of the ballistic expert is available on the file. The learned counsel submits that heavy assault was allegedly mounted upon the police party but none of the members of the same received even a scratch during this unfortunate incident and none of the culprits received any fire arm injury during the incident because of firing made by the police party. Further argued that offence under sections 3/4/5 of Explosive Substances Act, 1908 as well as section 7 of Anti-Terrorism Act, 1979 are not constituted against the

petitioner, whereas application of other penal sections needs further inquiry vis-a-vis involvement of the petitioner.

5. The learned Deputy Prosecutor General has opposed the bail application tooth and nail while rip raping the prosecution case and submitted that petitioner is member of a defunct JEHADI TANZEEM and during investigation it has come on the record that he remained active member of the same and kept on conspiring, abetting and inducing by making devices for the maskers to the innocent people. Adds that petitioner was apprehended flagrant delicto along with his co-accomplices and weapons including hand grenade, with the exclusionary of false involvement. It has been argued that petitioner along with his co-accused mounted attack at the police party, not only this, but also threw hand grenade which burst but fortune helped and police contingent was saved. Further submits that such like people are threat to the public at large, law enforcing agencies, having no respect of machinery of law and used to flout, ordains of Constitution of the Homeland, are not required to be let loose by way of grant of bail. With this, the learned D.P.G. argued that offence alleged in this case fall within prohibitory clause of section 497(1), Cr.P.C., as such, dismissal of bail application has been prayed.

6. With due diligence we have heard the arguments of leaned counsel for the parties and scanned the record.

7. A perusal of the F.I.R. guides that petitioner along with co-accused pre-concertedly having heavy weaponry in order to cause huge loss to the innocent people or property by act of terrorism, get together. Textual study of the F.I.R. further reveals that the role played by the accused mentioned in the F.I.R. cannot be played by an ordinary person, except the trained one.

8. Nothing has been seen by us, on careful scanning the entire available record that the police party has manoeuvered the incident or has falsely involved the petitioner and his co-accused by planting weapons and a bike. The petitioner and some of the co-accused were apprehended by the police party at the place of occurrence along with weapons. Even otherwise, no other inference can be drawn except that of terrorism. Such like persons are not only menacing for the society as a whole but also disturb the peace, harmony and tranquility in the society, cause threat to the law enforcing agencies, bring instability to the country and by their terrorist activities they are also causing financial weakness in the country, apart from stigmatizing the religion of Islam. The petitioner has been apprehended at the spot, not only along with weapon but also with his co-accused. Nothing has been brought on the record that petitioner has been falsely involved in the case. The investigation resolute petitioner's involvement by recommending his prosecution in this case. Prima facie there is overwhelming evidence against the petitioner to connect him with the commission of offence falling within the prohibitory clause of section 497(1), Cr.P.C. We, therefore, see no substance in this bail application and the same is accordingly dismissed.
N.H.Q./M-8/L Bail refused.

2012 P Cr. L J 138
[Lahore]
Before Muhammad Qasim Khan, J
ZULFIQAR ALI---Petitioner
Versus
THE JUSTICE OF PEACE/SESSIONS JUDGE and 7 others---Respondents

Writ Petition No. 15058 of 2011, decided on 13th July, 2011.

Criminal Procedure Code (V of 1898)---
----Ss. 22-A, 22-B & 154---Constitution of Pakistan, Art.199---Constitutional petition---Registration of case---Petitioner had sought implementation of order of Justice of Peace, whereby S.H.O. was directed to record statement of the petitioner without any deletion or alteration and to proceed with the matter in accordance with law---Explicit order/direction, passed by Justice of Peace, must have been complied with in letter and spirit, when said order was not set aside by any court of law or the operation thereof had been stayed---Mere contention of respondents that same F.I.R. had already been registered was no ground to defy the direction of Justice of Peace---Even if, some case had already been registered, there was no bar regarding registration of another F.I.R. regarding the same occurrence---Tendency of reluctance on the part of Police hierarchy in obeying such directions of Justice of Peace was not only tantamount to nullifying the intent behind S.22-A(6), Cr.P.C., purely meant to provide justice to the concerned at their door step, but at the same time, that inaction would result in unwanted delay and was unnecessarily burdening the court for petty issues---No justifiable reason was available at all for S.H.O. to not have implemented the direction of Justice of Peace---S.H.O. should have registered F.I.R. against the culprits and then investigate the case, strictly in accordance with law---Order accordingly.

Mushtaq Hussain v. The State 2011 SCMR 45 **rel.**
Ch. Muhammad Akram Khan for Petitioner.
Ch. Hanif Shahid for Private Respondents.
Imtiaz Ahmad Kaifi, Additional Advocate-General with Nazam Sub-Inspector.

ORDER
MUHAMMAD QASIM KHAN, J.---Through the instant writ petition, the petitioner has sought implementation of order dated 14-6-2011, whereby on the application of the petitioner, the S.H.O. has been directed to record statement of the petitioner without any deletion or alteration and to proceed with the matter in accordance with law.

2. Briefly the fact are that Zulfiqar Ali petitioner filed an application under sections 22-A/22-B, Cr.P.C. before the learned Justice of Peace seeking a direction for registration of case against Khurshid, Mehboob, Mehfooz and Muhammad Akhtar, and in the said application it had been alleged that accused had suspected illicit liaison of Muhammad Shahbaz Khan (son of the petitioner) with Mst. Sonia Bibi

(niece of respondent No.5 and maternal grand-daughter of respondents Nos.6 and 7) and for this reason the accused had called Mst. Sonia to Chak No.7. On the night between 24/25-5-2011, the son of the complainant received a call on his Mobile No.0345-4796585 that Mehfooz is ill and is to be taken to Hospital. As the accused were neighbourers and of the same BARADARI, son of the complainant went to their house, where he was captured and detained in a room. At about 1-34 a.m. (mid-night), Shehbaz called Muhamamd Ashraf, (his maternal uncle) on his Mobile No.0332-4871058, that he be saved from the accused. Muhammad Ashraf immediately went to the house of the respondents and knocked the door, whereupon, accused Mehfooz and Muhammad Akhtar armed with .12-bore guns came out, hurled abuses and on gunpoint directed him to go back. Muhammad Ashraf came back, took Muhammad Khan and one cousin with him and were heading towards the house of the accused, when mother of Muhammad Ashraf also accompanied them to beg pardon from the accused. These persons knocked the door of the accused, where they heard that Khurshid was exhorting lalkara that Shehbaz be fired at. He also directed his son Mehboob to catch hold of him and was commanding other accused to make fire. At about 1:49 a.m. the persons from the complainant side heard fire shots and cries of Shehbaz. After a while the accused also fired shots at Mst. Sonia. Muhammad Ashraf told the incident to the complainant.

3. It is contended by learned counsel for the petitioner that from the application moved by him before the learned Justice of Peace, clearly commission of a cognizable offence was disclosed and furthermore, when there was an explicit direction of learned Justice of Peace for the respondent/S.H.O. to record statement of the petitioner and then proceed ahead, there was no room left with the respondent/S.H.O. except to register an F.I.R. on the application of the petitioner. Instead, the respondent/S.H.O. with mala fide intention, registered an F.I.R. on the statement of the respondents by twisting the real facts. The learned counsel therefore, argued that a direction be issued to the respondent/S.H.O. to comply with the order of the learned Justice of Peace and register a criminal case on the statement of the petitioner.

4. On the other hand, learned Additional Advocate-General assisted by learned counsel for the respondents opposed the petition and argued that earlier to the issuance of impugned order dated 14-6-2011 by the learned Justice of Peace, already an F.I.R. with regard to the same occurrence had been recorded and the same is under investigation. Therefore, the petitioner may join the investigation and put his version before the Investigating Officer, who may juxta posed both the versions and then conclude the investigation, in accordance with law.

5. Arguments heard. Record perused.

6. Whatever may be the factual position of the matter, it is not for this court to comment on the same. Since, there is an explicit direction dated 14-6-2011 passed by the learned Justice of Peace directing the S.H.O. to record statement of the petitioner and then proceed in accordance with law, the same must have been complied with in

letter and spirit. It is not the case of the respondents that said order of the learned Justice of Peace had either been set aside by any court of law or the operation thereof, had been stayed. Mere contention of the respondents that already some F.I.R. had been registered on the statement of respondent No.5 is no ground to defy the direction of the learned Justice of Peace. Even if, already some case has been registered, there is no bar regarding registration of another F.I.R. regarding the same occurrence.

7. This court is mindful of the fact that the legislature in its wisdom used the word "shall" in section 154, Cr.P.C, of course with an intention that this provision of law may not be used by the S.H.O. on his whims, forced by any of the extraneous considerations. Needful, to add that by use of word "shall", it stands included in one of the important duties of the Station House Officers, to reduce into writing the information, whenever it is received about the commission of a cognizable offence, and any attempt of deviation on the part of the concerned Station House Officer, may entail the consequences. In any way, it was incumbent upon the S.H.O. to have recorded the statement of the petitioner, in compliance with the direction of the learned Justice of Peace, he should have recorded the statements of the witnesses and then to proceed within the parameters of law. As pointed out by the learned counsel for the respondents, since already an F.I.R. had been registered, instead of defying the subsequent direction of learned Justice of Peace, the proper course for the S.H.O. was to register a separate case on the basis of written application/statement of the petitioner, which otherwise, fully contained all necessary ingredients about the commission of a cognizable offence. In this respect, reliance is placed on the case reported in "MUSHTAQ HUSSAIN v. THE STATE" (2011 SCMR 45).

8. Once appropriate directions are passed by the learned Justice of Peace, unless such directions are set aside or operation thereof is suspended by the court of law, the tendency of reluctance on the part of police hierarchy in obeying such directions of Ex-Officio Justice of Peace not only tantamount to nullify the intent behind insertion of section 22-A(6) in the Cr.P.C., purely meant to provide justice to the concerned at their door-step, but at the same time, this inaction is resulting in unwanted delay and is unnecessarily burdening the courts for petty issues.

9. For what has been discussed above, I am of the considered view that there exists no justifiable reason at all for the respondents/S.H.O. to have not implemented the direction of learned Justice of Peace. However, in the facts and circumstances of this case, this court would refrain itself from recommending any legal action against the delinquent S.H.O., instead a direction is issued to the respondent No.4/S.H.O., that if the aforementioned orders of learned Ex-Officio Justice of Peace otherwise, still hold the field, he shall register an F.I.R. against the culprits and then investigate the case strictly in accordance with law, with compliance report to the Deputy Registrar (Judicial) of this Court.

10. With above directions, this writ petition is disposed of.
H.B.T./Z-37/L Order accordingly.

2012 P Cr. LJ 638
[Lahore]
Before Muhammad Qasim Khan, J
GHULAM QADIR FARAZ alias BABAR---Petitioner
Versus
STATION HOUSE OFFICER, POLICE STATION SADDAR KAMOKE and 2 others-Respondents

Writ Petiiion No.10989 of 2011, decided on 9th June, 2011.

(a) Penal Code (XLV of 1860)---
----Ss.371-A & 37I-B---Criminal Procedure Code (V of 1898), S. 103---Constitution of Pakistan, Art.199---Selling and buying person for purposes of prostitution---Constitutional petition for quashing of proceedings---Place where raid was conducted by the Police on spy information, was not public place, but was owned and in the possession of a private individual---Application of Ss.371-A & 371-B, P.P.C.---Scope---Neither search warrants were obtained by the Police, nor any effort was made by the Police in that behalf---No respectable from the locality was associated in the impugned raid proceedings---Alleged police raid, in such a situation, could not be termed any better than an "intrusion ", which was an act prohibited by the Constitution, Law and the Holy Quran---Legislators in their wisdom, having regard to the existing norms of the society, were conscious of the fact that if cases under such offences were permitted to be registered on spy information or on the complaints lodged by anonymous persons, such practice would have encouraged false reports involving innocent men or women for ill designs---Story as narrated in the F.I.R. seemed to be illogical, irrational. and implausible, as nobody could possibly run a brothel house in the residential area---Police Officials by not obtaining search warrants for raiding the places in question, had committed glaring illegality in not following the mandatory provision of S.103, Cr.P.C. and in circumstances had violated Art.14 of the Constitution---Police functionaries, could not be permitted to flout the provisions of law, which otherwise, would amount to derailing the entire judicial system---Provision of Ss. 371-A & 371-B, P.P.C. only apply to persons who sell or purchase any person with the intent that such person would be used for the purpose of prostitution or illicit intercourse---In the present case no material was available against accused to substantiate the commission of such offence---Non-observance of legal requirements by the Police, not only had given a strong impression about the mala fides of the Police, but it was also indicative of the fact that all was done by the concerned Police Officials in extreme haste, to cover up and shield the wrong, which they had done to the petitioner/accused person---Continuation of investigation, prosecution or the trial, in circumstances would amount to sheer abuse of process of law, which would not be regarded in meeting the ends of justice---F.I.R. registered against accused and all proceedings, thereunder, were ordered to be quashed, in circumstances.
Riaz v. Station House Officer, Police Station Jhang City and 2 others PLD 1998 Lah. 35 and Ghulam Sakina v. State 1991 PCr.LJ 568 ref.

(b) Constitution of Pakistan---

----Art. 199???? Constitutional petition---Scope---Quashing of F.I.R---When on the face of it, F.I.R. was registered with mala fide or prosecution of a .criminal case was patently against the provisions of law, or otherwise no case could possibly be made out, High Court had ample jurisdiction to quash the same, as no useful purpose would be served to keep such matters pending, rather same would amount to abuse of process of court of law---Mere availability of alternate remedy could not constitute a bar upon the jurisdiction of High Court to entertain a constitutional petition and to exercise its jurisdiction, if the circumstances so warrant---When registration of F.I.R. and proceedings thereon, were patently illegal or illegality was floating on the surface, to refuse interference under Art.199 of the Constitution would in fact amount to acting in aid of injustice and plea of alternate remedy would lose its legal significance---F.I.R. was ordered to be quashed.

Javad Iqbal Malik for Petitioner.

Sayyed Nayyar Abbasi Rizvi, A.A.-G. with Yaqoob Sub-Inspector.

ORDER

MUHAMMAD QASIM KHAN, J.---Ghulam Qadir Faraz alias Babar son of Faqir Muhammad (petitioner) through the instant writ petition has sought quashing of F.I.R. No.621 of 2010 dated 21-11-2010 under sections 371-A and 371-B, P.P.C. registered at Police Station Saddar Kamoke, Gujranwala, on the complaint of Abid Farooq Sub-Inspector.

2. Briefly the facts as evident from the impugned F.I.R. are that on 21-11-2010 at 4-15 a.m, the complainant Abid Farooq Sub-Inspector along with Muhammad Shahid 3710/C, Mubarak Ali 4541/C, Suhail Ahmad _3488/C, Muhammad Usman 3541/C and Sajid Ali 2850/C, was on patrol duty for the search of absconders, when information was laid that Irfan and Allah Rakha were indulged in the prostitution through three women, at the dera of Muhammad Awais son of Ghulam Sabir. On said spy information, when raid was conducted, Irfan, Allah Rakha and Muhammad Awais were found involved in taking money from Muhammad Irfan, Abid, Muhammad Shoaib Khan, Babar Hussain, Tariq Mehmood, Khalil, Babar (present petitioner) and Ghulam Abbas accused for committing illicit intercourse with Mst. Aysha, Shuma Bibi and Mst. Sobia. Allah Rakha, Ghulam Abbas and Babar (present petitioner) succeeded to flee, whereas, remaining accused persons were arrested. Irfan was found in possession of Rs.5,000, Muhammad Awais was having Rs. 6,000 and . two mobile phones of Nokia made, Rs.12,000 and a Nokia¸ mobile were recovered from Mst. Aysha, Rs.4,000 from Mst. Sobia and Rs. 3,000 were recovered from Mst. Shamsari. It is further .alleged in the F.I.R. that Irfan and Muhammad Awais also admitted to have received the amount from Abid, etc. for prostitution with Mst. Aysha, etc., Mst. Aysha, etc. also admitted to have received the amount, whereas, accused Abid, etc. admitted that they had given the amount for that purpose. Furthermore, from the possession of Muhammad Irfan accused a Nokia set, two China mobile sets were in the possession of Babar Hussain, one Nokia set from Tariq

Mehmood, one mobile phone was recovered from Khalil Ahmad accused. A total sum of Rs.30,000 and mobile sets were taken into custody.

3. It is argued by learned counsel that F.I.R. is based on absolutely cock and bull story, no such occurrence ever had taken place. The learned counsel contended with vigor that in fact the women, who have been cited as accused in this FIR., run a musical group and on 21-11-2010 they had gone to attend the musical program on the marriage of Ghulam Abbas son of Ghulam Sabir. On close of the program, when they were returning for Lahore, on Sadhoki road in front of dera of Sardar Afzal, they were stopped by police official namely Muhammad Shahid, Sajid Ali, Muhammad Usman and Riasat, etc., they hurled abuses, forcibly took them to police Chowki and confined them in a room. Abid Farooq (complainant) snatched money as well as mobile sets from them and forced the petitioner and others to dance and also wanted to commit zina with them. It is next argued that police officials forced Mst. Aysha to a naked dance and also misbehaved her, further on, the police officials got lodged the instant F.I.R. against the petitioner and others in order to plunder the amount and mobiles sets. It is next argued that regarding all this, a complaint was lodged to the RPO-Gujranwala, an inquiry was conducted and a case F.I.R. No.629 of 2010 under sections 294/354/381/342, P.P.C. read with section 155-C of the Police Order, 2002 was registered against the police officials at Police Station Saddar, Kamoke. The learned counsel added that no witness from public was associated in the alleged raid proceedings, there is no evidence about alleged sale and purchase of women for the purposes of prostitution and that it is a case of sheer violation of CHADDAR and CHARDEVARI, as protected by the Constitution of Islamic Republic of Pakistan, 1973.

4. The learned AAG has opposed this petition and argued that petitioner has more than one alternate remedies by way of approaching the police hierarchy or moving the learned trial court, hence, the instant writ petition is not maintainable.

5. I have considered the arguments and perused the record.

6. According to the contents of the F.I.R. itself, on spy information raid was conducted by the police contingent on the dera of Muhammad Idrees son of Ghulam Sabir situated at Mantpura. It has to be seen that the said place of raid was not a public place, rather it was owned and in the possession of a private individual i.e. Muhammad Idrees. In this case neither search warrants were obtained by the police nor even any effort was made by the police in this behalf and furthermore, no respectable from the locality was associated in the impugned raid proceeding. In such a situation, the alleged police raid cannot be better terms than an "intrusion", which is an act prohibited by the Constitution, the law and the Holy Quran.

7. On the question of registration of case under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, on the report of a spy informer, this court in its an elaborate judgment "RIAZ v. STATION HOUSE, OFFICER, POLICE STATION

JHANG CITY and 2 others" (PLD 1998 Lahore 35), after discussing the entire background, held that:-

"Law does not permit the registration of a case under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, on the report of a "Mukhbar" because this Ordinance has to be read in conjunction with the Offence of Qazf Enforcement of Hadd) Ordinance, 1979 and "Mukhbar" being entitled to have his name and identity kept secret, this would allow him to even make false imputations of Zina with impunity which would defeat the very spirit and purpose of both Enactments. Such act would not be in conformity with the spirit of Surah Hujrat, Ayat 6 and guidelines provided by the Holy Quran in this behalf. "

The legislators in their wisdom, having regard to the existing norms of the society, were conscious of the fact that if cases under such offences are permitted to be registered on spy information or on the complaints lodged by anonymous persons, this practice could have encouraged false reports to involve innocent men . or women for ill designs. I Therefore, section 496-B, Cr.P.C. was inserted, providing definition of fornication, as:--

"Fornication:
(1) A man and a woman not married to each other are said to commit fornication if they wilfully have sexual intercourse with one another.
(2) Whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees."
Further, a person who is accused of submitting incorrect information or leveling false accusation of fornication is to be dealt with under section 496-C, Cr.P.C., which provides that:-

"496C. Punishment for false accusation of fornication.
Whoever brings or levels or gives evidence of false charge of fornication against any person, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees:
Provided that a Presiding Officer of a Court dismissing a complaint under section 203C of the Code of Criminal Procedure, 1898 and after providing the accused an opportunity to show cause if satisfied that an offence under this section has been committed shall not require any further proof and shall forthwith proceed to pass the sentence. "

Offence of fornication has been defined above and section 203-C, Cr.P.C. provides that no court shall take cognizance of an offence under section 496-(B), P.P.C. except on a complaint lodged in a court of competent jurisdiction. By bare reading of F.I.R., it appears that the complainant tried to establish the allegation of fornication and for the same purpose only a private complaint could be lodged under section 496-C, P.P.C. and if the court comes to the conclusion that allegation of fornication levelled against the accused are false, the court can convict the complainant of the case and

the witnesses, who appear before the court to give evidence, but in the instant case the complainant and the I.O. in order to avoid the charge of false accusation, did not file the complaint under section 496-B, P.P.C., but on the other hand, the evidence of sale and purchase of the person is also not available on the file.

7. Expounding the scope of fundamental right relatable to inviolability of dignity of man and privacy of the home, it is observed that with incorporation of Article 2-A in the Constitution of Islamic Republic of Pakistan, 1973, a constitutional guarantee has been offered to all the Muslims in Pakistan that they shall be enabled to order their lives both in individual and collective spheres in accordance with the teaching of Islam as set out in the Holy Quran and the Sunnah. Every citizen has been rendered entitled to the basic freedoms and rights enunciated by Islam. Reading of Article 2A together with Article 227 of the Constitution, all State law and acts of State functionaries have to be examined on the touchstone of the provisions of the Holy Quran and Sunnah.

7. Apart from the above, in the instant case there is also sheer non-compliance of safeguards set out in Chapter 25.23 of the Police wherein, Gazetted Police Officer supervising investigations and inspecting officers are under legal obligation to take disciplinary action against the Investigating Officer who carries out searches without sufficient justification. An officer who fails in the discharge of this obligation would himself pass for being inefficient within the framework of Efficiency and Discipline Rules, relatable to his service as well as the Police Order, 2002, exploring him to multiple proceedings.

8. In short, for the purposes of law and implementation of its provisions no room has been made for house search. The Federal Shariat Court has emphatically observed that the charge of Zina should not be casually brought to Court or publicized as it shatters the foundation of the family where female is accused in such a crime. It has been further held that "human weakness should rather be overlooked and ignored, unless committed at public places and becomes a cause of concern from the society's point of view". Reference may be made to the case "GHULAM SAKINA v. STATE" (1991 PCr.LJ 568).

9. It has been observed that the story as narrated in the F.I.R. seems to be illogical, irrational and implausible, as nobody could possibly run a brothel house in the residential area. The police officials have not obtained the search warrants for raiding the Dem.' committed ' glaring illegality in not following the mandatory provisions of section 103, Cr.P.C. and thus violated Article 14 of the Constitution of Islamic Republic of Pakistan, 1973. Considering the importance of constitutionally guaranteed rights, the language of section 103, Cr.P.C. attains pivotal significance, providing that before making a search, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situated, to attend and witness the search and may issue an order in writing to them or any of them so to do. Then only other provision in the Criminal Procedure Code, which deals with House Search, is section 165 falling in Chapter IV

which relate to investigation. Here too, a police officer has to be seized of an investigation in the first place and in aid of same he has to have reasonable grounds for believing that anything necessarily connected therewith is to be found in a place and in his opinion same has to be obtained without undue delay, he may search or cause search to be made for such thing provided he first records in writing the grounds of his belief and specify in writing, so far as possible the thing for which search is rendered mandatory. But, in this case again, I see flagrant violation of this provision of law. It is nowhere the case of the prosecution that the Investigating Officer even attempted to join any person from public in the impugned raid proceedings, but he/they refused. In the absence of any such specific excuse or explanation, the police functionaries cannot be permitted to flout the provisions of law, which otherwise, would amount to derailing the entire judicial system.

10. In this case, the police has involved the petitioner and others without any iota of evidence, by violating the statutory provisions of law, also encroached the fundamental right of the petitioner and others guaranteed under Article 14 of the Constitution of Islamic Republic of Pakistan, 1973, providing that the dignity of man and subject to law the privacy of home is inviolable. Such fundamental rights are whenever violated and complained of, the court must step into and investigate under constitutional jurisdiction to pass such order as may be found just, legal and equitable. Human dignity, honour and respect is more important than physical comforts and necessities and no attempt on the part of any person individually, jointly or collectively to detract, defame or disgrace another person .thereby diminishing, decreasing and' degrading the dignity, respect, reputation and value of life and more particularly on the part of the police officials, who are otherwise bound to protect the rights of citizens, should be allowed to go with immunity. The provision providing for the dignity of man as a Fundamental Right is unparalleled in the Constitutions and hardly Constitutions of a few countries provide such rights. It is difficult to countenance the clandestine and spurious manner in which law has been put into motion in this case. Both injunctions of Islam and the law of the land are intended to protect and preserve Fundamental Right of the Dignity of man and Privacy of his Home. Both the concepts have to be read conjunctively. Privacy of home after all, also enshrines dignity of man. It may be noted that the word "inviolable" has been used in the Constitution in respect of this right particularly. Violation of the privacy of one's house through arbitrary intrusion by the police, without authority of law is certainly condemnable being repugnant to the concept of the human rights relatable both the dignity of man and privacy of the home.

11. From perusal of sections 371-A and 371-B, P.P.C., it is very much clear that these provisions only would apply to persons who sell or purchase any person with the intent that such person would be used for the purpose of prostitution or illicit intercourse. In this case no material was available against the accused to substantiate the commission of offence. No eye-witness was available before conducting the raid, no search warrant had been obtained before raiding the Dera and police officials committed violation of section 103, Cr.P.C.

12. Non-observance of all the above legal requirements, not only give a strong impression about the mala fides of the police, but it also is indicative of the fact that this all was done by the concerned police officials in extreme haste, to cover up and shield the wrong, which they had done to the petitioner and other persons, cited as accused in the instant F.I.R.

13. In view of the above, this Court is satisfied that in the instant case the prosecution was launched for ulterior motives and mala fide just to harass the petitioner and others, whereas, there is no evidence available on the file so that accused petitioner could be convicted in the case and even otherwise, the police officials have violated the law and fundamental rights protected by the Constitution of Islamic Republic of Pakistan, 1973. As such, it appears to be high time to take legal steps to keep the government functionaries and agencies within their lawful sphere, and in this case continuation of investigation, prosecution or the trial, would amount to sheer abuse of process of law and it would not be in the ends of justice. When on the face of it F.I.R. is registered with mala fide or prosecution of a criminal case is patently against the provisions of law, or otherwise no case could possibly be made out, this Court has ample jurisdiction to quash the same, as no useful purpose would be served to keep such matters pending, rather the same would amount to abuse of process of court of law. Mere availability of alternate remedy would not constitute a bar upon the jurisdiction of this Court to entertain a constitution' petition and to exercise its jurisdiction if the circumstances so warrant. When registration of F.I.R. and proceedings thereon, are patently illegal or illegality is floating on the surface, to refuse interference under Article 199 of the Constitution of Islamic Republic of Pakistan, would in fact amount to acting in aid of injustice and plea of alternate remedy loses its legal significance.

14. For what has been discussed, the instant writ petition is allowed, consequently F.I.R. No.621 dated 21-11-2010 registered at Police Station Saddar Kamoke, District Gujra.nwala under sections 371-A andl 371-B, P.P.C., and all the proceedings thereon, are quashed.

H.B.T./G-40/L? Petition allowed.

2012 P Cr. L J 776
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD NAWAZ---Petitioner
versus
ADDITIONAL SESSIONS JUDGE/JUSTICE OF PEACE, BAHAWALPUR CAMP AT YAZMAN and 3 others---Respondents

Writ Petition No.3429 of 2008/BWP, decided on 24th February, 2011.

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

----Ss. 22-A(6), 22-B & 6---Oaths Act (X of 1873), Ss. 8, 9, 10 & 11---Constitution of Pakistan, Art. 199---Constitutional petition---Power of courts to tender oaths---Duties and powers of Justice of Peace---Scope---Registration of F.I.R.---Petitioner had filed constitutional petition against the order of Justice of Peace on the premise that Justice of Peace had no jurisdiction to decide the application under S.22-A, Cr.P.C. on special oath and even otherwise no such oath was taken by the Justice of Peace---Justice of Peace was not 'a court' within the meaning of S.6, Cr.P.C. and being an ex-officio Justice of Peace he was not only required to exercise the power during office hours but was Justice of Peace for twenty four hours and could exercise powers anywhere at any time within its territorial jurisdiction---Powers conferred upon Justices of Peace were neither judicial nor supervisory, rather they were administrative in nature and such powers had to be used within the framework of S.22-A, Cr.P.C.---Functions and directions issued by Justice of Peace could not be equated with judicial orders/judgments---Proceedings before such ex-officio Justice of Peace could not be equated with proceedings before a court of law---Justice of Peace being not a court had no authority or jurisdiction to offer special oath on the asking of the parties---Justice of Peace had erred in law and entered into a domain which was beyond his jurisdiction and decided the matter after taking oath from the parties---Impugned order of Justice of Peace was set aside being derogative of law and case was remanded to Justice of Peace to decide the matter afresh in the parameters of Ss.22-A and 22-B of Cr.P.C.---Constitutional petition was disposed of accordingly.

PLD 2007 SC 539 and Khizar Hayat v. Inspector-General of Police, Punjab, Lahore PLD 2005 Lah. 470 **ref.**

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

----Ss. 22-A(6)---Powers of the Justice of Peace---Scope.

Under section 22-A(6) a Sessions Judge is empowered to issue as ex-officio justice of peace appropriate directions to the police authorities on a complaint regarding non-registration of criminal case; transfer of investigation from one police officer to the other; to take notice of neglect, failure or excess committed by police authority in relation to its functions and duties.

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

----S. 22-A---Oaths Act (X of 1873), Ss. 8, 9, 10 & 11---Powers of Justice of Peace---Scope---Power of Court to tender oaths---Scope---Under Ss. 8, 9 & 10 of the Oaths

Act 1898, oath must be ordered during judicial proceedings and its administration should be by the court---Sessions Judge or Additional Sessions Judge while acting as Justices of Peace do not function as court, nor the proceedings before ex-officio Justices of Peace are in the nature of judicial proceedings, hence, they have no power to proceed under the mentioned provisions of the Oaths Act, to decide any controversy between the parties and only the courts where judicial proceedings are in progress and have authority to record evidence, are authorized to administer oath in discharge of their legal duties or in the exercise of powers conferred or bestowed upon them---Justice of Peace as defined in Cr.P.C., has no authority or jurisdiction to offer such oath on the asking of parties.
Khizar Hayat v. Inspector-General of Police, Punjab, Lahore PLD 2005 Lah. 470 **ref.**
Nemo for Petitioner.
Ehsan ul Haq Tanveer for Respondent No.3.
Malik Muhammad Latif, Deputy Prosecutor-General with Muhammad Aslam A.S.-I.

ORDER
MUHAMMAD QASIM KHAN, J.---Briefly the facts are that respondent No.3 (Javed Iqbal) filed an application under section 22-A, Cr.P.C. before the learned Justice of Peace seeking a direction for registration of case against the, petitioner and others. The learned Justice of Peace summoned the parties and also called for report/comments from the concerned SHO and ultimately on 18-8-2008 passed the following impugned order:--
"Present: Javaid Iqbal, petitioner in person along with his counsel
Muhammad Nawaz respondent is also present in person along with his counsel and undertakes to pay Rs.72,000 to the petitioner within one month after his satisfaction on special oath of the petitioner on Holy Quran. This petition as requested is disposed of accordingly. File be consigned to the record room after its necessary compilation within prescribed period."

2. The present petitioner/respondent before the learned Justice of Peace filed this constitutional petition against the above order dated 18-8-2008 on legal premises that learned Justice of Peace had no jurisdiction to decide the application under section 22-A, Cr.P.C. on Special Oath and that no such Oath was even taken by the learned Justice of Peace. In this behalf reliance has been placed on the case PLD 2007 SC 539.

3. The learned counsel for private respondent argued that the learned Justice of Peace passed the order after taking oath impliedly with the consent of the parties; therefore, the petitioner is now stopped from challenging the said procedure through this writ petition.

4. Heard. Record perused.
5. A Full Bench of this Court in the case "KHIZAR HAYAT v. INSPECTOR-GENERAL OF POLICE, Punjab, Lahore" (PLD 2005 Lahore 470), has already declared that Justice of Peace is not a Court within the meaning of section 6 of the Criminal Procedure Code. Being an Ex-officio Justice of Peace he is not only

required to exercise the powers during office hours but they are Justices of Peace for twenty four hours and may exercise their powers anywhere at any time within their territorial jurisdiction. The powers conferred upon Justices of Peace are neither judicial nor supervisory, rather these are administrative in nature and such powers have to be used within the framework of section 22-A of Criminal Procedure Code. Under section 22-A, Cr.P.C. the duties of the Justice of Peace have been provided, whereas, under section 22-B of the Criminal Procedure Code, the powers to exercised by them have been settled. The functions and directions issued by the Justice of Peace cannot be equated with judicial orders/judgments nor even the proceedings before the Ex-officio Justice of Peace can be equated with the proceedings before a court of law. Under section 22-A(6) a Sessions Judge is, empowered to issue as Ex-officio Justice of Peace appropriate directions to the police authorities on a regarding non-registration of criminal case; transfer of investigation from one police officer to the other; to take notice of neglect, failure or excess committed by police authority in relation to its functions and duties. But in the case in hand, the learned Justice of Peace erred in law and entered into a domain which was beyond his jurisdiction and decided the matter after taking Oath from the parties.

6. Section 9 of the Oaths Act, 1873 provides for special oath to be offered to other party or witness by any party during judicial proceedings and this oath should be made in the light of section 8 of the above Act. Section 10 provides that if the offer of administering oath is accepted then the Court shall administer oath and section 11, ibid provides that evidence so given on oath shall as against the person who offers to be bound, shall be conclusive proof of the matter stated, but all these sections provide that oath must be ordered during judicial proceedings and its administration should be by the Court. The learned Sessions Judge or learned Additional Sessions Judges while acting as Justices of Peace do not function as Court, nor the proceedings before Ex-officio Justice of Peace are in the nature of judicial proceedings, hence, they have no power to proceed under the above mentioned provisions of the Oath Act, to decide any controversy between the parties and only the Courts where judicial proceedings are in progress and have the authority to record evidence, are authorized to administer oath in discharge of their legal duties or in the exercise of powers conferred or bestowed upon them. Justice of Peace being not a Court as defined in Cr.P.C. and its status has been elucidated in the case "KHIZAR HAYAT v. INSPECTOR-GENERAL OF POLICE, Punjab, Lahore" (PLD 2005 Lahore 470), has no authority or jurisdiction to offer such Oath on the asking of the parties. As such, from any angle the learned Justice of Peace had no authority to proceed and decide the matter on special Oath, as has been done in the instant case, therefore, the impugned order of learned Justice of Peace being derogative to law, is set aside and case is remanded to the same learned Justice of Peace, where application of the respondent shall be deemed to be pending, both the parties shall appear before the learned Justice of Peace on 15-3-2011 or may be summoned and then an appropriate order shall be passed by the learned Justice of Peace afresh in the parameters of sections 22-A and 22-B of Code of Criminal Procedure, 1898. Writ petition is dispose of accordingly.

M.W.A./M-7/L Case remanded.

2012 P Cr. L J 848
[Lahore]
Before Mazhar Iqbal Sidhu and Muhammad Qasim Khan, JJ
IQBAL HUSSAIN SHAH and another---Petitioners
versus
THE STATE and 3 others---Respondents

Writ Petition No.5695 of 2010/BWP, decided on 23rd November, 2010.

(a) Criminal Procedure Code (V of 1898)---
----Ss. 204 & 540---Penal Code (XLV of 1860), Ss.109/302/452/ 148/149---Anti-Terrorism Act (XXVII of 1997), S.7---Constitution of Pakistan, Art. 199---Constitutional petition---Issue of process---Power to summon material witness or examine persons present---Scope---Non-recording of statement of witness during preliminary proceedings of complaint---Quashing of order---Trial Court, after appreciating preliminary evidence, passed its first order under S.204, Cr.P.C. and summoned all the defendant except the accused (petitioners)---Statements of complainant (respondent) and another prosecution witness were recorded after which complainant submitted an application before the Trial Court for summoning of accused in the complaint case to face trial along with the accused who had already been summoned---Said application was accepted and vide second order accused were summoned to face trial---Contentions of accused were that they had not been summoned in the first order, in presence of which second order could not be passed and first order having not been challenged by the complainant, same had attained finality; that other prosecution witness was not examined by complainant at preliminary stage during the proceedings of the complaint and that his statement was recorded much later during trial in the absence of the accused and that second order had been passed with a lapse of about two years after the first order---Validity---Both the accused were nominated by the complainant in the private complaint with the allegation of abetment/conspiracy and complainant got his statement recorded as cursory statement before Trial Court and deposed against all the persons nominated by him in the complaint as accused---Non-recording of statement of the other prosecution witness at the time of preliminary proceedings of the complaint, through which he deposed about the fact of abetment/conspiracy, did not make any difference because in the interest of justice the statement of any person can be recorded whose evidence is essential for the just decision of the case after summoning him under S.540, Cr.P.C.---Statement of complainant, wherein he categorically deposed against the accused was corroborated by the statement of the other prosecution witness---Trial Court had taken cognizance of the case and not of the accused, therefore, the court was not debarred to summon a person to face trial who was prima facie found involved in the commission of the crime alleged---Criminal Procedure Code, 1898 was applicable to the proceedings carried out by the courts constituted under Anti-Terrorism Act, 1997, therefore, Trial Court was competent to summon the accused in the complaint to face trial---Order passed under S.204, Cr.P.C. was not to be equated with judgment under S.265-H, Cr.P.C. and its alteration in review under S.369, Cr.P.C. because such order was not to be treated as judgment or final order---Trial

Court was competent to pass the second (impugned) order and it did not amount to reviewing its first order, as fresh material was brought before the Court--- Constitutional petition was dismissed in circumstances.
Abdul Hussain Sana v. Suwalal Agarwala and another PLD 1962 SC 242 and Haji Junnat Lal v. The State and another PLD 2001 SC 433 **ref.**
Muhammad Ashraf v. The State and another 1995 SCMR 894; Sohno v. The State and another 1990 PCr.LJ 1190 and Zahid Anwar Wahla v. Muhammad Amin and another 1993 PCr.LJ 1585 **rel.**

(b) Criminal Procedure Code (V of 1898)---
----S. 540---Power to summon material witness---Scope---Non-recording of statement of witness during preliminary proceedings of complaint---Statement of any person can be recorded in the interest of justice, whose evidence is essential for the just decision of the case after summoning him under S.540, Cr.P.C. as ample powers have been given to the Trial Court under the said section.

(c) Criminal Procedure Code (V of 1898)---
----S. 540---Power to summon material witness---'Summoning' and 'conviction'---Distinction---Summoning of a person to face trial does not mean conviction, it is only a notice to the person so summoned to defend him against the charge alleged against him.

(d) Criminal Procedure Code (V of 1898)---
----S. 204---Issue of process---Scope---'Issue of process' and 'judgment'---Distinction--- Order passed under S.204, Cr.P.C. empowers the court to proceed with the trial against whom the complaint has been instituted, therefore, same cannot be treated as judgment or final order, whereas, the word "judgment" denotes the final order passed after complete rehearsal of the trial by a competent court.

(e) Judgment---
----Meaning and scope.

Mumtaz Hussain Bazmi and Rehan Malik for Petitioners.
Malik Muhammad Hanif, Deputy Prosecutor-General on Court's Call.

ORDER
Iqbal Hussain Shah and Aghaz Shah (petitioners) have called in question order dated 11-11-2010 passed by learned Judge Anti-Terrorism Court, Bahawalpur, whereby petitioners were summoned to face trial in a private criminal complaint titled "Allah Ditta v. Iqbal Hussain Shah, etc."

2. Brief facts giving rise to the filing of instant petition are that Allah Ditta respondent No.2 instituted a criminal complaint against seventeen persons including the present petitioners under sections 109, 302, 452, 148, 149, P.P.C. read with section 7 of the Anti-Terrorism Act, 1997 in the court constituted under the above Act, at Bahawalpur. The complaint was filed for the commission of murders of

Ibrahim, Mst. Faizan Mai, Mst. Ruqia Mai, Mst. Zainat, Mst. Hifza, Mst. Hansa and Muhammad Yousaf. In the complaint allegations of abetment/conspiracy were levelled against both these petitioners. After admission of complaint, cursory evidence was produced before the learned trial Court, after appreciating the preliminary evidence the learned trial Court passed an order under section 204, Cr.P.C. on 11-8-2008 and summoned all the respondents mentioned in the complaint except the petitioners. After procuring the attendance of the respondents pre trial formalities were observed and then the accused were indicted on 17-3-2009 under different heads of the charge-sheet. During trial statement of Allah Ditta complainant was recorded as P.W.1 and statement of Rab Nawaz was recorded on the same day as P.W.2. Both the P.Ws. were not cross-examined and cross-examination was reserved on the request of accused persons. After recording of said two statements, the complainant Allah Ditta (respondent No.2) submitted an application before the learned trial court praying for the summoning of the petitioners in the complaint case to face trial along with accused who had already been summoned. The said application was accepted and petitioners were summoned by the learned trial court vide order dated 11-11-2010, hence, the instant writ petition.

3. In support of writ petition, it has been argued that the learned trial Court could not review its previous order dated 11-8-2008 as in that order the petitioners had not beep summoned and the said order was still in the field, in presence of same second order dated 11-11-2010 could not be passed and same is liable to be set aside. Learned counsel has criticized the statement of P.W.2 namely Rab Nawaz who allegedly claimed to have overheard the incident of conspiracy allegedly hatched up between the petitioners and their co-accused, was not examined by the complainant at preliminary stage during the proceedings of the complaint in cursory evidence, whereas, his statement was recorded much later during the trial while passing of the first order dated 11-8-2008. Further argued that his statement cannot be taken into consideration as it had been recorded in the absence of the petitioners and was yet to be cross-examined in order to test the veracity of said witness. Further submits that the complainant did not challenge the order dated 11-8-2008 whereby the petitioners were not summoned, as such the same has attained finality. The learned counsel has vehemently submitted that no provision in the Code of Criminal Procedure exists to empower the learned trial court to review its earlier order therefore, the impugned order is bad in the eyes of law. The learned counsel has further argued that impugned order has been passed with a lapse of about two years after the first order which fact may also be taken into consideration while deciding the instant petition. In support of his contentions learned counsel has placed reliance on the case "ABDUL HUSSAIN SANA v. SUWALAL AGARWALA and another" (PLD 1962 SC 242) and, "HAJI JUNNAT LAL v. THE STATE and another" (PLD 2001 SC 433).

4. We have heard the learned counsel for the petitioners and also sought assistance from the learned Deputy Prosecutor-General who has entered appearance on court's call.

5. It has been noticed by us that both the petitioners were nominated by the complainant/respondent No.2 in the private complaint with the allegation of abetment/conspiracy and he got his statement recorded as cursory statement before the learned trial Court and deposed against all the persons nominated by him in the complaint as accused. So far as non-recording of statement of Rab Nawaz P.W.2 at the time of preliminary proceedings of the complaint who has deposed about the fact of conspiracy/abetment, is concerned, it does not make any difference because in the interest of justice the statement of any person can be recorded whose evidence is essential for the just decision of the case after summoning him under section 540, Cr.P.C. as ample powers have been given to the learned trial Court under the said section. We have noted from the list of prosecution witnesses available on the file and name of the said P.W. has been mentioned therein and also gone through the statement of the complainant recorded as P.W.1, wherein he has categorically deposed against the petitioners and his statement has been corroborated by the statement of Rab Nawaz P.W.2. We are conscious of the fact that when the court is seized of the trial then can pass any appropriate order in the circumstances of the case. Here, the learned trial Court has taken the cognizance of the case not of the accused, therefore, the court is not debarred to summon a person who is prima facie found involved in the commission of the crime alleged to face trial.

Summoning of a person to face trial does not mean conviction, it is only a notice to the person so summoned to defend him against the charge alleged against him. In this context reference may be made to section 193, Cr.P.C. which gives vast powers to the Sessions Court after taking cognizance of the offences in this respect.

6. The Code of Criminal Procedure, 1898 is applicable to the proceedings carried out by the courts constituted under Anti-Terrorism Act, 1997; therefore, the learned trial court was competent to summon the petitioners in the complaint case to face trial. Furthermore, an order passed under section 204, Cr.P.C. is not equated with judgment passed under section 265-H, Cr.P.C. and its alteration in review under section 369, Cr.P.C. because that order is not to be treated as judgment.

7. An order passed under section 204, Cr.P.C. empowers the court to proceed with the trial against whom the complaint has been instituted, therefore, same cannot be treated as judgment or final order, whereas, the word **"judgment"** denotes the "final order passed after complete rehearsal of the trial by a competent court". In this legal situation, it cannot be said that the learned trial Court was not competent to pass the impugned order dated 11-11-2010. It does not amount to review its previous order, as fresh material was brought before Court, relying on the same impugned order has been passed. We have been fortified by the principles laid down in the following reported judgments with regard to power of learned trial Court for summoning a person in the case. "MUHAMMAD ASHRAF v. THE STATE and another" (1995 SCMR 894), "SOHNO v. THE STATE and another" (1990 PCr.LJ 1190) and "ZAHID ANWAR WAHLA v. MUHAMMAD AMIN and another" (1993 PCr.LJ 1585). The petition being devoid of force is dismissed in limine.
M.W.A./I-6/L Petition dismissed.

2012 P Cr. L J 878
[Lahore]
Before Sh. Ahmad Farooq and Muhammad Qasim Khan, JJ
Rana SHAHID MASIH---Petitioner
versus
THE STATE---Respondent

C.M. No.1 of 2011 in Criminal Appeal No.864 of 2009, decided on 4th July, 2011.

(a) Criminal Procedure Code (V of 1898)---
----S. 426(1-A)(c), proviso (since omitted)---Suspension of sentence---Bail---Word "dangerous" used in the proviso to S. 426(1-A(c)---Meaning---Word "dangerous" used in proviso to S.426(1-A)(c), Cr.P.C. should be construed in its ordinary sense, which means horrible effects of an offence against society at large---Distinction is to be made between "an offence committed against an individual like theft or injury" and "an offence directed against the society as a whole for the purposes of bail"---Effects of smuggling and unlawful selling of narcotics are disastrous on the moral, social fabric of the society and accused of such offences have the potential of destroying the health and family life of a large number of people in addition to bringing a bad name for the country---Heroin, "charas" or other substance covered by Control of Narcotic Substances Act, 1997, were declared dangerous drugs basically on account of their dangerous effects on the society---Meaning of word "dangerous" can be ascertained in the light of the conduct of accused at the time of his arrest, his previous conduct, nature of offence coupled with its effect on society, his betrayal with reference to moral duties---If the word "dangerous criminal" is to be considered as previous convict, then the word "dangerous criminal" used in proviso of S.426(1-A)(c), Cr.P.C. would become completely redundant and meaningless.

(b) Criminal Procedure Code (V of 1898)---
----S. 426(1-A)(c), 1st proviso---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Suspension of sentence on ground of delay in decision of appeal, refusal of---Accused had been sentenced to imprisonment for life for having 100 kilograms of "charas" in his possession---Offence committed by accused was likely to destroy the fabric of society---Such narcotic peddlers commit these crimes not only consciously but in a well-planned manner irrespective of their hazardous impact on the society---Accused could be safely considered a "dangerous criminal" within the meaning of first proviso to S.426(1-A)(c), Cr.P.C. and he could not claim benefit of said provision of law---Petition was dismissed accordingly.
Muhammad Asghar v. The State 1992 MLD 1554 and The State through Deputy Director, Anti-Narcotics Force, Karachi v. Mobin Khan 2000 SCMR 299 **ref.**

(c) Criminal Procedure Code (V of 1898)---
----S. 426(1-A)(c), 1st proviso---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Suspension of sentence---"Dangerous criminal"---Connotation---Persons dealing in large quantity of heroin can safely be termed as "dangerous".
Muhammad Asghar v. The State 1992 MLD 1554 **ref.**

(d) Criminal Procedure Code (V of 1898)---
----S. 497(1), third proviso---Control of Narcotic Substances Act (XXV of 1997), Ss.51(1) & 9(b), (c)---Bail on ground of statutory delay---Third proviso to subsection (1) of S.497, Cr.P.C. cannot be pressed into service in view of subsection (1) of S.51 read with Cls.(b) & (c) of S.9 of the Control of Narcotic Substances Act, 1997, in a case in which the quantity of narcotic drug or psychotropic substance or controlled substance exceeds one Kg and which may entail, inter alia, death sentence.
The State through Deputy Director, Anti-Narcotics Force, Karachi v. Mobin Khan 2000 SCMR 299 **ref.**

Azam Nazeer Tarrar for Petitioner.
Tariq Mehmood Sipra and A.D. Nasim, Special Prosecutor for Anti-Narcotic Force.
Ikhlaq Ahmad, Deputy Prosecutor-General on Court's call.

ORDER
Criminal Miscellaneous No.1 of 2011.

MUHAMMAD QASIM KHAN, J.---Through the instant application, Rana Shahid Masih has sought suspension of sentence (imprisonment for life with fine of Rs.10,00,000, in default to further undergo six months' simple imprisonment) awarded by learned Judge Special Court, Control of Narcotic Substances, Faisalabad vide judgment dated 27-4-2009 recorded in a case arising out of F.I.R. No.14 of 2005 dated 17-12-2005 under section 9(c) of the Control of Narcotic Substances Act, 1997 registered at Police Station ANF-Faisalabad, wherein, allegation against the petitioner was of possessing 100-kilogram of charas, at the time of raid and subsequent arrest.

2. It has been argued by learned counsel for the petitioner that appeal of the petitioner could not be decided despite lapse of two years and delay in the decision of the appeal cannot be attributed to the petitioner. The learned counsel further argued that considering the heavy backlog, the appeal of the petitioner is also not likely to be fixed and decided in the near future, as such the learned counsel pleaded that in view of section 426(1-A)(c), Cr.P.C. the petitioner has become entitled for the suspension of sentence and release on bail, on statutory ground of delay in decision of the appeal.

3. Conversely the learned Special Prosecutor representing Anti-Narcotic Force assisted by learned Deputy Prosecutor-General, after opposing the case of the petitioner on merits, strenuously argued that proviso of section 426(1-A)(c), Cr.P.C. specially excludes the persons who are hardened, desperate or dangerous criminals, and present petitioner being involved in transportation of a huge quantity of narcotic (Charas) is covered by the phrase "dangerous criminal", as such is not entitled for the grant of bail, or suspension of his sentence on statutory ground alone.

4. We have heard the arguments of learned counsel for the parties at considerable length and perused the available record.

5. So far as merits of the case are concerned, we would not like to comment much, as any observation at this stage, may cause prejudice to either of the parties at the time of final hearing of the main appeal. However, the moot point in this case is, whether the petitioner, who is involved in the offences covered by Control of Narcotic Substances Act, 1997, could be termed as "dangerous criminal" and while declaring him so, could he be denied the benefit of section 426(1-A)(c), Cr.P.C.

6. The word "dangerous" used in proviso to section 426(1-A)(c), Cr.P.C. should be construed in its ordinary sense, which means horrible effects of an offence against society at large. Needless to mention here that a distinction is to be made between an offence which is committed against an individual like theft/injury and an offence, which is directed against the society as a whole for the purposes of bail. The effects of smuggling and unlawful selling of narcotics are disastrous on the moral, social fabric of the society and accused of such offences had the potential of destroying the health and family life of a large number of people in addition to bringing a bad name for the country. The heroin/charas (or other substance covered by (CNSA), were declared dangerous drugs in 1930 basically on account of their dangerous effects on society. Meaning of word "dangerous" can be ascertained in the light of the conduct of accused at the time he was arrested, his previous conduct, nature of offence coupled with its effect on society, his betrayal with reference to moral duties. If the word "dangerous criminal" is to be considered as previous convict, then the word "dangerous criminal" used in proviso of section 426(1-A)(c), Cr.P.C. would become completely redundant and meaningless. Therefore, opinion on this point could be formed upon the material available in case under trial as well any other material, which may be produced by the prosecution. In an earlier case "MUHAMMAD ASGHAR v. THE STATE" (1992 MLD 1554), this Court had already declared that persons dealing in large quantity of heroin could safely be termed as "dangerous", and while holding so, accused despite expiry of statutory period, was refused bail.

7. A Full Bench of the Hon'ble Supreme Court of Pakistan, in the case "THE STATE through Deputy Director Anti-Narcotics Force, Karachi v. MOBIN KHAN" (2000 SCMR 299), has held that "Third proviso to subsection (1) of section 497, Cr.P.C., cannot be pressed into service in view of subsection (1) of section 51 read with Cls. (b) and (c) of section 9 of the Control of Narcotic Substances Act, 1997, in a case in which the quantity of narcotic drug or psychotropic substance or controlled substance exceeds one kg. and which may entail, inter alia, death sentence."

8. For what has been discussed above, we have no doubt in our mind to hold that the petitioner, who has been convicted for an offence which was likely to destroy the fabric of society. Such narcotic peddlers commit these crimes not only consciously but also in a well-planned manner, irrespective of its hazardous impact on the society. Therefore, seen from any angle, the petitioner can be considered a "dangerous criminal", within the meaning of Ist proviso to section 426(1-A)(c), Cr.P.C., and as such, he cannot claim benefit of the said provison of law. The instant petition, being devoid of any merit, is accordingly dismissed.
N.H.Q./S-129/L Petition dismissed.

2012 P Cr. L J 1082
[Lahore]
Before Muhammad Qasim Khan, J
AMEER MAI---Petitioner
Versus
JUSTICE OF THE PEACE, YAZMAN, and 3 others---Respondents

Writ Petition No.934 of 2011/BWP, decided on 22nd February, 2011.

(a) Criminal Procedure Code (V of 1898)---
----Ss. 22-A, 107 & 151---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Powers of Justice of Peace---Scope---Application for registration of F.I.R.---Security for keeping the peace---Arrest to prevent cognizable offences---Applicant (petitioner) had assailed the order passed by Justice of Peace whereby on an application filed under S.22-A, Cr.P.C., applicant sought registration of case but concerned S.H.O. was directed to obtain bonds from both the parties and to take precautionary measures under Ss.107 & 151, Cr.P.C.---Applicant's application under S.22-A, Cr.P.C. showed that applicant along with others were severely beaten but there was no medical certificates available on file in support of their contention, which fact might have established the commission of the alleged offence---Said application also showed that there was a dispute between the parties about a sugar cane crushing machine installed by the respondents in front of the house of the applicant, which became a source of nuisance for the applicant but report by S.H.O. showed that no such occurrence had taken place---Disputed factual controversy between the parties required determination through detailed inquiry/ recording of evidence, which exercise could not be undertaken while discharging jurisdiction under Article 199 of the Constitution of Pakistan and thus direction for registration of case could not be issued---Constitutional petition was disposed of accordingly.
Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 SC 691; Muhammad Ali v. District Police Officer and others 2008 PCr.LJ 467; Muhammad Younus Khan and 12 others v. Government of N.-W.F.P. through Secretary, Forest and Agriculture, Peshawar and others 1993 SCMR 618; Muhammad Saleem Bhatti v. Syed Safdar Ali Rizvi and 2 others 2006 SCMR 1957 ref.

(c) Criminal Procedure Code (V of 1898)---
----Ss. 22-A, 107 & 151---Constitution of Pakistan, Art.199---Constitutional petition--- Powers of Justice of Peace--- Scope---Application for registration of F.I.R---Security for keeping peace---Arrest to prevent cognizable offences---Applicant (petitioner) had assailed the order passed by Justice of Peace whereby on an application filed under S.22-A, Cr.P.C., applicant sought registration of case, but concerned S.H.O was directed to obtain bonds from both the parties and to take precautionary measures under Ss.107 & 151, Cr.P.C.---Impugned order to the extent of directing the S.H.O (respondent) to obtain bonds and to adopt preventive measures under Ss.107 & 151, Cr.P.C. against the parties, in the facts and circumstances of the case, was an order which on the face of it had been issued in haste as Justice of Peace himself had found that there was no severe motive between the parties and mere fact

that some occasional enmity existed between the parties was not at all a ground to warrant such an action as contemplated under S.107, Cr.P.C.---Justice of Peace could call upon officers within his local area to aid him in the prevention of breach of peace or a disturbance of the public tranquillity, therefore, Justice of Peace ought to have opted for an inquiry or at least must have satisfied his conscience that circumstances in between the parties were such which could result in serious repercussions like breach of peace and disturbance of public tranquillity---Justice of Peace on the basis of an allegation levelled by the complainant in an application under S.22-A, Cr.P.C., without considering the requirements as mandated under Ss.107 and 151, Cr.P.C. directed the S.H.O. to proceed against the parties, therefore, impugned order to the extent of direction to S.H.O. for obtaining surety bond from both the parties and taking preventive measures under Ss.107 and 151, Cr.P.C., was set aside---Constitutional petition was disposed of accordingly.

(c) Criminal Procedure Code (V of 1898)---
----S.107---Security for keeping peace---Scope---Bare possibility of breach of peace is not enough to justify proceedings under S.107, Cr.P.C.
1980 PCr.LJ 126 ref.

(d) Criminal Procedure Code (V of 1898)---
----S. 151---Arrest to prevent cognizable offences---Scope---Under S.151, Cr.P.C. a police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented, however, but arrest made by police officer without any emergency as contemplated by S.151, Cr.P.C. is patently illegal.

1993 PCr.LJ 102 ref.
Sardar Afzaal Ahmad for Petitioner.
Muhammad Naveed Khalil, Assistant Advocate-General for Respondents.
Date of hearing: 22nd February, 2011.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---With the concurrence of learned counsel for the parties, this matter is being decided as PAKKA case.

2. Through this writ petition Mst. Ameer Mai the petitioner has assailed the order dated 10-2-2011 passed by learned Justice of Peace whereby on a petition filed by the petitioner under section 22-A, Cr.P.C. seeking registration of case, instead the concerned SHO has been directed to obtain bonds from both the parties and to take precautionary measures under sections 107/151, Cr.P.C.
2(sic.) Heard.

3. A perusal of the application filed by the petitioner before the learned Justice of Peace for registration of case although shows that petitioner along with others were severely beaten but there are no medical certificates available on the file in support of

their contention, which fact might have established the commission of the alleged offence. Furthermore, para-2 of the said application also shows that there is a dispute between the parties about a sugarcane crushing machine installed by the respondents in front of the house of the petitioner, which became the source of nuisance for the petitioner resulting in the filing of this petition. A report called by the learned Justice of Peace from the concerned SHO is also available on the file, according to which no such occurrence had taken place. The learned Justice of Peace by considering all these facts declined to issue direction for registration of case. Furthermore, the petitioner has an alternate remedy of filing of private complaint against the respondents, the petitioner may avail the same, if so advised.

4. The stance canvassed in this petition rested on disputed factual controversy requiring determination through detailed inquiry/recording of evidence, which exercise cannot be undertaken while discharging jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Thus, direction for registration of case cannot be issued. Reference can be made to the cases "RAI ASHRAF and others v. MUHAMMAD SALEEM BHATTI and others" (PLD 2010 SC 691), "MUHAMMAD ALI v. DISTRICT POLICE OFFICER and others" (2008 PCr.LJ 467), "MUHAMMAD YOUNUS KHAN and 12 others v. GOVERNMENT OF N.-W.F.P. through Secretary, Forest and Agriculture, Peshawar and others" (1993 SCMR 618) and "MUHAMMAD SALEEM BHATTI v. Syed SAFDAR ALI RIZVI and 2 others" (2006 SCMR 1957).

5. However, the impugned order to the extent of directing the respondent/SHO to obtain bonds and adopt preventive measures under section 107/151, Cr.P.C. against the parties, in the facts and circumstances of this case, is an order which on the face of it has been issued in haste. Once the learned Justice of Peace himself held that, there was no severe motive between the parties, mere fact that some occasional, enmity or ill-feeling exist between the parties was not at all a ground to warrant such an action as contemplated in section 107, Cr.P.C. Bare possibility of breach of peace is also not enough to justify proceedings under section 107, Cr.P.C. Reference may be made to the case reported in 1980 PCr.LJ 126. Section 107, Cr.P.C. shows that only Magistrate of the Ist Class on receiving information and having formed an opinion that there are sufficient grounds for proceeding, then he may proceed under section 107, Cr.P.C. Under section 151, Cr.P.C. a police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented but arrest made by the police officer without any emergency as contemplated by section 151, Cr.P.C. is patently illegal. Reference may be made to the case reported in 1993 PCr.LJ 102. The Justice of Peace can call upon police officer within his local area to aid him in the prevention of a breach of peace or a disturbance of the public tranquillity. Therefore, before proceeding under this section, the learned Justice of Peace ought to have even opted for an inquiry or at least must have satisfied his conscience that circumstances in between the parties were such which could result in serious repercussions like breach of peace and disturbance of the public tranquillity. Whereas, in the case in

hand, the learned Justice of Peace just on the basis of an allegation levelled by the petitioner side in an application under section 22-A, Cr.P.C. in a slipshod manner and without considering the requirements as mandated in section 107 or 151, Cr.P.C. directed the SHO to proceed against both the parties within the meaning of sections 107 and 151 of Criminal Procedure Code, 1898. Therefore, the impugned order of the learned Justice of Peace to the extent of above direction to the SHO for obtaining surety bond from both the parties and taking preventive measures under sections 107/151, Cr.P.C., is set aside and this writ petition is disposed of accordingly.

M.W.A./A-15/L Order accordingly.

2012 P L C (C.S.) 772
[Lahore High Court]
Before Muhammad Qasim Khan, J
IGNEES MARIA and another
Versus
DISTRICT COORDINATION OFFICER, DISTRICT BAHAWALNAGAR and 2 others

Writ Petitions Nos.2205, 1548, 2961, 2850, 3661, 1699, 1515, 1531, 2226, 3292, 2851, 2787, 3814 and 1563 of 2010/BWP, decided on 30th November, 2010.

(a) Maxim---
----A communi observantia non est recedendum---Meaning---When law requires a thing to be done in a particular manner, it has to be done in that way, otherwise it has no sanctity in the eyes of law.

(b) Interpretation of Constitution---
----Checks and balances---Scope---Success of whole system of developed society depends upon checks and balances---Where Constitution or relevant statutes bestow power on some authority, at the same time it has been ensured that such power or authority does not go unchecked or unbridled.

(c) Constitution of Pakistan---
----Art. 199---Constitutional jurisdiction---Scope---Illegal order---If any order is passed without lawful authority and without jurisdiction, High Court can look into such illegal exercise.

(d) Constitution of Pakistan---
----Art. 199---Constitutional petition---Maintainability---Civil service---Recruitment---Eligibility and fitness---Scope---If eligibility and fitness is with regard to fresh appointment and all appointment matters if based on mala fide, without lawful authority or result of exercise of defective jurisdiction, the same can be validly thrashed by High Court in exercise of its Constitutional jurisdiction..
PLD 1974 SC 139; 1975 PLC 781 and 1976 PLC 638 rel.

(e) Constitution of Pakistan---
----Arts. 4, 14, 18 & 199---Punjab Contract Appointment Policy, 2004---Constitutional petition---Illegal appointments---Petitioners were aggrieved of selection process adopted by authorities for appointment in question---Contention of petitioners was that the appointments were violative of Punjab Contract Appointment Policy, 2004---Plea raised by authorities was that there were only minor procedural lapses having gone through the entire relevant record---Validity---Irregularities agitated by petitioners and established on record were not minor procedural lapses rather were all violative of basic scheme of recruitment, which had gone to the root of entire selection process and such illegality conducted process could not be protected under any canon of law---High Court being custodian of fundamental rights could

validly issue writ, direction or order in exercise of its authority---Officials ignored procedure provided by government for recruitment and also did not constitute Recruitment Committee in accordance with law---Such fact created frustration and hatred in the minds of ignored applicants and was hit by Art.14 of the Constitution---By depriving legible candidates, authorities refused rights of persons having better qualification and entitled to be appointed and infringed rights of profession guaranteed by Art.18 of the Constitution and called for interference by High Court to strike down the same to ensure protection of citizen---High Court declared entire recruitment process in question as illegal, coram non judice based on nepotism, colourable exercise of jurisdiction, violative of fundamental rights guaranteed by the Constitution and set aside the same---Petition was allowed accordingly.
Muhammad Suleman v. Additional Deputy Commissioner (General) Lahore Cantt PLD 2000 Lah. 262; Dr. Ikramullah v. District Coordination Officer, Gujranwala and 6 others 2004 PLC (C.S.) 921; Dr. Muhamamd Sadiq Saleem v. Secretary Health, Government of Punjab, Lahore and 6 others 2008 PLC (C.S.) 25; Dr. Najam Iqbal Ahmed v. Province of Punjab and others Writ Petition No.1916 of 2007-BWP; K.M. Asaf v. Abdullah Malik and another 1975 PLC 781; Province of West Pakistan v. Raja Bashir Muhamamd Khan PLD 1983 Lah. 53; Sahib and 3 others v. The State 1990 MLD 1161; Muhammad Jafar Tarar v. District Magistrate Gujranwala and another 1990 CLC 281; CHIEF SECRETARY PUNJAB and others v. ABDUL RAOOF DASTI 2006 PLC (CS) 1278 and Abdul Jabbar Memon and others Human Rights Cases 1996 SCMR 1349 ref.

(f) Locus poenitentiae, principle of---
----Ill gotten gains---Scope---Principle of locus poenitentiae cannot be pressed into service to protect ill gotten gains---If some benefit has been obtained in sheer disregard to settled procedure and it also has been done by tarnishing rights of other eligible persons, then such benefit cannot be maintained perpetually.

(g) Fundamental Rights---
----Fundamental rights are not static document and should be interpreted in the light of needs of the day.

(h) Constitution of Pakistan---
----Art. 2A---Objectives Resolution---Scope---Objectives Resolution casts a heavy duty upon Executive, Legislature and Judiciary to be more careful with regard to fundamental rights of citizens as such rights have been awarded by divine, respect and announced by the Holy Prophet (PBUH).

(i) Good governance---
----Public functionaries---Duties---Every public functionary is supposed to function in good faith honestly and within precincts of its powers so that person concerned should be treated in accordance with law.

Miss Samina Qureshi, Ch. Shafi Muhammad Tariq, Ahmad Mansoor Chishti, Ch. Riaz Ahmad, Abdul Rasheed Rashid and Mian Noor Ali Watoo, for Petitioners.

Muhammad Aslam Khan Dhukar, Abdul Khaliq Sadozai, Mian Faiz-ul-Hassan, Abdul Ghaffar Chughtai, Mian Muhammad Jabbar, Malik Mumtaz Akhtar, A.-A.-G., Aizaz Ahmad Khan, Executive District Officer (Education) Bahawalnagar, Mrs. Fozia, District Education Officer (SE), Bahawalnagar, Mrs. Imtiaz Kausar, Deputy District Education Officer (WE) Bahawalnagar; Abdul Qayum, Assistant from the office of DEO (SE), Bahawalnagar, Javed Ahmad Bajwa Deputy District Education Officer- Fortabbas, Qaim Ali Khan, Deputy District Education Officer , Minchinabad, Shoukat Ali Lodhi, Deputy District Education Officer-Haroonabad for Respondents.
Date of hearing: 30th November, 2010.

JUDGMENT
MUHAMMAD QASIM KHAN, J.--- As all following matters arise out of almost similar facts and circumstances, therefore, are being decided by means of this single judgment:---
(1) Writ Petition No.1548 of 2010 titled as "Shafqat Nadeem and others v. DCO, Bahawalnagar, and others"
(2) Writ Petition No.2961 of 2010 titled as "Muhammad Aslam v. Dy.DEO(M), Bahawalnagar, and others"
(3) Writ Petition No.2850 of 2010 titled as "Muhammad Sajid and others v. EDO, Bahawalnagar, and others"
(4) Writ Petition No.3661 of 2009 titled as "Muhammad Hanif v. DCO, Bahawalnagar, and others"
(5) Writ Petition No.1699 of 2010 titled as "Muhammad Ishtiaq v. EDO (E), Bahawalnagar, and others"
(6) Writ Petition No.1515 of 2010 titled as "Tanvir Hussain v. DCO, Bahawalnagar, and others"
(7) Writ Petition No.1531 of 2010 titled as "Muhammad Asghar Javed v. DCO, Bahawalnagar, and others"
(8) Writ Petition No.2226 of 2010 titled as "Muhammad Shafiq v. DCO, Bahawalnagar, and others"
(9) Writ Petition No.3292 of 2010 titled as "Amir Saeed and othersv. EDO(E), Bahawalnagar, and others"
(10) Writ Petition No.2851 of 2010 titled as "Hafiz Muhammad Hassan and others v. EDO, Bahawalnagar, and others"
(11) Writ Petition No.2787 of 2010 titled as "Muhammad Idrees v. DCO, Bahawalnagar, and others"
(12) Writ Petition No.3814 of 2010 titled as "Ahmad Khan and others v. DCO, Bahawalnagar, and others"
(13) Writ Petition No.1563 of 2010 titled as "Hasnain Ahmad and others v. EDO, Bahawalnagar, and others"

2. Briefly stated the facts are that Executive District Officer (Education) Bahawalnagar/respondent No.2 through press advertisement dated 4-3-2010 flashed in local newspapers invited applications for numerous posts of Class- IV employees as Naib Qasid, Waterman, Chowkidar, Mali, Security Guard, etc. in different

Government Higher Education and Secondary Schools (Girls/Boys), all over District Bahawalnagar. It may be clarified here that according to the said advertisement each post was School specified and this recruitment was to be made according to Punjab Contract Policy, 2004 for a period of three years. It is also provided in the said advertisement itself that 20% quota was reserved for the children of Government Employees (BPS-1 to 5), 5% quota was reserved for women, 5% for minorities and 2% for disabled persons. Minimum qualification for the post of L.A. (Lab Assistant) was set as matriculate and for all other posts the candidates were required to at least literate. All the applicants were further required to submit their candidatures till 15-3-2010 in complete form. Through these writ petitions the petitioners who had also submitted/or intended to file their candidatures for respective vacant posts but either they could not file their applications or ultimately were not recruited, have impugned the entire recruitment process mainly and precisely on the following grounds:---

(a) The persons from outside Tehsils were imported and recruited against vacant posts just to accommodate political figures of a specified political party and that too without even in-time receipt of their formal applications, as such local deserving residents were denied the opportunity;

(b) The quota reserved for various categories i.e. for 5% for minorities, 20% for children of government employees, 2% disables, and 5% for women etc. was outright ignored in the entire selection process;

(c) All the recruitment process, according to the petitioners, was bad in law, as the said process was not carried on by a competently formulated Recruitment Committee;

(d) Interview marks were awarded to different applicants without observing any criteria, in an arbitrarily manner by ignoring the deserving candidates in terms of their qualifications, etc.

(e) All the appointees of Tehsil Minchianabad and Bahawalnagar had not applied against the posts where they were appointed.

On the other hand, learned Additional Advocate-General assisted by learned counsel representing the private respondents mainly attacked the maintainability of these writ petitions by contending that the aggrieved persons must have availed the alternate remedy available to them; the recruitment process with regard to eligibility and fitness of persons, was entirely within the domain of Executive, as such, this Court could not interfere in such affairs and even otherwise, the petitioners approached this court with considerable delay. Further they also defended the entire recruitment process by arguing that quota with regard to different categories was observed. Further argued that there was no such compulsion upon the recruitment committee to only consider the residents of within Tehsil limits and only condition in this behalf was that candidate must be the resident of District Bahawalnagar, as such, appointment of persons from other Tehsil is not violative of any provision of the Recruitment Policy. Further it has been argued that Selection Committee is only advisory authority and after its recommendations it has nothing to do with the issuance of appointment letters. The learned counsel for private respondents added that after issuance of appointment letters, the respondents have joined their respective places of posting, as such, valuable right has accrued in their favour which cannot be taken away, especially when lot of them have not been arrayed as respondents nor

any notices have been issued to them. Even otherwise, according to the learned counsel procedural defects or questions of facts could not be determined by this Court in these proceedings.

3. I have considered, the above arguments of learned counsel for the parties and have also gone through the entire record before me.

4. In this case after submission of report and parawise comments from the official respondents and examining the record, there appeared some glaring procedural defect and illegalities, as such, the respondents authorities were directed to bring the original record of entire recruitment process, right from the receipt of applications till issuance of appointment letters. In compliance with the court order, produced the respective record which has been produced and perused.

5. Further to ensure that all the newly appointed employees are represented and heard before passing the final judgment, as directed by this Court, the official respondents have placed on file reports about the fact that all the newly appointed Class-IV employees had been served with notice so that they may either appear in person or through counsel to defend their cause before this Court, all these reports are available on the record. Pursuant to these notices, a large number of newly appointed Class-IV employees appeared before this Court in person or through their Pleaders and put their version.

6. There is no dispute amongst all the parties that recruitment of Class-IV employees, impugned in these writ petitions, had to be governed by Recruitment Policy, 2004 No.SOR-IV(S&GAD)10-1/2003, issued by Government of the Punjab and circulated to almost all departmental heads of Province of Punjab and a perusal of the said policy would make it clear that policy makers took maximum care to ensure that entire recruitment process not only remains transparent at every level but also that equal rights to every interesting candidates are made available to them without any sense of insecurity in any mind, that is why respective quota seats were reserved for various categories like government employees children, minorities, disables and women. The said delicately framed policy also makes it clear that almost nothing had been left at the discretion of any of the individual and in this regard the principles set in Punjab Civil Servants Act and Punjab Civil Servants (Appointment and Conditions) of Service Rules, 1975 had been made the guidelines. Considering the facts of the cases in hand, it may be observed that under Clause 10(d) of the said Policy a Departmental Selection Committee at District Level had to be formulated for appointments against posts from BS-1 to 10 and the said Committee must have consisted of:---

(i)	Executive District Officer concerned	Chairman
(ii)	Executive District Officer (F&P)	Member
(iii)	District Officer (Coord)	Member
(iv)	Appointing Authority concerned (If other then the EDO concerned)	Member

(v)	One member to be nominated by the Administrative Department with the approval of Minister Incharge.	Member
(vi)	District Officer concerned	Member/ Secretary

The formation of the above Selection Committee also shows that senior officers had been inducted therein apart from one members who had to be nominated by the Administrative Department with the approval of Minister concerned. This all had been done with obvious reason that high rank government officers would not only ensure transparency but they would also be able to resist any untoward attempt to frustrate the selection process and further induction of a Member with the approval of Minister concerned also is an indication that he might be able to participate in the selection process, check its niceties and then if feels may submit an report to the Departmental Head and to the concerned Minister about the transparency of the process, who ultimately had to check the entire recruitment process. So much so, the said framers of the said Policy also took note-of the situation where recruitment could not be possible under that Policy and the said Policy could not be followed in its actual form and in this behalf through Note-2 in para 11 it had been provided that:---
NOTE-2: Department may change the selection criteria for specific specialized posts, if required, but the criteria must be clearly elaborated in order to ensure transparency in the selection process and should be got approved from the Chief Minister.

7. After the formation of a high rank Recruitment Committee, with an intent to pick the best of the candidates for ultimate recruitment and induction in government departments, para-1(A) of the said Policy specified a criteria for posts in BS-1 to 4, which is reproduced here below:---
CRITERIA FOR POSTS IN BS.1-4.
(i) EDUCATIONAL QUALIFICATION
(a) Where prescribed minimum qualification is literate:--
Literate 30
Primary 35
Middle 40
Matric 50
(b) Where prescribed minimum qualification is Primary:
Primary 35
Middle 40
Matric 50
(c) Where prescribed minimum qualification is middle:
Middle 35
Matric 40
Intermediate 50
(d) Where prescribed minimum qualification is Matric:
Matric 40

Intermediate 45

Bachelor 50

(ii) EXPERIENCE IN THE RELEVANT FIELD

Over and above experience in the service rules

(a) One year 5

(b) Two years 7

(c) Three years 10

(iii) **INVERVIEW Maximum Marks 40**

8. Now on the touchstone of said policy, this court would see the procedure of recruitment which is subject matter in these writ petitions. I have gone through the entire record which had been produced by the official respondents but have not been able to find even a single document which would show that any such Selection Committee, as mandated by the above Policy, had ever been formulated with regard to induction of a Member who had been inducted after approval of the Minister concerned, nor any such document would be cited on behalf of the respondents during the course of arguments or annexed with their report and parawise comments. This was a glaring deviation from the conditions set in the Policy and as reproduced above, although recruitment could be made by a changed criterion, but firstly it could only be done for specific specialized posts, which does not appear to be the case in impugned recruitments, and secondly for that purpose approval from the Chief Minister was essential. This court also could not lay hands on any of such approval letter from the Chief Minister from where it could be inferred that change in the recruitment criteria had been approved by the Chief Minister. There is a well known latin legal maxim "A communi observantia non est recedendum" when the law requires a thing to be done in a particular manner, it has be done in that way, otherwise it has no sanctity in the eyes of law. Non-participation of a specific member in the Selection Committee for recruitment proceedings would be quoram non judice and void and thus the appointment having been made in violation of relevant instructions. These cannot be said to have been made in accordance with law. In this behalf I would rely on the cases "MUHAMMAD SULEMAN v. ADDITIONAL DEPUTY COMMISSIONER (GENERAL) LAHORE CANTT" (PLD 2000 LAHORE 262) and "Dr. IKRAMULLAH v. DISTRICT COORDINATION OFFICER, GUJRANWALA and 6 others" (2004 PLC (C.S.) 921).

9. Apart from the above fatal irregularity, it has also been observed by this Court that in the impugned recruitment process no list was prepared or produced before the Court which could show that interview were conducted and how interview marks were given to the candidates by each Member of the Recruitment Committee. Non-availability of such list in the entire original record of the official respondents strengthens the argument of learned counsel for the petitioners that as a matter of fact the entire process was sham and tainted with mala fides. Further, it has been observe that although a merit list was available in the original record of the official respondents but it was observed that it was not carrying the signatures of all the

members of the Recruitment Committee, nor even the minutes of the meeting had been signed by all Members of the Committee. This all shows that neither the Committee had been properly constituted nor the merit list had been prepared in the light of recommendations of a validly constituted Recruitment Committee. Even otherwise, non availability of signatures on the merit list or the minutes of the meeting by even some members of the Committee is sufficient to lead to an inference that either no committee was constituted or the officials who were the members of committee as per their designation had not agreed to the recommendations and by not signing the relevant papers they in fact intentionally kept themselves away from the recruitment process. This fact is sufficient to establish mala fide, nepotism and arbitrariness in the recruitment process.

10. During the proceedings a letter was presented before the Court by the learned counsel for the petitioner which shows that a number of Head Masters, Head Mistresses and Principals agitated before the Higher Authorities with regard to the recruitment and the behavior of the local administration and violation of prescribed procedure. On Court direction all of them except two appear before this Court and when the letter with regard to the appointment of Class-IV Employees, written by them, was shown to them, they all admitted the fact that this document was written on their behalf and also admitted that it has been signed by them. The same has been placed on file as Mark-A and Mark-A/1. A cursory perusal of this letter would clear the entire picture, as the officials/officers in whose Institutions the newly recruited personals were to be posted had expressed serious reservations about the entire recruitment process.

11. In this context it may also be pointed out that the District Education Officer (S.E) also went on to admit before the court that in all seventy seven persons had been appointed against different posts of Class-IV employees but he could produce a merit list of only twenty two persons. Therefore, the letters Mark-A and Mark-B coupled with the fact that only a list of twenty two persons could be brought on the record, is sufficient evidence of the fact that actually the entire exercise was being done secretly just in order to choose the persons of likings of specific class. This act and conduct of the official respondents in deviating from the prescribed procedure and appointing a large number of persons in an extremely fishy process, has resulted in chaos amongst the eligible persons who were ignored for appointments on extraneous considerations. By doing so the concerned authorities not only frustrated the scheme of the applicable Policy, failed to perform the duty cast upon them, but also did not care about the fact that by making recruitment in violation of the policy and by appointing those persons who were otherwise not eligible for those posts, the available Members of the Recruitment Committee played a role in attempting to further destroy the education sector, if not already destroyed.

12. After having discussed the factual flaws in the impugned recruitment process, I would deal with the preliminary objections thrown, by learned Additional Advocate General as well as learned counsel for the private respondents, with regard to maintainability of these petitions with reference to Paragraph-17 of the Recruitment

Policy for the year 2004. Firstly, I would reiterate here that already a lot of Head Masters, Head Mistresses and the Principals had moved applications to the concerned authorities pointing out the irregularities committed , in the impugned recruitment process, but despite lapse of considerable time till filing of these writ petitions, the concerned authority never thought of taking notice of the pointed irregularities and flagrant violation of the Recruitment Policy. This inaction, rather deliberate silence on the part of the concerned authority by itself is sufficient to infer that as a matter of fact almost all the quarters from tail to head were involved in sheer breach of conditions and requirement of the Recruitment Policy, for obvious reasons to accommodate the blue eyed of the political figures. For this reason alone even if the clause 17 of the Recruitment Policy with regard to constitution of Complaint Redressal Cell is made available, even then inaction on the part of the authority in not taking notice of the apparent irregularities as pointed out by their own employees, has made this remedy of approaching the Complaint Redressal Cell, absolutely redundant and it cannot be said to be efficacious remedy, as held by this Court in the "DR. MUHAMMAD SADIQ SALEEM v. SECRETARY HEALTH, GOVERNMENT OF PUNJAB, LAHORE and 6 others" (2008 PLC (C.S.) 25). There is yet another aspect of the matter that The question about availability of remedy before the Complaint Redressal Cell came under consideration before this Court and vide judgment dated 2-4-2009 passed in Writ Petition No.1916 of 2007-BWP "Dr. NAJAM IQBAL AHMED v. PROVINCE OF PUNJAB AND OTHERS", this Court after detailed discussion observed that para-17 of the Recruitment Policy constituting Complaint Redressal Cell can neither be considered to be substitute of the Parent Act nor of the Rules framed there-under, as such it was held that conferment of power on the Complaint Redressal Cell to set-aside the order of the competent authority in respect of appointment and the recommendations drawn by the Special Selection Board, is bad in law and this Court strike down para No.17 of the Recruitment Policy through its judgment discussed above. This decision having been rendered on 2-4-2009, afterwards neither this Paragraph of the Recruitment Policy would be deemed to have been anymore part of the said Policy, nor any such remedy is available to any of the aggrieved person. As such, the petitioners are well within their lawful right to invoke the constitutional jurisdiction of this Court, therefore, the above argument with regard to maintainability of these writ petitions in the presence of alternate remedy, is overruled.

13. The next objections on behalf of the learned Additional Advocate-General and the learned counsel for the private respondent were that recruitment or appointment of suitable persons is only the prerogative of the administrative authorities, these writ petitions touch the factual aspects and that minor procedure defects cannot be made basis to overturn the entire recruitment process. I am afraid these arguments are just fallacious with no legal backing behind. The success of whole system of a developed society depends upon the checks and balances, where our Constitution or the relevant statues bestow power on some authority; at the same time it has been ensured that such power or authority does not go unchecked or unbridled. If the entire recruitments, appointments or induction of employees in all the government departments are left on the discretion of the tamed bureaucracy, then I am afraid no

good can be expected in the present scenario. Even otherwise if any order is passed without lawful authority and without jurisdiction, this Court can look into such illegal exercise. In this case, the Recruitment Committee was not constituted as per requirement of the Policy, as such the recommendations about the appointed candidates is an action without lawful authority. Furthermore, the matter does not relate to the promotion where eligibility or fitness may not fall within the jurisdiction of this Court. In these cases eligibility and fitness is with regard to fresh appointment and all appointment matters if based on mala fide, without lawful authority or result of exercise of defective jurisdiction, can validly be thrashed by this Court in exercise of its constitutional jurisdiction, as held in PLD 1974 SC 139, 1975 PLC 781 and 1976 PLC 638.

14. Further, this is not the case where factual controversy remains to be resolved, as a matter of fact by the record of the respondents authorities themselves every thing has become crystal clear and if anything was left, it was covered by the letters produced by the respective heads of the Schools showing their reservations about the impugned recruitment process. As regards the argument that these are only minor procedural lapses, having gone through the entire relevant record, as discussed above, I am of the considered view that irregularities agitated by the petitioners and established on the record are not minor, procedural defects, rather it all being violative of the basic scheme of recruitment, go to the very root of the entire selection process and such illegally conducted process cannot be protected under any canon of law. Under such circumstances, this Court being the custodian of fundamental rights can validly issue writ, direction or order in exercise of its authority.

15 Next comes the objection of learned counsel representing the private respondents/newly appointed Class-IV employees that their appointment are protected by the principle of locus poenitentiae and that omissions made by the departmental authorities cannot be made basis to upset their appointments. I am afraid the principle of locus poenitentiae cannot be pressed into service to protect the ill-gotten gains. If some benefit has been obtained in sheer disregard to settled procedure and it also has been done by tarnishing the rights of other eligible persons, then such a benefit cannot be maintained perpetually and as discussed above, in the case in hand, neither a valid Recruitment Committee was ever constituted nor the recommendations can be said to have been validly made by the competent authority, as such, the entire recruitment process being defective, the above argument of learned counsel is not sustainable under any law. As such, this Court has ample power to set-aside the impugned appointment orders in which the work has not been done as required to be done by the Recruitment Policy, 2004. This being a case of flagrant violation of the above Policy and lack of jurisdiction in the authority making the impugned appointment, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, this Court certainly has to assume its jurisdiction to protect the violation of fundamental rights. Reference may be made to "K.M. ASAF v. ABDULLAH MALIK and another" (1975 PLC 781), "PROVINCE OF WEST PAKISTAN v. Raja BASHIR MUHAMAMD KHAN" (PLD 1983 Lahore 53), "SAHIB and 3 others v.

THE STATE" (1990 MLD 1161) and "MUHAMMAD JAFAR TARAR v. DISTRICT MAGISTRATE GUJRANWALA and another" (1990 CLC 281).

16. The Hon'ble Supreme Court of Pakistan in the case "CHIEF SECRETARY PUNJAB and others v. ABDUL RAOOF DASTI (2006 PLC (C.S.) 1278), held as under:---

"Choosing persons for public service is not just providing a job and the consequent livelihood to the one in need but is a sacred trust to be discharged by those charged with it, honestly, fairly, in a just and transparent manner and in the best interest of public. Individuals so selected are to be paid not out of the private pocket of the persons appointing them but by the people through the public exchequer---Not selecting the best as public servants is a gross breach of public trust and is an offence against public, who has a right to be served by the best; it is also a blatant violation of the rights of those who may be available and whose rights to the posts are denied to them by appointing unqualified or even less qualified persons to such posts--- Such practice and conduct is highly unjust and spreads a message from those in authority that might is right and not vice versa, which message gets gradually permeated to grass-root level leading ultimately to a society having no respect for law, justice and fair play---Evil norms ultimately lead to anarchic and chaotic situations in a society--- Such likes evil tendencies should be suppressed and eliminated before the same eliminate us all."

17. The respondents by their act through which they over looked rather smashed, the whole policy and the procedure for the recruitment of employees deprived a large number of society members from their basic rights. It is settled principle of interpretation of statute that the fundamental rights are not static documents and should be interpreted in the light of needs of the day. Article 2-A (Objective Resolution) of the Constitution of Islamic Republic of Pakistan cast upon a heavy duty on the Executive, Legislature and the Judiciary to be more careful with regard to the fundamental rights of the citizens as these are the rights which are awarded by divine, respected and announced by Holy Prophet (P.B.U.H), but in the case in hand the respondents officials have ignored their official legal duties and violated the fundamental rights of the citizen and have played with the miseries of the people and in this way abused their power and ignored their duties imposed upon them by law. Article 4 of Constitution of Islamic Republic of Pakistan guarantees to the people that Executive cannot take their rights, liberty, property and reputation unless it has the support of some legal provisions for doing so. Every public functionaries is supposed to function in good faith honestly and within precincts of its powers so that person concerned should be treated in accordance with law. The act of respondents is against Article 4 of the Constitution of Islamic Republic of Pakistan. The Article 9 of the Constitution of Islamic Republic of Pakistan protect the life and liberty of citizen that no person should be deprived of his life and liberty save in accordance with law and the word "life" include a right to have a rule of law their right to live where all fundamental rights are guarantees but the case in hand, the respondents officials have deprived and ignored poor citizen from their right of life and by this act violated

Article 9 of Constitution of Islamic Republic of Pakistan. The respondents have also violated Article 14 of the Constitution of Islamic Republic of Pakistan which provides the dignity to the citizen and in this case as the respondents officials ignored the procedure provided by the government for the recruitment and also did not constitute the Recruitment Committee in accordance with law, this fact create frustration and hatred in the minds of ignored applicants and this act is hit by Article 14 of the Constitution of Islamic Republic of Pakistan and moreover, by depriving the legible candidates respondents have refused the rights of the persons having better qualification and entitled to be appointed and infringed the rights of profession guaranteed by the Article 18 of the Constitution of Islamic Republic of Pakistan and calls for interference by this Court to strike down the same to ensure the protection of the citizen. I have seek guideline in this regard by the judgment of Hon'ble Supreme Court of Pakistan in a case titled as ABDUL JABBAR MEMON and others Human Rights Cases (1996 SCMR 1349).

18. For what has been discussed above, I am of the considered view that the actions of official respondents in making the impugned appointments corum non judice, against the Recruitment Policy prepared for this purpose as well as fundamental rights, as provided under Articles 2(A), 4, 9, 14, and 18 of the Constitution of Islamic Republic of Pakistan, 1973. These all writ petitions are allowed and I declare the entire impugned recruitment process for Class-IV Employees in District Bahawalnagar in response to press advertisement dated 4-3-2010 flashing in local newspapers as illegal, corum non judice based on nepotism, colorable exercise of jurisdiction, violative the Fundamental rights guaranteed by the Constitution of Islamic Republic of Pakistan, 1973 and the same is set-aside with the direction that first of all if there are candidates who applied under section 17-A of the Punjab Civil Servants (Appointment and Conditions of Services) Rules, 1974, they be adjusted first then the quota of all categories i.e. 5% female quota, 5% minorities quota, 20% for, the children of government employees in basis scale Nos.1 to 10 and 2% disable quota on the basis of total strength will be observed and other remaining seats will be filled in on open merit strictly in accordance with law. The Secretary Education shall minutely supervise the whole process for recruitment by himself or by deputing some other senior officials that no illegality, irregularity or colourable exercise of jurisdiction should take place. However, the persons who worked, they should be paid salary for their work done in accordance with law and official respondents are directed to restart the recruitment of Class- IV employees after the stage of publication and the official respondents shall constitute the Recruitment Committee in accordance with the government policy and shall observe all formalities mentioned in the policy, prepare merit list amongst the candidates have already applied before them in response to their advertisement before the cut date and also fulfill the qualifications criteria. Office shall return the record to the concerned department.

M.H./I-7/L Petition allowed.

2012 P L C (C.S.) 1405
[Lahore High Court]
Before Muhammad Qasim Khan and Syed Iftikhar Hussain Shah, JJ
Mst. ITRAT NAZIR
versus
EXECUTIVE DISTRICT OFFICER, EDUCATION DISTRICT BAHAWALPUR and 4 others

I.C.A. No.26 of 2012/BWP in Writ Petition No.815 of 2012/BWP, decided on 12th April, 2012.

Constitution of Pakistan---
----Art. 199---Law Reforms Ordinance (XII of 1972), S.3---Constitutional petition---Civil service--- Appellant had filed Constitutional petition and sought direction to the effect that appointment letter be issued in her favour against the post of Secondary School Educator which was denied to her by the Authorities on the ground that her "no objection certificate" (NOC) was not signed by the competent authority of the institution where she was already serving---Constitutional petition of the appellant was dismissed on the ground that she had already availed an adequate remedy by making an application to the District Coordination Officer---Validity---Controversy in the present case was that application of the appellant was not in accordance with the advertisement and it was not accompanied with a "no objection certificate" (NOC) from the appointing authority of the Institution where she was already serving (Government Higher Secondary School) at the time of making an application for the advertised post ----Apart from clear deficiency in the obtaining of a NOC by the appellant and its defective attestation, the appellant had applied for the same post at two different places by using different domicile certificates; one for her own place of residence and the second procured by her on the ground of residence of her husband---Such exercise on part of the appellant could not be appreciated in law----Party approaching the High Court in its Constitutional Jurisdiction in fact seeks equitable relief and the party which did not approach the High Court with clean hands was hardly entitled for such a relief---Appellant had not approached the High Court with clean hands, intra-court appeal was dismissed, in circumstances.
Jamshaid Akhtar Khokhar for Appellant.

Sardar Muhammad Shahzad Khan Dhukkur, Asstt. A.-G. along with Shahid Jamil, Asstt. Director (Litigation)/EDO (Education) and Mian Ishaq, SSS Incharge Recruitment Cell EDO (Education) Bahawalpur for Respondents.

ORDER
The present Intra-Court Appeal has been preferred against the order dated 15-2-2012 passed by the learned Single Judge in Chamber whereby Writ Petition No.815 of 2012 filed by the appellant seeking direction to respondents Nos.1 and 2 for the issuance of appointment letter to the appellant against the post of Secondary School Educator/SSE (Phys-Math) BS-16 at Tehsil Khairpur Tamewali, District Bahawalpur, was dismissed.

2. The appellant applied against the vacant post of Secondary School Educator/SSE (Phys-Math) at Government Girls Secondary School, Tehsil Khairpur Tamewali, District Bahawalpur through proper channel as she was already performing her duties as SSE (Phys-Math) at Government Girls Higher Secondary School Chak No.319/HR, Maroot, Tehsil Fortabbas District Bahawalnagar. The husband of the appellant was permanent resident of District Bahawalpur and she was eligible to apply at the domicile place of her husband but her application has been rejected on the ground that NOC was not countersigned by the appointing authority. The learned Single Judge in Chamber after hearing the learned counsel for the appellant and after perusal of the record dismissed the Constitutional petition in limine on the ground that the appellant had already applied to the District Co-ordination Officer, Bahawalpur for the redress of her grievance vide application dated 11-2-2012 and she had already availed adequate remedy, therefore, the writ petition was not maintainable.

3. Learned counsel for the appellant has contended that the applicant was already in service and she had applied for the post mentioned above through proper channel through Headmistress and NOC was signed by her. Therefore, her application could not be rejected. The learned Single Judge in Chamber has not looked into this aspect of the case and has dismissed the writ petition erroneously, holding that the petitioner has availed the adequate remedy.

4. On the other hand, learned Assistant Advocate-General Punjab has contended that according to condition No.12 of the advertisement, in service employees of Education Department could apply through proper channel after obtaining the departmental permission and NOC from the concerned appointing authority but the appellant did not attach the NOC at the time of submission of the application on 2-12-2011. The appellant appeared on 10-12-2011 before the Executive District Officer (Education) respondent No.1 and produced the departmental permission certificate/NOC which was signed only by the Headmistress and not by the appointing authority-Executive District Officer (Education) Bahawalpur. She could not produce NOC at the time of her interview. Thereafter three days grace period was also granted but the appellant failed to submit any NOC therefore, her form has already been rejected.

5. We have heard the learned counsel for the appellant and learned Assistant Advocate-General Punjab and have also gone through the record.

6. The controversy between the parties is that the application of the appellant for her appointment as Secondary School Educator/SSE (Phys-Math) was not in accordance with the conditions mentioned in the advertisement for the said post published in different national newspapers in the month of November,2011 for the recruitment of Educator in District Bahawalpur. The application of the appellant was not accompanied with NOC of her appointing authority as she was already serving at Government Girls Higher Secondary School Chak No.319-H/HR, Maroot Tehsil Fortabbas District Bahawalnagar.

7. Yesterday Ms. Nasim Safdar, Executive District Officer (Education), Bahawalpur was summoned and was directed to submit her report especially with reference to the document available at page-18 of the writ petition. The Executive District Officer (Education) Bahawalnagar has sent the certificate today through Law Officer wherein it is mentioned that certificate of departmental permission issued by the then Headmistress in favour of the appellant Itrat Nazir, SSE(M) vide diary No.539 dated 2-2-2011 is not countersigned by the appointing authority i.e. Executive District Officer (Education), Bahawalnagar. Therefore, the said certificate cannot be verified by him. It was, therefore, pointed out by the learned Law Officer that the appellant has applied for the same post at two places. One at Government Girls Higher Secondary School Chak No.319/HR, Maroot, Tehsil Fortabbas, District Bahawalnagar where she is already serving and the second at Government Girls Secondary School, Tehsil Khairpur Tamewali, District Bahawalpur which is the place of domicile of her husband. Her subsequent application was rejected due to non-submission of NOC whereas the appellant has joined duty for the same post at Government Girls Higher Secondary School Chak No.319/HR, Maroot, Tehsil Fortabbas, District Bahawalnagar.

8. Therefore, apart from a clear deficiency in the obtaining of NOC and its defective attestation, it has also been observed that appellant could not apply for the same post at two different places, by using two different domicile/resident certificates, one she had for her own place of residence and the second procured by her on the ground of residence of her husband. This exercise on the part of the appellant by keeping two different domicile certificates simultaneously, cannot be appreciated in law, what to talk of using these domiciles/resident certificates at one and the same time. The party approaching this Court in writ jurisdiction in fact seeks an equitable relief and the party which does not approach this court in clean hands, is hardly entitled for such a relief. As discussed above, the appellant had not approached this Court with clean hands, as such, she was rightly refused the relief.

9. The learned Single Judge in Chamber has not committed any illegality or irregularity while dismissing the writ petition. Resultantly, this Intra-Court Appeal having no force is herby dismissed.

KMZ/I-27/L Appeal dismissed.

P L D 2012 Lahore 336
Before Muhammad Qasim Khan, J
LIAQAT ALI KHAN---Petitioner
versus
DISTRICT COORDINATION OFFICER, BAHAWALPUR and 3 others---Respondents

Writ Petition No.5500 of 2010, decided on 16th November, 2010.

(a) West Pakistan Maintenance of Public Ordinance (XXXI of 1960)---
----Ss. 3(1) & 26---Constitution of Pakistan, Art.199---Constitutional petition---Detention of petitioner for being criminal minded involved in criminal cases, having close links with a banned sectarian organization, providing shelter and financial assistance to desperate criminals including terrorists involved in sectarian and sabotage activities---Validity---Power of DCO to issue detention order was not absolute---Detention order would amount to curtailing fundamentally guaranteed right of liberty of a person---DCO had issued impugned detention order on the basis of reports of agencies without considering worth of material made available to him---Nothing on record to establish that petitioner was an active member of banned sectarian organization or having close links thereto---Petitioner had not been convicted in criminal cases registered against him, rather their trial was pending---Press clippings, alleged press releases or some writings on letter pads could not be used against petitioner to connect him with such charges---Providing financial assistance or shelter to desperate criminals was an offence, for which no criminal case had been registered against petitioner---Registration of one or two criminal cases with regard to providing financial assistance or shelter to desperate criminals would not be a valid ground for passing a detention order, unless such culprit was not only found repeatedly involved, but was also convicted for such misdeeds and his activities were found prejudicial to public peace and tranquility---Grounds of detention mentioned in impugned detention order were vague and based upon presumption and speculations---High Court had opted to burden DCO to pay from his pocket an amount of Rs.50,000 as fine, but on request of Law Officer and undertaking of Counsel of DCO that in future his client would not act in such inhuman manner, High Court abstained itself from imposing such fine---High Court set aside impugned detention order in circumstances.

State through Advocate-General, Sindh, Karachi v. Mst. Taji Bibi 2002 SCMR 914; Mrs. Mamoona Saeed v. Government of the Punjab and others 2003 YLR 2379; Muhammad Mushtaq v. District Magistrate, Sheikhupura and another 1997 MLD 1658; Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v. Mrs. Amatul Jalil Khawaja and others PLD 2003 SC 442; Hafiz Muhammad Saeed and 3 others v. Government of the Punjab, Home Department through Secretary, Lahore and 2 others 2009 YLR 2475; Mst. Misbah Tabassum and 2 others v. Government of Punjab through Secretary, Home Department, Lahore and 3 others 2007 PCr.LJ 1776 ref.

Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v. Mrs. Amatul Jalil Khawaja and others PLD 2003 SC 442; Muhammad Mushtaq v. District Magistrate, Sheikhupura and another 1997 MLD 1658; Mst. Misbah Tabassum and 2 others v. Government of Punjab through Secretary, Home Department, Lahore and 3 others 2007 PCr.LJ 1776 rel.

(b) West Pakistan Maintenance of Public Order Ordinance (XXXI of 1960)---
----Ss. 3(1) & 26---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---Detention order issued by DCO---Presence of alternate and adequate remedy of filing a representation before Home Secretary---Effect---High Court through its order had directed Home Secretary to decide before next date of hearing earlier pending representation of petitioner or treat constitutional petition as his representation---Representative of Home Secretary on next date of hearing stated that decision of such representation would not be possible before Eid-ul-Azha due to non-availability of the Secretary---Eid-ul-Azha was one of most sacred and well-celebrated religious festival of Muslims---Such lame excuse put forth on behalf of the Secretary made clear that he was adamant to keep the petitioner confined---Alternate remedy of representation in such circumstances had lost its adequacy and efficacy---High Court was constitutionally obliged to jealously safeguard security, dignity and freedom of a person---High Court proceeded to decide constitutional petition on merits.

Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v. Mrs. Amatul Jalil Khawaja and others PLD 2003 SC 442 rel.
Syed Munawar Hussain Naqvi and Muhammad Sarwar Chaudhry for Petitioner.
Malik Mumtaz Akhtar, Addl. A.-G., Sardar Riaz Ahmad Dahir, Asstt. A.G. with Muhammad Jamil DSP, Athar Naveed Inspector/SHO and Qamar Assistant Superintendent Jail.
Malik Faiz Bakhsh for Respondent DCO-Bahawalpur.
Date of hearing: 16th November, 2010.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---Liaqat Ali petitioner being brother of Ghulam Rasool has assailed the order dated 3-11-2010 passed by District Coordination Officer, Bahawalpur/respondent No.1 which reads as under:--

"WHEREAS, 1, Dr. Naeem Rauf, District Coordination Officer, Bahawalpur am satisfied that Mr. Ghulam Rasool son of Hussain Bakhsh cast Rajput resident of Kachiabadi Shahdra Tehsil and District Bahawalpur is most active worker of banned sectarian organization namely Tehrik-e-Nifaze-Fiqah Jaffaria Pakistan. Reportedly he has close links with the activities and terrorists of sectarian organizations particularly banned Tehrik-e-Jaffaria Pakistan and Sipah-e-Muhammad. He is criminal minded person and involved in 6 criminal cases as per police record. He has been providing financial assistance and shelter to the desperate criminals and other persons including the activists and terrorists involved in sectarian and sabotage activities. He has been instigating his followers to create law and order situation in his locality resulting in

disturbance of public tranquility, danger to human life, health and safety, posing grave threat to maintenance of public order.
(2) AND WHEREAS, based upon evidence/material place before me, I am convinced that the presence of Mr. Ghulam Rasool son of Hussain Bakhsh cast Rajput resident of Kachiabadi Shahdra Tehsil and district Bahawalpur at any public place and at large will pose great threat to the public safety and is likely to cause breach of public peace and order.
(3) NOW THEREFORE, in exercise of powers conferred upon me under subsection (1) of section 3 read with section 26 of Maintenance of Public Order Ordinance, 1960 and Notification of Home Department No. SP (IS-I)3-12/2007 dated 9-8-2008, I Dr. Naeem Rauf, District Coordination Officer, Bahawalpur order that Mr. Ghulam Rasool son of Hussain Bakhsh cast Rajput resident of Kachiabadi Shahdra Tehsil and district Bahawalpur be arrested and detained for a period of 30-days with immediate effect. His custody shall be placed under the superintendence of Superintendent District/Central Jail, Bahawalpur for detention at New Central Jail, Bahawalpur.
(4) The grounds of this order shall be communicated in due course of time shortly.
(5) The detenu shall have right to make representation against this order of the Government."

2. It is argued by learned counsel representing the petitioner that impugned detention order passed by respondent No.1 is illegal and without lawful authority. The contention of learned counsel is that in fact Ghulam Rasool (father of the petitioner) is News Reporter and had been publishing news items against the police officials, as a result of which with mala fide intention the impugned order has been issued, otherwise, he had no link with any of the banned organizations and the alleged reports allegedly collected and submitted by respondent No.2 are fake. The learned counsel further went on to argue that the alleged press clippings being inadmissible in evidence could not be made basis for passing the impugned detention order. Lastly, it is argued that impugned detention being without any valid material is violative of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, as such, the writ petition may be allowed with costs and the impugned detention order may be set-aside after declaring it as void ab initio. To strengthen their arguments, learned counsel for the petitioner have placed reliance on the cases: "STATE through Advocate-General, Sindh, Karachi v. Mst. TAJI BIBI" (2002 SCMR 914), "Mrs. MAMOONA SAEED v. GOVERNMENT OF THE PUNJAB AND OTHERS" (2003 YLR 2379), "MUHAMMAD MUSHTAQ v. DISTRICT MAGISTRATE, SHEIKHUPURA AND ANOTHER" (1997 MLD 1658), "FEDERATION OF PAKISTAN THROUGH SECRETARY, MINISTRY OF INTERIOR, ISLAMABAD v. MRS. AMATUL JALIL KHAWAJA AND OTHERS" (PLD 2003 Supreme Court 442), "Hafiz MUHAMMAD SAEED AND 3 OTHERS v. GOVERNMENT OF THE PUNJAB, HOME DEPARTMENT THROUGH SECRETARY, LAHORE AND 2 OTHERS" (2009 YLR 2475), "Mst. MISBAH TABASSUM and 2 others v. GOVERNMENT OF PUNJAB THROUGH SECRETARY, HOME DEPARTMENT, LAHORE AND 3 OTHERS" (2007 PCr.LJ 1776).
3. On the other hand, learned counsel representing the DCO/respondent No.1 at the very outset came with the assertion that he would adopt the same view as disclosed in

the comments submitted by the DCO and would bank upon the material attached therewith, however, added that whatever material was placed by the police officers before the DCO, it was made basis for issuing the impugned detention order, as such, according to the learned counsel the DCO could not be held responsible for any lapse, if otherwise found in the impugned order.

4. The learned Assistant Advocate General strenuously opposed the writ petition and contended that petitioner has an alternate remedy and in this behalf pursuant to the order of this court the petitioner has also filed a representation which is pending, as such, this writ petition is not maintainable. On merits, the learned Assistant Advocate General while referring the report/parawise comments and the record submitted on behalf of respondent DPO, Bahawalpur, contended that Ghulam Rasool has close links with the activists and terrorists of sectarian organization particularly "Tehrik-e-Nifaze Jaffaria Pakistan" and also is guilty of rendering financial assistance and shelter to the desperate criminals and other persons including the activists and terrorists involved in sectarian and sabotage activities. On court query, the learned Assistant Advocate General in order to establish his stance referred to some press clippings, alleged letters written by Ghulam Rasool (detenu) and also copies of some F.I.Rs.

5. After hearing the arguments of learned counsel for the parties at considerable length, because of paucity of time due to Eid Holiday, this court on 16-11-2010 had issued a short order to the following effect:--

For the reasons to be recorded later on, this writ petition is allowed, the impugned detention order dated 3-11-2010 passed by the District Co-ordination Officer, Bahawalpur qua Ghulam Rasool son of Hussain Bakhsh, is set aside and he is directed to be released forthwith if not required in any other case. The D.R. (J) of this Bench is directed to convey this order to the concerned authorities immediately.
Pursuant to and with reference to the said short order, this judgment shall form the detailed basis thereof.

6. With the concurrence of learned counsel for the parties this writ petition is decided as PAKKA CASE. A perusal of the impugned order would show that it had been issued against Ghulam Rasool precisely on the allegations that:--
(i) Ghulam Rasool son of Hussain Bakhsh cast Rajput resident of Kachiabadi Shahdra Tehsil and district Bahawalpur is most active worker of banned sectarian organization namely Tehrik-e-Nifaze-Fiqah Jaffaria Pakistan;
(ii) He has close links with the activists and terrorists of sectarian organizations particularly banned Tehrik-e-Jaffaria Pakistan and Sipah-e-Muhammad;
(iii) He is criminal minded person and involved in 6 criminal cases as per police record;
(iv) He has been providing financial assistance and shelter to the desperate criminals and other persons including the activists and terrorists involved in sectarian and sabotage activities;

(v) He has been instigating his followers to create law and order situation in his locality resulting in disturbance of public tranquility, danger to human life, health and safety, posing grave threat to maintenance of public order.

7. Before opening the case on merits, this court would like to deal with preliminary objection raised by learned Assistant Advocate General with regard to maintainability of this writ petition in the presence of alternate and adequate remedy of filing a representation before the Home Secretary. This contention of learned Law Officer was given anxious consideration by the court but it could not find favour for the reason that the impugned detention order was passed on 3-11-2010 and on 8-11-2010 this Court had passed an order directing the office to intimate by fax that order along with the copy of writ petition and annexures to respondent No.3/Secretary Home Department, Government of the Punjab, Lahore and a specific direction was passed on to said respondent either to decide the earlier pending representation of the petitioner or to treat the writ petition as representation and then decide the same before the next date of hearing and case was adjourned for 15-11-2010. On 15-11-2010 in response to the said very order a representative of respondent No.3 appeared and stated that representation could not be decided and when inquired by the court whether said representation could be decided till 16-11-2010 the said representation came up with the stance that it is not possible because availability of the Secretary Home Department will be seen, notice have to be issued to the parties and then the matter will be decided. Whereas, on 17th of November, 2010 it was Eid-ul-Azha, one of the most sacred and well celebrated religious festival of the Muslims, as such, considering the above lame excuse put forth by the representative of the Secretary Home Department, Government of the Punjab, this Court was of the firm view that respondents were not inclined to decide the pending representation and were adamant to keep the detenu confined. It was in these circumstances that this Court had to hold that although filing of representation before the Secretary Home may be an alternate remedy, but in the peculiar facts and circumstances of this case, it had lost its adequacy as well as efficacy. On the other hand, not only under provisions of Chapter-I, Part-II of Constitution, liberty, security, dignity and freedom of a person had been fully secured and guaranteed, but also under Charter of Human Rights, High Court had constitutional obligation to jealously safeguard such fundamental rights against any invasion. A learned Division Bench of Sindh High Court in the case "DR. MUHAMMAD SHOAIB SUDDLE v. PROVINCE OF SINDH, AND OTHERS" 1999 PCr.LJ 747 held that even on failure of detenu to make a representation to the executive authorities, the jurisdiction of High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, would not be barred, as such representation is neither adequate nor alternate within the meaning of Article 199(1) of the Constitution. In these circumstances this Court is of the view that it could competently step in such a case, as such, jurisdiction was assumed.

8. Now coming to the factual aspects, I would refer to a celebrated judgment of the apex Court reported in "FEDERATION OF PAKISTAN through Secretary, Ministry of Interior, Islamabad v. Mrs. AMATUL JALIL KHAWAJA and others" (PLD 2003

Supreme Court 442), wherein their lordships set a criteria that the preventive detention order has to satisfy the following requirements:--
(i) The Court must be satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention;
(ii) Satisfaction should be established with regard to each of the grounds of detention, and, if one of the grounds is shown to be bad, non-existent or irrelevant, the whole order of detention would be rendered invalid;
(ii) Initial burden lies on the detaining authority to show the legality of the preventive detention, and
(iv) The detaining authority must place the whole material, upon which the order of detention is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claims shall be within the competent of the Court to decide.

The legality and propriety of the detention order impugned in this writ petition shall be seen on the touchstone of above settled principles. As pointed out above, on court question about the material against Ghulam Rasool (detenu) to substantiate the above allegations, the learned Assistant Advocate General had nothing to refer but copies of some F.I.Rs. and a Press Release of Bahawalpur Press Club. Further, the learned Assistant Advocate General also tried to refer to some material which according to him was secret record/reports of the agencies, but having gone through the same I found nothing to term those documents as sensitive, as such, those were shown in the open court. When further questioned as to how the press clippings, alleged press releases or some writings on letter pads could be used against the detenu to connect him with the above allegations, no satisfactory answer was given to the Court. No material whatsoever has either been collected or produced before the court, which fact has rather been admitted by the respondents that there is no valid proof as to how Ghulam Rasool is most active member of banned sectarian organization namely Tehrik-e-Nifaze-Fiqah Jaffaria Pakistan and also there is no material to establish close links of Ghulam Rasool (detenu) with activists and terrorist of sectarian organizations. As regards criminal mindedness of Ghulam Rasool is concerned, although copies of some F.I.Rs. were cited by the learned Assistant Advocate General but admittedly in none of those cases he is the convict and all those cases are reportedly pending trial. Even otherwise, this Court in the case "MUHAMMAD MUSHTAQ v. DISTRICT MAGISTRATE, SHEIKHUPURA and another" (1997 MLD 1658) has already declared that "involvement of the detenu in number of criminal cases, per se, was not a valid ground for his preventive detention as he could not be vexed twice on the basis of the same criminal charge due to the pendency or disposal of the said criminal and his detention was nothing but punishment depriving him of his liberty." Coming to the next allegation of providing financial assistance and shelter to the desperate criminals and other persons and also that of instigation, again no record whatsoever could be shown to this Court to justify the above allegations. Furthermore, providing financial assistance or shelter to the desperate criminals is even otherwise an offence and if any person is found indulged in such like activities mere passing of detention order against him is neither proper nor

appropriate remedy and solution, rather he is to be, indicted under appropriate penal clause of Pakistan Penal Code or the Anti-Terrorism Act, 1997. But here in this case, although allegations have been levelled in the impugned detention order, yet on court query it has been admitted that so far not a single criminal case has been registered against the detenu for his alleged involvement in the above alleged nefarious activities. It may also be observed that registration of one or two criminal cases with regard to providing financial assistance to criminals or harbouring them may also not furnish a valid ground for passing a detention order, until such culprit is not only found repeatedly involved but is also convicted for his above misdeeds and furthermore his such activities are also found prejudicial to the public peace and tranquility falling within the ambit of Section 3 of the Maintenance of Public Order Ordinance, 1960. In these facts and circumstances, this Court has no hesitation in holding that impugned detention order could not satisfy the requirements of a valid detention order on the touchstone of guidelines settled by the apex Court in "FEDERATION OF PAKISTAN through Secretary, Ministry of Interior, Islamabad v. Mrs. AMATUL JALIL KHAWAJA and others" (PLD 2003 Supreme Court 442), as not a single ground/allegation mentioned in the said order could be established from the record/material, shown to the court.

9. Adverting to the role of respondent D.C.O. authority issuing the detention order, there is no cavil to the proposition that section 26 of the Maintenance of Public Order Ordinance, 1960 vests authority in the D.C.O. in passing such orders, but this power is not absolute and as shall be seen from the language used in subsection (1) of section 3 of West Pakistan Maintenance of Public Order Ordinance, 1960, before passing such detention order the authority/D.C.O. is to "satisfy" himself that with a view to preventing any person from acting in any manner prejudicial to public safety or the maintenance of public order, it is necessary so to do, he may issue an order in writing directing arrest and detention of such person for a period to be specified in the said order, but here in this case for the reasons as detailed above, the respondent/D.C.O. did not apply his independent judicious mind and passed the impugned detention order merely on the basis of report submitted by the District Police Officer, Bahawalpur without considering the worth of the material made available to him, whether this material could form basis for such a detention order and whether this material could even stand the test of admissibility in evidence or its evidentiary value. As a matter of fact a detention order amounts to curtailing the fundamentally guaranteed right of liberty of a person and it was for this reason that the legislators in their wisdom vested such powers with the D.C.Os. who are expected to be unbiased, as compared to the police agency and in this way the D.C.Os. are not supposed to react on the reports of the police agency until and unless they satisfy themselves that such reports are correct and are also supported by tangible material. It may be reiterated here that the impugned detention order has been passed by respondent D.C.O. without application of mind about alleged activities of the detenu, therefore, he had in fact deviated from his one of the sacred duty by taking off the liberty of a person. All the grounds of detention enumerated in the detention order passed by the Authorities in the present case, were vague, based upon presumptions and speculations; it was, therefore, sufficient to infer that detaining Authority had not

applied its mind to satisfy itself for issuance of detention order of detenu, as such, this court had opted to burden the respondent/D.C.O. Bahawalpur to pay from his pocket an amount of Rs.50,000 as fine, but on the request of the learned Law Officer and undertaking by the learned counsel representing the said respondent that in future his client would not act in such inhuman manner, this Court abstains itself from imposing the fine, by seeking guidance from a judgment "MST. MISBAH TABASSUM and 2 others v. GOVERNMENTS OF PUNJAB through Secretary, Home Department, Lahore and 3 others" (2007 PCr.LJ 1776).

10. For what has been detailed above, this writ petition is allowed in terms of the short order of this court dated 16-11-2010. A copy of this judgment shall be sent to the respondent/District Coordination Officer, Bahawalpur for future guidance.

S.A.K./L-2/L Petition accepted.

PLJ 2012 Cr.C. (Lahore) 261
Present: Muhammad Qasim Khan, J.
ASAD ULLAH--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 4112-B of 2011, decided on 25.10.2011.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302/34--Bail, grant of--Further inquiry--Not nominated in FIR--Petitioner had been involved in this case through supplementary statement of complainant which had been recorded about one year after the registration of FIR--Different versions taken by complainant in the FIR, in supplementary statement as well as in private complaint, made the case against petitioner one of further inquiry--Petitioner was behind the bars but there was no substantial progress in trial, whereas, he cannot be kept confined for an indefinite period--Bail allowed. [P. 262] A & B

Mr. Rizwan Ahmad Khan, Advocate for Petitioner.
Ch. Muhammad Ashraf Sindhu, Advocate for Complainant.
Mr. Amjad Rafiq, Deputy Prosecutor General for State.
Date of hearing: 25.10.2011.

Order
Petitioner seeks post arrest bail in case FIR No. 7/2010 dated 5.1.2010 under Section 302/34 PPC Police Station Gagoo, District Vehari.

2. It is argued by learned counsel that petitioner has been falsely implicated in this case on the basis of supplementary statement of the complainant recorded after about one year of the lodging of the FIR, otherwise, the petitioner neither participated in the occurrence nor had been nominated in the FIR. It is further contended by the learned counsel that regarding the same occurrence the complainant also filed a private complaint against Muhammad Yar, Mazhar, Anwar and Sadiq but subsequently withdrew the same, as such, different versions of the complainant make the case against the petitioner open to further inquiry. The learned counsel contends that petitioner is behind the bars since his arrest but there is no substantial progress in the trial.

3. The learned DPG assisted by learned counsel for the complainant opposed this petition by contending that although the petitioner is not nominated in the FIR but through supplementary statement he was fully implicated in the commission of the offence, as such, he is not entitled for bail.

4. Arguments heard. Record perused.

5. The petitioner is not nominated in the FIR, wherein, only Muhammad Yar and Mazhar were named with two unknown assailants, but even the features of said unknown persons have not been given in the FIR. The petitioner has been involved in this case through supplementary statement of the complainant which has been recorded about one year after the registration of the FIR. It is also an admitted position that subsequently the complainant also filed a private complaint against Muhammad Yar, Mazhar, Anwar and Sadiq, but withdrew the said complaint. Different versions taken by the complainant in the FIR, in the supplementary statement as well as in the private complaint, make the case against the petitioner one of further inquiry. The petitioner is behind the bars but there is no substantial progress in the trial, whereas, he cannot be kept confined for an indefinite period, which otherwise would amount to punishing him before trial. Consequently, this petition is allowed and petitioner is admitted to post arrest bail on furnishing bail bond in the sum of Rs.200,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail allowed

PLJ 2012 Lahore 399
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
GHULAM HAIDER--Petitioner
versus
FARKHANDA IQBAL, SSP INVESTIGATION, LODHRAN and 2 others—Respondents

W.P. No. 1192 of 2012, decided on 22.2.2012.

Constitution of Pakistan, 1973--
----Art. 199--Pakistan Penal Code, (XLV of 1860), Ss. 406 & 506--Constitutional petition--Criminal breach of trust--Superdari by an order of Ilaqa Magistrate--Tractor was handed over to respondent on superdari--I.O. had acted beyond territorial jurisdiction Direction to recover tractor from petitioner and produce it before Court--Challenge to--After registration of the case, through proper legal course the custody of the tractor was handed over to respondent on superdari by an order of Magistrate--It was no where mentioned that superdari was cancelled for any other reason--Prima facie the order giving tractor on superdari still holds the field--In presence of such an order, SSP investigation was not vested with any authority to direct I.O to recover the tractor from petitioner for its production before him--Order of SSP to extent it directed recovery of tractor from petitioner was declared illegal and without lawful authority--Petition was allowed. [P.] A

Rana Khalid Mehmood, Advocate for Petitioner.
Date of hearing: 22.2.2012.

Order
It is argued by learned counsel that petitioner is complainant of case FIR No. 167/2010 dated 13.03.2012 under Sections 406/506 PPC Police Station City, Lodhran for criminal breach of trust by Respondent No. 3 with regard to Tractor. During investigation the said Tractor was recovered, Accused/Respondent No. 3 was declared guilty and the Tractor was handed over to Respondent No. 3 on Superdari. It is further argued that as the accused were not being arrested, the petitioner filed W.P. No. 912/2012, whereupon direction was issued to DPO-Lodhran to look into grievance of the petitioner, hold an inquiry and if officials are found guilty in the performance of duty, he shall proceed against them departmentally. The grievance of the petitioner is that under the garb of said direction of this Court the SSP (Investigation) on 21.01.2012 held that Investigating Officer had acted beyond his territorial jurisdiction, as such, directed the Investigating Officer to recover the Tractor from the petitioner and produce it before him. This order/direction has been assailed by the petitioner through the instant writ petition.

2. I have heard the learned counsel and perused the available record.

3. I would not like to comment on the merits or demerits of the case, as any finding or observation of this Court, may subsequently prejudice the case of either side. However, it is established from the record that after registration of case, through proper legal course the custody of the disputed Tractor was handed over to Respondent No. 3 on Superdari by an order of the Ilaqa Magistrate. It is no where mentioned that said Superdari order was either set aside by any Court or the Superdari was cancelled for any other reason. Therefore, prima facie the order giving the Tractor to Respondent No. 3 on Superdari, still holds the field. In the presence of such an order, the SSP (Investigation), at least, was not vested with any authority to direct the Investigating Officer to recover the disputed Tractor from the complainant/petitioner for its production before him. Consequently, the impugned order of the SSP (Investigation) to the extent it directs recovery of Tractor from the petitioner, is declared illegal and without lawful authority. Other conclusions by the SSP (Investigation) in the impugned order/direction dated 21.01.2012, relate to factual assessment and this Court while sitting in constitutional jurisdiction, cannot determine the truth or falsehood of such conclusions. This writ petition, therefore, is partially allowed in the above terms.

(R.A.) Petition allowed

PLJ 2012 Cr.C. (Lahore) 860 (DB)
[Multan Bench Multan]
Present: Sardar Muhammad Shamim Khan and Muhammad Qasim Khan, JJ.
LAL KHAN--Appellant
versus
MAULIDAD and 2 others—Respondents

Crl. Appeal No. 125 of 1996, decided on 15.12.2011.

Criminal Law (Special Provisions) Ordinance, 1968 (II of 1968)--
----Scope--Constitution of Pakistan, 1973, Art. 264--General Clause Act, 1897 S. 6--Jurisdiction to take cognizance of the offence regarding question of guilt or innocence--Contention--Jurisdiction to try instant case was only with tribunal constituted under Ordinance, 1968--Proceedings pending must had been conducted in light of Art. 264 of Constitution--Validity--Word "void" cannot be equated with word "repeal" the word "void" is used when total lack of existence was intended to be conveyed--Held: Although in case when Acts or ordinances were repealed, there was saving clause u/Art. 264 of Constitution and S. 6 of General Clauses Act, but word "void" could not be equated with word and no saving clause in Constitution or any other law exists when Act/Ordinance was declared as void. [Pp. 865 & 866] A & B

Criminal Procedure Code, 1898 (V of 1898)--
----S. 417(2-A)--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Acquittal appeal--Appreciation of evidence--All witnesses were interested witnesses and Court had passed judgment of acquittal on valid and legal ground--Crime empties were not produced before trial Court--Crime weapons were not sent to office of FSE--Validity--I.O had collected crime empties from the spot which were taken into possession through recovery memos but such crime empties were not produced before the Court during trial--Accused had produced their crime weapons before I.O. which were taken into possession but crime empties or even crime weapons were not sent to office of FSL for matching or to know about workability of crime weapons--Held: It is also settled that once an acquittal is recorded, such concession cannot be withdrawn merely on ground that reanalysis or re-evaluation of same evidence may result into some other inference qua conviction of accused--Appeal was dismissed accordingly. [Pp. 867 & 868] C & G
1989 SCMR 1099, rel.

Extra Judicial Confession--
----Appreciation of evidence--Such joint confession was inadmissible in evidence and further more in FIR, there was not a single word on such aspect of the case that accused had confessed their guilt. [P. 867] D

Dying declaration--
----Such evidence could only be believed when it comes through mouth of independent and uninterested witnesses who credibility and impartiality was otherwise, not questioned, but in instant case no such independent witness had come

forward to land corroboration to such piece of evidence--FIR was silent with regard to dying declaration, which creates doubt on prosecution story and appeared that same had been developed--PWs admitted that deceased was their paternal uncle, therefore, factum of their deep interest in case was further strengthened by their statement before the Court. [P. 867] E

Chance witness--
----Absence of independent and uniterested--Witnesses--Statement of such interested as well as chance witnesses could not be believed to record conviction on capital charge, in absence of any independent and uninterested corroboration. [P. 868] F
PLJ 1995 SC 351, rel.

Sh. Jamshed Hayat, Advocate for Appellant.
Mr. Badar Raza Gillani, Advocate for Respondent with in Person.
Mr. Amjad Rafique, Deputy Prosecutor General.
Date of hearing: 15.11.2011.

Judgment
Muhammad Qasim Khan, J.--Through this appeal the appellant Lal Khan who is complainant of case FIR No. 1/1993 under Section 302/34,, PPC registered at Police Station Saura, Tribal Area, Tehsil Taunsa, District Dera Ghazi Khan, has assailed the judgment dated 16.04.1996 passed by learned Additional Session Judge, Taunsa Sharif, whereby respondents (Maulidad, Aman Ullah and Mehrab Khan) have been acquitted of the charges against them in the above FIR.

2. Briefly the facts of the case are that, Lal Khan appellant/complainant got lodged the above FIR (Ex.PA) on 24.02.1993 at 6.30 a.m. to the effect that on the fateful day and time he went to Sakandi for usual work, where his paternal uncle Muhammad son of Malang also reached to look after the crop and houses. Meanwhile, Mehrab Khan, Aman Ullah and Maulidad while armed proceeded towards Jarrhu-Marrh. It is further alleged that uncle of the complainant namely Muhammad also left for home in the noon, when he reached Thangwani-Khorrh, the accused/respondents took up a bunker from Jarrhu-Marrh Sar and made about 15/16 fires at Muhammad with the intention to commit his murder. The complainant rushed to the spot and saw the accused escaping after abandoning their bunkers at Marrh-Sar. Aman Ullah and Mauli Dad accused/respondents ran towards Sakandi, whereas, Mehrab Khan accused/respondent decamped toward South to his house. Muhammad received bullet shot which pierced through his lower part of the spinal cord. The complainant took his uncle Muhammad towards the bus-stop after picking him up. From there he boarded the victim on a motor bus and reached Sakharchur Barthi. However, during transit at about 9.00 a.m. the injured Muhammad succumbed to the injuries therefore, the complainant returned back and got lodged the FIR. It was further alleged in the FIR that Esa son of Meva, Braham son of Ahmadan, Haji Muhammadan son of Budha, Azeez son of Chakar Chaakrani and Easu Shah son of Ameer Shah also witnessed the occurrence and identified the accused person.

The motive was alleged to be that Muhammad (deceased) had murdered Saeen Daad brother of Mauli Dad (accused), a few years back and murder of Muhammad was result of said vengeance.

3. Muhammad Hashim Khan Dafedar (PW-2) recorded the FIR and inspected the spot, examined the dead body of Muhammad, prepared injury statement Ex.PD and seized the last worn cloths of deceased (not produced in Court) Ex.PE. Thereafter, PW-2 reached the place of occurrence, took fifteen crime empties from the spot (not produced in Court), prepared un-scaled site plan Ex.PB, recorded statements of the witnesses under Section 161, Cr.P.C., Mauli Dad accused/respondent surrendered before him on 02.03.1993 and produced rifle Ex.P-3, taken into possession vide memo. Ex.PF. Then the investigation was taken over by Jamedar Ghulam Qadir Khan PW-3. Aman Ullah accused/respondent surrendered before him on 21.3.1993 and produced rifle P-4 taken into possession vide memo. Ex.PG. Ultimately, report under Section 173, Cr.P.C., was submitted.

4. The accused/respondents were charge sheeted, to which they pleaded innocence and claimed to be tried. During trial the prosecution examined Hashim Khan and Jamedar Ghulam Qadir Khan Investigating Officers as PW-2 and PW-3 respectively, Musa PW-4 deposed production of rifle by Aman Ullah, PW-5 Shah Ali, PW-6 Aziz, Esa Khan PW-7 and Lal Khan PW-8 deposed about the ocular account of the occurrence. On close of prosecution case accused/respondents were examined under Section 342, Cr.P.C., however, they preferred not to produce any evidence in defence. Ultimately, the learned trial Court vide the impugned judgment recorded acquittal of all the three accused/respondents.

5. It is argued by learned counsel for the appellant/complainant that in the light of Criminal Law (Special Provisions) Ordinance (II of 1968) only the Deputy Commissioner, a Tehsildar or a Naib Tehsildar had jurisdiction to take cognizance of the offence covered by the above Ordinance and the matter with regard to question of guilt or innocence was to be referred to the Tribunal constituted under the Ordinance, ibid. According to the learned counsel, in this case the FIR was registered on 24.02.1993 and at that time Criminal Law (Special Provisions) Ordinance (II of 1968) was in the filed. Further argued that although in the case "Government of Balochistan through Additional Chief Secretary versus Azizullah Memon and 16 others" (PLD 1993 SC 341) the said Ordinance was repealed, but in the light of Article 264 of the Constitution of Islamic Republic of Pakistan, 1973 read with General Clauses Act, jurisdiction to try the instant case was only with the Tribunal constituted under the Ordinance, ibid, therefore, on this score alone the impugned judgment is not sustainable, as such, the same be set-aside and case be remanded. The learned counsel's contention is that since in this Article not only the word "repeal" but also the expression "deemed to have been repealed" has been used, the word "void" in Article 6 will have the same meaning as "deemed to have been repealed" and any action taken under a law, which becomes void by virtue of Article 6, will have the effect contemplated by Article 250. In support of his arguments the learned counsel

placed reliance on the case "Sona and another versus The State Etc" (PLD 1990 SC 264).

6. On merits, it has been argued by the learned counsel that matter was immediately reported to the police and the FIR was lodged with promptness and during the trial the prosecution had fully proved its case by tendering evidence on the point of motive, extra judicial confession, dying declaration and the recoveries, but the learned trial Court did not properly appreciate the prosecution evidence and recorded acquittal of the respondents on surmises and conjectures. The learned counsel for the appellant further contended that all the witnesses were natural witnesses and they had fully implicated the accused respondents in the commission of the offence, whereas, some alleged lacunas left by the Investigating Officers during the course of investigation could no be used to extend its benefit to the accused persons, against whom otherwise sufficient evidence had come on the record. The learned counsel concluded his arguments by contending that grave injustice has been done to the appellant/complainant by acquittal of the respondents, therefore, the impugned judgment of acquittal be set-aside and the case be remanded for its trial afresh.

7. The learned Deputy Prosecutor General assisted by learned counsel for the complainant opposed this criminal appeal by arguing that the learned Additional Sessions Judge rightly assumed the jurisdiction and concluded the trial as Criminal Law (Special Provisions) Ordinance (II of 1968) was not in the filed. The learned counsel for the complainant relied on the case "Purshotam Singh versus Narain Singh and State of Rajasthan" (AIR 1955 Rajasthan 203) and "Government of Balochistan through Additional Chief Secretary versus Azizullah Memon and 16 others" (PLD 1993 SC 341). Further argued that the case was registered way back on 24.2.1993, impugned judgment of acquittal was passed on 16.4.1996 and the respondents are facing the agonies for the last more than eighteen years, which by itself is a punishment. The learned counsel for the complainant added that all the witnesses were interest witnesses and the learned trial Court has passed the judgment of acquittal on valid and legal grounds as the prosecution had failed to produce the crime empties alleged recovered from the spot before the learned trial Court and furthermore the crime weapons allegedly recovered from the accused were not sent to the office of Forensic Science Expert. The learned counsel for the complainant next argued that the evidence of dying declaration was subsequently prepared by the prosecution to get support and the same was very rightly disbelieved by the learned trial Court. The learned counsel therefore, argued that appeal merits dismissal.

8. We have heard the arguments of learned counsel for the parties at a considerable length and perused the available record with their assistance.

9. As per impugned judgment passed by learned Additional Sessions Judge, report under Section 173, Cr.P.C. was submitted on 2.05.1993 and the Tribunal was constituted by the Deputy Commissioner on 17.5.1993 under Criminal Law (Special Provisions) Ordinance (II of 1968), the matter remained pending for conclusion of the trial before the Tribunal when vide order dated 17.1.1994 the President of the

Tribunal/ Political Assistant referred the file to Deputy Commissioner in the light of Notification No. SO(J-III)4-16/94 dated 11.1.1994 on the ground that the Tribunal had no jurisdiction to decide the case and Deputy Commissioner/District Magistrate vide order dated 25.10.1994 sent up the case to the Court of Sessions in the light of above mentioned Notification and the judgment of the Hon'ble Supreme Court of Pakistan (PLD 1993 SC 341) and tater-on the case was entrusted to learned Additional Sessions Judge who concluded the trial and acquitted the respondents vide the impugned judgment. The Hon'ble Supreme Court of Pakistan in the case "GOVERNMENT OF BALOCHISTAN through Additional Chief Secretary versus AZIZULLAH MEMON and 16 others" (PLD 1993 SC 341), held as under:

"In these circumstances, as Ordinance II of 1968 is declared to be void being in conflict with Articles 9, 25, 175 and 203 of the Constitution, the question arises what further relief should be granted in the absence of Ordinance II of 1968 there should be some valid law to hold the filed. It has been admitted that District Judges and Civil Judges are functioning in every district. In cases of violation of fundamental lights the Superior Courts are empowered to issue direction to the Federal Government or the Provincial Governments to bring the law in conformity with fundamental lights and/or enforce law and issue notification in that regard. The State as defined in Article 7 is bound to discharge its Constitutional obligations. In case of failure even the legislature and executive can be directed to initiate legislative measures to bring law in conformity with the fundamental rights. In these circumstances, while maintaining the impugned judgments, we dismiss the appeals, declare Ordinance, 1968 as void being in conflict with Articles 9, 25, 175 and 203 of the Constitution ....."

The learned counsel for the appellant was mainly of the view that as the above Ordinance II of 1968 had been repealed, therefore, all the proceedings pending must have been conducted in the light of Article 264 of the Constitution of Islamic Republic of Pakistan, 1973 read with General Clauses Act. We are afraid the word "void" cannot be equated with the word "repeal". The word "void" is used when total lack of existence is intended to be conveyed. (Law Terms & Phrases by Sardar Muhammad Iqbal Khan Mokal). Acts which are void and Acts repealed are not the same, they have entirely different meaning. Further the word "void" has been defined in Black's Law Dictionary (Sixth Edition), as "An instrument or transaction which is wholly ineffective, inoperative, and incapable of ratification and which thus has no force or effect so that nothing can cure it". In the instant case the Hon'ble Supreme Court of Pakistan declared Criminal Law (Special Provisions) Ordinance (II of 1968) as void, hence from the date of the judgment i.e. 10.04.1993 the said Ordinance ceased to be in force and no proceedings could be initiated or continued after the date of passing of the said judgment. Although in case when Acts or Ordinances are repealed, there is saving clause under Article 264 of the Constitution of Islamic Republic of Pakistan and Section 6 of the General Clauses Act, but the word "void" could not be equated with the word "repealed" and no saving clause in the Constitution or any other law exists when an Act/Ordinance is declared as "void". The relevant extract from the case "Tamizuddin Ahmed versus The Government of East Pakistan" (PLD 1964 DACCA 795), is reproduced as under:--

"The learned counsel's contention is that since in this Article not only the word "repeal" but also the expression "deemed to have been repealed" has been used, the word "void" in Article 6 will have the same meaning as "deemed to have been repealed" and any action taken under a law, which becomes void by virtue of Article 6, will have the effect contemplated, by Article 250. The meaning of the word "void" is "null and void; ineffectual; nugatory; having no legal force or biding effect; unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it; not valid." It will be seen that the framers of the Constitution have used the expression "repeal" "deemed to have been repealed" and "void" in different Articles. For the purposes of illustration, reference may be made to Articles 224, 29 and 6. In our view, these expressions cannot be taken to have been intended to convey the same meaning nor can the consequences that follow such happening be taken to be identical. If that were the intention, nothing stood in the way to include the word "void" in Article 250 as well. We are not to read in the Article what is not there. Our function is not to legislate. We are, therefore, of the view that Article 250 has no application to the present case."

It may be clarified here that Article 6 used in the above reproduced paragraph has been taken from the Constitution of Pakistan, 1962, which is now been replaced by Article 8 of the Constitution of Islamic Republic of Pakistan, 1973, whereas, Article 250 referred in the above paragraph is no govern by Article 264 of the Constitution of Islamic Republic of Pakistan, 1973.

10. As discussed above Criminal Law (Special Provisions) Ordinance, (II of 1968) (sic) and by Hon'able Supreme Court of Pakistan in the case "Government of Balochistan through Additional Chief Secretary versus Azizullah Memon and 16 others" (PLD 1993 SC 341), hence, the said Ordinance cannot be said to be in the field on the date when the impugned judgment of acquittal was passed by the learned Additional Sessions Judge, therefore, we see no illegality in the assumption of jurisdiction by the ordinary Court i.e. Court of Sessions and the legal question raised by learned counsel for the appellant is answered in the negative.

11. So far as the merits of the case are concerned, it has been observed that although it was the case of the prosecution that Investigating Officer had collected crime empties from the spot which were also taken into possession through respective recovery memos., but such crime empties were not produced before the Court during the trial. Furthermore, according to the Investigating Officers the accused/ respondents had produced before him their respective crime weapons i.e. Rifles which were taken into possession vide memo. Ex.P-3 and Ex.P-4 but the crime empties or even these crime weapons were not sent to the office of Forensic Science Laboratories for matching or to know about the workability of the crime weapons. In these circumstances the learned trial Court very rightly placed reliance on the case "Muhammad Ali versus Muhammad Farooq and 5 others" (1989 SCMR 1099) to observe that in the absence of report of Forensic Science Laboratory, such recoveries could no be used as corroborative piece of evidence.

12. So far as the evidence of alleged Extra Judicial Confession is concerned, according to the prosecution witnesses themselves the alleged extra judicial confession was made by Aman Ullah and Mauli Dad accused simultaneously, therefore, such joint confession was inadmissible in evidence and furthermore, in the FIR there is not a single word on this aspect of the case that accused had also confessed their guilt. As regards the alleged dying declaration, such evidence could only be believed when it comes through the mouth of independent and uninterested witnesses whose credibility and impartiality is otherwise, not questioned, but in the instant case no such independent witness has come forward to lend corroboration to this piece of evidence. The FIR is silent with regard to the dying declaration, which creates doubt on the prosecution story and it appears that the same has been developed later-on. Similarly, Esa Khan PW-7 as well as Lal Khan PW-8 both admitted that Muhammad deceased was their paternal uncle, therefore, the factum of their deep interest in the case was further strengthened by their statement before the Court and in this regard relevant portion from the judgment of the learned trial Court is reproduced hereunder:--

"It was admitted by PW-7 Easa Khan at the opening of his cross-examination that the deceased Muhammad was his real paternal uncle. PW-8 Laal Khan admitted within the FIR Ex.PA that the deceased Muhammad was his real paternal uncle. And as indicated earlier, the sufferance of rigorous imprisonment for a period of fourteen years regarding the murder of Saeendaad by the deceased Muhammad gave a strong reason to PW-7 Easa and PW-8 Laal Khan to become partisan witnesses against the three accused who were all closely related to the aforesaid that Saeendad. PW-7 Easa Khan, in the first instance, falsely deposed in its cross-examination that he had stated before Hashem Khan Dafedar and Jamedar Ghulam Qadir Khan to have learnt it from Muhammad deceased that he had been injured by Mehrab, Aman Ullah and Maulidad only because the deceased Muhammad had murdered Saeendaad some-time back; and that that Saeendad was real brother of Maulidad. When confronted with Ex.DB, it was discovered that the whole event of dying declaration was altogether missing from the contents of Ex.DB which it was Easa's statement recorded under Section 161 of the, Cr.P.C.".

Therefore, statements of such interested as well as chance witnesses could not be believed to record conviction on a capital charge, in the absence of any independent and uninterested corroboration.

13. For what has been discussed above, we see no misreading or non-reading of evidence nor the impugned judgment of acquittal suffers from any other legal infirmity. The Hon'ble Supreme Court of Pakistan in the cases reported in "Sikandar Hayat versus Muhammad Nawaz and 3 others" (P.L.J 1995 S.C. 351) and "Muhammad Iqbal versus Abid Hussain alias Mithu and 6 others" (1994 S.C.M.R 1928), while setting the guidelines about interference in the acquittal orders held that since after earning acquittal the accused gather a double presumption of innocence and no interference can be made unless grounds for acquittal was not supported by evidence, conclusion recorded for acquittal was such that a prudent man conceivably

read the same, the judgment was perverse, reasons are artificial and grave miscarriage is done by recording of acquittal. It is also settled that once an acquittal is recorded, such concession cannot be withdrawn merely on the ground that reanalysis or reevaluation of the same evidence may result into some other inference qua the conviction of the accused. Reliance is placed on the case reported in "THE STATE versus MUHAMMAD SHARIF and others" (1995 P.S.C (Crl) 419). Even otherwise the accused respondents are lynching with this litigation since 1993 despite their acquittal judgment rendered in 1996 and this protracted litigation by itself is not less then a punishment. Be that as it may be, this appeal fails and is accordingly dismissed.

PLJ 2012 Cr.C. (Lahore) 900
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Qasim Khan, J.
ALLAH WASAYA--Petitioner
versus
STATE & another—Respondents

Crl. Misc. No. 282-B of 2012, decided on 13.3.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Bail, grant of--Medical evidence was not in line with ocular account--Prima facie creates doubt--Allegation was to extent of beating and holding from arms--Held: When accused were armed with fire-arms, then role assigned to accused holding deceased from his arms, does not appeal to prudent mind--Question, whether accused actually participated in occurrence, as alleged by prosecution will be determined by trial Court after recording of evidence--Case of accused falls within ambit of S. 497(2), Cr.P.C.--Bail was allowed. [P. 901] A

Sh. Abdul Ghaffar, Advocate for Petitioner.
Mr. Khalid Pervez Opal, Deputy Prosecutor General for State.
Mr. Muhammad Naeem Bhatti, Advocate for Complainant.
Date of hearing: 13.3.2012.

Order
Allah Wasaya/petitioner seeks post-arrest bail in case FIR No. 193 registered at Police Station Khairpur Tamewali, District Bahawalpur, on 14-05-2011, for offences under Sections 302 & 34, PPC.

2. After hearing the learned counsel for the parties at length and going through the record, I have noted that according to FIR the petitioner along with his co-accused Muhammad Rafiq has given severe beating to Allah Bachaya brother of the complainant and then Allah Wasaya/petitioner caught hold of Allah Bachaya from his arms and Muhammad Rafiq fired with his carbine on the right thigh of Allah Bachaya and Muhammad Zafar fired with his carbine on the head of Allah Bachaya, who succumbed to the injuries at the spot. The allegation against the petitioner is to the extent of severely beating and holding Allah Bachaya from his arms but during post-mortem examination the doctor has not observed any injury of blunt or sharp edged weapon on the dead body of Allah Bachaya, except two firearm injuries; thus, the medical evidence is not in line with the ocular account and this fact prima facie creates doubts in the prosecution story. Moreover, when the accused were armed with firearms, then the role assigned to the petitioner i.e. holding the deceased from his arms, does not appeal to a prudent mind. The question whether the petitioner actually participated in the occurrence, in the manner, as alleged by the prosecution will be determined by the learned trial Court after recording of evidence. In these

circumstances, the case of the petitioner squarely falls within the ambit of sub-section (2) of Section 497, Cr.P.C.

3. In view of the above discussion, I am inclined to allow this petition and admit the petitioner to bail subject to furnishing bail bonds in the sum of Rupees Two Lac (Rs.2,00,000/-), with two sureties, each in the like amount, to the satisfaction of the trial Court.

(R.A.) Bail allowed
(R.A.) Appeal dismissed

2012 Y L R 85
[Lahore]
Before Sh. Ahmad Farooq and Muhammad Qasim Khan, JJ
MUHAMMAD NAEEM-UL-HAQ---Petitioner
versus
MUHAMMAD IQBAL and 3 others---Respondents

Criminal Miscellaneous Nos.10816-BC and 12467-BC of 2011, decided on 18th October, 2011.

Criminal Procedure Code (V of 1898)---
----Ss. 497(5) & 498---Control of Narcotic Substances Act (XXV of 1997), Ss.9(c), 15 & 51---Possessing narcotic---Petition for cancellation of pre-arrest bail---Petitioner was earlier arrested in a case registered under S.9(c) of Control of Narcotic Substances Act, 1997 at the instance of S.H.O./complainant---Petitioner was found innocent in the investigation and report for his discharge was submitted and he was acquitted from the charge---Inquiry transpired that S.H.O. had falsely implicated the petitioner in said case in collusion with respondents---Respondents having been granted bail, petitioner had filed petition for cancellation of bail granted to the respondents---Sufficient material was available to connect the respondents with the commission of the offence, punishment of which fell within the prohibitory clause of S.51 of Control of Narcotic Substances Act, 1997---Respondents, in circumstances, were required by the police for further investigation---Petitioner's innocence having been proved during the investigation and thereafter, his acquittal from the charge, prima facie had proved that the recovered 'charas' belonged to the respondents---No ill-will or element of mala fide on the part of the prosecution was found, accused/respondents were not entitled to the concession of pre-arrest bail, which was an extraordinary relief---Order granting pre-arrest bail to S.H.O., was also patently illegal as the Special Judge had ordered not to arrest him without permission of the court---If bail granting orders were not recalled, Investigating Agency was likely to be deprived of its right to investigate and collect further evidence against respondents---Impugned orders, in circumstances, having resulted in miscarriage of justice, order granting pre-arrest bail to respondents, were cancelled in circumstances.

Aftab Ahmad Bajwa for Petitioner
Muhammad Asim Mumtaz for Respondents Nos.1 and 2
Arshad Mehmood Sipra, Special Prosecutor, ANF along with Hayat Shah, S.I. and Sakhi Muhammad S.I., ANF.

ORDER
Through this single order we intend to decide Criminal Miscellaneous No.10816-BC of 2011 and Criminal Miscellaneous No.12467-BC of 11, as both these petitions have arisen out of the same F.I.R. No.28 of 2010, registered in Police Station, ANF, Sialkot, under section 9(c) of the Control of Narcotic Substances Act, 1997.
2. Through Criminal Miscellaneous No. 10816-B.C./11 the present petitioner has sought cancellation of pre-arrest bail granted to Muhammad Iqbal and Saleem

Ahmed/respondents Nos.1 and 2, by the learned Special Judge, C.N.S.A., Lahore, vide order dated 22-7-2011. In the other petition, bearing Criminal Miscellaneous No.12467-B.C/11, he is seeking with-drawal of the order of the learned Special Judge, C.N.S.A., Lahore, dated 14-9-2011 whereby he has granted pre-arrest bail to respondent No.1/Syed Hayat Shah.

3. Brief facts of the case in hand are that the present petitioner was arrested in a case arising out of F.I.R. No.28 of 2010, dated 23-12-2010, registered in Police Station, ANF, Sialkot, under section 9(c) of the Control of Narcotic Substances Act, 1997, at the instance of Syed Hayat Shah/S.I./S.H.O./complainant for an occurrence in which 1100 gram 'charas' was allegedly recovered from his possession. However, during investigation, the present petitioner was found to be innocent and report for his discharge was submitted. Consequently, he was acquitted from the charge by the learned trial Court. Nevertheless during the inquiry/ investigation, it transpired that Syed Hayat Shah, S.I/S.H.O. (respondent No.1 in Criminal Miscellaneous 12467-B.C/11) had falsely implicated the petitioner in the said case in collusion with Muhammad Iqbal (brother-in-law ('Behnoi') of the petitioner) and Saleem Ahmed (real brother of the petitioner). In view of the findings of the Inquiry Officer recorded in the report submitted under section 173, Cr.P.C. qua F.I.R. No.28 of 2010, dated 23-12-2010, the aforesaid respondents applied and were granted pre-arrest bail by the learned Special Judge, C.N.S.A., Lahore.

4. The learned counsel for the petitioner contended that facts and circumstances of the case did not warrant grant of pre-arrest bail to the respondents. He submitted that a huge quantity of 'charas' weighing 1100 k.gs. was planted by the respondent/Syed Hayat Shah, S.I/S.H.O. in connivance with other respondents/Muhammad Iqbal and Saleem Ahmed and this fact, has been proved during investigation and inquiry conducted by the Deputy Director, ANF, Lahore. He argued that as in the inquiry/investigation, the recovered 'charas' was found to be planted one, it was proved that the said 'charas' belonged to the respondents. He further argued that as the respondents have committed an offence falling within the ambit of section 9(c) read with section 15 of the C.N.S.A., 1997, which is punishable with death or imprisonment for life, or imprisonment for a term which may extend to fourteen years along with fine, they were not entitled to the concession of pre-arrest bail. He has contended that connivance of all the three accused/respondents is proved from the data of their cellular phones, which has been brought on the record of the investigation.

5. The learned Special Prosecutor, ANF has also supported the instant petition. He argued that the prosecution has sufficient material to connect the accused/ respondents with the commission of an offence falling under section 9(c) read with section 15 of the C.N.S.A., 1997, which falls within the prohibitory Clause of section 51 of the said Act. He further argued that the accused/respondents are required by the police for further investigation. He next contended that the accused/respondents were not entitled to the extraordinary relief of pre-arrest bail and the bail granting orders are erroneous and the result of improper exercise of discretionary powers.

6. The learned counsel for the accused/respondents/Muhammad Iqbal and Saleem Ahmed contended that nothing was recovered from their possession and the only allegation against them was that of providing the narcotic substance to Hayat Shah, S.I/S.H.O. for planting on the present petitioner. He further contended that the prosecution has no evidence to prove that the said narcotic substance was supplied by the respondents to the complainant/Hayat Shah. He submitted that the case of the accused/respondents being that of further enquiry, the learned trial Court has rightly extended them the benefit of pre-arrest bail. Lastly, argued that the bail granting order was passed by the learned trial Court in accordance with law and the same does not call for interference by this Court. The learned counsel for the respondent/Syed Hayat Shah submitted that no offence under section 9(c) read with section 15 of the CNSA, 1997 is made out against him and he has been falsely involved in the instant case by the Investigating Officer.

7. Arguments heard. Record perused.

8. Admittedly, the present petitioner has been exonerated from the charge of possessing 1100 grams of 'charas'. As per the investigation/inquiry, the recovered 'charas' was supplied by the respondents/ Muhammad Iqbal and Saleem Ahmed to Hayat Shah, S.I/S.H.O., who had planted the same on the present petitioner. Their connivance with the other accused/Hayat Shah, prima facie, proves from the data of their cellular phones. As such, sufficient material was available to connect them with the commission of the offence, the punishment of which falls within the prohibitory Clause of section 51 of the Control of Narcotic Substances Act, 1997. They are required by the police for further investigation. In the circumstances, it was not a fit case for the grant of pre-arrest bail to the accused/respondents.

9. So far as the case of the third accused/respondent/Syed Hayat Shah is concerned, it is observed that he has been granted pre-arrest bail on the statements of the Public Prosecutors made before the learned trial Court on 14-9-2011 to the effect that if the prosecution collects some material against him, he will be arrested, with the permission of the Court. On the other hand, the learned Special Prosecutor/Mr. Tariq Saleem Sheikh, at the time of hearing of bail petition of Muhammad Iqbal and Muhammad Saleem/ respondents had already submitted before the learned trial Court, on 22-7-2011, that the aforesaid two accused had provided narcotics to plant upon Naeem-ul-Haq. The statement of the learned Special Prosecutor/Mr. Tariq Saleem Sheikh dated 14-9-2011, prima facie, seems to be inconsistent with his earlier statement dated 22-7-2011 and aimed at extending undue favour to the accused/Syed Hayat Shah. However, the learned Special Prosecutor/ Mr. Arshad Mehmood Sipra submitted before this Court that physical custody of the accused/respondent is required by the police for further investigation and collecting material against him. Even otherwise, petitioner's innocence having been proved during the investigation and thereafter, his acquittal from the charge, prima facie, proves that the recovered 'charas' belonged to the accused/ respondents. There being no ill-will or element of mala fide on the part of the prosecution, the accused/respondents were not entitled to the concession of pre-arrest bail, which is an extraordinary relief. The order granting

pre-arrest bail to the accused/Syed Hayat Shah is also patently illegal as the learned Special Judge, C.N.S.A. has ordered not to arrest the accused/respondent without permission of the Court. In case, the impugned bail granting orders are not recalled, the investigating agency is likely to be deprived of its right to investigate and collect further evidence against the accused/respondents. Hence, the impugned orders have resulted in miscarriage of justice.

10. In view of the above discussion, both the petitions are accepted and the impugned orders dated 22-7-2011 and 14-9-2011, passed by the learned Special Judge, C.N.S.A., Lahore are set aside. Resultantly, pre-arrest bails granted to the accused/respondents, namely, Muhammad Iqbal, Saleem Ahmed and Syed Hayat Shah are cancelled.

H.B.T./M-360/L Petitions accepted.

2012 Y L R 801
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD SHAFEEQ---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No.2832-B of 2011, decided on 24th August, 2011.

(a) Criminal Procedure Code (V of 1898)---
----S. 497(2)---Penal Code (XLV of 1860), Ss.395/412---Dacoity, dishonestly receiving property stolen in dacoity---Bail, grant of---Further inquiry---Accused was not nominated in F.I.R. and after 26 days of the occurrence complainant in his supplementary statement had shown his suspicion on the accused and others---Accused was not put to any identification test and this fact alone was sufficient to make his case one of further inquiry---Mere presence of accused did not bar grant of bail to him if otherwise he deserved the same---Investigation was complete and challan had been submitted in the court---Accused was not a previous convict---Bail was allowed to accused in circumstances.

(b) Criminal Procedure Code (V of 1898)---
----S. 497---Penal Code (XLV of 1860), Ss. 395 & 412---Dacoity, dishonestly receiving property stolen in dacoity---Bail--Principles--- Mere presence of accused does not create any bar for grant of bail if otherwise accused becomes entitled for the same.

Abid Hussain Bhutta for Petitioner.
Ch. Muhammad Akbar, D.P.-G. for the State along with Sadiq S.I. with record.
Bakht Yar Mehdi for the Complainant.

ORDER
MUHAMMAD QASIM KHAN, J.---Muhammad Shafique petitioner seeks post-arrest bail in a case registered vide F.I.R. No.411 of 2011 dated 16-8-2010 at Police Station Muzafarabad District Multan under sections 395/412, P.P.C.

2. Succinctly, the prosecution case is that on the night of 14-8-2010, 12 unknown bandits trespassed into the premises of Messrs Khokhar Cotton Factory and Oil Mills, industrial Estate, Multan held the watchman under the shed of gun, tied him up took away net cash of Rs.7,000 a repeater gun, cell phone and cables valuing Rs.3,90,440. Hence, the case.

3. The learned counsel for the petitioner has submitted that the petitioner has been falsely involved in this case. The petitioner is not named in the F.I.R. and the supplementary statement of the complainant was recorded on 4-9-2010 after about 26 days of the occurrence in which the complainant has shown his suspicion on the petitioner along with others. Further added that no identification parade was held.

Lastly submitted that the investigation is complete and the petitioner is previously non-convict. In these circumstances, he may be allowed bail.

4. On the other hand, the learned D.P.-G. assisted by learned counsel for the complainant has opposed the submissions advanced by the learned counsel for the petitioner and prayed for dismissal of the bail petition.

5. Heard. Record perused.

6. The petitioner is not nominated in the F.I.R. The complainant in his supplementary statement recorded on 4-9-2010 after about 26 days of the occurrence shown his suspicion on the petitioner and others. The petitioner was not put to test identification parade. This fact alone is sufficient to make it a case of further inquiry. The petitioner is previous non convict. Mere presence of the petitioner did not create any bar for the grant of bail if otherwise accused becomes entitled for the same. The petitioner is behind the bars. The investigation is complete and Challan has been submitted in the Court.

7. Cumulative effect of the above discussion is that the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 (Rupees the hundred thousand only) each with one surety each in the like amount to the satisfaction of the learned trial Court/Duty Judge.

N.H.Q./M-369/L Bail allowed.

2012 Y L R 1192
[Lahore]
Before Muhammad Qasim Khan, J
ABDUL RAZZAQ---Petitioner
Versus
THE STATE and 3 others---Respondents

Criminal Revision No.90 of 2010, decided on 2nd December, 2010.

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

---Ss.540 & 94---Power to summon material witness or examine persons present---Production of further evidence, application for--- Applicant/complainant filed application under S.540, Cr.P.C. read with S.94, Cr.P.C for production of certain documents, which application was dismissed by the Trial Court---Complainant's contention was that said documents were very essential and necessary for just decision of the case and Trial Court had not properly exercised jurisdiction vested in it and dismissed the application on grounds which were not available---Validity---Documents required to be exhibited were prima facie important to establish as to which of the party was in possession of the land at the relevant time, where occurrence took place and the Trial Court was not justified in observing that complainant wanted to fill up the lacunae or flaws of the ocular account, especially when there was no embargo with regard to limitation and such jurisdiction could be exercised at any stage---Only examination-in-chief of three witnesses had been recorded, and they were yet to be cross-examined and the entire evidence was yet to be produced, hence, it could not be said that the documents would prejudice the rights of the accused/respondent---Said documents were essential for just decision of the case, therefore, Trial Court had passed its order without applying the law in its true perspective---Impugned order was consequently set aside with the direction to Trial Court to allow the complainant to produce documents during trial in accordance with law---Revision petition was allowed accordingly.

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

----Ss.540---Power to summon material witness or examine persons present---Scope---Section 540, Cr.P.C. gave wide powers to the court and main ingredient under the section was that whether the piece of evidence, which any party wanted to produce before the court, was essential to the just decision of the case or not---Section 540, Cr.P.C. enabled the court to examine any evidence at any stage of the proceedings which was deemed essential by the court for just decision of the case.

Zahid-ur-Rehman Tayib for Petitioner.

Muhammad Umair Mohsin for Respondents.

Muhammad Ali Shahab, D.P.-G. for the State.

ORDER

MUHAMMAD QASIM KHAN, J.---The petitioner who is complainant of case F.I.R. No.361 of 2008 registered with Police Station Abbas Nagar, Bahawalpur has filed this revision against the order dated 5-5-2010 passed by learned Additional Sessions Judge, whereby his application under section 540 read with section 94, Cr.P.C. for producing certain documents during trial, was dismissed.

2. It is argued by learned counsel that the documents fully detailed in the application filed under section 540 read with section 94, Cr.P.C. were very essential documents and necessary for just decision of the case, but the learned trial court did not properly exercise the jurisdiction vested in it and dismissed his application on the grounds which were not available, because there was no question of filling up the lacunae or flaws of the ocular account, as only examination-in-chief of three eye-witnesses had been recorded, they were yet to be cross-examined and remaining evidence was also to be produced by both the sides. The learned counsel therefore, argued that by producing of these documents no prejudice was likely to be caused to the parties, as such, the impugned order may be set aside.

3. On the other hand, learned counsel for the accused/respondents argued that the petitioner had not disclosed as to what was the necessity for bringing on record the proposed documents and the sole intention of the petitioner was to fill up the gaps. Further argued that these documents even otherwise, could not be produced because these were neither given to the I.O. nor copies thereof were delivered to the accused/respondents, as such, there is no illegality in the impugned order.

4. Heard. Record perused.

5. Search of truth is the primary duty imposed upon the court for administration of justice and court cannot base its opinion merely on technicalities. The documents required to be exhibited are prima facie important to establish as to which of the party was in possession of the land where occurrence took place at the relevant time and the learned trial court was not justified in observing that complainant wanted to fill up the lacunae, especially when there is no embargo with regard to limitation and such jurisdiction could be exercised at any stage. Here in this case only examination-in-chief of three witnesses had been recorded, they were yet to be cross-examined and the entire evidence was yet to be produced, hence, it could not be said that these documents will prejudice the rights of the accused/respondents. Section 540, Cr.P.C. gives wide powers to the court in this behalf and this jurisdiction should be exercised liberally as main ingredient under section 540, Cr.P.C. is that whether the piece of evidence which any party wanted to produce before the court, is essential to the just decision of the case or not. The court cannot sit as an idle spectator rather this section enables the court to examine any evidence at any stage of the proceedings which is deemed by the court essential for just decision of the case. As observed above, these documents were on the face of it essential for just decision of the case, therefore, the learned trial court passed the impugned order without applying the law in its true perspective. As such, this petition is allowed, the impugned order dated 5-5-2010 is set aside, as a necessary consequence the application of the petitioner filed under section 540 read with section 94, Cr.P.C, shall be deemed to have been accepted, and the petitioner is allowed to produce the documents, detailed in the said application, during trial in accordance with law.

M.W.A./A-14/L Revision allowed.

2012 Y L R 1331
[Lahore]
Before Muhammad Qasim Khan, J
NAZIR AHMAD and another---Appellants
Versus
THE STATE and another---Respondents

Criminal Appeals Nos.99 and 146 and Murder Reference No.16 of 2009, decided on 7th March, 2011.

Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---F.I.R. was promptly lodged---Occurrence had taken place in daylight---Presence of eye-witnesses at the scene of occurrence was established and no material diversity in their statements could be found---Conviction of accused was maintained---Element of family honour was involved in the case---Deceased himself had invited the misfortune by abducting the sister of accused---Immediate cause of murder had also remained a mystery---Death sentence awarded to accused was commuted to imprisonment for life in circumstances.

Abdul Manan Bhatti and Sardar Israr Ahmad Dahir for Appellant.
Muhammad Aslam Khan Dhukar for the Complainant.
Muhammad Ali Shahab, Deputy Prosecutor-General for Respondent.
Date of hearing: 7th March, 2011.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---Nazir Ahmad accused/appellant along with Ghulam Abbas (since acquitted) was booked in case F.I.R. No.221 of 2004 under section 302/34, P.P.C. registered with Police Station City Sadiqabad and ultimately vide judgment dated 9-4-2009 Ghulam Abbas co-accused was acquitted of the charges against him, whereas, Nazir Ahmad was convicted under section 302(b), P.P.C. for committing Qatl-e-Amd of Muhammad Afzal deceased and sentenced to death; further ordered to one lac rupees as compensation to the legal heirs of the deceased, failing which to further suffer simple imprisonment for six months. Murder Reference No.16 of 2009 has been sent by the learned trial court under section 374, Cr.P.C, Criminal Appeal No.99 of 2009 has been filed by Nazir Ahmad convict challenging his above conviction and sentence, whereas, Criminal Appeal No.146 of 2009 has been filed by Rasool Bakhsh complainant against the acquitted of Ghulam Abbas, all these three matters are being decided by this single judgment.

2. Briefly the facts are that Rasool Bakhsh complainant P.W.3 on 25-6-2004 reported the matter to the police, where upon formal F.I.R. was chalked out with the narration that on the fateful morning the complainant along with Muhammad Iqbal, Zafar Iqbal, Muhammad Afzal, Muhammad Khan were coming back after attending hearing in Katchery Sadiqabad, when at about 7-30 a.m. they reached near Sadiq Market, Nazir Ahmad (accused/appellant) armed with 12-bore pistol and Ghulam

Abbas armed wit pistol .30-bore (since acquitted) came; Nazir Ahmad exhorted lalkara to teach them lesson for having abducted his sister Mst. Fateh Bibi. Muhammad Afzal tried to run, Ghulam Abbas made a straight .30-bore pistol fire which went missed. Nazir Ahmad fired from his .12-bore pistol which hit the back of Muhammad Afzai and second fire by Nazir Ahmad landed on the right hand and head of Muhammad Afzal and he fell down in injured condition. On hearing the fire shots so many people were attracted at the scene of occurrence, they tried to apprehend the accused but accused persons extended threats and decamped. Muhammad Afzal died of the injuries at the spot.
Motive was alleged to be that sister of Nazir Ahmad accused namely Mst. Fateh Bibi had been abducted and a case F.I.R. No.25 of 2003 had been registered at Police Station Bhong for her abduction, wherein, Muhammad Afzal (deceased) and Zafar Iqbal had been challaned. It was further stated that Nazir Ahmad and Ghulam Abbas had committed the murder on the instigation of Ghulam Muhammad and Arz Muhammad.

3. After registration of the F.I.R., Umar Daraz Sub-Inspector P.W.9 initiated the investigation by visiting the spot, where he inspected the dead body, prepared injury statement Exh.PJ, inquest report Exh.PK and sent the dead body for post mortem examination. The I.O. took into possession blood-stained earth Exh.PC, two empties Exh.PD, prepared site plan of place of occurrence Exh.PL and recorded statements of the witnesses. On the same day Nazir Ahmad accused was arrested and .12-bore pistol P-2 was recovered from him with three live cartridges, site plan of place of recovery is Exh.PE/1. Since Nazir Ahmad accused failed to produce any licence for carrying the said weapon, a separate case was registered against him. On the same day co-accused Ghulam Abbas was arrested and pistol .30-bore P-4 with five live bullets P.5/1-5 were recovered, the site plan of place of recovery is Exh.PF/1. After recording statements of the witnesses the Investigation Officer proceeded to the hospital where last worn clothes of the deceased i.e. Shirt P-6, Chaddar P-7, Patka P-8 (all blood-stained) and a pair of shoes P.9/1-2 were produced to him and taken into possession vide memo Exh.PG. After completion of investigation the accused namely Nazir Ahmad and Ghulam Abbas were sent to face trial, however, during investigation as co-accused namely Ghulam Muhammad and Arz Muhammad were found innocent, their names were placed in Column No.2 of the report.

4. The accused persons were charge-sheeted, as they pleaded not guilty the trial commenced, wherein the prosecution produced ten witnesses, which include the statement of the Investigation Officer P.W.9, complainant appeared as P.W.3 and produced Zafar Iqbal P.W.4 to depose about ocular account, whereas Dr. Hafiz Nisar Ahmad P.W.7 appeared to depose about the conduct of post mortem over the dead body of Muhammad Afzal deceased and found the following injuries:--
(1) A lacerated wound 1/4 x 1/4 inches on left temple between left eye brow and left ear. Bleeding and blackening.
(2) A lacerated wound 1/4 x 1/4 inches on near left ear and bleeding and blackening.
(3) A lacerated wound 1/4 x 1/4 inches on middle of left lumber sacral lembosacral region, blackening and bleeding.

(4) A lacerated wound 1 x 1/4 inches on right middle finger and ring finger bleeding and blackening. Skin and muscles were injured.
According to the doctor probable time elapsed between injuries and death was immediate and between dearth and post mortem was 12-hours. The cause of death was observed to be Injuries Nos.1, 2 and 3 collectively, caused with fire arm. On close of the prosecution evidence the accused were examined under section 342, Cr.P.C., wherein they refuted, the entire prosecution case. Ultimately, Ghulam Abbas was acquitted of the charges against him, whereas, Nazir Ahmad accused/appellant was convicted and sentenced, as detailed above.

5. In support of instant appeal, learned counsel for the accused/appellant has argued that presence of the P.Ws. at the place of occurrence is unnatural as neither they abode nor had any business including cultivation at or around the place of occurrence and the occurrence has taken place on a thoroughfare but no independent person has been produced by the prosecution to prove its case. Learned counsel further argued that because of previous criminal litigation between the parties before Sessions Court at Rahim Yar Khan the appellant has been falsely involved in this case. The learned counsel emphasized with vehemence that post mortem has been conducted with inordinate delay, which reflects that neither the P.Ws. nor the complainant were present at the place of occurrence and they learnt about the incident and came at the spot after concocting the story in collusion with police a false case has been foisted against the appellant. Further argued that evidence produced by the prosecution has not been believed by the learned trial court qua remaining co-accused. Lastly, it has been argued that report of Forensic Science Laboratory showing positive report of the crime weapon is inconsequential on the ground that empties as well as crime weapon i.e. pistol; all were sent together, therefore, it may not be relied upon. The learned counsel further agued that if the court does not agree or has not been persuaded by the arguments raised, then it is not a case of capital sentence on the ground that family honour has been involved in this case as prior to the occurrence deceased abducted Mst. Fateh Bibi and the trial of the Said case was going-on, on so many dates prior to the happening of the occurrence both the parties have been going and coming together after the court proceedings, but none of the parties ever attempted to cause harm to the other side. If this background of the case is taken up, then according to the learned counsel it is mysterious on the part of the prosecution as to what happened on the day of occurrence instantly before the occurrence, therefore, the quantum of sentence of the appellant is obliged to be extenuated and same may be reduced.

6. The learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposed the above arguments on the ground that occurrence took place in shine day, parties were known to each other prior to the occurrence, both the parties have been entangled in criminal litigation and as per prosecution case on the day of happening of the misfortune incident, both the parties were coming back to their house and in a planned manner by repetitive fire shots the appellant secluded the deceased. The learned counsel for the complainant further argued that it is promptly lodged F.I.R., motive is very strong which has not been denied and recovery of crime weapon corroborates the prosecution evidence by way of positive report of Forensic

Science Laboratory and no element of mitigating the quantum of sentence exist in this case, thus the appeal may be dismissed. The learned counsel for the appellant while pressing his appeal against the acquittal of Ghulam Abbas has argued that his acquittal is result of misreading of prosecution evidence, otherwise, sufficient material was available on the file to justify conviction of said Ghulam Abbas.

7. We have explored the file with magnifying glasses and have also keenly heard the learned counsel for the parties, for the just decision of this case.

8. The instant occurrence took place in this case on 25-6-2004 at 7-30 a.m. in the area of Sadiq Market situated at a distance of 1-1/2 furlong from police station City Sadiqabad and the matter was reported to the police on the basis of application of complainant Rasool Bakhsh on the same day at 8-15 a.m. implying that F.I.R. was lodged with promptness leaving no room for consultation or deliberations. Courts have always regarded a promptly lodged F.I.R. to be unquestionable document to some extent. Therefore, we believe that the F.I.R. has been lodged with promptitude and have failed to search any loophole in the same to favour the appellant.

9. The motive though serious one, but it otherwise implicates family honour and somewhat constant shame. According to the prosecution case deceased along with other guys abducted Mst. Fateh Bibi sister of the appellant, about which a case was lodged and after accomplishment of investigation by preparing report under section 173, Cr.P.C. recommending prosecution of deceased and the co-accused, the learned trial court had initiated proceedings and on the day of occurrence allegedly the case was fixed for hearing and after being free from the court proceedings the parties were coming back to their homes and in the way this incident took place. It has been brought on record categorically by cross-examination of complainant P.W.3 that before happening of the incident both the parties have been attending the court for the last 10/12 dates jointly while going and coming but no untoward incident had taken place during said span of time, but what happened all of a sudden on the day of occurrence, which culminated in the assassination of Muhammad Afzal deceased, this aspect of the case is gloomy and fogy. It may not be tried to say that it remained mystery as to what happened immediately before the occurrence in between he parties. We believe the presence of the P.Ws. at the scene of occurrence at the relevant time and we have been unable to locate any material diversity in the statements of the eye-witnesses. The occurrence has taken place in the light of the day, but at this stage one aspect needs consideration i.e. the appellant did not make any fire shot at the deceased firstly rather the fire shot was made by Ghulam Abbas co-accused (since acquitted), but the same had gone missed, thereafter, allegedly the appellant made two successive fire shots hitting on different parts of body of the deceased resulting in falling on the ground dead. Spent crime empties as well as crime weapons allegedly recovered on the pointing out of the appellant were sent together, this fact also creates doubt in the veracity of the report of Forensic Science Laboratory Exh.PP. As we have already observed hereinbefore the element of family honour in this case cannot be over-looked, even otherwise, case of the prosecution when is seen in its totality then it can safely be inferred that deceased himself had

invited the misfortune and jumped in the boiling water by way of abducting sister of the appellant. But at the same time during prosecution of the said abduction case prior to the occurrence no untoward incident happened between the parties and on the day of occurrence all of a sudden, conspicuously the occurrence took place and the immediate cause of murder remains a mystery. Therefore, we are not inclined, in the circumstances of this case, to uphold the quantum of capital sentence imposed upon the appellant, therefore, by dismissing the appeal of the appellant the same is commuted to imprisonment for life with benefit of provision of section 382-B, Cr.P.C. Jail authorities are directed to count the period of incarceration so far undergone by the appellant towards substantive quantum of his sentence, the amount of compensation shall remain the same and case property shall be disposed of as ordered by the learned trial court. Office is directed to remit the record of the learned trial Court immediately.

10. For the same reasons, we find no substance in criminal appeal challenging the acquittal of Ghulam Abbas co-accused, as such, the same is dismissed accordingly.
MURDER REFERENCE IS ANSWERED IN NEGATIVE SENTENCE OF DEATH IS NOT CONFIRMED.

N.H.Q./N-25/L Sentence reduced.

2012 Y L R 1595
[Lahore]
Before Mazhar Iqbal Sidhu and Muhammad Qasim Khan, JJ
TARIQ---Appellant
versus
THE STATE and 2 others---Respondents

Criminal Appeal No.256 and Murder Reference No.27 of 2008, heard on 14th September, 2010.

Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Appreciation of evidence---F.I.R. was lodged after a delay of eighteen hours, explanation whereof was not believable---Complainant had twisted the real facts of the case, meaning thereby that either he had not seen the occurrence or he had concocted the story in connivance with the Police at a belated stage---Ocular testimony furnished by interested witnesses was not corroborated by any independent evidence---Co-accused had been acquitted by Trial Court---Motive for the occurrence had not been proved---Prosecution story appeared to be highly improbable and doubtful---Accused was acquitted in circumstances.

Syed Aasim Bokhari at State expanse for Appellant.
Malik Muhammad Latif, Deputy Prosecutor General for Respondents.
Date of hearing; 14th September, 2010.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---Tariq accused/appellant along with Muhammad Asghar, Ghulam Rasool and his father Jindwada was tried by learned Additional Sessions Judge, Sadiq Abad in case F.I.R. No.339 dated 6-7-2006 under sections 302/34, P.P.C. Police Station City Sadiqabad and on conclusion of the trial the remaining co-accused were acquitted of the charge, whereas, vide judgment dated 30-10-2008 Tariq accused/appellant was convicted and sentenced to death with a fine of Rs.25,000, in default to suffer rigorous imprisonment for two years. Challenging his above conviction and sentence the appellant has filed Criminal Appeal No.256 of 2008, whereas Murder Reference No.27 of 2008 has been sent by the learned trial court seeking confirmation or otherwise of the death sentence, both these matters are being decided by this single judgment.

2. Briefly the facts of the case are that on 6-7-2006 at 3-15 a.m. F.I.R. No.339 of 2006 was got lodged by Sajjad Ahmad complainant to the effect that on 5-7-2006 he (the complainant) along with Rahim Bakhsh and Sharif to meet Sadiq Hussain deceased at Mazdoor Colony. At about 7/8-00 p.m. Arslan, nephew of the complainant, went to make some purchases and after a while, they heard the noise of his weeping. The complainant and Sadiq Hussain came out of the house and saw that Jindwada was giving fist and slaps to Arslan. Sadiq Hussain tried to refrain Jindwada whereupon he started hurling abuses and on hearing the noise Tariq (accused/appellant) armed with sota, Ghulam Rasool and Muhammad Asghar came

there, Muhammad Tariq gave a sota blow on the head of Sadiq Hussain. Ghulam Rasool and Asghar shouted not to spare Sadiq Hussain. Rahim Bakhsh and Sharif also witnessed the occurrence. The complainant brought his injured brother Sadiq Hussain to Civil Hospital at Sadiq Abad, where from he was referred to Sheikh Zayed Hospital but the injured succumbed to the injuries.

3. Nizam ud Din Sub-Inspector on receiving information reached Sheikh Zayed Hospital where above statement was made by the complainant and was reduced into formal F.I.R. Nizam-ud-Din S.-I. P.W.13 went to the place of occurrence, inspected the site and prepared rough site plan Exh.PG, collected blood-stained KHAIS Exh.PC. Dr. Mushtaq Ahmad P.W.1 conducted post mortem over the dead body of Sadiq Hussain and found the following injuries:--

(1) A lacerated wound on the right side of head on parietal area 10 cm above the pinna of right ear measuring 0.5 cm x 0.5 cm. A bluish area around the stated injury measuring 5 x 5 cm present. Scalp haematoma present on the affected area. Bone of parietal area was fractured at multiple sites. Multiple pieces of bone were depressed into the brain matter, tearing the brain membrances. Lot of clotted blood was present under the membranes and into the brain matter. Brain matter was severally lacerated at right parietal area.

(2) Right eye was also black. Bleeding from nose was evidence through the clotted blood. Base of skull was also fractured at cribriform plate.

(3) Bleeding from both ears due to the fracture of skull bone was present.

Tariq accused was arrested on 2-8-2006 who led to the recovery of sota P-2 (Exh.PD). As, said Nizam-ud-Din was transferred, the investigation was taken over by Muhammad Aslam A.S.-I. P.W.10 who declared three of the co-accused of the appellant as innocent, which investigation was endorsed by ASP. Thereafter, finally Nasir Ali Inspector P.W.9 prepared the challan against Tariq accused/appellant.

4. On submission of challan, Tariq appellant was charge-sheeted who claimed to be tried, whereupon, trial commenced and prosecution produced (13) witnesses and produced report of Chemical Examiner Exh.PL. On close of prosecution evidence, the accused was examined under section 342 Cr.P.C. and on conclusion of the trial the above conviction and sentence was recorded against the accused/appellant.

5. It is argued by learned counsel that occurrence took place on 5-7-2006 at 7/8-00 p.m., and F.I.R. was lodged on 6-7-2006 at 3-15 p.m., with a delay of eighteen hours and the explanation allegedly offered by the complainant does not seem to be probable and reasonable. It is argued that occurrence took place during dark hours of night but complainant party in collusion with police stretched the same short after MAGHRIB prayer in order to establish identification of the appellant and his co-accused. It is contended that motive has not been proved because Arslan, nephew of the complainant, who was quarrelling with co-accused Jindwada, since acquitted, has

not been produced by the prosecution and in this way the motive remains shrouded in mystery; withholding of best possible evidence of motive shows the guilty conscience of the complainant. The learned counsel further argued that complainant admitted during cross-examination that he made two statements, one before the I.O. before the death of the deceased and then second after the death of the deceased in the Hospital but the first statement made by him is not available on record. It is contended by learned defence counsel that co-accused namely Jindwada, Ghulam Rasool and Muhammad Asghar were, found innocent during the investigation and they have also been acquitted by the learned trial court on the basis of same evidence in which Muhammad Tariq appellant has been convicted and sentenced. The learned counsel referred to the statement of the appellant recorded under section 342, Cr.P.C. to an answer given against Question No.8 i.e. "The complainant is real brother of Sadiq Hussain deceased who is resident of Mohallah Ghafoor Abad. There was a dispute of a plot owned by Mst. Sakina Bibi (real ant/paternal) which is situated between our house and the house of deceased Sadiq Hussain. All the residents of Mazdoor Colony are the illegal occupants of the railway land. Sadiq Hussain deceased wanted to occupy said plot upon which this false case get registered against me by the complainant." Learned counsel at the last submitted that the prosecution has miserably failed to prove its case, as such the appeal may be allowed.

6. Learned D.P.-G. argued that appellant is the sole perpetrator for causing the death of Sadiq Hussain deceased and on the basis of niceties he is not entitled for acquittal.
7. We have heard the arguments of learned counsel for the parties and perused the record.

8. The occurrence in this case took place on 5-7-2006 at 7/8-00 p.m., the complaint was recorded by the Investigating Officer at Hospital on 6-7-2006 at 2-00 p.m. and the same was sent to police station whereupon F.I.R. was lodged on the same day at 3-15 p.m. By this way there is delay of eighteen hours in lodging of the F.I.R. and the alleged explanation of delay in reporting the matter to the police is not believable because the complainant had the source to inform the police prior to the alleged date and time. It is pertinent to mention here that during cross-examination the complainant has categorically admitted that when the deceased arrived in the Civil Hospital his statement was recorded by the I.O. the same was thumb marked by him and injured being in precarious condition was removed to Sheikh Zayed Hospital where the deceased succumbed to the injuries and the complainant made second statement before the Investigating Officer which has been exhibited as Exh.PB. The file has been gone through but we have failed to locate the said statement. Withholding of Arslan who is star witness of the motive and misplacement of the first statement of the complainant recorded by the Investigating Officer in the life time of the deceased give rise to an inference that the complainant has twisted the real facts of the case, meaning thereby either he did not see the occurrence for he has concocted the story in connivance with the police at belated stage.

9. P.W.7 Muhammad Sharif is related to the deceased as well as the complainant, therefore, the ocular account of the prosecution case hinges upon the statements of

interested witnesses, which have not been corroborated by any other independent source. Co-accused have been acquitted in this case, the motive has not been proved and the story of the prosecution as mentioned above appears to be highly improbable and doubtful, thus, this appeal is allowed, conviction and sentence of the appellant is set aside and he is acquitted of the charge against him. He shall be released forthwith if not required in any other case. The case property, if any, be disposed of in accordance with law and the record of the learned trial court be sent back immediately.

MURDER REFERENCE IS ANSWERED IN THE NEGATIVE. SENTENCE OF DEATH IS NOT CONFIRMED.

N.H.Q./T-4/L Appeal accepted.

2012 YLR 2448
[Lahore]
Before Muhammad Qasim Khan and Syed Iftikhar Hussain Shah, JJ
MUHAMMAD SHARIF---Petitioner
Versus
JUDGE, ANTI-TERRORISIM COURT and 5 others---Respondents

Writ Petition No. 6371/BWP of 2011, decided on 21st March, 2012
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(a) Anti-Terrorism Act (XXVII of 1997)---
----S. 17---Powers of Anti-Terrorism Court with respect to other offences---Scope---Anti-Terrorism' Court has the power to try non-scheduled offence only when it is trying a scheduled offence, i.e., scheduled and non-scheduled offences can be tried together in one and the same trial---Such power shall not be available to the Anti-Terrorism Court when it is not trying any scheduled offence---Once the Anti-Terrorism Court after having tried the offence finds that the scheduled offence is not made out, then in terms of S.23 of the Anti-Terrorism Act, 1997, it will have no jurisdiction to pass any judgment and it will have to transfer the case to the ordinary court.

(b) Anti-Terrorism Act (XXVII of 1997)---
----Ss. 17, 23 & 7---Penal Code (XLV of 1860), Ss.365-A/302---Constitution of Pakistan, Art.199---Constitution petition---Abduction for ransom, qatl-e-amd---Anti-Terrorism Court vide impugned order had sent the case to the court or ordinary jurisdiction for decision-Validity-Anti-Terrorism Court had tried the offences and formed the opinion that a case of scheduled offence under S.365-A, P.P.C. had not been made out---After having formed a different opinion in terms of S.23 of the Anti-Terrorism Act, 1997, said court had no jurisdiction to pass any final judgment in the trial and it had the only option to transfer the case to the court of ordinary jurisdiction, as provided under S.23 of the said Act---Scope of S.23 of Anti-Terrorism Act, 1997, could not be limited to a specific point of trial, rather by use of word "cognizance" which includes trial, the Legislature was cognizant of the fact that in some cases (like the present one) the question of jurisdiction might be properly decided after recording of some evidence---Impugned order, thus, did not suffer from any procedural error, illegality, irregularity or jurisdictional defect and the same being perfectly in accordance with law was maintained---Constitutional petition was dismissed accordingly.
2003 SCMR 472; PLD 2005 SC 530; 2005 PCr.LJ 941 and 2011 PCr.LJ 411 ref.

(c) Anti-Terrorism Act (XXVII of 1997)---
----S. 23---Power to transfer cases to regular court---Scope---Scope of provisions of S.23 of Anti-Terrorism Act, 1997, cannot be limited to a specific point of trial, rather by use of word "cognizance", which includes trial, Legislature was cognizant of the fact that in some cases the question of jurisdiction may be properly decided after recording of some evidence.

Muhammad Sharif Bhatti for Petitioner.
Syed Asim Ali Bokhari for Respondents Nos. 2 to 6.
Naveed Hussain Chaudhary A.A.G. for Respondent No. 1.

ORDER

Through this constitutional petition, petitioner Muhammad Sharif has assailed the legality of order dated 18-10-2011 passed by the learned Judge Anti-Terrorism Court Bahawalpur whereby case F.I.R. No.9 of 2010 dated 9-1-2010 registered under sections 365-A/302 and section 7 of the Anti-Terrorism Act 1997 at Police Station Saddar Hasilpur District Bahawalpur was sent to the Court of ordinary jurisdiction.

2. Succinctly, the facts of the case are that complainant Muhammad Sharif got registered the aforesaid case against respondents Nos.2 to 6 with the allegation that on 9-1-2010 they abducted Manzoor Hussain alias Bhola, brother of the complainant from his poultry farm, for ransom. The police after investigation, challaned respondents Nos.2 to 6 and the learned Judge Anti-Terrorism Court Bahawalpur, after taking cognizance of the case, framed charge under section 302/ 365-A/109, P.P.C. read with section 7-E of the Anti Terrorism Act 1997, recorded the statements of 18 witnesses, examined accused/respondents Nos.2 to 6 under section 342 Cr.P.C. and after hearing the learned counsel for the parties, transferred the case to the Court of ordinary jurisdiction.

3. Learned counsel for the petitioner has contended that offence under sec?tion 365-A, P.P.C. and section 7 E Anti Terrorism Act, 1997 was made out as his brother, the deceased of this case, was abducted for ransom and was murdered and all the P.Ws. - had fully implicated the accused for the commission of the aforesaid scheduled offence but the learned Judge Anti-Terrorism Court Bahawalpur, after hearing the final arguments had opined that offence under section 365-A, P.P.C. was not made out against respondents Nos.2 to 6 and' they have committed an offence punishable under section 365, P.P.C. and sent the case to the Court of ordinary jurisdiction for further proceedings, illegally, because it was incumbent upon the learned Judge Anti-Terrorism Court Bahawalpur to decide the case either way and was not competent to transfer the case at the final stage, hence the impugned order is against the provisions of law and is liable to be set aside and the case is liable to be tried by the learned Judge Anti-Terrorism Court. Relies upon "2003 SCMR 472".

4. Conversely, the learned counsel for respondents Nos.2 to 6 has opposed this petition and contended that after recording the evidence and hearing the arguments, the learned Judge Anti-Terrorism Court had come to the conclusion that the offences under section 365-A, P.P.C. and section 7-E of the Anti-Terrorism Act, 1997 have not been made out against respondents Nos.2 to 6 and rightly transferred the case to the Court of ordinary jurisdiction as the learned Judge Anti-Terrorism Court was not competent to proceed further with the matter. Relies on "PLD 2005 Supreme Court 530", "2005 PCr.LJ 941 (Quetta)" and "2011 PCr.LJ 411 (Karachi)" .

5. We have heard learned counsel for the petitioner, learned counsel for respondents Nos.2 to 6, learned D.P.-G. for the State and have perused the record.

6. The case against respondents Nos.2 to 6 was registered under section 365, P.P.C. at Police Station Sadder Hasilpur District Bahawalpur. Respondents Nos.2 to 6 allegedly demanded ransom for the release of Manzoor Hussain deceased, brother of the complainant and thereafter due to non-payment of ransom, they done him to death. The police after investigation submitted challan before the learned Judge Anti-Terrorism Court Bahawalpur under sections 302/365-A, P.P.C. read with section 7 of the Anti-Terrorism Act, 1997. Learned Judge Anti-Terrorism Court Bahawalpur, after framing of charge, recorded the evidence produced by the prosecution, examined the accused under section 342, Cr.P.C., heard the final arguments and after appraisal of evidence concluded that the offence under section 365-A, P.P.C. was not made out and transferred the case to the Court of ordinary jurisdiction.

7. We have carefully gone through the case-law produced on the subject. The case titled "Nasir Abdul Qadir and others v. The State (2003 SCMR 472)" was registered under section 302/34, P.P.C. read with the provisions of Suppression of Terrorism Activities Special Court Act, 1995, wherein it was held that the question of jurisdiction can be determined on the basis of F.I.R. and the material which has been produced by the prosecution at the time of the presentation of the challan and it is the. Court which has to decide on the basis of material whether cognizance is to be taken or not and case was within the competence of the said Court.

8. The Hon'ble Supreme Court of Pakistan in case titled "Mirza Shaukat Baig and others v. Shahid Jamil and others PLD 2005 Supreme Court 530)" observed that it was obligatory upon the Court to watch carefully the nature of accusation and examine the entire record with diligent application of mind to determine as to whether the provisions as contained in the Act would, prima facie, be attracted or otherwise? Where such Courts are of the view, after taking cognizance of the offence, that the alleged offence does not fall, prima facie, under the provisions of the Act, it must transfer the same to regular Court without loss of time..'

9. Section 17 of the Anti-Terrorism Act; 1997 provides for the powers of Anti-Terrorism Court in respect of other offences, which reads as under:
"When trying any scheduled offence, (Anti-Terrorism Court) may also try any offence other than the scheduled offence with which the accused may, under the Code, be charged at the same trial"

According to the apparent meaning of section 17 of the Anti-Terrorism Act, 1997, the Anti-Terrorism Court has got a power to try non-scheduled offence only when it is trying scheduled offence i.e. scheduled and unscheduled offence can be tried together in one and the same trial. The said power under section 17 of the Anti-Terrorism Act, 1997 shall not be available to the Anti-Terrorism Court when it is not trying any scheduled offence. Once the Anti-Terrorism Court has tried the offence and has formed the opinion that the scheduled offence is not made out, then in the terms of section 23 of the Anti-Terrorism Act 1997, it will have no jurisdiction to pass any judgment and it will have to transfer the case to the ordinary Court. Section 23 ibid reads as under: --

"Where, after taking cognizance of an offence, (Anti-Terrorism Court) is of the opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try' such offence, transfer the case 'for trial of such offence to any Court having jurisdiction under the Code, and the Court to which the case is transferred may proceed with the' trial of the offence as if it had taken cognizance of the offence."

10. In this case, the Anti-Terrorism Court tried the offences and formed the opinion that' a case of scheduled offence under section 365-A, P.P.C. had not been made out, as such once the Court had formed a different opinion in terms of section 23 of Anti-Terrorism Act, 1997, the said Court had no jurisdiction to pass any final judgment in the trial. Instead the said Court had the only option to transfer the case to the Court of ordinary jurisdiction, as provided under section 23 ibid. It may be observed here that scope of provisions of section 23 of Anti-Terrorism Act, 1997, cannot be limited to a specific point of trial, rather by use of word "cognizance", which includes trial, the legislature was cognizant of the fact in some cases (like the one in hand), the question of jurisdiction may be properly decided after recording of some evidence. As such, no procedural error can be attributed to the impugned order of the learned Judge Anti-Terrorism Court.

11. The impugned order, therefore; is perfectly ' in accordance with law, no illegality, irregularity or any jurisdiction defect is seen therein, hence the same is hereby maintained and as a necessary consequence the writ petition being without any merits, stands dismissed.

NHQ/M-200/L Petition dismissed.

2013 M L D 140
[Lahore]
Before Muhammad Qasim Khan and Mehmood Maqbool Bajwa, JJ
SAJID IQBAL---Petitioner
Versus
THE STATE and others---Respondents

Criminal Miscellaneous No.2699 of 2011, decided on 26th August, 2011.

(a) Criminal Procedure Code (V of 1898)---
----S. 497---Drugs Act (XXXI of 1976), Ss. 23 & 27---Import, manufacture and sale of drugs---Spurious, mis-branded and unregistered drugs---Bail, grant of---Accused had been charged for violation of S. 23 of Drugs Act, 1976 which carried minimum sentence of 5 years' imprisonment---Accused's case did not fall within prohibitory clause of S. 497, Cr.P.C, as minimum sentence of offence had to be considered in order to determine whether offence fell within prohibitory clause---Accused had been in judicial lockup for ten months and his challan had not been submitted---Accused having no previous history and record, was admitted to bail.

(b) Criminal Procedure Code (V of 1898)---
---S. 497---Bail---Prohibition on grant of bail---Principles---Minimum sentence of the offence has to be taken into consideration in order to determine whether offence falls within prohibitory clause of S. 497, Cr.P.C.

(c) Criminal Procedure Code (V of 1898)---
----S. 497---Post-arrest bail---Principles---In the absence of any exceptional circumstances, withholding of post-arrest bail is not the intention of law.

Tariq Bashir and 5 others v. The State PLD 1995 SC 34 ref.
Ch. Mahmood Ali for Petitioner.
Malik Muhammad Jaffar, D.P.G. for the State.
Liaqat Ali, Sub-Inspector.

ORDER
Post arrest bail has been sought by the petitioner in case F.I.R. No. 114 of 2010 registered under sections 23 and 27 of the Drug Act 1976, (Act XXXI of 1976) at Police Station Muzafarabad, Multan.

2. Precise allegation contained in the F.I.R. recorded on the strength of complaint of Ehsan Ahmed, Drug Inspector, is that on 7-9-2009 he along with other officials inspected Sajid Clinic and Bismillah Zacha Bacha Center, Multan and in the presence of petitioner took 11 different types of drugs on form 4 and 10 different types of drugs on form 5 for analysis and as per report of Drug testing laboratory four drugs out of eleven on form 4 were found spurious and six were declared mis-branded and un-registered. Matter was reported to Provincial Quality Control Board, Lahore seeking permission for registration of case, who after serving the petitioner with show

cause notice and observing all codal and legal formalities accorded permission for registration of case.

3. Heard adversaries and perused the record.
The petitioner has been charged for violation of section 23 of the Drug Act, which is punishable under section 27 of the Drug Act, 1976 providing punishment with imprisonment which shall not be less than 5 years or more than 10 years and with fine which may extend to five lac rupees.

Nevertheless minimum sentence has to be taken into consideration in order to determine whether the offence falls within prohibitory clause. The offence as such does not fall within prohibitory clause. In the absence of any exceptional circumstances referred to in case of "TARIQ BASHIR and 5 others v. The State" (PLD 1995 SC 34) withholding of post arrest bail is not intention of law. The petitioner is in judicial lock up for last ten months. Challan has not yet been submitted and it will take considerable time for its presentation as objections are still to be removed by the Investigating agency for which purpose we called officiating S.P. (Investigation) with direction to gear up the process. Further detention of the petitioner as such will not serve any useful purpose and that too for an indefinite period. The petitioner had no previous history and record.

5. Pursuant to above discussion we are inclined to accept the petition and as such while allowing the same petitioner is admitted to bail subject to furnishing of bail bond in a sum of Rs.2,00,000 (two lacs) with one surety in the like amount to the satisfaction of trial Court.

MWA/S-1/L Bail allowed.

2013 P Cr. L J 872

[Lahore]

Before Muhammad Qasim Khan and Ibad-ur-Rehman Lodhi, JJ

ASHRAF ALI alias JAMAT ALI and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeals Nos.201, 230 and Murder Reference No.312 of 2007, decided on 4th December, 2012.

(a) Criminal trial---

----Motive, setting of---Effect---Not essential for prosecution to come out with specific motive---Where motive is alleged and it remains unproved then prosecution has to suffer.

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

----Ss.100 & 302(c)---Qatl-e-amd not liable to Qisas and right of self-defence---Appreciation of evidence---Grave and sudden provocation---Sentence, reduction in---Medical and ocular account--- Defence version---Motive, failure to prove---Accused was convicted and sentenced to death for committing murder of his real paternal uncle---Specific position of accused was that deceased while armed with hatchet entered his house to kill his father, when accused tried to restrain him, deceased rushed towards him to attack, whereupon, gun fire was shot by accused to save his life as well as life of his father---Validity---Stance of accused was closer to reality as according to medical evidence, fire arm injury found on dead body carried burning and blackening, which could only be possible when fire was shot from a distance of three to four feet, whereas scaled site plan disclosed same to be a distance of about thirty eight feet---Non-proof of motive also lent support to statement of accused and in fact there was no previous hostility amongst the parties and matter erupted at spur of the moment without there being any premeditation on the part of accused, who reacted due to sudden and grave provocation in order to save his life as well as life of his father---Defence plea taken by accused was not only plausible but also borne out from circumstances of the case, as there was no other reason available on record as to why he would launch assault on deceased, who also happened to be his real paternal uncle---Accused reacted due to sudden and grave provocation in order to save his life as well as life of his father---High Court set aside conviction under S.302(b), P.P.C. and convicted him under S.302(c), P.P.C. and sentenced him to twelve years' imprisonment---Appeal was allowed accordingly.

Prince Rehan Iftikhar Sheikh for Appellants.

Malik Bakhtiar Mehdi for the Complainant.

Munir Ahmad Sial, Deputy Prosecutor-General for the State.

Date of hearing: 4th December, 2012.

JUDGMENT

MUHAMMAD QASIM KHAN, J.---Ashraf Ali alias Jamat Ali accused/appellant, along with Abdul Rasheed, Mst. Andaz Mai, Muhammad Attiq alias Taqi and

Muhammad Habib faced trial before learned Additional Sessions Judge, Khanewal, in case F.I.R. No.144 of 2005 dated 21-4-2005 under sections 302/148/149, P.P.C. registered at Police Station Jahania, District Khanewal, and on conclusion of the trial, vide judgment dated 25-4-2007, while acquitting all the other accused, the appellant was convicted and sentenced as under:--

CONVICTED under section 302-b, P.P.C. and sentenced to death, with further orders to pay Rs.100,000 as compensation to the legal heirs of the deceased, in case of default in payment thereof to suffer one year' simple imprisonment.
However, benefit of section 382-B, Cr.P.C. was not given to him.

2. Criminal Appeal No.201 of 2007 has been filed by Ashraf Ali through counsel to assail his above conviction and sentence, whereas, Criminal Appeal No.230 of 2007 has been filed by Muhammad Rafiq/complainant against acquittal of Mst. Andaz Mai, Muhammad Attiq alias Taqi and Muhammad Habib/respondents. Murder Reference No.312 of 2007 has been sent by the learned trial court in terms of section 374, Cr.P.C. All these matters are being decided by this single Judgment.

3. Briefly the prosecution case, as unfolded through F.I.R. No.144 of 2005 (Exh.PB) is that on 21-4-2005 Muhammad Rafiq (P.W.2) complainant along with Kamal Din and Muhammad Yasin went to see his sister at Chak No.140/10-R. at about 9:30, Muhammad Aslam brother-in-law of the complainant was preparing to go out of his house on a donkey cart to earn his livelihood, suddenly Muhammad Ashraf armed with repeater, Attiq and Habib armed with .12-bore guns, Abdul Rasheed empty handed and his wife Mst. Andaz Mai armed with hatchet arrived there. On the noise, the complainant along with P.Ws. attracted to the street and saw that Abdul Rasheed was raising lalkara, whereupon Ashraf Ali made fire shot which hit Muhammad Aslam on his head; Attiq also made two successive fire shots which landed on the right shoulder and front side of chest of Muhammad Aslam; fire shot of gun made by Habib hit left arm of Muhammad Aslam, who fell down. While Muhammad Aslam was lying on the ground, Mst. Andaz Mai inflicted a hatchet blow on the back of Muhammad Aslam. Thereafter all the accused while brandishing their respective weapons fled away from the spot. Muhammad Aslam succumbed to the injuries at the spot.

The motive as alleged in the F.I.R. is that two years prior Muhammad Aslam caused fracture of the leg of Mst. Andaz Mai due to her immoral behavior and by the interference of relatives compromise was affected but Mst. Andaz Mai nurtured grudge and for this reason with common intention all the accused committed murder of Muhammad Aslam.

4. After the occurrence, Muhammad Rafiq/complainant appeared before Muhammad Afzal Sub-Inspector (P.W.8) at Police Post Thatha Sadiqabad and got recorded his statement as Exh.PB. Thereafter P.W.8 sent Exh.PB to the police station for formal registration of F.I.R. The Sub-Inspector proceeded to the spot, inspected dead body in presence of the P.Ws. Kamal Din and Muhammad Yasin and complainant; prepared

injury statement Exh.PG and inquest report Exh.PH; collected blood-stained earth from the spot and secured the same vide recovery memo Exh.PC; collected five empties of .12-bore P.5/1-5 and took the same into possession vide memo Exh.PD, prepared rough site plan Exh.PJ. Further investigation was conducted by Amar Khan, Inspector, who took the last worn clothes of the deceased in to possession vide memo Exh.PA and on 22-4-2005 arrested Mst. Andaz Mai and Abdul Rasheed Mst. Andaz Mai produced before him hatchet P-6, which he took into possession vide recovery memo Exh.PK. On 9-5-2005 he arrested Ashraf (appellant), who led to the recovery of repeater P-7, which was taken into possession vide recovery memo Exh.PL. On 25-5-2005 he also arrested Attiq and Muhammad Habib accused. On 1-6-2005 Attiq got recovered gun P-8, which was to into possession vide recovery memo Exh.PM. After completion of investigation the accused were sent to Court to face trial.

5. On submission of report under section 173, Cr.P.C. the accused persons were charge sheeted, to which they pleaded not guilty and claimed to be tried. The prosecution examined fourteen witnesses which include the statements of Muhammad Afzal, Sub-Inspector (P.W.8) and Amar Khan, Inspector (P.W.12) who being the Investigating Officers deposed about the investigation, the detail whereof has been given above. Muhammad Rafiq complainant (P.W.2) and Haji Kamal Din (P.W.3) deposed about the ocular account of the occurrence, Khizar Hayat (P.W.1) appeared in the witness box to depose about the identity of the dead body of deceased Muhammad Aslam. Dr. Muhammad Aslam P.W.6 conducted autopsy on the dead body of Muhammad Aslam and observed the following injuries:--

(1) A lacerated wound 9 cm x 3 cm x underlying bone exposed on Rt.side of head 7 cm from Rt.ear, tissue loss was present, blackening and burning of margins was present.
(2) A circular wound 2 cm diameter on Lt.side of chest blackening and burning of margins was present.
(3) A circular wound 1 cm diameter on Lt. side of wound was skin deep, blackening and burning of margins was present. Injury No.3 is 2 cm in fero lateral to injury No.2.
(4) An ovoid wound 1.2 cm x .8 cm x skin deep on Lt.side of chest, injury No.4 was 1 cm from No.2. Blackening and burning was present.
(5) A circular wound 6 cm diameter on Rt. Shoulder joint blackening and burning was present, tissue loss was present, entry wound.
(6) A circular wound 2.5 cm diameter on back of Lt. chest, blackening and burning was not present, exit wound.
(7) An incised wound 2.5 cm x 1 cm x bone deep on back of Rt. Chest x just lateral to mid line.
(8) A circular wound 1 cm diameter on dorsum of fore-arm, blackening and burning was present, entry wound. Wound was 3 cm above left wrist joint.
(9) A circular wound 1 cm diameter on dorsum of , fore arm, wound is 0.5 cm from injury No.8. Blackening and burning of margins was present.
(10) A circular wound 2 cm diameter on radial side of Lt. fore-arm 6 cm from wrist joint, it was communicating with injuries No.8 and 9, blackening and burning of margins was not present.

The rest of the prosecution witnesses are formal in nature and they made statements about their respective functions performed during the course of investigation. On close of oral evidence, the learned DDPP tendered in evidence the reports of Serologist Exh.PN and Exh.PO, report of Forensic Science Laboratory Exh.PQ, report of Chemical Examiner Exh.PR and with that case of the prosecution was closed. The accused persons when examined under section 342, Cr.P.C. they denied the entire prosecution evidence and Ashraf Ali alias Jamat Ali accused/appellant in answer to a question "why the case against you and why the P.Ws. have deposed against you" made reply to the following effect:--

"The case is false and fabricated. All the P.Ws. are inter se related, interested and inimical towards me and my co-accused. They have deposed falsely. They were not present at the place of occurrence nor there was any occasion of their presence at the spot. The reason alleged by P.Ws. for their presence at the spot for seeing the ailing wife of the deceased is incorrect. The prosecution has not proved it. The P.Ws. are of far off places. The deceased while under the influence of liquor had become out of senses as usual and was committing Ghul-Ghubbara, in the street and also was abusing the people. My father Abdul Rasheed co-accused, now dead, admonished and restrained him from his mischievous activities, being elder brother of the deceased. The deceased flared up, took hatchet from the Rehri, threatened my father and rushed towards him. My father Abdul Rasheed entered in his house to get rid of the deceased but the deceased while abusing entered our house while chasing my father. In our house the deceased wanted to kill my father with hatchet. My father raised hue and cry saying Bachao Bachao. I only was present in the house. I came out of the room to save my father and tried to restrain the deceased but he challenged me and rushed towards me to attack upon me with hatchet. I finding no way out to save myself, my father and honour of the house, fired with the gun, of our relative lying in our house. The pallets accidentally hit on the body of deceased. The deceased rushed out of the house along with hatchet and fell in the street where he succumbed to the injuries. Muhammad Attiq, Habib and Mst. Andaz Mai co-accused were not present in the house nor they took part in the occurrence. My father informed the respectable of the village about the actual facts, who informed the police. My father and myself appeared before the police along with the gun and apprised him of the real facts of the case. All the respectable of the village supported our version, that is why no local P.W. was cited for occurrence in recovery proceedings. Motive alleged by the prosecution is also false and it has not been proved by the local and independent P.Ws. My father also gave the addresses of the relatives of the deceased i.e. P.Ws. They were called from their respective villages. The wife of the deceased was also called along with relatives as she was living with her brothers due to the mischievous activities of the deceased. The I.O. sent the dead body to hospital. He took the hatchet from near dead body. He also took may father and me along with gun and also the P.Ws. to police station. The Roznamcha was stopped. The complainant with due deliberation and consultation with I.O. got registered this case that is why the post mortem was conducted later in the evening. The I.O. delayed my arrest to show his efficiency. In the court I came to know that due to the connivance with complainant party that I.O. had not recorded our true version and showed the place of occurrence

out of our house, to strengthen the prosecution case. As is clear from the above circumstances, I committed no offence. I am innocent."

However, neither the accused persons appeared to depose under section 340(2), Cr.P.C. nor produced any defence and on conclusion of the trial, above conviction and sentence was recorded against Ashraf alias Jamat Ali, whereas, his co-accused were acquitted of the charges against them.

6. It is argued by learned counsel for the accused/appellant that all the prosecution witnesses apart from being closely related to the deceased and inter se, also hail from a distant area. The learned counsel while referring to the statements of the eye-witnesses argued that it is admitted position that they were residents of about fourteen kilometers away from the place of occurrence, as such, their presence at the place of occurrence is unnatural. Further argued that no person from the locality was associated during investigation when alleged recoveries were being effected and even otherwise, according to the learned counsel, the manner with which the recoveries were allegedly effected makes the case of the prosecution highly doubtful. The learned counsel for the accused/ appellant further argued that even the motive set out in the F.I.R. could not be proved by the prosecution. It was therefore, concluded by ale learned counsel that since the prosecution has miserably failed to prove its case, the statement of accused/appellant recorded under section 342, Cr.P.C. has to be taken into consideration and as the appellant Muhammad Ashraf reacted in sudden and grave provocation to rescue his life as well as the life of his father, the conviction and sentence, if any, could be recorded accordingly.

7. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposed the criminal appeal and argued that it is a case of promptly lodged F.I.R., the broad-daylight occurrence took place near the house of the deceased, the witnesses are although related to the deceased but they have justified their presence at the place of occurrence at the relevant time. Further argued that association of witnesses of the locality in recovery proceedings is not essential in each and every case, as in such like serious offences independent witnesses of the locality hesitate to become witnesses. The learned counsel for the complainant added that in the F.I.R. specific motive had been taken and in their statements before the court, both the witnesses have made statements in line with the contents of the F.I.R., and even otherwise, according to the learned counsel non-proof of motive is not fatal to the prosecution for the reason that ocular account is consistent. The learned counsel for the complainant, therefore, prayed for dismissal of the appeal.

8. We have heard the arguments of learned counsel for the parties and perused the record.

9. So far as the date and time of the alleged occurrence is concerned, the same is almost admitted by the accused/appellant himself during his statement before the court under section 342, Cr.P.C. However, the place of occurrence, the place where deceased received injuries and the manner in which the occurrence took place are

disputed facts. In their statements (examination-in-chief) before the court Muhammad Rafiq complainant (P.W.2) and Kamal Din (P.W.3) remained consistent to some extent and also showed unanimity on the point that they were the permanent residents of a place about fourteen to fifteen kilometers away from the place of occurrence, as such, not being the residents of the area they are not the natural witnesses, therefore, their statements were to be considered with extra caution.

10. It has been observed that there is not a single word in the F.I.R. to explain the presence of the witnesses at the place of occurrence. However, during trial in their statements in order to establish and justify their presence at the place of occurrence at the relevant time, both the witnesses have taken a specific stance by improving their earlier statements recorded by the police that Mst. Salma (sister of the complainant) was ailing and they had come there to inquire about her health. Thus, the ailment of Mst. Salma was taken as a ground to justify the presence of the witnesses at the place of occurrence and this fact could be very conveniently established by the prosecution. But surprisingly neither the alleged ailing lady was produced before the Investigating Officer or the Court nor any medical certificate of the said lady was exhibited in court so as to establish that the lady was really ailing and they had assembled there to inquire about her health. Once it is admitted by the prosecution witnesses themselves that they were not the residents of the locality, and by the above lacuna in the prosecution case they also failed to establish their presence at the place of occurrence, their truthfulness becomes extremely doubtful, especially for the reason that during cross-examination they deviated each other on a material aspect, as according to complainant P.W.2 they reached the house of the deceased at 8-00 a.m., whereas, Kamal Din P.W.3 deposed that they reached there at 9-00 a.m.

11. Further, it is to be seen that according to scaled site plan of the place of occurrence (Exh.PE), the distance between Point-1 (the place where deceased is reported to have received fire arm shot and dead body was taken into custody), and Point-3 (the place from where the shots are shown to have been fired by Ashraf accused/appellant) as well as acquitted accused, is more than thirty feet, whereas, according to post mortem report by Dr. Muhammad Akram (P.W.6) the fire arm wounds available on the dead body, also carried burning and blackening. During cross-examination the doctor further stated that blackening and burning can be found when the fire is shot within a distance of three feet, injuries Nos.2, 3 and 4 can be result of one fire shot and that injury No.7 can be caused by a piece of brick. The prosecution witnesses have tried to adjust the distance from Point-1 to Point-3, as Muhammad Rafiq P.W.2 has stated that at the relevant time accused were at a distance of 15 feet from the door of house of Abdul Rasheed and Kamal Din P.W.3 stated that when Ashraf fired the shot, Muhammad Aslam deceased was at a distance of 10/15 feet. But even if this part of their statement is believed, even then the distance between the deceased and the accused would remain more than 10/15 feet and by such distance blackening and burning could not exist around the fire-arm wounds. We are conscious of the fact that laymen could not give exact distance between the place where the deceased was present or where the accused made firing, but their opinion could be different only to some extent, whereas, in this case the

distance given by the P.Ws. before the trial is noticeably different. Thus, even the dishonest improvement in statements by the prosecution witnesses have not been beneficial to the prosecution. There is yet another aspect of the matter i.e. according to the scaled site plan Exh.PJ Mst. Andaz Mai (one of the acquitted accused) was just at a distance of five feet from the place where deceased was alleged to be present and was fired at. If that had been so, and the fires were shot by the accused/appellant and acquitted co-accused from such a distance, it is not believable that Mst. Andaz Mai would not receive even a single pellet injury. All these factors are when put in juxtaposition lead us to an irresistible conclusion that as a matter of fact neither of the prosecution witnesses were present at the place of occurrence at the relevant time, therefore, their presence at the place of occurrence at the relevant time is disbelieved and their testimony is thrown out of consideration.

12. As regards the motive part, it is specific stance of the prosecution witnesses that about two years back because of indecent activities of Mst. Andaz, sister-in-law of the deceased, her leg was fractured by Muhammad Aslam deceased and because of that grudge the accused persons committed this offence. Firstly, it has been noticed that said alleged occurrence took place more than two years back and per prosecution story compromise between the parties was effected, hence after such a long period and even after the compromise, the alleged motive does not appeal to reason, especially when as admitted by the prosecution witnesses themselves said incident was never reported to the police, nor even any person from the locality was produced either before the police during the course of investigation or during trial before the court, to prove such earlier incident, which allegedly formed basis of the motive. We are conscious of the fact that it was not essential for the prosecution to come out with a specific motive, but there is abundant law on the point that where a motive is alleged but the same remains unproved, then the prosecution has to suffer. Here in this case, it can safely be said that prosecution has even failed to motive part of the incident and as to what happened immediately before the occurrence has been concealed by the prosecution.

13. While discarding the statements of the prosecution witnesses and also the motive part of the alleged occurrence, we are left with the statement of the accused (reproduced above), wherein, he admitted to have fired at the deceased, but he alleged the occurrence to have taken place in a totally different manner and with a different background. Material contradictions appearing in the statements of the prosecution witnesses and even the conflict amongst the ocular account and the medical evidence go a long way to support the stance taken by the accused/appellant in his statement under section 342, Cr.P.C. It is specific position of the accused/appellant that deceased while armed with hatchet entered his house to kill his father, when the accused/appellant tried to restrain him, the deceased rushed towards him to attack, whereupon, gun fire was shot by accused/appellant to save his life as well as life of his father. This stance appears to be closer to reality when we see that according to the medical evidence, the fire arm injuries found on the dead body carried burning and blackening, which could only be possible when the fire is shot from a distance of three to four feet, whereas, as discussed above, the scaled site plan disclosed it to be a

distance of about thirty eight feet and although the prosecution witnesses tried to cover up this distance, yet they could not bring their statements in line with the said site plan: Furthermore, non -proof of motive also lends support to the statement of the accused/appellant and it can very conveniently be observed that in fact there was no previous hostility amongst the parties and the matter erupted at spur of moment without their being any premeditation on the part of the accused/appellant and it appears that the accused/appellant reacted due to sudden and grave provocation in order to save his life as well as the life of his father.

14. Taking stock of the above situation, we hold that defence plea taken by the accused/appellant is not only plausible but also borne out from the circumstances of the case, as there is no other reason available on record as to why he would launch an assault on the deceased, who also happened to be his real paternal uncle. It therefore, becomes quite obvious the accused/appellant reacted due to sudden and grave provocation in order to save his life as well as the life of his father. Consequently, we partly allow this Criminal Appeal No.201 of 2007, set aside the conviction of the accused/appellant under section 302-b, P.P.C. and convict him under section 302(c), P.P.C. Considering that at the time of recording of his statement under section 342, Cr.P.C. on 16-4-2007 the age of the accused/appellant has been recorded as nineteen years, as such, at the time of occurrence i.e. 21-4-2005, he would be hardly eighteen years of age, therefore keeping in mind his tender age, the accused/appellant might have been forced by harshness of raw youth, a lenient view is taken and the accused/appellant is sentenced to undergo simple imprisonment for twelve years. Benefit of section 382-B, Cr.P.C. is extended. The record of the trial Court be remitted immediately and the case property if any shall be disposed of in accordance with law.

15. Since the prosecution case has been disbelieved and the conviction/sentence against the accused/appellant Ashraf has been recorded pursuant to his statement under section 342, Cr.P.C., wherein, he has taken a specific stance that he was lonely present in the house when assault was launched by the deceased and this stance weighed with the learned trial Court as well when Mst. Andaz Mai, Habib and Attiq co-accused of the appellant were acquitted, therefore, we see no infirmity so far as acquittal of said co-accused is concerned. Criminal Appeal No.230 of 2007 therefore, is dismissed.

MH/A-1/L Order accordingly.

2013 P Cr. L J 1322
[Lahore]
Before Muhammad Qasim Khan, J
JAMEEL AHMAD---Petitioner
Versus
HOME SECRETARY, GOVERNMENT OF PUNJAB, LAHORE and 4 others---Respondents

Writ Petitions Nos.3765, 4281 and 3655 of 2013, decided on 19th April, 2013.

(a) West Pakistan Maintenance of Public Order Ordinance (XXXI of 1961)---
----S. 3(1)--- Constitution of Pakistan, Art. 199--- Constitutional petition---Preventive detention---Judicial review---Scope---Satisfaction of authorities---Extent---Edifice of satisfaction is to be built on foundation of evidence, as conjectural presumption cannot be equated to that of "satisfaction", and it is subjective assessment and there can be no objective satisfaction---In exercise of jurisdiction under Art.199 of the Constitution, if High Court comes to conclusion that grounds mentioned in detention order are not supported by sufficient material, then there is nothing to stop High Court from exercising power of judicial review.
Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v. Mrs. Amatul Jalil Khawaja and others PLD 2003 SC 442 rel.

(b) Words and phrases---
----"Information"---Meaning.
Black's Law Dictionary Sixth Edition (Centennial Edition (1891-1991) rel.

(c) Words and phrases---
----"Sufficient"---Meaning.
Black's Law Dictionary Sixth Edition (Centennial Edition (1891-1991) rel.

(d) West Pakistan Maintenance of Public Order Ordinance (XXXI of 1961)---
----S. 3(1)---Anti-Terrorism Act (XXVII of 1997), S. 11-L & Fourth Schedule---Criminal Procedure Code (V of 1898), S. 154---Constitution of Pakistan, Art. 199---Constitutional petition---Preventive detention---Procedure---Petitioners were aggrieved of detention order passed against them by authorities for having contacts with proscribed organizations---Validity---Before passing detention order, authorities must have recourse to S.154, Cr.P.C., when allegations levelled against detenus in detention orders constituted a criminal offence under Anti-Terrorism Act, 1997, Penal Code, 1860, or any other law, as most of the allegations levelled against detenus were criminal offences---Person who had received information about involvement of a person in offence covered under Anti-Terrorism Act, 1997, and he believed or suspected that someone had committed an offence under such Act, that person was under legal compulsion to disclose such belief or suspicion to police officer---Neither names of detenus were ever placed in Fourth Schedule of the Act, nor they were proceeded against under Anti-Terrorism Act, 1997, for committing criminal offences covered by law---No other material "sufficient" to justify detention orders passed

against petitioners was available---High Court, in exercise of Constitutional jurisdiction, set aside detention orders passed against petitioners--- Petition was allowed in circumstances.

Federation of Pakistan through Secretary, Ministry of Interior, Islamabad, v. Mrs. Amatul Jalil Khawaja and others PLD 2003 SC 442; Muhammad Ayaz Khan and 6 others v. The District Magistrate, Batagram and another 1995 PCr.LJ 587 and Gulzar Ahmad v. District Magistrate and another 1998 PCr.LJ 1790 rel.
Mehmood Khan Ghouri for Petitioner.
Mirza Muhammad Salim Baig, Additional Advocate-General, Mubashir Latif Gill, Assistant Advocate-General and Mazhar Jamil Qureshi, Assistant Advocate-General with Rashid Minhas, Law Officer, Home Department, Waqar Hussain Deputy Secretary/Internal Security, Lahore, Iftikhar Ahmad SP, Noor Elahi and Liaqat Ali Sub-Inspectors for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.---This judgment shall form the detailed reasoning of my earlier short order of even date, whereby, these three matters (i) W. P. No.3765 of 2013 "JAMIL AHMAD v. DISTRICT COORDINATION OFFICER, Multan and others", (ii) W.P. No.4281 of 2013 "MST. NASIM BIBI v. HOME SECRETARY and others" and (iii) W.P. No.3655 of 2013 "MUHAMMAD ALI v. HOME SECRETARY and others", were allowed.

2. Briefly the facts are that respondent/DCO, Multan vide an order dated 24-2-2013 directed detention of Abdul Ahad, Shahab-ud-din and Afzal, respectively for a period of thirty days, on almost similar grounds that they have (i) strong knitted relations, allegiance and bonds with proscribed organization, (ii) use to encourage Malik Ishaq a renowned terrorist to facilitate him; (iii) carry forward the mission of aforesaid banned organization, (iv) possess strict hatred against Shia community, (v) aye extremists in school of thought, have uncompromised feelings, (vi) have been involved in recruiting support for Malik Muhammad Ishaq, and (vii) their activities are pre judicial to public peace and tranquility. The respondent/Secretary Home Department through the order dated 21-3-2013 further extended the period of detention for thirty days. The appeals filed by Abdul Ahad and Afzal against their detention orders, have been dismissed by the Secretary, Home Department, through almost similar but separate five line following orders:--

"Appeal against the detention Order No.SO(IS-I)3-3/2013 (Multan) dated 21-3-2013 in respect of Abdul Ahad son of Jameel Ahmad Caste Rajput resident of Rushan Kareem Colony, opposite Circuit House Multan presently detained in New Central Jail, Multan for a period of 30-days under section 3, MPO 1960 is hereby rejected."
"Appeal against the detention Order No.JB-i-125/13/DCO dated 24-2-2013 in respect of detenue Afzal @ Paittiar Wala son of Irshad, resident of Mohallah Mughal Pura, Nallah Khan Factory; Peeran Ghaib Raod, Multan presently detained in New Central Jail, Multan for a period of 30 days under section 3, MPO 1960 is hereby rejected."

As is clear from a visual look of the above reproduced stereotype orders, the respondent-Secretary? Home Department while dismissing the appeals has passed absolutely, non-speaking orders, neither these orders mention the reasons justifying the detention of the appellants, neither it refers to any other material on the basis of which the authority had satisfied itself nor these orders even touch the pleas raised by the detenus through their appeals. Thus, the above referred grounds alone are sufficient to declare those orders as nullity in the eyes of law and are liable to be set at naught.

3. However, in order to secure the ends of justice, the Law Officer was directed to argue the cases and produce before the court whatever the material is available against the detenus. Thus, lengthy hearing has been given to the parties.

4. The learned Additional Advocate-General referred to some typed reports and contended that detenus Abdul Ahad, Shahab-ud-din and Afzal are related to Deoband sect, Abdul Ahad is Vice-President of Muslim Student Organization; they work on the manifesto of LASHKAR-E-JHANGVI, collect funds and participated in meetings of said Organization. Shahab-ud-din detenu arranges program and meetings with Malik Ishaq and possess hatred against Shias and chants slogans against them, whereas, Muhammad Afzal detenu participating in a meeting held by proscribed organization Pakistan on 1-1-2012, participated in a Conference held on 29-1-2012 and attended the program on 10/11-5-2012. But on inquiry by the Court as to who prepared these reports and whether any case diary in any police station was ever registered, whether these activities are not covered by any penal clause of Pakistan Penal Code or, the Anti- Terrorist Act, 1997, as most of the allegations referred above are criminal offences under the Anti-Terrorist Act, 1997 and why criminal cases were not registered after the information had been conveyed to the authorities, the learned Law Officers remained unable to reply and could not refer case diary of any police station, or material in support of these reports.

5. The liberty of a citizen, save in accordance with law is protected by the Constitution of Islamic Republic of Pakistan, 1973, and this Court being custodian of the Constitution has to jealously protect and safeguard such fundamentally guaranteed rights. In the case "FEDERATION OF PAKISTAN through Secretary, Ministry of Interior, Islamabad v. Mrs. AMATUL JALIL KHAWAJA and others" (PLD 2003 Supreme Court 442), the Hon'ble Supreme Court of Pakistan, has held as under:--

S. 3(1)---Constitution of Pakistan (1973), Arts. 199 & 10---Preventive detention---Judicial review---Scope---Right of a person to a petition for habeas corpus---Extent---If the arrest of a person cannot be justified in law, there is no reason why that person should not be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty which is his basic right---Jurisdiction of High Court while examining the material before the detaining Authority is not unlimited---When an order passed by an executive authority detaining a particular person is challenged by invoking extraordinary jurisdiction of High Court, it is always by means of judicial

review and cannot be treated as appeal or revision---Court cannot substitute its discretion for that of administrative agency and the only function of the Court in such cases is to see whether or not order of detention is reasonable and objective.
The right of a person to a petition for habeas corpus is a high prerogative right and is a Constitutional remedy for all matters of illegal confinement. This is one of the most fundamental rights known to the Constitution. There being limitation placed on the exercise of this right, it cannot be imported on the actual or assumed restriction which may be imposed by any subordinate legislation. If the arrest of a person cannot be justified in law, there is no reason why that person should not be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty which is his basic right. In all cases where a person is detained and he alleges that his detention is un-Constitutional and in violation of the safeguards provided in the Constitution, or that it does not fall within the statutory requirements of the law under which the detention is ordered, he can invoke the jurisdiction of the High Court, under Article 199 and ask to be released forthwith."

The apex court in the above referred case while setting down specific criteria to gauge whether a detention order is valid or not held as under:--
"S. 3(1)---Preventive detention---Requirements to be satisfied by an order of preventive detention enlisted.

An order of preventive detention has to satisfy the following requirements:

(i) the Court must he satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention; (ii) that satisfaction should be established with regard to each of the grounds of detention, and, if one of the grounds is shown to be bad, non-existent or irrelevant, the whole order of detention would be rendered invalid; (iii) that initial burden lies on the detaining authority to show -the legality of the preventive detention, and (iv) that the detaining authority must place the whole material, upon which the order of detention is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claim shall be within the competence of the Court to decide.

In addition to these requirements, the Court has further to he satisfied, in cases of preventive detention, that the order of detention was made by the Authority prescribed in the law relating to preventive detention; that each of the requirements of the law relating to preventive detention had been strictly complied with; that "satisfaction" in fact existed with regard to the necessity of preventive detention of the detenu; that the grounds of detention had been furnished within the period prescribed by law, and if no such period is prescribed, then "as soon as may be"; that the grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenu to make representation against his detention to the authority prescribed by law; that the grounds of detention are not irrelevant to the aim and object of this law and that the detention should not be for

extraneous considerations or for purposes which may be attacked on the ground of malice.
The Hon'ble Supreme Court of Pakistan further provided guidelines for the detaining authority, as to on what conditions must exist, which would render their exercise based on their "satisfaction". The relevant paragraph is reproduced hereunder:--
"S. 3(1)---Constitution of Pakistan (1973), Art. 199---Preventive detention--- Judicial review--- Scope--- "Satisfaction" of the detaining Authority---Nature---Court can see whether the "satisfaction" about the existence of the requisite condition is a "satisfaction really and truly" existing in the mind of the detaining Authority or one "merely professed by the detaining Authority"---Court, in proper exercise of its Constitutional duty can insist upon disclosure of, the materials upon which the Authority had acted so that it should satisfy itself that the Authority had not acted in an "unlawful manner"---Principles.

The Court can see whether the satisfactions about the existence of the requisite condition is a satisfaction really and truly existing in the mind of the detaining Authority or one merely professed by the detaining Authority. A duty has been cast upon the High Court, whenever a person detained in custody in the Province is brought before that Court, to "satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner". This Constitutional duty cannot be discharged merely by saying that there is an order which says that he is being so detained. If the mere production of an order of detaining authority, declaring that he was satisfied, was to be held to be sufficient also to "satisfy" the Court then what would be the function that the Court was expected to perform in the discharge of this duty. Therefore it cannot be said, it would be unreasonable for the Court, in the proper exercise of its Constitutional duty, to insist upon a disclosure of the materials upon which the Authority had acted so that it should satisfy itself that the Authority had not acted in an 'unlawful manner"."

As shall be seen from the above reproduced portion of judgment from the cited case, it is manifest that, edifice of satisfaction is to be built on the foundation of evidence, as conjectural presumption cannot be equated to that of "satisfaction"; it is subjective assessment and there can be no objective satisfaction. In exercise of jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, if this court comes to a conclusion that the grounds mentioned in the detention order are not supported by sufficient material, then there is nothing stopping this court from exercising the power of judicial review. There is plethora of judgments on the point that the material should be of such a nature by examination of which, a man of common prudence must form his opinion that detention order has been rightly passed and the detaining authority is required/ to establish each and every ground of detention on the basis of sufficient material to justify its order. If the material on any one of such ground is missing then the whole detention order would loose its sanctity and would be liable to be set aside. In the case "MUHAMMAD AYAZ KHAN and 6 others v. THE DISTRICT MAGISTRATE, BATAGRAM and another" (1995 PCr.LJ 587), it has been held that "Court must be satisfied, that the material placed before the Authority empowered to issue detention order was of such a nature character so as to

persuade a person of ordinary prudence to make an order of preventive detention, such satisfaction should be established in respect of each of the grounds of detention and none of them should be vague, speculative or non-existent and detaining Authority should be in the first instance, able to discharge the initial onus/burden that the detention order is based on and backed by law/legality. All such requirements, however, must co-exist and if any of them is lacking/missing, detention order is liable to be struck down." In the case "GULZAR AHMAD v. DISTRICT MAGISTRATE and another" (1998 PCr.LJ 1790), it was held that fact of person being liable to prosecution for commission of an offence in ordinary criminal Court cannot be a ground for preventive detention under the Ordinance. In the instant cases, no ground whatsoever has been mentioned by respondent No.1 while extending the detention period of the detenus and the impugned orders on the face of it are clear indicative of the fact that the said authority neither examined the material nor applied its independent judicial mind and extending the detention period just on the recommendations by the DCO on the charges, detailed above.

6. Admittedly, none of the detenus has been enlisted in the 4th schedule. Section 11-EE of the Anti-Terrorism Act, 1997, provides that where any information is received that a person is an activist, office bearer or an associate of an organization, or in any way concerned or suspected to be concerned with such organization or affiliated with any group or, organization suspected to be involved in terrorism or sectarianism, the name of such person be placed in list entered in the Fourth Schedule. As such, if at all there was some material available with the government against the detenus, their names must have been placed in the Fourth Schedule and then would have been required to execute a bond so that their activities could be kept under watch. Unless and until any such order placing their names in the 4th schedule is passed, it could not at all be said that they are involved in Sectarian activities. Here in these cases the allegations against the detenus as have been detailed above, including the allegation that they provided or collected funds for any proscribed organizations, arranged meetings to be addressed by any member of such organization or rendered support, could more appropriately be checked under section 11A, 11B, 11F, 11H, 111, 11J and 11K of the Anti-Terrorism Act, 1997.

7. Furthermore, section 154 of the Code of Criminal Procedure, 1898 only requires laying an "information" about the commission of a cognizable offence. The word "information" has been defined in BLACK'S LAW DICTIONARY SIXTH EDITION (Centennial Edition (1891-1991), as "An accusation exhibited against a person for some criminal offence, without an indictment." Meaning thereby it is quite an initial stage and first step to set the law into motion by registration of a criminal case, whereafter, such information may be probed into and only then it can be concluded whether such information was true so as to lead towards indictment, or not. On the other hand, as discussed above with reference to the celebrated judgments of the Hon'ble Supreme Court of Pakistan, "sufficient" grounds must exist which would firstly satisfy the conscious of the detaining authority and such satisfaction may consist upon such a material, on the basis of which even a man of common prudence would have no other option except to form an opinion tilting towards the detention

order. BLACK'S LAW DICTIONARY SIXTH EDITION (Centennial Edition (1891-1991), had defined the word "sufficient", as "Adequate, enough, as much as may be necessary, equal or fit for end proposed, and that which may be necessary to accomplish an object." Therefore, as compared to information within the meaning of section 154, Cr.P.C., the stage to establish "sufficient" grounds to pass a detention order requires strict adherence to the solid material collected by the agencies. As such, it can safely be concluded that before passing a detention order, the authorities must have a recourse to a section 154, Cr.P.C., when the allegations levelled against the detenus in the detention orders constitute a criminal offence under Anti-Terrorism Act, 1997, Pakistan Penal Code or any other law, as in this case most of the allegations levelled against the detenus are criminal offences. Furthermore, under section 11L of the Anti-Terrorism Act, 1997 a person who receives an information about involvement of a person in an offence covered by Anti-Terrorism Act, 1997, and he believes or suspects that some one has committed an offence under the above Act, he is under a legal compulsion to disclose such belief or suspicion to the police officer.

8. In a situation where the Anti-Terrorism Act, 1997 has comprehensively dealt with almost all eventualities, which could in any way connect any person with proscribed organizations, the first option to be exercised by the government could be to set the provisions of this Act in motion through a proper process detailed in the Act, itself and the detention order, being an extreme step taking away the liberty of a person, must be used only as a last resort. Priority must be given to book the persons in criminal cases under the Anti-Terrorism Act, or any other relevant law, if their activities are offences under such laws.

9. For what has been discussed above, here in this case neither the names of the detenus were ever placed in 4th Schedule, nor they were proceeded against under the Anti-Terrorism Act, 1997 for committing criminal offences covered by the law, ibid. Further, there is no other material what to talk of "sufficient" to justify the impugned detention orders, thus, the orders passed by the respondent Authority miserably failed to reach the standards as set by the Hon'ble Supreme Court of Pakistan, in the judgment referred, supra. Consequently, all these writ petitions have been allowed by setting aside the respective impugned detention orders.

MH/J-11/L Petitions allowed.

2013 P Cr. L J 920
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD ASHFAQ---Petitioner
Versus
ADDITIONAL INSPECTOR-GENERAL OF POLICE (INVESTIGATION) PUNJAB, LAHORE and 3 others---Respondents

Writ Petition No.9719 of 2012, decided on 9th October, 2012.

(a) Criminal Procedure Code (V of 1898)---
----Ss. 156 & 173---Constitution of Pakistan, Art. 199---Constitutional petition---Reinvestigation/transfer of investigation after submission of final police report/challan under S.173, Cr.P.C.---Scope---Accused (petitioner) was declared as innocent by the police and report under S.173, Cr.P.C. was only submitted to the extent of the co-accused persons, however, Trial Court summoned the accused to face trial---Complainant filed application before Additional Inspector-General of Police for change of investigation and ultimately pursuant to a letter/order, the investigation was entrusted to a different officer---Validity---Complainant had not claimed anywhere that during investigation, the investigating officer did not record the statement of any of his witnesses; or that investigating officer wrongly entered statement of any of the witnesses under S.161, Cr.P.C.; or that complainant himself omitted to produce any document before the investigating officer; or that investigating officer did not consider any document produced by the complainant before making his final opinion; or that report under S.173, Cr.P.C. was in any way defective as it did not carry all the material tendered by the complainant at the time of investigation---Unless any of the said ingredients was alleged by the complainant, pointing serious flaw in the investigation, it might not be justified to allow reinvestigation of the case during subsistence of an earlier report under S.173, Cr.P.C., whereupon Trial Court had not only taken cognizance by framing charge but also summoned the accused---Trial Court in such circumstances had to proceed with the trial on the basis of report already submitted under S.173, Cr.P.C.---Constitutional petition was allowed and letter/order passed by Additional Inspector-General of police with regard to transfer of investigation was set aside.
Muhammad Nasir Cheema v. Mazhar Javaid and others PLD 2007 SC 31 and Muhammad Ashfaq v. Amir Zaman and others 2004 SCMR 1924 rel.
Liaqat Ali Virk v. Inspector-General of Police, Lahore and 8 others PLD 2010 Lah. 224 ref.

(b) Criminal Procedure Code (V of 1898)---
----Ss. 156 & 173---Reinvestigation after submission of final police report/challan under S.173, Cr.P.C.---Scope---No legal bar existed for reinvestigation of a criminal case even after submission of final report under S.173, Cr.P.C., however it was obligatory for the court to consider each case in its own peculiar perspective and reinvestigation might not be allowed in every case.

Bahadur Khan v. Muhammad Azam 2006 SCMR 373 rel.
Sardar Mehboob for Petitioner.
Mubashir Latif Gill, Assistant Advocate-General with Shoukat SHO.
Tahir Mehmood for Respondents.

ORDER

MUHAMMAD QASIM KHAN, J.---Briefly the facts are that Ghulam Jeelani (respondent. No.4) got lodged an F.I.R. No.176 of 2011 on 6-5-2011 under sections 302/34/109, P.P.C. at Police Station Makhdoom Rasheed, Multan, alleging that the present petitioner and others inflicted injuries to Khizar Hayat who succumbed to these injuries. During investigation the present petitioner and Muhammad Usman were declared innocent and report under section 173, Cr.P.C. was submitted only to the extent of Muhammad Hashim and Safdar Hussain co-accused. However, on the application of respondent No.4/complainant the learned trial Court also summoned the petitioner and Muhammad Usman to face trial vide order dated 6-1-2012. After this summoning order, respondent No.4/complainant filed an application before the Additional Inspector General of Police (Investigation) Punjab, Lahore for change of investigation and ultimately, pursuant to letter/order dated 13-3-2012 the investigation has been entrusted to RIB Multan Region, Multan.

2. The above letter/order dated 13-3-2012 with regard to transfer of investigation, has been assailed through the instant writ petition, on the ground that the final report under section 173, Cr.P.C. had already been submitted by the police before the Court concerned, wherein, although the present petitioner and one co-accused namely Muhammad Usman were not cited as accused, but subsequently on the application of respondent No.4/complainant these two were also summoned by the learned trial Court to face the trial, as such, the cognizance has been taken by the learned trial Court, attempt on the part of respondent/complainant for reinvestigation of the case was not tenable in law. The learned counsel contended that during investigation the complainant produced all the witnesses before the Investigating Officer and after complete and thorough investigation the petitioner and Muhammad Usman were declared innocent and others were sent to court; even the persons declared innocent by the I.O. have been summoned by the trial Court, all the material is available before the court of trial, application of respondent No.4/complainant to the extent of summoning of accused of section 109, P.P.C. has already been dismissed, therefore, the impugned order of transfer of investigation is not backed by any law. In support of his submissions learned counsel for the petitioner placed reliance on the case "MUHAMMAD NASIR CHEEMA v. MAZHAR JAVAID and others" (PLD 2007 SC 31), "MUHAMMAD ASHFAQ v. AMIR ZAMAN and others" (2004 SCMR 1924) and "LIAQAT ALI VIRK v. INSPECTOR-GENERAL OF POLICE, LAHORE and 8 others" (PLD 2010 Lahore 224).

3. The learned Assistant Advocate-General assisted by learned counsel for respondent No.4/complainant opposed this application by contending that reinvestigation of a criminal case even after submission of final report under section 173, Cr.P.C. was not barred by any law, therefore, the order of respondent No.1/Additional Inspector-

General of Police (Investigation) Punjab, Lahore, does not violate any provision of law.

4. I have heard the arguments of learned counsel for the parties and perused the available record with their assistance.

5. There is no dispute that in the light of verdict by Hon'ble Supreme Court of Pakistan in the case "BAHADUR KHAN v. MUHAMMAD AZAM" (2006 SCMR 373), no legal bar exists for reinvestigation of a criminal case even after submission of final report under section 173, Cr.P.C. but in the same judgment the apex Court held that "System of reinvestigation is a recent innovation which is always taken up at the instance of influential people for obtaining favourable reports, which in no way assists the Court in coming to a correct conclusion, rather they create more complications in the way of administration of justice---Such system of reinvestigation and successive investigations, therefore, was disapproved." The above reproduced observation of the apex Court disapproving the process of repeated investigations had made it obligatory for the court to consider each case its own peculiar perspective and reinvestigation may not be allowed in every case.

6. Here in this case it is nowhere the claim of respondent No.4/complainant that during investigation the Investigating Officer did not record the statement of anyone of his witnesses, wrongly entered the statement of any of the witnesses under section 161, Cr.P.C., either the respondent No.4/complainant himself omitted to produce any document before the Investigating Officer or the Investigating Officer did not consider such material before making his final opinion, or that report under section 173, Cr.P.C. was in any way defective as it did not carry all the material tendered by the complainant at the time of investigation. Unless any of the above ingredient is alleged by the complainant pointing serious flaw in the investigation, which otherwise is not attributable to him alone, it may not be justified to allow reinvestigation of the case during subsistence of earlier report under section 173, Cr.P.C., whereupon, the learned trial Court has not only taken cognizance by framing of the charge but had also summoned the accused who had been declared innocent during the first investigation and attempt of the complainant desiring summoning of the co-accused with the allegation of having hatched conspiracy, has been turned down. Reliance is placed on the case "MUHAMMAD NASIR CHEEMA v. MAZHAR JAVAID and others" (PLD 2007 SC 31), wherein the Hon'ble Supreme Court settled the guidelines by holding that "As investigation report (challan) had already reached trial Court, where trial had already commenced, changing of investigation or ordering further investigation in the matter thereafter was an exercise unsustainable in law." In this context the judgment of Hon'ble Supreme Court of Pakistan in the case "MUHAMMAD ASHFAQ v. AMIR ZAMAN and others" (2004 SCMR 1924) further clarifies the position, wherein it has been conclusively held that "Apprehension of the complainant was misconceived as trial Court could proceed with the trial on the basis of the report already submitted under section 173, Cr.P.C.---Trial Court was not bound by the opinion given in the final report or expressed in the report being submitted pursuant to re-investigation and it was always the judicial

consideration of the material collected by police which weighed with the Court while issuing process." In the light of above reproduced judgment of the apex Court, the order of respondent No.1/Additional Inspector-General of Police (Investigation) Punjab Lahore would be a futile effort, as the trial Court has to proceed with the trial on the basis of the report already submitted under section 173, Cr.P.C., whereupon, the cognizance has already been taken by it and charge has been framed. Consequently, this writ petition is allowed, the order/letter dated 13-3-2012 passed by respondent No.1/Additional Inspector-General of Police (Investigation) Punjab Lahore is hereby set aside.

MWA/M-339/L Petition allowed.

P L D 2013 Lahore 243
Before Muhammad Qasim Khan, J
ALLAH NAWAZ---Petitioner
Versus
STATION HOUSE OFFICER, POLICE STATION MAHMOOD KOT DISTRICT, MUZAFFARGARH

Criminal Miscellaneous No.566-H of 2012, decided on 14th September, 2012.

(a) Penal Code (XLV of 1860)---
----S. 375---Child Marriage Restraint Act (XIX of 1929), Ss.2(a) & (b)---Criminal Procedure Code (V of 1898), S. 491---Habeas Corpus petition for recovery of detenue---Rape---Scope---Marriage of Muslim girl below sixteen years of age who had otherwise attained puberty and consented to the marriage---Legality---Complainant (father of alleged detenue) filed present petition for recovery of her daughter contending that she was a minor girl and accused was subjecting her to rape---Alleged detenue contended that she had attained puberty and contracted marriage with the accused out of her own free will and consent---Validity---Medical reports of alleged detenue revealed that she was between 14 and 15 years of age, therefore, it was established that she was below sixteen years of age at the time of her marriage with the accused---Medico-Legal certificate available on record showed that alleged detenue had developed all physical characteristics of having attained puberty---Marriage of a Muslim girl who was below sixteen years of age, but had attained puberty and was also a consenting party to the marriage, was valid for all intent and purposes---Relationship of accused with the alleged detenue could not be equated with rape in such circumstances---Alleged detenue claimed to have attained puberty and admitted her wilful Nikah with the accused and also deposed to accompany him---Petition for recovery of alleged detenue was dismissed, in circumstances.
Yousaf Masih alias Baggah Masih and another v. The State 1994 SCMR 2102 and Mst. Hajra Khatoon and another v. Station House Officer, Police Station Fateh Jang, District Attock and 2 others PLD 2005 Lah. 316 rel.

(b) Penal Code (XLV of 1860)---
----S. 375(v)---Child Marriage Restraint Act (XIX of 1929), Ss.2(a) & (b)---Rape---Scope---Female under sixteen years of age admitting to having entered into marriage wilfully---Effect---Although S.375(v), P.P.C. provided that in case of sexual intercourse of a man with a girl under the age of sixteen years would amount to rape whether such act was committed with or without consent of such girl, but said section could not be made applicable to a case where the girl, though under sixteen years of age, admitted to having entered into marriage in explicit terms.

(c) Words and phrases---
----"Rape"---Definition.
Block's Law Dictionary 6th Edn. ref.

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

----S. 375---Child Marriage Restraint Act (XIX of 1929), Ss.2(a) & (b)---Rape---Scope---Marriage of Muslim girl below sixteen years of age, who had otherwise attained puberty and consented to the marriage---Legality---Performance of conjugal rights by the spouses under such a marriage could not be termed as "unlawful sexual intercourse" so as to attract S.375, P.P.C. in order to initiate proceedings against them.

Atif Mushtaq Bhutta for Petitioner.
Malik Muhammad Jaffar, Deputy Prosecutor General.
Miss Robina Magasi for Respondent No.2.
Muhammad Zafar, ASI and Saima Raza No.4363/LC with Mst. Jameela Bibi alleged detenue.

ORDER

MUHAMMAD QASIM KHAN, J.---Today, Mst. Jameela Bibi, the alleged detenue, appeared before the Court and made an explicit statement (recorded on a separate sheet), wherein she stated herself to be a pubert, married with Muhammad Iqbal respondent No.2 with her free will and wanted to accompany her husband.

2. The learned counsel for the petitioner (Allah Nawaz)/father of Mst. Jameela Bibi, on previous date had raised certain important queries with regard to the age of his daughter and by referring to Birth Certificate argued that Mst. Jameela Bibi was of tender age. The learned counsel therefore, by questioning the legality of her marriage with respondent No.2 contended that in fact Mst. Jameela Bibi was being subjected to rape by respondent No.2; as otherwise, she being a minor girl could not enter into marriage. The learned counsel also referred to section 375, P.P.C. to substantiate her arguments.

3. The learned counsel for respondent No.2 on the other controverted the above arguments of learned counsel for the petitioner and argued that though Mst. Jameela Bibi may be of tender age, but she otherwise has attained the age of puberty and according to her own statement, she contracted marriage with Muhammad Iqbal with her free-will and consent, as such, the relationship between the pair is just that of husband and wife, therefore, they cannot be attributed the allegation of rape. Lastly, argued that since Mst. Jameela Bibi herself has made an explicit statement, as such, she be set at liberty.

3A. 1 have considered the arguments of learned counsel for the parties and perused the available record.

4. To resolve the above controversy between the parties, this Court vide order dated 8-8-2012 ossification test of said girl was directed to be arranged. Pursuant to said direction of the court, reports of the medical experts are available on the file. Dr. Saleem Hussain Shah, Principal Dental Surgeon, Nishter Institute of Dentistry, Multan in his report dated 15-8-2012 has declared the age of Mst. Jameela Bibi to be fourteen years. Dr. Naveed Hyder, Senior Registrar, Radiology, Nishter Hospital,

Multan in his report has mentioned the radiological bone age of the girl as fourteen to fifteen years. It is therefore, established that Mst. Jameela Bibi at the time of her alleged marriage with Muhammad Iqbal respondent No.2 was below the age of sixteen years. However, according to the Medical Legal Certificate, the Senior Demonstrator, Forensic Medicine Department, Nishtar Medical College, Multan observed that "On examination her pubic hair are well grown. Axillary's hair are grown.. Breast developed giving H/O menstruation 2 years. So all secondary sex characters are developed". Now the question arises:

Whether marriage of a girl, below the age of sixteen years, who is otherwise pubert, is valid or not?

For better determination of this issue, Sections 250 and 251 of Muhammadan Law by D.F. Mulla is referred, which reads as under:--

"250. Definition of marriage.-Marriage (nikah) is defined to be a contract which has for its objection the procreation and the legalizing of children.

251. Capacity for marriage.-(1) Every Muhammedan of sound mind, who has attained puberty, may enter into a contract of marriage.

(2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians."

(3) A marriage of a Muhammedan who is of sound mind and has attained puberty, is void, if it is brought about without his consent."

In the case in hand, although as per reports by the Experts Mst. Jameela Bibi is of the age of 14-15 years, but according to the statement of said girl she has attained the puberty and furthermore the report of Medical Legal Certificate by the Senior Demonstrator, Forensic Medicine Department, Nishter Medical College, Multan that "On examination her public hair are well grown. Axiliary's hairs are grown. Breast developed giving H/O menstruation 2 years. So all secondary sex characters are developed" substantiates the claim of Mst. Jameela Bibi therefore in the absence of any evidence to the contrary, she is presumed to be pubert. In this respect guidance has also been sought from a judgment of the Hon'ble Supreme Court of Pakistan "1. YOUSUF MASIH ALIAS BAGGAH MASIH, 2. YOUNUS MASIH ALIAS JOONA. MASIH v. THE STATE" (1994 SCMR 2102), Wherein, their lordships held that 'All original texts of Hanafi Jurisprudence are unanimous on point that 9 years minimum age on which declaration of a girl about her puberty can be accepted." Therefore, for all intents and purposes the relationship of Mst. Jameela Bibi with Muhammad Iqbal would remain to be that of husband and wife, as according to the above reproduced provisions just on the ground of minority the marriage will not become invalid, unless consent of the minor who enters into marriage, is not obtained. In this respect reference may be made to the case "MST. HAJRA KHATOON and another v. STATION HOUSE OFFICER, POLICE STATION FATEH JANG, DISTRICT ATTOCK and 2 others" (PLD 2005 Lahore 316), wherein it has been held that "Nikah/Marriage contracted by a woman, not having attained the age of majority, as defined in law, but having attained puberty as defined in Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is valid and not void." Furthermore, even the Child Marriage Restraint Act (XIX of 1929), does not declare marriage of a girl who is pubert but under the age of sixteen years to be invalid or

void. Had the legislators any intent to declare the marriage of a girl below the age of majority invalid, a specific clause could be inserted in the Child Marriage- Restraint Act (XIX of 1929). In the absence of any such specific provision in the Act, ibid, it would be highly unjust to import a negative intent which' was not considered by the legislators at the time when said law being formulated.

5. It is therefore, held that marriage of a muslim girl, she may be below the age of sixteen years who has otherwise attained puberty and is also a consenting party to the marriage and there being no factor whatsoever to disbelieve the said factual position is valid for all intents and purposes. The next question would be whether the case of such a couple would fall within the definition of section 375, P.P.C. and this relationship can be termed as "rape"? In order to elucidate this point, section 375 PPC is reproduced hereunder:--

"**375. Rape.-**A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:--

(i) against her will;

(ii) without her consent;

(iii) with her consent, when the consent has been obtained by putting her in fear of dearth or hurt;

(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) with or without her consent when she is under sixteen years of age."

Although section 375(v), P.P.C. provides that: in case of sexual intercourse of a man, with a girl under the age of sixteen would amount to- rape, whether such act is committed with, or without the consent of such girl, but I am afraid this section, cannot be made applicable to the case where a girl, though under the age of sixteen years, in explicit terms admits to have entered into marriage, as is the case in hand. The word 'rape" has been defined in BLACK'S LAW DICTIONARY-SIXTH EDITION as under:--

"Unlawful sexual intercourse with a female without her consent The unlawful carnal knowledge of a woman by a man forcibly and against her will. The act of sexual intercourse committed by man with a woman not his wife and without her consent, committed when the woman's resistance is overcome by force or fear, or under other prohibitive conditions.

A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or (c) the female is unconscious, or (d) the female is less than 10 years old."

Keeping in view the above reproduced definition of word "rape" in BLACK'S LAW DICTIONARY Sixth Edition, the relationship of Mst.Janaeela Bibi with Muhammad

Iqbal respondent No.2 cannot be equated with "rape". In the same terms it may be held that performance of conjugal rights by the spouses, even though the girl may be below the age of sixteen years but has attained puberty and is also consenting party to such marriage, cannot be termed as "unlawful sexual intercourse" so as to attract section 375, P.P.C. in order to initiate proceedings against them.

6. For what has been discussed above, since, Mst. Jameela Bibi claims herself to be pubert and by admitting her wilful nikah with Muhammad Iqbal respondent No.2 deposed to accompany her husband, therefore, the instant petition is found to be devoid of merit, resultantly the same is dismissed and Mst. Jameela Bibi is set at liberty.

MWA/A-171/L Petition dismissed.

P L D 2013 Lahore 269
Before Muhammad Qasim Khan and Ibad-ur-Rehman Lodhi, JJ
NATIONAL BANK OF PAKISTAN through Attorney of the Bank---Appellant
Versus
KHALID JAVED QURESHI and 12 others---Respondents

I.C.A. No.180 and C.M. No.2 of 2012, decided on 3rd December, 2012.

(a) Law Reforms Ordinance (XII of 1972)---
----S. 3---Limitation Act (IX of 1908), S.12 & Art.151---High Court (Lahore) Rules and Orders, Vol. V, Chap.1, R.4---Intra-court appeal---Computation of limitation for filing of intra-court appeal---Time consumed in obtaining certified copies of impugned order to be excluded in the computation of limitation under S.12 of the Limitation Act, 1908---Contention of appellant was that time period consumed in obtaining certified copy of impugned order of single Judge had to be excluded from the period of limitation---Validity---Intra-court appeal had to be filed within twenty days but the present intra-court appeal was filed with a delay of eight days---Under the High Court (Lahore) Rules and Order, Vol. V, Chap. 1, R.4 the memorandum of appeal was not required to be accompanied by copy of impugned order but the said Rules themselves provided that the period of limitation had to be computed in accordance with provisions of S.12 of the Limitation Act, 1908---Under S.12 of the Limitation Act, 1908 time consumed in obtaining certified copies of impugned order was excluded---Although certified copy of the impugned judgment was not required to be attached with intra-court appeal but by a liberal interpretation of the High Court Rules and Orders, it could be said that the settled practice of appending certified copy of impugned order was a facility for the litigant and where under a prima facie bona fide impression a party considers that a certified copy was required for filing intra-court appeal and that solely formed the reason in the delay in filing of intra-court appeal, such delay had to be condoned in suitable cases depending on the facts and circumstance of the case, especially where valuable rights of the parties were involved and a technical knock out was expected to infringe such right---Benefit of S.12 of the Limitation Act, 1908 was therefore, available to the appellant and the time consumed in applying for certified order of single Judge, till its preparation and till the fling of the intra-court appeal, was excluded and therefore, the present intra court appeal was within time.
Board of Governors, Area Study Centre for Africa and North America, Quaid-e-Azam, University, Islamabad and another v. Ms. Farah Zahra PLD 2005 SC 153; Muhammad Islam v. Inspector-General of Police, Islamabad and others 2011 SCMR 8; Aftab Alam Khan v. The Settlement Commissioner and 3 others PLD 1972 Quetta 97 and Additonal Chief Engineer (Army) Okara Cantt. and others v. Messrs Nasim Co. (Pvt) Ltd. 1991 CLC 1476 ref.

(b) Law Reforms Ordinance (XII of 1972)---
----S. 3---High Court (Lahore) Rules and Orders, Vol. V---Intra-court appeal---Objection that certified copies obtained for the purpose of filing appeal before Supreme Court could not be used for filing of intra-court appeal---Validity---No such

distinction or prohibition existed in the High Court (Lahore) Rules and Orders, Vol. V---Objection was overruled.
Mughees Aslam Malik and Ch. Muhammad Ashraf Khan for Appellant.
Malik Muhammad Latif Khokhar for Respondents.

ORDER
Main Case, C.M. No.2 of 2012
The learned counsel representing the respondents raised a preliminary objection that instant Intra Court Appeal is barred by time and contended that in view of Article 151 of the Limitation Act, Intra Court Appeal had to be filed within twenty days of the order or judgment passed by learned Single Judge in chamber and attaching certified copy of order or judgment was not required. The learned counsel argued that here in this case the order was passed by learned Single Judge in chamber on 12-9-2012, the last date of filing the ICA was 2-10-2012, but this appeal was filed on 10-10-2012, therefore, it is barred by eight days. Lastly, the learned counsel while referring to certified copies of documents including that of the impugned order, urged that certified copies had been obtained by the appellant for Supreme Court purpose, therefore, even otherwise, the time consumed in obtaining such copies, could not be excluded. In support of his contentions learned counsel placed reliance on the case "BOARD OF GOVERNORS, AREA STUDY CENTRE FOR AFRICA AND NORTH AMERICA, QUAID-E-AZAM, UNIVERSITY ISLAMABAD and another v. Ms. FARAH ZAHRA" (PLD 2005 SC 153), "MUHAMMAD ISLAM v. INSPECTOR-GENERAL OF POLICE ISLAMABAD and others" (2011 SCMR 8)

2. On the other hand, learned counsel appearing on behalf of the appellant argued that High Court Rules and Orders Volume-V Chapter-1 Rule 4 has specifically provided that Section 12 of the Limitation Act, 1908 would be applicable to compute the period of limitation in filing the ICA, therefore, the instant Intra Court Appeal is within time, as the period consumed in obtaining certified copy of the order, impugned herein, has to be excluded from consideration. In support of his contentions learned counsel placed reliance on the case "AFTAB ALAM KHAN v. THE SETTLEMENT COMMISSIONER and 3 others" (PLD 1972 Quetta 97), "ADDITIONAL CHIEF ENGINEER (ARMY), OKARA CANTT. and others v. Messrs NASIM CO. (Pvt) LTD" (1991 CLC 1476).

3. We have heard the arguments of learned counsel for the parties and perused the record.

4. There is no dispute about the factual position that the order was passed by learned Single Judge in chamber on 12-9-2012, the Intra Court Appeal had to be filed within twenty days but the instant appeal was preferred on 10-10-2012 i.e. with delay of eight days. There is also no cavil to the proposition that under High Court Rules and Orders Volume-V, Chapter-1, Rule 4, the memorandum of appeal is not required to be accompanied by a copy of decree, order or judgment appealed from, but it is to be seen that this Rule itself further provides that "The period of limitation prescribed in this Rule shall be computed in accordance with the provisions of section 12 of the

Limitation Act, 1908." Section 12 of the Limitation Act, 1908 deals with computation of period of limitation, which includes the time consumed in obtaining certified copies of the impugned order/judgment. Therefore, by making section 12 of the Limitation Act, 1908 applicable even in computing the period of limitation about Intra Court Appeal, it can safely be said that although filing of certified copy of the order/judgment of learned Single Judge in chamber, is not required to be attached with an Intra Court Appeal, but by a liberal interpretation of the above Rules it can be said a deviation from settled practice of appending certified copy of impugned order/judgment is just a facility for the litigant and where under a prima facie bona fide impression a party considers that a certified copy was required for filing Intra-Court Appeal and that solely formed the reason in delayed filing of Appeal, such delay has to be condoned in suitable cases depending upon the facts and circumstances of such case, especially where valuable rights of the parties are involved and technical knock out is expected to infringe such rights. Therefore, we hold that benefit of Section 12 of the Limitation Act, 1908 is available to the present appellant and when the time consumed in applying for certified copy of the impugned order till its preparation and filing of Intra Court Appeal is excluded, the instant appeal becomes within time. As regards the objection of learned counsel for respondents i.e. use of certified copies for instant Intra Court Appeal, which in fact particularly had been obtained for Supreme Court purpose, a careful perusal of the relevant Rules would show that there does not exist any distinction in this respect, nor could any case-law be referred by the learned counsel. In this view of the matter, when no specific prohibition is available in the Rules about procurement of certified copies for Supreme Court use or for any other purpose, it would be highly unjust to import a negative impression in this respect. Consequently, the preliminary objection of learned counsel for the respondents is therefore, overruled.

5. The main Intra Court Appeal along with C.M. No.2 of 2012 shall be listed for arguments on merits on 20-12-2012 and meanwhile the operation of the impugned order dated 12-9-2012 shall remain stayed.

KMZ/N-2/L Order accordingly.

PLJ 2013 Cr.C. (Lahore) 36
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
BASHIR AHMAD--Petitioner
versus
STATE, etc.—Respondents

Crl. Misc. No. 3368-B of 2012, decided on 9.10.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 324, 148 & 149--Bail, grant of--Further inquiry--Injury attributed to the petitioner was on non-vital part of the body and whether the intention to kill exists will be decided by the trial Court as petitioner had not repeated the second fire--Moreover, as argued, motive is not attributed to the petitioner; he is behind the bars for more, than last nine months without any progress in trial--Investigation of the case is complete and he is no more required for the purpose of investigation. [P. 37] A

Mr. Nadeem Ahmad Tarar, Advocate for Petitioner.
Malik Muhammad Bashir Lakhesir, for State.
Date of hearing: 9.10.2012.

Order
Complainant of the case is in Jail and has been duly served through Superintendent New Central Jail, Multan but despite service, none has appeared on behalf of the complainant. This is bail after arrest which could not be kept pending for an indefinite period, therefore, same is going to be decided after hearing learned counsel for the petitioner as well as learned AAG and in view of the available record.

2. Petitioner seeks post arrest bail in case FIR No. 19/2012 registered under Sections 324/148/149, PPC at Police Station Sadar Jilalpur Pirwala, Multan.

3. Precisely, allegation against the petitioner is that on the fateful day he along with co-accused injured the complainant with their respective weapons. Role attributed to the petitioner is that he made a fire shot with repeater .12-bore which hit on the left hand's fingers of the complainant.

4. Learned counsel for the petitioner submitted that petitioner has falsely been involved in this case. Further submitted that in the circumstances of the case, Section 324 does not attract to the extent of petitioner, motive is not attributed to him and nothing has been recovered from him which makes out the case of petitioner one of further inquiry. Lastly submitted that investigation of the case is complete, petitioner is behind the bars since arrest and is no more required for the purpose of investigation, and even he is previous non convict.

5. On the other hand, learned, AAG has vehemently opposed this petition on the ground that petitioner is nominated in the FIR with a specific allegation and the offence with which the petitioner is charged falls within the ambit of prohibitory clause, therefore, is not entitled for the concession of bail.

6. I have heard the learned counsel for the petitioner as well as learned AAG and perused the record.

7. Although the petitioner has been charged under Section 324, PPC but as per FIR, one injury by repeater on the left thigh of complainant is alleged against Tanvir Sheikh, co-accused of the petitioner to whom motive is also attributed and second injury on the fingers of left hand is attributed to petitioner with repeater. Whether these injuries are result of the fire of petitioner or from the fire of the co-accused, Tanvir Sheikh, require further inquiry. Even otherwise, as injury attributed to the petitioner is on non-vital part of the body and whether the intention to kill exists will be decided by the learned trial Court as petitioner has not repeated the second fire. Moreover, as argued, motive is not attributed to the petitioner; he is behind the bars for more than last nine months without any progress in trial. Investigation of the case is complete and he is no more required for the purpose of investigation.

8. For what has been discussed above, this petition is allowed and petitioner is admitted to bail subject to furnishing bail bond in the sum of Rs. 1,00,000/- (one lac) with one surety in the like amount to the satisfaction of trial Court.

(A.S.) Bail allowed

PLJ 2013 Cr.C. (Lahore) 164 (DB)
[Multan Bench Multan]
Present: Muhammad Qasim Khan & Ibad-ur-Rehman Lodhi, JJ.
Mst. NAZIA ARSHAD & another--Petitioners
versus
STATE & another—Respondents

Crl. Misc. No. 5163-B of 2012, decided on 18.12.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pakistan Penal Code, (XLV of 1860), S. 324--Bail before arrest, confirmed--Nature of injury--Grievous violence or grievous bodily injury--S. 324, PPC can only be attracted, if intention to kill a person is present in action of the accused--To cause damage thighs or penis by no means, can be taken an act, which was committed with such intention or knowledge that under such circumstances, qatl would had been taken place--Bail was confirmed. [P. 166] A

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pakistan Penal Code, (XLV of 1860), S. 336-B--Bail before arrest, confirmed--Nature of injuries--Itlaf-i-salahiyyat-i-udw--Grievous violence or grievous bodily injury--Validity--Whoever causes hurt by corrosive, shall be punished with imprisonment for life must be considered as an extension of originally inserted S. 336 in, PPC and to constitute an offence u/S. 336 in, PPC, itlaf-i-salahiyyat-i-udw is a sine-qua-non--Prosecution was equipped with no evidence as to whether Salahiyyat of penis or thigh parts was damaged or same parts of body had become redundant or in active on account of alleged injuries caused to complainant in absence of such medical evidence even S. 336, PPC, prima facie cannot be attracted. [P. 166] B

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pakistan Penal Code, (XLV of 1860)--S. 337-F(i)--Bail, before arrest, confirmed--Jarah ghayr-jaifah damiyah--Prima facie--All injuries sustained by complainant were declared as jarah ghyar jaifah damiyah, which falls u/S. 337-F(i), PPC not only a bailable offence but also non cognizable one--Offence under such provisions of PPC prima facie can be attracted to had been committed by petitioners. [P. 167] C

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 324 & 336-B--Anti Terrorism Act, 1997, S. 7--Bail before arrest, confirmed--Nature of injuries--Grievance violence or grievous bodily injury--Role assigned was nothing more than that facility of providing transportation in order to reach her house--Role assigned to accused, nothing incriminating is to be recovered and he was not to be interrogated in any manner--Involvement being real brother of accused can be termed as a mala fide on part of complainant and police--Mala fides of complainant while in league with

police were so much obvious that same cannot be ruled out behind registration of criminal case against accused--Bail was confirmed. [P. 167] D & E

Rana Muhammad Asif Saeed, Advocate with Petitioners.
Mr. Munir Ahmad Sial, D.P.G. for State.
Chaudhary Faqir Muhammad, Advocate for Complainant.
Date of hearing: 18.12.2012.

Order

The petitioners, namely, Mst. Nazia Arshad and Saif Ullah, are seeking their bail before arrest in a case registered vide F.I.R. No. 725, dated 10.11.2012, under Sections, 324, 336-B, P.P.C. read with Section 7 of the Anti-Terrorism Act, 1997, at Police Station, Chehlyak, District Multan.

2. The allegation against the petitioner Mst. Nazia Arshad is that she managed the presence of her husband in an isolated place viz. a room of hotel and finding opportunity, she sprinkled acid, which caused some injuries on the thigh part and penis of the complainant.

3. The learned counsel for the petitioners has argued that the registration of criminal case is, in fact, a result of matrimonial differences crept in the life of the couple and in order to put a restraint on the petitioners, to get implemented the terms as have been settled at the time of Nikah mentioned in Column No. 19, whereby, it was agreed at the time of Nikah that in case of divorce or second marriage, the complainant Zafar Hussain will pay an amount of Rs. 8,00,000 (rupees eight lac only) to Petitioner No. 1. He further maintains that no offence, as has been alleged against the petitioners, is made out and even the Doctor, who examined the complainant on 10.11.2012, at 10:15 p.m., has declared the nature of injuries under Section 337-F(i) of P.P.C.

4. The plea of pre-arrest bail has been opposed seriously by the complainant on the ground that, at any cost, the petitioners are not entitled to extraordinary relief of pre-arrest bail.

5. We have heard the respective arguments of the learned counsel for the parties and have gone through the record with their able assistance.

6. It is a fact that in getting the matter reported to the police, it took almost eighteen hours to the petitioner and such inordinate delay has never been explained. A copy of Nikahnama in between Petitioner No. 1 and the complainant is available on record showing that they entered into Nikah on 25.11.2011, and the entries in Column No. 19, as have been noted above, are present there. The manner in which the complainant has described that who the petitioners managed his presence in the hotel, gives a clear indication that the families of the parties are, perhaps, not accepting their marriage and there are serious matrimonial differences in between the families, which gives strength to the version of the petitioners that in fact the complainant wants to

enter into second marriage, but in order to avoid his liability, as agreed in view of Column No. 19 of Nikahnama, the present baseless case has been concocted against the petitioners on the basis of mala fides.

7. The act of terrorism has been defined in Section 6 of the Anti-Terrorism Act, 1997, and maximum the provisions of Section 6(2)(b) of the Act can be attracted in the present case, which provides that an "action" shall fall within the meaning of terrorism, if it involves grievous violence against a person or grievous bodily injury or harm to a person.

Section 7 of the said Act provides the punishment for any act of terrorism.
8. Keeping in view the nature of injuries, allegedly caused at the hands of Petitioner No. 1 to the complainant, which have been described by the examinee Doctor as under Section 337-F(i) of P.P.C., the same cannot be termed as a grievous violence or grievous bodily injury.

9. Section 324 of P.P.C. can only be attracted, if the intention to kill a person is present in the action of the accused. To cause damage the thighs or penis, by no means, can be taken an act, which has been committed with such intention or knowledge that under such circumstances, Qatl would have been taken place.

10. Section 336-B, P.P.C. although provides that whoever causes hurt by corrosive substance, shall be punished with imprisonment for life, but this Section must be considered as an extension of originally inserted Section 336 in Pakistan Penal Code, 1860 and to constitute an offence under Section 336, P.P.C., itlaf-i-salahiyyat-i-udw is a sine-qua-non. The prosecution is equipped with no evidence as to whether `Salahiyyat' of penis or thigh parts has been damaged or the same parts of the body have become redundant or inactive on account of alleged injuries caused to the complainant, in absence of such medical evidence, even Section 336, P.P.C. prima-facie cannot be attracted. In view of the fact that all the injuries sustained by the complainant have been declared as jarah Ghayr-Jaifah-damiyah, which falls under Section 337-F(i) P.P.C., not only a bailable offence but also a non-cognizable one. At the most, after consideration of the case, from every angle, the offence under such provisions of P.P.C., prima-facie, can be attracted to have been committed by the petitioners.

11. From the narration of the facts, the incident as has been reported after spending some time in the hotel, both, Petitioner No. 1 and the complainant went to sleep, but Petitioner No. 1, according to the complainant, played dirty game, when after awakening up in the morning, he was busy in routine work in the washroom. Had there been any intention with Petitioner No. 1 to cause injuries to the complainant, it was the best time with her, when the complainant was sleeping in the said room. The incident, as has been alleged, took place within the four walls of a room of hotel, which, by no means, can be taken as a public place and, therefore, on this score also, offence under Section 7 of the Anti-Terrorism Act, 1997, cannot be taken an action of terrorism for which the crime must be committed at a public place.

12. The role assigned to Petitioner No. 2 is nothing more than that, when Petitioner No. 1 was checked out from hotel, he extended facility of providing transportation to Petitioner No. 1 in order to reach her house. No criminality can be attached in extending such facility to Petitioner No. 1 or at the most, he can be termed as an abettor and involvement in view of Section 109, P.P.C. would certainly be thrashed out during trial and keeping in view the role assigned to Petitioner No. 2, nothing incriminating is to be recovered and he is not to be interrogated, in any manner, whatsoever by the investigating agency. His involvement being real brother of Petitioner No. 1 can also be termed as a mala-fide on the part of the complainant and police.

13. The mala-fides of the complainant while in league with the local police are so much obvious that the same cannot be ruled out behind registration of the criminal case against the petitioners.

14. For what has been discussed above, this petition is allowed and interim pre-arrest bail already granted to the petitioners on 26.11.2012 is confirmed subject to their furnishing fresh bail bonds in the sum of Rs. 1,00,000/- each with one surety each in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court.

(R.A.) Bail confirmed

PLJ 2013 Cr.C. (Lahore) 461
[Multan Bench Multan]
Present: Muhammad Qasim Khan & Ibad-ur-Rehman Lodhi, JJ.
MUHAMMAD ABDULLAH TARIQ--Petitioner
versus
STATE and another—Respondents

Crl. Rev. No. 306 of 2010, decided on 13.12.2012.

Constitution of Pakistan, 1973--
----Art. 10(1)--Fundamental right--No person, who is arrested or detained, shall be denied the right to consult and be defended by a legal practitioner of his choice. By means of Constitution (Eighteenth Amendment) Act, 2010, Article 10A has been inserted in the Constitution, which provided that for the determination of his civil rights and obligations or in any criminal charge against him, a person shall be entitled to a fair trial and due process. [P. 463] A

Criminal Procedure Code, 1898 (V of 1898)--
----S. 340(1)--Right of accused--Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court, has a right to be defended by a pleader. [P. 463] B

Criminal Procedure Code, 1898 (V of 1898)--
----Ss. 439/435 & 540--Revision petition against the order of Addl. Sessions Judge, in which trial Court appointed defence counsel on state expenses and dismissed the application of petitioner for re-summoning of PWs for impugned order and gave opportunity to cross-examine over PWs--Right of accused--Last opportunity to petitioner to conduct the cross-examination--Conduct adopted by the trial Court in appointing the defence counsel on State expenses in a haste and then in refusal to re-summon the prosecution witnesses for their cross-examination by the counsel, are acts, which are not only violative to the provisions of the Constitution, but also the settled legal norms--The petitioner will appear before; the trial Court and if the Special Court is still being headed by the Judge, who has passed the impugned orders then, he will not take further proceedings in the trial and the matter will be reported back to High Court, for some appropriate direction with regard to conduct of trial by some other competent Court, and if the Special Court is now being headed by some other Judge, then he will proceed with the matter and re-summon the said witnesses for a date according to the Court's own schedule and this will be considered as a last opportunity to the petitioner to conduct the cross-examination on the said prosecution witnesses--Revision petition allowed. [P. 464] E & F

Right of accused--
----Counsel of his own choice--Concept of fair trial includes the right of an accused person to be defended by a counsel of his own choice, if he can afford one. Since right of counsel has been recognized, so its alleged violation becomes a justifiable issue over which the Court can exercise judicial review--When accused has engaged a

counsel of his own choice, the concept of fair trial necessarily included the right of an accused person to be defended by such: particular counsel. Basic principle is that justice should not only be done but manifestly be seen to have been done and where on account of any attending circumstances, a suspicion or distrust had occurred resulting in a loss of confidence in the administration of justice, which was essential to social order and security, it is always better that it should be done by a Court, whose impartiality could not be doubted and was above suspicion. When this is an established right of an accused to be defended by counsel of his own choice, the Court cannot impose an Advocate upon the accused. [Pp. 463 & 464] C & D

Nemo for Petitioner.
Mr. M.A. Hayat Haraj, Special Prosecutor for ANF.
Date of hearing: 13.12.2012.

Order

The petitioner is facing trial in Narcotics Case No. 09/N of 2008, in the Court of learned Special Judge Anti-Narcotics Force, Multan, where charge was framed on 12.03.2008 to which the petitioner did not plead guilty and, therefore, the matter was put to trial.

2. On 26.05.2010, two PWs i.e. Zahoor Ahmad, a Constable/recovery witness and Farooq Ahmad Sheikh, Investigating Officer, were present for making their statements before the Court, but the learned trial Court was informed that the learned counsel representing the accused-petitioner was busy in his professional engagements in some murder case in another Court. The request for adjournment as was made on account of non-availability of the learned counsel for the petitioner-accused, was turned down and Chaudhary Muhammad Akbar, Advocate was appointed as a defence counsel on State expenses and such newly appointed defence counsel straightaway cross-examined the said two witnesses.

3. On 07.06.2010, a petition under the provisions of Section 540 of Cr.P.C. was moved praying the re-summoning of PW.3 and PW.4, whose statements were recorded on 26.05.2010, and who were cross-examined by the defence counsel appointed by the learned trial Court on State expenses.

4. The learned trial Court vide order dated 16.06.2010 has proceeded to dismiss the said application by holding that the petitioner was provided a counsel on State expenses, who cross-examined the PWs and, thus, there was no justification left with the accused-petitioner to ask for re-summoning of the PWs and cross-examination by the counsel of his own choice

5. It is a fundamental right as guaranteed under Article 10(1) of the Constitution of Islamic Republic of Pakistan, 1973, which mandates that no person, who is arrested or detained, shall be denied the right to consult and be defended by a legal practitioner of his choice. By means of Constitution (Eighteenth Amendment) Act, 2010, Article 10-A has been inserted in the Constitution, which provided that for the

determination of his civil rights and obligations or in any criminal charge against him, a person shall be entitled to a fair trial and clue process.

6. In view of Section 340(1) of the Criminal Procedure Code, 1898, any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court, has a right to be defended by a pleader.

7. Concept of fair trial includes the right of an accused person to be defended by a counsel of his own choice, if he can afford one. Since right of counsel has been recognized, so its alleged violation becomes a justifiable issue over which the Court can exercise judicial review.

8. In the present case, the learned trial Court proceeded to record the statements of two important witnesses without waiting for the learned counsel of the choice of the petitioner-accused and further refused to recall the prosecution witnesses already examined without proper representation on behalf of the accused petitioner.

9. When accused has engaged a counsel of his own choice, the concept of fair trial necessarily included the right of an accused person to be defended by such particular counsel. Basic principle is that justice should not only be done but manifestly be seen to have been done and where on account of any attending circumstances, a suspicion or distrust had occurred resulting in a loss of confidence in the administration of justice, which was essential to social order and security, it is always better that it should be done by a Court, whose impartiality could not be doubted and was above suspicion. When this is an established right of an accused to be defended by counsel of his own choice, the Court cannot impose an Advocate upon the accused.

10. We have noted that on 26.05.2010, Chaudhary Muhammad Akbar, Advocate was appointed on State expenses to defend the accused-petitioner and on the same day, the said learned counsel cross-examined two prosecution witnesses; one a recovery witnesses and other one is the Investigating Officer of the case, without there being any consultation with the accused, and also without going through the record of the case. One can imagine that what sort of cross-examination was conducted by the said learned counsel, having no knowledge with the facts of the case.

11. The conduct adopted by the learned trial Court in appointing the defence counsel on Stale expenses in a haste and then in refusal to re-summon the prosecution witnesses for their cross-examination by the learned counsel, are acts, which are not only violative to the provisions of the Constitution, but also the settled legal norms.

12. In such view of the matter, this petition is allowed; the impugned orders dated 26.05.2010 and 16.06.2010, are set-aside, and the application filed by the petitioner under Section 540 of Cr.P.C. stand accepted with a direction to the learned Special Judge Anti Narcotics Force, Multan to re-summon the prosecution witnesses viz. PW.3 and PW.4 for the purposes of their cross-examination by the

learned defence counsel appointed by the petitioner-accused to defend himself in the trial.

13. The petitioner will appear before; the learned trial Court on 19.12.2012 and if the Special Court is still being headed by Mr. Muhammad Ashraf Gull, the learned Judge, who has passed the impugned orders then, he will not take further proceedings in the trial and the matter will be reported back to this Court, for some appropriate direction with regard to conduct of trial by some other competent Court, and if the Special Court is now being headed by some other learned Judge, then he will proceed with the matter and re-summon the said witnesses for a date according to the Court's own schedule and this will be considered as a last opportunity to the petitioner to conduct the cross-examination on the said prosecution witnesses.

14. Keeping in view the pendency of this trial and also the fact that the announcement of final judgment was stopped by this Court in the present Criminal Revision on 29.6.2010, it is directed that the trial of the case be expeditiously taken up and concluded within next three months from today under intimation to this Court through the Deputy Registrar (Judicial).

(A.S.) Revision allowed

PLJ 2013 Lahore 476
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
MEHR ZAMAN and 2 others--Petitioners
versus
STATE and 3 others—Respondents

W.P. No. 6235 of 2013, decided on 14.6.2013.

Constitution of Pakistan, 1973--
----Art. 199--Constitutional Petition--Cranes were taken into possession by wild life department--Custody of cranes and cages--Superdari of birds--Accused conferred found guilty and paid fine in Court--For superdari accused had failed to produce original licence/export licence of wildlife Animal Birds in Court--Orders were challenged--Undisputedly cranes/birds and cages were recovered from petitioners and except petitioners none else had come forward to claim ownership of birds--Held: Since trial was still under progress, petitioners were found entitled to get birds and cages on superdari--Petition was allowed. [P. 477] A

Malik Muhammad Ramzan Khalid Joiya, Advocate for Petitioner.
Mr. Mubashir Latif Gill, Assistant Advocate General for State.
Date of hearing: 14.6.2013.

Order
Briefly the facts of the case are that present petitioners were booked under Wild Life Act, 1974 with an allegation that they caught and kept the Cranes in their possession illegally, as such, 125-Cranes were taken into possession by Wild Life Department, Dera Ghazi Khan. Pursuant to alleged confession by the accused persons, certain fines were imposed on them vide order dated 01.04.2013 passed by learned Special Judicial Magistrate. On revision petition filed by the petitioners, the learned Sessions Judge, Dera Ghazi Khan vide order dated 11.04.2013 remanded the case to the learned Special Judicial Magistrate with a direction to decide the matter afresh after framing the charge properly. As regards the claim of the accused/petitioner about custody of the cranes and cages, the learned Sessions Judge observed that petitioner/ accused may approach learned Special Judicial Magistrate. Pursuant to the direction of learned Sessions Judge, the petitioner moved application for getting Superdari of the birds, vide order dated 30.04.2013, the applications were consigned to record with the observations "Accused confessed, found, guilty and paid fine in the Court. For the "Superdari" they have been failed to produce original licence/NOC/Export Licence of Wildlife Animal/Birds in the Court for handing over the cranes." Said order was again assailed through criminal revision, which has been dismissed by learned Sessions Judge, Dera Ghazi Khan vide order dated 07.05.2013. The petitioners have assailed the above orders through the instant writ petition.

2. Heard.

3. During hearing of this case, Assistant Director Wildlife, Multan was called and explained that as a matter of fact the petitioners did not carry transit permission at the time when they were hauled up. It is admitted position that Cranes were recovered from the possession of the petitioners and under the orders passed by learned Special Judicial Magistrate, Dera Ghazi Khan, the same were given in the custody of Wildlife Department, Dera Ghazi Khan. The impugned orders passed by learned Special Judicial Magistrate and the learned Sessions Judge are solely based on the ground that original licence were not produced by the claimants/petitioners. The record shows that at one point of time the licences produced by the petitioners were sent by the learned Special Judicial Magistrate to the Chief Conservator Wild Life, Khyber Pakhtankhwa for verification of the licence and vide letter No. 1055/WL(B) dated 25.04.2013 the Divisional Forest Officer, Bannu Wildlife Division, Bannu, verified the licences of the petitioners. Without further commenting on the merits of the case, suffice it to observe that undisputedly the Cranes/birds and cages were recovered from the petitioners and except the petitioners; none else has come forward to claim ownership of the birds. In this view of the matter, since the trial is still under progress, the petitioners are found entitled to get the birds and cages on Superdari. Consequently, this writ petition is allowed. Since the value of the birds has been assessed by the Wildlife authorities as Rs. 1,50,000/- approximately, therefore, subject to petitioners furnishing security equal to Rs. 300,000/- to the satisfaction of learned Special Judicial Magistrate, Dera Ghazi Khan, the birds/Cranes and cages in question are ordered to be handed over to them. The petitioners shall also submit their undertaking before the said Court to produce the birds/Cranes and cages before the learned trial Court as and when required.

(R.A.) Petition allowed

PLJ 2013 Lahore 503
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
ISHAQ AHMAD--Petitioner
versus
DISTRICT COORDINATION OFFICER, (DCO) MULTAN and 4 others—Respondents

W.P. No. 2557 of 2013, decided on 21.3.2013.

Constitution of Pakistan, 1973--

----Art. 199--W.P. Maintenance of Public Order Ordinance, 1960, S. 5--Constitutional Petition--Detention order--Legality and propriety of detention order--No material to establish close links of detenus with activist and terrorist of sectarian organizations--Validity--It is settled position that S. 5 of Ordinance, 1960 vests authority in DCO in passing such orders but power was not absolute and as shall be seen from language used in S. 3(1) of Ordinance before passing such detention order authority is to satisfy him that with a view to preventing any person from acting in any manner prejudicial to public safety or maintenance of public order--Detention order amounts to curtailing fundamentally guaranteed right of liberty of a person that legislators in their wisdom vested such powers with D.C.O. who were expected to be unbiased as compared to public agency and D.C.Os were not supposed to act on reports of police agency untill and unless they satisfy themselves that such reports were correct--Detention orders had been passed by DCO without judicious application of mind about alleged activities of detenus--Petitions were allowed. [Pp. 508 & 509] A, B & C

PLD 2002 Lah. 194, PLJ 2004 Lah. 1221, 2007 PCr.LJ 1776 & PLD 2003 SC 442, rel.

Mr. Mehmood Khan Ghouri, Advocate for Petitioners (in Writ Petition No. 2557/2013, Writ Petition No. 2558/2013, Writ Petition No. 2613/2013, Writ Petition No. 2614/2013, Writ Petition No. 2616/2013 and Writ Petition No. 2712/2013).

Mr. Muhammad Basir Khan Lakhani, Advocate for Petitioners (in Writ Petition No. 2911/2013 and Writ Petition No. 2538/2013).

Mian Gohar Mehmood Paracha, Advocate for Petitioner (in Writ Petition No. 2463/2013).

Mr. Mubashir Latif Gill, Assistant Advocate General with DPO, Muhammad Razzaq Rana DSP (Legal), Abdul Qayum Inspector, Muhammad Ajmal Inspector, Allah Bachaya Sub-Inspector, Muhammad Hanif, Sub-Inspector, Asif Zia (GAR), DCO Office, Multan, Muhammad Aslam Sub-Inspector, Abdul Kamran Inspector and Muhammad Anwar Junior Clerk, DCO Office, Multan, Asghar Sub-Inspector and Anwar Junior Clerk, DCO Office, Multan, Nadir Hameed Head Clerk and Muhammad Shafiq Sub-Inspector for Respondents.

Date of hearing: 21.3.2013.

Order

This single judgment is meant to decide the following matters i.e.:--

(1) W.P.No. 2557/2013 "ISHAQ AHMAD vs. DCO, Etc."
(2) W.P.No. 2558/2013 "MUHAMMAD MEHBOOB AHMAD vs. DCO, Etc."
(3) W.P.No. 2613/2013 "AMARIA ASLAM vs. DCO, Etc."
(4) W.P.No. 2614/2013 "GHULAM ZAINAB vs. DCO; Etc."
(5) W.P.No. 2616/2013 "HAQ NAWAZ vs. DCO, Etc."
(6) W.P.No. 2911/2013 "WILLAYAT ALI vs. DCO, Etc."
(7) W.P.No. 2538/2013 "MUSHTAQ AHMAD vs. DCO, Etc."
(8) W.P.No. 2463/2013 "MUZAMIL NAZIR vs. DCO, Etc."
(9) W.P.No. 2712/2013 "MUHAMMAD RIAZ vs. DCO. Etc."

In all these writ petitions similar orders of different dates issued by respondents/District Coordination Officers, Multan, Sahiwal, Vehari and Khanewal, passed under Maintenance of Public Order, directing the arrest and detention of certain persons (relatives of the petitioners), have been assailed.

2. The contention of learned counsel for the petitioners is that impugned detention orders are illegal, unjust, without authority and based on no evidence. It is further argued that the persons put under arrest and detention by the impugned orders, never remained in-touch with any sectarian activities or in any affair which may be called prejudicial to the public safety detrimental for maintenance of public order. Lastly, it is argued that impugned detention orders being without any valid material are violative of Articles 4, 9 and 14 of the Constitution of Islamic Republic of Pakistan, 1973, as such, the writ petition may be allowed with costs and the impugned detention orders may be set-aside after declaring the same as void ab-initio. To argue on the question of maintainability of these writ petitions it has been argued that although an alternate remedy is available to the petitioners, but the same is neither adequate nor efficacious, whereas, illegal detention of human being even for a moment, cannot allowed, as liberty of life is fundamentally guaranteed right of every citizen. Learned counsels for the petitioners placed reliance on the cases: PLD 2003 Supreme Court 442), "Hafiz Muhammad Saeed and 3 others versus Government of the Punjab, Home Department through Secretary, Lahore and 2 others" (2009 YLR 2475), Mst. Misbah Tabassum and 2 others versus Government of Punjab through Secretary, Home Department Lahore and 3 others" (2007 P.Cr.L.J. 1776).

3. On the other hand, learned Assistant Advocate General representing respondents/DCOs, at the very outset came with the assertion that alternate remedy by way of appeal is available to the petitioners, therefore, these writ petitions are not maintainable. To lend support to his arguments learned Assistant Advocate General placed reliance on the case "Sheikh Rashid Ahmad versus D.M. Rawalpindi etc? (PLJ 2004 Lahore 1221 (FB). The learned Law Officer, even on merits attacked the writ petitions by arguing that Saif-ur-Rehman and Ghulam Sarwar detenus in W.P. No. 2557/2013 and 2558/2013 are knitted with proscribed organization and criminal cases have also been registered against him; Qasim Razzaq detenu in W.P. No. 2613/2013 is President of defunct Sipah e Sahaba, Pakistan and is involved in creating hatred against shia sect; Qari Asghar detenu in W.P. No. 2614/2013 is member of banned

organization and carries links with terrorist; Zaheer Nawaz in W.P. No. 2616/2003 is also active member of proscribed organization and is Ameer of Lashkar-Jhangvi; Muhammad Farooq Babar detenu in W.P. No. 2538/2013 and Ghulam Murtaza detenu in W.P. No. 2911/2013 are involved in sectarian activities, whereas, Intizar Ahmad detenu in W.P. No. 2712/2013 is indulged in activities prejudicial to the public safety and Ghulam Muhammad detenu in W.P. No. 2463/2013 is activist of defunct organization and involved in stirring relations hatred against certain community. The learned Law Officer further submits that material was collected and is available with the agencies, which is sufficient to connect the detenus with the allegations levelled against them, and said material was made basis for issuing the impugned detention orders, as such, according to the learned Assistant Advocate General the impugned orders have been validly passed and there is no element of bad faith, therefore, these writ petition are liable to be dismissed even on merits.

4. I have considered the respective contentions of learned counsel for the parties and perused the available record with their able assistance.

5. Before opening the case on merits, this Court would like to deal with preliminary objection raised by learned Assistant Advocate General with regard to maintainability of these writ petitions in the presence of alternate and adequate remedy of filing a representation before the Home Secretary. The right of liberty, security, dignity and freedom of a person has been fully protected and safeguarded by. provisions of Chapter-I, Part-II of Constitution of Islamic Republic of Pakistan, 1973. Under Charter of Human Rights, High Court had constitutional obligation to jealously safeguard such fundamental rights against any invasion. A learned Division Bench of Sindh High Court in the case "Dr. Muhammad Shoaib Suddle versus Province of Sindh, etc. (NLR 1999 Civil 66) held that even on failure of detenue to make a representation to the executive authorities, the jurisdiction of High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, would not be barred, as such remedy of representation is neither adequate nor alternate within the meaning of Article 199 (1) of the Constitution. Above all the Hon'ble Supreme Court of Pakistan in the case "Federation of Pakistan through Secretary, Ministry of Interior, Islamabad versus Mrs. Amatul Jalil Khawaja and others" (PLD 2003 Supreme Court 442), in unequivocal terms held that "The right of a person to a petition for habeas corpus is a high prerogative right and is Constitutional remedy for all matters of illegal confinement. This is one of the most fundamental rights known to the Constitution. There being limitation placed on the exercise of this right, it cannot be imported on the actual or assumed restriction which may be imposed by any subordinate legislation. If the arrest of a person cannot be justified in law, there is no reason why that person should be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty which is his basic right. In all cases where a person is detained and he alleges that his detention is un-Constitutional and in violation of the safeguards provided in the Constitution, or that it does not fall within the statutory requirements of the law, under which the detention is ordered, he can invoke the jurisdiction of the High Court, under Article 199 and ask to be

released forthwith." On the strength of above pronouncement by the apex Court, these writ petitions are held to be competent and maintainable.

6. On facts, the Hon'ble Supreme Court of Pakistan in the above judgment "Federation Of Pakistan through Secretary, Ministry of Interior, Islamabad versus Mrs. Amatul Jalil Khawaja and others" (PLD 2003 Supreme Court 442), set a criteria that the preventive detention order has to satisfy the following requirements:--

(i) The Court must be satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention;

(ii) Satisfaction should be established with regard to each of the grounds of detention, and, if one of the grounds is shown to be bad, non-existent or irrelevant, the whole order of detention would be rendered invalid;

(iii) Initial burden lies on the detaining authority to show the legality of the preventive detention, and

(iv) The detaining authority must place the whole material, upon which the order of detention is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claims shall be within the competent of the Court to decide.

The legality and propriety of the detention orders impugned in these writ petitions shall be seen on the touchstone of above settled principles. The learned Assistant Advocate General also tried to refer to some material which according to him was secret record/reports of the agencies. No material whatsoever has either been collected or produced before the Court as to how the detenus are most active members of banned sectarian organizations and similarly there is no material to establish close links of detenus with activists and terrorist of sectarian organizations. Although copies of some FIRs were cited by the learned Assistant Advocate General but admittedly in none of those cases any conviction has been recorded. Even otherwise, this Court in the case "Muhammad Mushtaq versus District Magistrate, Sheikhupura and another" (1997 MLD 1658) has already declared that "involvement of the detenue in number of criminal cases, per se, was not a valid ground for his preventive detention as he could not be vexed twice on the basis of the same criminal charge due to the pendency or disposal of the said criminal cases and his detention was nothing but punishment depriving him of his liberty." In these facts and circumstances, this Court has no hesitation in holding that impugned detention order could not satisfy the requirements of a valid detention order on the touchstone of guidelines settled by the apex Court in "Federation of Pakistan through Secretary, Ministry of Interior, Islamabad versus Mrs. Amatul Jalil Khawaja and others" (PLD 2003 Supreme Court 442), as not a single ground/ allegation mentioned in the said order could be established from the record/material, shown to the Court.

7. It is settled position that Section 5 of the Maintenance of Public Order Ordinance, 1960 vests authority in the DCO in passing such orders, but this power is not absolute and as shall be seen from the language used in sub-section (1) of Section 3 of West Pakistan Maintenance of Public Order Ordinance, 1960, before passing such

detention order the authority/D.C.O is to "satisfy? himself that with a view to preventing any person from acting in any manner prejudicial to public safety or the maintenance of public order, it is necessary so to do, he may issue an order in writing directing arrest and detention of such person for a period to be specified in the said order, but here in this case for the reasons as detailed above, the respondents/D.C.Os did not apply their independent judicious mind and passed the impugned detention orders merely on the basis of reports submitted by the concerned agencies without considering the worth of the material made available to them, whether this material could form basis for such detention orders and whether this material could even stand the test of admissibility in evidence or its evidentiary value. Liberty of a citizen is a divine right which is vested in a citizen duly safeguarded by the Constitution. Dignity of a common man does not differ from man to man, race to race and nation to nation and it is the supreme right of a citizen which should be explained for each hour, each day and each month if curtailed. Reliance is placed on the case "Iffat Razi versus Government of Punjab and others" (PLD 2002 Lahore 194). As a matter of fact a detention order amounts to curtailing the fundamentally guaranteed right of liberty of a person and it was for this reason that the legislators in their wisdom vested such powers with the D.C.Os; who are expected to be unbiased, as compared to the police agency and in this way the D.C.Os are not supposed to act on the reports of the police agency until and unless they satisfy themselves that such reports are correct and are also supported by tangible material. It may be reiterated here that the impugned detention orders have been passed by respondent DCOs without judicious application of mind about alleged activities of the detenus, therefore, they had in fact deviated from their one of the sacred duty by taking off the liberty of persons. All the grounds of detention enumerated in the detention orders passed by the Authorities in the present, cases, are vague, based upon presumptions and speculations; it is, therefore, sufficient to infer that detaining Authorities had not applied its mind to satisfy themselves for issuance of detention order of detenus.

8. For what has been detailed above, all these writ petitions are allowed and the impugned detention orders are set-aside and the detenus are directed to be released forthwith if not required in any other case. A copy of this judgment shall be sent to the respondent/District Coordination Officers, for future guidance. As regards the prayer of learned counsel for the petitioners seeking imposition of costs on the respondent authority, this is not considered to be a fit case for imposition of costs. If so advised, the petitioners may avail alternate remedies under the law.

(R.A.) Petitions allowed

PLJ 2013 Lahore 577
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
ALTAF HUSSAIN--Petitioner
versus
DIRECTOR GENERAL ANTI CORRUPTION, ESTABLISHMENT and 9 others—Respondents

W.P. No. 3418 of 2013, decided on 21.3.2013.

Constitution of Pakistan, 1973--
----Art. 199--Pakistan Penal Code, (XLV of 1860), S. 409--Prevention of Corruption Act, 1947, S. 5(2)--Criminal Procedure Code, (V of 1898), Ss. 154 & 342--Quashing of FIR--Civil litigation pending between parties--Neither FIR can be quashed nor at stage of investigation, its proceedings can be held in abeyance to wait for decision--Validity--If accused considered that decision of civil suit will decide ultimate fate of criminal proceedings launched against them there can be two stages to agitate before trial Court, when report u/S. 173, Cr.P.C. is submitted and cognizance was taken by trial Court, at that moment accused might bring their stance before trial Court and if trial Court after tentatively considering material available, then it would stop proceedings to wait for decision of Civil Court, secondly, trial Court might proceed with trial, if in reply to question whether he will produce any evidence in defence, trial Court comes to conclusion that the judgment and decree will affect criminal proceedings only then trial Court shall stop trial proceedings--Petition was dismissed. [P. 579] A

2006 SCMR 276, rel.
Mr. Shakeel Javaid Chaudhry, Advocate for Petitioner.
Malik Muhammad Jaffar, Deputy Prosecutor General on Court's call.
Date of hearing: 21.3.2013.

Order
This writ petition, has been brought to seek quashing of FIR No. 15/2013 dated 12.03.2013 registered at Police Station Anti Corruption Establishment, Vehari under Section 409, PPC read with Section 5(2) Prevention of Corruption Act, 1947. The main thrust of argument by learned counsel for the petitioner is that the dispute subject matter of the FIR, is also under trial in a civil suit pending before learned Civil Judge, Vehari and the fate of the said suit will finally determine the sanctity of allegations levelled in the FIR. The learned counsel, therefore, argued that during the pendency of the said suit, FIR cannot continue, or that proceedings in the FIR may be stayed till final outcome of the suit.

2. It is admitted position that after registration of FIR the matter is still under investigation and it is the prerogative of the Investigating Officer to probe into the matter by considering all direct as well as surrounding aspects of the case. There may be some civil litigation pending between the parties, but commission of a cognizable

offence provides an independent mode and where any criminal offence is alleged to have been committed, criminal proceedings within the meaning of Section 154, Cr.P.C. can safely be launched and no legal bar can be imposed in this respect. Reliance is placed on the case "Muhammad Shafi versus Deputy Superintendent of Police (Malik Gul Nawaz) Narowal and 5 others" (PLD 1992 Lahore 178).

3. As regards the contention of learned counsel that result of the civil suit may have some impact on the criminal proceedings, I am afraid on this ground alone, neither the FIR can be quashed nor at the stage of investigation, its proceedings can be held in abeyance to wait for decision of the civil suit, as the pendency of civil suit or proceedings cannot take away the prerogative of the Investigating Officer to proceed with the investigation and conclude it on the basis of material, whatever is collected by him or is otherwise, brought before him, by either of the parties to arrive at just conclusion of the investigation.

4. Even otherwise, if the accused side considers that decision of the civil suit will decide the ultimate fate of the criminal proceedings launched against them, there can be two stages for them to agitate this question before the trial Court. Firstly, when report under Section 173 Cr.P.C. is submitted and cognizance is taken by the learned trial Court, at this moment the accused may bring their stance before the trial Court and if the trial Court after tentatively considering the material available before it, forms an opinion according to the plea of the accused, then it shall stop the proceedings to wait for the decision of the civil Court. Secondly, the trial Court may proceed with the trial, record the statements of prosecution witnesses and at the time of recording of statement of the accused under Section 342, Cr.P.C., if in reply to question whether he will produce any evidence in defence, the accused answers in the affirmative and desires to produce copy of any judgment and decree of a civil suit in his defence, the trial Court comes to a conclusion that said judgment and decree will ultimately affect the criminal proceedings, only then the trial Court shall stop the trial proceedings. It may be observed here that if before recording the statements of the prosecution witnesses, the trial in the state case is stayed just to wait for the decision of the civil Court, therefore, there would always remain apprehension that in the interregnum period, the prosecution evidence may be destroyed or diminish for any reason whatsoever and ultimately irrespective of the decision by the civil Court, the trial of the FIR case may loose its significance. Therefore, it would be more appropriate for the trial Court and also in the larger interest of justice to bring the entire prosecution case on its file and then consider the defence if any taken by the accused side in their statements under Section 342, Cr.P.C. on the above question.

5. Before such stage arises, it would be inappropriate to guillotine the investigation or to stop the trial, as it may otherwise, result in destruction of the prosecution evidence, as observed above. Even otherwise, the Hon'ble Supreme Court of Pakistan in the case "Col. Subah Sadiq versus M. Ashiq and others" (2006 SCMR 276) has held as under:--

(b) Art. 199--Criminal Procedure Code (V of 1998), Ss. 173, 265-K. 249-A, 551, 456-A, 190 & 484--Police Rules, 1934, R.24.7--Penal Code, Ss. 420, 468 & 471--Quashing of FIR.--Required circumstances-Constitutional jurisdiction of High Court--Scope--If, prima facie, an offence had been committed, ordinary course of trial before the Court should not be allowed to be deflected, by resorting to constitutional jurisdiction to quash the FIR by appreciation of documents produced by the parties without providing chance to cross examine or confronting the documents in question--High Court would err in law to short circuit the normal procedure of law as provided in Criminal Procedure Code, 1898. Party seeking the quashing of FIR had alternative remedy to raise objection at the time of framing the charge against them by the Trial Court or at the time of final disposal of the trial after recording the evidence. Said party had more than one alternative remedies before the Trial Court under Ss.265-K & 248-A, Cr.P.C. or to approach the concerned Magistrate for of the case under the provisions of Cr.P.C.--Alternative remedies available to the party enlisted--Principles.

(d) Tracheotomy of powers which is delicately balanced in the circumstances cannot be disturbed as if grants powers to each organ to decide the matters in its allotted sphere."

6. For what has been discussed above, I see no merit in this writ petition and the same is accordingly dismissed in limine.

(R.A.) Petition dismissed

PLJ 2013 Lahore 584
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
RIAZ HUSSAIN and another--Petitioners
versus
TEVTA through his Chairman, Lahore and 13 others—Respondents

W.P. No. 6233 of 2013, decided on 30.5.2013.

Constitution of Pakistan, 1973--
----Art. 199--Constitutional petition--Power of High Court to issue writs for enforcement of any of fundamental right--Validity--By allowing explicit prayer made in the instant petition, High Court in fact would be traveling beyond its constitutional mandate, as so far neither any appeal/revision/review application or representation of petitioner had been filed nor was pending before authority and every such move would definitely entail some period of limitation--If prayer was allowed the same would amount to taking away or assuming jurisdiction of such authority Court or tribunal--Petition was dismissed. [P. 576] A

Mr. Muhammad Shoaib Khan, Advocate for Petitioner.
Mr. Mubashir Latif Gill, Asstt. A.G.
Date of hearing: 30.5.2013.

Order
Notice for today. The learned Law Officer, present in Court accepts notice.

2. The instant writ petition carries the following prayer:--
"In view of the above, it is, therefore, respectfully prayed that this petition may please be accepted and by way of issuing an appropriate writ, order or direction, the respondents may kindly be directed to treat the instant writ petition as representation and decide the grievances of the petitioners in accordance with law, with all consequential benefits.
Any other writ, order or direction to which the petitioners are found entitled, in law, equity and justice, may kindly be granted, in vindication of their grievances."
3. Heard.
4. Our Constitution empowers this Court to issue writs for enforcement of any of the fundamental rights and basically there are five types of writs i.e.
1. Habeas Corpus

"Habeas Corpus" is a Latin term which literally means "you may have the body." The writ is issued to produce a person who has been detained, whether in prison or in private custody, before a Court and to release him if such detention is found illegal.
2. Mandamus

Mandamus is a Latin word, which means "We Command". Mandamus is an order from the Supreme Court or High Court to a lower Court or tribunal or public authority to perform a public or statutory duty. This writ of command is issued by the

Supreme Court or High Court when any Government, Court, corporation or any public authority has to do a public duty but fails to do so.

3. Certiorari

Literally, Certiorari means "to be certified". The writ of certiorari can be issued by the Supreme Court or any High Court for quashing the order already passed by an inferior Court, tribunal or quasi judicial authority.

4. Prohibition

The Writ of prohibition means to forbid or to stop and it is popularly known as `Stay Order'. This writ is issued when a lower Court or a body tries to transgress the limits or powers vested in it. The writ of prohibition is issued by any High Court or the Supreme Court to any inferior Court, or quasi judicial body prohibiting the latter from continuing the proceedings in a particular case, where it has no jurisdiction to try. After the issue of this writ, proceedings in the lower Court etc. come to a stop.

5. The Writ of Quo-Warranto

The word Quo-Warranto literally means "by what warrants?" or "what is your authority"? It is a writ issued with a view to restrain a person from holding a public-office to which he is not entitled. The writ requires the concerned person to explain to the Court by what authority he holds the office. If a person has usurped a public office, the Court may direct him not to carry out any activities in the office or may announce the office to be vacant. Thus High Court may issue a writ of quo warranto if a person holds an office beyond his retirement age.

WRITS IN BRIEF

Type of Writ	Meaning of the word	Purpose of issue
Habeas Corpus	you may have the body	To release a person who has been detained unlawfully whether in prison or in private custody.
Mandamus	We Command	To secure the performance of public duties by lower Court, tribunal or public authority.
Certiorari	To be certified	To quash the order already passed by an inferior Court, tribunal or quasi judicial authority.
Prohibition	--	To prohibit an inferior Court from continuing the proceedings in a particular case where it has no jurisdiction to try.
Quo Warranto	What is your authority?	To restrain a person from holding a public office which he is not entitled.

5. Keeping the above legal position in mind, this Court posed repeated questions to the learned counsel for the petitioner, to bring his prayer within any of the above detailed category of writs, but the learned counsel could not come out with any solid argument except took the stance that copy of this writ petition be sent to respondents with a direction that same may be treated as representation as then shall be decided. This Court is of the clear opinion that by allowing the explicit prayer made in the

instant writ petition, this Court in fact would be traveling beyond its constitutional mandate, as so far neither any appeal/revision/review/application or representation of the petitioner has been filed nor is pending before the respondent authority and every such move would definitely entail some period of limitation, apart from other intricacies. In such a situation, if the prayer of the petitioner is allowed, the same would also amount to taking away or assuming the jurisdiction of such authority/Court or the tribunal, Consequently, this instant writ petition is dismissed in limine.

(R.A.) Petition dismissed

PLJ 2013 Lahore 606
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
MUHAMMAD ASIF NAWAZ--Petitioner
versus
LEARNED ADDITIONAL SESSION JUDGE/JUSTICE OF PEACE, MULTAN and 2 others—Respondents

W.P. No. 10707 of 2012, decided on 16.5.2013.

Financial Institutions (Recovery of Finances) Ordinance, 2001--
----S. 7(4)--Pakistan Penal Code, (XLV of 1860), S. 489-F--Cheque was issued for return a loan obtained from Bank--No criminal case could be registered--Banks were debarred from taking advantage of S. 489-F, PPC in presence of special law--Jurisdiction of Banking Court--Any financial institution can avail remedy before any Court, but basic requirement is that such remedy must be available to institution under law by which financial institution had been established--When statute itself makes it clear that offence is not cognizable then registration of criminal case by local police could not be permitted by-law--PPC is general law, whereas Financial Institutions (Recovery of Finances) Ordinance, is a special law and legislators had enacted it in such a manner so as to had overriding effect of any general enactment--Although by amendment in PPC, S. 489-F, PPC had been inserted after promulgation of Ordinance, 2001 but such insertion would not give it an overriding effect over special law that special law is passed before or after general act does not change principle--Provisions of Ordinance, 2001, making offences bailable, non-cognizable and compoundable, were not brought under consideration--Petition was allowed. [Pp. 609, 610, 611 & 612] A, C, D & G
2013 CLD 738, 2013 CLD 508, PLD 2009 Lah. 541, rel.

Financial Institutions (Recovery of Finances) Ordinance, 2001--
----S. 20(4)--Pakistan Penal Code, (XLV of 1860), S. 489-F--Dishonest issuance of cheque towards repayment of finance or fulfillment of an obligation--No criminal case could be registered--Jurisdiction of Banking Court--Jurisdiction only lies with Banking Court established under Financial Institutions (Recovery of Finances) Ordinance and not before any other Court until and unless same is provided by law, by which financial institutions is established--Where special law is later, it will be regarded as an exception to, or qualification of, prior general act, and where general act is later, special statute will be construed as remaining an exception to its terms, unless repealed expressly or by necessary implication--When amendment was not made in Ordinance, 2001--Legislators explicitly made their intention clear that with regard to matters between financial institutions, such enactment shall hold the field and S. 489-F, PPC (dishonest issuance of cheque) will be applicable to other persons in general except those covered by Ordinance, 2001. [Pp. 610 & 611] B, E & F

Mr. Javed Iqbal Bhatti, Advocate for Petitioner.
Mr. Mubashir Latif Gill, Assistant Advocate General for Respondent.

Syed Wasim Haider, Advocate for Respondents No. 3.
Date of hearing: 16.5.2013.

Order

Briefly the facts of the case as unfolded in this writ petition are that Faysal Bank Limited through Relationship Manager (Ghazanfar Ali) filed an application under Section 22-A, Cr.P.C. before the learned Ex-officio Justice of Peace seeking registration of case against the present petitioner, with a narration that Muhammad Asif petitioner had obtained a loan from the Bank and for its return had issued a Cheque No. CA0022608054 dated 31.07.2011 valuing Rs.15,00,000/-, the said cheque when presented for encashment, was bounced. The learned Ex-officio Justice of Peace, vide order dated 15.06.2012 directed the SHO to record statement of said petitioner (respondent before Court) and proceed in accordance with law. This order has been assailed through the instant writ petition.

2. The contention of learned counsel for the petitioner is that in the light of Financial Institutions (Recovery of Finances) Ordinance, 2001, no criminal case could be registered. In support of his arguments the learned counsel placed reliance on the case "Abid Mahmood Malik versus Station House Officer, Police Station Margalla and others" (2013 CLD 508) and with reference to the case "Muhammad Iqbal versus Station House Officer, Police Station Hajipura, Sialkot and 2 others" (PLD 2009 Lahore 541), learned counsel contends that Banks are debarred from taking advantage of S. 489-F, PPC, in the presence of special law i.e. Financial Institutions (Recovery of Finances) Ordinance, 2001, but this fact has been over-sighted by the learned Justice of Peace before passing the impugned order dated 15.06.2012 rendered on the application of Respondent No. 3.

3. The learned Assistant Advocate General assisted by learned counsel for the respondents, defended the impugned order and argued that admittedly the Cheque was issued by the petitioner, the same when presented in Bank for encashment was dishonoured, as such, the commission of a cognizable offence was disclosed and the learned Ex-officio Justice of Peace after considering the factual aspect, issued a valid direction, as such, the impugned order does not suffer from any illegality or irregularity. The learned counsel for the respondent bank further argued that taking cognizance is something different as compared to the registration of case and the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 deal with cognizance of offence but not deal with registration of cases, therefore, the registration of case is not barred under this Ordinance. In support of his contention the learned counsel placed reliance on the case "Abdul Rauf Chaudhry and 2 others versus The State and 2 others" (2013 CLD 738).

4. I have considered the arguments of learned counsel for the parties and perused the available record with their assistance.

5. Earlier, Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 was promulgated and later, after certain modification, the same was re-

enacted as the Financial Institutions (Recovery of Finances) Ordinance, 2001. This Ordinance specially deals with matters arising between the Financial Institutions and its customers including Guarantors, etc. Section 9(1)(b) of the Ordinance, ibid, provides:--

"7. Powers of Banking Courts.--

(1) Subject to the provisions of this Ordinance, Banking Court shall.

(a) ----------

(b) in the exercise of its criminal jurisdiction, try offences punishable under this Ordinance and shall, for this purpose have the same powers as are vested in a Court of Sessions under the Code of Criminal Procedure, 1898 (Act V of 1898):

Provided that a Banking Court shall not take cognizance of any offence punishable under this Ordinance except upon a complaint in writing made by a person authorized in this behalf by the financial institution in respect of which the offence was committed."

.....

.....

.....

(4) Subject to sub-section (5), no Court other than a Banking Court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Court extends under this Ordinance, including a decision as to the existence or otherwise of a finance and the execution of a decree passed by a. Banking Court."

"(5) Nothing in sub-section (4) shall be deemed to affect--

(a) the right of a financial institution to seek any remedy before any Court or otherwise that may be avail able to it under the law by which the financial institution may have been established; or

(b) the powers of the financial institution, or jurisdiction of any Court such as is referred to in clause (a); or

Require the transfer to a Banking Court of any proceedings pending before any financial institution or such Court immediately before the coming into force of this Ordinance."

Section 7(4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 clearly postulates that no Court other than Banking Court shall have or exercise jurisdiction with respect to any matter to which the jurisdiction of Banking Court extends under this Ordinance. A bare reading of the above reproduced provision clearly show that any financial institution can avail remedy before any Court, but the basic requirement is that such remedy must be available to the said institution under the law by which the financial institution has been established.

6. Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is the provision relating to certain offences and its sub-section (4) deals with dishonest issuance of a cheque towards repayment of a finance or fulfillment of an obligation which is dishonoured on presentation. The punishment of said offence has been provided as one year or with fine or with both. Therefore, it becomes quite obvious that in the matter, like the one in hand, the jurisdiction only lies with the Banking Court established under the Financial Institutions (Recovery of Finances) Ordinance,

2001 and not before any other Court, until and unless the same is provided by law, by which the financial institution is established.

7. The contention of learned counsel for the respondent bank is that taking cognizance is something different as compared to the registration of case and the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 deal with cognizance of offence but not deal with registration of cases, therefore, the registration of case is not barred under this Ordinance. I am afraid this stance advanced by learned counsel for respondent Bank is not considerable at all. Section 20(6) of the Ordinance, ibid, read as under:--

"20. Provisions relating to certain offences.--

(1) ----------

(2) ----------

(3) ----------

(4) Whoever dishonestly issues a cheque towards re-payment of finance or fulfillment of an obligation which is dishonoured on presentation, shall be punishment with imprisonment which may extend to one year, or with fine or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque.

(5) ----------

(6) All offences under this Ordinance shall be bailable, non-cognizable and compoundable."

The above reproduced provision makes it abundantly clear that offences under this Ordinance shall be bailable, non-cognizable and compoundable and Section 154, Cr.P.C. comes in the field where the commission of a cognizable offence is disclosed. But as discussed above, when the Statute itself makes it clear that offence is not cognizable then the registration of criminal case by the local police could not be permitted by law. Even otherwise, the Pakistan Penal Code, 1860 is general law, whereas, the Financial Institutions (Recovery of Finances) Ordinance, 2001 is a special law and the legislators have enacted it in such a manner so as to have overriding effect of any other general enactment. A general law and a special law on the same subject are statutes in pari materia and should, accordingly, be read together and harmonized, if possible, with a view to giving effect to both. The rule is that where there are two acts, one of which is special and particular and the other general, which if standing alone, would include the same matter and thus conflict with the special act, the special law must prevail since it evinces the legislative intent more clearly than that of a general statute.

8. Although by amendment in PPC, Section 489-F, PPC has been inserted after promulgation of Financial Institutions (Recovery of Finances) Ordinance, 2001 but this insertion would also not give it an overriding effect over special law, for the reason that the special law is passed before or after the general act does not change the principle. Where the special law is later, it will be regarded as an exception to, or a qualification of, the prior general act; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless repealed

expressly or by necessary implication. Blackstone defines general law as a universal rule affecting the entire community and special law as one relating to particular persons or things of a class. And the rule commonly said is that a prior special law is not ordinarily repealed by a subsequent general law. The fact that one is special and the other general creates a presumption that the special is to be considered as remaining an exception of the general, one as a general law of the land, the other as the law of a particular case. If the legislators had an intention otherwise, they could at the very beginning formulate or afterwards could amend the Financial Institutions (Recovery of Finances) Ordinance, 2001 in such a manner so as to bring this offence within the definition of "cognizable" offence. In such circumstances, when the amendment was not made in the Ordinance, ibid, the legislators explicitly made their intention clear that with regard to the matters between financial institutions and their customers, this enactment shall hold the field and Section 489-F, PPC (dishonest issuance of cheque) will be applicable to all other persons in general except those covered by the Financial Institutions (Recovery of Finances) Ordinance, 2001. The purpose by not amending the Financial Institutions (Recovery of Finances) Ordinance, 2001 appears to be that normally in any case of loan from financial institution, the loans are protected by mortgage, warranties covenants made by or on behalf of the customer to a financial institution, including representations, warranties and covenants with regard to the ownership, mortgage, pledge, hypothecation or assignment of, or other charge on assets or properties, and the financial institution can recover the amount by adopting appropriate process under any of the above mode. The case law referred by learned counsel for the petitioner i.e. "Abid Mahmood Malik versus Station House Officer, Police Station Margalla and others" (2013 CLD 508) and "Muhammad Iqbal versus Station House Officer, Police Station Hajipura, Sialkot and 2 others" (PLD 2009 Lahore 541), by all force is applicable to the facts and circumstances of the instant case, whereas, the citation referred to by learned counsel for the respondent Bank i.e. "Abdul Rauf Chaudhry and 2 others versus The State and 2 others" (2013 CLD 738) is based entirely on different footings, therefore, have no applicability to the instant case and even otherwise, the provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001 making certain offences bailable, non-cognizable and compoundable, were not brought under consideration in the said case.

9. For what has been discussed above, this writ petition is allowed and the impugned order dated 15.06.2012 passed by learned Additional Judge/Ex-officio Justice of Peace, Multan, is hereby set-aside. This order, however, will not be considered a bar in the way of the respondent Bank to plead their case before the appropriate forum under the Financial Institutions (Recovery of Finances) Ordinance, 2001.

(R.A.) Petition allowed

PLJ 2013 Lahore 612
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
EHSAN ULLAH--Petitioner
versus
ILLAQA MAGISTRATE, P.S. WOHWA, DISTRICT D.G. KHAN and 5 others—Respondents

W.P. No. 6576 of 2013, decided on 6.6.2013.

Constitution of Pakistan, 1973--
----Art. 199--Constitutional petition--Recommendation for cancellation of FIR--Disagree with cancellation report and summoning of accused by Magistrate--Magistrate acts in his administrative capacity--Challenge to--Validity--It is settled proposition of law that while dealing with cancellation report submitted by police, Magistrate acts in his administrative capacity and order passed by him while agreeing or concurring with cancellation report, is an executive order--Magistrate if disagrees with cancellation report and directs police to file report u/S. 173, Cr.P.C. on a prescribed form, directs submission of calendar of witnesses or directs investigating agency for further investigation in matter, all such orders would be acts performed by magistrate in his administrative capacity and can be questioned only through writ jurisdiction of High Court--While dealing with cancellation report magistrate when disagreeing with cancellation report and by the order summons accused to face trial, then his first step of disagreeing with cancellation report administrative in nature would merge in his simultaneous order regarding summoning of accused passed u/S. 204, Cr.P.C. which is squarely judicial order. [P. 614] A

Mr. Abdul Rehman Khan Laskani, Advocate for Petitioner.
Malik Muhammad Jaffar, Deputy Prosecutor General on Court's call.
Date of hearing: 6.6.2013.

Order
Notice for today.

2. The learned Deputy Prosecutor General present in Court accepts notice on behalf of the state and with concurrence of learned counsel for the parties; this matter is being deciding as a PACCA case.

3. Briefly the facts of the case are that Respondent No. 3/Mst. Razia Mai got lodged an FIR No. 248/2012 dated 08.10.2012 under Sections 354/337-A(i)/337-F(iii)/148/149, PPC at Police Station Wohwa, Dera Ghazi Khan, against Ehsan Ullah/petitioner and others. After investigation, the police recommended for cancellation of the case, and when cancellation report was put up before the Ilaqa Magistrate, he vide order dated 04.04.2013 disagreed with the cancellation report and summoned the accused persons for facing the trial. This order

of the learned Ilaqa Magistrate disagreeing with cancellation report and summoning of the accused is under attack in this writ petition.

4. The contention of learned counsel for the petitioner is that earlier the accused party had got lodged an FIR No. 198/2012 at Police Station Wohwa against the complainant party, and just as a counterblast instant FIR was got lodged by Mst. Razia against the petitioner and others. Further contended that during investigation one of the witnesses swore affidavit to the effect that he was not present at the time of alleged occurrence. The learned counsel concluded his arguments by contending that during investigation no material could be collected by the Investigating Officer to connect the petitioner or other accused with the commission of the offence, as such, rightly a cancellation report was prepared, but the same has wrongly been disagreed with the learned Ilaqa Magistrate.

5. The learned Deputy Prosecutor General opposed this petition and argued that ipsi-dixit of police had no binding force on the Court and further as according to the learned Ilaqa Magistrate no solid and cogent proof in support of the conclusions drawn by the Investigating Officer, was produced before the Court, therefore, the order impugned in this petition, is fully justified.

6. I have heard the arguments of learned counsel for the parties and perused the file.

7. It is by now a settled proposition of law that while dealing with cancellation report, the learned Ilaqa Magistrate acts in his administrative capacity. When he concurs with the cancellation report submitted by the police, he would still be acting under his administrative status, as held by the Hon'ble Supreme Court of Pakistan in the case "BAHADUR and another versus THE STATE and another" (PLD 1985 SC 62), and such order can be challenged in writ petition. But, when the learned Ilaqa Magistrate disagrees with the cancellation report, he can take any of the following steps:--

(i) May direct the Station House Officer to submit report under Section 173 on prescribed form, along with copies of statements of witnesses recorded under Section 161 or 164, Cr.P.C. and inspection notes prepared by the Investigating Officer on his first visit to the place of occurrence, which is to be supplied to the accused under the Criminal Procedure Code;
(ii) The learned Ilaqa Magistrate may direct, the Station House Officer to submit calendar of witnesses; along with copies of statements of witnesses recorded under Section 161 or 164 Cr.P.C. and inspection notes prepared by the Investigating Officer on his first visit to the place of occurrence, which is to be supplied to the accused under the Criminal Procedure Code;
(iii) May direct the Investigating Agency under Section 156(2), Cr.P.C., to further investigate the matter; or
(iv) After taking cognizance and disagreeing with the cancellation report, he may also issue process for summoning of the accused.

It is settled proposition of law that while dealing with cancellation report submitted by the police, the Magistrate acts in his administrative capacity and the order passed by him while agreeing or concurring with the cancellation report, is an executive order. The Magistrate, if disagrees with the cancellation report and directs the police to file report under Section 173, Cr.P.C. on a prescribed form; directs submission of calendar of witnesses or directs the Investigating Agency for further investigation into the matter, all these orders would be the acts performed by the Magistrate in his administrative capacity and can be questioned only through writ jurisdiction of this Court. But, while dealing with cancellation report, the learned Ilaqa Magistrate when disagrees with the cancellation report and by the same order summons the accused person(s) to face trial, then his first step of disagreeing with the cancellation report (administrative in nature) would merge in his simultaneous order regarding summoning of the accused passed under Section 204, Cr.P.C. which is squarely a judicial order. Therefore, due to the merger of disagreeing order of the Magistrate into the ultimate and simultaneous order of summoning of the accused, the entire exercise by the Magistrate would become judicial action and undoubtedly such kind order can be assailed through criminal revision, not under the constitutional jurisdiction of this Court.

8. By forming the above observations, I am fortified by the judgment "Maznoor Ahmad versus Ahmad Yar, etc" (1996 MLD 1867) and "Haji Jamil Hussain versus Illaqa Magistrate Section 30, Multan, etc." (2012 P.Crl.L.J. 159). The instant writ petition, therefore being not maintainable, is hereby dismissed.

(R.A.) Petition dismissed

PLJ 2013 Lahore 686
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
NAZIR AHMAD--Petitioner
versus
STATE and others—Respondents

W.P. No. 3667 of 2011, decided on 5.6.2013.

Constitution of Pakistan, 1973--
----Art. 199--Criminal Procedure Code, 1898--S. 561-A--Constitutional petition--Cancellation report was disagreed by Magistrate--Challenge to--It is by now a settled proposition of law that while dealing with cancellation report, Magistrate acts in his administrative capacity--When he concurs with cancellation report submitted by police, he would still be acting under his administrative status. [P. 687] A
PLD 1985 SC 62 ref.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 204--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Cancellation report--Disagreeing order of Magistrate--Judicial order--While dealing with cancellation report, if Magistrate disagrees with cancellation report and in same order summons the accused person to face trial, then his first step of disagreeing with cancellation report administrative in nature would merge in his simultaneous order regarding summoning of accused passed u/S. 204, Cr.P.C. which is regularly a judicial order--Due to merger of disagreeing order of Magistrate into ultimate and order of summoning of the accused, entire exercise by Magistrate would become judicial action and undoubtedly such kind of order can be assailed through criminal revision--Petition was dismissed. [P. 687] B

1996 MLD 1867; 2012 PCr.LJ 159 fol.
Mr. Ahmad Raza, Advocate for Petitioner.
Malik Muhammad Jaffar, D.P.G. for State.
Mr. Khalid Mehmood Arain, Advocate for Respondents.
Date of hearing: 5.6.2013.

Order
This writ petition has been filed to challenge the order dated 13.01.2011, whereby the learned Illaqa Magistrate disagreed with cancellation report submitted by the police, summoned the accused and directed the SHO to submit calendar of witnesses.

2. Heard.

3. It is by now a settled proposition of law that while dealing with cancellation report, the learned Ilaqa Magistrate acts in his administrative capacity. When he concurs with the cancellation report submitted by the police, he would still by acting under his administrative status, as held by the Hon'ble Supreme Court of Pakistan in the case

`Bahadur and another vs. The State and another' (PLD 1985 SC 62). This Court in a detailed judgment dated 06.06.2013 passed in Writ Petition No. 6576/2013 `Ehsan Ullah vs. Ilaqa Magistrate, etc.', has held that while dealing with cancellation report, if the learned Illaqa Magistrate disagrees with the cancellation report and in the same order summons the accused person(s) to face trial, then his first step of disagreeing with the cancellation report (administrative in nature) would merge in his simultaneous order regarding summoning of the accused passed under Section 204, Cr.P.C. which is squarely a judicial order. In this respect I am forfeited by the judgment `Manzoor Ahmad vs. Ahmad Yar, etc.' (1996 MLD 1867) and `Haji Jamil Hussain vs. Illaqa Magistrate Section 30, Multan etc.' (2012 PCr.LJ 159). Consequently, due to the merger of disagreeing order of the Magistrate into the ultimate and simultaneous order of summoning of the accused, the entire exercise by the Magistrate would become judicial action and undoubtedly such kind of order can be assailed through criminal revision. The instant writ petition, therefore, being not maintainable, is hereby dismissed.

(R.A.) Petition dismissed

PLJ 2013 Cr.C. (Lahore) 879 (DB)
[Multan Bench Multan]
Present: Muhammad Qasim Khan and Syed Iftikhar Hussain Shah, JJ.
SARFRAZ--Appellant
versus
STATE—Respondent

Crl. Appeal No. 345 of 2004 & M.R. No. 723 of 2004, heard on 22.4.2013.

Delay in Post-mortem--

----Delay in post-mortem examination is generally suggestive of a real possibility that time was consumed by police in procuring and planting eye-witnesses and in cooking up a story for prosecution before preparing police papers necessary for getting a post mortem examination of dead body conducted. [P. 888] A
2008 SCMR 707 & 2011 SCMR 1190, ref.

Appraisal of evidence--

----Principles--There are some important principles for appraisal of evidence i.e. (i) FALSUS IN UNO FALSUS IN OMNI BUS, as held by the Hon'ble Supreme Court of Pakistan this principle is not applicable in Pakistan, (ii) Credibility of a witness cannot be treated as divisible, meaning thereby, the evidence disbelieved against some of the accused cannot be accepted against the others; and (iii) When the evidence of a prosecution witness is disbelieved to the extent of some of the accused, for relying the same qua others, is called "sifting grain from chaff, as held by the apex Court--But while applying this principle the prosecution evidence shall pass the hard test of scrutiny and there should be independent and distinct corroborative piece of evidence for recording conviction against an accused, on the basis of evidence which has been disbelieved qua others. [Pp. 888 & 889] B
2000 SCMR 1758, 2004 SCMR 1185 & NLR 1992 Criminal 79, rel.

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

----S. 302(b)--Conviction and sentence--Challenge to--Presence of the prosecution witnesses at the place of occurrence is highly doubtful, ocular account is not supported by the medical evidence, inordinate delay in conducting post mortem examination also creates do not qua the credibility of the FIR, the ocular account has been disbelieved qua three accused by the trial Court and appeals against their acquittal have been dismissed by High Court, bicycle and the tape recorder were not found at the place of occurrence when the Investigating Officer for the first time visited the site and when these articles were produced on the next date by the complainant himself the same were not stained with blood and report of Forensic Science Laboratory is also in the negative--All these factors are clear pointer that in this case the prosecution evidence has miserably failed to pass the hardest test of scrutiny--Prosecution has miserably failed to prove the charge against accused/appellant beyond any shadow of doubt--Appeal allowed. [P. 889] C
Malik Muhammad Salim, Advocate for Appellants.
Mr. Munir Ahmad Sayal, D.P.G. for State.

Ch. Zulfiqar Ahmad Sindhu, Advocate for Complainant.
Date of hearing: 22.4.2013.

Judgment

Muhammad Qasim Khan, J.--Bilal son of Abdul Rehman, Falak Sher son of Ejaz and Sarfraz son of Allah Wasaya faced trial before the learned Additional Sessions Judge, Muzafargarh, in case FIR No. 15 dated 21.01.2003 Under Sections 302/34, PPC registered at Police Station Saddar Muzafargarh and on conclusion of the trial vide judgment dated 31.05.2004, Bilal and Falak Sher co-accused were acquitted of the charge against them, whereas, Sarfraz accused was convicted under Section 302(b), PPC and sentenced to death, with further orders to pay Rs. 3,00,000/ as compensation under Section 544-A, Cr.P.C. to the legal heirs of the deceased, in case of default in payment thereof, to undergo simple imprisonment for six months. Criminal Appeal No. 345/2004 was filed by Sarfraz challenging his above conviction and sentence, Murder Reference No. 723/2004 was sent by the learned trial Court in terms of Section 374, Cr.P.C, whereas, Criminal Appeal No. 388/2004 was filed by Muhammad Akram to assail acquittal of Bilal and Falak Sher.

2. Before opening the case on merits, for ready reference we would like to point out here that in the same case, one Abid Hussain accused was tried separately, only for the reason that he had been declared a juvenile and vide a separate judgment of the same date i.e. 31.05.2004 handed down by learned Additional Sessions Judge, Muzafargarh, he (Abid Hussain) was also acquitted and to assail said acquittal a separate Criminal Appeal No. 417/2004 was filed.

3. Furthermore, it also looks quite appropriate to mention here that on 22.06.2009 all these matters were heard by this Court and a short order dated 22.06.2009 was issued, whereby conviction of Sarfraz accused/appellant was sustained, however, sentence was converted from death to life imprisonment, with benefit of Section 382-B, Cr.P.C, whereas, Criminal Appeals No. 388/2004 (against the acquittal of Falak Sher and Bilal) and Criminal Appeal No. 417/2004 (against the acquittal of Abid Hussain) were dismissed. However, the main judgment could not be delivered by the said Bench. The matter was agitated before the Hon'ble Supreme Court of Pakistan through Criminal Appeal No. 19-L/2013 and Criminal Appeal No. 20-L/2013 and the apex Court on 21.02.2003 passed the following order:

"With the consent of the learned counsel for the parties the impugned judgment dated 22.06.2009 passed by the Lahore High Court, Multan Bench, Multan is set aside, both appeals are allowed and the Registrar of the Lahore High Court, Lahore is directed to fix the Criminal Appeal No. 345 of 2004 and Murder Reference No. 723/2004 in the Court in the week commencing 04.03.2013 and it is expected that the learned High Court shall decide the matter within a period of fortnight thereof."
Hence, pursuant to the above order of the Hon'ble Supreme Court of Pakistan, Criminal Appeal No. 345/2004 and Murder Reference No. 723/2004 are being decided by this single judgment.

4. Briefly the facts of the case are that Muhammad Akram complainant got recorded his statement Ex.PB before the police on 21.01.2003 stating therein that on the fateful evening at 5.00 p.m. he proceeded from home to see the grass in his fields. On the way, Suhail and Hafeez met and joined him. Sooner they reached near the land of Allah Wasaya, they saw Fayyaz Ahmad (paternal cousin of the complainant) proceeding to his house on a bicycle with a tap recorder in his hands. In their sight, the accused persons namely Sarfraz armed with pistol, Bilal armed with revolver, Abid carrying iron rod (SARIYA) and Falak Sher empty handed, who had hidden themselves in sugarcane crop, came out. Falak Sher shouted lalkara that Fayyaz Ahmad shall not escape. Sarfraz made a straight pistol fire shot at Fayyaz which hit the left side of belly of Fayyaz Ahmad; second fire by Bilal also hit left side of Fayyaz Ahmad's belly. Fayyaz Ahmad fell on the ground smeared in blood. Meanwhile, Abid hit iron rod blow on Fayyaz Ahmad which landed on his right eye. On cries raised by the complainant and other two witnesses, persons attracted to the spot and on seeing them the accused along with weapons decamped towards west by hurling abuses. The complainant and witnesses when cared Fayyaz Ahmad he was unconscious. They took Fayyaz Ahmad on a private DALA to the DHQ Hospital, Muzafargarh, but Fayyaz Ahmad succumbed to the injuries on the way.

5. Motive was alleged that Sarfraz accused/appellant had suspicion about illicit liaison of Fayyaz Ahmad (deceased) with his sister Mst. Farzana, whereupon, the complainant party had satisfied them but the accused nourished grudge, and Sarfraz along with Bilal, Abid and Falak Sher in connivance with each other committed the murder.

6. After recording the statement of the complainant, Muhammad Azam Qamar Sub-Inspector (PW-7) sent the same to the police for registration of formal FIR and he himself proceeded to DHQ Hospital, Muzafargarh, prepared injury statement Ex.PJ and inquest report Ex.PK. The dead body was sent to mortuary for post mortem examination. He then reached the place of occurrence, obtained blood stained earth from the spot vide memo. Ex.PC, collected empty cartridges Ex.P.1/1-2, two live bullets P-2/1-2 of 30-bore pistol, both were secured vide memo. Ex.PD. Rough site-plan Ex.PM was prepared, statement of witnesses under Section 161, Cr.P.C. were recorded on 21.01.2003. Sajjad Constable on 22.01.2003 produced last worn blood stained clothes of the deceased (Shalwar P-5, Shirt P-6, Vest P-7) and one sealed phial, secured through recovery memo. Ex.PF and Ex.PG. On 22.01.2003, Muhammad Akram complainant produced before the Investigating Officer cycle P-3 of Fayyaz Hussain deceased and Tape Recorder P-4, secured vide memo. Ex.PB. The Investigating Officer got prepared scaled site plan in triplicate Ex.PA, Ex.PA/1 and Ex.PA/2 through Patwari. On 06.02.2003, accused Bilal, Sarfraz and Abid were arrested, whereas, Falak Sher was arrested on 15.02.2003. During custody Sarfraz led to the recovery of unlicensed Pistol .30-bore P-8 from an iron box lying in a residential room, secured vide memo. Ex.PL, site plan of place of recovery is Ex.PL/1. The recovery parcels were sent to Police Station for custody and onwards transmission to the concerned office. After completion of investigation he handed over the case file to the SHO and ultimately accused were sent to face trial.

7. On receipt of report under Section 173, Cr.P.C. the learned trial Court charge sheeted the accused, to which they pleaded innocence and claimed to be tried, whereupon, the prosecution examined nine witnesses, which include the statement of Muhammad Azam Qamar Sub-Inspector PW-7 who investigated the case and his statement has been given in detail in the preceding paragraph. The ocular account was furnished by Muhammad Akram complainant PW-3 and Muhammad Hafeez PW-4. Dr. Zafar Ali Khan, Medical Officer (PW-5) conducted autopsy over the dead body of Fayyaz Ahmad deceased and noted the following injuries:--

1. A lacerated wound 1.5 cm x 0.75 cm muscle deep just below the right eye.
2. An abrasion 3.5 cm x 1 cm on the right fore head.
3. An abrasion 3 cm x 2.5 cm just lateral to right eye.
4. Multiple abrasions measuring 1 cm each on the right cheek.
5. Multiple abrasion measuring .5 cm x .5 cm on the nose.
6. An oval shaped lacerated wound by fire arms measuring (1.5 cm x .75 cm) on the left back of upper chest going deep blackening around and in the wound. Margin inverted, (wound of entrance).

7. A semi circular lacerate wound by fire arms, measuring .75 cm x .75 cm in diameter blow the left lower chest (near the renal area) going deep into the abdominal cavity. Blackening in around the wound. Margin inverted (wound of entry).

8. An oval shaped lacerated wound by fire arms measuring 1.5 cm x .75 lying 1.5 cm below the injury No. 7, going deep into the abdominal cavity, margin inverted, a part of the mesentery was protruded out from the mouth of the wound (wound, of entry).

According to the doctor, all the injuries were ante mortem, probable time between injuries and death was 1 to 2 hours and between death to post mortem was 12 to 18 hours. The cause of death was injury to GIT corresponding to Injury No. 7 and 8 collectively leading to severe bleeding shock and death that was sufficient to cause dearth in ordinary course of nature.

8. The rest of the witnesses are all formal in nature and they made statements about various functions performed by them during the course of investigation. The learned SPP tendered in evidence the report of Chemical Examiner Ex.PN, report of Serologist Ex.PO and report of Forensic Science Laboratory Ex.PP and closed the case for the prosecution.

9. The accused when examined under Section 340(2), Cr.P.C. on a question as to why this case against them and why the PWs deposed against them, all the accused persons made the following similar reply:--

"It was a blind murder, I have falsely been involved in this case due to previous enmity and suspicion. PWs are inter se related and have deposed falsely just to strengthen the prosecution case."

However, neither the accused appeared in the witness box in terms of Section 340(2), Cr.P.C. nor opted to produce any defence.

10. On conclusion of the trial, above conviction and sentence was recorded against Sarfraz, whereas, rest of the accused were acquitted.

11. Learned counsel for appellant argued both the eye-witnesses namely Muhammad Akram complainant/PW-3 and Muhammad Hafeez PW-4 are closely related to the deceased and also related inter-se. They are chance witnesses and the explanations put-forth by them, were shattered through cross-examination. The learned counsel referred to certain portions from the statements of these PWs to establish glaring contradictions. He added that ocular account does not corroborate with the medical evidence and by referring to the statement of doctor PW-5 and the site plan, submits that Injuries No. 5 and 6 carried blackening around the wounds, as per site plan the distance between the deceased and the accused was about 4-karams (20-feet), whereas, blackening could occur if the fire is made from a distance of 3-4 feet. Further argued that Injury No. 6 is not attributed to any of the accused by the prosecution witnesses and these facts are sufficient to disbelieve their presence at the place of occurrence. It has been argued, that motive could not be proved, although specifically alleged by prosecution, as during cross-examination PW-3 Muhammad Akram admitted that he had satisfied Sarfraz accused regarding innocent of Fayyaz Hussain deceased and he stood satisfied, whereas, PW-4 Muhammad Hafeez did not utter a single word about the motive. The learned counsel submits that prosecution planted the alleged recovery of pistol against Sarfraz accused/ appellant, and even otherwise the same is inconsequential because according to the report of Forensic Science Laboratory the empties recovered from the place of occurrence were not found to have been fired from the pistol allegedly recovered from Sarfraz accused/appellant. Lastly, contends that as on the basis of same evidence three co-accused have been acquitted, therefore, same evidence could not be believed against the appellant without any strong corroborative piece of evidence, whereas, there is not an iota of corroborative evidence in support of ocular account is available against Sarfraz accused/appellant. The learned counsel supplicated that the prosecution has miserably failed to prove its case against Sarfraz accused/appellant as such, he be acquitted of the charge.

12. The learned Deputy Prosecutor General assisted by learned counsel for the complainant supported the judgment of the learned trial Court and argued that the learned trial Court rightly believed the prosecution evidence and that the contradictions pointed out by learned counsel for the accused/appellant are only minor and such contradictions are bound to occur when statements of the witnesses are recorded after quite some delay. The learned counsel for the complainant added that except the motive, there was no other enmity between the parties and the motive part was fully established through the statements of the witnesses. He argued that both the witnesses sufficiently explained their presence at the site, which fact is further substantiate by the circumstance that FIR was lodged with promptitude, eliminating the chances of false implication of the accused and the substitution is also a rear phenomena. The learned counsel for the complainant contended that when the prosecution witnesses made consistent statements, the medical evidence or the

evidence of recovery are only corroborative material and the weakness of such corroborative piece of evidence would not discard the consistent ocular testimony.

13. We have heard the arguments of learned counsel for the parties at full length and perused the entire record with their able assistance.

14. The entire prosecution case hinges upon:--
(i) Ocular account,
(ii) Motive,
(iii) Medical evidence,
(iv) Recovery, and
(v) Reports of Experts.

15. Although, Muhammad Akram PW-3 and Muhammad Hafeez PW-4 are closely related inter-se and also related to the deceased being his brothers-in-law (BHANOI), but their evidence could not be discarded merely on account of their relationship. According to the prosecution case itself, both these witnesses were present at the place of occurrence per chance and to explain his presence Muhammad Akram complainant PW-3 in the FIR submits that at about 5.00 p.m. he was going to see his grass field and in the way Suhail (given up PW) and Muhammad Hafeez PW-4 met and accompanied him. During cross-examination Muhammad Akram PW-3 admitted that he was going to see grass of Basreen which was ripe and it was spread over an area of 10-kanals, cultivated by Fayyaz Ahmad deceased (Page-40 of the Paper Book). Further admitted that "Two days before the occurrence I asked Fiyyaz Hussain regarding the up to date position of the said grass and he replied that the same had riped and. might be cut." It was admitted in cross-examination that in the documents the land was self cultivated and that Muhammad Hafeez as well as Suhail were standing after closing their KHOKHAS, but Hafeez PW-4 during cross-examination stated that "I closed my khokha on the asking of Muhammad Akram PW and asked me to accompany him to his field of Barseen." He also admitted that Muhammad Akram used to visit the said field of and on while passing nearby his KHOKHA and that earlier he was never asked to accompany the complainant. The above reproduced portions from the statement of Muhammad Akram complainant/PW-3 and Muhammad Hafeez PW-4; make it clear that the grass had not been cultivated by the complainant nor it was the land owned by him and furthermore, the deceased also used to tell him about the up date position of the standing crop. On this Specific point during cross-examination admitted that sugarcane field and the grass were visible from road side and that on the day prior to the occurrence at 3.15 p.m. he had seen his grass while passing through the said road. Therefore, the stance taken by the complainant in the FIR about the purpose of his visiting at the site has been negated by the complainant himself when he admitted that neither he was owner of the said land nor the grass had been cultivated by him, even otherwise, the complainant has categorically stated that right on the fateful day at about 3.15 p.m. he had seen his grass while passing through the road, therefore, in our view hardly there remained any justification for the complainant to revisit the site just about one and a half hour after his earlier visit. Even PW-4 Hafeez contradicts

Muhammad Akram PW-3 by deposing that he closed KHOKHA on the asking of PW-3, while PW-3 stated that Suhail and Hafeez were standing after closing their KHOKHAS. In view of the above situation, the explanations tendered by the witnesses for their presence at the place of occurrence as per chance does not appeal to a mind of common prudence.

16. Further, we observe that according to the prosecution case set out in the FIR, Falak Sher raised lalkara and Sarfraz accused/appellant made a pistol fire shot which hit the left side of belly of Fayyaz, second fire by Bilal also hit the left side of belly of Fayyaz deceased and Abid inflicted Iron Rod blow on the right eye of Fayyaz. The prosecution witnesses have given the distance between the deceased and the accused as 3/4 karams, same distance of the accused from the deceased has been shown in the site map Ex.PA. Dr. Zafar Ali Khan Medical Officer/PW-5 who conducted autopsy had noted eight injuries on the dead body. The Injury No. 1 is lacerated wound just below the right eye, Injury No. 2 is abrasion on right forehead. Similarly, Injuries No. 3, 4 and 5 are lacerations on the right eye, right cheek and nose. Injury No. 6 is fire arm lacerated wound on the left back of upper chest going deep blackening around and it had inverted margins (entry wound). Injury No. 7 fire arm lacerated wound below the left lower chest, with blackening (entry wound) and Injury No. 8 is yet another fire arm lacerated margin inverted (wound of entry). Therefore, it becomes quite clear that the injuries contained blackening around, which could only be found when the injuries are caused within a range of three to four feet, whereas, the prosecution witnesses and the site map point out a much more distance between the accused and the deceased. Furthermore, according to the locale and seat of the injuries given by the doctor, the dead body carried three fire arm entry wounds, whereas, according to the prosecution witnesses two fires (one by Sarfraz and second by Bilal) had been fired at the deceased, whereas, Injuries No. 3, 4 and 5 totally remain unexplained. Although it is not expected from common men to give a photographic view and exact seat and locale of the injuries, but when the prosecution witnesses themselves specified injuries to the accused and stated that two fire arm injuries were received on the abdomen of the deceased but they are silent about the third fire shot injury. Once, such an attempt has been made, then any weakness left in their statements is bound to damage the prosecution case. Hence, the ocular account does not find support from the post mortem report and create doubt about the presence of the prosecution witnesses at the place of occurrence.

17. In this case, the occurrence took place on 21.01.2003 at 5.00 p.m., Muhammad Akram complainant PW-3 and Muhammad Hafeez PW-4 took Fayyaz Ahmad on a private DALA to the DHQ Hospital, Muzafargarh, but Fayyaz Ahmad succumbed to the injuries on the way. PW-3 and PW-4 left Suhail (given up PW) at guard of the dead body, went towards Police Station, at 8.00 p.m. near the CIA staff, THANEDAR met the complainant who recorded his statement and Rupt No. 29 dated 21.01.2003 at 8.15 p.m. was written and FIR was registered. The Investigating Officer/PW-7 went to DHQ Hospital, Muzafargarh, where the dead body was lying and as per statement of PW-7, he prepared injury statement Ex.PJ, inquest report Ex.PK of the dead body, handed over the documents and dead body to Sajjad

Constable PW 9 for taking the same to mortuary for post mortem examination and then visited the place of occurrence, where necessary proceedings were carried out. The post mortem of the deceased was conducted on 22.01.2003, although the doctor admitted that the dead body was brought in the DHQ Hospital on 21.01.2003. There is no explanation whatsoever on the record that why the post mortem was conducted on 22.01.2003 and that too at 11.15 a.m. after a considerable delay. The post mortem report Ex.PH and the diagram Ex.PH/1, injury statement Ex.PJ and the inquest report Ex. PK on each and every page carry the signatures and stamp of the doctor who conducted the post mortem and each page contains the date 22.01.2003. This inordinate and unexplained delay in the conduct of post-mortem examination create doubt that FIR was registered with a considerable delay and the time mentioned for registration of FIR is not true, for the same reason the prosecution did not produce Rupt No. 29, registered in this regard. Both the eye-witnesses claim their presence as per chance at the place of occurrence and the reason advanced by them does not appeal to a prudent mind as discussed, above. All these facts create serious doubt with regard to the presence of the eye-witnesses at the place of occurrence at the relevant time. It appears that the prosecution witnesses reached at the place of occurrence when the incident was over and they got recorded the FIR with deliberations, that is why the post mortem examination was conducted with a delay of about eighteen hours from the time of occurrence and after more than fifteen hours after the dead body had reached at DHQ Hospital, Muzafargarh. Reliance can be placed on the case "Ali Sher and others versus The State" (2008 SCMR 707) and "Irshad Ahmed versus The State" (2011 SCMR 1190), wherein, it has been held that "Delay in post-mortem examination is generally suggestive of a real possibility that time was consumed by police in procuring and planting eye-witnesses and in cooking up a story for prosecution before preparing police papers necessary for getting a post mortem examination of dead body conducted."

18. As regards motive, the case of the prosecution is that Sarfraz accused/appellant suspected illicit liaison of Fayyaz deceased with his sister Farzana but, the complainant had himself explained during cross-examination that he had satisfied Sarfraz accused about innocence of Fayyaz and that he stood satisfied, where after, he did not receive any complaint. Whereas, on the point of motive, not a single word has been spoken by Muhammad Hafeez PW-4. Therefore, apart from the statement of Muhammad Akram PW-3 there is no other piece of evidence on this aspect of the matter and even the Investigating Officer stated that during investigation the complainant did not produce any witness in support of evidence of motive. Hence, the prosecution miserably failed to prove the motive as advanced in the FIR.

19. Coming to the evidence of recovery, according to Muhammad Akram complainant PW-3 Fayyaz Ahmad deceased at the fateful time was coming on a bicycle and had a tape-recorder in his hand and he received in that position and fell down. But, astonishingly, when after received information about the occurrence the Investigating Officer reached the place of occurrence, neither any Bicycle nor the tape-recorder was found there, rather both these articles were handed over to the Investigating Officer on the next day i.e. 22.01.2003. Furthermore, neither of these

articles had any blood stains. We are afraid, if Fayyaz Ahmad was riding a bicycle and also carried a tape-recorder, in that position he received fire shots and fell on the ground, blood was oozing, then at least the bicycle must have been stained with blood. Hence, the absence of bicycle and the tape recorded at the site at the time when the Investigating Officer first time visited the place of occurrence and no blood stains having been found thereon, create serious doubt about the prosecution story in this regard. Further, even the report of the Forensic Science Laboratory Ex.PP is in the negative, as it clearly states that crime empties C1 and C2 recovered from the place of occurrence had not been fired from the pistol of .30-bore, allegedly recovered on the pointation of Sarfraz accused/appellant. As such, recovery evidence becomes inconsequential in the instant case.

19-A. There are some important principles for appraisal of evidence i.e. (i) FALSUS IN UNO FALSUS IN OMNI BUS, as held by the Hon'ble Supreme Court of Pakistan in the case "Sarfraz alias Sappi and 2 others versus The State" (2000 SCMR 1758), this principle is not applicable in Pakistan, (ii) Credibility of a witness cannot be treated as divisible, meaning thereby, the evidence disbelieved against some of the accused cannot be accepted against the others; and (iii) When the evidence of a prosecution witness is disbelieved to the extent of some of the accused, for relying the same qua others, is called "sifting grain from chaff, as held by the apex Court in the case "Iftikhar Hussain and others versus The State" (2004 SCMR 1185). But while applying this principle the prosecution evidence shall pass the hard test of scrutiny and there should be independent and distinct corroborative piece of evidence for recording conviction against an accused, on the basis of evidence which has been disbelieved qua others. Reliance is placed on the case "Feroze Khan versus Fateh Khan, etc." (NLR 1992 Criminal 79). In this case, three of the co-accused persons have already been acquitted and appeals against their acquittal have been dismissed.

20. As discussed above, the presence of the prosecution witnesses at the place of occurrence is highly doubtful, ocular account is not supported by the medical evidence, inordinate delay in conducting post mortem examination also creates doubt qua the credibility of the FIR, the ocular account has been disbelieved qua three accused by the learned trial Court and appeals against their acquittal have been dismissed by this Court, bicycle and the tape recorder were not found at the place of occurrence when the Investigating Officer for the first time visited the site and when these articles were produced on the next date by the complainant himself the same were not stained with blood and report of Forensic Science Laboratory is also in the negative. All these factors are clear pointer that in this case the prosecution evidence has miserably failed to pass the hardest test of scrutiny. Therefore, we have no doubt in our mind to hold that prosecution has miserably failed to prove the charge against Sarfraz accused/appellant beyond any shadow of doubt. Consequently, we allow Criminal Appeal No. 345/2004, set-aside the conviction and sentence of Sarfraz accused/appellant and order his immediate release from jail if not required in any other case.

Murder Reference is answered in Negative Sentence of Death is not confirmed.

(A.S.) Appeal allowed

2013 Cr.C. (Lahore) 947
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
RIAZ-UL-HAQ--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 3357-B of 2012, decided on 6.9.2012.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 337-F(vi), 148 & 149--Bail, grant of--No substantial progress--Offence not hit by prohibitory clause--Although accused was nominated in FIR and specific allegation of causing injuries to victim was attributed but fact remains that offence committed by the accused at the most would be covered by Section 337-F(vi), PPC which offence provides maximum punishment of seven years, as such is not hit by prohibitory clause--No useful purpose would be served in keeping the accused incarcerated for indefinite period and that two without trial--Bail was allowed. [P. 948] A & B

Ch. Khalid Mehmood, Advocate for Petitioner.

Malik Muhammad Jaffar, Deputy Prosecutor General for State.

Mr. Maqsood Riaz, Advocate for Complainant.

Date of hearing: 6.9.2012.

Order

Petitioner seeks post-arrest bail in a case arising out of FIR No. 227/2012 dated 12.05.2012 under Section 337-F(vi), 148/149, PPC registered at Police Station Saddar Mian Channu, Khanewal, wherein, precise allegation against the petitioner is of having inflicted sota blow on the left arm , wrist and ankle of the complainant.

2. I have heard and considered the respective contentions of learned counsel for the parties and perused the available record with their assistance.

3. Although the petitioner is nominated in the FIR and a specific allegation of causing injuries to the complainant/victim is attributed against him, but the fact remains that the offence committed by the petitioner at the most would be covered by Section 337-F(vi), PPC, which offence provides maximum punishment of seven years, as such, is not hit by prohibitory clause. Both the parties i.e. the petitioner and the complainant are closely related and civil litigation amongst them is already pending. Co-accused of the petitioner who were also nominated in the FIR have earlier been enlarged on bail. Allegedly recovery has already been effected from the petitioner, he is behind the bars since 25.6.2012 and challan has been sent to the Court but there is no substantial progress therein. In these circumstances, no useful purpose would be served in keeping the petitioner incarcerated for an indefinite period and that too without trial. Consequently, this bail application is allowed and petitioner is admitted to bail on furnishing bail bond in the sum of Rs. 100,000/- with on surety in the like amount to the satisfaction of learned trial Court.

(R.A.) Bail allowed

2013 Y L R 734
[Lahore]
Before Muhammad Qasim Khan, J
ZAHOOR KHAN and another---Petitioners
Versus
The STATE and another---Respondents

Criminal Miscellaneous No1774-B of 2011, decided on 23rd August, 2011.

Criminal Procedure Code (V of 1898)---
----S. 497(2)---Penal Code (XLV of 1860), Ss. 302/148/149---Qatl-e-amd, rioting armed with deadly weapons---Bail, grant of---Further inquiry---Accused and co-accused had been nominated in the F.I.R., but no overt act had been attributed to them and they were shown to be merely present at the place of occurrence---Complainant's version had not been found to be wholly truthful during the course of investigation and report under S.173, Cr.P.C. had been submitted against a different set of accused---Applicability of Ss. 148 and 149 of P.P.C. to the extent of the accused and co-accused required further inquiry---Report under S. 173, Cr.P.C. had been sent to court, but there was no substantial progress in the trial---Accused and co-accused were admitted to bail accordingly.

Abdul Aziz Khan Niazi for Petitioners.
Rana Ibrar Hussain for the Complainant.
Ch. Muhammad Akbar, Deputy Prosecutor General with Mukhtiar Ahmad A.S.-I.

ORDER
MUHAMMAD QASIM KHAN, J.---Petitioners seek post-arrest bail in case F.I.R. No.46 of 2011 dated 5-2-2011 under sections 302, 148, 149 P.P.C. registered at Police Station Yousafwala, District Sahiwal, wherein, the precise allegation against the petitioners is that at the time of mounting of assault of their co-accused, the petitioners remained present at the place of occurrence.

2. It is argued by learned counsel that petitioners have been falsely involved in this case as a result of widened net. Further argued that although the petitioners have been nominated in the F.I.R. but no overt act is attributed to them, as no injury was caused by the petitioners to anyone. It is further argued that the version of the complainant has been found incorrect during the course of investigation and report under section 173, Cr.P.C. has been submitted against a different set of accused. The learned counsel has next contended that petitioners are behind the bars and after investigation report under section 173, Cr.P.C. has been submitted, but there is no substantial progress in the trial.

3. The learned Deputy Prosecutor-General assisted by learned counsel for the complainant has opposed the bail on the ground that petitioners are nominated in the F.I.R., as such, no case for bail is made out at this stage.
4. Arguments heard. Record perused.

5. A bare perusal of the F.I.R. would show that although both the petitioners have been nominated in the F.I.R., but no overt act has been attributed to them and they have been shown to be merely present at the place of occurrence. It has also come on the record that version of the complainant has not been found wholly truth during the course of investigation and report under section 173, Cr.P.C. has been submitted against a different set of accused. In these circumstances, applicability of offence under section 148/149, P.P.C. to the extent of the petitioners requires further inquiry. Additionally, the petitioners are behind the bars, report under section 173, Cr.P.C. has been sent to court, but there is no substantial progress in the trial. The petitioners cannot be kept confined for an indefinite period as a measure of advance punishment. Consequently, this petition is accepted and petitioners are admitted to bail on furnishing bail bonds in the sum of Rs.100,000 each with one surety each in the like amount to the satisfaction of learned trial Court/Duty Judge.

MWA/Z-5/L Bail granted.

2013 Y L R 836
[Lahore]
Before Muhammad Qasim Khan, J
SHABBIR AHMED---Petitioner
Versus
FARZANA FARID and 2 others---Respondents

Writ Petition No.524 of 2006/BWP, decided on 24th March, 2010.

(a) Civil Procedure Code (V of 1908)---
----O.VIII, Rr. 1, 9 & 10---Constitution of Pakistan, Art. 199---Constitutional petition---Filing of written statement, requirement of---Word "require" in O.VIII, R. 1, C.P.C.---Significance---Failure to present written statement and punitive action therefor---Respondent had filed suit for specific performance of the contract against petitioner and during pendency of suit, petitioner's right of filing written statement was closed by the Trial Court vide an order against which an application for setting aside said order was filed but was dismissed---Revision petition before Revision Court below, was also dismissed---Petitioner contended that Trial Court was not justified in striking out the defence of the petitioner and similarly revision petition was also illegally dismissed and Revision Court below had not exercised the jurisdiction vested in it---Validity---Word "required" in O. VIII, R.1, of Civil Procedure Code, 1908, was of most significance and it was essential that whenever a written statement was to be made subject to penal provision of O.VIII, R.10, Civil Procedure Code, 1908, there should be proof on record that the court had 'required' it by application of mind to the need and that too in a speaking order, as without same many innocent parties would be trapped in a technicality without fully realizing the implications---Where adjournments were granted for production of written statement which could be filed as of right under O.VIII, R.1, C.P.C. or which was permitted to be filed under O. VIII, R.9, C.P.C. that could not satisfy the law regarding the 'requirement' of the court---Only that written statement which was required by court by a speaking order, would entail the penal consequences of O. VIII, R.10, C.P.C. and in the present case it was admitted position that these requirements had not been fulfilled---Non-filing of required written statement left the Trial Court with two alternatives, namely the pronouncing of judgment forthwith or making of such other orders as the court thought fit, although, applying penal provisions of O. VIII, R.10, C.P.C. and pronouncing judgment without recording the evidence was discretionary with the court---Punitive action under O. VIII, R.10, C.P.C. was only to be taken in extreme circumstances based on the facts before the court---Other alternative available to the court was to award costs and grant an adjournment or proceed to record ex parte and then pronounce the judgment---Case record did not show that last opportunity was given to the defendant to file written statement and written reply---Trial Court and Revision Court below had not exercised the jurisdiction vested in them and resultantly constitutional petition was allowed and both the impugned orders passed by courts below were declared void, illegal, ab initio, having no legal effect on the rights of the petitioner---Trial Court was directed to award last and final

opportunity of fifteen days to petitioner to file his written statement, subject to payment of costs---Constitutional petition was allowed accordingly.
PLD 2006 Lah. 18; PLD 2002 SC 630 and PLD 2002 SC 491 ref.

(b) Civil Procedure Code (V of 1908)---
----O. VIII, Rr. 1 & 10---Failure to present written statement---Punitive consequences---Scope---When required written statement had not been filed, two alternatives were available before the Trial Court, namely the pronouncing of judgment forthwith or making of such other orders, though it was discretionary with the court to apply penal provisions of O. VIII, R.10, of Civil Procedure Code, 1908, and pronounce the judgment even without recording the evidence but such judgment should be on the basis of facts before it---Court in the alternative could award costs and grant adjournment or proceed to record evidence ex parte and then pronounce the judgment---Punitive action for non-filing of written statement should only be taken in very extreme circumstances.

Malik Imtiaz Mahmood for Petitioner.
Tariq Mahmood Khan for Respondent No.1.

ORDER
MUHAMMAD QASIM KHAN, J.---This writ petition is an old matter lingering on since, 2006. With the concurrence of both the parties this will be decided as "PAKKA" case.

Briefly stated facts of the suit are that Mst. Farzana respondent No.1/plaintiff had filed a suit performance of the contract against the petitioner/defendant Shabbir Ahmad and during the pendency of suit the right of filing written statement of petitioner/defendant was closed by the trial Court vide order dated 3-10-2005, against which an application for setting aside proceedings dated 3-10-2005 was filed but was dismissed. Aggrieved thereby, the petitioner/defendant filed a revision petition, which has also been dismissed by the learned Additional District Judge, Khanpur, vide order dated 3-2-2006; hence, this writ petition.

2. Learned counsel for the petitioner argued that the learned trial Court was not justified in striking out the defence of the petitioner and similarly his revision was also illegally dismissed and the Appellate Court has not exercised the jurisdiction vested in it. Relied upon the judgments reported in PLD 2006 (Lahore) 18, PLD 2002 SC 630 and PLD 2002 SC 491.

3. On the other hand, learned counsel for the respondent/plaintiff contends that both the courts below have passed the orders in accordance with law. No illegality irregularity has been committed. The petitioner was granted opportunities to file written statement but he did not bother to file the same, hence, the trial Court had no alternate except to strike of the defence of petitioner and it cannot be interfered with in writ jurisdiction.
4. Heard. Record perused.

5. The use of word "required" in Order VIII, Rule 1, C.P.C. is of most significance. It does not permit a routine order without application of mind to the "requirement" and all the need. Therefore, it is essential that whenever a written statement is to be made subject to penal Order VIII Rule 10, there should be proof on record that the court had "required" it by application of mind to the need and that too in a speaking order. Without the same many innocent parties would be trapped in a technicality without fully realizing the implication. Where adjournments are granted for production of a written statement which can be filed as of right under Rule 1 or which is permitted to be filed under Rule 9 that could not satisfy the law regarding the "requirement" of the court. It is the only written statement which is required and that too by the court by a speaking order, which would entail the penal consequences of Order VIII Rule 10. In the cases before the Court it is admitted position that these "requirements" had not been fulfilled. When "required" written statement had not been filed, two alternatives were before the trial Court namely the pronouncing of judgment forthwith or making of such other orders though it was discretionary with the court to apply penal provisions Rule 10 of Order VIII and pronounce the judgment even without recording the evidence but such judgment should be on the basis of facts before it. Punitive action should only be taken in severe circumstances. Court in the alternative award costs and grant an adjournment or proceed to record evidence ex parte and then pronounce the judgment. Rationale behind all discussion is that the defendant should not be deprived of putting forward his summary of defence. In this case, as earlier discussed, punitive action for non-filing of written statement should only be taken in very extreme circumstances. Case in hand does not show that last opportunity was given to the defendant to file written statement and written reply; hence, this court has the supervisory jurisdiction under the Constitu-tion of Islamic Republic of Pakistan, 1973. Moreover, as the trial Court and the Revisional Court did not exercise the jurisdiction vested on them, is allow the writ petition and both the orders impugned passed by the courts below are declared void, illegal, ab initio having no legal effect on the rights of the petitioner. Trial Court is directed to award one opportunity of 15 days subject to payment of costs of Rs.6,000 to the petitioner to file his written statement and this will be last and final opportunity for filing of written statement.

6. The notice issued to the Civil Judge vide order dated 13-3-2006, considering his explanation, is withdrawn. However, he shall remain more careful in future.

MWA/S-11/L Petition allowed.

2013 P.Cr.R. 1362
[Multan]
Present: **MUHAMMAD QASIM KHAN, J.**
Dildar Hussain
Versus
The State, etc.

Criminal Appeal No. 279 of 2008, decided on 29th August, 2011.

SUSPENSION OF SENTENCE (MURDER) --- (Statutory ground)
Criminal Procedure Code (V of 1898)---
---S. 426---Pakistan Penal Code, 1860, S. 302---Murder appeal---Seeking suspension of impugned sentence of life imprisonment---Statutory ground---Held: Appeals of life-convict has to be decided within a period of two years---Despite expiry of almost three years, appeal of petitioner could not be decided---Impugned sentence suspended. (Para 4)

[Despite lapse of almost 3 years, appeal had not been decided. Impugned sentence of life was suspended].
For the Petitioner: Prince Rehan Iftikhar Sheikh, Advocate.
For the Complainant: Rana **Muhammad** Asif Saeed, Advocate.
For the State: Abdul Wadood, Deputy Prosecutor General.
Date of hearing: 29th August, 2011.

ORDER
MUHAMMAD QASIM KHAN, J. --- Through this application Dildar Hussain petitioner seeks suspension of sentence (imprisonment for life and compensation of Rs. 50,000/-, in default to further suffer six months) awarded by the learned Trial Court *vide* judgment dated 28.8.2008 in case F.I.R. No. 476, dated 18.10.2004 under Section 302, P.P.C. registered at Police Station Jahanian, District **Khan**ewal.

2. It is argued by learned counsel that petitioner is behind the bars since 22.10.2004, impugned judgment of conviction and sentence was passed on 28.8.2008 and the appeal was preferred on 09.09.2008, which was required to be decided within a period of two years, in the light of amendment brought in Section 426, Cr.P.C., but the appeal of the petitioner is still pending. It is further argued that the learned Trial Court in para-18 of the judgment has held that it was not a preplanned occurrence, rather it erupted in spur of moment and the petitioner also acted to save family honour.

3 The learned D.P.G. assisted by learned counsel for the complainant has although opposed the application but they could not rebut the factual position with regard to the contention of learned counsel for the petitioner relating to statutory ground. The learned counsel for the complainant added that petitioner acted in a brutal manner and inflicted three blows, as such, it cannot be termed as a sudden

occurrence and the conduct of the petitioner disentitles him for any concession at this stage.

3. Arguments heard. Record perused.

4. I would not like to comment on the merits of the case, as any observation at this stage may cause prejudice to the case of either side during hearing of the appeal. Suffice it to observe that petitioner is under arrest since 22.10.2004 and the judgment of conviction was recorded by the learned Trial Court on 28.8.2008, whereagainst the present appeal was preferred by the petitioner on 09.09.2008. The sentence awarded to the petitioners is imprisonment for life and in view of the amendment brought in Section 426, Cr.P.C. the appeals of life convicts have to be decided within a period of two years, but despite expiry of almost three years, the appeal of the petitioner could not be decided. From the perusal of the record, nothing has been found to suggest that delay in the decision of the appeal has occurred due to any act of the petitioner. Considering the backlog, hearing of the appeal of the petitioner is still not in the offing. Hence, the instant petition is allowed and sentence of the petitioners is suspended on his furnishing bail bonds in the sum of Rs. 200,000/- with two sureties each in the like amount to the satisfaction of DR(J) of this Court.

Sentence suspended.

2013 P.Cr.R. 1356 [Multan]
Present: **MUHAMMAD QASIM KHAN, J.**
Shaukat Hussain
Versus
The State

Criminal Appeal No. 560 of 2009, decided on 23rd August, 2011.

SUSPENSION OF SENTENCE --- (Statutory delay)
Criminal Procedure Code (V of 1898)---
---S. 426---Pakistan Penal Code, 1860, S. 376---Impugned conviction/sentence of 10 years' R.I.---Appeal of petitioner must have been decided within a period of one year---Suspension of sentence---Statutory delay---Held: There was nothing on record to suggest that delay in decision of appeal resulted because of conduct of petitioner---Impugned sentence was suspended by High Court.
(Para 5)

[Delay in disposal of appeal. Impugned sentence was suspended].
For the Petitioner: Prince Rehan Iftikhar, Advocate.
For the State: Malik **Muhammad** Jafar, Deputy Prosecutor General.
Date of hearing: 23rd August, 2011.

ORDER
MUHAMMAD QASIM KHAN, J. --- Petitioner Shoukat Hussain seeks suspension of sentence (imprisonment for ten years and fine of Rs. 50,000/-, in default to further suffer imprisonment for two years), awarded by the learned Trial Court *vide* judgment dated 2.6.2009 in case F.I.R. No. 233/2007, dated 26.09.2007 under Section 376, P.P.C. registered at Police Station Galaywal, District Lodhran.

2. It is argued by the learned counsel that petitioner is behind the bars for quite sufficient time, conviction was recorded against him *vide* judgment dated 2.6.2009 and the main appeal was filed on 26.6.2009. The learned counsel contends that in view of the amendment brought in Section 426, Cr.P.C. the appeal of the petitioner must have been decided within a period of one year, but as the appeal of the present petitioner still remains pending, he has become entitled for the grant of bail on statutory ground.

3. The learned Deputy Prosecutor General has although opposed this application, but has not been able to rebut the contention of learned counsel for the petitioner with regard to the suspension of sentence on statutory ground.

4. Arguments heard. Record perused.

5. I would not make any comment on the merits of the case, as it may cause prejudice to either of the side at the time of final hearing of the main appeal. Suffice it to observe that impugned judgment of conviction and sentence was passed by the

learned Trial Court on 02.06.2009 and the instant appeal was preferred on 26.6.2009. Since the sentence of the petitioner is ten years, according to the amendment brought in Section 426, Cr.P.C. his appeal was required to be decided within one year of its filing, but the same still remains pending. There is nothing on the record to suggest that delay in the decision of the appeal resulted because of the conduct of petitioner. In these circumstances, I allow this petition and by suspending his sentence, order the release of the petitioner from jail subject to his furnishing bail bond in the sum of Rs. 2,00,000/- with one surety in the like amount to the satisfaction of DR(J) of this Bench. The petitioner shall appear before this Court on each and every date of hearing till final decision of the appeal.

Sentence suspended.

2013 P.Cr.R. 384

[Multan]

Present: **MUHAMMAD QASIM KHAN, J.**

Kamran *alias* Kami

Versus

The State and another

Criminal Miscellaneous No. 1750-B of 2011, decided on 8th August, 2011.

CONCLUSION

(1) Street crime and matter of bail.

BAIL (SNATCHING OF PURSE) --- (Street crime)

Criminal Procedure Code (V of 1898)---

---S. 497---Pakistan Penal Code, 1860, Ss. 342/411---Petitioner/Motorcycle rider allegedly snatched purse from complainant lady---Street crime---Bail plea---Held: Petitioner was nominated in F.I.R. with a specific role---There was no element of *mala fide* or ulterior motives on part of complainant or police for false involvement of petitioner in instant case---Certain recoveries had been effected on pointation of petitioner---Alleged offence fell within prohibitory clause---Bail after arrest refused.

(Para 5)

[Motorcycle rider allegedly snatched purse from lady in the street. Bail was refused].

For the Petitioner: Tariq **Muhammad** Iqbal Chaudhary, Advocate.

Muhammad Amjad Rafiq, Deputy Prosecutor General with Fayyaz, Sub-Inspector.

Date of hearing: 8th August, 2011.

ORDER

MUHAMMAD QASIM KHAN, J. --- Petitioner seeks post-arrest bail in a case arising out of F.I.R. No. 642/2010, dated 20.11.2010 under Sections 392/411, P.P.C. registered at Ghalla Mandi, Sahiwal.

2. Precisely the allegation against the petitioner is that when the complainant *Mst.* Razia Bibi alongwith *Mst.* Nasim Bibi proceeded for Lahore, two persons riding on Motorcycle No. SLL-10-9805 came from their behind and snatched purse from the complainant. In the electric light, the accused were identified to be **Muhammad** Rafiq and Kamran *alias* Kami (present petitioner).

3. It is contended by learned counsel that petitioner has been falsely involved in the case and there is delay in the lodgment of the F.I.R. It is further argued by the learned counsel for the petitioner that petitioner is behind the bars for the last about eight months, there is no criminal history against him and despite submission of challan there is no progress towards the conclusion of the trial. The learned counsel contends that the petitioner cannot be kept confined for an indefinite period as a matter of advance punishment, as such, further incarceration of the petitioner will not serve any useful purpose for the prosecution.

4. On the other hand, learned Deputy Prosecutor General has opposed the grant of bail by contending that petitioner is nominated in the F.I.R. and there is no element of *mala fide* on the part of the complainant to have falsely implicated the petitioner in the instant case. Further argued that offence with which the petitioner is charged falls within prohibitory clause, as such, no case for bail is made out at this stage.

4. Arguments heard. Record perused.

5. The petitioner is nominated in the F.I.R. with a specific role. There is no element of *mala fide* or ulterior motives on the part of the complainant or the police for false involvement of the petitioner in the instant case. The offence with which the petitioner is charged falls within prohibitory clause of Section 497, Cr.P.C. Certain recoveries have been effected on the pointation of the present petitioner. Such-like street crimes are on increase day by day, therefore, taking stock of all the above

discussion, I do not consider it a fit case for grant of bail at this stage. This petition, therefore, is dismissed.

Bail after arrest refused.

2014 P Cr. L J 1803
[Lahore]
Before Sikandar Zulqarnain Saleem and Muhammad Qasim Khan, JJ
GHULAM FARID---Petitioner
Versus
The STATE and others---Respondents

Writ Petition No.3079 of 2014, decided on 22nd May, 2014.

(a) Criminal Procedure Code (V of 1898)---
----S. 540---Summoning a person as witness---Object and scope---Court, jurisdiction of---Provision of S.540, Cr.P.C. is divided into two parts first is discretionary in nature, whereas the second is mandatory--- Solitary purpose of judicial proceedings in criminal cases is to find out truth and to arrive at a correct calculation and to see that no innocent person is punished---If it appears essential to Court that evidence is necessary for just decision of case, Trial Court is vested with jurisdiction to re-examine any witness and the only requirement is that his/her examination should be essential for the just decision of the case.

(b) Judicial proceedings---
----Object---Purpose of entire judicial proceedings is to find out truth and to arrive at correct decision.

(c) Qanun-e-Shahadat (10 of 1984)---
----Art. 3---Competency of witness---Child witness---Principle---Child of tender age, by reason of his/her youth, is not absolutely disqualified as a witness---No precise age prescribed which determines the question of competency of a person to give evidence---In case of child witness it is immaterial whether he/she can understand and answer in rational manner questions put to him/her---No general rule of universal application can be laid down that in no case evidence of child witness be believed---Each case depends upon its particular facts and circumstances.

(d) Penal Code (XLV of 1860)---
----Ss. 302 & 324---Anti-Terrorism Act (XXVII of 1997), S.7---Criminal Procedure Code (V of 1898), Ss. 200 & 540---Constitution of Pakistan, Art.199---Constitutional petition---Re-summoning of witness---During trial of private complaint on the allegations of Qatl-e-amd, attempt to Qatl-e-amd and terrorism, injured eyewitness of 10-11 years of age was given up by complainant on the plea of her being minor---Subsequently complainant filed application for re-summoning of injured girl as witness but Trial Court dismissed that application---Validity---Court had inherent powers to ensure that justice was done---In cases when court smelt foul play, it was not only justified but duty bound, in the interest of justice, to ascertain facts itself with the application of judicial mind---In the present case, there was enough material before Trial Court to come to the conclusion that in giving up the sole injured witness, complainant acted recklessly and perhaps at the instigation, if not in collusion with, persons interested in stifling prosecution case---Trial Court erred in

law by not taking into consideration the cursory statement of witness in question recorded by Trial Court earlier---High Court directed Trial Court to examine injured minor girl as prosecution witness---Petition was allowed in circumstances.

Qadeer Hussain v. The State 1995 PCr.LJ 803 ref.
Malik Ali Muhammad Dhol and Khalid Abdullah Khan Chingwani for Petitioner.
Qazi Sadar-ud-Din for Respondents Nos.3 to 5.
Muhammad Ali Shahab, Deputy Prosecutor-General for the State.

ORDER
By means of this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 read with section 561-A, of the Code of Criminal Procedure, 1898, Ghulam Farid petitioner has called in question the order dated 9-7-2013 passed by learned Judge, Anti-Terrorism Court, Dera Ghazi Khan whereby Mst. Rukhsana Bibi P.W. was given up as she failed to give rational answers to the questions and the order dated 11-2-2014 has also been impugned through the instant petition whereby an application moved by the petitioner for summoning of Mst. Rukhsana Bibi as a court witness has been turned down.

2. The facts leading to institution of instant petition are that petitioner is complainant of a private complaint "Kundan Mai v. Ghulam Farid" pending adjudication before the learned Special Judge Anti-Terrorism Court, Dera Ghazi Khan. Mst. Rukhsana Bibi is one of the victim of occurrence reported through the private complaint; as she allegedly sustained burn injuries result of sprinkling of acid. On 9-7-2013 Mst. Rukhsana Bibi star injured witness of the complaint was called to stand in the witness box; before recording of her evidence she was questioned to ascertain whether she was capable of giving evidence by understanding the nature of questions and could give rational answers thereto, being minor. When questions were being asked, counsel for the complainant at his own stated before the learned trial court that Mst. Rukhsana Bibi being minor is unable to give rational answers, whereupon she was given up on the basis of that statement. Thereafter an application was submitted by complainant/petitioner under section 540, Cr.P.C. read with section 338-F, P.P.C. and section 3 of Nafaz-e-Shari'ah Act, 1991, which has been declined vide impugned order dated 11-2-2014 by the learned Judge, Anti-Terrorism Court, Dera Ghazi Khan. Hence, this petition.

3. In support of this petition, learned counsel for the petitioner has contended that Mst. Rukhsana Bibi daughter of Ghulam Farid petitioner appeared before the court and her cursory statement was recorded, wherein, she disclosed all details of the occurrence very confidently and when later on she appeared before the learned trial Court as P.W.2, three questions were put to her and the learned counsel for the complainant without any cogent reason gave-up her evidence. The learned counsel submits that Mst. Rukhsana Bibi was the star witness of the case as she was also injured during the occurrence, therefore, the complainant moved an application under section 540, Cr.P.C. for re-summoning her, but the learned trial Court dismissed the said application through the impugned order dated 11-2-2014. Further submits that

when Mst. Rukhsana Bibi appeared in the witness box as P.W.2, the questions put to her were not relevant to assess her mental approach and maturity. Adds that it was not the order of the learned trial Court that witness is not mature enough to understand the questions put to her and it was only the statement of learned counsel for the complainant. Lastly, argued that under section 540, Cr.P.C., the trial Court had ample jurisdiction to re-summon and re-examine any witness.

4. Conversely, learned Deputy Prosecutor General assisted by the learned counsel for respondents Nos. 3 to 5 has vehemently opposed this petition on various grounds.

5. We have heard the learned counsel for the parties and also gone through the impugned orders as well as the relevant provisions of law with due care and caution.

6. The dismissal of application filed by the petitioner is devoid of judicial consideration. The Court of criminal jurisdiction enjoys plenary powers to summon a person and examine him as a witness at any stage of trial under section 540, Cr.P.C. when evidence of such person appears to the court essential to do the just decision of the case. For ready reference section 540, Cr.P.C. is reproduced as under:--

"540. Power of summon material witness or examine persons present.---Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

From the perusal of the above, it demonstrates that section 540, Cr.P.C. is divided into two parts first is discretionary in nature whereas the second is mandatory. Solitary purpose of judicial proceedings in criminal cases is to find out the truth and to arrive at a correct calculation and to see that no innocent person is punished. If it appears essential to the Court that the evidence is necessary for just decision of the case, the trial Court is vested with jurisdiction to re examine any witness and the only requirement is that his/her examination should be essential for the just decision of the case. Mst. Rukhsana Bibi was the star witness of the case as she was also injured during the occurrence and her statement was essential for just conclusion of the case. Court cannot be expected to sit as silent spectator even when it notices non-production of certain witnesses to be likely to result in miscarriage of justice. There is no doubt about it that Mst. Rukhsana's name is mentioned in the F.I.R. and she was also injured during the occurrence. Her presence, therefore, cannot be doubted in any manner, her young age at the time of occurrence that by itself would not ipso facto render her incapable of becoming a witness under Article 3 of Qanun-e-Shahadat Order, 1984. In such a situation on being an inmate of the house where the occurrence took place, she is the most important witness to be examined at the trial and her examination would definitely advance the interest of justice. Main purpose of entire judicial proceedings is to find out the truth and to arrive at the correct decision.

Second part of the section is obligatory on the court to examine such a witness ignoring technical and formal obligations.

7. Summoning of Mst. Rukhsana under section 540, Cr.P.C. would not be termed or regarded as a step towards filling of gaps or lacunas as question of prejudice would also not arise because in doing so court would be giving effect to a provision of law. Moreover, in 'Adab-ul-Qazi' it has been stated as under:--

8. The honourable Judges of Supreme Court of Azad Jammu and Kashmir in Qadeer Hussain v. The State (1995 PCr.LJ 803) have observed that rule enunciated in Article 3 of The Qanun-e-Shahadat Order, 1984, is not an absolute or inflexible rule. It means that observing intellect of a child witness in shape of questions and answers is not the requirement of law. The Court was quite competent to give its observation with regard to the intellect of the witness. It would mean that only requirement is the satisfaction of the Court. It may be pointed out that in the instant case, the child witness who was produced by the prosecution in support of its case was of the age of 10/11 years. She was not of the age so as not to understand the nature of questions put to her. Even otherwise, a child of tender years is not by reason of his/her youth, as a matter of law, absolutely disqualified as a witness. There is no precise age which determines the question of competency of a person to give evidence. In case of a child witness it is immaterial whether he/she can understand and answer in a rational manner the questions put to him/her. No general rule of universal application can be laid down that in no case the evidence of a child witness be believed. Each case depends upon its particular facts and circumstances. Moreover, it was not the order of the learned trial Court that witness is not mature enough to understand the questions put to her rather her evidence was given up on the statement of learned counsel for the complainant. Even the judge has inherent powers to ensure the justice is done, in cases when he smells foul play the learned trial judge would not only be justified, but would in fact be duty bound, in the interest of justice, to ascertain the facts himself with the application of judicial mind. In the present case there was enough material before the learned trial Judge to come to the conclusion that in giving up the sole injured witness, the complainant counsel had acted rather recklessly and perhaps at the instigation, if not in collusion with, persons interested in stifling the prosecution case. Thus, the trial Court has erred in law by not taking into consideration the cursory statement of Mst. Rukhsana Bibi recorded by the learned Judge Anti-Terrorism Court earlier on 16-5-2012.

9. For what has been stated above we accept this petition, set aside the impugned orders and the learned trial Court is directed to examine Mst. Rukhsana Bibi as a prosecution witness who was given up by the counsel for the complainant being minor.

MH/G-50/L Petition allowed.

2014 P L C (C.S.) 555
[Lahore High Court]
Before Muhammad Qasim Khan, J
Malik OBAID ULLAH
Versus
GOVERNMENT OF PUNJAB through Secretary, Education, Lahore and 4 others

Writ Petition No.7890 of 2010, decided on 28th October, 2013.

Constitution of Pakistan---
----Art. 199---Constitutional petition---Civil service-Appointment of Subject Specialists---Distinct categories of subjects---Scope---Posts of SESE for different subjects were advertised---Petitioner/candidate being qualified for the post of SESE (Arabic) applied against disabled quota but was not selected on merit---Contention of the petitioner/candidate was that since in other categories of SESE posts against disabled quota were vacant so he could be appointed against such vacant posts--Validity-Candidate/person who applied against the post of SESE (Arabic) could not be posted against the post of SESE (Oriental), Physical Education or Arts and Drawing---Subject specialists in a particular subject could educate the students better because of their specific knowledge in such subject---Person who did not possess specialization in a particular subject may not be able to properly educate or guide the students---Subjects of Arabic, Physical Education, Oriental, Arts and Drawing were of entirely different fields and the students of each category had required to go through altogether changed and distinct courses and as such the same being different entities, could not be equated or clubbed with each other to declare them one category for the purpose of disabled quota---Constitutional petition was dismissed.

Malik Muhammad Zafar Iqbal for Petitioner.
Mubashir Latif Gill, A.A.-G. with Muhammad Javed Rafiq, Deputy DEP(E), Multan for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.--- Briefly the facts leading to the filing of instant petition are that pursuant to an advertisement inviting applications for different posts including 51-seats of SESE (Arabic), the petitioner having the requisite qualification, submitted his application against 2% disabled quota. Through the instant petition, the grievance of the petitioner is that although he was on top of merit list of the male candidates, but without any justification appointment letter was not issued to him.

2. The contention of learned counsel for the petitioner is that 2% quota meant for disabled persons is to be calculated against each category and as according to the advertisement seats of SESE (Arabic), SESE (Oriental), SESE (Physical Education) and SESE (Arts and Drawing) fall within one category, therefore, 2% disabled quota is to be calculated on the basis of number of seats advertised in the above referred subjects as a whole. The learned counsel further argued that the department did not

appoint teachers in some of the subjects against disabled quota for the reason that no candidate was available, but ignored the fact that all these subjects fall within one category, therefore, if the petitioner could not be selected against the seat of SESE (Arabic) on merit, he could be adjusted against disabled quota meant for SESE (Oriental), SESE (Physical Education) or SESE (Arts and Drawing).

3. The learned Law Officer on the other hand, under instructions submits that petitioner only applied for the post of SESE (Arabic) and obtained 43.53-marks in the merit list meant for male candidates/disabled persons, whereas, in a separately prepared merit list of disabled female candidates, one Mst. Usma Qasim obtained 62.78-marks, therefore, she being the highest scorer, was selected and appointment letter was issued to her against disabled quota seat. Further argued that subjects of Arabic, Oriental, Physical Education and Arts and Drawing, cannot be clubbed with each other as qualification for each subject is different and until and unless any person has qualification of a specific subject, he cannot be appointed and that category is only with regard to subject, and seats are to be allocated accordingly. The learned law officer concluded his arguments by contending that as the petitioner was not on merit in SESE (Arabic), therefore, no appointment letter could be issued to him.

4. I have considered the arguments of learned counsel for the parties and examined the record.

5. In the writ petition, the precise prayer of the petitioner is that he be appointed as SESE (AT) against the seat of disabled person. The petitioner has specifically voiced his grievance for appointment against disabled quota for the seat of SESE (Arabic). It is admitted position that petitioner was not on top of the merit even on disabled quota against the seat of SESE (Arabic) and one Mst. Asma Qasim who had also applied for a seat against disabled quota secured 62.78-marks and thus appointment letter has been issued to her. The contention of learned counsel is that the word "category" used for disabled persons includes all subjects mentioned in one category and that petitioner applied for the post of SESE (Arabic Teacher) in Elementary Schools, therefore, he is entitled for posting against all the seats to be filled in Elementary Schools, irrespective of the fact whether those seats are for SESE (Arabic), Oriental, Physical Education and Arts and Drawing. The above contention of learned counsel for the petitioner is totally erroneous, as basic requirement for appointment of a person on a particular post, even against disabled quota, is to have requisite qualification of that post. The categories mentioned in the advertisement are with regard to the level of education i.e. Elementary Schools, but for each post, Special Subject has been mentioned in the advertisement and the rules, until and unless any disabled person possesses such qualification he could not be entitled to be posted against the said post and for the same reason, a person who applied against the post of SESE (Arabic), could not be posted against the post of SESE (Oriental), Physical Education or Arts and Drawing because the basic purpose of the teacher is to educate the students. It is admitted that Subject Specialists in a particular subject can educate the students better because of their specific knowledge in that subject, whereas, a

person who does not possess specialization in a particular subject may not be able to properly educate or guide the students, for the reason that the subjects of Arabic, Physical Education, Oriental and Arts and Drawing are of entirely different fields and the students of each category are required to go through altogether changed and distinct courses for each of the above subject, therefore, naturally they get knowledge and specialties in respective course alone. These subjects otherwise being different entities, could not be equated or clubbed with each other to declare them one category for the purposes of disabled quota. In this view of the matter, if such practice as urged by learned counsel for the petitioner, is allowed, it would leave a negative impact, rather may demolish the educational career of the students. Consequently, it is held that the department, therefore, rightly calculated the disabled quota on the basis of each subject, as a person having no qualification of Arabic cannot teach the subject of Arabic to the students. In this view of the matter, I see no force in this writ petition and the same is therefore, dismissed.

JJK/O-1/L Petition dismissed.

2014 P L C (C.S.) 602
[Lahore High Court]
Before Muhammad Qasim Khan, J
MUSHTAQ HUSSAIN
Versus
GOVERNMENT OF THE PUNJAB through Secretary, Education and 2 others

Writ Petition No.1274 of 2004, heard on 21st May, 2013.

Constitution of Pakistan---
----Arts. 199 & 212---Punjab Service Tribunal Act (IX of 1974), S.4---Punjab Local Government Ordinance (XIII of 2001), S.28---Constitutional petition---Maintainability--- Impugned order against civil servant was not passed by competent authority---Effect---Jurisdiction of High Court in matters relating to terms and conditions of service---Scope---Petitioners were promoted on the recommendations of departmental promotion committee---District Coordination Officer recalled the promotion order of the petitioners---Contention of the petitioners was that District Coordination Officer was not their competent authority and as such the impugned order was illegal---Department objected to the maintainability of constitutional petition as remedy of appeal was available before Service Tribunal---Validity---District Coordination Officer could not be termed as "departmental authority" of the petitioner---Appeal lay to Service Tribunal against an order, whether original or appellate made by a "departmental authority"---Constitutional petition was allowed.
Dilawar Hussain and another v. District Coordination Officer, Okara and 2 others 2004 CLC 324 and Mian Muhammad Aslam v. The Auditor-General of Pakistan, Islamabad and 2 others 1995 PLC (C.S.) 1178 rel.

Ch. Abdul Sattar Goraya for Petitioner.
Mubashir Latif Gill, A.A.-G. for Respondents.
Date of hearing: 21st May, 2013.

JUDGMENT
MUHAMMAD QASIM KHAN, J.--- With the concurrence of learned counsel for the parties, these matters are being decided as PAKKA CASES.

2. This single order shall deal with three matters i.e. Writ Petition No.1274 of 2004 "MUSHTAQ HUSSAIN v. GOVERNMENT OF PUNJAB and others" Writ Petition No.1241 of 2004 "GHULAM MURTAZA and others v. GOVERNMENT OF PUNJAB and others and Writ Petition No.1162 of 2004 "MUHAMMAD RAFIQ and others v. GOVERNMENT OF PUNJAB and others", as all three have arisen out of one and the same order dated 13-3-2004 passed by District Coordination Officer, Dera Ghazi Khan.

2. Briefly the facts of the case are that petitioners joined education department in the year 1995 as G.P.T (English Teachers) in BS-14 and were performing duties as such at respective places. Pursuant to a judgment by the Hon'ble Supreme Court of

Pakistan dated 28-3-2013 passed in Civil Petitions Nos.127, 4178, 4179 and 4180-L of 2002, the Additional Secretary (Schools), Government of Punjab vide letter dated 14th of January, 2004 invited implementation report and other allied information from Executive District Officers (Education) for the purposes of considering the cases of English Teachers for promotion as SST BS-16. Ultimately, the Government of Punjab constituted a Departmental Promotion Committee for Dera Ghazi Khan District and the said Committed consisted of (i) District Coordination Officer, Dera Ghazi Khan (Chairman), (ii) EDO-Education, Dera Ghazi Khan (Appointing Authority), (iii) DEO-Dera Ghazi Khan (Member) and (iv) EDO (F&P), Dera Ghazi Khan (Member). Pursuant to the recommendations of the Departmental Promotion Committee dated 29-1-2004, the petitioners along with others were promoted vide Notification No.1061/Admn-I dated 13-2-2004. The petitioners accordingly submitted their Joining Reports. Subsequently, however, vide Office Order dated 13-3-2004 (DCO/HCG/I/4036-41), the District Coordination Officer, Dera Ghazi Khan declared the proceedings of the Departmental Promotion Committee dated 29-1-2004 as irregular ab initio, and as such cancelled the promotions notified through Order No.1061/Admn-I dated 13-2-2004, reverted the promotees to their original posts and place of postings. This order dated 13-3-2004 issued by the District Coordination Officer, Dera Ghazi Khan recalling the promotion order, has been assailed through the instant three writ petitions.

4. The contention of learned counsel for the petitioners is that entire process of promotion was conducted in a lawful manner, as proper Departmental Promotion Committee was constituted, after consideration of cases of the employees, promotion orders were issued. The learned counsel further argued that promotion orders issued pursuant to the recommendations of the Departmental Promotion Committee also stood implemented when the petitioners joined their places of postings in BS-16 as SSTs, as such, the promotion order could not be recalled. The learned counsel further argued that even otherwise, since the promotion order had taken effect, the respondent District Co-ordination Officer if was of the view that something wrong went with the DPC, he could have ordered an inquiry, the petitioners must have been joined and given opportunity of hearing and only then he could refer the matter to the departmental authority. Lastly, it has been contended by the learned counsel that after recommendations by a properly constituted Departmental Promotion Committee, the District Coordination Officer in his independent capacity as such, could not interfere in the service matters of the petitioners and the impugned exercise under section 28(2) of the Punjab Local Government Ordinance, 2001 is totally without jurisdiction. On the question of maintainability of these writ petitions, the learned counsel argued that in the facts and circumstances of this case the District Coordination Officer could not be said as "departmental authority", as such, the petitioners were left remediless, therefore, the instant writ petitions, according to the learned counsel were maintainable.

5. The learned Assistant Advocate-General on the other hand, has mainly attacked the maintainability of these writ petitions and argued that under section 28 of the Punjab Local Government Ordinance, 2001 the District Coordination Officer was authorized

to take necessary steps to ensure smooth running of business of District Coordination Group of Offices and in his opinion glaring flaws were noted in the promotion process, therefore, through the impugned order, error committed by the Departmental Promotion Committee has been rectified. The petitioners, in case have any grievance, may avail remedy before the appropriate forum.

6. I have considered the respective contentions of learned counsel for the parties and perused the available record.

7. Before touching the facts of the case, firstly I would take up the question about maintainability of these writ petitions. Undoubtedly, the District Coordination Officer being coordinating head of the District Administration has been vested with authority under section 28 of the Punjab Local Government Ordinance, 2001, but a careful perusal of said entire section, reflects that powers bestowed upon the District Coordination Officer under this section are bounded by certain limits. The situation becomes clear with the explanation attached to this section, which reads as under:---
"Explanation.---.For the purposes of this section, the expression coordinating head means the authority to call for review and assess the performance of the groups of offices, individually or collectively and give directions for taking actions or measures for improving efficiency, service delivery and achievement of goals assigned in the approved plans of the District Government."

As shall be seen from the above reproduced explanation, the authority of the District Coordination Officer revolves around smooth running of functions of District Administration, effective management and achievement of goals which are assigned in the approved schemes of the District Government. Such, authority, therefore, cannot be stretched to allow the District Coordination Officer to single handedly enter into service matters of the government employees and pass such orders, directly connected with terms and conditions of their services. Section 1(3) of the Punjab Local Governments (Appeal) Rules, 2002 clearly mentions that the said rules would apply only to the appeals preferred against orders passed under the Punjab Local Government Ordinance, 2001, and the rules or bye-laws framed there under except appeals relating to Service matters of employees working under the Local Governments. The underlined portion clarifies the position that Punjab Local Governments (Appeal) Rules, 2002 are not applicable in the cases covered by terms and conditions of civil servants. In the case DILAWAR HUSSAIN and another v. DISTRICT COORDINATION OFFICER, OKARA and 2 others (2004 CLC 324), when the DCO had allowed use of passage over a property belonging to the Provincial Government, without the sanction of the Competent Authority (Health Department), this Court held that exercise of jurisdiction by the DCO under section 28 of the Punjab Local Government Ordinance, 2001, was illegal, mala fide and without jurisdiction, and it was observed that DCO could pass such an order only after prior approval by the Competent Authority. In this case, the District Coordination Officer also cannot be termed "departmental authority". In almost similar situation when the order had not been passed by the "departmental authority" this court in the case "Mian MUHAMMAD ASLAM v. THE AUDITOR-GENERAL

OF PAKISTAN, ISLAMABAD and 2 others" (1995 PLC (C.S.) 1178), held, as under:---

"Jurisdiction of High Court in matters relating to civil service---Extent---Jurisdiction of High Court to entertain Constitutional petition at the behest of civil servant was not ousted in respect of all matters---Ouster of jurisdiction was, however, limited only to those matters which could be taken up by Service Tribunal---Appeal would lie before Service Tribunal against order passed by Departmental Authority.---Only objection was raised by Authorities that civil servant was not entitled to emoluments for the period in question.---High Court had, thus, jurisdiction in the matter and order of refund of emoluments reviewed by civil servant for specified period was declared to be without lawful authority and of no legal effect."

In this view of the matter, as observed above the District Coordination Officer cannot be termed as "departmental authority" and under section 4 of the Punjab Service Tribunals Act, 1974, appeal to Tribunal lies against an order, whether original or appellate, made by a departmental authority, therefore, the said remedy is also not available to the petitioners. Consequently, the preliminary objection, raised by the learned Law Officer, with regard to the maintainability of these writ petitions, is not legally tenable, as such, the writ petitions are held to be maintainable.

8. As discussed above, the respondent/District Coordination Officer is not the departmental authority, he is not the appointing or appellate authority in the case of the present petitioner, as the same is covered by the terms and conditions of civil servant, nor he can be said to be the next higher departmental authority, in the hierarchy of the petitioners, therefore, he was not competent at all to pass the impugned order. Furthermore, the tenor of the impugned order passed by the District Coordination Officer shows that impugned action was taken by him on complaints by public representatives and not by any of the direct affected employee, if there was any. This fact alone is sufficient to infer that while passing the impugned order the District Coordination Officer was in fact compelled by extraneous considerations and thus succumbed to the outside influence, otherwise, if there was any affected employee, he could have challenged the recommendations of the Departmental Promotion Committee before the departmental authority and then before the Services Tribunal. Consequently the impugned order No.1061/ Admn-I dated 13-3-2004 passed by District Coordination Officer, Dera Ghazi Khan, having been passed without lawful authority, is hereby set aside.

JJK/M-247/L Petition accepted.

PLJ 2014 Lahore 1 (DB)
[Multan Bench Multan]
Present: Muhammad Qasim Khan and Ibad-ur-Rehman Lodhi, JJ.
MINISTRY OF DEFENCE and 3 others--Appellants
versus
MUHAMMAD ATHER—Respondent

I.C.A. No. 208 of 2012 in W.P. No. 7537 of 2009, decided on 26.3.2013.

Limitation Act, 1908 (IX of 1908)--
----S. 3 & Art. 151--Law Reforms Ordinance, 1972, S. 3--Intra Court Appeal--Post remand proceedings--Limitation--Question of--Maintainability of I.C.A. on touch stone of limitation--Delay occasioned in filing of I.C.A--Validity--Limitation provided for filing an appeal from a decree or order of a High Court in exercise of its original jurisdiction is twenty days from date of decree or order as provided under Art. 151 of First Schedule provided u/S. 3 of Limitation--Starting period is given as date of decree or order and present filing of appeal is not given any relaxation for exclusion of period spent in obtaining certified copies--When CPLA was ordered to be converted into Intra Court Appeal--Although there is no concept of exclusion of time spent in obtaining certified copies in case an I.C.A. is to be filed, nevertheless after exclusion of the period of six days--Date of submission of form in copying agency for obtaining certified copies of record, when copies were prepared even then, it would become 52nd day, when I.C.A. was considered to have been filed--Period of limitation provided under Art. 151, Limitation Act, I.C.A. was barred by 32 days on date of filing--While converting C.P.L.A into an I.C.A and by remitting back to High Court, left it open for High Court to decide appeal in accordance with law subject to all just and valid objections--High Court an examine objection with regard to limitation--Delay in filing of Intra Court Appeal would not become liable to be condoned as appellants had failed to show any sufficient reasons for condonation of such delay--Application was dismissed. [Pp. 3, 4 & 5] A, B, C & D

PLD 2001 SC 355 & 1999 SCMR 644, ref.
M/s. Khawaja Noor Mustafa, Deputy Attorney-General and Rana Javed Akhtar, Standing Counsel for Appellants.
Chaudhry Shakir Ali, Advocate for Respondent.
Date of hearing: 26.3.2013.

Order
Writ Petition No. 7537 of 2009 was allowed by a learned Single Judge of this Court on 06.05.2011. The present appellants feeling aggrieved of the said findings preferred CPLA No. 1008 of 2011 titled Ministry of Defence and 3 others v. Muhammad Ather" before the Hon'ble Supreme Court of Pakistan, which came up for hearing before the apex Court on 24.09.2012, and the same was disposed of in the following manner:--
"4. It is not disputed that the order passed by the Single Judge of the Lahore High Court was amenable to Intra Court Appeal. When so petition for leave to appeal could

not have been straight away filed in this Court. We, however, instead of dismissing this petition convert it into an ICA by following the dictum rendered in the case of Muhammad Anis and others v. Abdul Haseeb and others (PLD 1994 SC 539) and direct the office to send it back to the High Court for decision in accordance with law subject to all just and valid objections. This petition thus stands disposed of".

2. In post-remand proceedings, we have heard the learned counsel for the appellants.

3. The respondent appeared through his learned counsel at limine stage and by means of a preliminary objection, questioned the maintainability of the present Intra-Court Appeal on the touchstone of limitation and the learned Deputy Attorney-General/Standing Counsel were asked first to cross the hurdle of limitation.

4. Civil Miscellaneous No. 6558 of 2012 has been moved by the appellants under the provisions of Section 14 of the Limitation Act, 1908, with a request to condone the delay caused in filing of Intra-Court Appeal. In para-5 of the said Civil Miscellaneous, the stance of the appellants is that the delay occasioned in filing of the Intra-Court Appeal was neither deliberate nor intentional or wilful but it was occasioned only on account of the reasons mentioned in the preceding paragraphs of the said Civil Miscellaneous.

5. We have minutely gone through Paragraphs No. 1 to 4 of the said Civil Miscellaneous, but except narration of facts with regard to the passage of judgment passed by this Court in Writ Petition No. 7537 of 2009 and obtaining the copies thereof, the filing of CPLA and then returning the CPLA after its conversion into ICA to this Courts, no reason or justification has been extended by the appellants justifying such delay in filing the Intra-Court Appeal, in all these paragraphs, which are the sole basis of the prayer made in the Civil Miscellaneous for condonation of delay.

6. The limitation provided for filing an appeal from a decree or order of a High Court in the exercise of its original jurisdiction is twenty days from the date of decree or order as provided under Article 151 of the First Schedule provided under Section 3 of the Limitation Act, 1908. Column No. 3 of the said Schedule is meant for mentioning of time from which period begins to run and against Serial No. 151 in Column No. 3, the starting period is given as "the date of the decree or order" and the present filing of appeal is not given any relaxation for exclusion of the period spent in obtaining the certified copies of the relevant record.

7. The judgment passed by the learned Single Judge was delivered on 06.05.2011. On behalf of the appellants, an application for obtaining certified copies of the relevant record was made on 12.05.2011 and the record was prepared in shape of certified version on 17.05.2011. CPLA was filed on 09.07.2011, which was the 58th day of passage of the judgment by the learned Single Judge of this Court in Writ Petition No. 7537 of 2009.

8. The Hon'ble Supreme Court of Pakistan when disposed of the said CPLA, made certain observations, which are of significance for the purposes of disposal of the present Civil Miscellaneous seeking condonation of delay in filing of Intra-Court Appeal. The order was passed by the Hon'ble Supreme Court of Pakistan on 24.09.2012 in presence of both the parties and it is clearly noted that it was never disputed before the apex Court that the judgment passed by the learned Single Judge was amenable to Intra-Court Appeal. It is also noteworthy that when the CPLA was ordered to be converted into ICA, it was ordered to be sent back to the High Court for "decision in accordance with law subject to all just and valid objections".

9. The CPLA was allowed to be converted into ICA and at the cost of repetition the date of filing of CPLA is once again provided viz. 09.07.2011. When the CPLA was converted into ICA and the same is being heard by us as ICA, the date of filing CPLA must be taken as a date of filing of ICA. As noted earlier, the date of filing of CPLA was the 58th day from the date, when the learned Single Judge passed the judgment in Chambers on 06.05.2011.

10. Although there is no concept of exclusion of the time spent in obtaining the certified copies of the relevant record in case an ICA is to be filed, nevertheless after exclusion of the said period of six days (from 12.05.2011, the date of submission of form in Copying Agency for obtaining certified copies of relevant record to 17.05.2011, when the copies were prepared), even then, it would become 52nd day, when the ICA was considered to have been filed. Keeping in view the period of limitation provided under Article 151 of the Limitation Act, 1908, the ICA was thus barred by 32 days on the date of its filing.

11. The Hon'ble Supreme Court of Pakistan while converting the CPLA into an ICA and by remitting the same back to this Court, left it open for this Court to decide the appeal in accordance with law subject to all just and valid objections, thus, we can examine the objection raised by the respondent with regard to the limitation.
12. The Hon'ble Supreme Court of Pakistan in case of Mst. Khadija Begum and 2 others vs. Mst. Yasmeen and 4 others (PLD 2001 Supreme Court 355) while dealing with the question of limitation has categorically held that sufficient cause must be shown by the person seeking condonation of delay, which means "circumstances beyond control of party concerned" and that, nothing shall be deemed to be done in good faith, which is not done with due care and attention.

13. The Hon'ble Supreme Court of Pakistan in case of Federation of Pakistan and 2 others vs. Khurshid Ahmed and another (1999 SCMR 664) has dealt with the question of availability of ICA or otherwise and interesting factor is that in the reported matter, the General Headquarters (GHQ) was a party to the litigation and after such authoritative findings by the Hon'ble Supreme Court of Pakistan, the General Headquarters must become wiser and aware of the remedy available under the law but notwithstanding such position a remedy by way of CPLA was availed, while ICA was undeniably available to the aggrieved party. It is a settled position of

law that in case of time barred proceedings, defaulting party must explain the delay of each day caused in preferring a valid proceedings in accordance with law.

14. The learned Deputy Attorney-General has attempted to argue that they became aware of the position that ICA was the proper remedy only on 24.09.2012, when the Hon'ble Supreme Court of Pakistan disposed of their CPLA.
The learned counsel for the respondent, however, has drawn our attention to CMA No. 2820 of 2011 in CPLA No. 1008 of 2011 filed on behalf of the present respondent before the Hon'ble Supreme Court of Pakistan in such pending petition on 21.07.2011 and in para-3 thereof, an objection was specifically taken to the effect that the petitioners therein/appellants herein had bypassed the forum of ICA under Section 3 of the Law Reforms Ordinance, 1972 and by referring such CMA, the learned counsel for the respondent argued that at least on 21.07.2011, the appellants must be presumed to have become aware of the objection with regard to the availability of remedy in shape of ICA for the appellants, even then the appellants waited till disposal of the CPLA by the Hon'ble Supreme Court of Pakistan and have not taken any remedial steps after having become aware of availability of remedy of ICA, which shows their conduct as casual and irresponsible one towards their affairs.

15. From whatever angle, we adjudge, the delay in filing of ICA would not become liable to be condoned, as the appellants have failed to show any sufficient reasons for condonation of such delay.

16. For all what has been discussed above, we see no reason to condone the delay in filing of ICA No. 208 of 2012; resultantly, Civil Miscellaneous No. 6558 of 2012 is dismissed.

17. Since the Civil Miscellaneous has been dismissed and the delay caused in filing of ICA has not been condoned; therefore, the ICA is also dismissed as being barred by time.

(R.A.) I.C.A. dismissed

PLJ 2014 Cr.C. (Lahore) 76
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
MAQSOOD--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 825-B of 2013, decided on 13.3.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), S. 302--Bail--Before Sessions Judge bail was dismissed--Question of--Jurisdiction--Any order passed by the Subordinate Court, is incorrect, illegal, lacks propriety or that the findings of such Court are not in order or the subordinate Court exceeded its jurisdiction while passing any order, High Court has ample jurisdiction to exercise its suo-moto revisional jurisdiction for its correction--An offence under Section 302, PPC is made out, cannot be said to have been passed under revisions jurisdiction and it is made clear that no such order could be passed while exercising jurisdiction under Section 497 or 498, Cr.P.C., as any observation in bail orders is tenant in nature and could not prejudice the mind of the trial Court and law did not permit the Sessions Judge while dealing with a matter under Section 497, Cr.P.C--to exercise jurisdiction under Section 190, Cr.P.C--which is vested with the Magistrate--Even otherwise, when the matter was already pending before the Magistrate Section 30, then in the interest of propriety, firstly the Magistrate seized of the matter, must have passed a speaking order with regard to its jurisdiction, whereas, the impugned observations have in fact resulted in assuming the jurisdiction of Magistrate itself, otherwise, it was prerogative of the concerned Magistrate to have passed an appropriate order after examining the record. [P. 79] A & D

Constitution of Pakistan, 1973--
----Art. 203--Ample jurisdiction--Exercise of--Under Article 203 of the Constitution of Islamic Republic of Pakistan, 1973, High Court in the process of supervision the conduct of subordinate Courts can set-aside or suitably amend an order passed by the subordinate Court in order to streamline justice amongst the parties. [P. 79] B
1992 SC 251 & 1994 PCr.LJ 858, ref.

Territorial Jurisdiction of Sessions Judge--
----Proposition--Sessions Judge could call for and examine the record of any proceedings pending before the inferior criminal Court situated within its territorial jurisdiction and when any such record is called or is produced before him or otherwise it comes to, his knowledge with regard to the proceedings of inferior Court and he feels that some illegality has been committed which is not permissible in law, the Sessions Judge could pass appropriate orders to correct the wrong. [P. 79] C

Concurrent Jurisdiction--

----Principle--It is settled that if the Magistrate or the Sessions Judge have concurrent jurisdiction in any matter even then propriety demand that the Magistrate should have been firstly given opportunity to apply his independent judicious mind and pass an order. [P. 80] E

PLD 2002 Lahore 84 & 1981 SCMR 267, ref.
Malik Muhammad Salim, Advocate for Petitioner.
Malik Muhammad Jaffar, Deputy Prosecutor General for State.
Sardar Zafar Ahmad Lound, Advocate for Complainant.
Date of hearing: 13.3.2013.

Order

Learned counsel for the petitioner submits that he will not press this petition for bail, however, while giving brief history of the case, contends that the learned Sessions Judge, Dera Ghazi Khan while dismissing the bail application of the petitioner vide order dated 16.02.2013 acceded jurisdiction to make the following observation:--

"Section 302, PPC is made out and it is yet to be determined in evidence for constitution of offence whatsoever the case may be arise in evidence. Learned trial Court shall on such observation refer the matter to the Court of competent jurisdiction for trial."

The learned counsel while referring to Section 190(2), Cr.P.C. submits that police had submitted challan under Section 316, PPC and it is only the Magistrate who could first take cognizance under Section 190, Cr.P.C. and after taking cognizance (under Section 190, Cr.P.C., if he forms an opinion that an offence triable by Court of Sessions is made out, then without recording evidence, he could send the file to the Court of Sessions for trial. The learned counsel, therefore, instead of pressing this petition for bail, attacked the said order to the extent of above observation and argued that this Court while exercising is supervisory jurisdiction under Article 203 of the Constitution of Islamic Republic of Pakistan or even under its revisional jurisdiction can set-aside the order.

2. The learned Deputy Prosecutor General on the other hand argued that an application of the complainant challenging the jurisdiction of the trial Magistrate was already pending before the learned Ilaqa Magistrate, therefore, the learned Sessions Judge acted in haste, instead he should have waited for the decision of learned trial Magistrate on the said application of the complainant:

3. The learned counsel for the complainant opposed the contention of learned counsel for the petitioner and submitted that prima facie an offence under Section 302, PPC was made out and the police without any cogent reason out of mala fide had submitted report under Section 316, PPC and the Magistrate was not bound by the Sections applied by the police. The learned counsel further argued that even offence under Section 316, PPC provides punishment of imprisonment for a term which may extend to twenty-five years, whereas the Magistrate Section 30 can pass Sentence only up to seven years, therefore, on this score also the Magistrate himself should

have transferred the case file to the learned Sessions Judge under Section 347, Cr.P.C. In support of his arguments, learned counsel placed reliance on the case "Muhammad Iqbal etc. versus The State" (NLR 2008 Criminal 436).

4. In the light of stance taken by learned counsel for the petitioner, this petition to the extent of seeking post arrest bail, is hereby dismissed as not pressed. However, coming to the legal proposition with regard to the above reproduced observation of learned Sessions Judge in para-1 of this order, I have heard the learned counsel for the parties at a considerable length.

5. There is no ambiguity, rather it is too settled to any debate that if from the record it appears that any order passed by the subordinate Court, is incorrect, illegal, lacks propriety or that the findings of such Court are not in order or the subordinate Court exceeded its jurisdiction while passing any order, this Court has ample jurisdiction to exercise its suo-moto revisional jurisdiction for its correction. Even otherwise, under Article 203 of the Constitution of Islamic Republic of Pakistan, 1973, this Court in the process of supervision the conduct of subordinate Courts can set-aside or suitably amend an order passed by the subordinate Court in order to streamline justice amongst the parties) Reliance may be placed on the case "Haji Syed Rafi Ahmed versus Additional Sessions Judge, Rawalpindi and another" (PLD 1992 SC 251) and "Inayatullah Khan versus The State" (1994 PCr.LJ 858).

6. In this case, the police submitted report under Section 316, PPC which is triable by Magistrate Section-30. However, if at any stage-of proceedings, it appears to the trial Magistrate that the case ought to have been tried by the Court of Sessions, he will send the same to said Court. It is correct that an application of the complainant with the prayer that prima facie offence under Section 302, PPC attracts was pending before the learned Magistrate and was fixed for 26.02.2013, but through the order dated 16.02.2013 the learned Sessions Judge made the above impugned order. There is no cavil to the proposition that the learned Sessions Judge could call for and examine the record of any proceedings pending before the inferior criminal Court situated within its territorial jurisdiction and when any such record is called or is produced before him or otherwise it comes to his knowledge with regard to the proceedings of inferior Court and he feels that some illegality has been committed which is not permissible in law, the learned Sessions Judge could pass appropriate orders to correct the wrong, but in this case neither the record of the subordinate Court i.e. report under Section 173, Cr.P.C. along with documents appended with it, or the application filed by the complainant, were summoned by the learned Sessions Judge, nor it was brought before the Court, therefore, the order passed by learned Sessions Judge to the extent that an offence under Section 302, PPC is made out, cannot be said to have been passed under revisional jurisdiction and it is made clear that no such order could be passed while exercising jurisdiction under Section 497 or 498, Cr.P.C., as any observation in bail orders is tentative in nature and could not prejudice the mind of the trial Court and law did not permit the Sessions Judge while dealing with a matter under Section 497, Cr.P.C. to exercise jurisdiction under Section 190, Cr.P.C. which is vested with the Magistrate. Even otherwise, when the

matter was already pending before the learned Magistrate Section-30, then in the interest of propriety, firstly the learned Magistrate seized of the matter, must have passed a speaking order with regard to its jurisdiction, whereas, the impugned observations have in fact resulted in assuming the jurisdiction of Magistrate itself, otherwise, it was prerogative of the concerned Magistrate to have passed an appropriate order after examining the record. It is settled that if the Magistrate or the Sessions Judge have concurrent jurisdiction in any matter (but not in this case), even then propriety demand that the learned Magistrate should have been firstly given opportunity to apply his independent judicious mind and pass an order. Reliance is placed on the cases "Malik Zafar Yousaf versus The State" (PLD 2002 Lahore 84), "Mehar Khan versus Yaqub Khan and another" (1981 SCMR 267).

7. For what has been discussed above, the impugned order to the extent of above reproduced observations passed by learned Sessions Judge, is hereby set-aside and the matter viz assumption of jurisdiction or transfer of the file to the Court of Sessions is left to be decided by the Magistrate Section-30, who shall decide the application of the complainant in accordance with law after appraisal of material available before him.

(A.S.) Order accordingly

PLJ 2014 Cr.C. (Lahore) 154
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
MUHAMMAD AFZAL--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 5260-B of 2013, decided on 18.11.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(ii), 337-F(i), 148 & 149--Bail before arrest--Confirmed--Although the petitioner had been nominated in the FIR and the role assigned to him was that when the complainant tried to come back in order to save himself, sota blow by petitioner hit his toe and thus his finger was injured--Injury attributed to the petitioner, prima facie, at the most would attract Section 337-F(i), PPC and the same is punishable with one year imprisonment--Opinion of the doctor who had issued the medical legal certificate to the complainant, had been challenged by the accused side and a Medical Board was constituted for re-examination of the injured, but despite issuance of repeated process the injured did not appear before the Medical Board, as such sufficient doubt was cast about the prosecution case qua the injury assigned to the present petitioner and involvement of the petitioner in this case required further probe--Granted bail to the accused inter-alia on the ground that injured was avoiding appearance before the Medical Board--Taking stock of all the above situation, possibility of petitioner's false implication as a result of widened net, cannot be ruled out--Bail was confirmed. [Pp. 155 & 156] A & B

PLJ 2005 Cr.C. Lahore 47, 1997 MLD 215 & 2010 MLD 950, ref.
Mr. Mehmood Khan Ghouri, Advocate for Petitioner.
Malik Muhammad Jaffar, Deputy Prosecutor General for Respondents.
Complainant in Person.
Date of hearing: 18.11.2013.

Order
Petitioner (Muhammad Afzal) seeks pre-arrest bail in a case arising out of FIR No. 669/2013 dated 15.09.2013 under Sections 337-A(ii), 337-F(i), 148/149, PPC registered at Police Station Muzaffarbad Multan.

2. I have heard the arguments of learned counsel for the parties and perused the entire available record with their able assistance.

3. Although the petitioner has been nominated in the FIR and the role assigned to him is that when the complainant tried to come back in order to save himself, sota blow by Muhammad Afzal (petitioner) hit his toe and thus his finger was injured. The injury attributed to the petitioner, prima facie, at the most would attract Section 337-F(i), PPC and the same is punishable with one year

imprisonment. Apart from that aspect, the opinion of the doctor who had issued the medical legal certificate to the complainant, had been challenged by the accused side and a Medical Board was constituted for re-examination of the injured, but despite issuance of repeated process the injured did not appear before the Medical Board, as such sufficient doubt is cast about the prosecution case qua the injury assigned to the present petitioner and involvement of the petitioner in this case requires further probe. This Court in the case "Amanullah versus State" (PLJ 2005 Cr.C. (Lahore) 47); "Zafar Ali versus The State" (1997 MLD 215) and "Shahid Iqbal versus The State and another" (2010 MLD 950), granted bail to the accused inter-alia on the ground that injured was avoiding appearance before the Medical Board. Taking stock of all the above situation, possibility of petitioner's false implication as a result of widened net, cannot be ruled out. Consequently, while respectfully placing reliance on the case Miran Bakhsh Case (PLD 1989 SC 347), this bail application is allowed and interim pre-arrest bail earlier granted to the petitioner is hereby confirmed subject to his furnishing fresh bail bond in the sum of Rs. 100,000/- with one surety in the like amount to the satisfaction of learned trial Court.

4. Needless to add that if the petitioner tries to hamper the trial or misuses the concession of bail, the learned trial Court would be at liberty to proceed against him in accordance with law.

(A.S.) Bail confirmed

PLJ 2014 Lahore 157
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
MUHAMMAD UMAR LODHI, XEN (OPERATION) MEPCO, CITY DIVISION, MULTAN--Petitioner
versus
WAPDA through its Chairman, WAPDA House, Lahore and 2 others—Respondents

W.P. No. 10 of 2012, heard on 31.5.2013.

Constitution of Pakistan, 1973--
----Arts. 8 & 199--Constitutional petition--Major penalty of censure--Discredit of employee--Question of--Whether punishment of censure can be considered as stigma on service career of an employee and whether on basis of censure marks can be deducted from totally of an employee--Validity--Practice of MEPCO in deducting marks on basis of punishment of censure from credit of its employee at time of considering his case for promotion, is totally illegal and flagrant deviation from the judgment of PLJ 2006 SC 1429, thus such practice infringes Art. 8 of Constitution--Petition was allowed. [P. 161] A

PLJ 2006 SC 1429, rel.
Sardar Muhammad Sarfraz Dogar, Advocate for Petitioner.
Rao Muhammad Iqbal, Advocate with Mian Muhammad Sohail Afzal, DM (T&MP) for Respondents.
Date of hearing: 31.5.2013.

Judgment
With the concurrence of learned counsel for the parties, this writ petition is being decided as a PAKKA case.

2. Briefly the facts of the instant case are that petitioner who admittedly is an employee with Water & Power Development Authority (hereinafter to be referred as "WAPDA"), working under Multan Electric Power Company (hereinafter to be called as "MEPCO"), at one point of time had been imposed a minor penalty of "censure" along with certain co-employees. According to the petitioner, he is now at the verge of promotion but his grievance is that at the time of promotion the penalty of "CENSURE" is also being considered by the Departmental Promotion Committee to the discredit of the employee, as such, under the WAPDA Promotion Policy, 1.5 marks are deducted from the score of the employee, on the basis of "CENSURE". The contention of the learned counsel for the petitioner is that the impugned practice of deducting 1.5 marks on account of minor penalty of "CENSURE", is glaring violation of the judgment dated 7.04.2009 delivered by Hon'ble Supreme Court of Pakistan in Human Rights Case No. 5/2009. In this respect the learned counsel for the petitioner specially referred to Para-2 of the said judgment to emphasize that the apex Court has clearly held "censure is not a serious stigma debarring a person/employee

to enjoy future professional career". On the strength of above referred judgment of the Hon'ble Supreme Court of Pakistan, the learned counsel has attacked the very Promotion Policy, 2007 (revised through Office Memorandum No. GM (HR)/HRDA-598/743-73, contending that the same is ultra vires to the Constitution of Islamic Republic of Pakistan, 1973.

3. The learned counsel representing WAPDA assisted by representative of the respondent/department referred to Annex-B attached to the Revised Promotion Policy, under the heading "quantifying the confidential reports overall assessment" and argued that Para-3(d) carries a note and in terms of it clause 2(b) Censure has been considered to be a minor penalty, as such, 1-« marks on that count are deducted from the score of a contestant who during his service ever earned "CENSURE". The learned counsel for respondent/MEPCO, therefore, contended that there is nothing wrong with the practice being carried out by the Departmental Authorities.

4. I have heard the arguments of learned counsel for the parties at considerable length and perused the entire record with their able assistance.

5. The learned counsel for the respondent/MEPCO while arguing the case before this Court or even in the written statement filed by the respondent/department, raised no objection about the maintainability of this writ petition on the ground that it carried a factual controversy or that the parties to the writ petition were in fact covered by the definition of "master & servant". However, in report and parawise comments filed on behalf of respondent/MEPCO, these grounds have been taken in the following terms:-
-
"(I) That, MEPCO has no its statutory rules being a company registered under the Companies Ordinance, 1984. The writ petitioner under Article 199 of the Constitution is not maintainable against the MEPCO in circumstances."
(II) That, the petitioner being officer of company does not come within the definition of public funcationares and where employees are not being governed under the statutory safeguard and department has not statutory rules to regulate conditions of the services of the employees cannot file a writ petition under Article 199 of the Constitution as rule of `Master and Servant' would apply.
(III) That, factual controversies are herein involved which cannot be resolved by resorting the Constitutional jurisdiction."

6. As regards objections (I) & (II), both are in fact inter-linked, thus are being taken up for decision together. It is specific stance of the writ petitioner (Para-6 of the writ petition is referred) that he was initially inducted in service with WAPDA and his services were regulated by statutory rules i.e. Efficiency and Discipline Rules, 1978. Although after reshape the WAPDA was further divided in different companies and the MEPCO is one of them and the petitioner is now under the service of MEPCO, but the fact remains that till today the MEPCO is following the same statutory Rules as formulated by WAPDA, therefore, the petitioner would be governed by the said rules. Another aspect of the matter is that when an employee joins the service under certain rules, subsequently, the rules which are less beneficial to such employee

cannot be made applicable against him. Even otherwise, in the light of judgment of the Hon'ble Supreme Court of Pakistan in the case "Zarai Taraqiati Bank Limited and others versus Said Rehman and others" (2013 SCMR 642) and "Masood Ahmed Bhatti and others versus Federation of Pakistan through Secretary, M/O. Information Technology and Telecommunication and others" (2012 SCMR 152), the principle of "master and servant" would not apply, therefore, the objection to this extent is overruled.

7. Now, dealing up with objection (III) with regard to involvement of factual controversy, there is no cavil to the proposition that writ petition is not maintainable where factual controversy is involved, but here in this writ petition, both the parties are in agreement on the question of facts regarding status of the petitioner, his length of service his initial induction in WAPDA and then his adjustment in MEPCO. The only question involved in this writ petition is whether punishment of "CENSURE" can be considered as stigma on the service career of an employee and further whether on the basis of "Censure" 1.5 marks can be deducted from the total tally of an employee, therefore, the assessment of above questions only requires legal determination and no question of factual controversy being involved, the instant petition is hold to be fully competent and maintainable.

8. Coming to the merits, the question with regard to effect of a penalty of "censure" came under consideration before the Hon'ble Supreme Court of Pakistan in the case "Abdul Majeed Ex.A. Xen (B&R), E-in-C's Branch, GHO, Rawalpindi (PLJ 2006 SC 1429), and the august Court in categorical terms held that "Censure was minor penalty of the sort of warning which might not have a serious stigma effecting the service career of a person". Thereafter, the same point came under judicial scrutiny before the apex Court and the Hon'ble Supreme Court of Pakistan in Human Rights Case No. 5/2009 in the order dated 07.04.2009 with reference to the above judgment (PLJ 2006 SC 1429) concurred that "Censure is not a serious stigma debarring a person/employee to enjoy future professional career". The Hon'ble Supreme Court of Pakistan also directed its Registrar to deliver the copy of the said order to Auditor General of Pakistan, Secretary Establishment Division, Islamabad, Secretaries to the Government of Pakistan., Accountant General Pakistan Revenues and Chief Secretaries of all the Provinces for strict compliance of the observations. Lastly, with reference to the Promotion Policy criteria, the question about effect of punishment of "censure" on promotion prospects of an employee of PEPCO, was adjudicated by Peshawar High Court in the case "MUNSIF SHAH versus PEPCO through Managing Director, Lahore and 4 others" (2013 PLC (CS) 223), and it was held that censure being minor penalty, was not a hurdle in the way of promotion of employee.

9. Under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, "Any decision of the Supreme Court shall, to the extent that it decides question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan." Furthermore, under Article 190 of the Constitution "All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court," With reference to the above Articles, this Court in the case reported in PLD 2006 Lahore

332, has held that "not only the parties, but all the functionaries in view of Articles 189 and 190 of the Constitution, are bound by the judgment of the Supreme Court which has to be kept in view and action in that respect should be in conformity with the same. No deviation whatsoever therefrom can be made by anyone. Statutory functionaries (the official respondents) while carrying about their statutory functions will act strictly in accordance with the judgment of the Supreme Court and implement the same faithfully." In another ease reported in PLD 2004 Lahore 815, it was held by this Court that all organs of the state are under the statutory duly to act in aid of the law declared by the Supreme Court and not to flout the same. Right declared under judgment of Supreme Court cannot be overridden or nullified by an executive order, a rule or a dispensation short of legislative will.

10. In view of the above discussion, in the light of decision of the Hon'ble Supreme Court of Pakistan in the case "Abdul Majeed, Ex.A. Xen (B&R), E-in-C's Branch, GHQ, Rawalpindi" (PLJ 2006 SC 1429), and the judgment dated 07.04.2009 passed in Human Rights Case No. 5/2009, hardly there remains any doubt that "Censure" is not to be considered a stigma to debar a person/employee to enjoy future professional career and to contest for his promotion. Furthermore, the binding effect of Supreme Court orders is also unquestionable in terms of Article 189 and 190 of the Constitution of Islamic Republic of Pakistan, 1973, and this Court being custodian of the Constitution is obliged to ensure meticulous compliance of the Supreme Court orders. In the same terms, Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 mandates every individual to be dealt with in accordance with law, and according to Salmond, the "Law" means body of principles recognized and applied by the State in the administration of justice. The law therefore, is not confined to only statute law. Personal law and custom, to the extent they are recognized by the Courts, are laws. Even the judicial principles which are laid down by the Superior Courts from time to time are laws as it is binding on the lower Courts to follow them. Law is not the will of a sovereign. It is the body of principles recognized and applied by the State in the administration of justice as rules recognized and acted upon by the Courts of justice. Consequently, the practice of respondent/MEPCO in deducting 1.5 marks on the basis of punishment of "Censure" from the credit of its employee at the time of considering his case for promotion, is totally illegal and flagrant deviation from the above referred judgments of the Hon'ble Supreme. Court of Pakistan, thus this practice also infringes Article 8 of the Constitution of Islamic Republic of Pakistan, 1973. Consequently, the instant writ petition is allowed and the respondent/MEPCO authorities are directed not to deduct 1.5 marks/points from the total tally of its employee on the excuse of penalty of "censure" while considering his case for promotion.

(R.A.) Petition allowed

PLJ 2014 Lahore 161
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
MUHAMMAD JAVED TARIQ--Petitioner
versus
STATION HOUSE OFFICER POLICE STATION FAREED TOWN SAHIWAL and 2 others—Respondents

W.P. No. 10002 of 2012, decided on 10.6.2013.

Constitution of Pakistan, 1973--
----Art. 199--Criminal Procedure Code, (V of 1898) Ss. 22-A & 155(c)--Constitutional Petition--Direction of ex-officio justice of peace to register case was sought to be quashed--Non-cognizable offence neither could be registered nor investigated without permission of Magistrate--Validity--If police officers are guilty of any willful breach or neglect of any provision of law or any rule or regulation or any order, which he is bound to observe or obey is a cognizable offence and a direction for registration of case could be issued against delinquent official--Petition was dismissed. [Pp. 164 & 165] A & B

Mr. Khawar Siddique Sahi, Advocate for Petitioner.
Mr. Mubashir Latif Gill, Assistant Advocate General for Respondent.
Haji Muhammad Tariq Aziz, Advocate for Respondent/ Complainant.
Date of hearing: 10.6.2013.

Order
Briefly the facts leading to the filing of instant writ petition are that Respondent No. 3 Farhat Ali got lodged an FIR No. 28/2012 dated 13.01.2012 under Sections 392/397, PPC at police station Farced Town, Sahiwal and as the petitioner was posted at the said police station, the investigation of the said case was entrusted to him. Afterwards, the Respondent No. 3/complainant filed an application under Section 22-A, Cr.P.C. before the learned Ex-officio Justice of Peace to the effect that petitioner being the Investigating Officer misused his authority, prepared a fake application on behalf of the complainant/Respondent No. 3 and arrested one Imran who had no concern with the FIR, nor the Respondent No. 3 had ever nominated said Imran as his accused. On receipt of application under Section 22-A, Cr.P.C., the learned Ex-officio Justice of Peace vide order dated 22.05.2012 directed the District Police Officer to register a case under Article 155(c) of the Police Order, 2002, as a result whereof, an FIR No. 293/2012 under Article 155(c) of the Police Order, 2002 has been registered against the petitioner at police station Fareed Town, Sahiwal.

2. Through the instant writ petition the FIR No. 293/2012 registered pursuant to the direction of learned Ex-officio Justice of Peace, is sought to be quashed, mainly on the ground that offence under Article 155(c) of the Police Officer is non-cognizable, therefore, neither the same could be registered nor investigated without permission of the Magistrate. In support of his arguments, the learned counsel for the petitioner

placed reliance on the case "Muhammad Shafi versus S.H.O. and others" (2012 Y.L.R 828), "Shahid Hussain and another versus Additional Sessions Judge, Taunsa Sharif Distt. D.G. Khan and others" (2011 Y.L.R 294) and "Khuda Bakhsh versus Additional Sessions Judge, D.G. Khan and 3 others" (2010 Y.L.R 2622).

3. The learned Law Officer assisted by learned counsel for the Complainant/Respondent No. 3 opposed this petition by arguing that offence under Article 155(c) of the Police Order, 2002 is a cognizable offence and furthermore, after registration of the FIR the same is under investigation, therefore, it would be inapt to interfere in the investigation domain of the investigating hierarchy.

4. I have heard the arguments of learned counsel for the parties and perused the file with their assistance.

5. As shall be seen from the above narration of facts, the moot point in this case is "whether an offence under Article 155(c) of the Police Order, 2002 is cognizable or non-cognizable?" The word "cognizable" has not been defined in the Police Order, 2002 and the Code of Criminal Procedure, 1898 as procedural law is applicable to the penal provisions of Police Order, 2002 for the purposes of registration of cases, investigation and trial, etc.

6. The Code of Criminal Procedure, under Section 4(1) defines the word "cognizable" as an offence in which a police officer, may, in accordance with second schedule or under any law for the time being in force, arrest the accused without warrant, and further Section 4(n) of the Code, ibid, defines the word "non-cognizable" as an offence for which a police officer may not arrest the accused without warrant of arrest. Schedule-II is in tabular form, firstly it deals with, PPC and at the end of this schedule there is separate heading "OFFENCES AGAINST OTHER LAWS". When this part of the schedule is read with Section 4(f) of the, Cr.P.C., it makes clear that all offence under other laws are cognizable, if punishable with imprisonment for three years and upwards. However, its only exception is the relevant statute itself as the statute could define which offences are cognizable and bailable and which offences are non-cognizable and non-bailable. If with regard to some of the offence the statute is itself silent, then relevant part of Schedule-II (offences against other laws) as mentioned in the, Cr.P.C. shall hold the field.

7. Article 153 of the Police Order, 2002 only refers to certain offences which have been specified to be cognizable. Said Article 153 of the Police Order, 2002 reads as under:

"153. Certain offences to be cognizable.--Notwithstanding anything contained in the Code, offences falling under Articles 148 to 152 shall be cognizable."
While interpreting a Statute, no meaning other than those mentioned in the statute itself, can be derived, as the words of a statute are to be read in its original text, no addition, alternation or deletion can be made. The above reproduced Article, declares

some of the offences covered under Articles 148 to 152 of the Police Order, 2002 as "cognizable", and by bare reading of this section, it appears that the offences declared as "cognizable" by Article 153 of the Police Order, 2002 mostly carry short sentences. As there is no mention in Article 153, ibid, that rest of the offences under Police Order, 2002 are non-cognizable", the sentence under Article 155 of the Police Order, 2002 entail punishment which may extend to three years, therefore, by applicability of the Code of Criminal Procedure, when Section 4(f), Cr.P.C. is read with its Schedule-II, the offence under Section 155, Cr.P.C. shall be considered as "cognizable", as when the statute itself is silent in this respect, therefore, relevant part of Schedule-II (Offences Against other laws) as mentioned in the Cr.P.C. shall fully attract. In this context relevant portion from a Division Bench judgment of the Karachi High Court in the case "Naseem Akhtar Khan versus District and Sessions Judge" (PLD 2005 Karachi 285), is reproduced as under:--

"Finally learned counsel further argued that an offence under Article 155 of the Police Order was non-cognizable. We are not impressed by this contention either. Indeed the Police Order only requires a prosecution to be initiated upon a written report but does not say that no arrest can take place without a warrant The offence being punishable with imprisonment up to three years, it would be deemed to be cognizable under the Second Schedule to the, Cr.P.C."

On the same point, a Division Bench of the Peshawar High Court in the case "Haji Rehman SHO and 3 others versus Provincial Police Officer, Government Of Khyber Pakhtunkhwa, Peshawar and 5 others" (2012 P.Cr.L.J 1526), declared that Schedule-II of, Cr.P.C. under the heading, "Offences Against Other Laws" provided that police officer could arrest the accused without warrant in an offence, which was punishable with imprisonment for three years or upward and such offence had also been made non-bailable. As no such exception had been provided in, Cr.P.C. or Police Order, 2002 for an offence punishable under Art. 155 of said Order, therefore, on the above analogy offence under Section 155, Cr.P.C. was declared as "cognizable" offence. Furthermore, a Full Bench judgment of this case in the case "Khizar Hayat vs. Inspector-General of Police (Punjab) Lahore" (PLD 2005 LAHORE 470), wherein, following observations were made:--

"Upon a complaint received by him regarding non-compliance of his earlier direction on ex-officio Justice of the Peace can issue a direction to the relevant police authority to register a criminal case against the delinquent police officer under Article 155(c) of the Police Order, 2002."

In view of the above reproduced extract from the Full Bench judgment, it has been settled once for all that if police officers are guilty of any willful breach or neglect of any provision of law or any rule or regulation or any order, which he is bound to observe or obey, is a "cognizable offence" and a direction for registration of case could be issued against the delinquent official. In the presence of judgment of the Full Bench of this Court, perhaps at the time when the judgments referred by learned counsel for the petitioner were delivered, proper assistance was not rendered to the

Court. Even otherwise, it is settled position of law that the judgment of a Division and that of the Full Bench have to be followed by the Single Bench. In this view of the matter, I see no force in the contention of learned counsel for the petitioner that offence under Article 155(c) of Police Order, 2002 is "non-cognizable". This writ petition, therefore fails and is accordingly dismissed.

(R.A.) Petition dismissed

PLJ 2014 Cr.C. (Lahore) 178
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
MUKHTAR AHMAD @ Makhi--Petitioner
versus
STATE & another—Respondents

Crl. Misc. No. 5106-B of 2012, decided on 17.12.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 392, 458, 411 & 109--Bail, accepted--Statutory ground--In view of the amendment in third proviso to Section 497, Cr.P.C. according to which an under trial prisoner shall be released after expiry of the respective period if the trial is not concluded. Consequently, without touching the merits and demerits of this case, petition was accepted. [P. 178] A

Mr. Rizwan Ahmad Khan, Advocate, for Petitioner.
Malik Muhammad Jafar, Deputy Prosecutor General for State.
Mr. Sagir Ahmad Bhatti, Advocate for Complainant.
Date of hearing: 17.12.2012.

Order
Mukhtar Ahmad/petitioner seek post arrest bail in case FIR No. 198, registered at Police Station Sahuka, District Vehari, on 01-08-2011, for offences under Sections 392, 458, 411 & 109, PPC, only on statutory ground.

2. Per FIR, during the night in between 17/18-06-2011 four unknown person trespassed into the house of complainant and by committing dacoity deprived the complainant from his valuable articles. The petitioner, alongwith others, has been nominated in the FIR after following their footprints. As the bail has been sought only on statutory ground, I have examined the copy of order sheet of the learned trial Court appended with this petition and have observed that report under Section 173, Cr.P.C. was submitted before the Court on 12-09-2011 but charge has not been framed so far and delay in conclusion of trial cannot be attributed to the petitioner from any angle. The petitioner was arrested in this case on 04-08-2011, since then he is behind the bars and the conclusion of trial is not within the sight in near future; therefore, in view of the amendment in third proviso to Section 497, Cr.P.C. according to which an under trial prisoner shall be released after expiry of the respective period if the trial is not concluded. Consequently, without touching the merits and demerits of this case, this petition is accepted and the petitioner is admitted to bail on statutory ground, subject to furnishing bail bonds in the sum of Rupees One Lac (Rs. 1,00,000/-), with two sureties, each in the like amount, to the satisfaction of the trial Court.

(R.A.) Bail accepted

PLJ 2014 Cr.C. (Lahore) 179
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
SHEHZAD alias KAKA--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 4645-B of 2012, decided on 14.12.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Prohibition Enforcement of Hadd Order, 1979, Arts. 3/4--Bail, accepted--Offence not fall within prohibitory clause--Although the petitioner was nominated in the FIR with a specific allegation but the offence with which he was charged does not fall within the ambit of prohibitory clause as Article 4 is bailable and maximum punishment under Article 3 is five years which requires further probe and in such like cases grant of bail is a rule and refusal is an exception--Court could not find out any exceptional reason in this case to refuse the bail to the petitioner--He was behind the bars, investigation of the case was complete and was no more required for the purpose of investigation. [Pp. 179 & 180] A

Mr. Rizwan Ahmad Khan, Advocate for Petitioner.
Malik Muhammad Jaffar, DPG with for State.
Date of hearing: 14.12.2012.

Order
Petitioner seeks post arrest bail in case FIR No. 507/2012 registered under Article 3/4 of the Prohibition(Enforcement of Hadd) Order, 1979 at Police Station Model Town Burewala, District Vehari.

2. I have heard the learned counsel for the petitioner as well as learned DPG and perused the record.

3. Although the petitioner is nominated in the FIR with a specific allegation but the offence with which he is charged does not fall within the ambit of prohibitory clause as Article 4 is bailable and maximum punishment under Article 3 is five years which requires further probe and in such like cases grant of bail is a rule and refusal is an exception. I could not find out any exceptional reason in this case to refuse the bail to the petitioner. He is behind the bars, investigation of the case is complete and is no more required for the purpose of investigation.

4. For what has been discussed above, this petition is allowed and petitioner is admitted to bail subject to furnishing bail bond in the sum of Rs. 1,00,000/- (one lac) with one surety in the like amount to the satisfaction of trial Court.
(R.A.) Bail accepted

PLJ 2014 Cr.C. (Lahore) 266
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
SADIQ HUSSAIN etc.--Petitioners
versus
STATE, etc.—Respondents

Crl. Misc. No. 3205-B of 2012, decided on 20.9.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 324, 337-A(iii), 332-A(ii)--Bail, grant of--Principle of consistency--Common intention--Motive was not attributed--No injury of blunt weapon--Contradiction between story of FIR and occurrence narrated in supplementary statement--Cross-Version--Validity--Although the injuries of two injured/accused were declared by the medical board as self suffered as the medical board opined that possibility of these injuries having been caused with friendly hands cannot be ruled out but there was no opinion of the medical board with regard to other injured--Petitioners were behind the bars, investigation to their extent was complete and there will be no useful purpose to keep them behind the bars before conclusion of trial--They did not cause any injury to the deceased and only injuries to PWs were attributed to them--Co-accused had been granted bail and the petitioners were also entitled for the same relief on the principle of consistency, even petitioner was himself injured--Bail allowed. [P. 268] A & B

Mr. Irfan Ali Khan Khosa & Mr. Muhammad Waseem Khan Jaskani, Advocates for Petitioners.
Malik Muhammad Jaffar, DPG for State.
Sardar Muhammad Arif Khan Gurmani, Advocate for Complainant.
Date of hearing: 20.9.2012.

Order
This single order shall dispose of Criminal Miscellaneous No. 3205-B/2012, filed by Sadiq Hussain, petitioner and Criminal Miscellaneous No. 3538-B/2012 filed by Altaf Hussain, petitioner as both arise out of same FIR i.e. case FIR No. 98/2012 registered under Sections 302, 324, 337-A(iii), 337-A(ii), 337-F(i), 337-F(v), 148, 149, PPC at Police Station Dharama, D.G. Khan.

2. Precisely, allegation against the petitioners is that on the fateful day, they along with co-accused in furtherance of their common intention injured the complainant and PWs by giving sota blows.

3. Learned counsel for the petitioners submitted that petitioners have falsely been involved in this case and there is a delay of two days in lodging the FIR which has not been explained. Learned counsel representing the petitioner, Altaf Hussain, submitted that motive is not attributed to him and in fact he was present at the spot

and tried to stop the quarrel, as a result of which he too received injuries from the hands of complainant party. Learned counsel representing the petitioner, Sadiq Hussain, submitted that there is contradiction between the story of FIR and occurrence narrated in supplementary statement because in supplementary statement, the role attributed to petitioner Sadiq Hussain is that he inflicted sota blow on the left wrist of Muhammad Ismail, PW but as per medical report, no injury of blunt weapon has been found on the left wrist of Muhammad Ismail and only injury found on the left forearm is a bruise. Learned counsel for the petitioners submitted that this is a case of two version, cross-version was set up on the statement of co-accused Murid Hussain, six persons from the petitioners' side were also injured in the same occurrence and the injuries received by the petitioners' side were declared dangerous to life but with mala fide intention, neither any person from the complainant side was arrested nor challaned before the Court of competent jurisdiction. Further submitted that co-accused namely Saifullah, who was nominated by causing specific injuries has been granted bail by the learned Additional Sessions Judge while co-accused Murid Hussain with a specific role of causing injuries to Muhammad Ismail, Khadim and Javed (complainant) has been released on bail. Lastly argued that petitioners are behind the bars, investigation of the case is complete and they are no more required for the purpose of investigation.

4. On the other hand, learned DPG assisted by learned counsel for the complainant has vehemently opposed this petition on the ground that petitioners are nominated in the FIR with a specific role and the offence with which they are charged falls within the ambit of prohibitory clause, therefore, are not entitled for the concession of bail.

5. I have heard the learned counsel for the parties as well as learned DPG and perused the record.

6. As per FIR, petitioner, Sadiq Hussain, was attributed only motive of this case and later on, through statement of PW, for causing injury on the left hand of Ismail while petitioner, Altaf Hussain, is attributed injury on the left wrist of Mst. Hayatian Mai and on left hand of the complainant. All these injuries are not covered by the offence of prohibitory clause. Petitioners' party also received injuries. Although the injuries of two injured/accused were declared by the medical board as self suffered as the medical board opined that possibility of these injuries having been caused with friendly hands cannot be ruled out but there is no opinion of the medical board with regard to other injured namely Murid Hussain. Co-accused Murid Hussain and Saifullah have been granted bail by the learned trial Court and while granting bail it is observed that whether all accused are liable or not will be seen after recording of evidence by the learned trial Court. Petitioners are behind the bars, investigation to their extent is complete and there will be no useful purpose to keep them behind the bars before conclusion of trial. They did not cause any injury to the deceased and only injuries to PWs are attributed to them. Co-accused Murid Hussain and Saifullah have been granted bail and the petitioners are also entitled for the same relief on the principle of consistency, even petitioner Sadiq Hussain is himself injured.

7. For what has been discussed above, this petition is allowed and petitioners are admitted to bail subject to furnishing bail bond in the sum of Rs. 1,00,000/- (one lac) each with one surety each in the like amount to the satisfaction of trial Court.

(R.A.) Bail allowed

PLJ 2014 Cr.C. (Lahore) 269 (DB)
[Multan Bench Multan]
Present: Muhammad Qasim Khan and Syed Muhammad Kazim Raza Shamsi, JJ.
ALI--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 6041-B of 2013, decided on 23.1.2014.

Criminal Procedure Code, 1898 (V of 1898)--
----Ss. 497 & 161--Bail after arrest, granted--Pistol was handed over to co-accused for killing--Allegation was neither contained in FIR nor prosecution witnesses--Petitioner was merely present at the spot and had not performed any act leading to the death of deceased--Evidence of conspiracy/abetment hatched by the petitioner has also not been brought on the record in so many words, therefore, in this manner the involvement of the petitioner and his guilt calls for further inquiry, entitling him for the concession of bail. [P. 270] A

Mr. Muhammad Waseem Jaskani, Advocate for Petitioner.
Malik Muhammad Jafar, Deputy Prosecutor General for State.
Mr. Mushtaq Ahmad Ch., Advocate for Complainant.
Date of hearing: 23.1.2014.

Order
By filing instant criminal miscellaneous petition, the petitioner Ali son of Sheikh Muhammad Azam prays for his release on post arrest bail in case FIR No. 414/2013, registered under Sections 302/34 PPC read with Section 7 of Anti-Terrorism Act, 1997 and Section 13 of Arms Ordinance, 1965 with Police Station Civil Lines, D.G. Khan.

2. Precisely the allegation against the petitioner was that his co-accused Muhammad Saleem had killed Riaz Hussain by making fire at his person with pistol whereas the petitioner alongwith two other persons was present at the spot. Muhammad Saleem was taken into custody by the police at the spot and crime weapon was also recovered from him. In the same crime report it is further alleged by the complainant that the occurrence had taken place at the behest of the petitioner and his co-accused.

3. We have heard the learned counsel for the parties and examined the record.

4. On query of the Court as to what overt act the petitioner had performed in the occurrence, learned counsel appearing on behalf of the complainant submitted that the petitioner had handed over the pistol to Saleem co-accused for killing Riaz Hussain. When this explanation has been examined in the light of available record, it is found that this allegation is neither contained in the first

information report nor the PWs, whose statements were recorded under Section 161, Cr.P.C., have supported this allegation. The record further depicts that the petitioner was merely present at the spot and had not performed any act leading to the death of Riaz Hussain. The evidence of conspiracy/abetment hatched by the petitioner has also not been brought on the record in so many words, therefore, in this manner the involvement of the petitioner and his guilt calls for further inquiry, entitling him for the concession of bail.

5. For the foregoing reasons, the petition is accepted and the petitioner Ali son of Sheikh Muhammad Azam is admitted to bail on furnishing of bail bonds in the sum of Rs. 200,000/- (Rupees Two Lac only) with one surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail accepted

PLJ 2014 Cr.C. (Lahore) 271
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
PITRAS MASEEH--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 1271-B of 2013, decided on 5.4.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 337-F(v), 337-A(iii), 148 & 149--Bail, grant of--Injury attributed to the petitioner was on the left ribs of the complainant with the help of sota which was covered by Section 337.F(v), PPC and maximum punishment of same was five years which does not fall within the ambit of prohibitory clause--Moreover, there was a delay of about 18 days in lodging the FIR without any explanation as the occurrence in this case and FIR was lodged--Petitioner was behind the bars investigation of the case was complete and he was no more required for the purpose of investigation and at this stage, there will be no useful purpose to keep him behind the bars before conclusion of trial. [P. 272] A

Ch. Muhammad Saeed, Advocate for Petitioner.
Mr. Muhammad Amjad Rafiq, DPG for State.
Date of hearing: 5.4.2013.

Order
Petitioner seeks post-arrest bail in case FIR No. 257/2011 registered under Sections 337-F(v), 337-A(iii), 148, 149, PPC at Police Station Rangpur, Muzaffargarh.

2. I have heard the learned counsel for the petitioner as well as learned DPG and perused the record.

3. As per FIR, injury attributed to the petitioner is on the left ribs of the complainant with the help of sota which is covered by Section 337-F(v), PPC and maximum punishment of same is five years which does not fall within the ambit of prohibitory clause. Moreover, there is a delay of about 18 days in lodging the FIR without any explanation as the occurrence in this case took place on 24.11.2011 and FIR was lodged on 13.12.2011. Petitioner is behind the bars since 01.10.2012, investigation of the case is complete and he is no more required for the purpose of investigation and at this stage, there will be no useful purpose to keep him behind the bars before conclusion of trial. Resultantly, I allow this petition and admit the petitioner to bail subject to furnishing bail bond in the sum of Rs. 1,00,000/-(one lac) with one surety in the like amount to the satisfaction of trial Court.

(A.S.) Bail granted

PLJ 2014 Cr.C. (Lahore) 280
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
MUHAMMAD JAVAID--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 1134-B of 2013, decided on 17.4.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 395, 412--Bail, grant of--Although the petitioner was not nominated in FIR but later on the complainant involved him along with one co-accused through supplementary statement recorded after 2« months of the alleged occurrence--Petitioner along with co-accused was arrested in this case and both of them were identified by complainant and one eye-witness and allegedly, stolen articles were recovered from the petitioner and other co-accused but later on, the complainant twisted his stance and the appeared before the Sessions Judge during the proceedings of bail application filed by co-accused in which he submitted his affidavit--Although, in his affidavit he has stated that he has no objection if the bail application of accused is allowed but before the Court his statement on oath was recorded and on oath the submitted that "the accused has satisfied me regarding his innocence to his extent" this twisted stance of the complainant creates some sort of doubt on the involvement of the petitioner and co-accused in this case--Co-accused was granted bail by the trial Court--Case of the petitioner was at par with co-accused--When the complainant himself admits the innocence of co-accused who was involved and identified by the complainant in identification parade, then case of the petitioner also becomes one of further inquiry as veracity of identification parade and the statement of the complainant and other PWs will be evaluated by the trial Court after recording of evidence--Petitioner was behind the bars since arrest, investigation of the case was complete and challan has been submitted before the trial Court. [P. 281] A

Mr. James Joseph, Advocate for Petitioner.
Malik Muhammad Jaffar, DPG for State.
Khawaja Qaisar Butt, Advocate for Complainant.
Date of hearing: 17.4.2013.

Order
Petitioner seeks post arrest bail in case FIR No. 110/2012 registered under Sections 395/412, PPC at Police Station City Kehror Pacca, Lodhran.

2. I have heard learned counsel for the parties as well as learned DPG and perused the record.

3. Although the petitioner was not nominated in FIR but later on, the complainant involved him along with one Abdul Rasheed through supplementary statement

recorded after 2« months of the alleged occurrence. Petitioner along with Abdul Rasheed was arrested in this case and both of them were identified by Javed Iqbal, complainant and one Fazal Ahmad, eye-witness and allegedly, stolen articles were recovered from the petitioner and other co-accused but later on, the complainant twisted his stance and he appeared before the learned Sessions Judge during the proceedings of bail application filed by co-accused Abdul Rasheed in which he submitted his affidavit. Although, in his affidavit he has stated that he has no objection if the bail application of Abdul Rasheed accused is allowed but before the Court his statement on oath was recorded and on oath the submitted that "the accused has satisfied me regarding his innocence to his extent" this twisted stance of the complainant creates some sort of doubt on the involvement of the petitioner and Abdul Rasheed accused in this case. Abdul Rasheed, co-accused was granted bail by the learned trial Court. The case of the petitioner is at par with co-accused. When the complainant himself admits the innocence of co-accused Abdul Rasheed, who was involved and identified by the complainant in identification parade, then case of the petitioner also becomes one of further inquiry as veracity of identification parade and the statement of the complainant and other PWs will be evaluated by the learned trial Court after recording of evidence. Petitioner is behind the bars since arrest, investigation of the case is complete and challan has been submitted before the trial Court.

4. For what has been discussed above, this petition is allowed and petitioner are admitted to bail subject to furnishing bail bond in the sum of Rs. 1,00,000/- (one lac) with one surety in the like amount to the satisfaction of trial Court.

(A.S.) Bail granted

PLJ 2014 Cr.C. (Lahore) 413
[Multan Bench Multan]
Present: Muhammad Qasim Khan, J.
MUHAMMAD RAMZAN--Petitioner
versus
STATE & another—Respondents

Crl. Misc. No. 3779-B of 2013, decided on 10.9.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 452, 436, 148 & 149--Bail, grant of--Rule of consistency--None of witnesses had described source of fire--Held: No allegation of causing any injury to deceased or any PW- has been leveled against petitioner--Civil litigation is pending between parties--Four of nominated accused have been declared innocent during investigation--One of co-accused who had forcibly entered house of complainant and put household articles in Courtyard of house, had already been enlarged on bail--In such circumstances, case of petitioner squarely falls within ambit of Section 497(2), Cr.P.C. [P. 414] A

Rana Asif Saeed, Advocate for Petitioner.
Malik Riaz Ahmad Saghla, Deputy Prosecutor General for State.
Mr. Tariq Saleem Chaudhry, Advocate for Complainant.
Date of hearing: 10.9.2013.

Order
Muhammad Ramzan/petitioner seek post arrest bail in case FIR No. 246, registered at Police Station Harappa, District Sahiwal, on 20.06.2012, for offences under Sections 302, 452, 436, 148 & 149, PPC.

2. After hearing the learned counsel for the parties and going through the record, I have noted that though the petitioner is named in the FIR with role of entering in the house of complainant and setting on fire the household articles but in their statements, none of the witnesses has described the source of fire. No allegation of causing any injury to the deceased or any PW- has been levelled against the petitioner. Civil litigation is pending between the parties. Four of the nominated accused have been declared innocent during investigation. One of the co-accused namely Arshad, who as per prosecution had forcibly entered the house of complainant and put the household articles in the Courtyard of the house, has already been enlarged on bail. In such circumstances, case of the petitioner squarely falls within the ambit of Section 497(2), Cr.P.C. Resultantly, this petition is accepted and the petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rupees Two Lac (Rs.2,00,000/-), with two sureties, each in the like amount, to the satisfaction of trial Court.

(R.A.) Bail accepted

PLJ 2014 Cr.C. (Lahore) 492 (DB)
[Multan Bench Multan]
Present: Muhammad Qasim Khan and Syed Iftikhar Hussain Shah, JJ.
MUHAMMAD ALI ABBAS--Petitioner
versus
STATE and 3 others—Respondents

Crl. Rev. No. 93 of 2013, decided on 2.4.2013.

Drugs Act, 1976 (XXXI of 1976)--
----S. 42--Registration of any drug can be suspended--Under Section 42 of Drugs Act, 1976 registration of any drug can be suspended for a specified period--The said section is re-produced for ready reference:
"Where any person has been found to have contravened any of the provisions of this Act, or the rules in this respect of any registered drug, the Registration Board may, after giving such person an opportunity of being hear, cancel the registration of such drug or suspend such registration for a specified period."
It is an admitted fact that registration certificate of M/s Ankaz Pharmex (Pvt.) Ltd. Karachi was suspended for nine months--Under Section 11 of Drugs Act, 1976 Punjab Quality Control Board is competent to scrutinize reports of Provincial Inspector in respect of contraventions of this Act and reports of Government Analysts in respect of drugs sent to them by Provincial Inspector for test and analysis and issue instructions to Inspectors as to action to be taken on such reports--Provincial Quality Control Board by exercising said power, directed Drug Inspector to prosecute petitioner under Section 23(v) of Drugs Act, 1976 for manufacturing, possessing and selling substandard drugs. [Pp. 495 & 496] A & B

Criminal Procedure Code, 1898 (V of 1898)--
----S. 403--Double Jeopardy--Principle of double jeopardy--A person who has once been tried by 3 Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for same offence, nor on same facts for any other offence for which a different charge from one made against him might have been made under Section 236, or for which he might have been convicted under Section 237." [P. 496] C

Maxim--
----Nemo debts bis vexari proeaden causes--This provision is based on Latin maxim "nemo debts bis vexari pro eaden causes (No person should be twice disturbed for same cause) which led to development of two common law principles of equity namely, autre fois acquit (acquitted formally) and autre fois convicted (convicted formally). [P. 496] D

Prosecution--
----Word and Phrases--Stroud's Judicial Dictionary explains term "prosecution" in following manner:--

""Prosecution" of an action ends with final Judgment therein."
According to Webster's New International Dictionary (2nd Edition)
word "prosecution" mans, inter alia, "process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of State or Government as by indictment or information.
And in Oxford Dictionary
"prosecution" means "following up, continuing, or carrying out of any action, scheme, or purpose, with a view to its accomplishment or attainment." [P. 497] E

Criminal Procedure Code, 1898 (V of 1898)--
----Ss. 265-K & 435 & 439--Drugs Act, 1976, S. 42--Conviction and sentence--Challenge to--Allegation of--Selling substandard drugs--Admittedly, petitioner has not been tried offence of keeping and selling of substandard medicines by any competent Court of law--Only charge has been framed in complaint against him and evidence was yet to be recorded and final order of acquittal or conviction was to be passed--Therefore, principle of double jeopardy cannot be said to have been invoked against petitioner--Order passed u/S. 42 ibid regarding cancellation or suspension of registration of registered drug was an administrative order and penalty of suspension of registration does not amount to acquittal or conviction of petitioner and others for offence allegedly committed by them for manufacturing, keeping and selling substandard drugs--Therefore, impugned order was in accordance with law--Revision dismissed. [P. 497] F

Rana Muhammad Maqsood Afzal Khan, Advocate for Petitioner.
Mr. Munir Ahmad Sial, DPG as well as Mr. Zafarullah Khan, A.A.G. on Courts call for State.
Date of hearing: 2.4.2013.

Order
Muhammad Ali Abbas petitioner has assailed the legality of order dated 14.2.2013 passed by the learned Chairman Drug Court, Multan whereby application made by the petitioner under Section 265-K, Cr.P.C. was dismissed.

2. Succinctly, the facts of the case are that on 11.3.2009 Hassan Haider Shah, Drug Inspector Tehsil Arif Wala, District Pakpattan Sharif inspected the premises of the petitioner in the name and style of Ali Medical Store, situated at Thana Ahmad Yar Tehsil Arif Wala District Pakpattan Sharif and took sample of Suspension Biprim Forte Batch No. Y-225 manufactured by M/s Ankaz Pharmex (Pvt.) Ltd. Plot No. 24, Sector 12-A, North Karachi, Industrial Area, Karachi and sent the same for analysis to the Government Analyst Punjab Lahore and the Provincial Quality Control Board, Lahore. The Government Analyst Punjab declared the sample sub-standard vide its Letter No. 9682/DTL dated 28.3.2009. The petitioner challenged the said report before NIH Islamabad, which vide Report No. 076-P/2009 dated 11.12.2009, declared the same as substandard. Thereafter, the Provincial Quality Control Board Lahore issued notice for personal

hearing and granted sanction for the prosecution of the petitioner and formal complaint was filed by the Drug Inspector.

3. The challan was submitted before the Chairman Drug Court, Multan wherein the charge was framed against the petitioner on 9.5.2012 and the case was fixed for recording of evidence when an application under Section 265-K, Cr.P.C. was made, which was disallowed vide impugned order dated 14.2.2013. Hence, the present criminal revision petition.

4. Learned counsel for the petitioner has contended that the Provincial Quality Control Board has penalized the petitioner vide order dated 1.10.2012 and recommended for the suspension of the Registration Certificate of the Drug Biprim Forte Suspension of M/s. Ankaz Pharmex (Pvt.) Ltd. Karachi, which remained suspended for nine months, therefore, the Provincial Quality Control Board was not competent to grant permission for the prosecution of the petitioner and others; that a person cannot be vexed twice for the same offence, therefore, prosecution before the Drug Court amounts to double jeopardy.

5. On the other hand, learned A.A.G. has put appearance on Court's call and contended that order regarding the suspension of the license was administrative one and the petitioner has not been acquitted from any competent Court of law, therefore, the question of double jeopardy does not arise at all.

6. We have heard the learned counsel for the petitioner and the learned AAG and have also perused the record.

7. Under Section 42 of the Drugs Act, 1976 the registration of any drug can be suspended for a specified period. The said Section is re-produced for ready reference:--
"Where any person has been found to have contravened any of the provisions of this Act, or the rules in respect of any registered drug, the Registration Board may, after giving such person an opportunity of being hear, cancel the registration of such drug or suspend such registration for a specified period."

8. It is an admitted fact that registration certificate of M/s. Ankaz Pharmex (Pvt.) Ltd. Karachi was suspended for nine months. Under Section 11 of the Drugs Act, 1976 the Punjab Quality Control Board is competent to scrutinize the reports of the Provincial Inspector in respect of contraventions of this Act and reports of Government Analysts in respect of drugs sent to them by Provincial Inspector for test and analysis and issue instructions to the Inspectors as to the action to be taken on such reports. The Provincial Quality Control Board by exercising the said power, directed the Drug Inspector to prosecute the petitioner under Section 23(v) of the Drugs Act, 1976 for manufacturing, possessing and selling the substandard drugs.

9. The contention of the learned counsel for the petitioner is that by imposing penalty of suspension of license and the registration of the petitioner and license of M/s. Ankaz Pharmex (Pvt.) Lid. Karachi, further proceedings before the Drug Court amounts to double jeopardy and are in violation of Article 13 of the Constitution of Islamic Republic of Pakistan 1973. The said Article reads as under:--
"No person--
(a) shall be prosecuted or punished for the same offence more than once; or
(b) shall, when accused of an offence, be compelled to be a witness against himself."

10. The principle of double jeopardy has been provided under Section 403, Cr.P.C., which reads as under;--
"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237."
This provision is based on Latin maxim "nemo debts bis vexari pro eaden causes (No person should be twice disturbed for the same cause) which led to the development of two common law principles of equity namely, autre fois acquit (acquitted formally) and autre fois convicted (convicted formally). There are following pre-conditions for attracting the provisions of Section 403, Cr.P.C.
(i) There must have been earlier trial of the accused seeking protection against second trial for the offence charged;
(ii) The facts alleged in the earlier trial were the same sought to be proved in the second prosecution/trial;
(iii) The trial must have been conducted by a Court of competent jurisdiction; and
(iv) The trial must have ended in a judgment of conviction or acquittal."

11. Stroud's Judicial Dictionary explains the term "prosecution" in the following manner:--
"The "Prosecution" of an action ends with the final Judgment therein."
According to Webster's New International Dictionary (2nd Edition)
The word "prosecution" mans, inter alia, "the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the State or Government as by indictment or information.
And in the Oxford Dictionary
"prosecution" means "the following up, continuing, or carrying out of any action, scheme, or purpose, with a view to its accomplishment or attainment."

12. Admittedly, the petitioner has not been tried for the offence of keeping and selling of the substandard medicines by any competent Court of law. Only charge has been framed in the complaint against him and the evidence is yet to be recorded and the final order of acquittal or conviction is yet to be passed. Therefore, the principle of double jeopardy cannot be said to have been invoked against the petitioner. The order

passed under Section 42 ibid regarding the cancellation or suspension of registration of registered drug was an administrative order and the penalty of suspension of registration does not amount to acquittal or conviction of the petitioner and others for the offence allegedly committed by them for manufacturing, keeping and selling the substandard drugs. Therefore, the impugned order is in accordance with law.

For the foregoing reasons, the impugned order dated 14.2.2013 is hereby maintained and the revision petition stands dismissed in limine.

Sd/-

Muhammad Qasim Khan, J.

Sd/-

Syed Iftikhar Hussain Shah, J.

Muhammad Qasim Khan, J.--I have read the detailed judgment handed down by my learned brother and fully concur with the comprehensive reasoning given in the main order dated 02.04.2013. However, for further clarity of legal position, I would like to highlight another important aspect that by mere suspending or cancelling the licence of the manufacturer of drugs, the legal term "double jeopardy" cannot be made applicable while deciding the charge against an indict person by the Drugs Court and penalizing him under Section 27 of the Drugs Act, 1976. Section 5 of the Act, ibid, in terms deals with regulation of manufacturer of drugs and it provides that licence to a manufacturer of drug shall be regulated according to the conditions as well as procedure, which may be prescribed by Central Licensing Board. Section 7 of the Drugs Act, 1976 provides the conditions where the Registration Board is competent to cancel or suspend the registration. Section 7(11)(c)(d) of the Drugs Act, 1976 are reproduced hereunder for ready reference:--

"7. Registration of drugs:

(1) ----------

(2) ----------

(3) ----------

(4) ----------

(5) ----------

(7) ----------

(8) ----------

(9) ----------

(10) ----------

(11) If the Registration Board, on the basis of information received or an inquiry conducted by it, is of opinion that:--

(a) ----------

(b) ----------

(c) there has been a violation of the conditions subject to which a drug was registered; or

(d) it is necessary in the public interest so to do; the Registration Board may, after affording to the person on whose application the drug was registered an opportunity of showing cause against the action proposed to be taken, cancel or suspend the registration or specify any further conditions to which the registration shall be subject and inform such person and the Provincial Governments accordingly."

Rule 12 of the Drugs (licensing, Registering & Advertising) Rules, 1976 also deals with cancellation or suspension of licence and this rule provides that if a licencee did not comply with any of the conditions of the licence or if the licencee violates the provisions of the Ordinance or Rules, the Central Licensing Board may either cancel or suspend the licence for such period as it may deem fit. Suspension of licence of the petitioner under Section 41 of the Drugs Act, 1976 is a penalty under administrative domain of the Central Licensing Board, as whenever it received any information or any inquiry is conducted by the said Board itself, whereby, it forms an opinion that the licencee has breached any of provision of the license, the Board has the authority to proceed against him. As such, a thin of difference exists between the penalties provided under Section 27 of the Drugs Act, 1976 or a penalty for breach of conditions prescribed in the licence itself. Therefore, both these eventualities may be flowing or emerging from the same series, yet entail different, separate "but simultaneous impact and consequences, and thus, the order passed by the administrative authority for suspending or cancelling the licence cannot be equated with the punishment provided under Section 27 of the Act, ibid. Consequently, the argument of learned counsel about "double jeopardy" is held to be fallacious.

(A.S.) Revision dismissed

PLJ 2014 Lahore 547 (FB)
[Multan Bench, Multan]
Present: Muhammad Qasim Khan,
Muhammad Ameer Bhatti & Shahid Waheed, JJ.
BILAL AKBAR BHATTI--Petitioner
versus
ELECTION TRIBUNAL and others—Respondents

Writ Petition No. 11155 of 2013, heard on 19.2.2014.

Representation of the People Act, 1976--
----Ss. 52, 56(2) & 63--Constitution of Pakistan, 1973, Arts. 199 & 225--Notification of returned candidate was issued--Conduct of elections and election petitions for decision of doubts and disputes arising in connection with election--Election procedure was challenged--Validity--Once election process has been completed then it is exclusive jurisdiction of election tribunal to process election petitions with regard to election disputes--High Court cannot exercise jurisdiction under Art. 199 of Constitution with regard to post-election disputes--High Court can only exercise jurisdiction when order is illegal and aggrieved person becomes remediless and candidate has been disqualified and disfranchised and it is only in extraordinary circumstances that Court would aberrant sanctified rule--When a mechanism has been provided for decision of disputes arising out of elections, it could not be permitted to be bypassed through writ jurisdiction--Ordinarily, remedy provided by statute must be followed before appropriate authority--It is settled principle that where there is effective alternate remedy under statute, High Court will not exercise its jurisdiction as self imposed restriction and decline to interfere in elections matters, especially at intermediate stage. [Pp. 570, 571 & 572] A, F & G

Representation of the People Act, 1976--
----Ss. 52 & 67(1-A)--Scheme for resolving election dispute after completion of election process--Divine authority can be give to a person who is not real representative of the people of constituency--Election tribunal shall proceed with election petitions on day to day basis and decision thereof shall be taken within four months from its receipt and where delay in proceedings is occasioned by any act or omission of returned candidate or any person acting on his behalf, Tribunal shall refer to commissioner that such candidate may be declared by Commission to have ceased to perform functions of his office either till conclusion of proceedings or for such period as Commission may direct--Divine authority cannot be given to a person who is not real representative of the people of constituency and has been elected by violating law because Majlis-e-Shoora is sacred trust of the people of Pakistan consisting of sagacious, righteous, honest and ameen persons--Election tribunal is an independent body constituted under Section 57 of ROPA by Election Commission whose independence has been protected and guarded by Constitution; that a complete code of procedure for speedy trial has been provided to both parties of election petition; that each party to election petition has been provided opportunities of fair

hearing and, that right of appeal against final decision has been provided by ROPA before Supreme Court. [P. 570, 571 & 572] B, C & I

Interpretation of Statute--

----Interpretation of statute requires to advance purpose of legislation and any interpretation which would defeat object and purpose of statute, has to be avoided so that smooth working of scheme of legislation provided by statute be facilitated. [P. 571] D

Representation of the People Act, 1976--

----S. 67(3)--Issuance of notification of returned candidate--Dismissal of election petition--Interlocutory order--No right of appeal or revision against interlocutory order--Wait for final decision of election tribunal--Maintainability of petition--By doing this we would deprive the person of his substantive right of appeal provided under Section 67(3) of ROPA to the Hon'ble Supreme Court of Pakistan. [P. 571] E

Constitution of Pakistan, 1973--

----Art. 10-A--Basic ingredients for a fair trial--Right of fair trial is essential right in all countries respecting rule of law. [P. 571] H

Constitution of Pakistan, 1973--

----Arts. 199 & 225--Representation of the People Act, 1976, Ss. 52, 56(2) & 63--Issuance of notification of returned candidates--Interim order dismissing application which was assailed through petitions--Constitutional petition--Maintainability of--High Court was inclined to dismiss petitions--(i) that post election disputes to a House or a Provincial Assembly cannot be questioned by invoking jurisdiction of High Court under Art. 199 of Constitution; (ii) that when a thing is required to be done in a particular manner, it should be done in that way alone and otherwise whole proceedings would be void; (iii) that intention of Art. 225 of Constitution read with provisions of ROPA, is that election disputes should only be referred to Election Tribunals through election petitions; (iv) that High Court cannot sit in appeal over decision/order of Election Tribunal or statutory authorities and substitute their decision with its own; (v) that appeal is a substantive right in which whole dispute including an order on a preliminary objection of law and fact is reopened and reexamined--If by exercising jurisdiction under Art. 199 of Constitution High Court interfere with interlocutory order of tribunal, then High Court would be encroaching upon rights of aggrieved person to approach Supreme Court through a direct appeal; (vi) that intention of law is that election disputes should be resolved through uninterrupted expeditious trial--Such intention of legislature cannot be negated by entertaining constitution petition under Art. 199 of Constitution against interlocutory/interim orders of Election Tribunal; (vii) that ROPA, which excludes a right of appeal from interim orders of Election Tribunal, cannot be bypassed by brining under attack such interim orders in constitutional jurisdiction of this Court--Party affected has to wait till it matures into a final decision and then to attack it in proper exclusive forum, that is, Supreme Court; (viii) that orders at interlocutory stages should not be brought to High Court to obtain fragmentary decisions, as it

tends to harm advancement of fair play and justice, curtailing remedies available under law, even reducing right of appeal; (ix) that Parliament and Provincial Assemblies open their doors to those persons who are sagacious, righteous, honest and Ameen and thus it is imperative to remove any shadow of doubt on character of representatives of people at earliest--To achieve this object a special law, that is, ROPA, has provided a speedy mechanism which cannot be allowed to be deflected by exercising jurisdiction under Article 199 against interlocutory/ interim orders of Election Tribunal. [Pp. 573 & 574] J

Mr. Muhammad Khalid Ashraf Khan and Mr. Mehmood Ashraf Khan, Advocates for Petitioner in W.P. No. 11155/2013.
Mian Abbas Ahmad and M. A. Hayat Haraj, Mian Muhammad Shahid Riaz, Advocates for Petitioner in W.P. No. 11666/2013 and W.P. No. 1078/2014.
Sheikh Jamshaid Hayat, Advocate for writ petitioner in W.P. No. 12725/2013.
Syed Muzamil Hassan Bokhari, Advocate for writ petitioner in W.P. No. 11960/2013.
Rana Muhammad Asif Saeed, Advocate for Petitioner in W.P. No. 13668/2013 in W.P. No. 1594/2014.
Malik Mushtaq Ahmad Ghumb, Advocate for Petitioner in W.P. No. 1430/2014.
Mr. Tipu Sultan Makhdoom and Mr. Saeed Ahmad Cheema, Advocate for Petitioner in W.P. No. 1512/2014.
Syed Muhammad Ali Gillani, Advocate for Respondents in W.P. No. 11155/2013.
Ch. Abdul Sattar Goraya, Mr. Muhammad Masud Bilal, Mehr Imtiaz Hussain Mirali, Rana Muhamamd Imran, Advocates for Respondents in W.P. No. 11666/2013 and W.P. No. 1078/2014.
Ch. Sagheer Ahmad, Advocate for Respondent in W.P. No. 12725/2013.
Syed Riaz-ul-Hassan Gillani, Advocate for respondent in W.P. No. 11960/2013.
Mr. Mughees Aslam Malik, Advocate for Respondent in W.P. No. 13668/2013 and W.P. No. 1594/2014.
Mahr Irshad Ahmad Arain, Advocate for Respondent in W.P. No. 1430/2014.
Mr. Irshad Arain, Advocate for Respondent in W.P. No. 1512/2014.
Mr. Muhammad Naveed Rana, Standing counsel for the Federation.
Mr. Zafarullah Khan Khakwani, Assistant Advocate General.
Sardar Riaz Karim and Sardar Sarfraz Dogar, Advocates as amicus curiae.
Dates of hearing: 10, 11, 12, 13, 14, 17, 18 and 19.02.2014.

Judgment

Muhammad Qasim Khan, J.--Four constitution petitions i.e. (i) Writ Petition No. 11155/2013 "Bilal Akbar Bhatti versus Election Tribunal and others", (ii) Writ Petition No. 11666/2013 "Muhammad Raza Hayat Hiraj versus Election Commission Of Pakistan and others", (iii) Writ Petition No. 12725/2013 "Mehdi Abbas versus Election Tribunal and others" and (iv) Writ Petition No. 11960/2013 "Makhdoom Javed Hussain Hashmi versus The Election Commission Of Pakistan and others", were heard by a learned Division Bench of this Court comprising our learned brothers Ibad-ur-Rehan Lodhi and Mahmood Ahmad Bhatti. JJ. There being difference in opinion as to the decision of writ petitions, matters were placed before

the Hon'ble Chief Justice of the Lahore High Court, Lahore and it was ordered that the matter be heard by one of us (Muhammad Qasim Khan, J.) as a Referee Judge. Similarly, two other writ petitions i.e. Writ Petition No. 1078/2014 "Muhammad Raza Hayat Haraj versus Election Commission and others" and Writ Petition No. 1430/2014 "Saeed Ahmad Khan versus Election Commission Of Pakistan and others" were filed and as in all the writ petitions similar questions of law were involved, therefore, one of us (Muhammad Qasim Khan, J.) as a Referee Judge directed the office to club and place these matters before the Hon'ble Chief Justice, with a request for Constitution of a larger Bench and the Hon'ble Chief Justice vide order dated 08.02.2014 constituted this Bench as a Referee Bench for decision of all these matters. During proceedings of this Bench, some other petitions (Writ Petition No. 13668/2013 "Muhammad Arshad Malik versus The Election Tribunal, etc, Writ Petition No. 1078/2014 "Muhammad Raza Hayat Haraj versus Election Commission Of Pakistan, etc. Writ Petition No. 1430/2014 "Saeed Ahmad Khan Manais versus Election Commission Of Pakistan, etc. Writ Petition No. 1512/2014 "Syed Hussain Jahanian Gardezi, etc. versus Punjab Election Tribunal, etc." and Writ Petition No. 1594/2014 "Ch. Muhammad Hanif Jatt versus Election Tribunal, etc. were also placed before us.

2. For clarity of issue, briefly the facts are that after issuance of notification of the returned candidates of their respective National and Provincial Assemblies, the opposing contesting candidates filed Election Petitions before the Election Commission as provided under Section 52 of the Representation of Peoples Act, 1976 (hereinafter to be called as ROPA), and they were referred to the Election Tribunal for trial under Section 56(2). During trial the petitioners filed application under Section 63 of the ROPA for dismissal of Election Petition on the ground that the same did not conform to the mandatory provisions of Section 54 or 55 of the ROPA. The Election Tribunal dismissed the above said application. The interim order dismissing applications under Section 63 of the ROPA filed by the writ petitioners has been assailed through the instant petitions. In one case interim order allowing an application under Section 151, CPC filed by one respondent/election petitioner for amendment in verification, has been questioned.

3. Perusal of ROPA and survey of the judgments cited by the learned counsels for the parties, evinces that under Section 54 of the ROPA, the petitioner of Election Petition shall join as respondents to his Election Petition, all the contesting candidates and any other candidate against whom any allegation of corruption or illegal practice (that is corrupt practice or an illegal practice within the meaning of Chapter-VIII of ROPA) is made and serve personally or by registered post a copy of the petition; and that the contents of Election Petition and even "schedule" or "annexures" to that Petition shall be signed by him and verified in the manner laid down in Civil Procedure Code, 1908 (Act of 1908) for the verification of pleadings. The survey of the ROPA and the judgments pronounced by the apex Court from time to time in this regard vouchsafe following principles:--

(i) that Section 63 of the ROPA does not contain any direction that petition shall be dismissed, even if there be a partial failure to comply with the provisions of

Section 55, ex-facie Section 63 of the ROPA would seem to be designed to cover the case where the Petition as a whole made allegations of vague and indefinite character without being supported by full particulars of the corrupt or illegal practice. "S.M. Ayub versus Syed Yusaf Shah, etc" (PLD 1967 Supreme Court 486).

(ii) that Section 62(3) of the ROPA evinces the anxiety of the legislature to provide for the adjudication of substantial disputes between the parties insofar as it amounts to amendment of a petition to bring out the real points at issue, S.M. Ayub vs. Syed Yousaf Shah etc. (PLD 1967 Supreme Court 486).

(iii) that if the petition taken as a whole fails to comply with the provisions of Section 55 of ROPA, it shall be dismissed as revealing no cause of action for the reason that policy of ROPA is to discourage Election Petition, even during trial, if genuine grounds for challenging an election does not exist.

(iv) that by "schedule or annex" mentioned in Section 55(3) of the ROPA is apparently meant such a schedule and annexures as either makes additional allegations of a substantive character against the opposite party, or at least furnishes better particulars of the allegations made in the petition, so as to give them the status of substantive grounds of the petition itself. "S.M. Ayub versus Syed Yusaf Shah, etc." (PLD 1967 Supreme Court 486).

(v) that pleadings are to be verified on oath and the oath is to be administered by a person who is duly authorized in that behalf. Non-verification or non-attestation of oath by an authorized person is fatal. "Engr. Iqbal Zafar Jhagra and others versus Khalilur Rehman and 4 others" (2000 SCMR 250).

(vi) that Public documents do not require any verification. "Bashir Ahmed Bhanbhan and another versus Shaukat Ali Rajpur and others" (PLD 2004 SC 570).

(vii) that Oath is to be practically administered.

(viii) that requirement of Section 55 of the ROPA would be gone into by the Tribunal itself and not by the Chief Election Commissioner. Such objection can validly be raised before the Tribunal and Tribunal alone. "Sardarzada Zafar Abbas and others versus Hassan Murtaza and others" (PLD 2005 Supreme Court 600).

(ix) that there is no material difference between verification on oath and of verification through affidavit. An affidavit is sworn statement while the verification is confirmation in law by oath in order to establish the truth, accuracy and reality of a statement of facts. Thus, there is practically no difference whatsoever by verifying a statement on oath and by verifying the same statement on affidavit. It also loses significance when such affidavit on oath is attested by the authority competent to administer oath;

(x) that failure to give reference to the paragraphs of the pleadings as to what he happened to verify according to his own knowledge and what he happened to believe upon information received and believed to be true, is immaterial. "Moulvi Abdul Qadir and others versus Moulvi Abdul Wassay and others" (2010 SCMR 1877).

(xi) that amendment to remove the defects in verification of Election Petition and its annexures on Oath or solemn affirmation before a person authorized to administer Oath can be allowed by the tribunal during the period of limitation prescribed for

filing of Election Petition. PLD 2007 SC 362 (Malik Umar Aslam vs. Sumera Malik). CA No. 963 of 2013 decided on 26-09-2013 (Saeed Ahmad Qureshi vs. Haji Ehsan-ud-Din Qureshi).

(xii) that non-verification of pleadings on Oath or solemn affirmation before a person not authorized to administer Oath would be deemed not duly verified on Oath. "Malik Umar Aslam vs. Sumera Malik" (PLD 2007 SC 362).

(xiii) that Sections 62 and 63 of ROPA are independent of each other. "Malik Umar Aslam vs. Sumera Malik" (PLD 2007 SC 362).

(xiv) that if there are allegations that the returned candidate is a defaulter of loan, taxes, Government dues or utility charges, or has submitted a false or incorrect declaration regarding payment of loans, taxes, Government dues or utility charges, or has submitted a false or incorrect statement of assets and liabilities of his own, his spouse or his dependents under Section 12, then such allegations are not required to be verified on Oath.

(Section 76-A of the Representation of People Act, 1967)

4. Learned counsel for the petitioners, after relying upon the above cited decisions of the Hon'ble Supreme Court of Pakistan whereby the above quoted principles were established, submit that the order passed by the learned Election Tribunal by dismissing the application of the petitioners filed under Section 63 of ROPA is illegal; that this Court has ample jurisdiction to correct the illegality committed by the Election Tribunal; and that under Article 199(5) of the Constitution of the Islamic Republic of Pakistan, 1973, Tribunal falls within the definition of "Person" and thus this Court has jurisdiction to strike down the impugned order by issuing writ of certiorari as otherwise the petitioners would become remediless against the orders impugned in these petitions. On the other hand the learned counsel appearing on behalf of respondents vehemently opposed these petitions and submitted that instant petitions assailing the interim order of the Election Tribunal are not maintainable due to lack of jurisdiction and thus liable to be dismissed.

5. The learned Division Bench which had differed in opinion did not formulate any question to be resolved by the Referee Bench, thus, we, after examining the judgments of both the learned Members of the Division Bench, framed following questions of law to be resolved:--

(i) Whether Article 225 of the Constitution of the Islamic Republic of Pakistan, 1973 ousts the jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 with regard to post election disputes?

(ii) Whether jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 may be exercised against interlocutory orders passed by the Election Tribunal during the process of trial?

6. In order to provide the peg on which the above referred questions are to be hung, it is necessary to survey the case law on the subject.

(i) "Badarul Haque Khan versus The Election Tribunal, Dacca and others" (PLD 1963 SC 704) In this case against the order of the Election Tribunal a writ petition was filed and a Division Bench in constitutional jurisdiction set-aside the order of the

Election Tribunal resulting in leave to appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court converted the same into Civil Appeal and held as under:--

"The order of the Tribunal was attacked as without lawful authority also on the ground that it misinterpreted the provisions of the Representation of the People Act and held the simple appearance of the respondent's name on the contractors' list to be a sufficient disqualification. It is urged that this was a clear error of law and such an error would make the decision "without lawful authority". The proposition is indisputable that when there is jurisdiction to decide a particular matter then there is jurisdiction to decide it rightly or wrongly and the fact that the decision is incorrect does not render the decision without jurisdiction. I do not see any difference in a case where the question of law decided is a matter on which two opinions can easily be held and a case where the decision on a question of law appears to be clearly erroneous. It would not make difference that on logical reasoning the interpretation of law by the Tribunal could not be supported. Unless a case of mala fides or a mere colourable exercise of jurisdiction could be made out the decision would not be without lawful authority. If an order can be without legal authority because of a clearly wrong determination of a question of law, it should be without legal authority even in case of a clearly wrong determination of a question of fact. There is no reason for any distinction in this connection between a decision on a question of law and a decision on a question of fact. So if we were to accept the proposition that clearly erroneous decisions are without lawful authority the Court acting under Article 98 would constitute itself a Court of appeal for matters of fact as well as matters of law.

ORDER OF THE COURT

We allow this appeal and direct that the writ issued by the High Court to quash the decision of the Election Tribunal should be recalled. We leave the parties to bear their own costs."

(ii) In the landmark judgment handed down in the case of "Mian Jamal Shah versus The Member Election Commission, Government Of Pakistan, Lahore and others" (PLD 1966 SC 1), the question of jurisdiction conferred upon the High Court by Article 98 of the Constitution of 1962 (corresponding Article 199 of the Constitution of Islamic Republic of Pakistan, 1973) in relation to the election disputes, for which the provision was made by Article 171 (Corresponding Article 225 of the Constitution of 1973) and the law made in compliance there with, was considered at length, and it was held as under:--

"The position has throughout been that election disputes had been totally excluded from the jurisdiction of the High Courts. The whole law relating to the conduct of elections and in particular to balloting, ie discrimination between valid and invalid votes, as well as in relation to corrupt practices and other illegalities such as could vitiate an election or entail the loss of franchise by individuals has remained throughout sealed territory qua the jurisdiction of the High Court.

Further, it was held that:--

I say this, not with reference to anything arising in this case directly, but for the reason that where the Parliamentary and judicial traditions are not indigenous, nor of any long standing but where the Constitution expressly provides for differentiation of functions between the three great organs of the State, it is a major consideration of

great weight that its provisions should not be interpreted in a manner which enables one of those organs to interfere directly with matters which the Constitution has placed exclusively within the authority of another organ for "final determination". In direct contrast to the provision now obtaining in England that election disputes are referred to the High Court for determination under the special provisions referred to above, in our Constitution, Article 171 requires that such matters should go before specified authorities and Tribunals for "final determination." These authorities and Tribunals exercise in the relevant respect jurisdiction which does not and never did belong to the High Court, but is an essential part of Parliamentary jurisdiction, that has been by law entrusted to specified, authorities to operate.

The apex Court also observed:--

Anything in the nature of the exercise of a full scale appellate jurisdiction must, be rigorously avoided by the High Court, for that would be to override the requirement of the Constitution that the power under Article 98 should be exercised so as to give full effect to the terms of such a provision, as that contained in Article 171.

(iii) "Nawab Syed Raunaq Ali and others versus Chief Settlement Commissioner and others" (PLD 1973 SC 236). In this case, it has been held as under:--

"Finality given by Legislature to decision of certain Tribunal which also has jurisdiction to decide finally facts upon which its own jurisdiction founded-Decision, in such case, cannot be called into question in any collateral proceeding by another tribunal or body of limited jurisdiction.

It is no doubt true that there is a clear distinction between an act wholly without jurisdiction and an act done in the improper exercise of that jurisdiction. Where there is jurisdiction to decide, then as it has often been said there is jurisdiction to decider either rightly or wrongly, and merely a wrong decision doer not render the decision without jurisdiction. To amount to a nullity, an act must be non-existent in the eye of law; that is to say, it must be wholly without jurisdiction or performed in such a way that the law regards ft as a mere colourable exercise of jurisdiction or unlawful usurpation of jurisdiction."

(iv) "Muhammad Azam Faruqui versus Moulana Muhammad Shafi Okarvi and others" (1974 SCMR 471). In this case an order of the Election Tribunal refusing to dismiss election petition under Section 60 of the National and Provincial Assemblies (Elections) Ordinance XIII of 1970, was challenged before the Division Bench, and ultimately in the cited case the apex Court held as under:--

In these facts and circumstances we agree with the learned Judges of the High Court that under Section 64(3) of the Ordinance no appeal lay from the order of a Tribunal which was not an order passed under Section 63(1) of the Ordinance upon the conclusion of the trial of an election petition. We may add that the said Ordinance does not contemplate piecemeal trial of an election petition. The objection of the petitioners under Section 60 of the Ordinance could and should have been considered at the trial of the petition.

It may be noted here that under Section 59 of the Ordinance, the election petition is triable as nearly as may be in accordance with the procedure for the trial of suit under the Code of Civil Procedure and that the Tribunal is authorised at any time upon such terms and on payment of such fees as it may direct, to allow a petition to

be amended in such manner as may, in its opinion, be necessary for ensuring a fair and effective trial and for determining the real questions at issue, so however that no new ground of challenge to the election is permitted to be raised. In the present case it appears that the Election Tribunal was satisfied that prima facie the provisions of Section 52 of the Ordinance had been complied with. Nevertheless, issues have already been framed on the allegations of corrupt and illegal practices and the petitioner is not precluded from challenging at trial that the sail allegations are vague or that they have not been proved.

(v) "Mian Zahid Sarfraz versus Raja Nadir Pervaiz Khan and others" (1987 SCMR 1107). In this case Election Tribunal turned down preliminary objection, this order was assailed under Section 67(3) of the ROPA by way of an appeal. Preliminary objections were raised by learned counsel for respondents with regard to its competence as under Section 67(3) of the ROPA, an appeal could be filed against the final order. The Hon'ble Supreme Court discussed general principles from Corpus Juris Secundum to the following effect:--

"The general principle has been expressed in the following words in Volume 4 of Corpus Juris Secundum at Pages 89, 238 and 244:--

"As a general rule, a writ of error lies only from a final judgment or decree or an award in the nature of a final judgment. Such rule represents a policy of the law which is quite uniformly adhered to; but the rule is not inflexible, since it is held to be not jurisdictional with the reviewing Court, and the writ may be extended by statutes not only to final judgments but also to orders granting a new trial, or to a refusal to enter judgment for want of a sufficient affidavit of defense. It is the general rule, therefore, that an appeal, writ of error, exceptions, or other proceeding for review will not lie from or to an interlocutory or intermediate decision unless it is expressly permitted by statutes, rule, or constitutional provision The policy behind, or the ground for, the statutes, rules of Court, and decisions embodying this principle is that litigation should not proceed piece-meal, that intermediate appeals would unduly delay the final disposition of litigation, and that a complete disposition of the matter in the trial Court may make an appeal moot."

And ultimately, the Hon'ble Supreme Court upheld the preliminary objections with regard to competence of the appeal.

(vi) "Mian Ghulam Dastigir Bari versus Rai Salah-ud-Din and 3 others" (PLD 1987 LAHORE 39). This is a case wherein, against an interim order passed by the Election Tribunal, writ petition was dismissed by this Court, with the following observations:

"Election petition-Error-in-interlocutory orders-Assailing of such order-calling in question of election is prohibited except through determination of Election Tribunal-Provision of right of appeal under S. 67(3), Act LXXXV of 1976, held, was manifestation of intention of law-maker that proceedings before Election Tribunal be continued uninterrupted - Error-in-interlocutory orders of Election Tribunal could be assailed in appeal against final order.

Constitutional jurisdiction, exercise of-Prohibition contained in Art. 225 of Constitution that validity of elections could not be called in question except through the manner prescribed thereby is absolute Constitutional jurisdiction under Art. 199 being subject to other provisions of Constitution could not be exercised in derogation,

of Art. 225 of Constitution of Pakistan (1973) -- Merely because interlocutory order is not appealable, would be no ground to render same to constitutional jurisdiction."

(vi) "Bhagwandas versus The Returning Officer and others" (1990 SCMR 1228). In this case, the Hon'ble Supreme Court of Pakistan, held as under:--

"It is to be noticed that the election petition is still pending before the learned Election Tribunal and has not yet been finally disposed of. In the case of Zahid Sarfraz v. Nadir Pervez Khan 1987 SCMR 1107, this Court examined the types of orders from which appeals can be preferred under Section 67(3), Representation of the People Act. The view taken was that only such types of orders as were enumerated in Section 67(1) of the Act were appealable before this Court. Clearly, the order from which the appellant has preferred these two appeals, is not the type of order which can by any means be treated as one falling under the said enumeration. These appeals are, therefore, incompetent and are hereby dismissed in limine."

(vii) "Muhammad Baran and others versus Member (Settlement and Rehabilitation), and others" PLD 1991 SC 691. This is a case wherein, number of writ petitions were filed after decision of the Single Bench, matter was assailed before the Hon'ble Supreme Court of Pakistan and it was observed:--

"an order in the nature of certiorari or mandamus is a discretionary order. Its object is to foster justice and right a wrong. Therefore, before a person can be permitted to invoke this discretionary power of a Court, it must be shown that the order sought to be set aside had occasioned some injustice to the parties. If it does not work any injustice to any party, rather it causes a manifest illegality, then the extraordinary jurisdiction ought not to be allowed to be invoked.

(viii) "Muhammad Tariq Chaudhry, Member Senate of Pakistan Islamabad and Syed Masroor Ahsan and 3 others" (PLD 1991 Lahore 200). In this case the election of Member of Senate was assailed and this Court held as under:--

"The opening clause of Article 199 of the Constitution provides "Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law" indicates that the provisions containing in this Article are controlled by other provisions of the Constitution.

One of the main allegations against the successful candidate was that he filled in the nomination form and concealed having been indicted and convicted in criminal cases thereby earned disqualification to be member of the Senate, for his misconduct in the process of election---Filling up nomination paper for filing thereof being a step in the process of election, was only assailable by means of election petition as envisaged under Art. 225 of the Constitution read with Ss. 31 and 34, Senate (Election) Act, 1975---Article 225, Constitution of Pakistan by its mandate had created an independent jurisdiction for resolution of the election disputes by the Election Tribunal after the election process was completed, jurisdiction of High Court under Art.199 of the Constitution was not available because said jurisdiction was subject to provisions of the Constitution including Article 225.

(ix) "Pir Sabir Shah versus Election Commission Of Pakistan and others" (PLD 1994 Lahore 516). In this case a Reference with regard to disqualification of two members was sent by the Speaker to the Chief Election Commission and the learned Chief Election Commissioner commenced proceedings on the reference and an

interim order was passed by Election Commissioner, which was assailed before the High Court in writ jurisdiction, wherein, it was held as under:--

"Under Section 8-B (3) of Political Parties Act, 1962, the final order/judgment to be passed by the Election Commission is appealable to the learned Supreme Court. This being so, the grievance of the petitioner, if any, against the impugned order may be agitated by him in full in appeal against the final order/judgment before the learned Supreme Court. It is well settled that in a case-like this, the decision should always be given in a consolidated form rather than to be fragmentary so as to avoid the multiplicity of the litigation."

(x) In the case "Ghulam Mustafa Jatoi versus Additional District & Sessions Judge/Returning Officer, N.A. 158, Naushero Feroze and others" (1994 SCMR 1299), the Hon'ble Supreme Court held that:--

"The upshot of the above discussion is that generally in an election process the High Court cannot interfere with by invoking its Constitutional jurisdiction in view of Article 225 of the Constitution. However, this is subject to an exception that where no legal remedy is available to an aggrieved party during the process of election or after its completion, against an order of an election functionary which is patently illegal/without jurisdiction and the effect of which is to defranchise a candidate, he can press into service Constitutional jurisdiction of the High Court. The majority view in the case of Election Commission of Pakistan v. Javaid Hashmi (supra) is not applicable. We may clarify that we do not intend to overrule the above majority view in the above case. The above case in fact is distinguishable from the instant case for the reasons already discussed hereinabove."

(xi) "Dr. Sheela B. Charles versus Election Tribunal and another" (1996 CLC 344) The facts of this case are that two contesting candidates filed Election Petition before the Election Tribunal against Dr. Sheela B. Charles. During pendency of the Election Petition Dr. Sheela B. Charles filed preliminary objections before filing written statement and this petition was dismissed. Interim order was assailed through writ petition and this Court, held as under:--

"As observed above, the order dated 09.08.1994 is interlocutory one and with jurisdiction and the learned Election Tribunal has yet to pass final orders in the election petitions. The final order which includes any interlocutory order like the impugned order dated 9-8-1994, is subject to incidence of appeal under Section 67 of the Representation of People Act, 1976 before the Hon'ble Supreme Court. Therefore, on this ground alone, we think that the writ petitions are not maintainable against the impugned order dated 9-8-1994."

This judgment was upheld by the Hon'ble Supreme Court and the judgment of Hon'ble Supreme Court is reported as "Sheela B. Charles versus Election Tribunal and another" (1997 SCMR 941). The relevant extract of above judgment is as follows:--

".....that the Election Laws provide hierarchy for impugning the election and the orders passed by the Election Tribunal. If the above orders of the Election Tribunal are illegal, the same can be challenged by the petitioner if eventually the election petition is decided against her but the proceedings of an election petition cannot be stayed at this stage."

(xii) In another case "Sh. Rashid Ahmad versus The Election Tribunal, etc." (PLD 1993 Lahore 791), Election Petition was filed against the returned candidate and during hearing of the Election Petition an interlocutory order was passed and certain witnesses were summoned by the Election Tribunal. This interlocutory order was assailed by Sh. Rashid Ahmad through writ petition decided by a Division Bench of this Court, with the following observations:--

"The writ petition has been filed against an interim order. As per provision of Section 67 of the Representation of the People Act, 1976, any decision of the Election Tribunal is appealable to the Supreme Court. The word `decision' has been used in Section 67 of the Representations of the People Act, 1976, and it does not always refer to a final order. It shall also include an interim order. The petitioner if aggrieved by the order could have, hence filed an appeal before the Supreme Court of Pakistan and at any rate in case the ultimate final order is passed against him, he shall be entitled to challenge the interim impugned order in that appeal, in view of the established legal position to the effect that while challenging final order, the interim orders are also challengeable. Hence, writ petition against the interim order cannot be entertained as it will tend to delay the disposal of main case which is an election petition and is to be decided within a specified period of time expeditiously. It has been held in cases of Ibrahim v. Muhammad Hussain PLD 1975 SC 457, Abdul Bari v. Government of Pakistan and 2 others PLD 1981, Karachi 290, Allah Yar Khan v. Mst. Sardar Bibi and others (1986 SCMR 1957) and Mushtaq Hussain Bokhari v. The State (1991 SCMR 2136), that interim orders are not amenable to the exercise of the writ jurisdiction of this Court inasmuch as entertainment of writ in such like cases delays the decision of main cases wherein the interim orders have been passed."

(xiii) "Muhammad Iftikhar Muhammad versus Javed Muhammad and 3 others" (1998 SCMR 328). In this case the petitioner moved a petition seeking leave to appeal against the judgment of Election Tribunal Peshawar, whereby the learned Tribunal overruled preliminary objections raised by the petitioner and when this matter was taken up to the apex Court, it was observed as under:--

"After hearing the learned counsel for the parties, we are of the view that as the main election petition is still pending before the learned Tribunal and an appeal is provided against the final decision of the Tribunal before this Court, the petitioner in the event of the final decision going against him, will be entitled to raise all the pleas available to him, in the appeal before this Court including the preliminary objection as to the maintainability of the petition which has been overruled by the learned Tribunal by the impugned judgment."

(xiv) "Muhammad Asim Kurd alias Gailoo versus Nawabzada Mir Lashkari Khan Raisani and 11 others" (1998 SCMR 1597). In this case, a petition for leave to appeal was filed against an order passed by the Division Bench of High Court of Baluchistan, whereby Constitutional Petition was dismissed in limine, against the interlocutory order passed by the Election Tribunal Baluchistan, where direction for recounting of votes during pendency of the Election Petition was directed and the apex Court held as under:--

"The case of Mian Ejaz Shafi (supra), strongly relied upon by the learned counsel for the petitioner, does not advance his case, inasmuch as, Paragraph 6 of the aforesaid judgment reveals that the appellant therein challenged the order of the

Election Tribunal regarding recounting of votes before this Court through C.A. No. 425 of 1994, which was dismissed on 7-6-1994, on the ground that the appeal against the interim order passed by the Election Tribunal, was not competent. In the instant case also, the final order is yet to be passed by the Tribunal seized of the Election Petition filed by Respondent No. 1 against the petitioner. Admittedly, appeal against the final order of the Tribunal lies before this Court. The petitioner shall also be at liberty to file objections to the report of the Commission on recounting of votes. Clearly, if such objections are raised the same shall be considered by the Tribunal justly, fairly and in accordance with law, after providing an opportunity of being heard to the parties and allowing them to lead evidence in support of their respective contentions, if so desired, before final disposal of the Election Petition."

(xv) In "Sallahdino and another versus Ghulam Mustafa and 6 others" (2010 YLR 346), during pendency of Election Petition, an interim order was assailed before the Division Bench of Sindh High Court through a constitutional petition and it was dismissed with the following observations:--

"In the case in hand, the Election Tribunal has not passed final order and the contentions made by learned counsel for the petitioner are fully answered by the judgment of this Court in the case of Moula Bux v. Muhammad Rahim reported in 2003 CLC 319, where this Court had held that the Election Tribunal can order recounting of votes without recording evidence. Additionally, we are clear in our mind that no writ lies against interlocutory order. The order is interlocutory in nature and cannot be impugned in the constitutional petition. We are further fortified by this judgment of the Honourable Supreme Court in the case of Muhammad Naeem Kasi v. Abdul Latif reported in 2005 SCMR 1699."

7. Learned counsel for the petitioners also cited some case law regarding pre-election dispute to highlight the constitutional jurisdiction of this Court. In this context landmark judgments referred and discussed at length by learned advocates are:-

(i) "Election Commission Of Pakistan through its Secretary vs. Javaid Hashmi and others" (PLD 1989 SC 396). In this case list of Presiding Officers and Polling Officers was prepared; complaints were received in the Election Commission of Pakistan against the appointment of polling personals belonging to the Provincial Government's departments and direction was issued to the District Returning Officer; under the direction the Returning Officer changed the list of personals from the earlier approved list. This order was assailed before the Lahore High Court in writ jurisdiction and the High Court allowed the writ petition; judgment passed by the High Court was assailed before the Hon'ble Supreme Court of Pakistan and the Supreme Court by its majority view upholding the judgment passed by the High Court observed as under:--

"In enacting Article 225 in the Constitution the purpose of Legislature is obvious that it did not contemplate two attacks on matters connected with the election proceedings; one while the election process is on and has not reached the stage of its completion by recourse to an extraordinary remedy provided by Article 199, and another when the election has reached the stage of completion by means of an election petition. It is also of utmost consideration that in the case of two attacks on a matter connected with the election proceedings there is likelihood of there being two

inconsistent decisions; one given by the High Court and the other by the Election Tribunal which is also an independent Tribunal and this could not be the intention of the Legislature. Again the words "except by an election petition" in Article 225 of the Constitution do not refer to the period when it can be called in question but point to the manner and the mode in which it can be called in question. It is, therefore, that the constitutional provision is expressed in the negative form to give exclusive jurisdiction to the Tribunals appointed by the Election Commissioner and thus to exclude or oust the jurisdiction of all Courts in regard to election matters and to prescribe only one mode of challenge. The purpose is not far to seek as in all democratic Constitutions such as is ours the Legislatures have an important role to play, and, therefore, it is of utmost importance that the election should be held as scheduled without being unduly delayed or prolonged by challenging matters at an intermediate stage.

The scheme of the electoral laws and conduct of election accordingly appears to be that any matter which has the effect of vitiating the election process should be brought up only at the appropriate stage in an appropriate manner before the Election Tribunal and should not be brought up at an intermediate stage before any Court as otherwise Article 225 of the Constitution would be deprived of its meaning and content.

....."

(ii) In "Ghulam Mustafa Jatoi vs. Additional District & Sessions Judge/Returning Officer, NA. 158, Naushero Feroze and others" (1994 SCMR 1299) name of the candidate was dropped from publishing in the list of candidates on the ground that he was found to be a defaulter and clearance certificate had not been produced. Writ petition preferred against the said order was dismissed and civil appeal filed against the order of High Court was allowed; resulting the orders passed by the High Court and the Returning Officer were quashed on the ground that order was patently illegal and petition was dismissed. No remedy was available to the petitioner as action was taken after expiry of the period of appeal and petitioners stood disfranchised.

(iii) In "Ch. Muhammad Arif Hussain vs. Rao Sikandar Iqbal and 10 others" (PLD 2008 SC 429) during election process objection regarding qualification was raised before the Returning Officer; objection was sustained and nomination papers were rejected; the petitioner filed appeal before the Tribunal established under the ROPA; appeal was allowed resulting the petitioner was declared to be qualified to contest the election and against this decision writ petition was allowed, whereby the petitioner was declared to be not qualified to contest the election; matter was brought to the Hon'ble Supreme Court of Pakistan and it was declared that the petitioner had not requisite qualification to contest the election and the High Court has rightly exercised its jurisdiction.

(iv) In another case "Syed Nayyar Hussain Bukhari vs. District Returning Officer, NA-49, Islamabad and others" (PLD 2008 SC 487) Hon'ble Supreme Court of Pakistan observed that it is difficult to agree with the proposition that in all election matters at all stages, the jurisdiction of the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan is barred. However, they observed that the petitioner may either approach the Election Commission of Pakistan under

Section 103-AA of ROPA or avail remedy before the Election Tribunal under Section 52 of ROPA.

(v) In "Muhammad Hussain Babar vs. Election Commission Of Pakistan through Secretary and others" (PLD 2008 SC 495) shows that constitutional jurisdiction of the High Court can certainly be invoked in certain situations. The Hon'ble Supreme Court of Pakistan without commenting upon the merits of the case in either way disposed of the petition holding that the petitioner may avail remedy through petition under Section 52 of ROPA.

(vi) In two cases i.e. "Let. Gen. (R) Salahuddin Tirmizi vs. Election Commission Of Pakistan" (PLD 2008 SC 735) and "Aftab Shahban Mirani and others vs. Muhammad Ibrahim and others" (PLD 2008 SC 779) the law and facts were similar and the Hon'ble Supreme Court of Pakistan observed that Chapter X, sections 103 and 103-AA of ROPA are entirely independent to Section 52 of ROPA and the Commission after issuance of notification may exercise jurisdiction and entertain a complaint on the grounds mentioned therein and also may continue for 20 days of the official announcement of election. It is further concluded that orders passed by the Election Commission of Pakistan did not suffer from any illegality or material irregularity as it would warrant correction by this Court and order passed by the Karachi High Court, setting aside the order passed by the Election Tribunal, was set aside and appeal of Aftab Shaban Mirani was allowed and decision of Peshawar High Court, not setting aside the order of Election Tribunal, was upheld. Resultantly, leave petition of Salah ud Din Tirmizi was dismissed.

(vii) In case of "Federation Of Pakistan and others vs. Mian Muhammad Nawaz Sharif and others" (PLD 2009 SC 644) the petitioner filed nomination papers and two other contesting candidates namely Noor Elahi and Mian Ikhlaq Ahmad Guddu filed objection petition before Returning Officer questioning the candidature of Mian Muhammad Nawaz Sharif; objection petition was dismissed and appeal was filed before the Tribunal; said appeal was withdrawn and the other candidates filed application that he may be allowed to transpose as appellant but the said application was also dismissed. Latter on he filed time barred appeal. Meanwhile one Syed Khuram Shah filed application under Section 14(5-A) of the ROPA and the High Court passed split judgment the matter was referred to the Chief Election Commissioner due to divergent opinions of the Judges. The Chief Election Commissioner held that since the appeals of the objections had not been disposed of within the period specified in the election schedule, the same were deemed to have been dismissed in view of Section 14(6) of ROPA. Against the said order Writ Petition was filed, which was allowed holding that the petitioner is not qualified to contest election. This order was challenged by the Federation of Pakistan before the Hon'ble Supreme Court of Pakistan, which resulted into dismissal. A review petition was filed by Mian Muhammad Nawaz Sharif, which was allowed and it was held that Constitutional jurisdiction of High Court, after the order of the Chief Election Commissioner declaring the appeal as deemed to have been rejected in terms of S.14(6) of the Representation of the People Act, 1976, candidate and informer-objector having alternate remedy available under sections 52 & 76-A of the Act,

could not invoke the constitutional jurisdiction of High Court which was limited in this respect.

8. Syed Riaz-ul-Hassan Gillani, Advocate also cited some case law from Indian jurisdiction to explain the jurisdiction of this Court vis-a-vis election disputes. The Election Laws of India are not similar to ROPA, thus, there is no need to discuss them to resolve the questions involved in this Reference. The learned amicus curiae Sardar Muhammad Sarfraz Dogar, Advocate also assisted the Court with reference to law applicable in different countries with regard to election disputes. Sardar Riaz Karim, Advocate assisted the Court with reference to certain similar provisions available in the Financial Institutions (Recovery of Finances) Ordinance, 2001. Their assistance is appreciated.

9. We have given our anxious consideration to the above referred case law and all other cases referred by learned counsels in this regard before this Bench.

10. Article 222 of the Constitution provides that subject to the Constitution, Majlis-e-Shoora (Parliament) may by law provide for conduct of elections and election petitions for the decision of doubts and disputes arising in connection with elections; matters relating to corrupt practices and other offences in connection with elections; and all other matters necessary for the due Constitution of the two Houses and the Provincial Assemblies. Article 225 of the Constitution deals with election disputes. It starts with negative phraseology "no election to the House or Provincial Assembly shall be called in question", and then another negative phrase in unambiguous terms "except by an Election Petition presented to such Tribunal and in such manner, as may be determined by the act of Majlis-e-Shoora" Article 225 provide a special procedure for challenging the elections through Election Petition presented in such a manner as determined by the Act of Parliament and in the cases in hand the relevant Act is ROPA. Article 225 read with ROPA in very clear and unambiguous language say that once the election process has been completed then it is exclusive jurisdiction of the Election Tribunal to process Election Petitions with regard to election disputes. Thus in view of the bar contained in Article 225 of the Constitution, the High Court cannot exercise the jurisdiction under Article 199 of the Constitution with regard to post-election disputes.

11. The ROPA has its own scheme for resolving election disputes after completion of election process through an independent Election Tribunal by way of filing Election Petitions under Section 52 of ROPA. As per scheme of law, under Section 67(1A) of the ROPA, Election Tribunal shall proceed with the Election Petitions on day to day basis and decision thereof shall be taken within four months from its receipt and where the delay in proceedings is occasioned by any act or omission of returned candidate or any person acting on his behalf, the Tribunal shall refer to the Commissioner that such candidate may be declared by the Commission to have ceased to perform the functions of his office either till the conclusion of the proceedings or for such period as the Commission may direct. This aspect shows that the law which is made by Majlis-e-Shoora and is guarded by the Constitution,

requires for an early conclusion of election disputes because essence of the Constitution and the law is that the authority delegated by Allah Almighty to the chosen representative of the people be exercised by the persons having confidence of people of their constituency and qualify to be elected as member of the House or Provincial Assemblies. Divine authority cannot be given to a person who is not the real representative of the people of the constituency and has been elected by violating the law because Majlis-e-Shoora is sacred trust of the people of Pakistan consisting of sagacious, righteous, honest and Ameen persons. To clear the shadow of doubt and to remove the clouds on the chosen representatives of the people, speedy trial of an Election Petition with regard to election disputes, is essential.

12. All the rules of interpretation of the statute have been designed so as to promote the legislative intent behind the statute. Interpretation of statute requires to advance the purpose of legislation and any interpretation which would defeat the object and purpose of the statute, has to be avoided so that smooth working of scheme of legislation provided by the statute be facilitated. No right of appeal or revision against interlocutory orders has been provided in ROPA for the reason that the people should wait for the final decision of Election Tribunal and final decision be assailed, if so required by any of the party after conclusion of the trial before the Hon'ble Supreme Court. Mere wrong decision does not render the decision without jurisdiction. When Legislature has entrusted the Tribunal with jurisdiction to finally determine the dispute, this jurisdiction also includes to determine some preliminary issues and even if the Tribunal makes a wrong decision either of facts or law at an intermediate stage, it cannot be corrected in writ jurisdiction under Article 199 of the Constitution by exercising the power of appellate authority. The plea canvassed by the learned counsel for the petitioners regarding maintainability of this petition against interlocutory/interim order of the Tribunal cannot be acceded to for the simple reason that by doing this we would deprive the person of his substantive right of appeal provided under Section 67(3) of ROPA to the Hon'ble Supreme Court of Pakistan. In fact by exercising jurisdiction under Article 199, practically Section 67(3) of ROPA (right of appeal) will become redundant to some extent as the parties in such situation will have to file petition for leave to appeal instead of direct appeal before the Supreme Court, which is not the intention of the legislature. The basic principle which has been laid down by the apex Court of the country is that this Court can only exercise jurisdiction when the order is illegal and aggrieved person becomes remediless and the candidate has been disqualified and disfranchised and it is only in extraordinary circumstances that the Court would aberrant the sanctified rule. The learned counsel for the writ petitioner could not refer a single instance before this Court from the judgments of the Hon'ble Supreme Court when the matter was pending trial before the Election Tribunal and the Hon'ble Supreme Court interfered in any interlocutory decision of the Election Tribunal. When a mechanism has been provided for the decision of disputes arising out of elections, it could not be permitted to be bypassed through writ jurisdiction. Ordinarily, the remedy provided by the statute must be followed before the appropriate authority. It is settled principle that where there is effective alternate remedy under the statute, High Court will not exercise its

jurisdiction as self imposed restriction and decline to interfere in the elections matters, especially at the intermediate stage.

13. We are fully aware and have also given due consideration to Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, regarding fair trial. The right of fair trial is essential right in all countries respecting the rule of law. Various rights associated with fair trial are explicitly proclaimed in Article 10 of the Universal Declaration of Human Rights, as well as numerous other declarations throughout the world, but there is no binding international law that defines what is or is not a fair trial, for example the right to a jury trial and other important procedures vary from nation to nation. The basic ingredients for a fair trial are (i) the Court/Tribunal be independent, impartial and established under the law, (ii) all persons shall be equal before the Courts and Tribunal in the determination of their right and obligations; (iii) Every one shall be entitled to a fair hearing within reasonable time; (iv) Every one shall have a right of counsel; (v) right of public hearing if not prohibited by law; (vi) the procedure of trial as provided by the statute to be followed and (vii) the statute must provide a remedy of appeal. The provisions of ROPA satisfy the above stated principles as it stands established that Election Tribunal is an independent body constituted under Section 57 of ROPA by the Election Commission whose independence has been protected and guarded by the Constitution; that a complete code of procedure for speedy trial has been provided to both the parties of the Election Petition; that each party to the Election Petition has been provided opportunities of fair hearing and, that right of appeal against final decision has been provided by ROPA before the Hon'ble Supreme Court.

14. On study of number of cases as referred above particularly from "Badarul Haque Khan versus The Election Tribunal, DACCA and others" (PLD 1963 SC 704), "Mian Jamal Shah versus The Member Election Commission, Government of Pakistan, Lahore and others" (PLD 1966 SC 1) and "Muhammad Baran and others versus Member (Settlement and Rehabilitation) and others" (PLD 1991 SC 691), it becomes quite obvious that the Hon'ble Supreme Court of Pakistan declined to interfere in the proceedings of the Election Tribunal at intermediate stage of trial because the Constitution has conferred exclusive authority on the Election Tribunal to determine election disputes speedily and without any interruption.

15. In view of above, we are inclined to answer the questions, under reference, in the negative and consequently dismiss the petitions. The raison deter of our answer is summarized as follows:--

(i) that post election disputes to a House or a Provincial Assembly cannot be questioned by invoking jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, as it is a sealed territory for this Court;

(ii) that when a thing is required to be done in a particular manner, it should be done in that way alone and otherwise whole proceedings would be void;

(iii) that the intention of Article 225 of the Constitution of the Islamic Republic of Pakistan, 1973 read with provisions of ROPA, is that election disputes should only be referred to the Election Tribunals through Election Petitions;
(iv) that High Court cannot sit in appeal over the decision/order of the Election Tribunal or statutory authorities and substitute their decision with its own;
(v) that appeal is a substantive right in which the whole dispute including an order on a preliminary objection of law and fact is reopened and reexamined. If by exercising jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, this Court interfere with the interlocutory order of the Tribunal, then this Court would be encroaching upon the rights of aggrieved person to approach the Hon'ble Supreme Court of Pakistan through a direct appeal.
(vi) that the intention of the law is that election disputes should be resolved through uninterrupted expeditious trial. This intention of legislature cannot be negated by entertaining constitution petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 against interlocutory/interim orders of the Election Tribunal.
(vii) that ROPA, which excludes a right of appeal from the interim orders of the Election Tribunal, cannot be bypassed by brining under attack such interim orders in constitutional jurisdiction of this Court. Party affected has to wait till it matures into a final decision and then to attack it in the proper exclusive forum, that is, the Supreme Court.
(viii) that the orders at the interlocutory stages should not be brought to the High Court to obtain fragmentary decisions, as it tends to harm the advancement of fair play and justice, curtailing remedies available under the law, even reducing the right of appeal.
(ix) that the Parliament and Provincial Assemblies of Pakistan open their doors to those persons who are sagacious, righteous, honest and Ameen and thus it is imperative to remove any shadow of doubt on the character of the representatives of the people at the earliest. To achieve this object a special law, that is, ROPA, has provided a speedy mechanism which cannot be allowed to be deflected by exercising jurisdiction under Article 199 against interlocutory/interim orders of Election Tribunal.

16. Before parting with this judgment, we would like to express that the nature of the issue in these cases were somewhat more complicated than the ordinary lis, and the effort put in by the learned Advocates of this bar including the learned Law Officers Mr. Zafarullah Khan Khakwani, Assistant Advocate General, Mr. Muhammad Naveed Rana, Standing Counsel, made the issue more easily understandable. With their assistance we have been able to lay our hands on almost all case law on the subject by the superior Courts. Thus, we would like to bring on record a sense of appreciation and words of gratitude in respect of valuable assistance rendered to this Court by the renowned lawyers of this Bench including amicus curiae Sardar Riaz Karim and Sardar Muhammad Sarfraz Dogar, Advocate, in resolving the intricate question by putting in knowledgeable, tremendous labour and hardwork. Their professional skill has always been undoubted and more particularly in this case the patience the learned counsels showed in

addressing the Court precisely on the legal issue with the backing of relevant case law, is highly commendable. The group of lawyers who addressed the Court in this case has in fact been the galaxy of this Bar and we have no doubt in our mind that their effort and research put in this case, shall prove to be a valuable guideline for the young lawyers entering this noble profession.

(R.A.) Petitions dismissed

PLJ 2014 Cr.C. (Lahore) 917 (DB)
[Multan Bench Multan]
Present: Muhammad Qasim Khan and Arshad Mahmood Tabassum, JJ.
SHEIKH ZAHID--Petitioner
versus
STATE, etc.—Respondents

Crl. Misc. No. 4973-B of 2013, decided on 11.11.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 9(c)--Bail before arrest, confirmed--No identification--Abscondence--No evidence was available to connect accused with commission of alleged offence--Validity--False implication of accused in that case out of malafide and ulterior motives, cannot be ruled out--Bail application was allowed and interim pre-arrest bail earlier granted to petitioner was hereby confirmed. [P. 917] A

Sh. Jamshaid Hayat, Advocate for Petitioner.
Malik Muhammad Jaffar, D.P.G. for State.
Date of hearing: 11.11.2013.

Order
Petitioner (Sheikh Zahid) seeks pre-arrest bail in case FIR No. 486/2013 dated 9.9.2013 under Section 9(c) of the Control of Narcotic Substances Act, 1997 Police Station City Chichawatni Sahiwal.

2. We have heard the arguments of learned counsel for the parties and perused the available record.

3. Although the name of the petitioner figures in the FIR, but the narration of the FIR would show that the petitioner was not arrested at the spot and he was implicated on the basis of statement by another accused namely Javed Ahmad, wherein, Javed Ahmad allegedly deposed that he was selling the charas of Sheikh Zahid (present petitioner). Apart from the above referred statement of co-accused, prima facie no other evidence/incriminating material is available with the prosecution to connect the petitioner with the commission of alleged offence, as there is no identification of the petitioner and furthermore, abscondence of the petitioner in the presence of police contingent, also makes the case against the petitioner doubtful. In these circumstances, false implication of the petitioner in this case out of mala fide and ulterior motives, cannot be ruled out. Consequently, this bail application is allowed and interim pre-arrest bail earlier granted to the petitioner is hereby confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 200,000/- each with two sureties each in the like amount to the satisfaction of learned trial Court.

(R.A.) Bail confirmed

2015 C L D 1104
[Lahore]
Before Muhammad Qasim Khan, J
BILAL AHMAD---Petitioner
versus
JUSTICE OF PEACE/A.S.J. and 2 others---Respondents

W.P. No. 658 of 2012, decided on 3rd June, 2013.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---
----Ss. 20 & 7---Penal Code (XLV of 1860), S. 489-F---Criminal Procedure Code (V of 1898) S. 154---Constitution of Pakistan, Art. 199---Constitutional petition---Jurisdiction of Banking Court---Cheque issued to Financial Institution by customer as guarantee for return of loan facility---Dishonouring of cheque---Order for registration of FIR under S. 489-F, P.P.C.---Petitioner impugned order of Justice of Peace whereby FIR under S. 489-F, P.P.C. was ordered to be registered against him for dishonouring of cheque issued by him as guarantee to the Financial Institution---Held, that per S. 7 of the Financial Institutions (Recovery of Finances) Ordinance, 2001; no court other than the Banking Court shall have or exercise jurisdiction with respect to any matter to which jurisdiction of the Banking Court was extended to under the said Ordinance---Section 20(4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 dealt with the dishonest issuance of cheque and punishment of said offence had been provided in this section and therefore it was obvious that in said matter jurisdiction only lay with the Banking Court and not before any other court---Under S. 20(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001, offences under the Ordinance shall be bailable, non-cognizable and compoundable and S. 154, Cr.P.C. came in field where the commission of a cognizable offence was disclosed---When the statute itself made it clear that the offence was not cognizable, then registration for a criminal case/FIR by local police could not be permitted---High Court observed that even though S. 489-F was inserted after promulgation of the Financial Institutions (Recovery of Finances) Ordinance, 2001; but same would not give it an overriding effect over the Financial Institutions (Recovery of Finances) Ordinance, 2001, which was a special law---Impugned order was set aside--- Constitutional petition was allowed, in circumstances.
Muhammad Asif Nawaz v. The ASJ and others W.P. No. 10707 of 2012 rel.

(b) Interpretation of statutes---
----Conflict of laws---Interpretation of a general law in juxtaposition with a special law---Principles---General law and a special law on the same subject were statutes in pari materia and should accordingly be read together and harmonized, if possible, with a view to giving effect to both---Whenever there were two laws; one which was a special and particular law, and the other a general law, which if standing alone, would include the same matter and thus conflict with the special law; the special law must prevail since it evinced the legislative intent more clearly than the general statute---If a special law was passed before or after the general law; the same would

be regarded as an exception to; or a qualification of, the prior general law; and where the general law was passed later than the special law; the special law would be construed as remaining an exception to its terms, unless repealed expressly or by necessary implication.

Muhammad Asif Nawaz v. The ASJ and others W.P. No. 10707 of 2012 rel.
Makhdoom Mashooq Hussain for Petitioner.
Mubashir Latif Gill, Assistant Advocate General.
Muhammad Salim Iqbal for Respondent No. 3.

ORDER

MUHAMMAD QASIM KHAN, J.---This writ petition has been filed by the petitioner to assail the order dated 22-12-2011 passed by learned Ex-officio Justice of Peace, Jahanian, whereby, on an application filed by NRSP through its Recovery Officer, the respondent/SHO has been directed to register a case.

2. Heard.

3. It is admitted position that Cheques in question had been issued as a guarantee by the petitioner for the return of loan facility obtained by him from respondent/Bank. Section 7 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, provides:-

"(7) Powers of Banking Courts---

(1) Subject to the provisions of this Ordinance, Banking Court shall.

(a) ----------

(b) in the exercise of its criminal jurisdiction, try offences punishable under this Ordinance and shall, for this purpose have the same powers as are vested in a Court of Session under the Code of Criminal Procedure, 1898 (Act V of 1898):

Provided that a Banking Court shall not take cognizance of any offence, punishable under this Ordinance except upon a complaint in writing made by a person authorized in this behalf by the financial institution in respect of which the offence was committed."

.....

.....

(4) Subject to subsection (5), no court other than a Banking Court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Court extends under this Ordinance, including a decision as to the existence or otherwise of a finance and the execution of a decree passed by a Banking Court."

"(5) Nothing in subsection (4) shall be deemed to affect--

(a) the right of a financial institution to seek any remedy before any court or otherwise that may be available to it under the law by which the financial institution may have been established; or

(b) the powers of the financial institution, or jurisdiction of any court such as is referred to in clause (a); or

Require the transfer to a Banking court of any proceedings pending before any financial institution or such court immediately before the coming into force of this Ordinance."
The above-reproduced provision clearly postulates that no Court other than Banking Court shall have, or exercise jurisdiction with respect to any matter to which the jurisdiction of Banking Court extends under this Ordinance.

4. The contention of learned counsel for the respondent bank is that taking cognizance is something different as compared to the registration of case and the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 deal with cognizance of offence but not deal with registration of cases, therefore, the registration of case is not barred under this Ordinance. I am afraid this stance advanced by learned counsel for respondent Bank is not considerable at all. Section 20(6) of the Ordinance, ibid, read as under:-
"20. Provisions relating to certain offences
(1) ----------
(2) ----------
(3) ----------
(4) Whoever dishonestly issues a cheque towards re-payment of finance or fulfillment of an obligation which is dishonoured on presentation, shall be punishment with imprisonment which may extend to one year, or with fine or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque.
(5) ----------
(6) All offences under this Ordinance shall be bailable, non-cognizable and compoundable."
The above provision is relating to certain offences and its sub section (4) deals with dishonest issuance of a cheque towards repayment of a finance or fulfillment of an obligation, which is dishonoured on presentation. The punishment of said offence has been provided as one year or with fine or with both. Therefore, it becomes quite obvious that in the matter, like the one in hand, the jurisdiction only lies with the Banking court established under the Financial Institutions (Recovery of Finances) Ordinance, 2001 and not before any other court, until and unless the same is provided by law, by which the financial institution is established.

5. This court in the judgment dated 16-5-2013 rendered in case "Muhammad Asif Nawaz v. The ASJ, and others" (W.P. No.10707 of 2012), has held that a general law and a special law on the same subject are statutes in pari materia and should accordingly, be read together and _harmonized, if possible, with a view to give effect to both. The rule is that where there are two acts, one of which is special and particular and the other general, which if standing alone, would include the same matter and thus conflict with the special act, the special law must prevail since it evinces the legislative intent more clearly than that of a general statute. Further, it has been held that in terms of Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 offences under the said Ordinance shall be bailable, non-

cognizable and compoundable and section 154, Cr.P.C. comes in the field where the commission of a cognizable offence is disclosed and when the Statute itself makes it clear that offence is not cognizable then the registration of criminal case by the local police could not be permitted by law.

6. Although by amendment in P.P.C., section. 489-F, P.P.C. has been inserted after promulgation of Financial Institutions (Recovery of Finances) Ordinance, 2001 but this insertion would also not give it an overriding effect over special law, for the reason that the special law is passed before or after the general act does not change the principle. Where the special law is later, it will be regarded as an exception to, or a qualification of, the prior general act; and where the general act is later the special statute will be construed as remaining an exception to its terms, unless repealed expressly or by necessary implication.

7. Accordingly, this writ petition is allowed and the impugned order dated 22-12-2011 passed by learned Additional Judge/Ex-officio Justice of Peace, Jahanian, is hereby set aside. This order, however, will not be considered a bar in the way of the respondent Bank to plead their case before the appropriate forum under the Financial Institutions (Recovery of Finances) Ordinance 2001.

KMZ/B-2/L Petition allowed.

2015 M L D 408
[Lahore]
Before Muhammad Qasim Khan, J
ABDUL KARIM FIRDOUS and another---Petitioners
Versus
The STATE and 7 others---Respondents

Writ Petition No.239 of 2014, decided on 16th January, 2014.

Illegal Dispossession Act (XI of 2005)---
----Ss. 3 & 7---Constitution of Pakistan, Art.199---Constitutional petition---Scope and applicability of Illegal Dispossession Act, 2005---Basic ingredients to invoke the provisions of Illegal Dispossession Act, 2005, would be that accused must enter into or upon any property without having any lawful authority to do so, and with intention of dispossession of or grabbing, controlling or occupying the property from the owner or occupier thereof---Respondents, in the present case did not forcibly enter into the disputed property, rather possession of said property was handed over to the respondents by the petitioners themselves voluntarily---To bring a case into the pail of Illegal Dispossession Act, 2005, all the ingredients must co-exist---In the presence of specific consent of the petitioners in handing over possession of the disputed property, the petitioners, to get the said property vacated, should adopt procedure provided for ejectment or vacation of the property under other relevant laws, but not through proceedings under Illegal Dispossession Act, 2005---Trial Court, in circumstances, had committed no illegality, irregularity or jurisdictional defect in dismissing the complaint of the petitioners---Constitutional petition was dismissed.

Muhammad Ihsan Alvi and Syed Waheed Raza Bokhari for Petitioners.
Malik Muhammad Bashir Lakheser, Assistant Advocate General.
Muhammad Ali Shahab, Deputy Prosecutor General for the State.

ORDER
MUHAMMAD QASIM KHAN, J.---Briefly the facts of the case are that petitioners filed a complaint against the private respondents under section 3(1) read with section 7 of the Illegal Dispossession Act, 2005, precisely to the effect that they (petitioners) are owners of land measuring 1-kanal situated in Khewit No.187/149 Khattoni No.359, Multan road opposite Faisal Bank, Qasba Booraywala under Mutation No.1912/1 dated 21-8-2004. Further para-2 of the said complaint reads as under:--
With above narration, it was averred that in June, 2010, the petitioners asked respondents Nos.3 and 4 that property was required for personal use and that possession of the same be returned to the petitioners. Instead of returning back possession of the land, respondents Nos.3 and 4 started raising unauthorized and illegal construction on the said property and furthermore without permission of the petitioners they made Habib and Munir to sit and run oven clay in front of the said property and also parked the vehicles of adjoining workshops around the property. Sooner the petitioners got knowledge they along with witnesses went at the site, whereupon, workers of respondents variously armed came at the spot and extended

threats. Petitioners asked the respondents to vacate the property but they keep on possessing the same without any lawful authority. On receipt of complaint, the learned Additional Sessions Judge, Burewala recorded cursory evidence of the petitioners, summoned the respondents and on conclusion of trial vide impugned judgment dated 14-12-2013 dismissed the private complaint holding that "All this reflect that dispute regarding the possession of the property in question is between 02 individuals and neither any allegation nor any proof has come on the record that accused belong to land mafia/Qabza Group or property grabbers, hence section 3 of Illegal Dispossession Act does not attract in this case."

2. I have heard the arguments of learned counsel for the parties at a considerable length and perused the entire available record with their assistance in the light of respective case law on the subject.

3. Section 3 of the Illegal Dispossession Act, 2005, which in fact is the controlling clause, is reproduced hereunder:--
"(1) No one shall enter into or upon any property to dispossess, grab, control or occupy it without having any lawful authority to do so with the intention to dispossess, grab, control or occupy the property from owner or occupier of such property.
(2) Whoever contravenes the provisions of the sub-section (1) shall, without prejudice to any punishment to which he may be liable under any other law for the time being in force, be punishable with imprisonment which may extend to ten years and with fine and the victim of the offence shall also be compensated in accordance with the provision of section 544-A of the Code."
As shall be seen from the above reproduced section, the basic ingredient to invoke the provisions of Illegal Dispossession Act, 2005 would be that accused must enter into or upon any property without having any lawful authority to do so and with intention of dispossession of or grabbing, controlling or occupying the property from the owner or occupier thereof. In the light of above quoted paragraph from the complaint itself, one thing is quite obvious that respondents did not forcibly enter into the disputed property, rather admittedly the possession of the disputed property was handed over to the respondents by the petitioners themselves voluntarily, whereas, to bring a case into the pail of Illegal Dispossession Act, 2005, all the ingredients must co-exist. In the presence of specific consent by the petitioners in handing over possession of the disputed property to the respondents, to get the said property subsequently vacated, the petitioner should adopt procedure provided for ejectment or vacation of the property under other relevant laws, but not through proceedings under Illegal Dispossession Act, 2005.

4. For what has been discussed above, to maintain a complaint under Illegal Dispossession Act, it must contain the basic ingredients i.e. the accused must enter into the property and dispossess the owner/ occupant, without having any lawful authority to do so, but when a person has been authorized to use the said property then the owner/landlord who himself delivered possession of the property in a lawful manner, cannot seek the shelter under Illegal Dispossession Act, 2005, as it would in

fact tantamount to declare other relevant laws redundant and the petitioners cannot be allowed to circumvent other lawful process under the garb of a complaint under Illegal Dispossession Act, 2005. The learned trial court, therefore, committed no illegality, irregularity or jurisdictional defect in dismissing the complaint of the petitioner. This writ petition, therefore, fails and is dismissed.

HBT/A-48/L Petition dismissed.

2015 M L D 1131
[Lahore]
Before Muhammad Qasim Khan, J
Mst. BASHIRAN BIBI---Petitioner
versus
BASHIR AHMAD and 3 others---Respondents

Crl. Misc. No.17-T of 2013, decided on 18th June, 2013.

Criminal Procedure Code (V of 1898)---
----S.526---Penal Code (XLV of 1860), S.302---Qatl-i-amd---Transfer of case---Lack of confidence in court---Complainant sought transfer of case from Trial Court on the plea that he had lost confidence upon the court as pre-arrest bail to accused was confirmed through a police tout---Validity---Bail order passed by Trial Court was fully justified and complainant did not assail the same before any court, nor even name of the tout who purportedly ensured confirmation of bail to accused was disclosed---With such simple and bald allegation, just on the account of apprehension or fear that complainant would not get justice from Trial Court, without there being any proof in such regard, case could not be transferred---Judicial officers were expected and presumed to be performing their duties with all honesty and dedication by knowing that they had been bestowed with sacred obligation to deliver justice beyond any worldly temptation---Interference by High Court in working of Trial Court, on fallacious grounds would give rise to sense of insecurity amongst Judicial Officers and in such eventuality Judicial Officers might not be able to work with required vigor---High Court asserted that motivated attempts of parties for their personal gains, levelling false allegations against Judicial Officer, should be curbed---Transfer of case from Trial Court was declined---Application was dismissed in circumstances.

Ahmad Raza for Petitioner.
Muhammad Ali Shahab, Deputy Prosecutor General for the State.
Mehroz Aziz Khan Niazi for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.---This petition has been filed to seek transfer of trial of case "The State v. Bashir Ahmad" FIR No.550/2011 dated 21-11-2011 police station Mitru, Vehari, from the court of Syed Naveed Raza Bukhari, Additional Sessions Judge, Mailsi, to any other court. The sole ground urged before the court is that petitioner has lost confidence on the trial court, as pre-arrest bail of the respondent/accused was confirmed by the said court, through a police tout.

2. Heard.

3. I have gone through the entire file including the bail confirmation order but could not find out anything in the said order which in any way could give rise to some suspicion, as the same order is otherwise, fully justified in the facts and circumstances

of the case. Furthermore, the petitioner/complainant did not assail the said bail confirmation order before any court, nor even the name of the tout who purportedly ensured confirmation of bail to the respondent/accused, has been disclosed in this petition. With such a simple and bald allegation, just on account of apprehension or fear that petitioner/complainant would not get justice from the trial court, without there being any proof in this regard, the petition in hand cannot be allowed. At the same time it may be observed here that the Judicial Officers are expected and presumed to be performing their duties with all honesty and dedication, by knowing that they have been bestowed with a sacred obligation to deliver justice beyond any worldly temptation. Interference by this Court in the working of the trial courts, on fallacious grounds would give rise to a sense of insecurity amongst the Judicial Officers and in such eventuality the Judicial Officers may not be able to work with required vigor. For this reason also motivated attempts of the parties for their personal gains, leveling false allegations against the Judicial Officer, have to be curbed at this level. This petition, therefore, is dismissed.

MH/B-27/L Petition dismissed.

2015 P Cr. L J 532
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD YOUNIS---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.1885-B of 2014, decided on 7th May, 2014.

Criminal Procedure Code (V of 1898)---
----S. 497---Penal Code (XLV of 1860), Ss. 420, 468, 471 & 411---Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document, dishonestly receiving stolen property---Bail, refusal of---Accused was nominated in the FIR with a specific role---Fraud of quite a huge amount had been committed in the case in a sophisticated manner---Narration of the FIR, prima facie stood corroborated by the material so far collected by the Investigating Officer---One of the prosecution witnesses in his statement recorded under S.161, Cr.P.C. had specifically named accused along with his brother---Mobile/call data collected by the Investigating Agency, had provided sufficient incriminating material against accused---Accused had a criminal history of involvement in similar cases and was involved in a white-collor crime, and such offences were not victimless---By passage of time such type of crimes, were becoming more sophisticated than ever---Direct evidence in the case though may not be available, but prima facie prosecution had succeeded in collecting such an evidence which sufficiently provided a chance to connect accused with commission of alleged crime---Accused could not be enlarged on bail, in circumstances.

Malik Ali Muhammad Dhol for Petitioner.
Malik Muhammad Jafar, Deputy Prosecutor-General with Farhat Sub-Inspector with record for the State.
Muhammad Wasim Khan Jaskani for the Complainant.

ORDER
MUHAMMAD QASIM KHAN, J.---Petitioner (Muhammad Younis) seeks post arrest bail in case FIR No.45/2014 dated 4-2-2014 under sections 420/468/471/411, P.P.C. registered at police station Kot Chutta, Dera Ghazi Khan.

2. Briefly the facts of the case are that Babar Ali complainant got lodged the above FIR with a narration that he is dealer of NFML (National Fertilizer Marketing Limited) in Kot Chhuta. On 7-11-2013, he received a call from Mobile No.0307-773056 and the caller offered to buy 1200-bags of fertilizer on profit of Rs.30 per bag. The deal was accordingly struck and after a while a Truck with Demand Draft No.0966995 came to the complainant at Kot Chhuta, Rs.30,000 as commission price was given to the complainant and Rs.6,000, remaining amount of commission, was promised to be given later, the complainant put his signatures on the back of Demand Draft. Thereafter, the said person handed over said Demand Draft to Muhammad

Zafar, Store Incharge and took away 1200-bags of fertilizer. On 19-11-2013, Muhammad Zafar Store Incharge informed the complainant by telephone that Demand Draft was fictitious and no amount was available in the account. On move by the complainant the Demand Draft was found to be bogus and further it came to his knowledge that same fertilizer had been sold on the shop of one Irfan son of Ghulam Shabbir. The complainant went to Irfan who told that he also had received a call from Mobile No.0307-7553056 and the Caller sold him 1200-bags of fertilizer at Rs.1,640 per bag and Rs.19,68,000 were given to seller. Thereafter, the complainant and Irfan carried out search of the Caller, when they collected phone data, the number was found closed. Afterwards, EMI of the cell phone (355190054911359) was gathered and one SIM No.03338567622 was found operative against the said EMI. It was traced that one Muhammad Abu Bakar was using the said SIM. The complainant along with witnesses went to Abu Bakar and told him that fraud has been committed from his Cell. Muhammad Younis (petitioner) and Sherbaz (petitioner's brother) were present there and were identified by the complainant party. Abu Bakar told that his SIM No.03338567622 is with Muhammad Younis and he is using the same. Ultimately, Muhammad Younis (petitioner), Abu Bakar Siddique and Sherbaz confessed their guilt.

3. Heard.

4. After hearing the arguments of learned counsel for the parties at considerable length and perusing the entire relevant record, it has been observed that:--
(i) The petitioner is nominated in the FIR with a specific role;
(ii) On the face of it a fraud of quite a huge amount has been committed in this case in a sophisticated manner;
(iii) The narration of the FIR, prima facie stands corroborated by the material so far collected by the Investigating Officer of this case;
(iv) Explicit statement of one Rana Muhammad Nadim has been recorded under section 161, Cr.P.C. who runs a computer composing shop, and in his statement the witness has specifically named the petitioner along with his brother that had got composed a Demand Draft in the name of NFML on the plea that original had been misplaced by them;
(v) Statement of another witness namely Irfan has also been recorded from whose shop defrauded fertilizer had been sold. In his statement, Irfan has disclosed a specific mobile number (0307-7553056) which was used to struck the deal of sale and purchase of fertilizer and after the said deal, Muhammad Younis (present petitioner) along with his brother Sherbaz came to him and they in their presence deloaded the fertilizer from their Trucks and put the same in his shop;
(vi) During investigation, when SIM data was tried to be searched, it transpired that said SIM had been closed, however, on investigation about EMI number, it was revealed that mobile set of one Muhammad Abu Bakar was used when making calls from SIM No. 0307-7553056, and said Muhammad Abu Bakar in his statement under section 161, Cr.P.C. disclosed that his mobile remained under the use by Muhammad Younis (petitioner). In this respect mobile/call data has also been collected by the

Investigating Agency, which fact provides sufficient incriminating material against the petitioner;
(vii) Apart from all above, the petitioner also has a criminal history of involvement in similar cases;
(viii) On the face of it, the petitioner is involved in a white-collar crime, and undoubtedly these offences are not victimless. A single scam can destroy a company, devastate families by whipping out their life savings, or cost billions of rupees to the victims. By passage of time such type of crimes are now becoming more sophisticated than ever, and the Investigating Agencies have to use modern devices and expertise skills to track down the culprits. In these circumstances, when indirect/ circumstantial evidence is collected by the Investigating Agencies without breakage of chain, the same can be considered sufficient evidence/material to connect the accused with commission of the crime.
(ix) In the same manner, in the instant case, although direct evidence may not available, yet prima facie the prosecution has succeeded in collecting such an evidence, which sufficiently provides a chain to connect the petitioner with commission of alleged crime.

5. From tentative assessment of the material discussed above, this Court is of view that prima facie sufficient incriminating material has been collected by the prosecution against the present petitioner. Consequently, I find no force in this petition to enlarge the petitioner on bail at this stage. Bail application is accordingly dismissed.

HBT/M-216/L Bail refused.

2015 P Cr. L J 1425
[Lahore]
Before Muhammad Qasim Khan, J
IMTIAZ ALI alias PAPU and 4 others---Petitioners
versus
The STATE and another---Respondents

Criminal Miscellaneous No.375-B of 2014, decided on 18th March, 2014.

Criminal Procedure Code (V of 1898)---
----S. 498---Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971, Rr.2(b), 26-16/44, 34, 35, 36, 37, 38, 43(a) & 44---Penal Code (XLV of 1860), Ss.420, 467, 468, 471, 482, 483, 485 & 486---Cheating and dishonestly inducing delivery of property, forgery of valuable security, will etc., forgery for purpose of cheating, using as genuine a forged document, punishment for using a false trade mark or property mark, counterfeiting a trade mark used by a public servant, making or possession of any instrument for counterfeiting a trade mark or property mark, selling goods marked with a counterfeit trade mark or property mark---Bail, refusal of---Accused contended that District Officer, Civil Defence could not raid reclamation plant for collection of samples for analysis---Under R.2(b) and R.43(a) of the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 District Co-ordinating Officer could delegate powers of entry, inspection and collection of sample to District Officer, Civil Defence---Police Official could not enter any refinery, blending plant (reclamation plant) and marketing company which was registered under R.16 of the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 in which case Rules 16 to 33 of the Pakistan Petroleum (Refining Blending and Manufacturing) Rules, 1971 would be applicable---Where refinery, blending plant, reclamation plant and marketing company was established without licence and operated without permission of authority, requirement/restriction/protection under R.34 of the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 would not be applicable and police would be competent to enter, search, inspect the site and collect samples for analysis---Law protected those who abided by law---Rules 34, 35, 36 and 37 of the Pakistan Petroleum (Refining, Blending and Manufacturing) Rules, 1971 were directory in nature and same were not mandatory as no penal clause had been provided for non-observance of such rules---Accused were running unauthorized factory dealing with lubricant oil and reclamation plant without fulfilling requirements of Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 so they were exposed/amenable to all legal consequences under Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 as well as Penal Code, 1860---Where a statute specified that an offence was bailable or non-bailable, cognizable or non-cognizable, Criminal Procedure Code, 1898 would be applicable---Under R.44 of the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 offences alleged to have been committed by accused were punishable with three years imprisonment and were non-bailable---In the absence of allegations of mala fide or ulterior motives on the

part of complainant, accused were not found entitled to extraordinary concession of pre-arrest bail---Bail application was dismissed.

Raja Ansar Nadeem Ahmad v. The State and others 2012 YLR 2855 ref.
Raja Khalid Asghar for Petitioners.
Malik Muhammad Jaffar, Deputy Prosecutor General with Shehzad Instructor Civil Defence, Khanewal.

ORDER
MUHAMMAD QASIM KHAN, J.---Petitioners (Imtiaz Ali alias Papu, Sarfraz Ahmad, Muhammad Sajjad, Allah Ditta and Allah Bakhsh) seek pre-arrest bail in case FIR No.382/2013 dated 6-10-2013 under sections 26-16/44 of Pakistan Petroleum (Refining Blending and Marketing) Rules, 1971 read with sections 420/468, 471/467, 482/483, 485/486 of the Pakistan Penal Code, registered at Police Station Sarai Sidhu, District Khanewal, wherein, precisely the allegation against the petitioners is that on spy information when raid was conducted by the team, they were found packing spurious mobil oil. All the accused managed their escape on seeing the raiding party, however, recoveries were effected from the spot.

2. The main thrust of arguments by learned counsel for the petitioners is that offences under Pakistan Petroleum (Refining Blending and Marketing) Rules 1971 are not attracted in this case, as raid on reclamation plaint could be conducted only by the authority, or anyone else to whom he delegated the power in this regard, therefore, raid by the Sub-Inspector or District Officer, Civil Defence, Khanewal, is against law; that samples which were taken and sent for testing were not properly obtained and requirements of rule 38 of the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 were violated; that offence does not fall within prohibitory clause and moreover, the same is bailable. In support of his contentions, learned counsel placed reliance on the case "Raja Ansar Nadeem Ahmad v. The State and others" (2012 YLR 2855).

3. I have heard the arguments of learned counsel for the parties and perused the available record.

4. Rule 2(b) of Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 defines the "Authority" as Director General Oil. It is important to mention here that Rules 34 and 35 of the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 are with regard to entry, inspection and enforcement of Rules. Rule 35 is with regard to facilities to the Inspecting Officer to be provided by the owner, manager or any other person incharge. Rules 36 and 37 are with regard to collection of samples and test in laboratories, etc. and under rule 43(a) the District Coordination Officer of the District has been declared as authority with regard to powers to perform functions under rules 34, 35, 36, 38 and 43. When rule 2(b) is read with rule 4(a), it becomes clear that District Coordination Officer is authorized with regard to entry, inspection and collection of samples and for the same purpose, he could delegate his powers to District Officer, Civil Defence.

5. Another important aspect of the matter is that under Part-V "INSPECTION AND CHECKS" and VI "TESTING OF PETROLEUM PRODUCTS", relate to entrance, examination or inquiry and testing of petroleum products and only an authorized person either authority under rule 2(b) or under rule 43(a) or a person who has been delegated powers in that behalf, can enter to make search and collect samples for the purposes of test, but these rules cannot be read in isolation to other parts of the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971, because although any police official does not enjoy authority to enter into any refinery, blending plant (reclamation plant) and marketing company, but this restriction is with regard to refinery, blending plant (reclamation plant) and marketing company, which have been compulsorily registered under Rule 16 as mentioned in PART-III of the Rules and other necessary conditions have been fulfilled as provided in PART-III and IV of the rules with regard to the marketing of petroleum products. In such an eventuality, conditions mentioned from Rules 16 to 33 would be applicable, but when a refinery, blending plant, (reclamation plant) and marketing company, is established without licence and performs functions without permission of the authority and without fulfilling other conditions, then requirements laid down under Rule 34 with regard to entry and inspection would not be applicable, as the law protects only those who abide by the law and no leniency can be shown towards the persons who have least respect for the law, rather are out to defraud the public by supply spurious and adulterated petroleum products. In this view of the matter, any refinery blending plant, (reclamation plant) and marketing company, which is run without proper licence and permission by the authority required under the rules or without fulfilling other formalities necessary for establishment of such refinery, blending plant, (reclamation plant) and marketing company, then the law enforcing agencies including the police would be competent to enter, search, inspect the site and collect samples for analysis, and if found involved in a cognizable offence, police is fully competent to register a criminal case against them.

6. As regards the stance taken by learned counsel for the petitioner that rules 34, 35, 36 and 37 of the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 are mandatory has no legal backing, because the above referred rules laid down in the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971, are only directory in nature and not mandatory, for the reason that no penal clause has been provided in case of non-observance of the formalities detailed therein.

7. Apart from this legal position, another factual aspect of the matter is that by insertion of Rule 43A in Pakistan Petroleum (Refining Blending and Marketing) Rules, 1971, the District Coordination Officers have been declared as "Authority" in the following manner:--

43A. Certain powers of Authority exercisable by the District Coordination Officer.--In rules 34, 35, 36, 38 and 43, reference to "Authority" includes a reference to the "District Coordination Officer" of the district in, or in relation to which any power or function is to be exercised or performed by the Authority."

In this view of the matter, the argument of learned counsel with regard to non-application is Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971

has no legal foundation to stand on. As is alleged in the FIR, petitioners were running unauthorized factory dealing with lubricant oil and reclamation plaint, etc without fulfilling the legal formalities as required by the Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971, therefore, the petitioners would be exposed to all legal consequences under the said Rules, as well as under Pakistan Penal Code, 1860 or any other law applicable to the facts and circumstances of the case.

8. As regards the case law referred by learned counsel for the petitioner, it appears that proper assistance was not rendered in the said referred case, otherwise, it is well settled proposition of law that where the relevant statute itself does specify whether an offence under it, is bailable, non-bailable, cognizable or non-cognizable, then Criminal Procedure Code (V of 1898) would apply. Rule 44 of the aforesaid Rules provided for imprisonment up to three years or with fine of Rs.15000 or with both, as such according to Schedule-II under the heading "OFFENCES AGAINST OTHER LAWS" the offences with which the petitioners are charged, are non-bailable.

9. For what has been discussed above, since there exists no mala fide or ulterior motives on the part of the complainant, the petitioner are not found entitled for extra ordinary concession of pre-arrest bail. Further deeper appraisal of evidence is not warranted at this stage. However, the learned trial court will be at liberty to examine in detail the report of the Chemical Examiner for the purposes of sampling, etc. This petition, therefore, is dismissed.
ARK/I-13/L Application dismissed.

2015 P L C (C.S.) 1267
[Lahore High Court]
Before Muhammad Qasim Khan, J
MUHAMMAD IQBAL SHAHID
versus
PROVINCE OF PUNJAB through Incharge Recruitment Complaints Redressal Cell/ Secretary (Revenue) and 4 others

W.P. No.5914 of 2013, decided on 3rd April, 2015.

Constitution of Pakistan---
----Art. 199---Constitutional petition---Civil service---Appointment---Concessional quota---Patwari, appointment of---Petitioner was son of retired government servant and sought his appointment as Patwari against concessional quota---Validity---Department had to first fill vacancies on open merit and then cases of persons, who could not compete on open merit must have been considered against concessional quota, if they applied for the same---Department could not be allowed to import successful candidates from open merit into concessional quota as the whole scheme of policy of creating quotas would be frustrated and main purpose of keeping concessional quota would end to be just an eyewash---High Court directed the authorities to adjust successful persons whose name had been mentioned against concessional quota, on open merit and petitioner would be appointed against concessional quota, if otherwise, petitioner stood on merit and had met with appointment criteria---Petition was allowed, in circumstances.

Nergis Shazia Chaudhry v. Federal Public Service Commission and others 2010 PLC (C.S.) 1035; Ritesh R. Sah v. Dr. Y.L. Yamul and others (1996) 3 Supreme Court Cases 253 and AIR 1996 Supreme Court 1378 rel.
Rizwan Mushtaq for Petitioner.
Shahid Mobeen, Addl. A.-G. with Muhammad Naeem Akhtar, Naib Tehsil AC Office Kasur, Abdul Waheed HC Irshad Baig Naib Tehsildar, Muhammad Azam Deputy Director (Legal) and Muhammad Tahir Riaz Assistant Board of Revenue for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.--- Pursuant to advertisement about nine vacancies of Patwaries (six on open merit, 2 on concessional quota for government employees' children, and one on disabled quota), the petitioner being son of a retired government servant submitted his candidatures and after completing the requisite formalities, the name of the petitioner fell at serial No.4 of the contesting candidates against concessional quota, as there were only two vacancies, therefore, he could not be appointed in said concessional quota. Through this writ petition the grievance of the petitioner is that two other candidates namely Shaukat Ali Javaid and Saeed Khan had obtained 67 and 60 marks respectively, therefore, they could be conveniently adjusted on open merit, but they both were included and selected against concessional quota, thus the petitioner was deprived. According to the learned counsel,

concessional quota was meant to accommodate deserving candidates who otherwise could not qualify on open merit. It is further argued by learned counsel that a similarly placed candidate namely Muhammad Ramzan whose name figured at Serial No.3 of the merit list against concession quota, filed Writ Petition No.2959/2007 and ultimately he was, appointed on open merit.

2. The learned Additional Advocate-General assisted by departmental authorities opposed this writ petition.

3. The whole controversy in this case boils down to the point that whether a candidate belonging to the reserved category/quota even if he is entitled to be selected for appointment on open competition on the basis of his own merit yet can he be counted against the quota meant for reserved category or will he be treated as an open competition candidate? To answer this question, one must understand the logic behind formation of policy especially the element of concessional quota. It is quite obvious that concessional quotas are maintained in order to accommodate those candidates who otherwise for any reason could not compete on open merit, therefore, in order to provide them yet another opportunity of appointment, such concessional quota is created. But here in this case, there is no denial to the fact that Shaukat Ali Javaid and Saeed Khan (both could be appointed on open merit) had secured 67 and 60 marks respectively in the final merit, but they have been selected against concessional quota, whereas, the persons who had secured 58 and even 57 marks have been selected on open merit. This mode of selection is against the spirit of recruitment policy and spirit for special quota, as if a candidate although entitled for reserved quota, achieves the target of selection on open merit, but is not selected on the post against open merit, rather is considered on reserved quota alone, then wisdom for creating quota for any area or group of people will be frustrated, as the purpose behind creation of such quota is to up-built persons of backward areas or belonging to deprived class of people, who otherwise could not compete on open merit.

4. Furthermore, on scrutiny of the documents, it has been observed that one Muhammad Ramzan had filed his application for appointment against one of abovementioned vacant posts, in the body of said application he mentioned the particulars of his deceased father that he had served as Naib Qasid in Tehsil Office Kasur but he had not specified in the prayer clause that in which category either on open merit or on concessional quota, he was applying. The department considered his application against concessional quota and as he stood at serial No.3 of the said quota, he could not be appointed. However, subsequently he (Muhammad Ramzan) agitated the matter that his application must be considered against open merit. Accordingly, the department reconsidered his matter and he fell on merit, therefore, now said Muhammad Ramzan has been appointed on open merit. Exactly same is the position with Saeed Khan, whose application also disclosed that his father was working as Patwari but in prayer clause of his application he had not specified that in which category he had applied for appointment. The department considered his application against concessional quota and appointed him accordingly. Thus, the

discrimination meted out by the department is quite apparent from the record itself and this writ petition merits acceptance on this ground alone.

5. As a normal course, the department had to first fill the vacancies on open merit and then the cases of persons, who could not compete on open merit, must have been considered against concessional quota if they applied for the same. In a situation like the one in the instant case, if the department is allowed to import the successful candidates from open merit, into concessional quota, then the whole scheme of policy of creating quotas would be frustrated and the main purpose of keeping concessional quota would end to be just eyewash. While holding so, reliance is placed on the case "Nergis Shazia Chaudhry v. Federal Public Service Commission and others" (2010 PLC (CS) 1035), "Ritesh R. Sah v. Dr. Y.L. Yamul and others" (1996) 3 Supreme Court Cases 253, also reported in AIR 1996 Supreme Court 1378.

6. Consequently, this writ petition is allowed, the respondent authorities are directed to adjust the successful persons whose name have been mentioned against concessional quota, on open merit and the petitioner shall be appointed against concessional quota, if otherwise, he stands on merit and meets with the appointment criteria.

7. It is clarified here that during arguments, the Court was informed that certain seats are still vacant; therefore, it is held that as earlier candidates who have been appointed on open merit shall not be disturbed as their selection is not under question and even otherwise, they have earned a legitimate right of expectancy.

MH/M-124/L Petition allowed.

P L D 2015 Lahore 313
Before Muhammad Qasim Khan, J
Mian MUHAMMAD ALI---Petitioner
versus
CCPO and others---Respondents

Writ Petition No.29840 of 2014, decided on 12th November, 2014.

Criminal Procedure Code (V of 1898)---
----Ss. 22-A & 22-B---Constitution of Pakistan, Art.199---Constitutional petition---Order passed by Justice of Peace---Implementation of order passed by Ex-officio Justice of Peace---Directions/guidelines by High Court to the Police Department to implement order passed by the Ex-officio Justice of Peace.
Following directions were issued by High Court to all the CPOs/DPOs throughout the Province of Punjab, as guideline, with further direction to get the same implemented by their subordinates:--
(i) Any order passed by a Judicial Officer even in exercise of his jurisdiction on administrative side, must be followed by concerned authorities, if the same otherwise, holds the field;
(ii) When direction by Ex-officio Justice of Peace is passed in the above terms and the information received by the SHO discloses commission of a cognizable offence, he shall proceed under section 154, Cr.P.C. and if the information discloses commission of a non-cognizable offence then the SHO shall proceed under section 155, Cr.P.C;
(iii) If after registration of case in a cognizable offence, concerned police official has information or other intelligence relating to the alleged commission of cognizable offence, on the basis of which he has reason to suspect that alleged offence has not been committed, he shall enter information or other substance in the police station daily diary register and shall also record his reasons for suspecting that such offence has not been committed and shall also inform to the informant, if any, the fact that he will not investigate the case and shall also submit his report to the concerned Magistrate having the jurisdiction to take cognizance of such offence through senior official;
(iv) If the case is registered under section 295-C, P.P.C. then Incharge Police Station shall immediately forward the police file to the S.P. (Investigation), as required under section 156(A), Cr.P.C. and in case of offence of Zina under Offence of Zina (Enforcement of Hudood) Ordinance, he shall also forward the file to S.P concerned for investigation;
(v) Considering alarmingly high ratio of reports/complaints, in recent past, with regard to injuring or defiling place of worship, with intent to insult. the religion of any class (Section 295, P.P.C.), deliberate and malicious acts intended to outrage religions feelings of any class by insulting its religion or religious beliefs (Section 295-A, P.P.C.), as well allegations of, defiling, etc of copy of Holy Quran (Section 295-B, P.P.C.), keeping in mind social atmosphere and religious impact of such complaints in general public irrespective of truthfulness of such allegations, it is recommended that the accusations defined by Sections 295, 295-A and 295-B, P.P.C.,

must also be probed/inquired into by high rank police officers not below the rank of Superintendent of Police, so as to maintain public confidence on investigation system;
(vi) If after registration of cognizable offence under section 154, Cr.P.C. the concerned police official does not proceed under section 157(2), Cr.P.C. read with rule 24.4 of Police Rules, then he shall proceed for investigation of the case or refer the matter to any other official competent to investigate the same;
(vii) The Investigating Officer after collecting evidence if feels that sufficient material is not available to connect the accused person(s) with commission of crime, he will defer the arrest of nominated accused or release the accused on bond under section 169, Cr.P.C;
(viii) If the Investigating Officer finally concludes that although offence has been committed but there is no iota of evidence available to connect all or any of the accused with commission of crime, he shall submit discharge report before the learned Ilaqa Magistrate, accordingly, but shall proceed against the remaining accused against whom sufficient evidence is available, strictly in accordance with law;
(ix) The Investigating Officer if concludes that no such occurrence has taken place and a false case has been registered and sufficient evidence has been collected in this regard to negate the stance of the complainant, he shall submit cancellation report before the Ilaqa Magistrate for proceeding on the same in accordance with law;
(x) If the Ilaqa Magistrate agrees with cancellation report then the police authorities must proceed against the complainant or the informer under section 182, Cr.P.C.

Mian Muhammad Aslam for Petitioner.
Wali Muhammad Khan, Asstt. A.G. with Muhammad Ameen CCPO.

ORDER
MUHAMMAD QASIM KHAN, J.---I have heard the learned counsel for the petitioner as well as learned Law Officer appearing on court's call along with CCPO, Lahore who was present in court in connection with another matter.

2. In number of cases it has been observed that writ petitions are filed before this Court to seek implementation of orders passed by the learned Ex-officio Justice of Peace. In general it has been noticed that earlier the learned Justice of Peace issues direction to the SHO concerned for (i) registration of case or for recording version of the petitioner in accordance with law, or (ii) proceedings on application of the petitioner. But, these orders are not implemented, whereupon, the concerned party approached the learned Ex-officio Justice of Peace again to seek implementation of the orders, and on this second move direction to some senior officer or even to the CCPO is issued. The orders passed by learned Justice of Peach when still remain unimplemented and as a last resort the aggrieved party files writ petition before this Court to get the orders of learned Ex-officio Justice of Peace implemented. Thus, one way or the other this Court is overburdened just because of inaction on the part of the concerned quarters in police department. Faced with this situation, following

directions are issued to all the CPOs/DPOs throughout the Province of Punjab, as guideline, with direction to get the same implemented by their subordinates:--

(i) Any order passed by a Judicial Officer even in exercise of his jurisdiction on administrative side, must be followed by concerned authorities, if the same otherwise, holds the field;

(ii) When direction by learned Ex-officio Justice of Peace is passed in the above terms and the information received by the SHO discloses commission of a cognizable offence, he shall proceed under section 154, Cr.P.C. and if the information discloses commission of a non-cognizable offence then the SHO shall proceed under section 155, Cr.P.C;

(iii) If after registration of case in a cognizable offence, concerned police official has information or other intelligence relating to the alleged commission of cognizable offence, on the basis of which he has reason to suspect that alleged offence has not been committed, he shall enter information or other substance in the police station daily diary register and shall also record his reasons for suspecting that such offence has not been committed and shall also inform to the informant, if any, the fact that he will not investigate the case and shall also submit his report to the concerned Magistrate having the jurisdiction to take cognizance of such offence through senior official;

(iv) If the case is registered under section 295-C, P.P.C. then Incharge Police Station shall immediately forward the police file to the S.P. (Investigation), as required under section 156(A), Cr.P.C. and in case of Offence of Zina under Offence of Zina (Enforcement of Hudood) Ordinance, he shall also forward the file to S.P concerned for investigation;

(v) Considering alarmingly high ratio of reports/complaints, in recent past, with regard to injuring or defiling place of worship, with intent to insult. the religion of any class (Section 295, P.P.C.), deliberate and malicious acts intended to outrage religions feelings of any class by insulting its religion or religious beliefs (Section 295-A, P.P.C.), as well allegations of defiling, etc of copy of Holy Quran (Section 295-B, P.P.C.), keeping in mind our social atmosphere and religious impact of such complaints in general public irrespective of truthfulness of such allegations, it is recommended that the accusations defined by sections 295, 295-A and 295-B, P.P.C., must also be probed/inquired into by high rank police officers not below the rank of Superintendent of Police, so as to maintain public confidence on investigation system;

(vi) If after registration of cognizable offence under section 154, Cr.P.C. the concerned police official does not proceed under section 157(2), Cr.P.C. read with rule 24.4 of Police Rules, then he shall proceed for investigation of the case or refer the matter to any other official competent to investigate the same;

(vii) The Investigating Officer after collecting evidence if feels that sufficient material is not available to connect the accused person(s) with commission of crime, he will defer the arrest of nominated accused or release the accused on bond under section 169, Cr.P.C;

(viii) If the Investigating Officer finally concludes that although offence has been committed but there is no iota of evidence available to connect all or any of the accused with commission of crime, he shall submit discharge report before the

learned Ilaqa Magistrate, accordingly, but shall proceed against the remaining accused against whom sufficient evidence is available, strictly in accordance with law;
(ix) The Investigating Officer if concludes that no such occurrence has taken place and a false case has been registered and sufficient evidence has been collected in this regard to negate the stance of the complainant, he shall submit cancellation report before the learned Ilaqa Magistrate for proceeding on the same in accordance with law;
(x) If the learned Ilaqa Magistrate agrees with cancellation report then the police authorities must proceed against the complainant or the informer under section 182, Cr.P.C.

2. At this stage the CCPO, Lahore submits that he will ensure meticulous compliance of directions issued by this Court and will make sure that in future all orders passed by learned Ex-officio Justice of Peace, including the order dated 30-9-2014 subject matter of instant writ petition, must be implemented in letter and spirit. This writ petition is disposed of.

3. Office is directed to circulate copy of this order to the CPOs/DPOs, throughout the Province of Punjab and to all other concerned, for adherence.

AG/M-7/L Petition disposed

PLJ 2015 Cr.C. (Lahore) 61 (DB)
[Multan Bench Multan]
Present: **MUHAMMAD QASIM KHAN AND ABDUS SATTAR ASGHAR, JJ.**
MUHAMMAD ALI alias MAMMI--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 6651-B of 2014, decided on 15.12.2014.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail, grant of--Allegation of--1210 grams of *charas* was found in possession of a shopper of petitioner--It was case of prosecution that on spy information when raid was conducted, petitioner was apprehended and was found in possession of 1210-grams of *charras*, as such, a small quantity of contraband "*charras*" exceeded prescribed upper limit of quantity of narcotic, as mentioned in Section 9(c) of CNSA, 1997, which resulted in bringing case of present petitioner within mischief of 9(c) of Control of Narcotic Substance Act, 1997--In this case, there was nothing on record to say that whether narcotic, allegedly recovered from petitioner, was weighed with its wrappe1 'shopper or it was separated from wrapper/shopper and then weighed--In this view of matter, when on this aspect nothing can be said with exactitude, an inference favorable to petitioner can be drawn that narcotic substance recovered from petitioner was weighed with its wrapper/packet, therefore, question about exact weight of recovered narcotic substance would require further inquiry, as such a little difference, *prima facie*, casts doubt on prosecution story qua involvement of present petitioner in a case covered u/S. 9(c) of Control of Narcotic Substances Act, 1997--Additionally, petitioner was previous non-convict, he was behind bars and after completion of investigation challan has been submitted, but there was no progress in trial--Consequently, this petition was allowed. [Pp. 62 & 63] A

Ch. Dawood Ahmad Vains, Advocate for Petitioner.
Mr. Hassan Mehmood Tareen, Deputy Prosecutor General for State.
Date of hearing: 15.12.2014.

ORDER
Petitioner seeks post arrest bail in case FIR No. 543/2014 dated 02.09.2014 under Section 9(c) Control of Narcotic Substances Act, 1997 registered at Police Station City Sahiwal, wherein, allegation against the petitioner is that when raid was conducted, he was found in possession of a shopper containing 1210-grams of charas.

2. We have heard the arguments of learned counsel for the petitioner as well as learned Deputy Prosecutor General and perused the available record.

3. It is case of the prosecution that on spy information when raid was conducted, the petitioner was apprehended and was found in possession of 1210-grams of *charras*,

as such, a small quantity of contraband "*charras*" exceeded the prescribed upper limit of the quantity of the narcotic, as mentioned in Section 9(c) of the CNSA, 1997, which resulted in bringing the case of the present petitioner within the mischief of 9(c) of the Control of Narcotic Substances Act, 1997. In this case, there is nothing on the record to say that whether the narcotic, allegedly recovered from the petitioner, was weighed with its wrapper/shopper or it was separated from the wrapper/shopper and then weighed. In this view of the matter, when on this aspect nothing can be said with exactitude, an inference favorable to the petitioner can be drawn that the narcotic substance recovered from the petitioner was weighed with its wrapper/packet, therefore, the question about exact weight of the recovered narcotic substance would require further inquiry, as such a little difference, *prima facie*, casts doubt on the prosecution story qua involvement of the present petitioner in a case covered under Section 9(c) of the Control of Narcotic Substance Substances Act, 1997. Additionally, the petitioner is previous non-convict, he is behind the bars and after completion of investigation the challan has been submitted, but there is no progress in the trial. Consequently, this petition is allowed and petitioner is admitted to post arrest bail on furnishing bail bond in the sum of Rs. 100,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail allowed

PLJ 2015 Cr.C. (Lahore) 239
Present: **MUHAMMAD QASIM KHAN, J.**
MUHAMMAD TUFAIL--Petitioner
versus
STATE & another—Respondents

Crl. Misc. No. 13470-B of 2014, decided on 24.10.2014.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pakistan Penal Code, (XLV of 1860), S. 406--Bail before arrest--Confirmed--Allegation of--Criminal breach of trust--Petitioner had obtained car, along with its registration book, from him but subsequently car was returned to complainant without registration book, which petitioner retained with him with *mala fide*--During investigation, it has come on record that petitioner has not committed any criminal breach of trust, as he had purchased registration book of said car from one driver for consideration of Rs.25,000/- and handed-over registration book to complainant after receiving said amount from him--In such circumstances, possibility of involvement of petitioner in instant case due to *mala fide* and ulterior motive on part of complainant cannot be ruled out--Thus, efforts of police to arrest petitioner without any cogent evidence was tainted with *mala fide* and ulterior motive--Investigation was complete and nothing was to be recovered from petitioner--Object of pre-arrest bail was to save innocent persons from being unnecessarily harassed due to their arrest in case instituted against them with ulterior motives--Bail confirmed. [P. 239] A

1996 P.Cr.LJ 1422, *rel*.
Mian Shahid Ali Shakir, Advocate with Petitioner.
Mr. Muhammad Akhlaq, D.P.G. for State.
Complainant in Person.
Date of hearing: 24.10.2014.

ORDER
In continuation of order dated 02-10-2014, whereby the petitioner was granted ad interim pre-arrest bail in the instant case, I have further heard learned counsel for the parties and gone through the record.

2. As per FIR, allegation of criminal breach of trust has been leveled against the petitioner by the complainant alleging therein that the petitioner had obtained car, along with its registration book, from him but subsequently the car was returned to the complainant without registration book, which the petitioner retained with him with *mala fide*. During investigation, it has come on record that the petitioner has not committed any criminal breach of trust, as he had purchased the registration book of the said car from one driver namely Bhola for consideration of Rs.25,000/- and handed-over the registration book to the complainant after receiving the said amount from him. This fact is clearly shows in daily Diary No. 8 dated 25-08-2014 in the police file. In such circumstances, possibility of involvement of the petitioner in the

instant case due to *mala fide* and ulterior motive on the part of complainant cannot be ruled out. Thus, the efforts of police to arrest the petitioner without any cogent evidence is tainted with *mala fide* and ulterior motive. The investigation is complete and nothing is to be recovered from the petitioner. The object of pre-arrest bail is to save innocent persons from being unnecessarily harassed due to their arrest in the case instituted against them with ulterior motives. Thus, while placing reliance on 1996 P.Cr.L.J. 1422 *(James Sardar and another vs. The State),* instant petition is allowed and ad interim pre-arrest bail already granted to the petitioner *vide* order dated 02-10-2014 is confirmed, subject to furnishing fresh bail bonds in the sum of Rupees One Lac (Rs. 1,00,000/-), with one surety, in the like amount to the satisfaction of trial Court.

(A.S.) Bail confirmed

PLJ 2015 Cr.C. (Lahore) 294 (DB)
[Multan Bench Mutlan]
Present: **MUHAMMAD QASIM KHAN AND SIKANDAR ZULQARNAIN SALEEM, JJ.**
ABDUL HAMEED and another--Appellants
versus
STATE and another—Respondents

Crl. Appeal No. 281 & 443 of 2009, heard on 24.3.2014.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 410--Pakistan Penal Code, (XLV of 1860), S. 302(b)--Appeal against judgment--Conviction and sentence--Recovery was affected from dwelling house--Furthermore, as admitted by PWs at time of recovery, lumberdar of village and other respectable of locality had gathered, then why any one amongst those private and unrelated persons was not associated with recovery proceedings--As per post-mortem report, bloody discharge from mouth was present--This being position, if dead body was wrapped in a Chaddar "*PALLI*", and bloody discharge was oozing from mouth of deceased, then as a normal course some bloody discharge stains must have been present on Chaddar "PALLI" as well, but nothing of this sort has come in record of prosecution nor said cloth/Palli was sent to Chemical Examiner, Forensic Laboratory or histopathologist for analysis and Deoxyribonucleic Acid test--For this reason, this recovery could not be wedded with commission of offence--Therefore, without there being any independent corroboration, specific identity or any other connection of such recovered articles with murder, this recovery becomes inconsequential in this case--Narration of FIR, no motive whatsoever has been set by complainant, nor any such motive was alleged by him before police and even this motive was not alleged by him while appearing before trial Court in witness box--Motive element has been introduced only by PWs that accused appellants had suspicion that deceased had illicit relations with daughter of accused appellant and due to that reason was killed by them--But except these balled assertions, no other corroboration was available from entire prosecution evidence--Even these two witnesses during cross-examination admitted that accused never complained them about this motive nor any panchayat was convened--Investigating Officer while appearing in witness-box as PW during cross-examination admitted that he could not say if accused had any sister--Motive told by these witnesses was nothing but dishonest improvement in prosecution case--Evidence of last seen and extra judicial confession has been disbelieved recovery could not be wedded with commission of crime, whereas, motive was entirely based on dishonest improvements by prosecution witnesses, therefore, prosecution has failed to prove its case against accused/appellant beyond any shadow of doubt--Appeal was allowed. [P. 301] A, B & C

Prince Rehan Iftikhar Sheikh, Advocate for Convict/Appellant.
Mr. Muhammad Ali Shahab, D.P.G. for State.
Mr. Mudassar Altaf Qureshi, Advocate for Complainant.
Date of hearing: 24.3.2014.

JUDGMENT

Muhammad Qasim Khan, J.--Abdul Hameed and Zahid Abbas accused/ appellant faced trial before the learned Additional Sessions Judge, Burewala, in case FIR No. 138 dated 11.04.2008 under Section 302, 201/34, P.P.C. Police Station Saddar Burewala and on conclusion of the trial *vide* judgment dated 27.02.2009 the learned trial convicted both the accused under Section 302(b), P.P.C. and sentenced Zahid Abbas accused to suffer rigorous imprisonment for fourteen years and pay compensation, of Rs. 50,000/-; Abdul Hameed accused/ appellant was however, sentenced to ten years rigorous imprisonment with a compensation of Rs. 30,000/-. It was further ordered that in case of recovery of compensation, it shall be distributed amongst legal heirs of the deceased according to their legal shares; otherwise, the accused would undergo simple imprisonment for five months and three months, respectively. To assail their above conviction and sentence, the accused/ appellants filed Criminal Appeal No. 281/2009. On 10.12.2009 when Criminal Miscellaneous No. 1 of 2009 (application for suspension of sentence) came up for hearing before this Court, a notice for enhancement was issued to the accused/convicts to the effect that "as to why their sentence be not enhanced if after hearing both the sides it is proved that the offence u/S. 302(v), P.P.C. is made out." On issuance of notice for enhancement, a separate file (Criminal Revision No. 443/2009) was prepared and is now being taken up for decision through this judgment along with the main appeal against conviction.

2. Briefly the facts of the case as disclosed by Muhammad Sadiq complainant/PW-1 are that he is a farmer. On 10.04.2008 his son Muhammad Ehsan aged 18/19-years used to work at home till 11.00 a.m; then went out of house and did not return till evening, whereupon, the complainant along with Muhammad Abbas and Muhammad Sabir proceeded for his search but he could not be found. While on search, on 11.04.2008 at 4.00 (evening) when they reached Chiragah Sarkar, they saw a hand coming out of rubbish heap. When they removed rubbish heap, the dead body of Muhammad Ehsan was recovered. On leaving the dead body under the guard of Muhammad Abbas, the complainant was proceeding towards Police Station when he met the police and reported the matter to Ali Sher Sub-Inspector (PW-14), who reduced the same into writing and sent it to Police Station, where formal FIR Ex.PA was chalked out.

3. On reaching the place of occurrence, Ali Sher Sub-Inspector PW-14, prepared inquest report Ex.PB, prepared unsealed site-plan Ex.PH, sent the dead body to mortuary THQ Hospital Burewala under the escort of Abdul Jabbar 310/C and he himself interrogated the public. The Sub-Inspector then searched for the accused. On the same day, he obtained report of autopsy along with last worn clothes of the deceased *vide* memo. Ex.PF. On 12.04.2008, Muhammad Salman PW-6 and Sami Ullah PW-7 appeared before him and got recorded their statements regarding extra judicial confession by the accused Abdul Hameed. On 13.04.2008, the Investigating Officer got prepared scaled site-plan and recorded the statement of Revenue Patwari. On 23.04.2008, he arrested Abdul Hameed and Zahid Abbas accused from bus stop of Chak No. 473/E.B. on the next day, he obtained physical remand of the accused.

Zahid Abbas accused/appellant while in police custody on 28.04.2008 led to the recovery of Chaddar (Palli) P-1, rope P-2 and Kassi P-3, which were taken into possession *vide* memo. Ex.PB, witnessed by Muhammad Sadiq and Muhammad Sarwar PW-2. The Investigating Officer prepared the site-plan of the place of recovery Ex.PJ and on 29.04.2008 the accused were sent to judicial lockup. On conclusion of the investigation, report under Section 173, Cr.P.C. was sent to Court.

4. On receipt of report under Section 173, Cr.P.C., accused/appellants were charge sheeted, to which they pleaded not guilty and claimed to be tried. The prosecution in order to establish its case produced as many as fourteen witnesses, which include Ali Sher Sub-Inspector PW-14, whose statement has been given in detail in the preceding Paragraph. Muhammad Sadiq complainant PW-1 while appearing in the witness-box reiterated the contents of the FIR, however, added that at the time of recovery of dead body, he was not aware about the accused, but on the same day he was told by the people that accused Abdul Hameed and Zahid Abbas were the real culprits. He also deposed about witnessing certain recoveries on the pointation of the accused. Muhammad Sarwar PW-2 and Khadim Hussain PW-3 made statements of having lastly seen the deceased in the company of accused/appellants. Muhammad Abbas PW-4 toed the line of the complainant, whereas, Muhammad Salman PW-7 and Sami Ullah PW-7 made statements with regard to alleged extra judicial confession by Abdul Hameed accused/appellant. Muhammad Akram PW-8, Muhammad Ashiq PW-9, Abdul Jabbar PW-10, Iftikhar Ahmad PW-12 and Abdul Majeed PW-13 are formal witnesses who made statements about respective roles performed by them during investigation.

5. PW-11 Dr. Muhammad Yaqoob, had conducted post-mortem of Ihsan deceased on 11.04.2008 and observed the following injuries:--

1. Ligature mark, was present in front and upper part of the neck. On dissection muscle of the neck contused. Right conu of hyoid bone found, fractured.
2. Contusion 7 cm x 5 cm on front of middle of the left thigh.

According to the doctor, probable time that elapsed between injury and death was within a few minutes and between death and post-mortem was 24 to 36 hours. On close of oral evidence, the prosecution produced report of Chemical Ex.PK and closed its case.

6. When examined under Section 342, Cr.P.C., in answer to question "why this case registered against you and why the PWs have deposed against you?, Abdul Hameed stated that:

"I am innocent. I am a poor labourer due to suspicion at the instance of my opponent, I have been roped in this case and from the "Qul" ceremony the police arrested me and my son and got me challan falsely with the connivance of police."

Similar reply had been made by Zahid Abbas accused/appellant. They accused persons however, neither appeared in the witness-box within the meaning of Section 340(2), Cr.P.C. nor produced any evidence in defence and on conclusion of the trial, above conviction and sentence was recorded.

7. We have heard the arguments of learned counsel for the parties at considerable length and perused the entire available record with their assistance.

8. On the face of it, this is a case of an unseen occurrence and the entire prosecution case hinges upon:--
(i) The evidence of last seen furnished through the statements of Muhammad Sarwar PW-2 and Khadim Hussain PW-3;
(ii) The evidence of extra judicial confession coming through the statements of Muhammad Salman PW-6 and Sami Ullah PW-7;
(iii) The medical evidence coming through the statement of Dr. Muhammad Yaqoob Kamal PW-11 and post-mortem report Ex.PG;
(iv) The evidence of recovery of certain articles, allegedly used in the commission of the offence, on the pointation and disclosure of convict/appellant; and
(v) The motive.

9. In order to establish its case, the prosecution mainly depended on the evidence of last furnished by Muhammad Sarwar PW-2 and Khadim Hussain PW-3. Both the witnesses stated that on 11.04.2008, they had seen the deceased in the company of the accused/appellant, but after seeing them and putting an inquiry they went to Mian Channu to have a reaper. On the next date when they came back, they were informed that Ehsan deceased was buried in a rubbish heap and his dead was recovered from there. These witnesses improved their statements while appearing before the learned trial Court and they were duly confronted by the defence with respect to these improvements, especially with regard to their query from Ihsan to fodder the cattle and motive part introduced by these prosecution witnesses. These improvements appear to be dishonest attempt to strengthen the prosecution case. Moreover, it is not in the evidence of these prosecution witnesses that they saw the deceased along with appellant while entering into their house and especially when there are number of streets falling between the houses of these witnesses and the appellants, then why any one else from vicinity could not see the deceased in the company of the convict/appellant at that time. It is proved during trial that statements of these witnesses were recorded after sixteen to seventeen days of the occurrence, but as per statements of these prosecution witnesses when they returned to home from Mian Channu next day people had gathered at the place from where dead body was recovered, dead body was lying on the cot and police officials were also present. This being the position coming from the mouth of the prosecution witnesses themselves that they had come back home at the crucial time when dead body was recovered, it was placed, on a cot and more so when the police was also available at the place of recovery of the dead body, then why there statements were not recorded at that very moment and why they did not disclose the factum of last seen either to the complainant or to the police, whereas, to prove the element of last seen, the prosecution was under onus to link the evidence of last seen with the place where deceased was murdered, whereas, necessary chain is badly missing in the case. This fact creates doubts about the prosecution story *qua* the evidence of last seen. When whole of the prosecution evidence is juxtaposed and examined, a man of common prudence is not ready to believe it.

10. Moreover, the arrest of the accused/appellants in this case is an important event to be considered as it correlates with the evidence of last seen as well as extra judicial confession. PW-1 Muhammad Sadiq complainant who is father of Ehsan deceased stated that QUL KHAWANI was held on the next date of registration of FIR and from that venue the police arrested both the accused persons. He made another admission during cross-examination that police registered the case after consultation. On the point of arrest of the accused, other PWs toed the line of the complainant. All these facts are when taken together, it becomes quite obvious that FIR was registered on 11.04.2008, QUL KHAWANI, according to the complainant, was held on the next day i.e. 12.04.2008 and on the same day accused were arrested by the police. Against all that, Ali Sher Sub-Inspector/ complainant PW-14 who had investigated the case, submitted that he arrested Abdul Hameed on 23.04.2008 when he was informed about their presence at bus stop of Chak No. 473/E.B, on the same day he secured their physical remand. If the statement of the complainant and his other witnesses are believed on the aspect that arrest of the accused/appellants was made on 12.04.2008, then what was the reason to keep them in illegal confinement for quite a long time, especially when the evidence of last seen and extra judicial confession was available with the prosecution. It therefore, appears that arrest was made under some suspicion, the accused/ appellants were kept under illegal confinement for a long time and later on by fabricating false pieces of evidence of last seen, extra judicial confession and recovery, they were challaned, and these facts cast serious doubt about the prosecution story. The case *"Muhammad Yaqoob versus The State"* (2007 MLD 100), is referred.

11. As regards the evidence of Extra Judicial Confession, in this case according to the prosecution story, only Abdul Hameed accused/appellant went to the house of Salman PW-6, who is grandfather of deceased Ehsan, where Sami Ullah PW-7, cousin of the complainant was also present and the accused/appellant confessed his guilt. Although, according to Salman PW-6 the accused Abdul Hameed disclosed the mode of murder but the details of the occurrence with regard to the place of occurrence and its time, was not narrated by him and furthermore, even if such extra judicial confession was made, no corroborative piece of evidence in this regard could be collected by the police against him. Apart from that, a feeble person of 60-years had allegedly confessed guilt, then why both the witnesses who otherwise happened to be close relatives of the complainant as well as deceased, did not try to arrest him. It is pertinent to mention here that as per prosecution witnesses i.e. the complainant Muhammad Sadiq and others, accused appellants were arrested on 12.04.2008 immediately after QUL KHAWANI of the deceased and QUL KHAWANI was held in the early morning. According to the stance of Ali Sher Sub-Inspector/Investigating Officer PW-14, the accused confessed his guilt before Muhammad Salman and Sami Ullah and in this respect statements of both the witnesses were recorded by him on 12.04.2008. If the statements of prosecution witnesses are believed on the aspect that accused were arrested soon after QUL KHAWANI (held on 12.04.2008), then when the accused were in the custody of the police how they could approach the witnesses namely Muhammad Salman PW-6 and Sami Ullah PW-7 and confess the guilt, especially when it has categorically come in the prosecution evidence that QUL

KHAVANI was held at 6/7.00 a.m., police came in the village and arrested the accused at 8/9.00 a.m. There is yet another important contradiction amongst the statements of PW-6 and 7 i.e. according to Salman PW-6 Abdul Hameed came to him and by confessing the guilt he gave details of the occurrence and there is no mention about Zahid, whereas, Sami Ullah PW-7 in clear wrords disclosed in his examination-in-chief that *"After 10/15 minutes after departure of Hameed, Zahid Abbas came there. We asked Zahid what had happened he told us that the deceased was carrying illicit relations with his sister and they had killed Ahsan."* As discussed above, Muhammad Salman PW-6 and Sami Ullah PW-7 while appearing in the witness-box tried to improve the prosecution case to lend strength, but these improvements were duly confronted during cross-examination, as they never disclosed such improved facts to the police at the time of recording their statements under Section 161, Cr.P.C. This fact is further proved by the statement of Sami Ullah PW-7 himself when he stated that his statement had never been recorded before the police and he never approached the police to tell about the arrival of Abdul Kameed and Zahid Abbas accused/appellants. This above pointed unnatural conduct of the PWs, admission of PW-7 with regard to non-recording of his statement by the police and other above pointed glaring contradiction appearing in the statements of these PWs, drastically damages the case of the prosecution to the extent of extra judicial confession.

12. As regards the evidence of recovery, although it is case of the prosecution that certain recoveries were affected by Ali Sher Sub-Inspector/Investigating Officer PW-14 on the pointation and disclosure of Zahid Abbas accused/appellant, like Chaddar (PALLI) P-1, Rope P-2 and Kassi P-3, but none of these articles was blood stained and furthermore, these articles are not only of daily usage by the farmers in the villages, but are also commonly available in the market. Moreover, the recovery was affected from the dwelling house. Furthermore, as admitted by the PWs at the time of recovery, lumberdar of the village and other respectable of the locality had gathered, then why any one amongst those private and unrelated persons was not associated with recovery proceedings. As per post-mortem report, bloody discharge from mouth was present. This being the position, if the dead body was wrapped in a Chaddar "PALLI", and bloody discharge was oozing from the mouth of the deceased, then as a normal course some bloody discharge stains must have been present on the Chaddar "PALLI" as well, but nothing of this sort has come in the record of the prosecution nor said cloth/Palli was sent to Chemical Examiner, Forensic Laboratory or histopathologist for analysis and Deoxyribonucleic Acid test. For this reason, this recovery could not be wedded with the commission of offence. Therefore, without there being any independent corroboration, specific identity or any other connection of such recovered articles with the murder, this recovery becomes inconsequential in this case.

13. As shall be seen from the narration of FIR, no motive whatsoever has been set by the complainant, nor any such motive was alleged by him before the police and even this motive was not alleged by him while appearing before the learned trial Court in the witness box. The motive element has been introduced only by Muhammad Sarwar PW-2 and Khadim Hussain PW-3 that Abdul Hameed and Zahid Abbas had suspicion

that Ehsan deceased had illicit relations with daughter of Abdul Hameed and due to that reason Ehsan was killed by them. But except these balled assertions, no other corroboration is available from entire prosecution evidence. Even these two witnesses during cross-examination admitted that accused never complained them about this motive nor any panchayat was convened. The Investigating Officer while appearing in the witness-box as PW-14 during cross-examination admitted that he could not say if Abdul Hameed had any sister namely *Mst.* Razia Bibi. In this view of the matter, the motive told by these witnesses was nothing but dishonest improvement in the prosecution case.

14. For what has been discussed above, as the evidence of last seen and extra judicial confession has been disbelieved and recovery could not be wedded with the commission of crime, whereas, the motive is entirely based on dishonest improvements by the prosecution witnesses, therefore, we hold that prosecution has failed to prove its case against the accused/appellant beyond any shadow of doubt. Consequently, we allow this appeal and set-aside the conviction as well as sentence of the accused/appellants. They shall be released forthwith if not required in any other case. The record of the learned trial Court be sent back immediately and the case property, if any, shall be disposed of in accordance with law.

15. In view of the above, notice for enhancement is recalled and Criminal Revision No. 443/2009 is dismissed.

(A.S.) Appeal allowed

PLJ 2015 Cr.C. (Lahore) 309 (DB)
[Multan Bench Multan]
Present: MUHAMMAD QASIM KHAN AND SIKANDAR ZULQARNAIN SALEEM, JJ.
MUHAMMAD ASLAM--Appellant
versus
STATE and another—Respondents

Crl. Appeal No. 486 of 2013, decided on 7.5.2014.

Control of Narcotic Substances Act, 1997 (XXV of 1974)--
----S. 9(c)--Conviction and sentence--Challenge to--Contents of FIR, prosecution had levelled a direct allegation against accused/appellant that on spy information about presence of accused (appellant) in main bazar, raiding party reached at spot and on pointation of informer they arrested accused and recovered narcotics--Heavy duty was cast upon prosecution to prove that narcotics produced in Court during trial, was same narcotic which had been allegedly recovered from possession of accused/ appellant, but no explanation in this respect has been found on record--This being position, counsel for appellant has very rightly opted to question very recovery of narcotics from accused/ appellant by arguing that as stated by accused/ appellant in his statement u/S. 342, Cr.P.C. nothing had been recovered from him, rather recovery was effected from one accused, who succeeded to decamp from spot and appellant being his employee was arrested and false recovery was planted against him--To prove its charge, prosecution was under a legal obligation to prove it from all four corners, leaving behind no slightest element of doubt--But, here in this case, as pointed, above during trial prosecution has not produced whole of narcotic substance, allegedly recovered from accused/appellant, therefore, a strong inference lies in favour of accused/ appellant that as stated by him in his statement under Section 342, Cr.P.C. nothing was recovered from him, rather some recovery was effected from one accused who managed his escape and police planted recovery against accused/appellant--In any way deviation in terms of weight has materially affected prosecution case and since in these circumstances nothing can be said with exactitude that narcotic substance produced in Court was same bulk, which had been purportedly recovered from accused/appellant, therefore, as a settled proposition of law benefit of doubt is extended to accused/ appellant--Prosecution has not been able to prove charge against accused beyond any shadow of doubt--Appeal was allowed.
[Pp. 311 & 312] A, B & C

Syed Muhammad Jaffar Tayyar Bokhari, Advocate for Convict/Appellant.
Mr. Muhammad Ali Shahab, D.P.G. for State.
Date of hearing: 7.5.2014.

JUDGMENT
Muhammad Qasim Khan, J.--Muhammad Aslam accused/ convict/appellant was booked in case FIR No. 36/2013 dated 16.01.2013 under Section 9(c) of the Control of Narcotic Substances Act, 1997 Police Station City Mianchannu on the complaint of Muhammad Irshad Sub-Inspector, with the narration that on 16.01.2013, he (the

complainant) along with Nazar Hussain Sub-Inspector, Iqbal Hussain Shah Sub-Inspector, Muhammad Yasin Constable, Muhammad Sadiq Constable, Muhammad Rizwan Constable and Muhammad Rafique Constable along with a vehicle driven by Muhammad Arif Constable, were present at circular road Mianchannu in connection with patrolling. On a spy information, the complainant reached at Main Bazar Salma Market along with officials as well as spy agent and on his pointation a person carrying polythene bag in his hand was captured, who disclosed his name as Muhammad Aslam. On search, post in crushed form was recovered along with sale proceed Rs. 3500/-. When weighed, the weight of recovered narcotic was found to be 15-kilograms. One kilogram was separated for comparison, then both the sample as well as remaining narcotic were made into two separate parcels. The accused was arrested at the spot and after usual investigation; report under Section 173, Cr.P.C. was submitted in Court.

2. On receipt of report under Section 173, Cr.P.C., the accused/ appellant was charged, to which he pleaded not guilty and claimed to be tried. During trial, the prosecution examined five witnesses, including Abid Hussain ASI PW-1, Mazhar Abbas Constable PW-2, Nazar Hussain Sub-Inspector PW-3, Muhammad Irshad Sub-Inspector/complainant PW-4 and Muhammad Ashraf Constable as PW-5. In documentary evidence, prosecution produced copy of FIR as Ex.PA, recovery memo. of contraband Ex.PB, site-plan of place of recovery as Ex/PC, Complaint as Ex.PD, report of Chemical Examiner Ex.PE, copy of road Certificate as Ex.PF and copy of book of Malkhana as Ex.PG and with that it closed its case. The accused when examined under Section 342, Cr.P.C., in answer to question "why is this case agaisnt you and why have the pws, deposed agaisnt you?" stated that:
"I am innocent. The I.O. of this case conducted raid at Adnan and contraband material was recovered from the *baithak* of said Adnan. The I.O. of this case did not obtain search warrant to conduct raid in above said houses and during the raid, the above said Adnan succeeded to escape and the I.O. of the case arrested me and planted some contraband upon me to make his act as justified and to show his efficiency. No recover was effected from me. All the proceedings regarding the recoveries in the case are fake and fictitious and planted to legalize the illegal raid."
He however, opted not to make statement under Section 340(2), Cr.P.C. nor he produced any evidence in defence.

3. On conclusion of trial *vide* judgment dated 02.11.2013, Muhammad Aslam accused/ appellant was convicted under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him to rigorous imprisonment for four years and fine of Rs. 100,000/-, in default in payment of fine, he was to further suffer simple imprisonment for three months. Benefit of Section 382-B, Cr.P.C. was extended. Through the instant criminal appeal, said conviction and sentence has been challenged by the convict/appellant.

4. We have heard the arguments of learned counsel for the appellant as well as learned Deputy Prosecutor General and perused the entire record with their assistance.

5. As shall be seen from the contents of the FIR, the prosecution had levelled a direct allegation against the accused/appellant that on spy information about presence of accused (appellant) in main bazar, raiding party reached at the spot and on pointation of informer they arrested the accused and recovered narcotics. On the contrary, in his statement under Section 342, Cr.P.C., the accused had come out with a definite statement that as a matter of fact raid had been conducted on the *baithak* of Adnan and contraband was recovered from his *baithak*, but as Adnan managed his escape, false recovery was planted upon the accused/appellant. With this background, Nazar Hussain Sub-Inspector PW-3 during cross-examination made statement to the effect that *"We conducted raid against Adnan on the pointation of accused present in the Court".* Similar, admission was made by Muhammad Irshad Sub-Inspector PW-4 that on the same day raid was conducted against one Adnan. This witness made further statement to the effect that *"It is correct that accused Adnan fled away from the spot when we conducted raid. Adnan son of Idrees had a shop in the main bazaar ……. 840-Kg contraband from Adnan was recovered from the baithak of his house, when we conducted raid at his house."* [The shop of Adnan, where the raid has been conducted, admittedly is in the same locality i.e. main bazar, where the accused/appellant has been shown to be present].

6. There is yet another important aspect of the case i.e. the alleged narcotic substance was summoned in Court on the request of defence and on weighing it transpired that it was only 6.5-kilgoram, whereas, throughout, the prosecution case had been that 15-kilogram of post was recovered from the accused/appellant, and after separating 1-kg for sample purposes, remaining 14-Kg of narcotics was sealed in a separate parcel. A small difference of weight could be ignored, but here in this case as discussed above, more than half of the alleged narcotic substance was found missing as only 6.5-kg of narcotics was produced in Court, instead of 14-kg which had been purportedly recovered from the accused/appellant. The fact that only 6.5-kilogram of narcotic was produced in Court during trial, is admitted by the learned trial Court itself in the impugned judgment of conviction. In this view of the matter, heavy duty was cast upon the prosecution to prove that the narcotics produced in Court during trial, was the same narcotic which had been allegedly recovered from possession of the accused/ appellant, but no explanation in this respect has been found on the record. This being the position, the learned counsel for the appellant has very rightly opted to question the very recovery of narcotics from the accused/ appellant by arguing that as stated by the accused/ appellant in his statement under Section 342, Cr.P.C. nothing had been recovered from him, rather recovery was effected from one Adnan, who succeeded to decamp from the spot and appellant being his employee was arrested and false recovery was planted against him. We are also oblivion of the fact that to prove its charge, the prosecution was under a legal obligation to prove it from all four corners, leaving behind no slightest element of doubt. But, here in this case, as pointed, above during trial the prosecution has not produced whole of the narcotic substance, allegedly recovered from the accused/appellant, therefore, a strong inference lies in favour of the accused/ appellant that as stated by him in his statement under Section 342, Cr.P.C. nothing was recovered from him, rather some recovery was effected from one Adnan who managed his escape and the police planted

recovery against the accused/appellant. In any way deviation in terms of weight has materially affected the prosecution case and since in these circumstances nothing can be said with exactitude that the narcotic substance produced in Court was the same bulk, which had been purportedly recovered from the accused/appellant, therefore, as a settled proposition of law benefit of doubt is extended to the accused/ appellant.

7. For what has been discussed above, we are convinced that prosecution has not been able to prove the charge against the accused beyond any shadow of doubt. Consequently, we allow this appeal and set-aside the conviction as well as sentence of the accused/appellant. He shall be released forthwith if not required in any other case. The record of the learned trial Court be sent back immediately and the case property, if any, shall be disposed of in accordance with law.

(A.S.) Appeal allowed

PLJ 2015 Cr.C. (Lahore) 575
[Multan Bench Multan]
***Present*: MUHAMMAD QASIM KHAN, J.**
YOUSAF--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 3030-B of 2014, decided on 8.7.2014.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 156-A & S. 497--Pakistan Penal Code, (XLV of 1860), S. 295(c)--Bail, grant of--Derogatory remarks spoken were not heard--Sufficient for further inquiry--Investigation of offence under Section 295-C, P.P.C. shall not be conducted by an officer below rank of Superintendent of Police, thus, on face of it, above provision of law has boon violated--Petitioner has succeeded in making out a case of further inquiry in his favour--Consequently, petition was allowed and petitioner was admitted to post arrest bail subject to furnishing bail bond. [Pp. 576 & 577] A & B

Sh. Jamshaid Hayat, Advocate for Petitioner.
Malik Muhammad Jaffar, Deputy Prosecutor General along with petitioner in handcuffs.
Date of hearing: 8.7.2014.

ORDER
Petitioner (Yousaf) seeks post arrest bail in case FIR No. 94/2014 dated 20.02.2014 under Section 295-C, PPC registered at Police Station Sahooka, District Vehari.

2. After hearing the arguments of learned counsel for the parties at considerable length and perusal of the record, it has been observed that:--
(i) Apart from the complainant three persons namely Muhammad Mumtaz, Bashir Ahmad and Maqsood have been cited as PWs in the FIR and all the above three witnesses when got their statements under Section 161, Cr.P.C., recorded unanimously stated that one Abid Hussain was also present at the place of occurrence at the relevant time, but said Abid Hussain tendered his affidavit before the learned Additional Sessions Judge/during pendency of bail of the present petitioner and a copy of the said affidavit is part of instant bail application. In the said affidavit, Abid Hussain in clear terms has denied the contents of the FIR by stating that neither any derogatory remarks were spoken by the petitioner nor heard by him (Abid Hussain). This fact alone is sufficient to make the case against the petitioner one of further inquiry;
(ii) It is admitted position that throughout the investigation in this case has been conducted by Sub-Inspector, whereas, Section 156-A, Cr.P.C. in clear terms provides that investigation of offence under Section 295-C, P.P.C. shall not be conducted by an officer below the rank of Superintendent of Police, thus, on the face of it, above provision of law has boon violated;

(iii) Right from the date of his arrest while recording his first statement the petitioner has denied the allegations levelled against him and even today while produced in handcuffs pursuant to the direction of this Court, he has in clear terms deposed that he has full faith on the factum of "SHIFFA'AT" by Hazrat Muhammad (P.B.U.H) on the day of Judgment.
(iv) Another aspect of the matter is that in the FIR the time of occurrence has been shown as before "MAGHRIB", whereas, the alleged prosecution witnesses in their statements under Section 161, Cr.P.C. have stated that it was about "ZUHAR" time, when alleged occurrence took place;
(v) The petitioner is behind the bars, the investigation is complete and there is no likelihood of commencement of trial in near future;

3. For what has been discussed above, the petitioner has succeeded in making out a case of further inquiry in his favour. Consequently, this petition is allowed and petitioner is admitted to post arrest bail subject to furnishing bail bond in the sum of Rs. 100,000/- with one surety in the like amount to the satisfaction of learned trial Court.

4. Before parting with this order, it is made clear that whatever has been observed above is tentative in nature and result of conclusions drawn from the material so far available on the file and shall not influence the learned trial Court in any manner, at the time of final conclusions of the trial.

(R.A.) Petition allowed

PLJ 2015 Lahore 777
Present: **MUHAMMAD QASIM KHAN, J.**
ZEBA SHEHNAZ--Petitioner
versus
SECRETARY HIGHER EDUCATION PUNJAB, LAHORE—Respondent

W.P. No. 12051 of 2014, decided on 2.4.2015.

Punjab Civil Servants (Appointments & Conditions of Service) Rules, 1974--
----R. 21-A(4)(5)--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Recommendation for appointment in H.E.C.--Offer of appointment letter was accepted by candidate--Process of appointment--Question of--Whether offer of appointment and its acceptance by candidate would complete process of appointment--Determination--When offer of appointment was duly accepted by petitioner then bar of 190 days provided by Rule 21-A(4)(5) of Rules, 1974 would not apply and candidate could be posted any time and any where even after expiry of more than 190 days--If a person to whom offer of appointment has been issued fails to join within period specified in the offer of appointment his selection shall automatically stand cancelled--Only process of appointment has to be completed within 190 days, which process has been completed and posting order could be issued even after 190 days--Petition was allowed. [P. 780] A, B & C

Mr. Khalid Hussain Khokhar, Advocate for Petitioner.
Mr. Shahid Mobeen, Additional Advocate General with *Saima Raza,* Section Officer (Estab) for Respondent.
Date of hearing: 2.4.2015.

ORDER
Briefly the facts of the case are that after completion of requisite process the Punjab Public Service Commission recommended the petitioner for appointment against the post of Assistant Professor of Mathematics (BS-18) on regular basis in the Punjab Higher Education Department. The said department issued offer of appointment letter dated 1st of February, 2011 and the petitioner accepted said offer. In continuation to the offer of appointment letter, another letter was issued to the petitioner calling for her priority- wise option for posting station and in response to this letter the petitioner also wrote application to the Secretary Higher Education for up-gradation of her existing post or for her posting in nearby college, as according to the stance of the petitioner her other colleagues had been adjusted after up-gradation of their posts. Thereafter, the petitioner continued approaching the department for her posting, but without any positive response and lastly she was refused posting on the ground that process of appointment could not be completed within 190 days from the date of issuance of recommendations by the Punjab Public Service Commission. Hence, this writ petition.

2. The contention of learned counsel is that after going through lawful process of selection, the Punjab Public Service Commission recommended for appointment of

the petitioner and vide letter dated 1st February, 2011 she was offered appointment, which was accepted by her, however, as the petitioner was desirous about her posting at Faisalabad instead of Sargodha, therefore, she through written correspondence remained in touch with the authorities. Further argued that delay in decision of her applications is because of the departmental hierarchy itself. Lastly, argued that after the petitioner had accepted the offer of appointment, her posting at certain place was an independent issue and thus no ouster clause could apply against her.

3. The learned Law Officer submits that the process of appointment could not be completed within prescribed period in the rules, hence, now the recommendations of Punjab Public Service Commission cannot be implemented.

4. I have heard the arguments of learned counsel for the parties and perused the available record.

5. The question to be resolved through the instant writ petition is whether the offer of appointment and its acceptance by the candidate would complete the process of appointment or it includes posting of the candidate also? The main stance of learned counsel for the respondents is based on Rules 21.A(4,5) of Punjab Civil Servants (Appointment and conditions of Service) Rules, 1974 and Para-69 of the Punjab Public Service Commission Regulations, 2000. For ready reference the above relevant provisions are reproduced hereunder:--

RULE 21.A(4) and (5) of Punjab Civil Servants (Appointment and Conditions of Services) Rules, 1974.

"21.A (1) ----------

(2) ----------

(3) ----------

(4) The appointing authority shall complete the process of appointment within one hundred and ninety days from the date of issue of recommendations by the Punjab Public Service Commission and no request for extension in the joining time as specified in the offer of appointment shall be entertained.

(5) If a person to whom offer of appointment has been issued fails to join his post within the period specified in the said offer of appointment, his selection shall automatically stand cancelled."

PARA-69 of Punjab Public Service Commission Regulations, 000:

"The merit list remains valid for one year from the date of issuance of recommendations or till the next closing date for submission of applications for similar post, which ever is earlier."

The agreement between the parties becomes final when an offer is made and same is accepted by the other party. In this case the petitioner was recommended by Punjab Public Service Commission for appointment in Higher Education Department as Assistant Professor (BS-18) and this offer was only to the extent of appointment in Higher Education Department and it was the department which had to adjust/post the petitioner anywhere in the institutions run and controlled by Higher Education Department, if after issuance of offer of appointment letter by the authority, the same is accepted by the candidate. The process of appointment concluded by acceptance of

offer of appointment letter by the petitioner and her posting was altogether a second stage left for the Higher Education Department. As in this case admittedly the department issued offer of appointment letter which was accepted by the petitioner and after its acceptance, another letter was issued to receive priority-wise option for posting from the petitioner. Even the application submitted by the petitioner to Secretary Higher Education Department for upgradation of her existing post or her posting in a nearby College also establish that petitioner had accepted the offer of appointment. Thus, when the offer of appointment was duly accepted by the petitioner then the bar of 190-days provided by Rule 21-A(4) and (5) of the Punjab Civil Servants (Appointments and Conditions of Service) Rules, 1974 would not apply and the candidate could be posted anytime and anywhere even after expiry of more than 190 days.

6. Rule 21.A(5) of Punjab Civil Servants (Appointment and conditions of Service) Rules, 1974 further clarifies the position, where it is mentioned that if a person to whom offer of appointment has been issued fails to join within the period specified in the said offer of appointment, his selection shall automatically stand cancelled. Para-2 of the letter about offer of appointment is reproduced hereunder:--

"If you accept the above Terms and Conditions of the appointment, you may submit your acceptance to the offer of appointment within fifteen days and return this following portion to this Department."

Meaning thereby, the appointment was qualified by the only condition that candidate had to submit acceptance to the offer of appointment within fifteen days, and as the petitioner accepted said offer within the requisite time, which fact is not denied by the respondent department. Bare perusal of Rule 21.A(4,5), ibid, clarify that only the process of appointment has to be completed within 190 days, which process has been completed in this case and posting order could be issued even after 190-days.

7. For what has been discussed above, the stance taken by the respondent is held to be nullity in the eyes of law, as in the peculiar facts and circumstances of instant case Rule 21.A(4) and (5) of Rules, 1974 and Para-69 of Regulations, 2000 do not attract. Consequently, this writ petition is allowed and respondent/authorities are directed to issue formal posting orders to the petitioner, in accordance with law. It is however, made clear that although seniority would reckon from the date of acceptance of offer of appointment but the petitioner will be eligible for salary from the date when she will join her place of posting to perform her duties, as the employee is entitled for salary for the work done.

(R.A.) Petition allowed.

PLJ 2015 Lahore 790
Present: **MUHAMMAD QASIM KHAN, J.**
SHOUKAT ALI HAYAT--Petitioner
versus
GOVT OF PUNJAB, etc.—Respondents

W.P. No. 3637 of 2015, decided on 10.4.2015.

Constitution of Pakistan, 1973--
----Art. 199--Constitutional petition--Age relaxation for female candidates--Post of educators--Government policy--No fundamental right--Male dominated society--Difficulties of physical access--Adversely affect girls more than boys--Validity--Influence of factors can only be overcome by more sophisticated and multivariate spatial analysis of educations needs and planning and implementation of intergrated steps to encourage such women who face all practical issues and come out to complete with men on merits--Condition imposed in advertisement is not meant to infringe any of constitutional guarantees to men, rather towards protection and encouragement of deprived limb of the society--Petition was dismissed. [P. 792] A

Ch. Zulfiqar Ali, Advocate for Petitioner.
Mr. Imtiaz Ahmad Kaifi, Additional Advocate General with *Rana Muhammad Yousaf* Senior Law Officer and *Fayaz Mehmood* A.D (Litigation), Okara for Respondents.
Date of hearing: 10.04.2015

ORDER
Briefly the facts are that through an advertisement applications were invited for various posts of Educators in different categories in District Okara and according to one of the clause of said advertisement five years age relaxation was given to all the candidates, whereas, three years further relaxation of age has been given to the female candidates, as such, the age limit for male candidates was set as 20 to 35 years, whereas, for female candidates age limit was prescribed as 20 to 38 years. This condition is under challenge through the instant writ petition.

2. The contention of learned counsel for the petitioner is that although under Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 all citizens are equal and there shall be no discrimination on the basis of sex and under Article 25(3) the State is competent for making any special provisions for the protection of women and children but under the garb of protection in the case in-hand, the respondents are giving preference to the female candidates over male members of the society, which is against Article 27 of the Constitution which provides that no citizen otherwise qualified for appointment in service shall be discriminated and only exception is that certain number of posts could be fixed for any gender or locality in order to uplift them. The learned counsel concluded that said condition imposed in the

advertisement is violative of fundamental rights guaranteed by the Constitution, therefore, the same be struck down.

3. The learned Law Officer on the other hand has opposed this petition by contending that Government is fully empowered to lay a policy and by doing do, no fundamental right of the petitioner or other alike candidates has been infringed.
4. Heard.

5. This question earlier came under consideration before this Court in the case *"Nazar Elahi versus Government of Punjab and others"* (2013 CLC 1457) and after detailed study of different Articles of the Constitution of Islamic Republic of Pakistan, 1973, this Court observed that:
"……. age relaxation for female candidates meets the standard of a permissible affirmative action, hence is protected under Article 25(3) of the Constitution. I am also of the opinion that the age relaxation offered to female candidates does not violate Article 27(1) of the Constitution. In fact it promotes the full participation of women in national life as contemplated under Article 34 of the Constitution, which provides that steps shall be taken to ensure full participation of women in all part of National Life."

6. In addition to the above, it may be observed here that we are living in a male dominated society full with considerable disparity, and in some cases incompleteness, of institutional provision (even at primary level) relates directly to difficulties of physical access which adversely affect girls more than boys; there is an overall and profound urban/rural dichotomy which favours towns and cities, especially in respect of secondary school provision for girls; patterns of transportation and migration affect educational provision. The widespread operation of patriarchal systems of social organization; of customary early marriage; of heavier domestic and subsistence duties of females (especially in rural areas); a generally lower regard for the value of female life, all combine though differentially in each case, to adversely affect the participation of girls and women in formal education. To this list may be added problems of seclusion and security in some areas. The influence of above factors can only be overcome by more sophisticated and multivariate spatial analysis of educational needs and the planning and implementation of integrated steps to encourage such women, who face all such practical issues and come out to compete with men on merit. Thus, the condition imposed in the advertisement is not meant to infringe any of the constitutional guarantees to men, rather this is a step towards protection and encouragement of deprived limb of our society. I, therefore, see no merit in this petition and the same is accordingly dismissed.

(R.A.) Petition dismissed

2015 CLR 1194
[Lahore]
Present: **MUHAMMAD QASIM KHAN, J.**
Muhammad Avais Tariq Bosan
Versus
Government of the Punjab through Secretary Home, Civil Secretariat, Lahore and 2 others

Writ Petition No. 11620 of 2013, decided on 11th March, 2015.

REMOVAL FROM SERVICE---(Absence of regular inquiry)
Constitution of Pakistan, 1973---
---Arts. 199, 10-A---Punjab Emergency Services Act, 2006---PEEDA Act, 2006, Ss. 7(c), 19---Petitioner was employed in Rescue-1122 Service---Allegations---Show-cause notice---Impugned order of removal from service---Specific allegations of misbehaviour, abscondence from duty, habitual absentee and unsatisfactory performance had been levelled against petitioner---Without dispensing with regular inquiry as required by law a show-cause notice was issued to petitioner, he submitted reply thereof---Authority without having recourse to regular inquiry and without affording opportunity of personal hearing, proceeded to pass impugned order of removal from service---Validity---Procedure provided in statutory provisions of PEEDA Act had not been complied with and rights of petitioner had been prejudiced---Impugned order was set aside and petitioner was reinstated in service---Writ petition allowed. (Paras 6,7,9)
سائل نے شوکاز نوٹس میں الزامات سے بالخصوص انکار کیا تھا۔ لہذا ریگولر انکوائری عمل میں لانا ضروری تھا۔ زیر تفید برطرفی حکم کے خلاف ہائیکورٹ میں رٹ پٹشن مظور ہوئی۔
[Petitioner had specifically denied allegations in the show-cause notice, therefore, regular inquiry was necessarily to be conducted. Impugned removal order was set aside. High Court allowed writ petition.]

For the Petitioner: Mian Bilal Bashir and Raja Tasawar Iqbal, Advocates.
For the Respondents: Imtiaz Ahmed Kaifi, Additional Advocate-General with Ali Hassan, Head of Law Wing, Punjab Emergency Service.
Date of hearing: 11th March, 2015.

ORDER
MUHAMMAD QASIM KHAN, J. -- Briefly the facts of the case as are collected from contents of this writ petition are that petitioner joined Rescue Service-1122 as Fire Rescuer on contract basis in the year 2006 and thereafter his services were regularized. In appreciation of his work, he was sent on different courses including a Refresher Course, where a dispute arose between him and one Imtiaz CDI who had borrowed Rs. 2,000/- from petitioner and on demand for return, he moved application to Administrator Emergency Services Academy, Lahore and also to the Director General, Punjab Emergency Services. For this reason the officials of Emergency Services Academy became inimical towards the petitioner and on the basis of allegations a show-cause notice dated 11.4.2012 was issued to the petitioner. The

petitioner denied the allegations and ultimately letter dated 7th of May, 2012 for removal from service was issued against the petitioner. Against said removal order, departmental appeal of the petitioner failed *vide* order dated 3rd of December, 2012.

2. The learned counsel for the petitioner has argued that when the petitioner had specifically denied the allegations levelled against him in the show-cause notice, a regular inquiry into the matter was essential, wherein, the petitioner had to be supplied copies of evidence against him, he should have right to produce his defence and during inquiry if any witness appear against him, he had a right to cross-examine such witness. Reliance has been placed on the case reported in 1997 SCMR 1543. Adds that fair trial under Article 10(a) of the Constitution of Islamic Republic of Pakistan, 1973 is inalienable right of the person against whom any allegation is levelled, but in this case neither transparent procedure nor fair trial has been provided to the petitioner and even without there being any formal order about dispensing with regular inquiry, in a slipshod manner the impugned removal from service order has been passed.

3. On the other hand, learned Additional Advocate-General opposed this petition on all corners by contending that petitioner was found guilty of repeated misbehaviour with authorities and further he was also habitual absentee, therefore, the order removing him from service is fully justified.

4. I have heard the arguments of learned counsel for the parties and perused the entire available record with their assistance.

5. It is admitted fact that petitioner was employed in Rescue-1122 service, established under the "Punjab Emergency Services Act, 2006" which is an autonomous body being run under statutory rules. Appeal of the petitioner has been dismissed and by virtue of Section 19 of the PEEDA Act, being employee of an autonomous body per force of Section 2(h)(i) of the said Act, he could not file appeal before the Punjab Service Tribunal, hence, this writ petition is entertainable by this Court.

6. Without going deep into the factual aspect or controversy, the fact of the matter is that specific allegations of misbehaviour, abscondence from duty, habitual absentee and unsatisfactory performance, had been levelled against the petitioner. It is admitted position that without dispensing with regular inquiry as required by law a show-cause notice was issued to the petitioner, he submitted reply thereof but the authority without having recourse to regular inquiry and without affording opportunity of personal hearing, proceeded to pass the impugned order of removal from service.

7. To be precise enough, this slipshod act of the respondent/authority, whereby the impugned termination order has been passed without there being any order about dispensing with regular inquiry and without affording opportunity of personal hearing, is the pivotal point in this case.

8. After examining the entire record produced by the department and appended with this petition, it appears that only one show-cause notice dated 11.4.2012 was issued to the petitioner, which was replied by the petitioner on 17.5.2012, thereafter without dispensing with regular inquiry as required by the statute or providing him opportunity of personal hearing, the impugned order for removal from service was passed. Under Section 7(c) of the PEEDA Act, if the Authority has reasons and decides that there is no need for regular inquiry, he has to pass an order to dispense with regular inquiry and then shall issue show-cause notice and after receipt of reply to the show-cause notice by the accused/employee or if no reply is submitted within stipulated period, the authority shall determine whether the charge or charges have been proved against the accused and if the authority determines that charge/charges have been proved then he is bound under Section 7(d) of the PEEDA Act to provide opportunity of personal hearing to the accused employee, either himself or through the hearing officer, before passing the order of penalty under clause 9(f) of the Act, *ibid*, but in this case these mandatory provisions of PEEDA Act, have not been complied with.

9. For what has been discussed above, as the procedure provided in statutory provisions of PEEDA Act has not been complied with and the rights of the petitioner have been prejudiced, hence the impugned order runs against the spirit of law. Consequently, this petition is allowed, the impugned orders dated 17.5.2012, 3.12.2012 and 12.4.2013 are set aside and petitioner is reinstated in service. The period between his removal till reinstatement shall be considered as leave without pay.

Petition allowed.

2015 CLR 1199
[Lahore]
Present: **MUHAMMAD QASIM KHAN, J.**
Muhammad Din Awan, Retd. Associate Professor and another
Versus
Secretary to Government of the Punjab, Education Department, Lahore and 2 others

Writ Petition No. 12317 of 2008, decided on 16th June, 2015.

IMPLEMENTATION OF ORDER OF SERVICE TRIBUNAL---(Law)
Constitution of Pakistan, 1973---
---Art. 199---Seeking implementation of judgment of Punjab Service Tribunal---Grievance was that department had not implemented same---Relief---Said judgment of Punjab Service Tribunal had attained finality after dismissal of appeal of respondent-Department by Supreme Court---All organs of the State are bound by law to implement the orders of the Courts in letter and spirit---No one could be allowed to deprive citizens of Country of their rights protected by Constitution---Respondents-authorities were directed to implement the said judgment passed by Punjab Service Tribunal---Writ petition allowed. (Para 4)
سائل کی پروموشن سے متعلق ٹربیونل نے اپیل منظور کی تھی جو فیصلہ سپریم کورٹ نے برقرار رکھا۔ لیکن رسپانڈنٹ /محکمہ مذکورہ احکامات پر عملدرامد کرنے سے گریزاں تھا۔ ہائیکورٹ نے رٹ پٹیشن منظور کی۔
[Service Tribunal had allowed appeal *qua* promotion of petitioner which order was maintained by apex Court. But respondent/department was evading implementation of said Orders. High Court allowed writ petition.]

For the Petitioners: Mian Bilal Bashir and Raja Tasawer Iqbal, Advocates.
For the Respondents: Imtiaz Ahmad Kaifi, Additional Advocate-General with Prof. Khalid, DPI Colleges and Shoaib Akhtar, S.O.
Date of hearing: 16th June, 2015.

ORDER
MUHAMMAD QASIM KHAN, J. -- Through this petition, petitioners pray for implementation of the judgment dated 21.2.2005, passed by the Punjab Service Tribunal which was upheld by the Hon'ble Supreme Court of Pakistan *vide* order dated 13.1.2006, passed in Civil Petitions Nos. 980 and 986-L/2005.

2. Brief facts of this case are that the petitioners were deprived from promotion, they filed their respective appeals before the Punjab Service Tribunal which were accepted *vide* consolidated judgment dated 21.2.2005, the department preferred appeal before the Hon'ble Supreme Court, same were rejected *vide* order dated 13.1.2006, passed by the Hon'ble Supreme Court of Pakistan in Civil Petitions Nos. 980 and 986-L of 2015 but the department has not implemented the same; hence, this petition.

3. I have heard learned counsel for the petitioners as well as learned Law Officer and perused the record.

4. Grievance of the petitioners is that the respondents are not implementing the judgment dated 21.2.2005, passed by the Punjab Service Tribunal, Lahore as the same has attained finality after dismissal of appeal of the respondents-department by the Hon'ble Supreme Court of Pakistan *vide* order dated 13.1.2006, passed in Civil Petitions Nos. 980 and 986-L/2005 rather the petitioners time and again approached the respondents for implementation of the same. On the other hand, learned Law Officer has nothing to rebut the stance of petitioners. All the organs of the State are bound by law to implement the orders of the Courts in letter and spirit. No one can be allowed to deprive the citizens of the Country from their rights protected by the Constitution of Islamic Republic of Pakistan, 1973. Hence, this petition is allowed. Respondents-authorities are directed to implement the judgment dated 21.2.2005, passed by the Punjab Service Tribunal, Lahore in letter and spirit as the same has attained finality. DPI, present before the Court, shall convey this order to the concerned authorities for compliance.

5. Learned Law Officer shall also convey the concerned quarter for compliance of this order.

Petition allowed.

KLR 2015 Criminal Cases 211
[Lahore]
Present: **MUHAMMAD QASIM KHAN, J.**
Peer Bakhsh
Versus
SHO, etc.

Writ Petition No. 5466 of 2009, decided on 25th February, 2010.

CONCLUSION

(1) There is no cavil to the proposition of law that registration of case and initiation of criminal proceedings are entirely two different things.

(2)

(a) Administration of justice---

---Rules/Regulations---Effect---The sole object behind all legal formalities is to safeguard the paramount interest of justice---The rules and the regulations are only meant to streamline the procedure and administer the course of justice, but not to thwart the same---Mere technicalities unless and until offering some insurmountable hurdle should not be allowed to defeat the ends of justice. (Para 9)

(b) Judgment of equal Bench---

---"Earlier judgment of equal Bench in the High Court on the same point is binding upon the second Bench---If, however, a contrary view has to be taken, then request for constitution of a larger Bench should be made". (Para 7)
Ref. PLD 1995 SC 423.

(b) Registration of F.I.R. and Criminal Proceedings---

---Distinction---Proposition of law---Registration of case and initiation of criminal proceedings are entirely two different things. (Para 7)
Ref. 2006 CLD 625.

(d) Words and meaning---

---'Prosecution' word of---Meaning. (Paras 5, 6)

(e) Investigation, purpose of---

---The purposes of investigation is to find out the truth and place the same before the Court and it is the duty of the Investigating Officer not only to set up a case of the complainant party with such evidence as could enable the Court to record the conviction but also to bring out the truth.
(Para 5)

QUASHMENT OF F.I.R. --- (Offence)

(f) Constitution of Pakistan (1973)---

---Art. 199---Police Order, 2002, Art. 155(c)---Criminal Procedure Code, 1898, Ss. 154, 4(f)---Seeking quashment of impugned F.I.R.---It was asserted that alleged offence under Article 155(c) of Police Order was non-cognizable as such F.I.R. could not be registered---Whether offence under Article 155(c) was cognizable one or not,

and (ii) Whether in light of sub-clause (2) of Art. 155 a case under Section 154, Cr.P.C. could be registered---Legal proposition---Interpretation and analysis---In absence of any specific provision in the Police Order, Code of Criminal Procedure would come into field, its 2nd Schedule would attract and its second paragraph deals with the offences punishable with imprisonment for three years, making the offences under Arts. 155 and 156 of Police Order, 2002 as cognizable offence---Prosecution is final adjudication on a fact in issue or relevant fact between the parties by the competent Court of law whereas registration of F.I.R. and investigation relate to the proceedings conducted by executive authorities---Legislature had intentionally used the word 'prosecution' considering that due to false criminal case the police officials/officers are not demoralized as such they restricted prosecution of a police officer with special permission but did not restrict the registration of F.I.R. and investigation conducted as result of F.I.R.---No restriction was there for investigation of case and investigation upto its final conclusion in accordance with law---Impugned F.I.R. in instant case was not registered straightaway, rather a full-fledged inquiry was conducted by RPO wherein petitioner was found involved---Mere technicalities unless and until offering some insurmountable hurdle should not be allowed to defeat the ends of justice---Writ petition dismissed. (Paras 6, 7, 8, 9, 10)
Ref. 2006 SCMR 1957, 2006 MLD 855, PLD 1995 SC 423, 2006 CLD 825, 2001 YLR 1448.

(g) Police Order (2002)---
---Art. 155(2)---Prosecution---Authorized officer---Reportedly none had been authorized by the Government to file a report in writing for prosecution---Ministry of Law and Parliamentary Affairs was directed to take necessary steps accordingly.
(Para 11)
پولیس آرڈر 2002 کالعدم کرنے کیلئے موقف اختیار کیا 155 ((cسائل مذکور نے ایف آئی آر زیر دفعہ تھا کہ چونکہ مذکور جرم ناقابل دست اندازی پولیس ہے لہٰذا ایف آئی آر درج ہو سکتی تھی۔ ہائی کورٹ نے رٹ پٹیشن خارج کر دی۔
[Petitioner sought quashment of impugned F.I.R. under Article 155(c) of Police Order, 2002 on ground that since the alleged offence was non-cognizable, F.I.R. could not be registered. High Court dismissed writ petition].

For the Petitioner: Ch. Riaz Ahmad, Advocate.
For the State: **Muhammad** Riaz Ahmad Dahir, Assistant Advocate General.
Date of hearing: 25th February, 2010.

ORDER
MUHAMMAD QASIM KHAN, J. --- Through this petition, the petitioner who is Sub-Inspector in the police department, seeks quashing of F.I.R. No. 636/2009, dated 19.06.2009 registered with Police Station Noshera Jadeed under Article 155(c) of the Police Order, 2002, on the ground that Article 155(C) of the Police Order is non-cognizable and sub-Article (2) of Article 155(c) imposed a restriction, hence, case against the petitioner could not have been registered. Learned counsel with reference to unreported judgment of this Court dated 02.06.2008 handed down in W.P. No. 310/2007 *"**MUHAMMAD** SALEEM v. SHO, etc."* contends that in the said judgment

although F.I.R. was not quashed because challan had been submitted and alternate remedy was available yet it was held that offence under Article 155-C of the Police Order was non-cognizable and in non-cognizable cases F.I.R. could not be registered, only an information is to be entered into a book kept for this purpose under Article 155, Cr.P.C. and an information had to be referred to the Magistrate and Police could not investigate the matter without prior permission of the learned Magistrate, concerned.

2. On the other hand, learned A.A.G. assisted by learned counsel for the complainant has opposed the petition on the ground that lodging of F.I.R. is different than initiation of proceedings before the learned Trial Court, as such, the F.I.R. cannot be quashed and the petitioner may agitate this legal objection in his defence before the learned Trial Court at appropriate stage.

3. Heard. Record perused.

4. There are two propositions in this case: (i) Whether offence under Article 155-C is cognizable one or not; and (ii) whether in the light of sub-clause (2) of Article 155 a case under Section 154, Cr.P.C. can be registered.
There are two types of criminal cases *i.e.* cognizable and non-cognizable, the definition has been provided in sub-section (4)(f) of the Cr.P.C. as follows:---
"Cognizable offence: Cognizable case". "Cognizable offence" means an offence for, and "cognizable case" means a case in, which a police officer, may, in accordance with the second schedule or under any law for the time being in force, arrest without warrant."
I have gone through the relevant articles in the Police Order, 2002 with the assistance of learned counsel for the parties, the Police Order is silent regarding Articles No. 155 and 156 being cognizable or otherwise, in the absence of any specific provision in the Police Order, the Code of Criminal Procedure will come in filed, its 2nd Schedule would attract and at the end of this Schedule under sub-title "offences against other laws" is applicable and its second paragraph deals with the offences punishable with imprisonment for three years, making the offences under Articles 155 and 156 of the Police Order, 2002 as cognizable offence. The same view has been adopted by this Court in the case of *"Masood Ahmad Javed v. The State and 5 others"* (2006 MLD 855).

5. Now the second proposition is whether in the light of Article 155(2) of the Police Order, 2002, F.I.R. could be registered or not? This article reads as under:---
"155. Penalty for certain types of misconduct by police officers.-- (1)

---

(2) Prosecution under this Article shall require a report on writing by an officer authorized in this behalf under the rules [to be made by the Government].

From bare reading of this Article it appears that prosecution and the registration of case are two distinct things in a criminal case. Investigation starts after registration of the case, which is defined under Section (4)(*l*), Cr.P.C. as under:---

(l) 'Investigation'. *'Investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police-officer or by any person (other than Magistrate) who is authorized by a Magistrate in this behalf;*

The investigation consists of several steps to be taken by the Police Officer to ascertain whether any offence has been committed at all and if so by whom and what is the evidence on which the prosecution is based. A criminal case is registered under Section 154, Cr.P.C. and the investigation commences. During investigation material/evidence is collected from both the sides and thereafter it is seen by the I.O. that there is sufficient evidence/material against the accused to proceed against him in the Court. The purposes of the investigation is to find out the truth and place the same before the Court and it is duty of the Investigating Officer not only to set up a case of the complainant party with such evidence as could enable the Court to record the conviction; but also to bring out the truth. Where a suspicion arises with regard to the guilty of an accused, it becomes the duty of the Investigating Agency to put all efforts with a view to reach at the truth. After the completion of investigation a report about the conclusion of investigation is prepared by the SHO under Section 173, Cr.P.C. (Challan) and the same is put in Court for judicial proceedings on it.

6. On the other hand, prosecution includes every step and action, from its commencement to its final determination. In Words and Phrases Permanent Edition 34A, the prosecution has been defined:---

"A 'prosecution' is the means adopted to bring a supposed offender to justice and punishment by due course of law, and consists of the series of proceedings from the time when the formal accusation is made by the filing of an affidavit or a bill of indictment or information in the Criminal Court until the proceedings are terminated."

The prosecution has been defined in Black's Law Dictionary Sixth Edition as under:---

"Prosecution. A criminal action; a proceedings instituted and carried on by due course of law, before a competent tribunal, for the purposes of determining the guilt or innocence of a person charged with crime."

The above definitions make it clear that prosecution is final adjudication on a fact in issue or relevant fact between the parties by the competent Court of law, whereas registration of F.I.R. and investigation relate to the proceedings conducted by executive authorities. Both are two different steps in criminal cases. In Article 155(2) of the Police Order, 2002, it seems that legislature has intentionally used the word "prosecution" considering that due to false criminal cases the police officials/officers are not demoralized, as such they restricted the prosecution of a Police Officer with special permission, but did not restrict the registration of F.I.R. and investigation conducted as a result of the F.I.R. because the legislature was of the view that concerned authority under the rules will look into the whole evidence and material collected by the Investigating Agency after registration of the case and then if they come to the conclusion that offence has been committed and there is reasonable

evidence on the record to proceed with the case, the concerned officer under the rules shall file a report in writing for the prosecution of the case. No restriction is there for the investigation of case and its investigation up to its final conclusion in accordance with law, as it has been held in the case *"Aijaz Ali and 3 others v. The State and another"* (2001 Y.L.R. 1448) the word "prosecution" was defined as under:---
"Prosecution means proceedings either by way of indictment or information in criminal Court in order to put an offender upon his trial."

7. It is admitted position in the instant petition that F.I.R. under Article 155-C of the Police Order was not registered straightaway, rather a full fledge inquiry was conducted by the R.P.O., wherein the petitioner was found involved and only thereafter, complainant moved an application to the learned Justice of Peace and got an order, on the basis of which the F.I.R. was registered. There is no cavil to this proposition of law that registration of case and initiation of criminal proceedings are entirely two different things. The Hon'ble Supreme Court of Pakistan in the case of *"Industrial Development Bank of Pakistan and others v. Mian Asim Fareed and others"* (2006 C.L.D. 625), had created distinction between the investigation of case and taking of cognizance and disapproved quashing of F.I.Rs. by this Court, by holding that:---
"No order for quashing of F.I.R. could be passed nor the same could be approved in absence of any finding that the offences mentioned in the F.I.R. were false and malicious and in absence of a finding that if a particular forum or mode had been prescribed with respect to taking of cognizance of an offence then the same also implied prohibition regarding the registration of F.I.R.---Registration of F.I.R. and taking of cognizance of cases were two distinct and independent concepts under the criminal law---If the intention of law-maker was to put any clog on the registration of F.I.R. then the Legislature would have said so specifically and that if the law put a condition only on the taking of cognizance then it could never be read to imply prohibition on registration of F.I.Rs---High Court did not pass legal and valid order---Supreme Court converted petition for leave to appear into appeal and set aside the order passed by High Court."
This proposition came under consideration before this Court in the case *"Masood Ahmad Javed v. The State and 5 others"* (2006 MLD 855) and it was held as under:---
"Since prosecution had yet to commence in a competent Court and the direction being only to register a case, case had rightly been ordered to be registered by Justice of Peace---Offence in question being punishable with three years imprisonment and fine, same was cognizable within the meaning of Second Schedule to Cr.P.C---No bar was spelt out in the Police Order, 2002 against an investigation to be conducted in the matter---Matter was at investigation stage and proper stage for consideration of implication of Art. 155(2) of Police Order, 2002 would be when the matter was reported to the Court for commencement of prosecution."
As regards the view taken by this Court in an unreported judgment, as referred (hereinbefore) by learned counsel for the petitioner, the Hon'ble Supreme Court of Pakistan in the case *"Multiline Associates v. Ardeshir Cowasjee and 2 others"* (PLD 1995 Supreme Court 423), held that *"Earlier judgment of equal Bench in the High Court on the same point is binding upon the second Bench---If, however, a contrary*

view has to be taken then request for constitution of a larger Bench should be made." Thus, the legal position which emerges is that in the light of above judgment of the apex Court, the second Bench of this Court should not have given findings contrary to the findings of the 1st single Bench on the same point as reported in *"Masood Ahmad Javed v. The State and 5 others"* (2006 MLD 855) and should have adopted the correct method by making a request for constitution of a larger Bench, if at all a contrary view had to be taken. Anyhow, that having already been done, the view taken by the earlier single Bench has to be prevailed upon.

8. Apart from the above legal aspect of the case, the Hon'ble Supreme Court of Pakistan in its judgment passed in the case of *"**Muhammad** Saleem Bhatti v. Syed Safdar Ali Rizvi"* (2006 SCMR 1957), while dilating upon a matter wherein this Court had quashed F.I.Rs. while invoking its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, held as under:---

"*High Court was to exercise jurisdiction under Art. 199 of the Constitution within certain settled parameters---High Court was not supposed to enter into a factual controversy unless it was established that certain facts were not disputed between the parties---Complainant/respondent had alleged fraud which was controverted by petitioner; and keeping in view factual controversy between the parties, it was not fair to quash F.I.R. which was under investigation and was at preliminary stage---Petitioner could seek alternate remedy under S. 249-A, or 265-K, Cr.P.C. after submission of challan or by invoking jurisdiction of competent Court under S. 439, Cr.P.C. or that of High Court under S. 561-A, Cr.P.C.---Jurisdiction of High Court under Art. 199 of the Constitution had been invoked without availing appropriate remedies under Ss. 249-A, 265-K and 439 of Cr.P.C.---As F.I.R. had been quashed at preliminary stage it was bound to cause prejudice and injustice to the case of complainant---Judgment of High Court was set aside and case was sent back to Investigating Agency for conducting investigation and submitting challan in accordance with law---Complainant/respondent had challenged finding of High Court only to the extent of one F.I.R., therefore, quashment of other F.I.Rs. was to remain unaffected by the order passed by Supreme Court---Petition was converted into appeal and allowed accordingly."*

9. The sole object behind all legal formalities is to safeguard the paramount interest of justice. The rules and the regulations are only meant to streamline the procedure and administer the course of justice, but not to thwart the same. Mere technicalities unless and until offering some insurmountable hurdle should not be allowed to defeat the ends of justice. The entire scheme of the Code is to channelize and facilitate the smooth running of the system of criminal justice, therefore, while interpreting any provision of it, efforts have to be made so that neither any obstruction in its way is created, nor it is thwarted in any manner and that too on the basis of technicalities simpliciter, because effect to the former and is not to be substance would certainly defeat the ends of justice and ultimately the purpose of the law itself and such approach would definitely be prejudiced to the system itself.

10. For what has been discussed above, respectfully following the dictum laid down by the apex Court as reproduced above; this petition has no force and is accordingly dismissed.

11. Before parting with this judgment, it has become imperative to mention here that the learned Assistant Advocate General was called upon to obtain instructions from the concerned quarters whether in terms of Article 155(2) of the Police Order any officer had been authorized by the Government to file a report in writing for prosecution, the learned Law Officer has informed that so far none has been authorized as such. This being so the office is directed to send copy of this judgment to the Ministry of Law & Parliamentary Affairs to take necessary steps to avoid the difficulty in initiating prosecution against the real offenders.

Petition dismissed.

KLR 2015 Civil Cases 397

[Lahore]

Present: **MUHAMMAD QASIM KHAN, J.**

Sajida Tabshir

Versus

Government of Punjab and others

Writ Petition No. 10127 of 2002, decided on 15th April, 2015.

CONCLUSION

(1) It is incumbent upon the authority to have decided the matter strictly in terms of remand order.

(2)

REGULARIZATION OF SERVICE --- (Discrimination)

Constitution of Pakistan (1973)---

---Arts. 199, 201, 4, 25---Matter of regularization of service of petitioner---It was incumbent upon the authority to have decided the matter strictly in terms of remand order---There remained no ambiguity that it was held to be a case of discrimination towards petitioner as service of some of her colleagues had been regularized whereas petitioner was left stranded---Both the earlier said orders were never challenged by respondent-department before any forum, thus they had attained finality---Held: Petitioner was surely entitled for regularization of her service---Impugned order was set aside---Writ petition allowed.

(Paras 4, 5, 6)

Ref. PLD 1992 SC 501.

سائلہ سے امتیازی سلوک روا رکھا گیا تھا۔ محکمہ/رسپانڈنٹ نے ہائی کورٹ کے پہلے احکامات کے مطابق عمل نہ کیا تھا جو حتمی ہو چکے تھے۔ سائلہ کی ملازمت ریگولرائز کرنے کی غرض سے دائر رٹ پٹیشن منظور ہوئی۔

[Petitioner was treated discriminately. Respondent/department had not acted as per previous orders of High Court which had attained finality. Writ petition for regularization of service of petitioner was allowed].

For the Petitioner: Manzoor Hussain Dogar, Advocate.

For the State: Imtiaz Ahmad Kaifi, Additional Advocate General with Yasir Javed, Assistant.

Date of hearing: 15th April, 2015.

ORDER

MUHAMMAD QASIM KHAN, J. --- Briefly the facts of the case are that petitioner was employed as Librarian (B-16) in Government Polytechnic Institute for Women/Government Vocational Institute for Women under Women Division *vide* order dated 11.11.1990 and was posted at Gujranwala. Subsequently, on achieving Master Degree she was allowed basic pay scale-17. On 01.07.1994, however, the above Institution alongwith three other institutions were dissolved. Later-on, services of 12 senior gazetted officers of Government Polytechnic Institute were regularized on 06.10.1994. On representation by the petitioner, the Directorate of Technical

Education Punjab, Lahore recommended that services of the petitioner be regularized. Meanwhile, services of the other similarly placed employees were regularized but finally *vide* order dated 17.12.1998 petitioner was informed that proposal of Directorate for regularization of services of the petitioner, could not be accepted, whereupon, the petitioner filed Writ Petition No. 2726/1999 and this Court *vide* order dated 23.02.2001 in clear terms observed that:---

"In case the contents of para-7 and reply of para-7 are put in a juxtaposition then it is a case of discrimination which is hit by Article 25 of the Constitution."

While disposing of said writ petition this Court set aside the order dated 17.12.1998 and directed the Director Technical Education to pass a fresh order in accordance with law. Pursuant to the above remand order of this Court, the Director Technical Education on 19.05.2001 passed the fresh order to the following effect:---

"After going through the detail of the case it was observed that since the services of no contractual Librarian has been regularized and all the three posts of Librarians have already been filled through Punjab Public Service Commission on regular basis, hence your request for regularization of contract service as Librarian cannot be acceded to."

Aggrieved by the above order, the petitioner filed another Writ Petition No. 14484/2001 and this Court *vide* order dated 02.08.2001 in para-4 observed that:---

"*The impugned order itself reveals that the same was passed without applying its independent mind by the authority, therefore, same is not sustainable in eyes of law. Even otherwise the impugned order did not reveal that the same was passed in terms of the order of this Court dated 23.2.2001. It is settled principle of law that direction of this Court is binding on each and every organ of the State as is envisaged by Article 201 of the Constitution. The impugned order does not reveal that respondent has challenged the vires of the order passed by this Court dated 23.2.2001 before the Division Bench of this Court or before the Honourable Supreme Court."*

Ultimately, the writ petition was disposed of, the impugned order was set aside with the observation that representation of the petitioner shall be deemed to be pending before respondent No. 2 and he was directed to decide the representation in accordance with law with reasons in terms of the order of this Court dated 23.2.2001 within two months. Pursuant to the order of this Court dated 02.08.2001, the petitioner again approached the respondent, who *vide* order dated 28th of September, 2001 declined representation of the petitioner, hence, the instant writ petition.

2. Heard.

3. There is no denial about the fact from either of the side that the first order of this Court dated 23.02.2001 passed in Writ Petition No. 2726/1999 was not assailed by the respondent/department before any forum. Similar is the situation about second order of this Court dated 02.08.2001 passed in second Writ Petition No. 14484/2001, thus, by passage of time both of those orders have attained finality and the only question before this Court through the instant writ petition, is the implementation of those orders in letter and spirit. As reproduced.

4. As detailed above this Court while disposing of Writ Petition No. 2726/1999 reproduced para-7 of the writ petition and also quoted reply to the said paragraph submitted by the respondents, and then observed that:---

"In case the contents of para-7 and reply of para-7 are put in a juxtaposition then it is a case of discrimination which is hit by Article 25 of the Constitution. Public functionaries are duty bound to act in accordance with law as is envisaged by Article 4 of the Constitution without fear, favour and nepotism. In the same context it was held that "The aforesaid reply of the respondents reveals that petitioner is penalized by the in-action of the respondents. Therefore, same is not sustainable in the eyes of law as per principle laid down by this Court in Ahmad Latif's case (PLD 1994 Lahore 3).

From the above reproduced paragraphs from the initial judgment of this Court, no doubt is left that this Court had remanded the case for its decision afresh after almost setting the legal issue after discussing the aspect of discrimination. It was for the above reason that yet in another Writ Petition No. 14484/2001 this Court *vide* order dated 02.08.2001 had to again observe that post-remand order had not been passed with application of independent mind and the earlier order this Court dated 23.02.2001 was not complied with in letter and spirit. As discussed above, it is admitted position that both the above orders were never challenged by the respondent department before any forum, thus, it is not open for the respondents to question that those orders were legally or factually not correct. There is no cavil to the proposition that in terms of Article 201 of the Constitution of Islamic Republic of Pakistan, 1973 direction of this Court is binding on every organ of the State. Furthermore, as per analogy drawn from a judgment of the Hon'ble Supreme Court of Pakistan in the case *"Jamil Ahmad v. Saifuddin"* (PLD 1992 SC 501), it was incumbent upon the authority to have decided the matter strictly in terms of remand order.

5. By careful perusal of above reproduced extract from the orders passed by this Court in two earlier rounds of litigations, there remains no ambiguity that this Court had held it to be a case of discrimination towards the petitioner, as services of some of her colleagues had been regularized, whereas, the petitioner was left stranded. Thus, after holding that discrimination was least permissible, as it was against the settled norms of justice, the petitioner is surely entitled for regularization of her service.

6. In view of the above, this petition is allowed, the impugned order dated 28.09.2001 is set-aside and the respondents are directed to proceed for regularization of service of the petitioner in the light of earlier directions of this Court.

Petition allowed.

2015 P.Cr.R. 147
[Multan]
Present: **MUHAMMAD QASIM KHAN, J.**
Jam Abdul Karim
Versus
Additional Sessions Judge, etc.

Criminal Revision No. 40 of 2014, decided on 16th April, 2014.

CONCLUSION

(1) Although no limitation is prescribed in criminal prosecution, yet the longer the complaint is delayed, the lesser would become the chance of believing in its truth, particularly, when the same was based entirely on oral evidence.

(2)

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

---S. 204---Private complaint---Issuance of process---Duty of Court---As a primary duty before issuing the summoning process the Court seized of the matter shall form an opinion about existence of sufficient grounds---At the same time, it should remain in the judicious mind of Court to visualize, whether intended prosecution was based upon *bona fide* or *mala fide*---False, frivolous or vexatious accusations should be made to bury at initial stage---Allowing incessant proceedings in the case would necessarily be a travesty of justice, abuse of process of law and wastage of precious time of Court. (Para 4)

Ref: 2000 SCMR 1904.

DISMISSAL OF PRIVATE COMPLAINT --- (Incessant proceedings)

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

---Ss. 435/439, 200, 204---Pakistan Penal Code, 1860, Ss. 302/34/109---Occurrence of murder---Private complaint---Trial Court recorded cursory evidence of petitioner in private complaint and ultimately dismissed same---Impugned order---Incessant proceedings---Legal/factual position---If version as alleged in private complaint had any substance whatsoever, accused at the very first moment *i.e*. at the time of his arrest could point out real occurrence to Investigating Officer---At no stage petitioner/complainant side thought of coming forward with its version---Law prevents unnecessary dragging of the innocent people to the criminal prosecution, and the Courts would remain wide-awake for the enforcement of rights of the people---Narration of facts regarding occurrence in question had already led to registration of said FIR---Said case was thoroughly investigated, petitioner was found to be guilty by I.O. and on conclusion of investigation report u/s. 173, CPC was sent to Court---False, frivolous or vexatious accusations should be made to bury at initial stage---Allowing incessant proceedings in the case would necessarily be a travesty of justice, abuse of process of law and wastage of precious time of Court---Held: Trial Court committed no illegality in passing impugned order of dismissal of private complaint---Criminal revision petition dismissed.

(Para 4)

Ref: 2010 SCMR 1816, 2000 SCMR 1904.

ایف آئی آر میں قتل کے ملزم نے مستغیث کے خلاف استغاثہ دائر کیا تھا۔ جو ٹرائل کورٹ نے درست طور پر خارج کیا۔ ہائیکورٹ نے نگرانی درخواست خارج کردی۔

[Accused of murder in FIR had filed a private complaint against complainant which was correctly dismissed by Trial Court. High Court dismissed revision].

For the Petitioner: Muhammad Zubair Chaudhry, Advocate.
Mubashir Latif Gill, Assistant Advocate General on Court's call.
For the Respondents: Mian Muhammad Imran Tariq and Syed Waheed Raza Bokhari, Advocates.
Date of hearing: 16th April, 2014.

ORDER

MUHAMMAD QASIM KHAN, J. --- This criminal revision has been filed to assail the order dated 03.12.2012 passed by learned Additional Sessions Judge, Rajanpur, whereby, a private complaint filed by the present petitioner under Sections 324/34, 109, P.P.C. against respondent No. 1, has been dismissed.

2. Briefly the facts of the case are that an F.I.R. No. 109, dated 26.03.3012 was got lodged by Muhammad Iqbal/respondent No. 2 under Section 302/325, P.P.C. at police station Kot Mithhan precisely to the effect that accused Jam Ashiq Hussain used to keep a bad eye on Muhammad Alim (son of the complainant) and also used to tease him, whereupon, a day before the occurrence the complainant and his other son Muhammad Irfan forbade the accused. On the fateful day and time when the complainant alongwith his sons was present in Children Park, Jam Ashiq Hussain armed with 30-bore pistol came, exhorted lalkara and simultaneously made three fires which hit chest, belly and leg of Muhammad Alim, he fell down. Meanwhile, Ashiq Hussain accused himself made a fire on left side of his chest which pierced through his chest. The injured Alim was taken to hospital but he succumbed. The case was investigated and on 20.04.2012 challan was submitted in Court, on 21.05.2012 accused was charge-sheeted and prosecution evidence commenced when statements of prosecution witnesses were recorded on 29.05.2012 and 18.07.2012, then on 28.08.2012 present petitioner Jam **Abdul Karim** filed private complaint against Muhammad Iqbal complainant of FIR, his son Muhammad Irfan and one Muhammad Salim, with the allegation that on 26.03.2012, on the asking of Muhammad Iqbal, Muhammad Alim made a pistol fire which hit left chest of Jam Ashiq Hussain. When attempt was being made for repeating the fire, Jam Ashiq Hussain who had a licenced pistol with him, in order to save his life made three/four fires at Muhammad Alim who fell and died at the spot. The learned Trial Court recorded cursory evidence of the petitioner in the private complaint and ultimately *vide* impugned order dated 03.12.2012 dismissed the same.

3. I have heard the arguments of learned counsel for the parties and perused the available record with their assistance.

4. As shall be seen from the above narration of facts, regarding an occurrence dated 26.03.2012 already a criminal case *vide* F.I.R. No. 109/2012 was got lodged by Muhammad Iqbal on 26.03.2012 at police station Kot Mithhan with a detailed version. The said case was thoroughly investigated, Jam Ashiq Hussain was opined to be guilty by the Investigating Officer and on conclusion of investigation report under Section 173, Cr.P.C. was sent to Court on 20.04.2012, where charge was framed on 21.05.2012 and prosecution evidence commenced when statements of prosecution witnesses were recorded on 29.05.2012 and 18.07.2012. Throughout this period, right from registration of case till framing of charge, the version which has now been alleged through the private complaint, was never ever laid before the Investigating Officer by the accused side. If the version as alleged in the private complaint had any substance whatsoever, the accused at the very first moment *i.e*. at the time of his arrest could point out the real occurrence to the Investigating Officer; if his version/cross-version was not entertained by the Investigating Officer, the accused side could have very conveniently agitated his grievance before the police hierarchy through properly drafted applications, or at least the accused could have attempted to approach the learned *Ex-Officio* Justice of Peace or any other Court of law, but the accused side kept mum for more than five months. Although this Court is cognizant of the fact that delay in filing a private complaint, simplicitor could not be considered to knock out the complaint, but here in this case the *bona fide* of the complainant/accused side is very much under question. As detailed above, the accused side was very much aware of the allegations levelled against it by the complainant of the FIR, those allegations were investigated by the Investigating Agency, but at no stage the petitioner/complainant side thought of coming forward with its version. The law prevents unnecessary dragging of the innocent people to the criminal prosecution, and the Courts would remain wide-awake for the enforcement of rights of the people. At the time of summoning of accused in a private complaint, the Courts are required to assess and evaluate the cursory evidence in such a manner that it must be convinced that *prima facie* sufficient grounds exist for proceeding, only then the Court would issue the process of summoning. By language of Section 204, Criminal Procedure Code, it is clear that as a primary duty before issuing the summoning process the Court seized of the matter shall form an opinion about existence of sufficient grounds. At the same time, it should remain in the judicious mind of Court to visualize, whether intended prosecution was based upon *bona fide* or *mala fide*. False, frivolous or vexatious accusations should be made to bury at initial stage. Allowing incessant proceedings in the case would necessarily be a travesty of justice, abuse of process of law and wastage of precious time of Court. The apex Court in the case *"**ABDUL** WAHAB KHAN v. MUHAMMAD NAWAZ and 7 others"* (2000 SCMR 1904), while setting down guidelines and procedure to be adopted and consideration to be kept in mind in dealing with complaint, held that "Court concerned must scrutinize the contents of the complaint, nature of allegations made therein, material in support of accusations, the object intended to be achieved, possibility of victimization and harassment, if any, to ensure itself that no innocent person against whom allegations are levelled should suffer the ordeal of protracted time consuming and cumbersome process of law." As discussed above, *mala fide* on the part of the petitioner is floating on surface and the allegations levelled after five

months of the occurrence even after partial recording of evidence in the state case, are clear pointer of the fact that the petitioner/accused side wanted to create a shield for themselves. Although there is no limitation prescribed under the law in lodging an F.I.R. or filing a private complaint, but this fact is very much important to establish malice, ill-will, false, frivolous or vexatious accusations and it is for the Court to examine each and every case according to peculiar circumstances of respective case. Some time, a short delay may be sufficient to infer that vexatious accusations have been levelled with *mala fide* intention. The Hon'ble Supreme Court of Pakistan in the case *"ZAFAR and others v. UMER HAYAT and others"* (2010 SCMR 1816), held that "Although no limitation is prescribed in criminal prosecution, yet the longer the complaint is delayed the lesser would become the chance of believing in its truth, particularly when the same was based entirely on oral evidence." This being the legal position, the learned Trial Court committed no illegality in passing the impugned order of dismissal of private complaint. The instant criminal revision, therefore, is found without any substance. Dismissed accordingly.

Criminal revision petition dismissed.

Journals		S.L.R.(Shariat Law Reports)
Court		Lahore High Court
Bench		Lahore High Court Multan Bench
Judge		**MUHAMMAD QASIM KHAN, J.**
Citation		**2015 S.L.R. 42**
Other Citations:		
Appellant Respodent	**&**	**Muhammad Javed vs The State, etc.**
Appeal/Case No		Criminal Revision No. 323 of 2010
Date of Hearing		2011-11-29
Date of Decision		2011-11-29
Councling		*For the Petitioner:* Mehr Irshad Ahmad Arain, Advocate. *For the Respondent:* Mehr Allah Bakhsh Hiraj, Advocate. *For the State:* Muhammad Amjad Rafique, Deputy Prosecutor General.
Published On:		2015-01-01
Result		Criminal revision petition allowed.

ORDER

MUHAMMAD QASIM KHAN, J. --- Briefly the facts of the case are that respondent No. 2 got lodged an F.I.R. No. 468/2007, dated 16.9.2007 under Section 376(1), P.P.C. Police Station Sadar Kabirwala against the petitioner, alleging that the petitioner committed zina-bil-jabr with Mst. Mumtaz Mai (daughter of respondent No. 2/complainant). After usual investigation report under Section 173, Cr.P.C. was sent to Court, petitioner was charge-sheeted. During trial the complainant moved an application for exemption to produce Mst. Mumtaz Mai (victim) as a witness, on the ground of her ailment and further prayed that statement of the victim recorded under Section 161, Cr.P.C. may be allowed to be brought on the record. The said application of respondent No. 2/complainant has been allowed by the learned Trial Court vide impugned order dated 29.06.2010.

2.It is argued by learned counsel for the petitioner that Mst. Mumtaz Mai, the alleged victim, is alive, therefore, in these circumstances her statement recorded under Section 161, Cr.P.C. is inadmissible in evidence. The learned counsel referred to Section 162, Cr.P.C. to contend that said statement of the victim could not be used for any purpose at any inquiry or trial, except for the purpose to contradict such witness in the manner as provided in Article 140 of the Qanoon-e-Shahadat Order, 1984. The learned counsel concluded his arguments by praying that impugned order be declared illegal, as such, is liable to be set aside.

3.On the other hand, learned counsel for respondent/complainant defended the impugned order by arguing that in fact the victim Mst. Mumtaz Mai was produced

before the learned Trial Court and report from the medical expert was requisitioned, whereafter, due to psychological trauma medical expert declared her unfit to make any kind of statement and same was observed by the learned Trial Court, therefore, in terms of Article 46 of the Qanoon-e-Shahadat Order, 1984 the learned Trial Court rightly allowed the application of respondent No. 2/complainant and there is no illegality in the impugned order.

3.Arguments heard. Record perused.

4.The "Evidence" under Article 2(c) of the Qanoon-e-Shahadat Order, 1984 includes all statements in relation to matters of facts under inquiry or trial which the Court permits or requires to be made before it by a witness. Such statements are called oral evidence and all the documents produced for the inspection of the Court are called documentary evidence. Whether a person is incompetent for making any statement before the Court, is dealt with under Article 3 of the Qanoon-e-Shahadat Order, 1984 and this Article imposes conditions to testify the persons in relation to matters of fact under inquiry or trial and only such persons are competent to testify, to whom the Court considers that they can understand the questions put to them and are able to make rationale answer to such question and possess qualification prescribed by the injunctions of Islam as laid down in Holy Quran and Sunnah, but where such person is not forthcoming, the Court may take evidence of any available witness. In this respect, guidance is sought from the judgment "Khan Mir Daud Khan and others v. Mahrullah and others" (PLD 2001 SC 67). In the same judgment the Hon'ble Supreme Court of Pakistan held that: --
"Islamic Qanun-e-Shahadat lays down the following conditions for giving testimony by a witness:- -
(1)Existence of a claim or complaint and the requisition of the testimony in it.
(2)Testimony is to be given before a Court.
(3)Witness has the personal knowledge of the facts to be stated except in cases where hearsay evidence is admissible, such as res gestae.
(4)Statement to be given by first uttering the word "Shahadat, e.g. witness first of all to say that "I give Shahadat that ……
(5)Witness remembers the incident or the facts to be deposed.
(6)Witness is able to identify the parties at the time of making the statement.
(7)Conformity of the statement with the claim.
(8)Statements of witnesses of the parties should be corroboratory of each other and not conflicting.
(9)In Hudood cases excepting Qazaf, the fact sought to be proved should not have occurred in the distant past. (Maliki, Shafi'i and Hanbali Jurists, however, hold the view to the contrary and do not consider it as condition for giving evidence).

6.In this context, reference may also be made to the case of "The State v. Farman Hussain" (PLD 1995 SC 1), wherein, the apex Court observed as under: --
"In this regard, it may be pertinent to observe that Section 118 of the Evidence Act, 1872 (now Article 3 of the Qanun-e-Shahadat, 1984 which contains certain additions) (hereinafter referred to as the Act) deals with the question as to who may testify. It

provides that all persons shall be competent to testify unless the Court considers that they were prevented from understanding he questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind. The explanation to the above section lays down that a lunatic is competent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. In other words, the above provision of the Act makes all persons competent to testify unless the Court considers it otherwise on account of above reasons." Hence, the evidence of any PW who is summoned by the learned Trial Court or produced before it for recording of his evidence in relation to matter of fact under inquiry or trial, if the Court comes to the conclusion that a person present before it could not testify as he did not fulfill the criteria laid down under Article 3 of the Qanoon-e-Shahadat Order, 1984, the Court shall not record his evidence and shall record reasons for the same.

7.Now the question arises as to whether a person who could not testify due to some disease or any other cause of the same kind, his statement recorded under Section 161, Cr.P.C. by the Investigating Officer, is admissible in evidence or not? The general rule of evidence is that evidence must be direct and shall be recorded in the presence of the accused or his counsel, when his personal appearance is dispensed with, and statement of the witnesses be recorded on oath and also be testified through the cross-examination, but two exceptions are provided in the law to this general rule, one is provided under Section 512, Cr.P.C. and the purpose of this section is to preserve the important evidence until and unless the accused is arrested or he appears before the Court and the evidence recorded under Section 512, Cr.P.C. is admissible in evidence at later stage, when the accused is brought or appears before the Court. The second exception is provided under Article 46 of the Qanoon-e-Shahadat Order, 1984 and this Article provides the categories of the cases in which statement of a relevant fact by a person who is dead or cannot be found, etc. is admissible in evidence, (1) when this piece of evidence relates to the cause of death, (2) is made in the course of business, (3) against the interest of the maker, (4) gives opinion as to public right or custom or matters of general interest, (5) relates to existence of relationship, (6) is made in will or deed relating to family affairs, (7) in any document relating to transaction mentioned in Article 26, Paragraph (A), and (8) made by several persons and expresses feelings relation to matter in question.

8.The moot point involved in this case is "whether the statement of a person under Section 161, Cr.P.C. who could not testify due to sickness, his statement can be admissible in evidence or not? Section 162, Cr.P.C. specifically creates a bar that no statement made by any person to a police officer in the course of investigation shall be used for any purpose at any inquiry or trial in respect of any offence under investigation at the trial, except for the purpose to contradict such witness in the manner as provided under Article 140 of the Qanoon-e-Shahadat Order, 1984.

9.In this light of above discussed it becomes clear that when a witness is alive who could not testify due to some disease, whether of body or mind or any other cause of

the same kind, his statement recorded under Section 161, Cr.P.C. is not admissible in evidence, as Article 46 of the Qanoon-e-Shahadat Order, 1984 only permits dying declaration to be admissible in evidence. However, the prosecution may prove its case by producing any other evidence in relation to matter of fact under inquiry or trial by producing the doctor, eye-witnesses, recovery witnesses, report of Chemical Examiner or any other direct or corroborative piece of evidence and the trial could shall decide the matter accordingly.

10.As regards the case-law referred by the learned Trial Court in its impugned order, it appears that the learned Trial Court did not properly consider the same, as in the said citation the injured died later-on, as such, his evidence was considered admissible in evidence, as discussed above.

11.For what has been discussed above, the learned Trial Court committed illegality by passing the impugned order, hence, this criminal revision is allowed and the impugned order dated 29.06.2010 is set aside. The learned Trial Court may record its findings whether the victim (Mst. Mumtaz Mai) could be testified in the light of Article 3 of the Qanoon-e-Shahadat Order, 1984 and then it shall proceed further in accordance with law.

Criminal revision petition allowed.

2016 M L D 1484
[Lahore (Multan (Bench)]
Before Muhammad Qasim Khan, J
FIDA HUSSAIN---Petitioner
Versus
The STATE---Respondent

Criminal Appeal No.284 of 2008, decided on 12th May, 2015.

Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Incident was unseen---Role ascribed to accused, was similar to his three brothers, who were earlier found innocent during investigation, and subsequently had been acquitted by the Trial Court, though the set and nature of evidence against them was the same, as had been used against accused to record conviction against him---When same set of evidence had been disbelieved by the Trial Court qua three co-accused, extra care and caution was required to consider the same evidence against accused---All prosecution witnesses being closely related with the deceased and inter se, heavy onus was on the prosecution to have brought on record strong independent corroborative piece of evidence---As to how and in what manner the deceased lady was trapped in field, from where he got the cloth to tie the neck of the deceased, and what individual role was played by each of accused persons was no where mentioned---Trial Court, in circumstances, reached to a just and proper conclusion to reject the evidence of extra judicial confession---Prosecution witnesses, though were consistent about the recovery of dead body of the deceased from the fields, but that recovery was not sufficient to connect accused with the commission of the offence, because no recovery memo in that respect was prepared by Investigating Officer---Accused remained on physical remand, but no recovery was effected either on his disclosure or pointation---Prosecution having failed to prove its case against accused, beyond any shadow of doubt, conviction and sentence awarded to accused by the Trial Court, were set aside and he was released, in circumstances.

Prince Rehan Iftikhar Sheikh for Appellant.
Malik Muhammad Jaffar, Deputy Prosecutor General for the State.
Complainant in person.
Date of hearing: 12th May, 2014.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---Fida Hussain (accused/appellant) along with co-accused Ramzan, Rashid and Noor Muhammad faced trial before the learned Additional Sessions Judge, oDera Ghazi Khan, in case FIR No.492 dated 22.08.2006 under sections 302/34, P.P.C. police station Kot Chutta, Dera Ghazi Khan, and on conclusion of trial vide judgment dated 15.10.2008, Ramzan, Rashid and Noor Muhammad were acquitted of the charge against them, whereas, accused/appellant was convicted under section 302(b), P.P.C. and sentenced to imprisonment for life, with further direction to pay Rs.50 000/- as compensation under section 544-A

Cr.P.C. to the legal heirs of deceased, failing which to further suffer six months imprisonment Present criminal appeal has been filed by the accused/appellant to assail his above conviction and sentence.

2. Briefly the case of the prosecution as set down in FIR got lodged by Allah Wasaya complainant/PW-6 is that about 20/22 years before Mst. Sakina alias Medu was married with Fida Hussain (accused/appellant) and they had two sons and four daughters. The spouses were carrying dispute for last couple of days, whereupon, on 21.08.2006 at about DEGER VELA, the complainant along with his brother Allah Diwaya (PW-10) and brother-in-law namely Ghulam Haider PW-11 went to the house of Mst. Sakina, where they saw that Fida Hussain and his brothers Rashid and Anwar were quarreling with Mst. Sakina. The complainant and others requested them not to quarrel and in their view Mst. Sakina went to take grass from cotton crop and the complainant party came back to their house. On 22.08.2006 at about 11.00 a.m., they received information that Mst. Sakina after cutting the grass had not returned to her house. The complainant Allah Wasaya, along with Ghulam Haider, Allah Diwaya and Ghulam Shabir went to know about Mst. Sakina. When they searched in the land of "KHHOO" Murad Wala in cotton crop, dead body of Mst. Sakina was found and a cloth had been tied around her throat and stool had come out in her clothes. It was averred in the FIR that Mst. Sakina was murdered by Fida Hussain along with Rasheed and Anwar. [Subsequently during investigation the complainant got recorded supplementary statement to the effect that in fact Anwar was not brother of accused, rather Muhammad Ramzan was brother of accused and he had participated in the occurrence; he also implicated Motive was stated to be that Fida Hussain and his brother wanted to marry the daughter of Mst. Sakina with Ghulam Farid (niece of Fida Hussain accused), but Mst. Sakina was not willing.

3. On receipt of information about the occurrence, PW-9 Muhammad Farooq Sub-Inspector recorded statement of Allah Wasaya complainant and sent the complaint to police station. Thereafter, he proceeded to the spot, inspected the dead body, prepared application. Ex.PF for autopsy of deceased and inquest report Ex.PG. The dead body was sent to mortuary under escort of Ghulam Akbar Constable/87, prepared rough site plan Ex.PH, recorded statements of PWs under section 161, Cr.P.C. Last worn clothes of deceased i.e. Shirt P-1, Shalwar P-2, Earrings P-3 and Dupata P-4 were handed over to him and secured vide memo. Ex.PE. Two sealed envelopes for chemical analysis and report of histopathologist were also received by him. On 27.08.2006, he recorded statements of prosecution witnesses under section 161, Cr.P.C., in whose presence allegedly Fida Hussain had confessed his guilt. On 01.09.2006 he arrested Fida Hussain accused/appellant. After serving out physical remand the accused was sent to judicial lock. Rashid, Ramzan and Noor Muhammad were found innocent by the Investigating Officer and they were not challaned, however, on submission of report under section 173, Cr.P.C., Rashid, Ramzan and Noor were also summoned to face trial,

4. The accused persons were charge sheeted, to which they pleaded not guilty and claimed to be tried. During trial, the prosecution examined eleven witnesses. Allah

Wasaya complainant PW-6 and Ghulam Haider PW-11 made statements in line with narration of the FIR. Ghulam Shabir was examined as PW-7 who made statement with regard to recovery of dead body from cotton crop. Fida Hussain son of Imam Bakhsh PW-8 stated about extra judicial confession by accused/appellant Fida Hussain. Allah Diwaya PW-10 while toeing the line of the complainant also deposed about extra judicial confession. The rest of the prosecution witnesses are all formal in nature and they made statements before the court about their respective functions performed during the course of investigation, whereas, Lady Dr. Munaza Batool PW-2 had conducted autopsy over the dead body of Mst. Sakina alias Midu and while appearing in court disposed that following injuries were found by her on the dead body:--

"A ligature mark of size 6 cm x 15 cm incise situated in - front and lateral sides of neck"

The lady doctor further opined that probable time elapsed between injury and death was within few minutes and between death sand post mortem was about 24 to 36 hours.

5. The learned DDPP produced report of chemical examiner Ex.PK and with that closed the case for the prosecution. The accused persons when examined under section 342 Cr.P.C. while denying the prosecution evidence, in answer to a question "WHY THIS CASE AGAINST YOU AND WHY THE PWS HAVE DEPOSED AGAISNT YOU?", Fida Hussain accused/appellant made the following reply:--

"It was blind murder. Ghulam Haider father of deceased received Rs.70,000/- from Fida Hussain PW-8 and marriage of Rukhsana Mai, my daughter was contracted with Sabir Hussain PW-8 That Nikah was solemnized 40-kilometer away within area of under section Sarwar Wali. I have been falsely involved in this case because Ghulam Haider intended to give hands of my three daughters to sons of Allah Wasaya and Allah Diwaya PWs who are his "Salas". The PWs are brothers in law and sons in law of father of deceased. Due that reaction they have deposed falsely. "

6. On conclusion of trial, as detailed o above, Fida Hussain accused/appellant was convicted and sentenced, whereas, Ramzan, Noor Muhammad and Rashid co-accused were acquitted of the charge by extending them the benefit of doubt.

7. I have heard the arguments of learned counsel for the parties at considerable length and perused the entire available record with their assistance.

8. According to the prosecution itself and also held by the learned trial court, it is a case of unseen occurrence and the prosecution has fried to built its case on the point of motive, recovery of dead body, medical evidence and extra judicial confession by Fida Hussain accused/appellant.

9. Before analyzing the prosecution evidence, it may not be out of place to discuss here that as shall be seen by the contents of the FIR and also as deposed by the prosecution witnesses Allah Wasaya complainant PW-6, Allah Diwaya P W-10 and Ghulam Haider PW-11, when they reached at the house of Mst. Sakina, Fida Hussain

accused/appellant and his brothers were quarreling with Mst. Sakina. Further, the motive was also jointly attributed to Fida Hussain accused/appellant as well as his brothers Ramzan, Rashid and Noor. Similarly, it was alleged that Fida Hussain along with his brothers had committed the murder of Mst. Sakina. As such, throughout the role ascribed to Fida Hussain accused/appellant was similar to his three brothers, who were earlier found innocent during investigation and subsequently have been acquitted by the learned trial court as well, through the set and nature of evidence against them was the same, as has been used against the accused/appellant to record conviction against him.

10. With above situation, when same set of evidence has been disbelieved by the learned trial qua three of the co-accused of the accused/appellant, extra care and caution was required to consider the same evidence against 'Fida Hussain accused/appellant. Furthermore, admitted position of the matter is that Allah Wasaya complainant PW-6 was the real material uncle of Mst. Sakina deceased, similarly, Allah Diwaya PW-10 (being brother of the complainant) was her uncle, whereas, Ghul am Haider PW-11 was the real father of Mst. Sakina. Therefore, all these witnesses being closely related with the deceased and inter-se, heavy onus was on the prosecution to have brought on record strong independent corroborative piece of evidence. The importance of independent and impartial corroboration became further important in this the reason that same set of evidence has already been disbelieved by the learned trial court qua co-accused, not been assailed by the same judgment and said acquittal has forum, despite the prosecution/complainant before any higher forum, despite the fact that same allegations had been levelled by the prosecution against all the accused persons.

11. After discussing the above background, although in the FIR it has been stated that Fida Hussain accused/appellant and his brothers had quarreled with Mst. Sakina, as she was not consenting to their demand of giving the hand of her daughter to the son of Ghulam Farid (their niece), but in categorical terms it has also been explained in the FIR that matter was got patched up between them and in their presence Mst. Sakina went out to cut the grass. Firstly, if the motive as set out above is taken as correct; then according to the prosecution it existed against all the four accused and secondly when the dispute had been amicably settled down by the complainant and others and Mst. Salina left for cutting the grass, as a usual activity, then there does not appear any justifiable reason why her murder could be Committed by her husband and brothers-in-law.

12. Only the evidence of alleged extra judicial confession can be termed as a distinguishing feature between the case of Fida Hussain accused/appellant from the case of acquitted co-accused and to prove the aspect of Extra Judicial Confession, the prosecution examined Fida Hussain PW-8, Allah Diwaya PW-10 and. Ghulam Haider pw11. On this aspect, the learned trial court after appraising the evidence of above prosecution witnesses, in para-24 (at page7) of the impugned judgment has held that:-
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"Alleged confession made by accused Fida Husain before PW-8 and PW-10 Allah Dewaya appears doubtful and does not support the case of prosecution because it appears improbable that after that confession before them, they would have allowed to go to the accused free. Alleged occurrence took place on 21.08.2006 and same was reported to the police on 22.08.2006 after recovery of dead body of deceased. Alleged confession according to PW-8 was made by accused after four days of occurrence at about 10:00, 11:00 am. According to PW-10 Allah Dewaya, who is "Mamoo" of deceased, it was Made at about 1:00, 1:30 p.m. PW-8 admitted that after the confession of accused, they did not capture him for handing over his custody to police and he left the spot peacefully. Accordingly, alleged extra judicial confession does not prove the case of prosecution."

In addition to above, even if the statements of P.W.8 Fida Hussain son of Imam Bakhsh and PW-10 Allah Diwaya, which on the face of it are extremely brief on the aspect of extra judicial confession, I am afraid that same would hardly stand the test of being called a valid "extra judicial confessions", as not the slightest of details of the occurrence have been mentioned. It is no where mentioned that how and in what manner the deceased lady was trapped in fields, from where he got the cloth to tie the neck of the deceased and what individual role was played by each of the accused person. Therefore, the leanred trial court reached to a just and proper conclusion to reject the evidence of extra judicial confession.

13. Although, prosecution witnesses are consistence about the recovery of dead body of Mst. Sakina from the fields, but this recovery alone is not sufficient to connect the accused/appellant with the commission of the offence, because admittedly no recovery memo in this respect was prepared by the Investigating Officer and furthermore, through according to the Investigating Officer the accused/appellant remained on physical remand but no recovery was affecter either on his disclosure or pointation.

14. For what has been discussed above, it is held that prosecution has failed to prove its case against the accused/appellant beyond any shadow of doubt. Consequently, I allow this appeal and set aside the conviction as well as sentence of the accused/appellant. He shall be released forthwith if not required in any other case. The record of the learned trial Court be sent back immediately and the case property, if any, shall be disposed of in accordance with law.

HBT/F-22/L Appeal allowed.

2016 P Cr. L J 769
[Lahore]
Before Muhammad Qasim Khan, J
MANSOOR MUMTAZ KHILJI---Petitioner
Versus
The STATE and another---Respondents

Crl. Misc. No. 13064-B of 2015, decided on 1st December, 2015.

Criminal Procedure Code (V of 1898)---
----S. 498---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Cheque issued as security---Mala fide and ulterior motive on part of complainant---Bail before arrest, grant of---Word 'security cheque' were clearly mentioned on the back of the cheque---Complainant had in the FIR, and later before the Investigating Officer, had given two different purposes of issuing the cheque---Cheque, in said stances of the complainant, could not be said to have been issued towards repayment of loan or fulfillment of any obligation---Considering the material available on record, prima facie, the accused appeared to have been involved in the case due to mala fide and ulterior motives of the complainant---Recovery of amount under the disputed cheque could not be effected through criminal proceedings---Interim pre-arrest bail earlier granted to the accused was, therefore, confirmed accordingly.
Mian Muhammad Akram v. The State and others 2014 SCMR 1369 and Mian Allah Dita v. The State and others 2013 SCMR 51 rel.

Muhammad Ajmal Adil for Petitioner.
Ch. Muhammad Ishaq, Deputy Prosecutor-General with Maqbool Ahmad, ASI for the State.
Complainant in person.

ORDER
MUHAMMAD QASIM KHAN, J.---Petitioner seeks pre-arrest bail in case FIR No.390/2015 dated 22.06.2015 under section 489-F, P.P.C. registered at police station Kotwali, District Faisalabad.

2. I have heard the arguments of learned counsel for the petitioner as well as learned Deputy Prosecutor General and on perusal of the record, it has been observed that:-
i) On perusal of the original cheque, it has been observed that on its back, it is clearly mentioned that this is a security cheque;
ii) In the FIR the complainant stated that there was a business transaction with the petitioner but when he appeared before the Investigating Officer on 178.11.2015(sic.) he stated that petitioner was his employee and the cheque was executed at the time of his service to protect the interest of the Firm and this fact is incorporated in case Diary No.17;
iii) When both the above stances of the complainant are juxtaposed; in the light of later statement prima facie it cannot be said that the cheque was issued towards repayment of loan or fulfillment of any obligation;

iv) On consideration of the material so far collected by the prosecution, prima facie, it appears that petitioner has been involved in this case due to mala fide and ulterior motives of the complainant;
v) Even otherwise, the original cheque is already with the prosecution, whereas, recovery of amount under the disputed cheque cannot be effected through criminal proceedings.

3. For what has been discussed above, respectfully placing reliance on the case "Mian Muhammad Akram v. The State and others" (2014 SCMR 1369) and "Mian Allah Dita v. The State and others" (2013 SCMR 51), this application is allowed and interim pre-arrest bail earlier granted to the petitioner is hereby confirmed subject to his furnishing fresh bail bonds in the sum of Rs.200,000/- with two sureties each in the like amount to the satisfaction of learned trial court.

SL/M-44/L Bail allowed.

2016 P L C 107
[Lahore High Court]
Before Muhammad Qasim Khan, J
KOH-E-NOOR INDUSTRIES (PVT.) LTD.
Versus
EMPLOYEES' OLD-AGE BENEFITS INSTITUTION through Regional Head and others

Writ Petitions Nos.6618 of 2007 and 9976 of 2011, decided on 6th May, 2015.

(a) Employees' Old Age Benefits Act (XIV of 1976)---
----Ss. 2(bb)(c)(d) & 9---Punjab Employees' Special Allowance (Payment) Act (II of 1988), Preamble---Person employed through contractor---Denial of employer to pay contribution qua such person on the ground that contractor by whom such person was recruited was liable to pay the same---Validity---Punjab Employees Special Allowance (Payment) Act, 1988 was Provincial Statute which had no overriding effect on Federal Statute---Federal law would prevail on the principle of implication---Employees' Old Age Benefits Act, 1976 was Federal Statute and in case of any conflict between the Provincial and Federal Statute would prevail---Special pay allowance payable under Punjab Employees Special Allowance (Payment) Act, 1988 could be included in the wages of employee for the purposes of contribution under Employees' Old Age Benefits Act, 1976---Definition of "wages" would include special allowance---Employer was liable to pay the contribution on the basis of special allowance---Employer was bound to pay amount to the Employees' Old Age Benefits Institutions with regard to the insured person---Department should act for recovery of such contribution if employer had failed to comply with the provision of Employees' Old Age Benefits Act, 1976---Contribution of workers performing duties through a contractor or an agent or employees whose services had been provided by a contractor should be paid by the employer---Employer was bound to pay the contribution of the workers performing their functions under a contractor or agent---Contribution for certain period had not been fixed by the official of the Institution after examining the record---Appellate Authority had also added the amount of contribution with regard to the period for which relevant record was not checked by the concerned officials---Judgment of Appellate Authority was set aside, however, Authority would be at liberty to check record of employer firm in accordance with law and fix responsibility---Constitutional petition was accepted in circumstances.

1999 SCMR 1466 ref.
PLD 1968 SC 101; PLD 1991 SC 777; 2009 SCMR 1169; 1985 SCMR 257; 1961 PLC 432; PLD 1988 SC 131 and PLD 1965 SC 261 distinguished.

1996 PLC 373; 1999 SCMR 1477; Malik Asad Ali v. Federation of Pakistan through Secretary, Law, Justice and Parliament Affairs, Islamabad and others PLD 1998 SC 161 and Messrs Bolan Mining Enterprises v. Board of Trustees, EOBI and others 2010 SCMR 1573 rel.

(b) Employees' Old Age Benefits Act (XIV of 1976)---
----Preamble---Punjab Employees' Special Allowance (Payment) Act (II of 1988), Preamble---Conflict between the Federal Legislation and Provincial Legislation---Resolution---Punjab Employees Special Allowance (Payment) Act, 1988 was Provincial Statue which had no overriding effect over Federal Statute---Federal law would prevail on the principle of implication---Employees' Old Age Benefits Act, 1976 was Federal Statute and in case of any conflict between the two, Federal Statute would prevail.

(c) Employees' Old Age Benefits Act (XIV of 1976)---
----S. 2 (bb)---'Wages'---Meaning---Definition Of wages would include special allowance.

(d) Employees' Old Age Benefits Act (XIV of 1976)---
----S. 2(bb)---'Employee'---Meaning---'Employee' was a person employed whether directly or through any other person for wages or otherwise.

(e) Employees' Old Age Benefits Act (XIV of 1976)---
----S. 2(c)---'Employer'---Meaning---'Employer' would include any person who had employed either directly or through another person an employee.

Munawar Ahmad Javed for Petitioner (in both writ petitions).
Hafeez Saeed Akhtar for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.--- Through this single order, I propose to decide two matters (W.P.No.6618/2007 and W.P.No.9976/2011) as both carry almost similar questions of law and facts.

2. In Writ Petition No.9976/2011 the order dated 31.03.2010 passed by the Appellate Authority is under challenge, whereas, in Writ Petition No.6618/2007 the petitioner has assailed the decision dated 02.09.2006 passed by Board of Trustees, Employees Old Age Benefits Institution (hereinafter to be called as "Institution") in the capacity of appellate authority, the decision dated 29.11.2005 passed on the review petition of the petitioner and decision dated 26.09.2005 passed by Adjudicating Authority, Faisalabad on the ground that special allowance payable under Punjab Special Allowance (Payment) Act, 1988 is not covered under the EOB Act and secondly the petitioner is not responsible for the payment of Institution contribution with respect to the employees engaged through independent Contractors and wages as well as other dues paid to them by the said Contractors.

3. The learned counsel for the petitioner submits that Section 8 of the Punjab Special Allowance (Payment) Act, 1988 clearly speaks that special allowance shall not form part of wages of the workers for the purpose of any other law including the purpose of provident fund, gratuity and bonus and calculating wages for over-time work and it is special law which shall prevail over the general law. Adds that for the first time this

issue was decided in the light of Social Security Ordinance vide judgment 1996 PLC 373 and 1999 SCMR 1466. Contends that there is hell of difference between the definition of employee, employer, etc in Social Security Ordinance and EOB Act. Further contends that at the most if it is decided that petitioner is liable to pay the amount of contribution on the special allowance under Punjab Special Allowance (Payment) Act, 1998 then it only could recover/pay from the date of judgment i.e. 1996 PLC 373, as it will not affect retrospectively and will be implemented prospectively in the light of rule of law decided by the apex Court. In case of employees engaged by the independent contractor, as the petitioner never paid the wages to those employees and it was the responsibility of the contractor to pay the wages to all the persons employed by him, for the same reason the petitioner could not be liable for the payment of contribution on behalf of those employees of the contractor and if any liability for payment is, that is on the shoulder of the contractor and further submits that case law under Social Security Ordinance, 1969 in respect of the contract employment could not support the respondents' stance as the definition of employee, employer, wages and contribution in EOB Act is different from Social Security Ordinance. Further adds that EOBI charge contribution only when the employee is registered before him and in the absence of any registration, no contribution could be claimed because the contribution is only with regard to the payment of pension to certain employees but when those employees do not exist and no record is available how they are entitled for the contribution on their behalf. The learned counsel for the petitioner in addition to the above grounds with reference to Noon Sugar Mills added that the Adjudicating Authority fixed the responsibility for certain period and for the remaining period left the matter open to be decided after checking of the record and this order was not assailed before the appellate authority by the EOBI but the appellate authority also added the amount for the period which was not earlier calculated after checking the record of the petitioner, which is not permissible under law, thus is liable to be set-aside. In support of his arguments, the learned counsel placed reliance on the case PLD 1968 SC 101, PLD 1991 SC 777, 2009 SCMR 1169, 1985 SCMR 257 and 1961 PLC 432 (Supreme Court of India).

4. The learned counsel representing the respondent submits that EOB Act being federal statute has overriding effect on provincial statute i.e. Punjab Special Allowance (Payment) Act, 1988, and for the same reason Institution is competent to recover the amount received by the employee on the basis of Punjab Special Allowance (Payment) Act, 1988. Further submits that Hon'ble Supreme Court of Pakistan in its judgments only interpreted the law and no new law is created by the apex court, hence, the EOBI could receive contribution from the date of enactment of Punjab Special Allowance (Payment) Act, 1988. Further added that even if the petitioner's company obtained Labour through agent/third party, the petitioner is covered under EOB Act to pay the contribution on behalf of the Labour provided by the contractor. Reliance has been placed on 1999 SCMR 1477 and PLD 1988 SC 131. Lastly added that the respondent could charge statutory increase under section 13 of the EOB Act and with reference to Noon Sugar Mills contended that under Order XLI, Rule 33, C.P.C. the appellate court could increase the amount payable without respondents having gone into appeal.

5. I have heard the arguments of learned counsel for the parties at considerable length and perused the available record with reference to the relevant case-law.

6. The issue with regard to special allowance payable under Punjab Special Allowance (Payment) Act, 1988, has been decided by the Hon'ble Supreme Court of Pakistan in the case PLD 1999 SCMR 1477, to the effect that Punjab Special Allowance (Payment) Act, 1988 is provincial statute and the bar imposed under section 8 of the said Act that the special allowance shall not form part of the wages of workers for the purposes of any other law, have no overriding effect on federal statute and federal law would prevail on the principle of repeal by implication. The EOB Act is also federal statute and in case of any conflict between the two, federal statute will prevail. Similar was the situation with Social Security Ordinance and the Hon'ble Supreme Court in the above referred judgment considering the principle of adaptation having the constitutional mandate under Article 268 of the Constitution of Islamic Republic of Pakistan, 1973 with regard to conflict in federal and provincial statute, held that:-

"Leave to appeal is granted to consider whether the special allowance being, paid to a workman in pursuance of the provisions of the Punjab Employees Special Allowance (Payment) Act, 1988 is to be treated as part of his wages for the purpose of computing the contribution which his employer is liable to make under the Social Security Ordinance, 1965, despite the specific exemption granted by section 8 of the aforementioned Act. The interim order already made on 17-1-1996 to continue during the pendency of the appeals on the same terms.
In a unitary form of Government, all the Legislative Powers of necessity, vest in the legislature of the given country in the federal form of Government, however, the legislative powers vest in the respective legislatures in line with the dispensation under the Constitutional-document/concerned.
It is in the spheres of distribution of legislative powers in a federal set up that a conflict of sorts between the legislation by the Federal Central Legislature and Provincial /State Legislature can arise for resolution by the Judiciary.
Articles 141, 142 and 143 of 1973 Constitution respectively deal with (1) extent of Federal and Provincial Laws (2) subject matter of Federal and Provincial Laws and (3) inconsistency between Federal and Provincial Laws]
Under Article 141 (ibid) (Majlis-e-Shoora (Parliament)] may make law for the whole or any part of Pakistan and a Provincial Assembly may make laws for the Province or any part thereof. Under Article 142 (ibid) Majlis-e-Shoora (Parliament) has exclusive powers to make laws with respect to any matter in the Federal Legislative List and [Majlis-e-Shoora (Parliament)] and': a Provincial Assembly also have powers to make laws with respect to any matter in the Concurrent List. Under clause (c) of Article 142 (ibid) a Provincial Assembly shall and [Majlis-e-Shoora (Parliament)], shall not, have power to make laws with respect to any matter"...not enumerated in either the Federal Legislative List or the Concurrent Legislative List'. Further in the event of any inconsistency between the Federal law and the Provincial Law, the; mandate of the Constitution as contained in Article 143 (ibid) is that "...then the Act of Majlis-e-Shoora (Parliament, whether passed before or after the Act of the Provincial

Assembly, or, as the case may be, the existing law, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void."

7. Hence, the same principle is applicable to the EOB Act and the special pay allowance payable under Punjab Special Allowance (Payment) Act, 1988 could be included in the wages of employee for the purposes of contribution under EOB Act.

8. The above referred judgment of the apex Court was passed when consolidated judgment of this court passed in Writ Petition No.6186/1995 reported in 1996 PLC 373 was assailed and view of this Court was upheld and it was observed that the definition of wages provided in Social Security Ordinance includes special allowance. On the same principle the definition of wages as provided under EOB Act also does not exclude special allowance, hence, on the principle of law decided in 1996 PLC 373 by the High Court and in PLD 1999 SC 1477 by the Hon'ble Supreme Court of Pakistan after examining the Social Security Ordinance, is also applicable to the EOB Act and the petitioner is liable to pay the contribution on the basis of special allowance.

9. The stance of learned counsel for the petitioner is that the matter was for the first time decided in 1996 PLC 373, when the said judgment was passed on 26th of October, 1995 and as earlier this question of law was never decided, hence, before this date the contribution could not be recovered from the petitioner as it will be equated with retrospective implementation of statute. I have carefully considered the above argument and hold that the case-law referred by learned counsel for the petitioner i.e. PLD 1965 SC 261 is distinguishable as in that case the Hon'ble Supreme Court did not accept the view of the settlement authorities that the exercise of delegated power under displaced persons Act 1958 was subject to revision, review and appeal and to avoid the inconvenience and disturbances that would necessarily follow, the Hon'ble Supreme Court in the case PLD 1968 SC 101, held that decision in Jalal Din's case (PLD 1965 SC 261) was applicable from the date of delivery of judgment i.e. 2nd November, 1964. It was further held that the said judgment did not have the effect of altering the law as from commencement of the Act so as to render void of its own force all relevant orders of Settlement Authorities and the High Court. The other judgment referred by learned counsel for the petitioner i.e. PLD 1991 SC 777, is also with reference to PLD 1968 SC 261 and in the judgment reported in 2009 SCMR 1169, relied upon by learned counsel for the petitioner that retrospectively contribution could not be recovered, is also not beneficial to the petitioner because this view in this judgment was with reference to PLD 1990 SC 99 (judgment of Shariat Appellate Bench of Hon'ble Supreme Court of Pakistan), which declared the Land Reforms Regulations, 1972 against the injunction of Quran and Sunnah. The Hon'ble Shariat Appellate Bench of the Hon'ble Supreme Court itself specified the date on which the decision shall take effect as required under Article 203(d) of the Constitution of Islamic Republic of Pakistan, 1973 and could not support the petitioners. For the reasons discussed above, all the judgments referred by learned counsel for the petitioner are not applicable to his case for prospective recovery of

amount with regard to special allowance under Punjab Special Allowance (Payment) Act, 1988.

10. Now, reverting to the EOB Act, it is the duty of the employer to pay the amount to the Institution in respect of an insured person and department acts later on for the recovery of contribution, if the employer fails to comply with the provisions of EOB Act. The law with regard to special allowance was promulgated in 1988 and at that time EOB Act was in field. It was duty of the petitioner to pay the amount and if he did not pay the same he could not get its benefit. High Courts and the Hon'ble Supreme Court of Pakistan only interpret the law and it will be applicable from the date when law is enforced. In this respect, I am fortified by a judgment reported in "Malik Asad Ali v. Federation of Pakistan through Secretary, Law, Justice and Parliament Affairs, Islamabad and others" (PLD 1998 SC 161), wherein, it has been held that:-

"It is a well-settled law that a new or an amending statute touching the, vested rights of the parties operates prospectively unless the language of the legislation expressly provides for its retrospective operation. However, the presumption against the retrospective operation of a statute is not applicable to statutes dealing with the procedure as no vested right can be claimed by any 1 party in respect of a procedure. The only exception to the retrospective operation of a procedure law is that if by giving it a retrospective operation, the vested right of a party is impaired then to that extent it operates prospectively. The above principles applicable to a new or an amending statute, however, cannot be applied strictly to the law declared by the Courts through interpretative process. The Courts while interpreting a law do not legislate or create any new law or I amend the existing law. By interpreting the law, the Courts only declare the true I meaning of the law which already existed. Therefore, to that extent the law declared by the Court is applicable from the date the law is enacted."

It is not the case of the petitioners that earlier some different interpretation of the statute was available in the light of any other judgment of the High Court or that of Hon'ble Supreme Court of Pakistan. Hence, the only and sole interpretation of High Court and Supreme Court of Pakistan 1998 PLC 373 and PLD 1999 SC 1477 shall hold the field and will apply from the date when Punjab Special Allowance (Payment) Act, 1988 was promulgated.

11. Further, the controversy whether the petitioner is bound to pay contribution on the wages of workers provided by a contract or working through a contract or performing duties under an agent, is to be resolved keeping in view the definition of words "employee" and "employer" i.e. Sections 2(bb) and 2(c) of the EOB Act, the relevant sections are reproduced hereunder:-
"2(bb). "employee" means any person employed, whether directly or through any other person, for wages or otherwise, to do any skilled or unskilled, supervisory, clerical, manual or other work in or in connection with the affairs of an industry or

establishment, under a contract of service or apprenticeship, whether written or oral, express or implied, and includes such person when laid off):
Provided that a director of a limited company or of a corporation set up under any law shall not be treated as an employee under this Act, irrespective of his wages or emoluments];
(c) "employer", in relation to an industry or establishment, means any person who employs, either directly or through any other person, any employee, and includes--
(i) in the case of an individual, an heir, successor, administrator or assign;
(ii) a person who has ultimate control over the affairs of an industry or establishment, or where the affairs of an industry or establishment are entrusted to any other person (whether called a managing agent, managing director, manager, superintendent, secretary or by any other name), such other person; and
(d) "employment injury" means a personal injury to an insured person caused by an accident, or by such occupational disease as may be specified in the regulations, arising out of and in the course of his employment."
A bare reading of above definition clarify that "employee" is a person employed whether directly or through any other person for wages or otherwise and an "employer" with reference to Industry and establishment included any person who employees either directly or through another person an employee. Both these definitions when read together made it clear that all the workers performing duties through a contract or an agent, or services of those employees have been provided by a contract, their contribution shall be paid by the petitioner/employer. This matter was earlier decided by the apex Court in the case "Messrs Bolan Mining Enterprises v. Board of Trustees, EOBI and others" (2010 SCMR 1573) and it was held that:-
6. The language as employed to define "employee" is free from any ambiguity as it has been couched in a very simple and plain language and no scholarly interpretation whatsoever is called for. It cannot be stretched too far as suggested by Mr. Muhammad Humayoon, learned Advocate Supreme Court on behalf of appellant because the definition of "employer" has removed all the doubts if any which means any person who employs either directly or through any other person any employee meaning thereby that it would be immaterial to consider by whom an employee was got employed. The only question which needs determination would be with whom such employee is performing his duties. It is not disputed that the employees under question are performing their duties with Messrs Bolan Mining Enterprises (appellant) and are being paid as such. The learned Advocate Supreme Court on behalf of appellant has argued in oblivion of the fact that "employees" contractor" and "employees got employed through contractor" are not synonymous because such employees are not performing their duties with the contractor who had just managed their employment with the Messrs Bolan Mining Enterprises (appellant). It can be thus inferred safely that the contractor had acted just an agent or a middle man by whom the services of such employees were secured. Besides that such employees have never been excluded from the definition of "employee". It is an admitted position that such employees are under the administrative and financial control of employer i.e. Messrs Bolan Mining Enterprises (appellant) and the contractor by whom such manpower was provided does not figure in. The learned Advocate Supreme Court was asked pointedly that how such employees got employed by the

contractor can be deprived from the benefits as conferred upon them under the EOAB Act, 1976 which is a beneficial legislation and the question of preferential treatment or discrimination does not arise but no answer could be given and rightly so because there can be no answer as such employees by no stretch of imagination can be deprived of any benefit conferred under the EOAB Act, 1976. It is worth-mentioning that such employees are performing their duties along with other employees under same management and therefore, the source of their employment would immaterial.
8. The law laid down in case of Sindh Employees' S.S.I. (supra) is applicable and the question of any deprivation of such employees does not arise. Even otherwise the provisions as enumerated in section 9(1) of the EOAB Act, 1976 provides that every employer shall pay contribution in respect of every person in his insurable employment read with the provisions as contained in sections 2(bb) and 2(c) of the EOAB Act, 1976 whereby the "employee" and "employer" have been defined and all the doubts if any have been removed by giving such an exhaustive definition of "employee" and "employer". The learned Advocate Supreme Court at this juncture was asked that how section 9 of the EOAB Act, 1976 being charging section cannot be made applicable to such employees but no answer could be given. In our view a futile attempt has been made to frustrate the beneficial provisions of Labour Laws with an attempt to evade statutory liability by exploiting certain legal provisions of law and such like techniques and mechanism are usually evolved to avoid financial responsibilities having complete legal sanctity behind it which cannot be appreciated."
Hence, this principle has already been decided by the Hon'ble Supreme Court of Pakistan and the petitioner is bound to pay the contribution of the workers performing their functions under a contractor, agent, etc.

12. For what has been discussed above, Writ Petition No.6617/2007 "Koh-e-Noor Industries (Pvt.) Limited v. Employees Old-Age Benefits Institution, etc." is found to be without any merit and is dismissed accordingly.

13. So for as Writ Petition No.9976/2011 "Noon Sugar Mills Limited Bhalwal v. Employees Old-Age Benefits Institution, etc.", is concerned, the law points as discussed above are decided against the petitioner herein. However, with regard to additional ground relating to this petition, it has been observed that contribution for certain period has not been fixed by the officials of the Institution after examining the record and the Adjudicating Authority directed that after examining the record contribution could be fixed, but the appellant authority also added the amount of contribution with regard to the period for which relevant record was not checked by the concerned officials. Hence, this writ petition (W.P.No.9976 of 2011) is decided on this issue in the terms that judgment of the appellate authority is set-aside, however, the authority under EOB Act will be at liberty to check the record of the petitioner firm in accordance with law and fix the responsibility.

ZC/K-20/L Order accordingly.

2016 P L C (C.S.) 296
[Lahore High Court]
Before Muhammad Qasim Khan, J
MUHAMMAD RIAZ
Versus
MEDICAL SUPERINTENDENT, SERVICE HOSPITAL, LAHORE and 2 others

W.P. No.461 of 2014, decided on 12th March, 2015.

(a) Punjab Employees Efficiency, Discipline and Accountability Act (XII of 2006)---
----Ss. 5 & 7---Constitution of Pakistan, Arts. 199 & 10-A---Constitutional petition---Maintainability---Contract employee---Misconduct and charge of inefficiency---Effect---Show cause notice, issuance of---Termination of service---Regular inquiry, dispensation of---Principles---Discretion, exercise of---Natural justice, principles of---Reasonable opportunity of showing cause---Right of fair trial---Scope---Services of petitioner, a contract employee were terminated by issuing show cause notice by dispensing with regular inquiry---Validity---Petitioner was a contract employee---Competent authority had right to dispense with regular inquiry---Whenever any discretion was given to an authority it had to be exercised not arbitrarily, but honestly, justly and fairly in consonance with the spirit of law after application of judicious mind and for substantial reasons---Nature of allegations against the employee had to be considered for exercise of such discretion---When allegations could be decided with reference to admitted record or the authority had formed opinion that un-rebutted evidence to prove the charge against the accused/employee was available on record, regular inquiry might be dispensed with, otherwise ends of justice would demand an inquiry through an inquiry officer or inquiry committee---Such discretion had to be made in the nature of judicial decision---Discretion had to be exercised with due care and caution keeping in mind the principles of natural justice, fair trial and transparency---Authority should record reasons with regard to dispensing with regular inquiry---Where recording of evidence was necessary to establish charge then departure from regular inquiry would amount to condemn a person unheard---Serving of show cause notice and reply thereto in denial of allegations would not amount to affording the employee reasonable opportunity of showing cause---Requirement of reasonable opportunity of showing cause could only be satisfied if particular of charge or charges, substance of evidence in support of charges and specific punishment which would be called for after the charge or charges were established were communicated to the civil servant who was given reasonable time and opportunity to show use---Specific allegations had been leveled against the employee which included inefficiency and misconduct---Petitioner had denied both the charges and authority was bound to order for a regular inquiry---Departure from normal course did riot reflect bonafide of Authority rather same would show mechanical application of mind---Authority in fact was biased towards the employee---Right of fair trial had been associated with the fundamental right of access to justice which should be read in every statute even if not expressly provided

for, unless specifically excluded---Order terminating service of employee contained stigmatic allegations, therefore, constitutional petition was maintainable---Order of removal from service passed against the petitioner did not stand the test of judicial scrutiny as same was against the spirit of law---Impugned order was set aside and petitioner was reinstated in service---Period between removal till reinstatement should be considered as leave without pay---Constitutional petition was accepted in circumstances.

Rana Asif Nadeem v. Executive District Officer, Education, District Nankana and 2 others 208 PLC (CS) 715; Rai Zaid Ahmad Kharal v. Water and Power Development Authority, through Chairman WAPDA and another 2008 PLC (CS) 1005 and 1997 SCMR 1543 ref.
2003 SCMR 1110 and PLD 2012 SC 553 rel.

(b) Discretion---
----Exercise of---Principle---Whenever any discretion was given to an Authority it had to be exercised not arbitrarily, but honestly, justly and fairly in consonance with the spirit of law after application of judicious mind and for substantial reasons.

(c) Words and phrases---
----Right of fair trial---Meaning---Fair trial would mean right to proper hearing by an unbiased forum.

(d) Words and phrases---
----"Decision"---Meaning.
Black's Law Dictionary Eighth Edition rel.

Muhammad Iqbal Mohal for Petitioner.
Imtiaz Ahmad Kaifi, Addl. A.G.

ORDER
MUHAMMAD QASIM KHAN, J.--- Briefly the facts of the case are that petitioner was appointed as Driver (BS-4) on contract basis for a period of one year, which could be extended subject to performance and conduct to be evaluated by the competent authority. Subsequently a Silk Cause Notice under the charge of inefficiency as well as misconduct was issued and by dispensing with regular inquiry or affording him opportunity of hearing to him, the order dated 03.02.2008 was passed whereby his services were terminated.

2. Since the petitioner was admittedly a contract employee and furthermore the order terminating his service on the face of it contains stigmatic allegations, therefore, the instant writ petition is held to be entertain-able by this Court. Reliance in this respect is placed on the case "Rana Asif Nadeem versus Executive District Officer, Education, District Nankana and 2 others" (208 PLC (CS) 715) and "Rai Zaid Ahmad Kharal versus Water and Power Development Authority, through Chairman WAPDA and another" (2008 PLC (CS) 1005). In the later judgment, this Court while assuming

jurisdiction in clear terms held that "If the termination order would convey a message of any stigma, the employee could not be ousted from service without resorting to the procedure of Efficiency and Disciplinary Rules."

3. The learned counsel for the petitioner has argued that when the petitioner had specifically denied the allegations levelled against him in the Show. Cause Notice, a regular inquiry into the matter was essential, wherein, the petitioner had to be supplied copies of evidence against him, he should have right to produce his defence and during inquiry if any witness appear against him, he had a right to cross-examine such witness. Reliance has been placed on the case reported in 1997 SCMR 1543. Adds that fair trial under Article 10(a) of the Constitution of Islamic Republic of Pakistan, 1973 is inalienable right of the person against whom any allegation is levelled, but in this case neither transparent procedure nor fair trial has been provided to the petitioner, therefore, impugned removal from service order is to be struck down.

4. On the other hand, learned Additional Advocate General opposed this petition on all corners by contending that charges were proved against the petitioner, therefore, the order removing him from service is fully justified.

5. I have heard the arguments of learned counsel for the parties and perused the entire available record with the assistance.

6. Without going through the factual aspect or controversy, the fact of the matter is that specific allegations of inefficiency and misconduct had been levelled against the petitioner. It is admitted position that on same charges a Show Cause Notice was issued to the petitioner, he submitted reply thereof but the authority without having recourse to regular inquiry, dispensed with inquiry and proceeded to pass the impugned order of removal from service.

7. To be precise enough, this slipshod act of the respondent/authority dispensing with regular inquiry is the pivotal point in this case. For facility of reference, Section 7 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 (hereinafter to be called as PEEDA ACT), are attached with judgment at "FLAG-A".

8. By bare perusal of Section 7 of PEEDA Act, it is apparent that authority has been vested with a right to dispense with regular inquiry against an employee, but one must not lose sight of the fact that whenever any discretion is given to an authority, it has to be exercised not arbitrarily but honestly, justly, and fairly right in consonance with the spirit of law, after application of judicious mind and for substantial reasons. For this purpose, the nature of allegations against the accused has to be considered. In a case when it is clear to the authority that the allegations could be decided with reference to admitted record or he forms an opinion that un-rebuttable evidence on the touchstone of QANUN-E-SHAHADAT, to prove the charge against the accused/employee is available on the record, the procedure for regular inquiry (Section 5 of the PEEDA Act), may be dispensed with, otherwise, the ends justice

demand an inquiry through an Inquiry Officer or Inquiry Committee. Although, to dispense with reg1ar inquiry is discretion left for the authority to be gauged, yet, the word "decision" has been used in the said section, and the definition of word "decision" has been given in BLACK's Law Dictionary Eighth Edition (Bryan A. Garnder), as under:-

"A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case. "

Thus, as a matter of fact this discretion has been made in the nature of judicial decision, which has to be exercised with due care and caution keeping in mind the principles of natural justice, fair trial and transparency, so that no prejudice should be caused to the accused/employee. There can be a situation where real fate 9f allegations can only be adjudged by a regular inquiry and not by mere textual proof. The legislatures further emphasized that if the authority after considering the nature of charge or charges and the material before him, concludes that regular inquiry is to be dispensed with, then the authority shall record reasons in that respect. The sole object behind careful drafting of said provision is indicative of the fact that legislature intended that the discretion which was being left up to the authority, must be exercised judiciously and not arbitrarily. It is for the above reasons that the Hon'ble Supreme Court of Pakistan in the case reported in 2003 SCMR 1110 held that requirement of regular inquiry could be dispensed with in exceptional circumstances. Where recording of evidence was necessary to establish the charges, then departure from requirement of regular inquiry under the Rules would amount to condemn a person unheard.

9. In this case the defence put by the respondent authorities is that proper and lawful procedure was adopted by dispensing with regular inquiry, a Show Cause Notice was issued to the petitioner, he submitted reply to the same and thereafter, the authority being convinced that charges had worth, the removal from service order was passed, but I am afraid, serving of Show Cause Notice and reply thereto in denial of allegations on mere questions and answers do not amount to affording the accused reasonable opportunity of showing cause as required under PEEDA Act. The requirement of reasonable opportunity of showing cause against proposed action can only be satisfied if particulars of charges or charges, substance of evidence in support of the charges and specific punishment which would be called for after the charge or charges are established are communicated to the civil servant who is given reasonable time and opportunity to show cause. As detailed above, in this case specific allegations had been levelled against the petitioner which included inefficiency and misconduct. When the petitioner in response to Show Cause Notice, had specifically denied both the charges against him and furthermore, considering the nature of charges, all those allegations required evidence under each head, then it had become incumbent upon the authority to have ordered for a regular inquiry and in the above given situation departure from normal course does not reflect bonafides on the part of the authority, rather shows mechanical application of mind on his part, consequently the petitioner appears to be justified in pleading that the authority was in fact biased towards him.

10. It is by now well settled that right to a fair trial means right to a proper hearing by an unbiased competent forum. Right to a fair trial has been associated with the fundamental right of access to justice, which should be read in every statute even if not expressly provided for unless specifically excluded. While incorporating Article 10A in the Constitution and making the right, to a fair trial a fundamental right, the legislature did not define or describe the requisites of a fair trial, which showed that perhaps the intention was to give it the same meaning as is broadly universally recognized and embedded in jurisprudence in Pakistan. While holding so, guideline has been derived from the case reported in PLD 2012 SC 553.

11. For what has been discussed above, the impugned removal from service order passed against the petitioner does not stand the test of judicial scrutiny, as it runs against the spirit of law. Consequently, this petition is allowed, the impugned order dated 03.02.2008 is set-aside and petitioner is reinstated in service. The period between his removal till reinstatement shall be considered as leave without pay.

ZC/M-113/L Petition allowed.

2016 P L C (C.S.) 315
[Lahore High Court]
Before Muhammad Qasim Khan, J
HASSAN MEHMOOD
Versus
HABIB BANK LIMITED through President and 4 others

W.P. No.11472 of 2006, decided on 18th June, 2015.

Constitution of Pakistan---
----Art. 199--- Constitutional petition--- Maintainability--- Bank employee--- Respondent-Bank being a private organization, had non-statutory Rules---Effect--- Terms and conditions of service enforcement---Scope---Petitioner (employee of Bank) was dismissed from service---Contention of Bank was that constitutional petition was not maintainable against the Bank, being a private organization having no statutory rules---Validity---Constitutional petition would not lie against the bodies having no statutory Rules of service---Respondent-Bank, a banking limited company was not the creation of any statute---Services of employees of respondent-Bank were governed by its own manual---If a private authority had adopted any government law for its internal affairs even then by such adoption of laws it could not be said that the employees of said authority would be governed by a statute---Petitioner although was proceeded under Removal from Service (Special Powers) Ordinance, 2000 but it could not be said that he was proceeded under the statute---Petitioner could not file constitutional petition to seek enforcement of terms and conditions of his service against the Bank---Constitutional petition was dismissed being not maintainable.
Noor Badshah v. United Bank Limited through President and 3 others 2015 PLC (CS) 468 and Al Qera Atiq v. Federation of Pakistan through Secretary Aviation and 19 others 2015 PLC (CS) 363 distinguished.

Abdul Wahab and others v. HBL and others 2013 SCMR 1383; Noor Badshah v. United Bank Limited through President and 3 others 2015 PLC (CS) 468 and Pakistan International Airline Corporation and others v. Tanweer-ur-Rehman and others PLD 2010 SC 676 rel.
Munawar Ahmad Javed for Petitioner.
Syed Fazal Mahmood for Respondent/Bank.

ORDER
MUHAMMAD QASIM KHAN, J.--- Briefly the facts of the case are that after his appointment as Cashier in Habib Bank Limited on 11.12.1976, after various promotions the petitioner reached to the rank of Officer Grade-II w.e.f. 01.01.1999. According to the petitioner he was offered voluntary separation scheme but he refused, whereupon, he was transferred out of region. Subsequently, however, after an inquiry the petitioner was dismissed from\ service vide order dated 11th of June, 2002. Against his dismissal order, the representation of the petitioner also failed vide another impugned order dated July 22nd, 2002. The petitioner then filed a service

appeal, but with the decision reported in PLD 2006 SC 602, the appeal was abated, hence, this writ petition.

2. The learned counsel representing the respondent Habib Bank Limited has raised a preliminary objection about maintainability of this writ petition on the ground that Habib Bank Limited is a private Organization having its non-statutory rules, therefore, in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, this writ petition is not maintainable. Reliance has been placed on the case "Abdul Wahab and others v. HBL and others" (2013 SCMR 1383) and "Noor Badshah versus United Bank Limited through President and 3 others" (2015 PLC (CS) 468).

3. The learned counsel for the writ petition while rebutting the above preliminary objection argued that as it is an old matter and petitioner was proceeded under Removal from Service (Special Powers) Ordinance, 2000, therefore, per force of case "Pakistan Defence Officers Housing Authority and others v. Lt. Col. Syed Jawaid Ahmed" (2013 SCMR 1707), the instant writ petition is competent.

4. I have heard the arguments of learned counsel for the parties at full length and perused the available record with their assistance.

5. There is no dispute to the proposition that Constitutional Petition does not lie in respect of the bodies which do not have statutory rules of service. There is no denial to the fact that Habib Bank Limited is a private organization and is being run under non-statutory rules. The status of Habib Bank Limited earlier came under consideration before the Hon'ble Supreme Court of Pakistan in the case "Abdul Wahab and others v. HBL and others" (2013 SCMR 1383) and the apex Court after formulating a question "(i) What is the status of the Bank; the status and relationship of its employees (the petitioners) vis-a-vis the Bank;", answered the said question in para.7 of the judgment in the following terms:-

"It is an admitted position hat the Bank has been privatized and the majority shareholding thereof has been acquired and is vested in Agha Khan Foundation, there also is no discord that the Board of Management of HBL is predominantly represented by the said foundation. However, in order to bring the Bank within the purview and the connotations (s) of a 'person' and `authority' appearing in Articles 199, 199(5) and 199(1)(c) of the Constitution and also for the purposes of urging that appropriate order in the nature of a writ can be issued independently by this Court under Article 184(3) (Constitution), to the Bank, the leaned counsel for the petitioners has strenuously relied upon the function test'; and in this respect it is submitted that the State/Federation has a considerable, shareholding in the Bank and representation in the managing affairs thereto therefore it shall qualify having the status of a person/authority within the meaning of the law, besides, the Bank is being regulated by an under the authority of the SBP thus on this account as well it (Bank) has the status mentioned above, therefor4e this Court should exercise its jurisdiction in terms of the Article supra. In this context, it may be held that for the purposes of resorting

to the function test', two important factors are the most relevant i.e. the extent of financial interest of the State/Federation in an institution and the dominance in the controlling affairs thereof But when queried, it is not shown if the State/Federation has the majority of shareholding, or majority representation in the Board of Management of the Bank. As regards the authority and the role of the SBP (in the above context), SBP is only a regulatory body for all the banks operating in Pakistan in terms of Banking Companies Ordinance, 1962 and suffice it to say that such regularity role and control of SBP shall not clothe the Bank, with the status of a person' or the 'authority' performing the functions in connection with the affairs of the Federation. Rather it shall remain to be a private entity.

After the above detailed discussion the Hon'ble Supreme Court of Pakistan in an unambiguous manner held that "we have no hesitation to hold that the Bank is a private institution for all intents and purposes." Furthermore, this Court also in the case "Noor Badshah v. United Bank Limited through President and 3 others" (2015 PLC (CS) 468) after deep analysis held that Bank being a private entity and not performing functions in connection with Province, Federation or any statutory authority, Constitutional petition is not maintainable.

6. So far as the case law referred by learned counsel for the petitioner i.e. "Al Qera Atiq v. Federation of Pakistan through Secretary Aviation and 19 others" (2015 PLC (CS) 363), is concerned, the same is based entirely on distinguishing facts, as the said judgment has been rendered in a suit filed under Civil Procedure Code (V of 1908), whereas, to maintain a writ petition, the language of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is to be kept in mind. As regards the case "Pakistan Defence Officers Housing Authority and others v. Lt. Col. Syed Jawaid Ahmed" (2013 SCMR 1707), in the cited judgment the Hon'ble Supreme Court of Pakistan has held the writ petition to be maintainable by holding that "Keeping in view the statutes which established the statutory bodies in question and their functions, they were bodies performing functions, some of which were functions of the Federation/State and through the exercise of public power, said bodies created public employments.---Said statutory bodies were therefore "persons" within the meaning of Article 199 (1)(a)(ii) read with Art. 199(5) of the Constitution---Actions or orders passed by statutory bodies in question which were violative of the statutes creating them or of the rules/regulations framed under such statutes, could be interfered with by the High Court under Art.199 of the Constitution." There is no equivocation to the above dictum laid by the apex Court, but here in this case, the Habib Bank Limited (respondent-Bank) is a banking limited company. It is not the creation of any statute and the services of its employees are governed by their own manual. Even if a private authority adopts any government law for their internal affairs, by such mere adoption of laws, it cannot be said that the employees are governed by a statute. The petitioner being employee under the said respondent Bank was although proceeded under Removal from Service Ordinance (Special Powers) Ordinance, 2000 by the departmental authority, yet as discussed above, by simple adoption of any law it cannot be said that petitioner was proceeded under the statute and on that basis the petitioner cannot claim the relief under Article 199 of the

Constitution of Islamic Republic of Pakistan, 1973. Thus, with all respect to the above referred judgment, the dictate laid down therein, is of no use to the petitioner in this case.

7. For what has been discussed above, since the terms and conditions of service of the petitioner being an employee under HBL, a private organization, were not governed by any statutory rules, therefore, per force of judgment "Pakistan International Airline Corporation and others v. Tanweer-ur-Rehman and others (PLD 2010 SC 676), the petitioner could not file a Constitution Petition before this Court, to seek enforcement of terms and conditions of his service against Habib Bank Limited (HBL). Consequently, the instant writ petition is dismissed being not maintainable.

ZC/H-20/L Petition dismissed.

2016 P L C (C.S.) 363
[Lahore High Court]
Before Muhammad Qasim Khan, J
MUHAMMAD IMRAN
Versus
PUNJAB PUBLIC SERVICE COMMISSION LAHORE through Secretary and 3 others

W.P.No.1017 of 2015, decided on 10th March, 2015.

(a) Civil service---
----Advertisement for appointment of Sub-Inspectors in Police Department--- Fundamental Rights--- Word "family"--- Scope---Appointment letter was not issued to the petitioner by the department on the ground that he did not have good family background---Validity---No law/rules/regulations/SOPs could grab the Fundamental Rights protected by the Constitution---Authority could not be permitted to crush the rights and dignity of man on his whims without any justification---Every person was reasonable for his act and conduct and no liability could be fixed on the basis of blood or family relationship---No one could be penalized only due to the reason that someone from his relatives had been charged/indicted---Every person was responsible for his own act and he would be awarded according to his characteristics---Word "family" could not include the whole tribe---Neither the petitioner nor his father or brother were involved in any criminal case---Petitioner could not be declared having not good family reputation or his family belonged to a bad character family or a man supporting the criminals in society---If during service it was found that an employee was not fulfilling his duties or that his working was bringing bad name to the department then authority might proceed against him---No person could be debarred from service on the basis of presumptions or due to involvement of any person from his tribe in a criminal case---Act of authorities was violative of Arts.4 & 9 of the Constitution---Petitioner had been deprived from the right of life which would include the right to earn, right to work, right to serve, right to be appointed after selection on merit---Impugned order was set aside and department was directed to implement the recommendations of Public Service Commission in letter and spirit without any loss of time---Constitutional petition was accepted in circumstances.
Al-Baqra-286; An Najam 38-39; Az-Zummur-7; Yousaf-79; Chapter 2. A Man Is Not To Be Punished For The Wrongs Done By His Father or Brother and The Holy Prophet (S.A.W.), at the time of The Khutbah of Hajj-ul-Wida rel.

(b) Words and phrases---
----Family"---Connotation.
Black's Law Dictionary (English Edition); Baby Krishnan Prafula C. Pant in his book WORDS and PHRASES (Second Edition 2007; Muhammad Masoom, General Secretary Employees' Union v. Messrs Pak-American Fertilizers Ltd., Daudkhel 1965 PLC 467 and Mst. Arjumand Bano v. Ch. Ali Muhammad 1991 MLD 250 rel.

Barrister Shahid Masood Khan for Petitioner.

Imtiaz Ahmad Kaifi, Addl. A.G. with Asghar DSP and Javed SHO for Respondents.

ORDER

MUHAMMAD QASIM KHAN, J.--- Brief facts of the case are that petitioner applied for the post of SI advertised by Punjab Public Service Commission. After test and interview, he (petitioner) along with others qualified but despite recommendations by Punjab Public Service Commission, appointment letter was not issued to him by respondent No.3, Inspector General of Police, Punjab, Lahore petitioner filed Writ Petition No.26557/2014 in which vide order dated 03.10.2014, a direction was issued to decide the application/ representation of the petitioner after hearing the parties, then the impugned order dated 18.11.2014 was passed and petitioner was declined to be appointed just on the ground that he was not having good family back ground. Hence, this petition.

2. Learned counsel for the petitioner submits that the only query put in the application form was about the involvement or conviction of the applicant in any criminal case in Pakistan but no information about the family was required in this form so, later on, petitioner could not be deprived from his vested rights on flimsy ground of bad family reputation. Further adds that by using the word "Family", whole tribe could not be included, only real brothers and real sisters at the maximum could be included in the term "Family" and they are not involved in any criminal case. Further adds that one brother of the petitioner is Constable in police department and earlier the petitioner was appointed as Assistant Superintendent Jail which proves good character of the petitioner. Lastly adds that even the person who was involved in any criminal case is not closely related to the petitioner rather he has been acquitted from the charge by the learned Illaqa Magistrate.

3. On the other hand, learned Law Officer representing the respondents submits that department while recommending to PPSC for advertisement in clear terms mentioned that the candidate should have good family background. Further submits that the order passed on the direction of this Court in Writ Petition No.26557/2014 clearly shows that the family members of the petitioner were involved in criminal cases and it is the choice of Master/Authority to appoint any person as per criteria laid down by the Master/Authority. Learned Law Officer also submits that the authority is competent to frame rules, change rules at any stage and no restriction could be imposed on him.

4. I have heard learned counsel for the petitioner as well as learned Law Officer and perused the record.

5. Although, stance of respondents is that in recruitment rules, for eligibility "having good family background", is prerequisite for appointment but from perusal of these rules and Police Order, 2002, it appears that the word "Family" has not been defined. Now for the definition of word "Family", I have to consult dictionary. In Black's Law Dictionary (Eighth Edition), the word "Family" has been defined as:-

(i) A group of persons connected by blood, by affinity, or by law, esp. within two or three generations;
(ii) A group consisting of parents and their children; and
(iii) A group of persons who live together and have a shared commitment to a domestic relationship.
Baby Krishnan Prafula C. Pant in his book WORDS AND PHRASES (Second Edition 2007) after referring the word "family" with context of different statute and dictionaries defines as under:-
"Family" connotes a group of people related by blood or marriage. According to Shorter Oxford English Dictionary, 3rd Ed... the word "family" means the group consisting of parents and their children, whether living together or not; in wider sense, all those who are nearly connected by blood or affinity; a person's children regarded collectively; those descended or claiming decent from a common ancestor; a house, kindred, lineage; a race; a people or group of peoples. According to Aristotle (Politics I), it is the characteristic of man that he alone has any sense of good and evil, or just and unjust, and the association of living beings who have this sense make a family and a State. It would follow from the above that the word "family" always signifies a group. Plurality of persons is an essential attribute of a family. The general or ordinary accepted meaning of the word "family" as used in Compensation Act, mans a group, comprising immediate Kindred, consisting of the parents and their children, whether actually living together or not (p.343). Similarly, in Webster's Third New International Dictionary, the word "family" is defined thus: Household including not only the servants but also the head of the household and all persons in it related to him by blood or marriage a group of persons of common ancestry. In Chambers Twentieth Century Dictionary (New Edition 1972), the word "family" has been defined thus: The household, or all those who live in one house (as parents, children, servants): parents and their children. In Concise Oxford Dictionary (Sixth Edition), the same definition appears to have been given of the word "family" which may be extracted thus: Members of a household, parents, children, servants, etc., set of parents and children, or of relations, living together or not; person's children. All descendants of common ancestor, . A conspectus of the connotation of the term "family" which emerges from a reference to the aforesaid dictionaries clearly shows that the word "family" has to be given not a restricted but a wider meaning so as to include not only the head of the family but all members or descendants from the common ancestors who are actually living with the same head". (Emphasis has been supplied).

6. Under Punjab Civil Services, Pension Rules, 1963 for payment of amount of gratuity and family pension in the case of male government servants, the family only includes wife or wives, children of the government servant, widow or widows and children of deceased son of the government servant, son or sons include who have not attained the age of 24 years and a widow daughter, divorced daughter and un-married sister of government servant.

7. Industrial Court West Pakistan in the light of relevant Labour Laws defined the family: "Family" includes immediate relatives solely dependent upon employees, e.g.,

parents, minor brothers and unmarried sisters. 1965 PLC 467 titled "Muhammad Masoom, General Secretary Employees' Union v. Messrs Pak-American Fertilizers Ltd., Daudkhel".
In a Division Bench judgment reported in 1991 MLD 250 (Lahore) titled "Mst. Arjumand Bano v. Ch. Ali Muhammad" the family was defined as:-
"There are many general words in common usage in the law which have no precise or constant meaning but few have been used with so many shades of meaning in different contexts or have so freely acquired new meanings with the development of the law as the word "family". It is a popular and not a technical expression and indeed much turns upon the context in which it has been used. This is so because the family is a social unit and its meaning has changed from age to age and society to society.
In its broad general sense, the word "family" means a group of person consisting of parents and children; a collective body of persons who live in one house and under one head or management. (Per Mukerji J in Nil Kamal v. Kamakshva Charan AIR 1928 Cal. 539=109 IC 67 and Black's Law Dictionary, Fifth edition)".

8. As most of the above definitions which have been reproduced relate to the dictionaries, terms and phrases edited and complied by the persons and laws relate to the non-Muslim societies and some of the laws in India before partition adopted by the Government of Pakistan, the definition of "family" is influenced by Hindu law; hence, it is necessary that word "family" must be examined in the context of Islamic law and, if need, re-interpreted accordingly. In this regard their Lordships in 1991 MLD 250 observed that:-

"The parties here being Muslims, the expression must be understood in the context of an Islamic society, and if need, be re-interpreted accordingly, for, to quote from the preamble of the Constitution of the Islamic Republic of Pakistan, "it is the will of people of Pakistan to establish an order ..... wherein the Muslims shall be enable to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah". We do not, therefore, think that the concept of "undivided family", as understood in Hindu law, has any relevance in an Islamic society".
Their Lordships also observed that:-

"The Islamic law "does not allow the conception of a family life to overshadow its fundamental principle, namely, individual responsibility and liberty. Each member of the family is endowed with full legal capacity and the law does not sanction any joint family system of holding property as is prevalent among the Hindus. Whatever authority the law vests in the head of the family is based either on contract or on necessity for the protection of those members of the family who are unable to take care of themselves". (The Principles of Muhammadan Jurisprudence by Sir Abdur Rahim at page 326). This is because "as soon as an owner dies, succession to his property opens. There is no State intervention or clergy's intervention needed for the passing of the title immediately to the heirs". (Emphasis has been supplied).

9. Hence, it appears that the family defined for payment of gratuity and family pension under Punjab Civil Services, Pension Rules, 1963 is according to the principles of Islam because it includes those members who are dependent on the family head and by careful examination of above definitions, the word "family" in an Islamic Country includes parents, children if dependent on the parents, children's children, if dependent on grand-parents and maximum could extend as per values of our society unmarried sisters, widows/divorced sisters, wife of deceased son, wife of son of the deceased son but the word "family" could not include the whole tribe.

10. Now coming to the facts of the case in hand. The petitioner has appended his pedigretable attested by Nazim of union council concerned and Lumberdar of Mauza, this pedigree-table includes the paternal cousins of the petitioner. None of the persons mentioned in pedigree-table are involved in any criminal case and the person referred by the respondents being involved in a criminal case is not closely related to the petitioner as is evident from the pedigree-table appended by the petitioner.

11. We are living in a civilized society under the Umbrella of Constitution and Law, where legislation can be made or SOP could be issued only in the light of contract between the people of Pakistan and the State i.e. the Constitution of Islamic Republic of Pakistan, 1973 and no Law/Rules/Regulations/SOPs could grab the fundamental rights protected by the Constitution; hence, the authority cannot be permitted to crush the rights and dignity of man on his whims without any justification. Every person is responsible for his act and conduct and no liability can be fixed on the basis of blood or family relationship and no one could be penalized only due to the reason that some of his relatives have been charged/indicted. Hence, the stance of respondents to enhance the family and extend it to a tribe is not permitted by law as the meaning of family adopted by the respondents could not find out any support from the law.

12. It is also the principle of natural justice and the principle of Islam that every person is responsible for his own act and he will be awarded according to his characteristics and on the "Day of Judgment" his recital/performance will be on his right hand. Whether a person is liable to be penalized for the act of other, the Allah Almighty once for all has decided this issue in "Holy Quran". Some references of the Holy Quran (translated in English by Justice Mufti Taqi Usmani) are given below:---
Allah does not obligate anyone beyond his capacity. For him is what he has earned, and on him what he has incurred. (Al-Baqra-286).
(It was) that no bearer of burden shall bear the burden of the other,
and a man shall not deserve but (the reward of) his own effort,
(An Najam-38-39).
No one will bear the burden of someone else.
(Az-Zummur-7)
He said: "We seek Allah's refuge from keeping anyone other than him with whom we have found our thing, otherwise we shall be unjust."
(Yousaf-79).
Further elaboration of the Orders of Almighty Allah is originated from the following Hadiths:-

Chapter 2. A Man Is Not To Be Punished For The Wrongs Done By His Father or Brother.

4495. It was narrated that Abu Rimthah said: "I went to the Prophet (S.A. W.) with my father, then the Prophet (S.A. W.) said to my father: "Is this your son?" He said: "Yes, by the Lord of the Ka'bah." He said: "Is it true?" He said: "I bear witness to it." The messenger of Allah (S.A.W.) smiled at my resemblance to my father and my father's oath concerning me, then he said: "You are not accountable for his wrongdoing, and he is not accountable for yours." And the Messenger of Allah (S.A.W.) recited the Verse: "No bearer of burdens shall bear the burden of another".

Ref: (Sunan Abu Dawud (V-5).

Moreover, The Holy Prophet (S.A.W.), at the time of The Khutbah of Hajj-ul-Wida said:

"Now an accused will be responsible for his act. Now, neither the son will be nabbed for the sins of his father nor the father can be held answerable for the misdeed of his son".

13. For what has been discussed above, as in the Statute/Rules/ Policy/SOPs no definition of family has been provided; hence, the word "family" could not include the whole tribe and at the maximum it could include the family under the context of Islamic law as observed above.

14. Admittedly, neither the petitioner nor his father or brothers are involved in any criminal case; hence, by no imagination, petitioner could be declared having not good family reputation or his family belongs to a bad character family or a man supporting the criminals in society. Anyhow, if during service, it is found that an employee is not fulfilling his duties or that his working is bringing bad name to the department, the authority may proceed against him, but no person could be debarred from services on the basis of presumptions or due to involvement of any person from his tribe in a criminal case. The act of respondents is violative of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973. Petitioner has been deprived from the right of life, which includes the right to earn, right to work, right to serve, right to be appointed after selection on merit, and for the same reason, act of respondents is also violative of Article 9 of the Constitution of Islamic Republic of Pakistan, 1973. Hence, this petition is allowed. The impugned order dated 18.11.2014, is hereby set aside and respondents are directed to implement the recommendations of Punjab Public Service Commission in letter and spirit without any loss of time.

15. Let copy of this judgment be sent to respondents Nos.2 and 3 who are advised to revisit the definition of "family" in the light of above observations.

ZC/M-154/L Petition allowed.

2016 P L C (C.S.) 427
[Lahore High Court]
Before Muhammad Qasim Khan, J
MUHAMMAD MUQADDAS KHAN
Versus
INSPECTOR GENERAL OF POLICE, PUNJAB, LAHORE and 3 others

W.P. No.17666 of 2014, decided on 20th March, 2015

Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974---
----R. 17-A---Shaheed Policy [Office Letter No.1668-78/SE-II/VIII dated 10-04-2003]---Constitution of Pakistan, Art.199---Constitutional petition---Shaheed Policy---Scope---Petitioner being brother of shaheed constable submitted his application for appointment which was turned down on the ground that in presence of child of Shaheed employee his brother could not be appointed---Validity---Shaheed constable was brother of petitioner who left behind one child and a widow---Shaheed employee was survived by one son and petitioner could not be said to be covered by the Shaheed Policy---Affidavit did not have the overriding effect against the Shaheed Policy---Constitutional petition was dismissed in circumstances, however Inspector General of Police was directed for considering the Shaheed Policy to bring it in consonance with R.17-A of Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974 as widow had been ignored in the said Policy.

Ch. Tahir Mehmood for Petitioner.
Imtiaz Ahmad Kaifi, Addl. A.-G. with A.D. Dhakoor Inspector (Legal) for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.--- Precisely the facts of the case are that Muhammad Khalid Khan who was serving in Punjab Police as Constable embraced Shahadat on 22nd of November, 2005 while performing his duties and left behind a widow and one son aged about nine years. Per force of Shaheed Policy the present petitioner who is brother of Muhammad Khalid Khan (Shaheed employee) submitted his application for appointment. In this respect the concerned authorities summoned the widow of the deceased employee and obtained her statement in writing to the effect that she had no objection if the present petitioner was appointed pursuant to Shaheed Policy. After going through different tests the Capital City Police Officer, Lahore vide Memorandum No.16820/E&T-VI dated 18.04.2014 referred the petitioner for his medical test, but afterward vide letter No.8684/Ad-II dated 05.06.2014, it was concluded that Shaheed Claim Policy does not allow recruitment of a brother of Shaheed official in the presence of his child. Hence, this writ petition.

2. It is contended by learned counsel for the petitioner that since the petitioner is otherwise fully qualified for appointment; he has successfully gone through the requisite formalities, necessary documents including an affidavit of the widow has been submitted before the authorities, therefore, a legitimate right of expectancy has

accrued in his favour. Lastly, argued that some other similarly placed persons have already accommodation, therefore, petitioner cannot be discriminated.

3. The learned Law Officer on the other hand has opposed this petition on the ground that according to the settled Shaheed Policy, in the presence of child of the Shaheed Employee, brother of said employee cannot be appointed, therefore, the petitioner cannot claim appointment as a matter of right.

4. I have heard the arguments of learned counsel for the parties and perused the available record.

5. For ready reference, relevant extract from Shaheed Policy (Officer Letter No.1668-78/SE II/VIII dated 10.04.2003) is reproduced hereunder:-
"According to Shaheed Policy, one of the unemployed children of a Police Officer (if he is married or one of his brothers if he is unmarried) who lays down his life in a Police encounter may be provided a job according to his eligibility by the appointing authority if the child or brother of the Shaheed Police Officer is otherwise fit for the post."
Keeping the above reproduced policy in mind, there is no dispute that Khalid Khan deceased brother of the petitioner had embraced Shahadat, as is admitted by the respondent/department itself. Furthermore, it has been admitted by the petitioner himself that Khalid Khan deceased left behind one child and a widow. In view of these admitted facts, no ambiguity is left to hold that in terms of the Shaheed Policy, when Khalid Khan deceased (Shaheed Employee) is survived by one son, the petitioner being brother of said Shaheed Employee cannot be said to be covered by the said policy.

6. Apart from the above, although it is matter of record that widow of Khalid Khan (Shaheed Employee) has sworn an affidavit to the effect that she has no objection on adjustment of the petitioner, but I am afraid said affidavit does not have the overriding effect against the settled Shaheed Policy and merely on the basis of consenting statement by the widow the pith and substance of the policy will not change.

7. Some references have been quoted by learned counsel for the petitioner to argue that certain other similarly placed persons, who were brothers of the Shaheed Employees, were accommodated. It may be true, but I am afraid one wrong cannot be taken as precedent to repeat it and thus the petitioner cannot be allowed to lay his foundation, on totally a wrong premises and on the same ground no legitimate right of expectancy can be said to have accrued in favour of the petitioner to claim appointment as a matter of right.

8. For what has been discussed above, the instant writ petition is found to be devoid of any merit and is dismissed accordingly.

9. Before parting with this judgment, it has been observed that after amendment, Rule 17-A of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, now reads as under:-

"Notwithstanding anything contained in any rule to the contrary whenever a civil servant dies while in service or is declared invalidated/in-capacitated for further service, one of his unemployed children [or his widow/wife] may be employed by the Appointing Authority against a post to be filled under rules 16 and 17 for which he/she possesses. The prescribed qualifications and experience and such [or the widow/wife] may be given 10 additional marks in the aggregate by the Public Service Commission or by the appropriate Selection Board or Committee, provided he/she otherwise qualifies in the test examination and/or interview for posts in BS-6 and above:" [emphasis has been supplied]

Provided further that one child [or widow/wife] of a Government servant who dies while in service or is declared invalidated/ incapacitated for further service shall be provided a job against posts in BS-1 to 5 in the department in which the deceased Government servant was working, without observance of formalities prescribed under the rules/procedure provided such child is [or the widow/wife] otherwise eligible for the post.]

From the above reproduced rule, especially the phrases which have been emphasized, it becomes clear that the legislature by reevaluating the present scenario wherein even the women are in service field working shoulder to shoulder with men, therefore, the ultimate eventualities like death, invalidation/in-capacitation or Shahadat can be meted out to women as well, inserted those words to bring Rule 17-A, ibid, in line with current service structure. But, it appears that Shahadat Policy, as it exists today, is not in consonance with Rule 17-A, ibid and it only deal with son/brother of Shaheed Employee, but the widow has been ignored. In this view of the matter, office is directed to send a copy of this order to the Inspector General of Police, Punjab, Lahore for reconsidering the Shaheed Policy to bring it in consonance with Rule 17-A of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974.

ZC/M-118/L Petition dismissed.

2016 P L C (C.S.) 459
[Lahore High Court]
Before Muhammad Qasim Khan, J
Syed HASSAN ASKARI
Versus
PROVINCE OF PUNJAB through Chief Secretary and 2 others

W.Ps.Nos.4619, 12820 of 2015 and C.M. Nos.2, 1699, 4, 3023, 5 of 2015, decided on 16th June, 2015.

Civil service---
----Seniority of employee, fixation of---Matter of terms and conditions of service---Bar of jurisdiction contained in Art.212 of the Constitution---Scope---Discrimination---Violation of Fundamental Right---Effect---Seniority of civil servant would entail terms and conditions of service and same could be settled by the Service Tribunal alone---High Court could not decide matter of discrimination with regard to seniority of employees as same was covered by the terms and conditions of service---If an employee had been discriminated or any of his Fundamental Right had been violated, he could file appeal/representation before the departmental hierarchy and then appeal before the Service Tribunal---If there was a question of violation of any of the Fundamental Right even then bar of Art.212 of the Constitution would attract---Forum for determination of such issue would be the Service Tribunal and not the High Court---Constitutional petition was dismissed being not maintainable.

Asadullah Rashid v. Haji Muhammad Muneer and others 1998 SCMR 2129; Divisional Superintendent Pakistan Railways Quetta and others v. Shaukat Ali and another 2015 SCMR 836; Dr. Riffat Kamal and others v. Federation of Pakistan and others 2015 SCMR 847; Peer Muhammad v. Government of Balochistan through Chief Secretary and others 2007 SCMR 54; Bashir Akhtar Shahi v. Government of Punjab and others 1978 PLC (CS) 216; Ali Iftikhar Jafri and 12 others v. I.-G. Police, Punjab and 336 others 2005 PLC (CS) 811 and Syntron Limited v. Huma Ijaz and others 2014 SCMR 531 ref.
Iftikharullah Khan, Sub-Divisional Officer and others v. The Secretary, Irrigation and Power Department, Government of Punjab, Lahore and 3 others 2002 PLC (CS)+ 720; Mukhar Ahmad Junejo and 2 others v. Province of Sind and others PLD 1986 SC 560; L.H. Shaikh v. General Manager, Karachi Telecommunication Region and others 1974 SCMR 82; Ali Azhar Khan Baloch and others v. Province of Sindh and others 2015 SCMR 456; I.A. Sharwani and others v. Government of Pakistan through Secretary, Finance Division, Islamabad and others 1991 SCMR 1041 and Jamal Khan Jaffar and another v. Rahim Shah and 3 others 1994 SCMR 759 rel.
Waqar Hassan Mir for Petitioner in (Writ Petition No.4619/2015).
Tallat Farooq Sheikh for Petitioner (in Writ Petition No.12820/2015).
Imtiaz Ahmad Kaifi, Additional Advocate General with Kamran Adil SSP/Additional I.G (Legal), Qaisar Ali Sheikh SP/Additional I.G (Legal), Imtiaz Ali Sheikh DSP, Javed Asif Inspector (Legal), Miss Rabia Salim Inspector Legal and Athar Yaqoob Assistant from Inspector General of Police Office.

Tahir Mahmood Khokhar, Standing Counsel on Court's call.
Sheezada Mazhar for the Applicant in (C.M.No.02/2015 in W.P.No.4619/2015.
Khawaja Umar Masood, Advocate for Applicant (in C.M.No.1699/2015).
Manzoor Hussain Dogar for Applicant (in C.M.No.04/2015).
Shabbir Hussain for Applicant (in C.M.No.2023/2015).
Masood Ahmad Chishti for Applicant (in C.M.No.05/2015).

ORDER

MUHAMMAD QASIM KHAN, J.--- Through this single order, I propose to decide two writ petitions i.e. Writ Petition No.4619/2015 "Syed Hassan Askari v. Province of Punjab, etc." and Writ Petition No.12820/2015 "Muhammad Ishaq v. Home Secretary, etc." along with five civil miscellaneous applications i.e. C.M. No.2/2015, C.M.No.1699/205, C.M.No.04/2015, C.M.No.3023/2015 and C.M.No.05/2015, all filed in former Writ Petition No.4619 of 2015, as these matters have arisen out of almost similar facts and agitate identical issue.

2. Briefly the facts of the cases are that the petitioners in both these writ petitions are working as Inspectors in Punjab Police and the grievance put before the Court through the instant writ petition precisely is that one Usman Anwar who was junior as compared to the present petitioners, was given seniority, whereas, petitioners' seniority was not properly assessed, they were placed against their actual seniority and thus, they were deprived of right of promotion. With above facts, the prayer made in Writ Petition No.4619/2015, is to the following effect:-

"It is, therefore, most respectfully prayed that this petition may kindly be allowed appropriate writ/direction to be issued to the respondents to consider the case of the petitioner to the rank of DSP when his junior namely Muhammad Usman was considered, while recognizing and acknowledging to be an Inspector having been duly promoted as such on 16.11.1995, in the interest of justice."
The prayer clause of Writ Petition No.12820/2015 reads as under:-
"Under the above circumstances it is most respectfully prayed that the record of the case be called for, notice be issued to the respondents be directed to consider the petitioner as confirmed Inspector with effect from 16.11.1995 from the date when his juniors were considered.
It is further prayed that the name of the petitioner be placed above Serial No.27 and under Serial No.25-A i.e. Inspector Usman Anwar and respondent be dealt for non-complying the order dated 23.02.2015."

3. In Writ Petition No.4619/2015, five civil miscellaneous i.e. C.M. No.2/2015, C.M. No.1699/2015, C.M. No.04/2015, C.M.No.3023/2015 and C.M.No.05/2015 have been filed under Order I, Rule 10, C.P.C., wherein, the applicants who are also police Inspectors seek their impleading as party in the said writ petition.

4. On 12.06.2015, the learned Law Officer had contended that firstly the legal question about maintainability of this writ petition shall be decided and accordingly the case was fixed for today with clarification that matter will be argued on the point

of maintainability as well as application of Order I, Rule 10, C.P.C. Consequently, these matters have been heard on the above lines.

5. Mr. Waqar Hassan Mir, Advocate for the petitioner in Writ Petition No.4619 of 2015 on the point of maintainability of writ petition argued that Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is vast enough and it does not curtail the jurisdiction of this Court where discrimination is manifest. The learned counsel further argued that although Article 212 of the Constitution does carry a bar, but the said Article cannot be read in derogation to Article 199 of the Constitution. On this aspect, learned counsel submits that since the co-colleague namely Usman Anwar was granted a relief, in terms of his seniority, by this Court in Writ Petition No.9780 of 2014 vide order dated 24.04.2014 and the said order was kept intact even by the Hon'ble Supreme Court of Pakistan in C.P.No.20-L of 2014, therefore, it is a case of discrimination and this Court has the jurisdiction to entertain and decide the matter. On the question of application under Order I, Rule 10, C.P.C., the learned counsel argued that no relief was sought against the applicants and the petitioner was only claiming restoration of his seniority.

6. Mr. Tallat Farooq Sheikh, Advocate representing the petitioner in Writ Petition No.12820/2015 while adopting the above arguments, added that since the seniority list issued by the respondent department is only provisional in nature and as no final seniority list has been issued, therefore, the petitioner cannot have recourse to the Punjab Service Tribunal and this writ petition is maintainable.

7. Mr. Imtiaz Ahmad Kaifi, Additional Advocate General and Mr. Tahir Mehmood Khokhar, Standing Counsel appearing on court's call, have vigorously challenged the maintainability of both the writ petitions by arguing that determining of seniority is prerogative of the Service Tribunal and the bar under Article 212 of the Constitution of Islamic Republic of Pakistan, 1973 cannot be relaxed by pleading discrimination per force of Article 25 of the Constitution. The learned Additional Advocate General argued that even this is not a case of discrimination as Usman Umar had approached this Court through Writ Petition No.9780 of 2014 only for the implementation of order of the Punjab Service Tribunal dated 15.04.2008 and this Court vide order dated 24.04.2014 had only directed the respondent authorities to fix his seniority as already declared by the Punjab Service Tribunal in its judgment dated 15.04.2008 and the order of this Court was upheld by the apex Court vide order dated 02.12.2014 passed in C.P.No.820-L of 2014, therefore, the seniority determined by the respondent was pursuant to the initial order of the Punjab Service Tribunal, whereas, the present petitioners do not have any order of the Tribunal and through these writ petitions they have straightaway claimed seniority, which question can be settled by the Service Tribunal alone, therefore, these writ petitions are not maintainable. The learned Additional Advocate General referred "Asadullah Rashid v. Haji Muhammad Muneer and others" (1998 SCMR 2129), "Divisional Superintendent Pakistan Railways Quetta and others v. Shaukat Ali and another" (2015 SCMR 836), "Dr. Riffat Kamal and others v. Federation of Pakistan and others" (2015 SCMR 847) and "Peer

Muhammad v. Government of Balochistan through Chief Secretary and others" (2007 SCMR 54).

8. The learned Standing Counsel while adding to the arguments of learned Additional Advocate General contended that any challenge to the seniority list, can be subject matter of appeal before the Service Tribunal, as preparation of seniority list of civil servants is a matter which relates to the terms and condition of civil servant and this Court would lack jurisdiction, per force of bar contained in Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973. In support of his arguments, the learned Standing Counsel placed reliance on the case "Bashir Akhtar Shahi v. Government of Punjab and others" (1978 PLC (CS) 216), "Ali Iftikhar Jafri and 12 others v. I.-G. Police, Punjab and 336 others" (2005 PLC (CS) 811), "Iftikharullah Khan, Sub-Divisional Officer and others v. The Secretary, Irrigation and Power Department, Government of Punjab, Lahore and 3 others" (2002 PLC (CS). 720), "Mukhar Ahmad Junejo and 2 others v. Province of Sindh and others" (PLD 1986 SC 560) and "L.H. Shaikh v. General Manager, Karachi Telecommunication Region and others" (1974 SCMR 82).

9. The learned counsel representing the applicants in civil miscellaneous applications for impleading them as party, mainly argued that since in the main writ petitions, the petitioners have claimed that their names be placed on specific serial and in case the writ petitions are allowed, the applicants whose names also figure in the same seniority list, are bound to suffer and furthermore, as the seniority list carrying the names of the applicants is already available on the file, therefore, they are necessary and proper party to be impleaded in these petitions. Khawaja Umar Masood, Advocate C.M.No.1699/2015) also attacked the maintainability of writ petitions by referring to prayer clauses of the petitions and in this respect placed reliance on the case "Syntron Limited v. Huma Ijaz and others" (2014 SCMR 531) and "Ali Azhar Khan Baloch and others v. Province of Sindh and others" (2015 SCMR 456).

10. I have heard the arguments of learned counsel for the parties at full length and perused the entire record.

11. As shall be seen from the above-reproduced prayer clauses of both the writ petitions and as argued on behalf of the petitioners before this Court, the precise question involved in these writ petitions is determination and placement of names of the petitioners on the seniority list. Learned counsel for the petitioners in order to plead maintainability of the writ petitions, referred the earlier decision of this Court dated 24.04.2014 passed in Writ Petition No.9780 of 2014 and contended that since in the said writ petition a direction with regard to seniority of Muhammad Usman Anwar (petitioner therein), had been passed by this Court and the said order was upheld by the Hon'ble Supreme Court of Pakistan in C.P.No.820-L of 2014, therefore, no discrimination can be metted out to the present petitioners and these writ petitioner are maintainable. A perusal of the record shows that as a matter of fact said Muhammad Usman Anwar had approached the Punjab Service Tribunal through a Service Appeal and judgment dated 15.04.2008 was passed by the Service Tribunal,

as the said judgment was not being implemented, it was in these circumstances that Muhammad Usman Anwar filed Writ Petition No.9780 of 2014 to seek meticulous implementation of judgment of the Service Tribunal; pursuant to order dated 24.04.2014 the judgment of the Service Tribunal was implemented and Civil Petition No.820-L/2014 filed by the Province of Punjab was dismissed by the Hon'ble Supreme Court vide order dated 02.12.2014. Therefore, as a matter of fact Usman Anwar was granted seniority in implementation of judgment of Punjab Service Tribunal and this Court while dealing with Writ Petition No.9780 of 2014 had not determined his seniority, rather a straightforward direction was issued to the respondents to place the seniority of said petitioner as declared by the Punjab Service Tribunal in its judgment dated 15.04.2008. Hence, in that case there was no embargo of jurisdiction and the Court had only implemented the order of the Punjab Service Tribunal. The stance of learned counsel for the petitioners that they have been discriminated by placing Usman Anwar as senior to them, could not be decided by this Court as the seniority is covered by the terms and conditions of service. Even if an employee while fixing seniority is discriminated or any of his fundamental right has been violated, he would have two remedies, firstly, if provided, he could file appeal/representation before the departmental hierarchy and then appeal before the Service Tribunal. Even otherwise, the Hon'ble Supreme Court of Pakistan in the case "I.A. Sharwani and others v. Government of Pakistan through Secretary, Finance Division, Islamabad and others" (1991 SCMR 1041) with reference to Article 212 of the Constitution of Islamic Republic of Pakistan, in clear terms held that:-

"However, we may clarify that a civil servant cannot bye-pass the jurisdiction of the Service Tribunal by adding a ground of violation of the Fundamental Rights. The Service Tribunal will have jurisdiction in a case which is founded on the terms and conditions of the service even if it involves the question of violation of the Fundamental Rights."

The ground of "discrimination" based on Article 25 of the Constitution, definitely is one of the fundamental right constitutionally guaranteed and the apex Court in the above judgment has in unambiguous words held that even if there may be a question of violation of any of the fundamental right, the bar of Article 212 of the Constitution would attract. Therefore, even if the argument of learned counsel for the petitioners about discrimination is considered, even then the forum for determination of the issue in-hand, would be the Punjab Service Tribunal and not this Court.

12. Apart from the above there is settled law on the point that seniority of a civil servant, necessarily entails terms and conditions of service of civil employees and the question about seniority of civil servants can be settled by the Service Tribunal alone. In this respect some references are quoted as under:-

"Jamal Khan Jaffar and another v. Rahim Shah and 3 others" (1994 SCMR 759).

In this judgment, the Hon'ble Supreme Court has held that seniority in service is also one of the terms and conditions of the service of a civil servant and dispute regarding seniority raised by a civil servant is amenable to the jurisdiction of the Service Tribunal established under the Constitution. If the competent authority on a wrong basis and contrary to the provision of the law fixed the seniority of a civil servant such order is not immune from attack by the aggrieved civil servant.

"Mukhar Ahmad Junejo and 2 others v. Province of Sind and others" (PLD 1986 SC 560), wherein, the apex Court held that questions of seniority of civil servant can be agitated before Service Tribunal and Tribunal has the jurisdiction to decide these questions in course of an appeal before it.
"L.H. Shaikh v. General Manager, Karachi Telecommunication Region and others" (1974 SCMR 82), wherein the apex Court conclusively held that "Seniority was not one of the conditions of service which had been guaranteed by that Constitution nor could a writ petition lie to enforce the correction of a seniority list "
"Iftikhar Ullah Khan, Sub-Divisional Officer and others v. The Secretary, Irrigation and Power Department, Government of Punjab, Lahore and 3 others" (2002 PLC (CS) 720), wherein it has been held that "Even otherwise, this Court has consistently held that the preparation of a seniority list is a matter which relates to the terms and conditions of civil servant."

13. After the above synopsis of case law, there hardly remains any doubt in holding that the matter of seniority of civil servants involves the terms and conditions of civil servants and this question can be settled by the Service Tribunal and bar contained in Article 212 of the Constitution would attract by all force. In this regard, a latest pronouncement of the Hon'ble Supreme Court of Pakistan is reflected in the case "Ali Azhar Khan Baloch and others v. Province of Sindh and others" (2015 SCMR 456). In para-139 at page 516 of the judgment, the Hon'ble Supreme Court of Pakistan formulated a question "WHETHER CIVIL SERVANT CAN APPROACH THE HIGH COURT OF SINDH IN A SUIT OR IN CONSTITUTION PETITION IN RELATION TO TERMS AND CONDITIONS OF HIS SERVICE" and answer to the said query has been given in paras-149, 150 and 151 of the said judgment, as under:-
149. Article 212 of the Constitution ousts the jurisdiction of High Courts and civil Courts in respect of the matters pertaining to terms and conditions of civil servants. In other words, the provisions of Article 212 do not confer a concurrent jurisdiction to civil Courts, High Courts and Tribunals. The ouster contemplated under the said Article is a Constitutional command, and, therefore, of necessity restricts the jurisdiction of civil courts and High Courts on the subject, which squarely falls within the exclusive domain of Tribunals.
150. The High Court of Sindh has completely overlooked the intent and spirit of the Constitutional provisions relating to the terms and conditions of service, while entertaining Civil Suits and constitution petitions filed by the civil servants, which are explicitly barred by Article 212. The expression Terms and Conditions' includes transfer, posting, absorption, seniority and eligibility to promotion but excludes fitness or otherwise of a person, to be appointed to or hold a particular post or to be promoted to a higher post or grade as provided under section 4(b) of the Sindh Service Tribunals Act, 1973. Surprisingly, it has been ignored that it is, by now, a settled principle of law that the civil and writ jurisdictions would not lie in respect of the suits or petitions filed with regard to the terms and conditions of Civil Servants, and yet some of the learned Judges of High Court of Sindh have erroneously exercised both civil and writ jurisdictions with regard to the terms and conditions of civil servants. "[Emphasis supplied]

151. We, for the aforesaid reasons, conclude that the exercise of jurisdiction by way of suit and Constitution petition filed by a civil Servant with regard to his terms and conditions of service is violative of Articles 175, 212 and 240 and the law."

13. For what has been discussed above, in the light of repeated pronouncements of the apex Court regarding want of jurisdiction by the High Court in the matters involving terms and conditions of service, and more particularly the above referred recent judgment on this point, this court has no doubt to hold that the questions of seniority of a civil servant involves the terms and conditions of civil servant and thus in view of the bar contained in Article 212 of the Constitution of Islamic Republic of Pakistan, 1973, this court lacks jurisdiction to entertain these writ petitions, as determination or settling the questions about seniority of civil servant is solely the prerogative of the Service Tribunal. Consequently, both these writ petitions are dismissed on the point of maintainability.

14. Since the main writ petitions have been held to be not maintainable, therefore, the civil miscellaneous applications seeking impleading of the applicants in the proceedings of the writ petitions, have lost their efficacy, consequently are disposed of accordingly.

ZC/H-16/L Petition dismissed.

2016 P L C (C.S.) 497
[Lahore High Court]
Before Muhammad Qasim Khan, J
SAFDAR ALI NASIR
Versus
CHAIRMAN TECHNICAL EDUCATION AND VOCATIONAL TRAINING AUTHORITY (TEVTA) and 5 others

W.P.No.2231 of 2011, decided on 19th February, 2015.

(a) Punjab Employees Efficiency, Discipline and Accountability Act (XII of 2006)---

----Ss. 2(f)(i)(ii) & 16---Constitution of Pakistan, Art.199---Constitutional petition---Disciplinary proceedings, initiation of---Competent authority---Petitioner was employee with Punjab Small Industries Corporation and he was transferred to Technical Education and Vocational Training Authority where he was imposed major penalties of recovery and dismissal from service---Contention of petitioner was that he was employee of Punjab Small Industries Corporation and Chairman Technical Education and Vocational Training Authority was not the authority against him and only Punjab Small Industries Corporation being the parent department could initiate disciplinary proceedings---Validity---Petitioner was employee of Punjab Small Industries Corporation and his services were transferred to Technical Education and Vocational Training Authority and absorbed therein later-on---Petitioner was to be considered as an absorbed employee of Technical Education and Vocational Training Authority---Chairman Technical Education and Vocational Training Authority had been authorized to initiate proceedings against such employees of the Punjab Small Industries Corporation working therein---Chairman Technical Education and Vocational Training Authority was the competent authority against the petitioner (employee)---Chief Minister might authorize any officer or authority to exercise powers of competent authority---Said officer should not be inferior in rank to the appointing authority---Chairman Technical Education and Vocational Training Authority was not inferior in rank to the appointing authority of the petitioner---Chairman Technical Education and Vocational Training Authority was the authority for all the employees of Punjab Small Industries Corporation working therein after approval of Chief Minister---Employees who had been awarded any penalty under Punjab Employees Efficiency, Discipline and Accountability Act, 2006 might file an appeal before the appellate authority---If order was passed by the Chief Minister then employees might file review against the said order---Remedy of departmental appeal was available to the petitioner but he had skipped the same---No litigant could be allowed to avoid statutory remedies available to him and to adopt a forum of his own choice---Employee (petitioner) had not availed the remedy of appeal under S.16 of Punjab Employees Efficiency, Discipline and Accountability Act, 2006 which he might avail if so advised---Constitutional petition was dismissed in circumstances.

Punjab Small Industries Corporation v. Ahmad Akhtar Cheema 2002 SCMR 549; Ch. Muhammad Ismail v. Fazal Zada, Civil Judge, Lahore and 20 others PLD 1996 SC

246 and Mst. Kaniz Fatima through Legal Heirs v. Muhammad Salim and 27 others 2001 SCMR 1493 rel.

(b) Administration of justice---
----No litigant could be allowed to avoid statutory remedies available to him and to adopt a forum of his own choice.

Sh. Munir Ahmad for Petitioner.
Ms. Mehvish Tahira for Respondent No.1.

ORDER
MUHAMMAD QASIM KHAN, J.--- Briefly the facts of the case are that petitioner was employed with Punjab Small Industries Corporation (hereinafter to be called as "Corporation") and in the year 1999, a new authority with the name Technical Education and Vocational Training Authority (TEVTA) was established and certain offices and fixtures of the Corporation were transferred to TEVTA vide Notification No.TEVTA/Bud/PSIC/Abs./2014-15 dated 22nd of December, 2014. Under section 10 of the TEVTA Ordinance, the services of the employees of TEVTA were declared as deputationists. The petitioner was also performing his duties under TEVTA after transfer of his services from Corporation and was proceeded under Punjab Civil Servants (Efficiency and Discipline) Rules, 2006 on the following charges:-
(i) He used the different vouchers and rubbers stamps for preparing the bogus purchase bills;
(ii) He drew cheques with bogus signature of the co-signatory i.e. Mr. Nisar Ali Amjad, Accountant of this Centre;
(iii) He opened another stitching unit of HKTC at Mehdi Mohallah, Faisalabad without any written agreement between HKTC and the consumer."
The respondent No.1/Chairman, TEVTA vide order dated 27th of March, 2010 imposed major penalties of recovery of Rs.407,500/- and dismissal from service. This order has been assailed through the instant writ petition.

2. Learned counsel for the petitioner argued that the petitioner is employee of the Corporation and respondent No.1/Chairman, TEVTA is not the authority against him, therefore, proceedings under Punjab Civil Servants (Efficiency and Discipline) Rules, could not be initiated against him by TEVTA, rather only the Corporation, being the parent department of the petitioner, could initiate said disciplinary proceedings.

3. The learned counsel representing the respondents argued that although the petitioner was earlier employee of the Corporation but later on vide Notification No.TEVTA/Bud/PSIC/Abs./2014-15 dated 22nd of December, 2014, the employees of said Corporation were absorbed in TEVTA. Further submits that although under PSIC Rules and Regulations the authority vest with the relevant officer of the Corporation but in the case of the employees absorbed in TEVTA as a special case summary was moved to the Chief Minister and it was approved, whereby the authority regarding employees of the Corporation was delegated to Chairman TEVTA under section 2(7)(ii) of Punjab Employees Efficiency, Discipline and

Accountability Act, 2006. Further argued that the petitioner has alternate adequate remedy, hence, the writ petition is not maintainable. On merits, he submitted that there were serious charges against the petitioner and after proper inquiry, the petitioner has been rightly imposed major penalties.

4. I have heard the arguments of learned counsel for the parties and perused the available record with their assistance.

5. There is no dispute that the petitioner was employee of the Corporation and his services were transferred to TEVTA as deputationist. Later on, his services were absorbed in TEVTA vide notification No.TEVTA/Bud/PSIC/Abs./2014-15 dated 22nd of December, 2014. The opening paragraph of the said notification is reproduced as under:-

"No.TEVTA/Bud/PSIC/Abs./2014-15.--- Technical Education and Vocational Training Authority (TEVTA) is pleased to approve the absorption of PSIC employees transferred to TEVTA with effect from 01.10.2014 in TEVTA. The Services of PSIC employees in TEVTA shall continue to be governed by the prevailing PSIC Rules and Regulations as amended from time to time in future."

Admittedly, this notification holds the field till today, so the petitioner is to be considered as an absorbed employee of TEVTA.

6. Although the Corporation has its own rules and the authorities are mentioned under those rules to proceed against their employees but those rules and regulations are general for all the employees of the Corporation and in case of those employees who are serving in TEVTA, the Chief Minister in order to keep good governance, to provide better working atmosphere and at the same time to ensure expeditious results, approved a summary put up by the concerned quarters and by the approval of said summary the Chairman TEVTA has been authorized to initiate proceedings against such employees of the Corporation working in TEVTA. Therefore, the Chairman TEVTA is the competent authority against the petitioner under Punjab Employees Efficiency, Discipline and Accountability Act, 2006. For ready reference the definition of word "authority" as provided in Section 2(f)(i)(ii) of the Act, ibid, is reproduced:---

"competent authority' means- (i) the Chief Minister; or

(ii) in relation to any employee or class of employees, any officer or authority authorized by the Chief Minister to exercise the powers of competent authority under this Act; provided that such officer or authority shall not be inferior in rank to the appointing authority prescribed for the post held by the employee against whom action is to be taken; or ....."

A bare reading of above reproduced section clearly indicates that Chief Minister may authorize any officer or authority to exercise powers of competent authority under this Act, the only condition is that he will not be inferior in rank to the appointing authority and the Chairman TEVTA is not inferior in rank to the appointing authority of the petitioner. Hence, after approval of the Chief Minister under section 2(f)(ii) of Punjab Employees Efficiency, Discipline and Accountability Act, 2006, the

Chairman TEVTA is the authority for all the employees of corporation working in TEVTA.

7. Under Punjab Employees Efficiency, Discipline and Accountability Act, 2006, a complete mechanism has been provided and the employees who have been awarded any penalty under the said Act, may file an appeal before the appellate authority under section 16 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 but if the order is passed by the Chief Minister, he may file review. Under this Act, remedy of departmental appeal was available to the petitioner but he skipped the same. No litigant can be allowed to avoid statutory remedies available to him and to adopt a forum of his own choice. In this context reliance is placed on the case "Punjab Small Industries Corporation v. Ahmad Akhtar Cheema" (2002 SCMR 549), "Ch. Muhammad Ismail v. Fazal Zada, Civil Judge, Lahore and 20 others" (PLD 1996 Supreme Court 246) and "Mst. Kaniz Fatima through Legal Heirs v. Muhammad Salim and 27 others" (2001 SCMR 1493).

8. For what has been discussed above, the instant writ petition is dismissed on the sole ground that petitioner has not availed the remedy of appeal under section 16 of Punjab Employees Efficiency, Discipline and Accountability Act, 2006. He may avail the same, if so advised.

ZC/S-70/L Petition dismissed.

2016 P L C (C.S.) 572
[Lahore High Court]
Before Muhammad Qasim Khan, J
Syed ABBAS RAZA
Versus
PUNJAB through Chief Secretary and 2 others

Writ Petition No.11138 of 2015, decided on 20th May, 2015.

(a) Civil service---
----Inquiry, initiation of---Scope---Committee was constituted for recommendations for initiation of legal/criminal action against the delinquents---Validity---Inquiries conducted earlier were not under Punjab Employees' Efficiency, Discipline and Accountability Act, 2006 or any other law rather those were preliminary inquiries---Chief Minister being authority against the employees of senior post could initiate any fact finding inquiry---Consideration for such inquiry must be to unearth the real delinquents---Such practice would promote a sense of responsibility amongst the employees---No right of petitioner had been infringed as no action had been taken so far and no adverse order had been passed---Mere on the basis of apprehension, no direction could be issued to stop inquiry process---Petitioner had attempted to frustrate the inquiry proceedings---Reference to National Accountability Bureau could be submitted if tangible material was collected against the person/employee during proposed inquiry---Mere findings or recommendations of such inquiry committee were not to be considered as judgment of guilt against such person or employee---Constitutional petition being premature was dismissed in circumstances.

Khalid Mahmood Ch. and others v. Government of The Punjab through Secretary, Livestock and Dairy Development 2002 SCMR 805 and Mir Nabi Bakhsh Khan Khoso v. Branch Manager, National Bank of Pakistan, Jhatpat (Dera Allah Yar) Branch and 3 others 2000 SCMR 1017 rel.

(b) Constitution of Pakistan---
----Art. 199---Constitutional petition---Scope---No writ could be issued to stop inquiry process on the basis of apprehension.

Azam Nazir Tarrar and Khalid Ishaq for Petitioner.
Imtiaz Ahmad Kaifi, Addl A.G with Muhammad Awais, Law Officer HUD&PHE for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.--- Briefly the facts of the case are that during posting of the petitioner as Project Engineer, Rahim Yar Khan, a project of sewerage scheme was launched and it became operational in the year 2012. Subsequently, however, some blockage was observed in sewerage lines, whereupon, different inspections were carried out to know about the cause for failure of the sewerage system. Ultimately, through Notification/letter No.DIR(ASSEM) CMO/15/OT-

04/057568 dated 24th of March, 2015 a Committee has been constituted under the directions of Chief Minister Punjab, mainly consisting of six Members and said Committee had the option to add any other person as its member. Through the said Notification/letter it has been desired that the Committee shall convene its meeting, conclude recommendations and refer the case to NAB for initiation of legal/criminal action against the delinquents. This notification/letter is under challenge through the instant writ petition.

2. The contention of learned counsel for the petitioner is that already three fact finding inquiries have been conducted in the issue and petitioner was not declared responsible for the fault in sewerage line; the impugned notification does not have any backing of law as it is violative of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 (hereinafter to be called as "PEEDA") and that some members of the said Committee are private persons and prima facie it appears that same has been constituted with mala fide intention.

3. The learned Additional Advocate General has opposed this petition by arguing that only a fact finding inquiry has been ordered through the impugned notification/letter to probe into the matter and fix responsibility and the Chief Minister being the authority is fully competent to initiate fact finding inquiry.

4. I have heard the arguments of learned counsel for the parties and perused the available record with their assistance.

5. Although, earlier three inquiries were conducted and as per stance of learned counsel for the petitioner recommendations of inquiries were approved by the Chief Minister but admittedly those inquiries were not under PEEDA or any other law, rather those were just preliminary inquiries to probe into the reasons behind the fault in sewerage system. The Chief Minister Punjab being the authority under service rules against the employees of senior post, could initiate any fact finding inquiry, so as to protect the public exchequer and ensure good governance and for this purpose it is of paramount consideration that the matter involving colossal losses to the public treasury must be interrogated at all levels to unearth the real delinquents. This practice would surely promote a sense of responsibility amongst the employees, irrespective of their nature of job or pay scale and ultimately its benefit would flow to plug such types of mishaps in future.

6. In the report and parawise comments, the respondents have categorically admitted that petitioner is not being proceeded under PEEDA. It is further reported that this only being a fact finding inquiry, unless and until responsibility is fixed against specific person, relevant Agency or Company, no further proceedings will be initiated against the petitioner or anyone else.

7. In view of the above, when so far no action has been taken against the petitioner, no adverse order has been passed against him and there are no recommendations against him, it cannot be said that any of his right has been infringed, so as to

maintain this writ petition. Thus, at this stage merely on the basis of farfetched apprehension of the petitioner no writ can be issued to stop the inquiry process, rather the same appears to be premature attempt on the part of the petitioner to frustrate the inquiry proceedings.

8. As regards the provision in the impugned Notification regarding submission of reference to NAB, suffice it to say that obviously such process shall be initiated when some tangible material against any of the person/employee is collected during the proposed inquiry and furthermore, the NAB authorities have their own mechanism to initiate proceedings under the NAB Ordinance and mere findings or recommendations of such inquiry committee are not to be considered as judgment of guilt against such person or employee.

9. For what has been discussed above, respectfully placing reliance on the case "Khalid Mahmood Ch. and others v. Government of The Punjab through Secretary, Livestock and Dairy Development" (2002 SCMR 805) and "Mir Nabi Bakhsh Khan Khoso v. Branch Manager, National Bank of Pakistan, Jhatpat (Dera Allah Yar) Branch and 3 others" (2000 SCMR 1017), the instant writ petition is held to be premature and is dismissed.

ZC/A-76 Petition dismissed.

2016 P L C (C.S.) 1164
[Lahore High Court]
Before Muhammad Qasim Khan, J
Dr. MUHAMMAD SHARIF
Versus
PROVINCE OF PUNJAB through Secretary, Department of Agriculture and 2 others

W.P.No.10858 of 2007, decided on 22nd April, 2015.

(a) Punjab Employees Efficiency, Discipline and Accountability Act (XII of 2006)---

----Ss. 1(4)(iii), 4(c) & 26(2)---West Pakistan Civil Servants Pension Rules, 1963, R.1.8(b)---Constitution of Pakistan, Art.199---Constitutional petition---Applicability and scope of Punjab Employees Efficiency, Discipline and Accountability Act, 2006---Issuance of show cause notice after retirement of employee---Scope---Contention of employee was that at the time of retirement clearance certificate was issued by the department and no proceedings could be initiated against him---Validity---Government servants were bound to work efficiently and perform functions assigned to them in discharge of their duties---Conduct of government servants during service should not be prejudicial to good order or service discipline---Government servants should not be involved dishonestly or fraudulently in misappropriation of funds or indulge in embezzlement of government property or resources---Section 1(4)(iii) of Punjab Employees Efficiency, Discipline and Accountability Act, 2006 would apply to the employees in government and corporation service and would cover whole of service period of employee even before the promulgation of said Act and after its enforcement---Competent authority could proceed against an employee on the allegations of inefficiency or seizure of efficiency for any reason, misconduct, corruption or reasonably considered to be corrupt, engaged or reasonably believed to be engaged in subversive activities even if period of charge/allegations was before the enforcement of Punjab Employees Efficiency, Discipline and Accountability Act, 2006---Proceedings against retired employees could be initiated during service or within a period of one year of his retirement--- Punjab Employees Efficiency, Discipline and Accountability Act, 2006 could apply retrospectively to all employees who had even retired before promulgation of the Act but not after the expiry of one year of retirement---Penalty provided for a retired employee under Punjab Employees Efficiency, Discipline and Accountability Act, 2006 would be different as compared to the penalties for serving employees---All serving civil employees and retired civil servants (within a period of one year of their retirement) could be proceeded under Punjab Employees Efficiency, Discipline and Accountability Act, 2006 irrespective of the period of charge/allegations---Issuance of show-cause notice against the petitioner was in accordance with law and no illegality had been found therein---Constitutional petition was dismissed in circumstances.

(b) Punjab Employees Efficiency, Discipline and Accountability Act (XII of 2006)---

----Preamble---Punjab Employees Efficiency, Discipline and Accountability Act, 2006---Object and Scope---Act was promulgated to provide good governance to improve efficiency, discipline and accountability of employees in government and corporation service and matters connected therewith or ancillary thereto.

Ch. Inayat Ullah for Petitioner.
Imtiaz Ahmad Kaifi, Addl. A.-G. with Imtiaz Ali Dar, Litigation Officer for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.--- Briefly the facts of the case are that petitioner while performing duties as Director in the Department of Agriculture, Government of Punjab and posted as Principal, Agriculture Training Institute, Rahim Yar Khan, retired from service w.e.f. 14.05.2006 and then after his retirement, on 06.10.2007 a Show Cause Notice under Punjab Employees Efficiency, Discipline and Accountability Act, 2006 (hereinafter to be called as PEEDA) on the charges of inefficiency, misconduct and corruption, was issued against him. The petitioner submitted reply to the Show Cause Notice and filed the instant writ petition.

2. Learned counsel for the petitioner submits that petitioner is a retired civil servant and at the time of retirement clearance certificate was issued by the department, as such, no proceedings under PEEDA could be initiated against him. Further submits that PEEDA was promulgated on 17.10.2006, whereas, the petitioner retired from service on 14.05.2006, hence, the provisions of PEEDA cannot be enforced retrospectively. Lastly, argued that impugned action has been taken against the petitioner due to mala fide, ulterior motives and biased attitude of the authority.

3. The learned Law Officer submits that the authority is competent to proceed against the petitioner under PEEDA and after retirement within a period of one year, the authority could initiate inquiry against the retired employee, hence, proceedings against the petitioner are within the parameters of law, as the Show Cause Notice was issued before the expiry of one year from the date of retirement of the petitioner.

4. I have heard the arguments of learned counsel for the parties at considerable length and perused the record.

5. The PEEDA was promulgated to provide good governance to improve efficiency, discipline and accountability of employees in government and corporation service and matters connected therewith or ancillary thereto. As it is duty of the government servants to work efficiently and perform functions assigned to them, in discharge of duties. Their conduct during service should not be prejudicial to good order or service discipline and should not be involved dishonestly or fraudulently in misappropriation of Funds or indulged in embezzlement of government property or resources, etc.

6. The moot points in this case are whether after retirement of a civil servant, disciplinary proceedings could be initiated and whether civil servant could be

proceeded under PEEDA when the charges levelled against him related to the period when PEEDA has not been promulgated.

7. The proposition that if the charge against an employee has surfaced after the promulgation of PEEDA, for the period when the said Act was not in field whether, same would be applicable or previous law will apply, the answer to this question is provided in Section 1(4)(iii) of PEEDA. For ready reference, said section is reproduced hereunder:-

I. Short title, extent, commencement and application.-- (1) This Act may be called the Punjab Employees Efficiency, Discipline and Accountability Act, 2006.
(2)
(3)
(4) It shall apply to--
() employees in government service,
(ii) employees in corporation service; and
(iii) retired employees of government and corporation service; provided that proceedings under this Act are initiated against them during their service or within one year of their retirement."

The above reproduced section clearly indicates that it will apply to the employees in government and corporation service and further this Act would cover whole of their service period even before the promulgation of PEEDA and after the enforcement of PEEDA, either on the basis of any information or knowledge of the competent authority, he forms an opinion that sufficient grounds for initiating proceedings under PEEDA are available, the Authority can proceed against an employee on the allegations of inefficiency, or seizure of efficiency for any reason, misconduct, corruption, or reasonably considered to be corrupt, engaged or reasonably believed to be engaged in subversive activities, under PEEDA even if period of charge/allegations is before the enforcement of PEEDA.

8. Further, the contention of learned counsel for the petitioner has no force in the light of Section 1(4)(iii) of PEEDA and rule 1.8(b) of West Pakistan Civil Services Pension Rules, 1963, which provisions clearly provide that proceedings against retired employees could be initiated during service or within a period of one year of his retirement. Insertion of Section 1(4)(iii) in PEEDA connotes that legislative body was mindful of the fact that this Act could apply retrospectively to all employees who have even retired before promulgation of this Act, but not after the expiry of one year of retirement. However, the penalty provided for a retired employee under section 4(c) of PEEDA is different as compared to the penalties provided for serving employees.

9. There is repeal clause in Section 26 of PEEDA and by this repeal clause, the Punjab Removal from Service (Special Powers) Ordinance, 2000 was repealed. Subsection (2) of Section 26 of PEEDA provide that any proceedings which have been initiated under the Removal from Service (Special Powers) Ordinance, 2000 and pending immediately before the commencement of this Act against an employee

under the Punjab Civil Servants Act, 1974 and rules made thereunder, or any other law or rules shall continue under that law and rules, as provided in the relevant law.

10. Bare reading of Section 1(4) and Section 26(2) of PEEDA clarify that all serving civil employees and retired civil servants (within a period of one year of their retirement), could be proceeded under PEEDA irrespective of the period of charge/allegations and Section 26(2) of the Act is its exception, which covers those cases which are being already proceeded under the relevant law before the promulgation of PEEDA.

11. For what has been discussed above, the issuance of Show Cause Notice against the petitioner is perfectly in accordance with law and no illegality has been found therein. This writ petition, therefore, fails and is accordingly dismissed.

ZC/M-151/L Petition dismissed.

2016 P L C (C.S.) 1254
[Lahore High Court]
Before Muhammad Qasim Khan, J
GHULAM AKBAR and 5 others
Versus
GOVERNMENT OF PUNJAB through Secretary Home and others

Writ Petitions Nos.3250, 5984, 5694, 3402, 5855, 5720, 6580, 6451, 7310, 7633 of 2015, decided on 20th March, 2015.

(a) Police Order (22 of 2002)---
----Art. 7---Sub-Inspectors and Inspectors (Appointment and Conditions) of Service Rules, 2013---Constitution of Pakistan, Art.199---Constitutional petition---Civil service---Direct recruitment and promotion of Police sub-inspectors---Discrimination---Petitioners being employees of police department were working as Assistant Sub-Inspectors and Head Constables---Plea of petitioners-employees was that they were eligible and qualified for their further promotion to the rank of Sub-Inspectors---Public Service Commission advertised the posts of Sub-Inspectors wherein on open merit age limit of 20 to 25 years had been specified and from in-service employees age limit of 23 to 35 had been given---Contention of petitioners-employees was that Art.7 of Police Order, 2002 did not provide any age limit for promotion in police service and no condition could be imposed through subservient legislation i.e. Rules---Validity---Government could change Rules or qualification criteria in order to improve the working as well as to maintain good governance in the department considering the changing demands of progressive era---Such change could be taken note by the courts if it was found that same was a person tainted with some mala fides---No fundamental right of the petitioners could be said to have been infringed by change of promotion criteria/rules as such rules had not been changed or framed for any specific person---Recruitment criteria, pay and allowances and all other conditions of service of the police should be such as the Government might from time to time determine---Qualification for direct recruitment and promotion of Sub-Inspectors had been determined through Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013---General law would not apply when there was a special law---Present matter was with regard to police service and it would be governed by Police Order, 2002 as well as the rules framed thereunder---Police Act, 1861 and Police Rules, 1934 would be applicable to a discipline force only while Punjab Civil Servants Act, 1974 could not serve the purpose---Punjab Civil Servants (Relaxation of Upper Age Limit) Rules, 1976 were applicable to all the civil servants under the Provincial Government---Numbers of organizations, bodies under the control of Provincial Government had formulated their service rules and they were governed by such rules---Police force had not been established under Punjab Civil Servants Act, 1974---Police Order, 2002 was a special law only applicable to police department---Punjab Civil Servants (Relaxation of Upper Age Limit) Rules, 1976 had no applicability to the present petitioners as they would be governed by special law---Reasonable classification was permissible under the law---No discrimination had been made out in the present case---Condition of upper age

limit imposed in the advertisement was right and in consonance with law--- Constitutional petitions were dismissed in circumstances.

Ghulam Mustafa v. Punjab Public Service Commission, Lahore and others 2008 PLC (C.S.) 1117; Muhammad Qasim and 6 others v. Home Department, Government of the Punjab through Secretary, Civil Secretariat, Lahore and 2 others 2004 PLC (C.S.) 69 and Ehsan Ullah and 3 others v. Inspector-General of Police, Punjab, Lahore and 4 others 2006 PLC (C.S.) 964 ref.
I.G.P. v. Mushtaq Ahmad Warraich PLD 1985 SC 159; Farrukh Riaz and others v. Government of Punjab and others 2012 PLC (C.S.) 941; Tahira Haq v. A.H. Khan Niazi and others PLD 1968 Lah. 344 and Government of Khyber Pakhtunkhwa through Chief Secretary and others v. Muhammad Javed and others 2015 SCMR 269 rel.

(b) Constitution of Pakistan---
----Art. 189---Judgment of Supreme Court---Binding effect---Judgment rendered by the Supreme Court would be considered as precedent and same would be binding on all other courts to the extent it had decided a question of law or was based upon or enunciated a principle of law.

Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another PLD 2010 SC 483 and Commissioner of Income Tax v. Habib Bank Limited and ANZ Grindlays Bank PLC 2014 SCMR 1557 rel.

(c) Interpretation of statutes---
----Normally word "or" was disjunctive and the word "and" was conjunctive---Both these words should be read as vice-versa to give effect to the manifest intent of the legislature.

Statutory Interpretation by Justice G.P. Singh, 8th Edition, 2001, p.370 and Muhammad Arif and others v. District and Sessions Judge, Sialkot and others 2011 SCMR 1591 rel.
Syed Abdul Wakeel Trimzi for Petitioners (in W.Ps.Nos.5984/2015 and 5694/2015).
Aftab Hussain Bhatti for Petitioner (in W.P.No.3402/2015).
Mian Asim Ullah for Petitioner (in W.P.No.5855/2015).
Nemo for Petitioners (in W.P. No.3250/2015 and W.P.No.5720/2015).
Khalid Jamil for Petitioner (in W.P.No.6580/2015).
Qasim Hassan Buttar for Petitioner (in W.P.No.6451/2015).
Aftab Hussain Bhatti for Petitioners (in W.P.No.7310/2015).
Waqar Ahmad Hanjra for Petitioner (in W.P.No.7633/2015).
Imtiaz Ahmad Kaifi, Additional Advocate General with Mian Ghulam Shabir Thaheem, Advocate/ Law Officer PPSS for Respondents.
Muhammad Salim Chughtai DSP (Legal), Sh. Muhammad Asif DSP (Legal) and Khuda Yar Inspector (Legal)
Dates of hearing: 4th, 5th, 6th, 9th, 18th and 19th March, 2015.

JUDGMENT

MUHAMMAD QASIM KHAN, J.--- By this single judgment, I, propose to decide the following connected matters i.e.

(i) W.P.No.5984/2015
"Hamad Yasir etc. v. Provincial Police Officer etc."
(ii) W.P.No.5694/2015
"Muhammad Shahbaz Shahzad v. Provincial Police Officer, etc."
(iii) W.P .No.3402/2010
"Muhammad Tahir Naqash, etc. v. Provincial Police Officer, etc."
(iv) W.P.No.5855/2015
"Mudassir Ahmad v. Provincial Police Officer, etc."
(v) W.P.No.3250/2015
"Ghulam Akbar etc. v. Inspector General of Police, Punjab etc."
(vi) W.P.No.5720/2015
"Muhammad Shafiq Bhatti v. Government of Punjab etc."
(vii) W.P.No.6580/2015
"Muhammad Abbas Khan v. Province of Punjab, etc." and
(viii) W.P .No.6451/2015
"Sajjad Azam v. Secretary Interior, etc."
(ix) W.P.No.7310/2015
"Irfan Ali etc. v. Provincial Police Officer, Lahore, etc."
(x) W.P.No.7633/2015
"Muhammad Shahbaz Shahzad v. Punjab Public Service Commission etc."

2. Briefly the facts are that present petitioners who are employed with police department and are now working as Assistant Sub-Inspectors and Head Constables claim themselves to be eligible and qualified for their further promotion to the rank of Sub-Inspectors. Through these writ petitions they have thrown a challenge to the advertisement No.03/2015 published in daily newspapers on behalf of Punjab Public Service Commission, Lahore, whereby, at Serial No.21 (for recruitment to 200 posts of Sub-Inspectors) on open merit age limit of 20 to 25 years has been specified and at Serial No.22 (for recruitment to 115 posts of Sub-Inspectors) from in-service employees, age limit of 23 to 35 (Serial No.22-in service promotion) has been imposed.

3. The learned counsel representing the petitioners argued that Article 7 (3) of Police Order, 2002 relates to recruitment of Constable and Assistant Sub-Inspectors; etc. in police service, but it does not provide any age limit for promotion to ASI from serving Head Constables and Assistant Sub-Inspectors and also for Sub-Inspectors. Further argued that the rules made under Article 112 of the Police Order, 2002 could not redundant the provisions of main statute and when no age limits has been prescribed in the Statute (Police Order, 2002), no such condition can be imposed through subservient legislation i.e. rules.

4. It has further been argued on behalf of the petitioners that under Rule 3(c)(a) the only requirement is bachelor degree and no age limit has been prescribed therein,

therefore, the age limit imposed in the schedule has made rule 3(c)(a) ineffective. Lastly argued that promotion rules have been changed during service of the petitioners, as such, rights of the petitioners have been infringed.

5. The learned counsel further argued that insertion of clause "relaxation in underage/upper age, qualification and physical stands shall not be granted in any case" as mentioned in the advertisement is alien to law, as Rule 3(v) of Punjab Civil Servants (Relaxation of Upper Age Limit) Rules, 1976 provide relaxation of upper age limit to in-service government employees and said Rule is applicable to all the Civil Servants, as such, the relaxation provided by this Rule cannot be curtailed to the extent of the petitioners by any authority or subsequent rules. Added that by fixing age limit for in-service quota the petitioners have been discriminated as compared to the applicants who applied against the posts through direct/open candidatures. In support of their assertions, learned counsel representing the petitioners placed reliance on an unreported judgment of the Hon'ble Supreme Court of Pakistan dated 18.11.2008 passed in Civil Appeals Nos.772 and 773 of 2008 "The Inspector General of Police, Punjab and others v. Syed Nusrat Jamal and another", "Ghulam Mustafa v. Punjab Public Service Commission, Lahore etc." (2008 PLC (C.S.) 1117) and two unreported judgments of this Court, one dated 03.06.2010 passed in W.P.No.3393/2010 "M. Ali, etc. v. Provincial Police Officer, Punjab, etc." and the other dated 07.03.2011 passed in W.P. No.23000/2010 "Mudassar Ejaz v. Provincial Police Officer, etc.", as well as judgment dated 27.09.2012 passed in W.P.No.8156/2012 "Mudassar Khan etc. v. The Inspector General of Police Punjab, etc." and "Muhammad Qasim and 6 others v. Home Department, Government of the Punjab through Secretary, Civil Secretariat, Lahore and 2 others" (2004 PLC (C.S.) 69). The learned counsel representing the petitioner in Writ Petition No.7633/2015 "Muhammad Shahbaz Shahzad v. Punjab Public Service Commission, etc." argued that vide Notification No. SOR (S&GAD) 9-36/61 dated 21st May, 2012, age relaxation of five years, across the board has been granted by the Government and this relief cannot be withheld from the petitioners.

6. The learned Additional Advocate General opposed these writ petitions and argued that Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 were amended through gazette Notification dated 01.01.2014 and these rules are statutory rules and were made per force of Article 112 of the Police Order, 2002 by the Provincial Police Officer with the approval of the Provincial Government and these rules are special law, therefore, in the presence of these rules, Punjab Civil Servants (Relaxation of Upper Age Limit) Rules, 1976 are not applicable to the case of the petitioners. Further argued that these rules are also not inconsistent with the main statute as the advertisement was got published in consonance with these rules, therefore, no discrimination has been meted out to the present petitioners. The learned Additional Advocate General in support of his averments, placed reliance on an unreported judgment dated 20.03.2013 passed by Hon'ble Supreme Court of Pakistan in Civil Appeal No.276-L of 2013, the case "Ehsan Ullah and 3 others v. Inspector-General of Police, Punjab, Lahore and 4 others" (2006 PLC (C.S.) 964) and "Ghulam Mustafa v. PPSC" 2008 PLC (C.S.) 1117. The learned counsel representing Punjab

Public Service Commission, however, argued that they published the advertisement according to the policy and instructions imparted to them by the concerned department.

7. I have heard the arguments of learned counsel for the parties at considerable length and perused the entire relevant material and the law on the point in issue.

8. For facility of reference, Article 7 of Police Order, 2002 , Rules 3 and 13 of Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 as well as the Schedule relating to the recruitment of Sub-Inspectors attached to above referred Rules, 2013 are tagged with this judgment as "FLAG-A, B and C", respectively.

9. There is no cavil to the proposition that Punjab Civil Servants (Relaxation of Upper Age Limit) Rules, 1976 were formulated under the Punjab Civil Servants Act, 1974 and is a general law applicable to all the civil servants, but it is settled position of law that when there is a special law then general law will not apply. In this case the matter pertains to police service and it is governed by Police Order, 2002 as well as the rules framed thereunder i.e. Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013. These are specific rules meant for specific purposes; therefore, general rule would not apply. This Court after detailed analysis on this very aspect, had opportunity of going through the judgment of Hon'ble Supreme Court of Pakistan in "I.G.P. v. Mushtaq Ahmad Warraich (PLD 1985 SC 159) and by the said judgment it is deduced that the Civil Servants Act is an act of general application, has no constitutional status and it is as much a law as the Police Act of 1861 with the added distinction that it is of general application while the Police Act is of special application to the officers of the subordinate ranks of the police force. It must not be forgotten that the Police Act and the [Police] rules framed thereunder are such as would be applicable to a disciplined force only while the Civil Servants Act cannot serve this purpose. Furthermore, though it cannot be denied that the police force is one of the services of the Province and the police officers of the subordinate ranks are members of the service who satisfy the definition of "civil servant" yet distinction nonetheless remains that they belong to a disciplined force to which the particular act and the rules were applied from time immemorial. The added distinction is that when the Constitution was enacted in 1973, the police force being a disciplined force was treated differently as they were excepted from the application of Article 8(1) and (2), now in abeyance, with the result that the Police Act and the rules framed thereunder could not be challenged on the basis that they infringed the constitutional rights or was there any constitutional limitation on the power of the Parliament or the Provincial Assembly to legislate in contravention of clause (1) of Article 8. Earlier as well this Court in the case "Farrukh Riaz, etc. v. Government of Punjab, etc." (2012 PLC (C.S.) 941), with reference to the above judgment of the apex Court, observed that:-

"For our present purposes, the foregoing observations by the Hon'ble Supreme Court lead to the following conclusions. The Police Order and Police Rules are special laws governing the conditions of service in the subordinate ranks of the police force

whereas the Civil Servants Act, 1974 and correspondingly, the rules framed thereunder, including the Upper Age Limit Rules, are of general application which stand excluded in the matters of terms and conditions of service of such officers of the police force. The constitutional touchstone for the above classification is provided in Article 8(1) and (2) of the Constitution. The Police Order and the Police Rules are special laws because these pertain to a force "charged with the maintenance of public order." Accordingly, fundamental rights under the Constitution are not available to members of the police force "for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them."

9. As a result of the said findings, the relaxation of Upper Age Limit Rules stand excluded by the special provisions of Rule 12.6 of the Police Rules that prescribe an age limit of 18 to 25 years for recruitment of candidates to the post of ASIs through PPSC in open competition. Such exclusion has been held by the Hon'ble Supreme Court in its aforenoted authority to be based on the principle of maxim generalia specialibus non derogant. "

10. It may be clarified here that the Provincial Police Officer with the approval of the Provincial Government and by official gazette has made the above rules i.e. Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 and under Article 112 of the Police Order, 2002 he was fully empowered to make such rules for carrying into effect the provisions of Police Order, 2002. These rules which are duly notified with the approval of the Provincial Government as required by the main statute are meant to carry out the business under the said statute and details are incorporated in these rules not in the basic statute. To answer the question whether these rules are applicable, we have to examine Punjab Civil Servants Act, 1974, Punjab Civil Servants (Relaxation of Upper Age Limit) Rules, 1976 with Police Order, 2002 as well as Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013. By bare perusal of Punjab Civil Servants Act, 1974 and Punjab Civil Servants (Relaxation of Upper Age Limit) Rules, 1976 it is very much clear that these rules are applicable to all the civil servants under the Government of Punjab. Number of organizations, bodies under the control of Provincial Government formulated their service rules and they are governed by these rules. The police force has not been established under Punjab Civil Servants Act, 1974. Earlier it was established under Police Act, 1861 and Punjab Police Rules, 1934 and then Police Order, 2002 was promulgated and Police Act, 1861 was repealed. Later on, Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 were made for carrying into effect the provisions of Police Order, 2002. The police law is special law only applicable to police department and when special law is available for any territory, class of employees or for any department then general law will not be applicable. As in this case the matter pertains to the officers of the subordinate ranks of the police force having specific law and rules, therefore, general law i.e. Punjab Civil Servants Act and Punjab Civil Servants (Relaxation of Upper Age Limit) Rules, 1976 will not apply. In this respect reliance is placed on the case "Tahira Haq v. A.H Khan Niazi and others" (PLD 1968 Lahore 344), wherein, it was held that "Special provision in special statute excludes operation of general provision in general law."

Coming to the argument of learned counsel in Writ Petition No.7633/2015 relating to a Notification dated 21st of May, 2012, a careful perusal of said Notification would show that it was issued in exercise of powers conferred upon the authority under Section 23 of the Punjab Civil Servants Act, 1974 (VIII of 1974) and this Notification has been issued under general law, therefore, the same could not affect the qualification including age limitation prescribed in special law, as such, has no applicability to the case of the present petitioners.

11. As regards the argument of discrimination, the Hon'ble Supreme Court of Pakistan in the order dated 20.03.2013 passed in Civil Appeal No.276-L of 2013 in clear terms validated reasonable classification. Relevant paragraph of the said order is reproduced hereunder:-

"As to the case of Chairman, State Life Insurance Corporation and others (Supra) relied upon by Mian Ghulam Rasool, in our opinion the facts of the case are distinguishable as the relevant provisions of law i.e. Article 49 of the State Life Insurance (Nationalization) Order, 1972 mandated that the rules in question after the approval of the Government were to be published in the official gazette. Finally as to learned ASC's submission that under the Rules no age limit has been fixed for non graduate constables whereas 35 years upper age limit has been prescribed for graduate constables, suffice it to say that we do not find the same to be discriminatory as 25% quota has been reserved for graduate constables and 25% for fresh graduate entrants whereas 50% quota has been reserved for in-service non graduate constables. Even otherwise upper age limit for fresh entrants has been prescribed as 25 years. In our opinion this is a reasonable classification as in-service graduate constables have to complete with fresh graduates and hence some upper age limit has to be prescribed. Consequently this is not violative of Article 25 of the Constitution."

12. The stance of learned counsel for the petitioners that under Article 7 of Police Order, 2002 no qualification and age limit has been prescribed and Rule 3(c)(a) has made Article 7, ibid, ineffective, I am afraid the same is not true inference. Article 7 of Police Order, 2002 clearly indicates that the recruitment criteria, pay and allowances and all other conditions of service of the police shall be such as the Government may from time to time determine and in this respect qualification for direct recruitment and promotion of Sub-Inspectors has been determined, through Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013. Similarly, the contention of learned counsel that Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 is opposed to Article 7 of Police Order, 2002 which contain age limit as prescribed in the Schedule, has also no weight, as Rule 13 of Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 specifically mentioned that method of recruitment, minimum qualifications, age limit and other incidental matters for the posts of Sub-Inspectors and Inspectors in the functional unit shall be such as given in the Schedule appended to these rules. Hence, by virtue of this section, the Schedule becomes part and parcel of the rules and is applicable to the terms and conditions of appointment and promotions.

13. So for as the case law referred by learned counsel for the petitioners' i.e. unreported judgment of the Hon'ble Supreme Court of Pakistan dated 18.11.2008 passed in Civil Appeals Nos.772 and 773 of 2008 "The Inspector General of Police, Punjab and others v. Syed Nusrat Jamal and another", "Ghulam Mustafa v. Punjab Public Service Commission, Lahore etc." (2008 PLC (CS) 1117) and two unreported judgments of this Court, one dated 03.06.2010 passed in W.P.No.3393/2010 "M. Ali etc. v. Provincial Police Officer, Punjab, etc" and the other dated 07.03.2011 passed in W.P.No.23000/2010 "Mudassar Ejaz v. Provincial Police Officer, etc." as well as judgment dated 27.09.2012 passed in W.P.No.8156/2012 "Mudassar Khan etc. v. The Inspector General of Police Punjab, etc., is concerned, the former case (Civil Appeals Nos.772 and 773 of 2008) was in fact person specific and it is manifest from the order itself that special concession had been extended by the department itself to its employee and for this reason specifically it was incorporated that said concession would not be available to the future recruitment to the post of Assistant Sub-Inspectors of Police. In rest of the three judgments, perhaps proper assistance was not rendered to the courts on the point of applicability of special law. Furthermore, it is also to be observed here that Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 were promulgated on 2nd of January, 2014, therefore, those judgments could not consider the impact and consequences of the Rules which were framed afterwards. Whereas, the judgment dated 27.09.2012 passed by this Court in W.P.No.8156/2012 "Mudassar Khan etc. v. The Inspector General of Police Punjab, etc., was challenged before the Hon'ble Supreme Court of Pakistan and was set-aside by the apex Court vide judgment dated 20.03.2013 passed in Civil Appeal No.276-L of 2013, wherein, the question of discrimination as well as reasonable classification was conclusively settled. In this respect there is no cavil to the proposition of law that in terms of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, the judgment rendered by the apex Court shall be considered as precedent and would be binding on all other courts in Pakistan to the extent it decided a question of law or is based upon or enunciates a principle of law. In this respect reliance is placed on the case "Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another" (PLD 2010 SC 483) and "Commissioner of Income Tax v. Habib Bank Limited and ANZ Grindlays Bank PLC" (2014 SCMR 1557).

14. Coming to the argument of learned counsel for the petitioners with regard to change of promotion rules during subsistence of their service, in order to improve the working as well as to maintain good governance in its departments especially relating to law enforcing agencies, the Government can change the rules or qualification criteria considering the changing demands of the progressive era, however, where it is found that such change/alteration in the promotion rules is person specific tainted with some mala fides, then of course such change can be taken note by the courts. As such by change of promotion criteria/rules, no fundamental right of the petitioners can be said to have been infringed, as neither these rules have been changed or framed for any specific person nor any element of mala fide was argued on behalf of the petitioners. In this respect reliance is placed on the case "Government of Khyber

Pakhtunkhwa through Chief Secretary and others v. Muhammad Javed and others" (2015 SCMR 269), wherein, it has been held as under:-

"Government changing promotion criteria by prescribing higher educational qualification---Effect---When talent, skill and capability was rewarded, it provided opportunity to ambitious employees, and if those amongst them who were better qualified received a differential focus it benefit the department and the people of the country, as all civil servants were there to serve the people.---Similarly, if the bar to aspire to higher positions (i.e. promotion) was raised, it encouraged and motivated employees to take ownership of their careers and personal development---Moreover, when higher educational qualification and talent was appreciated it made for a more transparent system of advancement and may also help to retain talented individuals in an organization."

15. Lastly, taking up the argument of learned counsel for the petitioners about clause with regard to three years' experience as required for Head Constable and Assistant Sub-Inspectors, I am afraid in column-5 of the schedule it sub-clause (ii), it is written as "Three years' service as Head Constable or Assistant Sub-Inspector in the functional unit" A bare reading of said clause would indicate that Head Constable and Assistant Sub-Inspector both are mentioned in one phrase and this single phrase would include Head Constable and Assistant Sub-Inspector (both) and not only Head Constable, otherwise, there was no need for legislatures to add the word "ASI" in clause-5 part-ii. Moreover, it is known principle of interpretation of statute that the word "or" is normally disjunctive and the word "and" is normally conjunctive. But at times they are read as vice-versa to give effect to the manifest intent of the legislature as disclosed from the context. It is permissible to read "or" as "and" and vice-versa if some other apart of the same stature, or the legislative intent clearly spelled out, require that to be done. (Statutory Interpretation by Justice G.P. Singh, 8th Edition, 2001, p.370-referred). On this aspect reliance is also placed on the case "Muhammad Arif and others v. District and Sessions Judge, Sialkot and others" (2011 SCMR 1591). Applying the above principle of interpretation of justice, the use of word "or" in the Schedule appended with Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 in fact requires three years of service in functional unit, for both i.e. Head Constable as well as Assistant Sub-Inspector, as the intent of legislators shows the word "or" has been used as conjectural.

16. For what has been discussed above, it is held that Punjab Civil Servants (Relaxation of Upper Age Limit) Rules, 1976 have no applicability to the case of the present petitioners as they being officers of the subordinate ranks of the police force, will be governed by special law; since reasonable classification is permissible under the law, therefore, no case for discrimination is made out and Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 are not in conflict with the main statute i.e. Police Order, 2002, hence, the condition of upper age limit imposed in the advertisement is right in consonance with law. All these writ petitions, therefore, are dismissed.

17. At close of this judgment it is clarified here that W.P.No.5984/2015, W.P.No.5694/2015, W.P.No.3402/2015, W.P.No.5720/2015 and 3250/2015 were heard by this Court on 05.03.2015, W.P.No.5855/2015 was heard on 06.03.2015,

W.P.No.6451/2015, W.P.No.6580/2015 were heard by this Court on 10.03.2015, whereas, W.P.No.7633/2015 and W.P.No,7310/2015 were heard on 18.03.2015 and 19.03.2015 respectively.

FLAG-A.

"7. Constitution of police.--- (1) The police establishment for each general police area shall consist of such numbers in the senior and junior ranks and have such organization as the Government may from time to time determine.

(2) The recruitment criteria, pay and allowances and all other conditions of service of the police shall be such as the Government may from time to time determine.

(3) The recruitment in the police other than ministerial and specialist cadres shall be in the rank of Constable, Assistant Sub-Inspector and Assistant Superintendent of Police:

(3a) The selection for direct recruitment in the rank of Constable shall be made on the basis of district of domicile.

(3b) The selection for direct recruitment in the rank of Sub-Inspector shall be made through Punjab Public Service Commission on the basis of police region in which district of domicile of the candidate is located and shall not exceed fifty percent of total posts in the rank of Sub-Inspector.

(3c) Subject to the rules--

(a) Twenty-five percent of the quota reserved for departmental promotion to the rank of Sub-Inspector shall be filled through selection-on-merit by Punjab Public Service Commission from amongst police officers holding bachelor's degree in the rank of Head Constable and Assistant Sub-Inspector; and

(b) Twenty-five percent departmental promotions to the rank of Assistant Sub-Inspector shall made through selection-on-merit by Punjab Public Service Commission from amongst police officers holding bachelor's degree in the rank of Constable and Head Constable.

(4) The recruitment in the rank of Assistant Superintendent of Police shall be through the Federal Public Service Commission on all Pakistan basis.

(5)

(6) Every police officer while on police duty shall have all the powers and privileges of a police officer throughout Pakistan and be liable to serve at any time in any branch, division, bureau and section."

FLAG-B.

RULE 3 of Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013

"**3. Appointment of Sub-Inspectors.---** (1) Subject to the prior approval of the Provincial Police Officer, the appointing authority may, on the recommendation of the Commission, appoint a person as Sub-Inspector by initial recruitment or selection.

(3) Subject to the prior approval of the Regional Police Officer, the appointing authority may, on the recommendation of the departmental promotion committee, appoint an Assistant Sub-Inspector as Sub-Inspector by promotion."

FLAG-C

RULE 13 of Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013

"13. Method of recruitment, appointment and eligibility.- The method of recruitment, minimum qualifications, age limit and other incidental matters for the posts of Sub-Inspectors and Inspectors in the functional unit shall be such as given in the Schedule appended to these rules.

ZC/G-13/L Petition dismissed.

PLJ 2016 Lahore 13
[Multan Bench, Multan]
***Present*: MUHAMMAD QASIM KHAN, J.**
***Mst.* RIFFAT SATTAR--Petitioner**
versus
GOVERNMENT OF PUNJAB, etc.—Respondents

W.P. No. 11995 of 2015, decided on 2.9.2015.

West Pakistan Civil Servants Pension Rules, 1963--
----Rr. 5.7 & 5.8--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Preparation of pension case of government employee--Despite expiry of almost one year pension case was not finalized--Challenge to--Pension of a retired government employee has to be sanctioned one month in advance of due date of his retirement and final payment order must be issued not more than a fortnight in advance thereof--It was a vested right and a legitimate expectation of a retiring civil servant, same being a right conferred by law, could not be arbitrarily abridged or reduced except in accordance with law--Pension has not been paid to petitioner despite expiry of about one year after her retirement and thus petitioner has suffered agony for a long period without their being any fault on her part--Such delay occurred mainly due to inefficiency or slackness on part of respondents authorities, therefore, that is deemed to be a fit case for initiation of criminal proceedings as well as simultaneous action for gross contempt--However, instead of opting for criminal action or contempt proceedings against concerned officials, writ petition was allowed in terms prayed for, and in order to set an example and to convey an alert for future to government functionaries deliberately delaying pension cases of retired employees for their nefarious designs, costs be paid to petitioner by Government of Punjab through Secretary education within six months from today. [Pp. 15 & 17] A, B & C

Syed Muhammad Ali Gillani, Advocates for Petitioner.
Mr. Mubashir Latif Gill, Assistant Advocate General with Tariq Hameed Bhatti, Deputy Secretary (Admn) Higher Education Department, Lahore.
Pir Masood-ul-Hassan Chishti, Advocate for Respondent University of Education with Ashiq Dogar Registrar University of Education, Lahore.
Date of hearing: 2.9.2015

ORDER
Precisely the facts of the instant case are that petitioner stood superannuated as Assistant Professor of Economics (BPS-18) from respondent-University of Education, Multan Campus, on 10.09.2014 and the grievance highlighted through this writ petition is that despite expiry of almost one year her pension case has not be finalized.

2. I have heard the arguments of learned counsel for the petitioner as well as the learned Law Officer and examined the available record.

3. Before proceeding further, it may be mentioned here that preparation of pension case of a government employee is regulated by The West Pakistan Civil Servants Pension Rules, 1963. Relevant Rules 5.7 and 5.8 under (Chapter-V. Application for grant of pension) are reproduced hereunder for facility of reference:-

"5.7 (i) A pension/gratuity which is certified by the Audit Officer shall be sanctioned by the authority competent to sanction the pension.
(ii) Orders sanctioning the pension may issue not more than one month in advance of the due date of retirement and the Audit Officer may issue the pension/pension payment order not more than a fortnight in advance thereof to the Treasury Officer who is to pay the pension/gratuity.
5.8. Date of commencement of pension--Apart from special orders, an ordinary pension is payment from the date on which the pensioner ceases to be in Government service. A gratuity (other than anticipatory gratuity) shall be paid in a single sum."
It is thus quite obvious that pension of a retired government employee has to be sanctioned one month in advance of the due date of his retirement and final payment order must be issued not more than a fortnight in advance thereof. Furthermore, the Hon'ble Supreme Court of Pakistan in the case *"Secretary, Government Of Punjab, Finance Department and 269 others versus M. Ismail Tayer and 269 others"* (2015 PLC (C.S) 296), in clear words held that pension is not a bounty or an ex-gratia payment but a right acquired in consideration of past services. It was a vested right and a legitimate expectation of a retiring civil servant, the same being a right conferred by law, could not be arbitrarily abridged or reduced except in accordance with law.

4. Keeping in mind the above legal aspects, respondents' authorities were directed to submit report and parawise comments. After going through the report submitted on behalf of Respondents No. 4 and 5 (University authorities), it is observed that successful completion of service tenure by the petitioner is a fact not disputed by them. Similarly, there is no plea available with respondents authorities that the petitioner carried any stigmatic service record, that any departmental inquiry was either pending or was in the offing or that in any way the petitioner herself contributed towards delayed finalization of her pension case. As such, no explanation, worth the name, has been put before the Court from respondents authorities as to why the pension case of the present petitioner was not finalized despite passage of nearly one year. Rather, it has been observed that in their earlier report/parawise comments the respondents-University of Education had tried to play deception with this Court by stating that there is no pendency on their part and complete cases of the petitioner has been forwarded to the concerned quarters well in time. Subsequently, however, when the Higher Education Department, Government of Punjab denied receipt of any such record in their office, it was only then that the University of Education authorities admitted their fault, thus the *malafide* on the part of the official respondents is manifest from their record itself.

5. In the case *"Haji Muhammad Ismail Memon, Advocate* (Criminal Miscellaneous Application No. 226 of 2006) reported in PLD 2007 Supreme Court 35), the apex

Court while taking notice of slackness on the part of the government department in preparation of pension papers of the retired government employees expressed utter dismay as under:--

"It is pathetic condition that Government servants, after having served for a considerable long period during which they give their blood and sweat to the department had to die in a miserable condition on account of non payment of pension/pensionary benefits etc. The responsibility, of course, can be fixed upon the persons who were directly responsible for the same but at the same time we are of the opinion that it is an over all problem mostly in every department, where public functionaries failed to play their due role even in accordance with law. Resultantly, good governance is suffering badly. Thus every one who is responsible in any manner in delaying the case of such retired officers/official or widows or orphan children for the recovery of pension/gratuity and G.P. Fund has to be penalized. As their such lethargic action is in violation of Articles 9 and 14 of the Constitution of Islamic Republic of Pakistan, 1973. Admittedly it is against the dignity of a human being that he has to die in miserable condition and for about three years no action has been taken by the concerned quarters in finalizing the pension case and now when the matter came up before the Court, for the first time, they are moving in different directions just to show their efficiency and to clear their position before the Court. Such conduct on their behalf is highly condemnable and cannot be encouraged in any manner."

In order to set guidelines for future, the apex Court in the said judgment issued the following directions:--

"We, therefore, direct that all the Government Departments, Agencies and Officers deployed to serve the general public within the limit by the Constitution as well as by the law shall not cause unnecessary hurdle or delay in finalizing the payment of pensionary/retirement benefit cases in future and violation of these directions shall amount to criminal negligence and dereliction of the duty assigned to them."

For strict adherence to the above verdict, specific directions were issued to all the Chief Secretaries of the Provincial Governments as well as the Accountant Generals and the Account General Pakistan Revenue, Islamabad, to clear pension cases within a period not more than two weeks without fail.

6. But, as shall be seen from the facts of instant case, exactly on same lines the respondents authorities paid no heed to the directions of the Hon'ble Supreme Court of Pakistan, when the matter has come before this Court, they tried to shuffle their responsibility, as according to University of Education all the relevant papers were sent to the Secretary Higher Education and the stance of Higher Education Department is that pension case of the petitioner was not received to them, rather through letter dated 28th of August, 2015, the Registrar University of Education was requested to provide the papers, but he failed. In this respect a copy of written apology on behalf of Respondents No. 4 and 5 has been tendered, wherein, it is clearly mentioned that as a matter of fact one Additional Director (Admn), University of Education, had provided false information about forwarding of petitioner's pension papers and as the said official was found responsible for delay, therefore, he has been asked to submit his resignation, he has resigned from office and the said issue is in

the process. In any way, slackness and then concealment of facts on the part of official respondents is apparent from the record produced by them.

7. Be that as it may, the fact of the matter is that pension has not been paid to the petitioner despite expiry of about one year after her retirement and thus the petitioner has suffered agony for a long period without their being any fault on her part. Furthermore the documents now available on the file, go on to establish that such delay occurred mainly due to the inefficiency or slackness on the part of respondents authorities, therefore, this is deemed to be a fit case for initiation of criminal proceedings as well as simultaneous action for gross contempt of the above cited judgment of the apex Court. However, instead of opting for criminal action or contempt proceedings against the concerned officials, this writ petition is allowed in the terms prayed for, and in order to set an example and to convey an alert for future to the government functionaries deliberately delaying the pension cases of retired employees for their nefarious designs, I order that costs of Rs. 100,000/- be paid to the petitioner by the Government of Punjab through Secretary Education within six months from today.

It is however, for the Government of Punjab to recover the said amount from University of Education, Lahore.

(R.A.) Petition allowed

PLJ 2016 Lahore 18
[Multan Bench, Multan]
***Present*: MUHAMMAD QASIM KHAN, J.**
MUHAMMAD ANWAR--Petitioner
versus
ADDITIONAL SESSIONS JUDGE, etc.—Respondents

W.P. No. 14300 of 2011, decided on 2.9.2015.

Constitution of Pakistan, 1973—
----Art. 199--Criminal Procedure Code, (V of 1898), S. 161--Constitutional petition--Private complaint--Summoning of witness of calendar, allowed--Order was set aside by revision Court--Challenge to--Cursory statement--Validity--Cursory statements of the witnesses sought to be summoned by petitioner were not recorded, therefore, they could not be summoned, as in absence of their cursory statements accused would not have opportunity to confront them--Vast powers have been given to trial Court with regard to summoning of any person as witness but very slight condition that such person shall be acquainted with facts and will also be able to give evidence--Recording of cursory statement or statement under Section 161, Cr.P.C. is not requirement of law--Sole purpose of inserting these Sections in Cr.P.C. is that fair trial must be ensured--Names of witnesses sought to be summoned, were duly incorporated in calendar of witnesses which had been attached with private complaint--Accused/respondents would not have opportunity to confront them with their earlier statements under Section 161, Cr.P.C. or their cursory statements, has no backing of law, as when those witnesses would appear in witness box rival party would have ample opportunity to cross-examine them so as to shatter their testimony. [Pp. 19 & 20] A, B, C & D

Syed Jaffar Tayyar Bokhari, Advocate for Petitioner.
Mr. Mubashir Latif Gill, Assistant Advocate General and *Ch. Muhammad Akbar Kamboh,* Advocate for Respondents.
Date of hearing: 2.9.2015

ORDER
Briefly the facts of the case are that regarding an occurrence earlier the present petitioner got registered an FIR No. 193/2001 at Police Station Chab Kalan, but after cancellation of the said FIR, he filed a private complaint under Sections 452/148/149 P.P.C. against the private respondents, wherein, accused were summoned and charge sheeted. During trial the petitioner/complainant filed an application for summoning of the witnesses mentioned in the calendar of witness attached to the private complaint. The said application was allowed by the learned trial Court *vide* order dated 23.12.2009, but on a criminal revision filed by the respondents/accused the said order was upset by the learned Additional Sessions Judge *vide* order dated 27.03.2010. This order of the revisional Court is under challenge through the instant writ petition.
2. The contention of learned counsel for the petitioner is that the witnesses whose statements under Section 161, Cr.P.C. or for that matter their cursory statements are

not recorded, cannot be subsequently summoned during trial for the purposes of recording their evidence, as it will prejudice the rights of the accused side.

3. The learned Law Officer assisted by learned counsel for the respondent/complainant opposed this petition by arguing that there is no bar in criminal law to summon a witness at any stage, whose statement is considered necessary by the learned trial Court to reach at fair determination of trial.
4. Heard. Record perused.

5. A perusal of the impugned order dated 27.03.2010 passed by learned Additional Sessions Judge, reveals that the same is based on the sole ground that cursory statements of the witnesses sought to be summoned by the petitioner were not recorded, therefore, they could not be summoned, as in the absence of their cursory statements the accused would not have opportunity to confront them. I am afraid the approach of the learned Additional Sessions Judge while allowing the criminal revision is totally misconceived. Section 244 (2), Cr.P.C. dealing with trial of cases by Magistrates and Section 265-F(2), Cr.P.C. relating to trials before High Court and Court of Sessions, when read together, in clear terms provide that the Court shall ascertain from the public prosecutor, or, as the case may be, from the complainant, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon such persons to give evidence before it. It therefore, is quite clear that vast powers have been given to the trial Court with regard to summoning of any person as witness but very slight condition that such person shall be acquainted with the facts and will also be able to give evidence. As shall be seen from the above referred provisions, recording of cursory statement or statement under Section 161, Cr.P.C. is not the requirement of law. The sole purpose of inserting these Sections in the Code of Criminal Procedure, 1898 is that fair trial must be ensured.

6. Here in this case, it is not disputed that the names of the witnesses sought to be summoned, were duly incorporated in the calendar of witnesses which had been attached with the private complaint. The ground that accused/ respondents would not have opportunity to confront them with their earlier statements under Section 161, Cr.P.C. or their cursory statements, has no backing of law, as when those witnesses would appear in the witness box the rival party would have ample opportunity to cross-examine them so as to shatter their testimony. As compared to the order of learned revisional Court, the learned trial Court/Magistrate Section 30, Mianchannu had passed a well reasons order on correct legal approach. Consequently, this writ petition is allowed, the order dated 27.03.2010 passed by learned Additional Sessions Judge is set-aside and the order dated 23.12.2009 passed by the learned trial Court is resurrected.

(R.A.) Petition allowed

PLJ 2016 Lahore 99 (DB)
[Multan Bench Multan]
***Present*: MUHAMMAD QASIM KHAN AND ASLAM JAVED MINHAS, JJ.**
ABDUL RAZZAQ--Petitioner
versus
STATE and 2 others—Respondents

W.P. No. 10465 of 2015, decided on 17.8.2015.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, 1898--S. 540--Pakistan Penal Code, 1860--Ss. 302 & 365-A--Abduction and murder--Application to summon call data of mobile phones pertaining to specific period was turned down--Challenge to--Fair trial is a right of every accused as guaranteed in constitution--Without obtaining desired data from cellular companies trial proceedings would be futile exercise--Right to prove him innocent by producing evidence--Validity--When prosecution has employed modern device and adopted sophisticated technique to connect petitioner with commission of offence, petitioner has got every legitimate right to prove himself innocent by using same device/CD.R. for period of his choice--Dispensation of justice is to be treated even-handed and under no circumstances it should be allowed to be tipped in favour of one party at costs of other--An application under Section 540, Cr.P.C., mere on ground that same has been moved to delay trial is not a valid ground in eyes of law to reject same--Call data record related to those witnesses who had already been examined and same could not be confronted with same, suffice it to observe that they might be re-summoned and re-examined by prosecution so as to provide them an adequate opportunity to explain their conduct and point of view with regard to C.D.R in question--Raison deter of Courts is to dispense justice and to strive hard to get truth rather than rushing through trials/cases. [Pp. 101 & 102] A, B & C

Mr. Mushtaq Ahmad Tanveer, Advocate for Petitioner.
Ch. Muhammad Iftikhar Arif, Advocate for Respondents.
Mr. Mubashir Latif Gill, AAG for State.
Date of hearing: 17.8.2015.

ORDER

Through this single order, we intend to decide instant writ petition filed by Abdul Razzaq, the accused and Writ Petition No. 9789 of 2015 filed by Altaf Hussain, the complainant as both these matters have arisen out of same F.I.R. No. 616 dated 28.11.2013 for offence under Sections 302 and 365-A P.P.C., registered at Police Station Chowk Azam, District Layyah.

2. The brief facts of the matter are that Abdul Razzaq, the petitioner in W.P. No. 10465 of 2015 was booked in the aforesaid F.I.R. and is facing the trial for abduction and murder of Muhammad Umar aged about six years who is the son of the complainant. He submitted an application under Section 540, Cr.P.C. before the learned trial Court to summon Call Data of Mobile Phone Nos. 0302-6767991 of Zafar Iqbal (PW-2), 0346-2298893 of Altaf Hussain (PW-1) and 0344-3687306 of Muhammad Riaz Hussain (PW-3) pertaining to the period dated 23.11.2013 to

29.11.2013 and the date of the Mobile Phone of Naseeb Ullah Bearing No. 0344-8555990 for the period dated 15.12.2013 at 5:15 P.M. This application was turned down by the learned trial Court *vide* order dated 18.02.2015. Aggrieved of the said order, Abdul Razzaq, the petitioner filed Writ Petition No. 2559 of 2015 before this Court which *vide* order dated 30.03.2015 was allowed and the order impugned therein was set aside. Now the petitioner impugns the order dated 03.07.2015 passed by the learned trial Court whereby an application filed by the petitioner for correction of some paras of SOP "Mark-A" was rejected in violation of this Court's order dated 30.03.2015 and it is prayed that the impugned order may be set aside and trial Court may be directed to implement the order dated 30.03.2015 passed by this Court in W.P. No. 2559 of 2015 in letter and spirit. On the other hand, complainant/petitioner in Writ Petition No. 9789 of 2015 has prayed for a direction to the learned trial Court for early conclusion of the trial to meet the ends of justice.

3. The learned counsel for the petitioner in Writ Petition No. 10465 of 2015, *inter alia* contends, that the learned trial Court has not complied with the direction contained in order dated 30.03.2015 passed by this Court in W.P. No. 2559 of 2015; that the plea taken by the cellular companies regarding their inability to produce the record of CDR for more than one year is not worth relies; that the fair trial is a right of every accused as guaranteed in the constitution; that without obtaining the desired data from the concerned cellular companies, the trial proceedings would be a futile exercise; that it is case of heinous nature and the petitioner has every right to prove him innocent by producing the evidence favouring him; that the impugned order is a colorful exercise of authority by the learned trial Court which suffers from gross illegalities or irregularities. Lastly, prays that the impugned order may be set aside.

4. The learned counsel appearing on behalf of complainant/ petitioner in W.P. No. 9789 of 2015 contends, that trial proceedings are being prolonged due to the delaying tactics adopted by Abdul Razzaq, the accused; that the learned trial Court has already adopted the entire procedure and recorded the evidence to conclude the trial. The case is now fixed for final arguments but filing of frivolous application on behalf of the accused is nothing but to linger on the trial. Finally craves that the learned trial Court may be directed to conclude the trial expeditiously.

5. The learned Assistant Advocate General has adopted the arguments advanced by the learned counsel for the petitioner Altaf Hussain.

6. We have heard the learned counsel for the petitioner, learned counsel for respondent, AAG and also gone through the record.

7. Perusal of record available on file reveals that the complainant received calls on his Cell Phone, demanding a ransom of Rs. 20,00,000/- for the return of his missing child. Similarly, Zafar Iqbal (PW-2) made a statement regarding his mobile phone (Exh. P.1) and SIM No. 0344-3687306 (Exh. P.2). In the same way, Inam ul Haq, P.W-12, who was posted as ASI/In charge Crime Sceme, DPO Office, Layyah in 2013 testified on oath about C.D.R consisting of 27 pages, which were exhibited as Exh.P.6/1 to 27. When the prosecution has employed the modern device and adopted sophisticated technique to connect the petitioner with the commission of the offence, the petitioner has got every legitimate right to prove himself innocent by using the same device/CDR for the period of his choice. It goes without saying that the

dispensation of justice is to be treated even-handed and under no circumstances it should be allowed to be tipped in favour of one party at the costs of the other.

8. It is pertinent to mention that the provisions of Section 540, Cr.P.C. as under:--

Power to summon material witness or examine person present:--

"Any Court may, at any stage of any inquiry, that or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, through not summoned as a witness, or re-call and re-examine may person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case.

9. Apart from the provisions of Section 540, Cr.P.C., Section 94 Criminal Procedure Code, 1898 is also relevant in the context of this case. It would be expedient to reproduce sub-section (1) thereof, which reads as under:--

"**94. Summons to produce document or other thing.**--(1) Whenever any Court, or any officer in charge of a Police Station considers 'that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officers a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, at the time and place stated in the summons or order."

10. From the bare reading of the above said Sections, it is crystal clear that an application under Section 540, Cr.P.C., mere on the ground that the same has been moved to delay the trial is not a valid ground in the eyes of law to reject the same. As for the apprehension of the learned trial Court that some of the Call Data Record relates to those witnesses who have already been examined and the same could not be confronted with the same, suffice it to observe that they might be re-summoned and re-examined by the prosecution so as to provide them an adequate opportunity to explain their conduct and point of view with regard to the C.D.R in question. As such, the course followed by the learned trial Court would strike a balance between the prosecution and the defence. Needless to say, that the raison deter of the Courts is to dispense justice and to strive hard to get the truth rather than rushing through the trials/cases.

11. For what has been discussed above, Writ Petition No. 10465 of 2015 filed by Abdul Razaq is allowed by setting aside the order dated 03.07.2015 passed by the learned Judge Anti-Terrorism Court, Dera Ghazi Khan. Resultantly, the application moved by the petitioner under Section 540, Cr.P.C. before the learned trial Court is accepted with the result that the above-said PWs be summoned in accordance with law.

12. However, Writ Petition No. 9789 of 2015 filed by the petitioner (complainant) Altaf Hussain is disposed of with a direction to the learned trial Court to expedite the trial of the case and decide the same expeditiously.

(R.A.) Petition disposed of

PLJ 2016 Cr.C. (Lahore) 230
[Multan Bench, Multan]
***Present*: MUHAMMAD QASIM KHAN, J.**
RAZAQ and another--Appellants
versus
STATE and another—Respondents

Crl. Appeal No. 548 of 2002, heard on 23.12.2014.

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

----Ss. 302, 436, 201 & 34--Conviction and sentence--Factor of extra judicial confession was disclosed--Motive was entirely different from FIR--Motive coming through extra judicial confession was never investigated--Validity--If evidence of extra judicial confession is believed, then it is quite unnatural that persons who are empty handed and confess their guilt about commission of a heinous offence of murder, witnesses before whom such confession is made, would remain as silent spectators, as there is not a single word in statements of PWs that they made even an attempt to capture accused at that time to handover them to police--Thus, evidence of extra judicial confession is not confidence inspiring--Prosecution had miserably failed to prove charge against accused/appellants beyond any shadow of doubt--Criminal appeal was allowed. [Pp. 236 & 238] A & E

2011 YLR 2837, *rel.*

Extra Judicial Confession--

----Scope of--Evidence of alleged extra judicial confession, which by itself is a weak type of evidence, cannot advance case of prosecution against accused. [P. 237] B

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

----Ss. 302(b), 436, 201 & 34--Conviction and sentence--Recovery of crime weapon--Blood stained dagger--*Chhuri* was recovered from residential room lying in a box--Validity--After committing heinous crime of murder accused were keep crime weapon safe in their house, for its subsequent recovery and production to prosecution, so as to be used against them as evidence and secondly, it also does not appeal to mind that a *churri* which remains lying in a box along with clothes for more than two months would still carry blood stains on it--Therefore, recovery evidence which even otherwise has just corroborative value, is not believable, especially when recovery witness, in his statement before Court does not state that at time of recover crime weapons contained blood stains. [P. 237 & 238] C

Ocular account--

----Extra judicial confession--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 suffered from material contradictions.

[P. 238] D

Mr. Nadim Ahmad Tarrar and Malik Muhammad Siddique Kamboh, Advocate for Appellant.
Malik Muhammad Jaffar, D.P.G. for State.
Mr. Khalid Farooq, Advocate for Complainant.
Date of hearing: 23.12.2014.

JUDGMENT

Razaq son of Hameed and Dil Nawaz son of Jan Muhammad accused/ appellants faced trial before learned Additional Sessions Judge. Burewala in case FIR No. 133/1999 dated 30.3.1999 under Sections 302/436/201/34, P.P.C. registered at Police Station Gaggo. On conclusion of trial, *vide* judgment dated 13.6.2002, the learned Additional Sessions convicted the accused/ appellants under Section 302(b), PPC and sentenced them to imprisonment for life, with further direction to pay Rs. 50,000/- each as compensation to the legal heirs of deceased, in case of default in payment of compensation amount, they were to further suffer six months simple imprisonment. Both the accused/appellants were further convicted under Section 201, P.P.C. and sentenced to three years rigorous imprisonment with fine of Rs. 10,000/-, in case of default to further undergo two months simple imprisonment. They were also convicted under Section 436, P.P.C. and sentenced to five years rigorous imprisonment each with fine of Rs. 10,000/-, in case of failure to suffer further simple imprisonment for two months. Through the instant appeal, said conviction and sentence has been questioned by the accused/appellants/convicts.

2. Briefly the facts of the case are that Muhammad Ramzan complainant (PW.7) got lodged the above FIR on 30.03.1999 at 4.00 a.m. to the effect that on 29.03.1999 at about 9.00 p.m. his father Ahmad Yar (deceased) after taking meal went to BHAINI, whereas, the complainant along with other house inmates slept at his house situated at Chak No. 425/EB. On hearing noise, he woke up and saw that BHAINI was caught by fire, he ran towards BHAINI and meanwhile Hameed *alias* Allah Ditta and Bagh Ali son of Mehmood also rushed. On reaching near BHAINI, they saw Zahid armed with hatchet and Muhammad Hanif armed with *churri* running towards mettle road. They further saw burnt dead body of complainant, which was dragged out with the help of witnesses. The dead body was carrying wound on lower part of chest, right front and middle of belly. Blood was found on earth at some distance, where according to the FIR Muhammad Zahid and Muhammad Hanif accused had murdered Ahmad Yar and in order to destroy any clue, dead body was put on cot and then set at fire.
Motive was stated to be that mother of the complainant had died six years before and Allah Yar, father of the complainant, wanted to marry *Mst.* Zahida Bibi (sister of Zahid and sister-in-law of Muhammad Hanif accused, but both the accused were not agreeing, for which reason that had earlier beseeched Allah Yar and extended him threats of murder.

3. After registration of FIR, Muhammad Hussain inspector PW-14 conducted the investigation and while giving details of investigation he deposed that after recording statement of complainant he proceeded to the place of occurrence, inspected the dead

body, prepared injury statement Ex.PC, inquest report Ex.PB, collected blood stained earth Ex.PJ, collected burnt mattress P-4, Strings of Cot (BAAN) P-5, Ash P-6 which were taken into possession *vide* memo. Ex.PK. He inspected the place of occurrence, prepared rough site plan Ex.PL, dispatched dead body to mortuary. He recorded statements of witnesses under Section 161, Cr.P.C. After post-mortem, Noor Din Constable produced before him burnt piece of clothes of Qamiz P-1 which was taken into possession *vide* memo. Ex.PE. On 10.05.1999 he recorded supplementary statement of complainant and on 31.05.1999 recorded statements of Khan Muhammad, Allah Bakhsh and Muhammad Rafiq. Muhammad Akhtar Patwari produced before him site plan Ex.PD, Ex.PD/1 and Ex.PD/2. During physical remand on 09.06.1999 accused Dilnawaz led to the recovery of blood stained dagger P-2 from residential room of his house, which was taken into possession *vide* memo. Ex.PG, rough site plan of place of recovery is Ex.PM. On the same day, Razaq led to the recovery of blood stained *chhuri* P-3 from his residential room lying in a box, which was taken into possession *vide* memo. Ex.PH and site plan of place of recovery is Ex.PN. During initial investigation both of the nominated accused of the FIR namely Zahid and Muhammad Hanif were found innocent and opinion of the Investigating Officer was endorsed by Deputy Superintendent of Police through Zimni No. 9 dated 07.05.1999. However, afterwards the complainant came out with a different story through supplementary statement and nominated Razaq and Dilnawaz present appellants, as accused of the case and report under Section 173, Cr.P.C. was submitted against them.

4. During trial, the prosecution examined fourteen witnesses, which include the statement of Muhammad Ramzan complainant PW-7 whose statement precisely toes the supplementary statement. Allah Bakhsh PW-8 and Allah Ditta PW-9 made statement to the effect that on the fateful night they had seen Razaq and Dilnawaz coming from BHAINI of Ahmad Yar deceased and on reaching the BHAINI they saw that Ahmad Yar has burnt. Thereafter, they went to Lahore next morning, returned after about 2 ½ months and got recorded statement to the police. Muhammad Rafiq PW-2 and Khan Muhammad PW-3 deposed about alleged confession of guilt by Razaq and reason explained by Razaq for the murder, according to them, was that deceased had encroached on his land and refused to vacate the same. According to Muhammad Rafiq PW-2 similar confession was made by Dilnawaz accused. Dr. Muhammad Ramzan (PW-1) who conducted post-mortem examination over the dead body of Ahmad Yar and noted the following injuries:--

(i) An incised wound measuring 10 x 7 cm x going deep on the left side of front of chest on lower half;

(ii) An incised wound measuring 4x1 cm x going deep on the upper abdomen present 2 cm above umelicus in the mid line.

In the opinion of the doctor the death had occurred due to excessive bleeding result of both the injuries, which were sufficient in ordinary course of nature to cause death. The probable time between injury and death was within a few minutes and time elapsed between death and post-mortem was 8 to 24 hours. The rest of the witnesses are all formal in nature and they made statements about their respective roles during investigation. On close of oral evidence, the prosecution tendered report of Chemical

Examiner Ex.PO, Ex.PP and that of Serologist Ex.PP/1 and with that closed the case. The accused when examined under Section 342, Cr.P.C. denied the prosecution case and in answer to question "WHY THE CASE AGAINST YOU AND WHY THE PWS DEPOSED AGAINST YOU?, both the accused came out with the reply as under:--

"I am innocent. Accused namely Zahid s/o Iraq and Muhammad Hanif S/O Waryam who were nominated in the FIR by the complainant were let off by the complainant party in connivance with the police after getting money from them. All the witnesses are interested and related interse, and also inimical towards me. I along with Dilnawaz implicated as a escape goat. Entire evidence produced by the prosecution is fabricated piece of evidence. All the evidence produced by the prosecution is full of discrepancies and even prosecution witnesses made dishonest improvements in their statements recorded in the Court."

They however, opted not to make statements under Section 340(2), Cr.P.C. nor they produced any evidence in defence.

5. On conclusion of trial *vide* judgment dated 13.06.2002, the above conviction and sentence was recorded against the accused/appellants and through the instant criminal appeal, said, conviction and sentence has been challenged by the convict/ appellants.

6. I have heard the arguments of learned counsel for the parties at considerable length and perused the entire available record.

7. As shall be seen from the above narrated facts of the case Muhammad Ramzan complainant (PW.7) while making statement to the police, which formed basis for registration of case, had made a definite and explicit statement that he along with Hameed and Bagh Ali saw Zahid armed with hatchet and Muhammad Hanif armed with *churri* running towards mettle road. The complainant had also explained the motive that his mother had died six years before and Allah Yar, father of the complainant, wanted to marry *Mst.* Zahida Bibi (sister of Zahid and sister-in-law of Muhammad Hanif accused, but both the accused were not agreeing, for which reason that had earlier beseeched Allah Yar and extended him threats of murder. Neither, Hameed nor Bagh Ali were brought by the prosecution, in the witness box, whereas, the complainant during investigation changed his stance and came out with supplementary statement that at the place of occurrence in fact he had seen two unknown persons running towards mettle road, BHAINI was burning, he tried to save his father who had sustained injuries on the lower chest and left side of the abdomen and had died. He further stated that he had suspicion upon Zahid and Hanif, therefore, FIR was got lodged against them, whereas, on 10.05.1999 i.e. about 1 ½ months after the occurrence, prosecution introduced Khan Muhammad (PW-3), Allah Bakhsh (PW-8) and Muhammad Rafiq (PW-2) who informed the complainant that Razaq and Dilnawaz (present accused/appellants) had murdered Ahmad Yar. The complainant while appearing in the witness box PW-7 admitted that FIR was lodged on his dictation without any omission or addition. Thus, on the face of it the complainant had introduced two different sets of accused, earlier Zahid and Hanif were cited as accused and while naming them in the FIR the

complainant had not shown any reservation about their identity and had also attributed a clear motive against them for the murder of Ahmad Yar, deceased. In this view of the matter, when the complainant at the time of recording FIR had no ambiguity about involvement of Zahid and Hanif accused, heavy onus lied on the prosecution to refute the contention of present accused/appellants that earlier nominated accused were let off by taking money from them and subsequently appellants were introduced as accused as escape goat.

8. In order to advance the case of the prosecution, which had in fact been already shattered by two clear conflicting statements of the complainant himself, the prosecution produced Allah Bakhsh PW-8 and Allah Ditta PW-9 who deposed that on the fateful time they had seen Razaq and Dilnawaz coming from BHAINI of Ahmad Yar but this fact was disclosed by them to the complainant on 10.05.1999 i.e. after one and a half months of the occurrence. Although in order to explain the said delay Allah Bakhsh PW-8 and Allah Ditta PW-9 deposed that after the occurrence they had left for Lahore for labour and on return disclosed the said fact to the complainant, but Allah Ditta PW-9 during cross-examination admits that "I along with Allah Bakhsh PW remained the whole night in the village and next morning was Eid-uz-Zaha. We offered Eid-uz-Zaha prayer in Chak No. 425/EB. I along with Allah Bakhsh PW offered Eid-uz-Zaha prayer in one Mosque." This- witness further deposed in cross-examination that "I remained whole day of Eid-uz-Zaha in the village but I did not inform about the occurrence. I participated in the funeral ceremony of Ahmad Yar." As narrated above, this was not an ordinary occurrence, rather according to the prosecution BHAINI of the complainant was set at fire and dead body of Ahmad Yar (father of the complainant) was found there in burn condition. With this background, when the witnesses had allegedly seen the present appellants at the place of occurrence and they also participated in his funeral ceremony, it does not appeal to a man of common prudence that if at all they knew about the real accused and FIR against two others had been lodged, they would still keep mum and did not disclose the real culprits to the complainant. Thus, the delay in reporting the said factor to the complainant is not only inordinate but also creates serious doubt about veracity of their statements. Furthermore, this Court in the case "*Mst.* PARIS BIBI versus THE STATE and others" (2013 P.Cr.L.J 1886), held that:-- "Wajtakar 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 successful in establishing his presence at the time……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."

9. Further, the prosecution examined Muhammad Rafiq PW-2 Khan Muhammad PW-3 who made statements about alleged extra-judicial confession by accused. On careful scrutiny of their statements, it has been observed by this Court that the alleged occurrence in this case took place on 29.3.1999, according to these witnesses the alleged extra judicial confession by accused was made before them on 9.5.1999 and factor of extra judicial confession was disclosed to the complainant on 10.05.1999.

According to these witnesses Razaq explained that Ahmad Yar deceased used to pass by the Haveli of Dil Nawaz which was covered but the wall was demolished. Dil Nawaz stopped Ahmad Yar from passing through the Haveli, but Ahmad Yar did not agree, therefore, in consultation with Dilnawaz murder of Ahmad Yar was committed, with *churri*es carried by both of the accused. It is thus, obvious that the motive as allegedly disclosed by the accused to these witnesses, is entirely different from the one set by the complainant in the FIR. Furthermore, it remains an admitted position that motive coming through extra-judicial confession was never investigated by the Investigating Officer and apart from that if the evidence of extra judicial confession is believed, then it is quite unnatural that the persons who are empty handed and confess their guilt about commission of a heinous offence of murder, the witnesses before whom such confession is made, would remain as silent spectators, as in the present case there is not a single word in the statements of Muhammad Rafiq PW-2 or Khan Muhammad PW-3 that they made even an attempt to capture the accused at that time to handover them to the police. Thus, the evidence of extra judicial confession is not confidence inspiring. This Court in the case *"Muhammad Anwar versus The State"* (2011 YLR 2837) disbelieved the evidence of extra judicial confession by holding that:

"Extra-judicial confession made by accused in a Panchayat in open proceedings before so many persons and their letting off without any arrest, did not appeal to reason."

10. Considering the peculiar facts and circumstances of the case, as the complainant himself got recorded the FIR, during cross-examination admitted that FIR had been recorded on his statement without any omission of addition and further in the FIR he had nominated two accused with clarity, expressed in clear terms that one of them was Zahid *alias* Iraq carrying hatchet and second accused was Muhammad Hanif equipped with *churri*. The complainant also came out with clear narration about motive that since Ahmad Yar deceased wanted to marry *Mst.* Zahidan (sister of Zahid & sister-in-law of Hanif) therefore, out of said grievance murder was committed. In the presence of said explicit stance of the complainant appearing in the FIR, the evidence of alleged extra judicial confession, which by itself is a weak type of evidence, as discussed above, cannot advance the case of the prosecution against the present accused/appellants. This Court in the case *"Muhammad Yaqoob and others versus The State"* (2007 YLR 534), in clear terms held that:

"No provision exists in, Cr.P.C. about supplementary statement--Generally, such statement is recorded to fill the lacunas in the prosecution case."

11. As regards recovery of crime weapons, Muhammad Hussain Inspector/Investigating Officer (PW-14) deposed that during physical remand on 9.6.1999 accused Dilnawaz led to the recovery of blood stained dagger P-2 from residential room of his house, which was taken into possession *vide* memo. Ex.PG, rough site plan of place of recovery is Ex.PM, On the same day, Razaq led to the recovery of blood stained *chhuri* P-3 from his residential room lying in a box, which was taken into possession *vide* memo. Ex.PH and site

plan of place of recovery is Ex.PN. The occurrence took place on 29.03.1999 and the alleged recovery was affected on 09.06.1999 i.e. about two and a half months after the occurrence. Firstly, it is highly improbable that after committing heinous crime of murder the accused were keep the crime weapon safe in their house, for its subsequent recovery and production to the prosecution, so as to be used against them as evidence and secondly, it also does not appeal to mind that a *churri* which remains lying in a box along with clothes for more than two months would still carry blood stains on it. Therefore, the recovery evidence which even otherwise has just corroborative value, is not believable in this case, especially when Muhammad Ramzan PW-7, recovery witness, in his statement before the Court does not state that at the time of recover the crime weapons contained blood stains.

12. For what has been discussed above, this Court is convinced that the 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 suffered from material contradictions, as detailed above, whereas this Court in the case "*Bahadar versus The State"* (2007 YLR 1471), clearly held that:

"Supplementary statement of the complainant could not be equated with the F.I.R. and the same was recorded either to fill the lacunas in the prosecution case or to add the number of accused."

Thus, I am fully convinced that the prosecution has miserably failed to prove the charge against the present accused/appellants beyond any shadow of doubt. Consequently, this criminal appeal is allowed, impugned judgment of conviction and sentence recorded against the accused/appellants is set-aside, and they are acquitted of the charges against them. The record of the learned trial Court be sent back immediately and the case property, if any, shall be disposed of in accordance with law.

(R.A.) Appeal allowed

PLJ 2016 Lahore 268 (DB)
[Multan Bench Multan]
***Present*: MUHAMMAD QASIM KHAN AND ASLAM JAVED MINHAS, JJ.**
***Mirza* MUHAMMAD YOUNAS BAIG--Petitioner**
versus
N.A.B., etc.—Respondents

W.P. No. 12503 of 2014, decided on 12.8.2015.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 415 & 489-F--National Accountability Ordinance, 1999, S. 9(a)(ix)--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Bail before arrest, confirmed--Post dated cheques were dishonoured--Defrauded and cheated public-at-large and misappropriated huge amount--Deals in business of sale and purchase of commodities--**Held:** Whether provisions of Section 9(a)(ix) of N.A.O., attracts is a matter of further inquiry which will be seen during trial--Under Section 9(a)(ix) of N.A.B. had no jurisdiction to take cognizance of an offence of cheating under Section 415, PPC unless accused had dishonestly induced members of public-at-large to deliver any property including money or valuable security to any person and not in an individual case--Petition was allowed. [P. 270] A
Mr. Tariq Zulfiqar Ahmad Chaudhary, Advocate for Petitioner.
Mr. Faiz Rasool, ADPGA NAB alongwith *Ali Arslan Haider,* Law Officer/I.O. for Respondents.
Date of hearing: 12.8.2015.

ORDER
Through this petition, Mirza Muhammad Younas Baig, petitioner seeks his pre-arrest bail in A. C. Reference No. 3-M of 2014 titled *The State vs. Mirza Muhammad Younas Baig.*

2. Briefly, the facts of the case are that the petitioner deals in business of sale and purchase of commodities and according to the allegations, he used to collect food grains e.g. wheat and corn etc. from different commission agents running their business at Malka Hans and Arifwala. The petitioner made partial payments to some of the claimants and against balance amounts, he issued them post dated cheques which were later on dishonoured, thus, he defrauded and cheated the public-at-large and misappropriated huge amount. It is pertinent to mention here that firstly, the petitioner on the same allegations was booked in case F.I.R No. 443/2011, dated 02.11.2011, under Section 489-F, PPC, Police Station Malka Hans, District Pakpattan got registered by Abbas Ali proprietor of Waris Shah Traders. The petitioner was also booked in case F.I.R No. 353/2011, dated 04.08.2011, under Section 489-F, PPC, Police Station Malka Hans got registered by one Shafique Hussain. Thereafter, on the basis of said FIRs the present reference has been prepared against the petitioner, in which, the N.A.B Authorities has issued warrant of arrest of the petitioner dated 06.06.2014.

3. Learned counsel for the petitioner contended that the petitioner had made full payments to the claimants but they did not return the cheques issued to them by the petitioner; that the petitioner is previously not involved in any such type of case; that this is a money dispute of civil nature and the complainants of the FIRs have also filed civil suits which are pending before Civil Courts; that the petitioner has not committed any offence which comes within the ambit of N.A.B Ordinance, therefore, the petitioner is entitled for bail.

4. On the other hand the learned Prosecutor General N.A.B vehemently opposed the petition and contended that the petitioner has committed fraud and cheated the public-at-large.

5. We have heard the learned counsel for the parties and perused the record with their assistance.

6. Admittedly, on the same allegations the petitioner was booked in the cases bearing F.I.R. No. 443/2011, dated 2.11.2011, under Section 489-F, PPC and F.I.R. No. 353/2011, dated 04.08.2011, under Section 489-F, PPC, both registered at Police Station Malka Hans, in which he has been admitted to post arrest bail by this Court through Crl. Misc. No. 9068-B/2012 and Crl. Misc. No. 9074-B/2012 respectively and trial of both the cases is pending adjudication before the learned Allaqa Magistrate and he remained in jail for about one year in the said cases. The record also shows that civil suits have also been filed by the complainants of both the cases which are pending adjudication. Admittedly, the petitioner was dealing with some commission agents and he did not defrauded or cheated the public-at-large directly, therefore, whether the provisions of Section 9(a)(ix) of the National Accountability Ordinance, 1999 attracts in this case is a matter of further inquiry which will be seen during the trial. Under Section 9(a)(ix) of the National Accountability Ordinance, the N.A.B had no jurisdiction to take cognizance of an offence of cheating under Section 415, PPC unless the accused had dishonestly induced members of the public-at-large to deliver any property including money or valuable security to any person and not in an individual case. Reference in this regard may be made to the case of *Naseem Abdul Sattar & 6 others vs. Federation of Pakistan & 4 others* (PLD 2013 Sindh 357). Apparently, it is a business transaction between the petitioner and commission agents. The trial is almost completed and there left only the cross-examination of the Investigating Officer, therefore, at this stage if the petitioner is sent behind the bars it will prejudice his case. In view of the foregoing reasons, this petition is allowed and the ad interim pre-arrest bail already granted to Mirza Muhammad Younas Baig, petitioner is hereby confirmed subject to his furnishing surety bonds equivalent to defrauded amount i.e. Rs. 7.9 Millions to the satisfaction of the learned trial Court.

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

(R.A.) Petition allowed

PLJ 2016 Cr.C. (Lahore) 365 (DB)
[Multan Bench Multan]
***Present*: MUHAMMAD QASIM KHAN AND ASLAM JAVED MINHAS, JJ.**
SAJJAD HUSSAIN @ BHOLA--Appellant
versus
STATE & another—Respondents

Crl. A. No. 620 of 2010, heard on 11.11.2015

Control of Narcotic Substances Act, 1997 (XXV of 1997)--
----S. 9(c)--Sentence to imprisonment for life--Recovery of 17 packets *opium*--Ten gram from each packet was separated for sending to chemical examiner--Marginal witnesses of recovery memos--Samples of contraband substance--Mitigating circumstances--Joint report of chemical examiner was sufficient proof to establish guilt--Validity--It was duty of prosecution to prove recovery of each packet of *charas* and *opium* through separate packets and separate results of chemical examiner--Although in report of chemical examiner eight packets of *charas* and seventeen packets of *opium* were mentioned but a joint report of each narcotic substance respectively had been issued by chemical examiner, which was against requirements of law, whereas law requires separate reports for separate packet of samples, which were to be exhibited during trial--Prosecution had succeeded to establish its case against appellant only to extent of one slab of *charas* of 1200 grams and one slab of *opium* of 1200 grams--Appeal was dismsised. [P. 368] A

2015 SCMR 735, PLD 2009 Lah. 362 *rel.*
Hafiz Muhammad Abu Bakar Ansari, Advocates for Appellant.
*Mr. M. A. Hayat Hiraj, L*egal Advisor for ANF for State.
Date of hearing: 11.11.2015

JUDGMENT
Muhammad Qasim Khan, J.--*Vide* judgment dated 17.05.2010, learned Additional Sessions Judge, Multan, in case FIR No. 24 of 2007, registered at Police Station ANF, Multan, convicted Sajjad Hussain @ Bhola appellant for offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, and sentenced him to imprisonment for life with fine of Rs. 1,00,000/- and in default of payment of fine, he was to further undergo for six months; however, benefit of Section 382-B, Cr.P.C. was awarded to the appellant.

2. Brief facts of the case, as per complaint Ex.PH, are that Farooq Ahmad Sheikh, Inspector/S.H.O. Police Station ANF, Multan, on spy information constituted a raiding party and apprehended Sajjad Hussain @ Bhola; recovered eight packets of *charas* P-1 from his possession. Each packet of *charas* weighed 1200 gm, so by this way total 9600 kg *charas* was recovered from the accused. 10 gm *charas* from each packet was separated for chemical analysis. The accused further led to the recovery of 17 packets of *opium* P-2 from Almirah of his house. Each of the recovered packets of *opium* weighed 1200 gm; thus, total 20,400 kg *opium* was

recovered and 10 gm from each packet was separated for sending of the same to the chemical examiner. Thereafter both the contrabands P-1 and P-2 were taken into possession *vide* recovery memo. Ex.PA and Ex.PB.

3. After completion of investigation, the accused was sent up to face trial, where he denied the allegation and claimed trial.

4. During trial, to prove its case, the prosecution produced four witnesses. Muhammad Khalid HC appeared as PW-1. He stated about Shabbir Asad Moharar handed over to him 8 sample parcels of *charas* and 17 sample parcels of *opium* for handing over the same to the office of chemical examiner. Sajjad Haider, constable appeared as PW-2 he stated about the proceedings of the raid. Farooq Ahmad Sheikh, Inspector/ S.H.O. appeared as PW-3 stated about the arrest of the accused; recovery of *charas* and *opium* and investigation of the case. PW-4 Shabbir Asad, Moharar stated about handing over the scaled parcels of *charas* and *opium* to Muhammad Khalid, HC/PW-1. The prosecution closed its case after producing reports of chemical examiner Ex.PJ and Ex.PK.

5. After completion of prosecution evidence, statement of the accused was recorded under Section 342, Cr.P.C. wherein he pleaded his false implication. He did not appear in his own defence under Section 340(2), Cr.P.C. and after producing Ex.DA, DA/1 and DH closed its case.

6. Learned counsel for the appellant contends that case of the prosecution is replete with contradictions; though the samples were taken separately but the same were sent jointly and a joint result was provided by the chemical examiner, which is nullity in the eyes of law; thus, on this score alone conviction is not sustainable.

7. On the other hand, learned Deputy Prosecutor General has fully supported the judgment passed by learned trial Court by stating that the PWs are consistent on all the material aspects of the case; and it is not necessary to prepare separate reports for each sample, as law requires that samples must be taken from each packet and joint report of all sample by the chemical examiner is sufficient proof to establish the guilt and whole recovered articles were contraband substance, thus, instant appeal is liable to be dismissed.

8. I have heard learned counsel for the parties and gone through the available record with their able assistance.

9. From the perusal of statements of prosecution witnesses, who conducted the raid and also marginal witnesses of the recovery memos, it appears that there are contradictions in the statements of PWs, as Sajjad Haider HC/PW-2 in his examination-in-chief stated that "on checking of the said plastic TORA, 08 packets of *Charas* were recovered from his possession. On weighing, each packet was containing 1200 grams *Charas*. The I.O. weighed the *Charas* which became 9,600 k.g. in toto. The I.O. separated 10 grams *charas* from each packet and made

eight sample parcels and one parcel of remaining bulks (sic) contraband substance i.e. P-1 and P-2 could not be proved with certainty.

10. At the most, the prosecution case remains to the extent of samples of contraband substance, which were sent to the office of chemical examiner for analysis. As per prosecution case itself, in total twenty five packets (eight containing *charas* and seventeen alleged to contain opium) were recovered; from each of the recovered packets of contrabands, 10 grams each was taken as sample and allegedly separate sample packets were prepared for chemical analysis but only two joint reports of all the packets of *charas* as well as *opium* were received from the chemical examiner as Ex.PJ and Ex.PK, respectively, whereas, from the analogy drawn from the judgment of Hon'ble Supreme Court of Pakistan in the case of *"Ameer Zee versus The State"* (PLD 2012 SC 380), the prosecution was required to have taken samples from each of the recovered packets, thereafter, for each of the samples a separate report must be prepared by the chemical examiner. With this backdrop, joint result/report of the Chemical Examiner does not represent the whole quantity allegedly recovered narcotics from the possession of appellant and it can safely be said that at the most prosecution succeeds in proving its case only to the extent of two slabs of contraband substance, regarding which the result has been received i.e. two analysis reports Ex.PJ and Ex.PK. Consequently, while placing reliance upon PLD 2012 SC 380 *(Ameer Zeb vs. The State)*, we observe that it was the duty of prosecution to prove recovery of each packet of *charas* and *opium* through separate packets and separate results of chemical examiner. Although in the report of chemical examiner eight packets of *charas* and seventeen packets of *opium* are mentioned but a joint report of each narcotic substance i.e. Ex.PJ and Ex.PK respectively has been issued by the chemical examiner, which is against the requirements of law, whereas the law requires separate reports for separate packet of samples, which were to be exhibited during trial; thus, at this stage it can be observed that prosecution has succeeded to establish its case against the appellant only to the extent of one slab of *charas* of 1200 grams and one slab of *opium* of 1200 grams. In such a situation, to decide the quantum of sentence of the appellant for offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, for keeping 1200 grams of *charas* and 1200 grams of *opium* by the appellant judgment passed by this Court reported as PLD 2009 Lahore 362 *(Ghulam Murtaza and another vs. The State)* must be considered, wherein for an offence under Section 9(c) of the Act guidelines have been provided that for keeping charas more than 1 kilogram and up to 2 kilograms, the sentence will be 4 years and 6 months R.I, and fine of Rs. 20,000/- or in default S.I, for 5 months; similarly for keeping opium more than 1 kilogram and up to 2 kilograms, the sentence will be 4 years R.I, and fine Rs. 8,000/- or in default S.I, for 4 months and 15 days. It appears that appellant has already served out his sentence more than the above quoted guidelines because order dated 27-10-2011, whereby sentence of appellant was suspended, clearly shows that till that time the appellant had served out more than 11 years in jail which was more than half portion of his sentence; and thus, on that score sentence of the appellant was suspended

11. There is another mitigating circumstance in favour of the appellant, as learned Law Officer has placed on file certain documents regarding medical treatment of the

appellant, who has undergone the heart surgery. Appellant is present in Court today on a wheelchair; he cannot walk freely and his health condition appears to be very poor.

12. As a result of above discussion, while placing reliance on 2015 SCMR 735 *(Khuda Bakhsh vs. The State)* and PLD 2009 Lahore 362 *(Ghulam Murtaza and another vs. The State)*, considering that the period of sentence already undergone by the appellant will sufficiently meet the ends of justice, we accordingly alter the sentence of appellant to the period already undergone by him. However, sentences of fine and in its default are maintained.

13. With the above modification in the conviction and sentence this appeal is dismissed.

(R.A.) Appeal dismissed

PLJ 2016 Cr.C. (Lahore) 519
[Multan Bench Multan]
Present: **MUHAMMAD QASIM KHAN, J.**
SHAN--Petitioner
versus
STATE and another –Respondents

Crl. Misc. No. 6486-B of 2015, decided on 18.11.2015.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 324 & 34--Bail, grant of--Accused was not named in FIR; ii) subsequently identified by PWs during identification parade and role assigned to him is only of aerial firing; iii) injured witness did not join identification parade; iv) no allegation against petitioner in her statement under Section 164, Cr.P.C. v) motive was also not attributed; vi) whether petitioner actually participated in occurrence and his vicarious liability is matter, which will be determined by trial Court after recording of evidence; vii) co-accused having similar roles had already been granted bail by High Court; thus, petitioner was also entitled for same relief on principle of consistency. [P. 520] A

Mr. Nadeem Ahmad Tarar, Advocate for Petitioner.
Mr. Hassan Mehmood Khan Tareen, Deputy Prosecutor General for State.
Maher Muhammad Sharif, Advocate for Complainant.
Date of hearing: 18.11.2015.

ORDER
Shan/petitioner seeks post arrest bail in case FIR No. 450 of 2014 registered at Police Station Saddar Kehror Pacca, District Lodhran, for offences under Sections 302, 324 & 34, PPC.

2. After hearing learned counsel for the parties and going through the record, I have observed as under:
i) Petitioner is not named in the FIR;
ii) He was subsequently identified by the PWs during identification parade and role assigned to him is only of aerial firing;
iii) *Mst.* Kalsoom, injured witness did not join the identification parade;
iv) She has levelled no allegation against the petitioner in her statement under Section 164, Cr.P.C.
v) Motive is also not attributed to the petitioner;
vi) Whether the petitioner actually participated in the occurrence and his vicarious liability is the matter, which will be determined by learned trial Court after recording of evidence;
vii) Furthermore, Jamshed and Jaffar co-accused having similar roles have already been granted bail by this Court *vide* order dated 22-09-2015 in Crl. Misc. No. 5089-B

of 2015; thus, the petitioner is also entitled for the same relief on the principle of consistency; and

viii) Petitioner is behind the bars since 02-09-2014; he is no more required for the purpose of further investigation; thus, no useful purpose would be served to keep him behind the bars for indefinite period.

3. In view of the above discussion, I am inclined to accept this petition and admit the petitioner to bail, subject to furnishing bail bonds in the sum of Rs. 2,00,000/- (Rupees Two Lac), with one surety, in the like amount to the satisfaction of trial Court.

(R.A.) Bail allowed

PLJ 2016 Cr.C. (Lahore) 535 (DB)
[Multan Bench Multan]
Present: **MUHAMMAD QASIM KHAN AND ASLAM JAVED MINHAS, JJ.**
AMIR KHAN and others--Appellants
versus
STATE—Respondent

Crl. A. No. 265 of 2010, heard on 16.11.2015.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--
----Ss. 9(c) & 15--Sentence--Reconsideration of quantum of sentence--Recovery of narcotic substance--Joint report of chemical examiner--Validity--Conviction of accused under Section 9(c) of CNSA is sustained, however, while evaluating quantum of sentence--Where accused were tagged with that case since arrest, according to report of jail, at time of report accused had served out imprisonment, as such, by now accused/appellant had undergone a substantial period of about fifteen years confinement, whereas, according to report of superintendent--Thus by lapse of time till now these two accused/appellants had also undergone a substantial period of their entire sentence of imprisonment, which was considered sufficient to meet ends of justice. [P. 539] A, B & C
PLD 2012 SC 380, 2015 SCMR 735.
Hafiz Muhammad Abu Bakar Ansari and *Mr. Muhammad Afzal Khan,* Advocates for Appellants.
Miss Humera Naheed, Advocate for ANF for State.
Date of hearing: 16.11.2015.

JUDGMENT
Muhammad Qasim Khan, J.--Amir Khan, Taj Bahadar, Namatullah and Abdullah Jan accused/appellants faced trial in case FIR No. 12/2009 dated 04.07.2009 under Section 9(c)/15 of the Control of Narcotic Substances Act, 1997 registered at Police Station ANF, Multan and on conclusion of the trial *vide* judgment dated 25.02.2010 the learned trial Court/Additional Sessions Judge, Multan, all of the four accused/appellants were acquitted of the charge under Section 15 of Control of Narcotic Substances Act, 1997. However, on their conviction under Section 9-C of the said Act, Amir Khan accused/appellant was sentenced to imprisonment for life and fine of Rs. 200,000/-, in default thereof to further undergo simple imprisonment for one year and six months, whereas, accused Abdullah Jan, Namatullah and Taj Bahadar were also sentenced to imprisonment for life each with fine of Rs. 100000/- each, in case of default in payment of fine each one to suffer simple imprisonment for one year. Benefit of Section 382-B, Cr.P.C. was extended.

2. The learned counsel appearing on behalf of the accused/appellants/convicts (Amir Khan, Taj Bahadar, Namatullah Khan and Abdullah Jan) initially addressed arguments on merits of the case, but considering it be a case of promptly lodged FIR, accused were arrested red handed, the contraband recovered from them was sent to office of Chemical Examiner and reports were received in the positive, the veracity

whereof remained unquestionable, the prosecution case as set-up in the FIR was fully established during trial by producing prosecution witnesses, who all remained consistent on material aspects, the learned counsel representing the accused/ appellants turned to their alternate prayer for reconsideration of quantum of sentence and argued that prosecution witnesses materially contradict each other on the aspect of recovery and preparation of samples. Further argued that although according to the prosecution case accused were found in a vehicle and on checking 12 packets of charas weighing 1200 grams each were recovered from the plastic TORA lying near the feet of Abdullah Jan, ten grams charas from each packet separated for chemical examiner analysis; twelve packets of charas weighing 1100 gram were recovered from the TORA lying near accused Namatullah, ten gram charas from each packet was separated for chemical examiner; nine packets of opium weighing 1200 grams were recovered from the TORA lying near Taj Bahadar, ten grains each was separated from each of the packet for chemical analysis. Amir Khan accused/appellant got recovered 22 packets of charas from secret cavity at the back of the driving seat. He also got recovered 36 packets of charas and 10 packets of opium, as such total 69.600 kg charas and 12.k.g. opium was recovered from Amir Khan accused/appellant. The learned counsel further argued that Naeem Khan Sub-Inspector/Investigating Officer PW-2 while reiterating the prosecution case deposed before the Court that he had collected samples from each of the recovered packet and sent for chemical examiner, but joint analysis reports were received from the Chemical Examiner, but practice is against the spirit of case *"Ameer Zeb versus The State"* (PLD 2012 SC 380). The learned counsel therefore, argued that each of joint report at the most can be considered to the extent of one sample alone, as such, the quantum of sentence needs to be reconsidered. In support of their arguments, learned counsel referred the case *"Khuda Bakhsh versus The State"* (2015 SCMR 735) to contend that quantum of sentence in narcotic substance may depend upon the quantity of the recovered substance and the discretion lies with the Court to award any sentence which is deemed fit in the facts and circumstances of the case. The learned counsel therefore, argued that when the prosecution is not clear on this aspect, the reports of Chemical Examiner can be considered only to the extent of one sample collected from each of the accused, therefore, the sentence of each of the accused/appellant, may be reduced accordingly.

3. The learned counsel representing ANF on the other hand has opposed the above submissions by contending that already a lenient view has been taken with regard to the quantum of sentence qua the accused/appellants, whereas, the prosecution had successfully proved its case with regard to recovery of narcotic substance, collection of samples from each of the recovered packet, therefore, join submission of report by the Chemical Examiner at the most may be an irregularity and is not fatal to the prosecution case and it will not be sufficient to reconsider the whole of the sentence.

4. We have considered the respective arguments of learned counsel for the parties and perused the available record with their assistance.

5. It has been observed that according to the prosecution case accused were found in a vehicle and on checking 12 packets of charas weighing 1200 grams each were

recovered from the plastic TORA lying near the feet of Abdullah Jan, ten grams charas from each packet for separated for chemical examiner analysis; twelve packets of charas weighing 1100 gram were recovered from the TORA lying near accused Namatullah, ten gram charas from each packet was separated for chemical examiner; nine packets of opium weighing 1200 grams were recovered from the TORA lying near Taj Bahadar, ten grams each was separated from each of the packet for chemical analysis. Amir Khan accused/appellant got recovered 22 packets of charas from secrete cavity at the back of the driving seat. He also got recovered 36 packets of charas and 10 packets of opium, as such total 69.600 kg charas and 12.k.g. opium was recovered from Amir Khan accused/appellant. Naeem Khan Sub-Inspector/Investigating Officer PW-2 while reiterating the prosecution case deposed before the Court that he had collected samples from each of the recovered packet and sent for chemical examiner, but relating to recovery of twelve packets of charas from Abdullah Jan just one report of Chemical Examiner Ex.PM has been received. Similarly, the report of Chemical Examiner Ex.PN relates to whole of recovery of twslve packets of charas from Namatullah. Again a joint report of Chemical Examiner Ex.PQ relating to nine sealed parcels allegedly recovered from Taj Bahadar has been received and further this report in the result column does not disclose whole of the samples. Regarding receipt of fifty eight packets of charas recovered from Amir Khan accused/appellant one report Ex.PO and for ten sealed packets of opium recovered from same Amir Khan accused/appellant one report Ex.PR has been received.

6. Faced with above situation, we would like to refer the judgment *"Ameer Zeb versus State"* (PLD 2012 SC 380), wherein the apex Court has laid down a definite criterion, as under:

"For the purposes of clarity and removal of confusion it is declared that where any narcotic substance is allegedly recovered while contained in different packets, wrappers or containers of any kind or in the shape of separate cakes, slabs or any other individual and separate physical form it is necessary that a separate sample is to be taken from every separate packet, wrapper or container and from every separate cake, slab or other form for chemical analysis and if that is not done then only that quantity of narcotic substance is to be considered against the accused person from which a sample was taken and tested with a positive result."

From the analogy drawn by the above-reproduced paragraph of the judgment of Hon'ble Supreme Court of Pakistan, it is obvious that prosecution was required to have taken samples from each of the recovered packets, thereafter, for each of the sample a separate parcel must have been prepared and sent for chemical examiner and then the report of the Chemical Examiner must also have carried independent result of each of the parcel received in the said office. With this backdrop, although from the prosecution evidence it appears that separate parcels were made and sent for chemical examiner, but joint reports of the Chemical Examiner have been received regarding each of the accused/appellant. Thus, joint reports of Chemical Examiner Ex.PM, Ex.PN, Ex.PO, Ex.PQ and Ex.PR do not represent the whole quantity allegedly recovered from the possession of the accused/appellants and it can safely be said that at the most prosecution succeeded in proving its case only to the extent of

samples of the contraband substance, regarding which the result has been received and furthermore, one report of the Chemical Examiner would only represent not more then just one sample. Meaning thereby, the Chemical Examiner report Ex.PM will carry the effect that only one sample of charas collected from the contraband recovered from Abdullah Jan accused/appellant was received in the Chemical Examiner office and said one sample was reported to contain charas. Similarly, Ex.PN would represent on sample of charas collected from the contraband recovered from Namatullah, Ex.PO will stand for one sample collected from the charas recovered from Amir Khan, Ex.PQ will represent one sample prepared from the opinion recovered from Taj Bahadar and Ex.PR will stand for one sample prepared from the opium recovered from Amir Khan accused/appellant. After holding as above, Abdullah Jan, Namatullah and Taj Bahadar accused/ appellants can be sentenced to the extent of one sample each, whereas, Amir Khan accused/appellant is to be sentenced to the extent of two samples *(one regarding charas and the second with regard to opium)*. Now, coming to the question of quantum of their sentence, we have the benefit of going through a judgment of Hon'ble Supreme Court of Pakistan in the case *"Khuda Bakhsh versus The State"* (2015 SCMR 735), wherein, the apex Court has held that "Court had the discretion to award any sentence, which it deemed fit in the facts and circumstances of a certain case."

7. In these circumstances the conviction of the accused/ appellants under Section 9(c) of the Control of Narcotic Substance Act, 1997 is sustained, however, while evaluating the quantum of sentence, in the light of the guidelines settled by the Hon'ble Supreme Court of Pakistan in the case *"Ameer Zeb versus The State"* (PLD 2012 Supreme Court 380) as well as *"Khuda Bakhsh versus The State"* (2015 SCMR 735), in the peculiar facts and circumstances of this case where the accused/appellants are tagged with this case since there arrest in the year 2009, according to the report of Superintendent Central Jail, Haripur dated 23.10.2013, at the time of report Amir Khan and Taj Bahadar accused/appellants had served out twelve years, seven months and eleven days of imprisonment, as such, by now both these accused/appellant have undergone a substantial period of about fifteen years confinement, whereas, according to the report of Superintendent, New Central Jail, Multan dated 24.06.2010 at the time of report, Namatullah and Abdullah Jan had served out seven years, eight months and eleven days each, thus by lapse of time till now these two accused/appellants have also undergone a substantial period of their entire sentence of imprisonment, which is considered sufficient to meet the ends of justice. The amount of fine of Rs. 100,000/- qua Abdullah Jan, Namatullah and Taj Bahadar and fine of Rs. 200,000/-qua Amir Khan, as imposed by the learned trial and the period of imprisonment in default whereof, shall remain intact. The case property shall be disposed of in accordance with law and the record of the learned trial Court be sent back immediately. Benefit of Section 382-B, Cr.P.C. is extended.

8. With above modification in the quantum of sentence, this criminal appeal is dismissed.

(R.A.) Appeal dismissed

PLJ 2016 Lahore 592
Present: **MUHAMMAD QASIM KHAN, J.**
Mst. **NAGHMA ZAFAR--Petitioner**
versus
EXECUTIVE DISTRICT OFFICER (EDUCATION) SIALKOT and others—Respondents

W.P. No. 9006 of 2015, decided on 8.4.2015.

Constitution of Pakistan, 1973--
----Art. 199--Constitutional petition--Recruitment process--Appointment letter was withdrawn on grounds that documents were found fake and difference between marks in certificate/degree and appointment letter--Photo copies of educational degrees were got verified--Validity--Application of petitioner correct marks of graduation were mentioned; hence, if any wrong marks were mentioned in appointment letter of petitioner then it is not his fault rather it is fault on part of appointing authority and petitioner cannot be penalized for same when documents appended with application of petitioner was proved to be correct; therefore, by no stretch of meanings said documents cannot be declared bogus. [P. 595] A

Constitution of Pakistan, 1973--
----Art. 199--Constitutional petition--Appointment letter was withdrawn--Fake documents--Filing of domicile and nikah nama after cut date--Not carry any weight--Validity--Stance regarding filing of domicile and nikah nama after due date, also does not carry any weight; even if nikah nama, kept aside with domicile copy of which is available on file of respondent, is sufficient to prove residence of petitioner--Petitioner has produced bogus documents during process of recruitment has no force at all as record shows that nikah of petitioner was performed prior to preparation and issuance of appointment, letter. [P. 595] B

Mr. Muhammad Iqbal Mohal, Advocate for Petitioner.
Mr. Imtiaz Ahmad Kaifee, Additional Advocate General with *Ms. Farida Khawar/*Respondent No. 2.
Date of hearing: 8.4.2015.

ORDER
Brief facts of the case are that petitioner applied for the post of SESE (A); he appeared in the whole recruitment process and ultimately appointment letter on contract basis was issued to her *vide* order dated 26-01-2010; petitioner accepted the same; joined her place of posting and started performing duty but suddenly without issuing to the petitioner any show-cause notice and providing opportunity of hearing her appointment letter earlier issued in her favour was withdrawn *vide* order dated 11-12-2010, on the grounds that her documents were found fake and difference between marks mentioned in certificates/degree and appointment letter; and also filing of domicile and Nikah Nama after cut date as per report of the Deputy District Education Officer (W), Tehsil Pasrur. Feeling aggrieved by the impugned order dated

11-12-2010, the petitioner approached this Court by filing Writ Petition No. 32566 of 2014, which was disposed of *vide* order dated 09-12-2014 by my learned brother Faisal Zaman Khan, J. in the following terms:

"After hearing the learned counsel for the petitioner, I am inclined to send a copy of this petition alongwith its annexures to Respondent No. 2, who while treating the same as part of the pending application of the petitioner shall decide the same in accordance with law through a speaking order after hearing the parties within a period of one month from the receipt of certified copy of this order."

After receiving this order Respondent No. 2 decide representation of the petitioner *vide* Order No. 4112/Lit(W) dated 22.12.2014 in the following terms:

"In compliance with orders passed by His Lordship Mr. Justice Faisal Zaman Khan, Judge Lahore High Court Lahore dated 09-12-2014 in Writ Petition No. 32566/2014, the SESE GGES, Adilpur Tehsil Pasrur District (Sialkot) against the termination orders issued by this office *vide* No. 2174/E-I(w) dated 11.12.2010 was correct as the documents of the petitioner were found fake/difference between obtaining marks of BA degree and her Nikkah Nama was also issued after due date.

In view of the above perspective, and judgment dated 27.10.2010 passed by Punjab Service Tribunal Lahore in Appeal No. 10322/2010 titled as *Shamila Inayat Ex: SESE vs. Education* the relevant Para is as under:

"According to Section 2(b) of Punjab Service Tribunal Act, 1974, "Civil Servant" means a person who is or who has been member of civil service of the province or who holds or has held a civil post in connection with the affairs of the province. Section 2(b)(ii) of the Act *ibid* speaks that it does not include a person who is or who has employed on contract. So the appellant cannot file an appeal to the Tribunal as he was neither a civil servant. As such this appeal is not maintainable.

I undersigned hereby reject the representation filed by petitioner heaving no merit."

2. Learned counsel for petitioner submits that in compliance with this Court's order dated 09-12-2014, the petitioner filed application before District Education Officer/Respondent No. 2 by appending all the educational certificates/degrees, and all the photocopies of said educational certificates/degrees were got verified by the department from the concerned quarters but the highhandedness on the part of departmental authority is apparent from the impugned order which has been passed without providing opportunity of hearing to the petitioner although directed by this Court; hence, petitioner filed this petition assailing both the impugned orders dated 11-12-2010 and 22-12-2014. Further submits that petitioner produced copy of domicile and Nikah Nama before preparation of merit list and also provided true copies of her academic certificates/degrees, which were got verified by the concerned Institutions/ University, thus, passing of impugned order is illegal and liable to be set aside.

3. On the other hand, learned Law Officer submits that petitioner has provided bogus educational certificates; domicile was issued after the last date of filing of application forms and for the same reason petitioner was not entitled to be appointed on the bases of bogus documents; hence, this writ petition is liable to be dismissed.

4. Arguments heard and record perused.

5. On Court's query, Respondent No. 2 present in Court submits that petitioner had filed application by appending photocopies of her educational degrees and in the said application numbers of degree for Bachelor of Arts marks were written as 560/800 but actually she had obtained 460/800 marks. It is admitted correct that all these documents were got verified by the concerned departments, wherein numbers obtained by the petitioner were mentioned. This Court with the assistance of learned Law Officer has examined the photocopy of degree for Bachelor of Arts issued to the petitioner from the official file of respondents and are appended with application form of petitioner, wherein it has been clearly mentioned that the petitioner had obtained 460/800 marks. Furthermore, on the application of petitioner correct marks of graduation are mentioned as 460/800; hence, if any wrong marks are mentioned in the appointment letter of the petitioner then it is not his fault rather it is the fault on the part of appointing authority and petitioner cannot be penalized for the same when documents appended with application of the petitioner is proved to be correct; therefore, by no stretch of meanings said documents cannot be declared bogus.

6. The stance of respondent regarding filing of domicile and Nikah Nama after due date, also does not carry any weight; even if Nikah Nama, kept aside with domicile copy of which is available on the file of respondent, is sufficient to prove the residence of the petitioner. The stance of respondents that the petitioner has produced bogus documents during the process of recruitment has no force at all as the record shows that Nikah of the petitioner was performed on 09.11.2008 prior to preparation and issuance of appointment, letter. This fact is not denied that the same was provided before the preparation of merit list; hence, if a proof of residence has been provided before preparation of merit list and this document establishes that the petitioner was resident of locality; thus, she cannot be ignored. Even domicile, which is also a proof of residence, establishes that the petitioner was resident of *"Jhatokey Thesil Pasrur District Sialkot"* since birth.

7. For what has been discussed above, it appears that Respondent No. 2 has proceeded against the petitioner due to some bias and *mala fide* and stigmatized the character of the petitioner without considering the consequences of allegation that *"the petitioner has provided bogus documents"*. Bias of Respondent No. 2 further establishes from order dated 22-12-2014, which has not been passed in letter and spirit of order dated 09-12-2014 passed by this Court in Writ Petition No. 32566 of 2014, wherein it has been categorically directed the Respondent No. 2 that he shall decide the application of petitioner in accordance with law through a speaking order after hearing the parties but while deciding application of petitioner, Respondent No. 2 did not provided any opportunity of hearing to the petitioner and passed the impugned order with *mala fide*; hence, in this regard specific question was put to Respondent No. 2 why she should not be burdened with heavy costs for not obeying the direction of this Court but Respondent No. 2 put herself on the mercy of this Court and learned Law Officer also submits that costs may not be imposed upon the respondent, first being lady and secondly she might have not understand the orders of this Court; thus, the respondent is directed to remain careful in future while implementing orders of the Courts.

8. In view of the above discussion, this petition is accepted and impugned orders dated 11-12-2010 and 22-12-2014 are hereby set aside. The petitioner is reinstated in service from the date of issuance of order dated 11-12-2010 and interregnum period will be considered as extraordinary leave without pay. The petitioner shall be entitled to all the other service benefits i.e. seniority, regularization and promotion etc. excluding financial benefits. However, it is made clear that if any other candidate is appointed against the post of petitioner, he shall not be disturbed and as admitted by Respondent No. 2 that some vacant posts are available, the petitioner shall be readjusted against the same in the school where she was earlier appointed or in any nearby school.

(R.A.) Petition allowed

PLJ 2016 Lahore 718
[Multan Bench Multan]
Present: **MUHAMMAD QASIM KHAN, J.**
Mst. **NABEELA KAUSAR--Petitioner**
versus
S.H.O. POLICE STATION CHOWK AZAM, DISTRICT, LAYYAH and 3 others—Respondents

W.P. No. 17018-Q of 2015, decided 27.1.2016.

Constitution of Pakistan, 1973--

----Art. 199--Pakistan Penal Code, (XLV of 1860), Ss. 371-A & 371-B--Quashing of FIR--*Sui juris* muslim girl admits--Lawful marriage--No adverse inference--MRC was produced before High Court--Place of raid was not public place--No respectable from locality was associated in proceedings--Validity--FIR was registered with *mala fide* or prosecution of criminal case was patently against provisions of law, or otherwise no case could possibly be made out, High Court had ample jurisdiction to quash FIR as no useful purpose would be served to keep such matters pending--Mere availability of alternate remedy would not constitute a bar upon jurisdiction of High Court to entertain a constitutional petition and to exercise its jurisdiction if so warrant--When registration of FIR and proceedings were patently illegal or illegality was floating on surface to refuse interference u/Art. 199 of Constitution would in fact amount to acting in aid of injustice and plea of alternate remedy loses its legal significance--Petition was allowed. [Pp. 720 & 721] A

Mr. Faisal Aziz Chaudhry, Advocate for Petitioners.

Mr. Mubashir Latif Gill, Assistant Advocate General for Respondents.

Date of hearing: 27.1.2016.

ORDER

Through this writ petition, *Mst.* Nabeela Kausar (petitioner) seeks quashing of FIR No. 421/2015 dated 02.11.2015 under Section 371-A, 371-B, PPC registered at police station Chowk Azam, District Layyah.

2. Briefly the facts as evident from the impugned FIR are that on 02.11.2015 at about 12.15 (noon), Muhammad Nawaz Khan ASI/complainant received spy information that *Mst.* Nabila Kausar (petitioner) and Noman Ijaz (Respondent No. 3) had got booked the house of Peer Abdul Latif situated in Mohallah Qureshian and were indulged in prostitution. On said spy information, when raid was conducted, Noman Ijaz and *Mst.* Nabila were found in the room, whereas, so many persons of the locality were available in the Courtyard, they took out *Mst.* Nabila and Noman from the room and produced them before the raiding party.

3. It is argued by learned counsel that FIR is based on absolutely cock and bull story, no such occurrence ever had taken place. The learned counsel contended with vigor that as a matter of fact *Mst.* Nabila is legally wedded wife of Noman Ijaz/Respondent No. 3 and in proof of said claim a copy of Nikah Nama as well as Marriage Registration Certificate have been produced before the Court. The learned counsel therefore, argued that by entering into marriage, neither the petitioner nor Respondent No. 3 has committed any offence, as such, further continuation of proceedings in the FIR would be a futile effort and sheer wastage of time.

4. The learned AAG has opposed this petition and argued that petitioner has more than one alternate remedies by way of approaching the police hierarchy or moving the learned trial Court, hence, the instant writ petition is not maintainable.

5. I have considered the arguments and also perused the record.

6. According to the contents of the FIR itself, on spy information raid was conducted by the police contingent on the house of Peer Abdul Latif. It has to be seen that the said place of raid was not a public place, rather it was owned and in the possession of a private individual i.e. Pir Abdul Latif. In this case neither search warrants were obtained by the police nor even any effort was made by the police in this behalf and furthermore, no respectable from the locality was associated in the impugned raid proceeding. In such a situation, the alleged police raid cannot be better terms than an "intrusion", which is an act prohibited by the Constitution, the law and the Holy Quran.

7. Expounding the scope of fundamental right relatable to Inviolability of dignity of man and privacy of the home, it is observed that with incorporation of Article 2-A in the Constitution of Islamic Republic of Pakistan, 1973, a constitutional guarantee has been offered to all the Muslims in Pakistan that they shall be enabled to order their lives both in individual and collective spheres in accordance with the teaching of Islam as set out in the Holy Quran and the Sunnah. Every citizen has been rendered entitled to the basic freedoms and rights enunciated by Islam. Reading of Article 2-A together with Article 227 of the Constitution, all State law and acts of State functionaries have to be examined on the touchstone of the provisions of the Holy Quran and Sunnah.

8. In any way, when *Mst.* Nabila claiming herself to be a sui-juris muslim girl admits, in clear and unambiguous terms admits to have entered into a lawful marriage with Noman Ijaz/ respondent, no adverse inference whatsoever can be drawn. In support of her claim of marriage, *Mst.* Nabila (petitioner) has annexed with this file copy of her Nikah Nama which shows date of her Nikah with Noman Ijaz on 16.10.2015 and further a Marriage Registration Certificate has also been produced before this Court, which also shows the date of her marriage with Noman Ijaz as 16.10.2015, whereas, the prosecution has no evidence at all to rebut the above specific assertion of the petitioner. In these circumstances, when on the face of it FIR is registered with *mala fide* or prosecution of a criminal case is patently against the provisions of law, or otherwise no case could possibly be made out, this Court has ample jurisdiction to quash the same, as no useful purpose would be Served to keep such matters pending, rather the same would amount to abuse of process of Court of law. Mere availability of alternate remedy would not constitute a bar upon the jurisdiction of this Court to entertain a constitution petition and to exercise its jurisdiction if the circumstances so warrant. When registration of FIR and proceedings thereon, are patently illegal or illegality is floating on the surface, to refuse interference under Article 199 of the Constitution of Islamic Republic of Pakistan, would in fact amount to acting in aid of injustice and plea of alternate remedy loses its legal significance.

9. For what has been discussed above, the instant writ petition is allowed, consequently FIR No. 421/2015 registered at Police Station Chowk Azam, District Layyah under Sections 371-A and 371-B, PPC, and all the proceedings thereon, are quashed.

(R.A.) Petition allowed

2017 P L C (C.S.) Note 61
[Lahore High Court]
Before Muhammad Qasim Khan, J
MUHAMMAD TAHIR IJAZ
Versus
GOVERNMENT OF PUNJAB through Secretary Housing and 2 others

Writ Petition No.30395 0f 2014, decided on 23rd September, 2015.

(a) Punjab Development of Cities Act (XIX of 1976)---
----Ss. 4, 7(xvi), 8 & 9---Constitution of Pakistan, Art.199---Constitutional petition---Civil service--- Upgradation of post--- Withdrawal of--- Locus poenitentiae, principle of---Applicability---Post of employee was upgraded but same was withdrawn subsequently---Validity---Summary for upgradation was moved in violation of Ss.7(xvi), 8 & 9 of Punjab Development of Cities Act, 1976 which was channeled without approval of competent authority---Order for upgradation was not intended to be used as a policy applicable to all concerned rather same was meant to benefit two specific persons---Employee was claiming benefit on the basis of summary which was forwarded by violating the procedure of law---Employee could not claim that prevalent procedure of law had been ignored---Order for upgradation of employee was illegal---Employee was not entitled to any relief on such ground even under the principles of equity---Purpose of moving summary of upgradation was not transparent rather same was arbitrary---Service structure of whole of the Organization had not been changed---No permanent post of employee had been created nor for such posts any qualification/experience or criteria had been prescribed rather for two person specific upgradation was ordered---Such specific promotion/upgradation was prejudicial to the public interest---Order for upgrading only the post of present employee being hit by the Principles of natural justice was not sustainable---Principle of locus poenitentiae could not be used where grant of relief was immoral, unfair or against the dictates of good conscience and fair play---High Court was not bound to grant relief to such employee on the ground that he was entitled to some relief---Constitutional jurisdiction being discretionary could not be granted to hold and retain ill-gotten gain---Order for upgradation had not been implemented---Constitutional petition being not maintainable was dismissed in circumstances. [Paras. 8, 9, 10, 11 & 12 of the judgment]

Pakistan Defence Officers Housing Authority and others v. Lt. Col. Syed Jawaid Ahmed 2013 SCMR 1707 ref.
Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others PLD 2001 SC 415 and The Engineer-in-Chief Branch through Ministry of Defence, Rawalpindi and another v. Jalaluddin PLD 1992 SC 207 rel.

(b) Constitution of Pakistan---
----Art. 199---Constitutional jurisdiction of High Court---Scope---High Court could not exercise its constitutional jurisdiction in case of private organisation having non-

statutory rules even if there was any illegality or jurisdictional defect. [Para. 6 of the judgment]

Abdul Wahab and others v. HBL and others 2013 SCMR 1383 and Noor Badshah v. United Bank Limited through President and 3 others 2015 PLC (C.S.) 468 rel.
Malik Muhammad Saeed Hassan and Imam Raza Chadhar for Petitioner.
Waqar A. Sheikh for Respondent.

ORDER

MUHAMMAD QASIM KHAN, J.--- Briefly the facts of the case are that petitioner was appointed Horticulture Assistant (BS-16) in the year 1986 by the Lahore Development Authority and thereafter, in the year 1994 the petitioner was promoted as Assistant Director Horticulture (BS-17). Afterwards on 21.08.1995 the post of the petitioner was upgraded as Deputy Director Horticulture (BS-18) and then petitioner was promoted as Director Horticulture (BS-19) on 21.02.2004. Subsequently, the Director General, Parks and Horticulture Authority (hereinafter to be called as PHA) through an office order No.PHA/DA/206 dated 31.03.2008 after approval of the relevant summary by the Chief Minister, further upgraded two posts including the present petitioner and one Misbah ul Hasan Dar from Directors Horticulture (North) and (South) BS-19 to Additional Directors General Horticulture (North) and (South) BS-20. After a few days of issuance of said upgradation, the same was withheld by the Director General Horticulture through order No.PHA/DA/221 dated 07.04.2008, and later-on the summary was moved to the Chief Minister for the same purpose and after approval of the summary the earlier order of upgradation of the post was withdrawn and these orders are under challenge through the instant writ petition.

2. The main stance of learned counsel for the petitioner is that the impugned office order dated 07.04.2008 passed by the Director General PHA, later-on summary approved by the Chief Minister and the order for withdrawal of the earlier order, are illegal and without jurisdiction, therefore, the instant writ petition is fully competent. Further contended that this Court has ample jurisdiction of judicial review against the administrative orders if passed on the basis of mala fide, ill will or by violating the provisions of law. On merits the learned counsel has argued that under section 6(6) of PHA Act, 2012 the only competent authority is the Board constituted under the said Act to take decisions and the Director General PHA alone could not take the impugned decision without putting up the issue before the competent Board, therefore, the same is nullity in the eyes of law. Lastly, it is argued that since an order upgrading the post of the petitioner was validly passed and had been implemented by submission of joining report by the petitioner, the same could not be recalled, thus, the impugned office order is hit by the principle of locus poenitentiae and that before passing the subsequent office order the petitioner was not afforded opportunity of personal hearing thus the impugned action is also violative of principle of audi alteram partem.

3. The learned counsel representing respondent PHA opposed this writ petition tooth and nail by arguing that PHA service rules are non-statutory, therefore, instant writ

petition is not maintainable. The learned counsel further argued that true facts regarding involvement of the petitioner in corruption cases and registration of FIR against him have not been disclosed by the petitioner in the instant writ petition; although the earlier office order dated 31.03.2008 was issued but the same was never implemented and the joining report submitted by the petitioner is one-sided and the petitioner never worked as Additional Director General Horticulture (South). Furthermore since the initial order was obtained by ignoring the relevant procedure of law and principle of parity and justice in the Organization, therefore, the Director General PHA who issued the earlier orders, again under the specific approval of the Chief Minister withdrew the said order, thus, entire relevant procedure was properly followed. The learned counsel for the respondent-PHA therefore, argued that on the basis of the earlier illegal order the petitioner cannot set his claim, thus has no locus standi to file the instant writ petition.

4. The learned counsel for the petitioner in reply to the argument advanced by learned counsel for the respondent about jurisdiction of this Court, contended that earlier two petitions i.e. Writ Petitions Nos.718/2014 and 9948/2014 on the same subject were filed by the petitioner and entertained, hence, this writ petition on the same principle is maintainable. Further submits that as the provisions of PHA Act have been violated, hence, in the light of case "Pakistan Defence Officers Housing Authority and others v. Lt. Col. Syed Jawaid Ahmed" (2013 SCMR 1707), this writ petition is maintainable and as the Chief Minister has no authority to abolish the post and such power vests with the Board constituted under PHA Act, hence, when the provisions of stature have been violated, this court has jurisdiction to entertain this petition.

5. I have heard the arguments of learned counsel for the parties at considerable length and perused the entire available record with their able assistance.

6. As shall be seen from the narration of the writ petition and also observed during the course of arguments advanced by learned counsel for the petitioner, there is no specific and clear denial to the fact that PHA is governed by non-statutory rules. The main emphasis laid by learned counsel about maintainability of instant writ petition is that since the impugned order is unlawful and without jurisdiction, therefore, this writ petition is maintainable. I am afraid when undeniably PHA is a private Organization having its non-statutory rules, in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, this writ petition is not maintainable and the argument of illegality or jurisdictional defect would not be sufficient for this Court to invoke its jurisdiction in this matter. Reliance has been placed on the case "Abdul Wahab and others v. HBL and others" (2013 SCMR 1383) and "Noor Badshah v. United Bank Limited through President and 3 others" (2015 PLC (C.S.) 468).

7. I have gone through the orders passed by this Court in the earlier writ petitions and observe that in those cases the aspect about non-statutory rules and jurisdiction of this Court were not discussed, hence, those judgments/orders could not be referred as precedent to me in this regard. In this respect an unreported judgment dated

20.06.2013 passed by this Court in Writ Petition No.11584/2013 "Haroon ur Rashid v. LDA etc.", is referred.

8. The contention of learned counsel for the petitioner that as the provisions of PHA Act have been violated, hence, this Court has jurisdiction, has no force at all. The facts and circumstances of above referred cases are entirely different. In this case when the summary of the petitioner was moved for person specific upgradation, at that time the law applicable to the Organization of the petitioner was Punjab Development of Cities Act, 1976 and at the time when summary moved on the application of the petitioner and another, the relevant provisions of Sections 7(xvi), 8 and 9 of the Punjab Development of Cities Act, 1976 were violated and the summary was channeled without the approval of the authority constituted under Section 4 of the said Act. This is not the case of the petitioner that authority delegated its powers in this regard to the Director General PHA. Further as discussed above, the office order dated 31.03.2008 was not intended to be used as a policy applicable to all concerned, rather astonishingly it was meant to benefit two specific persons including the present petitioner. Another aspect of the matter is that the petitioner himself is claiming benefit on the basis of summary which was forwarded by violating the procedure of law applicable at the relevant time whereby, he was upgraded, therefore, at later stage he could not invoke the ground that the procedure of law applicable now a days has been ignored, because the earlier order of upgradation was also issued in violation of the relevant procedure, thus was an illegal order. Therefore, even under the principle of equity, the petitioner is not entitled for any relief on this score.

9. Moreover, the procedure adopted by the Director General PHA for the purpose of moving summary of upgradation of petitioner and another to the Chief Minister was not transparent, rather arbitrary, which itself establish either any sort of pressure on the Director General or this practice can be termed as an example of nepotism and favoritism, because the service structure of whole of the Organization was never changed, no permanent posts of Additional Director General (North and South) were created nor for such posts any qualification/experience criteria, was prescribed, rather two person specific upgradations were ordered, which practice cannot be permitted in a civilized society run under the constitution and law. The practice of upgrading of post, person specific, without following the prescribed procedure and permanent change in organizational structure, results in heartburning of other employees and such person specific promotion/upgradation is always prejudicial to the public interest and it cannot be said to be based on intelligible differentia, rather destroy the service structure and such like order create frustration amongst other employees who serve with hard work, acquire job skill and believe on healthy competitive process amongst other colleagues. This is not the era where the law of the jungle could be applied, the days are bygones when such favoritism or nepotism could go unsighted for any reason whatsoever. The law is based on logical, solid and merit oriented foundation and the courts are ever free within constitutional sphere to ensure transparency and observance of merit at all levels. Favoritism or nepotism, as is reflected in the case in-hand, needs to be plugged to pave way for promotion and upgradation of employees as a policy within the parameters of certain criteria

applicable to all concerned, which ultimately is bound to result in overall development of our institutions and for this purpose person specific actions have to be discouraged. Therefore, on this score alone, the order dated 31.03.2008 upgrading only the post of the present petitioner being hit by the principle of natural justice, was not sustainable in law.

10. As regards the applicability of principle of locus poenitentiae, there is no cavil to the settled legal position that said principle cannot be used where grant of relief is immoral, unfair or against the dictates of good conscience and fair play and this Court is not bound to grant relief to such petitioner simply, because he is legally entitled to some relief and further writ jurisdiction being discretionary cannot be granted to hold and retain ill-gotten gain. Reliance is placed on the case "Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi and 3 others" (PLD 2001 SC 415).

11. Even the Hon'ble Supreme Court of Pakistan in the case "The Engineer-in-Chief Branch through Ministry of Defence, Rawalpindi and another v. Jalaluddin" (PLD 1992 SC 207) has held that "Locus poenitentiae is the power of receding till a decisive step is taken. But it is not a principle of law that order once passed becomes irrevocable and it is past and closed transaction. If the order is illegal perpetual rights cannot be gained on the basis of an illegal order." The respondents have categorically denied that the petitioner performed duty against the upgraded post and petitioner could not establish that he received a single penny as salary for the upgraded post, therefore, it cannot be said that the earlier order of upgradation had been implemented.

12. For what has been discussed above, this instant writ petition apart from being not maintainable, also does not carry any substance. Dismissed.

ZC/M-300/L Petition dismissed.

P L D 2017 Lahore 394
Before Muhammad Qasim Khan and Shams Mehmood Mirza , JJ
MUZAFAR ABBAS---Appellant
Versus
Maulana MUHAMMAD AHMAD LUDHIANVI and 31 others---Respondents

Election Appeal No.4-A of 2016, heard on 11th November, 2016.

Representation of the People Act (LXXXV of 1976)---
----Ss. 14 & 19---Constitution of Pakistan, Arts. 62 & 63---Anti-Terrorism Act (XXVII of 1997), S. 11-EE---Election for the seat of Member Provincial Assembly---Amendment in the nomination papers---Objection---Inclusion of name of candidate in the notification issued under S.11-EE of Anti-Terrorism Act, 1997---Effect---Scrutiny of nomination papers---Procedure---Concealment of assets---Effect---Candidate moved application for correction of entries with regard to assets of his dependent son which was accepted---Contention of contesting candidate was that false declaration was filed by concealing the assets by the candidate---Validity---Election Tribunal was not expected to assess the taxes of the candidates; Government was only competent to assess the taxes---No one could be disqualified to contest the election nor could be declared wilful defaulter by mere an assertion that candidate had not paid income tax or any other tax or dues which were yet to be assessed by the Authority---Candidate would be disqualified to contest election inter alia if he had been convicted by a Court of competent jurisdiction for propagating any opinion or acting in any manner prejudicial to the ideology of Pakistan---Mere adding name of any person in the Fourth Schedule of Anti-Terrorism Act, 1997 could not be equated with conviction---Order passed under S.11-EE of Anti-Terrorism Act, 1997 could not be equated with "conviction" for all intents and purposes---Candidate could not be said to have worked against the integrity of the country or ideology of Pakistan by inclusion of name in the notification under S.11-EE of Anti-Terrorism Act, 1997---Specific date and time was given for scrutiny of nomination papers by the Returning Officer but same was adjourned without any order---Returning Officer was bound to inform the Election Commission for adjournment of scrutiny proceedings and pass an order in writing for the next date---Returning Officer could allow any defect to be remedied if it was not of substantial nature---Candidate had filed a declaration which was incorporated in the nomination papers that there was no other property except mentioned in the nomination papers in his name and in the name of his dependents---High Court observed that relevant information must be provided fairly and nothing must be concealed---If assets of a candidate, his spouse or dependent were concealed in the nomination papers, he could be disqualified on that score alone---Person who wanted to represent a large number of people if elected to participate in the legislation must not be so casual in filing declaration and providing the details in the relevant columns of his nomination papers---Non-providing the details of assets of dependent child could not be considered as minor omission and could not be allowed to be remedied---Permission granted by the Returning Officer by allowing the application to amend the nomination papers was beyond the scope of S.14 (3) (d) (ii) of Representation of the People Act, 1976---Candidate was aware with regard to

criminal cases pending against him but he did not mention details of the same and mentioned "NIL" in the relevant column which was concealment of fact---Candidate had concealed the assets of his dependant son at the time of filing of nomination papers and verified the nomination papers through declaration---Personality and pen-picture of the candidate must be before the electoral at the time of casting their votes---Candidate, in circumstances could not be said to be a sagacious, righteous, non-profligate, honest and ameen person to contest election---Orders of Returning Officer accepting the nomination papers of the candidate and granting permission to amend the same were illegal which were set aside---Candidate was held to be disqualified to contest election---Appeal was allowed accordingly.

Mulchand v. Smt. Indra and others PLD 1985 Kar. 362; Rashid v. Returning Officer Nankana Sahib PLD 2013 Lah. 509; PLD 2013 SC 239, Rao Tariq Mehmood v. Election Tribunal, Punjab, Lah. PLD 2003 Lah. 169 and Muhammad Ilyas v. Returning Officer and others PLD 2016 Lah. 179 ref.
Chaudhry Abid Raza v. Election Tribunal Punjab/Lahore High Court, Lahore and 3 others PLD 2008 Lah. 200 and Sheikh Muhammad Akram v. Abdul Ghafoor and 19 others 2016 SCMR 733 distinguished.
Mian Najeem ud Din Owasi and another v. Amir Yar Waran and others PLD 2013 SC 482; Barkhurdar v. Appellate Tribunal/Additional District and Sessions Judge, and 3 others PLD 2016 Lah. 101; Irfan Gul Magsi v. Haji Abdul Kahliq Soomro and others 1999 PTD 1302; Rana Muhammad Tajammal Hussain v. Rana Shaukat Mahmood PLD 2007 SC 277 and Muhammad Ahmad Chatta v. Iftikhar Ahmad Cheema and others 2016 SCMR 763 ref.
Syed Kalim Ahmad Khurshid and Muhammad Umar Riaz for Appellant.
Rana Baleegh ur Rehman for Respondent No.1.
Ch. Muhammad Imtiaz Elahi, Stnding Counsel for the Federation of Pakistan.
Date of hearing: 11th November, 2016

JUDGMENT
MUHAMMAD QASIM KHAN, J.--By this single judgment, we propose to decide two appeals i.e.. Election Appeals Nos. 04-A/2016 and 06-A/2016, as both these appeals have arisen out of similar facts and circumstances.

2. Brief facts of the case are that in pursuance of provisions of Clause (4) of Article 224 of the Constitution of the Islamic Republic of Pakistan (hereinafter to be referred as "the Constitution") read with Article 218(3) thereof and Section 108 of the Representation of the People Act, 1976 (LXXXV of 1976) (hereinafter to be called as "ROPA"), the Election Commission of Pakistan (hereinafter to be referred as the "Commission") called upon the electors of the Constituency No.PP-79 Jhang-II, to elect a Member to fill the set from the said Constituency, which had become vacant due to de-notification of Mst. Rashida Yaqoob, Member of the Provincial Assembly of Pakistan as void and schedule of the election was announced. Muhammad Ahmad Ludhianvi (hereinafter to be called as "respondent") along with others filed nomination papers before the returning officer (respondent No.2). Sh. Sheraz Akram (appellant in Election Appeal No.04-A of 2016) and Muzafar Abbas (appellant in

Election Appeal No.06-A of 2016), also filed their nominations papers and on the date fixed for scrutiny, they both filed written objections against the respondent. The respondent filed an application on 02.11.2016 for correcting the entries in Column No.11 about assets of his dependent son. The objections filed by both the appellants were dismissed by the Returning Officer-respondent No.2 and application for correction of entry filed by the respondent was allowed vide order dated 02.11.2016 and he was permitted to annex the relevant documents with his nomination papers. These order have been assailed before this Tribunal by way of these appeals under subsection (5) of Section 14 of the ROPA, on the ground that respondent had not disclosed true facts in column Nos.6, 11, 13 and 14 and filed false declarations by concealing the assets of his dependent son-Saif Ullah; the respondent had not filed Tax Return, though he visited abroad on number of times and that the respondent is member of a proscribed organization, his name has been entered under section 11-EE of the Anti-Terrorism Act, 1997 (hereinafter to be called as "the Act") in 4th schedule and his bank account (mentioned in the nomination papers) have been seized by the State Bank of Pakistan on the ground that his name has been included in the 4th schedule and the respondent filed false affidavit with respect to pending criminal cases against him.

3. We have heard Muzaffar Abbas, appellant in person and learned counsel representing the appellant in Election Appeal No.04-A/2016.

4. It has been submitted on behalf of the appellants that non-mentioning of the assets of dependent son is the defect of substantial nature which could not be rectified later on and the ground mentioned in the application moved by the respondent for correction of the entry in column No.11 did not disclose any justification as (oversight) is no ground for amendment in any petition. Placed reliance on the case "Mulchand v. Smt. Indra and others" (PLD 1985 Karachi 362). Further argued that the respondent has concealed the material facts, as he has to write all the details required in the nomination papers on the cut date i.e. the date for filing of the nomination papers and, after fling the nomination papers, he could not be allowed to amend any column which is of substantial nature. Further submits that the respondent has also not provided the detail of 19 criminal cases pending against him as per report appended in Election Appeal No.06-A/2016 (at page 90) prepared by the officials of the concerned Police Station, as per stance of the learned counsel for appellant, and the respondent submitted a declaration at the end of column No.18 that no other property, except mentioning in the Nomination Form, is in his name or in the name of his wife or dependent persons and he also declared (on oath) in column No.6 of the nomination papers about the pending criminal cases by writing the word as NIL'; hence, he has concealed the material facts. The learned counsel by referring the case "Chaudhry Abid Raza v. Election Tribunal Punjab/Lahore High Court, Lahore and 3 others" (PLD 2008 Lahore 200), adds that the respondent is a member of proscribed Organization under the Act and his name has been entered in the 4th Schedule under section 11-EE of the Act since, 2011 and being member of Banned Organization and by putting the name of the respondent in 4th Schedule by the statutory authorities, he did not qualify to contest the election as by 21st amendment in Article 175 of the

Constitution, the proceedings of statutory authority under the Act are protected. Further added that the respondent travelled number of times out of Pakistan and spent huge amount in this respect, but he has not paid the income tax. Learned counsel further submits that the order of the Returning Officer to allow the amendment for including the assets of the dependent son in the nomination papers is against the law and is liable to be set aside. Learned counsel also submits that in the light of order dated 02.11.2016 passed on the application of the respondent for correction of entry in the nomination papers, now there are two affidavits and both contradict each one. One affidavit declares that respondent's dependent son Saif Ullah had no assets and other provides that dependent son of the respondent had the assets, thus, by these contradictory declarations, it is established that the respondent is not a righteous persons, therefore, his nominations papers be rejected for filing false declarations and false affidavits. In support of above contentions, reliance was placed on the cases "Mulchand v. Smt. Indra and others" (PLD 1985 Karachi 362), "Rashid v. Returning Officer Nankana Sahib" (PLD 2013 Lahore 509), (PLD 2013 SC 239), "Rao Tariq Mehmood v. Election Tribunal, Punjab, Lahore' (PLD 2003 Lahore 169), "Mian Najeem-ud-Din Owasi and another v. Amir Yar Waran and others" (PLD 2013 SC 482), "Barkhurdar v. Appellate Tribunal/Additional District and Sessions Judge and 3 others" (PLD 2016 Lahore 101), "Muhammad Ilyas v. Returning Officer and others" (PLD 2016 Lahore 179), "Chaudhry Abid Raza v. Election Tribunal Punjab/Lahore High Court, Lahore and 3 others" (PLD 2008 Lahore 200).

5. On the other hand, the learned counsel representing the respondent in both the appeals submits that the assets of dependent son, Saifullah inadvertently could not be mentioned in the nomination papers and there was no reason to conceal these assets as in the year 2013 the respondent contested election in NA-89/Jhang and the assets of his dependent son were disclosed there. The learned counsel submitted the copies of nomination papers along with objection petitions filed and the orders passed by the Returning Officer of NA.89-Jhang held in the year 2013, the same are placed on the file. The learned counsel further adds that the respondent moved application to correct the nomination papers and as this amendment is not of substantial nature, hence, the Returning Officer rightly passed the order on the application of respondent No.1 and the respondent rightly filled column No.6 of the nomination paper regarding the criminal cases as he has to provide the information only with respect to the cases pending against him six months prior to the filing of nomination papers and the respondent was not facing the trial in any criminal case and the number of cases relied upon by the appellant, for the first time came into the knowledge of the respondent at the time of objections. Further submits that the respondent was not facing the trial in any criminal case; hence, he has not concealed any fact. Adds that the respondent was not aware about any order passed against him under section 11-EE of the Act and on the basis of order produced by the appellant, the respondent could not be disqualified to contest the election. In support of his assertions, learned counsel placed reliance on the case "Sheikh Muhammad Akram v. Abdul Ghafoor and 19 others" (2016 SCMR 733).

6. Learned Law Officer representing the Federal Government submitted certain documents about the order passed by the authority under section 11-EE of the Act,

and list of the cases registered against the petitioner. Copies of some relevant documents have been placed on file.

7. We have heard the learned counsel for the parties, perused the record and also examined the case law referred on behalf of the parties.

8. So far as the contention of the learned counsel for the appellant that respondent No. 2 travelled abroad a number of times and as per information provided in the nomination papers he earned a lot but he has not paid the income tax, is concerned, we are afraid while sitting as Tribunal we are not expected to assess the taxes of the candidates. Independent departments have been established by the Government of Pakistan and the Provincial Governments, and under the relevant law the authorities are competent to assess the taxes. Therefore, by mere an assertion that any contesting candidate has not paid the income tax or any other tax or dues which were yet to be assessed by the authority, he cannot be disqualified to contest the election nor can be declared willful defaulter. Steering thoughts in this respect have been gathered from the dictum laid down in the case titled Irfan Gul Magsi v. Haji Abdul Khaliq Soomro and others (1999 PTD 1302) wherein it has been held as under:
"This is a subject exclusively within the domain and authority of Taxation Authorities who may be seized of the matter. Unless the Taxation Authorities have assessed the valuation of the assets of the respondent, determined the tax due and payable thereon, it is neither lawful nor warranted in the circumstances to usurp the powers of these authorities .....This Tribunal is not possessed of the power of Taxation Authorities and it cannot assume the role and jurisdiction to assess the valuation of the assets of the respondent and render him liable to payment of tax which in law is available to hierarchy in Tax Authorities."

9. The stance of the appellant that the respondent is disqualified to contest the election, as his name has been added in 4th Schedule of the Act, is also without any weight. Qualifications and Disqualification for membership of Majlis-e-Shoora (Parliament) have been respectively provided in Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan, 1973, and on perusal thereof, it appears that only Articles 63(g) and 63(h) of the Constitution attract in the case of a convict person and furthermore, a person would be disqualified to contest election inter alia if he has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner prejudicial to the ideology of Pakistan, or the sovereignty, integrity or security of Pakistan or its judiciary or defames or brings into ridicule the judiciary or the Armed Forces of Pakistan and if any person has been convicted for moral turpitude. An order under Section 11-EE of the Act is passed by the executive authority to impose some restrictions on the movement and liberty of a person and just some preventive measures are adopted by the executive authority in order to ensure law and order situation and to avoid any untoward incident which may be a criminal offence, if committed. Thus mere adding name of any person in the 4th Schedule of the Act, cannot be equated with the conviction mentioned in above quoted Article of the Constitution because the conviction is a sentence either in imprisonment or fine which is imposed after framing the charge, recording of

evidence and also recording the stance of the accused in his defence and this process when finally results, either in acquittal or conviction. Hence an order passed under Section 11-EE of the Act cannot be equated with conviction for all intents and purposes, whereas, disqualification to contest an election only attracts against the person convicted under any law in view of Articles 63(g) and 63(h) of the Constitution. The case law "Chaudhry Abid Raza v. Election Tribunal Punjab/Lahore High Court, Lahore and 3 others" (PLD 2008 Lahore 200), referred by learned counsel for the appellants is not of much benefit to him for the reason that same is not backed by the Constitution and it appears that either proper assistance was not rendered at that time and the restrictions in Article 62(f) of the Constitution for a declaration by the court of law, was not there, as this restriction was imposed by substituting new Article 68 through 18th amendment for Article 62 of the Constitution.

10. The argument of the learned counsel for the appellant with respect to 21st Amendment in the Constitution has no force at all because by adding the proviso to Article 175 protection has been provided to the proceedings carried out under the Acts mentioned at Serial Nos. 6, 7, 8 and 9 of sub-part-III of Part-I of the First Schedule. Relevant provision is reproduced as under:

"Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial Nos. 6, 7, 8, and 9 of sub-part-III of Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect."

In sub-part-III of Part I of First Schedule of the Constitution at Serial Nos.6, 7, 8, and 9 following Acts/Ordinance are mentioned:

i) (6) The Pakistan Army Act, 1952 (XXXIX of 1952)
ii) (7) The Pakistan Air Force Act, 1953 (VI of 1953)
iii) (8) The Pakistan Navy Ordinance, 1961 (XXXV of 1961)
iv) (9) The Protection of Pakistan Act, 2014 (X of 2014)

The respondent has not been proceeded against under any of the clause of above-referred laws. The argument of learned counsel for the appellant that in the light of phrase in the new added proviso to Article 175 of the Constitution "who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect" the respondent's case is covered being activist of Sipah-e-Sahaba Pakistan/ Lashkar-e-Jhangvi, a proscribed. organization, we have given our anxious consideration to the arguments advanced by both the parties in this respect, but we are of the view that by no stretch of imagination, any proceedings carried out under section 11-EE of the Act, could be protected by new amendment in Article 175 of the Constitution. Additionally the word "who" has been written before the last phrase. This is a joining word to the earlier part of the phrase, hence, last phrase could not be read separately, rather it will be read with earlier part of the amendment by which only four statutes are included, names have been referred above. Had there been any intention of the legislative body to include the Act (Anti-Terrorism Act, 1997), they could do it at the time of latest amendment. So we conclude that the proceedings carried out under the Anti-Terrorism Act, 1997 have no nexus with the above referred four statutes.

11. Although the learned counsel for the appellant argued the case with reference to Article 62(g) of the Constitution, but we have noticed that except mere assertion no material is available on the file, whereas, we have no doubt in our mind to hold that simple inclusion of name in the notification under 11-EE of the Act, respondent cannot be said to have worked against the integrity of the country or ideology of Pakistan, therefore, the said argument of the learned counsel is repelled.

12. Before discussing the issue of amendment in the nomination papers, another important aspect which needs consideration is that under section 14(6) of ROPA, at the time of receiving the nomination papers, the Returning Officer shall have to inform the concerned person of the time and place at which he shall hold scrutiny and under section 19 of ROPA when proceedings relating to nomination, scrutiny or withdrawal, for the reasons beyond the control of the Returning Officer, cannot, take-place on the date fixed therefor, the Returning Officer may postpone such proceedings, for reasons to be recorded in writing, and sub-section (2) of Section 19 of the ROPA further imposes a duty on the Returning Officer that when the proceedings are postponed he shall inform the Commission of his having done so. Perusal of the nomination papers shows that at the time of receiving of the nomination papers for scrutiny on 01.11.2016 (date fixed for scrutiny of the nomination papers) a specific .date and time i.e. 01.11.2016 at 2.00 p.m. had been given. Returning Officer has not passed any order under section 19 of ROPA for adjournment of the proceedings with reasons. Subsection (2) of Section 19 of ROPA imposes a condition for providing information to the Commission and by bare reading of Section 19 it appears that this section is mandatory in nature and even otherwise, it is duty of the Returning Officer to pass an order in writing for the next date, if any matter is adjourned, in the interest of justice to establish that proceedings are being carried out fairly. What was the reason, is best known to the Returning Officer that why, without any written order, he postponed the proceedings of scrutiny for the next date i.e. 2nd of November, 2016. Although, it is alleged by learned counsel for the appellant that only time was provided to the respondent for filing of application in this respect, although absence of any order for adjournment of scrutiny proceedings, speaks a volume, but we restrain ourselves from making any observation in this regard. However, it is establish from the record that application for amendment in nomination papers was filed on 02.11.2016, the objectors were summoned and then application was allowed and it was not filed on 01.11.2016, the day when nomination paper were fixed for scrutiny by a written order.

13. We have carefully considered the arguments of learned counsel for the parties with respect to permission of the Returning Officer for amendment in the nomination papers. Under section 14(3)(d)(ii) of ROPA, the Returning Officer could allow any defect to be remedied forthwith, if it is not of substantial nature. In this case the respondent filed a declaration, which is incorporated in the nomination papers that there is no other property except mentioned in the nomination papers in his name and in the name of his dependents. When a declaration is filed then law requires that the relevant information must be provided fairly and all care and caution must be taken to avoid danger or mistake and nothing must be concealed. If the assets of a candidate,

his spouse or dependent are concealed in the nomination papers, he could be disqualified on this score alone and this disqualification is due to the reason that a false declaration has been filed, therefore, such particulars must have to be written with all care and caution. In this respect, it may be added here that a declaration itself is legal warranty that if such declaration is proved to be false, it must carry some adverse consequences. A person who wants to represent a large number of people if elected to participate in the legislation, must not be so casual in filing declaration and for providing the relevant details in the relevant columns of his nomination papers. Non-providing the details of assets of dependent child could not be considered as minor omission because the details have to be verified by declaration, and thus, become amendment of substantial nature and could not be allowed to be remedied and the permission granted by the Returning Officer by allowing the application to amend the nomination papers in above respect, is beyond the scope of Section l4(3)(d)(ii) of ROPA. In this context we would refer the case "Barkhurdar v. Appellate Tribunal/Additional District and Sessions Judge, and 3 others" (PLD 2016 Lahore 101) and "Rana Muhammad Tajammal Hussain v. Rana Shaukat Mahmood" (PLD 2007 SC 277).

14. The respondent under oath filled column No.6 of the nomination papers with respect to criminal cases pending against him as "NIL". A perusal of the objections filed by Sh. Sheraz Akram (appellant) show that he had mentioned eleven cases in his written objections pending against the respondent and list from the concerned police showed nineteen criminal cases against respondent, out of whom in four cases respondent earned acquittal. The learned Law Officer also submitted an incomplete report, which perhaps due to paucity of time could not be completed, which reflect thirteen criminal cases against the respondent, in four of those cases the respondent had been acquitted, in one case cancellation report had been submitted and remaining are still pending and as per report two cases were pending trial. The appellants have also submitted copies of reports under section 173 Cr.P.C. along with interim orders passed by the courts in case FIR No.409/2012 Police Station Daska and FIR No.44/2014 Police Station City Jhang and from perusal of these documents it appears that name of respondent is mentioned in these reports and he has been declared proclaimed offender after adopting legal proceedings by the court of competent jurisdiction. The stance of learned counsel for respondent about lack of his knowledge regarding such criminal cases, has no force at all, because the documents submitted by the learned law officer and above referred two reports submitted by learned counsel for the appellants, clearly establish that some of the cases are under trial before different courts against the respondent and he has not written these facts in relevant column of his nomination papers, filed under oath. In this context, we have also observed that the learned counsel representing the respondent, during the course of arguments, produced documents with respect to election held in 2013 in the constituency of NA-89/Jhang and those documents include the objections filed by the voter of the said constituency, wherein there is clear mention of twelve criminal cases against the respondent. Furthermore, during the said election, objections were also filed by another proposed candidate namely Sheikh Waqas Akram against the present respondent and along with those objections a list of eleven criminal cases was given

with details of the FIRs. This detail also include FIR No.409/212, in which the respondent has been declared as proclaimed offender by adopting proper procedure of law. Hence, it could not be said that respondent was not aware about these cases pending against him because from the available record it is established that most of the cases were mentioned in the objection petition filed by the objectors in general election-2013 for the constituency of NA-89-Jhang. Hence, when he was aware about criminal cases against him, non-mentioning of details thereof and mentioning "NIL" in the relevant column, clearly amount to concealment of facts. Relevant para-6 of the nomination papers (table) is drawn hereunder:-

15. As it has been held above, the respondent has concealed the assets of his dependent son on cut-date i.e. at the time of filing of nomination papers and verified the nomination papers through declaration. He has also concealed the fact of criminal cases pending against him within six months before the filing of the nomination paper and this fact too has been verified on oath. One of the purpose for such information is that the personality and pen-picture of the proposed candidate must be before the electoral at the time of casting their votes but here in this case these facts have been concealed by the respondent and he has also provided false information on oath that no criminal case is pending against him, therefore, he cannot be declared as sagacious, honest and ameen. In this respect we seek guidance from the case "Mian Najeem-ud-Din Owasi and another v. Amir Yar Waran and others" (PLD 2013 SC 482), wherein, the apex Court held as under:-
"Notwithstanding whether the condition of being a graduate or having a degree equal to the requisite academic skill was not available subsequent to the General Election 2008, and the judgment in the case of Muhammad Nasir Mahmood and others v. Federation of Pakistan through Secretary M/o Law (PLD 2009 SC 107 yet if a candidate has made a declaration in the column meant for academic qualification and declared himself to be a graduate, but subsequently, it is found that he was not a graduate then he would equally be liable to face the consequences under Articles 62 and 63 of the Constitution or the other relevant provisions of the P.P.C. It is further to be observed that once there is a disqualification, it is always a disqualification; therefore, while making declaration in the nomination papers, a candidate must provide, a crystal clear statement about his credentials and antecedents. There is no scope of making or providing information, which is not correct, because he is one of the persons whom the electorate of a constituency, which may be having a strength of 50 thousand, are going to elect their representative. Therefore, whatsoever, he possesses in terms of academic qualification, bank credits and taxes etc. he shall have to declare each and every thing required for the qualification to contest the election."
The case "Muhammad Ahmad Chatta v. Iftikhar Ahmad Cheema and others" (2016 SCMR 763), has also been gone through by us before forming the above view.

16. As regards the case law "Sheikh Muhammad Akram v. Abdul Ghafoor and 19 others" (2016 SCMR 733), referred by learned counsel for the respondent, with all respect to the dictum laid down therein, we have observed that said case is distinguishable for the reason that in the cited case relevant person was charged under a minor offence under traffic laws, no objection was raised at the time of filing of

nomination papers and first time the objection was raised in the election petition before the Election Tribunal and moreover, he was acquitted from the charge. The information of acquittal in any criminal case is not required to be written in the nomination papers, because as per para-6 of the nomination papers, the proposed candidate is only required to write the information for criminal cases pending against him six months prior to the filing of the nomination papers.

17. For what has been discussed above, we hold that the order dated 02.11.2016 passed by the Returning Officer-respondent No.2 for accepting the nomination papers of respondent No.1 and also the order of the same date vide which permission to the respondent was granted to amend the nomination papers about assets of his dependent son, are patently illegal and thus, set-aside. By filing false declaration in the nomination papers about assets of dependent son and also filing false affidavit about pending criminal cases against him, the respondent cannot be said to be a sagacious, righteous, non-profligate, honest and ameen person to contest the election. Resultantly, respondent is held to be disqualified to contest the bye-election from Provincial Constituency PP-78 Jhang-II and his nomination papers for the said constituency stand rejected.

18. This judgment shall form the detailed reasons of our short order dated 11-11-2016.

ZC/M-207/L Appeal allowe

P L D 2017 Lahore 479
Before Muhammad Qasim Khan and Sardar Muhammad Sarfraz Dogar, JJ
ALAMDAR HUSSAIN---Petitioner
Versus
NATIONAL ACCOUNTABILITY BUREAU through Chairman and others---Respondents

Writ Petition No.5948 of 2016, decided on 19th December, 2016.

(a) National Accountability Ordinance (XVIII of 1999)-
--S. 9(b)---Pail---Accused cannot be left at the mercy of investigating agency to establish charge of a particular offence against him and to investigate the matter---High Court has ample jurisdiction while deciding bail application after examining available record whether any particular offence under which investigating agency is trying to arrest accused prime .facie attracts in circumstances of the case or not.

(b) National Accountability Ordinance (XVIII of 1999)---
----S. 3---Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), S.4---Overriding effect of Financial Institutions (Recovery of Finances) Ordinance, 2001---Scope---Financial Institutions (Recovery of Finances) Ordinance, 2001 is not only a special law but same being also later in time prevails over provisions of National Accountability ordinance, 1999---To deal with dispute inter se Bank and Customer, Financial Institutions (Recovery of Finances) Ordinance, 2001 has its own comprehensive mechanism to deal with.

Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd. PLD 2012 SC 268 and Mahmood Khan Achakzai and others v. Federation of Pakistan and others PLD 1997 SC 426 rel.

(c) Lenity, rule of--
--Scope-Where accused can be tried or punished under two different statutes then 'Rules of Lenity' (a rule of construction of statutes that criminal statute ambiguities are resolved in favour of defendant or accused) would also attract in favour of accused person.

(d) Administration of justice-
-When law requires a thing to be done in a specific manner, it must tie done in that way or not at all.

Raheel Rashid v. National Accountability Bureau, Islamabad through Chairman and 2 others PLD 2005 Lah. 692 rel.

(e) National Accountability Ordinance (XVIII of 1999)---
----Ss. 3, 9(b) & 31-D---Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), S. 4---Pre-arrest bail, confirmation of---Suit for recovery of finance---Wilful default---Petitioner was accused in a reference by National Accountability

Bureau on complaint of Bank---Complainant Bank had earlier instituted recovery suit but later also invoked jurisdiction of National Accountability Ordinance, 1999---Plea raised by accused was that provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 had overriding effect in cases of such wilful default---Validity---National Accountability Bureau did not have authority in the matter and their actions against petitioner led to an inference of mala fide on their part---Finance facility subject matter of National Accountability Bureau reference was duly secured against adequate collateral in addition to other documents---Bank had not claimed that documents prepared for sanction of loan were bogus; property subject matter of mortgage was non-existent; such property was not in specific ownership of petitioner or that the same was already under some encumbrance---Despite such clear position, without touching factual aspects of allegations against customer, action of complainant Bank in filing complaint before National Accountability Bureau and further proceedings by National Accountability Bureau under National Accountability Ordinance, 1999, including attempted arrest of the customer per force of National Accountability Ordinance, 1999, was indicator of mala fide on part of complainant as well as National Accountability Bureau---Pre-arrest bail was confirmed in circumstances.

Muhammad Asif Nawaz v. ASJ and others (2014 PCr.LJ 1 = 2014 CLD 45; Abid Mahmood Malik v. Station House Officer, Police Station Margalla and others 2013 CLD 508; Muhammad Iqbal v. Station House Officer, Police Station Hajipura, Sialkot and 2 others PLD 2009 Lah. 541; Suo Motu No.10 of 2015 out of Civil Petitions Nos.1377 and 1378 of 2015 ref.

Muhammad Amjad Pervaiz, Muhammad Nawaz Chaudhry, Sultan Mehmood Khan and Anwaar Hussain along With the Petitioner.

Syed Faisal Raza Bokhari, Special Prosecutor for NAB with Muhammad Ramzan Khan, Deputy Director/1.0.

Nadeem Siddiqui for Bank of Punjab.

ORDER

By order dated 24th February 2016 this Court admitted the petitioner to ad interim pre-arrest bail as he anticipated his imminent arrest by the National Accountability Bureau (NAB) in connection with an inquiry (later on upgraded into investigation and ultimately a Reference No.68/2016 also submitted) under the National Accountability Ordinance, 1999 (hereinafter to be referred as "NAO, 1999") against him with respect to the offence of corruption and corrupt practices by misuse of authority, illegal gains through corrupt/dishonest/illegal means, which is cognizable under section 9(a), punishable under section 10 of NAO, 1999 and schedule thereto.

2. Precisely, the facts necessary for adjudication of instant petition are that on receipt of complaint from the Bank of Punjab (hereinafter to be called as "the Bank") against Alamdar Hussain (petitioner) and others on the allegation of misappropriation of Bank leased assets, an inquiry was authorized by the National Accountability Bureau which was later on up-graded into investigation. As per investigation, the petitioner Alamdar Hussain applied in 2006 for loan facility of Rs.2.1 million for the

construction of Shed and Rs.7.00 Million for purchase of 175 buffaloes under Kissan Dost Livestock Development Scheme introduced by the Bank of Punjab. The loan facility was granted to the accused only for stated purposes of construction of shed for dairy farm and purchase of buffaloes, whereas, the accused Alamdar Hussain dishonestly and fraudulently disposed of the bank leased animals and misappropriated the proceeds thereof in connivance with Other accused persons. The accused did not repay even a single penny to bank. Consequently, the accused misappropriated the funds of the bank and caused loss of Rs.22,299,848/- to the bank.

3. Learned counsel for the petitioner argued that above proceedings under the NAO, 1999 were initiated against the petitioner on receipt of complaint from the Bank of Punjab against Alamdar Hussain (petitioner) and others on the allegation that he procured finance facility from the Bank of Punjab (BOP) under Kissan Dost Finance Scheme. The finance facility procured by the petitioner was duly secured against adequate collateral mortgage and security and due to the circumstances beyond his control, the petitioner could not earn the expected profit and suffered substantial loss and damage, therefore, he could not return the amount as per agreement and the bank filed a suit for recovery of loan before the Judge Banking Court, Lahore which is still pending. The bank also filed a private complaint under section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter to be called as the "Ordinance") before Banking Court No. IV, which was dismissed at preliminary stage vide order dated 07.11.2014. The bank also approached respondents Nos.1 and 2 for initiation of proceedings under NAO. The learned counsel adds that matter in hand is between a customer and the Bank; the Financial Institutions (Recovery of Finances) Ordinance, 2001 being a special law has laid comprehensive mechanism for prosecution of offences relating to a customer and the Bank; the Ordinance, 2001 ibid is not only later in time, the same has also been given overriding effect over other laws, therefore, the NAB does not have the jurisdiction to intervene into the matter on this score alone. Further submits that offence of criminal breach of trust is not mentioned in the schedule of NAO, 1999, thus, the assumption of jurisdiction by the NAB in the peculiar circumstances of this case, is also an attempt to convert civil lis into criminal litigation with a mala fide intent, as such, the petitioner is entitled for confirmation of bail before arrest.

4. On the contrary, the learned Special Prosecutor for NAB assisted by learned counsel for the Bank, vehemently opposed this petition on the grounds that the bank leased assets, i.e. buffaloes were entrusted to the accused for his benefit but he dishonestly, fraudulently and with mala fide intention misappropriated the bank leased assets by committing the breach of trust. He also contends that the petitioner had claimed loss, but in this respect no evidence is available with him and even otherwise, the petitioner had no right to dispose-off bank leased animals without permission of the bank. Lastly adds that the NAO, 1999 is a special law, it has overriding effect on other laws and the provisions of section 31-D of NAO, 1999 are not applicable in the instant case, hence, this petition is liable to be dismissed.

5. We have heard the learned counsel for the petitioner as also learned Special Prosecutor for NAB assisted by learned counsel for the Bank and have also perused the record with their able assistance.

6. As shall be seen from the above contentions of learned counsel for both the parties, pre-arrest bail has been sought primarily on legal grounds i.e. applicability of National Accountability Bureau Ordinance, 1999 or the Financial Institutions (Recovery of Finances) Ordinance, 2001, in the peculiar facts and circumstances of the instant case. This being the position, this court has no other option but to deal with legal propositions involved herein, as any nominated accused cannot be left at the mercy of the Investigating Agency to establish the charge of a particular offence against him and to investigate the matter. This court has ample jurisdiction while deciding bail application after examining the available record, whether any particular offence under which the Investigating Agency is trying to arrest the accused, prima facie, attracts in the circumstances of the case or not? Hence to resolve this controversy, the crucial point to be considered while deciding the writ petition for grant of pre-arrest bail is whether the Financial Institutions (Recovery of Finances) Ordinance, 2001 will hold the field having the overriding effect over the NAO, 1999 or not? However, before entering into legal questions, it may be reiterated that the allegation against the petitioner is quite simple, i.e., he managed to procure finance facility to the tune of Rs.2.1-Million for construction of shed and Rs.7.0-Million for purchase of the buffalos under Kissan Dost Live Stock Relevant Scheme introduced by the Bank of Punjab but he usurped the said amount for his own.

7. From the respective contentions of leaned counsel for the parties, it has been observed that legal controversy can be summarized in the following manner:-
i) Amongst the two Ordinances i.e. the Financial Institutions (Recovery of Finances) Ordinance, 2001 and the National Accountability Ordinance, 1999, which one is applicable to the case of the petitioner?

8. The National Accountability Ordinance, 1999 was promulgated on 16th November, 1999 and its preamble clause provides its purpose i.e. to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misuse or abuse of power or authority, misappropriation of property, taking of kickbacks, commissions and for matters connected and ancillary or incidental thereto; for the recovery of outstanding amount from those persons who have committed default in the repayment of amounts to Banks, Financial Institutions, Governmental agencies and other agencies and for the recovery of state money and other assets from those persons who have misappropriated or removed such money or assets through corruption, corrupt practices and misuse of power or authority. Afterwards, the Financial Institutions (Recovery of Finances) Ordinance, 2001 was promulgated by repealing the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 with specific purpose to recover loans, advances, credits and finances.

9. Regarding the controversy as to which of the two i.e. Financial Institutions (Recovery of Finances) Ordinance, 2001 or the National Accountability Ordinance, 1999, would have overriding effect, it may be quoted here that Financial Institutions (Recovery of Finances) Ordinance, 2001 by means of Section 4 thereof, provides that:-

4. Ordinance to override other laws.-The provisions of this Ordinance shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

Similarly, Section 3 of the National Accountability Bureau Ordinance, 1999, provides that:-

"3. Ordinance to override other laws.- The provisions of this Ordinance shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

As shall be seen from the above, both these legislations contain no obstante clause, providing that the provisions of each Ordinance would prevail notwithstanding anything to the contrary contained in any law for the time being enforce. Perhaps this is the cause of conflict in the provisions of the aforementioned legislative instruments i.e. Financial Institutions (Recovery of Finances) Ordinance, 2001 and the National Accountability Ordinance, 1999.

10. The learned Special Prosecutor NAB has laid much emphasis on Sections 3 and 9(x) of the NAO, 1999, but it is a fact that the Financial Institutions (Recovery of Finances) Ordinance, 2001 was promulgated on 30th of August, 2001, which is not only later in time, but its section 4 also provides an overriding clause. Thus, this court is of the clear view that if the legislators had an intention to bring the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 under the pale of National Accountability Ordinance, 1999, then they could at the very beginning formulate or afterwards could amend the Financial Institutions (Recovery of Finances) Ordinance, 2001 accordingly. In this situation, when the Financial Institutions (Recovery of Finances) Ordinance, 2001 was neither originally drafted nor subsequently amended in the above terms, the legislators explicitly made their intention clear that with regard to the matters between financial institutions and their customers, this enactment shall hold the field and despite Section 3 of the NAB Ordinance, the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 shall have the overriding effect and will be applicable to all other persons in general except those covered by the Financial Institutions (Recovery of Finances) Ordinance, 2001. The sole purpose for not drafting the Financial Institutions (Recovery of Finances) Ordinance, 2001 or subsequently amending the same, appears to be that as normally in a case of loan from financial institution, the loans are protected by mortgage, warranties and covenants made by or on behalf of the customer to a financial institution, including warranties and covenants with regard to the ownership, mortgage, pledge, hypothecation or assignment of, or other charge on assets or properties, thus the financial institution can recover the amount by adopting appropriate process before the appropriate forum by way of filing a suit for recovery or could proceed by way of filing a private complaint and the court of Competent jurisdiction under the Ordinance, ibid, could proceed under the mandate of powers

provided in Sections 7(1) and 7(1)(b) of the Ordinance. By holding so, we are guided by the cases reported in "Muhammad Asif Nawaz v. ASJ and others' (2014 PCr.LJ 1=2014 CLD 45), "Abid Mahmood Malik v. Station House Officer, Police Station Margalla and others." (2013 CLD 508) and "Muhammad lqbal v. Station House Officer, Police Station Hajipura, Sialkot and 2 others" (PLD 2009 Lahore 541).

11. In furtherance to the above, we have no hesitation in holding that prima facie Financial Institutions (Recovery of Finances) Ordinance, 2001 is not only a special law but the same being also later in time would prevail over the provisions of the NAO, 1999, and as discussed above, the Ordinance, 2001 has its own comprehensive mechanism to deal with the disputes inter-se the bank and the customer. The august Supreme Court of Pakistan in the case :Apollo Textile Mills Ltd. and others v. c'nnPri Bank Ltd." (PLD 2012 SC 268) has held that:-
"18. The Financial Institutions (Recovery of Finances) Ordinance, 2001 i.e. is a special law. It provides a special procedure for the banking suits. The provisions of the Ordinance, 2001 under section 4 thereof override all other laws. The provisions contained in the said Sections require strict compliance."
Furthermore, in the case "Mahmood Khan Achakzai and others v. Federation of Pakistan and others" (PLD 1997 SC 426), it has been held that whenever there is a special law, it will override the general law and further even if there are two parallel, laws, even then law which is latter in time would prevail.

12. The Financial Institutions (Recovery of Finances) Ordinance, 2001.has comprehensively dealt with the liabilities of the customers by including the definition of word "obligation" in section 2(e)(i)(ii) and definition of word "willful default" in section 2(g), and as admittedly the bank has already filed a suit for recovery, hence, it has to pursue the said suit for recovery of loan, but after a long period of filing of the suit for recovery before the banking court, they thought of moving the NAB authorities in order to use the said agency for the purposes of recovery of amount which has to be ultimately decided by the-banking court.

13. In addition to the above, Section 405 "P. P . C . defines "criminal breach of trust" as under:-
"Whoever, being in any manner entrusted with property, or with any dominion over properly, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharges, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust."
In the same context Section 20 of the Ordinance, ibid, provides as udder:-
"20. Provisions relating to certain offences: -
(a) dishonestly commits a breach of the terms of a letter of hypothecation, trust receipt or any other instrument or document executed by him whereby possession of the assets or properties offered as security for the re-payment of finance or fulfillment of any obligation are not with the financial institution but are retained by or entrusted to him for the purposes of dealing with the same in the ordinary course of business

subject to the terms of the letter of hypothecation or trust receipt or other instrument or document or for the purpose of effecting their sale and depositing the sale proceeds with the financial institution; or.
(b) makes fraudulent mis-representation or commits a breach of an obligation or representation made to a financial institution on the basis of which the financial institution has granted a finance; or
(c) subsequent to the creation of a mortgage in favour of a financial institution, dishonestly alienates or parts with the possession of the mortgaged property whether by creation of a lease or otherwise contrary to the terms thereof without the written permission of the financial institution.
(d) ..
After comparison of above two reproduced provisions, one from P.P.C. and the other from the Financial Institutions (Recovery of Finances) Ordinance, 2001, it is obvious that the Ordinance, ibid, has more effectively dealt with the defaulters of loan and offences with respect to criminal breach of trust. Furthermore, criminal proceedings can also be
initiated under the said Ordinance. In the same sequel we are also cognizant of the fact that as discussed above, the definition of Section 405 P.P.C. is fully covered by the Ordinance, ibid, in its Section 20 and there is no other opinion that where an accused can be tried or punished under two different statutes, then "the rule of lenity" (A rule of construction of statutes that criminal statute ambiguities are resolved in favuor of the defendant or accused), would also attract in our of the petitioner. For this reason also, we are of the view that since the Financial Institutions (Recovery of Finances) Ordinance, 2001 provides a complete mechanism and also caters all probabilities amongst the bank and its customer, therefore, considering the facts of the instant case proceedings the proceeding only under the above Ordinance, is the proper and legal course.

14. Admittedly, in this case the complainant Bank had already invoked criminal jurisdiction of the Banking Court of competent jurisdiction in terms of Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and the proceedings in the suit for the recovery of the finance are already pending before a Banking Court of a competent jurisdiction. Here in this case there is no denial that the finance facility in question was duly secured against adequate collateral in addition to other documents. There is no allegation that the documents prepared for the sanction of loan were bogus., the property subject matter of mortgage was non-existent or that the said property, was not in the ownership of the petitioner.

15. Apart from all above, section 31-D of NAO, 1999 in clear terms provides that:--
31D. Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan:
Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000,

shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan."

The above question with regard to non-observance of requirement under section 31-D of the of NAO, 1999, came under consideration before the Hon'ble Supreme Court of Pakistan in Suo Motu No.10 of 2015 out of Civil Petitions Nos. 1377 and 1378 of 2015 and on 02.09.2015, the following order was passed by the apex Court:-

"We were constrained to issue notice to NAB because we observed that a reference was filed under the NAO, although it was apparent that the alleged activities against the respondent fell within the ambit of Section 20 of the Financial Institutions (Recovery of Finances), Ordinance, 2001 for which the exclusive jurisdiction vests with the Banking Courts. Moreover, Section 31(d) of the NAO stipulates that no inquiry, investigation 9r proceedings in respect of imprudent loans, defaulted loans or .e-scheduled loans shall be initiated or concluded by the National Accountability Bureau against any person, company of financial institutions without reference from Governor, State Bank of Pakistan. This prior approval admittedly had not been taken.

2. Faced with this situation, the learned Prosecutor General stated that the inquiries in these matters were initiated in 2013, and according to his opinion, these should be withdrawn. The references will be withdrawn by NAB without delay.

3. We would, however, say to the learned Prosecutor General that very careful review of matters should be undertaken before persons are put through the rigors of the prosecution by NAB.

4. The matter stands disposed of "

As shall be seen from the above reproduced order of the Hon'ble Supreme Court of Pakistan, since the reference, subject matter of the said case, had not been routed through the Governor, State Bank of Pakistan, the Prosecutor General had to make a statement for withdrawal of such references. But, here in this case despite specific objection by learned counsel for the petitioner, neither it is stance of NAB authorities that said section does not attract to the case of the present petitioner nor any document could be referred by NAB authorities to say that the requirement of above section was complied with and the reference was forwarded by the Governor, State Bank of Pakistan.

16. One cannot lose sight of the fact that when the law requires a thing to be done in a specific manner, it must be done in that way or not 3t all. This court in the case "Raheel Rashid v. National Accountability Bureau, Islamabad through Chairman and 2 others" (PLD 2005 Lahore 692) with reference to above Section 31-D, declared that the proceedings as against the accused being destitute of authorization of the Governor of State Bank of Pakistan, the reference did not vest jurisdiction in the National Accountability Bureau or the Accountability Courts. In this view of the matter, when the NAB authorities do not have the authority in the matter, their actions against the petitioner lead to an inference of mala fide on their part.

17. As discussed above, here in this case, there is no other view that the finance facility, subject matter of the NAB reference, was duly secured against adequate collateral in addition to other documents. In the same sequel it is not the claim of the Bank authorities that the documents prepared for the sanction of loan were bogus; the

property subject matter of mortgage was non-existent; that the said property was not in the specific ownership of the petitioner or that the same was already under some encumbrance. In view of the above noted peculiar facts and circumstances of this case, despite this clear position, without touching the factual aspect of the allegations against the petitioner, the action of the complainant bank in filing a complaint before the NAB and further proceedings by the NAB authorities thereon under the NAB Ordinance, including the attempted arrest of the petitioner per force of NAB Ordinance, is clear indicator of mala fide on the part of the complainant as well as NAB authorities, thus, we consider it to be a fit case for grant of pre-arrest bail to the petitioner.

18. For what has been discussed above, the ad interim pre-arrest bail granted to the petitioner vide order dated 24th February, 2016 is confirmed subject to furnishing his bail bonds in the sum of Rs.5,00,000/- (five lac) with two sureties each in the like amount to the satisfaction of the learned trial Court.

19. Needless to observe that the observations made hereinabove are only tentative in nature and are strictly confined to the extent of grant of instant bail. However, petitioner is directed to co-operate with the NAB authorities during investigation, and if reference is filed against the petitioner, he may attend the trial Court regularly.

MH/A-48/L Pre-arrest bail confirmed.

PLJ 2017 Lahore 222
***Present*: MUHAMMAD QASIM KHAN, J.**
***Mst.* SHUGUFTA PARVEEN and another--Petitioners**
versus
DISTRICT EDUCATION OFFICER (EE) SIALKOT and 3 others—Respondents

W.P. No. 1175 of 2014, decided on 8.11.2016.

Constitution of Pakistan, 1973--
----Art. 199--Constitutional petition--Appointment as ESE on contract basis were withdrawn--Allegations of--Difference between marks in original certificate/degree as compared with documents submitted with applications--Contentions--Copies of valid and genuine documents were attached and after verification of documents, appointment orders were issued--Termination without conducting inquiry as required by law--Remained on duties and received salaries before issuance of termination order--Educational marks were correctly written--Validity--Appointing authority denied signatures on appointment letters issued in favour of petitioners and produced by them but in absence of any other appointment letter and comparison of signatures of officer and recording of his statement in presence of petitioners and allowing petitioners to cross-examine authority, make whole process as doubtful--Appointment letters were rightly issued to petitioners after preparing of merit list and it may be possible due to some clerical mistake merit list has been wrongly prepared and now to save skin of officers petitioners have been made escape goat by leveling false allegations against them--Petitioners have been replaced by new one, as department has not initiated any inquiry in that respect and has not fixed responsibility on any person in this regard--Procedure at time of interview original documents are examined by authority and it is not possible that authority has not verified marks on application forms after examining original documents at time of interview--During recruitment process some negligence was committed by any of officials while calculating and typing marks for preparing merit list, but at late stage petitioners could not be penalized for same, especially when no one other is claiming appointment against posts of petitioner, being higher on merit and petitioner otherwise fulfil qualification criteria prescribed in recruitment policy. [Pp. 225 & 226] A, B & C

Mr. Muhammad Iqbal Mohal, Advocate for Petitioners.
Kh. Salman Mehmood, Assistant Advocate Genral with *Ghulam Sughran* Deputy District Education Officer (Women), Pasroor for Respondents.
Date of hearing: 8.11.2016.

ORDER
At the outset, learned counsel for the petitioners verbally seeks permission to add "Province of the Punjab through Secretary Education Government of the Punjab, Lahore" as Respondent No. 4, Although the learned Assistant Advocate General has opposed the stance, but in the larger interest of justice, permission is granted as it

would not materially affect the nature of the writ petition. Learned counsel for the petitioners has amended the memo. of parties in the view of the Court.

2. Briefly the facts of the case are that after going through the requisite process, finally *vide* order dated 23.10.2009 the petitioners were appointed as ESE on contract basis for a period of five years and pursuant to their appointment letters, they both joined their respective places of postings. Subsequently, however, *vide* two separate orders dated 08.12.2010 and 11.12.2010 respectively, the appointment orders of Petitioner No. 1 and 2 were cancelled/withdrawn on the ground that their documents, submitted along with application for appointment were found fake and that there was difference between the marks in the original certificates/degree as compared with the documents submitted with application. The petitioners filed Writ Petitions No. 847 and 20939 of 2011. *Vide* order dated 08.11.2012 Wirt Petition No. 847 of 2011 was allowed by holding that since no inquiry had been held, therefore, termination order was illegal, however, respondents were at liberty to take lawful action against the petitioner. Whereas, *vide* order dated 05.06.2012 Writ Petition No. 20939 of 2011 was allowed by holding that appointment letter was not issued on the basis of any bogus/forged documents and that petitioner had been punished without opportunity of hearing and show-cause notice. With reference to the above orders of this Court, the petitioner were reinstated in service, but later-on, *vide* order dated 05.11.2013, their services have again been terminated, hence, this writ petition.

3. It is argued by learned counsel that the petitioners were appointed after adopting all the requisite process, copies of valid and genuine documents were attached with the candidature and after verification of those documents, the petitioners were appointed, but subsequently without any regular inquiry and even without affording them opportunity of hearing the petitioners were removed from service and after the orders of this Court in the earlier round of litigation they were reinstated, but yet again they have been terminated without conducting inquiry as required by law, which is clearly against the earlier orders of this Court.

4. The learned Law Officer submits that petitioners provided bogus copies of the educational certificates mentioning higher marks and on the basis of these fake documents, the petitioners succeeded in getting appointment letters. Further submits that a proper inquiry was initiated and rightly the impugned orders have been passed, hence, the instant writ petition be dismissed.

5. I have heard the arguments of learned counsel for the parties and perused the record appended with this petition and in the custody of official respondent, present in Court today.

6. After joining as ESE, the petitioners performed their duties but suddenly show-cause notices were served upon them and ultimately their appointments letters were recalled. They filed Writ Petitions No. 20939/2011 and 847/2011, which were allowed *vide* orders dated 05.06.2012 and 08.11.2012, respectively, and one of the ground for allowing those writ petitions was that regular inquiry had not been

conducted, which was required under the law and it was further observed that respondents may take action against the petitioners after full-fledged inquiry. Resultantly, the orders *vide* which appointments of the petitioners were recalled, were set aside and the petitioners were reinstated in service. However, again *vide* the impugned orders dated 05.11.2013 passed by the authority i.e. DEO (W-EE), Sialkot, the services of the petitioners were terminated holding the same to be devoid of merit, rules and policy.

7. Although the stance of the respondents is very clear that the petitioners filed bogus certificates along with their application forms; for the same reason now they have been removed from service, but perusal of the file available with the officials of the respondents, present in Court, shows that in the application forms available on the file, the academic marks of the petitioners have been correctly written as compared to their original academic certificates. I have also gone through the appointment orders issued by the authority in favour of the petitioners, on which the academic marks of the petitioners have been mentioned, which are same as on the original academic certificates and the application forms available on the file. Para-16 of the contract agreement in which correct marks of the petitioners are written, also impose the following duty on the appointing authority:--

"It shall be the responsibility of concerned appointing authority that Academic and Professional record/documents of the Educators be verified before the relesase of the salary."

Admittedly the petitioner remained on their duties and received salaries for couple of months before issuance of first termination order. Although it is alleged that during inquiry, the DEO(W-EE). Sialkot, denied, the signatures over the appointment letters issued in favour of the petitioners, on which his educational marks are correctly written. The Inquiry Officer has not collected any other appointment letter except produced by the petitioners either from the office copy of the department or from the accounts office, to establish that petitioners are performing duties on the basis of forged appointment letters. Although, it is alleged that appointing authority denied signatures on the appointment letters issued in favour of the petitioners and produced by them but in the absence of any other appointment letter and comparison of signatures with other admitted signatures of the said officer and recording of his statement in presence of the petitioners and allowing the petitioners to cross-examine the authority, make the whole process as doubtful. Moreover, the numbers written on the application forms of the petitioners are also correctly written as per academic certificates and they tally with the marks on the appointment letters issued and presented by the petitioners and available on the departmental record.

8. It appears that appointment letters were rightly issued to the petitioners after preparing of merit list and it may be possible due to some clerical mistake merit list has been wrongly prepared and now to save the skin of the officers the petitioners have been made escape goat by leveling false allegations against them. When the application forms having correct marks of the petitioners are on the record of the department then how it could be said that the petitioners have provided bogus academic certificates having wrong academic marks and it is not the case of the

department that the application forms have been replaced by new one, as the department has not initiated any inquiry in this respect and has not fixed responsibility on any person in this regard. Even as per procedure at the time of interview the original documents are examined by the authority and it is not possible that the authority has not verified the marks on the application forms after examining the original documents at the time of interview.

9. Furthermore, Pura-3 of the order dated 05.06.2012 passed by the then Hon'ble Chief Justice, Lahore High Court, Lahore in Writ Petition No. 20939 of 2011, the relevant lines whereof are reproduced hereunder, in clear terms provides that:--

"The appointment letter has been perused. Cause 16 thereof mentions correctly the marks obtained by the petitioner in her matric, intermediate and graduation examinations. Clearly, the appointment letter was not issued to the petitioner on the basis of any bogus/forged documents."

It is admitted position that facts of the case of the writ petitioner in Writ Petition No. 20939/2011 are absolutely identical to the case of the petitioner in Writ Petition No. 847/2011, therefore, the conclusions drawn in the above-reproduced order also cover the case of the petitioner in the second writ petition and those findings have also attained finality, as those have not been challenged before any Court. Besides, as observed in the curlier round of litigation that the presumption would be with respect to the regularity of performance of administrative functions, unless and until otherwise is provided, but no reasoning could be forwarded by the respondents that how the authority neglected his duties imposed in Para-16 referred above. Even otherwise, from perusal of the documents, it appears that officials are trying to save their own employees and in a hasty manner are trying to fix responsibility on the petitioners. The petitioner were not provided copy of the charge sheet, they were not provided opportunity of cross-examining the witnesses and even not provided opportunity to produce their defence evidence. Furthermore, when the petitioners while appearing before the authority for personal hearing had in clear terms stated that their qualification certificates had been got verified by the Deputy District Education Officer, it was incumbent for authority that apart from associating the said Deputy District Education Officer in the inquiry proceedings, the entire relevant record must have been collected and attached with report and parawise comments at least or produced before this Court on the date of hearing. In the absence of any such important record, the inference is quite obvious that respondents have no such record.

10. As discussed above, it appears that during recruitment process some negligence was committed by any of the officials while calculating and typing the marks for preparing the merit list, but at this late stage the petitioners could not be penalized for the same, especially when no one other is claiming appointment against the posts of the present petitioners, being higher on merit and petitioner otherwise fulfil the qualification criteria prescribed in recruitment policy.

11. Furthermore, it is clear and authoritative view of the Hon'ble Supreme Court of Pakistan as declared in the case *"Province of Punjab through Secretary, Agriculture,*

Government of Punjab and others versus Zulfiqar Ali" (2006 SCMR 678), that appointment of an employee, if made illegally, could not be cancelled and instead of taking action against such employee, action must be taken against Appointing Authority for committing a misconduct by making illegal appointment. Reliance in also placed on the case *"Director, Social Welfare, N-W.E.P, Peshawar versus Sadaullah Khan"* (1996 SCMR 1350).

12. For what has been discussed above, this writ petition is allowed and the impugned termination order dated 05.11.2013 are hereby set-aside.

(R.A.) Petition allowed

2017 Y L R 1548
[Lahore]
Before Muhammad Qasim Khan and Sardar Muhammad Sarfraz Dogar, JJ
Malik SOHAIL ASLAM---Petitioner
Versus
SUPERINTENDENT OF POLICE (OPERATION), LAHORE and 3 others---Respondents

Intra Court Appeal No.1232 of 2015, decided on 5th December, 2016.

(a) Criminal Procedure Code (V of 1898)---
----S. 22-A(6)---Ex-officio Justice of Peace---Role and function of---Issuing appropriate directions to police authorities concerning complaint regarding non-registration of criminal case---Section 22-A, Cr.P.C. conferred discretionary powers upon Ex-officio Justice of Peace with regard to such direction---Ex-officio Justice of Peace was obliged to exercise powers vested under the law in a judicious manner with application of mind, taking into consideration the facts and material of the case.

(b) Criminal Procedure Code (V of 1898)---
----Ss. 22-A & 22-B---Penal Code (XLV of 1860), S.489-F---Application for registration of case against accused was allowed by Ex-Officio Justice of Peace after requisitioning the comments from SHO concerned---Accused had challenged the vires of said order through Constitutional petition, which was allowed---Applicant filed intra court appeal against the said order---Validity---Bare perusal of the application filed by the applicant constituted commission of cognizable offence, but concerned SHO had not registered case---Applicant was constrained to file a petition under Ss.22-A & 22-B, Cr.P.C. before the Ex-Officio Justice of Peace, who had issued direction for registration of case against the accused---Application made to SHO concerned with respect to the dishonouring of cheques was sufficient to constitute offence under S. 489-F, P.P.C. as liability/obligation had accrued against the cheques---Admittedly cheques were dishonoured and relevant slips were attached with the record, which constituted offence against the accused---Intra court appeal was allowed accordingly.

Muhammad Bashir v. Station House Officer, Okara Cantt and others PLD 2007 SC 539 and Younas Abbas and others v. Additional Sessions Judge, Chakwal and others PLD 2016 SC 581 rel.

(c) Criminal Procedure Code (V of 1898)---
----S. 154---First information report---Object---FIR was a pertinent document in criminal law---Main object of FIR was to set criminal law in motion, obtain information about the alleged criminal activity so as to take suitable steps to trace and to bring to book the guilty.
Muhammad Shoaib Khokhar for Appellant.
Muhammad Hammad Khan Rai, A.A.G. along with Arshad ASI for Respondents.
Tariq Manzoor Chaudhary for Respondent No.4.

ORDER

Through this Intra Court Appeal in terms of Section 3 of the Law Reforms Ordinance, 1972, Malik Sohail Aslam appellant has assailed the legality of order dated 16.9.2015 passed by the learned Single Judge-in-Chambers; whereby Writ Petition No.14986 of 2014 filed by respondent No.4 was allowed.

2. Succinctly the facts leading to this Intra-Court-appeal are that the appellant lodged an application under sections 22-A and 22-B of Cr.P.C. before the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Lahore seeking registration of case against respondent No.4. The learned Additional Sessions Judge/Ex-Officio Justice of the Peace, Lahore while entertaining the petition under Sections 22-A and 22-B of Cr.P.C. requisitioned the comments of SHO concerned for 8.5.2014. On the said date learned Additional Sessions Judge/Ex-Officio Justice of Peace, Lahore disposed of the said petition in the following manner:--

"3. The contention of the petitioner is that the proposed accused issued two cheques in his favour which was subsequently dishonoured by the concerned Bank on presentation copies of the same attached with instant petition. The documentary evidence in the form of copy of dishonour cheque and its slip is available with the file. Prima facie cognizable offence is made out. In these circumstances, I while exercising powers vested in my under Sections 22-A and 22-B, Cr.P.C. directed the petitioner to approach the SHO concerned and produce before him the original dishonour cheque and slip whereas SHO concerned is directed to record the statement of the petitioner while satisfying the mandatory requirement of Section 154, Cr.P.C. and due action under the law would follow.

4. In view of direction given above, this petition stands disposed of."

3. Respondent No.4 being aggrieved challenged the vires of above said order through Writ Petition No.14986/2014 which was allowed by the learned Single Judge-in-Chambers vide impugned order dated 16.9.2015 in the following manners:--

"3. After hearing the learned counsel for the parties and perusing the record, it is noticed that the petitioner and Dr. Farhan established a medical center under the name and style of "The Mall Medical Center" and respondent No.2 had invested the amount on monthly profit basis. This fact is evident from "Mutual Investment Deed" executed between the parties. According to the petitioner the respondent had also invested Rs.700,000/- in the business of the petitioner and in lieu of that amount cheque valuing Rs.700,000/- was issued in favour of the respondent as guarantee, which he got returned from the respondent after payment of that amount. The respondent has not stated about cheque of Rs.700,000/- in his application, therefore, the stance taken by the petitioner seems to be plausible. Learned Ex-Officio Justice of Peace while issuing the direction against the petitioner did not appreciate the afore-noted facts thus the impugned order requires interference of this Court."

4. We have heard the arguments advanced by the learned counsel for the parties as well as learned Law Officer and have perused the record minutely.

5. With reference to the arguments advanced by the learned counsel for the appellant, it is pertinent to mention that the Superior Courts in Pakistan have traveled a long

way in developing and interpreting the law of procedure viz-a-viz role and functions of the Ex-Officio Justice of Peace in respect of the complaints regarding failure of the police to register a case. Needless to mention that in terms of section 22-A(6), Cr.P.C. the learned Ex-Officio Justice of Peace may issue appropriate directions to Police Authorities concerned on a complaint regarding non-registration of criminal case. There is no cavil to the proposition that the word "may" used in the above noted provision confers discretionary power upon Ex-Officio Justice of the Peace in this regard. No doubt learned Ex-Officio Justice of the Peace is obliged to exercise powers vested in him under the law in a judicious manner with application of mind taking into consideration the facts and material of the case. Bare perusal of application constitutes commission of cognizable offence, but the concerned SHO has not registered a case which constrained the appellant to file a petition under sections 22-A and 22-B, Cr.P.C. before the learned Ex-Officio Justice of the Peace, who has issued a direction for registration of case against respondent No.4.

6. Moreover, perusal of the application which has been made to the SHO concerned with respect to the dishonour of the cheques is sufficient to constitute an offence under Section 489-F, P.P.C. as the liability or obligation has accrued against the cheques. There is no cavil to this proposition that if the liability is accrued and the cheques have been issued for the fulfillment of an obligation, then the case should have been registered.

7. Besides above, the FIR is a pertinent document in the criminal law procedure and its main object is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps to trace and to bring to book the guilty.

8. In the attending circumstances, the learned Ex-Office Justice of Peace has rightly abided the celebrated judgment of Hon'ble Supreme Court of Pakistan delivered in case titled "Muhammad Bashir v. Station House Officer, Okara Cantt. and others" (PLD 2007 Supreme Court 539) wherein, the following ratio has been decided:--
"No authority vested with an Officer Incharge of a Police Station or with anyone else to hold any inquiry into the correctness or otherwise of the information which was conveyed to the S.H.O. for the purposes of recording of an FIR Any FIR registered after such an exercise i.e. determination of the truth or falsity of the information conveyed to the S.H.O., would get hit by the provisions of section 162, Cr.P.C. Existence of an FIR was no condition precedent for holding of an investigation nor was the same a prerequisite for the arrest of a person concerned with the commission of a cognizable offence; nor does the recording of an FIR mean that the S.H.O. or a police officer deputed by him was obliged to investigate the case or to go through the whole length of investigation of the case mentioned therein or that any accused person nominated therein must be arrested."

9. We are unanimous in our view that admittedly the cheques were dishonoured and dishonoured slips are attached with the record but this material aspect perhaps escaped notice of the learned Single Judge-in-Chambers. Guidance in this respect can

also be sought from "Younas Abbas and others v. Additional Sessions Judge, Chakwal and others" (PLD 2016 Supreme Court 581).

10. For the reasons recorded herein above, this appeal is allowed, the order dated 16.9.2015 passed by the learned Single Judge-in-Chambers is set-aside and the order dated 8.5.2014 passed by the learned Ex-Officio Justice of Peace is up-held.

JK/S-15/L Appeal allowed.

2017 [M] C.L.R. 877
[Lahore]
Present: **MUHAMMAD QASIM KHAN, J.**
Arsalan Bari, etc.
Versus
Province of Punjab, etc.

Writ Petition No. 34937 of 2016, decided on 24th May, 2017.

CONCLUSION
(1) All training courses are covered under the terms and conditions of a civil servant.
Sub-Inspectors and Inspectors (Appointment of Conditions of Service) Rules (2013)---Rr. 2, 5---Police Rules, 1934, R. 19.25---Punjab Civil Servants Act, 1974, S. 5---Constitution of Pakistan, 1973, Act, 199.---Service rules, jurisdiction barred---The petitioner submitted that since they had been recruited they PPSC, therefore, the probation training class course would not fall within the terms and conditions of their service---Held: All training courses were covered under the terms and conditions of a civil servant, which were applicable to newly recruited officers even if they were not on probation---Jurisdiction of High Court under Article 199 to entertain such-like petition was barred---The petitioners may approach the departmental hierarchy or the Punjab Service Tribunal---Petition dismissed.
(Paras 2, 4, 7, 8, 9)
Ref. 1991 SCMR 1041.

معزز عدالت عالیہ نے آئینی درخواست ہذا کو حالصتاً ملازمتی معاملہ قرار دیتے ہوئے اپنے آئینی دائرہ اختیار سماعت سے خارج قرار دیتے ہوئے مسترد کر دیا تھا۔

For the Petitioners: Dilnawaz Cheema, Advocate.
Abdul Aziz Awan, Additional Advocate General with Rizwan Khurshid, Iftikhar Hussain and Muhammad Saeed, Inspectors Police (Legal).
Date of hearing: 24th May, 2017.

ORDER
MUHAMMAD QASIM KHAN, J. --- Through this writ petition, the petitioners have assailed the memorandum dated 26.09.2016 issued by Inspector General of Police, requiring all newly recruited I/SIs to report for Probationer Training Class Course at Police Training College, Sihala on 02.10.2016.

2. It is argued by learned counsel for the petitioners that they are working in police department as ASIs, they completed their probation and other necessary courses as per rules the petitioners applied for the posts of Sub-Inspectors from in-service quota. They were selected by the Punjab Public Service Commission and were issued appointment letters, thereafter, they also joined their posting and now *vide* the impugned letter dated 26.09.2016 they have been directed to report for Probationer Training Class Course at Police Training College, Sihala on 02.10.2016. The contention of learned counsel is that under Sub-Inspectors and Inspectors

(Appointment and Conditions of Service) Rules, 2013, there are three types of appointments as Sub-Inspectors, firstly 50% by initial recruitment through selection on merit; secondly a specific percentage by selection on merit from amongst the Head Constables and ASIs on the recommendations of the Commission and thirdly a specific percentage by departmental promotion on seniority-*cum*-fitness basis from amongst the ASIs from the functional unit. The learned counsel contends that petitioner belong to second category as they are ASIs and having qualification applied for the post amongst ASIs, thus, their selection as Sub-Inspectors could not be termed as new recruitment, rather their selection as Sub-Inspectors is in fact continuation of their earlier service and as they have already successfully completed their training courses, they could not be forced to join Probationer Training Class Course, as compared to newly recruited Sub-Inspectors. Adds that the Sub-Inspectors who are promoted on seniority-*cum*-fitness basis, they are never sent to such Probationer Training Class Course, on the ground that they have already completed such course and in some cases when such Sub-Inspectors were called for such training, subsequently their orders were withdrawn, thus, the petitioners have been discriminated.

3. On the other hand, learned law officer argued that case of the present petitioners is distinguishable from the ASIs who have been promoted as Sub-Inspectors. Added that there are three categories in the rules, first two categories are directly recruited for the post of Sub-Inspectors in which one is amongst the new candidates and secondly amongst the ASIs who fulfil the qualification criteria for appointment as Sub-Inspectors. Both these recruitments are through the process of Punjab Public Service Commission, hence, recruitment of the petitioners cannot be declared as promotion because this is fresh recruitment as Sub-Inspector and the petitioners are bound to pass the Probationer Training Class Course. The learned law officer also attacked maintainability of this writ petition on the ground that after joining as Sub-Inspectors the petitioners have become civil servants and Probationer Training Class Course being part of terms and condition of service, this Court lacks jurisdiction to entertain this petition.

4. While rebutting the above preliminary objection learned counsel for the petitioners submits that since the petitioners have been recruited through Punjab Public Service Commission, therefore, the Probationer Training Class Course would not fall within the terms and conditions of their service and even otherwise, the jurisdiction of the Punjab Service Tribunal becomes available when a final order is passed by the authority.

5. I have heard the arguments of learned counsel for the parties and perused the record.

6. Rule 2 of the Sub-Inspectors and Inspectors (Appointment and Conditions of Service) Rules, 2013 being the relevant provision, the same is reproduced hereunder:-
--

"2. Appointment of Sub-Inspectors.-- (1) Subject to the prior approval of the provincial Police Officer the appointing authority may, on the recommendation of the commissioner, appoint a person as Sub-Inspector by initial recruitment or selection.
(2) Subject to the prior approval of the Regional Police Officer, the appointing authority may, on the recommendation of the departmental promotion committee, appoint an Assistant Sub-Inspector as Sub-Inspector. "
The position has further been clarified in the schedule, which shows that there are three types of appointments as SubInspectors, firstly 50% by initial recruitment through selection on merit; secondly a specific percentage by selection on merit from amongst the Head Constables and ASIs on the recommendations of the Commission and thirdly a specific percentage by departmental promotion on seniority-*cum*-fitness basis from amongst the ASIs from the functional unit. It comes out to be a fact that recruitment of the petitioners as Sub-Inspectors surely falls within second category *i.e.* appointment by selection amongst ASIs through Public Service Commission is new recruitment of SIs for all intents and purposes.

7. The requirement of probation period and prescribed examination or tests, has been provided in Rule 5 of the rules *ibid*. The same is reproduced as under:---
"5. Probation of Sub-Inspectors.-- (1) A SubInspectors appointed under rule 4 or by promotion shall be on probation for a period of three years.
(2) A Regional Police Officer may discharge from service a Sub-Inspector appointed by initial recruitment during the period of probation if the SubInspector fails to pass the prescribed examinations or tests or fails to undertake or complete the requisite training or is deemed unsuitable for service in the police.
(3) A Regional Police Officer may revert to the previous post a Sub-Inspector appointed by selection or by promotion during the period of promotion if the Sub-Inspector fails to pass the prescribed examinations or tests or fails to undertake or complete requisite training or is deemed unsuitable for the post of Sub-Inspector."
As shall be seen from the above reproduced rules, after providing a period of three years as probation for the posts of Sub-Inspectors, the consequences of failure to complete such requisite training have been provided against both the categories *i.e.* initial recruitment as well as selection or promotion from in-service quota. In case Sub-Inspector who is appointed through initial selection fails, he shall be discharged from service, whereas, in terms of sub-rule (3) the use of word "revert" clearly indicates that in case if SubInspector from in-service quota fails to complete the above requirement, he shall stand revert to his previous post. Therefore, in any eventuality, either a direct/initial appointee or through in-service recruitment, it is compulsory to successfully go through the examination or the tests. Rule 19.25 of the Police Rules, 1934 also makes it mandatory to successfully go through the training courses.

8. In the same sequel it is observed that once the petitioners join as Sub-Inspectors they become civil servants and training course has been provided in the Police Rules itself. Furthermore, Section 5 of the Punjab Civil Servants Act, 1974 also provides "probation", as under:---

5. Probation.-- (1) An initial appointment to a service or post referred to in Section 4, not being an ad hoc appointment, shall be on such probation and for such period of probation as may be prescribed.

(2) Any appointment of a civil servant by promotion or transfer to a service or post may also be made on such probation and for such period of probation as may be prescribed.

(3) Where, in respect of any service or post, the satisfactory completion of probation includes the passing of a prescribed examination, test or course or successful completion of any training, a person appointed on probation to such service or post who, before the expiry of the original or extended period of his probation, has failed to pass such examination or test or to successfully complete the course or the training shall, except as may be prescribed otherwise:

(a) if he was appointed to such service or post by initial recruitment, be discharged; or

(b) if he was appointed to such service or post by promotion or transfer, be reverted to the service or post from which he was promoted or transferred and against which he holds a lien or, if there be no such service or post, be discharged."

By bare reading of above-referred section, especially subsection (3) it is established that all training courses are covered under the terms and conditions of a civil servant, which are applicable to newly recruited officers/officers even if they are on probation, hence, jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 to entertain such like petitions, is barred. The petitioners may approach the departmental hierarchy or the Punjab Service Tribunal. The Hon'ble Supreme Court of Pakistan in the case "I.A. Sharwani and others v. Government of Pakistan through *Secretary, Finance Division, Islamabad and others"* (1991 SCMR 1041), held that:--

"We are inclined to hold that if a statutory rule or a notification adversely affects the terms and conditions of a civil servant, the same can be treated as an order in terms of sub-section (1) of Section 4 of the Act in order to file an appeal before the Service Tribunal."

In the same judgment it was further held that:---

"However, we may clarify that a civil servant cannot bye-pass the jurisdiction of the Service Tribunal by adding a ground of violation of the Fundamental Rights. The Service Tribunal will have jurisdiction in a case which is founded on the terms and conditions of the service even if it involves the question of violation of the Fundamental Rights."

9. For what has been discussed above, the instant writ petition is held to be not maintainable and is dismissed accordingly.

Petition dismissed.

2017 [M] C.L.R. 835
[Lahore]
Present: **MUHAMMAD QASIM KHAN, J.**
Muhammad Ashfaq, etc.
Versus
Province of Punjab, etc.

Writ Petition No. 38980 of 2016, decided on 16th May, 2017.

CONCLUSION
(1) Failure of the department to appoint the person from waiting list was not in accordance with the fair practice of recruitment.
Constitution of Pakistan (1973)---
---Art. 199---Fresh appointment rather than waiting list, validity of---Grievance of the petitioners was that after issuance of merit list, five selectees were not issued appointment letters on the basis of non-verification of documents and some selectees did not join after completion of all formalities for the reasons best known to them---A waiting list was prepared, affixed and they were not offered appointments against the remaining vacant posts and the department published new advertisement to fill the vacant seats through fresh process---Held: Failure of the department to appoint the persons from waiting list, was not in accordance with fair practice of recruitment---The respondent department was directed to issue appointment letters to the petitioners and to all remaining candidates whose names figured in the waiting list, on the ground of equality and good governance---Petition allowed.
(Paras 5, 6, 8, 9)
Ref. 2014 PLC (CS) 526, 2009 SCMR 382.

معزز عدالت عالیہ نے آئینی درخواست ہذا کو منظور فرماتے ہوئے مسئول علیہ محکمہ کو ہدایت جاری کی تھی کہ وہ تمام سائلان و دیگر اُمیدواران کو برابری کی بنیاد پر تقرری نامہ جاری کردے۔
For the Petitioners: Malik Muhammad Awais Khalid, Advocate.
Abdul Aziz Awan, Additional Advocate General with Rana Muhammad Latif, S.P. (Legal), Muhammad Asif Ali Sheikh, DSP (Legal) from the office of CCPO, Lahore and Muhammad Salim Chughtai, DSP (Legal), CPO office, Lahore.
Date of hearing: 16th May, 2017.

ORDER
MUHAMMAD QASIM KHAN, J. --- Briefly the facts of the case are that pursuant to an advertisement published in print media flashing vacancies of constables (BPS-05), the petitioner also submitted their application forms and on completion of process, the following category wise merit list was prepared and displayed on 30.05.2016:----

Sr. No.	Category	Number of appointees
1	Open Merit	2065
2	Ex-Army men	2
3	Minorities	58
4	Female	176

While 115 candidates, including present petitioners were kept in the waiting list. Through this writ petition, precise grievance of the petitioners is that after issuance of merit list, some selectees were not issued appointment letters on the basis of non-verification of documents, for not having good antecedent and even for not having physical standards after examination by the medical board as required for the job and some selectees did not join after completion of all formalities for the reasons best known to them. A waiting list of 115 candidates including present petitioners was prepared, affixed and they were not offered appointments against the remaining vacant posts and the department published new advertisement to fill the vacant seats through fresh process.

2. It is argued by learned counsel for the petitioners that without challenging the merit list or the selection process, the petitioners have a straightforward case *i.e.* once the candidates who were offered appointments but they did not join, the seats became vacant and the petitioners who were admittedly on the waiting list and thus a vested right had accrued in their favour, must have been offered appointments. Therefore, without offering appointments to the waiting list candidates, new advertisement to fill in the vacant posts through a fresh selection process is not the legal course, rather it frustrates the basic purpose of preparation of waiting list. In support of his argument, the learned counsel placed reliance on the case *"Government of N.-W.F.P. through Secretary, Education Department, Peshawar and others v. Qasim Shah"* (2009 SCMR 382) and *"Sumara Umar Awan v. Chancellor Gomal University, D.I. Khan and 4 others"* (2014 PLC (C.S) 526).

3. On the other hand, it has been argued by learned law officer that waiting list will be valid for thirty days after display of final list and as the merit list was displayed on 30.05.2016, therefore, after 30.06.2016 the waiting list became redundant, as such, fresh advertisement was issued. In this respect, Standing Order No. 06/2015 issued by Government of the Punjab, Police Department has been referred.

4. I have heard the arguments of learned counsel for the parties at considerable length and perused the record with their assistance.

5. As shall be seen from the above narration of facts and the arguments of learned counsel for the parties, no challenge has been thrown to the recruitment process, subject matter of this writ petition and precisely the question involved in this case is the effect of waiting list. Before proceeding further, a table is drawn hereunder to clarify the final position:---

DETAIL OF RECRUITMENT OF CONSTABLES/LADY CONSTABLES NOVEMBER, 2015

Sr. No.			Recruited	Remain-ing	Remarks
1	OPEN MERIT	1611	1564	47	-
2	WOMAN	345	175	170	Unreserved (remaining

	QUOTA				seats to be filled by the male candidates)
3	MINORITY QUOTA @ 15%	115	52	63	63 Carry Forward
4	EX-ARMY PERSONNEL QUOTA @ 10%	230	2	228	As 10% of the vacancies is the maximum limit of recruiting ex-army personnel in the recruitment process, hence, the remaining seats to be filled through the general merit.
5	TOTAL VACANCIES	2301	1793	508 – 63 = 445	63 Carry Forward

There is no second view that after exhausting the above procedure, if the seats against reserved quota (excluding those reserved for minorities) remain vacant, the same would convert into open merit and had to be filled accordingly. As is visible from the above table taken from the reply submitted by Capital City Police Officer, Lahore, after completing the process, for all intents and purposes, according to the above drawn table, the remaining posts against open merit would become 445, and here come the candidates who fell on the waiting list.

6. The argument of learned law officer with regard to 30 days' life of the waiting list after display of merit list, is to be seen in the light of Standing Order No. 06/2015. Sections 22, 23, 24 and 25 are reproduced hereunder:---

"22. MERIT LIST.
A merit list will be prepared by the Recruitment Board on the basis of marks obtained by a particular candidate in written test, family claims and interview.
Waiting list of 5% of the vacancies will be displayed along-with result of successful candidates, which will be valid for 30 days after display of final list.

23. BACKGROUND INVESTIGATION.
The District Police Officer shall send the requisite information of the successful candidates to the Addl. Inspector General of Police, Special Branch and also to the concerned Police Station of the District where the candidate resides.
The two offices i.e. Addl. IGP Special Branch and District Police Officer concerned shall put every effort to verify the personal character, academic certificates and other relevant facts of the successful candidates.
The verification reports shall be minutely scrutinized by the DPO before issuing appointment letters.
Candidates having criminal record or affiliation with any proscribed organization shall not be appointed.
24. MEDICAL CHECK-UP.

Initially selected candidates after verification of antecedents shall appear before a medical board. Call letters the candidates at the residential address will be issued by the DPO concerned.

25. FINAL SELECTION/APPOINTMENT ORDERS.
Selection of candidates shall be based on merit. The selected candidates shall be allocated to respective Districts/Units according to their domicile and the vacancies available. The appointment orders shall be issued by the respective District Police Officers/competent authorities as the case may be.
Those candidates selected against the quota of SPU shall have to furnish a certificate stating therein that they are willing to serve anywhere in the Province and as per terms and conditions laid down in their appointment letter."
From bare perusal of para-22 above, it appears that in first part the merit list is to be prepared by the recruitment board on the basis of settled criteria and in the second part waiting list of 5% of the vacancies will be displayed along with result of the successful candidates and waiting list will be valid for thirty days after display of final list. The authority issuing the Standing Order intentionally did not use the word "merit list" and it used the word "final list", which fact indicates that merit list is different from the final list. From paras 23, 24 and 25, it appears that after preparation of merit list, the DPO shall send requisite information of the successful candidates to the Addl. Inspector General of Police, Special Branch and also to the concerned Police Station of the District where the candidate resides and two offices *i.e.* Addl. IGP Special Branch and District Police Officer concerned shall verify the personal character, academic certificates and other relevant facts of the successful candidates and then this report will be scrutinized by the DPO before issuing the appointment letter. After successful scrutiny, the cleared candidates shall appear before a medical board after receiving call letters from the concerned DPO and then final selection will be made on successful completion of the process. This process clearly draws a distinction between merit list and the final list. Merit list is prepared on the basis of marks obtained by the candidates in the written test, family claim and interview, whereas, final list is to be prepared after verification of antecedents of the candidates as per merit list, their medical checkup and then they will be allowed to join and at this stage final list shall be prepared, hence, there is a hell of difference between the merit list and the final list. From use of two words *i.e.* merit list and the final list in para-22 of the Standing Order, *ibid*, it becomes crystal clear that after completion of recruitment process as per merit list and after joining the candidates against their posting, the waiting list will come to surface. This fact is further clarified by the merit list itself, which has been produced before this Court, wherein, it has been clearly mentioned that *"This result is by no means final and if any of the candidates is found ineligible or his documents are found fake/forged, his result will stand cancelled."* Hence, the list dated 30.05.2016 is only the merit list and not the final list and it could not be said that after thirty days of this list, the list of the waiting candidates would stand scratched.

7. Another aspect of the matter is that some of the candidates who were offered appointments on open merit, minority quota or even women quota, have been allowed to join their appointments in the year 2017. In this respect a chart has been provided

by the respondents themselves and for ready reference the same table, showing order numbers, date of issuance, number of Constables and the dates of joining, is drawn hereunder:---

OPEN MERIT

S.NO.	ORDER #	DATE	NO. OF CONSTAB-LES	DATE OF JOINING
1	52907-15/E&T-VI	31.10.2016	960	01.11.2016
2	58803-15E&T-VI	26.11.2016	533	27.11.2016
3	64305-15/E&T-VI	28.12.2016	63	29.12.2016
4	5757-63/E&T-VI	10.02.2017	3	10.02.2017
5	17102-10/E&T-VI	22.04.2017	5	26.04.2017
	TOTAL		1564	

MINIORITY QUOTA

S.NO.	ORDER #	DATE	NO. OF CONSTAB-LES	DATE OF JOINING
1	52907-15/E&T-VI	31.10.2016	40	01.11.2016
2	58803-15E&T-VI	26.11.2016	10	27.11.2016
3	64305-15/E&T-VI	28.12.2016	1	29.12.2016
4	5757-63/E&T-VI	10.02.2017	1	10.02.2017
	TOTAL		52	

EX-ARMY PERSONNEL QUOTA

S.NO.	ORDER #	DATE	NO. OF CONSTAB-LES	DATE OF JOINING
1	58803-15E&T-VI	26.11.2016	2	27.11.2016
	TOTAL		2	

WOMEN QUOTA

S.NO.	ORDER #	DATE	NO. OF CONSTAB-LES	DATE OF JOINING
1	746-18/OB-CCPO/LAHORE	13.08.2016	156	13.08.2016
2	822-02/OB-CCPO/LAHORE	05.09.2016	5	05.09.2016
3	842-02/OB-CCPO/LAHORE	10.09.2016	4	10.09.2016
4	858-03/OB-CCPO/LAHORE	19.09.2016	2	19.09.2016
5	906-11/OB-CCPO/LAHORE	03.10.2016	2	03.10.2016
6	1110-02/OB-	05.12.2016	2	05.12.2016

	CCPO/LAHORE			
7	58-02/OB-CCPO/LAHORE	18.01.2017	2	18.01.2016
8	166-15/OB-CCPO/LAHORE	18.02.2017	1	18.02.2016
9	226-16/OB-CCPO/LAHORE	08.03.2017	1	08.03.2016
	TOTAL		2	

A perusal of the above chart shows that final appointment letters were issued to five candidates on 22.04.2017 and they joined on 26.04.2017, and on this date the above-mentioned process from merit list was completed and then the final list had to be prepared. Thereafter, the period of thirty days would reckon for the waiting list candidates.

8. The question of status of the candidates figuring in the waiting list has been decided by the Hon'ble Supreme Court of Pakistan in the case *"Government of N.-W.F.P. through Secretary, Education Department, Peshawar and others v. Qasim Shah"* (2009 SCMR 382) and *"Sumara Umar Awan v. Chancellor Gomal University, D.I. Khan and 4 others"* (2014 PLC (C.S) 526), wherein, it has been held that:---

"when some of the selected candidates do not join the service, such pots remain vacant and it was imperative for the department to have considered the remaining candidates for appointment against said posts. Such posts cannot be kept vacant till the next process of recruitment, if some of the selected candidates were still available on the waiting list."

Thus, it was concluded that failure of the department to appoint the persons from waiting list, was not in accordance with the fair practice of recruitment. The above verdict of the apex Court was followed in the case *"Sumara Umar Awan v. Chancellor Gomal University, D.I. Khan and 4 others"* (2014 PLC (CS) 526), and it was held that drill of subsequent requisition in ordinary course to re-advertise the vacancy would on one hand frustrate the procedure adopted and on the other, would deprive successful candidates whose names appeared in the waiting list, and to whom a vested right had been accrued.

9. For what has been discussed above, the stance of the respondent department that waiting list would remain valid only for thirty days *w.e.f.* display of merit list, is nullity in the eyes of law. The list of waiting candidates will come to surface only after completion of recruitment process from the merit list and preparation of final list of the selected candidates who join their posting. Consequently this writ petition is allowed and the respondent department is directed to issue appointment letters to the petitioners and to all other remaining candidates whose names figured in the waiting list, on the ground of equality and good governance. However, they will be allowed to join subject to verification of their antecedents and other relevant documents and clearance of medical test, as required by law.

Petition allowed.

2017 [M] P.Cr.R. 566
[Multan]
Present: **MUHAMMAD QASIM KHAN, J.**
Muhammad Ayoub
Versus
Federation of Pakistan, etc.

Writ Petition No. 3553 of 2017, decided on 3rd April, 2017.

CONCLUSION
(1) It is responsibility of the State to adopt all legal measures to prevent crimes.
Prevention of Electronic Crimes Act (XL of 1916)---
---S. 37---Constitution of Pakistan, 1973, Arts. 2A, 5, 19, 19A, 199---Blasphamous material on social media---Same facebook pages by the names of "Bhansa", "Mochi" and "Roshni" were found uploading inflammatory and blasphamous material---The content being uploaded on facebook was against the faith of muslims---Held: The term "right of expression" could not be stretched to such an extent that it be used as a tool to defy the religious thoughts or sacred personalities of one's religion---The Court directed the concerned agencies to block all such accounts on social pages spreading hateful material within four months and the honour of our last Holy Prophet Muhammad (ﷺ) *would be protected at any cost---The State may provide finance facility to F.I.A. to investigate the matter expeditiously---Petitions allowed.*

(Paras 1, 5, 6, 8, 12, 13, 14, 18, 19, 20, 21, 22)
Ref. Surah Al-Anbya Verse No. 107, W.P. No. 958/2013.

معزز عدالت عالیہ نے درخواست ہذا کو منظور فرماتے ہوئے متعلقہ اداروں کو گستاخانہ ویب سائٹس سوشل پیجز کو اندر میعاد چار ماہ بلاک کرنے کا حکم دیا تھا۔

[The Court allowed the petition and ordered the concerned agencies to block all the derogatory social pages].

For the Petitioner: Zulfiqar Ali Sidhu, Sher Zaman Qureshi, Waseem Mumtaz, Hafiz Allah Ditta Kashif, Ch. Salamat Ali Wains, Syed Athar Hassan Bokhari, Rana Miraj Khalid, Advocates.
Najaf Ali Malik, Assistant Attorney General for Federation with Nisar Ahmad, Director General IP&WA PTA, Khuram Siddiqui, Director Law PTA, Muhammad Naeem Ashraf, AHC (Consultant Law PTA), Faheem Gul, Assistant Director Law.
Madam Ameena Sohail, Member Legal MIOT.
Azhar Amin Chaudhry, Deputy Secretary.
Shahab Azim, Deputy Director FIA, Islamabad, Babar Shahryar, Deputy Director FIA, Multan, Muhammad Mumtaz Dogar, Assistant Director FIA, Muhammad Mumtaz Qureshi, SI/SHO, FIA Multan.
Date of hearing: 3rd April, 2017.

ORDER

MUHAMMAD QASIM KHAN, J. --- Briefly the facts relevant to the decision of instant writ petition are that some facebook pages by the names *"Bhansa", "Mochi"* and *"Roshni"* were found uploading inflammatory and blasphemous material. The said fact was taken notice of by the petitioner and he as a citizen of Islamic Republic of Pakistan, filed the instant writ petition precisely with the prayers that:---

(i) Respondents No. 2, 3 and 4 be directed to block the pages in the social media namely *"Bhansa", "Machar"* and other similar pages, and

(ii) Respondents No. 1 and 3 be directed to inquire into and investigate as to who are the actual culprits.

2. It is argued by learned counsel for the petitioner, being represented by a majority of the Bar and backed by number of religious scholars and the public, that the content being uploaded on facebook is not only against faith of muslims, the same is also clear violation of Article 19 and 19-A of the Constitution of Islamic Republic of Pakistan, 1973, in addition to being an offence covered by Chapter XV of Pakistan Penal Code. It is further argued that despite commission of an offence, silence on the part of state functionaries is unacceptable. While improving their arguments, it is argued that under Section 37 of the Prevention of Electronic Crimes Act, 2016, (hereinafter to be called as *"PECA"),* Pakistan Telecommunication Authority constituted under Section 2(iv) thereof, (hereinafter to be referred as *"PTA"*), must have taken steps to remove and block all such content, but here in this case conscious inactivity on the part of PTA, must be taken note of by this Court and authority must be directed to forthwith block facebook. The learned counsel representing the petitioner added that their above verbal prayer may be considered as part of the main prayer clause of the writ petition, as this Court otherwise has ample jurisdiction to grant the relief pursuant to the ultimate prayer *"any other relief"*).

3. The learned Assistant Attorney General, assisted by Director General PTA and other officers from respondent-ministries, came out with the stance that all out efforts are being made much before the instant raise of issue and in this context blasphemous content or pornographic sites were not only removed and blocked but the said fact was also pointed out to all the information system administrators requesting them to block such pages. The Director General PTA very fairly pointed out that as a matter of fact information from the secured websites could not be removed by the PTA itself unless supported by the information system itself. Further added that social media information systems namely facebook, YouTube and Twitter etc. are secured information systems and hosted out of territorial jurisdiction of Pakistan. Since the hosting of such information systems do not fall within the regulatory regime of PTA, the only option left with PTA is to make a request to the administrator of such secured information system to block objectionable contents/material available there. In this context, certain letters written by the respondents' way back since 2011 have been shown to the Court. The Court has been further informed that pursuant to the directions of the Hon'ble Islamabad High Court, they have been able to convince the facebook administrator and they have shown willingness to visit Pakistan and consider our concerns.

The Director General FIA, Multan submits that pursuant to the order of this Court an F.I.R. No. 59/2017 has been registered at police station FIA ACC, Multan and already another F.I.R. stood registered by the orders of Islamabad High Court, where-after, a joint investigation team has been constituted, some of the culprits have been arrested, continuous efforts are being to trace and arrest the remaining accused and all must be brought to book.

4. Heard.

5. On cursory glance to the annexures of this writ petition, this Court was shocked to see that the said material consisting of text as well as the pics in the shape of caricature, etc., was more than enough to create wide scale public unrest and outrage amongst absolute muslim majority of our Islamic ideological state. Therefore, taking notice of significance of the issue, on the very first date of hearing, the learned Standing Counsel for Federation as well as concerned officers from FIA, Multan, were summoned in the Court.

6. When an act is declared to be an offence, it is responsibility of the state to adopt all legal measures firstly to prevent such crimes and secondly if the said offence is committed then bring the culprits to book, put them before the Court for ultimate decision. In the same context Article 5 of the Constitution of Islamic Republic of Pakistan, 1973 deals with loyalty to state and obedience to the constitution and law, hence, it becomes constitutional duty of the State functionaries to perform their duties to curb the crimes as defined in different statutes of the country. With reference to this petition, the material appended with it clearly disclosed commission of offences as detailed in Chapter XV of the Pakistan Penal Code. This Court could not oversight that the legislators had laid down specific provisions *i.e.* Section 295-C, P.P.C, etc., to cater similar situations where any person uses derogatory remarks, etc., in respect of the Holy Prophet (ﷺ), by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, and thus defiles the sacred name of the Holy Prophet (ﷺ), the name of any wife (Ummul Mumineen), or members of the family (Ahle-bait) of the Holy Prophet (ﷺ), or any of the righteous Caliphs (Khulafa-e-Rashideen) or companions (Sahaaba) of the Holy Prophet (ﷺ). It was for the above reason that FIA authorities were directed to receive an application/oral statement of the petitioner and after adopting the requisite proper procedure, register a criminal case. This is quite a sensitive issue and the referred material clearly discloses that visible intent behind such posts was to hurt the feelings of muslims all over the world and we also have the history that whenever such unholy attempts were made, it worked as an ignition for the whole of our society and whenever the state failed to respond quickly, the antagonists were responded befittingly by the masses, at times by the individuals.

7. This Court would remind the State agencies of preamble of the Constitution of Islamic Republic of Pakistan, 1973 *(now Article 2-A of the Constitution),* which provides that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed; the Muslims shall be enabled

to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set down in the Holy Quran and Sunnah, protection shall be provided to the fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality.

8. As shall be seen from the preamble of our Constitution, the rights of every community have been delicately balanced and freedom of speech/expression and information is also hallmark of our constitution, but the term *"right of expression"* cannot be stretched to such an extent that it be used as a tool to defy the religious thoughts or sacred personalities of one's religion. This Court is of the clear view that under the umbrella of *"freedom of speech and information"* not only the muslim community, in fact the followers of all the religions have been made to suffer immensely e.g. Salman Rushdie wrote a book hurting the feelings of muslims all over the world and his book was banned in 1988, James Laine characterized Shivaji (Shivaji Maharaj Bhonsle) hurting the feelings of that sect, as a result Bhandarkar library was vandalized by the mob and similarly Wendy Doniger wrote a book *"The Hindus: An Alternative History"* creating rage amongst Hindu community. In view of the above, the right of expression cannot be allowed to thwart the feelings of any religion on earth, because as a matter of fact distortion of any religion on the pretext of right of speech/expression or information now amounts to another form of terrorism a fact that the international community must now concede.

9. There can be no second opinion that advancement and use of technology has brought whole of the universe into one global village and internet is now considered to be the most productive element in spreading, sharing and developing knowledge and ideas, ultimately benefiting the public at large. Having observed that, this Court is well aware of the fact that despite all above pointed benefits, comparatively a few of the internet users, for any reason whatsoever, have resorted to use it for destructive purpose. In this context we are aware that the internet or for that matter other social forums like facebook, twitter, etc. unfortunately are being used, by some of the elements, negatively, and by their such nefarious activities, the laws of the countries are being violated, religious feelings of all kinds of communities are being hit, let it be said that all this is being done under the cover of *"freedom of expression"* and *"freedom of speech".*

10. It is important to mention here that some individuals who can be counted on finger tips are of the view that under Article 19 and 19-A of the Constitution of Islamic Republic of Pakistan, 1973, they carry uninterrupted right of freedom of speech and information, therefore, no action can be taken against any such material, as is part of this writ petition. But, they are totally ignorant of the fact that Article 19 of the Constitution of Islamic Republic of Pakistan, 1973 in clear terms provides that said liberty should be subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality,

or in relation to contempt of Court or incitement to an offence. Same is the position with Article 19-A of the Constitution, which was inserted through 18th amendment and it provides a right of information to any citizen, but this is again subject to regulations and reasonable restrictions imposed by law. Therefore, any effort by the individuals or any smaller groups to twist these Articles and interpret the same at their whims could not be permitted as these liberties are not absolute, rather are subject to certain restrictions of law and the regulations.

11. The Court is cognizant that freedom of expression, universally acknowledged as both fundamental and foundational human right, is not only a corner stone of democracy but also indispensable to thriving civil society. Indeed, the freedom of expression is considered to be a foundational human right of the greatest importance. The right to freedom of expression is protected by a multitude of regional and international treaties and charters and frameworks, but internationally it is applied with some restrictions as no country could allow the rebellions by delivering speeches against the state, promoting hatred and seeds of terrorism in the country. If such situation is allowed to persist, certain disgruntled elements will start to recruit citizens as a force to wage a war against the state as is the case in Syria, Afghanistan, Iraq, etc. Hence, the restrictions imposed by the Constitution of Islamic Republic of Pakistan, 1973 could not be bypassed. In short freedom of speech and information and restrictions imposed there-against, could be explained in one sentence *"liberty of one ends where the nose of other starts"*.

12. One must not forget that the right of *"freedom of speech or freedom of expression"* which is now being portrayed as innovation of recent times had in fact been introduced by Holy Prophet (ﷺ) 1400 years ago. Yet it is important to remember that freedom of expression, speech, tolerance and respect go hand in hand. As it is a general consensus that mocking, degrading or insulting others, in the name of freedom of speech or expression devalues a civilized society. Without any doubt, democracy, racial equality, social justice, human rights are all Islamic concepts. But unfortunately, the western world sees Islam as the opposite. The reality of Islam is that it promotes justice and preserves human rights. The Holy Prophet (ﷺ) was the greatest humanitarian that ever walked on the planet. In fact "he must be called the saviour of humanity…". George Bernard Shaw insists that "if a man like Muhammad were to assume dictatorship of the modern world, he would succeed in solving its problems that would bring it the much needed peace and happiness." In support of this, a great historian, Lamartine argues that "as regards all standards by which human greatness may be measured, we may well ask, is there any man greater than he?" Thus, we learn that Muslims and non-Muslims alike have found the life of Holy Prophet (ﷺ) a continuous source of inspiration. Even the non-muslims of Makkah knew him as the Truthful" (Al Sadiq) and "the Faithful" (Al Amin). In fact, each aspect of the life of Hazrat (ﷺ) exemplifies his perfection and is invaluable for those who seek a model of guidance because it is specifically designed by Allah (S.W.T.) for this purpose. All of the Holy Prophet's (ﷺ) attributes, virtues and qualities have been showered on him as gifts from The Creator. Allah (S.W.T.) has carved the physical features, the style of living and the conduct of His Messenger

(S.A.W.) in such a perfect manner that each one of his qualities serves as an argument for the glory and grandeur of The Creator. In fact the life of Hazrat (ﷺ) is the focus of our faith. Recognition of Messengership is recognition of the divine presence. According to his wife Umm-ul Mu'mineen Hadhrat `A'ishah (R.A), "He was a personification of the Qur'an." Since the Prophet (S.A.W.) is the embodiment of all the virtues that have been enunciated by the Holy Qur'an, a true understanding of the attributes of the Prophet (ﷺ) is in fact a true understanding of Allah's attributes. Sahih Al-Bukhari, Sahih Muslim, and other authentic compilations of the traditions or Hadith of Hazrat (ﷺ) are brimming with examples to support the fact.

13. Deen-e-Islam is not a religion alone, it is a complete code of life. Religion deals with private affairs of life whereas Deen covers all aspects of life, individual as well as collective. In other words Deen is all embracing term which includes religio-socio-politico-economic system. It touches upon the material as well as spiritual dimensions of human existence and insists that all our thoughts and deeds should be performed with good consciousness. Having said all that, Hazrat (ﷺ) is the pivot around which all of our faith revolves. It is narrated by Abdullah bin Hisham (R.A.): "We were with the Prophet Muhammad (S.A.W.) and he was holding the hand of Umar bin al Khattab. Umar said to him "O Allah's Messenger! You are dearer to me than everything except my ownself." The Prophet (S.A.W.) said, *"No, by Him in whose hand my soul is you will not have complete faith till I am dearer to you than your own self."* Then Umar said to him, "However, now by Allah you are dearer to me than my ownself." The Prophet (ﷺ) said, "Now, O Umar (now you are a believer)".

14. As shall be seen from the life of Hazrat Muhammad (PBUH), in fact the fabric of Islam accentuates the concept of peace as the word 'Islam' itself has been derived from another Arabic word "Salam" which means peace and the literal meaning of Islam is 'to enter into peace'. The Holy Prophet (ﷺ) always endeavoured not only to maintain peace and tranquility within Islamic society but also for peaceful co-existence of Muslims with other communities. He (ﷺ) was sent as a messenger of peace and mercy for the whole mankind-not to the Muslims only as Allah Almighty says in verse 107 of Surah Al-Anbya (the Prophets), "And We have not sent you, [O Muhammad], except as a mercy to the worlds." Even before announcing his prophethood, the Holy Prophet (ﷺ) had been making efforts to promote peace in Arab society by amicably resolving the disputes. The issue of Blackstone (Hijr-e-Aswad) is one of its example. To carry the greatest of values set by Hazrat Muhammad (ﷺ) for each and every field of life, is the paramount duty of muslims on earth.

15. Now, it is really unfortunate that unholy attempts are being made by the certain elements to defy the most sacred personality (ﷺ), not only of muslims but whole of the universe. Perhaps, such wrongdoers are not aware of the fact that protecting the prestige of Hazrat (ﷺ) is the first and foremost duty of all muslims on earth. Muslims would not allow any one, on the basis of any slogan, either that of *"freedom of expression"* or *"freedom of speech"* to undermine the dignity of Hazrat

(ﷺ). I am also mindful of a big and unprecedented event of our muslim history *i.e. "waqia masjid-e-zarar".* In brief a mosque was constructed by some munafiqeen with an evil intention of causing harm and disgrace to the true muslims as well as the Holy Prophet (ﷺ) himself, when Hazrat (ﷺ) was returning from Ghazwa-e-Tabooq, following Ayats were revealed in the Holy Quran:---

Verses 107-110

And (there are) those who have built a mosque to cause mischief and infidelity and to create dissention among the believers and to make preparations for one who has been at war with Allah and His Messenger even before. And they will certainly swear (and say), "We intended nothing but good." And Allah testifies that they are liars. [107]

Do not ever stand there (in prayer). In fact, the mosque that was founded on *Taqwa* (Piety) from the very first day of more-worthy that you stand there. In it there are people who like to observe purity; and Allah loves those observing purity. [108]

Is, then, a person who has founded his building on fear from Allah and His pleasure better or the one who has founded his building on the edge of an abyss about to collapse, so it did collapse with him into the fire of Ja-hannam? And Allah does not give guidance to the unjust people. [109]

The building they have made shall always remain a source of doubt in their hearts unless their hearts are cut into pieces. And Allah is All-Knowing, Wise. [110]

Thus, on the commandment of Allah Almighty, Hazrat (ﷺ) ordered the same to be demolished and set on fire. From the above it is obvious that apparently one thing may be good but unless the intention behind such an activity is not pure, it is essential to curb it by all means.

16. During the course of arguments, the D.G. PTA was further enlightened on the rights and responsibilities of the users as uploaded by the facebook administrator. Its clause-3(7) clearly provides that its user will not post content that is hate speech, threatening, or pornographic; incites violence, or contains nudity or graphic or gratuitous violence. Further, its clause 5(1) and (2) provides that the user would not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law, and facebook could remove any content or information which is posted on facebook and it is believed that same violates the statement or policies of the facebook and similarly the respectful behaviour would be encouraged. When the Director General PTA, present in the Court, was confronted with above position, he pointed out that the secured websites are hosted on https and TLS etc., protocols. Most of the social media websites namely facebook, YouTube and Twitter etc are secured information systems and hosted out of territorial jurisdiction of Pakistan. Since, the hosting of such websites do not fall within the regulatory regime of PTA, the only option left with PTA is to make a request to the administrator of such secured website to block objectionable contents/material available there. Further, he informed the Court that already this issue has been taken up before the facebook authorities and he is sanguine that issue of bad content shall be resolved within next two months. He further recognized that facebook or twitter are only social portals and have no much significance in spreading knowledge based material.

17. This Court has been apprised that the issue of uploading blasphemous content on social media has also been discussed in a meeting of Muslim Ambassadors in Islamabad wherein, it has been decided to formulate a joint strategy to address the issue of blasphemous content on social media and further it has been resolved that a comprehensive strategy paper will be circulated by the Ministry of Foreign Affairs among the ambassadors of the Muslim countries, which they will share with their governments to evolve future plan of action. A formal reference will also be sent to Secretary General of the Arab League and Secretary General of OIC raising the issue of blasphemous content on social media. After response from the governments of the Islamic countries, the matter then will be taken up at the level of United Nations. Besides, legal options will be explored to follow up the matter legally in the Courts of the respective countries from where such content is being generated.

18. Furthermore, during arguments this Court repeatedly posed questions to the Director General PTA that if the facebook refuses to block such pages or some new pages are opened for the purpose of spreading hatred material which is otherwise against the law and the Constitution of the Islamic Republic of Pakistan, 1973, and it may even result in damaging the integrity and sovereignty of the state, whether the state agencies would remain silent spectators, D.G. PTA came out with the plea that if within a period of two months decisive steps are not taken by the concerned information system providers/administrators for removal of all such content, then as a last and final resort, the authority would block all such sites at once without any space.

19. As detailed above, this Court is convinced that pursuant to the orders of the Court, the concerned agencies have already activated the process of blocking all such accounts on social pages, spreading hateful material and in this respect as pointed out by the D.G. PTA approximately two months would be required to settle down the issue to its logical end, however, this Court is aware that all above activity would involve a new understanding with international information system providers, therefore, considering all the ground realities, as a safer mode, this Court directs that the concerned agencies may even take four months for the completion of above uphill task, but the ultimate object of protecting the honour of our Holy Prophet (ﷺ) shall be achieved at any cost.

20. In addition to the above, with reference to the order dated 13.05.2014 passed by a Division Bench of this Court in the case *"BYTES FOR ALL versus FEDERATION OF PAKISTAN, etc."*
(Writ Petition No. 958/2013), this Court is well aware that in somewhat similar matter, the Hon'ble Supreme Court of Pakistan on 17.09.2012 had passed the following order:---

"4. M/s. M. Akram Sheikh and Taufiq Asif, learned counsel have filed Civil Misc. Application No. 3908/2012, wherein attention of the Court has been drawn towards anti Islamic film under title "innocence of Muslim". They stated that in Pakistan this film, which contains disrespectful material regarding the Holy Prophet (Peace Be Upon Him), injuries to the feelings of every Muslim is still available on website. Therefore, the PTA is under legal obligation to control such like matter but it

has failed to perform its statutory duties, as such direction be issued to the PTA to block the above said film on U-Tube website and refrain fin future as well for allowing such material."

5. Office has inquired from the office of PTA and has gathered information that the Chairman, PTA is out of town and is likely to be back to Islamabad today. Be that as it may, on having seen the material, which has been published in newspapers *i.e.* The News, Dawn, etc. and the material, which is going on as per the reporting, we *direct the Chairman PTA to immediately block the offending material on U-Tube website and on any other website, referred to hereinabove.* This order be communicated to the Chairman PTA during course of the day. He is directed to submit report to the Registrar today positively for our perusal in Chambers. (Emphasis supplied.)

This Court has been told that said order of the apex Court still holds the field, and provides guidelines to this Court and all the concerned authorities in such like matters.

21. At this stage it is made clear that if the authorities could not succeed to remove the blasphemous content, as require by the Constitution and the other laws applicable in the country, all such accounts or even the information system involved in above pointed nefarious activities, shall be blocked at once as undertaken by the Director General PTA, present in the Court.

22. For what has been discussed above, in view of the substantial and adequate steps taken by the state in the matter, the learned counsels for the petitioner have expressed their satisfaction. This Court would only observe that it is never too late to make right decisions. Since F.I.R. has already been registered, the investigation shall take the matter to its logical end. Therefore, this writ petition is disposed of in above terms, however, for future eventualities, in furtherance and in addition to the directions earlier issued by this Court i n the case *"Islamic Lawyers Movement through Tahir Farooq alias Allah Bakhsh Leghari v. Federation of Pakistan through Secretary Establishment, Government of Pakistan, Islamabad and 3 others"* (2012 C.L.C. 1300), it is directed that:---

(i) State functionaries shall keep in mind that PTA is an independent body in the light of its statute and government at the most could issue instructions, that too within the parameters of law.

(ii) A Bill be tabled before the Parliament for deliberations and decision about:---

(a) Amendment in Section 37 of PECA to authorize PTA to block information system in case service providers fail to remove blasphemous content;

(b) Procedure for right of appeal, revision, review be provided to the individuals or the system operators whose accounts, pages or systems are blocked by the authorities;

(c) Where in Section 9 of PECA, punishment for offences relating to terrorism, proscribed organizations, etc. has been provided, punishment of Sections 295 to 295-C, P.P.C. may also be introduced.

(iii) Rules be framed under PECA, which are though required, yet have not been framed. This exercise must be completed within three months from today;

(iv) A cell in the foreign ministry shall be created to keep all the Islamic countries abreast of the efforts and steps taken pursuant to the above referred meeting of the Ambassadors, which was chaired by the Federal Interior Minister, Pakistan;
(v) The Government shall adopt all necessary measures for enhancing technical expertise and equipments of PTA authorities;
(vi) It appears that FIA which is to investigate such like matters is not equipped with complete devices and team of experts, hence, necessary steps including finance facility, be provided.

23. Since the annexures of the writ petition carry the material which is totally against our faith and belief, the same cannot be made public. As such, the same shall be sealed by the Deputy Registrar (Judicial) of this Bench, so that no one could have access to it or could even get its certified copies, except with specific approval of the Court.

Petition allowed.

2017 Law Notes 1359

[Multan]

Present: **MUHAMMAD QASIM KHAN, J.**

Kishwar Mehmood

Versus

The State

Criminal Rev. No. 13 of 2014, decided on 23rd April, 2014.

CONCLUSION

(1) The pendency of civil/family suit or proceedings cannot take away the prerogative of the Trial Court to proceed with the trial and conclude it.

Criminal Procedure Code (V of 1898)---

*---Ss. 435, 439, 561-A---Civil and criminal proceedings, principle of---The application of the petitioners for sine die adjournment of trial of case had been dismissed by the Trial Court---He claimed that the proceedings of trial in case F.I.R. got lodged by Respondent No. 3 be adjourned sine-die to wait for the decision of two suits, one filed by petitioner No. 1 for restitution of conjugal rights and the second instituted by the respondent No. 3 for the jactitation of marriage---**Held:** The pendency of civil/family suit or proceedings could not take away the prerogative of the Trial Court to proceed with the trial and conclude it on the basis of material whatever was brought before it, by either of the parties to arrive at just conclusion of the investigation---The Family Court was directed to decide the pending suits within a period of six weeks---Petition dismissed.*

(Paras 1, 2, 5, 7)

معزز عدالت عالیہ نے فوجداری نگرانی درخواست ہذا کو مسترد کرتے ہوئے قرار دیا تھا کہ دیوانی اور فوجداری کارروائیاں ساتھ ساتھ چلائی جا سکتی تھیں۔

For the Petitioner: **Sh. Javed Akhtar, Advocate.**

For the Respondents: **Tahir Mehmood, Advocate.**

Malik Muhammad Jaffar, Deputy Prosecutor General, with Muhammad Akram, Sub-Inspector.

Date of hearing: **23rd April, 2014.**

ORDER

MUHAMMAD QASIM KHAN, J. --- This writ petition has been brought to assail the order dated 17.12.2013, whereby application of the petitioners/accused for *sine-die* adjournment of trial of case F.I.R. No. 220/2013 has been dismissed by the

learned Trial Court.

2. Precisely the contention of learned counsel for the petitioner is that proceedings of trial in case F.I.R. No. 220/2013 got lodged by respondent No. 3 be adjourned *sine-die* to wait for the decision of two suits, one filed by petitioner No. 1 for restitution of conjugal rights and the second instituted by respondent No. 3 for jactitation of marriage. The contention of learned counsel is that fate of those pending suits will have material impact on the outcome of trial of the criminal case as the same will finally determine the sanctity of allegations levelled in the F.I.R.

3. The learned Deputy Prosecutor General assisted by learned counsel for the respondent/complainant opposed this petition by arguing that criminal trial as well as proceedings in the family or civil suits can continue simultaneously and attempt of the petitioner to stay proceedings of the F.I.R. case is in fact an effort to frustrate lawful process of trial.

4. Heard. Record perused.

5. I am afraid the ground that decision of some family or civil suit will have impact on the outcome of F.I.R. trial does not provide any legal justification to held in abeyance the trial of F.I.R. to wait for decision of the suit, as the pendency of civil/family suit or proceedings cannot take away the prerogative of the Trial Court to proceed with the trial and conclude it on the basis of material, whatever is brought before it, by either of the parties to arrive at just conclusion of the investigation.

6. Even otherwise, if the accused side considers that decision of the civil/family suit will decide the ultimate fate of the criminal proceedings launched against them, there are two stages for them to agitate this question before the Trial Court. Firstly, when report under Section 173, Cr.P.C. is submitted and cognizance is taken by the learned Trial Court, at this moment the accused may bring their stance before the Trial Court and if the Trial Court after tentatively considering the material available before it, forms an opinion according to the plea of the accused, then it shall stop the proceedings to wait for the decision of the Civil Court. Secondly, the Trial Court may proceed with the trial, record the statements of prosecution witnesses and at the time of recording of statement of the accused under Section 342, Cr.P.C., if in reply to question whether he will produce any evidence in defence, the accused answers in the affirmative and desires to produce copy of any judgment and decree of a civil suit in his defence, the Trial Court comes to a conclusion that said judgment

and decree will ultimately affect the criminal proceedings, only then the Trial Court shall stop the trial proceedings. It may be observed here that if before recording the statements of the prosecution witnesses, the trial in the State case is stayed just to wait for the decision of the Civil/Family Court, there would always remain apprehension that in the interregnum period, the prosecution evidence may be destroyed or diminish for any reason whatsoever and ultimately irrespective of the decision by the Civil/Family Court, the trial of the F.I.R. case may loose its significance. Exactly same has been observed by the learned Trial Court while dismissing application of the petitioners/accused through the impugned order. Therefore, it would be more appropriate for the Trial Court and also in the larger interest of justice to bring the entire prosecution case on its file and then consider the defence if any taken by the accused side in their statements under Section 342, Cr.P.C. on the above question.

7. For what has been discussed above, I see no merit in this writ petition and the same is accordingly dismissed. However, the Court (*Mrs.* Sajida Mehboob) seized of the family suits is directed to decide the pending suits within a period of six weeks of receipt of copy of this order. If required, the Family Court shall proceed with the trial on day to day basis and no adjournment shall be granted to either of the parties unless some special and compelling justification exists for adjournment. The Deputy Registrar (Judicial) shall convey this order to the learned Judge Family Court, telephonically.

Writ petition dismissed.

2018 M L D 369
[Lahore (Multan Bench)]
Before Muhammad Qasim Khan, J
FOUZIA BIBI---Petitioner
Versus
STATION HOUSE OFFICER, POLICE STATION CITY, LODHRAN and another---Respondents

Crl. Misc. No.7451-H of 2016, decided on 18th January, 2017.

Criminal Procedure Code (V of 1898)---
----S. 491---Habeas corpus---Recovery of child in custody of father---Petitioner was mother of minor girl and alleged that respondent who was father of the minor had illegally took away the minor with him---Validity---Neither minor was of such tender age nor could it be established by petitioner that she was forcibly removed from her by respondent in recent past, so as to attribute urgency within the meaning of S.491, Cr.P.C.---Petitioner mother had not alleged that there was immediate threat of her removal, or the child was in danger for any reason including health hazard etc.---Three sons of petitioner were already living with respondent (father) therefore, it was also inapt to separate the kids from one another, especially when they had already lost union of their parents---Habeas corpus petition was dismissed in circumstances.
Mst. Nadia Perveen v. Mst. Almas Noreen and other PLD 2012 SC 758 rel.
Mian Muhammad Naeem Karemi for Petitioner.
Mirza Abid Majeed, Deputy Prosecutor General.
Shehzada Abid Mushtaq for Respondent.

ORDER
MUHAMMAD QASIM KHAN, J.---Through this petition under section 491, Cr.P.C., Mst. Fozia Bibi seeks recovery of her daughter Mst. Zainab Bibi (aged six years), from the custody of respondent No.2 (father of the child).
2. The contention of learned counsel for the petitioner that she obtained divorce from respondent No.2 on 11.11.2014, afterwards, the respondent No.2 came to her, to see the minor and one month ago took the minor daughter with him.
3. On the contrary, the learned counsel for respondent No.2 has argued that allegation of forcible abduction of Mst. Zainab Bibi is absolutely wrong, instead Mst. Zainab Bibi as well as her three minor sons namely Shahid (aged fifteen years), Mujahid (aged 13 years) and Salman (aged twelve years), are happily living with him right from the very beginning, as such, it is not a case where jurisdiction under section 491, Cr.P.C. could be exercised and that if the petitioner is interested in the custody of the minor, she may approach the competent guardian court.
4. Heard. Record perused.
5. In pars No. 6 of this petition and as argued before this Court, it has been clear stance of the petitioner that minor (Zainab Bibi) was removed by the respondent forcibly from her house, but no date, time and place has either been mentioned in this petition nor pointed out to the court during arguments.

6. Apart from the above, from the documents attached by the petitioner herself along with this petition, it is clear that petitioner filed a suit for dissolution of marriage on 04.07.2014 against the respondent No.2 and in the said suit although the petitioner pleaded that she had four kids from the loin of respondent No.2, but she uttered not a single word that all or any one of those kids, including Mst. Zainab Bibi (the alleged abductee) was in her custody at the time of filing of the said suit. This fact has materially contradicted the stance taken by the petitioner in this petition that minor Mst. Zainab Bibi was forcibly removed by respondent No.2, especially when no date, time or place could be pointed out by her.

7. There is yet another aspect of the matter i.e. if the minor was forcibly removed by respondent No.2 about a month ago, then as a mother the petitioner could not have waited for such a long period to agitate the issue before this court. Furthermore, if the minor was living with the petitioner, then she could have brought on record school admission certificates, attendance certificates, etc. of the minor to show that minor was getting education under her supervision. The entire above situation, is clear pointer of the fact that minor had not been forcibly taken away by the respondent recently, whereas, the Hon'ble Supreme Court of Pakistan in the case "Mst. Nadia Perveen v. Mst. Almas Noreen and others" (PLD 2012 Supreme Court 758) has clearly held that "Matter of custody of minor children can be brought before a High Court under section 491, Cr.P.C. only if the children are of very tender ages they have quite recently been snatched away from lawful custody and there is a real urgency in the matter. In such a case the High Court may only regulate interim custody of the children leaving the matter of final custody to be determined by a Guardian Judge."

The above quoted case law is quite applicable to the facts and circumstances of the case in hand, as neither the minor is of such a tender nor could it be established by the petitioner that she was forcibly removed from her by the respondent in recent past, so as to attribute urgency within the meaning of section 491, Cr.P.C, as otherwise, it is no where the allegation of the petitioner that either there is immediate threat of removal of the child from Pakistan or that the life of the child is in danger for any reason including health hazard, etc. In addition to the above, it is admitted position that three sons of the petitioner are already living with their father/respondent No.2, therefore, it may also be inapt to separate the kids from each other, especially when unfortunately they have already lost the union of their parents. This petition, therefore, is dismissed. However, the parties are at liberty to approach the competent Guardian Court for determination of guardianship of the minors, the question with regard to interim custody shall also be seen by the said Court, if approached in this behalf.

8. Before parting with this order, it is made clear that whatever has been observed above is result of tentative assessment and shall not prejudice the case of either side during subsequent proceedings before any forum.

MH/F-17/L Petition dismissed.

2018 M L D 1386
[Lahore]
Before Muhammad Qasim Khan, J
HAIDER ABBAS BHINDAR---Petitioner
Versus
DISTRICT POLICE OFFICER, SHEIKHUPURA and 5 others---Respondents

Criminal Miscellaneous No. 19096-H of 2018, decided on 12th April, 2018.

Criminal Procedure Code (V of 1898)---
----S. 491---Habeas corpus petition---Contracting marriage without consent/knowledge of parents---Jurisdiction of High Court under S.491, Cr.P.C.---Scope---Abduction of wife of petitioner/husband by her parental family members---Petitioner contended that his wife had been forcibly abducted by her parental family members as she contracted marriage against their wishes---High Court observed that it had become trend in the society, rather it had shaped into well thought practice that girls come out of their houses for couple of hours on any pretext; enter into marriage without the consent of their parents; file complaint alleging harassment; return back to their parental home and thereafter, the entire exercise was followed by petition under S.491, Cr.P.C. before the High Court which was managed with a view to use High Court as a stage of "Rukhsati"---Such indecent activity was nothing less than menace which required to be plugged as far as practicable as the same was not only destroying character of youth but also stigmatizing and diminishing moral values---No evidence had been cited by the petitioner for the purpose of proceedings under S.491, Cr.P.C. to lend support of his assertion about immediate and forcible abduction of his wife---Girl who was major and allegedly abducted but none of the locality got glimpse of the incident---Petitioner had alleged to have been informed about forcible abduction by his wife telephonically but no cellular or landline number had been given to establish the same---Wife of the petitioner was, admittedly, with her parents---Petitioner could resort Family Court for the restitution of conjugal rights---Petitioner had not made out a case for handing over custody of alleged abductee---High Court declined to exercise jurisdiction under S.491, Cr.P.C. to effect "Rukhsati"---Habeas Corpus petition was dismissed, in circumstances.

Mukhtar Ahmad v. Ghafoor Ahmad and 3 others PLD 1990 Lah. 484; Irfan Ahmad v. SHO and 6 others 2011 PCr.LJ 597 and Muhammad Javed Sagar v. Station House Officer and 2 others 2011 PCr.LJ 674 ref.
Syed Tanvir Ahmad Hashmi for Petitioner.

ORDER
MUHAMMAD QASIM KHAN, J.---This is second petition, earlier the petitioner filed Crl. Misc. No. 192413-H/2018 but the same was dismissed as withdrawn on 05.04.2018 and now this petition has been filed without any cogent reason.

2. It is argued by learned counsel that the petitioner got married with Mst. Naila Shahzadi on 08.01.2018, but as the said marriage was contracted without the

blessings of parents of Mst. Naila Shahzadi, therefore, on 26.03.2018, respondent No.3 (father of the girl), respondent No.4 (brother of the girl) and respondents Nos. 5 and 6 (paternal uncles of the girl) came to the house of the petitioner and forcibly took Mst. Naila Shahzadi (wife of the petitioner) with them.

3. Heard.

4. It has become a trend in our society, rather it has shaped into a well thought out practice that girls come out of their houses for couple of hours on any pretext whatsoever; enter into marriage without the consent of their parents; file a complaint alleging harassment to them and their husbands; return back to their parental home and thereafter, the entire above exercise is followed by filing of petitions, like the instant one, before this court. All above is managed with a view to use this court as a stage of "Rukhsati. " This is prime time for the courts to notice and as far as practicable to plug such indecent activity nothing less than menace, which is not only destroying character of our youth; it is also stigmatizing and diminishing our moral values.

5. For the purposes of proceedings under section 491, Cr.P.C. this court has observed that no evidence has been cited by the petitioner to lend support to his assertion about immediate and forcible abduction of Mst. Naila Shahzadi , otherwise, it is not expected that a major girl is forcibly abducted but none from the locality gets even a glimpse of the incident or does not even hear the hullaballoo. Although it is alleged in the petition that petitioner was telephonically informed by Mst. Naila Shahzadi about her forcible detention, but no cellular or landline number has been given to establish the said factum.

6. It is admitted by the petitioner himself that Mst. Naila Shahzadi is now with her parents. This Court in the case "Mukhtar Ahmad v. Ghafoor Ahmad and 3 others" (PLD 1990 Lahore 484), held that:-
"... ... ... any restraint placed on the movements of a son or a daughter by a father out of concern for his or her welfare and to prevent ill-advised action by him or her cannot be termed illegal or improper detention unless such a restraint is patently unjust, cruel and obviously not in the best interest of the son or daughter so restrained; or if the general attitude and the usual treatment of the son or daughter by the father is such that it may attract the penal provisions of law. Otherwise it is accepted by every civilized society and duly approved of by every moral code and sanctioned by every religion, that, within limits prescribed, a parent has the right to restrain from, and to admonish in respect of, and to give practical expression to his or her disapproval of, the conduct unbecoming in his or her judgment, of a son or daughter."
Similar view was taken by this Court in the case "Irfan Ahmad v. SHO and 6 others" (2011 PCr.LJ 597) and "Muhammad Javed Sagar v. Station House Officer and 2 others" (2011 PCr.LJ 674), holding that custody of a girl with her parents (father, mother, brothers) cannot be termed as illegal or improper.

7. In the facts and circumstances of this case, this court is not persuaded that a case for handing over the custody of Mst. Naila Shahzadi to the petitioner is made out, nor shall this court allow its jurisdiction under section 491, Cr.P.C. to be invoked to effect a "Rukhsati", especially keeping in mind that the petitioner has appropriate and specific remedy to file a suit for restitution of conjugal rights before the Family Court and it is requirement of law that before proceeding further the said court shall summon both the parties for reconciliation proceedings and at that stage if the alleged abductee admits her Nikah with the petitioner, she may join the petitioner.

8. For what has been discussed above, this court is convinced that apart from the fact that the custody of Mst. Naila Shahzadi with her parents is not illegal, even the ingredients of section 491, Cr.P.C. also do not exist in this case. Consequently, the instant petition is dismissed. The petitioner is however, at liberty to seek alternate remedies in proper form at the appropriate forum.

MQ/H-5/L Petition dismissed.

2018 P Cr. L J 1133
[Lahore (Multan Bench)]
Before Muhammad Qasim Khan, J
MUHAMMAD AYOUB---Petitioner
Versus
FEDERATION OF PAKISTAN through Secretary, Ministry of Interior, Islamabad and 6 others---Respondents

Writ Petition No. 2553 of 2017, decided on 7th April, 2017.

(a) Constitution of Pakistan---
----Art. 5---Commission of crime---State responsibility---Scope---When an act is declared to be an offence, it is responsibility of the State to adopt all legal measures firstly to prevent such crime and secondly if offence has been committed then bring the culprits to book, put them before the Court for ultimate decision---Provisions of Art. 5 of the Constitution deals with loyalty to State and obedience to the Constitution and law---Constitutional duty of State functionaries to perform their duties to curb crimes as defined in statutes of the country.

(b) Constitution of Pakistan---
----Arts. 19 & 19-A---Penal Code (XLV of 1860), S. 295-C---Freedom of speech---Extent---Religious feelings, hurting of---Grievance of petitioner was that some accounts on social media Facebook were uploading inflammatory and blasphemous material, which accounts required to be proceeded against---Validity---Rights of every community were delicately balanced and freedom of speech/expression and information was also hallmark of the Constitution---Term 'right of expression' could not be stretched to such an extent that it could be used as a tool to defy religious thoughts or sacred personalities of one's religion---Right of expression could be allowed to thwart feelings of any religion on earth, because as a matter fact distortion of any religion on the pretext of right of speech /expression or information amounted to another form of terrorism and such was a fact that international community must concede---If authorities could not succeed to remove blasphemous content, as required by the Constitution and other laws applicable in the country, all such accounts or even the information system involved in pointed nefarious activities would be blocked at once as undertaken by Director General Pakistan Telecommunication Authority---High Court directed that a Bill should be tabled before the Parliament for deliberations and decision about amendment in S. 37 of Prosecution of Electronic Crimes Act, 2016 ("PECA") to authorize PTA to block information system in case service providers failed to remove blasphemous content; that procedure for right of appeal, revision, review be provided to the individuals or the system operators whose accounts, pages or systems were blocked by the authorities; that where in S. 9 of PECA, punishment for offences relating to terrorism, proscribed organizations, etc. had been provided, punishment of Ss. 295 to 295-C, P.P.C. may also be introduced; that rules be framed under PECA, which were though required, yet had not been framed; that the Government shall adopt all necessary measures for enhancing technical expertise and equipments of PTA authorities; and

that since the annexures of the present writ petition carried material which was totally against Islamic faith and belief, the same could not be made public, as such, the same shall be sealed by the Deputy Registrar (Judicial), so that no one could have access to it or could even get its certified copies, except with specific approval of the Court.

Zulfiqar Ali Sidhu, Sher Zaman Qureshi, Waseem Mumtaz, Hafiz Allah Ditta Kashif, Ch. Salamat Ali Wains, Syed Athar Hassan Bokhari and Rana Miraj Khalid for Petitioner.
Najaf Ali Malik, Assistant Attorney General with Nisar Ahmad Director General IP&WA PTA, Khuram Siddiqui, Director Law PTA, Muhammad Naeem Ashraf, AHC (Consultant Law PTA) and Faheem Gul, Assistant Director Law for Federation.
Madam Ameena Sohail, Member Legal MIOT.
Azhar Amin Chaudhry, Deputy Secretary.
Shahab Azim, Deputy Director FIA, Islamabad, Babar Shahryar, Deputy Director FIA, Multan, Muhammad Mumtaz Dogar, Assistant Director FIA and Muhammad Mumtaz Qureshi, SI/SHO, FIA Multan.

ORDER
MUHAMMAD QASIM KHAN, J.---Briefly the facts relevant to the decision of instant writ petition are that some facebook pages by the names "Bhansa", "Mochi" and "Roshni" were found uploading inflammatory and blasphemous material. The said fact was taken notice of by the petitioner and he as a citizen of Islamic Republic of Pakistan, filed the instant writ petition precisely with the prayers that:-
i) Respondents Nos.2, 3 and 4 be directed to block the pages in the social media namely "Bhansa", "Machar" and other similar pages, and
ii) Respondents Nos.1 and 3 be directed to inquire into and investigate as to who are the actual culprits.

2. It is argued by learned counsel for the petitioner, being represented by a majority of the Bar and backed by number of religious scholars and the public, that the content being uploaded on facebook is not only against faith of muslims, the same is also clear violation of Articles 19 and 19-A of the Constitution of Islamic Republic of Pakistan, 1973, in addition to being an offence covered by Chapter XV of Pakistan Penal Code. It is further argued that despite commission of an offence, silence on the part of state functionaries is unacceptable. While improving their arguments, it is argued that under section 37 of the Prevention of Electronic Crimes Act, 2016, (hereinafter to be called as "PECA"), Pakistan Telecommunication Authority constituted under section 2(iv) thereof, (hereinafter to be referred as "PTA"), must have taken steps to remove and block all such content, but here in this case conscious inactivity on the part of PTA, must be taken note of by this Court and authority must be directed to forthwith block facebook. The learned counsel representing the petitioner added that their above verbal prayer may be considered as part of the main prayer clause of the writ petition, as this Court otherwise has ample jurisdiction to grant the relief pursuant to the ultimate prayer "any other relief").
3. The learned Assistant Attorney General, assisted by Director General PTA and other officers from respondent-ministries, came out with the stance that all out efforts

are being made much before the instant raise of issue and in this context blasphemous content or pornographic sites were not only removed and blocked but the said fact was also pointed out to all the information system administrators requesting them to block such pages. The Director General PTA very fairly pointed out that as a matter of fact information from the secured websites could not be removed by the PTA itself unless supported by the information system itself. Further added that social media information systems namely facebook, YouTube and Twitter etc are secured information systems and hosted out of territorial jurisdiction of Pakistan. Since the hosting of such information systems do not fall within the regulatory regime of PTA, the only option left with PTA is to make a request to the administrator of such secured information system to block objectionable contents/material available there. In this context, certain letters written by the respondents' way back since 2011 have been shown to the court. The court has been further informed that pursuant to the directions of the Hon'ble Islamabad High Court, they have been able to convince the facebook administrator and they have shown willingness to visit Pakistan and consider our concerns.
The Director General FIA, Multan submits that pursuant to the order of this Court an FIR No.59/2017 has been registered at police station FIA ACC, Multan and already another FIR stood registered by the orders of Islamabad High Court, where-after, a joint investigation team has been constituted, some of the culprits have been arrested, continuous efforts are being to trace and arrest the remaining accused and all must be brought to book.

4. Heard.

5. On cursory glance to the annexures of this writ petition, this Court was shocked to see that the said material consisting of text as well as the pics in the shape of caricature, etc., was more than enough to create wide scale public unrest and outrage amongst absolute muslim majority of our Islamic ideological state. Therefore, taking notice of significance of the issue, on the very first date of hearing, the learned Standing Counsel for Federation as well as concerned officers from FIA, Multan, were summoned in the court.

6. When an act is declared to be an offence, it is responsibility of the State to adopt all legal measures firstly to prevent such crimes and secondly if the said offence is committed then bring the culprits to book, put them before the court for ultimate decision. In the same context Article 5 of the Constitution of Islamic Republic of Pakistan, 1973 deals with loyalty to state and obedience to the constitution and law, hence, it becomes constitutional duty of the State functionaries to perform their duties to curb the crimes as defined in different statutes of the country. With reference to this petition, the material appended with it clearly disclosed commission of offences as detailed in Chapter XV of the Pakistan Penal Code. This court could not oversight that the legislators had laid down specific provisions i.e. section 295-C, P.P.C., etc., to cater similar situations where any person uses derogatory remarks, etc., in respect of the Holy Prophet , by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, and thus defiles

the sacred name of the Holy Prophet , the name of any wife (Ummul Mumineen), or members of the family (Ahle-bait) of the Holy Prophet , or any of the righteous Caliphs (Khulafae-Rashideen) or companions (Sahaaba) of the Holy Prophet . It was for the above reason that FIA authorities were directed to receive an application/oral statement of the petitioner and after adopting the requisite proper procedure, register a criminal case. This is quite a sensitive issue and the referred material clearly discloses that visible intent behind such posts was to hurt the feelings of muslims all over the world and we also have the history that whenever such unholy attempts were made, it worked as an ignition for the whole of our society and whenever the state failed to respond quickly, the antagonists were responded befittingly by the masses, at times by the individuals.

7. This court would remind the state agencies of preamble of the Constitution of Islamic Republic of Pakistan, 1973 (now Article 2-A of the Constitution), which provides that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed; the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set down in the Holy Quran and Sunnah, protection shall be provided to the fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality.

8. As shall be seen from the preamble of our Constitution, the rights of every community have been delicately balanced and freedom of speech/expression and information is also hallmark of our constitution, but the term "right of expression" cannot be stretched to such an extent that it be used as a tool to defy the religious thoughts or sacred personalities of one's religion. This court is of the clear view that under the umbrella of "freedom of speech and information" not only the muslim community, in fact the followers of all the religions have been made to suffer immensely e.g. Salman Rushdie wrote a book hurting the feelings of muslims all over the world and his book was banned in 1988, James Laine characterized Shivaji (Shivaji Maharaj Bhonsle) hurting the feelings of that sect, as a result Bhandarkar library was vandalized by the mob and similarly Wendy Doniger wrote a book "The Hindus: An Alternative History" creating rage amongst Hindu community. In view of the above, the right of expression cannot be allowed to thwart the feelings of any religion on earth, because as a matter of fact distortion of any religion on the pretext of right of speech/expression or information now amounts to another form of terrorism a fact that the international community must now concede.

9. There can be no second opinion that advancement and use of technology has brought whole of the universe into one global village and internet is now considered to be the most productive element in spreading, sharing and developing knowledge and ideas, ultimately benefiting the public at large. Having observed that, this court is well aware of the fact that despite all above pointed benefits, comparatively a few of the internet users, for any reason whatsoever, have resorted to use it for destructive

purpose. In this context we are aware that the internet or for that matter other social forums like facebook, twitter, etc. unfortunately are being used, by some of the elements, negatively, and by their such nefarious activities, the laws of the countries are being violated, religious feelings of all kinds of communities are being hit, let it be said that all this is being done under the cover of "freedom of expression" and "freedom of speech".

10. It is important to mention here that some individuals who can be counted on finger tips are of the view that under Articles 19 and 19-A of the Constitution of Islamic Republic of Pakistan, 1973, they carry uninterrupted right of freedom of speech and information, therefore, no action can be taken against any such material, as is part of this writ petition. But, they are totally ignorant of the fact that Article 19 of the Constitution of Islamic Republic of Pakistan, 1973 in clear terms provides that said liberty should be subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court or incitement to an offence. Same is the position with Article 19-A of the Constitution, which was inserted through 18th amendment and it provides a right of information to any citizen, but this is again subject to regulations and reasonable restrictions imposed by law. Therefore, any effort by the individuals or any smaller groups to twist these Articles and interpret the same at their whims could not be permitted as these liberties are not absolute, rather are subject to certain restrictions of law and the regulations.

11. The court is cognizant that freedom of expression, universally acknowledged as both fundamental and foundational human right, is not only a corner stone of democracy but also indispensable to thriving civil society. Indeed, the freedom of expression is considered to be a foundational human right of the greatest importance. The right to freedom of expression is protected by a multitude of regional and international treaties and charters and frameworks, but internationally it is applied with some restrictions as no country could allow the rebellions by delivering speeches against the state, promoting hatred and seeds of terrorism in the country. If such situation is allowed to persist, certain disgruntled elements will start to recruit citizens as a force to wage a war against the State as is the case in Syria, Afghanistan, Iraq, etc. Hence, the restrictions imposed by the Constitution of Islamic Republic of Pakistan, 1973 could not be bypassed. In short freedom of speech and information and restrictions imposed there-against, could be explained in one sentence "liberty of one ends where the nose of other starts".

12. One must not forget that the right of "freedom of speech or freedom of expression" which is now being portrayed as innovation of recent times had in fact been introduced by Holy Prophet 1400 years ago. Yet it is important to remember that freedom of expression, speech, tolerance and respect go hand in hand. As it is a general consensus that mocking, degrading or insulting others, in the name of freedom of speech or expression devalues a civilized society. Without any doubt, democracy, racial equality, social justice, human rights are all Islamic concepts. But

unfortunately, the western world sees Islam as the opposite. The reality of Islam is that it promotes justice and preserves human rights. The Holy Prophet was the greatest humanitarian that ever walked on the planet. In fact "he must be called the saviour of humanity ". George Bernard Shaw insists that "if a man like Muhammad were to assume dictatorship of the modern world, he would succeed in solving its problems that would bring it the much needed peace and happiness." In support of this, a great historian, Lamartine argues that "as regards all standards by which human greatness may be measured, we may well ask, is there any man greater than he?" Thus, we learn that Muslims and non-Muslims alike have found the life of Holy Prophet a continuous source of inspiration. Even the non-muslims of Makkah knew him as "the Truthful" (Al Sadiq) and "the Faithful" (Al Amin). In fact, each aspect of the life of Hazrat exemplifies his perfection and is invaluable for those who seek a model of guidance because it is specifically designed by Allah (S.W.T.) for this purpose. All of the Holy Prophet's attributes, virtues and qualities have been showered on him as gifts from The Creator. Allah (S.W.T.) has carved the physical features, the style of living and the conduct of His Messenger (S.A.W.) in such a perfect manner that each one of his qualities serves as an argument for the glory and grandeur of The Creator. In fact the life of Hazrat is the focus of our faith. Recognition of Messengership is recognition of the divine presence. According to his wife Umm-ul Mu'mineen Hadhrat `A'ishah (R.A), "He was a personification of the Qur'an." Since the Prophet (S.A.W.) is the embodiment of all the virtues that have been enunciated by the Holy Qur'an, a true understanding of the attributes of the Prophet is in fact a true understanding of Allah's attributes. Sahih Al-Bukhari, Sahih Muslim, and other authentic compilations of the traditions or Hadith of Hazrat are brimming with examples to support the fact.

13. Deen-e-Islam is not a religion alone, it is a complete code of life. Religion deals with private affairs of life whereas Deen covers all aspects of life, individual as well as collective. In other words Deen is all embracing term which includes religio-socio-politico-economic system. It touches upon the material as well as spiritual dimensions of human existence and insists that all our thoughts and deeds should be performed with good consciousness. Having said all that, Hazrat is the pivot around which all of our faith revolves. It is narrated by Abdullah bin Hisham (R.A.): "We were with the Prophet Muhammad (S.A.W.) and he was holding the hand of Umar bin al Khattab. Umar said to him "O Allah's Messenger! You are dearer to me than everything except my ownself." The Prophet (S.A.W.) said, "No, by Him in whose hand my soul is you will not have complete faith till I am dearer to you than your own self." Then Umar said to him, "However, now by Allah you are dearer to me than my ownself." The Prophet said, "Now, O Umar (now you are a believer)".

14. As shall be seen from the life of Hazrat Muhammad, in fact the fabric of Islam accentuates the concept of peace as the word 'Islam' itself has been derived from another Arabic word "Salam" which means peace and the literal meaning of Islam is 'to enter into peace'. The Holy Prophet always endeavoured not only to maintain peace and tranquility within Islamic society but also for peaceful co-existence of Muslims with other communities. He was sent as a messenger of peace and mercy for

the whole mankind-not to the Muslims only as Allah Almighty says in verse 107 of Surah Al-Anbya (the Prophets), "And We have not sent you, [O Muhammad], except as a mercy to the worlds." Even before announcing his prophethood, the Holy Prophet had been making efforts to promote peace in Arab society by amicably resolving the disputes. The issue of Blackstone (Hijr-e-Aswad) is one of its example. To carry the greatest of values set by Hazrat Muhammad for each and every field of life, is the paramount duty of muslims on earth.

15. Now, it is really unfortunate that unholy attempts are being made by the certain elements to defy the most sacred personality , not only of muslims but whole of the universe. Perhaps, such wrongdoers are not aware of the fact that protecting the prestige of Hazrat is the first and foremost duty of all muslims on earth. Muslims would not allow any one, on the basis of any slogan, either that of "freedom of expression" or "freedom of speech" to undermine the dignity of Hazrat . I am also mindful of a big and unprecedented event of our muslim history i.e. "waqia masjid-e-zarar". In brief a mosque was constructed by some munafiqeen with an evil intention of causing harm and disgrace to the true muslims as well as the Holy Prophet himself, when Hazrat was returning from Ghazwa-e-Tabooq, following Ayats were revealed in the Holy Quran:-

Verses 107 - 110

And (there are) those who have built a mosque to cause mischief and infidelity and to create dissention among the believers and to make preparations for one who has been at war with Allah and His Messenger even before. And they will certainly swear (and any), "We intended nothing but good." And Allah testifies that they are liars. (107)

Do not ever stand there (in prayer). In fact, the mosque that was founded on Taqwa (piety) from the very first day is more-worthy that you stand there. In it there are people who like to observe purity; and Allah loves those observing purity. (108)

Is, then, a person who has founded his building on fear from Allah and His pleasure better or the one who has founded his building on the edge of an abyas about to collapse, so it did collapse with him into the fire of Ja-hannam? And Allah does not give guidance to the unjust people. (109)

The building they have made shall always remain a source of doubt in their hearts unless their hearts are cut into pieces. And Allah is All-Knowing, Wise. (110)

Thus, on the commandment of Allah Almighty, Hazrat ordered the same to be demolished and set on fire. From the above it is obvious that apparently one thing may be good but unless the intention behind such an activity is not pure, it is essential to curb it by all means.

16. During the course of arguments, the D.G PTA was further enlightened on the rights and responsibilities of the users as uploaded by the facebook administrator. Its clause-3(7) clearly provides that its user will not post content that is hate speech, threatening, or pornographic; incites violence, or contains nudity or graphic or gratuitous violence. Further, its clause 5(1) and (2) provides that the user would not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law, and facebook could remove any content or information which is posted on facebook and it is believed that same violates the statement or policies of the facebook and similarly the respectful behaviour would be encouraged. When the Director General PTA, present in the court, was confronted with above position, he pointed out that the secured websites are hosted on https and TLS etc., protocols. Most of the social media websites namely facebook, YouTube and Twitter etc are secured information systems and hosted out of territorial jurisdiction of Pakistan. Since, the hosting of such websites do not fall within the regulatory regime of PTA, the only option left with PTA is to make a request to the administrator of such secured website to block objectionable contents/material available there. Further, he informed the court that already this issue has been taken up before the facebook authorities and he is sanguine that issue of bad content shall be resolved within next two months. He further recognized that facebook or twitter are only social portals and have no much significance in spreading knowledge based material.

17. This court has been apprised that the issue of uploading blasphemous content on social media has also been discussed in a meeting of Muslim Ambassadors in Islamabad wherein, it has been decided to formulate a joint strategy to address the issue of blasphemous content on social media and further it has been resolved that a comprehensive strategy paper will be circulated by the Ministry of Foreign Affairs among the ambassadors of the Muslim countries, which they will share with their governments to evolve future plan of action. A formal reference will also be sent to Secretary General of the Arab League and Secretary General of OIC raising the issue of blasphemous content on social media. After response from the governments of the Islamic countries, the matter then will be taken up at the level of United Nations. Besides, legal options will be explored to follow up the matter legally in the courts of the respective countries from where such content is being generated.

18. Furthermore, during arguments this Court repeatedly posed questions to the Director General PTA that if the facebook refuses to block such pages or some new pages are opened for the purpose of spreading hatred material which is otherwise against the law and the Constitution of the Islamic Republic of Pakistan, 1973, and it may even result in damaging the integrity and sovereignty of the state, whether the state agencies would remain silent spectators, D.G PTA came out with the plea that if within a period of two months decisive steps are not taken by the concerned information system providers/administrators for removal of all such content, then as a last and final resort, the authority would block all such sites at once without any space.

19. As detailed above, this court is convinced that pursuant to the orders of the court, the concerned agencies have already activated the process of blocking all such accounts on social pages, spreading hateful material and in this respect as pointed out by the D.G PTA approximately two months would be required to settle down the issue to its logical end, however, this court is aware that all above activity would involve a new understanding with international information system providers, therefore, considering all the ground realities, as a safer mode, this court directs that the concerned agencies may even take four months for the completion of above uphill task, but the ultimate object of protecting the honour of our Holy Prophet shall be achieved at any cost.

20. In addition to the above, with reference to the order dated 13.05.2014 passed by a Division Bench of this Court in the case "Bytes for all v. Federation of Pakistan and others" (Writ Petition No.958/2013), this Court is well aware that in somewhat similar matter, the Hon'ble Supreme Court of Pakistan on 17.09.2012 had passed the following order:-

"4. M/s. M. Akram Sheikh and Taufiq Asif, learned counsel have filed Civil Misc. Application No. 3908/2012, wherein attention of the Court has been drawn towards anti Islamic film under title "innocence of Muslim". They stated that in Pakistan this film, which contains disrespectful material regarding the Holy Prophet (Peace Be Upon Him), injuries to the feelings of every Muslim is still available on website. Therefore, the PTA is under legal obligation to control such like matter but it has failed to perform its statutory duties, as such direction be issued to the PTA to block the above said film on U-Tube website and refrain in future as well for allowing such material."

5. Office has inquired from the office of PTA and has gathered information that the Chairman, PTA is out of town and is likely to be back to Islamabad today. Be that as it may, on having seen the material, which has been published in newspapers i.e. The News, Dawn, etc. and the material, which is going on as per the reporting, we direct the Chairman PTA to immediately block the offending material on U-Tube website and on any other website, referred to hereinabove. This order be communicated to the Chairman PTA during course of the day. He is directed to submit report to the Registrar today positively for our perusal in Chambers. (Emphasis supplied.)

This Court has been told that said order of the apex Court still holds the field, and provides guidelines to this court and all the concerned authorities in such like matters.

21. At this stage it is made clear that if the authorities could not succeed to remove the blasphemous content, as required by the Constitution and the other laws applicable in the country, all such accounts or even the information system involved in above pointed nefarious activities, shall be blocked at once as undertaken by the Director General PTA, present in the court.

22. For what has been discussed above, in view of the substantial and adequate steps taken by the state in the matter, the learned counsel for the petitioner have expressed their satisfaction. This Court would only observe that it is never too late to make right decisions. Since FIR has already been registered, the investigation shall take the matter to its logical end. Therefore, this writ petition is disposed of in above terms,

however, for future eventualities, in furtherance and in addition to the directions earlier issued by this Court in the case "Islamic Lawyers Movement through Tahir Farooq alias Allah Bakhsh Leghari v. Federation of Pakistan through Secretary Establishment, Government of Pakistan, Islamabad and 3 others" (2012 CLC 1300), it is directed that:-

i) State functionaries shall keep in mind that PTA is an independent body in the light of its statute and government at the most could issue instructions, that too within the parameters of law.

ii) A Bill be tabled before the Parliament for deliberations and decision about:-

a) Amendment in section 37 of PECA to authorize PTA to block information system in case service providers fail to remove blasphemous content;

b) Procedure for right of appeal, revision, review be provided to the individuals or the system operators whose accounts, pages or systems are blocked by the authorities;

c) Where in section 9 of PECA, punishment for offences relating to terrorism, proscribed organizations, etc. has been provided, punishment of sections 295 to 295-C, P.P.C. may also be introduced.

iii) Rules be framed under PECA, which are though required, yet have not been framed. This exercise must be completed within three months from today;

iv) A cell in the foreign ministry shall be created to keep all the Islamic countries abreast of the efforts and steps taken pursuant to the above referred meeting of the Ambassadors, which was chaired by the Federal Interior Minister, Pakistan;

v) The Government shall adopt all necessary measures for enhancing technical expertise and equipments of PTA authorities;

vi) It appears that FIA which is to investigate such like matters is not equipped with complete devices and team of experts, hence, necessary steps including finance facility, be provided.

23. Since the annexures of the writ petition carry the material which is totally against our faith and belief, the same cannot be made public. As such, the same shall be sealed by the Deputy Registrar (Judicial) of this Bench, so that no one could have access to it or could even get its certified copies, except with specific approval of the Court.

MH/M-87/L Order accordingly.

2018 P L C (C.S.) Note 73
[Lahore High Court]
Before Muhammad Qasim Khan, J
FAHAD MAQSOOD
Versus
FEDERATION OF PAKISTAN through Secretary and 30 others

W.P. No.931 of 2015, decided on 2nd May 2017.

(a) Civil service---
----Appointmennt---Advertisement for appointment of Chemical Engineers---Contention of petitioner candiate was that, in the present case, no criteria for awarding marks for interview had been declared or published and that he had been dropped by the Interviewing Committee---Validity---Mere clearance of written examination did not vest or create any right in favour of a candidate---Final merit list was prepared on the basis of accumulative marks of the candidate---Petitioner was below in merit as compared to those who had been offered appointment---Candidate might achieve good marks on the basis of qualification or in the written test, but said factor alone could not be made basis for his selection unless total marks in all the fields i.e. qualification, written test and interview placed such candidate on merit---Merit list was prepared by computing the NTS marks, interview weightage as well as that of education---Nothing was on record with regard to miscalculation of marks---Once the candidate submitted his candidature on the basis of advertisement that would mean that he accepted all the terms contained therein---Candidate at a stage when he had been ignored from selection could not raise any objection, if he/she was aggrieved, he/she must have raised such objection or challenged the same at the relevant time---Constitutional petition was dismissed in circumstances. [paras. 5, 6 & 8 of the judgment] A, B & D
(b) Constitution of Pakistan---
---Art. 199---Constitutional jurisdiction of High Court---Scope---Factual controversy could not be resolved in exercise of constitutional jurisdiction of High Court. [para. 7 of the judgment] C
Muhammad Qamar v. Oil and Gas Regulatory Authority through Chairman and 3 others 2016 PLC (C.S.) 1066 rel.
Sami Ullah Zia for Petitioner.
Mirza Salim Baig and Khuram Salim Baig for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.--- Briefly the facts relevant for the decision of instant writ petition are that pursuant to advertisement inviting applications for the different categories of posts including the post of Chemical Engineer, the petitioner also submitted his candidature for one of the post of Chemical Engineer in SNGPL. The grievance of the petitioner is that though he successfully appeared in NTS and then he also appeared before the interviewing committee but he has been dropped, hence, this writ petition.

2. The contention of learned counsel for the petitioner is that he has been ignored merely on the basis of interview marks; no criteria for awarding interview marks had been declared or published and that he has been deprived of recruitment as his father being Chief Editor of a newspaper was highlighting the corruption of officials of SNGPL. Lastly, argued that respondents Nos.5 to 31 have been appointed as a result of favoritism and nepotism.
3. On the other hand, learned counsels representing the respondents opposed the above contentions and argued that final merit list is prepared by including the interview marks and in the final list the petitioner fell below in merit. Further argued that factual controversy cannot be resolved in proceedings under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Lastly argued that respondent authorities had no ill motives against the petitioner, the persons who stood on merit have been appointed, without any element of nepotism.
4. Heard.
5. There can be no second opinion that mere clearance of written examination does not vest or create any right in favour of a candidate, so as seek its enforcement through constitutional jurisdiction of this court. Even otherwise, final merit list has been prepared on the basis of accumulative marks of the candidates, which include qualification marks, written test as well as interview marks, etc, and the petitioner is below in merit, as compared to those who have been offered appointments. It may be mentioned here that a candidate may have achieved good marks on the basis of qualification or in the written test as well, but that factor alone cannot be made basis for his selection, unless total tally of the marks in all the fields i.e. qualification, written test and the interview, etc, place such candidate on merit. In the instant case, a copy of the merit list has been placed on the file, which clearly reflects that same was prepared by computing the NTS marks, interview weightage as well as educational weightage, and as discussed above, the petitioner could not achieve the merit. It is not the case of the petitioner that any miscalculation has been made to his extent or that the selected candidates have been given excessive marks due to such miscalculation.
6. As regards the argument that no criteria for interview marks had been given in the advertisement, I am afraid once the petitioner submitted his candidature on the basis of said advertisement, it means that he accepted all the terms contained therein. At this subsequent stage when he has been ignored from selection, he cannot raise any such objection. If he was aggrieved then he must have raised such objection or challenged the same at that very moment, but no such exercise has been done in the instant case.
7. Coming to the question of bias towards the petitioner or nepotism towards the selected candidates, this is factual controversy, which cannot be resolved by this Court while sitting in constitutional jurisdiction. Reliance is placed on the case "Muhammad Qamar v. Oil and Gas Regulatory Authority through Chairman and 3 others" (2016 PLC (C.S.) 1066).
8. For what has been discussed above, I see no merit in this writ petition and the same is therefore, dismissed.

ZC/F-9/L Petition dismissed.

2018 P L C (C.S.) Note 111
[Lahore High Court (Multan Bench)]
Before Muhammad Qasim Khan, J
Dr. MUHAMMAD ZAFAR SHAH
Versus
DIRECTOR FINANCE, NISHTAR HOSPITAL, MULTAN and others

W.P. No.880 of 2016, decided on 6th March, 2017.

Punjab Traveling Allowance Rules, 1976---
----Rr. 3.1 & 3.2---Transfer of employee---Traveling allowance, payment of---Transfer for public convenience---Scope---Traveling allowance was not paid to the employee on the ground that he was transferred on his own request---Validity---When a civil servant was transferred otherwise than for public convenience then copy of said transfer order was to be sent to the Audit Officer with endorsement stating the reasons for such transfer---If no such endorsement was made in the order, it would be construed as an order of transfer for public convenience alone---Mere existence of request of a civil servant for transfer would not mean that transfer had been made on such request unless a specific endorsement in that regard figured in the transfer order itself---Neither any such endorsement with regard to transfer of employee had been made in the transfer order of the employee nor even certificate from the Head of the Office was available on the file---Transfer order of the employee was necessarily to be construed as an order of transfer for public convenience---Civil servant could not be denied transfer grant/allowance on his transfer---Authorities were directed to release the transfer allowance immediately---Constitutional petition was allowed in circumstances. [para.4 & 5 of the judgment]

Muhammad Zawar Shah Qureshi for Petitioner.
Mubashir Latif Gill, Assistant Advocate General with Javed Iqbal, Director Finance and Dr. Nasir Javed DMS, Nishtar Medical College, Multan for Respondents.

ORDER
MUHAMMAD QASIM KHAN, J.--- Through this writ petition, precisely the grievance of the petitioner is that while posted as Additional Principal Medical Officer, DHQ Hospital, Attock he was transferred and posted as Additional Principal Medical Officer, Nishtar Hospital, Multan vide Order No.SO(GC)M-129/2013 dated 2nd of January, 2015, but he is not being paid Transfer Grant.

2. The learned Law Officer under instructions submits that as the petitioner was transferred from Attock to Multan on his own request and in this respect his formal request for transfer is also available in the record, therefore, his transfer being not covered by the term "public convenience", per force of rule 3.1 "Travelling Allowance for Journeys on Transfer" Punjab Trevelling Allowance Rules, he is not entitled to get transfer allowance.

3 Heard.

4. Before evaluating the above argument of learned Law Officer, it appears appropriate to reproduce relevant rule 3.1 of "Travelling Allowance for Journeys on Transfer" Punjab Travelling Allowance Rules:-

"3.1. General conditions of admissibility: Travelling allowance may not be drawn under this chapter by a civil servant on transfer from one station to another unless he is transferred for the public convenience and is entitled to pay during the period occupied by the journey. A transfer at his own request should not be treated, as a transfer for the public convenience unless the authority sanctioning the transfer, for special reasons which should be recorded, otherwise directs."
As shall be seen from the above, there is no ambiguity that the travelling allowance cannot be drawn by a civil servant on transfer from one station to another unless he is transferred for the public convenience and that transfer at his own request should not be treated as a transfer for the public convenience, but this rule cannot be read in seclusion. For clarity of legal position, Rule 3.2 of the rules, ibid, is reproduced hereunder:-

"3.2. When a civil servant is transferred otherwise than for the public convenience, a copy of the order of transfer shall be sent to the audit officer with an endorsement stating the reasons for the transfer. In the absence of such an endorsement the audit officer shall assume that the civil servant has been transferred, for the public convenience. In the case of subordinate civil servant a certificate from the head of the office may be accepted in lieu of the copy of the order referred to above."

5. When both the above reproduced provisions of law are read together, the situation would become clear i.e. when a civil servant would be transferred otherwise than for the public convenience, a copy of the said transfer order is to be sent to the audit officer with clear endorsement stating the reasons for such transfer and in case no endorsement is made in the order then for all intents and purposes it is to be construed as an order of transfer for public convenience alone.

5. With above clear legal position, mere existence of request of a civil servant for transfer would not mean that transfer has been made on such request, unless a specific endorsement in this respect figures in the transfer order itself. In the instant case although a copy of request for transfer on behalf of the petitioner has been brought on the file, but no such official note is available thereon, so as to say that it was positively routed to the transferring authority and that the transfer order was passed on the basis of said application alone. Whereas, admittedly neither any such endorsement has been made in the transfer order of the petitioner nor even certificate from the head of the office is available on the file. Therefore, the transfer order of the petitioner from Attock to Multan is necessarily to be construed as an order of transfer for the public convenience, as such, the petitioner cannot be denied Transfer

Grant/Allowance on the eve of his transfer. It has been observed that petitioner is already on the verge of retirement, but he has been denied his right of Transfer Allowance since early 2015. As such, this writ petition is allowed with costs and respondent/authorities are directed to release the Transfer Allowance to the petitioner immediately.

ZC/M-126/L Petition allowed.

P L D 2018 Lahore 836
Before Muhammad Qasim Khan, Miss Aalia Neelum and Sardar Ahmed Naeem, JJ
MUHAMMAD JAWAD HAMID---Petitioner
Versus
Mian MUHAMMAD NAWAZ SHARIF and others---Respondents

Writ Petition No.9027 of 2017, decided on 6th July, 2018.

(a) Anti-Terrorism Act (XXVII of 1997)---
----S. 31---Criminal Procedure Code (V of 1898), Ss. 203 & 265-K --- Anti-Terrorism Court---Finality of orders---Orders passed by the Anti-Terrorism Court which were not appealable listed.
Following are examples of orders which were not covered under section 31 of Anti-Terrorism Act, 1997 and thus were not appealable but final in nature :-
(i) Discharge of an accused;
(ii) Remand of an accused;
(iii) Dismissal of a private complaint under section 203 Cr.P.C.
(iv) Summoning or non-summoning of accused in a private complaint;
(v) Summoning or non-summoning of a private witness;
(vi) Summoning or non-summoning of a document or any other thing;
(vii) Rejection of application under section 265-K Cr.P.C.

(b) Constitution of Pakistan---
----Art. 201---High Court---Judgment per incuriam---Scope---Any contrary decision given by the subsequent Bench of equal strength of High Court in ignorance of the terms of statute, binding precedent of Supreme Court, or previous decision of Bench of equal strength/Benches of coordinate jurisdiction of the same Court, would be a judgement per incuriam and without any precedential value.

(c) Judgment---
----Short order---Effect---Short order announced by the court of competent jurisdiction had the operational effect of judgement pronounced by the court.
D.-G. A.N.F. Rawalpindi and others v. Munawar Hussain Manj and others 2014 SCMR 1334; Reviews on behalf of Justice (Retd.) Abdul Ghani Sheikh and others PLD 2013 SC 1024; Justice Hasnat Ahmed Khan and others v. Federation of Pakistan/State PLD 2011 SC 680; Wisram Das v. SGS Pakistan (Pvt.) Ltd. and another 2010 SCMR 1234 and Wafi Associates (Pvt.) Limited v. Farooq Hamid and others 2010 SCMR 1125 ref.

(d) Constitution of Pakistan---
----Arts. 189 & 201---Short order by the High Court/Supreme Court---Precedential value---Important to distinguish between two types of short orders; those, which decided the question of law in clear and operative terms, and others which only adjudicated the matter and no question of law was clarified in terms of Arts.189 &

201 of the Constitution---Short orders covered under the first category had precedential value, however, those falling under the second had none.
Muhammad Tariq Badr and another v. National Bank of Pakistan and others 2013 SCMR 314 ref.

(e) Anti-Terrorism Act (XXVII of 1997)---
----S. 31---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Interim order passed by a Court under Anti-Terrorism Act, 1997, during proceedings of a case---Constitutional petition against such an order was not maintainable.

(f) Anti-Terrorism Act (XXVII of 1997)---
----S. 21(d)---Criminal Procedure Code (V of 1898), Ss. 435 & 439---Revision petition---Maintainability---Order passed by a Court under Anti-Terrorism Act, 1997, during proceedings of a case---Anti-Terrorism Court was subordinate/inferior court to the High Court---Under the Anti-Terrorism Act, 1997 no restriction had been imposed for filing of revision petition---High Court had the visitorial power over the Anti-Terrorism Court, therefore, it could entertain petitions in the nature of those covered by Ss.435 & 439, Cr.P.C, except to the extent of grant of bail or release of an accused in a case triable by Anti-Terrorism Court, in light of restriction imposed under S. 21(d) of the Anti-Terrorism Court, 1997.

Rai Bashir Ahmad, Muhammad Azhar Siddique, Mirza Naveed Baig, S. Parveen Mughal, Naeem ud Din Chaudhry, Abdullah Malik, Sardar Ghazanfar Husain, Adeel Hassan, Syed Umair Abbas and Ch. Naeem ud Din Chaudhry for the Petitioner.
Syed Ehtisham Qadir, Prosecutor General Punjab assisted by Rai Akhtar Hussain, Deputy Prosecutor General and Muhammad Amjad Rafiq, Additional Prosecutor General on court's call.
Sittar Sahil and Muhammad Hammad Khan Rai, Assistant Advocate General.

ORDER
The instant writ petition has arisen out of the following admitted facts:-
A private complaint was filed by Muhammad Jawad Hamid (petitioner) under section 190(1)(a) of the Code of Criminal Procedure (Act V of 1898 (hereinafter to be called as 'Code') and section 19(3) of the Anti-Terrorism Act, 1997, (hereinafter to be called as "ATA") for offences under sections 302/324, 295-B/452, 395/427, 365/506, 120-B, 148/149, 337-F(vi), 337-C, 337-F(iii), 337-A(v), 337-L(2), 337-F(i), 337-A(i) Pakistan Penal Code (Act XLV of 1860) read with Section 7 of the ATA and section 155-C of Police Order, 2002 before Special Court under Anti-Terrorism Act, 1997, at Lahore (hereinafter to be called as "ATC") , wherein, 139 persons were cited as accused; the case of Shahid Aziz Butt (respondent No.139) was separated; in the separate trial he was finally convicted and sentenced and the court has been informed that he is now out after serving out his entire sentence. After recording cursory evidence, vide order dated 07.02.2017 respondents Nos.13 to 138 have already been summoned and are facing trial before the ATC. Vide the same order dated 07.02.2017 the learned trial court opined that there is no evidence to prove prima facie case

against respondent No.1 to respondents No.12, as such, they were not summoned and their names were directed to be deleted from the list of respondents. (See para-41 of the impugned order.). The order dated 07.02.2017 to the extent of non-summoning of respondents Nos.1 to 12 is under challenge by the petitioner/complainant through the instant Writ Petition No.9027/2017 "Muhammad Jawad Hamid v. Mian Muhammad Nawaz Sharif and others".

2. Since the question about maintainability of writ petition against an order of summoning/non-summoning in the proceedings carried out under ATA was the basic legal question to be resolved, therefore, we took the same as primary issue and after hearing the learned counsel for the parties at length, vide our short order dated 11.05.2018, held that:-

"For the reasons to be recorded later in a detailed judgment, after hearing the learned counsel for respective parties, we hold that against an interim order passed by a Court under Anti-Terrorism Act, 1997, during proceedings of a case, including an order of summoning/non-summoning the accused, writ petition is not maintainable, as under Anti-Terrorism Act, 1997, applicability of sections 435, 436 and 439 Cr.P.C. has not been restricted, except under section 21(d) to the extent of bail, hence, criminal revision is competent."

This shall form the detailed reasoning of the above reproduced short order.

3. Rai Bashir Ahmad and Mirza Naveed Baig, Advocates representing the petitioner while referring to the principles of interpretation of statutes, argued that when any provision by itself is clear in its literal meaning then it may not involve question of interpretation, however, where there remains any ambiguity, only then interpretation would be required. According to the learned counsel as ATA is a special law having overriding effect on the Code, hence, in the light of sections 21-D, 31 and 32 of ATA, criminal revision under general law i.e. Code is not maintainable and furthermore since under section 25 of the Act only a remedy of appeal has been provided, therefore, no other meaning can be imported to say that criminal revision would lie as if this was the intent of the legislators they could have provided remedy of criminal revision in the statute itself. Added that the law was promulgated for speedy trial of heinous offences, which create panic in the society and this aspect is clear from the preamble of ATA. Submit that law is to be interpreted keeping in mind the purpose of the relevant law reflected by its preamble. The learned counsel therefore, concluded that if the legislator had the intent to provide multiple remedies to the persons aggrieved of orders of the ATC under ATA, then its scope could have been extended to make the provisions of Sections 435, 436, 439 of the Code, applicable. The learned counsel by referring different sections of ATA submits that since revisional jurisdiction has not been provided against interlocutory orders, and the legislators have intentionally kept the provisions of Sections 435, 436, 439 of the Code away from the proceedings under the above Act, therefore, by interpreting the statute a remedy of revision cannot be extended against interlocutory orders.

4. Mr. Muhammad Azhar Siddique, Advocate adopted the arguments of his learned colleagues with a view that any illegality can be rectified by the High Court in exercise of jurisdiction under section 561-A Cr.P.C.

5. Learned Prosecutor General referred 2012 PCr.LJ 696, 2000 YLR 2668 and 2000 PCr.LJ(sic) to contend that in these cited cases criminal revision has been held to be not maintainable, however, in the light of guidance provided in the latest case law i.e. PLD 2018 SC 351, 2016 PCr.LJ 1463, PLD 2012 IHC 35, PLD 2006 Lah. 290, criminal revision would lie against the orders passed by ATC. Further argued that bar contained under section 21(d) is only to the extent of the bail and could not take away revisional jurisdiction of the High Court. By referring Sections 21(d), 25, 31 and 32 of ATA, he further argued that ATA itself does not provide any bar on the jurisdiction of this Court under sections 435 and 439 of the Code, hence, the High Court can exercise revisional jurisdiction in appropriate case. By referring sections 19(14) and 32 ATA and Section 6 of the Code, he argued that for all intents and purposes the High Court being the appellate court has supervisory authority over the ATC as inferior/subordinate court, therefore, the scope of Sections 435, 439 of the Code, cannot be curtailed. In this respect learned Prosecutor General referred the case PLD 2016 SC 55 and (PLD 2018 SC 351).

6. Mr. Muhammad Amjad Rafiq learned Additional Prosecutor General argued that in the light of Mehram Ali's case PLD 1998 SC 1445, this Court can exercise revisional jurisdiction in appropriate cases against the proceedings of ATC. Further added that Section 31 ATA deals with finality of the judgment and order which is appealable and when the ATA was promulgated appeal lied before the Appellate Tribunal but later on amendment was introduced and High Court became the appellate court of ATC and the ATC is deemed to be court of Sessions under ATA and the provisions of Code are applicable until they are not inconsistent with the Code, which make it clear that against the interlocutory order or an interlocutory order of final nature, against which no appeal is provided, only revision is competent. Added that in Suppression of Terrorist Activities (Special Courts) Act, 1975, Terrorist Affected Areas (Special Courts) Act, 1992 and National Accountability Ordinance, 1999 (No.XVIII of 1999), specific prohibitions have been imposed against the filing of revision but no such condition has been imposed in the ATA, as such revision is maintainable and visitorial jurisdiction of the High Court over its subordinate courts cannot be curtailed.

7. Mr. Sittar Sahil, Assistant Advocate General, while agreeing with the arguments addressed by the learned Prosecutor General as well as the learned Additional Prosecutor General, and while referring to various provisions of law argued that writ petition is not maintainable and remedy of criminal revision can be invoked by the petitioner against the impugned order.

8. We have heard the arguments of learned counsel for the parties at full length and analyzed the legal proposition in the light of Articles 175, 203 of the Constitution of Islamic Republic of Pakistan, 1973 and Sections 2(c), 13(4) 19(14), 21-D, 25, 30(2), 31 and 32 of the ATA, Sections 6, 435, 439 and 561-A, of the Code.

9. On the face of it the question whether a Writ Petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, a Revision Petition under sections

435, 439 of the Code or a petition under section 561-A of the Code, would be maintainable to check the correctness, legality or propriety of any findings recorded by the ATC with respect to any order which is not appealable under ATA, appeared to be a perplexed question and admittedly there existed views of the courts for and against the said legal proposition, as some judgments of the courts held that a revision petition is not maintainable under the ATA on account of a collective reading and effect of sections 25, 31 and 32 of the said Act and in some judgments the court have held that revision petition is maintainable.

10. We have examined this issue in the light of relevant provisions of ATA and the Constitution of Islamic Republic of Pakistan, 1973. Article 175 of the Constitution deals with establishment of certain courts by implication of law other than Supreme Court, High Courts and the Federal Shariat Court. In Mehram Ali's Case the combined effect of Articles 175, 202 and 203 of the Constitution was examined and in para. No.11 thereof, it was held:-

(i) That Articles 175, 202 and 203 of the Constitution provide a framework of Judiciary i.e. the Supreme Court, a High Court for Province and such other Courts as may be established by law.

(ii) That the words "such other Courts as may be established by law" employed in clause (1) of Article 175 of the Constitution are relatable to the subordinate Courts referred to in Article 203 thereof

(iii) That our Constitution recognises only such specific Tribunal to share judicial powers with the above Courts, which have been specifically provided by the Constitution itself Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225). It must follow as a corollary that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution.

(iv) That in view of Article 203 of the Constitution read with Article 175 thereof the supervision and control over the subordinate judiciary vest in High Courts, which is exclusive in nature, comprehensive in extent and effective in operation.

(v) That the hallmark of our Constitution is that it envisages separation of the Judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in within the judicial framework of the Constitution.

(vi) That the right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The Courts/Tribunals which are manned and run by executive authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution.

(vii) That the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and condition."

[Emphasis have been supplied by us]

Section 6 of the Code accommodates classes of various criminal courts which are liable to revisional check of High Court; for facility of reference, relevant provisions are reproduced hereunder:-

Code of Criminal Procedure (Act V of 1898)

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

(i) Courts of Session;

(ii) Courts of Magistrate;

[(2) There shall be the following classes of Magistrate, namely:-

(i) Magistrate of the First Class;

(ii) Magistrate of the Second Class; and

(iii) Magistrate of the Third Class,

435. Power to call for records of inferior Courts:

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying, itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation: All Magistrates shall be deemed to be inferior to the Sessions Judge for the purposes of this subsection.

439. High Court's powers of revision:

(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court, may, in its discretion exercise any of the powers Conferred on a Court of Appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence and, when the Judges Composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by Section 429.

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

(3) Where the sentence dealt with under this section has been passed by a Magistrate the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Magistrate of the First Class.

(4) Nothing in this section shall be, deemed to authorize a High Court-

(a) To convert a finding of acquittal into one of conviction; or

(b) to entertain any proceedings in revision, with respect to an order made by the Sessions Judge under Section

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under subsection (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled at so to show cause against his conviction"

Examination of Section 6 of the Code uncovers that there might be other courts established by any law other than the courts created under the Code. All criminal courts whether created by the Code or some other law are the Courts inferior/subordinate to High Court in the light of Mehram Ali case (supra). Therefore, the revisional control under Sections 435 to 439 of the Code being supervisory and curative in nature, will be available to the High Court unless expressly ousted by such special law.

11. Now the question would remain as to what would be the scope and extent of Sections 21-D, 31 and 32 of ATA? Before dilating upon this legal proposition, we would like to refer the relevant provisions:-

21-D. Bail.-(1) Notwithstanding the provisions of sections 439, 491, 496, 497, 498, 498A and 561 of the Code, no Court, other than an Anti-terrorism Court, a High Court or the Supreme Court of Pakistan, shall have the power or jurisdiction to grant bail to or otherwise release an accused person in a case triable by an Anti-terrorism Court.

25. Appeal.--(l) An appeal against the final judgment of an [Anti-Terrorism Court] shall lie to [a High Court].

(2) Copies of the Judgment of [Anti-Terrorism Court] shall be supplied to the accused and the Public Prosecutor free of cost on the day the judgment is pronounced and the record of the trial shall be transmitted to the [a High Court] within three days of the decision.

(3) An appeal under subsection (1) may be preferred by a person sentenced by an [Anti-Terrorism Court] to [a High Court] within seven days of the passing of the sentence.

(4) The Attorney General, (Deputy Attorney General, Standing Counsel) or an Advocate General [or an Advocate of High Court or Supreme Court of Pakistan appointed as Public Prosecutor, Additional Public Prosecutor or a Special Public Prosecutor] may, on being directed by the Federal or a Provincial Government, file an appeal against an order of acquittal or a sentence passed by (An Anti-Terrorism Court) within fifteen days of such order.

[(4A) Any person who is a victim or legal heir of a victim and is aggrieved by the order of acquittal passed by an Anti-Terrorism Court, may within thirty days, file an appeal in a High Court against such order.

(4B) If an order of acquittal is passed by an Anti-Terrorism Court in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grant special leave to appeal from the, order of acquittal, the complainant may within thirty days present such an appeal to the High Court.]

(5) An appeal under this section shall be heard and decided by "a High Court" within seven working days.

[(6) Omitted by Ordi. IV of 1999 and XIII of 1999 w.e.f. 27.4.1999].

(7) Omitted by Ordi. IV of 1999 and XIII of 1999 w.e.f. 27.4.1999].

(8) Pending the appeal "a High Court" shall not release the accused on bail.
[(9) For the purposes of hearing appeals under this section each High Court shall establish a Special Bench or Benches consisting of not less than two Judges.
(10) While hearing an appeal, the Bench shall not grant more than two consecutive adjournments.]
31. Finality of judgment.--A judgment or order passed, or sentence awarded, by (An Anti-Terrorism Court), subject to the result of an appeal under this Act shall be final and shall not be called in question in any Court."
32. Overriding effect of Act.--(1) The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before [an Anti-terrorism Court] shall be deemed to be a Court of Session.
(2) In particular and without prejudice to the generality of the provisions contained in subsection (1), the provisions of section 350 of the Code shall, as far as may be, apply to the proceedings before [an Anti-terrorism Court] and for this purpose any reference in those provisions to a Magistrate shall be construed as a reference to [an Anti-terrorism Court].
By examining Section 31 along with section 25 ATA (relating to appeal), it becomes crystal clear that section 31 specifies just such orders which achieve conclusiveness after the decision of the High Court in appeal. The words "subject to" used in Section 31 ATA get significance as these words have not been defined; therefore, we need to think about their strict and lexicon meaning. This expression was examined in the case "DADA SOAP FACTORY LIMITED v. COMMISSIONER OF INCOME TAX, CENTRAL ZONE, KARACHI (1987 PTD 420), as "The word 'subject to' are not descriptive words but they impose conditions and obligation. These are words of qualification and conditions." Further, in the case "ISLAMIC REPUBLIC OF PAKISTAN v. ABDUL WALI KHAN" (PLD 1976 SC 57), the expression 'subject to' has also been defined as 'conditional upon or dependent upon' or 'exposed to (some contingent action)', being under the contingency." The case "A.P. Moller v. Taxation Officer of Income Tax" (2011 PTD 1460), is also referred. The circumstances in this manner develop that the word "subject to" used in section 31 ATA in the light of qualified condition of Section 25 ATA only included the orders of acquittal and not any interlocutory order, regardless of the fact that if it may be of a final nature. Following are some of the examples of such orders which are not covered under section 31 ATA being not appealable but are final in nature :-
i) Discharge of an accused;
ii) Remand of an accused;
iii) Dismissal of a private complaint under section 203 Cr.P.C.
iv) Summoning or non-summoning of blamed in a private complaint;
v) Summoning or non-summoning of a private witness;
vi) Summoning or non-summoning of a document or any other thing;
vii) Rejection of application under section 265-K Cr.P.C.

12. In the case of "Mian Khalid Rauf v. Chaudhrv Muhammad Saleem and another" (PLD 2015 SC 348) Leave to Appeal was granted by the Hon'ble Supreme Court to

consider the question, inter alia, whether the High Court was legally barred from entertaining a criminal revision petition against the Judgment of a Special Court and whether the bar of maintainability of appeal contained in section 10(2) of the Act 1958 would be extended to a Special Court created under Section 3 of the Act 1958 by an appropriate Provincial Government? While answering the said question it was observed that the Special Court/Judge is a Court inferior to the High Court and hence the High Court's revisional powers under section 435, Cr.P.C. to check the correctness, legality or propriety of any finding or order recorded or passed by an inferior Court would not stand excluded particularly as the Act itself does not exclude the same. Further, in the case "Abdul Hafeez v. The State" (PLD 1981 SC 352) it was argued that in the Drugs Act there was a provision as contained in subsection (7) of section 31 which provided for an appeal against a sentence passed by a Drug Court, to the High Court, but there was no express provision providing for or bestowing a revisional jurisdiction on the High Court, with the result, that in this case the High Court, had no jurisdiction or authority to enhance the petitioner's sentence in his own appeal, and as such, the order of the High Court in this respect was nullity and liable to be set aside. Repelling the aforesaid contention, Hon'ble Supreme Court observed:-
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5. The contention has no merit. Section 435 of the Criminal Procedure Code says that the High Court (to put in broad words) will have a revisional jurisdiction against orders of "inferior criminal Courts". The word "inferior" here means judicially inferior Nobin Kristo Mookerjee v. Russick Lall Laha (ILR 10 Cal. 269). It is to point out that a Court whose orders are subject to appeal to another independent and separate Court, is in that particular sense, inferior to the appellate Court. It will be worthwhile to mention here that in the Criminal Procedure Code of 1872, in the corresponding section 295, the words used were "any Court subordinate to such Court or Magistrate". It appears to unreasonable to suppose that this new expression has been substituted without any definite object, and the obvious conclusion which can legitimately be drawn is, that it refers to a Court over which the High Court proceeding under section 435, has appellate jurisdiction. From the above principle it is further evident that there may be inferiority without subordination but there cannot be subordination without inferiority. The epithet "inferior" seems to have been used simply in order to avoid the use of "subordinate" on account of the special limitation of the latter word which would prevent the superior Court from looking into certain cases arising beyond the line of "subordination" to it; which yet might properly be examined for the purpose of as order under sections 436 and 437 or reference under section 438, and then by High Court under section 439. It is to keep the hands of the High Court quite free in dealing with a case in its ultimate stage of revision etc. that expression "inferior" has been substituted for the word "subordinate". In that context, therefore, when in the manner aforesaid, a Drug Court has been made subject to appellate jurisdiction of the High Court and in that sense inferior to the High Court, the latter could exercise revisional jurisdiction against its order and proceedings as laid down in sections 435/439, Cr.P.C. In other words once having made the Drug Court, in that manner judicially inferior to the High Court, there was no necessity of duplicating the matter over again by expressly providing for a revisional jurisdiction of the High Court; because, the same already inhered in the status and position in

which the Drug Court stood to the High Court. It is well settled that an a appeal is a complaint to a superior body of any injustice done or error committed by an inferior one with a view to its reversion or correction etc. From that point of view also the Drug Court being subject to the appellate jurisdiction of the High Court is an "inferior criminal Court" whose orders and proceedings will be revisable by it under section 435. (Emphasis added)

After in-depth analysis, the Court concluded:--

The result is that looked from whatever angle, the conclusion is inevitable that no provision of the Drugs Act ousts the revisional jurisdiction of the High Court (and rather points to the contrary as discussed above) and the use of the word "final" does not detract anything from the same in the context above explained. The cumulative effect of all the above provisions and the discussion is that the High Court in cases under the Drugs Act is simultaneously a Court of appeal and revision and can, not only, exercise appellate powers but also, those under section 439 of the Cr.P.C. and can enhance sentence passed by, the inferior Court viz. the Drug, Court. (Emphasis added)

In the case of "Habib Bank Ltd. v. The State and 6 others" (1993 SCMR 1853) Section 10 of Suppression of Terrorist Activities (Special Courts) Act, 1975 came under consideration. The said provision is reproduced hereunder for ready reference.

10. Act to override other laws.- The provisions of this Act shall have effect notwithstanding anything contained in the Code or in any other law for the time being in force.

The Hon'ble Supreme Court resolved that the powers of the High Court under sections 435 and 439 remained intact despite prohibitory and negative provisions contained in section 10 of the Ordinance.

13. Honourable Karachi High Court in the case of "Huzoor Bux v. The State" (PLD 2008 Karachi 487) while referring to Criminal Appeals Nos. 257 of 2000 and others (Syed Hussain Abbass v. The State) decided by the august Supreme Court observed:-

"Criminal Appeals Nos. 257 of 2000 and others (Syed Hussain Abbass v. The State) had observed that High Courts being appellate forum against the orders of the Anti-Terrorism Court in a suitable and appropriate cases can exercise powers, as required under sections 435 and 439, Cr.P.C"

A Division Bench of this Court, in the case of Atta Ullah v. Ghulam Rasool and others (PLD 2006 Lahore 290) it was held:-

22. The conclusions drawn are that a petition for leave to appeal can be filed by an aggrieved person against an order or acquittal passed by ATA. Court before a High Court within the timeframe as prescribed and the aggrieved person includes the victim, a legal heir or a private complainant. Likewise, the High Court has the visitorial powers over the Anti-Terrorist Courts and, therefore, can entertain petitions in the nature of those as covered by section 439 of the Criminal Procedure Code. The law is now so declared and this constitutional petition is accordingly disposed of [Emphasis have been supplied by us]

The same view has been followed in the cases reported as Muhammad Obaid Iqbal and others v. Khadim Hussain and others 2006 PCr.LJ 78 [Lahore]; Muhammad Yunus Bhatti v. Muhammad Arif and others 2007 YLR 1171 [Lahore]. Whereas,

contrary view has been taken in the cases reported as Muhammad Arif v. Nazeer Ahmed and others 2012 PCr.LJ 696 [Lahore].

14. We have considered the argument of learned counsel for the petitioners that the law was promulgated for speedy trials and observe that although in the preamble of ATA, the purpose of the Act has been depicted as speedy trial of the case but the trial is to be conducted and completed by adopting all the legal parameters and no court can be permitted to circumvent the procedure or pass an illegal interim order which may prejudice the rights and privileges of the parties, now protected by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 and when no limitation has been forced in the statute then same cannot be embedded by deciphering the state in the light of preamble.

15. There are a number of judgments at High Courts level wherein contrary and contradictory interpretations of a single legal question have been offered by the different Benches of coordinate jurisdiction. This lack of coordination and non-adherence to the principles of horizontal stare decisis, judicial propriety and judicial comity create a lot of uncertainty and confusion. The Courts subordinate to High Court, which are bound to follow the principles of law enunciated by this Court as per Article 201 of the Constitution, face awkward situation and general public perception and trust in the judicial system stand compromised. In another context but on the same point august Supreme Court in case of Ameer Zeb v. The State (PLD 2012 SC 380) observed:-

5. Because of the conflict of decisions of this Court on the above point, the High Courts and subordinate Courts are making pick and choose to apply any of the decisions in the case which apparently is causing miscarriage of justice. Now it is left at the discretion of the High Courts and subordinate Courts to give benefit or otherwise to any particular accused which apparently is frustrating the intention of lawmakers and diminishing the rigour of law for which it is made...

With reference to binding authority of the ruling of Division Bench of High Court, august Supreme Court in cases "Multiline Associates v. Ardeshir Cowasijee" (PLD 1995 SC 423) observed as under:-

In such circumstances, legal position which emerges is that the second Division Bench of the High Court should not have given finding contrary to the findings of the 1st Division Bench of the same Court on the same point and should have adopted the correct method by making a request for constitution of a larger Bench, if a contrary view had to be taken. [..] We, therefore, hold that the earlier judgment of equal Bench in the High Court on the same point is binding upon the second Bench and if a contrary view had to be taken, then request for constitution of larger Bench should have been made. [emphasis added]

Earlier same view was taken by the august Supreme Court in the case of The Province of East Pakistan v. Dr. Azizul Islam (PLD 1963 SC 296), it was observed:--

With respect we must point out that the decision was a direct authority also on this question, as in spite of the rubber-stamp signature the validity of the order of requisition was upheld and if the learned Judges of the High Court deciding the present case were inclined to take a different view, they should have, in accordance

with the rules of their own Court, referred the matter to a larger Bench. Alternatively, they could have expressed their doubts regarding the view taken in the precedent case in a Court of co-equal jurisdiction, while yet following that view, and left the matter to be raised in appeal before this Court.

[Emphasis supplied by us.]

In more elaborated terms a Full Bench of Karachi High Court in case "Murad Ali v. Collector of Central Excise and Land Customs" (PLD 1963 (W.P.) Karachi 280(F.B) also observed:-

In order to maintain judicial propriety;

i) the decision of a Division Bench on a question of law should be followed by the other Bench. If they differ, the proper course to adopt would be to refer the question for the decision of a Full Bench;

ii) the decision of one Division Bench on a question of fact is not binding on the other Division Bench;

iii) if the decision of one Division Bench has not come to the notice of the other Bench and a different view is taken in the subsequent Division Bench case and when such two conflicting decisions are placed before the Bench, the proper procedure to follow in such a case would be, for the Bench hearing the case, to refer the matter to a Full Bench in view of the conflicting authorities without deciding the question itself.

The same view has been followed in the case of "Syed Muhammad Murtaza Zaidi v. Motor Registration Authority and others 2010" PTD 1797 (DB Lahore). In the case of Asif Mahmood v. Deputy Commissioner, Sheikhupura and another (2005 MLD 589 [Lahore]) a Division Bench of this Court observed:

Even otherwise we cannot bypass the judgment of the D.B. over the judgment of the Single Bench of this Court. Even otherwise it is settled principle of law that earlier judgment of the equal Bench in the High Court on the question of law is binding upon the Second Bench as per law laid down by the Honourable Supreme Court in Multi Line Associates' case (1995 SCMR 362). [Emphasis added]

On the same point august Supreme Court in Ameer Zeb Case (Supra) applied the principles laid down in Ardeshir Cowasijee Case (supra) to benches of equal strength of august Supreme Court and held:-

4. It appears that a contrary view was taken by two other Benches of equal number of Judges in the cases of Muhammad Hashim and Amanat Ali (supra). In such a situation. apparently the rule laid down by the case of Multiline Associates v. Ardeshir Cowasjee PLD 1995 SC 423 was required to have been followed which is that if a Bench of equal Judges does not agree with the earlier Bench of equal Judges, then the matter should be referred to a larger Bench. It appears that earlier decisions of this Court in the cases of Nadir Khan and Ali Muhammad (supra) were not brought to the notice of the Benches in the cases of Muhammad Hashim and Amanat Ali (supra), therefore, the principle laid down in the said cases was never discussed. In such a situation this Court in the case of Province of the Punjab v. S. Muhammad Zafar Bukhari PLD 1997 SC 351 observed as under:---

"Halsbury's Laws of England. Fourth Edition, Volume 26 in paras 577-578, has commented on the "judgment per incuriam" as under:

"A decision is given per incuriam when the Court has acted in ignorance of previous decision of its own or of a Court of coordinate jurisdiction which covered the case

before it in which case it must decide which case to follow or when it has acted in ignorance of House of a Lords' decision, in which case it must follow that decision or when the decision is given in ignorance of the terms of statute or rule has statutory force." [Emphasis added by us]

Indian Supreme Court, while highlighting the importance of judicial discipline in the case of "Dr. Vijay Laxmi Sadho v. Jagdish" (2001 (2) SCC 247) observed:--

It is well-settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of "different arguments" or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs." [Emphasis added]

A Division Bench of Allahabad High Court explained the principle of judicial comity in the case of "Arun Kumar Singh v. State of U.P." 2013(1) ADJ 457 in the following terms:-

9. Moreover, there is a principle known as "comity of Judges'. Particularly when the issue relates to High Court itself, such principle has to be applied for taking uniform stand, if not, make an observation to place the matter before the appropriate Court which had passed original order, that too when it is of a Division Bench, whose order has a binding effect, but not to show any judicial over-activism at the behest of handful of persons. In this regard, we have come across the judgements reported in (State of U.P. v. C.L. Agrawal), 1997. (5) SCC 1 (Furest Day Lawson Ltd. v. Jindal Exports Ltd.),2001 (6) SCC 356 (State of Madhya Pradesh v. Narmada Bachao Andolan), 2011 (7) SCC 639 (Rattirum v. State of M.P.), 2012 (4) SCC 516 and (U.P. Power Corpn. Ltd. v. Rajesh Kumar)., 2012 (7) SCC 1. In Furest Day Lawson Ltd. (supra) the Supreme Court has held that a prior decision of the Court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgement or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obstrusive omission, it is not desirable to depend on the principle of judgment "per incurriam". In U.P. Power Corpn. Ltd. (supra) it has been held by the Supreme Court that judicial discipline commands in such a situation when there is disagreement, to refer the matter to a larger Bench. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself. It was further held that one must remember that pursuit of the law, howsoever, glamorous it is, has its own limitation on the Bench. In a multi-Judge court, the Judges are bound by precedents and procedure. They could

use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned Single Judge or a Division Bench does not agree with the decision of a Bench of coordinate jurisdiction, the matter should be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure. The Supreme Court has also held that judicial enthusiasm should not obliterate the profound responsibility that is expected from the Judges.

[Emphasis supplied]

A Full Bench of Gujrat High Court (India) in the case of "State of Gujarat v. Gordhandas Keshavji Gandhi and others" AIR 1962 Gujarat 128, observed:-

One Judge of a High Court has, however, no right to overrule the decision of another Judge of the same High Court nor has one Division Bench of a High Court the legal right to overrule another decision of a Division Bench of the same High Court. (Emphasis added)

With regard to powers of Full Bench of High Court, Bombay High Court in the case of Emperor v. Ningappa Ramappa Kurbar (AIR 1941 Bombay 408), observed as follows:

"There seems to be very little authority on the powers and constitution of a Full Bench. There can be no doubt that a Full Bench can overrule a Division Bench and that a Full Bench must consist of three or more Judges; but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench, merely because the later bench consists of more Judges than the earlier. If that were the rule, by a majority of four to three, could overrule a unanimous decision of a bench of six Judges, though all the Judges were of co-ordinate jurisdiction. In Enatullah v. Kowsher Ali, ILR 54 Calcutta 266: (AIR 1926 Calcutta 1153) (SB) Sanderson, C.J., stating the practice in Calcutta, seems to have been of opinion that a decision of a Full Bench could only be reversed by the Privy Council or by a bench specially constituted by, the Chief Justice."

Therefore, any contrary decision given by the subsequent bench of equal strength of High Court in ignorance of the terms of statute, binding precedent of Supreme Court or previous decision of bench of equal strength/Benches of coordinate jurisdiction of the same Court will be a judgement per incuriam and without any precedential value. Moreover, whenever a contrary view has been taken after considering the previous decision of the Bench of the same Court, then such a decision would be in violation of law of precedent as set by the august Supreme Court in Ameer Zeb Case (supra) and Ardeshir Cowasijee Case (supra). Hence, subsequent judgements given by the subsequent benches of equal or less strength in the ignorance of Atta Ullah Case (supra) are held to be per incuriam.

16. It may be noted that this Full Bench vide short order dated 11.05.2018 held and declared that " against an interim order passed by a court under Anti-Terrorism Act 1997, during proceedings of a case, including an order of summoning/non-summoning the accused writ petition is not maintainable, as under Anti-Terrorism Act, 1997, applicability of Sections 435, 436 and 439 Cr.P.C. has not been restricted except under Section 21-D to the extent of bail, hence, criminal revision is competent". In the meanwhile, a new development has also arisen, which needs

consideration. Another full Bench of this Court (at Multan) in Criminal Revision No. 417 of 2006 vide order dated 31.05.2018 held that Criminal Revision against the order passed by Anti-Terrorism Court for dismissal of private complaint is incompetent and Constitution petition would be maintainable. The view taken by the learned second full bench (at Multan) is contrary to the declaration made by this Bench vide short order dated 11.05.2018.

Now the anomaly has arisen that, whether this Full Bench is bound by the decision of second Full Bench on the same question of law or the second bench was bound to follow the declaration of law made by this Bench through short order referred supra. It is well settled law that a short order announced by the court of competent jurisdiction has the operational effect of judgement pronounced by the court (reference may be made to D.-G. A.N.F. RAWALPINDI and others v. MUNAWAR HUSSAIN MANJ and others (2014 SCMR 1334); REVIEWS ON BEHALF OF JUSTICE (RETD.) ABDUL GHANI SHEIKH and others PLD 2013 SC 1024; JUSTICE HASNAT AHMED KHAN and others v. FEDERATION OF PAKISTAN/STATE PLD 2011 Supreme Court 680; WISRAM DAS v. SGS PAKISTAN (PVT.) LTD. and another 2010 SCMR 1234; WAFI ASSOCIATES (PVT.) LIMITED v. FAR00Q HAMID and others (2010 SCMR 1125). From perusal of case law on precedential value of a short order, we are of the view that there may be two types of short orders i.e. (i) which decide the question of law in clear and operative terms, and (ii) which only adjudicates the matter and no question of law is clarified in terms of Articles 189 and 201 of the Constitution of Islamic Republic of Pakistan, 1973. In the light of these principles, we have again carefully examined our short order dated 11.05.2018 and hold that the same is covered under the first category, therefore, has the precedential value. However, second type of orders have no precedential value, as those do not qualify the test as laid down in the case of MUHAMMAD TARIQ BADR and another v. NATIONAL BANK OF PAKISTAN and others (2013 SCMR 314)

[--] Moreover, for the purpose that a judgment of the apex Court should have due effect and due deference, three conditions as per Khan Gul Khan and others v. Daraz Khan (2010 SCMR 539) should be met (a) judgment decides a question of law; (b) it is passed upon the basis of law; and (c) it enunciates the principle of law...

(Emphasis added]

In the case of KHAN GUL KHAN and others v. DARAZ KHAN 2010 SCMR 539 it was held:--

In Muhammad Tariq's case supra, contentions raised by the learned counsel as noted in para.6. Precedents were also noted in paras.6 and 7 but the learned Judges had given conclusions in para.9. The same is result of per incuriam as the conclusion is not in consonance with the provisions of section 20 of the Pre-emption Act. The following are three basic ingredients of every decision :

(a) Findings of fact both direct and inferential.

(b) Statement of principles of law applicable to the legal terms disclosed by the facts.

(c) The judgment passed on the combined effect of the above ingredients.

A decision of apex Court is binding only when it fulfils the following three conditions:---

(i) It decides a question of law.

(ii) It is passed upon the basis of law.
(iii) It enunciates a principle of law.
Mere mentioning the precedents in the judgment without adverting to the ratio laid down, in the cited judgments raises questions than resolving the same.
[Emphasis supplied by us]
The decision of the second full bench of this Court (at Multan) has been based upon The State through Mehmood Ahnutd Butt, Deputy Director, Regional Directorate, Anti-Narcotics Force, Lahore v. Mst. Fazeelat Bibi, (PLD 2013 SC 361) wherein the question before the court was, "---whether the learned High Court in dismissing State's appeal has correctly interpreted the import of section 48 of the Control of Narcotic Substances Act, 1997". Responding the aforesaid question, it was held:-
[---] The right of appeal conferred by section 48(1) of the Control of Narcotic Substances Act, 1997 is all pervasive catering for every kind of appeal from every kind of order passed by such a Special Court and the provisions of section 48(1) of the Control of Narcotic Substances Act, 1997 do not make any distinction between an appeal against a conviction, an appeal against an acquittal or an appeal seeking enhancement of a sentence passed against a convict. The restrictive scope of section 48 of the Control of Narcotic Substances Act, 1997 visualized by the learned Division Bench of the Lahore High Court, Lahore confining it only to an appeal against conviction has been found by us to be offensive to the clear and unambiguous provisions of the said section and, thus, the same cannot be sustained or upheld by us.
Therefore, in the light of Khan Gul Khan Case (supra), Fazeelat Case cannot be cited as a binding authority on the question of revisional powers of this court against an interim order/order for summoning or non-summoning of the accused passed by the "subordinate" Anti-terrorism Court. Moreover, the second Full Bench of this Court was not informed about unreported judgement of Supreme Court of Pakistan in case of Syed Hussain Abbass v. The State (Criminal Appeals Nos. 257 of 2000 and others) wherein it has been held that High Courts being appellate forum against the orders of the ATA in suitable and appropriate cases can exercise powers, as required under sections 435 and 439, Cr.P.C.

17. This Court has already decided the issue through a short order dated 11.05.2018 which discloses that the question of law has been decided to the effect that only restriction of bail had been imposed under section 21(d) of ATA and Sections 435, 436, 439 of the Code have not been restricted. Despite the fact that it was a short order, it resolved a question of law and it appears that this order was not brought to the notice of the learned Full Bench at Multan. Further it has also been observed that before this Bench the matter was argued by the learned Prosecutor General as well as representative of the Advocate General in favour of maintainability of revision petition, but the ultimate decision rendered by this Court in the presence of learned Prosecutor General and the representative of the Advocate General was not conveyed to the Full Bench at Multan by their representatives during the course of arguments before the said learned Full Bench. Furthermore, through the same short order, the office was directed to convert writ petition into criminal revision, it was thus duty of the office to have conveyed this order to the administrative officers at the benches for further future references, but it appears that needful was not done. From the above

reasons perhaps, the order of this Full Bench, appears to have not been brought to the notice of the Full Bench at Multan and in addition to the above the judgment of the apex court in Syed Hussain Abbas v. The State (Criminal Appeals Nos.257 of 2000 and others), also appears to have not been referred to the learned Full Bench at Multan. As a consequence of our above discussion, the judgment dated 31-5-2018 passed by the Full Bench at Multan in Criminal Revision No.417/2006 "Aziz Ahmad v. Syed Irshad Hussain Shah and others" is held to be per incuriam and may not be treated as a binding precedent.

18. For what has been discussed above, we hold that ATC is subordinate/inferior court to the High Court; in ATA no restriction has been imposed for filing of revision petition, hence, the High Court has the visitorial power over ATC, therefore, can entertain petitions in the nature of those covered by Sections 435, 439 of the Code, except to grant bail or release an accused in a case triable by ATC, in the light of restriction imposed under section 21(d) of the ATA, and writ petition is not maintainable. The above exhaustive discussion on the point with reference to the case law, forms the reasoning of our above reproduced short order dated 11.05.2018.

19. Before parting with this Judgment, we observe that the question before us was not only complicated, but was also a case of first impression, therefore, deep rooted legal acumen was expected from the learned counsel representing the respective sides, and at this stage we acknowledge the skill of all the learned counsel for the parties who rendered marvelous assistance to this Bench. More particularly the determination and effort put in by Rai Bashir Ahmad, Mr. Muhammad Azhar Siddique, Mirza Naveed Baig, Mr. Azam Nazir Tarrar as well as Syed Ehtisharn Qadir (learned Prosecutor General), Mr. Muhammad Amjad Rafiq (Additional Prosecutor General) and Mr. Sittar Sahil, (Assistant Advocate General) is commendable. At the same time we appreciate the effort put in by Mr. Qaisar Abbas, Research Officer, of this court, as by his assistance we have been able to lay our hands on almost whole of case law on the subject by the superior courts. Thus, we would like to bring on record a sense of appreciation and words of gratitude in respect of valuable assistance rendered to this Court by all of the above.

MWA/M-107/L Order accordingly.

PLJ 2018 Lahore 122 (DB)
[Multan Bench Multan]
***Present*: MUHAMMAD QASIM KHAN AND ASJAD JAVAID GHURAL, JJ.**
GHULAM QADIR--Petitioner
versus
STATE and 2 others—Respondents

W.P. No. 3871-ATA of 2017, decided on 27.2.2017.

Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 295-A--Anti-Terrorism Act, 1997, Ss. 9, 19(2B) & 32--Criminal Procedure Code, (V of 1898), S. 265-K--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Face book account--Photograph--Edited--Detestable act--Religious feelings were outraged--Over riding effect of ATA Act--Technical Jurisdiction of special Court--Application for acquittal--Dismissed--Challenge to--Case was registered under Anti-Terrorism Act, 1997--Where no such provision under Section 196, Cr.P.C. was applicable--Anti-Terrorism Act, 1997 is a special law and have overriding effect on all other laws as envisaged under Section 32 of Anti-Terrorism Act, 1997--Provision of Code of Criminal procedure, 1898 are inapplicable to proceedings arising out of Special Law by virtue of sub-section (a) of Section 1 of the Criminal Procedure Code, 1898 and Section 32 of Act *ibid* having overriding effect--Petition was dismissed. [Pp. 124 & 125] A & B

Syed Jafar Tayyar Bukhari, Advocate for Petitioner.
Date of hearing: 27.2.2017.

ORDER
Through this Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 Ghulam Qadir, the petitioner has challenged the vires of order dated 01.03.2017 passed by learned Judge Anti-Terrorism Court, Sahiwal in case FIR No. 713, dated 24.12.2015 in respect of offences under Section 295-A, PPC alongwith Section 9 of the Anti-Terrorism Act, 1997 registered at Police Station Yousaf-Wala, District Sahiwal.

2. Briefly, the allegation against the petitioner was that on 22.12.2015, the petitioner edited a photograph from his Facebook account wherein a green turban was placed on the heads of the dogs and by this detestable act of the petitioner religious feelings of Hanfi-Brelvi Sect were outraged. Allegedly the petitioner to provoke the abhorrence further shared this photograph which was seen by Muhammad Asif, Sajjad Bashir, Sajid Mukhtar, Qari Muhammad Akmal, Safdar Ali Shad and Javed Mukhtar etc. and spread the anarchy in the society. After trial the petitioner has moved an application seeking his acquittal under Section 265-k, Cr.P.C., which was dismissed *vide* impugned order dated 01.03.2017. Hence. Hence, this petition.
3. Learned counsel for the petitioner submits that primarily the registration of case was illegal as sanction for prosecution had not been obtained which amounts to clear

violation of Section 196, Cr.P.C. where a complaint could be made by an order of the Central Government or the Provincial Government concerned, or some officer empowered in this behalf, but in the instant case no such sanction was procured to proceed further with the alleged offence; that the petitioner is liable to be acquitted as subsequent proceedings after registration of the case are without any foundation and ultimately there is no probability of his conviction at all.

4. Heard. Record perused.

5. Admittedly, no sanction for prosecuting the petitioner is available with the file, but it is important to mention here that the case was registered under Anti-Terrorism Act, 1997 where no such provision under Section 196, Cr.P.C. was applicable. The Anti-Terrorism Act, 1997 is a special law and have overriding effect on all the other laws as envisaged under Section 32 of the Anti-Terrorism Act, 1997, the same is reproduced here:--

"32. **Overriding effect of Act.--**(1). The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, insofar as they are not inconsistent with the provisions of this Act, apply to the proceedings before (An Anti-Terrorism Court), and for the purpose of the said provisions of the Code, (Anti-Terrorism Court) shall be deemed to be a Court of Session.

(3) In particular and without prejudice to the generality of the Provisions contained in sub-section (1), the provisions of Section 350 of the Code shall, as far as may be, apply to the proceedings before (Anti-Terrorism Court), and for this purpose any reference in those provisions to a Magistrate shall be construed as a reference to (Anti-Terrorism Court):"

(4)

6. According to Section 19(2-b) of the Act *ibid*, in Anti-Terrorism Act, amendment has been made with regard to sanction for prosecution and Section 19(2-b) has been insulted. That if sanction for prosecution is not received within thirty days, the same shall be deemed to have been given the same is reproduced here:

"(8-b)--Notwithstanding anything contained in Section 7 of the Explosive Substances Act, 1908 (VI of 1908), or any other law for the time being in force, if the consent or sanction of the appropriate authority, where required, is not received within thirty days of the submission of challan in the Court, the same shall be deemed to have been given or accorded and the Court shall proceed with the trial of the case."

Bare reading of aforesaid section shows that the sanction for prosecution in cases relating to Anti-Terrorism Act is not to be required and it shall be deemed to have been granted after expiry of thirty days of the submission of challan. Learned counsel for the petitioner submits that the proceedings are illegal and for the said reason the petitioner deserves acquittal. The petitioner was alleged to have committed a scheduled offence under the provision of Section 12 of the Act *ibid* which shall be triable only by the Special Court exercising territorial jurisdiction in relation to such area. In cases where Special Law attracts the provision of Code of Criminal procedure, 1898 are inapplicable to the proceedings arising out of the Special Law by

virtue of sub-section (a) of Section 1 of the Code of Criminal Procedure, 1898 and Section 32 of the Act *ibid* having overriding effect. In this regard, we seek guidance from the case reported as *"Mian Nawaz Sharif and others vs. The State"* (2000 MLD 946).

7. In view of above, without going into the merits of the case, the submissions made by learned counsel for the petitioner as he has confined himself to the extent that there was no sanction for prosecution to proceed with the matter is without any substance, hence, the same stands dismissed in limini.

(Y.A.) Petition dismissed

PLJ 2018 Lahore 139
***Present*: MUHAMMAD QASIM KHAN, J.**
MUHAMMAD NAWAZ--Petitioner
versus
EX-OFFICIO JUSTICE OF PEACE & others—Respondents

W.P. No. 91310 of 2017, decided on 19.10.2017.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 22-A(b)--Factual controversy--Jurisdiction--I find no illegality or material irregularity or jurisdictional defect in order impugned--Furthermore, stance taken by petitioner in this petition based on factual controversy, which needs recording of evidence and this exercise cannot be made by high Court in writ jurisdiction--However, if impugned order has been implemented, then investigating officer of said case shall first carry out investigation, join petitioner with investigation, record his oral/documentary version and during investigation, if he comes to conclusion that sufficient incriminating material is available on file to connect petitioner and others with commission of offence, he will obtain opinion from concerned legal cell and only then he will proceed to arrest accused--Disposed of. [Pp. 139 & 140] A

Sardar Yousaf Naseem Chandio, Advocate for Petitioner.
Date of hearing: 19.10.2017.

ORDER
Submits that Respondent No. 2 has moved application under Section 22-A(6), Cr.P.C. by concocting false story and has obtained impugned order dated 16-10-2017 with *mala fide* intention; therefore, the same is liable to be set aside.

2. After hearing the learned counsel and going through the available record, I find no illegality or material irregularity or jurisdictional defect in the order impugned herein. Furthermore, the stance taken by the petitioner in this petition based on factual controversy, which needs recording of evidence and this exercise cannot be made by this Court in writ jurisdiction. However, if the impugned order has been implemented, then Investigating Officer of the said case shall first carry out the investigation; join the petitioner with investigation; record his oral/documentary version and during investigation, if he comes to the conclusion that sufficient incriminating material is available on the file to connect the petitioner

PLJ 2018 Cr.C. (Lahore) 151 (DB)
[Multan Bench Multan]
***Present*: MUHAMMAD QASIM KHAN AND SIKANDAR ZULQARNAIN SALEEM, JJ.**
ARSHAD--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 6816-B of 2014, decided on 22.12.2014.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail after arrest–Grant of--Allegation of--Possessing *charas*--Petitioner was apprehended and was found in possession of 1050-grams of *charras*, as such, a small quantity of contraband "*charras*" exceeded prescribed upper limit of quantity of narcotic, as mentioned in Section 9(c) of CNSA, 1997, which resulted in bringing case of present petitioner within mischief of 9(c) of Control of Narcotic Substances Act, 1997—

Held: Whether narcotic, allegedly recovered from petitioner, was weighed with its wrapper/shopper or it was separated from wrapper/shopper and then weighed--When on this aspect nothing can be said with exactitude, an inference favorable to petitioner can be drawn that narcotic substance recovered from petitioner was weighed with its wrapper/packet, therefore question about exact weight of recovered narcotic substance would require further inquiry, as such a little difference, *prima facie*, casts doubt on prosecution story qua involvement of present petitioner in a case covered under Section 9(c) of Control of Narcotic Substances Act, 1997--Additionally, petitioner is previous non-convict, he is behind bars and after completion of investigation Challan has been submitted, but there is no progress in trial--Petition is allowed and petitioner is admitted to post arrest bail. [P. 152] A

Syed Jaffar Tayyar Bokhari, Advocate for Petitioner.
Mr. Hassan Mehmood Khan Tareen, Deputy Prosecutor General for State.
Date of hearing: 22.12.2014.

ORDER
Petitioner seeks post arrest-bail in a case arising out of FIR No. 524/2014 dated 09.10.2014 registered at the Police Station Noor Shah, Sahiwal under Section 9(c) of the Control of Narcotic Substances Act, 1997, wherein, the allegation against the petitioner is that on spy information when raid was conducted, he was found possessing 1050-grams of *charas* with him.

2. We have heard the arguments of learned counsel for the parties and perused the available record.

3. It is case of the prosecution that on spy information when raid was conducted, the petitioner was apprehended and was found in possession of 1050-grams of *charras*, as such, a small quantity of contraband "*charras*" exceeded the prescribed upper limit

of the quantity of the narcotic, as mentioned in Section 9(c) of the CNSA, 1997, which resulted in bringing the case of the present petitioner within the mischief of 9(c) of the Control of Narcotic Substances Act, 1997. In this case, there is nothing on the record to say that whether the narcotic, allegedly recovered from the petitioner, was weighed with its wrapper/shopper or it was separated from the wrapper/shopper and then weighed. In this view of the matter, when on this aspect nothing can be said with exactitude, an inference favorable to the petitioner can be drawn that the narcotic substance recovered from the petitioner was weighed with its wrapper/packet, therefore the question about exact weight of the recovered narcotic substance would require further inquiry, as such a little difference, *prima facie*, casts doubt on the prosecution story qua involvement of the present petitioner in a case covered under Section 9(c) of the Control of Narcotic Substances Act, 1997. Additionally, the petitioner is previous non-convict, he is behind the bars and after completion of investigation the Challan has been submitted, but there is no progress in the trial. Consequently, this petition is allowed and petitioner is admitted to post arrest bail on furnishing bail bond in the sum of Rs. 100,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(A.A.K.) Bail admitted

and others with the commission of offence; he will obtain opinion from the concerned legal cell and only then he will proceed for the arrest of accused.
3. With the above direction this petition stands disposed of.

(Z.I.S.) Petition disposed of

PLJ 2018 Cr.C. (Lahore) 190
***Present*: MUHAMMAD QASIM KHAN, J.**
JANNAT BIBI--Petitioner
versus
STATE etc.—Respondents

Crl. Misc. No. 63889-B of 2017, decided on 11.10.2017.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 34 & 109--Post Arrest Bail--Grant of--Further inquiry--Allegation of--Women accused--Delay in FIR--Delayed Medical Examination--No Recovery of Burn items--According to FIR, children were moved to hospital same day, whereas, their medical certificates showed that they were taken to hospital almost after 24 hours, No burnt or semi burnt item has been collected by investigation officer from spot, it is a fact borne out from record that in laws of petitioner are already at daggers daw and criminal proceedings against them were pending--Bail was allowed. [Pp. 191 & 192] A

Mr. Abdul Rouf, Advocate for Petitioner.
Hafiz Allah Yar Sipra, Advocate for Complainant.
Rana Tassawar Ali Khan, D.P.G. for State.
Date of hearing: 11.10.2017.

ORDER
Petitioner seeks post arrest bail in case FIR No. 437/2017 dated 28.07.2017 under Sections 324, 34, 109, PPC registered at Police Station Hujra Shah Muqeem, Okara, wherein, precisely the allegation against him is that due to in-house differences, she pressed the necks of the children, as a result they became unconscious and further she sprinkled petrol and set the household articles at fire.

2. I have heard the arguments of learned counsel for the parties at length and after perusing the available record, it has been observed that:--
(i) Although the alleged occurrence took place on 27.07.2017 at 10/11.00 am, but the matter was reported to the police next day i.e. on 28.07.2017 at 08.45 p.m., thus, there is obvious delay of about thirty three hours;
(ii) It has been observed that in the FIR Muhammad Waqas and Muhammad Yasin have been cited as eye-witnesses, but from the tenor of their statements recorded under Section 161 Cr.P.C. it appears that they reached at the site after seeing the flames, thus, it appears that they had not seen the first part of alleged incident wherein, purportedly the petitioner pressed the necks of the kids;
(iii) According to the FIR the children were moved to the Hospital same day, whereas, their medical certificates show that they were taken to hospital on 28.07.2017 at 11.00 a.m., i.e. after almost twenty four hours;
(iv) In addition to the above, the history of both the children narrated by their grand-mother as well as father has been written as beating, which fact is against the specific stance of throttling as taken in the FIR and furthermore, apart from the fact

that they were conscious and visibly were in normal condition, only minor abrasions were observed by the medical officer;

(v) As shall be seen from the contents of the FIR, there is specific allegation that household articles were set at fire by the petitioner, but no burnt or semi-burnt item has been collected by the Investigating Officer from the spot;

(vi) It is a fact borne out from the record that in-laws of the petitioner are already at daggers drawn and criminal proceedings against them are pending;

(vii) The petitioner is behind the bars without noticeable progress in the trial, whereas, the petitioner cannot be kept incarcerated for an indefinite period to wait for the conclusion of trial;

(viii) All the above facts when juxtaposed make the case against the petitioner one of further inquiry.

3. In view of above, this petition is allowed and petitioner is admitted to bail subject to furnishing bail bond in the sum of Rs. 100,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(A.A.K.) Bail allowed

2018 Y L R 383
[Lahore]
Before Muhammad Qasim Khan, J
KHALID HABIB---Petitioner
Versus
FEDERATION OF PAKISTAN through Secretary and others---Respondents

W.P. No.1822 of 2015, decided on 8th June, 2017.

(a) National Accountability Ordinance (XVIII of 1999)---
----Ss. 15 & 25(b)---Petitioner serving as Member (Technical) Pakistan Telecommunication Corporation Limited, was arrested by National Accountability Bureau and released as he entered into plea bargain under S.25(b) National Accountability Ordinance, 1999---Petitioner was dismissed from back date and disqualified from holding public office---Prosecution contended that although the Pakistan Telecommunication Corporation Limited was made a company subsequently, but the petitioner had served under statutory rules, therefore constitutional petition was not maintainable---Validity---Petitioner was employee of Pakistan Telecommunication Corporation having statutory rules; later on corporation was converted into company but service of the petitioner was to be governed under the statutory rules, therefore, the constitutional petition was competent---Provincial and Federal public servants when proceeded under the Prevention of Corruption Act, 1947 or Federal Investigation Agency Act, 1974 and convicted were not automatically dismissed or removed from service by virtue of their conviction---Departmental authority in such a case, had to proceed separately under the relevant laws and passed an independent order, but the National Accountability Ordinance, 1999, provided different mechanism---Section 25(b) read with S. 15 of the National Accountability Ordinance, 1999, described that when plea bargain was opted by an accused and approved by the court, he at once/immediately/without any further delay ceased to hold public office---Admittedly, the plea bargain was opted by the petitioner on 17.3.2003, therefore, for all practical purposes the petitioner ceased to remain on job---Department took up the matter of the petitioner and purely on the basis of his conviction by the National Accountability Bureau vide order dated 24.3.2005, he was dismissed from service with effect from 17.3.2003, the date of conviction by the National Accountability Bureau---Order dated 24.3.2005 being though for departmental purpose, yet the same in fact was implementation of specific provision of S. 15 of the National Accountability Ordinance, 1999--- Circumstances established that there was no merit in the petition---Constitutional petition was dismissed in circumstances.

Masood Ahmad Bhatti and others v. Federation of Pakistan through Secretary, M/O Information Technology and Telecommunication and others 2012 SCMR 152 and Muhammad Aslam, Ex-Deputy Director (Audit) District Govt. Lahore Region, Lahore v. Auditor-General of Pakistan, Islamabad 2013 SCMR 1904 rel.

(b) Criminal trial---

----Order of subordinate authority---Binding effect---Scope---Order/act of any subordinate authority was not precedent and had no binding effect on the courts to be followed and for considering any case whether discrimination had been meted out or not.

PRTC v. Mahmood Ahmad 2007 PLC 196 and Chandigarh Administration v. Jagit Singh and another AIR 1995 SC 705 rel.
Hafiz Tariq Naseem for Petitioner.
Sajjad Hussain Mian, Assistant Attorney General.
Shahid Anwar Bajwa for Respondents.

ORDER

MUHAMMAD QASIM KHAN, J.---Briefly the facts of the case are that while serving as Member Technical PTCL, proceedings under National Accountability Ordinance, 1999 (hereinafter to be called as "NAB, Ordinance") were initiated against him, which culminated into filing of a Reference before the Judge, Accountability Court No.II Rawalpindi/Islamabad (to be referred as "NAB Court") and as shall be seen from the order dated 17.03.2003 the petitioner opted for plea bargain under section 25(b) of NAB Ordinance, which was allowed by the NAB Court and consequently, per force of Section 25(b) read with Section 15 of the Ordinance, ibid, the petitioner was disqualified from holding the public office w.e.f. 17.03.2003 by an order dated 24.03.2005. By avoiding unnecessary details of litigation, it is to be mentioned here that lastly the petitioner filed Writ Petition No.27001/2011 which was allowed by this Court vide judgment dated 18.12.2012 in the terms that the appellate authority/The President of Pakistan was directed to decide the petitioner's representation and the President of Pakistan vide order dated 31.12.2014 dismissed petitioner's representation, hence, this writ petition.

2. It is argued by learned counsel for the petitioner that from the record it is visible that vide order dated 24.03.2015 the petitioner was dismissed from back date i.e. 17.03.2013, whereas, no adverse order could be passed with retrospective effect. Further argued that the petitioner has also been treated discriminately as compared to other two employees namely Khalid Mehmood and Bashir Hussain. The learned counsel while touching the maintainability of this writ petition contended that although subsequently the PTCL was made a company but as earlier the petitioner had served under statutory rules, therefore, in the light of case "Masood Ahmad Bhatti and others v. Federation of Pakistan through Secretary, M/O Information Technology and Telecommunication and others" (2012 SCMR 152), the writ petition is competent against the impugned orders. Lastly prayed that while setting-aside the orders dated 24.03.2005 and 31.12.2014, the order of dismissal from service be converted into an order for compulsory retirement from service.

3. On the other hand, the learned law officer assisted by learned counsel for the respondent department argued that as earlier the petitioner was employed in Pakistan Telecommunication Corporation which was converted into Company having the control over its affairs and also with respect to service of its employees, hence, no

writ petition against a company is competent. Further argued that under section 25 read with section 15 of NAB Ordinance, after entering into plea bargain the petitioner earned the status of a convict employee, and at the moment plea bargain was accepted, forthwith he ceased to hold public office, as such, no illegality has been committed in the order dated 24.03.2005 whereby the petitioner was dismissed from service w.e.f. 17.03.2003, date of acceptance of his plea bargain. While touching the ground of discrimination it was argued that two wrongs cannot make a right. Lastly, argued although the order passed by the President of Pakistan is not binding on the company but even then in the impugned order each and every aspect has been discussed and the instant writ petition is liable to be dismissed.

4. I have heard the arguments of learned counsel for the parties at considerable length and perused the entire relevant record.

5. So far as the question of maintainability of instant writ petition is concerned, while deducing analogy from the case "Masood Ahmad Bhatti and others v. Federation of Pakistan through Secretary, M/O Information Technology and Telecommunication and others" (2012 SCMR 152) it becomes clear that earlier the petitioner was employee of Pakistan Telecommunication Corporation having statutory rules, later-on converted into Company but service of the petitioner still will be governed under the statutory rules, therefore, as held by the Hon'ble Supreme Court of Pakistan in the cited case, the instant writ petition is held to be fully competent and maintainable before this court.

6. It is admitted position between the parties that proceedings under NAB, Ordinance were initiated against the petitioner a Reference before the NAB Court was submitted and on 17.03.2003 the petitioner opted for plea bargain under section 25(b) read with section 15(a) of NAB Ordinance, which was allowed. For ready reference sections 15(a) and 25(b) of the NAB Ordinance, are reproduced hereunder:--

15. (a) Where an accused person is convicted of [an offence under section 9 of this Ordinance] he shall forthwith cease to hold public office, if any, held by him and further he shall stand disqualified for a period of ten years, to be reckoned from the date he is released after serving the sentence, for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province;

Provided that any accused person who has availed the benefit of [subsection (b) of section] 25 shall also be deemed to have been convicted for an offence under this Ordinance, and shall forthwith cease to hold public office, if any, held by him and further he shall stand disqualified for a period of ten years, to be reckoned from the date he has discharged his liabilities relating to the matter or transaction in issue, for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province,

(b) Any person convicted of an offence [under section 9 of this Ordinance] shall not be allowed to apply for or be granted or allowed any financial facilities in the form of any loan or advances [or other financial accommodation by] any bank or financial

institution [owned or controlled by the Government] for a period of 10 years from the date of conviction.
Section 25(b):-
"(b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused."
This court is aware of the fact that provincial and federal public servants when are proceeded under the Prevention of Corruption Act, 1947 or Federal Investigation Agency Act, 1974 and convicted they are not automatically dismissed or removed from service by virtue of their conviction and the authority i.e. the departmental authority has to proceed separately under the relevant laws and pass an independent order but the special enactment i.e. NAB Ordinance which provides for effective measures and speedy disposal of cases involving corruption, corrupt practices, misuse or abuse of power or authority and misappropriation of property, provides somewhat different mechanism i.e. when an accused enters into plea bargain during investigation or the trial, by bare reading of Section 25(b) read with Section 15 of the NAB Ordinance, is clear that the legislators have taken note of such eventuality and perhaps considering the seriousness of the charge towards the society as a whole, they not only inserted section 15 in the NAB Ordinance but also used the word "forthwith" in the said provision, it means that sooner/at the moment when plea bargain is opted by an accused and approved by the court, he at once/ immediately/without any further delay ceases to hold the public office.

7. Here in this case, admittedly the plea bargain opted by the petitioner concluded on 17.03.2013, therefore, for all practical purposes the petitioner ceased to remain on job. However, every department is expected to maintain, manage and update the service records of its employees, for various internal purposes like audit, assessment of working strength, creation of new posts, etc. Therefore, despite the fact that petitioner ceased to hold the office on 17.03.2003, the respondent department in order to update its records for departmental intricacies, took up the matter of the petitioner and purely on the basis of his conviction by the NAB, vide Inter Office Memo dated 24.03.2005 the petitioner was dismissed from service w.e.f. 17.03.2003 (the date of conviction by the NAB). The order dated 24.03.2005 though for departmental purposes, yet the same in fact is implementation of specific provision (Section 15) of the NAB Ordinance. In this respect para-5 of the order passed by NAB court against the petitioner is relevant and the same is reproduced hereunder for ready reference:--
"Khalid Habib shall deemed to be convicted under section 9 of the NAB Ordinance and he shall forth with cease to hold public office, if any, held by him and further he shall stand disqualified for a period of ten years, to be reckoned from the date he has discharged his liabilities relating to the matter or transaction. In issue, for seeking

form being elected, chose, appointed or nominated as a member or representative of any public body or any statutory or local authority in the service of Pakistan or any of the Province Reference to the extent of Khalid Habib accused be filed."

In the light of above reproduced paragraph, the contention that the order dated 24.03.2005 amounts to passing of an order with retrospective effect, is not well founded. In this respect the case "Muhammad Aslam, Ex-Deputy Director (Audit) District Govt. Lahore Region, Lahore v. Auditor-General of Pakistan, Islamabad" (2013 SCMR 1904) is referred, wherein, the Hon'ble Supreme Court of Pakistan held that:--

"The law has provided the penalty in the nature of disqualification on entering to plea bargain. It is not in dispute that the plea bargain as entered into and accepted by the Chairman. NAB and the NAB Court accorded approval in terms of section 26(b) of the Ordinance and ordered release of the appellant. As a consequence of the approval, it entails the penalty in terms of proviso to subsection (a) of section 15 of the Ordinance, by which the appellant stood disqualified."

8. As regards the question of discrimination, although the Constitution of Islamic Republic of Pakistan jealously safeguards the citizens from any sort of discrimination but whether any illegal act or order by an authority could be made a ground for another legal act/order. I have given my anxious consideration to this aspect, but feel that as the order/act of any subordinate authority is not precedent and has not binding effect on the courts to be, followed and for considering any case whether discrimination has been meted out or not, the courts have to see:--

i) if the order has been passed by the Supreme Court or the High Court on a principle of law, that must be followed and no other person should be discriminated;

ii) However, when an order is passed by an executive authority then the court while issuing a writ on the ground of discrimination must consider whether such order has been passed fairly, impartially, in a transparent manner and strictly within the parameters of law. If the order does not stand to the above touchstone, then such order could not be weighed to issue writ on the ground of discrimination alone.

In this respect the case "PRTC v. Mahmood Ahmad" (2007 PLC 196) is referred, wherein, it has been held that two wrongs do not make a right. Furthermore; the Indian Supreme Court in the case "Chandigarh Administration v. Jagit Singh and another" (AIR 1995 Supreme Court 705) held that:--

"8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court, is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the

illegality or to pass another unwarranted order. The extra-ordinary and discretionary, power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law-indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law, but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis of a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interest of law and will do incalculable mischief to public interest."

9. For what has been discussed above, I do not see any merit in this writ petition and the same is dismissed.

JK/K-19/L Petition dismissed.

2018 Y L R 2433
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD KHALID and others---Petitioners
Versus
The STATE and another---Respondents

Crl. Misc. No.190071-B of 2018, decided on 4th July, 2018.

Criminal Procedure Code (V of 1898)---
----S. 498---Penal Code (XLV of 1860), Ss. 337-A(i), 337-A(iii), 337-L(2) & 452---Shajjah-i-Khafifa, Shajjah-i-hashimah, hurt---Ad-interim bail, confirmation of---General role of accused---Effect---Previous enmity---Scope---FIR was lodged against accused and co-accused that they entered the house of complainant while carrying dandas hurled abuses, extended threats, maltreated two female members inflicted fist, kick and danda blows to one of said female and dragged her---Accused had been attributed general role without causing any injury to the victim---Litigation existed between the parties---One of the co-accused was stated to be 50% owner of the disputed house and his wife was living there---Applicability of S. 452, P.P.C. would be seen at the trial after recording of evidence---Considering the background of hostility between the parties, possibility of petitioner's false implication in the case as the result of widening the net could not be ruled out---Ad-interim pre-arrest bail already granted to the petitioner was confirmed.
Meeran Bux v. The State and another PLD 1989 SC 347 ref.
Ch. Muhammad Ali for Petitioners.
Ch. Anwaar ul Haq Pannu and Nosheen Ambar, for the Complainant.
Muhammad Amjad Rafiq, Additional Advocate General and Usman Iqbal, Deputy Prosecutor General. Muhammad Hammad Khan Rai, Assistant Advocate General, Barrister Haaris Ramzan, Legal Advisor, Primary and Secondary Health Care Department and Muhammad Hussain Sub-Inspector.

ORDER
MUHAMMAD QASIM KHAN, J.---Petitioners (Muhammad Khalid, Shafaqat Hussain and Muhammad Iftikhar) seek pre-arrest bail in case FIR No. 138/2018 dated 20.02.2018 under sections 337-A(i), 337-(iii), 337-L(2), P.P.C. registered at Police Station Saddar Gujranwala.

2. This petition to the extent of Shafaqat Hussain (petitioner No.2) has already been dismissed due to non-prosecution vide order dated 21.05.2018. It has been observed that Shafqat Hussain (petitioner No.2) had also filed a separate pre-arrest bail application (Crl. Misc. No.220756-B/2018) in the same case, and the same has also been dismissed vide a separate order of even date on the ground of misuse of concession.
3. As regards, Muhammad Khalid, he has been assigned a joint role along with Iftikhar Ahmad, Shafaqat Hussain, Ahmad and three unknown assailants that they entered the house of the complainant while carrying DANDAs, hurled abuses,

extended threats, maltreated Mst. Samina Bibi and Fatima Bibi, all the accused inflicted fist, kick and Danda blows to Mst. Samina and dragged her outside the house. As shall be seen from the allegations levelled in the FIR the petitioner along with co-accused has been attributed general role without any specific injury by the petitioner to the victim. Previous family and civil litigation between the parties exists. Shafaqat Hussain co-accused of the petitioner is stated to be 50% owner of the disputed house and his wife is living therein, whereas, applicability of offence under section 452, P.P.C. will be seen at the trial after recording of evidence. As cumulative effect of above, considering the background of hostility between the parties, in the light of case "Meeran Bux v. The State and another" (PLD 1989 SC 347), possibility of petitioner's false implication in this case as a result of widening the net cannot be ruled out. Consequently, this application to the extent of Muhammad Khalid (petitioner No.1) is allowed, interim pre-arrest bail granted to him is hereby confirmed subject to furnishing fresh bail bond in the sum of Rs.100,000/- with one surety in the like amount to the satisfaction of learned trial court.

4. Coming to the case of Muhammad Iftikhar (petitioner No.3), he is nominated in the FIR with a specific and distinguishable role of inflicting fist blow on the nose of Mst. Samina Bibi, injured daughter of the complainant. The role ascribed to Muhammad Iftikhar (petitioner No.3) attracts Section 337-A(iii), P.P.C., the same is supported by the ocular account and corroborated by medical evidence. Therefore, I see no justifiable reason to the grant of extra ordinary concession of pre-arrest bail to him. Consequently, bail application to the extent of Muhammad Iftikhar (petitioner No.3) is dismissed.

5. During the course of hearing, one of the grounds agitated for confirmation of pre-arrest bail was that on a move by the petitioners, the Ilaqa Magistrate had ordered constitution of District Standing Medical Board, where the complainant/ injured did not appear, therefore, an inference against the injured had to be drawn and benefit thereof must be extended to the petitioners. It has been observed that even prior to this case, in so many petitions grievances were raised by the respective parties that although on their move District Standing Medical Board was constituted but the injured were not informed about it and in some cases even the police officials admitted that they had not informed the injures about formation of the District Standing Medical Board or about the date fixed by the said board for re-examination. In order to settle this situation the AIG (Legal) was summoned, who submitted his detailed report with reference to SOP, a copy whereof is tagged below:--

OFFICE OF THE
INSPECTOR GENERAL OF POLICE
PUNJAB, LAHORE

To i. The CCPO Lahore.
ii. All CPOs in Punjab.
iii. All DPOs in Punjab.

No. 10886/Inv/HA/L Dated: 15-5-2018

Subject: CRL. MISC. NO.198841-B OF 2018 TITLED AS MUHAMMAD SARWAR V. THE STATE AND ANOTHER. FIR NO-648/17 DATED 12.10.17

UNDER SECTIONs 336/ 337-L2/34, P.P.C. P.S. SADDAR DISTRICT SIALKOT.

Kindly refer to the U.O. No.8710/ Legal-29W/2018 dated 14.5.18 along with letter of Dy. Registrar Lahore vide No.034248/Crl-II (CCB-I & II) dated 10.5.18 and order of Hon'ble Court dated 4.5.18 received from AIG/Legal on the subject cited above.

2. The titled Cri. Misc. came up for hearing before the Hon'ble Lahore High Court Lahore on 4.5.18 in which the Hon'ble Court observed as under:--

"2. From the perusal of report dated 7.2.18 it has transpired that neither the injured, nor police or medical officer appeared before the District Medical Board Sialkot on two consecutive dates. The above situation shows that the medical board was constituted but it could not be able to form its opinion as the police did not inform the injured as well the medical officer to appear before the medical board.

2. Let any senior officer on behalf of IGP Punjab appear before this court by formulating the complete plan being circulated in all the Districts for compliance of the orders of the District Standing Boards.

3. The Secretary, Primary Health Care, Punjab as well as the Secretary Secondary Health Care, Punjab shall also appear along with their suggestions on the next date of hearing so that the process of re-examination of the injured can function smoothly.

4. To come up on 16.5.18. Dy. Registrar shall ensure the compliance of the order of this court."

3. On perusal of the order of Hon'ble Court, it reveals that police officials of PS Saddar Sialkot did not inform all the concerned regarding their appearance before the District Standing Medical Board despite directions of the said board. Non-compliance of lawful orders by police officials of PS Saddar Sialkot brought bad name and caused embarrassment to the Police Department.

4. The Hon'ble Division Bench has took serious notice of the matter and directed to formulate a complete plan being circulated in all the districts for compliance of the orders of the District Standing Boards.

5. The observations of the Hon'ble Court are serious in nature and needs your prompt attention. It is therefore, directed that all the field units working under your control may be sensitized and directed to comply with the directions of District Standing Medical Boards regarding appearance/presence of parties including injured as and when directed by the said board. If the parties despite receipt of intimation did not appear before Standing Board, the police officials/I.O. shall be duty bound to appear before the District Standing Board.

6. It is further directed that DSP/ Legal of your districts may be deputed as focal person to deal with the matter and ensure the compliance of the directions of Standing Medical Boards of districts.

7. A register will be maintained in the office of DSP/Legal. On receipt of any notice/information from the District Standing Medical Board shall be entered in the said register maintained in the office of DSP/Legal. The information/notice so received will be transmitted to relevant police station in original form or through wireless communication or telephonic message as per need of the hour with a copy to concerned SDPO for strict compliance.

8. All the Heads of District Police shall personally monitor that the directions of the District Standing Medical Boards are being complied within letter and spirit. In case

of deviation, stern departmental action be taken against the delinquent police officials/I.Os failed to comply with the directions and awarded exemplary punishments in this regard.
9. The CCPO Lahore, RPOs, CPOs and DPOs of Punjab shall ensure implementation and follow up of these directions in true letter and spirit.
10. Compliance report on fortnightly basis be submitted to this office.

(ABUBAKAR KHUDABAKHSH) PSP
Addl. IGP/Investigation
For Inspector General of Police,
Punjab, Lahore.

CC to the:--
i. PSO to IGP Punjab.
ii. All RPOs in Punjab for information and appropriate action.
iii. Dy. Registrar Criminal Lahore High Court Lahore w/r to the case titled above.

As in the process of re-examination of the injured two departments i.e. police and the health wing are involved and from the above reproduced SOP it appeared that some more clarification was also required, therefore, this court directed the Secretary Health and AIG (Legal) to collectively arrange a meeting with law officers of this court, who had firsthand knowledge of the difficulties faced to this court in such like matters and then draw a uniform and comprehensive strategy to remove such practical problems. Consequent upon court orders, a meeting was held and ultimately a notification (SOPs for medico legal cases) has been drafted and presented to this court, as tagged below:--

NO SO(H&D)7-1/2018
GOVERNMENT OF THE PUNJAB PRIMARY AND SECONDARY HEALTHCARE DEPARTMENT
Dated Lahore, the 18th May, 2018
To:
All The Chief Executive Officers,
District Health Authorities of the Punjab.
All the Medical Superintendents, DHQ / THQ Hospitals of the Punjab.
All the Incharges,
RHCs / BHUs of the Punjab

Subject: <u>SOPs FOR MEDICO-LEGAL CASES</u>

In compliance of Lahore High Court, Lahore bench, observations on the subject cited above, and in the light of meeting held in the Secretariat of Primary and Secondary HealhCare Department, Lahore, presided by worthy Secretary P&SH, Ali Jan Khan, the following instructions / SOPs have been finalized for timely and smooth communication of information to the injured person, whether he is complainant or defendant in the court of law, for re-examination by the District Standing Medical Board:

After the orders for re-examination through DSMB by the learned court of - Magistrate Section-30, the chairman DSMB makes arrangements for re-examination of the injured person on date fixed by him.

Although the prevailing practice is to inform all the concerned quarters, but it is imperative to inform the injured person through the concerned SHO to direct I.O. for making sure the appearance of injured person before the DSMB on the fixed date.
Same information be conveyed to the DPO / SDPO through a special messenger as well. He will direct the DSP Legal, concerned SHO and I.O. to produce the injured person before the District Standing Medical Board. SHO will ensue the delivery of letter to the injured person.
The letter to the injured party also be sent by registered mail and if cell No. of injured person is available an SMS be sent to him by the office of Chairman DSMB and DPO.
To further streamline the process, a twice information / letters be sent to the injured instead of three times (contrary to notified in letter No. 210-45/SML, dated Lahore the 15.01.2009) overcoming the delay in finalization of proceedings of DSMB.
The day of Wednesday be fixed as 1st and last of month with timings 01:00 noon or as may be feasible for all the four members of DSMB to attend the meeting. In case of increasing burden of cases, other Wednesdays can be availed.
The rest of ingredients of letter No. 210-45/SML dated Lahore the 15.01.2002 (Copy annexed), will be the same regarding the decision of case by the board, on basis of documents / evidence / witnesses if the injured does not attend the DSMB meeting twice.
The non- appearance of injured person or avoidance of the proceedings of board will be conveyed to the learned court every time and also be mentioned in final report of the DSMB.
One month practical training of newly inducted CMOs/MOs/ W/MOs shall be mandatory before start of medicolegal work and it shall be in concerned medical college Teaching Hospital to strengthen the gravity of initial MLC examination.

Sd/-
(Dr. Aqeel Muhammad Khaleel)
SECTION OFFICER (H&D)

NO. & DATE EVEN
A copy is forwarded for information and necessary action to:-
1. The Additional IG (Legal) Punjab, Lahore
2. The Additional Secretary (Tech) Specialized Healthcare and Medical Education Department, 11-Lawrence Road, Lahore
3. The Surgeon Medico-Legal, Punjab, 6-Katchery Road, Lahore.
4. M. Haris Ramzan, Director Law, P&S Healthcare Department.
5. All District Medico-legal Officers in districts of the Punjab.
6. PSO to Secretary, P&SH Department
7. PA to Additional Secretary (Tech), P&SH Department
8. Master file

Sd/-
(Dr. Aqeel Muhammad Khaleel)
SECTION OFFICER (H&D)

5. MLC is an evidence which is collected by the I.O during course of investigation as under section 156 Cr.P.C the Ilaqa Magistrate can direct for investigation in a case, as investigation includes collection of evidence for the purposes of digging out

truthfulness or falsehood of the allegations for commission of an offence, he can exercise this power for passing an order for re-examination of an injured through District Standing Medical Board (hereinafter shall be read as DSMB) or the Appellate Board (hereinafter shall be read as Board). However, the Magistrate shall not pass an order blindfolded, rather shall apply his judicious mind to the facts and circumstances of the case. It appears that for the same reason vide three tire policy notifications, the Government Punjab, Health Department, desired the Magistrate to pass an order on the application of an aggrieved person.

6. On perusal of the above referred notification, it has been observed by this court that different clauses thereof may not have binding impact on the other relevant department/forum, as such, in order to tackle this situation, it is suggested that following comprehensive measures shall be included in the notification so as public it in a compact form: -

ILAQA MAGISTRATE:

i) Application for the purposes of re-examination by DSMB or examination through Board against the decision of the DSMB shall be filed before the Magistrate by the aggrieved party;

ii) After receiving the application the Magistrate will issue notice to the injured/complainant (as the case may be) and the Investigating Officer for their appearance;

iii) The Magistrate shall not ordinarily adjourn the matter for more than one day;

iv) The Magistrate shall pass the order after securing the attendance of the injured/complainant and the Investigating Officer. If after service the injured or the complainant do not appear he may proceed in their absence;

v) If the Magistrate passes an order for re-examination through DSMB or the appellate board, he will provide three days' time to the applicant for depositing the relevant fee for this purpose as notified by Government of Punjab, Health Department and he shall further clarify in the order that if the fee is not deposited within stipulated period, the order shall be deemed to have been recalled;

vi) The Magistrate through the Investigating Officer shall get information about future dates when DSMB or the appellate Board is to assemble and shall direct the injured/IO or any other concerned to appear before the DSMN/Board on the said date. (According to the prevailing practice the DSMB assemble on first and last Wednesday of every month);

vii) Copy of the order for re-examination through DSMB or the Board be sent to the DSMB and the Board as the case may be ;

viii) Copy of the order be also sent to DPO and S.P (Investigation) concerned for compliance.

DISTRICT STANDING MEDI-CAL BOARD / APPELLATE BOARD.

i) After receiving order of the Magistrate for re-examination of the injured, DSMB or the Board shall examine the injured on the date so fixed by the Magistrate;

ii) If for any justifiable reason beyond the control of DSMB/Board the injured could not be examined on the date fixed, DSMB or the Board shall inform all concerned about the next date to be fixed and intimation shall be communicated to the Magistrate as well as DPO well in time;

iii) If on the date fixed, without any justifiable explanation, the injured does not appear despite his service, the DSMB/Board may proceed against him and may close the proceedings;
iv) If any justifiable reason is put-forth by the injured the one more opportunity may be provided to him;
v) If service on the injured is not effected by the I.O/SHO then DSMB/Board shall bring this aspect to the notice of the Magistrate/DPO who shall inquire into the matter, fix responsibility and proceed against the delinquent on departmental side, as well as if the act is covered under any cognizable offence then may direct for registration of criminal case and report in this respect by the DPO shall be sent to the DSMN/Board/Magistrate concerned;
vi) If the relevant doctor who had conducted first examination of the injured does not appear before the DSMB/Board along with record without any justification then his matter shall be referred to the Secretary Health for inquiry and if found negligent he will be proceeded against under the relevant laws;
vii) If proceedings before the DSMB/Board are completed they shall inform the Ilaqa Magistrate and DPO in writing and copy of the report be issued to the Investigation Officer, attested copy whereof shall also be sent to the Ilaqa Magistrate concerned.

POLICE.

i) When an order for re-examination of the injured through DSMB/ Board is received in the office of DPO, he shall immediately direct the concerned officials for its compliance;
ii) The DPO shall depute one focal person for keeping the computerized record about the orders received for re-examination of the injured through DSMB or the Board;
iii) The focal person shall ensure compliance of the orders and complete record in this respect shall be maintained and report of service shall be conveyed to the Magistrate/DSMB/Board before or on the date fixed for re-examination;
iv) The DPO shall ensure that the orders of the Magistrate shall not only be communicated to the injured, rather the same shall also be complied with by presence of the injured before the Board, as well as production of the record of police;
v) In case the injured is not served by the SHO/IO, the SHO/IO, as the case may be, shall convey the report to the DPO, who shall verify the genuineness of the reasons advanced therein and if not satisfied with it he shall adopt legal measures against the delinquent officials and shall further adopt legal measures to ensure service on the injured;
7. The Registrar of this Court shall send copies of this order to the Inspector General of Police Punjab and to the Secretary Health, so that they shall issue fresh SOPs by including the above observations and directions of this court. The I.G. Punjab shall further circulate this order amongst the RPOs, CPOs, DPOs, SHOs. The Registrar of this Court shall send copies of this order to all the District and Sessions Judges in the province, for onwards circulation to the Senior Civil Judges and the Magistrates for implementation.
8. At this stage I would like to offer my thanks to the learned counsel for the parties for rendering valuable assistance to this court. The effort put in by Ch. Anwaar ul Haq Pannu, Advocate and the learned officer has been commendable.
MQ/M-126/L Order accordingly.

KLR 2018 Criminal Cases 223
[Lahore]
Present: MUHAMMAD QASIM KHAN, J.
Norang
Versus
The State, etc.

Criminal Misc. No. 13294-B of 2014, decided on 25th November, 2014.

CONCLUSION
(1) Sperm cells (male reproductive cells) stay in the female reproductive system for many days and these can be detected after many days of sexual assault.
Pakistan Penal Code (XLV of 1860)---
---S. 365-B---Criminal Procedure Code, 1898, S. 497---Abduction---Divergent versions of victim bail, grant of---The petitioner sought post arrest bail---The petitioner alongwith co-accused abducted daughter of the complainant---This was a case of divergent versions put by the alleged victim/prosecutrix---She was sent to Darul-aman on the pretext that her husband was an addict person having illicit relations with other women and he had expelled her from the house---Co-accused with similar attribution had already been enlarged on bail---No incriminating material was available on the record to connect the petitioner of the crime---So many versions had been put forth by the prosecutrix herself---Petitioner was admitted to bail---Bail granted.
(Paras 2, 3, 4)

عزز عدالت عالیہ نے مغوی خاتون کے بار بار بدلتے بیانات و بیک وقت کئی بیانات کے باعث سائل کی ضمانت بعد از گرفتاری کی استدعا کو منظور فرمالیا تھا۔

For the Petitioner: Zahid Salim, Advocate.
For the State: Muhammad Akhlaq, Deputy Prosecutor General with Dr. Zawar Hussain, Technical Manager FPSA, Rashid Rasool, Legal Advisor FPSA and Muhammad Boota, ASI.
For the Complainant: Mian Shehzad Siraj, Advocate.
Date of hearing: 25th November, 2014.

ORDER
MUHAMMAD QASIM KHAN, J. --- Petitioner (Norang) seeks post arrest bail in case F.I.R. No. 119, dated 13.04.2014 for an offence under Section 365-B, PPC registered at police station Sadar, District Toba Tek Singh.

2. I have heard the arguments of learned counsel for the parties at considerable length and after perusing the available record, it has been observed that petitioner alongwith co-accused Hidayat is nominated in the F.I.R. and specific allegation has been levelled that they both abducted Mst. Nasrin married daughter of the complainant, but it has been noticed that this is a case of divergent versions put by the alleged victim/prosecutrix. Earlier, in total denial to the occurrence as mentioned in the FIR, Mst. Nasrin herself filed an application before the leaned Special Judicial Magistrate

for sending her to darul-aman on the pretext that her husband Sabir was an edict person having illicitt relations with other women and he had expelled her from the house. Thereafter, Mst. Nasrin filed application for her release from Darul-aman and alleged that she had filed a suit for dissolution of marriage against Sabir and that she had no threat to her life from anyone, consequently she was released from darul-aman. Afterwards, Mst. Nasrin filed another application before the learned Special Judicial Magistrate for sending her to darul-aman and the ground taken in this application was that as she had filed a suit for dissolution of marriage against Muhammad Sabir, therefore, he was out to murder her. She was then again sent to darul-aman on 15.04.2014. Then just after about thirteen days she filed application to seek her release from darul-aman and alleged that now she had no threat to her life. The alleged victim was therefore, released. The record shows that Sabir Iqbal (husband of the victim) had filed an application before learned *Ex-Officio* Justice of Peace to seek registration of case against Norang (petitioner), etc. and in the said application altogether a different story had been mentioned. Furthermore, co-accused of the petitioner with similar attribution has already been enlarged on bail. Except statement of the alleged victim under Section 161 and under Section 164, Cr.P.C., recorded after her joining with family, *prima facie* no other incriminating material is available on the file to connect the petitioner of the crime. Further, it has been observed that while submitting written statement to the suit for dissolution of marriage on 01.04.2014, Safdar (husband of the alleged victim) in clear terms stated that her wife had left the house herself on the instigation of her relatives and opponents, thus, there is no indication about commission of the alleged occurrence of abduction. All the above narration of facts clearly indicates that so many versions have been put forth by the prosecutrix herself. Therefore, the involvement of the petitioner in this case would certainly require further inquiry, Consequently, this bail application is allowed and petitioner is admitted to bail subject to his furnishing bail bond in the sum of Rs. 100,000/- with one surety in the like amount to the satisfaction of learned Trial Court.

3. Before parting with this order, it is to be mentioned here that while examining the police file this Court had a look at case diary No. 25 dated 11.09.2014, which refers to letter by Forensic Science Agency to the following effect:---

"CASE CLOSURE COMMUNICAOTN OF CASE F.I.R. No. 119/2014 DATED 13.04.20154 POLICE STATION SADDAR TOBA TEK SINGH DISTRICT TOBA TEK SINGH.

Kindly refer to the subject captioned above:

2. It is stated that above-mentioned case was received at PFSA vide PFSA Diary No. 2014.27686 for conducting forensic analysis. The incharge of DNA & Serology (DNA) department of PFSA reported that during review of this case it was found that the submitted evidence between the occurrence and medical examination of the victim is greater than 72 hours ((lapse cases) therefore, no forensic analysis could be conducted on this case and it has been closed as per policy of PFSA.

3. It is requested that submitted evidence/ samples of instant case may be received from the office of PFSA within 15 days of receiving of this letter, otherwise, submitted

evidence/samples will be disposed of and the PFSA will not be responsible for any claim."

After going through the above reproduced report of the Forensic Science, it becomes quite obvious that opinion/forensic analysis was declined by the Forensic Science just on the ground that swabs were taken from the victim after seventy two hours of the occurrence. This Court had summoned the Technical Manager, Department of DNA & Serology, Punjab Forensic Science Agency, Lahore, and with reference to relevant policy regarding evidence submission/collection, he submitted before the Court that in cases of rape, DNA analysis is carried out only when medical examination of the victim is conducted within seventy0two hours (three days) of the assault.

4. This Court is well aware that medico-legal system in Pakistan is not so developed, efficient and responsive as compared to other countries in the world and in our society passage of seventy-two hours in medical examination of the victim is quite normal phenomena, for the reason that whenever such an incident takes place, the victim or her other family members may not happily expose such incident for certain obvious reasons. Even in number of cases, when the matter is reported, sometimes the police shows reluctance in registration of F.I.R. and the victim has to approach the Court of law to get directions for registration of case or for conduct of her medico-legal examination. If an appropriate direction for conduct of medical examination of the victim is issued, then non-availability of female doctor in the nearby hospital may result in delay. In this respect after research particularly with reference to Lahore, Hasan et al., 2007 reported that most of the rape victims were medically examined after 72 hours of sexual assault and a table was drawn, as under:---

Time duration	Number of cases	Percentage
Less than 24 hours	6	4.9%
24-48 hours	9	7.3%
48-72 hours	15	12.2
More than 72 hours	93	75.6
TOTAL	123	100

After perusal of above drawn table, the pathetic factual position in our country becomes clear. Furthermore, while browsing on the issue of rape cases and medico-legal aspects, this Court has been able to note big difference about the standards/policy set by Department of DNA & Serology, Punjab Forensic Science Agency, Lahore and the other developed word, *e.g.* according to the guideline issued by National Institute of Justice, US, the sperm cells may be found in female reproductive tract for seven days after ejaculation. There is no second opinion that this fact has been realized by different jurisdictions, crime laboratories and law enforcing agencies that 3 days rule (72 Hours Rule) is not a universal truth, therefore, these agencies are not stuck with it and relaxed their policies regarding such cases. Some of the examples are:---

Jurisdiction/Agency	Time limit for examination since assault

National Protocol of Sexual Assault Forensic Medical Examination (Adults/Adolescent) by US Department of Justice, US.	96-hours (Four days)
Ohio Protocol of Sexual Assault Forensic Medical Examination issued by Ohio Attorney General office of criminal identification and investigation (2011), US	96-hours (Four days)
North Dakota Model Law Enforcement Sexual Assault Policy (2011)	96 hours (Four days)
Pima County Protocol for the violence against Woman Act (2009) US	Five days
Sexual Assault Examination Policy by Russian Federation	Five days
Washington Country Sheriff, Oregon, USA	No limit
Oregon State of Police, USA	No cut off limit for receiving sexual assault samples. Best samples are those taken upto 84-hours after assault
Texas Evidence Collection Protocol, Office of the Attorney General, SAPCSD, Texas, USA	No time limit

Furthermore, the medical experts on this issue, after thorough research have formed a view that sperm cells (male reproductive cells) stay in the female reproductive system for many days and these can be detected after many days of sexual assault. In this context, some references are quoted hereunder:---

Sr. No.	Presence of sperm cells in vagina after time since sexual assault	References
1	More than 6 days	Nicolson, 1965
2	Upto nine days	Morrison, 1972
3	7-10 days	Silverman and Silverman, 1978
4	More than 5 days	Allard, 1997
5	Upto 7 days	Jones 2005

After comparative study, as above, this Court is of the considered view that the policy being followed by Department of DNA & Serology, Punjab Forensic Science Agency, Lahore, needs to be updated to meet with challenges of time and to bring it in consonance with the scheme of other developed countries. The Punjab Forensic

Science Agency, Lahore shall accordingly revisit and upgrade their analysis system so that an important piece of evidence must not be wasted just for technical reasons, especially when those reasons have no strong basis. In this respect it may also be observed that Punjab Forensic Science Agency may also opt for cervix analysis of the victim, as according to research cervix is the part of female reproductive system, next to vagina and the sperm cells swim in vagina and get enter into cervix. These cells can be detected in cervix for many weeks. In this respect the Forensic Science Agency shall issue instructions to all the Women Medical Officers throughout the Province of Punjab, for doing the needful after getting consent from the victim**.** Office is directed to send a copy of this order to the concerned quarters for re-evaluation of policy of Department of DNA & Serology, Punjab Forensic Science Agency, Lahore.

5. While closing this order, I would like to pay gratitude for the commendable research work by the learned Deputy Prosecutor General (Mr. Muhammad Akhlaq) in assisting this Court on the above important aspect.

Bail granted.

KLR 2018 Criminal Cases 205
[Lahore]
Present: **MUHAMMAD QASIM KHAN, J.**
Muhammad Aslam, etc.
Versus
The State, etc.

Writ Petition No. 3780 of 2010, decided on 12th April, 2011.

CONCLUSION

(1) The order passed under Section 167, Cr.P.C. is a judicial order and revisable by the Sessions Court.

(2)

Criminal Procedure Code (V of 1898)---

---Ss. 4(m), 167, 435, 439---Constitution of Pakistan, 1973, Art. 199---Pakistan Penal Code, 1860, Ss. 279, 337-F(v), 337-H(ii), 337-L(ii)---Order, executive or judicial, determination of---An important law point was involved in instant case i.e. whether the order passed by Ilaqa Magistrate at the time when accused persons were produced before him for physical remand was a judicial order or an executive order?---Ruling: The word "proceeding" used in Section 435 to 439-A, Cr.P.C. connotes the judicial proceedings and not executive proceedings---"Proceedings" means any action, hearing, investigation, inquest or inquiry (whether conducted by a Court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law in which pursuant to law, testimony can be compelled to be given---The order passed under Section 167, Cr.P.C. was a judicial order and revisable by Sessions Court---Petition dismissed.
(Paras 2, 6, 9, 11, 18, 19)

Ref: PLD 1964 Lah. 426, AIR 1965 All 172, PLD 1950 Baghdad-ul-Jadid 48, PLD 1961 Kar. 29.

معزز عدالت عالیہ نے آئینی درخواست ہذا کو مسترد کر تے ہوئے قرار دیا تھا کہ دفعہ 167 ضابطہ فوجداری کے تحت جاری کیا گیا حکم عدالتی نوعیت کا تھا۔ انتظامی نوعیت کا برگز نہ تھا۔

For the Petitioner: Imran Khan Bhadera, Advocate.
For the State: Naveed Khalil, AAG.
For the Respondent No. 2: Imran Aziz Khan, Advocate.
Date of hearing: 12th April, 2011.

ORDER

MUHAMMAD QASIM KHAN, J. --- Through this writ petition, petitioner has challenged the order dated 09.07.2010, passed by learned Additional Sessions Judge, Hasilpur.

2. Brief facts of the case are that respondent No. 2 got lodged a case F.I.R. No. 80/2010 under Sections 337-F(v)/337-L(ii), PPC at Police Station Qaimpur Tehsil Hasilpur District Bahawalpur against the petitioners. The petitioners filed their pre-

arrest bail which was dismissed *vide* order dated 2.4.2010; resultantly they were arrested by the police and produced before the learned Illaqa Magistrate on 3.4.2010 for obtaining their physical remand. The learned Illaqa Magistrate, at the time of physical remand of the petitioners/accused, observed that presently offences under Section 279/337-H(ii), PPC have been made out which are bailable and also observed that question of recovery is immaterial; hence, he released the petitioners/accused on bail subject to furnishing their bail bond in sum of Rs. 50,000/- with one surety each in the like amount to the satisfaction of learned Illaqa Magistrate. Respondent No. 2/complainant filed a revision petition against the said order and the learned Additional Sessions Judge, Hasilpur *vide* impugned judgment dated 9.7.2010 set aside the order of learned Illaqa Magistrate and directed the Investigating Officer to arrest the petitioners under Section 337-F(v)/337-L(ii), PPC and investigate the case in accordance with law.

3. Learned counsel for the petitioner contends that the order of learned Illaqa Magistrate at the time when police requested for physical remand of the accused persons under Section 167, Cr.P.C., has been passed in its executive capacity and it could not be said as judicial order, rather it was an executive order against which, revision petition was not maintainable but learned Additional Sessions Judge did not consider this aspect of the case, entertained the revision petition and set aside the order passed by learned Illaqa Magistrate. Further contends that the impugned order, passed by the learned Additional Sessions Judge being without jurisdiction is liable to be set aside on this score alone. Further contends that learned Illaqa Magistrate had rightly passed the order in the light of report of Medical Board coupled with the conclusion of Investigating Officer that no such occurrence as narrated in the FIR, had taken place and there was only a motor-bike accident and for the same reasons he rightly turned down the request of police for physical remand of the petitioners and also deleted Section 337-F(v) and added Section 279/337-H(ii), PPC which were applicable to the case of petitioners in the circumstances of the case; hence, prayed that the impugned order, passed by the learned Additional Sessions Judge dated 9.7.2009 may kindly be set aside. Relied upon *PLJ 2001 Cr. C. (Lahore) 355* titled *"NASREEN BIBI versus NAZEER AHMAD and another"* and *PLD 2009 Lahore 401* titled *"MUHAMMAD KHAN versus MAGISTRATE SECTION-30, PINDI GHEB, DISTRICT ATTOCK and 3 others"*.

4. On the other hand, learned AAG assisted by learned counsel for the complainant argued that the order passed by Illaqa Magistrate under Section 167, Cr.P.C. is a judicial order and Sessions Judge has jurisdiction under SectionS 435, Cr.P.C. and 439-A, Cr.P.C. to exercise its revisional jurisdiction if any illegality comes to the knowledge of Court. Further contends that Illaqa Magistrate did not discuss the evidence available on the file and he simply followed the police opinion, although there was sufficient material/evidence to support the prosecution story in line with the FIR. Further argued that when report of Medical Board is examined in the light of statement of witnesses recorded under Section 161, Cr.P.C. it becomes clear that prosecution story is more plausible and appeals to reasons. Relied upon *2005*

P.Cr.L.J. 1709 (Lahore) titled *"MISBAH-UL-HASSAN versus THE STATE and 3 others"* and *1984 P.Cr.L.J 51*.

5. Heard. Record perused.

6. An important law point is involved in this case *i.e.* whether the order passed by Illaqa Magistrate at the time when accused persons were produced before him for physical remand is a judicial order or an executive order? Section 167, Cr.PC is reproduced as under:---

167. Procedure when investigation cannot completed in twenty-four hours: (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well founded, the officer incharge of the police-station or the police-officer making the investigation, if he is not below the rank of the sub-inspector, shall forthwith transmit to the (nearest Magistrate) a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

Explanation : [Omitted by the Ordinance, XXXVII of 2001, dt. 13-8-2001.]

(2) The Magistrate to whom an accused person is forwarded under, this Section may, whether he has or has noT jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case or [send] it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the Third Class, and no Magistrate of the Second Class not specially empowered in this behalf by the Provincial Government shall authorise detention in the custody of the police.

(3) A Magistrate authorizing under this Section detention in the custody of the police shall record his reasons for so doing.

[(4) The Magistrate, giving such order shall forward copy of his order, with his reasons for making it, to the Sessions Judge].

(5) ……..

(6) ……..

(7) ……..

Section 435, Cr.P.C. is also reproduced as under:---

435. Power to call for records of inferior Courts: (1) The High Court or any Sessions Judge may call for an examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying, itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

(2) ……..

(3) (**********)

(4) ……..

Section 439, Cr.P.C:---

439. High Court's Powers of revision. (1) In the case of any proceeding the record of which has been called for by itself, [….] or which otherwise comes to its knowledge the High Court may, in its discretion, exercise any of the powers conferred on a Court of appellate by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence, and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by Section 429.

2. .....
3. ……...
4. ……..
5. ……
6. …..…….

7. By bare perusal of Section 435, Cr.P.C. it becomes obvious that High Court or any Sessions Judge may call for and examine the record of any proceedings before any inferior Criminal Court situate within its local limits or his jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

8. I have gone through the facts and circumstances of the case referred by learned counsel for the petitioners *i.e.* 2001 P.Cr.L.J. Criminal Cases (Lahore) 355. In the referred case, the learned Judge while declaring the proceedings before the Magistrate under Section 167, Cr.P.C. as executive, was of the view that as no proceedings remained pending before the Magistrate Ist Class so the order passed is an executive order as jurisdiction under Section 435, Cr.P.C. could only attract when any proceedings are pending before any inferior Court. I am of the humble view that in this case proper assistance and all the relevant case-law was not referred before the learned Judge in Chamber nor proper assistance was rendered. The word '*Proceedings'* used in this Section could not be confined to the proceedings pending before the Magistrate, rather any matter which is referred before the Magistrate and it has been decided either way, is covered by the word 'proceedings'.

9. "Proceeding" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given. The word 'proceeding' when interpreted generally in connection with a criminal case is to carry vast meanings and to cover any action taken in case from its inception up till execution of judgment.

10. *In Words & Phrases by Baby Krishnan, Prafulla C.Pant*, 'proceeding' is defined as under:---

"the word 'proceeding' would depend upon the scope of the enactment wherein the expression is used with reference to a particular context where it occurs. It may mean a course of action for enforcing legal rights. In the journey of litigation, there are

several stages, one of which is the realization of the judicial adjudication which attained finality".

11. The word 'proceeding' used in Sections 435 to 439-A, Cr.P.C., connotes the judicial proceedings and not executive proceedings. The revisional powers of High Court under the above-mentioned Sections can be exercised with regard to inferior Criminal Courts which are functioning under the Code of Criminal Procedure and not in respect of proceedings while they are exercising judicial functions.

12. *In Words & Phrases by Mian Muhibullah Kakakheel* (Vol. III) it is defined that:---

"In the Criminal Procedure Code in which Section 4(m) defines the term "judicial proceedings" the word "proceeding" is sometime used in the restricted sense of judicial proceedings. The word "proceeding" in this Section is used in the sense of inquiry or trial, that is, it is used in the sense of judicial proceedings. Similarly, in Section 435 of the Code of Criminal Procedure, it must be held that the word "proceedings" is used in the sense of judicial proceedings. It is true that in Section 496 of the Criminal Procedure Code, "proceedings before a court" are used in a wider sense and not in the restricted sense of judicial proceedings alone".

13. *In A.I.R. 1965 All. 172*, it was observed that the word 'proceeding' is wider than the word "case" and it was further observed in *P.L.D. 1950 Baghdad-ul-Jadid 48* the word 'proceeding' in the light of Section 435 to 438 Cr.PC was defined as that it connotes any proceedings before any Inferior Criminal Court and in *PLD 1961 Karachi 29* the word 'proceeding' used in Section 435 to Section 439, Cr.P.C. is confined only to the proceeding before any Inferior Court and cannot be treated to include proceedings which are not held by criminal Courts.

14. In *PLD 1950 Baghdad-ul-Jadid 48*, it is held that in Sections 435 and 438 of the Criminal Procedure Code the word "proceeding" occurs prominently. It connotes any proceeding before any inferior Criminal Court. And it was further elaborated in *PLD 1964 Lahore 426, DLR 1964 W.P. 173, PLC 1964 Lahore 470*. The revisional powers of High Court under Section 435 and under Section 439, Cr.P.C. can be exercised only with regard to inferior Criminal Courts which are functioning under the Code of Criminal Procedure and not in respect of the proceedings before the Criminal Courts which may be created by special statutes.

15. In *PLJ 1979 Criminal Cases (Quetta) 94 and PLD 1979 Quetta 1* the word "proceeding" was defined as under":---

"the word "proceeding" would require such construction which may be best suited and best fitted in the scheme of a particular enactment. Generally it would mean "all what is done in a case" and would include every step and transaction commencing from the first step whereby the machinery of law is put into action upto the stage of the case where it concludes and does not require any further action. This last stage would not necessarily mean in the stage of judgment, for it may further include all steps taken till the stage of the execution of the judgment".

Judicial Proceedings:-

16. The 'judicial proceedings' are defined in Section 4(m) of the Code of Criminal Procedure as under:---

"(m) "Judicial Proceeding". "Judicial Proceeding" includes any proceedings in the course of which evidence is or may be legally taken on oath".

In Black's Law Dictionary (SIXTH EDITION), "Judicial Proceeding" is defined as under:---

"Any proceeding wherein judicial action is invoked and taken. Any proceeding to obtain such remedy as the law allows. Any step taken in a Court of justice in the prosecution or defense of an action. A general term for proceedings relating to, practiced in, or proceeding from, a Court of justice; or the course prescribed to be taken in various cases for the determination of a controversy or for legal redress or relief. A proceeding in a legally constituted court. A proceeding wherein there are parties, who have opportunity to be heard, and wherein the tribunal proceeds either to a determination of facts upon evidence or of law upon proved or conceded facts".

17. By seeking guidance from the judgment reported in *PLD 1957 SC 91, PLD 1985 SC 62 & PLD 1961 (W.P) Karachi 29* and principle laid down by the High Court and Supreme Court of Pakistan, these ingredients should be observed necessary to declare any function of a Court as 'judicial proceeding'. The proceeding should be taken in a Court of justice performing its functions under the Constitution or Statute that:---

1. Any law of the Country allows these proceedings.
2. The Court has taken into consideration/state all the material facts for issuing the order.
3. The proceedings have the character of judicial proceedings as defined by Section 4(m) of the Code of Criminal Procedure.
4. An opportunity is to be given to the parties to show cause against the order.
5. The opinion/decision is not absolutely and not excludes the authority under revisional jurisdiction.
6. There will be no distinguish between the order passed after recording the evidence and order passed after considering the material which is available with the file of Court.
7. Any person aggrieved by it can apply that it should be altered or rescinded.
8. The decision of the Court has to determine:---

(i) the dispute;

(ii) the dispute relates to the right or liability which, whatever its immediate aspects, is ultimately referable to some right or liability, recognized by the Constitution or statute or by a custom or equity which by the domestic law is declared to be the rule of decision;

(iii) Since every right or liability depends upon a fact the Court is under an obligation to discover relevant facts;

(iv) The ascertainment of the facts in the presence of the parties either of whom is entitled to produce evidence in support of its respective case and to question the truth of the evidence produced by his opponent.

(v) After an investigation of the facts and hearing legal arguments the Court renders a judgment which so far as the Court is concerned terminates the dispute.

18. In the light of these parameters to determine whether any function/proceeding are judicial function/judicial proceeding or is an executive order this Court go through Section 167, Cr.P.C. The word used in first paragraph of Section 167, Cr.P.C. when investigation is not completed within 24 hours for further remand first necessary requirement is accusation or information is well founded and it could only be establishes after examining the evidence collected by the Investigating Officer or produced before the Court during the proceedings. The second important aspect is that alongwith copy of entries in the diary forward the accused to the Magistrate so that accused could show cause against the request of the Investigating Officer and submit any material/evidence relevant before the Court to protect his opportunity granted under the Constitution of Islamic Republic of Pakistan, 1973 and even by the Code of Criminal Procedure and sub-section (2) Magistrate is competent to authorize the detention of accused any such custody as such Magistrate think fit it means he cut the liberty of citizen although in accordance with law but for this purpose he has to narrate all the facts of the case, any explanation given by the accused, evidence produced by him and if necessary, he could record the statement in the light of Section 4(m) and make a binding decision but sub-section (4) then bound down the Magistrate that he shall forward a copy of this order with reasons for making it to the Sessions Judge, it means order will be passed with the reasons. It will be a judicial order and it is sent to the Court of Sessions only for the purpose in the light of Section 435 read with Section 439-A, Cr.P.C. which comes to his knowledge and if he comes to the conclusion that any illegality or irregularity has been committed, he can exercise his revisional jurisdiction under Section 435, Cr.P.C. read with Section 439-A, Cr.P.C.; hence, by bare reading of Sections 435 to 439-A read with Section 167, Cr.P.C. it becomes clear that the order passed under Section 167, Cr.P.C. is a judicial order and revisable by Sessions Judge/Additional Sessions. Reliance is placed upon *2005 YLR 805*.

19. For what has been discussed above, it is crystal clear that the order passed by the learned Magistrate under Section 167, Cr.P.C. is a judicial order and passed in judicial proceedings; hence, learned Additional Sessions Judge, Hasilpur in the case in hand has rightly entertained the revision petition and passed the impugned order. Therefore, the writ petition having no force of law is *dismissed*

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Petition dismissed

2019 P Cr. L J 219
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD YASEEN---Petitioner
Versus
ADDITIONAL SESSIONS JUDGE, GOJRA and 3 others---Respondents

W.P. No. 206739 of 2018, decided on 25th June, 2018.

(a) Criminal Procedure Code (V of 1898)---
----S. 176---Disinterment of dead body, application for---Scope--- Petitioner contended that Appellate Court had wrongly allowed disinterment of dead body of the deceased (son of the respondent/complainant) as post-mortem of the deceased had already been conducted revealing his cause of death as firearm injury in the head---Complainant contended that he apprehended that his son did not commit suicide rather Police had murdered him and they (police officials) in connivance with Medical Officer got done post mortem of the deceased---Post-mortem of the deceased had revealed firearm injury on his head which also contained blackening, meaning thereby the same had been caused from a very close range---Cause of death i.e. infliction of firearm injury on the head of deceased stood established by the post-mortem report itself, and even by the respective stance of the parties---No justifiable reason existed to have recourse to disinter the dead body by invoking the process provided in S. 176, Cr.P.C. because determination of facts as to how and in what manner the incident took place was clearly a circumstance beyond the mandate of S. 176, Cr.P.C.---Court, while dealing with such application, would see that only in cases of real genuineness and as a last resort such an order would be issued---Application filed merely on the basis of apprehensions was not to be acceded to---Impugned order passed by Appellate Court not only suffered from illegality but did not stand the test of morality also---High Court set aside impugned order passed by the Appellate Court---Constitutional petition was allowed accordingly.

(b) Constitution of Pakistan---
----Arts. 199 & 4---Criminal Procedure Code (V of 1898), S. 439---Constitutional petition against revisional order---Maintainability---Contention was that revisional order could not be challenged in constitutional jurisdiction---Validity---Held, where an order passed by revisional court did not violate any law and no illegality was found to have been committed therein, the same could not be disturbed in constitutional jurisdiction---When, however, an order suffered from patent error or grave illegality in applying the correct law and the order passed by the revisional court did not qualify the test of Art. 4 of the Constitution, the same could be rectified in exercise of constitutional jurisdiction.
Badaruddin v. Mehr. Ahmad Raza, Additional Sessions Judge, Jhang and 6 others PLD 1993 SC 399; Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 ref.
Adnan Afzal for Petitioner.

Muhammad Hammad Khan Rai, Assistant Advocate-General for the State.
Muzammil Rasheed Bhatti for Respondent No.4.
Date of hearing: 25th June, 2018.

JUDGMENT

MUHAMMAD QASIM KHAN, J.---Petitioner seeks setting aside of order dated 18-04-2018 passed by learned Additional Sessions Judge, Gojra, whereby revision petition filed by Liaqat Ali/respondent No.4 was accepted and order dated 24-11-2017 passed by Magistrate 1st Class, Gojra, through which application filed by respondent No.4 for disinterment of dead body of his son Muhammad Imran was dismissed.

2. Briefly the facts of the case are that Muhammad Imran son of Liaqat Ali/respondent No.4 died of a fire arm injury; after completion of formalities by the police the dead was buried; however, after about three months respondent No.4 moved application for registration of case against the present petitioner and three others, by accusing them of murdering his son, whereupon, a committee consisting of DSP headquarters and DSP Circle Gojra was constituted by District Police officer, Toba Tek Singh. The committee submitted its report to the effect that Muhammad Imran (deceased) had committed suicide and application filed by Liaqat Ali was meant to counter an application under section 22-A(6), Cr.P.C. filed by Mst. Salma Bibi against him and some others. Thereafter, Liaqat Ali filed an application to the Ilaqa Magistrate for exhumation of dead body of his son, alleging that on 20.06.2017 at about 2.00 p.m. in broad daylight, Rana Saeed Rehman SHO along with other police officials and some private persons had committed the murder of his son Muhammad Imran; local police joined hands with the medical officer and got conducted post mortem of Muhammad Imran in his absence and thus obtained a fake and fictitious post mortem report. The learned Ilaqa Magistrate however, dismissed the said application vide order dated 24.11.2017, where-after, Liaqat Ali preferred a criminal revision which was allowed vide order dated 18.04.2018 passed by learned Additional Sessions Judge, Gojra, which order is under challenge through the instant writ petition.

3. It is argued by learned counsel for the petitioner that Liaqat Ali/respondent No.4 had changed his stance because Mst. Salma Bibi (relative of one of the nominated accused in the application of Liaqat Ali) had moved application for registration of case against Liaqat Ali and some others, otherwise, there was application of Liaqat Ali was totally a cock and bull story with no truth in it. Further argued that firstly a committee of two DSP and then the learned Ilaqa Magistrate had declared the application of Liaqat Ali as baseless, but the learned Additional Sessions Judge while passing the impugned order committed serious illegality and patent error, therefore, the same is not sustainable in law.

4. Learned counsel appearing for respondent No.4, however, opposed the contentions of learned counsel for the petitioner and defended the impugned order by arguing that Liaqat Ali/respondent No.4 being the real father of Muhammad Imran deceased had

every right to know about the cause of his death, therefore, the impugned order is perfectly in accordance with law.

5. The learned law officer argued that procedure provided under section 176, Cr.P.C., can only be activated to ascertain the cause of death. According to the learned law officer the cause of death had already been specified in the post mortem report already conducted, therefore, disinterment of dead body was not required. However, on legal ground he urged that revisional order cannot be challenged in writ jurisdiction, in the light of case "Badaruddin v. Mehr Ahmad Raza, Additional Sessions Judge, Jhang and 6 others" (PLD 1993 Supreme Court 399).

6. Heard. Record perused.

7. Firstly, I will take up the legal objection with regard to maintainability of writ petition against an order passed on a criminal revision. In the case of "Badaruddin v. Mehr Ahmad Raza, Additional Sessions Judge, Jhang and 6 others" (PLD 1993 Supreme Court 399) the Hon'ble Supreme Court of Pakistan has held that after the decision by a revisional court said order attained finality and could not be assailed in writ jurisdiction. The relevant portion of the judgment is reproduced hereunder:-
"Second ground given by the High Court is that writ will not lie if final order is passed by the Revisional Court. There is no dispute about the fact that powers of the High Court for exercise of revisional jurisdiction under section 439, Cr.P.C. are wider in scope than powers in the writ jurisdiction. By amendment in the law now Sessions Court and High Court have concurrent revisional jurisdiction which is allowed in the normal course to be exercised first by lower forum but that does not decrease the scope of jurisdiction as mentioned above. In such circumstances, it is said that if there is finding by the Court of competent jurisdiction on the revisional side then it has attained finality. On the same question writ petition would be non-maintainable because otherwise it would amount to allowing question finally decided in one set of forums to be agitated afresh in another set of forums and that way there will be no end to the finality."

This issue was again raised before the Hon'ble Supreme Court of Pakistan and while deciding it, in the case of "Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others" (PLD 2011 Supreme Court 905), the Hon'ble apex Court has held as under:-

"Lastly, attending to the plea propounded by the learned counsel for the appellants that the constitutional jurisdiction could not be exercised by the learned High Court for interfering in the revisional order of the Addl. District and Sessions Judge. Suffice it to say that on account of the provisions of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, it is an alienable right of every citizen to enjoy the equal protection of law and to be treated in accordance with law, therefore, if a revisional Court has passed an order which does not qualify the test of Article 4 ibid and suffer from a patent error, of fact, such as non-reading/misreading of the facts on the record or has committed a grave illegality in applying the correct law, such as the error of

misapplication and non application of correct law, thus being an illegality of a sheer nature can always be rectified by the High Court while exercising its constitutional jurisdiction under Article 199, as no bar/limitation in this behalf on the exercise of constitutional jurisdiction of the High Court either emanates from the plain reading of the Article or can be read into it."
The same principle was followed in "Muhammad Anwar and others v. Mst. Ilyas Begum and others" (PLD 2013 Supreme Court 255). By examining the above two judgments, it becomes clear that "Badaruddin v. Mehr Ahmad Raza, Additional Sessions Judge, Jhang and 6 others" (PLD 1993 Supreme Court 399) is the basic rule that where an order passed by a revisional court does not violate any law and no illegality is found to have been committed therein, then the same cannot be disturbed in constitutional jurisdiction, but when an order suffers from a patent error or grave illegality has been committed in applying the correct law and further the order passed by the revisional court does not qualify the test of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, then the same can be rectified in exercise of constitutional jurisdiction. For the reasons to be recorded in the preceding paragraphs, this court is convinced that as the order impugned herein does not stand the test of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, hence the instant writ petition is fully competent and maintainable.

8. Now coming to legal position with regard to section 176, Cr.P.C., there is hardly any doubt that basic and sole purpose to invoke section 176, Cr.P.C. is to know about the "cause of death" of a person who dies in the custody of the police. In this case it is correct that Muhammad Imran son of Liaqat Ali/respondent No.4 died when police was also present, it is also admitted position by all that Muhammad Imran died of a fire arm injury which figured on his head. Furthermore, the post mortem of the deceased was got conducted, wherein, the doctor had noted fire arm injury on the head which also contained blackening, meaning thereby the same had been caused from a very close range. In any way, the cause of death i.e. infliction of fire arm injury on the head of the deceased stands already established, rather by the respective stance of the parties, as also by the post mortem report itself. Therefore, on the face of it there existed no justifiable reason to have recourse to disinterment of the dead body by invoking the process provided in section 176, Cr.P.C., because otherwise assessment or determination of facts that as to why and in what manner the incident took place is clearly a circumstance beyond the mandate of section 176, Cr.P.C.

9. In continuation to the above, the court while dealing with an application under section 176, Cr.P.C. must bear in mind that although different religions/customs in different parts of the world may treat the dead bodies towards their destiny according to their customs or faith, but respect and honor to the dead body is almost common amongst all. Particularly, Islam upkeeps the dignity and honor of a human being not only in his life but even afterwards by giving him final bath, prayers for the departed soul and then respectful burial to earth; our faith does not at any stage allow desecration to a dead body, irrespective of faith the dead may carry. In this context, a quotation is referred:-

Another quote by Hazrat Muhammad also carries significance, which is referred below:-

"O people! I charge you with ten rules; learn them well for your guidance in the battlefield! Do not commit treachery, or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone."

There may be so many other references from Holy Prophet Muhammad laying unmatched humanitarian standards for living as well as the dead, but in order to remain within the context of the case in hand, it may not be required to quote them all.

10. In view of above discussion since it remains an established fact that respect, dignity and the honor required to a dead body must be protected, therefore, while dealing with an application for disinterment of dead body, the courts shall see that only in cases of real genuineness and as a last resort such an order shall be issued and the applications filed merely on the basis of apprehensions must not be acceded to. As discussed above post mortem of the deceased was conducted and cause of death has been ascertained by way of conduct of post mortem examination of the deceased and place of injury as well as nature of injury are the same as is reflects from the application filed by respondent No.4.

11. For what has been discussed above, the order passed by learned Additional Sessions Judge not only suffers from illegality, patent error and grave illegality in applying the correct law; even the order impugned herein is against the Statute, it also does not stand the test of morality. Consequently, this writ petition is allowed, the impugned order dated 18.04.2018 passed by learned Additional Sessions Judge is hereby set aside.

MQ/M-125/L Petition allowed.

2019 P Cr. L J 902
[Lahore]
Before Muhammad Qasim Khan, J
The STATE through Prosecutor-General Punjab, Lahore---Petitioner
Versus
KARAM DAD BHATTI---Respondent

Criminal Appeal No. 1611 of 2014, decided on 2nd October, 2018.

(a) Criminal Procedure Code (V of 1898)---
----S. 342---Statement of accused---When prosecution evidence is rejected in entirety, the statement of the accused under S. 342, Cr.P.C. is to be accepted in toto and without scrutiny.
The State v. Muhammad Hanif and others 1992 SCMR 2047 rel.

(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---
----Preamble---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Appeal against acquittal---Appreciation of evidence---Prosecution case was that accused being proprietor of a Business House obtained a loan amounting to Rs. 4,35,00,000 from a Bank but did not return the same---On repeated demands of the Bank, accused issued a cheque, which was dishonoured---Accused had issued cheque to the Bank as a customer for return of loan---Action could only be taken by the Bank against the customer under the Financial Institutions (Recovery of Finances) Ordinance, 2001 and no other law---Banking Court had exclusive jurisdiction in the matter under the said Ordinance---Prosecution case was full of patent illegalities right from its inception---Appeal was dismissed in limine.

Syed Mushahid shah and others v. Federal Investment Agency and others 2017 SCMR 1218 rel.
Muhammad Amjad Rafiq, Additional Prosecutor-General for the State.
Muhammad Akram Pasha for the Bank of Punjab.

ORDER
MUHAMMAD QASIM KHAN, J.---This appeal has been directed against the judgment dated 28.02.2014 passed by learned Additional Sessions Judge, Hafizabad, whereby, on acceptance of appeal filed by the accused/respondent, against the judgment of his conviction, he has been acquitted in case FIR No.924/2009 dated 21.09.2009 registered under section 489-F, P.P.C. at police station City Hafizabad.

2. Briefly the facts of the case are that above FIR was registered on the complaint of Rana Saleem Zaeem ur Rehman, Manager of the Bank of Punjab, Hafizabad, to the effect that one Qadir Bakhsh, Proprietor of M/s. Mian Qaiser Bakhsh & Co., Hafizabad Road, Jalalpur Bhattian, obtained a loan amounting to Rs.4,35,00,000/-, but did not return the same. On repeated demands of the Bank, he issue a Cheque No.88945 dated 15.02.2009 to be drawn on MCB, Jalalpur Bhattian for payment of the land. The said cheque was deposited for encashment but was dishonoured and

returned with the Memo slip. Ultimately the FIR was got lodged under section 489-F PPC, after investigation report under section 173, Cr.P.C. was submitted before the learned Judicial Magistrate Section 30, Hafizabad and after trial, the accused/respondent was convicted under section 489-F PPC and sentenced to rigorous imprisonment for three years with a fine of Rs.5,00,000/-, in case of non-payment of fine, to undergo simple imprisonment for one year. The said judgment was appealed against and as detailed in para No.1 of this order, the same was allowed, resulting in setting-aside the conviction and sentence of the accused/respondent.

3. With reference to findings recorded by the learned appellate court in para-9 of the impugned judgment, when a question as posed to the learned Additional Prosecutor General whether the original cheque was produced before the court or not, the learned law officer came out with the plea that in his statement under section 342, Cr.P.C. the accused/respondent had not denied the issuance of cheque and further that the original cheque was in possession of the Manager, who appeared before the court and submitted photo copy of the same cheque, therefore, there was no need to produce the original cheque and thus the findings of the learned Additional Sessions Judge, are erroneous. I am afraid the primary and foremost duty and obligation always lies with the prosecution to put and prove its case against the accused beyond any shadow of doubt. If any lacuna is left in the prosecution case, the same cannot be covered by placing reliance on statement of the accused recorded under section 342, Cr.P.C. It is now a well settled proposition of law that when prosecution evidence is rejected in entirety (as the case in the instant appeal, as held by the learned trial court), the statement of the accused under section 342, Cr.P.C. has to be accepted in toto and without scrutiny. Reliance is placed on the case "The State v. Muhammad Hanif and others" (1992 SCMR 2047).

4. As regards explanation about non-production of original cheque, section 76 of the Qanun-e-Shahadat Order, 1984 is the provision which permits secondary evidence, but while invoking said provision certain conditions, as provided in the said section itself must exist. For ready reference section 76 above, is reproduced hereunder:-
"76. Cases in which secondary evidence relating to document may be given.
Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-
(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court; or of any person legally bound to produce it; and when, after the notice mentioned in Article 77 such person does not produce it;
(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative-in-interest;
(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when, due to the volume or bulk of the original, copies thereof have been made by means of microfilming or other modern devices;
(e) when the original is of such a nature as not to be easily movable;
(f) when the original is a public document within the meaning of Article 85;
(g) when the original is a document of which a certified copy is permitted by this Order, or by any other law in force in Pakistan, to be given in evidence;
(h) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection;
(i) when an original document forming part of a judicial record is not available and only a certified copy thereof is available, certified copy of that certified copy shall also be admissible as a secondary evidence."
On the face of it, firstly the instant case was not covered by any of the above conditions, secondly, if for the sake of argument it is admitted to be a case where secondary evidence could be permitted, even then permission of the court must have been specifically obtained to bring on record secondary evidence, but here in this case the record does not reflect that even an attempt was made to get permission of the court to bring on record secondary evidence of the disputed cheque. Furthermore as shall be seen from the findings recorded by the learned Additional Sessions Judge, what to talk of getting formal permission of secondary evidence, only a photo copy of the disputed cheque was produced, which practice is least permissible in law. Therefore, in the absence of specific permission of the court to produce secondary evidence, the photo copy could not be said to be an evidence to be read against the accused. Furthermore, as held by the learned trial court even the photo copy of the cheque Ex.PE showed that it was a crossed cheque in the name of M/s. Qadir Bakhsh & Co. and about 1-1/2 inch above the relevant column bearing the name M/s. Qadir Bakhsh & Co. the word "Manager BOP-Hfd A/C" were mentioned in the blank space of the said cheque from which it is evident that the said words were added subsequently which were not even in the relevant column. There can be no other opinion that a crossed cheque could only be issued in the name of one person and not in the name of two or more different persons having differing account number. Therefore, the findings recorded by the learned trial court even on factual aspects are correct and no exception can be taken to such findings.

5. In addition to the above, earlier the proposition with regard issuance of cheque by a private person in favour of a bank for return of a loan, dishonor of the cheque and registration of criminal case under section 489-F, P.P.C., came under consideration before this Court in "Muhammad Asif Nawaz v. Additional Sessions Judge and others" (2014 PCr.LJ 1 = 2014 CLD 45) and after detailed discussion with reference to the relevant statute and the case law, this court made certain observations, the relevant portions thereof, are reproduced hereunder:-
"6. Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is the provision relating to certain offences and its subsection (4) deals with dishonest issuance of a cheque towards repayment of a finance or fulfillment of an obligation which is dishonoured on presentation. The punishment of said offence has been provided as one year or with fine or with both. Therefore, it becomes quite obvious

that in the matter, like the one in hand, the jurisdiction only lies with the Banking court established under the Financial Institutions (Recovery of Finances) Ordinance, 2001 and not before any other court, until and unless the same is provided by law, by which the financial institution is established.

7. ----------

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8. Although by amendment in P.P.C., section 489-F, P.P.C. has been inserted after promulgation of Financial Institutions (Recovery of Finances) Ordinance, 2001 but this insertion would also not give it an overriding effect over special law, for the reason that the special law is passed before or after the general Act does not change the principle. Where the special law is later, it will be regarded as an exception to, or a qualification of, the prior general Act; and where the general Act is later, the special statute will be construed as remaining an exception to its terms, unless repealed expressly or by necessary implication.

If the legislators had an intention otherwise, they could at the very beginning formulate or afterwards could amend the Financial Institutions (Recovery of Finances) Ordinance, 2001 in such a manner so as to bring this offence within the definition of "cognizable" offence. In such circumstances, when the amendment was not made in the Ordinance, ibid, the legislators explicitly made their intention clear that with regard to the matters between financial institutions and their customers, this enactment shall hold the field and section 489-F, P.P.C. (dishonest issuance of cheque) will be applicable to all other persons in general except those covered by the Financial Institutions (Recovery of Finances) Ordinance, 2001. The purpose by not amending the Financial Institutions (Recovery of Finances) Ordinance, 2001 appears to be that normally in any case of loan from financial institution, the loans are protected by mortgage, warranties and covenants made by or on behalf of the customer to a financial institution, including representations, warranties and covenants with regard to the ownership, mortgage, pledge, hypothecation or assignment of, or other charge on assets or properties, and the financial institution can recover the amount by adopting appropriate process under any of the above mode."

6. In continuation to the above discussion it may be mentioned here that the legal proposition with regard to issuance of cheques by the customers to the financial institutions for return of loans, dishonour thereof and registration of FIRs under the provisions of section 489-F of the P.P.C. by the banks against their customers, came under judicial scrutiny before this Court through various writ petitions, revision petitions or under section 561-A, Cr.P.C., claiming that action could only be taken against them under the Ordinance, 2001 (in particular Section 20 thereof) and no other law, and exclusive jurisdiction vests with the Banking Courts constituted under the said Ordinance. Through common judgments, the learned High Court dismissed the matters holding that concurrent jurisdiction vests in the Banking Courts

constituted under the Ordinance, 2001, the Special Courts constituted under the ORBO, the ordinary criminal courts and the Agency, and the jurisdiction of the latter two courts and the Agency would not be ousted on account of sections 4 and 20 of the Ordinance, 2001. Thereafter, the customers approached the Hon'ble Supreme Court of Pakistan and vide judgment reported as "Syed Mushahid Shah and others v. Federal Investment Agency and others" (2017 SCMR 1218), after exhaustive discussion the apex Court set-aside the judgment of this court by hold that:-
"19. In conclusion, we find that the provisions of the Ordinance, 2001 are to have an overriding effect on anything inconsistent contained in any other law for the time being in force, including the ORBO, the Code (read with the P.P.C.) and the Act, 1974 (read with the Ordinance, 2016). In essence, whenever an offence is committed by a customer of a financial institution within the contemplation of the Ordinance, 2001, it could only be tried by the Banking Courts constituted thereunder and no other forum. The Special Courts under the ORBO, the ordinary criminal Courts under the Code and the Agency under the Act, 1974 read with the Ordinance, 1962 would have no jurisdiction in the matter."

As such, the legal proposition now stands settled on the point that whenever an offence is committed by a customer of a financial institution within the contemplation of the Ordinance, 2001, it could only be tried by the Banking Courts. The Special Courts under the Offences in Respect of Banks (Special Courts) Ordinance, 1984, the ordinary criminal courts under the Cr.P.C. and the Agency under the Federal Investigation Agency Act, 1974, would have no jurisdiction in the matter.

7. For the above reasons, the prosecution case apparently was full of patent illegalities right from its very inception i.e. lodgment of the FIR, which could not have been done in the light of above cited pronouncement of Hon'ble Supreme Court of Pakistan. The learned Additional Sessions Judge, therefore, was fully justified in setting aside the conviction judgment against the accused/respondent and I do not see any legal or factual flaw therein. This appeal, therefore, is dismissed in limine.

JK/S-62/L Appeal dismissed.

2019 P Cr. L J Note 37
[Lahore]
Before Muhammad Qasim Khan, J
JAVED---Petitioner
Versus
The STATE and 7 others---Respondents

W.P. No. 237718 of 2018, decided on 22nd October, 2018.

Criminal Procedure Code (V of 1898)---
----Ss.22-A, 22-B & 154---Ex-officio Justice of Peace---Cross-version---Scope---Respondent lodged FIR against petitioner and some other persons---Petitioner had another story regarding the same occurrence, therefore, he moved application under Ss. 22-A & 22-B, Cr.P.C. to the Ex-officio Justice of Peace for a direction to the Investigating Officer to record his cross-version which was allowed---Petitioner claimed that despite order by the Ex-officio Justice of Peace his cross-version was not recorded---Validity---Perusal of police file revealed that statement of petitioner was not recorded under S. 161, Cr.P.C.; that his statement was also not incorporated in rapt roznamcha, and that statements of his witnesses and the site plan in the light of statements of witnesses of cross-version were not prepared---Cross-version of petitioner was recorded as per court's direction---Constitutional petition was disposed of accordingly.

Mst. Sughran Bibi v. The State PLD 2018 SC 595 rel.
Rasheed Afzaal Cheema for Petitioner.
Mian Muhammad Qamar uz Zaman for Respondent No. 7.
Muhammad Afzal Bhatti, Assistant Advocate-General with Muhammad Ilyas SSP and Muhammad Ismail S.P. for the State.

ORDER
MUHAMMAD QASIM KHAN, J.---Briefly the facts of the case are that regarding an occurrence, FIR No.116/2018 dated 30.03.2018 under sections 337-A(i), 337-A(ii), 186, 148, 149, P.P.C. was registered at Police Station City Nankana Sahib on the complaint of Abdul Rehman Shaheen (respondent No.7) against the present petitioner and some others. Since the petitioner had another story regarding the same occurrence, therefore, he filed an application under sections 22-A/22-B, Cr.P.C. before the learned Ex-officio Justice of Peace, the same was disposed of vide order dated 03.05.2018 with a direction to the Investigating Officer of the said FIR to proceed on the application of the petitioner if cross-version attracts in the case or not. Through the instant writ petition the petitioner voiced a grievance that despite order by the learned Ex-officio Justice of Peace, his cross-version was not being recorded.

2. On 27.09.2018 District Police Officer and S.P (Investigation) were directed to appear before this court in person along with Investigating Officer on 28.09.2018. On 28.09.2018 the court was apprised that cross-version of the petitioner had been recorded. On perusal of the police file this court observed that statement of petitioner

was not recorded under section 161, Cr.P.C. and further his statement was also not incorporated in RAPT ROZNAMCHA and statements of his witnesses and the site plan in the light of statement of the witnesses of cross-examination was not prepared, which is against the requirement of law and if the Investigating Agency adopted this way of recording cross-version then the complainant of cross-version will miss out his basic rights and it will frustrate the requirement of law in the light of case "Mst. Sughran Bibi v. The State" (PLD 2018 Supreme Court 595). The DPO as well as other police officers also could not come out with any explanation; as such the Additional Inspector General Police was directed to appear in person and he was apprised about the situation and relevant provisions of law, especially the police rules as guidance for recording of cross-versions and its investigation. He was also directed to prepare SOP with the consultation of all stakeholders and issue the same for guidance of police officials investigating the cross-versions to avoid any complication to the public at large.

3. Today, the court has been informed that SOP (Standard Operating Procedures) No.30200/Inv/HA/L dated 19.10.2018 has been issued with regard to recording of cross-versions, a copy whereof has been placed before the Court. An extract of the same is reproduced hereunder:-

On court query the police officers present in court inform that now the cross-version of the present petitioner has been recorded to bring the same in line with the requirement of law and the police rules. This being the position the grievance of the petitioner stands redress and this petition is disposed of accordingly.

4. It has been observed that in the above referred SOP a comprehensive mechanism has been laid down but from the covering letter of the SOP it appears that although the same was addressed to the heads/Incharge of the concerned branches of the police department, but the same do not appear to have been routed to the bottom i.e. to the SHOs or the Investigating Officers. Similarly, the SOP also does not appear to have been circulated for public awareness or to the legal fraternity. The Inspector General of Police Punjab is directed to ensure that above referred SOP shall be communicated to the SHOs who shall onward see that the SOP must be complied with in letter and spirit by the Investigating Officer. At the same time, the Inspector General of Police Punjab shall ensure that copy of this SOP must be transmitted to all the Tehsil and District Bar Associations of Punjab for information.

SA/J-8/L Order accordingly.

2019 P Cr. L J Note 152
[Lahore]
Before Muhammad Qasim Khan, J
MUSHTAQ---Appellant
Versus
The STATE and others---Respondent

Criminal Appeal No. 198-J of 2013, decided on 2nd April, 2019.

(a) Penal Code (XLV of 1860)---
----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, armed with deadly weapon and common object--- Appreciation of evidence--- Benefit of doubt--- Night-time occurrence---No source of light---Delayed post-mortem---Unnatural conduct of witness---Effect---Occurrence took place at 10:00 p.m. and first information report (FIR) was registered at 12:30 a.m.---No electric bulb was taken into possession by the investigating officer to establish that bulb was lightening---Post-mortem of the deceased was conducted on the next day at 10:30 a.m.---Doctor had stated that dead body arrived in the hospital at 10:00 a.m.---Possibility could not be ruled out that it being a night time occurrence none had seen the same; that the dead body was recovered in early hours of the morning; that the FIR was registered by ante-time and for the same reason dead body was dispatched and received in the hospital after considerable delay---Doctor had stated the time between injury and death to be within half hour to one hour---Witness, son of deceased, would naturally have tried to save the life of his father had he been present at the place of occurrence---Appeal was allowed and appellant was acquitted from the charges levelled against him, in circumstances. [Paras. 5 & 8 of the judgment]

(b) Penal Code (XLV of 1860)---
----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, armed with deadly weapon and common object---Contradictions in evidence---Scope---Complainant had attributed specific role of causing injury to the deceased and as per FIR, the witnesses were present at the place of occurrence before the injury was inflicted by the accused but the eye-witness did not attribute any injury to the accused---Contradictions existed in the evidence which affected the prosecution case. [Para. 6 of the judgment]

(c) Penal Code (XLV of 1860)---
----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, armed with deadly weapon and common object---Role of acquitted accused was same as that of accused---Effect---Role attributed by eye-witness to the accused was not distinctive from the acquitted accused---Eye-witness was neither declared hostile nor cross-examined by the prosecution; therefore it was to be presumed that his statement was not challenged by the prosecution---When any prosecution witness was not supporting the prosecution and he was not declared hostile by the prosecution then accused was entitled to get benefit of doubt. [Para. 6 of the judgment]
Osimuddin Sarkar v. The State PLD 1961 Dacca 798; Tiloo and 3 others v. The State 2007 YLR 239; Said Munir and another v. The State PLD 1964 (W.P.) Peshawar 194;

Syed Iqbal Hussain v. Mst. Sarwari Begum PLD 1967 Lah. 1138 and Karuidan Sarda and another v. Sailaja Kanta Mitra AIR 1940 Patna 683 ref.

(d) Penal Code (XLV of 1860)---
----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting, armed with deadly weapon and common object---Recovery of weapon---Delayed recovery---Effect---Blood-stained chhuri was recovered and taken into possession after six and half months of the occurrence---Held; blood could not remain on the weapon of offence for such a long period. [Para. 7 of the judgment]

(e) Criminal trial---
----Benefit of doubt---Slightest doubt goes in favour of the accused. [Para. 8 of the judgment]

Kh. Adnan Zia for Appellant.
Rana Tassawar Ali Khan, Deputy Prosecutor-General for the State.
Nemo for the Complainant.
Date of hearing: 2nd April, 2019.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---Mushtaq-appellant along with co-accused, namely Zahid, Saleem and Nazeer (since acquitted) was tried by the learned Additional Sessions Judge, Renala Khurd District Okara in case FIR No.313/2010 under sections 302, 148 and 149, P.P.C., Police Station Chuchak Tehsil Ranala Khurd and vide judgment dated 29.06.2013 while acquitting the co-accused, the learned trial Judge convicted the appellant under section 302(b), P.P.C. and sentenced him to imprisonment for life as 'Tazir' along with payment of Rs.2,00,000/- (two lac rupees) as compensation to the legal heirs of deceased-Rustam Zaman, recoverable as arrears of land revenue. In case of non-payment, he shall further undergo six months simple imprisonment. Benefit of section 382-B of Cr.P.C. was extended.

2. Being aggrieved with his above conviction and sentence, the appellant has filed instant appeal.

3. Brief facts of the case, gist of prosecution story, stance of learned counsel for the appellant and the prosecution has already been narrated in detail in the impugned judgment of learned trial Court; hence, there is no need to mention the same here.

4. I have heard learned counsel for the appellant as well as learned Deputy Prosecutor General and examined the record with their able assistance.

5. In this case, the occurrence was taken place on 18.8.2010, at 10:00 p.m. (night) and two witnesses namely Nayyar Gill/PW.8 and Abdul Ghafoor/PW.9 were produced. The cross-examination of PW.9-Abdul Ghafoor was reserved but he did not appear before the Court for the purpose of cross-examination and the trial Court declared that his testimony is left out of consideration and only the statement of PW.8 to the extent

of ocular account is left with the prosecution. His testimony is not confidence inspiring due to the following reasons:-

i. Although, as per prosecution stance, occurrence in this case was taken place on 18.8.2010 at 10:00 p.m. (night) and FIR was registered at 12:30 a.m. (night), it is a night occurrence and no electric bulb has been taken into possession by the Investigating Officer to establish that the bulb was fitting and unless the bulb is not taken into possession, in the light of judgment of apex Court of the Country it could not be believed that the light was available there.

ii. The deceased succumbed to the injuries at the place of occurrence and the occurrence was taken place, as earlier stated, at 10:00 p.m. (night) and FIR was registered at 12:30 a.m. (night) but the postmortem of the deceased was conducted on 19.08.2010 at 10:30 a.m. at District Headquarter City Hospital, Okara and normally in the District Headquarter Hospitals, doctors are available 24 hours but Dr. Shah Nawaz while appearing as PW.2 stated that the dead body was arrived at 10:00 a.m. It does not appeal to reason, if FIR was registered at 12:30 a.m. night why the dead body was kept with the complainant or police for continuously 10 hours and possibility could not be ruled out that it was a night occurrence, none had seen the occurrence and the dead body was recovered in early hours of the morning, FIR was registered by ante-time and for the same reason, dead body was dispatched and received in the hospital after considerable delay. An important aspect in the opinion of the doctor/PW.2 is that he stated probable time between injury and death within half hour to one hour. It means the deceased was alive for about one hour after receiving the injuries and if PW.8-Nayyar Gill, who is real son of the deceased, was present at the place of occurrence then his natural conduct must be to save the life of his father and for saving the life, he had to take the injured-father to the hospital immediately but as per prosecution case and FIR (Ex.PA), no such effort was made by PW.8 or any other witness at the relevant time. Another most important aspect of the case is that two witnesses namely Mikal and Bashir, who identified the dead body, as per statement of the doctor/PW.2 were not present at the time of postmortem to identify the dead body as he stated that:-

"Mikal and Basir PW did not appear before me at the time of post mortem examination of dead body. However, I maintained their names in relevant column on the basis of entries contains in police papers."

All these facts lead me to irresistible conclusion that it was a night occurrence, none had seen the occurrence, FIR was registered ante-time with deliberation and consultation.

6. Although, the complainant of FIR (PW.8) attributed a specific role of causing injury to the deceased and as per FIR, the witnesses were present at the place of occurrence before the injury was attributed by the convict/appellant but Abdul Ghafoor, while appearing as PW.9 in the witness box did not attribute any injury to the convict/appellant and his role as attributed by PW.9 could not be distinguished from the other accused, who have been acquitted from the charge. This witness was neither declared hostile nor got cross-examined by the prosecution; hence, it is to be presumed that his statement i.e. not attributing specific injury to convict/appellant was not challenged by the prosecution and when any witness is not supporting the

prosecution and he is not declared hostile by the prosecution then accused is entitled to get benefit of doubt resulted in his acquittal. In this regard, I am fortified by the judgment reported in the case "Osimuddin Sarkar v. The State" (PLD 1961 Dacca 798), "Tiloo and 3 others v. The State" [2007 YLR 239 (Karachi), "Said Munir and another v. The State" [PLD 1964 (W.P.) Peshawar 194], "Syed Iqbal Hussain v. Mst. Sarwari Begum" (PLD 1967 Lahore 1138) and "Karnidan Sarda and another v. Sailaja Kanta Mitra" (AIR 1940 Patna 683).

7. Although, weapon of offence i.e. Chhuri-P.3 was recovered and was taken into possession through recovery memo (Exh.PH) on 02.3.2011 after the arrest of convict/appellant by PW.10-Maqsood Akhtar-SI/I.O. who stated that weapon of offence was stained with blood but astonishingly it could not be believed as occurrence was taken place on 18.8.2010 and weapon of offence was recovered on 02.3.2011 i.e. after about six and half months and for such a long period, the blood could not remain on the weapon of offence. This fact also creates doubt qua the recovery proceedings.

8. For what has been discussed above, I found sufficient doubts and dents in the prosecution story which makes its case highly doubtful and the benefit of doubt even how slightest always goes in favour of the accused. Hence, this appeal is allowed and the appellant is acquitted from the charges levelled against him. He be released forthwith if not required in any other case. Case property, if any, be disposed of in accordance with law. Lower court record be returned immediately.

SA/M-101/L Appeal allowed.

P L D 2019 Lahore 373
Before Muhammad Qasim Khan, Sayyed Mazahar Ali Akbar Naqvi, and Ch.Abdul Aziz, JJ
Mst. NAZIA---Petitioner
Versus
STATE through S.H.O. and others---Respondents

Office Objection Diary No.245164 of 2018, decided on 18th March, 2019.

(a) Constitution of Pakistan---
----Art. 199---Constitutional petition---Maintainability---Locus standi of petitioner---For initiation of proceedings under Art.199 of the Constitution it was sine qua non that the petitioner should have locus standi, i.e. petitioner should be an aggrieved party from the impugned action.
Mian Fazal Din v. Lahore Improvement Trust, Lahore PLD 1969 SC 223 and Dr. Imran Khattak and another v. Ms. Sofia Waqar Khattak, PSO To Chief Justice and others 2014 SCMR 122 ref.

(b) Criminal Procedure Code (V of 1898)---
----S. 154---Penal Code (XLV of 1860), S.365-B---Constitution of Pakistan, Art. 199---Constitutional jurisdiction of the High Court---Scope---Quashing of FIR---'Aggrieved person'---Whether an abductee or prosecution witness of an FIR could seek quashing of FIR in Constitutional jurisdiction of the High Court---Held, that petitioner (abductee) or any witness of the FIR, could not be termed as "aggrieved party" as by no stretch of imagination it could be said that any of their Fundamental Rights were infringed by registration of FIR; or that they had suffered any loss; or that they had been wrongfully deprived or refused something which they were legally entitled to, or any restriction had been imposed upon them---Abductee/witness did not fall within the definition of "aggrieved party" to maintain a writ petition to seek quashing of FIR---Office objection regarding maintainability of Constitutional petition was upheld in circumstances.
Ch. Zulfiqar Ali Vahla for the Petitioner.
Rana Tassawar Ali Khan, Additional Advocate General and Ch. Sarfraz Ahmad Khatana, Deputy Prosecutor General on court's call.

ORDER
Mst. Nazia (petitioner) who is an abductee of case FIR No.565/2018 registered under section 365-B, P.P.C. at Police Station Ferozewala, District Sheikhupura, through the instant writ petition has sought quashing of said FIR on multifarious grounds, but the office has raised objection on maintainability of constitutional petition for quashing of FIR, by an abductee/witness. This is the precise question before us.
2. We have heard the respective arguments of learned counsel for the parties.
3. Although the jurisdiction of this court under Article 199 of the Constitution in the matters relating to quashing of FIRs, is almost settled, but leaving that aspect aside, we would confine ourselves to the legal question (objection) before us. There can be no difference of opinion that jurisdiction of this Court is conceived and regulated

through Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 and it is sine qua non for initiation of proceedings under Article 199 of the Constitution that the petitioner should have a locus standi to institute the proceedings or in other words the petitioner should be an aggrieved party from the impugned action. Pivotal judgment of the apex Court on this issue is "Mian Fazal Din v. Lahore Improvement Trust, Lahore" (PLD 1969 SC 223). In another case titled "Dr. Imran Khattak and another v. Ms. Sofia Waqar Khattak, PSO To Chief Justice and others" (2014 SCMR 122) the Hon'ble Supreme Court of Pakistan held as follows:

"It would exercise such jurisdiction under Article 199(1)(a)(i), (ii) and (c) on the application of an aggrieved person while under 199(1)(b)(i) & (ii) on the application of any person whether aggrieved or not, and not on an information or on its own knowledge. In the case of "Tariq Transport Company, Lahore v. Sargodha Bhera Bus Service and others" (PLD 1958 SC (Pak) 437), this Court held that a High Court was not competent merely on an information or on its own knowledge to commence certiorari proceedings or other proceedings of a similar nature under Article 170 of the Constitution of Islamic Republic of Pakistan, 1956. In the case of "Fazl-e-Haq, Accountant General, West Pakistan v. The State" (PLD 1960 SC (Pak) 295), this Court reiterated the view by holding that the extraordinary jurisdiction relating to a writ could only be exercised by the High Court when moved by a party whose legal rights have been denied"

Moreover, in "Hafiz Hamadullah v. Saifullah Khan and others" (PLD 2007 SC 52) the apex Court held as follows:
"With regard to the first objection it may be noted that under Article 199(1)(a) of the Constitutional jurisdiction of the High Court can be invoked by an aggrieved person which denotes a person who has suffered a legal grievance, against whom a decision has been pronounced which has wrongfully deprived him or wrongfully refused him something which he was legally entitled to. It is also the requirement that the person invoking the constitutional jurisdiction under Article 199 of the Constitution has to establish that any of his legal or fundamental right guaranteed under the Constitution has been violated resulting in legal loss"

On the above touchstone, the learned counsel were specifically asked as to how the petitioner is aggrieved of registration of an FIR, wherein, she is alleged to be an abductee or may also be called as prosecution's star witness but surely not an accused of the occurrence reported therein, but the learned counsel have not been able to come out with any answer. We are however convinced that petitioner (abductee) or any witness of the FIR, cannot be termed as "aggrieved party" as by no stretch of imagination it can be said that any of their fundamental right is infringed by registration of FIR; they have suffered any loss; they have been wrongfully deprived or refused something which they were legally entitled to, or any restriction has been imposed upon them. Consequently, we hold that abductee/witness do not fall within the definition of "aggrieved party" to maintain a writ petition to seek quashing of FIR. The office objection, therefore, is upheld.
MWA/N-10/L Office objection upheld.

P L D 2019 Lahore 380
Before Muhammad Qasim Khan, Sayyed Mazahar Ali Akbar Naqvi, and Ch.Abdul Aziz, JJ
Mst. FARHAT BIBI---Petitioner
Versus
STATION HOUSE OFFICER and others---Respondents

Office Objection Diary No.220363 of 2018, decided on 18th March, 2019.

(a) Criminal Procedure Code (V of 1898)--
----S. 154---Penal Code (XLV of 1860), S. 365-B---Constitution of Pakistan, Art. 199---Constitutional jurisdiction of the High Court---Scope---Quashing of FIR---'Aggrieved person'---Whether an abductee or prosecution witness of an FIR could seek quashing of FIR in Constitutional jurisdiction of the High Court---Held, that an abductee/witness of an FIR, was not an "aggrieved party" within the meaning of Art. 199 of the Constitution, as such, writ petition filed for quashing of same FIR on their behalf was not maintainable.

(b) Criminal Procedure Code (V of 1898)-
----Ss. 154 & 497---Constitution of Pakistan, Art. 199---Quashing of FIR in constitutional jurisdiction of the High Court---Scope---Office objection requiring the petitioner to bring on file bail granting order before seeking quashing of FIR through Constitution petition---Legality---Obtaining bail from a court of competent jurisdiction before approaching the High Court in its constitutional jurisdiction for quashing of FIR may be a practice for facility or preference but surely it was not a requirement of any law.

Afrasiab Mohal for Petitioner.
Rana Tassawar Ali Khan, Additional Advocate General and Ch.Sarfraz Ahmad Khatana Deputy Prosecutor General on court's call.

ORDER
Mst. Farhat Bibi (petitioner) who is an abductee of case FIR No.178/2018 registered under section 365-B, P.P.C. at Police Station Shah Pur Sadar, Sargodha, through the instant writ petition has sought quashing of said FIR on multifarious grounds, but the office has raised objection on maintainability of constitutional petition for quashing of FIR without bringing on file the copy of bail granting order.

2. We have heard the respective arguments of learned counsel for the parties.

3. This court in another Office Objection No.245164 of 2018 "Mst. Nazia v. State through SHO, etc." (PLD 2019 Lahore 373) vide an order of even date has held that abductee/witness in an FIR, is not an "aggrieved party" within the meaning of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, as such, writ petition for quashing of same FIR on their behalf is not maintainable. However, in the instant case office has not raised same objection, rather has raised an objection requiring the

petitioner (irrespective whether he/she is abductee, witness or accused) to bring on file copy of bail granting order before approaching this court to seek quashing of FIR through writ petition. We are afraid, though it may be a practice for facility or preference but surely it is not the requirement of any law that petitioner before approaching this court in its constitutional jurisdiction for quashing of FIR may firstly obtain bail from a court of competent jurisdiction.

4. For what has been discussed above, the office objection being alien in the scheme of law, is not sustainable and is overruled.

MWA/F-10/L Office objection overruled.

PLJ 2019 Cr.C. (Note) 13
[Lahore High Court, Lahore]
***Present*: MUHAMMAD QASIM KHAN, J.**
IMDAD HUSSAIN and 4 others--Petitioners
versus
STATE and another—Respondents

Crl. Misc. No. 243438-B of 2018, decided on 5.11.2018.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 367, 341, 337-A(i), 337-L(ii) 147, 149--Pre-arrest bail--Confirmation of--Ingredients of an offence u/S. 367 are not made out--Remaining offences are bailable--No weapon was used during alleged occurrence--No recovery--Attempt of the police to arrest the petitioners in offences which are otherwise bailable is sufficient to infer *mala fide* and ulterior motives of the police--Bail was granted. [Para 2(v)] A

Mr. Faisal Shehzad Gondal, Advocate with Petitioners.
Mr. Azhar Warraich, Advocate for Complainant.
Mr. Muhammad Amjad Rafiq, Additional Prosecutor General for State.
Date of hearing: 5.11.2018

ORDER

Petitioners (Imdad Hussain, Tanyeer, Ishtiaq Ahmad, Imran Khan and Abdul Qadeer) seek pre-arrest bail in case FIR No. 424/2018 dated 27.09.2018 under sections 367, 341, 337-A(i), 337-L(ii), 147, 149 PPC Police Station Phalia, Mandi Bahau Din.

2. After hearing the learned counsel for the parties at considerable length and examining the available record, it has been observed that:--

(i) Although the petitioners are nominated in the FIR but from the contents of the FIR itself the ingredients of an offence under Section 367, PPC are not made out, as according to the narration of the FIR the victim was taken in a nearby place which was only at some distance. The case *"Sajid Salem and others versus The State"* (2001 P.Cr.L.J. 1168) is referred.

(ii) All of the remaining offences with which the petitioners are charged, are bailable offences;

(iii) During the course of investigation it has been opined that no weapon was used during the alleged occurrence nor any thing was snatched from the complainant party;

(iv) When according to the Investigating Officer himself no weapon was used and further nothing was taken from the complainant party during the occurrence, then there is nothing to be recovered from the petitioners;

(v) The attempt of the police to arrest the petitioners in offences which are otherwise bailable is sufficient to infer *mala fide* and ulterior motives of the police.

3. For what has been discussed above, this petition is allowed and interim pre-arrest bail earlier granted to the petitioners is hereby confirmed subject to their furnishing fresh bail bonds in the sum of Rs. 1,00,000/- each with one surety each in the like amount to the satisfaction of learned trial Court.

(M.M.R.) Bail confirmed

PLJ 2019 Cr.C. 227
[Lahore High Court, Multan Bench]
Present: **MUHAMMAD QASIM KHAN, J.**
GHULAM SARWAR KHAN--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 3251-B of 2017, decided on 11.7.2017.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Emigration Ordinance, 1979, S. 17/22--Pre-arrest Bail--Confirmation of--Compromise between parites--Complainant, Present before the Court, identified by the inspector FIA in attendance, submits that he has effected a compromise with the petitioner and has no objection on confirmation of his pre-arrest bail--As the parties have effected the compromise and prime-facie, it will bring peace and harmony among the society; hence, petition is allowed--Pre-arrest bail confirmed. [P. 228] A & B

Mr. Abdul Qayyum Rao, Advocate for Petitioner.
Mr. Najaf Ali Mahey, Assistant Attorney General for State.
Complainant in person identified by Inspector FIA, present before the Court.
Date of hearing: 11.7.2107.

ORDER
Petitioner seeks pre-arrest bail in case FIR No. 108/2016 registered under Section 17/22 Emigration Ordinance, 1979 at Police Station FIA Circle, Multan.

2. At the very outset, Saifullah, complainant, present before the Court, identified by the Inspector FIA in attendence, submits that he has effected a compromise with the petitioner and has no objection on confirmation of his pre-arrest bail. In this regard, he also submitted his affidavit. Same be placed on file as ***"Mark-A"***.

3. On Court query the complainant admitted that affidavit ***"Mark-A"*** was executed under his instructions and in taken of its correctness, at the end of same, he thumb marked the same.

4. Head. Record perused.

5. As the parties have effected a compromise and *prima-facie*, it will bring peace and harmony among the society; hence, this petition is allowed and interim pre-arrest bail already granted to the petitioner is confirmed subject to furnishing fresh bail bond in the sum of Rs. 1,00,000/- (one lac) with one surety in the like amount to the satisfaction of learned trial Court.

(J.I.) Bail confirmed

PLJ 2019 Lahore 271 (DB)

[Rawalpindi Bench Rawalpindi]

***Present*: MUHAMMAD QASIM KHAN AND MUHAMMAD TARIQ ABBASI, JJ.**

AHMAD KHAN--Petitioner

versus

ADDITIONAL SESSIONS JUDGE, TALAGANG and 4 others—Respondents

W.P. No. 2531 of 2018, decided on 19.2.2019.

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

----S. 435--Standing Medical Board--Revisional Jurisdiction--An Executive order--Petitioner filed an application before learned Judicial Magistrate, for constitution of Medical Board for re-examination of injured, said application was dismissed, where-after, a criminal revision filed by petitioner also met same fate *vide* order passed by learned Additional Sessions Judge-Dismissing application for constitution of medical board, is administrative order and thus not revisable under Section 435, Cr.P.C.--An order of Judicial Magistrate allowing or dismissing an application for medical re-examination of injured being an executive order, is not amenable to revisional jurisdiction-both injured persons were medically examined almost seven months ago, injuries sustained by victims are covered under Sections 337-F(i), 337F(ii) and 337-L(ii), PPC, after such long with all probability wounds must have healed up, therefore, it would be a futile effort to get them medically re-examined at this belated stage. [Pp. 273 & 278] A & D

2010 YLR 2772; 2010 PCrLJ 1799; PLD 2007 Lahore 176; PLJ 1997 Lahore 1568; 2017 MLD 1828; 2010 YLR 2772; 2010 PCrLJ 1799; PLJ 2001 Cr.C (Lahore) 355; 1984 PCrLJ 2588; PLD 1985 SC 62; 2004 MLD 1401, *ref*.

Powers of Magistrate--

----Under Criminal Procedure Code a Magistrate is entrusted with diverse duties and in discharging same, does not always function as a Court, conducts judicial proceedings or is amenable to revisional jurisdiction--Some of his powers and duties under Code are administrative, executive or ministerial and he discharges these duties not as a Court but as a persona designata--Mere name or designation of a Magistrate is not decisive of question because at some times Magistrates perform their duties by applying their judicial minds but these proceedings are administrative in nature and some time their orders are judicial orders and guiding principles have been settled by superior Courts in this respect.

[P. 276] B

Executive Order--

----Re-examination of injured persons--Revisional jurisdiction--An order of Judicial Magistrate allowing or dismissing an application for medical re-examination of injured being an executive order, is not amenable to revisional jurisdiction--Petition was dismissed.

[P. 278] C

Mr. Saad Bin Safdar, Advocate for Petitioner.
Mr. Zaheer Ahmad Malik, Advocate for Respondents.
Mr. Qaisar Abbas Shah, Assistant Advocate General.
Mr. Ansar Nawaz Mirza, Advocate as amicus curiae.
Date of hearing: 19.2.2019

ORDER

The facts relevant for the decision of instant writ petition are that Mehr Bhari/Respondent No. 3 got lodged an FIR No. 67/2018 dated 1.9.2018 against Ahmad Khan (petitioner) and others, for offences under sections 337-F(i), 337-F(ii), 337-L(ii), 34 PPC at police station Lawa, Tehsil Talagang, alleging that she as well as her daughter Sharifan Khatoon were inflicted injuries by the accused persons with their respective weapons. Sharifan Khatoon and Mehr Bhari were medically examined on 22.7.2018 through MLC No. 318/2018 and MLC No. 319/2018, respectively. The petitioner was of the view that injuries were self inflicted, as such, he filed an application before the learned Judicial Magistrate Section 30-Talagang, for constitution of Medical Board for re-examination of both the injured, the said application was dismissed *vide* order dated 12.09.2018, where-after, a criminal revision filed by the petitioner also met the same fate *vide* order dated 17.09.2018 passed by learned Additional Sessions Judge, Talagang, by observing that the order of learned Judicial Magistrate dismissing application for constitution of medical board, is administrative order and thus not revisable under section 435 Cr.P.C. In support of his observations the learned Additional Sessions Judge placed reliance on *"Mehmood Ali versus Khadim Hussain alias Bagh Ali and 3 others"* (2010 YLR 2772) and *"Muhammad Shafi versus Munir Ahmad and another"* (2010 P.Crl.L.J.1799)

2. The above two orders have been assailed through the instant writ petition and the learned counsel for the petitioner while arguing the case referred the case *"Muhammad Iqbal versus Additional Session Judge, Khanewal and another"* (2004 MLD 1401) and contended that in this cited judgment, it has been held that criminal revision filed against an order of Magistrate refusing to constitute a Medical Board, is revisable. Since on the same question of law divergent views of this Court were available, therefore, pursuant to the order dated 25.10.2018 the learned Single Bench referred the matter to the Hon'ble Chief Justice, as a result whereof, the same was ordered to be listed before the Division Bench, hence, this order.

3. We have heard the arguments of learned counsel for the private parties, the learned law officer as well as the learned amicus curiae and also examined the case law cited from respective sides. The gist of cases, wherein, under specific facts and circumstances the orders passed by the Magistrate have been held to be judicial orders, is given below:--

i. *"Muhammad Iqbal versus Additional Session Judge, Khanewal and another"* (2004 MLD 1401).

This is a case wherein, application for constitution of Medical Board to re-examine the injured moved after 26 days of the medical examination, was dismissed on the ground that after such long time medical board could not be constituted for re-examination; a revision filed against said order was allowed by Additional Sessions Judge. The revisional order was assailed before this Court on the ground that order passed by Ilaqa Magistrate being an executive order, no revision could be filed, but this argument was rejected and writ petition was dismissed.

ii. *"Mansab Ali versus Asghar Ali Faheem Bhatti and 3 others"* (PLD 2007 Lahore 176)

In this case application for exhumation of grave was dismissed by the Judicial Magistrate, where-against a revision was filed, which was allowed by remanding the case. In post remand proceedings, the said application was accepted by the Judicial Magistrate, which order was again challenged in criminal revision and the same was dismissed by learned Additional Sessions Judge, where-after, a writ petition filed before this Court, was also dismissed. This matter was about exhumation of graveyard and proceedings were carried out under section 176 Cr.P.C., thus the facts of the said case are clearly distinguishable from the facts of the instant case.

iii. *"Muhammad Anwar versus Dr. Ghulam Murtaza"* (PLJ 1997 Lahore 1568).

This is a case wherein, the matter was directly brought to the High Court through writ petition and in the light of relevant notifications it was held that District Medical Board can only examine such cases on judicial orders of District Magistrate, but no parameters or differences between the judicial or executive orders were discussed.

iv. *"Muhammad Rizwan versus The State and others"* (2017 MLD 1828)

In this case, application for medical examination of the injured had been turned down by the Magistrate and the criminal revision filed against said order was dismissed by Additional Sessions Judge on the ground of maintainability, however, both the above orders were set-aside by this Court, but the question whether the order of Magistrate is judicial or an executive order and whether criminal revision is maintainable or not, was not discussed in this case and only the question of limitation for moving an application for re-examination of injured, was discussed.

Following are that cases wherein, the orders passed by the Courts have been declared to be executive orders:--

i. *"Mehmood Ali versus Khadim Hussain alias Bagh Ali and 3 others"* (2010 YLR 2772)

In the cited case, application for re-examination of the injured was dismissed by Judicial Magistrate and criminal revision filed before Additional Sessions Judge had been turned down, where-after, writ petition was filed before this Court on the ground that order passed by the Ilaqa Magistrate is executive

order and could not be assailed through revision petition. The writ petition was dismissed but no reasons for it being a judicial order were discussed and the writ petition was decided on the ground that learned counsel for the petitioner could not establish that the order of Magistrate is executive order. It appears that the said writ petition was dismissed in limine, as neither the state was represented nor any counsel for other respondents has been marked present.

ii. *"Muhammad Shafi versus Munir Ahmed and another"* (2010 P.Cr.L.J. 1799)

This is a case wherein the Magistrate had allowed the injury sustained by the complainant to be verified by the Medical Board. The said order was however, set-aside by Sessions Court while allowing a criminal revision. Ultimately this Court while accepting Criminal Miscellaneous application, set-aside the order of the Sessions Court by holding that the order of Magistrate being an administrative order could not be challenged through a revision petition.

iii. *"Nasreen Bibi versus Nazeer Ahmad and another"* (PLJ 2001 Cr.C (Lahore) 355).

In this case, when police applied for remand of an accused, the Magistrate converted offence from 354 PPC to 354-A PPC, which order was challenged in criminal revision which was allowed by Additional Sessions Judge and the order of the Magistrate was set-aside. This Court however, while allowing Criminal Miscellaneous application quashed the order of Additional Sessions Judge, by holding that revision against the said order of the Magistrate was not maintainable and that power of revision could be exercised only when a proceeding is pending before any inferior criminal Court

4. After going through the above case law, there remains no doubt that under the Criminal Procedure Code a Magistrate is entrusted with diverse duties and in discharging the same, does not always function as a Court, conducts judicial proceedings or is amenable to the revisional jurisdiction. Some of his powers and duties under the Code are administrative, executive or ministerial and he discharges these duties not as a Court but as a persona designata. Mere name or designation of a Magistrate is not decisive of the question because at some times the Magistrates perform their duties by applying their judicial minds but these proceedings are administrative in nature and some time their orders are judicial orders and the guiding principles have been settled by the superior Courts in this respect.

5. After careful study of case law on the subject, especially the case *"Bahadur and another versus The State and another"* (PLD 1985 Supreme Court 62) and the definitions provided in Black's Law Dictionary VIth Edn, we can further summarize the situation in the manner that while drawing bifurcation between the two orders, whether the same are judicial or administrative in nature, the Court must keep in mind the following conditions:--

Traits of Judicial Order.

(i) There must be power to hear and determine a controversy;

(ii) There must be power to make a binding decision (sometime subject to appeal) which may affect the person or property or other rights of the parties involved in the dispute;
(iii) It must involve the doctrine of res-judicata which has been held not to apply to the exercise of administrative powers;
(iv) It must touch the doctrine of functus officio which has been held not to apply to prevent the exercise of administrative powers;
(v) It must be binding and conclusive in so far as it cannot be impeached in collateral proceedings and it cannot in general be rescinded by the tribunal itself.

Traits of Administrative Order.

(i) Administrative functions consist of those activities which are directed towards the regulation and supervision of public affairs and the initiation and maintenance of the public services;
(ii) An administrative order is potentially open to attach for any material error of law or fact in either direct or collateral proceedings;
(iii) It cannot constitute res-judicata;
(iv) It may always be rescinded by the body making it.

Now, when we gauge the impugned order dismissing the application for re-examination of an injured, on the touchstone of above criterion, there remains no ambiguity that it definitely falls in the second category i.e. administrative order, for the reason that while passing such an order by the Court, definitely no lis was pending before the learned Judicial Magistrate, he was not functioning as criminal Court, it was not obligatory for the said Magistrate to hear the parties before making such an order, there was no conclusive decision given and, no finality or irrevocability was attached to it. As such, the order passed by the Ilaqa Magistrate was clearly missing the necessary characteristics of being a judicial order, as a consequence whereof; against the same order the revisional jurisdiction was not available to the learned Additional Sessions Judge.

6. So far as the case *"Muhammad Aslam, etc versus The State"* (Writ Petition No. 3780 of 2010) authored by one of us, is concerned, I have gone through the entire judgment and observe that the same was based on a judgment reported as *"Ghulam Sarwar and another versus The State"* (1984 P Cr. L J 2588), wherein, with reference to physical remand order, certain guidelines were setforth, including that the Magistrate shall forward a copy of his order passed under section 167, Cr.P.C. to the Sessions Judge concerned and the Sessions Judge could examine the same under section 439-A Cr.P.C. From perusal of this judgment, it appears that as liberty of the citizen is an important consideration under the law, during investigation delivering custody of the accused to the police, the Magistrates have to be more conscious and it was directed in the judgment that copy of physical remand order be sent to the Sessions Judge and under section 439-A Cr.P.C. read with section 435 Cr.P.C. when record of any proceedings is available

before the Sessions Judge, he could examine its legality and propriety, etc. Therefore, the case referred by the learned counsel for the petitioner has arisen out of specific facts and circumstances, thus, has no binding impact on the facts of the case in hand.

7. For what has been discussed above, we are convinced that an order of Judicial Magistrate allowing or dismissing an application for medical re-examination of the injured being an executive order, is not amenable to revisional jurisdiction. Thus, the order dated 17.09.2018 passed by the learned Additional Sessions Judge, Talagang dismissing the criminal revision filed against the order of the Judicial Magistrate dated 12.09.2018 dismissing application for constitution of medical board, is held to be based on perfect application of law. The instant writ petition is dismissed.

8. Apart from above legal position, it is observed that the alleged occurrence took place on 01.09.2018, both the injured persons were medically examined on 22.07.2018 and now almost seven months have passed, the injuries sustained by the victims are covered under sections 337-F(i), 337F(ii) and 337-L(ii) PPC, after such long with all probability the wounds must have healed up, therefore, it would be a futile effort to get them medically re-examined at this belated stage. However, during the trial the doctor who had medically examined these victims must be appearing before the learned trial Court, where the accused party would have ample opportunity to cross-examine him on the above aspects.

(K.Q.B.) Petition dismissed

PLJ 2018 Cr.C. 911

[Lahore High Court, Lahore]

Present: **MUHAMMAD QASIM KHAN, J.**

MUHAMMAD JAWAD HAMID--Petitioner

versus

Mian **MUHAMMAD NAWAZ SHARIF, etc.—Respondents**

Crl. Rev. Nos. 9027 & 7067 of 2017, heard on 27.6.2018.

Anti-Terrorism Act, 1997 (XXVII of 1997)--

----S. 7--Pakistan Penal Code, (XLV of 1860), Ss. 302/324, 295-B/452, 395/427--Non summoning order--challenge of--Maintainability of criminal revision petition--A private complaint was filed petitioner before Special Court wherein, 139 persons were cited as accused;After recording cursory evidence, the Respondents No. 13 to 138, were summoned and Respondents No. 1 to Respondents No. 12, were not summoned--petitioner challenged the order. [P. 922] A

Criminal Revision--

----Maintainability of criminal revision petition under Anti-Terrorism Act, 1997--both the petitions had initially filed respective writ petitions to raise their grievances, but this Court held that against an interim order passed by a Court under Anti-Terrorism Act, 1997, writ petition is not maintainable, as under Anti-Terrorism Act, 1997, applicability of Sections 435 and 439 of the Code has not been restricted, except under Section 21(d) to the extent of bail, hence, criminal revisions were competent, therefore, on our direction the writ petitions were converted into criminal revision. [P. 923] B

Partial Summoning of Accused--

----The Court may summon only a few accused and refuse to summon certain number of accused persons--In case where some of the "persons complained against" are not summoned, the said order to that extent also amounts to partial dismissal of the complaint. [P. 925] C

AIR 1929 Bombay 436 *ref.*

Judicial Order--

----The order passed under Section 203 and 204 of the Code is a judicial order. [P. 926] D

PLD 2016 SC 55 *ref.*

Non Summoning Order/Discharge Order--

----The order passed under Section 203 of the Code cannot be held as autrefois or statutory acquittal--At the most, dismissal of the complaint as a whole or non-summoning of some of the persons complained against may have the effect of discharge--The complainant, at his own option, may file a subsequent fresh complaint on same allegations by adding some new facts/grounds and mentioning any new

material/evidence which earlier were not in his knowledge or the complainant was not in a position to bring them on record. [P. 926] E
PLD 2011 FSC 121; 2015 PCr.LJ 784; 2018 PCr.LJ 771 *ref.*

Right of Audience--
----The right of audience of the "persons complained against" in case where complaint is dismissed under Section 203 of the Code as a whole or to the extent of some of the persons complained against--It is well settled law that until process is issued, the person complained against does not have the status of an accused and has no right of audience before the trial Court or before a superior Court at the pre-process stage--in case of dismissal of complaint by the Magistrate under Section 203 of the Code accused has no right to appear before the Sessions Judge when he orders further inquiry and no notice need, therefore, be given in such case. [P. 926] F
PLD 1972 Lah 185; 1985 CrLJ. 1309; 1993 (1) KLT (Madras); AIR 1929 Patna 230; AIR 1935 Pesh 14; 2007(1) MPHT 431; 1985 Cr.LJ 1309 *ref.*

Criminal Revision--
----Sections 435, 436 and 439, Criminal Procedure Code, (V of 1898)--The power of the High Court under Section 439, of the Code is very wide and it could revise the proceedings or orders passed by any of the inferior criminal Courts in the exercise of its Revisional jurisdiction in an appropriate case. [P. 927] G
1979 PCr.LJ 372; PLD 1996 Karachi 306 (DB) *ref.*

Prima Facie Case--
----In a complaint case, trial Court is not required to examine material minutely and or in depth, but has merely to see that prima facie a case has been made out to proceed further with the matter for issuance of warrant or summons--The two expressions i.e. existence of sufficient ground and *prima-facie* case (used in Section 204 of Cr.P.C.) have interchangeably been construed by the Courts--process u/Ss. 202 and 204 of the Code depends upon the availability or non-availability of sufficient incriminating material--the frivolous and vexatious complaints must be buried at their inception where no prima facie case is made out--At the stage of consideration of the private complaint the Court is not expected to see whether the allegations are likely to be proved by the materials produced before Court. [P. 931] H
PLD 2016 SC 55; 2010 SCMR 105; PLD 2007 SC 9; PLD 2009 Lah 444; AIR 1931 Cal. 607; 2010 SCMR 194; 2000 SCMR 1904; 2004 (2) KLT 53 *ref.*

Cognizance in Private Complaint--
----Following main aspects which may be taken into consideration by the Courts while taking cognizance of the private complaint:-
(a) Mere summoning a necessary party to explain the allegations levelled against him, does not tantamount to infringement of any right; rather opportunity is afforded to him to explain his position.
(b) In a complaint case at pre-trial stage, trial Court is not required to examine the material minutely or in depth but is merely to see that prima facie case has been made out to proceed further in the matter of issuance of process or summons.

(c) High Court cannot strangulate the trial by over stretching its jurisdiction and embark upon to examine adequacy or inadequacy of evidence, which stage will only reach after charge is framed and complainant is given opportunity to prove his case beyond any reasonable doubt.

(d) At the stage of consideration of private complaint, the Court is not expected to see whether the allegations are likely to be proved by the material produced before the Court.

(e) Until the process is issued to the accused a person shown as person complained against in the complaint does not have a status of accused and has no right of audience before the trial Court or before the superior Courts at pre-process stage.

(f) To take cognizance of offence in complaint case, burden of proof in preliminary enquiry for the issuance of process or summons as the case may be is much lighter on the complainant and he is required to establish prima facie case, whereas, the burden of proof placed on the prosecution during regular trial is much stringent and the prosecution is required to establish and prove the case beyond reasonable doubt.

(g) The scope of Section 202 is to separate founded from unfounded--The Court has to satisfy itself as to the truth or falsehood of the complaint before issuing of process to the persons complained against--The object and scope of Section 202 of the Code is:-

(i) To allow free, fair and full opportunity to complainant to produce some material to make out grounds for issuing processes against accused.

(ii) To ascertain the truth or falsehood of the allegations, the Court is bound not only to scrutinize contents of complaint, nature of allegations made therein and material in support of accusation but also to call for record, report or summon any person, who in the opinion of the Court, is acquainted with facts of the case and may be helpful to the Court to "satisfy itself" in terms of Section 202 of the Code or may enquire or investigate the matter as provided in this Section.

(iii) Object intended to be achieved, possibility of victimization and harassment, if any, to ensure himself that no innocent person against whom all allegations are levelled should suffer ordeal of protracted, time consuming and cumbersome process of law.

h) Possibility of accusations turning out to be false or frivolous at the trial should not overbear the Court from issuing the process if material available *prima facie* disclosed the case against the person complained--At this stage protracted inquiry or full dress rehearsal of trial is not required.

(i) At the stage of summoning the accused, Court is not to determine guilt or innocence of the accused on the criteria of evaluating the evidence as to whether prosecution has been able to prove its case beyond reasonable doubt or not and while giving such benefit accused ought to be acquitted, which is beyond the scope of proceedings at the stage of issuance of process after making complaint visualized under Section 202 to 204 of the Code.

(j) For deciding the question as to whether a prima facie case has been made out in an inquiry under Section 202 of the Code the consideration should be from the point of view of the complainant without adverting to any defence which the accused may have--At this stage the accused has no locus standi and is not entitled to be heard

on the question whether process should be issued against him or not. [Pp. 931, 932 & 933] I

Process of Inquiry--
----Process of inquiry or investigation by applying its judicious mind considering the facts and the circumstances of each case--When the Court can direct investigation of a case by Justice of Peace or any police officer or any other person as it thinks fit, the word "as it thinks fit" bound to the Court to apply its mind judiciously. [P. 934] J
PLD 2018 SC 595 *ref.*

Purpose of Inquiry--
----The purpose of inquiry as contemplated in Section 202 of the Code or investigation by a police officer or by "any other person", is only to help the Court to decide whether or not there is any sufficient ground to proceed further on facts of which cognizance had already been taken by it of the offence disclosed in the complaint but issuance of process had been postponed--Section 202 of the Code, confers all powers available to a police officer in charge of a Police Station for purposes of investigation except the power to arrest without warrant--Investigation Officer has vast powers even to arrest an accused without warrants and in the later he has to proceed with limited scope under the control and direction of the Court which had taken cognizance of the case and he is only to submit his report for the purposes of assistance whether the person complained against to be summoned or not and he (Investigation Officer) could not arrest without the permission of the Court.
[Pp. 935 & 936] K & L
2015 AIR (SC) 1742;(1976)3 SCC 736); (SC) 2007(12) SCC 641); (2004(11) SCC 622); (2014(8) ADJ 410); 1993 PCr.LJ 1988 *ref.*

Delay in Filing Complaint--
----Delay simpliciter is of no significance consideration of "delay" in filing of private complaint at the pre-trial stage (of Section 202, 203, of Cr.P.C.) is only relatable to the sufficiency of grounds for summoning and standard of explanation to prove this delay would not be that which is expected at trial stage. [P. 940] M
2013 PCr.LJ 1544; 2007 YLR 2195; 2007 YLR 2195; 2006 YLR 2934; 2005 PCr.LJ 979; 2004 MLD 424; 1986 MLD 2454; 1980 PCr.LJ 243; 2012 PCr.LJ 498; 2008 PLD 441; 1993 PCr.LJ 511; 1989 PCr.LJ 389; 1987 PCr.LJ 1624; 1985 PCr.LJ 349; 1969 PCr.LJ 1532 *ref.*

Duty of the Court--
----It is duty and obligation of the trial Court to scrutinize the contents of the complaint, nature of allegations made therein, material in support of the accusations, the object intended to be achieved, possibility of victimization and harassment and accordingly vexatious and frivolous complaints. [P. 941] N

2010 SCMR 1816, 2000 SCMR 1904, 2017 YLR 533, 2010 PCr.LJ. 575; 2017 YLR 57 *ref.*

Frivolous Complaints--

----In order to hold a complaint as frivolous, malicious or vexatious, following elements must exist:-

i) Where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused.

ii) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

iii) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

iv) Where there is an express legal bar engrafted in any of the provisions of the Code or any other law (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act providing efficacious redress for the grievance of the aggrieved party.

v) Where a criminal proceeding manifestly tainted with *mala fide* and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge and also having no sufficient material in support of allegations.

vi) If the acts of accused or person complained against are protected by the Constitution or any other relevant law for the time being in force.

vii) If the accused or person complained against discharges his legal duties and also obeys the direction, command or order of his superior or any Court, legal authority or tribunal.

viii) Where the concerned Court has fully satisfied after examining all material aspects that in all probability the complainant may not succeed in bringing charge home against the accused.

ix) Where the averments/contents of the complaints/ allegations from any angle are reflecting to the abuse of process of law. [Pp. 942 & 943] O

Evidence of One Case--

----Evidence of one case cannot be read into another case--the analysis of Article 140, 151 and 153 of QSO clearly indicates that there are two purposes for which a previous statement of a witness can be used--One is for cross- examination and contradiction and the other is for corroboration--Section 6 of the Punjab Tribunals of Inquiry Ordinance, 1969 puts embargo upon the use of statement recorded before Tribunal/Commission established under the said Act, against the witness except to prosecute him for giving false evidence before the Tribunal--It may be important to note that Section 6 of the Punjab Tribunals of Inquiry Ordinance, 1969 is pari materia with Section 16 of Pakistan Commissions of Inquiry Act, 2017, Section 6 of the Pakistan Commissions of Inquiry Act, 1956 (Repealed) and Section 6 of Indian Commissions of Inquiry Act, 1952--Since there is very little case on Section 6 of the Punjab Tribunals of Inquiry Ordinance, 1969, therefore, case law available on the

identical provisions of statutes of same nature may be useful to understand its proper scope. [Pp. 950 & 951] P
PLD 1986 SC 146; 1986 SCMR 2018; PLD 1987 Kar. 507; 2008 PCr.LJ 523; PLD 1976 Lah. 1446 *ref.*

Statements of Witnesses--
----The accused before the trial Court were entitled to use the copies of the statement of those prosecution witnesses who were examined before the Thakkar--the statement given before a commission shall not be admissible against the person in any subsequent civil or criminal proceeding save for perjury--such statement cannot be used against such witness in any manner--However, there has been no question ever that the witness examined before the Commission cannot be summoned or produced witness in any subsequent proceedings. [Pp. 952 & 953] Q, R & S
1959 SCMR 279; 1978 CrLJ 1157 *ref.*

Report of Commission/Tribunal--
----The report is a recommendation of the Commission/Tribunal for consideration of the Government--It is the opinion of the Commission based on the statements of witnesses and other material--It has no evidentiary value in the trial of the criminal case--However, the material collected or evidence recorded by the Inquiry Commission (i.e--oral depositions, affidavits, site inspection note, electronic and print media reports etc.) may be used by the prosecution--The trial Court may, on its own motion or at the request of the complainant may call the concerned persons to appear in investigation or inquiry for the purposes of recording of evidence or direct them to produce the relevant documents or to produce the record of electronic and print media and its transcript if require--However, while passing an order under Section 203 or 204 of the Code, the Court has to adjudge the relevance of the material so produced and not its admissibility which is the subject of regular trial. [P. 954] T
AIR 1988 (SC) 1883 *ref.*

Criminal Conspiracy--
The pivotal points relating to the offence of criminal conspiracy:-
(i) An object to be accomplished,
(ii) A plan or scheme embodying means to accomplish that object
(iii) An agreement or understanding between two or more of the accused persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means,
(iv) In the jurisdiction where the statute required an overt act
(v) Essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed,
(vi) Unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence,
(vii) Encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been

impossible, furnish the ground for visiting conspirators and abettors with condign punishment.
(viii) The conspiracy is held to be continued and renewed as to all its members whenever and wherever any member of the conspiracy acts in furtherance of the common design,
(ix) For an offence punishable under Section 120-B, prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement by may be proved by necessary implication,
(x) A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means,
(xi) So long as such a design rests in intention only, it is not indictable--When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, acts contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.
(xii) Essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by the direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available.
(xiii) There is distinction between the conspiracy and offences committed pursuant to conspiracy--Conspirators who did not commit the offence are liable for the offence committed by some of them in execution of the common design.
(xiv) Exact when the conspiracy was hatched can be spelled out--It is not always possible "to give affirmative evidence" about the date of formation of the criminal conspiracy." [Pp. 958, 959 & 960] U
2002 AIR (SC) 1661; AIR 2005 SC 128; AIR 2005 SC 3820 *ref.*

Qanun-e-Shahadat Order, 1984 (10 of 1984)--
----Art. 23--Things said or done by conspirator in reference to common design--As far as commitment between two or more persons who have conspired together to commit an offence etc., is concerned it is a relevant fact as against each of the persons believed to be so conspiring as well as for the purpose of proving the existence of the conspiracy as far as the purpose of showing that any such person was a party to it within the meaning of Article 23 of Qanun-e-Shahadat Order, 1984. [P. 964] V
2001 SCMR 424; PLD 1979 SC 53; PLD 2002 Kar 152; PLD 1989 SC 519; PLD 2016 SC 951; PLD 2005 SC 530; AIR 1957 SC 747; 1957 CrLJ 1325; 1976 CrLJ 860; AIR 1987 SC 1265 *ref.*

F.I.R.--
----FIR is not substantive piece of evidence, it is just information of an offence--It is not requirement of law that the complaint should provide full details to canvass the whole scene of the occurrence, describe the weapon of offence, number of witnesses, motive, the role played by the accused or details of the conspiracy--It is duty of the IO to dig out the truth and collect all evidence and not to bank upon the complainant alone. [P. 980] W
PLD 2018 SC 595; PLD 2016 SC 484 *ref.*

Report of JIT--

----The report of JIT is equated with report under Section 173, Cr.P.C.

[P. 983] X

PLD 2018 SC 178 *ref.*

Sufficient Material--

----Sufficient material for summoning of the petitioner was available before the learned trial Court and I could not find out any illegality, irregularity or jurisdictional defect in the impugned order to his extent--petitioner also has a remedy before the learned trial Court to move an application under Section 265-K, Cr.P.C. for redress of his grievance--The case is remanded to the trial Court--to avoid complexity and multiplicity of the trial, the proceedings of the case to the extent of already summoned accused persons shall stand suspended till the conclusion of inquiry/investigation as already directed--Afterwards, if the remaining persons complained against are summoned by the trial Court, it shall hold denovo trial and if it does not find sufficient grounds to proceed against the remaining persons complained against, then it shall proceed against the already summoned accused persons from its current stage and decide the matter strictly in accordance with law.

[Pp. 986 & 987] Y & Z

Rai Bashir Ahmad, Muhammad Azhar Siddique, Mirza Naveed Baig, S. Parveen Mughal, Naeem-ud-Din Chaudhry, Abdullah Malik, Sardar Ghazanfar Husain, Mr. Adeel Hassan and Syed Umair Abbas, Ch. Naeem-ud-Din Chaudhry, Advocates for Petitioner (in Crl. Rev. No. 9027/2017).

Mr. Azam Nazir Tarrar with Imran Arif Ranjha & Imran Nazir Chatha, Advocates for Petitioner (in Criminal Revision. No. 7067/2017).

Syed Ehtisham Qadir, Prosecutor General Punjab assisted by *Mr. Muhammad Amjad Rafiq,* Additional Prosecutor General and *Rai Akhtar Hussain,* Deputy Prosecutor General for State.

Mr. Muhammad Hammad Khan Rai, Assistant Advocate General for State.

Dates of hearing: 19.04.2018, 23.04.2018, 25.04.2018, 11.05.2018, 15.05.2018, 16.05.2018, 17.05.2018, 21.05.2018, 22.05.2018, 23.05.2018, 24.05.2018, 26.06.2018, 27.06.2018.

JUDGMENT

By this single judgment, I propose to decide two matters i.e. Criminal Revision No. 9027/2017 titled *"Muhammad Jawad Hamid versus Mian Muhammad Nawaz Sharif, etc.,* and Criminal Revision No. 7067/2017 titled *"Mushtaq Ahmad Sukhera versus Judge ATC-II, Lahore and another",* as both have arisen out of one complaint, one order of the same date and carry similar facts, which in brief are that:

A private complaint was filed by Muhammad Jawad Hamid (petitioner) under Section 190(1)(a) of the Code of Criminal Procedure (Act V of 1898 (hereinafter to be called as 'Code') and Section 19(3) of the Anti-Terrorism Act, 1997, (hereinafter to be called as "ATA") for offences under Sections 302/324, 295-B/452, 395/427, 365/506, 120-B, 148/149, 337-F(vi), 337-C, 337-F(iii), 337-A(v), 337-L(ii), 337-F(i), 337-A(i) Pakistan Penal Code (Act XLV of 1860) read with Section 7 of the ATA and Section

155-C of the Police Order, 2002 before Special Court constituted under the Anti-Terrorism Act, 1997, at Lahore (hereinafter to be called as "ATC") , wherein, 139 persons were cited as accused; the case of Shahid Aziz Butt (Respondent No. 139) was separated; in the separate trial he was finally convicted and sentenced and the Court has been informed that he is now out after serving out his entire sentence. After recording cursory evidence, the Respondents No. 13 to 138, *vide* order dated 07.02.2017, were summoned and the learned trial Court also opined that there is no evidence to prove a prima facie case against Respondents No. 1 to Respondents No. 12, as such, they were not summoned and their names were directed to be deleted from the list of respondents. (See para-41 of the impugned order.). **The order dated 07.02.2017 to the extent of non-summoning of Respondents No. 1 to 12 is under challenge by the petitioner/complainant through the Criminal Revision No. 9027/2017 *"Muhammad Jawad Hamid versus Mian Muhammad Nawaz Sharif and others",***

Whereas,

Mushtaq Ahmad Sukhera, the then Inspector General of Police, Punjab (Respondent No. 16 in the complaint), has assailed the same order to the extent of his summoning through Criminal Revision No. 7067/2017 titled *"Mushtaq Ahmad Sukhera versus Judge Anti-Terrorism Court, and others".*

2. Before proceeding further it is made clear that petitioners before us in both the petitions had initially filed respective writ petitions to raise their grievances, but this Court *vide* a short order dated 11.05.2018 (detailed reasoning dated 06.07.2018) held that against an interim order passed by a Court under Anti-Terrorism Act, 1997, during proceedings of a case, including an order of summoning/non-summoning the accused, writ petition is not maintainable, as under Anti-Terrorism Act, 1997, applicability of Sections 435 and 439 of the Code. has not been restricted, except under Section 21(d) to the extent of bail, hence, criminal revisions were competent, therefore, on our direction the writ petitions were converted into criminal revision, were numbered accordingly and thus are being decided as such.

3. This case involves multiple complex legal questions. Hence, the learned counsel for the petitioners, the learned Prosecutor General, the learned Additional Prosecutor General and learned Assistant Advocate General were called upon to assist this Court on these legal propositions. For the sake of convenience, these questions may be placed and addressed in the following sections:-

SECTION-I

1. Whether an order passed under Section 204, Cr.P.C. (for summoning of the accused to face the trial) is an adverse order affecting the right of the accused?
2. What is the effect of an order passed under Section 203, Cr.P.C.?
3. What is the nature of the order when a few accused have been summoned under Section 204, Cr.P.C. and few have not been summoned in a private complaint?
4. What is the remedy available against the order of dismissal of private complaint under Section 203, Cr.P.C. or against summoning of the accused under Section 204, Cr.P.C.?

5. Whether it is mandatory to afford hearing to the persons complained against in case order of dismissal of complaint (under Section 203, Cr.P.C.) is impugned in the Revisional/Constitutional jurisdiction?
6. What is the scope of revisional jurisdiction against an order passed under Section 203/204, Cr.P.C.?

SECTION II

1. What are the guiding principles for summoning/non-summoning of accused in a private complaint?
2. What is the effect of delay in filing a private complaint?
3. Under what circumstances at the preliminary stage, a private complaint can be declared as frivolous, vexatious and malicious?
4. Whether "political rivalry" is reasonable ground to declare a private complaint frivolous, vexatious, malicious and liable to be dismissed under Section 203, Cr.P.C.?
5. What is the scope of "inquiry" and "investigation" under Section 202(1), Cr.P.C.?
6. Whether police file and the material collected by the I.O during the process of investigation for the same offence, which is also subject matter of the FIR/State case, can be considered and examined for summoning or non-summoning of the person complained against?
7. When in a case the person complained against is not summoned on the basis of insufficient grounds, whether complainant can move application for further inquiry when he receives information of fresh ground/evidence/ material against such a person who had not been summoned, or he can file a fresh complaint by producing fresh material against the accused, in addition to the one which was already available with him and produced before the Court?

SECTION-III

1. Whether statement of a witness recorded in an inquiry under Commissions of Inquiry Act/ The Punjab Tribunals of Inquiry Ordinance, 1969 can be used against the person making it or any other person?
2. Whether the statement of a witness recoded in an inquiry under The Punjab Tribunals of Inquiry Ordinance, 1969 can be used against the other witness?

SECTION IV

1. What constitutes "criminal conspiracy"?
2. How the criminal conspiracy and abetment can be differentiated?
3. Whether statement of a conspirator can be used against another conspirator?
4. What is scope of "design" in the light of Section 6 ATA?

4. A plethora of case law from our own, Indian and other jurisdictions, for and against the above legal propositions was placed before us by the learned counsel for the respective sides as well as Research Centre of this Court. For the sake of brevity and preciseness, I do not consider it appropriate to reproduce excerpts from all such cited judgments and reference sources. The relevant case law and references would be mentioned where immediate reference is required.

5. Now, I would like to deal the questions mentioned in Section-I of this judgement without reproducing the same to avoid repetition. The order passed for the

summoning of the "person complained against" under Section 204 of Cr.P.C. modifies the status of said person to an "accused" and offer him/her an opportunity to respond to the charges levelled against him. Therefore, any such order does not tantamount to infringement of any right of that person and cannot be treated or deemed as an adverse order (reliance placed on *"Noor Muhammad v. The State"* (PLD 2007 SC 9). When a private complaint has been filed under Section 200 of Cr.P.C., the Court concerned, after recording the statement of complainant (if not a Court complaint or made by the public servant in the official capacity), may directly summon the persons complained against as accused or it may postpone the summoning process and opt inquiry/investigation under Section 202 of the Code. After the conclusion of inquiry or investigation, as the case may be, the Court may "dismiss" the complaint under Section 203 of the Code or summon the accused under Section 204 of the Code. In certain cases, the Court may summon only a few accused and refuse to summon certain number of accused persons. In case where some of the "persons complained against" are not summoned, the said order to that extent also amounts to partial dismissal of the complaint. (Reference may be made to *"Dhondu Bapu Gajar vs. Emperor"* (AIR 1929 Bombay 436). The order passed under Section 203 and 204 of the Code is a judicial order (Reliance is placed on *"Muhammad Farooq versus Ahmed Nawaz Jagirani and Others"* (PLD 2016 SC 55). However, the order passed under Section 203 of the Code cannot be held as autrefois or statutory acquittal *"Mst. Robina Rashid vs. Farrukh Amin"* (PLD 2011 FSC 121); *Ibrar Hussain Shah vs. Syed Waris Shah* (2015 PCr.LJ 784); *"Tariq Javed vs. Hom Purkash"* (2018 PCr.LJ 771 Karachi). At the most, dismissal of the complaint as a whole or non-summoning of some of the persons complained against may have the effect of discharge. The complainant, at his own option, may file a subsequent fresh complaint on same allegations by adding some new facts/grounds and mentioning any new material/evidence which earlier were not in his knowledge or the complainant was not in a position to bring them on record.

6. Now moving to the next question as to the right of audience of the "persons complained against" in case where complaint is dismissed under Section 203 of the Code as a whole or to the extent of some of the persons complained against. It is well settled law that until process is issued, the person complained against does not have the status of an accused and has no right of audience before the trial Court or before a superior Court at the pre-process stage. *(Mst. Bashir Begum and 2 others versus Ghulam Nabi and another"* (PLD 1972 Lahore 185); *Somu alias Somasundaram and others v. The State and another* (1985 Crl.L.J. 1309, (Madras) and *Sivasankar v. Santhakumari"* (1993 (1) KLT (Madras). Moreover, even in the pre-partition jurisprudence, in cases of *"Mannupsingh vs. Sahadeo Sadhu"* (AIR 1929 Patna 230) and *"Abdulla Jan vs. Totigul"* (AIR 1935 Pesh 14) it was held that in case of dismissal of complaint by the Magistrate under Section 203 of the Code accused has no right to appear before the Sessions Judge when he orders further inquiry and no notice need, therefore, be given in such case. Thus, the argument of learned Prosecutor General and Mr. Azam Nazir Tarrar, Advocate for the petitioner in connected Criminal Revision No. 7067/2017 regarding providing audience to the respondents, does not sound well. (Further reference may be made to the cases

of *Major Subodh Shukla v. Major R.S. Dudee (Madhya Pradesh)* (2007(1) MPHT 431); *"Somu @ Sumasundaram and others v. The State and another"* (1985 Cr.LJ 1309).

7. It has already been held by this Full Bench in order dated 11.05.2018 (detailed reasoning dated 06.07.2018) that Anti-Terrorism Court is one of the other Courts mentioned in Section 6 of the Code and its orders, *inter alia*, for dismissal of complaint or summoning of the accused are amenable to the Revisional jurisdiction of this Court as provided under the Code. There are three Sections in the Code (i.e. Sections 435, 436 and 439) which provide for the revisional powers. However, Section 436 of the Code would not attract in this case for the reasons that it places an embargo upon the powers of Revisional Court when an order for the dismissal of complaint under Section 203 has been challenged. It may be noted that in Section 203 of the Code the word 'Court' was substituted for the word 'Magistrate' by Law Reforms Order, 1972 and in Section 436 of the Code, word "any Magistrate" was substituted by Ordinance XXXVI of 2001, hence, if may be inferred that the legislature in its own wisdom, has deliberately not used term 'any Court' in the amended Section 436(a) and this Section would apply only when the impugned order under Section 203 of the Code has been passed by the 'Magistrate' and not any other Court. Moreover, the power of the High Court under Section 439, of the Code is very wide and it could revise the proceedings or orders passed by any of the inferior criminal Courts in the exercise of its Revisional jurisdiction in an appropriate case (Reference may be made to *"Muhammad Ashraf versus Khair Muhammad"* 1979 P.Crl.L.J. 372, *"Haleem Shah versus The State"* (PLD 1996 Karachi 306 DB).

8. While exercising jurisdiction under Section 435, 439 of the Code High Court can examine the record of any proceedings before any inferior criminal Court within its territory and within its local limits and having jurisdiction on it, to satisfy correctness, legality or propriety of any findings, etc, and in these provisions the word "accused" has been used and under Section 439 of the Code, it can exercise the powers of appeal available to it under Section 423, 427, 428 or by Section 338 of the Code Subsection (2) of Section 439 of the Code is important with reference to the question in issue, the same is reproduced hereunder:

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

Whether the private respondents can be equated with accused or not, we need to examine Sections 202 to 204 of the Code. Legislature in Section 202 for the person against whom allegations are levelled, has used the term **"person complained against",** and has not equated him with an "accused" because this is the stage where only a complaint of commission of an offence has been made and the Court has yet to ascertain the truth or falsehood of the complaint and for this purpose the Court, under Section 202, has to satisfy itself by holding an inquiry or directing any inquiry or investigation to be made by any Justice of Peace, Police Officer or a Magistrate. The Court can dismiss the complaint after examining the statement of the complainant, the witnesses and considering the result of inquiry and investigation. The word "accused"

has been used in Section 204 when summons or warrants as the case may be, for the attendance of the person complained against is issued and this is the stage when the person complained against has been considered as accused.

9. It is settled principle of law that in the proceedings under Section 202 the person complained against has no right to appear and participate in these pre-trial proceedings. At this preliminary stage the Court ascertains the truth or falsehood of the allegations levelled in the complaint. The complainant has to establish a prima facie case, because the word "sufficient ground" has been used for proceedings against the person complained against.

10. In the Indian Criminal Procedure Code 1973 Section 401 is parallel to Section 439 of our Code and it is important to be noted that in the Indian Code of Criminal Procedure, 1973, Section 401(2) has been added "other person" besides accused. The said part of the provision is reproduced as under:-
"(2) No order under this section shall be made to the prejudice of the ***accused or other person*** *unless he has had an opportunity of being heard either personally or by pleader in his own defense."*
Therefore, in the Code of Criminal Procedure 1973 Indian jurisprudence affords right of audience to every person whose right is likely to be affected by the order of Revisional Court and the same remedy is not provided in our Code.

11. In this case certain respondents were not summoned and to their extent the complaint was dismissed, as such these persons complained against had no right of audience before the trial Court and even before this Court. I, therefore, hold that issuance of notice to them is not required. I am mindful of the fact that under Section 440 of the Code the revisional Court has the power to allow any person to be heard in person or through a pleader, but as the Court has to decide the issue in the light of material available before the learned trial Court at the time of passing of order under Section 203 where respondents are not legally permitted to appear or participate in the proceedings, therefore, **I hold that the respondents in Criminal Revision No. 9027/2017 have the status of " persons complained against", as such, they are not entitled or required to be heard in these proceedings.**

SECTION-II

12. Prior to moving to the questions referred in Section-II, it would be appropriate to reproduced relevant provisions of Code of Criminal Procedure, 1898:-
"**200. Examination of complainant:** A Magistrate taking, cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:
Provided as follows:
(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under Section 192 [or sending it to the Court of Session];

(aa) when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or -purporting to act in the discharge of his official duties;
(b) [Omitted A.O., 1949,Sch.];
(c) when the case has been transferred under Section 192-and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

202. Postponement of issue of process:

(1) **Any Court,** on receipt of a complaint of an offence of which it is authorised to take cognizance; or which has been sent to it under Section 190, sub-section (3), or referred to it under Section 191 or-Section 192, may, **if it thinks fit, for reasons to be recorded, postpone** the issuance of process for compelling the attendance of the person complained against, and either inquire into the case itself or direct **any inquiry or investigation** to be made by [any Justice of the Peace or by] a police officer or by such other person as it thinks fit, **for the purpose of ascertaining the truth or falsehood of file complaint:**

Provided that save, where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of Section 200.

(2) A Court of Session may, instead of directing an investigation under the provisions of sub-section (1), direct the investigation to be made by any Magistrate subordinate to it for the purpose of ascertaining the truth or falsehood of the complaint.

(3) If any inquiry or investigation under this section is made by a person not being a Magistrate [or Justice of the Peace] or a police officer, such person shall exercise all the powers conferred by this Code on an officer-in-charge of a Police Station, except that he shall not have power to arrest without warrant.

(4) Any Court inquiring into a case under this section may, if it thinks fit, take evidence of witnesses on oath].

203. Dismissal of complaints: [The Court], before whom a complaint is made or to whom it has been transferred, [or sent] may dismiss the complaint, if, **after considering the Statement on oath** (if any) of the complainant **and the result of the investigation or inquiry** (if any) under Section 202 there is in his judgment **no sufficient ground** for proceeding. In such cases he shall briefly record his reasons for so doing.

204. Issue of process:

(1) If in the opinion of a [Court] taking cognizance of an offence there **is sufficient ground of proceeding,** and the case appears to be one in which, according to the fourth column of the Second Schedule, a summons should issue in the first instance, [it] shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, [it] may issue a warrant, or, if [Court] or if [it] thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such [Court] if as if it has no jurisdiction itself some other Court having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provisions of Section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and if such fees are not paid within a reasonable time, the Court may dismiss the complaint."
(Emphasis added)

13. In a complaint case, trial Court is not required to examine material minutely and or in depth, but has merely to see that *prima facie* a case has been made out to proceed further with the matter for issuance of warrant or summons (as the case may be) under Section 204 of the Code. *(Muhammad Farooq versus Ahmed Nawaz Jagirani and Others* (PLD 2016 SC 55); *Muhammad Fiaz Khan versus Ajmer Khan and another* (2010 SCMR 105). The two expressions i.e. existence of sufficient ground and *prima-facie* case (used in Section 204 of Cr.P.C.) have interchangeably been construed by the Courts *(Noor Muhammad vs. State"* (PLD 2007 SC 9); *"Abid Shah vs. Additional Sessions Judge Sheikhupura"* (PLD 2009 Lahore 444). In the case of *"Sher Singh v. Jatendranath Sen"* (AIR 1931 Cal. 607), it was observed "a *prima facie* case only means that there is ground for proceeding (same view has been adopted in the case of *"Noor Muhammad vs. State"* (PLD 2007 SC 9). August Supreme Court of Pakistan, to further clarify the proposition observed that it is to be kept in view that initiation of process under Sections 202 and 204 of the Code depends upon the availability or non-availability of sufficient incriminating material (2010 SCMR 194). It is settled principle of law that the provisions as contained in Sections 202 to 204 of the Code, if read together, would show that a proper safeguard has been provided by the Legislature by using the words "if any" and "sufficient grounds for any" in Section 203 of the Code and accordingly the frivolous and vexatious complaints must be buried at their inception where no *prima facie* case is made out *"Abdul Wahab Khan versus Muhammad Nawaz and 7 others"* (2000 SCMR 1904). At the stage of consideration of the private complaint the Court is not expected to see whether the allegations are likely to be proved by the materials produced before Court. (*Sreekumar S. Menon v. State of Kerala,* (2004 (2) KLT 53).

14. The analysis of relevant provisions of law and case law on the point of grounds of summoning or non-summoning of the accused in a private complaint, I have gathered the following main aspects which may be taken into consideration by the Courts while taking cognizance of the private complaint:-

a) Mere summoning a necessary party to explain the allegations levelled against him, does not tantamount to infringement of any right; rather opportunity is afforded to him to explain his position.

b) In a complaint case at pre-trial stage, trial Court is not required to examine the material minutely or in depth but is merely to see that prima facie case has been made out to proceed further in the matter of issuance of process or summons.

c) High Court cannot strangulate the trial by over stretching its jurisdiction and embark upon to examine adequacy or inadequacy of evidence, which stage will only reach after charge is framed and complainant is given opportunity to prove his case beyond any reasonable doubt.

d) At the stage of consideration of private complaint, the Court is not expected to see whether the allegations are likely to be proved by the material produced before the Court.

e) Until the process is issued to the accused a person shown as person complained against in the complaint does not have a status of accused and has no right of audience before the trial Court or before the superior Courts at pre-process stage.

f) To take cognizance of offence in complaint case, burden of proof in preliminary enquiry for the issuance of process or summons as the case may be is much lighter on the complainant and he is required to establish prima facie case, whereas, the burden of proof placed on the prosecution during regular trial is much stringent and the prosecution is required to establish and prove the case beyond reasonable doubt.

g) The scope of Section 202 is to separate founded from unfounded. The Court has to satisfy itself as to the truth or falsehood of the complaint before issuing of process to the persons complained against. The object and scope of Section 202 of the Code is:-

i. To allow free, fair and full opportunity to complainant to produce some material to make out grounds for issuing processes against accused.

ii) To ascertain the truth or falsehood of the allegations, the Court is bound not only to scrutinize contents of complaint, nature of allegations made therein and material in support of accusation but also to call for record, report or summon any person, who in the opinion of the Court, is acquainted with facts of the case and may be helpful to the Court to "satisfy itself" in terms of Section 202 of the Code or may enquire or investigate the matter as provided in this Section.

iii) Object intended to be achieved, possibility of victimization and harassment, if any, to ensure himself that no innocent person against whom all allegations are levelled should suffer ordeal of protracted, time consuming and cumbersome process of law.

h) Possibility of accusations turning out to be false or frivolous at the trial should not overbear the Court from issuing the process if material available prima facie disclosed the case against the person complained. At this stage protracted inquiry or full dress rehearsal of trial is not required.

i) At the stage of summoning the accused, Court is not to determine guilt or innocence of the accused on the criteria of evaluating the evidence as to whether prosecution has been able to prove its case beyond reasonable doubt or not and while giving such benefit accused ought to be acquitted, which is beyond the scope of proceedings at the stage of issuance of process after making complaint visualized under Sections 202 to 204 of the Code.

j) For deciding the question as to whether a prima facie case has been made out in an inquiry under Section 202 of the Code the consideration should be from the point of view of the complainant without adverting to any defence which the accused may have. At this stage the accused has no locus standi and is not entitled to be heard on the question whether process should be issued against him or not.

15. Provisions of Sections 202, 203 and 204 of the Code when read together make it clear that on one side fair opportunity to the complainant to produce material to make

out grounds for issuance of process against the person complaint against, has been provided; and on the other hand, a proper safeguard has been provided by the Legislators showing its intention in this regard by using the word "if any" and "sufficient grounds" if any in Section 202 of the Code, in order to burry a baseless complaint at initial stage and to protect innocent persons. To establish truth or falsehood, these provisions provide vast powers to the Court taking cognizance, to ascertain the allegations levelled in the complaint. For this purpose the Court shall record statement of the complainant on oath, after recording statement of the complainant and examining the material produced before it, if the Court finds reasons for not issuing the process for procuring the attendance of the persons complained against, in this situation the Court has vast powers to inquire into case itself or may direct an inquiry or investigation to be made by any Justice of Peace, or by police officer or by such other person as it thinks fit to ascertain the falsity or truthfulness of the complaint. This power has been given for two reasons i.e. (i) no person who has committed an offence under any law should be let free and unpunished as provided in the relevant statute and (ii) no innocent person should face the agony of trial and shall be saved from harassment. This option is left with the Court which has taken the cognizance to decide as to what procedure it is to adopt. Anyhow, the Court must not only opt for the procedure carefully, but at the same time it is to adopt the process of inquiry or investigation by applying its judicious mind considering the facts and the circumstances of each case before it. When the Court can direct investigation of a case by Justice of Peace or any police officer or any other person as it thinks fit, the word "as it thinks fit" bound to the Court to apply its mind judiciously. While appointing any police officer or any other person as Investigating Officer the Court has to observe that such person/police officer shall not have any interest in the cause. The Hon'ble Supreme Court of Pakistan in *"Mst. Sughran Bibi versus The State"* (PLD 2018 SC 595), with reference to Section 202 of the Code held that:-

"25. During the course of hearing of this petition we had inquired from the petitioner as to why she was insisting upon registration of a separate FIR in respect of her version of the incident especially when she had already instituted a private complaint containing her version of the incident and the accused persons in her private complaint had already been summoned by the trial Court to face a trial and a Charge had been framed against them. In response to that query the petitioner had categorically stated that she wanted the accused persons in her version of the incident to be arrested and recoveries to be affected from them which was not possible through the medium of a private complaint. Such understanding of the law on the part of the petitioner, which understanding is also shared by a large section of the legal community in our country, has been found by us to be erroneous and fallacious. By virtue of the provisions of Section 202(1), Cr.P.C. a Court seized of a private complaint can "direct an inquiry or investigation to be made by any Justice of the Peace or by a police officer or by such other person as it thinks fit". If in a given case the Court seized of a private complaint deems it appropriate to direct an investigation to be carried out in respect of the allegations made then the powers available during an investigation, enumerated in Part V, Chapter XIV of the Code of Criminal Procedure, 1898 read with Section 4(1)(l) of the same Code, include the powers to arrest an accused person and to affect recovery from his possession or at

his instance. Such powers of the Investigating Officer or the investigating person recognize no distinction between an investigation in a State case and an investigation in a complaint case."

16. The purpose of inquiry as contemplated in Section 202 of the Code or investigation by a police officer or by *"any other person",* is only to help the Court to decide whether or not there is any sufficient ground to proceed further on facts of which cognizance had already been taken by it of the offence disclosed in the complaint but issuance of process had been postponed. Section 202 of the Code, confers all powers available to a police officer in charge of a Police Station for purposes of investigation except the power to arrest without warrant. Reference be made to the cases *"Ramdev Food Products Private Limited v. State of Gujarat"* (SC) 2015 AIR (SC) 1742; *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi & Ors.,* (1976)3 SCC 736); *Dilawar Singh v. State of Delhi,* (SC) 2007(12) SCC 641); *Mr. Bhagat Ram v. Surinder Kumar,* (2004(11) SCC 622) and *Raj Kumar Adalkha v. State of U.P. (Allahabad)"* (2014(8) ADJ 410). There is difference between investigation carried out after registration of FIR u/S. 154 of the Code or investigation as initiated under Section 156 of the Code and investigation carried out under Section 202 of the Code. In the former, Investigation Officer has vast powers even to arrest an accused without warrants and in the later he has to proceed with limited scope under the control and direction of the Court which had taken cognizance of the case and he is only to submit his report for the purposes of assistance whether the person complained against to be summoned or not and he (Investigation Officer) could not arrest without the permission of the Court. The word "any other person" has been defined in *"Abdul Ghafoor and 4 others versus Ghulam Hussain and 4 others"* (1993 P.Cr.L.J. 1988) and it was held that:
"A Civil Judge or a Judicial Magistrate of his status can be included in the definition of 'such other person'. This word 'such other person' is wide enough and has been used in the context of a person with reference to any person other than a police officer or a Magistrate and a Civil Judge if not enjoying the powers of Magistrate falls within the definition of such other person."
In view of the above situation, the Court is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation for the purpose of deciding whether or not there is sufficient ground for proceedings. Thus, the object of an investigation under Section 202 of the Code is not to initiate a fresh case on police report but to assist the Court in completing proceedings already instituted upon a complaint before him.

17. The question arises that when the Court has itself inquired into the matter and recorded statements of some of the witnesses, in such an eventuality whether the same Court could direct for investigation or further inquiry, or not? The same question came under consideration before a Court in India in the case *"Mr. Bhagat Ram v. Surdinder Kumar & Ors.* (2004 (11) SCC 622), wherein, a complaint was filed before the Additional Chief Judicial Magistrate, after examining the complainant and his witnesses, the Magistrate directed the investigation to be done by the police and referred the matter for investigation/inquiry by the police. The said action of the

learned Magistrate was challenged before the High Court on the ground that the Court, after having taken cognizance and holding the inquiry under Section 202 of the Code, could not have referred the matter for inquiry/investigation by the police at all and it should have to proceed in the matter himself. The High Court set aside the order passed by the Magistrate. Thereafter, the appeal by special leave was presented before the Apex Court, where, it was laid down that:

"It is clear from a perusal of the order made by the learned Magistrate that he has not done anything other than to comply with the provisions of Section 202(1) proviso (b), Code of Criminal Procedure, that after examining the complainant and his witnesses he found that it was necessary to further probed into the matter and, therefore, directed investigation to be done by the police and after the investigation was done by the police and on report being filed by them, he heard the matter afresh and directed issue of summons."

The Supreme Court of India found that the procedure adopted by the learned Magistrate was perfectly in order. Similarly, in another case *"Raj Kumar Adalkha and others vs. State of U.P and another"* (2014 (8) ADJ 410), it was held that if after recording the evidence, the Magistrate finds it necessary for proper decision to find out the truth that inquiry/investigation is required by the police, then Magistrate is empowered under Section 202(1) of the Code to issue such direction which is entirely different form the investigation on the direction issued under Section 156(3) of the Code.

18. A careful analysis of law on the point leaves no room to doubt that investigation report under Section 202(1) of the Code alone cannot be made basis for decision of complaint. The object of investigation under Section 202 of the Code is to enable the Court to scrutinize carefully the allegations with a view to protect a person complained against from being summoned to face frivolous accusations. Section 202 of the Code, in fact, is an enabling provision so as to empower the Court to hold an effective inquiry into the truthfulness or otherwise of the allegations levelled in the complaint for the purposes of forming an opinion whether there exist sufficient grounds to proceed further or not. Therefore, inquiry/investigation under Section 202 of the Code is not a futile exercise and is to be taken into consideration by the Court while deciding whether process is to be issued or not.

19. The Court is not a silent spectator at the time of recording of cursory evidence before summoning of the person complained against. The Court has to carefully examine the evidence produced on record and may even put questions to the complainant or the witness to elicit answers to find out truth or otherwise and if he feels that further material is required to establish the truth or falsehood he can further inquiry into matter or may direct an investigation as provided in Section 202 of the Code.

20. There is difference between investigation under Chapter-XIV of the Code by the police and that ordered by the Court under Section 202, as former investigation is at pre-cognizance stage whereas inquiry or investigation under Section 202 of the Code is at post cognizance stage. Furthermore, inquiry or investigation under Section

202(1) of the Code by the police or by any other person is for limited purposed i.e. to help the Court to decide whether or not there is sufficient ground to proceed further on account of the fact of which cognizance had already been taken by him of the offence disclosed in the complaint but issuance of process had been postponed. The Court may entrust the investigation to any person considered fit for the said purpose, but it would be improper to select the one who is or may be interested in the matter. Except arrest without warrant, such person can exercise all powers as conferred on Incharge of a Police Station.

21. Now coming to the grounds agitated by the learned Prosecutor General and Mr. Azam Nazir Tarrar, Advocate (representing the petitioner in Criminal Revision No. 7067/2017) advancing the reasons why the respondents in Criminal Revision No. 9027/2017 may not be summoned and summoning order against the petitioner in Criminal Revision No. 7067/2017, be recalled, much emphasis has been put on the aspect that first FIR No. 510/2014 was registered on 17.6.2014 on the complaint of Rizwan Qadir, SHO Police Station Faisal Town, Lahore, second FIR No. 696/2014 was registered on 28.8.2014 at Police Station Faisal Town, Lahore, on the complaint of Muhammad Jawad Hamid, Director Administration, Minhaj-ul-Quran and private complaint was filed on 16.3.2016; hence, this complaint was filed after a period of one year and nine months and this inordinate delay is fatal to the complaint. Relied upon 2010 SCMR 1816, 2001 SCMR 1783, 2000 SCMR 1904, 2017 YLR 533, 2015 MLD 1145 and 2013 P.Cr.L.J. 1144.

22. Although, by careful perusal of the order passed by the ATC dated 07.02.2017 under Section 203, Cr.P.C. *vide* which he dismissed the complaint against private respondents, the Court has discussed the delay and rightly observed that no limitation for filing of complaint has been provided in the Limitation Act, 1908 and considering the number of injuries, material, other evidence in the shape of videos and footage, etc. held that the complaint has to be examined on the material available on file. As the complaint has not been dismissed only and only on the ground of delay; hence, no much emphasis is required, however, as issue was discussed at length by relying upon the judgments of apex Court, it is appropriate to discuss the same in some detail.

23. August Supreme Court in the case of *"Muhammad Fiaz Khan vs. Ajmer Khan and another"* (2010 SCMR 105) in the context of delay in filing of private complaint observed:

"6. It is settled proposition of law ***that each and every case is to be decided on its own peculiar circumstances and facts.*** *Facts highlighted hereinabove clearly depict that Respondent No. 1/complainant had filed the complaint after a considerable delay after availing different remedies mentioned hereinabove. It is a settled"* ***law that no limitation is provided in criminal law for lodging a complaint.*** *See Queen Empress v. Ajudhia Singh and others 10 All. 350. In spite of the aforesaid* ***general principle of law when the complaint was filed after a considerable delay which was not explained by the complainant then in such a situation it raises suspicion as to its truthfulness meaning thereby that delay in filing complaint is not by itself fatal except under very special circumstances. The complaint looses its truthfulness with***

the length of delay, more particularly when it is based on oral evidence. *This proposition of law was considered in Mst. Shamim's case 2003 SCMR 1466 and laid down the following principles:--*

"Be that as it may, unexplained delay in setting the machinery of law in motion prima facie points to fabrication of the prosecution story, therefore, we would like to observe that if the complainant hibernates after cancellation of the F.I.R. and makes a delayed private complaint the prosecution evidence must be sifted and weighed with' great care and caution." (Emphasis added)

24. In the case of *"Zafar and others vs. Umer Hayat and others"* (2010 SCMR 1816) it was observed:

"It is also settled principle of law that although no such thing as limitation is prescribed in criminal prosecutions, but yet on the other hand the longer complaint is delayed the less becomes the chance of believing in its truth, more particularly when it is based upon entirely oral evidence. It is also settled principle of law that all the laws of the land must wear in the sleeves of the Judge. It is basic and fundamental principle of law that it is duty and obligation of the trial Court to scrutinize the contents of the complaint, nature of allegation made therein supporting material in support of accusation, the object intended to be achieved, the possibility of victimization and harassment, if any, to ensure itself that no innocent person against whom allegations are levelled should suffer the ordeal of protracted time consuming and cumbersome process of law. It is also settled principle of law that the provisions as contained in Sections 202 to 204, of the Code if read together would show that a proper safeguard has been provided by the Legislature which showed its such intention by using the words "if any" and "sufficient grounds for any" in Section 203, of the Code and accordingly the frivolous and vexatious complaints must be buried at their inception where no prima facie case is made out. See Abdul Wahab Khan's case (2000 SCMR 1904). It is also settled principle of law that everyone has a right to approach the Court for redress of grievances but the same is subject to condition that sufficient grounds for issuance of process is made out. (emphasis added)

25. The Supreme Court of India, in the case of *"Assistant Collector of the Customs, Bombay v. L.R. Melwani"* (1970 AIR (SC) 962) observed:

"10. This takes us to the contention whether the prosecution must be quashed because of the delay in instituting the same. It is urged on behalf of the accused that because of the delay in launching the same, the present prosecution amounts to an abuse of the process of the Court. The High Court has repelled that contention. It has come to the conclusion that the delay in filing the complaint is satisfactorily explained. That apart, it is not the case of the accused that any period of limitation is prescribed for filing the complaint. ***Hence, the Court before which the complaint was filed could not have thrown out the same on the sole ground that there has been delay in filing it. The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint.*** *We, therefore, see no*

substance in the contention that the prosecution should be quashed on the ground that there was delay in instituting the complaint. (Emphasis added)

26. There has been consistent approach of our Courts that the delay simpliciter is of no significance and only unexplained delay matters in administration of justice in criminal cases. It is also to be noted that consideration of "delay" in filing of private complaint at the pre-trial stage (of Section 202, 203, of Cr.P.C.) is only relatable to the sufficiency of grounds for summoning and standard of explanation to prove this delay would not be that which is expected at trial stage. In this regard, further, reference may be made to the case of *"Abdul Ghaffar and another vs. Syed Shabbir Shah Gillani"* (2013 PCr.LJ 1544); *"Muhammad Din and another vs. Bashir Ahmad Nasir and another"* (2007 YLR 2195); *"Mst. Shamim Ghaffar vs. Ghulam Shabbir"* (2007 YLR 2195); *"Mst. Nasreen Bibi vs. Abdul Waheed"* (2006 YLR 2934); *"Muhammad Afzal vs. Haji Ahmed"* (2005 PCRLJ 979); *"Saleem vs. The State"* (2004 MLD 424); *Haidran Bibi vs. Muhammad Ibrahim"* (1986 MLD 2454); *Jairam vs. Jagdish* (1980 PCRLJ 243); *"Pir Ally Immrawan Sahar Essaphel vs. Judge Anti-Terrorism Court"* (2012 P.Cr.L.J 498); *Imtiaz Rubbani alias Billu vs. State* (2008 PLD 441); *"Noor Khan vs. The State"* (1993 PCRLJ 511); *"Muhammad Arshad vs. State"* (1989 PCRLJ 389); *"S.M. Yaqoob vs. Talat Hussain"* (1987 PCRLJ 1624); *"Sher Ali vs. The State"* (1985 PCRLJ 349) and *"Jodat Ali vs. The State"* 1969 PCRLJ 1532).

27. The learned Prosecutor General along with his team, the learned law officers as well as Mr. Azam Nazir Tarrar, Advocate assisted by his Associates pressed a hard that when the accusations against the persons complained, are frivolous, malicious and vexatious then the complaint must be dismissed at very inception. From the tenor of arguments advanced by learned Prosecutor General it appeared that he was of the view that order *qua* non-summoning of Respondents No. 1 to 12 has rightly been passed. The argument was that it is duty and obligation of the trial Court to scrutinize the contents of the complaint, nature of allegations made therein, material in support of the accusations, the object intended to be achieved, possibility of victimization and harassment and accordingly vexatious and frivolous complaints must be dismissed. Cases of *"Zafar and others versus Umer Hayat and others"* (2010 SCMR 1816), *"Abdul Wahab Khan versus Muhammad Nawaz and 7 others"* (2000 SCMR 1904), 2017 YLR 533, 2010 P.Cr.L.J. 575 and 2017 YLR 57), were referred in support of their contentions.

28. The terms "frivolous", "malicious" and "vexatious" have not been defined anywhere in the Code, therefore, we need to explore their lexical meanings and use in the judicial context.

"Frivolous"

The expression (frivolous) was used in case of "*Riasat Ali versus Election Tribunal*" (PLD 1961 B.J 11) to the effect that it means unworthy of credence on face of it, impossible to be substantiated and requiring no proof to expose it. In HANDBOOK OF LEGAL TERMS & PHRASES (Judicially defined), with reference to the same citation, it was defined as "An allegations is frivolous if on the face of it, it is

unworthy of credence and impossible to be substantiated and does not require any proof to expose it as such. WEBSTER's unabridged dictionary (SECOND EDITION), defines it as:-

"1. Characterized by lack of seriousness or sense, 2. Self- indulgently carefree; unconcerned about or lacking any serious purpose, 3. (of a person) given to trifling or undue levity, 4. of little or no weight, worth, or importance; not worthy of serious notice.

"Malicious"

WEBSTER's unabridged dictionary (SECOND EDITION), defines it as:-

"1. Full of, characterized by, or showing malice; malevolent; spiteful: malicious gossip, 2. Vicious, wanton, or mischievous in motivation or purpose."

In ENCYCLOPEDIC LAW DICTIONARY 3rd EDITION 2008, the phrase "malicious prosecution" has been defined as:-

"A malicious prosecution is an abuse of the process of the Court by wrongfully setting the law in motion on a criminal charge. To be actionable as a tort the process must have been without reasonable and probable cause and must have been instituted or carried on maliciously."

"Vexatious"

In HANDBOOK OF LEGAL TERMS & PHRASES (Judicially defined), with reference to case law *"Abid Y. Khan versus Muhammad Bashir"* (1965 PLC 22), provides."

"The word vexatious indicates an accusation merely for the purpose of annoyance and the word, frivolous means an accusation which is futile not serious or without foundation."

WEBSTER's unabridged dictionary (SECOND EDITION) , defines it as:-

"troublesome; annoying, instituted without sufficient grounds and serving only to cause annoyance to the defendant, disorderly; confused; trouble."

29. After examining the dictionary meanings of the above phrases and the judgments on the proposition, I am of the view that in order to hold a complaint as frivolous, malicious or vexatious, following elements must exist:-

I) Where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused.

II) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

III) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

IV) Where there is an express legal bar engrafted in any of the provisions of the Code or any other law (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act providing efficacious redress for the grievance of the aggrieved party.

V) Where a criminal proceeding manifestly tainted with *mala fide* and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge and also having no sufficient material in support of allegations.
VI) If the acts of accused or person complained against are protected by the Constitution or any other relevant law for the time being in force.
VII) If the accused or person complained against discharges his legal duties and also obeys the direction, command or order of his superior or any Court, legal authority or tribunal.
VIII) Where the concerned Court has fully satisfied after examining all material aspects that in all probability the complainant may not succeed in bringing charge home against the accused.
IX) Where the averments/contents of the complaints/ allegations from any angle are reflecting to the abuse of process of law.

30. Now, combined reading of Sections 203 and 204 of the Code in the light of definitions of words "frivolous, malicious and vexatious", makes clear that the complaint could be dismissed either as a whole or to the extent of some persons, firstly when the Court would conclude that no sufficient ground is available to proceed, and secondly there is no material available for issuing the process from the material available on the file, the complainant has moved baseless complaint without any material just to harass, victimize, pressurize or blackmail the person complained against or there is civil dispute and no criminal offence is made out. It is duty of the state and the Court being organ of the state to see that no criminal should go unpunished, if the arguments advanced by the other side are appreciated it means that the crime which is governed under any statute and is punishable even if there is some material for summoning of the persons complained, the complaint be buried on the argument that it has been made against senior officers, it is based on political or religious rivalry and meant to harass or pressurize the opponents. To declare a complaint as such at the stage of Section 203 of the Code, is only possible if the Court conclude that no material whatsoever is available against the person complained against and if there is material then such declaration can be made that the complaint is frivolous, malicious or vexatious only at the time when acquittal of the person complained against is recorded and then the remedy is provided in Section 250 of the Code. While observing so, I am fortified by a three member Bench judgment of the Hon'ble Supreme Court of Pakistan in the case *"Noor Muhammad versus The State and others"* (PLD 2007 Supreme Court 9). We have also gone through the judgment *"Abdul Wahab Khan versus Muhammad Nawaz and 7 others"* (2000 SCMR 1904) and observe that in para-5 of this judgment is in line with the above referred judgment *"Noor Muhammad vs. State"* (PLD 2007 SC 9) to the extent that frivolous and vexatious complaints must be buried in its inception where no prima facie case is made out or where no sufficient grounds for issuing the process exist.

31. By careful perusal of the judgment passed by the superior Courts on the principle of vexatious and frivolous prosecution it is observed that at least it has been held that the prosecution was launched without probable grounds and no material or evidence

was produced before the Court. **Hence, if any material is available on the file against the "person complained against", then at the stage of summoning of the "person complained against", it cannot be said that the complaint is frivolous, malicious, vexatious or baseless.**

32. The learned counsel for the petitioner argued that as the Court is to draw an inference of the conspiracy from the circumstances and in this respect newspaper clippings and video clips were produced before the Court as **Mark.C/1-59, D/1-14, P/3-9** which is important and corroborative evidence, therefore, the trial Court wrongly brushed aside the same by ignoring the law on the subject. Further argued that at the stage of passing an order under Section 203 or 204 of the Code only it was sufficient to place the material before the Court and during trial the relevant Reporters, Photographers or media anchors could have been summoned. The learned counsel in support of his arguments placed reliance on the case *"Mohtarma Benazir Bhutto and another versus President of Pakistan and others"* (PLD 1998 SC 388).

33. In reply to the arguments of learned Prosecutor General and the learned Additional Prosecutor General, submitted that when news clips had been placed before the Court then the names of the Reporters, Photographers or anchors could be submitted later-on and even the Court had ample jurisdiction under Section 540 of the Code to summon them as it will not amount to filling the lacunae. The learned Prosecutor General submitted that news clipping is not admissible in evidence in criminal cases unless reporter/author is examined in the Court as a witness. He placed reliance on the case PLD 2016 SC 17 and 1996 SCMR 1747. The learned Additional Prosecutor General with reference to Section 265 of the Code argued that list of witnesses had to be provided with the complaint itself, which has not been done in this case, therefore, the newspaper clippings should be ignored from consideration and put into dust bin, as the same do not have evidentiary value. Added that many statements are given only for political purposes and they could not create a legal right or obligation, hence no evidentiary value could be attached to such press report. In support of his arguments, placed reliance on 2010 YLR 975 and PLD 2004 SC 583.

34. It may be observed that the case of *Mumtaz Qadri* (PLD 2016 SC 17) and *"Muhammad Ashraf Khan Tareen and another v. The State and another"* (1996 SCMR 1747) referred by the learned Prosecutor General pertain to the "admissibility" of evidence, whereas, this Court at the moment is not sitting as an appellate Court upon the final judgement of trial Court. It has already been held that during inquiry under Section 202 of the Code the Court has to consider "material" and not the evidence in terms of QSO, 1984. Therefore, at this stage, critical element is "relevance" of such material and not the admissibility or evidentiary value, which is to be established at trial stage.

35. The case *"Mohtarma Benazir Bhutto and another versus President of Pakistan and others"* (PLD 1998 SC 388) pertains to exercise of powers of the President under Article 58(2)(b) of the Constitution of Islamic Republic of Pakistan, 1973. The said case may hardly be treated as precedent in the present case. However, the parallels

may be drawn that in both cases powers is to be exercised after "satisfaction" and to reach such satisfaction the trustee of such powers, *inter alia*, may consider news items and press clippings. In both cases, Qanun-e-Shahadat Order, 1984 is not applicable.

36. As regards the argument that petitioner/complainant has not attached list of witnesses, I am of the view that it is not the requirement of proceedings under Section 200, 201 or 202 of the Code that lists of witnesses must be appended with the complaint or all the documents must be mentioned or appended therewith. The stage of Section 265-C of the Code comes afterwards when trial commences. Although in Section 265-C(2), the word "shall" has been used but it is settled proposition that sometimes the word "shall" may be read as the word "may" and further the same has no penal clause, therefore, this sub-section is directory in nature, therefore, at this stage not attaching the list of witnesses along with the complaint or non-mentioning the names of reporters, photographers, anchor persons, is not an illegality and on this score alone the press clippings, etc. could not be ignored.

37. During arguments, a question arose that as in this case two FIRs were registered i.e. FIR 510/2014 at Police Station Faisal Town on the complaint of Rizwan Qadir SHO and FIR No. 696/2014 on the complaint of Jawad Hamid, Director (Admn) Idara Minhaj ul Quran at Police Station Model Town, **whether while examining the material before this Court, the Court could examine police files and JIT reports of above referred FIRs?**

38. The learned counsel for the petitioner/complainant argued that as the complainant was not satisfied with the conduct of the police officers and a large number of police officials were the persons complained against and they have been summoned including the I.G, Police Punjab, in such circumstances these reports should not be considered as they were prepared by biased officers and may prejudice the mind of the Court. On the other hand, learned PG assisted by his team and Mr. Azam Nazir Tarrar Advocate, argued that Court has powers to examine all such material. He submitted further, under Section 202 of the Code while inquiring into truthfulness or falsehood of the complaint, the Court has ample powers to examine the police files, final reports prepared by the police or JIT reports in order to reach at a final conclusion. Both of the parties have placed reliance on 1984 P.Cr.L.J. 2545 and 1968 P.Cr.L.J 1526.

39. Section 202 of the Code bestows vast powers upon the Court to ascertain the truth or falsehood of the complaint and in this respect as it could direct any inquiry or investigation and during inquiry it could examine the police file and final reports including report of JIT to come to a definite conclusion, as it is covered under the definition of material and if felt necessary may examine the members of JIT, I.O in a private complaint or any other witness recorded during investigation of said case so that complete picture of the occurrence supported by relevant material must be before him while passing an order under Section 204 (for summoning the accused), so that no innocent person should face agony of trial and no culprit should go unpunished.

Reference may be made to the judgement of august Supreme Court in case of *"S.M.H. Rizvi v. Abdus Salam and another"* (PLD 1960 SC 358) wherein it was observed:-

"We are conscious of the importance of allowing to each Court how-low-so ever full scope to exercise its powers within the law in the discharge of its functions. In a case where the initial complaint or report is of such a nature that it is doubtful whether a prima facie case of the offences alleged is made out, a Magistrate would be fully within his rights in calling for evidence before deciding that the complaint or report should be rejected."

It is pertinent to note that the use of police report in case of *"Muhammad Ismail v. The State and 3 others"* (1984 PCr.LJ 2545) the Court observed that police report cannot be read to detriment of the complainant (for dismissing complaint under Section 203 of Cr.P.C.) but it may be read and considered in favour of the complainant (for issuing process under Section 204 of Cr.P.C.).

In the case of *"Allah Yar v. The State"* (1968 P.Cr.L.J 1526) similar observations were made by the learned single judge of Sindh High Court in the following terms:-

"4. There is no doubt that it is for the trial Magistrate during a preliminary enquiry to sift the truth and that his discretion for arriving at the truth on the record before it is unfettered but the further consideration in the peculiar circumstances of this case in the context of Muhammad Ashraf v. Zafar Muhammad alias Master Khaki Zaman and others is that even though justice has to he administered without fear or favour regardless of the parties, it should appear to have beers done arid, therefore, the Court concerned must nevertheless guard against any suspicion of the "assumption of the role either of a prosecutor or of acting in favour of the defence. The order of the learned trial Magistrate dated the 16th of June 1967, stated that it was necessary to have the Police papers to be made available to him. At the stage of the impugned order all the witnesses of the complainant had been examined in the preliminary enquiry. At that juncture the counsel for Pir Shamsuddin applied for examination of witnesses who are obviously only defence witnesses on the point of his alibi and had nothing to state for the complainant case. In that one respect the order to examine Pir Ghulam Hyder as a witness does appear to be unjustifiable and to savour as an act advancing the case of the defence setting it at motion at that stage. Process in law can only issue after a proper enquiry and in the interests of justice and on the ground that Inspector Muhammad Pinjal had made the final investigation and submitted the challan and that the papers of the investigation contained documents referring to the movements of Pir Shamsuddin on the day previous to and the day of the incident, in which this applicant was a complainant, his examination at that stage in a preliminary enquiry on the other hand was fully justified. A reference with advantage may also be made to the following observations of Farooqi, J., in Syed Wahid Bux Shah v. The State and another where Section 202, Cr. P. C. and its purpose in law was under discussion:

"The whole purpose of the preliminary inquiry under Section 202, Cr.P.C. 1898 is to avoid the issue of process to the accused person in a case, and it is not to be held as if it was a full-dress rehearsal for the trial. If, therefore, the purpose of Section 202 of the Code is to enable Magistrate to postpone the issue of process, how then can that purpose be allowed to be frustrated when the Magistrate decides to

hold a preliminary inquiry in which he issues notice to the accused and "allows most of the things to be done which, properly, must wait until the issue of process. Therefore, though there may be no contravention of any specific provision of the Code it appears to be clear that it was not intended that in a preliminary inquiry, under Section 202 of the. Code, the accused should be summoned by notice and allowed to have the prosecution witnesses cross-examined and produce his own side of the case either orally or in writing. In the case the purpose of inquiry ostensibly was to determine whether process should be issued or not, and, therefore, the Magistrate did not act properly in permitting accused to be present by notice, allowing them to be represented by counsel and have the prosecution witnesses cross-examined."

40. The contention that if the complaint is filed against any officer or group of officers or department then examination of such report may prejudice the mind of the Court, has no wisdom at all because judicial officers are trained to examine the material from both the sides during trial or during other proceedings and then without being prejudiced always apply their independent judicious mind to come to a definite conclusion on material in issue. There is no intention of legislature in Section 202 of the Code to bind the Court only to the extent of complaint and the evidence produced by him, as the Court has vast powers of inquiry and investigation, therefore, unambiguously the Court is not bound by only and only evidence of the complainant, therefore, power of the Court cannot be curtailed and Court can examine the police file, report under Section 173 or JIT report, prepared in a state case registered about the same occurrence.

41. This has become a trend in our Courts that at the time of recording cursory evidence in complaint cases they take the matter without considering its importance and only rely upon the evidence/material produced by the complainant before the Court. In routine matter this procedure may be sufficient to establish the truthfulness or falsehood of complaint but in number of cases any material may be beyond the control of the complainant or he may not be aware whether such witness will appear and support the complaint or not or there is official record to be placed on the file and there is requirement of recording of statements of different officers including senior officers or high political figures then either the Court should broaden its canvass of inquiry and summon all concerned and also direct relevant material/documents to be submitted on record, relevant documents or may investigate the case and for the purposes of investigation the Court has again vast powers. It could get the matter investigated through Magistrate or Ex-Justice of Peace or through police or any other person. The word "any other person" used in this section carries vast impression. As discussed earlier, it includes officer(s) of any rank of any government, agency or even a retired officers and this investigation would be under the direct control and direction of the Court and to the extent of scope provided in Section 202 of the Code. **At this stage we are mindful of the fact that Court in this case is performing its functions under the relevant law but as per separation of powers between the province and the federation within the limits of province, but for the purposes of justice if Court feels necessary it may approach the federal government to get**

the services of any of its employees or agency like FIA, etc, or any officer of any agency or officer related to federal establishment division or federal agency and performing duty in the control of any province but that too with the permission of both, but the Court shall while appointing any officer as inquiry or investigation officer shall ensure that no person should be appointed as inquiry or investigation officer who has any direct or indirect interest in the complainant or the person complained against.

SECTION III

42. Learned counsel for the petitioner argued that one-man tribunal under the Punjab Tribunal of Inquiries Ordinance, 1961 was headed by Hon'ble Judge of High Court with the approval of the Hon'ble Chief Justice and they were trying to get report of this commission in support of their stance and also to produce evidence recorded by the Hon'ble Tribunal to be placed before the Court under proceedings in the complaint. On Court question whether the report of the commission and witnesses could be considered as material under Section 202 of the Code, learned counsel submitted that evidence recorded by the commission could be used as material.

43. On the other hand, learned PG submitted that the report of the commission could not be used in any subsequent proceedings and same protection has been provided to the witnesses who appear before the tribunal and their statements could only be used for the purposes of prosecuting for giving false evidence before the tribunal, hence both i.e. report of the commission as well as evidence recorded by the commission could not be considered as material under Section 202 of the Code, hence the same could not be produced. Further submits that even evidence of CW-18 (Muhammad Shakil) is not admissible in evidence at all because this relates to the statement of a witness before the tribunal and as the evidence by the witness has been protected in the statute not to be used against him, hence, any such evidence before the tribunal is irrelevant material for the purposes of inquiry or investigation under Section 202 of the Code.

44. Subject to certain exceptions, it is settled principle of criminal jurisprudence that, evidence of one case cannot be read into another case. Reference may be made to "*Natho v. The State* PLD 1986 SC 146, *Akbar Ali v. Qazi Javed Ahmad and others*" (1986 SCMR 2018), *Ali Sher v. The State*" (PLD 1987 Kar. 507), "*Umer Hayat v. Additional Sessions Judge-III, Khushab and 2 others*" (2008 PCr.LJ 523) and *Malik Aman v. Haji Muhammad Tufail*" (PLD 1976 Lah. 1446) However, the analysis of Articles 140, 151 and 153 of QSO clearly indicates that there are two purposes for which a previous statement of a witness can be used. One is for cross- examination and contradiction and the other is for corroboration. Section 6 of the Punjab Tribunals of Inquiry Ordinance, 1969 puts embargo upon the use of statement recorded before Tribunal/Commission established under the said Act, against the witness except to prosecute him for giving false evidence before the Tribunal.

45. It may be important to note that Section 6 of the Punjab Tribunals of Inquiry Ordinance, 1969 is pari materia with Section 16 of Pakistan Commissions of Inquiry

Act, 2017, Section 6 of the Pakistan Commissions of Inquiry Act, 1956 (Repealed) and Section 6 of Indian Commissions of Inquiry Act, 1952. Since there is very little case on Section 6 of the Punjab Tribunals of Inquiry Ordinance, 1969, therefore, case law available on the identical provisions of statutes of same nature may be useful to understand its proper scope. Relevant provisions are reproduced as under:-

THE PUNJAB TRIBUNALS OF INQUIRY ORDINANCE, 1969

*"**6. Statements made by persons to the Tribunal.**--**No statement made by a person in the course of giving evidence** before the Tribunal shall subject him to, or be **used against him** in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:*

Provided that the statement--

(a) is made in reply to a question which he is required by the Tribunal to answer; or

(b) is relevant to the subject matter of inquiry.

PAKISTAN COMMISSIONS OF INQUIRY ACT, 2017

***16. Statements made by persons before the Commission.** No statement made by a person in the course of giving evidence before the Commission shall, except in accordance with law, subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:*

Provided that the statement,-

(a) is made in reply to a question which he is required by the Commission to answer; or

(b) is relevant to the subject matter of inquiry.

THE PAKISTAN COMMISSIONS OF INQUIRY ACT, 1956

***6. Statements made by persons to the Commission.** No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:*

Provided that the statement,

(a) is made in reply to a question which he is required by the Commission to answer; or

(b) is relevant to the subject-matter of inquiry.

[INDIAN] THE COMMISSIONS OF INQUIRY ACT, 1952

6. Statements made by persons to the Commission,--

No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement.

Provided that the statement--

(a) Is made in reply to a question which he is required by the Commission to answer, or

(b) Is relevant to the subject matter of the inquiry."

46. In the case *"Kehar Singh v. State"* (AIR 1988 (SC) 1883) question before the Supreme Court of India was, whether the appellants i.e. the accused before the trial Court were entitled to use the copies of the statement of those prosecution witnesses who were examined before the Thakkar Commission for purposes of cross-

examination or to use the report of the Commission or whether it could be handed over or given over to the accused for whatever purpose they intended to use? While answering the question His Lordship Oza J. concluded that **"Without going into the wider questions even a plain reading of Section 6 as discussed above will prohibit the use of the previous statements at the trial either for the purposes of cross-examination to contradict the witness or to impeach his credit.** His lordship **K. Jagannatha Shetty, J. (agreeing with Oza, J.)** observed **that the statement given before a commission shall not be admissible against the person in any subsequent civil or criminal proceeding save for perjury.** It may be observed that in a considerable number of cases the subsequent use of statement recorded before the Inquiry Commission came under consideration but **it pertained to "use against the witness himself" and the Courts consistently ruled that such statement cannot be used against such witness in any manner whatsoever. However, there has been no question ever that the witness examined before the Commission cannot be summoned or produced witness in any subsequent proceedings.** In this regard, reference may be made to *"Ram Krishna Dalmia v. Justice Tendolkar"* (1959 SCR 279); *"Sohan Lal v. State"* (AIR 1965 Bombay 1) and *"State of Maharashtra v. Ibrahim Mohd.,"* (1978 Cri LJ 1157).

47. In the case *"Sajjan Kumar vs. Central Bureau of Investigation"* (Crl. Rev. P. 328/2012) the question of admissibility of evidence (recorded before commission) in another criminal case, came under consideration. In the cited case, the prosecution raised objection that accused cannot use the previous statements of prosecution witnesses for purpose of contradiction. The prosecution argument was based on the observation made by Apex Court in Kehar Singh's case (cited supra), wherein, the honourable Court observed:-

"26. At this stage, it would be appropriate to take note of the fact that in Kehar Singh's case, the prosecution did not rely upon any affidavit filed or statement made before the Commissions. It was the accused who requested for the copies of the statement of witnesses made before the Commission, to contradict the witness with reference to such statements as part of defence. Therefore, the facts of the case before this Court are altogether different.

27. The contention of learned Senior Advocate for CBI that the affidavits filed and statement made before the Commissions are admissible in examination-in-chief of PW-1 Smt. Jagdish Kaur but accused is precluded from contradicting the witness on Ex.PW1/A to C during cross-examination in view of bar of Section 6 of Commissions of Inquiry Act, is devoid of any merit as no examination- in-chief which is not allowed to be subjected to cross-examination can be read in evidence, since a person against whom a deposition is made/examination-in-chief is directed, has a legal right to cross-examine the witness who has deposed against him.

28. Neither the part of examination-in-chief which referred to affidavits Ex.PW1/A & B and statement Ex.PW1/C, nor these documents can be read in evidence against the accused unless he is given an opportunity to cross-examine PW-1 Smt. Jagdish Kaur with respect to affidavits filed and statement made before the Commissions."

48. It may be concluded that the report is a recommendation of the Commission/Tribunal for consideration of the Government. It is the opinion of the Commission based on the statements of witnesses and other material. It has no evidentiary value in the trial of the criminal case (in this regard reference may be made to "Kehar Singh v. State" (AIR 1988 (SC) 1883). However, the material collected or evidence recorded by the Inquiry Commission (i.e. oral depositions, affidavits, site inspection note, electronic and print media reports etc.) may be used by the prosecution and the embargo of Section 6 of the Punjab Tribunals of Inquiry Ordinance, 1969 only affords protection to such witness. The trial Court may, on its own motion or at the request of the complainant may call the concerned persons to appear in investigation or inquiry for the purposes of recording of evidence or direct them to produce the relevant documents or to produce the record of electronic and print media and its transcript if required. However, while passing an order under Section 203 or 204 of the Code, the Court has to adjudge the relevance of the material so produced and not its admissibility which is the subject of regular trial.

49. It may further be noted that the Tribunal report has already been made public on the direction of this Court in case of *"Province of Punjab versus Qaisar Iqbal and others"* (PLD 2018 Lahore 198). This report is no more a privileged document as it has become a public document. The complainant has a right to produce the evidence/material collected by the one-man Tribunal in case of inquiry/investigation Under Section 202 of the Code. **Therefore, there is every possibility that such material may or may not qualify as an admissible piece of evidence in subsequent trial proceedings. However, such "material" may be capable of being translated into admissible piece of evidence, leads to the discovery of admissible evidence or it is helpful to the Court in reaching the conclusion that order under Section 204 of the Code may be passed for the summoning of the accused.**

50. The question before this Court is, whether Judge Anti-Terrorism Court while conducting inquiry under Section 202, Cr.P.C. was justified in refusing to consider statements recorded before Inquiry Commission to ascertain the facts/allegations made in the private complaint? It has been noted above that in proceedings under Section 202, Cr.P.C., Court is required to satisfy himself as to the truth or falsehood of the facts narrated in the complaint on the basis of material already available to him or that came to his knowledge during inquiry/investigation process. The term "material" used in Section 202 of the Code connotes something relevant---not necessarily admissible piece of evidence. It has already been noted that a witness before the Inquiry Commission may be a good and competent witness during subsequent trial or proceedings. Therefore, at inquiry stage, Judge ATC was bound to consider the statements made before the Inquiry Commission to reach the conclusion whether these statements are "relevant" to the case and if, he reaches the conclusion that those statements are relevant, then on the basis disclosure of facts made therein, he could have summoned those witnesses at the inquiry stage under Section 202 of Cr.P.C. for the purpose of ascertaining the truth or falsehood of complaint. It may be called as a "pre-ascertainment of purpose stage". There arises no question of using it against the witness who made the same before the Inquiry Commission. Therefore,

Judge ATC altogether misapplied and misquoted Section 6 of the Punjab Tribunals of Inquiry Ordinance, 1969.

SECTION IV

51. It has been argued before us that no complaint under Section 120-B of PPC can be lodged except by Federal or Provincial Government or by a person authorized by either of the said Governments by virtue of bar contained in Section 196-A read with Section 196, Cr.P.C. The said provisions are reproduced hereunder for ready reference:-

CODE OF CRIMINAL PROCEDURE, 1898

*"**196. Prosecution for offences against the State:** No Court shall take cognizance of any offence punishable under Chapter VI or IX-A of the Pakistan Penal Code (except Section 127), or punishable under Section 108-A, or Section 153-A or Section 294-A, or Section 295-A or Section 505 of the same Code, unless upon complaint made by order of or under authority from, the Federal Government or the Provincial Government concerned, or some officer empowered in this behalf by either of the two Governments.*

***196-A. Prosecution for certain classes of criminal conspiracy.** No Court shall take cognizance of the offence of criminal conspiracy punishable under Section 120-B of the Pakistan Penal Code, (XLV of 1860).*

*(1) **in a case where the object of the conspiracy** is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence **to which the provisions of Section 196 apply,** unless upon **complaint made by order or under authority from [the [Federal Government], or the Provincial Government concerned,** or some officer empowered in this behalf by either of the two Governments], or*

(2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, 8[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, unless the [Provincial Government], or a [Officer incharge of the prosecution in the district] empowered in this behalf by the [Provincial Government], has, by order in writing, consented to the initiation of the proceedings:

Provided that where the criminal conspiracy is one to which the provisions of subsection [(4)] of Section 195 apply no such consent shall be necessary.]"

The plain reading of Section 196-A of the Code suggests that "certain classes of criminal classes" have been subjected to aforesaid condition i.e. if the criminal conspiracy is to commit an offence to which the provisions of Section 196 apply. Section 196 of the Code applies to the offences punishable under Chapter VI or IX-A, PPC (except Section 127), or punishable under Section 108-A, or Section 153-A or Section 294-A, or Section 295-A or Section 505 of the same Code. Therefore, the offence of criminal conspiracy (Section 120-B, PPC) would ordinarily be coached by Section 196-A of the Code if it has any connection with the offences controlled by Section 196 of the Code. Even otherwise, Honourable Supreme Court of Pakistan in the case *"Javed Iqbal and others vs The State"* (2016 SCMR 787) observed:-

"6. Another legal aspect of the case argued before us by the learned Sr. ASC was regarding non-compliance of the mandatory requirement of Section 196, Cr.P.C., about seeking sanction/permission for trial of an accused charged under Sections 295-A, P.P.C., which was lacking in the present case. In this context, he relied upon the case of Nawaz Sharif v. The State (2000 MLD 946). Indeed, Section 196 of Cr.P.C. bars the Court from taking cognizance of an offence under Section 295-A of P.P.C., without requisite sanction/approval/permission and failure to obtain such mandatory permission renders the proceedings to that extent a nullity in law. However, ***we are not impressed by this submission of the learned Sr. ASC, as bar of taking cognizance provided under Section 196, of the Code will not apply to the proceedings before the Anti-Terrorism Courts in view of the combined effect of Sections 12, 19, 30 and the overriding effect of Section 32 of the ATA, being proceedings under a special statute, which provides exclusion of those provisions of the Code and other laws which are inconsistent with the provisions of ATA.*** *In this context, a glance at these provisions of the ATA goes to show that Section 12, which starts with non obstante clause, deals with the jurisdiction of Anti- terrorism Courts; Section 19 provides for a detailed procedure under sub-sections (1) to (14), regarding the procedure and powers of Anti-terrorism Court; Section 30, which also starts with non-obstante clause, provides for modified application of certain provisions of the Code (Criminal Procedure Code), during the proceedings before the Anti-terrorism Court, and lastly Section 32 gives overriding effect to the provisions of ATA, and provides that notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before an Anti-terrorism Court, which shall be deemed to be a Court of Session. The case of Nawaz Sharif (supra) relied by the learned Sr. ASC in support of his submission about the applicability of Section 196, Cr.P.C. to the proceedings before the Anti-Terrorism Courts, also negates his arguments. For ease of reference, relevant conclusion in this judgment is reproduced as under:-*

"Thus, there being inconsistency and the difference between the provisions of Section 30 of the Act and Section 196 of the Code, the provisions contained in the latter will not be applicable to the proceeding before the Special Court. Therefore, in view of the inconsistency, as discussed above, Section 32 of the Act would come into play and the bar contained in Section 196, Cr.P.C. would not in any way affect to the taking of cognizance by this Court in exercising power under Section 19 of the Act. Consequently, the application is dismissed." (Emphasis added)

The interpretation offered by august Supreme Court of Pakistan fully covers the proposition in hand and the bar on taking cognizance provided under Section 196-A of the Code will not apply to the proceedings before the Anti-Terrorism Courts in view of the combined effect of Sections 12, 19, 30 and the overriding effect of Section 32 of the ATA, being proceedings under a special statute, which provides exclusion of those provisions of the Code and other laws which are inconsistent with the provisions of ATA.

52. Now I will take another important allegation of conspiracy advanced in the complaint against private respondents and argued before us with full vigour. The

August Supreme Court in the case of *"Zulfikar Ali Bhutto vs. The State"* (PLD 1979 SC 53) while interpreting Section 120 A of the Pakistan Penal Code observed:-

733. This section makes criminal conspiracy a substantive offence on the statue book like every other offence in the Penal Code. By its very definition criminal conspiracy consists in the mere agreement between two or more persons to do an illegal act, or an act which is not illegal by illegal means. However, as pointed out in Mulcahy's case a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an illegal act, or to do act by illegal means. As long as the design rests in intention only it is not indictable. The proviso to this section, however, expressly lays down that no agreement, except an agreement to commit an offence, shall amount to a criminal conspiracy unless some overt act besides the agreement is done in pursuance thereof.

734. This in essence is the whole gist of the offence of conspiracy and its characteristics. ***At the core, in a conspiracy, lies some sort of agreement, be it express, implied or implicit, or in any other form, between the parties thereto to do an illegal act or to do a legal act by unlawful means.*** *Indeed, this is common ground, and on this there was no difference between the parties at the hearing before us, It is, therefore, not necessary to labour the point any further." (Emphasis added)*

53. I am benefitted from a number of judgements of the Supreme Court of India *i.e. Devender Pal Singh v. State N.C.T. of Delhi* (2002 AIR (SC) 1661, *K. Hashim v. State of Tamil Nadu* (AIR 2005 SC 128) and *State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru* (AIR 2005 SC 3820), and deduce the pivotal points relating to the offence of criminal conspiracy:-

(i) An object to be accomplished,

(ii) A plan or scheme embodying means to accomplish that object,

(iii) An agreement or understanding between two or more of the accused persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means,

(iv) In the jurisdiction where the statute required an overt act,

(v) Essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed,

(vi) Unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence,

(vii) Encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment.

(viii) The conspiracy is held to be continued and renewed as to all its members whenever and wherever any member of the conspiracy acts in furtherance of the common design,

(ix) For an offence punishable under Section 120-B, prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement by may be proved by necessary implication,

(x) A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means,
(xi) So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, acts contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.
(xii) Essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by the direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available.
(xiii) There is distinction between the conspiracy and offences committed pursuant to conspiracy. Conspirators who did not commit the offence are liable for the offence committed by some of them in execution of the common design.
(xiv) Exact when the conspiracy was hatched can be spelled out. It is not always possible "to give affirmative evidence" about the date of formation of the criminal conspiracy."

54. Moreover, in the case of *"Yakub Abdul Razak Memon v. State of Maharashtra, through CBI, Bombay"* (2013(13) SCC 1) it has been observed by the Supreme Court of India that the gist of the offence is an agreement to break the law. It is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. It observed further,
"Since conspiracy is hatched in secrecy, to bring home the charge of conspiracy, ***it is relevant to decide conclusively the object behind it from the charges leveled against the accused and the facts of the case. Object behind it is the ultimate aim of the conspiracy. Further, many means might have been adopted to achieve this ultimate object. The means may even constitute different offences by themselves, but as long as they are adopted to achieve the ultimate object of the conspiracy, they are also acts of conspiracy.***
Prosecution need not necessarily prove ***that the conspirators expressly agreed to do or cause to be done the illegal act,*** *the agreement may be proved by necessary implication. It is not necessary that each number of the conspiracy must know all the details of the conspiracy. All of them need not be present in Pakistan or continue to remain in Pakistan. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. Accused need not be present at each and every meeting for being held to be a part of the conspiracy.*
It is also not necessary that each member of the conspiracy should know all the details of the conspiracy. Conspiracy is a continuing offence. Thus, If any act or omission which constitutes an offence is done in Pakistan or outside its territory, the conspirators continue to be the parties to the conspiracy - The conspiracy may be a general one and a smaller one which may develop in successive stages. It is an unlawful agreement and not its accomplishment, which is the gist/essence of the crime of conspiracy. In order to determine whether the conspiracy was hatched, the Court is required to view the entire agreement and to find out as in fact what the conspirators intended to do."

55. **Dr. Sri Hari Singh Gour in his well-known 'Commentary on Penal Law of India', (Vol. 2, 11th Edn. page 1138)** summed up the legal position in the following words:

*"**In order to constitute a single general conspiracy there must be a common design.** Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be general plan to accomplish the common design by such means as may from time to time be found expedient."*

56. In case of "*Regina v. Murphy*" [(1837) 173 E.R. 502] Coleridge, J. of Supreme Court of Canada observed:-

*"[...] I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove **that these two parties came together and actually agreed in terms to have this common design and to pursue it by common means, and so to carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing and neither law nor common sense requires that it should be proved.** If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. **The question you have to ask yourselves is, 'Had they this common design, and did they pursue it by these common means - the design being unlawful ?' .... "If you are satisfied that there was concert between them, I am bound to say that being convinced of the conspiracy, it is not necessary that you should find both Mr. Murphy and Mr. Doughlas doing each particular act, as after the fact of conspiracy is already established in your minds, whatever is either said or done by either of the defendants in pursuance of the common design, is, both in law and in common sense, to be considered as the acts of both."***

57. In the case of *"Ajay Agarwal v. Union of India"* (1993 AIR (SC) 1637 the Supreme Court of India as to the nature of criminal conspiracy as a continuing offence, observed:-

*"29. A conspiracy thus, is a **continuing offence** and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long its performance continues, it is a **continuing offence** till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same*

effect as in India, when part of the acts, pursuant to the agreement are agreed to be finalized or done, attempted or even frustrated and vice versa."

58. United States Federal Court in case *"Van Riper v. United States"* (13 F 2d. 961) observed, "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another and have made a partnership in crime." In the case *"Ram Narain Poply v. Central Bureau of Investigation"* (2003 AIR (SC) 2748) the Supreme Court of India observed:-

*"**349. No doubt in the case of conspiracy there cannot be any direct evidence.** The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and **such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.***

It was observed further:-

***We are aware of the fact that direct independent evidence of criminal conspiracy is generally not available and its existence is a matter of inference. The inferences are normally deduced from acts of parties in pursuance of a purpose in common between the conspirators.** This Court in V.C. Shukla v. State (Delhi Admn.), (1980(2) SCC 665) held that to prove criminal conspiracy there must be evidence direct or circumstantial to show that there was an agreement between two or more persons to commit an offence. **There must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of an offence and where the factum of conspiracy is sought to be inferred from circumstances, the prosecution has to show that the circumstances give rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.** As in all other criminal offences, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. The circumstances in a case, when taken together on their face value, should indicate the meeting of the minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits thereon which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied for the purposes of drawing an inference should be prior in time than the actual commission of the offence in furtherance of the alleged conspiracy."*

59. In the Case of *"Imran Ashraf and 7 others vs. The State"* (2001 SCMR 424), it has been held:-

"***As far as commitment between two or more persons who have conspired together to commit an offence etc., is concerned it is a relevant fact as against each of the persons believed to be so conspiring as well as for the purpose of proving the***

existence of the conspiracy as far as the purpose of showing that any such person was a party to it within the meaning of Article 23 of Qanun-e-Shahadat Order, 1984. For convenience it is reproduced hereinbelow:--

"23. Things said or done by conspirator in reference to common design.-- Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of purpose of showing that any such persons was a party to proving the existence of the conspiracy as for the it."

A perusal of above Article of Qanun-e-Shahadat Order suggests that the Court seized with the matter has a duty to satisfy itself that there is a reasonable ground to believe the existence of conspiracy in pursuance of an agreement among them to commit an unlawful act etc. existed, therefore, it becomes obligatory upon the prosecution to produce evidence for the purpose of establishing that two or-more persons have conspired for the commission of a crime or unlawful act by way of entering into an agreement and making commitment to fulfill it for the purpose of achieving the object. If the prosecution has failed to bring on record evidence to show that before the actual commission of the offence there was any agreement may be oral or written amongst two or more persons for the commission of the offence then it would not be possible to conclude that prior to the commission of the offence any criminal conspiracy was hatched to attract the provisions of Section 120-B, P.P.C."

60. August Supreme Court in the case *"Zulfikar Ali Bhutto vs. The State"* (PLD 1979 SC 53) while interpreting Section 10 of Evidence Act 1872 (corresponding to Article 23 of QSO 1984) held:-

"100. The methodology employed in the actual application of Section 1 of the Evidence Act is fully demonstrated in these cases to the effect that its actual application follows and does not precede the finding that there is reasonable ground to believe that a conspiracy exists and certain persons are conspirators. It merely speaks of the use of evidence in the case, and the section does not control the sequence in which the evidence should be let in. It appears to that these are but only two phases in the exercise of the application of Section 10 of the Act, and not two distinct and separate stage laying down the order in which evidence is to be led. ***In the initial phase and as a condition precedent under this section; the Court has got to find from evidence aliunde on the record that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence or ar; actionable wrong.*** *After having passed this test, the next phase ire the exercise consists in the actual application of the operative part of this section whereby anything said, done or written by any one of such persons in reference to their common intention, during the continuance of the conspiracy, is treated as a relevant fact against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of conspiracy as for the purposes of showing that any such person was a party to it. In fact this section deals with the mode of evaluation and the use of the evidence brought on the record. It does not provide that the proof of*

existence of the conspiracy must necessarily precede any proof of the acts and declarations of the co-conspirators of the accused for usel against them."

"101. To sum up, it will be seen that the facts in issue in a case under Section 10 of the Evidence Act are, whether there was an agreement for the alleged purpose and whether the accused was a party to it. Evidence in support of either may be given first. It may be that evidence is first allowed to go on the record about anything said done or written by one of the accused in reference to their common intention during the continuance of the alleged conspiracy for use against the other accused of their participation in the offence, subject to the condition that there were reasonable ground to believe about the very existence of the conspiracy and the partners in it This course is thus provisionally admitting the evidence has a merit in it and is conducive to the expeditious disposal of the trial and, if I may say so, suited to the prevailing conditions in this country where the delays in the administration of justice have become proverbial and moral especially because, as in this case, the trial is not by jury. So that the trial Court at the same time is the Judge both on facts and law in the case". (Emphasis added)

These principles were also followed by a learned full bench of Karachi High Court in the case *"Mian Muhammad Nawaz Sharif and others vs. The State and others"* (PLD 2002 Karachi 152). In the case *"Muhammad Azim Malik vs. Government Of Pakistan and others"* (PLD 1989 SC 519) it was held by the august Supreme Court:-

"15. Conspiracy has been made an offence under Section 963 of the United States Code Annotated. At serial No. 134 of United States Code Annotated, Title 18, Cumulative Annual Pocket Part for use in 1983 mentions the following case:-

"Accused who allegedly conspired with persons who were in Canada to have a murder committed and who allegedly made one or more telephone calls to those people in Canada had sufficient nexus with Canada, even though he did not enter Canada, to justify Canada's exercise of jurisdiction over charges that he conspired to kill someone outside of Canada. Melia v. U.S., C.A. Conn. 1981, 667 F.2d 300.1

16. Article 23 of Qanun-e-Shahadat contains an illustration of conspiracy which is relevant to the matter under consideration. It is reproduced as hereunder:-

"Reasonable ground exists for believing that A has joined in e conspiracy to wage war against Pakistan.

The facts that B procured arms in Europe for the purpose of the conspiray, C collected money in Peshawar for a like object D persuaded persons to join the conspiracy in Karachi, E published writings advocating the object in view at Multan and F transmitted from Lahore to G at Kabul the money which C had collected at Peshawar and contents of a letter written ...."by H giving an account of the conspiracy are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him and although they may have taken place before he joined the conspiracy or after he left it."

These two illustrations, one from the United States Law and the other from our own are sufficient to establish that in a case of conspiracy physical presence within the Court's jurisdiction is not necessary."

61. The "design" is a very critical component as to constitute criminal conspiracy. The said term has not been defined anywhere in Code of Criminal Procedure or Pakistan Penal Code. **Black's Law Dictionary TENTH EDITION** defines design as under:-

Design, n. (16c) 1. A plan or scheme. 2. Purpose or intention combined with a plan.

Formed design. (1861) Criminal law. The deliberate and fixed intention to kill, though not necessarily a particular person. See PREMEDITATION.

3.---

Advance Law Lexicon (4th Edition, Volume 2) explains the term in the following manner:-

Design, Purpose, Intend. *To design denotes an object or attainment placed before the mind, with a calculation of the steps necessary for it. It is a complicated intention carried into action, or proposed for it.*

The intention is a movement or inclination of the mind in regard to a distant object, which causes it to stretch forward toward that object. The design is an idea chosen and adopted, which implies method and mediation. An intention is pure or otherwise; a design is suddenly or deliberately formed, and may be good or bad, but is seldom entirely good. One may be mistaken in one's intentions, and thwarted in one's design. (Smith Syn. Dis.)

IN THE LAW OF EVIDENCE Design denotes purpose, or intention, combined with plan, or implying a plan in the mind.

It may also not be out of place to note that the term "design" has been used in Section 6 of ATA. The said term came under consideration before august Supreme Court of Pakistan in the case *"Kashif Ali vs. The Judge, Anti-Terrorism, Court No. II, Lahore and other"* (PLD 2016 SC 951), the honourable Court observed:-

"11. The term "design" has been defined in the Words and Phrases, Permanent Edition - Vol.12 as under:-

"Act is done "designedly" when done by design, on purpose, intentionally; "design" is plan or scheme conceived in mind and intended for subsequent execution, preliminary conception of idea to be carried into effect by action, contrivance in accordance with pre- conceived plan; and "to design" is to form plan or scheme of conceive and arrange in mind, originate mentally, plan out, contrive."

12. ***The term "design" now used in Section 6 of the Act has widened the scope of the Act and the terms "intention" and "motive" previously used have been substituted with the sole object that if the act is designed to create a sense of fear or insecurity in society, then the Anti- Terrorism Court will have the jurisdiction. From the above definition of the term "design" it is clear that it means a plan or scheme conceived in mind and intended for subsequent execution.*** *"*

In the case *"Mirza Shaukat Baig and others vs. Shahid Jamil and others"* reported as (PLD 2005 SC 530) it has been observed:-

"[T]he words "designed to" as used in Section 6 of the Act can be equated to that of 'willful' "which means intending the result which actually comes to pass; design; intentional; not incidental or involuntary. Again it says 'willfully is generally used to mean with evil purpose, criminal intent or the like. In R.V. Senior, willfully, was interpreted to mean deliberately and intentional, not accidentally or inadvertently." [(1899) 1 Q B 283]. (Words and Phrases, permanent Edn. Vol. 45, p.275).

17. According to Halsbury's Laws of England, Fourth Edition, Vol.11, para. 1252 'wilfully' means deliberately and intentional, not accidentally or inadvertently. Frank R. Prassel in his Criminal law, Justice and Society 1979 Edition, page 150 says that "Intent is probably the most common, at least for the major traditional offences, but some L codes call the proof of 'wilful' 'voluntary', 'malicious', 'corrupt', or 'purposeful' product instead. These terms are generally accorded similar legal meanings, subject to limited variation from one jurisdiction to another.
18. According to Black's Law Dictionary, Fifth Edition, "an act is done wilfully and knowingly when the actor intends to do it and knows nature of the act. Further that an act or omission is 'wilfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fall to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. It goes on to say that when used in criminal context it generally means an act done with a bad purpose, without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act."
19. Stroud's Judicial Dictionary Vol. 4, third Edition, says "that the legal meaning of wilful is purposely without regard to bona fides or collusion and deliberately and intentionally but does not involve obstinacy of an obstructive kind and it means an intentional disobedience. In the Law Terms and Phrases Judicially Interpreted, by Sardar Muhammad Iqbal Khan Mokal, the term "wilfully' amounts to nothing more than this that the person whose action is in question, mows that he is doing and intends to do what he is doing and is free agent. He further says that wilful means wantonly, intentional, deliberately and consciously and not accidentally or by inadvertence. Reference is made there to Madras State Waqf Board v. Tajammal Hussain (AIR 1968 Mad. 332) and Kedar Nath v. The State (AIR 1965 All. 233)."
20. According to Cyclopaedic Law Dictionary, 2nd Edition, the word 'wilfully' "means in the common sense, voluntary or intentional. In criminal law the term generally means more than 'voluntary' and implies as evil mind or intent. "
21. In the light of above mentioned discussion the only inescapable conclusion would be that the words "designed to" are equated to that of wilfully, knowingly and deliberately.

62. I am cognizant of the fact that terms, phrases and definitions used in one statute cannot be imported into another unless the law expressly provides for the same. However, if the context and object of the two different statutes is the same, the terms used in either of them may be used to understand the purpose of the same.
63. Ordinarily, a person cannot be made responsible for the acts of others unless they have been instigated by him or done with his knowledge or consent. However, Article 23 of QSO (which corresponds to Section 10 of repealed Evidence Act 1872, which is still in vogue in India) provides an exception to that rule, by laying down that an overt act committed by any one of the conspirators is sufficient, (on the general principles of agency) to make it the act of all. In this context it would useful to reproduce the pari materia provisions of both Acts:-
INDIAN EVIDENCE ACT, 1872

"**10. Things said or done by conspirator in reference to common design**
Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

Illustration

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the 11[Government of India]

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected in Calcutta for a like object D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta , and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

QANUN-E-SHAHADAT ORDER 1984

"**23. Things said or done by conspirator in reference to common design.--**Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving that existence of the conspiring as for the purpose of showing, that any such person was a party to it.

Illustrations

Reasonable ground exists for believing that A has joined in A conspiring to wage war against Pakistan.

The fact that B procured arms in Europe for the purpose of the conspiracy, C collected money in Peshawar for a like object, D persuaded persons to join the conspiracy in Karachi, E published writings advocating the object in view at Multan, and F transmitted from Lahore to G at Kabul the money which C had collected at Peshawar and contents of a letter written by H giving an account of the conspiring are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him and although they may have been taken place before he joined the conspiracy or after he left it."

64. In the case *"Kali Ram v. State"* 2010(6) AD(Delhi) 45 a Division Bench of Delhi High Court observed:-

"47. Since more often than not, conspiracy would be proved on circumstantial evidence, four fundamental requirements as laid down as far back as in 1881 in the

judgment reported 60 years later at the suggestion of Rt. Hon'ble Sir Tej Bahadur Sapru *i.e.* 1941 All ALJR 416, *Queen Empress v. Hoshhak may* be re-emphasised:-

I. That the circumstances from which the conclusion is drawn be fully established;

II. That all the facts should be consistent with the hypothesis of guilt;

III. That the circumstances should be of a conclusive nature and tendency;

IV. That the circumstances should, by a moral certainty, actually exclude every hypothesis but the one proposed to be proved;"

65. In *"Kehar Singh v. State" (cited supra)* Jagannatha Shetty, J., has analysed this particular section as follows:

"278. From an analysis of the section, it will be seen that ***Section 10 will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence. There should be, in other words, a prima facie evidence that the person was a party to the conspiracy before his acts can be used against his co- conspirator. Once such prima facie evidence exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was first entertained, is relevant against the others. It is relevant not only for the purpose of proving the existence of conspiracy, but also for proving that the other person was a party to it.*** *"*

68. Section 10 of the Evidence Act is based on the principle of agency operating between the parties to the conspiracy inter se and it is an exception to the rule against hearsay testimony. If the conditions laid down therein are satisfied, the act done or statement made by one is admissible against the co- conspirators."

66. In *"Sardul Singh Caveeshar v. State of Bombay"* (AIR 1957 Supreme Court 747), it was held:

"The principle underlying the reception of evidence under Section 10 of the Evidence Act of the statements, acts and writings of one co- conspirator as against the other is on the theory of agency. The rule in Section 10 of the Evidence Act, confines that principle of agency in criminal matters to the acts of the co-conspirator within the period during which it can be said that the acts were in reference to their common intention 'that is to say' things said, done or written, while the conspiracy was on foot 'and' in carrying out the conspiracy. It would seem to follow that where, the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence."

67. The Supreme Court of India in *"Central Bureau of Investigation v. V.C. Shukla and Ors."* (1998) 3 SCC 410, held:

"40. ... ... In dealing with this Section in ***Sardul Singh v. State of Bombay, 1957 CriLJ 1325,*** *this Court observed that it is recognised on well-established authority that the principle underlining the reception of evidence of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. Ordinarily, a person cannot be made responsible for the acts of others unless they*

have been instigated by him or done with his knowledge or consent. This section provides an exception to that rule, by laying down that an overt act committed by any one of the conspirators is sufficient, (on the general principles of agency) to make it the act of all. But then, the opening of words of the Section makes in abundantly clear that such concept of agency can be availed of, only, after the Court is satisfied that there is reasonable ground to believe that they have conspired to commit an offence or an actionable wrong. In other words, only when such a reasonable ground exists, anything said, done or written by any one of them in reference to their common intention thereafter is relevant against the others, not only for the propose of proving the existence of the conspiracy but also for proving that the other person was a party to it. In ***Bhagwan Swarup v. State of Maharashtra, 1976 CriLJ 860,*** *this Court analysed the section as follows:-*

"(1) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co- conspirator and not in his favour." (Emphasis Supplied)

68. In the case *"Mohd. Khalid v. State of West Bengal"* [2002(7) SCC 334], Supreme Court of India stated the legal position thus:

"We cannot overlook that the basic principle which underlies Section 10 of the Evidence Act is the theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under Section 10."

69. Adrian Keane and Paul McKeown in their book "The Modern Law of Evidence" (9th Edition, Oxford University Press, London, 2011, pp 398-400) have made exhaustive discussion on the issue of admissibility confessional statement/statement of an accused against co-accused. They have categorised three exceptions to the general rule (as to inadmissibility). The third exception relates to case in hand. They observe:-

"The third exception, which is perhaps best understood in terms of implied agency, applies in the case of conspiracy: statements (or acts) of one conspirator which the jury is satisfied were said (or done) in the execution or furtherance of the common design are admissible in evidence against another conspirator, even though he was not present at the time, to prove the nature and scope of the conspiracy, provided that there is some independent evidence to show the existence of the conspiracy and that the other conspirator was a party to it. Thus in R v Blake and Tye, where the accused

were charged with conspiracy to pass goods through the Custom House without paying duty, it was held that whereas a false entry by T in a counterfoil of a cheque, by which he received his share of the proceeds of the crime, was not admissible against B because it was not made in pursuance of the conspiracy, but simply as a matter of record and convenience, another false entry by T in a day book could be used in evidence against B since it was made in the execution or furtherance of their common design. It does not matter in what order the evidence of the statements (or acts) of the conspirator and the 'independent evidence' is adduced. Evidence of the statements (or acts) may be admitted conditionally, i.e. conditional upon some other evidence of the common design being adduced; if it transpires that there is no other evidence of common design, then the statements (or acts) should be excluded.
R v Blake and Tye was applied in R v Devonport, in which the prosecution were allowed to rely on a document, dictated by one accused, which showed the proposed division of the proceeds of the conspiracy among all five accused. The following elaborations on the principle derive from R v Platten. (1) The exception does not cover narrative, after the conclusion of the conspiracy, describing past events. (2) It covers statements made during a conspiracy and as part of the natural process of making the arrangements to carry it out, which are admissible not just as to the nature and extent of the conspiracy, but also as to the participation in it of persons absent when the statements were made. (3) Such statements can be admitted against all the conspirators even if made by one conspirator to a non-conspirator. (4) Statements about a conspirator having 'second thoughts' would be made in furtherance of the common design, because it is typical of a conspiracy for one conspirator to have doubts and to be persuaded by his co-conspirators to forget them. (5) Statements made before a conspirator was alleged to have joined the agreement can only be evidence of the origin of the conspiracy, not evidence of his part in it."

70. From our above survey it may be summarized that Sections 120-A and 120-B were introduced in the Penal Code by way of amendment in the year 1913. Underlying purpose was to make a mere agreement to do an illegal act or an act which is not illegal by illegal means punishable under law. For an offence punishable under Section 120-B, prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. It is not necessary that all the conspirators must know each and every detail of the conspiracy. It will be difficult to get direct evidence of the agreement, but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. If encouragement and support which co-conspirators gives to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. Mostly, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The exact period when the conspiracy was hatched can be spelled out. It is not always possible "to give affirmative evidence" about the date of formation of the criminal conspiracy. Usually both the existence of the conspiracy and its objects have to be inferred **from the circumstances and the conduct of the accused.** Moreover, there is distinction

between the conspiracy and offences committed pursuant to conspiracy. Conspirators who did not commit the offence are liable for the offence committed by some of them in execution of the common design.

71. It appears that the learned trial Court was not fully conversant with the principle of law of criminal conspiracy and how the conspiracy will be inferred and in order to prove the case of conspiracy, normally no direct evidence is available and inference is to be drawn through circumstantial evidence. The Court below has not passed any order that newspapers are not piece of material to be ignored, rather the Court took defence point of view that these statements were political in nature and there was no intention of these persons to have conspired. The Court adopted a different approach while directing summoning of Muhammad Usman (DCO), Tahir Mehmood Chandio and Ali Abbas (TMO).

72. It has been argued by Mr. Azam Nazir Tarrar, Advocate and his team that allegation against his client is of having conspired the occurrence, however, no such information was previously provided in FIR No. 696/2014 which was registered on 28.08.2014 and even after a considerable delay this fact was not disclosed in the application filed before JOP. He argued that the complainant party made a number of applications to Respondent police high ups and they had exhibited confidence in them. Therefore, in the given circumstances, delay is to be considered fatal to the case of the complainant. He argued further that action of the police force was taken under the authority of law with complete bona fide and same is protected by Section 79 of Pakistan Penal Code, 1860 and Article 171 of e Police Order, 2002 (C.E. Order No. 22 of 2002).

73. I would like to address the issue of "good faith" first. There is no cavil to the proposition that "acts or omissions" done by a public servants in good faith, bona fide or with legal justification are protected under the law. However, at the same time, it is relevant to observe that these stances may be offered as a defence in the appropriate proceedings and ordinarily do not bar the initiation of proceedings out rightly. In the case *"State of Orissa v. Bhagaban Barik"* (1987 AIR (SC) 1265) the Supreme Court of India observed:-

"3. Section 79 of the Indian Penal Code provides that nothing is an offence which is done by any person who is justified by law, or who by reason of mistake of fact and not by reason of mistake of law, in good faith, believes himself to be justified by law, in doing it. Under this section, although an act may not be justified by law, yet if it is done under a mistake of fact, in the belief in good faith that it is justified by law it will not be an offence. Such cases are not uncommon where the Courts in the facts and circumstances of the particular case have exonerated the accused under Section 79 on the ground of his having acted in good faith under the belief, owing to a mistake of fact that he was justified in doing the act which constituted an offence. As laid down in Section 52 of the Indian Penal Code, nothing is said to be done or believed in good faith which is done or believed without due care and attention. ***The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. 'Good faith' requires not logical infallibility***

but due care and attention. The question of good faith is always a question of fact to be determined in accordance with the proved facts and circumstances of each case.*"*

In the case *"Oriental Insurance Co. v. State of Bihar, (Patna) (DB)"* (2004(2) PLJR 458) Patna High Court observed:-

"[---] The plea of 'good faith', ***therefore, is not a ground on which alone the prosecution can be quashed at the threshold stage itself.*** *It is in the nature of defence which an accused may take in a criminal case and, therefore, whether under the General Insurance Business Act read with the General Clauses Act or under the Indian Penal Code when the question arises as to* ***whether the particular act was done in good faith within the meaning of Section 38 of the General Insurance Business Act, the party taking such defence is required to prove it by evidence.*** *"*

In the case *"Assistant Commissioner Anti Evasion Commercial Taxes, Bharatpur v. M/s Amtek India Limited"* (2007(11) SCC 407) Supreme Court of India held in express terms:-

"10. Whether an act has been done in good faith would depend upon the factual scenario. In order to establish "good faith", it has to be established that what has been imputed concerning the person claiming it to be so, is true."

In the instant case, it is very much unclear as to, "what was the legal mandate of police to use the force? Whether the magnitude of such mandate was proportionate to the object to be achieved? Whether such mandate was exercised within the legally prescribed limits?" These all are the questions of facts and may be adjudicated upon at the appropriate stage of the proceedings keeping in view the defence offered for the same.

74. The second argument of Azam Nazir Tarrar Advocate learned counsel for the petitioners that complainant were addressed number of applications to the police officers and hence, he had expressed confidence in them and the allegation as to their involvement is afterthought. This argument is misconceived on the very premise that complainant party moved various applications to various State Agencies and in the same way application was moved to the head of the Department of police i.e. Inspector General of Police in his official capacity, not to the petitioner in Criminal Revision No. 7067/2017 in his personal capacity. Suffice it to say that to move an application to register a criminal case against an SHO is addressed to the Station House Officer even he may himself be an accused.

75. Now, I would like to discuss the alleged delayed introduction of allegation of criminal conspiracy. From the documents placed on the direction of this Bench by the learned PG and his team it appears that the occurrence commenced in the midnight of 16/17.03.2014. First FIR was registered on 17.06.2014 by SHO Rizwan Qadir and second FIR was registered on 28.06.2014 and per report and documents placed on the file application was filed on 19.06.2014 before the police and then on the same facts without any addition or deletion application was moved before the learned Ex-officio Justice of Peace and accordingly second FIR was registered on the basis of same allegations. I will not like to further comment on this aspect as it may prejudice the

rights of the parties, sufficient to observe that in the application moved on 19.06.2014 it was carried out and ultimately the FIR was registered wherein it was written:

From above reproduced excerpt from FIR No. 696/2014 registered on the application of Jawad Hamid as well application dated 19.06.2014 filed by the same complainant before the police authorities; it appears that in the FIR as well as application same words have been written. It therefore appears that from the very beginning the complainant party was levelling allegation of conspiracy against the Chief Executive of the country and Chief Executive of the province along with other political personalities, Federal and Provincial ministers and senior bureaucrats and it was investigating agency which, later on, had to record evidence of the witnesses and collect all the evidence to dig out the truth. Although the learned PG submits that the witnesses were summoned again and again yet they did not appear before the investigating agency. On the other hand, as discussed above, in the complaint it is stated that the witnesses appeared before the JIT and their statements were not recorded and further mentioned that they moved number of applications for constitution of a new JIT as they had no confidence on the JIT constituted by the government. When these facts are examined, prima facie the stance of the complainant appeals to mind that JIT had not recorded their statements and for the same reason details of the facts were for the first time narrated before the Court during recording of cursory evidence. There is nothing on the record that witnesses of abetment (Khuram Nawaz Gandapur & Fayyaz Ahmad Chaudhry, Muhammad Tayyab Zia Norani and Hafiz Muhammad Waqar who had heard I.G Police, earlier before any authority deposed different as to their statements in the proceedings during complaint before the Court, hence, their statements for the first time surfaced and could not be brushed aside simply on the ground of having no supporting documentary evidence. Our apex Court and the superior Courts of many other foreign jurisdictions in a number of judgments, as we have discussed above, are of the view that normally there is no direct evidence as to the proof agreement between the conspirators and from the circumstances of the case inference is to be drawn. This important aspect has altogether been ignored by the learned Trial Court while passing the impugned order.

76. There is another important aspect of the case that the FIR is not substantive piece of evidence, it is just information of an offence which is provided in FIR No. 610/2014 and allegations of abetment have been levelled. It is duty of the IO to dig out the truth and collect all evidence and not to bank upon the complainant alone. Quite recently, August Supreme Court in *"Mst. Sughran Bibi versus The State"* (PLD 2018 SC 595), has held that each and every detail is not required to be provided in the FIR. It is not requirement of law that the complaint should provide full details to

canvass the whole scene of the occurrence, describe the weapon of offence, number of witnesses, motive, the role played by the accused or details of the conspiracy. The relevant portion of FIR states:-

Moreover, in case of *"Ali Muhammad and others v. Syed Bibi and others"* (PLD 2016 SC 484) it was held:-

"10. As could be seen from the plain reading of above reproduced provision of law, the requirement of Section 154 of the Code is to enter every information of commission of a cognizable offence, whether given orally or in writing to the officer-in-charge of the Police Station, which shall then be reduced into writing and signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in the form prescribed by the Provincial Government in this behalf. Meaning thereby, that it is not a legal requirement for provider of such information to canvass the whole scene of occurrence of a cognizable offence giving description and details of accused, details of weapons used by them, their specific role, motive behind the occurrence, and the names of eye-witnesses etc. But it is a matter of common experience that usually the entries made in Section 154 of the Code book, as per practice, contain invariably all such details so much so that in the ordinary parlance/sense it is considered as the gist of the prosecution case against the accused. In such state of affairs, if a collusive, mala fide or concocted FIR, registered at the instance of some individual with some ulterior motive, is taken as sacrosanct, it is likely to divert the whole course of investigation in a wrong direction and spoil the entire prosecution case on that premise. The Court while considering the crucial point of registration of another FIR cannot remain oblivious of these ground realities so as to non-suit the aggrieved party from agitating his grievance in an honest manner, or ensure regulating proper investigation of a crime in the right direction, or apprehend the real culprits and brought them before the Court of law for justice."

77. In line with the above referred judgment, a three member Bench of honourable Supreme Court, in the case *"Mst. Sughran Bibi versus The State"* (PLD 2018 SC 595), held:-

"(i) According to Section 154, of the Code an FIR is only the first information to the local police about commission of a cognizable offence. For instance, an information received from any source that a murder has been committed in such and such village is to be a valid and sufficient basis for registration of an FIR in that regard.

(ii) If the information received by the local police about commission of a cognizable offence also contains a version as to how the relevant offence was committed, by whom it was committed and in which background it was committed then that version of the incident is only the version of the informant and nothing more and such version is not to be unreservedly accepted by the Investigating Officer as the truth or the whole truth.

(iii) Upon registration of an FIR a criminal "case" comes into existence and that case is to be assigned a number and such case carries the same number till the final decision of the matter.
(iv) During the investigation conducted after registration of an FIR the Investigating Officer may record any number of versions of the same incident brought to his notice by different persons which versions are to be recorded by him under Section 161, of the Code in the same case. No separate FIR is to be recorded for any new version of the same incident brought to the notice of the Investigating Officer during the investigation of the case."

78. Hence, in the first application moved on 19th July, 2014 they have provided the information and it was duty of the concerned investigating agency to dig out the truth, call the witnesses and collect the material in this respect. It appears that when the petitioner was not satisfied with the investigation as senior officers and political high-ups were involved and complainant was of the view that fair independent JIT had to be constituted, and after his failure he filed this complaint and disclosed the facts in detail. The observations of trial Court for disbelieving the cursory statements on the ground that they had not provided number of the vehicle, colour of the vehicle, number of the building where meeting was convened, CDR was not placed on the record or the way of departure was not mentioned, does not appeal to reason. It appears that the Court was considering the case with the angle of the defence. Qanoon-e-Shahadat Order 1984, provides opportunity of cross-examination under Section 151 QSO to impeach credibility of the witnesses and even the Court itself did not put questions to the complainant or his witnesses while recording their cursory statements to get detailed information. Such observations have no legal support at all. The Court while passing the impugned order ignored the provisions of QSO which although lay down strict principle for proving a case yet where there is allegation of criminal conspiracy then the principle applicable to normal cases would not be applied and the rule embodied in Article 23 QSO would come into play.

79. Another reason advanced by the learned trial Court is that holding of three meetings were not flashed in the electronic or print media and same were also not disclosed in FIR No. 696/2014. I cannot lose the sight of the fact that Dr. Tahir ul Qadri along with his allies had expressed his intention to launch a campaign against the government. The said declaration made the Federal and Punjab Governments perturbed. In such circumstances, if some secret meetings were held between the two political parties, this was nothing unusual. Secret meetings especially in our country are not a new dimension. In order to prevent any sort of distrust amongst their followers, if any political party thought of not making such secret meeting public, there does not appear to be any serious wrong with it. Therefore, the reasoning advanced by the learned trial Court is totally alien to our social context. At the same time it appears that the Court did not fulfil its obligation to determine truth or falsehood and even the Court did not examine the report under Section 173, Cr.P.C. and report of the JIT in the state case registered regarding the same occurrence. The report of JIT is equated with report under Section 173, Cr.P.C. in a recent judgment of the apex Court in the case *"Province of Punjab through Secretary Punjab Public*

Prosecution Department and another versus Muhammad Rafique and others" (PLD 2018 SC 178) held:-

"13. The learned counsel has mainly relied upon the report of JIT and also read certain paragraphs therefrom ***but the said report is an opinion of the members of JIT, and it can be considered, at the most as a report under Section 173, Cr.P.C. It is settled by now that report under Section 173, Cr.P.C. is inadmissible in evidence,*** *as laid down by this Court in the case of Syed Saeed Muhammad Shah and another v. The State (1993 SCMR 550). The trial Court will appreciate the same if supported by some admissible material/evidence because the Court has to see the material and cannot decide the case upon any opinion of Police Officer/s, even of a high rank of Inspector General of Police." [Emphasis added]*

After conclusion of hearing of this case when trial Court was asked whether there is any JIT report available on its record, it was reported in the negative, whereas the learned PG and his team submitted all JIT reports informing that all these were part of the police files already submitted before the learned trial Court. It therefore, appears that the Court even did not bother to examine JIT report and material collected by them. The JIT report establishes that meeting of 16th was held and such meeting is corroborated by one witness who heard statement of the witnesses before the tribunal and in said meeting it has been admitted that all high ups were present, matter about removal of barrier was discussed along with overall situation of the country, but

i) No attempt was made by the learned trial Court to probe about minutes of the meeting,

ii) no attempt was made to probe that barriers on other roads of Lahore city were also removed or not, whereas it is admitted position that so many roads had been cleaned from barriers recently by the orders of the Hon'ble Supreme Court of Pakistan and by the orders of this Court.

iii) Meeting is admittedly part of the JIT, but Courts failure to examine those parts especially that he failed to fulfil his liability under Section 202 of the Code or where big political figures or bureaucrats were the persons complained against, principle of law has been violated by the Court.

iv) The Court also did not discuss that according to JIT report more than five hundred police men were present, along with police, private persons were also there, one of whom is Gullu Butt who has been separately tried and sentenced and video clips show that one SP rank officer could be seen embracing him. Therefore, such large number of police contingent and private persons under the command of the D.I.G Police was not required just for the removal of barriers. Further it has also come on record that occurrence spread over a vast area of bout 2½ kilometre radius. The Chief Minister had joined JIT proceedings on 14.03.2015 and told that he asked his secretary to disengage; the secretary joined JIT proceedings on 15.03.2015 and submitted that he had conveyed this message to the law minister and the Law Minister submitted before the JIT that he onwards directed the CCPO to complete the task. The post-mortem reports and MLCs show that lot of injuries were caused after 9/20 a.m. All these aspects established during JIT, are material as required by the law and admissible in evidence under Article 23 QSO. In this situation, another important aspect is that as a normal course government agencies carry out their such operations like removal of barricades in broad day light but here in this case no justifiable

explanation has come on the record as to what forced the police or what was the urgency so as to rush to the troubled area at about 12.00 midnight and that too while armed with heavy weaponry, especially when the opposite-party at the most had batons with them. All these facts when considered, lead us to infer that same were continuation of one mind set. Although it has come on the record that two police men also sustained fire-arm injuries, but admittedly those were simple in nature. However we would not like to further comment on the veracity of such injuries. Such brutality unleased by the police against unarmed men, with whom they also had no enmity, just for the purposes of removing the barriers, is sufficient to infer something seriously wrong or fishy and when these facts are read along with statements of Shahbaz Sharif, Rana Sana Ullah, Secretary to Chief Minister Syed Tauqeer Shah and Secretary Home Major ® Azam Suleman, during investigation of case FIR No. 696/2014, an inference in favour of the stance taken by the complainant becomes obvious.

80. A news item was flashed in number of newspapers and there is no rebuttal from any authority that why does the flight boarding Dr. Tahir ul Qadri bound for Rawalpindi was diverted to Lahore? As discussed earlier, these clippings were relevant material and trial Court was bound to consider the same at inquiry stage. However, the learned trial Court:-

i) Did not bother either to hold inquiry itself or get the matter investigated on the lines that how many flights on the crucial date were diverted?

ii) What were the weather conditions on the said date? Whether report from meteorology department was called for?

iii) What was the justification behind diversion of the flight?

iv) Whether "Tarmac" where the said flight landed after diversion was under the control of Civil Aviation? If not then why?

Such material was beyond the reach and access of the complainant and the trial Court could have call for the same in the inquiry proceedings or it conveniently, could have directed the investigation under Section 202 of the Code.

81. From the above discussions, especially the principles derived from the judgments of the Hon'ble Supreme Court of Pakistan and the High Courts, I am convinced that sufficient material for summoning of the petitioner in Criminal Revision No. 7067/2017 was available before the learned trial Court and I could not find out any illegality, irregularity or jurisdictional defect in the impugned order to his extent. Moreover, the said petitioner also has a remedy before the learned trial Court to move an application under Section 265-K, Cr.P.C. for redress of his grievance; therefore, Criminal Revision No. 7067/2017 is dismissed.

82. Criminal Revision No. 9027/2017 is allowed, the impugned order to the extent of non-summoning Respondents No. 1 to 12 is held to be against law as the sufficiency of material available on file has not been properly appreciated, thus the same is set-aside. The case is remanded to the trial Court with the direction that it is duty of the Court, during proceedings under Section 202 of the Code, to determine the falsehood or truthfulness of allegations levelled in the complaint and in the light of above made

observations, the Court may hold further inquiry into the matter or get it investigated through any person/agency or a team of experts, as the investigation by police officers does not appear to be appropriate exercise for the reason that number of police officers are involved in the case and have already been summoned. While holding so, I am influenced by the judgement *"Noor Muhammad vs The State, etc"* (2007 SCMR 9), wherein, their lordships held that:-

"The burden of proof in a preliminary inquiry for the issuance of process is quite lighter on the complainant as compared to the burden of proof on prosecution at the trial of an offence as the prosecution is to prove the case beyond reasonable doubt and at the preliminary stage the complainant is not required to discharge above heavy burden of proof . The Court cannot overstretch the proceedings as to convert the preliminary inquiry or the averments made in the complaint to a stage of full-fledged trial of the case. ***It is quite an initial stage whereafter the accused is having the opportunity, apart from showing his innocence in the case at the final stage, to have a recourse of an intermediatory remedy by moving the Court showing the complaint to be false and frivolous one and requesting the Court for his acquittal under Section 249-A or 265-K, of the Code prior to further proceeding in the case to be taken. Mere summoning of an accused by the Court to answer the charges level led against him does not tantamount to any infringement of any right of a person but rather an opportunity afforded to him to explain his position.*** *During the investigation of a F.I.R. case, where the police is empowered to arrest without warrant i.e., in cognizable case, such a process i.e., arrest etc. is resorted to by the police, even in a case where the person accused of the charge pleads innocence before the police and he succeeds in his efforts to some extent and the police agrees with him, yet before any recommendation by the police for his discharge an insistence is made on his surrender before the authorities/Courts. The possibility of accusation turning out to be false or frivolous at the trial should not overbear the Court from issuing the process if the material available, prima facie discloses the case against the accused. At this stage a protracted inquiry or full dress rehearsal of trial is not required. " [Emphasis added]*

83. In the meanwhile, to avoid complexity and multiplicity of the trial, the proceedings of the case to the extent of already summoned accused persons shall stand suspended till the conclusion of inquiry/investigation as already directed. Afterwards, if the remaining persons complained against are summoned by the trial Court, it shall hold denovo trial and if it does not find sufficient grounds to proceed against the remaining persons complained against, then it shall proceed against the already summoned accused persons from its current stage and decide the matter strictly in accordance with law.

84. Before parting with this judgment, I would like to appreciate the legal acumen and the worth exhibited by the learned counsel representing the petitioners and similarly the assistance rendered by the learned Prosecutor General, Additional Prosecutor General and the law officer has also been marvellous. I gratefully acknowledge the material assistance rendered by Lahore High Court Research Centre (LHCRC) headed by Mr. Qaisar Abbas. Proper and comprehensive assistance of all

above, on different and somewhat unique multiple questions of law, helped this Bench to analyse the law in its true perspective.

(K.Q.B.) Revision allowed

PLJ 2019 Cr.C. 1171
[Lahore High Court, Multan Bench]
***Present* : MUHAMMAD QASIM KHAN, J**
MUHAMMAD AHMAD--Appellant
versus
STATE, etc.—Respondents

Criminal Appeal No. 1121 of 2011, heard on 15.4.2019.

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

----S. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--No poison was detected and as at time of occurrence age of convict/appellant was about 14 years and was a student of 7th class whereas deceased age was 50 years well built having good health; hence, in these circumstances, it is not possible that a boy of 7th class could press throat of a well built with good health lady because when deceased was not under influence of any poison or narcotics, she could resist to assailant especially when he is a chap of aging 14 years--From postmortem report, she received seven injuries and when she was not under influence of poison; or narcotics, she must awoke up and straggle to rescue her life and resist assailant--When from bed sheet of deceased and other facts narrated in FIR, inspection notes at time of visit of Investigating Officer to place of occurrence and statement of Investigating Officer in this respect, it is not established that any resistance or struggle appears to be caused by deceased; hence, possibility could not be ruled out that either accused was a young man having strong body who could occupy a well built lady i.e. deceased or there were more than one accused--From postmortem all injuries have not been mentioned in pictorial diagram and even in other number of cases High Court has observed that perhaps medico legal or postmortem are being conducted by some unexperienced doctors alternately damaging to prosecution case--Considering it a serious issue a committee is constituted to be headed by (i) Registrar, Lahore High Court and it shall include (ii) Secretary, Specialized Healthcare & Medical Education Department, Govt. of Punjab, (iii) Secretary Primary & Secondary Healthcare, (iv) Prosecutor General, Punjab and (v) Director General District Judiciary as its members--Registrar shall convene meeting--This committee shall chalk out training program of doctors at Divisional Headquarters where Government Colleges are available having department of Forensic--This Committee may opt any other person as its member--Whole quantum, of my analytical examination of evidence reveals that presence of eyewitnesses at spot at relevant time of occurrence is not believable--In order to justify their presence at spot, they concocted a false story--Sufficient doubts and dents in prosecution story which makes its case highly doubtful and benefit of doubt how slightest always goes to accused--Hence, this appeal is **allowed.**

[Pp. 1175 & 1176] A, B & C

Prince Rehan Iftikhar, Advocate for Appellant.
Ch. Muhammad Akbar, Deputy Prosecute General for State
Mian Tahir Iqbal, Advocate for Complainant
Date of hearing : 15.4.2019.

JUDGMENT

Muhammad Ahmad-appellant was tried by the learned Sessions Judge/Judge Juvenile Court, Sahiwal in case FIR No.32/2011 under Sections 302 P.P.C., Police Station Fareed Town, Sahiwal and *vide* judgment dated 10.10.2011, the learned trial Judge convicted the appellant under section 302 (b) PPC and sentenced him to imprisonment for life along with payment of fine of Rs. 1,00,000/- recoverable as arrears of land revenue and in case the same is recovered, half of the same shall be paid to the legal heirs of the deceased. *Mst.* Naseem Akhtar as compensation under section 544-A Cr.PC. In case of non-payment, he shall further undergo six months simple imprisonment. Benefit of section 382-B of Cr.P.C was extended.

2. Being aggrieved with his above conviction and sentence, the appellant has filed instant appeal.

3. Brief facts of the case, gist of prosecution story, stance of learned counsel for the appellants and the prosecution has already been discussed in detail in the impugned judgment of learned trial Court; hence, there is no need to mention the same here.

4. I have considered the respective arguments of learned counsel for the parties as well as the learned Deputy Prosecutor General and perused the available record with their assistance.

5. In this case, the occurrence was taken place on 17.01.2011 after 6:00 a.m., FIR was registered at 11:25 a.m. with a delay of five and half hours. As per prosecution case, PW.8-Khalid Saeed and PW.7, Muhammad Tariq at the time of occurrence reached at the place of occurrence, apprehended the convict/appellant at the spot and these witnesses admitted that the distance between the Police Station and place of occurrence is 5/6 acres and Police Station is situated on a metal road but why they did not inform the police immediately and why the FIR was registered after delay of more than five hours. During cross-examination, the prosecution witnesses tried to improve their statements by saying that during this period they remained busy to inform their relatives about the occurrence. This part of the evidence introduced at the time of trial is dishonest improvement and does not appeal to prudent mind and this explanation could never be considered as valid explanation for the lodging of FIR with inordinate delay. Hence, delay in lodging of the FIR creates serious doubt qua the prosecution story.

6. The ocular account was furnished by Muhammad Tariq-PW.7 (Complainant of the case) and one Khalid Saeed-PW.8. The occurrence in this case took place in the area of Block-G i.e. House No.346-G, Farid Town, Sahiwal where the deceased-*Mst.* Naseem Akhar was residing, whereas, PW.7 namely Muhammad Tariq is resident of Chak No.89/6-R. Although, the complainant while appearing as PW.7 deposed that he used to visit the house of *Mst.* Naseem Akhtar-deceased after offering his *'Fajjar Prayer'* and on the day of alleged occurrence, as a matter of routine, he offered, his *'Fajjar Payer'* in *Masjid Shohda*. situated in Farced Town, Sahiwal, however, he admitted that there are 2/3 *Masjids* in his village i.e. Chak No.89/6- and

said Chak having surrounding of 6/7 acres consists upon 6000/7000 residents; hence, in these circumstances, it is unbelievable to a prudent mind that as to why the complainant had not been offering his *'Fajjar Prayer'* in his own Chak admittedly, having 2/3 Masjids. Hence, this fact coupled with the admitted fact that PW.7 is permanent resident of Chak No.89/6-R creates doubt regarding his presence at the place of occurrence especially when no other independent evidence is available on the file that these witnesses PW.7 and PW.8 daily came to the residence of deceased-Naseem Akhtar after *'Fajar Prayer'*. Moreover, PW.7 and PW.8 stated that after *'Fajar Prayer'* they jointly came to the house of *Mst.* Naseem Akhtar at House No.346-G, 'Farid Town but during the cross-examination, PW.7 stated that he recited '*Fajar Prayer* in Mosque Shohda, whereas, PW.S-Khalid Saeed stated that he recited *'Fajar Prayer'* in a different Mosque Abu Safian and as per PW.8 both the above referred Mosques relate to *'Dio Bandi'* seet and in our society, the Mosque of same sect are normally situated from a distance with each other to cover a large number of area of the community. In these circumstances, whether these two PWs, joined each other, the prosecution is silent in this respect and this aspect when examined in the light of delayed FIR, creates serious doubt qua the story of these witnesses about their arrival at the place of occurrence jointly and their statements that they have saw the occurrence.

7. Both the witnesses are not resident of same house, allegedly came from a distance to the place of occurrence, they are chance witnesses and they have to establish the reason of their presence at the place of occurrence and if they daily used to visit the place of occurrence after *'Fajar Prayer'*, they have to establish this fact but the prosecution has failed to prove that these witnesses daily used to visit the house of deceased after '*Fajar Prayer*. No inmate of the house or neighbor supported the stance of these witnesses; hence, their presence after *'Fajar Prayer*" and their stance that they saw the convict/appellant pressing the throat of the deceased could not be believed. Moreover, both these witnesses are close relatives of the deceased and they are interested witnesses. Although, evidence mere on the basis of relation could not be denied but have to be scrutinized carefully and especially when they are not inmate of the house and they are chance witnesses and could not prove the reason of their presence at the place of occurrence at the relevant time. Hence, the ocular account furnished by these witnesses is not worthy of credence and same is disbelieved.

8. Apart from above, PW.7 stated that he had a key of the house with him and by using the same, he opened the outer gate of the house but to prove their story they have to produce this key before the Investigating Officer. Neither these witnesses produced the said key before the Investigating Officer nor same was taken into possession by the Investigating Officer which also shattered the story of these two witnesses i.e. PW.7 and PW.8.

9. Postmortem (Exh. PC) of deceased-*Mst.* Naseem Akhtar was conducted by Dr. Ammara, Women Medical Officer, DHQ Hospital, Sahiwal at 3:00 p.m., on 17.1.2011. As per postmortem, there were seven injuries on the dead body of the

deceased. Although, on-the pictorial diagram (Exh.PC/1 & PC/2), only four injuries are mentioned and this doctor was not available and Dr. Arooba Munir. DHQ Hospital, Sahiwal appeared and exhibited postmortem report (Exh.PC) and in postmortem, cause of death was not opined, cause of death was to be declared after receiving the report of Chemical Examiner of the viseera and after receipt of the report of Chemical Examiner, PW.4-Dr. Arooba Munir declared the cause of death. As per report of Chemical Examiner (Exh.PL), no poison was detected and PW-4, Dr. Arooba declared the cause of death injury No.7. If the cause of death was injury No.7 and interference in respiration at the level of neck and chest, this fact was available at the time when Dr. Ammara, Women Medical Officer, DHQ Hospital, Sahiwal conducted the postmortem then why she did not declare the cause of death at that time and kept pending her opinion till the report of Chemical Examiner.

10. As discussed above that as per report of Chemical Examiner (Exh.PL), no poison was detected and as at the time of occurrence the age of convict/appellant was about 14 years and was a student of 7th class whereas the deceased age was 50 years well built having good health; hence, in these circumstances, it is not possible that a boy of 7th class could press the throat of a well built with good health lady because when the deceased was not under the influence of any poison or narcotics, she could resist to assailant especially when he is a chap of aging 14 years. From postmortem report, she received seven injuries and when she was not under the influence of poison; or narcotics, she must awoke up and straggle to rescue her life and resist the assailant. When from the bed sheet of the deceased and the other facts narrated in the FIR, inspection notes at the time of visit of the Investigating Officer to the place of occurrence and statement of the Investigating Officer in this respect, it is not established that any resistance or struggle appears to be caused by the deceased; hence, possibility could not be ruled out that either the accused was a young man having strong body who could occupy a well built lady i.e. deceased or there were more than one accused.

11. From postmortem (Exh.PC) as discussed above, all the injuries have not been mentioned in pictorial diagram and even in other number of cases this Court has observed that perhaps the medico legal or the postmortem are being conducted by some unexperienced doctors alternately damaging to the prosecution case. Considering it a serious issue a committee is constituted to be headed by (i) the Registrar, Lahore High Court and it shall include (ii) Secretary, Specialized Healthcare & Medical Education Department, Govt. of the Punjab, (iii) Secretary Primary & Secondary Healthcare, (iv) Prosecutor General, Punjab and (v) the Director General District Judiciary as its members. The Registrar shall convene the meeting. This committee shall chalk out the training program of the doctors at Divisional Headquarters where the Government Colleges are available having department of Forensic. This Committee may opt any other person as its member.

12. The whole quantum of my analytical examination of evidence reveals that presence of the eyewitnesses at the spot at the relevant time of occurrence is not believable. In order to justify their presence at the spot, they concocted a false story. I

also found sufficient doubts and dents in the prosecution story which makes its case highly doubtful and the benefit of doubt how slightest always goes to the accused. Hence, this appeal is **allowed** and the appellant is acquitted from the charges levelled against him. He be released forthwith if not required in any other case. Case property, if any, be disposed of in accordance with law. Lower Court record be returned immediately.

(A.A.K.) Appeal allowed

2019 Y L R Note 1
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD JAVED and another---Appellants
Versus
The STATE and another---Respondents

Criminal Appeal No.1352 and Criminal Revision No.697 of 2014, heard on 15th January, 2018.

(a) Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Prosecution witnesses being not only related inter se, but also to the deceased, was to be evaluated with extra care and caution---Post-mortem of deceased was conducted with unexplained delay of about nine hours---Such delay gave rise to a legitimate inference that FIR was not registered as per the time mentioned in the FIR---Delayed post-mortem examination of dead body of the deceased, was suggestive of a real possibility regarding time having been utilized by complainant party and the Police in procuring and planting eye-witnesses and cooking up story of prosecution---Subsequent change of stance by the complainant and prosecution witness, was total deviation from the stance taken by the complainant in the FIR---Material improvements were noticed in the case as set out in the FIR---Such dishonest and deliberate improvements and change of stance made the witnesses unreliable and it appeared that they had not witnessed the occurrence---House of accused was surrounded by other houses, but none from surrounding houses came at the spot after hearing the fire shot coming from their neighbourhood---No reason/ motive was set, either in the FIR or in the statements of the witnesses as to what prompted the accused to commit the murder of the deceased---No witness from the locality had been associated---Sending of the empty after six days of arrest of accused, created doubt that empty was sent after concocting a story in order to strengthen the prosecution case---Prosecution, had sufficient opportunity to join any independent person from the locality in the recovery proceedings, but no attempt was made in that respect, which was violation of S.103, Cr.P.C.---Murder was blind and motiveless and prosecution could not connect accused with the commission of the crime without any shadow of doubt---Conviction and sentence of accused were set aside and he was acquitted of the charge and was ordered to be released forthwith, in circumstances.
Abdullah and others v. The State and others 2006 PCr.LJ 1726; Muhammad Bilal v. The State 2006 YLR 2116; Saif Ali v. The State 2008 YLR 375; Misri and 3 others v. The State 1984 PCr.LJ 2832; Ali v. The State 1977 PCr.LJ 136 and Amir Zaman v. Mahboob and others 1985 SCMR 685 ref.

(b) Criminal trial---
----Witness---Relative witness---Mere relationship of witness was not sufficient to discard his testimony---Defence was required to elicit something favourable to it during cross-examination---Conviction could be recorded and sustained, even on the statement of a witness, having relationship.

(c) Criminal trial---
----Witness--- Dishonest improvement made by witness---Effect---When a witness made improvement dishonestly to strengthen the prosecution's case then his credibility would become doubtful---Improvement, once found deliberate and dishonest, would cast serious doubt on the veracity of such witness.

Akhtar Ali's case 2008 SCMR 6 and Khalid Javed's case 2003 SCMR 149 ref.
Rana Muhammad Azam Khan for Appellant.
Hafiz Ghulam Shabir for the Complainant.
Rana Sultan Mehmood, Additional Prosecutor General for the State.
Date of hearing: 15th January, 2018.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---Muhammad Javed accused/appellant faced trial before the learned Additional Sessions Judge, Shahkot District Nankana Sahib in case FIR No.54/2013 under section 302, P.P.C. registered with Police Station City Shahkot, District Nankana Sahib and vide judgment dated 29.04.2014, he was convicted under section 302(b), P.P.C. and sentenced to imprisonment for life with further order to pay Rs.50,000/- as compensation under section 544-A, Cr.P.C., in case of failure to pay compensation, to undergo simple imprisonment for six months. Benefit of section 382-B, Cr.P.C. was extended. This conviction and sentence is under attack through the instant criminal appeal, whereas, Crl. Rev.No.697/2014 has been filed by the complainant to seek enhancement of sentence.

2. Briefly the facts of the case are that Mst. Asia Pareen (PW.5) complainant widow of Muhammad Arshad (deceased) through complaint Ex.PB got lodged the FIR (Ex.PB/1) on 01.02.2013 at 3.55 a.m. (night) to the effect that on 31.01.2013 after Maghreb prayer, she along with Muhammad Arshad (husband), Muhammad Asghar and Muhammad Siddique were present in the house, when Muhammad Javed accused/appellant came and called her husband outside the house. The complainant, Muhammad Asghar and Muhammad Siddique saw Muhammad Arshad going to the house of Javed along with him. At about 1/2.00 a.m. (mid night) on hearing the report of fire, the complainant, Muhammad Asghar and Muhammad Siddique went to the house of Javed, who already had left by keeping door of his house open. They entered and saw that in the room of upper storey (CHOUBARA) of Javed, on a cot Muhammad Arshad was lying dead smeared with blood, who had fire injury on back of left ear. It was further averred that Muhammad Javed had murdered Muhammad Arshad for some grudge, on the instigation of Mst. Nusrat Parveen wife of Ghulam Bismillah and Mst. Ghulam Fatima wife of the accused.

3. After chalking out the formal FIR, Mukhtar Ahmad Sub-Inspector (PW-10) inspected the place of occurrence, prepared rough site plan Ex.PH, inquest report Ex.PJ, injury statement Ex.PK, application for post mortem examination Ex.PL and sent the dead body for autopsy. Thereafter, he secured crime empties of pistol 30-bore through memo Ex.PG, blood through cotton was secured through memo Ex.PD, he recorded statements of witnesses, secured clothes of the deceased and a sealed phial

vide memo Ex.PE. On 06.02.2013 accused Javed was arrested, who on 17.02.2013 disclosed and got recovered pistol P-10 from his house which was secured into possession vide memo Ex.PG, rough sketch of place of recovery is Ex.PG/1. The I.O then recorded statements of the witnesses and submitted report under section 173, Cr.P.C. against the accused.

4. Javed accused/appellant was charge sheeted, to which he pleaded innocence and claimed to be tried. During trial, the prosecution examined Mukhtar Ahmad Sub-Inspector (PW-10) who had investigated the case and the functions performed by him have been detailed above. Dr. Usman Shoukat (PW-8) had conducted autopsy over the dead body of Muhammad Arshad on 01.02.2013, whereas, Mst. Asia Bibi (complainant) who appeared in the witness box as PW-5 and Muhammad Asghar (PW-6) both deposed about the ocular account and Muhammad Nazir PW-9 is the witness of recovery of crime weapon from accused Javed. The rest of the witnesses are all formal in nature and they reiterated what they had performed during the course of investigation. On close of oral evidence, the learned DDPP submitted report of FSL in respect of cotton as Ex.PM and crime empty Ex.PN and closed the case for the prosecution. The accused when examined under section 342 Cr.P.C. while answering the question "Why this case against you and why the PWs have deposed against you", stated that:--
"I have been falsely involved in this case with mala fide and ulterior motive. The deceased Muhammad Arshad was not of good character who was done to death by some unknown assailants during the odd hours of night. His dead body was recovered from the agricultural fields. Later on a fake story was concocted and the case was registered against me. Neither the deceased was taken away by me as stated by the PWs nor his dead body was recovered from my house. In order to black-mail me and my family, I was arrayed in this case falsely after making me a scape-goat. "
The accused however, neither produced any defence evidence nor opted to appear as his own witness under section 340(2), Cr.P.C. and on conclusion of trial he was convicted and sentence, as detailed in the opening paragraph of this judgment.

5. It is argued by learned counsel that the prosecution case is full of improbabilities. He added that according to the prosecution case itself no one witnessed the occurrence and furthermore it appears that accused was recognized only by his voice but nothing has come on the record to suggest that accused was already known to the complainant lady or to the other witnesses. The learned counsel argued that there is no indication from the entire prosecution evidence that after hearing the voice of Javed accused/appellant the witnesses also came out along with Muhammad Arshad deceased, thus in the absence of any such evidence, the statements of the witnesses that they saw deceased going along with Javed accused, is totally a false stance. The learned counsel contended that both the witnesses being closely related inter se and also to the deceased, were highly interested witnesses; although in the FIR it was alleged that murder was committed by Javed accused/appellant on the abetment of Mst. Nusrat and Ghulam Fatima, but no motive or reason whatsoever was mentioned in the FIR as to why the accused would commit such an offence and why the two women could entice or abet the commission of the crime. The learned counsel argued

that recovery of crime weapon in this case is inconsequential. Lastly submitted that prosecution witnesses made dishonest improvements in their statements and they were duly confronted on important aspects, but the learned trial court totally misread the entire evidence and recorded conviction/sentence, which is not sustainable in the eyes of law.

6. On the other hand, learned counsel for the complainant assisted by learned Deputy Prosecutor General opposed the above arguments and contended that sufficient evidence was produced by the prosecution which consisted of most natural witnesses being inmates of the house, although they were subjected to lengthy cross-examination but nothing damaging to the prosecution or favourable to the defence could come out from their testimonies. Further argued that an occurrence could be motiveless, therefore, if no motive has been set by the prosecution, the defence cannot get any benefit of it, because otherwise, the prosecution succeeded in establishing its case against Javed accused/appellant beyond any shadow of doubt and the learned trial court committed error by imposing lesser sentence, whereas, he was entitled to capital punishment, therefore, the learned counsel argued that criminal revision filed for the said purpose i.e. enhancement of sentence, merits acceptance.

7. The arguments of learned counsel for the respective parties have been considered at length and the record of the case has been gone into.

8. It is admitted fact that prosecution witnesses are not only related inter-se but also related to the deceased, therefore, highly interested witnesses, therefore, their evidence is to be evaluated with extra care and caution. This court is also aware of the position that mere relationship of a witness is not sufficient to discard his testimony and the defence is required to elicit something favourable to it during cross-examination, otherwise, conviction can be recorded and sustained even on the statement of a witness who may have relationship.

9. According to the case of the prosecution itself the occurrence took place at about 1/2.00, a.m. (mid night) on 31.01.2013 and the matter was reported to the police on the same morning at 3.55 am. According to Mst. Asia Bibi (PW-5) the police reached at the place of occurrence at about 5.00 a.m. Mukhtar Ahmad Inspector/I.O. (PW-10) sent the dead body to mortuary through Faqeer Muhammad and Abdul Sattar (PW-1). Though the post mortem report mentions the date of receipt of dead body in the Dead House as 01.02.2013, however, no time of receiving the dead body has been written. Anyhow, after the visit of IO to the place of occurrence and sending the dead body to the hospital for post mortem examination might have taken an hour or so. Meaning thereby, the dead body must have reached the hospital roughly at 6 or 7.00 a.m., but from the post mortem report Ex.PF as well as from the statement of Dr. Usman Shoukat (PW-8), the post mortem was conducted at 04.15 p.m. i.e. with a delay of about nine hours and the delay in conduct of post mortem has not been explained by the doctor. Although in District Headquarter Hospitals doctors are available for twenty four hours, even otherwise, morning duty starts from 8.00 am. If it is presumed that doctor was not available at night then why he did not conduct the post

mortem in the earlier hours of the morning i.e. 8.00 or 9.00 am, when the morning batch of the doctors must have joined their duties. Delay in post mortem examination, without any explanation to that effect, gives rise to a legitimate inference that as a matter of fact the FIR was not registered at the time as is mentioned in the FIR, rather due to non-recording of FIR, inquest report and other papers were not complete, the dead body was kept in the mortuary and once the above formalities were completed later-on, the post mortem was thus conducted with delay and this factor is sufficient to create doubt about prompt registration of FIR. In this respect reliance is placed on the case "Abdullah and others v. The State and others" (2006 PCr.LJ 1726), a learned Division Bench of this Court observed that delayed post mortem examination of a dead body was generally suggestive of a real possibility regarding time having been utilized by complainant party and the police in procuring and planting eye-witnesses and in cooking up story of prosecution. Reference can be made to the cases "Muhammad Bilal v. The State" (2006 YLR 2116) and "Saif Ali v. The State" (2008 YLR 375).

10. As shall be seen from the narration of facts detailed above, the case of the prosecution in the complaint Ex.PB and in the FIR Ex.PB/1 is that:-
Subsequently, however, Mst. Asia Bibi (PW-5) and Muhammad Asghar (PW-6) while appearing in the witness box developed their case by adding that "At that time, Javed accused present in the court came at the door of our house, knocked at the door whereupon Arshad deceased inquired about the person who knocked at the door, then Javed accused stated that he was at the door outside the house."
i) If the statements of the witnesses before the court are considered it would mean that accused was simply identified by the witnesses by his voice and informing of his name when he called the deceased admittedly from outside the house, but the entire prosecution evidence is silent on the aspect whether Muhammad Javed was earlier in such terms with the witnesses that they would identify him by his voice.
ii) As observed above, subsequent change of stance by Mst. Asia Parveen PW-5 and Muhammad Asghar PW-6 was total deviation from the stance taken by the complainant in the FIR, wherein, it had been clearly mentioned that accused/appellant had called the deceased by voice (not by knocking at the door) and furthermore, there is no mention that on asking of the deceased, the accused/appellant himself disclosed his name as Javed. Further, both the witnesses before the court also change their version by stating that afterwards Siddique and Asghar PWs went to their house lateron. On these aspects Mst. Asia PW-5 was also duly confronted by the defence in the following words:-
"I got recorded in Exh.PA that upon knocking of the door, Arshad deceased inquired about the person who knocked at the door, at this accused Javed stated that he is at the door outside the house. Confronted with Exh.PA where it is not so recorded."
"I also got recorded in Exh.PA that, thereafter, Siddique and Asghar PWs also went to their house. Confronted with Exh.PA where it is not so recorded."
On same lines Muhammad Asghar (PW-6) was also confronted with his statement in court from his statement before the police.
iii) It is an old known canon that "three things cannot be long hidden: the sun, the moon, and the truth." This saying has proven correct in this case as it appears that

while appearing before the court and making statement on oath, truth came out from the mouth of the prosecution witnesses namely Mst. Asia PW-5 and Muhammad Asghar PW-6, when they deposed that they identified the accused when he himself informed about his name. From the statements of witnesses it appears that as initial impression even the victim could not identify the accused by his voice; that is why he inquired about the person who knocked at the door. Further, it could not be said that the person present outside the house had correctly told his own name, and there existed the possibility that he may have wrongly named himself as Javed to conceal his own identity.

iv) In relation to the cases of identifying the voice of the accused by the witness who heard the voice of the offender, the court has to mainly depend on the perception or the assertion of the witnesses regarding the voice of the offender. There is real possibility of mistake on expense of the surrounding circumstances when the witness perceived the voice. For example, the medium through which he perceived, the ability to remember the way the offender spoke, ability to compare the voices accurately, how long he heard the offender and the time passed between hearing the offender and the accused voice. The non-expert or witness's opinion may be admissible depending upon 'the degree of familiarity of the witness with the suspect's voice' as the strangers are likely to make mistakes. However, the danger of misidentification cannot be wiped out by the degree of familiarity of the witness with the voice of the accused and in order to use the said element as evidence, not only the prosecution is required to create all possible links, the court is also obligated to take such evidence with extra care. But, as observed above, the prosecution witnesses did not explain that they already knew Muhammad Javed and that they were in a positon to identify him by his voice. In the absence of such clarification, chances could not be ruled out that even someone else might have wrongly named himself as Javed who had called the deceased from outside the house. The above piece of evidence becomes further doubtful when we see that there is no indication in the statement before the court that any of the witness went outside the house along with Muhammad Arshad deceased and thus saw the deceased going along with the accused/appellant. Reliance can be placed on the case "Misri and 3 others v. The State" (1984 PCr.LJ 2832) and "Ali v. The State" (1977 PCr.LJ 136).

11. It is also worth noticing that in the FIR there is no mention that Siddique and Asghar PWs later on went to their house and from the contents of the FIR it appears that at about mid night on hearing the noise of fire shot, the complainant along with Muhammad Asghar and Muhammad Siddique right from the house of the complainant, went towards the house of Javed accused/appellant and that already Javed accused/appellant had escaped by keeping the door open. On the contrary, in their statements before the court both the witnesses changed their stance by stating that witnesses went to their house later on, when Muhammad Arshad had gone with Javed accused/appellant. On hearing the noise of fire shot, PWs Asghar and Siddique came to the house of the complainant and thereafter they were going towards the house of Javed, when witnessed Javed accused while going from his house having pistol in his hand. This part of the statement is also material improvement from the case set out in the FIR, wherein, it had been specifically got recorded that accused

had already left his house by keeping the door open; there is no mention that the witnesses had actually seen Javed while escaping and similarly there is no mention in the FIR that accused also had a pistol in his hands. In this respect also the defence duly confronted the complainant in the following manner:-

"I also got recorded in the application that after reporting of the fire shots, PWs Asghar and Siddique came to my house. Confronted with Exh.PA where it is not so recorded."

"I also got recorded in Exh.PA that when we are at some distance from his house, accused Javed fled away from his house while having pistol in his hand. Confronted with Exh.PA where fleeing away of Javed accused along with pistol is not recorded."

On same lines Muhammad Asghar (PW-6) was also confronted with his statement in court from his statement made before the police during investigation. Such dishonest and deliberate improvements and change of stances made the witnesses unreliable and it appears that they had not witnessed the occurrence, and are not trustworthy. It is held in the case of Amir Zaman v. Mahboob and others (1985 SCMR 685) that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in Akhtar Ali's case (2008 SCMR 6) it was held that when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, cast serious doubt on the veracity of such witness. In Khalid Javed's case (2003 SCMR 149) such witness who improved his version during the trial, was found wholly unreliable.

12. Another aspect is that prosecution witnesses during their statements in court have shown consistency on the point that after hearing the noise of fire shot, Muhammad Asghar PW-6 came to the house of the complainant (PW-5) and then they straightaway proceeded towards the house of Javed accused/appellant. During cross-examination Mst. Asia Bibi (PW-5) deposed that:-

"My village is situated on both sides of the above mentioned road. The street which leads to our house from the above said road is situated on the right side of the road. 7/8 houses fall in the street from the main road up till my house in the said street. The said street is the first street of the village Abadi which is situated on the east of the above said road. House of Siddique and Asghar is situated in the third street from my house. House of Siddique mentioned above is also situated in the street after 6/7 houses from the main road. Masjid Bazar is located after three streets from the house of Siddique mentioned above. House of accused Javed is situated towards west from Masjid Bazar. House of accused Javed is 12th house in the street from the metalled road, thereafter the agricultural fields are located."

Considering the location of the house of the complainant, the house of Muhammad Asghar and the house of deceased, as detailed by the complainant in the above reproduced lines, it becomes obvious that first there was the house of the complainant and the house of Muhammad Asghar (PW-6) was away in the third street from her house, whereas, the house of accused was further three streets away from the house of the witness and that too 12th in the street. This mean that house of the witness was in the street falling in the middle of the street of the complainant and the deceased. Thus if Muhammad Asghar PW-6 had heard the noise of fire shot, as a natural consequence

he must have rushed towards the site of fire shot, but according to the prosecution case instead of going towards the site of fire shot, he firstly ran towards opposite direction i.e. the house of the complainant, took her along and then came back to the place of occurrence, which is the most unnatural conduct. Furthermore, it has come in the evidence of prosecution witnesses that house of the accused was surrounded by other house, but surprisingly none from the surrounding houses came at the spot after hearing the fire shot coming from their neighborhood, whereas, Muhammad Asghar whose house was situated three streets away heard the sound of fire shot. Further, had the witnesses seen Javed accused/appellant escaping from the place of occurrence along with crime weapon in his hand in the odd hours of the night, they must have asked from him as to what had happened to him and where he was going with weapon in his hands, but the prosecution witnesses did not put any question to him at that moment. The witnesses even did not inquire from him regarding the whereabouts of Muhammad Arshad deceased.

13. As shall be seen from the contents of the FIR although it was alleged that Javed accused/appellant had committed the murder under the abetment of Nusrat Parveen and Ghulam Fatima, but no reason/motive was set either in the FIR or in the statements of the witnesses that what prompted the accused appellant to commit the murder and why the above two ladies would abet the commission of such crime, instead the complainant furnished an affidavit during the course of investigation that both the above ladies were not involved in the case as abettors and that they were innocent.

14. According to Mukhtar Ahmad Sub-Inspector/I.O. (PW-10) one empty P-1 was taken into possession by him vide recovery memo Ex.PC on the day of occurrence i.e. 01.02.2013.

i) Accused was taken into custody on 06.02.2013, he remained with police on physical remand and during this period on 12.02.2013, the empty was sent to the FSL for comparison. Although it is alleged that crime weapon i.e. Pistol P-10 secured vide memo Ex.PG was recovered on 17.02.2013 from the house of accused/appellant on his pointation and disclosure, but as in these proceedings relating to recovery of crime weapon from the accused, no witness from the locality has been associated. In this situation sending of the empty after six days of arrest of the accused create doubt that empty was sent after concocting a story and in order to strengthen the prosecution case the same was shown to have been recovered on 17.02.2013. Furthermore, considering the facts and circumstances of the case, the prosecution had sufficient opportunity to join any independent person from the locality in the recovery proceedings, but even no attempt was made in this respect, as such, there is obvious violation of Section 103 Cr.P.C.

ii) Another important aspect is that according to the prosecution case on the night of occurrence i.e. 01.02.2013, Javed accused/ appellant was seen by the witnesses while escaping from his house with crime weapon in his hand. Subsequently the accused was arrested on 06.02.2013 and on his disclosure/pointation crime weapon P-10 was recovered from his dwelling house on 17.02.2013. It is repellent to common sense that once the accused had successfully managed his escape from the place of

occurrence along with crime weapon, afterwards he returned back to his house (place of occurrence) along with weapon of offence, put it in his dwelling house and subsequently get the same recovered during investigation. These all factors when considered make the recovery/recovery proceedings extremely doubtful.

15. For what has been discussed above, I am of the considered view that this was a blind and motiveless murder and the prosecution could not connect the accused/appellant with the commission of said crime without any shadow of doubt. Consequently, this appeal is allowed, the conviction/sentence of the accused/ appellant is set-aside and he is acquitted of the charge. He shall be released forthwith if not required in any other case. The case property, if any, shall be disposed of in accordance with law and the record of the learned trial court be sent back immediately.

16. For the above reasons, the criminal revision fails and is dismissed.

HBT/M-138/L Appeal allowed.

PLJ 2019 Lahore 605
***Present*: MUHAMMAD QASIM KHAN, J**
JAVED--Petitioner
versus
STATE, etc.—Respondents

W.P. No. 237718 of 2018, decided on 22.10.2018.

Criminal Procedure Code, 1898 (V of 1898)----
----Ss. 154/161, 22-A & 22-B--Police Rules, 1934--Cross-version--Recording registered criminal case--Guidelines--Application for registration of criminal case--Same was disposed of with a direction to investigating officer of FIR to proceed on application of petitioner if cross-version attracts in case or not--Petitioner voiced a grievance that despite order by learned Ex-Officio justice of peace, his cross-version was not being recorded--Additional Inspector General Police was directed to appear--He was also directed to prepare SOP (Standard Operating Procedure) with consultation of all stakeholders and issue same for guidance of police officials investigating cross-versions to avoid any complication to public at large--Cross-version of present petitioner has been recorded to bring same in line with requirement of law and police rules.--Petition was disposed of. [Pp. 606 & 608] A & B

PLD 2018 SC 595, *ref.*
Mr. Rasheed Afzaal Cheema, Advocate for Petitioner.
Mian Muhammad Qamar-uz-Zaman, Advocate for Respondent No.7.
Mr. Muhammad Afzal Bhatti, Assistant Advocate General for State.
Date of hearing : 22.10.2018.

ORDER
Briefly the facts of the case are that regarding an occurrence, FIR No.116/2018 dated 30.03.2018 under Sections 337-A(i), 337- A(ii), 186, 148, 149, PPC was registered at Police Station City Nankana Sahib on the complaint of Abdul Rehman Shaheen (Respondent No.7) against the present petitioner and some others. Since the petitioner had another story regarding the same occurrence, therefore, he filed an application under Sections 22-A/22-B, Cr.P.C. before the learned Ex-officio Justice of Peace, the same was disposed of *vide* order dated 03.05.2018 with a direction to the Investigating Officer of the said FIR to proceed on the application of the petitioner if cross-version attracts in the case or not. Through the instant writ petition the petitioner voiced a grievance that despite order by the learned Ex-officio Justice of Peace, his cross-version was not being recorded.

2. On 27.09.2018 District Police Officer and S.P (Investigation) were directed to appear before this Court in person along with Investigating Officer on 28.09.2018. On 28.09.2018 the Court was apprised that cross-version of the petitioner had been recorded. On perusal of the police file this Court observed that statement of petitioner was not recorded u/S. 161 Cr.P.C and further his statement was also not incorporated in *RAPT ROZNAMCHA* and statements of his witnesses and the site plan in the light

of statement of the witnesses of cross-examination was not prepared, which is against the requirement of law and if the Investigating Agency adopted this way of recording cross-version then the complainant of cross-version will miss out his basic rights and it will frustrate the requirement of law in the light of case *"Mst. Sughran Bibi versus The State"* (PLD 2018 Supreme Court 595). The DPO as well as other police officers also could not come out with any explanation; as such the Additional Inspector General Police was directed to appear in person and he was apprised about the situation and relevant provisions of law, especially the police rules as guidance for recording of cross- versions and its investigation. He was also directed to prepare SOP with the consultation of all stakeholders and issue the same for guidance of police officials investigating the cross-versions to avoid any complication to the public-at-large.

3. Today, the Court has been informed that SOP (Standard Operating Procedures) No.30200/Inv/HA/L dated 19.10.2018 has been issued with regard to recording of cross-versions, a copy whereof has been placed before the Court. An extract of the same is reproduced hereunder:--
On Court query the police officers present in Court inform that now the cross-version of the present petitioner has been recorded to bring the same in line with the requirement of law and the police rules. This being the position the grievance of the petitioner stands redress and this petition is **disposed of** accordingly.

4. It has been observed that in the above referred SOP a comprehensive mechanism has been laid down but from the covering letter of the SOP it appears that although the same was addressed to the heads/Incharge of the concerned branches of the police department, but the same do not appear to have been routed to the bottom i.e. to the SHOs or the Investigating Officers. Similarly, the SOP also does not appear to have been circulated for public awareness or to the legal fraternity. The Inspector General of Police Punjab is directed to ensure that above referred SOP shall be communicated to the SHOs who shall onward see that the SOP must be complied with in letter and spirit by the Investigating Officer. At the same time, the Inspector General of Police Punjab shall ensure that copy of this SOP must be transmitted to all the Tehsil and District Bar Associations of Punjab for information.

(K.Q.B.) Petition Disposed of

2019 [M] P.Cr.R. 1019

[Lahore]

Present: **MUHAMMAD QASIM KHAN, J.**

Muhammad Salim and others

Versus

The State and others

Criminal Appeals No. 123794, 125821, 123677, 124400, 125624, 126431 and 126556 of 2017, decided on 3rd May, 2018.

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

---Ss. 409, 420, 468, 471---Prevention of Corruption Act, 1947, S. 5(2)---Loss to public exchequer---Documentary evidence not proved---Conviction and sentence set aside---Appellants (i) Farooq Ahmad, (ii) Muhammad Tariq, (iii) Arshad Mehmood-ul-Hassan, (iv) Muhammad Faheem and (v) Muneer Ahmad Cheema, were acquitted, whereas, the rest of the accused/appellants were convicted and sentenced: (i) Najam Pervaiz Butt, (ii) Imtiaz Ahmad, (iii) Muhammad Khalid, (iv) Sheikh Muhammad Saleem, (v) Basharat Ahmad were convicted and sentenced to rigorous imprisonment for three years with fine of Rs. 25,00,000/-, each---(i) Muhammad Ashraf Naz and (ii) Jehan Khan were convicted and sentenced to rigorous imprisonment for one year each with fine of Rs. 300.000/-, each---The allegations levelled against the accused/appellants is that they in connivance with each other prepared forged and fabricated estimates for widening the Urdu Bazar, New Urdu Bazar and Rail Bazar, Roads in Sargodha; while preparing the bills for the payments of the work done to the Contractor, they tempered with the relevant record and also made payments against the approved scope of work and they made fudged payments, thus, caused a loss of Rs. 24,56,564/- to the public exchequer---Allegation, conveniently could be established through the documentary evidence and as a matter of fact the prosecution got exhibited those documents during the course of trial and the conviction/sentence is also based on such documentary evidence---Almost all those exhibited documents only carry the stamp and signatures of Deputy District Officer, without any mention of name and date thereon---There also does not exist any certificate on the foot of any of those documents to the effect that same was true copy of the original document or part thereof---The documents which were brought on record without following the requirements of law could neither be exhibited in evidence nor the same could be read against the accused/appellants---Since all of the documents brought on record by the prosecution do not stand the test of legality, therefore, the same do not in any way advance the case of the prosecution---Therefore, when the main documents are taken out of consideration, merely on the basis of some other documents, neither the conviction could be recorded nor

sustained in the eyes of law---For the purposes of recording conviction solid evidence is required and in addition to the above when a charge can be established by documents, but those documents are not brought on record within the contemplation of law, then mere oral evidence will be of no use to the prosecution---The prosecution failed to bring on record the documents as required by law, in the absence whereof, there remains no evidence whatsoever to establish the charge against the accused/appellants---Consequently, all these seven criminal appeals filed by the convicts/appellants are allowed and their conviction/sentence is set aside.

(Paras 1, 4, 5, 6)

(b) Documentary Evidence, ingredient of---

---Qanoon-e-Shahadat Order, 1984, Art. 87---Mere marking of an exhibit on a document does not dispense with the formal proof thereof---Article 87 of the Qanoon-e-Shahadat, 1984 is the regulating law in relation to public documents and before placing reliance on any public document, the Court is to see whether the same fulfills the legal requirements to stand the test---On careful perusal of Article 87, it is deduced that following ingredients must exist in a document so as to consider the same as certified copy of public record---(i) Who may issue: A public officer in whose custody public record is kept ordinarily during the course of normal work is authorized by law to issue certified copy of public record---Person who does not keep such record in ordinary course of official duty is not authorized by law to issue such certified copy---(ii) Payment of legal fee: It is very important part of the issuance of certified copy of public record that fee has been paid for it before its issuance---(iii) Issuance on demand: Person who has right to inspect the record may apply for the certified copy of public record---It is not issued without application of its demand---(iv) Certification on foot of document: At the foot of the copy from public record, officer authorized puts the words "certified to be true copy"---Mere photocopy of public record does not form certified copy unless it is specifically certified as provided in law under Article 87 of the Qanun-e-Shahadat Order---(v) Name of issuing authority: Person who is issuing the certificate shall mention his name on certified copy---(vi) Designation: Authority issuing certified copy shall also provide her designation as to have authority to issue such certified copy---(vii) Signature: Officer issuing the certified copy puts his signature below the words "certified to be true copy"---(viii) Date: Date is mentioned on which certified copy is issued, and (ix) Seal: Certified copy of public record remains incomplete until or unless official seal is not put into it---Unless all the above ingredients co-exist, said document cannot be said to have been legally exhibited or proved.

(Para 4)

معزز عدالت عالیہ نے اپیل کنندگان کے خلاف دستاویزی شہادت ناقابل یقین اور خلاف قانون پائے جانے کی بناء پر تمام اپیل کنندگان کی سزاؤں کو کالعدم قرار دیتے ہوئے اپیل فوجداری ہذا کو منظور فرما لیا تھا۔

For the Appellants (in Crl. A. Nos. 123794 & 126431/2017): **Rashid Amin and Shazia Parveen, Advocates.**
For the Appellants (in Crl. A. Nos. 125821 & 125624/2017): **Zaka-ur-Rehman Awan, Advocate.**
For the Appellants (in Crl. A. No. 123677/2017): **Ch. Imtiaz Ahmad Kamboh, Advocate.**
For the Appellants (in Crl. A. No. 124400/2017): **Kazim Ali Malik and Imtiaz Ahmad Kamboh, Advocates.**
For the Appellant (in Crl. A. No. 126556/2017): **Ch. Zulfiqar Ali, Advocate.**
For the State: **Ch. Muhammad Ishaq, Deputy Prosecutor General.**
Date of hearing: **3rd May, 2018.**

JUDGMENT

MUHAMMAD QASIM KHAN, J. --- (i) Najam Pervaiz Butt, (ii) Muhammad Khalid, (iii) Muhammad Saleem, (iv) Basharat Ahmad, (v) Farooq Ahmad, (vi) Imtiaz Ahmad, (vii) Muhammad Tariq, (viii) Muhammad Ashraf Naz, (ix) Jehan Khan, (x) Arshad Mehmood-ul-Hassan, (xi) Muhammad Faheem and (xii) Muhammad Muneer Ahmad Cheema accused/appellants were tried by learned Special Judge Anti-Corruption, Sargodha, in case F.I.R. No. 49, dated 05.08.2013 (Ex.PA/1) under Sections 409/420/468/471/161, P.P.C. read with Section 5(2) of Prevention of Corruption Act, 1947 registered at Police Station ACE, Sargodha, on the basis of a complaint (Ex.PF) and on conclusion of trial *vide* judgment dated 12.12.2017, (i) Farooq Ahmad, (ii) Muhammad Tariq, (iii) Arshad Mehmood-ul-Hassan, (iv) Muhammad Faheem and (v) Muneer Ahmad Cheema, were acquitted, whereas, the rest of the accused/appellants were convicted and sentenced as under:---

(i) NAJAM PERVAIZ BUTT, (ii) IMTIAZ AHMAD, (iii) MUHAMMAD KHALID, (iv) SHEIKH MUHAMMAD SALEEM, (v) BASHARAT AHMAD.

Convicted under Section 409, P.P.C. and sentenced to rigorous imprisonment for three years with fine of Rs. 25,00,000/-, each.

Convicted under Section 420, P.P.C. and sentenced to rigorous imprisonment for three years with fine of Rs. 500,000/-, each, in default thereof to suffer further simple imprisonment for three months, each.

Convicted under Section 468, P.P.C. and sentenced to rigorous imprisonment for three years with a fine of Rs. 500,000/-, each, in default thereof to further undergo three months' simple imprisonment, each.

Convicted under Section 471, P.P.C. and sentenced to rigorous imprisonment for three years with fine of Rs. 500,000/- each, in default of payment of fine, to further suffer simple imprisonment for three months, each.

Convicted under Section 5(2)/47 PCA and sentenced to rigorous imprisonment for

three years with a fine of Rs. 500,000/-, each, in case of default to further suffer simple imprisonment for three months, each.

In addition to the above, Basharat accused/appellant was directed to deposit Rs. 22,76,868/- in the official account of District Officer Road, Sargodha.

(i) MUHAMMAD ASHRAF NAZ and (ii) JEHAN KHAN

Convicted under Section 409, P.P.C. and sentenced to rigorous imprisonment for one year each with fine of Rs. 300,000/-, each.

Convicted under Section 420, P.P.C. and sentenced to rigorous imprisonment for one year with a fine of Rs. 300,000/-, each, in default thereof to further undergo three months simple imprisonment, each.

Convicted under Section 468, P.P.C. and sentenced to rigorous imprisonment for one year each with fine of Rs. 300,000/-, each, in default of payment of fine, to further suffer simple imprisonment for three months, each.

Convicted under Section 471, P.P.C. and sentenced to rigorous imprisonment for one year each with fine of Rs. 300,000/-, each, in default of payment of fine, to further suffer simple imprisonment for three months, each.

Convicted under Section 5(2)/47, PCA and sentenced to rigorous imprisonment for one year with a fine of Rs. 300,000/-, each, in case of default to further suffer simple imprisonment for three months, each.

All the sentences were ordered to run concurrently and benefit of Section 382-B, Cr.P.C. was extended.

2. Details of the prosecution case including investigation, the .prosecution evidence and the stance of the accused/appellants have been given in-depth by the learned Trial Court in its judgment, therefore, the same need not to be reproduced here.

3. I have heard the arguments of learned counsel for the parties and examined the entire case with their able assistance.

4. As shall be seen from the prosecution case, the allegations levelled against the accused/appellants is that they in connivance with each other prepared forged and fabricated estimates for widening the Urdu Bazar, New Urdu Bazar and Rail Bazar, Roads in Sargodha; while preparing the bills for the payments of the work done to the Contractor, they tempered with the relevant record and also made payments against the approved scope of work and they made fudged payments, thus, caused a loss of Rs. 24,56,564/- to the public exchequer. Considering the nature of allegation, there remains no doubt that the same conveniently could be established through the documentary evidence and as a matter of fact the prosecution got exhibited those documents during the course of trial and the conviction/sentence is also based on such documentary evidence. Before proceeding further in the matter, it

may be made clear that mere marking of an exhibit on a document does not dispense with the formal proof thereof. Article 87 of the Qanoon-e-Shahadat, 1984 is the regulating law in relation to public documents and before placing reliance on any public document, the Court is to see whether the same fulfills the legal requirements to stand the test. On careful perusal of Article 87, *ibid*, it is deduced that following ingredients must exist in a document so as to consider the same as certified copy of public record:---

(i) **Who may issue:** A public officer in whose custody public record is kept ordinarily during the course of normal work is authorized by law to issue certified copy of public record. Person who does not keep such record in ordinary course of official duty is not authorized by law to issue such certified copy,

(ii) **Payment of legal fee:** It is very important part of the issuance of certified copy of public, record that fee has been paid for it before its issuance,

(iii) **Issuance on demand:** Person who has right to inspect the record may apply for the certified copy of public record. It is not issued without application of its demand,

(iv) **Certification on foot of document:** At the foot of the copy from public record, officer authorized puts the words "certified to be true copy". Mere photocopy of public record does not form certified copy unless it is specifically certified as provided in law under Article 87 of the Qanun-e-Shahadat Order,

(v) **Name of issuing authority:** Person who is issuing the certificate shall mention his name on certified copy,

(vi) **Designation:** Authority issuing certified copy shall also provide her designation as to have authority to issue such certified copy,

(vii) **Signature:** Officer issuing the certified copy puts his signature below the words "certified to be true copy",

(viii) **Date:** Date is mentioned on which certified copy is issued, and

(ix) **Seal:** Certified copy of public record remains incomplete until or unless official seal is not put into it.

Unless all the above ingredients co-exist, said document cannot be said to have been legally exhibited or proved. Keeping the above legal position in mind, when I see the documents produced by the prosecution in this case, it has been observed by this Court that almost all those exhibited documents only carry the stamp and signatures of Deputy District Officer, without any mention of name and date thereon. Above all, there also does not exist any certificate on the foot of any of those documents to the effect that same was true copy of the original document or part thereof. Although the said legal flaw could have been covered by production of the original record (primary evidence) during the course of trial, but it appears that said exercise was also not carried out by the prosecution in this case. Therefore, the documents which were brought on record without following the requirements of law could neither be exhibited in evidence nor the same could be read against the accused/appellants.

Reliance can be placed on the case "*Syed Hamid Saeed Kazmi and others v. The State*" (2017 P.Cr.L.J. 854) and "*Shad Khan v. The State*" (1995 P.Cr.L.J. 275).

5. In view of the above, since all of the documents brought on record by the prosecution do not stand the test of legality, therefore, the same do not in any way advance the case of the prosecution. Therefore, when the main documents are taken out of consideration, merely on the basis of some other documents, neither the conviction could be recorded nor sustained in the eyes of law. There is no cavil to the proposition that for the purposes of recording conviction solid evidence is required and in addition to the above when a charge can be established by documents, but those documents are not brought on record within the contemplation of law, then mere oral evidence will be of no use to the prosecution.

6. For what has been discussed above, it is held that the prosecution failed to bring on record the documents as required by law, in the absence whereof, there remains no evidence whatsoever to establish the charge against the accused/appellants. Consequently, all these seven criminal appeals filed by the convicts/appellants are allowed and their conviction/sentence is set-aside. Since all the accused are already on bail, therefore, they shall stand discharged of the bail bonds. The case property, if any, be disposed of in accordance with law and the record of the learned Trial Court be sent back immediately.

Appeal allowed.

2020 M L D 1
[Lahore]
Before Muhammad Qasim Khan, J
Baba Sufi MUHAMMAD IQBAL---Petitioner
Versus
JUSTICE OF PEACE/ADDITIONAL SESSIONS JUDGE, SAMUNDRI, DISTRICT FAISALABAD and another---Respondents

Writ Petition No.42135 of 2019, decided on 8th July, 2019.

Criminal Procedure Code (V of 1898)---
----Ss. 22-A, 22-B & 476---Contempt proceedings---Scope---Complainant was aggrieved of order passed by Ex-Officio Justice of Peace whereby he refused to initiate proceedings under S. 476, Cr.P.C. against police officials for filing false report in court---Validity---Only those proceedings were covered under S. 476, Cr.P.C. which were carried out in any court---Ex-Officio Justice of Peace being not a court under S. 476, Cr.P.C. and any statement, report submitted before Ex-Officio Justice of Peace could not be considered to be submitted before court under Cr.P.C.---When Ex-Officio Justice of Peace was not a court no proceedings under S. 476, Cr.P.C. could be carried out if a party had felt that any misinformation was submitted before Ex-Officio Justice of Peace in proceedings under Ss. 22-A & 22-B Cr.P.C.---High Court declined to interfere in matter---Constitutional petition was dismissed in circumstances.

Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others PLD 2005 Lah. 470; Muhammad Ali v. Additional 1.G., Faisalabad and others PLD 2014 SC 753; Younas Abbas and others v. Additional Sessions Judge, Chakwal and others PLD 2016 SC 581; Rab Nawaz v. The State 2011 SCMR 1485; Amanat Masih v. Additional Sessions Judge, Kasur and 4 others PLD 2007 Lah. 53 and Muhammad Nafees alias Sohail v. The State and others PLD 2005 Kar. 638 ref.
Ch. Umair Maqsood for the Petitioner.
Malik Abdul Aziz Awan, Addl. A.G. and Ch. Sarfraz Ahmad Khatana, Rana Tasawar Ali Khan, DPG for the State, on Court's call (they are ready to assist the Court).

ORDER
MUHAMMAD QASIM KHAN, J.---Baba Sufi Muhammad Iqbal (petitioner) moved a petition before the learned Ex-Officio Justice of Peace, Sumandari, District Faisalabad with the caption of implementation of the order dated 13.6.2017 for registration of case against Zulfiqar Sian, S.P. etc. but in the prayer clause it was stated as under:--
"In the light of submissions made above, it is, therefore, most respectfully prayed that this application may kindly be accepted and proceedings may kindly be initiated against the respondents Nos.2 and 3 for making false statement before this court and they be summoned, prosecuted and convicted strictly in accordance with law in the interest of justice."

2. The allegation levelled by the petitioner in this application before the learned Ex-Officio Justice of Peace, Sumandari, District Faisalabad, in short, is that the police officials submitted false reports based on mis-statements and concealment of facts in an earlier petition filed by him. This petition was filed on 10.3.2018, a number of adjournments were obtained by the petitioner or his counsel and finally vide order dated 14.5.2019, this application was dismissed by the learned Ex-Officio Justice of Peace, Sumandari, District Faisalabad. Although, the learned Ex-Officio Justice of Peace did not touch the legal issues and as a short law point is involved, learned Law Officers accept notice for today.

3. Learned counsel for the petitioner argued that although it was established from the record that a false report was submitted by DSP, Tandlianwala but learned Ex-Officio Justice of Peace, Sumandari dismissed the application of the petitioner and refused to proceed against the concerned officials under section 476, Cr.P.C. without any legal justification.

4. Learned Additional Advocate-General, Punjab and learned Deputy Prosecutor General both submit that Ex-Officio Justice of Peace is not a Court and no proceedings can be initiated under section 476, Cr.P.C.

5. I have heard the learned counsel for the petitioner, the learned Law Officers and perused the record with their able assistance.

6. The question arises firstly whether Ex-Officio Justice of Peace while exercising his powers under section 22(6) of the Code of Criminal Procedure, 1898 acts as a Court or not and secondly whether he can take action in respect of any false statement made before him under section 476, Cr.P.C. Firstly, this question was taken up by a Full Bench of this Court (comprising three Members Bench) in the case reported as "Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others" (PLD 2005 Lah. 470) and it was held as under:--
"That surely is not the case in Pakistan where no statute confers any judicial power upon a Justice of the Peace or an ex-officio Justice of the Peace. We can, therefore, safely hold that functions to be performed by a Justice of the Peace or an ex-officio Justice of the Peace in Pakistan are merely administrative and ministerial in nature and character. We feel fortified in so holding by the provisions of section 6, Cr.P.C. which categorizes the classes of criminal courts and Magistrates in Pakistan and a Justice of the Peace or an ex-officio Justice of the Peace is not included in any such class of courts or Magistrates. Apart ,from that sections 28 and 29, Cr.P.C. specify as to which courts are to try which offences and in those sections too a Justice of the Peace or an ex-officio Justice of the Peace does not figure at all."

7. This question was also brought before the Hon'ble Supreme Court of Pakistan and a Full Bench (consists of three Members Bench) of the Hon'ble Supreme Court of Pakistan in the case reported as "Muhammad Ali v. Additional I.G., Faisalabad and others" (PLD 2014 SC 753) held that Justice of Peace was not a court and his functions were executive, administrative or ministerial.

8. Later on, in another case, a larger Bench comprising five Judges of the Hon'ble Supreme Court of Pakistan in a case reported as "Younas Abbas and others v. Additional Sessions Judge, Chakwal and others"(PLD 2016 SC 581) did not agree with the ratio of the Khizar Hayat and Muhammad Ali's cases (supra) to the extent of the nature of the functions of the Ex-Officio Justice of Peace and held that these are not executive, administrative or ministerial but are quasi-judicial in nature. The relevant portion of the judgment is as under:--

"The functions, the Ex-Officio Justice of Peace performs, are not executive, administrative or ministerial inasmuch as. he does not carry out, manage or deal with things mechanically. His functions as described in Clauses (i), (ii) and (iii) of subsection (6) of section 22-A, Cr.P.C., are quasi-judicial as he entertains applications, examined the record, hears the parties, passes orders and issues directions with due application of mind. Every lis before him demands discretion and judgment. Functions so performed cannot be termed as executive, administrative or ministerial on any account. We thus don't agree with the ratio of the judgments rendered in the cases of Khizar Hayat and others v. Inspector General of Police Punjab Lahore and others (PLD 2005 Lah. 470) and Muhammad Ali v. Additional I.G. (PLD 2015 SC 753) inasmuch as it holds that the functions performed by the Ex-officio Justice of Peace are executive, administrative or ministerial."

9. However, the learned Full Bench of the Hon'ble Supreme Court of Pakistan did not differ with the earlier view that Ex-Officio Justice of Peace was not a Court. When it is settled that Ex-Officio Justice of Peace is not a Court then answer of the second question becomes easier and the Ex-Officio Justice of Peace could only exercise the powers under sections 22-A, 22-B, Cr.P.C. and proceedings before him cannot be declared as judicial proceedings nor he functions as a Court.

10. The apex court in a case reported as "Rab Nawaz v. The State" (2011 SCMR 1485) wherein Ex-Officio Justice of Peace took action under section 228, P.P.C., observed as follows:-

"The record of this case shows that the appellant had been proceeded against for violating/disobeying an order passed by the Additional Sessions Judge, Sargodha which order had been passed by him in his capacity as an ex-officio Justice of the Peace. The provisions of section 228, P.P.C. are attracted to a case involving insult or interruption during a "judicial proceedings" and it has already been held by the Lahore High Court, Lahore in the cases of Khizer Hayat and others v. Inspector-General of Police (Punjab); Lahore and others (PLD 2005 Lahore 470 (FB) and Pir Abdul Qayyum Shah v. S.H.O. and 4 others (2005 PCr.LJ 35) that proceedings conducted by an ex-officio Justice of the Peace are not judicial proceedings. In view of this legal position the appellant's conviction and sentence recorded for an offence under section 228, P.P.C. are clearly illegal and unsustainable. Apart from that the provisions of section 228, P.P.C. are attracted to an insult or interruption during some judicial proceedings but in the case in hand no such insult or interruption during any judicial proceedings had been alleged against the appellant and the only allegation levelled against him was that he had failed to carry out an order passed on an earlier occasion by the Additional Sessions Judge, Sargodha."

11. In another case reported as "Amanat Masih v. Additional Sessions Judge, Kasur and 4 others" (PLD 2007 Lahore 53), this Court held that direction given to the S.H.O. by the learned Ex-Officio Justice of Peace to initiate proceedings against the petitioner under section 182, P.P.C. is beyond the purview of section 22-A, Cr.P.C., hence in excess of the jurisdiction conferred upon him under the law.

12. The Hon'ble Sindh High Court in a case reported as "Muhammad Nafees alias Sohail v. The State and others"(PLD 2005 Karachi 638) held that Ex-Officio Justice of Peace was not justified rather empowered to impose fine/costs upon the petitioner while rejecting his application, filed under section 22-A, Cr.P.C.

13. The above survey of the case-law is to be considered in the light of Section 476, Cr.P.C. The same is re-produced below for ready reference:-
"Procedure in cases mentioned in section 195. (1) When any offences referred to in section 195, subsection (1) clause (b) or clause (c), has been committed in, or in relation to a proceedings in any Civil, Revenue or Criminal Court, the Court may take cognizance of the offence and try the same in accordance with the procedure prescribed for summary trials in Chapter XXII.
(2) When in any case tried under subsection (1) the Court finds the offender guilty, it may, notwithstanding anything contained in subsection (2) of section 262:
(a) pass any sentence on the offender authorized by law for such offence, except a sentence of death, or, imprisonment for life, or imprisonment exceeding five years, if such Court be a High Court, a Court of Session, a District Court or any Court exercising the power of a Court of Sessions or a District Court;
(b) sentence the offender to simple imprisonment for a term which may extend to three months, or to pay a fine not exceeding (one thousand rupees) or both, if such Court be a Court of Magistrate of the first class, a Civil Court other than a High Court, a District Court, or a Court exercising the powers of a District Court or Revenue Court not inferior to the Court of Collector;
(c) sentence the offender to simple imprisonment for a term not exceeding one month, or to pay a fine not exceeding fifty rupees or both, if such Court be a Criminal Court or Revenue Court other than a Court referred to in clause (a) or clause (b).
(3) The powers conferred on Civil, Revenue and Criminal Courts under this section may be exercised in respect of any offence referred to in subsection (1) and alleged to have been committed in relation to any proceeding in such Court by the Court to which such former Court is subordinate within the meaning of subsection (3) of S. 195.
(4) Any person sentenced by any Court, under this section may, notwithstanding anything hereinbefore contained, appeal,
(a) in the case of a sentence by the High Court, to the Supreme Court;
(b) in case of a sentence by a Court of Session or District Court, or a Court exercising the powers of a Court of Session or a District Court, to the High Court, and
(c) in any other case, to the Sessions Judge.
(5) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeal under this section and the Appellate Court may alter the finding or reduce or enhance the sentence appealed against."

14. Section 476, Cr.P.C. is itself clear that it covers only those proceedings which are carried out in any Court and Ex-Officio Justice of Peace is not a court under this Section and any statement, report submitted before the Ex-Officio Justice of Peace cannot be considered that they will submit before the Court under the Criminal Procedure Code, 1898, hence when Ex-Officio Justice of Peace is not a court no proceedings under section 476, Cr.P.C. could be carried out if a party feels that any misinformation has been submitted before Ex-Officio Justice of Peace in the proceedings under Sections 22-A, 22-B, Cr.P.C.

15. For what has been discussed above, the petition in hand having no merit is dismissed.

MH/M-133/L Petition dismissed.

2020 P Cr. L J 543
[Lahore]
Before Muhammad Qasim Khan and Asjad Javaid Ghural, JJ
WAJID HUSSAIN and others---Appellants
Versus
The STATE and others---Respondents

Capital Sentence Reference No. 44/T of 2005, Criminal Appeals Nos. 843 and 864 of 2015, heard on 24th June, 2019.

(a) Penal Code (XLV of 1860)---
----Ss. 302(b), 365-A, 201, 148 & 149---Qatl-i-amd, kidnapping or abduction for extorting property, valuable security etc., causing disappearance of evidence of offence, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Delay of about one month in lodging the FIR---Effect---In the present case, the matter was reported to the police, after one month of the occurrence---First Information Report showed that servant of the deceased came back of his own and told the complainant about their abduction---If that fact was admitted even then the FIR was got lodged nineteen days after the return and disclosure by the servant---No justifiable reason existed on the record to explain delay of one month in registration of FIR from the date of occurrence and delay of nineteen days from the date of return and disclosure by servant, one of the abductees---In the presence of such inordinate and unexplained delay in registration of FIR, the rest of the prosecution case was to be seen with extra care and caution.

(b) Penal Code (XLV of 1860)---
----Ss. 302(b), 365-A, 201, 148 & 149---Qatl-i-amd, kidnapping or abduction for extorting property, valuable security, causing disappearance of evidence of offence, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---Accused were charged for abducting the brother and his servant and then murdering the brother of the complainant and releasing the servant---Ocular account was furnished by complainant and one of the abductees/servant of the deceased---Statement of complainant remained limited to the extent that he visited the dera, found his brother and servant missing, some dandas were lying there and he noticed marks of tyre at the place of occurrence---Statement of complainant to participate in identification parade was of no avail to the prosecution for the reason that admittedly he had neither seen the occurrence nor the accused at the time of occurrence---Complainant while appearing in the witness box although stated as to how the entire occurrence and subsequent events ensued but he did not mention that all the said facts were told to him by his servant, one of the alleged abductees, whereas, according to the FIR, all the said details were narrated to the complainant by said servant/alleged abductee---While giving detail of the occurrence, the complainant in the examination -in-chief had stated that four unknown persons while armed with deadly weapons came on two cars---One car was parked behind the dera, whereas other car was parked near the fodder cutter in the dera---Said part of the statement of the complainant neither found support from the statement of servant nor

it was in line with the contents of FIR---Servant/one of the alleged abductees during his statement made certain improvements on most important aspects of the case and he was duly confronted by the defence during cross-examination---Said witness had specifically mentioned in his statement about one Maulvi as one of the accused of the occurrence---Furthermore, according to the statement of said witness, said Maulvi had also inflicted him a blow with pistol but no such person was associated during investigation or sent up to face trial---Nothing on the record that servant of the complainant was ever medically examined to establish the factum of injury purportedly sustained by him, which became obvious that the witness had materially changed his stance---If the deceased had been killed as told by the accused then the Investigating Officer must have taken the accused to the place where the deceased was beheaded and also the place where he was buried---No such effort was made by the Investigating Officer---Dead body or its skeleton also could not be recovered, as such the death itself carried a question mark---No proof about death of deceased was available on the file---Prosecution had failed to bring home the guilt against the accused beyond any shadow of doubt---Appeal was allowed, in circumstances.

(c) Criminal trial---

----Witness, statement of--- Subsequent improvement in such statement--- Validity---Such statement having been improved dishonestly, could not be relied upon---Improvements once found to be deliberate and dishonest, would cast serious doubt on veracity of such witness.

Farman Ahmed v. Muhammad Inayat and others 2007 SCMR 1826 rel.

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

----Ss. 302(b), 365-A, 201, 148 & 149--- Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, kidnapping or abduction for extorting property, valuable security etc., causing disappearance of evidence of offence, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---Test identification parade, having infirmities---Effect---In the present case, alleged abductee/ witness had not given the personal features of the accused and also had not assigned them specific role---Statement of said witness about identifying the accused would remain useless or atleast not free from doubt---Formal arrest of the accused was shown on 03.03.2015 and on 4.3.2015, they were sent to the judicial lockup---Identification of the accused was got arranged on 9.3.2015---No plausible reason existed on the file to explain that if accused had already been arrested then why they were not put to identification parade at the earliest---Identification was supervised by the Judicial Magistrate who admitted that he had not mentioned the heights, colour, features, body structure, shave and beard of the dummies sitting along with suspect accused were not of exact similarity with his beard---Said witness had admitted that accused were having specific identification marks---Incumbent for the Judicial Magistrate supervising the identification parade to have ensured that accused/dummies were not only similar in features but their special identification marks, if any, must have been covered, so that the witnesses could not use such mark to their benefit---Identification parade, in circumstances, was a nullity in the eyes of law.

(e) Qanun-e-Shahadat (10 of 1984)---
----Art. 22---Identification parade---Conducting identification in parade at the earliest---In order to eliminate the possibility of the accused being known to the witnesses prior to the test identification parade, it was desirable that a test identification would be conducted as soon as possible after the arrest of the accused.

(f) Criminal trial---
----Confession---Exculpatory confession---Scope---If the maker of confession would exonerate himself from important allegations then his such statement at the most could be termed as exculpatory confession, which could not be regarded as confession and had little value even against the maker.
Pervaiz Iqbal's case PLD 1976 Kar. 583 rel.

(g) Criminal Procedure Code (V of 1898)---
----S. 164---Confession---Retracted---Scope---Conviction could not be based on retracted conviction alone; in order to record conviction, it was imperative for the prosecution to bring on record corroborative piece of evidence.

(h) Penal Code (XLV of 1860)---
----Ss. 302(b), 365-A, 201, 148 & 149---Criminal Procedure Code (V of 1898), S. 164---High Court (Lahore) Rules and Orders, Vol. III, Ch. 1, Rr. 1, 7 & Ch. 13, R. 6---Qatl-i-amd, kidnapping or abduction for extorting property, valuable security etc., causing disappearance of evidence of offence, rioting armed with deadly weapon, unlawful assembly--- Appreciation of evidence--- Confessional statement, recording of---Procedure---Confessional statement was recorded after court hours---Effect---In the present case, Judicial Magistrate, who recorded confessional statement had admitted that proceedings were completed at Maghrib time, which meant that he recorded the statement after court hours---High Court (Lahore) Rules and Orders, Vol. III, Chap. 1 in its R. 1 provided that trial should be conducted during court hours at court houses only---Rule 7 of the said Chapter provided an exception that the hearing of the case taken up before closing hours might have continued for a short time after that hours---Chapter 13 of the Vol. III, which dealt with confessions and statements of accused persons---Rule 6 of the said chapter had categorically provided that confession should be recorded in open court and during court hours unless there were exceptional reasons to contrary---If there were exceptional reasons for recording confessional statement after court hours then the Judicial Magistrate was bound to record in writing all such exceptions, why he had recorded the statement after the close of court hours and what was the urgency in that respect, otherwise, the proceedings would become doubtful---In such eventualities, possibilities could not be ruled out that there was apprehension that if the matter was adjourned for the next day, the accused might have not made a statement which could involve him in the commission of offence---In exceptional cases, unless counsel of accused was present, confessional statement after court hours could not be recorded---Statement of Judicial Magistrate showed that he did not follow the procedure for recording confession/statement of the accused---Apparently, Judicial Magistrate had acted in haste to record confessional statement after court hours without any legal

justification---Said lacuna had rendered the entire proceedings with regard to recording of confessional statement illegal.

(i) Penal Code (XLV of 1860)---
----Ss. 302(b), 365-A, 201, 148 & 149---Qatl-i-amd, kidnapping or abduction for extorting property, valuable security etc., causing disappearance of evidence of offence, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Recovery of wallet and CNIC belonging to deceased from accused---Reliance---Scope---Record showed that except his statement before the court, complainant had not stated anywhere either in the FIR or in his complaint that CNIC and wallet of his deceased brother were missing---Alleged abductee/witness nowhere had mentioned in his statement that at the time of kidnapping wallet and CNIC of the deceased were also with him---Alleged recoveries of wallet and CNIC of the deceased were effected, almost six years after the occurrence-Circumstances suggested that it was repellent to common sence that accused would keep the belongings of the deceased including his wallet and CNIC with them, to be subsequently recovered and used against them---Allegedly said articles were got recovered by co-accused from a room of dera---No details were available as to where those articles had been kept, whether said articles were lying in open place in the room or had been hidden in box etc.---Nothing had come on record as to who was the owner of the dera where from the allegedly wallet and CNIC were got recovered by co-accused---No other person from the vicinity was associated in recovery proceedings and similarly statement of none of such persons from the area was recorded who might have seen the accused persons ever visiting the said dera---Recovery of wallet and CNIC allegedly belonging to deceased was disbelieved, in circumstances.

Arif Mehmood Rana for Appellants.
Arshad Nazir Mirza for the Complainant.
Ch. Muhammad Sarfraz Khatana, DPG for the State.
Date of hearing: 24th June, 2019.

JUDGMENT
MUHAMMAD QASIM KHAN, J.---Wajid Hussain, Muhammad Nazim alias Kalu and Ghulam Mustafa (hereinafter to be called as "convicts/appellants") faced trial before learned Judge, Anti-Terrorism Court, Faisalabad, in case FIR No.676 dated 27.11.2009 under sections 302/365-A/148/149/201, P.P.C. registered at Police Station Sadar Gojra, District Toba Tek Singh and on conclusion of trial vide judgment dated 23.04.2015, all the three (Wajid Hussain, Muhammad Nazim alias Kalu and Ghulam Mustafa) convicts/appellants were convicted and sentenced as under:-
Convicted under section 365-A read with section 149, P.P.C. and sentenced to death;
Convicted under section 7(e) of the Anti-Terrorism Act, 1997 read with section 149, P.P.C. and sentenced to death;
Convicted under section 302(b), P.P.C. and sentenced to death, and also ordered to pay Rs.500,000/- each as compensation under section 544-A, Cr.P.C., to be paid in

proportion to the legal heirs of deceased, failing which to undergo simple imprisonment for six months;
Convicted under section 148, P.P.C. and sentenced to rigorous imprisonment for two years and fine of Rs.20,000/-, in default in payment of fine to further suffer simple imprisonment for one month.
Furthermore, moveable as well as immovable properties of all the three accused/appellants were also forfeited in favour of the State. Through Criminal Appeal No.864/2015 Ghulam Mustafa and through Criminal Appeal No.843/2015 Wajid Hussain as well as Muhammad Nazim alias Kalu have assailed their above conviction and sentence, whereas, Capital Sentence Reference No.44-T of 2015 has been sent by the learned trial court. All these matters are being decided through the instant judgment.

2. Briefly the facts of the case as shall be seen from FIR (Ex.PG/1) got lodged by Aziz Ahmad Bajwa complainant (PW.6) through written complaint (Ex.PG) are that in the morning of 27.10.2009 the complainant went to his dera and saw that his brother Mubarak Ahmad Bajwa aged about 55 years and one servant namely Sikandar Mehmood Ansar aged 20 years, were not present there, however, their chaddar and shoes were lying on the cots. They were searched but no clue could be found. The complainant further saw that near the cots dandas were lying and there were also marks of tyres. On 08.11.2009 Sikandar Mehmood Ansari came back and informed that they had been abducted, kept at some unknown place and then he was released and that he could not point out the said place.

3. The gist of investigation as well as statements of the prosecution witnesses and the stance of the convicts/ appellants has been given in the impugned judgment of the learned trial court itself, therefore, the same need not to be reiterated here.

4. We have heard the arguments of learned counsel for the convict/appellant, learned counsel for the complainant as well as learned law officer and perused the record with their assistance.

5. It remains an admitted position that the alleged occurrence in this case took place on 27.10.2009 when the complainant went to his dera and found his brother as well as his servant missing, but the matter was reported to the police on 27.11.2009 i.e. after one month of the occurrence. Furthermore, it is mentioned in the FIR itself that Sikandar Mehmood Ansar (servant) came back of his own on 08.11.2009 and told the complainant about their abduction. If this fact is admitted even then the FIR was got lodged nineteen days after the return and disclosure by Sikandar Mehmood Ansari and no justifiable reason exists on the record to explain delay of one month in registration of FIR from the date of occurrence and delay of nineteen days from the date of return and disclosure by Sikandar one of the missing/abducted person. Considering the factor of inordinate and unexplained delay in registration of FIR, the rest of the prosecution case is to be seen with extra care and caution.

6. So far as the statement of complainant Aziz Ahmad Bajwa (PW-6) is concerned, the same remains limited to the extent that he visited the dera, found his brother and servant missing, some dandas were lying there and he also noticed marks of tyre at the place of occurrence. His rest of the statement revolves around what he was told by Sikandar (PW-7).

a) As regards the statement of complainant to participate in identification parade, the same is of no avail to the prosecution for the reason that admittedly he had neither seen the occurrence nor seen the convicts/ appellants at the time of occurrence; therefore, there remains no question of his identifying the convicts/appellants;

b) Furthermore, the complainant while appearing in the witness box although stated as to how the entire occurrence and subsequent events ensued but he did not mention that all these facts were told to him by Sikandar one of the alleged abductee, whereas, according to the FIR all these details were informed to the complainant by said Sikandar Mehmood;

c) In his examination in chief, while giving details of occurrence, the complainant states that "four unknown persons while armed with deadly weapons came on two cars. One car parked behind the 'dera' whereas other car was parked near the fodder cutter, in the 'dera'". This part of statement of the complainant neither finds support from the statement of Sikandar Mehmood as PW-7 nor it is in line with the contents of the FIR, because Sikandar Mehmood (PW-7) during his statement before the court in clear terms states that it was one car which came at the dera and neither there any mention about second car nor there is further detail where those had been parked, whereas, as shall be seen from the above the complainant who admittedly is not witness of the occurrence has given details which are otherwise non-existent from the record, because even the FIR is totally silent about the names and number of the accused or the vehicle.

7. Coming to the statement of Sikandar Mehmood one of the abductee (PW-7) made before the court, he made number of improvements on most important aspects of the case and he was duly confronted by the defence during cross-examination. Relevant portions from his statement are reproduced hereunder:-

"I stated in my statement recorded under section 161 of Cr.P.C. that Molvi Afzal pushed me in the white colour car." (Confronted with his statement Exh.D.A, where it is not so recorded.)

"I stated in my statement Exh.D.A that the accused gave a fist blow on the face of Mubarik Ahmad." (Confronted with Exh.D.A, where it is not so recorded.)

"I stated in my statement Exh.D.A that accused kept us in a `dera' consist of one room." (Confronted with Exh.D.A where room is not mentioned.)

"I stated in my statement that the accused told us that DSP was coming and we have to tell all the correct fact to the Deputy/DSP otherwise he would be killed and demanded the contact number of our relatives and family members but we refused." (Confronted with Exh.D.A. where it is not so recorded.)

"I stated in my statement that accused released me after 13 days of the abduction." (Confronted with Exh.D.A where it is not so recorded.)

In addition to the above, we have noticed that in his statement before the court this witness has specifically mentioned one Molvi Afzal as one of the accused of the

occurrence. Furthermore, according to the statement of Sikandar Mehmood (PW-7) himself, said Molvi Afzal had also inflicted him a blow with pistol, but no such person was associated during investigation or sent up to face trial and there is nothing on the record that Sikandar Mehmood was ever medically examined to establish the factum of injury purportedly sustained by him. It therefore, becomes obvious that the witness has materially changed his stance and it is well settled proposition of law as declared by the Hon'ble Supreme Court of Pakistan in the case "Farman Ahmed v. Muhammad Inayat and others" (2007 SCMR 1825), statement of a witness improving his version subsequently to strengthen the prosecution case, being improved dishonestly, could not be relied upon and once such improvements are found to be deliberate and dishonest, it would cast serious doubts on veracity of such witness.

8. After discarding the statements of above two prosecution witnesses, the prosecution is left with identification parade of the convicts/appellants, confessional statement allegedly made by Wajid Hussain one of the convict/appellants and recovery of purse/wallet and CNIC allegedly belonging to the deceased. As regards identification parade, it has been noticed that:-

a) Sikandar Mehmood (PW-7) in his statement before the court has not mentioned the features, descriptions, heights or ages of the convicts/appellants and furthermore no specific role has been assigned by him to the convicts/appellant. Even his statement appearing in Ex.DA is also silent on above aspects. In this view of the matter, when PW-7 had not given the personal features of the accused and also had not assigned them specific roles, his statement about identifying the accused would remain useless or at least not free from doubt;

b) In continuation to the above, it has been observed by us that Ghulam Rasool Inspector (PW-12) who had partially investigated the case states that on 24.02.2015 he joined all these convicts/ appellants in the investigation of instant case, whereas, their formal arrest in this case was shown on 03.03.2015 and on 04.03.2015 they were sent to judicial lock up, but their identification parade was got arranged on 09.03.2019 and no plausible reason exists on the file to explain that if the convict/appellants had already been arrested then why they were not put to identification parade at the earliest, whereas in order to eliminate the possibility of the accused being known to the witnesses prior to the test identification parade it is desirable that a test identification should be conducted as soon as possible after the arrest of the accused.

c) Identification was supervised by Allah Yar Bhatti, Magistrate Ist Class (PW-13) but this witness admitted that he had not mentioned the height, colour, features, body structure, shave and beard of the dummies and also that all the dummies sitting along with suspect accused Wajid Hussain were not of exact similarity with his beard;

d) It is admitted by Allah Yar Bhatti Magistrate Ist Class (PW-13) who had supervised the identification parade admitted that Wajid Hussain bears sign of small mole on left side of his face below the left eye, which could be seen from a distance of four feet, Wajid Hussain also had sign of small pox on the center of his forehead above the nose. Ghulam Mustafa convict/appellant had moles on his face, which was visible from 5 to 8 feet. Similarly, there were signs of wound on both hands of accused Muhammad Nazim alias Kalu. This being the position when it is admitted

that convict/ appellants were having specific identification marks, it was incumbent for the Magistrate supervising the identification parade to have ensured that accused/dummies were not only similar in feature but their special identification marks, if any, must have been covered, so that the witnesses could not use such mark to their benefit and identify the accused, which element is badly missing in the instant case.
All the above factors when considered jointly render the identification parade a nullity in the eyes of law.

9. Now coming to the retracted confessional statement of Wajid Hussain convict/appellant, it is matter of record that said statement was recorded by Rana Muhammad Ilyas Bashir Civil Judge Ist Class, Okara (PW-14).
a) It is admitted by the said judicial officer that the accused did not confess that he himself had committed the assassination mentioned in the confessional statement. We have also seen that Wajid Hussain convict/appellant does not provide details from the stage of abduction and has not mentioned that how or in what manner Mubarak Ahmad was kidnapped; he also does not include himself in the act of beheading, digging of the land and then burial of said Mubarak. In this view of the matter, when the maker is exonerating himself from important allegations then his such statement at the most can be termed as exculpatory confession, which cannot be regarded as confession and has little value even against the maker. Reliance is placed on Pervaiz Iqbal's case (DB) PLD 1976 Kar. 583).
b) In addition to the above legal position, the statement which is being referred as confessional statement of Wajid Hussain convict/appellant was subsequently retracted by him during trial and there is settled law on the point that conviction cannot be based on retracted confession alone, and in order to record conviction it is imperative for the prosecution to bring on record corroborative piece of evidence. Reliance has been placed Abdul Latfi's case (PLJ 1999 SC 264).
c) Apart from the fact that it was exculpatory and retracted statement, the same also lacks required corroboration from any other source for the reason that if the deceased had been killed as told by Wajid Hussain convict/ appellant then the Investigating Officer must have taken the accused/convict to the place where the deceased was beheaded and also the place where he was buried, but it is matter of fact that no such effort was made by the Investigating Officer;
d) Furthermore, the dead body or its Skelton also could not be recovered; as such the death itself carries a question mark, because otherwise, no proof about death of Mubarak Ahmad is available on the file;
e) Another important aspect of the matter is that proceedings with regard to recording of confessional statement were initiated through an application filed by Muhammad Aslam Sub-Inspector for getting the statement of Wajid Hussain convict/appellant recorded, when he was produced before Rana Muhammad Ilyas Bashir Civil Judge Ist Class, Okara (PW-14) for the purposes of obtaining his judicial remand in case FIR No.466/20145 under section 13/20/65 of Arms Ordinance registered at Police Station Saddar Gujrat. During cross-examination Rana Muhammad Ilyas Bashir Civil Judge Ist Class, Okara (PW-14) in clear words states that "It was the time of Maghrib prayer, when I completed the proceedings with regard to the recording of

confessional statement of the accused....". Subsequently although he denied to have completed the confessional statement of the accused after the closing hours of the court, but after above clear statement his subsequent explanation on the face of it appears to be an attempt to cover up his legal fault. When the Magistrate (PW-14) himself admits that proceedings were completed at Maghrib time, it means that he had recorded the statement after court hours. The Lahore High Court Rules and Orders Volume III, Chapter 1 in its rule 1 provides that trials shall be conducted during Court hours at court houses only. Rule 7 of the same chapter provides an exception that the hearing of a case taken up before closing hour may continue for a short time after that hour. Thereafter, Chapter 13 of the Volume III, which deals with confessions and statements of accused persons, its rule 6 categorically provides that confessions should be recorded in open court and during court hours unless there are exceptional reasons to the contrary and if there are exceptional reasons for recording confessional statement after court hours, then the Magistrate is bound to record in writing all such exceptions why he has recorded the statement after the close of court hours and what was the urgency in this respect, otherwise, the proceedings become doubtful and possibility cannot be ruled out that there was apprehension that if the matter is adjourned for the next day, the accused may not make a statement which could involve him in the commission of any offence.

f) Moreover, it is right of every accused to get the facility of an Advocate and after court hours no such facility could be availed. If there were exceptional reasons, then the court must have specifically put question to the accused present before the court that whether he would like to engage a counsel and unless his counsel is present confessional statement after court hours should not be recorded. The courts dealing with such matters must carefully observe and implement the instructions and guidelines provided in the relevant rules and the pronouncements of the superior courts.

g) From the statement of Magistrate PW-14, it appears that he has not followed the procedure for recording confession/ statement of the accused and apparently he acted in haste to record confessional statement after court hours without any legal justification. All the above pointed lacunae not only render the entire proceedings with regard to recording of confessional statement illegal but also require proper counseling to Rana Muhammad Ilyas Bashir Civil Judge Ist Class, Okara (as he was posted on 18.11.2014). Office is directed to place a copy of this judgment before Director General, District Judiciary for the needful in the light of above observations.

10. As regards recovery of wallet P.1 allegedly belonging to deceased Mubarak along with his CNIC P.2, it has been observed that:-

a) Except the statement of the complainant before the court, he had not stated anywhere either in the FIR or in his complaint that CNIC and wallet of his deceased brother were missing.

b) In the same terms although Sikandar gave other details but no where mentioned in his statement Ex.DA that at the time of kidnapping wallet and CNIC of the deceased were also with him.

c) Furthermore, the alleged occurrence took place 26/27.10.2009 and the alleged recoveries of wallet and CNIC of the deceased were effected on 27.03.2015 i.e. almost six years after the occurrence.
i) Firstly it is repellent to common sense that the convict/appellants who were so careful that they beheaded the deceased and then buried him so as to remove any trace, but at the same time they would keep the belongings of the deceased including his wallet and CNIC with them, to be subsequently recovered and used against them;
ii) Secondly, those articles were allegedly got recovered by convict/appellant Nazim Hussain from room of a dera. There is no further detail that where those articles had been kept, whether those were lying in open place in the room or had been hidden in box, etc;
d) Furthermore, it has not come on the record that who was the owner of the dera where from allegedly wallet and CNIC were got recovered by Nazim Hussain convict/appellant and no other person from the vicinity was associated in recovery proceedings and similarly statement of none of such person from the area was recorded who might have seen the convict/appellants ever visiting the said dera.
All the above grounds of sufficient to disbelieve the recovery of wallet or CNIC allegedly belonging to Mubarak deceased.

11. For what has been discussed above, we are of the firm view that prosecution has failed to bring home the guilt against the convicts/ appellants beyond any shadow of doubt. Consequently, Criminal Appeals Nos.864/2015 and 843/2015 are allowed, convictions/sentences against all the three convicts/appellants are set-aside and they are acquitted of the charges. They shall be released forthwith if not required in any other case.

Capital Sentence Reference is answered in the negative. SENTENCE OF DEATH IS NOT CONFIRMED.

JK/W-8/L Appeals accepted.

2020 P Cr. L J 1259
[Lahore]
Before Muhammad Qasim Khan and Asjad Javaid Ghural, JJ
ABDUL RAUF GUJJAR---Petitioner
Versus
JUDGE ATC-III, LAHORE and others---Respondents

Criminal Revision No. 21037 of 2019, heard on 20th November, 2019.

(a) Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act (III of 2006)---

----S. 10---Powers of Prosecutor---Stay of proceedings---Non-availability of witness---Failure to obtain authorization from the Prosecutor General---Effect ---Petitioner assailed the order of Trial Court whereby it, while acceding to the request of Deputy Prosecutor General had adjourned the case sine die in the light of S. 10(3)(f) of Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006---Validity---Prosecutor General or any Prosecutor especially authorized in that behalf by the Prosecutor General had to inform the court and he had to submit before the court the reasoning and decision of the Cabinet/Government---Neither any decision was made by the Government i.e. approval by the Cabinet nor any Prosecutor was specifically authorized in that behalf by the Prosecutor General---Deputy Prosecutor General had not even submitted before the Court that he was making the request under the instructions of the Prosecutor General---Mere fact that earlier case against the accused had already been postponed due to non-availability of a witness did not constitute a valid reason for postponement---Statement of the Deputy Prosecutor General had no sanctity in the eyes of law---Impugned order was set aside being illegal and void---Trial Court was directed to start the proceedings from that juncture when the case was adjourned sine die---Criminal revision was allowed, in circumstances.

(b) Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act (III of 2006)---

----S.10---Powers of Prosecutor---Stay of proceedings---Pre-requisites---Expression 'Government', meaning---Scope---Approval of the Government in order to obtain a stay under S. 10(3)(f) of the Act is necessary and that should be based on specific reasons---Such reasons should be in writing---Case is to be forwarded either by the Prosecutor General by advancing reasons to the cabinet or the cabinet itself is to take the decision but such decision must be based on some cogent reasons---Government, as mentioned in the S. 10 of the Act does not mean the Prosecutor, Prosecutor General or Secretary Prosecution or Chief Secretary, it is the 'Cabinet'.

Messrs Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance Islamabad and others PLD 2016 SC 808 ref.

Najeeb Faisal Chaudhry for Petitioner.

Muhammad Nawaz Shahid, Deputy Prosecutor-General for the State.

Nemo for the Complainant.

Date of hearing: 20th November, 2019.

JUDGMENT

MUHAMMAD QASIM KHAN, J.---Through this revision petition, the petitioner has attacked the legality of order dated 13.03.2019, passed by the learned Judge Anti-Terrorism Court-III, Lahore, whereby, by acceding the request made in the light of section 10(3)(f) of Prosecution Act, 2006, by learned DPG for postponement of the case, file of the case was consigned to record room.

2. We have heard learned counsel for the petitioner as well as learned Deputy Prosecutor General at length and perused the record available on the file.

3. Stance of learned counsel for the petitioner is that the petitioner was facing trial in case FIR No.1099/2013 Police Station Garden Town, Lahore and after hearing final arguments, the learned trial Court has adjourned the matter sine die although, no iota of evidence was available on file against the petitioner/accused and in this way, passed the impugned order in a whimsical manner just by relying upon the statement of DPG.

4. From perusal of the impugned order dated 13.03.2019, it appears that statements of formal witnesses have been recorded, whereas, eye-witnesses of the occurrence namely Munawar Hussain/ PW.19 and Najam-ul-Tasir/PW.20 have been declared hostile and the learned DPG prayed for postponement of the case by stating that the star witness namely Usman Qasmi is not available in case FIR No.753/2013 Police Station Ravi Road, Lahore as his whereabouts are not traceable to police; hence, on the statement of DPG the file was consigned to record.

5. To further dilate upon the matter, section 10(3)(f) of Prosecution Act, 2006 is reproduced herein below:-

"At any stage of a trial before any trial court subordinate to the High Court before the judgment is passed, the Prosecutor General or any Prosecutor specifically authorized by him, may, for reasons to be recorded in writing, inform the court on behalf of the Government that the Prosecutor shall not prosecute the accused upon the charge and thereupon all proceedings against the accused shall be stayed and he shall be discharged of and from the same.

Provided that such discharge shall not amount to an acquittal unless the Court directs otherwise."

6. There are some important ingredients to stay the proceedings in any criminal case that:-

i) The Government has decided not to proceed against the accused;

ii) The Prosecutor General shall inform the Court after recording the reasons in writing; or

iii) Any Prosecutor specifically authorized by the Prosecutor General shall inform the Court.

So first of all approval of the Government is necessary and that should be based on specific reasons and that reasons should be in writing either the case be forwarded by the Prosecutor General by advancing reasons to the cabinet by adopting the

departmental procedure or the cabinet itself take the decision but this decision must be based on some cogent reasons and the Government means does not the Prosecutor, Prosecutor General or Secretary Prosecution or Chief Secretary of the Province, it is the 'Cabinet'. Reference in this respect is made in the case "Messrs Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others" (PLD 2016 Supreme Court 808).

7. Secondly, either the Prosecutor General or any Prosecutor especially authorized in this behalf by the Prosecutor General has to inform the Court and he has to submit before the Court the reasoning and the decision of the 'Cabinet'. In this case, neither any decision was made by the Government i.e. approval by the 'Cabinet' nor any Prosecutor was specifically authorized in this behalf by the Prosecutor General and even the Deputy Prosecutor General had not submitted before the Court that he stated under the instruction of Prosecutor General and he has also not submitted the reasoning advanced by the Prosecutor General or the Cabinet/Government in this respect and the Deputy Prosecutor General while appearing before the Court stated as under:-

"Accused Abdul Rauf has already been convicted by Military Court vide order dated 04.01.2016 in case FIR No.319/2014, under sections 302, 324, 148, 149/34, P.P.C. and 7-ATA, 1997, Police Station Garden Town, Lahore. There is no issue of liberty of the accused so I also tender in evidence warrant of commitment of sentence regarding accused Abdul Rauf as Ex.P-GG and also close the prosecution evidence after tendering report of PFSA, Lahore Ex. P -HH/1-2 to Ex.P-QQ/1-8 with the request that case FIR No.753/2013, Police Station Ravi Road, Lahore and case FIR No.1099/2013, Police Station Garden Town, Lahore of accused Abdul Rauf may be decided on one and same date so that prejudice may not be caused because the star witness Usman Qasmi in case FIR No.753/2013, under sections 302, 324, P.P.C. and 7, A.T.A., 1997, Police Station Ravi Road, Lahore is not available, as per information his whereabouts are not traceable to the police because he has concealed himself due to threat of accused party".

8. Mere fact that earlier case against the accused has already been postponed due to non-availability of a witness does not constitute a valid reason that the other case of similar nature must also be postponed; hence, the above statement of learned Deputy Prosecutor General has no sanctity at all in the eyes of law as neither the Deputy Prosecutor General stated that he has been instructed by the Prosecutor General nor he has submitted any document to establish the approval of the Government in this respect. Hence, the impugned order is declared to be illegal, void and is hereby set aside and the learned trial Court is directed to start the proceedings of trial from the stage, the case was sine die adjourned.

9. With the above observations/directions, criminal revision is allowed.

SA/A-10/L Petition allowed.

2020 P Cr. L J 1158
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD SHER KHAN---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No. 62052 of 2019, decided on 21st October, 2019.

(a) Juvenile Justice System Ordinance (XXII of 2000) [since repealed]---
----S. 7---Determination of age---Non-availability of corroborative evidence---Beneficial construction---Scope---Petitioner assailed order passed by Trial Court whereby it had declared the accused to be a juvenile---Trial Court had refused to accept the record of NADRA and Union Council by observing that entries made therein were got recorded much after the date of occurrence---Date of birth recorded much after the commission of the crime could not be safely relied upon without any corroborative piece of evidence---Trial Court had rightly considered the report of Medical Board which included the ossification test---Accused had come out to be juvenile under the relevant law and such fact was supported by school leaving certificate---Age of accused on the day of occurrence was left by Medical Board to swing between 17 to 18 years---Where there were two interpretations then the one favourable to the subject had to be adopted---Approach of the Trial Court was perfectly in accordance with the law, no legal flaw, error or jurisdictional defect was found therein---Petition was dismissed.

(b) Juvenile Justice System Ordinance (XXII of 2000) [since repealed]---
----S. 7---Determination of age---Rule of lenity---Scope---Petitioner assailed order passed by Trial Court whereby it had declared the accused to be a juvenile---Medical Board had left the age of accused, on the day of occurrence, to swing between 17 to 18 years---High Court observed that the case was a fit case to apply the rule of lenity, which was intended to apply in the instances, where the court recognized the existence of more than one interpretations and where the decision which the court reached harmed or benefited the defendant to some greater or lesser degree, in such an eventuality, this rule required the court to select the interpretation most beneficial (or least detrimental) to the accused and to nullify the harsh by construing the ambiguity in favour of the accused---Trial Court had rightly considered the age of the accused which was more favourable to him---Petition was dismissed, in circumstances.

(c) Interpretation of statutes---
----Beneficial construction--- Scope--- Where there are two interpretations, the one favourable to the subject have to be adopted.

(d) Interpretation of statutes---
----Rule of lenity---Scope---Rule of lenity applies in the instances, where the court recognizes the existence of more than one interpretations and where the decision on

which the court reaches harms or benefits the defendant to some greater or lesser degree, in such an eventuality, the rule requires the court to select the interpretation most beneficial (or least detrimental) to the accused and to nullify the harsh by construing the ambiguity in favour of the accused.

Malik Zafar Iqbal for Petitioner.
Rana Tassawar Ali Khan, Deputy Prosecutor General on Court's Call.

ORDER
MUHAMMAD QASIM KHAN, J.---This criminal revision has been filed to question the legality of order dated 10.10.2019 passed by learned Additional Sessions Judge, Mianwali, whereby in post remand proceedings in case FIR No.3/2014 under section 302/34, P.P.C. Police Station Choddru, Mianwali, application of respondent/accused (Muhammad Shahzad Khan) for declaring him as a juvenile, has been allowed.

2. Notice.

3. The learned Deputy Prosecutor General present in court in some other case accepts notice on behalf of the State. As a short question is involved, the learned counsel for the petitioner and the learned Deputy Prosecutor General are ready to submit final arguments today.

4. It is matter of record that in earlier round similar application of the present petitioner was dismissed vide order dated 05.04.2017, however, Criminal Revision No.35308/2017 filed against the said order was allowed by this court on 23.11.2018 and case was remanded for a fresh order after inquiry within the meaning of section 7 of the Juvenile Justice System Ordinance, 2000. In post remand proceedings the trial court held an appropriate inquiry by summoning and recording the statements of officers/officials from NADRA, concerned School, Union Council as well as Consultant Radiologist. According to the record maintained by NADRA, School and Union Council, the date of birth of Muhammad Shahzad Khan (accused/ respondent) was recorded as 12.09.1998. I have noticed that the learned trial court while refusing to accept the record of NADRA and Union Council has very rightly observed that entries with NADRA as well as Union Council were got recorded much after the date of occurrence of this case and the date of birth recorded much after the commission of the crime could not be safely relied upon without any corroborative piece of evidence. Although the School record produced before the learned trial court establish the accused/respondent No.2 as a juvenile but when the date of birth was not recorded in the Union Council and NADRA records before the registration of case then only the record in primary/middle or high School about the date of birth must be examined carefully and with caution, thus, the learned trial court rightly considered medical board report which included the ossification test to establish the date of birth of accused/respondent No. 2 and according to the ossification test conducted on 18.10.2016 the Standing Medical Board determined the age of Muhammad Shahzad Khan as 20/21 years. The occurrence in this case took place on 07.01.2014, as such, if

according to the Medical Board Report the age of convict/respondent is taken as 20 years then on the date of occurrence i.e. 07.01.2014, his age would be 17-years, 02-months and 19 days and thus the accused/respondent came out to be a juvenile under the relevant law and this fact is also supported by school leaving certificate, and if his age according to the ossification test is considered as 21 years, then his age on the date of occurrence would become 18-years, 02-months and 19-days.

5. It is settled principle of interpretation that if there are two interpretations then the one favourable to subject is to be adopted. Furthermore, as discussed above when exact age has not been provided by the medical board report and the age of respondent/accused has been left to swing between 20/21 years on the day of medical report, then this court considers that this is a fit case to apply the "role of lenity", which is intended to apply in the instances, where the court recognizes the existence of more than one interpretation and where the decision which the court reaches harms or benefits the defendant to some greater or lesser degree, in such an eventuality, this rule requires the court to select the interpretation most beneficial (or least detrimental) to the accused and to nullify the harsh by construing the ambiguity in favour of the accused. Thus, the learned trial court has rightly considered the age of the accused/respondent which is more favour to him.

6. For what has been discussed above, the approach of learned trial court is perfectly in accordance with law, no legal flaw, error or jurisdictional defect has been found therein. The instant criminal revision is therefore, dismissed.

SA/M-206/L Petition dismissed.

P L D 2020 Lahore 358
Before Muhammad Qasim Khan, J
ZAHID KAMAL---Petitioner
Versus
EX-OFFICIO JUSTICE OF PEACE/ADDITIONAL SESSIONS JUDGE, SHEIKHUPURA and 2 others---Respondents

Writ Petition No.41737 of 2019, decided on 12th September, 2019.

(a) Criminal trial---
----Mens rea and actus reus---Specific and general intent--- Principle---To constitute a criminal offence, existence of mens rea and actus reus are two essentials as most crimes consistent of these two broad elements---Mens rea means to have 'a guilty mind' and rationale behind rule is that it is wrong for society to punish those who innocently cause harm---Actus reus literally means 'guilty act' and generally refers to an overt act in furtherance of crime---Requiring an overt act as part of a crime means that society has chosen to punish only bad deeds not bad thoughts---Specific intent and general intent are other terms to describe state of mind of a person--- General intent means intent to do something that law prohibits---Prosecution does not need to establish that accused actually intended precise result---Specific intent designates a special element above and beyond actus reus of crime and generally signifies an intentional or knowing state of mind.

(b) Electricity Act (IX of 1910)---
----S. 42---Wrongful act---Liability of---Principle--- Normally, a company may be liable for a wrong attributed to it but once an act is committed which constitutes an offence which is punishable then individuals may be held responsible and not company.
Chiragh Ali Chishti v. Abdul Ghaffar PLD 1961 (W.P) Lah. 875 rel.

(c) Electricity Act (IX of 1910)---
----S. 42---Criminal Procedure Code (V of 1898), Ss. 22-A & 22-B---Faulty installation of electric wires---Electrocution of animals---Negligence of officials---Complainant filed application against petitioner under Ss.22-A & 22-B, Cr.P.C. for negligently installing electric wires causing damage to his cattle---Ex-Officio Justice of Peace allowed the application---Validity---Wrong committed by an employee during performance of his official duties, unless mens rea and actus reus was established, launching criminal proceeding against him for such a wrong was least permissible exercise---Course available to an aggrieved, in such circumstances, might be to file suit for damages---High Court set aside order passed by Ex-Officio Justice of Peace as same was not sustainable---Constitutional petition was allowed in circumstances.

Syed Abdul Hameed v. Mian Izhar Ahmad PLD 2019 Pesh. 154;Younas Abbas and others v. Additional Sessions Judge, Chakwal and others PLD 2016 SC 581; Mian

Touseef v. District Police Officer 2017 PCr.LJ 1140; Rafiullah v. The State 2006 YLR 1345 and Tabish Gauhar v. The State 2016 PCr.LJ 1398 rel.
Muhammad Zakir Hussain for Petitioner.
Rai Ashfaq Ahmad Kharral for Respondent.
Malik Abdul Aziz Awan, Additional Advocate-General with Abdul Majeed, ASI.

ORDER

MUHAMMAD QASIM KHAN, J.---The petitioner (Sub-Divisional Officer, Civil Lines Division, Sheikhupura) has assailed the order dated 25.06.2019 passed by learned Ex-officio Justice of Peace, whereby, on an application filed by Ghulam Rabbani-respondent No.4 under sections 22-A/22-B Cr.P.C., against Lineman, Line Superintendent/SDO, the respondent SHO Police Station Saddar, Sheikhupura, has been directed to record his version and proceed in accordance with law.

2. The facts in brief are that respondent No.4 earlier filed a complaint before the SHO Police Station Saddar, Sheikhupura, precisely with the allegation that he (the complainant) has established haveli for cattle, nearby has made a pond for them and at about 50/60 feet away transformer of a tube-well of Haji Fazal Ahmad has been installed on a pole, the earth-pole whereof was planted by concerned WAPDA officials inside the watercourse and supporting wires of the said pole had also been fixed right in the same watercourse. On 04.06.2019 at 12.30 noon, two buffaloes of the complainant were sitting inside the pond, when due to negligence of WAPDA employees current of electricity passed through the watercourse thereby both animals were inflicted severe electronic shock, and resultantly both were hindquarters paralyzed and became unable to walk. According to the complainant this was due to negligence of LESCO officials, as such, a direction for registration of a criminal case was sought, and said direction was ultimately issued by learned Ex-officio Justice of Peace through the order, impugned herein.

3. I have considered the respective arguments of learned counsel for the parties and examined the file.

4. It is matter of record that the learned Ex-officio Justice of Peace/ Additional Sessions Judge, Sheikhupura had requisitioned a report from the police and said report is part of instant file, wherein, the S.P (Investigation) had observed that previous year four buffalos and recent year two buffalos of the complainant had been injured causing colossal loss to him, as such, he requested the court to issue a direction to WAPDA to constitute a technical team for site inspection to know whether the electricity had passed through 11000-KV pole or damage had been caused because of water motor and if the electric shock had resulted because of electricity pole then complainant be compensated.

5. There is no second opinion on the point that to constitute a criminal offence, existence of mens rea and actus reus are two essentials, as most crimes consist of two broad elements mens rea and actus reus. Menu rea means to have "a guilty mind." The rationale behind the rule is that it is wrong for society to punish those who

innocently cause harm. Actus reus literally means "guilty act," and generally refers to an overt act in furtherance of a crime. Requiring an overt act as part of a crime means that society has chosen to punish only bad deeds, not bad thoughts. Specific intent and general intent are other terms used to describe a person's state of mind. General intent means the intent to do something that the law prohibits; the prosecution does not need to establish that the accused actually intended the precise result. Specific intent designates a special element above and beyond the actus reus, of the crime, and generally signifies an intentional or knowing state of mind. For example, in the case of theft, the prosecution must establish the accused's intent to steal the property.

6. Keeping the above background of the events as well as legal position in mind, I have perused Section 42 of the Electricity Act, 1910 and observe that normally a company may be liable for a wrong attributed to it, but once an act is committed which constitutes an offence which is punishable then individuals may be held responsible and not the company. This provision of law came under discussion before this Court in the case "Chiragh Ali Chishti v. Abdul Ghaffar" (PLD 1961 (W.P) Lahore 875), wherein, three complaints were filed against individuals and not the licensee. The said ratio decidendi is not applicable to the facts and circumstances of the instant case, for the reason that in the cited judgment complaint had been filed specifically under section 42 of the Electricity Act 1910 and in that specific perspective it was held that "It will be seen that as a legal proposition it is well established that a company or corporation may be prosecuted and held criminally liable, except in the case of those offences which cannot be committed vicariously or for which the punishment must of necessity be imprisonment, transportation or death .." Therefore, in my view the above cited judgment is of no benefit to the petitioner. However, by careful perusal of impugned order it remains admitted position that before issuing the direction for registration of case the petitioner (proposed accused) was not heard and this practice is against the decision rendered by learned Division Bench of Peshawar High Court in Syed ABDUL HAMEED v. Mian IZHAR AHMAD (PLD 2019 Peshawar 154), wherein, with specific reference to the case "Younas Abbas and others v. Additional Sessions Judge, Chakwal and others" (PLD 2016 SC 581), held that "It is therefore, observed that the Justice of Peace before passing any order for the registration of the FIR shall put the other party on notice against whom registration of FIR is asked for." Similarly, a learned Division Bench of this Court in the case "Mian Touseef v. District Police Officer" (2017 PCr.LJ 1140), held that "... the concerned Justice of Peace, must provide an opportunity of hearing to the proposed accused before giving a direction for registration of the FIR." The impugned order, therefore, does not fulfill the above requirements settled by this court.

7. In addition to the above, as discussed above in detail, against a wrong, if any, committed by an employee during the performance of his official duties, unless mens rea and actus rea is established, launching criminal proceeding against him for such a wrong, is least permissible exercise, and in such circumstances the course available to an aggrieved may be to file a suit for damages. Reference is made to the case "Rafiullah v. The State" (2006 YLR 1345 Pesh) and "Tabish Gauhar v. The State"

(2016 PCr.LJ 1398-Sindh). The later judgment has been rendered in a case under section 309 P.P.C., where a person died after receiving electric shocks from the broken electric wires lying on the road and CEO of KESC was implicated and the Hon'ble Sindh High Court, quashed the proceedings while holding that:-
"For the reasons discussed supra, I am of the considered view that there is no probability of the applicant being convicted for the alleged offence even if all PWs are examined during the trial, as the complainant under the ill-advice has lodged FIR against the applicant instead of filing a suit for damages, with regard to the act of negligence allegedly committed by the applicant or other officials of KESC/KE. Consequently, instant criminal miscellaneous application stands allowed and the proceedings emanated from FIR No.163 of 2010, under section 319 P. P. C, are hereby quashed."

8. For what has been discussed above, the impugned order passed by learned Ex-officio Justice of Peace is not sustainable and is set-aside. However, as held in the case "Tabish Gauhar v. The State" (2016 PCr.LJ 1398-Sindh), the complainant will still be at liberty to file appropriate proceedings for recovery of damages against WAPDA/LESCO for the alleged negligence committed by its officers and officials, which allegedly caused physical damage to the buffaloes of the complainant and establish his claim before the relevant forums, and the barrier of limitation, if any, shall not come in his way, if such proceedings are instituted by the complainant within ninety days, from passing of this order. Disposed of.

MH/Z-25/L Petition allowed.

P L D 2020 Lahore 629
Before Muhammad Qasim Khan and Asjad Javaid Ghural, JJ
MUHAMMAD SHAKEEL and others---Appellants
Versus
GOVERNMENT OF PUNJAB through Home Secretary, Lahore and 3 others---Respondents

Criminal Appeals Nos.9249, 9248, 38981 of 2019, 249929 of 2018, 50221, 25426, 62906 of 2019 and 9637 of 2017 decided on 11th November, 2019.

Anti-Terrorism Act (XXVII of 1997)---
----S. 11-EE---Proscription of person---Administrative order---Scope---Question before High Court was whether, in appeals filed under S.11-EE(3-A) of Anti-Terrorism Act, 1997, the Prosecutor Department had to assist the court or it was a matter wherein the Advocate-General Office was required to render assistance---Held, Anti-Terrorism Act, 1997 was primarily linked with criminal law, repercussions flowing therefrom were penal and right of appeal also laid before the judicial forum---Where the order was passed in administrative capacity against which right of appeal was provided before the High Court, in such like matters, Advocate-General Office represented the State---Order passed under S.11-E(3) of Anti-Terrorism Act, 1997 was administrative in nature, hence, Advocate General Office was required to assist the court.

Khizer Hayat and others v. Inspector-General of Police (Punjab) Lahore and others PLD 2005 Lah. 470 rel.
Fida Hussain Rana for Appellants (in Crl. As. Nos.9249 & 9248 of 2019).
Muhammad Arshad Bhatti for Appellant (in Cr1. A. No.38981/2019).
Rai Bashir Ahmad for Appellant (in Cr1. A. No.249929 of 2018).
Muhammad Waseem Rana for Appellant (in Crl. A. No.50221/2019).
Rana Baleegh-ur-Rehman for Appellant (in Cr1. A. No.25426/2019).
Mudassar Naveed Chattha for Appellant (in Crl. A. No.62906 of 2019).
Ch. Umar Hayat Sindhu for Petitioner (in Writ Petition No.9637/2017).
Rana Muhammad Arif Kamal Noon, Prosecutor General, Muhammad Moin Ali and Muhammad Nawaz Sial, Deputy Prosecutor Generals.
Muhammad Shan Gul and Zafar Hussain Ahmad, Additional Advocate Generals.

ORDER
In all these criminal appeals, the appellants have impugned their respective orders of various dates, passed by the Home Department, Govt. of the Punjab, vide which their individual representations filed under section 11-EE (3) of the Anti-Terrorism Act, 1997 against the orders for insertion of their names in Fourth Schedule under the Act ibid, were rejected.

2. During hearing of these matters, question arose before this Court whether in appeals filed under section 11-EE(3-A) of the Anti-Terrorism Act, 1997, the Prosecutor Department is to assist this Court or it is a matter wherein the Advocate

General office is to render assistance, and on this legal proposition, today, we have heard learned counsel for the appellants as well as the learned Law Officer at length.

3. Stance of learned counsel for the appellants in respective appeals is that the prosecution department should argue the case, while on the other hand, learned Additional Advocate states that since the impugned orders have been passed in administrative capacity; hence, it is prerogative of the Advocate General office to argue the matter.

4. To settle this precise legal issue, nature of the matter as well as its stage is necessary to be analyzed i.e. whether same has arisen as a result of prevention of a crime or is an outcome of post occurrence event. Second phase i.e. post occurrence crime would definitely relate to an FIR or lodging of a complaint and proceedings in such like matters would come within the purview of criminal hierarchy, wherein, after submission of challan, trial is commenced and proceedings are initiated and regulated under the Code of Criminal Procedure. In such like matters, prosecution department is the appropriate office to represent the State. So far as the prevention of crime is concerned, it may relate to the Maintenance of Public Order Ordinance, 1960 and in this respect order is passed by the government under its administrative domain with a purpose to maintain the law and order situation, when and where reported. Against such an order, right of filing a representation is provided under section 20-A of the Maintenance of Public Order Ordinance, 1960 before the Home Department i.e. Secretary Home and after culmination of the process of representation, no remedy before judicial forum is provided and when no remedy is provided, it is for this reason that writ petition is preferred, in which office of Advocate General represents the State/Government and not the Prosecutor General office.

5. In the case in hand, although, the impugned orders have been passed under Anti-Terrorism Act, 1997 which primarily is linked with criminal law, repercussions flowing therefrom are penal and of course right of appeal also lies before the judicial forum but when same order is passed in administrative capacity against which also right of appeal is provided before the High Court but same cannot change the nature of the subject-matter, as filing of appeal under Anti-Terrorism Act in such like matters is similar course to the writ petition, filed against the order passed under the Maintenance of Public Order Ordinance, wherein, the office of Advocate General is to represent the State. We also seek guidance in this regard from Full Bench Judgment of this Court "KHIZER HAYAT and others v. INSPECTOR-GENERAL OF POLICE (PUNJAB), LAHORE and others" (PLD 2005 Lahore 470) wherein, while describing the powers and duties of an Ex-Officio Justice of Peace, it has been observed that the powers and duties of a Justice of Peace or an Ex-Officio Justice of Peace in Pakistan as provided in sections 22-A and 22-B, Cr.P.C. do not involve any jurisdiction which can be termed as judicial in nature or character and the functions to be performed by the Ex-Officio Justice of Peace in Pakistan are merely administrative and ministerial in nature and character. Although, while exercising such powers, the order is passed under section 22-A(6) of the Code of Criminal Procedure for

registration of the case but the same is an administrative order against which writ petition is filed and the Advocate General office represents the State.

6. For what has been discussed above, we are of the firm opinion that the impugned orders passed under section 11-EE(3) of the Anti-Terrorism Act, 1997 are administrative in nature; hence, Advocate General office shall assist the Court in these appeals.

7. Today record of the case is not available; hence, the matter be listed after summoning the record.

SA/M-13/L Order accordingly.

P L D 2020 Lahore 739
Before Muhammad Qasim Khan and Asjad Javaid Ghural, JJ
MUHAMMAD IQBAL alias BALI---Petitioner
Versus
PROVINCE OF PUNJAB through Secretary Home, Punjab and 6 others---Respondents

Writ Petition No. 24302 of 2019, decided on 13th March, 2020.

(a) Criminal trial---
----Policy matter---Scope---Policy has force of law---Enforcement or implication of law, especially when it favours an accused cannot be restricted at any stage on any ground.

(b) Juvenile Justice System Ordinance (XXII of 2000)---
----S.7---Penal Code (XLV of 1860), S. 302(b)---International Convention on Civil and Political Rights, 1966, Art. 6, paragraph 5---United Nations Convention on the Rights of Children, 1989, Art.37(a)---Constitution of Pakistan, Arts. 45 & 199---Death penalty to juvenile---Remissions---Applicability---Petitioner was convicted by Trial Court for committing Qatl-i-amd and was sentenced to death---Conviction and sentence was maintained up to Supreme Court and even mercy petition was also dismissed---Special remission was granted by the President of Pakistan in exercise of his powers under Art. 45 of the Constitution, whereby death sentence was converted into imprisonment for life for those convict who were juvenile at the time of commission of the offence---Authorities declined extension of such benefit of remissions to petitioner and referred the matter to the President of Pakistan to reconsider his mercy petition---Validity---After setting a proper law into motion and going through the entire exercise with regard to analysis of juvenility of petitioner, it was unjust for authorities to keep on restricting uniform benefit of law as well as law to all similarly placed persons, on one excuse or the other---Juvenile status of petitioner at the time of commission of offence was not under question and legal heirs of victim pardoned the petitioner, therefore, giving benefit of same legislative intent to other similarly placed accused was not denied---International legislation and domestic legislation imposed a clear bar on inflicting death penalty on an accused under the age of eighteen years---Claim of petitioner to seek a benefit which otherwise was fully available to him under the policy having force of law, could not have been denied by authorities at their level and no legislation could compel them to still refer the matter to the President of Pakistan for consideration merely on the ground that earlier mercy petition had been dismissed by the President---Age of juvenility was already assessed by Trial Court as required under S.7 of Juvenile Justice System Ordinance, 2000---High Court, in exercise of jurisdiction under Art. 199 of the Constitution, instead of sending the matter to Trial Court for re-examination / re-evaluation of age of petitioner, commuted death sentence into imprisonment for life---Constitutional petition was allowed in circumstances.
Ziaullah v. Najeebullah and others PLD 2003 SC 656 ref.

Barrister Sarah Belal, Orubah Sattar Ahmad, Zainab Mehboob, Sana Farrukh, Mahmood Iftikhar Ahmad Zufar, Ahmad Hassan Khan Niazi, Mehr Muhammad Iqbal and Imran Khan Kulair for Petitioner.
Sardar Jamal Sukhera, Advocate General, Malik Abdul Aziz Awan, Additional Advocate General, Zafar Hussain Ahmad, Additional Prosecutor General with Dr. Qadeer Alam, AIG (Prisons), Iqbal Hussain, Special Secretary Home, Aamir Shehzad, Assistant Superintendent Jail and Hafiz Qamar Abbas Section Officer (Home Department) for Respondents.

ORDER
Through instant Writ Petition the petitioner has challenged the order dated 04.05.2018 passed by Additional Chief Secretary (Home) with the following prayer:--
i) Declare that the impugned order dated 04.05.2018 is illegal, void and of no legal effect;
ii) Order immediate release of the Petitioner from jail;
iii) Order Respondents Nos.1 to 4 to pay compensation to the Petitioner for keeping him on death row and in illegal and unlawful confinement after completion of his life imprisonment, since issuance of Presidential Notification had commuted his punishment into life imprisonment;
iv) Direct that the execution of Petitioner during pendency of this Petition may kindly be suspended;
v) Grant any other relief that may be deemed just and equitable in the circumstances."

2. Briefly the facts of the case are that Muhammad Iqbal alias Bali (petitioner) was arrested in case FIR No.301 dated 11.07.1998 registered under sections 302, 324, 347/34, P.P.C. Police Station Qadirabad, District Mandi Bahau Din. On conclusion of trial vide judgment dated 05.07.1999, co-accused were sentenced to imprisonment for life, whereas, the petitioner was mainly convicted under section 396, P.P.C. and sentenced to death. The petitioner challenged his conviction and sentence through Criminal Appeal No.732/99 (Murder Reference No.347-T/1999), which was dismissed vide judgment dated 26.02.2002 (announced on 20.03.2002), as such, conviction/sentence was upheld by this Court. Afterwards, the petitioner filed Criminal Petition No.301-L of 2002 for grant of leave before the august Supreme Court of Pakistan, which was declined vide order dated 11.09.2002, followed by a Criminal Review Petition No.54/2002 which was however withdrawn on the ground of compromise, the said order is reproduced here-under:--
"Learned counsel for the petitioner seeks permission to withdraw this Criminal Review Petition."

3. Subsequently, the petitioner moved an application before the learned trial court for his acquittal on the basis of compromise, but said application was dismissed vide judgment dated 16.07.2005. The said order was assailed through Writ Petition No.15161/2005 before this Court, which was dismissed on 13.11.2006 and the order dated 13.11.2006 was challenged before the august Supreme Court of Pakistan in Civil Petition No.2441-L/2006, which too was dismissed vide order dated 21.02.2007. Civil Review Petition No.603/2016 filed against the judgment dated

21.02.2007 passed in C.P.No.2441-L/2004, was also dismissed on 28.04.2017. During this period the mercy petition of the petitioner was rejected by the President of Islamic Republic of Pakistan (Government of Punjab Home Department, Lahore Letter No.72/2002/MP/DC dated 27th March, 2015, referred).

4. Another round of litigation commenced after promulgation of Presidential Notification dated 13.12.2001, whereby, in exercise of his powers under Article 45 of the Constitution of Islamic Republic of Pakistan, 1973, the President of Pakistan granted special remissions in sentences to those condemned prisoners who were juveniles at the time of commission of offence. On the basis of said Presidential Notification the petitioner filed mercy petition before the President of Pakistan, which remains pending before him till date, as has been told to this court. In the meanwhile, a black warrants had been issued, the petitioner filed a petition before the National Commission for Human Rights, Islamabad (respondent No.5) and the respondent No.5 onwards directed Secretary Home Department, Government of Punjab (respondent No.1) to look into the matter on humanitarian grounds. Then petitioner filed another application dated 06.07.2017 before respondent No.6 (trial court/Anti-Terrorism Court-I, Gujranwala) requesting that black warrants may not be issued. After waiting for the outcome of departmental correspondences, the petitioner filed yet another Writ Petition No.163120/2018 prayed that special remissions be granted to the petitioner, said petition was disposed of vide order dated 06.03.2018 with a direction to respondent No.2 (Additional Chief Secretary (Home), Government of Punjab. The said direction was not being complied with, the petitioner filed Criminal Original No.6820-W/2009 and during those proceedings the court was informed that vide letter dated 04.05.2018 a mercy reference for commutation of death sentence of the petitioner into life imprisonment has been forwarded to the Chief Minister Punjab for its further transmission to the President of Pakistan for orders, consequently the contempt petition was disposed of vide order dated 21.02.2019. Relevant portion from the order dated 04.05.2018 passed by Additional Chief Secretary (Home), is reproduced hereunder:-

"5. The case was examined in this department at length and keeping in view the juvenility of the accused, a mercy reference for commutation of death sentence into life imprisonment in respect of subject cited condemned prisoner was forwarded to the Chief Minister Punjab for its further transmission to the Honourable President of Pakistan for orders. The outcome of the reference is still awaited.

AND WHEREAS, in compliance with the order of Hon'ble Lahore High Court, Lahore passed in Writ Petition No.163120 of 2017, an opportunity of personal hearing was granted to the petitioner's brother Muhammad Abbas along with his counsel on 09.04.2018 and Mian Mohsin Rasheed, Additional Secretary (Prisons) was appointed as hearing officer in this regard.

AND WHEREAS, Mian Mohsin Rasheed, Additional Secretary (Prisons) after hearing the petitioner's brother and his counsel submitted a report stating therein that a mercy reference for commutation of death sentence of the petitioner into life imprisonment has been forwarded to the Chief Minister Punjab for its further transmission to the Honourable President of Pakistan for orders and further

proceedings will be carried out after the outcome of the reference. In the meantime execution proceedings will remain suspended."
This order dated 04.05.2018 has been challenged through the instant writ petition, with prayer reproduced above.

5. After hearing the arguments of learned counsel for the parties at full length and examining the entire record, some of the facts which remain admitted by the parties can be summarized as under:-
a) The petitioner was booked in a criminal case (FIR No.301/1998 registered on 11.07.1998 regarding an occurrence of the same date i.e. 11.07.1998);
b) It is a fact that vide judgment dated 05.07.1999 on his conviction the petitioner was sentenced to death, which conviction as well as sentence ultimately stands affirmed before the Hon'ble Supreme Court of Pakistan;
b)sic There is no denying the fact that Presidential Notification dated 13.12.2001 was issued in exercise of powers under Article 45 of the Constitution of Islamic Republic of Pakistan, 1973, whereby the President of Pakistan granted special remissions in sentences to those condemned prisoners who were juveniles at the time of commission of offence;
c) It is a fact that earlier mercy petition of the petitioner was rejected by the President of Islamic Republic of Pakistan, whereas, second mercy petition to seek benefit of above referred Presidential Notification has not yet been decided by the President;
d) It is a fact admitted by respondent No.1 in reply to this writ petition that petitioner was a juvenile at the time of commission of the crime;
e) Further the Home Department/respondent No.1 in reply to this writ petition in categorical terms admit that although the law barred the award of death sentence to a juvenile accused from the date of enforcement of Juvenile Justice System Ordinance, 2000, but at the same moment it has been admitted that benefit of said Ordinance was extended to the accused of those cases which were registered earlier to its promulgation but were not decided and were pending trial on the date of enforcement of this Ordinance;
f) The respondent No.1 in written reply has come out with a clear stance that execution of death sentence in cases of juvenile accused decided some months prior to the enforcement of the Juvenile Justice System Ordinance would be unfair and such cases shall be brought at par with other cases;
g) There is also no doubt, rather it also remains admitted position that legal heirs of the deceased have also forgiven/pardoned the accused/petitioner.

6. From the above summary of facts, it becomes almost obvious that as a matter of fact that legal heirs of the victim having forgiven the accused/petitioner have lost their interest in hanging the petitioner to gallows, whereas, departmental agencies by and large have agreed to the proposition that it will be unfair to deny the benefit of a legislation (Juvenile Justice System Ordinance or the Presidential Notification dated 13.12.2001) to the petitioner, when the same benefit has already been extended to other similarly placed accused persons.

7. In such a situation when it has been admitted by the government that petitioner was entitled to the benefit of above referred Ordinance as well as Presidential Notification, then we are afraid that irrespective of the fact that earlier mercy petition of the petitioner might have been rejected by the President of Pakistan, the respondent No.1 (Home Department) was not required at all to have still sent a reference to the President of Pakistan for considering the case of the petitioner for commutation of his death sentence. The plea taken by the Provincial Government is that under section 402-B, Cr.P.C. a restriction existed for it to exercise its powers to commute the sentence of death in case where the President has already passed an order. But, we are of the view that here in this case the petitioner was not begging for anything over and above the legal or constitutional mandate, rather he was only seeking enforcement of a government policy executed in the light of Charter of United Nations Convention on the rights of Children, 1989 (UNCRC), International Convention on Civil and Political Rights, 1966 (ICCPR) and the Presidential Notification and that too on admitted factual and legal premises. It is admitted position that the policy has the force of law. There can be no second opinion that enforcement or implication of law, especially when it favours an accused, could not be restricted at any stage on any ground.

8. In addition to our above referred legislation and Presidential Notification, we are also cognizant of the fact that Pakistan is signatory to the United Nations Convention on the Rights of Children, 1989 (UNCRC) as well as International Convention on Civil and Political Rights, 1966 (ICCPR). Article 37(a) of the UNCRC and the Article 6 paragraph 5 of the ICCPR binds all members' states not to impose death penalty for crimes committed by persons of less than eighteen years of age. The promulgation of Juvenile Justice System Ordinance, 2000 as well as the Presidential Notification dated 13.12.2001 was in fact carrying on the obligations (sic) out by above referred two treaties.

9. Another aspect of the matter is that earlier vide letter No.8/41/2001-Pins dated 13th December, 2001, the President of Pakistan in exercise of his prerogative under Article 45 of the Constitution of Islamic Republic of Pakistan, 1973 granted special remissions in sentences. The operative part of the text of the said letter is reproduced:-

"The death sentence of those condemned prisoners who were juveniles as defined in the Juvenile Justice System Ordinance, 2000 at the time of commission of offence stands commuted to life imprisonment provided that the death sentence has been awarded under Ta'zir and not Qisas or under other Hadood Laws.

The Provincial Governments shall ensure that the age as recorded by the trial court entitles the condemned prisoner to such commutation."

As it appears on the basis of above letter, the executive authorities started to consider the cases of juvenility of offenders and this issue when came before the Hon'ble Supreme Court of Pakistan, the apex Court in the case "Ziaullah v. Najeebullah and others" (PLD 2003 SC 656), settled the proposition by holding that:--

"Essentially question relating to determination of the age of such claimant in terms of section 7 of the Juvenile Justice System Ordinance, 2000 can be settled judiciously

for the purpose of treating the accused to be juvenile offender. As far as Executive Authorities or any Committee constituted by them is concerned, it enjoys no power to discharge the judicial function. If they allowed to do so, it would be negation of the concept of independence of judiciary. Similarly, it would give rise to number of related complications on account of which possibility would be that in the garb of exercise of such powers the judgments of the superior courts are nullified by reducing the sentence of death to life imprisonment by the Executive Authorities on the argument that the age of the accused was below 18 years at the time of commission of offence."
In the light of above legal position, it remains a fact that here in this case the juvenility status of the petitioner was assessed by the learned trial court which was the proper and appropriate forum and no question has been put about his juvenility.

10. Therefore, after setting a proper law into motion and going through the entire exercise with regard to analysis of juvenility of the petitioner, it was totally unjust for departmental agencies to keep on restricting the uniform benefit of law as well as law to all similarly placed persons, on one excuse or the other. At the cost of repetition, we reiterate that juvenile status of the petitioner at the time of commission of the offence is not under question; the legal heirs of victim having pardoned the petitioner is beyond any doubt; giving benefit of same legislative intent to other similarly placed accused has not been denied; firstly the international legislation and secondly our domestic legislation impose a clear bar on the infliction of death penalty on an accused under the age of eighteen years, thus, the claim of the petitioner to seek a benefit which otherwise, was fully available to him under the policy, having the force of law, could not have been denied by the departmental authorities at their level and no legislation could compel them to still refer the matter to the President of Pakistan for consideration merely on the ground that some earlier mercy petition had been dismissed by the President.

11. For what has been discussed above, we declare that the order dated 04.05.2018 passed by Additional Chief Secretary (Home) sending the reference to the President of Pakistan, is nullity in the eyes of law. Consequently, as otherwise, factual as well as legal position about the claim of the petitioner has not been denied by the respondents, his age of juvenility has already been undeniably assessed by the learned trial court as required by Section 7 of the Juvenile Justice System Ordinance, 2000, therefore, instead of sending the petitioner back to learned trial court for re-examination/reevaluation of his age, in exercise of our jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, we commute the death sentence of the petitioner to imprisonment for life, whereas, his other convictions/sentences if any under the same trial shall remain intact.

MH/M-102/L Petition allowed.

PLJ 2020 Cr.C. (Lahore) 6
[Multan Bench Multan]
Present: **MUHAMMAD QASIM KHAN, J.**
SAIMA BIBI--Appellant
versus
STATE and another—Respondents

Crl. A. No. 92 of 2011, heard on 16.4.2019.

Duty of witness--
----It is duty of a witness, before whom an accused makes his confessional statement, that he must ascribe the statement/confession of the accused without any deletion or addition before the police and the Court. [Pp. 9 & 10] A

Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 302(b)--Conviction and sentence--Challenge to--Qatl-e-amd-- When both PWs do not corroborate each other on every aspects of the confession/statement of the accused, their statements cannot be relied upon rather it create suspicion on the veracity of testimony furnished by them--This aspect of the case smacks out the story of prosecution qua the extra judicial confession and left the impression that such story was built to strengthen the prosecution case--This aspect is further supported by the fact that both the PWs of extra judicial confession were not influential persons of the locality and even they were not in a position to get pardon to the accused from the complainant party--Furthermore, they admitted that on the day when the accused confessed before them, neither they informed the complainant nor to the police and even they did not try to apprehend the accused when they made confession before them--All these facts support my earlier observations that story of extra judicial confession is a result of concoction and fabrication against convict/appellant--When a piece of evidence has been disbelieved to the extent of co-accused, then it cannot be believed or used against the other accused for the purpose of conviction--Even they did not inform the police or any respectable of the locality or any relative of the deceased immediately thereafter, rather as per their own statements they informed the complainant on the next day--Furthermore, their statements were recorded by the police by further delay of 3 to 4 days; hence, their presence at the relevant place cannot be established without any shadow of doubt--Both these witnesses have stated that they heard the conversation conviction/appellant and other Co-persons of regarding murder of deceased but neither they approached the police nor respectable of the locality nor any family members of the deceased" rather they informed the complainant on the next day when post-mortem examination was conducted--It means that a. long time was consumed for post-mortem examination because police was preparing the papers and necessary padding qua the evidence of prosecution was also done during this period--Post mortem examination was conducted after considerable delay and to conceal this fact Constable/PW was examined, who developed a false, story of taking the dead body to a private hospital and then to Nishtar Hospital, Multan--Hence, this piece of evidence furnished by PWS is also not beneficial for the prosecution rather it creates serious doubts in the prosecution case--

As far as recovery of bloodstained Chhuri is concerned, it was taken into possession from the spot, no finger impressions were obtained over it, so no report from -the expert could be obtained in this regard that it was used by convict/appellant--In such a situation, why the Investigating Officer/PW did not recover the said clothes at the time when he inspected the spot, as the said clothes were lying under the cot of deceased--This important aspect of the case makes the recovery of deceased's clothes doubtful--Thus, recovery of Chhuri and clothes of the deceased cannot be useful for the prosecution--When all the above narrated facts are juxtaposed, it appears that prosecution has failed to prove its case beyond any shadow of doubt--After analyzing the prosecution case minutely from all angel, that it was an unseen occurrence; PWs were not present at the relevant time; story of extra judicial confession has been introduced after due consultations and deliberations; no motive has also been assigned to appellant to cause murder of deceased; and on the same evidence two of the co-accused have acquitted prosecution has miserably failed to prove its case against convict/appellant beyond any shadow of doubt--Appeal was allowed.

[Pp. 9, 10, 11, 12 & 13] B, C, F, G, H, I, J & K

Chance witness--

----It is necessary for a chance witness to advance the reasons of his presence at the place of occurrence, at the relevant time. [P. 11] E

Barrister Muhammad Rehan Khalid Joiya, Advocate for Appellant.
Mr. Akbar Ali Chaudhry, Deputy Prosecutor General for State.
Dr. Ashraf Ali Qureshi, Advocate for Complainant.
Date of hearing: 16.4.2019.

JUDGMENT

Saima Bibi/appellant was challaned in case FIR No. 318 of 2009 under Sections 302/201, PPC registered at Police Station Basti Malook, District Multan, who faced trial before learned Additional Sessions Judge, Multan, and vide judgment dated 23-12-2010 appellant was convicted under Section 302(b), PPC and sentenced, to ***imprisonment for life*** with compensation of Rs. 50,000/- payable to legal heir of deceased under Section 544-A, Cr.P.C., in default whereof appellant was to further undergo SI for six months. However, benefit, of Section 382-B, Cr.P.C. was extended in her favour.

2. There is no need to repeat the detailed facts of the case as well as summary of the prosecution evidence, as it has already been given by learned trial Court in the impugned judgment.

3. The prosecution case hinges upon the evidence of extra judicial confession allegedly made by the accused before Muhammad Aslam PW-15 and Altaf Hussain son of Mushtaq Khan PW-16, on 15.07.2009; evidence of Wajtakar furnished by Sardar Ali PW-14 and Abdul Aziz PW-17; recovery of weapon of offence from the, place of occurrence; recoveries from the spot and recovery of clothes of deceased on the disclosure of Saima Bibi convict/

appellant; statements of Altaf Hussain PW-10 and Abdul Aziz PW-17 about the hearing of conversation of the acquitted accused and seeing the burning of bloodstained clothes of Saima Bibi eonvict/appeflant coupled with medical evidence furnished by Dr. Rukhsana Tareen PW-4 and post-mortem examination report Ex.PD.

4. In this case Muhammad Iqbal complaihant/PW-7, father of the deceased, Allah Bakhsh PW-8 and Shamim Mai PW-9 (mother of deceased) furnished the ocular account and as per their stance, when they reached at place of occurrence, a large number of people were gathered there and dead body of Farzana smeared with blood was lying there on a cot. They are not eye-witnesses of the occurrence, as they have neither seen the accused while causing injuries on the person of Farzana/deceased nor they have seen any accused at the place of occurrence or while running away from the spot; therefore, their statements qua the ocular account is only a hearsay evidence and nothing else, which has no evidentiary value and cannot be used against Saima Bibi convict/ appellant.

5. Prosecution tried to prove its case through extra judicial confession allegedly made before Muhammad Aslam PW-15 and Altaf Hussain son of Mushtaq Khan PW-16 on 15.07.2009 at the Dera of Altaf Hussain PW-16, by alleging that Maqbool Ahmad, Abdus Sattar along with three women came at the Dera of Altaf Hussain PW-16. Maqbool Ahmad, father of Samia Bibi convict/appellant admitted that his daughter Saima Bibi had committed murder of Farzana and he sought pardon. Abdus Sattar also sought pardon for the guilt of ladies accused. Saima Bibi convict/appellant also sought pardon. Whereas Altaf Hussain PW-16 in his statement has given the details of occurrence, i.e. motive behind the occurrence and what was the plan of accused in this respect and other details of the occurrence including some other events committed after the occurrence. It is duty of a witness, before whom an accused makes his confessional statement, that he must ascribe the statement/confession of the accused without any deletion or addition before the police and the Court. But in this case the details of the statement/confession narrated by both these PWs do not corroborate each other, although the alleged confession was made at the same time in their presence. In such circumstances, when both these PWs do not corroborate each other on every aspects of the confession/statement of the accused, their statements cannot be relied upon rather it create suspicion on the veracity of testimony furnished by them.

6. There is another important aspect in this case regarding the arrest of Saima Bibi convict/appellant. In this connection, I would like to refer the statement of Muhammad Iqbal complainant/PW-7, who is real father of Farzana Bibi deceased. He in his cross-examination has admitted that Saima Bibi accused was arrested by the police on the same day i.e. on 07-07-2009, after shifting the dead body of Farzana Bibi deceased to the hospital. This statement of Muhammad Iqbal/PW-7 has much weight, as it came out from the mouth of father of the deceased; hence, it cannot be ignored. On the other hand, Muhammad Saeed Akhtar, Inspector/PW-10, who investigated the case, shown arrest of Saima Bibi as on 20-07-2009. In these circumstances, it appears that during interregnum period Saima Bibi convict/

appellant was under the custody of police but her arrest was shown in the police papers as on 20-07-2009; thus, how Saima Bibi convict/appellant could make extra judicial confession before Muhammad Aslam PW-15 and Altaf Hussain PW-16 on 15-07-2009. This aspect of the case smacks out the story of prosecution qua the extra judicial confession and left the impression that such story was built to strengthen the prosecution case. This aspect is further supported by the fact that both the PWs of extra judicial confession were not influential persons of the locality and even they were not in a position to get pardon to the accused from the complainant party. Furthermore, they admitted that on the day when the accused confessed before them, neither they informed the complainant nor to the police and even they did not try to apprehend the accused when they made confession before them. All these facts support my earlier observations that story of extra judicial confession is a result of concoction and fabrication against Saima Bibi convict/appellant.

7. There is another important aspect in the present case that this confessional statement of both the PWs i.e. Muhammad Aslam PW-15 and Altaf Hussain son of Mushtaq Khan PW-16 was not believed by learned trial Court qua the other two acquitted accused i.e. Mukhtar Mai and Mansab Mai. In such circumstances, when a piece of evidence has been disbelieved to the extent of co-accused, then it cannot be believed or used against the other accused for the purpose of conviction. In such a situation reliance can safely be placed upon the unreported judgment of the Hon'ble Supreme Court of Pakistan passed in Crl. Misc. Application No. 200 of 2019 in Crl. Appeal No. 238-L of 2013.

8. The other important piece of evidence against Saima Bibi convict/appellant is "Wajtakar". Both the witnesses i.e. Sardar Ali PW-14 is resident of Chah Naiwala, Mouza Pir Tannun, Multan, while Abdul Aziz PW-17 is resident of Chak No. 9/F, Tehsil and District Multan. They are not residents of Bock-D Shoukat Colony, where the occurrence was taken place. No plausible explanation has been given by both these witnesses for their presence at the road near the place of occurrence at the relevant time, from where they saw Saima Bibi convict/appellant with bloodstained clothes and entering her in the house of acquitted accused i.e. Mukhtar Mai and Mansab Bibi. Sardar Ali PW-14 stated that Abdul Aziz PW-17 came to his house for resolving the dispute of Mochhi Brotheri and for the same reason they were going to Dera of Ghulam Muhammad. Whereas Abdul Aziz PW-17 states that he went to Sardar Ali PW-14 for his personal business. It is necessary for a chance witness to advance the reasons of his presence at the place of occurrence, at the relevant time. It is pertinent to mention here that said Ghulam Muhammad was neither associated with the investigation nor he was produced in the witness box to strengthen whether these PWs had come to his Dera or not and what was the reason for their presence at his Dera. Another significant aspect in this case is that both these witnesses i.e. PWs 14 & 17 in their examination-in-chief have stated that "*Mst.* Saima told *Mst.* Samina that she committed the murder of *Mst.* Farzana by causing injuries with Churri. When both these. PWs had heard that Saima Bibi convict/appellant had committed the murder of Farzana but neither they made any attempt to apprehend the accused nor informed said Ghulam Muhammad or the complainant. Even they did not inform the

police or any respectable of the locality or any relative of the deceased immediately thereafter, rather as per their own statements they informed the complainant on the next day. Furthermore, their statements were recorded by the police by further delay of 3 to 4 days; hence, their presence at the relevant place cannot be established without any shadow of doubt.

9. Although, as per prosecution story, occurrence took place at 12:00 (Noon) on 07-07-2019 and FIR was registered at 4:35 PM on the same day on the statement of Muhammad Iqbal PW-7. After inspection of the spot, dead body of the deceased was handed over by Muhammad Saeed Akhtar, Inspector/I.O./PW-19 to Akhtar Hussain, constable/
PW-5 on the same day for post-mortem examination but post-mortem examination was conducted on the next day i.e. on 08-07-2009 at 2:00 pm. This delay also creates serious doubt and it appears that dead body was recovered after a long time of death of the deceased and when the relatives of the deceased were summoned by the police, they were in search of the accused and for the same reason anti-dated FIR was registered and post-mortem examination was conducted after a considerable delay. This fact further strengthen by the act and conduct of Sardar Ali PW-14 and Abdul Aziz PW-17. Both these witnesses have stated that they heard the conversation of Saima Bibi with Mukhtar Mai and Mansab Bibi regarding murder of Farzana Bibi deceased but neither they approached the police nor respectable of the locality nor any family members of the deceased rather they informed the complainant on the next day when post-mortem examination was conducted. It means that a long time was consumed for post-mortem examination because police was preparing the papers and necessary padding qua the evidence of prosecution was also done during this period.

10. Another important aspect in this case is that post-mortem examination was conducted by Dr. Rukhsana Tareen, WMO, RHC Ayyaz Abad, Maral, who appeared before the Court as PW-4. Whereas Akhtar Husain, constable/PW-5 stated that on 07-07-2009 he took the dead body earlier to a private hospital in Qasba Maral but he was referred to Nishtar Hospital, Multan. and he reached there at about Maghrib prayer time and he handed over the dead body to the hospital staff. On the next day, he again reached at Nishtar Hospital, Multan, where he received last worn clothes of the deceased and a parcel from the Doctor and came back to the Police Station at Maghrib Wela. Ex.PD shows that post-mortem examination was conducted at RHC, Ayyazabad Maral and not at Nishtar Hospital, Multan. Either post-mortem examination was conducted at Nishtar Hospital, Multan, has been concealed by the prosecution and post-mortem report Ex.PD was obtained by joining hands with Lady Doctor PW-4 or dead body was kept: at Police Station or in RHC, Maral, till preparation of necessary papers and for the same reason post-mortem examination was conducted after considerable delay and to conceal this fact Akhtar Hussain, Constable/PW-5 was examined, who developed a false, story of taking the dead body to a private hospital and then to Nishtar Hospital, Multan. Hence, this piece of evidence furnished by PWs 4 & 5 is also not beneficial for the prosecution rather it creates serious doubts in the prosecution case.

11. As far as recovery of bloodstained Chhuri P-7 is concerned, it was taken into possession from the spot, no finger impressions were obtained over it, so no report from the expert could be obtained in this regard that it was used by Saima Bibi convict/appellant. Furthermore, recovery of clothes of the deceased Ex.PG at the disclosure of Saima Bibi convict/appellant is concerned, as per site plan Ex.PK said recovery was made from the same room, where dead body was lying on the cot. In such a situation, why the Investigating Officer/PW-19 did not recover the said clothes at the time when he inspected the spot, as the said clothes were lying under the cot of deceased. This important aspect of the case makes the recovery of deceased's clothes doubtful. Thus, recovery of Chhuri P-7 and clothes of the deceased cannot be useful for the prosecution.

12. When all the above narrated facts are juxtaposed, it appears that prosecution has failed to prove its case beyond any shadow of doubt. After analyzing the prosecution case minutely from all angel, I am of the firm view that it was an unseen occurrence; PWs were not present at the relevant time; story of extra judicial confession has been introduced after due consultations and deliberations; no motive has also been assigned to Saima Bibi/appellant to cause murder of Farzana/deceased; and on the same evidence two of the co-accused namely Mukhtar Mai and Mansab Bibi have acquitted Consequently, I have come to an irresistible conclusion that prosecution has miserably failed to prove its case against Saima Bibi convict/appellant beyond any shadow of doubt.

13. As a result of above discussion, this appeal is allowed and Saima Bibi/appellant is acquitted of the charge. Appellant is on bail, her surety is hereby discharged from his liabilities. Case property, if any, be disposed of in accordance with law. Record be sent to learned trial Court forthwith.

(A.A.K.) Appeal allowed

PLJ 2020 Cr.C. (Note) 40
[Lahore High Court, Lahore]
Present: MUHAMMAD QASIM KHAN, J.
GHULAM MOHAY-UD-DIN etc.--Appellants
Versus
STATE and another—Respondents

Ctrl. Appeal No. 208-J of 2012 & Ctrl. Revision No. 171 of 2014, heard on 17.10.2018.

Criminal Procedure Court, 1888 (V of 1898)---

---S. 420—Pakistan Penal Code, (XLV of 1860), S. 302/34—Conviction and sentence—Challenge to—Delay in lodgment of FIR—Motive set out in case that a few days prior to occurrence a quarrel had taken place between accused/appellant and deceased but neither name of any witness to said earlier incident was disclosed by complainant nor even place, time or date of such quarrel had been mentioned. Further I.O. also admitted in his cross—examination that during course of investigation complainant could not produce ay cogent evidence with regard to motive—As such findings recorded by trial Court while discarding motive are found to commensurate with facts and circumstances of case. [Para10]A

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

---S. 302/34—Conviction and sentence—Challenge to—Material deficiencies in prosecution case i.e delay in lodgment of FIR, delay in conduct of post mortem, delay in recovery of crime weapon, unnatural conducted of witnesses at place of occurrence4 at relevant time, non-citation of electric bulb in site plans, non-recovery of electric bulb and non-proof of motive—There is no cavil to proposition that night is always deemed to be dark unless proved otherwise—In FIR as well as in his statement as PW-9, complainant has explained that they witnessed occurrence when electric bulb was lit but it has been observed another eye witness did not utter a single word in this respect—Furthermore, neither in scaled site plan prepared by Draftsman nor un-scaled suite plan prepared by I.O. point out place where electric bulb had been fixed nor even said bulb was taken into possession by I.O. Held, Prosecution has failed to establish its case beyond any shadow of doubt against accused/appellant—Appeal was allowed

[Para 14&15] B&C 2017 SACMR 486 ref.

Mr. Shah Nawaz Shah, Advocate for Appellant.

Ch. Sarfraz Ahmad Khatana, Deputy District Public Prosecutor for State.

Syed Faizan Abid Naqvi, Advocate for Complainant/ Respondent.

Date of hearing: 17.10.2018.

Full judgment can be viewed at www.pljlawsite.com

(Z.A.S)

Appeal Allowed.

PLJ 2020 Lahore (Note) 65
Present: **MUHAMMAD QASIM KHAN, J.**
GOHAR NAWAZ SINDHU--Petitioner
versus
GOVERNMENT OF THE PUNJAB, etc.—Respondents

W.P. No. 25302 of 2014, decided on 25.9.2014.

Constitution of Pakistan, 1973--
----Art. 199(1)(a)--Detention orders--Non-incriminating material availability of--Question of--Whether activities of detenus were prejudicial to public safety or maintenance of public order--Determination--Unlawful custody--Illegal detention--Challenge to--Although, under Article 199 (1) (a) of Constitution of Islamic Republic of Pakistan, 1973, writ can be issued on application of any aggrieved party but as Constitution protects liberty of citizen; hence, under Article 199 (1) (b) (i) on application of any person a direction for release of person could be issued if Court is satisfied that custody of any person within its territorial jurisdiction is without lawful authority or in an unlawful manner--From bare reading of Article 199 of Constitution, it appears that for purpose of releasing a person from unlawful custody or who has been detained in unlawful manner, embargo of aggrieved party does not attract and any person could file such petition whether he is related or known to detenu or not, therefore, this Court is competent to entertain a writ petition, if it is satisfied that any person has been detained illegally or in unlawful manner it could pass order to produce him before Court or record for his detention before Court to satisfy itself whether detention is lawful or any person has been detained in unlawful manner--Although, on date of hearing, respondents- authorities were directed to produce relevant material but no such material has been produced before Court to satisfy grounds of detention passed against 36 detenus detained in Central Jail Rawalpindi and District Jail Attock by orders of District Coordination Officer, Rawalpindi--Although, sufficient time was granted to respondents-authorities, but in light of non-production of any material, it is safely presumed that no material was available with detaining authority to support grounds of detention and it appears that while passing impugned order concerned authority has not applied its judicious mind. [Para 9 & 13] A & C

West Pakistan Maintenance of Public Order Ordinance, 1960--
----S. 3(9)--Constitution of Pakistan, 1973, Arts. 9 & 199--Imposing of conditions--Detention order--Fundamental rights--Liberty of citizen--Illegal detention--Parameters of law--Challenge to--This section imposes certain conditions while passing detention order and if these conditions are not fulfilled then detention order is illegal and void because Article 4 of Constitution of Islamic Republic of Pakistan, 1973 provides that all citizens should be treated in accordance with law, must enjoy protection of law and this right could not be taken away by any administrative authority and if any administrative authority passes any order against statutory provisions or against fundamental rights guaranteed by Constitution, same is amenable to judicial review by this Court under Article 199 of Constitution of Islamic

Republic of Pakistan, 1973 as liberty of citizen is divine right protected by Article 9 of Constitution of Islamic Republic of Pakistan, 1973, save in accordance with law--From bare reading of above reproduced Section 3 of West Pakistan Maintenance of Public Order Ordinance, 1960 with regard to detention order and especially sub-section (9) of Section 3 of said Ordinance,, it becomes clear that appellate authority firstly has to satisfy itself whether order for detention passed under Section 3, *ibid*, is within parameters of law as stated above and if order is within parameters of law then in exceptional circumstances authority may direct release of a person on bond for due observance of conditions and in this regard he could impose certain conditions which have to be fulfilled by detenu and in case of non-fulfillment of such conditions his bound should be forfeited--Detention orders are declared illegal, void, *ab-initio* and detention of these 36 persons is held to be unwarranted in law--They be released forthwith if not required in any criminal case.

[Para 11, 14 & 15] B, D & E

Syed Shadab Hussain Jafery, Advocate for Petitioner.
Mr. Ishtiaq A. Samsial, Advocate for Petitioner (in W.P. No. 25426 of 2014).
Syed Nayyar Abbas Rizvi, Addl. Advocate General, Mr. Muhammad Nasir Chohan and Mr. Sattar Sahil, Assistant Advocates General with Irfan Ali Chheena, Section Officer, Home Department and Raja Abdul Qayyum, Law Officer on behalf of Prison Department.
Date of hearing: 25.9.2014.

ORDER

This single judgment shall form the detailed reasoning of my earlier short order of even date, whereby, two matters (i) W.P. No. 25302/2014 titled *"Gohar Nawaz Sindhu versus Government of the Punjab, etc"* and (ii) W.P. No. 25426/2014 titled *"Pakistani Awami Tehreek versus Government of the Punjab, etc"* having same subject were disposed of. For facility of reference the short order is reproduced hereunder:

"This single order shall dispose of two petitions i.e. Writ Petition No. 25302/2014 titled "Gohar Nawaz Sindhu versus Govt. of the Punjab, etc." and Writ Petition No. 25426/2014 titled "Pakistan Awami Tehreem versus Govt. of the Punjab, etc".

2. Although, learned Law Officer states that all the detenus in the Province of Punjab have been released except 36 relating to District Rawalpindi, however, their appeals have been conditionally allowed that they may be released after submission of bail bond in the sum of Rs. 1,00,000/-(one lac) each with one surety each in the like amount to the satisfaction of District Coordination Officer, Rawalpindi.

3. The representative of Prison Department submitted his report. As per report, except above said 36 detenus, all the detenus relating to any political party detained from 1st of August, 2014 till today have been released by accepting their appeals and orders of the Court have been implemented.

4. Today, matter was argued before the Court only with regard to 36 detenus detained by the order of District Coordination Officer, Rawalpindi. In this regard,

the reasons to be recorded later on, order dated 24.9.2014, passed by the Secretary, Government of the Punjab, Home Department and the order of District Coordination Officer, Rawalpindi, in this regard are declared illegal, void, ab-initio; hence, the officials-respondents are directed to immediately release these 36 detenus without obtaining any bail bond.

5. With this direction, both writ petitions are disposed of".

Both the writ petitions were filed with the prayer that respondents detained a large number of persons through out the Province of Punjab without any legal justification and that all the detenus be released by setting aside the detention orders issued by the respondents.

2. The liberty of citizen is an important fundamental right guaranteed by the Constitution of Islamic Republic of Pakistan, 1973, so in order to avoid unnecessary delay which was likely to be caused due to statutory technicalities, copies of both the petitions were handed over to learned Law Officer with the direction for their onward transmission to Secretary Home, Government of the Punjab, Lahore who shall treat the same as appeal/representation on behalf of the detenus and after examining the record, shall decide them. Meanwhile, a report was requisitioned from Inspector General (Prisons) Punjab who appeared before this Court along with detailed report to the effect that in total 3509 persons related to Pakistan Awami Tehreek and Pakistan Tehreek-e-Insaf were detained firstly on the orders of concerned District Coordination Officers and later on, by the orders of Secretary Home, Government of the Punjab. Amongst those detenus, 2958 were released but 551 were still detained in different Jails of the Province of Punjab. Out of these detainees, 225 belong to Pakistan Tehreek-e-Insaf, 309 related to Pakistan Awami Tehreek while 17 others were detained on different grounds and their detention has not been assailed in both these writ petitions.

3. Today learned Law Officer informed that by accepting the representations of the detenus relating to Pakistan Tehreek-e-Insaf and Pakistan Awami Tehreek they have been released, except 36 persons detained in Central Jail Rawalpindi and District Jail Attock by the orders of District Coordination Officer, Rawalpindi and whose representations have been accepted with the condition that they should be released subject to executing a surety bond. Relevant para No. 5 of the order passed by Secretary Home, Government of the Punjab is as under:

"In consideration of the above, the Representations of the aforementioned detenues are hereby accepted and the detenues are released forthwith, subject to executing a surety bond of Rs. 1,00,000/- to the satisfaction of District Coordination Officer Rawalpindi, if not required in any other case".

4. Learned counsel for the petitioners submitted that while passing detention orders under Section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960, the concerned authorities had not applied their mind to satisfy themselves whether the activities of the detenus are prejudicial to public safety or maintenance of public order; no incriminating material was available before the detaining authorities at the

time of passing of the impugned orders and grounds of detention were not delivered to the detenus. Even condition imposed by the respondents is against the spirit of sub-section (9) of Section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960. Further submitted that cost be imposed on the respondents and Government of the Punjab for each detenu on daily basis.

5. On the other hand, learned Law Officer representing Provincial Government submitted that these writ petitions are not maintainable as same have been filed in representative capacity; petitioners are not aggrieved persons and detenus have not availed alternate and adequate remedy available to them under the relevant provision of law. Added that the condition imposed in 36 cases for submission of surety bond to the satisfaction of District Coordination Officer, Rawalpindi is within the parameters of law as there is apprehension that these persons after release from Jails may indulge themselves in activities prejudicial to public safety and maintenance of public order.

6. Learned Law Officer in response to the stance taken by learned counsel for the petitioners about imposition of fine, submitted that the authorities acted in good faith and therefore, fine may not be imposed.

7. On Court query, admits that all these persons were released on bail in earlier criminal cases and were detained considering the law and order situation prevailing in the Country and affiliation of these detenus with the political parties *i.e*. Pakistan Tehreek-e-Insaf and Pakistan Awami Tehreek which can provoke these persons for activities which could be prejudicial to public safety.

8. I have heard both the parties at length and perused all available record.

9. Although, under Article 199 (1) (a) of the Constitution of Islamic Republic of Pakistan, 1973, writ can be issued on the application of any aggrieved party but as the Constitution protects the liberty of citizen; hence, under Article 199 (1) (b) (i) on the application of any person a direction for release of person could be issued if the Court is satisfied that the custody of any person within its territorial jurisdiction is without lawful authority or in an unlawful manner. From bare reading of Article 199 of the Constitution, it appears that for the purpose of releasing a person from unlawful custody or who has been detained in unlawful manner, the embargo of aggrieved party does not attract and any person could file such petition whether he is related or known to the detenu or not, therefore, this Court is competent to entertain a writ petition, if it is satisfied that any person has been detained illegally or in unlawful manner it could pass order to produce him before the Court or record for his detention before the Court to satisfy itself whether detention is lawful or any person has been detained in unlawful manner and for this purpose, the condition of aggrieved person does not hold the field and this Court could initiate inquiry to satisfy itself:-

(i) whether detention order has been passed by the competent authority,

(ii) whether by bare reading of the detention order it could be declared a valid detention order;

(iii) whether there is any material available with the authority in support of detention order which appeal to the prudent mind; and
(iv) whether restriction imposes by the relevant law and the Constitution of Islamic Republic of Pakistan, 1973 has been observed or not.
Hence, the objection of learned Law Officer with regard to aggrieved persons is not a valid objection.

10. Second stance of learned Law Officer that alternate and adequate remedy, which is condition before invoking the writ jurisdiction, has not been availed by the detenus, this contention has also no force because as per report, more than 3509 persons were detained in the Province of Punjab, normally, in our Country people live in joint family system or have strong relations at least with their maternal and paternal families; hence, considering this fact at least 30000 to 40000 families were disturbed by the detention orders and for the same reason, this Court transmitted the copies of writ petitions to the concerned authority for treating the same as representations. Same were treated as representations and decided accordingly. It is not necessary that representation must be filed by the detenu himself because as detenu is in custody and in our Country, in normal course it will be difficult for him to move a representation petition before the authority specially in the circumstances when the concerned officials of Jail and police department did not advance support to them in this regard and moreover, as it was observed in some earlier petitions and during the proceedings of these writ petitions almost in all cases, the grounds of detention were not delivered to the detenus at the time of their detention; hence, delivery of copies of writ petitions by the learned Law Officer to Secretary Home, Government of the Punjab is sufficient to be equated with the representations of the detenus; hence, this objection is also overruled.

11. Now coming to the provision of Section 3 of West Pakistan Maintenance of Public Order Ordinance, 1960, this section imposes certain conditions while passing the detention order and if these conditions are not fulfilled then the detention order is illegal and void because Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 provides that all citizens should be treated in accordance with law, must enjoy protection of law and this right could not be taken away by any administrative authority and if any administrative authority passes any order against the statutory provisions or against the fundamental rights guaranteed by the Constitution, same is amenable to judicial review by this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 as liberty of the citizen is divine right protected by Article 9 of the Constitution of Islamic Republic of Pakistan, 1973, save in accordance with law.

12. For passing orders about preventive detention, statutory authorities must observe the following conditions:-
(i) the authority should satisfy itself on the basis of reasonable material which should appeal to the prudent mind that activities of the detenus are pre-judicial to the public safety and maintenance of public order;

(ii) for the purpose of satisfaction there should be sufficient material, strong reasons and only declaration of satisfaction is not the object of law;
(iii) detaining authority could not pass the preventive detention order arbitrarily, perversely, on the basis of surmises and conjecture and the authority is bound when required to show the Court the material which could form reasonable grounds for passing the order;
(iv) the authority is bound to provide copy of the grounds of detention order to the detenu so to enable him to file representation before the authority, if so, desired;
(v) there must be material with regard to each ground which is base of detention order, if same is lacking with regard to any one ground then whole the order is liable to be set aside;
(vi) authority while exercising his jurisdiction for detaining a person shall ensure that fair process of law must be carried out; and
(vii) Court can examine the way in which detaining authority exercise his jurisdiction whether while passing the detention order fair process or law has been carried out or not.

13. Although, on the date of hearing, respondents- authorities were directed to produce the relevant material but no such material has been produced before the Court to satisfy grounds of detention passed against 36 detenus detained in Central Jail Rawalpindi and District Jail Attock by the orders of the District Coordination Officer, Rawalpindi. Although, sufficient time was granted to the respondents-authorities, but in the light of non-production of any material, it is safely presumed that no material was available with the detaining authority to support the grounds of detention and it appears that while passing the impugned order concerned authority has not applied its judicious mind.

14. Another important aspect of the matter relates to imposition of condition imposed by Secretary Home, Government of the Punjab while accepting representations of the detenus, in Section 3 (9) of the West Pakistan Maintenance of Public Order Ordinance, 1960, it is mentioned that:
"Government may at any time, subject to such conditions as it may think fit to impose, release a person detained under this section and may require him to enter into a bond, with or without sureties, for the due observance of the conditions".
From bare reading of above reproduced Section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960 with regard to detention order and especially sub-section (9) of Section 3 of the said Ordinance,, it becomes clear that the appellate authority firstly has to satisfy itself whether order for detention passed under Section 3, *ibid*, is within the parameters of law as stated above and if the order is within the parameters of law then in exceptional circumstances authority may direct release of a person on bond for due observance of the conditions and in this regard he could impose certain conditions which have to be fulfilled by the detenu and in case of non-fulfillment of such conditions his bound should be forfeited. But in this case as it has been observed above, the impugned order of detention is liable to be set-aside on the following grounds:

i) Although some reasonable conditions could be imposed requiring fulfilment of those conditions by the detenu and before imposing any condition, the authority must examine that conditions mentioned in para-12 above have been fulfilled by the authority who passed the detention order;
ii) Although the authority has directed the release of detenus after obtaining bail bond, but no condition has been imposed which has to be fulfilled by the detenus and in case of non-compliance of that condition, their surety had to pay the amount of bound, if the same is forfeited;
iii) The condition imposed in the impugned order is also bad in law for the reason that the said detention order itself mentions that detenus were arrested in other cases and they were granted bail. In such circumstances, when detenus were already hauled up in criminal proceedings, on same ground neither detention order could be passed nor the impugned condition could be imposed. The case *"Arshad Ali Khan versus Government of the Punjab"* (1994 SCMR 1532), is referred, wherein the apex Court had concluded that "Where the Police had already registered a case against the detenu under various provisions of Penal Code that clearly showed that the detenu was accused of substantive offences and therefore, his preventive detention on the same allegations could not be justified." Reliance is also placed on the case *"Hamayun versus D.C.O, Kohat"* (2014 P.Cr.L.J 173), wherein, it was held that *"Petitioner remained involved in some offences for which he was charged, tried and sentenced--If he once again had committed any such offence then the legal course would be to book him in relevant offence instead of going for preventive detention."*
iv) Further in the impugned order the District Coordination Officer himself submitted that further detention of the detenus was not required. When the authority himself had observed so, no condition could be imposed.

15. As an accumulative effect of all above, these writ petitions are allowed, the detention orders are declared illegal, void, *ab-initio* and detention of these 36 persons is held to be unwarranted in law. They be released forthwith if not required in any criminal case.

16. Although, learned counsel for the petitioners argued that costs be imposed on the respondent including Government of Punjab for each detenu on daily basis, but on the direction of this Court while deciding representations a large number of detenus were released by the authority from different Jails all over the Punjab, except these thirty six persons who were directed to submit bond. As no previous guideline about obtaining bond was available, therefore, in the facts and circumstances of this case, order with regard to imposition of cost is not deemed appropriate.

(M.M.R.) Petitions Allowed

PLJ 2020 Cr.C. (Lahore) 897
Present: **MUHAMMAD QASIM KHAN, J.**
MUHAMMAD ANWAR @ DHOLI and another--Appellants
versus
STATE and others—Respondents

Crl. A. No. 168 of 2009 & Crl. Rev. No. 227 of 2009, heard on 5.3.2019.

Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 302(c) & 34--Criminal Procedure Code, (V of 1898), S. 342--Sentence--Challenge to--Benefit of doubt--Joint role ocular account--Appreciation of evidence--Legal position is well settled that it is always for prosecution to establish its case against accused beyond any shadow of doubt and, once it is established that prosecution failed in its obligation then conviction cannot be recorded against an accused merely on basis of his statement recorded under Section 342, Cr.P.C.--Statement of convict/appellant recorded under Section 342, Cr.P.C. alone cannot be made basis to sustain conviction--Prosecution has failed to prove its case beyond any shadow of doubt against both accused through unimpeachable, trustworthy and independent reliable evidence rather evidence produced by prosecution replete with doubts and it is settled law that benefit of doubt how slightest will go in favour of accused not as a matter of grace but as matter of right. [P. 904] D, E & F

Criminal Procedure Code, 1898 (V of 1898)--
----S. 342--Pakistan Penal Code, (XLV of 1860), S. 302(c)--Sentence--Challenge to--Statement of accused--Joint role was attributed--Benefit of doubt--It is settled principle of law that statement of accused should be accepted or rejected as a whole and it could not be accepted piecemeal--When he has denied murder of deceased by causing injury to him, it could not be said that he admitted murder--It is settled position of law that prosecution has to prove case and if prosecution fails then accused cannot be convicted merely on basis of statement of accused u/S. 342, Cr.P.C--However, to extent of accused (MJ) trial Court without taking into consideration stance taken m his statement u/S. 342, Cr.P.C. has convicted and sentenced him along with co-accused but from perusal of prosecution evidence it appears that prosecution cannot prove its case beyond any shadow of doubt against both convicts/appellants and when prosecution fails to prove its case, then mere on basis of defence version, accused cannot be convicted and sentenced. [Pp. 903 & 904] A, B & C

Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 302(c)--Sentence--Challenge to--Enhancement of sentence--Validity--As prosecution has failed to prove its case against both appellants through reliable confidence inspiring evidence, question for enhancement of their sentence does not arise--Resultantly, revision having no substance stands dismissed. [P. 904] G
Mr. Qaisar Mehmood Sra, Advocate for Appellants.

Ch. Sarfraz Ahmad Khatana, Deputy Prosecutor General for State.
Nemo for Complainant.
Date of hearing: 5.3.2019.

JUDGMENT

For committing murder of Muhammad Rafiq brother of complainant Muhammad Siddique @ Farooq (PW-1) ***Muhammad Anwar @ Dholi and Javed Ahmad***/appellants, along with Muhammad Boota and *Mst.* Rehman Bibi (since acquitted) faced trial in case FIR No. 214 of 2007, registered at Police Station Kangan-pur, Kasur, for offences under Sections 302 & 34, PPC, before learned Additional Sessions Judge, Chunian, Kasur, who *vide* judgment dated 10-02-2009, while acquitting Muhammad Boota and *Mst.* Rehman Bibi by extending benefit of doubt in their favour, convicted Muhammad Anwar @ Dholi and Javed Ahmad/appellants under Section 302(c), PPC and sentenced them imprisonment for 14 years with fine of Rs. 50,000/-each, in default whereof both the convicts/appellants were to undergo six months SI and benefit of Section 382-B, Cr.P.C. Criminal Appeal has been filed by the appellant to challenge their conviction and sentence, whereas, Muhammad Siddique, complainant has preferred Crl. Revision No. 227 of 2009 seeking enhancement of sentence imposed upon Muhammad Anwar @ Dholi and Javed Ahmad/Respondents No. 1 & 2. Both these matters will be decided through this single judgment.

2. There is no need to repeat the detailed facts of the case as well as summary of the prosecution evidence, as it has already been given by learned trial Court in the impugned judgment. However, relevant portions of the statements made by both the appellants under Section 342, Cr.P.C. are being reproduced hereunder.

3. Muhammad Anwar @ Dholi/Appellant No. 1 in answer to question "Do you want to say anything else?" replied as under:

"I am innocent I have been involved in this case by the complainant with malafide intention on the basis of false and concocted story narrated by the prosecution. The real facts behind the occurrence are that in the year 2006 my daughter Mst. Sajida Bibi was abducted by the accused mentioned above, in that regard I got registered above said case. Mst. Sajida Bibi was restored back me with the intervention of Sardar Hassan Akhtar Mokal and the matter was got patched up and thereafter I got married my daughter Sajida Bibi with one Arshad, who is a resident of village Jaurra, Tehsil & District Kasur. Two days prior to this occurrence my daughter Sajida Bibi alongwith her husband came in my house at Mokal for seeing us, on the day of occurrence I took my daughter alongwith her husband to Basti Qutab Shah Railway Station on a Rickshaw and I returned back, they were sitting for waiting of train. Meanwhile, One Bashar s/o Ranjha caste Sheikh r/o Kull, came at the railway station, who on a phone call informed to Muhammad Salim s/o Bagga, real paternal nephew of complainant and deceased that Sajida Bibi is present at railway station. Upon this information Muhammad Salim also came there and made immoral joke to my daughter. Meanwhile my brother co-accused Muhammad Javaid also reached at

the said railway station, who wanted to go to Kasur for purchasing bleeching, when Muhammad Javaid saw that Muhammad Salim is joking and teasing to his niece, on this quarrel took place between Muhammad Javaid and Salim there, passenger of railway station restrained them from quarrelling Later on train came and my daughter alongwith her husband and Javaid went to Kasur. Later on when I came to know about the occurrence of railway station through people, then I went to the Dera of Sardar Imtiaz Ahmad Nikai and complained him against the said Salim, who promised that he will advise them and in future Salim will never again joke and chase my daughter. On 11-6-07 at about 8/9 P.M. I alongwith my father Qasim were sitting in our house, when deceased Muhammad Rafique alias Bola, Muhammad Salim, Mst. Hamidan Bibi wife of complainant and Mst. Baidan Bibi mother of Muhammad Salim while they were armed with "Dandas" and "Sotas" forcibly tres-passed into my house and started quarrel for taking the revenge of quarrel which was took place at railway station with us, Muhammad Rafique deceased grappled with me while Muhammad Salim started beating to my father, during grapping deceased fell down on a bicycle standing there due to push and received some head injuries due to fallen on bicycle and ground, when Muhammad Salim saw that Muhammad Rafique has fallen on ground, then he left my father and attacked on me. Meanwhile, Muhammad Rafique Bola attacked on my father and got fall down him on the ground and started beating. During grapphng of deceased and me, Sota of deceased fell down on the ground and when I saw that Muhammad Rafique is beating to my father, who is an old man and his life is in danger in the. bands of deceased, then I became provoked and only , for saving the life of my father in the hand of deceased I pick up Sota of deceased from ground and gave a blow on his back, upon the hue and cries, respectables of the locality came there and saved us from hands of said assailants and made request to them to go back home. In this way all assailants went back and after this quarrel I again went in the Dera of Sardar Imtiaz Ahmad Nikai and complained regarding the said matter. After that Muhammad Rafique died due to heart attack and the complainant by throwing a wide net involved me alongwith my brother Muhammad Javaid, my mother Rehman Bibi and my brother-in-law Muhammad Boota. In fact, three co-accused of case were not present at the spot."

4. Muhammad Javed/Appellant No. 2 in reply to question *"Why this case against you and why the PWs have deposed against you?* replied as under:

"The PWs are inter-se related as well as staunch friends each other. They deposed falsely and maliciously against me and my co-accused on the asking of complainant only for involving us in the case. Real facts behind this false case are that in the year 2006 the paternal nephew of deceased namely Muhammad Salim alongwith his other companion abducted my paternal niece Sajida Bibi. In this regard a abduction case was registered on behalf of 'my brother co-accused Muhammad Anwar against the said Muhammad Salim etc. later on Sajida Bibi was returned to us due to the intervention of Sardar Hassan Akhtar Mokal, and and later on Sajid Bibi was married with one Arshad r/o Jaurey Wala District Kasur, Two days period to this occurrence, Sajida Bibi alongwith her husband came in the house of her father to see him at Mokal. On the day of occurrence Sajida Bibi alongwith her husband was sitting at Railway Station Basti Qutab Shah for waiting train. I was also reached

there because I was going to Kasur for purchasing Bleeching. When I reached there I saw that Muhammad Salim is joking and teasing to Sajida Bibi at the railway station. Upon this a quarrel took place between me and Muhammad Salim. Passenger of railway station interfere and restrained us from further quarrel. Later on train came, I Sajida Bibi and her husband went to Kasur, on a train. After purchasing bleech I went to Hussain Khan Wala Tehsil & District Kasur and remained whole night there in the house of my in-laws as my wife and kids were already there. I was not present at the spot. I did not take part in the occurrence. I am innocent. I have been involved in this case only due to the reason that I am brother of co-accused Muhammad Anwar."

5. Although prosecution tried to establish that FIR was registered without any delay, as occurrence was taken place on 11.06.2007 at 8:00 pm and FIR Ex.PA/1 was lodged on the same night at 9:30 pm, but post-mortem was conducted on 12.6.2007 at 11:00 am. At THQ Hospital, Chunian and Dr. Muhammad Arif Mahmood/PW-4 in his statement has categorically stated that the police papers were received by me about half an hour before conducting post-mortem examination. These facts create serious suspension *qua* registration of case without delay and possibility cannot be ruled out that police had stopped Roznamcha and FIR was registered after consultations and concoctions because in the THQ Hospital Doctors are available 24 hours and even from the morning *i.e.* from 8:00 AM Hospital runs with full force; hence, why post-mortem examination was not conducted at night or early in the morning at 8:00 or 9:00 AM. It appears that Doctor was waiting for the police papers and if FIR was registered promptly then for what reason the police papers were not submitted before the Doctor for about 13 hours after registration of the FIR. This aspect creates serious doubt *qua* promptly registration of FIR.

6. Another important aspect in this case is that as per statement of Irshad Hussain, SI/PW-7, he reached Police Station , and after drafting formal complaint, he wrote application for post-mortem examination and sent the dead body for autopsy through Muhammad Akram, HC to THQ Hospital Chunian. Thereafter he went to the place of occurrence. It means that dead boy and documents were sent to THQ Hospital at night but doctor states that he received police paper at about ½ hours before post-mortem examination. Another important aspect in this case is that inquest report is not available on the record, which was not exhibited during statement of the Investigating Officer or any other PW. This important document, which was prepared by the Investigating Officer immediately when he recorded complaint and inspected the dead body and surroundings. This fact also establish that certain facts have been improved/concealed and for some unknown reasons inquest report has not been placed on record.

7. As per FIR, two injuries of sota blows on the back of the deceased Muhammad Rafiq have been assigned to each of the appellants *i.e.* one to Muhammad Anwar @ Dholi/appellant No. 1 and second to Muhammad Javed/Appellant No. 2, while joint role of causing kicks and fists blows has been to all the accused but Dr. Muhammad Arif Mahmood/PW-4 in post-mortem examination report Ex.PB has observed one

injury on front of forehead, one injury on back of head, one injury on left eyebrow and injuries No. 4 & 5, which are attributed to the appellants, are on the back, left and right side of the chest. All the injuries were contusions and abrasions but the tissues were not damaged. Although in his opinion Doctor stated that injuries No. 1, 2 & 4 are sufficient to cause death in ordinary course of nature but after examining injuries, it appears that either Injury No. 4 has been written due to error by Doctor or due to *mala fide*, so as to burden the convicts/appellants with the cause of death. From examining the post-mortem report Ex.PB in column of remarks of medical officer, it is written as:

"In my opinion the deceased has died of shock and hemorrhage of brain due to injuries. Injury No. 1, 2, 4 are sufficient to cause death in ordinary course of nature."

But, injury Wo.4 appears to have been written by overwriting as even after examining the complete post-mortem report, Injury No. 3 appears to be relevant, because Injury No. 3 is contusion 3 x 2 cm on the left eyebrow. There was sub-conjunctival haemorrhage of the left eye ball. The fact that Injuries No. 1, 2 & 3 were sufficient to cause death, is sufficiently established on the basis of dissection notes wherein doctor has observed that there was haemorrhage present in the brain. About 200 cc blood was present on the brain cavity, all other organs were healthy. This witness *i.e*. Doctor during his cross-examination has admitted that there was no fracture under injuries No. 4 & 5 and these injuries are contusions and even muscle was not ruptured, hence, Injury No. 4 could be said to be the cause of death along with other head injuries.

8. The ocular account is based on the statement of Muhammad Siddique @ Farooq/PW-1 and Ali Muhammad/PW-2. PW-1 in his complaint Ex.PA and Muhammad Ali PW-2 in his statement under Section 161, Cr.P.C. stated that two injuries caused by convicts/appellants on the back of the chest of the deceased but both injuries were of simple nature but before the Court they improved their statement to the extent of both these appellants by stating that they inflicted sota blows on the victim on different parts of body. They did not state their earlier stance that all the accused caused kicks and fists blows to the deceased when he fell oh the ground and this part of their statement is duly confronted during cross examination and they have dishonestly improved this-portion of their statement in order to strengthen the prosecution story against the convicts/appellants.

9. Another important fact in this case is that the eye-witnesses mentioned the weapons of offence with which each accused was equipped and also attributed specific injuries to the accused persons. In this condition when they witnessed each and every injury being caused, then why they did not explain the injuries on the head and face of the deceased and why they kept mum in this respect in the FIR as well as in their statements recorded under Section 161, Cr.P.C. This fact creates doubt that either the witnesses were not present at the place of occurrence or there was dark night and they could not see the occurrence and identify the accused. It is pertinent to mention here that in FIR Ex.PA, neither any source of light has been mentioned nor any source of light *i.e*. blub was taken into possession by the Investigating Officer.

10. As per prosecution story, accused were not equipped with lethal weapons and the allegation is that they caused sota blows to the deceased; thus, in this background the conduct of the witnesses appears to be unnatural. Being real brothers, they did not try to intervene and protect their beloved brother from the clutches of the accused. This unnatural conduct of the witnesses makes their presence at the place of occurrence suspicious. Though PWs 1 & 2 have stated that *Mst.* Rehman and Muhammad Boota caught hold **(جپھہ)** of them but this fact was not recorded in their statements recorded under Section 161, Cr.P.C. or in the FIR Ex.PA/1 and they were duly confronted on this point. This is also dishonest improvement on the part of these witnesses, as by saying so they want to establish that for the same reason they could not rescue their deceased brother. This stance of Jappha **(جپھہ)** does not appeal to the prudent mind.

11. From the perusal of record, it appears that trial Court convicted Muhammad Anwar @ Dholi Appellant No. 1 by taking into consideration his statement under Section 342, Cr.P.C. Although he admit the quarrel and causing of one injury on the back of deceased and further states that later-on he died due to heart attack. It is settled principle of law that statement of accused should be accepted or rejected as a whole and it could not be accepted piecemeal. When he has denied the murder of the deceased by causing injury to him, it could not be said that he admitted the murder. Even if otherwise it is settled position of law that prosecution has to prove it case and if the prosecution fails then the accused cannot be convicted merely on the basis of statement of accused under Section 342, Cr.P.C. However, to the extent of Muhammad Javed/Appellant No. 2, learned trial Court without taking into consideration the stance taken in his statement under Section 342, Cr.P.C. has convicted and sentenced him along with Muhammad Anwar @ Dholi/Appellant No. 1 but from the perusal of prosecution evidence it appears that prosecution cannot prove its case beyond any shadow of doubt against both the convicts/appellants and when prosecution fails to prove its case, then mere on the basis of defence version, accused cannot be convicted and sentenced.

12. This Court is aware of the fact that in his statement under Section 342, Cr.P.C. the convict/appellant had not denied the occurrence, rather explained the same in his own manner as to how the occurrence took place, but he has not admitted that they caused head and face injuries, which in the facts and circumstance of the case have been found the cause of death, had been caused by him. The legal position is well settled that it is always for the prosecution to establish its case against the accused beyond any shadow of doubt and once it is established that prosecution failed in its obligation then conviction cannot be recorded against an accused merely on the basis of his statement recorded under Section 342, Cr.P.C. Reliance in this respect is placed on the case *"Azhar Iqbal versus The State"* (2013 SCMR 383). Here in the instant case, as detailed above the prosecution has miserably failed to establish its case, therefore, statement of the convict/appellant recorded under Section 342, Cr.P.C. alone cannot be made basis to sustain conviction.

13. The crux of the above discussion is that the prosecution has failed to prove its case beyond any shadow of doubt against both the appellants through unimpeachable,

trustworthy and independent reliable evidence rather the evidence produced by the prosecution replete with doubts and it is settled law that benefit of doubt how slightest will go in favour of the accused not as a matter of grace but as matter of right. Consequently, this appeal is allowed and both the appellants Muhammad Anwar @ Dholi and Muhammad Javed are acquitted of the charge. Appellants are on bail; they are present before the Court today, their sureties are hereby discharged from liabilities.

14. As prosecution has failed to prove its case against both the appellants through reliable confidence inspiring evidence, question for enhancement of their sentence does not arise. Resultantly, Crl. Revision No. 227 of 2009, having no substance stands ***dismissed.***

(S.A.B.) Revision dismissed

PLJ 2020 Cr.C. (Note) 107
[Lahore High Court, Lahore]
Present: **MUHAMMAD QASIM KHAN AND ASJAD JAVAID GHURAL, JJ.**
SAIF ULLAH and others--Appellants
versus
STATE—Respondent

Crl. A. No. 714 of 2009, heard on 9.1.2020.

Explosive Substance Act, 1908 (XI of 1908)--

----S. 4(b)--At the same time, offence under Section 4(b) of the Explosive Substances Act, 1908, could not attract, because the present case is based on mere recoveries, as is the situation in this case--Rather in such an eventuality, conviction could be recorded only under Section 5 of the Explosive Substances Act, 1908--Therefore, considering the facts and circumstances as well as evidence on record, conviction under Section 4(b) of the Explosive Substances Act, 1908, is ***set aside*** and the appellants are convicted under Section 5 of the Explosive Substances Act, 1908--While considering the quantum of sentence under Section 5 of the Explosive Substances Act, 1908, since mere recovery of the prohibited material was affected at the instance of the appellants and otherwise the prosecution could not establish the intention of the appellants to use the same, coupled with the fact that instant case was registered against the appellants in the year 2008, they firstly faced the pangs of investigation and protracted trial, remained in Jail during trial, after their conviction by trial Court-- Appellants are continuously behind the bars, therefore, quite sufficient period of sentence has already been undergone by the appellants--Consequently, as a cumulative effect of the above discussion, while converting conviction of the convicts/appellant from Section 4(b) of the Explosive Substances Act, 1908, to Section 5 of the said Act, sentence of imprisonment, which the appellants have already undergone, is considered sufficient to meet the ends of justice in the circumstances of the case. [Para 7] A

Anti-Terrorism Act, 1997 (XXVII of 1997)--

----Ss. 7(1), 21(c) & 25--Conviction and sentence--Challenge to--Huge--Quantity of prohibited material were recovered--Conviction for offence under Section 7(i) of the Anti-Terrorism Act, 1997, is concerned--No evidence or material has been collected and brought on record by the prosecution to show that appellants belonged to any terrorist gang/group, even involved in any terrorist activities, they wanted to use the recovered prohibited material for creating serious risk to safety of the public or designed to frighten the general public to prevent them from coming out and carrying on their lawful trade and/ business and disrupts civic life--Unless such elements are established by the prosecution to be exiting in this case, provisions of Section 7 Anti-Terrorism Act, 1997 cannot be invoked. [Para 8] B

Mr. Javed Akhtar Bhandara, Mr. Arif Mehmood Rana and *Malik Matee Ullah*, Advocates for Appellants.

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

Date of hearing: 9.1.2020.

JUDGMENT

Muhammad Qasim Khan, J.--(i) **Saif Ullah, (ii) Babar Usman @ Babar, (iii) Muhammad Mohsin @ Ameer Hamza @ Bugti @ Abu Bakar @ Faheem Ullah @ Imam Din @ Mouwia, (iv) Dilshad Ali, (v) Muhammad Shahid, (vi) Muhammad Usman @ Muawia, (vii) Nasar Ullah, (viii) Zahid Iqbal**/ appellants faced trial before learned Judge, Anti-Terrorism Court-IV, Lahore, in case FIR No. 519 of 2008 registered at Police Station Shera Kot, Lahore, for offences under Sections 21-C and 7, Anti-Terrorism Act, 1997, 4(b)/5 of the Explosive Substances Act, 1908 and 13 of the Arms Act, 1965; and ultimately vide judgment dated 11-05-2009, learned trial Court acquitted (i) Muhammad Mohsin @ Ameer Hamza @ Bugti @ Abu Bakar @ Faheem Ullah @ Imam Din @ Muawia, (ii) Dilshad Ali, (iii) Saifullah, (iv) Babar Usman @ Babar, (v) Muhammad Shahid and (vi) Muhammad Usman @ Muawia of the charge under Sections 21-C of the Anti-Terrorism Act, 1997 and Section 5 of Explosive Substances Act, 1908. Furthermore, (i) Nasar Ullah and (ii) Zahid Iqbal/appellants were also acquitted from the charges under Sections 21-C and 7(i) Anti-Terrorism Act, 1997 and Sections 4 and 5 of Explosive Substances Act, 1908. However, appellants:--

i) Muhammad Mohsin @ Ameer Hamza @ Bugti @ Abu Bakar @ Faheem Ullah @ Imam Din @ Muawia.

ii) Dilshad Ali.

iii) Saifullah.

iv) Babar Usman @ Babar.

v) Muhammad Shahid.

vi) Muhammad Usman @ Muawia were convicted and sentenced as under:--

i) ***Under Section 4(b) of Explosive Substances Act, 1908***

Rigorous Imprisonment for life each.

ii) ***Under Section 7(i) Anti-Terrorism Act, 1997***

Ten years' R.I. with fine of Rs. 10,000/- each and in default of payment whereof, they will further undergo one year R.I. each.

Nasar Ullah and Zahid Iqbal/appellants were convicted and sentenced:--

Under Section 13 of the Arms Act, 1965

One year R.I. each.

All the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.P.C. was also extended in favour of the appellants.

2. Aggrieved by their above noted convictions and sentences, the convicts/appellants have filed instant appeal.

3. There is no need to repeat the detailed facts of the case as well as summary of the prosecution evidence, as it has already been given in detail by learned trial Court in the impugned judgment.

4. Learned counsels representing the appellants have not seriously contested the conviction of the appellants; however, they contended that offence under Section 4(b) of the Explosive Substances Act, 1908, is not made out rather keeping in view the facts and circumstances of the case, at the most, an offence under Section 5 of the

Explosive Substances Act, 1908 may attract. They, however, attacked convictions of the convicts/appellants under Section 7 Anti-Terrorism Act, 1997 and the sentences recoded thereunder, by arguing that prosecution has not been able to connect the convicts/ appellants with any terrorist organization or terrorist activities. As such, their contention is that conviction under Section 7 Anti-Terrorism Act, 1997 is not sustainable.

5. After hearing learned counsel for the appellants, learned Deputy Prosecutor General and going through the available record, we have observed that instant case is based upon the recovery of prohibited articles/material, which as per prosecution, has been affected at the instance of appellants. The gest of recoveries is as under:--

i) One suicidal jacket (Ex.PB) at the instance of Muhammad Mohsin.
iii) One suicidal jacket (Ex.PC) from Dilshad.
iv) One suicidal jacket (Ex.PD) from Saif Ullah.
v) One KK rifle, two magazines along with 100 bullets (Ex.PE) from Nasar Ullah.
vi) One suicidal jacket (Ex.PF) from Babar Usman.
vii) One SMG rifle, 3 magazines along with 320 bullets (Ex.PG) from Zahid Iqbal.
viii) Five grenades along with pins (Russian made) (Ex.PH) from Muhammad Shahid.
ix) Two grenades (Russian made) along with one grenade launcher (Ex.PJ) from Usman Muawia.
x) 32 grenades along with one grenade launcher (Ex.PK) allegedly thrown by Abdul Rauf (absconding accused) were recovered in this case.

6. All these recoveries are supported by the statements of prosecution witnesses. These recovery witnesses were subjected to lengthy cross-examination by the defence but neither anything damaging the prosecution nor favouring the defence could be elicited from their mouth. As such, we are convinced that defence could not disprove the recovery of this huge quantity of prohibited material from the appellants. As regard the stance of the appellants that the recovered articles were not sealed in the parcels, suffice it to say that Walayat Ali, MHC/PW-2 and Muhammad Aslam, Constable PW/3 have categorically stated regarding receiving and handing over the sealed parcels of the recovered prohibited material. Furthermore, it is not the case of appellants that prosecution had substituted the prohibited articles. Thus, we are of the view that prosecution has successfully proved its case before learned trial Court by producing reliable convincing evidence in the shape of statements of Walayat Ali, MHC/PW-2, Muhammad Aslam, Constable/PW-3, Qaisar Mushtaq, Inspector/complainant/PW-4, Mushtaq Ahmad, SI/PW-5, Muhammad Aslam, Bomb Disposal Commander/PW-6 and Rizwan Qadir, Inspector/ PW-7 and as discussed above these witnesses have made consistent statements; hence, we are of the firm opinion that recoveries affected from the convicts/appellants stand fully proved.

7. At the same time, we have observed that offence under Section 4(b) of the Explosive Substances Act, 1908, could not attract, because the present case is based on mere recoveries, as is the situation in this case. Rather in such an eventuality,

conviction could be recorded only under Section 5 of the Explosive Substances Act, 1908. Therefore, considering the facts and circumstances as well as evidence on record, conviction under Section 4(b) of the Explosive Substances Act, 1908, is ***set aside*** and the appellants are convicted under Section 5 of the Explosive Substances Act, 1908. While considering the quantum of sentence under Section 5 of the Explosive Substances Act, 1908, since mere recovery of the prohibited material was affected at the instance of the appellants and otherwise the prosecution could not establish the intention of the appellants to use the same, coupled with the fact that instant case was registered against the appellants in the year 2008, they firstly faced the pangs of investigation and protracted trial, remained in Jail during trial, after their conviction by learned trial Court. Muhammad Usman and Muhammad Mohsin/appellants are continuously behind the bars, therefore, we are of the view that quite sufficient period of sentence has already been undergone by the appellants. Consequently, as a cumulative effect of the above discussion, while converting conviction of the convicts/appellant from Section 4(b) of the Explosive Substances Act, 1908, to Section 5 of the said Act, sentence of imprisonment, which the appellants have already undergone, is considered sufficient to meet the ends of justice in the circumstances of the case.

8. So far as, conviction for offence under Section 7(i) of the Anti-Terrorism Act, 1997, is concerned, we have observed that no evidence or material has been collected and brought on record by the prosecution to show that appellants belonged to any terrorist gang/group, even involved in any terrorist activities, they wanted to use the recovered prohibited material for creating serious risk to safety of the public or designed to frighten the general public to prevent them from coming out and carrying on their lawful trade and daily business and disrupts civic life. Unless such elements are established by the prosecution to be exiting in this case, provisions of Section 7 Anti-Terrorism Act, 1997 cannot be invoked. In this regard, reliance is placed on a reported judgment of Hon'ble Supreme Court of Pakistan, "2019 SLJ 1872" (*Ghulam Hussain and others vs. The State and others*) wherein the Apex Court in its para 16 has been held as under:

"for an action or threat of action to be accepted as terrorism within the meanings of Section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of Section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of Section 6 of that Act or the use of threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of Section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clause (b) or (c) of subsection (1) of Section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of Section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta."
Now, there remains no doubt that the facts and circumstances of this case do not, in any manner, come within the ambit of Section 7 of the Anti-Terrorism Act, 1997, as

explained by the Hon'ble Supreme Court of Pakistan in the above referred paragraph. Consequently, conviction of the appellants under Section 7(i) of the Anti-Terrorism Act, 1997, and sentence recorded there under is hereby ***set aside***.

9. With the above modifications in the convictions as well as sentences, this appeal stands *dismissed*.

(A.A.K.) Appeal dismissed

PLJ 2020 Cr.C. (Lahore) 1721
***Present*: MUHAMMAD QASIM KHAN, J.**
AFTAB GIL etc.--Appellants
versus
STATE and another—Respondents

Crl. A. No. 955-J, Crl. Rev No. 897 & PSLA No. 257 of 2015, heard on 11.3.2019
.
Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 302(b)--Conviction and sentence--Challenge to--Qatl-e-amd--Occurrence in this case took place on 20.10.2011 at 9.00 pm and the FIR was got lodged on the same night at 9.20 pm. in the FIR a general role had been as in the manner that all the accused simultaneously and indiscriminately started firing soon after entering into the house and due to their firing injured persons received injuries--The private complaint was filed by the complainant on 22.02.2012 *i.e.* with a delay of almost four months in criminal cases, delay simpliciter may not be worth considering, but it is bound to create a sense of doubt in the prosecution case and it is for the prosecution itself to sufficiently explain the delay--Here in this case, although the complainant has tried to justify the filing of private complaint by stating that his correct version was not recorded and brought in the FIR, but no explanation whatsoever has been given by him to file the private complaint with such a delay--As regards recovery of crime weapons on the pointation and disclosure of accused the Investigating Officer of this case CW-2 stated that on 30.12.2011 the said accused during interrogation made the disclosure and got recovered gun along with live cartridges under the bed form cot lying near the northern wall of the room of his accused:--
i) Occurrence in this case took place on 20.10.2011 and the accused had successfully managed his escape from the place of occurrence along with crime weapon, it is not believable the said accused still would have kept the weapon of offence intact in his house, so as to be subsequently recovered and used against himself.
ii) Even otherwise, as held above the sole eye-witness PW-7 has made dishonest improvements in his statement before the Court, thus is not worthy of credence, therefore, High Court is only left with the contents of the FIR, wherein, no specific injury was attributed to any of the accused--In this backdrop, the recovery of weapon, even if believed, the same becomes totally inconsequential in this case.
Further, it has been observed that in the FIR the complainant had taken a specific motive that a few days earner the children from both the sides had a quarrel and out of that vendetta the occurrence in this case took place, but PW-7 in his examination-in-chief did not utter a single word on this aspect, nor any witness of the said earlier quarrel was brought in the witness box--Therefore, High Court is convinced that though the motive was taken by the prosecution but the same could not be established and thus the prosecution is bound to face its adverse impact--Court have no doubt to hold that prosecution has not been able to prove its case against the convict/appellant beyond any shadow of doubt, as the sole eye witness had made dishonest improvements in his statement, the recovery is inconsequential and does not connect

the convict/ appellant with the commission of the crime and the motive though taken but could not be proved. [Pp. 1724, 1727 & 1728] A, C, D & E
2009 SCMR 1232.
Statement of witness—

----Dishonest improvement--It is well settled proposition of law as declared by Hon'ble Supreme Court of Pakistan in case *"Farman Ahmed versus Muhammad Inayat and others"* (2007 SCMR 1825), statement of a witness improving his version subsequently to strengthen prosecution case, being improved dishonestly, could not be relied upon and once such improvements are found to be deliberate and dishonest, it would cast serious doubts on veracity of such witness. [P. 1727] B
2007 SCMR 1825.
Mr. Imran Hamayun Cheeema, Advocate for Appellant.
Mr. Mushtaq Ahmad Dhoon and *Mrs. Naila Mushtaq Dhoon,* Advocates for Complainant.
Ch.Sarfraz Ahmad Khatana DPG for State.
Date of hearing: 11.3.2019.

JUDGMENT
Aftab Gil (convict/appellant), Joseph Gil, Daud Masih and Afzal Masih (acquitted/respondents) faced trial in private complaint titled "Ijaz Masih versus Joseph Gil and others" and on conclusion of trial *vide* judgment dated 14.07.2015, Aftab Gil was convicted under Section 302(b) PPC for the murder of *Mst.* Shahnaz Bibi (deceased) and sentenced to imprisonment for life, along with a compensation of Rs.200,000/-, to be paid to the legal heirs of deceased, in case of default to further suffer simple imprisonment for six months. The remaining accused namely Joseph Gil, Daud Masih and Afzal Masih were however, acquitted of the charges. Criminal Appeal No. 955-J of 2015 has been filed by Aftab Gil convict to challenge his conviction and sentence, Criminal Revision No. 897 of 2015 has been filed by Faisal Ijaz (son of Ijaz Masih-complainant) to seek enhancement of sentence of Aftab Gil, whereas, PSLA No. 257 of 2015 has also been filed by Faisal Ijaz to seek permission to file appeal against acquittal of Joseph Gil, Daud Masih and Afzal Masih. All these matters are being decided through the instant judgment.

2. The prosecution case in brief as set out in the complaint filed by Ijaz Masih complainant is that on 20.10.2011 at 9.00 p.m., the complainant along with his brother Niaz Masih (PW-7), Iqbal Masih and other family members, was sitting in the Courtyard of his house, while *Mst.* Shahnaz Bibi (deceased) was doing her work. Abruptly, the accused persons Joseph Gill, Aftab Gil, Daud Masih and Afzal Masih, all armed with deadly weapons, entered the house and started firing. Iqbal Masih (brother of the complainant) stood up, whereupon, all the four accused made straight firing at him, hitting multiple parts of his body, whereupon, he fell down, whereas, the complainant and others laid down. Meanwhile, *Mst.* Shahnaz (deceased) came forward and Joseph Gil accused armed with gun made straight fire which hit front of her chest, simultaneously Aftab Gil made a fire which hit right side of her face and

she fell down and in that condition Daud Masih made straight fire which hit her left arm. The complainant party made hue and cry, whereupon, the accused out of the house by making firing. *Mst.* Shahnaz succumbed to the injuries, whereas, Iqbal Masih received fire-arm injuries.
It was averred in the complaint that earlier the complainant got lodged an FIR No. 261 dated 20.10.2011 but his complete version was not brought in the FIR and then the local police in connivance with accused persons did not investigate the case properly, whereupon, the private complaint was filed.

3. After recording cursory evidence, all the four accused were summoned to face trial. The entire proceedings of the trial, the crux of prosecution evidence and the stance of the accused including the convict/appellant stand recorded in detail in the judgment of learned trial Court itself, therefore, it is not thought appropriate to reiterate the same here.

4. I have heard the arguments of learned counsel for the private parties as well as the learned law officer and examined the record.

5. It has been observed that the occurrence in this case took place on 20.10.2011 at 9.00 p.m. and the FIR was got lodged on the same night at 9.20 p.m. It is matter of fact that in the FIR a general role had been ascribed to all the accused in the manner that all the accused simultaneously and indiscriminately started firing soon after entering into the house and due to their firing Iqbal Masih and Shahnaz Bibi received injuries. The private complaint was filed by the complainant on 22.2.2012 *i.e*. with a delay of almost four months. In criminal cases, delay simpliciter may not be worth considering, but it is bound to create a sense of doubt in the prosecution case and it is for the prosecution itself to sufficiently explain the delay. Here in this case, although the complainant has tried to justify the filing of private complaint by stating that his correct version was not recorded and brought in the FIR, but no explanation whatsoever has been given by him to file the private complaint with such a delay. If correct version of the occurrence was not entertained by the police and the FIR was not chalked according to the stance, then the complainant had multiple remedies available to him, as he could have approached the police hierarchy pointing out his concern, or he could have approached the Court of law in appropriate forum to highlight his grievance with regard to recording of correct and complete version of the occurrence, but the complainant kept on sleeping on his right and afterwards, filed the private complaint. Since no explanation what to talk of plausible explanation has been furnished, this Court has no doubt to infer that as a matter of fact the sole intention to file the private complaint was to improve his case, because otherwise, as discussed above, the FIR, did not disclose the independent role of any of the accused and all were implicated with a general role.

6. It has further been noticed that although in the private complaint the complainant improved his case by attributing individual role to Joseph Masih and Aftab Gil, but it is matter of fact that the complainant Ijaz Masih as well as Iqbal Masih (injured) died during the course of trial, thus they could not be examined and thus the prosecution

was left with the sole eye-witness namely Niaz Masih. Said Niaz Masih (PW-7) when appeared in the witness box in clear and unambiguous terms stated that:

"All the accused persons started firing with their respective weapons upon us. My brother Iqbal Masih stood up from his place upon which all accused persons made firing upon him with intention to murder him. Fire shot hit on the various parts of his body due to which he fell down on the earth.

……

……

Meanwhile, Shahnaz Bibi, wife of my brother Ijaz Masih, came forward to us upon whom accused Joseph Gil made a fire shot with intention to murder her with his gun, which hit on her chest and after that second fire shot was made by accused Aftab Gil with his gun with intention to kill her which landed on the right side of her face due to these injuries Shahnaz Bibi fell down on the earth. Accused Daud Maseeh made a fire shot with his gun on fallen Shehnaz Bibi which hit her on her left arm. On our hue and cry the accused persons left the place of occurrence and went outside the house while raising lalkara and firing outside the house. I and my brother and Ijaz Maseeh attended the injured persons……"

If the statement of Niaz Masih (PW-7) is admitted as it is, then there remains no doubt that when four persons with their respective weapons made random firing at the time when they entered into the house, then two of the accused made specific fires at the deceased and the injured and then all the four accused also made firing outside the house when leaving the place of occurrence, then lot of empties must have been there at the spot and furthermore, the blood must have also been present at two places *i.e*. the place where *Mst.* Shahnaz Bibi sustained injuries and the place where Iqbal Masih had received fire arm shots, but:--

i) It has come in the statement of this witness that the I.O. visited the place of occurrence on the same night and collected blood stained earth from the place of murder of *Mst.* Shahnaz Bibi, alone and not from the place where allegedly Iqbal Masih had also sustained injuries during the same occurrence at the same place;

ii) During cross-examination admitted that "we did not collect any cartridge/crime empty from the place of occurrence." Although the witness farther explained that big number of people had gathered at the crime scene due to which no crime empty could be secured, but this explanation is of no use to the prosecution because crime empties were the most important piece of evidence, which could be used for corroborative purposes, and in the absence thereof, an important factor which could have connected the accused with the commission of the crime, is missing in this case;

iii) As shall be seen from the statement of Niaz Masih (PW-7) he had also attended *Mst.* Shahnaz Bibi and Iqbal Masih in injured condition. Since according to the prosecution both the injured had sustained fire arm injuries, definitely their clothes must have been smeared with blood and the person attending the injured in such condition, must also have carried blood stains on his clothes and this fact has been admitted by this witness but blood stained clothes of this witness were not procured.

In addition to the above, this witness made dishonest improvements in his statement to advance the case of the prosecution but the defence confronted him on almost each of the improved point. Some of the references are given below:

"I have stated before police that on 20.10.2011 at s about 09.00. I was present in the house of my real brother Ijaz Maseeh, confronted with statement Ex.DA where it is not so specifically recorded.
It have stated in my statement that my brother Iqbal Maseeh stood up upon which the accused persons made fire shots upon him, confronted with Ex.DA where it is not so specifically recorded.
It is incorrect to suggest that in Ex.DA, I have stated that my brother Iqbal Maseeh and Shehnaz Bibi deceased received fire shots of all accused persons and after receipt of fire shots Iqbal Maseeh and Shehnaz Bibi deceased fell down on the earth, confronted with Ex.DA where it is so recorded.
It is incorrect to suggest that I have recorded Ex.D that accused person made firing upon us and we saved ourselves by lying on the ground while Iqbal stood up, confronted with Ex.D where it was so recorded.
I have stated before the pohce that accused Joseph Gil made a fire shot with his gun which hit Shehnaz Bibi deceased in front of her chest, accused Aftab Gil made a fire shot with his gun which hit on the right side of face of Shehnaz Bibi whereas fire shot made by Baud Maseeh accused by his gun, hit Shehnaz Bibi deceased on her left arm, confronted with Ex.DA where no specific injury or fire shot has been attributed to any accused.
It is well settled proposition of law as declared by the Hon'ble Supreme Court of Pakistan in the case *"Farman Ahmed versus Muhammad Inayat and others"* (2007 SCMR 1825), statement of a witness improving his version subsequently to strengthen the prosecution case, being improved dishonestly, could not be relied upon and once such improvements are found to be deliberate and dishonest, it would cast serious doubts on veracity of such witness.
6. As regards recovery of crime weapons on the pointation and disclosure of accused Aftab Masih, the Investigating Officer of this case Asmat Ullah Khan CW-2 stated that on 30.12.2011 the said accused during interrogation made the disclosure and got recovered gun along with live cartridges under the bed form cot lying near the northern wall of the room of his accused:--
i) Keeping in mind that the occurrence in this case took place on 20.10.2011 and the accused had successfully managed his escape from the place of occurrence along with crime weapon, it is not believable the said accused still would have kept the weapon of offence intact in his house, so as to be subsequently recovered and used against himself.
ii) Even otherwise, as held above the sole eye-witness Niaz Masih PW-7 has made dishonest improvements in his statement before the Court, thus is not worthy of credence, therefore, this Court is only left with the contents of the FIR, wherein, no specific injury was attributed to any of the accused. In this backdrop, the recovery of weapon, even if believed, the same becomes totally inconsequential in this case.

7. Further, it has been observed that in the FIR the complainant had taken a specific motive that a few days earlier the children from both the sides had a quarrel and out of that vendetta the occurrence in this case took place, but Niaz Masih PW-7 in his examination-in-chief did not utter a single word on this aspect, nor any witness of the said earlier quarrel was brought in the witness box. Therefore, this Court is convinced

that though the motive was taken by the prosecution but the same could not be established and thus the prosecution is bound to face its adverse impact.

8. For what has been discussed above, I have no doubt to hold that prosecution has not been able to prove its case against the convict/appellant beyond any shadow of doubt, as the sole eye-witness had made dishonest improvements in his statement, the recovery is inconsequential and does not connect the convict/appellant with the commission of the crime and the motive though taken but could not be proved. Consequently, **Criminal Appeal No. 955-J of 2015 is allowed, the conviction and sentence recorded against the convict/appellant is set-aside and he is ordered, to be released forthwith if not required in any other case**.

9. **Since the convict has been acquitted of the charges, as such, Criminal Revision No. 897 of 2015 is dismissed for the reasons detailed above**.

10. In the case *"Mohammad Azam and others vs. The State"* (2009 SCMR 1232), the Hon'ble Supreme Court of Pakistan while laying down the criteria for interference in a judgment of acquittal, held that:

"Findings of Court acquitting the accused must be proved to be perverse, arbitrary, whimsical, unreasonable, fake, concocted, artificial, ridiculous, shocking, false, based on misreading of material evidence, on inadmissible evidence, on a view not possible to gather from the evidence on the record, highly conjectural, or based on surmises and unwarranted in law. Acquitted accused is credited with two advantages, one his innocence at the pre-trial stage and the other earned by him after his acquittal by a Court of competent jurisdiction."

While seeing the PSLA No. 257 of 2015 on the touchstone of above referred judgment of the apex Court, it remains a fact that in the FIR a joint role had been ascribed to all the acquitted accused/respondents, subsequently although the prosecution advanced its case but statement of sole eye-witness has been held to be full of dishonest improvements and no recovery was effected from any of the acquitted accused/respondents and the motive also could not established, therefore, the reasoning given by the learned trial Court in recording acquittal of the accused/respondents being solid and convincing, do not call for interference by this Court. As such, PSLA fails and is dismissed.

(A.A.K.) Appeal dismissed

2020 PTD 1095
Criminal Revision No.36593/2019.

Lin Zhiwei **VS.** The State, etc.

S.No. of order/ proceeding	Date of order/ proceeding.	Order with signatures of Judge, and that of parties or counsel, where necessary.

16.01.2020 Mr. Hammad Akbar Wilana, Advocate for Khawaja Ahmad Adnan, Advocate for the petitioner in Criminal Revision No.36369/2019.

Mr. Asad Ali Bajwa, Deputy Attorney General with Mr. Nauman Hassan Baloch, representative for FBR.

Briefly the facts of the case are that an F.I.R No.36/2018 dated 27.11.2018 under sections 2(s), 16, 32(1), 156(1) (8) (9) (14), 157 and 178 of the Customs Act, 1969 was registered at police station I & P Cell, MCC, Customs House, Lahore, precisely with the allegation that on 27.11.2018 on checking of a consignment by ANF, Lahore at Allama Iqbal International Airport, Lahore, it was found that the consignment consisting of 200 cartons was being exported to USA by M/s. Imroze Impex (SMC-Pvt) Ltd, Lahore through Airway Bill No.125 8461 6851 and commercial invoice No.1800069 with declared description of "salt" and unloaded at SAP Export Shed AFU, Lahore. The ANF found that 30 Cartons out of 200 cartons contained "*Ketamine*" weighing 154.5 kg and other 17 cartons were packed with salt. The stance of the prosecution is that the accused attempted to export/smuggle the Ketamine (powder form) valuing three carore rupees approximately, under the garb of salt by way misdeclaring the correct description of the goods on the Export Documents. Hassan Ali (petitioner in Criminal Revision No.36369/2019), when arrested, disclosed that Lin Zhi Wei (petitioner in Criminal Revision No.36593/2019) had handed over the said consignment to him at his office situation in House No.449, Sector-D, Phase-V, DHA Lahore, for its import to USA. On pointation of said Hassan Ali, when customs team reached at the office of Lin Zhi Wei, further 1600 grams Ketamine and empty bottles of Ketamine Injection (Ketrol) weighing 35 kg were recovered from him.

2. After registration of F.I.R and formal investigation, challan was submitted in the court, where Lin Zhi Wei and Hassan Ali (accused persons) filed two separate applications under section 265-K Cr.P.C. to seek their acquittal mainly on the ground that "*Ketamine*" does not fall within the definition of "*smuggle*" within the meaning of Section 2(s) of the Customs Act, 1969, therefore, no offence was constituted. The learned Special Judge (Customs, Taxation & Anti-Smuggling), Lahore, vide consolidated order dated 11.04.2019 dismissed both the applications and the said order has been assailed through Criminal Revisions No.36593/2010 and 36369/2019, which are being decided through the instant order.

3. I have heard the arguments of learned counsel for the parties at

full length and examined the record.

4. The moot point involved in both these cases is whether "*Ketamine*" is included in the definition clause of section 2(s) of the Customs Act, 1969 or is covered by any Notification, etc. as required by Section 2(s) or 156(2) of the Customs Act? Before proceeding further, the relevant clause is reproduced hereunder:-

*2(s) "**smuggle**" means to bring into or take out of Pakistan, in breach of any prohibition or restriction for the time being in force [, or en route pilferage of transit goods] or evading payment of customs duties or taxes leviable thereon,-*

(i) gold bullion, silver bullion, platinum, palladium, radium, precious stones, antiques, currency, narcotics and narcotic and psychotropic substances; or

(ii) manufactures of gold or silver or platinum or palladium or radium or precious stones, and any other goods notified by the Federal Government in the official Gazette, which, in each case, exceed [one hundred and] [fifty thousand rupees] in value; or

(iii) any goods by any route other than a route declared under section 9 or 10 or from any place other than a customs-station.] and includes an attempt, abetment or connivance of so bringing in or taking out of such goods; and all cognate words and expressions shall be construed accordingly;]

The parties are in agreement that so far as above reproduced section 2(s) of the Customs Act, 1969 is concerned, the word "*Ketamine*" is not mentioned therein, however, the stance of prosecution/Customs Department is that "*Ketamine*" is covered by the prohibitions stated in SRO 566(1/2005) dated 6th June, 2005 issued under section 2(s)(ii) and 156(2) of the Customs Act, 1969. The learned Deputy Attorney General while admitting that directly and specifically the word "Ketamine" is not mentioned anywhere in the above SRO as well, then referred clause 8 of SRO 566(1/2005), the same is reproduced hereunder:-

"Chemicals and precursors whose import and export is prohibited under the Trade Policy in force"

And argued that in Appendix "A" of the Trade Policy, 2016 the use of words "*Toxic Chemicals*" would cover "*Ketamine*"

5. To evaluate this aspect I have gone through Appendix "A" of the Trade Policy, 2016 and observe that "*Toxic Chemicals*" have been further elaborated and the prosecution/Customs Department is under the impression that use of words "*corresponding alkylated or protonated salts aminoethyl akyl (Me, Et, N-Pro or i-Pr) hosphonothioltes and e.g. VX: O-Ethyl S-2- diisopropylamino ethylmethl phosphonothiolate"* would include "*Ketamine*". It is thus obvious that the entire case of the prosecution revolves around the definition or interpretation of words "*corresponding alkylated or protonated salts aminoethyl akyl (Me, Et, N-Pro or i-Pr) hosphonothioltes and e.g. VX: O-Ethyl S-2-diisopropylamino ethylmethl*

phosphonothiolate", otherwise, it is clear position that directly and specifically the word "*Ketamine*" as an item or subject, has not been used in the entire Customs Laws including SRO or the Export Policy, etc. Reference to the words "*phosphonites*", "*amino*" or *ethyl*" groups and "*corresponding protonated salts*", may not be sufficient for the prosecution to draw its own meaning and draw an inference that these words would mean inclusion of "*Ketamine*" as well, because "*phosphonites*" are chemicals that contain phosphorus along with other elements; "*amines*" and "*ethyl*" groups contain carbon, whereas, "*phosphorus* or carbon are not essential components of "*Ketamine*" and it is comprised of hydrogen, oxygen, nitrogen and chlorine, alone. Therefore, it will be totally unjust to add our own meaning to a provision of law, which otherwise, carries ambiguous or no meaning at all. The legal position is also very much clear that whenever a statute requires interpretation, it shall be interpreted in a way which favoured the accused person and the prosecution or the state and where two interpretations of a statute are possible, then such interpretation shall be adopted which must run in favour the accused. Reliance is placed on the case *"PROVINCE OF PUNJAB through Secretary Punjab Public Prosecution Department and another versus MUHAMMAD RAFIQUE and others"* (PLD 2018 SC 178). A learned Division Bench of this Court in the case "*AMAD HUSSAIN versus THE STATE"* (PLD 1995 Lahore 250) held that doubt or ambiguity is to be resolved in favour of the accused. Whereas, the instant case as a matter fact is not a case of ambiguity, rather clearly a word "*Ketamine*" is missing in all the relevant statute and it has no-where been defined in clear and specific terms.

6. Another important aspect is that only an act or action which breaks a particular law and requires a particular punishment or the doing of an act or action which a penal law forbids to be done or omitting to do what it commands, is called an offence and naturally each offence carries its own punishment. But, it is equally settled that before attributing an act or action of any person to cover the definition of an offence, it is incumbent for the state to put the factual position as clear and unambiguous as one can imagine, meaning thereby, legislation must be loud and clear, leaving no doubt that what act or action would be an offence. Keeping this position in mind, here in this case what to talk of unclear or ambiguous legislation, no legislation whatsoever has been made to bring "ketamine" with the list of banned or prohibited items. It has been noticed that the Federal Board of Revenue (FBR) has placed a letter No.C.No.CUS/APT/FIR/01/2019/410 dated 02.12.2019 on this file, the relevant paragraphs No.4, 5 and 6 of the said letter are reproduced hereunder:-

"4. In the present case a huge quantity of Ketamine was being smuggled to the USA in the garb of salt. Ketamine is federally regulated in the USA and UK unlike in Pakistan where it is available over the counter for a mere 80-100 rupees. The United States classified Ketamine in Schedule III drugs as a controlled substance in 1999 in the Controlled Substances Act. In Hong Kong, since 2000. Ketamine is regulated under Schedule of Hong Kong Chapter 134 Dangerous Drugs Ordinance. It can only be used legally by health professionals, for university research purposes, or with a physician's

prescription. In Pakistan its import as raw material is also controlled and subject to certification from Drug Regularity Authority.

5.Ketamine misuse is becoming increasingly popular as recreational drug in Southeast Asian countries such as Taiwan, Malaysia, China, and Pakistan. Recently, it's emergence as a club drug different from other club drugs (e.g. MDMA) is due to its anesthetic properties at higher doses. The use of ketamine as part of a "post clubbing experience" has also been documented. In Hong Kong, it is termed as "poor man's cocaine". It is due to these reasons that there is a recent hike in seizures of ketamine while being smuggled to other countries.

6. Moreover, mixing the drug with other depressants like alcohol and heroin intensifies the dangers of respiratory depression which can be deadly. In Oct, 2015, the Nation reported the death of eleven young men who overdosed and died after injecting ketamine bought over the counter at local drug stores. Speculations are that the number of ketamine related deaths are much higher than on record. In August, 2019, the Malaysian customs authorities seized ketamine worth $162 million believed to have been shipped from Pakistan. The lacks of legal regulation in Pakistan regarding this drug is therefore not only marring the reputation of Pakistan in the international world but also helping increase the number of users of this fatal drug in Pakistan."

In the wake of above position, when all factual and legal position as well as drastic impact of ketamine was well within the knowledge of persons sitting in the hierarchy, it cannot be said that Federal Board of Revenue was taken by surprise about the status or impact of "ketamine". Despite that no step was taken to properly legislate and bring ketamine within the prohibited or banned items' list. Therefore, without there being any specific and purposeful legislation, by no stretch of imagination anyone dealing with "ketamine", can be hauled up on the pretext of committing a crime within Pakistan. Therefore, the word "*Ketamine*" which otherwise is alien to the Customs Act, cannot be imported and that too to the detriment to the accused. Consequently, it is held that "*Ketamine*" is not an item which may said to be prohibited material or narcotic drug under any law for the time being in force in Pakistan.

7. Another aspect of the matter is that Section 17 of the Export Policy Order, 2016, in clear terms provides that any export made without compliance with the requirements of this Order or made on the basis of false or incorrect particulars shall be treated as contravention of the provisions of the Act, and Appendix-D to the said Export Policy Order, 2016 requires submission of End-User-Certificate, and in this case admittedly the said Certificate was submitted by the petitioner but in the said Certificate it has not been mentioned that the exported goods included "Ketamine" and this fact could not be denied by learned counsel for the petitioners, therefore, it is clearly a case of concealment of fact, submitting a false statement and document electronically, which is an offence falling within the ambit of Section 32 of the Customs Act, the relevant portion whereof, is reproduced hereunder:-

32. ***[False] statement, error, etc.-*** *(1) If any*

person, in connection with any matter of customs,-

(a) makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or

(b) makes any statement in answer to any question put to him by an officer of customs which he is required by or under this Act to answer, 90[or]

[(c) submits any false statement or document electronically through automated clearance system regarding any matter of Customs.]

[knowing or having reason to believe that such document or statement is false] in any material particular, he shall be guilty of an offence under this section.

The punishment for the above offence is provided in section 156(14) of the said Act i.e.:-

Offences	Penalties	Section of this Act to which offence has reference
1	2	3
If any person commits an offence under (i) sub-section (1) or sub-section (2) of section 32;	such person shall be liable to a penalty not exceeding one hundred thousand rupees or three times the value of the goods in respect of which such offence is committed, whichever be greater; and such goods shall also be liable to confiscation; and upon conviction by a Special Judge he shall further be liable to imprisonment for a term not exceeding three years, or to fine, or to both;	32

Therefore, irrespective of the fact whether "*Ketamine*" is prohibited good or narcotic, the legal position would still remain that by submission of wrong, false or incorrect document (End User Certificate), prima facie the petitioner are guilty of commission of an offence under the Customs Act, therefore, the order dated 11.04.2019 passed by learned Special Judge (Customs, Taxation & Anti-Smuggling), Lahore, dismissing applications of the petitioners do not suffer from any illegality, irregularity or jurisdictional defect to warrant interference. Both these criminal revisions are therefore, **dismissed**.

PLJ 2020 Cr.C. (Lahore) 1594
Present: **MUHAMMAD QASIM KHAN, J.**
HUSNAIN IJAZ--Petitioner
versus
STATE, etc.—Respondents

Crl. Revision No. 493 of 2010 and Crl. Misc. No. 3662-M of 2015, heard on 30.01.2020.

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

----Ss. 324/337-A(iii), 337-L(ii)/337-D/109/34--Criminal Procedure Code, (V of 1898), S. 382-B--Conviction & sentence--Challenge to--Concurrent running of sentences--Extenting benefit of Section 382-B--Alteration quantum of sentence--Upholding sentence U/S. 337-D & 337-F(iii)--Court is convinced that since prosecution witnesses are firm in their statements, which could not be shattered during cross-examination and further their statements also find corroboration from documentary evidence and recoveries, therefore, counsel for convict/petitioner has very wisely chosen not to challenge his conviction on either of charge--Coming to quantum of sentence, this is matter of fact that sentence of imprisonment (seven years) has been recorded only under Section 324, PPC, and keeping in view facts and circumstances of instant only this sentence can be reconsidered and accordingly while sustaining said conviction under Section 324, PPC, sentence of imprisonment is reduced to term already undergone by convict/petitioner. However, sentences provided under sections 337-D and 337-F(iii), PPC i.e. payment of Arsh and daman, are mandatory, as such, convictions as well as sentences on both these two charges are upheld and sustained--With above alteration in quantum of sentence only to extent of Section 324, PPC, criminal appeal is dismissed.

[Pp. 1596 & 1597] A, B & C

Mr. Tariq Javed Manzoor Chaudhry, Advocate for Petitioner.
Rana Tassawar Ali Khan, Deputy Prosecutor General for State.
Mr. Irfan Nasir Cheema, Advocate for Complainant.
Date of hearing: 30.1.2020.

JUDGMENT

Husnain Ijaz (accused/petitioner) along with two others (Shahid Ali and Basharat Ali) faced trial before the Magistrate Section 30, Shakargarh in case FIR No. 312/2004 under Sections 324/337-A(iii), 337-L(ii)/337-D/109/34, PPC registered at Police Station Shakargarh and on conclusion of trial *vide* judgment dated 2.11.2009 accused Shahid Ali was acquitted of the charges, since Basharat Ali co-accused absconded therefore, file to his extent was consigned to wait for his arrest, and Husnain Ijaz accused/petitioner was convicted and sentenced as under:

Under Section 324, PPC sentenced to rigorous imprisonment for seven years and compensation of Rs. 50,000/- as Arsh.

Under Section 337-D, PPC sentenced to rigorous imprisonment for seven years and Rs. 50,000/- as Arsh.

Under Section 337-A(iii), PPC sentenced to seven years and Rs. 27576.2/- as Arsh.
The said judgment of conviction came under consideration before the learned Additional Sessions Judge in an appeal filed by Husnain Ijaz convict/petitioner and *vide* judgment dated 20.01.2010, the convictions under Sections 324 and 337-D, PPC were sustained however sentences were altered as under:
Under Section 324, PPC the sentence of seven years imprisonment was upheld, however, order with regard to payment of Arsh set-aside.
Under Section 337-D sentence of imprisonment was set-aside and payment of Arsh was ordered equal to 1/3rd of Diyat.
Whereas,
Conviction under Section 337-A(iii), PPC was altered to one under Section 337-F(iii), PPC and sentence of payment of Arsh was converted into payment of Daman of Rs. 24000/-.
All the sentences were ordered to run concurrently and benefit of Section 382-B, Cr.P.C., was extended. This judgment of learned Additional Sessions Judge has been assailed through the instant criminal revision, whereas, Suo Moto proceedings (Crl. Misc. No. 3662.M/2015) relate to the notice issued to the surety of the convict/ petitioner and it were initiated at the time when said Husnain Ijaz convict/petitioner had disappeared from this Court. Both these matters are being decided through this judgment.

2. Briefly the prosecution case is that on the fateful day and time the complainant Ghulam Qader (PW-1) went to Darman Chowk to see his brother-in-law Murad Ali who was sitting in a building material store and suddenly Husnain Ijaz accused/petitioner armed with two pistols in both of his hands, along with two unknown accused persons came and started firing on Murad Ali (injured PW-2), hitting his right flank, right buttock, left ribs and left hand, whereupon, he (Murad Ali) fell own. Muhammad Hanif who was sitting there also received injuries. Witnesses namely Atif Ikram, Muhammad Shahbaz and Malik Ghulam Rasool attracted to the Spot Murad Ali was taken to the hospital.

3. Subsequently, Murad Ali (PW-2) injured through an application nominated Shahid Malik and Basharat Malik as co-accused of Husnain convict/petitioner and all three were sent up to face trial.

4. Today, the learned counsel for the convict/petitioner started arguments on merits of the case but when confronted that specific and direct oral evidence coming through the mouth of Ghulam Qader complainant (PW-1) and injured witness Murad Ali (PW-2) corroborated by medical evidence including the statement of Dr. Khalid Mahmoud Ashraf (PW-13) as well as recoveries had come on the record, which was sufficient evidence to record conviction against him, the learned counsel came out with the alternate plea that convict/ petitioner has already served out major part of his substantial sentence, therefore, he would not press his criminal revision to challenge the convictions, however, argued that convict/petitioner remained under trial prisoner for more than three and a half years, then remained behind the bars for almost seven

months as convict prisoner and has also earned remissions of more than about one year and three months, thus the unexpired portion of sentence is about one year and six months. The learned counsel therefore, contends that he will be satisfied if the sentences are reduced to the period already undergone by him.

5. After hearing the learned counsel and examining the record, this Court is convinced that since the prosecution witnesses are firm in their statements, which could not be shattered during cross-examination and further their statements also find corroboration from documentary evidence and the recoveries, therefore, the learned counsel for the convict/petitioner has very wisely chosen not to challenge his conviction on either of the charge.

6. Coming to the quantum of sentence, this is matter of fact that sentence of imprisonment (seven years) has been recorded only under Section 324, PPC, and keeping in view the facts and circumstances of the instant only this sentence can be reconsidered and accordingly **while sustaining the said conviction under Section 324, PPC, the sentence of imprisonment is reduced to the term already undergone by the convict/petitioner.**
However, the sentences provided under Sections 337-D and 337-F(iii), PPC *i.e.* payment of Arsh and daman, are mandatory, as such, the convictions as well as sentences on both these two charges are upheld and sustained.

7. **With above alteration in quantum of sentence only to the extent of Section 324, PPC, the criminal appeal is dismissed.**
8. As regards Crl. Misc. No. 3662-M/2015 (proceedings against the surety), this court has taken note of the fact that ultimately the petitioner was arrested and now his sentence has also been reconsidered, therefore, this Court is convinced that purpose in issuing notice to his surety, has been duly served. **Consequently, proceedings against the surety are dropped and Crl. Misc. No. 3662-M/2015 is disposed of.**
(M.M.R.) Appeal dismissed

PLJ 2020 Cr.C. (Lahore) 1641 (DB)
Present: **MUHAMMAD QASIM KHAN AND ASJAD JAVAID GHURAL, JJ.**
MUHAMMAD UMAIR *alias* MUSLIM--Appellant
versus
STATE and another—Respondents

C.S.R. No. 12/T and Crl. A. No. 188 of 2015, heard on 8.3.2019.

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

----Ss. 302(b)/34--Anti-Terrorism Act, (XXVII of 1997), S. 7(a)--Conviction and sentence--Challenge to--Benefit of doubt--Identification parade--Further the prosecution tried to establish its case by identification of the accused, but on this aspect that Special Judicial Magistrate (PW-9) who supervised the identification parade, during cross-examination admitted that in his identification report he did not mention that accused was offered opportunity to change his position before start of proceedings of second witness--He also admitted it. to be correct that he did not mention in his report that accused had a wound mark on his forehead which had been observed by him--In this view of the matter:

i) When the accused was not offered to change his position before the second witness had to come and identify him, serious doubt is cast on such identification parade;

ii) Moreover, when it is admitted that accused was having a wound mark on his forehead, it was incumbent for the Magistrate supervising the identification parade to have ensures that accused/dummies were not only similar in feature but their special identification marks, if any, must have been covered, so that the witnesses could not use such mark to their benefit and identify the accused;

iii) Another important aspect is that although according to Masood Ahmad Bhatti Inspector/IO (PW-15), the convict/ appellant was arrested on 01.02.2014, but there has been consistent stance of the accused that in fact he had been abducted on 10.12.2013, regarding which FIBi was got lodged and even the matter was agitated up to this Court and out of that grudge he was involved in fake cases--In this respect documentary proof was also brought on the record of the learned trial Court--It therefore, also remains a possibility that accused was already m the custody of the police and the witnesses had opportunity to see him prior to formal identification parade.

Another important aspect of the matter is that though the occurrence took place on 09.11.2003 at 5.15 am, but the post mortem was conducted on the same day at 8.30 pm *i.e.* almost fifteen hours after the occurrence and no explanation whatsoever has come on the record on this aspect--This delay further damages the case of the prosecution when Court observe that according to PW-12 at 11.00 am, they escorted the dead bodies to Civil Hospital--It is not the case of the prosecution that during the interregnum period no, medical officer was available at the hospital and this resulted in delayed post mortem of the dead bodies--The only inference which c be drawn from such inordinate delay in conduct of post-mortem is that the prosecution story was built after due deliberation and consultation and thereafter, FIR recorded with ante-time--Further, it has' been held by the Hon'ble

Courts that such unexplained delay is normally occasioned due to incomplete police papers necessary to be handed over to the Medical Officer to conduct the post-mortem examination of the deceased and this happens only when the complainant and police are busy in consultation and preliminary inquiry regarding the culprits in cases of un-witnessed occurrence--Hence, we are of the view that the presence of the witnesses at the scene of occurrence at the relevant time is doubtful prosecution has failed to bring home the guilt against the conviction beyond any shadow of doubt--Appeal was allowed. [Pp. 1646 & 1647] A & B

2009 PCr.LJ 1022 Lahore and 2011 SCMR 1190.

M/s. Azam Nazir Tarrar and Mudasar Navid Chatha, Advocates for Appellant.

Lala Shakil-ur-Rehman, Mian Wahid Ahmad and Suhail Badar Khan, Advocates for Complainant.

Mr. Muhammad Moeen Ali, DPG for State.

Date of hearing: 8.3.2019.

JUDGMENT

Muhammad Qasim Khan, J.--*Vide* judgment dated 29.01.2015 passed by learned Judge, Anti-Terrorism Court-1, Gujranwala, Muhammad Umair convict/appellant after trial in case FIR No. 807 dated 09.11.2013 under Sections 302/34 PPC read with section 7(a) of Anti-Terrorism Act, 1997, police station Baghbanpura, Gujranwala, was, convicted u/S. 302(b)/34, PPC and sentenced to death on two counts, with compensation of Rs. 200,000/- to be paid to the legal heirs of each deceased and in case of default in payment of compensation, to further serve simple imprisonment for six months on each default. He was also convicted under section 7(a) of Anti-Terrorism Act, 1997 and sentenced to death on two counts, with, further orders to pay Rs. 200,000/- to the legal heirs of each of the deceased, and in case of default, to further undergo simple imprisonment for six months on two counts. Hence, the instant capital sentence reference sent by the learned trial Court and the criminal appeal filed by the convict/appellant.

2. Briefly the facts of the case as shall be seen from the complaint Ex.PM filed by complainant Kausar Ali (PW-11), on the basis whereof formal FIR (Ex.PA) was chalked out, are that on 09.11.2013 at 5.15 a.m. Muhammad Yousaf (cousin of the complainant) went to Ali Masjid Imambargah for Azan. After Azan, Haji Amanat Ali also reached in the Masjid for offering prayer. After hearing voice of firing, Kausar complainant along with Irfan Haider reached the Masjid from their nearby houses and found that Muhammad Yousaf and Haji Amanat were lying dead smeared with blood. According to the complaint some unknown persons had committed murders on sectarian ground.

3. After registration of case during the course of investigation on 01.02.2014 the JIT arrested Muhammad Umair convict/appellant under Section 54 PPC, identification parade was conducted on 07.02.2014 and thereafter, on 20.02.2014 he was formally arrested in the instant case. On completion of investigation, Muhammad Umair convict/appellant was sent up to face trial. The gist of statements of the prosecution witnesses and the stance of the convict/appellant has been given in the impugned

judgment of the learned trial Court itself, therefore, the same need not to be reiterated here.

4. We have heard the arguments of learned counsel for the convict/appellant, learned counsel for the complainant as well as learned law officer and perused the record with their assistance.

5. It remains an admitted position that FIR had been lodged against unknown accused person. According to the complainant two hours after the occurrence he met with Safdar Hussain (given up) and Babar Hussain (PW-12) at place of occurrence, who both told him that they had come to the mosque at 5.15 a.m. and saw four unknown accused persons coming outside the mosque, while Safdar Hussain and Babar Hussain were about to enter the mosque, but due to fear they did not intervene. According to the complainant when four accused came out of the mosque they expressed to Safdar Hussain and Babar Hussain that they had murdered Haji Amanat Ali and Yousaf as they were preaching shia sect. In this respect supplementary statement of the complainant was recorded. From the above narration of facts it becomes obvious that statement of the complainant is just hear-say, and the ocular account has been furnished by Babar Hussain (PW-12), whereas, the other witness namely Safdar Hussain has been given up by the prosecution.

6. While analyzing the evidence of Babar Hussain (PW-12), we have noticed that according to the complaint the occurrence took place on 09.11.2013 at 5.15 a.m. According to the supplementary statement of the complainant just after two hours of the occurrence, Babar Hussain PW-12 and Safdar Hussain (given up PW) met and explained the occurrence by explaining that one of the accused himself disclosed that they had committed the murders as Haji Amanat Ali and Yousaf used to preach shia sect. Babar Hussain (PW-12) while appearing before the Court stated that on 09.11.2013 at about 5.15 am, he went to offer prayer in Imambargah. In the way, Safdar Hussain PW met him, when they both reached in front of the main gate of Imambargah, they were about to enter, when heard the voice of firing from inside. In their sight four persons came out of the room of Ziarat, one person armed with pistol stopped them on pistol point and said that they had murdered Haji Amanat and Yousaf and that if anyone raised noise, they will also be murdered, as such, he went to his house and after some time when people gathered he again went to the scene of occurrence and told the incident to the complainant. It is consistent stance of the prosecution that it was sectarian occurrence and for this reason section 7 of the Anti-Terrorism Act, was added. Keeping this aspect in mind, we see the entire prosecution case and observe that:

i) It is matter of fact that in the complaint Ex.PM or even in supplementary statement of the complainant, the names of accused were not mentioned; however, their features were given by Babar Hussain PW-12;

ii) As shall be seen from the above the complainant gave the occurrence a color of sectarian killing attributing a story that one of the accused had told Babar Hussain PW-12 that they had committed the murders as deceased were preaching shia sect,

but while going through the statement of Babar Hussain (PW-12) we have noticed that this witness did not utter a single word on this aspect;

iii) Even if it is believed that it was sectarian killing, then firstly it does not appeal to mind that accused himself would have explained the said reason to the witnesses, and secondly if the witness was also present at the place of occurrence and the assault had been mounted with some sectarian thought, and not because of any personal vendetta against the victims, then it is not believable that terrorist would have left the witness alive;

iv) From the statement of Babar Hussain PW-12, it also appears that he was still outside the Imambargah When he heard the noise of firing from inside and that there were four persons who came out of the mosque, but,--

a) His statement is totally silent that he himself had seen the four persons, or any one of them making fires at the deceased persons;

b) From the statement of this witness it cannot be said that what kind of weapon was carried by all the four accused persons;

c) It therefore, remains obvious that no direct attribution could be leveled against the accused persons;

d) Although it is alleged that one of the accused armed with pistol stopped them but again it cannot be said that this was the person who also made fires at the deceased persons.

8. This Court is aware of the legal position that it is always for the prosecution, to choose as to how many witnesses, it wants to be examined and there is also no cavil to the proposition that conviction can be based even on solitary statement, but considering the facts and circumstances of the instant case, apparently when the statement of Babar Hussain (PW-12) has been found deficient on material aspects, it was incumbent for the prosecution to have produced Safdar Hussain, who according to the prosecution case was accompanying Babar Hussain and had also seen the occurrence, but he was not produced before the Court and presumption will go against the prosecution in terms of Article 129(g) of Qanoon-e-Shahadat Order, 1984 that had this witness been produced in the witness box, he would not have supported the prosecution case.

8. Further the prosecution tried to establish its case by identification of the accused, but on this aspect we have noticed that Ansar Hayat, Special Judicial Magistrate (PW-9) who supervised the identification parade, during cross-examination admitted that in his identification report Ex.PK he did not mention that accused was offered opportunity to change his position before start of proceedings of second witness. He also admitted it. to be correct that he did not mention in his report that accused had a wound mark on his forehead which had been observed by him. In this view of the matter:

i) When the accused was not offered to change his position before the second witness had to come and identify him, serious doubt is cast on such identification parade;

ii) Moreover, when it is admitted that accused was having a wound mark on his forehead, it was incumbent for the Magistrate supervising the identification parade to

have ensures that accused/dummies were not only similar in feature but their special identification marks, if any, must have been covered, so that the witnesses could not use such mark to their benefit and identify the accused;

iii) Another important aspect is that although according to Masood Ahmad Bhatti Inspector/IO (PW-15), the convict/appellant was arrested on 01.02.2014, but there has been consistent stance of the accused that in fact he had been abducted on 10.12.2013, regarding which FIR was got lodged and even the matter was agitated up to this Court and out of that grudge he was involved in fake cases. In this respect documentary proof was also brought on the record of the learned trial Court. It therefore, also remains a possibility that accused was already in the custody of the police and the witnesses had opportunity to see him prior to formal identification parade.

9. Another important aspect of the matter is that though the occurrence took place on 09.11.2003 at 5.15 am, but the post mortem was conducted on the same day at 8.30 pm *i.e*. almost fifteen hours after the occurrence and no explanation whatsoever has come on the record on this aspect. This delay further damages the case of the prosecution when we observe that according to Babar Hjissain PW-12 at 11.00 am, they escorted the dead bodies to Civil Hospital. It is not the case of the prosecution that during the interregnum period no, medical officer was available at the hospital and this resulted in delayed post mortem of the dead bodies. The only inference which can be drawn from such inordinate delay in conduct of post-mortem is that the prosecution story was built after due deliberation and consultation and thereafter, FIR was recorded with ante-time. Further, it has' been held by the Hon'ble Courts that such unexplained delay is normally occasioned due to incomplete police papers necessary to be handed over to the Medical Officer to conduct the post-mortem examination of the deceased and this happens only when the complainant and police are busy in consultation and preliminary inquiry regarding the culprits in cases of un-witnessed occurrence. Hence, we are of the view that the presence of the witnesses at the scene of occurrence at the relevant time is doubtful. In this regard, reliance is placed on the case of *"Muhammad Riaz versus The State"* (2009 P.Cr.LJ 1022 Lahore) wherein, this Court has observed as under:

"13. ... It is also not found correct that the F.I.R. had been got registered with promptitude as the occurrence had allegedly taken place at about 5-00 a.m. while the post-mortem examination was conducted at 1-00 p.m. and there is every possibility that the intervening period was consumed in concocting a story and to await for the relatives of the deceased, who were made witnesses subsequently, otherwise, they have failed to establish their presence at the spot ..."

Same view was affirmed by the Hon'ble Supreme Court of Pakistan in the case *"Irshad Ahmed versus The State"* (2011 SCMR 1190), wherein the Hon'ble Supreme Court was pleased to observe as under:

"3. ... We have further observed that the post-mortem examination of the deadbody of Shehzad Ahmed deceased had been conducted with a noticeable, delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses and in cooking up a story for the

prosecution before preparing police papers necessary for getting a post-mortem examination of the deadbody conducted ...
"

10. For what has been discussed above, we are of the firm view that prosecution has failed to bring home the guilt against the convict/ appellant "beyond any shadow of doubt. Consequently, the Criminal Appeal No. 188/2015 is allowed, conviction of Muhammad Umair convict/appellant is set-aside and he is ordered to be released forthwith if not required in any other case.
Capital Sentence Reference is answered in the negative. **SENTENCE OF DEATH IS NOT CONFIRMED.**

(A.A.K.) Appeal allowed

2020 Y L R 1854
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD IMRAN AHMED---Petitioner
Versus
PROVINCE OF PUNJAB through Secretary School Education and others---Respondents

Review Petition No.42 of 2017 in Writ Petition No. 5059 of 2010, decided on 10th February, 2020.

Civil Procedure Code (V of 1908)---
----S. 114---Limitation Act (IX of 1908), S. 5 & Sched.---Review---Limitation---Condonation of delay---Exclusion of time lapsed in proceedings of intra-court appeal---Applicant sought review of order of High Court passed in Constitutional petition, and sought condonation of delay for filing the same, on ground that applicant had filed intra-court appeal against said order and subsequently withdrew the same in order to file present application for review---Contention of petitioner was that time consumed in pendency of said intra-court appeal should be excluded in counting time for filing of review---Validity---Applicant had himself chosen forum of intra-court appeal and his subsequent withdrawal of same without specifically seeking permission for condonation of time consumed in such proceedings and then adopting another forum by filing application for review against same order, was not a practice recognized in law---Fault in approaching wrong forum for redressal of grievance would not be a reasonable cause to condone delay---Review being barred by time, was rejected in circumstances.

Ahmad Jan and others v. Qazi Azizul Haq and others 2009 SCMR 1022; Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others PLD 2018 SC 828 and 2002 PLC (C.S.) 960 rel.
Rana Rashid Akram Khan for Petitioner.
Malik Abdul Aziz Awan, Additional Advocate General with Adeel Zulfiqar, Assistant Education Officer.

ORDER
MUHAMMAD QASIM KHAN, J.---Through this petition, the petitioner seeks review of the order dated 18.02.2015 whereby, Writ Petition No.5059/2010 filed by the petitioner had been dismissed.

2. Irrespective of the merits of the case, it has been observed by this court that the order under review was passed by learned Single Judge in chamber on 18.02.2015. Thereafter, the petitioner filed an Intra Court Appeal (I.C.A. No.588/2015) before a Division Bench of this Court on 28.04.2015, the same was however, withdrawn on 29.03.2017 with the following order:--
"Learned counsel for the Appellant seeks permission to withdraw this ICA in order to file review application before the proper forum. Allowed.

2. Dismissed as withdrawn."

Thereafter, on 12.04.2017 the instant review petition was filed by the petitioner. The legal position is very much clear that under section 162 of the Limitation Act, the time period provided for filing a review petition is 20 days, whereas, the instant review petition has been filed apparently after two years of the passing of the original order. Though the learned counsel for the petitioner has tried to argue that ICA was withdrawn with explicit permission by the learned Division Bench to file a review, as such, the time consumed in the pendency of ICA is required to be excluded in counting the time for filing of instant review, but I am afraid the said contention of learned counsel for the petitioner is not backed by law. The Hon'ble Supreme Court of Pakistan in the case "Ahmad Jan and others v. Qazi Azizul Haq and others" (2009 SCMR 1022) in almost identical situation held that:-

"Admittedly, Writ Petition No.2075 of 2005 was dismissed on 23-2-2006 but the respondents did not file any Intra-Court Appeal or petition for leave to appeal before this Court against the said judgment which attained finality. Afterwards, they filed another Writ Petition No.544 of 2006 challenging the same order which was not maintainable in view of the Explanation IV to section 11 read with Order II, rule 2 of C.P.C., therefore, the same was dismissed as withdrawn, on 12-10-2006, with permission to file review petition in the previous Writ Petition No.2075 of 2005. The respondents filed the review petition in the month of October 4, 2006 after lapse of more than 8 months from the judgment, dated 23-2-2006. It is settled by now that when a petition is dismissed by the High Court in the exercise of its original jurisdiction, the application for review is governed by the provisions of Article 162 of the Limitation Act, which provides that a review application can be filed within 20 days from the date of the order or judgment. Apparently the review application has been filed beyond the period of limitation; hence, the same was hopelessly barred by time....

.....

.....

Even otherwise, at the time of dismissal of Writ Petition No.533 of 2006 the respondent No.1 neither requested for condonation of delay in filing of review petition nor the Court condoned the delay, therefore, simple permission to file the review petition cannot condone the delay."

In another case "Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others" (PLD 2018 Supreme Court 828), the Hon'ble Supreme Court of Pakistan held that:-

.....

.....

The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceedings/actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/ action and or remedy, which

in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief....."

From the above two judgments of the Hon'ble Supreme Court of Pakistan, there hardly remains any doubt that once the petitioner had himself chosen a forum (Intra Court Appeal), then simple withdrawal from such forum without specifically seeking permission for condonation of time consumed in such proceedings and then adopting another mode (Review Petition) against the same order, is a practice not recognized in law. In another case reported in 2002 PLC (C.S.) 960, it has been held that fault in approaching the wrong forum for redressal of the grievances would not at all be a reasonable cause to condone the delay. The litigants cannot be permitted to adopt forums at their will, as if such practice is allowed to develop, then there will be no end to any litigation and the parties may be playing mockery with the process of law. Consequently, the instant review petition being clearly barred by time is dismissed.

KMZ/M-83/L Petition dismissed.

KLR 2020 Civil Cases 414
[Lahore (Multan)]
Present: **MUHAMMAD QASIM KHAN, J.**
Aftab Ahmad and others
Versus
Water & Power Development Authoirty, and others.

Writ Petition No. 9079 of 2013, decided on 4th December, 2013.

(a) The Removal from Service (Special Power) Ordinance 2000---
---S. 3 of the Ordinance---The petitioners before this Court fully participated in the fresh recruitment process, they were given extra 5-marks on experience basis, but they failed to compete, whereas, successful candidates were issued appointment letters---This being an admitted position, one thing is quite obvious that the petitioners are hit by the principle of "acquiescence" and "estoppel"---In this respect, reliance can be placed on the case "EHSAN-UR-REHMAN versus ARSHAD ALI KHAN" (2012 PLC (CS) 795 = 2012 CLR (S.C.AJ&K) 809), wherein, the Hon'ble Supreme Court of Pakistan held that "Petitioners, after participating in the interview could not attain required merit position; they had acquiesced and were estopped from challenging the proceedings of Selection Committee---Writ petitions were liable to be dismissed on that ground---If a person participated in the proceedings and remained unsuccessful in getting the desired result, later on he could not turn round and challenge the proceedings on the ground that same were not conducted by the legally constituted body." On the same analogy, when after the above-referred judgment of this Court, the petitioners participated in the subsequent recruitment process but failed, their cases therefore, are covered by the principle of "acquiescence", to the extent of recruitment process carried out by the department---Now, after completion of the recruitment process, whether the petitioners could be terminated in a slipshod process, as has been done in these cases, or the department was required to initiate a proper procedure, remains to be determined by this Court.

(Para 7)

(b) Right of hearings---

---Although, in the light of earlier judgment of this Court, the persons who were recruited without proper procedure of law and officers/officials of the department were responsible for such illegal recruitment, the beneficiaries i.e. the persons who were appointed could not absolve of their responsibility as they were party to the illegal actions---In the said process some of the persons were deprived of their lawful right, whereas, in the process carried out by the department on the directions of this Court, a number of candidates who were earlier appointed, could not achieve the merit, whereas, the persons who were earlier deprived due to some extraneous considerations in terms of bypassing the legal procedure, have now achieved the merit and appointment letters have been issued to them---But, despite that no person could be condemned unheard, irrespective of his personal conduct, as such, the principle of "audi alteram partem" would fully attract---Even Allah Almighty has bestowed the right on man to be aware of what he is being punished for---The Hon'ble Supreme Court of Pakistan in the case "CHIEF COMMISSIONER, KARACHI and another versus Mrs. DINA SOHRAB KATRAK" (PLD 1959 SC (Pak) 45), held that "The rule of justice embodied in the maxim" audi alteram partem: "No man shall be condemned unheard" is not confined to proceedings before Courts but extends to all proceedings, by whomsoever held, which may affect the person or property or other right of the parties concerned in the dispute." In another landmark judgment "PAKISTAN and others versus PUBLIC AT LARGE and others" (PLD 1987 SC 304), the apex Court with reference to Islamic quotes, held that "Next instance is that of Iblees---He was scolded for having misled Hzt. Adam (P.B.U.H.) into disobedience of Allah's Command---Although, it had all happened in the presence of the Judge (Almighty Allah), the accused (Iblees) and Hzt. Adam (P.B.U.H.); and, may be, upon the now prevailing judicial norms, it could be said that there was no need for an inquiry; yet Allah Almighty called upon Iblees to explain his conduct---It was after hearing the explanation from him which was not found tenable, that he was condemned and punished for all times to come---The Hon'ble Supreme Court further held that "It is common principle which governs the administration of justice in Islam that in case of liability with penal or quasi-penal consequences and or deprivation of basic rights a notice as well as an opportunity of hearing, are of absolute necessity---This by itself has to be recognized as a basic right---With reference to the principle "audi alteram partem", the same view was reiterated by the Hon'ble Supreme Court of Pakistan in the case "HAZARA (HILL TRACT) IMPROVEMENT TRUST through Chairman and others versus Mst. QAISRA ELAHI and others" (2005 SCMR 678), while holding that "violation of principle of natural justice enshrined in the maxim would be enough to vitiate even most solemn proceedings." The case (1) THE UNIVERSITY OF DACCA THROUH ITS VICE

CHANCELLOR AND (2) THE REGISTRAR, UNIVERSITY OF DACCA VERSUS ZAKIR AHMED" (P L D 1965 SUPREME COURT 90)

(Para 10)

(c) Right of employment---

---This Court cannot shut its eyes from the fact that employment for a common person is source of livelihood and right of livelihood is an undeniable right to a person---If work is sole source of livelihood of a person, then right to work is not less than a fundamental right which has to be given protection---Such appointments are trust in the hands of public authorities and it is their legal and moral duty to discharge their functions as trustee with complete transparency as per requirement of law so that no person who is eligible to hold such post is excluded from the process of selection and is deprived of his right of appointment in service---Transparency is the hallmark of any effective system---Transparency and fairness of actions of governmental functions can be assessed only on the touchstone of fundamental rights and here in these cases their actions reflected through the impugned Office Orders, have not been found protecting the constitutional guarantees.

(Para 10)

For the Petitioners (in W.P.No.9079/2013, W.P.No.11837/2013, W.P.No,11515/2013, W.P.No.12292/2013): **Muhammad Zawar Shah Qureshi, Advocate.**

For the Petitioners (in W.P.No.11351/2013 and W.P.No.11691/2013): **Shahid Azeem Khan, Advocate.**

For the Petitioners (in W.P.No.11091/2013): **Syed Jaffar Tayyar Bokhari, Advocate.**

For the Petitioners (in W.P.No.11411/2013, W.P.No.11538/2013, W.P.No.10967/2013, W.P.No.11634/2013, W.P.No.10965/2013, W.P.No.11413/2013, W.P.No.11414/2013, W.P.No.10964/2013, W.P.No.10966/2013, W.P.No.10963/2013, W.P.No.11730/2013, W.P.No.10968/2013, W.P.No.11882/2013): **Muhammad Yousaf Khan, Advocate.**

For the Petitioner (in W.P.No.11769/2013): **Sh. Jamshaid Hayat, Advocate.**

For the Petitioner (in W.P.No.11170/2013): **Munawar Iqbal Thaheem, Advocate.**

For the Petitioners (in W.P.No.11989/2013, W.P.No.11567/2013, W.P.No.11838/2013, W.P.No.11596/2013, W.P.No.11568/2013. W.P.No.11569/2013, W.P.No.11595/2013, W.P.No.11926/2013, W.P.No.14383/2013, W.P.No.11271/2013): **Hamayun Sayed Rasool, Advocate.**

For the Petitioner in W.P.No.10627/2013, W.P.No.10628/2013: **Ashfaq Ahmad Khan, Advocate.**

For the petitioner (in W.P.No.11176/2013): **Hafiz Muhammad Abu Bakar, Advocate.**

For the Petitioner (in W.P.No.10593/2013): **Javed Iqbal Addam, Advocate.**

For Petitioner (in W.P.No.11724/2013): **Muhammad Irshad Khan, Advocate.**
For Petitioner (in W.P.No.12105/2013): **Asad Hussain Jaferi, Advocate.**
For the Petitioner (in W.P.No.10497/2013): **Muhammad Khalid Buzdar, Advocate.**
For the Petitioner (in W.P.No.11610/2013): **Rana Muhammad Shakil, Syed Waheed Raza Bokhari, Advocates.**
For the Petitioner (in W.P.No.13443/2013): **Muhammad Ramzan Khalid Joiya, Advocate.**
For the Petitioner in W.P.No.11194/2013: **Mrs. Humera Naheed Khand, Advocate.**
For the Petitioners in W.P.No.11743/2013: **Muhammad Asif Mahmood, Advocate.**
For the Petitioner (in W.P.No.8444/2013): **Malik Muhammad Naeem Iqbal, Advocate.**
For the Petitioner (in W.P.No.11518/2013, W.P.No.11518/2013): **Malik Muhammad Tariq Rajwana, Advocate.**
For the Petitioner (in W.P.No.13449/2013): **Ch. Ehsan Ali Gill, Advocate.**
Rao Muhammad Iqbal, Advocate Legal Advisor for MEPCO with Mian Sohail Afzal, Deputy Manager (T&MP).
Rana Javed Akhtar, Standing Counsel.
Date of hearing: **4th December, 2013.**

ORDER

MUHAMMAD QASIM KHAN, J.--- As all arise out of almost similar facts and circumstances and also attack Office Orders dated 4th and 5th of July, 2013 issued by Deputy Manager (T&MP), MEPCO Ltd., Multan with the approval of Chief Executive Officer, MEPCO. The said impugned Office Order, precisely is effect that "*In compliance of judgment dated 17.06.2010 of Hon'ble Lahore High Court, B/Pur Bench in writ petition No.701, 703 & 705/2010 and orders of Hon'ble Lahore High Court Lahore dated 12.03.2013 in ICA No.168/2010 and orders of Hon'ble Lahore High Court B/Pur Bench dated 20.06.2013 in Criminal Original No.279/2013 in writ petition No.701/2010, the services of following employees appointed as ASSA/SSOII/ALM/Commercial Assistant/Accounts Assistant/DEO/Date Coder, Lorry Driver, on contract basis under direct quota (2009-2010) are hereby terminated with immediate effect.*"

2. Briefly the facts are that pursuant to advertisement published in daily "*NAWAI-I-WAQT,* Multan, in its issue dated 03.11.2008 invited applications for appointments against posts of various categories in *MEPCO* and ultimately appointments were made by the authorities. Some of the persons who were not

recruited, filed various writ petitions before this Court at Bahawalpur Bench, and vide a detailed judgment dated 17.06.2010 passed in Writ Petition No.701/2010 "*SAFDAR HUSSAIN, Etc. versus WATER & POWER DEVELOPMENT AUTHORITY, Etc.*" the whole recruitment process was scrapped. It is pursuant to the said judgment that through impugned Officer Orders, the services of the petitioners were terminated, hence, these writ petitions.

3. Precisely the argument on behalf of learned counsels for the petitioners is that at the time when basic judgment dated 17.06.2010 was passed in Writ Petition No.701/2010, etc. the petitioners were not made party to those proceedings or they were not afforded opportunity of hearing, thus, they were condemned unheard. Further, argument on behalf of the petitioners is that even when the impugned Office Orders were issued, whereby, their services were terminated, no Show Cause Notice was served upon them, therefore, the impugned Office Orders being violative of fundamentally known principle "audi alteram partem", cannot sustain in the eyes of law.

4. It may be mentioned here that a Writ Petition No.8444/2013 "*SYED MUJAHID ABBAS versus DEPUTY MANAGER, Etc.*' arising exactly out of same facts, remained pending before another Bench and was transmitted to this Court lateron. Therefore, Malik Muhammad Naeem Iqbal, Advocate for the writ petitioner was heard on 19.12.2013.

4. On the other hand, the learned Standing Counsel, the learned Legal Advisor for MEPCO assisted by their representative and the learned counsels representing private respondents, have opposed these writ petitions by arguing that the main judgment passed by this Court at Bahawalpur Bench, has attained finality and it was pursuant to the said verdict that petitioners have been removed from service. It is further pointed out that after the said judgment, after scrapping whole of the recruitment process, a fresh process was initiated, wherein, the petitioners participated, they were given extra 5- marks for experience, but they failed to compete on merit, therefore, they are now stopped by their conduct to file the instant writ petitions.

5. I have heard the arguments of learned counsel for the parties at considerable length and examined the record with their assistance.

7. At the very beginning, it may be made clear that the judgment dated 17.06.2010 passed by this Court in Writ Petition No.701/2010 "*SAFDAR HUSSAIN,*

Etc. versus WATER & POWER DEVELOPMENT AUTHORITY, Etc." is not open to question before this Court in these proceedings, nor the findings recorded or conclusions drawn in the said judgment, could be questioned through writ petition. If any of the party, was aggrieved of the said judgment on any aspect, the law provided entirely different mode of proceedings for the aggrieved person. In this view of the matter, until and unless, the competent court of jurisdiction records anything to the contrary, the said judgment shall be considered final along with its conclusions.

8. At this stage, it is to be mentioned here that as stated by the MEPCO authorities, after decision of this court through above-referred judgment, a fresh process of recruitment was initiated according to the guidelines settled therein, the petitioners before this Court fully participated in the fresh recruitment process, they were given extra 5-marks on experience basis, but they failed to compete, whereas, successful candidates were issued appointment letters. This being an admitted position, one thing is quite obvious that the petitioners are hit by the principle of "acquiescence" and "estoppel". In this respect, reliance can be placed on the case "*EHSAN-UR-REHMAN versus ARSHAD ALI KHAN*" (2012 PLC (CS) 795), wherein, the Hon'ble Supreme Court of Pakistan held that "*Petitioners, after participating in the interview could not attain required merit position; they had acquiesced and were estopped from challenging the proceedings of Selection Committee---Writ petitions were liable to be dismissed on that ground---If a person participated in the proceedings and remained unsuccessful in getting the desired result, later on he could not turn round and challenge the proceedings on the ground that same were not conducted by the legally constituted body.*" On the same analogy, when after the above-referred judgment of this Court, the petitioners participated in the subsequent recruitment process but failed, their cases therefore, are covered by the principle of "*acquiescence*", to the extent of recruitment process carried out by the department. Now, after completion of the recruitment process, whether the petitioners could be terminated in a slipshod process, as has been done in these cases, or the department was required to initiate a proper procedure, remains to be determined by this Court.

8. Coming to the real issue under controversy, i.e. the impugned Office Orders, which on the face of it have been issued on the basis of above referred judgment, orders passed in Intra Court Appeal No.168/2010 and Criminal Original No.279/2013. It is settled principle of law that once the parties agree on a contract, then both the parties shall be governed by it. Furthermore, while examining such contract, no clause thereof can be read or seen in isolation, rather the whole contract

with its collective effect must be considered. I have gone through the initial contracts of the petitioners. In the said contract, two provisions have been provided which deal with termination of a contract employee. According to clause 1(l), the appointment on contract was liable to termination on one month's notice or payment of one month's pay in lieu thereof by either side without assigning any reason and according to clause 1(n) the employee will be governed under "*Removal from Service (Special Power) Ordinance, 2000.*" As shall be seen from the above clause 1(l), employee was entitled to one month's notice or salary for the said period, but this condition could be invoked where appointment was to be terminated without assigning any reason, whereas, in the cases in hand, as are visible by the impugned Office Orders, the authority has given reasons that appointment was being terminated pursuant to certain decisions of this Court. In this view of the matter, despite the fact that impugned Office Orders were being issued pursuant to this Court's judgment, yet the authority was required to abide by the initial contract and thus to have exercised its authority under clause 1(n) of the contract, which provided that employees were to be governed by "Removal from Service (Special Power) Ordinance, 2000". While concluding to the above aspect, Section 3 of the said Ordinance deals with dismissal, removal and compulsory retirement, etc. of certain persons in Government or corporation service, etc. Sub-section (e) of Section 3, refers to one of the ground on which dismissal order could be passed. It reads as under:-

(e) found to have been appointed or promoted on extraneous grounds in violation of law and the relevant rules."

Now, when the case of the petitioners is considered in the light of the above-referred judgment, on the touchstone of above reproduced sub-section (e) of Section 3 of the Removal from Service (Special Powers) Ordinance, 2000, in para (30) at page 38 of the judgment (W.P.No.701/2010), this Court held that:

"The narrative of the facts and circumstances of the case in hand would make it abundantly clear that the actions of the respondents were violative of the provisions contained in Articles 2-A, 4, 9, 14, 18, 25 and 27 of the Constitution of Islamic Republic of Pakistan,

1973……

……

31) Accordingly, the above contumacious actions of the respondents are declared to be ultra vires to the constitution the recruitment process was set-aside on the following grounds:-

i) The respondents made impugned recruitments beyond the scope of advertisement;

ii) No stipulated and transparent procedure for recruitment has been followed;

iii) Amendment in the recruitment procedure after publication of advertisement was not permissible in law;

iv) The respondents reserved higher percentage of interview marks, in derogation to the judgment of this court as discussed above; and

v) The actions of respondents are against the principles of natural justice and fundamental rights, enshrined in Article 2(a), 4, 9, 14, 18 and 27 of the Constitution of Islamic Republic of Pakistan, 1973.

Once, it has been conclusively held that in the recruitment process stipulated and transparent procedure was not following, amendment in the recruitment process after publication of advertisement was against law and further principles of natural justice and fundamental rights enshrined in the Constitution of Islamic Republic of Pakistan, 1973 were infringed, the cases of all the appointed persons under the said recruitment process, would be squarely covered by abovereproduced sub-section (e) of Section 3 of the Ordinance, and it could safely be inferred that they were appointed on extraneous grounds in violation of law and the relevant rules. Therefore, the competent authority was required to proceed against those appointees under Removal from Service (Special Powers) Ordinance, 2000.

9. This Court is cognizant of the fact that under second proviso to Section 3(e) of the Ordinance, ibid, the authority could dispense with opportunity of hearing after satisfying itself for the reasons to be recorded in writing that it was not reasonably practicable to give the accused an opportunity of showing cause, but considering the facts and circumstances of the instant case, though the initial recruitment process was scrapped by this Court, yet the fact would remain that after issuance of contract appointment letters, the petitioners had joined their service against respective positions, a lawful right had accrued in their favour, and despite the fact that authority was acting on the judgment of this court, the said right could not be taken away in such an arbitrary manner.

10. Although, in the light of earlier judgment of this Court, the persons who were recruited without proper procedure of law and officers/officials of the department were responsible for such illegal recruitment, the beneficiaries i.e. the persons who were appointed could not absolve of their responsibility as they were party to the illegal actions. In the said process some of the persons were deprived of their lawful right, whereas, in the process carried out by the department on the directions of this Court, a number of candidates who were earlier appointed, could not achieve the merit, whereas, the persons who were earlier deprived due to some extraneous considerations in terms of bypassing the legal procedure, have now achieved the merit and appointment letters have been issued to them. But, despite that

no person could be condemned unheard, irrespective of his personal conduct, as such, the principle of "*audi alteram partem*" would fully attract. Even Allah Almighty has bestowed the right on man to be aware of what he is being punished for. The Hon'ble Supreme Court of Pakistan in the case "*CHIEF COMMISSIONER, KARACHI and another versus Mrs. DINA SOHRAB KATRAK*" (PLD 1959 SC (Pak) 45), held that "*The rule of justice embodied in the maxim" audi alteram partem: "No man shall be condemned unheard" is not confined to proceedings before Courts but extends to all proceedings, by whomsoever held, which may affect the person or property or other right of the parties concerned in the dispute.*" In another landmark judgment "*PAKISTAN and others versus PUBLIC AT LARGE and others*" (PLD 1987 SC 304), the apex Court with reference to Islamic quotes, held that "*Next instance is that of Iblees. He was scolded for having misled Hzt. Adam (P.B.U.H.) into disobedience of Allah's Command. Although, it had all happened in the presence of the Judge (Almighty Allah), the accused (Iblees) and Hzt. Adam (P.B.U.H.); and, may be, upon the now prevailing judicial norms, it could be said that there was no need for an inquiry; yet Allah Almighty called upon Iblees to explain his conduct. It was after hearing the explanation from him which was not found tenable, that he was condemned and punished for all times to come. The Hon'ble Supreme Court further held that "It is common principle which governs the administration of justice in Islam that in case of liability with penal or quasi-penal consequences and or deprivation of basic rights a notice as well as an opportunity of hearing, are of absolute necessity. This by itself has to be recognized as a basic right. With reference to the principle "audi alteram partem*", the same view was reiterated by the Hon'ble Supreme Court of Pakistan in the case "*HAZARA (HILL TRACT) IMPROVEMENT TRUST through Chairman and others versus Mst. QAISRA ELAHI and others*" (2005 SCMR 678), while holding that "*violation of principle of natural justice enshrined in the maxim would be enough to vitiate even most solemn proceedings.*" The case *(1) THE UNIVERSITY OF DACCA THROUH ITS VICE CHANCELLOR AND (2) THE REGISTRAR, UNIVERSITY OF DACCA VERSUS ZAKIR AHMED*" (P L D 1965 SUPREME COURT 90), is also referred. This Court cannot shut its eyes from the fact that employment for a common person is source of livelihood and right of livelihood is an undeniable right to a person. If work is sole source of livelihood of a person, then right to work is not less than a fundamental right which has to be given protection. Such appointments are trust in the hands of public authorities and it is their legal and moral duty to discharge their functions as trustee with complete transparency as per requirement of law so that no person who is eligible to hold such post is excluded from the process of selection and is deprived of his right of appointment in service. Transparency is the hallmark of any effective system. Transparency and fairness of actions of governmental functions can be assessed only

on the touchstone of fundamental rights and here in these cases their actions reflected through the impugned Office Orders, have not been found protecting the constitutional guarantees.

11. For what has been discussed above, all these writ petitions are disposed of in the terms that impugned Office Orders are set-aside and the authority is directed to proceed further in terms of Section 3(e) of the Removal from Service (Special Powers) Ordinance, 2000, after issuing Show Cause Notices to the petitioners.

Disposed of.

2020 [M] P Cr. R 1552

[Lahore]

Present: **MUHAMMAD QASIM KHAN and ASJAD JAVAID GHURAL, JJ.**

Colonel Ellen Brigitte Brekke

Versus

Major Younis Joseph, etc.

Criminal Appeals No. 576 & 219 of 2010, decided on 25th September, 2019.

Pakistan Penal Code (XLV of 1860)---

---Ss. 302 & 34---We are convinced that the trial Court after correct and proper appraisal of evidence recorded acquittal of the accused/respondents---In the case "MUHAMMAD AZAM and others v. THE STATE" (2009 SCMR 1232), the Supreme Court of Pakistan while laying down the criteria for interference in a judgment of acquittal, held that: "Findings of Court acquitting the accused must be proved to be perverse, arbitrary, whimsical, unreasonable, fake, concocted, artificial, ridiculous, shocking, false, based on misreading of material evidence, on inadmissible evidence, on a view not possible to gather from the evidence on the record, highly conjectural, or based on surmises and unwarranted in law---Acquitted accused is credited with two advantages, one his innocence at the pre-trial stage and the other earned by him after his acquittal by a Court of competent jurisdiction.

(Para 7)

For the Appellant/Complainant (in Criminal Appeal No. 576/2010): **Raja Tariq Nadim, Advocate.**

For the Appellant/State (in Criminal Appeal No. 219/2010): **Muhammad Moeen Ali, Deputy Prosecutor General.**

For the Respondents: **Ali Zia Bajwa and Zafar Iqbal Bhatti, Advocates.**

Date of hearing: **25th September, 2019.**

JUDGMENT

MUHAMMAD QASIM KHAN, J.--- Briefly the facts of the case are that an FIR No. 1027/2007 dated 27.09.2007 under section 302/34, PPC read with section 7 of the Anti-Terrorism Act, 1997 was got registered by Major Peter Murray Scandan (complainant) at police station Civil Lines, Lahore, regarding an occurrence which according to the complainant took place on 27.09.2007 at 7 p.m. within the premises of Salvation Army Church compound 35-Fatima Jinnah Avenue, Lahore. It was an unseen occurrence, however, during investigation some evidence was collected by the Investigating Officer and consequently report under section 173, Cr.P.C. was submitted. Subsequently, a private complaint was filed against Major Younis Joseph,

Margrate Younis, Wajahat Masih, Sohail Javed Masih and Ikhlaq Hussain-respondents for commission of offences under sections 302, 109, 148, 149, 420, 468, 471, PPC and Sections 7(a) and 21(1) of the Anti-Terrorism Act, 1997, wherein, after getting a detailed history of dispute, it was alleged that on 27.09.2007 the eve of retirement of Chief Secretary Salvation Army, farewell gathering was arranged in the Church Compound of Salvation Army at 35 Shahrah-e-Fatima Jinnah Lahore which was attended by Colonel Bu Brekke (deceased), the complainant and about hundreds of other participants and when the farewell party was over, the majority of the particpants went away, Colonel Bu Brekke went towards his residential flat and thereafter, a sound of explosion was heard by the complainant and some others present in the Church Compound but they thought that perhaps, it was the sound of an electric transformer due to some electrical problem so, the complainant and other PWs went to their houses. Very soon, the complainant came to know that Colonel Bu Brekke had been murdered in his office. It was an unseen occurrence. Major Peter Scandan was the first person who reached at the place of occurrence and noticed the occurrence who lodged the FIR. It was alleged in the complaint that the accused Major Younis Joseph, his wife Margrate Younis and Ikhlaq Hussain in furtherance of their common intention got Colonel Bu Brekke murdered through hired assassins namely Wajahat Masih and Sohail Javed Masih. After preliminary inquiry, the accused respondents were summoned to face trial and on conclusion of trial *vide* judgment dated 13.01.2010 recorded by learned Judge ATC-IV, Lahore; they all were acquitted of all the charges. Against this judgment of acquittal, Colonel Ellen Brigitte Brekke *(the widow of deceased Col. Bu Brekke)* has filed Criminal Appeal No. 576/2010 and the State has also filed a separate Criminal Appeal No. 219/2010, since both have arisen out of one and the same judgment, therefore, are being decided through this single judgment.

2. Before proceeding further, we may clarify here that against the judgment of acquittal passed in a private complaint, an appeal could be filed only after grant of leave to appeal by this Court and formally no such PSLA had been filed in these two appeals, but it is matter of record that Col. Yousaf Ghulam, who in fact was the complainant in the private complaint had filed a proper PSLA (No. 45/2010) and *vide* order dated 25.06.2012 leave to appeal had been granted by this Court in the said matter and the said petition was converted into Criminal Appeal No. 2122/2012, however, subsequently as the order sheet dated 02.02.2017 reflects, the said criminal appeal was dismissed as not pressed. In this view of the matter, we are convinced that since a learned Division Bench after application of mind had granted leave to appeal against the judgment dated 13.01.2010, which is now subject-matter of instant appeals, therefore, we have no doubt in holding that non-filing of formal PSLAs

would not affect the rights of the parties, as such, we have opted to decide these appeals on merits.

3. Heard.

4. It is matter of record that in the FIR Ex.CG got lodged by Major Peter Murray Scandan on 27.09.2007 only a suspicion had been laid and that too against Younis Joseph one of the accused-respondents, alone. However, in the private complaint Ex.PR filed by Col. Yousaf Ghulam (PW-4) on 13.02.2008 it was alleged that after registration of FIR the entire record was handed over to the Investigating Officer, the police only arrested Younis Joseph, who according to the complainant confessed his guilt and also told that he got the deceased murdered through hired assassins, but the police did not properly investigate the matter and also did not join the rest of the accused with the investigation.

5. After going through the entire evidence, it remains an admitted fact that it was an unseen occurrence and furthermore, on careful perusal of the prosecution evidence, we have no doubt to hold that recovery of dead-body from the spot, other recoveries like shirt, vest, pant, socks, tie, etc. worn by the deceased, as also the medical evidence do not in any manner connect any of the accused/respondent with the commission of the offence. Now, the prosecution is left with the following pieces of evidence:---

(i) Extra-judicial confession of Younis Joseph before Mathias Indrias and Walson Wahed-uz-Zaman.

It is admitted fact that both of the above two witnesses did not appear in the witness-box, as such, their statement recorded under section 161, Cr.P.C. alleging extra-judicial confession by Younis Joseph cannot be used against the accused/respondents.

(ii) Younis Joseph accused/respondent arrested in another case, was formally arrested in this case on 20.10.2007 and during investigation he revealed before the Investigating Officer that he hired two accused namely Wajahat Masih and Sohail Javed Masih against payment of Rs. 100,000/- who murdered Col. Bu Brekke.

So far as statement of Younis Joseph accused/respondent recorded before the Investigating Officer is concerned, the same has no evidentiary value at all, for multiple reasons including the one that when the accused was already in the police custody there remains every possibility that either no such statement had even been made by him, or otherwise, he may have been subjected to torture to elicit a kind of statement from his mouth which could lend support to the prosecution. More-so, when in his statement under section 342, Cr.P.C. this accused/respondent specifically pleaded that he had been tortured.

(iii) On the pointation of accused Younis Joseph, co-accused Wajahat Masih and Sohail Javed were arrested and from their possession Sony Ericson with SIM and currency notes were recovered.

Even if these recoveries are admitted to have been duly effected, even then the same cannot be used against the accused/respondents, for the reason that these recoveries do not in any manner link them with the deceased or the occurrence.

(iv) Wajahat Masih and Sohail Javed were identified by Samson and Samuel Sohail, in identification parade conducted under the supervision of Tariq Maqsood, Special Judicial Magistrate CW-9.

(v) Aamir Mathias had seen Major Younis hurriedly coming from the side of the place of occurrence; and further Samuel Sohail and Samson had seen two accused with their approximate ages and features carrying pistols in their hands, running away from the building of occurrence towards back gate of their premises, when these two PWs tried to come in their way, both the unknown offenders extended criminal intimidation to if any one came in their way, they would kill and thereafter both the unknown offenders went out from the rear main gate and by boarding in a shit colour car.

None of the above three witnesses appeared in the witness-box to testify the identification parade or to establish the case of the prosecution with the evidence of last seen.

6. Although prosecution witnesses namely Roland James Swell (PW-1), Peter Murray Scandan complainant of the FIR (PW-2), Imran Sabir (PW-3) and Col. Yousaf Ghulam complainant of the private complaint (PW-4) gave history of differences between the deceased and one of the accused to establish motive, but we are afraid, firstly existence of some differences does not necessarily mean a motive and secondly when all other pieces of evidence have not been established by the prosecution, conviction could not be recorded on the basis of motive alone.

7. For what has been discussed above, we are convinced that the learned trial Court after correct and proper appraisal of evidence recorded acquittal of the accused/respondents. In the case *"MUHAMMAD AZAM and others Vs. THE STATE"* (2009 SCMR 1232), the Hon'ble Supreme Court of Pakistan while laying down the criteria for interference in a judgment of acquittal, held that:---

"Findings of Court acquitting the accused must be proved to be perverse, arbitrary, whimsical, unreasonable, fake, concocted, artificial, ridiculous, shocking, false, based on misreading of material evidence, on inadmissible evidence, on a view not possible to gather from the evidence on the record, highly conjectural, or based on surmises and unwarranted in law. Acquitted accused is credited with two advantages, one his innocence at the pre-trial stage and the other earned by him after his acquittal by a Court of competent jurisdiction."

On careful scrutiny of the available evidence, we have seen no misreading, non-reading of evidence or any other perversity in the impugned judgment to warrant interference. Both these appeals therefore, are dismissed.

Appeals dismissed.

2021 C L C 515
[Lahore]
Before Muhammad Qasim Khan, CJ
Messra SPARCO CONSTRUCTION COMPANY----Petitioner
Versus
PROVINCE OF PUNJAB and others----Respondents

Writ Petition No.23950 of 2020, decided on 3rd December, 2020.

(a) Punjab Procurement Rules, 2014---
----R.5---Constitution of Pakistan, Art.199---Foreign funded project --- Technical and financial bids---Technical Evaluation Committee declared the bid submitted by the petitioner-company and its joint venture company as non-responsive---Petitioner-company challenged its disqualification from the bid process by filing a constitutional petition before the High Court---Maintainability---Project in question was regulated under a loan agreement entered into between the Government of Pakistan and an international financial institution--- In the bid process the terms of the loan agreement and that of the bid documents were also to be applied according to the satisfaction of the international financial institution itself, therefore, on the face of it there was no applicability of Punjab Procurement Rules 2014 ('the 2014 Rules') in the whole project---As the loan agreement had been executed between the Government of Pakistan and an international financial institution, the present constitutional petition was not maintainable --- High Court dismissed the constitutional petition with the directions that the Provincial Government should form a Committee to minutely probe into the entire process of awarding of the project and bring it to the notice of the international financial institution as well; that the said Committee shall see if there was any misuse of authority in the entire process at any level, whether transparency was properly taken care of, and that proper process was adopted in the project; and, that formation of said Committee shall not mean stay of further process on the project.
Messrs Power Construction Corporation of China Ltd. through Authorized Representative v. Pakistan Water and Power Development Authority through Chairman WAPDA and 2 others PLD 2017 SC 83 and Suo Moto Case No.5 of 2010 PLD 2010 SC 731 ref.

(b) Civil Procedure Code (V of 1908)---
----O.I, R.9---Constitution of Pakistan, Art. 199 --- Misjoinder or non-joinder of necessary parties --- Foreign funded project --- Technical and financial bids---Technical Evaluation Committee declared the bid submitted by the petitioner-company and its joint venture company as non-responsive---Petitioner-company challenged its disqualification from the bid process by filing a constitutional petition before the High Court---Maintainability---Like the petitioner-company the other company with which the petitioner had a joint venture, was also part of the bid, thus, it must also be adversely affected by the impugned action of procuring authority, as such, instead of citing the joint venture company as a respondent, it must have been arrayed as one of the petitioners in the present constitutional petition, which has not

been done, thus the consequential inference would go against the petitioner---Furthermore, the claim of the petitioner had been that it fulfilled the requisite evaluation and qualification criteria set down in the Biding Document, as some projects identical to the present one were completed by certain groups and companies working under it---If that was so, then such groups and companies were necessary and proper party to present proceedings, but none of the said groups or companies was arrayed as a party in the constitutional petition---Inference which could be drawn in such circumstances was that those groups or companies, which the petitioner claimed worked under it, were either not interested/involved in the bid process, or were not supporting the stance of the petitioner in any manner --- Procuring authority appeared to be well within its right to urge that in fact those groups or companies had no liaison with the petitioner's joint venture --- Present constitutional petition was not maintainable due to misjoinder and non-joinder of necessary parties and was consequently dismissed.

Qazi Misbah ul Hassan and Muhammad Zain Qazi for Petitioner.
Malik Abdul Aziz Awan, Additional Advocate-General.
Asad Ali Bajwa, Deputy Attorney General-I.
Mustafa Ramday, Nadia Hafeez and Zoe K. Khan for Respondent No.3.
Barrister Ahmad Pansota and Shah Jehan Khan for Respondent No.4.

ORDER

MUHAMMAD QASIM KHAN, C.J.----Precisely the facts of the case are that a project with the name "Jalalpur Irrigation Project No.2 (JIP2)" for construction of main Canal (RD 52+0(l0 to RD 225+500), including distribution system and Flood Carrier Channels, Cross Drainage Structures, Road Bridges, etc. (Contract No.JIP/WKS/ICS-P2), was launched, where-for, bids were invited for award of contract and a Loan Agreement was entered into between the Government of Pakistan and the Mian Development Bank (ADB) to carry out the mid project. The petitioner after forming a joint venture with respondent No.5 (Top International Engineering Corporation (TIEC) of Peoples Republic of China), jointly participated in the tender by submitting their technical and financial bids. After opening technical bids, the Technical Bid Evaluation Committee formed by respondents Nos.2 and 3 declared the petitioner and its Joint Venture Company as non-responsive on multiple grounds, whereas, respondent No.4 was declared as successful bidder. Disqualification of petitioner's joint venture in the Technical Bid and the process of finalizing the contract in favour of respondent No.4, is in fact the grievance being voiced through the instant writ petition.

2. The contention of learned counsel for the petitioner is that qualification criteria set down in section 2.4.1 of the Bidding document required sufficient experience and minimum two successful/completed contracts identical to the one in hand, within last ten years, was fully met with by the petitioner. The petitioner also fulfilled the requirement as set in section 2.4.2 of the said document, but in violation of PPRA Rules, on both these aspects, the petitioner was disqualified and was not even provided the detailed reasons for non-considering of petitioner's documents and that

the financial bid of respondent No.4 which is rupees one billion higher than the bid submitted by the petitioner, is being accepted. Lastly, it was argued that since no Grievance Redressal Committee had been constituted under Rule 67 of the PPRA Rules, therefore, the petitioner having been left with no remedy, hence the writ petition is maintainable.

3. On the other hand, during arguments the learned counsel for the respective respondents raised preliminary objections i.e. terms and conditions of financial arrangement between the Government of Pakistan and the Asian Development Bank (ADB) whereby the loan for JIP has been granted by ADB, have overriding effect and prevail over Punjab Procurement Rules, 2014 (PPRA), which exception is envisaged by Rule 5 of PPRA Rules, 2014. Secondly, the ADB is not an institution operating or carrying on its functions relating the affairs of Federal or Provincial governments in Pakistan, as such, on both above grounds the writ petition is not maintainable. On factual aspects, the stance of the respondents is that requirements as envisaged in Clauses 2.4.1 and 2.4.2 were not complied with by the petitioner, as the joint venture of the petitioner at the relevant time had submitted experience of other companies by alleging that those were part of the petitioner's joint venture group, thus, they could not claim to have fulfilled the pre-requisites of a valid bid. Lastly, that the result of technical bid evaluation was duly comminuted to all concerned through its publication in the newspaper as well as its display on websites of Irrigation Department, PPRA and the ADB, therefore, the petitioner being disqualified from the very beginning, could not claim that his bid was of lesser amount than the one submitted by other contestants

4 Heard. Record perused.

5. This court while entertaining this writ petition and issuing notices to the respondents was mainly influenced by the argument that procedural as also technical aspects of the bid process were manoeuvred in favour of other parties contesting the bid and that entire process was being carried out under PPRA. Further that as the bid offered by the petitioner was rupees One billion (approximately) less than the bid offered by respondent No.4, therefore, apparently, there appeared to be some foul play, which could have resulted in colossal loss to the national exchequer. But, having heard the learned counsel for the respective parties, scanning the relevant record and analyzing the last on the subject, the admitted facts remain:-
(a) The project "Jalalpur Irrigation Project No.2 (JIP2)" for construction of main canal RD 52+000 to RD 225+500, Contract No. JIP/WKS/ICS-P2), was to be carried out by the Province of the Punjab through its Irrigation Department;
b) For the said project, a Loan agreement was entered into between Government of Pakistan and the Asian Development Bank (ADB);
c) Bids were invited by adopting the mode of "Single Stage Envelope Bidding Procedure";
d) The petitioner formed a joint-venture with respondent No.5 with name as "TIEC-SPARCO JV" and participated in the tender process;

e) The Technical Bid Evaluation Committee through its report dated 08.11.2019 declared TlEC-SPARCO JV as non-responsive, whereas, respondent No.4 and M/s. Descon Engineering Limited, were declared successful bidders in the technical bids, out of eight participants.

As shall be seen from the above, on the face of it, the mode, mechanism or the procedure adopted in the process right from initiation till conclusion or finalization of the bid has not been questioned by any of the party. Although, the petitioner has pleaded violation of PPRA Rules, but has not questioned that the loan agreement was entered into between the Government of Pakistan and the Asian Development Bank, which undisputedly is an international financial institution. It has not been disputed that the entire process was initiated within the bounds of the loan agreement, as also according to the terms and conditions satisfactory to the Asian Development Bank. This fact is mentioned in the BIDDING DOCUMENT itself, calling bids for the project. Therefore, the argument of learned counsel for the petitioner about purported violation or infringement of PPRA Rules, 2004 in the process, subject matter of the instant writ petition, has no legs to stand on for the simple reason that as the entire matter was being regulated under a loan agreement entered into between the Government of Pakistan and the Asian Development Bank and further in the bid process the terms of the said loan agreement and that of the bid documents were also to be applied according to the satisfaction of Asian Development Bench itself, therefore, on the face of it there was no applicability of PPRA Rules in the whole project. In this respect specific reference may also be made to Rule 5 of the Punjab Procurement Rules, 2009, which precisely reads as under: -

"5. International and inter-governmental commitments of the Federal Government. -
Whenever these rules are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State or States, or any international financial institution the provisions of such international treaty or agreement shall prevail to the extent of such conflict."

In view of the above factual and legal aspects, there remains no ambiguity to observe that as a matter of fact in the circumstances where the loan agreement has been executed between the Government of Pakistan and an international financial institution, the writ petition is not maintainable. Guidance is sought from the judgment of the Hon'ble Supreme Court of Pakistan in the case "Messrs Power Construction Corporation of China Ltd. through Authorized Representative v. Pakistan Water and Power Development Authority through Chairman WAPDA and 2 others" (PLD 2017 Supreme Court 83), wherein the apex Court with specific reference to Rule 5 of the PARA Rules, 2014, observed that the provisions of international treaties or agreements shall prevail, where any provision the PPRA Rules conflicts with an obligation or commitment of the Federal Government arising out of an international treaty or agreement. In this view of the matter the remaining arguments of learned counsel with reference to PPRA Rules, cannot be entertained in these proceedings under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, before this Court.

6 Another aspect of the matter is that admittedly the petitioner had formed a joint venture with Top International Engineering Corporation (TIEC) of Peoples Republic

of China, with its branch office House No.17, Street 61, F-8/4, Islamabad. Therefore, like the present petitioner the said Company being part of the bid, must also be adversely affected by the impugned action of respondents, whereby, their joint venture has been disqualified from the bid process, as such, instead of citing Top International Engineering Corporation (TIEC) as respondent No.5, it must have been arrayed as one of the petitioners in the writ petition, which has not been done thus the consequential inference would go against the petitioner. Furthermore, the claim of the petitioner has been that it fulfilled the requisite evaluation and qualification criteria set down in Section 3, Item 2.4.2 of the Biding Document, as some projects were completed by certain groups and companies working under it. If that is so, then they were necessary and proper party to these proceedings, but none of such groups or companies was arrayed as party in this writ petition. The ultimate inference which can be drawn is that those groups or companies, which the petitioner claimed to have worked under it, were either not interested/involved in the said bid process, or were not supporting the stance of the petitioner in any manner. As such, the respondents appear to be well within their right to urge that in fact those groups or companies had no liaison with the petitioner's Joint Venture. In any way, the instant writ petition is also not maintainable due to misjoinder and non-joinder of necessary parties.

7. As regards the argument that petitioner had offered a bid of rupees One billion less than the bid submitted by respondent No.4, this argument on the face of it looks convincing and attractive, but I am afraid any step of the process of such a big project cannot be considered in segregation with the rest. Every stage of the project right from its initiation till calling and submission of tenders, opening and then finalization of bids is a properly regulated mechanism and its every next step is netted with the previous one. Keeping this aspect in mind, unless the petitioner fulfilled its eligibility to submit the bid, he cannot be allowed to jump over to next stage and plead that as his bid was of the lesser amount, therefore, he may be considered. Before asking for it, the petitioner or anyone else, had to establish its very eligibility to enter in the process. As discussed above, as the petitioner failed to establish its construction experience etc., required by Clauses 2.4.1 and 2,4.2 of the bidding document, how so low his bid may be, he could not claim any benefit on this aspect.

8. For what has been discussed above, the instant writ petition is dismissed. However, this court while dismissing the writ petition has mainly confined itself to legal premises and deliberately has not touched the other allied factual aspects for some obvious reasons, because definitely it is a big project involving great financial implications and it was executed by the government functionaries. The transparency and fairness behind every such project is and shall be the hallmark of every civilized nation and further the public being the virtual owners of national exchequer must be kept satisfied that all such transactions and works are being carried out in a transparent manner, therefore, by seeking guidance from the judgment in "Suo Motu Case No.5 of 2010" (PLD 2010 Supreme Court 731), considering that as the instant matter is provincial subject, the Chief Minister, Government of the Punjab, is directed to immediately form a committee, consisting of men of sound caliber and integrity from all the concerned agencies, to minutely probe into the entire process and bring it

to the notice of the Asian Development Bank as well. The Committee, so constituted, shall see whether there was any misuse of authority in the entire process at any level, whether the transparency and fair play was properly taken care of and that the proper process was adopted in the project. It is made clear that simple formation of such committee, shall not mean stay of further process on the project.

MWA/S-4/L Petition dismissed.

2021 C L D 383
[Lahore]
Before Muhammad Qasim Khan, J
NAUMAN ALMAS---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No. 1869-B of 2019, decided on 12th March, 2019.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---
----Ss. 7 & 20---Criminal Procedure Code (V of 1898), S. 498---Penal Code (XLV of 1860), S. 380---Theft in dwelling house---Pre-arrest bail, grant of---Jurisdiction of Banking Court---Scope---Complainant, a company deputed by Bank to safeguard pledged stock, got lodged an FIR against the accused under S. 380, P.P.C., for stealing the stock pledged with the Bank---Validity---Provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 had an overriding effect on anything inconsistent contained in any other law for the time being in force, including Cr.P.C. read with P.P.C., and whenever an offence was committed by a customer, it could only be tried by the Banking Court constituted thereunder and no other forum or the ordinary criminal court had jurisdiction in the matter---Action of filing a complaint and getting registered a criminal case against the accused despite availability of remedy before the Banking Court was a clear indicator of mala fide on the part of prosecution---Petition for grant of pre-arrest bail was allowed.

Muhammad Asif Nawaz v. ASJ and others 2014 PCr.LJ 1 = 2014 CLD 45 ref.
Syed Mushahid Shah and others v. Federal Investigation Agency and others 2017 SCMR 1218 and Alamdar Hussain v. National Accountability Bureau through Chairman and others 2017 CLD 1101 rel.
Shahid Ikram Siddiqui for Petitioner.
Ms. Saba Saeed Sheikh for the Complainant.
Rana Tassawar Ali Khan, Additional Prosecutor General with Muhammad Amin, ASI for the State.

ORDER
MUHAMMAD QASIM KHAN, J.---Petitioner (Noman Almas) seeks pre-arrest bail in case FIR No.331 of 2018 dated 05.8.2018 under section 380, P.P.C. registered at Police Station Saddar Phool Nagar, District Kasur, got lodged by Ghulam Abbas (complainant-respondent No.2), as representative of National Cargo (Pvt) precisely with the allegation that National Cargo deals to safeguard bank's pledged stock. Salman Noman Enterprises Limited had availed loan facility from National Bank of Pakistan by pledge of its cotton stock. On 22.07.2018, however, the pledged stock was stolen which theft was detected on 23.07.2018 by godown (warehouse) labour. The information was conveyed to the office of National Cargo Private Limited and onwards to National Bank, whereupon, two officers from the bank visited the site and ultimately on the direction of Bank authorities, FIR was got lodged by the complainant.

2. The main contention of learned counsel for the petitioner is that though the complainant was working and acting on behalf of a private
company, but affairs of the said company were directly linked with the Bank as to ensure safety to the stock pledged by the said bank, was the responsibility of the said company, therefore, Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 was applicable and the dispute could be agitated within the confines of said Ordinance, thus, the local police had no jurisdiction to register a criminal case on the application of the complainant . In support of his contentions the learned counsel placed reliance on the case "Syed Mushahid Shah and others v. Federal Investigation Agency and others" (2017 SCMR 1218) and "Muhammad Asif Nawaz v. ASJ and others" (2014 PCr.LJ 1 = 2014 CLD 45).

3. On the other-hand, learned law officer as well as the learned counsel for the respondent-complainant have opposed the contention of learned counsel for the petitioner by arguing that National Cargo cannot be deemed to be a company within the meaning of Financial Institutions (Recovery of Finances) Ordinance, 2001, therefore, no other remedy under the Banking Laws was available and there was no bar for the respondent complainant to have recourse to the learned Ex-officio Justice of Peace.

4. I have heard the arguments of learned counsel for the parties and examined the record.

5. There is no dispute that Salman Noman Enterprises is an independent entity and the complainant/respondent was acting as representative of the said company, but considering the contents of the FIR it remains an admitted position that to safeguard the pledged stock of National Bank of Pakistan, was one of the primary obligation/ responsibility of the said company and therefore, it can safely be said that functions of the company were directly linked with the affairs of the bank. Furthermore, it has been clearly mentioned in the FIR itself that on the direction of the Bank authorities, the FIR was got lodged by the complainant, as such, practically the complainant on behalf of the company had acted as some sort of agent for the Bank. In order to make the situation more clear, Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, is reproduced hereunder:-
"20. Provisions relating to certain offences.-
(1) Whoever
(a) dishonestly commits a breach of the terms of a letter of hypothecation, trust receipt or any other instrument or document executed by him whereby possession of the assets or properties offered as security for the re payment of finance or fulfillment of any obligation are not with the financial institution but are retained by or entrusted to him for the purposes of dealing with the same in the ordinary course of business subject to the terms of the letter of hypothecation or trust receipt or other instrument or document or for the purpose of effecting their sale and depositing the sale proceeds with the financial institution."

Once it is admitted that complainant-company had been entrusted the pledged stock by the bank for a specific purpose to ensure its security and safety, therefore, function of the company definitely connected with the bank, and its such affairs would be covered by section 20 of the Ordinance, reproduced above and if the said company commits any default towards its above pointed obligation, the Bank would have a claim to raise against it within the bounds of said Ordinance. The proposition has been well settled by the Hon'ble Supreme Court of Pakistan in the case "Syed Mushahid Shah and others v. Federal Investigation Agency and others" (2017 SCMR 1218), wherein on the of question was with regard to removal of hypothecated or pledged goods, disposal of mortgaged properties and/or breaching the terms of the finance agreement, instrument, etc. and the apex Court held that provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 have overriding effect on anything inconsistent contained in any other law for the time being in force, including Cr.P.C. read with P.P.C., and whenever an offence is committed by a customer, it could only be tried by the Banking Courts constituted thereunder and no other forum and the ordinary criminal court would have jurisdiction in the matter. Similar view was taken by this court in the case "Muhammad Asif Nawaz v. ASJ and others" (2014 PCr.LJ 1 = 2014 CLD 45). In this context the case "Alamdar Hussain v. National Accountability Bureau through Chairman and others" (2017 CLD 1101) is also referred, wherein, it was laid down that "Where accused can be tried or punished under two different statutes then 'Rule of Lenity' (a rule of construction of statutes that criminal statues ambiguities are resolved in favour of defendant or accused) would also attract in favour of accused persons."

6. On careful perusal of the judgment of the apex Court as well as this Court it becomes crystal clear that remedy before the banking court was available to the exclusion of all other forums, despite that action of the complainant in filing a complaint and getting registered a criminal case against the petitioner and on that basis attempt to arrest the petitioner is clear indicator of mala fide on the part of prosecution, and without touching the merits of the case, this fact alone is sufficient to confirm pre-arrest bail. Consequently, this petition is allowed and interim pre-arrest bail earlier granted to the petitioner is hereby confirmed subject to his furnishing fresh bail bond in the sum Rs.100,000/- with one surety in the like amount to the satisfaction of learned trial court.

SA/N-20/L Bail confirmed.

2021 M L D 564
[Lahore]
Before Muhammad Qasim Khan, J
MUHAMMAD RIAZ---Petitioner
Versus
The STATE and others---Respondents

Writ Petition No.204172-Q of 2018, decided on 26th April, 2018*.

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

----Ss.44 & 154---Quashing of FIR---Scope---Petitioners sought quashing of FIR registered under Ss. 420, 460 & 471, P.P.C., on the ground that FIR did not disclose commission of a cognizable offence; that the complainant had tried to convert civil litigation into criminal dispute and that the complainant could not have got the FIR lodged in the light of S. 44, Cr.P.C.---Held; criminal and civil litigation could proceed simultaneously---Section 44, Cr.P.C., was a special clause binding every person to provide information but did not bar that only the aggrieved person or a directly affected person could get the FIR lodged---Section 154, Cr.P.C., not only had much broader scope and implications but the same also was not to be considered as subservient to S.44, Cr.P.C.---Section 44, Cr.P.C., on the face of it placed an obligation only on the persons who became aware of the commission or intention of commission of certain offences, that they shall lay information to the concerned authorities and if he did not do so, then obligation would be on that person to come out with a reasonable excuse for his inaction in the above terms, whereas, S.154, Cr.P.C., comparatively carried large connotations as it covered every information, not limited to the specific sections, as had been done in S.44, Cr.P.C.---Both Ss.44 & 154, Cr.P.C., were meant to set the criminal law into motion to furnish legal basis for conducting investigation in a case of commission of cognizable offence---Constitutional petition was dismissed, in circumstances.

Ch. Muhammad Aslam v. C.P.O. Rawalpindi and others 2011 PCr.LJ 1870 ref.

Seema Fareed and others v. The State and another 2008 SCMR 839 and Col. Subah Sadiq v. M. Ashiq and others 2006 SCMR 276 rel.

(b) Criminal trial---

---Civil and criminal litigation simultaneously---Scope---Criminal and civil litigation can proceed simultaneously, however, there exists only one probability that the decision of the civil suit has direct bearing on the criminal trial, then at the most proceedings in the criminal case can be stayed to wait for the ultimate fate of the civil suit.

Seema Fareed and others v. The State and another 2008 SCMR 839 rel.

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

----S.44---Public to give information of certain offences---Scope---Section 44, Cr.P.C., only binds "every person" that sooner he becomes aware of the commission or even intention of other person to commit any offence punishable under S.44, Cr.P.C., he shall forthwith give information to the nearest Magistrate, Justice of the Peace, or police officer of such commission or intention.
Abid Hussain Khichi for Petitioner.

ORDER
MUHAMMAD QASIM KHAN, J.----Through this writ petition, the petitioner seeks quashing of FIR No.116/2018 dated 16.04.2018 under sections 420/460/471, P.P.C. registered at police station City Wazirabad, District Gujranwala, on the ground that FIR does not disclose commission of a cognizable offence and the complainant has tried to convert civil litigation into criminal dispute. Further argued that in the light of Section 44, Cr.P.C. the respondent No.3-complainant could not get lodged the FIR.

2. Heard.

3. I will not like to make any comment on the factual aspects and would confine myself to observe that from bare reading of the FIR certain offences are made out, this fact is further left to be decided by the Investigating Office and the learned trial court.

4. It is settled principle of law that criminal and civil litigation can proceed simultaneously. In the case "Seema Fareed and others v. The State and another" (2008 SCMR 839) the Hon'ble Supreme Court held that:--
"It is well-settled that, a criminal case must be allowed to proceed on its own merits and merely because civil proceedings relating to same transaction have been instituted it has never been considered to be a legal bar to the maintainability of criminal proceedings which can proceed concurrently because conviction for a criminal offence is altogether a different matter from the civil liability. While the spirit and purpose of criminal proceedings is to punish the offender for the commission of a crime the purpose behind the civil proceedings is to enforce civil rights arising out of contracts and in law both the proceedings can co-exist and proceed with simultaneously without any legal restriction."
However, there exists only one probability that the decision of the civil suit has direct bearing on the criminal trial, then at the most proceedings in the criminal case can be stayed to wait for the ultimate fate of the civil suit. Even when the matter is under investigation the court could not strangulate the proceedings of investigation agency as it may prejudice the rights of the parties to the case. Furthermore, if during the course of investigation no evidence is collected by the I.0 then accused may apply for bail before the appropriate forum. In the matter of quashing of FIR, the Hon'ble

Supreme Court of Pakistan in the case "Col. Subah Sadiq v. M. Ashiq and others" (2006 SCMR 276), has held that:-
"If prima facie an offence has been committed, ordinary course of trial before the Court should not be allowed to be deflected by resorting to constitutional jurisdiction of High Court."
Further, it was held that:-
"The learned High Court had no jurisdiction to quash the impugned FIR by appreciation of the documents produced by the parties without providing chance to cross-examine or confronting the documents in question. Respondents had alternate remedy to raise objection at the time of framing the charge against them by the trial Court or at the time of final disposal of the trial after recording the evidence. Even otherwise, respondents have more than one alternative remedies before the trial Court under the Cr.P.C. i.e. sections 265-K, 249-A or to approach the concerned Magistrate for cancellation of the case under provisions of Cr.P.C."
The apex Court thus concluded that the trichotomy of powers which is already delicately balanced in the Constitution, cannot be disturbed as it grants powers to each organ to decide the maters in its allotted sphere.

5. So far as the argument with reference to Section 44, Cr.P.C. is concerned, the same has no force at all, because section 44, Cr.P.C. only bounds "every person" that sooner he becomes aware of the commission or even intention of other person to commit any offence punishable under certain sections specified in this provision, he shall forthwith give information to the nearest Magistrate, Justice of the Peace, or police officer of such commission or intention. This is a special clause binding every person to provide information, but does not bar that only the aggrieved person or a direct effect could get lodged the FIR. Section 154, Cr.P.C., not only has much broader scope and implications, the same also is not to be considered as subservient to section 44, Cr.P.C. As discussed above, section 44, Cr.P.C., on the face it places an obligation only to the persons who become aware of commission or intention of commission of certain offences, that they shall lay information to the concerned authorities and if he does not do so, then obligation would be on that person to come out with a reasonable excuse for his inaction in the above term, whereas, section 154, Cr.P.C., comparatively carries large connotations as it covers "every information", not limited to the specific sections, as has been done in section 44, Cr.P.C. In any way, both Sections 44 and 154, Cr.P.C., are meant to set the criminal law into motion and to furnish legal basis for conducting investigation in case of commission of cognizable offence, as held by a learned Division Bench of this Court in the case "Ch. Muhammad Aslam v. C.P.O. Rawalpindi and others" (2011 PCr.LJ 1870).

6. For what has been discussed above, neither on merits nor on legal premises, the petitioner has any case for quashing of FIR. This petition, therefore, is dismissed in limine.

SA/M-25/L Petition dismissed.

2021 P Cr. L J 504
[Lahore]
Before Muhammad Qasim Khan and Asjad Javaid Ghural, JJ
TAHIR ABBAS---Petitioner
Versus
The STATE and 2 others---Respondents

Criminal Revision No. 72656 of 2019, decided on 21st January, 2020.

Criminal Procedure Code (V of 1898)---
----Ss. 161 & 162---Examination of witnesses by police---Statement to police not to be signed---Use of such statement in evidence---Exhibition of supplementary statement in evidence---Scope---Petitioner assailed order passed by Trial Court whereby supplementary statement of complainant was allowed to be exhibited during his examination-in-chief---Validity---Station House Officer was bound to reduce into writing information regarding any cognizable offence rendered by the informer and there was no legal impediment for its exhibition during the trial---Once the crime report was lodged, any information gathered by the complainant at subsequent stage and placed before the Investigating Officer was treated as his statement under S. 161, Cr.P.C. which could be used by the defence for the purpose of contradiction as provided under S. 162, Cr.P.C.---Complainant was always at liberty to make statement before trial court regarding contents of such statement/application as well as his other statements recorded under S. 161, Cr.P.C. but there was no provision in the criminal law for independent exhibition of such statement---Trial Court had committed material illegality while passing the impugned order, which was set aside and the revision petition was allowed.

Naseer Haider and another v. The State and 2 others 2008 YLR 1092; Muhammad Safdar and others v. The State and others 2016 PCr.LJ 220 and Yasir Imran alias Yasir Arafat v. Muhammad Ashraf and others 2014 MLD 337 ref.

Navid Inayat Malik for Petitioner.

Muhammad Siddique Zafar Qadri for Respondent No. 2.

Muhammad Moeen Ali, Deputy Prosecutor General.

ORDER

This revision petition has been directed against order dated 26.11.2019 passed by the learned Anti-Terrorism Court-III, Lahore whereby supplementary statement of the complainant was exhibited during his examination-in-chief as PW-1.

2. Succinctly, the facts of the case are that respondent No.2/complainant got lodged FIR No.240 dated 12.03.2019, in respect of offences under sections 363, 365-A, 302, 34, 201 and 436-B, P.P.C., registered at Police Station Hair, Lahore, against the petitioner and others regarding abduction for ransom, murder and burning the dead body of deceased Ali Hassan aged 11/12 years, a son of the complainant. During trial, the complainant was examined as (PW-1) in

examination-in-chief, the trial court exhibited his supplementary statement as `Ex.PB' by over-ruling the legal objection raised by learned defence counsel vide impugned order dated 26.11.2019, which is under attack in this revision petition.

3. We have heard learned counsel for the petitioner, learned counsel for respondent No.2 and learned Deputy Prosecution General appearing for the State.

4. Under section 154, Cr.P.C., the Station House Officer is bound to reduce into writing information regarding any cognizable offence rendered by the informer and there is no legal impediment for its exhibition during the trial However, once the crime report is lodged, any information gathered by the complainant at subsequent stage and placed before the Investigating Officer, shall be treated as his statement under section 161, Cr.P.C., which may be used by the defence for the purpose of contradiction as provided under section 162, Cr.P.C. The complainant is always at liberty to make statement before the trial Court regarding contents of such statement/application as well as his other statements recorded under section 161, Cr.P.C. but there is no provision in the criminal law for independent exhibition of such statement. Reliance is placed on cases reported as Naseer Haider and another v. The State and 2 others (2008 YLR 1092) and Muhammad Safdar and others v. The State and others (2016 PCr.LJ 220). The judgment referred to by the learned counsel for respondent No.2 reported as Yasir Imran alias Yasir Arafat v. Muhammad Ashraf and others (2014 MLD 337), was authored by a learned Single Bench of this Court, which has no binding effect upon a Division Bench.

5. Cumulative effect of the above discussion is that the trial Court committed material illegality while passing the impugned order in exhibiting supplementary statement of the complainant, which cannot be perpetuated by the Court.

Resultantly, the criminal revision petition in hand is allowed and impugned order dated 26.11.2019 is hereby set aside.

SA/T-2/L Petition allowed.

2021 P Cr. L J Note 42
[Lahore]
Before Muhammad Qasim Khan, C.J.
MUHAMMAD SHAKEEL AHMAD KHAN---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No. 46508-B of 2020, decided on 14th October, 2020.

Criminal Procedure Code (V of 1898)---
----S. 497---Penal Code (XLV of 1860), Ss. 302 & 34---Qatl-i-amd and common intention---Bail, grant of---Prosecution case was that the accused and another fired with their respective weapons on the head of the deceased but as per post-mortem examination report only one injury was found on the head of the deceased, which was fatal in nature---Prosecution was not certain as to who had caused the injury and it would be decided by the Trial Court after recording the evidence whether the fire shot which hit the head of the deceased was made by the accused or co-accused---Case against accused was one of further inquiry into his guilt as contemplated under subsection (2) of S. 497, Cr.P.C.---Petition for grant of bail was accepted, in circumstances.

Matee Ullah for Petitioner.

Ch. Sarfraz Ahmad Khatana, DPG along with Sagheer Ahmad, ASI with record for the State.

Complainant in person duly identified by the I.O. present in the Court.

ORDER

MUHAMMAD QASIM KHAN, C.J.---Muhammad Shakeel Ahmad Khan, petitioner seeks post-arrest bail in case FIR No.246/2019 dated 29.5.2019 registered under sections 302 and 34, P.P.C. at Police Station City, Mianwali.

2. I have heard learned counsel for the petitioner, learned Deputy Prosecutor General and perused the record.

3. As per FIR and statements of Hamza Shah son of Mureerd Hussain Shah, Ikramullah son of Muhammad Afzal and Ghulam Rasool son of Ghulam Jillani recorded under section 161, Cr.P.C., it is alleged that the petitioner and co-accused Huzaifa Khan fired with their respective pistols which hit on the head of deceased Muhammad Shoaib Khan but as per post-mortem examination report there is only one injury is found on the head of the deceased which is fatal in nature but the prosecution is not certain that who caused this injury and it will be decided by the learned trial court after recording the evidence whether the fire which hit on the head of the deceased was either made by the petitioner or Huzaifa Khan, co-accused, hence case of the petitioner becomes one of further inquiry. The petitioner is behind the bars since his arrest and his further incarceration would not serve any useful purpose. As cumulative effect of all

above, case against the petitioner, prima-facie, is one of further inquiry into his guilt as contemplated under subsection (2) of section 497, Cr.P.C.

4. For what has been discussed above, I accept this petition and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs.200,000/- (Rupees one hundred thousand only) with two sureties in the like amount to the satisfaction of the learned trial Court.

SA/M-144/L Bail granted.

2021 P L C (C.S.) 355
[Lahore High Court]
Before Muhammad Qasim Khan, J
MUHAMMAD ASHFAQ and others
Versus
PROVINCE OF PUNJAB and others

Writ Petition No.38980 of 2016, decided on 16th May, 2017.

(a) Standing Order No. 06 of 2015---

----Paras. 22, 23, 24 & 25, (Issued by Government of Punjab, Police Department)---Merit list---"Final selection"/"appointment orders"---Distinction---Scope---Grievance of the petitioners was that after issuance of merit list some appointees were not issued appointment letters---Waiting list of 115 candidates including petitioners was prepared, affixed but they were not offered appointments against the remaining vacant posts and the department published new advertisement to fill the vacant seats through fresh process---Contention of department was that waiting list was valid for thirty days after display of final list, therefore, after lapse of thirty days the waiting list became redundant and as such fresh advertisement was issued---Validity---Merit list was prepared on the basis of marks obtained by the candidates in the written test, family claim and interview, whereas, final list was to be prepared after verification of antecedents of the candidates as per merit list after medical checkup and then they would be allowed to join and at such stage final list shall be prepared, hence, there was a hell of difference between the "merit list" and the "final list"---Merit list prepared by the department was not the final list and it could not be said that after thirty days the list of the waiting candidates would stand scratched---List of waiting candidates would come to surface only after completion of recruitment process from the merit list and preparation of final list of the candidates who joined their posting---Constitutional petition was allowed and department was directed to issue appointment letters to the petitioners and to all the remaining candidates whose names figured in the waiting list on the ground of equality and good governance.

Government of N.-W.F.P through Secretary, Education Department, Peshawar and others v. Qasim Shah 2009 SCMR 382 and Sumara Umar Awan v. Chancellor Gomal University, D.I. Khan and 4 others 2014 PLC (C.S.) 526 rel.

(b) Civil service---

----Reserved quota---Scope---If the seats against reserved quota (excluding those reserved for minorities) remain vacant, the same would convert into open merit and had to be filled accordingly.

Malik Muhammad Awais Khalid for Petitioners.

Abdul Aziz Awan, Additional Advocate General with Rana Muhammad Latif S.P. (Legal), Muhammad Asif Ali Sheikh DSP (Legal) from the Office of CCPO, Lahore and Muhammad Salim Chughtai, DSP (Legal), CPO Office, Lahore.

ORDER

MUHAMMAD QASIM KHAN, J.----Briefly the facts of the case are that pursuant to an advertisement published in print media flashing vacancies of constables (BPS-05), the petitioner also submitted their application forms and on completion of process, the following category wise merit list was prepared and displayed on 30.05.2016:-

Sr. No.	Category	Number of appointees
1	Open Merit	2065
2	Ex-Army men	2
3	Minorities	58
4	Female	176

While 115 candidates, including present petitioners were kept in the waiting list. Through this writ petition, precise grievance of the petitioners is that after issuance of merit list, some selectees were not issued appointment letters on the basis of non-verification of documents, for not having good antecedent and even for not having physical standards after examination by the medical board as required for the job and some selectees did not join after completion of all formalities for the reasons best known to them. A waiting list of 115 candidates including present petitioners was prepared, affixed and they were not offered appointments against the remaining vacant posts and the department published new advertisement to fill the vacant seats through fresh process.

2. It is argued by learned counsel for the petitioners that without challenging the merit list or the selection process, the petitioners have a straightforward case i.e. once the candidates who were offered appointments but they did not join, the seats became vacant and the petitioners who were admittedly on the waiting list and thus a vested right had accrued in their favour, must have been offered appointments. Therefore, without offering appointments to the waiting list candidates, new advertisement to fill in the vacant posts through a fresh selection process is not the legal course, rather it frustrates the basic purpose of preparation of waiting list. In support of his argument, the learned counsel placed reliance on the case "Government of N.-W.F.P through Secretary, Education Department, Peshawar and others v. Qasim Shah" (2009 SCMR 382) and "Sumara Umar Awan v. Chancellor Gomal University, D.I. Khan and 4 others" (2014 PLC (C.S.) 526).

3. On the other hand, it has been argued by learned law officer that waiting list will be valid for thirty days after display of final list and as the merit list was displayed on 30.05.2016, therefore, after 30.06.2016 the waiting list became redundant, as such,

fresh advertisement was issued. In this respect, Standing Order No.06/2015 issued by Government of the Punjab, Police Department has been referred.

4. I have heard the arguments of learned counsel for the parties at considerable length and perused the record with their assistance.

5. As shall be seen from the above narration of facts and the arguments of learned counsel for the parties, no challenge has been thrown to the recruitment process, subject matter of this writ petition and precisely the question involved in this case is the effect of waiting list. Before proceeding further, a table is drawn hereunder to clarify the final position:-

DETAIL OF RECRUITMENT OF CONSTABLES/LADY CONSTABLES NOVEMBER, 2015.					
Sr. No.			Recruited	Remaining	Remarks
1	OPEN MERIT	1611	1564	47	-
2	WOMAN QUOTA	345	175	170	Unreserved (remaining seat to be filled by the male candidates)
3	MINORITY QUOTA @ 15%	115	52	63	63 Carry Forward
4	EX-ARMY PERSONNEL QUOTA @ 10%	230	2	228	As 10% of the vacancies is the maximum limit of recruiting ex-army personnel in the recruitment process, hence, the remaining seats to be filled through the general merit.
5	TOTAL VACANCIES	2301	1793	508-63=445	63 Carry Forward

There is no second view that after exhausting the above procedure, if the seats against reserved quota (excluding those reserved for minorities) remain vacant, the same would convert into open merit and had to be filled accordingly. As is visible from the above table taken from the reply submitted by Capital City Police Officer, Lahore, after completing the process, for all intents and purposes, according to the above drawn table, the remaining posts against open merit would become 445, and here come the candidates who fell on the waiting list.

6. The argument of learned law officer with regard to 30 days' life of the waiting list after display of merit list, is to be seen in the light of Standing Order No.06/2015. Sections 22, 23, 24 and 25 are reproduced hereunder:-

"22. MERIT LIST.

A merit list will be prepared by the Recruitment Board on the basis of marks obtained by a particular candidate in written test, family claims and interview.

Waiting list of 5% of the vacancies will be displayed along with result of successful candidates which will be valid for 30 days after display of final list.

23. BACKGROUND INVESTIGATION.

The District Police Officer shall send the requisite information of the successful candidates to the Addl: Inspector General of Police, Special Branch and also to the concerned Police Station of the District where the candidate resides.

The two offices i.e. Addl: IGP Special Branch and District Police Officer concerned shall put every effort to verify the personal character, academic certificates and other relevant facts of the successful candidates.

The verification reports shall be minutely scrutinized by the DPO before issuing appointment letters.

Candidates having criminal record or affiliation with any proscribed organization shall not be appointed.

24. MEDICAL CHECK-UP.

Initially selected candidates after verification of antecedents shall appear before a medical board. Call letters to the candidates at the residential address will be issued by the DPO concerned.

25. FINAL SELECTION/APPOINTMENT ORDERS.

Selection of candidates shall be based on merit. The selected candidates shall be allocated to respective Districts/Units according to their domicile and the vacancies available. The appointment orders shall be issued by the respective District Police Officers/competent authorities as the case may be.

Those candidates selected against the quota of SPU shall have to furnish a certificate stating therein that they are willing to serve any where in the Province and as per terms and conditions laid down in their appointment letter."

From bare perusal of para-22 above, it appears that in first part the merit list is to be prepared by the recruitment board on the basis of settled criteria and in the second part waiting list of 5% of the vacancies will be displayed along with result of the successful candidates and waiting list will be valid for thirty days after display of final list. The authority issuing the Standing Order intentionally did not use the word

"merit list" and it used the word "final list", which fact indicates that merit list is different from the final list. From paras 23, 24 and 25, it appears that after preparation of merit list, the DPO shall send requisite information of the successful candidates to the Addl: Inspector General of Police, Special Branch and also to the concerned Police Station of the District where the candidate resides and two offices i.e. Addl: IGP Special Branch and District Police Officer concerned shall verify the personal character, academic certificates and other relevant facts of the successful candidates and then this report will be scrutinized by the DPO before issuing the appointment letter. After successful scrutiny, the cleared candidates shall appear before a medical board after receiving call letters from the concerned DPO and then final selection will be made on successful completion of the process. This process clearly draws a distinction between merit list and the final list. Merit list is prepared on the basis of marks obtained by the candidates in the written test, family claim and interview, whereas, final list is to be prepared after verification of antecedents of the candidates as per merit list, their medical checkup and then they will be allowed to join and at this stage final list shall be prepared, hence, there is a hell of difference between the merit list and the final list. From use of two words i.e. merit list and the final list in para-22 of the Standing Order, ibid, it becomes crystal clear that after completion of recruitment process as per merit list and after joining the candidates against their posting, the waiting list will come to surface. This fact is further clarified by the merit list itself which has been produced before this Court, wherein, it has been clearly mentioned that "This result is by no means final and if any of the candidates is found ineligible or his documents are found fake/forged, his result will stand cancelled." Hence, the list dated 30.05.2016 is only the merit list and not the final list and it could not be said that after thirty days of this list, the list of the waiting candidates would stand scratched.

7. Another aspect of the matter is that some of the candidates who were offered appointments on open merit, minority quota or even women quota, have been allowed to join their appointments in the year 2017. In this respect a chart has been provided by the respondents themselves and for ready reference the same table, showing order numbers, date of issuance, number of Constables and the dates of joining, is drawn hereunder:-

A perusal of the above chart shows that final appointment letters were issued to five candidates on 22.04.2017 and they joined on 26.04.2017, and on this date the above mentioned process from merit list was completed and then the final list had to be prepared. Thereafter, the period of thirty days would reckon for the waiting list candidates.

8. The question of status of the candidates figuring in the waiting list has been decided by the Hon'ble Supreme Court of Pakistan in the case "Government of N.-W.F.P through Secretary, Education Department, Peshawar and others v. Qasim

Shah" (2009 SCMR 382) and "Sumara Umar Awan v. Chancellor Gomal University, D.I. Khan and 4 others" (2014 PLC (C.S) 526), wherein, it has been held that:-

"when some of the selected candidates do not join the service, such pots remain vacant and it was imperative for the department to have considered the remaining candidates for appointment against said posts. Such posts cannot be kept vacant till the next process of recruitment, if some of the selected candidates were still available on the waiting list."

Thus, it was concluded that failure of the department to appoint the persons from waiting list, was not in accordance with the fair practice of recruitment. The above verdict of the Apex Court was followed in the case "Sumara Umar Awan v. Chancellor Gomal University, D.I. Khan and 4 others" (2014 PLC (C.S.) 526), and it was held that drill of subsequent requisition in ordinary course to re-advertise the vacancy would on one hand frustrate the procedure adopted and on the other, would deprive successful candidates whose names appeared in the waiting list, and to whom a vested right had been accrued.

9. For what has been discussed above, the stance of the respondent department that waiting list would remain valid only for thirty days w.e.f. display of merit list, is nullity in the eyes of law. The list of waiting candidates will come to surface only after completion of recruitment process from the merit list and preparation of final list of the selected candidates who join their posting. Consequently this writ petition is allowed and the respondent department is directed to issue appointment letters to the petitioners and to all other remaining candidates whose names figured in the waiting list, on the ground of equality and good governance. However, they will be allowed to join subject to verification of their antecedents and other relevant documents and clearance of medical test, as required by law.

SA/M-24/L Petition allowed.

P L D 2021 Lahore 105
Before Muhammad Qasim Khan, C.J.
Mst. ASMAT PARVEEN---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No. 42705-B of 2020, decided on 15th October, 2020.

(a) Police Rules, 1934---
----R. 22.4 (as amended)---Roznamcha waqiati---Maintenance of hard copy---Scope---Wisdom underlying the maintaining of manual roznamcha is to rule out the possibility of any fabrication which can easily be incorporated in the soft copy, hence, in all eventualities soft copy can never be a substitute of manual register maintained in terms of previous practice in vogue---Careful perusal of the amendment made in R. 22.4 divulges that maintaining of manual roznamcha has not been prohibited rather it delineates that in addition to hard copy, soft copy (electronic copy) of the registers shall be prepared---High Court issued direction to Inspector General of police to immediately issue directions to the police hierarchy throughout the Province to keep maintaining manual roznamcha waqiati as per previous practice---Electronic copy of the same as introduced through amendment would continue simultaneously.

(b) Criminal Procedure Code (V of 1898)---
----S. 497---Control of Narcotic Substances Act (XXV of 1997), Ss. 9(c) & 51---Possession of narcotics---Bail, grant of---Scope---Accused was alleged to have been found in possession of narcotics---Contention of accused was that two different FIRs were registered at the same police station within a span of ten minutes---First FIR was against her husband with regard to recovery of narcotic substance in front of his house while the other FIR was registered against the accused narrating the story that the charas was recovered from her and venue of recovery was mentioned as backside of the same house---Possibility of maneuvering false case implicating the accused in the case at the hands of complainant/local police could not be ruled out---Accused was a woman folk who was stated to be previous non-convict and behind the bars since the date of her arrest---Investigation being complete, person of the accused was no more required for further investigation---Sufficient grounds existed to interfere into the matter to grant relief of bail under S.51 subsection (2) of the Control of Narcotic Substances Act, 1997---Petition for grant of bail was allowed, in circumstances.
Muhammad Ehsan Gondal for Petitioner.
Ch. Sarfraz Ahmad Khattana, Deputy Prosecutor General with Jawad Ahmad Dogar, DIG (Legal), Tariq Mehmood Sukhera, S.P. (Investigation) and Saleem Ahmed, S.P. (Investigation) along with record for Respondents.

ORDER
MUHAMMAD QASIM KHAN, C.J.---Through the instant petition, petitioner seeks indulgence of this Court for her enlargement on post arrest bail in case FIR No.

293/2020 dated 21.06.2020 registered under section 9(c) of the Control of Narcotic Substances Act, 1997 at Police Station Miana Gondal, District Mandi Baha ud Din.

2. During the course of proceedings on 30.09.2020, learned counsel for the petitioner had vehemently argued that the instant FIR was lodged with mala fide intention in order to satisfy ulterior motives. In support of his contention learned counsel had brought into the notice of this Court that two different FIRs were registered at the same police station within a span of ten minutes: viz. FIR No.292/2020 was registered at 3:00 p.m. against husband of the petitioner (Muhammad Rafique) with regard to recovery of narcotic substance in front of his house while the instant FIR (No.293/2020) was registered at 3:10 p.m. against the present petitioner while narrating the story that charas was recovered from her and venue of recovery was mentioned backside of the same house. In order to evaluate the contention of learned counsel for the petitioner and ascertain the exact situation, the Superintendent of Police, Mandi Baha-ud-Din was directed to produce attested copy of 'roznamcha waqiyati' of the concerned Police Station. However, the same could not be produced. Jawad Ahmad Dogar, D.I.G. (Legal), who was present in connection with another case entered appearance and stated that through notification dated 15.12.2017 issued by the Provincial Police Officer, Government of the Punjab, amendments have been made in the Police Rules, 1934. A copy thereof has been placed on record, which is reproduced as under:-

"No.43604/DIG/I.T:--- In exercise of the powers conferred under Article 112 of the Police Order, 2002 (22 of 2002), the Provincial Police Officer, with the approval of Government of the Punjab, is pleased to direct that in the Police Rules, 1934, the following further amendments shall be made:--

AMENDMENTS

In the Police Rules, 1934, in Chapter XXII:

(1) for rule 22.3, the following shall be substituted:

"22.3, Station Clerk:- (1) A Station clerk shall:

(a) Be a literate head constable or IT literate officer;

(b) Work under the supervision of the officer incharge of the police station;

(c) Act as a clerk, accountant and record keeper; and

(d) Be the custodian of the property at the police station.

(2) A station clerk may be assisted by one or more assistant clerks.

(3) The Provincial Police Officer may, by general or special order, assign any one or more tasks to any officer mentioned above."; and

(2) in rule 22.4, for clause (a), the following shall be substituted:

(a) He shall

(i) maintain hard as well as soft copy (electronic copy) of the registers as per orders of the Provincial Police Officer;

(ii) dispose of and be responsible for early disposal of all the correspondence as per instructions of the officer incharge of the police station; and

(ii) write all reports and returns called for by the competent authority."

3. It is pertinent to mention that there was a wisdom underlying the maintaining of manual roznamcha so as to rule out the possibility of any fabrication, which can

easily be incorporated in the soft copy. Hence, in all eventualities soft copy could never be a substitute of manual register maintained in terms of previous practice in vogue. Moreover, careful perusal of the amendment made in rule 22.4 divulges that maintaining of manual roznamcha has not been prohibited rather it delineates that in addition to hard copy, soft copy (electronic copy) of the registers shall be prepared. In this view of the matter, this Court is left with no other option except to issue a direction to Inspector General of Police, Punjab/Provincial Police Officer to immediately issue instructions to the police hierarchy throughout the Punjab to start/keep maintaining manual roznamcna waqiati as per previous practice. Moreover, the electronic copy of the same as introduced through amendment shall continue simultaneously. Reference in this regard may also be placed on the pronouncements made in the judgments reported in the cases of Muhammad Tariq v. Station House Officer, Police Station Saddar Jampur and another (2019 PCr.LJ 1403) and Khatoon Bibi v. The State and others (2020 LHC 2463). It is made clear that any lapse in this behalf shall be taken seriously. Inspector General of Police Punjab/Provincial Police Officer shall submit compliance report in this regard to the Registrar of this Court.

4. As far as merits of the case are concerned though it is alleged that at the time of arrest of the petitioner 2000 grams contraband charas was allegedly recovered from her, however, if the factum of lodging of FIR No.292/2020 against husband of the petitioner coupled with venue of recovery i.e. same house is juxtaposed with the facts of the instant case, this Court is persuaded to believe that possibility of manoeuvring false case implicating the petitioner in the instant case at the hands of complainant/local police cannot be ruled out. (Reliance is placed on the case law reported as 2010 MLD 1908 (Ziarat Khan v. The State). The petitioner is a woman folk, who is stated to be previous non-convict and behind the bars since the date of her arrest. Moreover, investigation being complete person of the petitioner is no more required for further investigation. All these facts when evaluated on the judicial parlance persuade this Court to believe that there exist sufficient grounds to interfere into the matter to grant the relief of bail under section 51(2) of the Control of Narcotic Substances Act, 1997. Accordingly, this petition is allowed and petitioner is admitted to post arrest bail subject to her furnishing bail bond in the sum of Rs.100,000/- (one lac rupees) with one surety in the like amount to the satisfaction of learned trial court.

SA/A-2/L Bail granted.

PLJ 2021 Cr.C. (Lahore) 65
Present: **MUHAMMAD QASIM KHAN, CJ.**
ABDUL GHAFOOR BHATTI--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 26350-B of 2020, decided on 26.6.2020.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498 & 249-A--Pakistan Penal Code, (XLV of 1860), S. 1860, S. 489-F--Pre-arrest bail, confirmed--Allegation of--Dishonoured of cheque--Compromise between parties--As per record earlier complainant got registered a case *vide* FIR No. 415 of 2018 at same Police Station for offence under Section 406, PPC against son of petitioner regarding same transaction--On 18-09-2018 compromise was affected between parties and son of petitioner was granted post arrest bail--Subsequently, son of petitioner was acquitted of charge *vide* judgment dated 11-03-2020 by Additional Sessions Judge, Sialkot, in application under Section 249-A, Cr.P.C--During investigation, Investigating Officer has concluded that in present case disputed cheque was given by petitioner to complainant as guarantee of his son--These facts and circumstances sufficiently establish that disputed cheque was issued to complainant as guarantee and complainant has involved petitioner in this case with *mala fide* and ulterior motive--Concession of pre-arrest bail is meant for innocent persons--Resultantly, this petition is accepted and ad interim pre-arrest bail already granted to petitioner is hereby confirmed. [P. 65 & 66] A

C.M. Aslam, Advocate for Petitioner.
Mr. Asad Ali Bajwa, Deputy Attorney General-I for State.
Mr. Muhammad Saad Ullah Sial, Advocate for Complainant (filed power of attorney today).
Date of hearing: 26.6.2020.

ORDER

In continuation of order dated 16-06-2020, whereby petitioner was granted ad interim pre-arrest bail in the instant case *i.e.* FIR No. 328 of 2019, for offence under Section 489-F, PPC, registered at Police Station Hajipura, District Sialkot, I have further heard learned counsel for the parties and observed that as per record earlier complainant got registered a case *vide* FIR No. 415 of 2018 at the same Police Station for offence under Section 406, PPC against Muhammad Yasin son of the petitioner regarding the same transaction. On 18-09-2018 compromise was affected between the parties and Muhammad Yasin was granted post arrest bail. Subsequently, Muhammad Yasin was acquitted of the charge *vide* judgment dated 11-03-2020 by learned Additional Sessions Judge, Sialkot, in application under Section 249-A, Cr.P.C. During investigation, Investigating Officer has concluded that in the present case disputed cheque was given by the petitioner to complainant as guarantee of his son Muhammad Yasin. These facts and circumstances sufficiently establish

that disputed cheque was issued to the complainant as guarantee and complainant has involved the petitioner in this case with *mala fide* and ulterior motive. Concession of pre-arrest bail is meant for the innocent persons. Resultantly, this petition is ***accepted*** and ad interim pre-arrest bail already granted to the petitioner is hereby ***confirmed,*** subject to furnishing fresh bail bonds in the sum of Rupees One Lac (Rs.1,00,000/-), with one surety, in the like amount, to the satisfaction of trial Court.

(A.A.K.) Bail confirmed

PLJ 2021 Lahore (Note) 6

Present: **MUHAMMAD QASIM KHAN, J.**

INAMULLAH KHAN--Petitioner

versus

DISTRICT COORDINATION OFFICER, BHAKKAR and 4 others—Respondents

W.P. No. 16034 of 2014, decided on 23.4.2015.

Constitution of Pakistan, 1973--

----Art. 199--Application for post of SSE (Methematic)--Cut date for NTS examination--Entitlement for appearance in NTS examination--Eligibility for appointment--Receiving of application after last date for submission of applications--Cut date for examination of NTS was 20.11.2013 and as per advertisement and Govt. policy, candidates whose final result was not announced before last date for filing of applications were not eligible to file application and appear in written test and admittedly, last date for receiving application by NTS was 20.11.2013--On cut date Respondent No. 5 was not entitled to appear before NTS examination and for same reason, was not eligible to be considered for appointment against post of SSE--Although, Law Officer under instructions and counsel representing Respondent No. 5 referred Letter No. SO(SE-IV) 2-6/2012 Govt. of Punjab School Education Department, issued by Secretary School Education and stated that latter on persons whose results were received latter were allowed to appear in examination--I am astonished that stance of official of Govt. is against record--This relaxation was with regard to late receipt of result from NTS and not with regard to results declared by educational institution after date for applying NTS Test--Petition was allowed. [Para 5 & 5] A, B & C

Mr. Muhammad Aslam Chaudhry, Advocate for Petitioner.

Mr. Imtiaz Ahmad Kaifi, Additional Advocate General for State.

Mr. Muhammad Ashraf Nawaz, Advocate for Respondent No. 5.

Date of hearing: 23.4.2015.

ORDER

Learned counsel for the petitioner submits that petitioner has been deprived by the illegality committed by Respondents No. 1 to 4 during recruitment process for the post of SSE(Mathematic). Further submits that Respondent No. 5 was not eligible to be appointed as he was not qualified till the last date of receiving of applications.

2. On the other hand, learned Law. Officer under instructions submits that process was completed in a transparent manner and if any' illegality has been committed *i.e.* on the part of Respondent No. 3.

3. Learned counsel representing Respondent No. 5 submits that Respondent No. 5 is eligible to be appointed having educational qualifications prescribed for the said post and he fairly proceeded in the recruitment process and he could not be deprived from the right of appointment which accrues in his favour.

4. Heard. Record perused.

5. Petitioner applied for the post of SSE (Mathematic) and admittedly the cut date for the examination of NTS was 20.11.2013 and as per advertisement and government policy, the candidates whose final result was not announced before the last date for filing of applications were not eligible to file application and appear in written test and admittedly, last date for receiving the application by the NTS was 20.11.2013. Although, Respondent No. 5 appeared in examination held in May-July, 2013 but the result was declared on 02.1.2014 and this fact could not be denied by the departmental authority which establishes that on the cut date Respondent No. 5 was not entitled to appear before NTS examination and for the same reason, was not eligible to be considered for the appointment against the post of SSE. Although, learned Law Officer under instructions and learned counsel representing Respondent No. 5 referred Letter No. SO(SE-IV) 2-6/2012 Government of the Punjab School Education Department, dated Lahore, January 28, 2014 issued by the Secretary School Education and stated that latter on the persons whose results were received latter were allowed to appear in examination. I am astonished that stance of the official of the government is against the record. In this letter, it has been clearly mentioned that:

> *"in continuation of this Department's policy letter of even number dated 31.07.2013 and 21.11.2013, the Chairmen, District Recruitment Committee/District Coordination Officers are requested to entertain the applications of the candidates for the post of Educators who have passed "Post Specific Entry Test" through National Testing Service (NTS) but they were not able to apply by 20.01.2014 due to late receipt of results from NTS".*

6. Bare reading of this paragraph clearly shows that this relaxation was with regard to the late receipt of result from NTS and not with regard to the results declared by the educational institution after the date for applying NTS Test.

7. For what has been discussed above, this writ petition is allowed. Resultantly, officials are directed if after excluding the name of Respondent No. 5, petitioner is entitled for appointment on merit against the post of SSE (Mathematic), the appointment letter be issued to him.

8. If any other post of SSE(Mathematic) is vacant, then Respondent No. 5 be adjusted against the said post as he has not concealed any fact and it is the departmental authority who misconstrued their own letter. I am fortified in this regard by the judgment of apex Court reported in a case titled *"Muhammad Zahid Iqbal and others versus D.E.O., Mardan and others"* (2006 SCMR 285) and *"Province of Punjab through Secretary-Agriculture, Government of Punjab and others versus Zulfiqar Ali"* (2006 SCMR 678).

(Y.A.) Petition allowed

PLJ 2021 Cr.C. (Note) 8
[Lahore High Court, Lahore]
Present: **MUHAMMAD QASIM KHAN, J.**
MUHAMMAD ARIF and another--Appellants
versus
STATE and another—Respondents

Crl. A. No. 547 of 2016, heard on 11.1.2018.

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

----S. 302(b)--Conviction and sentence--Challenge to--Qatl-e-amd--Benefit of doubt to accused--High Court is convinced that since name of accused/appellant was not mentioned in FIR; his features were not given therein, nor even there is any supplementary statement to his effect, identification before Court after so long, is highly doubtful and further motive is also not established against him, therefore, prosecution has badly failed to prove charge against accused/appellant--Co-accused was implicated in case only to extent of motive, which has been disbelieved by High Court--As such, irrespective of fact that co-accused has been acquitted and said acquittal has not been challenged by complainant or prosecution, in light of principle "sifting grain from chaff, case of accused/appellant can be examined separately--It is a case wherein FIR was lodged with all possible promptness; accused/appellant was nominated in FIR with specific attribution; role assigned to him with regard to infliction of injury on person of deceased, stands fully corroborated by post-mortem examination of deceased and further prosecution witnesses also toes line of each other with regard to his participation in occurrence as well as role--Therefore, prosecution remained fully successful in establishing its case against accused/ appellant, as such, his conviction u/S. 302(b) PPC appears to be unexceptionable--At same time High Court with reference to report of Punjab Forensic Science Agency has observed that crime weapon recovered from accused/appellant did not match with crime empties collected from place of occurrence, as such, though recovery is just a corroborative piece of evidence, still said factum along with fact that motive also could not be established by prosecution, same can be taken as mitigating factors while imposing sentence--It otherwise, life imprisonment is equally a legal sentence under Section 302(b), PPC, therefore, sentence of life imprisonment recorded against accused/appellant also befits in facts and circumstances of instant case--Appeal was dismissed.

[Para 14, 15 & 16] A, C & D

"Falsus in uno-falsus in omnibus"--

----Legal proposition is well settled on point, as Ilon'ble Supreme Court of Pakistan in its various judgments has already held that doctrine of *"falsus in uno falsits in omnibus"* (false in one thing, false in all), is not applicable in prevalent system of criminal administration of justice--Similarly, there is no rule having universal applicability that where some accused were not found guilty, other accused would ipso facto stand acquitted, rather it is primary duty of Court to sift grain from

chaff--Similarly, there is no cavil to proposition that grain has to be sifted from chaff in each case, in light of its own peculiar circumstances. [Para 15] B

1973 SCMR 162, 2001 SCMR 177 and PLD 2007 SC 71.

Mr. Shafiq Ahmad Bhutta, Advocate for Appellants.

Nemo for Complainant.

Mr. Muhammad Amjad Rafiq, Additional Prosecutor General for Respondent.

Date of hearing: 11.1.2018.

JUDGMENT

Muhammad Arif, Muhammad Yaqoob (accused/appellants) along with *Mst.* Azra Bibi (acquitted co-accused) were tried by learned Additional Sessions Judge, Pasrur in case FIR No. 223 dated 07.08.2014 for offences under Sections 302/109/34, PPC registered at police station Sabazpir District Sialkot and *vide* judgment dated 24.02.2016, *Mst.* Azra Bibi was acquitted of the charges, whereas, Muhammad Arif and Muhammad Yaqoob (accused/appellants) were convicted under Section 302(b), PPC and both were sentenced to imprisonment for life. They were further directed to pay Rs. 200,000/- as compensation to the legal heir of the deceased, failing which they had to suffer simple imprisonment for six months each. Benefit of Section 382-B Cr.P.C was extended. Through this appeal, above conviction and sentence has been challenged.

2. Briefly the facts of the case are that *vide* complaint Ex.PB Muhammad Maskin complainant reported the matter to the police to the effect that on 07.08.2014 he along with his brother Abdul Rasheed, nephews Zain, Muhammad Samma and *"Bhanja"* Muhammad Tanvir, went to village Naungaran at darbar "Baba Kokey Shah" on motorcycles to pay their *"salaam"*. On way back to village Jandiala at about 5.00 p.m., when they reached near *"Defence Bund Badhari"* accused Muhammad Arif along with an unknown accused armed with pistols .30-bore came on motorcycle, intercepted the complainant and others. Accused Muhammad Arif gave pistol fire shot on complainant brother Abdul Rasheed which landed on his head. Unknown accused also made fire shot with his pistol which hit the abdomen of Abdul Rasheed, who fell on the ground and succumbed to the injuries, whereas, accused fled away from the spot on their motorcycle by making aerial firing. According to the complainant the occurrence was witnessed apart from him, by Muhammad Samma and Muhammad Tanvir.

The motive was alleged to be that murder was commitment under the abetment of *Mst.* Azra Bibi (wife of Abdul Rasheed deceased) because Muhammad Arif accused had illicit relations with her and Abdul Rasheed used to forbid her.

Subsequently, on 09.08.2014 the complainant moved another application Ex.PC to the police, wherein, he disclosed the name of unknown accused as Muhammad Yaqoob.

3. Investigation in this case was conducted by Yafat Bar Sub-Inspector (PW-12) who while appearing in the witness box deposed that after receiving information he proceeded to the place of occurrence, inspected the dead body, prepared

application for post-mortem examination Ex.PN, injury statement Ex.PO, inquest report Ex.PP and sent the dead body for post-mortem examination. He recorded statements of witnesses, took three empties P.6/1-3 and four live bullets *vide* memo. Ex.PG, took into possession blood stained earth *vide* memo. Ex.PA, motorcycle P.7 *vide* memo. Ex.PH. He took into possession cash and mobile phone from the pocket of the deceased, prepared rough site plan Ex.PQ and searched for the accused. On 08.08.2014, last worn clothes Shirt P.1, Shalwar P.2, Vest P.3 of the-deceased along with some papers were handed over to him, which he took into possession *vide* memo. Ex.PA. On 09.08.2014 the complainant submitted another application Ex.PE wherein he nominated Muhammad Yaqoob as accused. On 12.08.2014, he arrested Muhammad Arif accused, on whose disclosure and pointation on 23.08.2014 the I.O. recovered pistol P.4 along with three live bullets P.5/1-3 taken into possession vid memo. Ex.PE, prepared site plan of place of recovery Ex.PR. On 13.08.2014 *Mst.* Ara Bibi was arrested, whereas, Muhammad Yaqoob was arrested on 28.08.2014 and on 31.08.2014 on the disclosure and pointation of Muhammad Yaqoob, pistol .30-bore P.8 along with two live bullets P.9/1-2 was recovered and taken into possession *vide* memo. Ex.PK, the site plan of place of recovery is Ex.PS. On conclusion of investigation, he found all the three persons as accused and sent them to trial.

4. Charge was framed against the accused persons, they pleaded not guilty and claimed trial, where after the trial commenced and prosecution produced evidence, which consisted of statement of Yafat Sub-Inspector (PW-12) whose statement in brief has been given above; Muhammad Maskin complainant (PW-2) furnished eye-witness account as well as made statement about recoveries, Tanvir (PW-3) is another eye-witness of the occurrence and Dr. Muhammad Junaid (PW-9) who furnishing details of post-mortem conducted by him on 08.08.2014 at 5.30 a.m, deposed that deceased had the following external injuries:

"I) An oval wound 0.3 x 0.4 cm with jagged inverted margins back of left car. (entry wound)

II) An oval wound 1.3 x 1.4 cm with jagged everted margins above right ear. (exit wound).

III) An oval wound 0.4 x 0.5 cm with jagged inverted margins right cheek near right eye. (entry wound)

IV) A circular wound 1.5 x 1.5 cm with jagged everted margin back of lower part right of skull, (exit wound).

V) An oval wound 0.5 x 0.4 cm with jagged inverted margins and blacking around it right side outer aspect of lower chest, (entry wound).

VI) Circular wound 1 x 1 cm with jagged everted margins left side lower chest outer part. (exit wound)."

The rest of the witnesses are all formal and they made statements about various functions performed by them during the course of investigation. On close prosecution evidence, the accused when examined under Section 342, Cr.P.C. denied the prosecution evidence, however, they neither opted to produce defence evidence nor to appear on oath as required by Section 340(2), Cr.P.C. and on conclusion of the

trial the accused/appellants were convicted and sentenced as detailed in opening paragraph of this judgment, whereas, co-accused *Mst*. Azra was acquitted.

5. It is argued by learned counsel for the accused/appellants that *Mst.* Azra who had been nominated in the FIR with the allegation of abetment and source of motive has been acquitted by the learned trial Court by disbelieving the same set of witnesses; therefore, the entire prosecution case has become doubtful. The learned counsel further argued that Muhammad Yaqoob was not nominated in the FIR and his name was introduced by the complainant subsequently without any solid reasons. The learned counsel added that there are material contradictions in the statements of prosecution witnesses, who even otherwise, are related and chance witnesses and furthermore the medical evidence also contradicts the ocular account, whereas, the recoveries also remain doubtful, but the learned trial Court recorded conviction against the accused/appellants without proper and correct appraisal of evidence on record.

6. The learned law officer however, opposed the above arguments and contended that FIR was lodged with all possible promptness; the prosecution witnesses in their statements fully justified their presence at the place of occurrence at the time incident. Further argued that although name of Muhammad Yaqoob was not mentioned in the FIR but in the FIR one unknown person had been cited as accused and specific role had been attributed to him, therefore, if subsequently without any loss of time the complainant through application Ex.PC mentioned the name of Muhammad Yaqoob as accused, the defence cannot get any benefit of it. It was argued that even if one of the co-accused has been acquitted by the learned trial Court, no benefit thereof can be claimed by the accused/appellants, as the prosecution fully succeeded in establishing its case against both of them by ocular account, medical evidence as well as recoveries.

7. I have heard the arguments of learned counsel for the parties and perused the record.

8. It is case of the prosecution set out in the FIR and coming through statements of Maskin complainant (PW-2) and Tanvir (PW-3) that occurrence took place on 07.08.2014 at about 5.00 p.m. near *"Badhiari Bund"* and the matter was reported to the police through written complaint on the same evening at 6.30 p.m. Considering that police station was situated at a distance of fifteen kilometers from the place of occurrence, it can safely be said that FIR was lodged with promptness.

9. The ocular account in this case has been furnished by Muhammad Maskin complainant (PW-2) and Tanvir (PW-3). It is admitted fact that Muhammad Maskin is brother of Abdul Rasheed (deceased) and Tanvir is "*Bhanja*" of the complainant (related to the deceased). Therefore, being related witnesses, extra caution would be required to evaluate their statements to sustain the conviction of the accused/appellants. It is normal course in the villages that common villagers do visit shrines/darbar for their inner satisfaction. In the FIR as well as through their

statements before the Court, both the witnesses have satisfactorily explained their presence at the time and place of occurrence, which falls on way to the *"Darbar Baba Kokey Shah".*

10. In the FIR Muhammad Arif was nominated as the accused who inflicted .30-borc pistol fire shot injury on the head of Abdul Rashid, which pierced through his head. Second fire was alleged to have been filed by an unknown accused with .30-bore pistol which pierced through the belly of deceased. Furthermore, it was specifically alleged that murder was committed as Muhammad Arif accused/appellant had illicit relations with *Mst.* Azra (wife of the deceased) and deceased used to forbid Muhammad Arif. The prosecution witnesses also stuck to their stance during their statements before the Court to the extent of ocular account and role of Muhammad Arif accused/appellant and lengthy cross-examination on these witnesses could not shatter their testimonies.

11. Coming to the medical evidence, Dr. Muhammad Junaid (PW-9) explained that all the injuries were ante mortem caused by fire arm weapon and were sufficient to cause death in ordinary course of nature. The doctor had observed six injuries on the dead body, out of which three were entry and three exit wounds. According to the prosecution case both the accused including Muhammad Arif and one unknown (subsequently named as Muhammad Yaqoob) had similar kinds of weapons and considering the nature of injuries, there could be possibility that all injuries might have been caused by one and the same accused namely Muhammad Arif who was specifically nominated in the FIR with specific role. It is correct that in one of the entry wounds, blackening around it has been observed, whereas, rest of the two entry wounds do not have blackening, but this factor alone is not enough to say that injuries were caused by two accused from different angles or distances. The deceased once received the fire shot, could not have remained idle and as a natural course he might have been trying his best to shift and shuffle his place. Similarly, the accused while making repeated fire shots could not have remained stagnant and must have been changing his position to hide himself from the accused or to keep himself away from the counter attack, therefore the distance between the deceased and the attacker could vary during infliction of repeated fire arm injuries.

12. As regards motive, although it was specifically alleged in the FIR that Muhammad Arif accused/appellant had illicit liaison with *Mst.* Azra and as Abdul Rasheed used to forbid them, therefore, he was murdered under abetment by *Mst.* Azra wife of the deceased, but it has been observed that neither any witness was produced to establish the element of abetment, and for the same reason *Mst.* Azra was acquitted by the learned trial Court and furthermore, there is nothing on the record that said alleged illicit relationship of Muhammad Arif with *Mst.* Azra was ever raised by the deceased or the witnesses in the family or reported to the police. In addition to the above, the learned trial Court very rightly observed that the evidence of the PWs was clear which shows that during abadi of Azra Bibi and Abdul Rasheed deceased neither any quarrel look-place between them nor she filed any suit for

dissolution of marriage, therefore, these facts are sufficient to infer that motive although set, yet the same could not be established by the prosecution.

13. (i) After discussing the prosecution evidence as a whole, now I would take up the case of Muhammad Yaqoob accused/appellant. It is obvious that the FIR was got lodged by Maskin complainant (PW-2) through a written complaint Ex.PB on 08.08.2014, wherein, the name of Muhammad Yaqoob was not mentioned nor even the feature of unknown accused had been given, therefore, it cannot be said that omission of name of one of the accused was a slip of tongue or the police did not mention the name of Muhammad Yaqoob as accused for ulterior motives. Rather it was well thought out move by the complainant in lodging the FIR through a written complaint wherein details of the occurrence were given, Muhammad Arif and *Mst.* Azra were nominated as accused and one accused was shown to be unknown, but as discussed above no features were given by the complainant about said unknown assailant.

(ii) Furthermore, although motive was set in the FIR against *Mst.* Azra (acquitted accused) and Muhammad Arif (accused/appellant) but Muhammad Yaqoob was not linked with motive part in any manner. Afterwards, through application dated 9.8.2014 the complainant named Muhammad Yaqoob as one of the accused but neither any solid source was disclosed by the complainant as to how he could nominate Muhammad Yaqoob as one of the accused, nor in this application there is even a single word that said Muhammad Yaqoob was also tagged with the motive part of the occurrence. Furthermore, to his effect even there is no supplementary statement of PW-3 Muhammad Tanvir and accused Yaqoob was also not subjected to identification parade. I have minutely gone through the statement of Maskin complainant PW-2 and observe that even in his statement the complainant has not explained that how he came to know that the unknown accused shown in FIR was in fact Muhammad Yaqoob and furthermore, when no features were given in the FIR and no formal identification parade was held, involvement of said Muhammad Yaqoob accused/appellant in this case remains extremely doubtful, even if the witnesses say that they had identified Muhammad Yaqoob to be one of the accused who participated in the occurrence. Even otherwise, identification of the accused before the Court during the course of trial after quite a long period, is highly doubtful, for the reason that accused might have been appearing in the Court for the last so many dates and thus the witnesses had all opportunity to have repeatedly seen him before pointing out his identification.

14. As a result of above discussion, this Court is convinced that since the name of Muhammad Yaqoob accused/appellant was not mentioned in the FIR; his features were not given therein, nor even there is any supplementary statement to his effect, identification before the Court after so long, is highly doubtful and further motive is also not established against him, therefore, the prosecution has badly failed to prove the charge against Muhammad Yaqoob accused/ appellant. **Consequently, this appeal to his extent is allowed, his conviction and sentence is set-aside and he is ordered to be released forthwith if not required in any other case.**

15. Taking up the case of Muhammad Arif accused/appellant, through the learned counsel appearing on his behalf has tried to take the benefit of acquittal of co-accused *Mst.* Azra, but the legal proposition is well settled on the point, as the Ilon'ble Supreme Court of Pakistan in its various judgments has already held that the doctrine of *"falsus in uno falsits in omnibus"* (false in one thing, false in all), is not applicable in prevalent system of criminal administration of justice. Similarly, there is no rule having universal applicability that where some accused were not found guilty, other accused would ipso facto stand acquitted, rather it is the primary duty of the Court to sift the grain from chaff. In this regard, reliance can be placed on the case titled *"Somano v. State"* (1973 SCMR 162). Similarly, there is no cavil to the proposition that the grain has to be sifted from the chaff in each case, in the light of its own peculiar circumstances. In this regard, guidance is sought from the case titled *"Riaz Hussain v. The State"* (2001 SCMR 177). I would also like to refer the case of *"Ghulam Husain Soomro v. The State"* (PLD 2007 SC 71), wherein Hon'ble Supreme Court of Pakistan was pleased to hold as under:

> *"We may not be misunderstood to mean that an innocent person wrongly roped by prosecution or falsely involved by an unscrupulous Investigating Officer should be unreasonably dealt with or made escape goat but the Courts must maintain balance while arriving at the truth or falsehood of the matter by sifting the grain from the chaff. This may he treated as a rule of caution and circumspection."*

In addition to above, it has been observed that *Mst.* Azra co-accused was implicated in the case only to the extent of motive, which has been disbelieved by this Court. As such, irrespective of the fact that *Mst.* Azra co-accused has been acquitted and said acquittal has not been challenged by the complainant or the prosecution, in the light of principle *"sifting grain from the chaff",* the case of Muhammad Arif accused/appellant can be examined separately.

16. Having held so, it has been observed that it is a case wherein the FIR was lodged with all possible promptness; Muhammad Arif accused/appellant was nominated in the FIR with specific attribution; the role assigned to him with regard to infliction of injury on the person of the deceased, stands fully corroborated by post-mortem examination of the deceased and further the prosecution witnesses also toes the line of each other with regard to his participation in the occurrence as well as the role. Therefore, the prosecution remained fully successful in establishing its case against Muhammad Arif accused/appellant, as such, his conviction under Section 302(b), PPC appears to be unexceptionable. At the same time this Court with reference to the report of Punjab Forensic Science Agency (Ex.PV) has observed that crime weapon recovered from Muhammad Arif accused/appellant did not match with the crime empties collected from the place of occurrence, as such, though the recovery is just a corroborative piece of evidence, still the said factum along with the fact that motive also could not be established by the prosecution, the same can be taken as mitigating factors while imposing the sentence. Even otherwise, life imprisonment is equally a legal sentence under Section 302(b), PPC, therefore, the

sentence of life imprisonment recorded against Muhammad Arif accused/appellant also befits in the facts and circumstances of the instant case. Consequently, this appeal to the extent of Muhammad Arif accused/ appellant is dismissed, his conviction/sentence as recorded by the learned trial Court is sustained. The case property, if any, shall be disposed of in accordance with law, whereas, the record of the trial Court be sent back immediately.

(A.A.K.) Appeal dismissed

PLJ 2021 Lahore 98

Present: **MUHAMMAD QASIM KHAN, J.**

MUHAMMAD MUMTAZ AKHTAR--Petitioner

versus

ADDITIONAL SESSIONS JUDGE, etc.—Respondents

W.P. No. 233516 of 2018, decided on 7.3.2019.

Microfinance Institution Ordinance, 2001--

----S. 3(2)(3)--Legal position--Micro Finance Institutions cannot deemed to be a banking company--Jurisdiction--All microfinance institutions have been specifically taken out of pail of other banking laws by making legal position clear that no such institutions would be considered as banking company--Banking Court has no jurisdiction to deal with any matter other than business of Scheduled Bank, and definitely microfinance institutions are not included in list of Scheduled Banks--It becomes crystal clear that remedy before banking Court would be available to exclusion of all other forums only when Financial Institutions (Recovery of Finances) Ordinance, 2001 would attract, whereas, in terms of Section 3(2) of Microfinance Institutions Ordinance, 2001, financial institutions shall not apply to microfinance institutions.

[Pp. 100 & 101] A, B & C

PLJ 2013 Lahore 606 and 2017 SCMR 1218.

Microfinance Institution Ordinance, 2001--

----S. 3(2)--Criminal Procedure Code, (V of 1898), Ss. 22-A/22-B--Repayment of loan--Issuance of cheque--Allegation of dishonesty--Application of criminal and general laws--Jurisdiction--Challenge to--NRSP Microfinance Bank Limited being only a microfinance institution and not being included in list of Scheduled Banks, cannot take immunity from applicability of general law *i.e*. Criminal Procedure Code--Therefore, both above referred citations do not advance case of petitioner--Microfinance institutions cannot be termed as financial institution within contemplation of Financial Institutions (Recovery of Finances) Ordinance, 2001, to say that its matter could only be tried by Banking Court--Thus, Code of Criminal Procedure being fully applicable, application filed under Section 22-A/22-B Cr.P.C. on behalf of microfinance institution was fully competent and impugned orders passed by learned Ex-officio Justice of Peace do not suffer from any jurisdictional or legal error. [P. 102] D & E

Mian Shahid Ali Shakir, Advocate for petitioner.

Mr. Zeeshan Ali Khurshid, Advocate for Respondent No. 3.

Mr. Zafar Hussain Ahmad, Additional Advocate General for State.

Date of hearing: 7.3.2019.

ORDER

This single order is meant to decide three connected matters *i.e*. (i) Writ Petition No. 233516 of 2018 "Muhammad Mumtaz Akhtar versus ASJ, etc., (ii) Writ Petition No. 233530 of 2018 *"Muhammad Nawaz Akhtar versus ASJ, etc."*, and (iii) Writ Petition

No. 233532 of 2018 *"Muhammad Sarfraz Akhtar versus ASJ, etc*. as all these have arisen out of similar facts and circumstances.

2. Briefly the facts of the case are that Abdul Qadir (Respondent No. 3 in all these three petitions) in his capacity as Manager NRSP (National Rural Support Program) Microfinance Bank Shorkot Road, Toba Tek Singh filed separate applications under Section 22-A Cr.P.C., to seek direction for registration of criminal cases against all the three writ petitioners, with the allegation of dishonestly issuing a cheques pleading that the same had been issued by the petitioners towards repayment of loan. The learned Additional Sessions Judge/Ex-officio Justice of Peace *vide* three separate orders of even date *i.e.* 29.08.2018 directed the SHO to record statement of the applicant/Respondent No. 3 and proceed further in accordance with law. These orders have been challenged by the respective petitioners through their independent writ petitions.

3. The main contention of learned counsel for the petitioners before this Court is that the petitioner (Muhammad Mumtaz Akhtar) had obtained loan from NRSP (National Rural Support Program) Microfinance Bank, which is established with a purpose to provide Micro Credit, therefore, in case of a dispute between NRSP Microfinance Bank and its customers, criminal proceedings could not be initiated and the only course available to the said bank was to file a complaint before the Banking Court. In support of his contentions the learned counsel placed reliance on the case *"Syed Mushahid Shah and others versus Federal Investment Agency and others"* (2017 SCMR 1218) and *"Muhammad Asif Nawaz versus ASJ, etc"* (PLJ 2013 Lahore 606). The learned counsel concluded his arguments by submitting that the applications filed by Respondent No. 3 before the learned Additional Sessions Judge/Ex-officio Justice of Peace were neither maintainable nor could be entertained and thus the impugned orders are not sustainable in the eye of law.

4. On the other-hand, learned law officer as well as the learned counsel for the respondent-Bank have opposed these writ petitions by arguing that per force of Section 3 of the Microfinance Ordinance, the Banking Companies Ordinance and any other law for the time being in force relating to banking companies or financial institutions shall not apply to microfinance institutions, as microfinance institutions cannot be deemed to be a banking company for the purposes of said ordinance, therefore, no other remedy under the Banking Laws was available and there was no bar for the respondent Bank to have recourse to the learned Ex-officio Justice of Peace and the orders impugned herein, are perfectly in accordance with law.

5. I have considered the arguments of learned counsel for the parties at length and perused the record.

6. Before proceeding further, I would like to reproduce Section 3 (2) of the Microfinance Institutions Ordinance, 2001:
"Save as otherwise provided in this Ordinance, the Banking Companies Ordinance and any other law for the time being in force relating to Banking Companies or

financial institutions shall not apply to microfinance institutions licensed under this ordinance and microfinance institution shall not be deemed to be a Banking company for the purpose of the said Ordinance, the State Bank of Pakistan Act, 1956 (XXXIII of 1956), or any other law for the time being in force relating to Banking companies."

As shall be seen from the above reproduced provision of Microfinance Institutions Ordinance, 2001, the same in fact is an ouster clause and by specific insertion of said Section 3 sub- section (3) in the Ordinance ibid, all the microfinance institutions have been specifically taken out of the pail of other banking laws by making the legal position clear that no such institutions would be considered as banking company. On this legal proposition that Court in the case *"NRSP Microfinance Bank Limited versus The Additional Sessions Judge and two others"* Writ Petition No. 7964 of 2018-BWP has held that Banking Court has no jurisdiction to deal with any matter other than the business of Scheduled Bank, and definitely the microfinance institutions are not included in the list of Scheduled Banks.

7. As regards the contention of learned counsel for the petitioners with reference to case law *i.e. "Syed Mushahid Shah and others versus Federal Investment Agency and others"* (2017 SCMR 1218) and *"Muhammad Asif Nawaz versus ASJ, etc"* (PLJ 2013 Lahore 606), there can be no second opinion that in the cited cases, the Hon'ble Supreme Court of Pakistan has held that whenever an offence is committed by a customer of a financial institution within the contemplation of the Financial Institutions (Recovery of Finances) Ordinance, 2001, it could only be tried by the Banking Court constituted thereunder and no other forum. On careful perusal of the judgment of the apex Court it becomes crystal clear that remedy before the banking Court would be available to the exclusion of all other forums only when the Financial Institutions (Recovery of Finances) Ordinance, 2001 would attract, whereas, in terms of Section 3(2) of the Microfinance Institutions Ordinance, 2001, financial institutions shall not apply to microfinance institutions.

8. Similarly, in the case *"Muhammad Asif Nawaz versus Additional Sessions Judge, etc."* (PLJ 2013 Lahore 606), the matter with regard to an order for registration of case passed by learned Ex-officio Justice of Peace on an application filed on behalf of Faysal Bank Limited alleging dishonour of cheque issued by its customer towards payment of loan, had come under consideration and this Court held:

"6. Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is the provision relating to certain offences and its sub-section (4) deals with dishonest issuance of a cheque towards repayment of a finance or fulfillment of an obligation which is dishonoured on presentation. The punishment of said offence has been provided as one year or with fine or with both. Therefore, it becomes quite obvious that in the matter, like the one in hand, the jurisdiction only lies with the Banking Court established under the Financial Institutions (Recovery of Finances) Ordinance, 2001 and not before any other Court, until and unless the same is provided by law, by which the financial institution is established."

It is again clear that jurisdiction with the Banking Court established under the Financial Institutions (Recovery of Finances) Ordinance, 2001 would lie only when the bank/company is covered by the Financial Institutions (Recovery of Finances) Ordinance, 2001, whereas, in the instant case the NRSP Microfinance Bank Limited being only a microfinance institution and not being included in the list of Scheduled Banks, cannot take immunity from applicability of general law *i.e*. Criminal Procedure Code. Therefore, both the above referred citations do not advance the case of the petitioner.

9. In view of the above, this Court has no hesitation to hold that microfinance institutions cannot be termed as financial institution within the contemplation of the Financial Institutions (Recovery of Finances) Ordinance, 2001, to say that its matter could only be tried by the Banking Court. Thus, Code of Criminal Procedure being fully applicable, the application filed under Section 22-A/22-B Cr.P.C. on behalf of the microfinance institution was fully competent and the impugned orders passed by learned Ex-officio Justice of Peace do not suffer from any jurisdictional or legal error. These writ petitions therefore fail and are accordingly dismissed.

(M.M.R.) Petition Dismissed

2021 Y L R 702
[Lahore]
Before Shahid Hameed Dar and Muhammad Qasim Khan, JJ
MUHAMMAD AFZAL---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No. 12115-B of 2016, decided on 23rd November, 2016*.
Criminal Procedure Code (V of 1898)---
----S. 497---Bail---Fresh ground---Evidence of recovery witness---Scope---Accused filed fourth application for grant of bail on the ground that two recovery witnesses had not supported the prosecution case---Two of the earlier petitions had been decided on merits and the accused needed a fresh ground to render the petition meaningfully sustainable which was virtually non-existent, as evidence of two hostile formal prosecution witnesses generated no fresh ground in favour of the accused---Petition for grant of bail was dismissed, in circumstances.

The State through Advocate General, N.W.F.P. v. Zubair and 4 others PLD 1986 SC 173; Muhammad Siddique v. The State and another 2014 SCMR 304; Nazir Ahmad and another v. The State and others PLD 2014 SC 241 and Ghulam Qammber Shah v. Mukhtiar Hussain and others PLD 2015 SC 66 ref.
Fahad-ur-Rehman Tipu Zafar for Petitioner.
Tahir Mahmood Gondal, Standing Counsel for the Federation of Pakistan along with Tariq S.I. for the State.

ORDER
This is the 4th petition on the subject, on behalf of the petitioner. One of the earlier ones, Criminal Miscellaneous No. 6595-B of 2016, was dismissed as withdrawn after having been argued at length on 07.06.2016, the other one, Criminal Miscellaneous No. 8788-B of 2016, was also dismissed as withdrawn on 30.06.2016, but without any arguments thereon, whereas, the last one, Criminal Miscellaneous No. 10026-B of 2016, was dismissed on merits, vide order dated 04.08.2016.

2. Learned counsel for the petitioner has failed to hint at any fresh ground, except for the fact that two recovery witnesses had not supported the prosecution case and he repetitiously insisted that the petition in hand may be decided on merits. It must be known by the learned counsel that two of the earlier petitions had been decided on merits and he needed a fresh ground to render this petition meaningfully sustainable, which was virtually non-existent herein, as evidence of two hostile formal prosecution witnesses generated no fresh ground in favour of the petitioner. Guidance in this regard may be had from "The State through Advocate General, N.W.F.P. v. Zubair and 4 others" reported as PLD 1986 SC 173, Muhammad Siddique v. The State and another (2014 SCMR 304), Nazir Ahmad and another v. The State and others (PLD 2014 SC 241) and Ghulam Qammber Shah v. Mukhtiar Hussain and others (PLD 2015 SC 66). Sans existence of any fresh ground, this petition is dismissed in limine.
SA/M-23/L Bail declined.

KLR 2021 Criminal Cases 68
[Lahore (Multan)]
Present: **MUHAMMAD QASIM KHAN, J.**
Hafiz Shahid Pervez Ahmad
Versus
Director, Anti Corruption Establishment and others

W.P. No. 9721 of 2010, decided on 25th January, 2016.

Pakistan Penal Code (XLV of 1860)---
---Ss. 409 & 161 PPC---A criminal case is registered under section 154 Cr.P.C. and the investigation commences---During investigation material/evidence is collected from both the sides and thereafter it is seen by the I.O. that there is sufficient evidence/material against the accused to proceed against him in the court---The purpose of investigation is to find out the truth and place the same before the court and it is duty of the Investigating Officer not only to set up a case of the complainant party with such evidence as could enable the court to record the conviction; but also to bring out the truth---After the completion of investigation a report about the conclusion of investigation is prepared by the SHO under section 173 Cr.P.C. (Challan) and the same is put in court for judicial proceedings on it---One of the basic steps in any criminal case is taking cognizance of such actions---Only after taking the cognizance of offences, the judiciary comes into picture---If we apply the dictionary meaning to the word "cognizance", it simply refers to becoming aware or getting the knowledge of any such offences---The core purpose of criminal procedure is to provide the accused a full and fair trial in accordance with the principles of natural justice---There are various steps which should be followed in order to dispense justice and bring the guilty to the book---These include pre-trial procedures such as information, registration of cases, arrests, search and seizures etc; determining jurisdiction of police and courts regarding investigation and trial---Trial procedure includes cognizance of offences, initiation of proceedings etc; and finally the execution of final decision---A plain and dictionary meaning of word "cognizance" is 'taking note of', 'taking account of', 'to know about', 'to gain knowledge about', 'awareness about certain things' etc---The common understanding of the term 'cognizance' is "taking judicial notice by a court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter 'judicially'"---It may be further clarified here that when a magistrate applies his mind not for the purpose of proceeding as mentioned above, but for taking action of some other kind, like ordering investigation or issuing a search warrant for the purpose of investigation he cannot be said to have taken cognizance of the offence. ***(Paras 7, 8)***

For the Petitioner: **Shakeel Javed Chaudhry, Advocate.**
Mubashir Latif Gill, Assistant Advocate General with Syed Anwar Hussain, Additional Director, ACE.
Date of hearing: **25th January, 2016.**

ORDER

MUHAMMAD QASIM KHAN, J.--- Through this writ petition, the petitioner (Hafiz Shahid Pervez Ahmad) seeks quashing of FIR No.34/2010 dated 31.08.2010 under sections 409/161 P.P.C. read with section 5 of the Anti-Corruption Establishment Act II of 1947 registered at police station ACE, Sahiwal.

2. The main ground urged in support of this writ petition is that in terms of Section 63 of the Cooperative Societies Act, 1925 no court could take cognizance of any offence punishable under the said act except on a complaint in writing made by the Registrar or by a person authorized by him for the said purpose, but here in this case a private person lodged a complaint without any authorization as required by the Act, ibid.

3. The learned Assistant Advocate General opposed the above arguments with vehemence.

4. I have heard the arguments of learned counsel for the parties and examined the record.

5. Before proceeding further in the matter, I would like to reproduce Section 63 of the Cooperative Societies Act, 1925:-

"63. Cognizance of offences

> *No Court shall take cognizance of any offence punishable under this act except on a complaint in writing made by the Registrar or by a person duly authorized, for the purpose, by him."*

By bare reading of above clause, there remains no cavil to the proposition that the court would take cognizance of any offence punishable under the Act, ibid, only on a complaint which is either by the Registrar, or by a person authorized by him. It may be reemphasized here that the learned counsel for the petitioner could not refer any provision of the Act, ibid, that without filing of complaint by the authorities person, any restriction has been imposed on registration of the case, rather his sole argument is that court cannot take cognizance, except as provided in the above reproduced clause.

6. Here in this case, the admitted position is that after registration of the case the matter is still at the stage of investigation, may be, for the reason that a restraint order

had been passed by this Court on 04.10.2010. In the above background, the argument of the learned counsel for the petitioner on the face of it, is based on incorrect notion, for the reason that registration of a criminal case or investigation thereon is altogether different terminology from taking of cognizance or initiation of proceedings before the learned trial court. Almost similar question earlier came under consideration before this Court in the case "*INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN and others versus Mian ASIM FAREED and others*" (2006 C.L.D. 625), and this court had created a distinction between the investigation of case and taking of cognizance and disapproved quashing of, by holding that:-

> *"In the absence of any finding that the above mentioned offences mentioned in the F.I.R were false and malicious and in absence of a finding that if a particular forum or mode had been prescribed with respect to taking of cognizance of an offence then the same also implied prohibition regarding the registration of FIR., no such order could be passed nor the same could be approved. Needless to add that the registration of FIR and taking of cognizance of cases were two distinct and independent concepts under the criminal law; that if the intention of law-maker was to put any clog on the registration of F.IR then the Legislature would have said so specifically and that if the law put a condition only on the taking of cognizance then it could never be read to imply prohibition on registration of FIRs.*

With reference to the above cited case, this Court in another case "*PEER BAKHSH versus SHO, etc*" (KLR 2015 Criminal Cases 211), held that investigation would include proceedings for the collection of evidence conducted by a police-officer or by any person (other than Magistrate) who is authorized by a Magistrate in this behalf and that the investigation consists of several steps to be taken by the Police Officer to ascertain whether any offence has been committed at all and if so by whom and what is the evidence on which the prosecution is based.

7. A criminal case is registered under section 154 Cr.P.C. and the investigation commences. During investigation material/evidence is collected from both the sides and thereafter it is seen by the I.O. that there is sufficient evidence/material against the accused to proceed against him in the court. The purpose of investigation is to find out the truth and place the same before the court and it is duty of the Investigating Officer not only to set up a case of the complainant party with such evidence as could enable the court to record the conviction; but also to bring out the truth. After the completion of investigation a report about the conclusion of investigation is prepared by the SHO under section 173 Cr.P.C. (Challan) and the same is put in court for judicial proceedings on it.

8. One of the basic steps in any criminal case is taking cognizance of such actions. Only after taking the cognizance of offences, the judiciary comes into picture. If we apply the dictionary meaning to the word "cognizance", it simply refers

to becoming aware or getting the knowledge of any such offences. The core purpose of criminal procedure is to provide the accused a full and fair trial in accordance with the principles of natural justice. There are various steps which should be followed in order to dispense justice and bring the guilty to the book. These include pre-trial procedures such as information, registration of cases, arrests, search and seizures etc; determining jurisdiction of police and courts regarding investigation and trial. Trial procedure includes cognizance of offences, initiation of proceedings etc; and finally the execution of final decision. A plain and dictionary meaning of word "cognizance" is 'taking note of', 'taking account of', 'to know about', 'to gain knowledge about', 'awareness about certain things' etc. The common understanding of the term 'cognizance' is "taking judicial notice by a court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter 'judicially'". It may be further clarified here that when a magistrate applies his mind not for the purpose of proceeding as mentioned above, but for taking action of some other kind, like ordering investigation or issuing a search warrant for the purpose of investigation he cannot be said to have taken cognizance of the offence.

9. It is thus quite obvious that registration of case and initiation/ conclusion of investigation are different terminologies from commencement of proceedings/taking of cognizance. The stage of cognizance, as defined above and also used in Section 63 of the Act, ibid, would only come when after conclusion of investigation the entire material will be placed before the court for final adjudication. Therefore, for all intents and purposes Section 63 of the Act, ibid, did not restrict the registration of FIR and investigation conducted as a result of the FIR, as the Registrar or the authorized person under section 63, ibid during the course of investigation could file a complaint in writing before the Investigation Officer or he could file a complaint in writing before the court competent to take cognizance after completion of investigation and then the court could proceed on such complaint.

10. For what has been discussed above, respectfully following the dictum laid down by the apex Court as reproduced above; this petition has no force and is accordingly dismissed.

Dismissed.

KLR 2021 Criminal Cases 62
[Lahore]
Present: **MUHAMMAD QASIM KHAN, J.**
Zahoor Hussain
Versus
The State, etc.

Crl. Misc. No. 12182-B of 2014, decided on 11th November, 2014.

Pakistan Penal Code (XLV of 1860)---
---Ss. 395 & 412 PPC---While dilating upon the above legal issue, the Court has not lost sight of the fact that as mentioned above the complainant while recording the FIR had mentioned in clear terms that the accused could be identified by them whenever they will see the accused and subsequently when they saw the accused on a bus stand, they identified them---Thus, it is a case of spontaneous identification and in the case "HASRAT PATHAN v. STATE OF MAHARASHTRA" (2007 CRI.L.J. (NOC) 917) (BOM), 2007 (5) AIR Bom R 343, 2007 (5) AIR Bom R 343), it has been held that "Where witnesses abruptly come across the culprit and points out as such, such spontaneous identification is admissible in evidence no formal test identification parade is necessary---But where the accused is called at the police station and shown to the witnesses such identification would not be called spontaneous identification and would not be relied upon." Further in the case "STATE v SUSHIL SHARMA" (2007 CriLJ 4008 (Del-DB), where the witnesses police officials had deposed that they saw the accused in the restaurant on the day of occurrence when the dead body of the deceased was being burnt in a big oven, no formal identification parade of the accused was held to be necessary---But, one thing the courts must always bear in mind is that evidence as to identification must be subjected to a close scrutiny at the time of trial whether all the persons identified were previously known to the witnesses or were perfect strangers---The time, state of lights, the opportunities, the range and distance etc---would remain the material circumstances and the court while believing identification must simultaneously analyze that the witnesses of identification must not be having animosity or ill will towards the accused, as in that eventuality, serious doubts are bound to occur in that piece of evidence---It may further be observed here that test identification during investigation is to be considered only as corroboration to the identification of the accused by the witnesses before the court of law. ***(Paras 8, 9)***

For the Petitioner: **Sh. Irfan Akram, Advocate.**
Muhammad Akhlaq, Deputy Prosecutor General with Muhammad Nawaz Sub-Inspector.

For the Complainant: **Shafqat Mehmood Chohan, Advocate.**
Date of hearing: **11th November, 2014.**

ORDER

MUHAMMAD QASIM KHAN, J.--- Petitioner (Zahoor Hussain) seeks post arrest bail in case FIR No.481/2013 dated 27.12.2013 for offences under sections 395/412 PPC registered at police station Narang, District Sheikhupura, wherein, precisely the prosecution case is that on 27.12.2013 the complainant (Muhammad Nisar Ahmad) was present in the house of his in-laws, when about 4.00 a.m, seven unknown armed persons entered the house by scaling over the wall. After awakening the housemates, per force of arms, snatched four golden bangles, two pairs of gold earrings, two golden rings, two golden chain (neckless) weighing eight tolas, one nokia mobile X2-01 with SIM No.0344-6639037 (EMEI No.351946055918402), one nokia mobile-101 duel SIM with SIM No.0347-4755141 (EMEI No.354615053269343) and (354615053269350) and one licensed 30-bore pistol (License No.1033). As the bulbs were on, the complainant, Irfan Ali and Muhammad Salim saw the accused and they could be identified when seen. Afterwards, on 21.02.2014 the complainant got recorded his supplementary statement to the effect that on 15.01.2014, he (the complainant) along with Irfan and Muhammad Salim was present at bus stop Narang Moor; six persons passed in front of them and they were identified to be the accused who had committed the occurrence in their house. On exploration, their names and addresses were disclosed to be (i) Zahoor Hussain-present petitioner, (ii) Zubair Ahmad, both sons of Manzoor Ahmad caste Bhatti Odh, residents of Allahpur, District Okara, (iii) Ramzan son of Yasin caste Sheikh, (iv) Tariq son of Mehmood Caste Odh, residents of Ameenabad Tehsil Depalpur District Okara, (v) Aamir Shehzad alias Aamri son of Muhammad Nisar, and (vi) Junaid alias Billa son of Muhammad Jamil Caste Dogar, residents of Manga Virkan Tehsil, District Sheikhupura.

2. The learned counsel for the petitioner has argued that in the FIR, neither features nor description or role of the accused have been mentioned and moreover no identification parade has been conducted in this case. It is further contended that nomination of the accused through supplementary statement has no evidentiary value in the eyes of law, whereas, recoveries have been planted. In support of his arguments, learned counsel placed reliance on the case "*STATE through Advocate-General, Sindh, Karachi versus FARMAN HUSSAIN and others*" (PLD 1995 SC 1), "*GULIN KHAN versus THE STATE and 2 others*" (2000 P.Cr.L.J 1306), "*SABIR ALI WASEEM and 3 others versus THE STATE*" (2007 YLR 2142), "*WALAYAT versus THE STATE*" (PLD 2008 Lahore 470), "*MURSAL KAZMI alias QAMAR SHAH and*

another versus THE STATE" (2009 SCMR 1410) and "*HAFEEZULLAH YAMEEN versus THE STATE and another*" (2012 P.Cr.L.J. 1287).

3. The learned Deputy Prosecutor General assisted by leaned counsel for the complainant opposed the bail application by contending that in this case the accused were identified in most natural manner, and as the complainant had clarified in the FIR that accused could be identified by him as well as by the witnesses whenever seen, therefore, when the complainant and witnesses happened to be present at bus stop, the accused passed in front of them and as a natural course the complainant and his witnesses identified them to be the accused who had committed the offence. The learned counsel for the complainant added that complainant or the witnesses had no previous enmity towards the accused, including the present petitioner, for which they could have false implicated them with the commission of crime.

4. I have heard the arguments of learned counsel for the parties at considerable length and perused the entire available record with their assistance.

5. Mainly, following principles are stated regarding evidentiary value of identification parade i.e. (i) Identification tests do not constitute substantive evidence, they can only be used as corroborative of the statement in Court; (ii) the main object of holding an identification parade during interrogation stage is to test the memory of the witnesses based upon first impression and also to enable the prosecution to divide whether all or any of them could be cited as eye-witnesses of the crime; (iii) In order to eliminate the possibility of the accused being known to the witnesses prior to the test identification parade and it is desirable that a test identification should be conducted as soon as after the arrest of the accused, and (iv) Appreciation of such evidence would depend upon the strength and trustworthiness of witness. "*Mahesh v. State of Rajasthan*" (2006 CrLJ 1657 (Raj).

6. It is almost settled that as a general rule that the substantive evidence of a witness is the statement made in Court and the evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test idenfication therefore is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as the identity of the accused who are strangers to them, in the form of earlier identification proceedings.

7. The Hon'ble Supreme Court of Pakistan in the case "*STATE through Advocate-General, Sindh, Karachi versus FARMAN HUSSAIN and others*" (PLD

1995 SC 1), held that "*If witness gets a momentary glimpse of accused and claims that he would be able to identify him, then after arrest, identification test becomes very essential which is to be conducted strictly according to guidelines and legal requirements enunciated by law*". The apex Court further held that:-

> *"A distinction is to be made between a case in which witness has had only a fleeing glimpse of the accused who happened to be stranger and a witness who had known the accused previously or who had met the accused several times. In the former case the Court insists upon having proper identification parade whereas in the latter case the identification parade can be dispensed with as the witness can identify the accused even in the Court."*

A learned Division Bench of this Court in the case "*ZULFIQAR ALI alias DITTU and another versus THE STATE*" (1991 P.Cr.L.J. 1125" held that person's right perception of an object seen by him, depends amongst others on the circumstances i.e. (i) on his situation relative to the object viewed, his nearness to or distance from it, (ii) also on his capacity to see with perfect or sufficient distinctness an object far-off, (iii) he may be able to discern clearly things at a great distance from him, or to see distinctly only objects near to him that is, he may be either far-sighted or near-sighted, (iv) his right perception of the object may also depend on the light by which it is seen and therefore, on the time, whether day or night, (v) if may depend, also on the length or shortness of the time he has, in which to view the object, (vi) it may depend also on the freedom of his view from all obstructions at the time, from whatever cause, or momentary, and (vii) the sun shining full in the face of a person may very much obstruct his sight, and the same effect may be produced by falling snow, or dense rain or smoke. Here in this case, as the contents of the FIR show, the complainant and the witnesses had sufficient time and sources of light, etc at the time of occurrence to capture the features of the accused in their mind and for the same reason when they saw the accused on roadside they were able to identify the accused.

8. While dilating upon the above legal issue, the Court has not lost sight of the fact that as mentioned above the complainant while recording the FIR had mentioned in clear terms that the accused could be identified by them whenever they will see the accused and subsequently when they saw the accused on a bus stand, they identified them. Thus, it is a case of **spontaneous identification** and in the case "*HASRAT PATHAN v. STATE OF MAHARASHTRA*" (2007 CRI.L.J. (NOC) 917) (BOM), 2007 (5) AIR Bom R 343, 2007 (5) AIR Bom R 343), it has been held that "*Where witnesses abruptly come across the culprit and points out as such, such spontaneous identification is admissible in evidence no formal test identification parade is necessary. But where the accused is called at the police station and shown to the witnesses such identification would not be called spontaneous identification and would not be relied upon.*" Further in the case "*STATE v SUSHIL SHARMA*" (2007

CriLJ 4008 (Del-DB), where the witnesses police officials had deposed that they saw the accused in the restaurant on the day of occurrence when the dead body of the deceased was being burnt in a big oven, no formal identification parade of the accused was held to be necessary.

9. But, one thing the courts must always bear in mind is that evidence as to identification must be subjected to a close scrutiny at the time of trial whether all the persons identified were previously known to the witnesses or were perfect strangers. The time, state of lights, the opportunities, the range and distance etc. would remain the material circumstances and the court while believing identification must simultaneously analyze that the witnesses of identification must not be having animosity or ill will towards the accused, as in that eventuality, serious doubts are bound to occur in that piece of evidence. It may further be observed here that test identification during investigation is to be considered only as corroboration to the identification of the accused by the witnesses before the court of law.

10. After the above detailed discussed on the point of identification, this court is convinced that spontaneous identification of an accused is sufficient corroborative piece of evidence and it may not be discarded merely on the ground that formal identification parade was not conducted. With all respect to the case law referred by learned counsel for the petitioner, the same has been pronounced in somewhat different circumstances, as such, has no direct applicability on the issue involved in the instant case.

11. At this stage, however, I would like to pay my gratitude to the effort put in by learned counsel for the parties, especially the research work by the learned counsel for the petitioner is commendable which made it convenient for the court to deliberate on this important aspect in detail.

12. For what has been discussed above, prima facie sufficient evidence has been collected against the petitioner to connect him with commission of an offence covered by prohibitory clause. While deciding bail applications deeper appreciation of evidence is not permissible, and the court is to tentatively examine the evidence collected by the Investigating Officer or other material produced before it. The petitioner therefore, is not found entitled for bail at this stage. The instant petition, is hereby dismissed.

Dismissed.

KLR 2021 Criminal Cases 73

[Lahore]

Present: **MUHAMMAD QASIM KHAN and MUHAMMAD ANWAARUL HAQ, JJ.**

Faisal Riaz, etc.

Versus

The State, etc.

Crl. Misc. No. 13884-B of 2014, decided on 25th November, 2014.

Pakistan Penal Court (XLV of 1860)---

---Ss. 420, 468, 471 & 109---The above articles were taken into custody from the premises which was being used by the present petitioner (Rashid Bashir) for running an illegal Call Center and he could not produce any record to establish that the Laptop and Mobile Phone were used by someone else, whereas, he being owner of the Call/Internet Centre, must have the data/particulars of the visitors/users of his internet café or for that matter the record with regard to use of the computers kept for internet usage; (v) Investigation to the extent of Rashid Bashir petitioner is in progress and during investigation one person from United Kingdom sent an Email to the Investigating Officer, reporting misuse of his credit card and said Email is also part of the record; (vi) Gist of allegation is that accused had established a Tricon Communication Company and by posing them as representative of Titan Telecom, through websites by practicing fraud they obtain credit card information from the foreigners by enticing them to arrange for certain goods for them at 50% to 70% less rate---After obtaining credit card information, the accused instead of arranging such goods, through those credit cards make payments of bills of other persons and get half of the bill amount from those persons as commission through Money Exchange, thus, prima facie in a sophisticated manner, the entire crime has been managed; (vii) The Investigating Officer has also collected number of receipts showing how the petitioner collected data and then the same was used for stealing/hacking and using credit cards related to different Bank of UK; (viii) On the face of it, prima-facie the petitioner is involved in a white-collar crime, and undoubtedly these offences are not victimless---A single scam can destroy a company, devastate families by whipping out their life savings, or cost billions of rupees to the victims---By passage of time such type of crimes are now becoming more sophisticated than ever, and the Investigating Agencies have to use modern devices and expertise skills to track down the culprits---In these circumstances, although direct evidence is available in this case, but even when indirect/ circumstantial evidence is collected by the Investigating Agencies without breakage of chain, the same can be considered sufficient evidence/material to connect the accused with commission of the crime;

(Para 3)

For the Petitioners (in Crl. Misc. No. 13884-B/2014): **Mian Muhammad Naseem, Advocate.**
For the Petitioner (in Crl. Misc. No. 14140-B/2014): **Muhammad Qaisar Ameen, Advocate.**
Tahir Mehmood Gondal, Standing Counsel with Asif Ali, AD/FIA and Abdul Ghaffar DD/FIA.
Date of hearing: **25th November, 2014.**

ORDER

This single order shall deal with two bail applications i.e. Crl.Misc.No.13884-B/2014 "*FAISAL RIAZ, Etc vs THE STATE, Etc*." and Crl.Misc.No.14140-B/2014 "*RASHID BASHIR vs THE STATE, Etc*" as petitioners in both the petitions seek post arrest bail in one FIR No.67/2014 dated 26.09.2014 under sections 36, 37 of Electronic Transaction Ordinance, 2002 read with sections 420, 468, 471, 109 PPC registered at police station FIA/Cyber Crime Circle, Lahore, which precisely contains that:-

> *"A piece of information was received from a reliable source that a group of criminals is involved in stealing/Hacking of credit cards data related to the Banks of UK and other Countries. This data is being used for payments of student's fee and other payables. Upon receiving the information a raiding team was constituted by the competent authority comprising of Ch. Sarfraz DD/FIA, Asif Iqbal AD, Ch. Sarwar Inspector, Ahmar Sindhu, Inspector, Muhamamd Asif SI, headed by Mian Asif Ali AD./FIA/CCC/Lahore. The team raided at 33-M, 1 st Floor, Model Town ext Lahore dated 25-09-2014. During the raid it found that a person namely |Rashid Bashir s/o Muhammad Bashir r/o House No.285 block III sector D-II Green Town Lahore having CNIC 35202- 8812992-1 was running a call center along with the illegal business for the payments of students fee and other payables by using the hacked credit cards data belonging to different Banks of UK and other countries. During on spot investigation, the owner of the call center was unable to present the license/legal documents of the call center. Rashid Bashir S/o Muhamamd Bashir confessed during investigation that he is involved in stealing/hacking and using credit cards data related to different Bank of UK by the help of Faisal Riaz S/o Riaz Masih r/o H-6 Block No44 New Abadi Gohawa Badian Road Lahore Cantt, Aakash Patrick S/o Ilyas Masih r/o H-E-809 Nishat Colony Lahore. Digital media was seized for forensic analyses form the alleged premises."*

2. We have heard the arguments of learned counsel for the parties at length and perused the available record with their assistance.

3. As regards the case against Rashid Bashir (Crl.Misc.No.14140-B/2014), we observe that:-

(i) Rashid Bashir was arrested from the premises where raid was conducted;

(ii) He was found running the Call Center illegally, as he could not produce either before the Investigating Agency or before this Court any proof with regard to registration of Call Center, as required by Pakistan Software Export Board (G) Ltd, Ministry of Information Technology Government of Pakistan (PSEB);

(iii) Number of Computers/CPUs, Laptops and one Mobile set were recovered from the premises of raid and during investigation Rashid Bashir pointed out the concerned Laptop and Mobile Cell. On forensic/technical analysis of pointed Laptop and Mobile Phone, reports were prepared. The report with regard to LAPTOP is precisely to the following effect:-

"Forensic Analysis Facts and Findings:

On the basis forensic analysis of the subject hard disk, following are the forensic facts and findings:

1. *The scanned copies of electricity and gas bills payments has been extracted from the subject hard disk drive*
   Note: *The data is annexed at "**Flag-C**"*
2. *During the forensic analysis of the subject hard disk drive, it was found that confidential/private information of the foreigners are extracted.*
   Note: *The data is annexed at "**Flag-D**"*
3. *The document related to electricity bill with the name of Jagdish Ruparelia was found sent by Tricon Rashid.*
   Note: *The data is annexed at "**Flag-E**"*
4. *Huge numbers of records of TT of Wall Street Exchange company has been extracted;*
   Note: *The data is annexed at "**Flag-F**"*
5. *Huge numbers of bank receipts has been extracted and are attached at "**Flag-G**"*
6. *A confidential document of different business owners has been extracted whose utility bills were being paid from the stolen/hacked credit cards.*
   Note: *The data is annexed at "**Flag-H**"*
7. *Miscellaneous documents has been extracted from the seized hard disk drive and are attached at "**Flag-I**".*

Conclusion:

On the basis of aforementioned forensics facts and findings extracted after carrying out advanced forensics analysis techniques and using pre-indexed keyword searches using Forensic Toolkit software, it is hereby concluded that this laptop hard disk drive was involved in stealing/hacking and misuse of credit cards data belonging to the United Kingdom and other countries for the payments of students fee and other payables."

The report with regard to Mobile Cell is to the following effect:-

"Forensic Analysis Facts and Findings:

On the basis forensic analysis of the subject Mobile, following are the forensic/Technical facts and finding:

1. *The Mobile is dual SIM one Warid Telecom and other Mobilink Network.*
2. *IMSI Numbers of the SIMS are (1) 410072060166670 Warid Telecom, (2) 410018137309787 Mobilink*
3. *SIM/USIM Contacts are attacked at "**Flag A**"*
4. *The call detail record of Missed, Dialed and received are attached at "**Flag-B**"*
5. *After technical analysis of SMS detail it has been verified that the subject mobile was being used for financial transactions and payments of utility bills*

***Note:** The SMS detail is attached at "**Flag-C**"*

6. *During the forensic analysis of the subject cell phone, it was found that confidential/private information of the foreigners are extracted.*

   ***Note**: The data is annexed at "**Flag-D**"*
7. *Online transaction of Barclays and other banks has been extracted and are attached at "Flag-E:*
8. *During the forensic analysis of the subject cell phone, it was found that online transaction through internet information of the foreigners are extracted.*

   ***Note:** The data is annexed at "**Flag-F**"*
9. *Huge numbers of bank receipts has been extracted and are attached at "Flag-G"*
10. *Miscellaneous documents have been extracted from the seized hard disk drive and are attached at "Flag-I".*

Conclusion:

On the basis of aforementioned forensics/technical facts and findings, it is hereby concluded that this Cell Phone was involved in the misuse of credit cards data belonging to the United Kingdom and

other countries for the payments of Utility Bills and payment of students fee."

(iv) The above articles were taken into custody from the premises which was being used by the present petitioner (Rashid Bashir) for running an illegal Call Center and he could not produce any record to establish that the Laptop and Mobile Phone were used by someone else, whereas, he being owner of the Call/Internet Centre, must have the data/particulars of the visitors/users of his internet café or for that matter the record with regard to use of the computers kept for internet usage;

(v) Investigation to the extent of Rashid Bashir petitioner is in progress and during investigation one person from United Kingdom sent an Email to the Investigating Officer, reporting misuse of his credit card and said Email is also part of the record;

(vi) Gist of allegation is that accused had established a Tricon Communication Company and by posing them as representative of Titan Telecom, through websites by practicing fraud they obtain credit card information from the foreigners by enticing them to arrange for certain goods for them at 50% to 70% less rate. After obtaining credit card information, the accused instead of arranging such goods, through those credit cards make payments of bills of other persons and get half of the bill amount from those persons as commission through Money Exchange, thus, prima facie in a sophisticated manner, the entire crime has been managed;

(vii) The Investigating Officer has also collected number of receipts showing how the petitioner collected data and then the same was used for stealing/hacking and using credit cards related to different Bank of UK;

(viii) On the face of it, prima-facie the petitioner is involved in a white-collar crime, and undoubtedly these offences are not victimless. A single scam can destroy a company, devastate families by whipping out their life savings, or cost billions of rupees to the victims. By passage of time such type of crimes are now becoming more sophisticated than ever, and the Investigating Agencies have to use modern devices and expertise skills to track down the culprits. In these circumstances, although direct evidence is available in this case, but even when indirect/ circumstantial evidence is collected by the Investigating Agencies without breakage of chain, the same can be considered sufficient evidence/ material to connect the accused with commission of the crime;

(ix) The Hon'ble Supreme Court of Pakistan in the case "*SHAHZAD AHMED versus THE STATE through F.I.A. Islamabad*" (2010 SCMR 1221), held that:-

"It is also settled principle of law that in case of bail the Court is not required to probe into the matter but has to make a tentative assessment of the material produced to ascertain whether there are reasonable grounds to believe that the accused has committed the crime. See Chaudhry Shujahat Hussain v. The State 1995 SCMR 1249 and Government of Sindh through Chief Secretary and others v. Raeesa Farooq and others 1994 SCMR 1283. It is universal maxim that man is born innocent; it is the institutions of society that spoil him. It would also be relevant to consider that our nation is overwhelmed with an avalanche of corruption under whose weight it is being relentlessly crushed. Whatever the true in the observations, we seem to have institutionalized corruption. The bloody putrescence of the virus oozes out of every pore of the body politic and every segment of national life, be it Government politics, business, law, medicine, health or education. The landmark judgment of this Court reported as Dr. Mubashir Hassan's case (PLD 2010 SC 265) has raised hopes that the Courts will now play a significant role in the eradicating corruption and other social evils. Therefore, it is humbly highlighted that in such a situation a more pragmatic approach than has been the case so far on the parts of the Court is needed at the investigation as well as bail stages of corruption cases, because if the Courts show almost motherly leniency towards people accused of high corruption then it would be impossible to successfully investigate and help brining the culprits to book or to check the ever increasing cancer of corruption. It is settled principle of law that while deciding bail application the Court should consider the following pieces of evidence:--

(a) Allegations made in the F.I.R.

(b) Contends of the F.I.R. and statements recorded under section 161, Cr.P.C.

(c) Other incriminating material against accused.

(d) Nature and gravity of the charge.

(e) Plea raised by the accused."

[**Emphasis has been supplied by us]**

x) Further, the Hon'ble Supreme Court of Pakistan in the case "*KHURSHID versus THE STATE*" (PLD 1996 SC 305), held that:-

"The Court's approach, while appraising the evidence, should be dynamic and not static. It should keep in view all the facts and

circumstances of the case and if it is satisfied that factually the person charged with the offence has committed the same, it should record the conviction though there might have been some technical lapses on the part of the investigating agency/prosecution, provided the same have not prejudiced the accused in the fair trial. The people are losing faith in the criminal judicial system for the reasons that in most of the criminal cases the criminals get away without being punished on technicalities."

Almost, same view was reiterated by the apex Court in the case "*JAFAR ALI versus THE STATE*" (1998 SCMR 2669).

xi) When the case of Rashid Bashir is gauged on the touchstone of above referred judgments of the apex Court, especially the underlined portion from "*SHAHZAD AHMED versus THE STATE through F.I.A. Islamabad*" (2010 SCMR 1221), we are convinced that prima facie sufficient incriminating material has been collected by the Investigating Officer to connect Rashid Bashir with commission of crime.

6. **For what has been discussed above, we find no merit in the bail application of Rashid Bashir, thus Criminal Miscellaneous No.14140-B/2014 is hereby dismissed.**

7. As regards the case of Faisal Riaz and Aakash Patric (Crl.Misc.No.13884-B/2014), the learned Law Officer remained unable to rebut the contention of learned counsel for these petitioners that against these two petitioners, there is only statement of co-accused Rashid Bashir. Furthermore, on court query, the learned Law Officer could not refer any independent corroborative piece of evidence in support of said statement of Rashid Bashir coaccused. Additionally, we observe that Faisal Riaz and Aakash Patric are behind the bars for quite some time, investigation to their extent is complete and furthermore, as observed above for the moment independent corroboration to the extent of these petitioners is lacking, therefore, involvement of Faisal Riaz and Aakash Patric in the commission of the alleged offence, requires further inquiry. **Consequently, Crl.Misc.No.13884-B/2014 is allowed and Faisal Riaz as well as Aakash Patric petitioners are admitted to bail subject to their furnishing bail bonds in the sum of Rs.200,000/- each with one surety each in the like amount to the satisfaction of learned trial court.**

Bail granted.

2021 [M] P Cr. R 194

[Lahore]

Present: **MUHAMMAD QASIM KHAN, J.**

Umar Farid

Versus

The State, etc.

Crl. Misc. No. 11828-B of 2014, decided on 13th November, 2014.

Pakistan Penal Code (XLV of 1860)---

---Ss. 337A(i), 337A(iii) 380, 148, 149, 452 PPC---The petitioner is nominated in the FIR with specific attribution of causing injury on the forehead of Jahangir and the said offence attracts the provisions of Section 337-A(iii) PPC. The injury attributed to the petitioner is prima facie corroborated by the statement of injured as well as other prosecution witnesses in their statements recorded under section 161 Cr.P.C. and prima facie the medical certificate also lends corroboration to the ocular account---The case of the petitioner is distinguishable from the case of co-accused, who have been granted bail, therefore, the benefit of rule of consistency is not available to the petitioner---Pre-arrest bail being an extra ordinary concession is meant to protect the innocent persons whose arrest appears to be tainted with any malice or ulterior motives of the complainant and the police, but here in this case at least to the extent of the present petitioner no such element could be established from the record.

(Para 7)

For the Petitioner: **Muhammad Akram Qureshi, Advocate.**

Muhammad Akhlaq, Deputy Prosecutor General with Muhammad Nawaz ASI.

For the Complainant: **Muhammad Kamran ur Rehman Rashid, Advocate.**

Date of hearing: **13th November, 2014.**

ORDER

MUHAMMAD QASIM KHAN, J.--- Petitioner seeks pre arrest bail in case FIR No.146/2014 dated 19.06.2014 under sections 337-A(i), 337- A(iii), 380, 148, 149, 452 PPC registered at police station Arooti, District Toba Tek Singh.

2. It is argued by learned counsel for the petitioner on the basis of Birth Certificate of the petitioner that at the time of commission of the offence the petitioner was a juvenile and the role attributed to him at the most may attract section 337- A(iii) PPC, therefore, per force of Section 10(3) of the Juvenile Justice System Ordinance, 2000 the said offence is to be treated as bailable and thus petitioner is

entitled for prearrest bail, especially when co-accused of the petitioners have already been allowed pre-arrest bail by the learned trial court. Lastly, argued that the petitioner is not hardened, desperate or dangerous criminal, therefore, per force of Section 337-N(2) PPC no sentence of imprisonment can be imposed upon the petitioner.

3. The learned Deputy Prosecutor General assisted by learned counsel for the complainant opposed this bail application on the ground that School Leaving Certificate of the petitioner shows his date of birth as 07.01.1996 as such the age of the petitioner on the day of occurrence comes to about seventeen years and six months, therefore, petitioner cannot be said to be juvenile.

4. I have heard the arguments of learned counsel for the parties at considerable length and perused the available record.

5. As regards the argument of learned counsel for the petitioner with regard to age of the petitioner and concession of bail on the ground of juvenility, it has been observed that although the Birth Certificate of the petitioner is carrying his date of birth as 23.12.1996, whereas, School Leaving Certificate of the petitioner is reflecting his date of birth as 07.01.1996, as such, the question whether the petitioner is a juvenile or not, will be seen by the learned trial court at an appropriate stage. Furthermore, Section 10(3) of the Juvenile Justice System Ordinance, 2000 reads as under:-

> *"Without prejudice to the provisions of the Code, a child accused of a bailable offence shall, if already not released under section 496 of Code, be released by the juvenile Court on bail, with or without surety, unless it appears that there are reasonable grounds for believing that the release of the child shall bring him into association with any criminal or expose the child to any danger, in which case, the child shall be placed under the custody of a Probation Officer or a suitable person or institution dealing with the welfare of the children if parent or guardian of the child is not present, but shall not under any circumstances be kept in a police station or jail in such cases."*
>
> (Emphasis has been supplied)

The above reproduced provision of Juvenile Justice System provides that where a juvenile is accused of a bailable offence, he shall be released on bail and further Section 10(5) of the Ordinance, ibid provides that:-

(5) Where a child under the age of fifteen years is arrested or detained for an offence, which is punishable with imprisonment of less than ten years, shall be treated as if he was accused of commission of a bailable offence.

In the light of above reproduced provision before declaring an offence as bailable to the extent of a juvenile, two conditions must co-exist i.e. child must be under the age of fifteen years and the offence with which such child is charged must be punishable with imprisonment of less than ten years. Now, keeping in mind both the above provisions, when the case of the petitioner is gauged, it is clear that even according to the date of birth posed by the petitioner, he was not less than fifteen years of age on the date of occurrence and furthermore, he has been charged for an offence under section 337-A(iii) PPC and the punishment of such offence can be awarded for ten years, apart from punishment of Diyat. Therefore, at least on the ground of juvenility the petitioner is not found entitled for any concession of bail before arrest under the Juvenile Justice System Ordinance, 2000.

6. I have given my anxious consideration to the argument of learned counsel with regard to Section 337-N(2) PPC. A Full Bench of this Court in landmark judgment in the case "*ALI MUHAMMAD versus THE STATE*" (PLD 2009 Lahore 312), in para-33(i), held as under:-

"At the time of hearing of an application for postarrest bail in a case of hurt where the accused person is not a previous convict, habitual or hardened, desperate or dangerous criminal or where the offence has not been committed by him in the name or on the pretext of honour <u>if the accused person offers to deposit the requisite amount of Arsh and Daman with the trial court in order to secure the relevant amount of money due as punishment in case of his ultimate conviction, if any, and if the period of his physical remand is over and the statutory period of investigation has expired then ordinarily he should be admitted to bail subject to making of the requisite deposit and furnishing of bail bond</u>. Such a bargain shall, however, not be available to an accused person for his post arrest bail if he is a previous convict or in the tentative assessment of the court he is habitual or hardened, desperate or dangerous criminal or where the offence has been committed by him in the name or on the pretext of honour."

[Emphasis has been supplied by me]

A careful reading of this paragraph establishes that <u>benefit of Section 337-N(2) PPC is applicable only to an accused in after arrest bail and not in pre-arrest matter and that too at the time when accused person offers to deposit the requisite amount of Arsh/Daman with the trial court and he cannot be declared as hardened,</u>

desperate or dangerous criminal or that he has not committed the offence on the pretext of family honour. The case of the present petitioner is for extra ordinary concession of pre-arrest bail and moreover, the petitioner has also not offered to deposit the requisite amount of Arsh/Daman, therefore, his case is not covered by Section 337-N(2) PPC.

7. Coming to merits of the case, the petitioner is nominated in the FIR with specific attribution of causing injury on the forehead of Jahangir and the said offence attracts the provisions of Section 337-A(iii) PPC. The injury attributed to the petitioner is prima facie corroborated by the statement of injured as well as other prosecution witnesses in their statements recorded under section 161 Cr.P.C. and prima facie the medical certificate also lends corroboration to the ocular account. The case of the petitioner is distinguishable from the case of co-accused, who have been granted bail, therefore, the benefit of rule of consistency is not available to the petitioner. Pre-arrest bail being an extra ordinary concession is meant to protect the innocent persons whose arrest appears to be tainted with any malice or ulterior motives of the complainant and the police, but here in this case at least to the extent of the present petitioner no such element could be established from the record.

7. For what has been discussed above, the petitioner is not found entitled for extra ordinary concession of pre-arrest bail. Dismissed.

Dismissed.

2021 [M] C L R 249
[Lahore (Multan)]
Present: **MUHAMMAD QASIM KHAN, J.**
Sajjad Hussain
Versus
District Coordination officer, Layyah and others

W.P. No. 10926 of 2014, decided on 21st August, 2014.

Constitution of Pakistan, 1973---
---Art. 199---Section 154 of the Code of Criminal Procedure, 1898 only requires laying an "information" about the commission of a cognizable offence---The word "information" has been defined in BLACK'S LAW DICTIONARY SIXTH EDITION (Centennial Edition (1891-1991), as "An accusation exhibited against a person for some criminal offense, without an indictment." Meaning thereby it is quite an initial stage and first step to set the law into motion by registration of a criminal case, where after, such information may be probed into and only then it can be concluded whether such information was true so as to lead towards indictment, or not---On the other hand, as discussed above with reference to the celebrated judgments of the Hon'ble Supreme Court of Pakistan, "sufficient" grounds must exist which would firstly satisfy the conscious of the detaining authority and such satisfaction may consist upon such a material, on the basis of which even a man of common prudence would have no other option except to form an opinion tilting towards the detention order---BLACK'S LAW DICTIONARY SIXTH EDITION (Centennial Edition (1891-1991), had defined the word "sufficient", as "Adequate, enough, as much as may be necessary, equal or fit for end proposed, and that which may be necessary to accomplish an object"---Therefore, as compared to information within the meaning of Section 154 Cr.P.C., the stage to establish "sufficient" grounds to pass a detention order requires strict adherence to the solid material collected by the agencies---As such, it can safely be concluded that before passing an detention order, the authorities must have a recourse to Section 154 Cr.P.C., when the allegations levelled against the detenus in the detention orders constitute a criminal offence under Anti-Terrorism Act, 1997, Pakistan Penal Code or any other law, as in this case most of the allegations levelled against the detenus are criminal offences---Furthermore, under section 11L of the Anti-Terrorism Act, 1997 a person who receives an information about involvement of a person in an offence covered by Anti-Terrorism Act, 1997, and he believes or suspects that some one has committed an offence under the above Act, he is under a legal compulsion to disclose such belief or suspicion to the police officer.

(Para 9)

For the Petitioners: **Rafiq Ahmad Malik, Advocate.**

Mubashir Latif Gill, Assistant Advocate General with Nadim-ur-Rehman District Coordination Officer, Layyah, Salah-ud-Din Ghazi, District Police Officer, Layyah, Muhammad Abid Deputy Superintendent of Police, Ijaz and Ayub SHOs.

Date of hearing: **21st August, 2014.**

ORDER

MUHAMMAD QASIM KHAN, J.--- This judgment shall form the detailed reasoning of my earlier short order of even date, whereby, three matters (i) W.P.No.10926/2014 "*SAJJAD HUSSAIN versus DISTRICT COORDINATION OFFICER, Layyah and others*", (ii) W.P.No.10971/2014 "*MUHAMMAD RAMZAN versus DISTRICT COORDINATION OFFICER and others*" and (iii) W.P.No.10972/2014 "*MUHAMMAD GHULAM MUSTAFA versus DISTRICT COORDINATION OFFICER and others*, were allowed.

2. Briefly the facts are that respondent/ DCO, Layyah vide separate orders No. 4032 dated 06.08.2014, No. 4078 dated 08.08.2014 and No. 4079 dated 08.08.2014 directed detention of Fayyaz, Qadeer Ahmad and Ghulam Yahya, respectively for certain periods, on almost similar grounds that they are (i) hard liner and supporter of Pakistan Awammi Tehrek/TMQ, create ill will and hatred amongst public by delivery fiery speeches and inciting the general public to resort to disharmony, (ii) active member and supporter of an organization which is openly opposed to the constitutionalism in the country, create ill will among masses and provoke them to revolt against Government Institutions and authorities and that (iii) their activities are inciting general public to resort to agitation and create instability and anarchy in the society and they are acting prejudicial to public safety, tranquility and public peace.

3. Report and parawise comments have been received from District Coordination Officer, Layyah and District Police Officer, Layyah. The report submitted by District Coordination Officer, Layyah nothing more than repetition of charges already levelled in the impugned detention orders, whereas, in his report the District Police Officer, Layyah has given a very brief history to the effect that concerned S.H.O had submitted reports to his office showing antecedents of the detenus, which were forwarded to the District Coordination Officer, Layyah with a request to issue detention orders under section 3(1) of the West Pakistan Maintenance of Public Order, 1960 for maintaining peace and tranquility.

4. The Law officer was directed to argue the cases and produce before the court whatever the material is available against the detenus. Thus, lengthy hearing has been given to the parties.

5. The learned Assistant Advocate General could only refer to one Rupt No.27 dated 07.08.2014 of police station Saddar, Layyah, showing that Qadeer Ahmad and Ghulam Yahyah members of Minhaj-ul-Quran entice public and compel them to have sit-in. As, on the face of it the said report had been tempered, D.S.P and S.H.O of the concerned police station were called along with entire relevant record and the S.H.O admitted that said rupt had not been entered in the police station record or even in any other record in the office of D.S.P or the D.P.O. In this respect separate contempt proceedings have been initiated against the concerned. The learned Law Officer argued that detenus Fayyaz Hussain, Muhammad Qadeer and Ghulam Yahya are supporters of Pakistan Awammi Tehrek, they create ill will and hatred amongst public by delivering speeches and incite general public to revolt against the government institutions and authorities. But on inquiry by the Court whether these activities are not covered by an penal clause of Pakistan Penal Code or the Anti-Terrorist Act, 1997, as most of the allegations referred above are criminal offences under the Anti-Terrorist Act, 1997 and why criminal cases were not registered after the information had been conveyed to the authorities, the learned Law Officer remained unable to reply.

5. This Court in the case "*JAMEEL AHMAD versus DISTRICT COORDINATION OFFICER, MULTAN and others*" (2013 P.Cr.L.J. 1322), has held that "*The liberty of a citizen, save in accordance with law is protected by the Constitution of Islamic Republic of Pakistan, 1973, and this Court being custodian of the Constitution has to jealously protect and safeguard such fundamentally guaranteed rights.*" In the case "*FEDERATION OF PAKISTAN through Secretary, Ministry of Interior, Islamabad, versus Mrs. AMATUL JALIL KHAWAJA and others*" (P L D 2003 Supreme Court 442), the Hon'ble Supreme Court of Pakistan, while setting down specific criteria to gauge whether a detention order is valid or not, held as under:-

> *"S. 3(1) ---Preventive detention---Requirements to be satisfied by an order of preventive detention enlisted.*
>
> *An order of preventive detention has to satisfy the following requirements:*
>
> *(i) the Court must be satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention; (ii) that satisfaction should be established with regard to each of the grounds of detention, and, if one of the grounds is shown to be bad, non-existent or irrelevant, the whole order of*

detention would be rendered invalid; (iii) that initial burden lies on the detaining authority to show the legality of the preventive detention, and (iv) that the detaining authority must place the whole material, upon which the order of detention is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claim shall be within the competence of the Court to decide.

In addition to these requirements, the Court has further to be satisfied, in cases of preventive detention, that the order of detention was made by the authority prescribed in the law relating to preventive detention; that each of the requirements of the law relating to preventive detention had been strictly complied with; that "satisfaction" in fact existed with regard to the necessity of preventive detention of the detenu; that the grounds of detention had been furnished within the period prescribed by law, and if no such period is prescribed, then "as soon as may be"; that the grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenu to make representation against his detention to the authority prescribed by law; that the grounds of detention are not irrelevant to the aim and object of this law and that the detention should not be for extraneous considerations or for purposes which may be attacked on the ground of malice."

The Hon'ble Supreme Court of Pakistan further provided guidelines for the detaining authority, as to on what conditions must exist, which would render their exercise based on their "satisfaction". The relevant paragraph is reproduced hereunder:-

"S. 3(1)---Constitution of Pakistan (1973), Art. 199--- Preventive detention---Judicial review---Scope--- "Satisfaction" of the detaining Authority---Nature---Court can see whether the "satisfaction" about the existence of the requisite condition is a "satisfaction really and truly" existing in the mind of the detaining Authority or one "merely professed by the detaining Authority" ---Court, in proper exercise of its Constitutional duty can insist upon disclosure of, the materials upon which the Authority had acted so that it should satisfy itself that the Authority had not acted in an "unlawful manner" ---Principles.

The Court can see whether the satisfaction about the existence of the requisite condition is a satisfaction really and truly existing in the mind of the detaining authority or one merely professed by the detaining authority. A duty has been cast upon the High Court, whenever a person detained in custody in the Province is brought before that Court, to "satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner". This Constitutional duty cannot be discharged merely by saying that there is an order which says that he is being so detained. If the mere production of an order of detaining authority, declaring that he was satisfied,

was to be held to be sufficient also to "satisfy" the Court then what would be the function that the Court was expected to perform in the discharge of this duty. Therefore it cannot be said that it would be unreasonable for the Court, in the proper exercise of its Constitutional duty, to insist upon a disclosure of the materials upon which the authority had acted so that it should satisfy itself that the authority had not acted in an "unlawful manner".”

6. As shall be seen from the above reproduced portion of judgment from the cited case, it is manifest that edifice of satisfaction is to be built on the foundation of evidence, as conjectural presumption cannot be equated to that of “*satisfaction*”; it is subjective assessment and there can be no objective satisfaction. In exercise of jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, if this court comes to a conclusion that the grounds mentioned in the detention order are not supported by sufficient material, then there is nothing stopping this court from exercising the power of judicial review. There is plethora of judgments on the point that the material should be of such a nature by examination of which, a man of common prudence must form his opinion that detention order has been rightly passed and the detaining authority is required to establish each and every ground of detention on the basis of sufficient material to justify its order. If the material on any one of such ground is missing then the whole detention order would loose its sanctity and would be liable to be set-aside.

7. In the case “*GULZAR AHMAD versus DISTRICT MAGISTRATE and another*” (1998 P.Cr.L.J. 1790), it was held that fact of person being liable to prosecution for commission of an offence in ordinary criminal Court cannot be a ground for preventive detention under the Ordinance. In the instant cases, no ground whatsoever has been mentioned by respondent No. 1 and the impugned orders on the face of it are clear indicative of the fact that the said authority neither examined the material nor applied its independent judicial mind.

8. Admittedly, none of the detenus has been enlisted in the 4 th schedule. Section 11-EE of the Anti-Terrorism Act, 1997, provides that where any information is received that a person is an activist, office bearer or an associate of an organization, or in any way concerned or suspected to be concerned with such organization or affiliated with any such group or organization, the name of such person be placed in list entered in the Fourth Schedule. As such, if at all there was some material available with the government against the detenus, their names must have been placed in the Fourth Schedule and then would have been required to execute a bond so that their activities could be kept under watch. Unless and until any such order placing their names in the 4th schedule is passed, it could not at all be said that they are involved in anti state activities.

9. Furthermore, Section 154 of the Code of Criminal Procedure, 1898 only requires laying an "*information*" about the commission of a cognizable offence. The word "*information*" has been defined in *BLACK'S LAW DICTIONARY SIXTH EDITION (Centennial Edition (1891-1991)*, as "*An accusation exhibited against a person for some criminal offense, without an indictment.*" Meaning thereby it is quite an initial stage and first step to set the law into motion by registration of a criminal case, where after, such information may be probed into and only then it can be concluded whether such information was true so as to lead towards indictment, or not. On the other hand, as discussed above with reference to the celebrated judgments of the Hon'ble Supreme Court of Pakistan, "*sufficient*" grounds must exist which would firstly satisfy the conscious of the detaining authority and such satisfaction may consist upon such a material, on the basis of which even a man of common prudence would have no other option except to form an opinion tilting towards the detention order. *BLACK'S LAW DICTIONARY SIXTH EDITION (Centennial Edition (1891-1991)*, had defined the word "*sufficient*", as "*Adequate, enough, as much as may be necessary, equal or fit for end proposed, and that which may be necessary to accomplish an object.*" Therefore, as compared to information within the meaning of Section 154 Cr.P.C., the stage to establish "sufficient" grounds to pass a detention order requires strict adherence to the solid material collected by the agencies. As such, it can safely be concluded that before passing an detention order, the authorities must have a recourse to Section 154 Cr.P.C., when the allegations levelled against the detenus in the detention orders constitute a criminal offence under Anti-Terrorism Act, 1997, Pakistan Penal Code or any other law, as in this case most of the allegations levelled against the detenus are criminal offences. Furthermore, under section 11L of the Anti-Terrorism Act, 1997 a person who receives an information about involvement of a person in an offence covered by Anti-Terrorism Act, 1997, and he believes or suspects that some one has committed an offence under the above Act, he is under a legal compulsion to disclose such belief or suspicion to the police officer.

10. For what has been discussed above, here in this case neither the names of the detenus were ever placed in 4th schedule, nor they were proceeded against under the Anti-Terrorism Act, 1997 for committing criminal offences covered by the law, ibid. Further, there is no other material what to talk of "sufficient" to justify the impugned detention orders, thus, the orders passed by the respondent authority miserably fail to reach the standards as set by the Hon'ble Supreme Court of Pakistan, in the judgment referred, supra. Consequently, all these three writ petitions have been allowed by setting-aside the respective impugned detention orders.

Allowed.

2021 [M] C L R 221

[Lahore]

Present: **MUHAMMAD QASIM KHAN, RAUF AHMAD SHEIKH and IJAZ AHMAD, JJ.**

Saqib Naseeb

Versus

Returning Officer, etc.

Election Appeal No. 5 of 2012, decided on 5th November, 2012.

(a) Constitution of Pakistan, 1973---

---Art. 199---The Hon'ble Supreme Court of Pakistan in the case "Mirza MUHAMMAD TUFAIL versus DISTRICT RETURNING OFFICER, and others" (PLD 2007 S.C 16) set down the guiding principles to determine the status of a "civil servant", by holding that service means being employed to serve another, it implies submission to the will of another as to direction and control, to do work for another---Determination factor to hold a person to be in service of a body or authority, implies subordination to that body---Five tests for such subordination, namely (i) the power of authority of appointment to the office (ii) the power of removal or dismissal of the holder from the office (iii) the payment of remuneration (iv) the nature of functions of the holder of the office; he performs (v) the nature and strength of control and supervision of the authority---Decisive test is that of appointment and removal from service while remuneration is neutral factors and not decisive---Further held that tests should not be cumulated and not necessarily must co-exist and what has to be considered is the substance of the matter which must be determined by a consideration of all the factors present in a case---The apex Court further settled that whether stress has to be laid on one factor or the other depends on each particular case---In the instant case when status of the respondents is gauged by the above scale, as discussed above, these respondents have not been appointed by any authority rather they are elected persons under a specific process under the relevant rules; they do not hold whole time office; they are not paid any remuneration and their eligibility to become a member of said Organization or disqualification to retain such seat, is provided by these Rules---Although they may be public functionaries so far the nature of their functions is concerned, yet they cannot be termed to be in the service of Pakistan within the meaning of Article 260 of the Constitution of Islamic Republic of Pakistan, 1973. ***(Para 7)***

For the Appellant: **Masud Ghani, Advocate.**

For the Respondent No. 2: **Mian Abbas Ahmad, Advocate.**

Date of hearing: **5th November, 2012.**

ORDER

As Election Appeal No. 5/2012 "*SAQIB NASEEB versus RETURNING OFFICER, etc*" and Election Appeal No. 6/2012 "*SAQIB NASEEB versus RETURNING OFFICER, etc*", both arise out of almost similar facts and carry same questions of law, therefore, are being decided by means of this single judgment.

2. Briefly the facts are that the Election Tribunal constituted under Section 14(5) of the Representation of the People Act, 1976 for PP-226 Sahiwal-VII while dealing with an Election Petition No. 142/2008 vide its judgment dated 08.08.2012 declared one Malik Iqbal Ahmad Langrial (MPA-respondent No. 1 therein) ineligible to contest election for the seat of PP-226 Sahiwal-VII in the year 2008, held his election as MPA illegal and void, his notification as returned candidate for the said constituency was set-aside and Election Commission of Pakistan was directed to arrange for holding of by-election for PP-226 Sahiwal-VII. The Judgment of the Election Tribunal was upheld by the Hon'ble Supreme Court of Pakistan and consequently schedule of by-election was announced; the appellant along with others filed Nomination Papers. The Nomination Papers of Muhammad Iqbal (respondent No. 2 in Election Appeal No. 5/2012) and that of Muhammad Hanif (respondent No. 2 in Election Appeal No. 6/2012) were challenged by the appellant on the ground that former (Muhammad Iqbal) is Member of Area Water Board constituted under the Punjab Irrigation & Drainage Authority (Pilot Water Board) Rule, 2005 and latter Muhammad Hanif was elected Chairman of the "*Khal Panchayat*" of Chak No. 50/12-L under the Punjab Irrigation & Drainage Authority (Pilot Farmers Organizations) Rules, 2005, constituted under Punjab Irrigation & Drainage Authority Act, 1997 therefore, they both were disqualified to be elected as Member of Provincial Assembly (PP-226 Sahiwal-VII). The Returning Officer, however, accepted the Nomination Papers of Muhammad Iqbal as well as that of Muhammad Hanif through separate orders of same date i.e. 31.20.2012, hence, these Election Appeals.

3. The learned counsel for the appellant argued that respondents No. 2 in both the Election Appeals being Member of Area Water Board and Chairman of "*Khal Panchayat*" respectively, are holding the office of profit and performing services under Punjab Irrigation & Drainage Authority Act, 1997 and thus being public officers are "*civil servants*", and disqualified to be elected as Members of Provincial Assembly in terms of Article 63(d)(e) of the Constitution of Islamic Republic of Pakistan, 1973. The learned counsel for the appellant further referred Sections 4 and 14 of the Punjab Irrigation & Drainage Authority Act, 1997, Rules 3, 5 and 14 of the Punjab Irrigation & Drainage Authority (Pilot Area Water Board) Rules, 2005 and Rule 5, 17 of the Punjab Irrigation & Drainage Authority (Pilot

Farmers Organizations) Rules, 2005 and submitted that respondents are performing duties under the Punjab Irrigation & Drainage Authority Act, 1997 and they are fully covered by the definition of "civil servant" and the orders dated 31.10.2012 passed by the Returning Officer without adopting the proper procedure under section 14(3) of the Peoples Representation Act, 1976 accepted the Nomination Papers of the respondents under section 14(4) of the Act, ibid, thus the impugned orders are not in accordance with law and the Constitution of Islamic Republic of Pakistan, 1973.

4. On the other hand, learned counsel for respondents No. 2 contended that respondents are members of elected bodies and performing duties for the welfare of the Farmers within the limits prescribed by the statute without obtaining any remuneration, therefore, by no stretch of imagination the respondents can be termed as "civil servants", and they are fully qualified to be elected as Members of the Provincial Assembly, as disqualification clause referred by learned counsel for the appellant under Article 63(d)(e) of the Constitution of Islamic Republic of Pakistan, 1973 does not attract to the case of these respondents.

5. We have given anxious consideration to the arguments of learned counsel for the parties and perused the available record.

6. One of the important purpose for promulgation of the Punjab Irrigation & Drainage Authority Act, 1997 was to introduce participation of the beneficiaries in the operation and management of the canal system in the Province and for the same purpose the Punjab Irrigation and Drainage (Pilot Area Water Board) Rules, 2005 and the Punjab Irrigation and Drainage (Pilot Farmers Organization) Rules, 2005 were formulated and different bodies from the Farmers (owner or co-owner of land holding (*khata*) using canal water and directly engaged in cultivation of land within the areas of the water course), were established. Both the respondents are Members of these bodies elected under relevant rules and regulations and they are performing function within the parameters settled by the Act, ibid and the rules framed thereunder. Neither the respondents are appointed by any authority nor obtain remuneration from the Government. Careful reading of Rule 14, 15(2), 18 and 20 of the Punjab Irrigation & Drainage Authority (Pilot Area Water Board) Rules, 2005, and Rules 16 and 17 of the Punjab Irrigation & Drainage Authority (Pilot Farmers Organizations) Rules, 2005, clearly establish that respondents are not employees of the authority, rather they are performing their functions being elected members of the Farmers (owner or co-owner of land holding (*khata*) using canal water and directly engaged in cultivation of land within the areas of the water course).

7. Furthermore, there is nothing on the record to establish that respondents No. 2 are being paid any remuneration to declare them as "civil

servants". It is a fact borne out from the record itself that both the respondents are not appointed by any authority; rather they are the elected personals. By the involvement of local farmers of the area in irrigation system through the Punjab Irrigation & Drainage Authority Pilot (Area Water Board) Rules, 2005, the sole purpose before the Legislators was to fetch better output; otherwise, the respondents are not holding whole time office. The Hon'ble Supreme Court of Pakistan in the case "*Mirza MUHAMMAD TUFAIL versus DISTRICT RETURNING OFFICER, and others*" (PLD 2007 S.C 16) set down the guiding principles to determine the status of a "civil servant", by holding that service means being employed to serve another, it implies submission to the will of another as to direction and control, to do work for another. Determination factor to hold a person to be in service of a body or authority, implies subordination to that body. Five tests for such subordination, namely (i) the power of authority of appointment to the office (ii) the power of removal or dismissal of the holder from the office (iii) the payment of remuneration (iv) the nature of functions of the holder of the office; he performs (v) the nature and strength of control and supervision of the authority. Decisive test is that of appointment and removal from service while remuneration is neutral factors and not decisive. Further held that tests should not be cumulated and not necessarily must co-exist and what has to be considered is the substance of the matter which must be determined by a consideration of all the factors present in a case. The apex Court further settled that whether stress has to be laid on one factor or the other depends on each particular case.

In the instant case when status of the respondents is gauged by the above scale, as discussed above, these respondents have not been appointed by any authority rather they are elected persons under a specific process under the relevant rules; they do not hold whole time office; they are not paid any remuneration and their eligibility to become a member of said Organization or disqualification to retain such seat, is provided by these Rules. Although they may be public functionaries so far the nature of their functions is concerned, yet they cannot be termed to be in the service of Pakistan within the meaning of Article 260 of the Constitution of Islamic Republic of Pakistan, 1973.

7. In view of the above discussion, the orders passed by Returning Officer do not suffer from any illegality or infirmity. The appeals are without merits and same are hereby dismissed. The copy of this order be forwarded to the Returning Officer for information and necessary action.

Dismissed.

2021 [M] P Cr. R 174

[Lahore]

Present: **MUHAMMAD QASIM KHAN and ABDUL SAMI KHAN, JJ.**

Rab Nawaz, etc.

Versus

The State, etc.

Crl. A. No. 159 of 2008, decided on 12th September, 2012.

Pakistan Penal Code (XLV of 1860)---

---Ss. 302(B)/34 PPC, 337-D/34 PPC & 337-F(ii)/34 PPC---The word 'Notice" has been defined in BLACK's LAW DICTITIONARY Sixth Edition as "In another sense, "notice" means information, an advice, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which his interest are involved, or informing him of some fact which it is his right to know and the duty of the notifying party to communicate." Therefore, unless specifically provided or directed otherwise, simplicitor issuance of notice to convicts in a criminal revision seeking enhancement of sentence, would automatically carry a genuine impression that it requires explanation from such convict(s) to explain as to why the sentence imposed by the trial court may not be enhanced---We have no doubt in our mind to hold that mere issuance of notice (unless directed otherwise) in a criminal revision for enhancement, when read with prayer clause, would lead to a clear and just impression about enhancement of sentence and there was no need to add or insert the words that notice was being issued for such a specific purpose i.e. for enhancement of sentence, whereas, the contention of learned counsel for the petitioner is nothing more than a fallacy and the stance taken by him has no legal force at all. ***(Para 4)***

For the Petitioner: **Mian Bashir Ahmad Bhatti, Advocate.**

Munir Ahmad Sayal, Deputy Prosecutor General.

For the Complainant: **Malik Muhammad Latif Khokhar, Advocate.**

Date of hearing: **12th September, 2012.**

ORDER

Through this criminal miscellaneous learned counsel seeks suspension of the following sentences of Rab Nawaz and Zameer Hussain imposed upon them by learned Sessions Judge, Lodhran vide judgment dated 20.09.2008 in case FIR No.55/2006 dated 08.02.2006 police station Gailaywal, Lodhran i.e.

UNDER SECTION 302(B)/34 PPC sentenced to imprisonment for life;

UNDER SECTION 337-D/34 PPC for causing injury No.1 to Munir Ahmad sentenced to pay arsh equal to one third of diyat and imprisonment for five yerars, each.
UNDER SECTION 337-F(ii)/34 PPC for causing injuries No.2, 3 and 4 to Munir Ahmad, sentenced to imprisonment for a term of one year on three counts;
They were also directed to pay Rs.50,000/- as compensation to the legal heirs of deceased, in case of default to further undergo rigorous imprisonment for six months. All the sentences were ordered to run concurrently and benefit of section 382-B Cr.P.C. was extended.

2. On 22.09.2011, the learned counsel for the complainant pointed out that a criminal revision seeking enhancement of sentence has been admitted by this Court, as such, the sentence cannot be suspended. In answer to the said argument of learned counsel for the complainant, learned counsel for the petitioner has today argued that although Criminal Revision has been admitted by learned Single Judge of this Court vide order dated 12.03.2009, but the said order only finds mention about "Notice" and this word alone does not fulfill the requirement of Section 439(6) Cr.P.C, as the word "Notice" would not automatically mean a notice for enhancement, whereas it should have been specifically mentioned in the order that notice for enhancement is issued. The learned counsel therefore, concludes that despite the order dated 12.03.2012 notice for enhancement cannot be considered to have been issued to the convicts, as such, this application for suspension of sentence is maintainable.

3. The learned Deputy Prosecutor General assisted by learned counsel for the complainant adopted the same view as had been taken by them on 22.09.2011 and while referring the case "*MST. PARVEEN AKHTAR versus NIAZ ALI and another*" (2011 SCMR 1107) and "*AHMAD ZIA ALIAS BOBI and MALIK SAFI ULLAH-THE STATE*" (NLR 2000 Criminal 639), argued that when notice to the convict has been issued in a criminal revision seeking enhancement, it would mean notice for enhancement and nothing else, therefore, the contention of learned counsel for the petitioner is totally misconceived and the instant application is not maintainable.

4. We have heard the arguments of learned counsel for the parties at a considerable length and perused the available record.

5. The Criminal Revision No.43/2009 filed by Muhammad Azam complainant was with the following precise prayer:-

"For the foregoing reasons it is respectfully prayed that this criminal revision may kindly be graced with acceptance and sentence of respondents No.1 & 2 awarded by the learned Sessions Judge under section 302(b)/34 PPC of imprisonment for life be enhanced and converted to death."

The admitting note recorded on the said criminal revision vide order dated 12.03.2009 reads as under:-

"Learned counsel for the petitioner states that weakness of motive alone is not sufficient to pass lesser sentence.

2. Points raised need consideration. Admit. Notice

3. Office is directed to fix Crl.Revision No.158 of 2008 (Rab Nawaz vs. State), along with the instant petition."

4. A perusal of the above reproduced prayer of criminal revision as well as the order passed thereon; hardly leave any ambiguity about the purpose behind ordering issuance of notice to the convicts. There was specific prayer in the criminal revision and after its admission, notice could be issued to the convicts only with the intention to provide them opportunity to show cause as to why the sentence already imposed upon them by the learned trial court, may not be enhanced, as was the prayer in the criminal revision. The word 'Notice" has been defined in BLACK's LAW DICTITIONARY Sixth Edition as "In another sense, "notice" means information, an advice, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which his interest are involved, or informing him of some fact which it is his right to know and the duty of the notifying party to communicate." Therefore, unless specifically provided or directed otherwise, simplicitor issuance of notice to convicts in a criminal revision seeking enhancement of sentence, would automatically carry a genuine impression that it requires explanation from such convict(s) to explain as to why the sentence imposed by the trial court may not be enhanced. We have no doubt in our mind to hold that mere issuance of notice (unless directed otherwise) in a criminal revision for enhancement, when read with prayer clause, would lead to a clear and just impression about enhancement of sentence and there was no need to add or insert the words that notice was being issued for such a specific purpose i.e. for enhancement of sentence, whereas, the contention of learned counsel for the petitioner is nothing more than a fallacy and the stance taken by him has no legal force at all. Since notice of enhancement has already been issued to the petitioner in Criminal Revision No. 43/2009, in view of the dictum laid down by the apex Court in the above referred judgment, the sentence of the petitioner cannot be suspended, as such, the instant application is dismissed.

Dismissed.

2021 Law Notes 247
[Lahore (Bahawalpur)]
Present: **MUHAMMAD QASIM KHAN, J.**
Zarwali Khan
Versus
The State

Crl. Misc. No. 995-B of 2012, decided on 11th June, 2012.

Pakistan Penal Code (XLV of 1860)---
---Ss. 379, 411 PPC---It is correct that the offence under which the petitioner is being charged is not covered by prohibitory clause of section 497 Cr.P.C. and in normal course the courts are slow in refusing bail to the offenders whose offence do not fall within the ambit of prohibition contained in Section 497 Cr.P.C., but this practice may not be applicable in all eventualities---While applying this analogy the court while dealing with bail matters of such like offenders, must be cognizant of the fact as to the nature of the offence, the gravity thereof, its consequences and impact on the society---Here in this case the petitioner has been charged of illegally cutting and deceitfully removing the state property i.e. trees belonging to the Canal Department---In the recent times the importance of greenery (trees, plants, etc) has been recognized on almost every forum of national and international level, and now undoubtedly the trees are considered to be one of the most useful God-gifted commodities on earth---In earlier days men had so much of trees and natural environment to consume---But now, we only have destroyed jungles, increased global heat, and abnormal weather---Trees are very important in our life---The trees have a part on rainfall---And the other thing that trees provide us is oxygen to breath---Trees take the carbon dioxide for its food processing function and leave the oxygen---This activity is making the environment clean by providing oxygen---The cutting of trees has caused a huge change in the earth---The ozone plate has been damaged---This has increased the heat---By destroying the jungle the wild animals that live in the jungle are coming to the places where the people live and it destroys our lives---The birds have no place to live---Special kind of birds had been destroyed---This is the effect of what we have done to the trees---All this is happening due to illegal cutting of trees, but people still don't realize what they do and what they want to do. ***(Para 5)***

Sardar Zafar Iqbal Khan Tareen, Advocate.
Muhammad Ali Shahab, Deputy Prosecutor General with Aamir Rasool, Patrolling Police and Naseer ASI.
Date of hearing: **11th June, 2012.**

ORDER

Through this application, the petitioner (Zarwali Khan) seeks post arrest bail in a case arising out of FIR No.62/2012 dated 20.02.2012 under section 379 and 411 P.P.C. registered at police station Fort Abbas, Bahawal Nagar, wherein, precisely the allegation against the petitioner is that on spy information when raided the present petitioner along with co-accused was arrested at the spot and the woods loaded on a Truck was seized, which valued about Rs.9,00,000/-. It is alleged that this wood had been cut from Canal 1-L/9R-R and was attempted to be stolen.

2. It is argued by learned counsel that petitioner has been falsely involved in this case due to malafide and ulterior motives on the part of the Forest Department. The learned counsel contends that in the FIR neither the number nor the measurement of the alleged stolen woods has been mentioned. It is added that co-accused of the petitioner have been enlarged on bail by this Court and furthermore, the offence with which the petitioner is charged, is not hit by prohibitory clause of section 497 Cr.P.C. and nothing more is to be recovered from him, as such, no useful purpose would be served in keeping the petitioner incarcerated for an indefinite period.

3. The learned Deputy Prosecutor General Punjab on the other hand has opposed the grant of bail on the ground that although the offence under section 379/411 P.P.C. are not covered by prohibitory clause, but considering the nature of the offence committed by the petitioner, he is not entitled for bail.

4. I have considered the respective contentions of learned counsel for the parties and perused the record.

5. It is correct that the offence under which the petitioner is being charged is not covered by prohibitory clause of section 497 Cr.P.C. and in normal course the courts are slow in refusing bail to the offenders whose offence do not fall within the ambit of prohibition contained in Section 497 Cr.P.C., but this practice may not be applicable in all eventualities. While applying this analogy the court while dealing with bail matters of such like offenders, must be cognizant of the fact as to the nature of the offence, the gravity thereof, its consequences and impact on the society. Here in this case the petitioner has been charged of illegally cutting and deceitfully removing the state property i.e. trees belonging to the Canal Department. In the recent times the importance of greenery (trees, plants, etc) has been recognized

on almost every forum of national and international level, and now undoubtedly the trees are considered to be one of the most useful God-gifted commodities on earth. In earlier days men had so much of trees and natural environment to consume. But now, we only have destroyed jungles, increased global heat, and abnormal weather. Trees are very important in our life. The trees have a part on rainfall. And the other thing that trees provide us is oxygen to breath. Trees take the carbon dioxide for its food processing function and leave the oxygen. This activity is making the environment clean by providing oxygen. The cutting of trees has caused a huge change in the earth. The ozone plate has been damaged. This has increased the heat. By destroying the jungle the wild animals that live in the jungle are coming to the places where the people live and it destroys our lives. The birds have no place to live. Special kind of birds had been destroyed. This is the effect of what we have done to the trees. All this is happening due to illegal cutting of trees, but people still don't realize what they do and what they want to do.

6. When considered with above perspective, the offence committed by the petitioner in this case is not only colossal in terms of the loss caused to the government in terms of money but also is destructive for whole of the society, as such, his case cannot be taken lightly for the grant of bail, especially when the petitioner also does not have clean antecedents and has history of four other cases of like nature, therefore, the chances of repetition are prima facie visible. Furthermore, the petitioner along with some of the co-accused was arrested redhanded, stolen wood was recovered and axe as well as saw had been recovered from him. Although the learned counsel has tried to attribute malafide and ulterior motives to the department, but so far there is not a single document on record to establish this part of his argument. Although coaccused of the petitioners have been granted bail by this Court, but there case is distinguishable from the present petitioner, by the fact that said co-accused had not previous record of involvement in such like offences, whereas, the petitioner has criminal history and recovery had also been affected from him. As such, neither on merits nor on the ground of parity, the petitioner is found entitled for bail. This petition, therefore, is dismissed.

Dismissed.

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[Lahore (Bahawalpur)]

Present: **MUHAMMAD QASIM KHAN and SYED IFTIKHAR HUSSAIN SHAH, JJ.**

Muhammad Nawaz

Versus

The State

W.P. No. 5664 of 2011, decided on 21st March, 2012.

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

---Ss. 302, 324, 363, 34 P.P.C.---There is denial to the fact that it was never the intention of the legislature that every offender irrespective of nature of the offence and overall impact on the society or a section of society must be tried by Anti-Terrorism Court, and in order to determine as to whether an offence would fall within the ambit of section 6 of the Anti-Terrorism Act, 1997, it would be essential to have a glance over the allegations made in the FIR., record of the case and surrounding circumstances---It is also necessary to examine whether the ingredients of alleged offence have any nexus with the object of the crime as contemplated under sections 6, 7 and 8 thereof---Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind said act is to be seen---It is also to be seen as to whether the said act has created a sense fear and insecurity in the public or any section of the public or community or in any sect---In the case in hand, it is alleged by the complainant himself that his niece Mst. Aqsa Bibi was married with Fayyaz Akhtar, some time back relations amongst the spouses became strained, whereupon, Mst. Aqsa Bibi along with minor child, was expelled from the house by Fayyaz Akhtar and because of this family dispute the entire episode erupted.

(Para 5)

(b) Pre-Requisite of Terrorism---

---As held by the Hon'ble Supreme Court of Pakistan in the case "BASHIR AHMED versus MUHAMMAD SIDDIQUE and others" (PLD 2009 SC 11), striking of terror is sine qua non for the application of the provisions as contained in section 6 of the Anti-Terrorism Act, which cannot be determined without examining the nature, gravity and heinousness of the alleged offence, contents of the FIR, its cumulative effect on the society or on a group of persons and the evidence which has come on record---As observed above, except assertion in the FIR, there is no material available on the file to establish the element of terror or insecurity---Furthermore, the act of

terrorism is desired to be determined with the yardstick and scale of motive and object, instead of its result or after effect---In the case in hand admittedly previous hostility existed between the parties and from the facts and surrounding circumstances it appears that the instant occurrence had taken place due to the motive over a family dispute and there is nothing on the record to say that by commission of alleged occurrence the accused had the motive of creating sensation---Consequently, we hold that in the instant case the occurrence neither reflected any act of terrorism nor it was a sectarian matter, instead the murders in question were committed owing to previous enmity between the parties---In the above referred judgment the Hon'ble Supreme Court of Pakistan has held that "If the intention of the accused was not at all to create sense of insecurity or destabilize the public-at-large or to advance any sectarian cause the design or purpose of the offence as contemplated by the provision of section 6 of the Act were not attracted." ***(Para 7)***

For the Petitioner: **Rao Nasir Mehmood, Advocate.**

Navid Khalil, Assistant Advocate General.

For the Respondent: **Sajjad Amjad Khan, Advocate.**

Date of hearing: **21st March, 2012.**

ORDER

Briefly the facts of the case are that petitioner along with others was booked in a case FIR No.133/2011 dated 16.03.2011 under sections 302/324/363/34-P.P.C. read with Section 7-Anti Terrorism Act, 1997 registered at police station Fort Abbas, Bahawalnagar. The trial commenced before the learned Special Judge Anti-Terrorism Court, Bahawalpur and the petitioner filed an application under section 23 of the Anti Terrorism Act, 1997, alleging that in the facts and circumstances of the case provisions of Anti-Terrorism Act, 1997 were not attracted, as such, the trial had to proceed in the ordinary court. This application of the petitioner has been dismissed by the learned Special Judge, Anti-Terrorism Court, Bahawalpur, vide order dated 04.10.2011, impugned through the instant writ petition.

2. It is argued by learned counsel that both the parties were already tagged in litigation and the occurrence, subject matter of instant FIR, was outcome of said previous litigation. The learned counsel has further argued that even from the contents of the FIR previous enmity between the parties is quite evident. It is added by learned counsel that no firing was made outside the house and no panic or terror was caused in the area, nor the sense of fear was created in the locality, as such, the trial ought to have commenced in the ordinary court of jurisdiction and the learned

Special Judge Anti-Terrorism Court, did not consider these aspects of the case while passing the impugned order.

3. The learned Assistant Advocate General assisted by learned counsel for the complainant opposed this writ petition and by defending the impugned order, argued that although previous enmity between the parties is not denied, but this ground alone is not sufficient to take away the jurisdiction of Special Court, as otherwise, from the contents of the FIR the ingredients of offence under section 7 of the Anti-Terrorism Act, 1997, are made out, therefore, the impugned order has to be sustained.

4. We have heard the learned counsel for the parties and perused the record.

5. There is denial to the fact that it was never the intention of the legislature that every offender irrespective of nature of the offence and overall impact on the society or a section of society must be tried by Anti-Terrorism Court, and in order to determine as to whether an offence would fall within the ambit of section 6 of the Anti-Terrorism Act, 1997, it would be essential to have a glance over the allegations made in the FIR., record of the case and surrounding circumstances. It is also necessary to examine whether the ingredients of alleged offence have any nexus with the object of the crime as contemplated under sections 6, 7 and 8 thereof. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind said act is to be seen. It is also to be seen as to whether the said act has created a sense fear and insecurity in the public or any section of the public or community or in any sect. In the case in hand, it is alleged by the complainant himself that his niece Mst. Aqsa Bibi was married with Fayyaz Akhtar, some time back relations amongst the spouses became strained, whereupon, Mst. Aqsa Bibi along with minor child, was expelled from the house by Fayyaz Akhtar and because of this family dispute the entire episode erupted.

6. Although it is alleged by the complainant that due to the said incident, panic and sense of fear prevailed in the locality, but on a court query, the learned Law Officer submits that apart from the statement of the complainant, there is no statement of any person from the locality about the fact that by such firing sense of fear and insecurity in the public or section of pubic or community or in any sect, was created. Therefore, in the presence of the above admitted rivalry, it appears as if the

complainant had exaggerated the position by getting the lines about fear and insecurity added in the FIR to make it a case triable by Special Court under Anti-Terrorism Act, otherwise, on the present record, no such element could be established from the record.

7. As held by the Hon'ble Supreme Court of Pakistan in the case "*BASHIR AHMED versus MUHAMMAD SIDDIQUE and others*" (PLD 2009 SC 11), striking of terror is sine qua non for the application of the provisions as contained in section 6 of the Anti-Terrorism Act, which cannot be determined without examining the nature, gravity and heinousness of the alleged offence, contents of the FIR, its cumulative effect on the society or on a group of persons and the evidence which has come on record. As observed above, except assertion in the FIR, there is no material available on the file to establish the element of terror or insecurity. Furthermore, the act of terrorism is desired to be determined with the yardstick and scale of motive and object, instead of its result or after effect. In the case in hand admittedly previous hostility existed between the parties and from the facts and surrounding circumstances it appears that the instant occurrence had taken place due to the motive over a family dispute and there is nothing on the record to say that by commission of alleged occurrence the accused had the motive of creating sensation. Consequently, we hold that in the instant case the occurrence neither reflected any act of terrorism nor it was a sectarian matter, instead the murders in question were committed owing to previous enmity between the parties. In the above referred judgment the Hon'ble Supreme Court of Pakistan has held that "*If the intention of the accused was not at all to create sense of insecurity or destabilize the public-at-large or to advance any sectarian cause the design or purpose of the offence as contemplated by the provision of section 6 of the Act were not attracted.*"

8. For what has been discussed above, this writ petition is allowed, the impugned order dated 04.10.2011 passed by learned Special Judge Anti Terrorism Court, Bahawalpur, is hereby setaside, with a direction that the file of case FIR No.133/2011 dated 16.03.2011 police station Fort Abbas, Bahawalnagar, shall be transmitted to the learned Sessions Judge, Bahawalpur for its entrustment to the ordinary court of competent jurisdiction.

Allowed.

2021 [M] P Cr. R 202
[Lahore (Bahawalpur)]
Present: **MUHAMMAD QASIM KHAN and**
MAZHAR IQBAL SIDHU, JJ.
Zahid Hussain Alias Zaidi and others
Versus
The State and others

Murder Reference No. 22 of 2009, Criminal Appeal No. 140 of 2009, Criminal Appeal No. 154 of 2009 and Criminal Revision No. 81 of 2009, decided on 28th March, 2011.

Pakistan Penal Code (XLV of 1860)---
---S. 302/34/109 PPC---It is not always for the prosecution to prove the same, but once it has been set up in the FIR with assertion then it is duty of the prosecution to prove the same and if prosecution remains failed to do so, then its adverse affect would cast shadows on the prosecution case---In these circumstances, no previous enmity has been found, but the incident alleged to have taken place 4/5 days earlier to the happening of the main occurrence in the billiard shop has not been proved by any evidence---PW-2 and 3 did not see that earlier incident whereas Investigation Officer has ingenuously stated that Properitor of the shop did not appear before him or any other person who was present at that time to say anything about the quarrel---In these circumstances, we have found that prosecution remains failed to prove the motive against the appellants---So far as the part of conspiracy of the prosecution is concerned, half of the same was found false during the investigation by way of non recommending prosecution of Shafqat by placing his name in Column No.2 of the report under section 173 Cr.P.C. and even said accused was not summoned by the learned trial court to face trial, whereas, on the same set co-accused Awais has been acquitted by the learned trial court---This fact again goes against the credibility of the prosecution. ***(Para 14)***
For the Appellant: **Malik Sadiq Mehmood Khurram and Habib Ahmad Paras, Advocates.**
For the Complainant: **Malik Dost Muhammad Awan, Advocate.**
Muhammad Ali Shahab, Deputy Prosecutor General.
Date of hearing: **28th March, 2011.**

JUDGMENT
MUHAMMAD QASIM KHAN, J.--- Zahid Hussain alias Zaidi, Rana Muhammad Nadeem and Muhammad Awais accused faced trial before learned Additional

Sessions Judge, Rahim Yar Khan in case FIR No.54/2008 dated 17.05.2008 under sections 302/34/109 PPC registered at police station Air Port, Rahim Yar Khan, and on conclusion of the trial, vide judgment dated 30.04.2009, Zahid alias Zaidi was convicted under section 302-B PPC and sentenced to death and compensation of Rs.100,000/- to be paid to the legal heirs of deceased, in default to suffer six months imprisonment; Rana Nadeem was also convicted under section 302-B PPC and sentenced to imprisonment for life, with further order to pay Rs.100,000/- to the legal heirs of deceased, in case of default to further undergo six months imprisonment. Muhammad Awais co-accused was however, acquitted of the charges against him. Through Criminal Appeal No.140/2009 Muhammad Zahid alias Zaidi has assailed his above conviction and sentence, by Criminal Appeal No.154/2009 Rana Nadim has challenged his conviction and sentence, whereas, Criminal Revision No.81/2009 has been brought by Khalid Rafiq seeking enhancement in the quantum of sentence of Rana Nadeem and Murder Reference No.22/2009 has been sent by the learned trial court qua the death sentence of Zahid Hussain alias Zaidi, all these matters are being decided by this single judgment.

2. Briefly the prosecution case is that on 17.5.2008 at 1.50 a.m. through written application, Khalid Rafiq complainant reported the matter to the police with the narration that on the fateful day at about 12.30 (noon), he (complainant) along with Tausif Khalid (son) and Arif Rafiq (brother), was present in the home, when Zahid Hussain alias Zaidi armed with pistol, Rana Nadim armed with pistol riding a black colour motorcycle No.113/P came and called Tausif out of the house. The complainant and his brother Arif Rafiq also followed Tausif and in the sight Rana Nadim fired a straight shot but son of the complainant turned aside and fire was missed. Meanwhile, Zahid alias Zaidi made a pistol fire shot which hit on the neck of complainant's son. Shahid Farooq and Abdul Latif (brother in law of the complainant) also came at the spot and witnessed the occurrence. Complainant's son fell down in injured condition and accused decamped on their motorcycle by brandishing the firearm. The injured was being taken to Sheikh Zayed Hospital but he succumbed to the injuries in the way.

It was alleged in the FIR that murdered had been committed on the instigation of Awais (acquitted accused) and Muhammad Tufail, because 4/5 days earlier, Shafqat, Awais, Rana Nadeem and Zahid alias Zaidi had a quarrel with Tausif Khalid (deceased) on a billiard shop, and Zahid alias Zaidi had extended threat to Tausif.

3. Niaz Ahmad Sub-Inspector (PW-11) chalked out the FIR, prepared injury statement of deceased Ex.PH/3 and inquest report Ex.PH/2, sent the dead body for post mortem examination, prepared rough site plan Ex.PJ, collected blood stained earth form the place of occurrence vide memo Ex.PC, collected empty round P-1 vide memo Ex.PB. After post mortem examination last worn clothes of the deceased i.e. Vest P-2, Shalwar P-3 and Dopatta P-4 (all blood stained) were taken into possession. On 12.6.2008 accused persons were arrested, they got recovered crime empties Ex.PE and Ex.PG, Zahid accused/convict also led to the recovery of motorcycle P-7, taken into possession vide memo Ex.PF. After completion of usual formalities, the accused were sent to face trial.

4. On receipt of challan, the accused persons were charge sheeted to which they pleaded not guilty and trial commenced, wherein prosecution produced fourteen witnesses, which include the statement of investigation officers PW-11, detailed above, complainant Khalid Rafiq himself appeared in the witness box as PW-2 and produced Arif Rafiq as PW-3 to depose about ocular account and Dr. Javed Umar Khokhar was examined as PW-7 who while conducting post mortem over the dead body of Tausif Khalid had observed the following injuries on the dead body:-

1- *A lacerated wound with inverted margins of size 1 x 1 cm on the posterior of upper part of left scapular area near shoulder, blackening and burning present.*

2- *A lacerated wound with averted margins of size 6 cm x 2.5 cm on the right side of base of the neck. No blackening or burning was present."*

The rest of the witnesses are all formal in nature and deposed about the respective functions performed during the course of investigation. The accused persons when examined under section 342 Cr.P.C. denied and refuted the entire prosecution evidence, as such, on the completion of trial, as detailed above Awais was acquitted of the charges by extending him the benefit of doubt, whereas, above conviction and sentence was recorded against Zahid alias Zaidi and Rana Muhammad Nadeem.

5. Learned counsel for the appellants argued that learned trial court has disbelieved the allegation of abetment/ conspiracy leveled by the prosecution and Awais co-accused has been acquitted, whereas, Shafqat accused with similar allegation, had been found innocent by the Investigation Agency and his prosecution was not recommended. It has been argued that no previous enmity has been found in this case and the quarrel which allegedly had taken place 4/5 days prior to this occurrence in the billiard shop has not been proved for the reasons that neither the

Proprietor of the shop nor any player who allegedly played the game at the relevant time, has been produced by the prosecution. It has further been submitted that during intervening period i.e. incident of motive and the incident of murder no untoward had taken place between the appellants and the deceased. Learned counsel submits that story of the prosecution does not appeal to reasons because when threats of murder were issued by the appellants to the deceased and this fact was in the knowledge of the appellant, father of the deceased PW-2, then why he sent his son Tausif Khalid (deceased) in the company of the appellant. While criticizing the presence of the eye witnesses in this case, it has been submitted that their presence is highly doubtful in this case because they neither had any abode nor business near or around the place of occurrence, rather they have not assigned any reason for their presence at the place of occurrence at the relevant time. It has been argued that presence of Khalid Rafiq complainant and his viewing the occurrence is highly doubtful for the reason that deceased travelled about 80-feet from his house in the company of the enemies and was not either called back or intercepted by the complainant, the attitude of the complainant is not believable that he followed the deceased. Learned counsel has strenuously argued that had there being any doubt in the mind of the complainant about happening of untoward incident with his son Tausif Khalid then why he permitted him to accompany the appellants and if there was nothing in his mind then no justification can be given of his going behind the deceased.

6. So far as PW-3 Arif Rafiq is concerned, learned counsel has commented upon that without assigning any reason of his presence, in the FIR or in his statement recorded before the court as PW-3, either in the house of the complainant or at the place of occurrence, being not resident soft hast vicinity, cannot be believed. Learned counsel states that entire case of the prosecution hinges upon highly interested and related PWs and the time of occurrence as well as place of occurrence explicitly show presence of the independent people near or around the place of occurrence because venue of the murder is a thoroughfare and there so many shops situate, without independent corroboration it would be highly unsafe to believe the testimony of these two witnesses. The learned counsel further argued that it has not been brought on the record that no independent person was available that is why he was not cited as witness. Lastly, the learned counsel for the appellants with regard to the presence of the PWs has argued that after first fire shot allegedly made by Rana Muhammad Nadim appellant no effort was made by either of the PWs to attempt to save the life of deceased by way of either catching hold of the appellants or to run towards the deceased for this purpose, in these circumstances, presence of the PWs cannot be taken extirpated or disbelieved.

7. Learned counsel has vehemently criticized the alleged recoveries of the crime weapon from each accused and report of the Forensic Science Laboratory for the same. Only one crime empty was taken into possession, same has been found to have not matched with the pistol allegedly recovered from Zahid alias Zaidi appellant and the positive report of the alleged pistol of coappellant Rana Muhammad Nadim carries no value because he did not cause any injury to the deceased, though no effective firing has been attributed to him, but nothing was in his way to stop him from further firing. The learned counsel has argued that evidence of recovery even otherwise is taken as corroborative piece of evidence. Recovery of crime weapon has not advanced the prosecution case inasmuch as the appellant Zahid alias Zaidi is concerned.

8. So far as recovery of alleged motorbike shown to have had been recovered on the pointing out of Zahid alias Zaidi is concerned, it is argued by learned counsel for the appellants that no documents have been brought on the record as to its ownership, unless and until it has been proved categorically that motorcycle was belonging to the appellant then how the same can be used against him.

9. The learned counsel for the appellant has again raised a point that the entry wound is virtually not located at the neck of the deceased as alleged by the prosecution, rather it has been found available by the doctor on the upper part of left scapular area near the left shoulder with blackened and burnt margins, whereas exit wound has been found present on the right side of base of neck, in this way injury on the neck is an outlet injury, whereas, entry wound does not exist on the neck, this contradiction in between the medical evidence and the ocular account by itself, uproots the presence of the witnesses at the place of occurrence at the relevant time, and same cannot reconciled by the prosecution, on this diversity acceptance of appeal has been sought.

10. The learned Deputy Prosecutor General assisted by learned counsel for the complainant has controverted the arguments advanced on behalf of the appellants by contending that occurrence took place in broad day light, both the parties were found in acquaintance inter-se prior to the occurrence, incident initiated from the house of the complainant Khalid Rafiq PW-2 and at a short distance from his house the deceased was gunned down by the appellant without their inter-se complicity over a few days prior quarrel which took place in the billiard shop. The learned counsel further argued that occurrence took place at 12.30 p.m. on 17.5.2008, the deceased was taken to hospital through rescue 1122-van at Sheikh Zayed

Hospital, Rahim Yar Khan, but on the way he lost his life. Dead body was placed in the said Hospital where police came and a written application Ex.PA/1 was produced before the Investigation Officer at 1.30 p.m., same was sent to the police station for formal registration of FIR by Muhammad Nadim 1397/C, resultantly the FIR was chalked out on the same day at 1.50 p.m. Police Station is about 10-kilometere from the place of occurrence; by providing this data, the learned counsel submits that matter was reported to the police promptly, leaving no room for deliberations or consultation. The learned counsel for the complainant has argued that question of mistaken identity of the accused appellants does not arise in this case, occurrence took place at a distance of about 70/80-feet from the house of the complainant, presence of the complainant as well as his brother was not unusual or beyond the fact of rationality as the complainant is the resident of his own house, whereas, arrival of Arif Rafiq PW3 is also natural, if it may be taken that he did not reside in the house of the complainant or nearby to his house but being house of his brother, his presence is quite natural and considerable, even without assigning any reason. It is worth mentioning that during cross-examination on PW-2 at page-28 of the Paper Book Arif Rafiq PW-3 has stated that he run a shop of motorcycle on rental basis. The leaned counsel submitted that propinquity of the PWs with the deceased cannot be taken up to this extent that they would make false statements against any innocent person and in the absence of spite or enmity and without independent corroboration their statements are required to be believed. The learned counsel next argued that in these circumstances statements of these two related PWs cannot be discard. It is further submitted that it is a fact that people do not come forward to become witnesses though they had seen the same in order to avoid complications in their lives in future.

11. The learned counsel stated that motive means relevant fact to a fact in issue, and it is not required to be proved as the main occurrence and even in case of its non proof, disproof and being weak, it would not make any adverse effect on the prosecution case if otherwise evidence of eye witnesses and recovery of crime weapons are found to be true and reliable. The leaned counsel further added that motive remains hidden in the mind of the wrong doer in some times and the same cannot be adjudged or measured until and unless there was previous enmity by way of written proof i.e. registration of case or civil litigation or any application. However, the learned counsel submits that during cross-examination defence remained unsuccessful to shatter the motive in this case. So far as the non production of Proprietor of the shop is concerned, the same does not make the prosecution case doubtful because the incident of murder did not take place inside the shop or near the shop on its outer side. The learned counsel further argued that so far as recoveries of

crime weapons from each of the appellant as well as recovery of motorcycle from the appellant Zahid alias Zaidi is concerned, PWs in their statements up to their conclusion remains unprefixed by the defence and report of the pistol of appellant Rana Nadim issued by Forensic Science Laboratory is positive. Nevertheless, the appellant Rana Nadim fired s shot which did not hit the deceased but his participation in the occurrence cannot be doubted by the positive report of his weapon. So far as recovery of crime weapon from Zahid alias Zaidi accused/ appellant is concerned, the same does not make any adverse effect on the prosecution case in the absence of positive report against him for the reason that it has categorically been found that deceased received a fire shot made by the weapon which emits bullet. However, revolver recovered from him has been found operational by the ballistic expert. After arguing the pros and cons fo the case, learned counsel for the complainant has prayed for dismissal of appeals in toto and has prayed for enhancement of quantum of sentence of Rana Nadim appellant, by arguing that section 34 PPC is fully attracted.

12. As far as locale of injury on the person of the deceased, it has been argued by learned D.P.G that it has no where been mentioned by the PWs that injury available on the neck was exit or entry wound. However, it has been only described that deceased received fire shot near his neck, in this sequel it has been argued that on the strength of cross-examination that after first fire shot made upon the deceased by Rana Nadim, deceased Tausif took a turn, then immediately second fire was made by Zahid alias Zaidi appellant and when posture of the deceased was changed then it may not be expected form the PWs to described the seat of injury with certitude. One fire shot received by the deceased is available near the neck. The learned counsel submits that even otherwise from hick it cannot be expected that he may describe the exact seat of injury.

13. We have observed that occurrence in this case took place on17.5.2008 at 12.30 (noon) from a distance of 80-feet of the house of the complainant, the injured was taken to Sheikh Zayed Hospital, Rahim Yar Khan through Rescue 1122 Van and on the way the injured succumbed to the injuries and his dead body was placed in the said Hospital, where application was submitted before Niaz Ahmad Sub-Inspector at 1.30 a.m., the same was sent to police station through Muhammad Nadim 1397/C and formal FIR was lodged by Muhammad Rashid ASI at 1.50 a.m. This sequence of the happening of incident up to the lodgment of the FIR remains so prompt leaving no room for the complainant party to have deliberations or consultations. In these circumstances the FIR is taken as a sacrosanct document in the prosecution case.

14. So far as the motive is concerned, it is not always for the prosecution to prove the same, but once it has been set up in the FIR with assertion then it is duty of the prosecution to prove the same and if prosecution remains failed to do so, then its adverse affect would cast shadows on the prosecution case. In these circumstances, no previous enmity has been found, but the incident alleged to have taken place 4/5 days earlier to the happening of the main occurrence in the billiard shop has not been proved by any evidence. PW-2 and 3 did not see that earlier incident whereas Investigation Officer has ingenuously stated that Properitor of the shop did not appear before him or any other person who was present at that time to say anything about the quarrel. In these circumstances, we have found that prosecution remains failed to prove the motive against the appellants. So far as the part of conspiracy of the prosecution is concerned, half of the same was found false during the investigation by way of non recommending prosecution of Shafqat by placing his name in Column No.2 of the report under section 173 Cr.P.C. and even said accused was not summoned by the learned trial court to face trial, whereas, on the same set co-accused Awais has been acquitted by the learned trial court. This fact again goes against the credibility of the prosecution.

15. So far as ocular testimony is concerned, both the PWs are not only inter-se related (brothers) but Khalid Rafiq complainant is also father of the deceased, while presence of these witnesses is quite natural in their house situated at a short distance from the place of occurrence. Both the appellants allegedly called the deceased out from his house and took him to him to the place of occurrence. It may not be taken as unusual that both the PWs had come out from the house to see the deceased. We have not found any previous ill will or enmity whereby the PWs might have become false witnesses. The deceased Tausif Khalid was the real son of Khalid Rafiq complainant and this fact is beyond rationality that real father would substitute an innocent person in place of actual culprit. Kinship by itself is no ground to discard the testimony until and unless presence at the place of occurrence is found highly doubtful.

16. It is platitude that independent/private persons do not come forward to become witnesses especially in murder cases. This fact again be taken as petty of the society. So far as behavior of the witnesses at the place of occurrence, as highlighted by the defence, is concerned, it goes without saying that it cannot be expected from a person to jump in the fight to save an under attack person, it differs from man to man and situation to situation, normally it has been seen that where fire arm weapons are used in the commission of crime people/witnesses do not come

forward to save the victim at the risk of their own lives, therefore, in this case it cannot be said that PWs were not present and did not see the occurrence.

17. So far as the seat of injuries with reference to contradiction with medical evidence is concerned, the prosecution case is that appellant Zahid alias Zaidi made a fire shot with his revolver hitting near the neck of the deceased and it no where mentioned that the same shot made exit, entry wound has been found on the left scapular area near shoulder with blackened/burnt margins, its exit has been found on the right side of the base of the neck. A very slight variation as to the seat of injury has been found and during cross-examination it has been brought on the record that after the first fire shot which did not hit the deceased, the deceased took a turn, in this view of the situation, the deceased received a fire shot near the neck. Since there is a single shot on the deceased, therefore, we have found no glaring material or irreconcilable diversity in between the ocular and the medical evidence, as such, the argument of learned counsel for the appellant Zahid alias Zaidi are not helpful and do not make the case doubtful or the presence of the PWs was not established. We seek guidance by the case law "*ASLAM, Etc. versus THE STATE*" (PLJ 1997 SC 946), wherein there was a conflict in between the medical evidence and the ocular account and the apex Court observed that "in case the medical evidence is in direct conflict with ocular account which has been found truthful, in such an eventuality, medical opinion resting on the brink of possibility shall give way to the eye-witness account." In another landmark judgment ""*SAEEDULLAH KHAN versus THE STATE*" (1986 SCMR 1027), the Hon'ble Supreme Court of Pakistan had settled the principles that if the presence of the eye witnesses is proved at the place of occurrence at the relevant time without any shadow of doubt, their evidence is believed to be truthful. The description of the manner in which the injury was sustained by the deceased was the result of confusion and excitement generated by the dramatic and traumatic circumstances in which the accused was firing shot, the eye witnesses could be naturally expected to be perplexed and eye witnesses whose presence is established at the place of occurrence at the time of occurrence, must be looking at the awful scene enacted in their presence with great amount of tension and confusion about the fate of the victim. Therefore, in these circumstances, statements of truthful eye witnesses have to be given weight and any contradiction of ocular account with medical evidence should be ignored. Almost same is the situation in the case in hand where the deceased sustained the fire shot while in turning position, therefore, discrepancy of about two to three inches about the seat of injury is not fatal to the prosecution case.

18. As regards the recovery of crime weapon and the motorcycle, these pieces of evidence are regarded as corroborative, positive report of the weapon recovered from Zahid alias Zaidi is not found, however, his revolver has been found by the ballistic expert in working condition but only its workability does not support the prosecution case, whereas, the positive report of weapon of Rana Muhammad Nadim appellant though involves him but he did not cause any injury to the deceased, therefore, the same is taken out of consideration. During investigation about the motorbike allegedly recovered on the pointing out of Zahid appellant no verbal or documentary proof has been brought on the record as to who the same belonged. In these circumstances, this piece of evidence does not advance the case of the prosecution.

19. In the occurrence only one fire shot was made by Zahid alias Zaidi appellant, though he could repeat, but he did not. After considering all the material available on the file we have come to the conclusion that prosecution has proved its case with the exception of motive, recoveries as well as conspiracy, therefore, the appeal (Crl.A.No.140/2009) of Zahid alias Zaidi appellant is dismissed with the modification that his death sentence is commuted to life imprisonment for the reasons mentioned above i.e. motive as well as element of conspiracy could not be proved, there was no previous enmity between the parties and recovery in this case is not helpful to the prosecution and also it being a case of single fire shot.

20. So far as Rana Muhammad Nadim appellant is concerned, he did not cause any injury to the deceased, no effective firing is attributed to him and further after the first shot, as alleged by the prosecution, he did not repeat the same, although there was nothing in way which could have stopped him in repeating the fires, as such, benefit of doubt is extended to Rana Muhammad Nadim as a matter of abundant caution, his appeal (Crl.A.No.154/2009) is accepted and he is acquitted of the charge with the direction that he be set at liberty forthwith if is not required in any other case. In this respect we are benefited by the judgments of Hon'ble Supreme Court of Pakistan "*SHAHADAT and 8 others versus THE STATE*" (1992 SCMR 2276), wherein it was observed that "*in a situation, like the one in hand, the Courts have the power to extend the benefit of doubt to some of the accused as a matter of abundant caution without affecting the case of their co-accused.*" In another case "*SHAHZADO and others versus THE STATE*" (1980 SCMR 328) their lordships held that High Court was competent to sift evidence and acquit an accused as a matter of abundant caution.

21. Appellant Zahid alias Zaidi is provided the benefit of Section 382-B Cr.P.C, amount of compensation shall remain the same and on its non-realization the sentence too will remain the same. The case property shall be disposed of after the period of appeal, if any. Criminal Revision No.81/2009 filed by the complainant for enhancement of quantum of sentence of Rana Muhammad Nadim, in the circumstances of the case, fails and is dismissed. Record shall be remitted immediately.

MURDER REFERENCE IS ANSWERED IN NEGATIVE. SENTENCE OF DEATH IS NOT CONFIRMRED.

Dismissed.

2021 [M] C L R 329

[Lahore]

Present: **MUHAMMAD QASIM KHAN, J.**

Saeed Anjum

Versus

State, etc.

W.P. No. 1715 of 2007, decided on 7th March, 2011.

Pakistan Penal Code (XLV of 1860)---

---S. 420, 568, 471 PPC---So far as the first quoted relief is concerned, as discussed earlier the learned Justice of Peace acting as an executive authority had no jurisdiction to nullify the investigation, even though it might have been conducted illegally or in unauthorized manner---As such, the observations of learned Justice of Peace recorded in para-8 of the impugned order (reproduced above), being excessive as well as illegal abuse of jurisdiction beyond the scope of Sections 22-A and 22-B Cr.P.C. are declared illegal, and are accordingly set-aside---As regards the second relief granted by the learned Justice of Peace vide the impugned order (precisely reproduced above) suffice it to say that Police Order, 2002 provides a complete procedure for transfer of investigation as well as its supervision---It also provides that only two transfers of investigation could be allowed and procedure in this behalf has been given in Article 18(6) of the Police Order, 2002---Under Article 18(3), ibid, there should be head of the investigation, not below the rank of Superintendent of Police and responsible to his own hierarchy, whereas, Article 18(4) of Police Order provides that all registered cases shall be investigated by Investigation Staff in the District under the supervision of head of Investigation---The S.P (Investigation) being supervisory head of investigation himself could not take up the investigation process and he could only to issue directions to the concerned investigation staff to investigate the matter within the parameters of law---In his authority, the S.P (Investigation) can direct the I.O to collect any evidence (oral or documentary), inspect the site, obtain expert reports, etc. but in every eventuality he could not take over the charge or start conducting the investigation for himself---The S.P (Investigation) in suitable cases may even put up the matter before the competent District Standing Board for change of investigation---The learned Justice of Peace is not empowered to control the investigation by directing furnishing of weekly progress/result of the investigation to the office of his Superintendent---Any Sessions Judge or Additional Sessions Judge while acting as ExOfficio Justice of Peace has not

been delegated any such authority under Section 22-A and 22-B of Code of Criminal Procedure---He only acts as an Executive Authority, whereas, investigation is conducted by an independent agency controlled by Police Order, 2002 and Police Rules, 1937, therefore, the learned Justice of Peace was not at all authorized to interfere in the sphere of Investigating Agency, save as provided by law---In a celebrated judgment PLD 1994 SC 281 the Hon'ble Supreme Court of Pakistan has settled that interference by Courts in the matter of police investigation before submission of challan, order passed by High Court calling for periodic progress of investigation was set-aside---So the learned Justice of Peace could not issue such a direction as reproduced above---Therefore, said direction of learned Justice of Peace being illegal and void, is set-aside.

(Paras 6, 7)

For the Petitioners: **Mumtaz Hussain Bazmi, Advocate.**
For the Respondents: **Masud Ashraf Sheikh, Advocate.**
Date of hearing: **7th March, 2011.**

JUDGMENT

MUHAMMAD QASIM KHAN, J.--- This single order shall decide two matters i.e. W.P.No.1715/2007 "*SAEED ANJUM vs. STATE, Etc*" and W.P.No.1717/2009 "*RANA SAEED AHMAD vs. STATE, Etc*", assailing the order dated 03.07.2002 passed by learned Justice of Peace, as both matters arise out of similar facts and circumstances.

2. Briefly the facts are that Riaz Ahmad (respondent in both these writ petitions), lodged an FIR No.200/2007 with police station Kot Samaba under sections 420, 468, 471 PPC against Shakeel Ahmad (*whose W.P.No.1721/ 2007 has been decided by this Court vide a separate order of even date*), for alleged preparation of forged and fabricated agreement to sell with regard to 108-kanal and 17-marla of land situated in Chak No.85/NP. The said FIR was yet under investigation when Riaz Ahmad complainant moved an application dated 16.6.2007 under sections 22-A and 22-B of the Criminal Procedure Code, 1898 before the learned Justice of Peace, with the grievances that soon after registration of case the accused person in collusion with Rana Saeed Ahmad DSP (Investigation), who firstly got moved an application on behalf of the accused persons to DSP Saddar Circle Rahim Yar Khan and then got moved another application on behalf of the accused to the District Police Officer Rahim Yar Khan and thereafter an application under section 22-A Cr.P.C. was moved by the accused persons for change of investigation, as such after repeated applications

by the accused persons, the investigation was taken up by said Rana Saeed Ahmed DSP himself without the orders of competent District Standing Board. It was further stated in the application of the complainant that he moved complaints in this behalf but having failed, ultimately application under sections 22-A and 22-B Cr.P.C. was moved on the ground that investigation carried out by Rana Saeed Ahmad DSP without any order of the District Standing Board, was illegal and in violation of Police Order, 2002. It was therefore, prayed that action may be initiated against Rana Saeed Ahmad DSP under Police Order, 2002. The learned Ex-officio Justice of Peace vide a detailed order dated 03.07.2007, made the following remarks:

> *"Both the said police officers are also guilty of violation of duty, hence the acts of both the DSPs named above cannot be left unattended."*
>
> (Last three lines of Para-7 of the order dated 03.07.2007)
>
> *Investigation, if any, conducted without proper entrustment is not to sustain. Order accordingly.*
>
> (Last three lines of Para-8 of the order dated 03.07.2007)
>
> *"Before parting with this order, I would like to observe that collusion of Rana Saeed Ahmad and Saeed Anjum both DSPs with the accused of the said case is very much visible and therefore both the said police officers are liable to be proceeded against under section 155 (C & D) Police Order, 2002. DPO will get the criminal case registered against the said police Officers under intimation to this court by sending copy of the FIR within one week and the police Officer not below the rank of DSP may be deputed to conduct the investigation and the result/ progress in the said criminal case be sent to the office Superintendent of Sessions Court, Rahim Yar Khan weekly who will also follow up the progress in the said criminal case."*
>
> (Opening lines of Para-11 of the order dated 03.07.2007.

As discussed above, through W.P.No.1715 and 1717 of 2007 Saeed Anjum and Rana Saeed Ahmad both DSPs have assailed the above order dated 03.7.2007 passed by the learned Justice of Peace.

3. It is argued by learned counsel for the petitioners that learned Justice of Peace had limited powers and he could not treat the proceedings as regular lis nor was expected to render an elaborate judgment while acting as ExOfficio Justice of Peace within the meaning of Section 22-A and 22-B of the Code of Criminal Procedure, 1898, and he could also not interfere in the investigation process which was entirely within the domain of the concerned police agency. The learned counsel further argued that question of alleged malafide on the part of the police officers also

required factual inquiry and it could not be resolved by the learned Justice of Peace. It is argued that petitioners have been condemned unheard, as such, the remarks recorded by the learned Justice of Peace cannot sustain in the eyes of law. Learned counsel contends that case under section 155(c)(d) of Police Order could not be registered against the petitioners without the report in writing by an officer authorized in this behalf under the rules made by the Government, as Article 155(2) of the Police Order, imposed a restriction on the prosecution of case.

4. The learned counsel representing respondent No.3/ complainant argued that there is no illegality or irregularity in the findings recorded by the learned Justice of Peace in the impugned order. Further argued that on the face of it the petitioners/ police officers acted beyond their jurisdiction with regard to conduct the investigation without proper transfer of investigation under section 18(6) of Police Order, 2002, therefore, their actions being tainted with malafides, they were open to consequences under section 155 of the Police Order, 2002. According to the learned counsel transfer of investigation could only be ordered by Additional Inspector General of Police after considering the recommendations of District Standing Board under section 18(6) of the above Act, therefore, petitioners had committed illegality, as such, the proceedings conducted in an unauthorized manner had been rightly quashed. The learned counsel while rebutting the argument of learned counsel for the petitioners with regard to direction for registration of case against them, contended that under Police Order, 2002 no such embargo has been placed and in support of his contentions placed reliance on the case "*SAKHAWAT HUSSAIN SHAH versus STATE and 3 others*" (PLJ 2006 Lahore 1257) and "*NASEEM AKHTAR KHAN versus DISTRICT AND SESSIONS JUDGE*" (PLD 2005 Karachi 285).

5. Heard. Record perused.

6. Admittedly the impugned order dated 3.7.2007 was passed by learned District & Sessions Judge, Rahim Yar Khan while acting as Ex-Officio Justice of Peace, as such, he had to act within his jurisdiction settled by Section 22-A and 22-B of the Code of Criminal Procedure, 1898. It is by now a settled proposition of law that Justice of Peace only acts as an executive authority and has limited line of action bounded by Sections 22- A and 22-B, ibid. There is no dispute that application had been moved by respondent No.3 before the learned Justice of Peace under section 22-A Cr.P.C. and while exercising his jurisdiction under this section he could order

for registration of case, but in the case before this Court, the learned Justice of Peace granted three further relieves i.e.

i) *"The investigation, if any, conducted without proper entrustment is not to sustain. Order accordingly."*

ii) *"the result/ progress in the said criminal case be sent to the office Superintendent of Sessions Court, Rahim Yar Khan weekly who will also follow up the progress in the said criminal case."*

iii) *"Before parting with this order, I would like to observe that collusion of Rana Saeed Ahmad and Saeed Anjum both DSPs with the accused of the said case is very much visible and therefore both the said police officers are liable to be proceeded against under section 155 (C & D) Police Order, 2002. DPO will get the criminal case registered against the said police Officers under intimation to this court".*

So far as the first quoted relief is concerned, as discussed earlier the learned Justice of Peace acting as an executive authority had no jurisdiction to nullify the investigation, even though it might have been conducted illegally or in unauthorized manner. As such, the observations of learned Justice of Peace recorded in para-8 of the impugned order (reproduced above), being excessive as well as illegal abuse of jurisdiction beyond the scope of Sections 22-A and 22-B Cr.P.C. are declared illegal, and are accordingly set-aside.

7. As regards the second relief granted by the learned Justice of Peace vide the impugned order (*precisely reproduced above*) suffice it to say that Police Order, 2002 provides a complete procedure for transfer of investigation as well as its supervision. It also provides that only two transfers of investigation could be allowed and procedure in this behalf has been given in Article 18(6) of the Police Order, 2002. Under Article 18(3), ibid, there should be head of the investigation, not below the rank of Superintendent of Police and responsible to his own hierarchy, whereas, Article 18(4) of Police Order provides that all registered cases shall be investigated by Investigation Staff in the District under the supervision of head of Investigation. The S.P (Investigation) being supervisory head of investigation himself could not take up the investigation process and he could only to issue directions to the concerned investigation staff to investigate the matter within the parameters of law. In his authority, the S.P (Investigation) can direct the I.O to collect any evidence (oral or documentary), inspect the site, obtain expert reports, etc. but in every eventuality he could not take over the charge or start conducting the investigation for himself. The

S.P (Investigation) in suitable cases may even put up the matter before the competent District Standing Board for change of investigation. The learned Justice of Peace is not empowered to control the investigation by directing furnishing of weekly progress/result of the investigation to the office of his Superintendent. Any Sessions Judge or Additional Sessions Judge while acting as ExOfficio Justice of Peace has not been delegated any such authority under Section 22-A and 22-B of Code of Criminal Procedure. He only acts as an Executive Authority, whereas, investigation is conducted by an independent agency controlled by Police Order, 2002 and Police Rules, 1937, therefore, the learned Justice of Peace was not at all authorized to interfere in the sphere of Investigating Agency, save as provided by law. In a celebrated judgment PLD 1994 SC 281 the Hon'ble Supreme Court of Pakistan has settled that interference by Courts in the matter of police investigation before submission of challan, order passed by High Court calling for periodic progress of investigation was set-aside. So the learned Justice of Peace could not issue such a direction as reproduced above. Therefore, said direction of learned Justice of Peace being illegal and void, is set-aside.

8. So far as the objection of learned counsel that learned Justice of Peace could not direct for registration of case, suffice it to say that in the case in hand, there is no formal order from any of the competent authority within the meaning of Police Order, 2002 for the transferring of investigation of the case, as such, the petitioners prima facie appeared to have violated the provisions of Police Order, 2002. Furthermore, registration of case and initiation of criminal proceedings are entirely two different stages. It is by now settled that prosecution and the registration of case are two distinct steps in a criminal case. A criminal case is registered under section 154 Cr.P.C. and the investigation commences. During investigation material/ evidence is collected from both the sides. The purposes of the investigation is to collect the evidence and after the completion of investigation a report about the conclusion of investigation is prepared by the SHO under section 173 Cr.P.C. (Challan) and the same is put in court for judicial proceedings on it, whereas, prosecution includes every step and action, from its commencement to its final determination and it does not include the investigation. This question has already been resolved by this Court in the case "*PEER BAKHSH VS. SHO, ETC*" (W.P.NO.5466/2009- BWP), respectfully placing reliance on the judgment "*MASOOD AHMAD JAVED versus THE STATE and 5 others*" (2006 MLD 855). Therefore, prima facie the direction of learned Justice of Peace with regard to registration of case against the petitioners appears to be fully justified and is proper

use of jurisdiction duly vested in him. Therefore, I find no illegality in the impugned order to this limited effect.

9. As regards the contention of learned counsel that petitioners have been condemned unheard, it is settled principle of law that accused is not required to be heard before registration of a case, as such, the said argument is not sustainable at all. Furthermore, at the time of registration of a case or in an application for registration of case, issuance of notice and hearing of the accused is not necessary nor it is essential to give him opportunity of hearing at that stage. In this respect guidance is sought from the cases reported in 1995 MLD 372, PLD 2005 Lahore 470 and 1987 P.Cr.L.J. 1214, 1994 MLD 1736.

10. For what has been discussed in preceding paragraphs, both these writ petitions are disposed of in the above terms.

Disposed.

2021 [M] C L R 275
[Lahore (Bahawalpur)]
Present: **MUHAMMAD QASIM KHAN, J.**
Muhammad Ali Ghouri
Versus
Member Board of Revenue, etc.

Writ Petition No. 5481 of 2010, decided on 17th February, 2011.

Constitution of Pakistan, 1973---
---Art. 199---When Rule 96 is read with Rule 267 of the above Rules, it would make clear that an order passed by the Chairman Provincial Transport Authority is final and no right of appeal has been provided by the statute and jurisdiction of the Board of Revenue is only in the matters decided by the Punjab Transport Authority in its original jurisdiction, and the Board of Revenue has no jurisdiction to entertain an appeal under Rule 96-A of the Motor Vehicle Rules, 1969 against an order passed by the Chairman, Provincial Transport Authority---In this behalf I would seek guidance from a judgment "MUHAMMAD ASLAM versus CHAIRMAN, PROVINCIAL TRANSPORT AUTHORITY, Civil Secretariat Quetta and 2 others" (1996 C.L.C. 1630), whereby a learned Division Bench of the Quetta High Court, held as under: "Appeal against order passed by Chairman, Provincial Transport Authority would be competent before Board of Revenue, if former had acted under original jurisdiction No appeal would lie where order by Chairman, Provincial Transport Authority had been passed in exercise of appellate jurisdiction, conferred upon him under S.66, West Pakistan Motor Vehicles Ordinance, 1965"---All the Courts/Tribunal/Authorities before entertaining any matter or assuming jurisdiction have themselves to see whether jurisdiction vests in them to entertain and decide the matter brought before them---In this case as earlier held under rule 96-A of the Motor Vehicle Rules, 1969 the Board of Revenue had no power to entertain the appeal of the contesting respondents against the order passed by Chairman, Provincial Transport Authority under rule 96 and the matter of jurisdiction was also abruptly confronted by the petitioner to the Member Board of Revenue by filing a proper application, despite that the Member Board of Revenue entertained the appeal and passed an injunctive order, which impliedly shows that as a matter of fact the Member Board of Revenue assumed the jurisdiction, which fact further finds support by the letter written by Member (Judicial-II), Board of Revenue addressed to the learned Law Officer of this Court, wherein, he categorically mentioned that he has taken the cognizance in R.O.R.No. 94/2010 filed by the private respondents and it would be decided on merits---As such, there remains no ambiguity that the Member Board of Revenue had in fact turned down the objection raised before him by the

petitioner and impliedly assumed the jurisdiction---Therefore, it cannot be said that question of jurisdiction was either not raised before the said forum or was not decided by it. ***(Paras 8, 9)***

For the Petitioner: **Bilal Ahmad Qazi, Advocate.**

For the Respondent: **Nadim Iqbal Chaudhry, Advocate.**

Malik Mumtaz Akhtar, Additional Advocate General.

Date of hearing: **17th February, 2011.**

JUDGMENT

MUHAMMAD QASIM KHAN, J.--- With the concurrence of learned counsel for the parties, this case is being decided as *PAKKA* case.

2. Briefly the facts are that one Malik Abdul Qayum (*predecessor in interest*) of respondents No. 2 and 3 was running a transport business with the name of Minhaj Travels under a D-Class Stand Licence as provided by the Motor Vehicle Rules, 1969. Subsequently, the said Licence was revoked by the Regional Transport Authority, whereupon Malik Abdul Qayum brought a constitutional petition No. 1273/2009-BWP before this Court and on 07.04.2009 the learned counsel representing the petitioner of said writ petition came up with the plea that his appeal was already pending before the Chairman, Provincial Transport Authority, whereupon, this Court disposed of the writ petition by directing the Chairman, Provincial Transport Authority to decide the appeal of the petitioner Malik Abdul Qayum expeditiously. The said appeal was dismissed by the Provincial Transport Authority on 24.6.2010, which order was assailed on behalf of Minhaj Travels through W.P.No. 4091/2010-BWP but on 28.10.2010 the learned counsel on behalf of the petitioners in the said writ petition, opted not to press the writ petition as according to him the petitioners had availed the alternate remedy, as such, no grievance was left with them, the writ petition was disposed of. It so happened that one day before the making of above statement and withdrawal of W.P.No. 4091/2010- BWP, the present private respondents filed an R.O.R.No. 94/2010 before the Member (Judicial) Board of Revenue, Punjab, Lahore, under Rules 96-A and 97 of the Motor Vehicle Rules, 1969 against the decision of Provincial Transport Authority dated 24.6.2010. Precisely, the filing of this R.O.R before the Member Board of Revenue and taking of cognizance/ assumption of jurisdiction by the said authority on that R.O.R is the grievance which has been voiced by the petitioner through the instant constitutional petition.

3. In support of this writ petition, the learned counsel for the petitioner argued that against the order passed by Regional Transport Authority a right of appeal has been provided in Rule 96 of Motor Vehicle Rules, 1969 and the Chairman,

Provincial Transport Authority is to hear and decide the appeal, against whose order passed under Rule 96, ibid, no second appeal has been provided. The learned counsel took an exception that where the matter is decided by the Provincial Transport Authority in its original jurisdiction then appeal would lie before the Member Board of Revenue. According to the learned counsel there is distinction in Rule 96 and 96-A of Motor Vehicle Rules, 1969 and when Rule 96 is read with rule 267, ibid, it will become clear that he order of Chairman, Provincial Transport Authority on an appeal against the order of Regional Transport Authority is final and no further remedy of appeal is available. The learned counsel therefore, derives that in this case the appeal filed by the respondents before the Member Board of Revenue is against the prescribed procedure, whereas, no such remedy is available to the respondents.

4. The learned counsel contended that Member Board of Revenue has assumed the jurisdiction under Rule 96-A of the Motor Vehicle Rules, 1969 illegally while taking up R.O.R.No. 94/2010, although an application was filed before the Member (Judicial) Board of Revenue, Punjab, Lahore in the abovementioned R.O.R pointing out that the same was not maintainable and the Member Board of Revenue had no jurisdiction to entertain and decide it, but in the presence of that application, the learned Member Board of Revenue vide order dated 27.10.2010 went on to pass an injunctive order in favour of the private respondents. A copy of the application along with an affidavit of the learned counsel and order of the learned Member Board of Revenue have been brought on the record. The learned counsel further argued that when the learned Law Officer of this Court asked the Member Board of Revenue to submit his report, the M.B.R vide a letter dated 5th of November, 2010 (copy available on record) stated "*R.O.R No. 94/2010 has been filed by Malik Ahmad Minhaj under Rules 96-A of the Motor Vehicle Rules, 1969 as substituted by Punjab Notification No. 1154-71/1099-TI dated 07.08.1971 against the order dated 24.06.2010 and 10.06.2009 passed by Punjab Provincial Transport (Appellate) Authority Lahore and District Regional Transport Authority District Bahawalnagar. The revision petition has been taken cognizance of accordingly in terms of above provision of law and would be decided on merits.*" According to the learned counsel the reply of the Member Board of Revenue, is sufficient evidence of the fact that said authority has taken the cognizance and is now adamant to decide the same on merits, despite the fact that under Rule 96-A the appeal is not maintainable nor the Member Board of Revenue has any jurisdiction. The learned counsel therefore, argued when some authority entertains a matter which is beyond his jurisdiction and such proceedings are based on malafides, this Court has ample jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 to decide the same. In support of his assertions, the learned counsel placed reliance on the case "*CHIEF*

JUSTICE OF PAKISTAN IFTIKHAR MUHAMMAD CHAUDHRY versus PRESIDENT OF PAKISTAN through Secretary and others" (PLD 2010 SC 61).

5. The learned Additional Advocate General in the light of reply submitted by the Chairman, Punjab Provincial Transport Authority adopted the arguments, as had been advanced by learned counsel for the petitioner, whereas, on the other hand, learned counsel representing the private contesting respondents submits that point of jurisdiction is to be decided by the same authority, before whom any matter is brought for adjudication, otherwise, it would result in causing prejudice to the respondents as if this Court ultimately decides the question of jurisdiction, the respondents would be deprived of one right of appeal. Further argued that Section 66 of Motor Vehicle Ordinance, 1967 deals as to what order is appealable before which authority and Rule 197-C of Motor Vehicle Rules, 1969 provides that any person aggrieved by an order of the Provincial Transport Authority, may within thirty days of receipt of the order, may file appeal to the Appellate Authority as prescribed in Rule 96-A i.e. Board of Revenue. According to the learned counsel in this case the Board of Revenue being the authority can validly hear and decide an appeal filed against the order passed by Provincial Transport Authority, therefore, there is no jurisdictional error in filing of appeal or taking of cognizance by the Member Board of Revenue. The learned counsel next argued that Chairman and the Provincial Transport Authority are not distinct to each other and where the word "*Chairman*" is used it means whole of the Provincial Transport Authority and when it is read so, its orders will be appealable before the Board of Revenue under Rule 96-A of Motor Vehicle Rules, 1969. Lastly, the learned counsel argued that petitioner may appear before the Member Board of Revenue where the matter is subjudice and plead his case there. The learned counsel placed reliance on the case "*THE STATE through Federal Investigation Agency S.I.U., Islamabad versus Ch. SHUJJAT HUSSAIN and another*" (1995 P.Crl.L.J. 701) and "*SULTAN INDUSTRIES versus THE AUTHORITY UNDER PAYMENT OF WAGES ACT and another*" (1990 P.L.C. 357).

6. I have given anxious consideration to the arguments addressed by learned counsel for the parties at length and perused the entire available record in the light of relevant rules, law and the precedent case law.

7. In Motor Vehicle Ordinance, 1969 two authorities have been provided, one is Provincial Transport Authority and the second is Regional Transport Authority. The duties and functions of both these authorities are different and to better appreciate the above contentions, a table showing comparative study of their respective duties and functions, is drawn as under:-

PROVINCIAL TRANSPORT	REGIONAL TRANSPORT AUTHORITY

AUTHORITY			
A	Section 46(6): "The Provincial Transport Authority shall exercise and discharge the following powers and functions: (i) To coordinate and regulate the activities and policies of the Regional Transport Authority; (ii) To perform the duties of Regional Transport Authority; a) Where there is no such authority, or b) Where there is such authority, if it thinks fit so to do and if so required by that authority. (iii) To settle all disputes and decide all matters on which differences of opinion arise between the Regional Transport Authority; and (iv) To discharge such other functions as may be prescribed. Section 46(7) and (8):-	A	Section 17(1) of the Motor Vehicle Ordinance, 1965:- "A Regional Transport Authority constituted under Chapter IV may, for reasons to be recorded in writing and subject to any prescribed conditions declare any person disqualified, for a specified period, for holding or obtain in a license to drive a transfer vehicle in the Province."
B	Section 46(7) and (8):- "46(7): The Provincial Transport Authority may, subject to such conditions as may be prescribed, issue to the Regional Transport Authority such orders and directions, of a general	B	Section 64(1) of the Motor Vehicle Ordinance, 1965:- "The Regional Transport Authority may grant special permits, to be effective for one return trip only, authorizing the use of a motor vehicle for that trip as a public service vehicle."

	character in respect of road transport as it may deem necessary and the Regional Transport Authority shall give effect to all such orders and directions. (8): The Provincial Transport Authority and any Regional Transport Authority, if authorized in this behalf by rules made under section 69, may delegate such of its powers and functions to such authority or person and subject to such restrictions, limitation and conditions as may be prescribed by the said rules."		
C	Rule 57(A)(ii) (Punjab Substitution) of the Motor Vehicle Rules, 1969:- "The Provincial Transport Authority shall classify the route(s) which originate and terminate in the jurisdiction of more than one The Regional Transport Authority into "A", "B" and "C" categories for stage carriage permits on the basis of density of traffic and conditions of the roads."	C	Rule 57(A)(i): "The Regional Transport Authority shall classify the route(s) which originate terminate within the region."
		D	Rule 62 of Motor Vehicle Rules, 1969:- "A Regional Transport Authority may by general or special resolution recorded in its proceedings and subject to the restrictions, limitations and

			conditions and herein specified, delegate to the Chairman, Regional Transport Authority or Secretary, Regional Transport Authority all or any of its powers namely:- (i) Power under section 17 to disqualify a person for holding or obtaining a license to drive a transport vehicle; (ii) Power under section 44 and 52 to grant a contract carriage permit; (iii) Power under section 44 and 53 to refuse a contract carriage permit, in cases where no representations are received to grant with or without modification such an application, and attach conditions to the permit; (iv) Power under section 54 to grant a private carrier's permit; (v) Power under sections 44 and 57 to grant with or without modifications a public carrier's permit and power to attach conditions under section 58 or vary the conditions thereof; (vi) Power to attach to a stage carriage permit conditions under sub-section (2) section 5D; (vii) Power to renew private carrier's permits, public carrier's permits contract carriage permits and stage carriage permits under section 60 and to renew counter signatures of any such permits; (viii) Power under sub-section (2) of section 61 to permit the replacement of one vehicle by another; (ix) Power under section 62 to suspend

			permit; or (x) Power to grant stage carriage permit.
		E	Rule 179:- "Every company of cooperative society which operates a fleet of transport shall paint such vehicles according to the pattern and a particular color scheme approved and registered before hand by the Regional Transport Authority concerned. The particulars of the colour scheme shall be entered in the permits and no the company or society shall be entitled to painting vehicles according to a colour scheme adopted by the 'road Transport Authority, another company or Society in the Province."
		F	Rule 224(4): "A Regional Transport Authority or any of its officers, if so authorized by it, may by order in writing, in emergent cases, exempt any motor vehicle for such period and subject to such conditions as may be specified from any or all of the provisions of this rule."
		G	Rule 253(2): "The Regional Transport Authority may, in consultation with the local authority having jurisdiction concerned, make an order in the prescribed form (Form Stand A, Form Stand F, Form Stand C, and for stand D) permitting any place so be used as a stand and without such an orderno place shall be used. Provided always that no place which is privately owned shall be notified a a stand save on application by or with

			the written consent of the owner.
		H	Rule 253(5): "The Regional Transport Authority shall, from time to time, fix the fees or the maximum fees payable of every stand of Class, A, B or C."
		I	Rule 254(1): "The Regional Transport Authority may, in consultation with the District Magistrate having jurisdiction in the area concerned make an order in the prescribed form (Form FAL) permitting any place to be used for loading, unloading or halting the motor vehicle used for the carriage of goods for hire or reward.
		J	Rule 254(4): "The Regional Transport Authority may at any time revoke any order made by it under sub-rule (1) if in its opinion any of the conditions under which a place is to be used for the loading, unloading or halting of goods vehicles has been contravened or if the continuance of the said order is no longer in the public interest: Provided that before revoking the order, Regional Transport Authority shall give the Forwarding Agent concerned an opportunity of being head and shall record its reasons in writing."

It may be of relevance to point out that Government of the Punjab, Transport Department vide Notification dated 12th of March, 1987 constituted the Punjab Provincial Transport Authority, as under:-

1	Secretary to Government of the Punjab, Transport Department.	Chairman
2	Secretary to Government of the Punjab, Communications & Works Department.	Member
3	The Chief (Transport) to Government of the Punjab,	Member

	Planning & Development Department.	
4	Deputy Inspector General of Police, (Traffic), Punjab, Lahore.	Member
5	The Secretary, Punjab Provincial Transport Authority.	Secretary/ Member

The Regional Transport Authority for Bahawalnagar District was reconstituted by the Government of the Punjab, Transport Department vide Notification No. SOTR-1/5-4/2000, as under:-

1	DCO Bahawalnagar District Bahawalnagar	Chairman
2	District Police Officer	Member
3	DO Services	Member
4	Secretary, RTA	Secretary/ Member

8. Now the question arises, whether an order passed under Rule 96 of Motor Vehicle Rules, 1969 could be considered as an order passed by Provincial Transport Authority, or not?. In rule 96 it has been specifically mentioned that authority to hear and decide the appeal against an order of the Regional Transport Authority, shall be the Chairman, Provincial Transport Authority. The Chairman alone cannot sit as Provincial Transport Authority, because as mentioned above as a compact the Provincial Transport Authority consists of five members and Chairman is one of its Member only, hence any act or order of the Chairman while sitting individually cannot be said an order of whole of the Provincial Transport Authority. There is distinction in Rule 96 and 96-A of the Motor Vehicle Rules, 1969. Rule 96, ibid is limited to the appeal filed against the order of Regional Transport Authority and Rule 96-A was added to provide a right of appeal against the order passed by Chairman, Provincial Transport Authority in its original jurisdiction. The Member Board of Revenue has only jurisdiction to hear an appeal against the order passed by Provincial Transport Authority in its original jurisdiction and not against an order passed by the Chairman Provincial Transport Authority in appellate jurisdiction. Rule 267 of Motor Vehicle Rules, 1969 makes it very clear that any person aggrieved against the order of Regional Transport Authority sanctioning the establishment of a stand or revoking or modifying an order permitting the establishment of a stand, may, within thirty days of the receipt of the order, may file appeal to the appellate authority as prescribed in rule 96, whose orders thereon shall be final and conclusive. When Rule 96 is read with Rule 267 of the above Rules, it would make clear that an order passed by the Chairman Provincial Transport Authority is final and no right of appeal has been provided by the statute and jurisdiction of the Board of Revenue is only in the matters decided by the Punjab Transport Authority in its original jurisdiction, and the Board of Revenue has no jurisdiction to entertain an appeal under Rule 96-A of the Motor Vehicle Rules, 1969 against an order passed by the Chairman, Provincial

Transport Authority. In this behalf I would seek guidance from a judgment "*MUHAMMAD ASLAM versus CHAIRMAN, PROVINCIAL TRANSPORT AUTHORITY, Civil Secretariat Quetta and 2 others*" (1996 C.L.C. 1630), whereby a learned Division Bench of the Quetta High Court, held as under:-

> *"Appeal against order passed by Chairman, Provincial Transport Authority would be competent before Board of Revenue, if former had acted under original jurisdiction—No appeal would lie where order by Chairman, Provincial Transport Authority had been passed in exercise of appellate jurisdiction, conferred upon him under S.66, West Pakistan Motor Vehicles Ordinance, 1965."*

9. All the Courts/Tribunal/Authorities before entertaining any matter or assuming jurisdiction have themselves to see whether jurisdiction vests in them to entertain and decide the matter brought before them. In this case as earlier held under rule 96-A of the Motor Vehicle Rules, 1969 the Board of Revenue had no power to entertain the appeal of the contesting respondents against the order passed by Chairman, Provincial Transport Authority under rule 96 and the matter of jurisdiction was also abruptly confronted by the petitioner to the Member Board of Revenue by filing a proper application, despite that the Member Board of Revenue entertained the appeal and passed an injunctive order, which impliedly shows that as a matter of fact the Member Board of Revenue assumed the jurisdiction, which fact further finds support by the letter written by Member (Judicial-II), Board of Revenue addressed to the learned Law Officer of this Court, wherein, he categorically mentioned that he has taken the cognizance in R.O.R.No. 94/2010 filed by the private respondents and it would be decided on merits. As such, there remains no ambiguity that the Member Board of Revenue had in fact turned down the objection raised before him by the petitioner and impliedly assumed the jurisdiction. Therefore, it cannot be said that question of jurisdiction was either not raised before the said forum or was not decided by it.

10. As regards the case law cited by learned counsel for the private respondents, which undoubtedly holds that objection regarding jurisdiction of any Court, Authority or Tribunal must of necessity be taken by a party at earliest possible time before the forum where the matter is pending. But, as has been held by this Court in the preceding paragraph, the writ petitioner did raise the specific objection with regard to jurisdiction before the Member Board of Revenue by moving a proper application, but the Member Board of Revenue without deciding the question of jurisdiction proceeded to entertain the appeal of the private respondents and also in the letter addressed to the learned Law Officer of this Court, it was made clear by the Member Board of Revenue that cognizance has been taken and the appeal has to be

decided on merits. Therefore, as a matter of fact the guidelines settled in the above referred cases, have been duly met with in the case in hand, as such, in the peculiar facts and circumstances of the case in hand, as discussed above, the cited case law is of no much avail to the official respondents.

11. For what has been discussed above, this writ petition is allowed and it is held that Member Board of Revenue has no jurisdiction to entertain an appeal against the order of Chairman, Provincial Transport Authority and when a specific objection was raised before him with regard to his jurisdiction, an injunctive order passed by the Member Board of Revenue and his reply to the learned Law Officer, reproduced above, clearly shows that the Member Board of Revenue erred in law by impliedly assuming the jurisdiction and taking cognizance of the R.O.R. As such, the proceedings before the Member Board of Revenue in R.O.R.No. 94/2010 being without jurisdiction are quashed.

Order accordingly.

2021 [M] P Cr. R 187

[Lahore (Bahawalpur)]

Present: **MUHAMMAD QASIM KHAN and MAZHAR IQBAL SIDHU, JJ.**

Iftikhar Ahmad, etc.

Versus

The State

Murder reference No. 43 of 2007, Criminal Appeal No. 234 of 2007 & Criminal Appeal No. 245 of 2007, decided on 20th October, 2010.

Pakistan Penal Code (XLV of 1860)---

---S. 302(b)/34 PPC---During investigation the story of the prosecution has not been found correct in its totality and even otherwise, co-accused Altaf and Ghulam Jillani have been acquitted of the charges, to whom injuries to the PW have been attributed---This fact coupled with other facts create doubt in the prosecution version---In these circumstances, so far as Istikhar alias Papoo accused/ appellant is concerned, no fatal shot is attributed to him; alleged recovery of weapon is insignificant because report of ballistic expert is in the negative, injury attributed to him is on non vital part of the body and same has not contributed to the cause of death and he was also found innocent during investigation, therefore, false implication of Istikhar alias Papoo cannot be ruled out---As such, this appeal to the extent of Istikhar alias Papoo is allowed, he is acquitted of the charges against him and shall be released forthwith if not required in any other case---So far as the case of Iftikhar alias Taroo is concerned, the prosecution has miserably failed to prove the motive---This is not a case of deep rooted enmity; therefore, in the circumstances of the case, we feel it appropriate to reduce the quantum of sentence from death to life, as such, while dismissing this appeal to the extent of Iftikhar alias Taroo, his death sentence is commuted to life---The amount of compensation and imprisonment in lieu thereof, as ordered by the learned trial court, shall remain intact---Benefit of Section 382-B Cr.P.C. is extended---The record of the trial court be sent back and the case property, if any, be disposed of in accordance with law. ***(Paras 9, 10)***

For the Appellants: **Mian Muhammad Tayyab Watoo and Malik Sadiq Mehmood Khurram, Advocates.**

For the Respondent: **Mian Muhammad Afzal Watoo, Advocate for the complainant.**

Malik Muhammad Latif, Deputy Prosecutor General.

Date of hearing: **20th October, 2010.**

JUDGMENT

MUHAMMAD QASIM KHAN, J.--- Iftikhar Ahmad alias Taroo and Istikhar alias Papoo accused/appellants along with co-accused were tried by learned Additional Sessions Judge, Haroonabad in case FIR No.50/2006 dated 28.02.2006 police station Khichiwala and on conclusion of trial vide judgment dated 1.11.2007 the remaining co-accused were acquitted of the charges against them, whereas, Iftikhar alias Taroo and Istikhar alias Papoo were convicted under section 302(b)/34 PPC, Iftikhar was sentenced to death, whereas, Istikhar was sentenced to imprisonment for life. Both were also directed to pay Rs.100,000/- each to the legal heirs of deceased, in default to further undergo S.I for six months, each. To challenge their above conviction and sentence, Iftikhar and Istikhar have filed Criminal Appeal No.234/2007, whereas, complainant has filed Criminal Appeal No.245/2007 to assail the acquittal of coaccused and Murder Reference No.43/2007 has been sent by the learned trial court in terms of Section 374 Cr.P.C. All these matters are being decided by this single judgment.

2. Briefly the facts of the case are that Zafar Iqbal complainant got lodged the above FIR to the effect that on 28.2.2006 at about 6.00 p.m. he (the complainant) along with his brothers Muhammad Amjad (deceased), Muhammad Afzal and Muhammad Akram was present at his dera, when Iftikhar, Istikhar armed with pistols, Altaf Hussain armed with 222-bore rifle, Ghulam Jillani armed with hatchet along with three other unknown persons armed with sotis came and challenged that they had come to remove their notoriety. They hurled abuses, the complainant and his brothers rushed towards the room, but Iftikhar broke open the door and dragged out the complainant and his brothers from the room Iftikhar fired a straight shot hitting front \rigt side of chest of Amjad deceased. Istikhar fired with his pistol which hit left upper arm of Amjad. Ghulam Jillani inflicted hatchet blow at the left shoulder of Muhammad Akram PW and then inflicted hatchet blow with its blunt side, which hit Muhammad Akram PW on his right shoulder. Muhammad Altaf accused fired with rifle 222 bore which hit left upper arm of Zafar Iqbal complainant. Three unknown accused persons also gave beatings to the complainant party by kicks and fists. On hearing cries, Bashir Ahmad father of the complainant, Javaid and Muhammad Yaqoob PWs were attracted at the spot and accused decamped from the place of occurrence. It was alleged in the FIR that aggression had been launched on the abetment and with conspiracy of Ghulam Ghaus and Asmat Ullah and motive was said to be that one month prior to the occurrence, Iftikhar alias Taroo accused/appellant drunkard had struck his tractor with the bicycle of Muhammad

Amjad deceased and damaged it completely, due to which hot words were exchanged in between them.

3. On receipt of information about the commission of offence, Ghulam Murtaza SI (PW-12) reached the place of occurrence, recorded statement of the complainant, on the basis of which formal FIR was chalked out. The Investigating Officer prepared injury statement of Zafar Iqbal Ex.PN/1, injury statement of Muhammad Afzal Ex.PO/2, injury statement of Muhammad Akram Ex.PM/1, recorded statements of the witnesses and also prepared injury statement of Muhammad Amjad Ex.PL/2. Injured were sent to Hospital. The Investigating Officer inspected the site, took blood stained earth Ex.PC, secured two empties of 30-bore P-1/1-2, two live cartridges P-2/1-2 and a magazine of 30-bore along with five live cartridges P-3/1-5 vide recovery memo Ex.PB, prepared rough site plan Ex.PQ. Subsequently, he received information about the death of Muhammad Amjad, whereupon, he proceeded to Hospital, prepared inquest report Ex.PQ/3 and handed over the dead body for post mortem. After post mortem, last worn clothes of deceased i.e. Kameez P-4, Shalwar P-5 and Vest P-6 were taken into possession vide memo Ex.PD. On 3.3.2006 complainant and witnesses got recorded supplementary statements. Accused persons were arrested, Iftikhar got recovered pistol 30-bore P-7 taken into possession vide memo Ex.PE and Istikhar alias Papoo led to the recovery of Pistol 30-bore P-22 along with two live cartridges P-12/1-2 taken into possessions vide memo Ex.PI. After completion of other necessary formalities towards completion of investigation, the accused persons were sent up to face trial.

4. On receipt of challan, the accused were charge sheeted, to which the pleaded innocent and trial commenced with framing of charge. The prosecution produced its witnesses which including the statement of Dr. Muhammad Saeed Qamar PW-11 who apart from medically examining all the injured, subsequently also conducted autopsy over the dead body of Amjad Hussain deceased and found the following injuries on his person:-

1- *A lacerated punctured wound 1 ½ x 1 cm situated on anterior surface of upper part of right side of chest, 4 cm below the clavicle, 11 cm from the proginence of right shoulder, edges were inverted, no burning or blackening was present. Corresponding cut was present in the kameez.*

2- *There were two lacerated punctured wound on left upper arm 8 cm above the elbow joint.*

a) 1 x 1 cm on anterior lateral surface of left upper arm, edges were inverted, no burning or blackening was present.

b) 2 x 1 cm on posterior surface, edges averted, no burning or blackening was present. Cut in Kameez were present.

3- A small lacerated wound 1 x 1 cm on posterior surface of left side of chest. No burning or blackening was present.

On close of the prosecution evidence, the accused were examined under section 342 Cr.P.C., wherein they refuted the entire prosecution evidence and pleaded innocent. On conclusion of the trial, above conviction and sentence was recorded against Iftikhar alias Taroo and Istikhar alias Papoo, whereas, rest of the co-accused were acquitted of the charges against them.

5. In support of this appeal, it has been argued by learned counsel for the appellants that motive has not been proved in this case, therefore, false involvement due to ulterior motive cannot be ruled out; the appellant did not repeat the fire shot and during the trial story of the prosecution has been found doubtful, as co-accused whom injuries were attributed to the injured PWs have been acquitted. This fact alone creates doubt to the prosecution case and in these circumstances, case against Iftikhar alias Taroo is not of confirmation of sentence of dearth. So far as Istikhar alias Papoo accused/appellant is concerned, it is argued that during investigation he was found innocent, recovery does not implicate him and being brother of the principal accused, chances of his false implication cannot be ruled out, therefore, on the role of abundant precaution he is entitled for acquittal as alleged injury is also not contributive to the cause of death or alone causative, therefore, appeal to his extent may be allowed.

6. The learned Deputy Prosecutor General assisted by learned counsel for the complainant opposed the above submissions on the grounds that it is a case of prompt registration of FIR, injured PWs have supported the prosecution case, the occurrence took place in the house/Haveli of the complainant party and accused/appellants acted in a barbaric manner and caused dearth of the deceased and inflicted injuries to the other PWs. It is further argued that Iftikhar alias Taroo has caused fire shot to the deceased Amjad and report of the ballistic expert is in the posititive, therefore, the prosecution has fully proved its case and it is a fit case for confirmation of dearth sentence. So far as case of Istikhar alias Papoo is concerned, it has been argued that police opinion is not binding on the courts and insignificant report of the ballistic expert carries no value because recovery is always to be taken as corroborative piece of evidence. Istikhar caused injury to the deceased and it is a

case of common object, therefore, by virtue of section 149 or 34 PPC, he is to be treated equally responsible as principal accused. The learned counsel for the complainant has also challenged the acquittal of Altaf and Ghulam Jillani by arguing that their acquittal has been based on a PANCHAYATNAMA, to which the complainant is not the signatory, therefore, possibility of false and fake preparation of said PANCAYATNAMA cannot be ruled out, therefore, they be convicted and sentenced.

7. We have considered the arguments of learned counsel for the parties and perused the record.

8. It is not a case of deep rooted enmity. Previous incident of damaging the bicycle of deceased Amjad was not even reported to any forum and during investigation the police did not collect evidence about the motive incident. Although, the motive is not to be treated as sine qua non for proof or disproof of the allegations, but it is established law that once a motive has been set out then it become incumbent for the prosecution to discharge its onus. Since the prosecution has failed to prove its motive, therefore, prosecution has to suffer for the same.

9. During investigation the story of the prosecution has not been found correct in its totality and even otherwise, co-accused Altaf and Ghulam Jillani have been acquitted of the charges, to whom injuries to the PW have been attributed. This fact coupled with other facts create doubt in the prosecution version. In these circumstances, so far as Istikhar alias Papoo accused/ appellant is concerned, no fatal shot is attributed to him; alleged recovery of weapon is insignificant because report of ballistic expert is in the negative, injury attributed to him is on non vital part of the body and same has not contributed to the cause of death and he was also found innocent during investigation, therefore, false implication of Istikhar alias Papoo cannot be ruled out. As such, this appeal to the extent of Istikhar alias Papoo is allowed, he is acquitted of the charges against him and shall be released forthwith if not required in any other case.

10. So far as the case of Iftikhar alias Taroo is concerned, the prosecution has miserably failed to prove the motive. This is not a case of deep rooted enmity; therefore, in the circumstances of the case, we feel it appropriate to reduce the quantum of sentence from death to life, as such, while dismissing this appeal to the extent of Iftikhar alias Taroo, his death sentence is commuted to life. The amount of

compensation and imprisonment in lieu thereof, as ordered by the learned trial court, shall remain intact. Benefit of Section 382-B Cr.P.C. is extended. The record of the trial court be sent back and the case property, if any, be disposed of in accordance with law.

11. For the same reasons, Criminal Appeal No.245/2007 against the acquittal of Altaf Hussain and Ghulam Jillani fails and is dismissed.

MURDER REFERENCE IS ANSWERED IN THE NEGATIVE. SENTNECE OF DEATH IS NOT CONFIRMED.

Dismissed.

2021 [M] C L R 243

[Lahore]

Present: **MUHAMMAD QASIM KHAN, J.**

Mst. Razia Bibi

Versus

The State, etc.

W.P. No. 1722 of 2010, decided on 20th April, 2010.

Constitution of Pakistan, 1973---

----Art. 199---If the writ in the nature of habeas corpus is issued and detenue is brought before the Court, the Court shall decide as If the person is a minor, the Court may make over his custody to the guardian which will be dealing with him in accordance with law but if the person is major the only jurisdiction which the Court can exercise is to set him at liberty whether illegally or improperly detained in public or private custody or not---Hence, a sui-juris woman cannot be forced to live with any one against her wishes and even if a sui-juris woman is unwilling to go with her guardian, the Court cannot compel her to go with him, and she has to be set at liberty and allowed to move freely as has been held in PLD 1972 SC 6 titled "MUHAMMAD RAFIQ Vs. MUHAMMAD GHAFOOR" that: "Taking into consideration, the provisions of section 491 and 561-A, Cr.P.C. as well as that of the Fundamental Right No.1 in the Constitution of Pakistan (1962) that "No person shall be deprived of life or liberty save in accordance with law" there was no warrant in law for the direction passed by the High Court regarding the custody of the woman in the case---The High Court has two-fold jurisdiction under section 491, Cr.P.C. : (i) to deal with a person within its appellate criminal jurisdiction according to law; and (ii) to set him at liberty if he is illegally or improperly detained---If the Court finds that the person brought before it was not being illegally or improperly confined or detained then if the person is a minor, the Court may make over his custody to the guardian which will be dealing with him in accordance with law, but if the person is major, the only jurisdiction which the Court can exercise is to set him at liberty whether illegally or improperly detained in public or private custody or not---The Court may "set at liberty", but cannot restore status quo and against the wishes of the person brought before it---Such a course will lead to curtailment of liberty for which there is no warrant under section 491 nor can such an order be sustained under section 561-A of the Code as it cannot be said that allowing a person freedom of moment is an abuse of the process of the Court"---It is also a settled principle of law, that High Court cannot resolve the factual controversy in constitutional jurisdiction and also can not assume the role of Investigating Officer---The factual controversy between the statement of alleged detenue before the learned Sessions Judge and facts narrated in

this writ petition could not be resolved in writ jurisdiction---As discussed above the learned Sessions Judge has passed a legal and valid order in accordance with the Constitution of Islamic Republic of Pakistan, 1973 and law applicable thereto---Since the alleged detenue appeared before the learned Justice of Peace on 06.04.2010 and got recorded her explicit statement; there is no need to issue the writ in the nature of habeas corpus as statement of alleged abductee before the learned Sessions Judge that she is residing with her free will is sufficient---This writ petition is dismissed in-LIMNI. ***(Paras 7, 8, 9, 10)***

For the Petitioner: **Mumtaz Hussain Bazmi, Advocate.**

Date of hearing: **20th April, 2010.**

JUDGMENT

MUHAMMAD QASIM KHAN, J.--- Through this petition, the petitioner has prayed for the production of her daughter Mst. Sumera Bibi before this Court and determination of her fate in the facts and circumstances mentioned in the petition.

2. Brief facts of the case are that daughter of petitioner Mst. Sumera Bibi was married with Muhammad Ahmad but the same was ended in divorce and now she is living with one Khalid Mahmood. When the Mst. Razia Bbi, mother of petitioner approached to said Khalid Mahmood to take back her daughter, he refused to return her. She is living with Khalid Mahmood against Law and Quran-o-Sunna. Hence, this petition.

2. Learned counsel for petitioner argued that petitioner's daughter Mst. Sumera Bibi was married with Muhammad Ahmad but unfortunately she developed illicit relations with one Khalid Mahmood and said Khalid Mahmood with his companions forcibly got executed a divorce deed (TALLAQ NAMA) between Sumera Bibi and her husband Muhammad Ahmad. The period of marriage life between Sumera Bibi and her husband was five months and Mst. Sumera Bibi was also carrying pregnancy out of her husband. Further argued that now she has secretly been kept by Khalid Mahmood her paramour and other respondents for their illicit desires and the detenue is living her life against the law of the land and Quran-o-Sunna. To strengthen his arguments, learned counsel states that the alleged abductee is pregnant and her Iddat period will remain till birth of child. He also argued that order passed by learned Sessions Judge on the petition filed by the petitioner under Section 491 Cr.PC is against law and facts of the case.

3. Heard. Record perused.

4. Petitioner earlier filed an application under Section 491 Cr.PC before the learned Justice of Peace through her learned counsel Mr. Ghulam Yasin Abbasi, Advocate. The facts narrated in this writ petition and criminal miscellaneous mentioned above are different on material facts. However, without discussing the same, the record shows that the learned Sessions Judge directed the SHO for the production of alleged detenue and service upon respondents No.3 to 9. The respondents appeared before the Court on 03.04.2010 and stated that Mst. Sumera Bibi is not in their custody and further that the petitioner is at liberty to point out the clue of detenue in their houses and she can be searched from there. However, the learned Sessions Judge directed the SHO to ensure the production of alleged detenue Mst. Sumera Bibi. On 06.04.2010 Mst. Sumera Bibi was produced before the Court. Her meeting with the petitioner was arranged by the learned Sessions Judge, thereafter the statement of Mst. Sumera Bibi was recorded, wherein she stated that Bashir Ahmad Lambardar of Mauza Mullani had produced her before police and she was earlier residing in the house of Malik Nazir Ahmad who is relative of her mother Mst. Ruqayya Bibi i.e. petitioner. She further stated that her previous husband Muhammad Ahmad had divorced her and now she is under the period of Iddat. Also stated that none of the respondents detained her illegally, she refused to go with the petitioner and stated that she does not want to go to Darul Aman. As Mst. Sumera Bibi was not ready to accompany her mother i.e. petitioner and had also refused to go to Darul Aman, the learned Sessions Judge set her at liberty and the petitioner and her learned counsel in the light of statement made by Mst. Sumera Bibi did not press petition which was dismissed as withdrawn vide order dated 06.04.2010. No illegality could be established to the proceedings before learned Sessions Judge and he has passed an order with framework of law.

6. Habeas corpus literally means "*Have his body*". The writ of habeas corpus is a protective process for securing the liberty of people by affording an effective means of immediate release from unlawful detention whether in any prison or any private custody, by it the Court commands the production of the subject and inquires into the cause of his detention and if there is no legal justification the person is set at liberty this is why this writ is called the great writ of liberty. Hence, an order in the nature of habeas corpus is initiated to preserve the liberty of the subject and is a safeguard against the unlawful or improper manner of detention. It should be so construed as to advance the remedy and suppress the mischief and therefore it should always be construed in favour of the detenue.

7. The major Muslim woman like a major Muslim, being sui-juris is entitled for the same rights and liberties as are granted to the Muslim male. There is no law that a female on the mere ground of her gender must invariably be treated as a person under some sort of disability. Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 guarantees that no person can be deprived of life or liberty except in accordance with law. As such a major Muslim girl can not be detained in Darul Aman without her consent. Such detention for the purpose of preventing her from indulging in some alleged immorality would amount to preventive detention apart from the fact that there is no law requiring her to be so detained, the mandate of Article 10(4) of the Constitution ibid even forbids the making of such Laws. So if the writ in the nature of habeas corpus is issued and detenue is brought before the Court, the Court shall decide as **If the person is a minor, the Court may make over his custody to the guardian which will be dealing with him in accordance with law but if the person is major the only jurisdiction which the Court can exercise is to set him at liberty whether illegally or improperly detained in public or private custody or not.**

8. Hence, **a sui-juris woman cannot be forced to live with any one against her wishes and even if a sui-juris woman is unwilling to go with her guardian, the Court cannot compel her to go with him, and she has to be set at liberty and allowed to move freely** as has been held in PLD 1972 SC 6 *titled "MUHAMMAD RAFIQ Vs. MUHAMMAD GHAFOOR" that*:-

> *"Taking into consideration, the provisions of section 491 and 561-A, Cr.P.C. as well as that of the Fundamental Right No.1 in the Constitution of Pakistan (1962) that "No person shall be deprived of life or liberty save in accordance with law" there was no warrant in law for the direction passed by the High Court regarding the custody of the woman in the case.*
>
> *The High Court has two-fold jurisdiction under section 491, Cr.P.C. : (i) to deal with a person within its appellate criminal jurisdiction according to law; and (ii) to set him at liberty if he is illegally or improperly detained. If the Court finds that the person brought before it was not being illegally or improperly confined or detained then if the person is a minor, the Court may make over his custody to the guardian which will be dealing with him in accordance with law, but if the person is major, the only jurisdiction which the Court can exercise is to set him at liberty whether illegally or improperly detained in public or private custody or not. The Court may "set at liberty", but cannot restore status quo and against the wishes of the person brought before it. Such a course will lead to curtailment of liberty for which there is*

no warrant under section 491 nor can such an order be sustained under section 561-A of the Code as it cannot be said that allowing a person freedom of moment is an abuse of the process of the Court".

9. It is also a settled principle of law, that High Court cannot resolve the factual controversy in constitutional jurisdiction and also can not assume the role of Investigating Officer. The factual controversy between the statement of alleged detenue before the learned Sessions Judge and facts narrated in this writ petition could not be resolved in writ jurisdiction.

10. As discussed above the learned Sessions Judge has passed a legal and valid order in accordance with the Constitution of Islamic Republic of Pakistan, 1973 and law applicable thereto. Since the alleged detenue appeared before the learned Justice of Peace on 06.04.2010 and got recorded her explicit statement; there is no need to issue the writ in the nature of habeas corpus as statement of alleged abductee before the learned Sessions Judge that she is residing with her free will is sufficient. This writ petition is dismissed in-***LIMNI***. No order as to costs.

Dismissed.

2021 [M] P Cr. R 198

[Lahore (Bahawalpur)]

Present: **MUHAMMAD QASIM KHAN, J.**

Allah Diwaya

Versus

The state

Criminal Appeal No. 362 of 2004, decided on 25th March, 2010.

Criminal Procedure Code (V of 1898)---

---S. 22A---Jurisdiction would mean power to hear and determine a case, to adjudicate or exercise any judicial power in relation thereto---Court would have jurisdiction if it has the power and authority to decide matters that are litigated before it or to take cognizance of the matters presented before it in a formal way for the decision of the Court---When specifically the learned Justice of Peace had been held to be not performing or discharge any judicial functions, it could not itself assume the role of a court---The above reproduced provision of Section 195 Cr.P.C. only denote the word "Court" to launch criminal indictment---As such, initiation of criminal proceedings by the learned Justice of Peace in its administrative status by issuing notice to the appellant under section 476 Cr.P.C. was an act beyond his jurisdiction, as such, the entire superstructure built on such illegal and unwarranted exercise of jurisdiction, is bound to fall---By holding so I am guided by the law declared by Hon'ble Supreme Court in "YOUSAF ALI versus MUHAMMAD ASLAM ZIA and 2 others" PLD 1958 S.C 104), holding that: "No party can plead as final an order made in excess of the powers of the authority making it, in the eye of the law such order being void and non-existent---And if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded"---The same view was adopted by Hon'ble Supreme Court of Pakistan in subsequent judgment reported in PLD 1990 S.C 1070---In view of the above legal position, the very issuance of notice by the learned Justice of Peace was defective, as such, the impugned order/judgment of conviction and sentence, cannot sustain in the eye of law---The accumulative effect of all what has been discussed above is that this appeal is allowed, resultantly the conviction and sentence of the appellant is set-aside.

(Paras 6, 7)

For the Appellant: **Sadiq Mehmood Khurram, Advocate.**
For the Respondent: **Ch. Haq Nawaz, DDPG.**
Date of hearing: **25th March, 2010.**

JUDGMENT

MUHAMMAD QASIM KHAN, J.--- Briefly the facts are that Mst. Kausar Bibi wife of Allah Diwaya (accused/appellant) owned some land in Mouza Noorpur Nauranga and on 28.9.2004 when the appellant along with his workers was busy in the fields, Allah Ditta, Muhammad Ameen, Haji Muhammad and Muhammad Mandi armed with deadly weapons came at the spot, let loose their cattle and also broke the watercourse, as such the crop was damaged. Ultimately through an application under section 22-A Cr.P.C. moved by the appellant, the matter came before a learned Additional Sessions Judge/Justice of Peace, Bahawalpur, whereupon the SHO was called upon to submit report. In his report dated 13.10.2004 disclosed that matter had been patched up between the parties. However, on 25.10.2004 the appellant got recorded his statement that there was no compromise. On the contrary Akhtar Hussain Sub-Inspector also got recorded his statement to the effect that through document "MARK-A" compromise had been effected between the parties, whereupon notice under section 476 Cr.P.C. was issued to the present appellant. However, vide impugned order dated 10.12.2004, application of the appellant under section 22-A Cr.P.C. was dismissed and he was convicted and sentenced to one month imprisonment with a fine of Rs.1000/-, in default to undergo 15 days SI. Hence, this appeal.

3. It is argued by learned counsel for the appellant that admittedly proceedings under section 22-A Cr.P.C. were filed before the learned Additional Sessions Judge, Bahawalpur in his capacity as Justice of Peace. The learned counsel with reference to "*KHIZAR HAYAT and others versus I.G. PUNJAB, etc*" (P.L.D 2005 Lahore 470-Full Bench) contends that learned Justice of Peace was not a court within the meaning of Section 195 Cr.P.C, as such, neither it could issue notice under section 476 Cr.P.C. to the appellant nor could record any conviction or sentence, but this important legal aspect of the matter was lost sight by the learned Justice of Peace. It is therefore, argued that the impugned order is illegal, as such, the appellant deserves acquittal.

4. On the other hand, the learned D.D.P.G. has opposed the contentions of learned counsel by defending the impugned order of learned Justice of Peace.

5. I have considered the arguments of learned counsel for the parties and perused the record.

6. The language of Section 195 Cr.P.C. is very much clear, embodying that:-

> *"No Court shall take cognizance: -- (a) Prosecution for contempt of lawful authority of public servants: Of any offence punishable under Sections 172 to 188' of the Pakistan Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate."*

The Hon'ble Full Bench of this Court in the case "*KHIZAR HAYAT and others versus I.G. PUNJAB, etc*" (P.L.D 2005 Lahore 470-Full Bench), has in unequivocal terms held that an Ex-officio Justice of Peace in Pakistan does not perform or discharge any judicial function, as such could not be called a "Court". Jurisdiction would mean power to hear and determine a case, to adjudicate or exercise any judicial power in relation thereto. Court would have jurisdiction if it has the power and authority to decide matters that are litigated before it or to take cognizance of the matters presented before it in a formal way for the decision of the Court. When specifically the learned Justice of Peace had been held to be not performing or discharge any judicial functions, it could not itself assume the role of a court. The above reproduced provision of Section 195 Cr.P.C. only denote the word "Court" to launch criminal indictment. As such, initiation of criminal proceedings by the learned Justice of Peace in its administrative status by issuing notice to the appellant under section 476 Cr.P.C. was an act beyond his jurisdiction, as such, the entire superstructure built on such illegal and unwarranted exercise of jurisdiction, is bound to fall. By holding so I am guided by the law declared by Hon'ble Supreme Court in "*YOUSAF ALI versus MUHAMMAD ASLAM ZIA and 2 others*" PLD 1958 S.C 104), holding that:-

> *"No party can plead as final an order made in excess of the powers of the authority making it, in the eye of the law such order being void and non-existent. And if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded."*

The same view was adopted by Hon'ble Supreme Court of Pakistan in subsequent judgment reported in PLD 1990 S.C 1070. In view of the above legal position, the very issuance of notice by the learned Justice of Peace was defective, as such, the impugned order/judgment of conviction and sentence, cannot sustain in the eye of law.

7. The accumulative effect of all what has been discussed above is that this appeal is allowed, resultantly the conviction and sentence of the appellant is set-aside. Since the appellant is already on bail, he shall stand discharged of the bail bonds.

Order accordingly.

2021 Law Notes 1
[Lahore]
Present: **MUHAMMAD QASIM KHAN, J.**
Mudassar Azeem
Versus
The State, etc.

Criminal Appeal No. 161-J of 2017, decided on 25th January, 2018.

(a) Pakistan Penal Code (XLV of 1860)---
---Ss. 302(b), 458---324, 148, 149 & 109---The legal proposition is well-settled on the point, the Supreme Court of Pakistan in its various judgments has already held that the doctrine of "falsus in uno falsus in omnibus" (false in one thing, false in all), is not applicable in prevalent system of criminal administration of justice---Similarly, there is no rule having universal applicability that where some accused were not found guilty, other accused would ipso facto stand acquitted, rather it is the primary duty of the Court to sift the grain from chaff---In this regard, reliance can be placed on the case titled "Samano v. State" (1973 SCMR 162)---Similarly, there is no cavil to the proposition that the grain has to be sifted from the chaff in each case, in the light of its own peculiar circumstances---In this regard, guidance is sought from the case titled "Riaz Hussain v. The State" (2001 SCMR 177)---I would also like to refer the case of "Ghulam Hussain Soomro v. The State" (PLD 2007 SC 71), wherein Supreme Court of Pakistan was pleased to hold as: "We may not be misunderstood to mean that an innocent person wrongly roped by prosecution or falsely involved by an unscrupulous investigating officer should be unreasonably dealt with or made escape goat but the Courts must maintain balance while arriving at the truth or falsehood of the matter by sifting the grain from the chaff---This may be treated as a rule of caution and circumspection"---As such, irrespective of the fact that co-accused have been acquitted and said acquittal has not been challenged by the complainant or the prosecution, in the light of principle "sifting grain from the chaff", the case of Mudassar Azeem accused/appellant can be examined separately.
(Para 8)

(b) Benefit of doubt---
---High Court is convinced that prosecution badly failed to establish its case against the accused/appellant beyond any shadow of doubt---In the case "TARIQ PERVEZ vs. THE STATE" (1995 SCMR 1345), the Supreme Court of Pakistan held that: "…… The concept of benefit of doubt to an accused person is deep rooted in our country---For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts---If there is a circumstance which creates

reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right"---While placing reliance on the above dictum of the apex Court, I allow this appeal and by setting aside the conviction and sentence of the accused/appellant, he is ordered to be released forthwith if not required in any other case.

(Para 12)

For the Appellant: **Ch. Anwar-ul-Haq Pannu, Advocate.**
For the Complainant: **Muhammad Ibrahim Goraya, Advocate.**
For the State: **Jamil-ud-Din, DDPP.**
Date of hearing: **25th January, 2018.**

JUDGMENT

MUHAMMAD QASIM KHAN, J.--- Mudassar Azeem (accused/appellant) alongwith Mustansar Mehmood and Asmat Ullah (acquitted accused) faced trial before the learned Additional Sessions Judge, Narowal, in case FIR No. 57/2014 dated 30.05.2014 under sections 302/324/148/149/109, PPC registered at police station Rayyia Khas, District Narowal. On conclusion of trial *vide* judgment dated 15.02.2017, rest of the two accused were acquitted, whereas, Mudassar Azeem (accused/appellant) was convicted under section 302(b), PPC and sentenced to imprisonment for life with further order to pay Rs. 3,00,000/- as compensation to the legal heirs of the deceased, in default thereof to suffer six months' simple imprisonment. He was also convicted under section 458, PPC and sentenced to rigorous imprisonment for ten years with a fine of Rs. 50,000/- and in case of default in payment of fine, to further suffer simple imprisonment for three months. Both the sentences were ordered to run concurrently and benefit of section 382-B, Cr.P.C. was extended. Through the instant appeal, above conviction and sentence has been challenged by the convict/appellant.

2. Briefly the facts of the case are that Muhammad Nawaz complainant (PW-8) through an application dated 30.05.2014 (Ex.PG) which formed basis for registration of formal FIR (Ex.PC), reported the matter to the police to the effect that on 30.05.2014 at about 3:00 a.m. he was asleep in his house, when due to brisk wind and slight rain he was shifting the cots inside alongwith his family. Suddenly, there started firing in his house as well as in the house of Muhammad Idrees. According to the complainant, in his house Mudassar armed with repeater (accused/appellant), Mustansar *alias* Bau armed with pistol and one known (acquitted accused) were firing by raising lalkaras. His daughter Mst. Naila Bibi received fire shot injuries on front of her belly, right flank and right hand, she fell on the ground due to serious injuries. Meanwhile, Saif Ullah armed with repeater and one known person carrying fire-arm, kept on firing by raising lalkara in the house of Muhammad Idrees. Due to

firing of the accused, Mst. Saba Bibi daughter of Muhammad Idrees received injuries on her left leg and fell on the ground smeared in blood. On hearing the fire shot Umar Farooq and Shahid Tanveer came at the spot and witnessed the occurrence. The accused decamped from his house as well as from the house of Muhammad Idrees. It was further added that accused while escaping left their PAK Hero (Applied For) motorcycle at the spot.

Motive was said to be that Asmat Ullah and Muhammad Idrees, both brothers, have dispute over Haveli and the accused persons on the instigation of their father Asmat Ullah, committed the offence.

3. On receiving information about the occurrence, Muhammad Riaz, Sub-Inspector (PW-13) reached to the house of Muhammad Nawaz complainant, prepared injury statement of Mst. Naila Bibi (Ex.PM) and that of Mst. Saba Bibi (Ex.PN) and sent them to hospital for treatment and medical examination. He then inspected the place of occurrence, collected three crime empties of cartridges P.5/1-3 through memo. Exh.PH; took into possession motorcycle P.8 through recovery memo. Ex.PK; prepared two rough site plans pertaining to the place of occurrence *i.e.* one of the house of Muhammad Nawaz (Ex.PP) and the second of the house of Muhammad Idrees (Ex.PQ). Thereafter, he left for hospital, submitted applications (Ex.DA and Ex.DB) for recording statements of injured ladies. On the same day, both ladies were referred to Mao Hospital, Lahore. Mushtaq Ahmad 111/C, produced before the I.O, MLCs of the injured as Ex.PB and Ex.PA. He recorded statements of the witnesses and proceeded for search of the accused. On 12.06.2014, he was informed that one of the injured namely Mst. Naila Bibi succumbed to the injuries in Mayo Hospital, whereupon, he went to the said hospital and received the dead-body. Muhammad Nawaz, Umar Farooq and Shahid Tanveer accompanied the dead-body to DHQ Hospital, Narowal. The I.O. prepared inquest report Ex.PR and application (Ex.P A) for post-mortem examination were handed over to police constables. The I.O. collected blood through cotton from the dead-body at DHQ Hospital, Narowal and took the same into possession *vide* memo. Exh.PJ. After post-mortem, Muhammad Nawaz Constable handed over to him last worn clothes of deceased Naila Bibi *i.e.* Qameez P.1, Shalwar P.2, both blood-stained, which were taken into possession *vide* memo. Ex.PE. On 12.06.2014, Mirza Tahir Tasleem Draftsman (PW.4) took rough notes from the place of occurrence on the direction and pointation of the complainant and the PWs. On the same day, I.O. recorded statement of Mst. Saba Bibi injured. On 16.06.2014, the draftsman handed over to the I.O., scaled site plan of the place of occurrence, the I.O. entered his notes on the scaled site plan Ex.PD. On 20.06.2014, the I.O. recorded supplementary statement of complainant Muhammad Nawaz and statements of Anayat and Mubashir.

On 23.06.2014, accused Mudassar Azeem, Mustansar and Saif Ullah (Dead) were arrested and on 27.06.2014 on the disclosure of Mudassar (accused/appellant), repeater gun 12-bore was recovered from his Haveli, placed in the chaff room, the same was taken into possession and on unloading two live cartridges were recovered. Gun P.3 and catridges P.4/1-2 were taken into possession *vide* memo. Ex. PF, site plan of place of recovery was prepared as Ex.PT. After completion of formalities, the I.O. submitted challan in Court.

4. Charge was framed against the accused persons, to which they pleaded not guilty and claimed to be tried. (Saif Ullah accused died during the trial). The prosecution in order to prove the charges, produced Muhammad Riaz, Sub-Inspector/I.O as PW-13, whose statement in brief has been given above while giving the facts of the case; Dr. Sadaf Anait (PW-2) initially had medically examined Mst. Saba Bibi and Mst. Naila Bibi; Mirza Tahir Tasleem Draftsman PW-4 had prepared the site plans; Mubashir Ali PW-6 appeared to depose about the factor of abetment; Muhammad Nawaz complainant PW-8 and Shahid Tanvir PW-10 made statements about the ocular account; Muhammad Irshad PW-7 is witness of recovery of gun and Dr. Mamoona Kanwal PW-12 had conducted the post-mortem examination of Mst. Naila, whereas, all of the remaining witnesses are formal in nature and they gave details of their functions performed by them during the course of investigation. On close of oral evidence, the DDPP produced reports of PFSA, Lahore pertaining to blood-stained cotton, guns and empties as Ex.PX and Ex.PY. The accused persons when examined under section 342, Cr.P.C. denied the prosecution evidence and did not opt to appear as their own witnesses under section 340(2), Cr.P.C. however, accused Asmat Ullah tendered in evidence some documents as Ex.DE and Ex.DF, and his co-accused Mudassar and Mustansar also relied on those documents. Further, the accused also produced one Muhammad Rasheed as DW-1 who made statement about presence of accused/appellant Mudassar Azeem and acquitted accused Mustansar Mehmood *alias* Bau with him on 30.05.2014 at Faisalabad. On conclusion of trial, accused/appellant was convicted and sentenced as detailed in the opening paragraph of this judgment, whereas, rest of the accused were acquitted.

5. The learned counsel for the accused/appellant argued that prosecution failed to establish its case by producing independent and impartial witnesses; motive though taken in the FIR but the same could not be proved and above all identity of the accused appellant during the occurrence remains doubtful. While advancing his argument the learned counsel contended that although in the site plan, the prosecution had tried to show the source of light as bulb, but on the face of it, the location of the bulb is almost mid of the lawn, with no explanation has come on the record as to how the said bulb could be installed there. The learned counsel added

that according to the prosecution case itself it was night time occurrence and furthermore, brisk wind was blowing and it was raining also. In these circumstances if the sole source of light *i.e.* bulb is taken out of consideration, it becomes extremely doubtful that in such-like weather when there is firing also going on all around, how the witnesses could identify the accused persons with precision. The learned counsel contended that Mustansar Mehmood co-accused who had been nominated in the FIR and alleged to have participated in the occurrence and similarly Asmat Ullah co-accused who too had been nominated in the FIR with the allegation of abetting the offence, have already been acquitted by the learned trial Court by observing that prosecution failed to prove their participation, thus, according to the learned counsel the entire prosecution evidence was shattered and conviction against the accused/appellant is not sustainable.

6. The learned counsel representing the complainant and the learned DDPP opposed this appeal by arguing that it is case where FIR was lodged with promptness; accused/appellant was nominated in the FIR with specific attribution; prosecution witnesses being inmates of the house were though related, but they made consistent statements *qua* the role of the accused/appellant and the ocular account was fully corroborated by motive, medical evidence and the recoveries.

7. I have heard the arguments of learned counsel for the parties at considerable length and perused the available record.

8. Taking up the case of Mudassar Azeem accused/appellant, through the learned counsel appearing on his behalf has tried to take the benefit of acquittal of co-accused Mustansar and Asmat Ullah, but the said argument is not of much avail to him mainly for the reason that the roles assigned to both of the above two acquitted co-accused were different from the role attributed to the present accused/appellant. As shall be seen from the contents of the FIR although Mustansar was shown to be present at the place of occurrence armed with a weapon, but during their statements before the Court both the eye-witnesses *i.e.* Muhammad Nawaz PW-8 and Shahid Tanveer PW-10 confined their statements only to the role of the accused/appellant and did not utter a single word that Mustansar acquitted accused played any effective role in the occurrence. As regards, Asmat Ullah co-accused, he was accused of having abetted the crime and the evidence to that effect was disbelieved by the learned trial Court. As such, mere acquittal of above two co-accused would not advance the case of the accused/appellant. Even otherwise, the legal proposition is well-settled on the point, the Hon'ble Supreme Court of Pakistan in its various judgments has already held that the doctrine of "*falsus in uno falsus in omnibus*" (false in one thing, false in all), is not applicable in prevalent system of criminal

administration of justice. Similarly, there is no rule having universal applicability that where some accused were not found guilty, other accused would ipso facto stand acquitted, rather it is the primary duty of the Court to sift the grain from chaff. In this regard, reliance can be placed on the case titled "*Samano v. State*" (1973 SCMR 162). Similarly, there is no cavil to the proposition that the grain has to be sifted from the chaff in each case, in the light of its own peculiar circumstances. In this regard, guidance is sought from the case titled "*Riaz Hussain v. The State*" (2001 SCMR 177). I would also like to refer the case of "*Ghulam Hussain Soomro v. The State*" (PLD 2007 SC 71), wherein Hon'ble Supreme Court of Pakistan was pleased to hold as under:---

> *"We may not be misunderstood to mean that an innocent person wrongly roped by prosecution or falsely involved by an unscrupulous investigating officer should be unreasonably dealt with or made escape goat but the Courts must maintain balance while arriving at the truth or falsehood of the matter by sifting the grain from the chaff. This may be treated as a rule of caution and circumspection."*

As such, irrespective of the fact that co-accused have been acquitted and said acquittal has not been challenged by the complainant or the prosecution, in the light of principle "*sifting grain from the chaff*", the case of Mudassar Azeem accused/appellant can be examined separately.

9. It is the case of the prosecution itself that the occurrence took place at 03.00 a.m. (night time), brisk/strong wind and the factum of rain at the time of occurrence is also admitted by the prosecution.

(i) There is no cavil to the proposition that every night is presumed to be dark, unless proven otherwise. As shall be seen from the narration of the FIR, there was no indication as to how the witnesses could have identified the accused persons, as no source of light had been mentioned therein. However, perhaps acknowledging the said fact, the prosecution recollected itself and when the site plan (Ex.PD) was prepared by Tahir Tasleem Draftsman (PW.4) on the pointation of the witnesses he showed a point where allegedly a bulb was lightening and thereafter, while appearing in the witness-box the eye-witnesses *i.e.* Muhammad Nawaz complainant PW-8 accordingly improved his statement and came out with the plea that he had identified the accused in the light of the electric bulb, which part of his statement is not in line with the contents of the FIR. Furthermore it has been observed that although point of bulb has been shown in the site plan but the said point is neither attached with any wall nor even there is any indication that how the said bulb could exist or

could be installed there at an empty place without there being even any pole or the wall, etc.

(ii) In the same terms Shahid Tanveer PW-10 during his examination-in-chief stated that an electric bulb was on at the time and place of occurrence but he was duly confronted on this aspect with his statement recorded under section 161, Cr.P.C. wherein, no such deposition had been made by him. As such sufficient doubt is cast on the aspect whether at the time of occurrence there was lit or not, whereas, on the other hand, it is settled proposition that night is always to be considered as dark, unless specifically established otherwise.

(iii) Furthermore, Shahid Tanveer (PW-10) during the course of cross-examination stated that *"I witnessed the occurrence while standing near water pump"*, whereas, I have minutely gone through the site plan (Ex.PD) prepared by Tahir Tasleem Draftsman (PW-4), admittedly on the pointation of the complainant and PWs, but it has been observed that no water pump has been shown in the said site plan.

(iv) In the FIR it is specifically mentioned that:---

میں اٹھ کر اپنے گھر کے ساتھ چار پائیاں اندر کروارہا تھا کہ یکدم میرے گھر اور محمد ادریس کے گھر پر فائر نگ شروع ہو گئی۔

Muhammad Nawaz complainant (PW-8) made statement to the effect that "*At the same time we heard a noise from the house of accused Idrees where Saif Ullah armed with repeater gun alongwith one unknown person entered into their house*". Similar is the statement of Shahid Tanveer (PW-10) *i.e.* "*In the meanwhile we heard the noise from house of Muhammad Idrees. We attracted there and saw that Saif Ullah armed with repeater gun alongwith unknown person was present in their house where electric bulb was on*". It shows that there was simultaneous firing in both of the houses *i.e.* in the house of the complainant Muhammad Nawaz and in the house of Muhammad Idrees. In a situation like the one in the instant case, where it was night time, heavy wind (*according to PW-10 it was thunderstorm*) was blowing and it was also raining, it is not expected in ordinary course that witnesses could have witnessed both the occurrences at one time, which simultaneously occurred in separate houses and those witnesses also could remember the respective roles of the accused with their names.

(v) Another aspect is that in the site plan accused/appellant was shown at point-c and Mst. Naila sustained injuries by fire shots at point-A. The

distance between points-c and D, is fourteen feet. Muhammad Nawaz complainant (PW-8) being at point-B, was further ten feet away from Mst. Naila, thus, the distance between the accused/appellant and the complainant becomes almost twenty-four feet. Considering that it was dark night, strong wind was blowing, it was raining and the firing was also on, all around, definitely this could be an extreme panic situation. In such a horrible and intense position when the close family members were under severe gun attack, the existence of sole source of light *i.e.* bulb could not be established at the site, it becomes extremely doubtful for the complainant to have identified the assailants and that too with such precision.

(vi)(a) Shahid Tanvir PW-10 during cross-examination made a clear statement *i.e.* "*I got recorded my statement before police in P.S. Rayyia Khas. The date and time of recording statement is not in my memory.*" As the statement of this witness was not recorded at the place of occurrence, it renders the credibility of the witness seriously suspicious, as no explanation has been forwarded for his non-examination at the place of occurrence. Therefore, possibility could not be ruled out that this witness was not present at the relevant time at the place of occurrence, for the same reason his statement could not be recorded at the that time. When a witness does not disclose the time and date when his statement was recorded at police station, it appears that he is concealing the fact because had the witness disclosed those facts, then the same would have benefited the defence. While holding so, reference can be made to the cases reported in 2013 YLR 230, 2008 YLR 985 and 2009 YLR 1962.

(vi)(b) Even no person from the adjacent house of the complainant has been produced before the Investigating Officer or before the Court, thus it appears that prosecution introduced the witness, who was otherwise, not present at the place of occurrence at the relevant time and for the same reason his statement was recorded at police station later-on.

(vi)(c) From all above it appears that entire proceedings were conducted at the police station, otherwise improbability of the witness to have seen both the occurrences at one point of time, leads this Court to hold that in fact the witnesses had not seen the occurrence at all and later on, the prosecution developed its case by introducing false witnesses.

(vi)(d) Even the statement of PW-10 also creates doubt on the veracity of investigation, whether it was conducted at the place of occurrence or all the proceedings were carried out while sitting at police station, because as per normal human behviour when two young women

received bullet injuries their family members shall run towards hospital alongwith injured to rescue their lives and they would not sit to wait for the police to come at the place of occurrence and after their arrival, they will further wait that all the proceedings be completed in their presence, hence, the statement of PW-10 shatters the veracity of the proceedings conducted at police station.

All the above factors when juxta-posed, make the ocular account of the occurrence extremely doubtful.

10. The motive set out in the FIR was that Asmat Ullah and Muhammad Idrees had a dispute over Haveli and on the instigation of Asmat Ullah, assault was launched by his son Mudasar Azeem accused/appellant along with others.

(i) During cross-examination, Muhammad Nawaz complainant PW-8 in clear terms admitted that "*There was no civil & criminal litigation between Asmat Ullah and Muhammad Idrees pending in any Court prior to the occurrence. There was a dispute of place before Punchait regarding Haveli. Imtiaz son of Ikram was head of that Punchait. Imtiaz never joined investigation of this case.*" From the above reproduced lines, the statement of Imtiaz, before whom allegedly the dispute was raised in a Punchait, could be of significance for the prosecution but neither the said witness ever joined the investigation nor the prosecution produced him before the Court and furthermore, even no documentary proof in that regard was produced during the evidence, as such, there remains sole and balled statement of Muhammad Nawaz complainant without any strong corroboration from any other angle.

(ii) Furthermore, if the prosecution case about the motive is believed, then the accused must have carried venom against Muhammad Idrees with whom they allegedly had the dispute and then they could have nourished grudge against Muhammad Nawaz complainant as well, who purportedly was supporting Muhammad Idrees. But the tenor of the occurrence, as has been alleged by the prosecution itself, does not commensurate with the motive part, for the reason that during the occurrence only the women-folk from both the sides *i.e.* Mst. Naila Bibi (daughter of Muhammad Nawaz complainant) and Mst. Saba Bibi (daughter of Muhammad Idrees) fell victim of the aggression launched by the accused party. At the relevant time Muhammad Idrees was present in his house and according to the prosecution case itself Muhammad Nawaz complainant was also present in the house at the time of occurrence, therefore, if the accused had grudge or

grouse against Muhammad Idrees and Muhammad Nawaz, then as a natural course, they both must have been the prime object and attack must have been launched directly at Muhammad Idrees or Muhammad Nawaz, but here in this case it is not the case of the prosecution that accused made firing directly at Muhammad Nawaz but Mst. Naila Bibi fell victim accidently.

(iii) In addition to the above it may be added here that the element of abatement has already been discarded by the learned trial Court while recording acquittal of the co-accused who were shown to be the abettors.

11. Furthermore, although the prosecution had tried to link the accused/appellant with commission of the crime by introducing a motorcycle Ex.PK in the FIR by narrating that the same was left by the accused at the place of occurrence after committing the crime and also recovery of crime weapon, but:---

(i) As observed no witness deposed that they had seen the accused riding on the said motorcycle, there is nothing on the record that the I.O. ever tried to verify the ownership of the said vehicle, or to verify that from where and by whom the same had been bought. As such, when there is nothing on the record that how the said motorcycle was used or tried to be used by the accused during the occurrence, this Court is of the considered view that said recovery is totally inconsequential in this case.

(ii) As regards other recoveries, the occurrence took place on 30.05.2014, Muhammad Riaz, SI/IO (PW-13) on the same day visited the place of occurrence and took into possession three empties of cartridges P.5/1-3, but the same was sent to the office of PFSA on 23.06.2014 *i.e.* almost twenty-three days after the recovery when the accused was arrested. No explanation for keeping the empties at police station for about twenty-three days has been advanced and when empty has been forwarded on the day when allegedly the appellant was arrested, it create serious doubt about the veracity of the FSL report.

(iii) In addition to the above, when according to the prosecution case the accused had successfully managed their escape from the place of occurrence along-with weapons of offence, it does not sound good to infer that accused would keep the crime weapon in safe custody and that too in their own haveli, for afterwards recovery and production of the same crime weapon against the themselves.

(iv) It is requirement of Section 103, Cr.P.C. that search had to be made in the presence of two or more respectable inhabitants of the locality. This Court is aware of the fact that witnesses from locality may not happily opt to Join recovery proceedings for multiple reasons, but such defence would only be available to the prosecution where at least an attempt is made by the Investigating Officer to attract the witnesses from the locality and such attempt is supported by any documentary proof in that respect. It is for this reason that under sub-section (5) of Section 103, Cr.P.C. it has been clearly incorporated that any person who, without reasonable cause, refuses or neglects to attend and witness a search under this Section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Pakistan Penal Code. Here in this case though the prosecution had sufficient time to associate the witnesses from the locality and in the absence of any record of about any effort by the I.O. to associate any inhabitant of the area, clearly this is violation of Section 103, Cr.P.C. and for this reason also the recoveries cannot be believed.

Even otherwise, once the ocular account has been disbelieved, the evidence to the extent of motive and abetment has been discarded, the element of recovery is inconsequential, the medical evidence being only corroborative in nature would not advance the case of the prosecution, because the medical evidence may at the most may indicate the nature and kind of injuries, the time of infliction of such injuries or the cause of death, but could not connect any accused with the commission of crime. It is only other pieces of evidence which can connect the accused with the commission of crime and medical evidence could be used only as corroborative piece of evidence. In this case when the ocular account has been discarded, the medical evidence being only corroborative in nature would not advance the case of the prosecution.

12. For what has been discussed above this Court is convinced that prosecution badly failed to establish its case against the accused/appellant beyond any shadow of doubt. In the case "*TARIQ PERVEZ vs. THE STATE*" (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan held that:---

> *"…… The concept of benefit of doubt to an accused person is deep rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."*

While placing reliance on the above dictum of the apex Court, I allow this appeal and by setting-aside the conviction and sentence of the accused/appellant, he is ordered to be released forthwith if not required in any other case. The case property, if any, shall be disposed of in accordance with law, whereas, the record of the trial Court be sent back immediately.

Appeal allowed.

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Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT
Writ Petition No.59484/2020
(Shahzana Kazmi vs. Federation of Pakistan, etc.)
JUDGMENT

Date of hearing: 25.05.2021
Petitioner by: M/s. Adnan Ahmed Paracha, Zahid Ghaffar, Malik Eisa Usman Qazi and Asif Mehmood Khan, Advocates.
State by: Mr. Asad Ali Bajwa, Deputy Attorney General

MUHAMMAD QASIM KHAN, C.J.:- *Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. (John Marshall).*

This constitutional petition challenges Notice No. U.O No.8/2/2020-TK, dated 26th October, 2020 (Impugned Notice) of Cabinet Division issued for auction of different articles available in Tosha Khana through which only the Officers of Federal Government and Armed Forces were held entitled to join auction proceedings. According to the petitioner, impugned notification and the procedure adopted by the public functionaries, while dealing with the disposal of the public assets, has not cared to maintain fairness, equity, impartiality and expectations of the public at large attached with the auction proceedings; hence being against the fundamental rights of the citizens of Pakistan and law is liable to be declared illegal, unlawful and discriminatory.

2. For acceptance and disposal of gifts received by Government/Public functionaries the Government of Pakistan has devised a procedure. In suppression of earlier O.M.No.9/8/2004-TK dated 13th October, 2017 and the instructions, the Government of Pakistan through office memorandum *(the memorandum)* laid procedure for acceptance and disposal of gifts through notification No.8/5/2017-TK dated 18th December, 2018 and under clause 10 of the memorandum, the impugned notification was issued. Feeling aggrieved by the memorandum and the impugned notification, the petitioner preferred to file this constitutional petition as *pro bono publico* for enforcement of fundamental rights to equality of citizens and protection against discrimination and exploitation.

3. The petitioner, while alleging about element of discrimination, exploitation contended that the act of the public functionaries and the impugned auction proceedings through sealed bids of specific class of Government Officers is utter violation of law as well as constitutional rights as per esteemed Judgment of august Supreme Court of Pakistan in the case of NAIMATULLAH KAHN ADVOCATE vs. FEDERATION OF PAKISTAN (**2020 SCMR 513)**. Further

contended that the disposal/transfer of public assets, behind the curtain, to some selectees without public participation is abuse of trust and offensive to the spirit of public administration. In this regard learned counsel for the petitioner placed reliance on the dictum of law handed down in the case of HABIBULLAH ENERGY LIMITED and another vs. WAPDA through Chairman and others (**PLD 2014 SC 47)**. He next argued that the stoppage of public at large to participate in auction of public assets at Tosha Khana and the attitude of public officials towards disposal of gifts at Tosha Khana is patently an illegal act, arbitrary exercise of authority, fanciful and whimsical. Inviting or allowing a specific class of persons is against the trust and competition laws as held by the apex Court. Petitioner further stated that public functionaries are bound to do as the constitution requires them to do. Finally, the petitioner contended that auction proceedings in question were not approved from Federal Government but were based on the decision of Deputy Secretary (Co-ordination) Cabinet Division, which is against the principles laid by august Supreme Court in Mustafa Impex Case reported as **PLD 2016 SC 808**. Putting reliance upon a celebrated judgment from Indian jurisdiction reported as **AIR 1988 SC 157** *"Haji T. M. Hassan Rawther vs. Kerala Financial Corporation"* learned counsel for the petitioner urged that public property should be sold out through public auction by inviting tenders and nothing should be discriminatory. He further contends that transparency should be key component of every public action, which is squarely lacking in the process of the case in hand, hence prayed for an appropriate direction in the circumstances.

4. Vide order dated 17.11.2020, notice was issued to the learned Attorney General for Pakistan under Order XXVII-A, Rule 1 of the CPC. Learned Deputy Attorney General while appearing before the Court specifically stated that he was duly authorized by learned Attorney General for Pakistan to represent Federation in this case on his behalf. According to learned Deputy Attorney General the subject of Tosha Khana was transferred to the Cabinet Division from Ministry Of Foreign Affairs in 1973. The memorandum is duly approved by the Prime Minister of Pakistan and even the auction proceedings in question were also approved by the Prime Minister.

5. Arguments heard. Record perused.

6. For so many centuries, the exchange of gifts has held different States together and has made it possible to bridge the gulf where the language struggles. Such gifts reflect esteem welcome and respect from both sides. According to **Encyclopaedia Britannica** Gift exchange, also called '**ceremonial exchange'**, may be distinguished from other types of exchange in several respects: the first offering is made in a generous manner and there is no haggling between donor and recipient; the exchange is an expression of an existing social relationship or of the establishment of a new one that differs from impersonal market relationships; and the profit in gift

exchange may be in the sphere of social relationships and prestige rather than in material advantage.

7. The business of Federal Government is distributed amongst the Divisions in the manner indicated in Schedule-II of the Rules of Business, 1973 and item No. 23 of this schedule provides that subject of **'Tosha Khana'** is assigned to Cabinet Division. Though no specific definition is given in the Rules of Business, 1973 or any other legal document of the country, yet it is well-known that "Tosha Khana" is a place where gifts received to the Government/Public functionaries from foreign dignitaries/Head of the State are to be placed/deposited. Procedure for the acceptance and disposal of gifts is provided by the Federal Government vide Memorandum No.8/5/2017-TK, dated 18th December, 2018 **("Memorandum")**. According to clause 10 of the Memorandum, Gifts which are not fit to be retained or displayed shall be disposed off by periodical sales once or twice a year to be arranged by the Cabinet Division. The list of gifts to be sold shall be circulated to all Officers of Federal Government and Armed Forces. The articles not purchased in two consecutive auctions by the Government servants should be disposed of to the public through sealed bids. Per clause 10 of the Memorandum, Cabinet Division through letter/U.O No.8/2/2020-TK, dated 26th October, 2020 announced auction of few articles available in Tosha Khana and invited Bids by the Officers of Federal Government and Armed Forces. The petitioner is aggrieved about the specification of bidders limited only to the extent of Federal Government Officers and the Officers of Armed Forces.

8. As far as '**auction'** is concerned according to the **Concise Oxford Dictionary** it means "**public sale in which articles are sold to maker of highest bid".** In Black's Law Dictionary (5th Edition), the meaning of the word has been described as under:

> *"An auction is a **public sale of property** to the highest bidder by one licensed and authorized for that purpose……."*

When asked from learned Deputy Attorney General that why only the Officers of Federal Government and Armed Forces have been allowed to participate in bidding process for auction of items available at Tosha Khana, the learned counsel replied that in case of open auction, the privacy of highest foreign dignitaries could be compromised and bilateral relations would be affected. When asked that clause 10 of the Memorandum itself mandates that articles not purchased in two consecutive auctions by the Government servants **should be disposed of to the public** through sealed bids, the learned counsel for the respondents could not reply satisfactorily.

9. *Prima facie* the criteria to participate in auction proceedings set by Cabinet Division is not only, hypothetical but also against the fundamental rights guaranteed by the constitution of Islamic Republic of Pakistan. There appears no nexus between the criteria and the object sought to be achieved through the auction,

hence, it is a case of "**suspect classification**". It is so because no reason or justification has been furnished in support of the bidders classified by the Cabinet Division. To this Court 'auction' means only a **public sale** as distinguished from sale by private negotiation. Transparency and fairness always be an essence of governance. But in this case, the Federal Government has not only deprived the general public to participate in auction proceedings, but even as compared to Federal Officers and the Officers of Armed forces, has also excluded other Public functionaries and the members of civil society; i.e. Officers of Provincial Administrative Service, Officers of Semi Government Departments and Local Governments, lawyers, doctors, engineers, persons from academia and literature etc. This discrimination amongst the Public Servants and viz-a-viz other segments of society is sheer violation of constitutional guarantees provided in terms of rule of law (Article 4), dignity of man (Article 14), freedom of business (Article 18), right to information (Article 19-A), equality of citizens and protection against discrimination and exploitation (Article 25).

10. Federal Government, as stated by the learned Law Officer, has excluded the general public from auction proceedings merely for the reasons that prestige and honor of the dignitaries may not be compromised in an open announcement. This very argument or contention of the Federal Government officials is nothing but a classic example of ignorance of law. More so, Memorandum on the basis of which impugned auction notice was issued is also self-contradictory for the reasons discussed ensuing. **Government Servants (Conduct) Rules, 1964** are applicable to every person, whether on duty or on leave, within or without Pakistan, **serving in a civil capacity in connection with the affairs of the Centre and to the members of an All-Pakistan Service** during their employment under the Provincial Governments or while on deputation with any other Government, agency, institution or authority. Rule 5 of the Rules, 1964 requires that all gifts received by a Government servant, irrespective of their prices, must be reported to the 'Tosha Khana' set office in the Cabinet Division. The value of gifts shall be assessed by the Cabinet Division and the monetary limits up to which and the condition subject to which, the gifts may be allowed to be retained by the recipient, shall be as follows: -

(a) Gifts valued up to Rs. 1,000 may be allowed to be retained by the recipient;

(b) Gifts valued between Rs. 1,000 and 5,000 may be allowed to be retained by a recipient on his paying 25% of the value of the gift in excess of Rs. 1,000; and

(c) Gifts of value exceeding Rs. 5,000 may be allowed to be retained by a recipient on his paying 25% of so much of the value as exceeds Rs. 1,000 but does not exceed Rs. 5,000 and 15% of so much of the value as exceeds Rs. 5,001.

11. On the other hand, Punjab Government Servants (Conduct) Rules, 1966 applicable to all persons, serving in connection with the affairs of the Province of Punjab also provide the same procedure about acceptance, retention and disposal of gifts. Both these legislations and the Memorandum as well, are very much clear to the extent that if auction bids do not get successful, then the items under auction will be put for public auction. Amazingly the supra mentioned rules and the procedure mentioned in Memorandum are equally applicable to federal and provincial employees and they are equally entitled to purchase the gifted items up to certain amount, but in addition to first option of direct purchase, the federal Officers have also been prioritized to participate in auction proceedings. The Government Officers, during their foreign visit represent the State and Government. During such visits, not only they get travelling and other allowances, but some times, if dignitaries of foreign countries give them any gift, then again they are held entitled to retain it while paying discounted amount. However, if the recipients do not opt to purchase such gifts on discounted rates, then in second round the recipients or their fellows/collagenous only from the Federal Government or Armed Forces may have a right to participate in auction proceedings and purchase the gift items under auction. During the second round Government Officers from other cadres are explicitly prohibited to participate in auction proceedings. Even in second round if something may be left to be auctioned, then comes before the public at large for purchase through open auction.

12. The principle of all fairness and equality demands that even the Officers/recipients of gifts at first attempt solely must not be eligible to purchase on discounted rates, but I am restrained to discuss more as at the moment it is not the matter before this Court.

13. While arguing the case, learned counsel has referred to **Tosha Khana (Maintenance and Administration) Rules, 1974 of Bangladesh**, which mandates the relevant Committee to put such articles for **Public Auction**, which are likely to suffer depreciation in value if kept for a longer period or kept unused. Learned counsel for the petitioner has also referred to online auction procedure in India qua items of Tosha Khana. Both the neighboring countries are following procedure of disposing of such gifts through **public auction**, but amazingly, they do not have the fear of compromising of honor or dignity of those who gave such gifts, as we at Pakistan have.

14. In view of the position discussed above, the classification of bidders in this case is the classic example of bias, as well as against PPRA Rules. It is also notable that the Government of Pakistan has also given the option of public auction but it is subject to the condition that the articles not purchased in two consecutive auctions by the Government servants should be disposed of to the public through sealed bids. One must ask to the Government, whether at the time of newspaper

proclamation, public at large and the diplomatic community in Pakistan and the dignitaries outside Pakistan through their envoys did not come to know about auction of gifts. Another aspect worth consideration is that there is no bar for the successful bidder to further sell the items purchased through auction. Contrary to above mentioned standpoint of the Government, this Court considers that exchange of gifts at state level is always made to extend love and affection for people of each country and if through auction such gifted items come to the hands of public, then it is not compromise of dignity or honor, rather it is extension of love and affection attached with the gift. *However, it will be discretion of the Government not to disclose the identity of the gifts (from which country it belonged and the personality who presented it)*

15. It is an inalienable right of every citizen to be treated in accordance with law and no action detrimental to his life, liberty; reputation or property shall be taken except as per law but the impugned auction notice/advertisement infringed Petitioner's fundamental rights. Courts are custodian of fundamental rights of citizens and protector of civil liberties and the Constitution makes it imperative upon the Courts to pass orders and issue directions in case of breach. The basic human rights of life, liberty and enjoyment of one's property have been recognized nationally as well as internationally. The word 'life' in the Constitution has not been used in a limited manner and as per judicial precedents, now the right to life under Article 9 of the Constitution includes all such amenities and facilities which a person born in a free country is entitled to enjoy legally and constitutionally with dignity. Respectful reliance is placed on the *ratio decidendi* of august Supreme Court of Pakistan in the cases of Ms. SHEHLA ZIA and others vs. WAPDA (**PLD 1994 SC 693)**, ARSHAD MEHMOOD and others vs. GOVERNMENT OF PUNJAB through Secretary, Transport Civil Secretariat, Lahore and others **(PLD 2005 SC 193)** and WATAN PARTY and another vs. FEDERATION OF PAKISTAN and others **(PLD 2011 Supreme Court 997).** In the case of Habibullah. Energy Limited and another vs. WAPDA through Chairman and others **(PLD 2014 SC 47**), august Court was pleased to hold that *"……. all public functionaries must exercise public authority, especially while dealing with the public property, public funds or assets in a fair, just, transparent and reasonable manner, untainted by mala fide, without discrimination and in accordance with law, keeping in view the Constitutional Rights of the Citizens.*"

16. In sequel to what has been discussed above, the notification No.8/5/2017-TK dated 18th December, 2018 and the policy formulated by the Cabinet Division vide impugned Notice No. U.O No.8/2/2020-TK, dated 26th October, 2020, are declared ultra *vires* of the Constitution of Islamic Republic of Pakistan and are set-aside being against Articles 4, 9, 14 and 25 of the Constitution and principles of fairness and equity. The Government of Pakistan is directed to

formulate a new policy or lay down an enactment to regulate the auction proceedings of articles of Tosha Khana and ensure that new policy or enactment must be within the parameters of law and the Constitution of Islamic Republic of Pakistan, 1973.

17. The instant constitutional petition stands disposed of in the above terms.

(CHIEF JUSTICE)

Approved for Reporting

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FORM No.HCJD/C-121.

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT
Writ Petition No.31805/2021

Haq Nawaz
Vs
Chief Administrator Auqaf, Punjab and others.

S.No.of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of Parties of counsel, where necessary.

16.06.2021 Mr. Akhtar Hussain Bhatti, Advocate for the petitioner.

Malik Abdul Aziz Awan, Additional Advocate General with Faisal Javed, Chief Administrator, Auqaf, Faiza Munawar, Director Legal on behalf of respondent No.4, Mr. Aurangzeb Chaudhry, Advocate for respondents No.1 to 3, Zia ul Mustafa, Zonal Administrator, Nauman Saifi, District Manager Auqaf, Pak Pattan.

Mr. Muhammad Azhar Siddique, Advocate/*amicus curiae.*

Through the instant writ petition filed under Article 199 of the Constitution of Pakistan, precisely the contention of the petitioner is that the shrine of Hazrat Baba Farid ud Din Gang Shakar, Pak Pattan (hereinafter to be referred as "the shrine") is monarch of spiritual light for Muslims and hundreds and thousands of the followers visit the said shrine for soothing and satisfaction of their souls, but according to the petitioner the management of the said shrine is accumulating huge cash from the poor visitors on certain pretexts, for which purpose apart from issuing lease for "shoe-keeping", "washrooms", "parking", etc., cash boxes have been placed on different conspicuous places inside the shrine. The contention of learned counsel is that the Shrine has big chunk of agricultural land as well as commercial properties, which have also been leased out and the funds generated from said source are sufficient to meet with the expenditure of the shrine, therefore, practice of collecting cash from the visitor for abovementioned reasons, is not justifiable, especially, when despite all above even the basic facilities for the visitors are not provided at the shrine.

2. Since the matter involved public interest, report/ parawise comments were sought from the respondents, which have been received and a concise statement has also been brought on the record.

3. I have heard the arguments of learned counsel for the respective parties and also paid attention to the contentions raised by learned amicus curiae.

4. Before proceeding further it may be clarified here that admittedly the shrine is being run and managed by the Auqaf Department under Punjab Waqf Properties Ordinance 1979 and Punjab Waqf Properties Administratin Rules, 2002. This Court has been apprised that currently there are 546 shrines and 437 mosques under the control and management of Auqaf Organization and there are 2789 employees of different designations/grades working to look after the affairs of these shrines and mosques. After going through the above rules, hearing the learned counsel representing the respondents and going through the concise statement filed in this case, it remains almost a fact that the practice to lease out/auction different contracts or giving on rent properties of the shrine, has only one justification i.e. to get maximum amount of money by way of leasing it out through auction.

5. The record produced before this Court, on the face of it, shows that the cash is being collected from the visitors on different pretexts, which include nazranajat from "cash boxes", "Nazrana Mutfarraq" and "running traffic". The record shows that apparently this cash collection is also being counted for by the Auqaf Department and even otherwise, unless there comes something contrary, this Court has nothing to dispute the said data, whereas, the process of leasing/ auctioning or renting out the waqf properties has not been questioned in the instant writ petition.

6. There is no cavil to the legal proposition under Section 15 of the Punjab Waqf Properties Ordinance, 1979, Chief Administrator has been authorized to prepare schemes for administration of waqf property. The authorization to prepare such schemes has not been left stranded, rather the said authority is further to be regulated by the Punjab Waqf Properties (Administration) Rules, 2002. Rule 7(ii)(c) of the said rules provides the auction of contracts for "running traffic", "cash boxes" and "Nazrana Mutfarraq". However, terms "shoe keeping" does not find mention. Although the word "etc" has also been used in the rule, ibid, but it cannot be stretched to include illogical or even disgraceful terms like contract of "shoe keeping" or "toilet blocks". Therefore, so far as keeping cash boxes or collection of Nazrana is concerned, firstly these both terms are provided in the relevant rules and secondly in either of these two situations, there is never any compulsion on any visitor to drop something in the cash box or give something as nazrana, rather it is for the visitor himself to contribute something according to his sweet will if his conscience permits, whereas,

collection of fee for “shoe-keeping” “use of toilets and washrooms” and “car, cycle, motorcycle stands”, has been made almost compulsory, despite the fact that none of these terms are available in the relevant rules.

7. While respecting the legislative wisdom to authorize the Chief Administrator to set down a scheme, this Court cannot lose sight of the fact that this authorization shall remain within the bounds of Rule 7 of the Rules, ibid., and the above two actions with regard to issuing contracts for “shoe keeping”, “toilet/washroom blocks” and “car, motorcycle and cycle stands” are the actions beyond the scheme of law on the subject. This court is also cognizant of the fact that basic and foremost purpose to accumulate or generate funds through permissible contracts/lease or tent, would remain that of providing facilities to the visitors, and with all respect and regard to our sentiments, these shrines are not to be made profitable organizations. This is quite common and even it has been pointed by the respondents themselves that litigation about property under the shrine, is pending before the Hon’ble Supreme Court of Pakistan. Such disputes over the lands of shrines and even the ownership of the shrines also, are quite unfortunate aspects, but at the same time this is also indicative of the fact that shrines are being used more as profit oriented tombs, rather than monarchs of spiritual light.

8. I have gone through the law, rules and regulations of Auqaf Department. At the most relevant rules provide leasing out of Auqaf property but the fact has been ignored by the concerned authority that the property and services are two different terminologies used for different purposes. Auqaf authorities are not authorized to charge from public in lieu of services rendered by them at shrines or the mosques, which in no way can be equated with the property to be leased out under the rules. Services are the facilities which are provided by the government/department to the visitors. If visitors have to purchase the facilities then what else services the government is providing to them free of cost. Unles and until law permits charging of any amount from the visitors, said charge or leasing out of these facilities is an action purely against the relevant law. In other Islamic counrties the pilgrims paying visits to holy sites [Iraq, Sham, Saudi Arabia (Masjid-e-Haram and Masjid-e-Nabvi] and other places in different countries are extended such facilities free of cost. Moreover, every citizen of Pakistan, how so poor he may, is bound to pay indirect tax to the government even if he buys a matchbox from the shopkeeper. There must be some end to our worldly temptations. For how long, we will continue exploiting the visitors by collecting fees against the services on the pretext of maintenance and management of the shrines. When the government is accumulating taxes from all and sundry, they expect something in return as well. The shrine

visitors are bound to pay what the law requires from them, but they must not be befooled by collecting fees from them on the pretexts like “shoe keeping”, “toilets” and “parking stands (car, motorcycle and cycle stands)”, which terms are otherwise alien to the relevant rules.

9. For what has been discussed, so far as the questions about putting “cash boxes” or collecting “nazranas” is concerned, at the cost of repetition it is observed that since there is no compulsion on the visitors to put something in the cash boxes or to pay anything as nazrana, and furthermore the same are also provided in the rules as well, therefore, no interference in this context is called for. As regards issuing contracts for “shoe keeping”, “toilets/washrooms” and “parking stands”etc. this is not only disgrace but also against the spirit of relevant rules. Thus, the orders passed, proceedings carried out and actions taken by the Auqaf authorities qua issuing contracts or leasing out the above mentioned facilities, being totally against the relevant rules and having no backing of any law, are hereby set aside. The lease agreements or any other contracts in relation to above mentioned facilities are struck down, at once.

10. The instant Writ Petition stands disposed of in the above terms.

(CHIEF JUSTICE)

*Javed**

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FORM No.HCJD/C-121.

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Writ Petition No.25669/2020

Muhammad Shabbir Hussain

Vs.

Federation of Pakistan, etc.

S.No.of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of Parties of counsel, where necessary.

27.04.2021 Sardar Farhat Manzoor Khan Chandio, Advocate for the petitioner (Writ Petition No.25669/2020)

M/s Muhammad Azhar Siddique and Mian Ali Asghar, Advocates for the petitioner in Writ Petition No.26868/2020.

Malik Asif Ahmed Nissoana, Deputy Attorney General with Abu Bakar Khuda Bakhsh, Additional Director General, FIA.

M/s Asif Afzal Bhatti and Malik Abdul Aziz Awan, Additional Advocates General.

M/s Salman Akram Raja and Tariq Bashir, Advocates on behalf of Chairman OGRA with Ch. Moazzam Hussain SED and M. Rizwan ul Haq SED.

Ch. Muhammad Hammad, Advocate for Competition Commission of Pakistan in Writ Petition No.26268/2020.

Mr. Ruman Bilal, Advocate for SECP in Writ Petition No.26868/2020.

Barrister Hadroon Duggal, Advocate for respondent No.11 in Writ Petition No.25669/2020 and for respondent No.18 in Writ Petition No.26868/2020.

M/s. Mansoor Usman Awan, Malik Eisa Usman Ghazi and Asif Mehmood Khan, Advocates for respondent No.14 and 15 in Writ Petition No.25669/2020.

M/s Ali SibtainFazli, Hashim Ahmed Khan and EisaJalil Ahmed, Advocates for Total PARCO Attock.

Mr. Babar Sultan, Advocate for respondent No.12 in Writ Petition No.25669/2020.

Sh. Naveed, Advocate for respondent No.28 in Writ Petition No.26868/2020.

Malik Awais Khalid Advocate/*amicus curiae*.

Through this single order I intend to dispose of Writ Petition No.25669/2020 and Writ Petition No.26868/2020involving same questions of law and facts.

2. These writ petitions in the form of PIL (Public Interest Litigation) have been filed under Article 199 of the Constitution of Pakistan seeking issuance of appropriate orders concerning the acute shortage and thereafter unreasonable price hike of petroleum products occurred in the first and second quarters of the year 2020.

3 The main crux of prayer clause is that an appropriate writ in the nature of 'Mandamus' be issued against the respondents for the smooth supply of the petroleum products and the price hike in the petroleum products engineered by the companies in order to take undue advantage from this dreadful situation may be declared unlawful and illegal.

4. All the concerned quarters were taken on board to dig out the causes of this national crisis. During the proceedings of the petition, it emerged that apparently the Oil and Gas Regulatory Authority (OGRA) and Ministry of Energy (Petroleum Division) {MoEPD}were responsible for the smooth supply as well as check on arbitrary hike of the petroleum products. The core question to be determined by the Court in the given situation was to ascertain who failed to perform its obligatory duties efficiently resulting in national crisis qua shortage of petroleum products? Or were there some external factors beyond control which caused the crisis? Additionally, what measures could be suggested or devised to avoid such like situation in future?

5. Heard. Record perused.

6. Undoubtedly the Oil and Gas sector of a country is a pivotal part of its economy. Petroleum is one of the prime sources of energy production.It is a conventional method with ease of use and key to stimulate the micro economic development of every country deeply connected with the mobility of transport system. It has revolutionized the entire transport network of the world, be it road, rail, water or aviation transport. Energy and economy are inter connected, hence it has strong impacts on the national economy of any country. However, unfortunately on a number of occasions the people of Pakistan have experienced acute shortage of petroleum. Earlier in the year 2015 the episode of petroleum shortage occurred, which has haunted the country again in the early part of 2020. The difference, this time, was that the crisis developed over a period of time, persisted too long and witnessed a relatively poor response from the government. There had been no sign that the concerned authorities, regulators or market players had learnt any lesson from the past.

7. There is no gainsaying the fact that the oil industry always tends to minimize its losses when prices fall and maximize inventory gains as they move upwards. Businesses rarely follow principles, but incessant crisis of the last year confirmed the governance structure to be more fallacious than it was earlier. As the price decline hit the market in December 2019 and January 2020 the oil industry had curtailed its imports, as well as, local production. Red flags were already up when the coronavirus

led to the lockdowns by the end of March 2020 with ensuing result of substantial drop in the consumption. The wheat harvest was just round the corner when local refineries started to close down for limited offtake by Oil Marketing Companies *(hereinafter to be referred as OMCs)*. It was quite clear by the end of March that OMCs were not maintaining mandatory stocks for the 20-days' consumption cover as per the rules and licence-conditions contained in 'The Petroleum Act, 1934'.Unfortunately, even the strategic reserves (necessary for security purposes) had already been compromised. The supply chain disruption was nationwide and affected all major cities and towns in Punjab, Balochistan, Azad Jammu and Kashmir, as well as, Gilgit-Baltistan. So much so that the province of Khyber Pakhtunkhwa officially admitted that its 77 fueling (petrol) stations had completely dried out. By the first half of April, all stakeholders were fully aware of the initial shortages. At the same time the Oil and Gas Regulatory Authority (OGRA), the Petroleum Division and the oil industry were making friendly communications limited to file work. The rationing of oil products came into play around Eid-ul-Fitr in the third week of May, 2020. There also appeared some calls for a change in the pricing mechanism to a quarterly or weekly basis. In fact, when the priority should have been maintaining the stocks through administrative, regulatory and policy response to the shortage, the institutional debate remained focused on hedging against global oil prices. No wonder it was the supply chain that was managed like a 'Ponzi Scheme'.

8. For a country like Pakistan, it is not an easy job to move stocks from the port to upcountry especially when it is not equipped with the rapid means of transportation. Ironically, the world was suffering from storage constraints owing to a price crash while Pakistan went through one of the worst oil shortages in which the consumers were being forced to pay almost double prices.As the crisis culminated to its peak in the first week of June 2020, the industry along with the regulator and the government in its public discourse attributed the shortages to a sudden upsurge in consumption in that month. It quoted consumption of 850,000 tonnes in the month against the usual monthly consumption of around 650,000 to 700,000 tonnes. Being corroborated either by their relevant record or circumstantial evidence such excuse of the concerned quarters remained nothing more than a fable and bald assertion vis-à-vis the position that most major cities were already far from resuming normal business and educational activities. More surprisingly, the Government appointed a seven-member probe committee led by the same officers, which too, instead of arriving to some definite and conclusive result simply confined to blaming the industry for every dimension of crises. Separately, the regulator sent show-cause notices to nine OMCs for not maintaining mandatory stocks and finally imposed absurdly low fines on six of them. It was in June, 2020, when the instant writ petition was filed in the wake of an alarming position where the whole country had gone to a stand-still position and on account of shortage of petroleum and all kinds of activities

in the country had come to a halt urging this forum to take cognizance of the matter. On the other hand, as it appears that the concerned officials were still adamant not to serve the public by performing their statutory duties.

9. It becomes evident through perusal of the available material that despite foreseeing crises in the making, no effort whatsoever was made to take decisive steps to nip the evil in the bud. Confronted with this position, notices were issued to the respondents directing them to submit their respective reports and para-wise comments. Apathy of the affairs persisted to such extent that replies submitted by the Government functionaries were not simply unrealistic but even every length of effort was resorted to for shifting the responsibility to some other organizations/institutions. Proceedings were carried out on number of occasions and keeping in view importance of the issue, Malik Muhammad Awais Khalid Advocate was appointed as amicus curiae to assist the Court on the subject. Further in order to chalk out future mechanism, learned Attorney General for Pakistan was required to appear before the Court. Vide order dated 30.06.2020, learned Attorney General for Pakistan was directed to establish contact with the Speaker National Assembly of Pakistan to take viewpoint whether he is ready to form a Special Parliamentary Committee with equal membership of Treasury Benches and also Opposition Benches to probe all the petroleum crises right from the month of March 2020 to the end of June, 2020 including the storage capacity, guidelines for strategic storage and increase, as well as, decrease in petroleum prices during this period and whether the Speaker is also ready to set a time-frame for such Committee to finalize its report and place it before the House for debate and if such report is prepared, same shall also be placed before this Court. On the next date of hearing i.e. 09.07.2020, though report with regard to draft notification for 'appointment of commission' was submitted on behalf of the Federal Government, however, deeming it deficient for resolution of the real and attending issue with obvious view of avoiding repetition of such incident(s) in future, this Court vide order dated 16.07.2020 besides directing for establishment of the Commission had also outlined the following ToRs:-

"1. Whether the Government made any policy, during the crisis occurred to guide the authorities to take necessary actions and what steps were taken for the smooth supply of Oil? Whether such issue was discussed in Cabinet and any summary was moved by Petroleum Minister and what were the suggestions in it and what decision was taken by the Cabinet or P.M.?
2. Whether during the period when there was shortage of petroleum products in Pakistan, was there sufficient quantity of petroleum products available in the country? If so, who were responsible for hoarding and consequent shortage and petroleum crisis and what actions were or should have been taken against hoarders by the concerned authority?
3. Is there any mechanism by the Federal Government, OGRA or the oil

companies for the storage and supply of oil during the crisis/emergency period in order to keep the flow of oil products continuously and how much petrol was supplied to oil companies prior and after the crisis and what is the storage capacity of different oil companies?

4. Whether any order, decision, action or inaction including ban and subsequent relaxation on imports of petroleum products by any person, Authority or Division was meant to and/or did confer any undue benefit or advantage to any person including O.M.Cs., refinery, dealer etc in this crisis?
5. To examine the role of refineries/oil companies and determine their responsibility in the shortage/crisis vis-à-vis the procurement from local sources, imports, storage and supply in the country:

i. Whether the Ministry of Petroleum and OGRA were ill prepared for the artificial crisis, and its inconsistent response added to the uncertainty and panic in the country?
ii. Whether the OGRA failed to handle the situation under the mandate of OGRA Ordinance, 2002?
iii. Whether the Officials acted promptly under the mandate of Sections 3& 4 of Petroleum Act, 1934 in order to deal with the situation?
iv. Who are the officials responsible and guilty of misconduct and criminal negligence?
v. Whether the poor risk management of the concerned authorities is the cause of this crisis?

6. To determine the responsibility of the Petroleum Division, OGRA, O.M.Cs., Refineries, Petroleum Dealers or any other Authority or person for the shortage/crisis.
7. Whether before the crises and during pandemic Covid-19 any restriction was imposed on Oil Companies for importing the oil products? If so, what policy was made so that Oil Companies could maintain the required storage of petroleum?

i. What yearly data is available with the Government authorities and OGRA for the storage and usage of the petrol on monthly and daily basis?or the daily consumption of petrol in the country and total supply of various oil companies.
ii. What is the total import of the petroleum products in the ordinary days? Whether the import of oil, this year, was less as compared to past years? Was low import the primary reason for shortage of petrol?

8. To identify the deficiencies in prevailing laws, regulations, licenses, mechanism for imports, price determination, storage, storage capacity and supply of Petroleum products across the country.

9. To examine the possibility of market manipulation/cartelization by O.M.Cs/Petroleum Dealers etc. and identification of responsible for it.

i. Whether the Government both on federal and provincial level had provided guidelines to regulatory and enforcement agencies to curb the misuse of this crisis by the Cartels through hoarding or selling it in black on expensive rates to the general public?

10. The commission shall examine the quantity of storage of last one year of each company, if the storage was less than the required limit and capacity, what action was taken by the authority on this deficiency?

11. Whether any summary was moved by OGRA to increase the prices on 26.06.2020, if not then on whose recommendations rates were increased before usual date, how much petrol was supplied by all the companies throughout Pakistan after, by this increase, what financial benefits from 26.06.2020 to 01.07.2020 were derived?

12. Whether the Government of Pakistan has any strategic storage for the public to cope emergency situation? If not, is there any planning for establishing the strategic storage for public in future? What will be the strategy to cope with such unpleasant situation in future?

13. Whether there is any need of comprehensive policy to take the provinces on board in order to enforce the laws dealing with the petroleum issues?

14. To suggest short term as well as long term measures to ensure that such shortage or manipulation, if any, does not recur.

15. Any other issue deemed appropriate or relevant to the above ToRs.

10. Vide notification No.1/05/2020 Lit-III dated 28th July, 2020, Federal Government constituted the Commission hereinafter shall be referred as **(the Commission)** under the chairmanship of Mr. Abubakar Khudabakhsh, Additional Director General FIA, which included representative of Attorney General for Pakistan, representative of Intelligence Bureau, Representative of FIA, Director General, Anti-Corruption Punjab, Mr. Rashid Farooq, Former DG Oil, Petroleum Division and Mr. Asim Murtaza, C.E.O. Petroleum Institute of Pakistan. It is, however, worth mentioning that the last two members did not join the proceedings while showing their inability on account of personal/health reasons. The Commission also co-opted certain members. The Commission made an indiscreet probe while taking on board all stakeholders. After considering and evaluating all the facts and circumstances within the mandate of ToRs, the Commission made recommendations which can be summarized as under:-

1. OGRA

Strongly recommends dissolution of OGRA within next six months. Also recommends punishment for those who were involved in illegalities, unlawful marketing, license permission.

2. **MoEPD Ministry of Energy (Petroleum Division)**

   Commission recommends that to get out the present predicament of utter confusion, MoEPD must be empowered to take the matter into its own hands with consolidated approach. The oil industry can be straightened with the unified authority. Draft new rules within 6-12 months with the approval of cabinet/PM. The departmental penal action may be taken against incumbent DG Oil for passing illegal orders.The departmental penal action be taken against Mr. Imran Abro working without any legal ground for the term of 6 years on behalf of his superior.The departmental action against the Secretary of MoEP be taken for failure to render explanation with regard to petroleum crises during June 2020.

3. **Penalty for OMCs for June Crises**

   The Commission recommends that the unlawful gain must be recovered from the OMCs by the Federal Government as these profits rightfully belonged to the general consumer at large.

4. **Establishment of a monitoring cell**

   The Commission recommends that a monitoring cell must be established in MoEPD. The cell should collect all relevant data from OMC's.

5. **Invoking the role of Deputy Commissioner/District Administration**

   To inspect and examine any premises, facility or installation on or operated by an OMC or refinery and to conduct enquiry so as to find any infractions or violation, is the duty of Deputy Commissioner under Rule 54 of Pakistan Oil Rules 2016.

6. **Closing of illegal retail outlets**

   The Commission recommends that all the illegal outlets must immediately be closed down while simultaneously initiating action not only against their owners but also against those who allow them to prosper.

7. **Establishment Strategic Storage**

   The Commission recommends that focus of the policy formulators on the enhancement of strategic storage (both crude oil and refined products) of the country remained amiss be it the MoEPD or OGRA.

8. **Automated Gauging System**

   Automated Gauging System is the most important automation step that needs to be taken up, all storages must be fitted with digital censors. This system would also help in proper audit at the end of financial year and this would help cut huge tax leaks that reportedly exist in the oil industry. Both smuggling and adulteration practices could almost be brought to a grinding halt once this is fully and effectively enforced.

9. **Transportation**

The Commission recommends that all other private OMC's develop automated transportation system.

10. Revamping of PSO

The Commission recommends that the Government of Pakistan (GoP) may settle the impending debt issues of PSO in due time to enable it to adopt modern working ways of a vibrant company. The Commission also recommends that PSO may be directed to take the lead in the aforementioned automated process.

11. Shell Model

The Commission recommends that fair complaints of Shell may be properly addressed and redressed to attract other international players in the industry.

12. Price Fixing Formula

The Commission is of the view that the mechanism may be appraised after 6-months and the GoP may consider the same formula with average of 30 days instead of 15 days.

13. Abolition of import Quotas

The Commission recommends that in future product review meeting only quotas of local refineries be fixed as per the market shares of OMC's or as decided by the mutual deliberation of OMC's.

14. Smuggling and Adulteration

The quantum of smuggling through Pak-Iran border has been approximated at Rs.250 million. The Government must sensitize the Frontier Corps (south) to take strict measures at the Pak-Iran border to curb this colossal evasion of tax revenue. There is a dire need of mobile testing units, such units should routinely check quality of petroleum products in retail outlets and depots in their area of jurisdiction to curb this menace.

15. BYCO Case

It is recommended by the Commission that operation of both the refineries of BYCO be halted henceforth and full-scale inquiry be opened.

16. Scrutiny of other Regulatory Bodies.

The Commission is compelled to recommend that the Government may consider getting the performance audit done of all such regulatory bodies (NEPRA, PEMRA, DRAP etc.). The people of Pakistan have a right to know whether their hard-earned tax money is being utilized properly.

11. It is pertinent to mention here that at one stage Mr. Salman Akram Raja Advocate appearing on behalf of OGRA had apprised the Court that proper facts were not brought on record; hence no action is required to be taken against OGRA. When confronted learned counsel frankly conceded and ultimately agreed that once it is directed that before making any observation or taking any adverse action, the concerned agency or

department shall hear all the relevant including OGRA, learned counsel agreed that with such an observation he will be satisfied and convinced that any official or institution can be proceeded against after taking his point of view/affording hearing.

12. The recommendations made by the Commission have been exhaustively gone through and evaluated on judicial parlance. These have been found just and within the mandate of the Commission, as well as, proportionate to the prevailing crises. In the light of the supra recommendations by the Commission, following directions to the Cabinet Division of the Government are being issued so that future incidents of like nature may be eluded:-

i. It is made clear that inquiry report of the Commission is just a fact finding report and for further necessary action if any company, institution/party feels necessary to proceed adverse against anyone it must take the view point of all concerned.

ii. The Federal Government is directed to make necessary arrangements for the implementation of the recommendations proposed by the Inquiry Commission *reproduced above*.

iii. The Federal Government shall form a committee for recovery of unlawful gains from the OMCs. The committee so formed shall take point of view of all concerned and in case it comes to the conclusion that recovery has to be effected from OMCs, it shall design/draft mechanism for its materialization.

iv. The Federal Government shall take steps for the audit of all OMCs and in the light of such audit report if required, a committee or sub-committee shall be constituted to examine the existing rules and regulations, which in the facts and circumstances may propose amendments/recommend new legislation.

v. In case need arises, a committee/sub-committee shall be formed to examine

vi. The Federal Government must culminate legal action against those who were involved in mal practices of whatsoever nature or found responsible for creating the shortage crisis.

vii. In future Federal Government shall ensure that strategic storage is preserved in all eventualities.

viii. The Federal Government is directed to ensure the release of the report of the Commission regarding the artificial shortage of petroleum products immediately.

ix. The Federal Government is directed to submit compliance report within three months with regard to steps taken by it to the Additional Registrar (Judicial) of this Court.

x. The Chief Secretaries of the respective provincial governments are directed to take effective steps to empower the District Administration for better role to cater with such like situation.

xi. The Government shall examine the report of the Commission qua dissolution of OGRA through a high powered committee, however, if such Committee concludes that OGRA should remain in field then immediately the rules relating thereto must be revisited and fresh rules/regulations be framed and the authority should closely watch the working of OGRA and other autonomous bodies. In case of any lapse, the concerned officers/officials must be taken to task.

13. In the light of above referred directions Writ Petition No.25669/2020 and Writ Petition No.26868/2020 are disposed of accordingly.

14. Before parting with the order this Court deems essential to appreciate the assistance rendered by learned counsel for the parties, learned Deputy Attorney General, learned *amicus curiae,* Mr. Azhar Siddique, Advocate as well as, Members of the 'Commission' particularly its 'Chairman'. Admittedly the time-frame given to the 'Commission' to probe/dig out the issue was very short while facts were gigantic wherein big-guns were involved. Evaluation of all the facts in such a short timeand formulating recommendations in the shape of a comprehensive report which may help to articulate policy guidelines for the Federal Governmentreflects the capacity of the Chairman of the Commission, which is applauded.

(CHIEF JUSTICE)

15. Announced in Open Court on 25 .06.2021.

(CHIEF JUSTICE)

Approved for Reporting

Javed**

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FORM No.HCJD/C-121.

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Writ Petition No.67129/2020

Luqman Habib Vs. Federation of Pakistan, etc.

Writ Petition No.3110/2019

Bilal Riaz Sheikh vs. Federation of Pakistan, etc.

Writ Petition No.46684/2020

Liaquat Ali Chohan vs. Director General FIA, etc.

Writ Petition No.67329/2020

Muhammad Saeed Sindhu & another vs. Federation of Pakistan, etc.

Writ Petition No.18311/2021

Nadeem Sarwar vs. Federation of Pakistan, etc.

S.No.of order/Proceeding	Date of order/Proceeding	Order with signature of Judge, and that of Parties of counsel, where necessary.

09.06.2021 M/s Bilal Riaz Sheikh, Muhammad Azhar Siddique, Safdar Shaheen Pirzada, Muhammad Faizan Maqsood, Muhammad Usman Sheikh, Zubair Janjua, Faisal Nawaz Bhatti, Zahida Ghaffar, Asif Mehmood Khan, Adnan Paracha, Eisa Usman Ghazi and Irfan Akram, Advocates for the petitioner.

All the petitioners in Writ Petition No.3110/2019, Writ Petition No.46684/2020, Writ Petition No.67329/2020 and Writ Petition No.18311/2021 in person.

Mr. Asad Ali Bajwa, Deputy Attorney General with Muhammad Usama, Assistant Director (Software), Waqas Riaz, Inspector CEW, Asad Iqbal, S.I. and Nabeel Hussain, S.I./FIA.

Ch. Sarfraz Ahmed Khattana, Deputy Prosecutor General.

M/s Barrister Raja Hashim Javed, Barrister Ch. Muhammad Umar, Mufti Ahtesham ud Din Haider, Rana Muhammad Ansar, Advocates along with Muhammad Farooq, Director PTA, Shehzada Muhammad Hameed, Assistant Director (Vigilance) PTA.

Through this single order I intend to dispose of Writ Petition No.67129/2020, Writ Petition No.3110/2019, Writ Petition No.46684/2020, Writ Petition No.67329/2020 and Writ Petition No.18311/2021 involving same questions of law and facts as in all these writ petitions precisely grievance of the petitioners is that highly objectionable contents, which are totally against the injunctions of Islam, against the sanctity of Sahaba Ikram and last-hood of the Prophet Muhammad ﷺ is

being published in the social media particularly on face-book, therefore, appropriate measures are required to curb such like acts on face-book and blockade of certain web pages, etc.

2. I have considered the arguments advanced on behalf of the petitioners, learned Deputy Attorney General, as well as, learned counsel appearing on behalf of Pakistan Telecommunication Authority (PTA) and gone through the record available on file.

3. Religion plays a vital role in human life and society. Islam as a religion is comprehensive for all human actions. It explains Tauheed and Risalat doctrines effectively. It tells us how to live a virtuous life, how to conduct ourselves in public or at home, how to treat parents, relations, friends, strangers, the poor and orphans; it instructs us about economic and social, educational and political ends. In short, it is complete code of life, which provides guidance in all human situations. The six articles of faith as enunciated in Hadith are: 'You must believe in Allah, His Angels, His Holy Books, His Messengers, in the Last Day and in Fate (both in its good and in its evil aspects).' The two main sources of Islamic teachings and rules of Shari'ah are the Qur'an and Hadith. The Qur'an and Hadith are the primary source of guidance. By benefiting from them, man can attain worldly and otherworldly prosperity and success. The Qur'an is the last divine scripture. The status of Muhammad (PBUH) as per Qur'an is "Seal of the Prophets" (Khatam-un-Nabiyeen). In the Qur'an, He is also known by the term Khatam-ul-Mursaleen (Seal of the Envoys). Muslims take this to mean that Muhammad (PBUH) was the final Prophet and that no Prophet after him would be able to come at all. The following verses contain clear injunctions regarding the end of prophecy. "Muhammad (Blessings of Allah and Peace be upon Him) is not the father of any of your men, but He is the Messenger of Allah and the Last of the Prophets (ending the chain of the Prophets). And Allah is the Perfect Knower of everything." (Al-Quran, Al-Ahzab, 33:40). The chain of Prophet-hood is going to last till the Day of Judgment and the innumerable Muslims who are going to be born till the Day of Judgment will not hold a minute, because the prophets can accomplish this, but all the prophets and messengers will have to worry that the way will be cleared for the people so that they will never be in danger of going astray. "Today I have perfected your Deen (Religion) for you, and have completed My Blessing upon you, and have chosen for you Islam (as) Deen (a complete code of life)" (Al-Quran, Al-Maidah, 5:3).

4. Besides Quranic verses there are number of hadiths regarding the end of Prophethood which are included in the seven books of Hadiths. There are some hadiths in view of the glory of the Prophet (Peace and Blessings of Allah be upon Him). "It is narrated on the authority of Anas ibn Malik that the Messenger of Allah, may Allah bless him and grant him peace, said, "Whoever deliberately lies to Me, his abode should be Hell." (Ahmad bin Hanbal, Musnade Ahmed, Al-Maktabul-Islami

Beirout, page 98/2). It is narrated on the authority of Abu Huraira that the example of the Prophet (Peace and Blessings of Allah be upon Him) and the Prophets (Peace and Blessings of Allah be upon Them) is as follows: Appreciate the excellent construction but miss the space of a brick. I have replaced this brick. This building has been completed with me and the messengers have been eliminated with me. I am in the brick and I am the last of the prophets. (Bukhari Muhammad bin Ismaeel, Al Jamei, Al-Sahiah, Al-Bukhari, Hadith No.880/2). "It is narrated on the authority of Anasbin Malik that the Prophet (Peace and Blessings of Allah be upon Him) said: The Messenger-ship and Prophet-hood have been completed for Me and now there is no Prophet or Messenger after Me." (Jamia Termazi, Hadith 1989/2). The third most important position after the Qur'an and Sunnah is the consensus of the Companions. This is proved by all the reliable historical traditions that soon after the era of Holy Prophet, those who claimed Prophethood and those who accepted him, the Companions had fought against all of them in unison. In this regard, the case of Muslima Kadhab is noteworthy. This person did not deny the Prophethood of the Holy Prophet but claimed that he had been associated with the Holy Prophet. The Banu Hanifah believed in it with good intentions. And they were really led into the misconception that Muhammad, the Messenger of God, had made him a partner in the Prophet-hood. But the Companions did not recognize Banu Hanifah as Muslim and killed him. When Muslima Kadhab and her followers were attacked, Hazrat Abu Bakr Siddique said that their women and children should be enslaved and when they were taken captive, they were actually enslaved. Further there is hardly a clearer example of the consensus of the Companions Imam Abu Hanifa's opinion regarding the end of Prophethood Imam Abu Hanifa. A man in your time claimed Prophethood and said, "Give me a chance to present the signs of my Prophethood." Upon this, Imam Azam said: "Whoever asks him for a sign of Prophethood will also become a disbeliever because the Prophet (Peace and Blessings of Allah be upon Him) said: There is no Prophet after me. (Siyouti, Jalal ul Deen, Tabyeezul Sahifah Fi Munaqabe Abi Hanifah, p,129).

5. The Companions (Sahaba) were the individuals whom Allah made a means of connecting the whole Ummah until the Day of Judgement to the time, words, sayings and actions of Prophet. Without this connection, the Qur'an could not be passed to the Ummah. There are many verses of the Holy Qur'an which were only understandable from the words of the Prophet. The Companions were the ones who passed these pearls to us. Every action and saying of the Prophet was meticulously detailed, recorded and narrated to the following generations by these very Companions. The Companions were the close confidants of the Prophet. They were those individuals who in the preservation of the message of the Prophet sacrificed their wealth and lives. It is narrated on the authority of Hazrat Abdullah bin Mughal (may Allah be pleased with him) that the Prophet (Peace and Blessings of Allah be

upon Him) said: “Fear Allah about my companions, fear Allah about my companions, do not blame them after me, remember that whoever loves them, loves them because of me, And whoever is hostile to them, he is an enemy to them because they are hostile to me. And whoever persecutes God, then the day is not far when God will seize him.”(Jamia Termazi 169/6)

6. Now coming to the facts of the case on cursory glance to the annexures of this writ petition, this Court was shocked to see that the said material consisting of text as well as the pics in the shape of caricature, etc., was more than enough to create wide scale public unrest and outrage amongst absolute Muslim majority of our Islamic Ideological State. Therefore, taking notice of significance of the issue, the learned Deputy Attorney General, official of FIA and representatives of PTA were summoned.

> There is no cavil to this proposition that when an act is declared to be an offence, it is responsibility of the state to adopt all legal measures firstly to prevent such crimes and secondly if the said offence is committed then bring the culprits to book and put them before the court for ultimate decision. In the same context Article 5 of the Constitution of Islamic Republic of Pakistan, 1973 deals with loyalty to state and obedience to the constitution and law, hence, it becomes constitutional duty of the state functionaries to perform their duties to curb the crimes as defined in different statutes of the country. With reference to these petitions, the material appended with it clearly disclosed commission of offences as detailed in Chapter XV of the Pakistan Penal Code. This Court cannot oversight that the legislator had laid down specific provisions i.e. Section 295-A, 295-B and 295-C P.P.C, to cater similar situations where any person uses derogatory remarks, etc., in respect of the Holy Prophet ﷺ, by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, and thus defiles the sacred name of the Holy Prophet ﷺ, the name of any Wife (Ummul Mumineen), or members of the family (Ahlebait) of the Holy Prophet ﷺ, or any of the righteous Caliphs (Khulafae-Rashideen) or companions (Sahaaba) of the Holy Prophet ﷺ.

7. This is quite a sensitive issue and the referred material clearly discloses that visible intent behind such posts was to hurt the feelings of Muslims all over the world and we also have the history that whenever such unholy attempts were made, it worked as an explosion for the whole of our society. This Court would remind the state agencies of preamble of the Constitution of Islamic Republic of Pakistan, 1973 which provides that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed; the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance

with the teachings and requirements of Islam as set down in the Holy Quran and Sunnah, protection shall be provided to the fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality.

8. Preamble of our Constitution straightway discloses that the rights of every community have been delicately balanced and freedom of speech/expression and information is also hallmark of our Constitution, but the term "right of expression" cannot be stretched to such an extent that it be used as a tool to defy the religious thoughts or sacred personalities of one's religion. This Court is of the clear view that under the umbrella of "freedom of speech and information" not only the Muslim community, in fact the followers of all the religions have been made to suffer immensely.

9. There can be no second opinion that advancement and use of technology has brought whole of the universe into one global village while social media is now considered to be the most productive element in spreading and sharing knowledge and ideas, ultimately benefiting the public at large. Having observed that, this Court is conscious of the fact that despite all above pointed benefits, comparatively a few of the social media users have resorted to use it for destructive purpose. In this context we are aware that the social forums unfortunately are being used, by some of the elements, negatively, and by their such nefarious activities, the laws of the countries are being violated, religious feelings of all kinds of communities are being hit, let it be said that all this is being done under the cover of "freedom of expression" and "freedom of speech".

10. At this juncture it is important to mention here that some individuals are of the view that Article 19 and 19-A of the Constitution of Islamic Republic of Pakistan, 1973, has granted uninterrupted right of freedom of speech and information, therefore, no action can be taken against any such material, as is part of this writ petition. But, they are totally ignorant of the fact that Article 19 of the Constitution of Islamic Republic of Pakistan, 1973 in clear terms provides that said liberty should be subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court or incitement to an offence. The Court is cognizant that freedom of expression is considered to be a foundational human right of the greatest importance. Yet it is important to remember that freedom of expression, speech, tolerance and respect go hand in hand. Perhaps some wrongdoers are not aware of the fact that protecting the prestige of Hazrat ﷺ is the first and foremost duty of all Muslims on earth. Muslims would not allow any one, on the basis of any slogan, either that of "freedom of expression" or "freedom of speech" to undermine the

dignity of Hazrat ﷺ. During the course of arguments, the authorities were further enlightened on the rights and responsibilities of the users as uploaded by the Facebook administrator. Clause-3(6) of the *ibid* Rights and Responsibilities of the Facebook Users available on internet clearly provides that its user will not post content that is hate speech, threatening, or pornographic; incites violence, or contains nudity or graphic or gratuitous violence. Further, its clause 5(1) and (2) provides that the user would not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law, and Facebook could remove any content or information which is posted on Facebook and it is believed that same violates the statement or policies of the Facebook and similarly the respectful behaviour would be encouraged.

11. During arguments this Court repeatedly posed questions to the Chairman PTA that if the Facebook refuses to block such pages or some new pages are opened for the purpose of spreading hatred material which is otherwise against the law and the Constitution of the Islamic Republic of Pakistan, 1973, and it may even result in damaging the integrity and sovereignty of the state, whether the state agencies would remain silent spectators, Chairman PTA came out with the plea that if within a reasonable time decisive steps are not taken by the concerned information system providers/ administrators for removal of all such content, then as a last and final resort, the authority would block all such sites at once without any space.

12. Having taken into account the importance of the issue, which admittedly can augment the sentiments of general public particularly illiterate people, this Court is persuaded to hold that the actions taken by the government functionaries so far in this regard are straightway deficient, therefore, the matter requiring imminent intention appropriate measures are essential. Hence, while taking into account all the aspects, this Court deems it appropriate to pass the following directions:-

- Government shall establish a cell under PTA wherein I.T. Experts and Islamic Scholars must be included as members. The said cell shall keep an eye on websites as well as social media programs. Wherever any objectionable content is observed as defamatory the same shall be referred to the Islamic Scholars and if it is found that any act or omission in the said content violates any provision of law within Pakistan, is against the beliefs of the Muslims and against the integrity of State, adequate steps shall be taken for blockage of the relevant website/social media page, etc. and simultaneously legal proceedings against the delinquent be initiated.
- Under Article 2-A of the Constitution projection and protection of Islam is duty of the Government and for this purpose the Government shall establish an official website/portal where authentic copy of Holy Book (Qura'n) with translation by known scholars along with 'Ahadith books, all laws relating to Khatam-e-Nabuwat, articles written on the subject and decisions of the

superior courts on this specific issue shall be made available on the same website for awareness of the general public. A window/portal shall also be established where the known Islamic scholars shall answer the queries raised by anyone about the injunctions of Islam and Khatam-e-Nabuwat.

The Government of Pakistan shall establish a specific portal on the said website where details of all authentic Islamic websites/pages shall be introduced for guidelines for the whole world especially the Muslim Ummah.

- As per Rule 5(1) of Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguards) Rules, 2020, the Authority has been empowered to initiate proceedings only if a complaint is filed before it in terms of Section 5(2) and 5(3). While if there is any material in violation of Pakistani Law especially PPC, which itself is a cognizable offence in view of Section 154, Cr.P.C. this Court is of the view that filing of complaint is not mandatory rather it is the duty of the Authority to initiate proceedings at its own motion. In this respect it is suggested that relevant rules may be amended accordingly.
- Whenever any complaint is lodged about the offence involving Islamic Injunctions/Khatam-e-Nabuwat and Namoos-e-Sahaba, proceedings on such complaint shall be made available on the website/portal and updated step by step so that the public must know that adequate and proper measures are being taken at highest level to procure Islamic injunctions. This will ultimately result in controlling the sentiments of general public.
- Hazrat Muhammad Mustafa ﷺ is the last Prophet and to highlight this aspect, specific chapter shall be inserted in Textbooks of Urdu and Islamiyat from primary to master levels.
- When such website is established by the Government, it must be advertised on media and also on notice boards of Higher Education Commission, Public and Private Universities, Colleges and other officially run institutions so that maximum publicity is made in order to achieve the all-out benefit out of it.
- Social media providers must be compelled to establish their sub offices within the country (Pakistan) so that timely interaction could be made in case of any violation of Islamic injunctions or of any Article of Constitution of Pakistan is observed/found, simultaneously enabling our institutions to lay hands on them in case they are directly or indirectly found responsible for such violation.

13. The instant writ petition stands disposed of in the above terms.

(CHIEF JUSTICE)

Approved for Reporting

*Javed***

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Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT
Writ Petition No.64117/2020
(Mubashir Ahmad Almas vs. Province of Punjab, etc.)

JUDGMENT

Date of hearing: 09.06.2021

Petitioner by: M/s. Qazi Misbah ul Hassan, Zain Qazi, Advocates.

State by: M/s Malik Abdul Aziz Awan and Asif Afzal Bhatti, Additional Advocates General with Capt (R) Muhammad Usman, Commissioner Lahore Division, Aman Anwar Qadwai, Additional Commissioner.

Respondents by: M/s. Sahibzada Muzaffar, Ali Safdar Nagra, Asif Mehmood Khan, and Malik Eisa Usman Ghazi, Advocates.

Amicus Curiae: Malik Muhammad Awais Khalid Advocate.

Research assistance by: Malik Sher Abbas Awan, Senior Research Officer and Shafqat Abbas, Research Officer.

MUHAMMAD QASIM KHAN, C.J.:- This Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 "**the Constitution**" filed by the Petitioner as *pro bono publico* seeks enforcement of fundamental right to safe and secure life of citizens as guaranteed under Article 9 of the Constitution referring to his utter dismay for the maceration of environmental system being an outcome of sheer disregard to the forest and climate change policies by the respondents which have jeopardized the quality of life for the citizens. It was prayed that the Respondents be directed to restore original status of all those lands which are being used in violation of Lahore Development Authority Land Use Rules, 2014, especially the agriculture lands and the lands falling in green zones for the purpose of disconnection of utility installations thereupon, so long as those are not utilized for prohibited purposes; along with a direction for disciplinary proceedings against those delinquent officials who perpetuated/allowed/facilitated and illegally protected the owners of such lands in defiance to the prevailing law and rules.

2. Reports and parawise comments were called from the respondents and necessary directions were issued from time to time in order to bring to the fore the actual scenario of the situation regarding procedure of approval for housing societies to be established and constructed upon green belts and provision of civic

amenities including space for graveyards for the residents of such societies.

3. Arguments have been heard. Record, respective reports and comments submitted on behalf of the respondents have been minutely perused.

4. Firstly, I would like to address the question of maintainability of instant writ petition from the standpoint that generally a Constitutional petition can be filed by a person who is aggrieved and has got a *locus standi*. There is no denial to this fact that the present petitioner has brought the issue of violation of LDA laws, rules and regulations, which have a direct bearing on the lives of citizens of the province and run against the fundamental rights provided and safeguarded under the Constitution. It is not far-fetched to delineate that the courts are custodian of fundamental rights of citizens and protector of civil liberties and the Constitution made it imperative upon the Courts to pass orders and issue directions in case of breach of fundamental rights. The question of *locus standi* from the standpoint of bringing forth the issue of public importance and enforcement of fundamental rights on behalf of the community has always been liberally interpreted by the Courts and such actions have not only been permitted within the purview of Article 184(3) and Article 199 of the Constitution but also appropriate orders have always been passed to ensure that protection of fundamental rights for the citizens must not be breached upon by the executive, in any manner, through its inactions.

5. The Honorable Supreme Court of Pakistan in the case of MOULVI IQBAL HAIDER VERSUS CAPITAL DEVELOMENT AUTHORITY AND OTHERS reported as **PLD 2006 SC 394** expounded the concept of *pro bono publico* in the following terms:-

> *"The word `pro bono publico' as defined in Blacks Law Dictionary, Chambers Dictionary and Oxford Dictionary generally means `for the public good' or `for -welfare of the whole' being or involving uncompensated legal services performed especially for the public good. `Public interest' in the Black Law Dictionary, has been defined as the general welfare of the public that, warrants recognition and protection. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation. It thus signifies that in case of public interest litigation, one can agitate the relief on his own behalf and also on behalf of the general public against various public functionaries, where they have failed to perform their duties relating to the welfare of public at large, which they are bound to provide under the relevant laws."*

Similarly the Honorable Supreme Court in the case of JAVED IBRAHIM PARACHA VERSUS FEDERATION OF PAKISTAN AND OTHERS reported as **P L D 2004 Supreme Court 482** laid down the same principle, as follows:

10. No doubt with the development of new concept of public interest litigation in the recent years, a person can invoke the Constitutional jurisdiction of the superior Courts as pro bono publico but while exercising this jurisdiction, he has to show that he is litigating, firstly, in the public interest and, secondly, for the public good or for the welfare of the general public. The word 'pro bono publico' as defined in Black Law Dictionary, Chambers Dictionary and Oxford Dictionary generally means 'for the public good' or 'for welfare of the whole' being or involving uncompensated legal services performed especially for the public good. 'Public interest' in the Black Law Dictionary, has been defined as the general welfare of the public that warrants recognition and protection. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation. It thus signifies that in case of public interest litigation, one can agitate the relief on his own behalf and also on behalf of the general public against various public functionaries, where they have failed to perform their duties relating to the welfare of public at large which they are bound to provide under the relevant laws. Viewing the bona fide of petitioner in the above contest, we are of the opinion that the petitioner has not been able to show that he was aggrieved person within the meaning of Article 199 of the Constitution and can agitate his grievance as 'pro bono publico'.

This Court in the case of SHEIKH ASIM FAROOQ VS. FEDERATION OF PAKISTAN **(PLD 2019 Lahore 664)** also held that if public interest is brought before the Court with *bona fide* intention and the same is not tainted with vested interests, then principles of locus standi/aggrieved person are to be interpreted liberally by the Courts. Relevant extract out of the same is reproduced as under:-

22. Public Interest Litigation ("PIL") is a powerful tool for individuals and groups for combating illegalities, injustice and social ills which promotes and protects the larger public interest in case of violation of any fundamental rights. As long as the public interest prayed for is bona fide and not based on any vested interests, the principles of locus standi /aggrieved person are to be interpreted liberally by the Courts. Reliance in this regard is placed on "PROVINCE OF SINDH and others v. LAL KHAN CHANDIO and others "(2016 SCMR 48), "Messrs AL-RAHAM TRAVELS AND TOURS (PVT.) LTD. and others v. MINISTRY OF RELIGIOUS AFFAIRS, HAJJ, ZAKAT AND USHR through Secretary and others" (2011 SCMR 1621), "ARDESHIR COWASJEE and 10 others v. KARACHI BUILDING CONTROL AUTHORITY (KMC), KARACHI and 4 others" (1999 SCMR 2883), "Mian SHABIR ASMAIL v. CHIEF MINISTER OF PUNJAB and others" (PLD 2017 Lahore 597), "DISTRICT

BAR ASSOCIATION, RAWALPINDI v. FEDERATION OF PAKISTAN and others"(PLD 2015 SC 401), "Ms. IMRANA TIWANA and others v. PROVINCE OF PUNJAB and others" (PLD 2015 Lahore 522), "HABIBULLAH ENERGY LIMITED and another v. WAPDA through Chairman and others" (PLD 2014 Supreme Court 47), "SALAHUDDIN DHARAJ v. PROVINCE OF SINDH through Secretary, Local Government Department and 4 others" (PLD 2013 Sindh 236), "JAVED IBRAHIM PARACHA v. FEDERATION OF PAKISTAN and others" (PLD 2004 Supreme Court 482), "IQBAL AHMAD DHUDHI v. FEDERATION OF PAKISTAN and 5 others" (2014 CLC 1348), "MUHAMMAD QAHIR SHAH and others v. FEDERATION OF PAKISTAN, MINISTRY OF RAILWAYS, through Secretary, Islamabad and others" (2014 YLR 2571), PLD 2010 SC 759 -- Human Rights Case Nos. 1111 of 2006, 1111 of 2007 and 15283- G of 2010. The Respondents are under a Constitutional obligation to protect the Fundamental Rights of the public at large as per judgment of Hon'ble Supreme Court reported in "MUHAMMAD YASIN v. FEDERATION OF PAKISTAN through Secretary, Establishment Division, Islamabad and others" (PLD 2012 SC 132). The Superior courts bound to protect the Fundamental Rights of citizens in exercise of jurisdiction conferred via Articles 199 or 184 (3) of the Constitution. Reliance is placed on (2011 PLC (C.S.) 1076). In the matter of: SUO MOTU CASE NO. 24 OF 2010 (Regarding Corruption in Hajj Arrangements in 2010), hence petition on behalf of public for violation of fundamental rights can be entertained by this Court.

6. In view of the precedent law quoted hereinabove, it is manifestly clear that the petitioner has put forth a pervasive concern which is rampant in its impact, raised an issue, which has a direct bearing on citizens' fundamental right of enjoyment of life well enshrined and protected under Article 9 of the Constitution and also directly affects the conditions and quality of living for the people residing within the province and therefore his petition being well within the scope of *pro bono public* is maintainable in its present form. Even otherwise admittedly the petitioner is residing within the territorial limits of LDA and while breaching the rules and regulations of LDA thereby using the agricultural land and green belts area for development of the colonies, life of all the citizens including the petitioner has been and can be materially affected and for the same reason for enforcement of the fundamental rights of all the citizens, which are also available to the petitioner, he is an aggrieved person and competent to file this petition in his personal capacity, as well.

7. Now, adverting to the point of concern that came up during the course of proceedings and unveiled rather a bleak and sorry state of affairs concerns the provision of either insufficient or complete lack of basic amenities in private housing

societies and colonies for general public which divulges blatant defiance and failure on the part of respondents to implement the law and rules in this regard. The most painful and intense fact surfacing on the record is shocking revelation that most of the private housing societies do not have dedicated appropriate piece of land as graveyard for the residents despite the fact that law and rules of LDA unequivocally make it obligatory.

8. Housing society is formed with the object of providing its members with dwelling houses on conditions to be determined by its by-laws. Housing Cooperative Societies are intended to provide better and cheaper houses especially to the low and middle income groups who, otherwise, cannot afford to own houses through individual efforts. They are functioning on the cooperatives principles of self-help, self-finance, mutual aid and self-governance. In addition to the above, Housing colonies or housing societies developed by the land-developers/ government/ semi-government institutions/ autonomous bodies are meant to provide better living places to the citizens equipped with fully civic necessities and for this purpose they make offers for its sale by different modes of advertisements and agreements highlighting the facilities which will be available to the allottees/purchasers so they are bound to fulfill their obligation.

9. It goes without saying that there are settled laws and rules which govern the *modus operandi* for establishing a housing society/colony as to how the land has to be acquired/purchased; but as an ill-luck would have it, the housing colonies/societies are being allowed to run their affairs without proper sanction. Although in some of the cases it is claimed that the procedure has been adopted but in those matters too, by-laws have not been adhered to *stricto sensu* rather those are being trampled upon apparently for ulterior gains. This is evident from the fact that in most of the cases agricultural land is being converted into setting up housing societies/colonies, as well as, the green belts are being permitted to be crushed in the name of providing houses to the public. There is no denying the fact that green belts are one of the prime requirements for healthy atmosphere pre-requisite for better living standards. The green belt designation is a planning tool and the aim of green belt policy is to prevent urban sprawl by keeping land permanently open. A green belt development helps in removing particulate matter from the air and reduces the intensity of sound. Trees can either deflect, refract or may absorb sound to reduce its intensity. The green belts also help in soil erosion control and aid in containing water run offs. However, despite these irrefutable facts the green belts are being crushed for ulterior gains under the umbrella of providing houses to the public.

10. In our society ordinarily, we come across the complaints levelled against the administration of housing societies that the plots given to the purchaser after making full payment are different *(locality wise)* from what were shown to them at the time of agreement. This oftenly happens when the agreement (pre-requisite regarding

sale/purchase/transfer of property) is not registered with the Sub-Registrar rather different other modes which do not require registration such as transfer letter, allotment letter, agreement to sell and other similar documents, are used. This is somewhat a typical attempt at the part of developers of private housing societies to save stamp duty, registration fee and capital value tax (CVT), etc. By doing so the developers not only cause financial loss to the Government exchequer but they also keep the allottees in dark as they never feel secured in terms of their ownership with reference to authentic official record. While dealing this aspect august Supreme Court of Pakistan in a celebrated judgment reported as Messers PAK GULF CONSTRUCTION COMPANY (PVT.) LTD. ISLAMABAD vs. FEDERATION OF PAKISTAN through Secretary Finance, Ministry of Finance, Islamabad and others (**2020 PTD 336)** had observed as under: -

> *"However, during recent years with the development of co-operative housing societies and statutory authorities engaged in the business of development and sale of real estate, a methodology of transferring immovable property has evolved, whereby properties are transferred privately without involving the Registrar of Documents. Such private transfers are designed to avoid transactional costs, taxes and duties which in turn lead to higher turnover of such properties for investment purposes. Such societies, statutory authorities and even limited liability companies (such as the petitioner) adopt various modes of undertaking such transfers including issuance of transfer letters, allotment letters, agreements to sell and other similar documents which do not require registration. Although such mode of transfer is not a legally recognized ode of transfer of immovable property, a practice has evolved over the past few decades whereby such properties change hands on the basis of allotment letters, agreements to sell, transfer letters etc. This method has obvious financial benefits by way of saving Stamp Duty, Registration Fee and CVT. The sum combined effect such savings comes to substantial amounts of money in addition to being convenient and less hasslesome."*

Hence, in view of pronouncement of the Hon'ble Supreme Court referred to above it is directed that the developer of any housing society/colony/co-operative society while entering into agreement with the purchaser shall adopt all pre-requisites necessary for transfer of immovable property. In this regard complete abuttals of the plot should be made part of such agreement in order to rule out any possibility of deception. Such agreement must be registered in the relevant record of the concerned department. It is, however, made clear that LDA or any other alike authority itself competent to register, while launching housing schemes shall be exempted from such practice.

11. With the global surge in the density of urban population, policy makers and planners have been paying significantly more attention to the trials and methods

designed to promote sustainable development so as to improve the quality of life in the urban environment. To meet with such standards in Punjab Private Housing Schemes and Land Sub-division Rules, 2010, it has been made compulsory that 7% space must be allocated for green belts while 2% space necessarily be allocated for the graveyard. The rule 10 of *ibid* rules is reproduced herein-below for ready reference:-

> ***"10. Planning standards for a housing scheme****.– (1) A Town Municipal Administration, a Tehsil Municipal Administration or a Development Authority shall ensure that a housing scheme is planned and sanctioned in accordance with the National Reference Manual on Planning and Infrastructure Standards, prepared by Ministry of Housing & Urban Affairs, Environment & Urban Affairs Division, Government of Pakistan.*
>
> *(2) Notwithstanding the generality of the foregoing (1) above, the developer while planning a housing scheme shall adhere to following requirements:*
>
> ***(a) open space or park, seven percent and above;***
>
> ***(b) graveyard, two percent and above;***
>
> *(c) commercial area, fixed five percent;*
>
> *(d) public buildings from five to ten percent;*
>
> *(e) maximum size of residential plot one thousand square yards;*
>
> *(f) approach road in five City Districts not less than 60 ft and approach road in other Districts not less than 40 ft;*
>
> *(g) internal roads with minimum forty feet right of way;*
>
> *(h) accommodation of roads proposed in master plan;*
>
> *(i) a ten marla plot for solid waste management up to one thousand plots and ten marla plot for every additional one thousand plots;*
>
> *(j) 20 % of the plots in a housing scheme shall be reserved/ planned for plots upto 5 marlas for low income group;*
>
> *(k) Location of a tube well, overhead reservoir, pumping station and disposal station to be provided if required by WASA and other agencies;*
>
> *(l) Site of grid station to be provided if required by WAPDA or other agencies responsible for electricity; and*
>
> *(m) Green strip under high tension electricity line as per requirements of WAPDA or other agency responsible for electricity."*

It is apathetic on the part of respondents that despite settled legal standards, not only allocation of space for green belts is being overlooked rather green belts available in the city area are being ruined. So much so, nobody is paying any heed towards allocation of specified land for graveyard, which brings the situation to a sorry state of affairs and needs imminent measures with utmost promptitude.

12. It is paradoxical to note that Rule 56 of the *ibid* Rules makes it incumbent upon the respondents to take appropriate actions against any developer who violates the requirement of these rules, relevant Municipal Administration or Development Authority. For the sake of ready reference, the rule is reproduced below:-

> ***56. Action against violations***.– *A Town Municipal Administration, a Tehsil Municipal Administration or a Development Authority shall take appropriate action against a developer in case any provision of these rules is violated. The action shall be taken as provided in the law, rules and regulations framed there under.*

13. Even otherwise, provision of basic civic amenities is mandatory requirement and in a way is the sole purpose for which a housing society must have been established. People are not supposed to pay heavy prices only for a chunk of land but the prices are certainly paid for a piece of land situated in a secure perimeter wherein basic amenities which are necessary for enjoying a peaceful life as provided and guaranteed under Article 9 of the Constitution, are essentially provided. This aspect was deliberated in a recent judgment of august Supreme Court of Pakistan handed down in the case of D.G. KHAN CEMENT COMPANY LTD. vs. GOVERNMENT OF PUNJAB through Chief Secretary, Lahore and others reported as **2021 SCMR 834**. Similar view was held in a salutary judgment of the Apex Court reported as **PLD 1994 Supreme Court 693** titled "Ms. SHEHLA ZIA and others vs. WAPDA".

14. In sequel to what has been discussed above this Court is persuaded to issue a Writ of Mandamus with the following directions:-

i) Right of life includes oxygen and pollution free society. Right of life co-exists with forest and green areas. Therefore concerned authorities/legislative bodies should examine and make laws/rules/regulations to bound the developers that while establishing private housing colonies and societies, co-operative societies and even colonies developed by the DHA, along with the roadside there must be green belts separate to foot-paths and on these green belts trees of indigenous species must be planted to protect the environment and also to attract the birds.

ii) Although considering the area of the colonies/societies there is requirement in laws to maintain green belts and parks but considering the increasing pollution in Lahore particularly and in all other big cities of the province generally, it is necessary that within the cities, housing colonies which are yet to be approved in future at least 1% of total area (excluding already fixed for green belts and parks) be fixed for mini-forests and in this respect authorities shall proceed further to introduce new legislation or bring amendments in the existing rules/regulations of LDA or other relevant bodies.

   (a) During the hearing of this case a list was provided by the Commissioner and other authorities showing the area of Forest Department near the

Lahore City available for the development of forest and as per stance of the officials, government is trying to develop forests, but this exercise may take years to do the needful. In this respect the concerned officers of administrative bodies, Director General, LDA or officers of Local Government Department and Forest Department shall ensure completion of these projects as early as possible by joining hands with the people of locality and they can also establish public-private partnership and in these forests walking tracks for the citizens and picnic places may also be established and for this purpose again private-public partnership can be engaged and even the respectable citizens known for their charity also be involved to come forward to secure the environment of the cities. In this respect big organizations of businessmen like APTMA, Chamber of Commerce and Industry, Anjuman Tajran and individual businessmen may also be taken on board for this pious purpose and national cause.

(iii) To preserve the agricultural land the authorities must initiate a campaign on media including the social media to attract the people for high-rise buildings to avoid extra use of agricultural land for the purpose of residences/colonies or commercial plazas and necessary legislation be carried out and reasonable area be fixed for every housing society, where developers shall construct high-rise buildings/flats and provide all civic facilities in those buildings surrounded by beautiful green environment. The Court has no data in this respect, however, it is suggested that in future at least 30% area of every housing society/colony be fixed for high-rise buildings for the purpose of residence, alone.

(iv) In the wake of establishing housing societies, we are in fact erecting concrete stoned buildings thereby ignoring greenery whereas on the other hand already existing green sites are being ruined rapidly. We are straightway losing sight of the fact that in this way the damage being caused to the atmosphere is ultimately bound to affect the humanity. To cater with this situation it is directed that where government deems it necessary proper plants must be installed on road-sides ensuring that plantation be made according to the status of the land keeping in view the chances of effective and rapid growth.

(v) Since by every passing day we are facing acute water shortage, therefore such plants must be chosen which may require/consume minimum water for their growth. Moreover, the plants to be selected for this purpose must be of long height belonging to indigenous species, which may attract the local birds also.

(vi) LDA, Metropolitan Corporations, Town Committees, shall locate the government land available within the cities and shall ensure the development

of mini forests in thickly populated areas within the towns, cities, Metropolitan Corporations to minimize the impact of pollution.

(vii) The concerned government authorities shall endeavour to ensure availability of green belts around the ring-roads being built/future projects where trees including fruit plants shall be planted to attract the birds, which are necessary for a healthy atmosphere. Lahore Ring Authority shall also make adequate arrangements for this purpose.

(viii) During the course of proceedings, it has been highlighted, as also referred above that lot of agricultural land has been or is being converted into housing colonies/societies either with the approval of the authority or without requisite sanction. Undoubtedly general public purchases the plot for residence by spending the whole life saving. Such societies squarely lack civic amenities. However, it is also an admitted fact that these illegal housing societies have attracted hundreds & thousands of general public while it has been conceded by the respondent-authority that ousting of inmates of such illegal housing colonies at this stage is next to impossible. Hence, this Court is constrained to pass a direction to all concerned departments to ensure provision of all adequate civic facilities in such like housing societies by the persons who develop these societies/colonies, however, if the developers avoid their responsibility then all the civic facilities be provided by the concerned government authorities and the amount occurred thereupon be recovered from the persons who develop the society/colony.

(ix) During the course of proceedings in another case, the Court was apprised that masterplan of Lahore City is being prepared and the same is likely to be completed by December this year. The master-plan is the basic necessity for the development of the city and for saving the agricultural land and green area and also to ensure that people will be treated alike without any discrimination it is necessary that this master-plan be prepared as early as possible and in this respect Director General Lahore Development Authority is directed to minutely observe the progress of the preparation of new master-plan. He may join a team of officers with him for this purpose. The Director General shall not be transferred before the December 2021, the date on which the master-plan is expected to be completed. The authority shall consider for consistency of policy and for taking effective measures the tenure of key posts in Lahore Development Authority like Director General, other members from private sector must be three years and necessary steps be taken for amendment in relevant laws. It will not only facilitate them to work with full interest rather because of protective tenure in office they will be able to

effectively deal with mafias without any political pressure or outside influence.

(x) If the Committee devising masterplan faces hindrance in performance of its obligatory functions, it may move to this Court. Moreover, monthly report shall be submitted by the Director General LDA through Additional Registrar (Judicial).

(xi) During the hearing of this case the learned Law Officer and government officials apprised the Court that an Ordinance has been promulgated by the name of 'The Punjab Commission for Regularization of Irregular Housing Schemes Ordinance 2021'. At this stage as the issue of this Ordinance is not before this Court, hence while seeking guidance from the dictum of law laid down by august Supreme Court of Pakistan in the cases of Mian IFAN BASHIR vs. The DEPUTY COMMISSIONER (D.C.) Lahore and others **(PLD 2021 SC 571)** and JAHANZAIB MALIK vs. BALOCHISTAN PUBLIC PROCUREMENT REGULAROTRY AUTHORITY through Chairman Board of Directors and others (**2018 SCMR 414)**, this Court is persuaded to show judicial constraint thus I refrain from discussing the legality, formation, jurisdiction and so other factors about this Ordinance, however, *prima facie* it appears that the penalty provided in this case could not act as deterrence to avoid the development of illegal colonies and societies on agricultural lands or misuse of green area and other area preserved for civic facilities. It is an admitted fact that agricultural lands are available to the land developers on much cheaper rates, as compared to pari urban/urban land. On the other hand the quantum of penalty for this illegality is too low to avoid future development of residential colonies on agricultural land. Similar is the case with regard to violation of masterplan and other relevant laws, by the developers. Hence, fine/penalty must be equal to the difference of price between the agricultural land and pari-urban/urban land for the nearby agricultural land. In this regard, this observation be placed before the Chief Minister, Provincial Cabinet and also before the Provincial Assembly at the time when this Ordinance will be placed before it for legislation.

(xii) The Chief Secretary, Government of the Punjab, shall ensure that directions passed by this Court are circulated to all concerned for compliance in letter and spirit and adhered to in future without fail. A report in this regard shall be submitted before this Court within fortnight through Additional Registrar (Judicial).

15. It is made clear that the instant writ petition is mandamus in nature while the object of the writ of continuing mandamus is to ensure that orders of the courts are

implemented & are not fallen victim to official recalcitrance. The Doctrine of continuing mandamus serves several functions especially in a case where the executive does not carry out its functions effectively and either does not implement a statutory function/duty or does not exercise its discretion wisely. Socio-economic rights, for instance, propose a major challenge to the judicial and legal system where coercing state action is at times, an insurmountable task. The superior courts on number of occasions while exercising powers under Article 199 or 184(3) of the Constitution have held supervisory jurisdictional role. In the recent past in **Panama Case** judgments reported as **PLD 2017 SC 265** and **PLD 2017 SC 692** the Hon'ble Supreme Court of Pakistan in addition to passing directions, requested for appointment of a Monitoring Judge before whom periodical reports were submitted. In the foregoing facts and circumstances the matter is disposed of with a clarification that at any subsequent stage, if any person (citizen) feels that the direction(s) issued by this Court are not adhered to by any government functionary or the housing society, he will be at liberty to move this Court.

16. Before parting with the judgment this Court deems it essential to appreciate the assistance rendered by learned *amicus curiae* as well as Research Officers, Research Centre, Lahore High Court, in deciding the issue in hand which may help to articulate policy guidelines for the Provincial Government beneficial to the public at large.

(CHIEF JUSTICE)

Approved for Reporting
*Javed***

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ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT
WP.No.64117/2020

Mubashir Ahmad Almas
Vs.
Province of Punjab, etc.

S.No.of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of Parties of counsel, where necessary.

09.06.2021 Mr. Asif Afzal Bhatti, Additional Advocate General.
Malik Awais Khalid, Advocate/*amicus curiae.*

In continuation of order dated 04.02.2021, the matter with regard to shortage of graveyards proportionate to the number of people residing in Lahore as also improper maintenance and inadequate facilities is being taken up separately.

2. History of the matter in precise is that during the course of proceedings of the instant writ petition wherein the issue of violations being committed in establishing new housing societies within the jurisdiction of Lahore Development Authority (LDA) has been highlighted and it was emphasized that while allowing establishment of such societies the very basic ingredient of allocation of space for graveyards is being deliberately overlooked/ignored in connivance with the concerned officials of government departments. Hence, notices were issued to the respondents.

3. Before proceeding further it is very relevant to mention here that the divine religion of Islam bestows a noblest stature upon the human beings. His importance and rank is such that Allah Ta'ala has created the

entire universe for his sake and made subservient to man all forces of nature. Human dignity is a right given by Allah (Almighty) to all humans and our religion grants certain rights to humans before they are even born and others after their death. The burial of the deceased is a collective obligation *(farz-e-kafaaia)* on the Muslim community. Because of its character as collective obligation, the entire Muslim community will be guilty if a Muslim body is not buried in the vicinity in a befitting manner, unless the burial was beyond their knowledge or capacity. The respect for corpses is so rooted that even it has been made obligatory for Muslims to deal gently with the bodies of their enemies. The last Prophet Hazrat Muhammad ﷺ advised His Followers not to mutilate the dead bodies and said:-

> *"O people! I charge you with ten rules; learn them well…for your guidance in the battlefield! Do not commit treachery, or deviate from the right path. <u>You must not mutilate dead bodies.</u> Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone."*

4. There is no denial to this fact that dignity is the most sacred belonging and most valuable asset of every person regardless of his social or economic status in life and, therefore, one should never be deprived of the same, save in accordance with law. Similarly and more importantly, the right to dignity of a person not only remains intact when his connection with the thread of life disconnects but by that moment, his right to dignity gets more emphasized and it becomes more necessary to ensure that the right to a dignified burial according to the religion of the person must be ensured

and not violated at any cost. To uphold the dignity of a dead person, it is the duty of state to ensure provision of an appropriate place for burial and this responsibility is either to be discharged by the State itself through its local government bodies or departments. At the same time, in cases of private housing societies established under the relevant laws and regulations etc., it is still duty of the Government to ensure that provision of appropriate place for graveyard in every such housing society is left to meet the requirements of the population.

5. A cursory glance of the laws and regulations relating to such requirements in a Private Housing Society makes it abundantly clear that it is mandatory requirement for establishing a housing facility on private basis to make sure availability of appropriate and sufficient area for graveyards. Section 13(6)(c) of Lahore Development Authority Act, 1975 laid down the requirement of transfer of land in the name of Authority, which is reserved and allocated for the graveyard. The relevant provision is reproduced below for the sake of ready reference:-

> **13. Preparation of Schemes.–** (1) -----
>
> [(6) In case of a private housing scheme, the Authority may grant approval subject to the following conditions:-
>
> (a) mortgage of twenty percent plots of the scheme with the Authority against development and clearance of all kinds of default under applicable laws, rules and regulations;
>
> (b) transfer of minimum fifty percent area of public building sites in the name of the Authority up to a maximum of two percent of the scheme area;
>
> **(c) transfer of land falling under roads, parks, open spaces, graveyards or other such services in the name of the Authority;**
>
> (d) such other conditions as may be prescribed.]

Similarly, Regulation 8(2)(g) of Lahore Development Authority Private Housing Schemes Rules 2014, which are framed under Section 44 of the Lahore Development Authority Act, 1975 while dealing with submission of housing scheme laid down the requirement of submitting proposed division of scheme including place reserved for graveyard.

6. It is worth mentioning that Private Housing Societies established by virtue of legislation Defence Housing Authority also have codal and regulatory framework making it mandatory to establish and upgrade graveyard for the residents of the society. Regulation 53 of the Defence Housing Authority Construction and Development Regulations, 2007, applicable to the whole area controlled by the Defence Housing Authority Lahore, read as under:-

> ***53. Graveyard***
>
> *a. The Authority shall have the exclusive powers to develop, maintain, protect, up grade and to make proper maintenance and administration of the Graveyard, for the welfare and facility of the resident Registered Persons only.*
>
> *b. The corpse of the Registered person, their spouses, parents and dependent children can be buried in the graveyards managed and maintained by the Authority whereas in exceptional circumstances the corpse of another person may be allowed to buried with the permission of the President DHA only.*

Similar is the position with reference to Regulation 56 and Regulation 57 of Defence Housing Authority Construction & Development Regulation 2014, applicable to the Specified as well as Notified Area of Defence Housing Authority Lahore.

7. It is thus evidently clear that allocation of proper and appropriate space for graveyard is essential requirement for every housing society to

which laws, mentioned *supra* are applicable, however, unfortunately these explicit requirements are being willfully ignored. It is also worthwhile to note that the Punjab Shehr-e-Khamoshan Authority Act 2017 *(hereinafter to be referred as 'the Act 2017')*, was enacted for the whole province of Punjab and as per Section 27 thereof, the said Act is in addition to any other law in force on the subject, thus an exclusive piece of legislation enacted to provide to the public cemetery services, funeral services, crematory services and to deal with ancillary matters in the province. Section 6 of *the Act 2017* postulates powers and functions of Punjab Shehr-e-Khamoshan Authority *(hereinafter to be referred as 'the Authority')* established under Section 3 of *the Act 2017*. The functions of *the Authority* are comprehensive and include construction, maintenance and monitoring of cemeteries, prevention and removal of encroachments thereon. Section 20 of *the Act 2017* further empowered *the Authority* to acquire land to carry out the purposes of the Act under the Land Acquisition Act, 1894. The above referred legislative reference further solidify the responsibility of State, the Government, Local Authorities and Private Housing Societies to ensure availability of appropriate place for graveyard so that a person, whose right to dignity is inviolable under Article 14 of the Constitution must have a decent and dignified farewell on the journey to his eternal abode as the fundamental right of dignity didn't vanish or go away with the passing but remain intact till appropriate burial according to religion/custom takes place. However, the Court has been apprised that till today *the Authority* to be formed under Section 3 of *the Act 2017* has not been established as yet.

8. For this purpose notice was issued to Chief Secretary, Government of the Punjab. He was confronted with the upcoming challenges on the subject and was directed to take on board all the concerned stakeholders. During the course of proceedings report was submitted on behalf of the

Government of Punjab that four new graveyards have been established in the four corners of the city of Lahore to cope with the upcoming necessities. It is an open secret that though officials have been deputed to look after the affairs of graveyards, however, either their strength is insufficient to cater with the requirements or they are not skillful enough or proper funds and facilities have not been provided.

9. It is quite unfortunate that although proper legislation on so many aspects including the one referred above i.e. Punjab Shehr-e-Khamoshan Authority Act, 2017 exists but after legislative work further crucial steps to effectuate such legislation are not taken. Thus, practically the laws/rules remain redundant for the fault of concerned government authorities, whereas general public: the direct beneficiary of such legislation, keeps on suffering the miseries because of pure inaction on the part of the administrative wings, responsible to implement and effectuate such legislations. Hence a direction is issued to Government of the Punjab to immediately establish Punjab Shehr-e-Khamoshan Authority in the spirit of Section 3 of *the Act 2017* without fail. The Authority so constituted shall take all possible steps to run/manage the affairs of the graveyards as provided under Section 6 *of the Act 2017*. It is also a matter of concern that in our country the number of on-job people with reasonable pay is too low while on the other hand the number of persons with less means/jobless is too much. It is apathy that in case of sad demise of any of the family members, it becomes very difficult to make arrangements for burial of the dead body, which in present scenario costs too much. It is also an admitted fact that every person, no matter how much poor he is, while purchasing every day grocery articles from market pays some taxes to the government. At the end of the day on his death, it is the duty of the government to come forward and spend small penny upon his burial. Hence, a direction is issued

that necessary amendments must be made in *the Act 2017* and a body shall be set up for every graveyard to whom the representatives of poor people may contact for burial of the dead bodies free of cost (from arranging shroud for the dead body, its transportation towards the graveyard, cost of excavating the grave if any and burial, etc). It shall make all necessary arrangements in this regard and the expenditure occurred shall be born out by the body so established. It is pertinent to mention here that in United Kingdom proper legislation on this aspect has been made known as "**Public Health (Control of Disease) Act 1984"** and as per Section 46 thereof, it is the duty of the local authority to cause to be buried or cremated the body of any person who has died. Similar mechanism has been devised by South Africa in the form of **"Burial or Cremation of Destitute Person (Policy Number 40504)"** while in Scotland **"Burial and Cremation Act (Scotland) Act 2016"** has been promulgated. Hence, on the analogy of above foreign enactments, it is directed that necessary legislation shall be made by the provincial legislature on this aspect. This Court is cognizant of the fact that despite proper legislation, government may not be in a position to spare/allocate sufficient funds to effectuate such legislation. Hence, it is further directed that charitable bodies/personalities/ institutions/unions like APTMA, Chamber of Commerce and Industry, Anjuman Tajran and individual businessmen may also be taken on board for this pious cause. The Government shall also ensure that two model graveyards on the pattern of Lahore City shall be established firstly each in Faisalabad, Multan, Gujranwala and Rawalpindi and thereafter such beneficial exercise must be extended to other big cities of Punjab. Moreover, the graveyards must be properly managed and looked after. In this respect the concerned body assigned the task must sort out the possibility that each grave shall be numbered, registered in the record for future reference, plantation be carried

out, adequate sitting and allied facilities (water tabs, shed along with seats at proper spaces) be arranged/provided to the visitors of graveyard.

10. Before parting with the order this Court deems it essential to appreciate the assistance rendered by learned *amicus curiae*, which resulted in passing an order that will definitely be helpful for the government to chalk out policy on the subject for the welfare of destitute citizens of the province.

(CHIEF JUSTICE)

*Javed***