2010 M L D 1530

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ILYAS---Petitioner

Versus

ABDUL LATIF and another---Respondents

Criminal Miscellaneous No. 4986-CB of 2010, decided on 14th May, 2010.

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

----S.497(5)---Penal Code (XLV of 1860), Ss.406, 420 & 506---Criminal breach of trust and cheating---Application for cancellation of pre-arrest bail---Complainant had not mentioned the necessary particulars, viz., date, time, place and witnesses etc. of the alleged agreement of partnership---No proceedings, whatsoever, had been initiated by the complainant against the accused during his absence from the country for one year---Complainant had also failed to mention the said allegations in his suit for specific performance filed against the accused, which had been withdrawn by him---Bald allegation regarding extending of threats of dire consequences by the accused after getting pre-arrest bail, had not been established by the complainant by any evidence, nor the offence of any alleged criminal intimidation committed by accused had been reported to the police or any court of law by him---Circumstances had hinted at the mala fide intention of the complainant---Impugned order granting pre-arrest bail to accused did not call for any interference---Petition was dismissed in limine in circumstances.

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

----S.497(5)---Cancellation of bail---Principle---Considerations for cancellation of bail are altogether different from those required for grant or refusal of bail to an accused---Once the accused had been admitted to bail by a court of competent jurisdiction, then extraordinary circumstances are required to interfere with the said order.

Syed Zahid Hussain Shah for Petitioner.

ORDER

SHAHID HAMEED DAR, J---This is an application for cancellation of bail under section 497(5), Cr.P.C. allowed to Abdul Latif respondent No.1 on 27-3-2010 passed by the learned Addl. Sessions Judge, Gojra, District Toba Tek Singh.

2. The brief facts of case F.I.R. No. 182 of 2010 dated 27-3-2010, under section 406, P.P.C., registered at Police Station Gojra, as stated by Muhammad Ilyas complainant, are that he worked as a technician on the power looms of Abdul Latif respondent No.1 who tempted him to join his business as a partner and he would "pay monthly profit of Rs.10,000 against an investment of Rs.100,000, whereupon, the complainant invested Rs.55,000 with him besides, transferring a plot worth Rs.55,000 in the name of respondent No.1, who left Pakistan after about 25/26 days, for a foreign country and returned to Pakistan after about one year; the petitioner-complainant contacted him and asked for return of his invested amount and

the aforesaid plot but he despite having admitted his guilt in presence of the witnesses, had done nothing so far, to return the aforementioned property to the petitioner and ultimately, flatly refused to fulfil his promise; respondent No.1 had been extending threats of murder and also that of setting ablaze the house of the petitioner and his family members.

3. Learned counsel for the petitioner contends that the learned Addl. Sessions Judge has granted pre-arrest bail to respondent No.1, without adverting to the facts of this case; the respondent-accused had failed to point out any mala fide intention or ulterior motive on the part of the complainant; that the evidence of extra-judicial confession had not been taken into consideration and the respondent-accused had been allowed bail in gross violation of the settled principles governing the subject; that the petitioner had filed a suit for specific performance against respondent-accused for seeking a decree to urge respondent-accused to act upon the aforementioned agreement; that a Punchayat was also convened to settle the dispute between the petitioner and the respondent-accused and the arbitrators passed a decision that the respondent-accused would return Rs.55,000 to the petitioner and also abandon the house, built on the aforesaid plot in favour of Muhammad Latif petitioner but the said arbitration/decision had not been attended to by the learned bail granting Court; that the respondent-accused had committed a criminal breach of trust under section 406, P.P.C. as well as the offences under sections 420, 506, P.P.C.; that the impugned order has been passed in a slipshod manner and it suffers from non-reading and misreading of relevant record; that the respondent- accused had been extending threats to the petitioner as he has been encouraged by the impugned order and thus, misused the concession of bail.

4. I have heard the learned counsel for the petitioner and have perused the impugned order as well as the documents submitted by the petitioner with this application.

5. I find that no date, time and place has been mentioned by the petitioner as to when and where he allegedly invested Rs.55,000 with respondent-accused and he also failed to mention the names of the witnesses in this regard. So far as attestation of a sale deed by the petitioner in favour of respondent-accused is concerned, no such document could be submitted or pointed at by the petitioner; that after the alleged agreement of partnership, the respondent-accused left Pakistan for abroad and returned after one year but the petitioner, strangely, did not initiate any proceedings against him which reflects upon the contention of the petitioner. Besides, no specific date, time and place could be pointed out by the learned counsel for the petitioner as to the extension of the alleged threats of murder, etc. by the respondent-accused to the petitioner; that the impugned order passed by the learned Additional Sessions Judge, Gojra indicates that plaint of the suit for specific performance filed by the petitioner did not entail the factum of alleged partnership, desertion of the respondent-accused to a foreign country or other allied details. In this situation, it has been rightly held in the impugned order that the case against accused (respondent No.1) is one of further inquiry as the parties were already locked in litigation.

6. The considerations for seeking cancellation of bail are altogether different from the one, required for grant/refusal of bail to an accused. Once the accused has been admitted to bail by a competent Court of jurisdiction, extraordinary circumstances are required to be shown to interfere in the said order. A bald allegation has been levelled by the learned counsel for the petitioner that the respondent-accused had been extending threats of dire consequences, after, he had been allowed pre-arrest bail but no evidence has been produced to establish that the offence of criminal intimidation allegedly committed by the respondent-accused had been reported to the police or to any Court of law. The impugned order does not suffer from any illegal defect and it has been passed in accordance with law. The long unexplained period of silence on the part of the petitioner coupled with the fact that he failed to mention the

aforesaid allegations in his suit for specific performance and withdrawal of the said suit by the petitioner, are the circumstances, which hint at the mala fide intention of the complainant.

7. For what has been discussed above, I do not find that the impugned order calls for any interference by this Court. The instant cancellation petition is dismissed in limine.

N.H.Q/M-336/L Petition dismissed.

2010 M L D 1644

[Lahore]

Before Shahid Hameed Dar, J

FARHAT ABBAS SHAH and another---Petitioners

Versus

KHUDA BAKHSH and another---Respondents

Criminal Revision No. 372 of 2009, decided on 4th June, 2010.

Illegal Dispossession Act (XI of 2005)---

----S.3---Criminal Procedure Code (V of 1898), S.265-K---Illegal dispossession---Acquittal of accused/petitioners during trial, refusal of---Petitioners allegedly had purchased a plot of land in the year 1989 possession of which was delivered to them and they had been using the same as cattle-shed for the last twenty years---Respondent filed a private complaint against petitioners for illegally dispossessing him from the said plot---Additional District Judge, on receiving report from police and Tehsildar, summoned the petitioners to face trial---Petitioners filed application under S.265-K, Cr.P.C. and contended that they had purchased the disputed plot and were owner of the same on the basis of the judgment and decree whereby an arbitration award had been made rule of the court--Validity---Reports submitted by police and revenue officials in Trial Court were vague and sketchy and, therefore, of no help to ascertain whether the plot claimed with specific description by the complainant/respondent existed in the said locality---Resolution of the controversy by demarcation of plot in view of description of said plot involved practical difficulties as neither the accused nor the complainant got recorded documents pertaining to their claimed plots in revenue record---Plea of the accused for acquittal before recording of evidence could not be entertained until the controversy regarding ownership of the disputed plot had been resolved by Trial Court after ascertaining the truth of allegations levelled by the complainant---Impugned order, therefore, did not call for any interference---Petition was dismissed.

PLD 2007 Lah. 231; PLD 2007 SC 423; PLD 2008 Lah. 392; PLD 2008 Lah. 358 and 2010 PCr.LJ 268 ref.

Muhammad Farooq Qureshi for Petitioners.

Malik Muhammad Bashir Awan for Respondents.

Sahibzada M.A. Amin Mian, Addl. Prosecution-General.

ORDER

SHAHID HAMEED DAR, J.--Through this petition under sections 435/439 Cr.P.C. the petitioner has challenged the validity of order dated 13-4-2009 passed by learned Additional Sessions Judge, Khushab, whereby, an application under section 265-K, Cr.P.C., moved by the petitioners has been dismissed.

2. Briefly, the facts leading to the filing of the instant criminal revision are that the. petitioner purchased a 10 Marlas plot situated in Ulfat Colony, Joharabad Town, in year, 1989 from Moulana Rasheed Ahmad, with following descriptions:--

North	Road,
South	Plot of Abdul Sattar.
East	Plot of vendor.
West	Land of Khuda Bakhsh.

The possession of the plot was delivered to the petitioner who constructed its boundary wall with a gate installed in it. The petitioner had been using this plot as a cattle-shed/Haveli for 20 years.

3. Khuda Bakhsh, respondent No.1, claiming to be an owner of the said plot vide sale deed dated 24-1-2008, filed a private complaint under section 3 of Illegal Dispossession Act, 2005 against the petitioners, his brother and father with the allegation that they had forcibly taken the possession of the disputed plot and had started raising constructions thereon and that they had been extending him threats of dire consequences. It was prayed by the complainant-respondent No.1 that the plot grabbers be punished and the possession of the occupied plot be restored in their favour.

4. The learned Additional Sessions Judge called for a report from the police and concerned Tehsildar who submitted their reports in negation to the version of the complainant (respondent No.1) and in favour of the petitioners. The learned trial Court after preliminary proceedings, summoned the petitioners to face the trial and issued their bailable warrants of arrest. The petitioners moved an application under section 265-K, Cr.P.C. seeking acquittal of the charge but it was dismissed by the learned trial Court vide order dated 13-4-2009, hence, instant petition.

5. Learned counsel for the petitioners contends that the judgment/ decree dated 13-2-1989 and the Arbitration Award dated 2-1-1989 indicated that the petitioners had purchased the plot in question and the Arbitration Award had been made the rule of the Court; the petitioners are the owners of the disputed property since 1989 and the judicial record is un-rebuttable proof of it; that on his own showing, the respondent No.1 admits the possession of the petitioners on the disputed plot since long and his alleged sale deed has been fabricated by him twenty (20) years later than the judgment/decree of the petitioners which is still intact, having never been challenged by anyone including the respondent No.1; that a delayed sale deed of the respondent No.1, cannot outweigh the decree of the

petitioners; the Illegal Dispossession Act, 2005 is not applicable against the owners in possession of their own property; the learned trial Court has failed to appreciate the judicial record in favour of the petitioners and dismissed the application under section 265-K, Cr.P.C. without any cogent and plausible reason; the impugned order has been passed mechanically, without application of judicial mind; the impugned order is devoid of any rational argument which may not be held sustainable. Relies upon PLD 2007 Lahore 231.

6. On the other hand learned counsel for the respondent No.1 opposes the contentions of the learned counsel for the petitioners with the submission that the impugned order has been passed in accordance with law and it does not suffer from non-reading or misreading of the record; it is a speaking order which has been passed judiciously and it does not call for interference. Relies upon PLD 2007 SC 423, PLD 2008 Lahore 392, PLD 2008 Lahore 358 and 2010 PCr.LJ 268.

7. Arguments heard. Record perused.

8. The contention of the petitioner is that he is owner in possession of a plot, the description of which has been mentioned above. He also contends that he is the owner of the said plot on the basis of judgment and decree dated 13-2-1989 whereby, an Arbitration Award qua the plot in dispute has been declared as the Rule of the Court and that, said judgment/decree is still intact as it has never been challenged so far by anyone including Khudha Bakhsh, respondent No. 1. He claims to have constructed a boundary wall on it and that he has been using this plot as a cattle-shed since, 1989. The complaint filed by respondent No.1 under section 3 of the Illegal Dispossession Act, 2005 discloses that that he had purchased a plot measuring 10 Marlas from one Shaukat Ali on 24-1-2008 for consideration of Rs.4,20,000 with following descriptions:-

North	Street, thoroughfare
South	House of Sunderianwala.
East	Plot Haji Ahmad Jatt.
West	Vacant plot.

The learned trial Court called for the reports from Police Station, Joharabad as well as from concerned Revenue Officer. I have gone through both the reports, which are vague and sketchy. In the police report, it has not been written 'anywhere that the description of the plot mentioned in the sale deed, in favour of respondent No.1 overlapped the description of the plot owned by the petitioners yet, it has been certified that the petitioner Farhat Abbas Shah owned and possessed a plot of 10 Marlas with a few constructions on it, for last 20 years but not a single word has been mentioned either by the police or by the Revenue Official in their reports that the plot, one mentioned by Khuda Bakhsh, respondent No.1 with specific description, existed in Ulfat Colony, Joharabad, Town or not, or whether that Khuda Bakhsh respondent No.1 had been pointing at the same plot, as owned and possessed by the petitioner No.1, to be his plot which according to his complaint, had been forcibly occupied by the accused (petitioners). This controversy may be resolved through demarcation of the plot(s), keeping in view the

description of the said plots, but there is a practical difficulty, that, as per Revenue Record, neither the petitioner No.1, nor Khudha Bakhsh, respondent No.1 are the owners of any plot at above said Ulfat Colony. The petitioner No.1 and respondent No.1 has not got the documents pertaining to the claimed plots, entered into the Revenue Record of the area, as is evident from the report, submitted by the Revenue Official.

9. In the aforesaid situation, until the controversy regarding the description and location of the plot in question is resolved, the contention of the petitioners seeking acquittal, prior to the recording of the evidence of the parties may not be entertained. The answer to this riddle is concealed in the evidence of the parties which has to be recorded by the learned trial Court before it reaches any conclusion qua the veracity of the allegations, levelled by Khuda Bakhsh, respondent No. 1. The impugned order therefore, does not call for any interference as it cannot be termed as arbitrary, capricious or a foolish order.

10. The upshot of the above discussion is that the instant revision petition is dismissed, being misconceived.

A.R.K./F-24/L Petition dismissed.

2010 M L D 1653

[Lahore]

Before Shahid Hameed Dar, J

SADI AHMAD---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 6114-B of 2010, decided on 22nd June, 2010.

Criminal Procedure Code (V of 1898)---
----S. 498---Penal Code (XLV of 1860), Ss.337-L(ii), 354 & 440---Hurt, assault and mischief---Pre-arrest bail, grant of---Medical evidence did not lend any corroboration to the allegation contained in the F.I.R.---Investigating Officer was unable to furnish any explanation, except that case had been registered on the orders of Ex-officio Justice of Peace---Investigating Officer had collected no evidence as to how much crop had been damaged and what was the value of it and that how many cattle had allegedly grazed in the fields of the complainant---Offence under Ss.354 and 337-L(ii), P.P.C. were bailable---Accused by his index, appeared to be of 15/16 years, he was held to be a juvenile/child within the scope of Juvenile Justice System Ordinance, 2000---False implication of accused in the attending circumstances of the case, could not be ruled out---Ad interim bail allowed to accused was confirmed, in circumstances.

Rana Muhammad Arif for Petitioner.

Mehboob Aalam for the Complainant.

Khurram Khan, D.P.G.

ORDER

SHAHID HAMEED DAR, J.---Sadi Ahmad seeks bail before arrest in case F.I.R. No.300 of 2010 dated 9-5-2010 under sections 337L(ii), 354, 440 P.P.C. Police Station, Changa Manga, District, Kasur, on the complaint of Mst. Faizan Bibi.

2. Precisely, the prosecution case is that the petitioner along with his co-accused Muhammad Ashiq committed mischief and thereby damaged the crop of the complainant by letting loose their cattle in the fields of the complainant, when they were forbidden by the complainant, both of them attacked the complainant and her daughter Mst. Fakhra Bibi, tore their clothes, denuded them and inflicted multiple injuries on their bodies by means of blunt weapons, they carried, at the time of occurrence.

3. Both Faizan Bibi, complainant and her daughter Fakhra Bibi were medically examined at Rural Health Centre, Changa Manga on 24-4-2010 by the Medical Officer who determined duration of probable injuries of both the examinees as within 20 to 24 hours.

4. Learned counsel for the petitioner contends that the allegation against the petitioner is false and baseless as he had not committed any offence, alleged by the complainant and that he has been falsely roped in this case due to her malice and ulterior motive; that the medical evidence does not support the story contained in the F.I.R. as both the injured ladies were examined after one month of the registration of the F.I.R. and the duration of injuries was determined' by the Medical Officer as within 20 to 24 hours; the case was found false during the course of investigation vis-a-vis the accused Muhammad Ashiq was found innocent by the Investigation Officer; the petitioner is about 16 years and being less than 18 years the petitioner's case falls within the meaning of Juvenile Justice System, 2000; no damaged crop was taken into custody by the Investigation Officer during the course of investigation so the allegation qua committing the mischief has gone unsubstantiated; the offence under section 354, P.P.C. is bailable.

5. On the other hand learned Deputy Prosecutor-General assisted by learned counsel for the complainant controverts the submissions made by the learned counsel for the petitioner and contends that the petitioner is directly charged in the F.I.R. with specific role of damaging the crop of the complainant by letting loose his cattle; he also molested the chastity of the complainant as well as that of her daughter and that he has committed an offence which is non-bailable in nature; the pre-arrest bail is an extra ordinary relief which can only be extended to the innocent persons.

6. I have heard learned counsel for the petitioner and perused the record.

7. Both Faizan Bibi and Fakhra Bibi presented themselves before the Medical Officer at Rural Health Centre on 24-4-2010 for their medical examination. The Medical Officer found two blunt weapon injuries on the person of Faizan Bibi and equal number of blunt weapon injuries on the person of Fakhra Bibi. The probable duration of injuries recorded by the Medical Officer in respect of both the injured ladies was within 20 to 24 hours. The medical evidence does not lend any corroboration to the allegation contained in the F.I.R. The Investigation Officer when questioned by this court as to how he has resolved the controversy arising in the prosecution case by way of the above said observation made by the Medical Officer, he is unable to furnish any explanation except that the case has been registered on the orders of the learned Ex-Officio Justice of Peace. The Investigation Officer has collected no evidence as to how much crop has been damaged and what was the value of it and that how many cattle had allegedly grazed in the fields of the complainant. The offence under sections 354 and 337L(ii), P.P.C. are bailable. The petitioner by his index appears to be of 15/16 years,

he is held to be a juvenile/child within the scope of Juvenile Justice System Ordinance, 2000. The false implication of the petitioner in the attending circumstance of the case cannot be ruled out.

8. For the foregoing reasons, I accept this application and confirm the ad-interim bail allowed to the petitioner on 10-6-2010 subject to furnishing fresh bail bonds in the sum of Rs.50,000 with one surety in the like amount to the satisfaction of learned trial Court.

H.B.T./N/117/L Bail confirmed.

2010 P Cr. L J 1411

[Lahore]

Before Shahid Hameed Dar, J

Mst. TAYYABAH KIRAN---Petitioner

Versus

ASJ and others---Respondents

Writ Petition No. 2030 of 2007, decided on 5th May, 2010.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A & 22-B---Constitution of Pakistan (1973), Art.199---Constitutional petition---Respondent filed petition before Ex-officio Justice of Peace against petitioner and Police Officials, for returning the cheques forcibly obtained from the respondent---Justice of Peace directed Police Officials to retrieve the cheques from the petitioner and return the same to respondent---Petitioner contended that Justice of Peace had assumed the charge of an investigating officer by passing the order for return of cheques---Validity---Petitioner was involved in a monetary dispute with her real sister who was wife of respondent---Though respondent did not owe a single penny to the petitioner yet he was compelled by high-ranking Police Official to issue cheques in favour of petitioner, thereby abusing the process of law and authority---Petitioner should have agitated the matter before competent civil court for redressal of her grievance---Respondent could not be held responsible for acts and deeds of his wife who was an independent individual responsible for her own deeds---Impugned order did not suffer from any illegality---Petition was disposed of accordingly.

Naseer Ahmad Awan for Petitioner.

Abdul Ghaffar Khan for Respondent No. 3.

Aamir Jalil Siddiqui, Additional Advocate-General and Reasat Ali S.-I.

ORDER

SHAHID HAMEED DAR, J.---Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the validity of order dated 6-2-2007 passed by the learned Ex-Officio Justice of

Peace/Additional Sessions Judge, Gujranwala, respondent No.1, wherein certain observations and directions have been made, which according to the contention of the petitioner, are uncalled for, unlawful and beyond the scope and authority/powers of the learned Ex-Officio Justice of Peace.

2. The brief facts, necessitating institution of the instant writ petition are that Zahid Mehmood alias Gosha, respondent No.3, filed a petition under sections 22-A/22-B, Cr.P.0 before the learned Ex-Officio Justice of Peace, Gujranwala against DPO, Gujranwala, SHO, Police Station Gakkhar Mandi, Tayyaba Kiran (the petitioner) and Sohail Aziz (the husband of Mst. Tayyaba Kiran) contending therein that cheques, forcibly obtained from him by the police may be ordered to be returned to him and that proceedings should be conducted against the respondent-accused.

3. The learned Ex-Officio Justice of Peace called for the comments of SHO, P.S Gakkhar Mandi, District Gujranwala, respondent No.2 who submitted his report dated 18-1-2007 to the effect that nobody had extended threats to Zahid Mehmood nor the cheques were forcibly taken from him; the SHO further submitted that Mst. Tayyaba Kiran (the petitioner) and the wife of respondent No.3 were real sisters who had amicably settled their dispute through notables of the area.

4. The learned Ex-Officio Justice of Peace, on receipt of the said police report, passed the impugned order, whereby, he observed as under: --

> "Perusal of record reveals that the local police in its report dated 18-11-2007 had admitted that both the parties were summoned at P.S Gakkhar Mandi. The said cheques were got delivered from the petitioner amicably on the intervene of respectables of both the parties. The dispute going on between the parties was admittedly of civil nature and under the law the local police could not interfere in it without registration of a criminal case. The action taken by the respondent No.2 in obtaining the aforementioned cheques from the petitioner was an excess committed by him in relation to his functions and duties within the meaning of section 22-A(6) clause III, Cr.P.C. The present petition is, therefore, accepted and respondent No.2 is directed to get the aforementioned cheques returned to the petitioner."

5. Learned counsel for the petitioner contends that the impugned order dated 6-2-2007 passed by respondent No.1 is illegal, void ab initio and unlawful which is liable to be set aside; that the impugned order has been passed in disregard to the relevant law and facts of the case; that a civil suit had been filed by Zahid Mehmood, respondent No.3 in the Civil Court, Gujranwala along with an application for temporary injunction but the learned Civil Judge refused to award interim injunction by holding that monitory loss was no loss; that the impugned order has been passed on the back of the petitioner who has been condemned unheard; that. one of the three cheques bearing No.0058211 is the case property of case F.I.R. No.145 of 2007 dated 1-2-2007 under section, Police Station, Model Town, Lahore against Zahid Mehmood, respondent No.3; that the learned Ex-Officio Justice of Peace had assumed the charge of an Investigating Officer by passing the order qua return of cheques to Zahid Mehmood, respondent No.3, through SHO, Police Station Gakkhar Mandi; that the impugned order is patently illegal without jurisdiction and is not sustainable in the eyes of law; that the impugned order has resulted in grave miscarriage of justice.

6. On the other hand, learned counsel for the respondent No.3 contends that Tayyaba Kiran, the petitioner, presented an application before DPO, Gujranwala, who, in violation

of all provisions of law summoned Zahid Mehmood, respondent No.3 to the Police Station Gakkhar Mandi and made him issue three cheques bearing No.0058210, 0058211 and 0058212, duly signed by him, under coercion and delivered these cheques to Tayyaba Kiran (petitioner) and her husband Sohail Aziz; that Zahid Mehmood, respondent No.3 having been disgraced and harassed by the DPO, Gujranwala, moved an application before the D.I.-G., Gujranwala, who entrusted the matter for inquiry to Additional D.I.-G, Gujranwala who after detailed inquiry formulated his report to the effect that a pecuniary dispute existed between wife of Dr. Zahid Mehmood, respondent No.3 and the wife of Professor Sohail Aziz but Zahid Mehmood had been forced to issue the cheques, whereas, he was not supposed to do so as everyone was responsible for one's own deeds, therefore, he recommended that the act of obtaining cheques from Dr.Zahid Mehmood was illegal and unlawful and that the cheques should be declared as invalid; The Additional D.I.-G. further held in inquiry that the wife of Sohail Aziz (Tayyaba Kiran, the petitioner) could receive her money from the wife of Dr. Zahid Mehmood through a legal recourse; that Mst. Tayyaba Kiran had instituted a civil suit for cancellation of exchange agreement which was dismissed by the learned Civil Judge on 12-10-2009; that the inquiry report formulated by the Additional D.I.-G., had been challenged by Mst. Tayyaba Kiran through a separate Writ Petition No,889 of 2007 which is also pending adjudication for today; that in the light of the findings of the Additional D.I.-G. Gujranwala, the learned Ex-Officio Justice of Peace had passed the impugned order dated 6-2-2007; that Zahid Mehmood, respondent No.3 did not owe any amount at all to Mst. Tayyaba Kiran, the petitioner, so, the act of obtaining cheques from him by the DPO, Gujranwala and passing it over to Mst. Tayyaba Kiran etc. was absolutely illegal, uncalled for and a worst example of abuse of process of law and authority; that the order of learned Ex-Officio Justice of Peace, has been passed correctly who, has not traversed beyond scope of his authority; lastly contends that the instant petition may be dismissed.

7. Arguments heard. Record perused.

8. The petitioner admittedly has a monitory dispute with Mst. Mubashara Iram, the wife of Zahid Mehmood, respondent No.3. Zahid Mehmood, respondent No.3 did not owe even a single penny to Mst. Tayyaba Kiran, the petitioner or to her husband Professor Sohail Aziz yet, he was compelled by the DPO, Gujranwala and SHO Police Station, Gakkhar Mandi to come to Police Station Gakkhar Mandi where he was forced to issue three aforesaid cheques with his signatures, which were handed over to the petitioner Mst. Tayyaba Kiran and her husband. There cannot be a worst example of abuse of process of authority and law by a senior Police Officer like the DPO, Gujranwala and under his subordination by the SHO Police Station Gakkhar Mandi. If Mst. Tayyaba Kiran, the petitioner had any pecuniary dispute with the wife of Zahid Mehmood respondent No.3, she could resolve the matter firstly at the family level being the close relatives and in case of failure, she could agitate the matter before a competent civil court for redressal of her grievance. The learned counsel for the petitioner has repeatedly argued that Zahid Mehmood, respondent No.3 was responsible for all the acts and deeds of his wife and if any wrong had been done by Mubashara Iram, it was necessarily Zahid Mehmood, respondent No.3 to be taken to task. This submission of the learned counsel for the petitioner is patently illegal and militates against the basic principles of law and equity, as, every body is liable for one's act and deed. The wife of Zahid, Mehmood, respondent No.3 is an independent entity like any other individual. In both the inquiries, first conducted by S.H.O., Police Station Gakkhar Mandi, District Gujranwala and Additional D.I.-G. Gujranwala, the conclusion drawn is common, which relates to the fact that Mubashara Iram, the wife of Zahid Mehmood respondent No.3 owed a sum of Rs.3,50,000 to Tayyaba Kiran, the petitioner and in none of the two inquiries it has been opined by the Inquiry Officers that Zahid Mehmood had ever received any amount of

money from Mst. Tayyaba Kiran. In this eventuality, to pressurize and overawe Zahid Mehmood, respondent No.3 for issuance of the aforesaid cheques, is unjustified and undesirable.

9. So far as the impugned order passed by learned Ex-Officio Justice of Peace is concerned he appears to have been swayed away by the excesses, as discussed above, committed by the police, therefore, some element of harshness has crept in the impugned order, whereby, the learned Ex-Officio Justice of Peace has directed the respondent No.2 to get the aforementioned cheques returned to the petitioner. Besides, the other observations made in the impugned order are absolutely on the legal plank.

10. What can be the validity of the cheque No.0058211, the case property of case F.I.R. No.43 of 2007, supra, shall be best assessed by the learned trial Court, seized with the trial of the said case. The petitioner has all the legal remedies available at her disposal to get her grievance redressed by approaching the competent civil court, it so advised. I do not find any illegality in the impugned order barring the one, as discussed above.

11. For what has been discussed above, the instant petition stands disposed of in the aforementioned terms.

A.R.K./T-20/L Petition disposed of.

2010 P Cr. L J 1442

[Lahore]

Before Shahid Hameed Dar, J

Sheikh MUHAMMAD NAFEES---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE, HAFIZABAD and 13 others---Respondents

Writ Petition No. 5353-Q of 2008, decided on 25th May, 2010.

(a) Illegal Dispossession Act (X I of 2005)---

---Ss. 3, 4, 5 & 8---West Pakistan Land Revenue Rules, 1968, R.67-B---Constitution of Pakistan (1973), Art.199---Constitutional petition---Scope and application of Illegal Dispossession Act, 2005--Petitioner was dispossessed of land which he had inherited from his father---Revenue authorities looked into the matter on application of petitioner and found that respondents were in illegal possession of disputed land and ordered the respondents under sub-rule 7 of Rule 67-B of West Pakistan Land Revenue Rules, 1968 to deliver possession of land to the petitioner---Warrant Dakhal was duly issued in favour of petitioner---Respondents filed suit in respect of said land which was dismissed while appeal also met the same fate---Revenue authorities handed over possession to petitioner but respondents demolished structure, boundary wall constructed by petitioner and took over the possession of disputed land illegally and forcibly---Petitioner filed complaint before Additional District Judge who examined the complainant under section 200 of Cr.P.C. and summoned all accused persons/respondents to face trial but dismissed complaint at indictment stage---Petitioner/complainant contended that by dispossessing him from disputed land,

respondents had committed the offence within the meanings of provisions of Illegal Dispossession Act, 2005, notwithstanding the pendency of civil suit between the parties---Respondents/accused contended that during pendency of civil suit, criminal proceedings could not be initiated about the same matter between the same parties and that the petitioner had filed complaint to pressurize them---Validity---Pendency of civil suit was no bar to initiation of criminal proceedings and both civil and criminal cases could proceed simultaneously---Illegal Dispossession Act, 2005 was not meant only for checking illegal activities of land grabbers, Qabza groups or persons habitually involved in such-like acts but also encompassed identical land grabbing/snatching activities of individuals---Offence alleged by complainant was covered by definition of S. 3 of the Illegal Dispossession Act, 2005---Evidence produced by complainant and revenue record established that petitioner was lawful owner of the land in question which had been transgressed and occupied by respondents/accused illegally---Sufficient evidence thus was available to prosecute the accused persons---Constitutional petition, therefore, was allowed and impugned judgment dismissing complaint was set aside---Complaint filed by petitioner was held to be deemed to be pending before Trial Court which was directed to decide the same expeditiously on merits.

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

----S. 3---Scope and application of Illegal Dispossession Act, 2005---Act was not only meant for checking illegal activities of land grabbers, Qabza groups or persons habitually involved in such-like act but also covered identical land grabbing/snatching activities of individuals.

Zahoor Ahmad and 5 others v. The State and 3 others PLD 2007 Lah. 231 and Rahim Tahir v. Ahmad Jan and 2 others PLD 2007 SC 423 distinguished.

Rehmatullah v. Abdul Aziz and another 1974 PCr.LJ 541; Sheikh Ahmad v. Sheikh Muhammad Younas 1971 PCr.LJ 331 and Muhammad Shafi v. Deputy Superintendent of Police Narowal and 5 others PLD 1992 Lah. 178 ref.

Rai Zameer-ul-Hassan for Petitioner.

Atta-ul-Mohsan Luk and Waqar-ul-Mohsan Luk for Respondents.

ORDER

SHAHID HAMEED DAR, J.---Through this constitutional petition under Art. 199 of the Constitution of Islamic Republic of Pakistan 1973, the petitioner has challenged the validity of judgment dated 6-3-2007 passed by the learned Addl. Sessions Judge, Hafizabad whereby a complaint, under sections 3/8 of the Illegal Dispossession Act 2005, had been dismissed by the learned trial Court being non-maintainable mainly on the ground that prior to filing of the complaint both the parties were locked in civil/revenue litigations and the litigations before the Revenue Board were still pending.

2. The brief facts of the case are that the petitioner had filed a private complaint under sections 3/8 of the Illegal Dispossession Act 2005 before the learned Addl. Sessions Judge Hafizabad with the contention that his father Muhammad Sharif purchased the disputed land from Muhammad Sadiq on 18-2-1972 vide Mutation No.134 and after the death of his father the disputed land was transferred through mutation of inheritance, in the name of the petitioner, his brothers and his sisters who transferred their share of land in the name of the petitioner who, moved an application on 2-3-2005 under section 122 of the West Pakistan Land Revenue Act 1967 to the DDO(R)/Collector Hafizabad for restoration of possession. The DDO(R) through revenue officer inspected the spot in presence of the parties and after

demarcation, Irshadullah Naib Tehsildar prepared his report and after hearing the parties decided the petition in terms that Khalid Mehmood and Muhammad Arif respondents Nos.2 and 3 (writ petitioner) were found in illegal dispossession so they were ordered under section 67(b)(7) of the West Pakistan Land Revenue Act 1967 to deliver possession of the land to the complainant. Warrant Dakhal was issued in favour of the petitioner-complainant but in the meantime, respondents Nos.2 and 3 filed a civil suit in respect of the said land, which was dismissed. They filed an appeal before the learned District Judge, which was also dismissed. Thereafter Tehsildar along with Girdawar prepared Naqsha Tafawat in respect of the land measuring 2 Kanals 3 Marlas and after its demarcation, possession of the land was handed over to the petitioner-complainant without any resistance at 11-00 a.m. on 25-2-2006. After completion of these proceedings, the petitioner-complainant obtained possession of property, he raised certain constructions and also installed a gate after constructing boundary wall thereon; but the respondents-accused, while armed with dandas reached the spot on a tractor-trolley at 3-00 a.m. on 4-3-2006, demolished the boundary wall constructed by the complainant, caused loss of Rs.85,000 and took over the possession of the said land forcibly and illegally.

3. The petitioner filed the aforementioned complaint in the Court of learned Addl. Sessions Judge, Hafizabad, which was dismissed vide impugned order dated 6-3-2007 with reference to Zahoor Ahmad and 5 others versus the State and 3 others (PLD 2007 Lahore page-231).

4. The learned trial Court examined the petitioner complainant under section 200, Cr.P.C. followed by recording of preliminary statements of Liaquat Ali P.W.2 and Qamar Islam (P.W.3) under section 202, Cr.P.C. The petitioner-complainant tendered certain documents in evidence during the course of said inquiry and closed his preliminary evidence. The learned trial court vide its order dated 19-5-2006 summoned all the respondents-accused to face the trial in the aforesaid complaint under sections 3/4 of the Illegal Dispossession Act 2005.

The respondents-accused were delivered copies of the requisite documents under section 265-C, Cr.P.C. In the meantime the petitioner-complainant moved an application seeking interim custody/possession of the disputed land. The complaint was still at the stage of summoning of the respondents-accused, when on 6-3-2007 the learned trial court passed the impugned judgment.

5. Learned counsel for the petitioner contends that from the perusal of cursory evidence of the petitioner and other requisite material, it is proved on record that the respondents-accused while armed had committed worst degree of roguery on the fateful day, they razed constructions of the petitioner-complainant to the ground, forcibly took possession of the said land and caused a loss of Rs.85000 to the complainant; that the learned trial court has dismissed the complaint of the petitioner with reference to aforementioned case-law (PLD 2007 Lahore 231), but this judgment was no more in the field as it had been overruled by the judgment of the Hon'ble Supreme Court of Pakistan, reported as Rahim Tahir v. Ahmad Jan and 2 others (PLD 2007 SC page-423); that the petitioner-complainant had been handed down the possession of disputed land through the proceedings of Warrant Dakhal and he had been dispossessed of the said land by the respondents-accused which, was an offence within the meanings of provisions of Illegal Dispossession Act 2005; that the act of the respondents-accused falls within the definition of land grabbers and they are liable for prosecution under the Act, ibid, notwithstanding the pendency of civil or revenue case, prior to the institution of the instant complaint under Illegal Dispossession Act 2005.

6. On the other hand the learned counsel for the respondents-accused has contended that the operation of the Full Bench Judgment of this Court reported as PLD 2007 Lahore page 231 has been suspended by the august Supreme Court of Pakistan, but it had not been finally

decided as yet; that the complaint of the petitioner could not be taken to its logical end until the apex Court of the country finally decides the fate of the aforesaid Full Bench Judgment. He has further contended that the Courts are supposed to observe as to whether the case in hand relates to unauthorized occupancy or whether it was supported by the judgment of the apex Court referred to above; that sufficient material was available in the shape of the evidence and that the learned Judge has committed an error by dismissing the complaint.

Learned counsel for the respondents-accused has also contended that civil/revenue litigation was pending between the parties and on the score of the same allegations, the complainant has filed the instant complaint to redress the civil grievance under the garb of criminal proceedings; that the established principle of law is that in presence of civil proceedings, criminal courts cannot step forward and cannot use the leverage of the criminal law to pressurize and overawe the respondents; he prays for dismissal of the writ petition.

7. I have heard the learned counsel for both the parties and perused the record with their able assistance.

8. It has been laid down time and again by this Court as well as by the apex Court of the country that continuation of a civil suit is no bar to criminal proceedings, even though both the cases relate to the same subject-matter. The pendency of a civil suit is no bar for initiation of the criminal proceedings and that both cases may proceed ahead side by side. I rely, in this regard, upon case-law titled, "Rehmatullah v. Abdul Aziz and another (1974 PCr.LJ 541), Sheikh Ahmad v. Sheikh Muhammad Younas (1971 PCr.LJ 331) and Muhammad Shafi v. Deputy Superintendent of Police Narowal and 5 others (PLD 1992 Lahore 178).

9. Having been guided from the above principle as laid down in the aforesaid judgments, I am convinced that in presence of a civil/revenue case, pending between the petitioner-complainant and respondents-accused, the present complaint can continue side by side and no bar existed for its decision even prior to the decision of the civil/revenue case(s). The Illegal Dispossession Act, 2005 has been interpreted by a Full Bench of this Court in case titled Zahoor Ahmad and 5 others v. The State and 3 others (PLD 2007 Lahore 231) as under:

> (i) The Illegal Dispossession Act, 2005 applies to dispossession from immovable property only by property grabbers/Qabza group/ land mafia. A complaint under the Illegal Dispossession Act, 2005, can be entertained by a Court of Session only if some material exists showing involvement of the persons complained against in some previous activity connected with illegal dispossession from immovable property or the complaint demonstrates and organized or calculated effort by some persons operating individually or in groups to grab by force or deceit property to which they have no lawful, ostensible, or justifiable claim. In the case of an individual, it must be the manner of execution of his designs which may exposed him as property grabber.
>
> (ii) The Illegal Dispossession Act, 2005 does not apply to run of the mill cases of alleged dispossession from immovable properties by ordinary persons having no credentials or antecedents of being property grabbers/Qabza groups/land mafia i.e. cases of dispute over possession of immovable properties between co-owners or co-shares between landlords and tenants, between persons claiming possession on the basis of inheritance, between persons vying for possession on the basis of competing title documents, contractual agreement or Revenue Record or cases with a background of an ongoing private dispute over the relevant property."

The august Supreme Court of Pakistan in case of Rahim Tahir v. Ahmed Jan and 2 others, reported as PLD 2007 SC 423 has held as under:

(b) Illegal Dispossession Act (IX of 2005)--- Section 3--- prevention of illegal possession of property, etc--- Expression "Grab", "Control or occupy" used in section 3 of Illegal Dispossession Act, 2005, cannot be restricted to the illegal occupants who entered in the premises subsequent to the promulgation of the Act, rather all cases of illegal and unauthorized occupant would be subject to the Illegal Dispossession Act, 2005 except the cases which were pending adjudication before other forum."

It was also observed by the apex Court in the same judgment:--

---- Mere filing of the suit subsequent to the filing of complaint on the basis of a document having no legal foundation, was of no consequences and significant to protect the illegal and unauthorized possession."

10. In the above circumstances it is manifestly clear that Illegal Dispossession Act, 2005 was not only meant for checking and curbing the illegal activities of land grabbers, Qabza Groups or persons habitual involved in such like acts, but, it also encompasses the identical land grabbing /snatching activities of the individuals.

11. The complaint filed by the petitioner-complaint discloses the commission of an offence falling within the definition of section 3 of the Illegal Dispossession Act 2005. The statement of the complainant and those of his witnesses under section 202, Cr.P.C. along with supporting Revenue Record, prima facie establishes the fact that the petitioner-complainant was a lawful owner of the land in question, which had been transgressed and occupied by the respondents-accused, as alleged in the complaint. The complainant has specifically levelled the allegations of forcibly dispossession of his land at the hands of the respondents-accused and primarily has brought such evidence on record, which if, stands the test of the trial would be sufficient to successfully prosecute the respondents-accused. I do not want to comment further on the merits of the case, lest it may prejudice the case of any one of the two parties.

12. The complaint was at the stage of indictment of the respondents-accused when it was brought to a premature end by the learned trial Court through the impugned judgment.

13. In view of the above discussion, this writ petition is allowed. The impugned judgment dated 6-3-2007 is set aside and the complaint filed by the petitioner shall be deemed as pending before the learned Addl. Sessions Judge, Hafizabad, who will decide the same expeditiously on merits.

A.R./M-341/L Petition accepted.

2010 P Cr. L J 1460

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ISMAIL---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.4904-B of 2010, decided on 19th May, 2010.

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

----S. 497(2)---Penal Code (XLV of 1860), S. 395/109/412---Docoity, abetment and dishonestly receiving property stolen in docoity---Bail, grant of---Complainant had involved the accused in the case for the first time in his supplementary statement made after one year of the occurrence---Accused was not one of those accused persons, who had allegelly made extrajudicial confession of their guilt during the meeting of Punchayat---Recovery of cash amounting to Rs. 15,000 at the instance of accused was not a substantive piece of evidence, nor the same was proved to be a part of the located currency notes---Supplementary statement of complainant could not be considered as an integral part of the F.I.R. which contained the first hand information and no such qualification was attached with a subsequent or secondary statement of the complainant---Complainant had not explained or disclosed the source of his knowledge or belief qua the alleged involvement of the accused in the case---Case of accused was open to further inquiry into his guilt as required under S. 497(2), Cr. P. P.C. ---Accused was admitted to bail in circumstances.

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

----Ss. 154, 156 & 161---Supplementary statement of complainant---Value---Investigation of a criminal case on the basis of a supplementary statement of complainant is a recent innovation devised by incompetent police officers, who have gone beyond the limits of law to cut short the process of investigation, which has been causing indescribable damage to prosecution cases---Such sort of statements cannot be considered as an integral part of the F.I.R. and at the most it can be treated as a statement under S. 161, Cr.P.C.---F.I.R. recorded under S. 154, Cr. P. C. contains the first hand information whereas no such qualification is attached to a subsequent or secondary statement of the complainant.

Ch. Babar Waheed for Petitioner.

Sahibzada M.A. Amin Mian, Additional Prosecutor-General and Abdul Sattar, S.-I. for Respondent.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Siddique is the complainant of case F.I.R. No.274 of 2008 dated 6-9-2008 offences under sections 395, 109, 412 PPC, registered at Police Station, Shah Bhore, District Okara.

2. Briefly, the version of the complainant is that 9 persons armed with rifles scaled over the walls and entered his residential house, made all the members of the family hostage at gunpoint and looted gold ornaments and other household articles including cash, the detail of which has been mentioned in the F.I.R., and fled away with the booty. The complainant showed his suspicion against Riaz alias Laho, Muhammad Iqbal, Tahir alias Tari and Ilyas alias Ali who admitted their guilt before a Punchayat and promised to return the looted property but thereafter, flatly refused to do so. He further alleged in the F.I.R. that the occurrence, in his house, had been committed at the abetment of Muhammad Sarwar and Ahmad Yar.

3. Learned counsel for the petitioner contends that the petitioner is not nominated in the F.I.R. but he was falsely involved in this case by the complainant through his supplementary statement recorded after about one year of the occurrence; that the complainant did not disclose his source of information as to the nomination of the accused/petitioner as an accused of this case; that test identification parade had not been conducted in this case; that recovery of cash amounting to Rs.50,000 has been planted upon the petitioner to fabricate false evidence against him; the supplementary statement cannot be a substitute for the F.I.R. nor it could be read as a part thereof; the petitioner is behind the bars for the last seven months and there is no tangible progress in the trial.

4. On the other hand, learned Addl. Prosecutor-General has opposed the grant of bail to the petitioner with the contention that the petitioner had admitted his guilt before the Punchayat and had promised to return the looted property but thereafter he resiled; that the petitioner was nominated as accused by the complainant in supplementary statement dated 27-8-2009; that the petitioner had committed an offence which falls within the mischief of prohibitory clause of section 497, Cr.P.C.

5. Arguments heard. Record perused.

6. The petitioner's name was introduced as an accused for the first time by the complainant on 27-8-2009 i.e. about one year after the occurrence. He is not one of those accused who had allegedly made extrajudicial confession of their guilt during the meeting of Punchayat. The recovery of cash amounting to Rs.15,000 at his instance during the course of incident cannot be considered as a substantive piece of evidence nor there is any circumstance to prove that the currency notes allegedly produced by the petitioner were a part of the looted currency notes.

7. The investigation of a criminal case on the basis of supplementary statement of the complainant is a recent innovation which has been devised by the incompetent police officers who have gone beyond the limits of law to cut shot the process of investigation which has been causing indescribable damage to the prosecution cases. Such sort of statements cannot be considered as an integral part of the F.I.R. and it, at the most, can be treated as a statement under section 161, Cr.P.C. The first information report is recorded under section 154, Cr.P.C. but any statement of the complainant subsequent thereto shall be recorded and dealt with under section 161, Cr.P.C. The F.I.R. of course contains the first hand information whereas no such qualification is attached with a subsequent/secondary statement of the complainant.

8. The addition of the name of the petitioner in this case through a supplementary statement of the complainant can hardly be taken into consideration for the reason that no explanation or disclosure has been made by the complainant about the source of his knowledge or belief qua alleged involvement of the petitioner in this case. There are reasonable grounds to

believe that the petitioner's case is open to further inquiry into his guilt as required under section 497 (2), Cr.P.C.

9. For the foregoing reasons I accept this petition and admit the petitioner to post arrest bail subject to his furnishing bail bonds in the sum of Rs.1,00,000 with two sureties in the like amount to the satisfaction of the learned trial Court.

N.H.Q./M-339/L Bail allowed.

2010 P Cr. L J 1489

[Lahore]

Before Shahid Hameed Dar, J

THE STATE---Petitioner

Versus

MANZOOR AHMAD KHAN---Respondent

Criminal Miscellaneous No.27-M of 2009, decided on 11th June, 2010.

Criminal Procedure Code (V of 1898)---

----S. 514---Penal Code (XLV of 1860), S.489-F---Forfeiture of surety bond---Remission of penalty---Principle---Respondent stood surety for the accused, seeking bail in a case under S.489-F, P.P.C. and submitted surety bonds of Rs.200, 000 but the accused failed to enter appearance before High Court without just cause so the bonds submitted by surety were forfeited and show-cause notice was issued under S.514, Cr.P.C.---Surety contended that he had handed over the accused to police and left himself at the mercy of the court pleading that he had submitted the bonds out of sympathy and benevolence entitling him to the leniency---Validity---Balance needed to be maintained among leniency, undue generosity and undue severity so that none of the parties was prejudiced---Each case had to be dealt with according to attending circumstances---Law did not place any embargo on forfeiture of the whole amount of the bail bonds if necessary---Portion of the amount to be remitted or forfeited could be decided/determined by circumstances of each case---Surety had left himself at the mercy of the court citing his financial constraints--Surety, in circumstances, was held to be dealt with leniently in the interest of justice and was ordered to deposit Rs. 75,000 in the treasury within 30 days failing which the said amount would be recovered as arrears of land revenue.

Sardar Khan v. Crown PLD 1952 Lah. 645 rel.

Dildar and another v. The State PLD 1963 SC 47 fol.

Ustad Muhammad Iqbal for Petitioner.

Sahibzada M.A. Amin Mian, Additional Prosecutor-General for Respondent.

ORDER

SHAHID HAMEED DAR, J.---Manzoor Ahmad Khan, stood surety for Haneef Masih who being an accused, sought ad interim bail before arrest in Case F.I.R. No.278 of 2008 dated 20-10-2008 under section 489-F, P.P.C. registered at Police Station, Ganda Singh Wala, District Kasur on 28-11-2008 through Criminal Miscellaneous No.11713-B of 2008, and submitted bail bonds in the sum of Rs.200,000 to the satisfaction of Deputy Registrar (Judicial) of this Court on 4-12-2008.

2. The above said accused failed to enter appearance before this Court on 19-12-2008 without any just cause so the surety bonds submitted by Manzoor Ahmad Khan were forfeited and a show-cause notice in terms of section 514, Cr.P.C. was issued to the surety, the same day, who has submitted a written reply with the contention that he, after having caught Haneef Masih accused, has handed him over to the police so, he (surety) leaves himself at the mercy of the Court.

3. Learned counsel for the petitioner contends that the respondent-surety is a poor man who has a smallholding in village Dohewala, Tehsil and District Kasur; he had stood surety for Haneef Masih accused out of benevolence, being a co-villager without any financial or other benefits; he has discharged his responsibility as a surety and after hectic efforts he located the runaway accused, persuaded him to appear before the police and succeeded in producing him before the police; the surety is a man of limited means who being a labourer/ cultivator hardly manages both ends meet in present tough conditions; Lastly contends that the surety may be dealt with graciously and he may be absolved of his liability altogether.

4. The learned Additional Prosecutor-General- submits that the respondent had voluntarily opted to be a surety for Haneef Masih and he submitted the bail bonds to the tune of Rs.200,000 knowingly that he was worth it and could meet its consequences in case the accused would desert; the written reply submitted by him does not match the contentions of his learned counsel; no circumstance has been hinted at by the surety to establish that he had made successful efforts to hand over the accused to the police; the surety may be dealt with dynamically and a penalty equivalent to the amount of the bail bonds may be inflicted upon him.

5. I have considered the matter carefully and have given due consideration to the valuable arguments on both the sides. The respondent had opted to be a surety for Haneef Masih accused to the tune of Rs.200,000 merrily being a co-villager and submitted bail bonds for release of the accused with the promise that in case of desertion of the accused he shall be liable for payment of fine equivalent to the said amount. He could well conceive his financial worth before he decided to furnish said bail bonds. Once, he had submitted the surety bonds, he would be deemed to have assessed himself potent enough to face the consequences of the same.

6. The arguments of the learned counsel for the respondent-surety although are not akin to the contents of the written reply submitted by the surety yet, the fact that the surety is a man of limited means, owning a smallholding and economically crunched, had submitted the bail bonds out of benevolence, without any gain and for sympathetic considerations. So, he is entitled to be dealt with leniently.

7. The relevant law regarding remission of any portion of the penalty amount, as per section 514(5), Cr.P.C. reads as under:-

> "514(5). The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only."

8. So far as the term leniency is concerned this Court has observed in case Sardar Khan v. Crown (PLD 1952 Lahore 645) as under:

> "The Court should regulate the imposition of penalty in cases of default from the point of view, not so much of assessing the 'guilt' of the sureties in terms of money, but with the object of maintaining the system in its integrity. In other words, if leniency towards, sureties became the general rule, the whole system of release of accused persons on bail might require to be re-examined to ensure the proper progress of criminal cases. At the same time, it is obviously not necessary or desirable in the average case, that the courts should lean in the direction of severity, for this might lead to difficulties in production of sureties, having the effect of overcrowding the judicial lock-ups and other attendant inconveniences".

9. A balance is required to be maintained between leniency, undue generosity and undue severity, lest it should prejudice none of the two sides and in this regard, the answer is hidden in the attending circumstances of each case.

10. In the case of Dildar and another v. The State (PLD 1963 SC 47) the august Supreme Court has observed:--

> "……a balance has to be held between undue leniency which might lead to abuse of the procedure and interference 'with the course of justice in a large number of cases, and on the other hand, undue severity, which might lead to unwillingness on the part of neighbours and friends to come forward……."

11. Law does not place any embargo that full amount of the bail bonds cannot be forfeited if the circumstances of the case so warranted. The portion of the amount, to be remitted or forfeited entirely rests on the attending circumstances of the each case and there cannot be any hard and fast rule in this regard. The respondent-surety has left himself at the mercy of the Court by lastly contending that he and his family have been placed in a quagmire wherein every member of his family shall disappear if he is ordered to deposit the full amount of the bail bonds.

12. In the light of the above circumstances, I am convinced that the petitioner is to be dealt with leniently in the interest of justice so, he is ordered to deposit Rs.75,000 (seventy five thousands) in the treasury within 30 days from today, failing which the said penalty amount shall be recovered as arrears of land revenue by the learned trial Court within the scope of Land Revenue Act. The instant suo motu case stands disposed of.

A.R.K./S-108/L Order accordingly.

2010 P Cr. L J 1606

[Lahore]

Before Shahid Hameed Dar, J

EJAZ AHMAD alias JAJI---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No. 581 of 2005, heard on 4th May, 2010.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Motive as alleged in the F.I.R. had been proved---Medical evidence had fully corroborated the ocular version---Eye-witnesses had corroborated each other on every material aspect of the case and simply their relationship with the deceased could not disqualify their testimony in the absence of any serious previous enmity between the parties---Incident had occurred in day light---Parties being known to each other mistaken identity of accused was not probable, specially when the accused himself had admitted to have fired at the deceased in his defence---Delay in lodging the F.I.R. stood plausibly explained---Some minor contradictions and improvements made by eye-witnesses had no adverse bearing on their testimony---Belated and unsubstantiated defence plea of accused was an afterthought devoid of any merit, but at the same time it in a way had supported the prosecution version, which otherwise stood proved on its own facts and circumstances---Appeal was dismissed in circumstances.

Ch. Muhammad Rafique Gujjar for Appellant.

Sahibzada M.A. Amin Mian, Additional Prosecutor-General for the State.

Date of hearing: 4th May, 2010.

JUDGMENT

SHAHID HAMEED DAR, J.---This is an appeal under section 410, Cr.P.C. directed against the judgment dated 15-3-2005, passed by the learned Additional Sessions Judge, Gujranwala, whereby, the appellant has been found guilty by the, learned trial Court and convicted/sentenced to imprisonment for life under section 302(b), P.P.C. with an order to pay Rs.40,000 as compensation to the legal heirs of the deceased and in default of payment to further undergo three months' S.I. The appellant has been extended the benefit of section 382-B, Cr.P.C.

2. The prosecution story in brief, as disclosed in the F.I.R. Exh.PF/1, lodged by the complainant Nazir Masih, P.W.9 is that on the fateful day i.e. 8-12-2003 at about 4-00 p.m. a quarrel picked up between his son Nadeem Masih (deceased) and Ijaz alias Jaji accused which was, however, patched up due to the interference of the complainant that sometimes afterwards, the complainant was standing at the door of his house when, his son Nadeem Masih went into the street and a little while thereafter, the complainant heard noise of an altercation so, he rushed outside and witnessed that Muhammad Ijaz alias Jaji made a fire

shot with his carbine straight on his son which landed on his right shoulder; the occurrence was witnessed by the complainant, P.W.9 Dilawar Khokhar, P.W.10 and Irshad Bhatti (given up P.W.); the accused fled away extending threats of dire consequences; the complainant shifted his injured son to THQ Hospital Kamoke where the Medical Officer, medically examined his son and referred him to Mayo Hospital, Lahore, due to his serious condition, where, Nadeem Masih injured succumbed to the injuries at 1-20 a.m. on 12-12-2003.

3. The complainant further contended that he could not report the matter to the police earlier as he had been on the bedside of his injured son, besides being in a tense state of mind and that the dead body of his deceased son was lying in Mayo Hospital, Lahore.

4. Nazir Masih, complainant presented a written application Exh.PF to Khawar Latif SI/SHO, P.W.13 on the basis of which, a formal F.I.R. Exh.PF/1 bearing No.374 of 2003 dated 12-12-2003 under section 302, P.P.C. was registered at Police Station City Kamoke, Gujranwala.

5. Khawar Latif SI/SHO assumed the investigation of this case and reached the spot, inspected the place of occurrence, prepared visual site plan Exh.PG and recorded the statement of the witnesses under section 161, Cr.P.C. Thereafter he arrived at THQ Hospital Kamoke where the dead body of the deceased was lying. He inspected the dead-body, prepared inquest report Exh.PH, application Exh.PJ for postmortem examination of the dead body, handed over the police papers along with the dead-body of the deceased to Riaz Ahmad constable for postmortem examination. The dead body was identified by Yousaf Masih P.W.3 and Pervez Gill at the time of postmortem examination. After the. autopsy on the dead body of 'Nadeem Masih, the Investigating Officer took into possession last worn blood stained clothes of the deceased comprising Shalwar P-1, Chadar P-2 a sealed phial P-3 through recovery memo. Exh.PB, attested by Yousaf Masih, P.W.3 and Pervez Gill, P.W. The Investigating Officer got prepared a scaled site plan in duplicate Exh.PA and Exh.PA/1 through Masood Ahmad Bhatti, draftsman, P.W.1.

6. After his arrest on 4-1-2004, the accused Ijaz alias Jaji made a disclosure about the weapon of offence on 11-1-2004 and led to the recovery of .12 bore Carbine P-4 which was taken into possession through recovery memo Exh.PE, attested by Ghulam Rasul 1793-C, P.W.6 and Shamshad Ahmad 1299/C, P.W. He recorded the statements of the said P.Ws. and prepared a site plan of the place of recovery as Exh.PE/1. He handed over the sealed parcel of carbine .12 bore to the Moharrer for onward transmission to the office of Forensic Science Laboratory, Lahore. The I.O. recorded the statements of all the concerned witnesses under section 161, Cr.P.C. during the course of investigation. On conclusion of investigation he challaned the accused.

7. The appellant Ijaz alias Jaji was indicted on the charge of murder of Nadeem Masih (slain) to which he did not plead guilty and claimed trial. So the prosecution was asked by the learned trial Court to produce its evidence to prove the charge against the appellant-accused.

8. During the trial, the prosecution in support of its case produced as many as 13 witnesses. Masood Ahmad Bhatti, draftsman, P.W.1 prepared the scaled site plan in duplicate Exh.PA and Exh.PA/1 in scale of 1 inch equal to 30 ft, Maqbool Hussain 1283, P.W.2 dispatched the sealed parcel of carbine P-4 in the office of Forensic Science Laboratory, Punjab, Lahore on 29-1-2004, Yousaf Masih, P.W.3 identified the dead body of the deceased at the time of postmortem examination and attested the recovery memo. of last worn blood stained clothes of the deceased Exh.PB.

9. Dr. Syed Zafar Abbas PW-5 medically examined Nadeem Masih injured at 5:00 p.m on 8-12-2003 through MLR Exh.PD and described the details of injury suffered by the victim as under:

> "(1) A large ragged lacerated wound 4-1/2 c.m. x 3 c.m. on the back of right shoulder, lying 9 c.m. below the apex of right shoulder, close to the posterior auxiliary-line, margins irregular inverted, muscles exposed going deep into the body. No blackening seen. Advised X-Ray of right shoulder and chest. All clothes were moisted, qamiz stained with blood.
>
> (2) Bleeding through nostril, advised X-Ray, skull AP/LAT."

10. The Medical Officer found the injured serious, profusely sweating, semi conscious, B.P less, pulse less, and vomiting, so, he referred the injured to Mayo Hospital, Lahore for further management.

11. Injury No.1, according to the Medical Officer was caused by a firearm and injury No.2 by a blunt weapon, probable duration of injury was mentioned as, within three hours.

12. Dr. Muhammad Munir Hussain, P.W.4 who had conducted the autopsy on the dead body of Nadeem Masih (deceased) showed up as P.W.4 and prepared the postmortem examination report Exh.PC. He gave up the detail of injury suffered by the deceased as under:--

> (1) A large ragged lacerated wound 5 x 3 cm going deep on the bark of right, shoulder about 9 c.m below the apex of shoulder, close to the posterior auxiliary line. There was bleeding from the nose.
>
> (2) On dissection of injury No.2 he found no external injury to the nose. There was bleeding from the nose. Apex was due to damage to the lung vessels due to which bleeding occurred from the nostril and it was consequent of injury No.1.

13. In his opinion the injury No.1 was ante mortem and caused by firearm. According to him, the cause of death in this case was due to massive damage to the right lung and excessive haemorrhage. The probable time elapsed between injury and death was described by him as 3 to 4 days and between the death and postmortem examination was within 12 hours.

14. Ghulam Rasool 1793/HC, P.W.6 deposed about the recovery of carbine .12 bore P-4 at the instance of the appellant-accused vide recovery memo. Exh.PE, attested by him and Shamshad Ahmad 1299/C, Muhammad Rafique I475/C, P.W.7 dispatched the sealed parcel of the carbine to the office of Forensic Science Laboratory, Punjab, Lahore on 31-1-2004 through Maqbool Hussain 1283/C, P.W.2, Nazir Masih P.W.9, the complainant endorsed his version as contained in F.I.R. Exh.PF/1, Dilawar Masih, P.W.10 furnished an eye-witness account of the occurrence, Javed Iqbal ASI, P.W.11 being Duty Officer recorded formal F.I.R. Exh.PF/1, Muhammad Riaz 1056/C, P.W.12 got the autopsy done on the dead body of the deceased and later on produced the last worn clothes of the deceased Shalwar P-1, Chaddar P-2, sealed phial P-3, who secured the same vide recovery memo. Exh.PB attested by him and Yousaf Masih, P.W.3, Khawar Latif SI/SHO, P. W.13 received the written application Exh.PF from the complainant at City Chowk Kamoke, on 12-12-2003 and after recording police proceedings on it, dispatched it to the Police Station through Ghulam Rasul complainant for registration of formal F.I.R. Thereafter, he conducted the investigation in this case, the detail of which has already been mentioned in the preceding paragraphs.

15. Learned Special Public Prosecutor tendered in evidence report of Forensic Science Laboratory, Punjab, Lahore Exh.PK and closed the prosecution evidence.

16. Whereafter, the appellant was called upon to make his statement under section 342, Cr.P.C. who, while making the said statement denied the prosecution case and gave his own version while responding to question No.6 as to why this case against him and why the P.Ws. have deposed against him, Ijaz alias Jaji accused contended that Nadeem Masih being armed with a carbine had trespassed into his house at 2-00 p.m. on 8-12-2003 and pounced upon his sister Mst. Rukhsana Bibi and dragged her towards a room at gun point to commit Zina Bil Jabar with her; he could not tolerate it so he, in order to save the life and honour of his sister, fired with a .12 bore gun of his brother which hit Nadeem Masih deceased on his back, who, on receiving the shot fell down in injured condition. He further contended that the parents of the deceased learnt later on about the occurrence and they being ashamed of the indecent act of their son sought apology from the family of the appellant-accused and promised not to report the matter to the police; that the complainant chewed his words and got registered F.I.R. against him so, he voluntarily surrendered himself before the local police along with 12 bore gun but the Investigating Officer did not record his plea; he admitted that he caused solitary injury to Nadeem Masih in order to save honour of his sister and exercised his right of private defence lawfully; that the P.Ws. were not present at the spot at the time of occurrence and that they had deposed falsely against him by suppressing the true facts of the occurrence.

17. The appellant-accused did not opt to appear as his own witness under section 340(2), Cr.P.C. nor he intended to produce any defence evidence.

18. The learned trial Court, after conclusion of the trial appraised the evidence available on the file and passed the impugned judgment, whereby, he convicted and sentenced the appellant-accused as mentioned above.

19. Learned counsel for the appellant by expressing his belief, that the prosecution had been torn apart during the course of trial, has contended, that the prosecution had miserably failed to prove its case beyond any shadow of doubt; that though a motive had been specifically set up by the prosecution but it failed to prove the same; that the witnesses of ocular account were neither present at the spot at tilt relevant time nor they had witnessed the occurrence as it had taken place inside the house of the appellant- accused; that the deceased had himself invited the trouble by trespassing into the house of the appellant-accused being armed with a carbine and in a devilish manner attempted to commit Zina-bil-Jabbar with his sister, who could not tolerate the scene and having lost self control, fired with his brother's .12 bore gun to save the life, honour and chastity of his sister which was at stake at the hands of the deceased; that the deceased had been fired at by the appellant-accused under grave and sudden provocation and he had not committed Qatl-e-Amd of the deceased; that the appellant-accused had voluntarily appeared before the Investigating Officer along with weapon of offence but the Investigating Officer did not record the version of the accused correctly and bonafidely; that it is a case of two versions and the version of the accused was nearer to truth which should have been believed by the learned trial Court; that there is unexplained delay of 92 hours in lodgment of F.I.R. which is fatal to the prosecution case; that there are lots of loopholes in the ocular evidence which do not reconcile with the actual hard facts of the case; that the manner in which the alleged occurrence had been stated to have taken place, was neither believable nor plausible and that no blood stained earth was collected from the place where the deceased had allegedly received the injuries.

20. On the basis of his contentions, learned counsel for the appellant has prayed for the acquittal of the appellant. In the alternative he has made a prayer that quantum of sentence of

the appellant may be reduced and altered to one, punishable under section 302(c), P.P.C. on the ground that there are many mitigating and extenuating circumstances in favour of the appellant inasmuch as the origin of fight and the place of occurrence have remained shrouded in mystery.

21. Conversely, learned Additional Prosecutor-General has refuted the arguments put forward by the learned counsel for the appellant by contending that the prosecution has successfully proved its case beyond any shadow of doubt; that the delay in lodgment of F.I.R. has been explained in a natural way by the complainant as he had been on the bedside of his deceased son since the time of infliction of fatal injury, on his body and that the deceased had been inching towards the eventuality so his prime duty was to attend his injured son, instead of rushing to the police station to report the matter; that in absence of any previous animosity between the parties, the eye-witnesses could not be termed as interested witnesses, therefore, their statements could not be discarded simply on the ground that there was minor discrepancies in their evidence; that it is a case of single accused, the occurrence had taken place in a broad daylight in the open street, the parties knew each other since long, so, there was no probability as to mistaken identity of the accused; that the appellant-accused had adopted a delayed and afterthought defence plea during the course of trial as he never raised the said plea during the course of investigation; that the defence plea was himself rejected by the appellant-accused during the course of the trial when he denied the recovery of carbine with the suggestion that it had been planted upon him and that the proceedings in this regard were fabricated by the Investigating Officer, at the police station; that the report of FSL Exh.PK was positive in nature as it disclosed that the .12 bore short pistol (carbine) was in working order, in its present condition; that the appellant-accused had already been held leniently ,by the learned trial Court by not awarding him the capital punishment; that the defence plea, in a way substantiated the prosecution case, which had successfully stood the test of the trial; lastly contends that the instant appeal may be dismissed being devoid of any substance.

22. Arguments heard. Record perused.

23. I find that it is a case of two versions, one is the version of the complainant as contained in the F.I.R. Exh.PF/1 and the other advanced by the appellant-accused during the course of the trial. So both the versions shall be dealt with together by keeping them in juxtaposition inter se. There are certain circumstances which stand admitted by both the sides. There is no dispute as to the usage of a .12 bore weapon during the occurrence; the seat of injury and the name of the assailant. In the peculiar circumstances of the case I have picked up every piece of the prosecution evidence to assess the depth of real facts. I find that in this case, apart from the ocular evidence, the prosecution evidence is based on the evidence of motive, medical, recovery of weapon of offence as well as the report of Forensic Science Laboratory, Punjab, Lahore.

24. So far as, the motivating factor behind the occurrence is concerned I have noticed that according to the prosecution case a quarrel had taken place between Nadeem deceased, the son of Nazir Masih, the complainant and Ijaz alias Jaji, the appellant- accused at 3:45 p.m at about 8-12-2003 which was interfered and patched up by Nazir Masih, P.W.9. Though, the detail of the said altercation had not been mentioned in the written application Exh.PF, presented by the complainant for registration of F.I.R. yet while appearing as P.W.9, the complainant has mentioned that his son Nadeem deceased was distributing invitation cards in the Mohallah qua the marriage of his sister scheduled to be held on 11-1-2004, he was intercepted by Ijaz alias Jaji accused who contemptuously asked the deceased to pay him SALAM as (Appellant) was a Christian to which deceased Nadeem Masih replied in the same coin which led to an altercation between the two. That was the time when Nazir Masih,

complainant intervened and sought forgiveness from the accused for his deceased son and the matter was compounded. So far as this motive is concerned, only Nazir Masih had witnessed the motive altercation as it was he who had intervened and patched it up between the deceased and the appellant-accused. The statement of the Investigating Officer, P.W.13 in this regard is not very material when he contended that the complainant had not produced any supporting evidence to prove the factum of motive during the course of investigation but he completely forgot that the complainant had never contended that the earlier altercation had taken place in presence of certain other persons of the locality.

25. Any person familiar with the facts and circumstances of the motive can prove the same without asking for corroboration through other means. The motive is an element which is always worked out in the mind of the assailant and nobody can tell with exactitude as to what was the real motive whereunder, an accused had committed a particular offence. In majority of the criminal cases it is no more than a guess work or a speculation, so far as, the suggested motive is concerned. An accused may conspire to weave certain emotions into a calculated design to commit an offence.

26. The deceased was a christian and the appellant-accused a Muslim and there was hardly anything common between them. In absence of any previous enmity, the immediate cause of the occurrence could not be different from the one as deposed about by the complainant. In his testimony, P.W.9 has .not changed the motive at all but has only furnished embroidery of the earlier incident, hinted at by him in his written application Exh.PF as well as in his testimony as P.W.9. The embroidery work done by the complainant cannot be considered as a dishonest improvement on the part of the complainant. If I go by the defence plea, pressed into service by the appellant-accused it appears that he had not only admitted to deny the incident of motive but also the whole of the prosecution case as according to him the occurrence had taken place inside his house. I would dilate upon the veracity of the defence plea of the appellant-accused in the later part of this judgment but a cursory view of the same does not dent or undermine the value of the prosecution evidence qua the factum of motive. Nazir Masih, P.W.9 though the father of the deceased, did not have any bias, grudge or animosity to falsely charge the appellant-accused for none of his fault. The earlier quarrel took place just 15 minutes before the occurrence, so, there was every likelihood or probability that the appellant had reacted violently towards his verbal war of words. A very little time is found between the motive incident and the occurrence of murder. So I hold that the prosecution has successfully proved the motive, as alleged in the F.I.R. Exh.PF/1.

27. So far as, the medical evidence is concerned, according to the prosecution, Nadeem deceased had received a single fire of a .12 bore weapon on his right shoulder. The medical evidence had been furnished in this case by Dr. Syed Zafar Abbas, P.W.5 who had examined Nadim Masih (deceased) in injured condition at 5-00 p.m. on 8-12-2003 through MLR Exh.PD which contains description of a firearm injury on the back of right shoulder, 9 c.m below the apex of right shoulder with irregular inverted margins and going deep into the body. At the time of his medical examination, the condition of Nadeem Masih was found serious as he was found profusely sweating, semi conscious, BP and Pulse irrecordable and vomiting by the Medical Officer, P.W.5, who, after giving him first aid immediately referred him to Mayo Hospital, Lahore.

28. Dr. Muhammad Muneer Hussain, P.W.4 conducted autopsy on the dead body of the deceased, his findings were absolutely in line with that of P.W.5 in terms of description of injury of the deceased. On dissection he found the fracture of 4th, 5th and 6th ribs backside, right lung was severely damaged and chest cavity was full of blood. He also found a plastic shell and about 45 metallic round balls from inside of right side of chest. The injury No.2, showing bleeding from the nose was found by the Medical Officer, a consequence of injury

No.1 with the observation that no external injury was present on the nose of the deceased. I have also noticed that the pictorial diagram of the postmortem examination report also shows that there was a single entry wound. The shape of injury No.1 being irregular ragged wound coupled with. recovery of a number of spherical lead balls at the time of postmortem examination, clearly establishes the fact that the deceased had been fired at by means of .12 bore weapon. The appellant-accused had also admitted in his defence plea that he, while exercising his right of private defence, had used .12 bore weapon to fire at the deceased. Nazir Masih complainant, P.W.9 and Dilawar Masih, P.W.10 have deposed about receipt of a .12 bore shot on the right shoulder by the deceased at the hand of the appellant-accused. Therefore, I conclude that the medical evidence fully corroborates the ocular version.

29. Insofar as, recovery of carbine .12 bore P-4 from the appellant is concerned the same might not have been of any consequence, had the appellant not admitted to have used a .12 bore gun during the course of occurrence, as, this weapon had not been got compared with any crime empty from the office of Forensic Science Laboratory.

30. A .12 bore weapon, like a carbine does not emit empty unless and until its user intends to reload the same. In that eventuality the user would vacate the muzzle of the weapon so as to reload it.

31. The evidence to prove the recovery of carbine, P-4, the prosecution has produced Ghulam Rasul 1793/C, P.W.6 and Khawar Latif S.I./SHO, P.W.13, Maqbool Hussain 1283/C, P.W.2 carried the sealed parcel of carbine to the office of Forensic Science Laboratory on 29-1-2004 and deposited there, the same day. The report of FSL, Punjab, Lahore Exh.PK reveals that the aforesaid weapon was in working condition.

32. Interestingly, while conducting cross-examination on P.W.6 Ghulam Rasul 1793/C the recovery of the said weapon has been challenged and denied by the appellant-accused which is in negation to the defence plea, set up by the accused during the course of the trial. The evidentiary value of the recovery of carbine P-4 would have been nothing at all but for the plea of the accused it cannot be straightway thrown away.

33. Insofar as, the ocular evidence is concerned in absence of any serious enmity between the parties, the same cannot be disbelieved or discarded simply due to the relationship of the eye-witnesses with the deceased. The occurrence took place on 8-12-2003 and the matter was reported to the police on 12-12-2003 as the deceased remained alive till then and Nazir Masih, P.W.9, the father of the deceased, remained alongside the bed of his deceased son through and through. The learned counsel for the appellant has strongly contended that none of the witnesses of ocular account was present at the scene of occurrence nor they had witnessed it and only after having found Nadim Masih in injured condition, they carried him to Civil Hospital, Kamonke. Both the witnesses of ocular account have furnished a clean account of the details of occurrence and have corroborated each other on every material aspect of the case. The occurrence took place in the street, at about 4-00 p.m. witnessed by the complainant as well as by his co-witness, who, shifted Nadim Masih (deceased) in bad injured condition to THQ Hospital Kamonke. The MLR Exh.PD bears the name of Nazir Masih. complainant P.W.9 as a person to have brought the injured to the hospital for medical examination. The time of medical examination indicates that the deceased had been shifted to the hospital within about one hour of the time of occurrence. The Medical Officer has mentioned the duration of injury as within three hours which is not detrimental to the case of the prosecution in any manner as the injured was found bleeding at the time of his medical examination. Had he been bleeding for three hours as claimed by the appellant, he must not have been shifted alive to the hospital due to excessive shock and haemorrhage.

34. It was a broad daylight occurrence. Both the parties knew each other since long. There cannot be any probability of mistaken identity of the accused, specially, when the appellant-accused himself had contended by way of his defence plea that he had fired at the deceased with a .12 bore gun. The reporting of the matter to the police on 12-12-2003 indicates that Nazir Masih complainant had been worried and interested much more in saving the life of his son than rushing towards the police station to report the matter to the police, leaving his son on the death bed. His continuous presence alongside the bed of his deceased son is understandable, which, does not dent the prosecution case in any manner. The ocular account is fully supported by the medical evidence. It is true that there are some contradictions and improvements made by the eye-witnesses but they are minor in nature and cannot be regarded of such a nature which can cause discarding the ocular evidence, therefore, I have come to the conclusion that the prosecution has proved its case against the appellant beyond any shadow of doubt.

35. Insofar as, the plea of the accused is concerned it appears to be afterthought as he did not raise this plea during the course of investigation, rather, at the time of his arrest on 4-1-2004 the first plea recorded by the accused was absolutely different from the one he pressed into service, during the course of trial. In his statement under section 342, Cr.P.C. he contended that Nadim Masih deceased had trespassed into his house at 2-00 p.m. on the fateful day, being armed with a carbine, took his sister Rukhsana in clutches at gun point and dragged her towards a room of the house, with intention to commit Zina with her. He further contended that on seeing this scene he lost his self control and with a view to save the honour, dignity and life of his sister, he fired with a licensed .12 bore gun upon the deceased which landed on his right shoulder and he fell down in injured condition. He further contended that the deceased was later on lifted and taken to his house, wherefrom he was taken to the hospital. He has also alleged in his defence plea that the parents of the deceased were apologetic of the "shameful act" of their son so they had decided not to report the matter to the police. The defence plea-of the accused is not entertainable in many ways. He did not produce the said licensed gun to the police during the course of investigation, did not adopt the said version at the time of recording his first plea immediately on his arrest, he has denied the recovery of carbine .12 bore P-4 recovered at his instance and he opted not to produce any defence evidence in support of his plea and lastly, he kept his sister away, both, from the investigation as well as from the proceeding of the trial. The exercise of right of self defence undoubtedly, is conferred upon every citizen of the country, under the statute, but once the accused adopts a specific plea, falling within the recognized exceptions, the burden to prove the same shall shift to the accused. There are certain circumstances whereunder the accused may be found entitled to the benefit of exercise of right of self defence despite having not adopted a specific plea in this regard but it shall happen only if, some material, favourable to the accused, flows from the prosecution evidence. Here in this case, the prosecution does not disclose any such circumstance, the benefit of which, could be extended to the accused in the backdrop of his defence plea.

36. The non-recovery of the blood stained earth from the place of occurrence, does not dent the prosecution case, as, after four days of the occurrence, the blood stained earth could only be recovered if the place of occurrence had been properly safeguarded. The spot of occurrence was a thoroughfare, used by the inhabitants of the locality, so, there is every probability that the evidence of blood stained earth might have been lost under the feet of the pedestrians.

37. If the occurrence as claimed by the appellant-accused had taken place inside his house and that the deceased had fallen in injured condition there then, he must have shown the said place to the police, after he had been arrested. The gun, allegedly produced by him before the police at the time of his arrest, is also found nowhere. The claim of the appellant-accused that the parents of the deceased were apologetic due to the act of the deceased is equally

nonsensical, otherwise, he would have led some evidence to prove this part of the defence plea.

38. A belated and afterthought defence plea, not supported by any evidence, is inconsequential to the case of the appellant-accused. The defence plea being devoid of any merit is thus, declared as incredible, improbable, afterthought and meaningless. It, however, lends a sense of corroboration to the case of the prosecution, which otherwise, stands proven on its own facts and circumstances.

39. For what has been discussed above, the instant appeal is smissed and the impugned judgment is upheld.

N.H.Q./E-6/L Appeal dismissed.

2010 P Cr. L J 1629

[Lahore]

Before Shahid Hameed Dar, J

RAHAT JAVAID---Petitioner

Versus

DISTRICT POLICE OFFICER, NANKANA SAHIB and 6 others---Respondents

Writ Petition No.18047 of 2009, decided on 7th June, 2010.

Criminal Procedure Code (V of 1898)---

----S. 154---Penal Code (XLV of 1860), Ss. 302/148/149---Constitution of Pakistan (1973), Art. 199---Qatl-e-amd and rioting armed with deadly weapon---Constitutional petition---Registration of F.I.R.---Real brother of the applicant respondent had been killed by the police and according to the F.I.R. his death had occurred due to a police encounter---In a judicial inquiry held by Magistrate it was found that the occurrence was a fake encounter staged by the police and the death of the deceased was an extra judicial killing---Police then rushed into registration of a criminal case using the text of the judicial inquiry as the subject of the F.I.R., and wasted no time in recording the opinion of innocence without associating any aggrieved persons with the investigation and declared all the police officials as innocent---Brother of the deceased had arrogantly and contemptuously been kept at a distance by the police and they never attended to his grievance---Sessions Court, thereafter, on the application of the deceased's brother directed the SHO to register a criminal case against the persons mentioned therein, vide impugned order---Validity---Contention that other F.I.R. on the version of the applicant brother of the deceased could not be recorded was not legal---Version of the applicant had not been cared of by the police so far, rather his efforts to get a criminal case lodged had been obstructed by the respondents police officers--F.I.R. sought to be registered could not be stopped, as prima facie contents of the application had made out a cognizable offence---Another F.I.R. could be registered in circumstances---Station House Officer was, consequently, directed to record the statement of the brother of the deceased under S. 154, Cr.P.C. and proceed further in accordance with law---Constitutional petition was accepted accordingly.

Wajid Ali Durrani and others v. Government of Sindh and others 2001 SCMR 1556; Muhammad Basheer v. The SHO Okara Cantt. and others PLD 2007 SC 539; Mst. Allah Rakhi v. DPO, Gujranwala and 5 others 2009 MLD Lah. 99; Mrs. Ghanwa Bhutto and another v. Government of Sindh and another PLD 1997 Kar. 119; Basheer Ahmad v. Station House Officer and 5 others 2008 MLD Lah. 9; W.P.No. 8560 of 2007 and Muhammad Anwar's case PLD 1999 Lah. 50 ref.

Rana Muhammad Shahid Mehmood for Petitioner.

Inam-ul-Islam Khan for Respondent No. 6.

Aamir Jalil Siddiqui, A.A.-G. and Muhammad Anwar Sail, S.-I. for the Respondents.

ORDER

SHAHID HAMEED DAR, J.---Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1997, the petitioner challenges the validity of order dated 15-9-2009 passed by learned Sessions Judge, Nankana Sahib, whereby, the application for registration of criminal case under sections 22-A/22-B, Cr.P.C. moved by Muhammad Idrees respondent No.6 has been allowed.

2. Brief facts germane to the filing of the instant petition are that Muhammad Idrees, respondent No.6 filed a petition under sections 22-A/22-B, Cr.P.C. before the learned Sessions Judge, Nankana Sahib, respondent No.7 for the registration of a criminal case against Rahat Javed petitioner and others regarding the murder of his real brother Muhammad Javed, in a fake police encounter. The comments were called for from respondents Nos.3 and 4 who submitted the same and the learned Sessions Judge, after hearing the parties accepted the application and directed the SHO, Police Station Shah Kot, District Nankana Sahib to record the statement of respondent No.6 and if any cognizable offence was made out therefrom, he was directed to proceed in accordance with law.

3. Muhammad Idrees, respondent No.6 briefly, contended in his application under sections 22-A/22-B, Cr.P.C. that his brother Muhammad Javed was arrested at 8:00 a.m. on 26-2-2008 by police of Police Station, Shah Kot in case F.I.R. No.469 of 2005 and was taken to Police Station Shah Kot where Rahet Javed, the petitioner and others were chatting with SHO, Police Station Shah Kot, respondent No.3; a little while thereafter, they boarded Muhammad Javed in an official vehicle and proceeded to CIA Stop Chander Kot followed by Rahet Javed etc. in a private vehicle; Muhammad Idrees along with his cousins and others also followed them, when, they reached across Jender Kot bridge of canal they witnessed a police mobile and a private car; the respondent No.6 inquired from a police official about his brother, who told that he had been taken with him by DSP, Aashaq Marth, a notorious police encounter specialist; the petitioner and his companions reached the place where the police had taken his brother Javed and found Ahmad Yar Wattoo Inspector, present there who ordered him to get away; he also found Rahet Javed, Khalid Javed, Aslam alias Pola, Fazal Ahmad and two unknown accused persons, all armed with rifles aiming at his brother; on the Lalkara of Fazal Ahmad and Khalid Javed, the accused Rahet Javed fired straight with his rifle which, landed on the back of the head of Muhammad Javed, the brother of respondent No.6. In the meanwhile, the other police officials lead by DSP Aashaq Marth opened indiscriminate firing upon fallen Muhammad Javed and murdered him at the spot; the accused .persons also decided to kill Muhammad Idrees, respondent No.6 but due to arrival of other police vehicles they could not do so but Aashiq Marth, DSP threatened respondent No.6 if he told the matter to anyone he too would be killed in a fake encounter; that accused Rahet Javed (petitioner)

and others openly claimed that they had paid Rs.11,00,000 (eleven lacs) to police to kill Muhammad Javed in a fake encounter to avenge the murder of their brother.

4. Muhammad Idrees, respondent No.6, moved an application to respondents Nos.1 and 3 for registration of a criminal case but they did not take any action. So he filed a petition under sections 22-A/22-B, Cr.P.C. before the learned Additional Sessions Judge, Nankana Sahib for seeking the same relief. In the meanwhile, DPO, Nankana Sahib had moved an application before Sessions Judge, Nankana Sahib, respondent No.7 for holding a judicial inquiry into the killing of the brother of respondent No.6, whereupon, learned District and Sessions Judge, got conducted a judicial inquiry which was concluded on 20-7-2009 by learned Magistrate Section-30, Nankana Sahib, wherein the learned Judicial Officer opined that the claim of the police that the deceased had died in a police encounter, was false and fake and that the death of Muhammad Javed, the brother of respondent No.6 was an extra judicial killing.

5. The police, immediately after the occurrence, had registered a criminal case F.I.R. No. 64 of 2008 dated 27-2-2008 under sections 324, 353, 186, P.P.C. read with section 13 of Arms Ordinance No.XX, 1965 on the complaint of Liaqat Ali SI against Muhammad Javed deceased and an unknown accused person with the version that the occurrence of death/murder of Javed deceased was a result of a police encounter. Thereafter, the DPO, Nankana Sahib, respondent No.1, requested through a written application, the learned Sessions Judge, Nankana Sahib to hold an inquest/inquiry under section 174, Cr.P.C, whereupon the learned Magistrate, under the orders of learned Sessions Judge, held an inquiry and recorded the aforementioned conclusion regarding the occurrence contained in F.I.R. No.64 of 2008 supra, being a fake police encounter, as stated above.

6. On one hand, the DPO, Nankana Sahib and respondents Nos.2 and 3 did not lodge any criminal case on the application of Muhammad Idrees, respondent No.6 and on the other hand, without any reasonable cause, hurriedly rushed into registration of a criminal case.F.I.R. No.75 of 2009 dated 24-2-2009 under sections 302, 148, 149, P.P.C. read with sections 155, 156 Police Order, 2002, on the basis of the judicial inquiry conducted by learned Magistrate Section-30, Nankana Sahib. Though, the learned Magistrate or the petitioner had never desired that the text of judicial inquiry be used for registration of any F.I.R. The efforts of the petitioner in the meanwhile, continued for registration of a criminal case but, the respondents Nos.1 to 4 joined hands to make sure that the efforts of respondent No.6 could not bear fruit.

7. Muhammad Idrees, respondent No.6 at last, filed an application under sections 22-A/22-B Cr.P.C. before learned Sessions Judge, Nankana Sahib/Ex-Officio Justice of Peace, which, was allowed on 15-9-2009 with the direction to the SHO, Police Station, Nankana Sahib, respondent No.3 to record the statement of the complainant/ respondents No.6 and if his version disclosed commission of any cognizable offence then he should proceed in accordance with law. Hence, the instant petition.

8. The learned counsel for the petitioner contends that two F.I.Rs. about the same murder had already been recorded so there was no justification for respondent No.7 to pass the impugned order for registration of an other criminal case qua the same occurrence; the impugned order has been passed in sheer violation to the settled principles of dispensation of criminal justice as the matter had already been dealt with twice by way of case F.I.R. Nos.64 of 2008 and 75 of 2009 supra; that Muhammad Javed deceased was a notorious gangster who had been involved in a number of criminal cases and on the fateful day, he had attacked the police party by opening indiscriminate firing, which was retaliated by the police which resulted in the death of Muhammad Javed deceased while his unknown co-accused fled away leaving behind a sizeable quantity of weapons and ammunition; that SHO, Police Station, Shah Kot,

respondent No.3 had been wrongly directed by respondent No.7 as the occurrence had taken place within the territorial jurisdiction of Police Station, Bara Garh, District Nankana Sahib; that the impugned order suffers from misreading and non-reading of the record and it has been passed in an arbitrary and capricious manner without caring for the record of this case.

9. On the other hand, respondent No.6 has strongly opposed the contention of the learned counsel for the petitioner on the point that a judicial officer, learned Magistrate Section 30 Nankana Sahib after detailed judicial inquiry had found the version of the police as contained in case F.I.R. No.64 of 2008, absolutely false and he had observed that Muhammad Javed deceased had been murdered by the police in a fake encounter and that it was a case of extra judicial killing; the police did receive the application of respondent No.6 for registration of a criminal case against Rahet Javed and others including the police officials, but it was not attended to by any of the respondents Nos.1 to 4; the respondent No.1 with a view to pack-up the matter hurriedly made various moves but each of his move ended in smoke specially due to the result of judicial inquiry; the act of the respondents Nos.1 to 4 to lodge F.I.R. No.75 of 2009 supra on the subject of judicial inquiry smacks dishonesty as it was so done to avoid the registration of a criminal case on the application of Muhammad Idrees, respondent No.6; the conduct of respondents Nos.1 to 4 is highly condemnable as they wasted no time at all to record the opinion qua the innocence of the persons mentioned in the F.I.R. No.75 of 2009 and thereby, exonerated all those mentioned in the said F.I.R., an opinion, recorded by the judicial officer in a judicial inquiry has been overlooked by the dishonest police officers including respondent Nos.1 to 4; the impugned order has been passed strictly in accordance with law and no legal deficiency could be pointed out in it hence, it was a sustainable order; contends that an independent F.I.R. is the order of the day as per contention of respondent No.6, so, the instant petition may be dismissed in the interest of justice. To fortify his contentions learned counsel for respondent No.6 has placed reliance on Wajid Ali Durrani and others v. Government of Sindh and others (2001 SCMR, 1556), Muhammad Basheer v. The SHO Okara Cantt and others, (PLD 2007 SC 539), Mst. Allah Rakhi v. DPO, Gujranwala and 5 others (2009 MLD Lahore 99), Mrs. Ghanwa Bhutto and another v. Govt. of Sindh and another (PLD 1997 Karachi 119) and Basheer Ahmad v. Station House Officer and 5 others 2008 MLD Lahore 9) and unreported order dated 11-9-2007 passed by this court in W.P.No.8560 of 2007.

10. The learned Assistant Advocate-General has not opted to oppose both the sides but adds that Muhammad Idrees, respondent No.6 was an aggrieved person being the real brother of the deceased so his grievance may be attended to and redressed.

11. I have heard the arguments advanced by both the sides and gone through the impugned order and other relevant documents attached with this writ petition.

12. Muhammad Javed deceased, was the real brother of Muhammad Idrees, respondent No.6, who had been killed on 27-2-2008. Ch. Liaqat Ali SI got lodged a criminal case F.I.R. No.64 of 2008 supra wherein he alleged that three accused aboard a car bearing no number plate was chased by the police party, two of whom lastly, abandoned their car and hid themselves in a sugarcane field whereas, their third companion drove away speedily. Liaqat Ali SI further alleged that the two accused ambushed the police party, opened firing upon them and the police party also returned the fires which continued for about an hour till the firing stopped from the accused side, who were hidden in a sugarcane crop, whereupon, the police party entered the field and found Muhammad Javed alias Jaida lying dead with weaponry/ammunition scattered around him. The story contained in this F.I.R. was a subject of judicial inquiry conducted by the learned Magistrate Section- 30, Nankana Sahib who on conclusion- of his inquiry, opined that it was a fake encounter staged by the police and the death of Muhammad Javed deceased was an extra judicial killing. The police did not care for the outcome of the judicial inquiry and reduced its validity to ZERO within no time, when

they rushed into registration of a criminal case No.75 of 2009 on 24-9-2009 using the text of the judicial inquiry, as the subject of the F.I.R. and wasted no time in recording the opinion of innocence without associating any aggrieved persons with the investigation and declared all the police officials as innocent. Muhammad Idrees, respondent No.6, the brother of the deceased was arrogantly and contemptuously kept at an arms length by the police and they never attended to his grievance. Finally, he got the impugned order from the learned Sessions Judge, Nankana Sahib, respondent No.7 on his application under sections 22-A/22-B, Cr.P.C, whereupon a direction was given to the SHO, P.S Nankana Sahib, respondent No.3 for registration of a criminal case against those mentioned in his application. The contention of the learned counsel for the petitioner that another F.I.R. on the version of respondent No.6 could not be recorded is not based on any legal arguments. The version of the applicant/respondent No.6 has not been taken care of by the police so far, and his efforts to get a criminal case lodged, have been obstructed by the respondents Nos.1 to 4 as according to them, the registration of another F.I.R. will complicate the matter which is not a proper approach, keeping in view the peculiar facts and circumstances of the case. I seek guidance by pinning upon the luminous above referred to judgments, I hold that the F.I.R. sought to be registered cannot be stopped as prima facie cognizable offence is made out from the perusal of the contents of the application and an other F.I.R. can be registered as held in Muhammad Anwar's, case (PLD 1999 Lahore 50) and Ghanwa Bhatto's case (PLD 1997 Karachi 119). As per law laid down by the Hon'ble Supreme Court of Pakistan in the case Muhammad Basheer v. The Station House Officer Okara Cantt. and others PLD 2007 SC 539, the Station House Officer is bound to register the F.I.R., in a case of cognizable offence, thus respondent No.3 is directed to record the statement of the respondent No.6 under section 154, Cr.P.C. and proceed further in accordance with law. However the investigation of the said case shall be conducted by some Senior Police Officer other than the respondents Nos.1 to 4 who shall try his best to bring on record the true picture of the occurrence and ensure no injustice is done to any of the parties. With this direction the Writ Petition is disposed of accordingly.

The restraining order passed by this court on 18-9-2009 stands recalled.

N.H.Q./R-36/L Petition accepted.

2010 P Cr. L J 1698

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD RIAZ---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No.5565-B of 2010, decided on 4th June, 2010.

Criminal Procedure Code (V of 1898)---

----Ss.497 & 345---Penal Code (XLV of 1860), S.452/354/337-A(i), (ii)/337-F(i)/337-L(ii)/148/149---House trespass, outraging the modesty of woman, causing hurt shajjah, ghayr jaifah etc. rioting armed. with deadly weapons after forming unlawful assembly---Bail, grant of---Sections 452 and 354, P.P.C. had been deleted from the F.I. R. during

investigation---Some co-accused had been found innocent in police investigation---Parties had compromised in the matter---Court should also encourage the parties so as to avoid further complications and tension between them---Compromise, in such a situation, would bring around bliss, peace and coherence in the society, ending long standing enmites and preventing irreparable losses---Accused was admitted to bail in circumstances.

Malik Ejaz Ahmad Phullarwan for Petitioner.

Sahibzada M.A. Amin Mian, Additional Prosecutor-General for the State.

ORDER

SHAHID HAMEED DAR, J.-Muhammad Riaz petitioner has been arrested in case F.I.R. No.200 of 2010 dated 7-4-2010 for offences under sections 452, 354, 337-A-i, 337-A-ii, 337-F-i, 337-A-ii, 148, 149, P.P.C., registered at Police Station Sharqpur, District Sheikhupura, on the complaint of one Jafar Ali.

2. Precisely, the allegation contained in the F.I.R. is that accused Asghar Ali, Muhammad Riaz, Mehmood, Muhammad Ashfaq along with one unknown accused trespassed into the house of the complainant andbeat his wife, daughter and daughter-in-law; on the intervention of the complainant he too was beaten by Mehmood and Muhammad Ashfaq who caused him injuries by means of butt of their firearms on his forehead and left eye; Asghar and Riaz accused also gave him kick blows followed by threats of murder by Muhammad Riaz; the clothes of the wife of Jaffar Ali complainant were torn during the scuffle as a result of which she got naked; the motive behind the occurrence was that Asghar etc. had cut dirty jokes with the daughter-in-law of the complainant who admonished them, which caused grudge to the accused.

The police deleted sections 354 and 452, P.P.C. during the course of investigation as it was found that the occurrence had taken place at an open space.

3. At the very outset, learned counsel for the petitioner contends that compromise has been effected between the parties due to intervention of notables of the area and the complainant having been appeased, does not want to prosecute the petitioner and his co-accused .further; the offences under sections 452 and 354, P.P.C. have been deleted during investigation and rest of the offences are bailable; Jaffar Ali, complainant does not have any objection if the petitioner is admitted to bail.

4. Learned counsel for the complainant, by tendering a written affidavit of Jafar Ali complainant, submits that the matter has been compounded between the parties and in his affidavit, the complainant has shown his willingness to the acceptance of bail plea of the petitioner on the basis of compromise; that there is no other injured of this case and the complainant not only on his own behalf but also on behalf of his family members had forgiven the accused of this case. The complainant, present in person, also endorses the submissions made by his learned counsel on his behalf.

5. Learned Additional Prosecutor-General has also endorsed and adopted the submissions of the learned counsel for the complainant and submits that the Investigation Officer had deleted above said two sections as according to him, the occurrence had not taken place inside the house of the complainant; lastly contends that the rest of the offences are compoundable with the consent of the court.

6. Arguments heard. Record perused.

7. The complainant had alleged in the F.I.R. that the occurrence had taken place inside his house where he had been beaten and the chastity of the womenfolk of his house had been molested by the accused-petitioner and his co-accused but during the course of investigation, it transpired that the occurrence had taken place in the Baithak of Muhammad Boota, who is a relative of the petitioner so sections 354 and 452, P.P.C. were deleted. A couple of co-accused of the petitioner had been found innocent during investigation. Nevertheless, the parties are no more daggers drawn and they have patched up the matter due to the efforts of the elders of the locality. Regardless of the offences being compoundable or non-compoundable, sanity has prevailed and both the parties have come close to each other which is a redeeming move on their part. If they have decided to live in peace in future, the duty of the court is to encourage them so as to avoid further complications and tension between them.

8. Life is too short but the people sometimes make it still shorter, by indulging into insensible skirmishes leading to long standing enmities and irreparable losses. The compromise in such like, situation is a welcome sign which can do the miracles and bring around bliss, peace and coherence in the society. Such a healthy change of heart is worth admiration which must be allowed to flourish and bear fruit.

9. Therefore, I accept this application and admit the petitioner to post arrest bail, subject to furnishing bail bonds in the sum of Rs.50,000 with one surety in the like amount to the satisfaction of the learned trial Court.

N.H.Q./M-351/L Bail allowed.

2010 P Cr. L J 1702

[Lahore]

Before Shahid Hameed Dar, J

MAZHAR IQBAL---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.4300-B of 2010, decided on 19th May, 2010.

Criminal Procedure Code (V of 1898)---

----S.497(1)---Penal Code (XLV of 1860), Ss.365-B & 376---Abduction and commission of rape---Bail, refusal of---Complainant girl, a student of degree classes, while going to her college had been adducted by the accused and his companions in a car and subsequently ravished by them---Solitary statement of the complainant was sufficiently reliable, which was corroborated by her medico-legal report---Sanctity of the report of the Chemical Examiner would be assessed during the trial---Virgin educated girl would never put her honour and dignity as well as that of her family at stake for falsely implicating the accused in the case---Opinion of Investigating Officer regarding innocence of accused was sketchy in nature---Offence with which the accused was

charged fell within the mischief of the prohibitory clause of S. 497(1), Cr.P.C.---Bail was declined to accused in circumstances.

Ch. Waseem Ahmad Gujjar for Petitioner.

Anwar Basit for the Complainant.

M.A. Amin Mian, Additional Prosecutor-General and Iftikhar S.-I. for the State.

ORDER

SHAHID HAMEED DAR, J.---The petitioner Mazhar Iqbal seeks his release on bail in case F.I.R. No.118 of 2010 dated 20-3-2010, under section 365-B read with section 376, P.P.C., registered at Police Station City Kamalia, District Toba Tek Singh wherein, he had been arrested on 7-4-2010 by the police and was dispatched to the judicial lockup on 12-4-2010.

2. The complainant Mst. Zakiya Parveen has briefly, alleged in the F.I.R. that she was moving through a street Mohallah Hussain Shah Wali at about 8-30 a.m. on 17-3-2010 in order to go to Degree College for Women, Kamalia where she was a student of 3rd year. Suddenly two motorcyclists intercepted and stopped her at gun point; in the meanwhile, two persons aboard a car reached there and forcibly made her sit in their car and drove her to a room of Dera which was situated at a deserted place; they gagged her mouth by an adhesive tape, tied her hands and feet and confined her there; one of the accused was Mazhar (petitioner) who and his companions committed Zina Bil Jabbar with her and illegally detained her; on the second day, the accused went to city Kamalia to fetch food so she slipped away from that place and reached a bus stop where from she reached Data Darbar, Lahore by a wagon and then, managed to reach Chichawatni by bus; her maternal uncle and brother brought her back to the house of her parents on 19-3-2010.

3. The complainant was medically examined at 4-00 p.m. on 20-3-2010 by a Women Medical Officer who as per her findings found her menstruating since 18-3-2010. She also found that the examinee's hymen was healed old and vagina admitted two fingers tightly. The Lady - Doctor also found some laceration and abrasions on the body of the victim. She obtained vaginal swabs for detection of semen grouping, semen analysis and for DNA test. The report of the Chemical Examiner, Punjab, Lahore indicated that the swabs were not stained with semen, however, were stained with- blood; the complainant/victim refused to cooperate in connection with DNA test and submitted written application in this regard on 5-4-2010 to the SHO.

4. The Investigating Officer conducted investigation of this case by associating both the parties with the process of investigation and recorded his findings qua the innocence of the petitioner vide case Diary No.15-4-2010, consequently a report under section 173, Cr.P.C. was prepared by the Investigating Officer with the name of the petitioner in column No.2 of the Challan.

5. It has been contended by the learned counsel for the petitioner that a false case has been got lodged by the complainant under a conspiracy so as to cause humiliation and disrespect to the petitioner; that the version of the complainant had not been supported by any witnesses at all; that the medical evidence negates the version of the complainant; that the complainant/victim stated herself to be an unmarried girl who had been allegedly subjected to Zina Bil Jabbar by the petitioner and his co-accused but her medical examination, just after three days of the alleged occurrence, had unfurled falsity of her version; that the petitioner had been found innocent during the course of investigation and a report under section 173,

Cr.P.C. had been submitted by the Investigating Officer with name of the petitioner in its column No.2; that there is a delay of three days in lodgment of the FIR., for which no explanation had been offered by the complainant; that the petitioner is entitled for grant of bail as his case falls within the ambit of further inquiry.

6. On the other hand, learned Additional Prosecutor-General, assisted by learned counsel for the complainant has controverted the arguments of the other side with the contention that the version of the complainant/victim did not require any corroboration as no girl would ever like to put her honour and dignity at stake for falsely implicating a person in a criminal case; that the victim's career and future had been ruined by the devilish act of the petitioner as she was a student .of 3rd year and was moving towards a bright and secure future; that the act of the accused petitioner had not only ruined the victim but also her entire family, had been stigmatized due to ravishing of their girl; that ipse dixit of the opinion of the police .is not binding upon the court; that the offence committed by the petitioner falls within the prohibitory clause of section 497, Cr.P.C, so he was not entitled for release on bail.

7. Arguments heard. Record perused.

8. The complainant lady was a student of third year when forcibly picked up and abducted at gunpoint by the accused-petitioner and others while going to her college, where, she was a student of 3rd year. She was rendered helpless by applying an adhesive tape on her mouth and also tied her hands and feet. She was driven to a DERA situated at a deserted place where the petitioner and her co-accused subjected her to act of coitus against her will. She succeeded in fleeing away from the clutches of the petitioner and her co-accused when they had left for city Kamalia to fetch food. The medical evidence does not negate the version of the petitioner in any manner. As her hymen was not found intact though, observed to be healed old. The non detection of spermatozoa on the viginal swabs may be due to the fact that she was found menstruating at the time of her medical examination by the Medical Officer.

9. So far as the definition of rape/zina is concerned, the offence of Zina shall be deemed to have been committed if the penetration has taken place, without entering into the question as to how long it went.

10. The complainant was a student of 3rd year in Government Degree College for Women Kamalia and had set off for her college on the day of occurrence, as usual, absolutely, unaware of the circumstantial terror, which fell upon her when the petitioner and his co-accused abducted her for satisfaction of their lust. She, after having been ravished by the sex-mongers, managed to rejoin her family with a story of painful and frightful details. She being a student of degree classes was bound for a bright and purposeful future but for the satanic act of the petitioner and his co-accused her dreams had been shattered. Why would she cook up a story to falsely implicate the petitioner when she or her family had no grudge or bias against him.

11. The solitary statement of the victim/prosecutrix can be relied upon for the purpose of prosecution of an accused charged with, identical allegation. The required degree of corroboration to the statement of the complainant-victim is available in this case in the form of the MLR of the victim which has been discussed earlier. The learned counsel for the petitioner failed to answer to the query of this court as to why, a virgin educated girl shall put her honour and dignity as well as that of her family at stake for implicating someone in a criminal case. The sanctity of the report of Chemical Examiner shall be assessed during the course of the trial. I find that the opinion of the Investigating Officer is sketchy, in nature. The offence with which the petitioner is charged falls within the mischief of prohibitory clause of section 497, Cr.P.C.

12. For what has been discussed above, I am not inclined to admit the petitioner to post arrest bail. The instant petition stands dismissed.

N.H.Q. /M-338/L Bail refused.

PLJ 2010 Lahore 465

Present: Shahid Hameed Dar, J.

AMJAD RIAZ--Petitioner

versus

ADDITIONAL SESSIONS JUDGE/EX-OFFICIO JUSTICE OF PEACE, SIALKOT and 10 others--Respondents

W.P. No. 5745 of 2010, decided on 9.6.2010.

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

----Ss. 156 & 157--Domain of Investigation officer--Incharge of Investigation did not require any permission to investigate the circumstances of the case from the judiciary--It is the domain of I.O. to collect the evidence in a criminal case u/Ss. 156 & 157, Cr.P.C. and the Courts could not interfere with it by suggesting the mode, means, procedure or result of such investigation. [P.] A

Police Order, 2002 (22 of 2002)--

----S. 18(6) & Scope--Criminal Procedure Code, (V of 1898)--Ss. 22-A & 22-B--Powers of Ex-officio Justice of Peace--Power u/Ss. 22-A & 22-B, Cr.P.C. conferred upon the Ex-officio Justice of Peace mainly relate to issues, non registration of a criminal case, transfer of investigation from one Police Officer to an other within scope of S. 18(6) Police Order, 2002 and the neglect/failure or excess committed by a police authority in relation to its functions and duties. [P.] B

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

----S. 22-A(6)--Jurisdiction of Ex-officio Justice of Peace--A Justice of Peace can direct the police to do the needful in accordance with law but not to suggest the procedure or give direction to do a certain act. [P.] C

PLD 2005 Lah. 470, rel.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1890)--Ss. 22-A & 22-B--Constitutional Petition--Independent of investigation which cannot be approved of--Principles of dispensation of criminal justice--Proceedings being under taken by Ex-officio Justice of peace was challenged--Abduction of 8 years child--Without causing recovery of abductee, accused was sent to judicial lock-up--Petition u/Ss. 22-A, & 22-B, Cr.P.C. for redressal of grievance qua dishonest investigation of the case and non-recovery of abducted son, which was disposed of without any substantial relief to the petitioner--Validity--Proceedings being conducted by Ex-officio Justice of Peace, independent of investigation of the case, which cannot be approved of--Accused instead of joining the investigation, were absconding and their relative, through an application u/S. 22A/22-B, Cr.P.C. had planned to side line the investigation of the case and thereby, win an opinion qua the truthfulness or otherwise, of the allegation--Accused pondered over the proposition of approaching respondent to seek a relief of their choice but the law was not on their side--Held: Ex-officio Justice of Peace could only pass direction to investigation officer to conduct the investigation honestly and even handedly by hearing both the sides, collect the evidence and prepare a report u/S. 173, Cr.P.C. containing a gist of

investigation--Rost done by Ex-officio justice of peace cannot be approved of nor it can be held as legal or warranted by law--Proceedings pending before Ex-officio Justice of Peace on an application u/S. 22-A & 22-B, Cr.P.C. were quashed being illegal, unwarranted by law and abinito void--Petition was allowed. [P.] D & F

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

----S. 182--Charges alleged by informant were false--Proceedings against informant--Authority of investigation officer to decide taking action u/S. 1872, PPC if he comes to conclusion on conducting the investigation that the charges alleged by informant were false--In such situation, the initiation of proceedings against the informant shall be synonymous with the outcome of the investigation. [P.] E

Ch. Muhammad Lehrasib Khan Gondal, Advocate for Petitioner.

Mr. Iftikhar Hassan, Advocate for Respondents.

Mr. Aamir Jalil Siddiqui, AAG for Respondent No. 6.

Mr. Ashiq Hussain, SI.

Date of hearing: 1.6.2010.

Order

Through this Constitutional Petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner seeks indulgence of this Court as he feels aggrieved of the proceedings being undertaken by the learned Addl: Sessions Judge, Sialkot/Ex-Officio Justice of Peace, Respondent No. 1, on a petition moved by one Rehman Basheer, Respondent No. 6 under section 22-A/22-B Cr.P.C, who happens to be a nephew of accused Mehmood Ahmad (Respondent No. 7) of case FIR No. 669 of 2009 dated 29.11.2009, registered under section 364-A PPC, at P.S Hajipura, Sialkot, on the complaint of Amjad Riaz (petitioner) regarding abduction of his son Bilal, aged 8 years.

2. The brief facts, leading to the filing of the instant petition are that Amjad Riaz petitioner alleged in his FIR No. 669 of 2009 supra that his son Bilal had been abducted at gunpoint by accused Mehmood Ahmad etc. at 5:15 p.m. on 29.11.2009; the local police arrested only one accused Mehmood Ahmad, Respondent No. 7 but without causing recovery of the abductee, he was sent to the judicial lockup; his co-accused are still at large; the petitioner filed a petition under Sections 22-A/22-B Cr.P.C before the learned Ex-Officio Justice of Peace, Sialkotfor redressal of his grievance qua dishonest investigation of his case and non recovery of his abducted son, which was disposed of on 11.01.2010 without any substantial relief to the petitioner; one Rehman Basheer, Respondent No. 6, who is nephew of Respondents No. 7 and 8 filed a petition under Section 22-A/22-B Cr.P.C against the petitioner and Respondents No. 3 to 5 for. registration of a criminal case against them in the backdrop of above said FIR, before the learned Ex-Officio Justice of Peace, Sialkot, who sought a report from the SHO and also ordered for personal appearance of the Principal of Punjab School Sialkot Booth, where the alleged abductee was a student; the police submitted its report and also got recorded the statement of the Principal; the learned Justice of Peace being dissatisfied with the report/comments of the SHO, referred the matter to DPO, Sialkot, Respondent No. 3 for another report, which was made available but the learned Ex-Officio Justice of Peace did not feel satisfied and he again called for the Principal of the said school for recording fresh statement before him; the attendance record of the Punjab School was taken into possession by the Justice of Peace and thereafter referred the matter for further probe to RPO, Gujranwala, Respondent No. 2; on one hand the police did not effect the recovery of the abducted son of the petitioner and on the other hand the learned Ex-Officio Justice of Peace embarked upon conducting parallel inquiry into the matter by referring the matter to different police officers and the Principal of the Public School; the inquiry being conducted by

the learned Ex-Officio Justice of Peace Sialkot caused anxiety and annoyance to the petitioner, hence, the instant petition.

3. Learned counsel for the petitioner contends that the impugned proceedings being conducted by the learned Ex-Officio Justice of Peace were violative of the powers conferred upon him under Sections 22-A/22-B Cr.P.C where-under a Justice of Peace could direct the police official/Investigating Officer to do the needful in accordance with law but he could not suggest the procedure or to give a direction to do or not to do a certain act; the Justice of Peace is not a judicial officer and he, at the most, can direct the SHO concerned to proceed and conduct the investigation in accordance with law; the proceedings being conducted by the Respondent No. 1 are not only directory but also the way, method, procedure and the result is being suggested by the Ex-Officio Justice of Peace which is in sheer disregard to the settled principles of dispensation of criminal justice; the police has already filed an incomplete report under Section 173 Cr.P.C before the trial Court and the learned Judicial Magistrate, being seized of the matter, had taken cognizance and summoned the accused to face the trial; under Section 156 Cr.P.C, an officer in charge of investigation had the statutory right to conduct investigation of a cognizable offence and such investigation could not be interfered with by the judiciary, what to talk about the powers of the Justice of Peace under Sections 22-A/22-B Cr.P.C, the anxiety on the part of Respondent No. 1 is uncalled for and by way of the partisan proceedings under Sections 22-A/22-B Cr.P.C, the investigation of the case got conducted by the petitioner was being interfered with, sans any justification, authority and approval of law; through the impugned proceedings, the Respondent No. 1 was adamant to fabricate false evidence in favour of Respondents No. 7 to 10 etc. who are the accused of FIR No. 669/09 supra; the Ex-Officio Justice of Peace, Respondent No. 1 has not only assumed the role of an Investigating Officer but has also changed the inquiry of the aforesaid application of Respondent No. 6 at lightening pace from the first I.O to the DPO and then to the RPO which amounts to making a mockery of law; the abducted son of the petitioner is yet to be recovered due to indolent behaviour of the Investigating Officer and on the other hand the Respondent No. 1 through the impugned proceedings has encouraged them to be as apathetic to the petitioner as they can; the learned Ex-Officio Justice of Peace may be estopped to conduct impugned inquiry/investigation and let the police do its duty under Section 156 Cr.P.C; the impugned proceedings may be declared illegal, unwarranted by law and ab-initio void.

4. On the other hand learned Assistant Advocate General assisted by learned counsel for Respondent No. 6 submits that the petitioner has filed the instant petition malafidely and maliciously so as to camouflage his baseless and concocted version, contained in FIR No. 669/09 supra; the petitioner is a habitual offender and a conspirator by temperament who has not even spared his minor son aged 8 years and has used him as a tool against all ethical norms to lodge a false case against the Respondents No. 7 to 10; the application under Sections 22-A/22-B Cr.P.C moved by Respondent No. 6 before the learned Ex-Officio Justice of Peace is based upon true facts whereby a criminal case is required to be registered against the petitioner as he had lodged a false case against the relatives of Respondent No. 6 qua the abduction of his son who was regularly, attending his classes at above said Punjab School even after the registration of the said criminal case; the inquiry being conducted by Respondent No. 1 was the need of the hour and the anxiety shown by. him was natural and called for due to obnoxious conduct of the petitioner; the proceedings pending before the Respondent No. 1 were legal and justified which had no bearing upon the proceedings of the trial being conducted by the learned Judicial Magistrate; the instant petition may be dismissed, being devoid of merit.

5. I have heard learned counsel for the parties and have perused the entire relevant record.

6. The petitioner is the complainant of the above said criminal which has been got lodged by him against Respondents No. 7 to 10 with the allegation that they had abducted his minor son

Bilal Ahmad at gun point on 29.11.2009 and the people present at the spot including the complainant could not save the innocent child except watching the seen helplessly. According to the FIR the accused had committed the occurrence in the perspective of previous enmity between the parties. This case is pending investigation with, Malik Ashraf ASI, Respondent No. 5 who has virtually done nothing except causing the arrest of Mehmood Ahmad accused, Respondent No. 7 and dispatching him to the judicial lockup without the recovery of the abductee. He has submitted an incomplete challan under Section 173 Cr.P.C before the learned Judicial Magistrate for trial of the accused. The other accused are still at large. At this stage, Respondent No. 6, a relative of accused Mehmood Ahmad and Muhammad Haneef, Respondents No. 6 & 7 moved an application Under Sections 22-A/22-B Cr.P.Crequesting therein that case FIR No. 669/09 supra had been lodged by Amjad Riaz (petitioner) with a concocted version as his allegedly abducted son had been attending his classes at the Punjab School Sialkot Booth regularly even after the registration of said FIR, so a criminal case be registered against him. Such an application perse, is not maintainable for the reason that it required an action by the Ex-Officio Justice of Peace which is directly relatable to the outcome of the investigation of the above said FIR. The contention of RehmanBasheer, Respondent No. 6, as contained in his application, may be the version of the accused Mehmood Ahmad etc. during the course of investigation yet it could not be entertained and considered by the Respondent No. 1 for holding/directing inquiries one after the other. The Ex-Officio Justice of Peace could have disposed of the petition with the direction to the petitioner and the accused of the above said case to join the investigation and raise the plea of their choice before the Investigation Officer but he instead, indulged himself in a series of inquiries/investigations, as mentioned hereinbefore, which is uncalled for and unwarranted by law. A direction could have been passed by the Justice of Peace to the Police Officer, connected with the investigation of the said FIR to do the needful in accordance with law and even for that matter an officer in charge of investigation did not require any permission to investigate the circumstances of the said case from the judiciary, what to talk about an order in this regard, by the Justice of Peace under Sections 22-A/22-B Cr.P.C. It is the domain of the Investigating Officer to collect the evidence in a criminal case under Section 156, 157 Cr.P.C and the Courts could not interfere with it by suggesting the mode, procedure or the result of such investigation. The powers under Sections 22-A/22-B Cr.P.C conferred upon the Ex-Officio Justice of Peace mainly relate to the issues, non registration of a criminal case, transfer of investigation from one police officer to an other within the scope of section 18(6) Police Order 2002, and the neglect/failure or excess committed by a police authority in relation to its functions and duties. The full bench of this Court in a case reported as "Khizer Hayat and others Vs. Inspector General of Police (Punjab), Lahore and others" (PLD 2005, Lahore, page 470) has taken care of the aforesaid area of jurisdiction of the Ex-Officio Justice of Peace under Section 22-A(6) Cr.P.C. As per the full bench judgment, a Justice of Peace can direct the police to do the needful in accordance with law but not to suggest the • procedure or give direction, as mentioned above, to do a certain act. Any such direction given, during the investigation of a criminal case, is a plain departure from the settled provisions of law.

7. In another case "Muhammad Habib Vs. Addl: Sessions Judge/Justice of Peace, Jampur, District Rajanpur and two others" (PLD 2009 Lahore 235) it has been observed by this Court:--

"An Ex-Officio Justice of Peace i.e Sessions Judge and nominated Addl: Sessions Judge in the District/Sessions Divisions, has the powers to issued appropriate directions to the police authorities concerned on a complaint regarding non-registration of criminal case, transfer of investigation from one police official to another and for neglect, failure or excess committed by a police authority in relation to its functions and duties. At the cost of repetition it is noteworthy that justice of Peace or Ex-Officio Justice of Peace is not a Court as envisaged under Section 22(6) of the Cr.P.C or the relevant provisions of the C.P.C. The available record does not show as to how and with what authority the learned Addl: Sessions Judge Jampur, entertained the request of Mst. Subhal Mai, respondent as Ex-Officio Justice of Peace,

particularly when it is manifest from a bare perusal of sections 22-A and 22-B, Cr.P.C that the controversy between Mst. Subhal Mai respondent and Examiner Muhammad Habib, petitioner does not fall within the legally defined domain of Justice of Peace of Ex-Officio Justice of Peace."

8. I find that through the impugned proceedings being conducted by the learned Ex-Officio Justice of Peace, Sialkot, the fate of Criminal Case No. 669/09 Supra is being decided independent of the investigation of the said case, which cannot be approved of. The accused instead of joining the investigation, are absconding and their relative, Respondent No. 6 through an application under Section 22-A/22-B Cr.P.C has planned to sideline the investigation of the above said case and thereby, win an opinion from Respondent No. 1, qua the truthfulness or otherwise of the allegations contained in the mentioned FIR. The accused, Respondents No. 7 to 10 might have pondered over the proposition of approaching Respondent No. 1 to seek a relief of their choice but the law is not on their side, so far as the application under discussion, is concerned. It shall again be the authority of the Investigating Officer to decide taking action under Section 182 PPC if he comes to the conclusion on conducting the investigation that the charges alleged by the informant were false. In such like situation, the initiation of proceedings against the informant/complainant shall be synonymous with the outcome of the investigation.

9. The nutshell of the above discussion is that the Ex-Officio Justice of Peace, Respondent No. 6 could only pass a direction to the Investigating Officer of case FIR No. 669/09 supra to conduct the investigation honestly and evenhandedly, by hearing both the sides, collect the evidence and prepare a report under Section 173 Cr.P.C containing a gist of investigation. Rest done by the Respondent No. 1, as discussed above, cannot be approved of nor it can be held as legal or warranted by law. The instant petition is allowed within the meaning that the proceedings pending before the learned Ex-Officio Justice of Peace, Respondent No. 1 on an application under Sections 22-A/22-B Cr.P.C, moved by Respondent No. 6,. are hereby quashed being illegal, unwarranted by law and ab-initio void. The Respondent No. 6 and the Respondents-Accused No. 7 to 10, however, shall be at liberty to advance any plea of their choice, before the Investigating Officer who presently; conducts the investigation of above said criminal case. Disposed of.

(R.A.) Petition allowed.

PLJ 2010 Cr.C. (Lahore) 857

Present: Shahid Hameed Dar, J.

MAZHAR IQBAL--Petitioner

Versus

STATE & another--Respondents

Crl. M. No. 4300-B of 2010, decided on 19.5.2010.

Words and Phrases--

----Zina--Offence of Zina shall be deemed to have been committed if the penetration has taken place, without entering into the question as to how long it went. [P. 859] A

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

----S. 497--Pakistan Penal Code, (XLV of 1860)--Ss. 365-B & 376--Bail, refusal of--Prohibitory clause--Opinion of I.O is sketchy, in nature--Question of--Why a virgin educated girl shall put her honour and dignity as well as that of her family at stake for implicating in a Criminal case--Swabs were not stained with semen--Victim refused to cooperate in connection with DNA Test--Complainant was student of 3rd year--After having been ravished by sex-

mongers, managed to rejoin her family with a story of painful and frightful details--Being a student was bound for a bright and purposeful future but for satanic act of the accused her dreams had been shattered--Sanctity of the report of Chemical examiner would be assessed during the course of the trial--Opinion of Investigating officer is sketchy in nature--Offence with which the accused is charged falls within the mischief of prohibitory clause of S. 497, Cr.P.C.--Bail was refused. [Pp. 859 & 860] B & D

Solitary statement of victim--

----Purpose of--Solitary statement of victim can be relied upon for purpose of prosecution of an accused charged with identical allegation. [P. 860] C

Ch.Waseem Ahmad Gujjar, Advocate for Petitioner.

Mr. Anwar Basit, Advocate for Complainant.

Sahibzada M.A Amin Mian, Addl. P.G. for State.

Date of hearing: 19.5.2010.

Order

The petitioner Mazhar Iqbal seeks his release on bail in case FIR No. 118 of 2010 dated 20.03.2010 under Section 365-B read with Section 376 PPC, registered at Police Station City Kamalia, District Toba Tek Singh wherein, he had been arrested on 07.04.2010 by the police and was dispatched to the judicial lockup on 12.04.2010.

2. The complainant Mst. Zakiya Parveen has briefly, alleged in the FIR that she was moving through a street Mohallah Hussain Shah Wali at about 8:30 a.mon 17.03.2010 in order to go to Degree College for Women, Kamalia where she was a student of 3rd year. Suddenly two motorcyclists intercepted and stopped her at gun point; in the meanwhile, two persons aboard a car reached there and forcibly made her sit in their car and drove her to a room of Derawhich was situated at a deserted place; they gagged her mouth by an adhesive tape, tied her hands and feet and confined her there: one of the accused was Mazhar (petitioner) who and his companions committed Zina-bil-Jabbar with her and illegally detained her; on the second day, the accused went to city Kamalia to fetch food so she slipped away from that place and reached a bus stop where from she reached Data Darbar, Lahore by a wagon and then, managed to reach Chichawatni by bus; her maternal uncle and brother brought her back to the house of her parents on 19.03.2010.

3. The complainant was medically examined at 4:00 p.m on 20.03.2010 by a Women Medical Officer who as per her findings, found her menstruating since 18.03.2010. She also found that the examinee's hymen was healed old and vagina admitted two fingers tightly. The Lady Doctor also found some laceration and abrasions on the body of the victim. She obtained vaginal swabs for detection of semen grouping, semen analysis and for DNA test. The report of the Chemical Examiner, Punjab, Lahore indicated that the swabs were not stained with semen, however, were stained with blood; the complainant/victim refused to cooperate in connection with DNA test and submitted written application in this regard on 05.04.2010 to the SHO.

4. The Investigating Officer conducted investigation of this case by associating both the parties with the process of investigation and recorded his findings qua the innocence of the petitioner vide case Diary No. 15.04.2010, consequently a report under Section 173 Cr.P.C. was prepared by the Investigating Officer with the name of the petitioner in Column No. 2 of the Challan.

5. It has been contended by the learned counsel for the petitioner that a false case has been got lodged by the complainant under a conspiracy so as to cause humiliation and dis-respect

to the petitioner; that the version of the complainant had not been supported by any witnesses at all; that the medical evidence negates the version of the complainant; that the complainant/victim stated herself to be an unmarried girl who had been allegedly subjected to Zina-bil-Jabbarby the petitioner and his co-accused but her medical examination, just after three days of the alleged occurrence, had unfurled falsity of her version; that the petitioner had been found innocent during the course of investigation and a report under Section 173 Cr.P.C. had been submitted by the Investigating Officer with name of the petitioner in its Column No. 2; that there is a delay of three days in lodgment of the FIR, for which no explanation had been offered by the complainant; that the petitioner is entitled for grant of bail as his case falls within the ambit of further inquiry.

6. On the other hand, learned Addl: Prosecutor General, assisted by learned counsel for the complainant has controverted the arguments of the other side with the contention that the version of the complainant/victim did not require any corroboration as no girl would ever like to put her honour and dignity at stake for falsely implicating a person in a criminal case; that the victim's career and future had been ruined by the devilish act of the petitioner as she was a student of 3rd year and was moving towards a bright and secure future; that the act of the accused petitioner had not only ruined the victim but also her entire family, had been stigmatized due to ravishing of their girl; that ipsi dixit of the opinion of the police is not binding upon the Court; that the offence committed by the petitioner falls within the prohibitory clause of Section 497 Cr.P.C., so he was not entitled for release on bail.

7. Arguments heard. Record perused.

8. The complainant lady was a student of third year when forcibly picked up and abducted at gunpoint by the accused-petitioner and others while going to her college, where, she was a student of 3rd year. She was rendered helpless by applying a adhesive tape on her mouth and also tied her hands and feet. She was driven to a DERA situated at a deserted place where the petitioner and her co-accused subjected her to act of coitus against her will. She succeeded in fleeing away from the clutches of the petitioner and her co-accused when they had left for city Kamalia to fetch food. The medical evidence does not negate the version of the petitioner in any manner. As her hymen was not found intact though, observed to be healed old. The non detection of spermatozoa on the viginal swabs may be due to the fact that she was found menstruating at the time of her medical examination by the Medical Officer.

9. So far as the definition of rape/zina is concerned, the offence of Zina shall be deemed to have been committed if the penetration has taken place, without entering into the question as to how long it went.

A

10. The complainant was a student of 3rd year in Government Degree College for Women Kamalia and had set off for her college on the day of occurrence, as usual, absolutely, unaware of the circumstantial terror, which fell upon her when the petitioner and his co-accused abducted her for satisfaction of their lust. She, after having been ravished by the sex-mongers, managed to rejoin her family with a story of painful and frightful details. She being a student of degree classes was bound for a bright and purposeful future but for the satanic act of the petitioner and his co-accused her dreams had been shattered. Why would she cook up a story to falsely implicate the petitioner when she or her family had no grudge or bias against him.

11. The solitary statement of the victim/prosecutrix can be relied upon for the purpose of prosecution of an accused charged with, identical allegation. The required degree of corroboration to the statement of the complainant-victim is available in this case in the form

of the MLR of the victim which has been discussed earlier. The learned counsel for the petitioner failed to answer to the query of this Court as to why, a virgin educated girl shall put her honour and dignity as well as that of her family at stake for implicating someone in a criminal case. The sanctity of the report of Chemical Examiner shall be assessed during the course of the trial. I find that the opinion of the Investigating Officer is sketchy, in nature. The offence with which the petitioner is charged falls within the mischief of prohibitory clause of Section 497 Cr.P.C.

12. For what has been discussed above, I am not inclined to admit the petitioner to post arrest bail. The instant petition stands dismissed.

(R.A.) Bail refused.

PLJ 2010 Cr.C. (Lahore) 919

Present: Shahid Hameed Dar, J.

KASHIF alias KASHA--Petitioner

versus

STATE and another--Respondents

Crl.M. No. 4080-B of 2010, decided on 28.4.2010.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 324, 337F-5, 148, 149 & 34--Bail, grant of--Further inquiry--Petitioner had caused firearm injury on calf of grievous in nature--Petitioner repeated act if firing at time of occurrence--Locale of injury was on non vital part of body--Petitioner refrained reporting act of firing which reflects upon application of S. 324 PPC--Petitioner had no intention to fire upon any vital part of injured witness for purpose of launching murderous assault--Challan submitted in the Court--Trial have no commenced so for in--Accused was behind bars and no more required for purpose of further investigation--Application of S. 324 PPC shall be gone during course of trial after recording evidence of prosecution witness--Petitioner's case fall within ambit of further inquiries as envisaged u/S. 497(2) Cr.P.C.--Bail was allowed. [P. 921] A

Mian Shahid Ali Shakir, Advocate for Petitioner.

Sahibzada M.A Amin Mian, Addl. P.G. for State.

Date of hearing: 28.4.2010.

Order

The petitioners seek bail after arrest in case FIR No.315 of 2009 dated 01.06.2009 under Sections 324, 337F-5, 148, 149, 34 PPC registered at Police Station Khurianwala, District Faisalabad on the complaint of Muhammad Naeem Sarwar.

2. Precisely, the complainant has alleged in the FIR that Samar Abbas alia Ali armed with repeater gun, Kashif alias Kasha armed with pistol .30 bore, Pervez alias Peja armed with carbine, Asif armed with rifle .222 bore and Azam alias Kazam armed with rife .244 bore attacked the complainant party at about Mughrab prayer wela on 31.05.2009; the accused Kashaf fired with his pistol which landed on left calf of Ghulam Mustafa, brother of the complainant, Pervez fired with his carbine which landed on the right foot of injured Ghulam Mustafa, Samar Abbas fired with his repeater gun which landed on right foot of the said injured who got badly wounded due to firing of the accused; the accused Asif and Azam kept on raising Lalkaras and made aerial firing. The motive behind the occurrence was that a quarrel had taken place between the accused and the injured a day earlier.

3. Learned counsel for the petitioner contends that Samar Abbas accused has been admitted to post arrest bail and the case of the petitioner is at par with him so on the plea of consistency, the petitioner is also entitled for the same relief; that the prosecution case has been found false to the extent of all the co-accused of the petitioner during the course of investigation; that solitary shot is attributed to the petitioner and that too on non-vital part of the body; that the injury attributed to the petitioner is simple in nature; that the petitioner has not allegedly repeated the act of firing; that offence under Section 324 PPC is not made out as the Medical Officer had found the injured, stable at the time of his medical examination; that the petitioner is behind the bars for the last about 5 months and he is no more required for the purpose of further investigation. Relies upon case titled Muhammad Umar Vs. The State and another (PLD 2004 SC Page 477).

4. Learned Addl: Prosecutor General, assisted by learned counsel for the complainant submits that the petitioner is specifically nominated in the FIR with a particular role and the medical evidence corroborates the said role; that the petitioner abscondeded after the registration of the case and was arrested after the about six months; that the learned Prosecutor, however, admitted that no proceedings under Section 87 Cr.P.C were carried out against the accused-petitioner; that the petitioner led to the recovery of a pistol on 20.11.2009 during the course of investigation; that Section 324 PPC is applicable in this case as a fire-arm has been used in the occurrence; that the challan has been submitted in the learned trial Court and there is likelihood of commencement of the trial soon.

5. Arguments heard. Record perused.

6. The petitioner though specifically alleged to have caused a fire-arm injury on the calf of the injured yet, the injury has not been found grievous in nature. It has not been alleged against the petitioner that he repeated the act of firing at the time of occurrence. The locale of injury is non-vital part of the body. The injured apparently, was at the mercy of the petitioner and his co-accused, being empty handed, yet, the petitioner refrained from repeating the act of firing which reflects upon application of Section 324 PPC. It appears that the petitioner had no intention to fire upon any vital part of the injured witness for the purpose of launching murderous assault. Challan though, submitted in the court, the trial has not commenced so far. The accused is behind the bars, since the date of his arrest and was no more required for the purpose of further investigation. No useful purpose would be served by keeping the accused in custody any longer. The application of Section 324 PPC shall be gone into only during the course of the trial after recording the evidence of the prosecution witnesses. Prima-facie, the case of the petitioner falls within the ambit of further inquiry as envisaged under Section 497(2) Cr.P.C. aforementioned. The luminous judgment of the august Supreme Court of Pakistan provides guidance for admitting the petitioner to post arrest bail.

7. For the forgoing reasons, I allow this petition and the petitioner is admitted to post arrest bail provided he furnishes bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Courts.

(S.L.) Bail allowed.

2010 Y L R 1727

[Lahore]

Before Ijaz Ahmad Chaudhry and Shahid Hameed Dar, JJ

MUHAMMAD AZAM---Petitioner

Versus

RAFAQAT ALI and 3 others---Respondents

Crl. Miscellaneous No.2141/CB of 2010, decided on 6th April, 2010.

Criminal Procedure Code (V of 1898)-

----S. 497(5)---Penal Code (XLV of 1860), Ss.302,324, 148 & 149---Anti-Terrorism Act (XXVII of 1997), S.7---Qatl-e-amd and attempt to commit qatl-e-amd---Bail, cancellation of---Accused were named in the F.I.R. of the occurrence which had resulted in death of five persons and firearms injuries to two more persons---Police, though had declared the accused innocent, yet ipse dixit of police was not binding on the court---Plea of alibi taken by the accused person was not beneficial as the first Investigating Officer had not conducted the investigation honestly and fairly---Sufficient material was available to connect the accused with the commission of the alleged offence---False implication of accused was not likely in the absence of previous enmity between the parties---Accused persons were, prima facie, involved in a heinous criminal case, which fell within prohibitory clause of S.497(1), Cr. P. C. ---Bail granted to accused persons was, therefore, cancelled.

2007 SCMR 482 ref.

M. Iqbal Bhatti for Petitioner.

Ahsan Rasul Chattha, D.P.-G. for the State.

Sakhawat Ali for Respondents Nos.1 to 3.

Muhammad Iqbal S.-I. with police file.

ORDER

Through this application under section 497(5), Cr.P.C. the petitioner seeks cancellation of bail granted to respondents Nos.1 to 3, who are accused in case F.I.R. No.617 of 2009 dated 2-12-2009, registered at Police Station Badami Bagh, Lahore, under sections 302, 324, 148, 149, P.P.C. read with section 7 A.T.A. 1997.

2. Briefly, the facts of the case as contained in the F.I.R. lodged by the petitioner/complainant are that on 2-12-2009 at about 12-30 noon he reached the street of his house in the company of his son Wajahat Hussain from his college and found some persons gathered there; Muhammad Pervez, paternal nephew of the complainant, informed him that the accused Yasin and Noman alias Nona had abused and slapped him early in the morning on the false pretext that he was obstructing the sale of their house; due to which the accused Yasin,

Noman alias Nona along with his friends Liaqat Ali alias Lalu. Shoukat Ali, Sarwar alias Shera. Rafaqat Ali sons of Muhammad Aslam and Muhammad Naeem Butt had come again there to quarrel; the complainant alleged that he also intervened and tried to patch up the matter but the accused Muhammad Yasin, abused him and commanded his brother Noman alias Nona and his friends not to let the complainant party go alive whereupon, all the accused, with their respective weapons, made straight firing; the fire of Muhammad Yasin hit Wajahat Hussain son of the complainant who subsequently died, the fire of Noman accused hit Muhammad Aamir Hussain, neighbour of the complainant who also subsequently expired; Liaqat Ali alias Lalu hit with his fire at Sajjad son of Muhammad Ashraf a passerby (minor) who also expired, the accused Muhammad Naeem Butt fired against Muhammad Pervez and injured him who too expired subsequently. The remaining accused made indiscriminate firing while standing in the street and thereby injured Abid Hussain son of Sadiq Ali, Qaisar and Muazzam Ali (a minor) son of Ghulam Mustafa. The injured Qaisar also subsequently expired due to injuries. In this way, in this occurrence, five persons were murdered and two sustained injuries. The occurrence was witnessed by the complainant, Zulfiqar Ali son of Ismail, Mumtaz and Sajid Hussain who saved their lives by lying on the ground. It was alleged that all the accused were armed with pump action guns, pistols, etc. who by making indiscriminate firing succeeded to escape away.

By way of supplementary statement of P.Ws. namely Muhammad Azam complainant, Muhammad Ashraf, Shakil Ahmad and Muhammad Ijaz dated 14-12-2009, the accused Tanveer alias Billa Limmu Wala, Kashif alias Hero and Usman were also implicated in the alleged indiscriminate firing.

3. Learned counsel for the petitioner contends that the learned trial Court has granted bail to respondents Nos.1 to 3 only on the plea that they were declared innocent during the course of investigation. It is submitted that when the ugly design, ulterior motive, desire for pecuniary gains of the Investigating Officer disclosed upon the complainant, he immediately urged the matter before the higher police officers and the investigation was entrusted to S. P. (Investigation) who probed into the matter and made strong condemning report against the Investigating Officer Muhammad Ashraf Inspector and found that despite the overwhelming direct evidence connecting the accused-respondents with the commission of the offence, the condemned Investigating Officer dishonestly interpolated the evidence and declared the respondents/accused innocent just to facilitate them; that during the subsequent investigation these accused had rightly been found guilty of the offence as specific roles were ascribed to them; that they made firing with different sort of weapons which resulted into the murder of Aamir, Qaisar, Wajahat, Pervaiz and Sajjad who died due to the injuries received by them whereas Moazzam and Abid Hussain also received injuries, as such the medical evidence supports the ocular account; that offence with which the respondents are charged falls within the prohibitory clause section 497(1), Cr.P.C., and the respondents/accused are not entitled for grant of bail and requests that their bail may be cancelled /recalled. Learned counsel for the petitioner has placed reliance on the judgment of the honourable Supreme Court of Pakistan reported in 2007 SCMR 482 in support of his contentions.

4. The learned counsel for the respondents has submitted that they have been falsely implicated in this case with, mala fide on the part of the complainant who has widened his net by involving all the male members of the accused as respondents Nos.1 to 3 are real brothers; that no specific role has been attributed to the respondents by the eye-witnesses; challan has been submitted in the Court and respondents are facing trial and no allegation of misuse of concession of bail has been levelled against them; that the respondents remained on physical remand for 14 days and nothing was recovered from their possession. It is also contended that a number of persons had appeared from both sides during the investigation and then respondents were declared innocent by the Investigating Officer and that they have

not been declared innocent in a slipshod manner. It is contended that Rafaqat and Shafaqat are residing in the same vicinity but they were residing at some other places while Muhammad Sarwar alias Shera respondent is residing at Badami Bagh, Lahore.

5. We have heard the learned counsel for the parties and perused the record. The incident in the present case took place at 2-30 p.m. whereas F.I.R. was registered on 2-12-2009 at 3/40 a.m. on the statement of the petitioner. In the present incident five persons have lost their lives and two have received fire-arm injuries. Respondents Nos.1 to 3 have been specifically named in the F.I.R. with a specific role of causing, fire-arm injuries to Abid and Qaiser. So far as the innocence of the respondents is concerned, the ipse dixit of the police is not binding on the Court, even otherwise the plea of alibi taken by the respondents is not beneficial as the first Investigating Officer had not conducted the investigation honestly and fairly. There is sufficient material to connect the respondents with the commission of the crime, in which, five persons lost their lives and two have received fire-arm injuries. There is no enmity between the parties to falsely implicate the respondents in the present occurrence if they have been participated therein. Under the above circumstances, prima facie, the respondents are involved in a heinous criminal case, which falls within the prohibitory clause of section 497(1), Cr.P.C. and it is a fit case for cancellation of bail. This application is accepted and the bail already granted to the respondents is hereby recalled. They shall be committed to custody. However, it is made clear that the observations made hereinabove are tentative in nature and are not designed to influence the course of trial in any manner.

A.R.K./M-277/K Petition accepted.

2010 Y L R 1742

[Lahore]

Before Shahid Hameed Dar, J

Master ALLAH RAKHA---Petitioner

Versus

THE STATE and another---Respondents

CO. M. No.2791-B of 2010, decided on 12th April, 2010.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.409---Prevention of Corruption Act (II of 1947), S.5---Criminal breach of trust by public servant---Bail, refusal of---Allegations against petitioner were supported by a long list of witnesses who had endorsed the version of the complainant---Petitioner had deposited thousands of rupees in public treasury but could not produce cogent and credible evidence before the Investigating Officer for his exoneration---Available evidence showed, prima facie, that petitioner was found involved in the alleged offence---Petitioner had caused loss of lacs of rupees to the public exchequer---Alleged offence fell within the ambit of prohibition of S.497, Cr.P.C.---No reason was found to believe that the petitioner had not committed any non-bailable offence---Bail was refused.

Ali Zia Bajwa for Petitioner.

Sahibzada M.A. Amin Mian, Additional Prosecutor-General for the State.

Shah Muhammad Mehdi Ata Ghazali, for the Complainant-Respondent No.2.

Farrukh Sohail, Inspector/Circle Officer, Anti-Corruption Establishment, Khushab.

ORDER

SHAHID HAMEED DAR, J.--The brief allegation against the petitioner is that he being Headmaster Government High School, Chak No.47/MB, District Khushab committed extensive financial corruption by committing theft of government property including the wood and electric wires worth thousands of rupees during his stay of 9 years as Senior Headmaster of the School. The detail of his malpractices committed has been furnished in the F.I.R. No.25 of 2009 dated 3-9-2009 under section 409, P.P.C. read with section 5, Prevention of Corruption Act 1947, Police Station ACE, Khushab.

2. Learned counsel for the petitioner submits that the petitioner has been falsely implicated in this case due to malice and ulterior motives of a subordinate School Teacher, namely, Ghulam Dastgir, who used Naseer Ahmad complainant as a tool against the petitioner, that the petitioner's career as a School Teacher, spanning over23 years is spotless and there has not been any such allegation against him earlier; that the said Ghulam Dastgir is inimical towards the petitioner as he was oftenly checked by the petitioner for his immoral and un-Teacher like conduct/behaviour; that no excessive fee has been charged by the petitioner from the students of 9th Class and a number of students and their parents have endorsed the innocence of the petitioner; that no wood has been stolen by the petitioner rather, in an open auction, the School trees were sold to the highest bidder and the money received therefrom was deposited in the treasury; that the petitioner himself deposited thousands of rupees of the alleged amount of misappropriated funds, even before the registration of this F.I.R. including, three months salary of Muhammad Irfan, a Teacher of the School; that nothing is outstanding against the petitioner at the moment, as such, he is no more required by the prosecution for further investigation; that the petitioner's case squarely falls in the ambit of further inquiry.

3. Learned Additional Prosecutor-General assisted by the learned counsel for the complainant has vociferously controverted the submissions of the learned counsel for the petitioner and contends that the petitioner stands involved in a number of complaints of financial as well as unmoral corruption; that all the charges against the petitioner were found correct during an inquiry prior to the registration of the F.I.R, as well as during investigation after the registration of the case; that all the concerned persons including the School Teachers and the parents of some of the students have joined the investigation and recorded statements under section 161 in support of the allegations contained in the F.I.R; that the offence with which the petitioner is charged falls within the prohibition of section 497, Cr.P.C; that the petitioner has a history of involvement in such-like activities even in the past and that another criminal case of the same nature stands registered against him wherein he has been challaned and facing trial at the moment.

4. I have heard learned counsel for the parties and perused the record. The petitioner is burdened with allegation of financial as well as immoral corruption. The allegations alleged against him are supported by a long list of witnesses who have recorded their statements under section 161, Cr.P.C. During the course of investigation wherein, they have endorsed the version of the complainant. During the course of inquiry he desperately attempted to get rid of the allegations against him and for this purpose he deposited thousands of rupees in the

treasury but could not produce any cogent and credible evidence before the Investigating Officer for his exoneration of the charge against him.

5. The corruption and malpractice unluckily, is the order of the day and people involve themselves in such-like undesirable activities without any prick of the conscience, only to amass wealth/ money. This cancerous vice has polluted a multitude of humanity and the Education Department is no exception. The corruption and the corrupt element has been flourishing overnight in the Society without any fear of being checked, for a number of years and a notion has developed that no one could put brakes to the light-speed acceleration of such elements who, by virtue of their unbridled powers and influence could reach any office of public importance.

6. A duty has been cast upon every Muslim, by Almighty, to be prepared for the life hereinafter and ought not indulge oneself in waging rivalry in worldly increases/gains. There however, is a ray of hope for a couple of years that the Society is inching towards a corruption free future, which was longed for by the stalwarts of our history. This ray of hope has been kindled by the rejuvenated judiciary/judicial system of Pakistan. The apex Court of the country has passed unparalleled luminous judgments towards check and eradication of corruption which has perceivably, brought a miraculous change in the thoughts of a common man who, does not appear to be far off from a straight path, shown by Glorious Quran.

7. The educational system, having been polluted with such-like obnoxious vices is also required to be checked immediately and efficaciously. The petitioner hardly caring for the noble field he is in, committed malpractice and did misdeeds, to the disappointment of students, their parents and his colleagues. Many witnesses have recorded their statements in support of allegations contained in the F.I.R. and all the requisite documents have been taken into possession by the Investigating Officer, which prima facie, create nexus between the petitioner and the charges, alleged in the F.I.R.

8. He has been found involved in this case by the Inquiry Officer in pre-registration of case, inquiry and post registration, of F.I.R. investigation. The offence with which the petitioner is charged falls within the ambit of prohibition of section 497; Cr.P.C. He has caused a loss of lacs of rupees, to the public exchequer, who after having been arrested, has been recently dispatched to the judicial lock up. There is no reason to believe that he has not committed any non-bailable offence.

9. For what has been discussed above, I do not find myself inclined to admit the petitioner to post-arrest bail, which is declined accordingly. This petition stands dismissed.

A.R.K./A-98/L Petition dismissed.

2010 Y L R 1937

[Lahore]

Before Shahid Hameed Dar, J

SHAHNAZ BIBI---Petitioner

Versus

THE STATE and others---Respondents

Criminal Miscellaneous No. 4157/B of 2010, decided on 29th April, 2010.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.302, 147 & 149---Qatl-e-amd---Bail, grant of--- Further inquiry---Complainant alleged in F.I.R. that the accused, her real sister, with two other co-accused had choked her mother to death by gagging her mouth with a piece of cloth in order to take control of the property left by father of both the complainant and the accused---Complainant changed her version, however, before Investigating Officer by stating that she could not recognize the two co-accused as they had covered their faces with mufflers at the time of alleged occurrence---Prosecution witness, another sister of complainant, also took a U-turn by endorsing the changed version of the complainant---Post-mortem report did plot show any signs of death due to asphyxia---Accused was found to be innocent during investigation--Case of accused, prima facie, needed further inquiry---Abscondence alone was not a hurdle to grant of bail if accused otherwise was entitled to that---Accused, being a female, her case was also covered by S.497(1), Cr.P.C.---Accused was admitted to post-arrest bail in circumstances.

Ch. Hamayun Rasheed for the Petitioner.

Sahibzada M.A. Amin Mian, Addl. P.G. for the State.

Jaffar Ali, A.S.-I. with police file.

ORDER

SHAHID HAMEED DAR, J.--Petitioner Shehnaz Bibi widow of Muhammad Sadiq, stands arrested in case F.I.R. No. 476 of 2008, dated 15-8-2008, for offences under sections 302, 147, 149 P.P.C., registered at Police Station, City Pattoki, District Kasur, on the complaint of Mst. Shamas-un-Nisa.

2. Succinctly, the version of the complainant, as contained in the F.I.R. is that Mst. Shehnaz Bibi, Mst. Fauzia, Zahid alias Mithi and Tariq alias Tara, attempted to commit the murder of Mst. Saeeda Begum, the mother of the complainant at 9/10 p.m. on 14-8-2008 but they could not do so, due to arrival of Maqsood, etc. and they ran away; that the aforementioned accused along with Sh. Muhammad Ameen and Khurram again entered the house of the complainant, at 1-00 a.m. on 15-8-2008 and overpowered the complainant, her sister Kaneez Fatima, Khurram Murtaza and Arbab; Mst. Shehnaz Bibi accused gagged the mouth of her (complainant) mother by shoving a cloth in her mouth and placed a cushion on it, the accused Ameen and Muhammad Zahid caught hold of her hands and feet, who died within 2/3 minutes due to respiratory arrest, the accused

committed the murder of the mother of the complainant for taking the control of the property. The motive behind the occurrence was that the father of the complainant had some immovable property which, the accused party conspired to occupy. Ameen accused had also forcibly taken over the shops of the complainant through Mst. Seehnaz Bibi and that litigation was pending between the parties.

3. Learned counsel for the petitioner contends that the petitioner has not committed any offence and she has been falsely implicated in this case in the backdrop of property disputes; that the medical evidence is inconsistent with the version of the complainant; that the deceased lady was 90 years of age and a chronic patient of asthma besides being a heart patient, who died naturally but the complainant cooked up a false case to falsely implicate the petitioner and others; that the petitioner was found innocent during the course of investigation and has been placed in column No. 2 of the challan.

4. Learned Additional Prosecutor General opposes the grant of bail to the petitioner with the contention that the petitioner is nominated in the F.I.R. with a specific role of causing blockage of windpipe of the deceased by thrusting a piece of cloth, into the mouth of the deceased and thereby caused obstruction of respiration; that the petitioner had absconded after the occurrence and was declared a proclaimed offender during the course of investigation; that the petitioner has committed the murder of her mother who is not entitled for any relief.

5. Arguments heard. Record perused.

6. The petitioner admittedly is a daughter of the deceased. The complainant is a police official and employed at Karachi. The bone of contention between the parties is some immovable property, bequeathed by the father of the complainant, and that of the petitioner. Unluckily, the dispute of property has overshadowed the death of the deceased as the complainant, real sister of the petitioner, is adamant to implicate the petitioner in this case as an accused whereas, the petitioner has raised the plea during the investigation that she had a dispute qua the partition of property with her sister, the complainant of this case, and that her mother was a chronic patient who met with natural death. Mst. Shamas-un-Nisa, the complainant, took a summersault on 17-10-2008 and submitted her sworn affidavit, before the Investigating Officer with the contention that two of the accused persons had muffled their faces at the time of occurrence and that she failed to identify the accused Muhammad Ameen and Khurram at the time of occurrence. She further deposed that Ameen and Khurram were not the accused of this case and assisted them in earning an opinion of innocence, during the course of investigation. As per investigation, she stated that Muhammad Ameen, etc., had vacated the shops and handed over the possession thereof, to the complainant. Mst. Kaneez Fatima (P.W.) too, took a "U" turn to endorse the changed version of her sister, the complainant due to new development.

7. The cause of death recorded by the Medical Officer does not disclose the death of the deceased due to asphyxia. No bruises or abrasions were found on the lips, angles of the mouth, alongside the nostrils, on the cheeks, molar region or on the lower jaw, by the Medical Officer at the time of post mortem examination of the dead body. The inner surface of the lips was also not found lacerated. The nose was found flattened. No bloody froth or saliva was noticed dribbling out of the nostrils or mouth. It has also not been mentioned in the postmortem report that the skin of the body showed puntiform ecchymosis with lividity of the limbs and he also did not find any rupture of the tympanum which could have occurred from the violent effort at respiration.

8. The doctor did not find any cloth allegedly shoved in the mouth of the deceased.

9. The report of Histopathologist has not been made available by both sides and instead reference has been made to the opinion of the Medical Officer whereby the cause of death of the deceased had been recorded without any reference to asphyxia.

10. The petitioner was found innocent during the course of investigation and placed in column No.2 of the challan. Prima facie the case of the petitioner constitutes need for further inquiry within the meanings of subsection (2) of 1 section 497, Cr.P.C. Mere the factum of abscondence cannot impede the grant of bail to an accused if he/she is otherwise entitled to grant of bail, within the scope of section 497(2), Cr.P.C. Her case is also covered by section 497(1) Cr. P.C.

11. For what has been discussed above, I accept this petition and admit the petitioner to post-arrest bail subject to her furnishing bail bonds in the sum of Rs.100,000 (Rupees one lac) with two sureties each in the like amount to, the satisfaction of the learned trial Court.

12. The prosecution may approach this Court for seeking cancellation of bail, allowed to the petitioner, if any evidence establishes the cause of death as asphyxia.

13. Before parting with this order, it is clarified that all the observations made in this order are tentative in nature and shall have no bearing upon the merits of the case, during the course of the trial.

A.R.K./S-86/L Petition accepted.

2010 Y L R 1948

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ASIF---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 4354/B of 2010, decided on 4th May, 2010.

Criminal Procedure Code (V of 1898)---

----Ss. 498 & 561-A---Penal Code (XLV of 1860), Ss.353, 365, 380, 419, 511, 148 & 149---Assault or criminal force to deter public servant from discharge of his duty; kidnapping or abduction with intent secretly and wrongfully to confine person, theft in dewelling house and cheating by personation---Ad interim pre-arrest bail, confirmation of---Delay of seventeen days in lodging of F.I.R. was not explained by any plausible reason by complainant who was a Police Official himself---Alleged violence resulting in injuries to complainant could not be substantiated as he did not get himself medically examined---Both prosecution witnesses did not nominate the accused nor did they make any mention of alleged offences, namely, attempted abduction, impersonation or mobile phone

snatching---False implication of the accused due to malice or ulterior motive of the complainant could not be ruled out---Mere factum of involvement of accused in number of cases, without any conviction was not a hurdle to grant of bail to the accused---Case of accused was fully covered by S.497(2), Cr.P.C.---Ad interim pre-arrest bail of accused was confirmed in circumstances.

N.A. Butt for the Petitioner.

Sahibzada M.A. Amin Mian, Addl. P.G. for the State.

Aamir Nadeem Butt for the Complainant.

Muhammad Iqbal, S.-I. and Rustam Ali, A.S.-I. with police file.

ORDER

SHAHID HAMEED DAR, J.--Petitioner seeks bail before arrest in case F.I.R. No. 150/2010, for offences under sections 353, 365, 380, 419, 511, 148, 149, P.P.C. registered at Police Station Gowalmandi, Lahore, on the complaint of Rustam Ali A.S.-I.

2. Precisely the version of the complainant is that he was going to Police Station Gowalmandi, Lahore on foot in connection with his duty at 4/5.00 p.m. on 26-3-2010 when he reached in front of shop of Sardar Fish Seller, situated in Food Street Gowalmandi, he was confronted with Muhammad Asif and 3/4 unknown accused persons who caught him from his arms; one of the companions of Asif introduced himself as Inspector Anti-Corruption Establishment and started beating him; he caught hold the complainant and another person shot photographs; his official uniform/shirt was torn and he received injuries on his body; they attempted to forcibly abduct him whereupon he raised alarm which attracted a number of persons to the place of occurrence; some police officials reached there on an official vehicle, who rescued Rustam Ali, A.S.-I, the complainant; Muhammad Asif fled away with his companions and they also snatched a mobile phone Nokia from him; the complainant disappeared due to his injuries and fear of Anti-Corruption, he later on learnt that none of the aforementioned persons was an Anti-Corruption Officer, rather, he had impersonated as such, to exert pressure on him. The motive behind the occurrence was that he along with other police officials had caught Asif etc., red handed and registered a criminal case against him; that Muhammad Asif accused had also got lodged a criminal case F.I.R. No.117/2010 against the complainant and other police officials on the basis of bogus medical certificate, which was being investigated by D.S.P. Gowalmandi.

3. Learned counsel for the petitioner contends that there is an unexplained delay of 17 days in lodgment of F.I.R.; that the petitioner has been falsely implicated in this case due to malice and ulterior motives of the complainant who had lodged a false case against the petitioner as counterblast to F.I.R. No. 117 of 2010 whereof, the petitioner was the complainant; that none of the offences falls within the prohibitory clause of section 497 Cr.P.C.; that section 380 and sections 365 and 419 P.P.C. were not attracted against the petitioner as the petitioner had not been alleged to impersonate, as an officer of Anti-Corruption Establishment; that the allegation of violence upon the complainant is not supported by any medical evidence as he did not get himself medically examined; that insertion of section 511, P.P.C. indicates that the charge of alleged abduction and theft was false; that the petitioner's case calls for further inquiry into his guilt.

4. Learned Additional Prosecutor-General assisted by the learned counsel for the complainant has strongly opposed the grant of bail to the petitioner with the contention that Muhammad Asif accused and his family are a criminal lot and they stand involved in scores of criminal cases; that the accused petitioner too, has previous record of involvement in 10 criminal cases; his father is involved in 23 criminal cases and same is the situation with other members of his family; that the petitioner is equally liable for the whole occurrence and his case cannot be segregated from the role of his co-accused and he is an accused in equal degree; that the prosecution witnesses support the version of the complainant as contained in the F.I.R.; that the petitioner has failed to point out any element of malice or ulterior motive on the part of the complainant and he is not entitled for extraordinary concession of pre-arrest bail.

5. Arguments heard. Record perused.

6. The alleged occurrence is stated to have taken place at 4/5-00 p.m. on 26-3-2010 but the matter was reported to the police with a delay of about 17 days on 12-4-2010 for registration of the instant case for which no plausible explanation has/been offered by the complainant who himself is a police official and is supposed to understand, as to what a promptly lodged F.I.R. or a delayed F.I.R. means. It has been specifically alleged that the accused petitioner and his co-accused committed violence upon the complainant as a result of which he received a number of injuries but there is no medical evidence which could substantiate this part of F.I.R. as the complainant frankly admitted that he had not gone to any medical officer for medical examination of his injuries. No torn police uniform has been taken into possession by the Investigating Officer. I have gone through the record of this case, which indicates that two witnesses Muhammad Arshad Khan S.-I. and Abdul Jabbar constable had been examined under section 161 Cr. P.C. but none of the two witnesses nominates the petitioner as an accused of this case and instead they have deposed that 4/5 persons were dragging Rustam Ali A.S.-I. and that they had rescued him from their clutches. Both the witnesses have not stated about the alleged violence, attempted abduction of the complainant, impersonation or snatching of a mobile phone from the complainant. The photographs attached with the record hardly corroborate the allegations contained in the F.I.R. The petitioner is a complainant of case F.I.R. No.117/10 wherein Rustam Ali A.S.-I. is a nominated accused. The false implication of the accused/petitioner in this case due to malice or ulterior motives of the complainant, in attending circumstances of the cases, cannot be ruled out. The mere factum of involvement in a number of criminal cases, without any conviction, cannot impede the grant of bail to the petitioner, as his case is fully covered under section 497(2), Cr.P.C.

7. For what has been discussed above, I accept instant bail petition and confirm the ad interim pre-arrest bail already allowed to the petitioner on 27-4-2010 subject to his furnishing fresh bail bonds in the sum of Rs.100,000 (Rupees one lac) with one surety in the like amount to the satisfaction of the learned trial Courts.

A.R.K./M-302/L Petition accepted.

2010 Y L R 1988

[Lahore]

Before Ijaz Ahmad Chaudhry and Shahid Hameed Dar, JJ

TANVEER alias TEROO and another---Appellants

Versus

THE STATE---Respondent

Criminal Appeals Nos. 664, 655 and 234-J of 2007, heard on 5th April, 2010.

Penal Code (XLV of 1860)---

----Ss. 302/324/353/186/148/149/109---Anti-Terrorism Act (XXVII of 1997), S.7--Qatl-e-amd, attempt to commit qatl-e-amd and act of terrorism--Appreciation of evidence---F.I.R. in the case was recorded with an unexplained delay---None of the eye-witnesses had deposed that they knew accused and that they had seen them firing at the relevant time---Witnesses had made their statements only to the extent of their presence with Inspector/S.H.O. who had received an information that accused were present in the house in question and when they reached said house, the firing was started---Witnesses had not claimed that accused persons present in the house had actually fired at the Police party---Vague statements had been made by the eye-witnesses; and in such circumstances it could not be said that the prosecution had been able to prove case against accused through ocular account---Recovery of crime weapons was legally inconsequential and immaterial as there was no report of the Forensic Science Laboratory on record, whether the weapons recovered from accused persons had matched with the empties which were collected from the place of occurrence---As to which weapon had been used by them during the incident was not proved---To convict a person on capital charge, evidence should be of high quality and good standard, which was not available in the case---Prosecution was supposed to establish guilt against accused beyond shadow of reasonable doubt by bringing trustworthy, convincing and coherent evidence for the purpose of awarding conviction, but in the present case the prosecution evidence was not of such a character to sustain conviction of accused persons---Accused having made out a case for their acquittal, impugned judgment of the Trial Court was set aside and accused were acquitted from all the charges and were released.

Muhammad Inayat Ullah Cheema for Appellants.

Amjid Rasool Chattha, D.P.-G. for Respondent.

Date of hearing: 5th April, 2010.

JUDGMENT

IJAZ AHMAD CHAUDHRY, J.--Through this single judgment. we intend to dispose of Criminal Appeal No.664/2007, filed by Tanveer alias Teroo, Gulzar alias, Gulzari, Criminal Appeal No.655/2007, filed by Mujahid alias Mujahidi, Shahid alias Shadi alias Mocha and Criminal Appeal No.234-J/2007 filed by the aforesaid appellants including Mohsin alias Mohsini as all of them have arisen out of the same judgment dated 23-4-2007 passed by the learned Judge, Anti Terrorism Court No.1, Lahore, in case F.I.R.

No.137/2005 dated 16-5-2005, registered under sections 302/ 3241 353/186/148/149/109 P.P.C. and section ATA, 1997 at Police Station Khangah Dogran, whereby he convicted all the appellants under sections 302/149 P.P.C. and sentenced them to imprisonment for life each. They were also convicted under section 7(a) of the ATA, 1997 and sentenced to imprisonment for life each with a fine of Rs.25,000 each. They were further convicted under section 148 P.P.C. and sentenced to three years each. They were also convicted under section 186/149, P.P.C. and sentenced to imprisonment for three months each, under section 7 (h) of ATA, 1997 imprisonment for five years each under section 7(c) of ATA 1997 imprisonment for fourteen years and under section 324/149, P.P.C, ten years R. I. each. All the sentences were ordered to run concurrently with benefit under section 382-B, Cr.P.C. They were also directed to pay Rs.5,00,000 each separately to the legal heirs of Shaukat Ali deceased as compensation.

2. Briefly the prosecution case is that Saeed Inspector/S.H.O. Police Station Khangah Dogran had lodged the complaint Exh.PB on 16-5-2005 at 5-15 p.m. alleging therein that on the above said day he along with Zafar Ullah S.-I. armed with G-3 rifle, Shah Ali A,S.-I armed with G-3 rifle, Bashir Ahmad, A.S.-I armed with G-3 rifle. Ghulam Mustafa A.S.-I. armed with rifle, Abdul Hameed A.S.-I armed with rifle, Muhammad Arif/HC armed with rifle, Muhammad Akram armed with rifle, Ali Ahmad armed with rifle, Babar Zaman armed with rifle, Dilawar Hussain armed with rifle, Imtiaz Ahmad armed with rifle, Saeed Akhtar armed with rifle, Mushtaq Ahmad armed with rifle, Mujahid Inayat armed with rifle, Iftikhar Ahmad armed with rifle, Shaukat Ali armed with rifle and Naeem Ahmad armed with rifle were Present for patrolling and for arrest of Proclaimed offenders where he received a spy information that accused Shahid alias Mocha armed with 44 bore rifle, Tanveer alias Teroo armed with 222 bore rifle, Sarwar alias Sari armed with 44 bore rifle, Jamshed armed with 44 bore rifle, Mujahid alias Mujahidi armed with pump-action gun, Sarfraz armed with 7-MM rifle, Gulzar alias Gulzari armed with pump action, Mohsin alias Mohsini and 5/6 unknown accused armed with firearms were present at the house of Shahid alias Mocha and if raid is conducted they can be arrested. On this information a raiding party was constituted who conducted the raid whereupon the accused started firing towards the police. The police took shelter with the walls and fired in self-defence Naeem Ahmad constable received fire-short injuries on his right side and Shaukat Ali constable received fire-shot injury on his chest and they fell down. The accused persons while firing fled away.

3. After usual investigation the challan was submitted before the learned trial Court where all the accused were charge sheeted to which they did not plead guilty and the prosecution in order to establish their guilt examined as many as 17 witnesses out of whom Basharat Ali appeared as PW-1 and deposed that he had identified the dead body of Shaukat Ali deceased at the time of post-mortem examination. Muhammad Arif PW-2 escorted the dead body of the deceased Shaukat Ali deceased from Mayo Hospital, Lahore to the mortuary at Sheikhupura for autopsy. Mubarik Ali PW-3 transmitted the sealed parcels containing rifle and blood stained earth to the office of Chemical Examiner and F.S. Laboratory. He was also entrusted with the warrants of arrest of Sarwar, Sarfraz, Mohsin, Arif, Ashiq, Manzoor Exh. PM to Exh. PT for execution and also got published proclamations Exh.PU to Exh. PAA according to law. Muhammad Ashraf Sub-Inspector P.W.4 chalked out formal F.I.R. Exh. PB/1 on the basis of complainant Exh. P.B. and on 15-12-2006 he arrested Sarwar and Mohsin accused. Sarwar accused got recovered 9-mm pistol from near Hafizabad Chowk which was taken into his possession vide memo Ex.PB/2, Mohsin accused got recovered revolver vide memo Exh.P.C., Muhammad Arshad Mehmood P.W.5 prepared site plans Exh.PD and Exh.PD/1. Nasrullah P.W. 6 is a witness of recovery of pistol and .32 bore pistol on the pointation of Sarwar and Mohsin accused respectively vide memo. Exh.PB/2 and Exh.PC. Muhammad Akram P.W.7

deposed that on 16-5-2005 he alongwith Dilawar Hussain went towards village Salar Bhattian for execution of summons he saw Shahid alias Mocha, Tanveer Hussain alias Teroo along with Arif sitting at Dera and were talking with each other that if the police comes to village they will not allow them to go. He also witnessed the recovery of 244 bore rifle on the pointation of Shahid and rifle on the pointation of Tanveer alias Tero taken into his possession by the Investigating Officer vide memo Exh.PE and Exh.PF respectively. Ali Ahmad PW-8 witnessed the recovery of .12 bore gun from Gulzar vide memo. Exh.PG. Dr. Mubasher Ahmad who conducted post mortem examination on the dead body of the deceased appeared as P.W.9 and found one injury on his person which was sufficient to cause death in the ordinary course of nature. Dr. Farooq Anwar Chaudhary who medically examined Shaukat Ali along with other doctors appeared as PW-1 and found one injury on his person. Dilawar Hussain P.W.11 narrated the same story as narrated by Muhammad Akram PW-7, Naeem Ahmad P.W.12, Zafar Ullah P.W.13 and Nishan Ali P.W.14 furnished ocular account of the occurrence. Muhammad Akram PW-15 partly investigated the matter and on the disclosure made by Gulzar accused he took into his possession 12 bore gun vide memo Exh.P.S. Muhammad Aslam P.W. 16 also partly investigated the matter and arrested Mujahid, Tanveer and Shahid accused. He also took into his possession rifle vide memo. Exh.PE on the disclosure made by Shahid and also took into possession rifle on the disclosure of Tanveer vide memos Exh.PE and Exh.PF respectively. Muhammad Javed P.W.17 identified the handwriting and signatures of Saeed Inspector/complainant who had died. Learned PP after tendering in evidence reports of Chemical Examiner Exh.PBB, Serologist Exh.PCC, Forensic Science Laboratory Exh.PDD and Exh.PEE closed the prosecution evidence whereafter the statements of the accused under section 342 Cr. P. C. were recorded wherein they took the stand that they have falsely been implicated in the case. After conclusion of the trial, the learned trial Court while acquitting Muhammad Sarwar alias Sari convicted the appellants as stated above. Hence the present appeal.

4. Learned counsel for the appellants contends that the F.I.R. was not recorded with such a promptitude as claimed by the prosecution as it has been mentioned in the F.I.R. that both the injured were got admitted in D.H.Q. Hospital Sheikhupura at 5-15 p.m. but according to the medico legal reports of Shaukat Ali and Naeem they were admitted in the hospital at 8-30 p.m. This fact negates the prosecution story and the registration of the case within the given time. It is further contended that all the three witnesses in their statements before the Court and before the police have not mentioned that the appellants were those who had fired and only their names have been mentioned in the statement that their names have been told by Saeed Inspector that the accused were present in the house of Shahid accused and when they reached the said house the firing was started and in such circumstances the ocular account furnished through the statements of three P.Ws. has not been able to prove the case against the accused. It is also contended that the site plans also negate the prosecution story. It is also contended that P.W.14 admitted during cross-examination that all the police officials were armed with fire-arms and had resorted to firing but no body had received injury from the accused side. The police also did not try to apprehend the accused who were firing. It lastly contended that since the prosecution has badly failed to prove case against the appellants, therefore, they may be acquitted.

5. Learned DPG while supporting the impugned judgment contends that there is sufficient evidence available on record to connect the appellants with the commission of the offence. All the appellants are nominated in the promptly lodged F.I.R. and they were specifically nominated by the witnesses in their statement before the police as well as before the trial Court and the learned trial Court has rightly convicted and sentenced them, as such, their appeals may be dismissed.

6. We have heard the learned counsel for the parties and also perused the record. Incident in the instant case allegedly took place on 16-5-2005 at 5-15 p.m. in the house of Shahid accused. Muhammad Saeed Inspector/S.H.O. prepared the complaint Exh.PB at 5-15 p.m. and the F.I.R. was recorded at 5-35 p.m. and the story narrated in the F.I.R. shows that the complaint was drafted before 5-30 p.m. and subsequently F.I.R. was recorded at the given time but in the F.I.R. it has specifically been stated that both the injured Shaukat Ali and Naeem had been admitted in D.H.Q. Hospital, Sheikhupura but Shaukat Ali injured was referred to Mayo Hospital, Lahore as his condition was serious. After the perusal of their M.L.Rs. it is found, that they were admitted in the D.H.Q. Hospital Sheikhupura at 8-30 p.m. and before that Shaukat was not referred to the Mayo Hospital as per record and the M.L.R. so F.I.R. was recorded after 9-00 p.m. with an unexplained delay and recording of the F.I.R. with promptitude has been falsified by the documents.

7. In order to prove the ocular account the prosecution produced Naeem Ahmad injured P.W.12, Zafar Ullah P.W.13 and Nishan Ali A.S.-I. P.W.14. None of the eye-witnesses have deposed that they knew the accused and they had seen them firing at the relevant time. Only they have made their statements to the extent of their presence with Muhammad Saeed Inspector/S.H.O. who had received an information that the appellants were present in the house of Shahid and when they reached the house of Shahid the firing was started. They had not claimed that the accused persons present in the Court had actually fired at the police party. Vague statements have been made by the eye-witnesses as P.Ws. and in such circumstances, it cannot be said that the prosecution has been able to prove case against the accused through ocular account.

8. The recovery of crime weapons is legally inconsequential and immaterial as there is no report of the Forensic Science Laboratory oh record whether the weapons recovered from the appellants had matched with the empties which were collected from the place of occurrence. It has not been proved that which weapon has been used by them during the incident.

9. It is settled law that to convict a person on capital charge, evidence should be of high quality and good standard which is not available in the present case as the prosecution was supposed to establish guilt against the accused beyond shadow of reasonable doubt by bringing trustworthy, convincing and coherent evidence for purpose of awarding conviction but here in this case the prosecution evidence is not of such a character as stated above to sustain conviction of the appellants.

10. The upshot of the above discussion is that we are persuaded that the appellants have made out a case for their acquittal. In such circumstances, we allow all these appeals, set aside the impugned judgment and acquit all the appellants from all the charges. They shall be released forthwith if not required in any other criminal case.

H.B.T./T-12/L Appeals allowed.

2010 Y L R 2021

[Lahore]

Before Shahid Hameed Dar, J

GHULAM SHABBIR---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No. 3343/B of 2010, decided on 29th April, 2010.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque--Pre-arrest bail, grant of---Accused's contention that cheques were not issued to the complainant but given to the arbitrators as token of security, was corroborated by arbitrators who testified his version in the court---Investigating Officer also concluded that the complainant had obtained cheques from arbitrators by lying to them and that the complainant and the accused had no monetary dealing between them---Mere issuance and dishonour of cheque in the absence of other essential ingredients such as repayment of loan or discharge of any lawful obligation, did not constitute offence under S.489-F, P.P.C.--Alleged offence did not fall within prohibitory clause of S.497, Cr.P.C.---Malice on the part of complainant could not be ruled out in view of litigation between the parties---Cheques issued by the accused, as per agreement, could only be presented to Bank for encashment after the funds mentioned in the agreement had been credited to the drawee's account whereas complainant presented the same before said funds were received by the Bank---Accused was admitted to pre-arrest bail in circumstances.

Mazhar Iqbal v. The State 2006 YLR 406; Major Anwar-ul-Haq v. The State PLD 2005 Lah. 607; Iftikhar Akbar v. The State 2008 MLD 159; Riaz Ahmad v. The State 2009 SCMR 725; Muhammad Bakhsh v. The State 2006 YLR 23; Muhammad Tariq Javed v. The State 2008 YLR 947 and Jamil Ahmad and 2 others v. The State 2008 YLR page 1868 ref.

Malik Muhammad Awais Khalid for the Petitioner.

Syed Kazim Bukhari for Respondent No.2.

Sahibzada M.A. Amin Mian, Addl. P.G.

Khamis Baig, S.-I. with police file.

ORDER

SHAHID HAMEED DAR, J.---Ghulam Shabbir seeks bail before arrest in case F. I. R. No. 145 of 2010, dated 4-3-2010 for offence under section 489-F, P.P.C., registered at Police Station, Gulshan-e-Ravi, Lahore on the complaint of Syed Ahmad Ijaz Gillani who, in brief has alleged that accused Ghulam Shabbir handed over a cheques, value Rs.2,50,000 to him which he deposited in his account for encashment but it was returned unpaid due to insufficient funds.

2. It is contended by the learned counsel for the petitioner that the story contained in the F.I.R. is false and baseless which has been fabricated by the complainant to cause. humiliation and harassment to the petitioner; that the petitioner did not issue the cheque in question to the complainant but it was given to the arbitrators who were entrusted with the task of resolving the disputes and controversies between the two sides; that the petitioner is an elected President of Tehreek-e-Tauheed Pakistan, a charitable institution, of which runs a school as well and the petitioner is functioning as its principal; the complainant is not prepared to tolerate the position and status of the petitioner and has entangled him in a false case under a conspiracy; that the complainant side admits that the cheque was given to the arbitrators and it could only be handed over to the complainant if the funds were received from Punjab Education Foundation Assisted School Programme (PEF-FAS); that the complainant received the cheque from the arbitrators deceitfully by telling them that the funds had been received in the relevant account from the concerned sources; that the petitioner has been falsely implicated in this case under malice and ulterior motive of the complainant who, out of heart burning and bias, has lodged the instant case; that the petitioner is an educated person and has no previous criminal record; that the case of the petitioner calls for further inquiry. Relies upon case titled Mazhar Iqbal v. The State 2006 YLR page 406, Major Anwarul-Haq v. The State PLD 2005 Lahore page 607 and Iftikhar Akbar v. The State 2008 MLD page 159.

3. On the contrary, learned Additional Prosecutor General assisted by learned counsel for the complainant has vehemently controverted the submissions of the learned counsel for the petitioner and contends that the father of the complainant was a philanthropist who in his life time did many charitable works including establishment of Tehreek-e-Tauheed-e-Pakistan, for the welfare and betterment of the society; he also established a school for the children coming from the families of low income and limited means; that the petitioner was employed in this institution by the father of the complainant but he, after the death of the founder of the institution, played many dirty tricks to take over and gulp these institutions; that the petitioner has committed many forgeries and have fabricated a number of documents to cause erosion of the resources of a charitable institution; that the petitioner had dishonestly issued the cheque to the complainant and it has nothing to do with the arbitrators who have been siding with the petitioner for their ulterior motives; that the cheque in question is a bearer cheque and it has been returned unpaid by the bank due to insufficient founds; that another criminal case has been registered against the petitioner for the same offence. Relies upon case titled Riaz Ahmad v. The State 2009 SCMR page 725, Muhammad Bakhsh v. The State 2006 YLR page 23, Muhammad Tariq Javed v. The State 2008 YLR page 947 and Jamil Ahmad and 2 others v. The State 2008 YLR page 1868.

4. Arguments heard. Record perused.

5. It is admitted by both the sides that Tehreek-e-Tauheed Pakistan is a welfare institution, which was established by the father of the complainant who was a philanthropist. It is also admitted that the petitioner was employed as a teacher in a school, established under the auspices of Tehreek-e-Tauheed-e-Pakistan. Syed Ahmad Ijaz Gillani, the founder of the institution died and thereafter a tug and war started between the petitioner and the complainant of this case. Civil suits were filed on both the sides to seek decrees in their favour but it was the institution Tehreek-e-Tauheed Pakistan which was the nucleus point in the said suits. The petitioner though an employee/principal of the school showed over eagerness and he once showed himself the owner of City Public High School, registered under the said Tehreek-e-Tauheed-e-Pakistan.

6. The dispute between the parties was taken to the arbitrators but the matter could not be resolved. The complainant has alleged in the F.I.R. that the petitioner owed lacs of rupees to him but he could not furnish any detail in this regard. The arbitrators have sworn affidavits that two cheques, including the cheque in issue, were given to them by the petitioner as a token of security.

7. The arbitrators are also present in the Court who testify that afore-mentioned cheque had been received by the complainant from them as he told them that the funds from Punjab Education Foundation Assisted School Programme had been received by the bank. The Investigating Officer has also concluded that the complainant misstated before the arbitrators and secured two cheques from them on a false pretext and lodged the instant F.I.R. He has further opined that there exists no monetary dealing between the complainant and the petitioner.

8. Mere issuance of a cheque, subsequently, dishonoured does not constitute an offence under section 489-F, P.P.C. if the other essential ingredients qua the re-payment of loan or for discharging any lawful obligation do not exist.

9. The offence with which the petitioner is charged does not fall within the prohibitory clause of section 497, Cr.P.C. The cheque is already in the custody of the Investigating Officer and nothing is to be recovered from the accused-petitioner in the backdrop of massive litigation between the parties. The probability of presence of malice or ulterior motive on the part of the complainant cannot be ruled out. There are many unanswered questions of facts and law pertaining to the alleged commission of offence which can only be resolved during the course of the trial after the evidence of the parties is recorded by the learned trial Court. The petitioner has been joining the investigation and has fully explained his position, which indicates that there is no need for any further investigation. The cheque in issue has neither been issued for repayment of loan nor for fulfilment of an obligation. The cheque issued by the I(petitioner was required to be presented on the counter of the Bank for encashment only after the afore-mentioned funds were credited to the drawee account. The haste shown by the complainant has placed the matter one step short of fulfilment of the basic ingredients of section 489-F, P.P.C.

10. For the foregoing reasons, I admit the petitioner to bail before arrest and confirm the ad-interim pre-arrest bail allowed to the petitioner on 1-4-2010 subject to his furnishing bail bonds in the sum of Rs.1,00,000 to the satisfaction of learned trial Court.

A.R.K./G-36/L Petition accepted.

2010 Y L R 2448

[Lahore]

Before Shahid Hameed Dar, J

GUL KHAN---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No. 47/Q of 2009, decided on 28th May, 2010.

Criminal Procedure Code (V of 1898)---

----Ss. 265-K & 561-A---Penal Code (XLV of 1860), Ss. 302 & 392---Qatl-e-amd and robbery---Quashing of proceedings---Appreciation of evidence---Bail, grant of---One prosecution witness recognized the accused and three other co-accused during identification Parade---During proceedings of trial, complainant filed application under section 345, Cr.P.C. which could not make any progress as the offence was not compoundable---Accused filed application under section 265-K, Cr.P.C. which was dismissed by Trial Court---Accused then filed petition under S.561-A, Cr.P.C. which was disposed of by High Court with direction to complete the trial within eight weeks---Prosecution, however, failed to proceed its case expeditiously---Accused filed another application for acquittal which was dismissed--- Eye-witnesses categorically stated in their testimonies that they could not recognize the accused and that the accused persons facing the trial were not the persons who had killed the deceased---Remaining two eye-witnesses had migrated to USA for good---Fate of the case, thus, hinged on the testimony of said two witnesses who were needed to be examined by prosecution though the witnesses had left the country, yet their availability was not an impossibility so the Trial Court did not commit an error in dismissing the accused's application for acquittal---Agony of the accused, languishing in jail, however, could not be brushed aside as he was not responsible for delay in trial but as crucial evidence of prosecution had yet to be recorded, nothing certain could be predicted about conclusion of trial---Accused could not be allowed to rot in jail indefinitely---Application for quashment of proceeding was, thus, converted into bail petition and accused was admitted to bail.

Mushtaq Ali Tahir Kheli for Petitioner.

Aamir Jalil Siddiqui, A.A.-G. for the State.

ORDER

SHAHID HAMEED DAR, J.--Through this petition, under section 561-A, Cr.P.C. the petitioner has challenged the validity of order dated 26-8-2009 passed by the learned Addl. Sessions Judge, Lahore, whereby an application under section 265-K, Cr.P.C. moved by the petitioner seeking acquittal in case F.I.R. No.705 of 2005 dated 25-9-2005, for offences under sections 302/392 P.P.C., registered at Police Station South Cantt., Lahore, had been dismissed.

2. The brief facts germane to filing of the instant petition are that Mst. Naziha Saeed complainant of the aforesaid criminal case along with her husband Brigadier (R) Muhammad Saeed was present at her residential house situated in Defence Housing Authority, Lahore, at 9-15 .p.m. on 25-9-2005, when two boys aged 22/23 years pushed open the outer door of the house and got in; one of them pointed his pistol at her neck and ordered her to keep silent; in the meantime her husband Brig. (R) Muhammad Saeed appeared from his bedroom and asked what had happened, whereupon one of the accused fired straight with his pistol which landed at the chest of her husband who despite being injured attempted to catch them, but they fled away; her husband succumbed to the injuries at the spot.

3. Raza Mohammad Khan (P.W-7), Adil Sajjad and Sajjad Hameed later on made supplementary statements under section 161, Cr.P.C. wherein they stated that there were two more persons standing outside the gate of the house at the time of occurrence who had run away after seeing them and that they could identify them if they would see them

again. The petitioner was arrested, as a suspect on 25-9-2005 from Niazi Bus Stop Bakkar Mandi, Lahore and was dispatched to the judicial lock up for test Identification Parade, which was conducted at Kot Lakhpat Jail, Lahore under the supervision of Mr. Khalid Fayyaz Ahmad Khan, Special Judicial Magistrate Cantt, Lahore on 25-10-2005 wherein Adil Sejjad P.W. correctly picked up the petitioner and his three co-accused namely Bashar Khan, Nehmat ullah Khan and Naqeeb Ullah Khan, stating that they were the dacoits who had come at the residence of late Brigadier (R.) Muhammad Saeed on 25-9-2005 and had committed his murder during the occurrence.

4. The police on completion of investigation submitted a report under section 173, Cr.P.C. in the trial Court by placing the names of above said accused including the petitioner in its column No.3. After supply of copies under section 265-C, Cr.P.C. the petitioner and his co-accused were indicted on 6-5-2006. The co-accused of the petitioner namely Shabbar Khan and Nehmat Ullah Khan ran away from the police custody on 8-2-2007 so, they were proceeded against under section 87, Cr.P.C. by the learned trial Court.

5. During the proceedings of the trial, the complainant Mst. Naziha Saeed and other legal heirs of the deceased namely Jaudat Saeed son and Zohra Saeed daughter moved an application under section 345, Cr.P.C. wherein they contended to have pardoned the accused persons but it could not reach its logical end because offence under section 392, P.P.C., was not compoundable. The prosecution failed to produce material evidence against the petitioner and his co-accused, so he filed an application under section 265-K, Cr.P.C, which was dismissed by the learned trial Court vide order dated 28-5-2008. The petitioner then filed a petition under section 561-A, Cr.P.C. against the above said order of the learned trial Court through Criminal Miscellaneous No.7-Q of 2008 which was disposed of by this Court vide order dated 20-2-2009 with the direction to the trial Court that the case be decided within eight weeks. The prosecution produced its witnesses lazily. Resultantly the direction passed by this Court went abegging without any substantial progress in the trial. The prosecution since then has produced 12 P.Ws. out of whom Raza Khan P.W.7 and Mst. Naziha Saeed P.W.12 are the eyewitnesses who in their testimonies, have exonerated the petitioner and his co-accused Naqeeb Ullah. So far as the other witnesses namely Adil Sajjad and Sajjad Hameed are concerned, they according to the report of the process server, have migrated to United States of America and settled there permanently. The learned trial Court resorted to coercive measures to ensure presence of the above said P.Ws. but to no avail. The petitioner filed in the meantime, yet another application under section 265-K, Cr.P.C. which was dismissed by the learned trial Court on 26-8-2009. Hence the instant petition.

6. Learned counsel for the petitioner contends that the learned trial Court has passed the impugned order in an arbitrary, capricious and perverse manner without any reasonable or just cause; the prosecution does not have any connecting evidence whatsoever against the petitioner and the direction of this Court dated 20-2-2009 for conclusion of the trial in eight weeks' time has not been complied with by the learned trial court; the complainant P.W. 12s and Raza Hameed Khan P.W.7 have exonerated the petitioner and his co-accused in their testimonies and none of the other P.Ws. produced by the prosecution has uttered even a single word against the petitioner, yet the learned trial Court refused to accept the plea of the petitioner for seeking acquittal. The impugned order has been passed without application of judicious mind, in a slipshod manner; the impugned order is neither speaking nor contains any rational argument, which has rendered it a bad order in the eyes of law; that countless opportunities have been afforded to the prosecution up-till now to conclude the trial, but they have failed to do so, for which the petitioner is being penalized which is against the settled principle of dispensation of criminal justice; there is no likelihood of availability of the two gone away P.Ws, so the prosecution is badly short of connecting evidence against the petitioner. The petitioner had been arrested in this case on 25-9-2005 and since then he has

been languishing in jail for none of the fault on his part; the petitioner, in the attending circumstances of the case, merits acquittal or release on bail.

7. Conversely, the learned Addl. Prosecutor-General has contended that the petitioner and his co-accused had committed a gruesome and barbaric act during the occurrence, as a result of which, Muhammad Saeed, a retired Brigadier of Pak Army was murdered; the petitioner had been correctly picked up in the test Identification Parade by Adil Sajjad P.W. who had categorically stated that the petitioner and his co-accused had committed the murder of the deceased during the dacoity; a temporary non-availability of material witnesses does not warrant acquittal of the petitioner under section 265-K, Cr.P.C., the impugned order has been passed strictly in accordance with law and it does not suffer from any legal defect. Hence it is sustainable.

8. Arguments heard. Record perused.

9. The prosecution has produced 12 witnesses so far, out of whom Raza Hameed P.W-7, Mst. Naziha Saeed, P.W.12 are the eye-witnesses of the occurrence, who in their testimonies categorically stated that they did not recognize or identify Gull Khan petitioner and his co-accused and further that the accused persons facing the trial were not the accused who had committed the murder of the retired Brigadier Muhammad Saeed deceased. The other witnesses recorded so far are almost formal in nature. The Investigating Officer and two other eyewitnesses namely Sajjad Hussain and Adil Sajjad are yet to be presented and examined. Both the above said eye-witnesses as per report of the process server have migrated to USA and settled there. The trial Court has been trying hard to procure the presence of the above said witnesses one of whom Adil Sajjad is the most important and crucial prosecution witnesses as he had correctly picked up the petitioner and his co-accused by mentioning their role during the occurrence in the test identification parade on 25-10-2005. He has to be examined as a P.W. by the prosecution and his availability in the trial Court was not an improbability as Mst. Naziha Saeed P.W.12 who too had come from abroad to depose as a P.W. had informed the learned trial Court that both the aforesaid witnesses would reach Pakistan in due course of time. In this situation, the learned trial Court of course had no other option but to proceed ahead with the trial by adopting coercive measures for production of above said witnesses before it. A lot shall depend upon the testimonies of the above said prosecution witnesses so far as the outcome of the case is concerned. The learned trial Court has not fallen in error or committed any illegality while dismissing the application under section 265-K, Cr.P.C. moved by the petitioner. I have gone through the impugned order, which is well reasoned and does not suffer from any legal infirmity. It is neither whimsical nor arbitrary or capricious in nature. So the impugned order passed by the learned trial Court does not call for any interference.

10. The fact, however, cannot be lost sight of, that the petitioner had been arrested on 25-9-2005 and since then he has been languishing in jail. He has not been responsible for the delay caused in conclusion of the trial, in any manner. The prosecution failed to conclude the trial despite a direction of this court passed on 20-2-2009, according to which they were required to conclude the trial within eight weeks. The most important and crucial prosecution evidence is yet to be recorded. At the moment it cannot be said as to how long would it take for the prosecution to conclude the trial. The petitioner of course cannot be left to rot in jail for indefinite period of time, therefore, I convert this petition into bail application under section 497, Cr.P.C. and admit the petitioner to post-arrest bail subject to his furnishing bail bonds in the sum of Rs.200,000 (rupees two lac) with two sureties each in the like amount to the satisfaction of the learned trial Court. Order accordingly.

A. R. K. /G-41 /L Order accordingly.

2010 Y L R 2936

[Lahore]

Before Shahid Hameed Dar, J

INAYAT BIBI---Petitioner

Versus

AMJAD ALI and 4 others---Respondents

Writ Petition No. 8521 of 2007, decided on 29th June, 2010.

Criminal Procedure Code (V of 1898)---

----S. 382-B---Penal Code (XLV of 1860), S.302/34--- Constitution of Pakistan (1973), Arts.199 & 9--- Constitutional petition--- Qatl-e-amd--- Award of remissions in sentence--- Superintendent, District Jail released the accused from jail granting them 13 years, 6 months and 4 days remission in their sentence, which remission had been challenged by the petitioner in her constitutional petition---Accused who were convicted and sentenced to imprisonment for life, were extended benefit of S.382-B, Cr.P.C.---Convict who had been extended the benefit of S.382-B, Cr.P.C. would be entitled to grant of remission from the date of his arrest as an under-trial prisoner---Refusal to allow remission of pre-sentence custody period to a convict, whom the court had granted the benefit of 5.382-B, Cr.P.C. would be tantamount to deprivation of his liberty within the contemplation of Art.9 of the Constitution---Accused had not been convicted and sentenced for an offence which could debar the extension of benefit of S.382-B, Cr.P.C. to them, which had been validly conferred upon them---Accused could not be denied the remission in sentence announced from time to time by the President or the Provincial Government by way of issuance of notification in that regard---No illegality, in circumstances had been committed by Superintendent District Jail while he set accused persons at liberty by taking into account said remissions---Release of accused person, could not be interfered with nor they could be remitted to custody on the wishes and whims of the petitioner.

Shah Hussain v. The State PLD 2009 SC 460; Inayat Bibi v. Amjad Ali 2001 PCr.LJ 1453 and Aamer Ali v. State 2002 YLR 1902 ref.

Khalida Parveen for Petitioner.

Asif Hussain Sheikh for Respondents.

Aamir Jalil Siddiqui, A.A.-G.

Adeel Akram Cheema, Assistant Superintendent, District Jail, Gujrat.

ORDER

SHAHID HAMEED DAR, J.---Inayat Bibi petitioner has prayed in this petition that the release of Amjad Ali, respondent No.1 and Amer Jamshaid, respondent No.2, from District Jail, Gujrat by Superintendent District Jail, Gujrat, respondent No.3, may be declared illegal, incorrect, void ab initio and done without lawful authority with further prayer that they (respondents Nos.1 and 2) may be directed to surrender before respondent No.3 for serving

remaining sentence of "13 years", their non-bailable warrants of arrest may be issued for causing their arrest and that strict legal action may be taken against respondent No.3.

2. The brief facts to be taken into consideration for filing the instant petition are that respondents Nos.1 and 2 were convicted and sentenced to imprisonment for life with order to pay Rs.50,000 each to the legal heirs of the deceased and in default of payment thereof, to further undergo 6 months' S.I. vide judgment dated 31-8-2008 passed by learned Additional. Sessions Judge, Gujrat in case F.I.R. No. 386/95 dated 13-6-1995 under sections 302 & 34, P.P.C. read with section 109, P.P.C., registered at Police Station, Civil Line Gujrat, in connection with murder of Javed Iqbal, the son of the petitioner. Benefit of section 382-B, Cr.P.C., however, was extended to both the respondents-accused. The petitioner filed a revision petition before this Court for enhancement of sentence of the respondents-accused to death. The respondents-accused were awarded certain remissions in their sentence by respondent No.3 which was challenged by the petitioner before this Court vide Writ Petition No.23185 of 1999 which was decided by this Court on 2-4-2007 in terms that the grant of remissions to respondents Nos. 1 and 2 vide Notification, dated 28-8-1997, to the extent of 1/5th of the total sentence, 3 months vide Notification dated 14-8-1996 by the President of Pakistan and Notification dated 28-4-1996 followed by another Notification dated 27-2-1997 granting 2 months remission each by the Provincial Government was declared to be inapplicable and contrary to law, therefore, the same were set aside by partly accepting the writ petition. It was further held by this Court that the benefit of said notifications shall not be extended or awarded by way of remissions to the imprisonment to which respondents Nos.1 and 2 were sentenced on 31-8-1998 by a competent Court of law. The respondents Nos.1 and 2 preferred an Intra-Court Appeal No.384 of 2001 and the petitioner also filed I.C.A. No.349 of 2001 against the above said judgment / order passed by single learned Judge in chamber, which were decided by a learned Full Bench of this Court on 16-5-2006, whereby the impugned judgment passed by the learned Single Bench was upheld.

3. The Superintendent, District Jail Gujrat, respondent No.3 released the respondents Nos.1 and 2 on 8-8-2007 from the jail granting them 13 years, 6 months c and 4 days remissions in their sentence with reference to a judgment passed by a learned Division Bench (Bahawalpur) of this Court in Writ Petition No.292 of 07/BWP, hence, the instant petition.

4. Learned counsel for the petitioner contends that the act of grant of remissions, by respondent No.3, to the respondents Nos.1 and 2 is illegal, incorrect, void ab initio and without lawful authority; the judgment relied upon by respondent No.3 for grant of remissions and release of respondents-convicts was not applicable as a learned Full Bench of this Court had already adjudicated the question of grant of remissions to the respondents Nos.1 and 2, the judgment of a learned Division Bench cannot be preferred over the above noted judgment of learned Full Bench of this Court on the question of grant of remissions to the convicts; the pre-mature release of respondents-convicts has caused grave miscarriage of justice and contempt of the judgment passed by the learned Full Bench of this Court in the Intra-Court Appeal on 16-5-2006; the act of respondent No.3 qua release of the respondents-convicts is patently illegal, may be set aside and both the beneficiaries may be committed to custody for serving their remaining sentence.

5. On the other hand learned counsel for respondents Nos.1 and 2 have vociferously controverted the submissions of learned counsel for the petitioner and submits that the respondents-convicts have been lawfully extended the remissions in their sentence by the respondent No.3 and no illegality has been committed by him, to set both the respondents at liberty, as they had served out their entire sentence; the respondents-convicts were not only entitled to the post judgment remissions but also to the pre-judgment remissions as the provision of section 382-B, Cr.P.C. is absolutely clear and unambiguous in this respect, the

refusal to allow remissions of pre-sentence or post-sentence custody to a convict whom the Court has granted the benefit of section 382-B, Cr.P.C. is tantamount to deprivation of his liberty within the contemplation of Article 9 of the Constitution, except for the convicts of offences under the National Accountability Ordinance, 1999, Anti-Terrorism Act, 1997, the offence of Karo Karl etc., where the law itself prohibits the same, all other convicts are entitled to the remissions both pre-sentence and post-sentence, therefore, no illegality has been committed in connection with release of respondents Nos.1 and 2 by respondent No.3 so, the instant petition may be dismissed. Relied upon "Shah Hussain v. The State" (PLD 2009 SC 460).

6. The learned Deputy Prosecutor-General shares the view point of the learned counsel for the respondents Nos.1 and 2 and adds that respondent No.3 had not committed any illegality in releasing the respondents-convicts under the aforesaid formula of awarding the remissions in the sentence of the convicts.

7. I have heard learned counsel for the parties and perused the record.

8. The respondents-convicts had been released from the prison on 8-8-2007 by respondent No.3 after calculation of their remissions granted by the competent authorities from time to time by way of issuance of various notifications. The judgment dated 16-5-2006 passed in I.C.A. No.349 of 2001 by a learned Full Bench of this Court, of course, could not be eclipsed by a judgment passed by a learned Division Bench (Bahawalpur) of this Court in Writ Petition No.292 of 2007/BWP. The remissions, in sentence, resolved in favour of the respondents-convicts on the basis of a judgment passed by a learned Division Bench of aforesaid Writ Petition No.292 of 2007/BWP, in presence of a Full Bench judgment dated 16-5-2006 passed by this Court in I.C.A. No.349 of 2001, might be of little academic interest at this stage, as a recent glittering judgment of august Supreme Court of Pakistan, reported as "Shah Hussain v. The State" (PLD 2009 SC 460) has decided the question of grant of remissions to a convict, having been extended the benefit of section 382-B, Cr.P.C., for good, wherein, the question, if a convict would be entitled to the benefit of section 382-B, Cr.P.C. and if so, whether he would be entitled to the remission granted by the President of Pakistan or the Provincial Government or any other authority, has been dealt with. The judgment delivered by a learned Single Judge of this Court, in the case of "Inayat Bibi v. Amjad Ali" (2001 PCr.LJ 1453) was dissented to, in another judgment of this Court passed in the case of "Aamer Ali v. State" (2002 YLR 1902), which was taken note of by the august Supreme Court in Shah Hussain's case, supra, and deeming it pertinent to the relevant paragraph from Aamer Ali's case was reproduced as under: -

> "Now we may advert to the question whether the appellant can avail of the benefit of jail remissions granted to a convict prior to the date of his conviction if he is given the benefit of section 382-B, Cr.P.C. of the Criminal Procedure Code. The appellant's actual date of conviction is 10-5-2001 and his date of arrest is 21-2-2001. He was given the benefit of section 382-B, Cr.P.C. of the Criminal Procedure Code. Meaning thereby that the period of his sentence would be deemed to have commenced from the date of his arrest i.e. 21-2-2001. This question came up before a learned Single Judge of this Court in the case of Inayat Bibi v. Amjad Ali and others (2001 PCr.LJ 1453) in which it was held that question of granting remissions to a convict would arise only after the trial was over and judgment delivered by the Court. Thereafter, from the date of conviction onwards the convict could claim the remissions granted by the competent Authority. The arguments that since the substantive period of imprisonment was to be counted from the date of arrest of the convict by virtue of the provisions of section 382-B of the Criminal Procedure Code, therefore, remissions granted by the competent Authority from the date of arrest to be counted towards the appellant's substantive sentence, was repelled. With due deference, we are not inclined to subscribe to the

view expressed in the above referred case. It is true that the benefit of remissions is to be granted after announcement of judgment and passing of the sentence of imprisonment against a convict. However, the moment benefit of section 382-B of the Criminal Procedure Code is given to a convict, the period during which he remained in detention as under-trial prisoner, would be counted towards his substantive sentence. Legally he would be deemed to be in jail as a convict since the date of his arrest and would certainly be entitled to the benefit of remissions granted by the competent Authorities to the convicts after the said date."

9. It is now settled once for all that a convict who has been extended the benefit of section 382-B, Cr.P.C. shall be entitled to grant of remissions from the date of his arrest as an under trial prisoner. It has been held by the august Supreme Court that refusal to allow remissions of pre-sentence custody period to a convict, whom the Court has granted the benefit of section 382-B, Cr.P.C. is tantamount to deprivation of his liberty within the contemplation of above Article 9 of the Constitution. The cases of convict prisoners who are expressly debarred under any law from the benefit of section 382-B, Cr.P.C. stand on a different footing.

10. Almost all the judgments passed by this Court as well as by the august Supreme Court of Pakistan, on the subject of extension of benefit of section 382-B, Cr.P.C. and the remissions oozing therefrom, have been taken care of and discussed in the luminous/landmark judgment of Shah Hussain's case with following conclusions and directions:-

(1) After the use of word "shall" for the word "may" in section 382-B, Cr.P.C., at the time of passing the sentence, it is mandatory for the Trial Court to take into consideration the pre-sentence custody period in the light of the principles discussed above;

(2) The refusal to take into consideration the pre-sentence custody period at the time of passing the sentence is illegal inasmuch as if the Court sentences a convict to imprisonment for life, which is the alternate but maximum sentence for the offence of murder, but does not make allowance for the pre-sentence custody period, it would be punishing the convict prisoner with imprisonment, for life plus the pre-sentence custody period, that is to say, more than the maximum legal punishment.

(3) The convict-prisoner who are granted the benefit of section 382-B, Cr.P.C. shall be entitled to remissions granted by any authority in their post-sentence detention or during their pre-sentence detention in connection with such offence. However, the same shall not be available to the convicts of offences under the National Accountability Bureau Ordinance, 1999, Anti-terrorism Act, 1997, the offence of Karo Kari, etc. where the law itself prohibits the same;

(4) The law laid down in Abdul Malik's case that under Article, 45 of the Constitution, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President, is hereby reaffirmed.

11. The respondents Nos.1 and 2 had not been convicted and sentenced for offence which could debar the extension of benefit of section 382-B, Cr.P.C. to them which had been validly conferred upon them so, they could not be denied the remissions in their sentence, announced from time to time by the President or the Provincial Government by way of issuance of notifications in this regard. No illegality, in attending circumstances has been committed by

respondent No.3 while he set the respondents-convicts at liberty by taking into account the afore said remissions.

12. Therefore, the release of the respondents-convicts cannot be interfered with nor they can be remitted to custody on the wishes and whims of the E petitioner.

13. The nutshell of the above discussion is that the instant petition is dismissed being devoid of any merit.

H.B.T./I-41/L Petition dismissed.

2010 Y L R 2967

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ASIF---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE, LAHORE and 4 others---Respondents

Writ Petition No. 4097 of 2010, decided on 23rd June, 2010.

Penal Code (XLV of 1860)---

----S. 381-A---Criminal Procedure Code (V of 1898), S.550---Constitution of Pakistan (1973), Art.199---Constitutional petition---Theft of car---Superdari of the vehicle---Petitioner challenged order of Additional Sessions Judge whereby he had dismissed petitioner's application for superdari of car which was seized by police on suspicion of having been stolen---Validity--Three different reports of Forensic Science Laboratories had established that vehicle in question was a stolen property---Neither the registration book bore the name of the petitioner nor could petitioner produce any documentary evidence of transfer of ownership of the vehicle in his favour--Impugned order did not suffer from any illegality warranting High Court's interference---Constitutional petition was dismissed in circumstances.

Muhammad Imran Butt for Petitioner.

Aamir Jalil Siddiqui, A.A.-G.

ORDER

SHAHID HAMEED DAR, J.--Muhammad Asif, Raza, petitioner has challenged the validity of order, dated 17-6-2009 passed by learned Judicial Magistrate, Lahore whereby, an application moved by the petitioner was dismissed and the application filed by the Premium Insurance Company was accepted. Through this petition, order dated 3-9-2009 passed by learned Additional Sessions Judge, Lahore, has also been challenged, whereby, a revision petition filed by the petitioner against the above said order of the Magistrate, was dismissed.

2. The brief facts leading to filing of the instant petition are that Zafar Hussain Inspector AVLS City Lahore took into possession a Vehicle No.AMF-019, Suzuki Cultus, silver colour, Model 2006, Chassis No.368031, Engine No. F-399393, from Allah Ditta son of Inayat Ullah caste Mughal resident of Chakma 105/9-L; Tehsil and District Sahiwal, under section 550, Cr.P.C. as its chassis number and engine number had appeared tampered with, during the course of investigation of case F.I.R. No.847/06 dated 3-8-2006 under section 381-A, P.P.C. registered at Police Station, Civil Lines, Lahore.

3. The chassis number of the said vehicle was found same but its engine number read as PKF 360, X 2 X, when examined by Forensic Science Laboratory, Lahore. Thereafter, the police got it examined again from Forensic Science Laboratory, Islamabad and their report disclosed the chassis number being same but its engine number read as PF 345671. The full penal/chassis sheet bearing number SF 310 PK 368031 was found welded and refitted at the chassis point, by the Forensic Science Laboratory, Islamabad and the engine number was also found tampered with, after chemical treatment.

4. The said engine number, traced by Forensic Science Laboratory, Islamabad, was found to relate to the stolen vehicle (case property) of case F.I.R. No.539/08 supra, whose original registration number was LRL-901, Model of year 2003. Allah Ditta, however, produced a registration book showing the model of the vehicle as year 2006 and according to report of Excise Office, Karachi, his registration book was found original.

5. The complainant of case F.I.R. No.539 of 2008, Waseem Ahmad, according to police report, had received full claim of the said vehicle from Premium Insurance Company.

6. In presence of above said two reports from different offices of Forensic Science Laboratories, the learned Judicial Magistrate, Lahore ordered for third examination of the vehicle from Forensic Science Laboratory, Peshawar, for further satisfaction and the report submitted by Forensic Science Laboratory, Peshawar was exactly same, they too found the engine number tampered with, chassis number same and the full chassis sheet had been found welded and refitted in the said vehicle.

7. The petitioner moved an application for seeking superdari of the said vehicle, in parallel to the identical application moved by Premium Insurance Company, which was dismissed on 17-6-2009 by the learned Judicial Magistrate, Lahore and through the same order the application of the latter was allowed.

8. The petitioner preferred a revision petition under section 439-A, Cr.P.C. before the learned Additional Sessions Judge, Lahore which again met the same fate on 3-9-2009, hence, the instant petition.

9. Learned counsel for the petitioner contends that the vehicle in question had been taken into possession by the police under section 550, Cr.P.C. from the petitioner being case property of case F.I.R. No.539 of 2008 supra; the police had taken into possession the vehicle Registration number 019-AMA, silver colour Model 2006 from the possession of the petitioner and got it repeatedly examined from various offices of Forensic Science Laboratories to defeat the contention of the petitioner; the original registration book of the petitioner was found original by the Excise Office, Karachi, and they verified the authenticity of the registration book in the name of the petitioner, the learned Judicial Magistrate failed to appreciate the facts and circumstances of this case and passed the impugned order overlooking the stance of the petitioner as well as the documentary evidence in the name of the petitioner; the learned Additional Sessions Judge, too could not do justice with the subject and passed an order which is injurious to the bona fide interest of the petitioner; the petitioner purchased the

Vehicle No.AMF-19 from Iftikhar Ismail, the last registered owner, who executed a transfer deed in favour of the petitioner and transferred the vehicle in the name of the petitioner which is the conclusive evidence qua the ownership of the petitioner who is the bona fide transferee of the vehicle in question within the meaning of section 2(24) Motor Vehicle Ordinance, 1965 but this aspect has been badly ignored by both respondents No.1 and the learned Judicial Magistrate; the vehicle in question was taken into possession under section 550, Cr.P.C. but the police did not timely inform the learned Illaqa Magistrate within the scope of section 523, Cr.P.C. hence, all the proceedings, conducted by the police are illegal, the CIA police is not competent to take into possession the vehicle in question under section 550, Cr.P.C. nor they could conduct investigation thereof; the impugned orders dated 17-6-2009 and 3-9-2009 are patently illegal, hence, may not be maintained.

10. On the other hand learned Assistant Advocate-General submits that the impugned orders have been passed in accordance with law and no infirmity or illegality can be found in them; the petitioner or his claim does not figure anywhere in the entire scenario of this case and he is in fact trying his luck by beating about the bush; it was Allah Ditta from whose possession the vehicle in question had been taken into custody by the police and the petitioner's claim in this regard is baseless and mendacious; the petitioner is neither here nor there so far as the facts of this case are concerned and he without any bona' fide has planned to get the custody of the said vehicle; the contention of the petitioner has been rightly dealt with and rejected in the impugned orders as he has no ostensible evidence in proof of his claim; the registration book submitted by Allah Ditta had been verified by the Excise Office, Karachi and the petitioner unnecessarily is harping on the string that the said vehicle was taken into custody from his possession and that the registration book bore his name as the owner; the insurers claim has been rightly allowed in the impugned orders as they had fully covered the risks of the said car and had compensated the claim of the owner to the fullest who did not object to the claim of the Insurance Company; the letter of Subrogation with the other documents is solid evidence qua the genuineness of the claim of the Insurance Company, hence, the instant petition may be dismissed.

11. I have heard the learned counsel for the parties at length and have perused the record.

12. The vehicle in question had been taken into possession by Zafar Hussain, Inspector on 2-4-2009 under section 550, Cr.P.C. while dealing with the investigation of case F.I.R. No.847 of 2006 supra as he apparently found the chassis and engine number of the said vehicle tampered with. The above said vehicle was firstly examined by the office of Forensic Science Laboratory, Lahore, thereafter, by the office of Forensic Science Laboratory, Islamabad and lastly by the office of Forensic Science Laboratory, Peshawar. So far as, the first examination of the above said vehicle is concerned it was not found up to the mark by the police so it was required that the engine and chassis number of the said vehicle be examined through chemical treatment so it was sent to the office of Forensic Science Laboratory, Islamabad. Wherefrom, a report was received that the chassis number was same, as found by FSL, Lahore but its engine number read as PF 345671. The full panel/chassis sheet bearing number SF 310 PK 368031 was found cut, welded and refitted at the chassis point. The learned Judicial Magistrate before deciding the claims of the petitioner and that of the Insurance Company, as a matter of abundant caution, decided to get the said vehicle re-examined from the office of Forensic Science Laboratory, Peshawar and the report submitted by the said office was identical to that of the Forensic Science Laboratory, Islamabad. This exercise settled the issue that the vehicle in question was the case property of case F.I.R. No.539 of 2008 supra. That is why the applications of both the claimants was decided in relation to F.I.R. No.539 of 2008. The contention of the petitioner is not tenable for the following reasons:-

a) The above said vehicle had not been taken into custody by the police from the possession of the petitioner nor he could produce any evidence in this regard. He has not hinted at any circumstance that he had gone to District Sahiwal on 2-4-2009 nor he mentioned the names of any witnesses who could support his version that he was on the driving seat of the said vehicle at the time of its take over by the police.

b) The Registration Book does not disclose the name of the petitioner as owner of the said vehicle and it shows the name of one Iftikhar Ismail, a resident of Karachi, being the owner of this vehicle. The contention of the petitioner qua transfer of the said automobile in his favour is also not borne out from any registered document which could establish the correctness of the claim of the petitioner.

c) The divergent reports of different offices of Forensic Science Laboratories indicate that mischief had been made with the engine and chassis number of the said vehicle and the whole panel sheet bearing chassis number and engine number was found to be cut and re-fixed at its original place, which complicated the matter further. The fact however, remains that the Premium Insurance Company had paid full claim of the complainant of the F.I.R. No.539 of 2008 so they had every right, on the basis of their documents, including letter of subrogation etc. to ask for custody of the said car and the learned Judicial Magistrate had rightly found them entitled for the custody of the same.

d) The claim of the petitioner, in attending circumstances, appears to be alien to the facts of this case as his contention is not supported by any oral or documentary evidence.

The impugned orders do not suffer from non-reading or misreading of the record nor they could be termed as whimsical or capricious in any manner. Both the orders are well reasoned and have been passed in accordance with the spirit of law, hence, these do not call for interference by this Court.

13. The upshot of the above discussion is that the instant petition fails which is dismissed accordingly.

A.R.K. /M-410/L Petition dismissed.

2010 Y L R 3161

[Lahore]

Before Shahid Hameed Dar, J

EHSANULLAH and 2 others---Petitioners

Versus

MANZAR HUSSAIN---Respondent

Criminal Revision No. 439 of 2010, decided on 7th June, 2010.

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

----Ss.3/4---Application filed by the accused petitioners under S. 265-K, Cr.P.C. in a private complaint instituted by the respondent under Ss.3/4 of Illegal Dispossession Act, 2005, had been dismissed by Trial Court---Validity---Second complaint filed by the respondent on the same subject did not suffer from any defect, as the earlier complaint had not been decided on merits---Civil litigation between the parties could not bar the criminal proceedings initiated by the complainant in the form of a challan case or a complaint case and both civil and criminal proceedings could proceed ahead parallel to each other under the law---According to the complainant, he had been dispossessed of his landed property by the accused persons, which was an offence punishable under the Illegal Dispossession Act, 2005---Impugned order was based on cogent reason and dismissal of the application moved by accused under S.265-K, Cr.P.C. for acquittal, was neither capricious nor arbitrary---Revision petition was dismissed in circumstances.

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

----Ss.3/4---Second complaint---Practice and procedure---Law does not restrict filing of second or third complaint on the same subject under Ss.3/4 of Illegal Dispossession Act, 2005, if the earlier complaint had not been decided on merits.

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

----Ss.3/4---Civil and criminal proceedings---Practice and procedure---Civil and criminal proceedings on the same subject can proceed ahead parallel to each other, under the law.

Ch. Muhammad Anwar Bhindar for Petitioner.

Sahibzada M.A. Amin Mian, Additional Prosecutor-General for Respondent.

ORDER

SHAHID HAMEED DAR, J.--Through this Criminal Revision under sections 435/439, Cr.P.C. the petitioners have assailed the order dated 9-4-2010 passed by learned Additional Sessions Judge, Wazirabad, whereby, an application under section 265-K, Cr.P.C. moved by the petitioners in a private complaint under sections 3/4 of Illegal Dispossession Act, 2005 instituted by Manzar Hussain, respondent No.1, had been dismissed.

2. The facts leading to the filing of this revision petition are that Manzar Hussain filed a complaint under sections 3/4 of Illegal Dispossession Act, 2005 against Ehsanullah etc., the petitioners, with the contention that he had been dispossessed of his agricultural land, the detail whereof has been mentioned in the complaint, at 9-00 a.m. on 17-6-2007 by Ihsan Ullah and others (petitioners) who, being armed with deadly weapons forcibly occupied the agricultural land of the complainant and tilled it with a tractor; that Manzar Hussain, the complainant came forward to restrain them from doing so, he was threatened with dire consequences and that of murder, so, he could not stop the assailants and, like a silent spectator, saw the possession of land going to the hands of the accused; even a Punchayat thereafter, could not return him the possession of his land, therefore, he filed a private complaint under Illegal Dispossession Act, 2005.

3. Manzar Hussain respondent had previously filed a complaint on the same subject against Ehsanullah etc. (petitioner) which was dismissed due to non prosecution on 22-11-2007 as he was in Sialkot Jail at that time.

4. The petitioners moved an application under section 265-K, Cr.P.C. mainly relying upon the point that second complaint for the same offence was not competent under the law and secondly, civil litigation was pending between the parties and a suit for specific performance of contract filed by Manzar Hussain respondent had been decreed in his favour by the learned Civil Judge Wazir Abad on 17-5-2009 and a counter suit for specific performance of a contract, filed by Ehsan Ullah, the petitioner No.1 had been dismissed on the same day by the same learned court, hence, the instant petition.

5. Learned counsel for the petitioner contends that Manzar Hussain respondent was barred under the law to file second complaint under sections 3/4 of the Illegal Dispossession Act, 2005 on the same subject without any reasonable cause; both the petitioner No.1 and respondent No.1 had filed separate civil suits for specific performance of contract before the learned Civil Judge, Wazir Abad, much earlier to the filing of a complaint under sections 3/4 of the Illegal Dispossession Act, 2005 which were pending adjudication at that time, so, the filing of the said complaint by the respondent No.1 was not competent under the law; that the contention of Manzar Hussain, complainant in his above said complaint was contrary to his version as contained in civil suit wherein he had averred that he was owner in possession of the suit land and his suit had been decreed on 17-5-2008, which, clearly indicated that the occurrence alleged by him in his complaint case was baseless and false; that the impugned order passed by the learned Additional Sessions Judge, Wazirabad has been passed whimsically without application of judicious mind which has been passed in a slipshod manner; that the impugned order is based on surmises and conjectures and it has resulted in gross miscarriage of justice.

6. On the other hand, Manzar Hussain complainant contends that the pendency of a civil suit and that of petitioner No.1 was no bar to the filing of a private complaint under sections 3/4 of Illegal Dispossession Act, 2005; that the first complaint of respondent No.1 on the subject had not been decided on merits, and it was dismissed due to non-prosecution as he was confined in District Jail Sialkot then, who, could not manage his appearance before the learned trial Court on 22-11-2007 due to which the first episode of the complaint was dismissed; that the second complaint on the same subject in the attending circumstances was competent and it could not be brushed aside on the whims of the respondent/accused (petitioners); the judgment and decree passed by the learned Civil Judge in favour of the respondent does not certify anywhere that the respondent Manzar Hussain was still in possession of the territory forcibly occupied by the accused/ petitioners; the impugned order

passed by the learned Additional Sessions Judge, Wazirabad has been passed strictly in accordance with law and it does not fall short of requirement of law in any manner.

7. Arguments heard. Record perused.

8. The first complaint on the same subject filed by Manzar Hussain respondent had been dismissed by the learned trial Court on 22-11-2007 for want of presence of the complainant and it had not been decided on merits. The respondent No.1 filed second complaint under sections 3/4 of the Illegal Dispossession Act on the same subject by reasonably explaining his absence from the learned trial Court on 22-11-2007, according to which, he had been imprisoned at District jail Sialkot. The law does not enforce any restriction in terms of filing of second or third complaint on the same subject if the earlier episode (s) has not been decided on merits. So, no defect can be found so far as the filing of the second complainant by the respondent No.1 is concerned. It is admitted fact that two suits for specific performance of a contract, one each by petitioner No.1 and Manzar Hussain respondent had been filed about the same landed property which had been decided by the learned Additional Sessions Judge, on 17-5-2008 in terms that the suit of respondent No.1 had been decreed in his favour, whereas, the suit of petitioner No.1 was dismissed. It has not been mentioned anywhere in the judgment passed by the learned Civil Judge on 17-5-2008 that Manzar Hussain respondent/plaintiff was still holding the possession of the suit property. The conceding statement in form of compromise deed placed on the file of this case does not disclose at all as to who was in actual possession of the landed property and the averments of paragraph No.2 of the compromise deed is absolutely vague and hardly convey any meaning. The respondent has alleged in his complaint that he was dispossessed of his landed property by the accused Ehsanullah etc. (petitioners) on 17-6-2007 which constituted an offence punishable under Illegal Dispossession Act, 2005. It is settled once for all now, that the pendency of a civil suit is no bar to filing of a complaint under the criminal law or lodge a criminal case against the accused who had committed a cognizable offence, and that both the transactions could proceed ahead in parallel to each other. The ordinary civil suit, an application or a petition before a competent civil court cannot pre-empt upon the proceedings of a challan case or a complaint case. The impugned order has been gone into by me and I find that the learned trial Court has recorded cogent reasons while dealing with the matter and had reached a lawful conclusion while dismissing the application of the petitioner under section 265-K, Cr.P.C. The impugned order does not appear to have been passed in any arbitrary, capricious or perverse manner nor it has been passed in a sketchy or a slipshod manner. The arguments of the learned counsel for the petitioner are not tenable, hence, the impugned order does not call for any interference by this Court.

For the foregoing reasons, the instant petition is dismissed.

N.H.Q./E-7/L Revision dismissed.

2010 Y L R 3184

[Lahore]

Before Ijaz Ahmad Chaudhry and Shahid Hameed Dar, JJ

Chaudhry ASGHAR SHAHEEN-Petitioner

Versus

Raja MUNAWAR HUSSAIN and 12 others---Respondents

Writ Petition No. 8949 of 2010, decided on 6th May, 2010.

(a) Anti-Terrorism Act (XXVII of 1997)---

----S. 6---'Terrorism'---Determination as to whether an offence falls within the ambit of S.6 of Anti-Terrorism Act, 1997---Essentials elaborated.

Basheer Ahmad v. Muhammad Siddique' and others PLD 2009 SC 11 ref.

(b) Anti-Terrorism Act (XXVII of 1997)---

----Ss.6/7 & 23---Penal Code (XLV of 1860), Ss. 324/440/452/506/337-A(ii)/337-L(2)/109---Constitution of Pakistan (1973), Art. 199---Act of terrorism, attempt to commit qatl-e-amd, mischief committed after preparation made for causing death for hurt, house-trespass after preparation or hurt, assault or wrongful restraint, criminal intimidation, causing hurt, abetment---Constitution petition---Transfer of case by Anti-Terrorism Court to Regular Court for trial---Validity---Motivation, object, design or purpose behind an act had to be assessed to label the same as a terrorist act---Two groups of Advocates had clashed with each other in a full house session of District Bar Association with the agenda of discussing the probabilities of dismembering certain Members of District Bar Association, which was purely a personal agenda and had nothing to do with any design to commit the act of 'terrorism'---Receipt of injuries by a few during the occurrence was, at the most, an aftermath of the brawl between the two groups of Advocates and by no stretch of imagination the occurrence contained in the F.I.R. or in the private complaint could be termed as an act of terrorism---Anti-Terrorism Court had rightly concluded on sufficient reasons that the occurrence did not fall within the mischief of terrorism as defined in section 6 of Anti-Terrorism Act, 1997, and had termed the same as a purely indigenous trouble, haunting affairs of the District Bar Association---Impugned order of transfer of case to the Court of Area Magistrate did not suffer from any misreading or non-reading of the record---Constitutional petition was dismissed in limine in circumstances.

Basheer Ahmad v. Muhammad Siddique and others PLD 2009 SC 11 ref.

Ahmad Awais for Petitioner.

ORDER

Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner being aggrieved, has challenged the validity of order dated 5-1-2010, passed by the learned Judge Anti Terrorism Court No.II,

Gujranwala, whereby, an application under section 23 of Anti Terrorism Act, 1997, moved by respondents Nos. 1 to 13, for transfer of a complaint case under sections 324, 440, 452, 506, 337-A-(ii), 337L-2, 109 P.P.C. read with section 6/7 of Anti-Terrorism Act, 1997 has been accepted and the case has been transferred to the court of learned Area Magistrate for the purpose of trial.

2. The facts leading to the filing of instant constitutional petition are that a criminal case F.I.R. No.521 of 2004 dated 28-6-2004 under sections 324, 409, 420, 468, 471, 506, 395, 427, 148, 149, 109 P.P.C., had been registered at Police Station Civil Line, Gujrat on the complaint of Ch. Fakhar Nisar Advocate, District Courts Gujrat with the allegation in brief, that two groups of Advocates clashed with each other during a full house meeting of District Bar Association, Gujrat at 11-10 a.m. on 28-6-2004, which had been convened on a notice requisition, tabled by some members of the District Bar Association, Gujrat and the pressed agenda of the meeting was to discuss the probability of dismemberment of some local bar members of D.B.A. Gujrat including, Ch. Fakhar Nisar Advocate; that only 92 members of District Bar Association, Gujrat attended the said session as against 321 members required for satisfaction of quorum due to which requisition was supposedly rejected by the house; on seeing this, a group of Advocates all at once, started raising slogans and resorted to hooliganism; they abused the complainant party, extended threats of murder and hurled chairs etc. upon them to commit their murder, manhandled Muhammad Nadeem Iqbal Advocate and snatched cash etc. from the complainant. In the meanwhile, some one pointed out the insufficiency of quorum resultantly, the resolution was dropped; the situation worsened as some outsiders, not the members of District Bar Association, Gujrat, forcibly entered the bar room, committed worst degree of disturbance, ransacked the bar room, defiled its dignity and badly damaged furniture and fixtures of the bar room; the complainant and his fellow advocates saved their lives by getting away from the place of occurrence; that the attackers carried away the record of the bar room and tampered with it.

3. On the other hand, Ch, Muhammad Asghar Shaheen Advocate acting Secretary District Bar Association, Gujrat moved an application for registration of a cross-case with almost identical counter allegations with the addition that six advocates on their side had been injured by the other side during the said brawl; it was further alleged that Raja Munawar DPO, Gujrat had sabotaged a peaceful session of the District Bar Association, Gujrat by using his nominated disciples.

4. As the police hesitated to record the cross version case so the complainant was constrained to move an application under sections 22-A/22-B, Cr.P.C. before the learned Ex-officio Justice of Peace, Gujrat for registration of the cross-case which was allowed on 30-6-2004. The cross case was registered against the complainant party of F.I.R. which stood the test of investigation, still, Ch. Muhammad Asghar Shaheen, Advocate was constrained to file a private complaint under sections 324, 337A-(ii), 337-L-2, 440, 452, 506 P.P.C. read with section 6/7 of ATA, 1997 before the Anti Terrorist Court, No.II, Gujranwala to seek justice.

5. The learned Anti-Terrorism Court after recording the statement of the complainant and that of his witnesses under sections 200, Cr.P.C. and 202, Cr.P.C. summoned the respondent-accused but interestingly, the list of the respondent accused did not contain the names of any of the advocates though figured, in the aforesaid application for registration of a cross-case.

6. The learned Public Prosecutor, the Anti Terrorism Court No.2, Gujranwala added. section 7 of ATA, 1997 in the cross version, registered on 29-6-2004 where-against a

constitutional petition bearing Writ Petition No.16951 of 2008 was filed before this Court which was allowed on 10-6-2009 in terms that, addition of section 7 of Anti Terrorism Act, 1997 was declared to be without lawful authority and of no legal effect.

7. The respondent-accused, of the private complaint moved an application under section 23 of Anti-Terrorism Act, 1997 for transfer of the complaint from Anti Terrorism Court to a Court of ordinary jurisdiction which was accepted by the learned Judge Anti Terrorism Court No.2, Gujranwala on 5-1-2010. Hence, instant constitutional petition.

8. Learned counsel for the petitioner contends that the impugned order has been passed in violation to the settled principles/rules governing the subject; that the learned trial court has erred in passing the impugned order and has wrongly termed the occurrence as a dispute between the two groups of lawyers, supporting and opposing the strike call; that the view taken by the learned trial court is based on misreading and non-reading of the record; that the impugned order has been passed in a fanciful way, without taking into consideration the real facts of the case; that the learned trial court had no authority to review its earlier order dated 8-6-2009, whereby, the respondent-accused had been summoned to face the trial under the aforesaid provisions of law including under section 7 ATA, 1997; that the learned trial court has failed to appreciate that the respondent/accused were not the law practitioners and they were outsiders, who, with the blessing of the lordship of Muslim League (Q) and that of Raja Munawar, DPO, Gujrat, respondent No.1, reached the Bar Room of District Bar Association, Gujrat, ransacked it and caused destruction of the property worth lacs of rupees besides, committing other offences; that the offence committed by the respondent-accused falls within the definition of terrorism as defined by section 6 of ATA, 1997 but the learned trial court without any just cause, passed the impugned order which is not sustainable by any means; that the occurrence committed by the accused caused fear, panic, dread and fright to a section of the society which was widely publicized through print and electronic media which generated more anxiety and sense of insecurity in the minds of the public at large; that the impugned order being perverse, arbitrary, whimsical and illegal has resulted in miscarriage of justice which is liable to be set aside.

9. We have heard learned counsel for the petitioner at length and perused the impugned order, as well as available record attached with the petition.

10. The Anti-Terrorism Act, 1997 amended from time to time, has now attained the form of comprehensive and efficacious statute to deal with ever growing menace of terrorism. The definition of word "terror" as it stands today, was added to the act "ibid" through the Anti Terrorism (Amendment Order) 2001. The Ordinance XXXIX of 2001) promulgated on 15-8-2001. The amended section 6 (1) (b) satisfies the "design" and section 6(1)(c) denotes the "purpose" in respect of a terrorist act and the other essential ingredient i.e. "mens rea" is provided under section 6(1)(b)(c). So the act of terrorism is stated to have been committed where, all the three aforementioned ingredients are in existence. Terrorist act is one which is necessarily committed with the intention and purpose, and mens rea of committing terrorism if the use or threat of that action is "designed to coerce and intimidate or overawe the Government, or the public or section of public or community of sect or if such action is designed to create sense of fear or insecurity in the society or such act or threat thereto is made for the purpose of fanning the religious, sectarian or ethnic hatred". The spread of fear or terror to a section of the society or to society as a whole may be the byproduct of an ordinary criminal act but it cannot be termed as a terrorist act, within the meaning of section 6 of the Anti-Terrorism Act 1997, unless the aforementioned ingredients dominate the mind of the perpetrator of such an act as, the emphasize is on the motivation and objection and not on the result.

A gruesome or barbaric act committed to satisfy personal vendetta or vengeance may result in spread of shock, horror, fright or panic, to the public at large and it may render many, denerved, crestfallen and hopelessly demoralized, still, it shall not be an act of terrorism which has been defined by the Anti Terrorism (Amendment Order) 2001 in the aforementioned terms. The nexus emphasized by the stature, between the act committed and the ingredient in trinity, as mentioned hereinbefore, does constitute a terrorist act, which is committed to destabilize the society or overawe the government. To determine the question if an offence falls within the ambit of sections 6/7 of the Act, the allegations alleged in the F.I.R. (including the cross-case), record of the case and attending circumstances have to be taken into consideration. As laid down by the august Supreme Court of Pakistan, in a luminous judgment titled Basheer Ahmad v. Muhammad Siddique and others (PLD 2009 SC Page 11) a Terrorist Act shall be assessed to have been committed as under:-

> "In order to determine as to whether an offence would fall within the ambit of section 6 of the Anti Terrorism Act, 1997, it would be essential to have glance over the allegations made in the F.I.R., record of the case and surrounding circumstances. It is also necessary to examine that the ingredients of alleged offence have any nexus with the object of the case as contemplated under sections 6, 7 and 8 thereof. Whether a particular act is an act of terrorism or not, the motivation, objection, design or purpose behind the said act is to be seen. It is also to be seen as to whether the said act has created a sense of fear and insecurity in the public or any section of the public or community or in any sect."

The motivation, object, design or purpose behind such an act have to be assessed to label an act as a terrorist act.

11. We find that two groups of advocates clashed with each other on the day of. occurrence in the backdrop of specific circumstances relating to a full house session of the District Bar Association Gujrat with agenda of discussing the probabilities of dismembering certain members of District Bar Association Gujrat which was purely a personal agenda of the District Bar Association Gujrat, and it had nothing to do with any design to commit the act of terrorism. If a few had received injuries during the course of occurrence it was, at the most, an aftermath of the brawl between the two groups of advocates so, by no stretch of imagination of the occurrence contained in the F.I.R. or in the private complaint could be termed as the act of terrorism.

12. The learned trial court has furnished sufficient reasons to reach the conclusion that the instant occurrence did not fall within the mischief of definition of section 6 of Anti Terrorism Act, 1997 and termed it a purely indigenous trouble, haunting affairs of District Bar Association, Gujrat which resulted in the above said unpleasant occurrence but, it does not attract the definition of a terrorist act from any angle. The impugned order appears to have been passed strictly in line with and on the principles underlined, by the august Supreme Court of Pakistan, in the aforementioned luminous judgment.

13. There has not been any misreading or non-reading of the record in making the impugned order which does not call for any interference by this Court.

14. For the foregoing reason, the instant petition fails which is dismissed in limini.

N.H.Q. /A-124/L Petition dismissed.

2011 M L D 237

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ASIF and others---Petitioners

Versus

THE STATE---Respondent

Criminal Revision No. 614 of 2010, decided on 8th June, 2010.

Criminal Procedure Code (V of 1898)---

----Ss. 514---Penal Code (XLV of 1860), S.302/34---Qatl-e-amd---Forfeiture of bail bonds---Accused for whom the petitioners had stood sureties was a fugitive from law in a murder case and he had been declared a proclaimed offender by Trial Court---Sureties who appeared to be persons of limited means and law profile could not be believed to launch any successful operation to dig out the exact present particulars of the accused, overpower him and compel him to surrender before the court for facing the trial---Even the Government machinery with all its power and mobility had been unsuccessful in hauling up the accused to bring him to the court of law---However, it did not mean that the petitioners had no knowledge of the antecedents of the accused or of their own economic strength and they had happily and readily offered themselves to be the sureties of a criminal---Liability of the petitioners as sureties, therefore, could not be denied, who had failed to discharge their obligations and they were liable to pay penalty under the law---Forfeiture and infliction of penalty to the tune of Rs. 1,00,000 each was, however a bit harsh---Said penalty in the attending circumstances of the case was reduced to Rs.60,000 each to meet the ends of justice.

Tahir Zia Mohar for Petitioners.

Aamir Jalil Siddiqui, A.A.-G.

ORDER

SHAHID HAMEED DAR, J.---Through this revision petition, the petitioners have called in question the validity of order dated 20-5-2010 passed by learned Additional Sessions Judge, Sheikhupura, whereby, the petitioners who stood sureties for accused Mazhar Ali alias Azhar in case F.I.R. No.218 of 2007 dated 25-3-2010 under section 302/34 P.P.C., Police Station Bhikki, District Sheikhupura, have been ordered to make payment of Rs.1,00,000 each on account of forfeiture of the bail bonds, submitted by them, within seven days of the order, otherwise, their properties be attached by DDO (Revenue) for deposit of the bond amount in Government Treasury under section 514, Cr.P.C.

2. Learned counsel for the petitioner contends that the petitioners are illiterate and poor tillers of the land with small holdings who had stood sureties for the accused Mazhar Ali alias Azhar out of benevolence and humanitarian consideration and not for any monetary or personal gains but in any case, as the said accused had absconded in a murder case and pursuant thereto he had been declared a proclaimed offender, hence, it was not humanly

possible for the rugged and simple villagers, like the petitioners to go after the run-away accused so they should not have been taken to task and the forfeiture of full bond amount, submitted by them, vide impugned order, was intolerably harsh, unjust and backbreaking.

3. On the other hand learned Additional Prosecutor-General has controverted the arguments of the learned counsel for the petitioners and submits that the petitioners must be dealt with dynamically as they had opted to be the sureties of such a criminal character who had no respect and belief in the process of law and the courts; the petitioners had failed to discharge their duties as sureties and only due to their negligence the above said accused had absconded and become a fugitive from law.

4. I have given my anxious considerations to the submissions made by the learned counsel for the petitioners and the State.

5. Admittedly, the accused Mazhar Ali alias Azhar, for whom the petitioners had stood sureties is a fugitive from law in a murder case and he has been declared a proclaimed offender by the learned trial Court and in this situation, it was literally impossible for the petitioners to pursue/chase him to trace his whereabouts so as to make his presence possible before the learned trial Court. The sureties who give a look of the persons of limited means and low profile cannot be believed to launch any successful operation to dig out the exact/present particulars of the accused, overpower him and compel him to surrender before a court of law for facing the trial. Even the government machinery, with all its power and mobility has been unsuccessful in hauling up the said accused to bring him to the test of law. But it does not mean that the petitioners had no knowledge of the antecedent of the said accused or that of their own economic strength. They had happily and readily offered themselves to be the sureties of a criminal character and in that capacity had submitted the bail bonds worth Rs.1,00,000 each merrily, to secure the release of the above said P.O from the prison. So, the petitioners' liability as sureties cannot be denied. The learned Additional Sessions Judge has rightly concluded that the petitioners had failed to discharge their obligations as sureties so they were liable to pay penalty under the law. The forfeiture and infliction of penalty to the tune of Rs.1,00,000 each is however, a bit harsh, therefore, keeping in view the attending circumstances of this case, this court is inclined to reduce the penalty amount to Rs.60,000 each instead of Rs.1,00,000 each, which is accordingly done and the amount of surety bond is reduced to Rs.60,000 each against the petitioners, to meet the ends of justice.

6. The petitioners are directed to deposit the aforesaid penalty amount i.e. Rs.60,000 each, in the Treasury within 30 days from today, otherwise, it shall be recovered by the learned trial Court as land revenue under the relevant law. Order accordingly.

Disposed of.

N.H.Q./M-378/L Penalty reduced.

2011 MLD 346

[Lahore]

Before Shahid Hameed Dar, J

KHURRAM BASHIR---Petitioner

Versus

THE STATE and others---Respondents

Criminal Miscellaneous No. 1911-B of 2010, decided on 10th November, 2010.

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

----S.498---Penal Code (XLV of 1860), S.337-A(i)/354/452---Causing hurt "shajjah"; assault or criminal force to woman with intent to outrage her modesty; house-trespass after preparation for hurt, assault or wrongful restraint---Pre-arrest bail, grant of---Allegations made in the F.I.R. did not show that the empty handed accused had committed any act falling within the definition of S.452, P.P.C.---Accused had not caused any injury to the wife of the complainant, nor did he tear her shirt---False implication of accused in the case due to malice or ulterior motive of the complainant could not be ruled out--Extra ordinary relief of pre-arrest bail could be lawfully extended to a person who did not appear to have committed a non-bailable offence or room for further inquiry into his guilt would appear within the meaning of S.497(2), Cr.P.C.---Primary object of bail before arrest was to save innocent persons from the apprehension of being arrested for a tainted purpose carved out by the mischievous wire puller driven by malice and malignancy of intention---Injuries received by the wife of the complainant, according to her Medico-Legal Report fell within the definition of S.337-A(i), P.P.C. which was a bailable offence, punishable with two years' R.I.--Pre-arrest bail was allowed to accused in circumstances.

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

----S.498---Pre-arrest bail---Purpose and scope---Pre-arrest bail is an extra-ordinary relief, the scope whereof is narrow, but it can be lawfully extended to a person who does not, prima facie, appear to have committed a non-bailable offence, or there is room for further probe into his guilt within the meaning of S.497(2), Cr.P.C.---Primary object of pre-arrest bail is to save the innocent persons from the apprehension of being arrested for a tainted purpose, carved out by the mischievous wire puller, driven by malice and malignancy of intention.

Malik Waheed Anjum for Petitioner.

Malik Riaz Ahmad Saghla, D.P.G. for Respondents.

Muhammad Aslam, S.-I.

ORDER

SHAHID HAMEED DAR, J.---Seeks bail before arrest in case F.I.R. No.663 of 2010 dated 1-8-2010 under sections 337A(i), 354, 452 P.P.C. registered at Police Station Sadiqabad,

Rawalpindi on the complaint of Khurram Kiani.

2. Precisely, the prosecution case as stated by the complainant is that a dilapidated house was situated close to his residential house where the youths of Mohallah often smoked charas; he found Talat Bhatti, Waseem and Khurram Abbas (petitioner) smoking charas in the said house at 9-00 p.m. on 31-7-2010 and threw them out of the said house by insulting them; the above said three persons trespassed into his house at 9-30 p.m. raised lalkara, showered abuses upon him and insulted his wife; one of the accused namely Talat Bhatti beat the wife of the complainant due to which her shirt was torn; the accused picked up some used bottles and smashed them against the walls of the house, as a result of which the wife of the complainant received injuries as some splinters thereof hit her; on the alarm of the complainant, the neighbours reached there and persuaded the accused to leave the house of the complainant.

3. It has been found from the F.I.R. that the petitioner and his co-accused were empty handed at the time of alleged occurrence and none of them used the old bottles as a weapon of offence. It has been further found from the F.I.R. that it was Tallat Bhatti, the co-accused of the petitioner who allegedly beat the wife of the complainant during the occurrence. It has been alleged in the F.I.R. by the complainant that the accused/petitioner and his co-accused broke some empty bottles by striking them against the walls of the house and some pieces of the broken glass hit the wife of the complainant due to which she received injuries on her face and hand. It is further found that the accused left the house of the complainant after having been persuaded by the inhabitants of the same Mohallah.

4. I advantageously reproduce the definition of section 452, P.P.C. hereunder:--

> House-trespass after preparation for hurt, assault or wrongful restraint. Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

5. It is manifest from the definition of section 452, P.P.C. that the essential ingredients for commission of offence under section 452, P.P.C. is that the offender shall be deemed to have committed the offence of criminal house-tress pass if he after having made preparations would commit the said offence with a criminal intent to cause hurt to any person, assault any person, or wrongfully restrain any person etc. From the allegation contained in the F.I.R. it does not appear that the empty-handed accused/petitioner had committed any act which could attract the basic ingredients of section 452, P.P.C. He did not cause injuries to the wife of the complainant nor he tore her shirt and his case is clearly distinguishable from the case of his co-accused Talat Bhatti. The false implication of the petitioner due to malice or ulterior motives of the complainant especially in the backdrop of the earlier incident cannot be ruled out.

6. The pre-arrest bail admittedly, is an extra ordinary relief, the scope whereof is narrow still, it can be lawfully extended to a person who does not prima facie appear to have committed a non--bailable offence or there is room for further probe into his guilt within the F meaning of

section 497(2) Cr.P.C. The primary object of the pre-arrest bail is to save the innocent persons from the apprehension of being arrested for a tainted purpose, carved out by the mischievous wire puller, driven by maliciousness and malignancy of intention.

7. Learned Deputy Prosecutor-General though has opposed the grant of bail to the petitioner yet has failed to raise any point to establish that the alleged offence committed by the petitioner falls within the ambit of section 452, P.P.C. The injuries as I find from the MLR of the injured lady fall within the definition of section 337A(i), P.P.C. which is a bailable offence, punishable with two years' imprisonment.

8. For the foregoing reasons I accept this application and confirm the ad-interim pre-arrest bail granted to the petitioner vide order dated 4-11-2010 subject to furnishing fresh bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of the learned trial Court.

N.H.Q./R-61/L Pre-arrest bail granted.

2011 M L D 358

[Lahore]

Before Rauf Ahmad Sheikh and Shahid Hameed Dar, JJ

MUHAMMAD MUNIR---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No. 216 and Murder Reference No.353 of 2007, heard on 14th October, 2010.

Penal Code (XLV of 1860)---

----S.302(b)---Qatl-e-amd---Appreciation of evidence---Eye-witnesses had been proved to be natural witnesses of the occurrence and their presence on the spot at the relevant time also stood established---No element of any grudge or enmity between the accused and the eye-witnesses had been brought on record---Accused could not be substituted for any other culprit---Eye-witnesses had confidently recorded their statements and corroborated each other on almost every material aspect of the case, without any material discrepancy, contradiction or dishonest improvement---Motive as alleged stood proved---Matter had been reported to the police with utmost promptitude by complainant --"Chhuri" got recovered by accused was found to be stained with human blood---Medical evidence had further supported the prosecution version---Accused had never been looking after his minor children and, thus, the plea of being the father of the children, whose mother he had brutally murdered, would not provide a mitigating circumstance in his favour---Conviction and sentence of death of accused were upheld in circumstances.

Noor ul Hassan Khan for Appellant.

Rana Kashif Saleem Arfaa, Law Officer for Respondent.

Date of hearing: 14th October, 2010.

JUDGMENT

SHAHID HAMEED DAR, J.---The appellant Muhammad Munir has been convicted by the learned Addl. Sessions Judge, Jhelum vide judgment dated 31-3-2007, on a charge of murder of Mst. Munawar Bibi. The appellant was sentenced as under:--

> Under section 302(b), P.P.C.
>
> Death with order to pay Rs.1,00,000 as compensation to the legal heirs of the deceased, under section 544-A, Cr.P.C, in default thereof to undergo six months' S.I.

2. The convict has filed Criminal Appeal No.216 of 2007 against his conviction/sentence, besides, there is a usual reference under section 374, Cr.P.C. for the confirmation of the sentence of death, transmitted by the learned trial Court. This judgment will dispose of the above said appeal and the reference.

3. The crime is said to have been committed at 11-00 a.m. on 27-5-2006, in the area of village Mianibala, situated within the jurisdiction of Police Station, Sohawa, District Jhelum, which is at a distance of 7 kilometers from the place of the incident.

4. The facts culminating in this incident were that Muhammad Aslam complainant (P.W.6) resided in village Sargaddhan along with his brothers and sisters; his sister Mst. Munawwar Bibi (deceased) was married with Muhammad Munir (appellant), a resident of Changhar Mohallah Barker Road, Gujjar Khan; three daughters and two sons had been born out of the said wedlock; Mst. Munawwar Bibi, due to estrangement of relationship with her husband, had been living with the complainant for one year as she had been kicked out of his house by the appellant; she used to sell pottery to feed her children; the complainant also sold the earthenware by moving from place to place who along with his maternal cousin (mamoonzad) Akbar Ali, P.W.5 reached Mianibala at about 11-00 a.m on 27-5-2006 while selling the clay pots where they found Muhammad Munir (appellant) quarreling with his wife Munawwar Bibi who, within their view, pulled out a chhuri from the fold of his Shalwar and clubbed it into her abdomen as a result of which, she fell onto the ground; Muhammad Munir fled away, brandishing his weapon; the complainant and Akbar Ali shifted Munawwar Bibi in injured condition to Civil Hospital where she succumbed to the injuries.

5. The immediate motive of the occurrence pertained to the familial differences between the appellant and the deceased lady.

6. According to Noor Muhammad Inspector/Investigating Officer P.W.8, he along with fellow police officials, on learning about the incident, reached THQ Hospital Sohawa where Muhammad Aslam complainant (P.W.6) appeared before him at 1-30 p.m on 27-5-2006 and got recorded his complaint Exh.PE qua the above said incident. He after recording the statement, Exh.PE, sent the same to the Police Station Sohawa for registration of formal F.I.R. (Exh.PE/1.). Thereafter, he examined the dead body of the deceased lying in the mortuary prepared the injury statement Exh.PB, inquest report Exh.PB/1 and handed over the dead-

body of the deceased lady to Azmat Ullah 581/C P.W.9 for postmortem examination. He then, left for the place of occurrence, inspected it, collected blood-stained earth therefrom vide memo Exh.PD and prepared visual site plan of the spot. He took into possession last worn blood stained clothes of the deceased vide memo Exh.PG. He got prepared the site plan in duplicate Exh.PC and Exh.PC/1 by Akhtar Naqqash, draftsman, P.W.2 in the scale of 1 inch equal to 20 feet. He arrested the appellant-accused on 5-6-2006 who, pursuant to his disclosure, led to the recovery of chhurri P-1 on 7-6-2006 vide memo of recovery Exh.PF, attested by Muhammad Aslam (P.W.6) and Muhammad Gulzar P.W. (not produced). The I.O. completed the investigation and challaned the accused on 13-6-2006.

7. The dead-body of Mst. Munawwar Bibi deceased was shifted to DHQ Hospital Jhelum, where Dr. Mahjabeen Asjad D.M.S. P.W.1 conducted its postmortem examination at 1-30 a.m on 28-5-2006, vide postmortem examination report Exh.PA (pictorial diagrams Exh.PA/1 and Exh.PA/2) and found following injury on the dead-body:-

> A large wound on anterior abdominal wall with gut protruding out of the wound.

The cause of death, as recorded by the Medical Officer, was due to haemorrhage and shock caused by the above said injury which had badly damaged the abdominal wall, the intestines, diaphragm, stomach, liver and the left kidney. The above said injury was ante mortem and caused by a sharp-edged weapon.

The probable time, elapsed between injury and death was worked out by the Medical Officer as 'instantaneous' and between death and post-mortem examination within 24 hours.

8. In his statement under section 342 Cr.P.C., the appellant denied and controverted all the allegations of fact levelled against him by the prosecution and professed his innocence, while responding to the question, as to why this case against him and why the P.Ws had deposed against him, in the following words:--

> "The complainant has personal grudge with me and due to that reason he has falsely involved me in this case. I have two minor sons and three minor daughters. The P.Ws are relative of the complainant and they have deposed against me at the asking of the complainant."
>
> No evidence was called in defence by the appellant.

9. Muhammad Aslam complainant P.W.6 is the real brother of the deceased. Akbar Ali, P.W.5 is the real maternal cousin of Muhammad Aslam complainant. Obviously these P.Ws. are the close relations of the deceased.

10. Muhammad Aslam complainant, P.W.6 submits in his testimony that he along with his sister Mst. Munawwar Bibi (deceased) went to village Mianibala to sell pottery. She entered Abadi Deh whereas, he visited the adjoining areas to sell his clay pots and in this process he came across Akbar Ali P.W.5 who too had the same means of living. Both of them decided to see Munawwar Bibi and reached near the shrine of Miran Shah where they witnessed Muhammad Munir, appellant, engaged in a brawl with Munawwar Bibi, who, all at once pulled out a chhuri from the fold of his shalwar and stabbed her on the abdomen due to which she was flattened to the ground in a bad injured condition. The assailant/appellant

took to his heels, brandishing his weapon. The unfortunate lady was shifted to the hospital but en-route, she succumbed to the injuries. The motive qua the occurrence was that Munir Ahmad appellant was the husband of Munawwar Bibi, deceased, who treated her inhumanly so she having deserted him, was putting up with her brother Muhammad Aslam complainant, P.W.6, for almost a year prior to the occurrence. The appellant- accused committed the murder of his wife due to family feud. To the similar effect, is the evidence of Akbar Ali, P.W.5.

11. The learned Additional Sessions Judge, Jhelum examined the evidence of the prosecution witnesses and found their testimonies reliable and creditworthy as to the incident and took the view that they had witnessed the occurrence being present at the relevant time.

12. We have examined the eye-witness account with required degree of care and caution.

13. So far as the main story of the occurrence goes the evidence of P.W.5 and P.W.6 is consistent and of uniform character. There is nothing in their cross-examination to show as to why their evidence should be discarded nor any particular reason has been shown on the record as to why the witnesses of ocular account would render false evidence against the appellant. The alleged occurrence took place at about 11-00 a.m on 27-5-2006 at a place, in the proximity of the shrine of Miran Shah situated in village Mianibala where, Muhammad Munir appellant was found wrangling with his wife Mst. Munawwar Bibi, who due to maltreatment of her husband, had to leave his house about a year earlier than the day of the occurrence and she ever-since, had been residing along with her children in the same house where her brother Muhammad Aslam, complainant resided. She instead of sitting idle, adopted the same means, like that of her brother, to earn livelihood for her children. She would carry the earthen pottery every day and move through different villages to sell her commodities to the villagers and this is how she was bringing up her children. Her brother Muhammad Aslam, P.W.6 and her maternal cousin. Akbar Ali P.W.5 also earned their bread and butter the same way. There is nothing unusual when it is contended by P.W.5 and P.W.6, the witnesses of ocular account that they met each other in the area of village Mianibala where Mst. Munawwar Bibi deceased was also present for selling her wares. Muhammad Munir appellant-accused was obviously well aware of the business of his deserted wife so it was not difficult for him to find her out in any of the villages, she moved through, in her daily routine. The appellant did not treat the ill-fated lady humanly nor he showed any signs in the last one year, prior to the occurrence, that he had mended himself or that he was prepared to take his wife and children to his house. Instead, he chased her like a blood hound, being armed with a lethal weapon and disposed her of callously on the day of the occurrence. The way he clubbed his sharp edged weapon in the abdomen of the poor lady, shows his predetermined mind, as the force used by him for infliction of the terminal injury on the body of the deceased, damaged a number of internal viscerae, including stomach, intestines, liver and left kidney etc.

14. The presence of Muhammad Aslam P.W.6 and that of Akbar Ali P.W.5 at the place of occurrence, at the relevant time stands proven and 2 they have established themselves to be the natural eyewitnesses of the occurrence. They had every purpose to be present at the place of occurrence when Muhammad Munir appellant committed the damned act. Why would the witnesses of ocular account substitute the appellant accused for some other accused and the

argument raised by the learned counsel for the appellant in this context is absolutely unfounded and baseless. The substitution of an accused is a rare phenomena as it does not appeal to reason as to why one would let the actual assailant get scot-free to falsely implicate an innocent person. There has not been an iota of evidence that there was an element of grudge, grouse or enmity between the appellant and the witnesses of ocular account.

15. The contention of the appellant that he had two minor sons and three minor daughters looks queer as the children had been living with the deceased lady who being their mother had been running from pillar to post to feed them, as is evident from complaint Exh.PE wherein this fact has been categorically mentioned by Muhammad Aslam complainant. The appellant-accused strangely, did not utter even a single word in his statement under section 342 Cr.P.C., as to who had committed the murder of his wife and recorded an evasive answer without any element of rationality.

16. The cross-examination by the defence, on both the P.Ws. could not shatter the intrinsic value of their testimonies and both of them confidently recorded their statements by corroborating each other on almost every material aspect of the case. We do not find any material discrepancy or contradiction or dishonest improvement in the eyewitness account. The line of cross-examination adopted by the defence appears to be wavering, indecisive and unfocused, while grilling P.W.5 and P.W.6.

17. The motive alleged in this case stands more than proven as no other rivalry or hostility existed between the appellant and the deceased except that of the familial dispute. The appellant failed to furnish any explanation in his statement under section 342 Cr.P.C. in respect of his being negligent and oppressor to his wife. The matter was reported to the police with utmost promptitude by the complainant P.W.6 at 1-30 p.m. at THQ, Hospital Sohawa where Noor Muhammad Inspector (formerly an S.I.), P. W. 8 recorded the complaint Exh.PE. The evidence of recovery c of a blood stained chhuri P-1 got recovered by the appellant on 7-6-2006 through recovery memo Exh.PF, supported by positive reports of Chemical Examiner, Exh.PK and that of the Serologist Exh. PK/ l is also a strong corroboratory circumstance to the prosecution's case. The medical evidence, rendered by Dr. Mahjabeen Asjad, .D.M.S, DHQ Hospital, Jhelum who performed autopsy on the dead body of the deceased at 1-30 a.m on 28-5-2006 vide postmortem examination report Exh.PA, with pictorial diagrams Exh. PA/1 and Exh.PA/2, lends complete corroboration to the ocular account. In the circumstances we confirm the conviction of the appellant, as recorded by the learned trial Court.

18. Learned counsel for the appellant has seriously challenged the conviction of the appellant but at the same moment has stoutly urged for the reduction of the sentence of Muhammad Munir appellant. He argued that the prosecution had setup a 'specific motive in aforementioned terms but badly failed to establish the same through any cogent or plausible evidence. Adds that the non-establishment of motive would give rise to an extenuating circumstance in favour of the appellant and the failure on the part of the prosecution, in this regard, shall cause him face its consequences. Besides, learned counsel has also argued that the appellant-accused is the father of five minor children and the sentence of the capital punishment would be harsh and excessive as the children of the deceased lady would be left unattended and not to be taken care of if the sentence of the appellant is not commuted to a lesser penalty. We are afraid that both the objections raised by learned counsel for the

appellant are superfluous and untenable as the motive, set up by the prosecution, stands more than proven for the reasons recorded hereinbefore. So far as the latter plea of the appellant that his children would be left alone is again without any merit and substance. In the lifetime of Mst. Munawwar Bibi deceased he hardly cared for his minor children and the deceased lady bore the brunt of the hardships of life alone and roamed into the streets of different villages to feed her minor children. The appellant has not hinted at even a singular circumstance whereby he could prove that he had been looking after his minor children or he had been providing them the maintenance in any manner. The plea of being the father of the surviving children was always available to the appellant, in the lifetime of his better half but having brutally murdered her, he has lost this very argument and thus cannot be extended any premium thereof. We do not find any mitigation or extenuation in favour of the appellant-accused, hence, his plea for reduction in the sentence of capital punishment is repelled and rejected.

19. In this view of the matter and in the circumstances mentioned hereinbefore we uphold and confirm the conviction and sentence of the appellant accused as recorded by the learned trial Court in the impugned judgment. Resultantly, the appeal (Criminal Appeal No.216 of 2007) filed by Muhammad Munir appellant is dismissed.

20. The Murder Reference No.353 of 2007 is answered in the affirmative.

N.H.Q./M-594/L Appeal dismissed.

2011 M L D 535

[Lahore]

Before Shahid Hameed Dar, J

Syed FARAZ SHAH---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No. 1616-B of 2010, decided on 4th November, 2010.

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

---Ss. 154, 155, 156, 173 & 195---Registration of criminal case---Taking cognizance by the court---Registration of a criminal case was entirely a different phenomenon from the one, pertaining to the taking of cognizance by a court of law on the report under S.173, Cr.P.C.---Complaint within the meaning of S.195, Cr.P.C., could be made a part of the prosecution record, even after the registration of F.I.R.; as no compelling restriction was available in that regard.

Saeed Ahmad v. The State 1996 SCMR 1132; Abdul Qadeer v. The State 2010 YLR 2064; Muhammad Shahid Maqbool Bhatti v. Sajid Hussain and another 2010 MLD 722; Muhammad Hussain v. Muhammad Shafi 2008 SCMR 235; Syed Riaz Hussain v. The State 2010 YLR 2093 and Muhammad Shafi v. Deputy Superintendent of Police Malik Gul Nawaz PLD 1992 Lah. 178 ref.

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

----Ss. 497 & 155(2)---Penal Code (XLV of 1860), Ss.420, 468, 467 & 471---Cheating, forgery, using as genuine a forged document---Bail, refusal of---Offence under Ss.468 & 471, P.P.C. being non-cognizable could be validly investigated by the Police without fulfilment or requirement of S.155(2), Cr.P.C., as S.420, P.P.C. was cognizable and in presence of a cognizable offence, the non-cognizable offences could be lawfully investigated by' the Police seeking prior permission of the Magistrate---Accused did not appear to be innocent at all in the whole episode and reasonable grounds were available to believe that he had committed the offence, alleged against hint---Accused had the history of involvement in a couple of other criminal cases of alike nature---Attending circumstances of the case did not constitute need for further inquiry into the guilt of accused as contemplated by S.497(2), Cr.P.C.

Muhammad Faizal Malik for Petitioner.

Raja Ikram Amin Minhas for the Complainant.

Malik Riaz Ahmad Saghla, D.P.-G. with Aziz, S.-I. .

ORDER

SHAHID HAMEED DAR, J.---Syed Faraz Shah was arrested on 9-8-2010 in case F.I.R. No. 195 of 2010 dated 23-2-2010 for offences under sections 420, 468, 467, 471, P.P.C. registered at Police Station Civil Lines, Rawalpindi on the complaint of Malik Muhammad Nawaz who has alleged in the F.I.R. that he was the complainant of case F.I.R. No. 1154 recorded at the same Police Station under section 489-F, P.P.C. against one Idrees Khan who after having been arrested was sent to judicial lock-up; Idrees Khan moved an application for bail after arrest, during the pendency whereof Syed Mehdi Nawaz (petitioner), was appointed a guarantor who vide agreement deed No. 488.dated 18-9-2009 consented in presence of the witnesses, to satisfy the claim of the complainant in respect of case F.I.R. No. 1154 supra, by selling his property measuring 1 kanal, Khewat Nos. 612 to 614 Khatooni No. 406, Khasra No. 1418 worth Rs. 12,50,000 situated at Village Dhalyal, Rawalpindi and handed down a copy of record of rights pertaining to the said property to Malik Muhammad Nawaz complainant; the petitioner also got recorded his statement on 16-9-2009 before the learned Magistrate, Rawapindi qua the said fact, in response to which the complainant showed his willingness before the learned trial Court to the acceptance of the bail application of Idrees Khan accused who was released on bail due to the afore-said facts; the complainant as per above arrangement demanded the amount of Rs. 15,00,000 from Syed Mehdi Faraz Shah (petitioner) on 8-11-2009 who put him off for sometime and then asked one Raja Amjad to intervene for seeking extension of the target date and reiterated his version that he would do the needful within next 15 to 20 days; Raja Amjad and Syed Mehdi Faraz Shah again sought for another extension in the time limit but despite having availed the same he (petitioner) neither made payment to the complainant nor transferred any land in his name; the complainant on suspicion got verified from the Revenue Department, the entries of the copy of record of rights, given to him by the petitioner and he was informed that the said entries were bogus, for, he was not the owner of the said property and that the Fard jamabandi had not been issued by the Revenue Department. Hence the instant case.

2. Learned counsel for the petitioner submits that the petitioner has been falsely implicated in this case under a conspiracy hatched up by the complainant and his co-witnesses; the petitioner does not owe any amount to the complainant so he cannot claim any right, of the statement of the petitioner, recorded by the learned Magistrate on 16-9-2009; the petitioner has neither fabricated any forged document nor has used the same as genuine; the offence under sections 420 and 471, P.P.C. are bailable whereas sections 467 and 468 are non-cognizable; the prosecution does not possess the original copy of the record of rights so the prosecution case shall be deemed as a case of no evidence; a bar has been created by section 195, Cr.P.C. as to the taking of cognizance without fulfillment of the requirement of the said section, so the registration of a criminal case against the petitioner is violative of law; the offence with which the petitioner is charged do not fall within the prohibitory clause of section 497, Cr.P.C. and his case calls for further inquiry within the meanings of section 497(2), Cr.P.C. relied upon "Saeed Ahmad v. The State" (1996 SCMR 1132), "Abdul Qadeer v. The State (2010 YLR 2064) and "Muhammad Shahid Maqbool Bhatti v. Sajid Hussain and another" (2010 MLD 722).

3. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant has opposed the grant of bail to the petitioner with the contention that the petitioner on one hand befooled the complainant by his deceptive and fraudulent deed and on the other hand fetched a bail granting order for Idrees Khan accused fraudulently, from the Court of learned trial Magistrate; Idrees Khan accused after having been admitted to post arrest bail in case F.I.R. No. 1154 supra has absconded which straightaway shows the element of conspiracy hatched up by the petitioner and the released accused; the petitioner is a dare devil who despite having nothing to do with the ownership of the above said landed property, recorded a statement before the learned trial Court showing himself as owner of the same, agreed to satisfy the claim of the complainant and also produced the above said agreement deed before the learned trial Court with the contention that he would be bound by the terms and conditions of the agreement deed but he did all that, with a criminal intent to commit fraud and forgery; the offence with which the petitioner is charged falls within the ambit of prohibition of section 497, Cr.P.C., because of the criminal act of the petitioner Idrees Khan accused has also absconded; section 195, Cr.P.C. does not debar the registration of a criminal case against an offender for the afore said offences. The prosecution case brims with connecting evidence against the petitioner so he may not be released on bail. Relies upon "Muhammad Hussain v. Muhammad Shafi" (2008 SCMR 235), "Syed Riaz Hussain v. The State" (2010 YLR 2093) and "Muhammad Shafi v. Deputy Superintendent of Police (Malik Gul Nawaz)" PLD 1992 Lahore 178.

4. I have considered the arguments of the learned counsel for both the parties raised at the bar and perused the relevant record.

5. Malik Muhammad Nawaz, complainant had got lodged the above said Criminal Case No. 1154 for offence under section 489-F, P.P.C. at Police Station, Civil Lines, Rawalpindi against one Idrees Khan who was arrested and sent to judicial lock-up. He moved post-arrest bail application before the learned trial Court and it was the stage when Syed Mehdi Faraz Shah, petitioner stepped into the scene and offered himself as guarantor on behalf of Idrees Khan qua the claim of the complainant to receive Rs.12,50,000 from Idrees Khan. The petitioner with a view to satisfy all, including the complainant got prepared' an agreement Deed No.488

on 18-9-2009 wherein he categorically showed himself to be the owner of a piece of land measuring 1 kanal, Khewat Nos.612 to 614 Khatooni No.406, Khasra No.1428, situated at Village Dhalyal, Rawalpindi and showed its value at Rs.12,50,000. He in this agreement deed claimed to be the owner in possession of the said land. To put more force to his contention, he handed down a copy of the record of rights qua the said land to the complainant. During the proceedings of the bail application of Idrees Khan, the petitioner appeared before the learned Magistrate to get his statement recorded, in line with the language and text of the captioned agreement deed No. 488 and pledged to be bound down by its terms and conditions. Following the statement of the petitioner, the statement of Idrees Khan, accused was also recorded by the learned Magistrate, the same day who too consented to act upon the above said agreement. Being satisfied, the complainant also stated before the learned trial Court that he had no objection to the acceptance of post-arrest bail application of Idrees Khan accused on the basis of compromise. Consequently, Idrees Khan was released. The complainant waited for the petitioner to act upon his words but he showed no signs or willingness to keep his promise instead he introduced one Raja Amjad in this case and succeeded in obtaining the mandate of another 15 to 20 days for fulfillment of his promise but it did not help at all, as he neither satisfied the claim, of the petitioner nor showed any seriousness or sincerity in this regard, In the meanwhile, above said Idrees Khan after having been released on bail, absconded who is still at large. Being disappointed of the conduct of thepetitioner the complainant on his own approached the concerned revenue department to verify, whether the petitioner was the owner of the said property or not and he was astounded to learn that he had no concern with the said landed property nor the copy of record of rights was issued by the Revenue authorities. Case of the petitioner is of multiple dimensions and he appears to have committed the offence in a systematic manner hardly caring for the principles of morality or the decorum of the courts. The contention of the learned counsel for the petitioner that the prosecution does not possess the original FARD of the copy of record of rights so the petitioner was entitled to bail, I am afraid is not helpful to the petitioner as it has been alleged in the F.I.R. that the accused had delivered the copy of the record of rights to the complainant to satisfy him which shows that the original Farad Jaman Bandi was in the possession of the petitioner. So far as the objection raised by the learned counsel for the petitioner that because of a bar contained in section 195, Cr.P.C. the accused could not be prosecuted nor the F.I.R. could have been registered is not tenable. The registration of a criminal case is entirely a different phenomena from the one, pertaining to the taking of cognizance by a Court of law on a report under section 173; Cr.P.C, and the complaint within the meaning of section 195, Cr.P.C. can be made a part of the prosecution record even after the registration of the F.I.R. as there is no compelling restriction in this regard. The offence under sections 468, 471, P.P.C. being non-cognizable can be validly investigated by the police without fulfillment of requirement of section 155(2), Cr.P.C. as section 420, P.P.C. is cognizable and in presence of a cognizable offence, the non-cognizable offences can be lawfully investigated by the police without seeking prior permission of the Magistrate. It is high time that the offences, who committed such like offences without any prick of conscience and hardly care for the decorum of the Court should be taken to task dynamically. The wrong done by the petitioner has not only deprived the complainant of his sizeable amount of money but also he has been instrumental in getting the above said accused Idrees Khan released from the prison on the basis of a statement made by him with mala fide and criminal intent. Halqa patwari submitted a report before the Investigation Officer on 4-8-2010 that the entries contained in

the copy of record of rights, delivered to the complainant by the petitioner, were false and that the said document had not been issued by him. The petitioner does not appear to be innocent at all in the whole episode and there are reasonable grounds to believe that he has committed the offence, alleged against him. The petitioner has the history of involvement in a couple of other criminal cases of the alike nature. The attending circumstances of this case do not constitute need for further inquiry into the guilt of the petitioner as contemplated by section 497(2), Cr.P.C.

For what has been discussed above I am not inclined to accept this application which stands dismissed.

H.B.T./F-50/L Bail refused.

2011 M L D 704

[Lahore]

Before Shahid Hameed Dar, J

Mst. HUMERA ARSHAD---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 2011-M of 2010, decided on 10th December, 2010.

Criminal Procedure Code (V of 1898)---

---Ss. 516-A & 561-A---Penal Code (XLV of 1860), Ss.406/506---Criminal breach of trust, criminal intimidation---Superdari of car---Trial Court as well as the Sessions Court had refused to give the car in question to petitioner on "Superdari" vide impugned orders---Validity--Claim of the petitioner being the last possessor of the said car was hardly questionable---Accused had allegedly received the car from the petitioner as a deal struck between them---Matter regarding determination of title of the car was sub-judice before Civil Court--Impugned orders had been passed arbitrarily and injudiciously, especially the observations made by Sessions Court qua the last possession of the car in question, which were absolutely out of place and alien to the investigation record---Petitioner had already deposited an adequate security in the event of defeat of her claim of ownership of the car according to the order of Trial Court---Impugned orders were set aside and the car in question was given to petitioner on "Superdari" in circumstances.

Muhammad Shahzad Khan, Kakar, for Petitioner.

Nadeem Anwar for Respondent No.2.

Arshad Mehmood, Deputy Prosecutor General.

ORDER

SHAHID HAMEED DAR, J.---Mst. Humera Arshad petitioner has called in question the validity of order dated 17-2-2010 passed by learned Judicial Magistrate section 30, Lahore and order dated 4-9-2010 pronounced by learned Additional Sessions Judge, Lahore whereby request of the petitioner seeking superdari of an auto car (Suzuki Baleno) bearing registration No. LWB-572 has been answered in negative and the application of the petitioner under section 516-A, Cr.P.C. has been dismissed.

2. The petitioner got lodged F.I.R. No. 64 of 2008 dated 22-1-2008, under sections 406, 506, P.P.C. at Police Station Nishtar Colony, Lahore with the allegations in brief, that she had purchased an un-registered vehicle Surf-2005 for Rs.19,00,000 from her relatives Shahzad Khan and his father Haji Shahbaz Khan who received two automobiles, one bearing registration No.LRR-514, registered in the name of the mother of the petitioner and the other bearing No. LWB-572 (the vehicle in question) along with net cash Rs.2,50,000 and a cheque of Rs.6,00,000 of Soneri Bank, Allama Iqbal Town Branch, Lahore from the petitioner as the price of the mentioned vehicle but they did not deliver the possession of the sold out vehicle to the petitioner; the accused put off the petitioner for a long period of time despite having received the consideration amount and refused to return the afore-said vehicles and cash received by them from the petitioner.

3. Muhammad Asghar, S.-I./Investigating Officer arrested Shahbaz Khan accused on 22-1-2008 and recovered vehicle No.LRR-514 at his instance on 29-1-2008. The police apprehended Shahzad Khan accused and interrogated him at the police station on 18-3-2008. During investigation, the Investigating Officer received a telephone call from the complainant-petitioner, whereupon he conducted raid and took into custody the vehicle in question i.e. Suzuki Baleno LWB-572 on 6-9-2008 from the possession of one Tayyab Iftikhar who contended before the police that he had borrowed the said vehicle from his cousin Shahzad Khan son of Shahbaz Khan, 3/4 days before, for going to Faisalabad. The I.O. jotted down case diary No.23 dated 6-9-2008 in this respect and after usual investigation submitted a report under section 173, Cr.P.C. before the court of competent jurisdiction for trial of the accused.

4. The petitioner moved an application for seeking superdari of the aforesaid vehicle (registration No. LWB-572) which was accepted by the learned Judicial Magistrate concerned on 9-9-2008 and the custody of the vehicle was handed over to the petitioner subject to furnishing surety bonds, equivalent to the value of the vehicle with the added conditions that she would produce the vehicle in question before the court as and when required to do so and that she would not alienate it without the permission of the trial Court.

5. Bashir Ahmad, respondent No.2 also sought the superdari through an independent application, claiming to be its owner which, was disallowed on 17-2-2010 by the learned Judicial Magistrate section 30, Lahore but at the same moment the order dated 9-9-2008 passed earlier in favour of the petitioner was also recalled and the S.H.O. concerned was directed to take control of the disputed car and keep it parked at the premises of police station concerned.

6. Being dis-satisfied with the aforesaid situation, the petitioner as well as respondent No. 2

filed separate revision petitions against the order of the learned Magistrate which were decided through order dated 4-9-2010 by the learned Additional Sessions Judge, Lahore in terms that the revision petition moved by the petitioner was dismissed and the one preferred by respondent No. 2 was accepted. Hence the instant petition.

7. Learned counsel for the petitioner submits that the vehicle in question was owned by the petitioner and being its owner she had sold it out to his relatives Shahzad Khan and his father Haji Shahbaz Khan; the petitioner had not only handed over the vehicle in question to the above-said accused but also she had delivered another car (LRR-514) of her mother, cash Rs.2,50,000 and a cheque of Rs.6,00,000 to the accused as a part of the deal, to purchase a vehicle Surf-2005 from then the cheque received by the accused from the petitioner was also got encashed by them; the vehicle in question was lent for a few days by Shehzad Khan accused to Tayyab Iftikhar, at whose instance, it was taken into custody by the police and this fact has been admitted by him in his plea before the police; the petitioner being the bona tide owner was the last possessor of the vehicle so she was entitled under the law to fetch. its possession on superdari; the learned Magistrate in the first instance dealt with the matter in a lawful manner but subsequently recalled its earlier order in an illegal and unlawful way which is void ab-initio; the impugned order passed by the learned Additional Sessions Judge is equally unlawful as it has been passed in a mechanical manner without application of judicial mind; both the orders have been passed arbitrarily and capriciously which being bad in the eyes of law, are not sustainable.

8. Contrary to it, learned counsel for respondent No.2 submits that the petitioner is no more the owner of the vehicle in question and instead it is his client who is the bona tide purchaser and owner of the same; the petitioner had sold the disputed vehicle to one Mst. Pinki Fakhra on 28-2-2007 who onward sold it to Bashir Ahmad, respondent No.2 on 20-2-2008; the above said vehicle was transferred in the name of respondent No. 2 on the same day and since then he enjoyed its exclusive ownership; though the r a w of the petitioner had been restored as the owner of the said vehicle in the registration book by the ETO, Motor Registration Authority, Lahore vide order dated 16-10-2008 at the expense of the ownership of respondent No.2 yet it was struck off by the Director, Excise and Taxation, vide order dated 13-11-2008 and the case was remanded for rehearing; the ETO Motor Registration authority has suspended the status of the vehicle vide order dated 8-6-2009, till the decision of the civil suits filed by the parties; the impugned order passed by the learned Additional Sessions Judge does not call for interference as the vehicle in question had been taken into possession by the police from respondent No.2 the petitioner had no concern with the title and possession of the above-said car so the instant petition being destitute of merits may be dismissed.

9. Learned Deputy Prosecutor-General, on the other hand, submits that the car being claimed by both the sides had not been taken into possession by the police from respondent No:2 and it was one Tayyab Iftikhar, the last possessor of the vehicle who, contended before the police that he had borrowed it from his relative Shahzad Khan for a few days to go to Faisalabad; Shahzad Khan and his father Haji Shahbaz Khan had received the above-said vehicle from the petitioner so she was entitled to the interim custody thereof, till the decision of the trial of the accused; the observations made by the learned Additional Sessions Judge, Lahore in impugned order dated 4-9-2010 qua the possession of respondent No.2 are baseless and

against the record; lastly: submits that the impugned orders may be set-aside being unwarranted by law.

10. I have heard the learned counsel for the parties and perused the available record.

11. Notwithstanding the divergent orders passed by the ETO, Motor Registration Authority; Lahore, the moot point involved in this case is whether the vehicle in question had been taken into possession by the police from Bashir Ahmad, respondent No. 2 or the same had been recovered from Shahzad Khan-accused against whom, the petitioner had got lodged the F.I.R. The investigation record of the above-said F.I.R. case has been gone into which reveals that the Suzuki Baleno car bearing No.LWB-572 was taken into custody by Muhammad Asghar, S.-I./I.O: on 6-9-2008 after he conducted a successful raid on receipt of a telephonic tip off by Mst. Humera Arshad, the petitioner. The I.O. has prepared the memo of recovery dated 6-9-2008 which shows that the disputed vehicle had been taken into possession by him from the custody of Tayyab Iftikhar who on interrogation, adopted the version that he had borrowed said car from his cousin Shahzad Khan for 3/4 days so as to go to Faisalabad in connection with some urgent piece of work. I have gone through the entire investigation record but I do not find any case diary disclosing the name of Bashir Ahmad, respondent No.2 as a possessor of the vehicle on 6-9-2008. Tayyab Iftikhar is not an accused of the above said case so his contention before the police is not worth rejection. The allegation alleged by the petitioner in the F.I.R. got lodged by her is precise so the above-said contention of Tayyab Iftikhar gathers importance and it can be easily inferred that the claim of Mst. Humera Arshad petitioner being the last possessor of the vehicle is hardly questionable. The accused Shahzad Khan and Haji Shahbaz Khan had allegedly received the stated vehicle along with other items mentioned in the F.I.R. from the petitioner as a deal between the petitioner and the accused had been struck for the sale/purchase of vehicle Surf-2005. Whether the title of the petitioner or that of respondent No.2 had been dealt with lawfully or not by the Motor Registration Authority is not a relevant factor to be taken into consideration at this juncture as the matter regarding determination of title of the vehicle in question is sub-judice before a competent civil court where both the parties shall adduce evidence to establish their respective claims. It may be observed that in order for the interim custody of the case property regarding which all offence might appear to have been committed could be made under section 516-A, Cr.P.C. during an inquiry or' trial. This is stated only to emphasis the position that an order at this stage would be only interim in nature which would not be purported to give any finding in regard title of rival claimant or ownership of the vehicle.

12. The impugned orders are found to have been passed arbitrarily and injudiciously, especially a couple of observations made by the learned Additional Sessions Judge, Lahore qua the last possession of the vehicle in question are absolutely out of place and alien to the investigation record.

13. It has been contended on behalf of Bashir Ahmad, respondent No.2 that Mst. Humera Arshad is using the car in question carelessly and roughly which is bound to result in its rapid depreciation and in case his claim being the owner is finally accepted, he will bear irreparable loss in this account.

14. The fears of the learned counsel for respondent No.2 is hardly considerable as an adequate security in the possible event of defeat of her claim to the ownership of the vehicle in

question, has already been deposited by the petitioner in line with the order dated 9-9-2010 passed by the learned trial court. The petitioner shall be under obligation, to produce the car in question before the trial court as and when required to do so and in case she shows hesitation in this regard, the learned trial court shall be at liberty to take any appropriate action against her in accordance with law.

15. With the aforesaid observation, the instant petition is allowed, both the orders impugned by the petitioner through this writ petition are set aside.

N.H.Q./H-46/L Petition accepted.

2011 M L D 727

[Lahore]

Before Shahid Hameed Dar and Hassan Raza Pasha, JJ

Malik MAQBOOL HUSSAIN and others---Petitioners

Versus

THE STATE---Respondent

Criminal Miscellaneous No. 1575-B of 2010, decided on 23rd September, 2010.

Criminal Procedure Code (V of 1898)---

----S.497(2)---Penal Code (XLV of 1860), Ss. 324/353/188/ 186/148/149/427---West Pakistan Regulation and Control of Loudspeakers and Sound Amplifiers Ordinance (II of 1965), Ss.3/4---Anti-Terrorism Act (XXVII of 1997), S.7---Attempt to commit qatl-eamd, assault or criminal force to deter public servant from discharge of his duty, disobedience to order duly promulgated by public servant, obstructing public servant in discharge of public functions, rioting armed with deadly weapon, mischief by causing damage, causing terrorism---Bail, grant of---Many co-accused facing almost similar and identical charges had been released on bail by Trial Court and complainant had not assailed the said order---Accused and other protestors, according to F.I.R., had come on the road to press their demands regarding increase in salary etc. and this peaceful gathering had exploded into the alleged action only on their arrest by the police---Involvement of accused in other cases without conviction could not impede the grant of bail to them---Nobody out of an alleged mob of 250 or 300 people at this stage could be held specifically responsible for the commission of the alleged offences, which could be best done by Trial Court after recording evidence---Medicolegal report of the injured person had shown only a grazed wound on his left arm, which fell within the definition of S.337-F(i), P.P.C. punishable with one year's R.I---Section 7 of the Anti-Terrorism Act, 1997, was also open to serious exception in its application---Case of accused, thus, called for further inquiry, as envisaged under S.497(2), Cr.P.C.---Accused were admitted to bail in circumstances.

Shaukat Aziz Siddiqui for Petitioners.

Muhammad Nazir Abbasi, Standing Counsel along with Shafique Ahmad S.-I. for the State.

Ch. Abdul Aziz for the injured.

ORDER

Petitioners, Malik Maqbool Hussain, Amaad-ul-Hassan and Rana Hassan Mehmood, seek post arrest bail in case F.I.R. No.522, dated 3-9-2010, under sections 324/353/188/186/148/149/427, P.P.C. read with sections 3/4 of Amplifier Act and section 7 of the Anti Terrorism Act, 1997, registered at Police Station Margala, Islamabad, on the complaint of Abid Ikram, Inspector.

2. Precisely the prosecution story is that the protesting employees of PTCL being led by the petitioners and others started chanting slogans on speaker and encircled PTCL building on 3-9-2010, whereupon a strong contingent of the police attempted to haul them upon as some of them were required in case F.I.R. No.517, dated 1-9-2010; the protestors because of the action of the police Started pelting stones on them and also resorted to straight firing due to which certain police officials received injuries, including Muhammad Bashir, constable, who received a fire arm injury on his left arm, whereas Ghulam Muhammad Baqir Inspector, Shahid Bukhari and Muhammad Asad, constables, received injuries due to brick bating by the petitioners and their co-accused. The protestors also damaged a police vehicle, blocked the road and caused panic and terror to the public at large. Thirty five protestors, including the petitioners, were, however, arrested by the police at the place of occurrence; on their physical search the petitioners were found in possession of illicit fire arms, which were taken into possession and separate cases were registered against them under the relevant provisions of the West Pakistan Arms Ordinance, 1965.

3. Learned counsel for the petitioners submits that the petitioners are innocent, they have not committed any offence and they have been victimized by the administration of the PTCL department as they wanted to choke and check the petitioners and others so as to stop them from raising their legitimate demands; the police have committed highhandedness in this case having colluded with the top brass of the PTCL department and false events have been fabricated by the S.H.O. to falsely rope the petitioners in the instant case only to please their benefactors; the whole story contained in the F.I.R. is false and, a product of exaggeration; the instant F.I.R. is being used to pressurize the petitioners and other employees of the PTCL by the aforesaid administration to demoralise the petitioners; no specific role has been assigned to the petitioners, except a general allegation of brick batting; further submits that the co-accused of the petitioners, who have identical case as regards to the case of the petitioners, have been admitted to post arrest bail by the learned trial Court so, the petitioners are entitled to the grant of post arrest bail on the rule of consistency.

4. On the other hand, learned Standing Counsel assisted by the leaned counsel for the injured P.Ws. have opposed the grant of bail to the petitioners with the submissions that the petitioners had formed an unlawful assembly and committed the act of rioting during the course of which they created the law and order situation and thus committed an offence within the meaning of section 7 of the Anti-Terrorism Act, 1997, besides other offences;

the police did its lawful duty when they attempted to catch the petitioners as they were required to be arrested in a criminal case; the petitioners have been assigned specific role and their case is distinguishable from those who have been admitted to bail after arrest by the learned trial Court; the fire arms were recovered from the petitioners and separate cases under West Pakistan Arms Ordinance, 1965, were registered against them and they have a history of involvement in other criminal cases of the alike nature as well; the case of the petitioners is hit by the provisions of section 21(d) of the Anti-Terrorism Act, 1997, as it contains a bar for the grant of bail to those who have a tendency of repeating the offence time and again; lastly contends that the petitioners are not entitled for the relief prayed for as the Investigating Officer has recovered 12 empties, which support the allegations of firing as contained in the F.I.R.

5. We have heard the learned counsel for the parties and perused the record. We find that a number of co-accused of the petitioners have been admitted to post arrest bail on 9-9-2010, facing almost similar and identical charges and the bail granting order passed by the learned trial Court has not been impugned by the complainant as yet. There are no circumstances which can discriminate the case of the petitioners from the case of their co-accused who have been admitted to bail by the learned trial Court. We have gone through the text of the F.I.R. which indicates that the petitioners and other protestors had come on the road to press their demands regarding increase in salary or attainment of other lawful rights. At the start it was a peaceful congregation/procession which exploded into an action as alleged in the F.I.R., only after interference was made by the police to arrest the petitioners and others in connection with case F.I.R. No.517 of 2010. The involvement of the petitioners in other cases can hardly impede the grant of bail to the petitioners as, they have not been convicted in any criminal case so far. As the alleged occurrence was committed by a mob of about 250/300 people, so it shall be pretty difficult at this stage to distinguish as to who could be held specifically responsible for the above said alleged offences which can be best assessed, after recording of evidence by the learned trial Court. We have also examined the medico legal repot of Muhammad Shabbir, injured, which contains description of a grazed wound on his left arm, falling within the definition of section 337-F(i), P.P.C., punishable with imprisonment for one year. Application of section 7 of the Anti-Terrorism Act, 1997, is also open to serious exception.' Prima facie there are reasonable grounds to believe that the case of the petitioners calls for further inquiry, as envisaged under section 497(2), Cr.P.C.

For the foregoing reasons the instant petition is allowed and the petitioners are admitted to post arrest bail subject to their furnishing bail bonds in the sum of Rs.1,00,000 each with two sureties each in the like amount to the satisfaction of the learned trial Court.

N.H.Q./M-547/L Bail allowed.

2011 M L D 822

[Lahore]

Before Shahid Hameed Dar, J

UMAR FAROOQ---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.7878/B of 2010, decided on 18th August, 2010.

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

----S.497---Penal Code (XLV of 1860), S.302/148/149---Qatl-e-amd, rioting armed with deadly weapon---Bail-Police opinion---Effect---Opinion of Investigating Officer, if not based upon any cogent or plausible material, would be of no consequence to the case of accused and it would not bind the court in any manner---Police opinion may be relevant and persuasive if the data collected during investigation inspires confidence and, prima facie, appeals to common prudence, otherwise the same is to be rejected for the purpose of bail---Police can only conduct investigation and formulate an opinion, but they cannot do so by evaluating the prosecution evidence, which is the exclusive jurisdiction of the Trial Court.

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

----S.497---Penal Code (XLV of 1860), S.302/148/149---Qatl-e-amd, rioting armed with deadly weapon---Bail, refusal of---Investigating Officer had made every effort to make an uncalled for, uncanny and unscrupulous investigation in the case---Accused was specifically named in the F.I.R. with the role of having fired with his rifle the fatal shot on the back of the deceased---Post mortem report of the deceased had fully corroborated the ocular account---Eye-witnesses through their statements recorded under S.161, Cr.P. C. had impeccably endorsed the story mentioned by complainant in the F.I.R.---Rifle had been recovered at the instance of accused---Challan with the name of accused mentioned in its column No.3 had been submitted in the court---Reasonable grounds existed to believe the nexus of accused with the occurrence, which fell within the prohibitory clause of S.497(1), Cr.P. C.--Bail was declined to accused in circumstances.

Muhammad Hayat v. The State 1974 PCr.LJ 450; Nisar Ali v. The State NLR 1992 Criminal 699; Allah Rakha v. The State PLD 1984 Lah. 395; Muhammad Anwar v. The State NLR 1999 Criminal 704; Rehmat Ullah alias Rehman v. The State and another 1970 SCMR 299; Abbas v. The State 2009 PCr.LJ 384; Tabbasum Ali v. State 2004 YLR 822 and Abid Hussain Khan v. The State 2010 PCr.LJ 564 ref.

Ch. M. Inayat Ullah Cheema for Petitioner.

Khurram Khan, D.P.-G. with Mukhtar S.-I.

ORDER

SHAHID HAMEED DAR, J.---Petitioner seeks bail after arrest in case F.I.R. No.101 of 2010 dated 12-2-2010, for offences under sections 302, 148, 149 P.P.C, registered at Police Station, City Hafizabad on the complaint of Haji Imtiaz Hussain.

2. Precisely the prosecution case is that Umar Farooq petitioner along with his co-accused being armed with firearms committed the murder of Aamir Imtiaz at 2-00 p.m. on 12-2-2010. The petitioner Umar Farooq fired a shot with his rifle which landed on the back of Aamir lmtiaz, causing a terminal injury.

3. I find that the petitioner was arrested in this case on 19-3-2010 whereafter he led to the recovery of rifle .44 bore on 3-4-2010. The F.I.R. in this case was lodged within two hours of the alleged occurrence and the challan has been submitted before the learned trial court by the police on 10-4-2010, with the name of the petitioner in its Column No.3.

4. Learned counsel for the petitioner has emphatically argued that the story contained in the F.I.R. is false and preposterous which could not be verified by the Investigating Officer as he formulated the opinion on conclusion of the investigation that the complainant party had committed the aggression by attacking the house of the petitioner where they resorted to indiscriminate firing which left countless firing marks not only on the doors, windows and walls of the house of the accused side but also on the walls of the nearby houses. He has further contended that it was the frontal space of the house of the accused where the occurrence had taken place and one of the accused Sheikh Muhammad Yaseen, according to the result of the investigation, had returned the tire shots in defence from the rooftop of his house but the retaliatory firing made by him had not hit the deceased as he had only attempted to fend off the attack of the complainant party. It has been further submitted that the crime empties were found from a place, situated in front of the house of the petitioner and that the motive alleged in the F.I.R. was also proved untrue during the investigation, as contrary to the allegations of the F.I.R., it was the deceased who was gambling along with his game players in the morning of 12-2-2010 and that the petitioner had forbidden him from his immoral act which caused annoyance to the deceased who in cahoots of his aids, being armed with heavy arsenals committed aggression against the complainant party. Further contends that the place of occurrence was found to have been maliciously and conspiratorially changed to the place, as alleged in the F.I.R. which has also been noticed by the Investigating Officer who has concluded the investigation on the said note. Submits that the petitioner was not found to have fired at the deceased and it has been opined by the I.O. that he could not opine with certainty as to whose fire shot had extinguished the life of the deceased. Lastly contends that Abdul Majeed and Imran, the co-accused of the petitioner, have been found innocent during the course of investigation and in the attending circumstances, the case of the petitioner squarely falls within the ambit of further inquiry as envisaged under section 497(2), Cr.P.C. Relies upon Muhammad Hayat v. The State (1974 PCr.LJ 450), Nisar Ali v. The State (NLR 1992 Criminal 699), Allah Ralcha v. The State PLD 1984 Lah. 395, Muhammad Anwar v. The State (NLR 1999 Criminal 704), Rehmat Ullah alias Rehman v. The State and another (1970 SCMR 299), Abbas v. The State (2009 P.Cr.LJ Lahore 384), Tabbasum Ali v. State 2004 YLR 822 and Abid Hussain Khan v. The State (2010 PCr.LJ Lahore 564).

5. Conversely, the learned Deputy Prosecutor-General assisted by learned counsel for the

complainant has strongly opposed the grant of bail to the petitioner with the contention that both the parties knew each other for years and there was not probability of mistaken identity of the accused who in the broad daylight had committed the cold-blooded murder of the deceased which was viewed not only by the complainant but also by the witnesses Kashaf Imtiaz, Mustafa, Sarwar and Nadeem Ashraf who have recorded their statements under section 161, Cr.P.C. strictly in line with the version of the complainant as contained in his statement under section 154, Cr.P.C. Further submits that the petitioner has been saddled with specific liability of firing effectively upon the deceased with his rifle and thereby authoring the only terminal firearm injury on the body of the deceased. Adds that the opinion of the Investigating Officer is bald, sketchy and perverse which is not based upon any cogent or admissible material and the I.O. appears to have fared dishonestly being hands in glove with the accused side.

6. The opinion of the Investigating Officer has been blown out of proportions by the learned counsel for the petitioner and he deemed it so sacrosanct that he stretched it to beyond recognized limits and for a moment, he overlooked the settled principles of law on the subject by submitting that the opinion of the Investigating Officer in this case, would necessarily overweigh and sit in on the prosecution case by all means, notwithstanding the evidence available against the petitioner. It has been so held time and again by this court, as well as by the apex court of the country that the opinion of the Investigating Officer, if not based upon any cogent or plausible material, would be of no consequence to the case of the accused and it would not bind the court in any manner.

The opinion of the I.O. may be relevant and bearing "persuasiveness if the data collected by, him to base his opinion upon, is confidence-inspiring and prima facie appealable to common prudence but if otherwise, it is liable to be rejected and brushed aside for the purpose of bail. It is of course the domain of the police to conduct the investigation and formulate an opinion but they cannot do so by evaluating the evidence of the prosecution which is the exclusive jurisdictional authority of the trial court. I find that the Investigating Officer has consumed every ounce of his energy to throw the prosecution case to doldrums and has failed to impress me by his uncalled for, uncanny and unscrupulous investigation.

7. The petitioner is specifically named in the F.I.R. with the role that he had fired with his rifle which landed on the back of Aamer Imtiaz deceased and proved fatal. The postmortem examination report is manifest of the same fact and it entails solitary firearm injury on the back of the deceased, near lumber region. The story contained in the F.I.R. is impeccably endorsed by the statements of the other eye-witnesses, recorded under section 161, Cr.P.C. The petitioner led to the recovery of rifle .44 bore on 3-4-2010. The challan, on conclusion of the investigation, has been submitted before the learned trial court with placement of the name of the petitioner in its Column No.3 which speaks itself as to the validity of the opinion recorded by the Investigating Officer in this case. I have great reverence and respect for the case laws, relied upon by the learned counsel for the petitioner, but these do not assimilate the facts of this case. Prima facie there are reasonable grounds to believe that the petitioner has a nexus with the occurrence in hand and his case catches the prohibition of section 497, Cr.P.C.

8. For the foregoing reasons, I am not inclined to allow this application, which is accordingly dismissed.

N.H.Q./U-13/L Bail refused.

2011 M L D 844

[Lahore]

Before Shahid Hameed Dar, J

UMAR HAYAT---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 8293-B of 2010, decided on 9th August, 2010.

Criminal Procedure Code (V of 1898)---

----S.497(2)---Penal Code (XLV of 1860), S.337-A(iii)/34---Hurt "shajjah "---Bail, grant of---Accused while armed with a "Sota" had given a beating to the wife of the complainant in the company of his co-accused---Complainant had categorically burdened the co-accused with the responsibility of causing injury on the left cheek of his wife by hurling a brickbat on her, which had fractured her nasal bone---Single injury shown in the medico-legal report of the victim did not, corroborate the version of the complainant---Participation of accused in the incident was yet to be determined at the trial---Reasonable grounds were available to make the case of accused of further inquiry into the guilt within the meaning of S.497(2), Cr.P.C.-Accused was admitted to bail in circumstances.

Gohar Razaq Awan for Petitioner.

Khurram Khan, D.P.-G. for the State.

Nasim Ullah Khan Niazi for the Complainant.

Shafi Ullah A.S.-I. with Police file.

ORDER

SHAHID HAMEED DAR, J.---Umar Hayat petitioner seeks bail after arrest in case F.I.R. No.118 of 2010 dated 14-6-2010, for an offence under section 337-A(iii)/34, P.P.C., registered at Police Station Quaid-Abad, District Khushab on the complaint of 'Hafiz Muhammad Ayub.

2. The allegation against the petitioner is that he in the company of his co-accused, armed with sotas, gave blows to the wife of the complainant after she had fallen on the ground, having been charged with a brick-bat on her face by their co-accused Saif-ul-Malook; on hue and cry raised by the complainant side, the witnesses were attracted to the spot who rescued the injured and the complainant. The motive behind the occurrence was a dispute over a wall, which had happened two days ago.

3. Learned counsel for the petitioner submits that no specific role has been ascribed to the petitioner except the one that he was armed with a rota and he in the company of his co-accused had given, beating to Mst.Walayat Khatoon, the wife of the complainant after she was deflated to the ground due to hurling of a piece of brick by Saiful Malpok accused; further contends that the medico-legal report of the injured lady does not corroborate the

story contained in the F.I.R. as only one blunt weapon injury has been mentioned by the Medical Officer on the left cheek of the injured P.W.; the petitioner had not taken part in the' incident and he has been falsely implicated due to heart burning and bias of the complainant; further contends that the attending circumstances bring the case of the petitioner within the scope of further inquiry as envisaged under section 497(2), Cr.P.C. and he is entitled to the grant of post-arrest bail.

4. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant has opposed the grant of bail to the petitioner with the contention that the petitioner is specifically charged in the F.I.R. with a role that he being armed with a sots mercilessly beat the wife of the complainant and thereby caused a number of injuries on her person; the petitioner himself had admitted in the investigation that it was he who had hurled a piece of brick on the person of Mst. Walayat Khatoon which had landed on her left cheek; the fractural injury on the body of the injured lady falls within the definition of sections 337-A(iii) which catches the prohibition of section 497, Cr.P.C.; the petitioner was found involved in the occurrence and placed in Column No.3 of the challan, which stands submitted before the learned trial Court.

5. I have heard the learned counsel for the parties and perused the record.

6. No specific role has been ascribed to the petitioner except the one that he was armed with a sota, and he in the company of his co-accused gave beating to the wife of the complainant Mst.Walayat Khatoon but the medico-legal report of the said lady is not in line with the same as there is only one blunt weapon injury, on her person, the locale, being the left cheek; there is every probability that the injury on the left cheek in fact caused the fracture of the nasal bone of the injured lady. The complainant had categorically burdened Saiful Malook, the co-accused of the petitioner, with the responsibility of causing injury on the left cheek of Walayat Khatoon by hurling a brickbat on her, due to which, she fell down and thereafter the petitioner and others allegedly pounced upon her and gave her beating. The single injury mentioned by the Medical Officer in the Medico-legal report, I am afraid, does not corroborate the contention of the complainant. Whether the petitioner had taken part in the incident or not is a question which shall be dealt with by the learned trial Court during the course of the trial. There are reasonable grounds to believe that the petitioner's case calls for further inquiry within the meaning of section 497(2), Cr.P.C.

7. For what has been discussed above, I accept this petition and admit the petitioner to post-arrest bail, subject to his furnishing bail bonds in the sum of Rs.100,000 (rupees one lac) with one surety in the like amount to the satisfaction of the learned trial Court.

8. Before parting with this order, the learned trial Court is directed to expedite the proceedings of the trial and conclude the same within five months from the date of receipt of the order of this Court.

N.H.Q./U-11/L Bail allowed.

2011 M L D 1088

[Lahore]

Before Shahid Hameed Dar, J

KHALIL-UR-REHMAN alias GUDOO---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.230/B of 2011, decided on 11th March, 2011.

Criminal Procedure Code (V of 1898)---

----S.497---Penal Code (XLV of 1860), Ss.376/511---Attempt to commit rape---Bail, refusal of---Sufficient incriminating material had been collected against the accused during investigation---Accused overawed by his lecherous sentiments had committed the shameful act with the nine years old girl without caring for her age and his relationship with her---Delay in lodging the F.I.R. did not damage the prosecution case, as the minor victim must have been badly frightened because of the oppressiveness of the crime committed with her and also due to the threats extended to her by the accused---Affidavit transmitted by the father of the victim from abroad to the Investigating Officer was of no avail to the accused, as he resided permanently abroad and was not present in the country on the day of the alleged occurrence; he must have been persuaded by his family members to rescue the accused, who was the husband of his real sister---Record did not suggest any strained relations between the parties---Accused was a desperate sex-monger---Offence alleged against accused was hit by the prohibition contained in S.497(1), Cr.P.C.---Bail was refused to accused in circumstances.

Raja Zakar Hussain for Petitioner.

Ch. Muhammad Waheed Khan, Deputy Prosecutor General Punjab for the State.

Khawar Riaz Qadri for the Complainant.

Muhammad Ajmal, S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---The petitioner, Khalil-ur-Rehman (alias Gudoo) son of Abdul Rehman, by filing this petition, seeks post-arrest bail in case F.1.R. No.110, dated 6-2-2011, registered at Police Station Sadiqabad, Rawalpindi, for offences under sections 376 and 511, P.P.C.

2. The allegation against the petitioner, as alleged by Mst. Uzma Imran-complainant, is that Khalil-ur-Rehman, accused-petitioner, attempted to commit rape with her daughter, baby Aleena, aged nine, finding her alone, at his residential house, on 7th of January; the accused-petitioner is the husband of paternal aunt of the victim.

3. Baby Aleena was interviewed by the Investigation Officer on 6-2-2011, who disclosed the painful detail of the occurrence by contending that her uncle (Phhuphha), attempted to ravish

her at his house, by pressing against her to cause penetration and on her screaming, he changed the focus of his attention and dirtied her month, due to which she turned nauseous and vomited. She further stated before the Investigation Officer that the accused made her cleanse her mouth and intimidated her by threatening that he would kill her, if she would disclose the matter to someone. Hafiz Muhammad Munir, the maternal uncle of the victim, and Muhammad Idrees, the maternal grand-father of the victim, joined investigation before the Investigation Officer on 6-2-2011 and made statements under section 161, Cr.P.C., wherein they contended about the above said version of baby Aleena. The accused--petitioner was arrested on 6-2-2011 and his first version before the Investigation Officer is not much different from the one adopted by the above said witnesses, including the victim.

4. Learned counsel for the petitioner submits that the petitioner has been falsely involved in this case due to malice and ulterior motives of the complainant, as she under the garb of the instant case, has conspired to blackmail the petitioner and her in laws; the husband of the complainant, who is in Saudi Arabia, has sent an affidavit to the Investigation Officer, wherein he has deposed about the falsehood of the case, lodged by his wife, in the background of the estrangement of relationship with her husband and other in-laws; the real brother of the husband of the complainant, has also stated so before the Investigation Officer during investigation and that many others through their affidavits had dubbed the petitioner innocent. Lastly, contends that the complainant had gone astray in the absence of her husband and on being checked by her in-laws, she had falsely involved the petitioner in the instant case, to avenge her 'insult'.

5. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant has strongly opposed grant of bail to the petitioner with the contention that the accused-petitioner had committed a devilish act by making an abortive attempt to commit Zina with the poor child like a sex- maniac, which shows that the accused-petitioner is not less than a satan; the offence committed by the accused-petitioner falls within the prohibitory clause of section 497, Cr.P.C., so he may not be allowed bail.

6. After having heard the learned counsel for the parties and gone through the record, I hardly find any reason to admit the petitioner to bail as, sufficient incriminating evidence has been collected against him by the Investigation Officer. The innocent baby, aged nine, is the victim of the alleged occurrence. The accused, overawed by lecherous" sentiments, did not care for the age of the victim, nor his relationship with her, could stop him from committing the shameful act. The delay in lodgment of F.I.R. in this case is not damaging to the prosecution's case as the minor victim must have been badly frightened, firstly because of the oppressiveness of the crime, committed with her, and secondly, due to threats, extended to her by the accused-petitioner. The argument of learned counsel for the petitioner that the husband of the complainant had transmitted a written affidavit to the Investigation Officer is of no avail to the accused-petitioner, as he resides permanently in Saudi Arabia and was not present in Pakistan on the day of the alleged occurrence. He must have been persuaded by his parents and other members of the family to write, to the Police for rescuing the petitioner, who is the husband of his real sister. There is nothing on record to suggest that the relations between the parties were strained and that the complainant had been prompted by someone to wreck the future-life of her minor daughter. The petitioner appears to be a desperate character and a sex-monger. The offence committed by him catches the prohibition of section

497, Cr.P.C. The petitioner's case under' no circumstance constitutes need for further inquiry into his guilt, as enunciated under section 497(2), Cr.P.C. Therefore, I am not inclined to accede to the bail plea of the petitioner.

7. Resultantly, this petition fails and stands dismissed.

8. Before parting with this order, it looks appropriate that trial of the accused-petitioner be concluded as expeditiously as possible. Therefore, the learned trial Court is directed to accelerate the proceedings of the trial and conclude the same within five months on receipt of this order.

N.H.Q./K-19/L Bail refused.

2011 M L D 1228

[Lahore]

Before Shahid Hameed Dar, J

NASEER AHMED and another---Petitioners

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.7389-B of 2010, decided on 15th July, 2010.

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

----S.497---Penal Code (XLV of 1860), S.365-B---Kidnapping, abducting or inducing woman to compel for marriage etc---Bail, grant of---Alleged abductee had been refuting the allegation contained in the F.I.R. right from its inception---Alleged abductee, in her statement made before Magistrate under S.164, Cr.P.C. while rebuting the allegations made by her father (complainant) had stated that she being sui juris had contracted marriage with the brother of the accused of her free will and accord, which had annoyed her father and that she had not been abducted by anyone---To the same effect the alleged abucttee had also submitted her sworn affidavit before the Sessions Court giving her age as 16/17 years---Pubert woman could contract marriage of her own accord without the indulgence of a "Wali"---Abductee, in the attending circumstances, might be held as a woman having attained puberty and the case of accused, thus, called for further probe into their guilt---Accused were admitted to bail accordingly.

Mst. Zeenat Bibi and another v. The State and 2 others 2005 PCr.LJ 1312; Abdul Ghaffar v. Ishtiaq Ahmad Khan 1997 PCr.LJ 1150; Mauj Ali v. Syed Safdar Hussain Shah 1970 SCMR 437 and Hafiz Abdul Waheed v. Mrs. Asma Jehangir PLD 2004 SC 219 **ref**.

(b) Islamic law---

----Marriage---Validity---Consent of "Wali" is not required and a sui juris Muslim female can enter into valid Nikah/marriage of her own free will.

Hafiz Abdul Waheed v. Mrs. Asma Jehangir PLD 2004 SC 219 **ref**.

Ch. Nazir A. Ranjha for Petitioner.

Khurram Khan, D.P.-G.

ORDER

SHAHID HAMEED DAR, J.---Through this application Naseer Ahmad and Nazeer Ahmad seek bail after arrest in case F.I.R. No.256 of 2010 dated 23-3-2010 under section 365/B, P.P.C. registered at Police Station, Pindi Bhattian, District Hafizabad on the complaint of Manzoor Ahmad.

2. Precisely, the prosecution case is that Mst. Mafia Bibi aged 13/14 years daughter of the complainant went to the fields to answer the call of nature at 2-00 p.m on 19-3-2010, in the meantime Naseer Ahmad (petitioner) armed with firearm along with his two unknown companions abducted her at gunpoint which was witnessed by Ghulam and

Ahmad P.Ws.; the complainant learnt about the occurrence after he returned to his house in the evening.

3. Learned counsel for the petitioner contends that there is unexplained delay of four days in the lodgment of F.I.R.; Mst. Mafia, the alleged abductee being sui juris had contracted marriage with Ghulam Shabbir, the real brother of the petitioners but he has not been implicated in this case with mala fide intention of the complainant; Mst. Mafia Bibi, the alleged abductee does not support the story of the F.I.R. as she was produced before the learned Judicial Magistrate by the police for her statement under section 164, Cr.P.C. on 15-4-2010, wherein she categorically stated that she had not been abducted by anyone and being sui juris she had solemnized marriage with Ghulam Shabbir, with her free will and consent; she also appeared before the learned Addl: Sessions Judge, Pindi Bhattian and submitted her sworn affidavit to the same fact wherein she reiterated her version as she did before the learned Magistrate; the occurrence contained in the F.I.R. was found false during the course of investigation and a cancellation report had been prepared by the police under section 173, Cr.P.C. which was not agreed to by the learned Magistrate; the petitioner was arrested on 29-3-2010, the investigation is complete and his further incarceration is of no consequence to the prosecution's case; the attending circumstance of the case require further probe in the guilt of the petitioner within the scope of section 497(2), Cr.P.C. Relies upon case Mst. Zeenat Bibi and another v. The State and 2 others (2005 PCr.LJ 1312).

4. Learned Deputy Prosecutor-General opposes the grant of bail and contends that the petitioners are specifically nominated in the F.I.R. with the allegation that they being armed had abducted Mst. Mafia at gunpoint and thus they had committed an offence within the meanings of section 365-B, P.P.C.; the alleged abductee is a minor who could not contract marriage without the indulgence of a Wali.

5. I have heard learned counsel for the parties and perused the record.

6. Mst. Mafia Bibi, the alleged abductee happens to be the star witness of this case who has been refuting the allegations contained in the F.I.R. right from its inception. She appeared before learned Magistrate on 15-4-2010 to make statement under section 164, Cr.P.C, wherein she has rebutted the version of her father Manzoor Ahmad, the complainant and submitted that she being sui juris had contracted marriage with Shabbir Ahmad of her free will and accord, which had caused annoyance to her father. She further stated that she had not been abducted by anyone and the story contained in the F.I.R. was false. The alleged abductee showed further valour to appear before the learned Addl: Sessions Judge, Pindi Bhattian where she submitted her sworn affidavit to the effect that she had not been abducted by anyone, the accused mentioned in the F.I.R. were innocent and that she being 16/17 years of age had contracted marriage with Ghulam Shabbir on her own consent and that she had not been abducted by anyone. The complainant has mentioned the age of Mst. Mafia as 13/14 years, whereas, the alleged abductee stated her age as 16/17 years before the learned Addl: Sessions Judge, in her affidavit dated 25-6-2010.

7. The term "adult" in respect of a female, has been defined by the statute as the one who is either 16 years of age or has attained the age of puberty. The term puberty is synonymous with start of menstruation. Mst. Mafia while recording her statement under

section 164, Cr.P.C. mentioned her age as 18. It has been held in Abdul Ghaffar v. Ishtiaq Ahmad Khan 1997 PCr.LJ 1150 that a girl after reaching the puberty age can lawfully contract marriage even against the consent of her parents. Earlier to this judgment similar findings was recorded in Mauj Ali v. Syed Safdar Hussain Shah (1970 SCMR 437). In another case decided by august Supreme Court of Pakistan Hafiz Abdul Waheed v. Mrs. Asma Jehangir (PLD 2004 SC 219) it has been held that a sui juris Muslim girl can contract marriage of her own accord. The pronouncement of a couple as to their Nikah/marriage was found sufficient by the august Supreme Court of Pakistan for proof of a valid marriage in the above said glittering judgments. In para. No.6 of PLD 2004 SC 219 the previous judgments on the above points have been referred to, which I advantageously reproduce as under:--

"(6) In Muhammad Imtiaz and another v. The State PLD 1981 FSC 308, Arif Hussain and Azra Parveen v. The State PLD 1982 FSC 42, Muhammad Ramzan v. The State PLD 1984 FSC 93 and Muhammad Yaqoob and another v. The State and 3 others 1985 PCr.LJ 1064, the Federal Shariat Court has been consistently taking the view that a sui juris Muslim girl can contract marriage of her own accord and the consent of her Wali or other relations is not requisite to the validity of marriage. Earlier in Mauj Ali v. Syed Safdar Hussain Shah and another 1970 SCMR 437, this Court had held that a Muslim girl attaining puberty is competent to marry of her own free will and on this ground her custody was declined to her father and the order of the High Court permitting her to go and live with the husband was maintained. In PLD 1982 FSC 42 and PLD 1984 FSC 93 the Federal Shariat Court has even held that subject to other facts of a given case, an admission by a couple that they were married, would constitute sufficient proof of marriage."

The august Supreme Court further observed in para No.29 of the judgment, two of the said declarations are reproduced as under:--

(i) For what has been stated above, it is hereby held/declared/ordered that as per judgments of the Federal Shariat Court, noted in para.6 of this judgment, consent of 'Wali' is not required and a sui juris Muslim female can enter into valid Nikah/marriage of her own free-will.

(ii) Statement of law contained in the judgments of the Federal Shariat Court, noted in para.6 of this judgment is binding on the High Court and Courts subordinate to the High Court.

7. As a pubert woman can contract marriage of her own accord without the indulgence of a 'Wali' hence, the same principle shall be applicable to the instant case. Mst. Mafia in the attending circumstance may be held as pubert who had solemnized marriage of her free will and accord which was not liked by her parents, hence, the instant case has been brought by her father against the petitioners and their co-accused. It is strange that 'Mst.Mafia, the alleged abductee is leading matrimonial life with Ghulam Shabbir; the real brother of the petitioners yet he has not been named as an accused, by the complainant so far. The attending circumstance of the case constitute need for further inquiry into the guilt of the petitioner.

8. For the foregoing reasons, I accept this application and admit the petitioners to

post-arrest bail provided they furnish 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.

N.H.Q./N-71/L Bail allowed.

2011PCr.LJ 589

[Lahore]

Before Shahid Hameed Dar, J

REHAN---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No. 1954-B of 2010, decided on 1st December, 2010.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss.302/365-B/201/34---Qatl-e-amd, abduction, causing disappearance of evidence of offence---Bail, grant of---Further inquiry---Complainant had expressed his strong belief in the F.I.R. as to the culpability of accused in the case, but he failed to hint at any source of his information, either in the F.I.R. or during the course of investigation--No witness had been recorded by the Police during investigation to support the plea of the complainant as to the implication of accused in the gruesome incident---Doubt, howsoever strong could not take place of an admissible piece of evidence, nor could it be equated with the evidence, either direct or circumstantial---Notwithstanding abscondence, accused could be found entitled to grant of bail, if his case, otherwise fell within the scope of further inquiry as contemplated under S.497(2), Cr.P. C. ---Commencement of the trial, could not be relevant at bail stage, nor it 'could be considered as an impediment for grant of bail to accused---Accused had been found not involved in the occurrence during the course of investigation and stood named in column No.2 of the challan---Prima facie, reasonable grounds were available to believe that case of accused, called for further inquiry into his guilt within the meaning of S.497(2), Cr.P.C.---Accused, was admitted to bail, in circumstances.

Mithu Pitafi v. The State 2009 SCMR 299; Muhammad Muqeem alias Muqeem v. The State 2010 PCr.LJ 1479; Muhammad Sadiq v. The State and another 2010 YLR 3070; Imam Bux v. The State 2009 PCr.LJ 476; Awal Gul v. Zawar Khan and others PLD 1985 SC 402; Sher Ali alias Sheri v. The State 1998 SCMR 190; Meraj v. Gohar Ali and another 2005 PCr.LJ 1269; Muhammad Asim v. The State 2010 PCr.LJ 771 and Muhammad Ismail v. Muhammad Rafiqu and another PLD 1989 SC 585 ref.

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

----Ss. 497(2), 87 & 512---Bail, grant of---Abscondence of accused---Effect----Absconder certainly would lose some of his normal rights guaranteed both under the substantive

and the procedural law, but, evidence qua the abscondence of an accused was always corroboratory in nature---Even an innocent person, out of fear of the Police or that of being caught, could run away to save his life instead of facing the situation in a manlike manner---Notwithstanding the abscondence, an accused could be found entitled to grant of bail, if his case otherwise, fell within the scope of further inquiry as contemplated under S.497(2), Cr. P. C.

Majid Ahmad Abbasi and Ch. Khurram Tasadduq for Petitioner.

Raja Ikram Amin Minhas for the Complainant.

Malik Riaz Ahmad Saghla, D.P.-G. with Latif, S.-I. for the State.

ORDER

SHAHID HAMEED DAR, J.---Rehan, the petitioner was arrested on 15-9-2010 in case F.I.R. No. 508, dated 29-9-2009, under sections 302/365-B/201/34, P.P.C., registered at Police Station Murree, District Rawalpindi, on the complaint of Muhammad Safeer.

2. Precisely, the story of F.I.R. as unfurled by the complainant is that his daughter Faiza, aged 18, was attending a telephone call on the cell phone of her mother at about 1-30 a.m. on 23-9-2009 when she suddenly went missing; the complainant kept searching for his lost daughter but could not find her; the complainant showed strong suspicion and belief in the F.I.R. that his daughter had been enticed away on the promise of marriage by Rehan (petitioner) and his unknown accomplices for committing zina with her.

3. The `dopatta' of the unfortunate missed girl was found on the bank of River Jhelum by her father on 29-9-2010 whereas, the dead body of the ill-fated girl was found from the waters of River Jhelum by her father-complainant on 1-10-2009.

4. The corpse of the deceased lady was subjected to autopsy at THQ Hospital, Murree and during the course of these proceedings the medical officer found ligature marks around the neck of the deceased, the hyoid bone was fractured and there was an injury on the trachea as well. According to the necropsy report the medical officer opined that it was a case of asphyxiation/throttling. He, however, preserved some parts of the internal visccrae in some boxes, which were handed over to the police for onward transmission to the office of the Bacteriologist/ Hispathologist. The medical officer while recording his findings about the death of the deceased, also opined that it was not a case of death by drowning. The vaginal swabs of the deceased lady were also obtained by the medical officer to fetch a report from the office of the Chemical Examiner qua the presence of the spermatozoa, which was received `positive' as the swabs were found stained with semen. The police also went for the DNA test of the petitioner to establish whether or not the petitioner had committed the act of coitus with the ill-fated victim, before she was murdered. According to the report issued by the Center of Excellence in Molecular Biology, Lahore, the vaginal swabs of the deceased victim did not generate any DNA profile, therefore, no comparison could be made with the DNA profile of the accused, so, the above said report is inconclusive.

5. Learned counsel for the petitioner submits that the petitioner has been nominated in

the F.I.R. merely as a suspect and no evidence is available to connect him with the allegation contained in the F.I.R.; the complainant has not disclosed the source of his belief as to how he learnt the name of the petitioner as a suspect of this case; after his arrest on 15-9-2010 the petitioner underwent physical remand of 11 days but it did not yield to the recovery of the case property or any incriminating evidence against him; the prosecution is deficient of direct or indirect connecting evidence against the petitioner and the prosecution case against him has not traversed beyond ifs and buts, during the course of investigation; the co-accused of the petitioner, namely, Rizwan-ul-Haq, Shahzad Ahmad and Asad Shamrooz have been admitted to post-arrest bail and the case of the petitioner is not distinguishable from the case of . the said co-accused, so, on the dictum of consistency he may be released on bail; the petitioner had not absconded after the registration of the F.I.R. and fake proceedings have been fabricated against him by the prosecution to strengthen its false case; the petitioner was found not involved in the occurrence by the Investigation Officer and his name stands placed in column No.2 of the challan; the petitioner's case is open to further probe within the scope of section 497(2), Cr.P.C., therefore, the alleged abscondence may not impede the grant of bail to the petitioner. Relies upon Mithu Pitafi v. The State (2009 SCMR 299), Muhammad Muqeem alias Muqeem v. The State (2010 PCr.LJ 1479), Muhammad Sadiq v. The State and another (2010 YLR 3070) and Imam Bux v. The State (2009 PCr.LJ 476).

6. The learned DPG assisted by the learned counsel for the complainant has strenuously opposed the grant of bail to the petitioner with the contention that the complainant had a reason to suspect the credentials of the petitioner and it was why he nominated him as an accused in the F.I.R.; the petitioner and his co-accused had committed a barbaric act during the course of which they committed rape upon the poor girl before committed her murder and threw her dead body in the waters of River Jhelum to screen the evidence so as to save themselves from the consequences of the crime committed by them; the medical evidence directly corroborates the version of the complainant and it shows that she had been callously murdered` by the accused; the petitioner absconded after the occurrence and was arrested by the police after about one year of the occurrence, so, being a fugitive from law he may not be deemed entitled for the relief prayed for; the petitioner in the first instance was proceeded against under section 87, Cr.P.C. and a report under section 512, Cr.P.C. had been submitted against him before the learned trial court; the petitioner being a fugitive from law has certainly lost some normal rights guaranteed under the substantive as well as the procedural law; the trial has commenced and the case is at the stage of recording of the prosecution evidence; the accused may not be benefited of the opinion recorded by the Investigation Officer as he was hands in glove with the accused; the petitioner's case is distinguishable from the case of the released co-accused, so, the plea of consistency is not available to the petitioner. Relies upon Awal Gul v. Zawar Khan and others (PLD 1985 SC 402, Sher Ali alias Sheri v. The State (1998 SCMR 190), Meraj v. Gohar Ali and another (2005 PCr.LJ 1269), and Muhammad Asim v. The State (2010 PCr.LJ 771).

7. I have heard the learned counsel for the parties at length and perused the record. Although the facts and circumstances of this case are heart rendering and hair raising but the courts are not moved by the sentiments or emotions. This is the data/evidence collected by the Investigating Officer during the course of investigation, which matters

while adjudicating upon the bail plea of an accused. The complainant had expressed his strong belief in the F.I.R. as to the culpability of the petitioner in the instant ease but he failed to hint at any source of his information either in the F.I.R. or during the course of investigation. No witness has been recorded by the police during investigation to support the plea of the complainant as to the implication of the petitioner in the instant gruesome and gory incident. The doubt how strong so ever cannot take place of an admissible piece of evidence nor can it be equated with the evidence either direct or circumstantial. The complainant has alleged in the F.I.R. that a telephone call had been received at midnight on the cell phone of his wife whereupon his daughter Faiza attended the call and in the meanwhile went outside the house, not to be found alive thereafter. The particulars of the said phone-call could not be unearthed by the Investigating Officer. The police has taken into possession the 'dopatta' and the other parts of the attire of the deceased girl but it can, hardly create a nexus between the petitioner and the gruesome offence.

There is another objection against the petitioner that he absconded after the occurrence, he was proceeded against under section 87, Cr.P.C. and a report under section 512, Cr.P.C. had been formulated by the Investigating Officer against him during investigation. There can be no cavil to the fact that an absconder certainly loses some of his normal rights guaranteed both under the substantive and the procedural law but the fact remains that the evidence qua the abscondence of an accused is always corroboratory in nature. Different persons have been differently constituted by Allah Almighty with variant chemistry. Even an innocent person(s) out of fear of the police or that of being caught may run away to save his life instead of facing the situation in a manlike manner. It depends upon the inborn qualities and genes of an individual, which render a person brave or timid. It has been so held by the apex Court of the country as well as by this Court on many occasions that notwithstanding the abscondence, an accused may be found entitled to grant of bail if his case otherwise fell within the scope of further inquiry as contemplated under section 497 (2), Cr.P.C. The commencement of the trial may not be relevant at this stage nor it can be considered as an impediment for grant of bail to the petitioner in view of the principle laid down in case titled Muhammad Ismail v. Muhammad Rafique and another (PLD 1989 SC 585). The petitioner has been found not involved in the occurrence during the course of investigation and stands named in column No.2 of the challan. Prima facie, there are reasonable grounds to believe that the case of the petitioner calls for further inquiry into his guilt within the meaning of section 497(2), Cr.P.C.

8. For what has been discussed above, I accept this application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum Rs.1,00,000 (Rupees one hundred thousand) each with two sureties each in the like amount to the satisfaction of the learned trial Court.

9. Before parting with this order, it is clarified that the observations made hereinabove are tentative in nature and shall have no bearing upon the merits of the case/trial.

H.B.T./R-1/L Bail granted.

2011 P Cr. L J 778

[Lahore]

Before Shahid Hameed Dar and Waqar Hassan Mir, JJ

HASSAN ASKARI---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No. 285-J of 2005 and Murder Reference No. 807 of 2005, decided on 9th December, 2010.

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

----S. 302(b)---Qatl-e-amd---Witness---Credibility---Credibility of a witness depends upon his knowledge of the facts to which he testifies; his disinterestedness; his integrity; his veracity, and his being bound to speak the truth by such an oath as he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath---Proportioned to these principles is the degree of credit the testimony of witness deserves from the court.

Archbold Criminal Pleading,-Evidence and Practice, thirty-five Edition by Butler and Garsis para 1347 ref.

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

----S. 302(b)---Qanun-e-Shahadat (10 of 1984), Arts. 132 & 133---Qatl-e-amd---Appreciation of evidence---Principle---Any portion of the statement of a witness having not been challenged during cross-examination shall be deemed to have been admitted by the accused.

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

----S. 342---Penal Code (XLV of 1860), S. 302(b)---Qatl-e-amd---Examination of accused---Every bit of incriminating evidence must be put to the accused in his examination under S. 342, Cr.P.C. so as to seek his reply---Failure to do so shall exempt the accused from any penal action against him in respect of the missed piece of evidence.

Noor Muhammad v. The State 2010 SCMR 97; Abdul Wahab v. The Crown PLD 1955 FC 88; The State v. Gohar Rehman and another 1969 SCMR 460; Sheral alias Slier Muhammad v. The State 1999 SCMR 697 and Majnoo v. The State 1984 PCr.LJ 2069 rel.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Eye-witnesses had plausibly explained their presence at the scene of occurrence---Ocular testimony was truthful and credible and was corroborated by the site plan and medical evidence---Independent persons for fear of reprisal would usually hesitate to depose against the perpetrators of the crime, so as to save them and their families from any probable danger or trouble---F.I.R. had been promptly lodged---Mistaken identity of accused was out of question, as he was previously known to the eyewitnesses-Forthright, trustworthy and worth reliance ocular evidence could not be

discarded---Conviction of accused, therefore, was upheld---However, motive set up by the prosecution was not proved---Place of occurrence was just in front of the house of accused---What happened immediately before the occurrence and what transpired between the parties at the nick of the time was not known---Abscondence of accused was not proved---No crime empty having been secured from the spot, rifle recovered at the instance of accused could not be proved as the weapon of offence in the absence of any matching report of the Fire-arm Expert---Death sentence of accused was reduced to imprisonment for life in circumstances.

Noor Muhammad v. The State 2010 SCMR 97; Abdul Wahab v. The Crown PLD 1955 FC 88; The State v. Gohar Rehman and another 1969 SCMR 460; Sheral alias Sher Muhammad v. The State 1999 SCMR 697; Majnoo v. The State 1984 PCr.LJ 2069; Muhammad Bashi v. Khalid Mehmood and another 1994 SCMR 1096; Mst. Roheeda V. Khan Bahadur and another 1992 SCMR 1036 and Zulfiqar alias Bhutto v. The State 1995 SCMR 1668 rel.

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

---S. 302(b)---Qatl-e-amd---Sentence, quantum of---Appreciation of evidence---Motive-.--Inadequacy of motive lies in the background in the presence of clear, cogent and convincing evidence, and non-proof thereof has a bearing on the quantum of sentence, benefit of which has to be given to accused.

Muhammad Bashi v. Khalid Mehmood and another 1994 SCMR 1096; Mst. Roheeda v. Khan Bahadur and another 1992 SCMR 1036 and Zulfiqar alias Bhutto v. The State 1995 SCMR 1668 rel.

Mian Abdul Qayyum for Appellant.

Arshad Mehmood, D.P.-G. for the State.

Date of hearing: 9th December, 2010.

JUDGMENT

SHAHID HAMEED DAR, J.---The appellant Hassan Askari was held guilty for the murder of Gulraiz Shah. He was convicted under section 302-B, P.P.C. and sentenced to Death with order to pay Rs.1,00,000 as compensation under section 544-A, Cr.P.C. to the legal heirs of the deceased or in default to undergo six months' S.I. The convict has filed Criminal Appeal No.285-J of 2005 through Superintendent District Jail, Gujrat against the judgment of the learned trial Court dated 20-6-2005. The learned trial Court has submitted Murder Reference 807 of 2005 under section 374, Cr.P.C. for confirmation of the death sentence of the appellant. This judgment will dispose of the above said appeal and the reference.

2. Aslam Shah complainant died midway through trial, therefore, he could not be examined as a prosecution witness in this case.

3. On 10th of October, 1998 at about 1-45 p.m. Aslam Shah complainant after dropping the dowry articles of the daughter of his relative Said Shah, at his residence, was returning to his house along with his paternal nephew 'Gulraiz Shah (deceased). When they reached near the building of post office they found Hassan Shah (appellant) armed with rifle .222 bore and Haider Shah (since acquitted) armed with pistol .30 bore standing at the outer door of the

former's house. On seeing Gulraiz Shah, the appellant-accused fired with his rifle which hit Gulraiz Shah below his right eye, close to nose. Haider Shah (since acquitted) fired with his pistol which injured the right hand of Gulraiz Shah. Thereafter Hassan Shah accused fired 4/5 successive shots which landed on the right and left flank, right elbow and left hand of Gulraiz Shah who resultantly fell down. Hassan Shah appellant and Haider Shahsince acquitted fled away after the occurrence. Aslam Shah complainant saved his life by hiding himself behind nearby houses and witnessed the occurrence. Gulraiz Shah succumbed to the injuries on way to the hospital.

Aslam Shah complainant gave statement to Muhammad Gulzar Beg, P.W.3 at 2-30 p.m. on 10-10-1998 for registration of F.I.R. Exh.PD.

4. The motive behind the occurrence was that Hassan Shah appellant had been arrested in a narcotics case and was released on bail a few days before the occurrence. He had the suspicion that Gulraiz Shah deceased had furnished a spy information against him to the police so due to this grudge he along with his co-accused committed the murder of Gulraiz Shah in furtherance of their common intention. The occurrence was witnessed by Ahmad Shah P.W.4 and Safdar Shah, P.W.5.

5. After completion of due investigation by Rashid Ahmad SI, P. W .8 the appellant was found involved in the occurrence, hence, challan under section 173, Cr.P.C. was submitted against him. On receipt of the challan, charge was framed against the accused, to which he pleaded not guilty and claimed a trial. The prosecution at trial, in order to prove its case examined 8 witnesses in toto.

6. The prosecution relies on the ocular account/version of Ahmad Shah, P.W.4 and Safdar Shah P.W.5 as well as the testimony of Fayyaz Shah P.W.2. Reliance was also placed on the recovery of rifle .222 bore P-1 and the medical evidence presented by Dr. Muhammad Tariq, M.O., P.W.7.

7. The dead body of Gulraiz Shah deceased was subjected to autopsy by Dr. Muhammad Tariq, P.W.7 at 9-00 a.m. on 11-10-1998 vide postmortem examination report Exh.PE with pictorial diagrams Exh.PF/I and Exh.PF/2 who found following injuries on the dead body:--

(1) A Fire-arm entry wound 4 c.m x 4 c.m on right cheek close to the nose.

(2) A fire-arm entry wound 3 c.m x 3 c.m on dorsal aspect of right middle ring and little finger.

2-B A fire-arm exit wound on palmer aspect of the same hand.

3-A A fire-arm entry wound 3 c.m x 5 c.m on dorsal side of left hand at the base of ring finger.

3-B A fire-arm exit wound 3 c.m x 3 c.m on painter aspect of the left hand.

4-A A tire-arm entry wound I1c.m x 1 c.m on right upper arm interiorly.

4-B A fire-arm exit wound 1 c.m x 1 c.m. on posterior medial side of right and upper 1/3rd arm.

5-A A fire-arm entry wound 1 c.m x 1 c.m on the right side of chest close to axilla.

6-A A fire-arm entry wound 2 c.m x 2 c.m on outer aspect of right forearm, close to elbow joint.

6-B A fire-arm exit wound 6 c.m x 6 c.m on anterior medial of middle forearm.

7-A A fire-arm entry wound 1 c.m x I c.m on back left side of chest.

8-A A fire-arm entry wound 1 c.m x 1 c.m on back of lower 1/3" of the chest.

8-B A fire-arm exit wound 2 c.m x 2 c.m on the front of chest near nipple.

9-A A fire-arm entry wound 1 c.m x 1 c.m on the right hypochordium.

9-B A tire-arm exit wound 4 c.m x 4 c.m on the right lumber region.

The cause of death as recorded by the Medical Officer was heavy haemorrhage, shock and cardio pulmonary arrest due to injuries Nos.1, 5, 7, 8 and 9 which had damaged the vital organs. All the injuries were anti mortem and caused by fire-arm.

The probable time elapsed between injuries and death was calculated by the Medical Officer as "within half and hour" whereas between death and postmortem examination as within 24 hours.

7.A The appellant denied the allegation of murder and said in his statement under section 342, Cr.P.C. that he had been falsely implicated in the case. When questioned "why this case against you and why the P.Ws. have deposed against you", he gave the following answer:

> "In my village Moin Ud Din Pur where the occurrence took place, there is lot of enmity among the people residing there. Many persons have been murdered up till now. One Ashraf Shah, who is the real uncle of the deceased is the brother-in-law of one Fazil Shah, whose sons have severe enmity in the village and even outside the village. Fazil Shah is also the maternal uncle of the witness Safdar Shah. The deceased had sympathy with Fazil Shah and his sons. The deceased was strongly affiliated with Fazil Shah. One Mazhar Shah, Azhar Shah, Jafar Shah and Dilawar Shah were the Khalazad of Akram Shah, the father of deceased. The above said Mazhar Shah etc. are involved in many murder cases. The deceased' always supported the above said Mazhar Shah etc. and committed many crimes being the relatives and the party man of Mazhar Shah etc. the deceased had also enmity with many other persons of village, who murdered him. The deceased was not of good repute. My co-accused Haider Shah has been acquitted by the Hon'bte High Court relying upon the same evidence on file. The P.Ws. are related to the deceased."

8. To another question "Will you produce defence evidence". The appellant replied in affirmative but did not produce any defence evidence nor opted to appear under section 340(2), Cr.P.C. as his own witness to. repel the charge against him.

9. On conclusion of the trial, the learned trial Court appraised the evidence available on the record, held the appellant guilty of offence, convicted and sentenced him in the terns

mentioned hereinbefore through' the judgment under appeal.

10. We have heard learned counsel for the parties and have gone through the record of this case with their able assistance.

11. It is contended by the learned counsel for the appellant that the prosecution story was full of improbabilities and the learned, trial Judge has convicted and sentenced the appellant-accused merely on conjectures and surmises; the testimonies of the witnesses of ocular account are replete with countless contradictions and discrepancies which are fatal to the prosecution case; the place of occurrence is situated just in front of the house of the appellant which reflects upon the intrinsic value of the prosecution story; the house of the appellant by no means fell on the way to the house of Said Shah from the house of the complainant party so the acclaimed version of, the eye-witnesses is open to serious exception; the case of the appellant is hardly distinguishable from the case of his co-accused Haider Shah who had been acquitted by this court vide judgment dated 15-12-2004; the deceased was the person of a dubious character and countless persons had suffered at his hands in the past; the deceased being a rouge had himself invited the trouble by launching an attack at the residential house of the appellant; the motive' alleged by the prosecution remained unproven during the trial inasmuch as the alleged arrest of the appellant in a narcotics case, his release on bail and the alleged spy information could not be established through any evidence; the recovery evidence qua rifle .222 bore P-1 is weak and the crime weapon has been planted upon the accused to strengthen a false case against him; the medical evidence does not corroborate the prosecution case in any manner as the dead body of the deceased was dissected by the Medical Officer after about 19 hours of the occurrence which negates the version of the eye-witnesses as well as the registration of the F.I.R. at 2-30 p.m.; the prosecution has miserably, failed to bring home the guilt of the accused beyond any reasonable doubt and he is entitled to be acquitted; the motive being unproven is a mitigating circumstance in favour of the convict-accused and it renders the case of the appellant fit for reduction in sentence; lastly contends that the judgment under appeal suffers from non-reading and misreading of evidence which bears the character of arbitrariness, capriciousness and perversity which is liable to be set aside and the appellant merits acquittal.

12. By rendering the aforesaid submissions the learned counsel for the appellant showed confidence to have ripped through the prosecution case and concluded his submissions that the appellant was entitled to be acquitted of the charge.

13. Conversely, learned Deputy Prosecutor-General has submitted that the prosecution satisfactorily discharged its onus to prove its case against the appellant beyond reasonable shadow of doubt through cogent and confidence-inspiring evidence; the deceased was attacked and brutally murdered by the appellant and the medical evidence fully establishes the charge against the accused; the ocular account has been rendered by the truthful witnesses and their presence at the spot at the time of occurrence is not open to any question; the appellant failed to offer any explanation qua his longstanding abscondence during the trial which is an added corroboratory material against him; the prosecution case stands established by all means so he is not entitled for any relief or leniency; lastly submits that there is no mitigating circumstance in favour of the accused for a lesser sentence.

14. In the instant case the occurrence had taken place at 1-45 p.m. on 10-10-1998 just in front of

the house of the appellant situated in revenue limit of village Moin-ud-Din Pur which is at a distance of about 2 miles front the Police Station Saddar Gujrat while the matter was reported to the police at 2-30 p.m., the same day by Aslam Shah complainant though his verbal statement. The F.I.R. Exh.PD in attending circumstance of the case has been shown to be a promptly lodged F.I.R. The ocular account has been furnished by Ahmad Shah P.W.4, a person from the same brethren and Safdar Shah, P.W.5 a maternal nephew of the deceased. Aslam Shah, complainant who died before his examination, was the real paternal uncle of the deceased. Mere relationship of the prosecution witnesses with the deceased cannot undermine the intrinsic value of their testimonies unless they are shown to be inimical to the deceased.

15. The witnesses of the ocular account have categorically stated in their testimonies that they along with Muhammad Aslant complainant and Gulriaz Shah deceased had gone to the house of Said Shah to deliver dowry articles of his daughter who was schedule to be married on 11-10-1998. They after having done the task were returning to their house when they were surprised by Hassan Askari appellant who being armed with rifle showered bullets upon Gulraiz Shah in the backdrop of his arrest in a drugs case which landed on various parts of the body of Gulraiz Shah who on receiving the tire shots fell to the ground and breathed his last. Haider Shah, the acquitted co-accused of the appellant also authored a firearm injury on the right hand of the deceased but his appeal against conviction was accepted by this court, resultantly he was acquitted. Ahmad Shah P.W.4 and Safdar Shah P.W.5 have impeccably deposed about the role of the appellant and we find from the statements completely in line with each other. They have delivered spontaneous and naturally believable testimonies and they at no point of their statements appear to be jolted. We have gone through their testimonies with the help of the learned counsel for the parties and, we are of the view that they gave the evidence with full confidence. They stood the test of cross-examination as best as is expected from a truthful witness. Their statements are full of sincerity and warmth. The witnesses have fulfilled all the essential ingredients regarding judicial propriety, which to the mind of this court is always subject of law and judicial discretion. We would like to quote para 1347 from Archbold Criminal Pleading, Evidence and Practice, thirty-five Edition by Butler and Garsis, dealing with credibility of witnesses:

> "The credibility of a witness depends upon (1) his knowledge of the facts to which he testifies; (2) his disinterestedness; (3) his integrity; (4) his veracity; and (5) his being bound to speak the truth by such an oath as he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath (pst. para. 1357). Proportioned to these is the degree of credit his testimony deserves from the Court, and Jury".

16. Both the witnesses, P.W.4 and P.W.5, have narrated the circumstances of the prosecution case with minutest details and there is hardly any element of haze or obscurity in their testimonies. A cogent and plausible reason has been offered by theta as to how they got to the place of occurrence and their arrival at the spot at the relevant time has not been seriously challenged by the defence during the trial. The most important and crucial point in the prosecution case is whether the house of the appellant-accused fell on way to the house of Said Shah from the house of the complainant which has not been even touched upon by the defence while squeezing eye-witnesses. The requisite law in this regard is that any portion of

the statement of the witnesses having gone un-challenged during cross-examination shall be deemed to have been admitted by the accused. A number of questions have been put to both the P.Ws. as to the surrounding of the place of occurrence vis-a-vis shops, the roads, the paths etc., but not even a suggestion that the house of the appellant was not situated at the point and on the passages, as contend by P.W.4 and P.W.5.

17. The village Moin-ud-Din Pur, where the occurrence of murder of Gulraiz took place is not less than a battle field as 100 of murders have been committed in this small town, A positive suggestion was Out to P.W.5 by the defence which was replied in affirmative by the witnesses which is hair-raising and mind boggling and we learn from the said suggestion that hundreds of murders had taken place in the said village. Besides such a large scale massacre in the area, the defence failed to hint at any previous enmity between the deceased, the appellant and the eye witnesses. We have not found any noticeable inconsistency, pitfalls or contradictions in the statements of both the eye-witnesses except for a few trivial and negligible discrepancies which are bound to occur with the passage of time. The occurrence in the instant case took place in year 1998, and the testimonies of both the P.Ws. were recorded in year 2003, after more than 5 years of the occurrence.

18. The co-accused of the appellant Haider Shah was though convicted and sentenced to life imprisonment by the learned trial Court in the first round of the trial but his appeal against conviction/sentence was allowed by this court on 15-12-2004 mainly for the reason that the medical evidence had been found insufficient and uncorroborative to his extent, couple with the observation that the picture emerging from the prosecution case hinted at the guilt of his absconding co-accused i.e. Hassan Askari, the appellant. The objection of the learned counsel for the appellant that same evidence should not be believed in respect of the appellant which had been rejected in respect of Haider Shah co-accused of the appellant, is devoid of any force as the medical evidence corroborates the eye-witness account against the appellant. Much stress has been laid by learned Deputy Prosecutor-General on the factum of abscondence of the appellant but it has hardly any relevance in the attending circumstance of this case. Though the prosecution endeavoured to bring on record the requisite evidence to establish the abscondence of the appellant yet they showed negligence during trial and committed the folly of not putting the said piece of evidence to the appellant-accused in his statement under section 342, Cr.P.C. so as to enable him to explain his position. As the appellant has not been examined about abscondence so this piece of evidence cannot form basis of conviction and such a piece of evidence not put to the accused has to be ruled out of consideration. The law requires that every bit of incriminating evidence must be put to the accused in his examination under section 342, Cr.P.C. so as to seek his reply and failure to do so shall exempt the accused from any penal action against him in respect of the missed piece of evidence so the evidence of abscondence is inconsequential. We advantageously rely upon Noor Muhammad v. The State (2010 SCMR 97) Abdul Wahab v. The Crown (PLD 1955 FC 88), The State v. Gohar Rehman and another (1969 SCMR 460), Sheral alias Sher Muhammad v. The State (1999 SCMR 697) and Majnoo v. The State 1984 PCr.LJ 2069.

19. Both the eye-witnesses have given an account of occurrence which appeals to reason and logic, and acceptable to common prudence and despite searching cross-examination but they could not be shaken at all by the defence. They have rendered credible and truthful testimonies and we do not find any terminal circumstance which could cause the brushing

aside of the same. By no argument they can be termed as the chance witnesses as they have offered the plausible explanation and purpose of their presence at the crucial time of occurrence. The site plan Exh.PA is an other source of corroboration to the prosecution case as the place of occurrence is situated at a thoroughfare and the drawing made by Akhtar Nagash draftsman P.W. supports the version of the eye-witnesses as to the surroundings of the place of occurrence. The objection raised by the learned counsel for the appellant that the place of occurrence was a residential area where independent persons resided and none of them had come forward to substantiate the prosecution version, carries little value as the independent persons for fear of reprisal usually hesitate to come forward to depose against the perpetrators of a crime so as to save them and their families from any probable danger or trouble. The matter was reported to the police with promptitude in fact within 45 minutes of the occurrence. The appellant-accused was previously known to the witnesses of ocular account so there was no probability of mistaken identity of the accused. All the injuries on the body of the deceased except for a tiny injury attributable to acquitted co-accused, have been authored by the appellant as he spread volleys of bullets upon the ill-fated youth. The ocular account having been furnished by truthful witnesses is fully corroborated by the medical evidence. There is no reason to discard or brush aside the testimonies of the witnesses of ocular account which we hold to be forthright, trustworthy and worth-reliance. Therefore, the conviction of the appellant as recorded by the learned trial Court is confirmed.

20. Insofar as the evidence qua the motive is concerned we find that it has gone unproven during the course of the trial. The complainant had alleged in the F.I.R. Exh.PD that Hassan Askari appellant had been arrested in a narcotics case who was released from the prison on bail a few days prior to the occurrence and he had the suspicion that it was Gulraiz deceased who had given a tip off to the police against him and having nursed this grudge against him he committed the murder of Gulraiz Shah deceased. Following points were required to be proven by the prosecution during the course of the trial so far as the alleged motive was concerned:--

(1) The implication of the appellant in a narcotics case.

(2) His arrest in the said criminal case.

(3) His release on bail a few days prior to the occurrence.

(4) The doubt of the appellant against the deceased qua factum of passing a spy information to the police.

21. The motive as mentioned above in the instant case was of such a kind which could be established by the prosecution both orally as well as through documents. If the appellant had been involved in a criminal case of contraband substance, arrested on the said charge, dispatched to judicial lockup and released on bail a few days before the occurrence, it would have been easily established during the course of the trial. None of the eye-witnesses or any other witness produced by the prosecution has deposed about the above said factors in their testimonies during trial. The number of the F.I.R. case against the appellant, his date of arrest and dispatch to the judicial lockup and the date of his release on bail are shrouded in nebulousness and the prosecution does not have any answer to the objection of the learned counsel for the appellant that the motive as setup by the prosecution has gone unproven.

There is nothing in the evidence of Ahwad Shah P.W.4 and Safdar Shah P.W.5 pertaining to the motive. Once a specific motive has been set up the onus to prove the same would invariably lie upon the prosecution, in case, they fail to discharge the burden efficaciously, they have to bear the consequences of their failure and the benefit thereof has to be extended to the accused. 'There was no other previous enmity or rivalry between the appellant and the deceased and the only motivating factor alleged against the appellant by the prosecution pertained to the aforesaid stimulus factor, which has gone a begging. The offence of murder may be committed wantonly or without motive but if the motive is alleged by the prosecution and is found false the consequence thereof have to be resolved in favour of the accused. The inadequacy of motive certainly comes into background in face of clear, cogent and convincing evidence but non-establishment of motive certainly has bearing on the quantum of sentence and the benefit of obscurity of motive has to be extended to the accused. The reliance is placed on Muhammad Bashi v. Khalid Mehmood and another (1994 SCMR 1096), Mst. Roheeda v. Khan Bahadur and another (1992 SCMR 1036), Zulfiqar alias Bhutto v. The State (1995 SCMR 1668).

22. This now brings us to the question of sentence awarded to the appellant. As discussed above, the motive set up by the prosecution has gone unproven. The place of occurrence is situated just in front of the house of the appellant. Barring the non-established motive the witnesses of ocular account could not show any other inducing factor against the appellant to have launched the attack on the deceased. What happened immediately before the occurrence and what transpired between the parties at the nick of the hour is not known and remained shrouded in mystery. The allegation qua abscondence of the accused-appellant could also not be proved. The recovery of the crime weapon lost its relevance as rifle .222 bore P-1 allegedly got recovered by the appellant from his house on 28-3-2003 vide memo Exh.PC is also of no consequence to the prosecution case as no report from the Fire-arm Expert has been brought on the file by the prosecution to prove it the weapon of offence. In absence of recovery of any crime empty, the question regarding matching of the rifle with any spent bullet does not arise. The aforesaid factors shall have bearing upon the quantum of sentence awarded to the appellant by the learned trial Court. The learned counsel for the appellant, has on one hand challenged the conviction of the appellant-accused but at the same moment has stoutly prayed for the reduction in the sentence of the appellant. Due to the aforesaid laxity in the prosecution case we while relying upon the above noticed glittering judgments of the august Supreme Court reduce the sentence awarded to the appellant-accused though we retain his conviction under section 302-(b), P.P.C. and convert the same from Death to imprisonment for life with benefit of section 382-B, Cr.P.C. The sentence pertaining to the payment of the compensation amount as awarded by the learned trial Court shall remain unchanged.

23. The upshot of the above discussion is that Criminal Appeal No.285-J of 2005 filed by the appellant stands dismissed with the above-said modification in sentence.

24. The Murder Reference No. 807 of 2005 is answered in the negative.

N.H.Q./H-4/L Sentence reduced.

2011 P Cr. L J 973

[Lahore]

Before Shahid Hameed Dar, J

SARDAR ZAHEER AHMAD KHAN---Petitioner

Versus

GOVERNMENT OF THE PAKISTAN and others---Respondents

Case Diary No. 19681 of 2010, decided on 1st December, 2010.

Penal Code (XLV of 1860)---

----S. 295-C---Constitution of Pakistan, Arts. 248(2) & 199---Use of derogatory remarks etc. in respect of the Holy Prophet---Constitutional petition---Petition has sought multifarious direction from High Court, debarring the Government of Pakistan from remitting the conviction and sentence of the blasphemer accused woman or sending her to U.S.A. in supersession of the law and the Constitution, directing her to avail the remedy of filing an appeal before the appropriate forum against her conviction and sentence and also directing registration of a criminal case against the Governor of Punjab for having allegedly committed an offence of blasphemy in respect of the Holy Prophet (P. B. U. H)---Material produced by petitioner before High Court did not divulge the commission of an offence under the law of blasphemy by the Governor of Punjab, who was a Muslim by faith, so the question of registration of a criminal case against him did not arise---Even otherwise, the Governor had been provided immunity qua criminal proceedings against him while in office under Article 248(2) of the Constitution---Contentions raised by the petitioner were either based on hearsay evidence or the second hand knowledge got through press publications, highlighting the critical remarks about the Governor of Punjab, passed by same opinion makers---Petitions had no tangible material in support of his plea---Admittedly, Chief Justice of High Court had already taken cognizance of the matter and directed that the said accused woman would not be extradited from Pakistan to any other country till the final decision of her matter by the Appellate Court---Feared dispatch of the accused woman to U.S.A. without decision of her appeals by the Appellate Court, therefore, was a far-fetched cry---Petitioner being satisfied did not press the petition further and the same was disposed of accordingly.

Petitioner in person.

Abdul Wahid Babar A.A.-G. and Muhammad Nazir Abbasi, Standing Counsel on Court's call for Respondents.

ORDER

Objection Case

SHAHID HAMEED DAR, J.---The file has been put up by the office as an objection case.

It has been objected to by the office that the petitioner has no locus standi to file the instant petition and secondly in view of the contentions of the petitioner as contained in the instant

petition, it should be instituted at the principal seat.

As it is a matter of public importance so the objections raised by the office are over-ruled and the matter is taken up for hearing.

Main Case

Through this petition under Article 199 of the Islamic Republic of Pakistan, 1973, the petitioner seeks direction of this court as under:

(a) The conviction/sentence of Mst. Aasia, respondent No.2 may not be remitted and that the respondent No.1 be barred from sending her to USA in supersession of the law and the Constitution.

(b) Mst. Aasia should avail the remedy of filing an appeal before the appropriate forum against her conviction/sentence.

(c) A criminal case may be registered against the Governor of Punjab, respondent No.3 for having allegedly committed an offence of blasphemy in respect of the Holy Prophet (peace be upon Wm).

2. The petitioner, in person, while relying upon a press-clipping of the Daily Nawa-i-Wayat dated 30-11-2010 submits that the Hon'ble Chief Justice, Lahore High Court Lahore has already taken cognizance of the matter and a restraining directory order has been passed by the Hon'ble Chief Justice in terms that Mst. Aasia be not released before her appeal is finally taken-up and decided by the appellate court; further submits that the Governor of Punjab, Lahore, respondent No.3 also stands restrained by the Hon'ble Chief Justice, Lahore High Court, Lahore to take any swashbuckling step towards managing pardon fur Mst. Aasia from the President of Pakistan without the decision of her appeal(s), if any; the petitioner being a Muslim and a citizen of Pakistan is competent to file the instant petition as the matter involved is a cause of concern and worry to every Muslim citizen of the country; the act of the Governor of Province Punjab, respondent No.3 for having rushed to District Jail Sheikhupura to get some papers signed from the convict Mst. Aasia for dispatching her to USA with the blessings of respondent No.1 is highly offensive and disgusting which has injured the feelings and emotions of every Muslim; certain utterances made by the respondent No.3 amount to committing an offence of blasphemy so a criminal case may be registered against him; Mst. Aasia respondent No.2 had been found guilty for the charge of blasphemy by a competent court of jurisdiction and was convicted in accordance with the law of the land; the only punishment provided for the offence of blasphemy, in respect of the Holy Prophet Muhammad (peace be upon him) is the DEATH which may not be allowed to be eclipsed by any authority including respondent No. 1 and respondent No.3.

3. Mr. Muhammad Nazir Abbasi, learned Standing Counsel and Mr. Abdul Wahid Babar, learned Assistant Advocate-General, who have entered appearance on Court's call have vehemently opposed, in unison, the contentions of the petitioner with the submission that the Governor of Punjab, respondent No.3 has not committed at all any offence of blasphemy in respect of the Holy Prophet (peace be upon him) and the contentions of the petitioner are whimsical, presumptive and baseless; the Governor of a Province cannot be prosecuted for a criminal offence and a clear bar stands created by Article 248(2) of the Constitution of the

Islamic Republic of Pakistan, 1973; Mst. Aasia, respondent No.2 has already filed an appeal against her conviction before the appropriate forum, whereby, she has challenged her conviction/sentence and that the matter in due course of time shall be finally resolved by a competent court of law; the relief claimed by the petitioner, other than seeking a direction for registration of a criminal case against respondent No.3, has already been provided to all the Muslim citizen of Pakistan, as the Hon'ble Chief Justice at the principal seat has passed an order in terms mentioned hereinbefore; the Hon'ble Chief Justice has already taken cognizance of the matter at the principal seat so the filing of the instant petition at Rawalpindi Registry many not be advisable as it may lead to divergent decisions/judgments.

4. I have heard the petitioner and the learned Law Officers at length and perused the available record.

5. The petitioner has been unable to hint at any statement or material pertaining to the Governor of Punjab, respondent No.3 to prove, though prima facie, that some blasphemous utterances had been made by the Governor. Infact reference has been made by the petitioner, to the speeches/statements made by certain social or religious figures criticizing the Governor of Punjab, to make it a point for lodging a request for registration of a criminal case under the blasphemy laws against the Governor of Punjab. I can easily find that the material produced by the petitioner before this court does not divulge the commission of an offence under the above said law by the Governor of Punjab, who is a Muslim by faith, so the question for snaking a direction for registration of a criminal case against him does not arise. Even otherwise, the Governor has been provided immunity qua criminal proceedings against him, while in office, under Article 248(2) of the Constitution of Islamic Republic of Pakistan, 1973 which reads as under:-

> Article-248. Protection of President, Governor, Minister, etc.
>
> (1) ……
>
> (2) To criminal proceedings whatsoever, shall be instituted or continued against the President or a Governor in any Court during term of office.
>
> (3) ……
>
> (4) ……

So the request for registration of a criminal case against respondent No.3 being superfluous, is turned down.

6. In a Muslim Society every Muslim, being the follower of the Glorious and Glittering injunctions of Islam, honestly believes that Hazrat Muhammad (peace be upon him) is the Last Messenger of Allah Almighty and no one in the said category, shall follow him till the Day of the Judgment. It is equally important for every Muslim to show reverence, veneration and respect to the Holy Prophet (peace be upon him) enthusiastically and no Muslim, be Pakistani or a foreigner, can even imagine of tolerating a person committing the offence of blasphemy in respect of the Holy Prophet (peace be upon him). The Muslims faithfully and honestly believe that Hazrat Muhammad (peace be upon him) is the greatest ever savour of the humanity who has been sent to the world by the Almighty not only for the betterment of

the worldly affairs of the mankind but also for the life, hereinafter, of the Believers. Nothing is dearer to a Muslim than the love, and adoration of the Holy Prophet Muhammad (PBUH) so it is literally impossible for a Muslim to tolerate a sacrilegious or profane talk about the Last Messenger (peace be upon him).

7. Most of the contentions raised at the bar by the petitioner are either based on hearsay evidence or the second hand knowledge got through the press publications, highlighting the critical remarks about the Governor of Punjab, respondent No.3, passed by some opinion makers. The petitioner appears to be short of tangible evidence/material in support of his plea as contained in the instant petition. He himself has admitted that the Hon'ble Chief Justice, Lahore High Court, Lahore has already taken cognizance of the matter and a direction has been passed in terms that Mst. Aasia, respondent No.2 shall not be extradited from Pakistan to any other country till her matter was finally resolved and adjudicated upon by the appellate court, therefore, the feared dispatch of Mst. Aasia, respondent No.2 to USA without her appeals having been decided by the appellate court in the attending circumstances, is a far-fetched cry.

8. The petitioner, being satisfied, does not press this petition further. Disposed of.

N.H.Q./Z-57/L Petition dismissed.

2011 P Cr. L J 1239

[Lahore]

Before Shahid Hameed Dar, J

RIZWAN---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 8507-B of 2010, decided on 17th August, 2010.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), S. 379---Theft---Pre-arrest bail, grant of---Complainant had implicated the accused in the case simply on the basis of suspicion about the theft of his cell phone and some cash---Complainant and other prosecution witness had only learnt that it was the accused who had stolen the said items, but record was absolutely silent as to the source of their information---Doubt or suspicion, howsoever strong, could not be equated with admissible evidence and accused even at bail stage was entitled to get the benefit of doubt---Complainant during investigation had failed to connect the accused with the crime through any evidence---False implication of accused in the present situation due to malice or ulterior motive of the complainant, could not be ruled out---Pre-arrest bail was allowed to accused in circumstances.

Mian Muhammad Irfan for Petitioner.

Khurram Khan, D.P.-G. and Javaid A.S.-I. with Police file for the State.

Complainant in person.

ORDER

SHAHID HAMEED DAR, J.---Rizwan petitioner seeks bail before arrest in case F.I.R. No.718 of 2010 dated 17-6-2010 for an offence under section 379, P.P.C., registered at Police Station Factory Area, District Sheikhupura, on the complaint of Farooq.

2. Precisely the prosecution case is that the complainant is a resident of Mananwala, District Sheikhupura; on 14-6-2010 when he had gone to see Muhammad Akbar a contractor at Canal Rest House Khanpur; where, he put off his shirt, hanged it with a nearby tree and started taking bath in the said canal; after a while when he checked his shirt, he found his mobile Nokia 1203 and Rs. 6000 missing; during search he came to know that his mobile and the said amount had been stolen by the present petitioner.

3. It is contended by the learned counsel for the petitioner that the petitioner is totally innocent and has been falsely implicated in this case by the complainant due to previous grudge as he had contracted marriage with one Sobia without the consent of her parents as a result whereof F.I.R. No. 326 of 2010, for an offence under section 496-A, P.P.C. had been got registered against him at Police Station Manga Mandi, Lahore; he moved pre-arrest bail petition bearing Criminal Miscellaneous No.6176-B of 2010 which was confirmed by this Court vide order dated 18-6-2010; that there is an inordinate and unexplained delay in lodgment of F.I.R. and that in fact no occurrence of stealing mobile

and cash had ever taken place.

4. On the other hand learned Deputy Prosecutor-General controverts the submissions made by the learned counsel for the petitioner with the contention that the petitioner has failed to prove any malice or mala fide on the part of the complainant to falsely implicate him in this case and that the P.Ws. Maqsood Ahmad, etc. have fully supported the prosecution case and that it is a case of bail before arrest and the petitioner may not be allowed the same which is meant only for the innocent.

5. Arguments heard. Record perused.

6. It has been found that the petitioner has been implicated in this case on the suspicion shown by the complainant in his statement recorded under section 154, Cr.P.C. whereby he has contended that he had learnt that his cash and cellular phone had been stolen by Rizwan one of his companions. Muhammad Iqbal ASI, the Investigating Officer of this case has been repeatedly asked to hint at the evidence against the petitioner but he has been beating about the bush. Learned Deputy Prosecutor-General has drawn my attention towards the statement of one Maqsood recorded on 17-6-2010 who has also made a stereotyped statement adopting the plea that he too had learnt about the involvement of the petitioner in the instant case. I have also gone through the record which is to-date absolutely silent as to the source of information of the complainant as well as that of Maqsood Ahmad P.W.

7. The petitioner has been nominated in the F.I.R. only as a suspect by the complainant. The doubt or suspicion how strong soever cannot be equated with the admissible evidence and it is always an accused who being a favourite child of law is entitled for the benefit of doubt even at bail stage. The investigation record of this case reveals that the complainant has been unable to produce any connecting evidence against the petitioner. The false implication of the petitioner in such like situation due to malice or ulterior motives of the complainant cannot be ruled out.

8. For the foregoing reasons I accept this petition and the ad interim pre-arrest bail granted to the petitioner in terms of this court's order dated 6-8-2010 is confirmed subject to furnishing fresh bail bonds in the sum of Rs. 50,000 with one surety in the like amount to the satisfaction of the learned trial Court.

N.H.Q./R-53/L Pre-arrest bail allowed.

2011 P Cr. L J 1395

[Lahore]

Before Shahid Hameed Dar, J

Mirza FARHAN BAIG---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 3105/B of 2011, decided on 20th May, 2011.

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

----S. 497(2)-Penal Code (XLV of 1860), S.489-F---Dishonestly issuing- a cheque---Bail, grant of---Further inquiry---Defence plea---Opinion of Investigating Officer---Scope---Accused had allegedly been abducted by the complainant and kept at a secret place for many days during the course of which the cheque in question was allegedly obtained from the accused---Accused had pointed out to Investigating Officer in his first version that he had left behind a written message at the place of his confinement, which could be recovered and on such information given by accused, a raid was conducted by Investigating Officer, which led to the recovery of a written document from the frame of a tube-light, which entailed detail of miseries of accused---Investigating Officer conducted investigation of the case in the light of respective pleas of both the parties and reached a conclusion that accused was not responsible for the crime reported against him by complainant---Investigating Officer had placed the name of accused in Column No.2 of Challan---Opinion of Investigating Officer did not bind the court in any manner but its persuasiveness could be peeped into by way of abundant caution, so as to assess its creditworthiness, though tentatively---Case of accused, in circumstances, called for further probe into his guilt within the scope of S. 497(2), Cr.P.C.-Bail was allowed to accused.

(b) Bail---

----Bail should not be withheld as a matter of punishment.

Qazi Misbah-ul-Hassan for Petitioner.

Mian Muhammad Awais Mazhar, Deputy Prosecutor-General Punjab for the State.

Muhammad Adeel Yaqoob for the Complainant.

Lal Hussain, A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Mirza Farhan Baig, accused-petitioner through the instant application seeks post-arrest bail in case F.T.R. No.82, dated 22-1-2011, under section 489-F, P.P.C., registered at Police Station Gulberg, Lahore on the complaint of Malik Muhammad Imtiaz Awan.

2. Precisely, the allegation against the petitioner is that he handed down a cheque of Rs. 2.2 million to the complainant, which was presented by him for encashment at the counter of Standard Chartered Bank, Gulberg Branch, but it was bounced due to insufficient funds.

3. Learned counsel for the petitioner submits that the petitioner has been falsely involved in this case under a deep-rooted conspiracy as he had been abducted by the complainant side and kept at a secret place for many days, during the course of which the cheque book was obtained from the bank and the petitioner was made to sign the cheque in question, which ultimately became the apple of discard between the parties; the petitioner adopted the plea during investigation that he had left a written message in the frame of a tube-light at the place of his confinement and at this tip-off, the police/Investigating Officer raided the said place and recovered the written material, which supports the version of the petitioner; the accused-petitioner was found innocent during investigation and has been placed in column No.2 of the report under section 173, Cr.P.C., so he may be released on bail.

4. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant vehemently opposed grant of bail to the petitioner with the contention that the petitioner is a wicked and a clever person, who in connivance with the police has manoeuvred the recovery of written material so as to frustrate the prosecution case; the opinion of the Investigating Officer smacks dishonesty so, the petitioner may not be allowed to be benefited of the same; the cheque in question and the memo regarding return of the cheque for sufficiency of funds is a strong piece of evidence against the petitioner. Lastly submits that the petitioner's case does not call for further probe into his guilt, so he may not be allowed the relief prayed for.

5. After having heard learned counsel for the parties and gone through the record, I find that first version of the accused-petitioner before the Investigating Officer was that lie had been abducted by the complainant side and kept in confinement at a secret place for many days and during the intervening period, he was compelled to fetch a cheque book from the bank and after availability of the same, the cheque in question was fabricated/manoeuvred by the complainant side so as to create fake evidence against him. The petitioner also pointed out to the Investigating Officer in his first version that he had left behind a written message at the place of his confinement, which could be recovered and on this information a raid was conducted by the Investigating Officer, which led to the recovery of a written document from the frame of a tube-light, which entailed detail of miseries of the petitioner. The Investigating Officer conducted investigation of the case in the light of respective pleas of both the sides and reached a conclusion that the petitioner was not responsible for the crime reported against him by the complainant. The name of the accused-petitioner has been placed in column No.2 of the challan. The opinion of the Investigating Officer does not bind the court in any manner but its persuasiveness can be peeped into by way of abundant caution so as to assess its credit worthiness, though tentatively. The bail should not be withheld as a matter of punishment. If on culmination of the trial, the prosecution succeeds in establishing the guilt of the petitioner, lie may be taken in custody again to serve out the sentence. Presently I find that case of the petitioner calls for further probe into his guilt within the scope of section 497(2), Cr.P.C.

6. Resultantly, this application is allowed and the petitioner is admitted to post-arrest bail

subject to furnishing bail bonds in the sum of Rs.1,00,000 (Rupees one lac) with two sureties each in the like amount to the satisfaction of the learned trial Court.

M.H./F-18/L Bail allowed.

2011 P Cr. L J 1665

[Lahore]

Before Shahid Hameed Dar, J

Syed ASHIQ HUSSAIN SHAH---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No. 486-B of 2011, decided on 28th April, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.302/34---Qatl-e-amd---Bail, refusal of---Bail application was pressed on medical ground alone---Accused, according to his medical history, was suffering from the disease of which at present almost every person was a patient, because of the stress and strain prevailing all around---Many factors Wright contribute towards developing hypertension and diabetes, crucially being the stress---Socio-economical stress might grip a person in terms of falling prey to said diseases---Medical Officer had not stated that the condition of accused was serious, his treatment was not possible in jail hospital or that every day he passed in jail had hazardous effect on his health and life---Accused, therefore, could not be considered a sick and infirm person within the scope of S.497(1), Cr.P.C.---Weeping of the accused due to his imprisonment was natural---Everyone confined in jail would behave in the same way-Bail was declined to accused in circumstances.

Muhammad Hussain and others v. The State 1992 PCr.LJ 1683; Inayat Ullah v. The State and another 1997 PCr.LJ 1366; Muhammad Ashraf Khan v. The State 1990 PCr.LJ 169; Rai Ata Ullah Khan v. Raja Anar Khan and another 1979 SCMR 471; Zakhim Khan Masood v. The State 1998 SCMR,1065 and The State v. Haji Kabeer Khan NLR 2005 Criminal 399 ref.

Faisal Khan Niazi for Petitioner.

Malik Riaz Ahmad Saghia, Deputy Prosecutor-General Punjab with Muhammad Bashir, S.-I. for the State.

Kashif Ali Malik for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---Syed Ashiq Hussain Shah, the accused- petitioner seeks bail after arrest in case F.I.R. No. 233, dated 7-11-2009, under sections 302/34, P.P.C., registered at

police station Jand, District Attock, on the complaint of one Muhammad Aslam.

2. Precisely the prosecution case as stated by the complainant is that Ashiq Hussain Shah (petitioner), Tajamal Hussain and Nazakat Hussain were sitting in front of their baithak, at 4-30 p.m., on 7-11-2009; in the meanwhile, Muhammad Sajjad son of the complainant reached near the house of Syed Ashiq Hussain Shah where he was pounced upon by Nazakat Hussain, Tajammal Hussain and Ashiq Hussain Shah (petitioner); Tajamal Hussain being armed with pistol fired at Sajjad, which landed at his chest, as a result of which he fell on to the ground being injured; the complainant attempted to intervene so as to rescue his son, he was fired at twice by Ashiq Hussain (petitioner) with his pistol and the missiles hit his right arm and right chest. The motive behind the occurrence pertained to a previous dispute between Nazakat Hussain Shah and Wajid, the son of the complainant. Both the injured Sajjad and Muhammad Aslam (complainant) succumbed to the injuries, one on way to the hospital and the other after having been shifted to the hospital, so it is a case of double murder.

3. Learned counsel for the petitioner submits that he only presses the medical ground as the petitioner was a sick person who suffered from multiple diseases and his case is covered by first proviso to section 497(1), Cr.P.C.; the petitioner being a heart-patient had been medically tested, treated and prescribed certain medicines by the senior medical officers at DHQ Hospital, Attack from time to time and it has been observed by the medical officer that his condition might become serious because of the ailment, he suffered from; the petitioner wa arrested on 12-11-2009 and he stands continuously incarcerated sine then. Relies upon cases titled "Muhammad Hussain and others v. The State" (1992 PCr.LJ 1683), "Inayat Ullah v. The State and another (1997 PCr.LJ 1366), "Muhammad Ashraf Khan v. The State" (199 PCr.LJ 169), "Rai Ara Ullah Khan v. Raja Anar Khan and another (1979 SCMR 471), and "Zakhim Khan Masood v. The State" (1998 SCMR 1065).

4. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant opposed grant of bail to the petitioner with the contention that the petitioner along with his co-accused had committed a gruesome offence taking the lives of two innocent persons for none of their fault; the complainant, who received injuries at the hands of the petitioner, also died immediately after the occurrence, so there exists dying declaration against the petitioner and his co-accused; the petitioner is not sick nor he may be treated as such, as his case is not covered by the settled principles whereby a person car be held as sick or infirm; the ailments, the petitioner allegedly suffers from are not such, which may be considered hazardous to his life nor it has been suggested by the medical officer that his continued incarceration in jail may be dangerous to his life; lastly submits that the trial of the accused in the first round, almost stood concluded when his son and absconding co-accused Nazakat Hussain was arrested and the case entered the proceedings of a de novo trial; even in the second round three prosecution witnesses have been recorded and if accused would cooperate with the trial Court, the trial may be concluded within 2/3 months time. He relied upon case; titled "The State v. Haji Kabeer Khan" (NLR 2005 Criminal 399).

5. After having heard learned counsel for the parties and perused the record, I find that the bail plea of the petitioner has not been pressed on merits rather on medical ground only. For establishing the sickness of the petitioner, learned counsel for the petitioner has referred to a few documents issued by the medical officer, District Jail, Attack which transpire that the

petitioner had not only been examined and treated by the jail doctor at jail hospital but also by some senior medical officers at DHQ Hospital, Attock. I take all these documents one by one.

(i) The petitioner according to Endst. No. 6069 dated 17-6-2010, remained admitted in jail hospital, for treatment from 6-5-2010 to 17-6-2010 with known history' of hypertension, diabetes militus and Ischemic heart disease. The medical officer concluded that the blood pressure and diabetes of the under trial prisoner was controlled but occasionally he complained of pain in chest and palpitation. He further observed that the patient became much depressed due to his imprisonment and might deteriorate his health condition.

(ii) The medical officer of District Jail, Attack vide Enast. No.6380, dated 4-7-2010 reiterated his previous diagnosis about the patient with addition that the accused was an old man aged 66 years with depressed look, occasionally complaining of pain in chest and palpitation and that the had also developed pedal edema (swelling of feet) and that he was checked by the doctor of DHQ Hospital, Attock. This report was concluded with the observation that the examinee became immensely depressed and started weeping due to his health conditions and imprisonment and that constant stress might deteriorate his. health condition.

(iii) The last report issued by the medical officer in the month of February, 2001, is almost the repetition of the previous reports.

Learned counsel for the petitioner submits that the petitioner notwithstanding allegation against him may be admitted to bail deeming him sick and an infirm person.

6. I hate gone through all the reports and the case-laws referred to by the learned counsel for the petitioner besides attending to the arguments of learned Deputy Prosecutor-General Punjab as well as that of learned counsel for the complainant. I find that the trial of the accused might have been concluded much earlier. The tendering of arrest by Nazakat Hussain, the son of the petitioner, after recording of evidence of 12 prosecution witnesses in the first round of the trial appears to be purposeful. His arrest synchronized the initiation of a de novo trial, setting at naught all the previous proceedings thereof. Learned Deputy Prosecutor-General Punjab submits that after framing the amended charge by the learned trial Court, three prosecution witnesses had again been recorded and there is a likelihood that the trial shall be concluded, within 2/3 months time.

7. So far as the medical history of the petitioner is concerned, I find the disease, he suffers from, the one which at present, almost every citizen of the country is a patient of, because of the stress and strain, prevailing around. There may be many factors contributing towards development of hypertension and the disease of diabetes, crucially being the stress. The socio-economical stress might grip a person in terms of falling prey to the aforementioned diseases. It has not been observed by any medical officer that the condition of petitioner was serious, his treatment was not possible in jail hospital or that every day he passed in jail had the hazardous effect on his life and health, so he cannot be considered a sick and infirm person within the scope of' section 497(1), Cr.P.C.

8. Insofar as the repeated observation of the medical officer that due to his imprisonment, the petitioner starts weeping, is a fact which is but natural. Everyone who is confined in jail would behave the same way and who is there in world who cherished his imprisonment.

9. Having all the regard and reverence for the judgments submitted by the learned counsel for the petitioner. I find that the facts of the instant case do not assimilate the facts of the above said judgments, therefore, I am not inclined to accept this application, which is dismissed accordingly.

10. Before parting with this order, it looks appropriate that the learned trial Court may be directed to expedite the proceedings of the trial and conclude the same as immediately as possible, preferably within four months from the date of receipt of the order of this court.

N.H.Q./A-112/L Bail refused.

P L D 2011 Lahore 32

Before Shahid Hameed Dar, J

MUHAMMAD IJAZ---Petitioner

Versus

MUHAMMAD RIAZ and 4 others-Respondents

Criminal Miscellaneous No.1071-M of 2010, decided on 17th September, 2010.

Criminal Procedure Code (V of 1898)---

---Ss. 516-A & 561-A---Penal Code (XLV of 1860), S.379/411---West Pakistan Arms Ordinance (XX of 1965), S.13---Theft dishonestly receiving stolen property, possessing unlicensed fire arm---Custody on Superdari of case property---Matter related to the custody of a "bitch" which initially had been given to the petitioner on Superdari by the Magistrate---Sessions Court in revision upset the said order and gave the custody of the bitch to the respondent vide impugned order---Petitioner in his F.I.R. and respondent in his cross version had both admitted that the bitch was in the custody and control of the petitioner at the time of occurrence, when the same had been stolen---Petitioner had, prima facie, established that he was the last possessor of the bitch, which had been returned to him after the occurrence, as contended by both the parties in their respective versions before the police---Respondent, for the being, had failed to establish his claim of being the last possessor of the bitch---Sessions Court in the impugned order had rightly hinted at the principles governing the custody and control of the case property pending trial by observing that the last possessor of such property was entitled to the custody thereof under S. 516-A, Cr.P.C., but thereafter it had been swayed away by the terms "rightful claimant" and "sufficient material", as nothing of the sort at the moment existed on the investigation file of the case favouring the respondent---Impugned order had been passed on whimsical grounds which did not appeal to reason and logic---First order passed by Magistrate in favour of petitioner had not even been challenged by the respondent in his revision petition, which had been disposed of by Sessions Court in

an arbitrary and perverse manner---Impugned order was consequently set aside and the case property i.e., the bitch was directed to be retained by the petitioner till the final adjudication of the case by Trial Court---Petition was allowed accordingly.

Zafar Iqbal Chohan for Petitioner.

Malik Asif Ahmad Nissoana for Respondent.

Khurram Khan, D.P.G. with Muhammad Shahzad S.-I. (with record).

ORDER

SHAHID HAMEED DAR, J.---The petitioner has filed the instant petition under section 561-A, Cr.P.C. against order dated 5-5-2010 passed by the learned Additional Sessions Judge, Jhang, whereby the revision petition filed by respondent No.1, against an order dated 14-4-2010 passed by the learned Judicial Magistrate section 30, Jhang, has been accepted and the order under revision was set aside.

2. The brief facts germane to the filing of the instant petition are that the petitioner got lodged an F.I.R. No.190 of 2010 dated 30-3-2010 under sections 379, 411 P.P.C. read with section 13 of the Arms Ordinance XX of 1965 at Police Station, Mochiwala, District Jhang with the allegation that he was fond of keeping Bully dogs and obtained one from Ali Muhammad son of Ahmad Khan on barking of the dogs at about 12-30 a.m. on 30-3-2010, he woke up and saw Muhammad Afzal and Muhammad Azeem with two unknown armed men, filch his bitch; he raised hue and cry which attracted many co-villagers and they chased above said thieves who opened straight firing upon the complainant, and other chaser; the pursuers returned firing in self defence and it continued for about half an hour; the accused covered a distance of about four squares while firing when, all of a sudden, they stopped firing; the complainant and others drew nearer and round Muhammad Afzal lying dead, with a pistol fallen close to his dead body; in the meantime the bitch returned to the complainant who produced her before the police along with above said pistol, as the case property who took these articles into possession through separate recovery memos.

3. One Muhammad Azeem son of Noor Muhammad set up a cross-version in this case by contending that he along with Muhammad Afzal, Riaz and Muhammad Ashraf went to Muhammad Fjaz (complainant of F.I.R.) at 8/9-00 p.m. on 30-3-2010 to fetch the doggess of Muhammad Afzal but he refused to return the same; Muhammad Afzal forcibly untied the bitch and they all walked away, whereupon Muhammad Ejaz etc. exhorted loudly that the bitch be returned otherwise, they would kill Muhammad Afzal on his refusal to succumb to their demand Muhammad Ejaz etc. opened indiscriminate firing and murdered Muhammad Afzal at the spot.

4. The petitioner filed an application for seeking Superdari of the above said doggess before the learned Judicial Magistrate, section 30, Jhang which was accepted vide order dated 3-4-2010 and the custody of the animal was ordered to be delivered to the petitioner. The respondent No.1, thereafter, moved an application seeking cancellation of the above-mentioned order of Superdari before the learned Magistrate which was dismissed vide order dated 14-4-2010. Feeling aggrieved of the order dated 14-4-2010, respondent No.1 filed a revision petition before the learned Additional Sessions Judge, Jhang who vide order dated 5-

5-2010 accepted the revision petition and set aside the order dated 14-4-2010 passed by the learned Magistrate. The custody of the .bitch, however, could not change hands because of a restraining order passed by this court on 12-5-2010. The petitioner being dissatisfied, has challenged the validity of the above said order through the instant petition.

5. Learned counsel for the petitioner submits that the impugned order passed by the learned Additional Sessions Judge is patently illegal, unjust, unwarranted and superfluous as it has been passed in violation to the settled principles of law on the subject; the impugned order is self discrepant as on one hand it has been observed by the learned A.S.J. that the Superdari of the case property has to be given to the person whom-from it had been recovered by the police and on the other hand has allowed the revision petition of respondent No.1 against the record which shows that the petitioner had presented the above noted case property to the Investigating Officer at the time of registration of F.I.R.; the impugned order is based on surmises, conjectures and presumptions, hence, may not be , sustained; the first order passed by the learned Magistrate in favour of the petitioner has not been challenged by respondent No.1 which still holds ground and has attained finality under the law; lastly contends that the principle of restoring' the possession of the last possessor of the case property under section 516-A, Cr.P.C. has been violated through the impugned order by the learned A.S.J. which may be set aside.

6. On the other hand, learned counsel for respondent No.1 submits that the above said bitch belonged to Muhammad Afzal as is evident from the cross version recorded during the course of investigation, on the complaint of Muhammad Azeem the bitch was nurtured and brought up by respondent No.1 and his brother Muhammad Afzal (deceased) together and she could identify the actual owner even today if she was put to such a test; the impugned order has been passed by the learned A.S.J., after hearing both the sides and the earlier order of the Magistrate dated 3-4-2010 had been passed on the back of respondent No.1 which is inherently illegal; the impugned order has been passed judiciously by the learned A.S.J., Jhang which may be sustained and the custody of the bitch may be handed over to respondent No. 1.

7. Learned Deputy Prosecutor General has opposed the contentions of learned counsel for the petitioner and submits that the impugned order does not suffer from misinterpretation or misconstruing of law which has been passed correctly and lawfully by the learned A.S.J. in accordance with the record of this case.

8. I have heard learned counsel for the parties and perused the relevant record. The bitch might not have been as important a piece of evidence as it has rendered into by the Investigation Officer who, on registration of the F.I.R., took her into possession through a recovery memo when it was presented to him by the petitioner as the case property. The petitioner, being the complainant, has contended in F.I.R. No.190 of 2010 supra that the above said doggess rescued herself from the clutches of Muhammad Afzal etc. and managed to return to him. This is not a bald version of the petitioner as he, at the same moment, had produced the bitch, as the case property to the Investigating Officer. The moot point involved in the instant case relates to the last possession of the animal which, in the attending circumstances, can be resolved easily by adverting to the facts of this case. The petitioner in his F.I.R. and respondent No.1 in his cross version have both admitted that the bitch was in

the custody and control of the petitioner at the time of occurrence i.e. 12-30 a.m. on 9-3-2010 when according to the version of the former, it was stolen by Muhammad Afzal and his co-assailants whereas, the latter has alleged in the cross version that after a heated debate between the parties, Muhammad Afzal (deceased) had forcibly untied the bitch and taken her away, causing anger and provocation to the accused party of the cross case. The petitioner, in whose favour, the learned Magistrate had passed the order dated 3-4-2010 has prima facie established the fact that he was the last possessor of the above said bitch and that she had returned to him after the occurrence, as contended by both the parties in their respective versions before the police, so, in these circumstances, the contention of respondent No.1 that the bitch may be opened at an open place in presence of both the parties and be signalled to identify the actual owner, has lost relevance. The petitioner has of-course offered something to the Investigating Officer as to how he had sought the possession of the above said bitch but respondent No.1, for the time being, has failed to impress upon his version regarding possession of the said case property, as the last possessor.

9. The learned trial Court, in exercise of his powers under section 516-A, Cr.P.C. was competent to pass an order for custody and disposal of the case property, in the instant case, pending trial, by keeping in view the attending facts and circumstances which appears to have been judiciously and meticulously done by him while passing both the orders dated 3-4-2010 and 14-4-2010. Section 516-A, Cr.P.C. empowers the learned Magistrate to pass the appropriate order qua the case property pending trial in the following words:--

> "When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of……"

10. The learned Magistrate while passing order dated 3-4-2010 observed the required precautions and rightly directed the petitioner to produce the case property as and when directed by the learned trial Court during the course of the trial. A reasonable surety bond in the sum of Rs.1,00,000 has also been required to be furnished by the petitioner for securing the custody of the bitch.

11. It is manifest from the impugned order that the learned A.S.J, Jhang has rightly hinted at the principles governing the custody and control of the case property pending trial by observing that the last possessor of such property was entitled to the custody thereof under section 516-A, Cr.P.C. but after having made the said observation, he has been swayed away by the terms "rightful claimant" and "sufficient material" as nothing of the sort, at the moment, exists on the investigation file of this case, favouring respondent No.1. The impugned order as to the change of custody of the case property has been passed on whimsical grounds, which do not appeal to reason and logic. The first order dated 3-4-2010 passed by the learned Magistrate has not been called in question by respondent No.1 in his revision petition, decided by the learned A.S.J., Jhang vide the impugned order which is declared to have been passed in an arbitrary and perverse manner. The impugned order

therefore, is set aside being not sustainable.

12. The possession of the case property i.e. the bitch shall be retained by the petitioner till the final adjudication of the trial of the above said criminal case by the learned trial Court who shall also deal with the disposal of the above said case property through the same judgment.

13. With the above observations, the instant petition stands allowed.

N.H.Q./M-532/L Petition accepted.

PLJ 2011 Cr.C. (Lahore) 272

Present: Shahid Hameed Dar, J.

SABIR HUSSAIN--Petitioner

versus

STATE and another--Respondents

Crl. M. No. 7042-B of 2010, decided on 8.7.2010.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 34, 109--After arrest bail, grant of--Further inquiry--Occurrence was heart rendering and hair raising--Court was not swayed away by emotions and sentiments--It was evidence alone which for adjudication of bail--I.O. who had fabricated a bogus statement, had failed to collect any direct or indirect evidence against petitioner--Statement of deceased wife, which denied to have made it hardly created any incriminating evidence against petitioner--Deceased wife was present in person had submitted affidavit, that neither joined investigation nor had made any statement before I.O against petitioner or any body else--Case was concerned--Petitioner had made out case for grant of bail within meaning of S. 497(2)--Further probe was required to look into his guilt--Bail was allowed. [Pp. 273 & 274] A & B

Ch. Muhammad Din Ansari, Advocate for Petitioner.

Mr. Khurram Khan, DPG for Respondents.

Date of hearing: 8.7.2010.

Order

Sabir Hussain petitioner seeks bail after arrest in case FIR No. 295 of 2009 dated 27.12.2009 u/S. 302, 34 P.P.C. read with Section 109 P.P.C. registered' at Police Station, Karianwala, District Gujrat, on the statement of Muhammad Saeed.

2. Precisely, the prosecution case is that Abdul Ghaffar elder brother of the complainant divorced his wife Mst. Ghulam Kubra due to estrangement of matrimonial relationship about two years prior to the instant occurrence and thereafter he married Mst. Asifa Bibi against the wishes of her family members which caused annoyance to her paternal uncle Sabir (petitioner); Abdul Ghaffar and his maternal nephew Mukhtar, therefore migrated to village Bhring and established a clinic there. Sabir (petitioner) used to intimidate Abdul Ghaffar due to the aforesaid fact and also extended him the threats of murder. Abdul Ghaffar and his nephew Mukhtar Ali left village Bhring at 3:30 p.m on 26.12.2009 but did not return alive; the complainant alongwith his brother Raja Muhammad Sarwar set out in search of his brother and nephew and learnt from some persons that the dead bodies of two youthful persons were lying near a Barsati nullah so they went to that place and found the deadbody of Abdul

Ghaffar and Mukhtar Ali lying on the road besides their motorcycle; the complainant speculated that both of them had been murdered by Sabir Hussain (petitioner), Faiz Alam and Mst. Sobia, younger sister of Asifa Bibi. The motive, behind the occurrence was that Abdul Ghaffar had contracted marriage with Mst. Asifa Bibi against the wishes and consent of his parents-in-law.

3. Learned counsel for the petitioner contends that a bald allegation has been levelled by the complainant against the petitioner without hinting at any connecting evidence; the complainant failed to produce any evidence either direct or indirect during the course of investigation against the petitioner, as such, the real facts of this case continuously remained shrouded in mystery; the Investigation Officer fabricated the statement u/S. 161 Cr.P.C. of Mst. Asifa to the effect that Sabir Hussain, her husband had abetted some one for commission of murder of both the deceased, so, she appeared before the learned Ex-Officio Justice of Peace by way of an application u/S. 22-A/22-B Cr.P.C. seeking relief against the Investigation Officer who had fabricated a bogus statement in her name; the Investigation Officer has failed to collect any direct or circumstantial evidence qua the involvement of the petitioner in the occurrence; the case of the petitioner in the attending circumstances of the case falls within if the purview of further inquiry as envisaged u/S. 497(2) Cr.P.C.

4. Conversely, learned Deputy Prosecutor General submits that the petitioner had sufficient reasons to commit the murder of the deceased as he was annoyed over the marriage of Mst. Asifa Bibi with the deceased Abdul Ghaffar; the wife of Abdul Ghaffar Mst. Asifa had joined the investigation and recorded her statement u/S. 161 Cr.P.C. wherein she had categorically fixed the liability of murder of her husband on the petitioner; the Investigation Officer after conducting intensive investigation in this case has held the petitioner culpable for the murder of both the deceased and has found him involved in the occurrence; lastly contends that the offence with which the petitioner is charged catches the prohibition of Section 497 Cr.P.C. and he is not entitled for the relief prayed for.

5. I have heard learned counsel for the parties and perused the record.

6. Though the details of the occurrence are heart rendering and hair-raising, yet the Courts are not swayed away by emotions and sentiments and it is the evidence alone which matters for adjudication of bail application of an accused. I find that the Investigation Officer has failed to collect any direct or indirect evidence against the petitioner during the course of investigation up-till now. Even if the statement of Mst. Asifa, which she denies to have made, is taken into consideration it hardly creates any incriminating evidence against the petitioner as no date, time and place has been mentioned by her as to when, where & how the consultation for hatching up a conspiracy had taken place nor it discloses the names of the person who had been allegedly marshaled by the petitioner to commit the murder of both the deceased. Asifa Bibi appeared before the learned Ex-Officio Justice of Peace by way of an application u/S. 22-A/22-B Cr.P.C. with the contention that her statement had been fabricated by the Investigation Officer u/S. 161 Cr.P.C. during the course of investigation which should be discarded from the investigation file and that the above said Investigation Officer might be proceeded against according to law. Asifa Bibiwho is present in person has submitted her sworn affidavit to the same fact making the deposition that she had neither joined the investigation nor had made any statement before the I.O against the petitioner or anybody-else. So far as the circumstances of this case, at the moment are concerned, the petitioner has made out a case for grant of bail within the meanings of Section 497(2) Cr.P.C. as further probe is required to look into his guilt.

7. For the foregoing reasons, I accept this application and admit the petitioner to post arrest bail provided he furnishes bail bonds in the sum of Rs. 1,00,000/- with two sureties each in the like amount to the satisfaction of learned trial Court.

(S.L.) Bail allowed.

PLJ 2011 Cr.C. (Lahore) 322

[Multan Bench Multan]

Present: Shahid Hameed Dar, J.

IMDAD HUSSAIN--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 3099-B of 2010, decided on 9.9.2010.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 392 & 411--Bail, grant of--Further inquiry--Petitioner was not nominated in FIR nor his external features--Fabrication of supplementary statement by I.O. during the course of investigation of a criminal case is a recent innovation, which has been devised by the incompetent police officers--Process of investigation was lamentable--Recovery of memo of cell phone and the motorcycle, which indicates that these articles were recovered at the instance of three accused jointly--True import of such joint recovery shall be assessed during the course of trial by trial Court--Evidence of abscondence is hardly relevant against petitioner as he had not been mentioned in FIR and was introduced as an accused through supplementary statement of complainant--There are sufficient reason to believe that petitioner's case was open to further inquiry--Bail admitted. [P. 323] A

Rana Asif Saeed, Advocate for Petitioner.

Mr. Munir Ahmad Sial, DPG for Respondents.

Date of hearing: 9.9.2010.

Order

Imdad Hussain seeks bail after arrest in case FIR No. 329/09 dated 09.07.2009 u/Ss. 392, 411 P.P.C. registered at Police Station, Farid Town, District Sahiwalon the complaint of Sajid Iqbal.

2. Precisely, the prosecution case as stated by the complainant is that he was moving towards his house after closing his clinic and on the way he was intercepted by four unknown accused persons, two of whom were armed with Sotas, one was armed with a pump action gun and fourth was empty handed; the above mentioned accused snatched cash, a cell phone and fled away on the motorcycle of the complainant after having tied him and his brother.

3. The complainant made a supplementary on 20.07.2009 during the course of investigation wherein he contended that he had strong suspicion against the accused/petitioner and three others but he did not disclose the source and reason of such doubts.

4. Learned counsel for the petitioner submits that the petitioner is not nominated in the FIR; the external features of the unknown accused or complexions etc. have not been mentioned in the FIR by the complainant; the statement of the complainant is inadmissible in evidence being a belated attempt on his part to falsely implicate the petitioner in the instant case; the recovery allegedly shown against the petitioner is irrelevant and inadmissible in evidence, being a joint recovery; the petitioner does not have any previous antecedents and he merits release on bail.

5. On the other hand, learned Deputy Prosecutor General has opposed the grant of bail to the petitioner with the contention that he was nominated as an accused by the complainant in his supplementary statement and thereafter he absconded and was arrested on 16.08.2009 after the requisite proceedings under the law had already been conducted against him; the

petitioner led to the recovery of Nokia cell phone and motorcycle of the complainant on 20.08.2009; the witnesses support the version of the complainant and he has been found involved in the occurrence by the Investigation Officer and placed in column No. 3 of the challan.

6. Arguments heard. Record perused.

7. The petitioner is not nominated in the FIR nor his external features etc. have been mentioned by the complainant. The supplementary statement of the complainant is hardly relevant in attending circumstances of the case, as it cannot be read as an integral part of the FIR which at the most can be deemed as a statement u/S. 161 Cr.P.C. The fabrication of supplementary statement by the I.O. during the course of investigation of a criminal case is a recent innovation, which has been devised by the incompetent police officers so as to cut short the process of investigation without realizing as to how-much damage it does to the case of the prosecution, which is lamentable. I have gone through the recovery memo. of the cell phone and the motorcycle dated 20.08.2009 which indicates that these articles were recovered at the instance of the three accused jointly. The true import of such joint recovery shall be assessed during the course of the trial by the learned trial Court. The evidence of abscondence is hardly relevant against the petitioner as he had not been nominated in the FIR, and was introduced as an accused through supplementary statement of the complainant. There are sufficient reasons to believe that the petitioner's case is open to further inquiry into his guilt within the meaning of Section 497(2) Cr.P.C.

Therefore, I admit the petitioner to post arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail admitted.

PLJ 2011 Cr.C. (Lahore) 409

Present: Shahid Hameed Dar, J.

Master ALLAH RAKHA--Petitioner

versus

STATE and another--Respondents

Crl. M. No. 2791 of 2010, decided on 12.4.2010.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 409--Prevention of Corruption Act, 1947, S. 5--Bail, refusal of--Caused a loss to public exchequer--Accused committed extensive financial corruption by committing theft of Government property including wood and electric vires during his stay of service as headmaster of the school--Allegations were supported by a long list of witnesses--During course of inquiry he desperately attempted to get rid of allegations against him and for this purpose he deposited of money in treasury but could not produce any cogent and credible evidence before I.O for his exoneration of the charge--Held: Educational system having been polluted with such like obnoxious vices was also required to be checked immediately and efficaciously--Accused hardly caring for the noble field he was in, committed palpractice and did misdeeds, to the disappointment of students their parents and his colleagues--Many witnesses had recorded their statements in support of allegations contained in FIR and all requisite documents, had been taken into possession by I.O. which prima facie create nexus between the accused and charges alleged in FIR--Offence with which the accused was charged falls within the ambit of prohibition of S. 497, Cr.P.C.--Accused had caused a loss of lacs of rupees, to the public exchequer, who after having been arrested, has

been recently dispatched to judicial lock up--No reason to believe that he had not committed any non-bailable offence--Bail was dismissed. [P. 412] A & B

Mr. Ali Zia Bajwa, Advocate for Petitioner.

Sahibzada M.A. Amin Mian, Addl.P.G. for State.

Mr. Shah Muhammad Mehdi Ata Ghazali, Advocate for Complainant-Respondent No. 2.

Date of hearing: 12.4.2010.

Order

The brief allegation against the petitioner is that he being Headmaster Govt. High School, Chak No. 47/MB, District Khushab committed extensive financial corruption by, committing theft of Government property including the wood and electric wires worth thousands of rupees during his stay of 9 years as Senior Headmaster of the School. The detail of his malpractices committed has been furnished in the FIR No. 25/2009 dated 03.09.2009 under Section 409 PPC read with Section 5, Prevention of Corruption Act 1947, Police Station ACE, Khushab.

2. Learned counsel for the petitioner submits that the petitioner has been falsely implicated in this case due to malice and ulterior motives of a subordinate School Teacher, namely, Ghulam Dastgir, who used Naseer Ahmad complainant as a tool against the petitioner; that the petitioner's career as a School Teacher, spanning over 23 years is spotless and there has not been any such allegation against him earlier; that the said Ghulam Dastgir is inimical towards the petitioner as he was oftenly checked by the petitioner for his immoral and un-Teacher like conduct/behaviour; that no excessive fee has been charged by the petitioner from the students of 9th Class and a number of students and their parents have endorsed the innocence of the petitioner; that no wood has been stolen by the petitioner rather, in an open auction, the School trees were sold to the highest bidder and the money received therefrom was deposited in the treasury; that the petitioner himself deposited thousands of rupees off the alleged amount of misappropriated funds, even before the registration of this FIR including, three months salary of Muhammad Irfan, a Teacher of the School; that nothing is outstanding against the petitioner at the moment, as such, he is no more required by the prosecution for further investigation; that the petitioner's case squarely falls in the ambit of further inquiry.

3. Learned Additional Prosecutor General assisted by the learned counsel for the complainant has vociferously controverted the submissions of the learned counsel for the petitioner and contends that the petitioner stands involved in a number of complaints of financial as well as immoral corruption; that all the charges against the petitioner were found correct during an inquiry, prior to the registration of the FIR, as well as during investigation after the registration of the case; that all the concerned persons including the School Teachers and the parents of some of the students have joined the investigation and recorded statements under Section 161 in support of the allegations contained in the FIR; that the offence with which the petitioner is charged falls within the prohibition of Section 497 Cr.P.C.; that the petitioner has a history of involvement in such like activities even in the past and that another criminal case of the same nature stands registered against him wherein he has been challaned and facing trial at the moment.

4. I have heard learned counsel for the parties and perused the record. The petitioner is burdened with allegations of financial as well as immoral corruption. The allegations alleged against him are supported by a long list of witnesses who have recorded their statements under Section 161 Cr.P.C. during the course of investigation wherein, they have endorsed the version of the complainant. During the course of inquiry he desperately attempted to get rid of the allegations against him and for this purpose he deposited thousands of rupees in the

treasury but could not produce any cogent and credible evidence before the I.O. for his exoneration of the charge against him.

5. The corruption and malpractice unluckily, is the order of the day and people involve themselves in such like undesirable activities without any prick of the conscience, only to amass wealth/money. This cancerous vice has polluted a multitude of humanity and the Education Department is no exception. The corruption and the corrupt element has been flourishing overnight in the Society without any fear of being checked, for a number of years and a notion has developed that no one could put brakes to the light-speed acceleration of such elements who, by virtue of their unbridled powers and influence could reach any office of public importance.

6. A duty has been cast upon every muslim, by Almighty, to be prepared for the life Hereinafter and ought not indulge oneself in waging rivalry in worldly increases/gains. There however, is a ray of hope for a couple of years that the Society is inching towards a corruption free future, which was longed for by the stalwarts of our history. This ray of hope has been kindled by the rejuvenated judiciary/judicial system of Pakistan. The apex Court of the country has passed unparalleled luminous judgments towards check and eradication of corruption which has perceivably, brought a miraculous change in the thoughts of a common man who, does not appear to be far off from a straight path, shown by Glorious Quran.

7. The educational system, having been polluted with such like obnoxious vices is also required to be checked immediately and efficaciously. The petitioner hardly caring for the noble field he is in, committed malpractice and did misdeeds, to the disappointment of students, their parents and his colleagues. Many witnesses have recorded their statements in support of allegations contained in the FIR and all the requisite documents have been taken into possession by the Investigating Officer, which prima facie, create nexus between the petitioner and the charges, alleged in the FIR.

8. He has been found involved in this case by the Inquiry Officer in pre-registration of case, inquiry and post registration, of FIR, investigation. The offence with which the petitioner is charged falls within the ambit of prohibition of Section 497 Cr.P.C. He has caused a loss of lacs of rupees, to the public exchequer, who, after having been arrested, has been recently dispatched to the judicial lock up. There is no reason to believe that he has not committed any non-bailable offence.

9. For what has been discussed above, I do not find myself inclined to admit the petitioner to post arrest bail, which is declined accordingly. This petition stands dismissed.

(R.A.) Bail dismissed.

PLJ 2011 Lahore 461

Present: Shahid Hameed Dar, J.

MAHMOOD ALI--Petitioner

versus

KHADIM HUSSAIN @ BAGH ALI and 3 others--Respondents

W.P. No. 11268 of 2010, decided on 28.5.2010.

Medico Legal Report--

----Request for constutition of a special medical board for re-examination of injuries--Allegation of cross-version--Request for re-examination was dismissed--Administrative order--Challenge to--Description of injury--Injury did not show blackening, burning of edges, smudging of hair or tattooing around the margins of the wound--In absence of any such

features, injury, according to the medical jurisprudence shall be deemed to have been caused from a distance, exceeding 3-4 feet. [P. 463] A

Injury--

----Medico legal report of an injured can exhibit the number of injuries, seat of injuries, the weapon used for infliction of injuries, duration of injuries but it cannot disclose the identity of the author of such injuries. [P. 463] B

Administrative Order--

----Order of judicial magistrate, refusing to constitute special medical board for re-examination of the injuries was an administrative order, not prone to revision u/S. 435, Cr.P.C. which should have been dismissed by Sessions Judge on the solitary point of its maintainability--Dismissed in limine. [P. 464] C

Shahzada Muhammad Zeeshan Mirza, Advocate for Petitioner.

Date of hearing: 28.5.2010.

Order

Muhammad Ali-petitioner is aggrieved of order dated 03.04.2010 passed by the learned Judicial Magistrate, Pakpattan Sharif and order dated 14.04.2010 passed by the learned Sessions Judge, Pakpattan Sharif whereby his request for constitution of a special medical board for re-examination of the injuries of Muhammad Razzaq-Respondent No. 2, has been turned down.

2. The brief facts, leading to the filing of the instant petition are, that the petitioner and others were nominated accused in FIR 37/2010 registered on 24.03.2010, for offences under Sections 324, 148, 149 PPC, at Police Station Pakpattan Sharif, but subsequently, a cross version on the complaint of Riaz had been recorded under Sections 324, 148,149 PPC on 25.03.2010 against Respondents No. 1 and 2. Liaquat Ali and Hota received firearm injuries as per allegations of cross version, at the hands of Khadim Hussain etc., whereas Razzaq received firearm injuries at the hands of Mehmood Ali and his co-accused. The petitioner moved an application before learned Judicial Magistrate Pakpattan Sharif for re-examination of the injuries of Razzaq-Respondent No. 2, which was dismissed on 03.04.2010; whereafter he filed a revision petition against the administrative order of the learned Magistrate, which was again dismissed on 14.04.2010 by the learned Sessions Judge Pakpattan. Hence instant petition.

3. Learned counsel for the petitioner contends that both the impugned orders are fanciful which are based upon surmises and conjectures; that the impugned orders do not encompass all the legal aspects of the case and have been passed in an arbitrary and perverse manner; that the learned Judicial Magistrate as well as learned Sessions Judge, Pakpattan Sharif have erred in law by not exercising their judicial authority in favour of the petitioner; the medico legal report of Muhammad Razzaq-Respondent No. 2 indicates that the injuries mentioned therein were fabricated and doubtful, which required re-examination by the members of special medical board, Pakpattan Sharif but the request of the petitioner in this regard has been turned down by the said learned Courts injudiciously.

4. I have heard the learned counsel for the petitioner and have perused the MLR of injured Muhammad Razzaq, Respondent No. 2 and other documents, annexed with this petition. The main contention of the learned counsel for the petitioner is that two persons had received grievous firearm injuries in the occurrence as alleged in the cross case and MLR of Hota, one of the injured PWs of cross case, showed a firearm entry wound on the frontal chest of the injured, but the MLR of Razzaq-Respondent No. 2, an injured PW of FIR case, did not show any firearm injury on a vital part of his body. He has further contended that MLR of Razzaq had been manoeuvred by the complainant side of FIR case, in connivance with the Medical

Officer, and the police so, firearm injuries should have been re-examined by a team of medical officers constituting special medical board.

5. I have gone through the MLR of Razzaq, which shows one firearm entry wound on outer side of right leg, 25 cm above the lateral mellectus. This wound was bleeding and going deep towards inner side and caused an exit wound (Injury No. 2) on inner of back of right leg, above the medial mellectus. The Medical Officer also found corresponding holes in the Shalwar of the injured. The above said entry wound does not bear any characteristics of close range firing or point-blank range firing as the description of Injury No. 1 does not show blackening, burning of edges, smudging of hair or tattooing etc. around the margins of the wound. In absence of any such features, Injury No. 1, according to the medical jurisprudence shall be deemed to have been caused from a distance, exceeding 3-4 feet. From none of the descriptions of the injuries mentioned in the MLR of Razzaq-Respondent No. 2, it can be found that these were fabricated injuries or caused with friendly hands. The medico legal report of an injured can exhibit the number of injuries, seat of injuries, the weapon used for infliction of injuries, duration of injuries etc, but it cannot disclose the identity of the author of such injuries.

6. It has been contended by the learned counsel for the petitioner that Hota injured PW of cross case, had received two firearm injuries (entry and exit) on the front and back of his chest at the hands of Khadim Hussain etc., the accused of cross case, so Razzaq-Respondent No. 2 could not have been authored an injury on non-vital part of his body, therefore, his medical re-examination, in attending circumstances, was essential. This particular argument of the learned counsel for the petitioner is hardly entertainable as it necessarily relates to deeper appreciation of the evidence which can only be done during the course of the trial by the learned trial Court. It is also observed that the impugned order, passed by the learned Judicial Magistrate was an administrative order, not prone to revision under Section 435 Cr.P.C. still, the petitioner preferred a revision petition before the learned Sessions Judge, who dismissed the same on 14.04.2010, deeming it as a revision petition, which should have been decided by the learned Sessions Judge on the solitary point of its maintainability, under the law.

7. For what has been discussed above, I do not find any merit in this petition, which stands dismissed in limine.

(M.S.A.) Petition dismissed.

PLJ 2011 Lahore 483

Present: Shahid Hameed Dar, J.

Mst. TAYYABA KIRAN--Petitioner

versus

ADDITIONAL SESSIONS JUDGE, GUJRANWALA and 2 others--Respondents

W.P. No. 2030 of 2007, decided on 5.5.2010.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), Ss. 22-A & 22-B--Constitutional petition--Challenging the validity of order passed by Ex-officio Justice of Peace--Directing to get the cheques returned to the petitioner--Validity--Ex-officio Justice of Peace appears to have been swayed away by the excesses, committed by the police, therefore, some element of harshness has crept in the impugned order, whereby, the Ex-officio Justice of Peace has directed to get the cheques returned to the petitioner--Validity of the cheque shall be best assessed by the trial Court, seized with the trial of the case--Order accordingly. [P. 487] A & B

Mr. Naseer Ahmad Awan, Advocate for Petitioner.

Mr. Abdul Ghaffar Khan, Advocate for Respondent No. 3.

Mr. Aamir Jalil Siddiqui, AAG for Respondents.

Date of hearing: 5.5.2010.

Order

Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the validity of order dated 06.02.2007 passed by the learned Ex-Officio Justice of Peace/Add:Sessions Judge, Gujranwala, Respondent No. 1, wherein certain observations and directions have been made, which according to the contention of the petitioner, are uncalled for, unlawful and beyond the scope and authority/powers of the learned Ex-Officio Justice of Peace.

2. The brief facts, necessitating institution of the instant writ petition are that Zahid Mehmood alias Gosha, Respondent No. 3, filed a petition under Sections 22-A/22-B Cr.P.C before the learned Ex-Officio Justice of Peace, Gujranwala against DPO, Gujranwala, SHO, Police Station Gakkhar Mandi, Tayyaba Kiran(the petitioner) and Sohail Aziz (the husband of Mst. Tayyaba Kiran) contending therein that cheques, forcibly obtained from him by the police may be ordered to be returned to him and that proceedings should be conducted against the respondent-accused.

3. The learned Ex-Officio Justice of Peace called for the comments of SHO, P.S Gakkhar Mandi, District Gujranwala, Respondent No. 2 who submitted his report dated 18.01.2007 to the effect that nobody had extended threats to Zahid Mehmood nor the cheques were forcibly taken from him; the SHO further submitted that Mst. Tayyaba Kiran (the petitioner) and the wife of Respondent No. 3 were real sisters who had amicably settled their dispute through notables of the area.

4. The learned Ex-Officio Justice of Peace, on receipt of the said police report, passed the impugned order, whereby, he observed as under:

"Perusal of record reveals that the local police in its report dated 18.11.2007 had admitted that both the parties were summoned at P.S Gakkhar Mandi. The said cheques were got delivered from the petitioner amicably on the intervene of respectables of both the parties. The dispute going on between the parties was admittedly of civil nature and under the law the local police could not interfere in it without registration of a criminal case. The action taken by the Respondent No. 2 in obtaining the aforementioned cheques from the petitioner was an excess committed by him in relation to his functions and duties within the meaning of Section 22-A(6) clause III Cr.P.C. The present petition is, therefore, accepted and Respondent No. 2 is directed to get the aforementioned cheques returned to the petitioner."

5. Learned counsel for the petitioner contends that the impugned order dated 06.02.2007 passed by Respondent No. 1 is illegal, void ab-initio and unlawful which is liable to be set aside; that the impugned order has been passed in disregard to the relevant law and facts of the case; that a civil suit had been filed by Zahid Mehmood, Respondent No. 3 in the Civil Court, Gujranwala alongwith an application for temporary injunction but the learned Civil Judge refused to award interim injunction by holding that monitory loss was no loss; that the impugned order has been passed on the back of the petitioner who has been condemned unheard; that one of the three cheques Bearing No. 0058211 is the case property of case FIR No. 145 of 2007 dated 01.02.2007 under section, Police Station, Model Town, Lahore against Zahid Mehmood, Respondent No. 3; that the learned Ex-Officio Justice of Peace had assumed the charge of an Investigating Officer by passing the order qua return of cheques to Zahid Mehmood, Respondent No. 3, through SHO, Police Station Gakkhar Mandi; that the impugned order is patently illegal without jurisdiction and is not sustainable in the eyes of law; that the impugned order has resulted in grave miscarriage of justice.

6. On the other hand, learned counsel for the Respondent No. 3 contends that Tayyaba Kiran, the petitioner, presented an application before DPO,Gujranwala, who, in violation of all provisions of law summoned Zahid Mehmood, Respondent No. 3 to the Police Station Gakkhar Mandi and made him issue three cheques Bearing No. 0058210, 0058211 and 0058212, duly signed by him, under coercion and delivered these cheques to Tayyaba Kiran(petitioner) and her husband Sohail Aziz; that Zahid Mehmood, Respondent No. 3 having been disgraced and harassed by the DPO, Gujranwala, moved an application before the DIG, Gujranwala, who entrusted the matter for inquiry to Addl. DIG, Gujranwala who after detailed inquiry formulated his report to the effect that a pecuniary dispute existed between wife of Dr. Zahid Mehmood, Respondent No. 3 and the wife of Professor Sohail Aziz but Zahid Mehmoodhad been forced to issue the cheques, whereas, he was not supposed to do so as everyone was responsible for one's own deeds, therefore, he recommended that the act of obtaining cheques from Dr. Zahid Mehmood was illegal and unlawful and that the cheques should be declared as invalid; The Addl: DIG further held in inquiry that the wife of Sohail Aziz (Tayyaba Kiran, the petitioner) could receive her money from the wife of Dr.Zahid Mehmood through a legal recourse; that Mst. Tayyaba Kiran had instituted a civil suit for cancellation of exchange agreement which was dismissed by the learned Civil Judge on 12.10.2009; that the inquiry report formulated by the Addl: DIG, had been challenged by Mst. Tayyaba Kiran through a separate Writ Petition No. 889 of 2007 which is also pending adjudication for today; that in the light of the findings of the Addl. DIG, Gujranwala, the learned Ex-Officio Justice of Peace had passed the impugned order dated 06.02.2007; that Zahid Mehmood, Respondent No. 3 did not owe any amount at all to Mst. Tayyaba Kiran, the petitioner, so, the act of obtaining cheques from him by the DPO, Gujranwala and passing it over to Mst. Tayyaba Kiran etc. was absolutely illegal, uncalled for and a worst example of abuse of process of law and authority; that the order of learned Ex-Officio Justice of Peace, has been passed correctly who, has not traversed beyond scope of his authority; lastly contends that the instant petition may be dismissed.

7. Arguments heard. Record perused.

8. The petitioner admittedly has a monitory dispute with Mst. Mubashara Iram, the wife of Zahid Mehmood, Respondent No. 3. Zahid Mehmood, Respondent No. 3 did not owe even a single penny to Mst. Tayyaba Kiran, the petitioner or to her husband Professor Sohail Aziz yet, he was compelled by the DPO, Gujranwala and SHO Police Station, Gakkhar Mandi to come to Police Station Gakkhar Mandi where he was forced to issue three aforesaid cheques with his signatures, which were handed over to the petitioner Mst. Tayyaba Kiran and her husband. There cannot be a worst example of abuse of process of authority and law by a senior Police Officer like the DPO, Gujranwala and under his subordination by the SHO Police Station Gakkhar Mandi. If Mst. Tayyaba Kiran, the petitioner had any pecuniary dispute with the wife of Zahid Mehmood, Respondent No. 3, she could resolve the matter firstly at the family level being the close relatives and in case of failure, she could agitate the matter before a competent civil Court for redressal of her grievance. The learned counsel for the petitioner has repeatedly argued that Zahid Mehmood, Respondent No. 3 was responsible for all the acts and deeds of his wife and if any wrong had been done by Mubashara Iram, it was necessarily Zahid Mehmood, Respondent No. 3 to be taken to task. This submission of the learned counsel for the petitioner is patently illegal and militates against the basic principles of law and equity, as, every body is liable for one's act and deed. The wife of Zahid Mehmood, Respondent No. 3 is an independent entity like any other individual. In both the inquires, first conducted by S.H.O, Police Station Gakkhar Mandi, District Gujranwala and Addl. DIG, Gujranwala, the conclusion drawn is common, which relates to the fact that Mubashara Iram, the wife of Zahid Mehmood, Respondent No. 3 owed a sum of Rs. 3,50,000/- to Tayyaba Kiran, the petitioner and in none of the two inquiries it has been opined by the Inquiry Officers that Zahid Mehmood had ever received any amount of money from

Mst. Tayyaba Kiran. In this eventuality, to pressurize and overawe Zahid Mehmood, Respondent No. 3 for issuance of the aforesaid cheques, is unjustified and undesirable.

9. So far as the impugned order passed by learned Ex-Officio Justice of Peace is concerned he appears to have been swayed away by the excesses, as discussed above, committed by the police, therefore, some element of harshness has crept in the impugned order, whereby, the learned Ex-Officio Justice of Peace has directed the Respondent No. 2 to get the aforementioned cheques returned to the petitioner. Besides, the other observations made in the impugned order are absolutely on the legal plank.

10. What can be the validity of the Cheque No. 0058211, the case property of case FIR No. 43 of 2007 supra shall be best assessed by the learned trial Court, seized with the trial of the said case. The petitioner has all the legal remedies available at her disposal to get her grievance redressed by approaching the competent civil Court, if so advised. I do not find any illegality in the impugned order barring the one, as discussed above.

11. For what has been discussed above, the instant petition stands disposed of in the aforementioned terms.

(M.S.A.) Petition disposed of.

PLJ 2011 Cr.C. (Lahore) 567

Present: Shahid Hameed Dar, J.

MUHAMMAD MANSHA KHAN--Petitioner

versus

STATE and another--Respondents

Crl. M. No. 4686-B of 2010, decided on 19.5.2010.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail before arrest--Dismissal of--Cheque returned due to insufficiency of funds--Petitioner had dishonestly issued a cheque for discharge of his liability, knowingly that sufficient funds were not available, he had committed the offence alleged against him--Cheque had been returned unpaid by the bank due to insufficient funds in the bank account of petitioner--Petitioner had posed himself as the owner of the plot and sold it to the complainant for a consideration--Petitioner entered into written agreement with complainant--Petitioner handed down a cheque to the complainant and that he would be responsible for the encashment of same--Petitioner against signed an agreement--Petitioner failed to live up to his promise which finally culminated in the registration of the instant FIR--Petitioner Prima facie has committed an offence which falls within the definition of S. 489-F PPC--No malice or ulterior motive of the complainant or that of the police could be hinted at by the counsel for the petitioner which is a condition precedent for seeking extra ordinary concession of bail before arrest--There were no reasons to believe that petitioner has not committed any non-bailableoffence--Appeal dismissed. [P. 569] A

Mr. Iftikhar Shahid, Advocate for Petitioner.

Mr. Muhammad Saeed Tahir Sulehri, Advocate for Complainant.

Sahibzada M.A. Amin, Advocate Addl. P.G. for State.

Date of hearing 19.5.2010.

Order

Muhammad Mansha Khan petitioner seeks bail before arrest in case FIR No. 217 of 2010 dated 14.04.2010 registered under Section 489-F PPC, at Police Station, Defence-B, Lahore on the complaint of Muhammad Akram Butt.

2. Briefly, the version of the complainant as contained in the FIR is, that he gave a cheque of Rs. 3,75,000/- to the complainant in the backdrop of a dispute over a property deal, which was presented on the counters of Soneri Bank DHA, Branch, Lahore for encashment, but it. was returned unpaid by the bank for in sufficiency of funds.

3. Learned counsel for the petitioner contends that the petitioner has not committed any offence and he has been falsely roped in this case; that the petitioner was a property dealer who was infact, a mediator between Muhammad Ashraf, the owner of plot and the complainant; the earnest money of Rs. 4,00,000/- was paid to Muhammad Ashraf by the complainant through Courtesy of the petitioner, and that he had nothing to do with the title of the suit property; the allegation contained in the FIR is absolutely false and the complainant under the garb of this FIR had conspired to blackmail him; the petitioner had been falsely roped in this case due to mala fide intention and ulterior motives of the complainant; the petitioner had a genuine apprehension of arrest for tainted purposes as the police had colluded with the complainant; the petitioner had filed a suit for declaration and permanent injunction wherein, the Civil Court had summoned the complainant, being one of the defendants, to file written reply to the suit; that the petitioner had prayed in the above said suit that the impugned cheque No. PLS 9389616 of Soneri Bank, DHA Branch, Lahore, as well as the deed prepared on the blank paper, be declared illegal, null and void and the same be cancelled; that the actual owner of the plot Muhammad Ashraf was still prepared to act upon the aforementioned deal, if the complainant was ready to pay him the balance amount of Rs. 3.6 millions; the petitioner is innocent and he may be allowed to bail.

4. On the other hand, learned Addl: Prosecutor General assisted by learned counsel for the complainant has opposed the grant of bail to the petitioner with the contention, that the petitioner had dishonestly issued a cheque for discharge of his liability, knowingly, that sufficient funds were not available, so, he had committed the offence, alleged against him; that the cheque had been returned unpaid by the bank due to insufficient funds in the bank account of the petitioner; that two witnesses Muhammad Ikram and Zahid Ikram had recorded their statements under Section 161 Cr.P.C. as to the factum of deliverance of cheque by the petitioner to the complainant; the petitioner had entered into two written agreements with the complainant about the said plot, by showing him the owner of the plot; the petitioner had not been involved in this case, due to any malice or mala fide of the complainant; that the petitioner had committed a non-bailable offence so he may not be allowed bail before arrest.

5. Arguments heard. Record perused.

6. It has been alleged against the petitioner that he had posed himself as the owner of the plot and sold it to the complainant for a consideration of Rs. 4 millions and received Rs. 4,00,000/- from him as earnest money. The petitioner entered into written agreement one after the other confirming therein that he had struck a deal with the complainant qua the said plot for Rs. 4 millions, out of which he had received Rs. 4,00,000/-, and that he would get the sale-deed attested in favour of the complainant in due course of time, on receipt of total consideration amount. This agreement fell through, as, the complainant learnt that the petitioner was not the owner of the said plot but he was an agent of Muhammad Ashraf, the actual owner of the plot. On knowing this fact, the complainant got furious and the deal was cancelled. The petitioner entered into an other agreement with the complainant on 12.04.2009 wherein he admitted that the deal had been cancelled and that he had handed down a cheque of Rs. 3,75,000/- of Soneri Bank to the complainant and that he would be responsible for the encashment of same. The petitioner again signed an agreement on 16.12.2009, whereby, he undertook to pay the proceeds of the aforesaid cheque to the complainant by March 15, 2010. He, however, failed to live up to his promise which finally culminated in the registration of

the instant FIR. The petitioner prima facie has committed an offence which falls within the definition of Section 489-F PPC. No malice or ulterior motive of the complainant or that of the police could be hinted at by the learned counsel for the petitioner which is a condition precedent for seeking extra ordinary concession of bail before arrest. Prima facie, there are no reasons to believe that the petitioner has not committed any non-bailable offence.

7. For the foregoing reasons I am not inclined to accept this application which stands dismissed and the ad-interim pre-arrest bail allowed to the petitioner on 06.05.2010 is recalled.

(A.S.) Appeal dismissed.

PLJ 2011 Cr.C. (Lahore) 680 (DB)

Present: Shahid Hameed Dar & Ijaz Ahmed Chaudhry, JJ.

MUHAMMAD SIDDIQUE--Appellant

versus

STATE--Respondent

Crl. Appeal No. 1734 and C.S.R. No. 1/T of 2000, heard on 8.4.2010.

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

----S. 302(b)--Conviction and sentence--Challenge to--Ocular account furnished by a solitary witness, was highly doubtful--Recording of statement of deceased was dubious and did not appeal to reason and logic--Motive, as discussed above was also not believable--Non-presence of fire-arm injuries on the bodies of the two deceased, renders the recovery of rifle at the instance of the appellant inconsequential for the prosecution case--Two acquitted co-accused were also burdened with similar allegation like the appellant but the trial Court did not believe--Prosecution evidence and acquitted them for the charge of murder of deceased--No special or discernable circumstances have been pointed out by trial Court to uphold the divisibility of credence of the prosecution witnesses--Version contained in the FIR in the statement of PW, were equal unnatural preposterous and hard to believe--Prosecution case was full of contradictions and discrepancies--Impugned judgment had been passed on conjectures and surmises--Conclusions drawn were whimsical, which suffer from non-reading and misreading of evidence--Appeal accepted--Conviction and sentence set aside--Appellant acquitted. [P. 689] A & B

Rao Abdul Jabbar Khan, Advocate for Appellant.

Mr. Ahsan Rasool Chattah, DPG for State.

Date of hearing: 8.4.2010.

Judgment

Shahid Hameed Dar, J.--This criminal appeal is directed against the judgment dated 14.11.2000 passed by learned Addl. Sessions Judge/Special Judge Suppression of Terrorist Activities, Kasur, whereby, the appellant was found guilty under Section 302(b) PPC and was convicted/sentenced to death, with payment of compensation of Rs. 50,000/- on each count to legal heirs of Muhammad Haneef deceased and Mst. Salma Bibi deceased. He was also found guilty under Section 346 PPC and sentenced to 7 years R.I and fine in the sum of Rs. 25,000/-, in case of default, one year S.I and was convicted/sentenced under Section 324 PPC as well, with seven years R.I and fine in the sum of Rs. 25,000/- on each count and in default payment of fine, to undergo one year S.I while his co-accused Muhammad Sharif and Mst.

Maryyum Bibi were extended the benefit of doubt and acquitted from the aforementioned charges.

2 & 3. As benefit of Section 382(b) Cr.P.C was not extended to the appellant/convict, hence, it does not find mention in the impugned judgment.

4. Briefly stated, the facts of the case, as mentioned in the complaint Exh.PF, are that Mst. Salma Bibi, her husband Muhammad Haneef and their children Waqas and Amaar slept in a room of their residential house at the night between 5/6 July, 1996. Mst. Salman Bibi and others got up on hearing the sound of fall of some tile bricks and earth inside the room from the roof top, at about 12:30 a.m.; they had hardly awoken when kerosene oil and some burning clothes fell in the room through a hole in the roof, due to which, the room caught fire, they raised hue and cry and attempted to open the door which was bolted from outside; in the meanwhile, the accused made two fire shots through the same hole. The report of firing with shrieks of Mst. Salma etc. her maternal cousin (Mamonzad) Muhammad Latif and her brother Muhammad Aslam broke-opened the lock and opened the door of the room but her husband and children had been badly burnt; Muhammad Aslam, and Muhammad Latif witnessed, Muhammad Sharif, Muhammad Siddique and Mst. Maryan Bibi setting the room ablaze from the roof top and firing inside the room; on arrival of the co-villagers at the spot, the accused ran away, who were also accompanied by an unknown person. The motive behind the occurrence was that father-in-law of Mst. Maryam Bibi, namely, Ibrahim had transferred one acre of agricultural land in the name of husband of the complainant due to which Sharif and Siddique etc. usually quarreled with husband of Mst. Salma Bibi and due to this grudge they committed the occurrence with intent to commit murder; Muhammad Haneef, the husband of Mst. Salman Bibi complainant died due to burns in the Hospital at Lahore.

5. Mst. Salma Bibi also died of the burns, 3/4 days after the occurrence but her statement/complaint Exh.PF was recorded by Muhammad Rafique Khan ASI, PW-11 at Mayo Hospital, Lahore, before her death, on 06.07.1996.

6. Muhammad Siddique appellant was arrested on 29.07.1996 by Muhammad Sharif SI/SHO, PW-9 who on his disclosure lead to the recovery of rifle P-14 with 12 live bullets P-15/1-12 on 03.08.1996 which were taken into possession vide recovery memo. Exh.PE. After conclusion of investigation, report under Section 173 Cr.P.C was submitted for trial of the appellant/convict.

7. On commencement of the trial, the accused/appellant was indicted, he pleaded not guilty to the charge and claimed trial, whereafter, the prosecution was ordered to produce its witnesses/evidence.

8. In order to substantiate their accusations against the accused, they produced following witnesses.

9. Muhammad Ikram F.C No. 325, as PW-1 who deposited the sealed parcel of rifle in the office of Forensic Science Laboratory, Lahore on 20.08.1996.

10. PW-2 Muhammad Jamil ASI was posted as Moharrer on 03.08.1996 who was handed over a sealed parcel said to contain rifle, he kept it in Malkhana of the Police Station intact and handed the said parcel to Muhammad Ikram constable, PW-1 for transmission to the office of Forensic Science Laboratory, Lahore.

11. PW-3, Muhammad Akram, 857/HC was Moharrer at Police Station Khudian on 06.07.1996, who received a complaint Exh.PW-3/1 sent by Muhammad Rafique ASI, PW-1, correctly recorded formal FIR Exh.PW-3/2 without any addition or omission.

12. PW-4, Muhammad Nusrullah, the draftsman prepared the site-plan in the scale of 1 inch equal to 20 ft, Exh.PA and Exh.PA/1.

13. PW-5 Ghulam Shabbir HC was handed over the deadbody of Muhammad Haneef for its post-mortem examination, escorted the same to DHQ, Hospital, Kasur alongwith Liaqat Ali, 696/C. After post-mortem examination of the deadbody, the Doctor handed over to him last worn clothes of the deceased Shalwar P-1, which was taken into possession by the I.O. vide recovery memo. Exh.PC. He also got post-mortem examination conducted of the dead body of Mst. Salman Bibi on 11.07.1996 and after post-mortem examination of the, dead body last worn clothes of the deceased Shalwar P-2, Dopatta P-3 were handed over to him which were taken into possession by the Investigating Officer vide recovery memo. Exh.PC.

14. PW-6 Muhammad Ashiq deposed that the I.O visited the place of occurrence and took into possession one empty gallon P-4, a half filled gallon with kerosene oil P-5, burnt pieces of clothes of Mst. Salman Bibi P-6, burnt pieces of bed P-7, one Khurpa P-8, one lock P-9, four pieces of tiles P-10/1-4, one match P-11, one brick P-12 and two empties of rifle .7 M.M P-13/1-2, vide recovery memo. Exh.PD, attested by him and other PW.

15. PW-7 Muhammad Aslam deposed about the details of occurrence, claiming himself to be an eye-witness and stated that he had witnessed Siddique accused armed with rifle, Sharif accused having a gallon in his hand and a Khurpa and Maryyum Bibi being possession of clothes and one unknown person at about at about 12:30 a.m (midnight), who, set on fire the room wherein Haneef and his wife were sleeping alongwith their children by making a hole in the roof of the room; he further deposed that the room was locked from outside which was broken open by him alongwith other Haneef, Mst. Salman Bibi and their children were brought out of the burning room and by that time Haneef, his wife Salma and their children had been burnt to 3rd degree who, were shifted to DHQ, Hospital, Kasur, where the Medical Officer Dr.Abdul Rauf, PW-13 referred them to Mayo Hospital, Lahore, they were shifted there and admitted as indoor patients; he further deposed that his brother-in-law Haneef succumbed to the burns/injuries at Mayo Hospital, Lahore and 3/4 days thereafter, Mst. Salma also succumbed to the injuries. He identified both the dead bodies at the time of the autopsy; he deposed about the motive in line with one, mentioned by Mst. Salman Bibi deceased.

16. PW-8 Basheer Ahmad deposed that accused/convict Siddique made a disclosure qua the weapon of offence being in police custody, on 03.08.1996 and led to the recovery of a rifle P-14 and 12 live bullets P-15/1-12 from a sugar cane field which were taken into possession by the I.O. vide a recovery memo. Exh.PE.

17. PW-9 Muhammad Sharif SI/SHO, arrested Muhammad Siddique accused/appellant and his co-accused Mst. Maryam on 29.07.1996. He got physical remand of Muhammad Siddique appellant and recovered the aforementioned rifle and live bullets on his disclosure on 29.07.1996. He concluded the investigation in this case and submitted challan/report under Section 173 Cr.P.C for trial of the accused.

18. PW-10 Nazeer Ahmad, 492/HC, Moharrer deposed that he handed over the sealed parcel containing empties to Muhammad Ameen 1089/C, PW-12 for transmission to the office of Forensic Science Laboratory on 23.07.1996 intact.

19. PW-11 Muhammad Rafique Khan ASI is the first Investigating Officer of this case who recorded the statement of Mst. Salman Bibi (deceased) in injured condition at Mayo Hospital, on 06.07.1996 which is Exh.PW-3/1/Exh.PF, read it over to her, which was marked by Mst. Salman Bibi with her right big toe as her both hands including thumbs were badly burnt and got FIR recorded on the basis of this statement; he prepared the inquest report Exh.PG qua Haneef deceased and after handing over his dead body to Ghulam Shabbir 249/HC and Liaqat Ali 696 HC for post-mortem examination, reached the place of occurrence, inspected the spot, recorded the statements of the persons gathered there, took into possession two crime empties P-13/1-2 and other aforementioned articles through recovery memo. Exh.PD, secured last worn clothes Shalwar P-1 of Haneef deceased vide recovery memo. Exh.PB,

prepared the inquest report Exh.PH of Mst. Salman Bibi deceased on 10.07.1996, sent her dead body to the mortuary for post-mortem examination which was so done on 11.07.1996 and after the post-mortem examination of her dead body, the Investigating Officer took into possession her last worn clothes Shalwar P-2, Dopatta P-3 through recovery memo. Exh.PC; he got prepared the scaled site-plan Exh.PA and Exh.PA/1 at the hand of the draftsman Muhammad Nusrullah, PW-4, thereafter the investigation was entrusted to Muhammad Sharif SI, PW-9.

20. PW-12 Muhammad Ameen 1089/C transmitted the sealed parcel of crime empties, in the office of Forensic Science Laboratory, on 23.07.1996. His statement was not followed by any cross-examination.

21. Learned ADA closed the prosecution evidence on 19.10.2000 after tendering in evidence report of Forensic Science Laboratory Exh.PR.

22. At the end of prosecution evidence, the appellant was examined under Section 342 Cr.P.C, wherein he denied all the charges against him and contended that the deceased Muhammad Haneef was a kerosene oil dealer who used to have the same in small container in a room of his house where he alongwith others slept on the fateful night; he further contended that deceased Muhammad Haneef was a habitual smoker who threw a butt of the cigarette lying on the bed which on contact, with kerosene oil caught fire and within no time, the flaming fire reduced everything, present in the room, to ashes and caused bad burns on the bodies of the deceased etc. He further contends that father of Haneef deceased refused to lodge a false report, as he was aware of the real incident. He further contends that he was employee in a Garment Factory at Hanjarwal, Lahore and on the day of occurrence he was present at the place of his job; that Muhammad Latif and Sharif eye-witnesses refused to support the false prosecution version so they have not been produced by the prosecution at trial; that Muhammad Aslam, the only alleged eye-witness, produced by the prosecution is the real brother of Mst. Salma deceased who deposed falsely to cause them ruination.

23. The appellant did not opt to give statement on oath nor produced any witness in defence.

24. On conclusion of the trial the learned Special Judge Suppression of Terrorist Activities Court, Kasur found the appellant guilty and convicted/sentenced him in the aforementioned terms.

25. The learned Special Judge of S.T.A, Kasur has forwarded Capital Sentence Reference No. 01-T-of 2000 for confirmation of conviction and sentence of death awarded to accused Muhammad Siddique and we intend to decide both STA Reference No. 1-T/2000 and Criminal Appeal No. 1734 of 2000 through this single judgment.

26. The learned counsel for the appellant has vehemently contended that the prosecution could not produce any evidence to substantiate their charges against the appellant and yet, the learned trial Court through its impugned judgment, has awarded capital punishment to the appellant without any just cause and rational arguments; that the alleged dying declaration, as contained in complaint Exh.PF cannot be given any weight or read against the appellant, as, the requirements of law qua recording dying declaration have not been fulfilled nor it bore any certificate from the Medical Officer of Mayo Hospital, Lahore, endorsing the authenticity of the statement, allegedly made by Mst. Salma Bibi deceased; that the version contained in the alleged dying declaration is preposterous and does not fit in attending circumstances of the case; that Mst. Salma Bibi deceased, her husband and two minor children were not in a position to see as to who was standing on the roof top, causing the hole in the ceiling, showering kerosene oil through the hole and dropping lit clothes and match box inside the room where both the deceased were asleep; that the alleged presence of the eye-witnesses Muhammad PW-7 at the place of occurrence at the relevant time cannot be believed as he is the resident of village Dhings Shah which is at a distance of 2/ 2 1/2 k.m from village Rodhy (the village of occurrence) and he happens to be a chance witness who failed to

disclose the purpose of his visit to the house of his real sister Mst. Salma Bibi, on the day of occurrence; that the conduct of Muhammad Aslam, PW-7 during the course of occurrence reflects upon the sanctity of his testimony as he claims to have witnessed the appellant and his co-accused digging the roof of the room with a Khurpa, making a hole in it, sprinkling kerosene oil through a hole, dropping burning clothes inside the room through a hole setting the room ablaze and causing the bodies of Mst. Salman Bibi and her husband burnt yet, he, instead of raising alarm, silently watched prolonged act of the accused including the appellant and only after no probability of the life of Salma Bibi and her husband was left he alongwith others broke open the lock of the room to save the burning bodies; that the FIR/dying declaration does not inspire confidence at all nor it does establish the identity of the real perpetrators of the crime; that the appellant has not committed any offence at all and he has been dispatched to death cell by the learned trial Court through the impugned judgment which suffers from non-reading and misreading of the evidence.

27. Learned Deputy Prosecutor General has supported the impugned judgment and contends that in her dying declaration Mst. Salman Bibi deceased had categorically nominated the appellant to have committed a gruesome and callous act by torching the room wherein both deceased alongwith their children were sleeping; that the rifle .7 MM recovered at the instance of the accused/appellant was found matched with two crime empties, vide Forensic Science Laboratory report Exh.PR; that the impugned judgment does not suffer from any element of capriciousness, arbitrariness or foolishness of the argument.

28. We have carefully considered the contentions put forth by both the parties' learned counsels. According to the prosecution case, deceased Mst. Salman Bibi recorded her statement Exh.PF before Muhammad Rafique Khan ASI, PW-11 on 06.07.1996 when she was admitted in the Mayo Hospital, Lahore as injured patient and nominated the appellant as well as his acquitted co-accused to have committed the occurrence but the fact remains that she, her husband or her children, having slept inside the room were not in a position to see through a dug out hole in the roof top as to who was there on the roof around the said hole, as, her husband, her children and she herself had caught fire.

29. According to the complaint Exh.PF, the real brother of the complainant, Muhammad Aslam, PW-7, her maternal cousin Muhammad Latif, had witnessed Muhammad Sharif, Muhammad Siddique appellant and Mst. Maryan Bibi digging a hole in the roof of the room and setting the said room on fire by sprinkling oil and dropping lit clothes inside the room through the said hole. The inimical act of the accused must have lasted for quite some time. To dig a hole in the roof by means of a Khurpa could not be done within a minute or two as the accused did not have with them any mechanical device to hasten their crime, without causing any noise. The manual act done either by the accused or by any other person could have caused alarm to Muhammad Aslam, PW-7 and his companion Muhammad Latif who slept on a nearby roof but strange enough, they failed to notice the sound of repeated hurling of Khurpa in the roof, by the accused nor they could notice the presence of the persons standing on the rooftop, waiting for a hole to appear, to do the rest.

30. There are two possibilities about the presence of a hole in the roof of the room of occurrence, one, that it had been done by the accused much earlier then the night of the occurrence, or it was dug at the time of occurrence; if the hole had been caused in the roof much earlier then, it must have been noticed by the deceased at the time, they went to their bed.

31. It is a fact of common observance that while lying supine the eyes are always upwards and if any tampering had been done, with a through and through hole, in the roof, it could escape the vision of the person lying underneath the roof. If Muhammad Haneef, Mst. Salman Bibi and their two children had gone to their beds in the room of the occurrence and they did not make any complaint or they did not leave that room it indicates that every thing was

normal and there was no hole in the roof at that time which, had surely been dug after they slept.

32. A question arises what would Muhammad Aslam, PW-7 and other PWs wait for, till everything stood gutted and the bodies of the deceased and that of the children were badly burnt, before they decided to broke open the door?

33. The deceased Muhammad Haneef and the appellant are real brothers interse, who lived in two separate houses but, adjacent to each other. The alleged motive relates to transfer of one acre of agricultural land to Muhammad Haneef deceased by his father Ibrahim which according to Muhammad Aslam, PW-7 was a bone of contention between the two brothers. No mutation or transfer deed has been submitted by the prosecution during the trial to establish the fact of transfer of the suit land in the name of Muhammad Haneef deceased. Muhammad Aslam, PW-7, however, has admitted in cross-examination that Ibraheem, father of the appellant had gifted one acre of land to Muhammad Haneef with the consent of the accused/appellant. It being so, the factum of grudge to the appellant is hardly believable. No documentary evidence has been led by the prosecution to fortify the allegation which could show that the two brothers had heart burning or bias against each other or that some enmity existed between them which allegedly culminated in the unfortunate incident.

34. Naturally, Muhammad Ibraheem, the father of the deceased has been shown by the prosecution to have greater love and affection for his son Muhammad Haneef deceased because of the aforementioned gift of one acre of land to him. He was the resident of the same house and there could not be any other person than him to be more knowledgeable about the real facts of the occurrence. Had there been any substance in the allegations levelled in the FIR or in the testimony of Muhammad Aslam PW-7 Muhammad Ibraheem, was the best prosecution witness in the attending circumstances of the case to prove the allegation against the appellant/accused. Muhammad Aslam PW-7 took the dead body of Muhammad Haneef deceased to his village instead of letting it be buried in village Rodhy, the village of occurrence, gives rise to a strong suspicious as to the credentials of the said PW. It appears to have been done against the wishes of the father of the deceased as he did not opt to be a witness of the story, and master-minded by PW-7 who at the best, as discussed earlier, is a chance witness, whose statement has to be analyzed and scanned with utmost care and caution. The best corroboration to his statement would have been the deposition of the other alleged eye-witnesses Muhammad Sharif and Muhammad Latif but both of them were withheld by the prosecution and were given up as having been won over by the accused without any proof in this regard. The solitary statement of PW-7 does not stand corroborated by the statement of any other alleged eye-witness though, Muhammad Latif PW was real maternal cousin of the deceased and a resident of the same village like that of Muhammad Aslam PW.

35. According to the Medical Officer Dr. Abdul Rauf, PW-13, he medically examined Mst. Salman Bibi deceased (in injured condition) found that her face, part of skull front of chest, abdomen, chest back, almost 45% of the body was burnt with kerosene oil including her both hands, that is why the police proceedings recorded on Exh.PF indicate that the statement of Mst. Salman Exh.PF was got marked by her right big toe instead of her right thumb. Statement of the Investigating Officer Muhammad Rafique ASI, PW-11 does not contain the fact that he obtained opinion of the Medical Officer qua the fitness of Mst. Salman Bibi, if she was at all flit to make statement or not. The police proceeding recorded on Exh.PF, however, indicate this fact. No Medical Officer has been produced by the prosecution as a witness to the aforementioned crucial fact to establish that Mst. Salman Bibi was physically fit enough to make statement shown as Exh.PF. Even, the application referred to by Muhammad Rafique Khan, ASI, PW-11 in police proceedings recorded on Exh.PF, has not been tendered in prosecution evidence. So, serious doubt exists about recording of statement of Mst. Salma Bibi

deceased, by Muhammad Rafique Khan, ASI, PW-11 which cannot be termed as a dying declaration.

36. The recovery of rifle .7 MM P-14 with live bullets P-15/1-12 has not been used to cause injuries on the bodies of the deceased as none of the two dead bodies bear any fire-arm injury. The report of Forensic Science Laboratory Exh.PR indicates that the crime empties were received by the said office on 23.07.1996 and rifle 7 MM was deposited in the said office on 20.08.1996. The date of recovery of crime empties P-13/1-2 has been mentioned as 06.07.1996 and that of recovery of rifle 7.MM P-14 as 03.08.1996 by Muhammad Sharif SI, PW-9. It indicates that the crime empties were dispatched to the office of Forensic Science Laboratory after 17 days of its recovery and rifle, P-14 was sent again after 17 days of its recovery on 20.08.1996. No explanation has been offered by the prosecution qua the delay caused, in the dispatch of these articles to the office of Forensic Science Laboratory. The rifle 7 MM was recovered from the open field of Sugar cane crop of one Nazeer Ahmad which was not in the exclusive possession of the appellant and which of course, was in the access of all and sundry, being, an open place. In the attending circumstances of the case, the evidence qua recovery of the said rifle hardly, advances the case of the prosecution against the appellant.

37. The learned trial Court while passing the impugned judgment and formulating his opinion qua the guilt of the accused/appellant, has not drawn the conclusions, consonant with the prosecution evidence. The ocular account furnished by a solitary witness, PW-7 is highly doubtful. The recording of the statement of Mst. Salman Bibi (deceased) is dubious and does not appeal to reason and logic. The motive, as, discussed above is also not believable. Non presence of fire-arm injuries on the bodies of the two deceased, renders the recovery of rifle P-4, at the instance of the appellant inconsequential for the prosecution case. The two acquitted co-accused Muhammad Sharif and Maryan Bibi were also burdened with similar allegation like the appellant but the learned trial Court did not believe the prosecution evidence and acquitted them for the Charge of murder of Muhammad Haneef and Salman Bibi. No special or discernable circumstances have been pointed out by the learned trial Court to uphold the divisibility of credence of the prosecution witnesses. The version contained in the FIR and in the statement of Muhammad Aslam, PW-7 are equal unnatural preposterous and hard to believe. The prosecution case is full of contradictions and discrepancies. The impugned judgment has been passed on conjectures and surmises. The conclusions drawn are whimsical, which, suffer from non-reading and misreading of evidence.

38. For the foregoing reasons, we accept the instant appeal against conviction. The impugned judgment by which, the aforementioned conviction and sentence was awarded to the appellant, is set aside and he is acquitted of the charges, for which he had been indicted by the learned trial Court. He shall be released forthwith, if not required in any other criminal case. The death sentence awarded to the appellant is not confirmed. Murder Reference is answered in negative.

(A.S.) Appeal accepted.

PLJ 2011 Cr.C. (Lahore) 696

[Rawalpindi Bench Rawalpindi]

Present: Shahid Hameed Dar, J.

Malik MUHAMMAD ANWAR--Petitioner

versus

STATE--Respondent

Crl. Misc. No. 1749-B of 2010, decided on 21.10.2010.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 161--Prevention of Corruption Act, 1947, S. 5(2)--Bail, refusal of--Allegation of receiving illegal gratification for release/issuance of cheques of talent scholarship of children--No malice or ulterior motive on the part of complainant--Petitioner has not been able to offer any plausible explanation as to the recovery of the tainted currency notes from the drawer of his office table--Raid conducted by magistrate, observed all the deeper appreciation of the evidence under the law is not permissible, as a tentative assessment of the incriminating evidence against the accused has to be made u/S. 497 Cr.P.C., so as to determine the question of grant or refusal of bail to the accused--Held: This is high time to check the menace of ever increasing corruption, drastically and no undue lenenicy should be shown to such a character who on the one hand does not respect the law of the land and on the other hand defies the ordains of Allah Almighty--No reason to believe that petitioner has not committed a non-bailable offence--Bail dismissed. [Pp. 699 & 700] A, B, C & D

Sardar Muhammad Ishaq Khan, Advocate for Petitioner.

Mr. Iftikhar Ahmad Zaki, Advocate for Complainant.

Malik Riaz Ahmad Saghla, DPG for State.

Date of hearing: 21.10.2010.

Order

Malik Muhammad Anwar petitioner stands arrested in case F.I.R. No. 14 of 2010 registered at Police Station Anti-Corruption Establishment, Chakwal on 27.9.2010 for the offences under Sections 161 PPC read with Section 5 (2) Prevention of Corruption Act, 1947 on the complaint of Muhammad Younas, who has precisely, alleged in the F.I.R that he was an employes at Kohinoor Mills; he alongwith two other co-workers moved an application for obtaining talent scholarship as announced by the Government for his Three children, before District Officer, Labour, Chakwal, Muhammad Anwar (petitioner) who received Rs, 1000/- for each application from him and demanded Rs. 2000/- more, per child, so as to deliver him the cheques qua the talent scholarship amount; he was a poor man and could not afford to pay carrots to the accused, time and again but he was being compelled by the Labour Officer to pay him Rs. 6000/- as bribe for the three cheques.

2. Khalid Mehmood, C.O, Police Station, ACE, Chakwal moved an application with the request that a permission for conducting raid may be granted upon the bribe demanding accused, before the learned Sessions Judge, Chakwal, whereupon he (learned Sessions Judge) deputed Mr. Ehtisham Muqarab, learned Judicial Magistrate to supervise the raid in accordance with law, who reduced the statement of the complainant into writing, put his initials on currency notes worth Rs. 6000/- and returned the same to the complainant. The learned Magistrate joined by other members of the raiding party, on receipt of a signal from the complainant, conducted the raid, apprehended the petitioner and recovered the tainted currency notes from the drawer of the office table of the petitioner-accused which were secured by the C.O/I.O through a memo. of recovery.

3. The complainant as per receipt dated 24.9.2010, received a sum of Rs. 12,000/- through cross Cheque No. 70255421 dated 1.9.2010 from the accused-petitioner regarding award of talent scholarship which fact is also born out from the register Qabz-ul-Vasool wherein, this entry stands registered at serial No. 21, with the signatures of Muhammad Younas, complainant.

4. Malik Muhammad Anwar, District Officer, Labour (petitioner) recorded his version before the learned Magistrate after the proceedings of the raid, that he had a quarrel with Muhammad Younas complainant four days ago as he had refused to affix the adhesive stamps, at the time of receipt of the above-said cheques, but despite that, he delivered him the cheques of the scholarship amount; he further contended that Muhammad Younas

complainant had visited him at noon time, the same day and shared rice, "Biryani" with him; he after taking the meal went to the lavatory to wash his hands, leaving complainant in his office, who, most probably, had dropped the tainted amount in the drawer of the office table; he lastly contended that he had never demanded any bribe from the complainant; the learned Magistrate prepared a report to this effect and handed over the same to the Circle Officer for further investigation.

5. Learned counsel for the petitioner submits that the petitioner has been falsely roped in this case under a calculated conspiracy, hatched up by the complainant and his witnesses and the petitioner had never demanded bribe from him; the petitioner being a District Officer, Labour had already delivered the cheque of the talent scholarship amount to the complainant on 24.9.2010 without any extenuating consideration so there was no question of receipt of any bribe from him on 27.9.2010; the contention of the complainant also stands negated through the documentary evidence including a receipt dated 24.9.2010 and the entries of the register Qabz-ul-Vasool; the complainant is a cynical person who has managed the whole drama to avenge the previous heated debate between him and the petitioner on the issue of affixation of the adhesive stamps on the cheques; the complainant through his clever move has also befooled and baffled, the learned Magistrate by placing the tainted notes in the drawer of the office table of the petitioner, so as to create fabricated evidence against him; the petitioner has a blotless carrier and is respected in his department as an honest officer; the case of the petitioner calls for further inquiry into his guilt so he may be released on bail.

6. On the other hand, the learned D.P.G assisted by learned counsel for the complainant submits that the petitioner had received bribe from the complainant and made it a habit to vex him and others, so as to receive kickbacks from them on each and every delivery of the cheque; the learned Magistrate is an independent person who had no heart burning or bias against the petitioner and a successful raid had been conducted by him in accordance with law; the tainted amount, bearing the initials of the learned Magistrate, was recovered by him from the drawer of the office table of the petitioner which is the substantive evidence to establish the dishonest disposition of the petitioner; the prosecution case brims with direct believable evidence against the petitioner so he may not be allowed the relief prayed for.

7. I have heard the learned counsel for the parties and perused the record.

8. The allegation against the petitioner is simple and plain. He compelled the complainant, a labourer in a factory to pay him the illegal gratification of Rs. 2000/- per head, for release/issuance of the cheque of talent scholarship of his children. Prior to it, he is alleged to have already received Rs. 1000/- per head from the complainant, at the time of processing the applications, moved by the petitioner for availing the above-said facility. The complainant however, succeeded in obtaining the cheque from the petitioner on 24.9.2010 without payment of bribe to the petitioner who does not appear to have given up as he persuaded the complainant to pay him the above-said amount. The petitioner is a Government employee who had been assigned the official duty to deliver the cheques of talent scholarship to the deserving students but he used his authority as a tool to fleece money from the poor worker/laborers. I do not find any circumstance which could show the malice or ulterior motives on the part of the complainant who being a poor man could afford to commit a mischief against a person of authority, as the petitioner in the instant case is. The report prepared by the learned Magistrate, who is not inimical towards the petitioner, reveals that he had conducted raid alongwith other members of the raiding party on receipt of a signal and recovered the tainted amount from the drawer of the office table of the petitioner which cannot be over-looked, easily. The version adopted by the petitioner before the learned Magistrate at the time of raid is preposterous. Had an exchange of hot words taken place between the petitioner and the complainant on the question of bringing the adhesive stamps a few days earlier, he must not have shared "Biryani" with him, immediately before the raid was conducted. He must have offered food to the complainant as a matter of impulsive

generosity after having received the bribe from him. He has not been able to offer any plausible explanation as to the recovery of the tainted currency notes from the drawer of his office table and the explanation offered by him, to have gone to the wash room, does not appeal to common prudence.

9. The corruption is on the rampant in the society and it has eroded almost every discipline of life. There does not appear to be an end to it and the rivalry in worldly increase has distracted every corrupt government official who wishes to become a billionaire overnight. The conscience, the sense of duty, the honesty and nobility appear to have run down the drain. The element of corruption if not further checked, shall eat up all what is left behind and the day is not far when it will become impossible to shove the giant of corruption, back in the bottle.

10. I hardly find any weakness or feebleness in the proceedings of the raid conducted by the learned Magistrate as he observed all the requirements of law to do the same and the recovery of the tainted money from the drawer of the table, under the exclusive use and control of the petitioner, has left the petitioner un-responsive. The arguments raised by the learned counsel for the petitioner require deeper appreciation of the evidence which under the law, is not permissible, as a tentative assessment of the incriminating evidence against the accused has to be made under Section 497 Cr.P.C, so as to determine the question of grant or refusal of bail to the accused.

11. This is high time to check the menace of ever increasing corruption, drastically and no undue leniency should be shown to such a character who on the one hand does not respect the law of the land and on the other hand defies the ordains of Allah Almighty. Prima facie there are no reasons to believe that the petitioner has not committed a non-bailable offence.

12. The upshot of the above discussion is that I am not inclined to admit the petitioner to bail. The instant petition stands dismissed.

(M.S.A.) Bail dismissed.

PLJ 2011 Cr.C. (Lahore) 748 (DB)

Present: Shahid Hameed Dar and Ijaz Ahmad Chaudhry, JJ.

ROHTAS KHAN--Appellant

versus

STATE--Respondent

Crl. Appeal No. 446 of 2003 & M.R. No. 30-T of 2003, heard on 29.3.2010.

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

----S. 302(b)--Conviction and sentence--Challenge to--Death sentence confirmed--Different version in a different scenario--Onus to prove the defence plea did not rest upon the accused in as strong terms as it is upon the prosecution to prove its case against the accused beyond any shadow of doubt yet, the accused/appellant has taken a specific plea so, he was required to show certain circumstance to make his plea prima facie, believable--It was a day light occurrence, the matter was reported to the police with promptitude by excluding hypothesis of deliberation on the part of the prosecution, as many as three credible eye-witnesses of ocular account, truthfully deposing about the event, the medical evidence lending unflinching corroboration to the ocular account, coupled with the long abscondence are the points which prove decisive in this case to bring home the guilt of the accused/appellant beyond any shadow of doubt--All these factors were worth the proof, the law requires in such like cases to each a justifiable conclusion as to the guilt of the accused--Prosecution case has rightly believed and accepted by trial Court at the expense of the defence plea, to record the

conviction/sentence of death to the appellant--Not any extenuating or mitigating circumstance in this case to commute the sentence of death to a lesser sentence--Normal penalty in a criminal case is death which has been rightly awarded to the appellant in attending circumstances of the case, by trial Court--Appeal dismissed, death sentence confirmed. [P. 756] A, B & C

Kh. Sultan Ahmad, Advocate for Appellant.

Mr. Aftab Farrukh, Advocate, Sardar Khurram Latif Khan Khosa, Advocate & Mr. Ahsan Rasul Chattha, D.P.G. for State.

Date of hearing: 29.3.2010.

Judgment

Shahid Hameed Dar, J.--This judgment will dispose of Criminal Appeal No. 446 of 2003 and Murder Reference No. 30-T/2003 for confirmation of the death sentence of the accused, which arises out of a judgment dated 31.03.2003 passed by the learned Special Judge Anti-Terrorism Court, Sargodha, whereby the appellant-Rohtas Khan was convicted/sentenced as under:--

Under Section 302(b) PPC. Death sentence and Rs. 50,000/- as compensation to the legal walis of the deceased Asmat Ullah, under Section 544-A Cr.P.C, in default whereof to further undergo six months S.I.

2. The appellant Rohtas Khan son of Amir Khan aged 36/37 years was sent up to face trial for the murder of Asmat Ullah. The prosecution case as revealed from the FIR (Exh.PK) No. 403/2000 dated 06.10.2000 under Section 302/34 PPC registered at Police Station City, Mianwali, on the complaint of Atta Ullah, is that complainant, his brother Asmat Ullah deceased, Dawood Anwar and Haji Aziz Ullah were present at the shop of Asmat Ullah, being run in the name of Rehan Tent Service, at 8:00 a.m. on 06.10.2000; Rohtas Khan armed with .30-bore pistol automatic, Ghulam Rasul and Nazir Ahmad alias Munna reached there raising noise and alarm at about 8:30 a.m. and started terrifying the people, as they used to do earlier as well; Asmat Ullah forbade them whereupon, Rohtas Khan fired straight a burst at him with his pistol .30-bore (automatic) which landed at his lower abdomen and left thigh, as a result of which, he fell down Asmat Ullah was shifted to DHQ Hospital Mianwali by the complainant and his companions, where Asmat Ullah succumbed to the injuries. The motive behind the occurrence was that Rohtas Khan being armed, used to terrify the poor people, who was usually intercepted by Asmat Ullah, due to which Rohtas Khan committed his murder. Rohtas Khan-appellant absconded after the occurrence and was finally arrested by Muhammad Farid, Inspector (PW-16) on 04.09.2002. In the meantime, the co-accused of the appellant, namely, Nazir Ahmad alias Munna and Ghulam Rasul faced the trial in this case in the first round, and were acquitted by the learned trial Court, whereas, the appellant was declared a proclaimed offender vide order dated 21.03.2001.

3. Dr. Arif Hayat, Medical Officer, DHQ Hospital, Mianwali had conducted autopsy on the dead body of the deceased on 06.10.2000 at 11:30 p.m. vide post-mortem examination report (Exh.PG). Dr. Arif Hayat did not appear as a prosecution witness in this case as he had gone abroad before he could appear before the learned trial Court and testify the proceedings of post-mortem examination. In his place, the prosecution adduced secondary evidence by producing Hafiz Muhammad Hanif, Junior Clerk, DHQ Hospital, Mianwali as PW-11, who produced original post-mortem examination register during his statement and testified that he had worked with Dr.Arif Hayat, Medical Officer PW and that he could identify his handwriting and signatures. He verified and identified the signatures and handwriting of the Medical Officer in his testimony, which were available on the post-mortem examination report. During the course of his testimony, a carbon copy of the post-mortem examination report was received in evidence as Exh.PG and pictorial diagrams as Exh.PG/1-2. PW-11 endorsed the carbon copies of the post-mortem examination report Ex.PG and the sketches

attached therewith in token of their comparison and correctness with the original. According to the post-mortem examination report Exh.PG following injuries were found on the dead body of Asmat Ullah deceased:--

"1. A fire-arm wound of entry measuring 1/2 x 1/2 cm, 6-cm infro-lateral to the umblicus on the left side of front of abdomen, 4-cm from the mid line.

2. A fire-arm wound of exit measuring 1/2 x 1/2 cm, 8-cm from the mid line, 6-cm infro-lateral to the Injury No. 1 on the left side of abdomen (on the front).

3. A fire-arm wound of entry measuring 1/2 x 1/2 cm on antro-medical aspect of left thigh, 4-cm below the groin and 6-cm from the public tubercle.

4. A fire-arm wound of exit measuring 1/2 x 1 cm on the postro-lateral aspect of left buttock, 30-cm from the anterior superior iliac spine and 15-cm from the mid line (posterioly).

All the fire-arm injuries had been caused with fire-arm and were anti-mortem in nature. The cause of death was hemorrhagic shock resulting from Injuries No. 3 and 4.

4. The prosecution produced as many as 16 witnesses to prove the guilt of the appellant during the course of the trial. Nasullah 431-C appeared as PW-1, and stated about the execution of non-bailable warrants of arrest of accused Rohtas Khan/appellant, Exh.PA and the proclamation Exh.PC qua the appellant; Ghulam Yasin, ASI appeared as PW-2, who stated that he delivered the sealed parcel of blood-stained earth to Azmat Ullah Constable PW-3, to deliver it to the office of Chemical Examiner; Azmat Ullah 1078-C appeared as PW-3 deposed that he deposited said sealed parcel in the concerned office at Lahore, intact on 13.10.2000; Muhammad Ramzan Constable (C-1033) appeared as PW-4, who escorted the dead body to the mortuary and attested recovery memo. Exh.PD for last worn clothes of the deceased; Abdul Ghaffar Moharrar appeared as PW-5, who dispatched the sealed parcel of pistol to the office of Forensic Science Laboratory, Lahore; Habib Ullah Constable (C-231), appeared as PW-6 to depose that he deposited the said parcel in the office of Forensic Science Laboratory, Lahore intact; Sahib Khan S.I. appeared as PW-7, who stated to have recorded statements of a couple of prosecution witnesses under Section 161 Cr.P.C.; Shakil-ur-Rehman PW-8 identified the dead body of Asmat Ullah deceased at the time of post-mortem examination; Sher Muhammad PW-9 is a witness of recovery of pistol P3, licence P-4, vide recovery memo. Exh.PE, at the instance of the accused/appellant; Muhammad Shafique Khan PW-10 prepared site-plan in scale Exh.PF and Exh.PF/1; Raees Khan Constable (C-41) CW-1 deposed about his efforts for effecting the service of summons upon Dr. Arif Hayat, Medical Officer through summons Exh.CW-1/A, his reports Exh.CW-1/B, Exh.CW-1/C, Exh.CW-1/D and Exh.CW-1/E were available, he also mentioned about making efforts for the service of Hashmat Ali S.I. PW- through- summons Exh.CW-1/F and on learning about his death, he made a relevant report Exh.CW-1/G; Atta Ullah PW-12/complainant deposed about his version, contained in the FIR Exh.PK; Aziz Ullah PW-13 and Dawood Anwar PW-14 also gave an account of the occurrence being the eye-witnesses; Muhammad Azhar Yaqoob Inspector appeared as PW-15, who took over the investigation in this case on 12.10.2000 and arrested accused Ghulam Rasul and Nazir Ahmad alias Munna, he obtained the warrant of arrest of Rohtas Khan/appellant: Exh.PA and proclamation of the appellant Exh.PC, after completion of investigation, he challaned Nazir Ahmad alias Munna and Ghulam Rasul and placed the name of Rohtas Khan/appellant in the same challan under Section 512 Cr.P.C., he also deposed about the investigation conducted by Hashmat Ali, S.I. who had died earlier, and stated that he identified his handwriting and signatures; on his statement, FIR Exh.PK, injury statement of the deceased Exh.PN, inquest report Exh.PJ, visual site-plan of the place of occurrence Exh.PM, recovery memo. of blood-stained earth Exh.PL, the recovery memo. qua last worn clothes of the deceased Exh.PD and the red ink notes Exh.PF/1 were received in evidence on the file of this case, Muhammad Farid Inspector PW-16 arrested the appellant on 05.09.2002, effected recovery of a pistol P-3 alongwith licence P-4 through recovery memo.

Exh.PE with visual site-plan of place of occurrence Exh.PE/1; he got dispatched pistol to the Forensic Science Laboratory, Lahore and challaned the accused/appellant under Section 173 Cr.P.C.

5. Learned DDA for the State gave up certain PWs and tendered in evidence the report of Chemical Examiner Exh.PO, report of Serologist Exh.PQ, report of Forensic Science Laboratory Exh.PR and closed the case of the prosecution.

6. Thereafter, the appellant was examined under Section 342 Cr.P.C., wherein he, in reply to a question as to why this case against him and why the PWs had deposed against him, replied as under:

"The PWs have made false statements by twisting the real facts of the case to give me more grief and serious touch to the occurrence."

He opted not to appear on oath in his defence under Section 340(2) Cr.P.C. to rebut the allegations against him. He however, submitted photo copies of certain documents which were received as Mark D1 to D7.

7. After hearing the learned counsel for both the parties and the learned Public Prosecutor, the impugned judgment was passed by the learned trial Court, in aforementioned terms.

8. We are going to dispose of Murder Reference No. 30-T of 2003 alongwith Criminal Appeal No. 446 of 2003.

9. Learned counsel for the appellant submits that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt; that the impugned judgment has been passed on conjectures and surmises and it suffers from misreading and non-reading of evidence; that the prosecution witnesses of ocular account are interested and inimical towards the appellant and their statements could not fetch corroboration from any unflinching source; that the learned trial Court despite having disbelieved the motive and the recovery of pistol, passed the impugned judgment by way of capital punishment to the appellant, which is against the settled norms of dispensation of justice; that the medical evidence has not been legally injected to the case of the prosecution and even otherwise, it is inconsistent with the ocular account; that the defence plea of the accused/appellant, though, not mentioned by him in his statement under Section 342 Cr.P.C., that it was a sudden affair and the fire accidentally made by the accused first landed on against the metalled road, which rebounded, and hit the deceased, is more plausible and nearer to truth than the prosecution version; that the appellant had never absconded and the proceedings conducted thereto are fake; he further contended that the complainant party was very powerful and their many persons, posted at high ranks, were inimically disposed to the appellant, so he had no other option but to get into hideout, to save his life; that the impugned judgment has resulted in miscarriage of justice and hence not sustainable in the eyes of law.

10. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant has vehemently controverted the arguments of the learned counsel for the appellant, raised at the bar and submits that the impugned judgment has been passed strictly in accordance with law; that the prosecution has proved its case beyond any shadow of doubt; that the impugned judgment does not suffer from any misreading or non-reading of evidence nor it suffers from any infirmity; that the appellant has been awarded the sentence/conviction on the basis of sound reasoning by the learned trial Court and that the impugned judgment is sustainable.

11. We have heard learned counsel for the parties and have perused the record with their able assistance.

12. The prosecution case rests upon the testimony of three eye-witnesses Atta Ullah PW-12, Aziz Ulah PW-13 and Dawood Anwar PW-14. All the three PWs have categorically deposed about the fact, in their testimonies, that it was Rohtas Khan/appellant, who used his pistol

effectively qua the deceased at the time of occurrence and caused two fire-arm injuries on his body, one on the abdomen and other on the left thigh. According to the post-mortem examination report Exh.PG the Injury No. 1 was on the left side of the frontal abdomen and Injury No. 3 on antro-medial aspect of left thigh, whereas Injuries No. 2 and 4 were the exit wounds of Injuries No. 1 and 3. The locale of Injuries No. 1 and 2 as shown in pictorial diagram Exh.PG/1 and Exh.PG/2, indicates track, obliquely connecting the two injuries, is descending in nature. The witnesses of ocular account have corroborated each other on all material aspects of the case and the mode of occurrence mentioned by them is impeccably in line with the story contained in the FIR Exh.PK. Despite searching cross-examination, the witnesses of ocular account have stood the test of cross-examination. The defence plea, suggested to the PW-s of the ocular account, that during a scuffle, the pistol went off in the hand of the appellant, the bullet struck against the metalled road and with a ricochet, accidentally hit the deceased, does not appeal to a prudent mind as the medical evidence indicates two fire-arm entry wounds on the body of the deceased and as observed earlier, the obliquely connecting track between Injuries No. 1 and 2, is in diagonally downwards direction. The appellant did not like to come up with this version while recording statement under Section 342 Cr.P.C. The contention of the learned counsel for the appellant that the factum, in relation to, a deviation of the bullet from the road to the body of the deceased, was mentioned by many before the I.O. on the first day of the occurrence, as manifest from the first case diary, be gone through and believed as corroboration to the aforementioned defence plea, is hardly entertainable as the appellant shelved the said plea during trial, otherwise, it must have been mentioned in his statement under Section 342 Cr.P.C. and secondly, the medical evidence altogether negates it as two independent entry wounds on the body of the deceased suggest that he had been fired at repeatedly by the appellant.

13. The appellant remained absconder for almost two years. At the time of submission of first report under Section 173 Cr.P.C. his name was shown as an absconder and he remained a fugitive from law throughout the first round of the trial of his co-accused and he opted to come to the surface when, the trial of his co-accused had already been decided by the learned trial Court. The longstanding unexplained abscondence of the appellant is a piece of corroboratory evidence for prosecution case. The reasons given for such a prolonged abscondence have not satisfied the learned trial Court dealing with the matter. Relevance and the corroborative evaluation of abscondance cannot be denied on any interpretation of law applicable to it. The reliance is placed in this regard on an esteemed judgment of the august Supreme Court of Pakistan in a case titled "Ali Khan Vs. The State" and reported as 1980 SCMR 474. The relevant lines, full of wisdom, are reproduced as under :--

"11. ...His sudden disappearance for a short while could possibly by explained as an impulsive act of "sheer timidity", aimed at avoiding "risk of disgrace", torture of police, or the "ordeal of a criminal trial". Such a long absence, in this case of over a year, could not possibly be explained by reference to an ephemeral emotional reaction when the parties were already accustomed to serious criminal litigation. He turned up or was apprehended only after his property was attached and was in the process of being auctioned. The reasons given for such a prolonged abscondence have not satisfied any of the Courts, dealing with the matter. The relevance and the corroborative value of abscondence cannot be denied on any interpretation of law applicable to it. Its strength or weakness, sufficiency or otherwise can be a matter of debate in a given case. It is therefore, the facts of each case which will finally determine the place and the weight to be given to abscondence for proving a case beyond reasonable doubt. In evaluating the factors, the antecedents of the absconder, his occupational habits and limitations, the period of abscondence, the specific explanation for it have all to be considered in juxtaposition with the other evidence on the record. ..."

In another glittering judgment passed in a case titled "Muhammad Din alias Manna Vs. The State" reported as 1976 SCMR 185, the august Supreme Court has observed as under:

"...It is corroborated by the fact that the appellant absconded from the village for nearly seventeen months. The explanation given by him has been rightly rejected by the Courts below, as it was not supported by any evidence on the record. The absconsion of the appellant was proved by A.S.I. Barkat Ali (P.W.13) who had been entrusted with the task of apprehending the appellant. It also finds mention in the opening paragraph of the commitment order recorded by the Magistrate, in which the appellant has been described as an absconder during the commitment proceedings. ..."

In another case titled "Mst. Roheeda Vs. Khan Bahadur and another" and reported as 1992 SCMR 1036, the Hon'ble Supreme Court has observed as under:

"No doubt, abscondence by itself is not sufficient to convict an accused person but is a strong piece of corroborative evidence of the other direct and circumstantial evidence in the case. In the instant case the Accused/Respondent No. 1, Jahanzeb accused (since murdered) and their brother Aurangzeb remained fugitive from justice for a very long time without any plausible and reasonable explanation. Their conduct after the occurrence was indicative of their guilt when considered in conjunction with the ocular and circumstantial evidence in the case."

14. The firing at the spot has been admitted frankly by the appellant but with a different version and in a different scenario. Though, the onus to prove the defence plea did not rest upon the accused in as strong terms as it is upon the prosecution to prove its case against the accused beyond any shadow of doubt yet, the accused/appellant has taken a specific plea so he is required to show certain circumstance (s) to make his plea prima facie, believable. But not only, the appellant has not led any evidence in support of his plea nor any circumstance is shown from the prosecution case, which could show a sense of believability of the defence plea. The learned trial Court has not passed the impugned judgment in a mindless or a mechanical manner but has dealt with the matter judiciously and with uncanny legal approach.

15. It is a daylight occurrence, the matter was reported to the police with promptitude by excluding hypothesis of deliberation on the part of the prosecution, as many as three credible eye-witnesses of ocular account, truthfully deposing about the event, the medical evidence lending unflinching corroboration to the ocular account, coupled with the long abscondence are the points which prove decisive in this case to bring home the guilt of the accused/appellant beyond any shadow of doubt. All these factors are worth the proof, the law requires in such like cases to reach a justifiable conclusion as to the guilt of the accused. The prosecution case has been rightly believed and accepted by the learned trial Court at the expense of the defence plea, to record the conviction/sentence of death to the appellant.

16. We do not find any extenuating or mitigating circumstance in this case to commute the sentence of death to a lesser sentence. The normal penalty in a criminal case is death which has been rightly awarded to the appellant in attending circumstances of the case, by the learned trial Court.

17. For the foregoing reasons, we dismiss the instant appeal, moved by the appellant and confirm his conviction/sentence of death, awarded to him by the learned trial Court in the impugned judgment.

The death reference is replied in affirmative.

(A.S.) Appeal dismissed.

PLJ 2011 Cr.C. (Lahore) 791

Present: Shahid Hameed Dar, J.

EJAZ AHMAD alias JAJI--Appellant

versus

STATE--Respondent

Crl. Appeal No. 581 of 2005, heard on 4.5.2010.

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

----S. 302(b)--Conviction and sentence recorded against appellant by trial Court--Challenge to--Case of two versions--Quarrel had taken place between parties--Deceased was a Christian and the appellant/accused a Muslim and there was hardly anything common between them--In absence of any previous enmity, the immediate cause of the occurrence could not be different from the one as deposed about by complainant--It was a broad day light occurrence--Both parties knew each other since long--There cannot be any probability of mistaken identity of accused, especially, when the appellant/accused himself had contended by way of his defence plea that he had fired at deceased--Spot of occurrence was a thoroughfare, used by inhabitants of the locality--There was every probability that the evidence of blood-stained earth might have been lost under the feet of the pedestrians--The gun allegedly produced by him before the police at the time of his arrest, was also found nowhere--Claim of appellant/accused that the parents of the deceased were apologetic due to the act of deceased is equally non-sensical, otherwise, he would have led some evidence to prove this part of the defence plea--A belated and afterthought defence plea, not supported by any evidence, was inconsequential to the case of appellant/accused--Defence plea being devoid of any merit was declared as incredible, improbable afterthought and meaningless--However, lends a sense of corroboration to the case of prosecution which, otherwise, stands proven on its own facts and circumstances--Appeal dismissed. [Pp. 797, 798, 800, 801 & 802] A, B, C, D, E & F

Ch. Muhammad Rafique Gujjar, Advocate for Appellant.

Sahibzada M.A. Amin Mian, Addl. P.G. for State.

Date of hearing: 4.5.2010.

Judgment

This is an appeal under Section 410 Cr.P.C. directed against the judgment dated 15.03.2005, passed by the learned Addl. Sessions Judge, Gujranwala, whereby, the appellant has been found guilty by the learned trial Court and convicted/sentenced to imprisonment for life under Section 302(B) PPC with an order to pay Rs. 40,000/- as compensation to the legal heirs of the deceased and in default of payment to further undergo three months S.I. The appellant has been extended the benefit of Section 382 (B) Cr.P.C.

2. The prosecution story in brief, as disclosed in the FIR Exh.PF/1, lodged by the complainant Nazir Masih, PW-9 is that on the fateful day i.e. 08.12.2003 at about 4:00 p.m. a quarrel picked up between his son Nadeem Masih (deceased) and Ijaz alias Jagi accused which was, however, patched up due to the interference of the complainant; that sometimes afterwards, the complainant was standing at the door of his house when, his son Nadeem Masih went into the street and a little while thereafter, the complainant heard noise of an altercation so, he rushed outside and witnessed that Muhammad Ijaz alias Jagi made a fire shot with his carbine straight on his son which landed on his right shoulder; the occurrence was witnessed by the complainant, PW-9 Dilawar Khokhar, PW-10 and Irshad Bhatti (given up PW); the accused fled away extending threats of dire consequences; the complainant shifted his injured son to THQ Hospital Kamoke where the Medical Officer, medically examined his son and referred him to Mayo Hospital, Lahore, due to his serious condition, where, Nadeem Masih injured succumbed to the injuries at 1:20 a.m. on 12.12.2003.

3. The complainant further contended that he could not report the matter to the police earlier as he had been on the bedside of his injured son, besides being in a tense state of mind and that the dead body of his deceased son was lying in Mayo Hospital, Lahore.

4. Nazir Masih, complainant presented a written application Exh.PF to Khawar Latif SI/SHO, PW-13 on the basis of which, a formal FIR Exh.PF/1 Bearing No. 374 of 2003 dated 12.12.2003 under Section 302, PPC was registered at Police Station City Kamoke, Gujranwala.

5. Khawar Latif SI/SHO assumed the investigation of this case and reached the spot, inspected the place of occurrence, prepared visual site-plan Exh.PG and recorded the statement of the witnesses under Section 161 Cr.P.C. Thereafter he arrived at THQ Hospital Kamoke where the deadbody of the deceased was lying. He inspected the deadbody, prepared inquest report Exh.PH, application Exh.PJ for post-mortem examination of the dead body, handed over the police papers alongwith the deadbody of the deceased to Riaz Ahmad constable for post-mortem examination. The dead body was identified by Yousaf Masih PW-3 and Pervez Gill at the time of post-mortem examination. After the autopsy on the dead body of Nadeem Masih, the Investigating Officer took into possession last worn blood-stained cloths of the deceased comprising Shalwar P-1, Chadar P-2 a sealed peal P-3 through recovery memo. Exh.PB, attested by Yousaf Masih, PW-3 and Pervez Gill, PW. The Investigating Office got prepared a scaled site-plan in duplicate Exh.PA and Exh.PA/1 through Masood Ahmad Bhatti, draftsman, PW-1.

6. After his arrest on 04.01.2004, the accused Ijaz alias Jagi made a disclosure about the weapon of offence on 11.01.2004 and led to the recovery of .12 bore Carbine P-4 which was taken into possession through recovery memo. Exh.P.E, attested by Ghulam Rasul 1793-C, PW-6 and Shamshad Ahmad 1299/C, PW. He recorded the statements of the said PWs and prepared a site-plan of the place of recovery as Exh.PE/1. He handed over the sealed parcel of carbine .12 bore to the Moharrer for onward transmission to the office of Forensic Science Laboratory, Lahore. The I.O recorded the statements of all the concerned witnesses under Section 161 Cr.P.C. during the course of investigation. On conclusion of investigation he challaned the accused.

7. The appellant Ijaz alias Jagi was indicted on the charge of murder of Nadeem Masih (slain) to which he did not plead guilty and claimed trial. So the prosecution was asked by the learned trial Court to produce its evidence to prove the charge against the appellant-accused.

8. During the trial, the prosecution in support of its case produced as many as 13 witnesses. Masood Ahmad Bhatti, draftsman, PW-1 prepared the scaled site-plan in duplicate Exh.PA and Exh.PA/1 in scale of 1 inch equal to 30 ft, Maqbool Hussain 1283, PW-2 dispatched the sealed parcel of carbine P-4 in the office of Forensic Science Laboratory, Punjab, Lahore on 29.01.2004, Yousaf Masih, PW-3 identified the dead body of the deceased at the time of post-mortem examination and attested the recovery memo. of last worn blood-stained clothes of the deceased Exh.PB.

9. Dr. Syed Zafar Abbas PW-5 medically examined Nadeem Masih injured at 5:00 p.m. on 08.12.2003 through MLR Exh.PD and described the details of injury suffered by the victim as under:

"(1) A large ragged lacerated wound 4 cm x 3 cm on the back of right shoulder, lying 9 cm below the apex of right shoulder, close to the posterior auxiliary line, margins irregular inverted, muscles exposed going deep into the body. No blackening seen. Advised X-Ray of right shoulder and chest. All clothes were moisted, qamiz stained with blood.

(2) Bleeding through nostril, advised X-Ray, skull AP/LAT.

10. The Medical Officer found the injured serious, profusely sweating, semi-conscious, B.P less, pulse less, and vomiting, so, he referred the injured to Mayo Hospital, Lahore for further management.

11. Injury No. 1, according to the Medical Officer was caused by a fire-arm and Injury No. 2 by a blunt weapon, probable duration of injury was mentioned as, within three hours.

12. Dr. Muhammad Munir Hussain, PW-4 who had conducted the autopsy on the dead body of Nadeem Masih (deceased) showed up as PW-4 and prepared the post-mortem examination report Exh.PC. He gave up the detail of injury suffered by the deceased as under:--

(1) A large ragged lacerated wound 5 x 3 cm, going deep on the back of right shoulder about 9 cm. below the apex of shoulder, close to the posterior auxiliary line. There was bleeding from the nose.

(2) On dissection of Injury No. 2 he found no external injury to the nose. There was bleeding from the nose. Apex was due to damage to the lung vessels due to which bleeding occurred from the nostril and it was consequent of Injury No. 1.

13. In his opinion the Injury No. 1 was anti-mortem and caused by fire-arm. According to him, the cause of death in this case was due to massive damage to the right lung and excessive hemorrhage. The probable time elapsed between injury and death was described by him as 3 to 4 days and between the death and post-mortem examination was within 12 hours.

14. Ghulam Rasool 1793/HC, PW-6 deposed about the recovery of carbine .12 bore P-4 at the instance of the appellant-accused vide recovery memo. Exh.PE, attested by him and Shamshad Ahmad 1299/C, Muhammad Rafique 1475/C, PW-7 dispatched the sealed parcel of the carbine to the office of Forensic Science Laboratory, Punjab, Lahore on 31.01.2004 through Maqbool Hussain 1283/C, PW-2, Nazir Masih PW-9, the complainant endorsed his version as contained in FIR Exh.PF/1, Dilawar Masih, PW-10 furnished an eye-witness account of the occurrence, Javed Iqbal ASI, PW-11 being Duty Officer recorded formal FIR Exh.PF/1, Muhammad Riaz 1056/C, PW-12 got the autopsy done on the dead body of the deceased and later on produced the last worn clothes of the deceased Shalwar P-1, Chaddar P-2, sealed phial P-3, who secured the same vide recovery memo. Exh.PB attested by him and Yousaf Masih, PW-3, Khawar Latif SI/SHO, PW-13 received the written application Exh.PF from the complainant at City Chowk Karaoke, on 12.12.2003 and after recording police proceedings on it, dispatched it to the Police Station through Ghulam Rasul complainant for registration of formal FIR. Thereafter, he conducted the investigation in this case, the detail of which has already been mentioned in the preceding paragraphs.

15. Learned Special Public Prosecutor tendered in evidence report of Forensic Science Laboratory, Punjab, Lahore Exh.PK and closed the prosecution evidence.

16. Whereafter, the appellant was called upon to make his statement under Section 342 Cr.P.C. who, while making the said statement denied the prosecution case and gave his own version while responding to Question No. 6 as to why this case against him and why the PWs have deposed against him, Ijaz alias Jagi accused contended that Nadeem Masih being armed with a carbine had trespassed into his house at 2:00 p.m. on 08.12.2003 and pounced upon his sister Mst. Rukhsana Bibi and dragged her towards a room at gun point to commit Zina Bil Jabar with her; he could not tolerate it so he, in order to save the life and honour of his sister, fired with a .12 bore gun of his brother which hit Nadeem Masih deceased on his back, who, on receiving the shot fell down in injured condition. He further contended that the parents of the deceased learnt lateron about the occurrence and they being ashamed of the indecent act of their son sought apology from the family of the appellant-accused and promised not to report the matter to the police; that the complainant chewed his words and got registered FIR against him so, he voluntarily surrendered himself before the local police alongwith .12 bore gun but the Investigating Officer did not record his plea; he admitted that he caused solitary injury to Nadeem Masih in order to save honour of his sister and excercised his right of private defence lawfully; that the PWs were not present at the spot at the time of occurrence and that they had deposed falsely against him by suppressing the true facts of the occurrence.

17. The appellant-accused did not opt to appear as his own witness under Section 340(2) Cr.P.C. nor he intended to produce any defence evidence.

18. The learned trial Court, after conclusion of the trial appraised the evidence available on the file and passed the impugned judgment, whereby, he convicted and sentenced the appellant-accused as mentioned above.

19. Learned counsel for the appellant by expressing his belief, that the prosecution had been torn apart during the course of trial, has contended, that the prosecution had miserably failed to prove its case beyond any shadow of doubt; that though a motive had been specifically set up by the prosecution but it failed to prove the same; that the witnesses of ocular account were neither present at the spot at the relevant time nor they had witnessed the occurrence as it had taken place inside the house of the appellant-accused; that the deceased had himself invited the trouble by trespassing into the house of the appellant-accused being armed with a carbine and in a devilish manner attempted to commit Zina-bil-Jabbar with his sister, who could not tolerate the scene and having lost self control, fired with his brother's .12 bore gun to save the life, honour and chastity of his sister which was at stake at the hands of the deceased; that the deceased had been fired at by the appellant-accused under grave and sudden provocation and he had not committed Qatl-e-Amd of the deceased; that the appellant-accused had voluntarily appeared before the Investigating Officer alongwith weapon of offence but the Investigating Officer did not record the version of the accused correctly and bonafidely; that it is a case of two versions and the version of the accused was nearer to truth which should have been believed by the learned trial Court; that there is unexplained delay of 92 hours in lodgment of FIR which is fatal to the prosecution case; that there are lots of loopholes in the ocular evidence which do not reconcile with the actual hard facts of the case; that the manner in which the alleged occurrence had been stated to have taken place, was neither believable nor plausible and that no blood-stained earth was collected from the place where the deceased had allegedly received the injuries.

20. On the basis of his contentions, learned counsel for the appellant has prayed for the acquittal of the appellant. In the alternative he has made a prayer that quantum of sentence of the appellant may be reduced and altered to one, punishable under Section 302(c) PPC on the ground that there are many mitigating and extenuating circumstances in favour of the appellant inasmuch as the origin of fight and the place of occurrence have remained shrouded in mystery.

21. Conversely, learned Addl. Prosecutor General has refuted the arguments put forward by the learned counsel for the appellant by contending that the prosecution has successfully proved its case beyond any shadow of doubt; that the delay in lodgment of FIR has been explained in a natural way by the complainant as he had been on the bedside of his deceased son since the time of infliction of fatal injury, on his body and that the deceased had been inching towards the eventuality so his prime duty was to attend his injured son, instead of rushing to the police station to report the matter; that in absence of any previous animosity between the parties, the eye-witnesses could not be termed as interested witnesses, therefore, their statements could not be discarded simply on the ground that there was minor discrepancies in their evidence; that it is a case of single accused, the occurrence had taken place in a broad-day-light in the open street, the parties knew each other since long, so, there was no probability as to mistaken identity of the accused; that the appellant-accused had adopted a delayed and afterthought defence plea during the course of trial as he never raised the said plea during the course of investigation; that the defence plea was himself rejected by the appellant-accused during the course of the trial when he denied the recovery of carbine with the suggestion that it had been planted upon him and that the proceeding in this regard were fabricated by the Investigating Officer, at the police station; that the report of FSL Exh PK was positive in nature as it disclosed that the .12 bore short pistol (carbine) was in working order, in its present condition; that the appellant-accused had already been held leniently by the learned trial Court by not awarding him the capital punishment; that the defence plea, in a way substantiated the prosecution case which had successfully stood the

test of the trial; lastly contends that the instant appeal may be dismissed being devoid of any substance.

22. Arguments heard. Record perused.

23. I find that it is a case of two version, one is the version of the complainant as contained in the FIR Exh.PF/1 and the other advanced by the appellant-accused during the course of the trial. So both the versions shall be dealt with together by keeping them in juxta position interse. There are certain circumstances which stand admitted by both the sides. There is no dispute as to the usage of a .12 bore weapon during the occurrence; the seat of injury and the name of the assailant. In the peculiar circumstances of the case I have picked up every piece of the prosecution evidence to assess the depth of real facts. I find that in this case, apart from the ocular evidence, the prosecution evidence is based on the evidence of motive, medical, recovery of weapon of offence as well as the report of Forensic Science Laboratory, Punjab, Lahore.

24. So far as, the motivating factor behind the occurrence is concerned I have noticed that according to the prosecution case a quarrel had taken place between Nadeem deceased, the son of Nazir Masih, the complainant and Ijaz alias Jaji, the appellant-accused at 3:45 p.m. at about 08.12.2003 which was interfered and patched up by Nazir Masih, PW-9. Though, the detail of the said altercation had not been mentioned in the written application Exh.PF, presented by the complainant for registration of FIR yet while appearing as PW-9, the complainant has mentioned that his son Nadeem deceased was distributing invitation cards in the Mohallah qua the marriage of his sister scheduled to be held on 11.01.2004, he was intercepted by Ijaz alias Jagi accused who contemptuously asked the deceased to pay him Salam as he (Appellant) was a Christian to which deceased Nadeem Masih, replied in the same coin which led to an altercation between the two. That was the time when Nazir Masih, complainant intervened and sought forgiveness from the accused for his deceased son and the matter was compounded. So far as this motive, is concerned, only Nazir Masih had witnessed the motive altercation as it was he who had intervened and patched it up between the deceased and the appellant-accused. The statement of the Investigating Officer, PW-13 in this regard is not very material when he contended that the complainant had not produced any supporting evidence to prove the factum of motive during the course of investigation but he completely forgot that the complainant had never contended that the earlier altercation had taken place in presence of certain other persons of the locality.

25. Any person familiar with the facts and circumstances of the motive can prove the same without asking for corroboration through other means. The motive is an element which is always worked out in the mind of the assailant and nobody can tell with exactitude as to what was the real motive whereunder,an accused had committed a particular offence. In majority of the criminal cases it is no more than a guess work or a speculation, so far as, the suggested motive is concerned. An accused may conspire to weave certain emotions into a calculated design to commit an offence.

26. The deceased was a Christian and the appellant accused a Muslim and there was hardly anything common between them. In absence of any previous enmity, the immediate cause of the occurrence could not be different from the one as deposed about by the complainant. In his testimony, PW-9 has not changed the motive at all but has only furnished embroidery of the earlier incident, hinted at by him in his written application Exh.PF as well as in his testimony as PW-9. The embroidery work done by the complainant cannot be considered as a dishonest improvement on the part of the complainant, if I go by the defence plea, pressed into service by the appellant-accused it appears that he had not only admitted to deny the incident of motive but also the whole of the prosecution case as according to him the occurrence had taken place inside his house. I would dilate upon the veracity of the defence plea of the appellant-accused in the later part of this judgment but a cursory view of the same does not dent or undermine the value of the prosecution evidence qua the factum of motive.

Nazir Masih, PW-9 though the father of the deceased, did not have any bias, grudge or animosity to falsely charge the appellant-accused for none of his fault. The earlier quarrel took place just 15 minutes before the occurrence, so, there was every likelihood or probability that the appellant had reacted violently towards his verbal war of words. A very little time is found between the motive incident and the occurrence of murder. So I hold that the prosecution has successfully proved the motive, as alleged in the FIR Exh.PF/1.

27. So far as, the medical evidence is concerned, according to the prosecution, Nadeem deceased had received a single fire of a .12 bore weapon on his right shoulder. The medical evidence had been furnished in this case by Dr. Syed Zafar Abbas, PW-5 who had examined Nadim Masih (deceased) in injured condition at 5:00 p.m. on 08.12.2003 through MLR Exh.PD which contains description of a fire-arm injury on the back of right shoulder, 9 cm below the apix of right shoulder with irregular inverted margins and going deep into the body. At the time of his medical examination, the condition of Nadeem Masih was found serious as he was found profusely sweating, semi conscious, BP and Pulse irrecordable and vomiting by the Medical Officer, PW-5, who, after giving him first aid immediately referred him to Mayo Hospital, Lahore.

28. Dr. Muhammad Muneer Hussain, PW-4 condcuted autopsy on the dead body of the deceased, his findings were absolutely in line with that of PW-5 in terms of description of injury of the deceased. On dissection he found the fracture of 4th, 5th and 6th ribs backside, right lung was severely damaged and chest cavity was full of blood. He also found a plastic shell and about 45 metallic round balls from inside of right side of chest. The Injury No. 2, showing bleeding from the nose was found by the Medical Officer, a consequence of Injury No. 1 with the observation that no external injury was present on the nose of the deceased. I have also noticed that the pictorial diagram of the post-mortem examination report also shows that there was a single entry wound. The shape of Injury No. 1 being irregular ragged wound couple with recovery of a number of spherical led balls at the time of post-mortem examination, clearly establishes the fact that the deceased had been fired at by means of .12 bore weapon. The appellant-accused had also admitted in his defence plea that he, while exercising his right of private defence, had used .12 bore weapon to fire at the deceased. Nazir Masih complainant, PW-9 and Dilawar Masih, PW-10 have deposed about receipt of a .12 bore shot on the right shoulder by the deceased at the hand of the appellant-accused. Therefore, I conclude that the medical evidence fully corroborates the ocular version.

29. Insofar as, recovery of carbine .12 bore P-4 from the appellant is concerned the same might not have been of any consequence, had the appellant not admitted to have used a .12 bore gun during the course of occurrence, as, this weapon had not been got compared with any crime empty from the office of Forensic Science Laboratory.

30. A .12 bore weapon, like a carbine does not emit empty unless and until its user intends to reload the same. In that eventuality the user would vacate the muzzle of the weapon so as to reload it.

31. The evidence to prove the recovery of carbine, P-4, the prosecution has produced Ghulam Rasul 1793/C, PW-6 and Khawar Latif SI/SHO, PW-13. Maqbool Hussain 1283/C, PW-2 carried the seal parcel of carbine to the office of Forensic Science Laboratory on 29.01.2004 and deposited there, the same day. The report of FSL, Punjab, Lahore Exh.PK reveals that the aforesaid weapon was in working condition.

32. Interestingly, while conducting cross-examination on PW-6 Ghulam Rasul 1793/C the recovery of the said weapon has been challenged and denied by the appellant-accused which is in negation to the defence plea, set up by the accused during the course of the trial. The evidentiary value of the recovery of carbine P-4 would have been nothing at all but for the plea of the accused it cannot be straightway thrown away.

33. Insofar as, the ocular evidence is concerned in absence of any serious enmity between the parties, the same cannot be disbelieved or discarded simply due to the relationship of the eye-witnesses with the deceased. The occurrence took place on 08.12.2003 and the matter was reported to the police on 12.12.2003 as the deceased remained alive till then and Nazir Masih, PW-9, the father of the deceased, remained alongside the bed of his deceased son through and through. The learned counsel for the appellant has strongly contended that none of the witnesses of ocular account was present at the scene of occurrence nor they had witnessed it and only after having found Nadim Masih in injured condition, they carried him to Civil Hospital, Kamoke. Both the witnesses of ocular account have furnished a clean account of the details of occurrence and have corroborated each other on every material aspect of the case. The occurrence took place in the street, at about 4:00 p.m. witnessed by the complainant as well as by his co-witness, who, shifted Nadim Masih (deceased) in bad injured condition to THQ, Hospital Kamoke. The MLR Exh.PD bears the name of Nazir Masih, complainant PW-9 as a person to have brought the injured to the hospital for medical examination. The time of medical examination indicates that the deceased had been shifted to the hospital within about one hour of the time of occurrence. The Medical Officer has mentioned the duration of injury as within three hours which is not detrimental to the case of the prosecution in any manner as the injured was found bleeding at the time of his medical examination. Had he been bleeding for three hours as claimed by the appellant, he must not have been shifted alive to the hospital due to excessive shock and hemorrhage.

34. It was a broad-day-light occurrence. Both the parties knew each other since long. There cannot be any probability of mistaken identity of the accused, specially, when the appellant accused himself had contended by way of his defence plea that he had fired at the deceased with a .12 bore gun. The reporting of the matter to the police on 12.12.2003 indicates that Nazir Masih complainant had been worried and interested much more in saving the life of his son than rushing towards the police station to report the matter to the police, leaving his son on the death bed. His continuous presence alongside the bed of his deceased son is understandable, which, does not dent the prosecution case in any manner. The ocular account is fully supported by the medical evidence. It is true that there are some contradictions and improvements made by the eye-witnesses but they are minor in nature and cannot be regarded of such a nature which can cause discarding the ocular evidence, therefore, I have come to the conclusion that the prosecution has proved its case against the appellant beyond any shadow of doubt.

35. Insofar as, the plea of the accused is concerned, it appears to be afterthought as he did not raise this plea during the course of investigation, rather, at the time of his arrest on 04.01.2004 the first plea recorded by the accused was absolutely different from the one he pressed into service, during the course of trial. In his statement under Section 342 Cr.P.C. he contended that Nadim Masih deceased had trespassed into his house at 2:00 p.m on the fateful day, being armed with a carbine, took his sister Rukhsana in clutches at gun point and dragged him towards a room of the house, with intention to commit Zina with her. He further contended that on seeing this scene he lost his self control and with a view to safe the honour, dignity and life of his sister, he fired with a licenced .12 bore gun upon the deceased which landed on his right shoulder and he fall down in injured condition. He further contended that the deceased was lateron lifted and taken to his house, wherefrom he was taken to the hospital. He has also alleged in his defence plea that the parents of the deceased were apologetic of the "shameful act" of their son so they had decided not to report the matter to the police. The defence plea of the accused is not entertainable in many ways. He did not produce the said licenced gun to the police during the course of investigation, did not adopt the said version at the time of recording his first plea immediately on his arrest, he has denied the recovery of carbine .12 bore P-4 recovered at his instance and he opted not to produce any defence evidence in support of his plea and lastly, he kept his sister away, both, from the investigation as well as from the proceeding of the trial. The exercise of right of self-defence

undoubtedly, is conferred upon every citizen of the country, under the statute, but once the accused adopts a specific plea, falling within the recognized exceptions, the burden to prove the same shall shift to the accused. There are certain circumstances whereunder the accused may be found entitled to the benefit of exercise of right of self-defence despite having not adopted a specific plea in this regard but it shall happen only if, some material, favourable to the accused, flows from the prosecution evidence. Here in this case, the prosecution does not disclose any such circumstance, the benefit of which, could be extended to the accused in the backdrop of his defence plea.

36. The non-recovery of the blood-stained earth from the place of occurrence, does not dent the prosecution case, as, after four days of the occurrence, the blood-stained earth could only be recovered if the place of occurrence had been properly safe guarded. The spot of occurrence was a thoroughfare, used by the inhabitants of the locality, so, there is every probability that the evidence of blood-stained earth might have been lost under the feet of the pedestrians.

37. If the occurrence as claimed by the appellant-accused had taken place inside his house and that the deceased had fallen in injured condition there then, he must have shown the said place to the police, after he had been arrested. The gun allegedly produced by him before the police at the time of his arrest, is also found nowhere. The claim of the appellant-accused that the parents of the deceased were apologetic due to the act of the deceased is equally non-sensical,otherwise, he would have led some evidence to prove this part of the defence plea.

38. A belated and afterthought defence plea, not supported by any evidence, is inconsequential to the case of the appellant-accused. The defence plea being devoid of any merit is thus, declared as incredible, improbable, afterthought and meaningless. It, however, lends a sense of corroboration to the case of the prosecution, which otherwise, stands proven on its own facts and circumstances.

39. For what has been discussed above, the instant appeal is dismissed and the impugned judgment is upheld.

(A.S.) Appeal dismissed.

PLJ 2011 Cr.C. Lahore) 933

[Rawalpindi Bench Rawalpindi]

Present: Shahid Hameed Dar, J.

KHALIL-UR-REHMAN alias GUDOO--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 230/B of 2011, decided on 11.3.2011.

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

----S. 497--Pakistan Penal Code (XLV of 1860), Ss. 376 & 511--Bail, dismissal of--Delay in FIR--Accused attempted to commit Zina with minor girls of nine years--Sufficient incriminating evidence was collected against accused--Delay in lodging of FIR was not damaging to the prosecution case as the minor victim must have been badly frightened, become of oppressiveness of the crime, committed with her and due to threats, extended to her by accused--Bail was dismissed. [P. 935] A

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 376 & 511--Bail, dismissal of--Prohibitory clause--Accused committed a devilish act by making an absortive attempt to commit/Zina

with minor victim--Relation between parties were strained and that complainant had been promoted by someone to wreekthe future life of her minor daughter--Accused appeared to be desparate--Character and sex monger--Offence committed by accused catches the prohibitory clause of S. 497, Cr.P.C.--Bail was dismissed. [P.] B

Raja Zakar Hussain, Advocate for Petitioner.

Ch. Muhammad Waheed Khan, Deputy Prosecutor General Punjab for State.

Mr. Khawar Riaz Qadri, Advocate for Complainant.

Date of hearing: 11.3.2011.

Order

The petitioner, Khalil-ur-Rehman (alias Gudoo) son of Abdul Rehman, by filing this petition, seeks post-arrest bail in case F.I.R. No. 110, dated 6.2.2011, registered at Police Station Sadiqabad, Rawalpindi, for offences under Sections 376 & 511 P.P.C.

2. The allegation against the petitioner, as alleged by Mst. Uzma Imran-complainant, is that Khalil-ur-Rehman, accused-petitioner, attempted to commit rape with her daughter, baby Aleena, aged nine, finding her alone, at his residential house, on 7th of January; the accused-petitioner is the husband of paternal aunt of the victim.

3. Baby Aleena was interviewed by the Investigation Officer on 6.2.2011, who disclosed the painful detail of the occurrence by contending that her uncle (Phhuphha), attempted to ravish her at his house, by pressing against her to cause penetration and on her screaming, he changed the focus of his attention and dirtied her mouth, due to which she turned nauseous and vomited. She further stated before the Investigation Officer that the accused made her cleanse her mouth and intimidated her by threatening that he would kill her, if she would disclose the matter to someone. Hafiz Muhammad Munir, the maternal uncle of the victim, and Muhammad Idrees, the maternal grand-father of the victim, joined investigation before the investigation Officer on 6.2.2011 and made statements under Section 161 Cr.P.C, wherein they contended about the above said version of baby Aleena. The accused-petitioner was arrested on 6.2.2011 and his first version before the Investigating Officer is not much different from the one adopted by the above said witnesses, including the victim.

4. Learned counsel for the petitioner submits that the petitioner has been falsely involved in this case due to malice and ulterior motives of the complainant, as she under the garb of the instant case, has conspired to blackmail the petitioner and her in-laws; the husband of the complainant, who is in Saudi Arabia, has sent an affidavit to the Investigation Officer, wherein he has deposed about the falsehood of the case, lodged by his wife, in the background of the estrangement of relationship with her husband and other in-laws; the real brother of the husband of the complainant, has also stated so before the Investigation Officer during investigation and that many others through their affidavits had dubbed the petitioner innocent. Lastly, contends that the complainant had gone astray in the absence of her husband and on being checked by her in-laws, she had falsely involved the petitioner in the instant case, to avenge her `insult'.

5. On the other hand learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant has strongly opposed grant of bail to the petitioner with the contention that the accused-petitioner had committed a devilish act by making an abortive attempt to commit zina with the poor child like a sex-maniac, which shows that the accused-petitioner is not less than a satan; the offence committed by the accused-petitioner falls within the prohibitory clause of Section 497, Cr.P.C., so he may not be allowed bail.

6. After having heard the learned counsel for the parties and gone through the record, I hardly find any reason to admit the petitioner to bail as, sufficient incriminating evidence has been collected against him by the Investigation Officer. The innocent baby, aged nine, is

the victim of the alleged occurrence. The accused, overawed by lecherous sentiments, did not care for the age of the victim, nor his relationship with her could stop him from committing the shameful act. The delay in lodgment of F.I.R. in this case is not damaging to the prosecution's case as the minor victim must have been badly frightened, firstly because of the oppressiveness of the crime, committed with her, and secondly, due to threats, extended to her by the accused-petitioner. The argument of learned counsel for the petitioner that the husband of the complainant had transmitted a written affidavit to the Investigation Officer is of no avail to the accused-petitioner, as he resides permanently in Saudi Arabia and was not present in Pakistan on the day of the alleged occurrence. He must have been persuaded by his parents and other members of the family to write to the Police for rescuing the petitioner, who is the husband of his real sister. There is nothing on record to suggest that the relations between the parties were strained and that the complainant had been prompted by someone to wreck the future-life of her minor daughter. The petitioner appears to be a desperate character and a sex-monger. The offence committed by him catches the prohibition of Section 497 Cr.P.C. The petitioner's case under no circumstance constitutes need for further inquiry into his guilt, as enunciated under Section 497(2) Cr.P.C. Therefore, I am not inclined to accede to the bail plea of the petitioner.

7. Resultantly, this petition fails and stands dismissed.

8. Before parting with this order, it looks appropriate that trial of the accused-petitioner he concluded as expeditiously as possible. Therefore, the learned trial Court is directed to accelerate the proceedings of the trial and conclude the same within five months on receipt of this order.

(S.L.) Bail dismissed.

PLJ 2011 Cr.C. (Lahore) 935

[Multan Bench Multan]

Present: Shahid Hameed Dar, J.

SABIR ALI--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 18-B of 2011, decided on 25.1.2011.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 324, 337-F(iv) & 34--Bail, grant of--Injury was declared as Ghyr Jaifah Mudihah by medical officer--Applicability of S. 244, PPC--Delay of 8 days in FIR--No weapon of offence was recovered--No repetition of fire shot--Seat of injury was non-vital part of body--Held: Accused did not repeat fire short nor he did any other offensive act against the injured--Seat of injury was non-vital part of body--Complainant being empty handed was at the mercy of the accused who could had done him more harm but he abstained from doing so--Injuries received by complainant fall within definition of S. 337-F(iv), PPC punishable with imprisonment of five years which does not attract prohibitory clause of S. 497, Cr.P.C--Bail was allowed. [P. 938] A & C

Opinion of Investigation Officer--

----Not binding upon the Court--Purpose of adjudication--Persuasiveness of the opinion of an investigation officer can be gone into for purpose of adjudication of bail plea of an accused. [P. 938] B

Sh. Jamshed Hussain & Malik Muhammad Latif Khokhar, Advocates for Petitioner.

Mr. Sarfraz Khokhar, Advocate for Complainant.

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

Date of hearing: 25.1.2011.

Order

Seeks bail after arrest in case FIR No. 145 of 2011 under Sections 324, 337-F(iv), 34 P.P.C registered at Police Station Bohar Gate, Multan on the complaint of one Muhammad Ramzan who has alleged in the FIR that he was a grave digger and also knit `chiks' (a hanging screen made of reeds); he had a dispute over the supply of `chiks', the cost whereof he had already received from Shabbir etc; the buyers of the `chiks' had a brawl with Muhammad Ramzancomplainant, during the course of which, Sabir (petitioner) being armed with a pistol, aimed and shot at the complainant which landed on his arm; the petitioner and his co-accused also attempted to snatch the motorcycle of the complainant; the accused after committing the offence fled away.

2. Muhammad Ramzan complainant was medically examined at 5:15 p.m. on 08.11.2010 under the orders of a magistrate and his MLR reveals a fire-arm injury on the palmer aspect of right hand extending from medial side, upwards and causing the exposure of ulna bone; this injury has been declared as GhyrJaifah Mudihah falling within the definition of Section 337-F(iv) P.P.C by the Medical Officer.

3. Learned counsel for the petitioner submits that there is inordinate delay of 8 days in lodgment of FIR and no explanation has been offered by the complainant; the MLR is inconsistent with the allegations contained in the FIR as right arm of the complainant had not been injured during the occurrence; the statements of the prosecution witnesses recorded under Section 161 Cr.P.C. are in contrast to the version of the complainant as they have mentioned about the infliction of an injury on the left arm of the injured; the petitioner was arrested on 21.11.2010, sent to the judicial lockup on 02.12.2010 and despite being on physical remand for maximum period, permissible under the law, no weapon of offence had been recovered at the instance of the petitioner; the Investigation Officer after thorough investigation reached the conclusion that the circumstances of the case were doubtful so he formulated a report under Section 173 Cr.P.C. recommending cancellation of the case; no repetition of fire shot has been alleged against the petitioner; the seat of injury is non-vital part of the body and insertion of Section 324 P.P.C by the police is questionable; lastly submits that the offence with which the petitioner stands charged, does not catch the prohibition of Section 497 Cr.P.C.

4. On the other hand learned Deputy Prosecutor General assisted by learned counsel for the complainant has vehemently opposed the grant of bail to the petitioner with the contention that the complainant was denied the right of lodgment of FIR by the police so he approached the learned Ex-officio Justice of Peace, through an application u/S. 22-A/22-B Cr.P.C., obtained an order therefrom and then the instant FIR was registered; Muhammad Ramzan, complainant was medically examined within one hour of the occurrence and the Medical Officer has not declared his injury doubtful or fabricated; the opinion of the Investigation Officer is not binding upon the Court and that the cancellation report prepared by the police is a result of dishonest liaison between the accused and the I.O. lastly submits that the offence squarely falls within the ambit of prohibitory clause of Section 497 Cr.P.C.

5. Arguments heard. Record perused.

6. It has been alleged by the complainant that Muhammad Sabir petitioner had fired a pistol shot which landed at his arm. The actus reus alleged in the FIR is that on the point of supply of `chiks' a heated debate took place between the petitioner etc. and the complainant which ensued in the alleged occurrence. The complainant did not specify in the FIR as to on which arm, left or right, the bullet had hit him. The MLR however, reveals a fire-arm injury on the

palmer aspect of right hand, going from lateral to medial side, at palmer aspect of right hand with the passage of 0.3 c.m, continued with a lacerated wound on the ulnar side of right forearm exposing 1 c.m portion of the right ulner bone, which has been declared by the medical officer as Ghyr Jaifah Mudihah, falling within the definition of Section 337-F(iv) P.P.C. The petitioner did not repeat fire shot nor he did any other offensive act against the injured. The seat of injury is the non-vital part of the body. The complainant being empty handed was at the mercy of the petitioner who could have done him more harm but he abstained from doing so. The eye-witnesses, three in number were recorded by the I.O. under Section 161 Cr.P.C. who in their statements, have contended that the solitary fire shot made by the petitioner had landed on the left arm of the complainant which is inconsistent with the seat of injury i.e. right arm, as shown by the medical officer in the MLR. A number of persons joined investigation before the I.O. in defence of the accused/petitioner and submitted their sworn affidavits highlighting the innocence of the petitioner who after having been arrested underwent physical remand of about 12 days but no weapon was recovered at his instance. The I.O. after extensive investigation reached the conclusion that the petitioner was not responsible for the offence alleged against him and that he had been falsely involved in this case by the complainant. He prepared a cancellation report under Section 173 Cr.P.C. The opinion of the Investigation Officer though not binding upon the Court, cannot be overlooked casually if it is based upon cogent and plausible material. The persuasiveness of the opinion of an Investigating Officer can be gone into for the purpose of adjudication of the bail plea of an accused. Keeping in view the eye-witness account and the medical evidence, the applicability of Section 324 P.P.C is open to serious exception. The injuries received by the complainant fall within the definition of Section 337-F(iv) P.P.C punishable with imprisonment for five years which does attract the prohibitory clause of Section 497 Cr.P.C. There are reasonable grounds to believe that the petitioner's case calls for further inquiry into his guilt as contemplated under Section 497(2) Cr.P.C.

7. For what has been discussed above, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(R.A.) Bail allowed.

PLJ 2011 Cr.C. (Lahore) 963 (DB)

[Rawalpindi Bench Rawalpindi]

Present: Shahid Hameed Dar and Nasir Saeed Sheikh, JJ.

NISAR AHMAD--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 304-B of 2011, decided on 21.3.2011.

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

----S. 497(2)--Pakistan Penal Code (XLV of 1860), Ss. 365-A--Bail, grant of--Further inquiry--No incriminating evidence exit to connect with commission of offence--Offence of abduction for ransom was committed--Neither any ransom amount nor alleged abductee were recovered--Abductee was star witness of occurrence and non of them had nominated the petitioner as an accused of the case--Held: Heinousness of an offence not be considered as a ground for declining bail to petitioner--Case falling within scope of further inquiry as contemplated u/S. 497 Cr.P.C.--Bail was allowed. [P. 966] A

Syed Ali Shah Bokhari, Advocate for Petitioner.

Ch. Abdul Waheed, D.P.G. for State.

Malik Muhammad Kabir, Advocate for Complainant.

Date of hearing: 21.3.2011.

Order

Nisar Ahmad accused-petitioner seeks bail after arrest in case FIR No. 86 dated 01.11.2010 for offence under Section 365-A P.P.C registered at Police Station Injera, District Attock, on the complaint of Mehmood-ur-Rehman, who has briefly, alleged in the FIR that he was informed telephonically that his brother Aziz-ur-Rehman and another Bashir Ahmad had been abducted at gunpoint by Asmat Ullah, Lal Khan and their companions, who had been witnessed, committing the occurrence at 5:15 p.m. on 01.11.2010 by Muhammad Bashir; the complainant on this information, went towards Pir Abbas Chowk on his motorcycle and viewed themselves, the abductees, being taken away by the above said accused; they attempted to stop the car (registration No. 6762/LWA) of the accused but in vain.

2. The above said car and motorcycle were found parked at the place of occurrence, which were taken into possession by the police through memo. ofrecovery on 01.11.2010.

3. On a tip off, the police besieged a jungle on 21.11.2010, narrowed down the area of their action and pursuant to it, they overpowered accused Lal Khan and Asmat Ullah, who made disclosure that they could led to the recovery of Aziz-ur-Rehman and Bashir Ahmad, the abductees. As per disclosure of the accused, a raid was conducted by the police at another spot situated in the same jungle, as a result of which both the abductees Aziz-ur-Rehman and BashirAhmad were recovered with their hands and feet tied.

4. The accused Lal Khan was arrested on 21.11.2010, who led to the recovery of Rs. 10,00,000/- from the side pocket of his shirt and it was the ransom amount received by him from the complainant side. A Kalashnikov was also recovered from him at the same time. Asmat Ullah accused also led to the recovery of a fire-arm and other articles.

5. Aziz-ur-Rehman and Bashir Ahmad were recorded under Section 161 Cr.P.C. on 21.11.2010, who gave a detail of the mode of the occurrence but none of them nominated Nisar Ahmad (petitioner) as an accused of this case. Mehmood-ur-Rehman, complainant got recorded his supplementary statement on 21.11.2010, wherein he mentioned about the payment of ransom amount, Rs. 10,00,000/- to Lal Khan and Asmat Ullah accused.

6. Accused Lal Khan disclosed during interrogation on 23.11.2010 that he had abducted both the mentioned abductees in the company of Asmat Ullah, Sharif Khan, Babar Khan and Muhammad Fardus alias Mehmood accused by adding that they had handed over both the abductees to Nisar (petitioner) thereafter. It is how the name of the petitioner figured in this case for the first time.

7. The police took into possession Car No. 865-RIA alongwith its documents from Abdul Majeed son of Hayat Muhammad, which had been allegedly used in the commission of crime by the accused at a later stage to shift the abductees to some other place, Aziz-ur-Rehman and Muhammad Bashir, the abductees, identified the place of their confinement as they pointed out to it during the course of investigation on 10.01.2011.

8. Learned counsel for the petitioner submits that the petitioner has been falsely roped in this case for none of his fault and no incriminating evidence exists on record to connect him with the commission of offence; the confessional statement of Lal Khan accused before the police, can hardly be read against the petitioner and barring said statement, there is no other evidence with the prosecution against the petitioner; nothing has been recovered at his

instance and his involvement in this case does not proceed beyond mere suspicion; the petitioner's case calls for further inquiry into his guilt, so he may be released on bail.

9. Conversely, learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant has opposed grant of bail to the petitioner with the contention that the statement of Lal Khan accused is very important, which connects the petitioner with the commission of the crime; the offence of abduction for ransom is always committed by a team of criminals and each one of them plays one's particular role and the petitioner's role was to shift the abductees, subsequent to the stage of their abduction, to a safer place, wherefrom both of them were, later on, recovered by the police in consequence upon a raid; the self implicating statement of Lal Khan accused is an incriminating piece of evidence against the petitioner as well; the petitioner and his co-accused have committed a gruesome offence, which falls under the prohibitory clause of Section 497 Cr.P.C., so he may not be admitted to bail.

10. After having heard learned counsel for the parties and perused the record, we find that Lal Khan accused and Asmat Ullah accused, after hectic efforts of the police, were arrested on 21.11.2010 from a jungle. They were interrogated by the I.O. and in pursuance thereof, both the abductees were recovered from another spot situated in the same jungle, wherefrom the above named accused had been arrested. Despite self implicating statement of Lal Khan accused, whereby, he also disclosed the name of the petitioner as their aside in the commission of the occurrence, no other incriminating circumstance exists on the record to connect the petitioner with the crime. Neither any ransom amount has been recovered from him nor the alleged abductees were recovered at his instance. He was not found present by the police at both the above said spots, one pertaining to the arrest of accused Lal Khan etc., and the other, the place of recovery of the alleged abductees. The recovery of car at the instance of Abdul Majeed may be important in the circumstances of the case but its relevance qua the petitioner shall be best assessed by the learned trial Court, after recording evidence of the parties during trial. The abductees are the star witnesses of the occurrence and none of them has nominated the petitioner as an accused of this case. Mere heinousness of an offence cannot be considered as a ground for declining bail to the petitioner, once we find his case falling within the scope of further inquiry as contemplated under Section 497(2) Cr.P.C.

11. Resultantly, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac) with one surety in the like amount to the satisfaction of the learned trial Court.

(S.L.) Bail allowed.

PLJ 2011 Cr.C. (Lahore) 985 (DB)

[Rawalpindi Bench Rawalpindi]

Present: Shahid Hameed Dar and Rauf Ahmed Sheikh, JJ.

RIAZ HUSSAIN and another--Appellants

versus

STATE and others--Respondents

Crl. Appeal Nos. 251 & 305 of 2006, M.R. No. 501 of 2006, heard on 5.10.2010.

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

----S. 302(b)--Conviction and sentence--Challenge to--Death sentence altered--Held: To upset or alter a judgment of acquittal is not a routine affair nor it should be so done sparingly rather, exceptional grounds are required to interfere with such a finding of exoneration of an accused by a competent Court of jurisdiction--Objection qua the acquittal of

accused/respondent, that another view was possible qua the guilt of acquitted accused from the evidence on record, in parallel to view expressed by trial Court but it does not suffice to create a justification for altering or upsetting the Judicial verdict in favour of accused, as the law requires that no other view, except that of the guilt of the acquitted accused may necessitate the undoing of judgment of acquittal--Court did not find any justification or good reason for upsetting the impugned judgment qua acquittal of accused, which did not call for interference by High Court--Non-reading or misreading of any evidence on record--Ocular account found as trustworthy, reliable and unfalling so far as the appellant-accused was concerned--Sentence of imprisonment for life in case of appellant would meet the ends of justice, so death sentence was converted to imprisonment for life--Appeal partly allowed/dismissed. [Pp. 993 & 994] A, B & C

Mr. Basharat Ullah Khan, Advocate for Appellant.

Qazi Muhammad Amin, Advocate for Complainant.

Rana Kashaf Saleem Arfaa, Law Officer for Respondent.

Date of hearing: 5.10.2010.

Judgment

Shahid Hameed Dar, J.--The appellant Riaz Hussain has been convicted by the learned Addl. Sessions Judge, Chakwal on a charge of murder of Muhammad Mumraiz. The appellant was sentenced as under:

U/S 302 (b) P.P.C.

Death with order to pay Rs. 1,00,000/- as compensation to the legal heirs of the deceased u/S. 544-A Cr.P.C., in default thereof to undergo six months S.I.

2. The convict has filed Crl. Appeal No. 251 of 2006 against his conviction/sentence and Mst. Mehr Bhari complainant, PW-6 has filed an appeal against the acquittal of Alam Sher, Respondent No. 1, besides, there is a usual reference U/S. 374 Cr.P.C. for the confirmation of the sentence of death, transmitted by the learned trial Court. This judgment will dispose of the above said appeals and the reference.

3. The crime is said to have been committed at 10:00 a.m on 25.03.2002, in the area of Jasial situated within the jurisdiction of Police Station, Sadar Talagang which is at a distance of 4 miles from the place of the incident.

4. The facts culminating in this incident were that Mst. Mehr Bhari and his son Muhammad Mumraiz (deceased) went to Jasial necropolis for the maintenance of the graves of their nears and dears on 25.03.2002; on way back to their house, they were on a bicycle, when they reached a kuchha passage, leading to village Akwal, at about 10:00 a.m., they were ambushed by Mumtaz Hussain (since dead), Riaz Hussain (appellant) and Alam Sher (since acquitted), all armed with pistols, who emerged from densely grown reeds; Mumtaz raised lalkara that Mumraiz be not spared and be murdered within the view of his mother; Mumraiz threw his bicycle and attempted to run but Riaz Hussain (appellant) fired straight at him with his pistol which landed on his right hip, followed by another fire shot with his pistol by Muhammad Mumtaz Hussain (since dead) which landed on the left ear of Muhammad Mumraiz; Alam Sher (since acquitted) also fired with his pistol which hit Muhammad Mumraiz on the right lumber region due to which he fell on the ground; all the accused thereafter, jointly fired at the fallen son of the complainant and caused injuries on his right thigh and lumber area; Muhammad Mumraiz succumbed to the injuries instantaneously; the occurrence was witnessed by Sharaf Khan PW-7 and Muhammad Ashraf, PW (not produced); the accused fled away after committing the occurrence.

5. The motive behind the occurrence related to a dispute of growth of a tree due to which a quarrel had taken place between Muhammad Mumraiz (deceased) and Mumtaz Hussain etc, five days prior to the occurrence, wherein both the sides had showered abuses upon each other; besides, previous litigation between Alam Sher (since acquitted) and the complainant.

6. According to Muhammad Nauman SI, PW--9 on receipt of information reached the place of occurrence where Mst. Mehar Bhari complainant (PW-6) appeared before him and got recorded her complaint Exh. PF qua the above said incident. Muhammad Nauman SI examined the dead body, prepared injury statement Exh.PD, inquest report Exh.PE and dispatched the deadbody of Muhammad Mumraiz (deceased) to the mortuary under the escort of Muhammad Javed 692/C, (PW-3). The police proceedings recorded by PW-9, underneath the complaint, reveal that he had completed the proceedings of the complaint, at 12:00 noon on 25.03.2002, at the place of occurrence.

7. Muhammad Nauman S.I, PW-9 thereafter inspected the spot, prepared the rough site-plan Exh. PM of the place of occurrence, collected blood-stained earth vide memo. Exh.PG, attested by Sharaf Khan, PW-7 and Muhammad Ashraf PW (not produced). The I.O. also secured cycle P-6 vide memo. Exh.PJ. He took into possession three crime empties of .30 bore P-1/1-3 and two missed bullets P-9/1-2 vide memo. Exh.PH. All the aforesaid memos were attested by Sharaf Khan, PW-7 and Muhammad Ashraf PW (not produced). The I.O. took into possession last worn blood-stained clothes of the deceased Shalwar P-2, Qameez P-3, vest P-4 and a sealed phial containing bullet head P-5 vide memo. Exh.PB attested by Hashim Khan, PW-8, Ameer Khan PW (not produced) and Muhammad Javed 692/C PW-3. He got prepared the site-plan in triplicate Exh.PA, Exh.PA/1 and Exh.PA/2 by Mehram Khan Patwari, PW-2 in the scale of 1 inch equal to 80 karams. He arrested Mumtaz Hussain (since dead) and Riaz Hussain (appellant) on 01.04.2002. Riaz Hussain appellant, on his disclosure, led to the recovery of pistol .30 bore P-10 on 03.04.2002 vide memo. Exh.PL, attested by Manzoor Hussain PW (not produced) and Hashim Khan PW-8 and Mumtaz Hussain (since dead) pursuant to his disclosure, got recovered pistol .30 bore P-9, vide memo. Exh.PK, attested by Zafar Iqbal PW (not produced) and Sharaf Khan, PW-7, the same day. The I.O. prepared the rough site-plans Exh.PM and Exh.PK/1 qua the places of recovery of the above said weapons. The I.O. completed the investigation and challaned the accused except Alam Sher (since acquitted) as he was not found involved in the occurrence.

8. The dead body of Muhammad Mumraiz deceased was subjected to autopsy by Dr. Malik Zubair, M.O., PW-5 THQ Hospital, Talagang at 2:15 p.m. on 25.03.2002, vide post-mortem examination report Exh. PC (pictorial diagrams Exh. PC/1 & Exh. PC/2) who found following injuries thereupon:--

(1) A fire-arm wound of entry on right temple above right ear (8 mm in dia) having inverted edges.

(2) A fire-arm wound of exit with everted edges on left ear (1.1 cm dia) near auditory canal.

(3) A fire-arm wound of entry right upper thigh near the inguinal region, (1 cm dia) on the outer aspect.

(4) A fire-arm wound of entry on right thigh (8 mm dia) with inverted edges on outer aspect at almost greater trochanter level.

(5) A fire-arm wound of entry with inverted edges on left lower chest laterally approximately 8 mm dia, almost in mid axillary line.

(6) A fire-arm wound of exit 1.2 cm dia on right sub-costal region on lateral aspect, almost along posterior axillary line, having everted edges.

The cause of death, as recorded by the Medical Officer, was due to severe shock and haemorrhage caused by the above said injuries. All the injuries were ante-mortem and caused by fire-arm.

The probable time, elapsed between injuries and death was worked out by the Medical Officer as `immediate' and between death and post-mortem as within 12 hours.

9. The appellant in his statement u/S. 342 Cr.P.C., denied having committed the offence and professed his innocence, while answering the question, "Why this case against you and why the PWs have deposed against you" and contended as under:--

"The entire prosecution story is false. Witnesses are interse related. No witness whatsoever was present at the time of so called occurrence. In fact it was an unseen murder. Deceased met his unnatural death much earlier to the time of occurrence introduced by prosecution. Witnesses are also inimical towards me. Alam Sher accused two days earlier to this occurrence got registered FIR No. 34 at same Police Station against Hashim Khan and Muhammad Ashraf (PWs). They were wanted in that case. Myself and Mumtaz accused (late) had supported Alam Sher in that case. When Mumraiz Khan was found dead being unattended thereafter complainant party made a guess work. At a belated stage after deliberations and consultations having connivance with police the complainant and witnesses opted to involve me and my co-accused Mumtaz in this case. There was no reason for me to commit the murder of Mumraiz. I was taken to Police Station after 3 or 4 days of the occurrence where I alongwith Mumtaz was kept under illegal confinement for many days. I was physically tortured there and in this regard on my production before Area Magistrate for the first time, on 02.04.2002 I had submitted an application against police whereafter I and Mumtaz were medically examined and we were found being tortured. Prior to that complainant party had provided the weapons to police with which so called empties and bullets were prepared which were planted on us while sitting in Police Station. I am quite innocent in this case."

10. Mst. Mehr Bhari PW-6 is the mother of the deceased. Sharaf Khan, PW-7 is the real paternal uncle and Muhammad Ashraf PW (not produced) is the son of the complainant. Obviously these PWs are the close kith and kin of the deceased.

11. Mst. Mehr Bhari, PW-7 submits in her testimony that she alongwith her son Muhammad Mumraiz traditionally went to the graveyard to visit the graves of her departed relations on 25.03.2002 as it was the 10th of Moharram-ul-Haraam. When she was returning to her village on a bicycle driven by her above named son, they were ambushed by Mumtaz (since dead), Riaz Hussain (appellant) and Alam Sher (since acquitted), all armed with pistols .30 bore who emerged from a cluster of reeds. Muhammad Mumraiz by throwing his bicycle attempted to run away when he was fired at, one after the other, by Riaz Hussain, appellant-accused, Mumtaz Hussain (since dead) and Alam Sher (since acquitted). The fire shot of the appellant-accused landed on the right hip area, the shot fired by Mumtaz Hussain accused (since dead) landed on left side of the head near ear and the missile fired by Alam Sher (since acquitted) landed on right flank of Muhammad Mumraiz (deceased). The occurrence was witnessed by Sharaf Khan PW-7 and Muhammad Ashraf PW (not produced) besides herself. The accused took to their heels after committing the occurrence. The motive alleged was a dispute between the deceased son of the complainant and Mumtaz Hussain etc. (accused) which took place a few days prior to the occurrence besides the litigation between Alam Sher accused (since acquitted) and the deceased party. Sharaf Khan delivered a similar statement when he appeared before the trial Court as PW-7.

12. The learned Addl. Sessions Judge examined the evidence of the prosecution witnesses and found their testimonies reliable and credit- worthy as to the incident and formulated the opinion that they had witnessed the occurrence being present at the spot at the relevant time.

13. We have examined and scanned the eye-witness account with required degree of care and caution.

14. So far as the main story of the occurrence goes the evidence of PW-6 and PW-7 is consistent and of uniform character. There is nothing in their cross-examination to show as to why their evidence should be discarded nor any particular reason has been shown on the record as to why the witnesses of ocular account would render false evidence against the appellant-accused. The alleged occurrence took place at about 10:00 a.m. on 25.03.2002, on a kuchha passage where Muhammad Mumraiz (deceased) and his mother Mst. Mehr Bhari, complainant, PW-6 were ambushed by Riaz Hussain appellant-accused, allegedly joined by his co-accused Alam Sher (since acquitted) and Mumtaz Hussain (since dead) as they sat in wait in a cluster of reeds wherefrom they emerged at the time of occurrence. The appellant-accused in cahoots of his co-accused allegedly committed the occurrence in the perspective of a dispute qua plantation of a tree, between Mumtaz Hussain etc. and Muhammad Mumraiz (deceased) a few days prior to the occurrence wherein both the sides had showered abuses upon each other. The other part of the motive relates to registration of a criminal case by Alam Sher, accused (since acquitted) against the deceased and others.

15. It was 10th of Moharram-ul-Haram on the day of the occurrence and it is a common practice and ritual that the muslims in our country regardless of their faith and sect, observe Aashura with great reverence and veneration. They visit the graveyards where their deceased relatives are resting in peace. The contention of Mst. Mehr Bhari, PW-6 and that of Sharaf Khan PW-7 qua paying a visit to the graveyard, on the fateful day, cannot be disbelieved for the foregoing reason. It is however, to be seen whether all the three accused including the appellant-accused had participated in the occurrence. It cannot be denied that there is an ever growing tendency to cast the net too wide to falsely implicate as many sympathizers of the principal accused as possible so as to make sure that no one would come to the help and rescue of the actual assailant(s). The appellant-accused has been burdened with the liability of causing an injury on the right hip of Muhammad Mumraiz which is perfectly corroborated by the medical evidence, furnished by Dr. Malik Zubair M.O., PW-5.

16. The witnesses of ocular account PW-6 & PW-7 have deposed in their testimonies that Alam Sher (since acquitted) launched a missile with his pistol which landed on the right flank of the deceased son of the complainant but it is not corroborated by the medical evidence as the post-mortem examination report Exh.PC does not disclose any such entry wound on the body of the deceased. There, we find Injury No. 6 on the right sub-costal region on lateral aspect, almost along the posterior axillary line but this is the exit wound, having everted edges. The false implication of Alam Sher accused (since acquitted) in this case cannot be ruled out as he was the complainant of a criminal case, lodged against the deceased son of the complainant, a few days prior to the occurrence. Had Alam Sher accused (since acquitted) any motive to commit the occurrence in issue, he was not supposed to spare Ashraf PW (not produced) who was present at the time of occurrence and at the mercy of the accused. He was the man with whom Alam Sher had direct conflict so the question arises, why would he spare the person with whom he had a direct dispute. The inaction on the part of the acquitted accused qua Muhammad Ashraf PW creates a serious doubt about his involvement in the occurrence. He was found not present at the place of occurrence at the relevant time during the course of investigation. The unfortunate occurrence provided a golden chance to PW-6, PW-7 and Muhammad Ashraf PW (not produced) to fabricate a story for false implication of Alam Sher accused so as to settle score with him. The Investigation Officer Muhammad Nauman SI, PW-9 has categorically stated in his testimony that he had verified the plea of innocence of Alam Sher accused during the course of investigation which was verified by the Circle Officer as well.

17. So far as the implication of Mumtaz Hussain accused (since dead) in the occurrence is concerned there exist more than one circumstance which establish the correctness of the

prosecution case against him but to discuss the same would be an exercise in futility as he died during the course of the trial so to his extent, the prosecution case stands abated.

18. As discussed earlier, Riaz Hussain appellant-accused is well linked with the murder of Muhammad Mumraiz deceased as the ocular account is perfectly supported by the medical evidence. We are of the view that on the merits of the case, the evidence of these eye-witnesses is not open to any question or doubt so far as the appellant-accused is concerned. Their presence at the spot, at the relevant time is natural, as the passage leading to the above said graveyard from the village Dhoke Ladhar Dakhli Jasial was used by the villagers to attend the graves of their deceased relations to offer Fateha etc. All the PWs, produced or not produced are the close relatives interse so their presence at the spot together is hardly questionable. In the circumstances we confirm the conviction of the appellant-accused, as recorded by the learned trial Court.

19. Learned counsel for the appellant has seriously challenged the conviction of the appellant but at the same moment has stoutly urged for the reduction of his sentence. He argued that the prosecution had setup a specific motive in aforementioned terms but badly failed to establish the same through any cogent or plausible evidence. Adds that the non-establishment of motive would give rise to an extenuating circumstance in favour of the appellant and the failure on the part of the prosecution, in this regard, shall cause them face its consequences. Further submits that Riaz Hussain appellant-accused had nothing to do with the criminal case got lodged by his acquitted co-accused as he was not a witness of the said case. Even otherwise, the motive alleged by the prosecution, in complaint Exh.PF appears to have been abandoned by them as PW-6 and PW-7 have not uttered even a single word qua a dispute involving the growth of a tree. The fatal injury on the head of the deceased has not been caused by the appellant-accused as the locale of injury attributed to him is on the right thigh. The learned counsel for the complainant has contended that the previous grudge nurtured by the accused side speaks volumes about the correctness of the prosecution case and that the appellant-accused alongwith his co-accused had fired effectively upon the deceased and thereby caused his death. The learned Law Officer is also of the same view and adds that the appellant-accused has been correctly dealt with by the learned trial Court and the act of the appellant-accused, having ambushed the deceased in the company of his co-assailants gives rise to irresistible conclusion that the accused had launched a premeditated attack, in furtherance of common intention of them all.

20. We hardly find any substance in the arguments of learned Law Officer and the learned counsel for the complainant as we have discussed in the preceding paragraphs that the motive alleged by the prosecution had gone un-established as they failed to produce any supporting evidence in this regard and they have to bear the brunt thereof. Besides, the fatal injury, as discussed earlier, has not been attributed to the appellant-accused.

21. Insofar as recovery of pistol .30 bore P-8 at the instance of Riaz Hussain appellant-accused is concerned, Hashim Khan, PW-8 and Muhammad Nauman SI, PW-9 have been produced by the prosecution to establish the factum of the aforesaid recovery. The I.O./PW-9 has deposed that he had arrested the accused-appellant, obtained his physical remand who, on 03.04.2002 made a disclosure during investigation and thereafter led the police party and the PWs to his residential house and got recovered a pistol .30 bore P-8 wrapped in a polythene bag, lying in a room of the house which was taken into possession by the I.O. vide memo. Exh.PL attested by Hashim Khan PW-8 and Manzoor Hussain PW (not produced). The I.O. also prepared a site-plan Exh.PN qua the place of recovery. The Investigation Officer Muhammad Nauman, PW-9 inspected the place of occurrence, on 25.03.2002 and took into possession three crime empties P-1/1-3 vide recovery memo. Exh.PH attested by Sharaf Khan PW-7 and Muhammad Ashraf PW (not produced). According to the report of Forensic Science Laboratory, Lahore Exh.PP the scaled parcel of the crime empties was received in the said office on 03.04.2002, whereas the sealed parcel of the pistol was received by them on

22.04.2002. The report Exh.PP released by the above said lab shows that the above said crime empties had been fired through the pistol, got recovered by Riaz Hussain, the appellant. The aforesaid report though entails the points of similarities observed on crime and test empties yet it can hardly be taken into consideration for the reason that the appellant accused, according to the statement of Muhammad Nauman PW-9 was arrested on 01.04.2002 and three days thereafter, the prosecution decided to dispatch the parcel of the crime empties to the office of Forensic Science Laboratory, Lahore. What did they wait for till the arrest of the appellant-accused. It gives rise to a fair amount of doubt as to the delayed dispatch of the crime empties to the above said lab. The probability cannot be ruled out that the parcel of the crime empties had been dispatched to the above said office after having been tampered with so as to ensure the availability of a positive report. The evidence of recovery of the pistol P-8 is inconsequential, hence, brushed aside.

22. When we come to the case of Alam Sher, the respondent-accused in criminal Appeal No. 305 of 2006 we find that the conclusions drawn by the learned trial Court are cogent and plausible as both the eye-witnesses have been unable to connect him with the alleged occurrence and their statements qua his participation in the incident are divergent and at variance.

23. As discussed earlier the injury specifically attributed to the respondent-accused has not been described in the post-mortem examination report Exh. PC and the said injury has been mentioned by the Medical Officer as the exit wound. Alam Sher respondent-accused has earned double presumption of innocence, one, the basic principle of justice that everyone is innocent till proved otherwise and the other by way of the judgment of the trial Court.

24. To upset or alter a judgment of acquittal is not a routine affair nor it should be so done sparingly rather, exceptional grounds are required to interfere with such a finding of exoneration of an accused by a competent Court of jurisdiction which we are afraid, do not exist in the instant case. There may be a possibility, by keeping in view the objection raised by learned counsel for the complainant, qua the acquittal of Alam Sher, that another view was possible qua the guilt of the acquitted accused from the evidence on the record, in parallel to the view expressed by the learned trial Court but it does not suffice to create a justification for altering or upsetting the judicial verdict in favour of the said accused, as the law requires that no other view, except that of the guilt of the acquitted accused may necessitate the undoing of the judgment of acquittal. We do not find any justification or good reason for upsetting the impugned judgment qua acquittal of Alam Sher, which does not call for interference by this Court.

25. Same is the situation in respect of the appellant-accused as in his case too we do not find the impugned judgment to have been passed on conjectures or surmises. It does not suffer from non-reading or misreading of any evidence on the record. The ocular account we find as trustworthy, reliable and unfailing so far as the appellant-accused is concerned.

26. In this view of the matter and in the circumstances mentioned hereinbefore we are of the view that the sentence of imprisonment for life in case of Riaz Hussain appellant would meet the ends of justice, so, the death sentence awarded to him by the learned trial Court is converted to Imprisonment For Life accordingly, with benefit of Section 382-B, Cr.P.C. The sentence regarding payment of compensation amount to the legal heirs of the deceased, as recorded by the learned trial Court, shall remain intact. The Crl. Appeal No. 251 of 2006 is partly allowed/dismissed in aforementioned terms in respect of Riaz Hussain appellant.

27. The Murder Reference No. 501 of 2006 is rejected and answered in the NEGATIVE.

28. So far as Crl. Appeal No. 305 of 2006 filed by the complainant Mehr Bhari is concerned, we, for the foregoing reasons, do not find any substance therein and dismiss the same accordingly.

(A.S.) Appeal partly allowed/dismissed.

PLJ 2011 Cr.C. (Lahore) 994

[Rawalpindi Bench Rawalpindi]

Present: Shahid Hameed Dar, J.

RASHID IFTIKHAR--Petitioner

versus

STATE--Respondent

Crl. M. No. 1776-B of 2010, decided on 2.11.2010.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. Bail, grant of--Further inquiry--Involvement of petitioner in a number of criminal cases of the identical nature cannot dub him as hardened or a desperate criminal till he is shown to be a convict in any of the criminal cases--Mere factum of involvement in a number of criminal cases without conviction in any case, cannot impede grant of bail to the petitioner--Case of petitioner calls for further inquiry into his guilt within meaning of Section 497(2) Cr.P.C.--Bail admitted. [P. 996] A

Mr. Mehmood Akhtar Mughal, Advocate for Petitioner.

Malik Riaz Ahmad Saghla, DPG for State.

Date of hearing: 2.11.2010.

Order

The petitioner was arrested in this case under Section 54, Cr.P.C. on 05.03.2010. He underwent physical remand for 12 days and was dispatched to judicial lock up on 17.03.2010. During the course of his physical custody he led to the recovery of Rs. 10,000/- cash, a pistol and four live bullets on 08.03.2010.

2. Learned counsel for the petitioner submits that the petitioner is not nominated as an accused in the FIR; no test identification parade has been conducted in this case; despite having undergone 12 days physical remand no looted property was recovered from the possession of the petitioner; there is no direct or indirect connecting evidence on the record against the petitioner; the supplementary statement made by the complainant on 30.06.2010 does not offer any explanation as to why he remained tightlipped for a period exceeding three months; the petitioner is a previous non-convict and his case calls for further inquiry within the scope of Section 497(2), Cr.P.C.

3. Conversely, the learned DPG submits that the petitioner alongwith his co-accused had committed dacoity at the residential house of the complainant, who is a Major in Pak-Army and by rendering the inmates of the house hostages at gunpoint, looted valuables worth lacs of rupees and that they repeated the offence as they committed another occurrence of the identical nature at the residence of Major Daud-ur-Rehman; the prosecution witnesses in their statements under Section 161, Cr.P.C. supported the prosecution case as contained in the FIR; the petitioner got recovered Rs. 10,000/- cash, a pistol and four live bullets on 08.03.2010 during the course of physical remand; the complainant in his supplementary statement has averred that the accused-petitioner had admitted his guilt on 14.03.2010 at the Police Station wherein he confessed to have sold the looted gold ornaments to some goldsmiths and also named them; the petitioner has a history of involvement in as many as 13 criminal cases of identical nature and that he is a permanent menace to life and property of the public-at-large.

4. Arguments heard. Record perused.

5. It has been alleged by the complainant that he alongwith his wife returned to his house at about 1.00 p.m. on 30.01.2010 when they were overpowered by four unknown armed men who after making them hostages looted gold ornaments, cash and other accessories at gunpoint. He has further alleged that after ransacking his house the accused entered the mansion of Major Daud-ur-Rehman and committed another occurrence of dacoity in the same fashion. The detail of the occurrence as contained in the FIR necessitated the holding of the test identification parade in this case but the police, as usual showed gross indiligence and lethargy by not going for the said exercise. The supplementary statement of the complainant recorded by him on 30.06.2010 is inconsequential and hardly furnishes any evidence against the petitioner as he has alleged therein that the accused-petitioner had admitted his guilt before the Investigation Officer in his presence at the Police Station on 14.03.2010. He has not offered any explanation as to the period of taciturnity, which renders his supplementary statement, a nullity, which even, otherwise is not acceptable under any provision of law. The recovery of cash Rs. 10,000/- does not advance the case of the prosecution in any manner, as the allegedly recovered currency notes do not bear any distinctive marks and such an evidence could easily be managed by the prosecution during the course of investigation. The other recovery of the pistol and four live bullets is equally inconsequential as these articles can hardly be considered as the case property.

6. It has been held time and again by this Court as well as by the Apex Court of the country that a supplementary statement is a recent innovation, not recognized by law, which has been devised by incompetent, incapable and dishonest police officers to cut short the process of investigation without bearing in mind that such a short cut adopted by them is generally destructive to the case of the prosecution. A supplementary statement cannot be read as an integral part of the FIR and at the best, it has to be considered a statement recorded under Section 161, Cr.P.C.

7. The petitioner was arrested in this case as a suspect on 05.03.2010 and underwent physical remand for about 12 days but during the intervening period the police has failed to collect any connecting evidence against him, The involvement of the petitioner in a number of criminal cases of the identical nature cannot dub him as a hardened or a desperate criminal till he is shown to be a convict in any of the above-said criminal cases. Mere factum of involvement in a number of criminal cases without conviction in any case, cannot impede grant of bail to the petitioner. Reliance in this behalf is placed on Moundar and others v. The State (PLD 1990 SC 934). In the above circumstances, I find that the case of the petitioner calls for further inquiry into his guilt within the meanings of Section 497(2), Cr.P.C.

8. For what has been discussed above, I accept the instant application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail admitted.

2011 Y L R 72

[Lahore]

Before Shahid Hameed Dar, J

SAIMA GUL---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No. 1527-B of 2010, decided on 21st September, 2010.

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

----S.498---Penal Code (XLV of 1860), S.302/34---Qatl-e-amd---Pre-arrest bail, grant of---F.I.R. did not contain any incriminating material against the accused---Accused had been nominated as a suspect in the F.I.R. along with her real brother---Story given in the F.I.R. was self discrepant---Mere abscondence of account could not impede the grant of bail to her, when her guilt needed further probe within the meaning of S.497(2), Cr.P.C.---Accused being a lady, her case was also covered by the first proviso of S.497(1), Cr.P.C.---Mention of the name of accused in the F.I.R. as an accused registered for an offence entailing capital punishment, was not sufficient to deny her bail before arrest, when otherwise her case called for further inquiry---Differences between the parties were admitted---False implication of accused in the case due to malice and ulterior motives of the complainant, could not be ruled out---Ad-interim prearrest bail allowed to accused was confirmed in circumstances.

Muhammad Azam v. The State 1996 SCMR 71 and Muhammad Arshad and another v. The State and another 1996 SCMR 74 ref.

Miran Bux v. The State and another PLD 1989 SC, 347 rel.

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

----S.497(2)---Penal Code (XLV of 1860), 5.302/34--- Qatl-e-amd--- Bail--- Abscondence of accused---Effect---Mere absondence of accused cannot impede the grant of bail to an accused, if his case is open to further inquiry into his guilt within the scope of S.497(2), Cr.P.C.

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

----S.498---Penal Code (XLV of 1860), S.302/34---Qatl-e-amd---Pre-arrest bail---Scope---Concession of bail before arrest is though exceptional in nature with a limited scope as compared to bail after arrest, yet it can be validity granted to an accused, regardless of the charge against him, if his case needs further inquiry within the meaning of S.497(2), C.P.C.

Miran Bux v. The State and another PLD 1989 SC ref.

Malik Tahir Mahmood for Petitioner.

Abdul Jabbar Awan, for the Complainant.

Sh. Muhammad Munir, Deputy Prosecutor-General and Muhammad Riaz, S.-I. for the State.

ORDER

SHAHID HAMEED DAR, J.--Petitioner Mst. Saima Gul daughter of Sher' Zaman seeks pre-arrest bail in case F.I.R. No. 3 of 2010, dated 2-1-2010 under section 302/34, P.P.C. registered

at Police Station Wah Cantt. District Rawalpindi on the complaint of Shahzad Elahi.

2. Precisely, the case of the prosecution as contained in the F.I.R. is that Mst. Farhat Yasmeen the sister of the complainant was married with Babar Hussain in year, 2000, two daughters were born out of the wedlock; Babar Hussain contracted second marriage with Saima Gul (Petitioner) through courtesy of one Jahangir; about two months prior to the instant occurrence, certain differences crept up between Babar Hussain and his second wife Mst. Saima Gul (petitioner), so he rejoined his first wife and started living with her; Babar Hussain, Jahangir and Malik Tariq were friends and used to commit crimes especially pick-pocketing; Jahangir and Malik Tariq took Babar Hussain with them from his house on 29-12-2009 in presence of his first wife Mst. Farhat Yasmeen; Babar Hussain informed the complainant telephonically on 1-1-2010 that he was the company of Jahangir etc., and needed some clothes which be supplied to him at a particular place; the complainant waited for Babar Hussain at the said place, as told by him, but he did not turn up; the complainant received a telephone call in the evening of 1-1-2010 that Babar Hussain had suffered a massive heart attack and his dead body was lying in a Hospital at Wah Cantt. whereupon, the complainant along with others reached the said Hospital and found the dead body of Babar Hussain his "Behnoi", lying in the hospital; he showed suspicion that accused Jahangir and rnalik Tariq, being in league with Mst. Saima Gill (petitioner) and her brother Jamshaid, had committed the murder of Babar Hussain either by throttling him or by administering him poison. The motive behind the occurrence was that Babar Hussain had contracted second marriage with Mst. Saima Gul (petitioner), courtesy Jahangir etc. but he was displeased with his second wife for the last two months, and that Saima Gul etc., had extended him threats of murder.

3. Learned counsel for the petitioner submits that the petitioner has been falsely implicated in this case due to malice and ulterior motives of the complainant; there is no direct or indirect incriminating evidence against the petitioner and she has been falsely roped in this case due to mala fide intention of the complainant; mere mentioning the name of the petitioner in the F.I.R. cannot disentitle her to grant of bail as the prosecution has failed to produce any connecting evidence against her during the course of investigation; the deceased was involved in criminal activities so, she, being displeased, got published an advertisement of ostracism in this regard in the newspapers almost a year before the occurrence; the F.I.R. is self discrepant and the complainant has admitted in the F.I.R. that the deceased having developed differences with the petitioner's had been living with his first wife for a period of two months, prior to the occurrence; lastly submits that the case of the petitioner falls within the ambit of further inquiry as envisaged under section 497(2), Cr.P.C.

4. On the other hand, learned DPG assisted by the learned counsel for the complainant has strenuously opposed the grant of bail to the petitioner with the contention that the petitioner is specially nominated in the F.I.R. with the allegation that she had abetted her co-accused to murder Babar Hussain deceased; the petitioner is an absconder and being a fugitive from law, she had lost some of her legal rights guaranteed by the substantive as well as the procedural law; the petitioner has not joined the investigation and has misused the concession of bail; the petitioner has committed a heinous offence which catches the prohibition of section 497, Cr.P.C., therefore, she is not entitled for the relief as prayed for reliance has been placed on Muhammad Azam v. The State (1996 SCMR 71) and Muhammad Arshad and another v. The State and another (1996 SCMR 74).

5. I have heard the learned counsel for the parties and perused the record.

6. I have gone through the text of the F.I.R. minutely but have failed to find any incriminating material against the petitioner except, that she has been nominated as a suspect in the F.I.R. along with her real brother Jamshaid. The story of the F.I.R. is self discrepant and mainly revolves around the fact that after having contracted second marriage with Mst. Saima Gul (petitioner), Babar Hussain deceased developed differences with her and started living with his first wife, about two months prior to the alleged occurrence. It has been contended by the learned counsel for the complainant that, Babar Hussain deceased was a pick-pocket and he in the cahoots of Jahangir and Malik Tariq, oftenly committed the above-said offence jointly. There is no cavail to the fact that an accused who absconds after the occurrence and opts to be a fugitive from law would normally lose some of his normal rights udder the substantive as well as the procedural law, but the fact remains that mere abscondence cannot impede the grant of bail to an accused if his case is open to further inquiry into his guilt, within the scope of section 497(2), Cr.P.C.

7. The concession of bail before arrest is though exceptional in nature and its scope has been held to be limited as compared to bail after arrest yet, it can be c validly granted to an accused, regardless of the charge against him, if his case is open to further inquiry into his guilt within the meaning of section 497(2), Cr.P.C. I am fortified in my view while rely upon a glittering judgment of the august Supreme Court of Pakistan, reported as Miran Bux v. The State and another (PLD 1989 SC 347), wherein the august Supreme Court has confirmed the ad interim pre-arrest bail of Miran Bux, petitioner in a murder case after having found the case of the petitioner falling within the definition of section 497(2), Cr.P.C. The petitioner is a lady whose case is also covered by the 1st proviso to section 497, Cr.P.C. Mere mentioning of name of the petitioner in the F.I.R. as an accused, registered for an offence entitling capital punishment, cannot be deemed as a circumstance to deny her bail before arrest when he case otherwise calls for further inquiry. The differences between the parties is an admitted fact. The complainant, being the real brother of the first wife of Babar Hussain deceased was naturally possessed with bias and heart burning against the accused-petitioner as she had up-set the matrimonial life of his real sister Mst. Farhat Yasmeen who was the 1st wife of the deceased. Prima facie, there are reasonable grounds to believe that the petitioner has not committed any non-bailable offence and her case is open to further probe into her guilt. Her false implication in the instant case, due to malice and ulterior motives of the complainant cannot be ruled put.

8. For the foregoing reasons, I accept this petition and confirm the ad-interim pre-arrest bail, allowed to the petitioner on 6-9-2010 subject to furnishing fresh bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of the trial Court.

9. Before parting with this order it is clarified that the petitioner shall keep on joining the investigation in this case as and when required by the I.O. and if she hesitates in joining the same, prosecution shall be at liberty to lodge a request before this Court for recalling the instant bail granting order.

N.H.Q./5-190/L Pre-arrest bail allowed.

2011 Y L R 517

[Lahore]

Before Shahid Hameed Dar, J

SAMIULLAH---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No. 1836-B of 2010, decided on 23rd November, 2010.

Criminal Procedure Code (V of 1898)---

---S.497(2)---Penal Code (XLV of 1860), Ss.379 & 411---Theft, dishonestly receiving stolen property---Bail, grant of---Vehicle carrying the stolen electric transformer had been intercepted by the police on a barrier---Accused who was driving the vehicle was hauled up along with his co-accused there and then by the police---Complainant and other prosecution witnesses in their sworn affidavits had categorically admitted the plea of accused of his being a driver of the vehicle--Presence of two WAPDA employees, co-accused, at the time of occurrence might have given an impression to the accused that they were authorized to de-install the transformer and shift the same to some other place---Such a situation had, prima facie, constituted a need for further inquiry into the guilt of accused within the scope of S. 497(2), Cr.P.C.---Accused was admitted to bail in circumstances.

Shaukat Rauf Siddiqui for Petitioner.

Malik Riaz Ahmad Saghla, D.,P.-G. with Muhammad Hussain, S.-I.

ORDER

SHAHID HAMEED DAR, J.---Sami Ullah, petitioner was arrested by the police on 23-9-2010 in connection with case F.I.R. No.359, dated 23-9-2010, under sections 379/411, P.P.C., registered at Police Station Kahuta, District Rawalpindi, on the complaint of Muhammad Farooq.

2. Briefly, the prosecution case as contained in the F.I.R. is, that the complainant along with others had installed an electric transformer valued at Rs.2,25,000 for supply of water to the co-villagers which was stolen by some unknown accused; on receiving this information, the complainant along with other members of Water Supply Committee, reached the place of occurrence at 8-00 a. m. on 23-9-2010 and found the abovesaid transformer having been stolen; in the latter half of the F.I.R. it has been alleged by the complainant that he along with others searched for the removers of the transformer and through their personal probe they learnt that Muhammad Waqas, an employee of Wapda, Asad Wasim, Nadeem, Shahzad, Sami Ullah (petitioner) and Anjum Nawaz, all residents of Kahuta had committed the theft of

the transformer, being in league with Muhammad Waqas, another Wapda employee and that they had taken away the transformer by loading it on a dumper/vehicle TKV-175. The complainant hinted at another allegation qua theft of electric cable worth Rs.70,000 and he showed his suspicion against the above-said accused.

3. The police intercepted a dumper/ vehicle TKV-175 on 23-9-2010 at Bhoon Road, Link Rawalpindi-Kahuta Road wherein the stolen transformer was loaded and the accused-petitioner along with his above-named co-accused was seated therein.

4. Muhammad Farooq-complainant, Muhammad Fazal-P. W, Muhammad Ayub Chaudhry-PW and Ch. Muhammad Shafat P.W. have submitted their sworn affidavits contending therein that Sami Ullah petitioner was the driver of the dumper TKV-175, and that his co-accused Anjum Nawaz was the conductor of the said vehicle. They have further deposed that they had no objection to the acceptance of the bail application of the petitioner and his consequential release on bail. Their affidavits mark 'A' to mark 'D' are placed on the record.

5. Learned counsel for the petitioner submits that there is an inordinate delay of 24 hours in lodgment of the F.I.R. and the complainant has not offered any plausible explanation in this regard; section 379, P.P.C. is punishable with imprisonment of three years and does not catch the prohibitory provisions of section 497, Cr.P.C.; the evidence regarding recovery of the transformer is not admissible as the record prepared by the police shows a joint recovery at the instance of all the accused mentioned in the F.I.R.; the petitioner was a driver of the above-said vehicle and in presence of some Wapda officials he could not suspect the intent and credentials of the accused who paid him the rent to transfer the aforesaid electric gadget to some other place; the petitioner is a non- convict and has not been involved in any criminal case in the past; the investigation stands completed and he is no more required for the purpose of further investigation.

6. Conversely, learned D.P.-G. opposed the grant of bail to the petitioner but has done so in a lukewarm manner because of the affidavits submitted by the above-named deponents.

7. I have heard the learned counsel for the parties and perused the record. The complainant and the above-said prosecution witnesses have contended in their sworn affidavits mark 'A' to mark 'D' that the accused-petitioner was the driver of the vehicle/dumper No.TKV-175 and his co-accused Anjum Nawaz was the conductor of the said vehicle. Muhammad Waqas, co-accused is a Wapda employee whereas Asad Wasim co-accused was an ex-Wapda official. According to the investigation conducted by the police both Muhammad Waqas and Asad Wasim had got de-installed the above-said transformer in the company of their co-accused, loaded it on the dumper, driven by the accused-petitioner and took it away. They were on way to a certain destination when their vehicle was intercepted by the police on a barrier/blockade. The accused petitioner and his co-accused were hauled up by the police then and there and the stolen transformer was taken into custody by the police through a recovery memo. While disallowing the bail application of the co-accused of the petitioner on 22-10-2010, it was observed by this Court that accused Anjum Nawaz had failed to hint at any evidence as to his contention of being conductor of the above-said vehicle. The situation has undergone a change in view of the statements of Muhammad Farooq and those of the other P.Ws. who have categorically admitted as to the plea of the accused, being the driver of the above-said vehicle. The presence of the above-said Wapda employees at the time of the

alleged occurrence might have been taken as a circumstance by the petitioner that they F being officials of Wapda were authorized to dc-install the transformer and shift the same to some other place. In this situation, the case of the petitioner, prima facie, constitutes need for further inquiry into his guilt within the scope of section 497(2), Cr.P.C.

8. For what has been discussed above, the instant application is allowed and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

N.H.Q. /S-243/L Bail allowed.

2011 YLR 540

[Lahore]

Before Shahid Hameed Dar, J

SALIM DAD KHAN---Petitioner

Versus

GHULAM MUHAMMAD and others---Respondents

Criminal Miscellaneous No. 1682-B of 2010, decided on 14th October, 2010.

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

----S.497---Penal Code (XLV of 1860), Ss.420/ 468/ 471--- Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document---Bail, refusal of---Offence under S.420, P.P.C. being cognizable, non-cognizable offences under Ss. 468 & 471, P.P.C. could be lawfully investigated by the police in the presence of S.420, P.P.C., . without seeking prior permission of the Magistrate---Accused had no respect for the decorum of the court, as he in the absence of the original registration book had presented a bogus registration book before the Sessions Courts for taking the vehicle on "superdari" fradulently---Accused, thus, did not deserve any leniency despite the offences alleged against him were not hit by the prohibitory clause of S.497(1), Cr.P.C.---Accused would not become invariably entitled to grant of bail as a matter of right in every case not falling under the said prohibition---Abscondance of accused after the occurrence had disentitled him to some of his normal rights guaranteed under the substantive as well as procedural law---Complete challan having submitted in the Court, trial of accused was likely to commence---Bail was declined to accused, in circumstances.

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

----S.497---Bail---Offence not falling within the prohibitory clause of S.497(1), Cr. P. C. ---Law does not provide that an accused shall become invariably entitled to grant of bail as a matter of right in every case not falling under the prohibitory clause of S.497(1), Cr. P. C.

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

----S. 497---Bail---Abscondance---Effect---Absconder would lose some of his normal rights guaranteed under the substantive as well as procedural law.

Muhammad Tahir Khan for Petitioner.

Malik Riaz Ahmad Saghla, D.P.G. Muhammad Usman S.-I.

ORDER

SHAHID HAMEED DAR, J.--Seeks bail after arrest in case F.I.R. No.155 of 2010 under sections 420, 468, 471, P.P.C. registered at Police Station; Attock Khurd, on the complaint of Ghulam Muhammad S.-I.

2. Briefly the prosecution case is that the petitioner applied for seeking superdari of vehicle No.LXA 5113, the case property of case FIR No.126 dated 27-5-2010 under section 9-B C.N.S.A., Police Station, Attock Khurd and produced the registration book thereof before the court of learned Additional Sessions Judge, Attock, in respect of his claim which was got verified and the Excise and Taxation Department Rawalpindi reported that the said document was bogus/fake; the learned Sessions Judge, Attock on receipt of the above-said report ordered for registration of a criminal case against the petitioner, hence, the instant case.

3. Learned counsel for the petitioner contends that the petitioner has been falsely implicated in this case due to some misconception and confusion qua the facts, as the petitioner had produced the original registration book before the court at a later stage; offence under sections 420, 468, P.P.C. are non-cognizable and section 420, P.P.C. is bailable; the investigation stands completed and the petitioner is no more required for the purpose of further investigation.

4. On the other hand learned Deputy Prosecutor-General submits that a specific allegation of committing the offence of forgery and knowingly using the forged documents as genuine, has been alleged against him and there is sufficient evidence on the file to connect the petitioner with the said allegations; the petitioner is a desperate person who conspired and attempted to cheat a court of law, hence, he may not be released on bail; the petitioner absconded after the occurrence and proceedings under section 87 Cr.P.C. were conducted against him on 6-9-2010 so he may not be released on bail.

5. Arguments heard. Record perused.

6. It has been alleged against the petitioner that he, in a dare devil manner, presented a bogus registration book before the learned ASJ, Attock for seeking superdari of the vehicle in question which was got verified by the court, through the Excise and Taxation Department, Rawalpindi and it has been reported by the said office that the registration book, presented by the petitioner was fake. The petitioner later on changed his version that the previous owner of the said vehicle had handed down the original registration book of the vehicle to him and that he possessed the same being the exclusive owner of the vehicle, but, it cannot absolve the petitioner of the liability of having committed the offence under the aforesaid penal provision of law.

7. The objection raised by the learned counsel for the petitioner that offences under sections 468, 471, P.P.C. being non cognizable could not be investigated by the police without

fulfillment of requirement of section 155(2), Cr.P.C, is devoid of any force as section 420, P.P.C. is cognizable and in presence of a cognizable offence, the non-cognizable offences can be lawfully investigated by the police, without seeking prior permission of the magistrate. The petitioner has shown through his conduct that he has scant respect for the decorum of the courts as he in absence of original registration book ventured into presenting a bogus dozier/document before the court of law, to earn a favourable order fraudulently. The petitioner in the attending circumstances of this case does not deserve any leniency notwithstanding the arguments of the learned counsel for the petitioner that the offence alleged against the petitioner does not fall under the prohibitory clause of section 497, Cr.P.C. It has not been provided anywhere in the statute book that an accused shall become invariably entitled to grant of bail as a matter of right in every case, not falling under the prohibitory clause of section 497 Cr.P.C. The conduct of the accused has rendered him disentitled to grant of bail in the instant case for the reasons mentioned hereinbefore.

8. The petitioner absconded after the occurrence and was arrested by the police on 7-9-2010 and in the meanwhile a report under section 512, Cr.P.C. had been submitted against the accused before the court concerned after fulfillment of requirement of section 87, Cr.P.C. An absconder would lose some of his normal rights guaranteed under the substantive aswell as ordinary/procedural law. The police, after completion of investigation, filed complete challan under section 173, Cr.P.C. against the petitioner on 13-9-2010 which shows that the commencement of the trial of the accused is on the cards.

9. For what has been discussed above, I am not inclined to accept this application which, accordingly stands dismissed.

10. The learned trial Court is directed to accelerate the proceedings of the trial and conclude the same within four months from the date of receipt of order of this Court.

N.H.Q./S-213/L Bail refused.

2011 Y L R 558

[Lahore]

Before Shahid Hameed Dar, J

Syed SHAFIQUE HASSAN---Petitioner

Versus

MUHAMMAD SHOAIB ABBASI and others---Respondents

Criminal Miscellaneous No. 327-BC of 2010, decided on 19th October, 2010.

Criminal Procedure Code (V of 1898)---

----S.497(5)---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Bail, cancellation of---Accused owed Rs.4,50,000 to the complainant and he had issued two cheques of the said amount to the complainant, which had been bounced by the Bank on presentation---Pre-arrest bail had been allowed to accused by High Court on the condition that he would pay the whole amount to the complainant in 18 equal instalments of Rs.25,000 each according

to the schedule agreed to by him---After having paid four instalments to the complainant hesitantly, accused defaulted thereafter and became untraceable notwithstanding the issuance of non-bailalbe warrants of arrest against' him---Accused had misused the concession of pre-arrest bail and the same was recalled in circumstances.

Ch. Riaz Ahmad Hussain for Petitioner.

Malik Riaz Ahmad Saghla, D.P.G. with M. Hayyat, S.-I. and Sikandar, A.S.-I. with record.

Nemo for respondents.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Shoaib Abbasi, the respondent-accused was allowed bail before arrest vide order dated 26-1-2010, passed by this Court mainly on the ground that he had pledged to reimburse an amount of Rs. 4,50,000 to the complainant-petitioner in 18 installments of Rs. 25,000 each, per month and that the first installment was bound to be paid by him by February 10, 2010 while the last installment was payable by him till July 10, 2011. It was however, observed by this Court in the bail granting order that the complainant shall be at liberty to ask for cancellation of bail of the accused, if he would default in the payment of the installments, as mentioned above.

2. The respondent-accused adhered to the said charter of payment of installments to the complainant till May, 2010 and disrupted this sequence thereafter. Hence the instant cancellation of bail petition.

3. The respondent-accused appeared before this Court through his counsel on 24-5-2010 and submitted that he would pay the installment of Rs. 25,000 for the month of April, 2010 to the complainant on that very day and the installment for the month of May, 2010 would be paid by him within a fortnight and reiterated his version that the remaining installments would be defrayed by him regularly. The proceedings were adjourned to 8-6-2010 and on the said date, the respondent-accused made payment of another installment of Rs. 25,000 to the complainant for the month of May, 2010 and gave word that the installment for the month of June, 2010 shall be paid by him within a few days.

4. The respondent-accused did not turn up on 14-9-2010 and also failed to appear on 29-9-2010, so in order to procure his presence, bailable warrants of arrest were issued against him on 29-9-2010 for the next date of hearing and the proceedings were adjourned to 7-10-2010. The respondent-accused did not appear again on .7-10-2010, so his non-bailable warrants of arrest were issued to procure his presence. In the meanwhile, learned District and Sessions Judge, Rawalpindi submitted a report to the effect that father of the respondent-accused had met the Process, Server and informed him that he had ostracized his son, Muhammad Shoaib Abasi, being disobedient and had also disinherited him, so he knew not his whereabouts.

5. The learned Sessions Judge, Rawalpindi vide memo. No. 4937/WS.I, dated 19-10-2010 has submitted another report qua non execution of non-bailable warrants of arrest of the respondent-accused with the identical remarks that the father of the respondent-accused had ostracized his son, Muhammad Shoaib Abbasi and that he had wilfully concealed himself at some un-known place to avoid his arrest. As there is no probability of appearance of the

respondent-accused before this Court who has maliciously gone into hideout to evade his liability so no other option is left but to decide the instant petition in the prevalent circumstances.

6. Learned counsel for the petitioner submits that the respondent-accused had categorically submitted before this Court to discharge his liability of making payment of Rs. 4,50,000 to the complainant in 18 equal installments of Rs. 25,000 apiece, per month and thereby succeeded in fetching extraordinary relief of pre arrest bail on 26-1-2010 but he has failed to keep his promise so as per concluding observation of this Court, the pre-arrest bail allowed to the respondent-accused may be re-called.

7. Learned Deputy Prosecutor-General has also endorsed the submissions of the learned counsel for the petitioner and adds that the accused by showing scant respect to the order of this Court has rendered himself for a penal action against him.

8. I have heard the learned counsel for the petitioner as well as the learned Deputy Prosecutor-General and find that the petitioner who is an accused of case F.I.R. No. 619 of 2009 dated 3-12-2009 under section 489-F, P.P.C. registered at Police Station Banni owed Rs. 4,50,000 to the complainant-petitioner and he issued two cheques to the complainant for the equal amount which were bounced by the bank for sufficiency of funds. After dismissal of his pre-arrest bail application by the Sessions Court concerned, he applied for the same relief through Criminal Miscellaneous No. 23-B of 2010 which was allowed by this Court on 26-1-2010 on the assurance of the petitioner that he would pay the whole amount to the complainant in 18 equal installments of Rs.25,000 each and pay one installment per month to the complainant by 10th day of every month till July, 2011. He hesitantly delivered four installments to the complainant, as mentioned hereinbefore but defaulted thereafter and slipped away, not to be traced again, notwithstanding the issuance of non-bailable warrants of arrest against him. By his conduct, the respondent- accused has given a clear message that he had decided to chew his words and was not prepared to follow the above-noted schedule of payment. He has clearly misused the concession of pre-arrest bail which was allowed to him by this Court on 26-1-2010 under certain conditions, as mentioned above. Therefore, the bail granting order dated 26-1-2010 is recalled, the respondent-accused shall be arrested by the police and remitted to judicial custody.

9. Separate proceedings under section 514, Cr.P.C. be conducted by the learned trial Court, against the surety of the respondent-accused. The petition stands accepted.

N.H.Q./S-214/L Pre-arrest bail cancelled.

2011 Y L R 863

[Lahore]

Before Shahid Hameed Dar, J

ABDUL SATTAR---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No.1985-B of 2010, decided on 1st December, 2010.

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

----S. 497(2)---Penal Code (XLV of 1860), S.489-F---Dishonouring of cheque---Bail, refusal of---Car in question was purchased by the petitioner/accused from the complainant and instead of making payment of the consideration amount, he issued the cheques in questioning the name of the complainant knowing that he did not have sufficient funds to meet with the face value of the same---If an offender dishonestly issued cheque towards repayment of loan; or fulfilment of a legal obligation knowingly; that it would be bounced on presentation, would be deemed to have committed an offence within the scope of S.489-F, P.P.C.---If accused would adopt the plea that he had sufficient funds for encashment of the cheque issued by him, the burden to prove the same would be upon accused---Cheques in question had been bounced mainly for the reason that the funds in the relevant account were not sufficient---Having dishonestly issued the cheques in regular intervals with mala fide intention; and being in knowledge that sufficient funds were not available, accused had proved himself to be a habitual offender---Contention of counsel for accused was that offence against accused being punishable with imprisonment of three years, same did not fall within the prohibitory clause of S.497, Cr.P.C.; and should be deemed as a bailable offence as in such like offences, the grant of bail was a rule and rejection thereof an exception---Said contention could not be entertained---Prosecution case against accused brimmed with incriminating connecting evidence; and he had committed a non-bailable offence falling outside the scope of further inquiry as contemplated under S. 497(2), Cr.P.C.---Bail was declined.

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

----S.497(2)---Bail, grant of---Principles---Further inquiry---Accused, notwithstanding the punishment of imprisonment not falling under the prohibitory clause, of S.497, Cr.P.C. could not be admitted to bail as a matter of right, overlooking the attending facts and circumstances of the case---For seeking bail in a non-bailable offence, it was incumbent that accused would establish, though prima facie, the fact, that his case was open to further inquiry within the meaning of S. 497(2), Cr.P.C.

Shameel Ahmad v. The State 2009 SCMR 174 ref.

Muhammad Ilyas Siddiqui for Petitioner.

Raja Rizwan Abbasi for the Complainant.

Muhammad Nazir Abbasi, Standing Counsel.

Ishtiaq Ahmad, S.-I. along with the record.

ORDER

SHAHID HAMEED DAR, J.---Abdul Sattar, petitioner seeks bail after arrest in case F.I.R. No.595, dated 9-10-2010, for the offence under section 489-F, P.P.C., registered at Police Station, Margala, Islamabad on the complaint of Raja Muhammad Sabeel Abbasi.

2. Precisely, the prosecution case as stated by the complainant is that the petitioner issued four cheques to the complainant in the backdrop of purchase of a car Suzuki Liana, Model 2006 for Rs.9,00,000 which were presented by the complainant before the bank concerned for encashment on three different dates and the above-said cheques were bounced for insufficiency of funds. Hence the instant case.

3. Learned counsel for the petitioner submits that the petitioner has been falsely roped in this case with a cooked up version of the complainant and the allegations alleged are patently false, the petitioner had filed a civil suit for Rendition of Accounts against the complainant earlier then the registration of the above-said F.I.R. wherein it has been contended by the petitioner, being the plaintiff, that the complainant Raja Muhammad Sabeel Abbasi despite having received advance Cheques had failed to handover the original documents of the vehicle to the petitioner/ plaintiff, the complainant had issued a receipt, duly signed by him and the petitioner, showing that the monetary dispute between the parties stood resolved the offence with which the petitioner is charged is punishable with imprisonment of three years or with fine which does not fall within the prohibition of section 497 Cr.P.C. and grant of bail in such like offence is a rule the petitioner's case in view of the attending circumstances, is open to further inquiry within the scope of section 497(2), Cr.P.C.

4. Conversely, learned standing counsel assisted by the learned counsel for the complainant has opposed the instant bail petition with the contention that the petitioner had purchased a car, Suzuki Liana for Rs.9,00,000 from the complainant who runs a car showroom with the name and style of "Akash Motors"; the petitioner did not pay the consideration amount to the complainant and instead issued three cheques, one after the other with intermissions; the complainant firstly presented the cheque of Rs.4,00,000. for encashment before the bank on 26-8-2010 which was returned unpaid by the bank due to insufficiency of funds, second cheque of Rs.3,00,000 was presented before the bank on 31-8-2010 which also met the same fate, coupled with the fact that the drawer had ordered "stop payment" of the same, the last cheque of Rs.2,00,000 was presented before the bank on 31-10-2010 but no funds were available in the drawee's account and it was also returned un-enchased by the bank; the petitioner has repeated the offence fearlessly without caring for the consequence of his criminal act so by his contumacious behavior, he seems to be a habitual offence, the receipt relied upon by the petitioner pertains to a Honda Car whereas the dispute in the instant F.I.R. relates to the purchase of a car, Suzuki Liana; the civil suit was instituted by the petitioner much later than the application moved by the complainant before the S.P. Islamabad for registration of a criminal case against him, so the institution of the civil suit exhibits the dishonesty and mala fide intention of the petitioner : lastly, submits that the petitioner may not be released on bail notwithstanding the fact that the offence does not fall within the prohibitory clause of section 497, Cr.P.C. as his case is not open to further inquiry.

5. Arguments heard. Record perused.

6. The petitioner himself has admitted in the civil suit for cancellation, rendition of accounts and permanent injunction, filed against Raja Muhammad Sabeel Abbasi, the complainant that he, (plaintiff) had purchased the following vehicles from the defendant/complainant (Raja Muhammad Sabeel Abbasi):

(i) Mitsubishi Lancer for Rs.3,50,000

(ii) Suzuki Liana for Rs.9,00,000

(iii) Vitz for Rs.11,50,000

The Suzuki Liana appearing at Serial No.2 is the car in question which had been purchased by the petitioner for a sum of Rs.9,00,000 from the complainant and instead of making payment of the consideration amount, he issued the above said cheques in the name of the complainant knowingly that he did not have sufficient funds to meet with the face value of the same. If an offender dishonestly issues a cheque towards repayment of loan or fulfillment of a legal obligation knowingly that it shall be bounced on presentation, shall be deemed to have committed an offence within the scope of section 489-F, P.P.C. and if the accused adopts the plea that he had sufficient funds for encashment of the cheque issued by him, the burden to prove the same, will be upon the accused. I have gone through the objection memos issued by the bank which indicate that the above-said cheques had been bounced mainly for the reason that the funds in the relevant account were insufficient. Having dishonestly issued the above-said cheques in regular intervals with mala fide intention and being in knowledge that sufficient funds were not available, the petitioner has proved himself to be a habitual offender.

7. The submission made by the learned counsel for the petitioner that the offence being punishable with imprisonment of three years, does not fall within the prohibitory clause of section 497, Cr.P.C. should be deemed as a bailable offence as in such like offences, the grant of bail is a rule and rejection thereof an exception, I am afraid, cannot be entertained. I advantageously rely upon "Shameel Ahmad v. The State" (2009 SCMR 174), and observe that an accused notwithstanding the punishment of imprisonment, not falling under the prohibitory clause, cannot be admitted to bail as a matter of right overlooking the attending facts and circumstances of the case. For seeking bail in a non-bailable offence, it is incumbent that the accused shall establish though prima facie, the fact that his case is open to further inquiry within the meaning of section 497, (2), Cr.P.C. The prosecution case against the petitioner brims with incriminating connecting evidence and he obviously has committed a non-bailable c offence, falling outside the scope of further inquiry as contemplated under the above-said provision of law.

8. For the foregoing reasons, the instant bail petition is dismissed.

H.B.T./A-3/L Bail refused.

2011 YLR 911

[Lahore]

Before Shahid Hameed Dar, J

Malik MASOOD AKHTAR---Petitioner

Versus

THE STATE-Respondent

Criminal Miscellaneous No.1717-B of 2010, decided on 30th November, 2010.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss.406 & 420---Criminal breach of trust and cheating---Pre-arrest bail, confirmation of---Matter in the case pertained to a pecuniary dispute between the parties who had decided to resolve the matter amicably; and for that purpose they had entered into an agreement whereby certain conditionalities and modalities had been settled between the parties for resolution of the dispute---Both the parties had shown their desire and intention to abide by the terms of the agreement--Complainant appeared to be fully satisfied with the current state of affairs---Accused had also expressed his intention and bona fide to stick to the pledges made by him in the agreement deed---Compromise was always considered as a redeeming feature---Once, the parties had decided to resolve their dispute amicably through negotiations, it would not be desirable that the court should assume the role of a prosecutor and compel the parties to continue with their hostilities---Accused's pledge to abide by the terms and conditions of the agreement had entitled him to grant of relief prayed for---Ad interim pre-arrest bail allowed to accused, was confirmed, in circumstances.

Malik Tahir Mehmood for Petitioner.

Pervez Khan Minhas for the Complainant.

Malik Riaz Ahmad Saghla, D.P.-G.

Ghulam Muhammad A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---At the very outset learned counsel for the petitioner submits that a compromise has been effected between the parties and the terms/conditions thereof have been reduced into writing in an agreement deed which has been duly signed/thumb marked by the petitioner as well as by the complainant. Further submits that the complainant is satisfied with the conditionalities of the compromise and he does not oppose the grant of pre-arrest bail to the petitioner; the compromise being a redeeming feature may be allowed to be acted upon by both the sides and the ad-interim pre-arrest bail allowed to the petitioner on the basis of compromise may be confirmed.

2. On the other hand learned Deputy Prosecutor-General in view of the compromise between the parties does not oppose the grant of bail to the petitioner and adds that the compromise brings harmony and coherence in the society so he goes with it.

3. Learned counsel for the complainant has also shared the submissions raised at the bar by the learned counsel for the petitioner and submits that the complainant is satisfied with the essence of the compromise and he rightfully hopes that the conditions, entailed in the agreement deed shall be fulfilled by Malik Masood Akhtar, the petitioner in due course of time with sincerity and seriousness.

4. Zahir Shah complainant is also in attendance who too endorses the contentions of his learned counsel by submitting that he is satisfied with the arrangement of payment of the

amount in question as well as with the terms, agreed upon by the petitioner, for repatriation of the vehicle LRJ-2134 to him within the scope of the text of the dozier.

5. Arguments heard. Record perused.

6. Zahir Shah, complainant has alleged in the F.I.R. No.614 of 2010 dated 15-7-2010 under sections 406, 420 P.P.C. registered at Sadiq Abad, District Rawalpindi that he had purchased a vehicle Hiace No.LRJ-2134 in consideration of, Rs:7,20,000 from Fasihuddin and got the custody thereof vide an agreement deed whereby the complainant contended to have paid Rs.3,70,000 to the vendor and thereafter he made payment of Rs.1,50,000 to one Malik Naveed as the original registration hook was in his possession; the complainant employed Malik Naveed as a driver of the said vehicle but the relations between them became strained as Malik Naveed allegedly got the above said vehicle caught up by the police of Police Station New Town under section 550, Cr.P.C. with a mala fide intention; Malik Masood Akhtar (petitioner) father of Malik Naveed obtained the above said vehicle on superdari and thereafter it could not be found again by the complainant so he with the aforesaid version got the F.I.R. lodged against the petitioner.

7. The matter pertains to a pecuniary dispute between the aforesaid parties who now have decided to resolve the matter amicably and for this purpose they have entered into an agreement as shown in agreement deed Mark-A whereby certain conditionalities and modalities have been settled between the parties for resolution of the dispute. Both the parties have shown their desire and intention to abide by the terms of the agreement and Zahir Shah, the complainant appears to be fully satisfied with the current state of affairs and Malik Masood Akhtar, the petitioner has also expressed his intention and bona fide to stick to the pledges made by him in the agreement deed. The compromise has always been considered a redeeming feature by this court. Once, the parties have decided to resolve their disputes amicably through negotiations it shall not be desirable that the court should assume the role of a prosecutor and compel the parties to continue with their hostilities. The petitioner's pledge to abide by the aforesaid terms and conditions of the agreement has entitled him to grant of relict prayed for.

8. For the foregoing reasons I accept this application and confirm the ad-interim pre-arrest bail allowed to the petitioner on 8-10-2010 provided he furnishes fresh bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of learned trial Court.

9. Before parting with this order it is clarified that Zahir Shah, complainant has a right to ask for cancellation of bail allowed to the petitioner if he shows hesitation in complying with the commitments made by him vide agreement deed Mark-A which is placed on the record.

H.B.T./M-5/L Bail confirmed.

2011 YLR 918

[Lahore]

Before Shahid Hameed Dar, J

MUJTABA-UL-HAQ---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No.1880-B of 2010, decided on 8th November, 2010.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.420, 467, 468 & 471---Cheating, forgery, using as genuine a forged document---Bail, refusal of---Rescission of power of attorney---Accused was aged 19 years and a student of M.B.A. on the day of attestation of sale-deed by the attorney in favour of his mother---Accused, in circumstances, could not agitate that he was oblivious of the rescission of the power of attorney, which had been attested in favour of his father in the year 1972---Even otherwise, ignorance of law was no excuse---Accused, after being nominated as an accused in the case became fugitive from law along with his absconding parents---Counsel for accused could not offer any explanation for such long absconsion---Absconder would lose some of his normal rights guaranteed under substantive law as well as the procedural law---Contention of the counsel for accused that investigation of the case had been hit by a bar contained in S.155(2), Cr.P.C., was devoid of any merit as S.420, P.P.C. was cognizable and in presence of a cognizable offence, the other offences regardless of being cognizable or non-cognizable could be validly investigated by the Police without fulfilment of requirement of the said provision of law---Accused had actively contributed towards the fraudulent act of his parents; and played an important role in the commission of offence, through which immovable property worth crores of rupees had been transferred to his mother, which spoke volumes about the culpability of accused in the case---Punishment provided for an offence under S.467, P.P.C. fell under prohibition of S.497, Cr.P.C.---Prima facie no reasons were available to believe that accused had not committed any non-bailable offence; or that his case was open to further probe within the meaning of S.497(2), Cr.P.C.---Bail petition was dismissed, in circumstances.

Saeed Ahmad v. The State 1996 SCMR 1132 and Dr. Zulkifal v. Pervaiz Akhtar Mughal and others 2000 PCr. LJ 284 ref.

Ch. Abdul Aziz for Petitioner.

Amjad Afsar Gakhar for the Complainant.

Rana Kashif Saleem Arfaa, Law Officer with Raja Khadim Hussain, A.S.-I.

ORDER

SHAHID HAMEED DAR, J.---Mujtaba-ul-Haq, the petitioner seeks bail after arrest as he stands arrested in case F.I.R. No.410 of 2009, dated 18-5-2009, under sections 420, 467, 468, 471, P.P.C., registered at Police Station Civil Lines, Rawalpindi on the complaint of Jawwad Malik who has alleged in the F.I.R. that his brother Sohail Asghar Malik fraudulently got the ancestral house 9-A, 6th Road, Satellite Town, Rawalpindi transferred in the name of his wife Surayya Sohail withthe connivance of Registration Staff, District Rawalpindi and for this purpose, he used the power of attorney of even those who had either already died or had got

rescinded their power of attorney many years back; the matter was probed into by DDO(R), Rawalpindi Cantt. who vide his inquiry report, found Sohail Asghar Malik guilty of the charge.

2. The complainant made a supplementary statement under section 161, Cr.P.C. on 18-5-2009 before the Investigation Officer wherein he gave the detail of the executants having died much earlier to the date of attestation of Registration Deed No. 6842/ 1 and also furnished information as to the cancellation of the general power of attorneys by the remaining executants. According to his version, as contained in the supplementary statement, Mst. Sardar Begum the mother, Ghulam Shabbir the brother, and Nuzhat Kafaiyat the sister of Sohail Asghar Malik had died in years 1981 and 2002 respectively. His sisters Nusrat Malik, Riffat Malik, Nudrat Malik and Musarrat Malik had rescinded their power of attorney on 23-1-2001, still, Sohail Asghar Malik got attested the sale-deed on 22-12-2003 and for this purpose, he used his son Mujtaba-ul-Haq and one Raja Shabbir as the marginal witnesses of the sale-deed. Thus the name of the petitioner has figured in the supplementary statement of the complainant.

3. Mujtaba-ul-Haq Malik neither sought bail before arrest nor surrendered before the police like his co-accused so he was proceeded against under section 87 Cr.P.C. and was placed in Column No.2 of the challan, being an absconder, compiled by the Investigation Officer under section 512, Cr.P.C. He on the dismissal of his bail before arrest by the learned Sessions Judge, was finally arrested in this case on 5-10-2010.

4. Learned counsel for the petitioner submits that the petitioner is innocent and he has not committed any offence; he had no idea whatsoever as to why his father and co-accused Sohail Asghar Malik had written down his name in the sale-deed or asked him to appear before the attestation authorities for attestation of the sale-deed; the petitioner had just put his signatures on the sale-deed as a marginal witness deeming it an act of obedience and sincerity to his parents; the petitioner was just 19 years of age on -22-12-2003 i.e. the date of attestation of sale-deed and was a student of M.B.A who was not aware of the intentions and designs of his father and mother; sections 467, 468 and 471 P.P.C. are non-cognizable and section 420, P.P.C. is bailable, the petitioner merits release on bail as his case calls for further inquiry into his guilt. Relies upon "Saeed Ahmad v. The State" (1996 SCMR 1132) and "Dr. Zulkifal v. Pervaiz Akhtar Mughal and others" (2000 PCr.LJ 284).

5. On the other hand learned D.P.-G. assisted by the learned counsel for the complainant submits that the petitioner being a young educated person was fully conscious of the criminal design and plan of his parents so he voluntarily testified the sale-deed as a marginal witness, the beneficiary whereof was his mother and the vendor, his father: the petitioner being the son of the vendor and the vendee is the ultimate beneficiary of the above said fraudulent deed so he was swayed by the greed and lust for property; the petitioner possessed the knowledge of the death of the above-said executants aid the revocation of the power of attorney in favour of his father as all the executants were his close kith and kin; the petitioner by his conduct exhibited his malignancy and he is an accused in equal degree as regard his parents: the petitioner being the son of his co-accused had full knowledge about his implication in this case as an accused still he opted to abscond in this case along with his parents and a report under section 512, Cr.P.C. had been filed against him before the trial Court; the role of the

petitioner is not only that of a facilitator but also he is a potent beneficiary of the instant episode; the offence with which the petitioner is charged, catches the prohibition of section 497, Cr.P.C. and his case does not fall in the purview of section 497(2), Cr.P.C.

6. I have heard learned counsel for the parties and perused the record.

7. The petitioner is the unfortunate son of his greedy parents who for the lust of the worldly gains did not even spare their son and he tamely readied himself to become a crucial character of the fraudulent act, designed, scripted, directed and played by his parents but, of course, with the active assistance of the petitioner. Mst. Sardar Begum who died in year 1981 .was the real maternal grand mother of the petitioner, Ghulam Shabbir executant who died in year 2002 was his real paternal uncle and Mst. Nuzhat Kafaiyat who died on 17-1-2002 was his real maternal aunt, rest of the executants were his real paternal aunts who all had cancelled their power of attorney on 23-1-2001. It cannot he agitated on behalf of the petitioner that he was not aware of the death of his afore-said relatives or that he was oblivious of the rescission of the power of attorney which had been attested in favour of his father in Year 1972. As submitted by his learned counsel, the petitioner was aged 19 and a student of M.B.A. on the day of the attestation of sale-deed in favour of his mother, so, being a young and an educated person, he was supposed to be equipped with all the sane/rational qualities, virtues and characteristics, destined to be possessed by a young educated person of his age. Even otherwise, the ignorance of law is no excuse. The petitioner after being nominated as an accused in this case opted to turn a fugitive from law along with his absconding parents. The learned counsel for the petitioner has not offered any explanation as to the long standing absconding of the petitioner. The law on the point of the abscondence is simple and plain that an absconder shall loose-some of his normal rights guaranteed under the substantive law as well as the procedural law. The argument of the learned counsel for the petitioner that investigation of the instant case had been hit by a bar, contained in section 155(2), Cr.P.C. is devoid of any merit as section 420, P.P.C. is cognizable and in presence of a cognizable offence, the other offences regardless of being cognizable or non-cognizable can be validly investigated by the police without fulfilment of requirement of the above-said provision of law. The petitioner has actively contributed towards the fraudulent act of his parents and played an important role in the commission of the afore-said offence through which immovable property worth crores of rupees has been transferred to his mother which speaks volumes about the culpability of the accused-petitioner in this case. The facts of the aforementioned case laws, I am afraid, do not assimilate the facts of the instant case hence, of no avail to the petitioner. The punishment provided for an offence under section 467, P.P.C. catches the prohibition of section 497, Cr.P.C. Prima facie there are no reasons to believe that the petitioner has not committed any non-bailable offence or that his case is open to further probe within the meaning of section 497(2), Cr.P.C:

8. For the foregoing reasons, I am not inclined to allow the instant petition which is dismissed accordingly.

H.B.T./M-641/L Bail refused.

2011 Y L R 1110

[Lahore]

Before Ijaz Ahmad Chaudhry and Shahid Hameed Dar, JJ

MUHAMMAD JAMSHED alias PERVEZ and 2 others---Appellants

Versus

THE STATE---Respondent

Criminal Appeals Nos.1285, 440 and Murder Reference No.164 of 2005, heard on 13th July, 2010.

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

----S.302(b)---Qatl-e-amd--Appreciation of evidence---Arrival and presence of eye-witnesses on the spot at the crucial time had been established---According to mode of occurrence accused alone had murdered the deceased--Medical evidence had fully corroborated the credible ocular account---Defence evidence had been directly controverted by medical evidence and the same had not even been verified by the Investigating Officer---Defence plea was an after thought and a delayed attempt to evade the consequences of the murder---Conviction of accused was, therefore maintained---Prosecution, however, had failed to prove the motive and it was not certain as to what had happened between the parties prior to the occurrence---Possibility of a chance encounter between the parties could not be ruled out---Death sentence of accused was reduced to imprisonment for life in circumstances.

Noor Muhammad v. The State and another 2010 SCMR 97 ref.

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

----S. 302(b)/34--- Qatl-e-amd--- Appreciation of evidence---Accused being the relatives and team-mates of co-accused had been roped in the case to stop and discourage them to come to his rescue during investigation and trial---Act of allegedly holding the deceased by accused showed that they were not armed and they had not caused any injuries to the deceased---Motive as narrated by the complainant before the Investigating Officer could not be proved---Prosecution had failed to prove the case against accused and they were acquitted accordingly.

Munir Ahmad Bhatti and Mansoor ur-Rehman Khan Afridi for Appellants.

Najama Parveen and Munawar Hussain Sindho, A.P.-G. for the State.

Date of hearing: 13th July, 2010.

JUDGMENT

SHAHID HAMEED DAR, J.--Through this judgment we intend to dispose of Criminal Appeal No.1285 of 2005 tiled by Altaf Hussain alias Taafi and Muhammad Jamshed alias Pervez appellants accused and Criminal Appeal No.440 of 2005 filed by Amanat Ali alias Taju appellant-accused.

2. Through this consolidated judgment a Murder Reference No.164 of 2005 sent by the learned trial court shall also be answered.

3. The appellants-accused namely Muhammad Jamshed alias Pervez, Altaf Hussain alias Taafi and Amanat Ali alias Taju were prosecuted for the offence of murder of Muhammad Shahid son of the complainant in case F.I.R. No.55 of 2002 dated 24-2-2002 under section 302, P.P.C. read with section 34, P.P.C. registered at Police Station Manga Mandi, Lahore.

4. The appellants-accused were held guilty by the learned Addl. Sessions Judge, Lahore who vide judgment dated 26-2-2005 convicted and sentenced the appellants-accused, as under:

> Altaf Hussain alias Taafi appellant-accused. Under section 302(b), P.P.C. Death with order to pay Rs.50,000 as compensation, to the legal heirs of the deceased under section 544-A, Cr.P.C. and in default thereof, to undergo six months' S.I.
>
> Amanat Ali alias Taju and Muhammad Jamshed alias Pervez, appellants-accused.
>
> Under Section 302(b), P.P.C.
>
> Imprisonment for Life each with order to pay Rs.50,000 each as compensation, to the legal heirs of the deceased under section 544-A, Cr.P.C. and in default thereof, to undergo six months' R.I. each.
>
> Benefit of section 382-B, Cr.P.C. was extended to both of the above named appellants-accused.

5. The prosecution story, precisely, as unfurled in the statement Exh.PA (F.I.R. Exh.PA/1), rendered by Maqbool Ahmad, P.W.I. is that he was an agriculturist and resident of village Bhai Kot, Lahore; he was present at his house when his younger son Abid informed him at about 5-00 p.m on 24-2-2002 that a quarrel had erupted between Shahid (deceased) and Altai alias Taafi joined by Pervez and Taju etc. at the agricultural land of Maqsood Ahmad alias Hussain (late) where he had gone to play cricket with Altaf etc., the complainant (PW-1) Muhammad Siddique (P.W:2.) and Muhammad Akarm (given-up P.W.) rushed to the spot and witnessed Messrs Muhammad Altaf alias Taafi (appellant), Pervez (appellant) and "Taju (appellant), armed with cricket bats, wrangling with his son Shahid (deceased); Pervez and Taju (appellants) caught hold of the arms of Shahid (deceased) within the view of the complainant etc. and Altai alias Taafi gave a forceful blow of his bat on the chest of Shahid which felled him to the ground, then, all three beat deflated Shahid with their bats; on their satisfaction, that he had died, they fled away; Muhammad Shahid breathed his last instantaneously; the occurrence was witnessed by Muhammad Siddique, Muhammad Akram and the complainant; the motive behind the occurrence was that the team of Altaf alias Taafi etc, owing to partial umpiring by Shahid (deceased) had been defeated, 5/6 .days earlier and a brawl had taken place between them which caused them grudge, due to which they committed the murder of Shahid.

6. The complainant (P. W.1.) recorded his statement Exh.PA before Arshad Mahmood Inspector/S.H.0., (P.W.9.) at 5-30 p.m. on 24-2-2002 at the place of occurrence, on the basis of which, formal F.I.R. Exh.PA/1 was registered at Police Station, Manga Mandi, Lahore.

7. Haider Ali S.-I/Investigating Officer P.W.8. reached the place of occurrence immediately, tin receipt of an information about the incident and found the dead body of the deceased lying on the ground, he examined it and prepared an injury statement Exh.PH, inquest report

Exh.PJ, a docket Exh.PK for postmortem examination of the dead body and transmitted the corpse of the deceased to the mortuary under the escort of Mansab Ali constable and Muhammad Saeed 738/C, P.W.4. for autopsy; he/I.O./P.W.8. also prepared visual site plan of the place of occurrence Exh.PL; recorded supplementary statement of the complainant qua correction of the names of Amanat Ali and Muhammad Jamshed, appellants-accused, secured last worn clothes of the deceased Shalwar P-4, Qameez P-5 and Bunyan P-6 vide recovery memo Exh.PE; he got prepared scaled site plan Exh.PF and Exh.PF/1 in duplicate by Syed Younis Ali Bokhari, Draftsman P.W.5.

8. Jamshed alias Pervez, Altaf alias Taafi and Amanat alias Taju, the appellants-accused were arrested on 5-3-2002 by Haider Ali, S.-I./Investigating Officer P.W.8., who, pursuant to their turn-by-turn disclosure before him and other P.Ws., on 7-3-2002, led to the recovery of cricket bats P-1, P-3 and P-2 vide memos Exh.PB, Exh.PD and Exh.PC respectively, attested by Liaqat Ali, P.W.3. and Muhammad Latif, P.W. The I.O. prepared the site plans Exh.PM., Exh.PN and Exh.PO of the place of recovery of the above said cricket bats.

9. Upon completion of investigation, a report under section 173, Cr.P.C. was submitted before the learned trial court for trial of the accused-appellants.

10. At the commencement of the trial, the learned trial court charge sheeted the appellants-accused under section 302, P.P.C. read with section 34, P.P.C. to which they did not plead guilty and claimed a trial.

11. The prosecution examined 9 witnesses in toto to prove the guilt of the appellants-accused. Maqbool Ahmad, complainant, P.W.1. and Muhammad Siddique P.W.2. furnished the ocular account of the occurrence in question. P.W.1. also deposed about the motive part of the incident; Liaqat Ali, P.W.3. and Latif P.W. attested the recovery memos Exh.PB, Exh.PC and Exh.PD, qua the recovery of bats P-1, P2 and P-3, got recovered by Jamshed, Amanat Ali and Altaf Hussain appellants-accused. Liaqat Ali P.W.3 also identified the dead body of the deceased at the time of autopsy before the Medical Officer Dr.Maqbool Hussain P.W.7. Syed Younis Ali Bokhari, Draftsman P.W.5. prepared the site plan in duplicate, Exh.PF and Exh.PF/1 of the place of occurrence in the scale of 1 inch equal to 100 feet. Muhammad Saeed 738/C, P.W.4. attested recovery memo Exh.PE qua the above said last worn clothes of the deceased.

12. The medical evidence was provided by the Medical Officer, Dr.Maqbool Hussain P.W.7. who conducted postmortem examination of the dead body of Muhammad Shahid, deceased, at 11-15 a.m. on 25-2-2002 vide post mortem examination reports PG (pictorial diagrams Exh.PG/1 Exh.PG/2). All the 6 injuries on the dead body of the above deceased were caused by blunt weapon. The probable time elapsed, as noticed by this P.W., between injuries and death was 'immediate' and between death and postmortem was within 12 to 24 hours. The cause of death recorded by Medical Officer (P.W.7.) was due to damage to the heart leading to neurogenic shock.

13. Haider Ali S.-I./Investigating Officer P.W.8. conducted complete investigation of this case from day one, till preparation and submission of challan under section 173, Cr.P.C. for trial of the accused. The remaining evidence produced by the prosecution was more or less formal in nature.

14. The learned Public Prosecutor after giving up certain P.Ws. being unnecessary announced the prosecution case closed.

15. In their statements recorded under section 342, Cr.P.C. Altaf Hussain alias Taafi, Amanat Ali alias Taju and Muhammad Jamshaid alias Pervez, appellants-accused denied all the charges of the prosecution against them and professed their innocence. Altai' Hussain alias Taafi, appellant-accused, while answering the question, "why this case against you and why the P.Ws. had deposed against you", contended as under:--

> "I have been falsely implicated in this case due to previous enmity. My father Bashir Ahmad Malik was a witness against the father of Maqbool Ahmad P.W. in a murder case. Due to the said enmity I have been falsely implicated in this case."
>
> Amanat Ali alias Taju appellant-accused answered the aforesaid question, as under:--
>
> "I have falsely been implicated due to previous enmity. The father of the accused Altaf Bashir Ahmad Malik was a prosecution witness against the father of P.W.1. Maqbool Ahmad. I being relative of Malik Bashir Ahmad has been falsely implicated in this case."
>
> Muhammad Jamshed alias Pervez, appellant-accused, recorded his reply to the aforesaid question inn the following words:--
>
> "I have been falsely implicated in this case due to previous enmity. My maternal uncle Bashir Ahmad Malik was a witness in murder case against the father of Maqbool Ahmad P.W.1."

16. All the appellants-accused adopted another version, individually, qua their innocence in the instant case while responding to question No.7 of their statements under section 342, Cr.P.C, " Do you want to say anything-else,", with following contention:--

> "I am innocent. On the alleged day of occurrence Shahid was playing cricket and was running to complete score, fell on the bricks, used as wicket, with his own force suffered injuries and died."

17. They did not appear as their own witness under section 340(2), Cr.P.C. to repel the prosecution case against them. Altaf Hussain alias Taafi accused, however, produced Pervez Iqbal as DW-1 in his defence, whereas, his aforesaid co-accused did not avail the said facility.

18. Upon conclusion of the trial, the learned trial Court after finding the prosecution's case, against the appellants to have been proved beyond reasonable doubt, convicted and sentenced them, as stated herein before, hence, the present appeal and the connected murder reference before this court.

19. We have heard learned counsel for the parties and have perused the record of this case.

20. The learned counsel for the 'appellants, being convinced to have ripped apart the prosecution case, contends that the prosecution had failed to prove its case against the appellants beyond reasonable doubts and that they should have been acquitted; the witnesses of ocular account have rendered false and tutored statements against them as they were

neither present at the spot nor had witnessed the occurrence, besides their statements were pregnant with countless contradictions and discrepancies; the deceased was neither attacked, nor caused any injuries by the appellants-accused and he, being a patient of epilepsy, had fallen on the bricks with a thud due to epileptic fits, while running between the wickets, during a cricket game; the medical evidence does not corroborate the ocular account in any manner and the measurement of injuries of the deceased negates the story narrated by them; the evidence of recovery of cricket bats from the appellants-accused is fake, hence; inconsequential for the prosecution's case; the impugned judgment suffers from non-reading and misreading of the evidence which has been passed in an arbitrary, perverse and capricious manner; the site plan also does not corroborate the statements of P.W.1. P.W.2., the witnesses of ocular account, failed to establish their presence at the place of occurrence at the relevant time and they have rendered mendacious statements in this regard, which cannot be used under the law to convict and sentence the appellant; the impugned judgment has resulted in miscarriage of justice which cannot be sustained.

21. On the basis of the said contention, the learned counsel for the appellants has prayed for the acquittal of the appellants. In the alternative, he has made a prayer to convert the death sentence of Altaf Hussain alias Taafi, appellant into one of imprisonment for life on the ground, that there are mitigating and extenuating circumstances in favour of the said appellant as the motive has gone unestablished. Relies upon Noor Muhammad v. The State and another (2010 SCMR 97).

22. Conversely the learned Deputy Prosecutor-General assisted by counsel for the complainant have submitted in unison that the prosecution had succeeded in establishing its case against the appellants beyond reasonable doubt and thus their conviction and sentence recorded by the learned trial court does not warrant ally interference by this court.

23. We find, after having heard the learned counsel for the parties and gone through the record, that the prosecution case hinges at the ocular account furnished by P.W.1 and P.W.2, the medical evidence presented by P.W.7., the evidence of motive produced by P.W.I. and the recovery evidence qua three cricket bats P-1 to P-3 at the instance of the appellants-accused, furnished by P.W.3. and P.W.B.

24. According to the prosecution's case the appellants had been assigned specific role qua the deceased, that they being armed with cricket bats, in the backdrop of a previous dispute over umpiring of a cricket match, hurled their wooden arms on the body of the deceased and caused his instantaneous murder. Altaf Hussain alias Taafi, appellant-accused inflicted a specific blow with his cricket bat on the chest of Shahid deceased, after his co-accused had rendered the deceased helpless by catching his arms, due to which he fell down. Thereafter, all of then gave repeated blows with their weapons, on the body of fallen Shahid (deceased) till he expired at the spot. The witnesses of ocular account have further deposed that the appellants-accused fled away, after they had satisfied themselves about the expiry of their rival team-player. The occurrence took place at 5-00 p.m. on 24-2-2002 when daylight was available. In parallel to the prosecution's case, it has been contended by the appellants-accused in their statements under section 342, Cr.P.C., that the deceased had fallen on the bricks, which were used as wickets, during a cricket match and received multiple injuries on his body owing to which he died. The versions of bath the sides are poles apart interse so,

these shall have to be assessed and scanned by keeping them in juxtaposition to each other. Maqbool Ahmad, P.W. showed his ignorance as to what a cricket team meant and how many players formed a cricket team but he deposed about his little knowledge as to who an umpire was in a' cricket game. He was tested on the point that his deceased son was a patient of epilepsy and that he used to have fits of the said disease to which he replied in negative. He admitted in his cross-examination that his father was an accused in the murder case of a Patwari and that Bashir Ahniad Malik, father of Altai Hussain alias Taafi, appellant, was a prosecution witness against him and that he was a maternal uncle of Jamshed appellant-accused as well. It has also been admitted by him that Amanat appellant-accused was a relative of his co-accused appellants. He also deposed that it was the Tru day (the following day of Eid) when the unfortunate occurrence took place. The arena of the occurrence was a vast piece of land owned by one Maqsood alias Oland who had a big chunk of agricultural land, which touched Sundar road, leading to the village. Some portion of this land was used by the youth of the village to play cricket and they also used to stage cricket matches with other teams, hailing from the nearby villages. The gathering of a number of people at the said ground on the day of the occurrence, being a Tru day, may not be an unusual circumstance, as the people throng such places on a festive day for merry-making: While, conducting cross examination on both the P.Ws. the defence does not appear to be sure and definite as to how many persons had visited that ground on the day of the occurrence as number of such persons has been put to the P.Ws. with a difference, in hundreds. We find a strange approach of the defence while we go through the cross examination on the witnesses of ocular account that not a single question has been put to the said witnesses as to the mode of occurrence, the position and distance of the witnesses in regard to the deceased at the relevant time or the end of the cricket pitch where according to the defence, the deceased had allegedly fallen on the bricks. The defence has also shown no interest at all in establishing the fact, whether P.W.1. P.W.2. had reached the place of occurrence at the relevant time or they were placed in such a situation wherefrom they could witness the occurrence or not. A few questions regarding one irrelevant fact and a few regarding some other irrelevant fact and the defence exhausted themselves in terns of cross-examination. Both the witnesses have categorically denied the repeated questions as to the ailment of the deceased i.e. the epilepsy, which could not be established by the defence during trial. In fact, they shed the contention while making statements under section 342, Cr.P.C. P.W.1. and P.W.2. have successfully proved their presence at the place of occurrence as the portions of their statements in chief, relating to their arrival at the spot and their viewing the occurrence have not even, been touched upon by the defence, for the reasons known to them only, thus, leaving no other option but to believe them. The arrival of the police at the spot at about 5-15/5-20 p.m. has been deposed about by the P.Ws. which is a strong indication that the statement of the complainant Maqbool P.W.1. had been recorded by the police at about 5-30 p.m. and that the F.I.R. Exh.PA/1 had been recorded at 6-00 p.m. as is shown on the face of the said document. The promptitude shown in this respect by the prosecution lends a sense of authenticity to the deposition of P.W.I. that he had recorded his statement at the place of occurrence before Haider Ali S.-I./ Investigating Officer P.W.B. immediately on his arrival at the spot, within 15/20 minutes of the occurrence. The objection of the learned counsel for the defence that the post mortem examination of the deceased had been conducted at 11-15 a.m. on 25-2-2002, was a delayed post mortem examination so the F.I.R. night be considered as 'an anti tined document, does not have any substance in it as the relevant p.Ws. have not been cross examined at all in this regard. The

complainant has confidently stated that on receipt of information about the dispute from his son Abid, he immediately rushed to the place of occurrence and witnessed the same as there was no obstruction between the place of occurrence and the village abadi which could hinder his view of the scene of occurrence. As discussed earlier, the hesitation of the defence, to grill P.W.1 and P.W.2 on the said points has resulted in proving the arrival and presence of the said witnesses at the spot, at the crucial time of occurrence. Their testimonies, however, cannot be accepted in a blind folded manner as the mode of occurrence leads us to believe that it was Altaf Hussain alias Taafi appellant-accused, alone, to have committed the offence and his co-appellants appear to have been implicated in this case by casting the net too wide. Muhammad Jamshed alias Pervez, and Amanat Ali alias Taju appellants-accused have been stated to be the relatives of their co-appellant and their being co-players and team-mates of Altaf Hussain alias Taafi accused-appellant have been roped in this case so as to stop and discourage them to come to the rescue of' their co-accused during the investigation and during the course of the trial. Their presence at the place of occurrence might be possible for the foregoing reasons but it does not seem believable that they had given beating to the deceased. Had they, Muhammad Jamshed alias Pervez and Amanat Ali alias Taju appellants, been armed with cricket bats, why would they throw away their bats to catch hold of the deceased from his arms as they all, being three in number could easily hurl their weapons on the body of the deceased as he being alone could not show any resistance. It was not essential at all that two of the three appellants should render the deceased helpless by catching hold of his arms, as a person, at the mercy of three men armed with cricket bats, could easily be surrounded and nose-dived by them without any difficulty. Their act of allegedly holding the deceased in fact shows, that they were not armed at all nor c they had caused any injuries on the body of the deceased. It does not mean that on this score alone, .the ocular account should be thrown away as the primary duty of the courts is to sift grain from the chaff and segregate the mendacity from the truth. The principle of falsus in uno, fillsus in omnibus is not universally applicable and the innocent have to be separated from the sinners, on the basis of the evidence available on the record. In the way, both the above said witnesses have narrated the facts of this case, has led us believe that their testimonies are credible and worth-reliance to the extent of Altai Hussain alias Taati, appellant-accused.

25. So far as the raison d'etre is concerned it finds mention in the F.I.R. Exh.PA/1 and the prosecution witness P.W.1. has deposed in terms that a quarrel had taken place between Shahid deceased and Altaf alias Taafi and others 5/6 days prior to the occurrence, over the umpiring of a cricket match as Altaf alias Taati appellant, suspected the deceased of unfair and dishonest umpiring which had resulted in a defeat to his cricket team. The complainant P.W. did not produce any evidence before the Investigation Officer, P.W.8., in connection with the above said motive nor he claimed during the trial that the motive incident had taken place in his presence. Haider Ali, P.W.8. has stated in his testimony that the complainant had not produced any witness to establish the factum of motive. Although; the defence once again showed carelessness while cross-examining P.W.1., as not only, a single question in respect of the motive incident was not put to him but also, even a formal suggestion denying the motive was not put to the P.W., yet, it is always the prosecution to prove its case against the accused beyond shadows of doubt. So, the prosecution was not absolved of their primary duty to stand on its own legs even in respect of motive. In these circumstances, we have come to a definite conclusion that the prosecution miserably failed to prove motive as narrated by the

complainant before the Investigation Officer/P.W.8., for setting the machinery of law in motion.

26. Insofar as the medical evidence is concerned it has been produced by Dr. Maqbool Hussain, P.W. 7, who performed autopsy on the dead body Shahid deceased at 11-15 a.m. on 25-2-2002 vide postmortem examination report, Exh. PG (pictorial diagrams Exh.PG/1 and Fxh.PG/2). The eminent characteristics of the postmortem examination are that all the injuries on the body of the deceased had been caused by blunt weapon(s), the detail of which is reproduced hereunder:--

(1) Abraided area 3 x 2 c.m. on the back of right chest. 6.5 c.m. from posterior midline, 20 c.m. below to tip of right shoulder.

(2) Abraided area 4.5 x 2.5 c.m. on the back of left chest 8.5 c.m. from posterior midline, 9.5 c.m. below inferior angle of left scapula.

(3) Abrasion 2 x.3 c.m. on the front of neck in the mid line and to the left 4.5 c.m. above supra sternal notch.

(4) Abrasion 3 x 1 c.m. on the left chest anteriorly 2.5 c.m. from left nipple at 4-00 'O' clock position.

(5) Abrasion 1.5x .5 c.m on the left chest anteriorly 6.5 c.m below the left nipple at 6-00 'O'clock position.

(6) Abrasion 5 x 5 c.m on left fore arm medially 4 c.m. above left wrist.

27. The medical evidence establishes the fact that the dead body of the deceased had been dissected by the Medical Officer who had recorded his findings that the deceased had died due to damage to the heart leading to neurogenic shock. The time elapsed between-injury and death, was noticed by the Medical Officer, P.W.7, as 'immediate' and between death and postmortem as 12 to 24 hours which corroborates the ocular version. The Medical Officer recorded a strange reply in his testimony that Injuries 'Nos.4 and 5 might possibly be the result of fall on the bricks. The detail of dissection given by the. Medical Officer, straightaway negates his above said dishonest and concessional version, as, lower lobe of left lung was bruised, heart was congested, petechial haemorrhages were present, apex of left ventrical was bruised and testicles of the deceased were also bruised. The aforesaid favouring reply by the Medical Officer is unfortunate and smacks dishonesty and malpractice. The medical evidence, we fund, fully corroborates the ocular account.

28. So far as the evidence of recovery of cricket bats P-1 to P-3 at the instance of Altaf Hussain alias Taali, Muhammad Jamshed alias Pervez and Amanat Ali alias Taju, vide memos Exh.PD, Exh.PB and Exh.PC respectively, is concerned, it is hardly of any consequence as none of the wooden weapons was stained with blood, hence, these weapons were not sent to the office of Chemical Examiner, Punjab, Lahore or to the Serologist, Punjab, Lahore In absence of any such evidence, it cannot .be said if the said bats could be termed as the weapons of offence. This piece of evidence is inconsequential to the prosecution's case.

29. Insofar as the defence plea and the defence evidence produced by the appellants-accused is concerned we find it as devoid of any substance or truth for the reason that no plausibility

existed to believe the contention that the deceased had fallen on the bricks while running between the wickets and that he had the tits of epilepsy at the time of occurrence. The P.W.1 P.W.2 have categorically denied that the deceased was a patient of epilepsy or he had been having the treatment for such an ailment. The appellants-accused too felt the absurdity and shallowness id' their defence plea. Therefore, they did not press into service such sickness of the deceased while recording their replies in their statements under section 342, Cr.P.C. The defence' witness Pervez Iqbal (D.W.1) deposed about a cricket match between two teams at the place of occurrence wherein, Shahid deceased was also playing for one of the teams who played a ball and ran for the other end, where, he fell on the bricks, with a thud due to epilepsy and received the injuries which proved terminal. The medical evidence directly controverts this deposition of the defence witness as the pictorial diagram Exh.PG12 shows two G blunt weapon Injuries (Nos.1 and No.2) on the back whereas, three injuries are on the frontal posture of the deceased and one injury on the medial left arm. Such locale of injuries could only be found on the body of the deceased, if we look at the defence evidence, that the deceased- after falling once on the bricks, would get up and throw his body again and again on the bricks so as to receive the said injuries, as mentioned in the postmortem examination report Exh.PG. Pervez Iqbal, DW-1, never knew if his statement had been recorded by the Investigation Officer during investigation or not. He either innocently or cleverly had deposed that he never inquired from the I.O, if his statement had ever been recorded by him or not. It was an evasive action on the part of, the DW which reflected upon the veracity of his contentions. The statement of the I.O/P.W.8. also does not verify the said factum, as claimed by D.W.I. It was an after thought and a delayed attempt/move on the part of the defence, to evade the consequences of the murder of the deceased. The defence evidence thus, is brushed aside and rejected by us.

30. For the foregoing reasons, the prosecution, as we conclude, has failed to prove its case against Muhammad Jamshed alias Pervez and Amanat Ali alias Taju, the appellants-accused beyond any shadow of doubt. hence, we allow the Criminal Appeal No.1285 of 2005 to the extent of Muhammad Jamshed alias Pervez appellant and the Criminal Appeal No.440 of 2005, filed by Amanat Ali alias Taju; appellant, set aside the impugned judgment to their extent, passed by the learned trial court. They are acquitted of all the charges and would be released forthwith, if not required, in any other criminal case.

31. Now reverting to the quantum of sentence in respect of Altaf alias Taafi, we have observed, as discussed above that the prosecution failed to prove motive part of its story. Haider Ali S.-I./P.W.8. deposed that during his investigation, the complainant P.W.1. did not produce any evidence before him to prove the motive. The solitary statement of the complainant, on the factum of motive, could not find any corroboration from any source. It cannot be said with certainty as to what happened or transpired between the parties prior to the occurrence. The possibility of a chance encounter clash between the parties cannot be ruled out. As the motive, set up by the prosecution has gone a begging so the prosecution must suffer the consequences and not the defence. While relying upon the case-law Noor Muhammad v. The State and another (2010 SCMR 97), cited by the learned counsel for the appellants, we have held and concluded that there is it mitigating and extenuating circumstance, requiring the conversion of death sentence of Altaf Hussain alias Taafi, appellant into one of imprisonment for life. Hence, the death sentence, awarded to Altaf Hussain alias Thafi appellant, by the learned trial court is converted to Imprisonment for Life,

with benefit of section 382-B, Cr.P.C. The sentence of compensation and in default thereof, is however maintained.

32. The Murder Reference No. 164 of 2005 is answered in the negative.

N.H.Q./M-432/L Order accordingly.

2011 Y L R 1131

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ASHRAF and 6 others---Petitioners

Versus

MEHMOOD AHMAD and 3 others---Respondents

Writ Petition No. 13041 of 2010, decided on 17th August, 2010.

Penal Code (XLV of 1860)---

----S. 365---Constitution of Pakistan, Art.199---Constitutional petition---Kidnapping with intent to secretly and wrongfully confine a person---Accused challenged the Additional Sessions Judge's order directing Judicial Magistrate to call for supplementary challan after addition of relevant sections of law applicable to the case---Validity---Magistrate could not dictate the Police in the process of investigation which was exclusive domain of Police---Excess committed by Police could, of course, be checked but no court or authority was empowered to require the Police to conduct investigation in a particular manner or to submit report with respect to certain persons or offences--Magistrate/Trial Court had all the necessary powers to frame, amend, correct or alter the charge keeping in view material against the accused---Additional Sessions Judge erred in law while passing the impugned order in revision---No criminal trial was pending before the Magistrate who passed the order in question on a miscellaneous application--Section 439-A, Cr. P. C. barred revisional jurisdiction against administrative order passed by Magistrate---Impugned order passed by Additional Sessions Judge was set aside and order passed by the Magistrate was restored---Constitutional petition was allowed.

Badaruddin v. Mehr Ahmad Raza, ASJ, Mang and 6 others PLD 1993 SC 399; Abdul Rehman Bajwa v. Sultan and 9 others PLD 1981 SC 522; Muhammad Nasir Cheema v. Mazhar Javaid and others PLD 2007 SC 31; Brig (Retd.) Imtiaz Ahmad v. Govt. of Pakistan through Secretary Interior Division, Islamabad and 2 others 1994 SCMR 2142 and Rana Muhammad Farooque and others v. Aftab Hussain and others PLD 2003 Kar. 309 ref.

Muhammad Nasir Cheema v. Mazhar Javaid and other PLD 2007 SC 31; Brig (Recd) Imtiaz Ahmad v. Govt. of Pakistan through Secretary Interior Division, Islamabad and 2 others 1994 SCMR 2142 and Kh. Nazir Ahmad's case AIR 1945 Privy Council 18 fol.

Ch. Riaz Ahmad for Petitioner.

Maqbool Elahi Malik for Respondent.

Aamir Jalil Sididqui, A.A.-G

ORDER

SHAHID HAMEED DAR, J.--Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the validity of order dated 10-5-2010 passed by the learned Addl. Sessions Judge, Sheikhupura, whereby, he has directed the learned Judicial Magistrate, respondent No.2, to call for a supplementary challan in case F.I.R. No.43 of 2010 dated '14-1-2010 under section 365, P.P.C. registered at Police Station, Saddar, Sheikhupura after adding all the relevant sections which were applicable.

2. Learned counsel for the petitioner contends that the impugned order passed by the learned Addl. Sessions Judge, Sheikhupura, is patently illegal and that he enjoyed no such powers whereby he could issue the directions to the learned Magistrate to call for a supplementary challan from the police, after addition of all the relevant sections which were applicable; the impugned order has been passed without application of mind and in an injudicious manner; the observations made by the learned Addl: Sessions Judge, in the impugned order are uncalled for, illegal and void ab-initio; which may be set-aside; the learned Magistrate being persona-designata had -passed the order dated 14-4-2010 which was not amenable to revision as it was an executive order; the learned ASJ has entertained the revision petition against the above said order illegally and unlawfully, hence, the impugned order cannot be sustained; the impugned order is tantamount to causing interference in the investigation process which cannot be upheld by any stretch of imagination; the learned ASJ, in the capacity of a justice of peace may pass the direction to the police to conduct fair and honest investigation, according to the merits of the case but cannot dictate him to delete or add an offence during the course of investigation but, in the instant case, the authority exercised by the learned A.S.I. has grossly resulted in miscarriage of justice. Relies upon Badaruddin V. Mehr Ahmad Raza, ASJ, Jhang and 6 others (PLD 1993 SC 399) and Abdul Rehman Bajwa v. Sultan and 9 others (PLD 1981 SC 522).

3. Conversely, learned counsel for respondent No.1 has contended that the order dated 14-4-2010 passed by learned Magistrate is a judicial order which is open to revision as a Magistrate has the supervisory authority over the investigation of the criminal cases, falling within his territorial jurisdiction; the learned Magistrate committed a legal error by declining the request of respondent No.1 for addition of sections 365, 452, P.P.C. on flimsy grounds and thus he had been rightly and lawfully directed by the Addl: Sessions Judge, Sheikhupura vide impugned order, to call for supplementary challan in the case after adding all the relevant sections, which were applicable; the investigation had not been conducted fairly by the I.O and disciplinary action had been justly ordered by time Chairman District Public Safety and Police Complaint Commission under the Police Order, 2002; the revision petition, preferred by the respondent No.1 against the above, said order passed by the Magistrate has been. legally entertained and decided by the learned Addl. Sessions Judge as the Revisional Court; the impugned order is not perverse, capricious or foolish so it may be sustained. Relies upon Muhammad Nasir Cheema v. Mazhar Javaid and others (PLD 2007 SC 31), Brig (Retd.) Imtiaz

Ahmad v. Govt. of Pakistan through Secretary Interior Division, Islamabad and 2 others (1994 SCMR 2142) and Rana Muhammad Farooque and others v. Aflab Hussain and others (PLD 2003 Karachi 309).

4. The area/territorial Magistrate of course, possesses the formal supervisory powers over the investigation of a criminal case but it does not mean that he can dictate the police/I.O. in any manner, to cause interference in the process of investigation, which is tine exclusive domain of the police. It has been time and again observed by this court as well as by the august Supreme Court of Pakistan that the, police, in its right, has all the necessary legal powers to collect the relevant and required data evidence during the course of investigation and their powers cannot be fettered by any authority under any law. The excesses committed and the wrong done during the course of investigation by the police can be checked and remedial measures may be advised and enforced but the Investigating Officer cannot be suggested either by the courts or by any other authority to conduct the investigation, which also includes the deletion or addition of certain offences, inn a particular manner or on certain specific lines, nor any power is vested with any court, including High Court to override the legal command and to direct Station House Officer either not to submit investigation report (challan) or to submit the report in a particular manner i.e. against only such persons as the court desired or only with respect to such offences as the court wished. I am fortified in this regard, while I rely upon the' case Muhammad Nasir Cheema v. Mazhar Javaid and others (PLD 2007 SC 31) wherein the august Supreme Court of Pakistan has observed as under:--

> "The only provision relating to the subject which is available in the Code of Criminal Procedure is section 173 which commands expeditious conclusion of the investigations and further ordains that on conclusion of every investigation, the concerned S.H.O. shall submit a report of the result thereof in the prescribed manner to the Magistrate competent to take cognizance under section 190, Cr.P.C. No power vests with any Court including a High Court to override the said legal command and to direct the S.H.O. either not to submit the said report (mentioned as challan in the Police Rules and also in the impugned order) or to submit the said report in a particular manner i.e. against only such persons as the Court desires or only with respect to such offences as the Court wishes. The impugned order can also not be sustained because, as has been mentioned above, the challan in question stood already submitted inn Court and was thus beyond the reach of the concerned S.H.O."

The dishonest investigation can be taken care of under relevant- provisions of law and the Investigating Officer may also be taken to task with reference to penal provisions of the statute but he cannot be cowed down to conduct the investigation within a certain framework of the desires and whims of the parties, attached to a criminal case. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own functions. The courts are not vested with any authority or power to register or investigate a criminal case as it only vests in the police. While adjudicating upon the case, titled Brig (Retd) Imtiaz Ahmad v. Govt. of Pakistan through Secretary Interior Division, Islamabad and 2 others (1994 SCMR 2142), the apex court took note of an identical situation wherein the High Court had passed two orders during the pendency of a writ petition. In the first order the Investigating Officer of a criminal case was directed to finalize

the investigation by a. certain date and in the second order, passed on the statement of the investigation officer, that out of the 21 accused persons only 2 had been arrested and that challan was being submitted, the learned Judge observed that if "most of the accused have not been arrested, what is the use of submitting the challan" and that he was not satisfied with the performance of the Anti-Corruption Department and directed issuance of a notice to the Additional Director, Anti-Corruption to appear in a show cause as to why adverse observation about his efficiency and performance should not be passed and the same should be placed on his personal file. The august Supreme Court thought it necessary to reiterate the privy council's classic words of caution to the courts in the matter of interference with the police investigation in Kh. Nazir Ahmad case, AIR 1945 Privy Council 18 as under:--

> "Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matter which are within their province and into which the law imposes upon them the duty of enquiry …..There is statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without enquiring any authority from the judicial authorities and. it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function always of course, subject to the right of the Court to intervene in an appropriate case when moved under section 491, Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begins when a charge is preferred before it and not until then.

5. The order dated 14-4-2010 passed by the learned Magistrate though in the capacity of a persona-designata, is a lawful order whereby, correct approach and appreciation of law has been demonstrated by him, as, the learned trial court/ Magistrate has all the necessary powers, vide Chapter XIX of the Criminal Procedure Code, 1898, to take into account the prosecution's case to frame a charge against the accused, facing the trial. Notwithstanding, the game of addition or deletion of certain offences by the police during investigation, complete authority rests with the trial court to look into the probability of charge sheering the accused by keeping in view the material available against the under trial person(s). The charge may be amended, corrected or altered at any stage of the trial, before pronouncement of judgment in a criminal case. So, there cannot be any cavil to the validity of the observations made by the learned Magistrate in the above said order. The learned Additional Sessions Judge has clearly erred in law while passing the impugned order in exercise of his revisional jurisdiction which cannot be justified by any argument. The language of section 439-A, Cr.P.C. is plain and vivid which points to exercise of Sessions Judge's powers of revision as conferred on the High Court by section 439, Cr.P.C, in the case of any proceeding before a Magistrate, the record of which has been called for by the Sessions Judge or which otherwise conies to his knowledge, with further enunciation that an Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under the chapter in respect of any case which may be transferred to hint under any general or special order of the Sessions Judge. The order dated 14-4-2010

indicates that no criminal trial/case was pending adjudication before the learned Magistrate and only on a miscellaneous application, moved by the respondent No.1, the above said order was passed. The learned Additional Sessions Judge is required to judge himself the D validity of the impugned order passed by him as the requirement of section 439-A, Cr.P.C. clearly barred the re-visional jurisdiction, as invoked by him against the administrative order passed by the learned Magistrate.

6. For what has been discussed above, the instant petition is allowed and the impugned order dated 10-5-2010 passed by the learned Additional Sessions Judge, Sheikhupura is set aside, resultantly, the order dated 14-4-2010 passed by the learned Magistrate Sheikhupura stands restored.

A.R.K./M-488/L Petition allowed.

2011 Y L R 1401

[Lahore]

Before Shahid Hameed Dar, J

ALLAH DITTA---Petitioner

Versus

STATION HOUSE OFFICER, POLICE STATION SATTO KATLA, LAHORE and 6 others----Respondents

Writ Petition No.5659 of 2010, decided on 29th April, 2010.

Penal Code (XLV of 1860)---

----Ss. 420, 468 & 471---Constitution of Pakistan, Art. 199---Constitutional petition---Cheating, forgery, using as genuine a forged document---Quashing of F.I.R.---F.I.R. had alleged that accused and his co-accused forged the agreement to sell and for that purpose not only committed the offence of forgery, but also used the forged document as genuine---Mode of the occurrence detailed in the F.I.R., required investigation into the allegations, which was the exclusive domain of the Police---Proceedings of a civil suit and that of the criminal case could continue in parallel to each other under the law---Constitutional petition was dismissed.

Zafar Iqbal Bhatti for Petitioner.

Aftab Rahim Butt and Shahid Hussain for Respondent No.3.

M.A. Amin Mian, Additional P.G. with Ghulam Murtaza, S.-I. for the State.

ORDER

SHAHID HAMEED DAR, J.---Through this Constitutional petition under Art. 199 of the Constitution, of Islamic Republic of Pakistan, 1973, the petitioner seeks quashment of F.I.R. No. 171 of 2010, dated 11-2-2010, for offences under sections 420, 468, 471, registered at Police Station Satto Katla, District Lahore on the complaint of one Waris Ali.

2. Learned counsel for the petitioner contends that the allegations contained in the F.I.R. are absolutely false and the petitioner and his co-accused have not committed any offence as alleged in the F.I.R.; that the petitioner and his co-accused have not committed any forgery nor have defrauded Waris Ali complainant/respondent No. 3; that a civil litigation is pending between the parties prior to lodgment of the impugned F.I.R. regarding the alleged forged agreement to sell dated 10-1-2009; that in existence of civil suit, the complainant was barred under the law to get the impugned F.I.R. lodged as enunciated under section 476, Cr.P.C. that under the garb of the impugned F.I.R. the petitioner and his co-accused are being harassed and blackmailed by the complainant-respondent No. 3.

3. Learned Additional Prosecutor-General on the other hand, has controverted the contentions of the learned counsel for the petitioner and submits that the allegations contained in the F.I.R. relate to a factual controversy which cannot be resolved by way of the instant Constitutional petition; that multifarious allegations have been made in the F.I.R. by the complainant and it is the exclusive domain of the Investigating Officer to look into the veracity of the allegations by conducting investigation into it and quashment of F.I.R. at this stage would amount to choking and interfering with the investigation of this case which the law does not permit.

4. Arguments heard. Record perused.

5. It has been alleged in the F.I.R. that the accused/petitioner and his co-accused forged the agreement to sell and for this purpose not only committed the offence of forgery but also used the forged documents as genuine. The mode of the occurrence as detailed in the F.I.R. requires investigation into the allegations, which is the exclusive domain of the police. The proceedings of a civil suit and that of the criminal cases can continue in parallel to each other under the law.

6. For the foregoing reasons I find no substance in this petition, which stands dismissed.

H.B.T./A-271/L Petition dismissed.

2011 Y L R 1777

[Lahore]

Before Shahid Hameed Dar, J

Malik KHIZAR HAYAT---Petitioner

Versus

THE STATE and others---Respondents

Criminal Miscellaneous No. 240-B of 2011, decided on 16th March, 2011.

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

----S.497---Penal Code (XLV of 1860), S.489-F--- Dishonestly issuing a cheque---Bail, grant of---Admittedly, complainant had joined the business of accused as a partner on profit and loss sharing basis and the accused in order to satisfy the complainant had

delivered the cheque in question to him not with a criminal intent that it would be bounced on presentation for encashment by the Bank due to insufficient funds---Registration of another case by complainant against the accused on the same day when the present F.I.R. was got registered by him, could not be said to be a repetition of the offence by the accused---Pendency of a civil suit for rendition of accounts with permanent injunction filed by the accused against the complainant, was a strong circumstance going in favour of accused at this stage---Offence alleged against accused did not fall within the mischief of the prohibition of S.497, Cr.P.C.---Challan had been submitted in the Court---Accused was not required for any further investigation---Bail in such cases was rule and rejection thereof an exception, which must not be withheld if the accused had otherwise made out a case for bail---Accused was released on bail in circumstances.

Muhammad Yahya v. State and others PLJ 2011 SC 175 **rel**.

Rashid Farooq v. The State and others Criminal Miscellaneous No. 1668-B of 2010 decided by this Court on 12-10-2010 **ref**.

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

----S. 489-F--- Dishonestly issuing a cheque--- Scope--- Essentials--- Offence under S.489-F, P.P.C. shall be deemed to have been committed when a cheque is issued with dishonest intention by the offender towards payment of loan or fulfilment of a legal obligation, knowingly that it would be bounced by the bank on presentation for encashment.

Sh. Ashan ud Din for Petitioner.

Malik Riaz Ahmad Saghla, D.P.G.

Hazar Khan S.-I. with record.

Complainant in person.

ORDER

SHAHID HAMEED DAR, J.---The facts of the instant case suggest that Malik Khizar Hayat (petitioner) dealt in electronics in the name and style, "Khizar Electronics" who issued a cheque of Rs.14,00,000 to repay the amount of credit to Syed Atta Ullah Shah, the complainant who presented it for encashment before the bank concerned but it was returned unpaid for insufficiency of funds. The complainant has further alleged in the F.I.R. that Khizar Hayat (petitioner) did not defray his liability despite efforts of respectable of the area and that of the senior PAC Kamra authorities as he put them off with a variety of excuses.

2. It has been contended by learned counsel for the petitioner that the complainant had joined the business of the petitioner on profit and loss sharing basis in year, 2009 and soon both of them developed cordial intimacy; the petitioner in the wake of business activities, handed down three cheques to the complainant, one being the cheque in question as security; the godowns of the petitioner, due to incessant rains in the month of July were submerged in knee-deep water which damaged electronic goods worth millions of rupees and the petitioner had lodged claim with the Electronic Company, seeking compensation for the destroyed goods and he is determined to indemnify/ compensate the complainant in entirety, on satisfaction of the claim; the petitioner filed a civil suit

against the complainant on 27-12-2010 for rendition of accounts, earlier than registration of the instant F.I.R., also mentioning about the cheque in question, in para No.3 of the plaint, the petitioner had not issued any cheque to the complainant with dishonest intention knowingly that it would be bounced by the bank on presentation, for encashment; the petitioner has not misappropriated any funds of the complainant; the offence alleged against the petitioner does not catch the prohibition of section 497, Cr.P.C; the basic ingredients of section 489-F, P.P.C. are non-existent and the petitioner's case is open to further inquiry within the scope of section 497, Cr.P.C. Relies upon Muhammad Yahya v. State and others (PLJ 2011 SC 175).

3. On the other hand the complainant in person has vehemently opposed grant of bail to the petitioner with the contention that he had joined the business of the petitioner in year, 2009 only because of his oily tongue and he soon learnt that he was an employee of PAC who could not supply electronic goods to PAC or other government departments due to said infirmity; the petitioner had been rendered financial assistance by him only on account of friendship and that he had been defrauded by the accused through three cheques, including the cheque in issue; the petitioner stands involved, in another case of identical nature bearing F.I.R. No.553 of 2010 dated 31-12-2010 under section 489-F, P.P.C. registered at Police Station City Attock and he is a habitual offender; all the efforts made by him for recovery of the swindled amount even through Jirga had fallen apart only due to non-cooperation of the petitioner. Lastly submits that the petitioner may not be admitted to bail merely on the fact that the offence does not fall under the prohibitory clause of section 497, Cr.P.C. He has relied upon an unreported case titled Rashid Farooq v. The State and others bearing Criminal Miscellaneous No.1668-B-2010 decided by this court on 12-10-2010.

4. Learned Deputy Prosecutor General endorses the submissions made by the complainant and adds that the rudiments of section, 489-F, P.P.C. are fully attracted and the petitioner has committed an offence which is non-bailable.

5. After having heard learned counsel for the parties and perused the record, I find that it is a fit case for grant of bail as the complainant frankly admits to have joined the business of the accused-petitioner as a partner on profit and loss sharing basis and in wake of events, the petitioner with a view to satisfy the complainant had delivered the cheque in question, of course, not with a criminal intent that it would be bounced on presentation for encashment, by the bank due to insufficient funds. The complainant had got registered another case against the petitioner on the same day when the instant F.I.R. was got lodged by him. It cannot be said by any stretch of imagination that the petitioner had repeated the offence. A suit for rendition of accounts with permanent injunction had been filed by the petitioner on 27-12-2010 against the complainant which entails the fact that Atta Ullah Shah, (complainant) became a business partner of Malik Khizar Hayat (petitioner) on profit/loss sharing plan and paras Nos.3 to 8 of the plaint are relevant in this regard.

6. Learned counsel for the petitioner has categorically submitted that the petitioner with a clear conscience plans to indemnify the claim of the complainant and would do so without second thought, once his claim for Rs.14,92,900 would be awarded by the Haier Pakistan Private Limited, the manufactures of the electronic goods, the petitioner dealt in.

7. The complainant has also submitted about his financial curtailments and the learned counsel for the petitioner appears to have been moved by it and he has pledged on behalf of the petitioner, that the complainant shall be compensated by the petitioner to his satisfaction in due course of time.

8. An offence under section 489-F, P.P.C. shall be deemed to have been committed when a cheque is issued with dishonest intention by the offender towards payment of loan or fulfilment of a legal obligation, knowingly that it would be bounced by the bank on presentation for encashment. The business ties between the parties stand admitted and the cheque in question appears to have been delivered to the complainant by the petitioner for the reason, other than the one, mentioned in the definition of the above said penal provision of law. Till the satisfaction of the basic ingredients noted above, the petitioner can hardly be deemed to have committed an offence, alleged against him. The pendency of the civil suit is a strong circumstance going at this stage, to the favour of the petitioner. I am fortified in my view, while I base reliance upon Muhammad Yahya's case, PLJ 2011 SC 175. The relevant head note(A) is reproduced as under:--

> "---- S. 497--Pakistan Penal Code, (XLV of 1860), S.489-F--Bail, grant of-Dishonoured of cheque- Question for encashment of cheque-Injunctive order with regard to encashment of cheque was issued by Civil Court---Validity--Subject matter of instant petition---Matter of a pending suit which was filed before the registration of the F.I.R. and even presentation of cheque in question for encashment---A civil Court in the pending civil suit had also issued an injunctive order with regard to encashment of the cheque--Accused was behind the bars for the last six months and the trial had yet to commence--Bail was granted"

9. The offence alleged against the petitioner is punishable with imprisonment of three years and does not fall within the mischief of prohibition of section 497, Cr.P.C. The challan stands submitted before the learned trial Court and the petitioner is no more required for the purpose of further investigation. It is not the requirement of law that an accused who has otherwise made out a case for bail, be left to languish in jail for an indefinite period of time, only to satisfy the whimsical desires of the complainant. The bail in such like offences is a rule and rejection thereof, an exception, which must not be withheld as a matter of punishment.

10. Resultantly, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs 1,00,000 with one surety in the like amount to the satisfaction of the learned trial Court.

N.H.Q./K-20/L Bail allowed.

2011 Y L R 1827

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD SHAFI and another---Petitioners

Versus

THE STATE---Respondent

Criminal Appeals Nos.1792 and 1991 of 2002, heard on 16th July, 2010.

Penal Code (XLV of 1860)---

----Ss.308, 311/34 & 449---Criminal Procedure Code (V of 1898), S.345---Qatl-e-amd not liable to Qisas, tazir after waiver or compounding of right of qisas in qatl-e-amd, house-trespass in order to commit offence punishable with death---Compounding of offences---Parties after ending their differences through compromise wanted to bring back peace, harmony and revival of relationship in the family, which was a good omen and should be encouraged---Offences under Ss.308, P.P.C. and 311/34, P.P.C. were compoundable with the consent of the Court and compromise of the parties thereunder was consequently accepted and the accused were acquitted of the said charges---Offence under S. 449, P.P.C. was not compoundable, but the accused being the close relatives of the deceased could not be deemed to have committed the offence of trespass in his house within the scope of S.449, P.P.C.---Trial Court had not dealt with lawfully the said proposition and conviction of accused thereunder was not lawful and the same, therefore, was set aside---Appeal filed by accused was accepted in the circumstances and they were directed to be released forthwith accordingly.

Muhammas Asif v. The State 1999 YLR 1576 **ref**.

Munir Ahmad Bhatti for Appellants.

Muhammad Inayat Ullah Cheema for Respondent.

Date of hearing: 16th July, 2010.

JUDGMENT

SHAHID HAMEED DAR, J.---Through this single judgment we intend to dispose of Criminal Appeal No. 1792 of 2002 filed by Muhammad Shafi and Amjad Mehmood appellants-accused and Criminal Appeal No. 1991 of 2002 filed by Muhammad Asif, complainant against acquittal of Saqib Sultan, respondent No.1.

Three accused including the appellants-accused were tried by learned Addl: Sessions Judge, Mandi Bahauddin, in case F.I.R. No. 255 of 2001 dated 23-7-2001 under sections 302, 34 P.P.C. Police Station, Phalia, District Mandi Bahauddin who vide his judgment dated 30-9-2002 convicted and sentenced the appellants-accused, by holding them guilty, as under:-

Under Section 308 read with section 311/34, P.P.C.

Diyat Rs.10,00,000 along with 14 years' R.I. as Ta'zir. All the legal heirs of the deceased, except his real sister Mst. Fahmida Yasmeen, had waived their right of Qisas and Diyat, during the course of the trial, so, the learned trial Court while awarding sentence of payment of Diyat to the appellants, observed that Mst. Fahmida would be entitled to1/2 (half) share of Diyat i.e Rs.5,00,000.

Under Section 449 P.P.C.

Imprisonment for life each, with fine of Rs.1,00,000 each, in default thereof to further undergo one year's S.I.

The appellants-accused were extended benefit of section 382-B, Cr.P.C. with the order that all the aforementioned sentences shall run concurrently.

2. Brief facts, according to complaint Exh.PA, (F.I.R. Exh.PA/1) as stated by Muhammad Asif complainant P.W.1 are that Muhammad Shafi appellant-accused was real father of Mudassar Hussain (deceased) who, had two wives and offspring from both of them; Mudassar Hussain (deceased) and Fahmida Yasmeen were born from one wife while Amjad appellant-accused and Saqib (since acquitted) and their two sisters were from the other wife; Muhammad Shafi appellant-accused used to reside at Samanabad, Lahore, who was a well off person and had agricultural land as well as other immovable property, including a house (bungalow) situated in village Dhrakan Kalan, Police Station Phalia, District Mandi Bahauddin; he was reluctant to confer the share of his property upon his elder son Mudassar Hussain (deceased) so, he (deceased) took over the possession of the said bungalow (Kothi); Muhammad Shafi, Amjad, appellants, and Saqib (since acquitted) being armed with sticks/Sotas reached the disputed Kothi at Degarwaila on 23-7-2001; on the Lalkara of Saqib (since acquitted) Amjad appellant-accused inflicted a sota blow on the right side of the head of Mudassar (deceased), followed by a sota blow on the left side of the head of Mudassar (deceased) by Muhammad Shafi, appellant; Muhammad Asif complainant, P.W.1, Zafar Mehmood, P.W.2 and Khalid Mehmood (given up P.W.) attempted to rescue the deceased, whereupon, Saqib (since acquitted) threatened that they would be killed if they drew near; Amjad appellant gave another Sota blow on the right cheek of deflated Mudassar (deceased); on the hue and cry of the complainant and his companions, Muhammad Shafi etc. fled away in their vehicle. The occurrence was witnessed by the above said witnesses; the motive behind the occurrence was a dispute of property between the accused and Mudassar (deceased) due to which Muhammad Shafi etc. wounded Mudassar who was brought to Civil Hospital, Phalia by the complainant and his above named companions for treatment. The complainant got recorded his statement Exh.PA by Talib Hussain A.S.-I. Police Station Phalia at Civil Hospital, Phalia, at 7-30 p.m on 23-7-2001.

3. Mudassar Hussain, succumbed to the injuries on 23-7-2001 at THQ, Hospital, Phalia, District Mandi Bahauddin, so, section 302, P.P.C. was added to this case by the I.O.

4. After usual investigation a report under section 173, Cr.P.C. was submitted in the learned trial Court. The appellants and his co-accused were delivered copies of the prosecution evidence under section 265-C, Cr.P.C. Thereafter; they were charge-sheeted to which they did not plead guilty and claimed a trial.

5. The prosecution successfully proved the charge against the appellants, during the course of the trial, as a result of which, the appellants were awarded the aforementioned sentence, whereas, their co-accused Saqib was acquitted of the charge.

6. During the pendency of the trial, one Arshad Iqbal, relative of the deceased moved an application on 4-7-2002 before the learned trial Court for recording the statements of the legal heirs of the deceased qua waiver of their right of Qisas and seeking permission to deposit the amount of Diyat to the extent of Mst. Fahmida Yasmeen as she was not

ready to compound the matter with the accused- appellants. The learned trial Court recorded the statements of Arshad Iqbal, a utrine brother of Muhammad Shafi appellant-accused and real paternal uncle of the deceased, Mst. Fatima Bibi, the mother of the appellant Muhammad Shafi accused and real paternal grandmother of the deceased, Hamara Sajjad and Adeela Majeed, real sisters of Amjad Mehmood, appellant-accused and Saqib Sultan (since acquitted) besides being the step sisters of the deceased, on 26-9-2002.

7. As Mudassar Hussain deceased was the real son of Muhammad Shafi, appellant-accused, whose mother Mst. Rasulan Bibi had already died, leaving behind one son (Mudassar Hussain deceased) and one daughter (Mst. Fahmida Bibi), so, the above said legal heirs of the deceased had appeared before the learned trial Court on 26-9-2002 to record their statements qua waiver of their right of Qisas with the contention that the appellants-accused may be acquitted of the charge.

8. During the course of his statement Muhammad Asif, complainant, P.W.1, has deposed about the fact that Mst. Rasulan Bibi, the real mother of Mudassar Hussain deceased, was his maternal aunt as well as, the first wife of Muhammad Shafi, appellant-accused, who had died about 8/9 years earlier and she had left behind one son Mudassar Hussain (deceased) and a daughter Mst. Fahmida Yasmeen. He further deposed that Muhammad Shafi accused-appellant had solemnized his second marriage with Mst. Aimna Bibi who gave birth to two sons Saqib (since acquitted) and Amjad, the appellant-accused and two daughters namely Hamara and Adeela. He further deposed that the grandmother of the deceased Mst. Fatima Bibi was still alive and that Arshad Iqbal was the son of said Mst. Fatima Bibi but he was from her later husband Ghulam Hussain. He maintained in his statement that the name of father of Muhammad Shafi accused-appellant was Sultan Ahmad who had married Mst. Fatima but after his death she contracted marriage with Ghulam Hussain. Zafar Mehmood P.W.2, the husband of Mst. Fahmida Yasmeen, deposed in his testimony that Mst. Rasulan Bibi was his mother-in-law who was the wife of Muhammad Shafi, the accused-appellant and that she had died about 4/5 years back. The learned trial Court has referred to a pedigree (page No.16 of the impugned judgment) of the deceased by holding that following were the legal heirs of the deceased as he was unmarried at the time of his death:--

(i) Mst. Fahmida Yasmeen, real sister of the deceased (who had not waived her right of Qisas).

(ii) Mst. Fatima Bibi, real paternal grandmother of the deceased (who had waived her right of Qisas).

(iii) Mst. Hamara Sajjad, consanguine sister of the deceased (who had waived her right of Qisas).

(iv) Mst. Adeela Majid, consanguine sister of the deceased (who had waived her right of Qisas).

(v) Arshad Iqbal utrine uncle of the deceased (who had waived his right of Qisas).

9. The learned trial Court did not approve the compromise between the parties as Mst. Fahmida Yasmeen had refused to make a statement of waiver of her right of Qisas in

favour of the accused, during the course of the trial. The complainant too had vociferously opposed the acceptance of compromise at the trial stage with the contention that the real sister of the deceased Mst. Fahmida Yasmeen was the actual affected person of the murder of her real brother and that she had not waived her right of Qisas. It is why the learned trial Court while concluding the subject observed in the impugned judgment that Mst. Fahmida Yasmeen would be entitled to 1/2 share of Diyat, which had been fixed by the trial Court as Rs.10,00,000 under section 323, P.P.C.

10. When the instant appeals were taken up for hearing on 14-7-2010, a sense of sanity prevailed between the parties, a short dialogue was held between them and they decided that Mst. Fahmida Yasmeen too, would waive her right of Qisas by accepting the above said share of Diyat. So she has appeared before this court today and has submitted a Compromise Deed Mark-A, duly signed by her as well as by the learned counsel for both the sides and by Saqib Sultan (since acquitted). According to the terms and conditions of the compromise, the accused shall pay a sum of Rs.2,00,000 to Mst. Fahmida Yasmeen at 2:00 p.m on 19-7-2010, in the office of learned counsel for the appellants Munir Ahmad Bhatti, advocate and rest of the Diyat amount Rs.3,00,000 shall be paid by the accused in three monthly instalments by 19-10-2010, at the rate of Rs.1,00,000 per month through cheques which shall be handed over to the learned counsel for the complainant Muhammad Inayat Cheema, advocate, at noon time on 19-7-2010. It has been further settled between the parties that in case of default on the part of the accused, Mst. Fahmida Yasmeen reserved her right to take to the legal recourse against the accused-appellants. Mst. Fahmida Yasmeen has also verbally shown her satisfaction about the settlement/ compromise deed dated 16-7-2010 and has reiterated her version that she had compounded the matter with the appellants-accused as well as with Saqib Sultan (since acquitted) of her free will and accord and that she had no objection if the accused-appellants were acquitted of the charge by acceptance of their appeal.

11. Learned counsel for the appellants contends that all the legal heirs of the deceased but Mst. Fehmida Bibi (real sister of the deceased) had appeared before the learned trial Court during trial and had waived their right of Qisas and they showed no objection to the acquittal of the accused but the compromise could not be approved of by the learned trial Court as one of the legal heirs, Mst. Fahmida Yasmeen was not willing to join rest of the legal heirs for the purpose of compromise; the learned trial Judge, however, fixed the share of amount of Diyat for Mst. Fahmida Yasmeen as 1/2 of the total Diyat amount i.e. Rs.10,00,000; Mst. Fahmida Yasmeen has appeared before the court to state that she too has pardoned the appellants-accused and that she had no objection to their acquittal in this case for, she had compounded the matter; she has also signed a compromise deed in this regard which has been duly authenticated not only by the either side but also by the learned counsel for both the parties; the efforts for compromise between the parties, which had taken a start in the court of learned trial judge, have materialized into a complete rapprochement, after Mst. Fahmida Yasmeen has also consented to enter into compromise with the appellants-accused and their co-accused Saqib (since acquitted) and has put her signatures on the compromise deed; the appellants-accused on the basis of compromise may be acquitted of all the charges; the compromise is a redeeming feature which brings harmony, coherence and peace in the society which should be encouraged; that the statute had made the offence of culpable homicide compoundable and the

appellants-accused merited acquittal as the compromise arrived at between the parties was genuine and had been finalized without any pressure or coercion; that the deceased was real son of Muhammad Shafi appellant and step brother of Amjad Mahmood appellant-accused, hence, the legal heirs of the deceased with a view to turn the hostility into peace and revive the relationship between the parties, had struck compromise, which, should be accepted and the benefit whereof should be extended to the appellants; though section 449, P.P.C. was not compoundable still, the benefit of compromise may be extended to the appellants for the said offence as well so that the parties may harvest the complete premium of their change of heart; even otherwise, the conviction of the appellant-accused is not sustainable under the law for an offence under section 449, P.P.C. as the appellants could not be described as trespassers in the house of their son or brother; the instant appeal may be accepted and the appellants may be acquitted of the charge.

12. Learned Additional Prosecutor-General does not controvert the submissions made by the learned counsel for the appellant and adds that the statute had made, the offence under section 302, P.P.C., compoundable with the consent of the court and if the parties had decided to live in peace in future, he does not intend to defy it but the conviction/sentence of the appellants under section 449, P.P.C. cannot be set aside as the said offence is non-compoundable; the prosecution has proved the charge against the appellants through cogent and trustworthy evidence so the benefit of the compromise could only be extended to the offence of 302, P.P.C. read with section 311/34, P.P.C.

13. We have heard learned counsel for the parties and have also gone through the F.I.R., statements of the legal heirs of the deceased and that of the P.Ws. along with the statements of the accused under section 342 Cr.P.C. very minutely and carefully.

14. The deceased Mudassar Hussain was the real son of Muhammad Shafi appellant and step brother of Amjad Mehmood appellant who is also the son of Muhammad Shafi appellant. During the course of the trial the statements of legal heirs of the deceased namely Mst. Fatima Bibi, the paternal grandmother of the deceased, Mst. Hamara Sajjad and Mst. Adeela Majeed consanguine sisters of the deceased along with Arshad Iqbal utrine paternal uncle of the deceased were recorded by the trial Court wherein they had waived their right of Qisas and deposed that they had no objection if the appellants-accused were acquitted of the charge. Mst. Fahmida Yasmeen, the real sister of the deceased and one of the legal heirs, however, did not join the band of other legal heirs to compound the offence with the accused so the learned trial Court did not approve of the compromise between the parties and convicted/sentenced the appellants-accused in the aforementioned terms by fixing the share of Diyat (Rs.5,00,000) of Mst. Fahmida Yasmecn who during pendency of the instant appeal, has stated to have compounded the matter with the appellants/accused and that she would not object to their acquittal on the basis of compromise which has been conditioned with certain terms that shall be fulfilled by the accused according to the schedule given in the compromise deed Mark-A, duly signed not only by Mst. Fahmida Yasmeen and Saqib (acquitted co- accused) but also by the learned counsel for both the sides as a token of genuineness and authenticity of the completion of compromise.

15. The offences under section 308, P.P.C. read with section 311/34, P.P.C. have been made compoundable with the consent of the court. If the parties had buried their hatchet

and they had decided to live in peace in future and that through this act of compromise, wanted to bring back peace, harmony and revival of relationship in the family, it is a good omen, which should be encouraged. So, I nod in positive to the above said compromise and acquit the appellants-accused for offences under sections 308, 311/34, P.P.C. It is also worth-mentioning that the appellants-accused had been arrested in this case on 24-8-2001 and they by now must have undergone their sentence of imprisonment, they were awarded by the learned trial Court under section 308, P.P.C. read with section 311/34, P.P.C.

16. So far as, the conviction and sentence of the appellants- accused under section 449, P.P.C. is concerned I find that the place of occurrence, as per statement of Muhammad Asif P.W.1 and Zafar Mehmood P.W.2, was the bungalow (Kothi) owned by Muhammad Shafi appellant-accused wherein his real son Mudassar Hussain (deceased) was living for a number of years, allegedly against the wishes and consent of his father, as according to the prosecution case, Muhammad Shafi appellant-accused had not given him the share of his urban property. Can a father be considered a trespasser in the house of his real son or a person can be deemed as such in the house of his step brother (who is the son of the same father like him) is a question to be looked at and dealt with legal acumen-ship. The place of occurrence in this case was a house exclusively owned by Muhammad Shafi, the appellant-accused while his co-assailant Amjad Mehmood is his real son. Regardless of the allegations against them, it cannot be held that they being the relatives of the deceased, to such a close degree, would be deemed to have committed the offence of trespass within the scope of section 449, P.P.C. The instant proposition has not been dealt with lawfully by the learned trial Court and have recorded the conviction and sentence against the appellants-accused in a manner, unwarranted by law. I advantageously rely upon Muhammad Asif v. The State (1999 YLR 1576) wherein it has been held as under:--

> "Sentence under section 449, P.P.C. is set aside because it was the house of the sister of the appellant, so, in our view appellant had not criminally trespassed into the said house."

17. In the above referred to judgment, passed by this court, the facts of the case were that the appellant Muhammad Asif being armed with a knife had entered the house of his sister at 2-00 a.m. and committed the murder of his brother Asif Mehmood. With the above said observation, the conviction and sentence of the appellant under section 449, P.P.C. was set aside.

18. Therefore, I hold that the appellants-accused had not committed any offence under section 449, P.P.C. by entering the residential house of the deceased/place of occurrence, exclusively owned by Muhammad Shafi, appellant-accused, the father of the deceased and that of his co-appellant, so their conviction and sentence for the said offence is not maintainable, which is set aside.

19. The upshot of the above discussion is that the instant appeal bearing No. 1792 of 2002 filed by the appellants-accused is accepted, their conviction/sentence under section 449, P.P.C. is also set aside and they are acquitted of the charge. They shall be released forthwith, if not required in any other criminal case.

20. The Criminal Appeal No. 1991 of 2002 filed by Muhammad Asif, complainant

against acquittal of Saqib Sultan, respondent No.1, for the foregoing reasons is dismissed.

N.H.Q./M-457/L Appeal accepted.

2011 Y L R 1871

[Lahore]

Before Ijaz Ahmad Chaudhry and Shahid Hameed Dar, JJ

MUHAMMAD SIDDIQUE---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No. 1734 of 2000, heard on 8th April, 2010.

Penal Code (XLV of 1860)---

----Ss. 302, 324 & 346---Qatl-e-amd, attempt to commit qatl-e-amd, wrongful confinement in secret---Appreciation of evidence---Accused persons allegedly committed qatl-e-amd of the deceased complainant and her husband by locking in and torching the room they were asleep by digging a hole into the roof top of the room and throwing down kerosene oil and burning pieces of cloth through that hole---Deceased complainant had nominated the accused and his acquitted co-accused in her statement recorded in hospital and incorporated into F.I.R., but doubt remained as to the ability of the deceased to see the accused persons through hole in ceiling after they had been set on fire---Digging carried out by the accused could produce noise alarming the eye-witnesses asleep on a nearby roof---Question remained as to why eye-witness produced by the prosecution did not act promptly to break open the lock before fire burnt the deceased alive---Prosecution alleged that the accused harboured grudge against the deceased, his real brother, for a gift of land made by their father in favour of the deceased but no documentary evidence was produced regarding said gift to establish the allegation---Statement of the solitary prosecution witness was not corroborated by testimony of two other eye-witnesses which were withheld and given up by prosecution---Medical officer was not produced as witness to establish that the deceased complainant was fit for recording statement, neither the statement of the Investigating Officer revealed that he obtained the opinion of Medical Officer in this regard---Trial Court did not appreciate the evidence properly---Statements of the complainant and the eye-witness were highly dubious and contradictory---Motive attributed to the commission of offence could not be believed---Recovery of the rifle was inconsequential for the case of prosecution as no fire-arm injuries were found on the bodies of the deceased---Trial Court acquitted two co-accused charged with the same offences without distinguishing their case from that of the accused/appellant---Impugned judgment suffered from non-reading and misreading of evidence---Conviction and sentence awarded to the accused was set aside and he was acquitted of the charges---Death sentence was not confirmed, murder reference was answered in the negative.

Rao Abdul Jabbar Khan for Appellant.

Ahsan Rasool Chattah, D.P.-G. for the State.

Date of hearing: 8th April, 2010.

JUDGMENT

SHAHID HAMEED DAR, J.---This criminal appeal is directed against the judgment dated 14-11-2000 passed by learned Additional Sessions Judge/Special Judge Suppression of Terrorist Activities, Kasur, whereby, the appellant was found guilty under section 302(b), P.P.C. and was convicted/sentenced to death, with payment of compensation of Rs.50,000 on each count to legal heirs of Muhammad Haneef deceased and Mst. Salma Bibi deceased. He was also found guilty under section 346, P.P.C. and sentenced to 7 years' R.I and fine in the sum of Rs.25,000, in case of default, one year's S.I. and was convicted/sentenced under section 324, P.P.C. as well, with seven years' R.I and fine in the sum of Rs.25,000 on each count and in default payment of fine, to undergo one year's S.I. while his co-accused Muhammad Sharif and Mst. Maryyum Bibi were extended the benefit of doubt and acquitted from the aforementioned charges.

3. As benefit of section 382(b), Cr.P.C. was not extended to the appellant/convict, hence, it does not find mention in the impugned judgment.

4. Briefly stated, the facts of the case, as mentioned in the complaint Exh.PF, are that Mst. Salma Bibi, her husband Muhammad Haneef and their children Waqas and Amaar slept in a room of their residential house at the night between 5/6 July, 1996. Mst. Salman Bibi and others got up on hearing the sound of fall of some tile bricks and earth inside the room from the roof top, at about 12-30 a.m. they had hardly awoken when kerosene oil and some burning clothes fell in the room through a hole in the roof, due to which, the room caught fire, they raised hue and cry and attempted to open the door which was bolted from outside; in the meanwhile, the accused made two fire shots through the same hole. The report of firing with shrieks of Mst. Salma etc. her maternal cousin (Mamonzad) Muhammad Latif and her brother Muhammad Aslam broke open the lock and opened the door of the room but her husband and children had been badly burnt; Muhammad Aslam, and Muhammad Latif witnessed, Muhammad Sharif, Muhammad Siddique and Mst. Maryan Bibi setting the room ablaze from the roof top and firing inside the room; on arrival of the co-villagers at the spot, the accused ran away, who were also accompanied by an unknown person. The motive behind the occurrence was that father-in-law of Mst. Maryam Bibi, namely, Ibrahim had transferred one acre of agricultural land in the name of husband of the complainant due to which Sharif and Siddique etc. usually quarreled with husband of Mst. Salma Bibi and due to this grudge they committed the occurrence with intent to commit murder; Muhammad Haneef, the husband of Mst. Salman Bibi complainant died due to burns in the Hospital at Lahore.

5. Mst. Salma Bibi also died of the burns, 3/4 days after the occurrence but her statement/complaint Exh.PF was recorded by Muhammad Rafique Khan A.S.-I., P.W.11 at Mayo Hospital, Lahore, before her death, on 6-7-1996.

6. Muhammad Siddique appellant was arrested on 29-7-1996 by Muhammad Sharif S.-I./S.H.O., P.W.9 who on his disclosure lead to the recovery of rifle P-14 with 12 live bullets P-15/1-12 on 3-8-1996 which were taken into possession vide recovery memo. Exh.PE. After conclusion of investigation, report under section 173, Cr.P.C. was submitted for trial of the appellant/convict.

7. On commencement of the trial, the accused/appellant was indicted, he pleaded not guilty to the charge and claimed trial, whereafter, the prosecution was ordered to produce its witnesses/evidence.

8. In order to substantiate their accusations against the accused, they produced following witnesses.

9. Muhammad Ikram F.C No.325, as P.W.1 who deposited the sealed parcel of rifle in the office of Forensic Science Laboratory, Lahore on 20-8-1996.

10. P.W.2 Muhammad Jamil A.S.-I. was posted as Moharrer on 3-8-1996 who was handed over a sealed parcel said to contain rifle, he kept it in Malkhana of the Police Station intact and handed the said parcel to Muhammad Ikram constable, P.W.1 for transmission to the office of Forensic Science Laboratory, Lahore.

11. P.W.3, Muhammad Akram, 857/HC was Moharrer at Police Station Khudian on 6-7-1996, who received a complaint Exh.P.W.3/1 sent by Muhammad Rafique A.S.-I., P.W.1, correctly recorded formal F.I.R. Exh.P.W.3/2 without any addition or omission.

12. P.W.4, Muhammad Nusrullah, the draftsman prepared the site plan in the scale of 1 inch equal to 20 ft, Exh.PA and Exh.PA/1.

13. P.W.5 Ghulam Shabbir HC was handed over the deadbody of Muhammad Haneef for its postmortem examination, escorted the same to DHQ, Hospital, Kasur along with Liaqat Ali, 696/C. After postmortem examination of the deadbody, the Doctor handed over to him last worn clothes of the deceased Shalwar P-1, which was taken into possession by the I.O. vide recovery memo. Exh.PC. He also got postmortem examination conducted of the dead body of Mst. Salman Bibi on 11-7-1996 and after postmortem examination of the dead body last worn clothes of the deceased Shalwar P-2, Dopatta P-3 were handed over to him which were taken into possession by the Investigating Officer vide recovery memo. Exh.PC.

14. P.W.6 Muhammad Ashiq deposed that the I.O. visited the place of occurrence and took into possession one empty gallon P-4, a half filled gallon with kerosene oil P-5, burnt pieces of clothes of Mst. Salman Bibi P-6, burnt pieces of bed P-7, one Khurpa P-8, one lock P-9, four pieces of tiles P-10/1-4, one match P-11, one brick P-12 and two empties of rifle .7 M.M P13/1-2, vide recovery memo. Exh.PD, attested by him and other P.W.

15. P.W.7 Muhammad Aslam deposed about the details of occurrence, claiming himself to be an eye-witness and stated that he had witnessed Siddique accused armed with rifle, Sharif accused having a gallon in his hand and a Khurpa and Maryyum Bibi being possession of clothes and one unknown person at about 12-30 a.m. (midnight), who, set on fire the room wherein Haneef and his wife were sleeping along with their children by making a hole in the roof of the room; he further deposed that the room was locked from outside which was broken open by him along with other Haneef, Mst. Salman Bibi and their children were brought out of the burning room and by that time Haneef, his wife Salma and their children had been burnt to 3rd degree who, were shifted to DHQ, Hospital, Kasur, where the Medical Officer Dr. Abdul Rauf, P.W.13 referred them to Mayo Hospital, Lahore, they were shifted there and admitted as indoor patients; he further deposed that his brother-in-law Haneef succumbed to the burns/injuries at Mayo

Hospital, Lahore and 3/4 days thereafter, Mst. Salma also succumbed to the injuries. He identified both the dead bodies at the time of the autopsy; he deposed about the motive in line with one, mentioned by Mst. Salman Bibi deceased.

16. P.W.8 Basheer Ahmad deposed that accused/convict Siddique made a disclosure qua the weapon of offence being in police custody, on 3-8-1996 and led to the recovery of a rifle P-14 and 12 live bullets P-15/1-12 from a sugarcane field which were taken into possession by the I.O. vide a recovery memo. Exh.PE.

17. P.W.9 Muhammad Sharif S.-I./ S.H.O., arrested Muhammad Siddique accused/appellant and his co-accused Mst. Maryam on 29-7-1996. He got physical remand of Muhammad Siddique appellant and recovered the aforementioned rifle and live bullets on his disclosure on 29-7-1996. He concluded the investigation in this case and submitted challan/report under section 173, Cr.P.C. for trial of the accused.

18. P.W.10 Nazeer Ahmad, 492/HC, Moharrer deposed that he handed over the sealed parcel containing empties to Muhammad Ameen 1089/C, P.W.12 for transmission to the office of Forensic Science Laboratory on 23-7-1996 intact.

19. P.W.11 Muhammad Rafique Khan A.S.-I. is the first Investigating Officer of this case who recorded the statement of Mst.Salman Bibi (deceased) in injured condition at Mayo Hospital, on 6-7-1996 which is Exh.P.W.3/1/Exh.PF, read it over to her, which was marked by Mst. Salman Bibi with her right big toe as her both hands including thumbs were badly burnt and got F.I.R. recorded on the basis of this statement; he prepared the inquest report Exh.PG qua Haneef deceased and after handing over his dead body to Ghulam Shabbir 249/HC and Liaqat Ali 696 HC for postmortem examination, reached the place of occurrence, inspected the spot, recorded the statements of the persons gathered there, took into possession two crime empties P-13/1-2 and other aforementioned articles through recovery memo. Exh.PD, secured last worn clothes Shalwar P-1 of Haneef deceased vide recovery memo. Exh.PB, prepared the inquest report Exh.PH of Mst. Salman Bibi deceased on 10-7-1996, sent her dead body to the mortuary for postmortem examination which was so done on 11-7-1996 and after the postmortem examination of her deadbody, the Investigating Officer took into possession her last worn clothes Shalwar P-2, Dopatta P-3 through recovery memo. Exh.PC; he got prepared the scaled site plan Exh.PA and Exh.PA/1 at the hand of the draftsman Muhammad Nusrullah, P.W.4, thereafter the investigation was entrusted to Muhammad Sharif S.-I., P.W.9.

20. P.W.12 Muhammad Ameen 1089/C transmitted the sealed parcel of crime empties, in the office of Forensic Science Laboratory, on 23-7-1996. His statement was not followed by any cross-examination.

21. Learned ADA closed the prosecution evidence on 19-10-2000 after tendering in evidence report of Forensic Science Laboratory Exh.PR.

22. At the end of prosecution evidence, the appellant was examined under section 342, Cr.P.C, wherein he denied all the charges against him and contended that the deceased Muhammad Haneef was a kerosene oil dealer who used to have the same in small container in a room of his house where he along with others slept on the fateful night; he further contended that deceased Muhammad Haneef was a habitual smoker who threw a butt of the cigarette lying on the bed which on contact, with kerosene oil caught fire and

within no time, the flaming fire reduced everything, present in the room, to ashes and caused bad burns on the bodies of the deceased etc. He further contends that father of Haneef deceased refused to lodge a false report, as he was aware of the real incident. He further contends that he was employee in a Garment Factory at Hanjarwal, Lahore and on the day of occurrence he was present at the place of his job; that Muhammad Latif and Sharif eye-witnesses refused to support the false prosecution version so they have not been produced by the prosecution at trial; that Muhammad Aslam, the only alleged eye-witness, produced by the prosecution is the real brother of Mst. Salma deceased who deposed falsely to cause them ruination.

23. The appellant did not opt to give statement on oath nor produced any witness in defence.

24. On conclusion of the trial the learned Special Judge Suppression of Terrorist Activities court, Kasur found the appellant guilty and convicted/sentenced him in the aforementioned terms.

25. The learned Special Judge of S.T.A., Kasur has forwarded Capital sentence Reference No. 1-T of 2000 for confirmation of conviction and sentence of death awarded to accused Muhammad Siddique and we intend to decide both S.T.A. Reference No.1-T/2000 and Criminal Appeal No.1734 of 2000 through this single judgment.

26. The learned counsel for the appellant has vehemently contended that the prosecution could not produce any evidence to substantiate their charges against the appellant and yet, the learned trial Court through its impugned judgment, has awarded capital punishment to the appellant without any just cause and rational arguments; that the alleged dying declaration, as contained in complaint Exh.PF cannot be given any weight or read against the appellant, as, the requirements of law qua recording dying declaration have not been fulfilled nor it bore any certificate from the Medical Officer of Mayo Hospital, Lahore, endorsing the authenticity of the statement, allegedly made by Mst. Salma Bibi deceased; that the version contained in the alleged dying declaration is preposterous and does not fit in attending circumstances of the case; that Mst. Salma Bibi deceased, her husband and two minor children were not in a position to see as to who was standing on the roof top, causing the hole in the ceiling, showering kerosene oil through the hole and dropping lit clothes and match box inside the room where both the deceased were asleep; that the alleged presence of the eye-witnesses Muhammad P.W.7 at the place of occurrence at the relevant time cannot be believed as he is the resident of village Dhings Shah which is at a distance of 2/2-1/2 k.m from village Rodhy (the village of occurrence) and he happens to be a chance witness who failed to disclose the purpose of his visit to the house of his real sister Mst. Salma Bibi, on the day of occurrence; that the conduct of Muhammad Aslam, P.W.7 during the course of occurrence reflects upon the sanctity of his testimony as he claims to have witnessed the appellant and his co-accused digging the roof of the room with a Khurpa, making a hole in it, sprinkling kerosene oil through a hole, dropping burning clothes inside the room through a hole, setting the room ablaze and causing the bodies of Mst. Salman bibi and her husband burnt yet, he, instead of raising alarm, silently watched prolonged act of the accused including the appellant and only after no probability of the life of Salma Bibi and her husband was left he along with others broke open the lock of the room to save the burning bodies; that the

F.I.R./dying declaration does not inspire confidence at all nor it does establish the identity of the real perpetrators of the crime; that the appellant has not committed any offence at all and he has been dispatched to death cell by the learned trial Court through the impugned judgment which suffers from non-reading and misreading of the evidence.

27. Learned Deputy Prosecutor-General has supported the impugned judgment and contends that in her dying declaration Mst. Salman Bibi deceased had categorically nominated the appellant to have committed a gruesome and callous act by torching the room wherein both deceased along with their children were sleeping; that the rifle .7 MM recovered at the instance of the accused/appellant was found matched with two crime empties, vide Forensic Science Laboratory report Exh.PR; that the impugned judgment does not suffer from any element of capriciousness, arbitrariness or foolishness of the argument.

28. We have carefully considered the contentions put forth by both the parties' learned counsels. According to the prosecution case, deceased Mst. Salman Bibi recorded her statement Exh.PF before Muhammad Rafique Khan A.S.-I., P.W.11 on 6-7-1996 when she was admitted in the Mayo Hospital, Lahore as injured patient and nominated the appellant as well as his acquitted co-accused to have committed the occurrence but the fact remains that she, her husband or her children, having slept inside the room were not in a position to see through a dug out hole in the roof top as to who was there on the roof around the said hole, as her husband, her children and she herself had caught fire.

29. According to the complaint Exh.PF, the real brother of the complainant, Muhammad Aslam, P.W.7, her maternal cousin Muhammad Latif, had witnessed Muhammad Sharif, Muhammad Siddique appellant and Mst. Maryan Bibi digging a hole in the roof of the room and setting the said room on fire by sprinkling oil and dropping lit clothes inside the room through the said hole. The inimical act of the accused must have lasted for quite some time. To dig a hole in the roof by means of a Khurpa could not be done within a minute or two as the accused did not have with them any mechanical device to hasten their crime, without causing any noise. The manual act done either by the accused or by any other person could have caused alarm to Muhammad Aslam, P.W.7 and his companion Muhammad Latif who slept on a nearby roof but strange enough, they failed to notice the sound of repeated hurling of Khurpa in the roof, by the accused nor they could notice the presence of the persons standing on the roof top, waiting for a hole to appear, to do the rest.

30. There are two possibilities about the presence of a hole in the roof of the room of occurrence, one, that it had been done by the accused much earlier then the night of the occurrence, or it was dug at the time of occurrence; if the hole had been caused in the roof much earlier then, it must have been noticed by the deceased at the time, they went to their bed.

31. It is a fact of common observance that while lying supine the eyes are always upwards and if any tampering had been done, with a through and through hole, in the roof, it could at escape the vision of the person lying underneath the roof. If Muhammad Haneef, Mst. Salman Bibi and their two children had gone to their beds in the room of the occurrence and they did not make any complaint or they did not leave that room it indicates that every thing was normal and there was no hole in the roof at that time

which, had surely been dug after they slept.

32. A question arises what would Muhammad Aslam, P.W.7 and other P.Ws. wait for till everything stood gutted and the bodies of the deceased and that of the children were badly burnt, before they decided to broke open the door?

33. The deceased Muhammad Haneef and the appellant are real brothers inter se, who lived in two separate houses but, adjacent to each other. The alleged motive relates to transfer of one acre of agricultural land to Muhammad Haneef deceased by his father Ibrahim which according to Muhammad Aslam, P.W.7 was a bone of contention between the two brothers. No mutation or transfer deed has been submitted by the prosecution during the trial to establish the fact of transfer of the suit land in the name of Muhammad Haneef deceased. Muhammad Aslam, P.W.7, however, has admitted in cross-examination that Ibraheem, father of the appellant had gifted one acre of land to Muhammad Haneef with the consent of the accused/appellant. It being so, the factum of grudge to the appellant is hardly believable. No documentary evidence has been led by the prosecution to fortify the allegation which could show that the two brothers had heart burning or bias against each other or that some enmity existed between them which allegedly culminated in the unfortunate incident.

34. Naturally, Muhammad Ibraheem, the father of the deceased has been shown by the prosecution to have greater love and affection for his son Muhammad Haneef deceased because of the aforementioned gift of one acre of land to him. He was the resident of the same house and there could not be any other person than him to be more knowledgeable about the real facts of the occurrence. Had there been any substance in the allegations levelled in the F.I.R. or in the testimony of Muhammad Aslam P.W.7 Muhammad Ibraheem, was the best prosecution witness in the attending circumstances of the case to prove the allegation against the appellant/accused. Muhammad Aslam P.W.7 took the dead body of Muhammad Haneef deceased to his village instead of letting it be buried in village Rodhy, the village of occurrence, gives rise to a strong suspicious as to the credentials of the said P.W. It appears to have been done against the wishes of the father of the deceased as he did not opt to be a witness of the story, and masterminded by P.W.7 who at the best, as discussed earlier, is a chance witness, whose statement has to be analyzed and scanned with utmost care and caution. The best corroboration to his statement would have been the deposition of the other alleged eye-witnesses Muhammad Sharif and Muhammad Latif but both of them were withheld by the prosecution and were given up as having been won over by the accused without any proof in this regard. The solitary statement of P.W.7 does not stand corroborated by the statement of any other alleged eye-witness though, Muhammad Latif P.W. was real maternal cousin of the deceased and a resident of the same village like that of Muhammad Aslam P.W.

35. According to the Medical Officer Dr.Abdul Rauf, P.W.13, he medically examined Mst. Salman Bibi deceased (in injured condition) found that her face, part of skull front of chest, abdomen, chest back, almost 45% of the body was burnt with kerosene oil including her both hands, that is why the police proceedings recorded on Exh.PF indicate that the statement of Mst. Salman Exh.PF was got marked by her right big toe instead of her right thumb. Statement of the Investigating Officer Muhammad Rafique A.S.-I., P.W.11 does not contain the fact that he obtained opinion of the Medical Officer qua the fitness of Mst.

Salman Bibi, if she was at all fit to make statement or not. The police proceeding recorded on Exh.PF, however, indicate this fact. No Medical Officer has been produced by the prosecution as a witness to the aforementioned crucial fact to establish that Mst. Salman Bibi was physically fit enough to make statement shown as Exh.PF. Even, the application referred to by Muhammad Rafique Khan, A.S.-I., P.W.11 in police proceedings recorded on Exh.PF, has not been tendered in prosecution evidence. So, serious doubt exists about recording of statement of Mst. Salma Bibi deceased, by Muhammad Rafique Khan, A.S.-I., P.W.11 which cannot be termed as a dying declaration.

36. The recovery of rifle .7 MM P-14 with live bullets P15/1-12 has not been used to cause injuries on the bodies of the deceased as none of the two dead bodies bear any fire arm injury. The report of Forensic Science Laboratory Exh.PR indicates that the crime empties were received by the said office on 23-7-1996 and rifle .7 MM was deposited in the said office on 20-8-1996. The date of recovery of crime empties P-13/1-2 has been mentioned as 6-7-1996 and that of recovery of rifle 7.MM P-14 as 3-8-1996 by Muhammad Sharif S.-I., P.W.9. It indicates that the crime empties were dispatched to the office of Forensic Science Laboratory after 17 days of its recovery and rifle, P-14 was sent again after 17 days of its recovery on 20-8-1996. No explanation has been offered by the prosecution qua the delay caused, in the dispatch of these articles to the office of Forensic Science Laboratory. The rifle .7-MM was recovered from the open field of Sugarcane crop of one Nazeer Ahmad which was not in the exclusive possession of the appellant and which of course, was in the access of all and sundry, being, an open place. In the attending circumstances of the case, the evidence qua recovery of the said rifle hardly, advances the case of the prosecution against the appellant.

37. The learned trial court while passing the impugned judgment and formulating his opinion qua the guilt of the accused/appellant, has not drawn the conclusions consonant with the prosecution evidence. The ocular account furnished by a solitary witness, P.W.7 is highly doubtful. The recording of the statement of Mst. Salman Bibi (deceased) is dubious and does not appeal to reason and logic. The motive, as, discussed above is also not believable. Non-presence of fire-arm injuries on the bodies of the two deceased, renders the recovery of rifle P-4, at the instance of the appellant inconsequential for the prosecution case. The two acquitted co-accused Muhammad Sharif and Maryan Bibi were also burdened with similar allegation like the appellant but the learned trial court did not believe the prosecution evidence and acquitted them for the charge of murder of Muhammad Haneef and Salman Bibi. No special or discernable circumstances have been pointed out by the learned trial court to uphold the divisibility of credence of the prosecution witnesses. The version contained in the F.I.R. and in the statement of Muhammad Aslam, P.W.7 are equal unnatural, preposterous and hard to believe. The prosecution case is full of contradictions and discrepancies. The impugned judgment has been passed on conjectures and surmises. The conclusions drawn are whimsical, which, suffer from non-reading and misreading of evidence.

38. For the foregoing reasons, we accept the instant appeal against conviction. The impugned judgment by which, the aforementioned conviction and sentence was awarded to the appellant, is set aside and he is acquitted of the charges, for which he had been indicted by the learned trial Court. He shall be released forthwith, if not required in any other criminal case.

The death sentence awarded to the appellant is not confirmed. Murder Reference is answered in negative.

A.R.K./M-288/L Appeal allowed.

2011 Y L R 1909

[Lahore]

Before Shahid Hameed Dar, J

GHULAM RASOOL---Petitioner

Versus

THE STATE and another---Respondent

Criminal Miscellaneous No.4704-B of 2010, decided on 3rd June, 2010.

Criminal Procedure (V of 1898)---

----S.498---Penal Code (XLV of 1860), Ss.420/406---Cheating and dishonestly inducing delivery of property, criminal breach of trust---Pre-arrest bail, grant of---Offence of criminal breach of trust would be deemed to have been committed when some property given on trust was required to be returned to the person creating the said trust---Complainant had not alleged that he had given any documents of the motorcycle or the motorcycle itself to the accused to be kept by him by way of trust and the same were bound to be returned to him by accused---Unless such condition was fulfilled S.406, P.P.C. could not be attracted---Complainant had not produced any evidence with regard to transfer of ownership of the motorcycle by the accused to the co-accused during investigation---Complainant appeared to be aggrieved by the alleged misappropriation of his wages of Rs.55,000 by the accused, as mentioned in the later part of the F.I.R.---Implication of accused in the case due to malice or ulterior motives of the complainant could not be ruled out---Accused, prima facie, could not be said to have committed any non-bailable offence--Pre-arrest bail was granted to accused in circumstances**.**

2006 PCr.LJ Lah. 1900 and 2008 MLD (Lahore) 331 **ref**.

Ch. Abdul Rasheed for Petitioner.

Sahibzada M.A. Amin Mian, Addl. P.G. for Respondent.

Zahoor Ali, A.S.-I.

ORDER

SHAHID HAMEED DAR, J.---Ghulam Rasul petitioner seeks bail before arrest in case F.I.R. No.105 of 2010 dated 13-3-2010 for offences under section 420, 406, P.P.C. registered at Police Station Gawalmandi, Lahore on the complaint of one Muhammad Anwar.

2. Brief facts of the case are that the complainant purchased a second

hand motorcycle from Shah Jee Motors Farooq Center, Lahore Hotel on 15-5-2009 for consideration of Rs.28,500; the proprietor of the company issued a receipt and an open transfer letter to the complainant with the promise that the original relevant documents would be delivered to the complainant after due completion; Ghulam Rasul (petitioner) was also with him at that time who, joined by one Imran approached the proprietor of Farooq Center and deceitfully obtained the aforesaid documents from him by pretending that he was sent by Muhammad Anwar (complainant); thereafter, he fraudulently transferred the above said motorcycle in the name of his friend Muhammad Imran, by fabricating forged documents; Ghulam Rasul had also misappropriated the wages of the complainant to the tune of Rs.55,000.

3. Learned counsel for the petitioner contends that the petitioner has been falsely implicated in this case by the complainant due to his mala fide intention and previous grudge against him; the story contained in the F.I.R. is self contradictory and it does not disclose commission of an offence under section 406, P.P.C. as no property had been entrusted by the complainant to the petitioner and section 420, P.P.C. is bailable. Relies upon 2006 PCr.LJ (Lahore) 1900, 2008 MLD (Lahore) 331.

4. On the other hand learned Addl. Prosecutor-General assisted by learned counsel for the complainant opposes the grant of bail to the petitioner with the contention that the petitioner has betrayed the friendship of the complainant by receiving the documents of the motorcycle on a false pretext and thereafter transferred the same to his co-accused through fraudulent means; the petitioner has failed to point out any element of malice or ulterior motive on the part of the complainant, therefore, he is not entitled for grant of extraordinary concession of pre-arrest bail.

5. Arguments heard. Record perused.

6. It has not been alleged anywhere in the F.I.R. that the complainant had entrusted some property to the petitioner within the meaning of section 406, P.P.C. so, it is hard to attach any importance with insertion of section 406, P.P.C. with section 420, P.P.C. on the tenor of the F.I.R. Both the above said penal provisions are miles apart from each other so far as, there definition is concerned. Section 405, P.P.C. provides the definition of criminal breach of trust which reads as under:--

> "Whoever, being in any manner entrusted with property, or with any dominion over property, 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 discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do, commits "criminal breach of trust."

7. It is evident from the above definition that an offence of criminal breach of trust shall be deemed to have been committed when some property

is given on trust which is required to be returned to a person creating the said trust. In the instant case, the complainant has not alleged that he had given any documents of the motorcycle or the motorcycle itself to the petitioner, to be kept by him by way of a trust and the same were bound to be returned to the complainant. Unless such condition is fulfilled, it shall not attract the provisions of section 405, P.P.C. read with section 406, P.P.C. So far as the allegation of transfer of the ownership of the motorcycle by the petitioner to his co-accused Imran is concerned no evidence has been produced by the complainant in this regard during the course of investigation. One Asghar Ranjha, of Shah Jee Motors joined the investigation on 9-4-2010 and got recorded his statement under section 161, Cr.P.C. wherein he has not named the petitioner to have taken away the documents of the motorcycle either from him or from any other person. The complainant appears to be aggrieved against the petitioner as he has alleged in the later part of the F.I.R. that he had misappropriated his wages amounting to Rs.55,000. The implication of the petitioner in the instant case due to malice or ulterior motives of the complainant cannot be ruled out. Prima facie it cannot be said that the petitioner has committed any non-bailable offence.

8. For the foregoing reasons I accept this petition and confirm the ad-interim pre-arrest bail allowed to the petitioner on 6-5-2010 subject to furnishing fresh bail bonds in the sum of Rs.50,000 with one surety in the like amount to the satisfaction of the learned trial Court.

N.H.Q./G-61/L Pre-arrest bail allowed.

2011 Y L R 1924

[Lahore]

Before Shahid Hameed Dar, J

SABIR HUSSAIN---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.7042/B of 2010, decided on 8th July, 2010.

Criminal Procedure Code (V of 1898)---

----S.497(2)---Penal Code (XLV of 1860), Ss.302/34/109---Qatl-e-amd, abetment---Bail, grant of---No direct or indirect evidence to connect the accused with the commission of the offence had been collected during investigation---Wife of the deceased had disowned her statement made before the Investigating Officer under S.161, Cr.P.C. which even otherwise did not incriminate the accused for having hatched up a conspiracy for the murder of both the deceased, as no date, time and place of the same had been mentioned by her---Even the names of the persons allegedly marshalled by the accused to do away with the deceased had not been disclosed in the said statement---Wife of the deceased while appearing in person in High Court had also submitted her sworn affidavit to the

effect that she had neither joined the investigation nor had made any statement before the Investigating Officer against the accused---Further probe into the guilt of accused as required under S.497(2), Cr.P.C. was indispensable---Bail was allowed to accused in circumstances.

Ch. Muhammad Din Ansari for Petitioner.

Khurram Khan, D.P.-G. for the State.

ORDER

SHAHID HAMEED DAR, J.---Sabir Hussain petitioner seeks bail after arrest in case F.I.R. No.295 of 2009 dated 27-12-2009 under section 302, 34, P.P.C. read with section 109, P.P.C. registered at Police Station Karianwala, District Gujrat, on the statement of Muhammad Saeed.

2. Precisely, the prosecution case is that Abdul Ghaffar elder brother of the complainant divorced his wife Mst. Ghulam Kubra due to estrangement of matrimonial relationship about two years prior to the instant occurrence and thereafter he married Mst. Asfa Bibi against the wishes of her family members which caused annoyance to her paternal uncle Sabir (petitioner); Abdul Ghaffar and his maternal nephew Mukhtar, therefore migrated to village Bhring and established a clinic there. Sabir (petitioner) used to intimidate Abdul Ghaffar due to the aforesaid fact and also extended him the threats of murder. Abdul Ghaffar and his nephew Mukhtar Ali left village Bhring at 3-30 p.m on 26-12-2009 but did not return alive; the complainant along with his brother Raja Muhammad Sarwar set out in search of his brother and nephew and learnt from some persons that the dead bodies of two youthful persons were lying near a Barsati nullah so they went to that place and found the deadbody of Abdul Ghaffar and Mukhtar Ali lying on the road besides their motorcycle; the complainant speculated that both of them had been murdered by Sabir Hussain (petitioner), Faiz Alam and Mst. Sobia, younger sister of Asia Bibi. The motive behind the occurrence was that Abdul Ghaffar had contracted marriage with Mst. Asfa Bibi against the wishes and consent of his parents-in-law.

3. Learned counsel for the petitioner contends that a bald allegation has been levelled by the complainant against the petitioner without hinting at any connecting evidence; the complainant failed to produce any evidence either direct or indirect during the course of investigation against the petitioner, as such, the real facts of this case continuously remained shrouded in mystery; the Investigating Officer fabricated the statement under section 161 Cr.P.C. of Mst. Asfa to the effect that Sabir Hussain, her husband had abetted some one for commission of murder of both the deceased, so, she appeared before the learned Ex- Officio Justice of Peace by way of an application under sections 22-A/22-B Cr.P.C. seeking relief against the Investigating Officer who had fabricated a bogus statement in her name; the Investigating Officer has failed to collect any direct or circumstantial evidence qua the involvement of the petitioner in the occurrence; the case of the petitioner in the attending circumstances of the case falls within the purview of further inquiry as envisaged under section 497(2), Cr.P.C.

4. Conversely, learned Deputy Prosecutor General submits that the petitioner had sufficient reasons to commit the murder of the deceased as he was annoyed over the marriage of Mst. Asfa Bibi with the deceased Abdul Ghaffar; the wife of Abdul Ghaffar

Mst. Asfa had joined the investigation and recorded her statement under section 161 Cr.P.C. wherein she had categorically fixed the liability of murder of her husband on the petitioner; the Investigating Officer after conducting intensive investigation in this case has held the petitioner culpable for the murder of both the deceased and has found him involved in the occurrence; lastly contends that the offence with which the petitioner is charged catches the prohibition of section 497, Cr.P.C. and he is not entitled for the relief prayed for.

5. I have heard learned counsel for the parties and perused the record.

6. Though the details of the occurrence are heart rendering and hair-raising, yet the courts are not swayed away by emotions and sentiments and it is the evidence alone which matters for adjudication of bail application of an accused. I find that the Investigating Officer has failed to collect any direct or indirect evidence against the petitioner during the course of investigation up-till now. Even if the statement of Mst. Asfa, which she denies to have made, is taken into consideration it hardly creates any incriminating evidence against the petitioner as no date, time and place has been mentioned by her as to when, where and how the consultation for hatching up a conspiracy had taken place nor it discloses the names of the person who had been allegedly marshalled by the petitioner to commit the murder of both the deceased. Asfa Bibi appeared before the learned Ex-Officio Justice of Peace by way of an application under sections 22-A/22-B, Cr.P.C. with the contention that her statement had been fabricated by the Investigating Officer under section 161, Cr.P.C. during the course of investigation which should be discarded from the investigation file and that the above said Investigating Officer might be proceeded against according to law. Asifa Bibi who is present in person has submitted her sworn Affidavit to same fact making the deposition that she had neither joined the investigation nor had made any statement before the I.O against the petitioner or anybody-else. So far as the circumstances of this case, at the moment are concerned, the petitioner has made out a case for grant of bail within the meanings of section 497(2), Cr.P.C. as further probe is required to look into his guilt.

7. For the foregoing reasons, I accept this application and admit the petitioner to post arrest bail provided he furnishes bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

N.H.Q./S-159/L Bail allowed.

2011 Y L R 1933

[Lahore]

Before Shahid Hameed Dar, J

ARSHAD ALI---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 8386/B of 2010, decided on 18th August, 2010.

Criminal Procedure Code (V of 1898)---

----S.497---Penal Code (XLV of 1860), Ss.334/337-V---Itlaf-i-Udw, Arsh for hair---Bail, grant of---Occurrence had taken place on a dispute of turn of water---Medico-legal report had not supported the version of the complainant---Trial court was yet to determine if uprooting of the tooth of the complainant had been caused because of violence of accused on him or by poor hygienic condition---Uprooting of a tooth could not be considered as "Itlaf-I-Udw", as a single tooth did not form a complete organ of the human anatomy---Prosecution itself seemed to be perplexed about the application of S.337-U, P.P.C. or S.336, P.P.C. in the case---Charge with which the accused was confronted did not fall within the prohibition contained in S.497(1), Cr.P.C.---Accused was enlarged on bail in circumstances.

Zahoor Ahmad and another v. The State 2005 YLR 1664 **ref**.

Azmat Ali Chohan for Petitioner.

M.A. Ghaffar-ul-Haq for Respondent No.2.

Khurram Khan, D.P.-G. and Abdul Hameed A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Seeks bail after arrest in case, F.I.R. No.281 dated 18-5-2010 under sections 334, 337-VII, P.P.C, Police Station, Saddar Bhakkar, District Bhakkar, on the complaint of Akram Ali.

2. Succinctly, the prosecution case as unfurled by the complainant, in the F.I.R., is that on 11-5-2010 at about 11-47 a.m., the complainant was present at Naka 42/5 for irrigating his land as it was his turn of water but found that the water through the said terminal was not flowing as Arshad Ali petitioner and Hussan Ali were irrigating their fields in violation of the schedule whereupon the complainant reminded them of his turn of water; Arshad Ali, petitioner caught hold of the complainant from his beard and gave fists blows on his face, which resulted in uprooting of one of his teeth, besides other injuries on the face; the co-accused of the petitioner Hussain Ali also committed violence upon the complainant.

3. It has been found from the medico legal report of Muhammad Akram, the complainant that the medical officer did not find any clotted blood in or around socket nor any bleeding or swelling was noticed by him on the gums or lips of the injured. It has been observed by the medical officer that no marks of violence existed around mouth and lips of the examinee/injured. The Dental Surgeon declared the Injury No.2 of the injured complainant as Itlaf-i-Tooth, if proved otherwise.

4. Learned counsel for the petitioner contends that the story contained in the F.I.R. is false and Muhammad Arshad petitioner has been falsely implicated in this case due to malice and ulterior motives of the complainant; the offence under section 334, P.P.C. is not made out as the injuries of the complainant have not resulted into Itlaf-i-Udw and his injuries, at the most, catch the mischief of section 337-U, P.P.C. which is primarily punishable with payment of Arsh; there is an inordinate delay of 7 days in the lodgment of the F.I.R. and the complainant has offered no explanation in this respect; the

Investigating Officer is under the thumb of the son of the complainant who is an official of the Interior Ministry and he is bent upon in humiliating the petitioner; lastly contends that the case of the petitioner falls within the ambit of further inquiry as envisaged under section 497(2), Cr.P.C.

5. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant submits that the petitioner is directly charged in the F.I.R. with a specific role of having not only caused the defiling of the beard of the complainant, who is an aged man of 70 years but also gave blows on his mouth and face which caused the uprooting of one of his teeth; the Investigating Officer deleted sections 337-L(2), 337-U, P.P.C. during the course of investigation and replaced them with sections 334, 337-V, P.P.C; the injured, complainant and the eye-witnesses still support the prosecution case; the petitioner was found involved in the occurrence during the course of investigation and stands placed in Column No.3 of the challan; lastly contends that the offence with which the petitioner is charged falls within the prohibitory clause of section 497, Cr.P.C. and he is not entitled for relief prayed for.

6. I have heard learned counsel for the parties and perused the record.

7. The occurrence in the instant case took place on a dispute of turn of water, as the complainant found Naka No.42/5-4 dried up and his fields were not being irrigated. He also found at the time of occurrence that the accused-petitioner and his co-accused had violated his turn of water and they were still irrigating their fields due to which the hot words were exchanged between them, followed by the above said brawl. I am afraid, the medico legal report does not support the version of the complainant as the medical officer at the time of medical examination of the examinee did not find any marks of violence on or around his mouth, lips, gums or socket and the hygienic condition of the teeth of the complainant was noticed as poor. This question shall be determined by the learned trial Court if uprooting of the tooth had taken place because of the violence committed by the petitioner upon the complainant or it was extracted due to poor hygienic condition.

8. The uprooting of a tooth, of course, cannot be considered as Itlaf-i-Udw as a single tooth does not form a complete organ of the human anatomy as it has been observed in the case titled Zahoor Ahmad and another v. The State (2005 YLR 1664), that section 334, P.P.C. is made out if an organ or limb is amputated, whereas a finger of the hand or toes of the foot are not the organs, similarly teeth are not an organ, but the whole jaw is an organ. Whether the case of the petitioner would fall within the ambit of section 337-U, P.P.C. or under section 336, P.P.C. is a question whereabout the prosecution seems to be perplexed. In the attending circumstance, the charge with which the petitioner is confronted, does not fall within the prohibitory clause of section 497, Cr.P.C.

9. Therefore, I admit the petitioner to post arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of learned trial court.

10. Before parting with this order, it is clarified that the observations made in this order are tentative and shall have no bearing upon the merits of the case.

N.H.Q./A-193/L Bail granted.

2011 Y L R 2141

[Lahore]

Before Shahid Hameed Dar, J

AMJAD RIAZ---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE/EX-OFFICIO JUSTICE OF PEACE

and 10 others---Respondents

Writ Petition No.5745 of 2010, decided on 9th June, 2010.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A & 22-B---Police Order (22 of 2002), Art.18(6)---Penal Code (XLV of 1860), S.364-A---Constitution of Pakistan (1973), Art.199---Constitutional, petition---Kidnapping or abducting a person under the age of fourteen---Powers of ex-officio Justice of Peace---Scope---Petitioner challenged the proceedings undertaken by ex-officio Justice of Peace who, being dissatisfied with investigation, directed the Police authorities to conduct further investigation---Petitioner contended that ex-officio Justice of Peace was not empowered to suggest a particular procedure or result of investigation---Petitioner further contended that the ex-officio Justice of Peace could not interfere with statutory power of Police to conduct investigation---Validity---Ex-officio Justice of Peace should not have indulged in inquiries/investigations; instead he should have directed the Investigating Officer to conduct investigation in accordance with law---Courts could not interfere in the process of collection of evidence under Ss.156 & 157, Cr.P.C. by Police---Powers conferred on ex-officio Justice of Peace under Ss.22-A and 22-B, Cr.P.C, dealt with issues relating to non-registration of F.I.R., transfer of investigation under Art.18(6) of the Police Order, 2002 and neglect, failure or excess committed by a police authority---Justice of Peace could not suggest the procedure or give direction to do a certain act as any such direction to suggest a particular procedure of investigation was departure from provision of law---Proceedings conducted by ex-officio Justice of Peace amounted to deciding the case without considering the result of investigation---Proceedings pending before the ex-officio Justice of Peace were held to be illegal and void ab initio and were quashed accordingly. ?

Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others PLD 2005 Lah. 470 and Muhammad Habib v. Addl: Sessions Judge/Justice of Peace, Jampur, District Rajanpur and 2 others PLD 2009 Lah. 235 rel.

Ch. Muhammad Lehrasib Khan Gondal for Petitioner.

Iftikhar Hassan, Advocate.

Aamir Jalil Siddiqui, A.A.-G. Ashiq Hussain S.-I.

ORDER

SHAHID HAMEED DAR, J.---Through this Constitutional petition under Article 199 of

the Constitution of Islamic Republic of Pakistan, 1973, the petitioner seeks indulgence of this court as he feels aggrieved of the proceedings being undertaken by the learned Addl. Sessions Judge, Sialkot/Ex-Officio Justice of Peace, respondent No.1, on a petition moved by one Rehman Basheer, respondent No. 6 wider section 22-A/22-B, Cr.P.C, who happens to be a nephew of accused Mehmood Ahmad (respondent No.7) of case F.I.R. No. 669 of 2009 dated 29-11-2009, registered under section 364-A, P.P.C., at Police Station Hajipura, Sialkot, on the complaint of Amjad Riaz (petitioner) regarding abduction of his son Bilal, aged 8 years.

2. The brief facts, leading to the tiling of the instant petition are that Amjad Riaz petitioner alleged in his F.I.R. No.669 of 2009 supra that his son Bilal had been abducted at gunpoint by accused Mehmood Ahmad etc. at 5-15 p.m. on 29-11-2009; the local police arrested only one accused Mehmood Ahmad, respondent No.7 but without causing recovery of the abductee, he was sent to the judicial lockup; his co-accused are still at large; the petitioner filed a petition under section 22-A/22-B, Cr.P.C. before the learned Ex-Officio Justice of Peace, Sialkot for redressal of his grievance qua dishonest investigation of his case and non-recovery of his abducted son, which was disposed of on 11-1-2010 without any substantial relief to the petitioner; one Rehman Basheer, respondent No.6, who is nephew of respondents Nos.7 and 8 filed a petition under section 22-A/22-B, Cr.P.C. against the petitioner and respondents Nos.3 to 5 for registration of a criminal case against theca in the backdrop of above said F.I.R., before the learned Ex-Officio Justice of Peace, Sialkot, who sought a report from the S.H.O. and also ordered for personal appearance of the Principal of Punjab School Sialkot Booth, where the alleged abductee was a student; the police submitted its report and also got recorded the statement of the Principal; the learned Justice of Peace being dissatisfied with the report/comments of the S.H.O.; referred the matter to DPO, Sialkot, respondent No.3 for another report, which was made available but the learned Ex-Officio Justice of Peace did not feel satisfied and he again called for the Principal of the said school for recording fresh statement before him; the attendance record of the Punjab School was taken into possession by the Justice of Peace and thereafter referred the matter for further probe to RPO, Gujranwala, respondent No.2; on one hand the police did not effect the recovery of the abducted son of the petitioner. and on the other hand the learned Ex-Officio Justice of Peace embarked upon conducting parallel inquiry into the matter by referring the matter to different police officers and the Principal of the Public School; the inquiry being conducted by the learned Ex-Officio Justice of Peace Sialkot caused anxiety and annoyance to the petitioner, hence, the instant petition.

3. Learned counsel for the petitioner contends that the impugned proceedings being conducted by the learned Ex-Officio Justice of Peace were violative of the powers conferred upon him under sec?tions 22-A/22-B, Cr.P.C. whereunder a Justice of Peace could direct the police official/Investigation Officer to do the needful in accordance with law but he could not suggest the procedure or to give a direction to do or not to do a certain act; the Justice of Peace is not a judicial officer and he, at the most, can direct the S.H.O. concerned to proceed and conduct the investigation in accordance with law; the proceedings being conducted by the respondent No.1 are not only directory but also the way, method, procedure and the result is being suggested by the Ex-Officio Justice of Peace which is in sheer disregard to the settled principles of dispensation of criminal

justice; the police has already filed an incomplete report under section 173, Cr.P.C. before the trial Court and the learned Judicial Magistrate, being seized of the matter, had taken cognizance and summoned the accused to face the trial; under section 156, Cr.P.C, an officer incharge of investigation had the statutory right to conduct investigation of a cognizable offence and such investigation could not be interfered with by the judiciary, what to talk about the powers of the Justice of Peace under section 22-A/ 22-B, Cr.P.C; the anxiety on the part of respondent No.1 is uncalled for and by way of the partisan proceedings under section 22-A/22-B, Cr.P.C, the investigation of the case got conducted by the petitioner was being interfered with, sans any justification, authority and approval of law; through the impugned proceedings, the respondent No.1 was adamant to fabricate false evidence in favour of respondents Nos.7 to 10 etc. who are the accused. of F.I.R. No.669 of 2009 supra; 0.e Ex-Officio Justice of Peace, respondent No.1 has not only assumed the role of an Investigating Officer but has also changed the inquiry of the aforesaid application of respondent No.6 at lightening pace from the first Investigating Officer to the DPO and then to the RPO which amounts to making a mockery of law; the abducted son of the petitioner is yet to be recovered due to indolent behaviour of the Investigating Officers and on the other hand the respondent No.1 through the impugned proceedings has encouraged them to be as apathetic to the petitioner as they can; the learned Ex-Officio Justice of Peace may be estopped to conduct impugned inquiry/ investigation and let the police do its duty under section 156, Cr.P.C; the impugned proceedings may be declared illegal, unwarranted by law and ab initio void.

4. On the other hand learned Assistant Advocate-General assisted by learned counsel for respondent No.6 submits that the petitioner has tiled the instant petition malafidely and maliciously so as to camouflage his baseless and concocted version, contained in F.I.R. No.669 of 2009 supra; the petitioner is a habitual offender and a conspirator by temperament who has not even spared his minor son aged 8 years and has used him as a tool against all ethical norms to lodge a false case against the respondents Nos.7 to 10; the application under section 22-A/22-B, Cr.P.C. moved by respondent No.6 before the learned Ex-Officio Justice of Peace is based upon true facts whereby a criminal case is required to be registered against the petitioner as he had lodged a false case against the relatives of respondent No.6 qua the abduction of his son who was regularly attending his classes at above said Punjab School even after the registration of the said criminal case; the inquiry being conducted by respondent No.1 was the need of the hour and the anxiety shown by him was natural and called for due to obnoxious conduct of the petitioner; the proceedings pending before the respondent No.1 were legal and justified which had no bearing upon the proceedings of the trial being conducted by the learned Judicial Magistrate; the instant petition may be dismissed, being devoid of merit.

5. I have heard learned counsel for the parties and have perused the entire relevant record.

6. The petitioner is the complainant of the above said criminal case which has been got lodged by him against respondents Nos.7 to 10 with the allegation that they had abducted his minor son Bilal Ahmad at gun point on 29-11-2009 and the people present at the spot including the complainant could not save the innocent child except watching

the seen helplessly. According to the F.I.R. the accused had committed the occurrence in the perspective of previous enmity between the parties. This case is pending investigation with, Malik Ashraf A.S.-I., respondent No.5 who has virtually done nothing except causing the arrest of Mehmood Ahmad accused, respondent No.7 and dispatching him to the judicial lockup without the recovery of the abductee. He has submitted an incomplete challan under section 173, Cr.P.C. before the learned Judicial Magistrate for trial of the accused. The other accused are still at large. At this stage, respondent No.6, a relative of accused Mehmood Ahmad and Muhammad Haneef, respondents Nos.6 and 7 moved an application under sections 22-A/ 22-B, Cr.P.C. requesting therein that case F.I.R. No.669 of 2009 supra had been lodged. by Arnjad Riaz (petitioner) with a concocted version as his allegedly abducted son had been attending his classes at the Punjab School Sialkot Booth regularly even after the registration of said F.I.R., so a criminal case be registered against him. Such an application per se, is not maintainable for the reason that it required an action by the Ex-Officio Justice of Peace which is directly relatable to the outcome of the investigation of the above said F.I.R. The contention of Rehman Basheer, respondent No.6, as contained in his application, may be the version of the accused Mehmood Ahmad etc. during the course of investigation yet it could not be entertained and considered by the respondent No.1 for holding/directing inquiries one after the other. The Ex-Officio Justice of Peace could have disposed of the petition with the direction to the petitioner and the accused of the above said case to join the investigation and raise the plea of their choice before the Investigating Officer but he instead, indulged himself in a series of inquiries/ investigations, as mentioned hereinbefore, which is uncalled for and unwarranted by law. A direction could have been passed by the Justice of Peace to the Police Officer, connected with the investigation of the said F.I.R. to do the needful in accordance with law and even for that matter an officer in charge of investigation did not require any permission to investigate the circumstances of the said-case from the judiciary, what to talk about an order in this regard by the Justice of Peace under sections 22-A/22-B, Cr.P.C. It is the domain of the Investigating Officer to collect the evidence in a criminal case under sections 156 and 157, Cr.P.C. and the courts could not interfere with it by suggesting the mode, means, procedure or the result of such investigation. The powers under sections 22-A/22-B, Cr.P.C. conferred upon the Ex-Officio Justice of Peace mainly relate to the issues, non-registration of a criminal cases, transfer of investigation from one Police Officer to another within the scope of Art. 18(6) 1 Police Order, 2002, and the neglect/failure or excess committed by a police authority in relation to its functions and duties. The full Bench of this court in a case reported as "Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others" (PLD 2005, Lahore, page 470) has taken care of the aforesaid area of jurisdiction of the Ex-Officio Justice of Peace under section 22-A(6), Cr.P.C. As per the full Bench judgment, a Justice of Peace can direct the police to do the needful in accordance with law' but not to suggest the procedure or give direction, as mentioned above, to do a certain act. Any such direction given, during the investigation of a criminal case, is a plain departure from the settled provisions of law.

7. In another case "Muhammad Habib v. Addl. Sessions Judge/Justice of Peace, Jampur, District Rajanpur and 2 others" (PLD 2009 Lahore 235) it has been observed by this

court:

> "An Ex-Officio Justice of Peace i.e. Sessions Judge and nominated Addl. Sessions Judge in the District/Sessions Divisions has the powers to issue appropriate directions to the police authorities concerned on a complaint regarding non-registration of criminal case, transfer of investigation from one police official to another and for neglect, failure or excess committed by a police authority in relation to its functions and duties. At the cost of repetition it is noteworthy that justice of Peace or Ex-Officio Justice of Peace is not a court as envisaged under section 22(6) of the Cr.P.C. or the relevant provisions of the C.P. C. The available record does not show as to how and with what authority the learned Addl. Sessions Judge Jampur, entertained the request of Mst. Subhal Mai, respondent as Ex-Officio Justice of Peace, particularly when it is manifest from a bare perusal of sections 22-A and 22-B, Cr.P.C. that the controversy between Mst. Subhal Mai respondent and Muhammad Habib, petitioner does not fall within the legally defined domain of Justice of Peace or Ex-Officio Justice of Peace."

8. I find that through the impugned proceedings being conducted by the learned Ex-Officio Justice of Peace, Sialkot, the fate of Criminal Case No.669 of 2009 Supra is being decided, independent of the investigation of the said case, which cannot be approved of. The accused instead of joining the investigation, are absconding and their relative, respondent No.6 through an application under section 22-A/22-B, Cr.P.C. has planned to sideline the investigation of the above said case and thereby, win an opinion from respondent No.1, qua the truthfulness or otherwise of the allegations contained in the mentioned F.I.R. The accused, respondents Nos.7 to 10 might have pondered over the propo?sition of approaching respondent No.1 to seek a relief of their choice but the law is not on their side, so far as the application under discussion, is concerned. It shall again be the authority of the Investigating Officer to decide taking action under section 182, P.P.C. if he comes to the conclusion on conducting the investigation that the charges alleged by the informant were false. In such-like situation, the initiation of proceedings against the informant/complainant shall be synonymous with the outcome of the investigation.

9. The nutshell of the above discussion is that the Ex-Officio Justice of Peace, respondent No.6 could only pass a direction to the Investigating Officer of case F.I.R. No.669 of 2009 supra to conduct the investigation honestly and evenhandedly, by hearing both the sides, collect the evidence and prepare a report under section 173, Cr.P.C. containing a gist of investigation. Rest done by the respondent No.1, as discussed above, cannot be approved of nor it can be held as legal or warranted by law. The instant petition is allowed within the meaning that the proceedings pending before the learned Ex-Officio Justice of Peace, respondent No.1 on an application under sections 22-A/ 22-B, Cr.P.C, moved by respondent No.6, are hereby quashed being illegal, unwarranted by law and ab initio void. The respondent No.6 and the respondents-accused No.7 to 10, however, shall be at liberty to advance any plea of their choice, before the Investigating Officer who presently, conducts the investigation of above said criminal case. Disposed of.

A.R.K./A-161/L Disposed of.

2011 Y L R 2504

[Lahore]

Before Ijaz Ahmad Chaudhry and Shahid Hameed Dar, JJ

SHAHADAT ALI---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.955 and Murder Reference No.503 of 2005, heard on 17th August, 2010.

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

----Ss. 302(b), 364 & 201---Qatl-e-amd, abduction in order to murder, causing disappearance of evidence of offence---Appreciation of evidence---Motive set up by complainant was vague and could not be proved---Non-mention of the event of - "last seen" in the F.I.R. by 'the complainant had clearly reflected adversely on the veracity of its evidence---Silence for eleven days by the witnesses of last seen evidence was fatal not only for their statements but also for the prosecution case as a whole---Despite the relationship of the said witnesses with the deceased, they had taken no steps whatsoever to save his life, so much so that admittedly they had not shown the place of last seen to the police during investigation---Belated statements of the witnesses of last seen evidence were nothing but an afterthought and a result of deliberations and concoctions---Medical evidence could only tell the number and nature of injuries, weapon used for causing such injuries and other allied details, but it could not identify the author of the said injuries and the same was not of much significance and relevance in the case---No crime empty having been collected from the place of occurrence, recovery of pistol at the instance of accused and the report of Forensic Science Laboratory thereon, were of no help to the prosecution case---Prosecution had failed to build up a continuous chain of circumstantial evidence with one end making a noose around the neck of the accused and the other end touching the dead body, excluding all hypotheses of his innocence---Prosecution evidence had already been disbelieved by trial Court while acquitting the co-accused and the case of accused was not in any way distinguishable from that of his co?-accused---Impugned judgment was based merely on conjectures and surmises which was set aside in circumstances---Accused was acquitted accordingly.

2000 SCMR 1784; PLD 1991 SC 718; 1980 PCr.LJ 164 and 1988 PCr.LJ 722 ref.

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

----Ss.302(b), 364 & 201---Qatl-e-amd, abduction in order to murder, causing disappearance of evidence of offence---Appreciation of evidence---Circumstantial evidence of last seen together---Nature and essentials---Last seen together is a weak type of circumstantial evidence, which cannot be readily believed unless corroborated by unimpeachable source, and it should be close to the time and place of murder to exclude possibility of innocence---Strong motive and proximity of time of last seen coupled with evidence of incriminating recoveries are the essential ingredients for believing such evidence.

2000 SCMR 1784; PLD 1991 SC 718; 1980 PCr.LJ 164 and 1988 PCr.LJ 722 ref.

Ms. Khalida Parveen for Appellant.

M. Sarwar Sandhu, A.P.-G. for Respondent.

Date of hearing: 17th August, 2010.

JUDGMENT

SHAHID HAMEED DAR, J.---Through this judgment we intend to dispose of Criminal Appeal No. 955 of 2005 filed by Shahadat Ali the appellant-accused.

2. We, through the same judgment, intend to dispose of Murder Reference No.503 of 2005, as well, sent by the learned trial Court, under section 374, Cr.P.C, for confirmation of the death sentence of the appellant.

3. Shahadat Ali, appellant-accused along with his co-accused Amanat Ali, Sana Ullah, Ghulam Sarwar and Imdad Ullah (since acquitted) was tried in the Court of learned Addl. Sessions Judge, Hafizabad for an offence under sections 302, 201, 148, 149 of the P.P.C. for causing murder of Ihsan Ullah, brother of the complainant. The occurrence took place on 3-1-2004 at 3/4 p.m. in the area of Ali Pur Road near Kandar Seem Nullah, Police Station, City Hafiz Abad. The statement got recorded by Muhammad Zaman, complainant, P.W.8 formed the basis for the registration of formal F.I.R. Exh. PJ. The complainant being dissatisfied by the investigation filed private complaint Exh.PC; so, the learned trial Court conducted proceedings in the complaint case. The appellant 'along with his co-accused was charged under sections, 302, 201, 148, 149, 364, P.P.C. They pleaded not' guilty and claimed a trial.

4. The prosecution story narrated by Muhammad Zaman P.W.8 in his statement (F.I.R. Exh.PJ) is that he was resident of village Chak Kharal, his brother Ihsan Ullah alias Shana (deceased) dealt in milk who, went to Hafiz Abad on his Motorcycle GAD 6869 Yamaha, at about 3/4-00 p.m. on 3-1-2004 to sell milk but did not return to his house till it was evening; Muhammad Zaman complainant with Mazhar Iqbal P.W. (not produced) reached City Hafiz Abad while searching for his brother Ihsan Ullah alias Shana (deceased) where Mubashir Ahmad (P.W.12) who was getting his tractor repaired at Ali Pur Road, told them that he had seen Shahadat Ali (appellant), Amanat Ali, Sanaullah and Ghulam Sarwar, joined by four unknown accused, all armed with firearms, take Ihsan Ullah away from Ali Pur Road, city Hafiz Abad; when complainant and his companions returned to their village, Messrs Ghulam Rasul P.W.l1 and Muhammad Arif P.W. (not produced) told them that they had witnessed Ihsan Ullah in the company of Shahadat (appellant) etc. on a bridge, moving towards Do-Aba Rice Mills and Shahadat etc. had told them that they were taking Ihsan Ullah to Thatha Kharlan for the verification of some fact; Ihsan, Ullah (deceased) did not come back so the complainant and his companions contacted the abductors but they despite having made certain promises, did not release Ihsan Ullah; the complainant and others continued search for the abducted soul and finally found . his dead body wrapped in a sheet of cloth on the embankment of Bhoon-Kalan Canal, near a bridge which was identified by the complainant (P.W.8), Khizar Hayat P.W. (not produced) and Ghulam Sabir (P.W.2); he left the said P.Ws. alongside the dead body and himself left for the Police Station City Hafizabad; the motive behind the occurrence was that Ihsan Ullah (deceased) had illicit relations with Mst.

Noor Safia, sister-in-law of Shahadat Ali (appellant) and wished to marry her; Shahadat Ali (appellant) etc. had received a sizeable amount of money from Ihsan Ullah for this purpose and for the same reason they had murdered Ihsan Ullah and thrown his dead body in the canal.

5. The complainant (P.W.8) recorded his statement Exh.PJ before Sajjad Hussain S.-I., (CW-1) at 3-45 p.m. on 14-1-2004 at Police Station City Hafiz Abad for registration of formal F.I.R. (Exh.PJ) No.503 of 2005, dated 14-1-2004, under sections 302, 148,149, P.P.C.

6. The dead body of the deceased was shifted to the DHQ, Hospital Hafizabad, where Dr.Syed Nusrat Sherazi, P.W.5 conducted its postmortem examination at 9-30 p.m. on 14-1-2004, vide postmortem examination report Exh.PD (pictorial diagram Exh.PD/1) and found following injuries:

> "Fire arm wound of entry 3/4 x 3/4 c.m into DNP on back of left side of abdomen upper part 11 c.m toward left from midline of back edges were inverted and margins were blackened with exit wound 1 c.m x 1 c.m on front of right side of abdomen. Lower most part on pubic region 2 c.m towards right from midline edges were everted".

The cause of death, as recorded by the Medical Officer, was the excessive haemorrhage and shock due to Injury No.1 - which was caused by firearm.

The probable time, elapsed between injury and death was worked out by the Medical Officer as about 15 to 30 minutes and between death and postmortem as about 10 days.

After registration of the F I R., Exh.PJ, Syed Sajjad Hussain, S.-I/I.O., CW-1 proceeded to Lower Chenab Canal near Bhoon Kalan where he found the dead body of deceased Ihsan Ullah lying on the bank of the canal; he took the same into custody and prepared inquest report Exh.PK, injury statement Exh.PL, drafted an application Exh.PM for postmortem examination of the dead body and dispatched it to the mortuary under the escort of Naseem Akhtar P.W. (not produced) and Muhammad Aslam (P.W.1) for autopsy; he inspected the place of occurrence, prepared the visual site plan Exh.PN, recorded the statements of the witnesses under section 161, Cr.P.C. and secured the blood-stained clothes of the deceased on the same day, after the necropsy, Qameez P-1, Shalwar P-2, Pajama P-3, Sweater P-4, Jacket P-5 and Chadar, P-6 vide recovery memo. Exh.PA, attested by Muhammad Aslam, 215/C (P.W.1), Ghulam Sabir (P.W.2), Khizar Hayat P.W. (not produced) and Waseem Akhtar 242/C P.W. (not produced); he got prepared scaled site plan, Exh.PE and Exh.PE/1 in duplicate qua the place of recovery of the dead body and another site plan Exh. PF and Exh.PF/1 qua the place of murder of the deceased, through Naseer Ahmad Patwari, P.W. 6 in the scale of 1 inch equal to 20 feet; he arrested Shahadat Ali appellant on 5-2-2004 from a place, near Old Vegetable Market, Alipur Road Hafizabad and obtained his physical remand; the appellant, pursuant to his disclosure on 13-2-2004, led to the recovery of a pistol .30 bore P-8 from his residential house vide memo Exh.PG, attested by Muhammad Banaras P.W.7 and Muhammad Riaz, P.W. (not produced); The I.O. prepared the site plan Exh.PG/1, of the place of recovery of the above said article; he also took into possession, vide recovery memo. Exh.PB, a motorcycle Yamaha GAC 6968 from canal Gogera Branch on 13-2-2004, courtesy the disclosure and pointed-ness of Shahadat Ali, appellant, attested by Muhammad Inayat P.W.

(not produced) and Mustansar (P.W.3); he also prepared a site plan Exh.PH/1 in this regard; on the same day, Shahadat Ali (appellant) in police custody pointed out to a place where he had murdered Ihsan Ullah (deceased), the I.O. prepared "Fard Nishan Dahl" Exh.PH in this respect, attested by Muhammad Banaras (P.W.7) and Muhammad Riaz P.W. (not produced); he also prepared a site plan without scale Exh.PH/1 qua the said fact; he got conducted test identification parade of accused Imdad Ullah (since acquitted) on 21-2-2004 under the supervision of Syed Shahbaz Hussain Naqvi, Special Judicial Magistrate, 'P.W.10; on completion of investigation, he challaned accused Shahadat Ali (appellant), Imdad Ullah (since acquitted) and placed the names of the other accused in Column No.2 of the challan, being innocent.

8. As pointed out earlier, the complainant being not satisfied with the investigation of the challan case, preferred a private complaint Exh.PC, which was taken up first by the learned trial Court for the trial of the accused.

9. The appellant and his co-accused denied the charge, pleaded not guilty and claimed a trial.

10. In support of its case, the prosecution produced 12 P.Ws. and one C.W. P.W.3., Mustansar attested the recovery memo Exh.PB of motorcycle P-7, two drums, got recovered by the appellant. P.W.4 Muhammad Ali 13/C deposited the sealed parcel of pistol in the office of Forensic Science Laboratory, Lahore on 5-3-2004. P.W.6 Naseer Ahmad Patwari draftsman prepared site plans, in duplicate Exh.PE, Exh.PE/1 qua the place of recovery of the dead body and Exh.PF, Exh.PF/1 qua the place of murder of the deceased. PW-7 Muhammad Banaras attested a memo Exh.G qua pistol .30 bore-P-8, recovered at the instance of Shahadat Ali, appellant on 13-2-2004; he also attested memo Exh.PH, showing the place of murder of the deceased; this PW also attested the recovery memo Exh.PJ and Exh.PJ/1 qua motorcycle and drums, recovered at the instance of Shahadat Ali, appellant. P.W.8 Muhammad Zaman is the complainant of this case. P.W.9 Gulzar Ahmad 52/LHC kept pistol .30 bore in Malkhana and despatched it to the office of Forensic Science Laboratory, Lahore through Muhammad Ali, 13/C, P.W.4. P.W. 10 Syed Muhammad Shahbaz Hussain Naqvi, Special Judicial Magistrate supervised the test identification parade of accused Imdad Ullah on 21-2-2004. P .W. 11 Ghulam Rasool is a witness of the last seen evidence. P.W.12 Mubashir Ahmad is also a witness of the last seen evidence. CW-1 Syed Sajjad Hussain S.-I. conducted the investigation of this case. Rest of the prosecution evidence more or less, is formal in nature.

11. The learned Public Prosecutor tendered the report of Forensic Science Laboratory, Lahore Exh.PR in evidence and closed the prosecution case.

12. The learned trial Court thereafter, asked the accused-appellant to make statement under section 342, Cr.P.C. who, denied all the prosecution charges against him and professed his innocence while recording his reply to a question, " Why this case against you and why the P.Ws. have deposed against you," in the following words:

> "P.Ws. are inter se related with deceased and inimical towards me. As just one day before the registration of this case a Report No.12 dated 13-1-2004 Police Station City Hafizabad was got registered by the complainant Muhammad Zaman regarding the fact that the deceased Ihsan Ullah of this case is missing since 3-1-2004 after the silence of ten days with the intention to get a proclamation in the newspaper. After the

recovery of dead body of Ihsan Ullah deceased I was involved in a false case due to suspicion. The' prosecution story is totally false, fabricated and after-thought one"

13. After perusing the material on the record, the learned trial Court convicted and sentenced the appellant, vide judgment dated 13-4-2005 as under:--

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

Death, with order to pay Rs.50,000, as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C, in default thereof to under six months' S.I.

Under Section 364, P.P.C.

Five years' R.I with fine of Rs.20,000, in default thereof to undergo three months' S.I.

Under Section 201, P.P.C. Two years' R.I.

The co-accused of the appellant, Amanat Ali, Sana Ullah, Ghulam Sarwar and Imdad Ullah, however, were acquitted by the leaned trial Court through the same judgment.

14. The appellants' learned counsel contends that. Ihsan Ullah deceased had been done to death by some unknown assailants at some unknown time for some unknown reason and on finding the dead body of the deceased, Muhammad Zaman, complainant, 'PW-8, having colluded with his co-witnesses has cooked up a false version and implicated the appellant-accused in the instant case malafidely and malevolently; the prosecution has miserably failed to prove its case against the appellant beyond a reasonable doubt and the learned trial Court has passed the impugned judgment merely on conjectures and surmises; the evidence of last seen is unnatural, unbelievable, discrepant and full of contradictions which is liable to be rejected and brushed aside; the motive set up by the prosecution has gone un?established not only during investigation but also during the course of the trial which has further driven the prosecution case to a complete mystery; the P.Ws. have rendered speculative statements while groping in the dark and have badly failed to bring around any cogent, plausible and credible piece of evidence against the appellant; the learned trial Court has erred in law while passing the impugned judgment which suffers from non-reading and misreading of the evidence, available-on the record, hence, it may not be sustained.

15. On the basis of the said contention, the learned counsel for the appellant has prayed for the acquittal of the appellant by adding that the case against the appellant is virtually a case of no evidence and the learned trial Court has committed a patent illegality in convicting/sentencing the appellant-accused.

16. Conversely the learned Addl: Prosecutor-General has submitted that the prosecution had succeeded in establishing its case against the appellant beyond reasonable doubt and thus his conviction and sentence recorded by the learned trial Court does not warrant any interference by this court; the last seen evidence, rendered by P.W.11 and P.W.12 is well supported by the medical evidence and other allied evidence which plainly connects the appellant-accused with the murder of Ihsan Ullah, deceased; the witnesses of last seen evidence, the recovery evidence qua motorcycle P-7 and pistol P-8 is reliable and trustworthy which makes the impugned judgment a sustainable dossier; the circumstantial evidence presented by the prosecution in this case is of highest calibre and credence which leads to only one irresistible

conclusion that the impugned judgment is sustainable by all means; the motive stands established so there is no mitigation in the instant case which could be resolved in favour of the appellant; lastly contends that the impugned judgment does not suffer from non-reading or misreading of prosecution evidence nor it has been passed in an arbitrary; perverse or implausible manner, hence, it does not call for interference by this court.

17. We find, after having heard the learned counsel for the parties and gone through the record, that the prosecution case against the appellant-accused hinges at the circumstantial evidence furnished by P.W.8, P.W.11 and P.W.12, the medical evidence presented by P.W.5, besides, the evidence of motive presented by P.W.5.

18. As far as, the motivating factor behind the occurrence is concerned we have noticed that according to the prosecution, the apple of discord between the parties was a circumstance, relating to alleged illicit relationship of Mst. Noor Safia, the sister-in-law of the appellant with the deceased besides, Ihsan Ullah deceased also intended to-marry her and in this perspective Shahadat Ali appellant accused etc. had swindled him massively. The accused including the appellant, committed his murder, so as to avoid their liability of getting him married with Mst. Noor Safia. Muhammad Zaman, PW-8 is the only witness who has deposed about the said factum in his testimony without seeking corroboration from any source. The alleged motive can be bifurcated in two ways, one pertaining to the alleged illicit liaison of the deceased with Mst. Noor Safia and the other relating to squeezing of sizeable amount of money from the deceased by the appellant-accused and others. Mst. Noor Safia was the sister-in-law of the appellant-accused and the real sister of Sana Ullah and Ghulam Sarwar (both since acquitted). The prosecution was required to produce evidence so as to prove the motive against the appellant but they neither succeeded in substantiating the former part of the raison d'etre nor they could establish the latter through any evidence. The under discussion lady kept herself away from the investigation process and did not opt to appear as a prosecution witness during trial either. None joined the investigation or bothered to appear before the trial Court to depose about the factum of illicit liaison between the said lady and the deceased. The complainant, P.W.8 just beat about the bush while stating about the motive and simply kept on harping the same string that both of them had immoral nexus, inter se, without hinting at the source to prove the same. Likewise, the contention of the complainant P.W.8 that the appellant-accused and his acquitted co-accused had cheated and deprived Ihsan Ullah deceased of a huge amount of money, in the name of Mst. Noor Safia, has not received corroboration from any source. When, where, how, under what circumstances, what amount of money and in whose presence the appellant-accused or his acquitted co-accused had blackmailed the deceased or received money from him, continuously remains shrouded in mystery. Ihsan Ullah deceased was a married man who was not enjoying good matrimonial life with his wife and their relations had become bitter and sour resulting into desertion of his wife about 1-1/2 year prior to the occurrence but it had not ended in separation or divorce to his wife who lived with her brother, on the day of occurrence. The complainant happens to be the sole witness of the above said motive who could not help out himself of the liability, he was supposed to discharge to establish the same. The deceased was a milk trader who had been murdered on the fateful day in mysterious circumstances, after having been abducted or deceitfully taken away by someone, 11 days prior to his murder. The complainant got

lodged Rappat No.12 Exh.DA (which could not be found on the record but it finds mention in the testimony of Syed Sajjad Hussain S.-I./I.O., CW-1) on 13-1-2004 i.e. one day prior to the lodgment of F.I.R., wherein, he did not allude to the above said motive or refer to it in any manner. In this eventuality, the motive becomes more and more vague and blurred. The contention of P.W.8 qua the motive set up by him, is hardly believable and acceptable which has badly gone un?established and unproven.

19. Insofar as the evidence of last seen is concerned Ghulam Rasul P.W.11 and Mubashir Ahmad P.W.12 have testified that they had seen Ihsan Ullah deceased in the company of Shahadat Ali, appellant-accused, Imanat Ali, Ghulam Sarwar, Sana Ullah and four other unknown persons, one of them identified by them as Imdad Ullah accused (all since acquitted) on 3-1-2004. Ghulam Rasul P.W.11 testified that he along with Muhammad Arif P.W. (not produced) had witnessed the deceased in the company of above said accused near Dooaba Rice Mills, close to a bridge, where they had a dialogue with them and they learnt thereby that the armed accused were taking him somewhere with them for some verification. This P.W. identified one of the four unknown accused as Imdad Ullah in a test identification ` parade on 21-2-2004, held inside Central Jail Gujranwala. Mubashir Ahmad P.W.12 deposed about witnessing Ihsan Ullah deceased in the company of Shahadat Ali appellant-accused and his acquitted co-accused Amanat Ali, Ghulam Sarwar, Sana Ullah and four unknown persons, one out of them being Imdad Ullah, about 11 days prior to finding of his dead body. Both of them happen to be the close relation to the deceased and the complainant. Ghulam Rasul P.W.11 is the paternal cousin (chachazad and Mubashir Ahmad; P.W.12 is the maternal cousin (Mamoonzad of the complainant. Both of them allegedly saw Ihsan Ullah deceased in the company of a group of armed persons but they did not disclose it to the complainant who one day prior to the lodgment of F.I.R. (Exh.PJ), lodged Rappat No.12 at Police Station City Hafiz Abad, about his lost brother with the contention that his brother Ihsan Ullah alias Shana 'who had carried milk to city Hafiz Abad had not returned home and despite their hectic efforts they had been unable to trace or locate him. Had P.W.11 and P.W.12 seen the deceased in the company of aforesaid group of armed criminals, they must have had their eyebrows raised and informed the complainant immediately, without loss of any time. The lodgment of Rappat No.12 by the complainant on 13-1-2004 about the lost brother without mentioning the event of "last seen" is a crucial circumstance which clearly reflects upon the version of P.W.11 and P.W.12 of having seen the deceased in the company of the appellant-accused and his acquitted co-accused. The silence for 11 days observed by the aforesaid witnesses is fatal not only for their statements but also for the prosecution case as a whole. P.W.11 has failed to establish the purpose of his presence near Doabba Rice Mills on 3-1-2004 at the relevant time of allegedly viewing the deceased in the company of the appellant-accused and others. He has admitted in his testimony that his village was at a distance of about 11/12 Km from the said rice mills and that he had no business or residence near the place where he had allegedly witnessed the deceased and the appellant-accused together. He has also deposed that he did not inform the police about the facts of this case, although he went to the police station along with Muhammad Zaman, complainant P.W.8 4/5 times between 3-1-2004 to 14-1-2004. Mubashir Ahmad P.W.12 also did not behave differently and he too admitted that he did not inform the police regarding this occurrence.

According to his version, the place of his viewing the deceased and the accused together was at a distance of about 7/8 miles from his village. He has however, recorded an interesting answer that the complainant P.W.8 and Mazhar Iqbal P.W. (not produced) met him the same day when he last saw the deceased in the company of the accused, and disclosed to them the above said fact. This is a mere gossip on his part and does not contain any truth in it for the reason that the complainant P.W.8 would have been the last person to withhold such an important evidence and lodge a report with the police on 13-1-2004 by simply complaining about the disappearance of his brother without fixing liability on any. P.W.12 has recorded another ridiculous answer by stating that he had seen the deceased and the accused moving on a motorcycle. Both P.W.11 and P.W.12 have mentioned about nine armed men including the appellant-accused, some nominated and some unknown, to have abducted the deceased but to see them all sitting on. a motorcycle was a far-fetched idea, having no relevance to truth and reality. Both the witnesses P.W.11 and P.W.12 have frankly admitted in their statements that they had not shown the place of last seen to the police during investigation nor they produced any independent person in support of their contentions. Their statements are marked with unbelievable notes which make their testimonies increasingly unreliable. Their relationship with the deceased is a crucial t element which must have driven both of them to rush to the complainant, after having allegedly seen their paternal/ maternal cousin in the company of some outlawed, armed with arsenal, so as to save his life but by having not done so, they have given a clear message that their belated statements were afterthought and a result of deliberations/concoctions. They have failed to answer any explanation as to the period of their taciturnity, which has given a fatal blow to the prosecution cage.

20. The evidence of last seen in this case, is a circumstance where-about the knowledge 9f the complainant is of second hand nature/as the persons/P.Ws. who had allegedly seen the deceased moving in the company of the said accused were supposed to disclose the same to the complainant immediately but they did not pass on such information to him when they had an ample chance to do so, which might have saved the life of the deceased. Even otherwise, it cannot be said that such piece of evidence, in this case, can be treated as last seen evidence because the prosecution evidence is silent about the fact as to after how many hours or days the abductee was disposed of or that the place where they all were seen in the company of each other, was near the place wherefrom the dead, body of the deceased was found. Last seen together is a weak type of circumstantial evidence, which cannot be readily believed unless it was corroborated through unimpeachable source, and it should be close to the time and place of murder to exclude possibility of innocence. Strong motive and proximity of time of last seen coupled with evidence of incriminating recoveries are the essential ingredients for believing such an evidence. The possibility of the deceased having separated from the appellant-accused and others soon afterwards cannot be excluded altogether. Therefore, the evidence of last seen is not trustworthy or believable in this case. I am fortified in this regard while making reliance upon 2000 SCMR 1784, PLD 1991 SC 718, 1980 PCr.LJ 164 and 1988 PCr.LJ 722.

21. As far as medical evidence is concerned, it has been furnished by Dr. Syed Nusrat Abbas Sherazi, P.W.5 who performed autopsy on the dead body of Ihsan Ullah deceased

at 9-30 p.m. on 14-1-2004 vide postmortem examination report Exh.PD with pictorial diagrams Exh.PD/1 which showed two firearm injuries (one entry and one exit), the entry wound (Injury No.1) being on the back of left side of abdomen of the dead body. The cause of death recorded by the Medical Officer was the excessive haemorrhage and shock due to Injury No.1. The probable time, as noticed by the Medical Officer, between injuries and death was "15 to 30 minutes" and between death and postmortem was about 10 days. The medical evidence can only tell the number of injuries, the weapon used for such injuries, the nature of injuries and other allied/ancillary details but it cannot identify the author of the said injuries, hence, the medical evidence, in this case, is not of much significance and relevance.

22. Insofar as the evidence of recovery of a pistol .30 bore P-8 is concerned, it has been furnished by Muhammad Banaras P.W.7 and Syed Sajjad Hussain S.-I./I.O., CW-1, who had recorded the arrest of the appellant-accused on 5-2-2004. According to the evidence of the aforesaid P.Ws., the appellant-accused had made a disclosure, while in police custody on 13-2-2004 and pursuant thereto, he led to the recovery of the aforesaid article vide recovery memo Exh.PG, attested by P.W.8 and Muhammad Riaz P.W. (not produced). According to the contents of the report Exh.PR, released by the office of Forensic Science Laboratory, Lahore, the pistol .30 bore was in working order and fired semi automatically in its present condition. As CW-1/I.O. failed to collect any crime empty from the place of occurrence, hence, the recovery of the weapon P-8 and the report of Forensic Science Laboratory, Lahore do not mean much to the prosecution case.

The recovery of a motorcycle P-7 along with two drums has been shown against the appellant-accused vide memo. Exh.PB, attested by Mustansar P.W.3 and Muhammad Inayat P.W. (not produced). P.W.3 has deposed that he joined the investigation of this case after one month and ten days of the occurrence along with Muhammad Inayat P.W. and in their presence Shahadat Ali, appellant-accused made a disclosure and then led to the recovery of the aforesaid articles, from Gadah Pully near Old Canal. The above articles lay on the bed of the canal in shallow water. This particular evidence hardly strengthens the prosecution case as according to this P.W. the place of recovery was an open place which was accessible to all and sundry. This place was not in the exclusive possession of the appellant. Whom the above said motorcycle belonged to, is a question, still unresolved. No documentary or oral evidence qua identification of the same has been produced by the prosecution. This piece of evidence like rest of the prosecution evidence, does not fortify the case of the prosecution in any manner so, it is brushed aside being irrelevant.

23. It has been alleged by the complainant P.W.8 in F.I.R. Exh.PJ that he had contacted the appellant-accused and his acquitted aides for the repatriation of Ihsan Ullah deceased but they despite having made promises did not return him and lingered on the matter on one pretext or the other. This piece of evidence in fact shows an effort on the part of the complainant to fabricate the evidence of extra judicial confession. We are afraid, he has miserably failed to do so. Nothing has been said by him as to when, where and how, he contacted the accused party to seek the return of his lost brother nor he could hint at the name of any person, in whose presence he had approached the appellant-accused and others for having his brother Ihsan Ullah deceased returned to him. Did the complainant meet the appellant-accused or any of the acquitted co-accused

before reporting the matter to the police, is a hidden fact. Was it the appellant-accused alone or the other acquitted co-accused who had allegedly kept the complainant P.W.8 at bay is yet another riddle to be resolved by the prosecution. The evidence of extra judicial confession is the weakest type of evidence which is very easy to procure or fabricate in absence of any direct evidence. The vague insinuation by the complainant, in this regard is inconsequential for the prosecution case as the complainant has badly failed to build the structure of the prosecution case on a baseless and unfounded piece of evidence, called extra judicial confession.

24. It has been vociferously argued by the learned Addl: Prosecutor-General that the appellant-accused, after having been arrested had made certain disclosures about the place of murder of the deceased during investigation and pursuant to it he on 13-2-2004 led the police party, headed by CW-1 Syed Sajjad Hussain S.-I./I.O., to the embankment of Seem Nullah and pointed to a place by contending that it was the place where he had shot at and murdered Ihsan Ullah deceased, whereupon, the I.O. prepared "Fard Nishan Dahi" Exh.PH, attested by Muhammad Banaras, P.W.7 and Muhammad Riaz P.W. (not produced). The aforesaid evidence and preparation of a memo mean nothing except that the admission of guilt has been fabricated by the prosecution which is barred by Qanun-e-Shahadat as the admission of guilt of an accused before a Police Officer of the rank, how high so ever, is illegal and inadmissible in evidence. Nothing could be discovered or, recovered from the aforesaid prosecution evidence except that a confessional statement of the appellant-accused came into being which cannot be given any weight at all. The same stands rejected.

25. As we have an overall look upon the prosecution case, we find it a case of no evidence. Each and every bit of the prosecution evidence has lost its relevance once we reached the conclusion that the evidence of the last seen had been fabricated upon finding the dead body of the deceased and even, prior to it the credentials of the prosecution witnesses were dubious. The circumstantial evidence in the form, as we find in the instant case, could only become relevant if the prosecution had succeeded in building a continuous chain, one end of which made a noose around the neck of the accused and the other end touched the dead body, excluding all the hypotheses of his innocence but here in this case, the situation is vice versa and there exists no probability of the conviction of the appellant-accused, hence, the impugned judgment in respect of the appellant, cannot be sustained. Even otherwise, the same evidence has been disbelieved and rejected by the learned trial Court while recording acquittal of the co-accused of the appellant. There is hardly any distinguishing circumstance, which could segregate the case of the appellant accused from that of his acquitted co-accused. The impugned judgment has been passed merely on conjectures and surmises which cannot be maintained.

26. For the foregoing reasons, the prosecution, as we conclude, has failed to prove its case against Shahadat Ali, the appellant-accused beyond any shadow of doubt, hence, we allow the Criminal Appeal No.955 of 2005 and set aside the impugned judgment, passed by the learned trial court. Shahadat Ali, appellant, is acquitted of all the charges and he would be released forthwith, if not required in any other criminal case.

27. The Murder Reference No.503 of 2005 is answered in the negative.

N.H.Q./S-174/L Appeal accepted.

K.L.R. 2011 Criminal Cases 1

[Rawalpindi]

Present: **RAUF AHMAD SHEIKH and SHAHID HAMEED DAR, JJ.**

Muhammad Ghalib and others

Versus

The State

Crl. Appeal No. 79 of 2004, Crl. Revision No. 112 of 2004 and Murder Reference No. 299 of 2004, decided on 18th October, 2010.

CONCLUSION

(1) Onus to prove his exceptional plea as per requirement of Article 121 of Qanun-e-Shahadat Order, 1984 is on the accused.

MURDER---(Defence plea)

Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, Ss. 302/324/148/149---Qanun-e-Shahadat Order, 1984, Art. 121---Murder trial---Defence plea---Ocular account/recoveries/medical evidence/motive---Criminal appeal against impugned conviction/sentence of death---Appreciation of evidence---Validity---Prosecution had succeeded to prove motive as set up by them while triggering off legal machinery into motion---Medical evidence did corroborate ocular version perfectly---Evidence on point of recovery of said weapons of offence was found credit worthy and reliable---Insofar as ocular account was concerned, in absence of any serious flaw or discrepancy in testimony of PWs, same could not be disbelieved or discarded simply due to relationship of eye-witnesses/PWs with deceased persons---Matter was reported to police with utmost promptitude---PWs of ocular account had given a clean breast of occurrence without contradicting with each other on any aspect of case and they had appeared to have routed rendered naturally believable evidence---Ocular account had been furnished by truthful PWs and statements of said PWs had affixed a seal of truth, believability and authenticity *qua* veracity of prosecution case---There may be some contradictions in statements of said PWs but those had been found to be minor in nature and could not be regarded as of such nature which could become a ground to discarding ocular account---It was incumbent upon appellant-accused to discharge onus to prove his exceptional plea but he neither appeared himself as his own witness u/S. 340(2), Cr.P.C. nor he showed valor and confidence to adduce any defence evidence---Defence plea is introduced by appellant was worth rejecting in more than one way, being unnatural preporterous and fantastic---It did not appeal to reason that three youthful persons would travel to house of appellant from a distance of 1 k.m. being armed and would surrender meekly to be clubbed and stabbed time and again by lone appellant-accused who could not show even a single scratch on his person of his wife or mother-in-law---Defence plea was bound to be rejected both on facts and law---Impugned conviction/sentene was upheld---Criminal appeal dismissed.

(Paras 17,18,19,20,23,24,25,26)

Ref. 2010 SCMR 1791

دفاع تاویل ثابت نہ ہو سکی۔ مجرم قتل میں سزائے موت برقرار۔

Key Terms:- Defence plea.

[Defence plea could not be proved---Impugned conviction/sentence of death was maintained.]

For the Appellant: **Muhammad Tanvir Ch. and Sayed B.H. Shah, Advocate.**

For the Respondent: **Ch. Abdul Aziz, Advocate.**

For the State: **Muhammad Nazeer Abbasi, Standing Counsel.**

Date of hearing: **18th October, 2010.**

JUDGMENT

SHAHID HAMEED DAR, J. --- The appellants Muhammad Ghalib, Nasir Mahmood, Muhammad Hanif and Waheed Ahmad have been convicted by the learned Addl. Sessions Judge, Islamabad for the charge of murder of Liaqat and Shaukat deceased and attempting on the life of Wajid Abbasi (PW-9). The appellants were sentenced as under:--

Muhammad Ghaliz and Waheed Ahmad.

U/S. 302(b)/34, P.P.C.

Death on two counts to the each appellant, with order to pay Rs. 1,00,000/- each, as compensation to the legal heirs of the deceased, u/S. 544-A, Cr.P.C., in default thereof to undergo six months' S.I. each.

U/S. 324/34, P.P.C.

10 years' R.I. to each appellant, with fine of Rs. 50,000/- each, in default thereof to undergo three months' S.I. each.

Muhammad Ghalib appellant was also convicted u/S. 337-F(iii), P.P.C. and sentenced to three years' R.I. with payment of R. 5,000/- as Daman.

Nasir Mahmood and Muhammad Hanif appellants.

U/S. 302(b)/34, P.P.C.

Life imprisonment on two counts each with order to pay Rs. 50,000/- each as compensation to the legal heirs of the deceased, u/S. 544-A, Cr.P.C., and in default thereof to undergo three months' imprisonment each.

U/S. 324/34, P.P.C.

10 years' R.I. each with fine of Rs. 25,000/- each, and in default thereof to undergo imprisonment for three months' S.I. each.

Muhammad Hanif appellant was also convicted u/S. 337-D, P.P.C. and sentenced to 10 years' R.I. with payment of Rs. 1,00,000/- as Arsh, being 1/3rd of Diyat amount.

All the sentences of imprisonment were ordered to run concurrently with benefit of Section 382-B, Cr.P.C.

Through the same judgment the co-accused of the appellants namely, Arshad, Azhar, Sajid and Talib were acquitted of the charge.

2. The convicts have filed Crl. Appeal No. 79 of 2004 against their conviction/sentence, besides, there is a usual reference u/S. 374, Cr.P.C. against Muhammad Ghalib and Waheed Ahmad appellants, for the confirmation of their sentence of death, on two counts, transmitted by the learned Trial Court. Rafaqat *alias* Bagga complainant (PW-8) has also filed Crl. Revision No. 112 of 2004 against Muhammad Hanif, respondent No. 1 and Nasir Mahmood, respondent No. 2 for enhancement of their sentence to death. This judgment will dispose of the above-said appeal, revision and the reference.

3. The appellants alongwith their acquitted co-accused were tried in the Court of learned Addl. Sessions Judge, Islamabad for committing Qatl-e-Amd of Shaukat and Liaqat and for attempting on the life of Wajid Abbasi, PW-9 at 9.00 p.m. on 26.7.2002, in the area of Noorpur Shahan, Bari Imam, falling within the jurisdiction of Police Station, Secretariat, Distrist Islamabad. The statement Exh.PW got recorded by Muhammad Rafaqat *alias* Bagga, complainant (PW-8) formed the basis for the registration of formal F.I.R. Exh.PA.

4. The prosecution story, as stated by the complainant in his complaint Exh.PW is that he was not on speaking terms with Ghalib *alias* Guddi (appellant) for 3/4 years due to a petty quarrel between them; they exchanged hot words in early hours of the day on 26.7.2002 in the bazaar of Bari Imam and the matter was patched up; he was present at the shop of Miskeen, situated in Adda, at about 8.00 p.m., the same day, the accused Ghalib *alias* Guddi (appellant), armed with *chhuri*, Talib (since acquitted) armed with *danda*, Kala (since acquitted) armed with *danda*, Waheed (appellant) armed with hatchet and pistol 30 bore, Sajid (since acquitted) armed with 12 bore gun Pappu armed with *chhuri*, Nasir (appellant) armed with *chhuri* and Azhar (since acquitted) armed with a knuckle duster came there and beat him, the people present at the spot intervened and rescued him; his family members, later on, learnt about the brawl; his brothers Shaukat and Liaqat (deceased) alongwith Wajid Abbasi (PW-9) also reached there, consoled him and intended to lodge a complaint with Aurangzeb, the brother of Ghalib; they all came to the shop of Aurangzeb and complained of the excesses committed by his brothers with the request that he should check their unruly behaviour; thereafter, they moved towards their house, Liaqat, Shaukat and Wajid were ahead of the complainant, who was a little behind, when they reached near the house of Riaz, they were all at once, ambushed by the above-named accused at 9.00 p.m.; they pounched upon Shaukat, Liaqat and Wajid and caused them severe injuries by means and their respective weapons; they also made firing and ran away; in the meanwhile, Muhammad Fayyaz PW (not produced) and Mahmood *alias* Mooda PW (not produced) and Javed PW (not produced) reached their and witnessed the occurrence; the complainant and his companions shifted the injured to Poly Clinic, Hospital in a Suzuki pick-up but Shaukat and Liaqat succumbed to the injuries on the way to the hospital.

5. The complainant (PW.8) got recorded his statement Exh.PW before Arshad Ali, S.I., PW.10 at 11:10 p.m. on 26.7.2002 at Poly Clinic Hospital, which was sent to the Police Station, Secretariat, District Islamabad by PW.10, for registration of formal F.I.R. (Exh.PA), through Mushtaq 5847/C.

6. Arshad Ali, S.I./I.O., PW.10, examined the dead-bodies of Shaukat Ali and Liaqat deceased and prepared inquest reports Exh.PY, Exh.PX and also drafted applications Exh.PBB and Exh.PCC respectively for post-mortem examination of both the dead-bodies. He prepared injury statement Exh.PZ of the injured Wajid and wrote down a memo. of identification Exh.PAA of both the deceased. Thereafter, he reached the place of occurrence, caused its inspection and drafted visual site plan Exh.PDD about it. He took into possession blood-stained earth from two spots *vide* memo. Exh.PH and rendered it into two separate sealed parcels. He returned to the PIMS and shifted the dead-bodies of the deceased to DHQ Hospital, Rawalpindi for post-mortem examination. He, after the autopsy of the dead -odies, took into possession the last worn blood-stained clothes of the deceased *vide* memo. Exh.PM. He arrested Muhammad Ghalib (appellant), Muhammad Talib (acquitted co-accused), Nasir Mehmood (appellant) and Sajid Mehmood (acquitted co-accused) on 28.7.2002. Muhammad Ghalib appellant got recovered *chhuri* P.6, *vide* memo. Exh.PJ, attested by Tariq Mahmood, PW-3 and Talib Mahmood PW (not produced). Talib appellant led to the recovery of a deceased P.7 *vide* memo. Exh.PK and Nasir Mahmood appellant got recovered *chhuri* P.8 *vide* memo. Exh.PL attested by the above-said PWs. The I.O. prepared the site plans *qua* the places of the recovery of the afore-said weapons Exh.PEE. He also arrested Arshad Mahmood (since acquitted), Azhar Mahmood (since acquitted), Muhammad Hanif (appellant) and Waheed Ahmad (appellant). Muhammad Haneef accused led to the recovery of *chhuri* P-1 *vide* memo. Exh.PC attested by Haji Ghaffar, PW-2 and Maula Dad PW (not produced). Sajid Mahmood accused (since acquitted) got recovered 12 bore gun P.2 *vide* memo. Exh.PD, attested by Haji Ghaffar PW.2 and Muhammad Nazakat PW (not produced). Wahed Ahmad (appellant) got recovered hatchet P.3 and a pistol P.4 *vide* separate memo. of recovery Exh.PE and Exh.PF, both attested by Haji Ghaffar PW-2 and Muhammad Nazakat PW (not produced). Azhar Mahmood accused (since acquitted) led to the recovery of a knuckle duster P.5 *vide* memo. Exh.PG attested by Haji Ghaffar, PW.2 and Maula Dad PW (not produced). The I.O./PW.10 also prepared the site plans *qua* the places of the recovery of the above-said weapons.

7. The medical evidence was presented by Dr. Muhammad Arshad, C.M.O., Federal Services Hospital, Islamabad, PW.6, who conducted post-mortem examination of both the dead-bodies at DHQ Hospital, Rawalpindi, one after the other. Firstly, he performed autopsy on the dead-body of Muhammad Liaqat at 1.00 p.m., on 27.7.2002, *vide* post-mortem examination report Exh.PR, bearing his signature Exh.PR/1 and found the following injuries thereon:--

(1) An incised stab wound on the right temple just in front of the upper border of the right ear pinna, measuring, 3 c.m. x 1 c.m., cutting the under lying bone. The brain matter was coming out through the wound, right ear was plugged.

(2) An incised stab wound, bone deep, measuring 3 c.m. x 1 c.m. on the upper border of the right shoulder.

(3) An incised stab wound measuring 1.5 c.m. x .5 c.m. on the front of right shoulder just medial to the axillary fold.

(4) An incised stab wound measuring 1.5 c.m. x .5 c.m. on right front chest, 1 inch below the nipple.

(5) An incised stab wound measuring 3 c.m. x 1 c.m. on the lateral surface of the right chest, 9 c.m. lateral to the nipple.

(6) An incised stab wound measuring 2 c.m. x .8 c.m. on posterior of the right chest at the level of posterior axillary line.

(7) A penetrating wound measuring .8 c.m. diameter on the right side of the abdomen, 6 inches lateral to the umbilicus.

The cause of death recorded by the Medical Officer was due to the damage to the brain and right lung. All the injuries were ante-mortem and except injury No. 7, caused by sharp-edged weapon. The injury No. 7 was guessed as a blunt weapon. The injury No. 7 was guessed as a blunt weapon injury.

The probable time elapsed, as noticed by this PW, between injury and death was 'immediate' and between death and post-mortem examination, within 30 hours.

The dead-body of Muhammad Shaukat deceased was dissected at 11.40 a.m. on the same day by the same Medical Officer, PW.6, *vide* post-mortem examination report Exh.PS with his signature Exh.PS/1, who found the following injuries on the dead-body:--

(1) An incised wound on the anterior surface of the left mid arm, muscle deep measuring 3 c.m. x 1 c.m., 16 c.m. below the shoulder and 19 c.m. above elbow.

(2) An incised stab wound on right upper front part of the chest, measuring 1.5 c.m. x 1 c.m., one inch medial to the axillary fold.

(3) An incised stab wound on the right abdomen, measuring 4 c.m. x 2 c.m. above and lateral to the umbilicus (7 c.m.).

(4) A long transversely placed incised wound on the lower back chest 10 c.m. in length, bone deep, on the left and with tale on the right, 16 c.m. above the iliac crest.

(5) A bruise measuring 11 c.m. x 2 c.m. on back of right shoulder.

(6) An abrasion measuring 2 c.m. x nail head on the forehead, just right to the mid.

The cause of death recorded by the Medical Officer was the haemothorax and haemorrhage due to damage to the right sub-clavian vessels, upper lobe of the right lung and the liver. All injuries were ante-mortem and caused by sharp-edged weapon(s) except injuries Nos. 5 and 6 which were caused by the blunt weapon.

The probable time elapsed, as noticed by this PW, between injury and death was 'an hour' and between death and post-mortem examination, within 30 hours.

Dr. Rana Muhammad Mobeen, C.M.O. Poly Clinic Islamabad, PW-7, though examined the dead-bodies of both the deceased on 26.7.2002 and noticed their external injuries *vide* OPD Tickets Exh.PT and Exh.PU, but he did not perform the autopsy, therefore, the description of the injuries on both the corpses, deposed about by this witness might not be important to be reproduced, as, the testimony of Dr. Muhammad Arshad, C.M.O., PW.6 entails all such details. He, PW-7, however, conducted medical

examination of Wajid Abbasi injured, PW.9, at 9.55 p.m. *vide* MLR Exh.PV and found the following injuries on his person:--

(1) Transverse incised/cut wound over right side of neck, skin deep with haematoma.

(2) Incised/cut wound over right side of scalp, skin deep with sharp kin edges.

(3) Cut wound over lower abdomen through which loops of small intestine protruded out with perforation on it.

(4) Cut wound over abdomen in midline just above umbilicus.

The patient was operated by the Surgeons of General Surgery Department who found Jejunum perforation, 2 to 3 tears in mesentery of small intestine and Scrosal tear. Three centimeters of jejunum resected and end-to-end enastomosi done.

The above-said injuries were declared as Jurh Jaifah (337-D, P.P.C.) Ghayr Jaifah Badiah (337-F(ii), P.P.C.) and Ghayr Jaifah Damiyah (337-F(i), P.P.C.) and were found to be caused by sharp-edged weapon.

8. The prosecution, after indictment of the appellant-accused and their acquitted co-accused, produced I.O. witnesses before the learned Trial Court, *in toto* to establish the charge against the accused. Muhammad Rafaqat, PW-8 and Wajid Abbasi, PW.9 furnished the ocular account. The medical evidence was tendered by Dr. Muhammad Arshad, C.M.O., PW.6, who performed autopsy on both the dead-bodies *vide* post-mortem examination report Exh.PR and Exh.PS. Dr. Rana Muhammad Mobeen, C.M.O., PW.7, also externally examined the injuries of both the deceased *vide* OPD tickets Exh.PT, Exh.PU and medically examined Wajid Abbasi (PW.9) *vide* MLR Exh.PV. The evidence of recovery of the crime weapons was furnished by Haji Ghaffar, PW.2, Tariq Mahmood PW.3 and Arshad Ali, S.I./I.O., PW-10 who completed the investigation and submitted a report u/S. 173, Cr.P.C. before the learned Trial Court. The I.O. got prepared sealed site plan Exh.PQ, Exh.PQ/1 and Exh.PQ/2 in triplicate, by Muhammad Akram, Draftsman, PW.5 in the scale of 1 inch equal to 20 feet. The rest of the prosecution evidence is, more or less, formal.

9. In his statement u/S. 342, Cr.P.C., Muhammad Ghalib, the appellant-accused, denied and controverted the prosecution case and advanced a specific plea of exercise of right of self-defence, while recording his reply to the question, “why this case against you and why the PWs have deposed against you” as follows:--

> “All the private witnesses are related to the deceased persons and remaining witnesses are police officials who are public servants. No independent witness of the area deposed against me. The prosecution witnesses are interested and inimical towards me therefore, they supported false story of the prosecution against me. On the day of the occurrence actually, Liaqat, Shoukat and Wajid trespass to my house after coming almost a distance of one kilometer. They gave injuries to me and my wife and mother-in-law due to the earlier altercation between me and Rafaqat *alias* Bagga. I by exercising my right of private defence took out a *chhuri* from my kitchen and gave few blows to the assailants. After receiving injuries they ran back towards the street, Liaqat and Shoukat fell down near the house of Majampu-Hassan and Zarwaiz whereas Wajid fled away from

the said place. Both the injured remained in lying condition at the said place for 30 minutes and subsequently died. I being injured alongwith other injured family members went to the Poly Clinic Hospital for treatment where I was arrested. I also lodged complaint of the attack of the complainant party in my house but police did not lodge report against the complainant party. The police with the connivance of the complainant party, registered a case against me and my other innocent relatives in this case. During the attack of complainant party at my residence Talab my brother after hearing my hue and cry came to the scene of the occurrence and tried to rescue myself and save my family members who also saw the occurrence but the complainant party and police also subsequently made accused of this case. The complainant party for the purpose to safe their skin regarding their aggression upon me and my family members changed the venue of the occurrence and concocted a story that occurrence was taken place near the house of Riaz."

Nasir Mahmood, Muhammad Haneef and Waheed Ahmad appellants accused however, denied and rebutted the allegations of fact against them and perfessed their innocence, in their separately recorded statements u/S. 342, Cr.P.C., while recording reply to the above-said question in the following words:--

"I have been falsely implicated in this case due to my relationship with Ghalib accused, at the time of occurrence I was not present at the spot and did not participate in the occurrence, the police subsequently arrested me in this case and false recoveries were planted upon me. I am innocent and may be acquitted from this case."

The appellants did not produce any defence evidence nor they opted to appear as their own witness to repel the charges against them u/S. 340(2), Cr.P.C.

10. The learned Trial Court on appraisement of the evidence, available on the record held the appellants guilty, convicted and sentenced them in the afore-mentioned terms, through the judgment under appeal. The co-accused of the appellants, namely Muhammad Talib, Azhar Mahmood, Sajid Mahmood, and Arshad Mahmood, however, were acquitted through the same judgment.

11. We have heard the learned counsel for the parties and have gone through the record of this case with their assistance.

12. Muhammad Rafaqat *alias* Bagga, complainant, PW.8 is the real brother of both the deceased. Wajid Abbasi, PW.9, is the real maternal uncle of the deceased. Muhammad Fayyaz PW (not produced) is the maternal cousin (*khalazad*) of the deceased, Mahmood *alias* Mooda PW (not produced) is the husband of the real sister of the deceased and Javed Iqbal PW (not produced) is the paternal cousin (*chachazad*) of the deceased. It has been admitted by the complainant PW-8 in his evidence that all the prosecution witnesses including himself, are close relatives *inter se*, as well as, of the deceased.

13. The learned counsel for the appellants has argued that the prosecution had failed to prove its case against the appellants beyond the reasonable doubt and thus they are entitled to be acquitted by this Court; the eye-witnesses produced by the prosecution were closely related to the deceased, interested and inimical to the appellants who, maliciously had suppressed the real facts of the case; the F.I.R. is an

anti-dated and anti-timed document which has been fabricated by the prosecution with false timings shown on it, to pose it as a promptly lodged document; the motive set up by the prosecution had remained far from being proved so the prosecution has to face its consequences; the recovery of *chhuries* P.6, P.8 and P.1 have been planted upon Muhammad Ghalib, Nasir Mahmood and Muhammad Haneef appellants, whereas, a hatchet P.3 and pistol P.4 have been placed upon Waheed Ahmad appellant with fictitious proceedings, to substantiate, an otherwise unproven prosecution's case; the medical evidence is inconsistent with the ocular account, furnished by the inimical and biased witnesses; the complainant party had committed aggression against the appellants by causing severe injuries to the appellants in an unprovocative attack at the residential house of Muhammad Ghalib appellant; the co-appellants of Muhammad Ghalib appellant had not taken part in the incident and it was he alone who had retaliated in self-defence to fend off the aggression launched by the deceased; impugned judgment has been passed in arbitrary, perverse and capricious manner which may be set aside and the appellants may be acquitted of the charge.

14. As against the submissions of learned counsel for the appellants, the learned Deputy Prosecutor General appearing for the State and the learned counsel for the complainant have submitted in agreement that the prosecution had fully established the guilt of the appellants beyond reasonable doubt through trustworthy ocular account, corroborative medical evidence, the evidence of the recovery of weapons of offence from all the appellants and the evidence of motive; the appellants and their co-accused had committed a barbaric act, by taking the life of two innocent persons and almost killed the third one during the occurrence; the appellants Nasir Mahmood and Muhammad Haneef should have been awarded the capital punishment like their co-appellants in absence of any extenuating circumstance, being vicariously liable for the murder of Shaukat and Liaqat deceased, hence, the revision petition filed by the complainant for enhancement of sentence may be accepted and the instant appeal of the appellants may be dismissed.

15. The prosecution case hinges upon the ocular account furnished by an injured witness PW.9 and Muhammad Rafaqat PW.8, the evidence of motive, the medical evidence presented by Dr. Muhammad Arshad, C.M.O., PW.6 and Dr. Rana Muhammad Mobeen, C.M.O., PW.7 alongwith the evidence of recovery of the crime weapons, *chhuri* P.6, *vide* memo. Exh.PJ, hatchet P.3 *vide* memo. Exh.PE, pistol P.4 *vide* memo. Exh.PF, *chhuri* P.8 *vide* memo. Exh.PL and *chhuri* P.1 *vide* memo. Exh.PC, at the instance of Muhammad Ghalib, Waheed Ahmad, Nasir Mahmood and Muhammad Haneef appellants-accused, respectively.

16. After having heard the learned counsels for the parties and going through the record we straightaway find that Muhammad Ghalib appellant has advanced a specific defence plea, as regard to the prosecution case and in his statement u/S. 342, Cr.P.C. he has contended that he alongwith his wife and mother-in-law had been badly injured by Liaqat (deceased), Shaukat (deceased) and Wajid (PW.9) who being armed, had attacked him, at his residential house, after covering a distance of about 1 kilometer. We further noticed that despite having raised the specific defence plea, he has neither appeared, in his defence, u/S. 340(2), Cr.P.C. nor he has adduced any defence evidence. The requirement of Article 121, Qanun-e-Shahadat appears to have been ignored and overlooked by the defence during the course of the trial. The unfortunate incident was reported to the police promptly, within two hours and ten minutes by Muhammad Rafaqat *alias* Bagga complainant PW.8. We have also gathered that on the basis of the same

evidence, four co-accused of the appellants have been let off by the learned Trial Court so in this background we have to see whether or not the ocular account, gets the complete corroboration from the other attending circumstances and whether the ocular account in its present form is trustworthy and unimpeachable? In these circumstances we have to deal with each bit of evidence available on the record so as to plumb the depth of the real facts of this case.

17. As far as the motivating factor in the instant case is concerned we have noticed that it relates to the tense and strained relations between Muhammad Rafaqat *alias* Bagga, PW.8 and Ghalib *alias* Guddi, appellant spanning over a period of 4/5 years which led to an exchange of hot words between them in the early hours of the fateful day but due to the intervention of the people around, the matter was, for the time being, resolved. The trail of this tension full tale did not come to an end as the complainant, who sat at the shop of one Miskeen, situated in the Adda, at about 8.00 p.m., he, in the backdrop of the animosity, was attacked and thrashed by the appellants, joined by their acquitted co-accused, who took part in the violent drill being armed with different weapons. To his good luck, the people present at the spot again intervened and rescued him. This piece of the motive incident, when known by the family membes of the complainant, PW.8, prompted his real brothers Shaukat, Liaqat and his maternal nephew Wajid Abbasi to reach the point of trouble and they consoled and solaced him but decided that the untruly behaviour and conduct of Ghalib be reported to his brother Aurangzeb who incidentally, was their close relative (*behnoi*) and ran a shop not far off from the house of the appellants-accused. The residential house of Talib accused (since acquitted) was situated close to the shop of Aurangzeb. There was close relationship between the parties as Liaqat deceased was married with the real sister of Ghalib accused-appellant and as discussed above, the real sister of Liaqat deceased was married with Aurangzeb. Muhammad Rafaqat *alias* Bagga PW.8 has contended in his testimony that the relations between the two families had become strained due to many complications involving the *inter se* marriages between the two families. The hostility between the complainant and Ghalib appellant in fact sparked off due to aforesaid reasons which got compounded because of repeated clashes between them. The strained, but close relationship between the two families had been admitted by both the sides. When we come to the statements u/S. 342, Cr.P.C. of the appellants, they have frankly admitted that a quarrel had taken place in the early hours of the day on 26.7.2002, between the deceased and the complainant and all of them have replied in affirmative while answering question No. 2, relating to the previous skirmishes between them. By this way, the enmity between the complainant and the appellants stands admitted. The last incident, pursuant to the sore relationship between the parties, prior to the main occurrence took place at 8.00 p.m. when the complainant was beaten by the appellants and their acquitted co-accused, at the shop of Miskeen, situated in the Adda. The motive emerges to contain a number of collisions between the parties, the last in the sequence, taking place at 8.00 p.m. on the fateful day. The deceased brothers of the complainant after seeing the haplessness of their real brother decided to lodge a complaint with Aurangzeb, the brother of Ghalib, appellant-accused, and *behnoi* of the deceased so as to bring an end to the hostilities. Their decision in this regard is neither offensive nor entails any mischief as Aurangzeb was the person who being a relative on both the sides, could be effective in enforcing a lull between the related rivals. They acted upon their decision without having the slightest idea as to what was there for them in the store and what monstrous moments waited for them in the next few hours. The non-production of Miskeen on whose shop, the last clash

prior to the occurrence occurred does not weaken the motive part of the incident as PW.8 and PW.9 have satisfactorily rendered the details of the clashes between the complainant and the accused, coupled with the fact that the statements of the accused-appellants u/S. 342, Cr.P.C. lend a strength of corroboration to the motive set up by the prosecution. In these circumstances, we have come to a definite conclusion that the prosecution has succeeded to prove motive, as set up by them while triggering off the legal machinery into motion.

18. As far as medical evidence is concerned, it provides unflinching corroboration to the witnesses of the ocular account as both the deceased, Muhammad Liaqat and Muhammad Shaukat had received multiple sharp-edged injuries at the hands of the appellants-accused besides, Wajid Abbasi, PW.9 was almost killed by them, having given him grievous multiple sharp-edged injuries. The post-mortem examination of both the deceased was conducted by Dr. Muhammad Arshad, C.M.O., PW.6 *vide* post-mortem examination report Exh.PR, *qua* Muhammad Liaqat deceased and Exh.PS *qua* Muhammad Shaukat deceased. The necropsy report Exh.PR discloses the infliction of six sharp-edged injuries and one punctured wound whereas, the post-mortem examination report Exh.PS entails description of four sharp-edged fatal injuries and two blunt weapon injuries, bruise and an abrasion. Same is the situation with the medico-legal report Exh.PV of Wajid Abbasi, injured PW, which shows four sharp-edged injuries on various parts of his body and he appears to have survived through his sheer good luck as injury No. iii on his abdomen had caused the loops of small intestine, protruding out of the wound. The witnesses of ocular account, specially PW.9 has categorically deposed about the specific role played by the appellants-accused in committing the occurrence and the medical evidence supports their version in totality. The duration of injuries, the seat of injuries, the time elapsed between injuries and death, and between death and post-mortem examination are all in line with the ocular account furnished by PW.8 and PW.9. We have noticed that the post-mortem examination reports are not attached with the pictorial diagrams and the learned counsel for the appellants has effervescently pointed at the said omission with the contention that in absence of the pictorial diagrams the entries of the post-mortem examination reports cannot be read against the appellants, we are afraid, that the learned counsel is badly misconceived as the non-existence of the sketches does not undermine the intrinsic value of these important reports nor these can be thrown away due to the said omission. Both the Medical Officers have been subjected to detailed cross-examination but we do not find any infirmity in their statements which could cause brushing aside of their statements, therefore, we have concluded that the medical evidence did corroborate the ocular version perfectly.

19. Insofar as the evidence of recovery of the weapons of offence from the appellants is concerned, we find from the statements of Haji Ghaffar, PW.2, Tariq Mahmood, PW.3 and Arshad Ali, S.I./I.O., PW.10 that Muhammad Ghalib, Nasir Mahmood, and Muhammad Haneef appellants led to the recoveries of blood-stained *chhuri* P.6, *vide* memo. Exh.PJ, blood-stained *chhuri* P.8 *vide* memo. Exh.PL and blood-stained *chhuri* P.1 *vide* memo. Exh.PC, respectively while Waheed Ahmad appellant-accused led to the recovery of blood-stained hatchet P.3 *vide* memo. Exh.PE. He also led to the recovery of pistol P-4, *vide* memo. Exh.PF. The report of Chemical Examiner Exh.PFF reveals that the weapons got recovered by the appellants were stained with blood and the scrappings thereof, sent to the office of the Serologist have been found to

be of human origin, *vide* report Exh.PFF/1, released by the Serologist Govt. of Punjab, Lahore. Haji Ghaffar PW.2 and Tariq Mahmood PW.3 have established the factum of the recovery of the aforesaid weapons at the instance of the appellants. Though, some discrepancies appear in their testimonies but those are of trivial nature. The Investigating Officer Arshad Ali, S.I., PW.10 who recovered all the above-said articles during the course of investigation, at the behest of the appellants, looked a bit wavered and reminiscence-less in his testimony but his inattention and heedlessness has done little damage to the evidence in this regard. The statements of PW.2, PW.3 and PW.10 read with the above-said documentary evidence lend a sense of corroboration to the prosecution's case. The laboratory reports cannot be discarded by any argument as the sealed parcels containing the above-said weapons and the scrappings thereof, had been received intact by the said Labs. Besides during the cross-examination of the above-said witnesses it has not been suggested by the defence that the weapons in question were sent to the said Lab. after having been tampered with in any manner, rather the suggestions put to PW.4 by the defence are found to be self-destructive to the arguments raised before us. Therefore, we find the evidence on the point of the recovery of the above-said weapons of offence, creditworthy and reliable.

20. Insofar as the ocular evidence is concerned, in absence of any serious flaw or discrepancy in the testimonies of PW.8 and PW.9 the same cannot be disbelieved or discarded simply due to the relationship of the eye-witnesses with the deceased persons of this case. The matter was reported to the police with utmost promptitude, in fact, within about two hours. One of the eye-witnesses, Wajid Abbasi, PW.9 is an injured witness, so his presence at the place of occurrence cannot be questioned or ruled out. Even the learned defence counsel has not disputed his presence at the spot, at the relevant time rather, he argued that he alongwith his companions Muhammad Shaukat and Muhammad Liaqat, being armed with different weapons had trespassed into his house, caused injuries to Ghalib appellant-accused, his wife and his mother-in-law so he, in order to save the life, honour and chastity of the family, held a *chhuri* from the kitchen of his house and single handedly stabbed it into their bodies one after the other, who, on receiving the injuries ran away from his house and stumbled to fall down at some distance from his house where they were spotted after about half an hour by the PWs who shifted them to the hospital but due to excessive loss of blood, two of them Muhammad Liaqat and Muhammad Shaukat died on way to the hospital.

21. The complainant PW.8 had not been having speaking terms with Muhammad Ghalib for a period of about 4/5 years who quarreled with him on a number of occasions. It was on 26.7.2002 that Muhammad Rafaqat complainant was engaged in a brawl with Muhammad Ghalib accused, firstly in the early hours of the morning and then at 8.00 p.m. at the shop of Miskeen but on both the occasions the people present there, intervened and separated them. The occurrence at 8.00 p.m. prior to the main occurrence was graver than the one, having taken place in the morning as all the appellants-accused in cahoots of their acquitted co-accused had pounced upon Muhammad Rafaqat but he was lucky to be saved again by the people around. This was the stage when it was decided by the complainant and his real brothers, joined by Wajid Abbasi, their cousin, to report the matter to Aurangzeb, their *behnoi* and a brother of Muhammad Ghalib appellant. It was a wise decision on their part as they had compound relationship *inter se* as real sister of Muhammad Ghalib appellant was the wife of Muhammad Liaqat

deceased and at the same moment, Aurangzeb, the brother of Muhammad Ghalib appellant was the husband of the real sister of the deceased. After lodging a complaint with Aurangzeb, the ill-fated party was returning to their house, when they reached the place of occurrence, the appellants and their acquitted co-accused caught them by surprise, as they being armed with lethal weapons, ambushed them at about 9.00 p.m., emerging from the hedges and authored terminal injuries on the bodies of Muhammad Shaukat and Muhammad Liaqat deceased, whereas, they caused an injury on the abdomen of Wajid Abbasi, PW.9 besides other injuries, which caused bulging out of small intestine from the wound. Muhammad Rafaqat PW.8 has endorsed his previous version as contained in his complaint Exh.PA and deposed about the occurrence in a manner, which is truly corroborated by the testimony of Wajid Abbasi, PW.9.

22. The hallmark of the statement of PW.9 is that he has given the detail of the occurrence in minutes term and has burdened the appellants with the specific role of authoring injuries not only on the bodies of the deceased persons but also on his body. The terminal injuries stand attributed to Muhammad Ghalib and Waheed Ahmad appellants accused with precision and he has also mentioned about the infliction of injuries on his person by Haneef *alias* Pappu appellant and Muhammad Ghalib appellant-accused. Wajid Abbasi, PW.9 has perfectly corroborated his previous stance before the police, as contained in his statement u/S. 161, Cr.P.C., wherein he has been very specific not only about the injuries of both the deceased but also that of his own, caused by the appellants-accused. Despite lengthy cross-examination, on these PWs, the defence badly failed to gain anything.

23. The defence plea, introduced by Muhammad Ghalib appellant-accused in fantastic and unbelievable. It looks ridiculous and bizarre that Muhammad Shaukat, Muhammad Liaqat, deceased and Wajid Abbasi being armed allegedly committed aggression by launching an attack on the house of Muhammad Ghalib accused and ended up with two dead-bodies and the third almost killed without causing any injury to the persons allegedly attacked upon by them. Though, it has been contended in his defence plea by Muhammad Ghalib appellant that he had gone to a hospital at Islamabad (PIMS) for his medical examination but he was taken into custody by the police and that was why he could not get himself medically examined or fetch some document from a Medical Officer in support of his plea of self-defence, yet, his plea does not ring true or sound plausible as his wife and mother-in-law who too according to him had been injured in the occurrence, were neither taken into custody by the police nor they had been debarred by any one from the complainant side to approach a Medical Officer/doctor for their medical examination. In fact, the plea raised by the appellant Muhammad Ghalib is nothing but a farce. We again do not find any reasonableness in his contention that the deceased etc. had covered a distance of about 1 kilometer to attack him and that they had been stabbed and injured by him inside his house as the shop of Aurangzeb, where the deceased and others had gone to lodge a complaint was not miles away from the house of the appellant-accused Muhammad Ghalib but its distance from his house was so meager that it has been mentioned by the PWs in feet. Had it been so that the house of the said appellant-accused not fallen on way to the shop of Aurangzeb, there might have been some substance in the defence plea of the accused.

24. The witnesses of ocular account have given a clean breast of the occurrence without contradicting each other on any aspect of the case and they appear to have rendered naturally believable evidence. No extra argument is required to establish the presence of Wajid Abbasi, PW.9 at the place of occurrence as he has irremovable imprint of his presence at the place of occurrence which is directly substantiated through medical evidence. The small distance between the house of Muhammad Ghalib appellant from the place of the occurrence cannot belie the version of the eye-witnesses as we do not find any weakness, feebleness or fragility in their testimonies. The ocular account has been furnished by the truthful witnesses and the statement of these PWs has affixed a seal of truth, believability and authenticity *qua* the veracity of the prosecution case. There may be some contradictions in their statements but those have been found to be minor in nature and cannot be regarded as of such nature which can become a ground for discarding the ocular account. Therefore, we conclude that the ocular evidence is duly supported by the medical evidence, the evidence of the recovery of the crime weapons, the motive and by the other attending circumstances which have led us believe that the ocular account is trustworthy, credible and worth reliance against the appellant-accused. Therefore, we confirm their conviction as recorded by the learned Trial Court.

25. So far as the defence plea, agitated by Muhammad Ghalib appellant in his statement u/S. 342, Cr.P.C. is concerned it has been discussed a little bit in the preceding paragraphs of this judgment. He however, has contended that Muhammad Liaqat (deceased), Muhammad Shaukat (deceased) and Wajid had trespassed into his house on the day of the occurrence, after covering a distance of 1 kilometer and caused injuries to him, his wife and mother-in-law due to the previous altercations between him and Rafaqat *alias* Bagga, complainant PW.8. He has further contended that he by exercising his right of private defence took out a *chhuri* from his kitchen and gave a few blows to the assailants who after receiving the injuries ran out of his house and fell in injured condition near the house of Najmul Hassan and Zarwaiz whereas, Wajid Abbasi fled away from the said place. He has further contended that both the deflated injured remained alive for about half an hour and died subsequently. He further contends that he alongwith his injured family members went to Poly Clinic Hospital for treatment where he was arrested and that he too had lodged a complaint with the police but his version/report had not been recorded by the police as they were hands in gloves with the complainant party. He used his full energy to orally submit that he alone had stabbed the deceased and the injured PW and that none of his co-accused had taken part in the incident and that the allegations levelled by the prosecution against him and his co-accused were concocted. It was incumbent upon the appellant-accused Muhammad Ghalib to discharge the onus to prove his exceptional plea as per requirement of Art. 121 of the Qanun-e-Shahadat but he neither appeared himself as his own witness u/S. 340(2), Cr.P.C. nor he showed valor and confidence to adduce any defence evidence. Reliance is placed on a recent judgment passed by the august Supreme Court of Pakistan in the case titled *Anwar Shameem and another Vs. The State* (2010 SCMR 1791). The defence plea, as introduced by Muhammad Ghalib, appellant is worth rejection in more than one way, being unnatural, preposterous and fantastic. It does not appeal to reason that three youthful persons would travel to the house of the appellant-accused from a distance of 1 kilometer being armed and would surrender meekly to be clubbed and stabbed time and again by the lone appellant-accused who could not show even a single scratch on his

person nor on the person of his wife or mother-in-law. The attending circumstances, as mentioned hereinbefore clearly show that the deceased party had been caught by surprise, ambushed and wounded by the appellants who sat in wait for the returning deceased party from the shop of Aurnagzeb and this is how they sustained the casualties. The defence plea is bound to be rejected both on the facts and the law.

26. For what has been discussed above and in the circumstances mentioned h`ereinbefore we uphold and confirm the conviction and sentence of the appellants-accused as recorded by the learned Trial Court in the impugned judgment. Resultantly, the appeal (Crl. Appeal No. 79 of 2004) filed by Muhammad Ghalib, Nasir Mahmood, Muhammad Hanif and Waheed Ahmad appellants-accused is dismissed.

27. The Crl. Revision No. 112 of 2004 filed by the complainant, for the reasons discussed hereinabove is dismissed.

28. The Murder Reference No. 299 of 2004 *qua* Muhammad Ghalib and Waheed Ahmad, appellants is answered in the affirmative.

Criminal Appeal dismissed.

K.L.R. 2011 Criminal Cases 32

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

Shahzad Ahmed

Versus

The State and others

Crl. Misc. No. 1463-B of 2010, decided on 24th August, 2010.

CONCLUSION

(1) Varying statements of abductee. Case for grant of bail is made out.

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, S. 365-B---Abduction case---Varying statements of alleged abductee---Bail concession---**Held:** Alleged abductee got varying statement recorded u/Ss. 161, Cr.P.C. and 164, Cr.P.C.---Which one of nearer to truth and belieability was a question necessarily to be dealt with by Trial Court during course of time---Matter fell within ambit of further inquiry---Bail after arrest granted.

(Paras 7,8)

بیوہ مغویہ کے زیر دفعہ 161 ض ف و زیر دفعہ 164 ض ف متضاد بیانات۔ ضمانت عطا ہوئی۔

Key Terms:- Abduction so bail.

[Varying statements of alleged abductee recorded u/S. 161, Cr.P.C. and 164, Cr.P.C. Bail allowed.]

[Abduction of bail]

For the Petitioner: **Rana Sher Afgan, Advocate.**

For the State: **Khalid Pervaiz Opal, DDPP.**

Date of hearing: **24th August, 2010.**

ORDER

SHAHID HAMEED DAR, J. --- Shahzad Ahmad seeks bail after arrest in case F.I.R. No. 58/10, dated 11.5.2010 for offence under Section 365-B, P.P.C. registered at Police Station, Manthar, District Raheem Yar Khan, on the complaint of Muhammad Shabbir.

2. Precisely, the prosecution case as stated by the complainant is that Muhammad Boota, a neighbour of the complainant sought the hand of his daughter *Mst.* Saddaf for his son Shahzad but he (complainant) refused; *Mst.* Saddaf was abducted at gun point by Shahzad (petitioner) armed with pistol, Boota (father of the petitioner), Riaz (the brother of Muhammad Boota accused) and Adnan (son of Riaz) at 6.00 a.m. on 11.5.2006; the petitioner brandished his weapon at the complainant and exhorted, if anyone drew near, would be killed; the accused confined *Mst.* Saddaf Bibi at their residential house after abducting her.

3. The police was informed by the complainant well in time *qua* the abduction of his daughter, so the Investigation Officer reached the place of occurrence alongwith the complainant and recovered Mst. Saddar from a room of the house of the petitioner, the same day.

4. Learned counsel for the petitioner contends that both the parties are closely related to each other and it was why Muhammad Boota had asked for the hand of *Mst.* Saddaf for his son Shahzad, the petitioner, the alleged abductee had also fallen in love with Shahzad petitioner so she herself left her house on 11.5.2010 and reached the house of the petitioner with the intention that she would not go back to her parents till she was married with Shahzad; the police recovered her from abode of the petitioner where *Mst.* Saddaf categorically stated that she had herself come to the house of her relatives and that she wanted to marry Shahzad; she further contended that she had not been abducted by anyone and the case lodged by her father was false; the statement of the alleged abductee was recorded by the Investigation Officer, the same day under Section 161, Cr.P.C. wherein she had totally denied the allegations contained in the F.I.R. and had reiterated her version which she advanced before the Investigation Officer at the time of unbolting the door of the room wherein she had concealed herself; the complainant has falsely roped the petitioner, his father Muhammad Boota, real paternal uncle Riaz and his son Adnan with *mala fide* intention to humiliate and disgrace them; all the accused except the petitioner had been found innocent during the course of investigation and the story narrated by the complainant could not be verified by the I.O.; lastly contends that the petitioner's case constitutes need for further inquiry into his guilt.

5. On the other hand learned DDPP has strongly opposed the grant of bail to the petitioner with the contention that *Mst.* Saddaf was produced before the learned Area Magistrate on 12.5.2010 for her statement under Section 164, Cr.P.C. wherein she

completely owned the story contained in the F.I.R. and categorically alleged that she was abducted at gunpoint by Shahzad and his co-accused on the day of occurrence and that she had been taken to the house of the petitioner and confined there; the offence with which the petitioner is charged catches the prohibition of Section 497(2), Cr.P.C. and he is not entitled for the relief prayed for.

6. Arguments heard. Record perused.

7. The crucial point of the instant case pertains to the recovery of the alleged abductee from the house of the petitioner by the Investigation Officer who has recorded the proceedings of the recovery of the alleged abductee from a room of the said house in case Diary No. 1, dated 11.5.2010. It has been mentioned by the Investigation Officer that the Court took him to the said house and pointed to a room wherein *Mst.* Saddar had confined herself by bolting the door from inside. The I.O. knocked at the door of the said room, in response to which *Mst.* Saddaf cried that she would not open the door till she was married with Shahzad accused. According to the case diary she was given the assurance by the complainant that her desires shall be respected, so she opened the door and informed the Investigation Officer of the real facts of this case. It also transpired from the record that the Investigation Officer produced the alleged abductee before the learned Magistrate for her statement u/S. 164, Cr.P.C., the same day but it could not be recorded, as the Court time was over. The I.O., however, recorded the statement of the alleged abductee u/S. 161, Cr.P.C., the same day wherein the categorically denied the story as alleged in the F.I.R. and contended that she loved her *Phoophizad* Shahzad and wanted to marry him but her parents were reluctant, so she decided to do it on her own by leaving the house of her parents. She further contended that she had gone to the house of her beloved on her own and that she had not been abducted by anyone. The alleged abductee however, took a summersault when she was produced before the learned Magistrate again on 12.5.2010 for her statement u/S. 164, Cr.P.C. by the Investigation Officer as she stated before the learned Magistrate that she had been abducted by Muhammad Boota and his co-accused and taken to their house where she was confined in a room of the house. She further deposed that she was confined there for 2/3 hours and was recovered therefrom by the Investigation Officer. The police found the father, paternal uncle and paternal cousin of the petitioner innocent during the course of investigation and challaned the accused-petitioner. Presently there are two statements of the alleged abductee on the record, which one of the two is nearer to truth and believability is a question necessarily to be dealt with by the learned Trial Court during the course of the trial. The proceedings conducted by the Investigation Officer at the time of recovery of the alleged abductee cannot be thrown away for the simple reason that the alleged abductee had taken a U-turn while deposing u/S. 164, Cr.P.C. on 12.5.2010. Even otherwise the allegations levelled by the complainant are preposterous as a father and uncle in our society hardly associate with his son/nephew to commit such an occurrence as alleged by the complainant. All the co-accused of the petitioner had been found innocent during the course of investigation and the case of the petitioner in the attending circumstances is open to further inquiry into his guilt within the meaning of Section 497(2), Cr.P.C. The petitioner was arrested on 24.5.2010. The investigation is complete and he is no more required for the purpose of further investigation.

8. Therefore, I admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned Trial Court.

Bail after arrest granted.

K.L.R. 2011 Criminal Cases 36

[Rawalpindi]

Present: **SHAHID HAMEED DAR, J.**

Arshad Farooq

Versus

***Ch.* Muhammad Ishaq and others**

Crl. Misc. No. 1224/BC of 2010, decided on 5th October, 2010.

CONCLUSION

(1) Accused shown to have played hide and seek with the Court is not enlisted to extra-ordinary relief of bail.

(a) Bail before arrest---

---Grant of---Yardstick laid down---The bail before arrest is an extraordinary relief, the scope whereof is very narrow which is restricted only to the innocent---Unless an accused can show or hint at element of malice or ulterior motive on the part of complainant or that of the police he cannot be held entitled to the same relief.

(Para 8)

CANCELLATION OF BAIL---(Conduct of accused)

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

---Ss. 497(5)/498---Pakistan Penal Code, 1860, Ss. 403/427/440---Matter of cancellation of pre-arrest bail---Playing Hide and seek with Courts---Conduct of accused---**Held:** Accused-respondent had been having facility of ad-interim pre-arrest bail at his choice and he always moulded situation to his liking and benefited himself, be it first pre-arrest bail application or third in number---Respondent had misused concession of bail fearlessly---Contention that respondent had been held innocent by I.O. stands exporated because of mentioning name of accused in column No. 3 of challan---Respondent alongwith co-accused committed on offence which was *prima facie* non-bailable and by no stretch of imagination case of respondent-accused called for further inquiry---Pre-arrest bail was recalled by High Court.

(Paras 7,8,9)

ملزم آخری تاریخ پر عدالت سے غیر حاضر ہو کر دوبارہ عبوری ضمانت سے لطف اندوز ہوتا رہا۔ ہائیکورٹ نے قبل از گرفتاری ضمانت منسوخ کر دی۔

Key Terms:- Pre-arrest bail

[Accused kept absenting himself on last date and thus was enjoying ad-interim pre-arrest bail time and again. Pre-arrest bail was cancelled by High Court.]

For the Petitioner: **Malik Tahir Mehmood, Advocate.**

For the Respondent: **Syed Sibtain Hussain Shah, Advocate with respondent No. 1 in person.**

Sh. Muhammad Munir, DPG with Yasir, S.I.

Date of hearing: **5th October, 2010.**

ORDER

SHAHID HAMEED DAR, J. --- Seeks cancellation of pre-arrest bail allowed to respondent No. 1, *vide* order dated 21.7.2010 passed by learned Additional Sessions Judge, Rawalpindi, in case F.I.R. No. 985, registered at Police Station, Westridge, Rawalpindi, on 14.12.2009 for offences under Sections 403/427/440, PPC.

2. Precisely, the prosecution case as stated by Arshad Farooq-complainant is that the vegetable crop grown by him over an area of 40 kanals of leased land was completely damaged at about 4.30 p.m. on 13.12.2009 by Muhammad Ishaq-respondent No. 1 and his co-accused, being armed with different weapon as they marshaled their driver to plough the said land by driving a tractor into it; the respondent-accused and his co-accused caused a loss of Rs. 9/10 lacs to the complainant as the produce was ripe enough for harvesting; the accused committed the occurrence in the backdrop of a property dispute.

3. The respondent-accused and others sought *ad-interim* bail before arrest from the Court of learned Additional Sessions Judge, Rawalpindi and got absent on 26.12.2009 as a result of which their bail petition was dismissed due to non-prosecution. Thereafter, they sought *ad interim* pre-arrest bail from this Court on 7.1.2010, enjoyed it till 17.6.2010 and again opted not to attend the Court as a result of which their repeated bail application (Cr. M. No. 20-B/10) was again dismissed due to non-prosecution on 17.6.2010.

The respondent-accused in the company of the co-accused again succeeded in obtaining *ad-interim* bail before arrest from this Court through Cr. M. No. 971-B/10, but, withdrew the same on 5.7.2010 with the contention that they intended to move the Court of learned Additional Sessions Judge, Rawalpindi, for bail before arrest, afresh. This is how, they obtained the impugned order dated 21.7.2010 from the Court of learned Additional Sessions Judge, Rawalpindi, by moving another application for bail before arrest. Hence, the instant petition.

4. Learned counsel for the petitioner submits that the impugned order through which the respondent-accused had been admitted to bail before arrest has been passed in flagrant violation of settled principles of dispensation of criminal justice; the respondent-accused failed to hint at any element of malice or ulterior motives on the part of the complainant or that of the police still extra-ordinary concession of pre-arrest bail was bestowed upon him which renders the impugned order unsustainable in the eyes of law; the respondent-accused alongwith his co-accused has committed a non-bailable offence which is not only supported by the complainant but also by the eye-witnesses in their statements under Section 161, Cr.P.C.; the conduct and demeanour of the respondent-accused clearly showed that he alongwith his co-accused played hide and seek with the Courts and finally fetched the impugned order which does not contain any

valid or sound reasons for acceptance of his bail plea; the respondent-accused had been held responsible for the commission of offence by as many as three Investigation Officers, thereafter, he wickedly earned a sketchy opinion in his favour from AIG (Vigilence)/CPO, Punjab, Lahore, the benefit whereof was extended to him by the learned Additional Sessions Judge, in complete violation of the relevant provisions of law on the point; there are no reasons to believe that the respondent-accused has not committed the offence alleged against him and his case is not open to further inquiry at all; the impugned order may be set aside and the bail allowed to the respondent-accused may be re-called.

5. On the other hand, learned counsel for the respondent-accused opposed the contentions of learned counsel for the petitioner with the submission that the respondent-accused had been found innocent by a responsible Police Officer who had opined that the accused had reached the spot after the occurrence was over; the opinion recorded by the Investigation Officer has been rightly believed and given weight by the learned Additional Sessions Judge and the impugned order does not call for interference; the investigation stands completed and a report under Section 173, Cr.P.C. is already in the pipe line for submission before the Trial Court; the offence with which the respondent-accused is charged does not fall within the prohibitory clause of Section 497, Cr.P.C. and grant of bail in such like cases is a rule and rejection, an exception. The impugned order is well-reasoned and does not suffer from any legal defect.

6. The learned DPG has endorsed the submissions of learned counsel for the petitioner and adds that the impugned order is not sustainable, as it has been passed in a slipshod manner, alien to the principles governing such an extra-ordinary relief.

7. I have heard the learned counsel for the parties and gone through the relevant record. The case of the respondent-accused has a chequered history as he alongwith his co-accused has been playing hide and seek with the Courts through his clever skirmishes whereby he defeated the very purpose of relevant provisions, governing the dispensation of criminal justice. The hallmark of the case of the respondent-accused is that he never felt shy of getting absent on the last date of hearing fixed either by the Court of learned Additional Sessions Judge or by this Court for hearing of his bail plea. He has been having the facility of *ad-interim* pre-arrest bail at his choice and he always moulded the situation to his liking and benefited himself, be it his first pre-arrest bail application, or third in number. The respondent-accused again exploited the situation on 5.7.2010 when his case has already been argued before this Court and withdrew the same under the pretext that he wanted to approach the Court of learned Additional Sessions Judge again by way of yet another application for bail before arrest. This is how he gained the time and enjoyed the luxury of *ad-interim* bail before arrest for many months. To encapsulate the intelligent and clever moves of the respondent-accused it can be held, whatever he has done in the instant case right from its inception, he has misused the concession of bail fearlessly. A copy of the challan has been submitted by the learned counsel for the respondent-accused, which shows that the name of the respondent-accused has been placed in its column No. 3. The contention of learned counsel for respondent-accused that in one of the investigations, the respondent-accused has been held innocent by the Investigation Officer stands evaporated because of the mentioning of the name of the accused in the aforesaid column of the challan. It indicates that the Inspector/SHO, was fully convinced about the culpability of respondent No. 1.

The significant feature of the case is that the co-accused of the respondent-accused having been admitted to bail, have absconded.

8. The bail before arrest is an extra-ordinary relief, the scope whereof is very narrow which is restricted only to the innocent. Unless an accused can show or hint at the element of malice or ulterior motives on the part of the complainant or that of the police he cannot be held entitled for the same relief. I have gone through the opinion recorded by the above-said Investigation Officer in favour of the respondent-accused but there are hardly any circumstances, which could be resolved in his favour during investigation. In all the earlier investigations, the Investigation Officers had extensively investigated the case and found the respondent-accused involved in the occurrence but the last Investigation Officer without collecting any viable defence evidence recorded a shoddy opinion in favour of the accused, benefit whereof was extended to the accused in an injudicious manner by the learned Additional Sessions Judge,Rawalpindi. The respondent-accused alongwith his co-accused have committed an offence which is, *prima facie*, non-bailable and by no stretch of imagination the case of the respondent-accused calls for further inquiry into his guilt within the scope of Section 497(2), Cr.P.C.

9. For the foregoing reasons I accept this application, set aside the impugned order and recall the pre-arrest bail allowed to the respondent-accused *vide* order dated 21.7.2010.

Pre-arrest bail recalled.

K.L.R. 2011 Criminal Cases 42

[Rawalpindi]

Present: **SHAHID HAMEED DAR, J.**

Asad Mehmood

Versus

The State

Crl. Misc. No. 1670/B of 2010, decided on 19th October, 2010.

CONCLUSION

(1) When an accused person becomes entitled as of right to bail, the same cannot be withheld on the ground of practice.

(a) Bail and Principles---

---When an accused person becomes entitled as of right to bail under sub-section (2) of S. 497, Cr.P.C., the same cannot be withheld on the ground of practice, because the latter is relatable to exercise of discretion while the former is relatable to the exercise of grant of right.

(Para 8)

Ref. PLD 1989 SC 585.

BAIL---(General allegation)

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

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 324/337-A(v)/148/149---Bail after arrest, grant of---General allegations---Validity---One fractural injury on head of complainant/injured stood attributed to petitioner as well as his co-accused---In absence of any clarifying statement it could not be said at the stage as to who had authored said injury---Other two injuries had been shown simply by M.O. obviously falling within definition of "*Shajjah-i-Khafifa*"---None of PWs u/S. 161, Cr.P.C. statements had attributed specific injury to petitioner *qua* injured-complainant---Case was open to further inquiry---Mere fact that alleged offence fell within prohibitory clause could hardly impede grant of bail to petitioner---Bail after arrest granted.

(Paras 7,8)

Ref. PLD 1989 SC 585

یہ واضح نہ تھا کہ کس ملزم نے مضروب کے سر پر ضرب رسید کر کے ضمانت عطا ہوئی۔

Key Terms:- General allegation and bail.

[It was not clear as to who authored injury on head of the injured PW. Bail allowed.]

For the Petitioner: **Muhammad Zafar Khokhar, Advocate.**

For the Complainant: **Ch. Abdul Aziz, Advocate.**

M. Nazir Abbasi, Standing Counsel.

Date of hearing: **19th October, 2010.**

ORDER

SHAHID HAMEED DAR, J. --- Asad Mehmood, petitioner seeks bail after arrest in case F.I.R. No. 302 of 2010, dated 20.6.2010 under Section s 324, 337-A(v), 148, 149, PPC, registered at Police Station, Shahzad Town, Islamabad.

2. Precisely, the prosecution case as stated by Meharban, complainant is that he was having his own house constructed, adjacent to the house of his brother Irfan, on 20.6.2010 when accused Asad (petitioner) armed with pistol, Nadeem, Shahzad, Irshad and two un-known accused, armed with pistols and *dandas,* pounced upon him and thrashed him mercilessly at about 9.00 a.m.; Asad (petitioner) and his co-accused Nadeem gave repeated blows of the butts of pistols, on his head and also caused injuries to his real brother, Irfan; the witnesses Muhammad Farooq and Tariq intervened and rescued the complainant; the motive behind the occurrence is that the accused intended to forcibly occupy the residential plot of the complainant.

3. Meharban complainant, aged 60 years was medically examined at 9.40 a.m. on 20.6.2010 *vide* MLC No. 1323 at Federal Government Services Hospital, Islamabad by a Medical Officer who found three blunt weapon injuries on his head; injury No. 1 showed a depressed fracture of the skull so it was declared as *Shajjah-i-Hashimah* punishable under Section 337-A(v), PPC whereas the other two injuries were found simple in nature.

4. Learned counsel for the petitioner submits that the petitioner has been falsely roped in this case under a conspiracy by the complainant and the charge against him is baseless; there is no evidence with the prosecution to specifically attribute the fractural injury on the head of the complainant either to the petitioner or to his co-accused; the eye-witnesses of the occurrence namely Tariq, Irfan and Muhammad Farooq have not supported the version of the complainant in their statements under Section 161, Cr.P.C. and have not burdened the petitioner with the liability of causing any injury on the head of the complainant; the petitioner's case is open to further inquiry into his guilt within the scope of Section 497(2), Cr.P.C., so he may be released on bail. Relies upon "*Muhammad Aslam and another Vs. The State through A.G., Punjab and another*" (1997 SCMR 251), "*Muhammad Afzal Vs. The State*" (NLR 2008 Criminal 157), "*Ali Muhammad Vs. The State*" (PLD 2009 Lah. 312) and "*Jaffar and others Vs. The State*" (1980 SCMR 784).

5. Learned Deputy Prosecutor General assisted by learned counsel for the complainant has vociferously opposed the grant of bail to the petitioner with the contention that the petitioner was armed with a pistol at the time of occurrence and he hurled the *butt* thereof on the head of the complainant and caused the fractural injury; the petitioner led to the recovery of pistol 30 bore on 29.6.2010 which is a piece of strong corroboration to the version of the complainant; the eye-witnesses including the injured PW still support the prosecution case which falls within the prohibitory clause of Section 497, Cr.P.C.; the petitioner alongwith his co-accused Nadeem is vicariously liable for the commission of the offence, alleged against him, so he may not be released on bail; lastly contends that the trial of the accused-petitioner has commenced and the case has been fixed by the learned Trial Court for recording of the prosecution evidence; the petitioner has been found involved in the occurrence by the I.O. and his name has been placed in

its column No. 3 of the challan. Relies upon "*State through Force Commander ANF, Rawalpindi Vs. Khalid Sharif*" (2005 SCMR 1265).

6. I have heard the learned counsel for the parties and perused the record.

7. The petitioner has been bracketed when his co-accused Nadeem who too was allegedly armed with a pistol and both of them authored injuries by hurling their weapons from the wrong side, on the head of the complainant. The M.L.R. of complainant shows three blunt weapon injuries on his head, one out of which, injury No. 1, shows a depressed fracture of the skull whereas the other two injuries have been shown by the Medical Officer to be simple, obviously falling within the definition of Shajhah-i-Khafifah, punishable under Section 337-A(i), PPC. The complainant produced three witnesses M/s. Tariq, Irfan and Muhammad Farooq before the Investigating Officer for their statements under Section 161, Cr.P.C. but ironically, none of three has attributed any specific injury to the petitioner *qua* the injured-complainant and in a vague manner each one of them has alleged that all the accused mentioned in the F.I.R. had caused injuries to the complainant and his medically un-examined brother, by means of their weapons. The statements of PWs hardly render any corroboration, in present form, to the version of the complainant. One fractural injury on the head of the complainant stands attributed to the petitioner as well as to his co-accused and in absence of any clarifying statement, it cannot be said at this stage as to who had authored the said injury. The mystery regarding infliction of the above-said injury on the head of the complainant and the fixation of the liability thereof shall only be possible after the learned Trial Court would record the evidence of the parties during the course of the trial. It has been contended by the complainant that his brother Irfan had also been beaten by the accused during the occurrence but there is no medico-legal certificate, establishing the said fact as he did not offer himself to be medically examined by the Medical Officer concerned. There is no doubt that the punishment provided for an offence under Section 337-A(v), PPC catches the prohibition of Section 497, Cr.P.C., but, this fact in the attending circumstances, can hardly impede the grant of bail to the petitioner as his case clearly calls for further probe into his guilt.

8. The objection of learned counsel for the complainant *qua* the commencement of the trial cannot be taken into consideration at this stage for the foregoing reasons as the petitioner's case is fully covered by Section 497(2), Cr.P.C. In the identical circumstances, it has been held by the august Supreme Court of Pakistan, in case titled "*Muhammad Ismail Vs. Muhammad Rafique and another*" (PLD 1989 SC 585) as under:--

> It is apparent that when the Court finds that the two essential conditions contained in Section 497(2), Cr.P.C. are satisfied the accused shall become entitled as of right to bail. In the impugned order the learned Judge, it seems, without saying so in so many words, felt that the two conditions existed in this case (a), that "there are not reasonable grounds for believing that the accused has committed (a) non-bailable offence)"; (b), that there are sufficient grounds for further inquiry into his guilt." Accordingly the accused had become entitled to be released on bail.
>
> The question then arises; whether, sub-section (2) of Section 497, Cr.P.C. would have operation notwithstanding the afore-stated practice of this Court. Much discussion is not necessary in this behalf. When an accused person becomes

entitled as of right to bail under sub-section (2) of Section 497, Cr.P.C. the same cannot be withheld on the ground of practice; because, the latter is relatable to exercise of discretion while the former is relatable to the exercise and grant of right.

Having been guided by the afore-said luminous judgments relied upon by the learned counsel for the petitioner, I accept this application and admit the petitioner to post-arrest bail provided he furnishes bail bond in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned Trial Court.

Bail after arrest granted.

K.L.R. 2011 Criminal Cases 48

[Rawalpindi]

Present: **HASSAN RAZA PASHA and SHAHID HAMEED DAR, JJ.**

Zahoor Akhtar

Versus

Tariq Mehmood and others

Crl. Appeal No. 506 of 2000, decided on 21st September, 2010.

CONCLUSION

(1) The yardstick for assessment of evidence in appeal against acquittal is markedly different from the standards set for appeal against conviction.

(a) Acquittal---

---Interference with---Proposition of law---Courts should be slow to interfere with the judgment of acquittal unless it is felt that the judgment of the Trial Court was perverse, capricious and completely illegal besides, that on perusal of the evidence no other conclusion could be made except that the accused was guilty or there had been complete misreading or non-reading of evidence leading to miscarriage of justice---Even if another view, *qua* the guilt of the accused, was possible while scanning the prosecution evidence, it cannot replace the view, going in favour of the accused except for that no other view was possible than the one establishing the guilt of the accused.

(Para 22)

(b) Acquittal Appeal---

---Appreciation of evidence---Rule---The yardstick for assessment of the evidence in appeal against acquittal is markedly different from the standards set for appeal against conviction---In the appeal against conviction the appraisal of evidence is done in strict terms, ensuring exclusion of all hypothesis of the improbabilities and inconsistencies but in case of an appeal against acquittal the same rigidity/inelasticity of the method is not be supplied---In respect of judgment of acquittal, the interference is only permissible if it is the product of gross misreading of the evidence having resulted in grave miscarriage of

justice---The scope of an appeal against acquittal is much narrow than an appeal against conviction and its boundaries or limitations cannot be stretched too far.

(Para 17)

Ref. 1996 SCMR 635.

ACQUITTAL APPEAL---(Appreciation of evidence).

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

---S. 417(2A)---Pakistan Penal Code, 1860, S. 302---Murder---Circumstantial evidence---Acquittal appeal---Appreciation of evidence---Validity---There were number of circumstances which did not let prosecution proceed beyond shadow of doubt---Respondent-accused was empty handed at that time and he was pitched against said PWs who could easily over-power accused at spot and hand him over to police without much difficulty---Had respondent-accused butchered deceased, he could have easily run away from place of occurrence without being seen by anyone---PWs allegedly found dead-body of deceased in *baithak* which was admittedly in exclusive ownership of grand-father of respondent-accused---Motive in fact was self-discrepant and badly dented version of said PWs---Even if motive dispute had been patched up between parties yet element of displeasure and heart burning could not be outrightly disbelieved between the two so, the idea to pass a night with respondent-accused in said *Baithak* was hardly believable---Delayed post-mortem examination was also a strong factor going against prosecution case---Neither motive, nor medical evidence substantiated or corroborated so-called circumstantial evidence---It was held that complainant and his co-witnesses found dead-body of deceased and thereafter they cooked up a story by joining hands with each other so as to cause ruination to respondent-accused---Conduct of PWs was highly doubtful on each and every stage of prosecution case---Trial Court had evaluated evidence brought on record in accordance with well-known principals of dispensation of criminal justice by advancing forceful and sound reason for disbelieving evidence of motive and circumstantial evidence which had been badly breached by medical evidence---Criminal appeal dismissed.

(Paras 19,21,22,24)

Ref. 1996 SCMR 635.

واقعاتی شہادت - فیصلہ بریت کے خلاف اپیل خارج ہوئی۔

Key Terms:- Circumstantial evidence.

[Circumstantial evidence. Impugned acquittal judgment was maintained.]

For the Appellant: **Ch. Sajid Mehmood Chattha, Advocate.**

For the State: **Rana Kashaf Saleem Arfaa, Law Officer**

Date of hearing: **21st September, 2010.**

JUDGMENT

SHAHID HAMEED DAR, J. --- We intend to dispose of through this judgment Criminal Appeal No. 506 of 2000, filed by Zaheer Akhtar, complainant, PW-4 against acquittal of Tariq Mahmood, respondent-accused, *vide* judgment dated 1.11.2000 passed

by learned Addl. Sessions Judge, Rawalpindi, in case F.I.R. No. 38 of 1999, dated 14.1.1999 u/S. 302, P.P.C. registered at Police Station, Sadiqabad, Rawalpindi.

2. Tariq Mehmood, respondent-accused was tried in the Court of learned Additional Sessions Judge, Rawalpindi for an offence under Section 302, P.P.C. for causing murder of Nasir Mahmood (deceased). The occurrence took place at night between 13/14.1.1999 in the area of Police Station, Sadiqabad, Tehsil & District Rawalpindi. The statement (Exh.PD) got recorded by Zahoor Akhtar, complainant, PW-4 formed the basis for the registration of formal F.I.R. Exh.PD/2. The respondent was charged under Section 302, P.P.C. He pleaded not guilty and claimed a trial.

3. The prosecution story narrated by Zahoor Akhtar PW-4 in his statement (Exh.P1) and F.I.R. (Exh.PD/2) is that he lived in his own house at Service Road, Sadiqabad and dealt in cattle-head; he went to the house of his brother Khushhal Khan (PW-5) who told him that he had rebuked Nasir Mahmood (deceased), the previous night as he did not go to his place of job, due to which he left the house in anger and did not return; the complainant and his brother Khushhal Khan went out to search for Nasir Mahmood (deceased) and reached Service Road near Single Minaret Mosque where M/s. Muhammad Safdar, PW (not produced) and Aurangzeb, PW-8 met them who disclosed that they were present with Tariq Mahmood (respondent) in his *baithak*, last night, and Nasir Mahmood (deceased) also reached there who told them that he would stay with Tariq Mahmood (respondent) for a night and a little while thereafter, they left them together, in the *baithak*; thereupon the complainant (PW-4), Khushhal Khan (PW-5), Muhammad Safdar PW, (not produced) and Aurangzeb (PW-8) reached the *baithak* of Tariq Mahmood (respondent) at about 5.30 p.m. and knocked at its door which was opened by Tariq Mahmood (respondent) who looked confused and on seeing them, ran away; the complainant and his companions entered the *baithak* and found the dead-body of Nasir Mahmood, soaked in blood, lying on the floor.

4. The motive behind the occurrence was that a quarrel had taken place between Nasir Mahmood (deceased) and Tariq Mahmood, respondent-accused a week back, on a money matter, which was patched up by the complainant etc. and due to this grudge, Tariq Mahmood had murdered Nasir Mahmood.

5. The complainant (PW-4) appeared before Aqal Dad, S.I., PW-12 at the place of occurrence and recorded his statement Exh.PD at 6.30 p.m. on 14.1.1999 for registration of formal F.I.R. (Exh.PD/2) No. 38 of 1999, dated 14.1.1999 u /S. 304, P.P.C., at Police Station, Sadiqabad.

6. After recording the statement Exh.PD of Zahoor Akhtar complainant, Aqal Dad, S.I./I.O., PW-12 examined the dead-body of Nasir Mahmood, deceased, prepared inquest report Exh.PG, injury statement Exh.PH and dispatched the dead-body to Civil Hospital, Rawalpindi for neeropsy under the escort of Maqsood Ahmad 1273/C, PW-7 inspected the place of occurrence and prepared visual site plan, collected blood by means of cotton *vide* recovery memo. Exh.PB and recorded the statements of witnesses u/S. 161, Cr.P.C.; he took into possession the blood-stained clothes of the deceased on 15.1.1999 shirt P-2, *Shalwar* P-3, *Bunyan* P-4, sweater P-5 *vide* memo. Exh.PF, he got prepared the scaled site plan Exh.PC and Exh.PC/1 by Qamar-ud-Din draftsman, PW-3. He arrested the respondent-accused on 17.1.1999 and recovered a razor on his point'edness on 21.1.1999 from the above-said *baithak vide* recovery memo. Exh.PA, attested by Sagheer Akhtar, PW-1 and Jahangir, PW (not produced). He dispatched the

accused to judicial lock-up on 22.1.1999 and submitted challan u/S. 173, Cr.P.C. against him before the learned Trial Court.

7. The dead-body of Nasir Mahmood, deceased was dissected at 9.00 a.m. on 15.1.1999 by Dr. Zafar Mahmood, D.M.S., at D.H.Q. Hospital, Rawalpindi *vide* post-mortem examination report Exh.PF who found following injuries on the corpse of the deceased:--

(1) An incised wound 13 c.m. x 2 c.m. in front of the neck extending from right side of neck to the anterior aspect of left side of neck, 6.5 c.m. from right ear, 8 c.m. from chin, 12 c.m. from left ear, 1 c.m. above sternal notch.

(2) An incised wound 8 c.m. x 1 c.m. lying transversely, bone deep on the left parietal region of the head, 7 c.m. above left ear.

(3) An incised wound 3 c.m. x 0.5 c.m. on left occipital region 3 c.m. from left ear.

(4) An incised wound 2.5 c.m. x 0.5 c.m. on the palmer aspect of the base of left thumb.

(5) An incised wound 1.5 c.m. x 0.5 c.m. bone deep, on palmer aspect of middle phalynx of middle finger of right hand.

(6) An incised wound 1.5 c.m. x 0.5 c.m. situated on palmer aspect of middle phalynx of right ring finger.

(7) An incised wound 1.5 c.m. x 0.5 c.m. situated on palmer aspect of middle phalynx of little finger of the right hand.

The cause of death, was the shock and extensive haemorrhage due to damage to major blood vessels like carotid artery etc. All the injuries were ante-mortem and caused by sharp-edged weapon.

The probable time, elapsed between injuries and death was “within 30 minutes” and between death and post-mortem examination within 30 hours.

After supply of copies of the requisite documents u/S. 265-C, Cr.P.C., the respondent-accused was indicated who did not plead guilty to the chrage and claimed a trial. The prosecution was directed by the Trial Court to produce evidence so as to prove the charge against the accused.

8. In support of its case, the prosecution produced 12 PWs. *in toto*. Sagheer Ahmad PW-1 attested recovery memo. Exh.PA *qua* razor P-1. Qamar-ud-Din, draftsman PW-3 prepared the site plan Exh.PC and Exh.PC/1 of the place of occurrence, in the scale of 1 inch equal to 10 feet. Zahoor Akhtar, PW-4 endorsed his version Exh.PD, recorded by the I.O. PW-12. Khushhal Khan PW-5 made an identical statement like Zahoor Akhtar, complainant, Aurangzeb PW-8 is a witness of last seen evidence, Ahmad Yar, ASI, PW-10 dispatched the sealed parcels of blood-stained cotton and razor to the office of Chemical Examiner, Punjab, Lahore through Muhammad Arif, HC, PW-11 on 1.2.1999 who deposited the said parcels in the concerned office intake. Aqal Das, S.I. PW-12 conducted complete investigation in this case. Rest of the prosecution evidence is almost formal in character.

9. The learned Public Prosecutor tendered in evidence the reports of Chemical Examiner, Lahore, Exh.PI, Exh.PJ and report of the Serologist Exh.PK and announced the prosecution case closed.

10. The respondent-accused, in his statement u/S. 342, Cr.P.C. denied the charges against him, professed his innocence and on a question, "Why this case against you and why the PWs have deposed against you" replied as under:--

> "The deceased was addicted to heroin. The complainant got rid of him and falsely involved me in the instant case. All the PW s are close relative of the deceased and they are interested witnesses. I was made a scapegoat in this case. The complainant and the PWs are trying to kill two birds with one shot."

11. The respondent-accused neither led defence evidence nor opted to appear as his own witness u/S. 340(2), Cr.P.C. to disprove the charge against him.

12. After hearing learned counsels for both the sides and perusing the material on the record, the learned Trial Court acquitted the respondent-accused, *vide* judgment dated 25.11.2000. Hence, instant appeal.

13. We have heard the learned counsel for the appellant at full length who has contended that prosecution had come up with clean hands and its *bona fide* was above board throughout the trial but the learned Trial Court fell in error to accept an artificial type of doubt to acquit the accused/respondent; it is true that the enmity is a double-edged weapon which may be utilized to trap the enemy but on the other hand it is a forceful lever to involve the real culprits and substitution would be a rare phenomena when the deceased was a close relative of the complainant side; the recovery of the weapon of offence P-1 from the respondent-accused was also a good piece of evidence to support the other circumstantial evidence; though the place of occurrence was situated in a populated area but mere fact that no person from the vicinity had come forward to become a witness could be well understood from the fact that the people generally are shy to poke their nose in the affairs of others; the presence and production of independent and disinterested witnesses is not only a far cry but also almost impracticable; the deceased was last seen in the company of the respondent-accused by Aurangzeb PW-8 and the ill-fated deceased could not be seen alive thereafter by anyone-else; the dead-body of the deceased was found lying in the *baithak* which was in exclusive possession of the accused and he had no answer to offer in this regard; the PWs are related to both the sides, hence, they cannot be deemed to be interested or untrue witnesses; the respondent-accused was witnessed by PW-5, PW-6 and PW-8 departing the place of occurrence hurriedly in a confused and perturbed manner leaving behind the dead-body of the deceased in his *baithak*; the grounds on which Trial Court proceeded to acquit the respondent-accused are not supportable from any evidence on record; the aforesaid PWs are minutely unanimous in their statements and despite a thorough and lengthy cross-examination, their statements could not be shaken; no reason is forthcoming as to why the respondent-accused should have been falsely implicated by the complainant/appellant; minor discrepancies in the statements of the witnesses shall not be material particularly so when such testimony is otherwise fully corroborated by the medical evidence as well as circumstantial evidence; the discrepancies highlighted by the learned Trial Court in the statement of PW-5, PW-6 and PW-8 are of no important and do not go to the root of the case; lastly reiterates that medical evidence, recovery of the

weapon of offence and motive fully support the charge and prove the case beyond pale of reasonable doubt. To substantiate the pleas he has placed reliance on *Waheed Vs. The State* (PLD 2002 SC 62), *Mst. Roheeda Vs. Khan Bahadur and another* (1992 SCMR 1036), *Muhammad Din Vs. The State* (1998 SCMR 1), *Abdul Rasheed Vs. Umid Ali and two others* (PLD 1975 SC 227), *Najaf Saleem Vs. Lady Dr. Tasneem and others* (2004 YLR 407) and *The State Vs. Muhammad Raja and three others* (PLD 2004 Pesh. 1).

14. Learned Deputy Prosecutor General supports learned counsel for the appellant.

15. On the other hand learned counsel for the respondent submits that the respondent has attained double presumption of innocence firstly, that every accused is presumed to be innocent unless proved guilty and secondly by an order of acquittal in his favour by the Trial Court; the statements of the witnesses are full of contradictions and the prosecution case is devoid of any connecting evidence against the respondent-accused; the judgment of acquittal ordinarily is never upset, altered or interfered with unless same is perverse or fallacious; the prosecution case is preposterous and absolutely incredible as PW-5, PW-6 and PW-8 have badly failed to render any worthwhile evidence against the respondent; there is no corroborative evidence to supplement the statements of the above-said PWs; each and every bit of the prosecution evidence is defective and failing in intrinsic value, hence, not fit enough for reliance to implicate the accused with certainty; it is settled principle of law that one piece of tainted evidence cannot corroborate another tainted piece of evidence. Reliance upon *Haroon Vs. The State and another* (1995 SCMR 1627), *Zaheer Din Vs. The State* (1993 SCMR 1628), *Ghulam Sikandar and another Vs. Hamraz Khan and others* (PLD 1985 SC 11), *Ali Sher Vs. The State and 3 others* (PLD 1980 SC 317), *Muhammad Anwar Vs. The State* (1997 P.Cr.L.J. 2075) and *Pasham Khan and 7 others Vs. The State* (PLD 1984 Pesh. 156).

16. We have examined the evidence with required degree of care with the assistance of learned counsel for both the parties in order to see whether appreciation of evidence by the Trial Court suffers from any misreading or non-reading of any material evidence.

17. The yardstick for assessment of the evidence in appeal against acquittal is markedly different from the standards set for appeal against conviction. In the appeal against conviction the appraisal of the evidence is done in strict terms, ensuring exclusion of all of the improbabilities and inconsistencies but in case of an appeal against acquittal the same rigidity/inelasticity of the method is not be supplied. In respect of judgment of acquittal, the interference is only permissible if it is the product of gross misreading of the evidence having resulted in great miscarriage of justice. The scope of an appeal against acquittal is much narrow than an appeal against conviction and its boundaries or limitations cannot be stretched two far, as is held in *The State Vs. Muhammad Sharif and others* (1996 SCMR 635).

18. The occurrence in this case takes a start from the point when Nasir Mahmood, deceased, leaves the house of his father Khushhal Khan, PW-5 in dismay as he was rebuked and reprimanded by his father at 7.30 p.m. on 13.1.1999 whereafter, he could not return to his house alive. Zahoor Akhtar, PW-4 went to the house of his brother, PW-5 at 4.00/4.30 p.m. on 14.1.1999 and learnt about the disappearance of his nephew, Nasir Mahmood. According to PW-4 and PW-5 they set out in search of Nasir Mahmood

and per-chance met Aurangzeb, PW-8 and Muhammad Safdar PW (not produced) who told them that they had seen him in the *baithak* of the respondent-accused on 13.1.1999 and that he had informed them about his intention to stay with Nasir Mahmood in his *baithak* for a night. Having learnt the said fact all four *i.e.* the complainant, PW-4, Khushhal Khan, PW-5, Aurangzeb PW-8 and Muhammad Safdar PW (not produced) went to the above-said *baithak*, found it closed so, they knocked at the door which was opened from inside by Tariq Mahmood, respondent-accused, who looked confused and perturbed and within their view he sped away. The PWs entered the *baithak* and found the dead-body of the ill-fated youth lying in a pole of blood, on the floor. This is how they believed that Nasir Mahmood had been done to death by the respondent-accused. Thereafter, they informed the police, lodged the F.I.R., joined the investigation and caused the submission of challan against the accused before the learned Trial Court. When we look upon the prosecution case we find that it mainly hinges at the circumstantial evidence rendered by PW-5, PW-6 and PW-8 but the most crucial point involved in this case is whether or not the respondent-accused had committed the murder of the deceased?

19. There are a number of circumstances, which do not let the prosecution case proceed beyond the shadow of doubt, against the respondent-accused. The deceased left his house on 13.1.1999 being crest fallen as he had been absued by his father PW-6 and was found by PW-8 in the *baithak* of the respondent-accused wherefrom his dead-body was recovered on 14.1.1999 at about 5.30 p.m. Muhammad Safdar PW (not produced) and Aurangzeb PW-8 met PW-5 and PW-6 and they all, according to their testimonies, went to the *baithak* of the accused wherefrom he emerged and within the view of the PWs allegedly ran away. Plainly speaking, the respondent-accused was empty handed at that time and he was pitched against four PWs who could easily overpower the accused at the spot and hand him over to the police without much difficulty. The PWs on opening the door by the accused, saw the dead-body of Nasir Mahmood deceased lying on the floor of the *baithak* and if the respondent-accused was confused or perturbed he could not escape or decamp as in such terrifying situation, the internal chemistry of human anatomy cannot supply much vigor and power to the body and one would start panting before he takes a start. If the depositions of the above-said PWs are believed it becomes all the more important that the accused had confined himself in the said *baithak* not finding enough courage to run away from the point of trouble and he opted to stay alongside the dead-body, pensively. Accordingly to the medical evidence the time elapsed between injuries and death was 30 minutes which means that the deceased was alive for half an hour till after he received the injuries. Had the respondent-accused butchered the deceased, he could have easily run away from the place of occurrence without being seen by any one. The PWs. allegedly found the dead-body of the deceased in the *baithak* whereabout the PWs have admitted in their testimonies that it was in the exclusive ownership of grand-father of the respondent-accused. Aurangzeb PW-8 failed to furnish purpose of his alleged visit to the said *baithak* on 13.1.1999 except stating that he alongwith Muhammad Safdar PW (not produced) sat in the above-said *baithak* at 9.00 p.m. alongwith Tariq Mahmood respondent-accused. He is a resident of Service Road, Sadiqabad Rawalpindi whereas, accused Tariq Mahmood resided in village Maira Gulra Nai Abadi, Thalian, Tehsil & District Islamabad. He has admitted in his statement that his house is situated at a distance of half furlong from the place of occurrence. He has further stated that there was no street light around the said *baithak*. He has deposed that a quarrel had taken place between the accused and the

deceased on some money transaction about 8 to 10 days prior to the occurrence. If so, he would be the last man to prefer to stay overnight with a person driven by animus sentiments against him. The motive in fact is self-discrepant and badly dents the version of the above-said PWs. Even if the motive dispute had been patched up between the parties yet the element of displeasure and heart burning cannot be outrightly disbelieved between the two so, the idea to pass a night with the respondent-accused in the above-said *baithak* is hardly believable. Zahoor Akhtar, PW-4 and Khushhal Khan, PW-5 have also deposed about the above-said motive with the contention that the deceased and the respondent-accused had a brawl about 7 to 8 days prior to the occurrence. They have contended that due to the said motive the accused committed the murder of Nasir Mahmood deceased. Had they resolved and patched up the matter between them, why would the respondent-accused commit the murder of the deceased just for nothing. If the respondent-accused was possessed with grudge and bias against the deceased then, he must be a foolhardy to go to the respondent-accused to pass a night with him at his *baithak*. This is such a discrepancy, which has badly jolted the prosecution case.

20. It has been admitted by PW-4 that none of them chased the respondent-accused at the time of occurrence. PW-4 has also deposed that the motive incident was resolved by him and his brother but Tariq Mahmood, respondent-accused did not return the money to the deceased and only made a promise to return the same later on. He has admitted that only one cot was lying in the *baithak* and no other furniture was available there except two cupboards. Khushhal Khan PW-5 has also admitted that neither he nor anyone of his companions ran after the accused when he emerged from the *baithak* and took to his heels within their view. He has rendered a very interesting answer that the *baithak* was lit with an electric bulb and they saw the dead-body in the light of the said bulb. According to him, only one cot waslying in the *baithak*.

21. Barring the discrepant statements of PW-4, PW-5 and PW-8 there is no other material evidence except the medical evidence, presented by Dr. Zafar Mahmood, PW-9, who had performed autopsy on the dead-body of the deceased at 9.00 a.m. on 15.1.1999 *i.e.* after about 15 hours of the registration of the F.I.R. The Medical Officer, PW-9 has worked out the time elapsed between death and the post-mortem examination as 30 hours which is startling and badly reflects upont he veracity of the statements of the witnesses of circumstantial evidence. The delayed post-mortem examination is also a strong factor going against the prosecution case and the PWs have been unable to furnish any satisfactory answer as to why the dead-body of the deceased was dissected with such a considerable delay. The answer to this query however, can be found that F.I.R. Exh.PD/2 in fact had not been recorded at the time shown on its teno. According to above-said PWs they had gone to the *baithak* of the respondent-accused at about 5.30 p.m. where they found the dead-body of the deceased, if so, the intervening time elapsed between death and post-mortem examination must not exceed 15 to 18 hours. The elapsed time of 30 hours, as mentioned by Dr. Zafar Mahmood, PW-9 in his testimony sufficiently unfurls the mendacity and maliciousness of the prosecution witnesses who under a conspiracy have joined hands to depose falsely against the respondent-accused to wreck him. Neither the motive nor the medical evidence substantiates or corroborates the so-called circumstantial evidence rendered by PW-4, PW-5 and PW-8. The net picture emerging from the overall view of the prosecution case is that the complainant and his co-witnesses found the dead-body of Nasir Mahmood deceased and thereafter they cooked up a story by joining hands with each other so as to cause ruination to the respondent-accused. Each and every word of their evidence is incredible and does not appeal to reason and logic. They at no stage of the case have been able to furnish creditworthy and reliable evidence to prove the prosecution case.

22. We have considered the foregoing points that the learned Trial Judge has evaluated the evidence brought on record in accordance with well-known principles of dispensation of criminal justice by advancing forceful and sound reasons for disbelieving the evidence of motive and the circumstantial evidence presented by PW-4, PW-5 and PW-6 which has been badly breached by the medical evidence. The conduct of the PWs has been highly doubtful on each and every stage of the prosecution case. It is now well-settled that Courts should be slow to interfere with the judgment of acquittal unless it is felt that the judgment of the Trial Court was perverse, capricious and completely illegal besides, that on perusal of the evidence no other conclusion could be made except that the accused was guilty or there had been complete misreading or non-reading of evidence leading to miscarriage of justice. Even if another view, *qua* the guilt of the accused, was possible while scanning the prosecution evidence, it cannot replace the view, going in favour of the accused, except for that no other view was possible them the one, establishing the guilt of the accused.

23. The recovery of weapon of offence razor P-1 and the reports of Chemical Examiner and that of the Serologist are immaterial and consequential to the prosecution case for the material prosecution evidence has been found by us to be devoid of any element of believability, spontancity and truthfulness. The Investigating Officer, Aqal Dad, S.I. PW-12 visited the place of occurrence on 14.1.1999, stayed there for a while, inspected the spot but could not find any razor lying there. The place of occurrence, the *baithak* was thoroughly inspected by the I.O. and he made mention of salient features of the place of occurrence in his inspection note which indicates that he had conducted extensive examination of the spot. Had, the razor P-1 been there in the said *baithak*, it would have been taken into possession by the I.O., the same day. The recovery of the razor on 21.1.1999 *vide* recovery memo. Exh.PA being doubtful is rejected and brushed aside.

24. For what has been discussed above, we are of the considered opinion that no case for interference by this Court is made out, therefore, this appeal (Crl. Appeal No. 506 of 2000) filed by Zahoor Akhtar against the acquittal of present respondent is dismissed.

Criminal Appeal dismissed.

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[Rawalpindi]

Present: **SHAHID HAMEED DAR, J.**

Muhammad Humayun Khan

Versus

Muhammad Sadiq and others

Crl. Misc. No. 2110/BC of 2010, decided on 11th January, 2011.

CONCLUSION

(1) Once an accused is admitted to bail by a Court of competent jurisdiction, exceptional circumstances shall be required to interfere with bail granting order.

BAIL CANCELLATION---(Insufficiency of evidence)

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

---S. 497(5)---Pakistan Penal Code, 1860, Ss. 365/342---Matter of cancellation of post-arrest bail---Facts and circumstances---Insufficiency of prosecution evidence---Validity---Respondents-accused were not directly responsible in respect of alleged abduction of abductees and their names appeared in F.I.R. at later stage with allegations that they allegedly committed tortures upon victims and intimidated them with threats of murder etc.---No evidence could be produced before police against accused by complainant during investigation nor any medical evidence existed to prove charge of commission of violence upon alleged abduction---Malice and *ultra vires* motive of complainant could be easily perceived floating across the face of mentioned F.I.R.---Once an accused had been admitted to bail on merits by a competent Court of jurisdiction, exceptional circumstances shall be required to interfere with bail granted order---Bail cancellation petition dismissed. (Paras 9,10)

(b) Cancellation of bail---

---The considerations for cancellation of bail are altogether different from the one meant for the grant/refusal of bail u/S. 497, Cr.P.C.---Once an accused has been admitted to bail on merits by a Court of competent jurisdiction, exceptional circumstances shall be required to interfere with the bail granting order.

(Para 10)

Key Terms:-- Pre-arrest bail.

[No evidence was produced by complainant during investigation for involvement of petitioner in alleged offence. Cancellation of bail was refused].

For the Petitioner: **Ghufran Khurshid Imtiaz, Advocate.**

Malik Riaz Ahmad Saghla, D.P.G.

For the Respondent No. 1: **Muhammad Altaf Raja, Advocate.**

Date of hearing: **11th January, 2011.**

ORDER

SHAHID HAMEED DAR, J. --- Through this application under Section 497(5), Cr.P.C. the petitioner seeks cancellation of post-arrest bail allowed to Muhammad Sadiq and Muhammad Faisal, respondents Nos. 1 and 2 respectively *vide* orders dated 1.6.2010 and 8.6.2010, passed by learned Magistrate Section 30, Rawalpindi in case F.I.R. No. 307 of 2010, dated 17.3.2010 u/Ss. 365, 342, P.P.C. registered at P.S. R.A. Bazar, Rawalpindi.

2. The petitioner, in the 1st instance, had moved the Court of learned Additional District Judge, Rawalpindi by way of filing a cancellation of bail application against the respondent-accused which was dismissed *vide* order dated 15.11.2010, hence, the instant petition.

3. Precisely, the prosecution case as stated by Muhammad Humayun Khan complainant-petitioner is that he and his son Imran Khan had been illegally taken into custody by six persons, four clad in police uniform and two in plain clothes, at 5.40 p.m. on 15.4.2010 who took them to Police Post Race Course, Rawalpindi where they conducted interrogation and later on confined them in the police lock-up; on the next day the police officials Masood, ASI and Muqarab Jan, Constable presented them before the learned Magistrate for obtaining their physical remand but they failed to do so, as the learned Magistrate refused to accede to their request, finding the circumstances of the case dubious; thereafter the delinquent police officials drove both the abductees to an unknown place and confined them in a room where M/s. Sheraz, Faisal (respondent No. 2), Banaras, Ayyaz Mehmood, Nisar, Sadiq (respondent No. 1) and Tariq accused tortured and criminally intimidated them by extending threats of dire consequences and that of murder; the accused besides committing violence, did not provide them any food and finally abandoned them near Koh-e-Noor Mills and fled away.

4. The respondent-accused were arrested by the police and sent to judicial lock-up. The learned Magistrate Section 30, Rawalpindi admitted them to post-arrest bail *vide* orders as mentioned hereinbefore and set them at liberty. The cancellation of bail petition filed by the complainant, as noted above was dismissed by the learned Additional District Judge, Rawalpindi on 15.11.2010.

5. Learned counsel for the petitioner submits that the respondents-accused had repeated the offence after having been admitted to bail and a criminal case F.I.R. No. 552 of 2010 was registered against them on 8.7.2010 for offence under Section 364, PPC at Police Station, R.A. Bazar, Rawalpindi on the statement of the petitioner, for having abducted Muhammad Zeshan Khan, the son of the complainant; the accused having repeated the offence had clearly misused the concession of bail so they could no more enjoy the afore-said concession; the impugned order passed by the learned Additional District Judge, Rawalpindi is patently illegal as the fact *qua* repetition of the offence by the accused was not attended to by the learned subordinate Court and the cancellation of bail petition was dismissed arbitrarily and capriciously; the respondent-accused had abducted the complainant alongwith his son Muhammad Imran Khan, and after their release on bail they abducted the other son of the complainant whose whereabouts were still unknown; the police had been siding with the accused party and they did not record the statements of the witnesses produced by the complainant during investigation; the petitioner-complainant had been on the receiving end, firstly at the hands of their adversaries and secondly at the hands of the police who dishonestly damaged the prosecution case; sufficient incriminating evidence is available against the accused and no circumstance exists to believe that the case of the respondent-accused was open to further inquiry within the meanings of Section 497(2), Cr.P.C.; lastly submits that it is a fit case wherein the bail facility unduly extended to the accused may be recalled. Relies upon *Raja Zahoor Ahmad Vs. The State and 2 others* (2005 P.Cr.L.J. 1713).

6. Conversely, learned counsel for the respondent-accused submits that the complainant had cooked up a false story against the accused to cause them harassment, intimidation and humilitation; the story contained in the F.I.R. is self-discrepant and preposterous which has no relevance with the truth; the respondent-accused had been admitted to post-arrest bail strictly in line with the rules governing grant of bail and their case was open to further inquiry within the meaning of Section 497(2), Cr.P.C.; the respondent-accused after having been admitted to bail neither misused the same nor tampered with the prosecution evidence in any manner; the complainant burnt with passion of getting the accused arrested in a false case, for tainted purposes so the instant petition may be dismissed.

7. Learned Deputy Prosecutor General has endorsed the contentions of learned counsel for the respondent-accused and maintains that the impugned order did not suffer from any infirmity or impairment so the instant petition being devoid of merits may not be entertained.

8. I have heard learned counsel for the parties and perused the available record.

9. It has not been alleged against the respondents-accused that they in any manner, had trespassed into the house of the complainant or had abducted Imran Khan and Muhammad Humayun Khan complainant. The names of the respondent-accused though find mention in the F.I.R. still it is not clear as to what offence they had actually committed. No evidence could be produced before the police against the accused by the complainant during the course of investigation nor any medical evidence exists to prove the charge of commission of violence upon the alleged abductees. The bail granting Court has rightly observed that it was the police party from Peshawar who had taken both the alleged abductees in custody and had produced them before the learned Magistrate for seeking their physical remand but having failed in this regard, they opted to drop them near Koh-e-Noor Mills. The respondent-accused were not directly responsible in respect of the alleged abduction of the abductees and their names appeared in the F.I.R. at a later stage with the allegation that they allegedly committed torture upon the victims and intimidated them with threats of murder etc. Learned counsel for the petitioner has heavily relied upon the argument that the respondent-accused had repeatedly committed the same offence against the complainant party as they were booked in case F.I.R. No. 552 of 2010 *supra* so their bail facility should be recalled. This argument, I am afraid, is devoid of any force as the pre-arrest bail application of the respondent-accused (Crl. Misc. No. 1557-B/2010) was confirmed by this Court *vide* order dated 6.10.2010 with the following observations:--

> "On the last date of hearing the Investigating Officer sought adjournment as he wanted to get verified some data collected about the mobile phone calls to clarify if those calls were ever made by the petitioner to the complainant etc. Today he has entered appearance and stated before the Court that no any call according to his investigation was ever made by the petitioner. Except mere allegations at present no evidence could be collected by the Investigating Officer to connect the petitioner with the commission of the offence. No doubt pre-arrest bail is an extra-ordinary remedy but it is available on the statute book to protect innocent persons to be involved in the false case as well as uncalled for allegations etc. as at present except mere allegations no connecting evidence is available on record, therefore, petitioner's pre-arrest bail already granted to him *vide* order dated 8.9.2010 is hereby confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 50,000/- (Rs. Fifty thousand only) with one surety in the like amount to the

satisfaction of learned Trial Court within one week otherwise this bail petition shall be deemed as dismissed."

10. The subsequent F.I.R. (552 of 2010) got lodged by the complainant appears to be an attempt on the part of the complainant to get the respondent-accused arrested at any cost, so, the malice and ulterior motives of the complainant can be easily perceived floating across the face of the mentioned F.I.R. The considerations for cancellation of bail are altogether different from the one meant for the grant/refusal of bail under Section 497, Cr.P.C. Once an accused has been admitted to bail on merits by a competent Court of jurisdiction, exceptional circumstances shall be required to interfere with the bail granting order, which do not exist in the instant case. Therefore, I am not inclined to accept the instant application which, being destitute of merits, stands dismissed.

Bail cancellation petition dismissed.

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[Lahore]

Present: **WAQAR HASSAN MIR and SHAHID HAMEED DAR, JJ.**

The State

Versus

Hassan Askari, etc.

Murder Reference No. 807 of 2005 and Criminal Appeal No. 285-J of 2005, decided on 9th December, 2010.

CONCLUSION

(1) Non-establishment of motive certainly has bearing on the quantum of sentence and benefit of obscurity of motive has to be extended to the accused.

MURDER --- (Quantum of sentence)

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

---S. 410---Pakistan Penal Code, 1860, S. 302(b)---Occurrence of murder---Quantum of sentence---Laxity on part of prosecution---Factors---**Held:** Motive set up by prosecution had gone unproven---Place of occurrence was situated just in front of house of appellant---What happened immediately before occurrence and what transpired between parties at nick of hour was not known and remained in mystery---Allegation *qua* abscondence of convict-appellant could not be proved---No report from fire-arm expert had been brought on file---In absence of recovery of any crime empty, the question regarding matching of rifle with any spent bullet did not arise---Impugned sentence of death was converted into life imprisonment---Sentence reduced.

(Paras 22, 23)

(b) Criminal trial---

---Murder---Motive---The offence of murder may be committed wantonly or without motive but if the motive is alleged by the prosecution and is found false the consequence thereof have to be resolved in favour of the accused---The inadequacy of motive certainly comes into background in face of clear, cogent and convincing evidence but non-establishment of motive certainly has bearing on the quantum of sentence and the benefit of obscurity of motive has to be extended to the accused.

(Para 21)

Ref: 1994 SCMR 1096, 1992 SCMR 1036, 1995 SCMR 1668.

(c) Criminal trial---

---Incriminating evidence---Statement under Section 342, Cr.P.C---Requirement of law---The law requires that every bit of incriminating evidence must be put to the accused in his examination under Section 342, Cr.P.C. so as to seek his reply and failure to do so shall exempt the accused from any penal action against him in respect of the missed piece of evidence.

(Para 18)

Ref: 2010 SCMR 97, PLD 1995 FC 88, 1969 SCMR 460, 1999 SCMR 697, PLJ 1985 Cr.C. 210.

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

---S. 342---Occurrence of murder---Absconsion of accused---Non-putting incriminating evidence to accused---Prosecution though endeavoured to bring on record requisite evidence to establish abscondence of appellant yet they showed negligence during trial and committed folly of not putting the said piece of evidence to appellant-accused in his statement under Section 342, Cr.P.C. so as to enable him to explain his position---Effect---As appellant had not been examined about abscondence so said piece of evidence could not form basis of conviction.

(Para 6)

(e) Cross-examination, rule of law---

---Any portion of the statement of the witnesses having gone un-challenged during cross-examination shall be deemed to have been admitted by the accused.

(Para 18)

(f) Witnesses---

---Statement of---Credibility of---Test---The credibility of a witness depends upon (1) his knowledge of the facts to which he testifies; (2) his disinterestedness; (3) his integrity; (4) his veracity; and (5) his being bound to speak the truth by such an oath as he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath (pst para. 1357)---Proportioned to these is the degree of credit his testimony deserves from the Court and Jury".

(Para 15)

Ref: Archbold Criminal Pleading, Evidence and Practice, Thirty-five Edition by Butler and Garsis, para 1347.

Key Terms:- Reduction of sentence.

[Motive of murder could not be proved. Impugned death sentence was converted into life imprisonment].

For the Appellant: **Mian Abdul Qayyum, Advocate.**

For the State: **Arshad Mehmood, Advocate.**

Date of hearing: **9th December, 2010.**

JUDGMENT

SHAHID HAMEED DAR, J. --- The appellant Hassan Askari was held guilty for the murder of Gulraiz Shah. He was convicted under Section 302(b), P.P.C. and sentenced to Death with order to pay Rs. 1,00,000/- as compensation under Section 544-A, Cr.P.C to the legal heirs of the deceased or in default to undergo six months' S.I. The convict has filed Crl. Appeal No. 285-J of 2005 through Superintendent District Jail, Gujrat against the judgment of the learned Trial Court dated 20.06.2005. The learned Trial Court has submitted Murder Reference No. 807 of 2005 under Section 374, Cr.P.C. for confirmation of the death sentence of the appellant. This judgment will dispose of the above-said appeal and the reference.

2. Aslam Shah complainant died midway through trial, therefore, he could not be examined as a prosecution witness in this case.

3. On 10th of October, 1998 at about 1:45 p.m. Aslam Shah complainant after dropping the dowry articles of the daughter of his relative Said Shah, at his residence, was returning to his house alongwilh his paternal nephew Gulraiz Shah (deceased). When they reached near the building of post office they found Hassan Shah (appellant) armed with rifle .222 bore and Haider Shah (since acquitted) armed with pistol .30 bore standing at the outer door of the former's house. On seeing Gulraiz Shah, the appellant-accused fired with his rifle which hit Gulraiz Shah below his right eye, close to nose. Haider Shah (since acquitted) fired with his pistol which injured the right hand of Gulraiz Shah. Thereafter Hassan Shah accused fired 4/5 successive shots which landed on the right & left flank, right elbow and left hand of Gulraiz Shah who resultantly fell down. Hassan Shah appellant and Haider Shah since acquitted fled away after the occurrence. Aslam Shah complainant saved his life by hiding himself behind nearby houses and witnessed the occurrence. Gulraiz Shah succumbed to the injuries on way to the hospital.

Aslam Shah complainant gave statement to Muhammad Gulzar Beg, PW-3 at 2:30 p.m. on 10.10.1998 for registration of F.I.R. Exh.PD.

4. The motive behind the occurrence was that Hassan Shah appellant had been arrested in a narcotics case and was released on bail a few days before the occurrence. He had the suspicion that Gulraiz Shah deceased had furnished a spy information against him to the police so due to this grudge he alongwith his co-accused committed the murder of Gulraiz Shah in furtherance of their common intention. The occurrence was witnessed by Ahmad Shah PW-4 and Safdar Shah, PW-5.

5. After completion of due investigation by Rashid Ahmad, SI, PW-8 the appellant was found involved in the occurrence, hence, challan under Section 173, Cr.P.C. was submitted against him. On receipt of the challan, charge was framed against the accused, to which he pleaded not guilty and claimed a trial. The prosecution at trial, in order to prove its case examined 8 witnesses *in toto.*

6. The prosecution relies on the ocular account/ version of Ahmad Shah, PW-4 and Safdar Shah PW-5 as well as the testimony of Fayyaz Shah PW-2. Reliance was also placed on the recovery of rifle .222 bore P-1 and the medical evidence presented by Dr. Muhammad Tariq, M.O, PW-7.

7. The dead-body of Gulraiz Shah deceased was subjected to autopsy by Dr. Muhammad Tariq, PW-7 at 9:00 a.m. on 11.10.1998 *vide* post-mortem examination report Exh.PE with pictorial diagrams Exh.PF/1 and Exh.PF/2 who found following injuries on the dead-body:---

(1) A fire-arm entry wound 4 c.m. x 4 c.m. on right cheek close to the nose.

(2) A fire-arm entry wound 3 c.m. x 3 c.m. on dorsal aspect of right middle ring and little finger.

(2-B) A fire-arm exit wound on palmer aspect of the same hand.

(3-A) A fire-arm entry wound 3 c.m. x 5 c.m. on dorsal side of left hand at the base of ring finger.

(3-B) A fire-arm exit wound 3 c.m. x 3 c.m. on palmer aspect of the left hand.

(4-A) A fire-arm entry wound 1 c.m. x 1 c.m. on right upper arm anteriorly.

(4-B) A fire-arm exit wound 1 c.m. x 1 c.m. on posterior medial side of right and upper 1/3''' arm.

(5-A) A fire-arm entry wound 1 c.m. x 1 c.m. on the right side of chest close to axilla.

(6-A) A fire-arm entry wound 2 c.m. x 2 c.m. on outer aspect of right forearm, close to elbow joint.

(6-B) A fire-arm exit wound 6 c.m. x 6 c.m. on anterior medial of middle forearm.

(7-A) A fire-arm entry wound 1 c.m. x 1 c.m. on back left side of chest.

(8-A) A fire-arm entry wound 1 c.m. x 1 c.m. on back of lower part of the chest.

(8-B) A fire-arm exit wound 2 c.m. x 2 c.m. on the front of chest near nipple.

(9-A) A fire-arm entry wound 1 c.m. x 1 c.m. on the right hypochordium.

(9-B) A fire-arm exit wound 4 c.m. x 4 c.m. on the right lumber region.

The cause of death as recorded by the Medical Officer was heavy haemorrhage, shock and cardio pulmonary arrest due to injuries Nos. 1, 5, 7, 8 and 9 which had damaged the vital organs. All the injuries were anti-mortem and caused by fire-arm.

The probable time elapsed between injuries and death was calculated by the Medical Officer as "within half an hour" whereas between death and post-mortem examination as within 24 hours.

7. The appellant denied the allegation of murder and said in his statement under Section 342, Cr.P.C. that he had been falsely implicated in the case. When questioned "why this case against you and why the PWs have deposed against you", he gave the following answer:---

> "In my village Moin-ud-Din Pur where the occurrence took place, there is lot of enmity among the people residing there. Many persons have been murdered up-till now. One Ashraf Shah, who is the real uncle of the deceased is the brother-in-law of one Fazil Shah, whose son have severe enmity in the village and even outside the village. Fazil Shah is also the maternal uncle of the witness Safdar Shah. The deceased had sympathy with Fazil Shah and his sons. The deceased was strongly affiliated with Fazil Shah. One Mazhar Shah, Azhar Shah, Jafar Shah and Dilawar Shah were the Khalazad of Akram Shah, the father of deceased. The above-said Mazhar Shah etc. are involved in many murder cases. The deceased always supported the above-said Mazhar Shah etc. and committed many crimes being the relatives and the party man of Mazhar Shah etc. the deceased had also enmity with many other persons of village, who murdered him. The deceased was not of good repute. My co-accused Haider Shah has been acquitted by the Hon'hle High Court relying upon the same evidence on file. The PWs are related to the deceased."

8. To another question "Will you produce defence evidence" the appellant replied in affirmative but did not produce any defence evidence nor opted to appear under section 340(2), Cr.P.C. as his own witness to repel the charge against him.

9. On conclusion of the trial, the learned Trial Court appraised the evidence available on the record, held the appellant guilty of offence, convicted and sentenced him in the terms mentioned hereinbefore through the judgment under appeal.

10. We have heard learned counsel for the parties and have gone through the record of this case with their able assistance.

11. It is contended by the learned counsel for the appellant that the prosecution story was full of improbabilities and the learned Trial Judge has convicted and sentenced the appellant-accused merely on conjectures and surmises; the testimonies of the witnesses of ocular account are replete with countless contradictions and discrepancies which are fatal to the prosecution case; the place of occurrence is situated just in front of the house of the appellant which reflects upon the intrinsic value of the prosecution story; the house of the appellant by no means fell on the way to the house of Said Shah from the house of the complainant party so the acclaimed version of the eye-witnesses is open to serious exception; the case of the appellant is hardly distinguishable from the case of his co-accused Haider Shah who had been acquitted by this Court *vide* judgment dated 15.12.2004; the deceased was the person of a dubious character and countless persons had suffered at his hands in the past; the deceased being a rouge had himself invited the trouble by launching an attack at the residential house of the appellant; the motive alleged by the prosecution remained unproven during the trial inasmuch as the alleged arrest of the appellant in a narcotics case, his release on bail and the alleged spy information could not be established through any evidence; the recovery evidence *qua* rifle .222 bore P-1 is weak and the crime weapon has been planted upon the accused to strengthen a false case against him; the medical evidence does not corroborate the prosecution case in any manner as the dead-body of the

deceased was dissected by the Medical Officer after about 19 hours of the occurrence which negates the version of the eye-witnesses as well as the registration of the F.I.R. at 2:30 p.m. the prosecution has miserably failed to bring home the guilt of the accused beyond any reasonable doubt and he is entitled to be acquitted; the motive being unproven is a mitigating circumstance in favour of the convict-accused and it renders the case of the appellant fit for reduction in sentence; lastly contends that the judgment under appeal suffers from non-reading and misreading of evidence which bears the character of arbitrariness, capriciousness and perversity which is liable to be set aside and the appellant merits acquittal.

12. By rendering the aforesaid submissions the learned counsel for the appellant showed confidence to have ripped through the prosecution case and concluded his submissions that the appellant was entitled to be acquitted of the charge.

13. Conversely, learned Deputy Prosecutor General has submitted that the prosecution satisfactorily discharged its onus to prove its case against the appellant beyond reasonable shadow of doubt through cogent and confidence inspiring evidence; the deceased was attacked and brutally murdered by the appellant and the medical evidence fully establishes the charge against the accused; the ocular account has been rendered by the truthful witnesses and their presence at the spot at the time of occurrence is not open to any question; the appellant failed to offer any explanation *qua* his longstanding abscondence during the trial which is an added corroboratory material against him; the prosecution case stands established by all means so he is not entitled for any relief or leniency; lastly submits that there is no mitigating circumstance in favour of the accused for a lesser sentence.

14. In the instant case the occurrence had taken place at 1:45 p.m. on 10.10.1998 just in front of the house of the appellant situated in revenue limit of village Moin-ud-Din Pur which is at a distance of about 2 miles from the police station Saddar Gujrat while the matter was reported to the police at 2:30 p.m. the same day by Aslam Shah complainant though his verbal statement. The F.I.R. Exh.PD in attending circumstance of the case has been shown to be a promptly lodged F.I.R. The ocular account has been furnished by Ahmad Shah PW-4, a person from the same brethren and Safdar Shah, PW-5 a maternal nephew of the deceased. Aslam Shah, complainant who died before his examination, was the real paternal uncle of the deceased. Mere relationship of the prosecution witnesses with the deceased cannot undermine the intrinsic value of their testimonies unless they are shown to be inimical to the deceased.

15. The witnesses of the ocular account have categorically stated in their testimonies that they alongwith Muhammad Aslam complainant and Gulriaz Shah deceased had gone to the house of Said Shah to deliver dowry articles of his daughter who was scheduled to be married on 11.10.1998. They after having done the task were returning to their house when they were surprised by Hassan Askari appellant who being armed with rifle showered bullets upon Gulraiz Shah in the backdrop of his arrest in a drugs case which landed on various parts of the body of Gulraiz Shah who on receiving the fire shots fell to the ground and breathed his last. Haider Shah, the acquitted co-accused of the appellant also authored a fire-arm injury on the right hand of the deceased but his appeal against conviction was accepted by this Court, resultantly he was acquitted. Ahmad Shah PW-4 and Safdar Shah PW-5 have impeccably deposed about the role of the appellant and we find from the statements completely in line with each

other. They have delivered spontaneous and naturally believable testimonies and they at no point of their statements appear to be jolted. We have gone through their testimonies with the help of the learned counsel for the parties and we are of the view that they gave the evidence with full confidence. They stood the test of cross-examination as best as is expected from a truthful witness. Their statements are full of sincerity and warmth. The witnesses have fulfilled all the essential ingredients regarding judicial propriety, which to the mind of this Court is always subject of law and judicial discretion. We would like to quote para 1347 from Archbold Criminal Pleading, Evidence and Practice, thirty-five Edition by Butler and Garsis, dealing with credibility of witnesses:---

> "The credibility of a witness depends upon (1) his knowledge of the facts to which he testifies; (2) his disinterestedness; (3) his integrity; (4) his veracity; and (5) his being bound to speak the truth by such an oath as he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath (pst para. 1357). Proportioned to these is the degree of credit his testimony deserves from the Court and Jury".

16. Both the witnesses, PW-4 and PW-5, have narrated the circumstances of the prosecution case with minutest details and there is hardly any element of haze or obscurity in their testimonies. A cogent and plausible reason has been offered by them as to how they got to the place of occurrence and their arrival at the spot at the relevant time has not been seriously challenged by the defence during the trial. The most important and crucial point in the prosecution case is whether the house of the appellant-accused fell on way to the house of Said Shah from the house of the complainant which has not been even touched upon by the defence while squeezing eye-witnesses. The requisite law in this regard is that any portion of the statement of the witnesses having gone un-challenged during cross-examination shall be deemed to have been admitted by the accused. A number of questions have been put to both the PWs as to the surrounding of the place of occurrence *vis-à-vis* shops, the roads, the paths etc. but not even a suggestion that the house of the appellant was not situated at the point and on the passages, as contend by PW-4 and PW-5.

17. The village Moin-ud-Din Pur, where the occurrence of murder of Gulraiz took place is not less than a battle field as 100 of murders have been committed in this small town. A positive suggestion was put to PW-5 by the defence which was replied in affirmative by the witnesses which is hair-raising and mind boggling and we learn from the said suggestion that hundreds of murders had taken place in the said village. Besides such a large scale massacre in the area, the defence failed to hint at any previous enmity between the deceased, the appellant and the eye-witnesses. We have not found any noticeable inconsistency, pitfalls or contradictions in the statements of both the eye-witnesses except for a few trivial and negligible discrepancies which are bound to occur with the passage of time. The occurrence in the instant case took place in year 1998, and the testimonies of both the PWs were recorded in year 2003, after more than 5 years of the occurrence.

18. The co-accused of the appellant Haider Shah was though convicted and sentenced to life imprisonment by the learned Trial Court in the first round of the trial but his appeal against conviction/sentence was allowed by this Court on 15.12.2004 mainly for the reason that the medical evidence had been found insufficient and un-corroborative to his extent, couple with the observation that the picture emerging from the prosecution

case hinted at the guilt of his absconding co-accused *i.e.* Hassan Askari, the appellant. The objection of the learned counsel for the appellant that same evidence should not be believed in respect of the appellant which had been rejected in respect of Haider Shah co-accused of the appellant, is devoid of any force as the medical evidence corroborates the eye-witness account against the appellant. Much stress has been laid by learned Deputy Prosecutor General on the factum of abscondence of the appellant but it has hardly any relevance in the attending circumstance of this case. Though the prosecution endeavoured to bring on record the requisite evidence to establish the abscondence of the appellant yet they showed negligence during trial and committed the folly of not putting the said piece of evidence to the appellant-accused in his statement under Section 342, Cr.P.C. so as to enable him to explain his position. As the appellant has not been examined about abscondence so this piece of evidence cannot form basis of conviction and such a piece of evidence not put to the accused has to be ruled out of consideration. The law requires that every bit of incriminating evidence must be put to the accused in his examination under Section 342, Cr.P.C so as to seek his reply and failure to do so shall exempt the accused from any penal action against him in respect of the missed piece of evidence so the evidence of abscondence is inconsequential. We advantageously rely upon *Noor Muhammad v. The State* (2010 SCMR 97), *Abdul Wahab v. The Crown* (PLD 1958 FC 88), *The State v. Gohar Rehman and another* (1969 SCMR 460), *Sheral alias Sher Muhammad v. The State* (1999 SCMR 697) and *Majnoo v. The State* (PLJ 1985 Cr.C. 210).

19. Both the eye-witnesses have given an account of occurrence which appeals to reason and logic and acceptable to common prudence and despite searching cross-examination but they could not be shaken at all by the defence. They have rendered credible and truthful testimonies and we do not find any terminal circumstance which could cause the brushing aside of the same. By no argument they can be termed as the chance witnesses as they have offered the plausible explanation and purpose of their presence at the crucial time of occurrence. The site plan Exh.PA is another source of corroboration to the prosecution case as the place of occurrence is situated at a thoroughfare and the drawing made by Akhtar Naqash draftsman PW-1 supports the version of the eye-witnesses as to the surroundings of the place of occurrence. The objection raised by the learned counsel for the appellant that the place of occurrence was a residential area where independent persons resided and none of them had come forward to substantiate the prosecution version, carries little value as the independent persons for fear of reprisal usually hesitate to come forward to depose against the perpetrators of a crime so as to save them and their families from any probable danger or trouble. The matter was reported to the police with promptitude in fact within 45 minutes of the occurrence. The appellant-accused was previously known to the witnesses of ocular account so there was no probability of mistaken identity of the accused. All the injuries on the body of the deceased except for a tiny injury attributable to acquitted co-accused, have been authored by the appellant as he spread volleys of bullets upon the ill-fated youth. The ocular account having been furnished by truthful witnesses is fully corroborated by the medical evidence. There is no reason to discard or brush aside the testimonies of the witnesses of ocular account which we hold to be forthright, trustworthy and worth reliance. Therefore, the conviction of the appellant as recorded by the learned Trial Court is confirmed.

20. Insofar as the evidence *qua* the motive is concerned we find that it has gone unproven during the course of the trial. The complainant had alleged in the F.I.R. Exh.PD that Hassan Askari appellant had been arrested in a narcotics case who was released from the prison on bail a few days prior to the occurrence and he had the suspicion that it was Gulraiz deceased who had given a tip off to the police against him and having nursed this grudge against him he committed the murder of Gulraiz Shah deceased. Following points were required to be proven by the prosecution during the course of the trial so far as the alleged motive was concerned:---

(1) The implication of the appellant in a narcotics case.

(2) His arrest in the said criminal case.

(3) His release on bail a few days prior to the occurrence.

(4) The doubt of the appellant against the deceased *qua* factum of passing a spy information to the police.

21. The motive as mentioned above in the instant case was of such a kind which could be established by the prosecution both orally as well as through documents. If the appellant had been involved in a criminal case of contraband substance, arrested on the said charge, dispatched to judicial lock-up and released on bail a few days before the occurrence, it would have been easily established during the course of the trial. None of the eye-witnesses or any other witness produced by the prosecution has deposed about the above-said factors in their testimonies during trial. The number of the F.I.R. case against the appellant, his date of arrest and dispatch to the judicial lock-up and the date of his release on bail are shrouded in nebulousness and the prosecution does not have any answer to the objection of the leaned counsel for the appellant that the motive as setup by the prosecution has gone unproven. There is nothing in the evidence of Ahmad Shah PW-4 and Safdar Shah PW-5 pertaining to the motive. Once a specific motive has been setup the onus to prove the same would invariably lie upon the prosecution, in case, they fail to discharge the burden efficaciously, they have to bear the consequences of their failure and the benefit thereof has to be extended to the accused. There was no other previous enmity or rivalry between the appellant and the deceased and the only motivating factor alleged against the appellant by the prosecution pertained to the aforesaid stimulus factor, which has gone a begging. The offence of murder may be committed wantonly or without motive but if the motive is alleged by the prosecution and is found false the consequence thereof have to be resolved in favour of the accused. The inadequacy of motive certainly comes into background in face of clear, cogent and convincing evidence but non-establishment of motive certainly has bearing on the quantum of sentence and the benefit of obscurity of motive has to be extended to the accused. The reliance is placed on *Muhammad Bashir v. Khalid Mehmood and another* (1994 SCMR 1096), *Mst. Roheeda v. Khan Bahadur and another* (1992 SCMR 1036), *Zulfiqar alias Bhutto v. The State* (1995 SCMR 1668).

22. This now brings us to the question of sentence awarded to the appellant. As discussed above, the motive setup by the prosecution has gone unproven. The place of occurrence is situated just in front of the house of the appellant. Barring the non-established motive the witnesses of ocular account could not show any other inducing factor against the appellant to have launched the attack on the deceased. What happened immediately before the occurrence and what transpired between the parties at

the nick of the hour is not known and remained shrouded in mystery. The allegation *qua* abscondence of the accused-appellant could also not be proved. The recovery of the crime weapon lost its relevance as rifle .222 bore P-1 allegedly got recovered by the appellant from his house on 28.03.2003 *vide* memo. Exh.PC is also of no consequence to the prosecution case as no report from the fire-arm expert has been brought on the file by the prosecution to prove it the weapon of offence. In absence of recovery of any crime empty, the question regarding matching of the rifle with any spent bullet does not arise. The aforesaid factors shall have bearing upon the quantum of sentence awarded to the appellant by the learned Trial Court. The learned counsel for the appellant, has on one hand challenged the conviction of the appellant-accused but at the same moment has stoutly prayed for the reduction in the sentence of the appellant. Due to the aforesaid laxity in the prosecution case we while relying upon the above noticed glittering judgments of the august Supreme Court reduce the sentence awarded to the appellant-accused though we retain his conviction under Section 302(b), PPC and convert the same from Death to imprisonment for life with benefit of Section 382-B, Cr.P.C. The sentence pertaining to the payment of the compensation amount as awarded by the learned Trial Court shall remain unchanged.

23. The upshot of the above discussion is that Criminal Appeal No. 285-J of 2005 filed by the appellant stands dismissed with the above-said modification in sentence.

24. The Murder Reference No. 807 of 2005 is answered in the negative.

Sentence reduced.

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[Rawalpindi]

Present: **SHAHID HAMEED DAR, J.**

The State

Versus

***Mst.* Riffat Shaheen**

Criminal Misc. No. 976-BC of 2010, decided on 21st December, 2010.

CONCLUSION

(1) Courts have always been slow to interefere with bail granting order when the trial has virtually commenced.

(a) Bail, cancellation of---

---Commencement of trial---Effect---The Courts have always been slow and shown little interest in recalling the bail granting order on merits when the commencement of trial is in sight or it has virtually commenced.

(Para 10)

Ref: PLD 1989 SC 585, 1988 SCMR 1129.

BAIL CANCELLATION --- (Commencement of trial)

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

---S. 497(5)---Pakistan Penal Code, 1860, Ss. 420/467/468/ 471/409/109, r/w S. 5(2), PCA---Matter of cancellation post arrest bail---Commencement of trial---Effect---There was strong likelihood of conclusion of trial in next 3/4 months---High Court did not deem it proper to interfere with bail granting order or recall the same, albeit the commencement of trial---Contention that after their release on bail accused had been prevailing upon PWs to tamper with prosecution evidence was without any substance as no evidence in that respect could be hinted by petitioner---Bail cancellation/petition dismissed. (Paras 11,12,13)

"3/4"

Key Terms:- Commencement of trial.

[Trial was likely to be concluded within 3/4 months. Cancellation of bail was declined].

For the State: **Malik Riaz Ahmad Saghla, DPG.**

For the Respondents: **Syed Ali Shah Bukhari, Ch. Salim-ul-Haq and Zia-ul-Haq, Advocates.**

Raja Inayat Ullah, DPP/ACE and Asif Iqbal, C.O. ACE, Rawalpindi.

Date of hearing: **21st December, 2010.**

ORDER

SHAHID HAMEED DAR, J. --- Through this single order, I intend to dispose of following petitions for cancellation of bail moved under Section 497(5), Cr.P.C.

(i) Crl. Misc. No. 976-BC/2010 titled *The State v. Mst. Rifim Shaheen".*

(ii) Crl. Misc. No. 984-BC/2010 titled *The State v. Muhammad Rasheed Akhtar.*

(iii) Crl. Misc. No. 983-BC/2010 titled *"The State v. Dr. Bilal Arshad.*

2. Mst Riffat Shaheen and Muhammad Rasheed Akhtar respondents-accused were admitted to post arrest bail by this Court *vide* separate orders dated 14.12.2009 whereas Dr. Bilal Arshad accused was admitted to post arrest bail by this Court *vide* order dated 24.12.2009 in ease F.I.R. No. 24 of 2009, dated 17.10.2009 for the offences under Sections 420, 467, 468, 471, 409, 109, PPC read with Section 5(2) PCA, 1947, registered at police station, Anti-Corruption Establishment, Rawalpindi. This F.I.R. was got lodged by Anwar Ahmad Khan, Secretary Health, Govt. of the Punjab.

3. At the very outset, learned counsel for Mst. Riffat Shaheen, respondent-accused submits that the trial of the respondent-accused has commenced and nine prosecution witnesses have already been recorded/ examined. Further submits that trial of the accused is again fixed for today and there is every likelihood that some more prosecution evidence shall be recorded today by the learned Trial Court.

4. Learned counsel for the petitioner submits that the respondents-accused have committed worst degree of fraud, forgery, cheating and corruption whereby they incurred loss of lacs of rupees to the Govt. Exchequer; the co-accused of the

respondents-accused namely Dr. Khalid Iqbal Malik and Asif Ayub have been declined post arrest bail by the august Supreme Court of Pakistan with an observation which equally hits the merits of the respondents so, the bail granting orders passed in their favour may not be sustained; the respondents have been allowed bail without looking into the probability of existence of further inquiry into their guilt as contemplated under Section 497(2), Cr.P.C. so they can no longer enjoy the facility of bail due to said shortcoming in the bail granting orders; that after their release on bail, the respondents are vying for tempering with the prosecution evidence which amounts to misusing the concession of bail. He however, has admitted that the trial has commenced and nine prosecution witnesses till last date of hearing had been recorded by the Trial Court.

5. Syed Ali Shah Bukhari, Ch. Salim-ul-Haq and Zia-ul-Haq, learned counsel for the respondents-accused submit in unison that the trial of the accused has already commenced, a number of prosecution witnesses stand recorded so interference in the bail granting orders may be in violation to the ratio of various judgments passed by the apex Court on the subject; the prosecution could not move for cancellation of bail before this Court in absence of any material/evidence hinting at alleged misuse of facility of bail; the request for cancellation of bail is not supported by any plausible or cogent evidence therefore the same may not be entertained. *Muhammad Ismail v. Muhammad Rafique and another* (PLD 1989 Supreme Court 585). *The State v. Rashid Ahmad and another* (1988 SCMR 1129), *Amir Khan v. Ghoran and another* (1985 SCMR 1487) and *Muhammad Azhar v. Dilawar and another* (2009 SCMR 1202)

7. On a query of this Court, learned counsel for the petitioner/complainant submits that the trial of the respondents-accused and that of their co-accused shall be concluded by the learned Trial Court in 3 to 4 months' time.

8. I have heard the learned counsel for the parties and gone through the relevant record.

9. Without going into the merits of the case, I find that the respondents-accused alongwith their co-accused were indicted by the learned Trial Court on 13.7.2010 to which they pleaded not guilty and claimed a trial. The prosecution to-date, has produced nine witnesses in proof of the charge against the accused and all of them stand recorded/examined by the learned Trial Court. The trial is proceeding ahead at a satisfactory pace therefore, the learned counsel for the petitioner is confident that it shall be concluded within 3 to 4 months time period.

10. The Court have been slow and shown little interest in recalling the bail granting order on merits when the commencement of the trial is in sight or it has virtually commenced. The crucial point involved in such-like practice of not interfering with bail granting orders, post commencement of trial, is to avoid the subtle question of causing pre judice to the case of any of the parties locked in litigation. There is discernable wisdom in the above-said practice of not telling provision of Section 497(5), Cr.P.C. invoked in favour of the complainant/State once the trial of the accused has gone past the stage of framing of charge so as to keep the belief of litigants un-shakenly intact, in the administration of dispensation of criminal justice. I advantageously rely upon *Muhammad Ismail's case* (PLD 1989 SC 585) wherein a very important question of law and fact has been dealt with:---

> "However, the above-stated position notwithstanding, after hearing the learned counsel we feel that this appeal merits to be dismissed. Firstly, if the merit points involved herein are determined, the very practice relied upon by the learned counsel will go against the appellant. The trial is to commence within a fortnight; hence cancellation of bail at this stage would not be proper. But in the circumstances of this case there is a more vital point on account of which this appeal merits to be dismissed."

In the case of *"The State v. Rashid Ahmad and another"* (1988 SCMR 1129) while dealing with the proposition of commencement of trial it has been held in head note "C" of the judgment as under:---

> "---S. 497(5)---Bail, cancellation of---Granting to accused by High Court in 1985 on wrong ground---Possibility existing that accused either had stood his trial or that his trial was to commence soon---Order granting bail to accused maintained on ground other than one given by High Court (p. 1132) D".

11. The case of the respondent/accused is different than the case of their co-accused who have been declined post arrest bail by august Supreme Court of Pakistan. The submission of learned counsel for the petitioner that after their release on bail, the accused had been prevailing upon the prosecution witnesses to temper with the prosecution evidence, is without any substance as no evidence in this respect could be hinted at by him, therefore, this submission cannot be made a basis for cancellation of respondents' bail concession.

12. It has been categorically submitted by the learned counsel for the petitioner/complainant that there is a strong likelihood of conclusion of the trial in next 3 to 4 months' time, therefore, I do no deem it proper to interfere with the bail granting orders or recall the same, albeit the commencement of the trial.

13. While keeping in view the faith and firm belief of the learned counsel for the complainant *qua* conclusion of the trial, the learned Trial Court is directed to accelerate the proceedings of the trial and ensure conclusion thereof, within four months from the date of receipt of the order of this Court. The Deputy Registrar (Judicial) of this Court is directed to convey this direction to the learned Trial Court by some swift means for compliance, preferably on telephone or through courier service or by both.

Bail cancellation petition dismissed.

K.L.R. 2011 Criminal Cases 137

[Rawalpindi]

Present: **SHAHID HAMEED DAR, J.**

Hazrat Saeed

Versus

The State

Criminal Misc. No. 2073-B of 2010, decided on 22nd December, 2010.

CONCLUSION

(1) Admission of guilt by accused before police is not an admissible piece of evidence.

(a) Bail---

---Admission of accused before police---Legal effect---The admission of guilt before a police officer of the rank how-high-so-ever, is not an admissible piece of evidence nor can it be deemed as a viable and worthwhile circumstance against the accused allegedly making such statement.

(Para 6)

BAIL --- (Admission before police)

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

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 420/468/471---Vehicle was taken into custody under Section 550, Cr.P.C. and it was found that plate bearing original chasis number had been cut, removed and replayed by fake chasis---F.I.R---Bail concession---Admission before police---Petitioner had admitted his guilt before police at time of his arrest---Validity---Admission of guilt before a police officer of the rank how- high-so-ever, is not an admissible piece of evidence nor can it be deemed as a viable and worthwhile circumstance against the accused, allegedly making such statement---Prosecution at moment was clearly short of evidence against petitioner---Whether or not petitioner claimed to be the owner of said vehicle or sought custody thereof on superdari, was a circumstance which opened the case of petitioner to further inquiry into his guilt---Offence alleged did not fall within prohibitory clause---Grant of bail in such-like offences has always been deemed to be a rule and rejection thereof, an exception---Bail after arrest granted.

(Paras 6, 7, 8)

Key Terms:- Admission of accused.

[Except admission of petitioner before police there was no other evidence against him. Bail was allowed in offence of fraud/forgery].

For the Petitioner: **Ch. Mehmood Akhtar Khan, Advocate.**

For the State: **Malik Riaz Ahmad Saghla, D.P.G.**

Tassaduq-ur-Rehman, ASI alongwith record.

Date of hearing: **22nd December, 2010.**

ORDER

SHAHID HAMEED DAR, J. --- Hazrat Saeed petitioner was arrested in case F.I.R. No. 632, dated 28.9.2010 for the offences under sections 420, 468, 471, PPC, registered at police station Gujar Khan, District Rawalpindi on the complaint of Tassaduq-ur-Rehman, A.S.I. Police Station, Gujar Khan, District Rawalpindi.

2. The allegation contained in the F.I.R. is that the notice on suspicion, intercepted a vehicle at Missa Kaswal, Check Post and took the same into possession

under Section 550, Cr.P.C. which was being driven by one Sultan Zaib and Hazrat Saeed ('petitioner') occupied its front seal both the accused failed to furnish any document, showing their title or lawful possession *qua* the vehicle in question; the automobile "Carry Dabba" PZ-791 was referred to Forensic Science Laboratory, Islamabad and after chemical treatment, it was found that the chasis number of the vehicle had been cut and replaced by another iron sheet bearing chasis No. 934851 which had been welded at the relevant place after removal of the original chasis number.

3. Learned counsel for the petitioner submits that the petitioner has been falsely roped in this case under ulterior motives of the complainant and the allegation alleged against him is false; the text of the F.I.R. does not disclose the commission of any cognizable offence against the petitioner, there is no direct or indirect connecting evidence against the petitioner and the prosecution case does not traverse beyond speculations; the petitioner's case constitutes need for further inquiry into his guilt as contemplated by Section 497(2), Cr.P.C. Relies upon *"Raqias Shah v. The State"* (2004 P.Cr.L.J. 186).

4. On the other hand, learned Deputy Prosecutor General has opposed grant of bail to the accused with the contention that the petitioner was member of a gang involved in the theft and disposal of the stolen vehicles and had close liaison with his co-accused the driver of the vehicle; both of them had conspired to sell the stolen/doctoral vehicle; the petitioner has not applied for seeking the custody of the vehicle on superdari which is a strong circumstance hinting at the dubious character of the petitioner. Lastly contends that the car lifting crime is on the rise so the petitioner is not entitled to the relief prayed for.

5. I have heard the learned counsel for the parties and perused the record.

6. The petitioner was travelling in a "Suzuki Carry Dabba" bearing registration No. PZ-791, being driven by Sultan Zaib, when intercepted by the police at a barrier on 23.9.2010. It was taken into custody under Section 550, Cr.P.C for determining the credential thereof. It was referred to Forensic Science Laboratory, Islamabad and on chemical treatment, it was found by the Laboratory that the plate bearing original chasis number had been cut, removed and replayed by fake chasis No. 934851 which was engraved on the replaced chasis sheet. Despite repeated queries, learned Deputy Prosecutor General has failed to point out any connecting evidence against the petitioner except that the petitioner had admitted his guilt before the police at the time of his arrest. The admission of guilty before a police officer of the rank howhighsoever, is not an admissible piece of evidence nor can it be deemed as a viable and worthwhile circumstance against the accused, allegedly making such statement. The prosecution at the moment, is clearly short of evidence against the petitioner.

7. The above-said vehicle after having been taken into custody by the police is parked at police station, Gujar Khan the custody whereof has not been claimed so far by the petitioner or his co-accused on superdari. Whether or not the petitioner claims to be the owner of the above-said vehicle or seeks the custody thereof on superdari, is a circumstance which opens the case of the petitioner to further inquiry into his guilt within the scope of Section 497(2), Cr.P.C. The offence with which the petitioner is charged does not fall within the ambit of prohibitory clause of Section 497, Cr.P.C. The grant of bail in such-like offences has always been deemed to be a rule and rejection thereof, an exception. I do not find any exceptional circumstances on the basis of which it could be inferred that the petitioner is not entitled to the concession of bail.

8. Consequently, the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned Trial Court.

Bail after arrest granted.

K.L.R. 2011 Criminal Cases 141

[Rawalpindi]

Present: **SHAHID HAMEED DAR, J.**

Azhar Ali Shah

Versus

The State

Criminal Misc. No. 2173-B of 2010, decided on 24th December, 2010.

CONCLUSION

(1) A person who does not believe in the process and commandment of law exposes himself to a position of deprivation and disadvantageousness.

BAIL --- (Absconsion)

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

---S. 497---Pakistan Penal Code, 1860, S. 489-F---Petitioner was alleged to have dishonestly issued a cheque of Rs. 20,00,000/---Earlier bail petition was dismissed as withdrawn ---Bail plea for second time---Absconsion of accused---**Held:** Petitioner remained fugitive from law---A fugitive from law loses some of his normal rights not only under the substantive law but also under the procedural law---Bail after refused.

(Paras 4, 5)

(b) Bail---

---Absconsion of accused---Effect---A fugitive from law loses some of his normal rights not only under the substantive law but also under the procedural law.

(Para 5)

489-F

Key Terms:- Absconsion.

[Petitioner remained fugitive from law. Bail was refused in offence under Section 489-F, PPC].

For the Petitioner: **Hafiz M. Adil Umer Mian, Advocate.**

Date of hearing: **24th December, 2010.**

ORDER

SHAHID HAMEED DAR, J. --- This is the second post arrest bail application of the petitioner, first having been dismissed as withdrawn on 15.11.2010 after it had been argued at full length.

2. Learned counsel for the petitioner submits that the petitioner has been falsely implicated in this case, the charge is groundless and offence does not fall within the prohibitory clause of Section 497, Cr.P.C. further submits that the petitioner was arrested on 2.10.2010 challan under Section 173, Cr.P.C. stands submitted, before the Court concerned and he is no more required for further investigation.

3. I have heard learned counsel for the petitioner and perused the available record.

4. The first post arrest bail application of the petitioner (Crl. Misc. No. 1899-B/2010) was dismissed as withdrawn but not before the learned counsel for the petitioner had argued the same at full length and had sensed its outcome. The petitioner was nominated as an accused of this case by the complainant on 18.11.2008 whereafter he skipped and turned fugitive from law. He was arrested on 2.10.2010 and in the meanwhile, process under Section 87, Cr.P.C. stood completed against him.

5. A person who does not believe in the process and commandment of law exposes himself to a position of deprivation and disadvantageousness. It has been held time and again that a fugitive from law loses some of his normal rights not only under the substantive law but also under the procedural law. I do not find any circumstance warranting further probe into the guilt of the petitioner, who is named in the F.I.R. with the allegation to have dishonestly issued a cheque of 20,00,000/- (two millions) to the complainant knowingly that it would be dis-honoured on presentation and this is what exactly happened subsequent thereto. The instant petition is dismissed *in limine*, being destitute of merits.

Bail after arrest refused.

2012 M L D 331

[Lahore]

Before Shahid Hameed Dar, J

ABDUL HAMEED---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.10399-B of 2011, decided on 14th September, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), S.302/34---Qatl-e-amd---Bail, grant of---Further inquiry---Allegation against the accused was merely that of raising "lalkara" being empty handed at the time of occurrence---Said "lalkara" could not be deemed to be commanding in nature---Accused, during police investigation, was found merely to be present empty handed at the scene of occurrence without having committed any overt act during the entire episode---Opinion of the Investigating Officer though not binding on the court, yet its persuasiveness in view of the attending circumstances of the case could not be easily overlooked---Being father of the principal accused, false implication of accused in the case could not be ruled out---Further inquiry into the guilt of accused, thus, was needed as envisaged under S.497(2), Cr.P.C.---Accused was admitted to bail in circumstances.

Ch. Nawab Ali Mayo for Petitioner

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab.

Hasham Sabir Raja for Complainant

Iftikhar S.-I with record

ORDER

SHAHID HAMEED DAR, J.---Seeks bail after arrest in case F.I.R. No.295 of 2011 dated 26-4-2011 under sections 302, 34 P.P.C. registered at Police Station A Division, District Kasur.

2. After having heard learned counsel for the parties and perused the record, I find that the allegation against the petitioner is merely that of raising lalkara at the time of occurrence, being empty-handed. The complainant along with his son Abdul Ghaffar (deceased), Ghulam Rasul and Amjad Nazeer took tea at about 7-30 p.m. on 25-4-2011, when they heard some hubbub in the street, they came outside and saw Farooq Ahmad and Abdul Majeed (brother of the petitioner) wrestling against each other and they also showered abuses upon one another. It was at this stage when Abdul Hameed (petitioner) allegedly raised lalkara and induced his son Abdul Kareem, who was armed with a pistol, to fire at the person, quarreling with his brother. The fire shot made by Abdul Kareem proved terminal as it cut the life line of Abdul Ghaffar (deceased). The motive is not attributable to the petitioner as it pertains to cutting some dirty jokes by one Mudasar Ali, the brother of Farooq Ahmad with Abdul

Hameed (petitioner). Abdul Ghaffar (deceased) did not test muscles with Abdul Majeed or Abdul Hameed (petitioner) nor with any person belonging to the accused side so, the lalkara allegedly made by the petitioner cannot be deemed to be commanding in nature. The investigating officer formulated an opinion during the course of investigation that Abdul Hameed (petitioner) was merely present at the scene of occurrence, empty handed and committed no overt-act whatsoever during the entire episode. The opinion of the investigating officer admittedly does not bind the court in any manner still its persuasiveness, by keeping in view the attending circumstances of the case, cannot be overlooked easily. Being father of his co-accused Abdul Kareem who is the principal accused, the false implication of the petitioner in this case cannot be ruled out. Sufficient reasons exist to believe that the petitioner's case constitutes need for further inquiry into his guilt as envisaged under section 497(2), Cr.P.C.

3. Resultantly, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs 1,00,000 with two sureties each in the like amount to the satisfaction of the learned trial court.

N.H.Q./A-216/L Bail allowed.

2012 M L D 343

[Lahore]

Before Shahid Hameed Dar, J

RAFIULLAH---Petitioner

Versus

THE STATE and others---Respondents

Criminal Miscellaneous No.255/B of 2011, decided on 15th March, 2011.

Criminal Procedure Code (V of 1898)---

----S.497(2)---Penal Code (XLV of 1860), Ss.302/324/365/511---Qatl-e-amd, attempt to commit qual-e-amd, kidnapping or abduction with attempt to commit the same---Bail, grant of---Case was of two versions---Supplementary statement of complainant, inconsistent medical evidence, suppression of injuries of the accused, challaning of the accused of the cross case set up by the accused, barren physical remand of the accused for 13 days and the mystery hovering over the prosecution case as to the initiation of launching of aggression were the circumstances, which had made the case of accused one of further inquiry as contemplated under S.497(2), Cr.P.C.---Accused was admitted to bail in circumstances.

Shoaib Mehmood Butt v. Iftikhar-ul-Haq and 3 others 1996 SCMR 1845 ref.

Sh. Muhammad Yaqub for Petitioner

Kh. Sohail Iqbal D.P.-G

Nazar Muhammad S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Taskeen Abbas Shah, a police head-constable is the complainant of case F.I.R. No.30 of 2011 dated 13-1-2011 under sections 302, 324, 365, 511, P.P.C. registered at Police Station, Wah Cantt., District Rawalpindi, who has precisely alleged in the F.I.R. that he visited his friends Jaffar Khan and Aurangzeb at Hassan Abdal on 13-1-2011; they set out for inspection of a house together, as they had been asked to do so by Rafi Ullah Pathan (petitioner); they walked towards the said house and crossed Awan Chowk at about 7-15 p.m., where they saw a man standing close to a vehicle who, on seeing them, made a telephone call with his cell phone and within flash of an eye, pulled out his pistol and fired straight at the complainant which hit his frontal thigh; they started running to save their lives and reached Awan Chowk, where, 3/4 armed persons of different age group intercepted them who, opened indiscriminate firing upon them; Jaffar Khan and Aurangzeb were deflated to the ground with bullet injuries while complainant was gunned down by them with an injury in the chest; the accused after commission of offence ran-away; the injured were immediately shifted to Civil Hospital, Taxila but Jaffar Khan succumbed to the injuries on the way to the hospital; Rafi Ullah Pathan etc., 3/4 persons had committed the occurrence with community of intention by spraying volleys of bullets, at the spot; the motive behind the occurrence was that sometimes earlier, an abductor was caught by the complainant from the area of Lala Rukh Wah Cantt. Who was a relation to the above said accused and due to this grudge they committed the occurrence.

2. The complainant got recorded his supplementary statement before the I.O. on 20-1-2011, whereby, he contended that he along with his friends Jaffar Khan and Aurangzeb had been fired at by a youthful person, as a result whereof, they all three received multiple firearm injuries; they despite being badly wounded, ran for saving their lives but they were overpowered and given kick/list blows by Rafi Ullah Pathan etc. at some distance from the place where they had been fired at. He, however, failed to nominate the above said youthful person, responsible for having injured him and his two companions, including Jaffar Khan Deceased

3. The Investigating Officer collected some important items from the place of occurrence on his first visit to the spot which included a pistol .9 M.M along with magazine and live bullets, belonging to the complainant, 4 crime empties of .9 M.M, a syringe filled with some medicinal liquid which could cause unconsciousness and a Kalashnikov, which lay in the vehicle of Rafi Ullah Pathan petitioner.

4. The complainant and Aurangzeb injured were medically examined at THQ Hospital Taxila, the same day and their MLRs show multiple firearm injuries on their persons. Rafi Ullah Pathan (petitioner) who too, had firearm injuries on his left hand was medically, examined at the same hospital on 16-1-2011, courtesy local police and his MLR shows four lacerated firearm wounds on the palmer aspect of the left hand.

5. The dead body of Jaffar Khan deceased was dissected at the same hospital on 13-1-2011. The necropsy report qua the deceased shows three firearm injuries on the dead body.

6. The injuries of Rafi Ullah Pathan (petitioner) were not disclosed by the complainant in the F.I.R. His statement, however, was rendered into a cross version by the I.O. on 31-1-2011, wherein, he (petitioner) alleged that the complainant, in cahoots of his aides, had attempted to abduct him on the day of the occurrence, he showed resistance due to which he was fired at by the alleged abductors and thus, he received firearm injuries on his person.

7. Leaned Deputy Prosecutor General after going through the record submits that accused of the F.I.R. case and that of the cross version case had been found involved in the occurrence by the I.O. and two separate reports under section 173, Cr.P.C. had been submitted before the learned trial court by him, against the respective accused.

8. The petitioner was arrested in this case, according to the record on 16-1-2011 and was despatched to judicial lockup on 29-1-2011 but nothing was recovered from his possession in the intervening period.

9. Learned counsel for the petitioner submits that the petitioner has been falsely implicated in this case through a distorted version of the complainant; the occurrence mentioned in the F.I.R. is false and the real facts have been suppressed by the complainant so as to withhold the truth and paint a picture of his own choice; the petitioner has not been burdened with the liability of firing at the deceased or the injured witnesses and the only allegation against him is, that he along with his companions gave fist and kick blows to the complainant party but the medical evidence does not corroborate the said allegation; the petitioner was taken into custody by the police on the very day of the occurrence and did not record his arrest being hands in glove with the complainant, who was a police official, therefore, an application was filed against the local police for recovery of the petitioner and in consequence thereof, the police rushed into recording his arrest on 16-1-2011; the MLR pertaining to the petitioner strongly supports the cross version and being a case of two versions, the case of the petitioner constitutes need for further inquiry into his guilt within the ambit of section 497(2), Cr.P.C. Relies upon Shoaib Mehmood Butt v. Iftikhar-ul-Haq and 3 others (1996 SCMR 1845).

10. On the other hand, learned Deputy Prosecutor General has opposed grant of bail to the petitioner with the contention that he stands nominated in the F.I.R. being the principal accused as it was he who had invited the complainant and his friends for inspection of a house, situated at Hassan Abdal where he and his friends committed the gruesome crime; the prosecution case brims with connecting evidence against the petitioner who has committed an offence which squarely falls under prohibitory clause of section 497, Cr.P.C, so, he may not be released on bail.

11. After having heard learned counsel for the parties and perused the record, I find that the supplementary statement of the complainant had entirely changed the tenor of the F.I.R. case as he, in sharp contrast to his earlier version recorded under section 154, Cr.P.C, has contended in his later statement that an unknown armed youth had resorted to incessant firing upon them at the time of occurrence, as a result whereof, he along with Jaffar Khan (deceased) and Aurangzeb received multiple firearm injuries. It divulges from the record that the petitioner had also received firearm injuries during the occurrence which fact has not been disclosed by the complainant either in the F.I.R. or in his supplementary statement. The eye-witnesses, recorded by the police under section 161, Cr.P.C. are also silent about this fact. The submission of separate challans under section 173, Cr.P.C. in both the transactions, one in the

F.I.R. case and the other in the cross case, is a circumstance which makes it a case of two versions and which one is nearer to truth, shall be assessed by the learned trial court, after recording the evidence of the parties during trial. The injuries on the person of the petitioner have been suppressed by the complainant and nothing can be said at this stage, whether the petitioner had received the injuries while showing resistance against the complainant party, in the alleged act of abduction or he committed aggression against his adversaries. Who is the aggressor in the instant case and who has been aggressed upon is a crucial question which cannot be answered at this juncture. In Shoaib Mehmood Butt's case (1996 SCMR 1845), the apex court of the country has dealt with an identical proposition with the following observation:--

"In case of counter-versions arising from the same incident, one given by complainant in F.I.R. and the other given by the opposite-party---Case-law is almost settled that such cases are covered for grant of bail on the ground of further enquiry as contemplated under section 497(2), Cr.P.C.---In such cases normally, bail is granted on the ground of further enquiry for the reason that the question as to which version is correct is to be decided by the trial Court which is supposed to record evidence and also appraise the same in order to come to a final conclusion in this regard---In cases of counter-version, normally, plea of private defence is taken giving rise to question as to which party is aggressor and which party is aggressed---In the case of Fazal Muhammad v. Ali Ahmed (1976 SCMR 391) in cross-cases the High Court granted bail to the accused on the ground that there was probability of counter-version being true as some of the accused had received injuries including a grievous injury on the head of one accused---It was held by this Court that in such circumstances the High Court was right in granting bail and no interference was warranted---In the same context, reference can be made to the case of Mst. Shafiqan v. Hashim Ali and others (1972 SCMR 682).

The cross case got lodged by the petitioner stood the test of investigation and the accused mentioned therein have been challaned by the police to stand trial.

12. The medical evidence is not consistent with the allegation that Rafi Ullah Pathan petitioner and his co-accused had given fist and kick blows to the deceased or to the injured P.Ws. as none of them bore any blunt weapon injury (ics) on their person. The petitioner underwent physical remand of 13 days but it did not yield to the discovery/recovery of any incriminating evidence against him. The supplementary statement of the complainant, the inconsistent medical evidence, the suppression of injuries of the petitioner, the challaning of the accused of the cross case, set-up by the petitioner, barren physical remand of the petitioner for 13 days and the mystery hovering over the prosecution case as to the initiation of launching of aggression are the circumstances which make the case of the petitioner one of further inquiry as contemplated under section 497(2), Cr.P.C.

13. Resultantly, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of the learned trial court.

N.H.Q./R-15/L Bail allowed.

2012 M L D 430

[Lahore]

Before Shahid Hameed Dar, J

SHAHID IQBAL---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 14397-B of 2010, decided on 29th December, 2010.

Criminal Procedure Code (V of 1898)---

----S.498---Penal Code (XLV of 1860), S.324/148/149---Attempt to commit qatl-e-amd, rioting armed with deadly weapons---Pre-arrest bail, grant of---Complainant of the cross-version had alleged that accused along with others being armed with different weapons had trespassed into his "Haveli" by scaling over the walls and gave a beating to his wife---Veracity of the said allegation could not be ascertained in the absence of any medical evidence---Accused being an injured prosecution witness was the star witness of the case and his false implication in the cross case due to malice and ulterior motive of the complainant could not be ruled out and it was difficult to ascertain as to who was the aggressor---Reasonable grounds existed to believe that the case of accused was open to further probe into his guilt as contemplated under S.497(2), Cr.P.C.---Pre-arrest bail was granted to accused in circumstances.

Hamza Ali Hamza and others v. The State 2010 SCMR 1219 and Muhammad Shahzad Siddique v. The State and another PLD 2009 SC 58 ref.

Muhammad Azhar Solehria for Petitioner.

Muhammad Ashfaq Mughal for the Complainant.

Mian Hamayun Aslam D.P.-G. with Allah Ditta, S.I. with record.

ORDER

SHAHID HAMEED DAR, J.----Seeks bail before arrest in a cross case, recorded in F.I.R. case No. 332 of 2010 dated 3-11-2010 for offence under sections 324, 148, 149, P.P.C. registered at Police Station Kaleki Mandi, District Hafizabad on the complaint of one Imran Khan.

2. The cross case was recorded by the I.O., on 7-11-2010 for offences under sections 452, 427, 34, P.P.C. on the complaint of Muhammad Shahbaz who has precisely, alleged that Shahid Iqbal accused (petitioner) had visited his house on 3-11-2010 with a view to appease his wife Mst. Kausar Bibi but could not do so as she refused to accompany him because of the maltreatment she was meted out by the accused/petitioner; immediately thereafter, Shahid Iqbal (petitioner) joined by Imran Khan, Yasir Iqbal armed with hatchet, Kassi and Sotas scaled over the wall of the house of Muhammad Shahbaz complainant and thrashed his wife with their respective weapons; the inmates of the house took refuge in a room and bolted it

from inside but the intruders forcibly broke open the said room; Muhammad Shahbaz with a view to fend off the attack fired with his rifle which hit Shahid Iqbal on his chest; the accused fled away after the occurrence.

3. Imran Khan, co-accused of the petitioner reported the matter to the police at 5-30 p.m on the same day for registration of F.I.R with the contention that his brother Shahid Iqbal had developed some familial differences with his wife who being angry had gone to the house of her parents which was situated close to the house of Imran Khan complainant; Messrs Shahid Iqbal (petitioner), Yasir Iqbal and Imran Khan complainant went to haveli of his paternal uncle/father-in-law Muhammad Shahbaz for fetching back his cattle-head where Muhammad Shahbaz armed with rifle, Zaman Khan armed with Sota, Farman Ali armed with Sota, Mst. Zohra Bibi and Kishwar Bibi attacked them; Zaman Khan and Farman Ali inflicted Sota blows on the person of Imran Khan etc. whereas Muhammad Shahbaz with intent to kill made a fire shot with his rifle which landed on the left chest of Shahid Iqbal who fell to the ground badly wounded; he was immediately shifted to Civil Hospital Hafizabad, wherefrom, he was referred to Mayo Hospital Lahore because of his precarious condition.

4. Shahid Iqbal was medically examined at DHQ Hospital Hafizabad on 3-11-2010. His MLR entails a firearm injury on the left side of chest measuring 3/4 x 3/4 x DNP (depth not probed), close to left nipple. The injured was referred to Mayo Hospital Lahore for further management and treatment.

5. On a query by this court learned counsel for the complainant (cross case) submits that the wife of Muhammad Shahbaz complainant was not medically examined so there is no MLR to support the allegations contained in the cross case.

6. Learned counsel for the petitioner submits that the petitioner has been falsely implicated in this case due to malice and ulterior motives of the complainant for the reason that he is the injured P.W of the F.I.R. case; the real facts of the case have been distorted and suppressed by the complainant of the cross case and he having colluded with the Investigation Officer has got lodged the cross case with, a view to evade the consequences of their criminal act; the complainant party of the cross case had aggressed upon the petitioner and others and that the MLR of Shahid Iqbal petitioner is evident of veracity of the F.I.R. case; the false implication of the petitioner because of his status of being injured P.W. of the F.I.R. case cannot be ruled out; lastly submits that the petitioner's case calls for further inquiry into his guilt within the meanings of section 497(2), Cr.P.C. Relies upon case titled Hamza Ali Hamza and others v. The State (2010 SCMR 1219) and Muhammad Shahzad Siddique v. The State and another PLD 2009 Supreme Court 58)

7. On the other hand learned Deputy Prosecutor-General assisted by learned counsel for the complainant has opposed grant of bail to the petitioner with the contention that the petitioner seeks bail before arrest albeit no evidence qua malice or ulterior motives of the complainant exists on the record; it has been admitted by the petitioner himself that he along with others had gone to haveli of Muhammad Shahbaz where the alleged occurrence took place and thus launching of aggression stands admitted by him; the petitioner and his co-accused have committed a non-bailable offence so he is not entitled to grant of extraordinary relief of bail before arrest.

8. Arguments heard. Record perused.

9. It has been alleged by the complainant of the cross version that the petitioner along with others being armed with different weapons had trespassed into his haveli, by scaling over its walls and gave beating to his wife. On the other hand the complainant of the F.I.R. case has alleged that the petitioner along with others had gone to the house of Muhammad Shahbaz, his father-in-law, for bringing some cattle-head back which had been handed over to her parents by the wife of the petitioner. The fire shot on the chest of Shahid Iqbal petitioner has been admitted by Muhammad Shahbaz in his written application for registration of cross case. The MLR of Shahid Iqbal is manifest of a fire arm injury on his chest which speaks volumes about the veracity of the contention of the petitioner. Shahid Iqbal was referred to Mayo Hospital, Lahore as his condition was not found satisfactory by the Medical Officer of DHQ Hospital, Hafizabad where he remained admitted for as many as 16 days as indoor patient. In absence of any medical evidence, it cannot be said with certainty as to whether the contention of Muhammad Shahbaz complainant about thrashing of his wife at the hands of petitioner and his co-accused is true or not. The petitioner is the star witness of the F.I.R. case being an injured P.W. so the probability that he has been falsely implicated in the cross case due to malice and ulterior motives of the complainant cannot be ruled out. It is difficult at this stage to ascertain as to who was the aggressor. The question regarding initiation of aggression shall be determined by the learned trial court after recording the evidence of the parties during the course of trial. I advantageously rely upon the above cited judgments to observe that reasonable grounds exist to believe that the petitioner's case is open to further probe into his guilt as contemplated under section 497(2), Cr.P.C.

10. For the foregoing reason I accept this application and confirm the ad interim pre-arrest bail allowed to the petitioner on 15-12-2010 subject to furnishing fresh bail (bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of learned trial court.

N.H.Q./S-11/L Prearrest bail allowed.

2012 M L D 583

[Lahore]

Before Shahid Hameed Dar, J

SAJAWAL alias BHOLA---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.7556-B of 2011, decided on 15th July, 2011.

Criminal Procedure Code (V of 1898) ---

----S.497---Penal Code (XLV of 1860), Ss.302, 364, 347, 452, 337-H(2), 148, 149 & 109---Qatl-e-

amd, kidnapping, house-trespass, hurt by rash or negligent act---Bail, grant of---Petition for bail had not been filed by accused on merits of the case, but only on the ground of statutory delay---Accused was arrested on 26-11-2008 and prosecution could produce only two witnesses before the Trial Court after about two and a half years---Challan in the case was submitted after about one month of arrest of accused, which progressed at snail's pace and then the complainant filed a private complaint against accused---Said complaint case equally matched the pace of progress of the challan case---Bail application was filed almost seven months after the dead-line set by the statute under S.497(1), Proviso (v), Cr.P.C., for conclusion of the trial qua an offence entailing capital punishment within two years, had already gone by---Accused had not been previously convicted for an offence, entailing capital punishment, nor was he a hardened, desperate or dangerous criminal---Accused did not contribute in any manner towards delay in conclusion of the trial, nor any other person acting on his behalf had done so---Accused was admitted to bail, in circumstances.

Mian Muzaffar Ahmad for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab.

Muhammad Afzal Siddiqi for the Complainant. Ayub S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Sajawal alias Bhola seeks bail after arrest in case F.I.R. No.178 of 2008 dated 4-10-2008 under sections 302, 364, 347, 452, 337-H(ii), 148, 149, 109, P.P.C. and section 3 of Amplifier Act, 1965, registered at Police Station Hadiara, Lahore, on the complaint of Hadayat Ali.

2. The petitioner had been arrested on 26-11-2008 and faces incarceration ever-since. The trial of the accused has not been concluded so far. Learned counsel for the complainant has pointed out that two witnesses Hadayat Ali P.W.1 and Muhammad Majid P.W.2 were recorded on 30-6-2011 but they were not cross-examined due to non-availability of learned defence counsel.

3. Learned counsel for the petitioner submits that the delay in conclusion of the trial has not been occasioned by any act of the accused or that of any other person acting on his behalf; the petitioner has not been previously convicted for an offence entailing capital punishment; the petitioner is not a hardened, desperate or dangerous criminal nor his case is hit by the exceptional clause to 5th proviso of section 497, Cr.P.C, so he may be set at liberty.

4. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant submits that the delay in conclusion of the trial has been occasioned exclusively by the accused or by the person acting on his behalf as is manifest from bail declining order dated 10-6-2011 passed by learned trial court; the accused-petitioner, as well as his co-accused had committed brutal murder of two persons, so his case falls within the definition of the 'adjectives' mentioned in the Exceptional clause.

5. I have heard learned counsel for the parties and gone through the record.

6. The post arrest bail applications of the petitioner had been dismissed on merits not only by

this Court but also by the august Supreme Court of Pakistan as is evident from order dated 27-8-2009 passed in Crl. P.L.A No.854-L of 2009 and order dated 25-11-2009 passed in Criminal Review Petition No.331 of 2009. The instant petition however has not been moved on merits of the case but only on the ground of statutory delay. It appears from the record that the petitioner had been arrested on 26-11-2008. The prosecution appears to have shown lethargy throughout the period of imprisonment of the petitioner as they could produce only two witnesses before the trial court for the first time on 30-6-2011. The challan in the instant case had been submitted before the trial court on 20-12-2008 which progressed at snail's pace and then the complainant filed a private complaint against the accused on 23-1-2009. The complaint case equally matched the pace of progress of the challan case as the accused in the complaint case were charge-sheeted on 9-1-2011 after having been summoned to face the trial on 21-3-2009. The statutory period when reckoned with from the date of arrest of the accused-petitioner i.e. 26-11-2008, appears to have expired on 25-11-2010 and prosecution in the meantime did not bother to produce its witnesses even once before the trial court for their examination. The instant bail application has been moved on behalf of the petitioner on 23-6-2011, almost seven months after the dead-line set by the statute i.e. under section 497(1) proviso (v) of Code of Criminal Procedure, for conclusion of the trial qua an offence entailing capital punishment within two years, had already gone by. The complainant having sensed the subtlety of the situation rushed into recording of statements-in-chief of a couple of prosecution witnesses on 30-6-2011, but they could not be cross-examined due to non-availability of the defence counsel. The fact however, remains that above situation arose much later than the expiry of the statutory period. The petitioner has not been previously convicted for an offence, entailing capital punishment nor is he, to the mind of this court, a hardened, desperate or a dangerous criminal. It is found from the record that the accused-petitioner did not contribute in any manner towards delay in conclusion of the trial nor any other person acting on his behalf has done so.

7. Therefore, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with two sureties each in the like amount to the satisfaction of the learned trial Court.

8. Before parting with the order, it looks appropriate to direct the trial court to adopt every possible measure to procure the presence of the prosecution witnesses and accelerate the proceedings of the trial in such a way that the trial is concluded within next five months.

H.B.T./S-141/L Bail granted.

2012 M L D 693

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD MUMTAZ---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.16488-B of 2011, decided on 22nd December, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 302/34---Qatl-e-amd common intention---Bail, refusal of---Accused had allegedly hit the deceased twice with a brick on the back of his chest, which caused swelling on the back of the deceased's chest and his underlying muscles and soft tissues were found damaged with clotted blood at two different places, underneath the said injuries---Medical officer had declared the cause of death as cardio-genic shock resulting from traumatic injuries on the back of the deceased's chest---Complainant had categorically alleged in the F.I.R. that accused hurled a brick twice on the back of deceased's chest which sent him to the ground in an injured condition--Opinion of Investigating Officer that deceased went back to his house from the place of occurrence and lived for two and a half hours after the occurrence before he suffered a fatal heart attack, was without any substance as the medical officer had recorded that the probable time that elapsed between injuries and death was one hour---Statements of eye-witnesses under S. 161, Cr.P.C. were in line with the version of the complainant as contained in the F.I.R.---Deceased was murdered in daylight and parties were fully known to each other and there was no possibility of mistaken identity of the accused---Sufficient incriminating evidence was available to formulate that accused's case did not call for further probe into his guilt---Bail application of accused was dismissed accordingly.

Shahid Nawaz Langrial for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor-General Punjab for the State with Munir Ahmad A.S.-I.

Miss Aalia Neelum for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.68, dated 15-3-2011, under sections 302, 34 P.P.C., registered at Police Station Phullarwan, District Sargodha.

2. The allegation against the petitioner is that he gave two brick blows on the back of Muhammad Nazir (deceased) whereas his co-accused two in number, also committed violence upon him during the occurrence as a result of which Muhammad Nazir died at the spot; the motive behind the occurrence pertained to a previous quarrel between the parties over throwing garbage in a drainage.

3. Learned counsel for the petitioner submits that medical evidence is inconsistent with the ocular account; his co-accused has been admitted to bail, hence the petitioner, on the principle of consistency also deserves the same treatment; the prosecution's case has been found false by the Investigating Officer during the course of investigation who opined that the deceased had died, having suffered a massive heart attack.

4. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant submits, that the principle of consistency is not applicable in respect of the accused-petitioner as his role is plainly distinguishable from that of his co-accused; the

medical evidence fully establishes that the deceased had died due to the injuries received by him at the hands of the accused; the eye-witnesses still support the prosecution case; the petitioner's case does not call for further probe into his guilt so he may not be granted the relief prayed for.

5. Having heard learned counsel for the parties and perused the record, it is observed that Muhammad Nazir (deceased) was allegedly hit twice with a brick on back of his chest by the accused-petitioner. The blows on the body of the deceased were given so forcefully that it caused swelling, on the back of his left and right side of the chest in areas measuring 14 cm x 6 cm and 18 cm x 4 cm. The underlying muscles and soft tissues were found damaged with clotted blood at two different places, underneath the above-noted external injuries. The medical officer was confident enough to declare the cause of death as cardio-genic shock resulting from the traumatic injuries on the back of the chest of the deceased. It has been categorically alleged in the F.I.R. by the complainant that Mumtaz accused hurled a brick twice on the back of chest of Muhammad Nazir which sent him reeling to the ground in injured condition. The opinion of the Investigating Officer that Muhammad Nazir went back to his house from the place of occurrence and lived for another 2-1/2 hours after the occurrence before he suffered a massive heart attack which proved fatal, is without any substance as the medical officer has recorded the probable time that elapsed between injuries and death as within one hour. The statements of eye-witnesses under section 161, Cr.P.C. are in line with the version of the complainant as contained in the F.I.R. The true import of the report, issued by the Forensic Histopathologist, hinting at Ischamic Heart Disease due to fibrosis, in respect of Muhammad Nazir (deceased) shall be assessed by the learned trial court after recording evidence of the parties at trial. The medical officer however recorded cause of death of the deceased in aforementioned terms, with reference to the report of the histopathologist. Muhammad Nazir was murdered in a daylight occurrence. The parties were fully known to each other and there was no probability of mistaken identity of the accused. Sufficient incriminating evidence is available to prima facie, formulate an opinion that the petitioner's case does not call for further probe into his guilt, therefore, I am not inclined to accept this application which is dismissed accordingly.

M.W.A./M-23/L Application dismissed.

2012 M L D 725

[Lahore]

Before Shahid Hameed Dar, J

Mian ZAHID---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.7444-B of 2011, decided on 13th July, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.302/324/148/149---Qatl-e-amd attempt to commit qatl-e-amd common object---Bail, refusal of---Counter versions of both the parties would be decided by Trial Court through independent trials by keeping their respective pleas in juxtaposition inter se---Accused, according to F.I.R., while armed with Kalashnikov had caused six firearm injuries on the body of the deceased and killed him at the spot---Opinion of Investigating Officer did not bind the court in any manner---Injuries allegedly received by a couple of accused during the occurrence and submission of challan in the cross version, would gather importance when the accused of cross version would vie for their bails---Offence against accused entailed capital punishment---Case of accused did not constitute need for further inquiry into his guilt---Bail was declined to accused in circumstances.

Shoaib Mehmood Butt v. Iftikhar-ul-Haq and 3 others 1996 SCMR 1845; Nasir Muhammad Wassan and another v. The State 1992 SCMR 501 and Muhammad Ashraf v. The State 2007 MLD 482 ref.

Munir Ahmad Bhatti for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor-General Punjab for the State with Zafar S.I.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No. 103, dated 14-3-2011, under sections 302, 324, 148, 149 P.P.C., registered at Police Station Dinga, District Gujrat.

2. The allegation against the petitioner is that he being armed with a kalashnikov, joined by his co-accused who too were armed with kalashnikov, resorted to indiscriminate firing and thereby caused cold blooded murder of Amjad Javed besides causing two firearm injuries to Faisal, one being the entry wound and the other as exit wound; specifically speaking, the petitioner raised lalkara at the time of occurrence and immediately thereafter he fired a burst through his kalashnikov which hit the forehead and right shoulder of Javed Amjad (deceased) who fell onto the ground and succumbed to the injuries within no time; the motive behind the occurrence pertained to previous enmity between the parties.

3. During the course of investigation, a cross version was registered on 17-3-2011 for offences under sections 324/427/148/149, P.P.C. against the complainant party of the F.I.R. on the statement of Zahid (petitioner).

4. Two persons Ehsan Ullah and Sarfraz, from the accused side also received firearm injuries during the occurrence but this fact has not been specifically mentioned in the F.I.R. by the complainant who in somewhat vague terms alleged that some of the assailants also received injuries during the occurrence but at the hands of their co-accused.

5. The MLR of Ehsan Ullah accused reveals one firearm injury whereas that of Sarfraz accused entails three firearm entry wounds, one showing the locale of injury as chest.

6. Learned counsel for the petitioner submits that the crime had been reported by the complainant with distorted facts and many important features had been withheld by him; the injuries of Ehsan Ullah and Sarfraz accused have been suppressed by the complainant; the

fact about receipt of injuries by the accused had been mentioned so casually in the F.I.R. as if no body was injured on the accused side; the cross version got lodged by Zahid (petitioner) stood the test of investigation and the accused mentioned therein have been challaned under section 173 Cr.P.C.; the Investigating Officer after extensive investigation formulated an opinion that the complainant party of the F.I.R. case were aggressed and the accused mentioned therein had been aggressed upon; the Investigating Officer-recovered a kalashnikov and crime empties lying near the dead body of Amjad Javed deceased which strongly reflects on the veracity of the version of Ghazanfar Ali complainant; the petitioner's case notwithstanding the aforesaid role, constitutes need for further inquiry into his guilt as contemplated under section 497(2), Cr.P.C. Relies upon "Shoaib Mehmood Butt v. Iftikhar-ul-Haq and 3 others" (1996 SCMR 1845).

7. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant submits that the petitioner has been burdened with the specific role of causing terminal injuries to Amjad Javed deceased, after having himself raised a lalkara; the medical evidence fully corroborates the version of the complainant; the Investigating Officer recovered 130 crime empties from the place of occurrence which corroborates the allegation that all the accused had sprayed volleys of bullets during the occurrence; the petitioner having been arrested on 25-3-2011 led to the recovery of a kalashnikov on 7-4-2011; the challan against the petitioner and his co-accused stands submitted before the trial court on 18-4-2011; the petitioner is a hardened and desperate criminal as he has the history of involvement in as many as 16 cases of similar nature. Learned Deputy Prosecutor-General Punjab finally submits that the Investigating Officer had opined during investigation that it was the complainant party of F.I.R. case which had opened attack on the accused party at the relevant time of occurrence. Relies upon "Nasir Muhammad Wassan and another v. The State" (1992 SCMR 501), "Muhammad Ashraf v. The State" (2007 MLD 482).

8. I have heard learned counsel for the parties and perused the record.

9. It has been alleged against the petitioner that he was armed with a kalashnikov at the time of occurrence and he joined by his armed co-accused launched an attack on the complainant party by opening indiscriminate firing, as a result of which they gunned down Javed Amjad (deceased) and Faisal with fire arm injuries. It was the accused-petitioner who immediately after having raised lalkara, showered bullets by firing a burst through his kalashnikov at Javed Amjad (deceased) which landed on his forehead and right shoulder due to which he fell onto the ground badly wounded and died instantenously. Faisal, a companion of the complainant ran the race of his life during the occurrence but indiscriminate firing made by all the accused downed him with firearm injuries. The complainant has alleged in the F.I.R. that the accused party in sheer chaos, boarded their vehicles to flee the scene of occurrence and some of them got injured due to the firing of their accomplices. The petitioner having been arrested on 25-3-2011 led to the recovery of kalashnikov on 7-4-2011. The Investigating Officer had collected 130 crime empties of KK from the place of occurrence during spot inspection. The petitioner had been found involved in the occurrence during the course of investigation and placed in column No.3 of the challan.

10. It has been strongly contended by learned counsel for the petitioner that two persons Ehsan Ullah and Sarfraz the co-accused of the petitioner received firearm injuries during the

same occurrence at the hands of their adversaries but this fact has almost been withheld by the complainant and that the cross version registered on 17-3-2011 at the instance of Zahid Mehmood (petitioner) stood the test of investigation with opinion of the Investigating Officer that the complainant party of F.I.R. case were the aggressors and the accused mentioned therein had been aggressed upon. The initiation of aggression during an occurrence, can only be determined by the trial court after recording the evidence of the parties at trial. In cases of counter pleas/versions, the police should not arrogate itself to determine the subtle question of sparking off aggression by any of the two sides and it must be left for the trial court to look into. Each criminal case proceeds on its own peculiar facts and circumstances which ought not to be intermingled for the purpose of adjudication of bail plea of the accused. Even otherwise, the trial court shall conduct independent trials of the counter versions of both the parties and decide the same through separate independent judgments, though, by keeping the respective pleas of the parties in juxtaposition inter se. So far as the F.I.R. case is concerned, it was the petitioner alone who authored all the firearm injures, six in number, on the body of Javed Amjad deceased and murdered him at the spot. Tile opinion of the Investigating Officer, as noted above, does not bind the court in any manner. The injuries allegedly received by a couple of accused during the occurrence and submission of challan in the cross version are the circumstances which shall gather importance when the accused of the cross version would vie of their bails. The offence, the petitioner is confronted with, entails capital punishment. There are sufficient reasons to believe that the petitioner's case does not constitute need for further inquiry into his guilt.

11. For the foregoing reasons, I am not inclined to accept this application which is dismissed accordingly.

N.H.Q./Z-33/L Bail refused.

2012 M L D 1163

[Lahore]

Before Shahid Hameed Dar, J

GUL FAROOQ---Petitioner

versus

THE STATE and 2 others---Respondents

Writ Petition No.21350 of 2011, decided on 19th October, 2011.

Criminal Procedure Code (V of 1898)---

----S. 435---Penal Code (XLV of 1860), Ss.354, 452, 506, 148 & 149---Constitution of Pakistan, Art.199---Constitutional petition---Assault or criminal force to woman with intent to outrage her modesty, house-trespass, criminal intimidation, rioting, common object---Revision petition---Limitation---Extension of time---Scope---Application filed by the respondent/complainant seeking arrest of petitioner/accused was rejected by the

Magistrate/Trial Court---Said rejection was assailed by the complainant through revision petition, which revision had been accepted by Appellate Court below---Petitioner had alleged that revision petition filed by the complainant being time-barred, should have been outrightly dismissed on the point of limitation---Validity---Revision petition could not be rejected on mere ground of delay or laches---What required the court to observe, was that a revision petition should be filed within a reasonable period of time, which could change from case to case; and situation to situation---Rule to file a revision petition within 30 days against an order complained of was not inflexible; and time could be extended in exceptional cases---Trial Court/Magistrate in the present case had traversed beyond its jurisdictional authority by misinterpreting the law and passing an order in favour of petitioner/ accused without caring for the law on the subject; even in the slightest term and dealt with the matter in an unlawful and ridiculous manner---Mere technicalities, could not be taken into consideration to annul a lawful judgment passed by revisional court.

Muhammad Nur Ali and others v. The State PLD 1961 Dacca 239 and Luqman Ali v. Hazaro and another 2010 SCMR 611 **rel**.

Irfan Ahmad Khan for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor-General Punjab (on Court's call).

ORDER

SHAHID HAMEED DAR, J.---Through a constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, the petitioner has challenged the vires of order dated 5-7-2011 passed by learned Addl. Sessions Judge, Okara, whereby a revision petition filed by the petitioner against order dated 20-9-2010 of the learned Magistrate section 30 Depalpur was dismissed.

2. The brief facts germane to the filing of the instant petition are that Yaqoob, respondent No.3 got registered a case F.I.R. No.864 of 2008 dated 28-11-2008 under sections 452, 354, 506, 148, 149, P.P.C. at Police Station Hujra Shah Moqeem, Tehsil Depalpur, District Okara against Gul Farooq (petitioner) and his co-accused who applied for bail before arrest which was dismissed as withdrawn by the learned Addl: Sessions Judge, Depalpur on 25-4-2009. The accused also filed a quashment petition before this Court which was disposed of in terms that the petitioner might file an application under section 249-A, Cr.P.C. before the learned trial court which was filed by the petitioner but it has not been decided so far; after submission of challan under section 173, Cr.P.C. the petitioner and his co-accused appeared before the learned trial Court who were directed to submit bail bonds within the definition of section 91, Cr.P.C. without attending to the requirements of sections 497 and 498, Cr.P.C.; the application filed by the complainant (respondent No.3) seeking arrest of the accused was rejected by the learned trial court vide order dated 20-9-2010. This order was assailed by the complainant through a revision petition on 7-12-2010 which was accepted vide order dated 5-7-2011 by learned Addl: Sessions Judge Okara with the observation that "the impugned order passed by the learned trial court is illegal, irregular and has been passed in dis-regard of the mandatory provision of sections 496, 497 and 498 Cr.P.C", hence, the instant petition.

3. Learned counsel for the petitioner submits that the impugned order passed by the learned Addl. Sessions Judge, Okara is patently illegal inasmuch as, the revision petition has been filed by the complainant (respondent No.3) after the limitation period and being a time barred case it should have been outrightly dismissed on the point of limitation; the petitioner and his co-accused attended the learned trial court regularly for years and never defaulted in this regard; the charge against the accused is groundless and their application under section 249-A, Cr.P.C. is hanging fire since year 2009 which is like doing injustice to the applicants; the order passed by learned Magistrate on 20-9-2010, whereby, the petitioner was ordered to submit bail bonds under section 91, Cr.P.C. is perfectly legal and hardly called for interference by the revisional court, on a time barred revision petition; lastly submits that the impugned order may be set aside and the order dated 20-9-2010 passed by the learned trial court may be restored. Relies upon case titled Muhammad Nur Ali and others v. The State (PLD 1961 Dacca 239).

4. Learned Deputy Prosecutor General Punjab who has entered appearance on Court's call submits that the instant petition is misconceived and militates against the ratio of the judgment titled **Luqman Ali v. Hazaro and another** (2010 SCMR 611) which clearly underlines that section 91, Cr.P.C. is subservient to the operation of sections 496, 497 and 498, Cr.P.C.; no time limit has been provided by the statute for filing a criminal revision petition, therefore, respondent No.3 had filed a competent revision which was lawfully decided by the Revisional Court through the impugned order; lastly submits that the instant petition being misconceived may be dismissed.

5. After having heard learned counsel for the petitioner and perused the record, it transpires that the petitioner along with his co-accused is booked in case F.I.R. No.864 of 2008 dated 28-11-2008 for offences under sections 452, 354, 506, 148 and 149, P.P.C. registered at Police Station Hujra Shah Moqeem Tehsil Deepalpur, District Okara on the complaint of Haji Muhammad Yaqub. The accused applied for bail before arrest through an application under section 498, Cr.P.C. which was dismissed as withdrawn on 25-4-2009 by learned Addl: Sessions Judge, Depalpur in following terms:--

> "At this stage it was submitted by learned counsel for the petitioners that the quashment is already pending in the Hon'ble High Court, Lahore wherein comments of the Local Police has been called and the original impugned order has been suspended. Therefore, the petitioner's counsel wants to withdraw the instant bail petition for the time being and accordingly, the instant pre-arrest bail petition is hereby dismissed as withdrawn".

6. In the meantime the accused filed a quashment petition before this Court which was disposed of in year 2008 in terms that the petitioner might file an application under section 249-A, Cr.P.C. before the learned trial court, if so, advised. The petitioner moved the aforesaid application which, according to him, has not been decided so far. The petitioner and his co-accused appear to have played a trick with the learned trial court as they without being on bail, kept attending the proceedings of the trial for a considerable period of time. On one fine morning, realizing the situation, the complainant (respondent No.3) moved a miscellaneous application before the learned trial court contending therein that the accused had not sought bail from any court of law so they may be ordered to be

arrested. Their plea was disposed of by the learned trial court in terms that it was rejected and the accused were showered with impulsive generosity of submitting bail bonds within the meaning of section 91, Cr.P.C., notwithstanding the fact that they had been challaned by the police and placed in column No.3 of the report under section 173, Cr.P.C. The complainant being aggrieved of this order, challenged it before the revisional court through a revision petition on 7-12-2010, almost 2 months 17 days after the order passed by the learned trial court. The learned Addl: Sessions Judge, Okara through a detailed judgment allowed the revision petition filed by the complainant with the following observations:--

> "14. Nutshell of the above discussion is that if a person accused of non-bailable offence is not only required to execute bond under section 91 for his appearance but it is also required that either he be taken into custody by the Court and if he is to be released on bail then before such release a notice to prosecution is to be issued and the grant or refusal of bail is then to be examined on its own merits. It is thus evident that a person accused of non-bailable offence should either be in the custody of the Court or in the custody of a surety in terms of section 496 or 497. Execution of bond under section 91 does not qualify the above test.
>
> 14. So the nut shull of the above discussion is that the impugned order passed by the learned trial court is illegal irregular and has been passed in dis-regard of the mandatory provision of sections 496, 497 and 498, Cr.P.C. In the sanerio of above discussion, the instant petition is allowed and the impugned order is hereby set aside. The respondent/accused are not present in the Court. A copy of this order be sent to the learned trial court with the direction that the petitioner be dealt in accordance with provision of section 497, Cr.P.C. or 498, Cr.P.C",

7. The discussion made by learned revisional court in the impugned judgment is definitely in line with the judgment passed by Hon'ble Supreme Court of Pakistan in case titled **Luqman Ali v. Hazaro and another** (2010 SCMR 611). The learned magistrate/trial court badly failed to appreciate the contention of the complainant and passed an order which was patently illegal and void ab initio. The kindness, which, at the most, could have been showered upon the accused-petitioner by the learned trial court was to allow him a few days' time to approach the Sessions Court concerned for seeking bail before arrest, if it did not intend to cause their arrest. But, instead of doing so, the learned trial court adopted such a course which could not be approved of by any stretch of imagination. The accused had been found involved in the occurrence during investigation by the Investigating Officer and placed in column No.3 of the challan. Can an accused, who appears before the court in pursuance of process under section 204, Cr.P.C. be readily granted the favour, as done to the accused by the learned trial court in this case or he should have been required to seek bail, within the scope of sections 497 and 498, Cr.P.C, is a proposition which has been dealt with by the august Supreme Court of Pakistan in the august judgment (2010 SCMR 611), referred to hereinabove, in the following terms:--

> "10. Thus, the purpose of section 204, Cr.P.C., is to procure the attendance of the accused by issuing the required process. If the accused is in custody then such

process can be issued by issuing production order to the jail authorities and if the accused is absconding then the process can be issued in the shape of warrants. It is pointed out that if the accused is absconding or released then the name of accused of both the categories are required to be mentioned in Column No.2 of the challan with red and blue ink, respectively therefore, the process is to be issued to the accused, who is absconding and similar process can also be issued to an accused whose name is in column No.2 with blue ink after he is made an accused in the case. It will be noted that warrants are addressed to the Police Officer to arrest the person and produce him before the Court on a particular date. Thereafter the said warrants become ineffective unless extended or re-issued by the Court. Similar is the case with the bailable warrants under which the Police Officer is required not to arrest the accused if he furnishes surety before him for his appearance before the Court on the date mentioned in the warrants. After appearance of the said accused before the Court the said order ceases to exist unless the accused is released in accordance with law.

(11) In such a situation when the accused appears in pursuance of process under section 204, Cr.P.C. either through summons or warrants or bailable warrants or on his own and if the offence is non-bailable then the provisions of section 497, Cr.P.C. would be attracted and accused could only be released after moving such application and grant of the same. If no such application is moved or no bail is granted by any competent Court either under section 497 or 498, Cr.P.C. as the case may be, then the accused is required to be remanded to judicial custody till the time a proper order is passed either by the trial Court or by the superior Court.

(12) We have examined the order of the learned Additional Sessions Judge and find that the same is well-reasoned, based upon correct interpretation of relevant provisions of law and relying upon the case of Noor Nabi (supra). We have also examined the said judgment and found that the learned High Court examined in depth all the required provisions of law and interpreted the same in its true perspective. We have examined the impugned order of the learned High Court but are unable to persuade ourselves to agree with the finding arrived at by the learned High Court particularly releasing the accused without the grant of bail. Such release of the accused was unwarranted, illegal and against the provisions of sections 497 and 498 Cr.P.C., therefore, the said order cannot be sustained".

8. So far as the argument of learned counsel regarding the question of limitation is concerned, one thing is to be remembered that no limitation is prescribed in the Limitation Act, 1908 nor Code of Criminal Procedure, 1898, provides any such limitation. A revision petition cannot be rejected on mere ground of delay or laches. What requires the courts to observe is that a revision petition should be filed within a reasonable period of time which may change from case to case and situation to situation. Even in the judgment relied upon by the learned counsel for the petitioner it has been held that the rule to file a revision petition within 30 days against an order complained of, was not inflexible and time could be extended in exceptional cases. Here in the instant case, I am of the considered opinion that the learned trial court clearly traversed: beyond its jurisdictional authority by misinterpreting the law and passed an order in favour of the

petitioner-accused without caring for the law on the subject even in the slightest term and dealt with the matter in an unlawful and ridiculous manner. Mere technicalities, as objected to, by the learned counsel cannot be taken into consideration to annul a lawful judgment passed by the learned revisional court. The instant petition, therefore, fails being meritless and is **dismissed in limine**.

H.B.T./G-65/L Petition dismissed.

2012 P Cr. L J 187

[Lahore]

Before Shahid Hameed Dar and Altaf Ibrahim Qureshi, JJ

HIMAYUN KHAN SHAHEED---Appellant

Versus

SARFRAZ AKHTAR and another---Respondents

I.C.A. No. 265 of 2011 in Writ Petition No. 5250 of 2011, decided on 23rd June, 2011.

Criminal Procedure Code (V of 1898)---

----S. 154---Registration of F.I.R.---Grievance of the appellant in its present form could not invoke any penal provision of law, nor it had necessitated the registration of a criminal case, as he had been directed by the Supreme Court to take recourse to the civil law for redressal of his personal grievance---Contention that the vaccination in question had caused weakening of the eyesight of the appellant was a far-fetched cry, as the appellant did not appear to have any evidence which could render his plea cogent or believable---Appellant had merely relied upon his verbal asertions rather than hinting at some documentary evidence, which might show some nexus between his alleged claim of loss of eyesight and use of vaccination in question---Impugned order had been passed with sound reasoning and convincing arguments and it did not call for any interference---Intra-court appeal was dismissed in limine accordingly.

Mehr Ata-ur-Rehman for Appellant.

ORDER

Through this Intra-Court Appeal, the appellant has called in question order dated 13-3-2011 passed in Writ Petition No.5250 of 2011 by a learned Single Judge in Chambers, whereby the writ petition containing prayer for issuance of a direction to S.H.O.-respondent No.2 to register a criminal case against representatives of Highnoon Laboratories was dismissed.

2. The version of the appellant in brief is that Highnoon Laboratories set up a medical camp at Faisalabad in year 2002 for vaccination of Hepatitis; he in the first instance was injected Heprovac-B followed by second dose of the same vaccination sometimes thereafter; the Intelligence Bureau on complaints, raided the camp and took into possession various medicines; the appellant felt some weakness in his eyesight and the Specialists of the District Headquarters Hospital, Faisalabad diagnosed that it had

been caused due to usage of some medicine; the appellant understood afterwards that the vaccine injected to him was imported by Highnoon Laboratories, which could not stimulate the production of anti-bodies and procure immunity from the above said disease and that the injurious vaccination had damaged his eyesight; he being aggrieved, filed Writ Petition No.7967 of 2005, which was dismissed and then he filed an I.C.A., which is still pending adjudication; the appellant lodged a complaint before the Hon'ble Chief Justice, Supreme Court of Pakistan, which was taken up as Human Rights Case No.453-P of 2009 and disposed of on 6-1-2010 with the following observation:--

> **"....., states at bar that the drug in question is not being imported or sold by the Company since the year 2006. This statement is not been converted by the petitioner, Muhammad Humayun Khan, as well as the representative of the Ministry of Health, Mr. M. Masood, Deputy Drug Controller, who states that the drug in question has been deregistered. In this view of the matter, there is nothing left to be done in the present case. If the petitioner has any personal grievance, he has remedy available in the civil Court."**

After fetching the aforesaid direction from the Hon'ble Supreme Court, the appellant decided to take up the matter on the criminal law side and moved an application for registration of a criminal case before the R.P.O., Faisalabad, but to no avail; it prompted him to approach the learned Ex-Officio Justice of Peace, Faisalabad under sections 22-A and 22-B, Cr.P.C., but he failed in his attempt; he filed Writ Petition No.5250 of 2011 against the order dated 16-7-2010 passed by the learned Ex-Officio Justice of Peace, which was dismissed in limine by a learned Single Judge in Chamber, vide order dated 14-3-2011 with the following observations:--

> **"3. The learned Additional Sessions Judge/JOP has based his order on judgment dated 6-1-2010 of the august Supreme Court of Pakistan passed in Human Rights Case No.453-P of 2009 whereby it was held that the petitioner has remedy available in the civil court. The contention of the petitioner that the learned Additional Sessions Judge/JOP has failed to appreciate that the civil remedy is distinguished from the remedy on criminal side and both can be availed of at a time. The contention of the petitioner that he was injected the Vaccination, which was not fit for human use, if proved, would constitute a cause of action for him to claim damages and seek remedy from the civil court. The medicine was imported from China and it is not clear that Messrs Highnoon Laboratories had the knowledge of the deficiency in the medicine. The august Supreme Court of Pakistan has dealt with the matter and held that the petitioner may avail of the remedy in the civil court. In these circumstances, the learned Additional Sessions Judge/JOP was fully justified in turning down the prayer for issuance of direction to respondent No.2 to register the criminal case."**

3. After having heard learned counsel for the appellant and considered the matter from all angles, we are of the considered view that the grievance of the petitioner in its present form cannot invoke any penal provision of law nor it necessitates the registration of a criminal case as he had been directed by the Hon'ble Supreme Court of Pakistan to take recourse to the civil law for redressal of his personal grievance. The contention of learned counsel for the appellant that the vaccination in question had caused weakening of the eyesight of the appellant is a far-fetched cry as the appellant does not appear to

have any evidence, which could render his plea cogent or believable. The appellant merely relies upon his verbal assertions rather than hinting at some documentary evidence, which may show some nexus between his alleged claim of loss of eyesight and use of vaccination in-question. The impugned order appears to have been passed with sound reasoning and convincing arguments, therefore, it does not call for interference by this Court.

4. Resultantly, we find no merit in this appeal, which is hereby dismissed **in limine.**

N.H.Q./H-24/L Appeal dismissed.

2012 P Cr. L J 311

[Lahore]

Before Shahid Hameed Dar and Mehmood Maqbool Bajwa, JJ

ABDUL MUNAAF---Petitioner

Versus

THE STATE and another---Respondents

Criminal Appeal No. 1439 and Criminal Miscellaneous No.1 of 2011, decided on 12th December, 2011.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), S. 302(b)---Qatl-e-amd---Suspension of sentence---Convict despite being armed with weapon (Sota) did not use it at the time of the alleged occurrence---Lalkara attributed to the convict and allegation regarding his close linkage with the motive of the offence, could not be considered as circumstances, as co-convicts were burdened with---Abscondence of convict, however, drew a line of distinction between him and co-convicts but abscondence was not a conclusive proof of guilt as an innocent person may also run away, fearing reprisals of his adversaries or out of fear of being arrested by the police---Co-convicts, who were sentenced to identical terms of imprisonment as the convict had been admitted to bail by way of suspension of sentence despite their roles being graver than that of the convict---Sentence of convict was suspended, in circumstances, and he was released on bail accordingly.

Danyal Ijaz Chadhar for Petitioner

Khurram Khan, Deputy Prosecutor-General Punjab for the State.

Kh. Mehmood Ahmad for the Complainant

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks suspension of sentence and his consequential release on bail, as he was convicted under section 302(b), P.P.C. and sentenced to imprisonment for life, by learned Additional Sessions Judge, Gujrat, vide

judgment dated 1-8-2011.

2. Learned counsel for the petitioner submits that the petitioner has been convicted/sentenced for the only role of having raised Lalkara at, the time of occurrence; two co-convicts of the petitioner, Kashif-ur-Rehman and Muhammad Altaf, who were sentenced to identical terms of imprisonment, have been admitted to bail by way of suspension of sentence by this Court vide order dated 23-2-2010; the role of the petitioner is of lesser gravity to that of the released co-convicts, therefore, the petitioner may also be granted the same relief.

3. On the other hand, learned Deputy Prosecutor-General Punjab for the State assisted by learned counsel for the complainant disputes the prayer of the petitioner with the contention that the convict-petitioner having been admitted to bail on 21-4-2005, pending trial, absconded and he was arrested by the police on 25-11-2010; the petitioner's abscondance has not been explained by the other side, so he may not be admitted to bail as he would abscond again, if admitted to bail; the petitioner is directly linked with the motive part of the prosecution-case and his proven participation in the occurrence is distinguishable on facts from the case of his co-convicts, who had been granted bail earlier in consequence of suspension of their sentence.

4. After having heard learned counsel for the parties and perused the record, it is observed that the petitioner despite being armed did not use the weapon (Sofa), he held at the time of alleged occurrence. The Lalkara attributed to the petitioner, coupled with the allegation regarding his close linkage with the motive part of the prosecution case, cannot be considered as heavy circumstance as his co-convicts Kashif-ur-Rehman and Muhammad Altaf were burdened with. The factum of abscondance of the petitioner, however, draws a line of distinction between him and the above-named co-convicts, but we have to remember, that the abscondahce is not a conclusive proof of guilt of an accused. Sometimes, an innocent person may run away, fearing the reprisals of his adversaries or out of fear of being arrested by the police. To opt to be an absconder or to face the situation in a manlike manner, however, depends upon the chemistry of an individual, as different persons have been differently constituted by Almighty Allah. The co-convicts of the petitioner, namely, Kashif-ur-Rehman and Muhammad Altaf, had been granted bail by way of suspension of sentence vide order dated 23-2-2010 by this Court despite their role, according to the prosecution case was graver than that of the petitioner. A son and co-convict of the petitioner, namely, Amraiz has been awarded the death sentence. The true import of the evidence of abscondance of the petitioner shall be assessed at the time of final adjudication of the appeal, filed by the petitioner, who stands imprisoned since 25-10-2011.

5. For the foregoing reasons, we are inclined to accept this application, which is so done accordingly. The sentence of the petitioner is suspended and he shall be released on bail subject to furnishing bail bonds in the sum of Rs.5,00,000 (Rupees five lacs) with two sureties each in the like amount to the satisfaction of the learned trial Court.

M.W.A./A-225/L Sentences suspended.

2012 P Cr. L J 565

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ILYAS---Petitioner

Versus

MUHAMMAD NAZIR and another---Respondents

Criminal Miscellaneous No. 6379-BC-11, decided on 28th June, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497(5)---Penal Code (XLV of 1860), Ss.302, 324 & 34---Qatl-e-amd and attempt to commit qatl-e-amd---Application for cancellation of bail---Details of occurrence, no doubt were heart rendering as six persons were murdered and two wounded during the occurrence, but courts were not driven by sentiments---Data/evidence collected by the Investigating Officer during the course of investigation would matter, while adjudicating upon the bail plea of accused---Joint role of firing had been ascribed to all accused persons---Accused was arrested about 8 months after registration of F.I.R. and was admitted to bail---Plea of alibi raised by accused during investigation was verified by the Investigating Officer--- Accused underwent physical remand for 14 days, but nothing was recovered at his instance---Bail ought not be withheld nor cancelled as punishment---Considerations for cancellation of bail were altogether different from the one, meant for grant/refusal of bail under S.497, Cr.P.C.---Commencement of trial and conclusion thereof could reprieve the anxiety of the applicant/complainant, but the situation as it persisted, did not require that the facility of bail granted to accused could be recalled only for the satisfaction of whimsical grudge of the complainant---Application for cancellation of bail, was dismissed in circumstances.

Mst. Irshad Begum v. Muhammad Afzal and another 1985 SCMR 1691 and Akmal Masih and others v. Salamat Masih and 4 others 1988 SCMR 918 rel.

Muhammad Alamgir Khan for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor-General Punjab for the State with Hameed S.-I.

Azhar Ilyas Bajwa for Respondent No. 1.

ORDER

SHAHID HAMEED DAR, J.---Through this petition Muhammad Ilyas petitioner, a relative of the deceased persons of this case has sought cancellation of post-arrest bail allowed to respondent No.1 by the learned Additional Sessions Judge, Gujranwala through order dated 10-5-2011.

2. Precisely the prosecution case as stated by the complainant is that he along with others was sitting in front of their haveli when they were attacked by 12 armed men, including the respondent-accused; on the joint lalkara of Muhammad Bashir and Muhammad Nazir (respondent No.1), all the accused made reckless firing at the place of occurrence resulting into the instant death of Muhammad Aslam, Muhammad Haleem, Muhammad

Ramzan, Muhammad Boota and Muhammad Sharif whereas Abdullah, Muhammad Saleem and Muhammad Ibrahim were badly wounded; Abdullah succumbed to the injuries lateron; the accused fled the scene of occurrence after committing the crime; the motive behind the occurrence pertained to a previous criminal case in respect of murder of Bawa Allah Ditta.

3. Learned counsel for the petitioner submits that the respondent-accused had been admitted to post-arrest bail on whimsical grounds which are not borne out from the record; the respondent-accused is vicariously liable for the occurrence as a whole as he was an active participant of the crime, having fired jointly on the complainant party being armed with a rifle; the Investigating Officer collected 135 crime empties from the place of occurrence; five of the co-accused of the respondent-accused still absconder; the life of the prosecution witnesses had been made miserable by the respondent-accused and his cronies, as they extended them threats of murder etc., so as to restrain them from deposing against the accused party; a criminal case has been registered against respondent No.1 under section 506, P.P.C.; lastly submits that the accused mentioned in the F.I.R. including the respondent-accused have committed a gruesome crime so he was not entitled for grant of bail and that the impugned order has caused serious prejudice to the petitioner.

4. On the other hand, learned counsel for the respondent-accused submits that the petitioner being father of his co-accused has been falsely involved in this case with mala fide intention; the accused was more than 60 years of age and with a fragile frame, he could not commit the occurrence, alleged against him; the accused-respondent underwent physical remand for 14 days but nothing was recovered at his instance; after extensive investigations it was opined by the Investigating Officer that Nazir accused had not taken part in the incident nor he was present at the spot at the relevant time; the trial Court has taken cognizance of the matter and after supply of the copies under section 265-C, Cr.P.C. to the accused, has fixed next date for framing of charge, on 5-7-2011; in view of likelihood of commencement of trial, the instant petition may not be allowed.

5. Learned Deputy Prosecutor-General Punjab endorses the submissions of learned counsel for the respondent accused by adding that the impugned order is sustainable by all means.

6. The details of the occurrence are heart rendering as six persons were murdered and two wounded during the occurrence, allegedly committed by 12 accused including the respondent accused, being armed with Kalashnikovs and rifles. The courts however, are not driven by sentiments. It is the data/evidence collected by the Investigating Officer during the course of investigation, which matters, while adjudicating upon the bail plea of an accused. A joint role of firing has been ascribed to all the accused. Muhammad Nazir respondent No. 1 was arrested on 6-3-2011, about 8 months after the registration of the F.I.R. and admitted to bail by the learned trial Court on 10-5-2011. The plea of alibi raised by the respondent accused during investigation was verified by the Investigating Officer with the opinion that accused Muhammad Nazir though not participated in the occurrence, had however abetted his co-accused to commit the occurrence. It has been strongly contended by learned counsel for the petitioner that the respondent accused had actively participated in the occurrence and overwhelming connecting evidence was available against him still he has been admitted to post arrest bail by the learned trial Court through the impugned

order which is neither well reasoned nor confidence-inspiring. I have gone through the bail granting order in question which may not be an ideal order but the fact remains that the learned trial Court after having delivered the copies to the accused under section 265-C, Cr.P.C. has set the stage for indictment of the accused on 5-7-2011. The commencement of trial or likelihood of commencement of trial in near future is a circumstance which has always been given importance by the courts in terms that it is not worth the occasion to pass an order for cancellation or recalling a bail granting order. Reliance in this regard is placed on "Mst. Irshad Begum v. Muhammad Afzal and another" (1985 SCMR 1691) and "Akmal Masih and others v. Salamat Masih and 4 others" (1988 SCMR 918).

7. It has been vehemently contended by learned counsel for the petitioner that the respondent accused after having been set at liberty had been misusing the concession of bail as he along with his co-accused had repeatedly intimidated the complainant and other prosecution witnesses so as to refrain them from adducing evidence against the accused. He has tendered copy of F.I.R. No. 644 of 2011, dated 3-6-2011 under section 506, P.P.C. registered at Police Station Civil Lines, Gujranwala to substantiate his argument. Learned counsel for the respondent accused has counter argued that the respondent accused had been declared innocent by the Investigating Officer in the said criminal case, in reply to which, learned counsel for the petitioner submits that the accused had sought pre-arrest bail in the said case and joined investigation but it had not been finalized by the Investigating Officer as yet. One thing itches the mind as to whether a person on the wrong side of 60s and with frail structure, like the respondent accused possesses, could do all, that had been alleged against him. There is a tendency to involve innocent persons with the guilty. Once an innocent person is falsely involved in a serious case he has to remain in jail for considerable time. When a person is detained in jail, all his dependents also suffer hardships. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of bail granted to him but no satisfactory reparation can be offered to an innocent man for his unjustified imprisonment at any stage in the case albeit, his acquittal in the long run. The bail ought not to be withheld nor cancelled as punishment. The respondent accused after having been arrested on 6-3-2011 underwent physical remand for complete 14 days but this time period remained barren. The considerations for cancellation of bail are altogether different from the one, meant for grant/refusal of bail under section 497, Cr.P.C. The commencement of trial and conclusion thereof may reprieve the anxiety of the petitioner in the long run but the situation as it persists now, does not require that the facility of bail granted to the respondent accused may be recalled only for the satisfaction of whimsical grudge of the complainant.

8. Therefore, I am not inclined to accept this application, which is dismissed accordingly.

H.B.T/M-226/L Application dismissed.

2012 P Cr. L J 625

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD IRFAN and others---Petitioners

Versus

THE STATE and others---Respondents

Criminal Miscellaneous No. 2152-B of 2010, decided on 19th January, 2011.

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

----S. 497(2)--- Penal Code (XLV of 1860), Ss. 3 02/324/33 7-A(i)(ii)/ 337-F(i)/337-F(iii)/337-F(v)/337-L(2)/427/404/148/149-=- Qatl-a-antd, attempt to commit qatl-e-amd, dishonest misappropriatiop of property of the deceased person, rioting armed with deadly weapons---Bail, grant of---Accused along with his co-accused being armed with klashnikovs had allegedly killed four persons by firing---Complainant, however, on the same day through his supplementary statement had entirely changed his version given in the F.I.R. and let off the three accused including the present accused specifically involving other persons---Was yet to be determined by Trial Court as to which of the attributions, are in the F.I.R. and the other in the supplementary statement or in the statement under S.512, Cr. P. C. was correct or believable against the accused---Such fact alone was sufficient to bring the case of accused within the scope of further inquiry as envisaged under S.497(2), Cr. P. C. ---Abscondence of accused could not impede the grant of bail to him, if his case fell within the ambit of further inquiry-Commencement of trial was also no ground to refuse bail to accused if his case was otherwise covered by S.497(2), Cr. P. C., which was his legal right---Only three formal witnesses had been so far examined by the prosecution and the trial was not likely to be concluded soon---Accused was admitted to bail in circumstances.

Mudassar Altaf v. State 2010 SCJ 504; Shaukat Ilahi v. Javed Iqbal and others 2010 SCMR 966; Sardar Munir Ahmad Dogar v. The State PLD 2004 SC 822; Ghulam Sarwar v. The State 2010 MLD 680 and PLD 1989 SC 585 ref.

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

----Ss. 161 & 156---Supplementary statement---Nature and value---Supplementary statement is a recent innovation, not recognized by law, devised by incompetent, incapable and dishonest Investigating Officers to cut short the process of investigation without realizing that such a short cut is generally destructive to the prosecution case---Practice of manufacturing and fabricating supplementary statements has to be checked by drastic measures--- Police high-ups and the Authorities at the helm of affairs should perceive the horrendous consequences caused by such innovation--- Unbridled powers enjoyed by the police would do more harm instead of doing good to the oppressed.

(c) Criminal Trial---

----Abscondence---Effect---Fugitive from law who cannot offer any explanation for his long standing abscondence or disappearance, loses some of his normal rights guaranteed under the substantive taw as well as the procedural law.

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

----S. 497(2)---Penal .Code (XLV of 1860), Ss. 302 & 324---Qatl-e-amd, attempt to commit qatl-e-amd---Bail, grant of---Further inquiry-=-Abscondence---Effect---Once the court comes to the conclusion that the case of accused falls within the ambit of further inquiry into his guilt, his abscondence cannot impede the grant of bail to him.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302 & 324---Qatl-e-amd, attempt to commit qatl-e-amd---Bail, grant of---Further inquiry---Commencement of trial---Effect---Commencement of trial is no ground to refuse bail to an accused if his case is otherwise covered by S.497(2), Cr.P.C. as it necessarily relates to his legal right.

PLD 1989 SC 585 ref.

Ch. Mehmood Akhtar Khan for Petitioners.

Pirzada Noor Ali Shakoori for the Complainant.

Malik Riaz Ahmad Saghla D.P.-G. and Muhammad Iftikhar A.S.-I. for the State.

ORDER

SHAHID HAMEED DAR, J.---At the very outset the learned counsel for the petitioner wishes to withdraw the instant petition to the extent of Umer Farooq accused-petitioner dismissed as having not been pressed. -

2. So far as Muhammad Irfran accused-petitioner is concerned, he was arrested on 8-8-2010 in connection with case F.I.R. No.12 of 2007, for offences under sections 302, 324, 337-A(i), 337-A(ii), 337-F(i), 337-F(iii), 337-F(v), 337-L(2), 427, 404, 148, 149, P.P.C., registered at Police Station Lawa, Tehsil Talagang, District Chakwal.

3. Briefly, Khalid Mehmood complainant has alleged in the F.I.R. that Muhammad Irfan (petitioner) armed with Kalashnikov,. in the company of his armed co-accused made incessant firing at the vehicles driven by the complainant party as a result whereof, 7 persons Gohar Khan, Muhammad Yar. Yaqub Khan, Muhammad Ilyas, Lal Khan, Muhammad Nasir, and Khalid Saeed lost their lives and four others namely Khalid Mehmood, Muhammad Hanif, Sajid Akhtar and Muhammad Ijaz received multiple firearm injuries; the firing made by the trio of Muhammad Irfan, Malik Khan and Nazar Khan caused the death of Muhammad Yaqub, Muhammad Ilyas, Khalid Saeed and Muhammad Nasir. The motive behind the occurrence pertained to previous enmity between the parties which had already severed the lifeline of as many as five persons on both the sides.

4. Learned counsel for the 'petitioner submits that there are four sets of accused and each one has been burdened with a specific liability by the complainant; Aitbar Khan and. Muhammad Riaz co-accused of the petitioner had been admitted to post-arrest bail (Criminal Miscellaneous No.337-B of 2010) and (Criminal Miscellaneous No.1885-B of 2010) vide orders dated 24-3-2010' and 19-1-2010 respectively; the-complainant after registration of the F.I.R. made a supplementary statement on 26-2-2007 wherein he changed the tenor of roles attributed to Aitbar Khan, Muhammad Riaz and Muhammad Irfan accused with the contention/ improvement that Aitbar Khan and Muhammad Riaz accused had fired

effectively at the time of occurrence, whereas, he contended vice versa in respect of Muhammad Irfan accused, rather, let him off the hook by altering the allegation to an absolute new look; all the witnesses in their statements under section 161, Cr.P.C. had categorically supported the supplementary statement of the complainant whereby they burdened accused Muhammad Tariq, Aitbar Khan, Muhammad Riaz and Habib Ullah with the same role in place of Nazar Khan, Malik Khan, and Muhammad Irfan (petitioner); Muhammad Hanif, Muhammad Ijaz P.Ws. drivers of the vehicles have contended in their statements under section 161, Cr.P.C. that the crime was committed by some unknown accused and they did not nominate the accused-petitioner or any of the accused mentioned in the F.I.R. as the assailants; the previous enmity between the parties is admitted and only a joint and divergent role has been assigned to the petitioner-accused; the order through which, accused Aitbar Khan and Muhammad Riaz had been admitted to bail are still intact and have not been assailed by the complainant before any forum, so the petitioner having an identical case deserves the same treatment on the dictum of consistency; the complainant and injured P.Ws., five in number, recorded their statements under section 512, Cr.P.C. before the Anti-Terrorism Court, Rawalpindi wherein they followed the attributions made in the supplementary statement of the complainant and shelved the story of the F.I.R. pertaining to the accused-.petitioner..

5. On the other hand, learned Deputy Prosecutor-General assisted by the learned counsel for the complainant has strenuously opposed the grant of bail to the petitioner with the contention that the petitioner is named in the F.I.R. with a specific role that he along with his co-accused being armed with Kalashnikovs resorted to reckless firing at the vehicles of the complainant side and committed carnage by having killed as many as seven persons and almost killing another four as they too, received multiple firearm injuries on their bodies; the role of the petitioner is not at par with that of Aitbar Khan and Muhammad Riaz accused as the complainant had not burdened them with specific liability in the F.I.R.; the supplementary statement of the complainant is of no value and the petitioner cannot harvest any benefit out of the same for the reason that it did not have the acceptance and recognition of law; the petitioner absconded after the occurrence and was arrested after more than two years of the occurrence and being a fugitive from law he is not entitled to the relief prayed for; the role of the petitioner is distinctly separable from the role of the co-accused Aitbar Khan and Muhammad Riaz so he cannot ask for equity of treatment; the trial has commenced and three prosecution witnesses have already been recorded by the learned trial Court. Relies upon "Mudassar Altaf v. State" (2010 SCJ 504), "Shoukat Ilahi v. Javed Iqbal and others" (2010 SCMR 966), "Sardar Munir Ahmad Dogar v. The State" (PLD 2004 Supreme Court 822) and "Ghulam Sarwar v. The State" (2010 MLD 680)

6. Learned counsel for the parties have been heard and the relevant record has been gone into.

7. It has been categorically alleged by the complainant in the F.I.R. that Muhammad Irfan (petitioner) along with his co-accused Malik Khan and Nazar Khan being armed with Kalashnikovs, sprayed volleys of bullets at the victims with community of intention which caused the death of Muhammad Yaqub, Muhammad Ilyas, Khalid Saeed and Muhammad Nasir. The complainant did not stick to his version as contained in the F.I.R. and he rather

_rushed into making a supplementary statement on the same day wherein he entirely changed the role attributed to as many as five accused, Aitbar Khan, Muhammad Riaz, Nazar Khan, Malik Khan and Muhammad Irfan (petitioner). By way of his supplementary statement, the complainant made specific attributions to Aitbar Khan and Muhammad Riaz accused and let off Nazar Khan, Malik Khan and Muhammad Irfan accused. So far as the change of roles of the mentioned accused was concerned, it must be at the back of the mind of the complainant as to how and under what circumstances, he improved upon his earlier version under section 154, Cr.P.C. and it was why he chose to burden off the above-named three accused, including the petitioner. It has been held time and again by this court as well as by the apex Court of the country that a supplementary statement is a recent innovation, not recognized by law, which has been devised by incompetent, incapable and dishonest police officers/I.Os. to cut short the process of investigation without hearing in mind that such a short cut is generally destructive to the case of the prosecution. This practice of manufacturing and fabricating the supplementary statements continues unabated which has to be checked by some drastic measures. Till the time, the police high-ups and the authorities at the helm of affairs wake up and perceive horrendous consequences caused by such innovation, the unbridled powers enjoyed by the police would do more harm instead of doing good to the oppressed. Here in this case, barring the supplementary statement, the complainant and the injured P.Ws., Khalid Mehmood, Sajid Akhtar, Tanvir Aslam, Najaf Raza and Gul Jahan appeared before the learned trial Court on 19-7-2008 and recorded statement under section 512, Cr.P.C. wherein they all followed the changed/improved version of the complainant as underlined by him in his supplementary statement. This is a million dollar question for the prosecution to answer' as to which of the attributions, one in the F.I.R. and the other in supplementary statement or in the statement under section 512, Cr.P.C., was correct or believable against the accused-petitioner. This fact alone is sufficient to bring the case of the petitioner within the scope of further inquiry as envisaged under section 497(2), Cr.P.C.

8. So far as the allegation of abscondence against the petitioner is concerned, there is no cavil to the proposition that a fugitive from law, who cannot offer any explanation for his long standing abscondence/dis?appearance, loses some of his normal rights guaranteed under the substantive law as well as the procedural law. Once the court comes to the conclusion that the case of an accused falls within the ambit of further inquiry into his guilt, the alleged abscondence cannot impede the grant of bail to the' accused.

9. So far as the commencement of the trial and the fact that three prosecution witnesses have been recorded is concerned, it has been brought to the notice of this court that after the arrest of a few more accused in this case, the de novo trial has started before the learned trial Court. It has been held by the august Supreme Court of Pakistan in PLD 1989 SC 585 that commencement of trial is no ground to refuse the bail to an accused, if his case is otherwise covered by section 497(2), Cr.P.C. as it necessarily relates to the legal right of the accused. Only three formal prosecution witnesses have been recorded, so far and the conclusion of the trial is not expected in a foreseeable future. The petitioner, in the attending circumstances, cannot be denied his legitimate right of seeking release on bail, once he has been entitled thereto.

10. For the foregoing reasons, I accept the instant petition and admit the petitioner (Muhammad Irfan) to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 each, with two sureties each in the ' like amount to the satisfaction of the learned trial Court.

N.H.Q. /M-661L Bail allowed.

2012 P Cr. L J 905

[Lahore]

Before Shahid Hameed Dar and Mehmood Maqbool Bajwa, JJ

MUHAMMAD YOUSAF FAROOQI---Petitioner

versus

GOVERNMENT OF PUNJAB---Respondent

Writ Petition No.16295 of 2011, decided on 17th August, 2011.

Anti-Terrorism Act (XXVII of 1997)---

----S. 11EE & Fourth Schedule---Constitution of Pakistan, Art. 199---Constitutional petition---Inclusion of petitioner's name for a second time in list prepared under Fourth Sched. of the Act---Legality---Petitioner's name was placed in the list prepared under Fourth Schedule of Anti-Terrorism Act, 1997 on 27-06-2006, and he was required to execute a bond for keeping good behavior for a period of three years---Petitioner filed constitutional petition before the High Court, which on 10-3-2011, directed that name of petitioner be deleted from the Fourth Schedule of Anti-Terrorism Act, 1997---Home Department, Government of Punjab (Authority), deleted name of petitioner from Fourth Schedule of Anti-Terrorism Act, 1997 on 5-5-2011 but on the very same day i.e. 5-5-2011, through an order, included petitioner's name once again in the list of said Schedule---According to the Authority, activities of petitioner were allegedly found detrimental and hazardous to the public peace and tranquillity, maintenance of public order and sectarian harmony for placement of his name in the Fourth Schedule of Anti-Terrorism Act, 1997, but such activities were never disclosed nor brought on record to justify placing of petitioner's name in list of the said Schedule, which lasted for five years and was finally recalled on 5-5-2011---Authority, instead of deleting the name of the petitioner from the Fourth Schedule in the real sense resorted to unlawful exercise of including his name again in the list of the said Schedule, which could not be approved of under any circumstance---No evidence or reason had been offered by the Authority to justify inclusion of petitioner's name in the said list and could not come up with a clear answer and indication as to the availability of the material/reasons, except for an assertion that District Investigation Committee had some secret information/data against the petitioner---Authority had overdone and instead of learning from its mistake committed earlier repeated the same at the cost of the liberty of the petitioner guaranteed under the Constitution---Constitutional petition was allowed, impugned order was set aside and the Authority was directed to remove the name of petitioner from the list prepared under Fourth

Schedule of the Anti-Terrorism Act, 1997.

Arif Mehmood Rana for Petitioner.

Ch. Muhammad Shabbir Gujjar, A.A.-G. with Irfan Ali Chheena, S.O., Home Department Punjab, Lahore for Respondent.

ORDER

SHAHID HAMEED DAR, J.---Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner seeks direction of this Court in the name of the respondent (Secretary, Home Department, Civil Secretariat, Lahore) to delete his name from the list prepared under Fourth Schedule to section 11EE of the Anti-Terrorism Act, 1997 and also to restrain the respondent from illegally harassing him and his family.

2. The facts leading to the filing of the instant petition are that the name of the petitioner was placed in Fourth Schedule of section 11EE of the Anti-Terrorism Act, 1997 vide Order No.9-55-H-SPL-I/06, dated 27-6-2006 and he was required to execute a bond for keeping good behavior for a period of three years; during the said period of time, his movements were curtailed and few restrictions were imposed upon him including the one that he would inform and seek prior permission of the local police station before he moves to any other place beyond the jurisdiction of said police station and he would not enter the places mentioned under section 11EE(2)(a) of the Act, ibid; the ordeal of the petitioner continued for as many as five years, which was brought to an end by this Court vide order dated 10-3-2011 passed in Writ Petition No.1528 of 2011, when it was directed that the name of the petitioner be deleted from Fourth Schedule of Anti-Terrorism Act, 1997 as the law did not permit it to curtail his liberties for a period exceeding three years under the garb of the aforesaid order. The case of the petitioner, after direction of this Court, was taken up by the Home Department and his name was deleted from the Fourth Schedule on 5-5-2011, but with a cunningness his name was again placed in the said Schedule on the same day i.e. 5-5-2011, without affording him any opportunity to rejoice the deletion of his name by the Home Department, hence, the instant petition.

3. Learned counsel for the petitioner contended that according to section 11EE of the Act, only names of those persons could be inserted in the Fourth Schedule, who were activists or office-bearers of some proscribed organization or involved in sectarian activities or any such activities which are detrimental to public peace and tranquillity; the name of the petitioner had been placed in the said Schedule without any cogent or confidence inspiring material and he had been victimized under the aforesaid order; the petitioner had no link or concern with any proscribed organization nor he was an activist thereof, still, the wrath of the establishment fell upon him; no evidence exists on record to justify the repeated placement of the name of the petitioner in Fourth Schedule of the Anti-Terrorism Act, 1997 and it has been done in a bizarre way without caring for the requirement of the law, equity and justice; the Authority could not collect any data regarding the alleged detrimental activities of the petitioner either at the time of placement of his name in Fourth Schedule on 27-6-2006 nor they could discover same even on 5-5-2011; the impugned order has been passed by Home Department, Government of Punjab, the respondent, maliciously and the liberty of the petitioner has been curtailed without caring for the safeguards provided by the Constitution

of Islamic Republic of Pakistan; the impugned order has resulted in grave miscarriage of justice and it may be ordered to be recalled.

4. On the other hand, learned Assistant Advocate-General Punjab resisted this plea with the submission that the petitioner did not file any appeal before the Provincial Government as provided in subsection (3) of section 11EE of Anti-Terrorism Act, 1997; sufficient evidence had been provided by the law enforcing agencies (District Investigation Committee) against the petitioner hinting at his unwholesome, uncalled for and dangerous activities, which prompted the Authority to issue the order in question. Further submits that the name of the petitioner has been rightly placed in Fourth Schedule of Anti Terrorism Act, 1997; the mere fact that the petitioner has not been convicted in any criminal case does not necessarily mean that he did not have links with any proscribed organization.

5. After having heard learned counsel for the parties and perused the record, we find that the activities of the petitioner were allegedly found detrimental and hazardous to the public peace and tranquillity, maintenance of public order and sectarian harmony by the Home Department for placement of his name in Fourth Schedule of Anti-Terrorism Act 1997 but such activities were never disclosed nor brought on record to justify the issuance of aforesaid order dated 27-6-2006, which lasted for five years and was finally recalled on 5-5-2011, as mentioned hereinbefore. If the sorrowful tale of the petitioner had been brought to an end by this Court vide order dated 10-3-2011, the Home Department toyed with the matter and instead of deleting the name of the petitioner from the Fourth Schedule in the real sense resorted to an unlawful exercise mentioned hereinbefore, which could not be approved of under any circumstance. We have gone through the impugned order annexed with the instant petition and find that no evidence or reason has been offered by the respondent-Secretary, Home Department, Government of Punjab, to justify the issuance of the impugned order. Except for a bald assertion that D.I.C. had some secret information/data against the petitioner, the learned Assistant Advocate-General Punjab, could not come up with a clear answer and indication as to the availability of the material/reasons, which formed basis for issuance of the above-said order.

6. A person having links with proscribed organization being activist thereof or falling into such activities, which may endanger the whole fabric of the society or threaten public peace, tranquillity or cause fanning out of religious and sectarian hatred etc., must be placed under Fourth Schedule as the said provision of law has been brought on the Statute Book for the said purpose, but in the instant case, no such reason has been offered or no such evidence has been hinted at either by the Authority or by the learned Assistant Advocate-General Punjab, which could justify the action of the respondent for placing the name of the petitioner in the Fourth Schedule as Re-entry on 5-5-2011 immediately on deletion of his name from the said schedule, which, for the first time, had been inserted through order dated 27-6-2006. It appears to be an overdoing on the part of the respondent, who instead of having learnt a lesson from the mistake committed by him earlier repeated the same at the cost of liberty of a citizen (the petitioner) guaranteed under the Constitution of Islamic Republic of Pakistan. We do not find any good reason to believe that the impugned order or the repeated order dated 5-5-2011, had been passed by the respondent on some sound reasoning and believable evidence, which ought to have been hinted at, if there was any. The mechanical exercise undertaken by the respondent does no good to the society or to the law arid order situation or

maintenance of public order or religious/sectarian harmony. It rather appears to be an eye-wash, which certainly militates against the requirement of law.

7. Therefore; we allow this petition and set aside the impugned order dated 5-5-2001 with a direction to the learned Assistant Advocate-General Punjab that name of the petitioner be get removed from the Fourth Schedule of Anti-Terrorism Act, 1997 forthwith.

M.W.A./M-353/L Petition allowed.

2012 P Cr. L J 1117

[Lahore]

Before Shahid Hameed Dar, J

NISAR AHMED alias KALI alias IMRAN alias NISARA---Petitioner

versus

THE STATE and another---Respondents

Criminal Miscellaneous No.167-B of 2012, decided on 9th February, 2012.

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

----S. 497(2)--- Penal Code (XLV of 1860), Ss. 395/412/392/ 109/337-A(ii)---Dacoity, dishonestly receiving property stolen in the commission of dacoity, robbery, abetment, shajjah-i-mudihah---Bail, grant of---Further inquiry---Complainant while reporting the crime to the police gave a brief description of the external features and complexion of the unknown accused which warranted holding of a test identification parade to establish identity of the accused---Investigation officer instead of conducting an identification parade, resorted to a short-cut by fabricating supplementary statement of the complainant---Contents of supplementary statement of complainant revealed that accused persons hailed from different parts of two provinces, but it was not known as to how the complainant learnt the names of the accused, their parentage and places of residence---Fact that complainant was guided by the police to implicate the accused in the case could not be ruled out--- Recovery of two gold bangles, allegedly at the instance of the accused, might have also been managed by the police to create incriminating evidence against the accused---Contention of prosecution that accused had been involved in fourteen previous cases of similar nature, could not be deemed a circumstance to deny bail to accused as he had not been convicted in any of the previous cases---Sufficient reasons existed to believe that case of accused needed further inquiry into his guilt as envisaged under S.497(2), Cr.P.C.---Bail application of accused was accepted and he was admitted to bail.

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

----Art. 22--- Penal Code (XLV of 1860), Ss. 395/412/392/109/ 337-A(ii)---Identification parade---Practice of police to cut short investigation by producing supplementary statement instead of holding identification parade was deprecated by High Court.

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

----Art. 22--- Penal Code (XLV of 1860), Ss. 395/412/392/109/ 337-A(ii)---Identification parade--- Production of supplementary statement instead of holding identification parade---Validity---Cutting short process of investigation by way of supplementary statement does not serve any lawful purpose nor it creates any admissible evidence, and such a statement cannot be equated with lawful evidence of test identification parade.

Muhammad Aslam Khan Dhukkur for Petitioner.

Khalid Pervaiz Uppal, D.P.-G. with Khan Muhammad S.-I. for the State.

Complainant in person.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No 90, dated 6-6-2011, under sections 395, 412, 392, 109, 337-A(ii), P.P.C., registered at Police Station Ab-e-Hayat, District Rahim Yar Khan.

2. Precisely the prosecution case as stated by Imran Saleem complainant is that nine unknown accused trespassed into his house at about 2-00 a.m. on 6-6-2011, rendered the inmates of the house hostages, committed torture upon his brother Sajid Suleman, broke open the locks of the house and looted cash, gold ornaments and other valuables at gun point; the above said accused also committed the dacoity at the house of Noor Ahmad, the same night and snatched cash, gold ornaments etc. from the inmates of the said house as well.

3. The petitioner was nominated as an accused of this case by the complainant through his supplementary statement dated 25-6-2011 whereby he also nominated eight other accused belonging to different provinces of the country.

4. After having been arrested on 14-8-2011, the petitioner allegedly got recovered two gold bangles on 26-8-2011 which were seized by the I.O. through a memo of recovery.

5. After having heard learned counsel for the parties and perused the record, it is observed that the complainant while reporting the crime to the police gave a brief description of the external features and complexion of the unknown accused which warranted holding of test identification parade to establish the identity of the accused. The I.O. instead of resorting to said exercise preferred a shot-cut by fabricating supplementary statement of the complainant on 25-6-2011 without ever perceiving, as to how damaging could it be for the prosecution's case. The supplementary statement of the complainant has been read over by the learned DPG and it is learnt that some of the accused stated therein hail from different parts of Province Sindh and some of them belong to different areas of Province Punjab. No one knows as to how the complainant learnt the names of the accused, their parentage and their places of residence. The probability cannot be ruled out that he had been guided in this regard by the police to implicate the above said persons in the instant case. It has been observed time and again by the Hon'ble Supreme Court of Pakistan as well as by this court that cutting short the process of investigation by way of a supplementary statement does not serve any lawful purpose nor it creates any admissible evidence and that such a-statement cannot be equated with lawful evidence of test identification parade but, the police appear to have turned a deaf ear to it which is unfortunate. In this background, the recovery of two bangles at the instance of the petitioner on 26-8-2011 may also be a 'managed' affair so as to create incriminating evidence against the petitioner, who after having been arrested in this case on 14-8-2011 stands incarcerated ever since. The argument of learned DPG that the petitioner has previous criminal antecedents, being involved in 14 other cases of almost identical nature may not be deemed a circumstance to decline his bail plea as he has not been convicted in any of the said cases. Sufficient reasons exist to believe that the petitioner's case constitutes need for further inquiry into his guilt as envisaged by section 497(2), Cr.P.C.

6. Therefore, I accept this application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

M.W.A./N-10/L Bail granted.

2012 P Cr. L J 1581

[Lahore]

Before Shahid Hameed Dar and Mehmood Maqbool Bajwa, JJ

SHAHZADI MUMTAZ alias TAJI---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.5000-B of 2012, decided on 24th April, 2012.

Criminal Procedure Code (V of 1898)---

----S.497---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Possession of narcotic---Bail, grant of---Allegation against the accused was that charas weighing 1250 grams was recovered from her possession---Investigation officer of the case took the accused in custody and allegedly committed zina-bil-jabr with her, whereafter an inquiry was held which concluded with the observation that allegation of zina-bil-jabr with the accused was correct---Contention of the accused (lady) was that she had been falsely involved in the case under a conspiracy by the Investigation Officer with ulterior motives and he ravished her after taking her in custody---Validity---Investigation Officer had abused his authority/power to commit an act of immorality, and sufficient reasons existed to believe that the accused had been falsely involved in the case under a plan by the investigation Officer---Innocence of the accused could not be ruled out---Bail application of accused was accepted and she was admitted to bail with directions that penal actions recommended/suggested by the Inquiry Officer against the Investigation Officer must be taken to their legitimate end.

Raja Tariq Nadeem for Petitioner.

Muhammad Akhlaq, Deputy Prosecutor-General with Ramzan, S.-I. for the State.

ORDER

The petitioner seeks post-arrest bail in case F.I.R. No.900 of 2011, registered under section 9(c) of The Control of Narcotic Substances Act, 1997, at Police Station Haveli Lakha, District Okara.

2. Precisely, the prosecution case as narrated by Muhammad Shoaib, ASI, is that he overpowered a lady on 13-12-2011 and recovered from her possession contraband charas weighing 1250 grams.

3. The petitioner in fact, had been arraigned as an accused in case F.I.R. No.880 of 2011, dated 8-12-2011 under section 9(c) of The Control of Narcotic Substances Act, 1997, registered at Police Station Haveli Lakha, District Okara by Muhammad Shoaib, ASI, who, being Investigating Officer of this case opined during investigation that it was she, who had trapped Muhammad Irfan alias Fani accused by planting charas weighing 2-kilogram upon him and thus, he declared him innocent and in his place, the accused/ petitioner was involved as an accused in case F.I.R. No.880 of 2011 (supra).

4. The petitioner sought bail before arrest in case F.I.R. No.880 of 2011 (supra) and she was on ad interim pre-arrest bail when Muhammad Shoaib, ASI, booked her in the instant case on 13-12-2011, which led to the dismissal of her pre-arrest bail application in the said case (880 of 2011 supra) on 17-12-2011. Muhammad Shoaib, ASI, after having taken her in custody, allegedly committed Zina bil-Jabr with her, regarding which an inquiry was held by the S.P. (Investigation), Sahiwal Branch, Sahiwal, during the course of which it was concluded by him that allegation of commission of Zina bil-Jabr by Muhammad Shoaib, ASI, with Mst. Shehzadi Mumtaz alias Taji (petitioner) was correct. By holding the delinquent police official guilty, the Inquiry Officer recommended for certain departmental and penal actions against him.

5. Learned counsel for the petitioner having referred to the aforesaid circumstances submits that the petitioner has been falsely involved in this case under a conspiracy by Muhammad Shoaib, ASI, with ulterior motives and having taken in her custody, he ravished her. The circumstances of the case are hair-raising and reflect a picture of characterlessness of a police official who abused his authority/power to commit an act of immorality. Such a nasty element is certainly a stigma on the Police Department. There exist sufficient reasons to believe that the petitioner has been falsely involved in this case by Muhammad Shoaib, ASI, under a devilish plan and her innocence in the instant case cannot be outrightly ruled out. Therefore, we accept this application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs.100,000 (Rupees one hundred thousand) with one surety in the like amount to the satisfaction of the learned trial Court.

6. Before parting with this order it is directed that the penal actions as suggested by the Inquiry Officer and recommendations made by him against the morally corrupt police official (Muhammad Shoaib, ASI) must be taken to its legitimate end and a report to this effect be submitted before this Court through Deputy Registrar (Judicial).

MWA/M-163/L Bail granted.

2012 Y L R 381

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD FAROOQ alias PANNA---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous Nos.9099-B and 10064 of 2011, decided on No.23rd September, 2011.

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

----S. 497---Penal Code (XLV of 1860), Ss.302/ 324/ 148/ 149/ 109--- Qatl-e-amd, attempt to commit qatl-e-amd, abetment---Bail, refusal of---Accused joined by his co-accused had committed a gruesome offence being armed with deadly weapons and gunned down seven persons at the festivity ceremony of "Rasm-e-Hina" of brother of the complainant---Indiscriminate firing by accused did not make any distinction between their foes and strangers and even killed an electrician at the spot, who was busy in installating decoration lights on the house and had nothing to do with the rivalry between the parties---Some other persons present in the street had also received firearm injuries as a result of said firing by the accused---Accused was a hardened and desperate criminal who along with the co-accused had turned a joyous festival into a wailing scenario within no time---Complainant had also been murdered when co-accused had absconded---Case of accused was hit by the exceptional clause of the fifth proviso to S.497, Cr.P.C.---Bail was declined to accused, in circumstances.

Mashkoor v. The State 2009 PCr.LJ 110 and Wajid Ali v. The State 2009 PCr.LJ 275 ref.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss.302/ 324/ 148/ 149/ 109---Qatl-e-amd, attempt to commit qatl-e-amd, abetment---Bail, grant of---Accused along with his co-accused had allegedly hatched up a conspiracy and abetted their co-accused to commit the main occurrence---Time, date and place of conspiracy and the names of the witnesses of conspiracy were not mentioned in the F.I.R.---Two witnesses had been produced by the complainant before the Investigating Officer one month after the occurrence in support of abetment against the accused, but none of them had explained the reason for the silence for such a long period---Value of statements of the said witnesses would be assessed at the trial---Case against accused required further inquiry within the meaning of S. 497, Cr.P.C.---Accused was admitted to bail in circumstances.

Tayyab Ramzan for Petitioner (in Criminal Miscellaneous No.9099-B of 2011).

Asghar Ali Gill for Petitioner (in Criminal Miscellaneous No.10064-B of 2011).

Khurram Khan, Deputy Prosecutor-General Punjab for the State.

Muhammad Afzal Siddiqui for the Complainant.

Muhammad Irshad S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---I intend to dispose of Criminal Miscellaneous No.9099-B of 2011 moved by Muhammad Farooq alias Panna petitioner as well as Criminal Miscellaneous No.10064/B of 2011 qua Muhammad Khalid alias Billa through this single order, as both the petitions arise out of one and the same F.I.R. No.844 of 2008 dated 28-11-2008 under sections 302, 324, 148, 149, 109 P.P.C. registered at Police Station, Badami Bagh, Lahore.

2. The allegation against Muhammad Farooq alias Panna (petitioner) is that he along

with his co-accused being armed with lethal weapons fired indiscriminately at the ceremony of Rasm-e-Hina of Kafeel Bhatti, and gunned down seven persons with multiple firearm injuries, one of whom namely Ghulam Hussain, electrician succumbed to the injuries at the spot. The motive behind the occurrence pertained to previous pitched enmity between the parties. The complainant alleged in the F.I.R. that the occurrence took place at the abetment of Muhammad Khalid alias Billa (petitioner) and Muhammad Farooq Bhatti accused.

3. Muhammad Farooq alias Panna (petitioner) was arrested on 8-2-2009 and he is behind the bars ever-since. Muhammad Khalid alias Billa (petitioner) was arrested in this case on 20-4-2011. The complainant did not mention in the F.I.R. as to the time, date, place and the names of witnesses qua the factum of hatching up of conspiracy by the accused but he produced two witnesses Shahzad Butt and Muhammad Ashfaq before the I.O. on 6-12-2008 who stated about the factum of hatching up of conspiracy by the accused petitioner in cahoots of his above said co-accused, joined by others mentioned in later part of the F.I.R. They, however, did not offer any explanation as to the period of silence, they observed from the date of the alleged occurrence.

4. Learned counsel for the petitioner Muhammad Farooq alias Panna submits that the petitioner is entitled for grant of bail on the ground of statutory delay in conclusion of the trial which according to her has not even taken off as yet and it is still at the stage of submission of supplementary/ secondary challan against the accused; the trial of the instant case for the first instance was taken up by the Anti-Terrorism Court, Lahore and 4/5 prosecution witnesses had been recorded when learned Special Judge while exercising its authority under section 23 of the Anti-Terrorism Act, 1997 transferred it to the court of ordinary jurisdiction, where no fresh evidence has been recorded to date; the petitioner is not a hardened, desperate or a dangerous criminal as he has not been previously convicted for sentence of death or imprisonment for life nor he had committed an offence punishable under Anti-Terrorism Act, 1997; the delay in conclusion of the trial is not on the part of the petitioner nor any other person acting on his behalf is responsible in this regard; the petitioner despite having undergone 14 days physical remand did not lead to the recovery of any incriminating article nor he had been burdened with any specific role by the complainant. Learned counsel for the petitioner has relied upon case titled Mashkoor v. The State (2009 PCr.LJ 110) and Wajid Ali v. The State (2009 PCr.LJ 275).

5. Learned counsel for Muhammad Khalid alias Billa submits that prosecution is badly short of connecting evidence against the petitioner as the complainant of this case failed to mention the time, date, place, and the names of the witnesses in the F.I.R. qua the allegation of hatching up of conspiracy by the accused; the abscondence of the petitioner may not be deemed conclusive as petitioner's case calls for further probe into his guilt, within the meaning of section 497(2) Cr.P.C.

6. On the other hand, learned counsel for the complainant submits that the petitioner Muhammad Farooq alias Panna joined by his co-accused committed a gruesome offence during the course of which they committed cold-blooded murder of Ghulam Hussain electrician and caused injuries to another six; the mode of occurrence suggests that the accused-petitioner was a hardened and a desperate criminal and his case is hit by the exceptional clause of the 5th proviso to section 497, Cr.P.C; the complainant Abdul Waheed

had been murdered on 6-9-2010 by the relatives of both the petitioners so this is yet another factor showing the desperate character of the accused; the trial could not show progress for the simple reason that co-accused of the petitioners had absconded and they were arrested one after the other so it was why, the trial was at the stage of requisitioning complete report under section 173, Cr.P.C; Muhammad Farooq alias Panna accused twice sought bail before arrest and absconded and he was finally arrested on 8-2-2009.

7. After having heard learned counsel for the parties and perused the record, I find that accused Muhammad Farooq alias Panna joined by his co-accused committed a gruesome offence being armed with different weaponry and gunned down seven persons at the scene of festivity of Rasm-e-Hina of Kafeel, the brother of the complainant, one of whom Ghulam Hussain, an electrician, who was installing decorative lights on the house of the intended bridegroom, succumbed to the injuries at the spot. The act of the petitioner and that of his co-accused certainly shows that they are the persons of desperate character who did not think twice before spraying volleys of bullets at the place of occurrence with such indiscrimination that they did not care for the strangers or their foes. Ghulam Hussain, deceased, the poor soul had nothing to do with the rivalry between the complainant and the accused who was present at the spot solely for the purpose of earning bread and butter for his family. Besides him some other persons present in the street namely Farooq, Zaheer and Shahid were also deflated to the ground with firearm injuries by the accused for none of their fault. The delay in conclusion of the trial may not have been occasioned by the accused-petitioner Muhammad Farooq alias Panna but I do not find his case fit enough for setting him at liberty as the crime committed by him, in the company of his co-accused, renders him a hardened and a desperate criminal. There may not be any special meaning to the 'adjectives' i.e., hardened, desperate or dangerous criminal and to formulate an opinion in this regard, the court may take into consideration the mode of occurrence and the way an accused behaved himself at the relevant time of occurrence. The accused-petitioner and his co-accused turned a joy-filled festival into a wailing circumstance within no time. The complainant of this case was also murdered when co-accused of the petitioner absconded. The facts of the case-law relied upon by learned counsel for the petitioner do not assimilate the facts and circumstances of the instant case. The case of the petitioner is hit by the exceptional clause of the fifth proviso to section 497, Cr.P.C, therefore, I am not inclined to accept this application which is dismissed accordingly.

8. So far as Muhammad Khalid alias Billa accused-petitioner is concerned, the only allegation against him is that he along with his co-accused Iqbal Bhatti hatched up a conspiracy and abetted their co-accused to commit the main occurrence. The complainant failed to mention the time, date and place where the conspiracy had been allegedly hatched up by the petitioner and his co-accused nor he could mention the names of the witnesses in the F.I.R. who allegedly overheard the conspiratorial chat of the accused. A couple of witnesses were produced by the complainant before the Investigating Officer about one month after the occurrence in support of allegation of abetment against the accused-petitioner but none of them offered any plausible explanation as to the period for which they kept quiet. The true import of the delayed statements of the witnesses Shahzad Butt and Muhammad Ashfaq shall be assessed by the learned trial court after recording evidence of the parties at trial. The induction of above said witnesses in the prosecution case by the complainant after significant delay renders the case of the petitioner Muhammad Khalid alias

Billa one of further inquiry, falling within the definition of section 497(2), Cr.P.C.

9. For the foregoing reasons I accept Criminal Miscellaneous No.10064/B of 2011 moved by Muhammad Khalid alias Billa and admit him to post-arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of learned trial court.

N.H.Q./M-348/L Order accordingly.

2012 Y L R 425

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD AMIN---Petitioner

Versus

THE STATE and others---Respondents

Criminal Miscellaneous No.8924-B of 2011, decided on 24th November, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.365-B---Abducting woman to compel for marriage---Bail, grant of---Accused was father of co-accused and he could not be expected to encourage or accompany his sons to commit an offence of moral turpitude or of abducting a woman---Accused was 80 years old---Factum of marriage between the co-accused and the alleged abductee was still to be probed into by Investigating Officer, who despite having received a copy of Nikahnama appeared to be reluctant to investigate the case from this angle---Co-accused had not been arrested so far---All able bodied male members of the family of the accused had been involved in the case---False implication of accused being father of co-accused and due to the malice or ulterior motives of the complainant, could not be ruled out---To keep the accused further incarcerated would be of no consequence to the prosecution case---Bail was allowed to accused in circumstances.

Ms. Khalida Parveen for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor-General for the State with Mehmood A.S.-I

Ch. Abdul Rasheed, for the Complainant

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.562 of 2011, dated 28-5-2011, under section 365-B P.P.C., registered at Police Station Factory Area, District Sheikhupura.

2. Muhammad Mukhtar Khan complainant has alleged in the F.I.R. that his daughter Mst.Nagina Shehzadi, aged 20 was alone at her house when accused Mazhar, Azhar, Zahid, Khizar and Muhammad Amin (petitioner) abducted her on 26-5-2011; witnesses Ghulam Qadir and Muhammad Imran witnessed the occurrence; the accused also took with them gold ornaments weighing 22 tolas and cash Rs.1,50,000.

3. Learned counsel for the petitioner submits that accused petitioner is aged 80 and father of his co-accused who are real brothers inter se; accused Khizar worked at the house of the complainant for many years and he developed liaison with Mst.Nagina Shehzadi which led to their marriage on 4-6-2011; the alleged victim filed a private complaint against her parents and others under sections 452/506/34, P.P.C. wherein she admitted to have

solemnized Nikah with Khizar Hayat accused; all the able bodied male members of the petitioner have been falsely involved in this case so he may be set at liberty.

4. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant submits that the petitioner along with his co-accused forcibly abducted the daughter of the complainant and also stole valuables worth lacs of rupees; the abductee is yet to be recovered who is in the clutches of the accused; mere old-age of the petitioner without any element of sickness does not help the petitioner in any manner; nikahnama was neither produced before the Investigating Officer nor it stands verified during the investigation.

5. After having heard learned counsel for the parties and perused the record, I find that petitioner is real father of his co-accused. His implication as an accused in this case, in the said perspective raises eyebrows, for, society has not run so bankrupt that a father would encourage or accompany his sons to commit an offence of moral turpitude or an offence like the one, under discussion. He has been stated to be aged 80 and it is the stage of life, which may bring senility as well. The factum of marriage between accused Khizar and Mst. Nagina Shehzadi is still to be probed into by the Investigating Officer who despite having received a copy or nikahnama appears to be reluctant to investigate the case from the said angle as Khizar Hayat accused has not been arrested so far. All able bodied male members of family of the petitioner have been involved in this case along with the petitioner whose false implication in this case being father of his co-accused and due to malice or ulterior motives of the complainant cannot be ruled out. To keep the petitioner incarcerated further would be of no consequence to the case of prosecution. Therefore, I accept this application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of learned trial court.

N.H.Q./M-350/L Bail allowed.

2012 Y L R 561

[Lahore]

Before Shahid Hameed Dar, J

UMER SHARIF---Petitioner

Versus

THE STATE and 2 others---Respondents

Criminal Miscellaneous No.8324-B of 2011, decided on 23rd August, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss.302/109/201/34---Qatl-e-amd, abetment, causing disappearance of evidence---Bail, grant of---Accused's father, who was co-accused and also complainant in the case, had already been granted bail by High Court---Case of accused was on better footing than that of his co-accused father---Father of accused, no doubt,

had burdened the accused with the murder of his mother in the F.I.R., but the circumstances mentioned in the F.I.R. had undergone a massive change---Outcome of the investigation and filing of the private complaints by two real brothers of the deceased regarding the same occurrence had not corroborated the allegation that the accused had throttled his mother to death---Bail could not be withheld as a matter of punishment---Equity of treatment had to be maintained amongst the accused placed in identical and similar circumstances---Sufficient reasons existed to believe that case of accused needed further inquiry as envisaged under S.497(2), Cr.P.C.---Accused was admitted to bail in circumstances.

Asif Ayub v. The State 2010 SCMR 1735 ref.

Syed Hassam Qadir Shah for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab for the State with Iqbal S.I.

Ghulam Farid Sanootra for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---Seeks bail after arrest in case F.I.R. No.459, dated 5-12-2010, under section 302, P.P.C. read with 109/34 P.P.C. (subsequently added), registered at Police Station Saddar Kamalia, District Toba Tek Singh as well as in private complaint filed by Muhammad Iqbal, real brother of the deceased lady Mst.Noor Bibi, under sections 302, 34, 109, 201 P.P.C., registered against accused Muhammad Sharif, Muhammad Hanif, Umer Sharif (petitioner) and Muhammad Razzaq.

2. Precisely the F.I.R. case as stated by Muhammad Sharif complainant is that on return to his house on 4-12-2010, he found his wife and children present inside the house; a little while thereafter he left for the house of his brother Dr.Hanif; he returned and found his wife and son Umar Sharif (petitioner) not present at home; Umer Sharif (petitioner) returned after sometime and informed his father Muhammad Sharif (complainant) in presence of Maulvi Manzoor and Muhammad Ishaq that he had strangulated his mother Mst.Noor Bibi to death due to her objectionable character; the dead body of Mst.Noor Bibi was found from a sugarcane field.

3. Muhammad Habib, a brother of the deceased lady moved an application before the S.H.O. Police Station Saddar Kamalia alleging therein that his sister Mst.Noor Bibi was murdered by her husband Muhammad Sharif and Umer Sharif (accused); Umer Sharif had held her mother during the act of strangulation by his co-accused near a sugarcane crop. It was further alleged by the applicant that his sister was murdered on the abetment of Dr.Muhammad Hanif and Razzaq.

4. Another brother of Mst.Noor Bibi (deceased) namely Muhammad lqbal filed a private complaint about the same occurrence, under sections 302, 34, 201, 109 P.P.C. against Muhammad Sharif and three others, including Umer Sharif (petitioner) with the allegation that Muhammad Sharif the husband of the deceased lady had throttled his wife Mst.Noor Bibi to death and Umer Sharif (petitioner) had gripped the legs of the deceased. According to the version of Muhammad Iqbal, his ill-fated sister had been done to death at the house of Muhammad Sharif accused. After fulfilment of requirement of section 202 Cr.P.C., the learned

trial court summoned the respondent-accused and proceeded with the private compliant in accordance with ratio of Nur Elahi's case (PLD 1966 SC 708). Learned trial court vide order dated 14-4-2011 observed that proceedings would be conducted in the complaint case and the State case would be put up along with it.

5. Learned counsel for the petitioner submits that the case of the petitioner is at par with that of his co-accused Muhammad Sharif who had been admitted to post-arrest bail by this court vide order dated 28-4-2011; it is a case of three versions and which one is nearer to truth shall be determined by the trial court during the course of trial; Muhammad Sharif is the principal accused of this case and his admission to post-arrest bail makes the case of the petitioner one of further inquiry as envisaged by section 497(2), Cr.P.C.

6. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant opposes with the contention that petitioner according to the F.I.R. case brutally murdered his mother by 'strangulating her; the medical evidence corroborates the above said allegation against the petitioner; notwithstanding the application of Muhammad Habib and private complaint, filed by Muhammad Iqbal, the fact remains that the petitioner is principal accused so far as the F.I.R. case goes; the allegations contained in the complaint case and in the application moved by Muhammad Habib cannot eclipse the allegations contained in the F.I.R. case; the principle of consistency is not applicable to the petitioner's case; relies upon "Asif Ayub v. The State" (2010 SCMR 1735)

7. After having heard learned counsel for the parties and perused the record, I find that Muhammad Sharif, who got lodged the F.I.R. against his son Umer Sharif (petitioner) for committing the murder of his mother Mst.Noor Bibi was found involved in the occurrence as the Investigating Officer collected incriminating material against him during the course of investigation which included the statements of two eye-witnesses Ghulam Farid and Nawaz who categorically stated before the Investigating Officer on 5-12-2010 that they had witnessed Muhammad Sharif strangulating his wife Mst.Noor Bibi to death and he was actively assisted by his son Umer Sharif (Petitioner) who allegedly rendered his mother helpless at the relevant time of occurrence by gripping her body. To the extent of Muhammad Sharif accused the investigation ended in volte face. He however was admitted to post-arrest bail by this court vide order dated 28-4-2011 passed in Criminal Miscellaneous No.3870-B of 2011, the relevant para whereof is reproduced hereunder:--

"Admittedly, petitioner is complainant of the main F.I.R. and it is a case of three versions, one given in the F.I.R. by the petitioner, second given by Muhammad Habib, real brother of the deceased, through an application dated 5-12-2010 on the basis of which report under section 173, Cr.P.C. has been submitted against the petitioner. Third version of this occurrence is the private complaint filed on 17-1-2011 by Muhammad Iqbal, another real brother of the deceased. Although in both the versions given by the brothers of the deceased, petitioner has been named as an accused but there are material contradictions in these two versions. In the complaint it is alleged that the place of occurrence is the house of the petitioner falling within the area of Police Station City Kamalia and that complainant along with other witnesses had seen the occurrence when they were present in the house of the petitioner at the time of occurrence, whereas in the State case set up against the petitioner on the statement of Muhammad Habib, another real brother of the deceased, it is alleged that occurrence took

place in the area of Chak No.725-GB in open fields falling within the territorial jurisdiction of Police Station Saddar Kamalia where he along with other P.Ws. had witnessed the occurrence in the light of their motorbike. It is very strange that authors of both the versions are real brothers of the deceased and they both claim that they saw the occurrence at two different places far away from each other. In view of three divergent versions available on the record, I am of the considered view that case against the petitioner prima facie falls within the purview of subsec-tion (2) of section 497, Cr.P.C. being one of further inquiry into his guilt. Evidentiary value of the joint recovery of motorcycle from two accused can validly be determined by the learned trial court after recording of some evidence."

8. The investigation of this case took a sharp turn on the very first day when Habib, the brother of the deceased lady appeared before the Investigating Officer to state that matrimonial relations between his sister Mst.Noor Bibi (deceased) and her husband Muhammad Sharif were not cordial and that he along with two eye-witnesses Ghulam Farid and Nawaz, having received a telephone call from his sister, followed Muhammad Sharif and Umer Sharif (petitioner) as they took Mst.Noor Bibi with them in the darkness of the night outside her house and by reaching near a sugarcane field, they witnessed Muhammad Sharif accused strangulating Mst.Noor Bibi whereas Umer Sharif (petitioner) held her body. The statement of Muhammad Habib was supported by the alleged eye-witnesses Ghulam Farid and Nawaz. The investigation was completed by the Investigating Officer, believing the statements of above said eye-witnesses. Muhammad Habib died lateron on so his real brother Muhammad Iqbal filed a private complaint against Muhammad Sharif and three others, including the petitioner with the same allegation as mentioned hereinabove. He produced cursory evidence before the trial court under section 202, Cr.P.C. on the same line but with a difference that the occurrence of murder had been committed by the accused at their residential house. The learned trial court took up the private complaint first for trial of the accused and virtually stitched the challan case with the complaint case vide order dated 14-4-2011. The case of the petitioner, in the attending circumstances, is on better footing than that of his co-accused Muhammad Sharif, who as discussed above, had already been admitted to bail. It has been strongly argued by the learned counsel for the complainant that Muhammad Sharif had burdened the petitioner with the allegation of murder of his mother, in the F.I.R. and it could not be expected of a father to falsely implicate his real son for the charge of murder. Had the circumstances of the F.I.R. case not undergone a massive change as noted above, the argument of learned counsel for the complainant might have gathered importance but in the changed situation, the argument of learned counsel loses relevance. The outcome of the investigation, the text of above said application moved by Muhammad Habib and the private complaint case filed by Muhammad Iqbal do not corroborate the allegation that petitioner throttled his mother. Bail should not be withheld as a matter of punishment. The equity of treatment has to be maintained amongst the accused placed in identical and similar circumstances. The petitioner's case however is on better footing. Sufficient reasons exist to believe that petitioner's case constitutes need for further inquiry as envisaged under section 497(2), Cr.P.C.; therefore, I accept this application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000 with two sureties each in the like amount to the satisfaction of learned trial court.

N.H.Q./U-12/L Bail allowed.

2012 Y L R 778

[Lahore]

Before Shahid Hameed Dar, J

SARDAR MUHAMMAD---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous No.4808/B of 2010, decided on 10th June, 2010.

Criminal Procedure Code (V of 1898)---

----S.497---Penal Code (XLV of 1860), S.302/324/353/186/224/225/148/149---West Pakistan Arms Ordinance (XX of 1965), S.13---Qatl-e-amd, attempt to commit qatl-e-amd, assault or criminal force to deter public servant from discharge of his duty, obstructing public servant in discharge of public functions, resistence or obstruction by a person to his lawful apprehension, resistance or obstruction to lawful apprehension of another person, rioting armed with deadly weapon and unlicenced possession of arms---Bail, refusal of---Accused was specifically charged for causing firearm injuries on the back of the deceased, which were supported by medical evidence---Mother of the deceased in her private complaint had also reiterated her version qua the said role of the accused---Investigating Officer had also found the accused to have participated in the occurrence at the relevant time---Case had reached the stage of recording of prosecution evidence---Accused having been assigned specific role of firing on the deceased, dictum of consistency was not applicable to him, as his case did not warrant further inquiry within the meaning of S.497(2), Cr.P.C.---Reasonable grounds, prima facie, had linked the accused with the crime---Case of accused fell within the mischief of the prohibitory clause of S.497(1), Cr.P.C.---Bail was declined to accused in circumstances.

Ch. Abdul Rashid for Petitioner.

A.D. Naseem for Mst. Rashida Bibi.

Syed Abbas Haider, Advocate.

Sahibzada M.A. Amin Mian, A.P.-G for the State.

Liaqat Ali S.-I.

ORDER

SHAHID HAMEED DAR, J.---Through this petition under section 497, Cr.P.C. the petitioner seeks bail after arrest in case F.I.R. No.616 of 2008 dated 13-8-2008 under sections 324, 353, 186, 224, 225, 148, 149 P.P.C. read with section 13 of Arms Ordinance (XX), 1965 lodged at the instance of Muhammad Attique Butt, DSP/SDPO, Mian Channu, District Khanowal.

2. Precisely the story contained in the F.I.R. is that the complainant along with scores of

policemen, armed with sophisticated weapons conducted a raid on the house of Amer Sher, Alam Sher and Shakoor, the accused of case F.I.R. No.261 of 2008 dated 22-6-2008 under section 395, P.P.C., Police Station City Mian Chunno; and besieged it from all sides in the darkness of the night and waited for the day light to appear; they knocked at the door of the house of the accused at 6-10 a.m. whereupon, a couple of persons ran in the courtyard of the house raising alarm and asking Amer Sher, Alam Sher and Shakoor to runaway, whereupon, Amer Sher, Alam Sher and Shakoor made straight firing upon the police party so as to breach the police cordon; they attempted to escape through door-less passages of the house but could not do so; the police warned them to surrender but they kept firing on the police party and made a desperate effort to decamp through a passage on the western side but that too had been sealed by the police whereupon, they directly showered bullets at the police party who took refuge behind a Pakka water course (Khada) and positioned themselves to counter attack; the firing made by the accused hit the water course and the police returned the firing in their self-defence which felled Amer Sher, Alam Sher in injured condition who died instantaneously, whereas, their third companion Shakoor managed good his escape and disappeared in the fields; Muhammad Nawaz and Allah Yar were captured by the police at the end of the encounter. A large number of weapons and massive ammunition was found lying close to the dead bodies of Alam Sher and Amer Sher; one buffalo, case property of a dacoity case was also recovered from the place of occurrence.

3. Mst. Ruqaiyya Bibi mother of the two deceased got registered a cross version on the same day in which she alleged that accused Attique Butt, DSP, along with Sardar Gujjar (petitioner) his son Umair Sardar and some other private persons, aided by many police officials had trespassed into her house, overpowered her sons Alam Sher and Amer Sher where, DSP, Attique Butt fired with his rifle on the head of Amer Sher deceased at the lalkara of Rehm Din; Sardar (petitioner) made two fire shots with his rifle on the back of Amer Sher, Umair accused fired with his rifle which hit Amer Sher; when Alam Sher ran to save the life of his brother, Rehm Din fired with his rifle at his thigh, Noor Muhammad Inspector fired with his rifle which landed on the his area of Alam Sher, Muhammad Zameer S.-I. also fired at the chest of Alam Sher, thereafter, Umair, Mazhar and Rehm Din made heavy firing at the spot as a result of which Alam Sher, Amer Sher succumbed to the injuries at the spot; the accused also stole a buffalo, Motorcycle Yamaha, two phones and cash etc. from her house. The motive behind the occurrence was that Rehm Din and Muhammad Akram had bribed Attique Butt DSP to avenge the murder of their brother and also to take revenge of the land dispute.

4. Mst. Ruqaiyya Bibi being dissatisfied with the investigation of the case field a private complaint against 47 persons under sections 302, 324, 449, 337H-2, 396, 148, 149 P.P.C. read with sections 155, 156 Police Order, 2002, wherein, she nominated Sardar (petitioner) as respondent/accused No.2 along with others, with the same charge, as alleged in her version before the police.

5. Mst. Najma Bibi, the widow of Alam Sher deceased moved separate application for registration of independent criminal case against aforementioned persons for the murder of Alam Sher, Amer Sher but she did not nominate Umair and Sardar as accused of the occurrence. She too being aggrieved of the investigation filed a private complaint against 40 respondents which did not include the petitioner Sardar. Both the above said private

complaints are pending adjudication. A private complaint has also been filed by said Muhammad Attique Butt.

6. A judicial inquiry was also conducted in this case by the learned Senior Civil Judge, Pakpattan who concluded the same vide inquiry report dated 11-9-2008 wherein the name of the petitioner does not find mention.

7. Learned counsel for the petitioner contends that the petitioner has been falsely implicated in this case due to malice and ulterior motive of the complainant of the cross version; that a judicial inquiry was conducted by the learned Senior Civil Judge, Pakpattan wherein no role has been ascribed to the petitioner; that Mst. Ruqaiyya Bibi burdened Muhammad Attique, DSP/SDPO with the allegation that his fire landed on the head of Amer Sher deceased, both in her statement before the police and in the private complaint but she and her witnesses gave a clean chit to the said accused in his bail petition bearing Criminal Miscellaneous No.1564-B of 2010 on 22-2-2010; Mst. Najma Bibi, in her private complaint, has not nominated the petitioner as an accused of this case; the medical evidence is inconsistent with the eye-witness account; lastly contends that the petitioner's case calls for further inquiry within the meaning of section 497 subsection (2) of Cr.P.C.

8. Learned Addl: Prosecutor General assisted by learned counsel for the complainant has vehemently opposed grant of bail to the petitioner on the point that he is named in the cross case and in the private complaint, with a specific role of causing firearm injuries on the back of Amer Sher deceased; the prosecution witnesses fully support the story contained in the cross version and in the private complaint; that the petitioner and his co-accused have committed a gruesome and barbaric act during the course of which they murdered two youthful sons of Mst. Ruqaiyya Bibi, complainant; that the petitioner played pivotal role in the whole episode and it was he, who had master-minded the whole occurrence and aided by the police officials, committed worst degree of oppression; that the private complaint filed by the widow of Alam Sher deceased is collusive in nature and she has malafidely and maliciously omitted the name of the petitioner from the list of the respondent-accused in her private complaint; that the petitioner does not merit release on bail as his case does not call for further inquiry; the trial has commenced and after framing of charge the case is fixed for recording of prosecution evidence; the P.Ws. in fact were present on the last date of hearing before the trial court but the petitioner and his co-accused did not produce their counsel malafidely and the case was adjourned.

9. Arguments heard. Record perused.

10. The petitioner has been charged with specific role of causing firearm injuries on the back of Amer Sher deceased which is supported by the medical evidence. Mst. Ruqaiyya Bibi, being aggrieved of the investigation conducted by the police filed a private complaint wherein she has reiterated her version qua the aforesaid specific role of the petitioner. The private complaint filed by Mst. Najma Bibi widow of Alam Sher deceased is of little help to the petitioner as his case is not at par with that of his co-accused Umair, against whom Ruqaiyya Bibi had made certain improvements in her private complaint. Muhammad Attique Butt, DSP/SDPO who allegedly, authored fatal injury on the body of Amer Sher deceased was admitted to post arrest bail by my learned brother Mr. Justice Ijaz Ahmad Chaudhry, J. on 22-2-2010 as Mst. Ruqaiyya Bibi appeared before the court to make a statement of

compromise with the petitioner in the company of two P.Ws. The Investigating Officer has formulated the opinion that the petitioner had taken part in the incident at the relevant time. The trial has commenced and it is at the stage of recording of prosecution evidence. In fact complete set of eye-witnesses was present before the learned trial court for recording their statements on 26-5-2010 but the learned defence counsel did not appear and the case was adjourned. The dictum of consistency is not applicable in respect of the petitioner as he unlike his co-accused Umair, has been saddled with liability of a specific role qua Amer Sher deceased, both in the cross version and in the private complaint. I am not impressed by the submissions of learned counsel for the petitioner as the case of the accused-petitioner does not constitute need for further inquiry into his guilt under section 497(2), Cr.P.C. Prima facie, there are reasonable grounds to believe that the petitioner has committed the offence alleged against him. His case falls within the mischief of prohibitory clause of section 497, Cr.P.C.

11. For the forgoing reasons, I am not inclined to accept instant petition which is dismissed accordingly.

As the trial has commenced, so the learned trial court is directed to expedite the proceedings of the trial and conclude the same within five months from the date of receipt of the order of this court.

N.H.Q./S-161/L Bail refused.

2012 Y L R 1101

[Lahore]

Before Shahid Hameed Dar, J

MUSHTAQ AHMAD---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.15192/B of 2011, decided on 25th November, 2011.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302/34---Qatl-e-amd---Bail, grant of---Further inquiry---Accused along with his co-accused, armed with .12 bore gun, allegedly fired at the time of occurrence and committed the murder of the deceased---Accused had also been burdened with the liability of having raised 'Lalkara' and his fire shot allegedly landed at the middle finger of the left hand of the deceased---Accused raised the plea of alibi and produced witnesses in support thereof and his plea was verified by the Investigating Officer during the course of investigation---Accused also underwent physical remand for thirteen days, but this time period remained unproductive for the prosecution---Investigating Officer after having extensively investigated the case had opined that accused had not taken part in the incident and he was not responsible for the alleged occurrence in any manner---Name of accused had been placed in column No.2 of the report under section 173, Cr.P.C and a discharge report in

respect of accused was also prepared by the Investigating Officer---Postmortem examination report of the deceased revealed a fire arm entry wound on the back of the left hand at the root of the middle finger which fractured the underlying bone---Accused was armed with a .12-bore gun, which was a soft bore weapon and causes dispersal of multiple spherical lead pellets and as such it may not be possible for the human eye to visualize the landing of multiple pellets of .12-bore, on the body of a human being with exactitude--- Probability of a pellet landing at the back of the left hand of deceased of a fire shot made by the co-accused could not be ruled out---Sufficient reasons existed to believe the case of accused was that of further probe into his guilt within the meaning of section 497(2) Cr.P.C---Accused's bail application was allowed and he was released on post-arrest bail.

Anwar Shamim and another v. The State 2010 SCMR 1791 and Muhammad Arshad and others v. The State and others PLD 2011 SC 350 distinguished.

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

----S. 173---Report of police-officer---Effect---Opinion of the Investigating Officer does not have binding effect on the court and it becomes not only irrelevant but also inadmissible in evidence at trial.

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

----Ss. 497 & 173---Bail---Report of police-officer---Reasonableness or the persuasiveness of police opinion can be glanced at while adjudicating upon the bail plea of an accused by tentatively assessing the worth thereof.

Hafiz Khalil Ahmad for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab.

Mushtaq Ahmad Mohal for the Complainant.

Muhammad Nawaz S.I. with record.

ORDER

SHAHID HAMED DAR, J.---Mushtaq Ahmad petitioner seeks bail after arrest in case F.I.R. No.292, dated 30-7-2011, under section 302/34, P.P.C. registered at Police Station Kaloor Kot, District Bhakkar on the complaint of Tariq Mahmood.

2. The allegation against the petitioner is that he being armed with a .12 bore gun joined by his co-accused also armed with identical weapon effectively fired at the time of occurrence and thereby committed the murder of Altaf Hussain, father of the complainant; the role against the petitioner is that he raised lalkara, whereupon his accused resorted to straight firing at the deceased and he himself made a fire shot which landed at the middle, finger, of left hand of the deceased.

3. The postmortem examination report of the deceased discloses eight firearm injuries, out of which, injuries Nos.7 and 8; may be attributed to the petitioner, which show fracture of the underlying bone of middle finger of the left hand.

4. Learned counsel for the petitioner submits that the petitioner joined investigation on the very first day and raised his plea of innocence in support whereof he produced two witnesses Hasham and Wahid Bakhsh which led to formulation of an opinion by the Investigating Officer qua innocence of the petitioner; a discharge report was prepared by the Investigating Officer which was not agreed to by the learned Magistrate and he has been placed in Column No.2 of the challan under section 173, Cr.P.C.

5. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant submits that the petitioner is nominated with specific role in promptly lodged F.I.R.; the medical evidence is consistence with the ocular account, furnished by two witnesses Sarfraz and Riaz Hussain; the Magistrate disagreed with the opinion of the Investigating Officer with cogent reasons; in formulating opining regarding innocence of the petitioner, the Investigating Officer violated the requirement of section 4(1), Cr.P.C, as his primary duty was to collect the-evidence and place the same before the Court concerned. Relies upon Anwar Shamim and another v. The State (2010 SCMR 1791) and Muhammad Arshad and others v. The State and others (PLD 2011 SC 350).

6. Having heard learned counsel for the parties and perused the record, it is observed that all three accused including Mushtaq Ahmad (petitioner), Imam Bakhsh and Muhammad Afzal were allegedly armed with .12-bore guns by means of which accused Imam Bakhsh and Mushtaq Ahmad (petitioner) made one fire each, whereas Muhammad Afzal-accused fired twice with his gun at Altaf Hussain deceased and committed his instantaneous murder, besides, Mushtaq Ahmad (petitioner) has also been burdened with the liability of raising a Lalkara at the time of alleged occurrence. The petitioner, when arrested on 5-9-2011, raised the plea of innocence/alibi and produced witnesses in support thereof and his plea was verified by the Investigating Officer during the course of investigation. He underwent physical remind for thirteen days; but this period of time remained unproductive for the prosecution. On completion of investigation, the Investigating Officer categorically opined, having extensively investigated the case that the petitioner had not taken part in the incident and he was not responsible for the alleged occurrence in any manner, which, led to placement of his name in Column No.2 of the report under section 173, Cr.P.C. A discharge report in respect of the accused-petitioner was also prepared by the Investigating Officer, but it was not concurred with by the learned area Magistrate. There is no cavil to the proposition that the opinion of the Investigating Officer does not have the binding effect and it becomes not only irrelevant but also inadmissible in evidence at trial. The reasonableness or the persuasiveness of such opinion, however, can be glanced at while adjudicating upon the bail plea of an accused by tentatively assessing the worth thereof. The postmortem examination report of the deceased reveals a firearm entry wound measuring 0.5 cm x 0.5 cm on the back of left hand at the root of middle finger with fractured underlying bone. This is a crucial fact that all the accused were armed with a .12-bore gun each, which, admittedly, is a soft bore weapon and causes dispersal of multiple. spherical led balls, even if fired through once. It may not be possible for the human eye to visualize the landing of multiple pellets of .12-bore, on the body of a human being with exactitude. Only one fire shot of a .12-bore weapon may result into more than one injury to an individual. The probability qua landing of a pellet at the back of left hand of the deceased off a fire shot made by the co-accused of the petitioner cannot be ruled out. This is, however, a riddle, which may be undone by the trial Court after recording the evidence of the parties during trial. The facts of the ease law relied upon by learned

counsel for the complainant may not be of much relevance at this stage, as the above said august judgments deal with the appeals filed by the convicts at post-trial stage. Sufficient reasons exist to believe that the petitioner's case calls for further probe into his guilt within the meaning of section 497(2), Cr.P.C.

7. Resultantly, this application is allowed and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 (Rupees one lac) with two sureties each in the like amount to the satisfaction of the learned trial Court.

M.W.A./M-15/L Bail allowed.

2012 Y L R 1110

[Lahore]

Before Shahid Hameed Dar, J

MUMTAZ IMTIAZ---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.16119-B of 2011, decided on 22nd December, 2011.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss. 392 & 411---Robbery, dishonestly receiving stolen property---Bail, grant of---Further inquiry---Accused despite being well-known to the complainant side had not been nominated as an accused at the time of reporting the crime to the police---Accused underwent maximum period of physical remand, permissible under law but said period remained unproductive for the prosecution---Heinousness of the offence could not be deemed to be a ground to decline the right of an accused to be granted bail if his case was covered by section 497(2), Cr.P.C.---Case of accused falling within purview of section 497(2), Cr.P.C, he was admitted to bail.

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

----S. 497(2)---Bail---Further inquiry---Heinousness of offence, effect of---Heinousness of the offence could not be deemed to be a ground to decline the right of an accused to be granted bail if his case was covered by S. 497(2), Cr.P.C.

Malik Matee Ullah and Shahid Azeem for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor-General for the State.

Mian Ghulam Rasool for the Complainant.

Muhammad Anwar S.I. with Record.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Imtiaz (petitioner) seeks bail after arrest in case F.I.R. No.584 of 2011 dated 13-6-2011 under sections 392 and 411 P.P.C. registered at Police Station Mansoor Abad, District Faisalabad.

2. Precisely, the prosecution case as stated by Sadaf Ilyas complainant is that four unknown armed men broke into her house at 4-00 p.m. on 12-6-2011; rendered the inmates of the house hostages and snatched from them cash, gold ornaments, cell phones, C.D etc. at gun point. The complainant furnished a brief description of features of the unknown accused in the F.I.R.

3. The petitioner after having been arrested on 11-7-2011 was sent to judicial lockup on the following day for identification purpose. The test identification parade was staged on 15-7-2011 during the course of which Mst. Samar Naz, Mst. Uzma Tabbasum and Mst. Sadaf Ilyas (complainant) correctly picked him up as an accused of this case.

4. The petitioner underwent physical remand for 14 days but this time period remained unproductive.

5. Learned counsel for the petitioner submits that petitioner has been falsely involved in this case and he has nothing to do with the occurrence as alleged in the F.I.R.; the petitioner was well-known to the complainant prior to the registration of this case as he being a rickshaw driver had been carrying Mst. Uzma Tabbasum, the sister of the complainant to her educational institution for about one year; despite having undergone maximum period of physical remand, nothing was recovered at the instance of the petitioner; the petitioner is no more required for the purpose of further investigation, therefore, he may be granted the relief prayed for.

6. On the other hand learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposes with, the submission that the petitioner was correctly identified by as many as three prosecution witnesses during the course of test identification parade; he has been found involved in the occurrence during the course of investigation and his name stands placed in Column No.3 of the challan. Lastly submits that the offence, the petitioner is charged with catches prohibition of section 497(1), Cr.p.C, therefore, his bail plea may be declined.

7. The complainant is also present in person and appears over anxious to address the Court. She submits that Muhammad Imtiaz is a beast who did not show any respect to the kindness, shown by her as she engaged his rickshaw about a year before the occurrence to pick and drop her sister Mst. Uzma Tabbasum, who was a student of law; the petitioner is an accused in equal degree like his co-accused so he may not be released on bail.

8. After having heard all concerned and perused the record it is observed that the petitioner was well-known to the other side as is evident from the statement of the complainant, who, is annoyed and dejected because of the alleged involvement of the petitioner in the occurrence. The question, however, arises, if the petitioner had taken part in the incident and he was known to the complainant side earlier, why he had not been nominated as an accused by the complainant, at the time of reporting the crime to the police. One thing is certain that the statement of the complainant reflects on the utility of the evidence of test identification

parade. The complainant and her sister Mst. Uzma Tabbasum being well acquainted with the petitioner long before the occurrence, could easily pick the petitioner correctly at the test identification parade, which they did accordingly. Further comments upon the legality or validity of the aforesaid of evidence at this stage may prejudice the case of the parties, therefore, it is left for the trial Court to determine as to its admissibility at trial. The petitioner underwent maximum period of physical remand, permissible under the law but this period of time remained barren. Mere heinousness of offence cannot be deemed a ground to decline the right of an accused to be granted bail if his case is covered by the efficacy of section 497(2) Cr.P.C. The case of the petitioner prima facie falls in the said category.

9. Resultantly, the instant petition is accepted and the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

M.W.A./M-18/1 Bail allowed.

2012 Y L R 1262

[Lahore]

Before Shahid Hameed Dar and Sardar Muhammad Shamim Khan, J

WAZIR AHMED and 2 others---Petitioners

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.2752-B of 2011/BWP, decided on 28th December, 2011.

Criminal Procedure Code (V of 1898)---

----S. 498 & 497(2)---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Possession of narcotics---Ad interim pre-arrest bail , confirmation of---Further inquiry---Only allegation brought against accused revolved around spy information allegedly provided to the complainant (police official)---Contents of F.I.R. revealed an unusually detailed and precise tip-off, which could hardly be considered as an admissible piece of evidence---Prosecution witnesses did not say any word in their statements under S. 161, Cr.P.C about the fact of receipt of spy information, in terms mentioned by the complainant, nor they mentioned anything about the culpability of the accused in any manner---Previous F.I.R. had been registered at the instance of a widow (sister-in-law of one of the accused) , which contained allegations against police officials of the same police station where present F.I.R. had been lodged---Accused were closely related to the husband of the said widow, and in the backdrop of previous grudge between accused and police officials, false implication of accused in the present case could not be ruled out---Prosecution had contended that accused were involved in cases of similar nature in the past, but failed to point out any viable connecting evidence against the accused with respect to the present case---Case of accused constituted need for further inquiry into their guilt as contemplated under S. 497(2), Cr.P.C---Bail application of

accused was allowed and pre-arrest bail granted to them was confirmed.

Malik Muhammad Aslam, Kh. Muhammad Aslam and Muhammad Aslam Khan Dhukar for Petitioners.

Muhammad Ali Shahab, Deputy Prosecutor-General, Punjab for Respondents.

ORDER

SHAHID HAMEED DAR, J.---Wazir Ahmed, Dilbar Hussain and Muhammad Ali (petitioners) seek bail before arrest in case F.I.R. No.275 of 2011 dated 10-8-2011 under section 9(c) of the Control of Narcotic Substances Act, 1997 registered at Police Station, Ahmedpur Lama, District Rahim Yar Khan, on the complaint of Peeran Ditta S.I.

2. Precisely the prosecution case as stated by the complainant is that he received a spy information to the effect that Aslam Khan Pathan traded in drugs and he had links with Basheer, Pervaiz, Dilbar (petitioner), Wazir (petitioner), Zahid and Muhammad Ali (petitioner) who too dealt in the said nasty trade; the complainant further learnt that the aforesaid persons including Aslam Khan Pathan, Zahid and Dilbar (petitioner) would travel by a car to Sadiq Abad and that Zahid and Dilbar possessed 2 kgs. heroin each which they had purchased from Aslam Khan Pathan; a barricade was set up by the police at the bridge of a canal where they intercepted a car, coming from the direction of Hashimi Colony, wherefrom, Zahid and Dilbar (petitioner) alighted and took to their heels while being in possession of 2 Kgs. heroin each; they were chased but to no avail; accused Aslam Khan Pathan, however, was overpowered by the police who disclosed that he had sold the contraband substance (charas) to Bashir, Pervaiz, Wazir (petitioner), Zahid and Ali (petitioner) and that Zahid and Dilbar had fled the scene being in possession of 2 Kgs. heroin each; accused Aslam Khan Pathan got recovered contraband charas weighing 5 Kgs. from the said car which was taken into possession by the I.O. through a memo of recovery; 10 grams charas was segregated from the bulk so as to transmit it to the office of Chemical Examiner, for chemical analysis; besides sale amount of Rs.3,000 and a copy of his National Identity Card was recovered from the said accused.

3. Learned counsel appearing on behalf of the petitioners submit in unison that it is virtually a case of no evidence against accused Wazir and Muhammad Ali nor any role has been ascribed against them by the complainant; the accused-petitioners have been nominated in this case merely on the whims of the complainant; law does not recognize such sort of hypothetical allegations as a piece of evidence; the statement of Muhammad Aslam Khan Pathan cannot be read against the petitioners nor does it carry any evidentiary value, because of the bar contained in the Qanun-e-Shahadat Order, 1984; the witnesses recorded under section 161, Cr.P.C. during the course of investigation do not support the baseless allegations, as these appear in the F.I.R. Lastly submits that the petitioners have been falsely involved in this cash being close relation to Muhammad Shahid whose widow Mst. Sharnim Akhtar got a criminal case lodged against the police officials of the above said police station for offences under sections 380/452, P.P.C. which hints at the mala fide and malice of the police.

4. On the other hand, learned Deputy Prosecutor-General Punjab strongly opposes the

instant petition with the contention that all the petitioners are a criminal lot who stand involved in many other cases of identical nature; there is no malice or ulterior motives on the part of the police to falsely implicate the petitioners in the instant case and that their person is required for further investigation/probe as well as for the recovery of the contraband substance, they had taken away with them.

5. After having heard learned counsel for the parties and perused the record, it is observed that the only allegation brought around against the petitioners by the prosecution revolves around a spy information allegedly tendered to the complainant by a spy informer. Much of the story, as entailed in the F.I.R. hints at an unusually lengthy tip-off, which can hardly be considered as an admissible piece of evidence. The information brought by the spy informer was so precise that the weight and kind of contraband substance, allegedly possessed by the petitioners prior to the interception of the car of accused Muhammad Aslam Pathan, has been mentioned in the F.I.R., which reveals that 5 Kgs. contraband charas was recovered from the car belonging to Muhammad Aslam Khan Pathan accused, at his instance. Interestingly the prosecution witnesses did not say even a single word in their statements under section 161, Cr.P.C. about the factum of receipt of a spy information, in aforesaid terms, by Peeran Dita S.I./complainant, nor they have uttered a single word about the culpability of the accused-petitioner in any manner. Our attention has been drawn towards registration of case F.I.R. No.511 of 2009 under section 380/452, P.P.C. registered at Police Station Ahmad Pur Lama, Rahim Yar Khan at the instance of Mst. Shamim Akhtar, widow of Muhammad Shahid, which contains allegations against some police officials of the same Police Station where the instant F.I.R. has been lodged. According to the contention of the learned counsel, Muhammad Ali petitioner happens to be the real brother of the above named Muhammad Shahid, whereas, rest of the petitioners are close kith and kin. In the backdrop of previous heartburning and some sort of rivalry between them, the false implication of the petitioners in the instant case due to malice and ulterior motives of the police/complainant cannot be ruled out. The statements of the above said prosecution witnesses have almost sealed the fate of this case prematurely so far as the allegations against the petitioners are concerned. Learned Deputy Prosecutor General Punjab vehemently argued that the petitioners stand involved in some other cases of identical nature but he has failed to point out any viable connecting evidence against the petitioners, so far as the instant case against them is concerned. Sufficient reasons prima facie, exist to believe that the petitioners' case constitutes need for further inquiry into their guilt as contemplated under section 497(2), Cr.P.C. Therefore, the instant application is accepted and the ad interim pre-arrest bail granted to the petitioners vide order dated 19-12-2011 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.1,00,000 each with two sureties each in the like amount to the satisfaction, of learned trial Court.

6. Before parting with this order, it is clarified that the petitioners shall keep on joining the investigation of this case as and when required by the Investigating Officer and if they hesitate in doing so, the prosecution shall be at liberty to move an application against them under section 497(5), Cr.P.C. with a prayer to recall the instant bail granting order.

M.W.A./W-4/L Application allowed.

2012 Y L R 1825

[Lahore]

Before Ch. Muhammad Tariq and Shahid Hameed Dar, JJ

MUHAMMAD HANIF and others---Petitioners

Versus

THE STATE and others---Respondents

Criminal Miscellaneous No.1 of 2011 in Criminal Appeal No.912 of 2007, decided on 10th August, 2011.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), Ss.302(b)/149, 324/149 & 148---Qatl-e-amd, attempt to commit qatl-e-amd, rioting armed with deadly weapons---Suspension of sentence---Accused was behind the bars since 2-2-2006 and appeal against his conviction and sentence by Trial Court had not been fixed for hearing so far in the High Court---Accused or any other person on his behalf; was not shown responsible for causing delay in the decision of appeal---By the passing of time accused had earned a right to ask for suspension of his sentence---Accused was not a previous convict and no circumstance appeared on record to dub him a hardened, dangerous or desperate criminal---Accused had not fired at the deceased, rather he along with his co-accused had fired at the injured prosecution witnesses---Sentence of accused was suspended in circumstances and he was released on bail accordingly.

Sanaullah Khan v. The State 2010 SCMR 608; Hafiz Tanveer v. The State and another PLD 2010 Lah. 156; Raja Shamshad Hussain v. Gulraiz Akhtar and others PLD 2007 SC 564; Barkat Hussain v. The State 1995 SCMR 1109; Muhammad Yaqoob and others v. The State 1991 SCMR 1459; Makhdoom Javed Hashmi v. The State 2007 SCMR 246; Babar Ali v. Bashir Ahmad and another 2007 SCMR 184; Farhat Azeem v. Waheed Rasul and others PLD 2000 SC 18; Bashir Ahmad v. Zulfiqar and another PLD 1992 SC 463 ref.

Mian Abdul Quddous for Petitioner.

Khurram Khan, Deputy Prosecutor-General for the State.

Azam Nazeer Tarar for the Complainant.

ORDER

Criminal Miscellaneous No.1 of 2011

SHAHID HAMEED DAR, J.---The petitioner Shahid Shafique, having been convicted under sections 302(b)/149, 148, 324/149 P.P.C. and sentenced to various punishments including life imprisonment, by the learned Additional Sessions Judge, Faisalabad on 28-7-2007, through this application under section 426, Cr.P.C. seeks suspension of the sentence and his consequential release on bail.

2. Learned counsel for the petitioner submits that the petitioner has been convicted and awarded sentence merely on conjectures and surmises; the petitioner was not assigned any

role whatsoever by the complainant or his witnesses during the course of investigation but they improved upon their previous statements during the course of trial whereby they (P.W.15, P.W.16 and P.W.17) attributed a joint role to the petitioner that he along with his, co-convicts Shaukat Ali, and Muhammad Ramzan fired effectively and thereby caused injuries to Muhammad Anwar (P.W.15), Ghulam Sabir (P.W.16) and Muhammad Arshad (P.W.17); even in his supplementary statement got recorded by the complainant on 19-11-2005, he did not ascribe any role against the petitioner and the prosecution case till then only disclosed that the petitioner drove a car at the time of occurrence; the petitioner underwent full term of physical remand and nothing was recovered at his instance; the Investigating Officer could not find any crime empty of pistol 30 bore during spot inspection; the petitioner was arrested on 2-2-2006 and was awarded sentence vide judgment dated 28-7-2007; he has challenged his conviction/ sentence through Criminal Appeal No.912 of 2007 which is still undecided and pending adjudication; the petitioner has not attributed towards delay in decision of the appeal nor any other person acting on his behalf is responsible for such lassitude; two co-convicts of the petitioner have been awarded death sentence by the trial court so there is no probability of early hearing/fixation of the above said appeal; the petitioner is not a previous convict for an offence entailing capital punishment nor he is a hardened, dangerous or desperate criminal; relies upon "Sanaullah Khan v. The State" (2010 SCMR 608), "Hafiz Tanveer v. The State and another" (PLD 2010 Lahore 156), "Raja Shamshad Hussain v. Gulraiz Akhtar and others" (PLD 2007 SC 564), "Barkat Hussain v. The State" (1995 SCMR 1109) and "Muhammad Yaqoob and others v. The State" (1991 SCMR 1459).

3. On the other hand, learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant submits that the court has always been slow in entertaining the plea of a convict for suspension of sentence lest it should prejudice the case of either of the two sides; there is a probability of early fixation of the appeal filed by the petitioner and by his co-appellants, the decision of a petition for suspension of sentence on merits has not been approved by the Hon'ble Supreme Court of Pakistan; relies upon "Makhdoom Javed Hashmi v. The State" (2007 SCMR 246), "Babar Ali v. Bashir Ahmad and another" (2007 SCMR 184), "Farhat Azeem v. Waheed Rasul and others" (PLD 2000 SC 18), "Bashir Ahmad v. Zulfiqar and another" (PLD 1992 SC 463).

4. After having heard learned counsel for the parties and perused the record, we find that the petitioner was arrested on 2-2-2006 and he stands incarcerated ever since. He was convicted/sentenced vide judgment dated 28-7-2007 passed by learned Additional Sessions Judge, Faisalabad which was impugned by the petitioner through an appeal (Criminal Appeal No.912 of 2007) and the same has not been fixed for hearing so far. No circumstance has been hinted at either by learned counsel for the complainant or learned Deputy Prosecutor-General Punjab that the petitioner or any other person acting on his behalf is responsible for causing delay in the decision of above said appeal. By the afflux of time, the petitioner has earned a right to ask for the relief prayed for. The petitioner is not a previous convict of death sentence or imprisonment for life nor any circumstance appears on the record to dub him a hardened, clangorous or desperate criminal.

5. So far as the merits of the case are concerned, the petitioner did not fire at the deceased rather he along with his co-convicts fired at the above said injured P.Ws. Therefore, we accept this application and suspend the sentence of the petitioner. He shall be released on

bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of the learned trial Court. The petitioner is directed to appear before this Court on each and every date of hearing of main appeal.

N.H.Q./M-319/L Sentence suspended.

2012 Y L R 1839

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD AKRAM and others---Petitioners

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.3349-B of 2012, decided on 25th April, 2012.

Criminal Procedure Code (V of 1898)---

---Ss. 498 & 497(2)---Penal Code (XLV of 1860), S. 376---Rape---Ad interim pre-arrest bail, confirmation of---Further inquiry---Allegation against accused and co-accused was that they trespassed onto the house of the complainant, where after the accused committed zina-bil-jabr with the alleged victim (complainant's daughter)---Contentions of the accused were that he and his co-accused had been found innocent by different investigating officers and their names were placed in column No.2 of the challan; that medical evidence was inconsistent with the ocular account; that both the prosecution witnesses had stated that they had not witnessed the occurrence, and that implication of the accused and his co-accused was based on mala fide and ulterior motives of the complainant---Validity---Story contained in the F.I.R. appeared to be preposterous and unconvincing---Fact that accused succeeded in ravishing the victim in the presence of other family members was hard to believe---Medical evidence did not support the prosecution case as medical officer had observed that the scratches on the victim's chest were fabricated and she was used to the act of coitus---Prosecution witnesses had categorically stated that they had not witnessed the occurrence and they had been falsely cited as eye-witnesses by the complainant---No other incriminating circumstances existed to corroborate the version of the alleged victim---Probability that accused and his co-accused had been falsely involved in the case under a certain plan, could not be ruled out---Sufficient reasons existed to believe that the case constituted need for further inquiry as contemplated under S. 497(2), Cr.P.C---Bail application of accused and co-accused was accepted and ad-interim pre-arrest bail already granted to them was confirmed, in circumstances.

Abdul Razzaq Younas for Petitioners.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab for the State.

Muhammad Imran Butt for the Complainant.

Muhammad Amin S.-I.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Akram and Nadeem petitioners seek bail before arrest in case F.I.R. No.737 of 2011 dated 2-11-2011 under section 376, P.P.C. registered at City Patoki (Kasur).

2. The petitioners were found innocent during the course of investigation and their names were placed in Column No.2 of the challan. Learned trial court summoned them on an application of the complainant and directed them to apply for bail before arrest which they did but their efforts ended in smoke as learned trial court dismissed their application for bail before arrest, hence, the instant petition.

3. Precisely, the prosecution case as narrated by Shaukat Ali complainant is that both the accused Muhammad Akram and Nadeem (petitioners) trespassed onto his house and one of them namely Muhammad Akram committed zina bil jabr with his daughter Mst. Nabeela Bibi; the occurrence was witnessed by Farzand Ali and Allah Ditta and on seeing them approach the place of occurrence, both of them fled the spot.

4. Learned counsel for the petitioners submits that petitioners have been found innocent repeatedly by different Investigating Officers and their names stand placed in column No.2 of the challan; medical evidence is inconsistent with the ocular account; both the eye-witnesses resiled from the prosecution case and they categorically stated before the Investigating Officer that they had not witnessed the occurrence. Lastly submits that implication of the petitioners is based on male fide and ulterior motives of the complainant.

5. Learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant opposes with the contention that the alleged victim Mst. Nabeela Bibi in her statement under section 161, Cr.P.C. has fully supported the prosecution case; the offence committed by the accused catches the prohibition of section 497(1), Cr.P.C. and in absence of any ulterior motives, they may not be granted the extraordinary relief of bail before arrest.

6. I have heard learned counsel for the parties and perused the record.

7. The story contained in the F.I.R. appears to be preposterous and unconvincing. The complainant has alleged that he along with his other family members were asleep in the courtyard of his house where his daughter Mst. Nabeela Bibi also slept. It is very hard to digest that in presence of other family members, Muhammad Akram accused succeeded in ravishing Mst. Nabeela Bibi. The medical evidence does not support the prosecution case in its present form, as medical officer has observed that scratches on the chest of the examinee were fabricated. The medical officer also opined that the examinee/victim was used to the act of coitus and she enjoyed the sex game habitually. Both the eye-witnesses Farzand Ali and Allah Ditta categorically stated before the Investigating Officer on 19-12-2011 that they had not witnessed the occurrence and they had been falsely cited as eye-witnesses by the complainant. There exists no other incriminatory circumstance to corroborate the version of the alleged victim. The probability cannot be ruled out that both the accused/petitioners had been falsely involved in this case under a certain plan by the complainant mainly due to his malice and ulterior motives, which form the condition precedent for grant of bail before

arrest. Sufficient reasons exist to believe that petitioners' case constitutes need for further inquiry into their guilt as contemplated under section 497(2), Cr.P.C.

8. Therefore, the instant application is accepted and the ad interim pre-arrest bail allowed to the petitioners on 13-3-2012 is confirmed subject to 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.W.A./M-165/L Bail confirmed.

2012 Y L R 1889

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD SHAHZAD---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.13148-B of 2011, decided on 21st October, 2011.

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

----S. 497(2)---Penal Code (XLV of 1860), S.322---Qatl-bis-sabab---Bail, grant of---Young son of the complainant, no doubt, had lost his life in an unfortunate manner, but no incriminating material was available on record to believe that the accused had fenced the field with an electric current, or he had contributed towards the eventuality in any manner---Complainant had himself made it a case of two versions, one contained in the F.I.R. and the other in his supplementary statement---Trial Court would determine after recording evidence of the parties as to which of the two stories was nearer to truth---Abscondence of accused must give way to his bail plea, when his case had categorically constituted need for further inquiry as contemplated under S.497(2), Cr.P.C.---Accused was admitted to bail in circumstances.

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

----S. 497(2)---Penal Code (XLV of 1860), S. 322--- Qatl-bis-sabab--- Bail---Abscondence--- Principle--- Element of abscondence must give way to the bail plea of an accused whose case categorically constitutes need for further inquiry as contemplated under S.497(2), Cr.P.C.

Kamil Hussain Naqvi for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab.

Rao Javed Khurshid for the Complainant.

Intizar Hussain A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Shahzad petitioner seeks bail after arrest in case F.I.R. No.188 of 2010 dated 4-5-2010 under section 322, P.P.C. registered at Police Station Sarai Mughal, District Kasur.

2. The prosecution case as unfurled in the F.I.R. is that Muhammad Mudassar (deceased) son of the complainant went outside to fetch grass for animals; the complainant also followed him and there he saw Chiragh Din and Shahzad (petitioner) attaching hooks with the barbed wire stretched around their fields so as to electrify it; the complainant all at once heard shrieks and found his son clung against the barbed wire; his ill-fated son died at the Spot within no time; the accused ran away from the scene of electrocution of Muhammad Mudassar.

3. The complainant made supple-mentary statement before the Investigating Officer on 16-5-2010, whereby, he improved upon his previous version by contending that both the accused Chiragh Din and Shahzad (petitioner) were armed with firearms at the time of occurrence and they had forced his deceased son to catch the barbed fence due to which he was electrocuted.

4. Learned counsel for the petitioner submits that petitioner has been falsely roped in this case due to malice and ulterior motives of the complainant and he is innocent; the complainant has himself made it a case of two versions by introducing a new story through his supplementary statement; the case of the petitioner calls for further probe into his guilt so he may be granted the relief prayed for.

5. On the other hand learned counsel for the complainant submits that the petitioner's pre-arrest bail had been dismissed vide order dated 18-6-2010, whereafter he absconded and was taken into custody on 28-5-2011; the petitioner has committed a non-bailable offence and his case does not call for further probe into his guilt.

6. Learned Deputy Prosecutor-General Punjab submits that challan against the accused was submitted under section 512, Cr.P.C. on 16-9-2010; two eye-witnesses Rozdar Khan and Muhammad Afzal stated before the Investigating Officer that the accused-petitioner and his co-accused fled the scene of occurrence on witnessing Muhammad Mudassar (deceased) hanging against the live barbed wire instead of disconnecting the supply of electricity. He, however, admits that the Investigation Officer had formulated a favourable opinion qua the petitioner in terms that he was not present at the place of occurrence at the relevant time.

7. After having heard learned counsel for the parties and perused the record, it transpires that the petitioner is not the owner of the land which stood fenced by means of live barbed wire. Who applied hooks to the fence, to run electric current in it, is a circumstance which has not been ably investigated by the Investigating Officer nor any plausible evidence appears to have been collected by him in this respect during the course of investigation. The complainant made a mockery of his own version as contained in the F.I.R., by getting recorded his supplementary statement on 16-5-2010 to the effect that the accused-petitioner and his co-accused being armed with firearms had forced his son Mudassar (deceased) to catch hold of the live-wire. He produced two witnesses Muhammad Arif and Muhammad

Akbar on 16-5-2010 to the said effect. In the F.I.R., it has been alleged by the complainant that both the mentioned accused, Shahzad (petitioner) and his grandfather Chiragh Din were fixing hooks against the iron fence but there is no evidence to believe the said allegation. It is a pity that young son of the complainant lost life in an unfortunate manner but no incriminating material is available on the record to believe that the petitioner had fenced the said field or ran electric current in it or he had contributed towards the eventuality in any manner. The complainant has himself made it a case of two versions, one contained in the F.I.R. and the other in his supplementary statement dated 16-5-2010. Which one of two stories is nearer to truth shall be seen by the learned trial court after recording the evidence of the parties during trial.

8. A few words about the alleged abscondence of the petitioner. The petitioner's pre-arrest bail application had been dismissed by this Court on 18-6-2010 and he was finally taken into custody by the police on 28-5-2011. Different persons have been differently constituted by ALLAH ALMIGHTY. Sometimes a person, instead of facing the situation/crises in a manlike manner opts to go into hibernation believing, that his period of misery and trouble may go by as the time would pass along. The world is not empty of the gallant either who show courage, confidence and valor to confront a most turbulent and anarchic situation without having a second thought. It is merely the difference of chemistry which makes the human beings behave and react distinctively. There is, however, no denial to the fact that everyone fears the wrath of the police, though in variant degrees. If one despite being innocent takes a decision out of timidity or nervousness to escape to a safer haven, the other one, also placed in identical situation, despite having certain reservations, may decide to bear the brunt of the upheavals in a manly way. Nothing can be said about the chemistry and disposition of the petitioner at this stage. The factum of abscondence, may not be a deciding factor, while dealing with the bail plea of an accused. The attending circumstances of the case and a tentative study thereof would be relevant for decision of a bail application on the touchstone of further inquiry as contemplated under section 497(2), Cr.P.C. The element of abscondence must give way to the bail plea of an accused whose case categorically constitutes need for further inquiry. The case of the petitioner falls in the said category.

9. Resultantly, I accept this applica-tion and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of learned trial court.

N.H.Q./M-102/L Bail allowed.

2012 YLR 2264

[Lahore]

Before Shahid Hameed Dar, J

GHULAM TAHIR and 2 others---Petitioners

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.3174-B of 2012, decided on 7th May, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 337-A(i)/ 337-F(i)/ 337-F(v)/337-L(2)/ 148/149/379---Shajjah-i-khafifah, ghayr-jaifah damiyah, ghayr-jaifah-hashimah, other hurt, rioting armed with deadly weapons, unlawful assembly, theft---Bail, grant of---Delay in conclusion of trial---Allegation against accused and co-accused persons was that they mounted an attack on the injured and wounded him badly and also took away his wrist watch and cell phone---Validity--- Medico legal report of the injured revealed that he had sustained seven blunt weapon injuries out of which two could be attributed to the accused and co-accused---Said two injuries had been declared as ghayr jaifah-hashimah falling with the definition of S.337-F(v), P.P.C---Investigation officer had opined that accused remained empty handed at the place of occurrence and did not cause any injury to the injured---Co-accused persons were in jail for a period exceeding one year and incarceration period of the accused was also close to one year---Offences with which the accused and co-accused persons were charged did not fall within the prohibitory clause of S.497(1), Cr.P.C---Probability of the trial concluding in the near future was very less---No useful purpose would be served by keeping the accused and co-accused behind bars for an indefinite period---Bail application of accused and co-accused was accepted and they were admitted to bail.

Mushtaq Hussain Badani for Petitioners.

Miss Muqadass Tahira, Additional Prosecutor General for the State with Umer A.S.-I.

Talaat Mahmood, for the Complainant.

ORDER

SHAHID HAMEED DAR, J. ---Ghulam Tahir, Muhammad Zahid and Waheed Ali (petitioners) seek bail after arrest in case F.I.R. No. 120, dated 17-4-2011, under sections 337-F (i), 337-F (v), 337-A (i), 337-L (2), 379, 148, 149 P.P.C., registered at Police Station Garh, District, Faisalabad.

2. Precisely the prosecution case as stated by the complainant is that accused Muhammad Zahid, Ghulam Tahir, Muhammad Waheed (petitioners) and Rab Nawaz all armed with sotas, Hafiz Hanif empty-handed joined by four others, all armed with .12 bore guns mounted an attack upon Muhammad Zaman and badly wounded him; Muhammad Zahid (petitioner) gave a sota blow and broke the leg of Muhammad Zaman; accused Ghulam Tahir and Waheed Ali gave blows of their weapons at the chest area of the said injured and broke his ribs; rest of the accused also caused injuries to him as a result of which he fell onto the ground in a bad injured condition; the accused also took away the wrist watch and cell phone of the injured.

3. The MLR of Zaman injured reveals seven blunt weapon injuries out of which Injuries Nos.4 and 6 can be attributed to the petitioners. Injury No.6 shows fracture of left leg of the injured which has been ascribed against Zahid accused whereas Injury No.4 which is at the left part of the chest, stands jointly attributed to accused Ghulam Tahir and Waheed Ali. Both

the Injuries (Nos.4 and 6) have been declared as Ghayr-Jaifah Hashimah, falling within the definition of section 337-F(v) P.P.C.

4. After hearing learned counsel for the parties and perusing the record, it is observed that petitioners Muhammad Zahid and Waheed Ali were arrested in this case on 28-4-2011 whereas Ghulam Tahir accused-petitioner was arrested on 12-5-2011. According to learned counsel for the complainant, the trial of the accused is still at a nascent stage as learned trial court has just summoned the accused placed in Column No.2 of the challan, on an application moved by the complainant. The I.O. opined after culmination of investigation that accused Ghulam Tahir remained present at the place of occurrence empty handed and did not cause any injury to the above said injured. The petitioners Muhammad Zahid and Waheed Ali have been languishing in jail for a period exceeding one year and incarceration of Ghulam Tahir accused is also getting closer to period of one year with the passage of each day in jail. None of the offences, the petitioners are charged with, falls within the ambit of prohibition of section 497(1), Cr.P.C. The probability regarding conclusion of the trial in foreseeable future is bleak. No useful purpose would be served to keep the petitioners behind the bars for an indefinite period of time. Therefore, I accept this application and admit the petitioner to post arrest bail subject to furnishing 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.

MWA/G-20/L Bail granted.

2012 Y L R 2414

[Lahore]

Before Shahid Hameed Dar, J

FARHAN---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.7551/B of 2012, decided on 29th June, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302/392/411---Qatl-a-amd, robbery, dishonestly receiving stolen property---Bail, grant of-Further inquiry---Uncertainty as to the cause of death of the deceased---Effect---Case of circumstantial evidence against the accused hinging upon evidence of test identification parade during the course of which the accused was picked-up by the witnesses---Evidence of last seen presented by the prosecution witnesses, and evidence of recovery of items at the instance of the accused---Body of the deceased did not bear any injury marks---Opinion of medical officer who performed autopsy on the deceased did not remove the uncertainty hovering over the cause of her death---Part of said opinion mentioned cause of death as ischaemia (heart disease), whereas another part of the, said opinion showed an element of estimation/speculation on pall of the medial officer

that possibility of death resulting from stress due to robbery could' not be ruled out---Said opinion of medical officer did not establish in categorical terms that the deceased had met an unnatural death---Such obscurity could only be removed during the course of the trial---Co-accused of the crime had been granted bail---Identification of the accused at the. test identification parade did not divulge any role, allegedly played by him at the time of the occurrence---Evidence of alleged recovery at the instance of the accused seemed insignificant, in circumstances of the case---Case against the accused called for further probe into his guilt as contemplated under S. 497(2), Cr. P. C---Accused was admitted to bail.

Malik Saeed Hassan for Petitioner.

Ms. Muqadass Tahira, Additional Prosecutor General Punjab.

Asghar Ali Gill for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---Farhan (petitioner) seeks bail after arrest in case F.I.R. No. 418 of 2011 dated 12-11-2011 under sections 302, 392, 411 P.P.C. registered at Police Station Chinab Nagar, District Chiniot.

2. It is a case of circumstantial evidence mainly hinging at the evidence of test identification parade held on 3-12-2011 during the course of which Farhan (petitioner) was correctly picked-up by witnesses Muhammad Azam and Ahmad Ali, the evidence of last seen, presented by witnesses Ahmad Ali and Muhammad Azam whose names stand mentioned in the supplementary statement of the complainant made by him on 13-11-2011 during the course of investigation; to the effect that they had noticed the presence of three men and a woman (without naming them) at about 8/8-30 p.m. at the outer door of the house of the deceased besides, the evidence tendered by Shabbir Ahmad Butt and Mubashar Ahmad, the cited witnesses in the F.I.R. who stated before the I.O. that they had , seen a motorcycle going towards Sahiwal Road at about 1-00 a.m. at the fateful night, coupled with the evidence of recovery of two gold rings and a DVD player at the instance of the petitioner on 18-12-2011 when he was on physical remand.

3. The deceased lady was 80 years of age. Her dead body did not bear any injury mark(s) and the medical officer was constrained to defer the cause of death until receipt of requisite reports from the office of Chemical Examiner and that of the Bacteriologist/Histopathologist. The above reports have been received, one, released by the office of Chemical Examiner is negative in nature as poison was not detected in the interval viscera of the deceased nor the vaginal swabs were found with semen and the other one relating to the office of Bacteriologist/Histopathologist reads as under:--

> "**AUTOPSY HISTOPATHOLOGICAL REPORT**"
>
> Received Specimens:
>
> Received whole heart, portions of lung, brain, one kidney. Histological Feature:
>
> Histological examination of heart sections reveals advanced atherosclerotic changes in the coronaries. The myocardial sections reveal one area of fibrosis others are

unremarkable. The lung sections reveal mild vascular congestion. The brain, and renal sections are unremarkable."

On receipt of the above reports following cause of death, in respect of the ill-fated lady has been recorded by the medical officer who performed autopsy on. the dead body of the said deceased:

Final Opinion.

P. M. R 36/2012 dated 12-11-2011.

In view of my P.M.P. 36/2012, Reports of Chemical Examiner, and Forensic Histopathologist, LHR. (Original copies of both attached), after endorsement in my opinion, the cause of death is ischaemic heart disease. However the possibility of psychogenic stress due to robbery leading to myocardial infraction cannot be ruled out.

Duration = 0 -15 minutes. "

The above said remarks of the medical officer have not removed the haziness and uncertainty hovering over the cause of death of the deceased lady. The earlier part of the above opinion pertains to a heart disease called ischaemia which relates to localized blood deficiency caused by constriction or destruction of blood vessels that supply blood to that area, whereas latter part of the opinion shows an element of speculation/estimation on the part of the autopsy performer which inclines more towards the circumstantial evidence, to be led by the prosecution at trial, rather than exhibiting an expert opinion. Speaking in medical terminology myocardial relates to, myocardium which stands for muscular layer of heart, derived from endocardial cells and its infarction means sudden inadequate supply of blood to a certain area resulting in cell death or an injury to the tissues. The term myocardial-infarction defines a heart attack, during the course of which severe reduction in blood supply to a portion of myocardium takes place owing to arterloscerlosis, thrombus formation-and other physiological disorders leading to death of myocardial cells and formation of necrotic area. The above said opinion of medical officer in respect of cause of death of the deceased does, not establish in categorical terms that Mst. Umat-ul-Majeed (deceased) had met an unnatural death. The equivocation or the obscurity in this regard however can only be removed by the prosecution during the course of the trial after the prosecution would produce some relevant/determining evidence in respect thereto. The ambivalence, as noted above was the determining factor when Mst. Atiya Bibi a co-accused of the petitioner was granted post-arrest bail by this Court vide order dated 3-5-2012 passed in Criminal Miscellaneous No.4590-B of 2012. The identification of the petitioner at test identification parade by the above named witnesses does not divulge any role, allegedly played by the former, at the time of the occurrence. The evidence of the alleged recovery of two gold rings and a DVD player on 18-12-2011 at the instance of the petitioner sounds a bit insignificant, at this stage, for the reasons supra. The accumulative effect of the discussion made hereinabove is that the petitioner's case calls for further probe into his guilt as contemplated under section 497(2), Cr.P.C. Therefore, the instant application is accepted and petitioner is admitted to post arrest bail subject to furnishing bail bonds in the slim of Rs.2,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/F-291L Bail granted.

2012 Y L R 2764

[Lahore]

Before Shahid Hameed Dar and Altaf Ibrahim Qureshi, JJ

ANJUM alias ANJA---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.128-J of 2005 and Murder Reference No.682, heard on 13th June, 2011.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Mitigating factors---Ocular account of occurrence furnished by eye-witnesses inspired confidence, which was corroborated by another injured eye-witness examined as a court witness, as he had compromised with the accused during trial---Medical evidence had also fully corroborated the ocular testimony---Discrepancies pointed out in evidence being trivial were of no consequence---Conviction of accused, therefore, was sustained, however, non-establishment of the set up motive and inconsequential evidence qua the recovery of pistol at the instance of accused, were the mitigating factors in favour of accused for not awarding capital punishment to him in the case---Death sentence of accused was commuted to imprisonment for life in circumstances.

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

----S.342---Power to examine the accused--Non-compliance---Effect---Law requires that each incriminating circumstances must be put to the accused in his statement under S.342, Cr.P.C. so as to afford him an opportunity to explain his position---Left out piece of incriminating circumstance cannot be used against an accused to base conviction thereon.

Qaiser Tasleem for Appellant.

Khurram Khan, Deputy Prosecutor General Punjab for the State.

Date of hearing: 13th June, 2011.

JUDGMENT

SHAHID HAMEED DAR, J.---The appellant Anjum alias Anja was tried by the learned Additional Sessions Judge, Sialkot, for committing the murder of Imran deceased, the paternal cousin (chachazad) of the complainant and attempting on the life of Aashir Masih (C.W) in case F.I.R. No.04 of 2004 dated 6-1-2004 under section 302, 324, P.P.C. registered at Police Station Kotwali, Sialkot. By virtue of judgment dated 31-3-2005, the learned trial judge found the appellant guilty of the charge, convicted him under section 302(b), P.P.C. and

sentenced him to death with order to pay Rs.1,00,000 as compensation under section 544-A, Cr.P.C. to the legal heirs of the deceased and in default thereof to undergo rigorous imprisonment for six months. The learned trial Court, however, acquitted the convict-appellant under section 324, P.P.C. as the injured witness Aashir Masih (CW) forgave the appellant and compounded the offence during trial.

2. The convict-appellant has filed Criminal Appeal No. 128-J of 2005 against his conviction/sentence, besides, there is a usual reference under section 374, Cr.P.C. (Murder Reference No.682 of 2005) for confirmation or otherwise of the sentence of death, awarded to the appellant, transmitted by the learned trial Court. We propose to dispose of both the matters together through this single judgment.

3. The crime is alleged to have been committed at 5-30 p.m., on 6-1-2004, in the area of Christian Street adjacent to Greenwood Street, Sialkot, situated within the jurisdiction of Police Station Kotwali, Sialkot, which is at a distance of about 1 kilometer, towards west from the place of occurrence.

4. The facts, as unfurled by Shaheen Eishrat Gill (P.W.4) in complaint Exh.PC are that on return to his house at 5-30 p.m on 6-1-2004 he asked his wife to prepare the meal; his paternal cousins and other relatives lived in the same mohallah where he lived; in the meanwhile, he heard someone shouting and calling bad names in the street so he came out of his house to inquire about the situation, where he saw his paternal uncle (chacha) George Masih and paternal cousin (chachazad) Aamir standing under the light of a lit electric bulb; within his view Anjum alias Anja (appellant) pulled out a pistol from his dabb (fold) and fired straight at Imran (deceased) which landed at his forehead and pierced across the head posteriorly; the same bullet also whistled past Aashir Masih, a passerby, injuring his left cheek and nose; Imran died at the spot. The occurrence was witnessed by the complainant (P.W.4), Aamir (P.W.6) and George Masih P.W. (not produced).

The motive behind the occurrence was that Anjum alias Anja (appellant) used to tease girls at the corner of the street; he was checked by Imran (deceased) a few days back, having nursed grudge against him, the appellant committed his murder.

6. Hassan Muhammad S.I./I.O. (P.W.12) having learnt about the incident, went to Civil Hospital, Sialkot along with other police-officials, where, Shaheen Eishrat Gill, complainant submitted an application (Exh.PC) qua the crime before him, which was transmitted to the Police Station Kotwali, Sailkot for registration of formal F.I.R. (Exh.PC/1), he examined the dead body and prepared the injury statement (Exh.P1), drafted an application (Exh.PJ) for postmortem examination, prepared inquest report (Exh.PK) and handed over the dead body of Imran to Babar Rafique 1412/C (P.W.2) for its postmortem examination; he reached the place of occurrence, inspected the same, prepared visual site plan (Exh.PL), collected blood by means of cotton vide memo Exh.PD; secured two crime empties (P-7/1-2) of .30 bore from the spot vide memo Exh.PF; after postmortem examination, he took into possession last worn blood-stained clothes of the deceased vide memo Exh.PB; he got prepared the site plan in scale (Exh.PG and Exh.PG/1) qua the place of occurrence, by Zia-ul-Hassan, draftsman (P.W.11); he arrested accused-appellant on 8-1-2004 and interrogated him, who, pursuant to his disclosure led to the recovery of .30 bore pistol (P-1) on 12-1-2004 from his house vide memo Exh.PA; he drew the site plan Exh.PA/1 qua the place of recovery of pistol .30 bore.

On completion of investigation, he challaned the accused.

7. At trial, the prosecution in order to prove its case produced 12 witnesses in all. Aashir Masih was examined by the court as a C.W. The ocular account was furnished by Shaheen Eishrat Gill (P.W.4) and Aamir (P.W.6). Both of them also stated about the motive part of the incident. Hassan Muhammad S.-I. (P.W.12) and Muhammad Mansha 173/C (P.W.1) deposed about the recovery of pistol .30 bore (P-1) from Anjum alias Anja-appellant; Hassan Muhammad, S.-I. (P.W.12) furnished an account of investigation conducted by him in this case. Rest of the evidence is more or less formal in nature.

8. The medical evidence was presented by Dr.Fayyaz Ahmad (P.W.5), who, performed autopsy on the dead body of lmran Masih deceased at 8-30 p.m. on 6-1-2004 vide postmortem examination report Exh.PE (pictorial diagrams Exh.PE/1) and found following injuries thereon:--

(1) A punctured lacerated oval wound measuring 1 cm x 0.8 cm, left side of forehead, 1 cm from midline above eyebrow with inverted margins (entry).

(2) A lacerated exit wound 2 cm x 0.5 cm, on left occipital area of skull with everted margins.

Both the injuries (1 and 2) were ante mortem in nature and caused by firearm.

The cause of death in this case was the excessive haemorrhage and shock due to extensive damage to the brain matter leading to cardio-pulmonary arrest, caused by above said injuries.

The probable time that elapsed between injuries, and death was "instantaneous" and between death and postmortem examination, it was approximately "3 to 4 hours".

9. On the same day, at 5-30 p.m., Dr. Fakharul Zaman, P.W.10 medically examined Aashir Masih injured vide medico-legal report (Exh.PH) and observed following injuries on his person:--

(1) A lacerated brushing injury measuring 2 cm x 1/2 cm x skin deep, front and left side of nose with inverted, blackened and charred margins.

(2) A lacerated punctured wound measuring 1 cm x cm x 1/2 cm front of left cheek close to injury No.1 with margins inverted, blackened and charred.

(3) A lacerated punctured wound measuring 1.25 cm x 0.7x cm. DNP, lateral aspect of left cheek with evaded margins.

10. Learned Public Prosecutor tendered in evidence report of Chemical Examiner (Exh.PM), reports of Forensic Science Laboratory (Exh.PN) and (Exh.P.O) and announced the prosecution case closed.

11. In his statement under section 342 Cr.P.C. the appellant controverted the prosecution case and emphatically professed his innocence while recording reply to the question, "Why this case against you and why the P.Ws. have deposed against you" as follows:--

"The case was registered against me due to suspicion and the P.Ws. have deposed against me on the instance of complainant being close relatives of the deceased."

The appellant-accused neither appeared as his own witness under section 340(2), Cr.P.C. to repel the charge against him nor he opted to produce any evidence in defence.

12. The learned trial Court after hearing learned counsel for the parties and having taken into consideration the evidence available on record passed the impugned judgment, whereby, the appellant was convicted and sentenced in the aforementioned terms.

13. We have heard the learned counsel and gone through the file.

14. Learned counsel for the appellant submits that prosecution had badly failed to prove the charge against the appellant beyond reasonable shadow of doubt; the occurrence took place in the darkness of the night and the presence of a lit electric bulb at the corner of the street at the relevant time of occurrence could not be proved by the prosecution; the evidence of recovery of pistol .30 bore is inconsequential as the crime empties and pistol were sent to the office of Forensic Science Laboratory together after the arrest of the appellant; the motive set up by the prosecution went begging as the prosecution could not produce any evidence in this regard; the witnesses of ocular account rendered contradictory and discrepant statements which could not be believed against the appellant to base conviction thereon; all the inconsistencies in the statements of the witnesses have been resolved in favour of prosecution which is a patent illegality as it is always the accused who should be extended the benefit of each doubt; the most important prosecution witness Aashir Masih was withheld during trial by the complainant/prosecution as he refused to back the false prosecution version so he was examined as a CW by the learned trial Court; the impugned judgment has been passed on conjectures and surmises which suffers from non-reading and misreading of evidence, hence, it may not be sustained. Alternatively being a case of motive having gone unestablished capital punishment is not warranted.

15. Conversely, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant submits in unison that the prosecution brought home the guilt of the accused beyond all shadows of doubt through trustworthy ocular account duly corroborated by the medical evidence, the proven motive, and the evidence of recovery of pistol .30 bore which is supported by a positive report of Forensic Science Laboratory, Punjab, Lahore (Exh.PN); the impugned judgment has been passed with sound reasons which may be sustained.

16. Shaheen Eishrat Gill (P.W.4) testified to the prosecution story being present there as it was just close to the residential house of his paternal uncle where the deceased was fired at by the appellant-convict and murdered Aamer P.W.6 and George Masih P.W. (not produced) were also present there at the crucial hour. Aashir Masih (CW) was a passer-by who got injured during the occurrence. Detailing the ocular account inclusive of the motive impetus, he (P.W.4) deposed that the appellant's pistol-shot landed on the forehead of the deceased and left his head posteriorly; the appellant made another fire shot which hit the nose and cheek of the above said passer-by Aashir Masih (CW); Imran fell down badly wounded and succumbed to the injuries at the spot; the deceased was standing in the street at the time of occurrence and the venue was lit with the light of an electric bulb. The complainant made an

improvement in his testimony when he stated about the repeated fire-shot by the appellant-convict during the occurrence. He stammered in his testimony when he stated that his house was not situated in the street where the occurrence took place and that he lived at a distance of about 500 yards from the spot besides adopting the version that he was present in the house of his paternal uncle at the relevant time of occurrence which was situated in the street where the occurrence took place. He appears to have been baffled a bit while explaining the aforesaid situation but he did not err in establishing his presence at the scene of occurrence at the relevant time.

17. Amir P.W.6, another witness of ocular account furnished almost the same details qua the occurrence with the version that the appellant had made two fire shots, one landing at the forehead of Imran deceased and the other on the nose and cheek of Aashir Masih, the passer-by (CW). He also stated about the same motive as deposed about by the complainant (P.W.4).

18. The injured witness Aashir Masih was not produced by the prosecution. Learned trial Court, however, summoned him as a CW in the interest of justice. He in fact had effected compromise with the appellant and forgiven him by showing intention that he did not wish to prosecute him nor did he object to his acquittal for the offence of having launched a murderous assault on him. He, in his testimony stated that he suffered serious injuries when, all of a sudden a bullet hit his face. He concluded that he fell unconscious after receipt of injuries and he was told by someone that the fire shot made by Anjum alias Anja (appellant) had hit him. He was cross-examined by both the sides and it was established that he had been injured during the occurrence through a pistol shot fired by the appellant and that Imran had died in the same occurrence.

19. Having gone through the entire evidence we are not persuaded by the contentions urged by the learned counsel for the appellant because the prosecution case stands fully proven through the confidence-inspiring ocular account furnished by Shaheen Eishrat Gill (P.W.4) and Aamir (P.W.6) besides the statement of injured CW Aashir Masih, though, he had forgiven the appellant-convict during trial. The above said witnesses explicitly attributed the fatal fire shot to the appellant, whose presence at the venue of occurrence at the relevant time stands established. The ocular account stands fully corroborated by the medical evidence inter alia as to the timings mentioned by the medical officer Dr.Fayyaz Ahmad (P.W.5) in the postmortem examination report Exh. PE and by Dr.Fakhar-ul-Zaman (P.W.10) in MLR (Exh.PF-I). Some of the discrepancies pointed out by the learned defence counsel are inconsequential being trivial. The fact that the venue of occurrence was flooded with the light of an electric bulb has not been disputed by the defence. The line of cross-examination adopted by the defence is also indicative of presence of the appellant at the place of occurrence along with the deceased, when the occurrence took place. The relevant excerpt of the testimony of Shaheen Eishrat Gill (P.W.4) is reproduced hereunder:---

> "it is incorrect to suggest that deceased Imran and accused Anjum used to drink together I was at a distance 3/4/5 feet away from the accused Anjum. It is incorrect to suggest that they were best friends. It is incorrect to suggest that the accused and deceased Imran were drunkened on the day of occurrence and being influence of wine the pistol of deceased Imran had a fire which hit on his forehead and he died"

Aamir P.W.6 was also tested with identical line of cross-examination. The relevant

portion of his testimony is important:--

> "It is also incorrect to suggest that there was some other private persons also present at the place of occurrence except the aforesaid persons which I have mentioned in my statement. It is correct that Ashir Masih was also present at the place of occurrence at the time of occurrence. Volunteered he was passing nearby. It is incorrect to suggest that only Aashir Masih has witnessed the occurrence who was also injured in this occurrence. ….. It is incorrect to suggest that while the deceased Imran and the accused had exchange of abuses, they grappled each other. Volunteered the deceased could not get time/opportunity to grapple with the accused in the same way none of the present at the place of occurrence got opportunity/time to interfere in the quarrel between the deceased and the accused. …… It is incorrect to suggest that on the day of occurrence Imran deceased and the accused present in court came out of a house after being drunknened. It is further incorrect to suggest that being drunknened, under the influence of wine, by chance the loaded pistol of the deceased, operated by the hands of the deceased and a fire shot hit the deceased and resulted into his death."

20. In his statement under section 342, Cr.P.C, the appellant however, did not stick to the aforesaid line of defence and changed it to one of denial simpliciter. The ocular account is trustworthy and worth-reliance having been duly corroborated by the medical evidence.

21. Insofar as the recovery of pistol .30 bore P-1 at the instance of the appellant-convict is concerned, it does little good to the prosecution's case despite having been found wedded with the crime empty vide Forensic Science Laboratory Report Exh.PN, for the reason that it reveals the receipt of the parcels of crime empty and that of pistol .30 bore on the same day i.e. on 14-1-2004, six days after the arrest of the appellant-accused. The probability cannot be ruled out that transmission of the parcel of the crime empty had been purposely delayed till the arrest of the accused by the Investigating Officer so as to manoeuvre a positive report from the Firearm Expert, after having fetched an empty by firing through the pistol (P-1) allegedly got recovered by the accused. This particular piece of evidence means nothing to the prosecution's case.

22. Insofar as the raison d'etre is concerned, it could not be established during trial nor any evidence was led by the prosecution during investigation to prove the allegation that Imran deceased had ever checked the appellant so as to stop him from teasing the girls of the area. Even otherwise, the motive part of the prosecution case has not been put to the appellant in his statement under section 342, Cr.P.C. Law requires that each incrimi-nating circumstance must be put to the accused in his statement under section 342, Cr.P.C. so as to afford him an opportunity to explain his position. A left out piece of incriminating circumstance cannot be used against an accused to base conviction thereon. The motive as alleged by the prosecution in the instant case therefore, becomes a redundant piece of evidence which cannot be used against the appellant as an incriminating piece of evidence.

23. The nutshell of the above discussion is that the appellant's conviction being unexceptionable is hereby sustained. We, however, find ourselves in agreement with the plea in the alternative, raised at the bar by the learned counsel for the appellant-convict, hinting at non-establishment of the set-up motive, being a mitigating factor, capital punishment is not attracted. The inconsequential evidence qua recovery of pistol P-1 at the instance of the

appellant, is another determinative factor, calling for reduction in the sentence of the convict-appellant.

24. Therefore, partly allowing the appeal (Criminal Appeal No.128-J of 2005), maintaining the appellant's convic-tion and the compensation amount, the awarded death sentence is commuted to imprisonment for life, with the benefit contemplated by section 382-B, Cr.P.C. The term of imprisonment, in case of default in payment of the compensation amount shall be six months' S.I. instead of six months' R.I.

25. Answering the Murder Reference No.682 of 2005 in the Negative, the death sentence is not Confirmed.

NHQ/A-201/L Sentence reduced.

2012 Y L R 2824

[Lahore]

Before Rauf Ahmad Sheikh and Shahid Hameed Dar, JJ

AZHAR HUSSAIN---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.265 and Murder Reference No.606/RWP of 2005, decided on 19th April, 2012.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Date time, place of occurrence and motive, were admitted facts---Prosecution witnesses, who rendered eye-witness account, had unquestionably established the guilt of accused beyond any shadow of doubt---Presence of the eye-witnesses at the spot at the relevant time, stood established---Medical evidence, revealed 12 firearm injuries on the body of the deceased, which had shown .that the deceased had been fired at incessantly and was murdered in a cold-blooded manner---Defence witness, did not utter a single word in his testimony as to the specific defence plea of accused that deceased had been murdered by a servant of accused---Accused had not produced evidence to prove his plea of alibi---Defence evidence moved opposite to the stance of accused, which he adopted while deposing under 5.342, Cr. P. C. ---Abscondence of accused, though may not be a conclusive proof of evidence but its corroboratory value, could not be denied---Keeping in view the venue and the mode of occurrence, coupled with the motive part of the case, it could not be said that accused and his absconding brother, were innocent; or that they fearing the wrath of the Police, had gone into a hideout merely because of timidity or being chicken-hearted persons---Circumstances of the case had led to believe that abscondence of accused was as calculated as the occurrence itself- Motive stood established---All the facts and circumstances brought on record by the prosecution,

converged on an irresistible conclusion that deceased had been murdered by accused and his co-accused---Occurrence had taken place in the same manner 'and style as set up by the prosecution in their case---Prosecution had impeccably succeeded in bringing home the guilt of accused beyond reasonable shadow of doubt---No mitigating circumstance being present in favour of accused, there was no reason to differ with the findings and conclusion drawn by the Trial Court---Conviction and sentence recorded by the Trial Court against accused, were upheld---Sentence of death awarded to accused by the Trial Court, was confirmed and Murder Reference was answered in the affirmative, in circumstances.

Riaz Ahmad alias Rajoo and another v. The State PLD 1970 Lah. 689; Tikka Khan and 3 others v. The State PLD 1974 Lah. 100; Akhtar Ali and others v. The State 2008 SCMR 6; Habibullah and others v. The State PLD 1969 SC 127; Ali Bahadur and. 2 others v. The State 1998 PCr.LJ 24; Muhammad Yameen alias Raja v. The State and others 2009 SCMR 84; Ali Ahmad and 2 others v. The State 1978 SCMR 384; Muhammad Farooq and another v. The State 2006 SCMR 1707; Naik Muhammad alias Naika and another v. The State 2007 SCMR 1639; Mst. Sabeeha v. Israr and others 2012 SCMR 74; Shaukat Rehman alias Jernail v. Rahim Noor and another 2002 PCr.LJ 1946; Rohtas Khan v. The State 2010 .SCMR 566 and Muhammad Arshad and others v. The State and others PLD 2011 SC 350 distinguished.

Ali Khan v. The State PLJ 1980 SC 313; Muhammad Iqbal alias Javed Iqbal v. The State PLD 1976 SC 291; Noor Muhammad y. The State PLD 1991 SC 150; Muhammad Sharif and another v. The State PLD 2001 SC 94 and Sarfraz alias Sappi and 2 others v. The State 2000 SCMR 1758 ref.

Sardar Muhammad Ishaq Khan for Appellant.

Rana Kashif Saleem Arfaa, Law Officer for the State.

Rana . Zahoor Ahmad and Sh. Zameer Hussain for the Complainant.

Date of hearing: 19th April, 2012.

JUDGMENT

SHAHID HAMEED DAR, J.---Azhar Hussain appellant was held guilty -under section 302(b), P.P.C. for the murder of Muhammad Ashfaq, by learned Additional Sessions Judge, Gujjar Khan, District Rawalpindi vide judgment dated 26-7-2005 and sentenced to death with direction to pay a sum of Rs.2,00,000 as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default thereof to undergo simple imprisonment for six months. His co-accused Attar Israr was, however, acquitted of the charge by the learned trial Court on extension of benefit of doubt, whereas his co-accused, Zawar Hussain was declared as proclaimed offender.

2. The convict-appellant by filing Criminal Appeal No.265 of 2005 has called in question his conviction and sentence under the impugned judgment, whereas, the learned trial Court has submitted reference under section 374, Cr.P.C. (Murder Reference No.606 of 2005) for confirmation of the sentence of death of the appellant. We propose to dispose of both the matters through this single judgment.

3. The facts, as narrated by Altaf Hussain-complainant (P.W.7) in complaint Exh.PE/1, on the basis whereof F.I.R. (Exh.PE) had been registered were that at about 7-30 p.m., on 11-3-2001, he along with his brother Muhammad Ashfaq (deceased) and Mohabbat Hussain (P.W.8) was present in his house; Attar Israr (since acquitted) arrived there and told Muhammad Ashfaq that he had held a dialogue with Zawar Hussain (since P.O.) and Azhar Hussain (appellant) for winning a compromise, therefore, he should accompany him to the said house, so as to seek an apology from Zawar Hussain and others, to which Muhammad Ashfaq did not agree, but Attar Israr gave an assurance that in case of any untoward happening, he would take the responsibility; on the insistence of Attar Israr, he (complainant), along with his brother Muhammad Ashfaq and Mohabbat Hussain (P.W.8) accompanied Attar Israr to the house of Azhar Hussain (appellant) and Zawar Hussain (since P.O.) and reached there at 8-30 p.m.; they sat on cots lying in a room and chatted with Mst.Azizan Bibi, widow of Mustaqeem with regard to compromise qua the murder of her husband; all of a sudden, Zawar Hussain (since P.O.) and Azhar Hussain (appellant), both armed with pistols, came there, raised a lalkara that Muhammad Ashfaq be taught a lesson for having murdered their father; both of them made straight fire-shots at Muhammad Ashfaq hitting his eye, head, neck and other parts of his body, which caused his instantaneous death; both the accused fled the scene of occurrence by making aerial firing.

The motive behind fire scene was that Muhammad Ashfaq had committed the murder of Mustaqeem Khan, father of the accused, for which he was convicted/ sentenced and after serving out the sentence he had been released from the prison a year ago; the widow of Mustaqeem Khan and his sons had shown intentions to compound the offence with Muhammad Ashfaq (deceased); as such, Zawar Hussain (since P.O.), Azhar Hussain (appellant) and Attar Israr (since acquitted) in furtherance of their common intention, called the complainant, Mohabbat Hussain and Muhammad Ashfaq to their house deceptively and committed intentional murder of Muhammad Ashfaq.. Leaving the dead body at the spot, the complainant left for the police station for reporting the crime. He, however, came across Syed Imdad Hussain, S.-I., (P.W.16), at Police Post Sakhu, at 9-30 p.m. on 11-3-2001, who recorded his statement (Exh.PE/1) and despatched the same to Police Station Mandra, District Rawalpindi for registration of formal F.I.R.; Zulfiqar Ali, S-.I. (P W.6) on receipt thereof drafted formal F.I.R. (Exh.PE) at 10-20 p.m. the same day.

4. Imdad Hussain, S.-I, (P.W.16) assumed the investigation of this case, reached the place of occurrence, examined the dead body of the deceased, prepared inquest report (Exh.PH), application for postmortem examination thereof (Exh.PG), appointed Mushtaq Ahmad, 3108/C (P.W.17) to escort the dead body to the mortuary; inspected the place of occurrence, collected blood-stained earth vide memo Exh.PB, secured empties, eight in number (P2/1-8), vide memo Exh.PD, secured blood-stained bed-sheet (P1) vide memo Exh.PC, and prepared visual site plan Exh.PM; Mushtaq Ahmad, constable (P. W.17) tendered the last worn blood-stained clothes of the deceased (P5 to P7), a sealed phial containing bullet-head (P8), which he took into possession vide memo Exh.PN, got prepared site plan in scale in duplicate Exh.PA and Exh. PA/ 1 by Qamarud-Din, draftsman (P.W.4). He arrested accused Attar Israr on 25-3-2001 and after necessary interrogation sent him to judicial lock up.

Dur-e-Muhammad, S:-I. (P.W.14) arrested accused Zawar Hussain (P.O.) and Azhar Hussain (appellant) on 23-2-2002 and recovered one pistol 30-bore each (P3 and P4) at their instance on

28-2-2002 vide memos of recovery Exh.PI and Exh.PK, respectively, attested by Muhammad Hussain and Manzoor Hussain P. Ws. (not produced).

5. At trial, prosecution in order to prove its case produced nineteen witnesses in all. The ocular account was furnished by Altaf Hussain-complainant (P.W.7), Mohabbat Hussain (P.W.8) and Zafar lqbal (P.W.9). They (P.W.7 & P.W.8) also stated about the motive part of the incident. None of the private witnesses entered appearance to testify the recovery of the pistols at the instance of the accused, however, Dur-e-Muhammad, S.-I. (P. W.14) deposed about the factum of recovery of pistol (P4) vide memo Exh.PK at the instance of the appellant, which, however, is of no consequence owing to a negative report (Exh. D-2) from the office of Forensic Science Laboratory.

6. The medical evidence was presented by Dr. Mushtaq Ahmad, who was initially examined as P. W .1, when only Attar Israr faced the trial, but, on arrest of the appellant and that of his repeatedly runaway co-accused Zawar Hussain, he was examined as P. W.10. He conducted autopsy on the dead body of Muhammad Ashfaq (deceased), at 3.45 a.m., on 12-3-2001, vide necropsy report Exh.PF (pictorial diagram Exh.PF/1 and Exh.PF/2) and found following injuries thereon:

(1) An entry wound measuring I cm x .8 cm on medial aspect of right " eyebrow.

(2) An exit wound measuring 1.5 cm x 1.5 cm on back of head, lower part and midline.

(3) An entry wound measuring .5 cm x .5 cm on the left side of neck, lateral to midline.

(4) An exit wound foreign body could be felt on back of middle of chest, left side .6 cm from midline, incision given and bullet collected.

(5) An entry wound measuring 1 cm x 1 cm on the left side of thigh, upper lateral with touching margin on lower aspect.

(6) An exit wound measuring 1 cm x 8 cm on the upper level of left hip bone, back.

(7) An entry wound measuring 1 cm x 1, cm on left thigh, lateral and lower aspect with touching margin on lower aspect.

(8) An exit wound measuring 1 cm x 1.5 cm on the back and lateral aspect of left thigh, upper part.

(9) An entry wound measuring 1 cm x 1 cm on the back of left elbow joint.

(10) An exit wound measuring 1 cm x 1 cm and 2 cm from the entry wound and medial to the entry.

(11) An entry wound measuring 1 cm x 1 cm on the upper and front left arm with fracture of humorous bone.

(12) An exit wound measuring 1.5 cm x 1.5 cm on left armpit, inner and back aspect, 2 cm from armpit, fold.

The cause of death, as recorded by the medical officer was, due to the damage caused by

Injuries Nos.1 and 3 to the vital organs of the deceased, which was sufficient to cause death in the ordinary course of nature and time. All the injuries were ante-mortem and caused by firearm. The probable time that elapsed between injuries and death was "within fifteen minutes", whereas between death and postmortem examination, it was within nine hours.

The evidence regarding abscondence of the appellant was tendered by Muhammad Ishaque 1270/C, P.W.12, Dure-Muhammad P.W.14 and Muhammad Ishtiaq 2808/C P. W.19. Rest of the evidence produced by the prosecution was more or less formal in nature.

7. Learned prosecutor gave up remaining prosecution witnesses as unnecessary and tendered in evidence report of the Chemical Examiner (Exh.PP) and that of Serologist (Exh.PQ) regarding blood-stained earth, declared the prosecution case closed.

8. The appellant as well as his co-accused Attar Israr (since acquitted) and Zawar Hussain (since P.O.) recorded their statements under section 342, Cr.P:C, entered the, plea of innocence and false involvement opting not to depose within the scope of section 340(2), Cr,P.C. or adducing the defence evidence except for the appellant, who tendered two documents, Exh.Dl and Exh.D2 in defence. The contention adopted by the appellant in reply to the question as to why this case against him and why the P. Ws: had deposed against him, is reproduced hereunder:-

"In fact Altai Hussain complainant of the present case was having an illicit liaison with Mst. Qamraz, the wife of Muhammad Ashfaq deceased, as such he (complainant) wanted to remove him from the way and he hired one Salamat Teli to get Muhammad Ashfaq murdered, who was our servant, as such the complainant got his brother Muhammad Ashfaq eliminated through Salamat Teli afore-named, who murdered Muhammad Ashfaq. After the occurrence said Salamat Teli' was sent abroad by Altaf Hussain complainant in order to maintain the secrecy of murder of Muhammad Ashfaq by Salamat Teli afore-named. The complainant took along Muhammad _ Ashfaq to the house of Muhabat Hussain, an alleged eye-witness of the occurrence and from there he sent him to our house, where Muhammad Ashfaq was done to death by the former (Salamat Teli). The complainant and Muhabat Hussain, the alleged P.Ws. were not present at the spot and they did not witness the occurrence. It was an unwitnessed occurrence. We have been involved in the present case, as the complainant party was having grudge/grouse against us. I and my brother Zawar Hussain have been made a scape-goat in this case because qur father was killed by Muhammad Ashfaq afore- named and he was convicted/ sentenced by the learned court concerned, as such on the one. hand Altaf Hussain complainant implicated us in the said false case and on the other hand removed Muhammad Ashfaq from his way in order to marry with Mst. Qamraz; the wife of the deceased. After the death of Muhammad Ashfaq, Altaf Hussain complainant of the instant murder case contracted marriage with Mst. Qamraz afore-named. We were not present at the time of alleged occurrence at the spot and the complainant of the present case Altai Hussain involved us with his mala fides, although we are absolutely innocent and the prosecution story as alleged in the F.I.R. is nothing but mere a concoction and the same is not at all based on any sort of reality."

9. The learned Additional Sessions Judge on culmination of the trial proceeded to convict/sentence the appellant as mentioned hereinabove, besides declaring Zawar Hussain accused a P.O. as he, slipped away, at the stage of final arguments. He, however was arrested

on 18-12-2008 and convicted/sentenced in identical terms, like the appellant was meted out, vide judgment dated 29-10-2009 against which he filed an appeal (Criminal Appeal No.415 of 2009) which has been decided/dismissed by this Court, through an independent judgment of even date.

10. We have heard learned counsel for the parties and perused the record with their able assistance.

11. Learned counsel for the appellant has contended that by putting the defence version in juxtaposition to the prosecution story, the truthfulness of the defence version would be evident from the fact that Attar Israr, a key figure in the prosecution case and main persuader to have taken the deceased with him to the house of the appellant, stood acquitted of the charge; the empties recovered from the spot had not been found matched with the pistol recovered from the appellant, as is evident from the Forensic Science Laboratory's report Exh.D2; the witnesses of ocular account are not only related inter-se and with the deceased but they are biased' towards the appellant, therefore, their evidence requires strong corroboration; the presence of P.W,7, P.W.8 and P.W.9 at the spot at the relevant time of occurrence was highly doubtful as the purpose shown by them for their presence at the spot did not appeal to common sense, rather the acquittal of Attar Israr accused negates the very purpose of their presence at the spot, at the crucial hour; the abscondence of the appellant has no value in the eyes of law as the eye-witness account is not believable; the procedure adopted by the trial Court for declaring the appellant an absconder was illegal thus, insufficient to label the appellant a fugitive from law; the incident had not been witnessed by the P. Ws. , therefore, the appellant is entitled to clean acquittal; the appellant was found not involved in the occurrence during the course of investigation, as is evident from the statement of Inspector Kareem Nawaz Khan (DW-1); the witnesses of ocular account made dishonest improvements in their testimonies which had caused collapse of the prosecution case in entirety but trial ' Court failed to deal with the aforesaid situation in a lawful manner; incomplete statement of P.W. Mohabbat. Hussain a witness of ocular account could not be read in evidence which has been unlawfully relied upon by the trial Court in sheer disregard to the principles, settled by law; all the doubts and lacunae in the prosecution case, unlike the settled principles of law have been resolved in favour of the prosecution; no other conclusion than the acquittal of the appellant, was possible from the evidence, adduced by the prosecution at trial but against all estimations and probabilities, learned trial Court passed the impugned judgment which is patently illegal and calls for interference by this Court. Alternatively submits that the case of the appellant hints at more than one mitigating factor which call for a reduction in the quantum of sentence of the appellant. Relies upon cases titled: Riaz Ahmad alias Rajoo and another v. The State (PLD 1970 Lahore 689), Tikka Khan and 3 others v. The State (PLD 1974 Lahore 100), Akhtar Ali and others v. The State (2008 SCMR 6), Habibullah and others v. The State (PLD 1969 SC 127), Ali Bahadur and 2 others v. The State (1998 PCr.LJ 24), Muhammad Yameen alias Raja v. The State and others (2009 SCMR 84), Ali Ahmad and 2 others v. The State (1978 SCMR 384), Muhammad Farooq and another v. The State (2006 SCMR.1707), Naik Muhammad alias Naika and another v. The State (2007 SCMR 1639), Mst. Sabeeha v. Ibrar and others (2012 SCMR 74), Shaukat Rehman alias Jernail v. Rahim Noor and another (2002 PCr.LJ 1946), Rohtas Khan v. The State (2010 SCMR 566) and Muhammad Arshad and others v. The State and others (PLD 2011 SC 350).

12. Conversely, learned State Counsel assisted by learned counsel for the complainant has supported the impugned judgment by arguing that the ocular account is trustworthy which has been rendered by natural witnesses; the evidence of the witnesses is directly corroborated by the medical evidence coupled with the evidence of abscondence of the appellant; the active participation of the appellant along with his run away partner stood established through the evidence of unimpeachable character and it is a case wherein there does not exist any mitigation in favour of the appellant. Places reliance on the cases titled: A1i Khan v. The State (1980 SCMR 474), M .I antmad Igbal alias laved tqbal v. The State (PLD 1976 SC 291), Noor Muhammad v. The State (PLD 1991 SC 150), Muhammad Sharif and another v. The State (PLD 2001 SC 94), Sarfraz alias Sappi and 2 others v. The State (2000 SCMR 1758).

13. After hearing the arguments of learned counsel for the appellant and also for the State and learned counsel for the complainant and taking into consideration the evidence. available on record with their able assistance, it is observed that the prosecution case is plain and simple which takes a start from the point, when Attar Israr (since acquitted) persuaded Muhammad Ashfaq (deceased), Altaf Hussain complainant P.W.7 and Mohabbat Hussain P.W.8 to pay a visit to the house of Azhar Hussain appellant for striking compromise with him, qua the murder of his father Mustaqeem Khan, for which Muhammad Ashfaq (deceased) had been found guilty and awarded sentence by the trial Court. Though he after having served the total sentence had returned to the village, a year back, yet element of enmity could not be presumed to have gone extinguished. It has been vociferously argued by the learned counsel for the appellant that the very basis of the prosecution case, relating to the factum of paying a visit to the house of the appellant by Muhammad Ashfaq (deceased) in search of compromise qua the previous murder case had gone dismantled owing to the acquittal of Attar Israr through the impugned judgment. The learned trial Court while acquitting Attar Israr has nowhere observed in the impugned judgment that he had not gone to the place of occurrence on the fateful day or that he had not been instrumental in leading Muhammad Ashfaq deceased and the eye-witnesses to the place of occurrence, rather the main reason, in recording acquittal of Attar Israr was that no evidence had been produced by the prosecution to show that he was possessed with a criminal intent to have led the deceased party to the house of the appellant for some mischievous purpose. The learned trial Court in this regard was of the view that he too might have been taken by surprise when situation, at the house of the appellant, erupted into a shootout by the appellant and his co-accused at the deceased. The acquittal of Attar Israr does not dent the prosecution case in any manner nor does it give rise to a conclusion that the deceased had gone to the house of the appellant for some other purpose than in quest of a compromise, qua the murder of the father of the appellant. There are a couple of factors which stand admitted on both the sides and there we find no cleavage in respect thereto, for instance, the date, lime, the place of occurrence and the motive appear to be the common factors.

14. Insofar as the raison d'etre in the instant case is concerned it relates to the murder of Mustaqeem Khan, the father of the appellant as well as that of his absconding co-accused which had been committed by Muhammad Ashfaq deceased who was charged for the said murder and after a full-fledged trial he was convicted and sentenced therein. His return to the same village where the accused/appellant also lived, after serving out the entire sentence was a perennial danger for both the sides which could ignite another bloody encounter between them. At no stage of the trial, the prosecution or the defence disputed each other on the point

of motive as an un-rebuttable circumstance existed to believe that the motive set up by the prosecution was a proven fact.

15. Insofar as the ocular account furnished by the prosecution is concerned it has been rendered by three witnesses, two cited in the F.I.R. and one namely Zafar lqbal (P.W.9), appearing at the investigation stage and then joining the prosecution-fold to render his testimony before the trial Court. Learned counsel for the appellant took many hours to argue a 'controversial' point, touching the testimony of Mohabbat Hussain P.W.8. He was an unfortunate soul. He died due to ailment when his examination had been "partly" recorded and that too, at a stage, when his disease was transmitting alarming signals about the mortality, ' fast approaching him. There is an irresistible aspect of the evidence of Mohabbat Hussain P.W.8 which reflects on the trial-conducting qualities of the learned Addl: Sessions Judge, seized with the trial of the accused as, he did not show the required degree of sense, courage and confidence, while granting countless and on most of the occasions uncalled for adjournments to the defence. The learned trial Court behaved so badly while repeatedly acceding to the requests of the defence for seeking adjournments, 36 in number only in respect of the witnesses of ocular-account, that it, at the best, can be termed as distressing and disgusting. On a couple of occasions i.e. on 21-6-2003 and 17-4-2004 Mohabbat Hussain (P.W.8) appeared at trial in a miserable state of health and trial Court despite noticing that his condition was serious, wilted under the pressure of the defence and injudiciously adjourned the proceedings, in a mindless manner, despite a vocal protest by the other side. Unending chain of adjournments finally resulted into the death of the enervating witness on 24-7-2004, but earlier to it, for almost every bit of his examination-in-chief, he had been grilled by the defence. It appears from the record that with a little bit show of common sense and mental-agility, the testimony of P.W.8 should have been 'completed' as there existed no viable reason to adjourn the proceedings gratuitously. The adjournments sought for by the defence on many occasions, when complete set of eye-witnesses including Mohabbat Hussain (P.W.8), was present before the trial Court, looked certainly a part of their clever campaign not to let Mohabbat Ilussain (P.W.8) be examined and on the other hand, the prosecution asserted vociferously, almost on each date of hearing, for his Immediate examination, keeping in view, his ever worsening disease. There cannot be two opinions about it that an examination-in-chief of a witness, not followed by cross-examination, for any reason, cannot be considered an admissible piece .of evidence and incomplete statement of such a witness cannot be given any weight but in the instant case, the situation is hugely different as examination-in-chief of the deceased-P.W. had been recorded on 21-11-2002 and he stood cross-examined almost in complete terms by the defence, in two years time, before he died on 24-7-2004. It appears from the proceedings, recorded by the trial Court for the said day that there was every probability that the statement of P.W.8 could have been completed; who, despite being in a delicate condition, had taken rigors to appear before the trial Court to render his evidence. Even if it is believed that the proceedings had been adjourned by the trial Court on 17-4-2004 at the request of learned defence counsel for remaining cross-examination on the said P.W., it cannot be said, that the evidence rendered by him was a thrown-away material, or that it could not be taken into consideration. As discussed above, the defence sought 36 adjournments spanning over a period of about two years (from 21-11-2002 to 24-7-2004) which shows a poor state of affairs and non-serious attitude of the trial Court. The P.W. in' question himself and his counsel had been constantly raising voice and concerns about the

ever deteriorating condition of the incumbent prosecution witness, who, despite, the death gazing into his eyes bravely faced the situation and did not lose the heart at any stage and made sure that his statement was recorded by the trial Court. Almost 95% of the adjournments, as noted above had been granted by the trial Court, when there was hardly any occasion for it to do so. The defence cannot raise the plea at this stage nor the case law, relied upon by it, give any strength to their version that the statement of P.W.8 should be rejected because of 'incompletion' of the cross-examination by the defence.

16. The examination-in-chief of P.W.8 was recorded on 21-11-2002 which was partly cross-examined by the defence on 28-2-2004 and even on that day, learned trial Court was constrained to observe that he "appeared in a very precarious condition being sick and with the consent of learned counsel for the defence he has been provided chair when he made statement in the court". Mohabbat Hussain P.W.8 despite frailty of health was determined to get his statement completed on. 28-2-2004 which could not be done, again due to the non-cooperation of the defence. He for the last time in his life, appeared before the trial Court on 17-4-2004 and faced cross-examination confidently And his statement, from all angles, appeared to have been completed, when learned trial Court again showed an unenviable weakness by adjourning the proceedings at the request of the leaned defence counsel who, due to the 'death' of his friend's wife refused to continue doing his duty. The request for adjournment, on the said day, was however, vociferously opposed by the learned counsel for the complainant but to no avail. Would that, it were inquired by the trial Court, before granting adjournment on the said day, as to on what other aspects of the case learned defence counsel wanted to continue the cross-examination. Mohabbat Hussain P.W.8 finally succumbed to the disease before he could appear before the trial Court on 37th occasion for his examination. More we look into the mode and style of the trial Court by which it handled the affairs of the trial in this case, firmer becomes our view that it was a lamentable show of poor craftsmanship and dexterity on the part of the trial Judge, who created a record of its kind for award of uncalled for adjournments in a single case. This particular conduct of the trial Court is regrettable as well as condemnable. The facts of the judgments relied upon by the learned counsel for the appellant asking for an observation of this court to discard the above said piece of evidence, do not assimilate the proposition in hand, hence, it is held that the testimony of Mohabbat Hussain (P.W.8) for the aforesaid reasons is as good as the statement of P.W.7 Altaf Hussain, Zafar Iqbal (P.W.9) or any other witness, produced by the prosecution at trial.

17. Besides the aforesaid pathetic state of affairs, the trial Court awarded countless other adjournments, to the defence, when P.Ws. were in attendance. It appears that every move, made by the defence at trial to demoralize the complainant, succeeded because of the impulsive generosity, shown by the trial Court towards the former. The prosecution, however, deserved a pat on their back that they showed exceptional endurance and made sure, that the trial was concluded, though it took them years to do so.

18. Altaf Hussain P.W.7 and Mohabbat Hussain P.W.8 rendered the eye-witness account, whereby, they unquestionably, established the guilt of the appellant beyond any shadow of doubt. Zafar lqbal P.W.9 also chipped-in with an identical statement but with a change that he, on listening to the report of firing reached the spot and learnt from Altaf Hussain P.W.7 and Mohabbat Hussain P.W.8 that Zawar (since P.0) and Azhar (appellant) had fired with

their weapons to do away with Ashfaq (deceased). He along with Rafique P.W. (not produced) entered the room of the appellant and found Ashfaq lying on a cot in injured condition who breathed his last in a jiffy, within their view. The ocular account, thus, comprises statements of three P.Ws., Altaf Hussain (P. W .7), Mohabbat Hussain (P.W.8) and Zafar Igbal (P.W.9), the last one qualifying the characteristics of the evidence of res gestae. Learned counsel for the appellant has vigorously argued that all the three witnesses had improved upon their previous statements they rendered before the police under section 161, Cr.P.C. and, made dishonest improvements which would label them unreliable and un creditworthy. The specification of injury and description of certain other depositions as it appears in the statements of P.W.7 to P.W.9, can simply be deemed embroidery of the real facts and nothing-else. Undoubtedly, many confrontations appeared in the testimonies of the eye-witnesses, especially, P.W.7 and P.W.8 who have been so confronted with their previous statements, much more in number than done in respect of P.W.9. An attempt has been made by Altaf Hussain-complainant (P.W.7) to specify a couple of fire shots of the appellant as well as that of the absconding co-accused by deposing that the second fire shot made by Azhar Hussain (appellant) hit the frontal neck of Muhammad Ashfaq deceased and the first fire shot of Zawar Hussain (since P.0) landed at, the right eyebrow of the deceased, which may be a departure from their previous statements, recorded by Dure-Muhammad S.-I./I.O. (P. W.14) whereby ,they attributed a sole of joint firing at the deceased to both the accused, killing him at the spot, but this particular improvement cannot be termed dishonest for twofold reasons, firstly, the presence of the eye-witnesses at the spot at the relevant time of occurrence stands more than established and secondly, the dead body of the deceased bore 12 fire-arm injuries, six apiece, entry and exit.

19. The defence plea of the appellant, adopted by him under section 342, Cr.P.C. also extends a sense of strength to the prosecution case, whereby, the appellant admitted the arrival of Muhammad Ashfaq (deceased) at his house at the fateful night where he was murdered by his servant Salamat Teli. The contention of the appellant regarding murder of Ashfaq deceased by his servant Salamat Teli is a bombastic plea which cannot be believed by any stretch of imagination but fortifies the prosecution case in a sense that Muhammad Ashfaq was murdered at his residential louse. The medical evidence, as noted above, reveals 12 fire arm injuries on the body of the deceased which show that the ill-fated person had been fired at incessantly and murdered in a cold-blooded manner. The prosecution presented such a case before the trial. Court wherein specific role of the accused would mean less, keeping in view the gravity of offence and the venue of the occurrence. Salamat Teli, a servant of the appellant is an alien so far as the case in hand is concerned. He had no enmity at all with the deceased nor could he be supposed to have thought in terms of murdering a person/depeased gratuitously. The defence evidence has been presented by Inspector Karim Nawaz Khan (DW-1) who did not utter even a single word in his testimony, as to the specific defence plea of the appellant, that Muhammad Ashfaq (deceased) had been murdered by Salamat Tell, a servant of the appellant Azhar Hussain, rather, he deposed about his opinion whereby he verified the plea of alibi of the appellant, regarding his presence at Rawalpindi, at the relevant time of occurrence. This particular piece of evidence virtually meant nothing as he failed to hint at the material on the basis of which he formulated such an opinion in favour of the accused-appellant. Even otherwise, the appellant produced no evidence at all in his favour to establish his presence at Rawalpindi at the crucial hour nor it was his stand-point

that he was at Rawalpindi at the time of occurrence. The burden to prove the plea of alibi certainly shifts to the accused, taking such plea and in the instant case, the appellant never felt" like discharging the requisite onus qua the said plea. The defence evidence moves opposite to the stance of the appellant, he adopted-while deposing under section 342, Cr.P.C.

20. There is another crucial circumstance which has caught the eye of this Court being an important corroboratory piece of evidence. The appellant, as stated earlier, was arrested in this case on 23-2-2002 but not before, he had been declared a P.O under section 87, Cr.P.C. by the trial Court. His co-accused Attar Israr (since acquitted) after having been arrested on 25-3-2001 by Imdad Hussain S.-I. P.W. 16 faced the trial and some of the prosecution witnesses already stood recorded when the appellant and his absconding co-accused Zawar Hussain were arrested together on 23-2-2002. The prosecution with a view to prove the abscondence of the appellant, produced Muhammad Ishaque 1270/C P. W.12, Dure-Muhammad S.-I. P.W.14 and Muhammad lshtiaq 2808-C P.W.19. Muhammad Ishaq constable P.W.12 caused the execution of non-bailable warrants of arrest of the appellant (Exh. P.W.9/B) and his absconding co-accused (Exh.P.W,9/A). He rendered a Statement before learned Area Magistrate regarding non-execution of the non-bailable warrants of arrest in consequent thereupon, the proclamation Exh.P.W.9/D were issued against the appellant and his above said co-accused (Exh.P.W.9/C). The reports made by this P.W. on the proclamations were exhibited, Exh.P.W.9/C-1 and Exh.P.W.9/D/1. Imdad Hussain S.-I. P.W.16 was the Investigating Officer who dealt with the matter of abscondence of the appellant as well as that of his still absconding co-accused. It was he who, pending investigation, obtained the non-bailable warrants of arrest of the appellant and that of Zawar Hussain (since P.0) followed by obtainment of the proclamations against them. Muhammad Ishtiaq 2808-C P.W.19 caused the execution of the proclamations against the appellant and his brother, the absconding co-accused Zawar Hussain. The proclamation Exh.PU in respect of the appellant bears a report Exh. PU/ l on its reverse, made by P.W.19, Like-wise the proclamation Exh.PT bears a report Exh. PT/ 1 scribed by the above said P.W. The evidence regarding abscondence, is an important circumstance which lends a sense of corroboration to the ocular account, furnished by P.W.7, P.W.8 and P.W.9. The abscondence of an accused may not be a conclusive piece of evidence but its corroboratory value cannot be denied by any argument. By keeping in view the venue and the mode of occurrence, coupled with the motive part of the case, it cannot be said that : the appellant and his I absconding brother were innocent or that they fearing the wrath of the police, had gone into a hideout merely because of timidity or being chicken-hearted persons. The circumstances of the case lead to believe that, their abscondence was as calculated as the occurrence itself.

21. The motive, which unequivocally stands established, transmits a vivid signal that Mustageem, father of the appellant, had been murdered by Muhammad Ashfaq (deceased) and for this sin 'he, had been convicted/sentenced by the trial Court and he having served out the entire sentence, returned to the village, which was certainly, a circumstance, causing blood bubbling, in the veins -of the appellant and his absconding co-accused which prompted them to chalk out a plan whereby they could attract him to their house for winning a compromise in the previous murder case, Mustaqeem being the deceased. The idea worked out by them clicked, Attar lsrar a common friend, innocently took him to the house (if the appellant, where eventuality awaited him. It was the best opportunity coming appellant's/ way which he joined by his co-accused availed with both hands: The appellant and his

mentioned co-accused Zawar Hussain, whose appeal (Criminal Appeal No.415 of 2009) has also been decided/dismissed vide an independent judgment of even , date, and none-else committed the murder of Muhammad Ashfaq deceased. All the facts and circumstances brought on the record through statements of their witnesses by the prosecution converge on an irresistible conclusion that Muhammad Ashfaq (deceased) had been murdered by the appellant and his mentioned co-accused.

22. The upshot of the above discussion is that prosecution has impeccably succeeded in bringing home the guilt of the appellant beyond reasonable shadow of doubt. We are of the considered view that the occurrence had taken place in the same manner and style as set up by the prosecution in their case. There is no mitigating circumstance in favour of the appellant and we find no reason or circumstance to differ with the findings and conclusion drawn by the trial Court. Therefore, we uphold the conviction of the appellant Azhar Hussain by dismissing Criminal Appeal No.265 of 2005 filed by him against his conviction/sentence, as recorded by the learned trial Court.

23. The sentence of death awarded to the appellant by the trial Court through the impugned judgment is confirmed and Murder Reference No.606 of 2005 is answered in the affirmative.

HBT/A-127/L Appeal dismissed.

2012 Y L R 2900

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD SUFYAN---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 16585-B of 2011, decided on 19th December, 2011.

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

----S. 497(2)---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Roil, grant of--Further inquiry---Complainant had not hinted at any evidence during investigation as to for what purpose, in whose presence, when and where he had handed down the amount to the accused---Mere bouncing of cheque by bank without satisfaction of basic ingredients of S. 489-F, P.P.C. did not call for invocation of said section---Complainant had ,failed to hint that accused issued cheque knowing that it would bounce on presentation as complainant simply contended that accused owed hire certain amount---accused was charged with offence which did not catch the prohibition of S. 497, Cr. P. C and sufficient reasons existed to make his case one of further inquiry---Accused was admitted to bail, in circumstances.

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

----S.489-F---Dishonestly issuing a cheque--Scope---Accused is only liable under S.489-F, P.P.C. if he issues the cheque dishonestly towards repayment of loan or discharge of some lawful obligation knowingly, that it shall be bounced on presentation.

Rai Sajjid Ali Kharal for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab for the State.

Arshacli A.S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Sufyan (petitioner) seeks bail after arrest in case F.I.R. No.460 of 2011 dated 24-5-2011 under section. 489-F, P.P.C. registered at Police Station Sabzi Mandi, District Gujranwala.

2. After having heard learned counsel for the parties and perused the record, it is observed that the complainant did not hint at any evidence during the course of investigation as to for what purpose, in whose presence, when and where he had handed down a huge amount of rupees three millions to the petitioner. Mere bouncing of cheque by the bank without satisfaction of the basic ingredients thereof, the invocation of section 489-F, P.P.C. is not called for. An offender shall only be liable for an action under the aforesaid penal provision of law if he issues the cheque dishonestly towards repayment of loan or discharge of some lawful obligation knowingly, that it shall be bounced on presentation. No such element has been hinted at by the complainant who has simply contended that the petitioner owed him an amount of rupees three millions and that's all. The offence, the petitioner is charged with does not catch the prohibition of section 497, Cr.P.C. Sufficient reasons are available to believe that petitioner's case constitutes need for further inquiry into his guilt as envisaged by section 497(2), Cr.P.C.

3. For the foregoing reasons, the instant application is accepted and petitioner is admitted to post arrest bail subject to furnishing surety bonds in the sum of Rs. 1,00,000 with one surety in the like amount to the satisfaction of learned trial Court.

MWA/M-389/L Bail granted.

2012 Y L R 2904

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ARSHAD, DSP---Petitioner

Versus

THE STATE and others---Respondents

Criminal Miscellaneous No. 5021-B of 2012, decided on 29th May, 2012.

Criminal Procedure Code (V of 1898)---

---S. 497---Penal Code (XLV of 1860), Ss. 302/ 365/ 342/ 148/ 149/ 337-F(i)i 337-L(2)---Qatl-a-amd, kidnapping of abducting with intent secretly anti wrongfully to confine person, wrongful confinement, rioting armed with deadly weapons, unlawful assembly, ghayr jaifahdamiyah, other hurt-Bail, refusal of---Allegation against the accused (police-official) was .that he' had supervised and monitored the torture of the deceased and injured persons---Alleged motive for the 'incident was that the police officials had demanded money from the complainant, which he refused to pay---Contentions of the accused were that he had been falsely involved in the case under a conspiracy hatched up by the complainant and others; that the accused was a senior and responsible police officer who had years of clean service record, and that neither the accused caused any injuries to the deceased or injured persons nor he was linked with the motive part of the prosecution---Validity---Although the accused did not commit physical violence upon the deceased and injured persons, but his Bresence at the spot at the relevant time stood fully established through the statements of witnesses---Postmortem report of the deceased revealed that he had been subjected to the worst degree of torture---Medico-Legal Report of ,the injured persons also gave description of trauma on different parts of their bodies---Deceased and injured persons were not involved in any criminal 'case---Contention of the accused that he had not caused any injury to the deceased or injured persons was not of much relevance as he had allegedly supervised his subordinates, who took the life of the deceased while the injured persons escaped the same eventuality through their good luck---Judicial inquiry and police department inquiries had been conducted against the accused, which prima facie established the accused's contributory role in the crime---Eye-witnesses and injured persons supported the prosecutions case---Accused remained an absconder before he was taken into custody---Offence with which accused was charged caught the prohibition of S. 497(1), Cr. P. C---Bail application of the accused was dismissed, in circumstances.

Syed Zahid Hussain Bukhari for Petitioner.

Miss Muqadass Tahira, Additional Prosecutor' General Punjab for the State with Rustam Ali S.I.

Saif Ullah Khan for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.370, dated 18-8-2011, under sections 302, 365, 342, 148, 149, 337-F(i), 337-L(2) PPC, registered at Police Station Malka Hans, District Pakpattan Sharif.

2. Precisely the prosecution case as narrated by Wali Dad (complainant) is that he along with his paternal nephew Allah Ditta and others, while riding two motorcycles moved towards Chak No.191/4-L (District Okara) on 10-8-2011; when they reached near Chak No.72/D, they were intercepted by a police van wherein Muhammad Ashraf Khokhar ASI and four constables were seated; they arrested Allah Ditta and Zaheer son of Naseer and took then to an unknown place wherefrom they were shifted under the commandment of Muhammad Arshad DSP/SDPO (petitioner, to Police Station Kalyana; both the captives

were subjected to severe torture by police officials Rana Ilyas and Asif Khan; he along with Naseer Ahmad reached Police Station Kalyana at about 2-00 p.m. on 18-8-2011 where he found Arshad Hussain DSP/SDPO supervising his subordinates, busy in committing violence on Allah Ditta who, died Instantaneously; he nominated the tormentors as Muhammad Ilyas, Asif Khan and Rana Ilyas. The motive behind the occurrence was that Asif Khan S.H.O. Police Station Kalyana and Rana Ryas A.S.-I. demanded an amount of Rs.5 lass from the complainant which he refused to pay and due to this fact, they arrested Allah Dicta (deceased) and Zaheer; Asif, Khan S.H.O. had threatened, if he was not paid Rs.5 lacs, he would return the dead body of Allah Ditta instead of letting him return alive.

3. Learned counsel for the petitioner submits that petitioner has been falsely involved in this case under a conspiracy hatched up by the complainant and others; the petitioner is a senior and responsible police officer who has years of clean service-record and his involvement in this case is conspiratorial; the petitioner did not cause any injury to the deceased or to the injured P.W. nor he is linked with the motive part of the prosecution case; the petitioner was arrested on 20-3-2012 and he has been languishing in jail ever since.

4. On the other hand, learned A.P.-G. assisted by learned counsel for the complainant opposes with the contention that petitioner is the principal accused of this ease as he, by supervising the torturous act of his subordinates, contributed a lot towards the unfortunate end of Allah Ditta; the injured witnesses Zaheer and Ashiq along with other eye-witnesses fully corroborate the story, mentioned in the F.I.R.; the petitioner was found involved in the occurrence during the course of investigation and judicial inquiry into the death of the deceased by Magistrate Section-30, Pakpattan Sharif also ended in his guilt; two departmental inquiries were also conducted in the instant case wherein, the petitioner was found guilty.

5. After hearing learned counsel for the parties and perusing the record, it is observed that Muhammad Arshad DSP (petitioner), though did not commit physical violence upon Allah Ditta deceased, Zaheer Ahmad and Ashiq injured, yet his presence at the spot the relevant time of occurrence stood fully established through the statements of as many as four witnesses including the ones, pertaining to Zaheer Ahmad and Ashiq injured. The necropsy report qua Allah Ditta deceased divulges that the poor soul had been subjected to worst degree of torture before he breathed his last. The MLRs of Zaheer Abbas and Ashiq injured are also descriptive of blunt trauma, on different parts of their bodies. The circumstances hovering over this case show a pathetic state, of affairs of the police department. The corruption and the corrupt appear to be flourishing with every passing hour and there looks no respite to a common man. The rivalry in worldly increase has distracted countless public servants and those, working in the police hierarchy are the worst examples. There does not appear an end to the said race. More, one amasses the wealth, deeper would he dive into the bottomless ocean of greed. Lust for money knows no bounds and one, running after the worldly gains forgets the ordainment of Almighty Allah that he has been sent to the earth to prepare himself for life-hereinafter: This rebellious attitude towards commandments of the Almighty has already plunged the society in an inferno like situation. This is high time to wake up and make mends otherwise it would be too late. The corruption and malpractices have to be alleviated so as

to ensure a zero corruption society.

6. The record of this case reveals that the ill-fated deceased was not involved in any criminal case and so was the position of Zaheer Abbas and Ashiq injured. They were picked up by the police when they were moving towards a village where their relatives were waiting for them. They had no idea whatsoever when intercepted by the police that heavens would fall upon them in next few days. Both the victims right from the day of their apprehension to the fateful day appeared to be under surveillance of the accused-petitioner who being a DSP/ SDPO did everything, but, his duty in an honest manner. The contention of the learned counsel that the petitioner had not caused any injury to the deceased or to the injured P.Ws. is not of much relevance as he allegedly supervised his subordinates' brutal act which took the life of an innocent person, while others (injured) escaped the eventuality, only through sheer good-luck. No scholarly argument is required to believe that the petitioner's presence at the relevant time of occurrence at Police Station Kalyana went a long way in committing the crime by his subordinates. An outcome of the judicial inquiry conducted by Magistrate Section 30, Pakpattan Sharif, the result of another inquiry conducted by S.P. Regional Investigation Branch, Sahiwal and the result of two departmental inquiries conducted by two senior police officials prima facie establish the petitioner's contributory role in the crime. The eye-witnesses and the injured witnesses still support the prosecution case. The petitioner remained an absconder before he was taken into custody by the police on 20-3-2012 but not before he repeatedly hoodwinked the process of law and that of the courts in worst terms. The pre-arrest bail plea of the petitioner (Criminal Petition No.29 of 2012) was dismissed on 19-3-2012 by the Hon'ble Supreme Court of Pakistan. A crucial and relevant excerpt containing a few observations touching the merits of the case, from the above-said order is reproduced hereunder:

> "The allegation against the petitioner is that in his capacity as DSP/SDPO Saddar, Pakpattan Sharif he had supervised and monitored torture of three suspects namely Allah Ditta, Zaheer and Ashiq and as a result of that torture Allah Ditta had died. The document available at page No.35 of the paper-book of the present petition shows that on 16-8-2011 the District Police Officer, Pakpattan Sharif had felt dissatisfied with the interrogation of the above mentioned suspects conducted thus far and had directed the petitioner to personally monitor the interrogation and to submit a report before the District Police Officer about such interrogation and monitoring on a daily basis. It was in that backdrop that, according to the prosecution, the petitioner had personally supervised and monitored the interrogation of the said suspects leading to the death of Allah Ditta and receiving of injuries by two other suspects namely Zaheer and Ashiq. A judicial inquiry had been conducted into the allegation against the petitioner and two departmental inquiries had also been conducted and it had been concurrently found in the judicial as well as departmental inquiries that the allegation against the petitioner regarding personally supervising the torture of the above mentioned suspects was correct. Even during the investigation of this case the local police had arrived at the same conclusion and a challan in that respect has already been submitted before the learned trial Court. It is not disputed that Wali Dad complainant and the two injured suspects namely Zaheer and Ashiq have so far stood by their

statements made before the police fully incriminating the petitioner."

The petitioner not only played a supervisory role through `N' through, but also patronized the crime by remaining present, as a monitor and monstor, at the torture-den', when hapless victims bore afflictions at the hands of his subordinates, the co-accused. The offence, the petitioner is charged with catches the prohibition of section 497(1), Cr.P.C. By no means, the case of the petitioner falls within the mischief of section 497(2), Cr.P.C.

7. Therefore, I am not inclined to accept this application which is dismissed accordingly.

MWA/M-210/L Bail dismissed.

2012 Y L R 2923

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD AKHTAR---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 4644-B of 2012, decided on 8th June, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1850), Ss. 302/34---Qatl-a-amd, common intention---Bail, refusal of---Honour killing---Allegation against the accused and co-accused persons was that they murdered the deceased (son of the complainant) as they suspected him of having' developed illicit relationship with the daughter (deceased) of the accused---Contention of the accused was that he saw both the deceased in a compromising position and lost his self-control and committed the occurrence, which was a natural fallout of the immoral activity committed by both the deceased, and that the act of the accused was an act of righteousness which fell within the scope of recognized exceptions of law---Validity---First F.I.R. for the incident was reported to the police by the maternal grandfather of the deceased-girl, wherein the accused was nominated as the only perpetrator of the crime---Subsequently the complainant lodged the second F.I.R. (present F.I.R.) for the occurrence wherein he nominated four persons including the accused and maternal grandfather of the deceased-girl, who was also the complainant of the first F.I.R.---Occurrence admittedly took place at the house of the maternal grandfather of the deceased-girl, therefore, probability that the matter reported by him to the police was nearer to the truth, could not be ruled out---Honour killing or murder in the name of "ghairat" was not legitimate-Defence plea of the accused that he committed the crime under grave and sudden provocation was a circumstance to be looked into by the Trial Court after recording of evidence of the parties---Accused had allegedly committed the crime in a cold-blooded manner---Prosecution witnesses supported the prosecution case---Offence with which the accused was charged caught the prohibition of S.497(1), Cr.P.C---

No reasons existed to believe that the case against the accused fell within the definition of further inquiry as defined in S. 497(2), Cr.P.C-Bail application of the accused was dismissed, accordingly.

Ch. Muhammad Ashraf Kamboh for Petitioner.

Muqadass Tahira, Addl: Prosecutor General Punjab for the State.

Ch. Muhammad Akram Khan for the Complainant.

Faqeer Muhammad A.S.-I.

ORDER

SHAHID HAMEED DAR, J.--Muhammad Akhtar (petitioner) seeks bail after arrest in case F.I.R. No. 600 of 2011 dated 14-7-2011 for offences under section 302, 34 P.P.C. registered at Police Station Bhilthi (Sheikhupura).

2. Precisely, Zulfiqar Ali (complainant) informed the police that his sun Muhammad Shahbaz (deceased) was suspected of having developed an illicit relationship with Mst. Sonia Bibi, the daughter of Muhammad Akhtar accused (petitioner), the maternal grand-daughter of accused Khursheed and maternal niece of accused Mahboob and Mahfooz; with this suspicious state of mind, the above said accused deceitfully called Muhammad Shahbaz to their house where they committed his brutal murder and also killed Mst. Sonia Bibi at the spot.

3. Prior to it, Khursheed Ahmad, the maternal grandfather of Mst. Sonia Bibi had got registered case F.I.R. No.423 of 2011 dated 25-5-2011 under section 302, P.P.C. at the same Police Station with the assertion that his son-in-law Akhtar (petitioner), believing it a case of an illicit liaison between Mst. Sonia Bibi and Shahbaz, committed their murder and he was seen by him (complainant) with a gun in his hand, leaving the room wherein dead bodies of both the deceased lay.

4. Learned counsel for the petitioner submits that both the deceased were seen in a compromising position by the petitioner who is the father of Mst. Sonia Bibi and having lost, self-control, he committed the occurrence, which was a natural fall-out of the said immoral activity of the deceased; the petitioner was not supposed to garland Shahbaz deceased or his daughter for their shameless union and what he did at the crucial hour, was an act of righteousness; the petitioner is behind the bars since 25-5-2011 and his trial has not concluded so far; it is not a case of culpable homicide amounting to murder as, the deceased were not masoom-ud-dam; the case of the ' petitioner falls within the scope of recognized Exceptions of law.

5. On the other hand, learned Addl: Prosecutor-General Punjab assisted by learned counsel for the complainant has argued that the accused petitioner behaved himself in a callous manner at the time of occurrence and crime committed by him was a sheer brutality, which fell within the mischief of prohibitory clause of section 497(1), Cr.P.C.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the occurrence, allegedly committed by the petitioner is tragic, as two youths have been

done to death for whimsical reasons by the accused-petitioner and his co-accused. The crime was firstly reported to the police by Khursheed Ahmad, the maternal grandfather of Mst. Sonia Bibi who nominated Muhammad Akhtar (petitioner), his son-in-law as the only perpetrator of the crime. A few months thereafter i.e. on 14-7-2011 Zulfiqar Ali, the father of Muhammad Shahbaz (deceased) got lodged second F.I.R. bearing No.600/1.1 (supra) about the same occurrence wherein he nominated four persons as accused including Khursheed Ahmad, the complainant of the previous F.I.R., Mahboob, Mahfooz and Muhammad Akhtar (petitioner) for having committed the above said occurrence. One thing is common in both the F.I.Rs. which relates to the factum, regarding development of illicit relations by both the deceased. The occurrence, admittedly, took place at the residential house of Khursheed Ahmad accused, hence, the probability that the matter reported by him to the police was nearer to truth, cannot be ruled out. The involvement of four persons, as named above, in F.I.R. No.600 of 2011 (supra) is however, subject to the scrutiny of the trial Court during the course of the trial. Even if the arguments of learned counsel for the petitioner are believed as such, would it mean that the honour killing or murdering a person in the name of ghairat, stood legitimized, the answer to which, is a certain NO. It may be the defence plea of the accused at trial that he having lost self-control committed the crime under grave and sudden provocation but this is again a circumstance to be looked into by the trial Court, after recording the evidence of the parties at trial. Deeper appreciation of evidence, at the bail stage, is not permissible under the law. The petitioner allegedly committed the crime in a cold-blooded manner. If such like act as committed by the petitioner, is approved of, it would lead to an anarchic situation in the society and lynching of accused would be the order of the day. The eye-witnesses still support the prosecution case. The offence, the petitioner is charged with catches the prohibition of section 497(1), Cr.P.C. There exists no reason to believe that the petitioner's case falls within the definition of further inquiry as defined under section 497(2), Cr.P.C.

Therefore, I am not inclined to allow this application which is dismissed accordingly.

MWA/M-228/L Petition dismissed.

PLJ 2012 Cr.C. (Lahore) 6

[Multan Bench Multan]

Present: Shahid Hameed Dar, J.

MUHAMMAD IQBAL--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 4987-B of 2010, decided on 2.3.2011.

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

----S. 497(2)--Pakistan Penal Code (XLV of 1860), Ss. 302 & 34--Bail, grant of--Further inquiry--Blind murder--Nominated through supplementary statement--Last seen evidence--Joint

recovery--Failed to explain crucial period of taciturnity--Held: Witness of last seen evidence was a close relative of deceased who appeared before police to record his statement after four days of the occurrence without intervening period of silence--Recovery of crime articles and case property revealed that it was case of joint recovery--Further dilate upon quality and admissibility of prosecution evidence at that stage lest it would cause prejudice to case of any two sides--Prima facie grounds to believe that petitioner's case one of further inquiry--Bail was allowed. [Pp. 7 & 8] A

Mr. Muhammad Rashad Gill, Advocate for Petitioner.

M/s. Malik Muhammad Aslam Budh, and Sardar Manzoor Ahmad Khan, Advocates for Complainant.

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

Date of hearing: 2.3.2011.

Order

Muhammad Arif, the only son of the complainant was murdered by some unknown accused on 06.07.2010 and his dead body was found from the area of Mohallah Hayat Nagar, with hands and feet tied by a string. Mst. Sughra Bibi complainant lodged the report of crime against some unknown accused, as is evident from the text of FIR No. 498/2010 of 06.07.2010 for offence U/S. 302, 34 P.P.C, registered at Police Station City Muzaffargarh.

2. The complainant made supplementary statement before the I.O. on 10.07.2010 and nominated Muhammad Iqbal (petitioner) and Junaid Waseem as the accused, to have committed the offence and mentioned the names of Baqir Hussain and Noor Muhammad witnesses as the source of her information. One of the witnesses namely Noor Muhammad happens to be a close relation to the deceased, as pointed out by learned counsel for the complainant. The evidence of last seen was introduced by the prosecution through the statement of above said Baqir Hussain and Noor Muhammad PWs on 10.07.2010.

3. On the pointedness of Muhammad Iqbal (petitioner) and his co-accused Junaid Waseem certain articles belonging to the deceased were recovered by the I.O. during the course of investigation on different dates, some on 23.07.2010 and some on 27.07.2010.

4. Learned counsel for the petitioner has based his arguments mainly on the point that the evidence of last seen was fabricated by the prosecution after four days of the occurrence and that the alleged recovery of the case property is joint in nature which is inadmissible in evidence. He has relied upon Muhammad Bilal Vs. The State and another (2010 MLD 766), Abdul Salam Irfan Vs. The State (2000 P Cr. LJ 842), Abdul Saleem Vs. The State (1998 SCMR 1578), Hyder Jamal and another Vs. The State (1999 MLD 979) and Ghulam Akbar and another Vs. The State (2008 SCJ 907).

5. On the other hand, the bail plea of the petitioner has been strongly opposed by learned Deputy Prosecutor General assisted by learned counsel for the complainant on the ground that the last seen evidence read with evidence of recovery of crime articles and other case property connects the petitioner with the commission of offence; the petitioner has committed a gruesome offence so he is not entitled for the relief prayed for.

6. After having heard learned counsel for the parties and perused the record I find that Noor Muhammad a witness of last seen evidence is a close relative of Muhammad Arif deceased who appeared before the police to record his statement after four days of the alleged occurrence without offering any explanation as to the intervening period of silence. The other PW of the same evidence, Baqir Hussain, also failed to explain the crucial period of taciturnity. The news of recovery of the dead body of the deceased must have spread like a jungle fire and the funeral of the deceased must have been largely attended to and it cannot be believed that Noor Muhammad PW could not learn about the murder and funeral of the

deceased. He must have been the first man to inform the complainant about having seen the deceased in the company of the accused on the day of the occurrence and the tenor of the FIR therefore, must have been different from the one as is found now. The memoes. prepared by the I.O. regarding recovery of the crime articles and that of the case property reveal that it is a case of joint recovery. I do not want to further dilate upon the quality and admissibility of the prosecution evidence at this stage lest it should cause prejudice to the case of any of the two sides.

7. Prima-facie there are reasonable grounds to believe that the case of the petitioner is one of further inquiry within the contemplation of Section 497(2) Cr.P.C. and I am fortified in this regard while I seek guidance from the judgments relied upon by the learned counsel for the petitioner.

8. Resultantly, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to furnishing fresh bail bonds in the sum of Rs 1,00,000/- with two sureties each in the like amount to the satisfaction of the learned trial Court.

(S.L.) Bail allowed.

PLJ 2011 Cr.C. (Lahore) 8

[Multan Bench Multan]

Present: Shahid Hameed Dar, J.

SHAHBAZ SHARIF and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 5151-B of 2010, decided on 2.3.2011.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 392, 411--Bail, grant of--Further inquiry--Offence like dacoity would be investigated by some knowledgeable and competent police officer so that prosecution case could stand the test of trial--No reason by complainant as to why could not nominate accused in FIR and how did complainant learn the names of accused immediately after registration of FIR--Source of complainant was continuously unknown--Circumstances made case of further inquiry in favour of accused within scope of S. 497(2), Cr.P.C.--Bail was allowed. [Pp. 9 & 10] A

Kh. Qasir Butt, Advocate for Petitioner.

Mr. Muhammad Afzal, Advocate vice-original counsel for Complainant.

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

Date of hearing: 2.3.2011.

Order

Syed Muhammad Ali Gardazi complainant and his servant were looted at gunpoint by three unknown armed accused at night between 27/28-08.2010 when they were moving on their jeep through Industrial Area Multan; the external features of the accused and their complexion etc. had been mentioned by the complainant in the FIR.

2. The complainant recorded his supplementary statement before the I.O. immediately after the registration of FIR and nominated Muhammad Zubair, AbidHussain (petitioner) and Shahbaz Sharif (petitioner) as the perpetrators of the crime. The petitioners were arrested on

30.09.2010. Nothing was recovered from the possession of Shahbaz Sharif accused and a sum of Rs.5000/- was recovered at the instance of Abid Hussain petitioner.

3. After having heard learned counsel for the parties and perused the record, I find that it is a case which required holding of test Identification Parade as the complainant and his servant were confident about the external features of the assailants which for the reasons, known only to the I.O. has not been got arranged. A golden opportunity for bringing on record a viable piece of evidence has been thrown away by the incompetent Investigating Officer. It has been held time and again that the offences like dacoity etc. should be investigated by some knowledgeable and competent police officer so that the prosecution case could stand the test of the trial. The police on countless occasions has been reminded of their duty to conduct the investigation of such like cases/offences in a manner approved of by the law but they do not appear to have received the same. This is unfortunate, which must be taken care of by those who are at the helm of affairs of the police department before it becomes too late.

4. No reason has been advanced by the complainant as to why he could not nominate the petitioner in the FIR and how did he learn the names of the accused immediately after the registration of the FIR. The source of the complainant is continuously unknown. The attending circumstances, make it a case of further inquiry in favour of the petitioners within the scope of Section 497(2) Cr.P.C.

5. Resultantly, the instant petition is allowed and the petitioners are admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- each with one surety each in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail allowed.

PLJ 2012 Cr.C. (Lahore) 18 (DB)

[Multan Bench Multan]

Present: Shahid Hameed Dar and Sardar Muhammad Shamim Khan, JJ.

MUHAMMAD ASLAM and another--Appellants

versus

STATE--Respondent

Crl. Appeals No. 414, 394 & M.R. No. 723 of 2006, heard on 9.2.2011.

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

----Ss. 154 & 161--Pakistan Penal Code, (XLV of 1860), S. 302(b)--Conviction and sentence recorded against accused by trial Court--Challenge to--Appreciation of evidence--Repercussions of dishonest improvements--Dents veracity of testimonies--Validity--Unlike proverb that a single swallow cannot not make a summer, a witness can be debbed as untrue and untrustworthy if found lacking in believability even on a single crucial circumstance, having been maliciously rendered by such a witness. [P. 21] A

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

----S. 161--Statement of prosecution witness was recorded during course of investigation--Stood signed and thumb marked by witness--Statement was delayed by more than one month--Date of occurrence did not contain any explanation as to period of taciturnity on part of maker of such statement--Validity--It has to be deemed as a statement having lost its relevance for variety of reasons, firstly on point of delay caused in making such statement and secondly, being discrepant to earlier one as appearing in case diary. [P. 22] B

Appreciation of evidence--

----Contradiction and improbabilities--Ocular account--Testimony of statements of PWs was full of contradictions and improbabilities--Intrinsic value whereof had been reduced to nullity by hesitant and under confidence prosecution witnesses--Ocular account was held as ludicrous, improbable and unbelievable which was brushed aside. [P. 23] C

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

----S. 302--Conviction and sentence recorded against accused by trial Court--Challenge to--Motive--Appreciation of evidence--Contention--No evidence of enmity qua story of motive--Validity--Contention of prosecution witness could not find any supporting signals both during investigation and trial--No evidence had been produced before him by complainant side in respect of motive part of prosecution case--I.O. in his statement admitted that no evidence of enmity qua story of motive could be brought on record by prosecution side--Motive part of prosecution case had gone un-established like rest of prosecution case--Trial Court had convicted and sentenced merely on conjectures and surmises in sheer disregard to settled principles of dispensation of criminal justice--Benefit of doubt had to be extended to accused--Accused were acquitted. [Pp. 23 & 24] D & E

Malik Ghulam Qasim Rajwana, Advocate for Appellants.

Mr. Muhammad Waseem Khan Babnar, Advocate for Complainant.

Mr. Munir Ahmad Sial, D.P.G. for State.

Dates of hearing: 7 & 9.2.2011.

Judgment

Shahid Hameed Dar, J.--Muhammad Aslam and Shaukat Ali (appellants) have been convicted under Section 302-B P.P.C by the learned Sessions Judge Vehari on the charge of murder of Muhammad Irshad at 7:30 p.m on 20.12.2004. The first named has been sentenced to death, with order to pay Rs. 1,00,000/- as compensation to the legal heirs of the deceased under Section 544-A Cr.P.C. in default thereof to undergo six months S.I and the second one to imprisonment for life with payment of Rs. 1,00,000/- as compensation to the legal heirs of the deceased under Section 544-A Cr.P.C and in default thereof to undergo six months S.I. The benefit of Section 382-B Cr.P.C has been extended to the latter. They have preferred separate appeals and the sentence of Muhammad Aslam is before us for confirmation by way of Murder Reference No. 723 of 2006, transmitted by the learned trial Court under Section 374 Cr.P.C.

2. The case is a simple one. In the evening of 20.12.2004 at about 5:00 p.m Gohar Ali, complainant (PW-6), his son Muhammad Afzal (PW-8), his son-in-law Muhammad Irshad (deceased), his step brother Muhammad Iqbal (PW-7) and his daughter Mst. Zatoon PW (not produced) were chatting with each other at the residential house of the last named lady when, Muhammad Aslam and Shaukat Ali appellants called Muhammad Irshad (deceased) outside the house who went with them on his motorcycle. He did not return till late night, the complainant and others being worried kept waiting for him. All of a sudden, they heard the report of firing, so they all walked eastwards to a distance of 5/6 acres where they found Irshad lying in a sugarcane field of one Khushi Muhammad, badly wounded, wrangling in pain; they attended him and found bullet injuries on his posterior left shoulder and left upper arm. The injured succumbed to the injuries instantaneously.

3. The bone of contention mentioned in the FIR Exh.PE is that Muhammad Irshad had sold cotton crop for Rs. 33,000/- the very day and this fact was in the knowledge of the appellants who out of greed, deceitfully took him away and brutally murdered him to grab the said amount of money.

4. Gohar Ali complainant (PW-6) appeared before Israr Khalid Inspector/SHO, PW-9 at 8:30 p.m, the same day at Police Station Saddar Vehari and got his statement recorded for

registration of FIR No. 507 of 2004, Exh.PE, against the accused under Section 302/34 P.P.C. According to 4th column of FIR the place of occurrence is situated in the revenue limits of Chak No. 192/EB which is at a distance of 14 miles from the police station (Book No. 25).

5. According to the medical evidence, rendered by Dr. Muhammad Nawaz M.O, D.H.Q, Hospital Vehari, PW-1, there are two firearm entry wounds on the dead body of the deceased, one 11 cm below the left shoulder joint posteriorly and the other on lateral part of left upper arm. The margins of both the injuries, according to the postmortem examination report Exh.PA (pictorial diagram Exh.PA/1), bore blackening and tattooing marks, giving rise to impression that it was a close range fire. The left 3rd, 4th and right 3rd, 4th and 5th ribs were fractured, the pleurae were perforated, the upper lobes of right and left lungs were badly crushed and the cavity contained clotted blood. Corresponding to Injury No. 1 a bullet was recovered by the medical officer, PW-1, from the muscles of upper part of back of left side of chest, between the shoulder joint and the neck. Both the injuries were ante-mortem and caused by firearm. The probable time elapsed between injury and death was immediate and between death and postmortem examination within 6 to 12 hours. The damage to the above said vital organs caused irreversible shock and hemorrhage leading to the death of the deceased.

The prosecution case is a blend of the statements rendered by Gohar Ali PW-6 and Muhammad Iqbal PW-7 qua the factum of deceitfully taking away the deceased on the fateful day from his house and the eye witness account rendered by Muhammad Sharif PW-8. All of these PWs and the given up PWs are closely related interse, as well as with the deceased.

6. In their over ambitiousness to show their presence at the abode of the deceased at the crucial hour of summoning of Irshad Ahmad deceased by the appellants, both PW-6 and PW-7 have made dishonest improvements in their testimonies and the most glaring one, being the dying declaration of the deceased. Both of them have deposed about the fact that they drew near the, wincing in pain, deceased who on asking of the PWs replied that the accused Aslam and Shaukat (appellants) had fired at him. They had never raised this contention during the course of investigation in their statements under Section 154 Cr.P.C and 161 Cr.P.C. The defence confronted them with their previous statements not only on this crucial fact but also with the other portions, improved upon by these witnesses during trial. The repercussions of such dishonest improvements would surely dent the veracity of their testimonies. Unlike the proverb that a single swallow cannot make a summer, a witness can be dubbed as untrue and untrustworthy if found lacking in believability even on a single crucial circumstance having been maliciously rendered by such a witness. Gohar Ali PW-6 in his testimony raised divergent contention as to his presence in Chak No. 19/EB as he in the first instance adopted the version that he had gone to said Chak to see his daughter Mst. Zatoon Bibi, but, at a later stage, when finding himself short of confidence, he switched onto a new stance that he had gone to the said village for attending funeral prayer of the sister of one Shafaat Hussain and as the burial of the deceased lady was delayed due to late arrival of some of the relatives so he had to stay in the said Chak. Muhammad Iqbal, PW-7, a resident, in the neighborhood of the deceased, also looked waivered in his testimony while deposing about the calling of the deceased by the appellants at 5:00 p.m on the fateful day and he admitted in his statement that during his presence at the residence of the deceased he on a couple of occasions had visited his own house for some urgency. He could not satisfactorily contend as to for what purpose he repeatedly returned to the house of the deceased. He too improved upon his previous statement, recorded by the Investigation Officer, PW-9 and was duly confronted with it but he could not offer any plausible explanation for having done so. He too showed eagerness to describe about the dying declaration of the deceased which did not find mention in his statement under Section 161 Cr.P.C. The dishonest improvements made by PW-6 and PW-7, surely reflect upon the intrinsic believability of their testimonies. I advantageously rely upon Syed Saeed Muhammad Shah and another Vs. The State (1993 SCMR 550), wherein it has been observed as under:--

27. Secondly, statements of the witnesses in the Court in which improvements are made to strengthen the case of the prosecution are not worthy of reliance. It is held in the case of Amir Zaman Vs. Mehboob and others (1985 SCMR 685) that testimony of witnesses containing material improvements are not believable. Reference can also be made to the cases of Haji Bakhsh V. The State (PLD 1963 Kar. 805), Qaim Din and others V. The State (1971 PCr.LJ 229) and Fazla and another V. The State (PLD 1960 Lah. 373).....

None of the above said PWs stated in his testimony that the deceased within his view had accompanied the appellants when they had called him out of the house. Their statements do not inspire confidence thus, have to be brushed aside.

7. Insofar as the eye-witness account presented by Muhammad Sharif PW-8 is concerned his testimony has done no good to the prosecution case and the learned trial Court appears to have believed him with hiccups. He claims to have witnessed the appellants committing the murder of the deceased by firing at him one after the other. He also contends about the dying declaration of the deceased with the words "I also reached the place of occurrence. At that time the Irshad uttered that Aslam and Shaukat have fired me."

8. A controversy exists as regards to the statement of PW-8 recorded by the I.O under Section 161 Cr.P.C. Israr Khalid Inspector/SHO, PW-9 appears to have received the statement of Muhammad Sharif PW-8, on 26.1.2005 during the course of investigation which stands signed and thumb marked by the PW. This statement is delayed by more than one month as regards the date of occurrence and it does not contain any explanation as to the period of taciturnity on the part of the maker of this statement. It has to be deemed as a statement, having lost its relevance for a variety of reasons, firstly on the point of the delay caused in making such statement and secondly, being discrepant to the earlier one as appearing in case diary dated 30.05.2005. The learned trial Court in Paragraphs No. 22 and 23 of the impugned judgment has referred to a number of case diaries so as to resolve the controversy of recording the statement of this witness by the I.O the prosecution way, but such a practice cannot be approved of. The case diaries can be peeped into by the learned trial Court for moral satisfaction but cannot be relied upon for recording conviction of an accused. The shortcomings of the investigation may be resolved in favour of the accused but under no circumstance, in favour of the prosecution, if the trial record is silent about it. There may be certain circumstances in the investigation going to the favour of an accused but not brought on the judicial record due to some inconvincing or malicious reasoning but the Courts, may, on its own, look into such probabilities and resolve the issue in favour of the accused by dilating upon the same without ever quoting the case diaries in the judgment. I am fortified in my view while seeking reliance upon Manzoor Ullah Vs. The State (2002 MLD Lahore 85). The relevant portion of Paragraph No. 9, at page 90 of the above said judgment is reproduced for ready reference:--

"9. .....In order to ascertain this fact I have looked into the Case Diary and this fact has been found mentioned in the subsequent investigation. Whether the Case Diary can be examined during the hearing of appeal or not, this was the second question. This question finds support from Emperor v. Lalmia and another 1943 Indian Cases 206, while deciding an appeal the Calcutta High Court held that the Court if can suo motu look into Police Diary and can question witnesses to contradict evidence. This fact is further supported by Ghulam Hussain v. The State (PLD 1974 Karachi 91). So the Case Diary can be consulted not for the purpose of conviction but for ascertaining any fact in favour of the accused person. So it is found in the Case Diary that during the subsequent investigation, defence version was duly examined. I am not impressed by the findings of the Investigating Officer and it has got no evidentiary value and the judgment cannot be based on the opinion of the Investigating Officer. Perusal of the case diary was only to the extent whether the plea raised by the accused was taken by them during the investigation....."

The testimony of Muhammad Sharif PW-8 like the statements of PW-6 and PW-7 is full of contradictions and improbabilities, the intrinsic value whereof has been reduced to nullity by the hesitant and under confidence PWs.

9. The ocular account therefore is held as ludicrous, improbable and unbelievable which is brushed aside.

10. So far as the motive part of the prosecution case is concerned, we straightaway find that it has gone un-established. The contention of PW-6 in this regard could not find any supporting signals both during investigation and the trial. The Investigation Officer, PW-9 plainly admitted that no evidence had been produced before him by the complainant side in respect of the motive part of the prosecution case. The complainant PW-6 and Muhammad Iqbal PW-7 showed no knowledge whatsoever as to when, where, how much and to whom the cotton crop was sold by Muhammad Irshad deceased and where from they got the knowledge that he had sold the bulk of the crop for Rs. 33,000/-. The Investigation Officer, PW-9 in his statement admits that no evidence of enmity/ill-will qua the story of motive could be brought on record by the complainant side. The motive part of the prosecution case has gone un-established like the rest of the prosecution case. The learned trial Court has convicted and sentenced the appellants merely on conjectures and surmises in sheer disregard to the settled principles of dispensation of criminal justice. The benefit of doubt has to be extended to the accused but the impugned judgment shows that all the infirmities of the prosecution case have been resolved in favour of the prosecution in a manner alien to the basic principles of law. The impugned judgment therefore we hold, unsustainable.

11. Resultantly, we accept both the appeals, filed by the appellants Muhammad Aslam and Shaukat Ali, set aside the impugned judgment and acquit the appellants of all the charges against them. They shall be set at liberty forthwith if not required in connection with any other criminal case.

12. The Murder Reference No. 723 of 2006 is answered in the negative.

(R.A.) Order accordingly.

PLJ 2012 Cr.C. (Lahore) 44 (DB)

Present: Ijaz Ahmad Chaudhry, C.J. and Shahid Hameed Dar, J.

AHMAD ALI--Appellant

versus

STATE--Respondent

Crl. Appeal No. 1282 of 2008 & Crl. Rev. No. 729 of 2008, heard on 18.10.2011.

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

----S. 302(b)--Criminal Procedure Code, (V of 1898), S. 382-B--Conviction and sentenced to life-imprisonment--Challenge to--Appreciation of evidence--Divergent pleas of eye-witnesses--Factum of recovery--Beyond reasonable doubt--Contention to have witnessed occurrence was patently false--Eye-witnesses had failed to establish their presence at place of occurrence at relevant time--Previous heart-burning between the accused and deceased if any stood forgotten by the parties because of a patch up, hence allegation that accused deceitfully took deceased towards his haveli, after having offered him a lift on his motorcycle did not appeal to reason--Ocular account was brushed aside being false, highly discrepant and unreliable having been rendered by inimical and interested witnesses--Motive of incident which took place about two months prior to occurrence had not been honestly setout by prosecution which was disbelieved by trial Court--Discrepant and contradictory ocular account not

sufficiently corroborated by medical evidence and badly dented by unproven motive had already been disbelieved by High Court, therefore, evidence of recovery of the item was of no consequence to prosecution case--Prosecution had failed to prove its case against accused beyond reasonable doubt--Appeal was accepted. [Pp. 49 & 53] A, B, C & D

Rai Bashir Ahmad, Advocate Assisted by Mian Mansoor Ahmad, Advocate for Appellant.

Mr. Tariq Javaid, Deputy District Public Prosecutor for State.

Ch. Nazir Ahmad Kamboh, Advocate for Complainant/Petitioner (in Crl. R. No. 729 of 2008).

Date of hearing: 18.10.2011.

Judgment

Shahid Hameed Dar, J.--Ahmad Ali appellant was held guilty under Section 302(b) P.P.C. for the murder of Muhammad Naseem, by learned Additional Sessions Judge, Kasur vide judgment dated 18.10.2008 and sentenced to imprisonment for life with direction to pay a sum of Rs.1,00,000/- to the legal heirs of the deceased by way of compensation under Section 544-A Cr.P.C. or in default thereof to undergo simple imprisonment for six months. Benefit of Section 382-B Cr.P.C. was, however, extended to him.

2. The convict/appellant has filed Criminal Appeal No. 1282 of 2008 against, his conviction/sentence, whereas the complainant preferred Criminal Revision No. 729 of 2008 seeking enhancement of the sentence awarded to the respondent-convict (appellant), which was admitted to regular hearing and notice was issued to the respondent on 4.6.2009. We propose to dispose of both the matters together through this single judgment.

3. The facts, as unfolded by Muhammad Sarwar-complainant (P.W.8) in F.I.R. (Exh.PG) were that he was a security guard at Allied Bank Kot Radha Kishan; about two months ago, his paternal nephew Muhammad Naseem (deceased) and Ahmad Ali (appellant) exchanged hot words, but the matter was patched up due to intervention of the elders; on the fateful day, i.e. 23.11.2002, at 4.00 p.m., he along with his brother Dildar Hussain, Muhammad Naeem and Muhammad Naseem (deceased) was going towards his house from the fields; in the meanwhile Ahmad Ali (appellant), while riding a motorcycle, reached there from behind and offered lift to Muhammad Naseem (deceased) to go to the village, whereupon, Muhammad Naseem sat on the rear seat of his motorcycle; on reaching a poultry farm near Rajbah Handal bridge, Ahmad Ali turned the motorcycle towards his haveli instead of going to the village; the complainant and his companions suspected some foul play so they rushed towards the haveli of Ahmad Ali (appellant); on reaching there, they saw Ahmad Ali carrying a rifle, and Muhammad Naseem (deceased) standing on path near a sugarcane crop; within their view, Ahmad Ali fired three successive rifle shots, which hit Muhammad Naseem, who fell onto the ground and breathed his last instantaneously; Ahmad Ali fled the scene; the occurrence was witnessed by the complainant and his above said companions; Ahmad Ali (appellant) committed murder of Muhammad Naseem due to previous grudge; leaving Dildar Hussain and Muhammad Naeem to guard the dead body, the complainant left for the Police Station and got registered F.I.R. (Exh.PG), on the same day at 6.00 p.m.

4. After registration of the F.I.R., Muhammad Ijaz Khan, Inspector (P.W.9) took over the investigation and immediately reached the spot; examined the dead body, prepared injury statement (Exh.P1), inquest report (Exh.PJ), an application for postmortem examination and despatched the dead body of the deceased to the mortuary for autopsy under the escort of Mukhtar Ahmad, C/590 (P.W.3) and Muhammad Anwar, C/925 PW (not produced); he inspected the place of occurrence and prepared visual site plan Exh.PH; secured blood stained earth vide memo. Exh.PD and three empties (P4/1-3) vide memo. Exh.PE; Mukhtar Ahmad, constable (P.W.3) produced before him last worn clothes of the deceased along with relevant papers, which were secured by him through memo. Exh.PL; he got prepared the site plan-in scale in duplicate (Exh.PB & Exh.PB/1) qua the place of occurrence, by Muhammad

Latif, Patwari (P.W.2). He arrested the accused-appellant on 4.12.2002, who during course of interrogation, got recovered rifle .8-MM (P3) along with four live bullets (P2/1-4), which was secured by him vide memo. Exh.PF. On completion of investigation, he submitted challan against the accused-appellant for his trial in accordance with law.

5. At trial, prosecution in order to prove its case produced nine witnesses in all, whereas five persons were examined as Court Witnesses. The ocular account was furnished by Muhammad Sarwar-complainant (P.W.8) and Muhammad Naeem (P.W.7). Both of them also stated about the motive part of the incident. Muhammad Naeem (P.W.7) also appeared to testify the factum of recovery of rifle (P3) vide memo. Exh.PF at the instance of Ahmad Ali-appellant. The Court witnesses (CW-1 to CW-5) were recorded by the trial Court, to assess the age of the appellant.

6. The medical evidence was presented by Dr.Mumtaz Ahmad (P.W.1), who, at 1.00 p.m., on 24.11.2002, conducted autopsy on the dead body of Muhammad Naseem (deceased), vide necropsy report Exh.PA (pictorial diagram Exh.PA/1) and found following injuries thereon:-

1. A penetrating lacerated wound measuring 4 cm x 4 cm, just above the right clavicle middle part on the front and most upper part of right chest.

2. A penetrating wound measuring 1 cm x 1 cm on the front and right side of chest 2 cm from midline and 7 cm below and medial to right nipple and 4 O'clock position to right nipple.

3. A penetrating lacerated wound measuring 5 cm x 3 cm on the left side of chest, 5 1/2 cm below and in line with left nipple.

4. A penetrating lacerated wound 4« cm x 1« cm on the back of right chest, 4 cm on midline in right scapular area.

5. A penetrating wound measuring 4 cm x 2 cm on the back of left side of chest in lower part, 8 cm from midline and in mid scapular line.

6. A penetrating wound measuring 1 cm x 1 cm on the back side of left side of chest and abdomen, 3 cm from midline, 9 cm below and medical to Injury No. 5.

7. A penetrating lacerated wound measuring 4 cm x 2 1/2 cm on the inner side of the right wrist, underlying bones of right wrist were seen damaged.

8. A penetrating wound measuring 2 cm x 1 cm on the back of right wrist and communicating with Injury No. 7.

The cause of death, recorded by the medical officer was haemorrhage, shock and injury to vital organs, i.e. heart, liver and spleen, due to Injuries No. 1 to 6, which were sufficient to cause death individually or collectively in the ordinary course of nature. The probable time that elapsed between injuries and death was "almost immediate", whereas between death and postmortem examination, it was within "20 hours approximately".

7. Learned Public Prosecutor by tendering in evidence the reports of Chemical Examiner, Serologist and Forensic Science Laboratory (Exh.PM, Exh.PN & Exh.PO), respectively, announced the prosecution case closed.

8. In his statement under Section 342 Cr.P.C, the appellant denied and controverted all the allegations of fact, alleged against him, by the prosecution and professed his innocence while responding to the question as to why this case against him and why the PWs had deposed against him in the following words:--

"In fact Muhammad Naseem was my fast friend had licence of Daood Corporation son of Inayat Ali allowed us to purchase the fertilizer. My father invested Rupees 23 lacs which was in the custody of the deceased and it was month of Ramzan and at the relevant time Muhammad Sarwar was performing duty on 13.12.2002 from 9.00 a.m. to 5.00 p.m. and at that

time he was in the house and at the relevant time Muhammad Sarwar was performing duty on 13.12.2002 from 9.00 a.m. to 5.00 p.m. and at that time he was in the house and at the mid night father of the deceased who identified the dead body sent message that Naseem had been murdered and Muhammad Sarwar who is army personnel went in the Police Station and after shifting the dead body in the Police Station and observing injuries involved me in order to usurp Rupees twenty three lacs balance of my father. In fact first counsel was engaged by an advocate who belongs to Kot Radha Kishan is kith and kin of Sardar Muhammad Tufail, second counsel was engaged who was also close relative of Sardar Muhammad Tufail, Ex-MNA and they prolonged the case. Lateron they made the incorrect application for declaration of my insolvency and matter was agitated up to Supreme Court for the determination of my age. In fact according to my birth entry which is Exh.DB my date of birth is 12.01.1986 and in school certificate my date of birth is 12.01.1986 which is Exh.DC and certificate of the manager of the Allied Bank in which he has mentioned that on 13.11.2002 Muhammad Sarwar was performing duty as security guard from 9.00 a.m. to 5.00 p.m. and that certificate is Exh.DD and attested copy of the Allied Bank is also Exh.DE in which it is clearly mentioned that at Column No. 23 there is a cutting which is Exh.DE/1 and these are five attested documents which are Exh.DE/2, Exh.DE/3, Exh.DE/4, Exh.DE/5 and Exh,DE/6. I also produced the original licence which is Exh.F which was produced before the Investigating Officer who with malafide intention did not obtain it and made part and parcel of the judicial file. I am innocent. No body from the vicinity and locality supported the prosecution version except Muhammad Sarwar and his nephew. My parents also produced respectable of the locality before the Investigating Officer Inspector Ijaz who did not try to obtain permission from the S.P. Investigation or DSP Investigation and conducted the investigation dishonestly due to fear of Sardar Muhammad Tufail Ex MNA, I sent many respectable to the complainant that in the month of Ramzan Naseem was coming with cash and robbery had been committed and his body lying dead in the field but Sardar Muhammad Tufail Ex MNA who was dead opponent to me and my family due to election friction compelled the complainant party not to compromise with me and my family. P.Ws and his nephew are greedy and they usurped Rupees 23 lacs of my father and involved me in this false case. It is pertinent to note here that six/seven F.I.Rs of robbery were produced and it was admitted by Muhammad Sarwar that on that road robbery has been committed in routine which is crystal clear that Naseem was murdered by unknown robberers and I have been falsely involved in this case."

The appellant did not opt to appear as his own witness under Section 340 (2) Cr.P.C. to repel the charge against him, nor he opted to adduce evidence in defence.

9. The learned Additional Sessions Judge on culmination of trial proceeded to convict/sentence the appellant as mentioned hereinabove.

10. Learned counsel assailing legality of the appellant's conviction and sentence contended it to be an un-witnessed occurrence, alleged to have taken place during the course of a dacoity, as such crimes were committed frequently in the area; the FIR was lodged belatedly after preliminary investigation, with a false timing recorded thereon in respect of its registration; all the eye-witnesses being relations of the deceased are inimically disposed towards the appellant thus they are interested and their statements do not find corroboration from any independent source; the case set up by the prosecution against the appellant is preposterous and presence of the eye-witnesses at the place of occurrence is highly improbable; the motive set up by the prosecution is unbelievable and gone un-established.

11. While learned counsel appearing on behalf of the state assisted by learned counsel for the complainant has supported the impugned judgment.

12. Having minutely perused the entire evidence with the assistance of learned counsel for the parties, we are not persuaded by the story, set up by the prosecution against the appellant as we find that the eye-witnesses failed to establish their presence at the place of occurrence at

the relevant time. The previous heart-burning between the appellant and deceased if any, stood forgotten by the parties because of a patch up between them, hence the allegation that the appellant deceitfully took Muhammad Naseem (deceased) towards his haveli, after having offered him a lift on his motorcycle, does not appeal to reason. Muhammad Naeem (PW-7) is real brother of Muhammad Naseem (deceased) whereas Muhammad Sarwar complainant (PW-8) is an uncle of the deceased. Muhammad Sarwar complainant has contended that he along with his companions including Muhammad Naeem (PW-7) and Muhammad Naseem (deceased) were moving towards their house on foot from his haveli and the interse distance was around 3 kilometers. The relations between the parties were so cordial that nobody resisted the offer of Ahmad Ali appellant, to carry Muhammad Naseem (deceased) on his motorcycle so as to facilitate him in reaching his house. It was the month of Ramzan and Muhammad Naseem deceased was fasting on the day of occurrence. The haveli of the appellant was many acres away from the spot, wherefrom he took Muhammad Naseem with him on his motorbike. According to the statement of Muhammad Naeem (PW-7) and Muhammad Sarwar (PW-8), the appellant had driven his motorcycle for about 10 minutes when he took turn and instead of going to the village of the deceased adopted a course leading to his haveli. If none from the complainant side doubted the intention of the appellant at the time he offered a lift to Muhammad Naseem, it is highly improbable that mere turn of his motorcycle towards his haveli would have raised the eye-brows of the complainant and that of his companions so as to prompt them to give hot-pursuit to Ahmad Ali appellant. There was no reason to develop such suspicion as the alleged motive incident, stood compounded.

13. The statements of both the eye-witnesses are full of contradictions and discrepancies, which render their testimonies highly improbable and hard to believe. The deposition of Muhammad Naeem (PW-7) that Muhammad Sarwar complainant was on leave on the day of occurrence and that he had taken one day leave through a written application from his bank with a view to harvest the wheat crop is negated by PW-8 who categorically deposed in his testimony that he stayed in his bank during his duty hours till 2.30 p.m. and thereafter by leaving his cycle and uniform at the bank, he came to the bus stop where a passenger-packed bus was ready to leave, which he boarded and alighted at the relevant bus stop, wherefrom he directly went to his fields to assist his brothers who were busy working in the fields. Similarly PW-7 has deposed that Muhammad Sarwar complainant did not go to the Police Station directly from the place of occurrence rather he first went to Kot Radha Kishan and thereafter he went to the Police Station. The factum of shifting of dead body to the Police Station is very crucial and reflects on the timing of registration of FIR which has been shown as 6.00 p.m. on 23.11.2002. A strong impression arises from the testimonies of both the eye-witnesses that the FIR had been recorded much later than the time shown on the FIR (Exh.PG). The postmortem examination of the dead body was conducted at 1.00 p.m. on 24.11.2020, after about 21 hours of the occurrence and the delay in this regard has not been explained by the prosecution witnesses in any manner. Muhammad Naeem (PW-7) and Muhammad Sarwar (PW-8) in their anxiety to show their presence at the place of occurrence have stated about many facts which are adverse to normal human conduct. The medical evidence does not render the required corroboration to the ocular account, for the reason, that the necropsy report (Exh.PA) reveals four firearm entry wounds on the body of Muhammad Naseem (deceased) as regards three stated by both the eye-witnesses who with a variation of distance qua their presence at the place of occurrence at the crucial hour, have stated to have witnessed the occurrence. The medical officer Dr. Mumtaz Ahmad (PW-1) deposed in his testimony that the probability could not be ruled out that three different kinds of weapons were used for the injuries, authored on the body of the deceased. About Injuries No. 7 and 8 on the body of the deceased, the medical officer stated that Injury No. 8 was an entry wound of Injury No. 7 and that for infliction of these injuries, the deceased had been fired at from his back. None of the eye-witness gave an account of 4th firearm entry wound.

14. The deposition made by Muhammad Naeem (PW-7) with following assertion is crucial:--

"The haveli of the father of Ahmad Ali is situated on the bank of Rajbah. The haveli is at a distance of about 13 acres from the poultry farms if some body travels on the bank of Rajbah. On motorcycle Naseem and Ahmad Ali covered the distance of one mile uptill haveli in about ten minutes. They might have reached over there at quarter to five. From in between the distance of the haveli is about 5/6 acres from the place where from Ahmad Ali had given right to deceased Muhammad Naseem. When we entered into the fields fro going upto the haveli we crossed the fields of Muhammad Mehdi. We crossed his one, two acres. Thereafter we crossed two three acres of Jaffar Ali, Chairman. Thereafter the land of Ahmad Ali started. That was about one acre which we crossed and then the haveli of Ahmad Ali came. We were three who were running towards the haveli, myself, my uncles Dildar Hussain and Muhammad Sarwar. We reached at the place of occurrence simultaneously."

Muhammad Sarwar complainant (PW-8) while giving a description of the place of occurrence contended that the road where the occurrence took place was a thorough fair whereon Dala, rickshaw, cycle, motorcycle and buses used to ply. He further stated that his house was at a distance of three kilometers from the fields and he further deposed with a contradiction that he and his companions were going to fields at the time of alleged occurrence. He however took another turn in his statement while deposing that they were going on foot from his haveli to his house at the time of occurrence. About the location of residential house of his brother Dildar PW (not produced), he contended that he lived in a separate house like that of Muhammad Naeem (PW-7) and Muhammad Naseem (deceased) and that fifteen streets separated their residential house and the abode of the deceased. The following assertion of PW-8 is important, therefore, reproduced:--

"Poultry farm is at a distance of three acres from where deceased took lift of motorcycle on asking the accused. I do not know at that time who wereemployees of the poultry farm owned by one person who belonged to Lahore. I do not know the numbers of the employees. I do not know whether the employees of the poultry farm were locals, or not. That poultry farm is consisting of 10/11 acres. There was no shop in front of the poultry farm. That poultry farm is at a distance of 20 kilometer from Kot Radha Kishan. That poultry farm is also at a distance of three kilometer from village Handal. There is a pacca road which leads to village Handal. Handal is a big village. Accused is resident of village Handal,"

15. The conduct of PW-8 at the relevant time of occurrence is also important and helps in understanding whether or not he was present at the place of occurrence at the crucial hour or whether he had witnessed the occurrence or not:--

"It is correct that I, Dildar and Naeem are healthy and having a stitched body. I have not tried to apprehend accused as being army personnel before making fire at the deceased. We tried to apprehend the accused at some distance and other persons are also with me. We had not made a noise of seeing the accused armed with rifles. I have not tried to apprehend the accused from the back side after conceding myself before firing. When accused made first fire I reached near my nephew in order to save his life. No fire hit to me or any other witness at the alleged place of occurrence. I have not laid down on my nephew in order to save his life. I have not tried to lay on my nephew on the second and third fire. I have not tried to shift him in any hospital in order to save his life. Voluntarily stated he succumbed to the injuries at the spot. After receiving the fire shot he fell downward and trembling at that time. I saw the injuries of the deceased. I have not placed the deceased on the cot. I have not made any noise after it. I stayed ten minutes at the spot. I have not made arrangements of any vehicle. I have not taken cycle motor from the haveli to reach the hospital. I have not asked Jaffar chairman to provide me weapon or persons or vehicle to produce me in order reach the Police Station."

The divergent pleas of both the eye-witnesses transmit a clear signal that they had not seen the occurrence nor they had any purpose to be present at the spot where Muhammad

Naseem (deceased) was murdered and their contention to have witnessed the occurrence is patently false. The involvement of the appellant in the instant case appears to be skeptical and the allegations against him qua the murder of Muhammad Naseem (deceased), look speculative. The ocular account is brushed aside being false, highly discrepant and unreliable, having been rendered by the inimical and interested witnesses. The motive of the incident which took place about two months prior to the occurrence has also not been honestly setout by the prosecution which was disbelieved by the learned trial Court.

16. So far as the factum of recovery of rifle .8 mm (P-3) along with pistol P-4 and four live bullets vide memo. of recovery Exh.PF from a room of his house by the appellant is concerned, though there is a positive report (Exh.PO) issued by the office of Forensic Science Laboratory, Lahore hinting at wedding of the crime empties with the aforesaid weapon, it cannot be considered a conclusive circumstance to base conviction/sentence thereon against the appellant. The discrepant, and contradictory ocular account, not sufficiently corroborated by the medical evidence and badly dented by the unproven motive, has already been disbelieved by us, therefore, the evidence of recovery of the mentioned items is of no consequence to the prosecution case.

17. The defence plea adopted by the appellant in his statement under Section 342 Cr.P.C, is a pileup of divergent circumstances, having no relevance, or conformity interse which divulges nothing but three facts, firstly, the case against the appellant-accused was false and conspitorial, secondly, the deceased had been done to death in some occurrence of dacoity as the dacoits were on the rampant in the said area since long and thirdly, one MNA and his son were instrumental in construction of allegations against the convict. Both the eye-witnesses admitted in their testimonies that the dacoits were active in the area of murder of the deceased and affirmed the positive suggestions in this regard. The available material however is not sufficient to believe the defence plea of the accused who has already been held by us to have been falsely involved in this case under a calculated move by the vested elements, bent upon in causing his annihilation.

18. The upshot of the above discussion is that in view of the defects and infirmities pointed out above, the prosecution has failed to prove its case against the appellant beyond reasonable doubt, hence we accept the appeal (Crl.A. No. 1282-2008), set-aside the conviction and sentences of the appellant and acquit him of all the charges. We direct that the appellant be set at liberty forthwith if not to be detained in any other case.

19. For the reasons noted hereinabove, the revision petition (Crl. Rev. No. 729-2008) filed by the complainant, for enhancement of sentence of the appellant is dismissed.

(R.A.) Appeal accepted.

PLJ 2012 Cr.C. (Lahore) 126

[Multan Bench Multan]

Present: Shahid Hameed Dar, J.

ALLAH BAKSH and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 378-B of 2011, decided on 7.2.2011.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 324/34--Bail before arrest--Grant of--Compromise--Offence u/S. 324 PPC is compoundable with consent of Court--Both injured

PW and complainant have categorically admitted and contended that they did not oppose the grant of bail before arrest to the petitioners, on the basis of compromise--Both sides have decided to live in peace and bury the hatchet--Compromise in a criminal case has always been considered as a redeeming feature, as it brings peace and harmony in the society--Petition allowed and ad-interim pre-arrest bail was granted and confirmed. [P. 128] A & B

Mr. Shahbaz Ali Khan Gurmani, Advocate for Petitioner.

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

Date of hearing: 7.2.2011.

Order

At the very outset, learned counsel for the petitioner submits that compromise has been effected between the parties and the injured PW Sajjad Hussain in his sworn affidavit has admitted the said fact; further submits that the complainant has also pardoned the petitioners in the name of Almighty and he too, has sworn an affidavit in this regard.

2. Sajjad Hussain, the injured PW submits that he has forgiven the petitioners in the name of Almight so, he does not object to grant of bail before arrest to the accused-petitioners; submits his sworn affidavit Mark-A.

3. Imran Hussain Shah, complainant reiterates his version of having compounded the offence and forgiven the petitioners in the name of Almighty. He has also submitted his sworn affidavit Mark-B, in this respect.

4. The allegation against Allah Baksh petitioner is that he was armed with a pistol .30 bore at the time of occurrence and Shaboo petitioner had participated in the occurrence being empty handed; they with community of intention, in the company of their co-accused, caused firearm injury(s) on the person of Sajjad, brother of the complainant; thereafter all of them extended threats of murder etc. and fled away; the motive behind the occurrence pertained to a previous brawl between the parties.

5. Learned Deputy Prosecutor General in view of reconciliatory statement of the injured and that of the complainant does not oppose the instant petition.

6. The offence under Section 324 P.P.C is compoundable with consent of the Court. Both Sajjad Hussain, the injured PW and Imran Hussain Shah, the complainant have categorically admitted the factum of compromise in their sworn affidavits and contended that they did not oppose the grant of bail before arrest to the petitioners, on the basis of compromise. Both the sides have decided to live in peace and bury the hatchet. The compromise in a criminal case has always been considered as a redeeming feature, as it brings peace and harmony in the society.

7. In view of above, the instant petition is allowed and the ad-interim pre-arrest bail granted to the petitioner on 31.1.2011 is confirmed subject to furnishing fresh bail bonds in the sum of Rs. 50,000/- each with one surety each in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail confirmed

PLJ 2012 Cr.C. (Lahore) 91 (DB)

[Multan Bench Multan]

Present: Shahid Hameed Dar and Sardar Muhammad Shamim Khan, JJ.

GHULAM HUSSAIN alias Abid--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 287-B of 2011, decided on 7.2.2011.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 365-A, 170 & 171--Anti-Terrorism, Act, (XXVII of 1997), S. 7--Bail, grant of--Further inquiry--Recovery of abductee was effected two days after the registration of FIR--Accused was nominated by abductee--Identification parade--Accused could not achieve their objects--Validity--Safe course for prosecution was to go for lawful exercise of holding the test identification parade of the accused which for reason only known to I.O. had not been resorted to--Trial Court would asset true import of statement of accused, during trial after recording evidence of the parties--Prima facie reasonable ground to believe that case of accused constituted need for further inquiry into his guilt within scope of S. 497(2) Cr.P.C.--Bail was allowed. [Pp. 93 & 94] A & B

Mr. Shakil Javed Chaudhry, Advocate for Petitioner.

Mr. Munir Ahmad Sial, DPG for State.

Date of hearing: 7.2.2011.

Order

Ghulam Hussain petitioner seeks bail after arrest in case FIR No. 339, dated 21.09.2007, under Sections 365-A/170/171, PPC read with Section 7, ATA, 1997, registered at Police Station Thingi, District Vehari, at the instance of Abdul Rehman-complainant, who has alleged in the FIR that he alongwith his son Muhammad Naeem boarded a bus for going to their house situated in Vehari on 20.09.2007; this bus was intercepted by two cars wherein 8 unknown accused were seated; the accused had muffled their faces to conceal their identity; four of them, the external features of whom have been mentioned in the FIR, caught Muhammad Naeem off his collar and abducted him at gunpoint; on resistance shown by Muhammad Naeem-abductee, the veils of some of the accused were removed, as a result whereof, the complainant identified them as Muhammad Tanvir, Shahid Hussain, Abdul Ghaffar and Muhammad Amin; the accused made the abductee sit in Suzuki Mehran and drove him away leaving the complainant in a wretched state of mind; the complainant, later on, received a phone call from the cell phone of his son whereby one of the accused demanded from him ransom of Rs. 8 millions in a very harsh tone. The matter was reported to the police by the complainant the same day.

2. After having struck a deal with the complainant party accused Shahid and Tanvir took Muhammad Naeem-abductee with them and set off for a place where the complainant was supposedly present to make payment of ransom amount to the accused but he in an intelligent move brought with him a strong contingent of the police, which overpowered both the accused before they could retreat. The abductee, however, was recovered in the process.

3. Muhammad Naeem, the abductee, joined the investigation immediately on his recovery and got recorded his statement under Section 161, Cr.P.C. wherein he gave a detailed account of his misery and torrid moments he had been through. He in his statement nominated one of the accused as Khan. The police believed that "Khan @ Abid" accused in fact represented Ghulam Hussain accused (Petitioner) and that it was his pseudonym. During investigation, accused Kamran @ Saffi admitted his guilt and made the disclosure that Khan @ Abid in fact was Ghulam Hussain accused and that both of them lived in the same village.

4. Learned counsel for the petitioner submits that the petitioner has been falsely involved in this case through dishonest investigation by the police as the complainant and other prosecution witnesses did not name the petitioner as an accused; the circumstances warranted holding of test identification parade and by having not resorted to such exercise the implication of the petitioner in this case is highly doubtful; the petitioner did not abscond

after the registration of FIR and he permanently remained in the area, he hailed from and the evidence qua the alleged abscondence of the petitioner is fake; the petitioner after having been arrested, underwent physical remand for ten days but it did not yield to collection of any incriminating evidence against him; even the abducteecould not nominate the petitioner as one of the accused and he also harped on the same string by nominating one `Khan' as an accused of this case; there are reasonable grounds to believe that the petitioner's case calls for further inquiry into his guilt as prosecution is clearly short of connecting evidence against him.

5. On the other hand, learned DPG submits that Ghulam Hussain accused is the same person who was called `Khan' by his co-accused and that it was his fake name which he used to conceal his identity; the abductee has named the petitioner in his statement under Section 161, Cr.P.C. and there may not be two opinions about the identification of the petitioner as an accused of this case; lastly submits that the petitioner has committed a heinous offence which catches the prohibition of Section 497, Cr.P.C.

6. We have heard learned counsel for the parties and gone through the available record. The complainant has alleged in the FIR that he alongwith his son Muhammad Naeem-abductee, after closing their medical store, sat in a bus bound for Vehari which was intercepted by 8 unknown accused, who used their cars for this purpose. The accused had veiled their faces to conceal their identity. It was the resistance shown by the alleged abductee which caused unveiling of faces of four accused and they were identified by the complainant as the accused, nominated in the FIR. They, however, did not include the petitioner. After having reached a deal with the complainant party, accused Shahid and Tanvir took Muhammad Naeem-abductee with them to a fixed place where the complainant was supposed to deliver them the ransom amount to the tune of Rs. 8 millions, for securing release of his son Muhammad Naeem. The accused could not achieve their mission as they were raided upon and taken into custody by the police.

7. The recovery of the alleged abductee was effected two days after the registration of the FIR who in his statement under Section 161, Cr.P.C. besides furnishing other details of the occurrence, also nominated one `Khan @ Abid' as an accused, who was believed by the Investigating Officer to be GhulamHussain petitioner. We do not find any evidence, which could divulge that Ghulam Hussain petitioner was aliasly known as `Khan' or `Abid Ali'. In attending circumstances, the safe course for prosecution was to go for the lawful exercise of holding the test identification parade of the accused/petitioner, which, for the reasons only known to the Investigating Officer, has not been resorted to. The trial Court shall assess true import of the statement of the above-said co-accused of the petitioner, during trial after recording evidence of the parties. Prima facie, there are reasonable grounds to believe that the petitioner's case constitutes need for further inquiry into his guilt within the scope of Section 497(2), Cr.P.C.

8. For the foregoing reasons, we accept this application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred thousand) with two sureties each in the like amount to the satisfaction of the learned trial Court.

(S.L.) Bail allowed

PLJ 2012 Cr.C. (Lahore) 309

Present: Shahid Hameed Dar, J.

HAQ NAWAZ--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 6971-B of 2011, decided on 27.6.2011.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 392--Bail, grant of--Further inquiry--Abscondence--There is no cavil to proposition that a fugitive from law would lose some of normal rights guaranteed under substantive law as well as procedural law but more abscondence without any incriminating/connecting evidence cannot impede grant of bail to an accused sufficient reasons exist to believe that petitioner's case calls for further probe into his guilt as required by S. 497(2) Cr.P.C.--Bail was allowed. [P. 311] A

Malikzada Hameed-ur-Rehman Khokhar, Advocate for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab for State.

Date of hearing: 27.6.2011.

Order

The petitioner seeks bail after arrest in case FIR No. 318, dated 21.07.2010, under Section 392 P.P.C., registered at Police Station Saddar Sargodha, District Sargodha.

2. The complainant while aboard his car was intercepted at 8.30 p.m. on 20.07.2010 by four unknown armed men who tied his arms and legs as well as those of his companions and threw them in a sugarcane crop after having them blind-folded. They snatched, from them cash, cell phones, ATM card etc. at gunpoint and drove away the car of the complainant; the crime was reported to the police on the following morning by the complainant after he untied him with the cooperation of co-victims.

3. Learned counsel for the petitioner submits that complainant nominated the petitioner as an accused in his second supplementary statement dated 26.11.2010; the petitioner was arrested on 16.03.2011, underwent physical remand for 10 days but nothing was recovered at his instance; the petitioner does not possess any criminal antecedents so he may be released on bail.

4. On the other hand, learned Deputy Prosecutor General Punjab submits that petitioner was declared as proclaimed offender by the police on 15.01.2011; the petitioner's name stands mentioned in Column No. 3 of the challan.

5. The petitioner is not nominated in the FIR. The complainant got recorded his first supplementary statement on 22.11.2010 whereby he nominated Muhammad Saleem as an accused but withdrew his name on the following day by making yet another statement in terms that he was innocent. In his second supplementary statement he nominated Haq Nawaz (petitioner), Ajab Gul, Ghulam Rasool and Naveed Hussain as accused, on the basis of his personal knowledge but failed to disclose his source. The petitioner despite having undergone physical remand for 10 days, did not lead to the recovery of any crime article. The prosecution appears to be short of connecting evidence against the petitioner at the moment. There is no cavil to the proposition that a fugitive from law would lose some of his normal rights guaranteed under the substantive law as well as the procedural law but mere abscondence without any incriminating/connecting evidence cannot impede grant of bail to an accused. Sufficient reasons exist to believe that the petitioner's case calls for further probe into his guilt, as required by Section 497(2) Cr.P.C.

6. Therefore, I accept this application and admit the petitioner to post arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(R.A.) Bail allowed

PLJ 2012 Cr.C. (Lahore) 522 (DB)

Present: Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ.

MUHAMMAD RIAZ--Appellant

versus

STATE--Respondent

Crl. Appeal No. 796 of 2005, Murder Reference No. 640 of 2005 and Criminal Revision No. 469 of 2008, heard on 16.11.2011.

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

----S. 302(b)--Conviction and sentence--Challenge to--Delay in FIR and autopsy of dead body of deceased was understandable because of compelling circumstance enumerated--Motive behind occurrence was previous Pitched enmity and criminal litigation between parties--Impetus motive was broadened and testimony of witness--Medical evidence tendered by Dr. reveals twenty five firearm injuries on body of deceased--State of affair patently rule out any possibility of substitution leaving real culprit get scot free and prosecution case cannot be discarded merely on account of relationship of witness with deceased for same having been corroborated unimpeachably by medical evidence, the motive abscondance of accused appellants and attending circumstance of case--Non examination of complainant at trial have been sufficient explained by defence themselves--Evidence qua recovery of kalashinkov at instance of appellant, however, is of no consequence because of non availability of report of fireman expert--Acceptance of recovery evidence by trial Court as an incriminatory piece of evidence is not impressive at all--Conviction sentence u/S. 302(b) PPC being unexceptionable was maintained. [P. 532] A

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

----S. 302(b)--Challenge to--Acquittal--Delay in FIR and autopsy of dead body of deceased was understandable because of compelling circumstance enumerated--Motive behind occurrence was previous pitched enmity and criminal litigation between parties--Impetus motive was broadened and testimony of witness--Maxim falsu in uno, falsu in omnibus is not applicable to facts because of availability of corroboration of ocular testimony in abundance from other sources, besides do not find any element of cogency so for as reasons advanced in impugned judgment regarding acquittal of accused were concerned--Grounds made basis by trial Court for recording acquittal of said accused were flimsy, unconvincing and implausible--Unfortunately aspect of case was that complainant had not challenged part of impugned judgment, which exonerate the accused of charge of murder--Non-filling of an appeal against acquittal of accused, it does not mean that principle of consistency was applicable to case of appellant whose conviction in case was found unexceptionable--Legitimate and cogent finding acquittal an be taken to deal with prayer regarding equity of treatment and equation, so as to balance the scale, but certainly not finding conclusion like one in respect of accused parity of treatment is a legal phrase which ought to be handled legally--Appeal was dismissed. [P. 533] B

Mr. Ishtiaq Qadeer, Advocate for Appellant.

Mr. Nisar Ahmad Virk, D.P.G. Punjab for State.

Mr. Seerat Hussain Naqvi, Advocate for Complainant.

Date of hearing: 16.11.2011.

Judgment

Shahid Hameed Dar, J.--Muhammad Riaz-appellant was held guilty under Section 302(b) P.P.C. for the murder of Munawar Hussain, by learned Additional Sessions Judge, Faisalabad vide judgment dated 7.5.2005 and convicted/sentenced to death with direction to pay a sum of Rs. 1,00,000/- as compensation to the legal heirs of the deceased under Section 544-A Cr.P.C, or in default thereof to undergo simple imprisonment for six months. His co-accused Muhammad Nawaz and Muhammad Iqbal alias Bali were, however, acquitted of the charge by the learned trial Court on extension of benefit of doubt.

2. The convict-appellant by filing Criminal Appeal No. 796 of 2005 has called in question his conviction and sentence under the impugned judgment, whereas, the learned trial Court has submitted reference under Section 374 Cr.P.C. (Murder Reference No. 640 of 2005) for confirmation or otherwise of the sentence of death of the appellant. Mst. Shahadat Bibi, mother of the complainant as well as of the deceased has also approached this Court by filing Criminal Revision No. 469 of 2008 praying therein enhancement in compensation amount imposed upon the appellant by the learned trial Court. We propose to dispose of all these matters together through this single judgment.

3. The facts, as unfolded by Saddi Ahmad-complainant (since dead) in complaint Exh.PG, on the basis of which F.I.R, (Exh.RG/3) had been registered were that at about 4.30 p.m., on 26.8.2001, he along with Sakhawat Ali (P.W.2) and Azhar Abbas (P.W 1), was present at his dhari, situated at a metalled road leading to Chak No. 592/GB; Muhammad Riaz (appellant), armed with Kalashnikov and Muhammad Nawaz, armed with carbine .12-bore, reached there while riding a motorcycle Honda 125-CC and saw around; the accused on catching sight of Munawar Hussain, brother of the complainant, who was coming towards dhari from the village on foot, drove their motorcycle and on reaching near him, Muhammad Riaz (appellant) exhorted a Lalkara that they had come to avenge their father's insult and fired a burst at Munawar Hussain, which landed at different parts of his body, as a result of which he fell onto the ground; thereafter, Muhammad Nawaz fired a carbine shot at legs of Munawar Hussain; besides the complainant the occurrence was witnessed by his companions; almost at the same moment, Ahmad Ali, armed with rifle, Sajjad Akbar, armed with .12-bore double barrel gun and Abdul Khaliq, armed with rifle, who were sitting in a nearby chari crop, emerged at the scene, when Muhammad Riaz (appellant) induced them to come out as they had done the job; after accomplishing their ignoble design, the accused scampered off while making aerial firing; the complainant and his companions shifted Munawar Hussain in injured condition to Civil Hospital, Faisalabad, where he succumbed to the injuries.

The motive behind the scene was previous animosity and criminal litigation between the parties, due to which the accused in consultation with each other and on the abetment of Iqbal alias Bali committed the crime in question. Leaving his companions to guard the dead body, the complainant left for the police station and came across Muhammad Ashraf, SI (P.W.8), Police Post Kurr, at Pull Peeraywala, at 3.30 a.m. on 27.8.2001, who recorded his statement (Exh.PG) and despatched the same to Police Station Bahlak, District Faisalabad for registration of formal F.I.R.; Liaqat Ali, ASI (P.W.15) on receipt thereof drafted formal F.I.R. (Exh.PG/3) at 4:15 a.m.; the same day.

4. Muhammad Ashraf, SI, PW-8 assumed the investigation of this case, examined the dead body of the deceased, prepared injury statement Exh.PD, inquest report Exh.PE, appointed Ghulam Mustafa, 2073/C (PW-11) to escort the dead body to the mortuary and left the hospital for the venue of crime; on reaching the place of occurrence, he caused the inspection thereof, collected blood-stained earth vide memo Exh.PA, secured empties, eight in number (P1/1-8), vide memo Exh.PB, prepared visual site-plan Exh.PH; Ghulam Mustafa, constable

(PW-11) tendered the last worn blood-stained clothes of the deceased which he took into possession vide memo Exh.PJ; got prepared site-plan in scale in duplicate Exh.PF and Exh.PF/1 by Noor Jamal, Patwari (PW-6). After completion of investigation, challan was submitted against the accused before the trial Court for their trial in accordance with law.

5. At trial, prosecution in order to prove its case produced sixteen witnesses in all. The ocular account was furnished by Azhar Abbas (P.W.1) and Sakhawat Ali (P.W.2). They also stated about the motive part of the incident.

6. The medical evidence was presented by Dr.Mehmood-ul-Hassan (P.W.14) and Dr.Muhammad Azam Athar Gill (P.W.5). The former, while posted as C.M.O., D.H.Q. Hospital Faisalabad, medically examined Munawar Hussain (deceased), while in injured condition, at about 6.20 p.m. on 26.8.2001, who was brought by his brother Saddi Ahmad-complainant (not produced because of being an absconder in a criminal case). The medical officer found following injuries on the person of the then injured vide medico-legal report Exh.PQ (pictorial diagrams Exh.PQ/1 & Exh.PQ/2):--

1. A fire-arm cluster of three entry wounds, measuring 3« cm x 2 cm, 1/3 cm x 1/3 cm & 3 cm x 1« cm (DNP), back of left side of chest, middle part.

2. A fire-arm entry wound measuring 1 cm x 3/4 cm (DNP) on outer side of left chest, lower part.

3. A fire-arm entry wound measuring 2« cm x 1¬ cm (DNP) on outer side of left abdomen, 20 cm from umbilicus.

4. A fire-arm entry wound measuring 1 cm x 1 cm (DNP) on outer side of left abdomen, 3 cm below Injury No. 3.

5(A). A fire-arm entry wound measuring 1 cm x 1 cm on outer side of left thigh upper part.

5(B). A fire-arm entry wound measuring 1 cm x 1 cm on outer side of left thigh middle part.

6-A. A fire-arm entry wound measuring 1 cm x 1 cm on back of left thigh, middle part.

6-B. A fire-arm exit wound measuring 2 cm x 2 cm in front of left thigh, 6 cm above knee.

7. A fire-arm entry wound measuring 1 cm x 1« cm (DNP) on left buttock.

8. A grazing fire-arm wound measuring 11 cm x 6 cm on outer side of right leg, lower part extending up to right foot.

9. A grazing fire-arm wound measuring 1« cm x 1/2 cm on left ring finger breaking the nail.

10. A fire-arm wound measuring 1/3 cm x 1/3 cm (DNP) on inner side of right leg, middle part.

11. A fire-arm wound measuring 1/2 cm x ½ cm (DNP) on outer side of right thigh, 10 cm above right knee.

12. A fire-arm wound measuring 1/2 cm x 1/2 cm (DNP) on outer side of right knee.

13. A fire-arm grazing wound measuring 6 cm x 1« cm on outer end lower part of right buttock.

14(A). A fire-arm entry wound measuring 1 cm x 1/2 cm on back of right thigh, middle part.

14(B). A fire-arm exit wound measuring 1 cm x 1 cm on back of right thigh, upper part.

15. A fire-arm entry wound measuring 2 cm x 1 cm on lower part of right buttock.

16. A fire-arm entry wound measuring 2 cm x 1 cm (DNP) on upper part of right buttock.

17. A fire-arm entry wound measuring 1« cm x 1 cm (DNP) on right side of front of abdomen upper part,

18. A fire-arm entry wound measuring 1/2 cm x 1/4 cm (DNP) on front of right abdomen upper part.

19-A. A fire-arm entry wound measuring 1/2 cm x 1/4 cm on inner side of right forearm, 2 cm above right wrist joint.

19-B. A fire-arm exit wound measuring 3/4 cm x 1/4 cm on inner side of right forearm, 4 cm above the wrist.

20. A fire-arm wound measuring 1/2 cm x 1/2 cm (DNP) on back of right arm near elbow.

The above said examinee expired 40 minutes after arrival in the hospital. The duration of injuries was noticed by the medical officer between two to three hours approximately. The injuries were ante-mortem and caused by fire-arm.

The dead body of Munawar Hussain (deceased) was dissected by Dr. Muhammad Azam Athar Gill (P.W.5), at 10.00 a.m., on 27.8.2001, vide necropsy report Exh.PC (pictorial diagram Exh.PC/I), who found following injuries thereon:--

1. Fire-arm entry wounds, 3 in number, measuring 3.3/5 cm x 2 cm, 1 cm x 3 cm & 3 cm x 1« cm on back of left side of chest, middle part, depth probed, superficial.

2. A fire-arm entry wound measuring 1 cm x 3/4 cm on outer side of left chest, lower part, one bullet was recovered from chest cavity on exploration.

3. A grazing fire-arm wound measuring 1« cm x 1/2 cm on left ring finger breaking the nail.

4. A fire-arm entry wound measuring 1/2 cm x 1/2 cm on back of right arm near elbow, depth probed, superficial injury.

5(A). A fire-arm entry wound measuring 1/2 cm x 1« cm on inner side of right forearm, 2 cm above the right wrist.

5(B). A fire-arm exit wound measuring 3/4 cm x 1/4 cm on inner side of right forearm, 4 cm above the wrist joint.

6. A graze mark 1/4 cm x 1/4 cm on outer end back of left upper arm.

7. A fire-arm entry wound measuring 2« cm x 1¬ cm on outer side of left abdomen, 20 cm above umbilicus, one bullet was recovered from abdominal cavity, on exploration.

8. A fire-arm entry wound 1 cm x 1 cm on outer side of left abdomen, 3 cm below Injury No. 7. One bullet was recovered on exploration.

9(A). A fire-arm entry wound measuring 1 cm x 1 cm on outer side of left thigh, upper part.

9(B). A fire-arm exit wound measuring 5 cm x 2 cm on outer side of left thigh, middle part.

10(A). A fire-arm entry wound measuring 1 cm x 1 cm on back of left thigh, middle part.

10(B). A fire-arm exit wound measuring 2 cm x 2 cm in front of left thigh, 6 cm above left knee.

11. A fire-arm entry wound measuring 1/2 cm x 1/2 cm on left buttock, depth probed superficial injury.

12. A fire-arm entry wound measuring 1/4 cm x 1/2 cm on outer side of right thigh, 10 cm above right knee joint, depth probed superficial injury.

13. A fire-arm grazing wound measuring 6 cm x 1« cm on outer end lower part of right buttock.

14(A). A fire-arm entry wound measuring 1 cm x 1/2 cm on back of right thigh, middle part.

14(B). A fire-arm exit wound measuring 1 cm x 1 cm on back of right thigh, upper part.

15. A fire-arm grazing wound measuring 2 cm x 1/2 cm on lower part of right buttock, depth probed, superficial injury.

16. A fire-arm entry wound measuring 2 cm x 1 cm on upper part of right buttock, depth probed, superficial injury.

17. A fire-arm entry wound measuring 1/2 cm x 1/4 cm on front of right thigh upper part, depth probed, superficial injury.

18. A fire-arm entry wound measuring 1« cm x 1 cm on right side front of abdomen upper part, depth probed, superficial injury.

19. A fire-arm grazing wound measuring 11 cm x 6 cm on outer side of right leg, extending upto right foot.

20. A fire-arm wound measuring 1/3 cm x 1/3 cm on inner side of right leg middle part, superficial injury.

21. A fire-arm wound measuring 1/2 cm x 1/2 cm on outer side of right knee, depth probed, superficial injury.

The cause of death, recorded by the medical officer was the haemorrhage and shock due to Injuries No. 2, 7, & 8, which, individually as well as collectively, were sufficient to cause death in ordinary course of nature and time. All the injuries were ante-mortem and caused by fire-arm. The probable time that elapsed between injuries and death was "approximately 3 to 4 hours", whereas between death and post-mortem examination, it was "approximately 15 hours".

7. In their statements under Section 342 Cr.P.C., Muhammad Riaz (appellant) as well as his acquitted co-accused denied and controverted all the allegations of fact, alleged against them, by the prosecution and professed their innocence while responding to the question as to why this case against them and why the PWs had deposed against them. The reply to the said question answered by Muhammad Riaz-appellant is relevant, which reads as under:--

"I am innocent I was not residing at Chak No. 594/GB at the time of alleged occurrence. I and my co-accused have been involved in this case due to suspicion and doubts because it was a blind murder. Neither any PW was present at the spot at the time of occurrence nor any other person witnessed the occurrence. There was a long chain of litigation among the complainant party and the accused Ghulam Murtaza (since acquitted). Ahmad Ali, the real brother of co-accused Ghulam Murtaza (since acquitted) was sentenced to undergo life imprisonment U/S. 10, Zina (Enforcement of Hadood) Ordinance for having illicit relations with Mst. Shamim, Chachi of Sadi Ahmad complainant of this case. When Ahmad came back to his home after having passed the imprisonment, he was fired at by the complainant and his deceased brother which was mistakenly hit to Ziadat Bibi, sister of the accused. Murtaza (since acquitted) and case FIR No. 69/95 U/S. 324/148/149 P.P.C. was registered at P/S Bahlik against the complainant and the deceased. I produce the copy of FIR Ex.DA in this respect. Due to grudge of Mst. Ziadat, Murtaza (since acquitted) murdered Munawar deceased. I also produce copy of FIR No. 72/94 U/S. 324/148/149 PPC Ex.DB registered at P/S Bahlik against the complainant party by Murtaza accused (since acquitted). I also produce copy of FIR No. 221/95 Ex.DC, copy of FIR No. 278/2000 U/S. 337-F1, 337-L2/34 PPC P/S Bahlik Ex.DD showing enmity between the complainant party and Murtaza accused (since acquitted) and others. Saddi complainant, who is P.O. in another case also got registered a case FIR No. 75/99 P/S Bahlik against Murtaza and others which is Ex.DE and in case FIR No. 69/95 U/S. 324/148/149 PPC, a cross-version was lodged against Murtaza and his party U/S. 429/148/149 PPC which is Ex.DF. Saddi Wattoo group belongs to a narcotics group known as

Nazrou Sahi group while Murtaza (since acquitted) belongs to Akrou narcotics group residents of Sheikhupura. In this way, complainant Saddi who is an absconder in case FIR No. 327/03 is a hardened and desperate person and involved me and my co-accused in this case due to suspicion and doubts, Murtaza party with the help of Akrou group murdered Munawar Hussain. When the complainant Saddi came to know that his brother was murdered by Murtaza party, then he in order to take the revenge of his brother, murdered Murtaza (since acquitted) and abducted his real nephew Shahid and later on he was also murdered in Sheikhupura. I produce the copies of FIRs No. 327/03, 249/03 U/S. 302/148/149 PPC P/S Bahlik Ex.DG and copy of FIR No. 9 dated 5.1.2005 U/S. 365 PPC P/S Bahlik Ex.DH in this regard. Therefore, the complainant Saddi who is a P.O. in case FIR No. 327/03 did not appear in this Court intentionally to make statement because he knew that I and my co-accused were innocent in this case. PW-1 and PW-2 produced evidence against me due to the reason that I belong to Khichi family who were closely related to the complainant party."

The appellant and his co-accused (since acquitted) did not opt to make statements, under Section 340(2) Cr.P.C. to repel the charge against them, however, the appellant opted to adduce evidence in defence, but did not do so.

8. By believing the ocular account, the motive set up, the medical evidence and the evidence of recovery of the Kalashnikov at the instance of the appellant, the trial Court proceeded to convict the appellant, but recorded the acquittal of two co-accused Muhammad Nawaz and Muhammad Iqbal alias Bali, who faced the trial along with the appellant.

9. Learned counsel for the appellant has assailed the above-said items of evidence, which had impressed the trial Court and canvassed that the prosecution had badly failed to prove its case against the appellant beyond reasonable shadow of doubt; both the eye-witnesses being the relations of the deceased and inimically disposed towards the appellant are, thus, interested, whose testimonies having been disbelieved qua the acquitted co-accused needs independent corroboration, which is lacking in this case; the role of acquitted co-accused Muhammad Nawaz overlaps the role of the appellant and circumstances being identical the conviction/sentence of the appellant is not sustainable; the same evidence having been disbelieved qua the acquitted co-accused, cannot form the basis for returning the guilty verdict for the capital charge on the appellant and, thus, he is also entitled to the acquittal.

10. While learned Deputy Prosecutor General Punjab on behalf of the State assisted by learned counsel for the complainant has supported the judgment in question.

11. Having minutely perused the entire evidence with the assistance of learned counsel for the parties, we are not persuaded by the contentions urged on behalf of the appellant because presence of the eye-witnesses, independent of their relationship, at the place of occurrence at the crucial hours stands convincingly explained. The occurrence admittedly took place near the Dhari of Saddi Ahmad-complainant (not produced), where Azhar Abbas (P.W.1) and Sakhawat Ali (P.W.2), both close relations to the deceased and the complainant, were also present.

12. Saddi Ahmad-complainant is the real brother of Munawar Hussain deceased, whereas Azhar Abbas (P.W.1) is maternal nephew of the deceased and Sakhawat Ali (P.W.2) is maternal cousin (Khalazad) of the deceased. The prosecution failed to produce the complainant at trial and he was given up being untraceable. Both the eye-witnesses Azhar Abbas and Sakhawat Ali (P.W.1 & P.W.2) formed the ocular account. Azhar Abbas. (P.W.1) tendered details of the occurrence in his testimony with the assertion that Muhammad Riaz (appellant) fired a burst through his Kalashnikov hitting various parts of the body of Munawar Hussain deceased and sent him reeling to the ground badly wounded followed by a fire shot of his carbine on the legs of fallen Munawar Hussain by Muhammad Nawaz accused (since acquitted), Munawar Hussain was immediately shifted to D.H.Q. Hospital, Faisalabad by Saddi Ahmad-complainant (not produced) and his companions, which fact is

borne out from the medico-legal report (Exh.PG), wherein, name of Saddi Ahmad-complainant has been mentioned as the one, accompanying the then injured Munawar Hussain. Dr. Mehmood-ul-Hassan (P.W.14) has also deposed about this fact in his testimony that Munawar Hussain could not last long and he succumbed to the injuries almost within 40 minutes as stated by P.W.14. Azhar Abbas (P.W.1) stood the test of cross-examination confidently and hardly stammered at any stage during the course of his testimony. Denied the suggestion that he had deposed falsely being a relation to the deceased and the complainant. Also refuted that Munawar Hussain deceased had been murdered by Murtaza, because of the previous grudge between them mainly touching on the murder of Mst. Ziadat Bibi, the sister of Murtaza accused by Saddi Ahmad-complainant in the backdrop of abduction of Mst. Shamim, a paternal aunt of the complainant, by Ahmad Ali, the real brother of Ghulam Murtaza accused (since acquitted). Affirmed the suggestion that Saddi Ahmad-complainant was required in the murder case of Murtaza accused, who was allegedly murdered by him on 24.9.2003 with reference to F.I.R. No. 327/2003. Maintained that the motive behind the occurrence was the previous pitched enmity and criminal litigation between the parties. Impetus motive was broadened and further detailed in the testimony of this witness.

13. Sakhawat Ali also did not err while tendering his evidence as P.W.2 and he narrated the facts qua occurrence with the same degree of precision and confidence as is the hallmark of the testimony of P.W.1; he categorically contended that the appellant sprayed a volley of bullets through his Kalashnikov at the deceased and despatched him to the ground with multiple fire-arm injuries on various part of his body; verified that Munawar Hussain was carried to the hospital in injured condition from the place of occurrence by Saddi Ahmad-complainant and them, but they could not save him as he succumbed to the injuries at D.H.Q. Hospital, Faisalabad. Straightly denied the identical suggestions having been refuted by the other eye-witness P.W.1 that Munawar Hussain deceased had been murdered by Murtaza in the peculiar circumstances, as suggested to the other eye-witness. Also refuted that the appellant and his co-accused had been falsely implicated in this case due to party friction and grouping in the area. The line of cross-examination adopted by the defence is interesting as it emphasizes, presence of the complainant and the eye-witnesses near the place of occurrence at the crucial hour. The following suggestion put to P.W.2 is important:

"it is incorrect that at the time of occurrence, we and Saddi Ahmad-complainant were armed with fire-arms at the time of occurrence at our Dharies."

14. The medical evidence tendered by Dr.Muhammad Azam Athar Gill (P.W.5) reveals twenty five fire-arm injuries on the body of the deceased and all these injuries stand mentioned in the post-mortem examination, report (Exh.PC). Besides, the testimony of Dr.Mehmood-ul-Hassan (P.W.14) also discloses, almost as many fire-arm injuries, which stand detailed in medico-legal report (Exh.PQ) of Munawar Hussain (deceased). The date of arrest of the appellant i.e. 18.8.2003 is crucial as proceedings under Section 87 Cr.P.C. had been completed against him through non-bailable warrants of arrest (Exh.PM) bearing report (Exh.PM/1) of the process server Muhammad Asghar (P.W.12), who was a constable at the time of execution of the warrant on 6.2.2002, but he had been promoted as A.S.I, when rendered his testimony at trial on 17.3.2005, the same process server is also responsible for the execution of proclamation (Exh.PP) of Muhammad Riaz (appellant) bearing report (Exh.PP/1), dated 11.2.2002 of the above said police official.

15. The above-said state of affairs patently rules out any possibility of substitution leaving the real culprit(s) get scot-free and the prosecution case cannot be discarded, merely on account of relationship of the witnesses with the deceased, for the same having been corroborated unimpeachably by the medical evidence, the motive, the abscondance of the accused-appellant and other attending circumstances of the case. The delay in lodgment of the F.I.R. and in autopsy of the dead body of the deceased is understandable because of the compelling

circumstances enumerated hereinabove. The non-examination of the complainant at trial hardly does any damage, to the prosecution's case as circumstances leading to his non-appearance at trial have been sufficiently explained by the defence themselves. The evidence qua recovery of Kalashnikov at the instance of the appellant, however, is of no consequence because of non-availability of report of Fire-arm Expert. The acceptance of the recovery evidence by the trial Court as an incriminating piece of evidence is not impressive at all.

16. The vehemence shown by the learned counsel that the appellant merited same treatment as meted out to Muhammad Nawaz-accused, who had been acquitted by the trial Court, cannot be given any weight, as in the absence of any strong circumstance, we cannot subscribe to the said view point, so as to evolve a conclusion totally different from the prosecution version. Even otherwise, the maxim falsus in uno, falsus in omnibus is not applicable to the facts and circumstances of this case because of the availability of corroboration of ocular testimony in abundance from other sources, besides, we do not find any element of cogency, so far as the reasons advanced in the impugned judgment regarding acquittal of Muhammad Nawaz-accused are concerned. The grounds made basis by the trial Court for recording acquittal of the said accused are flimsy, unconvincing and implausible. The unfortunate aspect of the case is that the complainant had not challenged that part of the impugned judgment, which exonerated Muhammad Nawaz-accused of the charge of murder of Munawar Hussain. By non-filing of an appeal against the acquittal of Muhammad Nawaz-accused, it does not mean that the principle of consistency was applicable to the case of the appellant Muhammad Riaz, whose conviction in this case, is found unexceptionable for the reasons, discussed in detail hereinabove. Only a legitimate and cogent finding of acquittal can be taken into consideration to deal with the prayer regarding equity of treatment and equation, so as to balance the scale but certainly not a finding/conclusion like the one, we find in the impugned judgment in respect of Muhammad Nawaz-accused. The parity of treatment is a legal phrase, which ought to be handled legally. Therefore, we are not persuaded by the argument of the learned counsel that Muhammad Riaz-appellant was entitled to identical treatment like Muhammad Nawaz-accused was extended to.

17. The upshot of the above discussion is that the appellant's conviction/sentence under Section 302(b) P.P.C. being unexceptionable, is maintained and his Criminal Appeal No. 796/2005 is hereby dismissed being devoid of any substance.

18. The Murder Reference No. 640/2005 is answered in the affirmative, with confirmation of death sentence of the appellant-Muhammad Riaz.

19. We do not find any good reason for enhancement in the compensation amount awarded to the appellant by the learned trial Court through the impugned judgment, hence, Criminal Revision No. 469/2008 filed by the mother of the complainant is dismissed.

(S.L.) Appeal dismissed

PLJ 2012 Lahore 595

Present: Shahid Hameed Dar, J.

Mst. SUGHRAN BEGUM--Petitioner

versus

ADDITIONAL SESSIONS JUDGE, KHARIAN, DISTRICT GUJRAT and 7 others--Respondents

W.P. No. 12345 of 2012, decided on 4.6.2012.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1908) Ss. 22-A & 22-B--Ex-officio Justice of Peace--Order was passed in mechanical manner without application of judicious mind and it causes annoyance and frustration to petitioner--Validity--Petitioner moved an application u/Ss. 22-A & 22-B, Cr.P.C. with allegation that police officials with criminal intent trespassed into her house, ransacked it and looted property lying therein besides committing violence upon inmates of the house of petitioner--Text of application certainly merits a serious inquiry which can only be done after rendering statement of petitioner into an FIR--Ex-officio Justice of Peace does not appear to have taken into consideration subject matter of application of petitioner and he having been swayed by negative report submitted by police, passed impugned order, dismissing application--Commission of cognizable offence ought to result into registration of a case as enunciated u/S. 154, Cr.P.C.--Petition was allowed. [Pp. 596 & 597] A & B

PLD 2007 SC 539, rel.

Ch. Muhammad Lehrasib Khan Gondal, Advocate for Petitioner.

Ch. Muhammad Shabbir Gujjar AAG for Respondents.

Date of hearing: 4.6.2012.

Order

Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner being aggrieved of order dated 17.04.2012 passed by Ex-Officio Justice of Peace, Kharian (Gujrat) seeks for registration of a criminal case against Respondents No. 4 to 7 and their unknown cronies.

2. A report has been submitted on behalf of the respondent-SHO which reveals that the petitioner is habitually involved in different cases of narcotics and that she had been convicted/sentenced more than once in the said cases. It is further learnt from this report that the petitioner had filed the instant petition with mala fide intention and with a concocted version.

3. Learned counsel for the petitioner submits that the application moved by the petitioner under Section 22-A, 22-B, Cr.P.C., categorically disclosed commission of a cognizable offence but Ex-Officio Justice of Peace did not attend to the said aspect of the case and passed the impugned order merely on whimsical reasons; Respondents No. 3 to 5 are the police officials and committed the crime in the company of 10/11 unknown aides with the active connivance/abetment of Respondent No. 6; the impugned order has been passed in a mechanical manner without application of judicious mind and it causes annoyance and frustration to the petitioner.

4. Learned AAG opposes with the contention that the petitioner is a mischief monger and a habitual offender besides being a convict in a couple of cases of narcotics; the husband of the petitioner was a notorious drug paddler who had the history of involvement in as many as 14 cases of drugs etc. and he had been convicted/sentenced in almost every such case; the comments submitted by the respondent-SHO reveal that the occurrence alleged by the petitioner had not taken place and she concocted a baseless assertion in a bid to involve the respondent police officials in a false case. He however admits that a cognizable offence appears to have been made out from the contents of the application submitted by the petitioner under Sections 22-A, 22-B, Cr.P.C. before the Ex-Officio Justice of Peace, Kharian.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner moved an application under Section 22-A, 22-B, Cr.P.C. with the allegation that respondent police officials with a criminal intent trespassed into her house, ransacked it, and looted the property lying therein besides committing violence upon the inmates of the house of the petitioner. The aforesaid allegations apparently constitute cognizable offences which

warrant that a criminal case be registered against the persons complained against so that the matter be investigated in accordance with law. So far as the contention of learned AAG that the petitioner is a habitual offender or she had been convicted in a couple of cases is concerned, it does not mean that she had lost the right of living peacefully or that she could be dealt with unlawfully by the police. The circumstances mentioned in her application (Annexure A) lead to believe that cognizable offence(s) had been committed by the respondents. The text of the application certainly merits a serious inquiry/investigation which can only be done after rendering the statement of the petitioner into an FIR. The Ex-Officio Justice of Peace does not appear to have taken into consideration the subject matter of the application of the petitioner and he, having been swayed away by a negative report submitted by the police, passed the impugned order, dismissing the application-of the petitioner. Commission of a cognizable offence ought to result into registration of a case as enunciated under Section 154, Cr.P.C. Reliance is placed on Muhammad Bashir's case (PLD 2007 SC 539).

6. For the foregoing reasons, the instant petition is allowed in terms that the respondent DPO shall ensure an action against the delinquent persons/officials in the light of the observations, made hereinabove, within a week from today and a compliance report in this regard shall be submitted by him to this Court through the learned AAG of this Court.

(R.A.) Petition allowed

PLJ 2012 Lahore 760

[Rawalpindi Bench Rawalpindi]

Present: Shahid Hameed Dar, J.

NASIR ALI--Petitioner

versus

STATION HOUSE OFFICER, POLICE STATION, CIVIL LINES, RAWALPINDI--Respondent

W.P. No. 752 of 2012, decided on 3.4.2012.

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

----S. 182--Constitution of Pakistan, 1973, Art. 199--Quashing of proceeding in qalandra u/S. 182, PPC submitted by SHO--Question of--Whether SHO was competent to furnish a complaint against petitioner for penal action--Validity--Continuation of proceedings u/S. 182, PPC before Magistrate was tantamount to abuse of process of law--Application was submitted by petitioner before CPO which led to registration of case and on investigation the same was found false--Only competent authority or public servant was CPO to make complaint before Magistrate for penal action against petitioner u/S. 182 of PPC, which was not so done by him and in his place SHO presented a qalandra which was pending adjudication before judicial magistrate--Correctness of legal proposition had not been disputed by A.G. and had self assuredly submitted that proceedings against petitioner pending before Court of Magistrate were patently illegal--Petition was accepted. [P. 763] A

Raja Muhammad Farooq, Advocate for Petitioner.

Malik Feisel Rafique, AAG for Respondent.

Date of hearing: 3.4.2012.

Order

Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner seeks for quashment of proceedings being conducted by a learned judicial

magistrate at Rawalpindi, in a complaint/qalandra under Section 182, PPC, submitted by the respondent-SHO against the petitioner, in consequence of cancellation of case-FIR No. 379 of 2010, dated 11.04.2010 under Section 379, PPC, registered at Police Station Civil Lines (Rawalpindi), on the complaint of the petitioner.

2. The only point for consideration is whether the respondent-SHO was competent to furnish a complaint against the petitioner for a penal action under Section 182 of the, PPC. It has been underlined by Section 195 of the Cr.P.C. that no Court can take cognizance of an offence under Section 182, PPC except on a complaint in writing of the public servant concerned or that of some other public servant to whom he is subordinate. The public servant concerned includes the person or authority to whom a false information is furnished by someone knowingly, believing it to be false with intent to cause said public servant to use his lawful power/authority to the injury of another person. Reproduction of the definition of Section 182, PPC and illustrations attached thereto, would be advantageous:--

"182. False information with intent to cause public servant to use his lawful power to the injury of another person: Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant :--

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to [three thousand rupees]64, or with both.

Illustrations

(a) A informs a Magistrate that Z, a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(b) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of premises, attended with annoyance to Z. A has committed the offence defined in this section.

(c) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of their information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.

3. It has been strongly argued by learned counsel for the petitioner that the complaint filed by the respondent-SHO under Section 182, PPC was not competent being contrary to the mandatory provisions of Section 195, Cr.P.C. It was urged that the complaint was made by the CPO/SSP, therefore, it was he alone or another officer/public servant to whom he was subordinate, who could legally file a complaint against the petitioner under Section 182, PPC.

4. For proper appreciation of the controversy, the relevant portion of Section 195, Cr.P.C. is reproduced hereunder:--

"195. Prosecution for contempt of lawful authority of public servants: Prosecution for certain offences against public justice: Prosecution for certain offences relating to documents given in evidence.--(1) No Court shall take cognizance:

(a) 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".

It is abundantly clear from the above provision of law that any offence punishable under Sections 172 to 188, PPC could only be taken cognizance of when complaint was tendered in writing by the public servant concerned or by some other public servant to whom he was subordinate. The SHO was not the person/public servant concerned to whom a complaint had been filed by the petitioner. Even otherwise the FIR case got lodged by the petitioner had not been decided on the judicial side rather a cancellation report prepared by the respondent-SHO under Section 173, Cr.P.C. on finalization of investigation, had been dealt with by the learned area magistrate in the capacity of a persona designata. The veracity of information laid down by the petitioner should have been judicially determined before he was called upon to answer the charge of giving false information. Reliance in this regard may be placed on the cases, titled "Sarwar Begum Vs. The State" (1974 PCr.LJ. Note 114 at p.73) and "Mian Fazal Ahmad Vs. The State" (PLD 1970 Lah. 726). In this background, the continuation of the proceedings under Section 182, PPC before the learned judicial magistrate Rawalpindi is a certain tantamount to abuse of process of law. In the present case, admittedly the application was submitted by the petitioner before the CPO Rawalpindi which led to registration of case FIR No. 379/10 (supra) and on investigation the same was found false. Therefore, the only competent authority or the public servant was the CPO Rawalpindi to make a complaint before the learned area magistrate for penal action against the petitioner under Section 182 of the, PPC, which was not so done by him and in his place, the respondent-SHO presented a complaint/qalandra in question which, as stated above, is pending adjudication before above said judicial magistrate. The correctness of the legal proposition, discussed hereinabove, has not been disputed by the learned Additional Advocate General Punjab and he has self assuredly submitted that the proceedings against the petitioner, pending before the Court of learned magistrate were patently illegal.

6. In this view of the matter, the instant petition is accepted, the impugned qalandra/complaint under Section 182 of the, PPC and ongoing proceedings thereunder before the Court of learned judicial magistrate Rawalpindi are quashed.

(R.A.) Petition accepted

PLJ 2012 Cr.C. (Lahore) 896

Present: Shahid Hameed Dar, J.

OMAIR alias OMAIRI--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 13150-B of 2012, decided on 1.10.2012.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 392 & 411--Bail, grant of--Sufficient reasons was existed--Nominated as an accused through supplementary statement--Recovery of cash and cell phone--No memo of identification was prepared qua cell phone--Accused does not have any previous criminal antecedent--His further incarceration would be of no consequence

to prosecution case--Sufficient reasons exist to believe that case of accused calls for further probe into his guilt as envisaged by S. 497(2), Cr.P.C.--Bail was allowed. [Pp. 896 & 897] A

Mr. Muhammad Moazzam Lone, Advocate for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor General Punjab for State.

Date of hearing: 1.10.2012.

Order

The petitioner seeks bail after arrest in case FIR No. 1028. dated 29.10.2011, under Sections 392, 411, PPC, registered at Police Station Baghbanpura, District Gujranwala.

2. After hearing learned counsel for the parties and perusing the record, it is observed that petitioner was nominated as an accused by the complainant through his supplementary statement on 12.11.2011 whereby he nominated two other accused namely Sabrook alias Sonu and Nadeem Ahmad as well. The petitioner appeared to have been arrested in case FIR No. 1113, dated 29.11.2011, under Sections 302, 402, PPC, registered at police station Baghbanpura(Gujranwala) wherefrom he was taken into custody in the instant case by the police. The petitioner allegedly got recovered cash Rs.40,000/- on 05.12.2011 and a cell phone on 8.12.2011. No memo. of identification has been prepared by the I.O. qua the cell phone so it cannot be said with certainty as to who does it belong to. The complainant relied upon his own knowledge while nominating the petitioner as an accused but he did not disclose the source thereof. The petitioner does not have any previous criminal antecedent. His further incarceration would be of no consequence to the prosecution case. Sufficient reasons exist to believe that petitioner's case calls for further probe into his guilt as envisaged by Section 497(2), Cr.P.C. Therefore, the instant application is allowed and petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs. 2 lacs with two sureties each in the like amount to the satisfaction of learned trial Court.

(R.A.) Bail allowed

2012 P.Cr.R. 388

[Lahore]

Present: **SHAHID HAMEED DAR and MEHMOOD MAQBOOL BAJWA, JJ.**

Muhammad Ashraf *alias* Khari

Versus

The State and another

Crl. Misc. No. 16253-B of 2011, decided on 22nd December, 2011.

BAIL (NARCOTIC)---(Samples)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Control of Narcotic Substances Act, 1997, S. 9(c)---Recovery of 540 grams heroin---Recovered heroin was allegedly packed in certain "Tokens" which was unfolded by complainant/I.O. who mixed it all, weighed it and segregated meager quantity of one gram from total substance for dispatch to office of Chemical Examiner---**Held:** Blending of material by I.O. was uncalled for---Alleged offence did not catch prohibition---Petitioner was no more required for purpose of investigation---Bail after arrest granted.

(Para 3)

[After mixing up alleged heroin weighing 540 grams packed in certain "Token" in meager quantity was sent for chemical analysis. Bail was allowed].

For the Petitioner: **Faisal Azhar Tarar, Advocate.**

For the State: **Khurram Khan, D.P.G.**

Date of hearing: **22nd December, 2011.**

ORDER

The petitioner seeks post-arrest bail in case F.I.R. No. 942, registered at Police Station City, Hafizabad, on 23.9.2011 for an offence under Section 9(c) of the Control of Narcotic Substances Act, 1997.

2. The allegation against the petitioner is that he was found in possession of 540 grams heroin and sale amount of Rs. 1,220/- when taken into custody by the police on 23.9.2011.

3. Having heard learned counsel for the parties and perused the record it is observed that the recovered heroin was packed in certain "Tokens" which were unfolded by the complainant Sub-Inspector who mixed it all, weighed it and segregated meager quantity of one gram from the total substance for dispatch to the office of Chemical Examiner. The blending of the material by the Investigating Officer was uncalled for who appears to have done so without ever perceiving as to how injurious it could be to the prosecution's case. Further discussion in this regard may prejudice the case of either of the two sides, therefore, this particular aspect of the prosecution case is left for the Trial Court to look into at trial. The offence under Section 9(b) is punishable upto 7 years' imprisonment and does not catch the prohibition of Section 51 of the Control of Narcotic Substances Act, 1997, nor that of Section 497(1), Cr.P.C. The investigation stands completed and petitioner is no more required for the purpose of investigation, therefore, we accept this application and the admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred thousand) with one surety in the like amount to the satisfaction of the learned Trial Court.

Bail after arrest granted.

2012 P.Cr.R. 844

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

Tanvir Ahmad

Versus

The State and another

Criminal Misc. No. 2608-B of 2011, decided on 25th January, 2012.

CONCLUSION

(1) Commencement of trial cannot be deemed a circumstance to impede grant of bail to accused where his case calls for further inquiry within the scope of S. 497(2), Cr.P.C.

BAIL (MURDER) --- (Join confession)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 302/34---Petitioner and wife of the deceased admitted before the PWs that they had murdered the said deceased---Joint extra-judicial confession---Bail concession---**Held:** There were glaring contradictions in allegations mentioned in F.I.R. and in the text of inquest report *qua* deceased---Such sort of evidence of extra-judicial confession of petitioner as well as that of co-accused (wife of the deceased) which looked joint in nature could be easily managed by prosecution whenever direct connecting evidence did not come their way---Commencement of trial could not be deemed a circumstance to impede grant of bail to accused---Case constituted need for further inquiry---Bail after arrest granted.

(Paras 5, 6)

Ref: PLD 1989 SC 585.

[illegible]

[Allegation was that wife had murdered her husband in connivance with her paramour. Extra-judicial confession was joint. Bail was allowed].

For the Petitioner: **Sh. Faisal Munir, Advocate.**

For the State: **Khalid Pervaiz Uppal, DPG with Ghulam Mustafa, S.I.**

For the Complainant: **Rehan Zafar, Advocate.**

Date of hearing: **25th January, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- The petitioner seeks bail after arrest in case F.I.R. No. 754, dated 02.07.2011, under Sections 302, 34, PPC, registered at police station City Bahawalnagar, on the complaint of Mushtaq Ahmad.

2. Precisely the prosecution case as stated by the complainant is that his brother Saeed Ahmad *alias* Rasheed Ahmad was married with Mst. Nadia who unfortunately developed illicit liaison with Tanveer Ahmad (petitioner); the complainant

and his brothers persuaded Mst. Nadia Bibi to give up her relationship with Tanveer Ahmad but she would not listen to them; both the spouses often quarreled with each other on the said score; it was at 4.00 a.m. on 30.06.2011 when Mst. Nadia Bibi informed Fiaz Ahmad, the brother of her husband that Saeed Ahmad was lying unconscious so he might be taken care of; the complainant and others checked Saeed Ahmad and found him dead; when dead-body of the deceased was being given a bath, the complainant and his brothers saw some contusions around his neck; they informed the police and got the dead-body of the deceased dissected by a medical officer; the complainant joined by his witnesses sent for Tanveer Ahmad (petitioner) and Mst. Nadia Bibi who admitted before them that they had murdered Saeed Ahmad *alias* Rasheed Ahmad.

3. Prior to the police on reaching the place of occurrence, prepared inquest report *qua* the dead-body of the deceased on 30.06.2011 wherein they gave a brief account of the circumstances hovering over the death of the deceased; the brief description as given in the inquest report does not bear the name of the accused-petitioner rather, it is mentioned therein that Mushtaq Ahmad complainant and his brothers suspected their bhabhi Mst. Nadia Bibi to have committed the murder of the deceased being hands in glove with some unknown accused.

4. The medical officer who performed autopsy on the dead-body of the deceased formulated an interim opinion to the effect that it was a case of asphyxiation; he however deferred his final opinion till receipt of report from the office of Chemical Examiner as to the presence of poison in the internal viscera of the deceased.

5. After having heard learned counsel for the parties and perused the record, it is observed that there are glaring contradictions in the allegations mentioned in the F.I.R. and in the text of the inquest report *qua* the deceased. Initially, while informing the police about the death of his brother, the complainant did not raise any suspicion against Tanveer Ahmad (petitioner) rather it was contended by him that Mst. Nadia Bibi having joined hands with some unknown accused had committed the murder of the deceased. Three witnesses namely Rafiq Ahmad, Khalil Ahmad and Fiaz Ahmad were recorded by the I.O. under Section 161, Cr.P.C. on 02.07.2011 whereby they gave an account of the extra-judicial confession of the accused-petitioner as well as that of his co-accused Mst. Nadia Bibi, which looks joint in nature. Such sort of evidence can be easily managed by the prosecution wherever direct connecting evidence does not come their way. As the trial has commenced, further remarks about this piece of 'evidence' may not be in the interest of the warring parties as it may prejudice their case. The commencement of the trial and the fact that a couple of official prosecution witnesses stood recorded cannot be deemed a circumstance to impede grant of bail to the accused in view of ratio of the judgment passed by the Hon'ble Supreme Court of Pakistan in Muhammad Ismail's case (PLD 1989 SC 585). Once it is concluded by a Court of competent jurisdiction, while dealing with bail application of an accused that his case calls for further probe into his guilt, within the scope of Section 497(2), Cr.P.C., the commencement of trial shall hardly create any impediment. I am of the considered view that the petitioner's case constitutes need for further inquiry into his guilt as envisaged by Section 497(2), Cr.P.C.

6. For the foregoing reasons, I accept this application and admit the petitioner to post arrest bail subject to furnishing of bail bonds in the sum of Rs. 1,00,000/- with two sureties each in the like amount to the satisfaction of learned Trial Court .

Bail after arrest granted.

2012 P.Cr.R. 847

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

***Syed* Abdul Moeed Shah**

Versus

The State and another

Criminal Misc. No. 31-B of 2012-BWP, decided on 19h January, 2012.

CONCLUSION

(1) Mere bouncing of cheque without satisfaction of its basic ingredients, no action could be taken against an accused under Section 489-F, PPC.

BAIL (BOUNCING OF CHEQUE) --- (Business deal)

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

---S. 497(2)---Pakistan Penal Code, 1860, S. 489-F---Bounced cheque---Business deal---Bail concession---No evidence had been produced by complainant to establish the fact that petitioner used to purchase some commodities from him on credit---No account books or ledgers had been produced by complainant before I.O. in support of his version regarding sale/purchase of khal---**Held:** Mere bouncing of cheque without satisfaction of its basic ingredients, no action could be taken against an accused under said penal provision of law---Alleged offence did not catch prohibitory clause---Case was open to further inquiry---Bail after arrest granted.

(Paras 2, 3)

(b) Bail---

---The facility of bail cannot be withheld as a matter of punishment nor one could be left to rot in jail for the satisfaction of the whimsical grudge/grouse of the complainant.

(Para 2)

[illegible] 489-F [illegible]

[Business deal. Bail was allowed in offence under Section 489-F, PPC].

For the Petitioner: **Malik Saeed Ejaz, Advocate.**

For the State: **Khalid Pervaiz Uppal, Deputy Prosecutor General Punjab and Mushtaq Ahmad, SI with record.**

Date of hearing: **19th January, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- Syed Abdul Moeed Shah (petitioner) seeks bail after arrest in case F.I.R. No. 176/11, dated 25.05.2011 u/s. 489-F, P.P.C. registered at P.S. City B-Division, Rahim Yar Khan.

2. I have heard learned counsel for the parties and perused the record. It is observed that the petitioner allegedly issued a cheque of Rs. 5,00,000/- in the backdrop of a business deal, to the complainant which was bounced by the bank on presentation, as

the relevant bank account was short of funds to meet the face value of the cheque. No evidence has been produced by the complainant to establish the fact that the petitioner used to purchase some commodities from him on credit. He has cited two witnesses Safdar Hussain and Muhammad Ashraf in the F.I.R. but their statements |are related to the fact that the cheque in question had been delivered to the complainant by the petitioner in their presence. No account books or ledgers had been produced by the complainant before the investigating officer in support of his version regarding sale/purchase of khal. Mere bouncing of cheque without the satisfaction of its basic ingredients, no action can be taken against an accused under the aforesaid penal provision of law. The "offence, the petitioner is charged with is punishable with three years imprisonment and does not catch the prohibition of Section 497(1), Cr.P.C. The petitioner was arrested on 18.06.2011 and he has been languishing in jail since then. The facility of bail cannot be withheld as a matter of punishment nor one could be left to rot in jail for the satisfaction of the whimsical grudge/grouse of the complainant. The case of the petitioner is open to further inquiry within the meaning of Section 497(2), Cr.P.C.

3. For the foregoing reasons the instant application is allowed and the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned Trial Court .

Bail after arrest granted.

2012 P.Cr.R. 858

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

Adnan Atif

Versus

The State and another

Criminal Misc. No. 2852-B of 2012/BWP, decided on 24th January, 2012.

CONCLUSION

(1) I.Os. are to make sure about preparation of memo. of identification *qua* the recovered articles in cases of dacoity of theft.

BAIL (DACOITY) --- (Absence of memo. of identification)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 392/411---Unknown accused allegedly snatched from complainant cash amount and two cell phones at gun point---Non-preparation of identification memo.---Bail concession---**Held:** Identification parade was delayed by more then one month---No circumstance existed on record as to why test identification parade had been conducted after such a long delay---I.O. did not prepare memo. of identification *qua* articles allegedly got recovered by petitioner during course of physical remand---Petitioner was no more required for the purpose of investigation and challan had already been submitted before Trial Court---Case needed further inquiry---Bail after arrest granted.

(Paras 4, 6)

Key Terms:- Dacoity case and identification parade.

[Identification parade was delayed by more than one month. No memo. of identification *qua* recovered articles was prepared. Bail was allowed in offence of dacoity].

For the Petitioner: **Rao Nasir Mehmood Khan, Advocate.**

For the State: **Khalid Pervaiz Uppal, DPG with Muhammad Asif, ASI.**

Date of hearing: **24th January, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- The petitioner seeks bail after arrest in case F.I.R. No. 216, dated 08.03.2011, under Sections 392, 411, PPC. registered at police station City Khanpur (Rahim Yar Khan).

2. Precisely the prosecution case as narrated by the complainant is that three unknown accused, whose external features have been given in the FIR, trespassed onto his shop and snatched from him Rs. 2,23,900/- and two cell phones at gun point; the occurrence was witnessed by Sh. Shahid Farooq and Zeeshan Ali; the unknown accused made good their escape after the occurrence.

3. The petitioner was taken into custody on 04.08.2011 and sent to judicial lock-up for test identification parade which was staged on 08.09.2011 during the course of which the complainant and his co-witnesses correctly picked him up as an accused of the occurrence; subsequent to it, the petitioner was formally apprehended in this case. He being on physical remand led to the recovery of Rs. 1,13,000/-, two cell phones and a pistol.

4. After having heard learned counsel for the parties and perused the record, it appears that the complainant got recorded a supplementary statement on 20.07.2011 wherein he expressed strong doubts against one Nasir and Adnan Atif (petitioner). The hallmark of this statement is that the maker thereof rendered complete details about the parenthood and postal address of both the suspects. The probability cannot be ruled out that the complainant and his co-witnesses might have seen the accused-petitioner from close quarters before entering into the exercise of test identification parade. The above-said exercise is delayed by more than a month which may reflect on its admissibility as well as its soundness at trial. No circumstance exists on the record to justify as to why the test identification parade had been conducted after such a long delay. It is observed that the I.O. did not prepare any memo. of identification *qua* the articles allegedly got recovered by the petitioner during the course of physical remand. The petitioner is behind the bars since 15.09.2011 and he is no more required for the purpose of investigation as challan against him has already been deposited before the Trial Court on 27.09.2011.

5. It has been noted with concern, that the police/I.Os. are not in habit of preparing memo. of identification *qua* the recovered articles in cases of dacoity or theft which leaves big gaps in the prosecution case(s). Learned law officer appears to be equally worried about this particular aspect of the investigation but he apparently seems

helpless. He is directed to take up the matter with the RPO, Bahawalpur, hold negotiations with him, apprise him of the incompetence rather dishonesty of the police working under him and make sure that such sort of pitfalls do not spoil the prosecution case(s) in future. *Prima-facie* the petitioner's case constitutes need for further inquiry into his guilt as envisaged by Section 497(2), Cr.P.C.

6. For the foregoing reasons, I accept this application and admit the petitioner to post arrest bail subject to furnishing of bail bonds in the sum of Rs. 1,00,000/- with two sureties each in the like amount to the satisfaction of learned Trial Court .

Bail after arrest granted.

2012 P.Cr.R. 861

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

Ali Akbar and another

Versus

The State and another

Criminal Misc. No. 35-B of 2012/BWP, decided on 24th January, 2012.

CONCLUSION

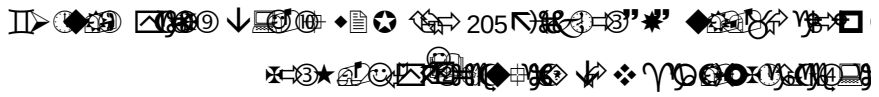
(1) In such offences falling outside prohibitory clause grant of bail is a rule and refusal an exception.

BAIL (MONETARY LOSS) --- (Vicarious Liability)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, S. 407---Truck loaded with bales of cotton was allegedly driven away by the drivers---Involvement of owner of Goods Transport Company and Adda Clerk (petitioner)---Bail concession---Vicarious liability---Petitioners underwent physical remand for 10 days but nothing had been recovered at their instance during investigation---Named drivers had not been tracked down by I.O. so far and same was the situation with truck in question---Investigation in relation to petitioners was complete and they were no more required for purpose of further investigation---Alleged offence did not catch prohibitory clause---It would be determined by Trial Court during course of trial as to vicarious liability *qua* commission of offence alleged---Grant of bail in such cases is a rule and rejection thereof was exception---Bail after arrest granted.

(Paras 5, 6)



Key Terms:- Vicarious liability.

[According to FIR, 205 maunds of cotton bales loaded in Truck had not reached its destination. During investigation neither Truck nor the driver was tracked down. Petitioner being owner of Goods Transport Company and Adda Clerk was allowed bail].

For the Petitioners: **Shabbir Ahmad Awan, Advocate.**

For the State: **Khalid Pervaiz Uppal, DPG with Nasir Bhatti, SI.**

Date of hearing: **24th January, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- Ali Akbar and Muhammad Hanif, petitioners seek post arrest bail in case F.I.R. No. 727, dated 01.11.2011, under Section 407, PPC, registered at police station City Hasilpur, District Bahawalpur, on the complaint of one Khalid Hussain.

2. Precisely the prosecution case as stated by the complainant is that he got booked 205 maunds of cotton with New Hasilpur Goods Transport Company, Hasilpur for transmission to Sadiqabad through a consignment note *(builty)* dated 08.10.2011; the truck No. 7719-LXT loaded with the afore-said consignment did not reach its destination which caused alarm to the complainant who established contact with Ali Akbar (petitioner) the owner of the goods transport company and Muhammad Hanif (petitioner) a clerk of the said company/Adda but to no avail. The petitioners put off the complainant on one pretext or the other for a considerable period of time but they finally refused to compensate him.

3. Learned counsel for the petitioner submits that there is delay of about 23 days in lodgment of F.I.R. for which no explanation has been offered by the complainant; the truck loaded with the bales of cotton was driven by Rasheed and Amjad who are still not traceable; the petitioners also deal in cotton as commission agents and for this reason they have been falsely involved in this case by the complainant.

4. On the other hand, learned DPG opposes with the contention that the petitioners are directly responsible for the commission of offence and the truck loaded with the cotton had been dishonestly concealed by them to inflict huge monetary loss upon the complainant; the drivers employed by the petitioners committed the offence with the active connivance of the latter, hence they may not be set at liberty.

5. After having heard learned counsel for the parties and perused the record, it is observed that Ali Akbar (petitioner) is the alleged owner of New Hasilpur Goods Transport Company whereas Muhammad Hanif (petitioner) works as a clerk for the said transport company. The evidence collected so far reveals that the truck bearing registration No. 7719-LXT was loaded with cotton by the complainant in presence of witnesses Asif Iqbal and Noor Muhammad on 08.10.2011 which was driven by a team of drivers including Amjad and Rasheed. The truck was driven away by the said drivers within the sight of the parties. The petitioners after having been arrested on 11.12.2011 underwent physical remand for 10 days but nothing has been recovered at their instance during the interregnum. The drivers as named above have not been tracked down by the I.O. so far and same is the situation with the mentioned truck. The investigation in relation to the petitioners is complete and they are no more required for the purpose of further investigation. The offence, the petitioners are charged with does not catch the prohibition of Section 497(1), Cr.P.C., being punishable with seven years' imprisonment.

Grant of bail in such-like cases is a rule and rejection thereof an exception. It shall be determined by the Trial Court during the course of trial as to the vicarious liability of the petitioners *qua* the commission of offence as alleged by the complainant in the F.I.R. There exist sufficient grounds to believe that the petitioners' case constitutes need for further inquiry into their guilt as envisaged by Section 497(2), Cr.P.C.

6. Therefore, I accept this application and admit the petitioners to post arrest bail subject to furnishing surety bonds in the sum of Rs. 1,00,000/- each with two sureties each in the like amount to the satisfaction of learned Trial Court .

Bail after arrest granted.

2012 P.Cr.R. 864

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

Abdul Khaliq *alias* Khalqi

Versus

The State and another

Criminal Misc. No. 2510-B of 2011/BWP, decided on 24th January, 2012.

CONCLUSION

(1) An absconder can only be penalized for such absconsion, if his case would not fall within the ambit of further inquiry as contemplated under Section 497(2), Cr.P.C.

(a) Bail---

---Absconder---Proposition of law---There is no cavil to the proposition that a fugitive from law would lose some of his normal rights as guaranteed under the substantive law as well as the procedural law but an absconder/fugitive from law can only be penalized for such abscondence, if his case would not fall within the ambit of further inquiry as contemplated under Section 497(2), Cr.P.C.

(Para 4)

BAIL (POLICE ENCOUNTER) --- (Absconder)

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

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 353/324/34---Absconder---Bail concession---There is no cavil to the proposition that a fugitive from law would lose some of his normal rights as guaranteed under the substantive law as well as the procedural law but an absconder/fugitive from law can only be penalized for such abscondence, if his case would not fall within the ambit of further inquiry---**Held:** I.O. failed to collect any incriminating evidence against petitioner during course of investigation---Case needed further inquiry---Bail after arrest granted.

(Paras 4, 5)

[No incriminating material was collected against petitioner during investigation although petitioner remained a fugitive from law, yet bail was granted in the said offence].

For the Petitioner: **S.M. Asif Bukhari, Advocate.**

For the State: **Khalid Pervaiz Uppal, Deputy Prosecutor General, Punjab and Muhammad Yousaf, Inspector/SHO.**

Date of hearing: **24th January, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- Abdul Khaliq *alias* Khalqi (petitioner) seeks bail after arrest in case F.I.R. No. 164/2008, dated 06.05.2008 under Sections 353, 324, 34, P.P.C registered at P.S. Shedani, Tehsii Liaquatpur, district Rahim Yar Khan.

2. Being entrusted with the investigation of case F.I.R. No. 163/08, dated 06.05.2008 under Sections 365-A, 392, P.P.C registered at P.S. Shedani (Rahimyar Khan), the Inspector-SHO Muhammad Arshad alongwith a strong contingent of police headed towards village Din Muhammad Dahar where they noticed four unknown riders driving a motorcycle CD-70 Model, 2003, which, on suspicion, was chased by the police party; the accused sped away by dropping Muhammad Ismail Kahairi, the alleged abductees of the above-said case, whose hands were found tied with a rope; the police kept chasing the accused which resulted into exchange of firing between them, during the course of which two of the unknown accused got injured and one fled the scene under the sheath of darkness; two local farmers disclosed the names of the injured accused as Abdul Hameed *alias* Hameeda and Abdul Rasheed *alias* Rasheeda.

3. Ghulam Akbar, the complainant appeared before the learned Magistrate Liaqat Pur on 20.06.2011 to state that he was satisfied about the non-participation of Abdul Khaliq (petitioner) in the occurrence, as contained in F.I.R. No. 163/2008 (*supra* and that he had not found him at the spot, at the relevant time of occurrence. The statement, so made by the above-noted complainant was found sufficient by the learned Magistrate to admit the petitioner to bail in the said case (163/2008).

4. After having heard learned counsel for the parties and perused the record, it appears that the investigating officer failed to collect any incriminating evidence against the petitioner during the course investigation. Two important informers of the police Elahi Bakhsh and Ghous Bakhsh who had furnished certain crucial information to the police regarding identity of the accused-petitioner and that of his co-accused were not associated with the investigation of this case nor they were ever examined by the investigating officer under Section 161, Cr.P.C. It has been pointed out by the learned Deputy Prosecutor General Punjab that the statements of the above-said witnesses had been recorded u/s. 161, Cr.P.C. but mischievously/dishonestly removed from the file either by the investigating officer or by some other police official and an inquiry was being conducted by the S.P. (Investigation) in this respect. The fact remains that no such evidence is available on the record. The petitioner was arrested on 15.03.2011 as an absconder, in this case. There is no cavil to the proposition that a fugitive from law would lose some of his normal rights as guaranteed under the substantive law as well as the procedural law but an absconder/fugitive from law can only be penalized for such abscondence, if his case would not fall within the ambit of further inquiry as contemplated under Section 497(2), Cr.P.C. So far as the accused-petitioner is concerned, the investigating officer appears to have shown no rigors at all to collect incriminatory

evidence against him, hence, his case constitutes need for further probe into his guilt within the meaning of Section 497(2), Cr.P.C.

5. Therefore, the instant petition is accepted and the petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with two sureties each in the like amount to the satisfaction of learned Trial Court .

Bail after arrest granted.

2012 P.Cr.R. 1242

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

Imtiaz Ahmad and another

Versus

The State and another

Crl. Misc. No. 123-B of 2012/BWP, decided on 2nd February, 2012.

CONCLUSION

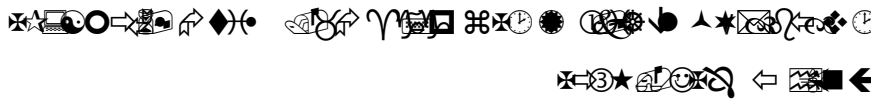
(1) Runaway marriage and grant of bail

BAIL (ABDUCTION)---(Runaway marriage)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 365-B/376---Bail after arrest, grant of---Runaway marriage---Tentative ascertainment of record---Victim repeatedly appeared before a Court of law as well as before Ex-Officio Justice of Peace to admit factum of her Nikah with accused-petitioner---Gold ornaments and cash allegedly recovered at instance of petitioner had not been identified by complainant through a memo. of identification---Pendency of said family suits was an important circumstance which would decide fate of Nikahnama showing marriage between alleged abductee and petitioner---Medical evidence did not show any injury, anywhere on person of alleged victim---**Held:** *Prima facie*, sufficient reasons existed to believe that case of petitioner called for further inquiry---Bail after arrest granted.

(Paras 4,5)



[Runaway marriage/family case was pending/no injury was found on person of alleged abductee as per medical report. Case called for further inquiry. Bail was allowed].

For the Petitioners: **Sardar Muhammad Iqbal Khakwani, Advocate.**

For the State: **Muhammad Ali Shahab, DPG.**

For the Complainant: **Qazi Muhammad Saif Ullah, Advocate.**

Date of hearing: **2nd February, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- Imtiaz Ahmad and Ijaz Ahmad, the petitioners seek bail after arrest in case F.I.R. No. 1040, dated 28.11.2011, under Sections 365-B, 376, PPC, registered at Police Station, Saddar Khan Pur, District Rahim Yar Khan.

2. Learned counsel for the petitioners has argued the case on the following lines:--

(a) the alleged abductee contracted marriage of her own free will and accord with Imtiaz Ahmad petitioner on 21.4.2011 and nikahnama to this effect endorses the said fact;

(b) all the co-accused of the petitioners were found innocent during the course of investigation;

(c) the victim swore an affidavit on 21.4.2011 to the effect that she had not been abducted by anyone and that she being *sui juris* contracted marriage with Imtiaz Ahmad accused-petitioner on 21.4.2011;

(d) the alleged abductee moved an application under Section 22-A, Cr.P.C. seeking a direction of learned *Ex-Officio* Justice of Peace to the effect that she and her spouse Imtiaz Ahmad (petitioner) may not be harassed by the police and a direction by the learned *Ex-Officio* Justice of Peace, to this effect is available on the record;

(e) a private complaint was filed by the alleged abductee against her brothers and she stated before the learned Trial Court under Section 200, Cr.P.C. that she had contracted marriage with Imtiaz Ahmad (petitioner) but contrary to the wishes of her parents, and for this reason she had been intimated by the respondent-accused;

(f) a suit for restitution of conjugal rights filed by Imtiaz Ahmad petitioner is pending adjudication before a Family Court and in parallel to it, a suit for jactitation of marriage is also pending which has been instituted by the alleged victim;

(g) lastly submits that the petitioners' case constitutes need for further inquiry into their guilt as envisaged by Section 497(2), Cr.P.C. so they may be granted the relief prayed for.

3. On the other hand, learned DPG assisted by learned counsel for the complainant opposes with the contention that the accused-petitioners are nominated in the F.I.R. with a specific allegation that they alongwith their co-accused forcibly abducted *Mst.* Nadia Bibi and they also committed theft of cash and gold ornaments; the nikahnama is a forged document which was fabricated by the accused to prove a runaway marriage, which has been challenged by the abductee through her suit for jactitiation of marriage; the petitioner Imtiaz led to the recovery of cash and gold ornaments on 13.12.2011 during the course of physical remand; lastly submits that both the petitioners were held guilty during the course of investigation.

4. Having heard learned counsel for the parties and perused the record. It is observed that the nikahnama showing marriage between Muhammad Imtiaz (petitioner) and *Mst.* Nadia Bibi is a crucial document the validity/veracity whereof should have been probed into by the I.O. during the course of investigation but no rigors appears to have been taken by him in the said direction. The victim repeatedly appeared before a

Court of law as well as before the learned *Ex-Officio* Justice of Peace to admit the factum of her nikah with Imtiaz Ahmad-accused. The statement recorded by the learned Judicial Magistrate, Muzaffar Garh in a private complaint case, on 21.11.2011 shows that *Mst.* Nadia Bibi, the alleged victim had appeared before the Court in person to make above-said statement. The gold ornaments and cash allegedly recovered at the instance of the petitioner have not been identified by the complainant through a memo. of identification. The pendency of the family suits referred to hereinabove, before a Family Court at Khanpur, District Rahim Yar Khan is an important circumstance which shall decide the fate of the nikahnama showing between the alleged abductee and Imtiaz Ahmad petitioner. The medical evidence does not show an injury, anywhere on the person of the alleged victim and findings of the woman Medical Officer hint at a strong probability that the examinee did not experience, for the first time the 'tang' of sexual intercourse. The involvement of Ijaz Ahmad petitioner in the instant case is not above-board as he happens to be real brother of the co-petitioner and data collected by the I.O. against him does not inspire confidence. *Prima facie* sufficient reasons exist to believe that the case of the petitioners calls for further probe into their guilt as envisaged by Section 497(2), Cr.P.C.

5. Therefore, I accept this application and admit the petitioners to post-arrest bail subject to furnishing surety bonds in the sum of Rs. 1,00,000/- each with two sureties each in the like amount to the satisfaction of learned Trial Court.

Bail after arrest granted.

2012 P.Cr.R. 1205

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

Sagheer Ahmad

Versus

The State and another

Crl. Misc. No. 2753-B of 2012/BWP, decided on 10th January, 2012.

CONCLUSION

(1) The facility of bail must not be withheld as a matter of punishment.

(2) Law requires that equity of treatment has to be maintained amongst the accused persons in similar circumstances.

BAIL (DACOITY)---(Two versions case)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, S. 392---Bail concession---Two versions case---Rule of consistency---Validity---It was a case of two versions---Both the accused-petitioners as well as their co-accused had received multiple injuries during the alleged occurrence---Mere factum of registration of a number of cases against an offender without conviction in any does not necessarily mean that he was a hardened, desperate

or a dangerous criminal---Besides, co-accused was admitted to bail by High Court---Law requires that equity of treatment had to be maintained amongst accused placed in identical circumstances---Case fell within ambit of further inquiry---Bail after arrest granted.

(Paras 5,6)

[illegible]

[Co-accused was on bail. It was a case of two versions. Bail was allowed in offence of dacoity].

For the Petitioner: **Mrs. Kausar Iqbal Bhatti, Advocate.**

For the Complainant: **Muhammad Saleem Chaudhry, Advocate.**

For the State: **Malik Muhammad Latif, Deputy Prosecutor-General, Punjab.**

Date of hearing: **10th January, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- Through this single order, I intend to dispose of two connected bail applications bearing Crl. Misc. No. 2753/B-2011/BWP filed by Sagheer Ahmad-petitioner and Crl. Misc. No. 2754/B-2011/BWP filed by Allah Ditta-petitioner, as both arise from the same F.I.R. No. 189, dated 18.5.2011, under Section 392, P.P.C. registered at Police Station, Saddar Haroonabad, District Bahawalnagar, whereby the petitioners seek for post-arrest bail.

2. Amir Ali, a co-accused of the petitioners was admitted to post-arrest bail by the Court *vide* order dated 15.11.2011 passed in Crl. Misc. No.2451/B-2011/BWP, with the following observations:--

> "4. ……. The case of the complainant in the F.I.R. is that three persons, two of whom with muffled faces, came at the spot. They were armed with rifle and pistols and snatched Rs. 9,000/- and mobile phone Sony Ericson valuing Rs. 8,000/- from the complainant as well as cash amount and mobile phones from others. On their hue and cry, the accused were chased by the people and were encircled in a garden. The accused persons resorted to firing and the complainant side also fired in self-defence and they (accused) were captured and disclosed their names as Muhammad Saghir Ahmad, Allah Ditta and Ameer Ahmad. Nothing was recovered from the petitioner at the time of his arrest and even during the course of investigation. The petitioner is not involved in any other case of such-like nature as confirmed by the learned DPG under instructions from the Police Officer, present in Court. In the circumstances, case to the extent of the petitioner calls for further inquiry within the ambit of sub-section (2) of Section 497, Code of Criminal Procedure."

3. Learned counsel for the petitioners submits that the case of the petitioners is at par with that of their released co-accused; the dictum of consistency requires that the petitioners may also be dealt with identically.

4. On the other hand, learned Deputy Prosecutor-General, Punjab assisted by learned counsel for the complainant disputes with the contention that the petitioners have committed a heinous offence; both of them were caught red-handed after they had forcibly snatched valuables from certain individuals; the petitioners, unlike their co-accused, have previous criminal record as they stand involved in a number of identical criminal cases; the offence committed by the petitioners falls within the prohibition of Section 497(1), Cr.P.C., therefore, they may not be granted the relief prayed for.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the case of the petitioners simply overlaps the case of their co-accused Amir Ali, who had been granted bail by this Court *vide* order dated 15.11.2011. The plea of the accused-petitioners for grant of bail stands further strengthened as a cross-case under Section 324, P.P.C. has been registered against the complainant party *vide* case diary dated 28.12.2011. It is relevant to mention here that both the accused-petitioners as well as their co-accused Amir Ali had received multiple injuries during the occurrence as is manifest from their medico-legal reports. Sagheer Ahmad (petitioner) received fire-arm as well as blunt weapon injuries, whereas Allah Ditta (petitioner) also received similar sort of injuries at the hands of their adversaries. The medico-legal report of Amir Ali-accused also reveals the similar facts. It has been vociferously argued on behalf of the complainant that Sagheer Ahmad-accused was involved in a dozen cases of identical nature and Allah Ditta accused, also had another case of dacoity against his name, so being habitual offender they may not be granted the relief sought after. Mere factum of registration of a number of cases against an offender without conviction in any does not necessarily mean that he was a hardened, desperate or a dangerous criminal. Unless an accused is held guilty by a competent Court of jurisdiction, his involvement in certain criminal cases may only be of some academic interest but certainly not a conclusive circumstance to deprive him of the basic presumption of innocence. The facility of bail must not be withheld as a matter of punishment. The question as to the initiation of aggression shall be dealt with by the learned Trial Court after recording the evidence of the parties at trial. Being a case of two versions, it cannot be opined with certainty at this stage as to which one of the two stories is nearer to truth. Besides, law requires that equity of treatment has to be maintained amongst the accused, placed in identical circumstances. *Prima facie*, sufficient reasons exist to believe that the petitioners' case falls into the mischief of Section 497(2), Cr.P.C.

6. For the foregoing reasons, these applications are accepted and the petitioners are admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac) each with two sureties each in the like amount to the satisfaction of the learned Trial Court.

Bail after arrest granted.

2012 LAW NOTES 298

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

Muhammad Rafique

Versus

The State

Criminal Appeal No. 95/J of 2009/BWP, decided on 17th January, 2012.

CONCLUSION

(1) The substitution is a rare phenomen in criminal law.

CRIMINAL TRIAL --- (Substitution)

Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, S. 376---Accused/phopha allegedly had been sexually ravished an orphan girl aged 13/14 years---Charge---Impugned conviction/sentence---Substitution---Defence plea---Appreciation of evidence---Validity---Suggestions regarding commission of repeated act of coitus with the victim by one 'N' who had been married with prosecutrix six months earlier than occurrence but Rukhsati had not taken place, were absolutely absurd and hinted at a frustrated effort on part of appellant to evade consequences of his devilish wrongdoings---By no stretch of imagination, pregnancy of the victim could be attributed to cohabitation by her husband, who lived miles away from victim---Statement of victim was not only corroborated by eye-witness of occurrance/PW, who was real paternal uncle of prosecutrix and brother-in-law of appellant but also corroborated by medical evidence--- Element of pregnancy was conclusive proof of fact that an act of coitus had been committed upon victim---Even otherwise, it did not appeal to mind that appellant had been substituted as accused of named husband---Substitution of an accused is a rare phenomenon in criminal law---Appellant could not muster courage to substantiate his defence plea by producing any defence evidence nor he himself volunteered to appear under Section 340(2), Cr.P.C. as his own witness in support of his defence plea, which, by all means and from all angles, looked incredible, hence, rejected---Prosecution appeared to have discharged its onus impeccably to bring home guilt of accused-appellant beyond any reasonable shadow of doubt---Criminal appeal dismissed.

(Paras 6, 7, 8, 9)

13/14

Key Terms:- Substitution.

[Phopha allegedly sexually ravished an orphan girl aged 13/14 years. Impugned conviction/sentence was upheld].

For the Appellant: **Sardar Israr Hussain Daher, Advocate.**

For the State: **Khalid Pervaiz Uppal, Deputy Prosecutor General Punjab.**

For the Complainant: **Sardar Afzal Ahmad, Advocate.**

Date of hearing: **17th January, 2012.**

JUDGMENT

SHAHID HAMEED DAR, J. --- The criminal appeal filed by Muhammad Rafique is directed against the judgment dated 2.4.2009 passed by learned Additional Sessions Judge, Haroonabad, district Bahawalnagar, whereby the appellant was convicted under Section 376, P.P.C. and sentenced to rigorous imprisonment for ten years with fine of Rs. 10,000/- or in default thereof to further undergo simple imprisonment for six months. The benefit of Section 382-B, Cr.P.C. has been extended to the appellant.

2. Briefly stated, it is the case of prosecution according to written application (Exh.PF) by Mst. Farkhanda Shaheen-complainant (P.W.4) that she was 13/14 years of age, her parents had died and she lived at the residential house of her paternal uncle (Taya) Abdul Ghafoor (P.W.5); her Phuphi Mst. Shamim alongwith her husband Muhammad Rafique (appellant) also lived in the same house; Abdul Ghafoor (P.W.5) was issueless and he dealt in vegetables; Mst. Shamim and Muhammad Rafique helped Abdul Ghafoor on his farms and they also sold the vegetables; her Phupha Muhammad Rafique started sexually harassing the complainant about 2½ months prior to the occurrence, who forbade him and reminded him of the fact that he was like her father but he would not listen to it and intimidated her by threatening that he would murder all those living in the said house; she preferred to keep quiet being frightened; Muhammad Rafique (appellant) started committing Zina-bil-Jabar with her under coercion, as a result of which she conceived but her Phupha Muhammad Rafique did not stop his satanic act; about eight/nine days prior to the occurrence, her Phuphi Mst. Shamim, her Phupha Muhammad Rafique (appellant) went to the fields alongwith their children and her paternal uncle Abdul Ghafoor went to his shop by leaving her alone at his house as it was an affair in routine; a little while thereafter, Muhammad Rafique (appellant) came back, shut the door and started committing Zina-bil-Jabar with her at gunpoint; she screamed out of pain and in the meanwhile her Taya Abdul Ghafoor (P.W.5) and Mushtaq Ahmad PW (not produced) entered the house, pushed the door ajar and witnessed the appellant committing Zina with her; the appellant by picking his pistol raised Lalkara that he would murder if someone drew near; the accused fled the scene waving his pistol in the air; the Phuphi and Taya of the complainant, joined by Mushtaq Ahmad PW beseeched the complainant not to take any action against the culprit and that they would settle the matter themselves; the appellant could not be found by the complainant and others, which compelled her to move an application (Exh.PF) for reporting the matter to the police, on the basis of which formal F.I.R. (Exh.PG) was recorded.

3. The appellant-accused was arrested on 1.7.2007 and after completion of necessary investigation challaned to face the trial.

4. At trial, prosecution examined six witnesses in all. The medical evidence was presented by Dr. Samar Ghafoor (P.W.1), who medically examined the complainant *vide* medico-legal report (Exh.PA) on 29.6.2007 and observed as under:---

> "HYMEN was torn, tags of tears were present. No fresh laceration or bleeding was seen. Vagina admitted two fingers easily. Two deep vaginal swabs and one superficial vaginal swab was taken, dried, sealed and sent to the Chemical Examiner, Multan for detection of semen. On vaginal examination, her uterus was bulky and soft. For detection/confirmation of pregnancy, she was referred to

Gyaenecologist for expert opinion and she was admitted. On prenium (Libia, Majora and Minora) there was no marks of violence or discharge at the time of examination. In my opinion, she had been subjected to sexual intercourse. However, final opinion was kept pending till the receipt of Chemical Examiner report and gyaenecologist report."

She referred the examinee to the Gyaenecologist for expert opinion as to her gravidity. She took two deep vaginal swabs and one superficial vaginal swab, sealed them for chemical examination. On the basis of positive report (Exh.PB) from the Gynaecologist, the woman medical officer (P.W.1) opined that the examinee carried pregnancy of nine weeks.

The Gynaecologist Dr. Rubina Aziz was examined as P.W.2, who *vide* report (Exh.PB) remarked that size of the uterus of the victim showed pregnancy of eight weeks. She, however, referred the examinee to the Radiologist, DHQ Hospital, Bahawalnagar through letter (Exh.PC) for her ultra-sonographic test. The Radiologist *vide* report (Exh.PD) confirmed that the victim carried nine weeks old pregnancy.

P.W.3 is Dr. Muhammad Ameen, who medically examined the appellant-accused Muhammad Rafique on 2.7.2007 for potency and *vide* medico-legal report (Exh.PE) found him potent enough to perform sexual intercourse.

P.W.4-Mst. Farkhanda Shaheen is the complainant, who reiterated her statement as mentioned hereinabove. Abdul Ghafoor (P.W.5) is an eye-witness of the occurrence, who per chance returned to his house alongwith Mushtaq Ahmad PW (not produced) and saw Muhammad Rafique (appellant) committing Zina with the complainant and then running away from the spot with a pistol in his hand. P.W.6 is Muhammad Ashraf, SI. He on receipt of application (Exh.PF) from Mst. Farkhanda Shaheen-complainant (P.W.4) chalked out formal F.I.R. (Exh.PG). He arrested the accused-appellant on 1.7.2007. He investigated the case and challaned the accused-appellant to face trial.

5. The appellant-accused made a statement under Section 342, Cr.P.C. wherein he denied the allegations and pleaded innocence by contending that:---

"Alleged victim of this case married but Rukhsati was not made yet. However, bridegroom used to visit the house of victim occasionally finding an opportunity as alleged victim used to reside in the house alone. Family Member of the victim used to go in connection of labour. I have not committed the offence. Mst. Farkhanda Shaheen is just like my real daughter. I had strained relations with my wife who got registered this false F.I.R. implicating me as accused and Mst. Farkhanda Shaheen made false statement on asking of my wife."

He declined to make statement on oath or lead any evidence in defence.

6. I have heard learned counsel for the parties and perused the record with their able assistance. It was vehemently argued by learned counsel for the appellant that the prosecution case was based on solitary statement of the complainant and as a rule of prudence the same could not be made basis for conviction. This contention was, however, found without any substance as the statement of Mst. Farkhanda Shaheen (P.W.4) was not only fully corroborated by the evidence of Abdul Ghafoor (P.W.5) but also corroborated by the medical evidence. So far as the testimony of P.W.4 is concerned, it may be mentioned that she was struck by the worst degree of misfortune as her violator was no one else but her real Phupha, who, in the ordinary circumstances, would have

been a fatherly figure to her. The circumstances of this case are heart rendering as the victim-complainant was an orphan and merely 13/14 years of age. The appellant was given refuge in his house by Abdul Ghafoor (P.W.5), who was issueless and believed in the piety of *inter se* relationship with the appellant-accused, who was the husband of his real sister. Nobody knew that a beast clothed in ordinary attire lived in the said house. The diabolic act of the appellant, having sexually ravished an innocent girl of 13/14 years stands more than proven as I look into the evidence produced by the prosecution against him. The statement of the complainant is natural and confidence inspiring. She has been subjected to searching cross-examination, but nothing fruitful to the defence stood adduced, therefrom. The suggestions regarding commission of repeated act of coitus with the victim by one Nasir, who had been married with the prosecutrix six months earlier than the occurrence, but Rukhsati had not taken place, are absolutely absurd and hint at a frustrated effort on the part of the appellant to evade the consequences of his devilish wrongdoings. By no stretch of imagination, the pregnancy of the victim can be attributed to cohabitation by her husband Nasir, who lived miles away from Mst. Farkhanda Shaheen. As it appears from the testimony of PW.4, that the appellant lived in the same house alongwith others including the victim, having glued his eyes lustfully on the poor soul, devastated her by repeatedly committing Zina-bil-Jabar with her. It can be easily understood from the evidence available on the record that P.W.4 being a child-minor of merely 13/14 years of age was too feeble to resist the criminal/sexual onslaught upon her by the appellant. The contents of her statement have been duly supported by Abdul Ghafoor (P.W.5), an eye-witness of the occurrence, who was real paternal uncle of the prosecutrix and brother-in-law *(Sala)* of the appellant. He lived in the same house, rather, the appellant, his wife and children lived in his house, where the unfortunate incident took place. The appellant appears to be a sex maniac, who despite having his own family committed excesses against an innocent girl and ruined her life through his abhorrent act. The statement of Abdul Ghafoor (P.W.5) fully corroborates the version of the victim and his presence at the spot at the relevant time of occurrence cannot be seen with curiosity. Report of the Gyaenecologist regarding pregnancy of the victim and the medico-legal report (Exh.PA) issued by P.W.1 in respect of the complainant rendered unflinching corroboration to the statement of the victim. Although report of Chemical Examiner is not available on the record nor it appears to have been tendered in evidence by the public prosecutor, yet element of pregnancy is the conclusive proof of the fact that an act of coitus had been committed upon the victim.

7. The defence plea submitted by the appellant-accused is without any substantial corroboration. Even otherwise, it does not appeal to mind that the appellant had been substituted as accused for Muhammad Nasir. The substitution of an accused is a rare phenomenon in criminal law. The appellant has produced no evidence to support his plea that his wife had got registered a false case against him by winning over Mst. Farkhanda Shaheen. The appellant could not muster courage to substantiate his defence plea by producing any defence evidence nor he himself volunteered to appear under Section 340(2), Cr.P.C. as his own witness in support of his defence plea, which, by all means and from all angles, looks incredible, hence, rejected.

8. The prosecution appears to have discharged its onus impeccably to bring home guilt of the accused-appellant beyond any reasonable shadow of doubt.

9. Resultantly, I maintain conviction and sentence awarded to the appellant by the learned Trial Court *vide* judgment dated 2.4.2009 and dismiss his appeal.

Criminal appeal dismissed.

2012 LAW NOTES 403

[Bahawalpur]

Present: **SHAHID HAMEED DAR, J.**

Riaz Hussain Shah

Versus

The State and 3 others

Criminal Misc. No. 480/Q of 2011, decided on 18th January, 2012.

CONCLUSION

(1) A party cannot be allowed to lead additional evidence to fill in lacunae in his case.

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

---Ss. 244(2), 265-F---Production of document---Provisions of---Mandate---The prosecution can be allowed to lead oral as well as documentary evidence at any stage of the trial, unless it appears that the document(s), required to be submitted belatedly in evidence had not been subsequently cooked up or that such witness was being called for elasticating delaying or frustrating the ends of justice, which could prove prejudicial to the accused. (Para 7)

TRIAL --- (Production of additional evidence)

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

---Ss. 561-A, 540, 244(2), 265-F---Qanun-e-Shahadat Order, 1984, Art. 161---Pakistan Penal Code, 1860, S. 489-F---Criminal trial---Production of additional evidence---Courts below accepted application for leading additional evidence---Impugned orders---Validity---Cheques in question sought to be produced were already available on record and entire prosecution case revolved around said negotiable instruments---Said cheques had also figured in testimony of complainant (respondent) recorded by Trial Court, hence, these were necessary documents, which were required to be produced by prosecution---It stood proved that those had not been introduced subsequently---Debt amount was required to be defrayed by accused-petitioner through cheques in question, which were bounced by bank due to insufficient funds---Non-production of cheques in question earlier was not sufficient to deprive prosecution of presenting crucial documents in Court---Order according.

(Paras 7, 8, 12)

[illegible] 489-F [illegible]

Key Terms:- Additional evidence.

[Application for producing cheques in question as additional evidence was rightly accepted by Trial Court in offence u/s. 489-F, PPC].

For the Petitioner: **Khan Lal Khan Lakhwera, Advocate.**

For the State: **Khalid Pervaiz Uppal, Deputy Prosecutor General Punjab.**

For the Respondent No. 4: **Ms. Nusrat Jabeen, Advocate.**

Date of hearing: **18th January, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- Through this petition under Section 561-A, Cr.P.C., the petitioner seeks setting aside of order dated 18.1.2011 passed by learned Judicial Magistrate, Chishtian, district Bahawalnagar, whereby an application under Section 540, Cr.P.C. read with Article 161 of the Qanun-e-Shahadat Order, 1984 moved by Syed Azhar Hussain Shah (respondent No. 4) for leading additional evidence has been accepted, besides, the instant petition is also directed against the order dated 19.2.2011 passed by learned Additional Sessions Judge, Chishtian (Bahawalnagar), whereby criminal revision filed by the petitioner against the above-said order of learned Judicial Magistrate was dismissed.

2. The facts leading to the filing of the instant petition are that the petitioner is an accused of case F.I.R. No. 446/2008, dated 25.10.2008, under Section 489-F, P.P.C. registered at Police Station Shehr Fareed, district Bahawalnagar; the trial of the accused-petitioner almost stood concluded as it was fixed for final arguments, when Syed Azhar Hussain Shah-complainant (respondent No. 4) moved an application under Section 540, Cr.P.C. read with Article 161 of the Qanun-e-Shahadat Order, 1984 for leading documentary evidence pertaining to the cheques in question and certain other documents in evidence, which was accepted by the learned Trial Court *vide* order dated 18.1.2011 with the observation that the documents required to be exhibited were not cooked up by the prosecution subsequently and that the documents in question were the public record and if allowed to be exhibited, it would not cause any prejudice to the fate of the case of the accused; the learned Additional Sessions Judge, was approached by the petitioner through a criminal revision, which was dismissed *vide* order dated 19.2.2011 with the observation that "data available on record speaks volumes with regard to the justified contention of the respondent in his application u/s. 540, Cr.P.C. read with Section 244(2) of the same Code". Hence, the instant petition.

3. Learned counsel for the petitioner contends that the prosecution having already concluded its evidence and the case now fixed for final arguments was not the stage to allow the belated and afterthought prayer of the respondent-complainant for submitting the documentary evidence, as placing on record the documents mentioned hereinabove, would amount to re-opening of the case because the document in question were neither produced by the prosecution with the challan nor copies thereof were supplied to the petitioner under Section 241-A, Cr.P.C. the prosecution has been illegally permitted by both the learned Courts below to fill in the lacunae of their case at the cost of justice and both the impugned orders have resulted in serious prejudice to the petitioner.

4. On the other hand, learned counsel for respondent No. 4 has drawn the attention of this Court towards the bone of contention between the parties, which certainly pertains to cheques No. 116815 and 116816, which are the subject-matter of the F.I.R. No. 446/2008 (*supra*) and it clearly shows that these documents had not been cooked up during the trial and the same were the integral part of the record of the case even before the registration of said F.I.R., hence, allowing submission of the said instruments and placing it on the record would be necessary to reach the just decision of the case and if these cheques are not tendered in evidence, the case of the prosecution shall be badly prejudiced. The learned counsel has referred to case reported as *Mst. Shama Akram v. Muhammad Latif alias Teefa alias Liaqat and 7 others* (2001 Y.L.R. 746), wherein it has been laid down that any oral or documentary evidence, which the prosecution designed to produce, could not be refused before closing of the prosecution case.

5. Learned Deputy Prosecutor General Punjab submits that he supports the arguments of learned counsel for respondent No. 4.

6. I have heard the arguments of learned counsel for the parties and gone through the available record.

7. The Magistrate is empowered under sub-section (2) of Section 244, Cr.P.C. to issue summons to any witness directing him to attend or to produce any document or other thing on the application of the complainant or the accused. The definition of the aforesaid provision of law is given hereunder for ready reference:---

> "The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing."

The Courts have to exercise their discretion in a judicious and proper manner so that the question of prejudice to any of the parties at war does not arise. When Section 244(2), Cr.P.C. is read with Section 265-F, Cr.P.C., it gives rise to a clear understanding that the prosecution can be allowed to lead oral as well as documentary evidence at any stage of the trial, unless it appears that the document(s), required to be submitted belatedly in evidence had not been subsequently cooked up or that such witness was being called for elasticating delaying or frustrating the ends of justice, which could prove prejudicial to the accused. It is important to note that the cheques in question sought to be produced were already available on the record and the entire prosecution case revolved around the said negotiable instruments. These cheques have also figured in the testimony of the complainant (respondent No. 4) recorded by the learned Trial Court, hence, these were necessary documents, which were required to be produced by the prosecution. It stands proved that these had not been introduced subsequently. The respondent-complainant and his witnesses even during the course of investigation contended about the fact that the cheques, referred to hereinabove, had been issued by the accused-petitioner to the complainant (P.W.4) for repayment of loan of Rs. 2,00,000/-. The debt amount was required to be defrayed by the accused-petitioner through the cheques in question, which were bounced by the bank due to insufficient funds.

8. It has been contended by learned counsel for respondent No. 4 that a civil suit about the same instruments was also pending between the parties and both the cheques had been tendered in evidence before the learned Civil Court and copies thereof would be tendered as secondary evidence in the trial of the accused, who would have

every opportunity to challenge the submission of said documents by lodging a request for cross-examining the witness, tendering the said instruments/documents in evidence. The non-production of the cheques in question earlier is not sufficient to deprive the prosecution of presenting the crucial documents in the Court.

9. So far as the other documents, which have been permitted to be tendered in evidence by the learned Trial Court, are concerned, these have nothing to do with the trial of the accused. The details of these documents has been given in paragraph 4 of the application moved by respondent No. 4 before the learned Trial Court and these are incidentally the documents, which were not presented before the Investigating Officer during the course of investigation nor they formed a part of the judicial record. It appears that the complainant (respondent No. 4) decided to present these documents in evidence after he found certain lacunae in his case, which he attempted to fill-in through the said documents. It is not the requirement of law that facilities should be created for one of the parties at trial to bridge up the gaps and pitfalls of his case and the other side be left badly prejudiced and crest-fallen. Hence, none of the documents mentioned in paragraph 4 of the application of the complainant (respondent No. 4) can be allowed to be tendered in evidence by the prosecution. The impugned order passed by learned Additional Sessions Judge shall also be relevant only to the extent of tendering the cheques in question in evidence and it shall have no bearing at all so far as it relates to the other documents, noted hereinabove.

10. The learned Trial Court shall make sure that the defence does not suffer because of the tendering of cheques in evidence by the prosecution and every lawful procedure shall be adopted by it to avoid the question of prejudice. It is important to mention here that the accused-petitioner would have the right to cross-examine the witness, who shall submit the cheques in question in evidence. The right of cross-examination, to be availed by the petitioner-accused would help avoid the question of bias or prejudice by all means.

11. It is found with concern that the trial of the accused-petitioner is hanging fire since 2008 and it has not concluded so far for a variety of reasons. It is high time that the trial of the accused be concluded within shortest possible time, preferably within two months from the date of receipt of the instant order.

12. For the foregoing reasons, the instant petition is disposed of in terms that the impugned orders shall be relevant only to the extent of tendering the disputed cheques in evidence, with the observation that the said exercise shall be done by the learned Trial Court strictly in accord with Chapters XX and XXIV of the Code of Criminal Procedure and the relevant provisions of Qanun-e-Shahadat Order 1984.

Order accordingly.

2013 M L D 115

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD JAMIL alias JEELA---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.5697-B of 2012, decided on 12th June, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302/ 324/ 353/ 148/ 149/186---Qatl-e-amd, attempt to commit qatl-e-amd, assault or criminal force to deter public servant from discharge of his duty, rioting armed with deadly weapons, unlawful assembly, obstructing public servant in discharge of public functions---Bail, grant of---Further inquiry---Police had allegedly taken the deceased to his 'dera' for effecting the recovery of certain crime articles, where the accused and co-accused allegedly attacked the police party so as to rescue the deceased from their custody---Contentions of the accused were that no one had seen him firing at the police at the spot of the occurrence, and that a false narration had been devised by the police in the name of the deceased so as to camouflage their criminal act of his murder---Validity---Alleged occurrence took place at midnight, when everything was plunged in darkness, and it had not been alleged anywhere in the F.I.R. that the complainant or other members of the police party had witnessed the accused firing at the place of the occurrence---F.I.R. alleged that once the accused and co-accused started firing at the police party, the deceased shouted and asked the accused and co-accused to stop firing as he had been hit by bullets---None of the police officials could catch a glimpse of the accused or co-accused but deceased surprisingly noticed that he had been hit by their firing---Escape of the accused and co-accused in the presence of such a heavy contingent of police caused eyebrow raising---According to the necropsy report, the accused received nine firearm injuries, but the police officials did not receive even a single scratch during the occurrence, despite having flanked the deceased closely---No crime articles / weapon were recovered from the accused during his judicial lockup---Question as to whether the incident was a real police encounter or a fabricated story by the police to conceal some factuality was a crucial circumstance, which could be answered by the Trial Court---Sufficient reasons existed to believe that the case of the accused constituted need for further inquiry into his guilt as envisaged by S. 497(2), Cr.P.C---Bail application of the accused was accepted and he was admitted to bail.

Ch. Masood Ahmad Zafar for Petitioner.

Miss Muqadass Tahira, Additional Prosecutor General Punjab for the State with Iqbal Hussain S.-I. and Iftikhar S.-I.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R.

No.1177, dated 7-12-2008, under sections 302, 324, 353, 186, 148, 149, P.P.C., registered at Police Station Hanjarwal, District Lahore, on the complaint of inspector Muhammad Saeed.

2. Precisely the prosecution case as narrated by the complainant is that the police took accused Pervaiz alias Peji to his village for effecting the recovery of crime article(s), as he was an accused of case F.I.R. No.1158, dated 28-11-2008, under sections 302, 109, 148, 149 P.P.C., registered at Police Station Hanjarwal, Lahore; as soon as the police party entered a dera, they were ambushed by 08/09 persons who made reckless firing at the police party; Pervaiz alias Peji all at once shouted and asked Muhammad Jamil (petitioner) and Jedi to stop firing as he had been hit by the bullets; the police retaliated in defence; the shooters on the other side decamped under the sheath of darkness leaving behind a bulk of arms and ammunition which were taken into possession by the police.

3. Learned counsel for the petitioner submits that it is a case of no evidence against the petitioner as he had not been seen by anyone firing at the spot at the police party; a false narration has been devised by the police in the name of the ill fated deceased so as to camouflage their criminal act as it were they who committed his murder and no one else; Jedi accused is the real brother of the deceased whereas Muhammad Jamil happens to be his first cousin; the petitioner was taken into custody on 16-8-2010 and he has been languishing in jail ever since.

4. On the other hand, learned A.P.G. opposes with the contention that the petitioner joined by his co-accused attacked the police party so as to rescue Pervaiz alias Peji from the custody of the police and in this campaign they took his life; as many as seven eye-witnesses joined investigation and supported the story contained in the F.I.R. through their statements under section 161, Cr.P.C.; the petitioner, not only committed the murder of an innocent person but also attacked the men in uniform which speaks volumes about his criminal demeanour.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the sentence allegedly uttered by Pervaiz alias Peji (deceased) at the time of occurrence is of crucial nature. The attribution of words ( ) to the deceased, in the F.I.R. apparently establishes the fact that the police failed to identify the fire-makers, on the other side. The alleged occurrence took place at 12-10 a.m. on 7-12-2008 which is a mid-night hour, when everything is plunged in the intense darkness. It has not been alleged anywhere in the F.I.R. that the complainant or other members of the police party had witnessed the accused-petitioner firing at the place of occurrence. It is a mysterious circumstance that none of the police officials could catch a glimpse of the accused-petitioner or that of his co-accused but Pervaiz alias Peji (deceased), surprisingly noticed that he had been hit by the firing of Muhammad Jamil (petitioner) and his co-accused Jedi. Some arms and ammunition had been allegedly taken into possession by the police from the place of occurrence to establish that it had been left behind by the runaway accused. The escape of the snipers from the place of occurrence, in the presence of such a heavy contingent of police causes eyebrow raising. Equally surprising looks the version of the complainant, that firing by the accused only hit the deceased, who, as per the necropsy report, received nine firearm injuries. The police officials did not receive even a single scratch during the occurrence, despite having flanked the deceased closely. The petitioner was taken into custody on 16-8-2010 and sent to judicial

lockup on 24-8-2010 but without the recovery of any crime article/weapon at his instance. Learned A.P.-G. has pointed out that a judicial inquiry into the story of F.I.R. still continues which looks astonishing as the alleged occurrence took place as back as on 7-12-2008. Was it a real police encounter or a story fabricated by the police to conceal some factuality is a crucial circumstance, to be gone into at the proper stage by the learned trial court. Prima facie sufficient reasons exist to believe that petitioner's case constitutes need for further probe into his guilt as envisaged by section 497(2), Cr.P.C. Therefore, I accept this application and admit the petitioner to post arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/M-233/L Bail granted.

2013 M L D 181

[Lahore]

Before Shahid Hameed Dar, J

MUSHTAQ AHMAD and 3 others---Petitioners

Versus

NAZAR MUHAMMAD and another---Respondents

Criminal Miscellaneous No.5590-B of 2012, decided on 4th May, 2012.

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

---Ss. 498 & 497(2)---Penal Code (XLV of 1860), S. 364---Kidnapping or abducting in order to murder---Ad interim pre-arrest bail, confirmation of---Further inquiry---Son of the complainant went missing and an F.I.R., was lodged against the accused persons---Investigation officer found that none of the accused persons was involved in the occurrence and placed them in column No.2 of the challan---Complainant filed private complaint against the accused persons, whereafter the Trial Court summoned them to stand trial---Accused persons moved application for bail before arrest, but same was dismissed by the Trial Court---Validity---Complainant had reported the matter to the police after a lapse of four years without offering any plausible explanation---Police conducted an extensive investigation and reached the conclusion that the accused persons had no concern with the disappearance of the son of the complainant and placed all of them in Column No.2 of the challan---Even at the time of filing private complaint, the complainant did not adduce any evidence as to why he kept tight-lipped for such a long period of time---Case against the accused persons was one of further inquiry falling within the purview of S.497(2), Cr.P.C---Bail application of accused persons was accepted and ad interim pre-arrest bail granted to them was confirmed, in circumstances.

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

----S. 498---Bail before arrest---Grounds---Scope---Bail before arrest was an extraordinary relief, the scope whereof was narrow and which could only be extended to a person who was

either innocent or who had not committed a non-bailable offence.

Muhammad Hanif Khan for Petitioners.

Rana Kashif Saleem Arfaa, Law Officer with Farrukh A.S.-I. for the State.

Muhammad Razzaq Mahar for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---Mushtaq Ahmad, Muhammad Hassan, Muhammad Hussain son of Mushtaq Ahmad and Muhammad Hussain son of Inayat Ullah (petitioners) seek bail before arrest in a private complaint-case, filed, by Nazar Muhammad (complainant) for an offence under section 364, P.P.C., being aggrieved of the investigation conducted by the police in respect of case F.I.R. No. 282, dated 20-5-2011, under section 363, P.P.C., registered at Police Station Basirpur (Okara); all the petitioners were found not involved in the occurrence by the I.O. and vide case diary dated 28-6-2011, they were placed in Column No. 2 of the challan. The complainant filed the aforesaid private complaint on 27-9-2011 wherein, after necessary proceedings under sections 200, 202 Cr.P.C., the learned trial court summoned the petitioners to stand trial. The petitioners moved an application for bail before arrest which was dismissed by learned trial court vide order dated 20-4-2012, hence the instant petition.

2. After hearing learned counsel for the parties and perusing the record, it is observed that the complainant had reported the crime to the police after lapse of more than four years and did not offer any plausible explanation as to the period of taciturnity observed by him, since his son went missing. The police after extensive investigation reached the conclusion that the accused-petitioners had no concern with the disappearance of the son of the complainant and placed all of them, being innocent, in Column No.2 of the challan. Even in his private complaint, the complainant did not adduce any evidence as to why he kept tight-lipped for such a long period of time as mentioned above. The exoneration of the petitioners during investigation, placement of their names in Column No.2 of the challan and reporting of the crime to the police after four years are the circumstances which render the case of the petitioners one of further inquiry falling within the purview of section 497(2), Cr.P.C. There is no cavil to the proposition that bail before arrest is an extra ordinary relief, the scope whereof is narrow and which can only be extended to a person who is either innocent or who has not committed a non-bailable offence. Nevertheless, the petitioners do fall in the above-said category. Therefore, I accept this application and confirm the ad interim pre-arrest bail granted to the petitioners vide order dated 26-4-2012 subject to 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.

MWA/M-179/L Bail confirmed.

2013 M L D 869

[Lahore]

Before Shahid Hameed Dar, J

Syed AZHAR ABBAS and another---Petitioners

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.15737-B of 2012, decided on 26th December, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 302/148/149---Qatl-e-amd, rioting armed with deadly weapons, unlawful assembly---Bail, refusal of---Medical evidence corroborating allegations in the F.I.R.---Long abscondence---Effect---Accused persons allegedly fired at and killed the deceased persons---Legal heir of one of the deceased allegedly submitted affidavit in favour of accused persons before the investigating officer, who on basis of such affidavit opined that accused persons were innocent---Post mortem report of deceased persons revealed that they received dozens of firearm injuries at the hands of accused---Accused persons absconded after the occurrence and remained proclaimed offenders for six years, for which they offered no explanation---Factum of unexplained abscondence would extinguish some of the normal rights of accused persons guaranteed under substantive as well as procedural law---F.I.R. had been lodged against accused persons for submitting a forged affidavit on behalf of a legal heir of one of the deceased---Even if said affidavit was considered to be genuine, benefit of the same could not be extended to accused persons as legal heir, who had allegedly submitted the same, had not witnessed the incident at the spot---Opinion of Investigation Officer was nothing but an expression full of arbitrariness, capriciousness and perversity---Offence allegedly committed by accused persons entailed capital punishment and fell within the prohibitory clause of S. 497(1), Cr.P.C.---Bail application of accused persons was dismissed in circumstances.

Muhammad Inayatullah Cheema for Petitioners.

Ms. Muqaddas Tahira, Addl: Prosecutor General Punjab along with Nawaz S.I. with record.

Khawaja Mehmood Ahmad for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---Syed Azhar Abbas and Syed Zahid Abbas (petitioners) seek bail after arrest in case F.I.R. No.571 of 2006 dated 9-7-2006 registered for offences under sections 302, 148, 149, P.P.C. at Police Station Civil Lines, Gujrat.

2. Precisely, the prosecution case as narrated by Basheer Hussain Shah (complainant) is that his brother Ghulam Hussain Shah and paternal grandson Umair Abbas while aboard a car, moved towards their house at about 6-30 p.m. on 9-7-2006; their car was intercepted and

overtaken by another car, ridden by Azhar Shah (petitioner) armed with kalashnikov, Zahid Abbas Shah alias Poley Shah (petitioner) armed with .223 bore rifle and their armed co-accused, who alighted their car and opened indiscriminate firing at the riders of the other vehicle, killing Ghulam Hussian Shah and Umair Abbas at the spot; the motive behind the occurrence pertained to previous litigation of murders between the parties.

3. Learned counsel for the petitioners submits that the petitioners have been falsely involved in this case in the backdrop of previous enmity between the parties and accusations against them are baseless; no specific role has been assigned to the petitioners and they have been burdened with the act of general firing; the story contained in the F.I.R. was found false during the course of investigation and both the petitioners were repeatedly held innocent by different investigating officers; the complainant of this case has been absconding in another murder case for years, hence, there is no probability of early conclusion of the trial of the accused; the petitioners underwent physical remand for maximum period permissible under the law but nothing was recovered at their instance; the placement of the names of the petitioners in Column No.2 of the challan brings their case within the ambit of section 497(2), Cr.P.C.

4. On the other hand, learned counsel for the complainant submits that the petitioners joined by their co-accused committed a heinous offence during the course of which they committed cold-blooded murder of Ghulam Hussan and Umair Abbas; the investigating officer collected 39 crime empties from the place of occurrence during spot inspection; the petitioners remained absconders for six long years and investigating officer was constrained to file a report against them under section 512 Cr.P.C.; the petitioners, fabricated forged affidavits of the legal heirs of Ghulam Hussain deceased, presented them before the investigating officer, who was in-league with them and fetched an opinion of innocence from him on the basis of such forged documents; one of the legal heirs of the said deceased filed a complaint against the accused/petitioners etc. and got lodged case F.I.R. No.776 of 2010 dated 28-10-2010 against them for offences under sections 420, 468, 471, P.P.C. at Police Station Civil Lines, Gujrat; lastly submits that the petitioners are hired assassins and desperate characters who have little respect for human lives.

5. Learned Addl: Prosecutor-General Punjab relies upon the submissions of learned counsel for the complainant with the addition that the investigation conducted in this case is highly defective as it is based on forged affidavits of the legal heirs of Ghulam Hussain deceased who did not own the contents thereof.

6. After hearing learned counsel for the parties and perusing the record, it is observed that, according to the allegations, the petitioners armed with lethal weapons, joined by their armed co-accused fired recklessly and incessantly at a car, ridden by Ghulam Hussain Shah and Umair Abbas, killing both of them at the spot. The post mortem examination reports of both the deceased reveal that they received dozens of firearm injuries at the hands of the accused. The petitioners absconded after the occurrence and they remained P.Os. for six long years, for which they have no explanation to offer. The factum of unexplained abscondence would certainly extinguish some of their normal rights guaranteed under the substantive law as well as the procedural law. The bullet-ridden bodies of the deceased speak voluminously about the savagery committed by the accused.

7. So far as the opinion of the investigating officer, as pressed into service by the learned counsel, is concerned, it is mainly based on the affidavits of legal heirs of Ghulam Hussain (deceased), one out of whom, namely Mst. Sajida Bibi, a daughter of the deceased moved an application against the petitioners and their co-accused contending therein that the affidavits having been written in their names were forged and fabricated by the accused to spoil the prosecution case, which led to registration of case F.I.R. No.776 of 2010 dated 28-10-2010 under sections 420, 468, 471, P.P.C. against them and others, at Police Station Civil Lines, Gujrat. The affidavit of Mst. Sajida Bibi to the said effect was prepared in year 2010, when the accused-petitioners still absconded. Mst. Sajida Bibi is not a cited eye-witness of the F.I.R. case, hence, keeping the controversy of genuineness or otherwise of her affidavit aside, no benefit could be extended to the accused by the I.O. in terms that they (accused/petitioners) had not been witnessed by her at the spot, at the crucial hour or that they were deemed innocent by her. According to leaned counsel for the complainant the trial of case F.I.R. No.776 of 2010 (supra) is still in progress before the learned trial court. Learned Addl: Prosecutor-General Punjab argued that the opinion formulated by the investigating officer in favour of the petitioners, is not based on any cogent or plausible material. It is evident from the police record that said assertion of the learned Law Officer is not without substance and noted opinion of the investigating officer is nothing but an expression, full of arbitrariness, capriciousness and perversity. The offence allegedly committed by the petitioners entails capital punishment and thus falls within the scope of prohibitory clause of section 497(1), Cr.P.C. There exists no viable reason to believe that the petitioners have not committed the offence alleged.

8. Therefore, I am not inclined to accept this application, which is dismissed accordingly.

MWA/A-3/L Bail refused.

2013 M L D 874

[Lahore]

Before Shahid Hameed Dar, J

Mst. RUBINA QURESHI---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.1681/B of 2012, decided on 31st October, 2012.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Ad interim pre-arrest bail, confirmation of---Cheque issued as a guarantee instrument---Dispute of civil nature---Allegation against the accused-lady was that she issued a cheque to the complainant in the backdrop of an agreement to sell, which was dishonoured on presentation due to insufficient funds---Agreement was executed between the parties, wherein it had been

mentioned that accused issued the cheque in question as a guarantee instrument to the complainant---Fact that cheque was a guarantee instrument had been impliedly admitted by the complainant in another agreement executed between the parties---Before complainant reported present matter to the police, accused had already filed civil suits qua matter in issue against the complainant, which were pending adjudication---Controversy between the parties was of civil nature and could only be resolved by the civil court, where suits filed by accused were already pending---Question as to whether cheque in question was a guarantee instrument or not and what repercussions would it have on the merits of the trial of the accused, was a significant factor which could only be gone into by the Trial Court after recording evidence at trial---Accused was a lady, therefore, she was covered under S. 497(1), Cr.P.C. and her involvement in the present case due to calculated or ulterior motive of complainant could not be ruled out---Ad interim pre-arrest bail of accused was confirmed in circumstances.

Arif Majeed for Petitioner.

Muhammad Usman, Deputy Prosecutor General Punjab.

Abdul Wahid Babar for the Complainant.

Aftab S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Mst. Rubina Qureshi (petitioner) seeks bail before arrest in case F.I.R. No.588 of 2012 dated 25-9-2012 registered for an offence under section 489-F, P.P.C. at Police Station Saddar Berooni, Rawalpindi.

2. The allegation against the petitioner is that she issued a cheque of Rs.10,50,000 to the complainant Fazal Akbar, in the backdrop of an agreement to sell, which was presented for encashment by the latter but it was bounced by the bank due to insufficient funds.

3. Learned counsel for the petitioner submits that petitioner has been falsely involved in this case due to malice and ulterior motive of the complainant; the petitioner was made to issue the cheque in question as a guarantee instrument which fact is admitted by the complainant in agreement to sell, executed on 15-11-2010 as well as in another agreement of the same nature, dated 7-3-2011; lastly submits that petitioner has not committed any offence and she may be saved from the undue harassment likely to be caused to her under the garb of a false case got lodged by the complainant against her.

4. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant opposes the contention that issuance of the cheque and her signature thereon is admitted by the petitioner; the cheque in question was never intended to be issued as a guarantee instrument by the petitioner and she issued it for the sole purpose of repaying the amount received by her from the complainant in relation to an agreement to sell, whereby, she struck a deal with the complainant for sale of landed property measuring 4 kanals; the petitioner on one hand, has received an amount of Rs.4.2 million from the complainant for attestation of the requisite sale deed and on the other hand dishonestly issued a bogus cheque so as to usurp the said amount in violation to the terms agreed upon;

lastly submits that petitioner has committed a non-bailable offence, hence, she may not be granted the extraordinary relief of bail before arrest.

5. After hearing learned counsel for the parties and perusing the record, it is observed that two agreements to sell were executed between the parties on 13-7-2010. In one of the agreement deeds, Mst. Rubina Qureshi (petitioner) is the vendor of land measuring 4 kanal, khasra No.344 situated in village Kalyas, district Rawalpindi, the complainant being the vendee and in the other agreement deed, the latter, despite not being the proprietor of the said land poses himself as such and shows to have sold it to her (petitioner) for an enhanced amount of Rs.56,00,000. There is yet another agreement between the parties which was executed on 15-11-2010 wherein it has been mentioned that Mst. Rubina Qureshi (petitioner) issued the cheque in question as a guarantee instrument to the complainant, who is the second party of the said agreement. The fact that the cheque in question is a guarantee instrument has been impliedly admitted by the complainant in yet another agreement-deed executed between the parties on 7-3-2011. Before the-complainant could report it to the police, the petitioner had already filed four independent civil suits qua the matter-in-issue against the complainant and others before the Senior Civil Judge at Rawalpindi, which, according to the learned counsel for the petitioner, are still pending adjudication. A simple and plain transaction regarding sale of the said property has been rendered complicated not only by the complainant but by both the parties. It is incomprehendible that the complainant was merely an intending vendee on 13-7-2010 qua the said land and without attaining the title thereof he appeared to have sold it, back to back, to the petitioner for an enhanced amount, as regards the consideration amount of Rs.4.2 million, as mentioned in the first agreement to sell. The controversy between the parties, which is of civil nature, can only be resolved by a competent civil court where the above noted suits are still pending. Whether or not the cheque in question is a guarantee instrument or what repercussions would it have on the merits of the trial of the accused/petitioner, is a significant factor which can only be gone into by the learned trial court after recording evidence of the parties at trial. The complicity of the prosecution version renders it a case, fit enough for grant of bail before arrest to the petitioner, who being a lady has the coverage of section 497(1), Cr.P.C. to her credit. Her involvement in this case due to some calculated or ulterior motive of the complainant cannot be ruled out.

6. Therefore, the instant application is accepted and the ad interim pre-arrest bail granted to the petitioner on 23-10-2012 is confirmed subject to furnishing fresh bail bonds 'in the sum of Rs.2,00,000 with one surety in the like amount to the satisfaction of learned trial court.

MWA/R-40/L Bail confirmed.

2013 M L D 1029

[Lahore]

Before Shahid Hameed Dar, J

MUSHTAQ AHMAD---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.16153-B of 2012, decided on 30th November, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 324/148/149---Attempt to commit qatl-e-amd, rioting armed with deadly weapons, unlawful assembly---Bail, refusal of---Accused allegedly fired at the complainant party as a result of which a fire-shot hit the injured victim on his calf---Prior to present F.I.R. another case was lodged against the accused, wherein complainant was a witness---Another F.I.R. was registered against accused for firing at the house of the complainant---Apparently accused and his companions were after the complainant, who was a witness against them in another case, and intended to hunt him down at any cost so as to stop him from deposing against them---Although accused did not repeat fire-shot and did not aim at vital part of victim's body, but he could not be given any premium for poor-marksmanship---Trial had commenced and prosecution witnesses were appearing before Trial Court regularly---Substantial progress in the trial was hampered by the defence side---Bail application of accused was dismissed in circumstances.

Ch. Shahid Ehsan Warriach for Petitioner.

Muhammad Nawaz Shahid, DDPP for the State.

Shahid Nawaz Warriach for the Complainant.

Fayyaz A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Mushtaq Ahmad (petitioner) seeks bail after arrest in case F.I.R. No.109 of 2012 dated 10-2-2012 registered for offences under sections 149, 324, 148, P.P.C. at Police Station Civil Line (Gujrat).

2. Precisely, the allegation against the petitioner is that he being armed with rifle .99 MM, in the company of his armed co-accused launched an attack during the course of which, petitioner fired a shot which landed at the left calf of Muhammad Zahid. The motive relates to previous litigation between the parties.

3. The MLR of Muhammad Nawaz injured reveals one firearm injury on the 'left middle leg, medial side' which was declared as Ghayr-jaifah mutulahimah (337-F(iii), P.P.C.),

punishable with three years imprisonment.

4. Learned counsel for the petitioner submits that the petitioner did not cause any injury on the vital part of the body of the injured and in such a situation, application of section 324, P.P.C. is open to a serious question; the petitioner was taken into custody on 30-3-2012 and he has been languishing in jail ever-since.

5. On the other hand, learned DDPP assisted by learned counsel for the complainant opposes by contending that the instant case is in fact an extension of previous two cases lodged at the instance of Muhammad Aslam (complainant) which included case F.I.R. No.315 of 2011 dated 10-12-2011 under sections 324, 109, 148, 149, P.P.C. and case F.I.R. No.206 of 2012 dated 5-8-2012 for offences under sections 337-H(ii), 148, 149, P.P.C. both registered at Police Station Lorry Adda Gujrat wherein the petitioner is a nominated accused; the trial has commenced and petitioner hampered it through various tactics. Lastly submits that the offence committed by the petitioner catches the prohibition of section 497(1), Cr.P.C.

3(sic) After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner though, did not repeat the fire-shot at the time of occurrence nor he aimed at any vital part of the body of Muhammad Zahid injured yet, it cannot be easily overlooked that the petitioner is a nominated accused of previously lodged case F.I.R. No.315 of 2011 (supra) got registered by one Mirza Tahir Hussain wherein Muhammad Aslam (complainant) is a witness against him for the charge of abetment. Besides, the petitioner is also involved in case-F.I.R. No.206 of 2012 (supra) with the allegation that he along with his co-accused indiscriminately fired at the house of Muhammad Aslam (complainant), in the back-drop of case F.I.R., 315 of 2011 (ante). The instant F.I.R. case wherein, the petitioner seeks post arrest bail is infact, sandwiched between above noted two cases, as F.I.R. No.315 of 2011 was recorded on 10-12-2011 and F.I.R. No. 206/12 was recorded on 5-8-2012 as regards the date of registration of case F.I.R. No.109 of 2012 (supra) which falls on 10-2-2012. It appears that the petitioner and his co-accused are after Muhammad Aslam complainant, who is a witness against them, and they intend to hunt him at any cost so as to stop him from deposing against them. The petitioner cannot ask for a premium for his poor-marksmanship for having fired only once at a 'non vital part' of the body of the injured. It has been brought to the knowledge of this Court that the trial has commenced and prosecution witnesses have been regularly appearing before the trial court but for cooperation of the defence, the trial of the accused/petitioner has not shown substantial progress. Learned trial court could only record examined-in-chief of Muhammad Aslam (complainant) as P.W.1 and Zahid Ali (injured) as P.W.2 on 27-11-2012, as the learned defence counsel was not available. The hamper the proceedings of the trial is not a likeable idea. The attending circumstances of the case do not permit me to hold that the petitioner's case constitutes need for further inquiry into his guilt, as required by section 497(2), Cr.P.C.

For the reasons, recorded hereinabove, I am not inclined to accept this application which is dismissed accordingly.

MWA/M-5/L Bail refused.

2013 M L D 1303

[Lahore]

Before Shahid Hameed Dar, J

SHABBIR HUSSAIN---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.14461/B of 2012, decided on 7th November, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 462-C & 462-F---Tampering with auxiliary or distribution pipelines of gas---Bail, grant of---Further inquiry---Incompetently investigated case---Effect---Network of illegal gas connections---Allegation against accused was that he along with the co-accused persons intercepted main distribution gas pipeline and committed theft of gas not only for his own consumption but also delivered its connections to more than two hundred consumers/houses---Certain circumstances had either been distorted or withheld by the complainant while reporting the crime to the police---Whereabouts of the co-accused persons had not been located by the police---Co-accused persons were not residents of the area where the accused resided---Although a mass network of illegal gas connections was allegedly unearthed by the complainant but he took no pains to mention the names of illegal consumers of the connections, which showed non-seriousness and dishonesty on his part---Gas meter installed outside the house of the accused had not been taken into possession by the investigating officer---Investigating officer did not collect any material from the Gas company to verify the claim of the accused regarding issuance of a demand notice to him and deposit of gas connection fee by him---Record was also silent as to how much loss had been sustained by the Gas company because of the alleged crime---Present case was a classic case of incompetent, dishonest and unscrupulous investigation confuted by the investigating officer---Report under S. 173, Cr.P.C had already been deposited in court and accused was no more required for further investigation---Case called for further probe into guilt of accused, who was admitted to bail accordingly.

M. Irshad Chaudhry for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor General Punjab and Mansha, DSP for Respondent.

ORDER

SHAHID HAMEED DAR, J.---Shabbir Hussain (petitioner) seeks bail after arrest in case F.I.R. No. 22/12 dated 8-1-2012 registered for offences under sections 462-C, 462-F, P.P.C. at Police Station Manawan, Lahore.

2. Precisely, the allegation against the petitioner is that he along with others intercepted main distribution gas pipeline and committed theft of gas not only for his own consumption but also delivered its connections to more than two hundred consumers/houses.

3. Learned counsel for the petitioner submits that petitioner applied for a connection of gas-supply on 17-7-2008 and received a demand notice from Sui Northern Gas Pipeline Limited, on the basis of which he deposited an amount of Rs.3000 on 21st July, 2008; the gas-meter was installed by a fitter of the department and this is how, the petitioner started receiving the supply of gas in his house; none of the persons/accused mentioned in the F.I.R. is resident of the locality where the petitioner lives and their names have been mentioned in the F.I.R. just for nothing.

4. On the other hand, learned Deputy Prosecutor General Punjab opposes with the contention that the offence committed by the petitioner is serious which falls within the prohibitory clause of section 497(1), Cr.P.C., hence, he may not be granted the relief prayed for.

5. After hearing learned counsel for the parties and perusing the record, it is observed that there are certain circumstances which have either been distorted or withheld by the complainant while reporting the crime to the police. Learned Deputy Prosecutor General Punjab after going through the record submits that the police has not succeeded in locating the whereabouts of any of the co-accused of the petitioner. In fact the statement of one Ejaz Ahmad has been recorded by the I.O. on 6-11-2012 which divulges that the persons named as co-accused of the petitioner were not the residents of the area, where the petitioner resided. It looks strange that a mass network of illegal gas-connections was allegedly unearthed by the complainant but he took no pains to mention the names of illegal consumers of the gas correctly. It shows non-seriousness and dishonesty on his part. An impression arises from case diary No.9 as if a gas-meter stood installed outside the residential house of the petitioner yet, it has not been taken into possession by the I.O., probably for the reason that it was neither shown to him by the complainant nor handed over to him for the purpose of recovery. The investigating officer did not collect any material from the Sui Northern Gas Pipeline Limited to verify the claim of the petitioner regarding issuance of a demand notice and deposit of gas-connection fee Rs.3000 by the petitioner subsequent thereto. The record is also silent as to how much loss had been sustained by the said department because of the crime, allegedly committed by the petitioner and his co-accused. Maqsood Khan, a fitter joined investigation on 8-1-2012 whereby he fully corroborated the story of F.I.R. except for mentioning the name of the petitioner as an accused. This omission in his statement leads the prosecution case to nowhere. Similar is the situation in respect of another statement under section 161, Cr.P.C, rendered by Ch.Sharafat Ali D.O-V a Sui Gas Northern Pipeline Limited, Gulberg, Lahore. This a classic case of incompetent, dishonest and unscrupulous investigation which, as per record has been conducted by Muhammad Akbar S.-I. (investigation) Police Station Manawan. The petitioner is no more required for the purpose of further investigation as report under section 173, Cr.P.C. stands deposited with the trial court on 1-8-2012. Sufficient reasons exist to believe that the petitioner's case calls for further probe into his guilt as envisaged by section 497(2), Cr.P.C.

6. Therefore, the instant application is accepted and petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of learned trial court.

7. Before parting with this order, it is directed that the learned Law Officer shall

establish contact with the SP (Investigation) Cantt, Lahore, apprise him of the anxiety and annoyance of this Court and require him to hold an inquiry into the conduct of the above named investigating officer which shall be completed by him within one month from today under intimation to this Court, through the learned Law Officer, as to the action taken by him against the delinquent Investigating Officer.

MWA/S-23/L Bail granted.

2013 M L D 1463

[Lahore]

Before Shahid Hameed Dar, J

JAVED IQBAL---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.1595-B of 2013, decided on 28th February, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 365-B, 376, 420, 468, 471 & 109-Kidnapping, abducting or inducing woman to compel for marriage etc. , rape, cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document, abetment---Bail, refusal of---Factum of marriage (Nikkah) not proved---Nikahnama found as forged---Probability of abscondment of accused---Effect---Accused and co-accused persons allegedly kidnapped the abductee and thereafter committed rape with her---Plea of accused that abductee being sui juris solemnized nikah with him---Validity---Alleged marriage between accused and abductee stood undone through a judgment and decree passed in a suit for jactitation of marriage filed by the abductee---Nikahnama could not be verified during course of investigation because of which offences under Ss. 420, 468 & 471, P.P.C. were also added---Abductee categorically alleged in her statements under Ss. 161 & 164, Cr.P.C. that the accused and co-accused ravished her repeatedly---Conduct of accused was not praiseworthy at all as after dismissal of his pre-arrest bail applications from High Court and the Supreme Court, he did not surrender before the police and continuously kept absconding till he was arrested as a fugitive from the law---Abscondment of accused spanned over years, thus probability could not be ruled out that he might abscond again, if released on bail---Offence alleged fell within the prohibitory clause of S. 497(1), Cr.P.C.---Bail application of accused was dismissed accordingly.

Fawad Malik for Petitioner.

Mrs. Muqadass Tahira, Additional Prosecutor General Punjab for the State with Zafar Iqbal S.I.

Rai Munir Zafar Sangra for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.1, dated 1-1-2010, under sections 365-B, 376, 420, 468, 471, 109 P.P.C., registered at Police Station Bahawana, District Chiniot.

2. Precisely the story of F.I.R. as narrated by Mian Hussain Bakhsh (complainant) is that his paternal grand-daughter Mst.Amina Bibi aged 14/15, a student of 10th class in Farhan Model High School was forcibly abducted by Javed Iqbal (petitioner), Abdul Ghaffar, Ahmad Yar, Taleh Bibi and two unknown accused, all armed with different weaponry, on 31-12-2009, when she was on way to her house while riding a rickshaw; the accused by throwing her in their car drove away to some unknown destination; the occurrence occurred in presence of Irshad Hussain, the father of the abductee Mst.Amina Bibi and one Abdul Ghafoor.

3. Learned counsel for the petitioner submits that the petitioner did not abduct Mst.Amina Bibi rather she being sui juris solemnized nikah with him on 5-4-2009, which factum she admitted repeatedly as true before different courts of law; at one stage she entered appearance before learned Sessions Judge, Chiniot on 19-1-2010 and categorically stated to have married Javed Iqbal (petitioner) but she opted to accompany her parents; the judgment and decree obtained by the prosecutrix regarding jactitation of marriage has been challenged by the petitioner through an appeal which is still pending adjudication wherein the alleged abductee has shown little interest in making appearance; she shifted from one stance to another frequently when she went into the hands of her parents and nominated certain other persons as accused whose names did not figure in the F.I.R.; a witness of F.I.R., Irshad Hussain filed a private complaint on 10-4-2012 qua the same occurrence, whereby he implicated a number of persons, even those who were not in picture till then as accused; the co-accused of the petitioner, Ahmad Nawaz etc. have been granted bail by this court vide order dated 27-6-2011 and certain observations contained in the said order are equally helpful to the petitioner; lastly submits that the petitioner's case calls for further probe into his guilt, within the meaning of section 497(2), Cr.P.C.; relies upon "Qamar alias Mitho v. The State and another" (PLD 2012 SC 222) and "Muhammad Sadiq v. Sadiq and others" (PLD 1985 SC 182), by contending that the petitioner's case is one of further inquiry, therefore, factum of abscondance hardly impedes his prayer for bail.

4. On the other hand, learned Additional Prosecutor General Punjab assisted by learned counsel for the complainant opposes with the contention that the petitioner has committed a heinous offence and he, not only on merits but also through his offensive conduct, does not merit release on bail as he hoodwinked the process of law and courts repeatedly; the pre-arrest bail application of the petitioner was dismissed by this court on 28-6-2012 whereafter he approached the Hon'ble Supreme Court of Pakistan for the same purpose but his repeated attempt also ended in smoke as he absented himself from the apex court besides failing to furnish the bail bonds; the victim challenged the validity of nikah through a suit for jactitation of marriage which was decreed in her favour on 24-2-2012 and it was a contested case by both the sides; the factum of nikah has not been verified by the I.O. and all those who were linked with the fabrication of nikahnama have been held guilt and placed in column 3 of the challan by the I.O. therefore, he may not be granted the relief prayed for.

5. After hearing learned counsel for the parties and perusing the record, it is observed

that the conduct of the petitioner is not praiseworthy at all as he, after dismissal of his pre-arrest bail application on 28-6-2012 by this court and dismissal of another petition of alike nature on 24-7-2012 by the Hon'ble Supreme Court of Pakistan, did not surrender before the police and continuously kept absconding till he was arrested as a fugitive from law, on 19-11-2012. The acclaimed marriage between accused-petitioner and the prosecutrix stands undone through judgment and decree dated 24-2-2012 passed in the suit for jactitation of marriage, filed by the latter against Javed Iqbal accused, by a competent court of jurisdiction. The nikahnama could not be verified by the I.O. during the course of investigation, who on finding it a forged document, added offences under sections 420, 468, 471, P.P.C. and implicated all those who were linked with fabrication thereof. The petitioner was not only declared an absconder during the course of investigation but he was also held as such by the learned trial Court. The stubbornness shown by the accused-petitioner, especially after dismissal of his applications for bail before arrest by this court as well as by the Hon'ble Supreme Court of Pakistan is a hard-core fact which cannot be easily lost sight off as, police struggled for months thereafter, to catch him on 19-11-2012. The prosecutrix categorically alleged in her statements under sections 161 and 164, Cr.P.C., that the accused-petitioner and his cronies ravished her repeatedly. Whatever she said and whatever she did, while being in clutches of the accused can only be appreciated by the trial Court after recording evidence of the parties at trial. The petitioner has been sent to jail a few months back and his period of abscondance spans over years. The probability cannot be ruled out that he may abscond again, if released on bail. The offence, alleged against the petitioner is covered by prohibitory clause of section 497(1), Cr.P.C. Therefore, I am not inclined to accept this application, which is dismissed accordingly.

MWA/J-6/L Bail refused.

2013 P Cr. L J 252

[Lahore]

Before Shahid Hameed Dar, J

Sheikh MUHAMMAD SADIQ---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.818-B of 2012, decided on 2nd July, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 497 & 155(2)---Penal Code (XLV of 1860), Ss. 420/468/471---Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document---Bail, refusal of---Accused charged with a combination of cognizable and non-cognizable offences---Permission to be obtained by the police from the Magistrate in circumstances---Civil and criminal litigation proceeding simultaneously---Scope---Right to bail for offences falling within prohibitory clause of S.497(1), Cr.P.C.---Scope---Accused owed

a sum of money to the complainant in settlement of which he executed a sale deed qua a house in favour of the complainant promising to deliver the possession later on--- Subsequently the accused allegedly attested a sale deed of the same house in favour of one of the co-accused, who in turn transferred the house in the name of his wife--- Contentions of the accused were that date and time of alleged occurrence was unknown as was evident from the F.I.R.; that the property in question was the subject of pending civil litigation between the parties; that Ss.468 and 471, P.P.C. were bailable whereas section 468 was non-cognizable; that the co-accused, who was the principal accused of the case had already been granted bail, and that offences alleged did not fall within the prohibitory clause of S.497, Cr.P.C.---Validity--- Circumstances of the case revealed that the accused kept both the complainant and the co-accused engaged simultaneously so as to leave each of them labouring under the impression that their part of the deal was legally perfect and their claim complete---Act of the accused was sheer fraud and forgery by which he swindled a huge amount from the complainant and probably also from the co-accused and his wife---Where there was blend of non-cognizable and cognizable offences, the police did not necessarily have to obtain permission from the Magistrate for conducting investigation---Prosecution, therefore, could not be blamed in the present case, if they had not gone for the invocation of S.155(2), Cr.P.C.---Accused had categorically admitted his liability to pay an amount to the complainant in the agreement that he had prepared, which directly corroborated the claim of the complainant as mentioned in the F.I.R.---Pendency of civil suits between the parties was no ground to hold that the criminal proceedings against the accused by way of present F.I.R. could not be taken to their legitimate end---Civil and criminal proceedings could proceed side by side inter se---Rule that accused had a right to bail where offences did not fall within the prohibitory clause of S.497(1), Cr.P.C., was not an inelastic rule---Bail application of the accused was dismissed in circumstances.

Raja Pervaiz Akhtar v. State 2000 YLR 539; Tariq Bashir and 5 others v. The State PLD 1995 SC 34 and Ubedullah v. The State 2003 PCr.LJ 1921 ref.

Sardar Shaukat Hayat Khan for Petitioner.

Rana Kashif Saleem Arfaa, Law Officer with Akram S.-I. for the State.

Mazhar Iqbal Chaudhary for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.347, dated 6-5-2012, under sections 420, 468, 471, P.P.C., registered at Police Station New Town (Rawalpindi), on the complaint of Farhan Ahmad.

2. Precisely the prosecution case as narrated by Farhan Ahmad (complainant) is that he ran a jewelry shop in Sarrafa Bazaar Rawalpindi where Abid Mehmood and Sadiq Mehmood (petitioner) also dealt in the jewelry; they developed business ties with him and frequently purchased gold from him on credit; a stage came, when they owed a sum of Rs.1,25,00,000 to him as price of the gold, purchased by them; to indemnify him, both the accused handed down to him four signed pro notes on 6-8-2010 and they also handed over to him an original

sale deed, pertaining to House No.CA-142, area measuring 7 marlas as a mortgage-agreement and undertook that they would alienate the said house to him if they could not repay the above said amount; the accused executed a sale-deed qua the said house in his favour and promised to deliver to him the possession thereof later on; one month thereafter he learnt that the said house had been transferred to his wife, by accused Zahid Islam, being general attorney holder of the accused, whereon he went to them, and asked for retrieval of the possession of the said house; he again approached the accused at village Pandoda and reminded them of their promise to hand over to him the possession of the said house but they told him that the house in question had been alienated through a sale-deed dated 2-9-2010 to Mst. Samina Kausar and Zahid Islam; he reacted by saying that the power of attorney in favour of Zahid Islam had been cancelled by them on 6-10-2010 in reply to which they turned rash and asked him to do whatever he liked; he went to kutchery Rawalpindi where he got the knowledge that the accused having connived with Zahid Islam and his wife Mst. Samina Kausar had got lodged Rapat No.27, dated 26-8-2010 qua the loss of original sale-deed of the said house and got prepared a power of attorney in favour of Zahid Islam on 27-8-2010 who, by using it to his benefit, transferred the said property to his wife on 2-9-2010 and subsequent to it, accused Abid Mehmood and Sadiq Mehmood (petitioner) deceitfully and fraudulently got attested a sale-deed in his (Zahid Islam) favour qua the said house on 8-10-2010.

3. Learned counsel for the petitioner submits that date and time of the alleged occurrence is known as is evident from the tenor of the F.I.R.; civil litigation is pending between the parties since 2009 and the document/property in question is the subject-matter of the said suits; sections 420, 471, P.P.C. are bailable whereas section 468 is non-cognizable; the complainant learnt about the alleged occurrence within one month of the dispute but he took years to report the crime to the police which smacks dishonesty and mischief on his part; Zahid Islam, as per the contents of the F.I.R., is the principal accused of this case who has been granted bail before arrest by the learned Additional Sessions Judge, Rawalpindi vide, order dated 22-5-2012 and in such an eventuality the case of the petitioner might have been resolved in similar terms, by the said court on the principle of consistency; the offences, the petitioner is charged with, do not fall under the prohibition of section 497(1), Cr.P.C.; the petitioner's case outrightly constitutes need for further inquiry into his guilt, hence he may be granted the relief prayed for. Relies upon "Raja Pervaiz Akhtar v. State" (2000 YLR 539), "Tariq Bashir and 5 others v. The State" (PLD 1995 SC 34) and "Ubedullah v. The State" (2003 PCr.LJ 1921 Karachi).

4. On the other hand, learned law officer assisted by learned counsel for the complainant opposes with the contention that the petitioner joined by his co-accused got prepared an agreement deed dated 6-8-2010 whereby they admitted their liability in similar terms, as mentioned in the F.I.R.; the pendency of a civil suit is no bar in initiation of proceedings under the criminal law as both the remedies can be availed in parallel to each other; the petitioner has deprived the complainant of a sizeable amount of Rs.1,25,00,000 and also committed fraud upon him by letting the house in question transferred/alienated in the name of wife of accused Zahid Islam, hence he may not be released on bail.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner joined by his real brother and co-accused appears to have committed the crime with uncanny cleverness and sharpness of mind. The circumstances reveal that he kept

both, the complainant and Zahid Islam engaged simultaneously so as to leave each one of them labouring under an impression that his part of the deal was legally perfect and his claim stood indemnified in complete terms. The story of F.I.R. may hint at the mental agility and briskness of the mind of the accused but, the events in question, which are in the documented form, plainly establish that the accused with intent to kill two birds with one stone, had done nothing but an act of sheer fraud and forgery by which they swindled a huge amount, running into millions of rupees, from the complainant and, probably, also from Zahid Islam accused and his wife. It has been vociferously contended by learned counsel for the petitioner that sections 420 and 471 were bailable and section 468, P.P.C. is non-cognizable and in this situation, the police could not embark upon the investigation of this case unless so authorized by a Magistrate under section 155(2), Cr.P.C. I am afraid this particular argument of the learned counsel is devoid of any legal force as blending of a non-cognizable offence with a cognizable offence does not necessarily warrant obtainment of permission by the police, from a learned Magistrate for conducting investigation of a case, registered for the mentioned category of offences. The prosecution cannot be blamed at all in respect thereto, if they have not gone for the invocation of section 155(2), Cr.P.C. There is another important aspect of the case which relates to preparation of an agreement deed by Sadiq Mehmood (petitioner) and his brother Abid Mehmood, on 6-8-2010 wherein they have categorically admitted their liability to pay an amount of Rs.1,25,000,00 to Farhan Ahmad (complainant) which is directly corroborative to the claim of the complainant, as mentioned in the F.I.R. that accused Muhammad Sadiq etc. had a liability to discharge in his favour. The pendency of a couple of civil suits between the parties is no ground to hold that the criminal proceedings against the accused by way of the instant F.I.R. case could not be taken to its legitimate end. There is no cavil to the proposition that civil and criminal litigation can proceed side by side inter se.

6. Learned counsel for the petitioner has argued another point in absolute terms that an accused confronted with a charge, not falling under the prohibitory clause of section 497(1), Cr.P.C. should, regardless of the allegations, be necessarily granted bail, as according to him, grant of bail in such like offences is a rule and rejection thereof an exception. The rule is not inelastic that every accused, being prosecuted for an offence, falling in the mentioned clause, must be showered upon the concession of bail as a matter of right, leaving aside the peculiar facts of the said case. An argument to the contrary would be a mere misconception of law. The basic principle of law is that an accused having committed a non-bailable offence would only be entitled to grant of bail on merits if his case falls within the purview of 2nd proviso to section 497, Cr.P.C. and this is the qualification, the case of the petitioner is not studded with.

7. For the foregoing reasons, I am not inclined to accept this application which is dismissed accordingly.

MWA/M-260/L Bail dismissed.

2013 P Cr. L J 297

[Lahore]

Before Shahid Hameed Dar, J

RASHID ALI---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No. 5661-B of 2012, decided on 13th June, 2012.

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

----S. 497---Penal Code (XLV of 1860), Ss. 302/396/412---Qatl-e-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Bail, refusal of---Allegation against the accused and co-accused was that they committed dacoity at the house of the deceased, who was murdered for showing resistance during the commission of the dacoity---Accused and co-accused allegedly fled the crime scene in a car, which was intercepted by the police on the same day of the occurrence, whereafter a test identification parade was conducted---Contentions of the accused were that he had been involved in the matter due to suspicion; that he was not found armed during the time of his arrest; that evidence regarding test identification parade was contradictory, and that recovery of cash and National Identity Card (NIC) of the complainant from the accused hardly implicated him as said evidence had been fabricated by the prosecution---Validity---Complainant and other victims of the dacoity had given a brief description of the external features of the accused persons with the contention that they could identify them---During the course of the identification parade, one of the victims of the dacoity correctly picked up the accused---Deceased had been murdered for the reason that he showed resistance during an occurrence of dacoity committed by the accused and his co-accused---Trial of the accused had commenced and four prosecution witnesses had already been examined by the Trial court---Offences with which the accused was charged, caught the prohibition of S.497(1), Cr.P.C.---No circumstances existed to believe that the case of the accused called for further probe into his guilt within the meaning of S.497(2), Cr.P.C.---Bail application of the accused was dismissed, in circumstances.

Rehmat Ullah v. The State and another 2011 SCMR 1332 rel.

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

----Ss. 302/396/412---Qatl-e-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Participation in a dacoity---Liability---Scope---Individual role of an accused, in cases of dacoity, did not matter much and every participant of such a crime, regardless of his role, would be an accused in equal degree.

Muhammad Ahsan Bhoon for Petitioner.

Miss Muqadass Tahira, Additional Prosecutor-General Punjab with Ghulam Qadir, S.-I. for the State.

Basharat Ali Gill for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No. 13, dated 11-1-2012, under sections 302, 396, 412, P.P.C., registered at Police Station Chatiana, District Toba Tek Singh.

2. Precisely the prosecution case as narrated by the complainant is that he was present at the house of his brother Muhammad Amin and they chatted about some domestic issues; it was after the Fajar prayer time, when someone rang the bell at the outer door of the house, at about 7-00 a.m.; Muhammad Amin deceased opened the gate and found seven armed men standing at the door; they overpowered Muhammad Amin and pushed him inside the house; they snatched cash Rs.4,000 from him, Rs.3,000 from Muhammad Ahmad and Rs.5,000 from Ejaz along with their national identity cards at gunpoint; Muhammad Amin showed bravery and made an attempt to catch one of the dacoits, whereupon, the other one who wore a maroon colour shirt, made a fire shot with his pistol which hit the neck of Muhammad Amin; all other accused also resorted to firing and one of the fire shots landed at the chest of Muhammad Amin who fell on the ground badly wounded; the accused after committing the crime fled the scene in Car No.LZS-0789 Corolla XLI white colour; the injured succumbed to the injuries on way to the hospital; the complainant gave a description of external features of the accused in the F.I.R. with the contention that he could identify them if he would ever see them again.

3. According to the record, the above said car was intercepted by the police at a picket later in the day, which was ridden by accused Muhammad Zeeshan, Usman, Rashid (petitioner), Waseem, Ali Hassan, Muhammad Asif and Sabir Ali. Some of them possessed illicit arms for which all of them were hauled up by the police and taken to the police station. The police sent the above said accused to the judicial lock-up for the purpose of test identification parade which was so held on 19-1-2012, during the course of which the accused-petitioner was correctly picked up by an eye-witness Ejaz but complainant failed to identify him. The other eye-witness Muhammad Ahmad however, did not participate in the test identification parade.

4. Learned counsel for the petitioner submits that petitioner has no concern with the occurrence contained in the F.I.R. and he has been involved in this case merely on suspicions; the petitioner was allegedly arrested on the very day of the occurrence but he was not found armed by the police, when they intercepted the vehicle of the accused; the evidence regarding test identification parade is contradictory in respect of the petitioner which brings the case of the petitioner within mischief of further inquiry under section 497(2), Cr.P.C.; the recovery of cash Rs.1,000 and a copy of the NIC of the complainant hardly incriminate the petitioner as this particular piece of evidence has been fabricated by the prosecution to lend strength to its case; the petitioner is behind the bars since 11-1-2012 and he is not required for the purpose of investigation any longer.

5. On the other hand, learned APG assisted by learned counsel for the complainant vehemently opposes with the contention that the petitioner joined by his co-accused committed a heinous offence during the course of which they committed the murder of Muhammad Amin deceased for none of his fault; the accused-petitioner and his co-accused

have committed a gruesome offence not only against an individual but also against the society as a whole; the fact that the petitioner had not been identified by the complainant does not mar the quality of the prosecution case in any manner as, the other eye-witness Muhammad Ejaz was mentally alert enough to identify the accused-petitioner during the above said exercise; the medical evidence fully supports the story contained in the F.I.R.; the recovery of cash, NIC of one of the victims and a pistol at the instance of petitioner validly constitute an incriminating piece of evidence against the accused; the trial has commenced and four prosecution witnesses have already been recorded; finally submits that the offence committed by the petitioner catches the prohibition of section 497(1), Cr.P.C.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the complainant while reporting the crime to the police gave a brief description of the external features of the accused with the contention that he could identify them, if he would see them again. Similar were the contentions of the other victims. In these circumstances, the best mode for identification of the accused was none else than the test identification parade, which was held on 19-1-2012, during the course of which one of the victims Ijaz Ahmad correctly picked up the accused-petitioner. The complainant, however, failed to do so. Its effect/import shall be determined by the trial Court during the course of trial. The petitioner was taken into custody on 21-1-2012 and being on physical remand he got recovered cash Rs.1,000, three identity cards pertaining to Maqsood Ahmad (complainant), Muhammad Ahmad and Ijaz Ahmad on 31-1-2012. He also got recovered a pistol .30-bore on 27-1-2012. The charge against the petitioner is heinous and alarmingly dangerous. Muhammad Amin had been murdered for the only reason that he showed resistance during an occurrence of dacoity committed by the petitioner and his co-accused, who too had been identified by the victims at test identification parade, on 19-1-2012. It is a settled principle of law that in cases of dacoity the individual role of an accused does not matter much and every participant of a such like crime, regardless his role, would be an accused in equal degree. Hence, the objection raised by learned counsel for the petitioner in this regard is without any substance. The trial of the accused has commenced and four prosecution witnesses have already been examined by the trial Court. In these circumstances, any comments on merits of the case may not be advisable as it may cause prejudice to the case of either of the sides. Reliance in this regard may be placed on the case "Rehmat Ullah v. The State and another" (2011 SCMR 1332).

7. It is noted with concern that crime rate qua robberies and dacoities had touched alarming heights in the recent past. The robbers and the dacoits are on the rampant and there is little respite for a common man at the hands of such outlawed. It was a gruesome and dastardly crime committed by the petitioner and his co-accused. The offences, the petitioner is charged with, catch the prohibition of section 497(1), Cr.P.C. No circumstance exists to believe that the petitioner's case calls for further probe into his guilt within the meaning of section 497(2), Cr.P.C.

8. For the foregoing reasons, I am not inclined to accept this application, which is dismissed accordingly.

9. Before parting with this order, the learned trial Court is directed to accelerate the proceedings of the trial and conclude it as immediately and conveniently as possible.

MWA/R-29/L Bail refused.

2013 P Cr. L J 323

[Lahore]

Before Ijaz Ahmad Chaudhry, C.J. and Shahid Hameed Dar, J

AHMAD ALI and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeal No.1282 and Criminal Revision No.729 of 2008, heard on 18th October, 2011.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Eye-witnesses had failed to establish their presence at the scene of occurrence---Previous enmity between the parties, if any, had been patched up---Statements of eye-witnesses were full of contradictions and discrepancies, which had made their testimony highly improbable and non-believable---F.I.R. had been recorded much later than the time shown therein---Post-mortem examination of the deceased had been delayed for 21 hours without any explanation--- Medical evidence had not corroborated the ocular testimony---Eye-witnesses had not seen the occurrence, nor they had any purpose to be present there---Involvement of accused in the case was skeptical and the allegation against him qua the murder of the deceased was speculative---Ocular account was brushed aside being false, highly discrepant and unreliable, having been rendered by the inimical and interested witnesses---Prosecution had failed to establish the motive against the accused---Evidence of recovery of fire arms at the instance of accused and the positive report of the Forensic Science Laboratory hinting at matching of the crime empties with the said fire arm, was of no consequence, when the prosecution case against the accused, otherwise, stood disproved---Accused was acquitted in circumstances.

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

----S. 302(b)--- Qatl-e-amd--- Appreciation of evidence--- Recovery---Principle---Evidence of recovery of incriminating articles from the possession of accused cannot be considered a conclusive circumstance to base conviction thereon against the accused, if the prosecution case against him, otherwise, stands disproved.

Rai Bashir Ahmad assisted by Mian Mansoor Ahmad for Appellants.

Tariq Javaid, Deputy District Public Prosecutor for the State.

Ch. Nazir Ahmad Kamboh for the Complainant (Petitioner in Criminal Revision No.729 of 2008).

Date of hearing: 18th October, 2011.

JUDGMENT

SHAHID HAMEED DAR, J.---Ahmad Ali-appellant was held guilty under section 302(b), P.P.C. for the murder of Muhammad Naseem, by learned Additional Sessions Judge,

Kasur vide judgment dated 18-10-2008 and sentenced to imprisonment for life with direction to pay a sum of Rs.1,00,000 to the legal heirs of the deceased by way of compensation under section 544-A, Cr.P.C. or in default thereof to undergo simple imprisonment for six months. Benefit of section 382-B, Cr.P.C. was, however, extended to him.

2. The convict/appellant has filed Criminal Appeal No.1282 of 2008 against, his conviction/sentence, whereas the complainant preferred Criminal Revision No.729 of 2008 seeking enhancement of the sentence awarded to the respondent-convict (appellant), which was admitted to regular hearing and notice was issued to the respondent on 4-6-2009. We propose to dispose of both the matters together through this single judgment.

3. The facts, as unfolded by Muhammad Sarwar-complainant (P.W.8) in F.I.R. (Exh.PG) were that he was a security guard at Allied Bank Kot Radha Kishan; about two months ago, his paternal nephew Muhammad Naseem (deceased) and Ahmad Ali (appellant) exchanged hot words, but the matter was patched up due to intervention of the elders; on the fateful day, i.e. 23-11-2002, at 4-00 p.m., he along with his brother Dildar Hussain, Muhammad Naeem and Muhammad Naseem (deceased) was going towards his house from the fields; in the meanwhile Ahmad Ali (appellant), while riding a motorcycle, reached there from behind and offered lift to Muhammad Naseem (deceased) to go to the village, whereupon, Muhammad Naseern sat on the rear seat of his motorcycle; on reaching a poultry farm near Rajbah Handal bridge, Ahmad Ali turned the motorcycle towards his haveli instead of going to the village; the complainant and his companions suspected some foul-play so they rushed towards the haveli of Ahmad Ali (appellant); on reaching there, they saw Ahmad Ali carrying a rifle and Muhammad Naseem (deceased) standing on path near a sugarcane crop; within their view, Ahmad Ali fired three successive rifle shots, which hit Muhammad Naseem, who fell onto the ground and breathed his last instantaneously; Ahmad Ali fled the scene; the occurrence was witnessed by the complainant and his above said companions; Ahmad Ali (appellant) committed murder of Muhammad Naseem due to previous grudge; leaving Dildar Hussain and Muhammad Naeem to guard the dead body; the complainant left for the police station and got registered F.I.R. (Exh.PG), on the same day at 6-00 p.m.

4. After registration of the F.I.R., Muhammad Ijaz Khan, Inspector (P.W.9) took over the investigation and immediately reached the spot; examined the dead body, prepared injury statement (Exh.P1), inquest report (Exh.PJ), an application for postmortem examination and despatched the dead body of the deceased to the mortuary for autopsy under the escort of Mukhtar Ahmad, C/590 (P.W.3) and Muhammad Anwar, C/925 P.W.1 (not produced), he inspected the place of occurrence and prepared visual site plan Exh.PH; secured blood-stained earth vide memo Exh.PD and three empties (P4/1-3) vide memo Exh.PE; Mukhtar Ahmad, constable (P.W.3) produced before him last-worn clothes of the deceased along with relevant papers, which were secured by him through memo Exh.PL; he got prepared the site plan-in scale in duplicate. (Exh.PB and Exh.PB/1) qua the place of occurrence; by Muhammad Latif, Patwari (P.W.2). He arrested the accused appellant on 4-12-2002, who during Course of interrogation, got recovered rifle .8-MM (P3) along with four live bullets (P2/1-4), which was secured by him vide memo Exh.PF. On completion of investigation, he submitted challan against the accused-appellant for his trial in accordance with law.

5. At trial, prosecution in order to prove its case produced nine witnesses in all, whereas

five persons were examined as Court Witnesses. The ocular account was furnished by Muhammad Sarwar-complainant (P.W.8) and Muhammad Naeem (P.W.7). Both of them also stated about the motive part of the incident. Muhammad Naeem (P.W.7) also appeared to testify the factum of recovery of rifle (P3) vide memo Exh.PF. at the instance of Ahmad Ali-appellant. The court witnesses (C.W.1 to C.W.5) were recorded by the trial Court, to assess the age of the appellant.

6. The medical evidence was presented by Dr. Mumtaz Ahmad (P.W.1), who, at 1-00 p.m., on 24-11-2002, conducted autopsy on the dead body of Muhammad Naseem (deceased), vide necropsy report Exh.PA (pictorial diagram Exh.PA/1) and found following injuries thereon:--

(1) A penetrating lacerated wound measuring 4 cm x 4 cm, just above the right clavicle middle part on the front and most upper part of right chest.

(2) A penetrating wound measuring 1 cm x 1 cm on the front and right side of chest 2 cm from midline and 7 cm below and medial to right nipple and 4 o'clock position to right nipple.

(3) A penetrating lacerated wound measuring 5 cm x 3 cm on the left side of chest, 5-1/2 cm below and in line with left nipple.

(4) A penetrating lacerated wound 3-1/2 x 1-1/2 cm on the back of right chest, 4 cm on midline in right scapular area.

(5) A penetrating wound measuring 4 cm x 2 cm on the back of left side of chest in lower part, 8 cm from midline and in mid scapular line.

(6) A penetrating wound measuring 1 cm x 1 cm on the back side of left side of chest and abdomen, 3 cm from midline, 9 cm below and medial to injury No.5.

(7) A penetrating lacerated wound measuring 4 cm x 2-1/2 cm on the inner side of the right wrist; underlying bones of right wrist were seen damaged.

(8) A penetrating wound measuring 2 cm x 1 cm on the back of right wrist and communicating with injury No.7.

The cause of death, recorded by the medical officer was haemorrhage, shock and injury to vital organs, i.e. heart, liver and spleen, due to injuries Nos.1 to 6, which were sufficient to cause death individually or collectively in the ordinary course of nature. The probable time that elapsed between injuries and death was "almost immediate", whereas between death and postmortem examination, it was within "20 hours approximately".

7. Learned Public Prosecutor by tendering in evidence the reports of Chemical Examiner, Serologist and Forensic Science Laboratory (Exh.PM, Exh.PN and Exh.PO), respectively, announced the prosecution case closed.

8. In his statement under section 342, Cr.P.C., the appellant denied and controverted all the allegations of fact, alleged against him, by the prosecution and professed his innocence while responding to the question as to why this case against him and why the P.Ws. had

deposed against him in the following words:--

"In fact Muhammad Naseem was my fast friend had licence of Daood Corporation son of Inayat Ali allowed us to purchase the fertilizer. My father invested Rupees 23 lacs which was in the custody of the deceased and it was month of Ramzan and at the relevant time Muhammad Sarwar was performing duty on 13-12-2002 from 9-00 a.m. to 5-00 p.m. and at that time he was in the house and at the relevant time Muhammad Sarwar was performing duty on 13-12-2002 from 9-00 a.m. to 5-00 p.m. and at that time he was in the house and at the mid night father of the deceased who identified the dead body sent message that Naseem had been murdered and Muhammad Sarwar who is army personnel went in the police station and after shifting the dead body in the police station and observing injuries involved me in order to usurp Rupees twenty three lacs balance of my father. In fact first counsel was engaged by an Advocate who belongs to Kot Radha Kishan is kith and kin of Sardar Muhammad Tufail, second counsel was engaged who was also close relative of Sardar Muhammad Tufail Exh.MNA and they prolonged the case. Later on they made the incorrect application for declaration of my insolvency and matter was agitated up to Supreme Court for the determination of my age. In fact according to my birth entry which is Exh.DB my date of birth is 12-1-1986 and in school certificate my date of birth is 12-1-1986 which is Exh.DC and certificate of the manager of the Allied Bank in which he has mentioned that on 13-11-2002 Muhammad Sarwar was performing duty as security guard from 9-00 a.m. to 5-00 p.m. and that certificate is Exh.DD and attested copy of the Allied Bank is also Exh.DE in which it is clearly mentioned that at Column No.23 there is a cutting which is Exh.DE/1 and these are five attested documents which are Exh.DE/2, Exh.DE/3, Exh.DE/4, Exh.DE/5 and Exh.DE/6. I also produced the original licence which is Exh.F which was produced before the Investigating Officer who with mala fide intention did not obtain it and made part and parcel of the judicial file. I am innocent. Nobody from the vicinity and locality supported the prosecution version except Muhammad Sarwar and his nephew. My parents also produced respectable of the locality before the Investigating Officer Inspector Ijaz who did not try to obtain permission from the S.P. Investigation or DSP Investigation and conducted the investigation dishonestly due to fear of Sardar Muhammad Tufail Exh.MNA. I sent many respectables to the complainant that in the month of Ramzan Naseem was coming with cash and robbery had been committed and his body lying dead in the field but Sardar Muhammad Tufail Exh.MNA who was dead opponent to me and my family due to election friction compelled the complainant party not to compromise with me and my family. P.Ws and his nephew are greedy and they usurped Rupees 23 lacs of my father and involved me in this false case. It is pertinent to note here that six/seven F.I.Rs of robbery were produced and it was admitted by Muhammad Sarwar that on that road robbery has been committed in routine which is crystal clear that Naseem was murdered by unknown robbers and I have been falsely involved in this case."

The appellant did not opt to appear as his own witness under section 340(2), Cr.P.C. to repel the charge against him, nor he opted to adduce evidence in defence.

9. The learned Additional Sessions Judge on culmination of trial proceeded to, convict/sentence the appellant as mentioned hereinabove.

10. Learned counsel assailing legality of the appellant's conviction and sentence

contended it to be an unwitnessed occurrence, alleged to have taken place during the course of a dacoity, as such crimes were committed frequently in the area; the F.I.R. was lodged belatedly after preliminary investigation, with a false timing recorded thereon in respect of its registration; all the eye-witnesses being relations of the deceased are inimically disposed towards the appellant thus they are interested and their statements do not find corroboration from any independent source, the case set up by the prosecution against the appellant is preposterous and presence of the eye-witnesses at the place of occurrence is highly improbable; the motive set up by the prosecution is unbelievable and gone unestablished.

11. While learned counsel appearing on behalf of the State assisted by learned counsel for the complainant has supported the impugned judgment.

12. Having minutely perused the entire evidence with the assistance of learned counsel for the parties, we are not persuaded by the story, set up by the prosecution against the appellant as we find that the eye-witnesses failed to establish their presence at the place of occurrence at the relevant time. The previous heart-burning between the appellant and deceased if any, stood forgotten by the parties because of a patch up between them, hence the allegation that the appellant deceitfully took Muhammad Naseem (deceased) towards his haveli, after having offered him a lift on his motorcycle, does not appeal to reason. Muhammad Naeem (P.W.7) is real brother of Muhammad Naseem (deceased) whereas Muhammad Sarwar complainant (P.W.8) is an uncle of the deceased. Muhammad Sarwar complainant has contended that he along with his companions including Muhammad Naeem (P.W.7) and Muhammad Naseem (deceased) were moving, towards their house on foot from his haveli and the inter se distance was around 3 kilometers. The relations between the parties were so cordial that nobody resisted the offer of Ahmad Ali appellant, to carry Muhammad Naseem (deceased) on his motorcycle so as to facilitate him in reaching his house. It was the month of Ramzan and Muhammad Naseem deceased was fasting on the day of occurrence. The haveli of the appellant was many acres away from the spot, wherefrom he took Muhammad Naseem with him on his motorbike. According to the statement of Muhammad Naeem (P.W.7) and Muhammad Sarwar (P.W.8), the appellant had driven his motorcycle for about 10 minutes when he took turn and instead of going to the village of the deceased adopted a course leading to his haveli. If none from the complainant side doubted the intention of the appellant at the time he offered a lift to Muhammad Naseem, it is highly improbable that mere turn of his motorcycle towards his haveli would have raised the eye-brows of the complainant and that of his companions so as to prompt them to give hot-pursuit to Ahmad Ali appellant. There was no reason to develop such suspicion as the alleged motive incident, stood compounded.

13. The statements of both the eye-witnesses are full of contradictions and discrepancies, which render their testimonies highly improbable and hard to believe. The deposition of Muhammad Naeem (P.W.7) that Muhammad Sarwar complainant was on leave on the day of occurrence and that he had taken one day leave through a written application from his bank with a view to harvest the wheat crop is negated by P.W.8 who categorically deposed in his testimony that he stayed in his bank during his duty hours till 2-30 p.m. and thereafter by leaving his cycle and uniform at the bank, he came to the bus stop where a passenger packed bus was ready to leave, which he boarded and alighted at the relevant bus stop, wherefrom he directly went to his fields to assist his brothers who were busy working in the fields.

Similarly P.W.7 has deposed that Muhammad Sarwar complainant did not go to the police station directly from the place of occurrence rather he first went to Kot Radha Kishan and thereafter he went to the police station. The factum of shifting of dead body to the police station is very crucial and reflects on the timing of registration of F.I.R. which has been shown as 6-00 p.m. on 23-11-2002. A strong impression arises from the testimonies of both the eye-witnesses that the F.I.R. had been recorded much later than the time shown on the F.I.R. (Exh.PG). The postmortem examination of the dead body was conducted at 1-00 p.m. on 24-11-2002, after about 21 hours of the occurrence and the delay in this regard has not been explained by the prosecution witnesses in any manner. Muhammad Naeem (P.W.7) and Muhammad Sarwar (P.W.8) in their anxiety to show their presence at the place of occurrence have stated about many facts which are adverse to normal human conduct. The medical evidence does not render the required corroboration to the ocular account, for the reason, that the necropsy report (Exh.PA) reveals four firearm entry wounds on the body of Muhammad Naseem (deceased) as regards three stated by both the eye-witnesses who with a variation of distance qua their presence at the place of occurrence at the crucial hour, have stated to have witnessed the occurrence. The Medical Officer Dr. Mumtaz Ahmad (P.W.1) deposed in his testimony that the probability could not be ruled out that three different kinds of weapons were used for the injuries, authored on the body of the deceased. About injuries Nos.7 and 8 on the body of the deceased, the Medical Officer stated that injury No. 8 was an entry wound of injury No. 7 and that for infliction of these injuries, the deceased had been fired at from his back. None of the eye-witness gave an account of 4th firearm entry wound.

14. The deposition made by Muhammad Naeem (P.W.7) with following assertion is crucial:--

"The haveli of the father of Ahmad Ali is situated on the bank of Rajbah. The haveli is at a distance of about 13 acres from the poultry farms if somebody travels on the bank of Rajbah. On motorcycle Naseem and Ahmad Ali covered the distance of one mile uptill haveli in about ten minutes. They might have reached over there at quarter to five. From in between the distance of the haveli is about 5/6 acres from the place where from Ahmad Ali had given right to deceased Muhammad Naseem. When we entered into the fields for going upto the haveli we crossed the fields of Muhammad Mehdi. We crossed his one, two acres. Thereafter we crossed two three acres of Jaffar Ali, Chairman. Thereafter the land of Ahmad Ali started. That was about one acre which we crossed and then the haveli of Ahmad Ali came. We were three who were running towards the haveli, myself, my uncles Dildar Hussain and Muhammad Sarwar. We reached at the place of occurrence simultaneously."

Muhammad Sarwar complainant (P.W.8) while giving a description of the place of occurrence contended that the road where the occurrence took place was a thoroughfare whereon Dala, rickshaw, Cycle, motorcycle and buses used to ply. He further stated that his house was at a distance of three kilometers from the fields and he further deposed with a contradiction that he and his companions were going to fields at the time of alleged occurrence. He however took another turn in his statement while deposing that they were going on foot from his haveli to his house at the time of occurrence. About the location of residential house of his brother Dildar P.W. (not produced), he contended that he lived in a separate house like that of Muhammad Naeem (P.W.7) and Muhammad Naseem (deceased) and that fifteen streets separated their residential house and the abode of the deceased. The

following assertion of P.W.8 is important, therefore, reproduced:--

"Poultry farm is at a distance of three acres from where deceased took lift of motorcycle on asking the accused. I do not know at that time who were employees of the poultry farm owned by one person belonged to Lahore. I do not know the numbers of the employees. I do not know whether the employees of the poultry farm were locals, or not. That poultry farm is consisting of 10/11 acres. There was no shop in front of the poultry farm. That poultry farm is at a distance of 20 kilometer from Kot Radha Kishan. That poultry farm is also at a distance of three kilometers from village Handal. There is a pacca road which leads to village Handal. Handal is a big village. Accused is resident of village Handal."

15. The conduct of P.W.8 at the relevant time of occurrence is also important and helps in understanding whether or not he was present at the place of occurrence at the crucial hour or whether he had witnessed the occurrence or not:--

"It is correct that I, Dildar and Naeem are healthy and having a stitched body. I have not tried to apprehend accused as being army personnel before making fire at the deceased. We tried to apprehend the accused at some distance and other persons are also with me. We had not made a noise of seeing the accused armed with rifles. I have not tried to apprehend the accused from the back side after conceding myself before firing. When accused made first fire I reached near my nephew in order to save his life. No fire hit to me or any other witness at the alleged place of occurrence. I have not laid down on my nephew in order to save his life. I have not tried to lay on my nephew on the second and third fire. I have not tried to shift him in any hospital in order to save his life. Voluntarily stated he succumbed to the injuries at the spot. After receiving the fire shot he fell downward and trembling at that time. I saw the injuries of the deceased. I have not placed the deceased on the cot. I have not made any noise after it. I stayed ten minutes at the spot. I have not made arrangements of any vehicle. I have not taken motorcycle from the haveli to reach the hospital. I have not asked Jaffar chairman to provide me weapon or persons or vehicle to produce me in order reach the police station."

The divergent pleas of both the eye-witnesses transmit a clear signal that they had not seen the occurrence nor they had any purpose to be present at the spot where Muhammad Naseem (deceased) was murdered and their contention to have witnessed the occurrence is patently false. The involvement of the appellant in the instant case appears to be skeptical and the allegations against him qua the murder of Muhammad Naseem (deceased), look speculative. The ocular account is brushed aside being false, highly discrepant and unreliable, having been rendered by the inimical and interested witnesses. The motive of the incident which took place about two months prior to the occurrence has also not been honestly setout by the prosecution which was disbelieved by the learned trial Court.

16. So far as the factum of recovery of rifle .8 mm (P-3) along with pistol P-4 and four live bullets vide memo of recovery Exh.PF from a room of his house by the appellant is concerned, though there is a positive report, (Exh.PO) issued by the office of Forensic Science Laboratory, Lahore hinting at wedding of the crime empties with the aforesaid weapon, it cannot be considered a conclusive circumstance to base conviction/sentence thereon against the appellant. The discrepant and contradictory ocular account, not sufficiently corroborated by the medical evidence and badly dented by the unproven motive, has already been disbelieved by us, therefore, the evidence of recovery of the mentioned items is of no consequence to the

prosecution case.

17. The defence plea adopted by the appellant in his statement under section 342, Cr.P.C., is a pileup of divergent circumstances, having no relevance or conformity inter se which divulges nothing but three facts, firstly, the case against the appellant-accused was false and conspitorial, secondly, the deceased had been done to death: in some occurrence of dacoity as the dacoits were on the rampant in the said area since long and thirdly, one MNA and his son were instrumental in construction of allegations against the convict. Both the eye-witnesses admitted in their testimonies that the dacoits were active in the area of murder of the deceased and affirmed the positive suggestions in this regard. The available material however is not sufficient to believe the defence plea of the accused who has already been held by us to have been falsely involved in this case under a calculated move by the vested elements, bent upon in causing his annihilation.

18. The upshot of the above discussion is that in view of the defects and infirmities pointed out above, the prosecution has failed to prove its case against the appellant beyond reasonable doubt, hence we accept the appeal (Criminal Appeal No.1282 of 2008), set aside the conviction and sentences of the appellant and acquit him of all the charges. We direct that the appellant be set at liberty forthwith if not to be detained in any other case.

19. For the reasons noted hereinabove the revision petition (Criminal Revision No.729 of 2008) filed by the complainant, for enhancement of sentence of the appellant is dismissed.

NHQ/A-213/L Appeal accepted.

2013 P Cr. L J 412

[Lahore]

Before Rauf Ahmad Sheikh and Shahid Hameed Dar, JJ

MUHAMMAD GHALIB and others---Appellants

Versus

The STATE and others---Respondents

Criminal Appeal No.79, Criminal Revision No.112 and Murder Reference No.299 of 2004, heard on 18th October, 2010.

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

----Ss. 302(b)/324/34/337-F(iii)/337-D---Qatl-e-amd, attempt to commit qatl-e-amd, common intention, ghayr-jaifah-mutalahimah, jaifah---Appreciation of evidence---Incident reported to police promptly---Motive for occurrence established---Enmity between parties admitted---Medical evidence corroborating ocular account---Defence plea not believable---Effect---Accused persons while armed with weapons allegedly ambushed the deceased persons and the injured witness---Motive for the occurrence was strained and tense relations between the

parties spanning over a period of 4 to 5 years---Although complainant was brother of the deceased persons and injured witness was also related to the deceased, but their evidence could not simply be discarded due to their relationship--- Matter was reported to the police within two hours---Enmity between the parties stood admitted and prosecution had successfully proved the motive for the occurrence---Presence of injured witness at the place of occurrence could not be questioned and he had perfectly corroborated his stance before the police, as contained in his statement under S.161, Cr.P.C.---Medical evidence provided corroboration to the witnesses of the ocular account as both the deceased persons and the injured witness had received multiple sharp edged injuries---Duration of injuries, time elapsed between injuries and death, and between death and post-mortem examination were all in line with the ocular account furnished by complainant and injured witness---Medical officers were subjected to detailed cross-examination but no infirmity was found in their statements---Regarding recovery of weapons at instance of accused persons, report of Chemical Examiner revealed that weapons were stained with blood and scrapings thereof sent to Serologist had been found to be of human origin---Weapons recovered from accused persons and scrapings thereof, had been received in sealed parcels by the relevant Laboratories---Defence did not suggest that weapons were sent to the relevant Laboratories after having been tampered with in any manner---One of the accused took the defence plea that deceased and injured witness while armed launched an attack on his house and attacked his wife and mother-in-law---Said accused claimed that he alone managed to club and stab the deceased and injured witness in self-defence, however such a defence plea seemed unnatural and preposterous as said accused could not show even a single scratch on his person nor on the person of his wife or mother-in-law, who even otherwise were not taken into custody by the police nor examined by a medical officer/doctor---Appeal was dismissed in circumstances and conviction and sentences recorded by Trial Court were confirmed.

Anwar Shameem and another v. The State 2010 SCMR 1791 rel.

(b) Criminal trial---

----Post-mortem examination, evidentiary value of--- Non-existence of pictorial diagrams/sketches--- Effect--- Non-existence of sketches did not undermine the intrinsic value of post-mortem examination reports nor could such reports be thrown away due to such an omission.

Muhammad Tanvir Ch. and Sayeda B.H. Shah for Appellants.

Ch. Abdul Aziz for Respondents.

Muhammad Nazeer Abbasi, Standing Counsel.

Date of hearing: 18th October, 2010.

JUDGMENT

SHAHID HAMEED DAR, J.---The appellants Muhammad Ghalib, Nasir Mahmood, Muhammad Hanif and Waheed Ahmad have been convicted by the learned Additional Sessions Judge, Islamabad for the charge of murder of Liaqat and Shaukat deceased and attempting on the life of Wajid Abbasi, (P.W.9). The appellants were sentenced as under:--

Muhammad Ghalib and Waheed Ahmad.

Under section 302(b)/34, P.P.C.

Death on two counts to the each appellant, with order to pay Rs.1,00,000 each, as compensation to the legal heirs of the deceased, under section 544-A, Cr.P.C., in default thereof to undergo six months' S.I. each.

Under section 324/34, P.P.C.

10 years' R.I to the each appellant, with fine of Rs.50,000 each, in default thereof to undergo three months' S.I each.

Muhammad Ghalib appellant was also convicted under section 337F(iii), P.P.C. and sentenced to three years' R.I. with payment of Rs.5,000 as Daman.

Nasir Mahmood and Muhammad Hanif appellants.

Under section 302(b)/34, P.P.C.

Life imprisonment on two counts each with order to pay Rs.50,000 each as compensation to the legal heirs of the deceased, under section 544-A, Cr.P.C., and in default thereof to undergo three months' imprisonment each.

Under section 324/34, P.P.C.

10 years' R.I. each with fine of Rs.25,000 each, and in default thereof to undergo imprisonment for three months' S.I. each.

Muhammad Hanif appellant was also convicted under section 337-D, P.P.C. and sentenced to 10 years' R.I. with payment of Rs.1,00,000 as Arsh, being 1/3rd of Diyat amount.

All the sentences of imprisonment were ordered to run concurrently with benefit of section 382-B, Cr.P.C.

Through the same judgment the co-accused of the appellants namely, Arshad, Azhar, Sajid and Talib were acquitted of the charge.

2. The convicts have filed Criminal Appeal No.79 of 2004 against their conviction/sentence, besides, there is a usual reference under section 374, Cr.P.C. against Muhammad Ghalib and Waheed Ahmad appellants, for the confirmation of their sentence of death, on two counts, transmitted by the learned trial Court. Rafaqat alias Bagga complainant (P.W.8) has also filed Criminal Revision No.112 of 2004 against Muhammad Hanif, respondent No.1 and Nasir Mahmood, respondent No.2 for enhancement of their sentence to death. This judgment will dispose of the above said appeal, revision and the reference.

3. The appellants along with their acquitted co-accused were tried in the Court of learned Additional Sessions Judge, Islamabad for committing qatl-e-amd of Shaukat and Liaqat and for attempting on the life of Wajid Abbasi, P.W.9 at 9-00 p.m on 26-7-2002, in the area of Noorpur Shahan, Bari Imam, falling within the jurisdiction of Police Station, Secretariat, District Islamabad. The statement Exh.P.W. got recorded by Muhammad Rafaqat

alias Bagga, complainant (P.W.8.) formed the basis for the registration of formal F.I.R. Exh.PA.

4. The prosecution story, as stated by the complainant in his complaint Exh.P.W. is that he was not on speaking terms with Ghalib alias Guddi (appellant) for 3/4 years due to a petty quarrel between them; they exchanged hot words in early hours of the day on 26-7-2002 in the bazaar of Bari Imam and the matter was patched up; he was present at the shop of Miskeen, situated in Adda, at about 8-00 p.m, the same day, the accused Ghalib alias Guddi (appellant), armed with chhuri, Talib (since acquitted) armed with danda, Kala (since acquitted) armed with danda, Waheed (appellant) armed with hatchet and pistol .30 bore, Sajid (since acquitted) armed with .12 bore gun, Pappu armed with chhuri, Nasir (appellant) armed with chhuri and Azhar (since acquitted) armed with a knuckle duster came there and beat him, the people present at the spot intervened and rescued him; his family members, later on, learnt about the brawl; his brothers Shaukat and Liaqat (deceased) along with Wajid Abbasi (P.W.9) also reached there, consoled him and intended to lodge a complaint with Aurangzeb, the brother of Ghalib; they all came to the shop of Aurangzeb and complained of the excesses committed by his brothers with the request that he should check their unruly behaviour; thereafter, they moved towards their house, Liaqat, Shaukat and Wajid were ahead of the complainant, who was a little behind; when they reached near the house of Riaz, they were all at once, ambushed by the above named accused at 9-00 p.m.; they pounced upon Shaukat, Liaqat and Wajid and caused them severe injuries by means of their respective weapons; they also made firing and ran away; in the meanwhile, Muhammad Fayyaz P.W. (not produced) and Mahmood alias Mooda P.W. (not produced) and Javed P.W. (not produced) reached their and witnessed the occurrence; the complainant and his companions shifted the injured to Poly Clinic Hospital in a Suzuki Pickup but Shaukat and Liaqat succumbed to the injuries on the way to the hospital.

5. The complainant (P.W.8) got recorded his statement Exh.P.W. before Arshad Ali SI, P.W.10 at 11-10 p.m on 26-7-2002 at Poly Clinic Hospital, which was sent to the Police Station, Secretariat, District Islamabad by P.W.10, for registration of formal F.I.R. (Exh.PA), through Mushtaq 5847/C.

6. Arshad Ali SI/I.O., P.W.10, examined the dead bodies of Shaukat Ali and Liaqat deceased and prepared inquest reports Exh.PY, Exh.PX and also drafted applications Exh.PBB and Exh.PCC respectively for postmortem examination of both the dead bodies. He prepared injury statement Exh.PZ of the injured Wajid and wrote down a memo of identification Exh.PAA of both the deceased. Thereafter, he reached the place of occurrence, caused its inspection and drafted visual site plan Exh.PDD about it. He took into possession blood-stained earth from two spots vide memo Exh.PH and rendered it into two separate sealed parcels. He returned to the PIMS and shifted the dead bodies of the deceased to DHQ Hospital, Rawalpindi for postmortem examination. He, after the autopsy of the dead bodies, took into possession the last worn blood-stained clothes of the deceased vide memo Exh.PM. He arrested Muhammad Ghalib (appellant), Muhammad Talib (acquitted co-accused), Nasir Mehmood (appellant) and Sajid Mehmood, (acquitted co-accused) on 28-7-2002. Muhammad Ghalib appellant got recovered chhuri P-6, vide memo Exh.PJ, attested by Tariq Mahmood, P.W.3 and Talib Mahmood P.W. (not produced), Talib appellant led to the recovery of a danda P-7 vide memo Exh.PK and Nasir Mahmood appellant got recovered chhuri P-8 vide memo Exh.PL attested by the above said P.Ws. The I.O. prepared the site plans qua the places

of the recovery of the aforesaid weapons Exh.PEE. He also arrested Arshad Mahmood (since acquitted), Azhar Mahmood (since acquitted), Muhammad Hanif (appellant) and Waheed Ahmad (appellant), Muhammad Haneef accused led to the recovery of chhuri P-1 vide memo Exh.PC attested by Haji Ghaffar, P.W.2 and Maula Dad P.W. (not produced). Sajid Mahmood accused (since acquitted) got recovered .12 bore gun P-2 vide memo Exh.PD, attested by Haji Ghaffar P.W.2 and Muhammad Nazakat P.W. (not produced). Waheed Ahmad (appellant) got recovered hatchet P-3 and a pistol P-4 vide separate memo of recovery Exh.PE and Exh.PF, both attested by Haji Ghaffar P.W.2 and Muhammad Nazakat P.W. (not produced). Azhar Mahmood accused (since acquitted) led to the recovery of a knuckle duster P-5 vide memo Exh.PG attested by Haji Ghaffar, P.W.2 and Maula Dad P.W. (not produced). The I.O/P.W.10 also prepared the site plans qua the places of the recovery of the above said weapons.

7. The medical evidence was presented by Dr. Muhammad Arshad C.M.O, Federal Services Hospital, Islamabad, P.W.6, who conducted postmortem examination of both the dead bodies at DHQ Hospital, Rawalpindi, one after the other. Firstly, he performed autopsy on the dead body of Muhammad Liaqat at 1-00 p.m., on 27-7-2002, vide post mortem examination report Exh. PR, bearing his signature Exh.PR/1 and found the following injuries thereon:--

(1) An incised stab wound on the right temple just in front of the upper border of the right ear pinna, measuring, 3 c.m x 1 c.m, cutting the under lying bone. The brain matter was coming out through the wound, right ear was plugged.

(2) An incised stab wound, bone deep, measuring 3 c.m x 1 c.m on the upper border of the right shoulder.

(3) An incised stab wound measuring 1.5 c.m x .5 c.m on the front of right shoulder just medial to the axillary fold.

(4) An incised stab wound measuring 1.5 c.m. x .8 c.m. on right front chest, 1 inch below the nipple.

(5) An incised stab wound measuring 3 c.m x 1 c.m on the lateral surface of the right chest, 9 c.m lateral to the nipple.

(6) An incised stab wound measuring 2 c.m x .8 c.m on posterior of the right chest at the level of posterior axillary line.

(7) A penetrating wound measuring 8 c.m diameter on the right side of the abdomen, 6 inches lateral to the umbilicus.

The cause of death recorded by the Medical Officer was due to the damage to the brain and right lung. All the injuries were ante-mortem and except injury No.7, caused by sharp-edged weapon. The injury No.7 was guessed as a blunt weapon injury.

The probable time elapsed, as noticed by this P.W., between injury and death was 'immediate' and between death and postmortem examination, within 30 hours.

The dead body of Muhammad Shaukat deceased was dissected at 11-40 a.m. on the

same day by the same Medical Officer, P.W.6, vide post mortem examination report Exh.PS with his signature Exh.PS/1, who found the following injuries on the dead body:--

(1) An incised wound on the anterior surface of the left mid arm, muscle deep measuring 3 c.m x 1 c.m, 16 c.m below the shoulder and 19 c.m above elbow.

(2) An incised stab wound on right upper front part of the chest, measuring 1.5 cm x 1 c.m, one inch medial to the axillary fold.

(3) An incised stab wound on the right abdomen, measuring

4 c.m x 2 c.m, above and lateral to the umbilicus (7 c.m).

(4) A long transversely placed incised wound on the lower back chest 10 c.m in length, bone deep, on the left end with tale on the right, 16 c.m above the iliac crest.

(5) A bruise measuring 11 c.m x 2 c.m on back of right shoulder.

(6) An abrasion measuring 2 c.m x nail head on the forehead, just right to the mid.

The cause of death recorded by the Medical Officer was the haemothorax and haemorrhage due to damage to the right sub-clavian vessels, upper lobe of the right lung and the liver. All injuries were ante mortem and caused by sharp-edged weapon(s) except injury Nos.5 and 6 which were caused by the blunt weapon.

The probable time elapsed, as noticed by this P.W., between injury and death was 'an hour' and between death and postmortem examination, within 30 hours.

Dr. Rana Muhammad Mobeen C.M.O Poly Clinic Islamabad, P.W.7, though examined the dead bodies of both the deceased on 26-7-2002 and noticed their external injuries vide OPD Tickets Exh.PT and Exh.PU, but he did not perform the autopsy, therefore, the description of the injuries on both the corpses, deposed about by this witness might not be important to be reproduced, as, the testimony of Dr. Muhammad Arshad, C.M.O, P.W.6 entails all such details. He, P.W.7, however, conducted medical examination of Wajid Abbasi injured, P.W.9, at 9-55 p.m. vide MLR Exh.PV and found the following injuries on his person:--

(1) Transverse incised/cut wound over right side of neck, skin deep with haematoma.

(2) Incised/cut wound over right side of scalp, skin deep with sharp skin edges.

(3) Cut wound over lower abdomen through which loops of small intestine protruded out with perforation on it.

(4) Cut wound over abdomen in midline just above umbilicus.

The patient was operated by the Surgeons of General Surgery Department who found Jejunum perforation, 2 to 3 tears in mesentery of small intestine and Serosal tear. Three centimeters of jejunum resected and end-to-end anastomosi done.

The above said injuries were declared as Jurh Jaifah (337-D, P.P.C.) Ghayr Jaifah Badiah (337-Fii, P.P.C.) and Ghayr Jaifah Damiyah (337-Fi, P.P.C.) and were found to be caused by sharp-edged weapon.

8. The prosecution, after indictment of the appellants-accused and their acquitted co-accused, produced 10 witnesses before the learned trial Court, in toto to establish the charge against the accused. Muhammad Rafaqat, P.W.8 and Wajid Abbasi, P.W.9 furnished the ocular account. The medical evidence was tendered by Dr. Muhammad Arshad, C.M.O. P.W.6, who performed autopsy on both the dead bodies vide Postmortem Examination Report Exh.PR and Exh.PS. Dr. Rana Muhammad Mobeen C.M.O. P.W.7, also externally examined the injuries of both the deceased vide OPD tickets Exh, PT, Exh. PU and medically examined Wajid Abbasi (P.W.9) vide MLR Exh.PV. The evidence of recovery of the crime weapons was furnished by Haji Ghaffar, P.W.2, Tariq Mahmood P.W.3 and Arshad Ali SI/I.O., P.W.10 who completed the investigation and submitted a report under section 173, Cr.P.C. before the learned trial Court. The I.O. got prepared scaled site plan Exh. PQ, Exh.PQ/1 and Exh.PQ/2 in triplicate, by Muhammad Akram draftsman, P.W.5 in the scale of 1 inch equal to 20 feet. The rest of the prosecution evidence is, more or less, formal.

9. In his statement under section 342, Cr.P.C., Muhammad Ghalib, the appellant-accused, denied and controverted the prosecution case and advanced a specific plea of exercise of right of self-defence, while recording his reply to the question, "Why this case against you and why the P.Ws. have deposed against you" as follows:--

> "All the private witnesses are related to the deceased persons and remaining witnesses arc police officials who are public servants. No independent witness of the area deposed against me. The prosecution witnesses are interested and inimical towards me therefore, they supported the false story of the prosecution against me. On the day of the occurrence actually, Liaqat, Shoukat and Wajid trespass to my house after coming almost a distance of one kilometer. They gave injuries to me and my wife and mother-in-law due to the earlier altercation between me and Rafaqat alias Baga. I by exercising my right of private defence took out a chhuri from my kitchen and gave few blows to the assailants. After receiving injuries they ran back towards the street, Liaqat and Shoukat fell down near the house of Najmul Hassan and Zarwaiz whereas Wajid fled away from the said place. Both the injured remained in lying condition at the said place for 30 minutes and subsequently died. I being injured along with other injured family members went to the Poly Clinic Hospital for treatment where I was arrested. I also lodged complaint of the attack of the complainant party in my house but police did not lodge report against the complainant party. The police with the connivance of the complainant party, registered a case against me and my other innocent relatives in this case. During the attack of complainant party at my residence Talab my brother after hearing my hue and cry came to the scene of the occurrence and tried to rescue myself and save my family members who also saw the occurrence but the complainant party and police also subsequently made accused of this case. The complainant party for the purpose to save their skin regarding their aggression upon me and my family members changed the venue of the occurrence and concocted a story that occurrence was taken place near the house of Riaz."

Nasir Mahmood, Muhammad Haneef and Waheed Ahmad appellants-accused however, denied and rebutted the allegations of fact against them and professed their innocence, in their separately recorded statements under section 342, Cr.P.C., while recording reply to the above said question in the following words:--

> "I have been falsely implicated in this case due to my relationship with Ghalib accused, at the time of occurrence I was not present at the spot and did not participate in the occurrence, the police subsequently arrested me in this case and false recoveries were planted upon me. I am innocent and may be acquitted from this case."

The appellants did not produce any defence evidence nor they opted to appear as their own witness to repel the charges against them under section 340(2), Cr.P.C.

10. The learned trial Court on appraisement of the evidence, available on the record held the appellants guilty, convicted and sentenced them in the aforementioned terms, through the judgment under appeal. The co-accused of the appellants, namely Muhammad Talib, Azhar Mahmood, Sajid Mahmood, and Arshad Mahmood, however, were acquitted through the same judgment.

11. We have heard the learned counsel for the parties and have gone through the record of this case with their assistance.

12. Muhammad Rafaqat alias Bagga, complainant, P.W.8 is the real brother of both the deceased. Wajid Abbasi, P.W.9, is the real maternal uncle of the deceased. Muhammad Fayyaz P.W. (not produced) is the maternal cousin (khalazad) of the deceased. Mahmood alias Mooda P.W. (not produced) is the husband of the real sister of the deceased and Javed Iqbal P.W. (not produced) is the paternal cousin (chachazad) of the deceased. It has been admitted by the complainant P.W.8 in his evidence that all the prosecution witnesses including himself are close relatives inter se as well as, of the deceased.

13. The learned counsel for the appellants has argued that the prosecution had failed to prove its case against the appellants beyond the reasonable doubt and thus they are entitled to be acquitted by this court; the eye-witnesses produced by the prosecution were closely related to the deceased, interested and inimical to the appellants who, maliciously had suppressed the real facts of the case; the F.I.R. is an ante dated and ante timed document which has been fabricated by the prosecution with false timings shown on it, to pose it as a promptly lodged document; the motive setup by the prosecution had remained far from being proved so the prosecution has to face its consequences; the recovery of chhuries P-6, P-8 and P-1 have been planted upon Muhammad Ghalib, Nasir Mahmood and Muhammad Haneef appellants, whereas, a hatchet P-3 and pistol P-4 have been planted upon Waheed Ahmad appellant with fictitious proceedings, to substantiate, an otherwise unproven prosecution's case; the medical evidence is inconsistent with the ocular account, furnished by the inimical and biased witnesses; the complainant party had committed aggression against the appellants by causing severe injuries to the appellants in an unprovocative attack at the residential house of Muhammad Ghalib appellant; the co-appellants of Muhammad Ghalib appellant had not taken part in the incident and it was he alone who had retaliated in self-defence to fend off the aggression launched by the deceased; impugned judgment/has been passed in arbitrary, perverse and capricious manner which may be set aside and the

appellants may be acquitted of the charge.

14. As against the submissions of learned counsel for the appellants, the learned Deputy Prosecutor-General appearing for the State and the learned counsel for the complainant have submitted in agreement that the prosecution had fully established the guilt of the appellants beyond reasonable doubt through trustworthy ocular account, corroborative medical evidence, the evidence of the recovery of weapons of offence from all the appellants and the evidence of motive; the appellants and their co-accused had committed a barbaric act, by taking the life of two innocent persons and almost killed the third one during the occurrence; the appellants Nasir Mahmood and Muhammad Haneef should have been awarded the capital punishment like their co-appellants in absence of any extenuating circumstance, being vicariously liable for the murder of Shaukat and Liaqat deceased, hence, the revision petition filed by the complainant for enhancement of sentence may be accepted and the instant appeal of the appellants may be dismissed.

15. The prosecution case hinges upon the ocular account furnished by an injured witness P.W.9 and Muhammad Rafaqat P.W.8, the evidence of motive, the medical evidence presented by Dr. Muhammad Arshad C.M.O., P.W.6 and Dr. Rana Muhammad Mobeen, C.M.O., P.W.7 along with the evidence of recovery of the crime weapons, chhuri P-6, vide memo Exh.PJ, hatchet P-3 vide memo Exh.PE, pistol P-4 vide memo Exh.PF, chhuri P-8 vide memo Exh.PL and chhuri P-1 vide memo Exh.PC, at the instance of Muhammad Ghalib, Waheed Ahmad, Nasir Mahmood and Muhammad Haneef appellants-accused, respectively.

16. After having heard the learned counsel for the parties and going through the record we straightaway find that Muhammad Ghalib appellant has advanced a specific defence plea, as regard to the prosecution case and in his statement under section 342, Cr.P.C. he has contended that he along with his wife and mother-in-law had been badly injured by Liaqat (deceased), Shaukat (deceased) and Wajid (P.W.9). who being armed, had attacked him, at his residential house, after covering a distance of about 1 kilometer. We further noticed that despite having raised the specific defence plea, he has neither appeared, in his defence, under section 340(2), Cr.P.C. nor he has adduced, any defence evidence. The requirement of Article 121, Qanun-e-Shahadat appears to have been ignored and overlooked by the defence during the course of the trial. The unfortunate incident was reported to the police promptly, within two hours and ten minutes by Muhammad Rafaqat alias Bagga complainant P.W.8. We have also gathered that on the basis of the same evidence, four co-accused of the appellants have been let off by the learned trial Court so in this background we have to see whether or not the ocular account, gets the complete corroboration from the other attending circumstances and. whether the ocular account in its present form is trustworthy and unimpeachable? In these circumstances we have to deal with each bit of the evidence available on the record so as to plumb the depth of the real facts of this case.

17. As far as the motivating factor in the instant case is concerned we have noticed that it relates to the tense and strained relations between Muhammad Rafaqat alias Bagga, P.W.8 and Ghalib alias Guddi, appellant spanning over a period of 4/5 years which led to an exchange of hot words between them in the early hours of the fateful day but due to the intervention of the people around, the matter was, for the time being, resolved. The trail of this tension-full tale did not come to an end as the complainant, who sat at the shop of one

Miskeen, situated in the Adda, at about 8-00 p.m., he, in the backdrop of the animosity, was attacked and thrashed by the appellants, joined by their acquitted co-accused, who took part in the violent drill being armed with different weapons. To his good-luck, the people present at the spot again intervened and rescued him. This piece of the motive incident, when known by the family members of the complainant, P.W.8, prompted his real brothers Shaukat, Liaqat and his maternal nephew Wajid Abbasi to reach the point of trouble and they consoled and solaced him but decided that the unruly behaviour and conduct of Ghalib be reported to his brother Aurangzeb who incidentally was their close relative (behnoi) and ran a shop not far off from the house of the appellants-accused. The residential house of Talib accused (since acquitted) was situated close to the shop of Aurangzeb. There was close relationship between the parties as Liaqat deceased was married with the real sister of Ghalib accused-appellant and as discussed above, the real sister of Liaqat deceased was married with Aurangzeb. Muhammad Rafaqat alias Bagga P.W.8 has contended in his testimony that the relations between the two families had become strained due to many complications involving the inter se marriages between the two families. The hostility between the complainant and Ghalib appellant in fact sparked off due to aforesaid reasons which got compounded because of repeated clashes between them. The strained, but close relationship between the two families had been admitted by both the sides. When we come to the statements under section 342, Cr.P.C. of the appellants, they have frankly admitted that a quarrel had taken place in the early hours of the day on 26-7-2002, between the deceased and the complainant and all of them have replied in affirmative while answering question No.2, relating to the previous skirmishes between them. By this way, the enmity between the complainant and the appellants stands admitted. The last incident, pursuant to the sore relationship between the parties, prior to the main occurrence took place at 8-00 p.m. when the complainant was beaten by the appellants and their acquitted co-accused, at the shop of Miskeen, situated in the Adda. The motive emerges to contain a number of collisions between the parties, the last in the sequence, taking place at 8-00 p.m. on the fateful day. The deceased brothers of the complainant after seeing the haplessness of their real brother decided to lodge a complaint with Aurangzeb, the brother of Ghalib, appellant-accused and behnoi of the deceased so, as to bring an end to the hostilities. Their decision in this regard is neither offensive nor entails any mischief as Aurangzeb was the person who being a relative on both the sides, could be effective in enforcing a lull between the related rivals. They acted upon their decision without having the slightest idea as to what was there for them in the store and what monstrous moments waited for them in the next few hours. The non- production of Miskeen on whose shop, the last clash prior to the occurrence occurred does not weaken the motive part of the incident as P.W.8 and P.W.9 have satisfactorily rendered the details of the clashes between the complainant and the accused, coupled with the fact that the statements of the accused-appellants under section 342, Cr.P.C. lend a strength of corroboration to the motive set up by the prosecution. In these circumstances, we have come to a definite conclusion that the prosecution has succeeded to prove motive, as set up by them while triggering off the legal machinery into motion.

18. As far as medical evidence is concerned, it provides unflinching corroboration to the witnesses of the ocular account as both the deceased, Muhammad Liaqat and Muhammad Shaukat had received multiple sharp-edged injuries at the hands of the appellants-accused besides, Wajid Abbasi, P.W.9 was almost killed by them, having given him grievous multiple

sharp edged injuries. The postmortem examination of both the deceased was conducted by Dr. Muhammad Arshad, C.M.O, P.W.6 vide postmortem examination report Exh.PR, qua Muhammad Liaqat deceased and Exh.PS qua Muhammad Shaukat deceased. The necropsy report Exh.PR discloses the infliction of six sharp-edged injuries and one punctured wound whereas, the postmortem examination report Exh.PS entails description of four sharp-edged fatal injuries and two blunt weapon injuries, a bruise and an abrasion. Same is the situation with the Medico-legal Report Exh.PV of Wajid Abbasi, injured. P.W., which shows four sharp edged injuries on, various parts of his body and he appears to have survived through his sheer good-luck as injury No.iii on his abdomen had caused the loops of small intestine, protruding out of the wound. The witnesses of ocular account, specially PW-9 has categorically deposed about the specific role played by the appellants- accused in committing the occurrence and the medical evidence supports their version in totality. The duration of injuries, the seat of injuries, the time elapsed between injuries and death, and between death and postmortem examination are all in line with the ocular account furnished by P.W.8 and P.W.9. We have noticed that the postmortem examination reports are not attached with the pictorial diagrams and the learned counsel for the appellants has effervescently pointed at the said omission with the contention that in absence of the pictorial diagrams the entries of the postmortem examination reports cannot be read against the appellants, we are afraid, that the learned counsel is badly misconceived as the non-existence of the sketches does not undermine the intrinsic value of these important reports nor these can be thrown away due to the said omission. Both the Medical Officers have been subjected to detailed cross-examination but we do not find any infirmity in their statements which could cause brushing aside of their statements; therefore, we have concluded that the medical evidence did corroborate the ocular version perfectly.

19. Insofar as the evidence of recovery of the weapons of offence from the appellants is concerned, we find from the statements of Haji Ghaffar, P.W.2, Tariq Mahmood, P.W.3 and Arshad Ali SI/I.O., P.W.10 that Muhammad Ghalib, Nasir Mahmood, and Muhammad Haneef appellants led to the recoveries of blood-stained chhuri P 6, vide memo Exh.PJ, blood-stained chhuri P-8 vide memo Exh.PL and blood stained chhuri P-1 vide memo Exh.PC, respectively while Waheed Ahmad appellant-accused led to the recovery of blood stained hatchet P 3 vide memo Exh.PE. He also led to the recovery, of pistol P-4, vide memo Exh. PP. The report of Chemical Examiner Exh.PFF reveals, that the weapons got recovered by the appellants were stained with blood and the scrappings thereof, sent to the office of the Serologist have been found to be of human origin, vide report Exh.PPF/1, released by the Serologist Govt. of Punjab, Lahore. Haji Ghaffar P.W.2 and Tariq Mahmood P.W.3 have established the factum of the recovery of the aforesaid weapons at the instance of the appellants. Though, some discrepancies appear in their testimonies but those are of trivial nature. The Investigation Officer Arshad Ali, SI, P.W. 10 who recovered all the above said articles during the course of investigation, at the behest of the appellants, looked a bit wavered and reminiscence-less in his testimony but his inattention and heedlessness has done little damage to the evidence in this regard. The statements of P.W.2, P.W. 3 and P.W.10 read with the above said documentary evidence lend a sense of corroboration to the prosecution's case. The laboratory reports cannot be discarded by any argument as the sealed parcels containing the above said weapons and the scrappings thereof, had been received intact by the said Labs. Besides during the cross-examination of the above said witnesses it has not

been suggested by the defence that the weapons in question were sent to the said Lab. after having been tampered with in any manner, rather the suggestions put to P.W.4 by the defence are found to be self-destructive to the arguments raised before us. Therefore, we find the evidence on the point of the recovery of the above said weapons of offence, creditworthy and reliable.

20. Insofar as the ocular evidence is concerned, in absence of any serious flaw or discrepancy in the testimonies of P.W.8 and P.W.9 the same cannot be disbelieved or discarded simply due to the relationship of the eye-witnesses with the deceased persons of this case. The matter was reported to the police with utmost promptitude, in fact, within about two hours. One of the eye-witnesses, Wajid Abbasi, P.W.9 is an injured witness, so his presence at the place of occurrence cannot be questioned or ruled out. Even the learned defence counsel has not disputed his presence at the spot, at the relevant time rather, he argued that he along with his companions Muhammad Shaukat and Muhammad Liaqat, being armed with different weapons had trespassed into his house, caused injuries to Ghalib appellant-accused, his wife and his mother-in-law so he, in order to save the life, honour and chastity of the family, held a chhuri from the kitchen of his house and single handedly stabbed it into their bodies one after the other, who, on receiving the injuries ran away from his house and stumbled to fall down at some distance from his house where they were spotted after about half an hour by the P.Ws. who shifted them to the hospital but due to excessive loss of blood, two of them Muhammad Liaqat and Muhammad Shaukat died on way to the hospital.

21. The complainant P.W.8 had not been having speaking terms with Muhammad Ghalib for a period of about 4/5 years who quarrelled with him on a number of occasions. It was on 26-7-2002 that Muhammad Rafaqat complainant was engaged in a brawl with Muhammad Ghalib accused, firstly in the early hours of the morning and then at 8-00 p.m. at the shop of Miskeen but on both the occasions the people present there, intervened and separated them. The occurrence at 8-00 p.m., prior to the main occurrence was graver than the one, having taken place in the morning as all the appellants-accused in cahoots of their acquitted co-accused had pounced upon Muhammad Rafaqat but he was lucky to be saved again by the people around. This was the stage when it was decided by the complainant and his real brothers, joined by Wajid Abbasi, their cousin, to report the matter to Aurangzeb, their behnoi and a brother of Muhammad Ghalib appellant. It was a wise decision on their part as they had compound relationship inter se as real sister of Muhammad Ghalib appellant was the wife of Muhammad Liaqat deceased and at the same moment, Aurangzeb, the brother of Muhammad Ghalib appellant was the husband of the real sister of the deceased. After lodging a complaint with Aurangzeb, the ill-fated party was returning to their house, when they reached the place of occurrence, the appellants and their acquitted co-accused caught them by surprise, as they being armed with lethal weapons, ambushed them at about 9-00 p.m., emerging from the hedges and authored terminal injuries on the bodies of Muhammad Shaukat and Muhammad Liaqat deceased, whereas, they caused an injury on the abdomen of Wajid Abbasi, P.W.9 besides other injuries, which caused bulging out of small intestine from the wound. Muhammad Rafaqat P.W.8 has endorsed his previous version as contained in his complaint Exh.PA and deposed about the occurrence in a manner, which is truly corroborated by the testimony of Wajid Abbasi, P.W.9.

22. The hallmark of the statement of P.W.9 is that he has given the detail of the occurrence in minutest term and has burdened the appellants with the specific role of authoring injuries not only on the bodies of the deceased persons but also on his body. The terminal injuries stand attributed to Muhammad Ghalib and Waheed Ahmad appellants accused with precision and he has also mentioned about the infliction of injuries on his person by Haneef alias Pappu appellant and Muhammad Ghalib appellant-accused. Wajid Abbasi, P.W.9 has perfectly corroborated his previous stance before the police, as contained in his statement under section 161, Cr.P.C., wherein he has been very specific not only about the injuries of both the deceased but also that of his own, caused by the appellants-accused. Despite lengthy cross-examination, on these P.Ws., the defence badly failed to gain anything.

23. The defence plea, introduced by Muhammad Ghalib appellant-accused is fantastic and unbelievable. It looks ridiculous and bizarre that Muhammad Shaukat, Muhammad Liaqat, deceased and Wajid Abbasi being armed allegedly committed aggression by launching an attack on the house of Muhammad Ghalib accused and ended up with two dead bodies and the third almost killed without causing any injury to the persons allegedly attacked upon by them. Though, it has been contended in his defence plea by Muhammad Ghalib appellant that he had gone to a hospital at Islamabad (PIMS) for his medical examination but he was taken into custody by the police and that was why he could not get himself medically examined or fetch some document from a medical officer in support of his plea of self-defence, yet, his plea does not ring true or sound plausible as his wife and mother-in-law who too according to him had been injured in the occurrence, were neither taken into custody by the police nor they had been debarred by any one from the complainant side to approach a medical officer/doctor for their medical examination. In fact, the plea raised by the appellant Muhammad Ghalib is nothing but a farce. We again do not find any reasonableness in his contention that the deceased etc. had covered a distance of about 1 kilometer to attack him and that they had been stabbed and injured by him inside his house at the shop of Aurangzeb, where the deceased and others had gone to lodge a complaint was not miles away from the house of the appellant-accused Muhammad Ghalib but its distance from his house was so meagre that it has been mentioned by the P.Ws. in feet. Had it been so that the house of the said appellant-accused not fallen on way to the shop of Aurangzeb, there might have been some substance in the defence plea of the accused.

24. The witnesses of ocular account have given a clean breast of the occurrence without contradicting each other on any aspect of the case and they appear to have rendered naturally believable evidence. No extra argument is required to establish the presence of Wajid Abbasi, P.W.9 at the place of occurrence as he has irremovable imprint of his presence at the place of occurrence which is directly substantiated through medical evidence. The small distance between the house of Muhammad Ghalib appellant from the place of the occurrence cannot belie the version of the eye- witnesses as we do not find any weakness, feebleness or fragility in their testimonies. The ocular account has been furnished by the truthful witnesses and the statement of these P.Ws. has affixed a seal of truth, believability and authenticity qua the veracity of the prosecution case. There may be some contradictions in their statements but those have been found to be minor in nature and cannot be regarded as of such nature which can become a ground for discarding the ocular account. Therefore, we conclude that the ocular evidence is duly supported by the medical evidence, the evidence of the recovery of the crime weapons, the motive and by the other attending circumstances which have led us

believe that the ocular account is trustworthy credible and worth reliance against the appellants-accused. Therefore, we confirm their conviction as recorded by the learned trial Court.

25. So far as the defence plea, agitated by Muhammad Ghalib appellant in his statement under section 342, Cr.P.C. is concerned it has been discussed a little bit in the preceding paragraphs of this judgment. He however, has contended that Muhammad Liaqat (deceased), Muhammad Shaukat (deceased) and Wajid had trespassed into his house on the day of the occurrence, after covering a distance of 1 kilometer and caused injuries to him, his wife and mother-in-law due to the previous altercations between him and Rafaqat alias Bagga, complainant P.W.8. He has further contended that he by exercising his right of private defence took out a chhuri from his kitchen and gave a few blows to the assailants who after receiving the injuries ran out of his house and fell in injured condition near the house of Najmul-Hassan and Zarwaiz whereas, Wajid Abbasi fled away from the said place. He has further contended that both the deflated injured remained alive for about half an hour and died subsequently. He further contends that he along with his injured family members went to Poly Clinic Hospital for treatment where he was arrested and that he too had lodged a complaint with the police but his version/report had not been recorded by the police as they were hands in gloves with the complainant party. He used his full energy to orally submit that he alone had stabbed the deceased and the injured P.W. and that none of his co-accused had taken part in the incident and that the allegations levelled by the prosecution against him and his co-accused were concocted. It was incumbent upon the appellant-accused Muhammad Ghalib to discharge the onus to prove his exceptional plea as per requirement of Art. 121 of the Qanun-e-Shahadat but he neither appeared himself as his own witness under section 340(2), Cr.P.C. nor he showed valor and confidence to adduce any defence evidence. Reliance is placed on a recent judgment passed by the august Supreme Court of Pakistan in the case titled Anwar Shameem and another v. The State (2010 SCMR 1791). The defence plea, as introduced by Muhammad Ghalib, appellant is worth rejection in more than one way, being unnatural, preposterous and fantastic. It does not appeal to reason that three youthful persons would travel to the house of the appellant-accused from a distance of 1 kilometer being armed, and would surrender meekly to be clubbed and stabbed time and again by the lone appellant accused who could not show even a single scratch on his person nor on the person of his wife or mother-in-law. The attending circumstances, as mentioned hereinbefore clearly show that the deceased party had been caught by surprise, ambushed and wounded by the appellants who sat in wait for the returning deceased party from the shop of Aurangzeb and this is how they sustained the casualties. The defence plea is bound to be rejected both on the facts and the law.

26. For what has been discussed above and in the circumstances mentioned hereinbefore we uphold and confirm the conviction and sentence of the appellants accused as recorded by the learned trial Court in the impugned judgment. Resultantly, the appeal (Criminal Appeal No.79 of 2004) filed by Muhammad Ghalib, Nasir Mahmood, Muhammad Hanif and Waheed Ahmad appellants-accused is dismissed.

27. The Criminal Revision No.112 of 2004 filed by the complainant, for the reasons discussed hereinabove dismissed.

28. The Murder Reference No.299 of 2004 qua Muhammad Chalib and Waheed Ahmad appellants is answered in the affirmative.

MWA/M-600/L Appeal dismissed.

2013 P Cr. L J 1458

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD JAMIL and others---Petitioners

Versus

The STATE and others-Respondents

Criminal Miscellaneous Nos.2276-B and 2449-B of 2013, decided on 12th March, 2013.

Criminal Procedure Code (V of 1898)---

----Ss. 498 & 345---Penal Code (XLV of 1860), Ss. 420, 468 & 471---Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document---Ad interim pre-arrest bail, confirmation of---Grant of bail on basis of compromise in case of non-compoundable offences---Scope---Plea of accused persons that a compromise had been effected between the parties and monetary claim of complainant had been indemnified to his entire satisfaction---Complainant did not object to allowance of bail to accused persons---Plea of State Prosecutor that offences committed by accused persons were non-compoundable, therefore, they should not be allowed bail---Validity---Complainant appeared to be fully satisfied with the terms of the compromise and did not oppose bail plea of accused persons---Although offences mentioned in the F.I.R. were non-compoundable but compromise/reconciliation between parties was a redeeming feature, which brought peace and harmony in the society---Courts always respected enthusiasm and passion of parties to compound the offence, whether the same was compoundable or not---Will of parties to compound the offence had to be respected and given assent to, so that they might bear the fruit thereof---Ad interim pre-arrest bail already granted to accused persons was confirmed in circumstances.

Abdul Khaliq Safrani for Petitioners (in Criminal Miscellaneous No.2276-B of 2013).

Ch. Tariq Mehmood for Petitioner (in Criminal Miscellaneous No.2449B of 2013).

Ch. Muhammad Jahangir, Deputy Prosecutor-General Punjab for the State.

Complainant in person.

Muhammad Arshad, A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Through this single order, I intend to dispose of two bail applications, separately moved by accused Muhammad Jamil and Ghulam Mustafa (Criminal Miscellaneous No.2276-B of 2013) and accused Aziz-ur-Rehman (Criminal Miscellaneous No.2449-B of 2013), as they stood involved in case F.I.R. No.431/12, dated 22-6-2012, registered for offences under sections 420, 468, 471, P.P.C., at Police Station, Township (Lahore).

2. Precisely, the story of F.I.R., as set-up by Muhammad Akram (complainant) is that he handed down a sum of Rs.9,60,000 to Aziz-ur-Rehman (petitioner) with a view to get his son and other relatives employed in Police and Customs Departments; the latter gave him six appointment letters, pertaining to the said departments and on verification, they turned out to be fake; he asked the said accused to refund the amount, whereon, through efforts of punchayat, he delivered two post-dated cheques of Rs.4,00,000 and Rs.2,00,000 to him; Aziz-ur-Rehman accused-petitioner by joining his co-accused Jamil and Ghulam Mustafa (petitioners) committed the offence of forgery and extended threats of dire consequences and that of murder, in case, he (complainant) would lodge any case against them.

3. At the very outset, learned counsel for the petitioners submit in unison that compromise has been effected between the parties and complainant's claim has been indemnified to his entire satisfaction and in this background he does not press against the bail-plea of the accused.

4, The complainant, Muhammad Akram, who has been identified by Muhammad Arshad ASI/I.O., endorses the said viewpoint by adding that terms and conditions of compromise/agreement have been reduced into writing and signed by both the sides, the original whereof along with his sworn affidavit has been furnished by him to substantiate the said plea; further submits that he does not object to allowance of the bail-plea of the accused/petitioners, on the basis of compromise.

5. Learned Deputy Prosecutor-General Punjab, however, is not pleased with the situation and submits that offences committed by the petitioners are non- compoundable besides being heinous, therefore, he prays for rejection of these petitions.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the warring-parties have entered into compromise through an agreement-deed (Mark-A), which entails terms and conditions agreed upon by them. The complainant appears fully satisfied with the terms of compromise, as such, he does not oppose the bail-plea of the accused-petitioners, which is also evident from his sworn 16 affidavit (Mark-B). Though, the accusations, mentioned in the F.I.R., constitute non-compoundable offences yet, compromise/reconciliation between the parties has always been held a redeeming feature, which brings peace and harmony in the society and only for this reason, the courts have always respected enthusiasms and passion of the parties to compound the offence, being compoundable or not. This is of course, not a job of the courts to pressurize the parties to continue with their hostilities or prosecute each other for years. The offence allegedly committed and gravity thereof can be validly determined by the learned trial Court after recording evidence of the parties at trial. Let parties' will to compound the offences be

respected and given an assent to, so that they may bear fruit thereof.

7. Therefore, the mentioned applications are accepted and the ad interim pre-arrest bail granted to the petitioners vide orders dated 20-2-2013 and 25-2-2013 are confirmed subject to 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.

MWA/M-108/L Bail confirmed.

2013 P Cr. L J 1804

[Lahore]

Before Shahid Hameed Dar and Muhammad Yawar Ali, JJ

AHMED RAZA---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.2715/M of 2012 in Criminal Appeal No.1670 of 2004 and Murder Reference No.137 of 2005, decided on 13th March, 2013.

Criminal Procedure Code (V of 1898)---

----Ss. 382-B & 561-A---Penal Code (XLV of 1860), Ss. 302(b) & 316---Qatl-e-amd, qatl Shibh-e-amd---Grant of benefit of S.382-B, Cr.P.C., application for---Capital punishment awarded to accused during trial was altered to rigorous imprisonment for fourteen years, but no order with regard to benefit of S.382-B, Cr.P.C. was made; it was mandatory that pre-sentence period of imprisonment, must be taken into consideration by the Trial Court, before awarding sentence, other than capital punishment to accused as provided under S.382-B, Cr.P.C.---Appellate Court had essentially been empowered to extend benefit of pre-judgment incarceration to accused, if was not done by the Trial Court, owing to some error or omission, or due to some compelling reason---Said relief was not to be extended to an accused by way of grace, but it ought to be granted as a matter of right---Refusal to take into account the pre-judgment imprisonment, could be a patent illegality in the eyes of law---Benefit of S.382-B, Cr.P.C. being available to accused, same was to be extended to him in express term---So far as, reckoning at the period of incarceration of accused, was concerned, it would be the domain of Jail-Superintendent to make necessary calculation, by keeping in view the relevant record of the jail, where accused stood lodged as an under trial prisoner and/or a convict.

Shah Hussain v. The State PLD 2009 SC 460 rel.

Syed Tahir Abbas Rizvi for Petitioner.

Khurram Khan, Deputy Prosecutor-General Punjab for the State.

ORDER

Criminal Miscellaneous No.2715-M of 2012

Ahmad Raza-petitioner and his co-accused Azhar Hussain was held guilty under section 302(b)/34, P.P.C. by the learned Additional Sessions Judge, Gujrat, vide judgment dated 5-10-2004, for committing murder of Ali Imran and sentenced to death and imprisonment for life, respectively, with direction to pay a sum of Rs.1,00,000 each to the legal heirs of the deceased as compensation under section 544-A, Cr.P.C. or in default whereof to undergo simple imprisonment for six months each. Benefit of section 382-B, Cr.P.C. was, however, extended to Azhar Hussain-convict. They challenged their conviction/sentence by filing Criminal Appeal No.1670 of 2004 and Criminal Appeal No.1671 of 2004, respectively. The appeal filed by Azhar Hussain (Criminal Appeal No. 1671 of 2004) was allowed by this Court vide consolidated judgment dated 30-7-2009 and he was acquitted of the charge, whereas the petitioner's appeal (Criminal Appeal No.1670 of 2004) was dismissed with a modification in his conviction from 302(b), P.P.C. to 316, P.P.C. and sentence from imprisonment for life to rigorous imprisonment for fourteen years along with Diyat, to be paid to the legal heirs of the deceased. He was ordered to be kept behind the bars after serving the sentence of imprisonment till such time, he would pay the amount of Diyat. No order with regard to benefit of section 382-B, Cr.P.C. was passed by this Court while converting his conviction/sentence, as it was not prayed for on behalf of the appellant.

3(sic.) Through this miscellaneous application (Criminal Miscellaneous No.2715/M of 2012), the petitioner, however, has invoked extra-ordinary inherent jurisdiction of this Court under section 561-A, Cr.P.C. for grant of benefit under section 382-B, Cr.P.C.

4. Learned counsel for the petitioner confidently submits that he did not approach the august Supreme Court of Pakistan after dismissal of his appeal by this Court; the provisions of section 382-B, Cr.P.C. have been made mandatory by the Code of Criminal Procedure (Second Amendment Ordinance No.LXXI of 1979); the omission to grant the said relief by this Court militates against the law and it was liable to rectification, as envisaged by the relevant provisions of section 561-A, Cr.P.C.

5. Learned counsel for the State does not oppose the prayer made on behalf of the petitioner.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner was convicted under section. 302(b), P.P.C. and awarded sentence of death, as noted above, by the learned trial Court. His conviction and sentence, however, was modified by this Court vide judgment dated 30-7-2009 passed in Criminal Appeal No.1670 of 2004, in terms that he was held guilty under section 316, P.P.C. instead of offence under section 302(b), P.P.C. and capital punishment awarded to him during trial was altered, to rigorous imprisonment for fourteen years, but no order with regard to benefit of section 382-B, Cr.P.C. was made. In order to appreciate the prayer of the petitioner in its true perspective, it is worthwhile to reproduce the provisions of section 382-B, Cr.P.C. and section 561-A, Cr.P.C., which read as follows:--

I. SECTION 382-B Cr.P.C.:

"Period of detention to be considered while awarding sentence of imprisonment.- Where a Court decided to pass a sentence of imprisonment on an accused for an offence it shall take into consideration the period, if any, during which such accused was detained in custody for such offence. Appellate Court has power to apply this section."

II. SECTION 561-A Cr.P.C.:

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

The use of word "shall" in section 382-B, Cr.P.C. renders it mandatory that pre-sentence period of imprisonment must be taken into consideration by the trial Court, before awarding sentence, other than capital punishment, to an accused. The appellate Court has essentially been empowered to extend benefit of prejudgment incarceration to a convict, if not so done by the trial Court, owing to some error or omission or due to some compelling reason. The aforementioned relief is not to be extended to an accused by way of grace, rather, it ought to be granted as a matter of right. The refusal to take into account the pre-judgment imprisonment may be a patent illegality in the eyes of law. The Hon'ble Supreme Court of Pakistan while dealing with an identical situation in case, Shah Hussain v. The State (PLD 2009 SC 460) has elaborated that:--

"if a Court sentences a convict to imprisonment for life, which is the alternate but maximum sentence for the offence of murder, but does not make allowance for the pre-sentence custody period, it would be punishing the convict prisoner with imprisonment for life plus the pre-sentence custody period, that is to say, more than the maximum legal punishment;"

The afore-referred relief has not been extended to the petitioner by this Court, probably inadvertently, while passing judgment dated 30-7-2009 in Criminal Appeal No.1670 of 2004. The benefit of section 382-B, Cr.P.C. is certainly available to the petitioner, which is accordingly extended to him in express terms.

7. So far as, reckoning at the period of incarceration of the petitioner is concerned, it would be the of the Jail-Superintendent(s), to make necessary calculations, by keeping in view the relevant record of the jail(s), where the petitioner stood lodged as an under trial prisoner and/or a convict. The judgment passed by this Court in respect of the petitioner on 30-7-2009 in Criminal Appeal No.1670 of 2004 (supra) shall be deemed to ingrain the benefit of section 382-B, Cr.P.C.

8. The instant petition stands disposed of in terms mentioned hereinabove.

HBT/A-44/L Order accordingly.

P L D 2013 Lahore 506

Before Shahid Hameed Dar, J

THE STATE---Petitioner

Versus

ABDUL SHAGOOF----Respondent

Criminal Miscellaneous No.875-BC of 2013, decided on 12th March, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(5)---Penal Code (XLV of 1860), Ss. 392 & 397/34---Robbery, robbery or dacoity, with intent to cause death or grievous hurt---Suo motu notice under S.497(5), Cr.P.C---Mala fide of police--- Probability of false implication in the offence by the police--- Effect---Accused had been granted post arrest bail by Trial Court---High Court issued suo motu notice under S.497(5), Cr.P.C to the accused on the basis that bail granting order seemed to have been passed in disregard to the material available---Plea of accused that he had been involved in the case due to vindictive police officials---Validity---Accused was being harassed by the police which led him to file a petition under Ss.22-A & 22-B, Cr.P.C against Station House Officer, which was disposed of by Justice of Peace with a direction to Station House Officer not to cause undue harassment to the accused and his family---Accused was subsequently picked up and confined by the same Station House Officer, because of which wife of accused filed a habeas corpus petition under S.491, Cr.P.C, wherein a bailiff was appointed by the court to recover the accused-detenu from the custody of the police---During such stage, Station House Officer devised a supplementary statement of the complainant of the F.I.R. and roped the accused in the case---Date of implication of accused in the offence coincided with the date of his recovery by the bailiff---Residential address of the accused assimilated with the address of the complainant, which gave rise to the probability that complainant and his witnesses might have been familiar and acquainted with the accused, prior to the date of test identification parade---Probability could not be ruled out that accused had been involved in the case due to mischievous wire-pulling by the police---Trial of accused had already commenced---Although bail granting order of Trial Court was not ideally good nor based on cogent arguments, yet, High Court refused to interfere in the same---Suo motu notice issued to accused under S.497(5), Cr.P.C was withdrawn accordingly.

Ch. Muhammad Jehangir, Deputy Prosecutor General Punjab for the State with Muhammad Ashraf S.I.

Respondent in person with Muhammad Asghar Bhatti.

ORDER

SHAHID HAMEED DAR, J.---During arguments in post arrest bail application (CrI.Misc.No.17240-B-2012) moved by Ahsan Taqveem accused, it transpired that respondent Abdul Shagoof had been granted post arrest bail vide order dated 10-8-2012 by the learned Magistrate section 30, Ferozewala (Sheikhupura). On perusal of the bail granting order, it looked unimpressive, having been passed in disregard to the material available, which led to

issuance of notice under section 497(5) Cr.P.C. to the respondent- accused.

2. Learned counsel submits that the respondent-accused has been falsely involved in this case by the vindictive police officials as his wife Mst.Shabana Kausar moved a petition under section 491, Cr.P.C. before the learned Additional Sessions Judge, Ferozewala for recovery of her husband and one Sabir Hussain which led to recovery of the alleged detenus by the bailiff on 28-6-2012 and since then, SHO of Police Station Factory Area (Sheikhupura) became a personal enemy of the respondent-accused and his other family members; the respondent-accused, his wife and his brothers filed a petition under sections 22-A, 22-B Cr.P.C. against aforesaid SHO which was disposed of vide order dated 23-6-2012 by an Ex-Officio Justice of Peace, Ferozewala with a direction to the respondent-SHO not to cause undue harassment to the petitioners; in both the petitions, the SHO tendered report that Abdul Shagoof was not required in any case nor he had been harassed by the police in any unlawful manner; the alleged occurrence took place on 9-6-2012, which was reported to the police by Muhammad Bashir (complainant) through F.I.R. No.673/12, under sections 392, 397, P.P.C., Police Station Factory Area (Sheikhupura), wherein, three unknown accused were alleged to have committed the offence; the investigating officer booked the respondent-accused in this case, on 28-6-2012 through supplementary statement of the complainant and it so happened, when he was recovered by the bailiff from the said police station, the same day; the test identification parade is of no consequence as respondent-accused and the complainant resided in the same colony/area.

3. Learned Deputy Prosecutor General Punjab appearing on behalf of the State opposed contentions of the learned counsel for the accused.

4. After hearing learned counsel for the parties and perusing the record, it is observed that the bail granting order has been passed in sheer disregard to the record available as, observations made by the learned judicial magistrate are ridiculous as well as unconvincing. The evidence of test identification parade did not look worth-consideration to the learned trial court as he could not find any order of learned Sessions Judge or that of learned Magistrate for fixation of date and time of said exercise. Interestingly, the police record categorically shows that learned Sessions Judge, Sheikhupura directed learned Ilaqa Magistrate, vide order dated 7-7-2012 to "conduct identification parade of the said accused person, in accordance with law", in response to which learned Ilaqa Magistrate fixed the date as 17-7-2012, for holding the test identification parade, in the premises of District Jail, Sheikhupura. The record further reveals that the test identification parade was held on 17-7-2012 under the supervision of learned Ilaqa Magistrate during the course of which the complainant and others correctly picked up the respondent-accused and his co-accused. Learned bail granting court has recorded another facetious finding as to the age(s) of the accused including the respondent-accused, which is equally implausible. Does it mean that the order in question may be recalled only for the mentioned fallacies?

5. Let an answer to the noted question be searched for. The respondent-accused, for one reason or the other, was being teased by the police when he along with his wife and brothers filed a petition under sections 22-A, 22-B, Cr.P.C. against the SHO of P.S. Factory Area (Sheikhupura), which was disposed of vide order dated 23-6-2012 by the Ex-Officio Justice of Peace, with a direction to the respondent-SHO not to cause undue harassment to the

petitioners. Nevertheless, the respondent-accused was unlawfully picked up and confined by the said SHO which constrained his wife Shabana Kausar to file a petition under section 491, Cr.P.C. wherein a bailiff was appointed by the court who recovered the alleged detenu from custody of the police on 28-6-2012. It was at this stage, when, the respondent-SHO devised a supplementary statement of the complainant and roped the respondent-accused and three others in this case as accused. Interestingly, the date of implication of the respondent accused in the said case coincides to the event of his recovery by the bailiff, on the same day. The residential address of the respondent accused assimilates the address of the complainant which gives rise to a probability that the complainant and his co-witnesses might have been familiar and acquainted with the former, earlier to the date of test identification. Further remarks in this regard may prejudice anyone's case, therefore, it is left for the trial court to assess evidentiary value thereof (test identification) during trial. The probability cannot be ruled out that the involvement of the respondent-accused in this case may be due to mischievous wire-pulling by the police. Though order in question is not ideally good nor based on cogency-filled arguments, yet, it is not set aside for the reasons mentioned, hereinabove. Another fact which is equally crucial, does not allow interference in the said order, which relates to the factum of commencement of trial of the respondent-accused. The suo motu notice under section 497(5), Cr.P.C. issued to the respondent accused is withdrawn. The outcome of the impugned order remains intact.

MWA/S-36/L Petition dismissed.

P L D 2013 Lahore 540

Before Shahid Hameed Dar, J

BAHADAR ALI---Petitioner.

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.18819-B of 2012, decided on 13th February, 2013.

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

----S.497---Second bail application, filing of---Fresh grounds---Scope---When first bail application of accused was dismissed as withdrawn, all the grounds available on the date extinguished, necessitating a fresh ground to be raised by the accused for purpose of repeating his bail application.

The State through Advocate-General, N.-W.F.P. v. Zubair and 4 others PLD 1986 SC 173 and Muhammad Siddique v. The State and another Criminal Petition No.896-L of 2012 rel.

Muhammad Riaz v. The State 2002 SCMR 184 distinguished.

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

----S. 497---Penal Code (XLV of 1860), Ss. 302 & 34---Qatl-e-amd, common intention---Bail, refusal of---Second bail application, filing of---Fresh grounds---Scope---First bail application dismissed as withdrawn after arguments at some length---Effect---Such withdrawal was not withdrawal simpliciter---Fact that counsel for accused withdrew first bail application, without having sensed the outcome thereof, could not be believed---Fresh ground for filing subsequent bail application was one which shot into existence after rejection of earlier bail application either on merits or having not been pressed---Request of accused for withdrawal of his first bail application would haunt all his subsequent endeavors for release on bail, till he came across a fresh ground in the real sense--- Bail application of accused was dismissed in circumstances.

Aziz Ahmad Bhatti for Petitioner.

Mrs. Muqadass Tahira, Addl. Prosecutor-General Punjab for the State with Irshad S.I.

Mansoor-ur-Rehman Khan Afridi for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.326, dated 4-5-2012, under sections 302, 34 P.P.C., registered at Police Station Ghaziabad, Lahore.

2. Precisely the prosecution case as narrated by Faizan Shaukat (complainant) is that he received a telephone call from his mother at about 12-00 noon on 4-5-2012 regarding sickness of his younger sister, on receipt whereof, he returned to his house after fetching medicine for his sister; he along with his mother, disabled sister and younger brother was present at his house on the said day when accused Aslam Dogar alias Kadi Dogar armed with pistol, Bahadar Dogar (petitioner) armed with pistol, Mst.Abida armed with sota and Bashir alias Bhola armed with pistol trespassed on his house and mounted an attack which resulted into death of his father Muhammad Shaukat, who was fired at by accused Kadi Dogar; his disabled sister beseeched the accused to spare them but they would not listen to her; the accused fled the scene after committing the crime. The motive behind the occurrence was that the accused intended to forcibly occupy the house of the complainant.

3. Learned counsel for the petitioner submits that the petitioner has not been assigned any role by the complainant nor there exists any evidence to connect him with the commission of offence alleged; the petitioner underwent physical remand for many days but nothing was recovered at his instance; Mst.Abida Bibi whose role is at par with the accused petitioner has been granted post-arrest bail by the learned trial court; the petitioner's case calls for further probe into his guilt, therefore, he may be set at liberty.

4. On the other hand, learned Additional Prosecutor General Punjab assisted by learned counsel for the complainant opposes with the contention that the instant petition is second on the subject and in absence of any fresh ground, it is not maintainable as envisaged by judgment, titled "The State through Advocate General, N.-W.EP v. Zubair and 4 others" reported as (PLD 1986 SC 173); the petitioner immediately after the occurrence committed an

offence of extortion which led to registration of case F.I.R. No.558, dated 4-5-2012, under sections 324, 386 P.P.C. at Police Station North Cantt., Lahore; on finalization of investigation, the petitioner having been found involved in the occurrence, was placed in Column No.3 of the challan; the petitioner is a hardened and desperate criminal as he is involved in almost a dozen cases of alike nature.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the first bail application (Criminal Miscellaneous No.16471-B of 2012) of the petitioner was dismissed as withdrawn vide order dated 22-11-2012 by this court and with it, all the grounds available to him on the said day extinguished, necessitating a fresh ground to be hinted at by the accused-petitioner, if he would ever think of repeating an identical petition before this court for release on bail. This is what the requirement of ratio of the illustrious judgment of the apex court, titled "The State through Advocate General, N.-W.F.P. v. Zubair and 4 others" (PLD 1986 SC 173) is and this view-point has been upheld again, in a recent judgment passed on 3-1-2013 in Criminal Petition No.896-L of 2012 titled "Muhammad Siddique v. The State and another", by the Hon'ble Supreme Court of Pakistan. Though, it was so held by the apex court, on an earlier occasion, that a subsequent/second bail application of an accused even in absence of any fresh ground, was maintainable if the earlier one on the subject was not pressed on merits and dismissed as withdrawn as per case-law titled "Muhammad Riaz v. The State" (2002 SCMR 184) yet, the latest view, in terms of judgment dated 3-1-2013, as mentioned above, must prevail. It was not a case of withdrawal simpliciter when first bail application of the petitioner was dismissed as the matter had been argued at some length by his learned counsel. It cannot be believed that the learned counsel withdrew the first bail application, without having sensed the outcome thereof. Learned counsel for the petitioner has vehemently argued that more than three months time-period has elapsed since passing of first bail dismissal order and in the meanwhile many-a-days have dawned and many a nights fallen which necessarily gives rise to a fresh ground, lending a sense of maintainability to the instant petition, which, I am afraid, is a mere misconception as sun-rise or sun-set, moon-rise or moon-set, day-break or night-fall, arrival of icy winter or departure of simmering summer, does not give rise to any fresh ground, for holding the second bail application maintainable under the law. To encapsulate, a fresh ground is one which shoots into existence after rejection of earlier bail application either on merits or having not been pressed. The request of the petitioner for withdrawal of his first bail application would haunt all his subsequent endeavours for release on bail, till he comes across a fresh ground in real sense, which he is badly bereft of at the moment. Besides, the allegation of house trespass against the petitioner, being armed with pistol along with his armed cronies, followed by callous murder of Muhammad Shaukat (deceased) despite beseechment of a disabled sister of the complainant, are the crucial circumstances, which cannot be overlooked easily.

6. For the reasons supra, I am not inclined to accept this application which is dismissed accordingly.

MWA/B-9/L Bail refused.

P L D 2013 Lahore 646

Before Shahid Hameed Dar, J

RIAZ alias MABDAL---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.1190/B of 2013, decided on 20th March, 2013.

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

----S. 497---Bail, refusal of---Post-arrest bail petition withdrawn by accused after arguments at some length---Filing of subsequent bail petition on fresh grounds---Scope---First bail petition of accused was dismissed as having not been pressed, after arguments at some length---Accused himself decided to abandon his right of bail (by withdrawing his first bail petition), hence it was incumbent upon him to raise a fresh ground in his subsequent bail petition, which ground was not available to him earlier and had arisen subsequent to the withdrawal order---Withdrawal of first bail petition was not withdrawal-simpliciter as was manifest from the order, which hinted at advancement of arguments at some length by counsel for the accused, who having anticipated the outcome, took a decision to bring a premature halt to his quest for bail---Bail application of accused was dismissed in circumstances.

The State through Advocate-General, N.-W.F.P. v. Zubair and 4 others PLD 1986 SC 173 rel.

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

----S. 497---Post-arrest bail application withdrawn after arguments at some length---Filing of subsequent bail application on fresh grounds---Scope---Withdrawal of a post-arrest bail application synchronized with exhaustion of all grounds available---For moving second/subsequent bail application(s) it was expedient for the accused to search for a fresh ground, which was not available to him earlier and had arisen subsequent to the withdrawal order.

The State through Advocate-General, N.-W.F.P. v. Zubair and 4 others PLD 1986 SC 173 rel.

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

----S. 497(1), fifth proviso---Bail, refusal of---High Court dismissing bail application with a direction to Trial Court to conclude trial within 3 months---Delay in conclusion of trial occasioned by adjournments sought by defence---Effect---Record showed that direction for conclusion of trial within 3 months could not be complied with mainly due to stubbornness of the defence, as it sought repeated adjournments when prosecution witnesses were in attendance, therefore case fell within the mischief of fifth proviso to S.497(1), Cr.P.C---Bail application was dismissed accordingly.

Ch. Imtiaz Hussain Bhatti for Petitioner.

Ch. Muhammad Jehangir, Deputy Prosecutor General Punjab for the State with Arshad Ali, S.I.

Sardar Akbar Ali Khan Dogar for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks post-arrest bail in case F.I.R. No.218, dated 13-5-2008, for offences under sections 395 and 412, P.P.C., registered at Police Station Baraghar, District Nankana Sahib.

2. The relevant facts for consideration are that Mehboob Alam (complainant) along with his family members slept at his house, at night between 12/13-5-2008, when they suddenly got up on a slight inkling and found seven unknown armed men brandishing their weapons at him; the accused threatened, if he raised alarm, he would be shot at and killed; three of the accused tied his hands on the back and rendered all other inmates of the house hostages, snatched cash, cell-phone, gold-ornaments, wrist-watches, licensed pistol etc., worth lacs of rupees, at gunpoint and fled the spot with the looted articles.

3. The complainant rendered a supplementary statement on 17-9-2010, whereby he implicated Riaz alias Mabdal (petitioner), Nawaz alias Jajji, Mukhtar alias Mukhtari, Zaheer, Fakhroo, Imran and Maqbool Ahmad in this case on the basis of his personal inquiry and knowledge, whereafter, Riaz alias Mabdal (petitioner) was arrested on 20-9-2010 and sent to judicial lock-up for test identification parade, which took place on 29-9-2010, in proceedings whereof Mehboob Alam-complainant, Muhammad Nawaz and Amanat Ali, correctly picked him up. The accused/petitioner was formally arrested on 4-10-2010 and he got recovered gold-ornaments weighing thirteen tolas and rifle 8-MM on 14-10-2010. The Investigating Officer prepared a memo of identification qua these ornaments on 14-10-2010.

4. Learned counsel for the petitioner submits that the petitioner has been falsely involved in this case under a conspiracy by the complainant, who is of the same village, where the petitioner hails from; the test identification parade is of no consequence as complainant and his co- witnesses knew the petitioner for years prior to the alleged occurrence; the gold-ornaments and rifle 8-MM have been planted upon the accused so as to fabricate incriminating evidence against him; the petitioner is behind the bars for more than three years and his trial has not concluded so far; he is not a hardened, desperate or dangerous criminal, therefore, he may be set al liberty.

5. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant opposes with the contention that the petitioner's first bail application (Criminal Miscellaneous No.4246/B of 2012) was dismissed, having not been pressed, on 8-6-2012, with a direction to the trial Court to conclude the trial within three months, excluding the summer vacation; the prosecution witnesses have appeared before the trial Court on countless occasions, but they returned unexamined only due to non-availability of learned defence counsel; the petitioner, his co-accused and their learned counsel have occasioned delay in conclusion of the trial, which is evident from the order-sheet qua trial of the accused; no fresh ground exists in favour of the petitioner, hence, he may not be granted the relief of bail.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the instant petition, on behalf of the petitioner, is third on the trot, the first one (Criminal Miscellaneous No.4246/B of 2012) was dismissed as having not been pressed vide order dated 8-6-2012, after arguments at some length, with a direction to the trial Court to speed up the proceedings of the trial, so as to conclude it within three months. The second application (Criminal Miscellaneous No.18559/13-2012) was dismissed due to non-prosecution on 31-12-2012.

7. There is no cavil to the proposition that withdrawal of a post-arrest bail application synchronizes with exhaustion of all the grounds available, rendering it expedient, for the accused to search for a fresh ground, not available to him earlier and having arisen subsequent to the withdrawal-order, so as to move second or subsequent bail application(s). The petitioner himself decided to abandon his right of bail on 8-6-2012, hence, it is incumbent on him to fulfil aforesaid condition to press for release on bail. It is important enough that the ground of statutory delay in conclusion of trial was also shelved along with other grounds by the petitioner on the said day i.e. 8-6-2012. It was not a situation of withdrawal-simpliciter as is manifest from the bail dismissal-order, which hints at advancement of arguments at some length by learned counsel for the petitioner, who having anticipated the outcome of his oratory, took a decision to bring pre-mature halt to his quest for bail. The ratio decidendi of the judgment titled: The State through Advocate-General, N.W.F.P. v. Zubair and 4 others (PLD 1986 SC 173) certainly envisages, as to what an accused needed most after dismissal of his first/earlier bail application as withdrawn, the reply to which is hidden in a fresh circumstance/ground, arisen thereafter. The record reveals that the direction for conclusion of trial within three months went begging, mainly due to stubbornness of the defence, as they sought repeated adjournments when prosecution witnesses were in attendance. The accused stretched their irresponsible behavior to such an extent that they told the learned trial Court on 20-2-2013, when five prosecution witnesses appeared in the witness box, that they were yet to engage a defence counsel. There cannot be a worse example of non-seriousness, non-cooperation and idiotic-obduracy. No one else but the petitioner and his co-accused have occasioned delay in conclusion of the trial, which brings their case within the mischief of Exceptional clause of fifth proviso to section 497(1), Cr.P.C. and they cannot blame anyone else for the disqualification earned.

8. For the discussion supra, I am not inclined to accept this application, which is accordingly dismissed.

MWA/R-4/L Bail refused.

P L D 2013 Lahore 651

Before Shahid Hameed Dar, J

ALI RAZA and another---Petitioners

Versus

The STATE and another---Respondents

Criminal Miscellaneous Nos.741-B and 1465-B of 2013, decided on 26th March, 2013.

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

----Ss. 497 & 345---Penal Code (XLV of 1860), Ss. 395/41---Dacoity, dishonestly receiving stolen property---Bail, grant of---Grant of bail on basis of compromise for a non-compoundable offence---Scope---Accused persons allegedly snatched cash from the complainant and his wife---Accused persons and complainant subsequently reached a compromise and terms and conditions of the same had been reduced into writing vide an agreement deed, which was signed by complainant and one of the accused---Complainant being fully satisfied with the terms and conditions of compromise had no objection if accused persons were admitted to bail---Plea of public prosecutor that offence in question was non-compoundable, therefore accused persons could not be granted bail---Validity---Although offence alleged was not compoundable, but eagerness of the parties to settle their dispute by executing an agreement had to be given a sense of respect, so that they might harvest benefit thereof---Complainant and his wife were doctors by profession, hence educated persons, who understood the terms of the compromise well---If loss sustained by the complainant at the hands of accused persons was made good to his satisfaction, then there might be no harm in admitting accused persons to bail---Complainant had expressly stated that on account of the compromise he did not intend to prosecute the accused persons further---Accused persons were admitted to bail in such circumstances with the observation that complainant would be within his right to lodge a request for withdrawal of bail, if the accused side showed hesitation in complying with the terms and conditions of the compromise agreement.

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

----S. 345---Compromise in case of a non-compoundable offence---Scope---Compromise even in non-compoundable offences was a redeeming factor, which brought peace, harmony and coherence in the society, and it might have far-reaching positive effects in the lives of warring parties.

Syed Khadim Hussain Zaidi, Mazhar Hayat and Ch. Inayat-ur-Rasool Uppal for Petitioners.

Zahid Younas, District Public Prosecutor.

Muhammad Ahsan Bhoon and Tariq Bashir Awan for the Complainant.

Imran S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Through this single order, I intend to dispose of two bail applications, separately moved by accused Ali Raza (Criminal Miscellaneous No 741-B of 2013) and accused Tahir Hussain (Criminal Miscellaneous No.1465-B of 2013), as they stood arrested in case F.I.R. No.626 of 2012, dated 23-7-2012, registered for offences under sections 395, 411, P.P.C., at Police Station Saddar Gujranwala.

2. Precisely, the prosecution case as narrated by Dr.Shahbaz Asghar Uppal (complainant) is that he came-across an advertisement, published in The Daily Jhang, whereby, 'G.M. Ahmad Group of Company' had offered employment to visiting doctors/consultants; he established contact with Ali Raza (petitioner) on his cell-phone who asked him to come to his house on 4-4-2012, whereon, he reached there and met him; he visited his residence again on 15-4-2012, where he was introduced with one Mehmood alias Mirza Ahmad who posed for proprietor of the said company; all of a sudden Shahzad Asghar Butt driver started playing table-race-game with Mehmood alias Mirza Ahmad, who lost Rs.4.5 millions to the former; Mehmood alias Mirza Ahmad asked driver Asghar Butt alias Shahzad to show the amount so that he (Mehmood alias Mirza Ahmad), might pay him the said amount, which he lost to him in the game; Ali Raza accused/petitioner took an amount of Rs.7,00,000/- from him (complainant) and paid it to the winner of the game; he was asked by Ali Raza accused to visit his house on 3-5-2012 so that he might defray the debt-amount, whereon he went to the said house on 3-5-2012 in the company of his wife Dr.Tayyaba Shahbaz, who carried an amount of Rs.7.8 millions with her; Mst. Kalsoom Bibi accused was present there in the company of Rana Waheed Murad, Jamshaid Bhatti, Ali Raza (petitioner), Shahzad Asghar Butt, Mehmood alias Mirza Ahmad, Haji Muhammad Sharif, Haji Muhammad Tufail and two unknown accused, who, being armed with different weapons rendered him and his wife helpless and snatched a bag, full of cash Rs.7.8 millions, from his wife and confined them in a room; the accused also obtained their signatures on some blank stamp-papers under coercion; the accused chased him and his family so as to murder them.

3. At the very outset, learned counsel for the petitioners submit in unison that compromise has been effected between the parties and terms/conditions of agreement have been reduced into writing vide an agreement-deed, which has been signed by the complainant, his wife and Mst. Kalsoom Bibi, an accused of the F.I.R. owing to his satisfaction, the complainant does not oppose the bail-plea of the accused/petitioners.

4. Learned counsel appearing on behalf of the complainant do not oppose the contentions of the learned counsel, appearing on behalf of the accused/petitioners and submit that the complainant is fully satisfied with the terms and conditions of compromise, hence he has no objection, if the petitioners are admitted to post-arrest-bail.

5. Learned District Public Prosecutor, however, is not pleased

with the present situation and by tendering copies of some F.I.Rs., registered against the petitioners, submits that the offences being non- compoundable, the petitioners may not be granted the relief prayed for.

6. After hearing learned counsel for the parties and perusing the record, it is observed

that the detail of the occurrence, as narrated by the complainant is a mind-itching-factor and gives rise to a number of probabilities and speculations as to under what circumstances the complainant and his wife carried with them such a huge amount of money on the day of the alleged occurrence, especially when they had no idea whatsoever about the antecedents of the accused side. It is also an inquisitive circumstance that driver Shahzad Asghar Butt and Mehmood alias Mirza Ahmad played table-race-game under a heavy bet in presence of complainant etc. and for what reason he delivered an amount of Rs.7,00,000/- to the loser so as to facilitate him to pay the said amount to the winner. It appears that something is being hidden by both the sides. The probability cannot be ruled out that the F.I.R. case as narrated by the complainant suffered from certain distortions or twist of facts. Nevertheless, Mst. Kalsoom Bibi accused and Dr.Shahbaz Asghar Uppal have compounded the affair/offence as per terms and conditions, entailed in agreement-deed Mark-A, which the parties intend to follow in due course of time. The offence alleged is certainly non-compoundable but, eagerness of the parties to settle their dispute by executing an agreement, in mentioned terms has to be given a sense of respect, so that they may harvest benefit thereof. The complainant and his wife, who are doctors/medical-officers by profession, hence, educated persons; well understand the ins and outs of the compromise arrived at and they, being, present in person like Mst. Kalsoom Bibi accused have expressly stated that they on account of compromise do not intend to prosecute the accused-petitioners further. If the loss allegedly sustained by the complainant and his wife at the hands of the accused/petitioners has been made good, to their entire satisfaction, there may be no harm in allowing the instant applications for bail after arrest. Even otherwise, it has always been observed that the compromise even in non-compoundable offences is a redeeming factor, which brings peace, harmony and coherence in the society and it may have far-reaching positive effects, in the lives of warring-parties.

7. Therefore, I allow both the applications (Criminal Miscellaneous No.741-B of 2013 and Criminal Miscellaneous No.1465-B of 2013) and admit the petitioners to post arrest bail subject to furnishing bail bonds in the sum of Rs.5,00,000/- each with two sureties each in the like amount to the satisfaction of learned trial court.

8. Before parting with this order, it is clarified that the complainant would be within his right to lodge a request for withdrawal of aforesaid facility, if the other side shows hesitation in complying with the terms and conditions of the agreement, as entailed in the said deed (Mark-A).

MWA/A-48/L Bail granted.

K.L.R. 2013 Criminal Cases 63

[Rawalpindi]

Present: **SHAHID HAMEED DAR and ALI BAQAR NAJAFI, JJ.**

Arif Khan

Versus

The State, etc.

Criminal Miscellaneous No. 1625-B of 2012, decided on 23rd October, 2012.

BAIL (NARCOTICS) --- (Previous convict)

Criminal Procedure Code (V of 1898)---

---S. 497---Control of Narcotic Substances Act, 1997, S. 9(c)---Case for recovery of charas Gardah weighing 1250 grams---Petitioner was a previous convict---**Held:** It was not a fit case for grant of bail---Bail after arrest refused.

(Para 5)

[Petitioner was a previous convict. Bail was refused in contraband case].

For the Petitioner: **Basharat Ullah Khan, Advocate.**

Sheikh Istajab Ali, D.P.G. with Zafar Butt, S.I.

Date of hearing: **23rd October, 2012.**

ORDER

The petitioner seeks post-arrest bail in case F.I.R. No. 353 of 2012, dated 24.07.2012, for offence under Section 9(c) of the Control of Narcotic Substances Act, 1997 registered at Police Station Pirwadhai, Rawalpindi.

2. Precisely, the allegation against the petitioner is that he possessed Charas-garda weighing 1250 grams when apprehended by the police on 24.07.2012.

3. Learned counsel for the petitioner submits that the allegation against the petitioner is false and mentioned contraband substance has been planted upon him; the case of the petitioner is on a border line nature, therefore, he may be granted the relief prayed for.

4. On the other hand, learned D.P.G. opposed the grant of bail by contending that the petitioner is a previous convict and for an identical charge besides, being involved in five other cases of identical nature.

5. After hearing the learned counsel for the parties and perusing the record it is observed that the petitioner is a previous convict in case F.I.R. No. 16/2007, dated 20.08.2007, under Section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station R.D. A.N.F., Rawalpindi. He was handed down a sentence of 4 years' R.I. and fine of Judge ANF, Rawalpindi *vide* judgment dated 12.08.2009. The offence, the petitioner is confronted with, is hit by an embargo of Section 51 of the Control of Narcotic Substances Act, 1997 as well as by Section 497, Cr.P.C. It is not a fit case for grant of bail, which stands dismissed.

Bail after arrest refused.

K.L.R. 2013 Criminal Cases 95

[Lahore]

Present: **SHAHID HAMEED DAR, J.**

Ijaz Ahmad

Versus

The State, etc.

Criminal Miscellaneous No. 18735-B of 2012, decided on 24th January, 2013.

BAIL --- (Absconsion)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Arms Ordinance, 1965, S. 13---Explosive Substances Act, 1908, Ss. 4/5---Absconsion---Bail matter---Petitioner was granted bail after arrest---Petitioner subsequently got in a murder case wherein he absconded to avoid arrest---Petitioner however, earned a judgment of acquittal after a full-fledged trial---**Held:** Possibility could not be ruled out that petitioner absconded and jumped facility of bail out of fear, otherwise, he might not have done so---Petitioner was behind bar for about seven months---Bail after arrest granted.

(Para 12)

[illegible]

[After obtaining bail in instant case, petitioner became absconder due to fear of involvement in another murder case in which he, however, earned a judgment of acquittal. Bail was allowed].

For the Petitioner: **Muhammad Irfan Malik, Advocate.**

For the State: **Mrs. Muqadass Tahira, Additional Prosecutor General with Ahsan, ASI.**

Date of hearing: **24th January, 2013.**

ORDER

SHAHID HAMEED DAR, J. --- The petitioner seeks bail after arrest in case F.I.R. No. 121, dated 21.05.2008, under Section 13 of Pakistan Arms Ordinance XX of 1965 and under Sections 4/5 of Explosive Substances Act, 1908, registered at Police Station Kakrali, District Gujrat.

2. The record reveals that the petitioner was granted post-arrest bail *vide* order dated 27.05.2008 by the learned Trial Court *i.e.* learned Magistrate Section-30, Kharian (Gujrat). Learned counsel for the petitioner submits that the petitioner unluckily got involved in a murder case later on, wherein he absconded to avoid arrest as he had not committed the offence alleged. He was finally arrested in the said case on 29.05.2012 and tried by the Anti-Terrorism Court, Gujranwala where he earned a judgment of acquittal on 24.10.2012 after a full-fledged trial. The arrest of the petitioner was recorded

again in this case on 26.06.2012 and since then he had been regularly appearing in the Trial Court as an under-trial prisoner. The probability cannot be ruled out that the petitioner absconded and jumped the facility of bail only out of fear otherwise he might not have done so. He, however, turned out to be innocent through a judicial verdict, in the said murder case. Having been behind the bars for about seven months, the accused-petitioner must have learnt a lesson by now, so to keep him continuously imprisoned may not serve any useful purpose. Therefore, the instant application is accepted and petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with two sureties each in the like amount to the satisfaction of the learned Trial Court.

Bail after arrest granted.

KLR 2013 Criminal Cases 262

[Lahore]

Present: **SHAHID HAMEED DAR and MUHAMMAD YAWAR ALI, JJ.**

Nazir Ahmad

Versus

The State and 4 others

Criminal Appeal No. 857 of 2003, decided on 25th February, 2013.

(a) Acquittal Appeal---

---Scope---Principles and yardstick---(i) With the acquittal, the presumption of the innocence of the accused becomes double; one initial, that till found guilty he is innocent, and two, that after his trial a Court below has confirmed the assumption of innocence---(ii) Unless all the grounds on which the High Court had proposed to acquit the accused were not supportable from the evidence on record, Supreme Court would be reluctant to interfere, even though, upon the same evidence it may be tempted to come to a different conclusion---(iii) Unless the conclusion recorded by a Court below was such that no reasonable person would conceivably reach the same, the Supreme Court would not interfere---(iv) Unless the judgment of acquittal is perverse and the reasons therefor are artificial and ridiculous, the Supreme Court would not interfere, and (v) The Supreme Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion, and that too, with a view only to avoid grave miscarriage of justice and for no other purpose.

(Para 9)

Ref. PLJ 1995 SC 351.

ACQUITTAL (MURDER) --- (Appreciation of evidence)

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

---S. 417(2A)---Pakistan Penal Code, 1860, Ss. 302/109/337-F(iv), 337-A(ii), 337-F(iii), 337-F(i), 337-L(ii)/34---Commission of occurrence---Criminal Acquittal Appeal---Appreciation of evidence---Principles and yardstick---Considerations for interference in appeal against acquittal and in appeal against conviction are altogether different---A judgment of acquittal cannot be upset sparingly as the accused would enjoy double presumption of innocence, one relating to the pre-judgment stage, that every accused is innocent till proved otherwise and the other one, through a judicial verdict---**Held:** It was not a case requiring interference with impugned judgment which appeared to have been passed strictly in line with settled principles of law---Trial Judge disbelieved ocular version holding that said PWs were not present at place of occurrence as it so flowed their testimonies---Presence of complainant (PW at relevant time of incident was not established and for that reason his improved version, *qua* witnessing the occurrence was excluded from consideration---Keeping in view massive delay in medical examination of deceased by Doctor/PW which was well over three hours and in lodgment of formal F.I.R. which was more than eleven hours from date of occurrence, no other view could be possibly made that none of eye-witnesses had witnessed occurrence---Recoveries of weapon had been rightly disbelieved by Trial Court as none of it was stained with blood---All said factors were lawfully considered by Trial Court before formulating an opinion of innocence in favour of accused---Reasons recorded by Trial Court before formulating an opinion of innocence in favour of accused, were not open to any exceptions---Reasons whereon acquittal of respondents was based on, were neither artificial were ridiculous---Criminal appeal dismissed.

(Paras 9,10,11,12)

Ref. PLD 1973 SC 469, PLJ 1995 SC 351.

[illegible]

[Presence of alleged eye-witnesses/PWs at place of occurrence was not established. Impugned judgment of acquittal in murder case was maintained].

For the Appellant: **Zafar Iqbal Chohan, Advocate.**

For the State: **Khurram Khan, Deputy District Public Prosecutor.**

For the Complainant: **Ch. Saleem Akhtar, Advocate.**

Date of hearing: **25th February, 2013.**

JUDGMENT

SHAHID HAMEED DAR, J. --- Nazir Ahmad-complainant/appellant by filing this appeal under Section 417(2-A), Cr.P.C. has challenged-judgment dated 27.10.2003 passed by the learned Additional Sessions Judge, Pakpattan Sharif, whereby respondents Nos. 2 to 5, Farrukh, Saeed, Muhammad Nawaz and Muhammad Din were acquitted of all the charges, on extension of benefit of doubt, during trial, in respect of case-F.I.R. No.

337/2002, dated 19.7.2002, for offences under Sections 302, 109, 337-F(iv), 337-A(ii), 337-F(iii), 337-F(i), 337-L(2) read with Section 34, P.P.C., registered at Police Station Saddar Arifwala, District Pakpattan Sharif.

2. Precisely the facts giving rise to this appeal are that Nazir Ahmad-complainant (P.W.8) got the aforesaid F.I.R.-case registered alleging therein that his brothers, Muhammad Rafique (deceased) and Faqir Muhammad (P.W.9), on their turn of water, irrigated the agricultural land on 19.7.2002; Faqir Muhammad (P.W.9) also kept a vigil on the watercourse; it was at about 5.00 a.m., when respondents, Saeed, armed with hatchet, Farrukh, armed with *sabbal,* Muhammad Nawaz, armed with hockey, and Aamir (juvenile), armed with *sabbal,* all of a sudden reached there and tortured Muhammad Rafique (deceased); respondent-Saeed gave a hatchet blow from its wrong-side on his head, followed by another rour blows, two at his right and left arm and one at his left calf; Aamir (juvenile) shoved his *sabbal* repeatedly into his left and right calves, whereas respondent-Farrukh authored four injuries by means of his weapon at his right thumb, right calf, posterior left thigh and left calf; respondent-Muhammad Nawaz inflicted eight injuries with his hockey at the back, left elbow, left shoulder, right thumb, right shoulder, right thigh, left calf and right calf of Muhammad Rafique (deceased), due to which he fell onto the ground crying in pain, which attracted Faqir Muhammad (P.W.9), Istadad and Muhammad Anwar PWs (given up) to the spot, who also witnessed the occurrence; the witnesses beseeched the accused, rescued Muhammad Rafique and shifted him to hospital at Arifwala; examining the injuries of Muhammad Rafique, the medical officer issued medico-legal report No. 506/2002, dated 19.7.2002 and admitted him in hospital as indoor patient. Motive behind the occurrence was that Nazir Ahmad-complainant/appellant (P.W.8) alongwith his brothers purchased six acres of agricultural land, which caused grudge to the accused; Muhammad Din-respondent extended threats of dire consequences to his brother Muhammad Sharif Master about twenty days back, if he would not agree to his offer of exchange of land with him; the occurrence was committed by the accused on the abetment of respondent-Muhammad Din.

3. The complainant (P.W.8) being in possession of a copy of medical certificate of the injured, came across Muhammad Ijaz, ASI (P.W.11), at 4.35 p.m. on the same day at *Hota Morr,* where, the latter recorded his statement (Exh.PK) and despatched it to the Police Station Saddar Arifwala (Pakpattan Sharif), on the basis of which Nazir Ahmad, MHC (P.W.4.) chalked out formal F.I.R. (Exh.PE), at 4.50 p.m. for offences under Sections 337-A(ii), 337-F(iii), 337-F(iv), 337-F(i), 337-L(2)/34, P.P.C., the same day, against the above-named accused. On deterioration of his condition, Muhammad Rafique was referred to General Hospital, Lahore, for treatment and management of his injuries, where he died at 10.30 p.m., on 3.8.2002; which led to insertion of Section 302, P.P.C. in this case by the Investigating Officer, Ajmal Saeed, S.I. (P.W.12).

4. To prove its case, the prosecution produced twelve witnesses. Nazir Ahmad-complainant (P.W.8) and Faqir Muhammad (P.W.9) tendered ocular account (if the occurrence, whereby they claimed to have seen respondents Nos. 2 to 4, Farrukh, Saeed and Muhammad Nawaz alongwith their co-accused Aamir (juvenile) inflicting injuries on various parts of the body of Muhammad Rafique (deceased), who fell down badly wounded. He was taken to the hospital, but succumbed to the injuries, as noted above, at General Hospital, Lahore, on 3.8.2002. Both the eye-witnesses also deposed about the allegation of conspiracy/abetment against Muhammad Din (respondent No. 5). They stated that twenty days before the occurrence, respondent-Muhammad Din

presented an idea of exchange of land to Muhammad Sharif Master and on his denial, the when produced before him in injured condition, through medico-legal report (Exh.PC). Dr. Ashfaq Hussain (P.W.2) proved the post-mortem examination report (Exh.PA). Rashid Ahmad, Constable (P.W.5) and Muhammad Sharif (P.W.7) supported the recovery of crime weapons from the accused-respondents. Muhammad Ijaz, ASI (P.W.11) and Ajmal Saeed, S.I. (P.W.12) gave an account of the investigation, conducted by them one after the other. The rest constitutes almost formal evidence.

5. When examined under Section 342, Cr.P.C., all the accused denied the allegations against them and also refuted the incriminating evidence produced by the prosecution. They raised the plea of false involvement in this case owing to previous enmity. None of them opted to appear as his own witness under Section 340(2), Cr.P.C. nor they adduced the defence evidence. They all claimed that it was an unseen occurrence, having happened in dying-hours of the night and they termed themselves innocent.

6. The learned Trial Judge acquitted the respondents-accused of all the charges through the impugned judgment, being aggrieved of which, the complainant/appellant filed the titled appeal with the prayer that the impugned judgment may be annulled and accusedrespondents may be convicted/sentenced accordingly.

7. Learned counsel for the appellant has argued that the prosecution successfully proved its case by bringing home the charge of murder against the accused beyond any shadow of doubt; Nazir Ahmad-complainant (P.W.8) and Faqir Muhammad (P.W.9) are natural witnesses of the occurrence, who furnished confidence inspiring statements during trial but badly overlooked by the learned Trial Court in a non-serious manner; both the witnesses also supported the allegation of conspiracy against respondent Muhammad Din, but that part of their statements has also been rejected without any cogent reason; the respondents except for Muhammad Din actively participated in the occurrence and caused countless injuries on the body of the deceased; the eye-witnesses are not interested witnesses being not inimical to the accused and their statements do not suffer from material contradictions and major discrepancies.

8. Learned counsel appearing on behalf of the accused respondents supported the acquittal of the respondents. Learned Deputy Prosecutor General, Punjab, however, supported this appeal but in a lukewarm manner.

9. After hearing learned counsel for the parties and perusing the record with their able assistance, it is observed that considerations for interference in appeal against acquittal and in appeal against conviction are altogether different. A judgment of acquittal cannot be upset sparingly as the accused would enjoy double presumption of innocence, one relating to the pre-judgment stage, that every accused is innocent till proved otherwise and the other one, through a judicial verdict. Learned counsel for the appellant has failed to pinpoint any illegality, infirmity or improbability in the impugned judgment except for repeating the accusations, like it was so done by the prosecution witnesses in their testimonies. The Hon'ble Supreme Court of Pakistan in *Sikandar Hayat's* case reported as P.L.J. 1995 S.C. 351 formulated following points, holding them well-settled principles to be kept in view while dealing with an appeal against acquittal:---

"*(i)* *With the acquittal, the presumption of the innocence of the accused becomes double; one initial, that till found guilty he is innocent, and two, that after his trial a Court below has confirmed the assumption of innocence;*

(ii) *Unless all the grounds on which the High Court had proposed to acquit the accused were not supportable from the evidence on record, Supreme Court would be reluctant to interfere, even though, upon the same evidence it may be tempted to come to a different conclusion;*

(iii) *Unless the conclusion recorded by a Court below was such that no reasonable person would conceivably reach the same, the Supreme Court would not interfere;*

(iv) *Unless the judgment of acquittal is perverse and the reasons therefor are artificial and ridiculous, the Supreme Court would not interfere, and*

(v) *The Supreme Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion, and that too, with a view only to avoid grave miscarriage of justice and for no other purpose."*

Following the aforesaid principles and yardstick, we have reappraised the evidence and events of this case, which lead us to believe that it is not a case requiring interference with the impugned judgment, which, to our considered view, appears to have been passed strictly in line with settled principles of law. We do not feel impressed by the argument of learned counsel for the appellant, who, for most of the time, harped on the allegation that the respondents accused committed the crime and both the witnesses of ocular account remained present at the spot at the relevant time of occurrence. The learned Trial Judge disbelieved the ocular version, furnished by Nazir Ahmad-complainant (P.W.8) and Faqir Muhammad (P.W.9) by holding that they were not present at the place of occurrence as it so flowed from their testimonies. We find that Nazir Ahmad (P.W.8) did not claim his presence at the hot-spot at the crucial hour while rendering an oral statement (Exh.PK), recorded by Muhammad Ijaz, ASI (P.W.11), which categorically shows that the deceased went to his agricultural land in the company of his brother Faqir Muhammad (P.W.9) and none else. Two other names of the eye-witnesses, Istadad and Muhammad Anwar figure in compliant (Exh.PK), who despite being independent persons were not produced by the prosecution at trial and given up as unnecessary. Nazir Ahmad-complainant with a view to establish his presence massively improved upon his previous statement (Exh.PK), while rendering his testimony, as P.W.8 and he was duly confronted with his earlier recorded statement as per requirement of law, which not only dented the said particular aspect of his version, rather it badly damaged creditworthiness of his statement as a whole. A belated attempt, made by the complainant to mention his presence in complaint (Exh.PK), also ended in smoke as words added therein upset the sequence and meaning of the relevant sentence. The learned Trial Court while dealing with this particular skirmish categorically observed in paragraph 19 of the impugned judgment that the words added ☎" (in line No. 18 of complaint (Exh.PK), were not a part of the F.I.R. (Exh.PE), hence, presence of the complainant at the relevant time of incident was not established and for this reason his improved version, *qua* witnessing the occurrence was excluded from consideration.

10. The prosecution case is left only with the statement of Faqir Muhammad (P.W.9), who too, in his anxiety to establish presence of Nazir Ahmad-complainant (P.W.8) committed the same mistake, thereby grievously injuring the veracity of his own

evidence. His testimony reveals that his attention was also drawn to various innovations, he made as regards his previous statement (Exh.DD) and he failed to furnish any plausible explanation in respect thereto. He mentioned about an amazing factor that he did not accompany his brother and complainant Nazir Ahmad, when he took Muhammad Rafique (deceased) to the police station and onwards to the hospital at Arifwala. Being real brother of the deceased and that of the complainant, it was a startling amI unbelievable disposition which badly reflected on, what he said in the Court.

11. Keeping in view the massive delay in medical examination of Muhammad Rafique (deceased) by Dr. Ghulam Farid Khichi (P.W.3), which is well over three hours and in lodgment of formal F.I.R. (Exh.PE), which is more than eleven hours from the time of occurrence, no other view can be possibly made that none of the eye-witnesses had witnessed the occurrence. The medical evidence, presented by Dr. Ashfaq Hussain (P.W.2) and Dr. Ghulam Farid Khichi (P.W.3) does little good to the prosecution's case. The recoveries of weapons have been rightly disbelieved by the learned Trial Court as none of it was stained with blood. The time of occurrence, 5.00 a.m., may be much earlier than the one, claimed by unreliable and rejected eye-witnesses in their evidence. All of these factors were lawfully and consciencely considered by the learned Trial Court before formulating an opinion of innocence in favour of the accused, which, to our considered view, is not open to any exception. The reasons recorded by the learned Trial Court for the acquittal of the respondents are in line with the evidence on record and circumstances mentioned therein, as it was unsafe to act upon the evidence of the two eye-witnesses. The infirmities and flaws pointed out in the impugned judgment assumed importance, when taken into consideration, in the backdrop of conclusion that innocence of the respondents was the only result which could be inferred and arrived at by the learned Trial Court. The principles for setting aside such a judgment have been laid down in the case of *Noora and another v. The State* (P.L.D. 1973 S.C. 469) in the following words:---

> "*As an ultimate Court, we must give due weight and consideration to the opinions of the Courts below, and normally we should not interfere with their findings where we are satisfied that they are reasonable and were not arrived at by the disregard of any accepted principle regarding the appreciation of evidence. The mere fact that this Court might have taken a different view of the evidence should not be sufficient to overrule the findings of the Courts below; but we should first satisfy ourselves that there is some serious defect in the process by which the finding has been arrived at. Where such defect is discovered and the finding is not considered tenable, then it should be open to the Court to come to its own independent finding upon a re-examination of the evidence untrammeled by the opinion of the Courts below.*"

We find no defect in the reasoning, recorded by the learned Trial Court, as it appears to have acted strictly in accordance with law and principles governing the safe administration of criminal justice. The reasons, whereon acquittal of the respondents is based on, are neither artificial nor ridiculous.

12. The upshot of the above discussion is that there exists no such compelling reason, which may necessitate interfering with the well-reasoned judgment of acquittal. Therefore, we dismiss this appeal. Respondents Nos. 2 to 5, namely, Farrukh, Saeed, Muhammad Nawaz and Muhammad Din are present on bail. They stand discharged of their bail bonds.

Criminal appeal dismissed.

KLR 2013 Criminal Cases 318

[Lahore]

Present: **SHAHID HAMEED DAR, J.**

Shabbir Hussain

Versus

The State

Crl. Misc. No. 14461/B of 2012, decided on 7th November, 2012.

BAIL (ILLEGAL SUI GAS CONNECTION)---(FLAWED investigation)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 462-C/462-F---Petitioner alongwith co-accused allegedly committed theft of sui gas---Bail concession---Flawed investigation---It looked strange that a mass network of illegal gas connections was allegedly unearthed by the complainant but he took no pain to mention the names of illegal consumers of the gas correctly---Gas meter in question had not been taken into possession by the I.O. probably for the reason that it was neither shown to him by the complainant nor handed over to him for the purpose of recovery---I.O. did not collect any material for Sui Northern Gas Department to verity claim of petitioner regarding issuance of said demand notice---Record was also silent as to how much loss had been sustained by the said department because of alleged crime---Petitioner was no more required for purpose of further investigation---Case called for further inquiry---Bail after arrest granted.

(Paras 5,6)

[illegible]

[Regarding allegation about illegal sui gas connection, I.O. has not report the alleged demand notice of petitioner from the office of Sui Gas nor did he collect the meter in question. Bail was allowed].

For the Petitioner: **M. Irshad Chaudhry, Advocate.**

For the State and another: **Mirza Abid Majeed, Deputy Prosecutor General, Punjab.**

Date of hearing: **7th November, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- Shabbir Hussain (petitioner) seeks bail after arrest in case F.I.R. No. 22/12, dated 8.1.2012 registered for offences u/S. 462-C, 462-F, PPC at Police Station, Manawan, Lahore.

2. Precisely, the allegation against the petitioner is that he alongwith others intercepted main distribution gas pipeline and committed theft of gas not only for his own consumption but also delivered its connection to more than two hundred consumers/houses.

3. Learned counsel for the petitioner submits that petitioner applied for a connection of gas supply on 17.7.2008 and received a demand notice from Sui Northern

Gas Pipeline Limited, on the basis of which he deposited an amount of Rs. 3,000/- on 21st July, 2008' the gas meter was installed by a fitter of the department and this is how, the petitioner started receiving the supply of gas in his house; none of the persons/accused mentioned in the F.I.R. is resident of the locality where the petitioner lives and their names have been mentioned in the F.I.R. just for nothing.

4. On the other hand, learned Deputy Prosecutor General, Punjab opposes with the contention that the offence committed by the petitioner is serious which falls within the prohibitory clause of Section 497(1), Cr.P.C., hence, he may not be granted the relief prayed for.

5. After hearing learned counsel for the parties and perusing the record, it is observed that there are certain circumstances which h have either been distorted or withheld by the complainant while reporting the crime to the police. Learned Deputy Prosecutor General, Punjab after going through the record submits that the police has not succeeded in locating the whereabouts of any of the co-accused of the petitioner. Infact the statement of one Ejaz Ahmad has been recorded by the I.O. on 6.11.2012 which divulges that the persons named as co-accused of the petitioner were not the residents of the area, where the petitioner resided. It looks strange that a mass network of illegal gas connections was allegedly unearthed by the complainant but he took no pains to mention the names of illegal consumers of the gas correctly. It shows non-seriousness and dishonesty on his part. An impression arises from case Diary No. 9 as if a gas meter stood installed outside the residential house of the petitioner yet, it has not been taken into possession by the I.O., probably for the reason that it was neither shown to him by the complainant nor handed over to him for the purpose of recovery. The Investigating Officer did not collect any material from the Sui Northern Gas Pipeline Limited to verify the claim of the petitioner regarding issuance of a demand notice and deposit of gas connection fee Rs. 3,000/- by the petitioner subsequent thereto. The record is also silent as to how much loss had been sustained by the said department because of the crime, allegedly committed by the petitioner and his co-accused. Maqsood Khan, a fitter joined investigation on 8.1.2012 whereby he fully corroborated the story of F.I.R. except for mentioning the name of the petitioner as an accused. This omission in his statement leads the prosecution case to nowhere. Similar is the situation in respect of another statement u/S. 161, Cr.P.C., rendered by Ch. Sharafat Ali, D.O-V a Sui Gas Northern Pipeline Limited, Gulebrg, Lahore. This a classic case of incompetent, dishonest and unscrupulous investigation which, as per record has been conducted by Muhammad Akbar, S.I. (Investigation) P.S. Manawan. The petitioner is no more required for the purpose of further investigation as report u/S. 173, Cr.P.C. stands deposited with the Trial Court on 1.8.2012. Sufficient reasons exist to believe that the petitioner's case calls for further probe into his guilt as envisaged by Section 497(2), Cr.P.C.

6. Therefore, the instant application is accepted and petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned Trial Court.

7. Before parting with this order, it is directed that the learned Law Officer shall establish contact with the SP (Investigation) Cantt., Lahore, apprise him of the anxiety and annoyance of this Court and require him to hold an inquiry into the conduct of the above-named Investigating Officer which shall be completed by him within one

month from today under intimation to this Court, through the learned Law Officer, as to the action taken by him against the delinquent Investigating Officer.

Bail after arrest granted.

KLR 2013 Criminal Cases 321

[Rawalpindi]

Present: **SHAHID HAMEED DAR, J.**

Mohsin Ali Raza Shah

Versus

The State and another

Crl. Misc. No. 1586/B of 2012, decided on 24th October, 2012.

BAIL (MURDER)---(Plea of *alibi*)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 302/324/109/148/149---Plea of *alibi*---Bail concession---Validity---Petitioner's plea of *alibi* that he had not participated in said occurrence, having gone to "C" much earlier than time of occurrence was verified by I.O. who formulated an opinion and recommended his discharge from case---Area Magistrate however did not agree with said report, and resultantly, name of petitioner was placed in Column No. 2 of challan---Nothing was recovered at instance of petitioner---Petitioner's case called for further inquiry---Bail after arrest granted.

(Paras 6,7)

plea of alibi

[Plea of *alibi*/name of petitioner was placed in Column No. 2 of challan. Bail was allowed in offence of murder].

For the Petitioner: **Ch. Mehmood Akhtar Khan, Advocate.**

For the Complainant: **Qazi Muhammad Amin, Advocate.**

For the State: **Sheikh Istajabat Ali, Deputy Prosecutor General, Punjab.**

Date of hearing: **24th October, 2012.**

ORDER

SHAHID HAMEED DAR, J. --- Mohsin Ali Raza Shah (petitioner) seeks bail after arrest in case F.I.R. No. 102, dated 12.6.2012 registered for offences u/Ss. 302, 324, 109, 148, 149, P.P.C. at Police Station, Dhuman, District Chakwal.

2. The petitioner was arrested in this case on 1.8.2012 on the charge of having committed the murder of Sohail Abbas and attempting on the life of Tassawar Hussain Shah, while armed with a kalashinkov and joined by his armed cronies. Certain specific attributions have been made by Saleem Abbas (complainant) in the F.I.R., according to which all the accused mentioned in the F.I.R., emerged from the house of the petitioner

and mounted an attack on the complainant side, during the course of which the accused/petitioner made a fire shot with his kalashinkov which landed at the face of Sohail Abbas (deceased) followed by another fire shot by him, hitting the neck-area of Tassawar Hussain Shah while his armed co-accused also resorted to a similar act of firing whereby they authored multiple fire-arm injuries on the bodies of both the victims. One of the injured namely Sohail Abbas succumbed to the injuries, en-route the hospital. The motive behind the occurrence pertained to a previous altercation between the parties wherein Iftikhar Hussain Shah, a paternal nephew of the complainant received injuries at the hands of accused Asad Abbas Shah, etc.

3. The complainant, according to the record rendered a supplementary statement on 12.6.2012, whereby, he contended that he was in a perturbed state of mind while reporting the crime to the police and for this reason he omitted to mention a couple of important factors *qua* the occurrence which included the fact that the accused, dragged both the injured from the place of occurrence towards their house and one of them Asad Abbas, on the asking of Mohsin Raza Shah (petitioner picked-up the crime empties from the place of occurrence to destroy them. Tassawar Hussain Shah, the injured of this case appears to have been recorded u/S. 161, Cr.P.C. on 20.6.2012 who contended before the I.O. that he had been hit by the firing of the accused with the specification that Mohsin Ali Raza (petitioner) and Badro accused held repeater-guns at the crucial hour, by means of which they made firing.

4. Learned counsel for the petitioner submits that the story contained in the F.I.R. was not believed by the I.O. during the course of investigation for a variety of reasons and net-result thereof was that the petitioner was found innocent by the I.O. and recommended for discharge from this case, though not concurred with by the learned Area Magistrate; the petitioner has been placed in Column No. 2 of the challan which renders his case one of further inquiry, within the scope of Section 497(2), Cr.P.C.; the medical evidence is in sharp conflict with the eye-witness account as the dimension/measurement of the injuries on the body of the deceased and that of the injured categorically reflected that pellets had been fired by the accused and not the bullets as alleged in the F.I.R.; it is a case of three versions and which one of them is true can only be assessed by the learned Trial Court at trial. Relies upon case titled *Shazia Ghafoor Vs. The State* (2005 YLR 2477), *Mushtaq Ahmad Vs. The State* (2012 YLR 1101), *Rehmat Ullah alias Rehman Vs. The State and another* (1970 SCMR 299), *Meeran Bux Vs. The State and another* (PLD 1989 SC 347), *Muhammad Ilyas Vs. Ijaz Ahmad Butt and another* (1992 SCMR 1857), *Muhammad Mumtaz and 3 others Vs. The State* (1988 SCMR 1452), *Dr. Muhammad Aslam Vs. The State* (1993 SCMR 2288) and *Amir Ali and others Vs. The State* (1984 SCMR 521).

5. On the other hand, learned Deputy Prosecutor General, Punjab assisted by learned counsel for the complainant opposes with the contention that the trial has commenced and five prosecution witnesses have already been recorded by the Trial Court and in such a situation any comments/remarks by this Court on merits of the case may prejudice the case of any of the parties; the complainant had not rendered any supplementary statement during the course of investigation nor there was any such occasion for him to do so; the Investigating Officer being hands in glove with the accused side, fabricated fake evidence to damage the prosecution case and extend undue benefit to the accused; the plea of *alibi* of the petitioner has been believed in an arbitrary and capricious manner by the I.O., overlooking the delayed joining of investigation by him;

deeper appreciation of evidence is not permissible under the law and specially at a stage when conclusion of the trial in foreseeable future is a strong probability. Relies upon case titled *Mumtaz Vs. The State* (2012 SCMR 556), *Muhammad Arshad and others Vs. The State and others* (PLD 2011 Supreme Court 350) and *Abdul Hayee and 2 others Vs. The State* (1996 SCMR 555).

6. After hearing learned counsel for the parties and perusing the record, it is observed that Sohail Abbas (deceased) was allegedly fired at by Mohsin Ali Shah (petitioner) with a kalashinkov, badro Shah accused with his repeater gun and Asad Abbas Shah accused with a .12 bore gun. The missiles allegedly fired by Mohsin Ali Shah (petitioner) and Badro Shah accused landed at his face whereas, firing made by Asad Abbas Shah accused hit his left calf. The Medical Officer while performing autopsy on the dead-body of the deceased found multiple fire-arm entry wounds (injury No. 2) measuring 0.4 c.m. x 0.4 c.m., with blackened inverted margins covering the area of forehead and face of the deceased. The pictorial diagram shows scores of small apertures of equal size on the head and face of the deceased which can be seen, lying in close proximity *inter se*. The probability cannot be ruled out that all of these injuries have been caused by a soft bore weapon. The medico-legal report of Tassawar Hussain Shah injured reveals multiple lacerated wounds measuring 0.5 c.m. x 0.5 c.m. in the area of his chin, right side of neck and left lower thigh. The probability of usage of soft bore weapon(s) by the accused, firing at him, cannot be ruled out. According to the story of F.I.R. Badro Shah accused armed with repeater gun, Asad Abbas Shah armed with .12 bore gun and Mohsin Ali Shah (petitioner) armed with kalashinkov fired at Tassawar Hussain Shah and hit his face and neck. The Medical Officer found multiple lacerated/entry wounds on the right side of his neck with measurement of 0.5 c.m. x 0.5. c.m. each. The injured witness was recorded on 20.6.2012 by the I.O. who alleged that Mohsin Ali Shah (petitioner) was armed with a repeater gun like his co-accused Badro at the relevant time of occurrence. The supplementary statement of the complainant, though disowned by his learned counsel, reveals that he introduced two facts therein that the accused, after committing the crime, dragged both the injured from the place of occurrence towards their house so as to paint a different picture *qua* the incident and that Asad Abbas accused, on the inducement of Mohsin Ali Raza Shah (petitioner picked-up the crime empties from the place of occurrence to screen the evidence. The petitioner's plea of *alibi*, that he had not participated in the occurrence, having gone to Chakwal much earlier than the time of occurrence, was verified by the Investigating Officer who formulated an opinion of innocence and recommended his discharge from this case. Learned Area Magistrate however did not agree with it, resultantly, his name was placed in Column No. 2 of the challan. The Investigating Officer, after extensive investigation reached the conclusion that the complainant party, being aggrieved of the motive incident, went to the house of Budar Munir *alias* Badro accused where they insulted his mother which infuriated him and to avenge the insult of his mother he went to his rooftop wherefrom he made firing with his .12 bore gun and downed Sohail Abbas (deceased) and Tassawar Hussain Shah with fire-arm injuries. The Investigating Officer also opined that the complainant party took away their injured to nearby Chowk so as to fabricate an incident of their choice. The Investigating Officer collect only two empties of .12 bore from the place of occurrence during spot inspection. The equality of dimension/measurement of the injuries of the deceased as well as that of the injured witness, is an important circumstance which lends a sense of plausibility of the above-noted opinion of the Investigating Officer. The petitioner after having been arrested on 1.8.2012 underwent

physical remand till 15.8.2012 but nothing was recovered at his instance. With all the reverence for the case-law relied upon by the learned counsel for the complainant, it is found that the facts of this case do not assimilate the facts of the said judgments. Keeping in view the ratio of the judgments relied upon by the learned counsel for the petitioner and tentatively assessing the data available on the record, I am of the considered opinion that the petitioner's case constitutes need for further probe into his guilt, as contemplated under Section 497(2), Cr.P.C.

7. For the discussion *supra*, I accept this application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 2,00,000/- with two sureties each in the like amount to the satisfaction of learned Trial Court.

Bail after arrest granted.

2013 Y L R 92

[Lahore]

Before Shahid Hameed Dar and Altaf Ibrahim Qureshi, JJ

PERVAIZ IQBAL---Petitioner

Versus

SPECIAL JUDGE, ANTI-TERRORISM COURT NO.III and 2 others---Respondents

Writ Petition No.15601 of 2011, decided on 7th July, 2011.

(a) Anti-Terrorism Act (XXVII of 1997)---

----S.6---Terrorism---Components and constituents of terrorism detailed. The 'purpose', the motivation, the 'actus reus' and the 'mens rea' constitute the components of terrorism or an act of terrorism. An action designed to coerce and intimidate or overawe the government or the public or section of public or community or sect or, if such an action is designed to create a sense of fear or insecurity in society in the backdrop of religious, sectarian or ethnic cause, shall constitute an act of terrorism or a terrorist act. To create fear or insecurity in the society through a crime is not by itself terrorism unless the motive or the design or the actus reus or mens rea pre-exists for creating such fear or insecurity in the society. A private crime resulting into fear or insecurity as a by-product, a fall out or an unintended consequence of fright etc. cannot be termed as an act of terrorism. Mere gravity, heinousness, gruesomeness or shocking nature of any offence, committed in pursuance of personal enmity or in settlement of personal vendetta is not by itself sufficient to brand such crime as a terrorist act or an act of terrorism.

Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445 and Muhabbat Ali and another v. The State and another 2007 SCMR 142 ref.

(b) Anti-Terrorism Act (XXVII of 1997)---

----Ss. 6, 7 & 23---Penal Code (XLV of 1860), Ss. 324/ 148/ 149/ 427/ 337-A(i)/ 337-F(iii)/ 337-L(2)--- Constitution of Pakistan, Art.199---Attempt to commit qatl-e-amd, rioting with deadly weapons, causing hurts---Constitutional petition---"Act of terrorism", determination of---Nexus had to be shown between the act done and the objective or design by which the offence had been committed, to formulate an opinion whether or not such offence could be termed an act of terrorism---In the absence of such linkage it could not be held that the offence committed in the background of personal enmity or vendatta, transmitting a wave of terror or fright or horror, was necessarily an act of terrorism---Complainant and his co-witnesses had categorically stated during investigation that the accused mentioned in the F.I.R. had a personal motive and grudge to commit the offence, therefore the crime committed by them, regardless its repercussions, could not be dubbed an "act of terrorism"---Impugned order passed by Anti-Terrorism Court transferring the case to the court of ordinary jurisdiction on the application of accused moved under S.23 of the Anti-Terrorism Act, 1997, was well-reasoned and based on relevant law---Constitutional petition was dismissed in limine accordingly.

Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445 and Muhabbat Ali and another v. The State and another 2007 SCMR 142 ref.

(c) Anti-Terrorism Act (XXVII of 1997)---

----Ss. 6 & 7---"Act of terrorism"---Determination---Principles---Nexus has to be shown between the act done and the objective or design by which the offence was committed, to formulate an opinion whether or not such offence could be termed an "act of terrorism"---In the absence of such linkage it cannot be held that the offence committed in the background of personal enmity or vendatta, transmitting a wave of terror or fright or horror, was necessarily an act of terrorism.

Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445 rel.

Rai Nadeem Iqbal Kharal for Petitioner.

Ch. Muhammad Shabbir Gujjar, Assistant Advocate General for Respondent (on Court's call).

ORDER

The petitioner, complainant of case F.I.R. No. 1266 of 2010 dated 15-10-2010, under sections 324, 148, 149, 427, 337-A(i), 337-L(iii), 337-L(2), P.P.C. read with section 7 Anti-Terrorism Act, 1997 registered at Police Station Qila Gujjar Singh, Lahore, feels aggrieved of order dated 21-6-2011 passed by learned Judge ATC No.III, Lahore, whereby, application filed by respondent No.2 (accused) under section 23 of Anti-Terrorism Act, 1997 has been accepted and trial of above said case has been transferred to the Court of ordinary jurisdiction.

2. Learned trial Court, in para 4 of the impugned order has referred to the rudiments of 'terrorism' and a 'terrorist act' as defined under section 6(2) (a to n) of Anti Terrorism Act, 1997. The 'purpose', the motivation, the 'actus reus' and the 'mens rea' constitute the

components of terrorism or an act of terrorism. An action designed to coerce and intimidate or overawe the government or the public or section of public or community or sect or, if such an action is designed to create a sense of fear or insecurity in society in the backdrop of religious, sectarian or ethnic cause, shall constitute an act of terrorism or a terrorist act. To create fear or insecurity in the society through a crime is not by itself terrorism unless the motive or the design or the actus reus or mens rea pre-exists for creating such fear or insecurity in the society. A private crime resulting into fear or insecurity as a by-product, a fall out or an unintended consequence of fright etc. cannot be termed as an act of terrorism. Mere gravity, heinousness, gruesomeness or shocking nature of any offence, committed in pursuance of personal enmity or in settlement of personal vendetta is not by itself sufficient to brand such crime as a terrorist act or an act of terrorism. The reliance in this regard may be had to "Mehram Ali and others v. Federation of Pakistan and others" (PLD 1998 SC 1445) and "Muhabbat Ali and another v. The State and another" (2007 SCMR 142).

3. Precisely, the prosecution case as stated by Pervaiz Iqbal complainant is that 8/10 boys, who were armed with mousers, rifles and dandas all at once, resorted to aerial firing at about 7-00 pm on 14-10-2010 when he sat in his shop; one of them fired straight which landed on his right hip area; the accused also injured left leg of Muhammad Asif with their act of firing; one of the fire shots kissed past the head of Khurram Shahzad who luckily escaped any injury on his person; all the aforesaid accused resorted to indiscriminate firing in the market, ransacked many shops, smashed furniture and fixture and fled away still firing and raising lalkaras. The motive behind the occurrence was that the above said accused were forbidden from selling the dummies of the cell phones which caused them anger and anguish due to which they committed the crime. The complainant later-on learnt the names of the assailants as Adeel alias Chitta (armed with mouser), Shoaib (armed with mouser), Faran Khan (armed with mouser) and Lilla (armed with mouser) but he did not disclose the source of his information.

4. It has been strongly contended by learned counsel for the petitioner that Basit accused-respondent No.2 in cahoots of his armed co-accused committed the crime, during the course of which they resorted to indiscriminate firing, injured the complainant and another, put lives of many at peril, ransacked many shops of the market, smashed furniture and fixture and thereby committed a gruesome act which sent a wave of terror and fright amongst the shopkeepers/public at large and thereby they committed an act of terrorism punishable under section 7, Anti-Terrorism Act, 1997 which, as required under section 12 of the Act is exclusively triable by an Anti Terrorism Court; the attending facts of the case have been grossly overlooked by the learned trial Court while passing the impugned order which may not be sustained.

5. Arguments heard. Record perused.

6. The definition and interpretation of an act of terrorism, as noted hereinabove does not favour the contention of the learned counsel for the petitioner as the offence alleged by the petitioner was necessarily a fall out of the motive alleged in the aforesaid F.I.R., according to which the act of selling the dummies of cell phones by the accused, was checked by the shopkeepers including the petitioner, who forbade them to do so due to which they nurtured grudge and committed the crime. It is a case of satisfaction of personal vendetta by the

accused which has nothing to do with the ingredients and components of an 'act of terrorism' as the crime committed was not meant for creating a sense of fear or insecurity in the society or a section of society or to public at large nor it was designed to coerce or intimidate or overawe the government or the public or section of the public or community or sect or fanning out the religious, sectarian or ethnic ill-will or hatred. A private crime cannot be transformed into an 'act of terrorism' by any stretch of imagination, only by keeping in view the fear, the fright, the horror, or the sense of insecurity being the by-product or the fall out or an unintended consequence or an undesigned extremity caused by such offence. In Mehram Ali's case (PLD 1998 SC 1445) it has been observed by the Hon'ble Supreme Court of Pakistan that nexus has to be shown between the act done and the objective or design by which the said offence was committed, to formulate an opinion whether or not such offence could be termed an act of terrorism. In the absence of such linkage it cannot be held that the offence, committed in the background of personal enmity or vendetta, transmitting a wave of terror or fright or horror was necessarily an act of terrorism. The complainant and his co-witnesses had categorically stated during investigation that the accused mentioned in the F.I.R. had a personal motive and grudge to commit the offence, therefore, the crime committed by them, regardless its repercussions, cannot be dubbed an act of terrorism. The impugned order is well-reasoned and appears to have been passed not only by keeping in view the facts of the case but also the relevant law on the subject. Therefore, we are not inclined to interfere with the impugned order which, being cogent and plausible, is sustained.

7. Resultantly, the instant writ petition is dismissed in limine.

NHQ/P-11/L Petition dismissed.

2013 Y L R 303

[Lahore]

Before Shahid Hameed Dar, J

WALI MUHAMMAD, S.I.---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.11526/B of 2011, decided on 14th October, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss.420/468/471---Prevention of Corruption Act (II of 1947), S.5(2)---Cheating, forgery, using as genuine a forged document---Bail, grant of---Petitioner, Investigating Officer after investigation in a criminal case found the accused involved therein innocent---S.H.O. concerned agreed with the opinion of the accused Investigating Officer for cancellation of the said case and a report under S.173, Cr.P.C. had been prepared after formal proceedings for presentation before the court for appropriate orders---Big gap existed thereafter and it could not be understood as to when and by whom

the report under S.173, Cr.P.C. was carried and placed before the Magistrate concerned and who had fabricated a forged order of the Magistrate---Accused Sub-Inspector being the Investigating Officer of that case could be understood to have the knowledge of the said fact, but who could be burdened with the liability of forgery of the order of Magistrate was a question which was not answered by the data collected by the Investigating Officer of the present case---Necessary Police Officials had not been interrogated so far by the police in this regard---Forged order did not show that the case itself had been filed or that the request of the police for cancellation of the case only stood filed---Forged order even did not bear any date---Record showed that the Area Magistrate had undone the opinion of the Investigating Officer and passed an order for submission of challan against the accused---Accused was behind the bars for the last about two and a half months and was no more required for further investigation---Guilt of accused needed further probe under S.497(2), Cr.P.C.---Accused was admitted to bail in circumstances.

Ch. Abdul Ghaffar for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab for the State.

Muzaffar Hussain Basra for the Complainant.

Sheraz Mirza Inspector (Legal).

Ehsan Ullah Inspector (Legal).

ORDER

SHAHID HAMEED DAR, J.---Wali Muhammad S.-I. seeks bail after arrest in case F.I.R. No.142 of 2011 dated 28-7-2011 under sections 420, 468, 471 P.P.C. read with section 5(2) Prevention of Corruption Act, 1947, registered at Police Station Railway Police, Lahore.

2. Wali Muhammad S.-I. (petitioner) was the Investigating Officer of case F.I.R. No.127 of 2010 dated 24-5-2010 under section 506, 337-H(2), 427, 452, 148, 149 P.P.C. registered at Police Station Railway Police, Lahore and he recommended the case for cancellation as he reached the conclusion that the occurrence contained in the F.I.R. was false. After fulfilment of various formalities, the investigation file bearing the aforesaid opinion of the I.O. (petitioner) was supposed to be presented before the learned Magistrate concerned under section 173, Cr.P.C. for appropriate orders. It transpired at a later stage that order regarding cancellation of the case by the learned Magistrate was forged one. The learned Magistrate having learnt the said fact got lodged F.I.R. No.142 of 2011 dated 28-7-2011 under sections 420, 468, 471 P.P.C. read with section 5(2) Prevention of Corruption Act, 1947 at Police Station Railway Police, Lahore. The petitioner was arrested in this case on 29-7-2011, hence, the instant petition.

3. It is contended by his learned counsel that accused-petitioner has been falsely roped in this case under a conspiracy and he is not even remotely linked with the allegation of forgery; Nadeem Arif 501/HC had been handed down the investigation record for presentation before the learned Area Magistrate on 28-7-2011 by Altaf Hussain 346/MHC; the allegation of forgery of the order in question can only be explained by Altaf Hussain 346/HC or Nadeem Arif 501/HC; the petitioner was arrested on 29-7-2011 and he is no more required

for the purpose of further investigation; the offence under sections 468, 471 are non-cognizable, whereas, section 420, P.P.C. is bailable.

4. Conversely, learned Deputy Prosecutor General Punjab has opposed the bail petition with the contention that the petitioner being Investigating Officer was directly responsible for offence of forgery of the order of learned Magistrate; accused Nadeem Arif HC and Altaf Hussain Moharrer are equally responsible for the charge, faced by the petitioner.

5. After having heard learned counsel for the parties and perused the record, it transpires that Wali Muhammad S.-I. (petitioner) was the Investigating Officer of case F.I.R. No.127 of 2010 supra, the investigation whereof, he concluded in terms that the charge against the accused was false, they were innocent and that the case was liable to be cancelled. He recorded case Diary No.7 dated 18-6-2010, wherein he recorded his disagreement with the contention of the complainant and opined about the innocence of the accused. The inspector S.H.O. verified the opinion of the Investigating Officer (petitioner) vide case Diary No.8 dated 57-2010 and okayed the opinion of the Investigating Officer for cancellation of the case. The report prepared by the S.H.O. under section 173, Cr.P.C. dated 5-7-2010 after formal proceedings by the Deputy Superintendent, Pakistan Railways Police, Lahore Division and SP, Pakistan Railway, Lahore was forwarded on 9-7-2010 by the Prosecutor Inspector Pakistan Railways Police, Division, Lahore for presentation before the "Court" for appropriate orders. Till this stage every thing was in order. There is a big gap thereafter and it cannot be understood as to when and by whom the report under section 173, Cr.P.C. was carried for placement before the Magistrate concerned and who fabricated a forged order of the Magistrate. Wali Muhammad S.-I. being the Investigating Officer can be understood to possess the knowledge as to the aforesaid fact, but, who could be burdened with the liability of forgery of the aforesaid order, is a circumstance which, is not answered by the data collected by the Investigating Officer of case F.I.R. No.142 of 2011 supra. The grilling of Nadeem Tariq 501/HC and Altaf 346/MHC may lead to unfurling the mystery hovering over the prosecution case. It is strange that both of them have not been interrogated so far by the police which must have been done by now so as to bridge-up the gap in the prosecution case. The language of the forged order is interesting as it does not show that the case itself had been filed or that the request of the police for cancellation of the case stood filed. This order does not bear any date. It appears from the record that the learned Area Magistrate had undone the opinion of the Investigating Officer and passed an order for submission of challan against the accused. The petitioner is behind the bars since 29-7-2011 and no more required for the purpose of further investigation. For the reasons discussed hereinabove, I conclude, that petitioner's case calls for further probe into his guilt as contemplated under section 497(2), Cr.P.C.

6. The instant petition, therefore, is allowed and petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of the learned trial Court.

NHQ/W-2/L Bail allowed.

2013 Y L R 458

[Lahore]

Before Shahid Hameed Dar and Altaf Ibrahim Qureshi, JJ

MUHAMMAD RIAZ---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.653 and Murder Reference No.422 of 2006, heard on 30th June, 2011.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Improvements made by eye-witnesses including the complainant at the trial were calculated and crucial and could not be overlooked---Presence of eye-witnesses at the place and time of occurrence was not established---Medical evidence had not corroborated ocular testimony, rather it had severely jolted the same in many important aspects---Deceased lady had been killed much earlier than the time mentioned in the complaint---Ocular account was full of countless contradictions and discrepancies, which had badly marred the intrinsic worth of the testimonies of the eye-witnesses---Trial Court had passed the impugned order on conjectures and surmises and the same was set aside in circumstances---Accused was acquitted accordingly.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Medical evidence, corrobora-tion of---Medical evidence can disclose the number of injuries, the seats of injuries, the weapon used for infliction of such injuries, probable time of occurrence or the other allied details, but it cannot identify the perpetrator of the crime.

Ghulam Subhani assisted by Saif-ur-Rehman Pran for Appellants.

Khurram Khan, Deputy Prosecutor General Punjab for the State.

Date of hearing: 30th June, 2011.

JUDGMENT

SHAHID HAMEED DAR, J.---The appellant Muhammad Riaz was held guilty under section 302(b), P.P.C. for the murder of Mst.Arshad Bibi, by learned Additional Sessions Judge, Faisalabad, vide judgment dated 7-4-2006 and convicted/ sentenced to death with direction to pay a sum of Rs.1,00,000 to the legal heirs of the deceased as compensation or in default thereof to undergo imprisonment for six months.

2. The convict/appellant has filed Criminal Appeal No.653 of 2006 against his conviction/sentence, besides, there is a usual reference (Murder Reference No.422 of 2006) under section 374, Cr.P.C. for the confirmation or otherwise of the sentence of death, awarded to the appellant, transmitted by the learned trial Court. We propose to dispose of both the matters together through this single judgment.

3. The facts, as unfurled by Muhammad Anwar-complainant (P.W.9) in complaint Exh.PC, on the basis of which F.I.R. (Exh.PC/1) has been registered are that Mst. Arshad Bibi (deceased), his paternal niece, was married with Muhammad Riaz (appellant), who was his maternal nephew, about 19/20 years back; two daughters and three sons were born out of this wedlock who were alive; Mst. Arshad Bibi due to estrangement of relationship filed a suit for dissolution of marriage against her husband Riaz before a Family Court, at Faisalabad which was decreed in her favour about 2-1/2 months ago, thus their marriage was dissolved; Muhammad Riaz (appellant) due to this grudge trespassed into the house of Mst. Arshad Bibi being armed with pistol, at 6-30 p.m. on 31-8-2005 and raised lalkara that he would teach her a lesson for having sought a divorce-decree; the alarm raised by the children attracted Muhammad Anwar complainant (P.W.9), Muhammad Arif (P.W.10) and Muhammad Sarfraz P.W. (not produced) to the spot; accused Muhammad Riaz fired thrice through his pistol and the bullets landed at right lumber area, right hip area and right thigh of Mst. Arshad Bibi; the occurrence was witnessed by Muhammad Anwar (complainant), Muhammad Arif and Muhammad Sarfraz who could not help the deceased out of fear; the accused fled the scene while firing and waving his weapon; Mst. Arshad Bibi succumbed to the injuries soon after she had been shifted to Allied Hospital Faisalabad; the motive behind the occurrence pertained to obtainment of talaq through court by Mst. Arshad Bibi (deceased).

4. After registration of the F.I.R., Bashir Ahmad, S.-I. (P.W.11) took over the investigation and immediately reached, Allied Hospital, Faisalabad, examined the dead body, prepared injury statement (Exh.PE), inquest report (Exh.PF), handed over the police papers to Muhammad Arshad, 2680/C (P.W.2) along with the dead body for autopsy; he visited the venue of crime, on the following day i.e. 1-9-2005, inspected the place of occurrence and prepared visual site plan Exh.PJ; collected blood-stained earth vide memo. Exh.PG; Muhammad Arshad, constable (P.W.2) produced before him the last worn blood stained clothes of the deceased along with a sealed phial and an envelope, which were secured by him through memo. Exh.PB; he got prepared the site plan in scale in duplicate (Exh.PA and Exh.PA/1) qua the place of occurrence, by Aurangzeb, draftsman (P.W.1); he arrested Riaz-accused on 5-9-2005 and recovered from him pistol .30-bore (P5) with two magazines, one containing four live cartridges (P6/1-4), vide memo Exh.PH, attested by Muhammad Ramzan (P.W.8) and Muhammad Ashraf P.W. (not produced). On completion of investigation, the Investigating Officer submitted challan against the accused-appellant for his trial in accordance with law.

5. At trial, prosecution in order to prove its case produced eleven witnesses in all. The ocular account was furnished by Muhammad Anwar-complainant (P.W.9) and Muhammad Arif (P.W.10). The complainant also stated about the motive part of the incident. Muhammad Ramzan (P.W.8) appeared to testify the factum of recovery of pistol .30 bore P-5 vide memo Exh.PH from Riaz-appellant.

6. The medical evidence was presented by Lady Doctor Nageen Sobia (P.W.5), who, conducted autopsy on the dead body of Mst.Arshad Bibi (deceased) vide necropsy report Exh.PD (pictorial diagram Exh.PD/1) and found following injuries thereon:-

(i) An entry wound measuring 1 cm x 3/4 cm, 10 cm below the right nipple, front of chest. Margins inverted with blackening around it.

(ii) An exit wound measuring 1-1/2 cm x 1 cm margins everted, 9 cm below the scapular blade on the right side of scapula (bone), 4 cm away from the thorax spine.

(iii) An entry wound measuring 1 cm x 3/4 cm on front of right thigh, upper 1/3rd part, 10 cm below the iliac spine.

(iv) An exit wound measuring 1-1/2 cm x 1 cm about 11 cm below the pubic bone on the inner side of right thigh upper 1/3rd part.

(v) An entry wound measuring 1 cm x 34 cm, with inverted margins on the outer side of left thigh upper part.

(vi) An exit wound 1-1/2 cm x 1 cm margins everted on the outer side of left thigh upper part.

The cause of death, recorded by the medical officer was massive haemorrhage occurred due to above-mentioned injuries, which were ante-mortem and sufficient to cause death in the ordinary course of nature and time. The probable time that elapsed between injuries and death was within "2 to 4 hours", whereas between death and postmortem examination, it was within 48 to 72 hours.

7. Learned Public Prosecutor by tendering in evidence the report of Chemical Examiner (Exh.PK) and that of the Serologist (Exh.PL), announced the prosecution case closed.

8. In his statement under section 342, Cr.P.C., Muhammad Riaz (appellant) denied and controverted all the allegations of fact, alleged against him, by the prosecution and professed his innocence while responding to the question as to why this case against him and why the P.Ws. had deposed against him, in the following words:--

> "Mst.Arshad Bibi had left my house about 1-1/2 year prior to the occurrence and had started living with her mother in Chak No.273/JB Police Station Thikriwala. While living in the house of her mother, Mst.Arshad Bibi started remaining absence from the house and some times she used to remain away from her house for 10/12 days at a stretch and due to that reason her close relatives including the P.Ws. became annoyed with her. It has been admitted by the P.W.10 i.e. maternal cousin of Mst.Arshad Bibi deceased that, "it is correct that I, my relatives and her mother were angry with Mst.Arshad Bibi for daily going out of the house".

In fact Mst.Arshad Bibi was missing from her house three days prior to the occurrence and her dead body was found lying in nearby sugarcane fields on 31-8-2005. The said dead body was removed to Allied Hospital on the same day and the complainant party with connivance of local police involved me in this case falsely.

The mother of Mst.Arshad Bibi and her four children of the ages of 16, 14, 13, 7 years, who were admittedly present in the house at the alleged time of occurrence and the neighbours have not been produced in the court. The deposition of the alleged eye-witnesses suffer from material discrepancies and version of P.Ws. have been contradicted by the medical evidence. The P.Ws. have deposed falsely against me because they are closely related in inter se as well as to the deceased."

The appellant did not opt to appear as his own witness under section 340(2), Cr.P.C. to repel the charge against him nor he produced evidence in defence.

9. The learned Additional Sessions Judge on culmination of trial proceeded to convict/sentence the appellant as mentioned hereinabove.

10. We have heard learned counsel for the parties and perused the record with their able assistance.

11. Muhammad Riaz (appellant) allegedly committed the murder of his ex-wife Mst. Arshad Bibi in the backdrop of a decree of talaq, obtained by the latter after having developed irreconcilable familial differences with the former. According to complaint Exh.PC, lodged by Muhammad Anwar complainant (P.W.9) Mst. Arshad Bibi after having deserted her husband Muhammad Riaz was living in separation along with her children, two daughters and three sons for almost a year. In the meantime she filed a suit for dissolution of marriage against her husband which was decreed by the Family Court concerned in her favour about 2-1/2 months before the unfortunate incident during the course of which, she lost her life at the hands of her ex-husband. The complainant has categorically accused Muhammad Riaz (appellant) of forcibly entering the house of Mst. Arshad Bibi being armed with a pistol and launching an unprovocative attack during the course of which he showered bullets upon the ill-fated lady which landed at various parts of her body including right pelvic region, right lumber region and right thigh. According to complaint Exh.PC, the injured lady was rushed to Allied Hospital Faisalabad but she could not survive and breathed her last, no sooner was she taken to the said hospital. The motive of course, was the one as stated above.

12. Muhammad Anwar complainant (P.W.9) is the real paternal uncle of the deceased lady and maternal uncle of the appellant. Muhammad Arif (P.W.10) is the maternal nephew of the complainant. The given up eye-witness Muhammad Sarfraz is the real paternal nephew of the complainant. Muhammad Ramzan (P.W.8) is real brother of the complainant and Muhammad Arshad (P.W.2) is also related to him. All the prosecution witnesses obviously, are related to the deceased but they at the same time, cannot be considered alien to the appellant as well. The question arises whether they, in the attending circumstances of the case had rendered credible or trustworthy evidence?

13. The blood-stained earth had been collected by Bashir Ahmad S.-I. (P.W.11) from a spot which was situated just in front of the house of Abdul Majeed, the father of the deceased lady vide memo Exh.PG, which was attested by Muhammad Ashraf P.W. (not produced) and Liaqat Ali (P.W.7). The site plan without scale Exh. PJ and site plan in scale Exh.PA indicate that it was point No.2 where Mst. Arshad Bibi (deceased) had fallen to the ground in injured condition and it was the same place wherefrom the blood-stained earth was taken into possession by the Investigating Officer. The drawers of both the site plans have shown point No.1 as the place where Mst. Arshad Bibi had been fired at her lumber region by Muhammad Riaz (appellant) and this spot denotes the compound of the house of Abdul Majeed. The Investigating Officer (P.W.11) and the draftsman (P.W.1) have mentioned in their testimonies that they had drawn the site plans Exh.PJ and Exh.PA as per directions of the eye-witnesses. This version has not been denied or controverted by Muhammad Anwar complainant (P.W.9) and Muhammad Arif (P.W.10) in their testimonies. Both the eye-witnesses have categorically stated that the occurrence had taken place at 6-30 p.m. about 5 months or 5-1/2 months earlier

than the date of their examination before the trial Court. For this purpose, so as to know the exact date of occurrence we have to revert to the complaint Exh. PC which shows it as 31-8-2005. The witnesses of ocular account might not have mentioned the exact date of occurrence knowingly, while deposing as P.Ws. during trial as they by that time, must have smelled something boiling at the bottom of the prosecution case, after having fully known the inns and outs of the postmortem examination report Exh.PD which shows that the autopsy on the dead body of the deceased had been performed by lady doctor Nageen Sobia (P.W.5) on 31-8-2005 at 12-00 p.m. during the course of which she recorded the crucial details regarding "the time elapsed between injury and death within two to four hours and between death, and postmortem 48 to 72 hours".

14. The lady doctor while appearing as P.W.5 stated that she had dissected the dead body at 12-00 on 31-8-2005 without mentioning whether it was 12-00 noon or zero hour. She, however, mentioned in her examination-in-chief, after having been re-examined on 30-1-2006 that she had conducted the postmortem examination upon receipt of reference Exh.PE/1 transmitted by a medical officer RHC, Chak 30/JB dated 1-9-2005 which bore an endorsement Exh.PE/2, made by her and it showed that she had dissected the dead body on 1-9-2005. The medical officer of RHC, Chak 30/JB however, did not appear at trial as a prosecution witness. The document Exh.PE in fact is the injury statement qua the deceased lady which bears an uncustomary 'Note' (Exh.PE/1) by the above said medical officer with following description:--

> "As ordered by respected DOH Faisalabad dead body is Ref to Chak Ghumra RHC For postmortem W.M.O seat is vacant at RHC 30 JD ORDERED BY ALLAHO/ALL MIGHTY "

The above 'Note' bears the signature of a medical officer of RHC 30 JB and the date as 1-9-2005. The entire 'Note' (the signature of the medical officer and date inclusive) has been cancelled with parallel oblique lines by someone (probably by the same medical officer) to annul the validity thereof. The endorsement (Exh.PE/2) "Examined vide PM No. 5/05 dated 1-9-2005" does not bear the same signature of lady' doctor Nageen Sobia (P.W.5) as we find on the necropsy report Exh.PD. It might be a clever skirmish on the prosecution's part so as to bridge up the gap and inconsistencies between the ocular account and the medical evidence.

15. Muhammad Anwar P.W.9 has stated in his testimony that Riaz accused while armed entered the house of Arshad Bibi and raised lalkara that he would teach Mst. Arshad Bibi (deceased), a lesson for having gotten divorce from him; on hearing the noise of the children, the complainant joined by Arif (P.W.10) and Sarfraz P.W. (not produced) rushed to the house of Mst. Arshad Bibi and saw that Riaz fired a shot with .30 bore pistol which hit the right flank of Arshad Bibi who ran outside the house and fell in the street in injured condition; Riaz accused fired two more shots which landed on the right hip and right thigh of fallen injured; the accused-appellant ran away still firing and waving his pistol; the complainant and other eye-witnesses shifted Mst. Arshad Bibi in injured condition to Allied Hospital Faisalabad but she succumbed to the injuries near the said hospital.

16. Muhammad Arif P.W.10 stated that he reached the spot on hearing the noise and saw the accused running away while firing; he immediately corrected himself and stated that accused made three fire shots on Mst. Arshad Bibi which landed on her right flank, right hip

and left thigh; he along with others shifted the injured lady to Allied Hospital but she succumbed to the injuries before she could be taken to the said hospital. This witness did not depose about the place of occurrence nor he stated about the mode of occurrence as to how many fire shots had been received by the deceased lady inside the house and how many in the street.

17. The improvements made by Muhammad Anwar complainant in his testimony are crucial and calculated which cannot be overlooked easily. He did not contend at all in complaint Exh.PC that one of the fire shots had been received by the deceased lady in the courtyard of her house and the rest in the street. The changed version in aforesaid terms, might have been adopted by the complainant as blood-stained earth was collected by the Investigating Officer Bashir Ahmad S.-I. (P.W.11) from the street. The complaint Exh.PC categorically reveals that the occurrence had taken place inside the house of the deceased lady and she had been done to death there. He was confronted with his previous statement Exh.PC in his testimony and it was found that he had stated nothing about Mst. Arshad Bibi to have run outside the house after receipt of first fire shot and fallen in the street in injured condition where she was fired at twice by the accused. It appears from the testimony of Muhammad Anwar P.W.9 that mother and two children of the deceased lady aged 16 years and 14 years resisded with her at the time of occurrence. The other children aged 13, 11 and 7 also lived in the same house. He has admitted in his statement that he was present at the time when the I.O. and the draftsman visited the place of occurrence for preparation of the site plans and that he had pointed out various spots to both of them along with Sarfraz and Arif P.Ws. for the preparation of site plans Exh.PJ and Exh.PA. He has admitted in his statement that his house was at a distance of 90 feet from the house of occurrence and situated in a bazaar, across the road and the bazaar was about 30 feet wide. The house of Sarfraz P.W. was at a distance of 150 feet towards north from his house. He has further deposed that he heard the noise of the children and also heard the report of three fire shots one minute thereafter.

18. Muhammad Arif P.W.10 stated that mother of Mst. Arshad Bibi was present at his house at the time of occurrence. He further stated that he along with Sarfraz P.W. was present at the door step of Muhammad Anwar complainant when they heard the reports of fire shots. He could not mention anything worthwhile which could establish his presence at the place of occurrence at the relevant time. Both the eye-witnesses (P.W.9 and P.W.10) were put the suggestions that the deceased was a lady of easy virtue who remained away from her house frequently for days and her family members were annoyed over her conduct and that she had been missing from her house for some days prior to the occurrence and that her dead body was found from the sugarcane fields whereafter, the complainant and others joined hands under a conspiracy to fabricate a false case against the appellant to blackmail him but these suggestions have been denied by these witnesses.

19. The departure made from his previous statement by Muhammad Anwar complainant clearly establishes the fact that he was neither present at the spot at the relevant time nor he had witnessed the occurrence. The distance of his house from the place of occurrence and his contention to have heard the report of firing there-from is sufficient to hold that he had not rendered the credible depositions. Why would he change his stance as contained in his complaint Exh.PC to the one that Mst. Arshad Bibi after having received the first fire shot ran outside her house and fell in the street? It is a dishonest improvement which badly dents the

prosecution case. Why did the complainant and others could not shift Mst. Arshad Bibi to the hospital for treatment in injured condition and what obstructed them to do so, has also not been accounted for by them in their testimonies. The deceased lady according to the medical evidence remained alive for about two to four hours after having received the fire arm injuries and this time was sufficient for the eye-witnesses, if they were present at the place of occurrence at the crucial hour, to make it to the hospital along with the injured lady. The witnesses took another somersault in their testimonies when they contended that the injured lady died on way to the hospital, in contrast to their earlier version that she expired after she had been taken to the hospital.

20. The medical evidence as discussed in preceding paragraphs does not corroborate the ocular account in any manner rather it severely jolts the same as the time elapsed between death and postmortem examination has been mentioned by the medical officer (P.W.5) as 48 to 72 hours in the postmortem examination report. Regardless the controversy discussed hereinbefore, qua the date and time of autopsy, the fact remains that the time elapsed between death and postmortem examination, as is manifest from the postmortem examination report Exh.PD, it can be held that the ill-fated lady had been done to death much earlier than the time mentioned in complaint Exh.PC. Even if the time 12-00 or 12-00 p.m. are taken into consideration or the controversial 'Note' (Exh.PE/1) or the endorsement Exh.PE/2 are pondered over, the gulf created by the medical evidence, as to the time of death of the deceased, cannot be reconciled by any argument. The medical evidence can disclose, the number of injuries, the seat of injuries, the weapon used for infliction of such injuries, the probable time of the occurrence or the other allied details but it cannot identify the perpetrator of the crime. The medical evidence in its present form is not only fatal to the ocular account but also to the prosecution case as a whole. The eye-witness account presented by Muhammad Anwar P.W.9 and Muhammad Arif P.W.10 is filled with countless contradictions and discrepancies which have badly marred the intrinsic believability of their testimonies, so these (statements) cannot be relied upon for sustaining the impugned judgment which we hold to have been passed merely on conjectures and surmises by the learned trial Court without caring for the inconsistencies and fallibility of the prosecution case.

21. Considering all the circumstances, we feel constrained to allow the appeal (Criminal Appeal No.653 of 2006) which we hereby allow and set aside the conviction and sentence of the appellant and acquit him all of the charges against him. We direct that the appellant be set at liberty forthwith, if not wanted in any other connection.

22. The Reference (M.R. No.422 of 2006) is rejected, death sentence not confirmed.

NHQ/M-326/L Appeal accepted.

2013 Y L R 491

[Lahore]

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

MUHAMMAD KHAN and 2 others---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.610 of 2007, heard on 13th October, 2011.

Penal Code (XLV of 1860)---

----Ss. 224, 225/149, 148/149, 353/149 & 337-L(2)---Anti-Terrorism Act (XXVII of 1997), S.7(h)---Resistance or obstruction to lawful apprehension, rioting, assault or criminal force to deter public servant from discharge of his duty, hurt---Appreciation of evidence---Probability that a distorted story had been fabricated by the prosecution witnesses to give coverage to their unlawful act of having raided the house of the accused without fulfilment of the requisite legal requirements of law, could not be ruled out which had given rise to a strong impression as to the correctness of the defence version preferred by the accused during their statements recorded under S.342, Cr.P.C.---Cross-examination on the prosecution witnesses by defence was also consonant with the defence plea of the accused---Ocular testimony was in direct conflict with medical evidence---Prosecution had not set out the motive of the incident honestly---Police had failed to justify the action of raid---Ocular evidence in the absence of any corroboratory evidence could not be relied upon---Accused were given benefit of doubt and acquitted in circumstances.

Munir Ahmad Bhatti for Appellants

Khurram Khan Deputy Prosecutor-General Punjab for the State.

Date of hearing: 13th October, 2011.

JUDGMENT

SHAHID HAMEED DAR, J.---Muhammad Khan, Farrukh Javed and Zafar lqbal appellants were convicted under sections 224, 225, 149, 148/149, 353/149, 337-L(2)/149 P.P.C., read with section 7(h) of the Anti-Terrorism Act, 1997/149 P.P.C. and sentenced by learned Special Judge, Anti Terrorism Court, Sargodha vide judgment dated 17-4-2007 as under:--

Farrukh Javed (Appellant).

(i) Convicted under section 224, P.P.C. for intentional resistance and obstruction to his lawful apprehension and sentenced to undergo two years' R.I.

Muhammad Khan and Zafar lqbal (Appellants).

(i) Both appellants were convicted under section 225/149, P.P.C. for showing

resistance and obstructing lawful apprehension of Farrukh Javed (appellant) who was required in a criminal case under section 365(B), P.P.C. and sentenced to undergo three years' R.I. each with a fine of Rs.10,000 each, in default whereof to further undergo six months' S.I. each.

(ii) Both were also convicted under section 148/149, P.P.C. and sentenced to three years' R.I. each.

Farrukh Javed, Muhammad Khan and Zafar Iqbal (appellants).

(i) All three convicted under sec-tions 353/149, P.P.C. for using criminal force to deter police force from discharge of their duty and sentenced to undergo two years' R.I. each.

(ii) All three convicted under sec-tions 337-L(2)/149, P.P.C. for causing an injury to Wali Muhammad (P.W.2) and sentenced to two years' R.I. each.

(iii) All three were convicted under section 7(h) of the Anti-Terrorism Act, 1997 read with 149, P.P.C. and sentenced to undergo five years' R.I. each with a fine of Rs.10,000 each, in default thereof to further undergo six months' S.I. each.

2. Vide the aforesaid judgment the co-accused Muhammad Abdullah was acquitted of all the charges. The convicts have filed (Criminal Appeal No.610 of 2007) against their conviction and sentence which shall be disposed of by this judgment.

3. The occurrence had taken place in a street, running in front of the house of Farrukh Javed (appellant) in the area of Chak No.165/North, 27 km away from Police Station Shah Nakdar, District Sargodha at 4-30 p.m. on 31-10-2007.

4. Muhammad Shafiq S.-I. (P.W.1) was the Investigating Officer of case F.I.R. No.24, dated 22-1-2007, under section 365(B), P.P.C., registered at police station Shehzad Town, Islamabad which related to the abduction of Mst.Ambreen Akhtar daughter of Ali Muhammad and it transpired that she was in the unlawful custody of Farrukh Javed (appellant) resident of Chak No.165/North, District Sargodha, so, to effect the recovery of the alleged abductee, Muhammad Shafiq S.-I. joined by Muhammad Arif 6150/HC, Muhammad Tufail 5853/C P.Ws. (not produced) reached Police Station Shah Nakdar (Sargodha) wherefrom his team was re-enforced when Ghulam Hussain A.S.-I., Muhammad Riaz 1665/HC P.Ws. (not produced), Wali Muhammad 1785/C (P.W.2) and Ahmad Hayat 231/C P.W. (not produced) joined their raiding party which aboard the official vehicles assisted by 'mobile-3' arrived at a street in Chak No.165/North and knocked at the door of: the house of Farrukh Javed (appellant); besides, his name was also called loudly, in response to which he appeared at the outer gate and was overpowered by the police; in the meantime Muhammad Khan (appellant), Abdullah (since acquitted), Muhammad Ejaz (since P.O), Zafar Iqbal (appellant) and Shahbaz (since P.O) whose names were allegedly learnt by the police on a query; joined by nine unknown persons, all armed with fire arms besides two ladies emerged in the street while shouting at the police party, Farrukh Javed (appellant) raised lalkara and tortured Ghulam Hussain S.-I. P.W. (not produced); he was attempted to be rescued by the fellow police officials but their efforts were frustrated as Muhammad Khan (appellant) father of Farrukh Javed gave butt blows of his gun on the left arm of Wali Muhammad 1785/C

(P.W.2) while rest of the attackers having obstructed the police, created an opportunity for Farrukh Javed (appellant) to escape from the custody of the police, who within the view of the police, sped away with Mst.Ambreen Akhtar occupying the rear seat of his motorcycle; all the accused made good their escape after the occurrence.

5. Muhammad Shafiq S.-I. (P.W.1) prepared complaint Exh.PB and sent the same to Police Station Shah Nakdar, through Muhammad Riaz 1665/C P.W. (not produced) for registration of a case, where formal F.I.R. Exh.PB/1 was recorded by Muhammad Altaf Hussain A.S.-I. (P.W.5). Muhammad Shafiq S.-I. (P.W.1) also prepared injury statement (Exh.PA) of Wali Muhammad constable (P.W.2) and, sent him to RHC Sillanwali for medical examination under the escort of Muhammad Iqbal constable P.W. (not produced).

6. The investigation was initially conducted by Muhammad Nazir S.-I. (P.W.6) who reached the place of occurrence on 31-1-2007, caused inspection thereof and prepared visual site plan (Exh.PB) besides recording the statements of witnesses under section 161. Cr.P.C.; obtained non-bailable warrants of arrest Exh.PH/1 to Exh.PH/6 of the accused on 3-2-2007 and entrusted them to Ghulam Hussain A.S.-I. P.W. (not produced) for execution; also obtained proclamations Exh.PI/1 to Exh.PI/6 of all the accused and deputed Allah Dad constable P.W. (not produced) for execution, arrested appellants Farrukh Javed, Muhammad Khan, Zafar Iqbal and also Abdullah accused (since acquitted); Muhammad Khan (appellant) led to the recovery of .12 bore gun P-1 and two cartridges P-2/1-2 in pursuance to his disclosure from a room of his house which were taken into possession by the Investigating Officer vide memo Exh.PC; Abdullah accused (since acquitted) got recovered .12 bore gun P-3 and five live cartridges P-4/1-5 from a room of his house vide memo of recovery Exh.PD; the points of recovery of above said weapons were shown in site plan Exh.PC/1 and Exh.PD/1 Zafar Iqbal (appellant) led to the recovery of a danda P-5 on 6-3-2007 from his house vide memo of recovery Exh.PE, the site plan whereof is Exh.PE/1; on completion of investigation, he challaned the arrested accused.

7. Dr. Aman Ullah Qazi (P.W.4) presented the medical evidence with the contention that he medically examined Wali Muhammad constable at 9-15 a.m. on 1-2-2007 vide MLR (Exh.PF) and found following injury on his person.

> "(i) A contused swelling 15 x 10 cm on front lateral lower 1/3rd of left upper arm involving elbow joint".

The medical officer referred the injured to DHQ Hospital, Sargodha for management and X-rays of his injuries. The medical officer declared the above said injury as 337-L(2) P.P.C. by consulting the X-ray film report. The duration of the injury was noticed as "within 24 hours". It was a blunt weapon injury.

9. The public prosecutor gave up some of the prosecution witnesses being unnecessary and announced the prosecution case closed on 29-3-2007.

10. The defence plea taken up by Muhammad Khan (appellant) was adopted by all the appellants as well as by the acquitted co-accused which is re-produced hereunder:--

> "Police made illegal proceedings. Police entered in my house where it dragged women-folk and brought them out from the house. This was an illegal raid. I had

objected and warned police employees that I would make complaint to D.P.O. Sargodha against them on which they were annoyed and then with a false story they involved me and my co-accused in this case. Farrukh Javed accused and Mst.Ambreen were not present there but in another village and similarly Abdullah and Zafar accused too were not present there. On the same day I moved an application to D.P.O. with a prayer that a case be registered against police employees. All of us are innocent in this case."

11. None of the accused-appellants appeared as his own witness to repel the charges against him under section 340(2), Cr,P.C. nor anyone of them led any oral defence evidence. Muhammad Khan appellant however tendered in defence certain documents including copy of complaint titled "Mst.Ambreen Akhtar v. Aftab and others" (Exh.DB), copy of statement of Mst.Ambreen Akhtar recorded by a learned Magistrate at Sargodha (Exh.DC), copy of nikahnama showing marriage between Mst.Ambreen and Farrukh Javed (Exh.DD), copy of F.I.R. No.24 dated 22-1-2007 registered at Police Station Shehzad Town, Islamabad (Exh.DF), copy of order dated 21-2-2007 passed in above said writ petition (Exh.DG) and copy of application moved to the DPO Sargodha (Mark-A) and closed the defence evidence.

12. Disbelieving the defence plea, the learned trial Court proceeded to convict the appellants on the basis of ocular account furnished by the members of the raiding party which stood corroborated by motive and medical evidence. The learned defence counsel however has assailed the above noted items of evidence which impressed the learned trial Court and canvassed that the defence plea had the element of credence and correctness.

13. The occurrence took place in the scenario that Muhammad Shafiq (P.W.1), while investigating case F.I.R. No.24 supra learnt that Mst.Ambreen Akhtar, the alleged abductee/victim was in the unlawful custody of the abductors, Farrukh Javed (appellant) being one of them, hence, he prepared a raiding party comprising the aforementioned members and reached Police Station Shah Nakdari (Sargodha) for the dual purpose of fetching re-enforcement and conducting raid on the abode of Farrukh Javed (appellant) which was situated in Chak No.165/North, falling in the territorial jurisdiction of Police Station Shah Nakdar. The raiding team was fortified by the addition of certain other police officials, belonging to the said police station, which included Wali Muhammad constable (P.W.2) who is an injured witness of this case. According to the prosecution case, the police party knocked at the door of the house of Farrukh Javed (appellant) and also called loudly his name which caused his appearance at the threshold of the outer gate of his house. It was the point, when trouble started. Farrukh Javed (appellant) was immediately taken into custody by the police and they had hardly started interrogating him so as to learn about the whereabouts of Mst.Ambreen Akhtar, when they were attacked by Muhammad Khan (appellant), Abdullah (since acquitted), Zafar Iqbal (appellant), Muhammad Ijaz (since P.O.), Shahbaz (since P.O.) joined by two female characters and nine unknown culprits who were armed with firearms and dandas etc. On the lalkara of Farrukh Javed appellant, the police party was targeted of aggression by the above said attackers who snatched Farrukh Javed (appellant) from the custody of the police and assisted him in fleeing the place of occurrence on a motorcycle along with Mst. Ambreen Akhtar Wali Muhammad constable (P.W.2) was inflicted injuries by Muhammad Khan (appellant) as he hurled his rifle at the said police official from its butt side.

14. No evidence, either verbal or documentary has been led by the prosecution to prove that the raid on the house of Farrukh Javed (appellant) had been conducted in a lawful manner or it was the requirement of the investigation of case F.I.R. No.24 supra to conduct a raid for the recovery of Mst.Ambreen Akhtar nor any Rapat Roznamcha (case diary) of Police Station Shah Nakdar was tendered before the trial Court during the course of trial. It was a strong contingent of the police which had gone to the house of Farrukh Javed (appellant) to accomplish the mission of recovery of Mst.Ambreen Akhtar, members whereof showed such cowardice, as if they were just nothing and proved themselves to be less than nothing against those who were the common villagers. Search warrant was also not produced to justify that the raid of the police was conducted in a legal and regular manner. The defence plea in fact is, that the police conducted an illegal raid, dragged women folk, molested their chastity and brought them out of their house which act of the police was objected to by Muhammad Khan (appellant) who warned the police employees of lodging complaint against them with DPO Sargodha, whereupon they got annoyed and lodged a false case with a cooked up version against the appellants and their co-accused. Muhammad Khan (appellant) further contended. statement under section 342, Cr.P.C., which was relied upon by his co-convicts, that Farrukh Javed (appellant) and Mst. Ambreen Akhtar were not present at the scene of occurrence at the relevant time and similarly Abdullah (since acquitted) and Zafar Iqbal (appellant) were also not present there. He concluded that he had moved an application to DPO Sargodha with the prayer that a case be registered against the said police employees. The possibility of the correctness of the said version is not ruled out for a variety of reasons, discussed herein.

15. The medical evidence also does not lend complete corroboration to the eye-witness account rendered by Muhammad Shafiq S.-I. (P.W.1) and Wali Muhammad constable (P.W.2) as the testimony of Dr. Aman Ullah Qazi (P.W.4) reveals only one blunt weapon injury (337-L(2) P.P.C.) at the locale of front lateral lower 1/3rd left upper arm with measurement of 15 cm x 10 cm. The time of occurrence is 4-30 p.m. on 31-1-2007 and medical examination of P.W.2 is delayed by about 17 hours for which no explanation has been offered by the prosecution. The other alleged injured witness of the occurrence Ghulam Hussain S.-I. was withheld by the prosecution and given up as unnecessary. The statement of the medical officer (P.W.4) however does not show that Ghulam Hussain S.-I. was ever medically examined by him as an injured witness of the occurrence.

16. The depositions made by Muhammad Shafiq S.-I. (P.W.1) and Wali Muhammad constable (P.W.2) in their testimonies show that Wali Muhammad constable had received multiple injuries on his person at the hands of Muhammad Khan (appellant) but testimony of P.W.4 discloses only one blunt weapon injury on his person. It appears from the testimony of Wali Muhammad constable (P.W.2) that the police party was heavily armed at the time of occurrence which surprises us as to the ease whereby they surrendered before a few disorganized and disjointed villagers. Sufficient reasons exist to believe that Farrukh Javed (appellant) was not present at the relevant time of occurrence nor he had been taken into custody by the police and the version of the prosecution in this regard does not seem more than a Mere gossip or exaggeration. The probability that a distorted story had been fabricated by the prosecution witnesses to give coverage to their unlawful act of having raided the house of Muhammad Khan (appellant), without fulfilment of the requisite legal requirements of law, cannot be ruled out This give rise to a strong impression as to the correctness of the defence version, preferred by the appellant during their statements under section 342, Cr.P.C.

17. The line of cross-examination on the above said P.Ws., by the defence is also consonant with the defence plea of the accused. The ocular account is in direct conflict with the medical evidence as discussed supra. The motive of the incident has also riot been honestly setout by the prosecution. The police had failed to justify the action of raid and in the absence of corroboratory evidence, we do not feel inclined to place implicit reliance upon the ocular evidence.

18. In these circumstances, we are constrained to accept this appeal, set aside the conviction and sentences of the appellants and acquit them by extending benefit of doubt. They are on bail. Their sureties are discharged.

NHQ/M-11/L Appeal accepted.

2013 Y L R 692

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD RAFIQUE---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous Nos.13838-B and 14047-B of 2011, decided on 2nd November, 2011.

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

----Ss. 497(2) & 498---Penal Code (XLV of 1860), S.302/34---Qatl-e-amd, acts done by several persons in furtherance of common intention---Ad interim pre-arrest bail, confirmation of---Further inquiry---Case of three versions---First version was of the complainant who, according to the F.I.R. alleged that two unknown accused were seen by him and other eye-witnesses leaving the spot after having committed the murder of the deceased; second version was the private complaint by complainant, almost two months after the occurrence, against deceased's wife with the assertion that he and other eye-witnesses had witnessed deceased's wife firing at the deceased committing his murder and third version was private complaint by paternal nephew of the deceased against accused, co-accused and deceased's wife with the assertion that accused had fired into the chest of the deceased and thereby committed his murder---Accused's name did not figure in the investigation record---Complainant and eye-witnesses of the F.I.R. had stated, in the first private complaint before Trial Court that deceased had been done to death by deceased's wife---Second private complaint was an attempt to eclipse the proceedings qua the challan case and the first private complaint, as new set of eye-witnesses were presented, who had neither joined the investigation nor stated anything against the accused during the course of investigation---Accused's case constituted need for further inquiry into his guilt and his false implication in the case due to hidden motives of the complainants could not be ruled out and as to which of the three versions was probable or nearer to the truth could only be determined by Trial Court after recording

evidence of the parties during trial---Ad interim pre-arrest bail granted to accused was confirmed, in circumstances.

Muhammad Ismail v. Muhammad Rafique and another PLD 1989 SC 585 rel.

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

----S. 497(2)---Penal Code (XLV of 1860), S.302/34---Qatl-e-amd, acts done by several persons in furtherance of common intention---Bail, grant of---Further inquiry---Case of three versions---First version was of complainant who according to the F.I.R. alleged that two unknown accused were seen by him and other eye-witnesses leaving the spot after having committed the murder of the deceased; second version was private complaint by complainant, almost two months after the occurrence, against deceased's wife with the assertion that he and other eye-witnesses had witnessed deceased's wife firing at the deceased committing his murder and third version was private complaint by paternal nephew of the deceased against accused, co-accused and deceased's wife with the assertion that co-accused had fired into the scalp of the deceased and thereby committed his murder---Evidence provided by complainant against co-accused during investigation at the most hinted at a probability qua the latter, being an abettor of the crime---Complainant and eye-witnesses of the F.I.R. had stated, in the first private complaint before Trial Court that deceased had been done to death by deceased's wife---Second private complaint was an attempt to eclipse the proceedings qua the challan case and the first private complaint as new set of eye-witnesses were presented who had neither joined the investigation nor stated anything against the accused during the course of investigation---Accused's case constituted need for further inquiry into his guilt and his false implication in the case due to hidden motives of the complainants could not be ruled out and as to which of the three versions was probable or nearer to the truth could only be determined by Trial Court after recording evidence of the parties during trial---Accused was admitted to post arrest bail in circumstances.

Muhammad Ismail v. Muhammad Rafique and another PLD 1989 SC 585 rel.

Ch. Ijaz Ahmad for Petitioner (in Criminal Miscellaneous No.13838-B of 2011).

Muhammad Saeed Ansari for Petitioner (in Criminal Miscellaneous No.14047-B of 2011).

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab and Ammar A.S.-I. for the State.

Arshad Ali Chohan for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---Through this single order, I intend to dispose of two bail applications, one (Criminal Miscellaneous No.13838-B of 2011) moved by Muhammad Rafiq accused-petitioner for seeking bail before arrest and the other (Criminal Miscellaneous No.14047-B of 2011) moved by Muhammad Maalik accused-petitioner for seeking post-arrest bail, in case F.I.R. No.113, dated 18-3-2011, under sections 302, 34 P.P.C., registered at Police Station Malka Hans, District Pakpattan Sharif and in private complaint titled "Syed Mazhar Abbas Shah v. Muhammad Malik and 2 others" filed for offences under section 302,

34, P.P.C. as well as in another private complaint titled "Munawar Hussain v. Mst.Nasreen Bibi" filed for an offence under section 302 P.P.C. in the perspective of pendency of both the private complaints.

2. Both the learned counsel for the petitioners submit in unison that none of the accused-petitioners is named in the F.I.R.; no incriminating evidence could be collected during the course of investigation by the Investigating Officer against accused Muhammad Rafiq and the evidence brought on the record against Muhammad Maalik accused (petitioner) does not corroborate the prosecution case in any manner; lastly submit that the petitioners' case constitutes need for further inquiry into their guilt so they may be granted the relief prayed for.

3. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant opposes with the contention that witnesses Imdad Hussain, Dildar Hussain and Muhammad Iqbal joined investigation on 20-8-2011 and implicated Muhammad Maalik accused through direct depositions to the effect that he (Maalik) along with Mst.Nasreen Bibi hatched-up a conspiracy at a hotel, 10/15 days prior to the occurrence and chatted about their intentions to murder Zafar Ali Shah (deceased), the husband of Mst.Nasreen Bibi as he had learnt about the illicit liaison between them (Maalik and Mst.Nasreen Bibi); in the private complaint filed by Syed Mazhar Abbas Shah on 9-7-2011 both the petitioners have been burdened with the specific liability of firing effectively at Zafar Ali Shah (deceased) and thereby committing his instantaneous murder; the medical evidence fully corroborates the text of the noted private complaint the trial has commenced, hence petitioners plea for bail may not be entertained.

4. Having heard learned counsel for the parties and perused the record, I find that Munawar Hussain Shah reported the crime vide F.I.R. No.113 of 2011, dated 18-3-2011, for offences under sections 302, 34, P.P.C. at Police Station Malka Hans, District Pakpattan Sharif with the precise allegation that two unknown accused were seen by him and other eye-witnesses hurriedly leaving the spot after having committed the murder of Zafar Ali Shah. Munawar Hussain Shah (complainant) filed a private complaint on 17-5-2011 almost two months after the occurrence against Mst.Nasreen Bibi for an offence under section 302, P.P.C. with a categorical assertion that he and the other eye-witnesses had witnessed Mst.Nasreen Bibi accused firing through a .12 bore gun at her husband Zafar Ali Shah and thereby committing his instantaneous murder. During pendency of this complaint case, Syed Mazhar Abbas Shah, a paternal nephew of the deceased chipped in, with a fresh private complaint against Muhammad Maalik, Muhammad Rafiq (petitioners) and Mst.Nasreen Bibi with a specific version that Muhammad Maalik (petitioner) being armed with .12 bore gun had fired at the scalp of the deceased whereas Muhammad Rafiq accused-petitioner fired with his .12 bore gun right into the chest of the deceased and thereby committed his murder. So far as the investigation record is concerned, the name of the petitioner Muhammad Rafiq does not figure therein so he happens to be an alien to the prosecution's case. The evidence produced by the complainant against Muhammad Maalik (petitioner) during investigation, at the most hints at a probability qua the latter, being an abettor of the crime as mentioned in the F.I.R. The complainant of F.I.R. and the eye-witnesses cited therein categorically stated before the learned trial Court in private complaint case, that Zafar Ali Shah had been done to death by Mst.Nasreen Bibi. Syed Mazhar Abbas Shah however made an attempt to eclipse the previous

proceedings qua the challan case and the private complaint case filed by Munawar Hussain Shah, through another private complaint, mentioned hereinabove and thus changed the whole scenario by presenting a new set of eye-witnesses who had neither joined the investigation nor stated anything against the accused-petitioners during the course of investigation.

5. In view of the aforesaid circumstances, I am of the considered view that the petitioners' case constitutes need for further inquiry into their guilt as envisaged by section 497(2), Cr.P.C. and their false implication in this case due to some hidden motives of the complainant side led by Syed Mazhar Abbas Shah cannot be ruled out. At the moment, it appears to be a case of three versions and which one is probable or nearer to truth can only be determined by the learned trial Court after recording evidence of the parties during trial. It has been vociferously argued by learned counsel for the complainant that trial has commenced or it is likely to commence in near future so petitioners' bail plea may not be entertained, I am afraid, is not based on any element of cogency, as an accused would be entitled to grant of bail as a matter of right, once, court reaches the conclusion that his case calls for further probe into his guilt within the scope of further inquiry as contemplated by the aforesaid provision of law. Guidance in this regard may be had from case titled "Muhammad Ismail v. Muhammad Rafique and another" (PLD 1989 SC 585), therefore, I accept both the above noted bail applications.

6. The ad interim pre-arrest bail granted to Muhammad Rafiq accused-petitioner vide order dated 18-10-2011 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court. Muhammad Maalik, accused-petitioner is admitted to post-arrest bail provided he furnishes bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

7. Before parting with this order, it is clarified that the observations contained herein are tentative in nature and have no bearing upon the merits of the case.

MWA/K-10/L Bail confirmed.

2013 Y L R 828

[Lahore]

Before Shahid Hameed Dar, J

SHAMSHAD AKHTAR---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.5489-BC of 2012, decided on 30th November, 2012.

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

----S. 497(5)---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Petition for cancellation of bail, dismissal of---Details of transaction resulting in issuance of cheque not clear---Effect---Accused allegedly issued a cheque to the complainant in connection with the sale of a house, which cheque got dishonoured on presentation due to insufficient funds---High Court granted bail to accused---Validity---No evidence existed on record to establish as to when, where and how the disputed cheque was handed down to the complainant by the accused---Record also did not show as to who were the witnesses in whose presence the alleged transaction regarding sale/purchase of house was carried out---Story contained in the F.I.R. was vague and in absence of any corroborating evidence, it was not clear as to why accused delivered the cheque in question to the complainant---Accused was not alleged to have misused the concession of bail in any manner since his release from prison---Petition for cancelation of bail was dismissed in circumstances.

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

----S. 497(5)---Bail, cancellation of---Grounds---Petition for cancellation of bail could not be granted unless some serious legal infirmity or exceptional circumstance calling for interference could be found from the bail granting order.

Muhammad Bashir Malik for Petitioner.

Muhammad Nawaz Shahid, Deputy District Public Prosecutor for the State with Allah Bakhsh S.-I.

Sahir Mehmood Bhatti for Respondent No.2 (in person).

ORDER

SHAHID HAMEED DAR, J.---Seeks cancellation of pre-arrest bail, allowed to Sh. Muhammad Ali (respondent No.2) vide order dated 24-5-2011 passed by this court in Criminal Miscellaneous No.5361-B of 2011, in case F.I.R. No.169, dated 21-3-2011, under section 489-F, P.P.C., registered at Police Station Naseerabad, Lahore.

2. Precisely the prosecution case as narrated by Shamshad Akhtar (complainant-petitioner) is that the respondent-accused handed down a cheque of Rs.1.2 million to the complainant which on presentation for encashment by her was bounced by the bank due to insufficient funds.

3. Learned counsel for the petitioner submits that the impugned order had been obtained by respondent No.2 having suppressed the real facts of the case and misled the court to believe that he was on inimical terms with his maternal nephew Khalid Saeed; the first F.I.R. bearing No.166 of 2011, dated 15-3-2011, under section 489-F, P.P.C., registered at Police Station Old Anarkali, Lahore was a conspiratorial instrument, devised by the respondent-accused to shun his liability towards the petitioner-complainant and create a false defence for his misdeed; the text of the F.I.R. No.166 of 2011 (supra) revealed that it was self-contradictory and it was created through an unholy liaison between the respondent-accused and his maternal nephew who was assisted by the former in getting him post-arrest bail in the said case from the court of learned Judicial Magistrate, Lahore by compounding the offence with him; first F.I.R. No.166 of 2011 (supra) was not properly read and appreciated at the time of passing the impugned order;

Khalid Saeed was an attorney of respondent No.2 and general power of attorney in his favour has not been rescinded by the respondent-accused as yet; lastly submits that the respondent-accused failed to satisfy the condition-precedent for grant of extraordinary relief of bail before arrest, hence, the impugned order may be re-called.

4. Learned counsel appearing on behalf of respondent-accused submits that the order-in-question has been passed by this court while taking into consideration all the attending circumstances of the case and respondent No.2, at no stage, deceived or misled this court to procure the impugned order; the judicial opinion recorded by this court through the impugned order does not call for interference as condition-precedent for lodging such a request, akin to the case in hand, can only be entertained if the respondent-accused misused the concession of bail or suppressed or distorted the actual facts of the case; the contention of the petitioner as on today is not entertainable, hence the instant petition may be dismissed.

5. Learned DDPP submits that the police record still reveals that no evidence has been collected by the I.O., in terms of recording statements under section 161, Cr.P.C. of any witness qua the alleged deal between the parties, hinting at purchase/sale of a house.

6. Learned counsel for the petitioner counter argues with the submission that the statement of the bank manager and that of two independent witnesses regarding deliverance of cheque by respondent No.2 to the complainant-petitioner have been recorded.

7. After hearing learned counsel for the parties and perusing the record, it is observed that the order-in-question was passed by this court after having considered all the facts of this case. It remains a fact that there exists no evidence on the record as to when, where and how the disputed cheque was handed down to the complainant-petitioner by the respondent-accused nor it can be found from the record as to who were the witnesses in whose presence the alleged transaction regarding sale/purchase of a house was carried out. Admittedly case-F.I.R. No.166 2011 (supra) was registered much earlier than case-F.I.R. No.169 2011 (supra), at the instance of Sh. Muhammad Ali (respondent No.2) wherein, the disputed cheque figures conspicuously, having been issued by the respondent-accused along with two other cheques, to his maternal nephew Khalid Saeed in the wake of sale of a house. This particular F.I.R. deeply over-shadows the story of F.I.R. No.169 of 2011 ante.

8. Learned counsel for the petitioner has gone too deep into the facts of this case without realizing that it is a cancellation-petition under section 497(5), Cr.P.C. which has its own parameters and cannot be granted unless some serious legal infirmity or exceptional circumstance calling for interference, can be found from the bail-granting order. The rudiments of section 489-F, P.P.C. require that an offender would be liable for an action thereunder if he would dishonestly issue a cheque towards repayment of loan or discharge of a lawful obligation which on presentation be bounced by the bank for the reasons enumerated therein. It cannot be held even today that the above said basic ingredients stood satisfied. The story of F.I.R. No.169 of 2011 (supra) is as vague and perplexing as ever, for it, in absence of any corroboratory evidence, keeps its reader guessing as to the compulsive reason, leading to alleged deliverance of the disputed cheque by the respondent-accused to the petitioner. There is no allegation against the respondent-accused that he misused the concession of bail in any manner since his release from the prison. I do not find any flaw in the bail granting order which is hereby sustained. The instant petition being devoid of merits is dismissed.

MWA/S-6/L Petition dismissed.

2013 Y L R 958

[Lahore]

Before Shahid Hameed Dar, J

ABDUL JABBAR and 2 others---Petitioners

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.16044-B of 2012, decided on 27th December, 2012.

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

---Ss. 498 & 497(2)---Penal Code (XLV of 1860), Ss. 337-A(iii)/337-F(v)/34/ 337-L(2)--- Shajjah-i-hashimah, ghayr-jaifah hashimah, common intention, other hurt---Ad interim pre-arrest bail, confirmation of---Case of cross-versions---Complainant suppressing injuries received by accused party during the incident---Effect---Accused persons allegedly inflicted injuries on the injured persons during the occurrence---Cross-version F.I.R. for the occurrence was lodged by accused side---Two versions of the occurrence existed, which ran parallel to each other---Question as to which party initiated aggression could not be resolved at bail stage and would be determined by Trial Court after recoding evidence of parties at trial---Injuries received by accused persons were suppressed by the complainant in the present F.I.R.---Element of doubt existed regarding injuries received by one of the injured persons---Investigation officer had opined that both parties had participated in the occurrence---Case was one of further inquiry---Ad interim pre-arrest bail already granted to accused was confirmed in circumstances.

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

---Ss. 497 & 498---Bail---Principle---Plea that accused should not be granted bail so as to facilitate the police in recovering weapon of offence---Validity---Accused could not be denied bail on such a plea as recovery of weapon could be achieved by an investigating officer after obtaining a search warrant.

Rana Zahid Iqbal for Petitioners.

Ms. Muqaddas Tahira, Addl: Prosecutor General Punjab.

Abdul Qadeer Kamboh for the Complainant.

Muhammad Awais Junior Clerk, DHQ Hospital, Pakpattan Sharif and Azhar A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Abdul Jabbar, Muhammad Aslam and Muhammad Nisar (petitioners) seek bail before arrest in case-F.I.R. No.468 of 2012 dated 13-9-2012 registered for offences under sections 337-A(iii), 337-F(v), 337-L(2), 34, P.P.C. at Police Station Saddar Arifwala (Pakpattan Sharif).

2. Precisely, the prosecution case as stated by Mst.Rani Bibi, in the noted F.I.R. is that Abdul Jabbar (petitioner) armed with sota, Muhammad Aslam (petitioner) armed with sota, Muhammad Nisar (petitioner) armed with an iron rod and accused Khushi Muhammad, armed with sota attacked her husband Noor Ahmad and son Subeh Sadiq, at 4-00 p.m. on 10-9-2012 and badly wounded them by inflicting injuries on various parts of their bodies; Abdul Jabbar (petitioner) gave a sota blow on the left arm of Noor Ahmad, Muhammad Aslam (petitioner) inflicted an injury on the nose of Noor Ahmad, whereas, Muhammad Nisar (petitioner) caused an injury on the left hand of her son Subeh Sadiq; the motive behind the occurrence pertained to a previous dispute between the parties.

3. The Investigating Officer recorded statement of Abdul Jabbar (petitioner) on 16-9-2012 to record a cross-case for offences under sections 337-A(i), 337-A(ii), 337-F(v), 337-L(2), 34 P.P.C., which reveals the time of occurrence as 6-00 p.m. on 10-9-2012. According to the cross-case Muhammad Aslam (petitioner) and Muhammad Nisar (petitioner) received multiple injuries during the occurrence at the hands of the accused who are Noor Ahmad and others.

4. Learned counsel for the petitioners submits that the petitioners have been falsely involved in this case due to malice and ulterior motives of the complainant; the facts of the case have been distorted by Mst. Rani Bibi (complainant) so as to conceal the guilt of her party, who badly tortured Muhammad Aslam and Muhammad Nisar (petitioners); the injuries of the petitioners have been suppressed by the complainant of the F.I.R. case with a view to withhold the factum of initiation of aggression by them; the Medical Board of Pakpattan Sharif re-examined the injuries of Noor Ahmad and after CT-Scan they found that Noor Ahmad had not received any fractural injury on his nose; lastly submits that it is a case of two versions and which version is correct, can only be seen by the trial Court after recording evidence of the parties at trial.

5. On the other hand, learned counsel for the complainant opposes with the contention that the petitioners being armed with different weapons launched aggression against the complainant party and caused multiple injuries on the bodies of Noor Ahmad and his son Subeh Sadiq; the story of cross-version is false and delayed by three days from the date of registration of the F.I.R.; the injuries of Muhammad Aslam and Muhammad Nisar accused have been caused with friendly hands so as to build-up a cross-case; there exists no reason to believe that the petitioners have not committed a non-bailable offence.

6. Learned Addl: Prosecutor-General Punjab relies upon the submissions of learned counsel for the complainant and submits that recovery of weapons of offence is yet to be effected from the accused.

7. After hearing learned counsel for the parties and perusing the record, it is observed that Abdul Jabbar (petitioner) is the complainant of cross-case, which was recorded on 16-9-2012 by the Investigating Officer for offences under sections 337-A(i), 337-A(ii), 337-F(v), 337-L(2), 34, P.P.C. against the husband of the complainant, namely Noor Ahmad and others. Muhammad Aslam (petitioner) and Muhammad Nisar (petitioner) are the injured P.Ws. of the cross-case who received multiple injuries during the occurrence, which have been completely suppressed by the complainant of the F.I.R. case. The MLR of Muhammad Aslam accused/petitioner reveals four blunt weapon injuries, one out of which Injury No.2 was declared Ghayr-Jaifah Hashimah (337-F(v), P.P.C.) by the Medical Officer, whereas,

Muhammad Nisar accused/ petitioner, as per his MLR received one sharp-edged-weapon-injury and two others by blunt weapon(s). Injury No.1 on his person was declared as Shajjah-i-Mudihah (337-A(ii), P.P.C.).

8. So far as the MLR of Noor Ahmad, the husband of the complainant, is concerned, it entails three blunt weapon injuries, one out of which, Injury No.1, was declared as Shajjah-i-Hashimah (337-A(iii) P.P.C.) and the other, Injury No.2 was declared as Ghayr-Jaifah Hashimah (337-F(v) P.P.C.) by the first Medico-legal Officer, whereas, MLR of Subeh Sadiq, the son of the complainant disclosed two blunt weapon injuries which fell within the definition of section 337-L(2) P.P.C. The accused challenged the veracity of MLR of Noor Ahmad injured, as a result of which, his injuries were re-examined by the members of District Standing Medical Board Pakpattan Sharif who, after conducting various tests including the CT-Scan, reversed the finding of the first Medico-legal Officer in respect of injury No.1 by declaring that no fracture was seen in the nasal bone. Hence, this particular injury falls within the definition of Shajjah-i-Khafifah (337-A(i)P.P.C.). So far as Injury No.2, which showed fracture of left ulna, lower part, is concerned, it remained as such, even after its re-examination by the District Medical Board.

9. Apparently, there are two versions of the occurrence, alleged, which run parallel to each other. The question regarding initiation of aggression cannot be resolved at this stage and it would be determined by the learned trial Court, after recording evidence of the parties at trial. The injuries on the person of Muhammad Aslam and Muhammad Nisar (petitioners) have been suppressed by the complainant and the Medico-legal Report of Noor Ahmad injured showed an element of dubiousness when his injuries were re-examined by the members of the District Standing Medical Board. The cross-case has stood the test of investigation and opinion formulated by the Investigating Officer, at present shows that the accused of the F.I.R. case as well as that of the cross-case had participated in the occurrence, as alleged against them.

10. Insofar as the argument of the learned counsel for the complainant that recovery of crime weapons is still to be effected from the accused/petitioners therefore, they may not be granted the relief of bail before arrest, is not of much relevance as, by keeping in view the attending circumstances of the case discussed hereinabove. The petitioners cannot be sent to jail only to facilitate the police to recover some weapons from them, for such an objective could be achieved by an Investigating Officer through obtainment of a search warrant, To resort to such an exercise, the police have to equip themselves with the modern techniques of investigation, the professional dexterity and legal acumen, which they regrettably lack for a variety of reasons. I am of the considered view that the petitioners case constitutes need for further inquiry into their guilt as envisaged by section 497(2), Cr.P.C. and in such a situation it is an inherent right of the accused to be granted bail.

11. For the discussion supra, I accept this application and confirm ad interim pre-arrest bail granted to the petitioners vide order dated 5-11-2012 subject to 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.

MWA/A-4/L Bail confirmed.

2013 Y L R 1046

[Lahore]

Before Shahid Hameed Dar, J

UMAR FAROOQ---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.16383-B of 2011, decided on 14th December, 2011.

Criminal Procedure Code (V of 1898)---

----Ss. 497(2) & 498---Penal Code (XLV of 1860), Ss.392 & 411---Robbery, dishonestly receiving stolen property---Ad interim pre-arrest bail, confirmation of---Further inquiry---Accused along with his co-accused was alleged to have entered the house of the complainant, rendered the inmates of the house hostages and snatched numerous valuables at gun-point---Accused was not named in the F.I.R. nor in the statements of prosecution witnesses---Accused had in the year before, moved an application before the police with the contention that he had been looted at gun-point by four unknown persons which led to the initiation of proceedings under Ss.107 & 151, Cr.P.C against the brother of one of the witnesses of the accused's case---Said witness might have been biased against the accused for such reason---Investigating Officer had failed to collect any viable connecting evidence against the accused and had been relying on the statements of the co-accused who allegedly disclosed accused as one of their companion during the occurrence---Accused was admittedly the next door neighbor of the complainant---Call-logs of accused's cell phone might have shown a contact between accused and nominated co-accused but what this was all about, could only be resolved during trial---No evidence existed to believe complainant's version that accused abetted his co-accused in the commission of the crime---Accused's case was open to further probe---Ad-interim pre-arrest bail granted to accused was confirmed, in circumstances.

Petitioner in person with Mian Muhammad Sikandar Hayat for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab for the State.

Muhammad Bedar Bakhat Bajwa for the Petitioner.

Gulzar A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Umar Farooq (petitioner) seeks bail before arrest in case F.I.R. No.1504 of 2011 dated 27-9-2011 under section 392, 411, P.P.C. registered at Police Station Peoples Colony, Faisalabad.

2. Three unknown veiled accused entered the house of the complainant, rendered the inmates of the house hostages and snatched lap top, wrist watch, cash Rs.20,000 and gold ornaments weighing two tolas from them at gunpoint; on showing resistance by the

complainant, the veils of two of the accused were removed who were identified by the complainant as Usman and Kashif, whereas the third accused escaped unidentified.

3. The complainant got recorded supplementary statement on 17-10-2011 with the contention that he had been searching for the third accused and learnt through his resources that it was Umar Farooq (petitioner) who had been in the company of the nominated co-dacoits at the time of alleged occurrence:

4. Usman and Kashif were arrested on 7-10-2011 and they led to the recovery of a few looted articles on 16-10-2011. They disclosed before the Investigating Officer that their third companion was Umar Farooq, the petitioner who had received the lap-top and cash Rs.10,000 as his share.

5. Learned counsel for the petitioner submits that petitioner has been falsely involved in this case due to malice and ulterior motives of the complainant; the petitioner is the next door neighbour of the complainant and he is a student of 4th year; the petitioner and his family had direct enmity with the alleged eye-witness Shahid Mehmood as his real brother Fahad along with others had been proceeded against under section 107, 151 Cr.P.C on 17-2-2010 by the police on the complaint of the petitioner who was also booked under the same provision of the Criminal Procedure Code along with certain others, the same day; it was said Shahid Mehmood who persuaded the complainant to falsely implicate the petitioner in the instant case.

6. On the other hand learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant submits that sufficient incriminating evidence is available against the petitioner as he had closed liaison with the nominated co-accused and the Investigating Officer had collected the call-log of his cell phone which established his link with Usman accused; the petitioner after having committed the occurrence received his share off the looted property and according to the disclosure made by his co-accused, the laptop and cash were in his possession which were still to be recovered.

7. After having heard learned counsel for the parties and perused the record, it is found that the petitioner is not named in the F.I.R., nor in the statements of witnesses Muhammad Nawaz and Shahid Mehmood. The record reveals that the petitioner moved an application before the S.H.O, Police Station Peoples Colony, Faisalabad with the contention that he had been looted at gunpoint by four unknown accused at 8-00 p.m. on 16-2-2010, one out of whom, namely Ali Cheema was identified by him at the time of occurrence. This application led to the initiation of proceedings under sections 107, 151 Cr.P.C. against Umar Farooq (petitioner) and three others on one side and Fahad Mehmood, the real brother of eye-witness Shahid Mehmood (of this case) and four others on the other side. This is how, the cited witness Shahid Mehmood may be biased against the petitioner. The Investigating Officer has failed to collect any viable connecting evidence against the petitioner so far. He has been banking on the statements of the co-accused of the petitioner who allegedly disclosed before him that their third companion was Umar Farooq (petitioner) who had received from them a laptop and some cash as his share. The petitioner is admittedly, the next door neighbour of the complainant. He is a student of 4th year in G.C. University, Faisalabad, as is evident from his roll-number slip. The call-log pertaining to the cell phone of the petitioner may show a contact between the petitioner and the nominated co-accused but what was this all about,

could only be resolved during the course of the trial. Even otherwise no evidence is available to rely upon this particular piece of evidence at this stage. At one stage of investigation, as is manifest from case diary dated 21-11-2011, the complainant adopted the version that Umar Farooq petitioner who was his neighbour had abetted his co-accused in the commission of the above said crime. There exists no evidence to believe this particular version of the complainant. It may not be without substance when learned counsel for the petitioner argued that, due to previous heartburning, Shahid Mehmood (witness) prevailed upon the complainant to falsely implicate the petitioner in the instant case. Prima facie the case of the petitioner is open to further probe as envisaged by section 497(2), Cr.P.C.

8. For the foregoing reasons, this application is accepted and the ad-interim pre-arrest bail granted to the petitioner on 2-12-2011 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of learned trial Court.

MWA/U-1/L Pre-arrest bail confirmed.

2013 Y L R 1175

[Lahore]

Before Shahid Hameed Dar, J

ABDUL MANAN---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous Nos. 1 of 2012 in Criminal Appeal No.58 of 2012, decided on 28th March, 2012.

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

----S. 426 (2-A)---Penal Code (XLV of 1860), Ss. 320/337-G/427---Qatl-e-khata by rash or negligent driving, hurt by rash or negligent driving, mischief causing damage to the amount of fifty rupees---Suspension of sentence---Accused had been convicted and sentenced after about fifteen (15) months of the occurrence---Accused had not caused any injury to the deceased who lost his life in the fatal accident---Complainant had lodged the F.I.R. with the contention that accused overtook the vehicle of the deceased in a reckless manner due to which deceased's vehicle collided against a tree, resulting in his sudden death and causing severe injuries to the co-riders, whereas in the private complaint, complainant changed his stance with the allegation that the accused rammed his car into the vehicle of the deceased from behind, in consequence whereof, it crashed into a tree---Judgment of Trial Court showed that amended story advanced by the complainant had not been believed---All offences for which accused was convicted were bailable---Petition for suspension of sentence was allowed and accused was released on bail.

Abdul Habib Khan and another v. The Emperor AIR 1928 All. 211 rel.

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

----S. 426(2-A)---Penal Code (XLV of 1860), Ss. 320, 337-G & 427---Qatl-e-khata by rash or negligent driving, hurt by rash or negligent driving, mischief causing damage to the amount of fifty rupees---Bail on basis of suspension of sentence---Scope---Language of S. 426(2-A), Cr.P.C showed that discretion of original court of jurisdiction convicting a person for a bailable offence was subject to its satisfaction that the convict had intention to file an appeal---Trial Court was bound by law to admit the convict to bail once it assured itself of the intention of the convict to file an appeal against the judgment/order of conviction---Grant of bail to a convict in bailable offences was an indefinable and inalienable right and mere heinousness of a bailable offence may not deter the court to release an accused/convict on bail who had filed an appeal against his conviction and sentence---Matter of right could not be allowed to be eclipsed by the quantum of punishment recorded by the court of original jurisdiction in a bailable offence.

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

----S. 426 (2-A)---Penal Code (XLV of 1860), Ss. 320, 337-G & 427---Qatl-e-khata by rash or negligent driving, hurt by rash or negligent driving, mischief causing damage to the amount of fifty rupees---Bail on basis of suspension of sentence---Seriousness of the offence---Scope---How-soever serious an offence might be, if same was bailable and there was no reason, such as the likelihood of the accused absconding if released on bail, the seriousness of the offence would not alone justify a court in refusing bail to which a convicted person was entitled under the law.

Abdul Habib Khan and another v. The Emperor AIR 1928 All. 211 rel.

Mian Muhammad Arif for Petitioner.

Muhammad Ishaq Hanjra, Addl: Prosecutor General Punjab for the State.

Muhammad Ilyas Siddiqi for the Complainant.

ORDER

Criminal Miscellaneous No.1-12

SHAHID HAMEED DAR, J.---Through this petition Abdul Manan (petitioner)' has sought suspension of his sentence, as recorded by the learned trial Court through judgment dated 26-1-2012 and admission to bail during the pendency of his appeal. He was held guilty under sections 320, 337-G and 427, P.P.C. and sentenced in following terms:--

UNDER SECTION 320, P.P.C.

Ten years R.I along with an amount of Diyat Rs.7,54,430.

UNDER SECTION 337-G, P.P.C.

One year' S.I along with Rs.10,000 as Daman.

UNDER SECTION 427, P.P.C.

Six months' S.I along with fine of Rs.5000, in default thereof to undergo one month' S.I.

2. Having heard learned counsel for the parties and gone through the relevant record, it is observed that the petitioner had been awarded the aforesaid conviction/ sentence in a private complaint case, which was filed by the complainant under sections 302, 324, 427, 109, 34, P.P.C. after about 15 months of the occurrence. The F.I.R. had been registered under sections 322, 337-G, 427, P.P.C. qua the occurrence in question and report under section 173 Cr.P.C. had been submitted before the learned trial Court for offences under sections 320, 337-G, 427, P.P.C. which was adjourned sine die by the learned trial Court on 9-5-2010. The petitioner admittedly had not caused any injury to Arshad who lost his life in the fatal accident. Originally, the F.I.R. was lodged by Muhammad Ali Ashraf complainant with the contention that Muhammad Arshad (deceased) drove an automobile at the time of occurrence which was overtaken by another car driven by the petitioner, in a reckless manner due to which, vehicle of Muhammad Arshad collided against a tree, resulting into sudden death of Muhammad Arshad and severe injuries to his co-riders. In his private complaint, however, the complainant changed his stance with the allegation that petitioner rammed his car into the vehicle of Muhammad Arshad from behind, in consequence whereof, it crashed into a tree due to which Muhammad Arshad died instantaneously and others were badly wounded. The judgment passed by the learned trial Court showed that the amended story advanced by the complainant had not been believed and it was categorically observed by the learned trial Court that the incident had taken place " due to rash and negligent driving of the cars by the accused Abdul Manan as well as Arshad Mehmood and due to fault of accused Abdul Manan accident took place and it is not an intentional murder." It has been further observed in the impugned judgment that the accused was "proved to be guilty of offence of "Qatl-i-Khata" through rash and negligent driving punishable under sections 320/337-G/427, P.P.C....." All the offences under which the petitioner has been convicted are bailable.

3. The question arises whether a person convicted of a bailable offence and who has filed an appeal against the conviction and sentence is entitled to bhail as a matter of right. A reference may be had to relevant provisions of the statute as contained in subsection (2-A) of section 426, Cr.P.C. which reads as under:--

"When any person other than a person accused of a non-bailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court may if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the Court to be enable him to present the appeal and obtain the orders of the Appellate Court under subsection (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended."

4. The above said provision of law was inserted by Law Reforms Ordinance, 1972, item 148(11). The language of subsection (2-A) of 426 Cr.P.C. shows that the discretion of original court of jurisdiction convicting a person for a bailable offence is subject to its satisfaction that the convict has intention to file an appeal. The trial Court is bound by law to admit the convict to bail once it assures itself of the intention of the convict to file an appeal against the judgment/order of conviction. Grant of bail to a convict immediately on his conviction, has been made mandatory by the law if he assuredly contends to impugn the order of conviction

and such assurance of the convict finds weight with the court. It may be observed that grant of bail to a convict in bailable offences shall be an indefeasible and inalienable right like an under trial person is entitled to, under section 496, Cr.P.C. Mere heinousness of a bailable offence may not deter the court to release an accused/convict on bail who has filed an appeal against his conviction and sentence. A matter of right cannot be allowed to be eclipsed by the quantum of punishment, recorded by the court of original jurisdiction in a bailable offence.

5. For these reasons, it is held that the petitioner is entitled to grant of bail by way of suspension of sentence on the touchstone of ratio decidendi laid down in case titled Abdul Habib Khan and another v. The Emperor (AIR 1928 All 211), wherein it has been held:--

"... However serious an offence may be, if it is bailable and there is no reason, such as the likelihood of the applicant absconding if released on bail, the seriousness of the offence would not alone justify a Court in refusing bail to which a convicted person is entitled under the law."

6. Resultantly, I allow the instant petition, suspend the sentence of the petitioner and he shall be released on bad subject to furnishing bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court. The petitioner is directed to appear before this court on each and every date of hearing of main appeal.

MWA/A-65/L Petition allowed.

2013 Y L R 1300

[Lahore]

Before Shahid Hameed Dar, J

ABDUL SAMAND---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.13434-B of 2012, decided on 27th September, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 395 & 397---Dacoity, robbery or dacoity, with attempt to cause death or grievous hurt---Bail, grant of---Further inquiry---Personal grudge of police---Possibility of false implication---Belated test identification parade---Truck belonging to complainant had been intercepted on a main road by two cars, wherefrom armed men alighted and drove away the truck, which was loaded with yarn---Complainant rendered a supplementary statement before the investigating officer whereafter a test identification parade was conducted during the course of which accused was picked up with the allegation that he was the person driving one of the cars which intercepted the truck---Accused was neither nominated in the F.I.R. nor in the supplementary statement of the complainant---Probability of false implication of accused existed as he had filed a writ petition against the

Station House Officer of the Police Station concerned for recovery of his employees and vehicles---Bailiff appointed by Court found the said vehicles belonging to accused parked at the Police Station concerned---Fury of the Station House Officer in such circumstances was understandable---Test identification parade took place about 5 months after the occurrence, the veracity whereof could not be truly assessed at bail stage---Accused had no criminal history-Investigation into the case was complete and challan had already been submitted before the Trial Court---Accused was admitted to bail in circumstances.

Ch. Sohail Arif Sandhu for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor General Punjab for the State with Riaz S.I.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.75, dated 22-2-2012, under sections 395 and 397 P.P.C., registered at Police Station Mananwala, District Sheikhupura.

2. Tanveer Ahmad is the complainant of the above said case, who has, precisely, alleged in the F.I.R. that his truck bearing Registration No.LHP-297 loaded with yarn worth Rs.32,50,000 was being driven by Muhammad Khalil with Shehzad alias FM as his helper, towards Mananwala on 21-2-2012, when it arrived at a distance of about 1 km from the G.T.Road, it was intercepted by two cars, wherefrom six unknown armed men alighted and rendered both of them hostages at gunpoint; they drove away the loaded truck and also abducted the driver and helper in their car. A cell phone of the driver was also snatched by them.

3. The above said truck was booked by the traffic police, the same day being overloaded but it was allowed to continue its journey after issuance of the 'challan'. One Shoaib approached the traffic police on 9-3-2012 for fetching the documents (Registration Book etc.) of the said truck but he was retained by the police and interrogated who disclosed that the occurrence, as contained in F.I.R. No.75 of 2012 (supra) was committed by his maternal uncle Iftikhar. In the meanwhile Abdul Samad (petitioner) who ran a goods forwarding Adda at Sheikhupura filed Writ Petition No.11227 of 2012 against the S.H.O. Police Station Mananwala and the DPO Sheikhupura for the recovery of his two employees Dildar Masih and Muhammad Imran as well as the recovery of two vehicles, a car and a jeep which had been taken into custody on suspicion by the said police on 9-3-2012 and 30-4-2012 respectively, wherein a bailiff of this court spotted the above said vehicles parked at Police Station Mananwala (Sheikhupura) but the alleged detenus Dildar Masih and Muhammad Imran could not be recovered by him. This writ petition was finally withdrawn by the petitioner on 17-5-2012. Interestingly, Abdul Samad (petitioner) was arrested by the police, belonging to the same Police Station on 18-5-2012 under section 54, Cr.P.C., when he stood along with one Ali Raza at Adda Mananwala and sent to judicial lockup for the purpose of test identification parade.

4. It was at this stage, when Tanveer Ahmad (complainant) rendered a supplementary statement before the Investigating Officer of this case whereby he, on the basis of his personal knowledge, nominated Imran alias Bastar, Nasar Abbas, Shabbir, Ghazanfar Abbas, Kali, Asif

Hayat and Imran alias Thakar as the accused of this case. Test identification parade of the accused-petitioner was held on 8-6-2012 during the course of which he was correctly picked up by Khalil and Shehzad with the allegation that he drove a car at the time of occurrence.

5. The petitioner led to the recovery of five bags of yarn on 20-6-2012 when he was on physical remand with the police.

6. After hearing learned counsel for the parties and perusing the record, it is observed that petitioner is neither nominated in the F.I.R. nor in the supplementary statement of the complainant. Every probability exists to believe that the above said writ petition filed by him against the S.H.O. of Police Station Mananwala for the recovery of his employees Dildar Masih and Imran had caused anger to the above-said S.H.O., as he called in question the act of the police for having taken into custody his vehicles, a car and a jeep, on suspicion on 9-3-2012 and 30-4-2012 and a bailiff appointed by this court found both the vehicles parked at the said Police Station. The fury of the S.H.O. in such a situation is understandable. The complainant did not doubt the credentials of the petitioner even at the time of making a supplementary statement on 19-5-2012. The test identification parade took place about 5-1/2 months after the occurrence, the veracity whereof cannot be truly assessed at this stage which, however, shall be looked into by the trial Court after recording evidence of the parties at trial. The petitioner does not have any criminal history. His implication in the instant case, for the aforesaid reason does not appear aboveboard and his case calls for further probe into his guilt as envisaged by section 497(2), Cr.P.C. The investigation stands completed and report under section 173, Cr.P.C. has already been submitted before the trial Court vide case diary dated 26-6-2012 and in such a situation, his further incarceration may be of no consequence to the prosecution case.

7. Therefore, the instant application is allowed and petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.2 lacs with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/A-140/L Bail granted.

2013 Y L R 1318

[Lahore]

Before Shahid Hameed Dar, J

MUHAMAMD FAYYAZ and others---Petitioners

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.1278-B of 2012, decided on 9th September, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.302, 109, 148 & 149---Qatl-e-amd, abetment, rioting

armed with deadly weapons, unlawful assembly---Bail, refusal of---Probability of early conclusion of trial on the directions of the Supreme Court---Effect---Accused persons were alleged to have fired indiscriminately at the deceased, which resulted in his death and taken the plea that they were not in the country at the time of the occurrence---Supreme Court had directed the Trial Court in the case to conclude the trial within four months and every probability existed that such direction would be complied with by the Trial Court and there was no reason to underestimate the intention of the Trial Court in such respect---Plea of alibi taken by accused persons required scrutiny of their oral as well as documentary evidence, which was not advisable at bail stage---Bail application was dismissed in circumstances.

Sardar Khurram Latif Khan Khosa for Petitioners.

Mirza Abid Majeed, Deputy Prosecutor General Punjab for the State with Muhammad Siddique Inspector.

Muhammad Ahsan Bhoon for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Fayyaz and Asif Ayub (petitioners) seek bail after arrest in case F.I.R. No.208, dated 13-4-2011, under sections 302, 109, 148, 149 P.P.C., registered at Police Station Barki, Lahore, on the complaint of Suleman Saeed.

2. Precisely the allegation against the petitioners is that they being armed with Kalashnikov and rifle .222 bore fired indiscriminately at Haji Altaf Hussain and committed his instantaneous murder at about 1-00 p.m. On 13-4-2011 in the background of previous pitched enmity between the parties involving the murder of Salah-ud-Din, the real brother of Haji Altaf Hussain, deceased.

3. Learned counsel for the petitioners submits that the petitioners have been falsely roped in this case under a conspiracy, in the backdrop of previous enmity of murders between the parties; the petitioners were not present in Pakistan on the day of the alleged occurrence as their sojourn in Thailand from 5-4-2011 to 15-4-2011 was verified and believed by the Investigating Officer who minutely scanned the travel-documents of the petitioners to formulate the said opinion; the story of the F.I.R. was found false even against three co-accused of the petitioners namely Adnan Ali, Tahir alias Mithu and Tariq Ali who have been placed in Column No.2 of the challan; the complainant rendered a supplementary statement on 14-4-2011 whereby he changed the tenor of the occurrence as contained in the F.I.R.; the petitioners are not linked with the crime in any manner and data collected by the investigating officer renders their case one of further inquiry within the meaning of section 497(2), Cr.P.C.

4. On the other hand, learned D.P.G. assisted by learned counsel for the complainant opposes with the contention that the Hon'ble Supreme Court of Pakistan vide order dated 31-8-2012 has directed the learned trial Court to conclude the trial within four months so propriety demands that the order of the Hon'ble Supreme Court of Pakistan may be followed and learned trial Court may be afforded an opportunity to comply with the aforesaid direction of the apex court; the opinion of the Investigating Officer is not based on any cogent or plausible material which has been formulated by him being in league with the accused; the

petitioners have been assigned the main role in the F.I.R. as they, having armed themselves with lethal weapons effectively fired at the deceased and committed their murder; the complainant did not render any supplementary statement during the course of investigation and it was a product of impious liaison between the Investigating Officer and the accused; lastly submits that the offences, the petitioners are charged with, catch the prohibition of section 497(1), Cr.P.C., therefore, the prayer of the petitioners may not be granted.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioners were granted bail before arrest by the learned trial Court vide order dated 25-6-2011 which was recalled by this court vide order dated 11-11-2011, passed in Criminal Miscellaneous No.8287-BC of 2011. Subsequent thereto the petitioners approached the Hon'ble Supreme Court of Pakistan through Criminal Petition No.969-L of 2011, which was dismissed on 13-12-2011, as not pressed with the observation that "since the High Court had discussed the merits of the case for the purpose of bail, including observations regarding the plea of Alibi taken by the petitioners, the applications so moved by the petitioners shall be decided un-influenced by such observations." The petitioners were arrested in this case on 19-12-2011. They applied for their post arrest bail before the learned trial Court which was dismissed on 25-1-2012.

6. The complainant of this case Suleman Saeed also filed a petition before the apex court, in relation to aforesaid order of this court which was dismissed as withdrawn on 31-8-2012, with an observation in following terms:--

"We, however, expect that considering the delay which has already occurred in concluding the trial of the case, the learned trial Court shall make efforts to decide the case expeditiously and if possible conclude the trial within four months from today."

7. It is noteworthy that both the orders of the Hon'ble Supreme Court of Pakistan, as noted above, were passed after hearing, the learned counsel for the parties at some length or at great length, as is evident from the said orders.

8. Learned counsel for the complainant has submitted that the learned trial Court on receipt of the aforesaid direction of the Hon'ble Supreme Court of Pakistan regarding conclusion of trial within four months categorically directed the prosecution on the last date of hearing to ensure the availability of all of its witnesses on the next date of hearing i.e. 10-10-2012 on which date, it plans to indict the accused and record the prosecution evidence. The commencement of the trial is within sight and every probability exists that the direction of the apex Court for conclusion of the trial in the given time would be complied with by the learned trial Court and there is no reason to underestimate the intention of the learned trial Court, in respect thereto. Let the learned trial Court be afforded an opportunity to follow the direction of the Hon'ble Supreme Court of Pakistan meticulously to conclude the trial within the stipulated time-period.

9. The plea of alibi of the accused-petitioners, as raised by them in investigation, requires scrutiny of their oral as well as documentary evidence which may not be an advisable exercise to resort to at this stage because of its delicacies and subtleties. It may not be appropriate at this juncture to dilate upon the submissions of learned counsel for the parties, though tentatively, which touch the merits of the melancholic story lest it should

prejudice anyone's case at trial. Therefore, I am not inclined to accept this application which is dismissed accordingly.

MWA/M-305/L Bail refused.

2013 Y L R 1437

[Lahore]

Before Sardar Muhammad Shamim Khan and Shahid Hameed Dar, JJ

FAISAL IQBAL---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.12906/B of 2012, decided on 10th October, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 365-A & 363---Kidnapping or abduction for extorting property, valuable security etc., kidnapping---Bail, grant of---Further inquiry---Accused and co-accused persons were alleged to have kidnapped the abductee for ransom---Test identification parade was staged almost twenty three days after the arrest of the accused---Extra-judicial confession before the complainant was allegedly made by co-accused and not by the accused---Ransom amount, according to the record, was received by co-accused and not by the accused---One of the co-accused, whose name persistently appeared on the record, had been granted bail---Case against accused was one of further inquiry---Accused was admitted to bail in circumstances.

Ch. Muhammad Safdar Bhatti for Petitioner.

Khurram Khan, Deputy Prosecutor General Punjab for the State. With Muhammad Akbar, S.I.

Naveed Ahmed Khawaja, for the Complainant.

ORDER

The petitioner seeks post-arrest bail in case F.I.R.No.486 dated 26-10-2011, under section 363, 365-A, P.P.C., registered at Police Station Narang, District Sheikhupura.

2. The prosecution case as narrated by Muhammad Aslam Bajwa (complainant) is that his paternal nephew Hassan Afzal was abducted by three motorists at about 5-45 a.m. on 25-10-2011 and taken to an unknown place; Shahzaib, who was with Hassan Afzal, returned to his house and informed him about the incident.

The complainant rendered a supplementary statement on 6-11-2011 stating therein that accused Imran Mushtaq had visited him on the said day and admitted his guilt with the

contention that he along with Seemon, Faisal (petitioner) and Bilal Butt had abducted the minor for the purpose of ransom and that he had been paid an amount of Rs.50,000 by Faisal (petitioner) as his share of the ransom amount, paid by the complainant to the accused.

Hassan Afzal abductee was recovered on 28-10-2011, when he was released by the accused including Kalay Khan, Mohsan, Shanoon, Banoon, Naveed and Bhola at the embankment of the canal, wherefrom he was brought back to his house by the complainant. The petitioner was arrested on 14-12-2011, whereon he was sent to judicial lock up for his test identification, which took place on 7-1-2012, during the course of which he was correctly picked up by Mushtaq Aziz, Shahzaib and Hassan Afzal (abductee). The petitioner's earlier bail application (Criminal Miscellaneous No.5669/B of 2012) was disposed of vide order dated 23-5-2012 in terms that the learned trial Court was directed, at the request of his learned counsel, to conclude trial within six months.

3. Learned counsel for the petitioner submits that a new development has taken place as Mohsin Javed accused has been admitted to post-arrest bail vide order dated 26-7-2012 by the learned trial Court on the basis of an affidavit of the complainant whereby he exonerated the said accused; the earlier direction regarding expeditious disposal of the trial within six months by the trial Court was obtained by another learned counsel for the petitioner, but he believes that the bail granting order in respect of Mohsin Javed has created a fresh ground in favour of the petitioner; the complainant is not serious in conclusion of the trial as he has requested the trial Court to stop the proceedings of the trial as he had moved an application for change of investigation of this case; the complainant failed to produce any incriminating evidence against the petitioner during the course of investigation and he being in league with the police got the petitioner booked in the instant case; the test identification parade is also conspiratorial as the petitioner had been shown to the witnesses repeatedly at the police station before he was sent to judicial lock up for the said purpose.

4. On the other hand, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant opposes with the contention that the petitioner joined by his co-accused committed a heinous offence, which entails capital punishment; the abductee and other witnesses identified the petitioner during the course of test identification parade, held on 7-1-2012; after commencement of the trial in the light of aforesaid direction of this Court, three prosecution witnesses have been examined and the trial Court seems earnestly serious to conclude the trial within the above said period of time.

5. After hearing learned counsel for the parties and perusing the record, it is observed that although first bail application of the petitioner was disposed of in terms that the trial Court was directed to conclude the trial within six months, yet, a couple of developments have taken place subsequent thereto, which render it necessary that the instant bail application should be decided on merits. Firstly, Mohsin Javed, a co-accused of the petitioner, whose name persistently exists on record, right from the stage when the petitioner was roped in this case as an accused, has been granted post-arrest bail by the learned trial Court vide order dated 26-7-2012 as the complainant tendered his sworn affidavit contending therein that the elders of the locality had satisfied him about the conduct of the said accused and that he, having compounded the offence, did not intend to prosecute him further. Secondly, both the sides made a joint request for adjournment of the proceedings of the trial on 20-9-2012 as

they were not satisfied with the investigation of this case. Learned counsel for the complainant submitted on the said occasion that the complainant side had moved an application for transfer of investigation of this case before the Additional Inspector General of Police (Investigation) Punjab, which had been accepted and investigation had been entrusted to Deputy Inspector General of Police, Range Crimes, Sheikhupura, camp at Lahore. By this way, the proceedings of the trial were adjourned on the said day and P.Ws. in attendance were sent back without being examined. The test identification parade of the accused was held on 7-1-2012 during the course of which he was correctly picked up by Mushtaq Aziz, Shahzaib and Hassan Afzal (abductee). Likewise, Mohsan Javed accused, who has been granted bail by the learned trial Court, was also identified by the abductee and his co-witnesses during test identification on 12-3-2012. Learned counsel for the petitioner has drawn the attention of this Court towards order dated 14-12-2011 passed in Criminal Miscellaneous No.2197/H of 2011 filed by Muhammad Sohail Iqbal, real brother of the petitioner, which shows that a bailiff of this Court had been deputed to recover the alleged detenu, namely, Faisal Iqbal (petitioner) from the detention of the respondent-S.H.O. The record reveals that the arrest of the petitioner was recorded by the police in this case on the same day i.e. 14-12-2011 before the bailiff could make it to the said police station. The petitioner moved an application under sections 22-A and 22-B, Cr.P.C. against the officials of Police Station Narang, District Sheikhupura on 14-12-2011 for registration of a criminal case, which ended in a direction on 18-12-2011 to the District Police Officer, Sheikhupura for redressal of the grievance of the petitioner. Even if above said record pertaining to the habeas petition and the application under sections 22-A and 22-B, Cr.P.C. is kept aside, the test identification parade was staged almost twenty three days of the arrest of the accused-petitioner. The extra-judicial confession was allegedly made by Imran Mushtaq accused and not by the petitioner. It has been held time and again by this Court as well as by the apex Court that the aforesaid circumstance constitutes the weakest type of evidence, which can be manoeuvred by the prosecution wherever direct connecting evidence does not come their way. The true import of this piece of evidence, however, shall be determined by the trial Court after recording evidence of the parties at trial. The ransom amount, according to the record, was not received by the petitioner from the complainant, but it was Mansoor accused, who had done so. The aforesaid circumstances render it a case of further inquiry into the guilt of the petitioner as envisaged by section 497(2), Cr.P.C.

6. Resultantly, this application is accepted and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.5,00,000 (Rupees five lacs) with two sureties each in the like amount to the satisfaction of the learned trial Court.

7. Before parting with this order, learned trial Court is directed to keep up the pace, so as to ensure conclusion of the trial within the stipulated period as set out by this Court vide order dated 23-5-2012 passed in Criminal Miscellaneous No.5669/B of 2012, without being influenced by any of the tentative observations, contained hereinabove.

MWA/F-34/L Bail granted.

2013 Y L R 1600

[Lahore]

Before Shahid Hameed Dar, J

ABDUL HAMEED---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.14081-BC of 2011, decided on 26th September, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 497(5), 498 & 345---Pre-arrest bail, recalling of---Pre-arrest bail granted on basis of compromise---Terms of compromise not complied with---Effect---According to terms of the compromise between the parties, accused was required to pay the agreed amount to the complainant within five months of the bail granting order---Accused did not pay the agreed amount despite repeated promises and appeared to be interested in per-petuating the agony of the complainant---No one could be allowed to make a mockery of the process of law and that of the courts---Order made by court of law had to be complied with in letter and spirit and no excuse could be allowed to eclipse or overawe the efficaciousness of the order---Accused had also moved an application before Justice of Peace for registration of case against complainant, which reflected on his unpreparedness to comply with the requirements of the compromise---Pre-arrest bail granted to accused was recalled in circumstances and directions were given to take him into custody and send him to judicial lockup to face trial.

Syed Farhan Ali Shah for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor General Punjab for the State with Muhammad Javed A.S.-I.

Mian Muhammad Saeed for Respondent No.2 with Respondent No.2 in person.

ORDER

SHAHID HAMEED DAR, J.---The respondent-accused, Sh.Abdul Samad was granted bail before arrest by this court vide order dated 19-5-2011, passed in Criminal Miscellaneous No.5085-B-2011, for the solitary reason that compromise had been effected between the parties, in line of which he was required to defray each penny of the 'worked out' amount to the complainant-petitioner within next five months from the date of the above said bail granting order. Due to apathetic attitude of the respondent-accused, the petitioner filed the instant cancellation petition under section 497(5), Cr.P.C. on 20-10-2011 which could not be decided due to repeated promises made by the respondent-accused to satisfy the claim of the petitioner.

2. Learned counsel appearing on behalf of the respondent-accused, in all fairness believes that the matter between the parties could still be amicably settled within spirit of the bail granting order but, the respondent-accused appears to be interested more in perpetuating

the agony of the petitioner rather than showing sincerity and respect to the said order, which had been passed with the consent of the parties. No one can be allowed to make a mockery of the process of law and that of the courts. An order made by a court of law has to be complied with in letter and spirit and no excuse can be allowed to eclipse or overawe the efficaciousness of the said order. The attention of this court has been drawn to an order, passed by the Ex-Officio Justice of Peace, Lahore, on an application under section 22-A, 22-B Cr.P.C. moved by the respondent-accused for registration of a case against the petitioner which also reflects on the preparedness of the respondent-accused to comply with the requirement of the above said order of this court.

3. By being nonchalant and having shown a little sincerity in complying with the aforesaid direction/order, the respondent-accused has disentitled himself to continuously harvest the fruit of the said order. No other option is left but to allow this petition and recall the above said bail granting order. The respondent-accused be taken into custody and sent to judicial lockup as an under-trial prisoner, so as to face the trial.

4. Before parting with this order, the learned trial Court is directed to accelerate the proceedings of the trial and ensure its conclusion, under intimation to this court, within five months from today.

5. A copy of this order be transmitted to the learned trial Court for information and compliance.

MWA/A-139/L Bail recalled.

2013 Y L R 1624

[Lahore]

Before Shahid Hameed Dar, J

AMEER KHAN and 2 others---Petitioners

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.14530/B of 2012, decided on 6th November, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 498 & 195(c)---Penal Code (XLV of 1860), Ss. 420, 468 & 471---Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document---Ad interim pre-arrest bail, confirmation of---Surety bonds filed for bail on basis of bogus documents---Accused persons were granted ad interim pre-arrest bail in connection with an F.I.R. and filed surety bonds on basis of sale-deeds, which were subsequently declared as bogus---Accused persons appeared to have fallen prey to the crookedness and unscrupulousness of the surety, who single-handedly, managed the whole affair, on the strength of two bogus sale-deeds---Offence had been committed during course of judicial

proceedings, which rendered it essential that procedure under S. 195(c), Cr.P.C should have been followed before the matter was reported to police for registration of a case against the accused persons---Whether or not complainant was an aggrieved person who had the legal authority to lodge the F.I.R. in question could only be determined by the Trial Court---Even otherwise accused persons had moved an application before the Magistrate for filing fresh bail bonds by contending that they had been deceived by the surety---F.I.R. for which accused persons were granted bail was also found as false---Ad-interim pre-arrest granted to accused persons was confirmed in circumstances.

Mian Faiz Ali for Petitioners Nos.1 to 3.

Ch. Muhammad Akram Tahir, DDPP for the State.

Adeel Hashmi for the Complainant.

Nawaz S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Ameer Khan, Aman Ullah and Muhammad Ali (petitioners) seek bail before arrest in case F.I.R. No.963 of 2012 dated 6-7-2012 registered for offences under sections 420, 468, 471 P.P.C. at Police Station, Islampura (Lahore).

2. Precisely the allegation against the petitioners is that they sought ad interim bail before arrest from the Court of a learned Addl: Sessions Judge at Lahore in case F.I.R. No.267 of 2012 under section 380, P.P.C. registered at Police Station Green Town, Lahore and filed surety bonds on the basis of bogus documents/sale-deeds which were declared as such by the Sub-Registrar Ravi Town, Lahore.

3. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioners appear to have fallen prey to the crookedness and unscrupulousness of the surety, Muhammad Idrees who, single-handedly, managed the whole affair, on the strength of two bogus sale-deeds. The offence as noted above, has certainly been committed during the course of judicial proceedings which rendered it essential that the procedure as enshrined in section 195(c) of the Criminal Procedure Code should have been followed in letter and spirit before the matter was reported to the police for registration of a case against the petitioners. Whether or not the complainant was an aggrieved person or he had the legal authority to lodge the F.I.R. in question can only be determined by the learned trial Court, while looking into the requirement of law. Even otherwise the petitioners moved an application before the learned Area Magistrate on 7-5-2012 for filing fresh bail bonds by contending that they had been deceived by the surety Muhammad Idrees. One of the petitioners namely Ameer Khan got registered case F.I.R. Nos.1220 of 2012 dated 1-9-2012 under sections 420, 468, 471 P.P.C. at Police Station Islampura (Lahore) against the above said surety, for having committed an offence of cheating, fraud and forgery. There is another important circumstance which may not be lost sight of that case-F.I.R. No.267(supra) was found false during the course of investigation. The dubiousness of the prosecution case, as it appears from the tenor thereof, entitles the petitioners to grant of the relief prayed for.

4. Therefore, the instant application is accepted and the ad interim pre-arrest bail

granted to the petitioners Nos.1 to 3 vide order dated 9-10-2012 is confirmed subject to 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.

MWA/A-20/L Bail confirmed.

2013 Y L R 1631

[Lahore]

Before Shahid Hameed Dar, J

FAISAL RASOOL and others---Petitioners

Versus

The STATE and another---Respondents

Criminal Miscellaneous Nos. 18365-B, 18016-B, 17396-B and 17913-B of 2012, decided on 24th December, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.462-B---Theft of oil from a petroleum pipeline---Bail, grant of---Rule of consistency---Incompetent investigation of case---Effect---Accused persons had allegedly dug up a tunnel under a rented premises to steal oil from a main pipe line---Contention on behalf of accused persons was that one of the co-accused had already been granted bail in similar circumstances, therefore, they were also entitled to bail under the rule of con-sistency---Validity---Although allegation against accused persons, per se looked heinous and not less than an act of terrorism, but it was a badly investigated case, which had been spoiled by the investigating officer in more than one way---No evidence was collected to find out as to when rented premises was let out to the accused-tenants; as to when, where and in what manner one of the accused stood guarantee on behalf of the accused-tenants; as to why supplementary statement of complainant was delayed and why it did not contain any element of reasonableness or persuasiveness; and as to why evidence of recovery of certain articles, as shown against the accused looked queer and unconvincing---Two of the accused were nominated through supplementary statement of complainant, who did not disclose source of his knowledge---Cash allegedly recovered from one of the accused was shown in the recovery memo to be an indirect recovery, managed by some relatives of the said accused---Recovery of a van from one of the accused was also a haphazard circumstance, which lent very little corroboration to the case in the F.I.R.---Incompetence, unscrupulousness and witlessness of the investigating officer had badly marred the veracity of accusations against the accused persons---Case of accused persons plainly assimilated the case of the co-accused, who had already been granted bail---Following dictum of consistency accused persons were also admitted to bail.

Asghar Ali Gill for accused Faisal Rasool.

Zafar Iqbal Chohan for Accused Abdul Waheed.

Zahid Aslam Malik for accused Mehboob Ellahi.

Javed Imran Ranjha for accused Asghar Ali.

Ms. Muqaddas Tahira, Addl: Prosecutor General Punjab Aslam S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Through this single order I intend to dispose of four bail applications, separately moved by accused Asghar Ali (Criminal Miscellaneous No.18365-B of 2012), Abdul Waheed (Criminal Miscellaneous No.18016-B of 2012), Mehboob Elahi (Criminal Miscellaneous No.17396-B of 2012) and accused Asghar Ali (Criminal Miscellaneous No.17913-B of 2012), as they all stood arrested in case F.I.R. No.596/1012 dated 9-10-2012 registered for an offence under section 462-B,

P.P.C. at Police Station Nishat Abad (Faisalabad).

2. Precisely, the prosecution case as narrated by Ahmad Masood Sheikh, Admn. Officer, PARCO is that Pak Arab Refinery Limited is a joint operation/venture between Government of Pakistan and Abu Dhabi for supply of oil (petroleum products) from Karachi to Sheikhupura through underground pipelines, which makes backbone of the economy of the country; for some weeks a noticeable decline in pressure of oil, prompted him and his colleagues to patrol the area and for this purpose a separate patrolling team was constituted to keep a check on oil-pipelines; he along with security-officer Major Fayyaz Ahmad patrolled the area at about 2-00 a.m. on 9-10-2012 and suspected some foul-play in the building of a nearby hotel and a few residential houses; they approached the said hotel and on seeing them, the hotel-staff slipped away; they checked the spot and unearthed a tunnel measuring 180 ft. which was dug by the oil-mafia to steal oil from the main pipeline; the apparatus used by the accused for pilfering oil was taken into possession by them; on inquiry he (complainant) learnt that it was Zafar Chhina accused, who rented out the hotel to Shamim and Saleem accused under the guarantee of Faisal accused (petitioner); the offence of pilferage of oil from main pipeline was committed by Mehboob (petitioner) and Touseef along with aforementioned Saleem and Faisal accused; seven more (unknown) were also suspected of oil-theft.

3. Asghar Ali (petitioner) and Abdul Waheed (petitioner) were named as accused through supplementary statement of the complainant, rendered by him on 18-10-2012 whereby), he also nominated ten others as accused without disclosing the source of his knowledge. Mehboob Elahi (petitioner) and Faisal Rasul (petitioner), however, stood nominated in the F.I.R. as accused.

4. Learned counsel for the petitioners one after the other has contended that case of the petitioners is at par with that of Muhammad Akram accused who was granted post-arrest bail by this Court vide order dated 26-11-2012, passed in Writ Petition No.27919 of 2012 which was converted into a post-arrest bail application and decided as such; accused Mahboob Elahi and Faisal Rasul were found innocent during the course of investigation by more than one Investigating Officer as complainant failed to produce any connecting evidence against them during the course of investigation; the investigating officer prepared discharge-report in respect of both the accused by showing them innocent but it was disagreed to by the learned

Area Magistrate vide order dated 2-11-2012; accused Asghar and Abdul Waheed have also been involved without any incriminatory material against them and they appear to have been labelled as suspects; the alleged recovery of cash Rs.2,80,000 at the instance of Abdul Waheed accused is a fake piece of evidence which has been planted upon him by the I.O. to strengthen the prosecution case; accused Asghar is not named in the F.I.R. like his co-accused, Abdul Waheed and his implication in this case smacks malicious-ness and dishonesty on the part of the complainant.

5. On the other hand, learned Addl. Prosecutor-General Punjab opposes with the contention that the accused/petitioners have committed a heinous offence as they incurred huge monitory loss to the economy of the country through their illegal act; the offence, committed by the petitioners is heinous, hence, they may not be granted the relief prayed for.

6. After hearing learned counsel for the parties and perusing the record, it is observed that allegation against the petitioners, per se looks heinous and not less than an act of terrorism but, it is a badly investigated case, which has been spoilt by the Investigating Officer in more than one way, vis-a-vis no evidence has been collected as to when the mentioned hotel was let out to the tenants/accused, Shameem and Saleem; when, where and in what manner accused Faisal stood guarantee on behalf of above said tenants; why supplementary statement of the complainant was so delayed and why did it not contain any element of reasonableness or persuasiveness; why evidence of recovery of certain articles, as shown against the accused looked queer and unconvincing; why the senior hierarchy of the police felt not the subtleness of the matter and why the quality of investigation remained hopelessly poor. While admitting Muhammad Akram, a co-accused of the petitioner to post arrest bail, certain observations were made by this Court which are advantageously reproduced hereunder:-

"...it is found that the petitioner's name figured as an accused of this case, for the first time on 18-10-2012 through a supple-mentary statement of the complainant who despite being an educated person, did not opt to disclose the source through which he learnt his name as one of the unknown accused. The buildings which were connected through illegal pipelines for oil-theft did not belong to the petitioner. No evidence has been collected by the Investigating Officer as to whether the petitioner was ever seen at the spot along with his co-accused. The evidence of recovery of cash Rs.10,000 is of joint character. The arrest of the petitioner on 3-11-2012, as claimed by the petitioner is a controversial circumstance, keeping in view the proceedings conducted by the learned Sessions Judge, Faisalabad in a habeas corpus petition filed by Muhammad Anwar, the brother of the petitioner, for the recovery of Muhammad Akram (petitioner) from the unlawful custody of the police. The dubiousness hovering over the arrest of the petitioner has been discussed in detail in order dated 19-11-2012 passed in the titled' constitutional petition, whereby, the petitioner; on having been produced from the prison, was set at liberty as an ad-interim arrangement. Though the allegation contained in the F.I.R. is serious yet, the incriminating evidence against the petitioner is equally deficient. Plainly speaking it is a badly investigated case with a touch of incompetence and unscrupulousness on the part of the police. Sufficient reasons exist to believe that the petitioner's case calls for further probe into his guilt within the meaning of section 497(2) Cr.P.C...".

Of the four petitioners two, namely Abdul Waheed and Asghar Ali were nominated through his supplementary statement recorded on 18-10-2012, by the complainant who did not like to disclose the source of his knowledge which prompted him, to name them as accused. A cash-amount of Rs.2,80,000 was allegedly got recovered by Abdul Waheed accused but recovery-memos depict a sorry state of affairs as it shows an indirect recovery of the said amount, having been managed by some relatives of the accused. The recovery of Suzuki pick-up/van by accused/petitioner Asghar on 22-10-2012 is also a haphazard circumstance, which lends a very little corroboration to the F.I.R.-case. The incompetence, unscrupulousness and witlessness of the investigating officer has badly marred the veracity of accusations against the accused. The petitioners' case plainly assimilates the case of their co-accused Muhammad Akram, who, as mentioned above, was granted bail by this Court on 26-11-2012. Following the dictum of consistency, the petitioners are also admitted to post-arrest bail, subject to furnishing bail bonds in the sum of Rs.2,00,000 each with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/F-13/L Bail granted.

2013 Y L R 1743

[Lahore]

Before Shahid Hameed Dar, J

MAQSOOD SHAHZAD---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.584-B of 2013, decided on 23rd January, 2013.

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

----Ss. 497(2) & 161---Penal Code (XLV of 1860), Ss. 365-B---Kidnapping, abducting or inducing woman to compel for marriage etc.---Bail, grant of---Further inquiry---Implication based on supplementary statement of complainant---Complainant implicating accused on basis of his "firm belief"---Effect---Accused was alleged to have abducted the alleged abductee so as to snatch her gold ornaments and cash---Story mentioned in the F.I.R. appeared a bit vague, as the complainant merely showed his "firm belief" without hinting at any incriminating evidence, even against those accused persons, he had been named in the F.I.R.---Present accused was implicated in the case through a supplementary statement of the complainant, alleging that accused had made a telephone call to his brother and used derogatory language against him---Alleged abductee was still to be recovered and since arrest of accused there had been no progress towards her recovery---Case was one of further inquiry into guilt of accused---Accused was admitted to bail in circumstances.

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

----S. 497---Bail, relief of---Scope---Relief of bail could not be withheld as a matter of

punishment nor could one be left to rot in jail only to satisfy a complainant.

Fahad Naveed for Petitioner.

Ms. Muqadass Tahira, Addl: Prosecutor-General Punjab.

Aslam S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Maqsood Shahzad (petitioner) seeks bail after arrest in case-F.I.R. No.160/12 dated 16-3-2012 registered for an offence under section 365-B, P.P.C., at Police Station Nishatabad (Faisalabad).

2. Precisely, the prosecution-case as narrated by Muhammad Amjad Gill (complainant) is that his sister Mst. Sajida Parveen visited his house on 1-1-2011 and after an overnight stay she left for the house of her husband, being in possession of gold ornaments weighing 10 tolas and cash Rs.50,000; she did not reach the destination and disappeared in between; he repeatedly tried to contact his sister on telephone but he found it switched-off; he fetched the call-data and learnt that the SIM of the cell phone of his sister was used by accused Muhammad Ashiq, Arfan Ahmad and Shahzad Masih on various occasions; he showed firm belief that the aforesaid accused along with some unknown accused had abducted his sister to snatch gold ornaments and cash from her.

3. The complainant rendered a supplementary statement on 8-7-2012, whereby he contended that he searched for his missing sister and gathered the information that Maqsood Shahzad (petitioner) was the main character in the entire episode, as he telephonically contacted the brother of the complainant and used the virulent language.

4. Learned Addl: Prosecutor-General Punjab, after having gone through the record, submits that the alleged abductee has not been recovered so far and the Investigating Officer has not collected any incriminating evidence against the petitioner except for a call-log, the effects whereof are not too clear.

5. Learned counsel for the petitioner submits that there is inordinate delay of more than five months in lodgment of the F.I.R. and no explanation has been offered by the complainant in this regard; it is a case of no evidence against the petitioner and he merits release on bail.

6. After hearing learned counsel for the parties and going through the record, it is found that the story contained in the F.I.R. appears a bit vague, as the complainant merely showed his 'firm belief,' without hinting at any incriminating evidence, even against those, whom he named as accused therein. The petitioner was implicated in this case by the complainant through a supplementary statement, rendered by him on 8-7-2012, whereby, he contended that Maqsood Shahzad (petitioner) had a hand in the abduction of his sister as he telephonically contacted his brother Muhammad Akram and used derogatory language against him. The alleged abductee is still to be recovered. The petitioner was taken into custody on 10-7-2012 and there has not been any progress so far, towards recovery of the alleged victim. To keep the petitioner behind the bars, for an indefinite period of time, may not serve any useful purpose. The relief of bail cannot be withheld, as a matter of punishment,

nor one can be left to rot in jail only to satisfy a fuming complainant. It is certainly a case, which constitutes need for further inquiry into the guilt of the petitioner, within the meaning of section 497(2), Cr.P.C.

7. For the foregoing reasons, the instant application is accepted and petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with one surety in the like amount to the satisfaction of learned trial Court.

MWA/M-49/L Bail granted.

2013 Y L R 1963

[Lahore]

Before Shahid Hameed Dar, J

SILKE INGRID RASSMANN---Petitioner

Versus

The STATE and 2 others---Respondents

Criminal Miscellaneous No.8022-BC of 2011, decided on 20th December, 2011.

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

----Ss.497(5) & 497(2)---Penal Code (XLV of 1860), Ss. 302, 109, 120-B, 148 & 149---Qatl-e-amd, abetment, criminal conspiracy, rioting armed with deadly weapons---Application for cancellation of bail, refusal of---Both accused were found not involved in the occurrence during the course of investigation and plea of alibi raised by them was verified by the Investigating Officer who had collected sufficient material in that regard to base his opinion---F.I.R. stated that both deceased were fired at and killed by eight accused persons who all were armed with firearms---Postmortem report of one of the deceased showed four entry wounds while that of the other showed one firearm entry wound---Fire shots of which accused hit the deceased and which did not, was to be resolved at trial---No proceedings under S.87, Cr.P.C. were conducted against the accused and contention of applicant in that regard was without any substance---Enmity between the parties was admitted and registration of a previous F.I.R. against one of the deceased (when alive) was ample proof of the same, as the person murdered in the said F.I.R. happened to be real brother of the accused---No exceptional or extraordinary circumstance existed to believe that case of the accused was not open to further probe as envisaged by S. 497(2), Cr.P.C.---Accused underwent almost full term physical remand but such period of time remained unproductive---Petition for cancellation of bail was dismissed accordingly.

Muhammad Ilyas, Chief Manager/Attorney, Allied Bank Ltd. v. Shahid Ullah and others and Muhammad Ilyas Chief Manager/Attorney, Allied Bank Ltd. v. Arif Ali and another PLD 2009 SC 446; Nasir Khan v. Waseel Gul and another 2011 SCMR 710 and Abdul Ghafoor and others v. Mst.Marriam Bibi (deceased) through Legal Heirs and others 2011 SCMR 1648 ref.

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

----S. 497(5)---Cancellation of bail---Principles stated.

A bail granting order can be recalled if it suffers from the disqualification of being patently illegal, erroneous, factually incorrect or it has resulted in miscarriage of justice or the court considers that the same is perverse on the face of it or it has been passed in violation of the law. Considerations for cancellation of bail are altogether different from the ones, meant for grant/refusal of bail to an accused. Once an accused has been admitted to bail by a court of competent jurisdiction, exceptional circumstance would be required to interfere with such order.

Rana Maqsood-ul-Haq for Petitioner.

Rana Tasawar Ali Khan, Deputy Prose-cutor General Punjab for the State with Irfan Inspector and Muhammad Riaz S.I.

Respondents Nos.2 and 3 in person with Agha Nayyar Latif.

ORDER

SHAHID HAMEED DAR, J.---Seeks cancellation of post-arrest bail allowed to respondents Nos.2 and 3, vide order dated 10-6-2011 by learned Additional Sessions Judge, Gujranwala in case F.I.R. No.335, dated 12-10-2010, under sections 302, 109, 120/B, 148, 149, P.P.C., registered at Police Station Wahndo, District Gujranwala.

2. Learned counsel for the petitioner submits that the respondents-accused had been attributed role of firing at the deceased and thereby committing their murder instantaneously; both the accused absconded after the occurrence and this fact was badly ignored by the learned bail granting court; the opinion of the Investigating Officer was not based on any cogent or plausible material still, the same was resolved in favour of the respondents in an injudicious manner; the crime committed by the respondents-accused is heinous and falls under the prohibitory clause of section 497(1), Cr.P.C.; lastly submits that the impugned order has resulted in grave miscarriage of justice which may not be sustained; relies upon "Muhammad Ilyas, Chief Manager/ Attorney, Allied Bank Ltd. v. Shahid Ullah and others" and "Muhammad Ilyas, Chief Manager/Attorney, Allied Bank Ltd. v. Arif Ali and another" (PLD 2009 SC 446).

3. On the other hand, learned counsel for the accused-respondents submits that the case of the prosecution had been found false during the course of investigation and it came to light that the accused-respondents had not taken part in the incident in any manner; no specific injury to the deceased has been attributed to the respondents-accused; Muddassar Hussain respondent is employed at civil secretariat who established his presence in his office at the relevant time of occurrence through plea of alibi which was verified by the Investigating Officer; Shamas Tabraiz accused also raised an identical plea which was verified by the Investigating Officer after having collected direct evidence in respect thereto; the respondents have been falsely involved in this case in the backdrop of previous enmity as they happened to be the real brother of Mubashar, the deceased of case F.I.R. No. 309 of 2008, dated 31-8-2008, under section 302, P.P.C., registered at Police Station Aimanabad, District Gujranwala

wherein Shafqat (deceased of this case) was one of the accused; the bail granting order is passed according to the settled principles of law so it may be maintained; relies upon "Nasir Khan v. Waseel Gul and another" (2011 SCMR 710) and "Abdul Ghafoor and others v. Mst.Marriam Bibi (deceased) through Legal Heirs and others" (2011 SCMR 1648).

4. Learned Deputy Prosecutor-General Punjab supports and adopts the contentions of learned counsel for the petitioner and submits that the impugned order may be set aside being illegal one;

5. Having heard learned counsel for the parties and perused the record, it is observed that both the respondents-accused were found not involved in the occurrence during the course of investigation and plea of alibi raised by them was verified by the Investigating Officer who collected sufficient material in this regard to base his opinion thereon. According to the F.I.R. case both the deceased Adil and Shafqat Hussain were fired at and killed by as many as eight accused who all were armed with firearms. The postmortem examination report of Adil deceased shows four entry wounds whereas, that of Shafqat Hussain deceased reveals one firearm entry wound. Whose fire shot virtually hit the deceased and whose not, is a riddle, to be resolved, at trial. No proceedings under section 87, Cr.P.C. were conducted against the respondents and contention of learned counsel for the petitioner, in this regard is without any substance. The pitched enmity between the parties is admitted and registration of F.I.R. No.309 of 2008 for an offence under section 302, P.P.C. against Shafqat Hussain deceased is an ample proof of it as the person murdered in the said case happened to be the real brother of the respondents. There is; no cavil to the proposition that a bail granting order can be recalled if it suffers from the disqualification of being patently illegal, erroneous, factually incorrect or it has resulted in miscarriage of justice or the court considers that the same is perverse on the face of it or it has been passed in violation of the law. Considerations for cancellation of bail are altogether different from the ones, meant for grant/refusal of bail to an accused. Once an accused has been admitted to bail by a court of competent jurisdiction, exceptional circumstance would be required to interfere with such order. I do not find any such exceptional or extraordinary circumstance to believe that the case of the respondents was not open to further probe, as envisaged by section 497(2), Cr.P.C. The respondents underwent almost full term physical remand but this period of time remained unproductive. While referring to the case law, relied upon by learned counsel for the respondents, I do not find it a fit case to recall the impugned order, through which respondents-accused were granted bail.

6. In view of the above, finding it destitute of merits, I dismiss the instant petition.

MWA/S-5/L Petition dismissed.

2013 Y L R 2209

[Lahore]

Before Shahid Hameed Dar and Muhammad Yawar Ali, JJ

KHALID HUSSAIN CHATHA---Petitioner

Versus

MUHAMMAD USMAN alias NOMEE and 2 others---Respondents

Criminal Miscellaneous No.13227-CB of 2012, decided on 30th January, 2013.

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

----S. 497(5)---Penal Code (XLV of 1860), Ss. 420, 468 , 471, 109 & 34---Prevention of Corruption Act (II of 1947), S. 5(2)---Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document, criminal misconduct---Petition for cancellation of bail, dismissal of---F.I.R. was lodged after a delay of about four years without any explanation---Offences alleged did not fall within the prohibitory clause of S. 497(1), Cr.P.C.---Misuse of concession of bail on part of accused was not shown---Plea of accused that he was a previous non-convict and was no more required for further investigation was not negated by complainant---Petition for cancellation of bail was dismissed in circumstances.

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

----S. 497(1)---Bail, grant of---Scope----Accused charged with offences not falling within the prohibitory clause of S. 497(1), Cr.P.C.---For such offences bail was a rule and refusal thereof an exception.

Tariq Bashir and 5 others v. The State PLD 1995 SC 34 rel.

Mian Muhammad Younas for Petitioner.

Abdul Ghafoor Sheikh for Respondent No.1.

Muhammad Usman Arif and Muhammad Khalil Rana for the Bank.

Ch. Muhammad Ishaq, Deputy Attorney General with Safdar Iqbal, Manager, Askari Bank and Irshad Ahmad, Inspector/FIA.

ORDER

Through this petition filed under section 497(5) Cr.P.C., the petitioner, Khalid Hussain Chatha seeks cancellation of bail in case F.I.R. No.12 of 2012 dated 19-1-2012 for offences under section 420, 468, 471, 34 P.P.C. read with section 5(2) of the Prevention of Corruption Act, 1947 registered at Police Station F.I.A., CCC Circle, Lahore allowed to respondent No.1 by this Court vide order dated 8-8-2012 while disposing of Criminal Miscellaneous No.9054-B of 2012.

2. The learned counsel for the petitioner and the learned Law Officer representing the

State submit that respondent No.1 has been nominated in the F.I.R. and a specific role has been attributed to him. Respondent No.1 has been found to be guilty during the investigation which has taken place. There is no mala fide on the part of the complainant/petitioner herein to have lodged a false and frivolous criminal case against the accused persons. Respondent No.1 has previous criminal antecedents inasmuch as a large number of F.I.R's. have been registered against him. Respondent No.1 is the mastermind behind a mega financial scam hence miscarriage of justice would be occasioned, in case, post-arrest bail earlier allowed to him by this Court is not recalled.

3. The learned counsel for respondent No.1 has controverted the allegations which have been levelled by the petitioner by submitting that the instant F.I.R. has been lodged with an inordinate delay which has not been explained; respondent No.1 owns only 5% share of the alleged rogue firm Messrs I.G. Traders; respondent No.1 is a previous non-convict no more required for further investigation of the case.

4. After hearing the arguments advanced by the learned counsel for the parties and going through the record, it is clear that the F.I.R. in question has been lodged with an inordinate delay for which no plausible explanation is forthcoming. In the column of date and hour of occurrence only "Year-2008" has been mentioned meaning thereby that the offence is stated to have taken place in the year 2008 whereas the F.I.R. was lodged after about four years on 19-1-2012. Without going into the deeper merits of the case, it can be observed that respondent No.1 has been charged with offences which do not fall within the prohibitory clause of section 497, Cr.P.C. hence, in cases not punishable with death, imprisonment for life or ten years imprisonment grant of bail is a rule and refusal is an exception as has been held by the august Supreme Court of Pakistan in Tariq Bashir and 5 others v. The State (PLD 1995 SC 34). It has neither been argued by the learned counsel for the petitioner, nor is there any material on the record to show that respondent No.1 has misused the concession of bail earlier allowed to him by this Court on 8-8-2012 while disposing of Criminal Miscellaneous No.9054-B of 2012. It is trite that considerations for cancellation of bail are totally different and distinct from considerations for grant of bail. The august Supreme Court of Pakistan while deciding case titled Shahid Arshad v. Muhammad Nagi Butt and 2 others 1976 SCMR 360 has held that although they were not entirely happy by the bail granting order still they would not interfere and cancel the bail since concession of bail granted to the respondent had not been misused. The learned counsel for the petitioner has failed to convince us that the bail granting order is perverse and patently illegal, warranting any interference by this Court. The State/Anti-Narcotic through Director-General v. Rafiq Ahmad Channa (2010 SCMR 580) can be read with considerable advantage. An assertion made by the learned counsel for respondent No.1 that respondent No.1 is a previous non-convict no more required for further investigation of the case has neither been negated by the learned counsel for the petitioner nor by the learned Law Officer representing the State.

5. For what has been stated above, this petition being without any merit is dismissed.

MWA/K-12/L Petition dismissed.

2013 Y L R 2220

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ZEESHAN ZARIF---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.1213-B of 2013, decided on 14th February, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 496-A & 376---Enticing or taking away or detaining with criminal intent a woman, rape---Runaway marriage---Contradictions in statements of alleged victim---Effect---Accused was alleged to have abducted the alleged victim and subjected her to zina-bil-jabar---Plea of accused was that alleged victim being sui juris had contracted marriage with him of her own free will---Validity---According to F.I.R. on the day of incident alleged victim left home to attend her tuition academy but she never attended any class, however in her statement under S. 161, Cr.P.C , alleged victim adopted a different version and stated that on the day of incident she did attend three lectures at the academy---Before leaving home alleged victim took with her gold ornaments, prize-bonds, cash and other valuables---Alleged victim had also filed a private complaint against her father and other relatives, wherein she appeared before the Magistrate and deposed that she had contracted marriage with the accused of her own accord---Copy of Nikahnama was available on record which revealed that it was a runaway marriage---Alleged victim after rejoining her family took a u-turn and implicated accused for misleading her into leaving her house and subjected her to rape before and after the Nikah---Although alleged victim had obtained a decree from Family Court in a suit filed by her for jactitation of marriage, but appeal against said decree was still pending adjudication----Question as to whether accused violated the alleged victim forcibly or enjoyed sex with her in a lawful manner could only be resolved at trial---Offence alleged did not fall within the prohibitory clause of S.497(1), Cr.P.C.---Present case was one of further probe into guilt of accused-Accused was admitted to bail in circumstances.

Irfan Ahmad Khichi for Petitioner.

Mrs. Muqadass Tahira, Additional Prosecutor General Punjab for the State with Tariq A.S.-I.

Malik Muhammad Riaz Awan for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.1453, dated 19-9-2012, under sections 496-A, 376, P.P.C. registered at Police Station Shahdra, Lahore.

2. Precisely the prosecution case as narrated by Shamshad Ahmad (complainant) is that her daughter Mst. Amina Shamshad aged 17 and a student of F.Sc left his house at about 8-00 a.m. on 15-9-2012 for Alnoor Academy Lajpat Road, Shahdra and took away with her gold ornaments weighing 13 tolas, prize bond worth Rs.1,05,000, net cash Rs.1 lac, cell phones, the utility bills and certain security documents; she did not return from the academy; his wife went there and learnt that Mst. Amina Shamshad did not attend her classes on that day; a case might be registered against the unknown accused.

3. The alleged abductee/prosecutrix joined investigation on 19-9-2012 and endorsed the story of F.I.R.; she was also examined under section 164, Cr.P.C. whereby she reiterated her previous stance, she took before the police. She also filed a suit for jactitation of marriage which was decreed in her favour vide judgment dated 14-12-2012 by the Judge Family Court, Lahore.

4. Learned counsel for the petitioner submits that the petitioner has been falsely involved in this case as he did not abduct Mst. Amina Shamshad, who being sui juris contracted marriage with him on 14-9-2012; the alleged abductee filed a private complaint under sections 452, 506, 34, P.P.C. against her father and others wherein she appeared before learned Judicial Magistrate, Lahore on 17-9-2012 and deposed that she was aged 18 and being sui juris she contracted marriage with Zeeshan (petitioner) of her free-will and accord and that she lived with him as his wife; the alleged victim however took a somersault after joining the complainant and deposed against the petitioner being under the thumb of her father; the petitioner has filed an appeal against the ex parte judgment and decree of the learned Family Judge which is still pending adjudication.

5. On the other hand, learned counsel for the complainant submits that it is a case of elopement/enticement as Mst. Amina Shamshad was misled by the petitioner to leave her house with valuables whereafter she was subjected to zina-bil-jabr by the accused-petitioner who, fabricated forged documents including nikahnama, at gunpoint; the suit for jactitation of marriage filed by the abductee was decreed in her favour on 14-12-2012; the petitioner has ruined the life of an innocent girl, therefore, he may not be granted the relief prayed for.

6. Learned Additional Prosecutor General Punjab submits that the alleged victim categorically alleged before the I.O. and the learned Magistrate that she was subjected to zina bil jabr by the accused which led to addition/insertion of section 376, P.P.C. to the facts of this case; the petitioner has been found involved in the occurrence during the course of investigation, therefore, he may not be set at liberty.

7. After hearing learned counsel for the parties and perusing the record, it is observed that the alleged victim set-out to the path of disaster herself, as can be seen from the contents of the F.I.R., which reveal that she pocketed gold ornaments, prize-bonds and cell phones worth lacs of rupees, besides hot-cash and certain security documents before leaving her house, on the pretext of attending Al-Noor Academy where, she never went. Her mother, while searching for her, went to said academy and to her dismay, learnt that she did not attend her classes and went to some other place. The alleged victim, in her statement under section 161, Cr.P.C. adopted the version that she attended three lectures at the academy on the day of occurrence which fact is directly negated by the contents of the F.I.R. She filed a private complaint under section 452, 506, 34, P.P.C. against her father and other relatives

wherein she appeared before the learned Judicial Magistrate, Lahore on 17-9-2012 to depose that she being sui juris had contracted marriage with Zeeshan Zarif (petitioner) of her own accord and she lived with him merrily as his wife. A copy of nikahnama is available on the record which reveals that it was a runaway marriage between the accused-petitioner and the alleged victim. Mst. Amina Shamshad after rejoining her family, took U-turn and adopted the version that she had been misled by the accused who persuaded her to leave the house with cash and gold ornaments etc., so that they might live together and that he took her to the sessions court for solemnization of nikah, which she helplessly agreed to. She further alleged that the accused forcibly raped her before and after the nikah. An ex parte judgment and decree was obtained by the alleged victim on 14-12-2012 from a court of law which has been impugned by the judgment-debtor through an appeal which is still pending adjudication. Whether the petitioner violated the alleged victim forcibly or enjoyed sex with her in a lawful manner is a question which can only be resolved at the time of trial. The statement of the alleged abductee/victim under section 164 Cr.P.C. does little good to the prosecution case being grossly divergent to her statement under section 161, Cr.P.C. The offence, the petitioner is faced against, is punishable with seven years imprisonment which does not fall under the prohibitory clause of section 497(1), Cr.P.C. There exist sufficient reasons to believe that the petitioner's case calls for further probe into his guilt as contemplated by section 497(2), Cr.P.C. Therefore, I accept this application and admit the petitioner to post arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/M-100/L Bail granted.

2013 Y L R 2230

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ALTAF---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.680-B of 2013, decided on 6th February, 2013.

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

----S. 497---Bail---Grounds---Heinousness of offence---Mere heinousness of offence could not be permitted to permeate and over-weigh the bail plea of accused.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss.302, 148 & 149---Qatl-e-amd, rioting armed with deadly weapons, unlawful assembly---Bail, grant of---Further inquiry---Defective investigation by police---Case of no incriminating evidence---Effect---During course of investigation no incriminating evidence was brought on record---Investigating officer took no

rigors at all to collect incriminatory material against the accused except for recording statement of complainant and a police constable- Investigating officer dealt with the case in a mindless and un-impressive manner which left many aspects of the case plunged in darkness---Not a single witness had been produced by complainant during investigation to connect accused with the offence---Co-accused whose case was much graver than the accused had already been granted bail---Accused remained on physical remand for 14 days but such period of time remained unproductive---Case was one of further inquiry into guilt of accused---Accused was released on bail accordingly.

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

----S. 497(2)---Bail---Case of further inquiry into guilt of accused---Abscondence of accused---Effect---Factum of abscondence posed no threat to the plea of accused for bail, if there existed sufficient reasons to believe that his case called for further probe into his guilt.

Pervaiz Inayat Malik for Petitioner.

Mrs. Muqadass Tahira, Addl: Prosecutor General Punjab for the State.

Tahir Pervaiz Malik for the Complainant.

Ghazanfar Ali S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Altaf (petitioner) seeks bail-after-arrest in case F.I.R. No.2 of 2012, dated 1-1-2012, registered for offences under sections 302, 148, 149, P.P.C., at police station Badiana, District Sialkot.

2. The prosecution story as set-up in the F.I.R. by Muhammad Maalik (complainant) is that his brother Muhammad Waris went to village Baqir pur on 30-12-2011 and did not return till evening; he, being worried enquired from the said village and learnt that his brother was taken from village Baqirpur on a motorcycle by his paternal nephew Zafar Iqbal; he returned to his house after queries but his brother did not come back; it was at about 10-00 a.m. on 1-1-2012, when he received a phone-call as to lying of a dead-body in the fields, situated between revenue limits of villages Kot Kalan and Lawarey; on receipt of this information he along with Muhammad Yaseen and Matloob Hussain reached the spot and identified the dead body as that of his missed-brother; he burdened his nephew Zafar Iqbal with the liability of murder of his brother Muhammad Waris.

3. The complainant recorded a supplementary statement on 2-1-2012 with the assertion that his brother was murdered by his paternal nephew Zafar Iqbal and three others namely Yaseen, Arfan and Kashif, being in-league with each other and they also sprinkled acid over the dead body.

4. The Investigating Officer recorded second supplementary statement of the complainant on 21-1-2012, whereby, he contended that Altaf alias Tafo accused/ petitioner was equally responsible for the murder of his brother.

5. The complainant rendered yet another statement under section 161, Cr.P.C. on 15-2-

2012, whereby he added the name of Ghulam Murtaza to the list of the accused by asserting that Ghulam Murtaza accused had admitted his guilt before Muhammad Nawaz and Munawar Hussain with the contention that he along with his co-accused murdered Waris (deceased).

6. Learned counsel for the petitioner submits that it is a case of no evidence against the petitioner and he has been languishing in jail for none of his fault; the Investigating Officer failed to collect any evidence against the accused/ petitioner and he challaned him gratuitously.

7. On the other hand, learned Additional Prosecutor-General Punjab assisted by learned counsel for the complainant submits that the petitioner is equally responsible for the murder of Waris deceased and complainant burdened him with the said liability in unequivocal terms; the petitioner absconded after the occurrence and he was proceeded against under section 87, Cr.P.C. on 8-3-2012; a co-accused of the petitioner, Yaseen alias Tara has been denied bail-after-arrest by this Court vide order dated 11-5-2012, therefore, the petitioner is not entitled to the relief prayed for.

8. After hearing learned counsel for the parties and perusing the record, it is observed that details of the occurrence are hair-raising and sensational as, Muhammad Waris was done to death in a brutal manner. It, however, does not mean that mere heinousness of offence may be permitted to permeate and over weigh the bail-plea of the petitioner, especially when, no incriminating evidence of any sort has been brought on record by the Investigating Officer, during the course of investigation. It is a sorrowful aspect of the prosecution case that the Investigating Officer took no rigors at all to collect incriminatory material against the petitioner except for recording second supplementary statement of the complainant on 21-1-2012 and statement of Gulzar Ahmad constable on 25-3-2012 regarding issuance of proclamation against Zafar Iqbal, Ghulam Murtaza, Kashif and Altaf (petitioner). Not a single witness has been produced by the complainant during investigation to connect the petitioner with the commission of offence alleged. The profile of this case required that it should have been investigated by a competent investigating officer, well-versed with the technique and process of investigating such like cases. He should have been a knowledgeable person, possessing all the know how as to the niceties involved in such like situations. The dexterity, acumen, commonsense, prudence and uprightness must have been the hallmark of the character of such an investigating officer. It is sorrowfully noted that the investigating officer of this case has not shown any of the qualities, mentioned above and dealt with the matter in a mindless and un impressive manner which left many aspects of the case, plunged in the darkness.

9. The case of Yaseen alias Tara accused is easily distinguishable from the case of the petitioner, as Investigating Officer collected certain pieces of incriminating evidence against him, including the last seen evidence and recovery of certain crime articles at his instance, hence, outcome of his bail application (Criminal Miscellaneous No. 4546-B/2012) hardly affects the case of the petitioner. The bail declining order in respect of Yaseen accused causes no inroads into the case of the petitioner.

10. Muhammad Arfan, a co-accused of the petitioner, whose role looks much graver than that of the petitioner has been granted bail vide order dated 29-2-2012 by the learned trial

court, which order is still intact. The petitioner underwent physical remand for 14 days but this period of time remained unproductive. Prima facie, there exist sufficient reasons to believe that the petitioner's case calls for further probe into his guilt as contemplated under section 497(2), Cr.P.C., hence, factum of abscondence poses no threat to the plea of the accused for bail.

11. Resultantly, I accept this application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/M-104/L Bail granted.

2013 Y L R 2688

[Lahore]

Before Shahid Hameed Dar, J

HASSAN RAZA BUTT---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.646/B of 2013, decided on 27th June, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.302, 324, 148, 149, 109, 337-F (i), 337-F (iii) & 337-F (v)---Qatl-e-amd, attempt to commit qatl-e-amd, rioting armed with deadly weapon, common object, abetment, damiyah, mutalahimah and hashimah---Bail, refusal of---Accused had allegedly fired at the deceased by Kalashnikov which landed at his left shoulder and was fatal in nature---Eye-witnesses had supported the prosecution case in entirety---Accused being S.H.O. of another police station had no business to be there at the spot---Investigation Officer had formulated the opinion that accused had a role in the alleged occurrence but only that of an abettor---Such opinion was implausible and unimpressive which was not based on any rationale and carried no weight nor was binding on the court---Occurrence was daylight having prompt F.I.R. and specific role corroborated by the medical evidence---Bail was refused in circumstances.

Muhammad Abbasi's case 2011 SCMR 1606; Mst. Qurdrat Bibi's case 2003 SCMR 68 and Ghulam Ahmad Chishti's case 2013 SCMR 385 rel.

Abid Saqi for Petitioner.

Mrs. Muqadass Tahira, Additional Prosecutor General Punjab for the State with Fida Hussain, S.I., Arshad Ali, S.I., Mehmood, S.I. and Muhammad Shahbaz, S.I.

Umar Hayat Bhatti and Malik Maqsood Ahmad Awan for the Complainant.

Ch. Imran Raza Chadhar for legal heirs of Muhammad Afzal (deceased).

ORDER

SHAHID HAMEED DAR, J.---Hassan Raza Butt, Exh.S.H.O., Police Station Khanqah Dogran (petitioner), who stands imprisoned since 25-10-2012 in case-F.I.R. No.340, dated 2-8-2012, for offences under sections 302, 324, 148, 149, P.P.C. (sections 109, 337-F(i), 337-F(iii), 337-F(v), P.P.C. added later on), registered at Police Station Saddar Sangla Hill (Nankana Sahib) at the instance of Muhammad Falak Sher-complainant, by filing this application seeks post-arrest-bail.

2. Precisely, the allegation against the petitioner is that he being armed with Kalashnikov, joined by six named and two unknown companions, all armed with, Kalashnikovs, except Ijaz Ahmad accused, who allegedly held rifle G-3, attacked the complainant party on their agricultural land at about 4-30 p.m. on 2-8-2012, and sped away their vehicles from the venue of occurrence, leaving behind Sajjad Anwar son of Muhammad Anwar, resident of Dherh Chak No.29/RB and Naseer Ahmad son of Khan Muhammad, caste Machhi, resident of Dharmpura, Lahore dead with two others, Faisal alias Kaka and Fazal Mehmood alias Kala badly wounded; Hassan Raza Butt (petitioner) fired through his weapon at Naseer Ahmad, which landed at his left shoulder; many inhabitants of the village heard report of firing and they rushed to the spot, where incessant firing by all the accused welcomed them; the occurrence was committed by the accused in the backdrop of previous litigation and land-disputes with the complainant party.

3. It has been contended by learned counsel for the petitioner that the allegation against the petitioner is patently false as he neither participated in the occurrence nor he was linked with the co-accused in any manner; the contention of the complainant qua the petitioner is baseless as Naseer Ahmad, the alleged deceased of the occurrence, was alive and it was Muhammad Afzal son of Hakim Ali, who had been murdered during the occurrence along with Sajjad Anwar deceased; the story of F.I.R. has been found false during the course of investigation; the Investigating Officer has opined that the petitioner was not a participant of the alleged occurrence and he has merely termed him an abettor; the petitioner remained with the police on physical remand for fourteen days but nothing was recovered from him during the said time-period; the story of F.I,R. is afterthought and product of a deep-rooted conspiracy against the petitioner, who is not even remotely linked with the said incident and his case plainly falls within the purview of section 497(2), Cr.P.C.

4. Ch. Imran Raza Chadhar, Advocate, entered appearance on behalf of the legal heirs of Muhammad Afzal son of Hakim Ali, vociferously argued the point that it was Muhammad Afzal, who had been murdered along with Sajjad Anwar by the accused, Mehboob Ahmad and others, and enough material existed to establish the said fact; Naseer Ahmad, who is shown to have been murdered, in the F.I.R. was alive and detained in District Jail, Sheikhupura in some cases of theft/dacoity etc.; the learned Judicial Magistrate, who conducted judicial inquiry under the orders of learned Sessions Judge, Nankana Sahib has tentatively opined that Muhammad Afzal had been murdered during the occurrence but he did not conclude the finding, leaving it to DNA test/profiling of Muhammad Afzal and Naseer Ahmad; the legal heirs of Muhammad Afzal are satisfied about the innocence of the petitioner and they are equally interested in his release on bail.

5. On the other hand, learned Additional Prosecutor-General Punjab assisted by learned counsel for the complainant opposes this petition with equal degree of vehemence by contending that the accused-petitioner actively participated in the occurrence and authored terminal injury on the body of Naseer Ahmad (deceased); none of the accused, arrested so far in this case, including the petitioner, at no stage of investigation ever contended that it was not Naseer Ahmad son of Khan Muhammad, who had been murdered during the occurrence or it was Muhammad Afzal son of Hakim Ali, having been killed by the accused; the opinion of the Investigating Officer showing the petitioner an abettor was recorded by him without any plausible and cogent material, which may not be given any importance; the confusion being created qua identification of the dead body of Naseer Ahmad deceased was a planned affair, which had been masterminded by the accused petitioner; all the eye-witnesses including the injured P.Ws. categorically endorse the story of F.I.R. in their statements under section 161, Cr.P.C.; lastly submits that the petitioner is well connected with the commission of offence, falling within the prohibitory clause of section 497(1), Cr.P.C. Learned Law Officer, however, admits that the Investigating Officer, Irfan Gul, S.-I., had held the petitioner not to have participated in the occurrence being not present at the spot at the relevant time of incident rather he opined that he (petitioner) abetted his co-accused to commit the crime and he possessed advance knowledge about the occurrence alleged.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the learned counsel for the petitioner and Ch. Imran Raza Chadhar, Advocate, consumed every ounce of their energy to prove that it was Muhammad Afzal son of Hakim Ali, who had been murdered during the alleged occurrence and not Naseer Ahmad son of Khan Muhammad, as mentioned in the F.I.R. There, however, exists no controversy as to the identification of Sajjad Anwar deceased, whom the accused side also believes that he was the other disposed of person of this case. So far as, the police record is concerned, not a word can be found therefrom as to afore-noted controversy and investigation of the case appears to have been finalized by the Investigating Officer, believing both, Naseer Ahmad and Sajjad Anwar, the slain-men, as shown in the F.I.R.

We find that it all started when a lady named Mst. Surraya Bibi filed a habeas petition (Criminal Miscellaneous No.1669/H of 2012), claiming herself to be the wife of the alleged detenu, Muhammad Afzal son of Hakim Ali, which took a couple of turns before being disposed of by this court on 6-9-2012. During pendency of the said habeas petition, learned counsel for Mst.Surraya Bibi informed the court on 28-8-2012 that Muhammad Afzal, the alleged detenu, was a proclaimed offender of case F.I.R. No.787, dated 28-9-2011, under section 395, P.P.C., registered at Police Station Nishatabad (Faisalabad) and he as per contents of Rapat No. 9 dated 3-8-2012 recorded at the said police station had been murdered on 2-8-2012, but this fact was concealed with mala fide intention by Muhammad Falak Sher, who reported the said crime to the police vide case F.I.R. No.340 of 2012 (supra) and in his place, he introduced the name of Naseer Ahmad son of Khan Muhammad as one of the deceased along with Sajjad Anwar, being the other deceased. It was ordered by this court in habeas-petition on 28-8-2012 that the S.H.O., Police Station Sangla Hill (Nankana Sahib) would produce record of case F.I.R. No.340 of 2012 (supra) and S.H.O., Police Station Nishatabad (Faisalabad) would present police record of case F.I.R. No.787 of 2011 (supra) on 4-9-2012. He (Waheed) appeared in the said petition on 4-9-2012 to state that he had received the dead body of Naseer Ahmad deceased, who served him as a driver for five years;

he undertook to produce the parents of Naseer (deceased) before this court, if accorded an opportunity. Learned counsel appearing on behalf of said Muhammad Falak Sher submitted before this court on 4-9-2012 in the habeas petition that a judicial inquiry was being conducted by a Judicial Magistrate at Sangla Hill in the alleged occurrence as contained in F.I.R.No.340 of 2012 (supra), whereon Mst. Surraya Bibi was directed to join the judicial inquiry and produce her evidence before the Judicial Magistrate. The habeas petition, as noted earlier, was wound up on 6-9-2012 with certain observations/ directions, one relating to the "factual controversy", if it was Naseer Ahmad or Muhammad Afzal, who had been murdered in the alleged occurrence, as contained in F.I.R.No.340 of 2012 (supra) and in this backdrop the judicial officer concerned was directed to "thrash out" the said riddle in judicial inquiry without being biased to any. By the other direction, Mst.Surraya Bibi was required again to join the said judicial inquiry. Interestingly, Mst.Surraya Bibi failed to impress the court through her conduct as she could not tell the name of even a single relative of her "missing, husband" Muhammad Afzal (detenu) and frankly admitted that she knew nothing about it. Waheed, who was supposed to produce the parents of above-said Naseer Ahmad also showed his inability to do so on the said occasion, contending that he could not establish contact with them. The movement of this habeas petition, which started on 16-8-2012, came to a halt on 6-9-2012.

Subsequent to disposal of above-said habeas petition, one Hakim Ali filed Writ Petition No.2149 of 2013 on 30-1-2013, versus the District and Sessions Judge, Nankana Sahib and six others with the prayer that respondent No.2, the judicial magistrate/inquiry officer, Nankana Sahib might be directed to complete the judicial inquiry, within one week, by taking into consideration all the documents relied upon by him, so as to verify the 'factum', if it was Naseer Ahmad son of Khan Muhammad, who had been murdered in the occurrence, as alleged in F.I.R. No.340 of 2012 (supra) or it was Muhammad Afzal son of Hakim Ali, who, as claimed, lost life in the said occurrence. This constitutional petition was still pending adjudication when one Fazal Mehmood, the injured P.W. of the said murder case filed an identical petition (Writ Petition No.5438 of 2013) with the prayer that the proceedings of the judicial inquiry might be set aside, wherein a direction was given to the respondent-DPO on 7-3-2013 to submit his report and comments within a fortnight, as to the grievance of Fazal Mehmood, the mover of the petition. Both the constitutional petitions are still pending adjudication.

The record reveals that the District Police Officer, Nankana Sahib vide memo No.1508-Legal, dated 8-8-2012 lodged a request for judicial inquiry in case F.I.R. No.340 of 2012 (supra), which was registered against Hassan Raza Butt (petitioner), the Inspector/S.H.O., Police Station Khanqah Dogran (Sheikhupura) and eight others, with the allegation that they being armed with sophisticated/lethal weapons, brutally murdered Naseer Ahmad son of Khan Muhammad and Sajjad Anwar son of Muhammad Anwar besides, seriously injuring Faisal alias Kaka and Fazal Mehmood. Learned District and Sessions Judge, Nankana Sahib deputed Mr. Shahid Iqbal, Magistrate First Class, Sangla Hill to hold judicial inquiry in the said F.I.R.-case. The learned Magistrate virtually did nothing in the judicial inquiry except for formulating an interim inquiry report on 9-3-2013, whereby he tentatively opined that the DNA test was a key to the question, raised by one of the contesting sides if it was Muhammad Afzal and not Naseer Ahmad, who was murdered along with Sajjad Anwar during the occurrence, reported vide case F.I.R. No.340 of 2012 (supra).

This court with a view to satisfy its judicial anxiety, summoned Khan Muhammad, father of Naseer Ahmad (deceased), and Hakim Ali, father of Muhammad Afzal, to appear before this court for an interview. In the meanwhile, Ch.Imran Raza Chadhar, Advocate, created a stir by contending on 12-6-2013 that Naseer Ahmad son of Khan Muhammad (deceased) was alive and arrested by the police in case F.I.R. No. 580, dated 3-6-2013 under section 13 of Pakistan Arms Ordinance, XX of 1965, registered at Police Station Gulberg, Lahore and also tendered a copy of the F.I.R. Both Khan Muhammad and Hakim Ali appeared before this court today and reiterated the facts, which they firstly spoke about on 20-6-2013. Khan Muhammad said that his son Naseer Ahmad was alive and confined in District Jail, Sheikhupura in some cases of dacoity, whereas Hakim Ali, the father of Muhammad Afzal, submitted that his son had been murdered in an occurrence along with Sajjad Anwar deceased and that he buried his dead body in Chak No.49/GB, Bathan. *The complainant party, however, refused to identify both Khan Muhammad and Hakim Ali with the contention that they were 'fake and imported actors', who played a conspiratorial role to mislead everyone and if their contentions were true, why didn't they ever join the investigation or judicial inquiry to press their astounding stance and why Naseer Ahmad, if alive, continuously kept himself tight-lipped and away from the said fora, which could guarantee him a life. This objection contained some substance therein as it left both the 'fathers' confused and speechless.

7. The first Investigating Officer of this case, Arshad Ali, S.-I. was directed on 20-6-2013 to prepare a list of legal heirs of the deceased of F.I.R.-case, Sajjad Anwar and Naseer Ahmad and submit it before the court besides, ensuring presence of parents of Naseer Ahmad (deceased). He submitted his report to the effect that Naseer Ahmad son of Khan Muhammad was alive and confined in District Jail, Sheikhupura. This report is attached with the statements of parents of Naseer Ahmad and that of one Liaqat Ali son of Hakim Ali besides, the statement of Naseer Ahmad son of Khan Muhammad, allegedly recorded in District Jail, Sheikhupura on 24-6-2013, who appears to have stated before Arshad Ali, S.-I. that he knew about his name having been entered in F.I.R. No.340 of 2012 (supra) as a deceased but he kept mum and subdued as complainant party silenced him under duress. He further stated that he was confined in jail in some cases of theft and dacoity etc. *This Sub-Inspector has compiled the said report without associating the complainant party with the assignment given. He did not interview the identifiers of the dead body of Naseer Ahmad (deceased) nor he talked to Waheed, who as per police record received his dead body after its postmortem examination on 3-8-2012. He also took no pains to satisfy himself about the identification of Naseer Ahmad, confined in said jail and in sharp contrast to the investigation conducted by him, he readily believed him to be the 'deceased person' of the alleged occurrence (F.I.R. No.340/2012) albeit, Naseer Ahmad (deceased), as mentioned in the F.I.R. and in the necropsy report, hailed from Dharampura, Lahore, whereas Naseer Ahmad, reportedly interviewed by him in jail was resident of Tanda Colony, Jalalpur Bhattian, district Hafizabad. He investigated this case from 2-8-2012 to 19-9-2012, but he was never informed by anyone as to aforesaid controversy, despite Shehzad Ahmad accused, whom he arrested on 9-8-2012, remained under his extensive interrogation till 16-8-2012. He must have consulted the police-record before preparing the above-said report, which explicitly showed that the accused-petitioner, who after having been arrested on 25-10-2012, underwent physical remand for fourteen days and interrogated on scores of occasions, did not adopt the version even once

that there was any dispute or controversy as to the identification of the dead body of Naseer Ahmad son of Khan Muhammad. The recklessness and irresponsibility in preparation of the said report by Arshad Ali, S.-I. is deplorable. Even otherwise, the report submitted by him is a sketchy and shoddy document, which, in no way, helps resolve the dispute, if any. It can be safely assessed even at this stage that the learned trial Court is the best forum where both the parties would be at liberty to adduce evidence in support of their respective claims and proceedings being conducted hither and thither qua said 'issue' are bound to remain inconclusive. The complainant, Muhammad Falak Sher, in the meanwhile filed a private complaint against the accused of F.I.R.-case, wherein they have been summoned by the trial Court under section 204, Cr.P.C. to stand trial. The complainant has stuck to his previous stance in the complaint case by maintaining that Sajjad Anwar and Naseer Ahmad son of Khan Muhammad were murdered by the accused.

8. So far as the role attributed to the petitioner is concerned, he allegedly fired at Naseer Ahmad (deceased) through his Kalashnikov, which landed at his left shoulder. According to remarks by the medical officer, as recorded in the postmortem examination report, injury No.1, which is at back of left shoulder of the deceased, was fatal in nature, having damaged the vital organs and major blood vessels. Besides, Muhammad Falak Sher (complainant) there are three other eye-witnesses of the occurrence, which also include Faisal alias Kaka and Fazal Mehmood, the injured witnesses, who all still support the prosecution case in entirety. The petitioner being a man in uniform and S.H.O. of a police station other than the one, in the limits whereof the alleged occurrence took place, had no business to be there at the spot, while accompanying, virtually leading a heavily armed band of the offenders. In parallel to it, Irfan Gul, S.-I., the Investigating Officer, has formulated the opinion vide case diary dated 22-10-2012 that the accused-petitioner certainly had a role in the alleged occurrence, but only that of an abettor. He opined so at the strength of some call-data pertaining to the cell-phone of the accused-petitioner and those of his co-accused. Does this opinion entail any element of cogency or not, learned Additional Prosecutor-General Punjab has shown little faith in it by submitting that it is a self-contradictory opinion, as maker thereof also held, in the same breath, that the accused-petitioner remained in the same area where the alleged occurrence took place, but not at the place of occurrence. We believe that the opinion so recorded by the Investigating Officer is implausible and unimpressive being a hollow affair, not based on any rationale. Even so, the opinion of an Investigating Officer, as held by the Hon'ble Supreme Court in Muhammad Abbasi's case reported as 2011 SCMR 1606 and Mst. Qudrat Bibi's case reported as 2003 SCMR 68, carries no weight in the eye of law nor does it bind the court in any manner. In Ghulam Ahmad Chishti's case, reported as 2013 SCMR 385, the apex court while rejecting bail plea of the accused observed that plea of alibi raised by the accused could be considered by the trial Court in the light of the evidence led by the prosecution and defence and the trial Court could also consider the allegation of conspiracy against the accused at the stage of trial. This is what the petitioner's case is all about. He does not appear to have been stitched up in this case by the complainant, for a variety of reasons/facts vis-a-vis, daylight occurrence, prompt F.I.R., specific role of inflicting terminal injury to Naseer Ahmad (deceased), corroboratory medical evidence and overwhelmingly consistent eye-witness account, which pushes aside much-trumpeted "controversy" qua identification of the dead body of Naseer Ahmad (deceased) and also dwindles the efficacy of argument of the learned counsel for the petitioner, that it was a case, open to further probe,

within the scope of section 497(2), Cr.P.C.

9. For the reasons discussed supra, we find no merit in this application, which is accordingly dismissed.

AG/H-15/L Application dismissed.

2013 Y L R 2697

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ASHRAF---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.10164-B of 2011, decided on 26th August, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss.324 & 337-F(v)---Attempt to commit qatl-e-amd, causing Hashimah to any person---Bail, grant of---Further inquiry---Investigating Officer prepared a cancellation report as parties struck a deal during investigation and complainant side showed intention not to further prosecute accused---Such cancellation report could not be taken to its logical end, as the complainant party appeared before the DSP/SDPO, to state that the affidavits on the basis of which cancellation report had been prepared by the Investigating Officer were false---Investigation re-started and taken to conclusion by the Investigating Officer, in terms, that accused was guilty of the offence---Declaration of under observation injuries, of the injured, which was done by the Radiologist about 10 months after the medical examination of the injured---Such delay in declaration of injuries had not been explained---Accused did not repeat the fire shot during occurrence, though empty-handed injured was at his mercy---Application of S.324, P.P.C, in circumstances, was open to serious exception---Accused was no more required for investigation as report under S.173, Cr.P.C. had already been submitted before the Trial Court---Keeping accused languishing in jail, would not serve any useful purpose---Prima facie, accused's case, constituted the need for further inquiry into his guilt as envisaged under S.497(2), Cr.P.C., he was admitted to post arrest bail, in circumstances.

Nazar Abbas Syed for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor-General Punjab for the State.

Ch. Ghulam Shabbir Shahid Chadhar for the Complainant.

Muhammad Mumtaz A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Ashraf seeks bail after arrest in case F.I.R. No. 414 of 2010 dated 14-7-2010 under sections 324, 337-F(v), P.P.C, registered at Police Station Langrana, District Chiniot.

2. The allegation against the petitioner is that he being armed with a .12 bore gun made a fire shot straight at Ahmad Nawaz, the real brother of Anwaar Hussain complainant which landed at his left calf due to which he fell onto the ground. The injured was medically examined vide MLR dated 6-7-2010 which shows two fire arm injuries on the left leg of the injured, one being the entry wound and the other, exit wound. The nature of the injuries was kept under observation which was finally declared by the Radiologist on 2-5-2011 after having X-rayed the injuries of the injured on the said date.

3. Learned counsel for the petitioner submits that the petitioner's case calls for further inquiry into his guilt as he did not repeat the fire shot, nor aimed at any vital part of the body of the injured and prosecution itself is perplexed about attraction of offences under section 324, P.P.C. and (sic).

4. Learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant has opposed the instant petition with the contention that petitioner is specifically nominated in the F.I.R. with role of targeting the left lower leg of the injured with his .12 bore gun and medical evidence supports the said allegation; non-repetition of the fire shot or the locale of injury being non-vital part of the body would not mean that the petitioner did not possess the criminal intent to launch murderous assault on Ahmad Nawaz injured.

5. After having heard learned counsel for the parties and perused the record, I find that the Investigating Officer prepared a cancellation report on 28-9-2010 as parties struck a deal during investigation and complainant side showed intentions not to further prosecute the accused. This cancellation report could not be taken to its logical end as the complainant party appeared before the DSP/SDPO to state that the affidavits on the basis of which cancellation report had been prepared by the Investigating Officer were fake. It was at this stage, when investigation re-started and taken to conclusion by the Investigating Officer, in terms, that the petitioner was guilty of the offence as alleged by the complainant. One thing is important in this case and it relates to the declaration of under observation injuries of the injured which was so done by the Radiologist on 2-5-2011, about 10 months after the medical examination of the injured on 6-7-2010. This delay in declaration of injuries has not been explained vital part of the body of the injured. The petitioner did not repeat the fire shot during the occurrence though empty-handed injured was at his mercy. In this situation, application of section 324, P.P.C. is open to serious exception. The petitioner is no more required for investigation as report under section 173, Cr.P.C. has already been submitted before the learned trial Court on 15-4-2011 so, to keep him languishing in jail would not serve any useful purpose. Prima facie the petitioner's case constitutes need for further inquiry into his guilt as envisaged under section 497(2), Cr.P.C.

6. Therefore, the instant petition is allowed and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.1,00,000 with one in the like amount to the satisfaction of the learned trial Court.

HBT/M-352/L Bail granted.

PLJ 2013 Cr.C. (Lahore) 117

Present: Shahid Hameed Dar, J.

ABIDA BIBI & another--Petitioners

versus

STATE & another--Respondents

Crl. Misc. Nos. 18544-B & 18564-B of 2012, decided on 31.12.2012.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), 1860, Ss. 371-A, 371-B & 376--Bail, grant of--Further inquiry--Allegation of selling or buying of a female for the purpose of prostitution--Investigating officer failed to collect any evidence during the course of investigation, as to the allegation of selling or buying of a female for the purpose of prostitution, nor he associated any local inhabitant with the investigation so as to bring some independent evidence on the record--Clothes of the petitioners or that of their co-accused were not taken into possession by the investigating officer despite a categorical allegation in the FIR that the accused-petitioners and their co-accused were engaged in sexual intercourse at the time of raid, conducted by the police--Investigating officer has conducted the investigation of this case in a casual and non-serious-way and except for re-producing in-verbatim the story of FIR, in the statements of three witnesses u/S. 161, Cr.P.C., did not collect any other evidence which might corroborate the story of FIR in a plausible or cogent manner--Would it be a case of fornication or the one, as alleged in the FIR, is a question which shall be dealt with by the trial Court, after recording evidence of the parties at trial--In absence of any corroboratory/plausible evidence, an element of dubiousness is attached with the allegation of running a prostitution-den by accused/petitioner, which renders the petitioners' case, one of further inquiry, as contemplated u/S. 497(2), Cr.P.C.--Bail accepted. [Pp. 118 & 119] A & B

Mr. Muhammad Tariq Chughati, Advocate for Petitioners (in Crl. Misc. No. 18544-B/2012).

Ch. Shahid Mehmood, Advocate for Petitioner (in Crl. Misc. No. 18564-B/2012).

Ms. Muqaddas Tahira, Addl. Prosecutor General Punjab for State.

Date of hearing: 31.12.2012.

Order

Two separate post arrest bail applications, Crl. Misc. No. 18544-B/2012 moved by accused Mst. Abida Bibi and Mst. Chheema Dogri and Crl.Misc. No. 18564-B/2012 moved by Mst. Saba Bibi, shall be decided through this single/composite order, as both arise from case-FIR No. 740/2012 dated 13.12.2012 registered for offences under Section 371-A, 371-B and 376, PPC at Police Station, Ellah Abad (Kasur).

2. Precisely, the prosecution case as set-up in the FIR by Asif Ali S.I. is that, he along with fellow-police-officials, on receipt of a spy information, conducted raid on a brothel, being run by Mst. Chheema Dogri (petitioner) and found Mst. Abida Bibi (petitioner) and Mst. Saba Bibi (petitioner) committing zina with their male partners, and they admitted their guilt after having been overpowered by the police.

3. Learned counsel for the petitioners, submit in unison that there exists no incriminating material on the record to connect the petitioners with the commission of offence; the accused-petitioners' case calls for further probe into their guilt, hence, they may be released on bail.

4. On the contrary, learned Addl: Prosecutor General Punjab opposes with the contention that the petitioners are engaged in an act of immorality, which does not call for any leniency. The learned Law Officer, however, complains of the incompetence and carelessness of the investigating officer.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the investigating officer failed to collect any evidence during the course of investigation, as to the allegation of selling or buying of a female for the purpose of prostitution, nor he associated any local inhabitant with the investigation so as to bring some independent evidence on the record. The clothes of the petitioners or that of their co-accused were not taken into possession by the investigating officer despite a categorical allegation in the FIR that the accused-petitioners and their co-accused were engaged in sexual intercourse at the time of raid, conducted by the police. Learned Addl: Prosecutor General Punjab, after having gone through the police record, submits that the investigating officer has conducted the investigation of this case in a casual and non-serious-way and except for re-producing in-verbatim the story of FIR, in the statements of three witnesses under Section 161, Cr.P.C., did not collect any other evidence which might corroborate the story of FIR in a plausible or cogent manner. Would it be a case of fornication or the one, as alleged in the FIR, is a question which shall be dealt with by the trial Court, after recording evidence of the parties at trial. In absence of any corroboratory/plausible evidence, an element of dubiousness is attached with the allegation of running a prostitution-den by Mst. Chheema Dogri accused/petitioner, which renders the petitioners' case, one of further inquiry, as contemplated under Section 497(2), Cr.P.C.

6. For the foregoing reasons, both the applications, as noted above, are accepted and petitioners are admitted to post-arrest-bail subject to furnishing bail bonds in the sum of Rs. 2,00,000/- each with two sureties each in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail accepted

PLJ 2013 Cr.C. (Lahore) 14

Present: Shahid Hameed Dar, J.

MUHAMMAD ANWAR--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 13666-B of 2012, decided on 9.10.2012.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail, grant of--Disputed cheques were issued by the petitioner and the same were bounced by the bank due to insufficient funds does not establish any element of culpability against him unless it is proved that the said instruments were issued by him in the backdrop of the rudiments, as mentioned in penal provision of the Code--Although petitioner stands involved in two other cases of identical nature but he had not been shown as a convict in any--Accused was charged with, did not fall within the mischief of the prohibition of Section 497(1), Cr.P.C.--Grant of bail in such like offences is a rule and rejection thereof, an exception. [P. 15] A

Haji Khalid Rehman, Advocate for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor General Punjab for State.

Mr. Salah-ud-Din Siddiqui, Advocate for Complainant.

Date of hearing: 9.10.2012.

Order

The petitioner seeks bail after arrest in case FIR No. 538, dated 18.08.2012, under Section 489-F, PPC, registered at Police Station Kotwali, District Faisalabad.

2. Precisely the allegation against the petitioner is that he purchased the machinery installed at Arif Textile Mills for consideration of Rs. 1,11,00,000/- and to pay its cost, he borrowed the aforesaid amount from the complainant and to repay the said amount, he issued two cheques to the latter, which on presentation for encashment, were bounced by the bank due to insufficient funds.

3. Learned counsel for the petitioner submits that the allegation against the petitioner is false as he did not borrow any amount from the complainant nor he issued the cheques in question to the complainant.

4. On the other hand, learned DPG assisted by learned counsel for the complainant opposes with the contention that the petitioner is a habitual offender who has the history of involvement in two other cases of identical nature; the signatures on both the cheques were admitted by the accused and bouncing of the cheques renders the petitioner liable for a penal action under Section 489-F, PPC.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the complainant alleges to have lent an amount of Rs.1,11,00,000/- to the petitioner and his co-accused under a deal but he failed to produce any evidence in respect thereto during the

course of investigation. Mere fact that the disputed cheques were issued by the petitioner and the same were bounced by the bank due to insufficient funds does not establish any element of culpability against him unless it is proved that the said instruments were issued by him in the backdrop of the rudiments, as mentioned in the above-noted penal provision of the Code. Although petitioner stands involved in two other cases of identical nature but he has not been shown as a convict in any. The offence, the petitioner is charged with, does not fall within the mischief of the prohibition of Section 497(1), Cr.P.C. Grant of bail in such like offences is a rule and rejection thereof, an exception. On finalization of the investigation, report under Section 173, Cr.P.C. has been submitted before the trial Court vide case diary dated 30.08.2012. In such a situation, further incarceration of the petitioner may be of no consequence to the prosecution case. Therefore, the instant application is allowed and petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.2 lacs with two sureties each in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail admitted

PLJ 2013 Cr.C. (Lahore) 30

Present: Shahid Hameed Dar, J.

MUHAMMAD SAEED--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 15650-B of 2012, decided on 8.11.2012.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Bail, grant of--Further inquiry--Divergent opinions of the I.Os about alleged participation of the petitioner in the occurrence are relevant for consideration of the bail plea of the petitioner--Sufficient reasons exist to believe that the petitioner's case calls for further probe into his guilt, within the scope of Section 497(2), Cr.P.C., hence his alleged abscondence does not adversely affect the outcome of instant petition--Bailis allowed. [P. 32] A

Ch. Waris Ali Janjua, Advocate for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor General Punjab for State.

Mr. Muhammad Sajjad Amin, Advocate for Complainant.

Date of hearing: 8.11.2012.

Order

The petitioner seeks bail after arrest in case FIR No. 487, dated 23.09.2010, under Sections 302, 34, PPC, registered at Police Station Saddar Arifwala, District Pakpattan Sharif.

2. Precisely the prosecution case as narrated by Muhammad Eisa (complainant) is that his brother Muhammad Amin while riding a motorcycle reached the agricultural land of one Ghulam Rasool where he was intercepted by three persons, armed with pistol .30 bore each,

one out of whom Muhammad Bashirfired a shot with his weapon which landed at the head, close to left ear of his brother and pierced across the skull from the other side, one of the unknown accused also made a fire shot which hit the neck area of his brother; the occurrence was witnessed by Manzoor Ahmad and Muhammad Sharif; the motive behind the occurrence pertained to the fact that accused Bashir had developed illicit relationship with his niece, who asked him for her hand but he rejected his request.

3. The eye-witnesses Manzoor Ahmad and Muhammad Sharif were examined under Section 161, Cr.P.C. on 23.09.2010 by the I.O. whereby they endorsed the story of FIR in entirety. Both of them however, rendered another statement on 24.09.2010 and on this occasion, they nominated Muhammad Saeed(petitioner) with the liability to have fired at the neck of the deceased, without disclosing the source of their knowledge qua the said fact.

4. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner's name figures, for the first time, as an accused when, both the eye-witnesses, Manzoor Ahmad and Muhammad Sharif rendered secondary statements on 24.09.2010 with the contention that they had identified him and it was he, who had fired at the neck of the deceased. They however, did not disclose the source through which they learnt about the alleged participation of the accused/petitioner in the occurrence. Interestingly, both the eye-witnesses categorically contended before the I.O. on 23.09.2010 while rendering statements under Section 161, Cr.P.C. that an unknown accused, who accompanied Muhammad Bashir accused, fired a missile which passed through the neck of the deceased. The hesitancy on their part in hinting at the source of their knowledge is a crucial circumstance which cannot be lost sight of easily. It appears from the record that only one prosecution witness has been recorded by the trial Court so far notwithstanding a categorical direction of this Court, made on 17.07.2012 in Crl. Misc. No. 8251-B-2012, that the trial of the accused-petitioner be concluded expeditiously, within shortest possible time. Divergent pleas has been raised on both the sides as to who actually contributed towards delay in conclusion of the trial but I find from the record that much of the time had gone wasted, due to repeated strike calls by the local bar association. The petitioner was arrested in this case on 09.05.2012 but not before he had been declared a proclaimed offender during investigation and a report under Section 512, Cr.P.C. stood submitted against him by the I.O., before the learned trial Court. He was, however, declared innocent by the I.O. who opined about the FIR-case having gone untraced. On an objection raised by the prosecution branch, the I.O. prepared a fresh report under Section 173 Cr.P.C, placing the name of the petitioner in its Column No. 2. In the last round of investigation conducted by the RIB Sahiwal, the petitioner and his co-accused Muhammad Bashir were found involved in the occurrence. The divergent opinions of the I.Os about alleged participation of the petitioner in the occurrence are relevant for consideration of the bail plea of the petitioner. Sufficient reasons exist to believe that the petitioner's case calls for further probe into his guilt, within the scope of Section 497(2) Cr.P.C, hence his alleged abscondence does not adversely affect the outcome of this petition. Therefore, the instant application is allowed and petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.2 lacs with two sureties each in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail allowed

PLJ 2013 Cr.C. (Lahore) 71

[Rawalpindi Bench Rawalpindi]

Present: Shahid Hameed Dar, J.

FAISAL MEHMOOD & 2 others--Petitioners

versus

STATE & another--Respondents

Crl. Misc. No. 1579-B of 2012, decided on 24.10.2012.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 34 & 337--Bail, grant of--Further probe--`Strong suspicion'--Offence of sodomy and murdered--Anal swabs qua the deceased were found stained with semen by the Chemical Examiner, but, it cannot be discerned from the postmortem examination report whether the anal area of the deceased child had been examined by the medical officer or riot--Detail of the occurrence is hair-raising and heart bleeds while going through it but, Courts are" not driven by the sentiments--It is the incriminatory material alone, collected by the I.O. during the course of investigation which has to be tentatively assessed for the purpose of adjudication of the bail plea of an accused--Accused has already been granted bail by the trial Court--Evidentiary value of the aforesaid incriminating circumstance shall be truly assessed by the trial Court after recording the evidence of the parties at trial--There is no other incriminating material which may connect the petitioners with the commission of offence--Sufficient reasons exist to believe that the petitioners' case calls for further probe into their guilt as envisaged by Section 497(2) Cr.P.C.--Bail admitted. [P. 73] A

Mr. Muhammad Bashir Paracha, Advocate for Petitioners.

Sh. Istajabat Ali, DPG for State.

Sh. Waqar Azeem Siddiqui, Advocate for Complainant.

Date of hearing: 24.10.2012.

Order

The petitioners seek bail after arrest in case FIR No. 209, dated 09.06.2012, under Sections 302, 34, PPC (Sections 377, PPC added lateron), registered at Police Station Pindi Gheb, District Attock.

2. Umer Usman, aged 07, the ill-fated son of Muhammad Usman (complainant) went missing on 07.06.2012 and about his disappearance, Rapat No. 15 was lodged at Police Station Pindi Gheb on 08.06.2012 at the instance of the complainant; a campaign for tracking down the whereabouts of the missing child was launched during the course of which, the complainant and his companions found the dead body of the missing child afloat in a well of the village. The complainant showed strong suspicions against Abdul Majeed, Bilal (petitioner), Faisal Mehmood (petitioner) and Haroon (petitioner) with the assertion that they had murdered his son. The motive alleged was that Abdul Majeed etc. were the roguish characters who teased the lads of the village with a noxious intent.

3. Prior to the registration of the FIR, Rapat No. 15 (supra) was got lodged by the complainant whereby he contended that his missing son could be found if Abdul Majeed accused was made to join the investigation as he, when contacted by the complainant had admitted to have seen a boy of seven years of age, clad in red colour clothes, weeping near his house, at night, on 07.06.2012.

4. Learned counsel for the petitioners submits that except for delayed last seen evidence, there is no other material which may connect the petitioners with the commission of offence; the petitioners' case requires further probe into their guilt, within the scope of Section 497(2) Cr.P.C.

5. On the other hand, learned DPG assisted by learned counsel for the complainant opposes with the contention that the allegation against the petitioners is simple and plain which is duly corroborated by the last seen evidence, rendered by six witnesses, all related to the complainant; the son of the complainant was brutally murdered by the accused after they committed sodomy upon him; the petitioners have committed a heinous offence which catches the prohibition of Section 497(1), Cr.P.C. Relies upon "Raja Fazal-ur-Rehman Vs. Muhammad Afzal and another" (2010 SCMR 179), "Zaheer alias Fauji Vs. The State" (2002 P.Cr.LJ 1114) and "Sohrab and 3 others Vs. The State" (2001 P.Cr.LJ. 366).

6. After hearing learned counsel for the parties and perusing the record, it is observed that the only evidence against the petitioners is in the form of statements of a few relatives of the complainant who joined the investigation on 10.06.2012 to tender last seen evidence and that too in a dissenting manner. The complainant reported the disappearance of his ill-fated son Umer Usman to the police on 08.06.2012 through Rapat No. 15 whereby he contended that his son did not return to his house on 07.06.2012 from the village mosque for a considerable period of time whereon he started searching for him and in this process, came across his neigbour Abdul Majeed accused who told him that a child of seven years of age, wearing red attire was seen weeping by him, close to the rear wall of his house, whom he asked to go to his house. The complainant required the police to interrogate Abdul Majeed for recovery of his missing son. The subject of this report is crucial as it does not contain the names of the petitioners. So far as, story contained in the FIR is concerned, it merely shows `strong suspicion' of the complainant against the accused-petitioners and their co-accused Abdul Majeed. The complainant instead of hinting at the last seen evidence, presented by some of his close relatives, opted to express his mere suspicions in the; FIR against the accused which reflects on the veracity of their statements, recorded on 10.06.2012. The witnesses of the last seen evidence include Jehan Khan, Tahir Mehmood and Muhammad Nisarwho joined the investigation belatedly, on 10.06.2012. Besides, they did not disclose it to the complainant well in time, otherwise this crucial incriminating circumstance might have been mentioned in the FIR in categorical terms by him, but he could do nothing, except for showing his suspicions against the accused therein. The anal swabs qua the deceased were found stained with semen by the Chemical Examiner, but, it cannot be discerned from the postmortem examination report whether the anal area of the deceased child had been examined by the medical officer or not. The detail of the occurrence is hair-raising and heart bleeds while going through it but, Courts are not driven by the sentiments. It is the incriminatory material alone, collected by the I.O. during the course of investigation which has to be tentatively assessed for the purpose of

adjudication of the bail plea of an accused. Abdul Majeed accused has already been granted bail by the learned trial Court. The evidentiary value of the aforesaid incriminating circumstance shall be truly assessed by the learned trial Court after recording the evidence of the parties at trial. There is no other incriminating material which may connect the petitioners with the commission of offence. The facts of the judgment, relied upon by the learned counsel for the complainant do not assimilate the facts of this case. Sufficient reasons exist to believe that the petitioners' case calls for further probe into their guilt as envisaged by Section 497(2), Cr.P.C.

7. Therefore, I accept this application and admit the petitioners to post arrest bail subject to furnishing bail bonds in the sum of Rs. 2,00,000/- each with two sureties each in the like amount to the satisfaction of learned trial Court.

8. It is clarified that the observations contained hereinabove are of tentative character which shall have no bearing upon the merits of the case.

(A.S.) Bail admitted

PLJ 2013 Cr.C. (Lahore) 766

Present: Shahid Hameed Dar, J.

AMJAD ALI--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 3260-B of 2013, decided on 27.3.2013.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 337-L(ii), 427, 337-A(ii), 337-A(i), 337-A(iii), 337-F(v), 337-F(iii), 337-F(ii), 148 & 149--Bail, grant of--Further inquiry--It was a case of two versions and which one of the theories was nearer to truth cannot be pointed out at this stage with certainty, which controversy would be resolved by the trial Court, alter recording evidence of the parties at trial--Memo. of recovery prepared by the investigating officer does not reveal that the hatchet allegedly got recovered by the accused-petitioner was blood-stained--An element of obscurity hovers over the exact venue of occurrence and factum regarding initiation of aggression--To resolve this riddle an elaborate evaluation of the evidence is required which cannot be done at this stage--A case of two counter-versions arising from the same incident is certainly covered for grant of bail on the ground of further inquiry--Objection that the petitioner remained a fugitive from lau/S--and declared an absconder in the process may be a question of propriety which has to give way to a question of right of the accused, whose case requires further probe into his guilt, as defined by Section 497(2), Cr.P.C.--It is an admitted fact that the petitioner was no more required for the purpose of investigation, hence, his physical custody may be of no consequence to the prosecution's case--Bail allowed. [P. 769] A

2012 SCMR 1273, 1996 SCMR 184 ref. and 1972 SCMR 682 rel.

Rao Jabbar Khan, Advocate for Petitioner.

Mr. Zahid Younas, District Public Prosecutor for State.

Mr. Iram Javed Chaudhary, Advocate for Complainant.

Date of hearing: 27.3.2013.

Order

Amjad Ali (petitioner) seeks bail after arrest in case FIR No. 251/2012, dated 14.08.2012. registered for offences under Sections 337-L(ii), 427, 337-A(ii), 337-A(i), 337-A(iii), 337-F(v), 337-F(iii), 337-F(ii), 148, 149, PPC, at Police Station Phelora (Sialkot).

2. Precisely, the prosecution case as narrated by Muhammad Akram (complainant) is that he cultivated agricultural land on lease, the owner whereof was Muhammad Javed; he along with his companions cultivated the land by means of a tractor at about 2/3:00 p.m. on 13.08.2012 when they were ambushed by accused Amjad Ali (petitioner) armed with hatchet and his 10 armed cronies; all the accused inflicted multiple injuries on the persons of Muhammad Jamil, Habib Ullah, Abbas Ali, Muhammad Siddique, Muhammad Hanif, besides himself; Amjad Ali accused-petitioner gave a hatchet blow on the head of AbbasAli, followed by another blow by him of his weapon at right-hand of Abbas Ali; the accused also damaged his tractor and stole many articles from the place of occurrence; motive behind the occurrence pertained to a previous dispute/case between the parties, wherein he was a witness of the complainant-side.

3. Learned counsel for the petitioner submits that there is inordinate delay of 20 hours in lodgment of FIR, which has not been explained by the complainant in any manner; the petitioner's brother Ghazanfar also received injuries during the occurrence, which is corroborated by his medical certificate; it is a case of two versions as petitioner's father Muhammad Anwar got recorded cross-version/case on 06.09.2012 for offences under Sections 337-L(ii), 337-F(v), 337-F(iii). 337-A(i), 148, 149, PPC against the complainant party with a categorical assertion that the occurrence took place in his fields; the petitioner's case calls for further probe into his guilt, hence factum of his abscondence becomes irrelevant.

4. On the other hand, learned District Public Prosecutor assisted by learned counsel for the complainant opposes with the contention that the cross-version got registered by father of the petitioner was found false vide case-diary dated 31.10.2012; the petitioner got recovered a hatchet on 23.12.2012; one of the injuries attributed to the petitioner caused fracture of skull of Abbas Ali, which falls within the mischief of Section 337-A(iii), PPC; the petitioner remained an absconder in this case and for this reason he has lost some of his normal rights guaranteed under the law; lastly submits that the petitioner has committed an offence which catches the prohibition of Section 497(1), Cr.P.C.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the parties have counter-claims, as to the place and mode of the alleged occurrence. Six persons namely Muhammad Jamil, Habib Ullah, Abbas Ali, Muhammad Siddique, Muhammad Hanif and Muhammad Akram(complainant) received injuries on the complainant side, whereas, one person Ghazanfar Ali, the petitioner's brother received multiple injuries on his person including chip-fracture of proximal phalanx of thumb. In parallel to the FIR-case, a cross-

version was set-up by Muhammad Anwar, father of the petitioner on 06.09.2012 against the complainant party for offences under Sections 337-F(v), 337-F(iii), 337-L(ii), 337-A(i), 148, 149, PPC, which stood its ground till 10.10.2012 when it was found fit-enough by the investigating officer for submission of challan against the accused mentioned therein, under Section 173 Cr.P.C. before the learned trial Court. The Investigating Officer after having recorded statements of the injured/eye-witnesses on both the sides and having submitted challan under Section 173, Cr.P.C. acted queerly, as he recorded an arbitrary and capricious finding on 31.10.2012 as to the cancellation of cross-case by using term, "for the time being cancelled". After submitting a report under Section 173 Cr.P.C. before the learned trial Court, the Investigating Officer cannot venture into recording an akin finding. The injuries sustained by Ghazanfar have not been explained by the complainant. Regardless the alleged attributions against the petitioner it remains a fact that it is a case of two versions and which one of the theories is nearer to truth cannot be pointed out at this stage with certainty, which controversy would be resolved by the trial Court, after recording evidence of the parties at trial. The memo. of recovery prepared by the Investigating Officer does not reveal that the hatchet allegedly got recovered by the accused-petitioner was blood-stained. An element of obscurity hovers over the exact venue of occurrence and factum regarding initiation of aggression. To resolve this riddle an elaborate evaluation of the evidence is required which cannot be done at this stage. A case of two counter-versions arising from the same incident is certainly covered for grant of bail on the ground of further inquiry. Reliance is placed on case titled Shoaib Mehmood Butt Vs. Iftikhar-ul-Haq and 3 others (1996 SCMR 1845), Mst.ShafiqanVs. Hashim Ali and another (1972 SCMR 682). The objection that the petitioner remained a fugitive from law and declared an absconder in the process may be a question of propriety which has to give way to a question of right of the accused, whose case requires further probe into his guilt, as defined by Section 497(2), Cr.P.C. A reference in this regard may be made to Ikram-uI-Haq's case, reported as 2012 SCMR 1273. It is an admitted fact that the petitioner is no more required for the purpose of investigation, hence, his physical custody may be of no consequence to the prosecution's case.

6. For the discussion supra, the instant application is allowed and petitioner is admitted to post-arrest-bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail admitted

PLJ 2013 Cr.C. (Lahore) 198 (DB)

Present: Shahid Hameed Dar and Muhammad Yawar Ali, JJ.

MUHAMMAD SHAHID--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 2585-B of 2013, decided on 6.3.2013.

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

----S. 497--Control of Narcotic Substances Act, 1997, S. 9(c)--Bail, grant of--Contraband Substance--Quantity of the recovered substance exceeded one kilogram by 10 grams, which may be for the reason that the recovered substance was scaled along with its wrapper--Probability cannot be outrightly ruled out that for weight of the envelope--Actual weight of the contraband might have receded to one kilogram or even less--Mere involvement of the petitioner in another case of identical nature without any conviction, may not be a detrimental factor to the bail plea of the petitioner--Investigation was completed and report u/S. 173, Cr.P.C. had already been deposited with the trial Court--Further incarceration of the petitioner may be of no consequence to the prosecution's case--Application was accepted and admit the petitioner to post-arrest bail. [P. 199] A

2012 SCMR 573, ref.

Mr. Shahid Rafique Meo, Advocate for Petitioner.

Mr. Khurram Khan, Deputy Prosecutor General Punjab for State.

Date of hearing: 6.3.2013.

Order

The petitioner seeks post-arrest bail in case F.I.R. No. 32, dated 22.1.2013, under Section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Batapur, Lahore, on the complaint of Mubashir Ahmad, ASI.

2. The petitioner was allegedly found in possession of contraband charas weighing 1010 grams, when apprehended by the police on 22.1.2013.

3. After hearing learned counsel for the parties and perusing the record, it is observed that quantity of the recovered substance exceeds one kilogram by 10 grams, which may be for the reason that the recovered substance was scaled along with its wrapper. The probability cannot be outrightly ruled out that for weight of the envelope, the actual weight of the contraband might have receded to one kilogram or even less. Mere involvement of the petitioner in another case of identical nature without any conviction, may not be a detrimental factor to the bail plea of the petitioner, Reliance in this regard is placed on the case Jamal-ud-Din alias Zubair Khan v. The State (2012 S.C.M.R. 573). The investigation stands completed and report under Section 173, Cr.P.C. has already been deposited with the trial Court. In this eventuality, further incarceration of the petitioner may be of no consequence to the prosecution's case. Therefore, we accept this application and admit the petitioner to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two lacs) with two sureties each in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail accepted

PLJ 2013 Cr.C. (Lahore) 287

Present: Shahid Hameed Dar, J.

MAHMOOD AHMAD--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 16914-B of 2012, decided on 19.2.2013.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 365, 302, 34--Bail, grant of--Further inquiry--Petitioner's involvement in this case as an accused smacks certain elements of dubiousness which render the prosecution case increasingly hazy and obscure so far as the petitioner's involvement in the murder of deceased was concerned--Accused who got recovered the dead-body of the deceased stated before the investigating officer that he along with his co-accused had committed the murder of deceased whereafter they concealed his dead-body in the sewerage-line of an under-construction building of the Labour Court--So far as evidence regarding extra judicial confession of the accused was concerned, suffice it to say, it is joint in nature--This particular piece of evidence may cause prejudice to any of the parties at trial, hence, to assess its true evidentiary value, the matter is left for the trial Court to attend to--Circumstantial evidence, faced by the petitioner, is the weakest type of evidence, which can be manoeuvered by the prosecution, wherever direct connecting evidence does not come their way--There exist reasonable grounds to believe that the petitioner's case calls for further probe into his guilt as envisaged by Section 497(2), Cr.P.C.--Bail granted. [P. 289] A

Haji Khalid Rehman, Advocate for Petitioner.

Mrs. Muqadass Tahira, Addl. Prosecutor General Punjab for State.

Mr. Waseem Talib Chatta, Advocate for Complainant.

Date of hearing: 19.2.2013.

Order

Mahmood Ahmad (petitioner) seeks bail-after-arrest in case-FIR No. 323/2012, dated 31.05.2012, registered for offences under Sections 365-PPC, Sections 302 and 34, PPC (added during the course of investigation), at police station Nishatabad (Faisalabad).

2. Precisely, the prosecution case as narrated by Muhammad Mansha (complainant) is that his paternal uncle Muhammad Aslam, on receipt of a telephonic call, left his house on 25.05.2012 to meet one Shah Jee but did not return thereafter; he made an attempt to establish contact with him but his cell phone was switched-off; a case might be registered against the unknown accused for having abducted his uncle along with his motorcycle.

3. The complainant moved a written application before the Investigating Officer on 26.12.2012 with the contention that he was informed by Haji Manzoorand Muhammad Mansha son of Saleh, two days earlier that they saw his missing maternal uncle in the company of accused Arshad alias Munna, Saleemalias Jatt, Ghulam Murtaza and Mehmood Ahmad (petitioner) at about 6:00 a.m. on 25.05.2012; the aforesaid accused came back on the same motorcycle but his

uncle was not with them; he further stated that Zulfiqar and Mazhar Mehmood told him on 2.06.2012 that accused Arshad alias Munna, Saleem alias Jatt, Ghulam Murtaza and Mehmood Ahmad (petitioner) had approached them a day earlier and admitted their guilt qua the murder of his maternal uncle by lodging a request that they might be accorded forgiveness by the complainant.

4. Ghulam Murtaza accused disclosed before the police/Investigating Officer on 04.06.2012 that he along with Arshad alias Munna and Muhammad Saleemalias Jatt abducted Muhammad Aslam and committed his murder and that he could lead to the recovery of his dead-body. In line with his disclosure, he got recovered the dead-body of Muhammad Aslam (deceased) from the sewerage pipes of the under-construction Labour Court. The complainant rendered an oral supplementary statement on 25.06.2012 with the assertion that the deceased had received a telephonic call from Mehmood Ahmad (petitioner) on the day of occurrence before he left the house. He rendered another supplementary statement on 17.06.2012 which relates to the disclosure of the accused before the Investigating Officer.

5. Learned counsel for the petitioner submits that the petitioner is not named in the FIR and he has been falsely involved in this case under a conspiracy by the complainant so as to blackmail him; it is a case of no evidence against the petitioner and he is innocent.

6. On the other hand, learned Addl: Prosecutor General Punjab assisted by learned counsel for the complainant opposes with the contention that petitioner is well connected with the commission of murder of Muhammad Aslam (deceased) as he had been seen by a team of witnesses going along with his co-accused and the deceased on 25.05.2012; the accused petitioner along with his co-accused admitted their guilt before Zulfiqar and Mazhar, who joined investigation on 02.06.2012 to corroborate the said fact; a call-log was collected by the Investigating Officer which shows that the cell phone of the petitioner was used during the occurrence to call him from his residential house.

7. After hearing learned counsel for the parties and perusing, the record, it is observed that the petitioner's involvement in this case as an accused smacks certain elements of dubiousness which render the prosecution case increasingly hazy and obscure so far as the petitioner's involvement in the murder of Muhammad Aslam is concerned. Ghulam Murtaza accused who got recovered the dead-body of the deceased stated before the Investigating Officer that he along with his co-accused Arshad alias Munna and Saleem alias Jatt had committed the murder of Muhammad Aslam (deceased) whereafter they concealed his dead-body in the sewerage-line of an under-construction building of the Labour Court. So far as evidence regarding extra judicial confession of the accused is concerned, suffice it to say, it is joint in nature. Further remarks about this particular piece of evidence may cause prejudice to any of the parties at trial, hence, to assess its true evidentiary value, the matter is left for the trial Court to attend to. It has been held time and again that the circumstantial evidence, like the one, faced by the petitioner, is the weakest type of evidence, which can be manoeuvered by the prosecution, wherever direct connecting evidence does not come their way. There exist reasonable grounds to believe that the petitioner's case calls for further probe into his guilt as envisaged by Section 497(2), Cr.P.C.

8. Therefore, the instant application is accepted, the petitioner is admitted to post-arrest-bail subject to furnishing bail bonds in the sum of Rs.2,00,000/- with two sureties each in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail granted

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[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD RIAZ---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.2052-B of 20103, decided on 8th March, 2013.

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

----S. 497---Penal Code (XLV of 1860), Ss. 392, 397 & 412---Robbery, robbery or dacoity, with intent to cause death or grievous hurt, dishonestly receiving property stolen in the commission of dacoity---Bail, refusal of---Recovery of looted articles from the accused---History of involvement of accused in similar offences---Effect---Accused and co-accused persons allegedly committed dacoity at the house of complainant---Complainant implicated accused through a supplementary statement before the police---Mere fact that accused had been implicated through a supplementary statement, without disclosing his source of knowledge, could not be considered a circumstance going in favour of accused for the reason that accused and co-accused led to the recovery of some of the looted articles, which were duly identified by the complainant in presence of witnesses---Memo of identification qua the recovered articles had also been prepared by the investigating officer---Non-holding of test-identification parade might have been an irresponsible act on part of the police, but it did not mean that the complainant should suffer for it---Offence under S. 412, P.P.C was punishable with life imprisonment, thus falling under prohibitory clause of S. 497(1), Cr.P.C---Accused had a history of involvement in seven other cases identical to the present case, which showed him to be a desperate character---Mere non-conviction of accused in the past for any crime was no ground by itself to release him on bail---Accused was refused bail accordingly.

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

----S. 497---Bail---Grounds---Accused involved in identical offences in the past but not convicted for any of them---Mere non-conviction of accused in the past for any crime was no ground by itself to release him on bail.

Afzaal's case 2003 SCMR 573 rel.

Gohar Razzaq Awan for Petitioner.

Mrs. Muqadass Tahira, Additional Prosecutor General Punjab for the State with Rasheed, S.I.

Azhar Hussain Sani for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.

216, dated 17-8-2012, under sections 392, 397, P.P.C., registered at Police Station Raja Jang, District Kasur.

2. Precisely the facts of the case as narrated by Muhammad Rafiq (complainant) are that he along with his other family members slept at various places, inside his house, at night on 16-8-2012; it was at 11.00 p.m. when 15 unknown armed accused got into his house by scaling over its wall and rendered all inmates of the house hostages; his mother, brothers Rasheed Ahmad and Muhammad Sarwar resisted whereon they were tortured by them; they confined all of them in a room, snatched keys from them at gun point and looted cash, gold ornaments, unstitched cloth, cell phones, passports, valid visas, driving licences, wrist watches and some armory etc., from his house, which they took away with them; the accused were of mixed height, structure and complexion.

3. The complainant rendered a supplementary statement on 7-9-2012 with the contention that he, on his own, searched for the accused and learnt through reliable sources that the crime was committed by Saleem alias Major, Munir, Mustafa, Riaz (petitioner), Liaqat Ali, Niamat, Rafi and Riaz Ahmad. Riaz accused was arrested in this case on 9-9-2012 whereafter he led to the recovery of certain articles, including an iron, hair dryer, torch, juicer machine, Rado watch, six unstitched suits and single barrel .12 bore licensed gun on various dates i.e. 17-9-2012, 19-9-2012 and 21-9-2012. The investigating officer prepared a memo of identification of the recovered articles on 23-9-2012.

4. Learned counsel for the petitioner submits that the petitioner has been falsely involved in this case by the complainant merely on suspicion and mode of his nomination as an accused, through a supplementary statement, is not approved by law; the complainant has not disclosed the source of his knowledge through which he learnt about the implication of the petitioner in this case; the I.O. has planted even those articles on the petitioner, which have not been mentioned in the F.I.R.; the petitioner was falsely involved by the police in certain other cases as well but he stands bailed out in all of those cases.

5. On the other hand, learned Additional Prosecutor-General Punjab assisted by learned counsel for the complainant opposes with the contention that the petitioner has committed a heinous offence which has been termed by the courts an offence against the society; a number of looted articles were got recovered by the petitioner during the course of investigation which were duly identified by the complainant and I.O. prepared a memo of identification in this regard on 23-9-2012; the I.O. added section 412, P.P.C. during the course of investigation which also falls under the prohibitory clause of section 497(1) Cr.P.C.

6. After hearing learned counsel for the parties and perusing the record, it is observed that details of the alleged occurrence are hair-raising, as a band of dacoits, 15 in number, almost swept across the entire house of the complainant, which fact can be found from the contents of the F.I.R. Gold ornaments weighing 50 tolas worth lacs of rupees, hot-cash amounting to Rs.20 lacs, licenced firearms with ammunition, cell phones loaded with SIMS, passports, driving licences, valid visas, DVD player, juicer machine, unstitched clothes, registration books of two cars, a couple of Rado wrist-watches, the revenue record and what not, snatched and taken away by the dacoits at gunpoint. Mere fact that the complainant nominated the petitioner, through a supplementary statement, without disclosing source of knowledge cannot be considered a circumstance, going in favour of the accused-petitioner for

the reason that he, like his co-accused, led to the recovery of some of the crime articles, duly identified by the complainant in presence of witnesses which led to addition of section 412 P.P.C., during the course of investigation. A memo of identification qua the recovered articles has also been prepared by the investigating officer. Non-holding of test identification parade may be an irresponsible and insane act of the police, but, does it mean that the complainant should suffer and pay a price for it, the answer to which is a certain 'NO'. The alleged recovery, at the instance of the petitioner constitutes an offence under section 412 P.P.C. which is punishable with imprisonment for life, thus falling under the prohibitory clause of section 497(1) Cr.P.C. The complainant and his co-witnesses, on the factum of recovery of snatched goods, still support the prosecution case. The petitioner has history of involvement in seven other cases of identical nature which shows his inclination towards being a desperate character. Mere non-conviction of the accused-petitioner in the past for any crime is no ground by itself to release him on bail. Guidance in this regard may be had from Afzaal's case reported as 2003 SCMR 573. No such grounds have been shown to exist in this case that the accused-petitioner was entitled to the grant of bail on account of the reasons mentioned in section 497(2) Cr.P.C., which could convince this court to allow him bail.

7. In view of the discussion, made hereinabove, I find no merit in this petition which is dismissed accordingly.

MWA/M-107/L Bail refused.

2014 M L D 392

[Lahore]

Before Shahid Hameed Dar and Muhammad Yawar Ali, JJ

LIAQAT ALI---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.1870/B of 2013, decided on 27th February, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Possession of narcotic---Bail, grant of---Further inquiry---Contradiction regarding quantity of sample sent for analysis---Effect---Accused was allegedly found in possession of 4.360 kilograms of narcotic---As per content of F.I.R., complainant (police-official) segregated thirty grams (sample) from the recovered substance for chemical analysis, but report of Chemical Examiner revealed that the parcel (of sample) analyzed contained 250 grams of recovered substance---Complainant appeared to have toyed with the parcel of recovered substance by fetching another sample therefrom at a later date, but question as to how and in whose presence he did so, was not supported by any evidence---Complainant belatedly recorded his supplementary statement to cover up the said lacuna, which too showed an interpolation---Question as to whether accused possessed a narcotic substance, as alleged in the F.I.R., could only be determined by Trial Court after recording evidence of parties at trial---Case against

accused called for further probe into his guilt---Accused was admitted to bail accordingly.

Farooq Hassan Naqvi for Petitioner.

Khurram Khan, Deputy Prosecutor General Punjab for the State with Asghar Ali, S.I.

ORDER

Mr. Farooq Hassan Naqvi, Advocate has submitted his Wakalatnama on behalf of the petitioner by contending that the original counsel hails from Faisalabad, who is not available today, but he has authorized him to represent the petitioner, who seeks post-arrest bail in case F.I.R. No.1212, dated 22-10-2012, under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Ghulain Muhammad Abad, Faisalabad.

2. The allegation against the petitioner is that he possessed 4.360 kilograms narcotic-Bhikki, when arrested by the police on 22-10-2012.

3. Learned counsel for the petitioner submits that story mentioned in the F.I.R. does not inspire confidence as a daughter cannot be expected in our society to deliver contraband substance to her father to sell it; it was a populated area wherefrom the petitioner was taken into custody and absence of evidence by a local inhabitant renders the story of F.I.R. doubtful; the petitioner is aged 70, who has no previous criminal record, therefore, he may be released on bail.

4. On the other hand, learned Deputy Prosecutor General Punjab opposes by contending that the petitioner possessed huge quantity of narcotic, when taken into custody; the report of the Chemical Examiner is positive; the petitioner's case is covered by the prohibitory clause of section 51 of the Control of Narcotic Substances Act, 1997; lastly submits that a prosecution witness has already been recorded by the learned trial Court and trial of the accused may be decided in near future.

5. After hearing learned counsel for the parties and perusing the record, it is observed that Muhammad Anwar, S.-I. (complainant) as per contents of the F.I.R. segregated an amount of thirty grams from the bulk for chemical analysis, but report received from the office of Chemical Examiner reveals that the parcel-analyzed contained 250 grams Bhikki, which sharply negates aforesaid aspect of the prosecution case. The complainant appears to have toyed with the parcel of the recovered substance by fetching another sample therefrom on 26-10-2012, but how and in whose presence he did so, is not supported by any evidence, rather he (complainant) belatedly recorded his own supplementary statement to cover up the said lacuna, which too shows an interpolation. Whether or not, the petitioner possessed a narcotic substance, as alleged in the F.I.R., can only be determined by the learned trial Court after recording evidence of the parties at trial. There exist sufficient reasons at this stage to believe that the petitioner's case calls for further probe into his guilt, within the meaning of section 497(2), Cr.P.C.

6. Resultantly, this application is allowed and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 (Rupees two lacs) with two sureties each in the like amount to the satisfaction of the learned trial Court.

MWA/L-3/L Bail granted.

2014 M L D 633

[Lahore]

Before Shahid Hameed Dar, J

FAYAZ HUSSAIN---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.6566-B of 2013, decided on 14th June, 2013.

Criminal Procedure Code (V of 1898)---

---S. 497---Penal Code (XLV of 1860), S. 406---Criminal breach of trust---Bail, grant of---Delay in conclusion of trial---Trial Court failing to comply with directions of High Court regarding conclusion of trial within a certain time period---Effect---Bail application of accused was disposed of by the High Court with a direction to Trial Court to conclude the trial within three months---Trial Court had recorded statement of only two prosecution witnesses so far out of a total of ten---Trial Court had to issue non-bailable warrants of arrest of the prosecution witnesses---Neither accused nor any other person acting on his behalf ever showed indolence during trial---Offence alleged did not fall within the prohibitory clause of S. 497(1), Cr.P.C.---Direction of High Court regarding conclusion of trial within three months had not been complied with mainly for the fault of the prosecution---No one could be left to rot in jail for an indefinite period of time only to satisfy the whimsical grudge of the complainant---Accused was granted bail in circumstances.

Rustam Khan Padhiar for Petitioner.

Mrs. Muqadass Tahira, Addl: Prosecutor General Punjab for the State.

Malik Abdul Sattar Dogar for the Complainant.

Muhammad Anwar A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Fayaz Hussain (petitioner) seeks bail-after-arrest in case F.I.R. No.744 of 2012, dated 28-7-2012, registered for an offence under section 406 P.P.C., at Police Station Shad Bagh, Lahore.

2. Precisely, the prosecution case as narrated by Muhammad Nadeem (complainant) is that he runs the business of processing hides of the animals at New Shad Bagh Lahore, where traders, from all over Pakistan, come to purchase them; Fayaz Hussain (petitioner) and his four co-accused visited him at 3:00 p.m. on 1-5-2012 and struck a deal to purchase hides, valuing at Rs.41,20,000 on a deferred payment with the promise to pay it off within two days; the accused promised to return the said consignment to him if they failed to pay cost thereof.

3. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner's first post-arrest-bail application (Criminal Miscellaneous No. 15052-B of

2012) was dismissed as withdrawn vide order dated 6-12-2012, after it had been argued at full length. The petitioner's second application (Criminal Miscellaneous No.2263-B of 2013) on the subject was also disposed of in the same fashion vide order dated 27-2-2013 with a direction to the learned trial court to conclude the trial within three months from the date of receipt of the said order. Learned counsel for the petitioner has contended that the direction of this Court for conclusion of the trial has gone begging as prosecution did not cooperate with the trial court and sought repeated adjournments on different pretexts. Learned counsel has submitted copies of the interlocutory orders, passed by the learned trial court during trial of the accused-petitioner to support his assertion. Learned counsel for the complainant is however, opposes with the submission that it was the accused-petitioner and his co-accused who did not let the trial court achieve the objective within aforesaid period of time but he has failed to hint at any such order which may endorse his submission. The record reveals that the learned trial court has succeeded in recording statements of only two prosecution witnesses so far out of a tally of ten which means that aforesaid direction of this Court has not been complied with in letter and spirit. I have gone through the interim orders passed by the learned trial court between 23-2-2013 to 11-6-2013 and I do not find that the accused-petitioner or any other person acting on his behalf ever showed indolence during trial rather, the learned trial court issued non-bailable warrants of arrest of the prosecution witnesses on 11-2-2013. The offence, the petitioner faces, is certainly not hit by the prohibitory clause of section 497(1), Cr.P.C. The direction passed by this Court on 27-2-2013 does not appear to have been complied with mainly for the fault of the prosecution. The petitioner was taken into custody on 13-8-2012 and he has been languishing in jail lever-since. No one can be left to rot in jail for an indefinite period of time only to satisfy the whimsical grudge of the complainant.

4. Therefore, the instant petition is accepted and petitioner is admitted to post-arrest-bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with one surety in the like amount to the learned trial Court.

MWA/F-25/L Bail granted.

2014 M L D 785

[Lahore]

Before Shahid Hameed Dar, J

ZAMAN---Petitioner

Versus

The STATE and another ---Respondents

Criminal Miscellaneous No.1109-B of 2013, decided on 12th February, 2013.

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

----S. 498---Penal Code (XLV of 1860), Ss. 302 & 34---Qatl-e-amd, common intention---Ad interim pre-arrest bail, recalling of---Active participation in a murderous assault---Scope---

Allegation against accused and co-accused persons was that they murdered the deceased persons by beating them with wooden clubs (sota)---Accused was specifically named in the F.I.R. with the role that he being armed with a wooden club (sota), joined by co-accused persons, tortured the deceased persons and committed their cold-blooded murder---Although accused was not assigned a specific role in the F.I.R., but he appeared to have actively participated in the occurrence as post-mortem examination report of one of the deceased revealed multiple blunt weapon injuries on her head---Accused had also been summoned by Trial Court in a private complaint for the same occurrence, wherein accused was levelled with the same charge as in the present challan case---Weapon of offence was still to be recovered from the accused---Ad interim pre-arrest bail already granted to accused was recalled in circumstances.

Muhammad Amin and another v. The State 1987 SCMR 1522; Bahadur Khan Niazi v. Alam Khan and 2 others PLD 2000 Kar. 74 and Ghulam Murtaza Qureshi v. The State 1990 PCr.LJ 323 distinguished.

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

----S. 498---Pre-arrest bail, grant of---Scope---Bail before arrest was an extraordinary relief with a narrow scope, which was meant only for the innocent, or was available to a person who had not committed a non-bailable offence or whose involvement in a case was necessarily due to malice or ulterior motives of the complainant.

Muhammad Iqbal Chaudhary for Petitioner.

Mrs. Muqadass Tahira, Addl: Prosecutor General Punjab for the State.

Maqsood S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Through this single order, I intend to dispose of two applications for bail-before-arrest (Criminal Miscellaneous No.1109-B/2013 and Criminal Miscellaneous No.1110-B of 2013), both filed by the petitioner in case-F.I.R. No.124/12, dated 22-3-2012, registered for offences under sections 302, 34 P.P.C., at Police Station Qubola Sharif (Pakpattan Sharif) and in a private complaint-case titled Ghulam Hussain v. Manzoor Ahmad etc. qua the same occurrence, respectively.

2. Precisely, the prosecution story as narrated by Ghulam Hussain (complainant) in the F.I.R is that his brother Ghulam Mustafa (deceased) was married with Mst. Riaz Bibi, daughter of Sikandar accused, who went to see her parents on 18-3-2012 but did not return; Ghulam Mustafa with a view to bring her back, went to the house of his in-laws on 22-3-2012 where he was attacked by Manzoor Ahmad, armed with a wooden-beam, Zaman (petitioner) armed with sota, Sikandar armed with sota and Ali Ahmad armed with sota; Manzoor Ahmad caused an injury by means of his weapon on the head of Ghulam Mustafa and he also injured Mst. Riaz Bibi by giving her two blows of his weapon; Ali Ahmad accused also caused injuries to Mst. Riaz Bibi; both the injured died instantaneously.

3. The story of private-complaint-case as narrated by the said complainant is that his brother Ghulam Mustafa married Mst. Riaz Bibi about a month before the occurrence against

the wishes of his in-laws and started living with her as her husband; some times thereafter, accused Manzoor Ahmad, Zaman (petitioner), Falak Sher and Ali Ahmad resolved their differences with Mst. Riaz Bibi and they took her with them to Chak Mehdi Khan on 18-3-2012; Ghulam Mustafa with a view to bring his wife back went to the said chak at about 8:00 a.m. on 22-3-2012 wherefrom he made a telephone call at about 12:00 noon and told him that Manzoor Ahmad etc. were not prepared to let Mst. Riaz Bibi accompany him and they had restrained both of them; on receipt of this information, he along with his brother Bashir Ahmad and one Munir Ahmad reached the house of the accused by a motorcycle where they saw that Manzoor Ahmad armed with a wooden-beam, Zaman (petitioner), Falak Sher and Ali Ahmad all armed with sotas had forcibly restrained his brother Ghulam Mustafa and Mst. Riaz Bibi; within their view, Falak Sher accused raised lalkara whereupon Manzoor Ahmad gave a blow of beam on the head of Ghulam Mustafa which felled him to the ground followed by two more blows by him at the head and cheek of Mst. Riaz Bibi; Ali Ahmad accused gave successive blows of his weapon at the left cheek and chin of Mst. Riaz Bibi, who fell onto the ground badly wounded; both the injured succumbed to the injuries at the spot; the accused fled the scene after committing the crime; he reported the matter to the police through an oral statement which was not correctly recorded as they being in league with Falak Sher accused, omitted his name to falsely implicate his brother Sikandar; the police did not willfully arrested the accused Falak Sher and Muhammad Zaman (petitioner) and declared Ali Ahmad accused innocent; he approached the high-ups of the police to register his protest against the I.O. but to no avail, hence, he decided to file private complaint.

4. Learned counsel for the petitioner submits that no specific role has been assigned to the petitioner except for the role that he being armed with a sota, joined by his armed co-accused thrashed Ghulam Mustafa and Mst. Riaz Bibi; Ali Ahmad, a co-accused of the petitioner, who had been attributed a specific role qua Mst. Riaz Bibi (deceased) was declared innocent, during the course of investigation; the petitioner was merely found present at the spot without committing any overt-act; the mother of Mst. Riaz Bibi (deceased), moved an application before the police for registration of a cross-case, which was not entertained by the police with mala fide intention; she was constrained to move an application under sections 22-A/22-B Cr.P.C. before the Ex-Officio Justice of Peace, which resulted in recording of a cross-case on 17-12-2012, she being the complainant thereof; she also filed a private complaint on 5-6-2012, about three months after the registration of F.I.R., wherein, the petitioner has been summoned by the trial court to face trial; a co-accused of the petitioner Falk Sher was granted bail-before-arrest on 14-12-2012 and petitioner's case is not much different from him, which is liable to invoke the dictum of consistency, in favour of the petitioner; lastly submits that the petitioner has not contributed towards the occurrence in any manner and he is absolutely innocent. Relies upon, case titled Muhammad Amin and another v. The State (1987 SCMR 1522) Bahadur Khan Niazi v. Alam Khan and 2 others (PLD 2000 Karachi 74), Ghulam Murtaza Qureshi v. The State (1990 PCr.LJ 323).

5. On the other hand, learned Addl: Prosecutor-General Punjab, opposes with the contention that the petitioner actively participated in the occurrence along with his co-accused and he is equally responsible for the occurrence, as a whole; the weapon of offence is still to be recovered; learned Law Officer, however, admits that the petitioner as per opinion of the investigating officer did not cause any injury to the deceased and that he was held responsible only to the extent of bringing both the deceased, Ghulam Mustafa and Mst. Riaz

Bibi to the place of occurrence and confining them in a room there.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner is specifically named in the F.I.R. with the role that he being armed with sota, joined by his armed co-accused, tortured Ghulam Mustafa (deceased) and Mst. Riaz Bibi (deceased) and committed their cold-blooded murder at the spot. The petitioner, though not assigned a specific role, appears to have actively participated in the occurrence as postmortem-examination report of Mst. Riaz Bibi (deceased) reveals multiple blunt-weapon injuries on her dead-body. The investigating officer held the petitioner guilty but in a different tone, by opining that he brought both the deceased to the place of occurrence, confined them in a room, induced his co-accused to reach the spot and stayed there till both the spouses were done to death in a callous manner by the co-accused of the petitioner. It is a double murder-case with heart-rending details. The petitioner's case is plainly distinguishable from the case of his co-accused, Falak Sher, who was granted bail by this court vide order dated 14-12-2012, mainly for the reason that he had been substituted for his real brother Sikandar, who had died many years before the alleged occurrence. The mother of Mst. Riaz Bibi, after many months of the alleged occurrence, set-up a cross-version with the contention that the occurrence was committed by accused Ghulam Hussain, Ghulam Rasul, Munir Ahmad, Bashir Ahmad and Wazeer Ahmad but it was disbelieved by the investigating officer being a plethora of lies, vide case-diary dated 29-12-2012. The petitioner has been summoned by the learned trial court in private-complaint-case as well, for the same charge as is found in the challan case. Bail before arrest is an extraordinary relief, the scope whereof is narrow, which is meant only for the innocent or is available to a person who has not committed a non-bailable offence or whose involvement in a case is necessarily due to malice or ulterior motives of the complainant. The petitioner's case incidentally, does not fall in any of the said categories, The weapon of offence is still to be recovered from the accused. The judgments relied upon by the learned counsel for the petitioner, being divergent on facts, are not helpful to the petitioner in any manner.

For the aforesaid reasons, I am not inclined to accept these petitions, which are dismissed accordingly. The ad interim pre-arrest bails granted to the petitioner vide orders dated 28-1-2013 are recalled.

MWA/Z-6/L Bail recalled.

2014 M L D 791

[Lahore]

Before Shahid Hameed Dar, J

MEHDI---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.2354-B of 2013, decided on 20th March, 2013.

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

---S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 324, 34, 337-A(i), 337-A(ii) & 337-F(ii)---Qatl-e-amd, attempt to commit qatl-e-amd, common intention, shajjah-i-khafifah, shajjah-i-mudihah,

ghayr-jaifah-badiah---Bail, grant of---Further inquiry---Case of cross-version F.I.Rs.---F.I.R. registered by the accused side was prior in time and was recorded a day before the F.I.R. registered by the complainant side---Record showed that it was the complainant party which went to the place of occurrence, where accused and his companions were cutting fodder---Accused and his father received multiple injuries during the occurrence, which was evident from their medical certificates---Question as to whether the occurrence was pre-meditated or pre-concerted could not be answered in the facts of the case---Which party had initiated the aggression could only be resolved after recording of evidence at trial---Recovery of weapon from accused might not be of much relevance at bail stage as investigating officer failed to collect any crime empty---All the co-accused had already been granted bail---Case of accused was one of further inquiry into his guilt---Accused was admitted to bail accordingly.

Noor Muhammad v. The State 2009 SCMR 324 rel.

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

----S. 497---Bail---Recovery of weapon at the instance of accused---Relevance---Such recovery might not be of much relevance at bail stage, if the investigating officer failed to collect any crime empty during spot inspection.

Rai Muhammad Ali Kharal for Petitioner.

Ch. Muhammad Jahangir, Deputy Prosecutor General Punjab with Asif, A.S.-I.

Mian Muhammad Sikandar Hayat for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks post arrest bail in case F.I.R. No.269 of 2012 dated 5-8-2012, under sections 324/ 337-A(i), 337-A(ii), 337-F(ii)/34 P.P.C., section 302 P.P.C. (added during investigation) registered at Police Station, Langrana (Chiniot).

2. Precisely, the prosecution case as narrated by Shahadat (complainant) is that he moved towards 'Dhari' of his father-in-law at 'Deegarvela' on 3-8-2012; Mujahid, Shamas-ul-Haq and Noor Muhammad were grazing animals at that time; in the meanwhile, accused Mehdi (petitioner) armed with double-barrel gun, Mapal armed with single-barrel gun, Riaz armed with sota and Niamat Bibi armed with hatchet, reached there and launched an attack; Mehdi (petitioner) raised lalkara and fired with his gun at Shamas-ul-Haq, but it went missing, followed by another fire shot by him, which landed at abdomen of Mujahid; Mapal, Niamat Bibi and Riaz accused caused injuries to him, Shamas-ul-Haq and Noor Muhammad by means of their respective weapons; Mehdi (petitioner) and Mapal made indiscriminate firing but he and others ran to save their lives. The motive behind the occurrence pertained to a previous occurrence, involving abduction of Mst. Kubra Bibi daughter of Riaz accused by Shams-ul-Haq.

3. The ill-fated injured Mujahid, could not survive and he succumbed to the injuries at a hospital on 9-8-2012, which resulted in addition of section 302 P.P.C.

4. It will be advantageous to give a brief account of another case pertaining to the same occurrence which was got registered by Riaz Hussain accused on 4-8-2012 vide F.I.R. No.267/12 under sections 324, 337-F(i), 337-A(ii), 337-L(ii), 148/149 P.P.C. at Police Station, Langrana District Chiniot with the contention that he and his son Mehdi Hassan were cutting

fodder for their animals at about 4 p.m. on 3-8-2012 from their fields, when accused Shamas-ul-Haq armed with 12 bore gun, Mujahid armed with hatchet, Shamas-ul-Haq, Noor Muhammad and Ameer armed with sotas, reached there and started showering abuses upon them; Shamas-ul-Haq raised lalkara and fired with his gun which landed at his left hand, followed by multiple blows of their weapons by accused Sameer, Noor Muhammad and Ameer, which landed on different parts of his body; Mujahid gave repeated blows of hatched on left shoulder and head of his son Mehdi Hassan; the fire shot made by Shamas-ul-Haq, accused did not hit Mehdi Hassan and instead landed at the body of Mujahid; on arrival of the witnesses and co-villagers, the accused fled the spot. The motive behind the occurrence pertained to a previous dispute between the parties.

5. Learned counsel for the petitioner submits that the alleged occurrence took place in the fields of the petitioner and it was the complainant party, which launched aggression against him and his father, who reported the matter to the police on 4-8-2012 through an independent F.I.R. wherein he alleged that Shamas-ul-Haq etc. being armed with different weapons launched aggression and caused injuries to him and his son Mehdi (petitioner), who were medically examined through police which fact is proved from their medico-legal certificates; the Investigating Officer did not conduct the investigation honestly and he declared all the accused of case F.I.R. No.267 of 2012 supra innocent, therefore, the petitioner's father filed a private complaint, wherein Shamas-ul-Haq etc. have been summoned to face trial. It is a case of two versions and one, which is true, can only be determined by the trial court during trial; the petitioner's case calls for further probe into his guilt, within the meaning of section 497(2) Cr.P.C, therefore, he may be granted bail, as prayed for. He has placed reliance on Noor Muhammad v. The State (2009 SCMR 324).

6. On the other hand, learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant opposes by contending that the F.I.R. got lodged by Riaz was found false during the course of investigation and all the accused mentioned therein were found innocent; the medical board opined that injuries allegedly sustained by Mehdi Hassan (petitioner) and his father were fabricated; the petitioner is named in the F.I.R. with a specific role of causing fatal injury to the deceased, Mujahid; the petitioner led to the recovery of .12 bore gun during physical remand on 27-8-2012; the challan submitted by the investigating officer in cross F.I.R. case shows that all the accused have been placed in column 2 thereof; the petitioner and his co-accused have been indicted by the trial court and case is fixed for recording evidence; one P.W. has been recorded by the trial court which has not been cross-examined by the accused as yet.

7. After hearing learned counsel for the parties and perusing the record it is observed that two separate F.I.Rs., one by petitioner's father and the other by Shahadat, in respect to the same incident, were registered by the police, containing respective versions of the warring-parties. The F.I.R. registered on the petitioner's side is prior in date and time, rather it was recorded on the following day of the alleged occurrence and the other F.I.R., wherein the petitioner seeks relief of bail, was recorded a day thereafter. It appears from the record that it was the complainant party, which went to the site of occurrence, where the petitioner and his companions were cutting fodder for their animals. The complainant, Shahadat has not specifically mentioned about the hot-spot in the F.I.R., which appears to have been so done by him purposely. The petitioner and his father received multiple injuries during the occurrence which fact is evident from their medical certificates, obtained by the police on the very day of the alleged occurrence. Riaz Hussain accused received six injuries, one out of which, injury No.4, was a firearm-wound and rest was the blunt trauma. The petitioner received two injuries, one by a sharp edged weapon and the other by blunt means. Though, the accused of case-F.I.R. No.267/2012 supra have been declared innocent by the police during the course of investigation and placed in column No.2 of the challan, yet in a private complaint-case, filed

by petitioner's father, all the respondents-accused have been summoned by the trial court to stand trial. The petitioner has been burdened by the complainant with the liability of authoring fatal injury to the deceased through his double-barrel gun still, keeping in view the attending circumstances of this case, it could not be said that the occurrence alleged was premeditated or pre-concerted. It is definitely a case of two versions, wherein question regarding initiation of aggression can only be resolved by the trial court after recording evidence of the parties at trial. The recovery of 12 bore gun, at the instance of the petitioner, on 29-8-2012 may not be of much relevance at this stage as, investigating officer failed to collect any crime empty during spot-inspection. In an identical situation, the Hon'ble Supreme Court of Pakistan, while dealing with Noor Muhammad's plea for bail observed in 2009 SCMR 324 that it was yet to be determined as to "which of the party was the aggressor and whether capital punishment or that of imprisonment for life could be awarded in the circumstances" and granted post arrest bail to the said accused, who had allegedly inflicted fatal injury to the deceased.

8. All the co-accused of the petitioner have been granted bail and none of the accused of case F.I.R. No.267 of 2012 supra is incarcerated either, therefore, the petitioner who is behind the bars since 26-8-2012, is entitled to relief of post arrest bail, considering his case to be one of further inquiry, falling within the definition of section 497(2), Cr.P.C.

9. Therefore, the instant application is accepted and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs.5,00,000 (Rupees five lac only) with two sureties each in the like amount to the satisfaction of learned trial court.

MWA/M-109/L Bail granted.

2014 M L D 851

[Lahore]

Before Shahid Hameed Dar, J

Syed SHEHZAD HUSSAIN SHERAZI---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.6216-B of 2013, decided on 31st May, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 396 & 412---Qatl-e-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Bail, grant of---Further inquiry---Accused was identified during test identification parade but not by main eye-witnesses---Recovery of cash from accused not free from doubt---Effect--Allegation against accused was that he facilitated his co-accused in committing a dacoity which also resulted in murder of one person---Accused was implicated in the case after being picked by witnesses in the test identification parade and cash amounting to Rs.2 million was also recovered at his pointation---Complainant and other eye-witnesses who were present at the spot at the time of occurrence claimed that they could identify the accused persons if they ever saw them again,

however at the time of test identification parade they were not present for identifying the accused, and instead two other witnesses picked up the accused during the identification parade---Both said other witnesses were not named in the F.I.R. as eye-witnesses, and during identification parade they made statements to the supervising Magistrate to the effect that they saw the accused stepping down and then getting back in a car at the time of occurrence, while a fire shot was fired---Recovery of cash amounting to two million rupees at the instance of accused, appeared to be huge amount, but possibility could not be ruled out that it was part of strategy of prosecution to involve the accused in the present case---Recovery memo prepared by the investigating officer in such regard might not be as transparent and unblemished as shown by the prosecution---Question as to whether the currency notes allegedly recovered from the accused bore any distinguishing marks still remained a riddle---Evidentiary value of recovered cash was to be determined by the Trial Court after recording evidence at trial---Case against accused required further inquiry---Accused was granted bail in circumstances.

Naseer Ahmad Bhutta and Ch. Waris Ali Janjua for Petitioner.

Zahid Yunus, District Public Prosecutor for the State with Saleem S.I.

Syed Imdad Hussain Hamdani for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.310, dated 3-12-2012, under section 394, P.P.C., (sections 396, 302, 412 P.P.C. added during investigation), registered at Police Station Khushab, District Khushab.

2. Precisely the prosecution case as narrated by Muhammad Hassan Younas (complainant) is that he along with Muhammad Tariq Nawaz, Manager Zafar Sultan and Sohaib was present at the office of Total Petrol Pump at about 1.00 p.m. on 3-12-2012; in the meanwhile he sent manager Zafar Sultan and Sohaib with two bags full of cash, Rs.75,36,000 on a motorcycle for depositing it in Muslim Commercial Bank, Khushab; he along with Muhammad Tariq Nawaz as a matter of caution also followed them by a motorcycle; they had hardly covered a distance of 50 yards when a car, bearing registration No.396/LXZ Honda-City intercepted the motorcycle of Zafar Sultan and Sohaib wherefrom a bulky-figure wheat-like colour, armed with a pistol, stepped down and fired at Zafar Sultan which went missing; in the meantime a lanky person, smart body, clad in cream colour clothes armed with firearm, fired through front gate of the car which landed at left side of manager Zafar Sultan who fell onto the ground in injured condition; the accused picked up the cash-bags and fled the spot on the said car, which was driven by a young man of wheat-like colour; he (complainant) asserted that he along with his companions could identify the accused, if they saw them again; Zafar Sultan injured was shifted to hospital Joharabad in a precarious condition.

3. Zafar Sultan succumbed to the injuries on 11-12-2012 which led to insertion of sections 302, 396 P.P.C., in place of section 394 P.P.C.

4. The accused-petitioner was taken into custody as a suspect under section 54 Cr.P.C. on 3-2-2013 and sent to District Jail Shahpur forthwith for the purpose of test identification.

The record reveals that the test identification parade was staged on 9-2-2013 during the course of which two witnesses Muhammad Akbar and Sakhawat correctly picked him up with the contention that he was aboard another car, wherein he along with his co-accused kept themselves posted as guards to facilitate their co-accused and they were empty handed. The petitioner was formally arrested in this case on 19-2-2013 where after he led to the recovery of cash Rs.20 lacs on 25-2-2013.

5. Learned counsel for the petitioner submits that the petitioner is neither named in the F.I.R. nor he, according to the prosecution case took part in the occurrence of dacoity in any manner; the evidence of test identification parade is of no consequence against the petitioner as both the identifiers, Muhammad Akbar and Sakhawat are not cited witnesses of the F.I.R.; the evidence of recovery of cash Rs.20 lacs at the instance of the petitioner has been manoeuvred by the prosecution only to strengthen their false case; the complainant Muhammad Hassan Yunus, Muhammad Tariq Nawaz and Sohaib (victim) are named in the F.I.R. as eye-witnesses of the occurrence but none of them participated in the test identification which adversely reflects on the veracity of said evidence; lastly submits that the petitioner's case calls for further probe into his guilt within the meaning of section 497(2) Cr.P.C.

6. On the other hand, learned District Public Prosecutor assisted by learned counsel for the complainant opposes with the contention that the petitioner in fact stood guard to facilitate his co-accused who intercepted the motorcycle of the deceased and snatched from him the money-filled-bags at gun point, besides committing his ruthless murder; the witnesses of identification have categorically stated under section 161 Cr.P.C. that the accused-petitioner along with his five co-accused was seated in another car at the time of occurrence as on-watchers of the incident, committed by their co-accused; the evidence of test identification coupled with recovery of cash Rs.20 lacs is a strong corroboratory circumstance against the petitioner who is vicariously liable for the entire occurrence; lastly submits that the offence committed by the petitioner is heinous and falls within the mischief of prohibition of section 497(1) Cr.P.C.

7. After hearing learned counsel for the parties and perusing the record, it is observed that the complainant-Muhammad Hassan Younas, Muhammad Tariq Nawaz and one of the alleged victims, Sohaib categorically asserted in their statements that they had witnessed the occurrence being present at the spot at the crucial hour and they could identify the accused, if they would ever see them again. One of them, Sohaib is the most important person, as he was the co-rider of manager Zafar Sultan, when their motorcycle was intercepted by a car bearing registration No.396-LXZ Honda-City, wherefrom two persons fired at them and one of the fire shots made from front seat of the car, hit manager Zafar Sultan, due to which they both, manager Zafar Sultan and Sohaib, fell-off their motorcycle and fire-shooters took away the cash filled bags. Test identification parade was held on 9-2-2013 for identification of accused Syed Shahzad Hussain Sherazi (petitioner) and his co-accused Mumtaz, wherein, surprisingly, none of the above-named witnesses took part and they kept themselves away from the said lawful exercise for the reasons, only known to the prosecution and not disclosed by them during the course of investigation. The witnesses, Muhammad Akbar and Sakhawat participated in joint test identification and correctly picked up the accused-petitioner and Mumtaz accused, but their statements, recorded by the supervising magistrate leave a blurred

impression as to involvement of the petitioner in the alleged occurrence as they contended that they had seen the accused-petitioner stepping down from a Honda-City car, being empty handed and he did nothing except for boarding the said car again and in the meanwhile they also heard report of a fire shot. Both the identifiers are not named in the F.I.R. as witnesses, rather they were introduced in this case later on, but on the very first day. Their statements under section 161 Cr.P.C. reveal that the occurrence was committed by some unknown accused, boarded in two cars and they claimed that they could identify three of the six occupants of a Honda-City car, external features of whom they mentioned in their statements. It appears from the record that the occurrence of dacoity itself was committed by the riders of another vehicle, again a Honda-City car. Non-joining of test identification by Muhammad Hassan Yunus complainant, Muhammad Tariq Nawaz and alleged victim Sohaib causes eyebrow-raising and leaves one guessing about the aforesaid strategy of the prosecution. During arguments learned counsel for the complainant, on query of this court, advanced a novel argument that the other car wherefrom the petitioner and his co-accused stepped down, was parked at a distance of about one and a half (1-1/2) furlong from the venue of the occurrence and for this reason, the complainant and his co-witnesses could not see him (petitioner) at the spot. If it is so, how a nexus shall be established between above said two Honda-City cars, one allegedly used by those, who virtually, as per contents of F.I.R., committed the crime and the other one used by their alleged facilitators including the petitioner? This question requires a serious consideration, which can probably, be answered by the prosecution only during the course of the trial. So far as recovery of cash rupees two millions at the instance of the accused-petitioner is concerned, though it appears to be a huge amount, allegedly got recovered by the petitioner, yet, it cannot be altogether ruled out while keeping in view aforesaid strategy and anxiety of the prosecution to involve the petitioner in this case, that the recovery memo prepared by the Investigating Officer in this regard may not be as transparent and unblemished as it has been shown by them (prosecution) to be. Whether or not the currency notes allegedly got recovered by the petitioner bore any distinguishing marks still remains a riddle. The evidentiary value of this particular piece of evidence, however, shall be determined by the trial court after recording evidence of the parties at trial. There exist reasonable grounds to believe that the petitioner's case constitutes need for further inquiry into his guilt as envisaged by section 497(2), Cr.P.C.

8. Therefore, this application is allowed and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 (Rupees two lacs) with two sureties each in the like amount to the satisfaction of the learned trial Court.

MWA/S-58/L Bail granted.

2014 M L D 1050

[Lahore]

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

SHERAZ AKRAM alias SHERAZI---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.2205 and Capital Sentence Reference No.50/T of 2010, heard on 27th January, 2014.

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

----Ss. 302(b) & 353---Anti-Terrorism Act (XXVII of 1979), S.7(a)---Qatl-e-amd, assault or criminal force to deter public servant from discharge of his duty, act of terrorism---Appreciation of evidence---Benefit of doubt---Story of F.I.R., not only suffered from self-contradictions but was astounding as well as preposterous---Inordinate delay of twenty four hours before registration of F.I.R., had not been explained anywhere by prosecution---Probability that F.I.R. had been recorded with the fictitious timings, could not be ruled out---Inquest report also cast doubt on the timing of registration of the F.I.R.---Registration of the F.I.R., in circumstances could not be other than an ante-timed affair---Story of F.I.R. had been badly distorted and dishonesty improved upon by two Police Officials who appeared as prosecution witnesses---Both the sides exchanged firing, which fact was evident from the testimonies of the eye-witnesses as well as from the visual site plan---Briskness shown by the eye-witnesses in the shifting from one stance to another in their testimonies spoke the falsity of the story narrated by them---Prosecution, in circumstances, had failed to bring home the guilt of accused beyond reasonable doubt---Conviction recorded and sentence awarded to accused by the Trial Court, could not be sustained---Conviction and sentence awarded to accused, were set aside, and accused was acquitted of the charge and was released, in circumstances.

(b) Criminal trial---

---Medical evidence---Scope---Medical evidence could furnish all the necessary details qua the injuries of a person, living or dead, but it could not identify as to who inflicted injuries.

Ms. Bushra Qamar for Appellant.

Khurram Khan, Deputy Prosecutor-General Punjab for the State.

Date of hearing: 27th January, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.---Sheraz Akram alias Sherazi appellant was held guilty under sections 302(b), 353, P.P.C. and under section 7(a) of the Anti-Terrorism Act, 1997, by learned Judge, Anti-Terrorism Court No.II, Lahore, vide judgment dated 24-7-2010 and

sentenced as under:--

(I) UNDER SECTION 302(b) P.P.C.

To death, with direction to pay a sum of Rs.2,00,000 to the legal heirs of the deceased as compensation under section 544-A, Cr.P.C. or in default thereof to undergo simple imprisonment for six months.

(II) UNDER SECTION 7(a) of ATA, 1997:

To death.

(III) UNDER SECTION 353 P.P.C.:

To two years (imprisonment) simple or rigorous, not declared.

2. The convict-appellant by filing Criminal Appeal No.2205 of 2010 has called in question his conviction and sentence under the impugned judgment, whereas, the learned trial Court has submitted reference under section 374 Cr.P.C. (C.S.R.No.50/T of 2010) for confirmation of the sentence of death of the appellant. We propose to dispose of both these matters together through this single judgment.

3. The prosecution story in brief as unfurled by Muhammad Shabbir S.-I./complainant (P.W.5) in complaint (Exh.PA), is that, at 3.00 a.m. on 4-2-2010, he along with Muhammad Akram S.-I., Muhammad Asif 17522/C and Muhammad Idrees 3769/C while on patrol duty was present near WASA Morr, Gulshan-e-Ravi, Lahore, where he received a spy information that Sheraz alias Sherazi, a notorious car-lifter and habitual criminal was present near nursery Mian Aamir, across Ganda Nullah Bund Road along with his two companions and if immediate raid was conducted, they could be apprehended; on receipt of this information, he along with his fellow police officials, conducted raid and on seeing them, the accused opened straight firing, which lasted for about four/five minutes; as raiding-police-officials were less in number, they stepped backward and sent for reinforcement; in the light of 'Raushni' he (complainant) found Muhammad Asif constable dead with injuries on the head; the bricks were scattered besides his dead body; the accused fled the scene taking shelter of darkness; he scribed complaint (Exh.PA) at 3.00 a.m., on 4-2-2010 and despatched it to the Police Station Sanda (Lahore) through Muhammad Idrees 3769/C (P.W.6), on the basis whereof formal F.I.R. (Exh.PA/1) was drawn up by Muhammad Jameel, S.I. (P. W.2), at 3.30 a.m. on the same day.

4. After registration of the case, its investigation was entrusted to Arif Hussain Inspector (P.W.8), who immediately reached the place of occurrence, inspected it and prepared visual site plan (Exh.PJ) thereof; he examined the dead body of Muhammad Asif constable (deceased), prepared inquest report (Exh.PK) and despatched it to the mortuary under the escort of Muhammad Naeem 11364/C (P.W.3) and Arif Ali 9786/C P.W. (not produced); he collected blood stained earth vide memo Exh.PF, attested by Muhammad Akram S.-I. P.W. (not produced) and Muhammad Idrees 3769/C (P.W.6); he secured live crime empties of .30-bore (P5/1-5) and empties of semi-automatic (P6/1-3) vide recovery memos Exh.PD and Exh.PE, respectively, attested by the same set of witnesses; on 5-2-2010, he took into possession last worn clothes of the deceased, trouser (P1), sweater (P2) and vest (P3) vide memo Exh.PB, attested by Muhammad Naeem 11364/C (P.W.3) and Arif Ali 9786/C P.W.

(not produced). He got prepared the site plan in-scale in duplicate (Exh.PL and Exh.PL/1) by Hameed-ud-Din Chishti, Draftsman (P.W.11). He arrested Sheraz Akram alias Sherazi (appellant) on 2-4-2010, who on his disclosure led to the recovery of blood stained brick (P4) on 4-4-2010, which was secured vide memo Exh.PC, attested by Muhammad Amin 11776/C P.W. (not produced) and Muhammad Naeem 11364/C (P.W.3); on completion of the investigation, challan against the accused-appellant was submitted before the court for his trial in accordance with law.

5. The appellant on indictment pleaded not guilty and claimed a trial. The prosecution, in order to prove its case, produced eleven witnesses, namely, Muhammad Yasir (P.W.1), Muhammad Jameel S.-I. (P.W.2), Muhammad Naeem 11364/C (P.W.3), Muhammad Younas 6183/C (P.W.4), Muhammad Shabbir S.-I./complainant (P.W.5), Muhammad Idrees 3769/C (P.W.6), Basharat Ali 7508/C (P.W.7), Arif Hussain, Inspector (P.W.8), Dr.Rafaqat Ali (P.W.9), Imtiaz Ahmad, 11645/HC (P.W.10) and Hameed-ud-Din Chishti (P.W.11). Thereafter, the appellant was examined under section 342, Cr.P.C., whereby he professed his absolute innocence in the matter and denied the allegations levelled against him. He did not opt to depose under section 340(2) Cr.P.C. but adduced defence-evidence by producing Safdar Ali (D.W.1), Khalil Ahmad (D.W.2), Muhammad Ilyas (D.W.3) and Abbas Ali 7077/HC (D.W.4). The contention adopted by him in reply to question as to why this case against him and why the P.Ws. deposed against him, reads as under:--

"I am innocent. I have falsely been involved in this case. In fact this was a blind murder and prosecution made a frivolous and fictitious case against me and there is no direct evidence against me as according to the prosecution there was darkness at the place of occurrence and no direct or indirect evidence is available on record to connect me with the commission of alleged crime. According to the prosecution own version, I was already stood arrested in another case, which was also a false case against me and since this case involved blind murder of a police official and the concerned police had failed to trace out the real culprits, just to show their efficiency, they made me scapegoat in this case. All the P.Ws. are police officials and there is no private witness in this case, which strengthens my stance that I have just been made a scapegoat in this case in order to please the highups and release the pressure of higher authorities because a police Official was murdered in this occurrence. The alleged recovery of brick, that too after months of the occurrence from an open place, is planted upon me and cannot be believed in the circumstances. The P.Ws. being police officials have deposed against me falsely on baseless grounds. I have nothing to do with this alleged occurrence."

The learned trial Judge on conclusion of the trial held him guilty of the offence charged and sentenced him as mentioned hereinabove.

6. Learned counsel for the parties heard and record perused with their able assistance.

Plainly speaking, the occurrence qua exchange of firing between the police and the accused, as alleged in F.I.R. (Exh.PA/1) took place at about 3.00 a.m. on 4-2-2010 and it incidentally is the time, when police found the dead body of Muhammad Asif, constable placed near some bricks. The accused, Sheraz Akram alias Sherazi (appellant) and his two unknown companions, by that time, had fled the spot under the sheath of darkness. The important feature of the story of F.I.R. is that it suffers from self-contradiction as Muhammad

Shabbir S.I. (P.W.5), who scribed the complaint (Exh.PA), mentioned in the F.I.R. that he found injuries at the head of Muhammad Asif, constable in the light of 'Raushni' and almost in the same breath, he recorded the fact that the accused made good their escape from the place of occurrence under the cover of darkness. The F.I.R. (Exh.PA/1) further tells that Muhammad Shabbir S.I. (P.W.5) was present at WASA morr Gulshan-e-Ravi along with Muhammad Akram S.I. P.W. (not produced), Muhammad Asif, 17522/C (deceased) and Muhammad Idrees 3769/C (P.W.6), when he received a spy information as to the presence of Sheraz alias Sherazi-accused (appellant) and that of his two cronies at Mian Aamir Nursery, across a sewer-nullah. On receipt of this information, he along with his fellow police-officials raided the said place where they were fired at by the accused; the firing lasted for about four/five minutes; due to inadequate number of the members of the raiding party, they lost their positions, whereon reinforcement was sent for and it was the time when Muhammad Asif constable was found dead with injuries on the head. The story of F.I.R. looks astounding as well as preposterous. It seems as if many a real facts have either been suppressed or distorted by the scribe police-official (P.W.5). It, however, is learnt from the formal F.I.R. (Exh.PA/1) that it was recorded at the police station by Muhammad Jameel S.I. (P.W.2) at about 3.30 a.m., the same day, within thirty minutes of the occurrence entailed therein. It may be termed a promptly lodged F.I.R. but circumstances hovering over it contradict the said impression as autopsy on the dead body of the deceased was performed by Dr.Rafaqat Ali (P.W.9) at 3.30 a.m. on 5-2-2010, about twenty four (24) hours after its (F.I.R.) registration. The inordinate delay of twenty four hours has not been explained anywhere in their case by the prosecution. The probability that the F.I.R. (Exh.PA/1) has been recorded with the fictitious timings cannot be altogether ruled out. Interestingly, the inquest report (Exh.PK) also casts doubt on the timing of registration of the F.I.R. Its column No.3, which pertains to time and date of receipt of knowledge about the death of the deceased, reveals the said information, as "3.35 a.m. on 4-2-2010". According to the contents of the complaint (Exh.PA), it was prepared by Muhammad Shabbir S.I. (P.W.5) at 3.00 a.m. on 4-2-2010 with the entailment of the fact that the dead body of Muhammad Asif constable was found placed near the bricks. If, as per contents of the inquest report (Exh.PK), the knowledge as to the death of the deceased-constable was got by the police at

3.35 a.m., how come F.I.R. (Exh.PA/1) stood recorded at 3.30 a.m., the said day. A lot appears to have been toyed with by the police while preparing the complaint (Exh.PA) and the F.I.R. (Exh.PA/1). The medical officer (P.W.9) too has mentioned in a column of the necropsy report (Exh.PM), the time of death of the deceased as 3.35 a.m., which is in line with the inquest report (Exh.PK). Another startling fact can be found from the postmortem examination report, which pertains to date and hour of shifting of the dead body to the hospital/mortuary, King Edward Medical University, Lahore, which has been mentioned as 1.00 p.m. on 4-2-2010 i.e. about twelve hours after the occurrence. This massive delay again remains un-explained. The registration of the F.I.R., as contended by the learned defence counsel, therefore, may not be other than an ante-timed-affair.

7. Insofar as evidence of recovery of blood stained brick (P4) is concerned, Muhammad Naeem 11362/C (P.W.3), Muhammad Shabbir S.I. (P.W.5), Muhammad Idrees 3769/C (P.W.6) and Arif Hussain, Inspector (P.W.8), have reduced its creditworthiness to a cypher, having tendered divergent and incredible statements in respect thereto. Muhammad Shabbir, S.I. (P.W.5), who headed the police contingent at the time of raid categorically deposed about the

fact that, on arrival of the reinforcement, he found Muhammad Asif constable (deceased) having fallen towards the nursery-side and a brick, stained with blood, lay nearby. Muhammad Idrees 3769/C (P.W.6) stated in his testimony that Arif Hussain, Inspector (P.W.8) recovered the blood stained brick (P4) during spot inspection, which he must have done on reaching there immediately after the registration of the F.I.R. on 4-2-2010. Coming to the statement of Arif Hussain (P.W.8), it has been categorically deposed about by him that he arrested Sheraz Akram alias Sherazi accused (appellant) on 2-4-2010 and he got recovered blood stained brick (P4) on 4-4-2010 on his pointedness, vide recovery memo Exh.PC, attested by Muhammad Amin 11776/C P.W. (not produced) and Muhammad Naeem 11364/C (P.W.3) from the area of nursery Mian Aamir. One wonders how a particular piece of evidence can be manoeuvred and fabricated by the police to fortify their case, in oblivion of the divergency of the events, which may nullify all such dishonest efforts. The prosecution appears to have despatched the brick (P4) to the office of the Chemical Examiner, as stated by Muhammad Younas 6183/C (P.W.4), Arif Hussain, Inspector (P.W.8) and Imtiaz Ahmad MHC (P.W.10) in their testimonies but we find no report from the said expert in this regard on the record. This lapse on the prosecution's part is ostensibly fathomable, in view of the contradictory statements of the prosecution witnesses, mentioned in the beginning of this paragraph. The evidence regarding recovery of the "weapon of offence", brick (P4) is nothing but a farce and so is the quality of evidence qua recovery of three crime empties (P5/1-5) & (P6/1-3), tendered by Muhammad Idrees 3769/C (P.W.6), Inspector Arif Hussain (P.W.8) and Imtiaz Ahmad MHC (P.W.10) as connecting firearm had not been recovered at the instance of the appellant during the course of investigation.

8. Insofar as the ocular account tendered by the prosecution is concerned, it includes the testimonies of Muhammad Shabbir S.I. (complainant/P.W.5) and Muhammad Idrees 3769/C (P.W.6). The story of F.I.R. (Exh.PA/1) has been badly distorted and dishonestly improved upon by Muhammad Shabbir S.I. in his testimony as P.W.5. From the contents of the F.I.R., it cannot be ascertained as how and in what manner and by whom Muhammad Asif constable was done to death and nothing could be brought forth by the complainant (P.W.5) in this regard therein. The text of the F.I.R. divulges that both the sides exchanged firing inter-se, which fact is evident from the testimonies of the eye-witnesses as well as from the visual site plan (Exh.PJ) prepared by Arif Hussain, Inspector (P.W.8) and site plan in-scale (Exh.PL) drawn by Hameed-ud-Din Chishti, Draftsman (P.W.11). Points 'A', 'B' & 'C' in the visual site plan have been shown in a perpendicular manner, both in Exh.PJ and Exh.PL. The position of the police-party has been shown at point 'D' towards south-east of the noted points (`A', `B' & 'C') at a distance, around forty (40) feet in between. The point 'A' denotes the place where Muhammad Asif constable was done to death by the accused and from this particular point, the police secured the blood stained earth, vide memo Exh.PF. Point 'B' denotes the place wherefrom an unbroken brick and two pieces of bricks were taken into possession by the Investigating Officer. The position of the accused has been shown in the site-plans (Exh.PJ & Exh.PL) at point 'C', which does not expressly indicate its distance from point 'A' but keeping in view the other details, it may be assessed between six to nine feet inter se. The distance shown between points 'C' & 'D' and 'A' & 'D' are crucial, which may help understanding the veracity or otherwise of the depositions of both the eye-witnesses, who have categorically mentioned in their testimonies that all the members except Muhammad Asif constable (deceased) were armed with firearms but Muhammad Asif constable took part in the incident

empty handed. It looks incredible that the armed police-officials kept a distance of about forty to forty-three (40-43) feet from the accused during the occurrence but one, who was empty handed, drew himself close to the accused so as to "take a position" against them. Both the eye-witnesses (P.W.5 & P.W.6), in a ridiculous way, have stated that Muhammad Asif constable, when firing was being exchanged by the law-enforcers and the accused, went closed to the accused to take position against them. One wonders what position he meant to have taken against the armed accused, being empty handed. It is an eyebrow-raising factor. If the accused were armed with lethal firearms, by means of which they showered bullets upon the raiding-police-party, why would they inflict an injury on the head of the deceased-constable by means of a brick. A bullet or two into the body of the ill-fated constable would have finished him. It appears that the departed constable had been done to death by some unknown person(s), who must have had no firearm with him and who murdered him with a blunt weapon, a brick or any other tool, no one can assess with exactitude from the record. The complainant (P.W.5), in an unimpressive way, has deposed that being a small raiding-party, the members thereof went misdirected/scattered and Muhammad Asif constable-deceased posted himself at a place, not far-off from the accused, rather in their close proximity. An empty handed person, in presence of his armed companions would have taken their shelter by staying at their back in a situation of confrontation/encounter with the armed accused. It does not appeal to reason that Muhammad Asif constable would have consciously gone close to the accused to "take a position" against them, empty handed. He certainly was not a foolhardy, who could commit such a folly as narrated by the witnesses of the ocular account. Though Muhammad Shabbir S.I. (P.W.5) and Muhammad Idrees 3769/C (P.W.6) have not been cross-examined commendably well by the defence but inherent fallacies and inconsistencies in the prosecution case cannot be overlooked easily. The prime duty of the complainant and his armed companions would have been to keep unarmed Muhammad Asif constable at a safer place rather than letting him perilously draw nearer and nearer the accused to endanger his life. The bullets fired from both the sides signalled at a clear risk that whosoever would enter the arena may perish forthwith. The, contention of the eye-witnesses that sufficient electricity light was available at the place of occurrence, if so, why didn't they gun-down Sheraz Akram alias Sherazi (appellant), when he held a brick in his hand instead of a firearm, just at a distance of about forty (40) feet from them. Muhammad Asif constable was not a disabled or an incapacitated person, hence, to overpower him by one accused would have been a daunting task. In a tumultuous situation, someone must have wrestled with him so as to render him helpless, for authoring terminal injury by means of a brick, on his head. Should it be believed that the armed policemen silently watched like a spectator, the fight, if any, going on between the said police official and the accused/appellant. The briskness shown by the eye-witnesses in shifting from one stance to another in their testimonies speaks voluminously about the falsity of the story narrated by them. Sometimes it is the electricity light wherein they could see everything happening around and then they switched over to the stance of pitched darkness wherein, all the accused including the appellant took to their heels. The probability cannot be altogether ruled out that Muhammad Asif constable may have been murdered by some unknown assailant at some unknown time and on finding his dead body, the prosecution knit a story around it, without caring for the inherent and ingrained deficiencies thereof, so as to push the appellant to the gallows. The testimonies of the eye-witnesses do not inspire confidence and despite raw-handling of the case by the defence during trial, they look unworthy of reliance and credibility. The witnesses

of ocular account have surprisingly admitted in their testimonies that Sheraz Akram alias Sherazi (appellant) stood confined in jail prior to the occurrence. Did they mean that he was behind the bars in some other case(s) before the murder of the unfortunate police-official? This is yet another unresolved riddle in their testimonies.

9. Insofar as the abscondence of the appellant in this case is concerned, the prosecution in order to prove this particular aspect of the case produced Basharat Ali 7508/C (P.W.7) and Inspector Arif Hussain (P.W.8), besides tendering in evidence non-bailable warrant of arrest (Exh.PG), report thereon (Exh.PG/1) and proclamation (Exh.PH) with report (Exh.PH/1) of the process-server, Basharat Ali 7508/C (P.W.7) thereon. The reports (Exh.PG/1 & Exh.PH/1) have not been testified by any inhabitant of the area. Basharat Ali 7508/C (P.W.7) contended in his testimony that he did not meet any local resident when he went to the residential-place of the accused-appellant for execution of warrant (Exh.PG). The process-server did not like to mention the place or places in his report (Exh.PG/1) where he searched for the accused to cause his arrest. He prepared the above-said reports with an interval of two days. Even otherwise, the arrest of the appellant on 2-4-2010 reduced the significance of the said piece of evidence to a nullity in the eyes of law as thirty days statutory period since issuance of the proclamation had not elapsed by then. The appellant, therefore, cannot be held an absconder or a fugitive from law in this case.

10. As we, in the above paragraphs, have brushed aside and disbelieved the prosecution evidence qua the recovery of "weapon of offence", brick (P4), the evidence of abscondence and the ocular account, hence, to take toll of the medical evidence and the other evidence of formal nature, besides the defence evidence led by the appellant during trial, would serve no useful purpose. It has been held time and again that the medical evidence can furnish all the necessary details qua the injuries of a person, living or dead, but it cannot identify the author of such injuries.

11. The crux of the discussion (supra) is that the prosecution has badly failed to bring home the guilt of the appellant beyond reasonable shadows of doubt, hence, the conviction recorded and sentence awarded to him by the learned trial court cannot be sustained. The instant appeal is allowed, conviction/sentence of the appellant is set aside and he is acquitted of the charge. He would be released forthwith if not required in any other case.

12. The death sentence awarded to the appellant is NOT confirmed and Capital Sentence Reference is answered in the negative.

HBT/S-14/L Appeal allowed.

2014 M L D 1230

[Lahore]

Before Shahid Hameed Dar, J

ABDUL AZIZ---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.8252-B of 2013, decided on 10th July, 2013.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss. 420, 468 & 471---Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document---Ad interim pre-arrest bail, confirmation of---Taking oath on Holy Quran to prove innocence for purposes of bail---Scope---Husband/co-accused had divorced his wife---Nikah Registrar (accused), husband and his father (co-accused persons) were alleged to have tampered with the Nikahnama---Accused was 82 years of age and offered to take oath on the Holy Quran before the court to establish that he had not tampered with the Nikahnama in question---Although criminal matters could not be decided on basis of special oath of accused, yet his voluntariness in such terms to take oath, opened the matter to a serious question, whether or not the Nikahnama had ever been tampered with by the accused---Wife had filed a suit in the Family Court for maintenance and return of dowry articles on the strength of her Nikahnama, but she did not raise any plea in her suit regarding any interpolation in the Nikahnama and believed it as a genuine document, having not been doctored by anyone---Complainant's sister had been divorced, which might be a reason for him to involve the accused and co-accused persons in the present case---Co-accused persons had already been granted pre-arrest bail by the Trial Court, and in such a situation there was no option with the High Court but to allow bail to accused---Ad interim pre-arrest bail already granted to accused was confirmed in circumstances.

Rana Zulfiqar Ali Khan for Petitioner.

Mrs. Muqadass Tahira, Additional Prosecutor General Punjab and Nawaz S.I. for the State.

Tabassam Pervaiz Cheema for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail before arrest in case F.I.R. No.713, dated 21-12-2012, under sections 420, 468, 471 P.P.C., registered at Police Station Noshehra Virkan, District Gujranwala.

2. Precisely the story of F.I.R. as alleged by Muhammad Shafiq (complainant) is that his sister Mst.Sumaira married Muhammad Rashid according to Islamic rituals/rights in column No.19 of nikahnama a condition was incorporated that the bridegroom would pay a sum of

Rs.10 lacs to the bride in case he divorced her; the bridegroom, Muhammad Rashid and his father Muhammad Bashir tampered with the nikahnama erasing the said condition; Muhammad Rashid divorced Mst.Sumaira on 18-6-2012 and it was then, he and his sister Mst.Sumaira learnt about the clever skirmish of the accused.

3. After hearing learned counsel for the parties and perusing the record, it is observed that Mst.Sumaira filed a suit for maintenance and return of dowry articles etc., before a learned Family Judge at Gujranwala, on the strength of above said nikahnama which did not contain any such condition, in its column No.19, as alleged in the F.I.R. Learned counsel for the complainant submits that the suit filed by Mst.Sumaira was decreed in her favour vide judgment dated 21-5-2013. Interestingly, Mst.Sumaira, the plaintiff did not raise any plea in her suit as to aforesaid interpolation in nikahnama and believed it a genuine document, having not been doctored by anyone, till the complainant got registered above-said F.I.R. on 21-12-2012. The petitioner who is the nikah registrar, is aged about eighty two (82). He has categorically stated before this court that the nikahnama in issue was not tampered with by him or any of his co-accused in any manner. He has offered to take oath on Holy Quran, in token of correctness of his version. A criminal matter can certainly not be decided on a special oath of the accused yet, his voluntariness in above terms, opens the matter to a serious question, whether or not the document in question had ever been tampered with by the accused-side. There exists no evidence at this stage which may lead to believe that the nikahnama had been tampered with, as alleged by the complainant. It also remains a fact that the sister of the complainant had been divorced by her husband, Muhammad Rashid accused on 18-6-2012 which may be a reason, for the complainant, to involve him and his co-accused, including the petitioner, in the case. Learned Additional Prosecutor General Punjab rather learned counsel for the complainant has submitted that the pre-arrest bail application of the bridegroom Muhammad Rashid and that of his father had been granted by the learned Additional Sessions Judge, Gujranwala vide order dated 20-6-2013. In such a situation, no other option rests with this court but to allow this petition as prayed for. Therefore, I accept this application and confirm the ad interim pre-arrest bail already granted to the petitioner vide order dated 2-7-2013, subject to furnishing bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of learned trial court.

MWA/A-104/L Bail confirmed.

2014 M L D 1308

[Lahore]

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

JAVED IQBAL---Petitioner

Versus

GOVERNMENT OF THE PUNJAB through Home Secretary and another---Respondents

Writ Petition No.1023 of 2014, decided on 11th March, 2014.

Anti-Terrorism Act (XXVII of 1997)---

----S. 11EE & Fourth Schedule---Penal Code (XLV of 1860), S.188---Constitution of Pakistan, Art.199---Constitutional petition---Petitioner's name was listed to the Fourth Schedule to the Anti-Terrorism Act, 1997 once again, after High Court had directed the authorities to delete his name after the expiry of previous enlistment---Validity---Prosecution produced a copy of F.I.R. under S.188, P.P.C. alleging that petitioner was still an activist of a banned organization since his mother's last rites were attended by some other activists---Allegations in the said F.I.R. could not impose any liability on petitioner under S.188, P.P.C.---No fresh material was available against petitioner to necessitate relisting his name to the Fourth Schedule---Liberty of a man could not be curtailed on lame excuses---Courts being custodians of law, had to jealously guard the fundamental rights of citizens---Relisting of petitioner to the Fourth Schedule to the Anti-Terrorism Act, 1997 was illegal in circumstances---Petition was allowed.

Arif Mehmood Rana for Petitioner.

Ch. Muhammad Shabbir Gujjar, A.A.-G. with Irfan Ali Chheena, Section Officer, Home Department and Anwar, S.I. for Respondent.

ORDER

The petitioner through the instant constitutional petition seeks a direction to respondent No.1 for deletion of his name from the list prepared under Fourth Schedule (section 11-EE) of the Anti-Terrorism Act. 1997.

2. Precisely the facts giving rise to this petition are that the petitioner's name was earlier placed in the Fourth Schedule of Anti-Terrorism. Act, 1997 in year 2005; thereafter, he filed Writ Petition No.21322 of 2010, which was accepted by this Court vide order dated 29-11-2010 and the Home Department was directed to delete his name from the said list, which was so done by them on 3-1-2011; thereafter, his name was again placed in the said Schedule on 30-10-2013 on the basis of a report submitted by the District Intelligence Committee, Hafizabad. Hence, the instant petition.

3. Learned counsel for the petitioner contends that the petitioner's name has been enlisted again iti the Fourth Schedule vide order dated 30-10-2013 passed by respondent No.1, without any fresh stuff, rather on the same material, as used earlier for placing his name in the said category, hence, it may be declared illegal and set aside.

4. Learned Assistant Advocate General Punjab concedes that the name of the petitioner remained enlisted in the Fourth Schedule for more than five years in the first instance, which was deleted on 3-1-2011 after his constitutional petition was allowed by this Court vide order dated 29-11-2010; further submits that fresh enlistment of the petitioner in the Fourth Schedule has been made on 30-10-2013, under newly formulated recommendations of the District Intelligence Committee (DIC), Hafizabad, and law enforcing agencies have serious apprehensions that he would involve himself again in activities, prejudicial to public safety, security integrity of the country or maintenance of public order etc.; the appeal filed by the petitioner against the impugned order was dismissed on 10-3-2014 by respondent No.l.

5. After hearing learned counsel for the parties and perusing the record, it is noticed that the petitioner's name, for the first time, was placed in the Fourth Schedule of Anti-Terrorism Act, 1997 in year 2005 with the objection/allegation that he was involved in such activities, which were highly prejudicial to public safety, harmony, peace, tranquility, and coexistence, which

lasted for more than five years i.e. almost twice the period as envisaged by the law. He filed a constitutional petition (W.P.No.21322/2010) against the above said order, which was accepted by this Court on 29-11-2010 with a direction to the respondent(s) to delete his name from the said list. The direction of this Court was complied with on 3-1-2011 by the respondent concerned, who clamped aforesaid restrictions on him again on 30-10-2013 on the basis of a so-called fresh report from the DIC, Hafizabad. In fact, respondent No.1 harped on the same string while re-enlisting the name of the petitioner in the said Schedule and there was nothing new, which might justify his action for having done so.

6. Learned Assistant Advocate General Punjab has produced a copy of case-F.I.R. No.651, dated 20-12-2013, under section 188, P.P.C. registered at Police Station Saddar Hafizabad to show that the petitioner was still an activist of Sipah-e-Sahaba Pakistan and he had not learnt a lesson from his previous enlistment in the Fourth Schedule (supra). Sarcastically, the text of this F.I.R. reveals that the petitioner's real mother died on 17-12-2013 and her last rituals were attended to by Maulana Muhammad Ilyas Ghumman and Rana Jamshed Tabassum alias Bambo, the followers of Dev-Bund school of thought, besides others. Did it show that the petitioner had a nefarious liaison with the said A participants, the answer to which would certainly be in negative. Who can stop the mourners from participating in the funeral rituals of a deceased person? Our religion, however, does not identify any such precedence to quote, so as to justify such a prohibition. The above said allegation is bizarre as well as ridiculous, which should not burden the petitioner with any sort of liability under section 188 P.P.C. Barring F.I.R. No.651/13(supra), there exists no other material whatsoever, which may be considered incriminating against the petitioner. It, however, remains a fact that the above said case was registered about one and half month after the impugned order was passed. We have not come across any such material against the petitioner, which may be considered fresh and which might have necessitated re-enlistment of his name in the Fourth Schedule of the Act (ibid) on 30-10-2013. All other circumstances mentioned in "fresh DIC report" existed on the record on 29-11-2010 when Writ Petition No.21322 of 2010 (supra) was allowed by this court and resultantly his name was deleted from the oft-repeated Fourth Schedule of Anti-Terrorism Act 1997. What wrong was committed by the petitioner between 29-11-2010 to 30-10-2013 is a question, to which the respondents do not have any plausible answer to offer. No one can be enlisted in the Fourth Schedule merely on the whims and guess-work of the authorities concerned nor liberty/freedom of a man can be curtailed on lame excuses or on baseless pretexts. In such a scenario, the courts cannot sit idle and it is their bounden duty being custodian of law to jealously guard the fundamental rights of the citizens as enshrined in the Constitution of Islamic Republic of Pakistan, 1973.

7. There is no cavil to the proposition that the name of a person can be placed repeatedly in the Fourth Schedule, if some fresh evidence or material so envisages, but in the instant case, re-enlistment of the name of the petitioner in the said Schedule appears to have been made with ulterior motives, which, being illegal, cannot be approved of under any circumstance.

8. In view of the above, we are satisfied that retaining the name of the petitioner for another period of three years is a mala fide act of the respondent-government functionaries, which practice cannot be allowed to continue unabatedly. Consequently, the instant petition is allowed and the respondents are directed to delete the name of the petitioner from the Fourth Schedule of the Anti-Terrorism Act, 1997 forthwith.

ARK/J-7/L Petition allowed.

2014 M L D 1502

[Lahore]

Before Shahid Hameed Dar, J

IRFAN alias FANI---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.2112-B of 2014, decided on 4th March, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302 & 337-F (iv)---Qatl-e-amd, ghayr-jaifahmudihah---Bail, grant of---Further inquiry---Implication on basis of supplementary statement of complainant---Initially F.I.R. was lodged against unknown armed men---Subsequently, a day after the registration of F.I.R. complainant rendered his supplementary statement implicating the accused for firing at the ankle of the deceased, and co-accused for firing at the chest of deceased---Reason given by complainant for not implicating the accused and co-accused in the F.I.R. was that he was highly perturbed and in a confused state of mind, and could not nominate the accused and co-accused, despite knowing both of them---Question was as to why complainant required a period of 24 hours to compose and recollect himself---Evidentiary value of supplementary statement of complainant could be assessed by the Trial Court---Post-mortem examination report showed that injury on ankle of deceased, assigned to the accused, was ghayr-jaifahmudihah [S. 337-F(iv), P.P.C.], which was punishable with 5 years' imprisonment [thus it did not fall within the prohibitory clause of S. 497(1), Cr.P.C.]---Medical Officer had declared the injury on the chest of deceased, assigned to the co-accused, as the fatal injury---Case was one of further inquiry, and accused was granted bail accordingly.

Muhammad Tanveer Chaudhary for Petitioner.

Humayun Aslam, Deputy Prosecutor General Punjab for the State with Ilyas S.I.

ORDER

SHAHID HAMEED DAR, J.---The complainant, Riasat Ali has alleged in the F.I.R. that his real brother Anwar Ali was attacked and murdered by two unknown armed men/accused at about 11.00 p.m. on 19-5-2011; one of the accused fired at the right ankle of his brother and the other fired into his chest.

2. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner has been named as an accused of this case vide supplementary statement of the complainant, which he rendered on 21-5-2011, a day after the registration of the F.I.R. with the contention, that he being highly perturbed and in a confused state of mind, could not nominate the accused while reporting the crime to the police, albeit he knew both of them. He attributed the role of firing at the right ankle of the deceased to the accused-petitioner and burdened Amjad Masih accused with the liability of causing the chest-wound. The supplementary statement appears to have been made by the complainant more than 24 hours after the registration of the F.I.R. It itches the mind that he required such a long period of time

to compose and recollect himself. Further remarks in this regard may prejudice the case of any of the parties, hence it is left for the learned trial court to assess true evidentiary value thereof, after recording evidence of the parties at trial. The contents of the postmortem examination report show that the injury on the ankle of the deceased was Ghayr Jaifah Mudihah (337-F(iv) P.P.C.) which is punishable with five years imprisonment. The medical officer has declared the chest-injury as fatal to the deceased. The petitioner was taken into custody on 24-6-2011 and he has been languishing in jail ever since. His trial has not concluded as yet. Without entering into the niceties as to who occasioned delay in conclusion of trial, I find it a case falling within the scope of section 497(2), Cr.P.C. Therefore, I allow this application and admit the petitioner to post arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with two sureties each in the like amount to the satisfaction of the learned trial court.

MWA/I-19/L Bail granted.

2014 M L D 1561

[Lahore]

Before Shahid Hameed Dar, J

TARIQ SAEED---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No.261 of 2002, heard on 5th March, 2014.

Criminal Procedure Code (V of 1898)---

----S. 417(2-A)---Penal Code (XLV of 1860), S.302---Pakistan Arms Ordinance (XX of 1965), S.13---Qatl-e-amd, possessing illicit arms---Appeal against acquittal---Accused who was acquitted for the murder charge, requested for his acquittal in case under S.13 of Pakistan Arms Ordinance, 1965, which request was acceded to, and accused was also acquitted of the charge under S.13 of Pakistan Arms Ordinance, 1965---Validity---Facts relating to recovery of dagger, were inseparably stitched with story qua the murder of the deceased---Said dagger had not been recovered from the possession of accused, but Investigating Officer took it in his possession in absence of accused---Accused was implicated as an accused of murder case, and he was also booked in a separate case under the same F.I.R.---Witnesses of recovery of said dagger, who also deposed against accused in murder case, were disbelieved---Story of murder of the deceased and that of recovery of dagger both were disbelieved and accused acquitted---Case, depended a lot on the outcome of the murder case, in which accused was acquitted---Recovery of the dagger was not an independent circumstance, but it stood imbedded in murder case, in which accused was acquitted---Complainant had failed to file appeal within prescribed time-limit---Appeal was also liable to be dismissed on that score.

Malik Muhammad Ghafoor for Appellant.

Hamayun Aslam, Deputy Prosecutor General Punjab for the State.

Muhammad Asif Saeed and Abdul Rehman for Respondent No.2.

Date of hearing: 5th March, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.---Tariq Saeed-appellant, by filing this appeal under section 417(2-A), Cr.P.C. has assailed judgment dated 21-1-2002, passed by learned Judicial Magistrate, Lahore, whereby Abdul Rehman (respondent No.2) has been acquitted of the charge under section 249-A, Cr.P.C.

2. Precisely the facts giving rise to instant appeal are that the appellant got registered case F.I.R.No.2, dated 3-1-1999, under section 302, P.P.C. and section 13 of the Pakistan Arms Ordinance XX of 1965 at Police Station Lohari Gate, Lahore alleging therein that his brother Muhammad Shafaqat was found murdered at his house, with a dagger clubbed in his throat; the Investigating Officer held Abdul Rehman (respondent No.2) guilty of offence during the course of investigation, prepared two separate reports against him under section 173, Cr.P.C., one for the murder-charge and the other qua an illicit arm (dagger) and submitted them before the trial courts concerned for his trial; learned magisterial court indicted respondent No.2 on 30-9-2000 for an offence under section 13 of the Ordinance (ibid), but he pleaded not guilty and claimed a trial; the prosecution failed to adduce any evidence against him till 21-1-2002, whereon he verbally requested the learned trial court to acquit him under section 249-A, Cr.P.C., as he in the meanwhile had been acquitted for the murder-charge, vide judgment dated 14-11-2001 passed by the learned Additional Sessions Judge, Lahore, a copy whereof he tendered before the learned trial court then; his request was acceded to by the learned court and he was acquitted of the charge under section 13 of the Ordinance (ibid) vide the impugned judgment.

3. Learned counsel for the appellant has submitted that the impugned order is patently illegal as judgment passed in the murder case could not be made basis for recording acquittal of respondent No.2-Abdul Rehman in this case; the learned trial court may have adjourned trial of the accused sine die under section 249 Cr.P.C. till such time, when prosecution witnesses would be available to depose against him; the learned trial court has committed a patent illegality by delivering the impugned judgment, which may be annulled and respondent-accused may be ordered to be tried again.

4. Learned counsel appearing on behalf of respondent No.2 opposes by contending that facts of illicit-arm-case are inseparably sewn in the main murder-case, hence, acquittal of the respondent in the murder-case was bound to influence the outcome thereof; the impugned judgment is patently legal from all corners, which may be maintained at the cost of the titled-appeal.

5. Learned Deputy Prosecutor General Punjab, after a deep look into the impugned judgment, takes the decision not to oppose it.

6. After hearing learned counsel for the parties and going through the available record, it is observed that the facts of the case relating to recovery of a dagger, shoved in the neck-wound of the deceased are inseparably stitched with the story qua murder of Muhammad Shafaqat, real brother of the complainant/appellant, as the illicit weapon (dagger) had not been recovered from the possession of respondent-Abdul Rehman. The Investigating Officer took this dagger in possession at the time of recovery of the dead body of the deceased, of course, in the absence of the accused, whosoever he was, as complainant reported the crime against some unknown accused. Abdul Rehman (respondent No.2), however, was implicated

as an accused of the murder-case and he was also booked in a separate case of the Arms Ordinance (supra), under the same F.I.R. number, for his trial in both the cases. The witnesses of recovery of dagger also deposed against respondent No.2 in the murder case and they were disbelieved, as is evident from judgment dated 14-11-2001 passed by the learned trial judge in the murder case, a copy whereof is available on the record. The story of murder of Muhammad Shafaqat and that of recovery of dagger, both were disbelieved and Abdul Rehman was acquitted of the charge as is manifest from the said judgment. Had it been a case that the dagger would have been recovered at the instance of respondent-Abdul Rehman, the judgment of acquittal passed by the learned trial court in the murder case would have been of no consequence, so far as his trial regarding recovery of dagger was concerned. Learned counsel for the appellant has rightly pointed out that persistent non-availability of the prosecution witnesses in a case would result in deferment of the proceedings of the trial sine die under section 249, Cr.P.C., but in the instant case, for mentioned exigency and inevitability, no other decision of the case was possible than the one, impugned herein. The outcome of the illicit weapon-case depended a lot on the outcome of the murder-case, which unluckily went the other way and respondent-Abdul Rehman was acquitted of the charge. How come the recovery of dagger, having been disbelieved by the learned Additional Sessions Judge, Lahore, could be proven by the appellant/complainant and his co-witnesses, in the peculiar circumstances of the case, for, the recovery of the dagger was not an independent circumstance, rather it stood imbedded in the murder-case. For the mentioned reasons, the judgment of acquittal passed in the murder-case by the learned Additional Sessions Judge, Lahore became relevant and it persuaded the learned judicial magistrate, Lahore to pass the impugned judgment, whereby respondent-Abdul Rehman was acquitted of the charge. It was also learnt during arguments on this appeal that the appellant failed to file an appeal, within prescribed time-limit, against respondent-Abdul Rehman qua his acquittal in the murder-case and half-hearted attempt made by him in this regard went begging, as submitted by his learned counsel.

7. For the discussion supra, I find no merit in this appeal, which is accordingly dismissed.

HBT/T-8/L Appeal dismissed.

2014 M L D 1771

[Lahore]

Before Shahid Hameed Dar, J

KALAY KHAN alias KALLU---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.5875-B of 2014, decided on 5th June, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 148 & 149---Qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Bail, grant of---Further inquiry---Nature of injury on deceased not matching the nature of weapon assigned to accused---Effect---Accused along

with the co-accused was alleged to have fired at the deceased---Accused was specifically alleged to have made two fire shots at the right shoulder and right buttock of the deceased---One of the co-accused who was also alleged to have fired at the right buttock of the deceased was already granted bail with the observation that eight different accused persons were alleged to have fired at the right buttock of the deceased ; that wound on right buttock of deceased showed a cluster of holes located in close proximity inter se, but none of the accused was shown to be armed with a soft bore (0.12 bore) weapon---Same observation was attracted to the present accused's case---Equity of treatment had to be maintained between the accused and co-accused who had already been granted bail---Other allegation against accused was of firing at right shoulder of deceased, but said injury was not supported by medical evidence---Accused was no more required for purposes of any recovery or investigation---Case was one of further inquiry into guilt of accused---Accused was admitted to bail accordingly.

Muhammad Ajmal Adil for Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State with Shafique S.I.

Rana Liaqat Ali Khan for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner, Kalay Khan alias Kallu faces the allegation that he being armed with pistol .30-bore joined by eight others, all armed with firearms of different bores, fired at Muhammad Saleem and murdered him at 2.00 p.m. on 22-9-2012. The petitioner specifically fired twice at the right shoulder and right buttock of the deceased. The motive behind the occurrence pertained to a previous murder-case, Jahangir being the deceased thereof.

2. After hearing learned counsel for the parties and perusing the record, it is observed that a co-accused of the petitioner, namely Ghulam Qadir, who allegedly fired at the right buttock of the deceased, was granted post-arrest bail vide order dated 20-3-2014, made by this court in Crl. Misc.No.1492-B of 2014, with the following observations:--

"It is observed that the complainant has bracketed eight accused together, with the liability of firing at the right buttock of the deceased. There are eight entry holes, each measuring 0.1 cm diameter, as can be visualized from the postmortem examination report of the deceased. The Investigating Officer failed to verify the story of F.I.R. as narrated by the complainant in complete terms as he declared all the accused innocent during investigation but Kalu, Ali Ahmad and Ghulam Qadir (petitioner) accused. Learned Deputy Prosecutor General Punjab has seen the pictorial diagram, a part of the necropsy report again and again and looked perplexed, if cluster of injuries shown therein, could be caused by a rifled weapon(s). None of the accused had been shown armed with a soft bore weapon. All the entry-holes on the right buttock of the deceased are located in close proximity inter se. Who knows that all of these injuries may be the result of a single fire shot of a .12 bore weapon."

The reproduced observations, as above, are equally attracted to the petitioner's case so far as the allegation of firing by him at the right buttock of the deceased is concerned. The other allegation against him that he hit right shoulder of the deceased with a fire-shot is not supported by the medical evidence as necropsy report shows no injury-mark at the said locale. There, however, a firearm injury may be seen at the left shoulder of the deceased, but it is an exit wound. No other role than the one, as mentioned above, has been attributed to him. His case seemingly looks at par with that of Ghulam Qadir accused, already granted bail on

20-3-2014, as pointed to hereinabove. Equity of treatment has to be maintained between them. The petitioner was taken into custody on 30-11-2012 and he is no more required for the purpose of any recovery or investigation etc. There exist reasonable grounds to believe that his (petitioner) case calls for further probe into his guilt within the scope of section 497(2), Cr.P.C. Therefore, this application is allowed and petitioner is admitted to post-arrest-bail subject to furnishing bail bonds in the sum of Rs.2,00,000 (two lacs) with two sureties each in the like amount to the satisfaction of the learned trial court.

MWA/K-34/L Bail granted.

2014 P Cr. L J 237

[Lahore]

Before Shahid Hameed Dar, J

Mst. NOORAN BIBI alias BANO---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.17342-B of 2012, decided on 14th December, 2012.

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

----Ss. 498 & 497(2)---Penal Code (XLV of 1860), Ss. 302, 148, 149 & 109---Qatl-e-amd, rioting armed with deadly weapons, unlawful assembly, abetment---Ad-interim pre-arrest bail, confirmation of---Further inquiry---Accused, a female---Case of no evidence based on mere "firm belief" of complainant---Material prosecution witnesses joining investigation belatedly---Probability of false implication of accused---Effect---Allegation against the accused-lady was that she was involved in the murder of deceased since prosecution witnesses allegedly heard her whispering the same fact in the ear of her daughter---Complainant simply showed his "firm belief" about the alleged involvement of accused and failed to hint at any evidence in the F.I.R. as to how the accused had abetted the murder of deceased---Prosecution witnesses who allegedly heard the accused whispering joined the investigation more than four months after the occurrence without offering any explanation for such delay---Said witnesses were related to the complainant, therefore, they should have disclosed what they had heard, to the complainant at the earliest---False implication of accused due to malice and ulterior motives of complainant could not be ruled out in such circumstances---Accused was a female, therefore, her case was also covered under S.497(1), Cr.P.C.--- Case was one of further inquiry into guilt of accused---Ad interim pre-arrest bail already granted to accused was confirmed in circumstances.

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

----Ss. 498 & 497---Bail---Scope---Accused was implicated for the offence on basis of "firm belief" of complainant---Evidentiary value--- Such belief on part of complainant could not be equated with admissible piece of evidence as it simply showed that complainant speculated

about the involvement of accused in the crime.

Rana Muhammad Arshad for Petitioner.

Ms. Muqaddas Tahira, Additional Prosecutor-General Punjab for the State.

S. H. Shahzad Azmat for the Complainant.

Khalid Abu Bakar, DSP, CIA, Cantt. Lahore.

ORDER

SHAHID HAMEED DAR, J.---Mst. Nooran Bibi alias Bano (petitioner) seeks bail before arrest in case F.I.R. No.844 of 2012 dated 20-7-2012 registered for offences under sections 302, 109, 148, 149, P.P.C. at Police Station Nashtar Colony, Lahore.

2. Precisely, the prosecution case, as narrated by Muhammad Aslam (complainant) is that his son Mudassar alias Babu contracted marriage with Mst. Ansa daughter of Riaz Ahmad (accused) without the blessings of her parents; Riaz Ahmad (accused) telephonically contacted his son and asked him to visit his dera who went to the said place where Riaz Ahmad and Tawakal joined by an unknown accused committed his murder at about 5-00 p.m. on 20-7-2012; Mst. Bano Bibi (also known as Mst. Nooran Bibi petitioner) earlier to the occurrence, visited his house, met her daughter Mst. Ansa Bibi and told her that she was going to a hospital to fetch medicine; he on receipt of the information qua the occurrence reached the spot and found the dead body of his son lying in the courtyard of the dera of the accused, smeared with blood; he firmly believed that Mst. Bano Bibi (petitioner) was also involved in the occurrence.

3. The complainant produced Muhammad Ashraf and Ali Sher before the Investigating Officer on 16-4-2012 who rendered their statements under section 161, Cr.P.C. and contended that Mst. Bano Bibi while visiting the house of the complainant spoke in a whisper with her daughter Mst. Ansa that she and her husband had decided to murder Mudassar alias Babu. Interestingly, the names of above-said witnesses have not been cited in the F.I.R.

4. Learned counsel for the petitioner submits that it is a case of no evidence against the petitioner and she has been falsely involved in this case only due to malice and ulterior motives of the complainant who was aggrieved of the marriage of his son with Mst. Ansa as he did so without his consent; further submits that the names of the witnesses of abetment are not mentioned in the F.I.R. and they joined the investigation belatedly.

5. On the other hand, learned Additional Prosecutor-General Punjab assisted by learned counsel for the complainant opposes with the contention that the accused-petitioner is fully involved in the crime alleged, as she murmured in the ear of her daughter immediately before the occurrence that they had planned to dispose of her husband; the petitioner was found involved in the occurrence during the course of investigation and her name has been placed in column No.3 of the challan.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the complainant has simply shown his 'firm belief' about the alleged involvement of the accused/petitioner in this case and he failed to hint at any evidence in the F.I.R. as to how the

accused lady had abetted the occurrence. Mere expression of 'firm belief' by the complainant cannot be equated with an admissible piece of evidence as it simply shows that he speculated about the involvement of the petitioner in the crime. The witnesses Ashraf and Ali Sher joined the investigation on 16-11-2012, more than four months after the occurrence and offered no explanation as to the period they kept silent. Muhammad Ashraf happens to be real brother of the complainant, whereas, Ali Sher is a relation to Muhammad Ashraf. Had any such dialogue, as mentioned above, taken place between the petitioner and her daughter Mst. Ansa and taken notice of by the witnesses, they being related to the complainant, should have disclosed this fact to him at the earliest. The massive unexplained delay in joining the investigation by the said witnesses, certainly reflects on the veracity of allegation of abetment, against the petitioner. The false implication of the petitioner due to malice and ulterior motives of the complainant, in the backdrop of the circumstances, mentioned hereinabove, cannot be ruled out. No doubt, the scope of bail before arrest is narrow but not to be rendered narrower on flimsy grounds and it should be effectively stretched to its limits in a case where an innocent person faces the ostensible danger of being arrested by the police for some tainted purpose, as designed by the complainant. Being a female accused, the case of the petitioner is covered by section 497(1), Cr.P.C. Sufficient reasons exist to believe that the petitioner's case calls for further probe into her guilt as contemplated under section 497(2), Cr.P.C.

7. Resultantly, the instant application is accepted and the ad interim pre-arrest bail granted to the petitioner vide order dated 30-11-2012 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of learned trial Court.

MWA/N-10/L Bail confirmed.

2014 P Cr. L J 396

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD SAEED---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.15650-B of 2012, decided on 8th November, 2012.

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

----S. 497(2)---Penal Code (XLV of 1860), S. 302/34---Qatl-e-amd, common intention---Bail, grant of---Further inquiry---Implication of accused on basis of second supplementary statement before police--- Divergent opinions during investigations qua participation of accused in the offence---Effect---Accused was nominated for the offence for the first time when both the eye-witnesses rendered secondary statements (before the police) claiming that they had identified the accused as the person who had fired at the deceased---Said witnesses

did not disclose the source through which they learnt about participation of the accused in the offence, and such hesitation on part of witnesses in disclosing their source of knowledge was a crucial circumstance---Initially accused was declared as innocent by the investigating officer, however subsequently a fresh report under S.173, Cr.P.C. was prepared and accused was placed in column No.2 of the challan---During last round of investigation accused was (again) found involved in the occurrence---Such divergent opinions of investigating officers about alleged participation of accused in the occurrence were relevant for consideration at bail stage---Abscondence of accused did not adversely affect his bail petition as his case called for further probe into his guilt within the scope of S.497(2), Cr.P.C.---Accused was admitted to bail accordingly.

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

----Ss. 497 & 173---Bail---Investigations qua participation of accused in the offence---Divergent opinions---Relevancy---Accused initially declared as innocent by investigating officer---Subsequent investigation finding accused involved in the offence---Effect---Such divergent opinions of investigating officers about alleged participation of accused in the offence were relevant for consideration for bail plea of accused.

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

----S. 497---Bail---Abscondence of accused---Effect---Abscondence of accused would not adversely affect the outcome of his bail petition if sufficient reasons existed to believe that his case called for further inquiry into his guilt within the scope of S.497(2), Cr.P.C.

Ch. Waris Ali Janjua for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor-General Punjab with Waheed ASI for the State.

Muhammd Sajjad Amin for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.487, dated 23-9-2010, under sections 302, 34, P.P.C., registered at Police Station Saddar Arifwala, District Pakpattan Sharif.

2. Precisely the prosecution case as narrated by Muhammad Eisa (complainant) is that his brother Muhammad Amin while riding a motorcycle reached the agricultural land of one Ghulam Rasool where he was intercepted by three persons, armed with pistol .30 bore each, one out of whom Muhammad Bashir fired a shot with his weapon which landed at the head, close to left ear of his brother and pierced across the skull from the other side, one of the unknown accused also made a fire shot which hit the neck area of his brother; the occurrence was witnessed by Manzoor Ahmad and Muhammad Sharif; the motive behind the occurrence pertained to the fact that accused Bashir had developed illicit relationship with his niece, who asked him for her hand but he rejected his request.

3. The eye-witnesses Manzoor Ahmad and Muhammad Sharif were examined under section 161, Cr.P.C. on 23-9-2010 by the I.O. whereby they endorsed the story of F.I.R. in

entirety. Both of them however, rendered another statement on 24-9-2010 and on this occasion, they nominated Muhammad Saeed (petitioner) with the liability to have fired at the neck of the deceased, without disclosing the source of their knowledge qua the said fact.

4. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner's name figures, for the first time, as an accused when, both the eye-witnesses, Manzoor Ahmad and Muhammad Sharif rendered secondary statements on 24-9-2010 with the contention that they had identified him and it was he, who had fired at the neck of the deceased. They however, did not disclose the source through which they learnt about the alleged participation of the accused/petitioner in the occurrence. Interestingly, both the eye-witnesses categorically contended before the I.O. on 23-9-2010 while rendering statements under section 161 Cr.P.C. that an unknown accused, who accompanied Muhammad Bashir accused, fired a missile which passed through the neck of the deceased. The hesitancy on their part in hinting at the source of their knowledge is a crucial circumstance which cannot be lost sight of easily. It appears from the record that only one prosecution witness has been recorded by the trial Court so far notwithstanding a categorical direction of this court, made on 17-7-2012 in Criminal Miscellaneous No.8251-B of 2012, that the trial of the accused-petitioner be concluded expeditiously, within, shortest possible time. Divergent pleas has been raised on both the sides as to who actually contributed towards delay in conclusion of the trial but I find from the record that much of the time had gone wasted, due to repeated strike calls by the local bar association. The petitioner was arrested in this case on 9-5-2012 but not before he had been declared a proclaimed offender during investigation and a report under section 512, Cr.P.C. stood submitted against him by the I.O., before the learned trial Court. He was, however, declared innocent by the I.O. who opined about the F.I.R. case having gone untraced. On an objection raised by the prosecution branch, the I.O. prepared a fresh report under section 173, Cr.P.C., placing the name of the petitioner in its Column No.2. In the last round of investigation conducted by the RIB Sahiwal, the petitioner and his co-accused Muhammad Bashir were found involved in the occurrence. The divergent opinions of the I.Os. about alleged participation of the petitioner in the occurrence are relevant for consideration of the bail plea of the petitioner. Sufficient reasons exist to believe that the petitioner's case calls for further probe into his guilt, within the scope of section 497(2), Cr.P.C., hence his alleged abscondence does not adversely affect the outcome of this petition. Therefore, the instant application is allowed and petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2 lacs with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/M-35/L Bail granted.

2014 P Cr. L J 628

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD ANWAR---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.2080-B of 2013, decided on 6th March, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)--- Penal Code (XLV of 1860), Ss. 377, 386, 500, 364-A & 120-B---Unnatural offences, extortion by putting a person in fear of death or grievous hurt, defamation, kidnapping or abducting a person under the age of fourteen, criminal conspiracy---Bail, refusal of---Accused allegedly induced the co-accused to commit sodomy with the victim (complainant's son) and he also recorded the act of sodomy on his cell phone so as to blackmail the complainant for extorting money---Accused being in league with the co-accused schemed to stigmatize the complainant's family and blackmail him in the process---Accused actively contributed towards the commission of the offence by letting the co-accused use his premises for an immoral activity and also recorded the act of sodomy, with intent to extort money from the complainant---Witnesses in whose presence accused extorted money from the complainant consistently supported the prosecution case---Alleged victim gave an account of his ordeal while rendering his statement before the Investigating Officer---Medical certificate of the victim rendered necessary corroboration to the accusations contained in the F.I.R.---Offence alleged fell within the prohibitory clause of S.497(1), Cr.P.C.--- Accused was denied bail in circumstances.

Ch. Muhammad Lehrasib Khan Gondal for Petitioner.

Mrs. Muqadass Tahira, Additional Prosecutor-General Punjab with Fazeel Ahmad A.S.-I. for the State.

Ch. Muhammad Ashraf Sohawa for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.201, dated 24-10-2012, under sections 377, 386, 500, 364-A, 120-B, P.P.C., registered at Police Station Budyana, District Sialkot.

2. Precisely the story of F.I.R. as setup by Muhammad Rashid (complainant) is that Muhammad Anwar (petitioner) joined by his co-accused Usman alias Osama hatched up a conspiracy to blackmail him and in line whereof he, the accused-petitioner, through his son Awais, invited Sheraz aged 6/7 to his house and confined him at his haveli where Usman alias Osama accused committed sodomy upon him on the inducement of Muhammad Anwar (petitioner); the act of sodomy was picturized by the petitioner through his cell phone; the

accused-petitioner approached Muhammad Rashid (complainant) at about 4-00 p.m. on 17-10-2012 in presence of Nadeem Akhtar and Atif Naeem to demand from him a sum of Rs.1 lac and to save his honour, the latter paid Rs.10,000 to the former and also beseeched him not to malign his family name; the accused-petitioner again came to his house and demanded more money from him but he refused whereon he left, extending threats of dire consequences.

3. Learned counsel for the petitioner submits that the petitioner has not committed the crime alleged and he has been falsely involved in this case by the complainant either due to some misunderstanding or under a malicious plan; the petitioner himself moved an application before the SDPO Pasrur on 20-10-2012 with the request that sanctity of his haveli had been violated by Usman alias Osama accused to commit unnatural offence with minor Sheraz and got the scene picturized by one Subhan, so as to blackmail the complainant; the petitioner also moved an application before the Ex-Officio Justice of Peace under section 22-A, 22-B, Cr.P.C. for registration of a case as police did not attend to the grievance of the petitioner, who is innocent, having not committed the crime.

4. On the other hand, learned Additional Prosecutor-General Punjab assisted by learned counsel for the complainant opposes with the contention that the accused-petitioner is not only the master-mind of the whole occurrence but he, in furtherance of the common intention of all, also prepared an obscene film to blackmail the complainant; the cited witnesses, Nadeem Akhtar and Atif Naeem joined investigation and fully corroborated the story of F.I.R.; the alleged victim Sheraz was examined under section 161, Cr.P.C. on 2-11-2012 who implicated the petitioner in this case within the meaning of F.I.R.; the petitioner led to the recovery of said video film, the memory card and cash amount of Rs.5,000 on 2-11-2012; lastly submits that the offence committed by the petitioner is heinous, hence he may not be granted the relief prayed for.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the allegation against the petitioner is heinous as well as sensational. He, having foreknown the movement(s) of the complainant, who intended to report the criminal act of the accused to the police, submitted an application before the police for registration of a case against Usman alias Osama accused, which, was a smart move on his part. He however failed in his bid as, application filed by him was rejected by the police being false. He also filed a petition under section 22- A, 22-B, Cr.P.C. against the said accused before the Ex-Officio Justice of Peace, Pasrur but withdrew it on 8-11-2012, as report submitted by the SHO was detrimental to his version. Even otherwise, the aforesaid contention of the petitioner is fantastic and unbelievable being preposterous. There exist reasons to believe that the petitioner being in league with his co-accused schemed to stigmatize the complainant's family and blackmail him in the process. The petitioner actively contributed towards commission of the alleged offence by not only letting his co-accused use his haveli for an immoral activity but also picturized the devilish act of the sodomite, with intent to extort money from the complainant. A poor child of 6/7 years of age was made to succumb to bestial designs of an active-agent. The witnesses in whose presence the accused-petitioner extorted money from the complainant and still demanded more, consistently support the prosecution case. The alleged victim gave an account of his ordeal, while rendering statement under section 161, Cr.P.C. before the I.O. The medical certificate of the poor child renders necessary corroboration to the accusations, contained in the F.I.R. The Investigating Officer also added

an offence under section 364-A, P.P.C. during the course of investigation. The offence committed by the petitioner is well-covered by the prohibition of section 497(1), Cr.P.C.

6. For the discussion, supra I am not inclined to accept this application, which is dismissed accordingly.

MWA/M-106/L Bail refused.

2014 P Cr. L J 828

[Lahore]

Before Shahid Hameed Dar and Muhammad Yawar Ali, JJ

NAZIR AHMAD---Appellant

Versus

The STATE and 4 others---Respondents

Criminal Appeal No.857 of 2003, heard on 25th February, 2013.

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

----S. 417(2-A)--- Appeal against acquittal--- Considerations for interference in "appeal against acquittal" and in "appeal against conviction"---Considerations for interference in appeal against acquittal, and in appeal against conviction, were altogether different---Judgment of acquittal could not be upset sparingly, as accused would enjoy double presumption of innocence, one relating to the pre-judgment stage, that every accused was innocent, till proved otherwise, and the other one, through a judicial verdict.

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

---Ss. 302, 337-A(ii), 337-F(i)(iii)(iv), 337-L(2), 34 & 109---Criminal Procedure Code (V of 1898), S. 417(2-A)---Qatl-e-amd, causing Shajjah-i-Madihah, Damihah, Mutalihimah, Mudihah, common intention, abetment---Appeal against acquittal---Reappraisal of evidence---Counsel for appellant/complainant, had failed to point out any illegality, infirmity or improbability in the impugned judgment of acquittal, except for repeating the accusations---Present was not a case requiring interference with the impugned judgment, which appeared to have been passed strictly in line with the settled principles of law---Complainant, did not claim his presence at the hot-spot at the crucial hour and he with a view to establish his presence, had massively improved upon his previous statement while rendering his testimony---Two other names of the eye-witnesses figured in complaint, but despite being independent persons, were not produced by the prosecution at trial, and were given up, as unnecessary---Presence of the complainant at the relevant time of incident, having not been established, his improved version, qua witnessing the occurrence, was excluded from consideration---In view of massive delay in medical examination of the deceased, it could be said that none of the eye-

witnesses had witnessed the occurrence---Medical evidence, did little good to prosecution's case---Recovery of weapons had rightly been disbelieved by the Trial Court, as none of those was stained with blood---Time of occurrence, could be much earlier than one, claimed by unreliable and rejected eye-witnesses in their evidence---Reason recorded by the Trial Court for acquittal of accused, were in line with the evidence on record and circumstances mentioned there---Trial Court had acted strictly in accordance with law and principles governing the safe administration of criminal justice---Reasons, whereon acquittal of accused was based were neither artificial nor ridiculous---Well-reasoned judgment of acquittal could not be interfered with in appeal---Appeal against acquittal was dismissed, in circumstances.

Sikandar Hayat's case 1995 SCMR 616 and Noora and another v. The State PLD 1973 SC 469 rel.

Zafar Iqbal Chohan for Appellant.

Khurram Khan, Deputy District Public Prosecutor for the State.

Ch. Saleem Akhtar for the Complainant.

Date of hearing: 25th February, 2013.

JUDGMENT

SHAHID HAMEED DAR, J.---Nazir Ahmad-complainant/ appellant by filing this appeal under section 417(2-A), Cr.P.C. has challenged judgment dated 27-10-2003 passed by the learned Additional Sessions Judge, Pakpattan Sharif, whereby respondents Nos.2 to 5, Farrukh, Saeed, Muhammad Nawaz and Muhammad Din were acquitted of all the charges, on extension of benefit of doubt, during trial, in respect of case-F.I.R. No.337/2002, dated 19-7-2002, for offences under sections 302, 109, 337-F(iv), 337-A(ii), 337-F(iii), 337-F(i), 337-L(2) read with section 34, P.P.C., registered at Police Station Saddar Arifwala, District Pakpattan Sharif.

2. Precisely the facts giving rise to this appeal are that Nazir Ahmad-complainant (P.W.8) got the aforesaid F.I.R.-case registered alleging therein that his brothers, Muhammad Rafique (deceased) and Faqir Muhammad (P.W.9), on their turn of water, irrigated the agricultural land on 19-7-2002; Faqir Muhammad (P.W.9) also kept a vigil on the watercourse; it was at about 5-00 a.m., when respondents, Saeed, armed with hatchet, Farrukh, armed with sabbal, Muhammad Nawaz, armed with hockey, and Aamir (juvenile), armed with sabbal, all of a sudden reached there and tortured Muhammad Rafique (deceased); respondent-Saeed gave a hatchet blow from its wrong-side on his head, followed by another four blows, two at his right and left arm and one at his left calf; Aamir (juvenile) shoved his sabbal repeatedly into his left and right calves, whereas respondent-Farrukh authored four injuries by means of his weapon at his right thumb, right calf, posterior left thigh and left calf; respondent-Muhammad Nawaz inflicted eight injuries with his hockey at the back, left elbow, left shoulder, right thumb, right shoulder, right thigh, left calf and right calf of Muhammad Rafique (deceased), due to which he fell onto the ground crying in pain, which attracted Faqir Muhammad (P.W.9), Istadad and Muhammad Anwar P.Ws. (given up) to the spot, who also witnessed the occurrence; the witnesses beseeched the accused, rescued Muhammad Rafique and shifted him to hospital at Arifwala; examining the injuries of Muhammad Rafique, the

Medical Officer issued Medico-Legal Report No.506/2002, dated 19-7-2002 and admitted him in hospital as indoor patient. Motive behind the occurrence was that Nazir Ahmad-complainant/appellant (P.W.8) along with his brothers purchased six acres of agricultural land, which caused grudge to the accused; Muhammad Din-respondent extended threats of dire consequences to his brother Muhammad Sharif Master about twenty days back, if he would not agree to his offer of exchange of land with him; the occurrence was committed by the accused on the abetment of respondent-Muhammad Din.

3. The complainant (P.W.8) being in possession of a copy of medical certificate of the injured, came across Muhammad Ijaz, ASI (P.W.11), at 4.35 p.m. on the same day at Hota Morr, where, the latter recorded his statement (Exh.PK) and dispatched it to the Police Station Saddar Arifwala (Pakpattan Sharif), on the basis of which Nazir Ahmad, MHC (P.W.4) chalked out formal F.I.R. (Exh.PE), at 4-50 p.m. for offences under sections 337-A(ii), 337-F(iii), 337-F(iv), 337-F(i), 337-L(2)/34 P.P.C., the same day, against the above named accused. On deterioration of his condition, Muhammad Rafique was referred to General Hospital, Lahore, for treatment and management of his injuries, where he died at 10-30 p.m., on 3-8-2002, which led to insertion of section 302, P.P.C. in this case by the Investigating Officer, Ajmal Saeed, SI (P.W.12).

4. To prove its case, the prosecution produced twelve witnesses. Nazir Ahmad-complainant (P.W.8) and Faqir Muhammad (P.W.9) tendered ocular account of the occurrence, whereby they claimed to have seen respondents Nos.2 to 4, Farrukh, Saeed and Muhammad Nawaz along with their co-accused Aamir (juvenile) inflicting injuries on various parts of the body of Muhammad Rafique (deceased), who fell down badly wounded. He was taken to the hospital, but succumbed to the injuries, as noted above, at General Hospital, Lahore, on 3-8-2002. Both the eye-witnesses also deposed about the allegation of conspiracy/ abetment against Muhammad Din (respondent No.5). They stated that twenty days before the occurrence, respondent-Muhammad Din presented an idea of exchange of land to Muhammad Sharif Master and on his denial, the respondent extended threats of dire consequences. Dr. Ghulam Fareed Khichi (P.W.3) medically examined Muhammad Rafique (deceased) produced before him in injured condition, through Medico-Legal Report (Exh.PC). Dr. Ashfaq Hussain (P.W.2) proved the postmortem examination report (Exh.PA). Rashid Ahmad, constable (P.W.5) and Muhammad Sharif (P.W.7) supported the recovery of crime weapons from the accused-respondents. Muhammad Ijaz, ASI (P.W.11) and Ajmal Saeed, SI (P.W.12) gave an account of the investigation, conducted by them one after the other. The rest constitutes almost formal evidence.

5. When examined under section 342, Cr.P.C., all the accused denied the allegations against them and also refuted the incriminating evidence produced by the prosecution. They raised the plea of false involvement in this case owing to previous enmity. None of them opted to appear as his own witness under section 340(2), Cr.P.C. nor they adduced the defence evidence. They all claimed that it was an unseen occurrence, having happened in dying-hours of the night and they termed themselves innocent.

6. The learned trial Judge acquitted the respondents-accused of all the charges through the impugned judgment, being aggrieved of which, the complainant/appellant filed the titled appeal with the prayer that the impugned judgment may be annulled and accused-

respondents may be convicted/sentenced accordingly.

7. Learned counsel for the appellant has argued that the prosecution successfully proved its case by bringing home the charge of murder against the accused beyond any shadow of doubt; Nazir Ahmad-complainant (P.W.8) and Faqir Muhammad (P.W.9) are natural witnesses of the occurrence, who furnished confidence-inspiring statements during trial but badly overlooked by the learned trial Court in a non-serious manner; both the witnesses also supported the allegation of conspiracy against respondent Muhammad Din, but that part of their statements has also been rejected without any cogent reason; the respondents except for Muhammad Din actively participated in the occurrence and caused countless injuries on the body of the deceased; the eye-witnesses are not interested witnesses being not inimical to the accused and their statements do not suffer from material contradictions and major discrepancies.

8. Learned counsel appearing on behalf of the accused-respondents supported the acquittal of the respondents. Learned Deputy Prosecutor-General Punjab, however, supported this appeal but in a lukewarm manner.

9. After hearing learned counsel for the parties and perusing the record with their able assistance, it is observed that considerations for interference in appeal against acquittal and in appeal against conviction are altogether different. A judgment of acquittal cannot be upset sparingly as the accused would enjoy double presumption of innocence, one relating to the pre-judgment stage, that every accused is innocent till proved otherwise and the other one, through a judicial verdict. Learned counsel for the appellant has failed to pinpoint any illegality, infirmity or improbability in the impugned judgment except for repeating the accusations, like it was so done by the prosecution witnesses in their testimonies. The Hon'ble Supreme Court of Pakistan in Sikandar Hayat's case reported as 1995 SCMR 616 formulated following points, holding them well-settled principles to be kept in view while dealing with an appeal against acquittal:--

"(i) With the acquittal, the presumption of the innocence of the accused becomes double; one initial, that till found guilty he is innocent, and two, that after his trial a Court below has confirmed the assumption of innocence;

(ii) Unless all the grounds on which the High Court had purposed to acquit the accused were not supportable from the evidence on record, Supreme Court would be reluctant to interfere, even though, upon the same evidence it may be tempted to come to a different conclusion;

(iii) Unless the conclusion recorded by a Court below was such that no reasonable person would conceivably reach the same, the Supreme Court would not interfere;

(iv) Unless the judgment of acquittal is perverse and the reasons therefor are artificial and ridiculous, the Supreme Court would not interfere, and

(v) The Supreme Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion, and that too, with a view only to avoid miscarriage of justice and for no other purpose."

Following the aforesaid principles and yardstick, we have reappraised the evidence and events of this case, which lead us to believe that it is not a case requiring interference with the impugned judgment, which, to our considered view, appears to have been passed strictly in line with the settled principles of law. We do not feel impressed by the argument of learned counsel for the appellant, who, for most of the time, harped on the allegation that the respondents-accused committed the crime and both the witnesses of ocular account remained present at the spot at the relevant time of occurrence. The learned trial Judge disbelieved the ocular version, furnished by Nazir Ahmad-complainant (P.W.8) and Faqir Muhammad (P.W.9) by holding that they were not present at the place of occurrence as it so flowed from their testimonies. We find that Nazir Ahmad (P.W.8) did not claim his presence at the hot-spot at the crucial hour/while rendering an oral statement (Exh.PK), recorded by Muhammad Ijaz, ASI (P.W.11), which categorically shows that the deceased went to his agricultural land in the company of his brother Faqir Muhammad (P.W.9) and none else. Two other names of the eye-witnesses, Istadad and Muhammad Anwar figure in complaint (Exh.PK), who despite being independent persons were not produced by the prosecution at trial and given up as unnecessary. Nazir Ahmad-complainant with a view to establish his presence massively improved upon his previous statement (Exh.PK), while rendering his testimony, as P.W.8 and he was duly confronted with his earlier recorded statement as per requirement of law, which not only dented the said particular aspect of his version, rather it badly damaged creditworthiness of his statement as a whole. A belated attempt, made by the complainant to mention his presence in complaint (Exh.PK), also ended in smoke as words added therein upset the sequence and meaning of the relevant sentence. The learned trial Court while dealing with this particular skirmish categorically observed in paragraph 19 of the impugned judgment that the words added ( ) in line No.18 of complaint (Exh.PK), were not a part of the F.I.R. (Exh.PE), hence presence of the complainant at the relevant time of incident was not established and for this reason his improved version, qua witnessing the occurrence was excluded from consideration.

10. The prosecution case is left only with the statement of Faqir Muhammad (P.W.9), who too, in his anxiety to establish presence of Nazir Ahmad-complainant (P.W.8) committed the same mistake, thereby grievously injuring the veracity of his own evidence. His testimony reveals that his attention was also drawn to various innovations, he made as regards his previous statement (Exh.DD) and he failed to furnish any plausible explanation in respect thereto. He mentioned about an amazing factor that he did not accompany his brother and complainant Nazir Ahmad, when he took Muhammad Rafique (deceased) to the police station and onwards to the hospital at Arifwala. Being real brother of the deceased and that of the complainant, it was a startling and unbelievable disposition which badly reflected on, what he said in the Court.

11. Keeping in view the massive delay in medical examination of Muhammad Rafique (deceased) by Dr. Ghulam Farid Khichi (P.W.3), which is well over three hours and in lodgment of formal F.I.R. (Exh.PE), which is more than eleven hours from the time of occurrence, no other view can be possibly made that none of the eye-witnesses had witnessed the occurrence. The medical evidence, presented by Dr. Ashfaq Hussain (P.W.2) and Dr. Ghulam Farid Khichi (P.W.3) does little good to the prosecution's case. The recoveries of weapons have been rightly disbelieved by the learned trial Court as none of it was stained with blood. The time of occurrence, 5-00 a.m., may be much earlier than the one, claimed by

unreliable and rejected eye-witnesses in their evidence. All of these factors were lawfully and consciencely considered by the learned trial Court before formulating an opinion of innocence in favour of the accused, which, to our considered view, is not open to any exception. The reasons recorded by the learned trial Court for the acquittal of the respondents are in line with the evidence on record and circumstances mentioned therein, as it was unsafe to act upon the evidence of the two eye-witnesses. The infirmities and flaws pointed out in the impugned judgment assumed importance, when taken into consideration, in the backdrop of prevalent circumstances, which give rise to only one irresistible conclusion that innocence of the respondents was the only result which could be inferred and arrived at by the learned trial Court. The principles for setting aside such a judgment have been laid down in the case of Noora and another v. The State (PLD. 1973 SC 469) in the following words:--

"As an ultimate Court, we must give due weight and consideration to the opinions of the Courts below, and normally we should not interfere with their findings where we are satisfied that they are reasonable and were not arrived at by the disregard of any accepted principle regarding the appreciation of evidence. The mere fact that this Court might have taken a different view of the evidence should not be sufficient to overrule the findings of the Courts below; but we should first satisfy ourselves that there is some serious defect in the process by which the finding has been arrived at. Where such defect is discovered and the finding is not considered tenable, then it should be open to the Court to come to its own independent finding upon a re-examination of the evidence untrammeled by the opinions of the Courts below."

We find no defect in the reasoning, recorded by the learned trial Court, as it appears to have acted strictly in accordance with law and principles governing the safe administration of criminal justice. The reasons, whereon acquittal of the respondents is based on, are neither artificial nor ridiculous.

12. The upshot of the above discussion is that there exists no such compelling reason, which may necessitate interfering with the well-reasoned judgment of acquittal. Therefore, we dismiss this appeal. Respondents Nos.2 to 5, namely, Farrukh, Saeed, Muhammad Nawaz and Muhammad Din are present on bail. They stand discharged of their bail bonds.

HBT/N-17/L Appeal dismissed.

2014 P Cr. L J 893

[Lahore]

Before Shahid Hameed Dar, J

GHULAM MUSTAFA alias BAGGI---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.3442-B of 2013, decided on 25th June, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), S. 302/34---Qatl-e-amd, common intention---Bail, grant of---Further inquiry---Inefficiency and delay by police in sending medical evidence to concerned laboratories---Effect---Accused was alleged to have murdered his wife by strangulating her---Dead body of deceased was found in a putrefied state---Medical officer who performed autopsy on the body removed certain body parts and sealed them in parcels to send them to the police for further dispatch to Chemical Examiner and bacteriologist/ histopathologist---Said parcels were dispatched to laboratories by the police more than a year after they were received, which was a pathetic situation and reflected on the working and efficiency of the police---Expert reports from laboratories had not been received so far, therefore, medical evidence was still far from the stage of being a corroboratory piece of evidence---Trial of accused was at a nascent stage---Complainant took about 10 days to report the matter to the police and waited till such time that body of deceased was recovered from a far-off field---Co-accused had also been found innocent during investigation---Case against accused called for further probe---Accused was granted bail in circumstances with the observation that prosecution/complainant would be at liberty to apply for cancellation of bail granted to accused, once medical evidence in question got a proper shape and was revealed as incriminating/corroboratory material.

Muhammad Yar Khan Dah for Petitioner.

Mrs. Muqadass Tahira, Additional Prosecutor-General Punjab.

Mehmood ul Hassan DSO/SDPO Arifwala.

Taqi Abbas Akhtar, Inspector/SHO Rang Shah and Muhammad Hussain A.S.-I.

ORDER

SHAHID HAMEED DAR, J.---Ghulam Mustafa alias Baggi (petitioner) seeks bail after-arrest in case-F.I.R. No.149/2012, dated 17-5-2012, registered for offences under sections 302, 34, P.P.C., at Police Station Rang Shah (Pakpattan Sharif).

2. Precisely, the prosecution case as narrated by Muhammad Tufail (complainant) is that his sister Mst. Zohra Bibi married Ghulam Mustafa alias Baggi (petitioner) about three years back; she developed certain differences with real brothers of her husband whereafter she along with her husband shifted to Noor Pur Adda and started living there; she told him and others including Muhammad Sarwar, Asif Nawaz and her mother about the said fact and expressed her fears that she might be murdered by her husband and his brothers; Ghulam Mustafa (petitioner) intended to shift to some other place from Noor Pur Adda but she refused to accompany him; he and his mother however persuaded her to accompany her husband; he along with his mother and sister visited in-laws of Mst. Zohra Bibi and found her missing from the house; on asking by them, Ghulam Mustafa (petitioner) after showing some hiccups, told that she had gone to Lahore to meet some relatives and he would ask her to contact them after about 2/3 days; he learnt on 15-5-2012 that the dead body of an unknown female had been recovered from a maize-crop-field, situated in revenue limits of Chak No.60/SP, whereon he along with some witnesses visited the police station and on seeing snapshots, clothes and a pair of shoes identified the dead body to be of his sister Mst. Zohra

Bibi; his behnoi Muhammad Nawaz, maternal nephew Rab Nawaz alias Tariq Mehmood were visited by Ghulam Mustafa (petitioner), Mumtaz and Muhammad Usman on 16-5-2012 and it was Ghulam Mustafa (petitioner) who, firstly admitted before them that he along with his brother Mumtaz and Muhammad Usman had murdered Mst. Zohra Bibi by strangulating her as she was a lax-morale lady; he further told that legs and arms of Mst. Zohra Bibi were held by his co-accused Usman and Mumtaz, whereas he strangulated her to death; all the accused admitted that after murdering Mst. Zohra Bibi they threw her dead body in a maize-crop-field by loading it on a motorcycle.

The dead body of the deceased lady was dissected on 12-5-2012 at DHQ, Hospital Pakpattan Sharif by a woman Medical Officer who, after finding it putrefied did not record any finding or remarks as to its cause of death and deferred her opinion till such time, the reports from the offices of the Chemical Examiner and Bacteriologist/Histopathologist were made available. The record reveals that the said reports are still awaited, reason being, that the internal viscera were sent to the said offices by the police more than a year after they were handed over to them by the woman Medical Officer.

3. Learned counsel for the petitioner submits that it is a case of no evidence against the petitioner, who has been falsely involved in this case only due to suspicions of the complainant; the evidence of extra-judicial confession is joint in nature and conveys no legal sense; lastly submits that the petitioner was taken into custody on 23-5-2012 and he has been languishing in jail ever since for none of his fault.

4. On the other hand, learned Additional Prosecutor-General Punjab opposes with the contention that the accused/petitioner is solely responsible for causing death of the ill-fated lady as he kept her whereabouts hidden for a number of days and he did so under a calculated-move and plan; the evidence of extra-judicial confession rendered by three witnesses Muhammad Nawaz, Rab Nawaz and Asif Nawaz connects the petitioner with the commission of offence; the Investigating Officer was in-league with the accused side as he, despite having received the internal viscera of the deceased immediately after autopsy retained them for months with criminal intent and made every effort to destroy the said evidence; the delay in dispatch of viscera of the deceased to the said offices is not intentional rather it is due to fault of the Investigating Officer who is being proceeded against by the DPO concerned for having shown criminal negligence; lastly submits that the petitioner is well-connected with the commission of offence, hence, he may not be granted the relief prayed for.

5. After hearing learned counsel for the parties and perusing the record, it is observed that Ghulam Mustafa (petitioner) is the husband of the ill-fated lady, Mst. Zohra Bibi whose dead body was recovered on 11-5-2012 from a maize-crop-field, situated in the revenue limits of Chak No.60/SP. Initially, the dead body was found putrefied and maggots crawled in and out of it, with tongue protruding out of the mouth. The Woman Medical Officer, who performed autopsy on the dead body, removed hyoid-bone and certain other internal viscera, including stomach, liver, spleen, kidney, small intestine and large intestine, rendered them into sealed-parcels, which she delivered to the police on 12-5-2012 for their dispatch to the offices of Chemical Examiner and Bacteriologist/Histopathologist. Cause of death qua the deceased was kept under observation by the doctor till receipt of reports from the said

offices/Laboratories. It transpired during pendency of this bail-application that noted sealed-parcels had never been dispatched to the said offices by the police rather they recorded rapat No.11 on 24-5-2013 mentioning therein the said 'feat', without giving any details or reasons in respect thereto. Holding it a pathetic situation, we directed the DPO, Pakpattan Sharif to hold an inquiry into the matter and make sure that the requisite reports were made available without further delay and delinquent persons/officials were taught a proper lesson. The DPO on receipt of order dated 28-5-2013 awoke all at once and dispatched aforesaid parcels to the laboratories concerned vide Road Certificate Nos.326/21 and 327/21 dated 2-6-2013, more than a year after they were handed over to the police by the Woman Medical Officer. It was a pathetic situation, which adversely reflected on working and" efficiency of the police, especially the SHO and the DPO concerned as well as the Prosecution Branch. Despite a categorical direction of this Court made on 4-6-2013, the DPO, Pakpattan Sharif vide Memo No.11346 dated 19-6-2013 has informed that the requisite reports would be available after about seven weeks. Is it a situation to take a pride or feel sheepish, being nonchalant and apathetic, makes a point for the DPO concerned to ponder over.

The argument of learned Additional Prosecutor-General Punjab that the evidence of extra-judicial confession rendered by Muhammad Nawaz, Asif Nawaz and Rab Nawaz alias Tariq Mehmood incriminates the petitioner beyond doubt, may be of little relevance at this stage, as medical evidence is still far from the stage of being a corroboratory piece of evidence, owing to non-availability of Expert-reports, which may help autopsy-conductor declare the cause of death of the deceased. This particular piece of evidence can better be visualized, provided "reports in the making" fall to one's hand. The petitioner was taken into custody on 23-5-2012 and his trial is still at a nascent stage, as argued by his learned counsel, who pointed out that the petitioner was indicted on 11-12-2012 by the learned trial Court but there was no advancement in trial afterwards. The complainant took about 10 days to report the matter to the police and awaited till such time, when dead body of his deceased sister was recovered on 11-5-2012 from a far-off field. The co-accused of the petitioner has been found innocent during the course of investigation. There exist reasonable grounds to believe that the petitioner's case, in its present form, calls for further probe into his guilt, as envisaged by section 497(2), Cr.P.C.

Therefore, the instant petition is accepted and petitioner is admitted to post-arrest-bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

Before parting with this order, it is clarified that the complainant/prosecution would be at liberty to move under section 497(5), Cr.P.C. against the petitioner, once reports-in-issue reveal incriminating/corroboratory material and medical evidence gets a proper shape, in terms of a supporting factor.

So far as proceedings against the Investigating Officer and others are concerned a separate file (Criminal Miscellaneous No.2044-M of 2013) is being maintained by the office for adjudication.

MWA/G-25/L Bail granted.

2014 P Cr. L J 1062

[Lahore]

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

YOUNAS---Petitioner

Versus

The STATE and 2 others---Respondents

Writ Petition No.1545 of 2014, decided on 5th March, 2014.

(a) Anti-Terrorism Act (XXVII of 1997)---

----Ss. 6(2)(m), (n) & 23---Constitution of Pakistan, Art. 199---Constitutional petition---"Terrorism", meaning of---Scope---Exchange of fire with police contingent---Doubts regarding element of serious violence against police---Accused persons, 17 in number, allegedly made indiscriminate firing upon a police contingent, snatched an official rifle and ammunition, and used force and coercion to rescue one of the accused from the police---Despite the fact that firing upon police contingent was made by 17 persons, no police official received a single scratch---None of the accused received any fire shot injury at the hands of police---Uniform of none of the police officials was torn---In presence of a reasonable police contingent, it was not comprehendible as to how official arm and ammunition was snatched and as to how accused persons managed to rescue one of theirs from the police---Element of involvement of serious violence against police was lacking in such circumstances---Provisions of Anti-Terrorism Act, 1997, were not applicable in the present case---Case of accused persons was ordered to be transferred from Anti-Terrorism Court to the court of plenary jurisdiction---Constitutional petition was allowed accordingly.

Taj Muhammad v. Judge, Anti-Terrorism Court and another PLD 2003 Lah. 588 rel.

(b) Anti-Terrorism Act (XXVII of 1997)---

----Ss. 6(1)(b) & (c)---"Terrorism", meaning of---Scope---For an act to fall within the definition of "terrorism", nexus of the actions of the wrongdoer must be to terrorize the public in general and to spread the sense of fear and insecurity in the particular community or sect of people.

Syed Ferhad Ali Shah for Petitioner.

Ch. Muhammad Shabbir Gujjar, A.A.-G. along with Liaqat Ali S.-I. and Sher Bar, S.-I. for the State.

ORDER

The petitioner challenges the validity of order passed by the learned Special Judge, Anti-Terrorism Court-III, Lahore dated 15-1-2014 through instant constitutional petition filed under Art. 199 of the Constitution of Islamic Republic of Pakistan, 1973.

2. Facts necessitating the filing of instant petition, tersely, are that on 13-5-2013 at about 3-00 p.m., Liaqat Ali SI/SHO Police Station Mandi Faizabad along with police posse was on

sentrigo at Herray Road where he received an information that rival parties of F.I.R. No.172 dated 13-5-2013 registered under sections 324/379/148/149/337F(iii)/ 337A(i)/337L(2), P.P.C. at Police Station Mandi Faizabad were busy in exchanging firing whereupon at 2-45 p.m., he along with Ameer Ahmad ASI and other police contingents reached near the Dhari of Munawwar Ali Gujjar where the petitioner along with his co-accused namely Naseer Ahmad, Shabbir Ahmad alias Bhola, Tanveer Afzal, Naveed Afzal, Abbas, Asif, Ishaq, Irfan, Ghulam Mustafa alias Tariq, Younas, Shoukat, Ali Akbar, Nazir and four unknown persons while armed with firearms as being in two groups were making fire shots, on seeing the police party as well as the complainant and eye-witnesses of the above mentioned criminal case started indiscriminate firing on the police party. The complainant SHO Liaqat Ali warned them to stop firing but the same went in vain. The petitioner and his co-accused took their heels from the spot and allegedly snatched SMG Rifle bearing No.28432 from Abdul Rehman 1355/C along with 60 live bullets and two magazines and a bandolier. On hot pursuits made by the police contingents, Ali Akbar fell to the ground and was subdued by the police party but again the petitioner and his co-accused got him rescued.

3. On the conclusion of investigation, report under section 173, Cr.P.C. was prepared and was presented in special court, consequently, the case was entrusted to the above mentioned court and on application filed by the petitioner under section 23 of the Anti-Terrorism Act, 1997 to the effect that facts and circumstances of the case did not make out a case to be tried by the learned special court but the application was turned down vide impugned order.

4. In support of the instant petition, learned counsel has argued that during the alleged incident, no person from the police force received any injury; uniform of any member of the police contingents was not torn; there was no serious violence against the members of the police party which is the condition precedent to invoke the jurisdiction of special court constituted under Anti- terrorism Act, 1997, therefore, instant application may be accepted and the impugned order may be set aside. In support of his arguments, learned counsel has relied upon a case titled Taj Muhammad v. Judge, Anti-Terrorism Court and another (PLD 2003 Lahore 588).

5. Learned Assistant Advocate-General has vehemently opposed the submissions by arguing that the petitioner and his co-accused made straight indiscriminate firing at the police party and the complainant including the P.Ws. of the case mentioned hereinabove, snatched an official rifle, bandolier, magazine and bullets from Abdul Rehman constable; co-accused of the petitioner namely Ali Akbar was apprehended at the spot but again by using force and coercion, intimidation and serious violence got him rescued from the police party, in this way, by virtue of section 6(2) its clause (m) and (n) of Anti-Terrorism Act, 1997, the case in hand squarely falls within the mischief of 'terrorism' and the petitioner and his co-accused can be termed as terrorists as they displayed violence against law-enforcing agency. Lastly, it has been submitted that running epoch needs element of terrorism to be dealt with iron hands such like persons who coerce and cause serious violence against law-enforcing forces, therefore, instant petition may be dismissed.

6. Arguments heard. Record perused.

7. Section 6 of the Act ibid defines "terrorism". Its clause (b) and (c) primarily take it to

its preamble and moreso nexus of the actions of the wrongdoer must be to terrorize the public in general and to spread the sense of fear and insecurity in the particular community or sect of people. Clause (m) of the section ibid specifically relatable to the public servant excluding the forces of law enforcing agencies whereas clause (n) of the section ibid deals the forces of law enforcing, agencies. For better understanding clause (n) is reproduced as follows:--

Section 6(2)(n):

"Involves serious violence against a member of the police force, armed forces, civil armed forces or a public servant".

Now in the light of this particular clause, the narrative of the accusal has been observed that allegedly indiscriminate firing was made at the police contingent by 17 persons out of whom, 13 were nominated and 4 were unknown mentioned in the F.I.R. No person from the police party received even a single scratch, what to say about the receipt of bullet injuries. During the whole incident, uniform of any of the police officials was not torn. So far as snatching of an official rifle from Abdul Rehman 1355/C along with live bullets, magazine and bandolier is concerned; it is incomprehendible that in presence of reasonable police contingent, how the same was snatched and again Ali Akbar co-accused of the petitioner was apprehended at the spot but was got rescued by the petitioner and his co-accused. This fact again is an enigmatic to the efficiency and working of the police. No person even from the side of the accused persons mentioned in the F.I.R. received any fire shot injury at the hands of the police party. In these circumstances, the element of involvement of serious violence against police force lacks. In this regard, guidance has been sought from case of Taj Muhammad v. Judge, Anti-Terrorism Court and another reported in PLD 2003 Lahore 588 wherein this court has observed as follows:--

"It is true that if the F.I.R. in this case is to be taken into consideration then apparently some public servants had allegedly been obstructed from performance of their official duty and had also been assaulted upon by the accused party but at the same time it is equally true that most of the allegations contained in the said F.I.R. had been found during the investigation of this case to be untrue. For instance, it had been alleged in the F.I.R. that the petitioner and others were indulging in theft of electricity and it has been maintained before us by the learned Assistant Advocate-General and the learned counsel for the complainant that the accused party were illegally running a private Grid Station on their own but during the investigation no evidence whatsoever had become available on the record to support or substantiate such allegations. In the F.I.R. it has been maintained by the complainant that he had been given blows with an iron-rod on his head and nose and he had also received a brick-bat injury on his left knee but the Medico-legal Certificate issued in respect of the complainant showed that he had received only one scratch on the bridge of his nose and had not sustained any injury on his head or knee. It had also been maintained in the F.I.R. that one of the accused persons had fired at the complainant with his revolver but the bullet had got stuck in that revolver and, thus the said attempt to fire at the deceased had remained abortive. The Investigating Officer of this case has stated before us today in unequivocal terms that according to the investigation no firearm was available or used in the occurrence at all. We have further noticed that according to the F.I.R., apart from the complainant, three other public servant namely Rana Muhammad Irfan, Ahmad Khan and Ijaz Shah had also been

beaten up by the accused party during the alleged occurrence but the record of investigation shows that Ahmad Khan and Ijaz Shah were never medically examined for any injury and Rana Muhammad Irfan had sustained only a bruise on the right side of his face. No fire-arm was recovered during the investigation of this case and the use of an iron-rod was also not found by the Investigating Officer to have been established. All these facts available on the record have prima facie convinced us that the complainant party has resorted to quite a bit of exaggeration in the F.I.R. and an attempt was made therein to bolster and enhance the seriousness of the incident so as to attract the jurisdiction of a court constituted under the Anti-Terrorism Act, 1997. Such exaggeration might have been resorted to by the complainant party to teach a lesson to the accused party and to get them punished for more than what they might have actually done at the spot. This intention on the part of the complainant party to teach a lesson to the accused party also had a background. It is available on the record that the accused party had complained against the complainant party before the Federal Ombudsman and the matter had ultimately been decided against the complainant party in the recent past."

"We have further observed that according to the scheme of the Anti-Terrorism Act, 1997 it is not every disruption of or interference with the duties of a public servant or every coercion, intimidation or violence against a public servant which attract the definition of 'terrorism' contained in section 6 of the Anti-Terrorism Act, 1997 as what the provisions of section 6(2)(1), (m) and (n) to the case in hand has appeared to us to be quite suspect".

8. After considering all the pros and cons of the case, the court is of the view that provisions of Anti-Terrorism Act do not attract their applicability to the facts and circumstances of the case. Therefore, instant writ petition is allowed and the impugned order is set aside and the case of the petitioner and his co-accused is ordered to be, transferred to the court of plenary court. Thus, learned special court is directed to send the file of this case to the court of learned District and Sessions Judge, Nankana Sahib for its entrustment to the court of competent jurisdiction for its disposal in accordance with law.

MWA/Y-2/L Petition allowed.

2014 P Cr. L J 1084

[Lahore]

Before Shahid Hameed Dar and Syed Iftikhar Hussain Shah, JJ

Malik MUHAMMAD ISHAQ---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.2627/B of 2014, decided on 20th March, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S. 295-A---West Pakistan Maintenance of Public Order Ordinance (XXXI of 1960), S. 16---Anti-Terrorism Act (XXVII of 1997), S.9---Deliberate and

malicious act intended to outrage religious feelings, stirring up sectarian hatred and disrupting public peace---Bail, grant of---Administration of justice---Accused had been detained under various preventive detention orders since 22-5-2013, and he, despite having been granted bail in various cases registered under S.16 of West Pakistan Maintenance of Public Order Ordinance, 1960, and Ss. 188 & 295-A, P.P.C. by different Courts of law, had not been released from prison---Validity---Accused did not condemn or abuse or verbally attack the sect, rather he spoke in praise of the pious companions (may the Almighty be pleased with them) of the Holy Prophet Muhammad (Peace Be Upon Him) by referring to various verses from the glorious Qur'an with the pledge that their dignity, nobility and eminence was to be defended, the way it ought to be---Any person could follow any school of thought as regarded by the faith and could keep allegiance with any sect but it had to be remembered that survival as nation was only in sactarian harmony, inter-faith coherence and on the principle of 'live and let live'---No one could be left to rot in jail for an indefinite period of time to satisfy a grudge, whimsical or otherwise, of anyone---Justice could not be allowed to be brutalized to curtail life and liberty of any individual, who was hard nut to crack by police---Period of incarceration of accused, if extended, would serve no useful purpose---Bail was allowed in circumstances.

Qazi Misbah-ul-Hassan for Petitioner.

Khurram Khan, Deputy Prosecutor-General Punjab with Muhammad Asghar, DSP (Legal) and Muhammad Farooq, S.-I. for the State.

ORDER

The allegation against the petitioner, Malik Muhammad Ishaq is that he along with Maulana Sohail Abbas Naqvi, Maulana Moavia Azam Tariq, Mufti Saeed Arshad Alhussaini and Maulana Manzoor Ahmad Akkasha, addressed a gathering of 900/1000 persons at Jamia Masjid Qadeem Firdaus, Darya Khan at 9-15 p.m. on 8-2-2013 and delivered incendiary speeches by attacking the Shia-sect, recited poetry, equally inflammatory, induced the charged crowd to chant offensive slogans against the Shi'ites and provoked them to launch a crusade against them, if needed; Malik Muhammad Ishaq (petitioner), however, used language of lesser gravity and he mainly defended the nobility and piety of the Companions (May Almighty be pleased with them) of the Holy Prophet Muhammad (Peace Be Upon Him).

2. Learned counsel for the petitioner submits that the petitioner has been falsely involved in this case on the instigation of some vested quarters and allegation against him is patently false; the alleged occurrence took place on 8-2-2013 and section 9 of the Anti-Terrorism Act, 1997 has been unlawfully added to the facts of this case with a mala fide intention on 24-10-2013; the contents of the F.I.R. do not disclose commission of any cognizable offence as attribution made to the petitioner disclosed nothing but his personal faith and belief, which everyone under the law and the Constitution of Islamic Republic of Pakistan 1973 may have to follow; lastly submits that the petitioner was taken into custody in this case on 10-6-2013 and he has been languishing in jail since then only for the sin of being a follower of the faith and sect opposite to the one, as mentioned in the F.I.R.

3. Learned Deputy Prosecutor-General Punjab on the other hand opposes with the

contention that the petitioner is a constant threat to the public safety, public peace and tranquillity and his activities are grossly prejudicial to the religious harmony, coherence and brotherhood amongst different sects; the speech made by the petitioner thrilled the audience and he motivated them to show their furious sentiments against the Shia-sect; the stir created by the petitioner through his inflammatory speech put the lives of the opposite sect at peril and sectarian fever ran high due to reckless conduct of the accused; the petitioner has a long history of involvement in such-like cases and he does not look inclined to shed his irresponsible behaviour. He, however, admits that section 9 of the Anti-Terrorism Act, 1997 has been added to the list of offences, later on.

4. After hearing learned counsel for the parties and perusing the record, it is observed that the co-speakers of the petitioner delivered incendiary speeches as if they had waged a war against the Shi'ites. Though, speech allegedly made by the petitioner was also of provocative character, yet words used by him as compared to the others, might have relatively fallen with lesser severity, on the ears of the listeners. In terms of gravity and intensity, his speech may easily be segregated from the other speeches made, as it contained\an element of comparison between Shia and Sunni schools of thought. The comments made and sentiments shown by the petitioner, however, cannot be held praiseworthy, as a rationale and intellect-filled-dialogue may turn much more effective and leave much deeper impression, in contrast to an effervescent outburst of sentiments. The Holy Prophet (Peace Be Upon Him) and His pious Companions (May Almighty be pleased with them) won the hearts of their arch rivals and implacable enemies by their patience and unprecedented polity and character. The masses have to recapitulate the forgotten lesson, so as to keep the head aloft amongst the comity of nations and paint a peace-loving, enduring and tolerant society.

5. The petitioner was arrested in this case on 10-6-2013, but it does not mean that he, earlier to it, roamed about freely, like a common man without any restrictions on him, as he stood detained under various preventive-detention-orders, since 22-5-2013 and he, despite having been granted bail in various cases, registered under section 16 of Pakistan Maintenance of Public Order Ordinance 1960 and sections 188, 295-A P.P.C. etc., by different courts of law, he had not been released from the prison. A close scrutiny of the contents of the F.I.R. would reveal that the petitioner hardly condemned or abused or verbally attacked the Shia sect rather he spoke in praise or the pious Companions (May Almighty be pleased with them) of the Holy Prophet Muhammad (Peace Be Upon Him) by referring to various Verses from the Glorious Qur'an with the pledge that their dignity, nobility and eminence would be defended, the way it ought to be. One may follow any school of thought as regards the faith and one may keep allegiance with any sect but it has to be remembered that survival as a nation only lies in sectarian harmony, inter-faith- coherence and on the principles of 'live and let live'. If law-enforcing agencies fear the activities of the petitioner, then, they should critically look at their own line of action and devise a method, so that his "spell-binding" voice and tone may be used for a better purpose, in the interest of the masses. To drive and push him to jail repeatedly under various pretexts and orders may not be an absolute answer to the pain, being felt in their neck by the law -enforcing agencies. No one can be left to rot in jail for an indefinite period of time to satisfy the grudge, whimsical or otherwise, of anyone. Justice cannot be allowed to be brutalized to curtail life and liberty of an individual, who is found a hard nut to crack by the police. Without going further into the niceties of the speech, allegedly

made by the accused-petitioner, we may observe that period of his incarceration, if extended further, would serve no useful purpose.

6. For the discussion supra, this petition is allowed and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 (two lacs) with two sureties each in the like amount to the satisfaction of the learned trial Court.

MH/M-147/L Petition allowed.

2014 P Cr. L J 1468

[Lahore]

Before Shahid Hameed Dar, J

RASHID MASIH---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.7963-B of 2013, decided on 11th July, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S. 462-B---Theft of oil from a petroleum pipeline--- Bail, grant of---Incompetent investigation of case---Effect---Accused along with his-co-accused was alleged to have pilfered a sizeable quantity of oil by tampering a main underground petroleum pipeline---Main oil pipeline connecting the country had been tampered with for pilfering oil without conceiving its hazardous fall-out, as breach in the main pipeline could have flooded and set-ablaze the entire area causing massive loss of property and human lives---However, investigation of the case was so shallow that alleged offence was not backed by any incriminating evidence except for alleged recovery of twenty liters of petrol from the accused, which carried little weight as it was not compared with the oil flowing in the pipeline---Statement of complainant/employee at oil refinery required collection of circumstantial evidence, but same was not done during investigation---For investigation of a high profile case such as the present one, dexterity, craftsmanship and legal acumen were prerequisites, however investigation of the present case appeared to be of the poorest quality, brainlessly carved out and hopelessly dealt with---Due to said fallacies in the prosecution's case, accused had made out a case for bail in his favour under S. 497(2), Cr.P.C.---Accused was no more required for any recovery---Accused was released on bail accordingly with the direction that Provincial Inspector General of Police and Additional Inspector General (Investigation) should look into the efficiency, conduct and potential of the investigating officer of the present case and other officials supervising him, and formulate an opinion if the fallacies in the investigation of the present case were to be taken pride of or they asked for bemoaning and bowing the heads in acknowledgement of failure.

Fahad Ahmad Siddiqui for Petitioner.

Mrs. Muqadass Tahira, Additional Prosecutor-General Punjab along with Hanif, S.-I. for the State.

Muhammad Hanif Khan for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner seeks bail after arrest in case F.I.R. No.443, dated 27-8-2012, under section 462-B, P.P.C., registered at Police Station Saddar Farooqabad, District Sheikhupura.

2. Bashir Ahmad Malik, Admn. Officer, PARCO is the complainant of the above said case, who has alleged in the F.I.R. that Pak Arab Refinery is a joint venture of the Government of Pakistan and the Government of Abu Dhabi which supplies oil, through an underground pipeline, from Karachi to Sheikhupura and this project forms backbone of the economy of the country; Muhammad Khalid, Security Officer received an information at about 10-00 p.m. on 25-8-2012 in 'Control Room PARCO' that pressure of oil in the pipeline had gradually dropped whereon, he along with Muhammad Imran, station incharge patrolled the area; when they reached Q.B. Link canal near village Buttar they found some persons, without any veil on their faces drifting away from the pipelines and they disappeared in the paddy-crop fields, under the sheath of darkness; the complainant learnt through a spy informer that the said deserters were the pilferers of oil and they included Ashraf alias Phool, Khalid alias Bhola, Irfan alias Bhola, Khurram, Rashid Masih (petitioner), Sarwar and his brother Ramta sons of Shaukat, Arshad alias Achhi, Abid, Gulzar, Javed, Dhalla and seven unknown persons; according to his knowledge, the first four had masterminded the crime; the supervisor, Sami Masood got the area dug on 27-8-2012, in presence of the police and found an iron-clamp attached to the main pipeline, used for theft of oil which was removed and replaced by a safety-clamp; the stolen oil estimated at 1500 liters; the PARCO pipeline ran through two villages and in last two years many a theft-instances of oil were reported which were committed by an organized inter-district-gang; there existed a strong fear that the damage to the pipeline might engulf the nearby population in massive flames.

3. Learned counsel for the petitioner submits that the allegation against the petitioner is vague which is not supported by any incriminating evidence; the petitioner is not even remotely linked with the alleged occurrence and he is languishing in jail since 26-9-2012 for none of his fault.

4. On the other hand, learned Additional Prosecutor-General Punjab assisted by learned counsel for the complainant opposes with the contention that Khalid Mehmood security officer and Muhammad Imran Assistant security officer fully supported the story of F.I.R. in their statements under section 161, Cr.P.C.; the petitioner and his co-accused have committed a heinous offence as they tampered with the 'national asset' and pilfered a sizeable quantity of oil, a chunk of which, twenty liters was recovered at the instance of the petitioner on 5-10-2012; the petitioner has committed an act of terrorism which is punishable under section 6 of Anti-Terrorist Act, 1997; the offence against the petitioner catches prohibition of section 497(1), Cr.P.C., therefore he may not be granted the relief prayed for.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the contents of the F.I.R. are frightening as main pipeline of oil, connecting Karachi with rest of the country had been tampered with by the accused, for pilfering oil without ever conceiving its probable hazardous out-fall, as breach in the main pipeline could flood and set-ablaze the entire area, rendering it an inferno, which could prove disastrous, in terms of massive loss to property and human lives. It shows the heinousness of the crime. Let us see if the offence alleged is backed by some incriminating evidence against the accused or prosecution simply goes after the sensational and heinous nature thereof.

6. The allegation, as mentioned in the F.I.R. hints at the daredevilry and 'mastery' of the crime committers, who possessed the technology to manage sneaking flow of oil from the main pipeline. The F.I.R. reveals that the complainant believed more in his spy information while nominating the accused, including the petitioner, without ever perceiving as to cruciality of the vacuum and gap left therein. The dexterity, craftsmanship and legal acumen were the requisites, required for the investigation of this case, but none of it can be seen forthcoming, when looked at the police record. The investigation conducted so far is so shallow and stupid that the learned Law Officer despite having shuffled and re-shuffled the record did not himself in a position to hint at some incriminating piece of evidence against the petitioner except for the alleged recovery of twenty liters oil from him, which carried little value at this stage as it had not been got compared with the stuff flowing in the pipelines. The pattern of the statement of the complainant, as entailed in the F.I.R., required collection of circumstantial evidence, so as to connect the nominated accused with the allegation of theft of oil but no such circumstance could be spelt out from the record, save the statements of above-named two officials of PARCO, under section 161, Cr.P.C. recorded on 28-9-2012, which appeared to be a replica of the F.I.R.-story leaving aforementioned gap, wide open. The missing link may overwhelm the other thoughtless working of the Investigating Officer.

7. It, being a high-profile case, certainly required to be investigated by a proficient, masterly competent and capable Investigating Officer, but it was not to be, as the work done so far by Shahbaz Khan, SI, the Investigating Officer, in plain words, appeared to be of the poorest quality, brainlessly carved out and hopelessly dealt with. It is painfully noted that the conduct and approach of the police hierarchy as a whole is deplorable, apathetic and lamentable. Isn't it so that the incompetence coupled with mal-practices including corruption have unspeakably eroded the very foundations of the police department and that of the other sister-institutions, which often expose their vulnerability to the 'strength of the mighty' and paint a picture of despair/dismay for the common-man, who is merely an on-watcher. The corrupt-mafia has swollen itself to such a gigantic size that the law-enforcing-agencies, with their present questionable prowess find them untamable. It is high time to wake up before it is too late.

8. The petitioner, for the aforesaid fallacies in the prosecution's case has made out a case for bail in his favour within the sphere of contemplations under section 497(2), Cr.P.C. He is behind the bars since 26-9-2012 and no more required for the purpose of any recovery etc., which renders his further imprisonment inconsequential for the time being. For the discussion supra, the instant application is allowed and petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

9. A copy of this order be sent to the Inspector-General of Police, Punjab, and Additional Inspector-General of Police (Investigation), Punjab, within one week through a swift mean, requiring them to look into the efficiency, conduct and potential of the above-named Investigating Officer, the other Investigating Officer(s), if any and that of the senior police officers supervising him/them, besides having an overall critical view of the working of their department(s) and formulate an opinion, if the above discussed situation is to be taken a pride of or it asks for bemoaning and bowing the heads down in acknowledgement of failure and sheer defeat. The critical work/assessment, as directed, be completed within one month under intimation to this court through its Deputy Registrar (Judl.).

MWA/R-16/L Bail granted.

PLJ 2014 Cr.C. (Lahore) 272

Present: Shahid Hameed Dar, J.

IFTIKHAR HUSSAIN BHATTI--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 17019-B of 2013, decided on 9.1.2014.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail, grant of--Dishonoured of cheque--Accused-petitioner had deceitfully received a sum of Rs. 4,00,000/- from him with the promise to fetch him a job--Mere bouncing of a cheque without satisfaction of the basic ingredients of Section 489-F, P.P.C. hardly means anything so far is the law goes--Petitioner was behind the bars and he was no more required for the purpose of any recovery etc, therefore, no useful purpose would be served to keep him continuously incarcerated--The offence, the petitioner was charged with was punishable with three years imprisonment, which does not fall within the prohibitory clause of Section 497(1), Cr.P.C.--Therefore, this application was accepted and petitioner was admitted to post-arrest-bail. [P. 273] A

Mr. A.D Bhatti, Advocate for Petitioner.

Mrs. Muqadass Tahira, Addl: Prosecutor General Punjab for State.

Mr. Ustad Muhammad Iqbal, Advocate for Complainant.

Date of hearing: 9.1.2014.

Order

The allegation against the petitioner, Iftikhar Hussain Bhatti is that he issued a Cheque of Rs. 3,50,000/- to Imran Saleem (complainant) in the backdrop of an aborted pledge, which was presented for encashment by the latter but it was bounced by the bank due to insufficient funds.

2. After hearing learned counsel for the parties and perusing the record, it is observed that the complainant does not appear to have produced any evidence during the course of investigation as to the fact that the accused-petitioner had deceitfully received a sum of Rs. 4,00,000/- from him with the promise to fetch him a job. Mere bouncing of a cheque without satisfaction of the basic ingredients of Section 489-F, P.P.C. hardly means anything so far as the law goes. The petitioner is behind the bars since 04.10.2013 and he is no more required for the purpose of any recovery etc, therefore, no useful purpose would be served to keep him continuously incarcerated. The offence, the petitioner is charged with is punishable with three years imprisonment, which does not fall within the prohibitory clause of Section 497(1), Cr.P.C., Therefore, this application is accepted and petitioner is admitted to post-arrest-bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail granted

PLJ 2014 Cr.C. (Lahore) 563

Present: Shahid Hameed Dar, J.

MAULA BUX and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 16882-B/2012, decided on 3.12.2012.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860)--Pre-arrest bail--Confirmed by High Court--Bail, grant of--Further inquiry--Allegation of--Recovery of weapon--Place of occurrence was admittedly the agricultural land of petitioner which fact was also evident from the contents of the cross-case--MLR of injured revealed only one injury, an abrasion, at front of his neck which was declared Ghayr-jaifah damiyah (337-F(i), PPC) by the medical officer--So far as MLR of other injured was concerned, it revealed two injuries both declared Ghayr-jaifah damiyah (337-F(i), PPC), one out of which, Injury No. 2 has been caused with a fire-arm whereas, Injury No. 1, an abrasion, has been caused with a weapon, other than fire-arm as the medical officer did not declare the weapon in respect thereto--Petitioner was the complainant of FIR-case who received seven blunt weapon injuries during the occurrence, one out of which, Injury No. 4 has been declared as Uaifah (337-D, PPC), showing fracture of his 7th rib with collapse of right lung--Petitioner received five blunt-weapon injuries during the occurrence, some falling within the definition of Section 337-F(i), PPC and some u/S. 337-L(ii), PPC--Site of the occurrence, which belongs to petitioner was an important feature of the FIR-case as well as that of the cross-case which, may be a crucial factor for formulating an opinion, though tentative, as to the initiation of aggression by whom--A rib of petitioner was broken with his right lung collapsed as a result thereof and in such a situation, if his son petitioner had not timely reacted to save his father from the onslaught of the adversaries, it would have been an un-son-like behaviour--Injuries attributed to petitioner were not fully corroborated by the medical evidence--So far as the contention of the DDPP that the weapon of offence was yet to be recovered, which necessitates rejection of the bail plea of the accused--False implication of the petitioners in this case for malice and ulterior motives of the complainant and for reasons discussed herein-above may not be a remote probability--Sufficient reasons exist to believe that the petitioners' case calls for further probe into their guilt as contemplated under Section 497(2), Cr.P.C. [P. 566] A & B

1982 PCr.LJ 1286.

Mr. Abdul Rauf, Advocate for Petitioners.

Mr. Muhammad Nawaz Shahid, DDPP for State.

Malik Muhammad Ghazanfar Ali Khokhar, Advocate for Complainant.

Date of hearing: 3.12.2012.

Order

Maula Bux and Muhammad Imran (petitioners) seek bail before arrest for offences under Sections 324, 337-A(i), 337-F(i), 337-L(ii), 148, 149, PPC in a cross-case, registered on 06.11.2012 during investigation of case FIR No. 754/12 dated 04.11.2012 u/S. 337-D, 337-L(ii), 337-A(i), 341, 148, 149, PPC Police Station Saddar Depalpur (Okara).

2. Precisely, the story of cross-case as advanced by Haji Muhammad Shafi (complainant) is that demarcation of his land took place at about 11/12 noon on 29.10.2012 in presence of his father, a few notable of the area, besides himself; they were all at once attacked upon by Maula Bux (petitioner) who was armed with a sota and Muhammad Imran (petitioner) armed with pistol .30 bore, as a result of which he (complainant) and Ghulam Muhammad received injuries while other co-accused of the petitioners who were armed with fire-arms caused injuries to his brother Muhammad Rafi; the accused took away the licensed rifle .44 bore of one Muhammad Irshad Shah. The motive alleged is that Muhammad Shafi (complainant) exchanged his land with Noor Muhammad which caused grudge to the accused and for this reason they committed the crime.

3. Precisely, the story of FIR as narrated by Maula Bux (petitioner/complainant) is that he along with his sons Muhammad Yar, Muhammad Imran(petitioner) and Muhammad Ikram was getting his agricultural land, demarcated at about 11:30 a.m. on 29.10.2012 when accused Muhammad Shafi and his companions, 13 in number, all armed with different weaponry launched an attack and badly wounded him along with his sons Muhammad Imran (petitioner), Muhammad Ikram and Muhammad Yar; the motive behind the occurrence was that Muhammad Imran (petitioner) married Mst. Shahida Rafi without the blessings of her parents which infuriated the accused.

4. Learned counsel for the petitioners submits that the petitioners have been falsely involved in this case due to malice and ulterior motives of the complainant who having suppressed the real facts, got lodged a delayed false cross-case with a view to evade the consequences of the crime committed by them; Maula Bux (petitioner) received grievous injuries during the occurrence whereas, Muhammad Imran (petitioner) received multiple blunt-weapon injuries at the hands of the accused which have been suppressed by the complainant; the occurrence took place at the agricultural land of the petitioners which speaks volumes about the aggression committed by the accused; the petitioners' case calls for further probe into their guilt and they merit the relief prayed for.

5. On the other hand, learned DDPP assisted by learned counsel for the complainant opposes with the contention that the petitioners are specifically named in the cross-case with the role that they used their weapons effectively and caused multiple injuries to Ghulam Muhammad and Haji Shafi; the weapons of offence are yet to be recovered from the, accused; the MLR of Muhammad Shafi has not been prepared by the medical officer according to his injuries as he was in-league with the accused side; Muhammad Imran (petitioner) repeatedly fired at Muhammad Shafi and his act falls within the mischief of Section 324, PPC; the petitioners have committed a non-bailable offence, hence, their bail-plea may be rejected.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the place of occurrence is admittedly the agricultural land of MaulaBux (petitioner) which fact is

also evident from the contents of the cross-case. The MLR of Ghulam Muhammad injured reveals only one injury, an abrasion, at front of his neck which was declared Ghayr-jaifah damiyah (337-F(i), PPC) by the medical officer. So far as MLR of Muhammad Shafi injured is concerned, it reveals two injuries both declared Ghayr-jaifah damiyah (337-F(i), PPC), one out of which, Injury No. 2 has been caused with a fire-arm whereas, Injury No. 1, an abrasion, has been caused with a weapon, other than fire-arm as the medical officer did not declare the weapon in respect thereto. Maula Bux (petitioner) is the complainant of FIR-case who received seven blunt weapon injuries during the occurrence, one out of which, Injury No. 4 has been declared as Jaifah (337-D, PPC), showing fracture of his 7th rib with collapse of right lung. Muhammad Imran (petitioner) received five blunt-weapon injuries during the occurrence, some falling within the definition of Section 337-F(i), PPC and some u/S. 337-L(ii), PPC. The site of the occurrence, which belongs to Maula Bux (petitioner) is an important feature of the FIR-case as well as that of the cross-case which, may be a crucial factor for formulating an opinion, though tentative, as to the initiation of aggression by whom. A rib of Maula Bux was broken with his right lung collapsed as a result thereof and in such a situation, if his son Muhammad Imran (petitioner) had not timely reacted to save his father from the onslaught of the adversaries, it would have been an un-son-like behaviour. The injuries attributed to Muhammad Imran (petitioner) are not fully corroborated by the medical evidence. So far as the contention of the learned DDPP that the weapon of offence is yet to be recovered, which necessitates rejection of the bail plea of the accused, I am afraid is not of much importance, keeping in view the peculiar facts of this case and following the ratio of judgment titled Muhammad Ashraf and another vs. The State (1982 P.Cr.L.J 1286). The false implication of the petitioners in this case for malice and ulterior motives of the complainant and for reasons discussed herein-above may not be a remote probability. Sufficient reasons exist to believe that the petitioners' case calls for further probe into their guilt as contemplated under Section 497(2), Cr.P.C.

7. Therefore, the instant petition is accepted and the ad-interim pre-arrest bail granted to the petitioners vide order dated 21.11.2012 is confirmed subject to furnishing fresh bail bonds in the sum of Rs. 1,00,000/-each with one surety each in the like amount to the satisfaction bf learned trial Court.

(A.S.) Bail confirmed

PLJ 2014 Cr.C. (Lahore) 585

Present: Shahid Hameed Dar, J.

MUHAMMAD ALI--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 5518-B of 2014, decided on 13.5.2014.

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

----S. 498--Bail before arrest confirmed--Proverbal lalkara was attributed in FIR--Involvement due to relationship with co-accused--Held: Petitioner merely remained present at spot without doing any overt act--His false implication due to malice or ulterior motives of complainant, owing to fact that he was real father of main accused, could not be ruled out--Nothing is to be recovered at his instance, hence, despatching him to jail only to satisfy grudge of complainant, would serve no useful purpose--His case constitutes need for further probe into his guilt within mischief of Section 497(2), Cr.P.C. [P. 586] A

Ch. Azhar Siddique Cheema, Advocate for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab for State.

Ms. Shazia Parvez Butt, Advocate for Complainant.

Date of hearing: 13.5.2014.

Order

This is a petition filed by Muhammad Ali (petitioner) seeking for bail-before-arrest in case F.I.R. No. 76, dated 16.2.2014, under Section 302/34, P.P.C., registered at Police Station Saddar Pindi Bhattian, District Hafizabad, after having his earlier quest for bail rejected by the learned Additional Sessions Judge. Pindi Bhattian on 16.4.2014.

2. The allegation against the petitioner is that he raised Lalkaras prompting his son to kill Muhammad Boota, real father of Ehsan Ahmad (complainant), who virtually did so. This occurrence took place at 4.00 p.m. on 16.2.2014 in the backdrop of previous heart-burning between the parties over parking of a donkey-cart in front of the house of the complainant.

3. On behalf of the petitioner, it is submitted by his learned counsel that he has only been attributed a proverbial Lalkaras in the F.I.R., whilst he was empty handed and did not overt act. It is further contended that his involvement in this case is mainly due to his relationship with the co-accused, who are his real sons. It is lastly submitted that the petitioner is an aged person with poor physique and allegation against him is baseless.

4. On behalf of the complainant/State, it has been submitted that the petitioner actively participated in the occurrence and for his commanding Lalkaras, the crime could not have been committed by his co-accused. It is also submitted that no malice has been alleged by the petitioner against the complainant or the police and his involvement in this case is truly believable.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner is real father of the principal accused. Azhar Ali, who allegedly throttled Muhammad Boota to death. The other accused Javed Iqbal is also real son of the petitioner, who allegedly strangulated Usman, a brother of the complainant, but he luckily escaped the onslaught. The petitioner looks an old man with a frail structure, who, according to the allegations, possessed no arm at the time of the alleged occurrence. His delicate physique suggests that he has probably been burdened with a liability, disproportionate to his puniness. Whether or not the Lalkaras allegedly exhorted by him at the relevant time of occurrence induced his youthful co-accused to commit the crime is a question, which may better be answered at the trial stage. The opinion formulated by the Investigating Officer lends a probable impression that the petitioner merely remained present at the spot without doing any overt act. His false implication due to malice or ulterior motives of the complainant, owing to the fact that he was the real father of the main accused, could not be ruled out. Nothing is to be recovered at his instance, hence, despatching him to jail only to satisfy the grudge of the complainant, would serve no useful purpose. His case constitutes need for further probe into his guilt within the mischief of Section 497(2), Cr.P.C.

6. For what has been discussed supra, this application is allowed and ad-interim pre-arrest bail granted to the petitioner vide order dated 23.4.2014 is confirmed subject to furnishing fresh bail bonds in the sum of Rs. 2,00,000/- (two lacs) with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail confirmed

2014 Y L R 894

[Lahore]

Before Shahid Hameed Dar, J

EHSAN alias SANI---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.6895-B of 2013, decided on 20th June, 2013.

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

----S. 497---Penal Code (XLV of 1860), Ss.355, 452, 337-A(ii), 337-F(i), 337-F(iii), 337-F(v), 337-L(2), 148 &149---Assault or criminal force with intent to dishonour person, otherwise than on grave provocation, house-trespass after preparation for hurt, assault or wrongful restraint, shajjah-i-mudihah, ghayr-jaifah-damiyah, ghayr-jaifah-mutalahimah, ghayr-jaifah-hashimah, punishment for other hurt, rioting armed with deadly weapons, unlawful assembly---Bail, grant of---Accused along with co-accused persons was alleged to have trespassed into house of complainant, whereafter they beat to the injured witness and inflicted various injuries upon him---Injured witness joined investigation belatedly without offering any explanation--Statement of injured witness under S.161, Cr.P.C. was inconsistent with the story of F.I.R.,

inasmuch as, he did not contend therein to have been beaten inside the house of complainant, as claimed by the complainant in the F.I.R.---Allegation against accused was of collective and general nature and it could not be seen from the contents of F.I.R. as to which injury on person of injured had been inflicted by whom---Danda allegedly recovered at the instance of accused did not corroborate the F.I.R. or statement of injured witness, who categorically alleged that accused was armed with an iron rod at the time of the occurrence---None of the offences alleged against accused fell within the prohibitory clause of S. 497(1), Cr.P.C.---Accused was no more required for purpose of any recovery or discovery of any other act---Accused was granted bail in circumstances.

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

----S. 497(1)---Bail---Offence not falling within the prohibitory clause of S. 497(1), Cr.P.C.---For such offences grant of bail was a rule and rejection thereof an exception.

Rana Muhammad Aslam Nadeem for Petitioner.

Mrs. Muqadass Tahira, Addl: Prosecutor-General Punjab, Sabir S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Ehsan alias Sani (petitioner) seeks bail-after-arrest in case F.I.R. No.73 of 2013, dated 23-3-2013, registered for offences under sections 355, 452, 337-A(ii), 337-F(i), 337-F(iii), 337-F(v), 337-L(2), 148, 149, P.P.C., at Police Station Kassokey (Hafizabad).

2. Precisely, the prosecution case as narrated by Qasim Ali (complainant) is that he along with his family members, brother Muhammad Ameen, cousin Azmat Ali and three others was present at his house on 22-3-2013; It was at about 5:00 p.m. when ten (10) accused, including the petitioner, all armed with iron rods and hatchets trespassed onto his house by scaling over the outer walls and started thrashing his brother, Muhammad Amin. He and his family members attempted to rescue him, who ran out of the house to save himself; accused chased and took over him in a wheat crop field where they gave him merciless beating and also rendered him completely naked.

3. Learned counsel for the petitioner submits that there is delay of one day in lodgment of F.I.R., which has not been explained by the complainant in any manner; none of the offences falls within the prohibitory clause of section 497(1), Cr.P.C.; a danda has been planted upon the petitioner by the police on 31-3-2013 despite the fact that, none of the accused, as per allegations, was armed with any danda; lastly submits that allegation against the petitioner is non-specific and of general nature, hence, it cannot be said with certainty at this stage as to which injury had been caused by the petitioner.

4. On the other hand, learned Addl: Prosecutor-General Punjab assisted by learned counsel for the complainant opposes with the contention that the petitioner joined by his co-accused mercilessly beat Muhammad Ameen injured and inflicted 18 injuries on various parts of his body; the injured joined investigation on 2-4-2013 and fully corroborated the story of F.I.R. in his statement under section 161, Cr.P.C. by contending that a blow given by the petitioner caused fracture of his hand; the petitioner and his co-accused have committed a

heinous offence, therefore, they may not be granted the relief prayed for.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the injured, Muhammad Amin joined investigation in this case belatedly i.e. on 2-4-2013 and offered no explanation as to why he kept quiet for such a long period of time. His statement under section 161, Cr.P.C. is inconsistent with the story of F.I.R. inasmuch as, he does not contend to have been beaten by the accused inside the house of his brother, Qasim Ali (complainant), as regards the allegation by the latter that it was so done by the accused inside his house. None from the house of Sultan son of Khan Muhammad, whose name figures in the F.I.R. joined investigation to state that the accused-petitioner and his co-accused firstly forced their way into his house before getting into the house of the complainant. The allegation against the petitioner is of collective and general nature and it cannot be seen from the contents of the F.I.R. as to which injury on the person of the injured had been inflicted by whom. Though, the injured P.W. has burdened the petitioner with a specific injury at the fingers of his left hand, yet, the story of F.I.R. is silent about this particular fact. The petitioner allegedly got recovered a danda on 31-3-2013, which fact does not corroborate the F.I.R. or the statement of the injured P.W., who has categorically alleged that the accused-petitioner was armed with an iron rod at the time of occurrence. None of the offences, the petitioner is confronted with, falls within the mischief of prohibitory clause of section 497(1), Cr.P.C. Grant of bail in such like offences, as the petitioner is faced against, is a rule and rejection thereof an exception. The petitioner is behind the bars since 27-3-2013 and he is no more required for the purpose of recovery or discovery of any order fact.

6. Therefore, the instant petition is accepted and the petitioner is admitted to post-arrest-bail subject to furnishing bail bonds in the sum of Rs.1,00,000 (Rupees one lac) with one surety in the like amount to the satisfaction of the learned trial Court.

MWA/E-4/L Bail granted.

2014 Y L R 928

[Lahore]

Before Shahid Hameed Dar, J

Rana MUHAMMAD SOHAIL---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.18686/B of 2012, decided on 19th February, 2013.

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

----S. 497---Penal Code (XLV of 1860), Ss.302/324/148/149---Qatl-e-amd, attempt to commit qatl-e-amd, rioting armed with deadly weapons, unlawful assembly---Bail, refusal of---Accused allegedly fired at the complainant party which resulted in firearm injuries to four persons and also caused the death of the deceased---First bail application of accused before

High Court was dismissed as withdrawn, while the second one was dismissed due to non-prosecution---Plea of accused that present (i.e. third) bail application had been filed on basis of the fresh grounds that complainant party had also been summoned as accused in a private complaint, and that trial had not concluded despite a lapse of more than two years---Validity---All injured witnesses except one joined investigation and fully corroborated story of the F.I.R. in their statements under S. 161, Cr.P.C.---One of the injured witnesses burdened the complainant party for the offence and thus set-up a cross case by way of a private complaint---Said private complaint was filed more than a year after the alleged occurrence and by that time prosecution witnesses had resiled from their previous statements and changed their loyalties---Said private complaint could hardly be a fresh ground for filing present bail application---Delay in conclusion of trial was occasioned by the accused side as complainant, prosecution witnesses and eye-witnesses kept appearing before the Trial Court but they could not be recorded due to stubbornness of the accused---Two of the eye-witnesses had not been cross-examined by defense side despite a lapse of about 17 months---Bail application was dismissed in circumstances.

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

----S. 497---Second bail application, filing of---Fresh grounds---Scope---Dismissal of first bail application on merits or as withdrawn synchronized with exhaustion of all grounds available, whether pressed or not, and subsequent/second bail application would lie only on a fresh ground, which arose after dismissal of first/previous bail application.

The State through Advocate-General, N.-W.F.P. v. Zubair and 4 others PLD 1986 SC 173 rel.

Muhammad Taqi Khan and Sardar Akbar Ali Dogar for Petitioners.

Mrs. Muqadass Tahira, Addl: Prosecutor-General Punjab for Respondents.

Rana Safdar Hussain for the Complainant.

Abdul Hameed A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Rana Muhammad Sohail (petitioner) seeks bail-after-arrest in case F.I.R. No.708/ 2010, dated 26-6-2010, registered for offences under sections 302, 324, 148, 149, P.P.C., at Police Station Saddar Sheikhupura.

The instant petition is third on the subject, the first one (Criminal Miscellaneous No.14895-B of 2011) was dismissed as withdrawn on 1-12-2011 while second application (Criminal Miscellaneous No.13798-B of 2012) was dismissed due to non-prosecution on 7-12-2012.

2. Precisely, the prosecution case as narrated by Mushtaq Ahmad (complainant) is that his brother and paternal nephew, who was a driver, drove Toyota Wagon 7794/LHO between village and Sheikhupura, as public transport; he received a telephonic information at about 8:30 a.m. on 26-6-2010 from his paternal nephew, Muhammad Ramzan (driver) that Rana Muhammad Sohail (petitioner) and his co-accused, four in number did not permit them

to board passengers in their wagon and they had also snatched key of the vehicle from them; on receipt of this information, he along with his brother Muhammad Ramzan and son Liaqat Ali reached main bazaar and beseeched Sohail etc. but they would not listen to them, which led to a heated and bitter debate between them; Sohail etc. went away while extending threats of dire consequences and returned a few minutes thereafter, to the spot along with three unknown persons, being armed with different weaponry and resorted to indiscriminate firing; he, his companions and passersby had a narrow-escape; in the meanwhile, his nephew Muhammad Ramzan and son Liaqat Ali snatched rifle from Rana Muhammad Sohail (petitioner) but it was forcibly taken back by Abdul Sattar accused, who delivered it to Rana Muhammad Sohail by exhorting that all should be killed; Rana Muhammad Sohail, who was armed with Kalashnikov and his armed co-accused showered bullets by firing bursts, due to which Muhammad Ramzan, Ghulam Abbas, Sajid, Waqas and Munawar Hussain fell onto the ground, badly wounded; they were shifted to hospital for treatment of their injuries; motive behind the occurrence was that Rana Muhammad Sohail etc. used to act roguishly at the Wagon Stand.

3. Learned counsel for the petitioner submits that the instant petition has been filed by the petitioner on the fresh ground that trial of the accused has not concluded despite lapse of more than two years; besides, the complainant party has been summoned as accused in a private complaint-case filed by Ghulam Abbas (injured) vide order dated 28-1-2013, by the learned trial Court; all the injured persons are cited witnesses of private complaint-case and they have categorically stated before the learned trial Court that it was the complainant party, which had committed the occurrence; the petitioner was arrested in this case on 4-8-2010 and he has been languishing in jail ever-since; the question regarding initiation of aggression can only be resolved at the time of trial; the petitioner or any other person acting on his behalf has not occasioned delay in conclusion of the trial; for the aforesaid reasons, the petitioner is entitled to the relief prayed for.

4. On the other hand, learned Addl: Prosecutor-General Punjab, assisted by learned counsel for the complainant opposes with the contention that petitioner is the principal accused of this case, who downed as many as five persons with firearm injuries, one out of whom, Muhammad Ramzan succumbed to the injuries on 31-7-2010; the motive is directly attributed to the petitioner; it is the accused-petitioner, joined by his co-accused, who hampered proceeding of the trial on different pretexts and they occasioned delay in conclusion thereof.

5. After hearing learned counsel for the parties and perusing the record, it is observed that first bail application (Criminal Miscellaneous No.14895-B of 2011) of the petitioner was dismissed as withdrawn vide order dated 1-12-2011 followed by dismissal of his second bail-application (Criminal Miscellaneous No.13798-B of 2012) vide order dated 7-12-2012 by this court due to non prosecution. There is no cavil to the proposition that dismissal of first bail-application on a particular day either on merits or as withdrawn synchronizes with exhaustion of all the grounds available, whether pressed or not and subsequent/ second bail application would lie only on a fresh ground, having arisen after dismissal of the first/earlier one. Guidance in this regard may be had from the case-law titled "The State through Advocate-General, N.W.F.P v. Zubair and 4 others (PLD 986 SC 173), which view has been upheld by the Hon'ble Supreme Court of Pakistan in a recent judgment passed on 3-1-2013 in

Criminal Petition No.896-L of 2012. The record reveals that all the injured witnesses except Ghulam Abbas joined investigation and fully corroborated the story of F.I.R. in their statements under section 161, Cr.P.C. Ghulam Abbas injured, however, stated otherwise in is statement under section 161, Cr.P.C., recorded on 2-7-2010, whereby he burdened the complainant party to have committed the occurrence and thus set-up, cross-case for offences under sections 324, 148, 149 P.P.C. against the complainant party, which was finally rejected on 8-8-2010 by the Investigating Officer as he failed to produce any evidence in support of his contention. All the injured P.Ws., appeared to have taken a somersault, as one of them Ghulam Abbas filed a private complaint against the complainant party on 19-9-2011, wherein he mentioned names of the other injured persons as witnesses of the occurrence, who rendered statements before the learned trial Court under section 202 Cr.P.C., whereby they changed the tenor of the F.I.R. case. Learned counsel for the petitioner submits that learned trial Court has summoned the respondent-accused in the complaint-case vide order dated 28-1-2013 to stand trial. In this background, learned counsel for the petitioner has submitted that it is a case of two versions. The above-said private complaint-case and order passed therein by the learned trial Court under section 204, Cr.P.C. can hardly be deemed a fresh ground, at this stage, as the injured P.Ws. resiled from their previous statements, recorded by the Investigating Officer, while rendering cursory evidence under section 202, Cr.P.C. The noted private complaint-case was filed by Ghulam Abbas, more than a year after the alleged occurrence and by that time, the injured P.Ws. Sajid, Waqas and Munawar had changed their loyalties to the other side.

6. So far as delay in conclusion of trial is concerned, it can be easily observed that prosecution witnesses, especially, the complainant and the eye-witnesses, appeared before the trial Court time and again but they could not be recorded due to stubbornness of the accused. The statements of the eye-witnesses lmran (P.W.3) and Mushtaq (P. W. 4) were recorded on 26-9-2011 but they have not been cross-examined as yet by the learned defence counsel, despite lapse of about seventeen (17) months. While declining bail to the petitioner, the learned trial Court observed in order dated 24-8-2012 that delay in disposal of trial cannot be attributed to the prosecution. The learned trial Court, on as many as 18 occasions noted/marked presence of the eye-witnesses on record but failed to examine them due to non-availability of the learned defence counsel or for some other reason, again attributable to the accused-petitioner and his co-accused. The delay caused is certainly on the part of the accused. Therefore, I am not inclined to accept this application, which is dismissed accordingly.

MWA/M-92/L Bail refused.

2014 Y L R 1093

[Lahore]

Before Shahid Hameed Dar, J

MANASAB ALI alias KALI---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.797-B of 2013, decided on 29th January, 2013.

Criminal Procedure Code (V of 1898)---

---Ss. 498 & 497(2)---Penal Code (XLV of 1860), Ss. 302, 324, 34 & 109---Qatl-e-amd, attempt to commit qatl-e-amd, common intention, abetment---Ad-interim pre-arrest bail, confirmation of---Further inquiry---Case of mere abetment---Date and time of abetment not disclosed---Probability of false implication due to malice---Inordinate delay in implicating accused for the offence---Effect---Allegation against accused was that few days prior to the occurrence he induced/abetted the co-accused persons to kill the deceased, which abetment was heard by two witnesses---Allegation against accused was of mere abetment, which surfaced for the first time when complainant rendered a written supplementary statement before the investigating officer---During investigation witnesses of abetment claimed to have witnessed the occurrence but they did not utter a single word against accused about the allegation of abetment---Said witnesses and complainant recorded their supplementary statements with an inordinate delay, wherein they nominated the accused as an abettor of the offence-Date and time of the alleged abetment/ conspiracy by the accused had not been disclosed by any of the witnesses---Question as to how many days before the occurrence, accused and co-accused persons plotted to murder the deceased, remained shrouded in mystery---Probability could not be ruled out that accused had been falsely implicated in the present case due to malice and ulterior motives of the complainant---Case was one of further inquiry---Ad-interim pre-arrest bail already granted to accused was confirmed in circumstances.

Arshad Ali Chohan for Petitioner.

Mrs. Maqadass Tahira, Addl: Prosecutor-General Punjab for the State.

Ghulam Raza S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---Manasab Ali (petitioner) seeks bail before-arrest in case-F.I.R. No.315/2012 dated 24-5-2012, registered for offences under sections 302, 324, 109, 34, P.P.C., at Police Station City Arifwala (Pakpattan Sharif).

2. Precisely, the prosecution case, as narrated by Ghulam Qadir (complainant) is that his son Abdul Razzaq along with his pupil Muhammad Asif, moved towards the shop of his son on 24-5-2012; when they reached the metalled road, they were attacked by Muhammad Ashraf, Naveed, both armed with pistols .30-bore and Tanveer; the fire-shots made by

Muhammad Ashraf and Muhammad Asif, deflated his son to the ground, in a bad injured condition; Abdul Razzaq succumbed to the injuries at a hospital in Sahiwal; the motive behind the occurrence was that the accused Ashraf etc. owed a sum of Rs.27,000/to his son, who demanded his money back, which was felt ill by the accused.

3. The complainant moved a written application before the Investigating Officer on 9-7-2012 with the contention that a few days prior to the occurrence Majid Ali Sheikh and Manasab Ali Kali (petitioner), while chatting with Muhammad Ashraf, Tanveer and Naveed accused, induced them to murder Abdul Razzaq, so as to avenge their insult; they made a promise that they would take care of the matter and make sure that the police would not catch them; Abdul Razzaq had been murdered by the accused on the abetment of Sajid Ali and Manasab Ali (petitioner); Akbar Ali Shah and Muhammad Haneef are the witnesses of abetment, who rendered statements against the petitioner on 9-7-2012.

4. Learned counsel for the petitioner submits that the petitioner has been falsely involved in this case due to malice and ulterior motives of the complainant; it is a case of no evidence against the petitioner and charge against him is patently false; Akbar Ali Shah, a witness of abetment, is an eye-witness of the occurrence, who recorded a statement under section 161, Cr.P.C. before the Investigating Officer on 24-5-2012 but did not utter even a single word against the petitioner; the other witness Muhammad Hanif did not offer any explanation, as to why he kept silent for a long period of time before joining the investigation; lastly submits that the petitioner's case calls for further probe into his guilt, hence, he may be saved from the conspiracy of the complainant and his witnesses.

5. On the other hand, learned Addl: Prosecutor-General Punjab opposes with the contention that two witnesses namely Akbar Ali Shah and Muhammad Haneef support the charge of abetment; the complainant or his witnesses are not inimical to the petitioner, nor they involved him in this case falsely; the petitioner was found guilty during the course of investigation and placed in Column No.3 of the challan.

6. After hearing learned counsel for the parties and perusing the record, it is observed that the allegation against the petitioner is merely that of abetment, which surfaced on the record, for the first time on 9-7-2012, when the complainant rendered a written supplementary statement before the Investigating Officer with the contention that the accused-petitioner joined by his co-accused held a conspiratorial chat with his co-accused, Muhammad Ashraf, Tanveer and Naveed, a few days before the occurrence of murder, which was overheard by the witnesses Akbar Ali Shah and Muhammad Hanif. It is a crucial fact that Akbar Ali Shah is an eye-witness, who firstly joined investigation on 24-5-2012 and rendered a statement under section 161, Cr.P.C. qua the factum of having witnessed the occurrence, but he did not utter even a single word against the petitioner or his co-accused about the allegation of abetment. Muhammad Haneef, another witness of the same set also remained inordinately tacit before joining the investigation and recording his statement under section 161, Cr.P.C. on 9-7-2012. The subsequent written statement of the complainant is also silent about the fact, as to why he took so long to nominate the petitioner as an abettor of the occurrence alleged. His delayed supplementary statement as well as those of the above-named witnesses of abetment, do not offer any explanation as to the unconscionable and inordinate delay occurred/involved. Learned Addl: Prosecutor-General Punjab, after going through the record submits that the date

and time, as to alleged hatching-up of the conspiracy by the petitioner and his co-accused has not been disclosed by any of the witnesses. It remains shrouded in mystery as to how many days earlier to the main occurrence, the petitioner and his co-accused plotted to commit the murder of the deceased and the stance taken by the witnesses in this respect is vague as well as speculative. In such an eventuality, the probability cannot be ruled out that the petitioner has been falsely involved in this case due to malice or ulterior motives of the complainant or for some mischievous wire-pulling by him, which brings his case within the ambit of further inquiry as enunciated by section 497(2), Cr.P.C.

7. Therefore, the instant application is accepted and the ad-interim pre-arrest bail allowed to the petitioner vide order dated 22-1-2013 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.1,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/M-99/L Bail confirmed.

2014 Y L R 1174

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD SARWAR---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE and 4 others---Respondents

Writ Petition No.22688 of 2013, decided on 5th November, 2013.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A, 22-B & 154---Constitution of Pakistan, Art. 199---Constitutional petition---Registration of F.I.R.---Ex-Officio Justice of Peace, directed S.H.O. concerned to register F.I.R. on the complaint of the complainant---Validity---When a cognizable offence was reported by a person the S.H.O. of the concerned Police Station was bound to register F.I.R. under the mandatory provisions of S.154, Cr.P.C.---Police was under a statutory duty under S.154, Cr.P.C. to register a case, where a cognizable offence appeared to have been committed; and was statutorily bound to investigate a cognizable offence---No illegality or defect was found by High Court in the exercise of jurisdiction by Ex-Officio Justice of Peace while passing the impugned order---Constitutional petition was dismissed.

Jamal Khan's case PLD 2009 SC 102 and Muhammad Bashir's case PLD 2007 SC 539 ref.

Muhammad Tanveer Chaudhry for Petitioner.

Ch. Muhammad Shabbir Gujjar, A.A.-G. for the State.

Aamir Zubair Rai assisted by Ch. Muhammad Imran Khan for Respondent No.4.

ORDER

SHAHID HAMEED DAR, J.---Through this constitutional petition, Muhammad Sarwar-petitioner prays for setting aside order dated 5-9-2013 passed by respondent No.1, the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Arifwala (Pakpattan Sharif), whereby he while disposing of the application under section 22-A 22-B, Cr.P.C. moved by Abdul Rehman (respondent No.4) directed the respondent-S.H.O. to register an F.I.R. on the complaint of respondent No.4.

2. Precisely the facts giving rise to the instant petition are that the petitioner purchased 2100 litres of diesel and 100 litres of petrol from respondent No.4, Business Development Officer in AGRO Centre, Qabula Road, Arifwala, and issued two cheques to him for Rs.2,28,060 and Rs.1,12,200, respectively, as cost thereof, which, on presentation, were bounced by the drawee bank due to lack of funds; respondent No.4 contacted the petitioner for payment of the aforesaid amount, but he refused to do so, which prompted him to approach the respondent-S.H.O. for registration of a case, but to no avail; respondent No.4, lastly, filed an application under sections 22-A and 22-B, Cr.P.C. before the Ex-Officio Justice of Peace Arifwala (Pakpattan Sharif), seeking for issuance of a direction qua registration of a criminal case against Muhammad Sarwar (petitioner), whereon the impugned order was passed.

3. After hearing learned counsel for the parties and perusing the record, it is observed that the Ex-Officio Justice of Peace (respondent No.1) has concluded that the petitioner, prima facie, committed a cognizable offence and thus, rightly issued a direction to the respondent-S.H.O. to register a criminal case against him. The main argument of the learned counsel that the cheques in question were issued by the petitioner as a token of guarantee to one Muhammad Imran (not a respondent herein) against whom he had filed a suit for rendition of accounts and it was he who conspiratorially delivered the said instruments to the respondent-complainant, is not corroborated by any material whatsoever. Even in the noted suit, which was filed earlier to the date of passing of the impugned order or filing of the application under sections 22-A and 22-B, Cr.P.C. by respondent No.4, does not contain the said fact. The name of respondent No.4 (Abdul Rehman), however, does not figure in the said suit, as a defendant. No factual inquiry as to the aforesaid contention of the learned counsel can be conducted in this constitutional petition.

The impugned order is within the parameters of section 22-A(6), Cr.P.C. When a cognizable offence is reported by a person, the S.H.O. of the concerned police station is bound to register F.I.R. under the mandatory provisions of section 154, Cr.P.C. It has been held on several occasions by the apex court as well as by court statutory that the police are under section 154, Cr.P.C. to register a case, where a cognizable offence appears to have been committed and they are statutorily bound to investigate a cognizable offence. Reference in this regard may advantageously be made to the Jamal Khan's case, reported as PLD 2009 SC 102 and Muhammad Bashir's case, reported as PLD 2007 SC 539. Learned counsel for the petitioner has failed to hint at an illegality in the impugned order. No defect is found by this court in the exercise of jurisdiction by the Ex-Officio Justice of Peace while passing the impugned order.

4. For the reasons recorded supra, I find no force in this petition, which is dismissed.

HBT/M-13/L Petition dismissed.

2014 Y L R 1233

[Lahore]

Before Shahid Hameed Dar, J

RAJAB ALI---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.6278-B of 2013, decided on 17th June, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), S.302/34---Qatl-e-amd, common intention--Bail, grant of---Further inquiry---Murder committed in compelling circumstances---Generalized and collective allegations---Effect---Deceased boy and girl had developed an illicit liaison between them---Accused and co-accused persons allegedly caught the two deceased in the room of a house and inflicted multiple injuries on their bodies, which resulted in their death---Allegation against accused was collective and generalized---Mode of occurrence indicated that it was not a premeditated crime---Post-mortem examination of both the deceased showed that they received a number of sharp-edged weapon injuries, which spoke volumes of the fact that they were done to death in a frenzy by the accused and co-accused persons, who after seeing both the deceased together in a room turned furious and emotionally wild---Circumstances showed that accused and co-accused committed the offence under compelling circumstances---Present case did not appear to be case wherein the offence had been committed in the name of "Ghairat" or family honour, which terms had to be differentiated from grave and sudden provocation---Investigating officer absolved accused from the liability of causing any injury to the deceased persons by opining that accused was guilty only to the extent of summoning co-accused at the scene of occurrence, besides exhorting a lalkara after the co-accused had already murdered the deceased persons---Nothing was recovered at the instance of accused during investigation---Case was one of further inquiry---Accused was granted bail in circumstances.

Rai Muhammad Hussain Kharl for Petitioner.

Mrs. Muqadass Tahira, Addl: Prosecutor General Punjab for the State.

Muhammad Inayatullah Cheema for the Complainant.

Muhammad Iqbal S.I./I.O. with record.

ORDER

SHAHID HAMEED DAR, J.---Rajab Ali (petitioner) seeks bail after-arrest in case-F.I.R. No.74 of 2013, dated 27-2-2013 registered for offences under sections 302, 34, P.P.C., at Police Station Sadar Gojra (Toba Tek Singh).

2. Precisely, the prosecution case as narrated by Shaukat Ali (complainant) is that he

along with Muhammad Ramzan and Muhammad Iqbal stood close to the house of Muhammad Nawaz on 27-2-2013; his maternal nephew Abu Bakar, who had developed an illicit liaison with Mst. Shakeela Bibi, daughter of Muhammad Nawaz, entered the house of Mst. Shakeela Bibi and joined her in a room of the house, which fact became known to mohalledars; Rab Nawaz, Rajab Ali (petitioner) armed with datar, hammer and Muhammad Saleem armed with taisi entered the said house and bolted the door of the room from outside, wherein both Abu Bakar and Mst. Shakeela Bibi were present; Muhammad Nawaz, the father of Mst. Shakeela Bibi was sent for who reached there armed with toka at about 11-00 a.m.; accused Muhammad Nawaz, Rab Nawaz, Rajab Ali (petitioner) and Muhammad Saleem opened the door and they pounced upon Abu Bakar and caused him multiple injuries by means of their respective weapons and sent him reeling to the ground severely wounded; Rajab Ali (petitioner) and his co-accused also attacked Mst.Shakeela Bibi and inflicted multiple injuries on her body with their respective weapons; the accused fled from the spot after committing the crime; both the injured died instantaneously; motive behind the occurrence pertained to an illicit liaison between the deceased.

3. Learned counsel for the petitioner submits that no specific role or injury has been attributed to the petitioner and allegation against him is of general and collective nature; nothing was recovered at the instance of the petitioner during the course of investigation; the postmortem-examination-reports of the deceased reveal that they only received sharp-edged-weapon injuries which is inconsonant with the allegation against the petitioner, who allegedly held a hammer at the time of occurrence; the story of F.I.R. was found false during the course of investigation as Investigating Officer opined that the accused/petitioner was guilty only to the extent of bringing Muhammad Nawaz to the place of occurrence, besides raising a lalkara, after the occurrence was over; the alleged occurrence happened all of a sudden, without any element of premeditation and deceased themselves invited the trouble; lastly submits that it is a case of two versions and which one of them is nearer to truth can only be ascertained at the time of trial. Relies upon case titled Muhammad Sadiq v. Muhammad Rafiq and others (1982 SCMR 301), Ehsan Ullah v. The State (2012 SCMR 1137), Zia Ullah v. The State and another (2012 MLD 319), Abdul Latif v. The State and another (2012 YLR 2860), Rehana and others v. The State 1984 SCMR 1557, Allah Bachaya v. The State and another (PLJ 2011 Cr.C (Lahore) 119), Ghulam Hussain v. The State (1979 PCr.LJ 72), Abdul Ghafoor and 2 others v. The State (1979 PCr.LJ 442) and Rehmat Ali v. The State (PLJ 1980 Cr.C. (Lahore) 171).

4. On the other hand, learned Addl: Prosecutor-General Punjab assisted by learned counsel for the complainant opposes with the contention that the petitioner actively participated in the occurrence and he is equally liable for the entire episode; both the deceased were done to death in a callous and brutal manner, which fact is evident from the contents of the necropsy-reports; the eye-witnesses in their statements under section 161, Cr.P.C. have categorically stated about the active participation of the petitioner in the occurrence; the petitioner was found involved in the occurrence during the course of investigation and placed in Column No.3 of the challan, which stood submitted before the trial Court vide case diary dated 17-4-2013; lastly submits that trial of the accused is at the stage of indictment and learned trial Court has already fixed it on 22-6-2013 for the said purpose.

5. After hearing learned counsel for the parties and perusing the record, it is observed

that the petitioner faces a collective and generalized charge qua an occurrence, which admittedly took place in the house of Muhammad Nawaz accused, who happens to be real father of Mst. Shakeela Bibi (deceased) and a paternal uncle of the petitioner. The complainant did not feel shy of mentioning in the F.I.R. that his maternal nephew, Abu Bakar (deceased) had developed illicit relations with Mst. Shakeela Bibi and in this backdrop, he got into the house of Muhammad Nawaz accused. He certainly went there for enjoying sex but, to his bad luck, it was not his day on the said occasion, as his entrance in the love-nest was noticed by the accused-petitioner and others who held him and his girlfriend captives in a room of the house by bolting it from outside and it was thereafter, that heavens fell upon they erring youths. The mode of occurrence, as alleged by the complainant, leads to believe that it was not a premeditated affair. The contents of the postmortem examination-reports reveal that the ill-fated youths received a number of sharp-edged weapon injuries on their bodies, in fact by Mst. Shakeela Bibi and 17 by Abu Bakar, which speaks volumes about the fact that they were done to death in frenzy by the accused, who after having seen both of them together in a room of the house turned furious and emotionally wild. This is the all important fact that the bodies of the deceased were found in the house of Muhammad Nawaz accused, the paternal uncle of the accused-petitioner. The deceased persons had an affair inter se, touching frankness of immorality as admitted by immorality the prosecution itself which gives rise to a view that the accused committed the offence alleged under a compelling circumstance. The complainant repeatedly asserted in the F.I.R. that the occurrence narrated by him was an off-shoot of illicit love affair between the deceased couple. It does not appear to be a case wherein the offence has been committed by the accused in the name of "Ghairat" or family honour, which terms have to be differentiated from grave and sudden provocation, as it can be discerned from the statement of the complainant under section 154, Cr.P.C. that his nephew Abu Bakar (deceased) sneaked into the house of Muhammad Nawaz accused to make love with his daughter Mst. Shakeela Bibi (deceased). It has been opined by the Investigating Officer that the petitioner was guilty only to the extent of summoning his paternal uncle Muhammad Nawaz from his fields to the scene of occurrence, besides exhorting a lalkara after his co-accused Muhammad Nawaz and Rab Nawaz had already murdered the 'in-trouble lovers", thus absolving him of the liability of causing any injury(-ies) to them. These important aspects of the case prima facie tilt in favour of the accused-petitioner. Nothing was recovered at the instance of the accused/petitioner during the course of investigation. The judgments relied upon by the learned counsel for the petitioner certainly lend a sense of strength to the petitioner's bail-plea, who, prima facie has made out a good case for grant of bail in his favour as contemplated under section 497(2), Cr.P.C.

6. Therefore, the instant petition is accepted and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with two sureties each in the like amount to the satisfaction of learned trial Court.

7. Before parting, it is clarified that the observations made hereinabove are of a tentative nature and case against the accused/petitioner shall be decided by the learned trial court on the basis of evidence, led before it by the parties.

MWA/R-14/L Bail granted.

2014 Y L R 1356

[Lahore]

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

ABDUL SAMAD---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.38-J of 2010, heard on 30th January, 2014.

Penal Code (XLV of 1860)---

----Ss. 365, 337-F(i) & 337-L(2)---Kidnapping or abducting with intent secretly and wrongfully to confine person, causing damiyah, and other hurt---Appreciation of evidence---Complainant failed to nominate any of the abductors of his son, except for alleging that his son was abducted by three unknown young armed men---Elements of deliberation and consultation, could not be ruled out in respect of involvement of accused in the present case---Complainant failed to highlight the circumstance in his testimony through which he involved accused in the case, nor he burdened him anywhere in his testimony, if the accused ever demanded any ransom amount from him, either telephonically or otherwise---Nomination of accused in the case, was enveloped in a thick layer of haze, which had eclipsed the veracity of the case, set up by the prosecution against accused---No corroboration was available to the claim of alleged abductee, according to which he burdened accused and his co-accused to have fired at the Police party; and ran away from the hot-spot under the sheath of darkness, by leaving behind the dead body of their crime partner---Testimony of the abductee for want of corroboration, was unbelievable and untrustworthy---Ocular account, in circumstance was brushed aside being a hollow and incredible affair---Unexhibited report of Forensic Science Laboratory with regard to recovery of pistol .30 bore along with five live bullets was of no consequence as Investigating Officer failed to collect any crime empty from the place of occurrence at the time of spot inspection---Recovery of car bearing registration number was inconsequential as complainant did not mention any such Registration number in the F.I.R.; and both prosecution witnesses also failed to mention the same---Evidence of recoveries of noted-articles burdened by prosecution witnesses, did not convey any sense and meant less than nothing---Medical evidence could provide all the necessary information about the bodily injuries of a living or a dead person, but it could not identify as to who inflicted them---Medical evidence in the case was inconsequential like rest of the prosecution evidence---Prosecution having failed to bring home the guilt of accused beyond reasonable doubt; impugned judgment passed by the Trial Court, suffered from misreading, non-reading and misunder-standing the evidence---Conviction and sentence of accused were set aside, he was acquitted of the charge and was released, in circumstances.

Mirza Abdul Khaliq-I for Appellant.

Hamayun Aslam, Deputy Prosecutor-General for the State.

Ch. Aamir Rehman for the Complainant.

Date of hearing: 30th January, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.---Abdul Samad-appellant was held guilty under sections 365, 337-F(i), 337-L(2), P.P.C. by the learned Judge, Anti-Terrorism Court No.II, Gujranwala, vide judgment dated 20-5-2009 and sentenced as under:--

(i) Under section 365, P.P.C.: to undergo rigorous imprisonment for seven years with fine of Rs.25,000 or in default thereof to further undergo simple imprisonment for one month.

(ii) Under section 337-F(i), P.P.C.: to undergo rigorous imprisonment for one year on two counts for causing injuries to Abdul Majeed-complainant and his son Munib Ahmad, with Daman of Rs.10,000 on two counts or in default thereof to further undergo simple imprisonment for fifteen days on each count.

(iii) Under section 337-L(2), P.P.C.: to undergo rigorous imprisonment for one year, with Daman of Rs.10,000 or in default thereof to further undergo simple imprison-ment or fifteen days.

All the sentences were ordered to run concurrently.

2. The convict-appellant by filing the instant appeal has called in question the impugned judgment.

3. The prosecution story in brief as unfolded by Abdul Majeed-complainant (P.W.1) in application (Exh.PA), is that he was resident of X-Block Peoples Colony Gujranwala and ran a shop in Rail Bazaar; on 22-1-2009, at evening time, he along with his son Munib Ahmad after closing the shop, as usual, left for their home by means of motorcycle bearing Registration No.7170/GAH; at about 8.15 p.m., when they reached near the house of Sh.Muhammad Islam in Street No. 16, X-Block, a white colour-Alto Car struck them from behind, as a result of which they fell on to the ground; three young boys of medium height and average physique, two of them armed with rifles and one with pistol alighted the car and started pulling his son towards the car; he tried to rescue his son and in result they beat and injured them both; the accused forcibly put Munib Ahmad into their car at gunpoint and drove away; he submitted an application (Exh.PA) before the S.H.O., Police Station Peoples Colony, Gujranwala at 12.20 a.m. on 23-1-2009, on the basis whereof Muhammad Shabbir, SI (P.W.7) drew up formal F.I.R. (Exh.PA/2), the same day.

4. After registration of the case, its investigation was entrusted to Muhammad Iqbal S.I. (P.W.8), who immediately reached the place of occurrence, inspected it and prepared visual site plan (Exh.PF) thereof; the complainant produced before him his Medico-legal Report; he completed all legal formalities and started search of the unknown accused; on 27-1-2009, the complainant (P.W.1) produced before him telephone numbers, wherefrom he received calls from the accused demanding ransom; on 28-1-2009, he recorded supplementary statement of the complainant, wherein he nominated the accused-persons including name of the appellant; on 1-2-2009, at about 1.30 he received an information that in Madina Town, falling within the territorial jurisdiction of Police Station Civil Lines, one of the accused Muhammad Khalid had been killed in an encounter with the police and Munib Ahmad (abductee) had been got

released, whereupon he reached there and recorded statement of the abductee under section 161, Cr.P.C.; as Munib Ahmad (abductee) was found injured, therefore, he got him medically examined on 2-2-2009 from the DHQ Hospital, Gujranwala and placed on record his Medico-legal Report (Exh.PC); on 9-2-2009, he joined Abdul Samad, accused/appellant in investigation, who was already in custody being involved in case F.I.R. No.415/2008, under section 365-A, P.P.C., registered at Police Station Peoples Colony, Gujranwala; he on pointedness of the accused/appellant secured car (P1) bearing Registration No.6463/LEF-07 vide recovery memo Exh.PD, duly attested by Mubashar Hussain 2675/C (P.W.5) and Javed Iqbal 2804/C P.W. (not produced); the accused/appellant also got recovered pistol .30-bore (P2) loaded with five live bullets (P3/1-5) vide recovery memo Exh.PE, duly attested by Muhammad Sharif 2476/C and Hamid Abdullah 1940/C P.W. (not produced); on completion of investigation, he submitted incomplete report under section 173, Cr.P.C. before the court for trial of the accused/appellant, whereas rest of the accused were declared proclaimed offenders.

5. The appellant on indictment pleaded not guilty and claimed a trial. The prosecution, in order to prove its case, produced eight witnesses, namely, Abdul Majeed-complainant (P.W.1), Munib Ahmad-abductee (P.W.2), Dr. Manzoor Ahmad Butt (P.W.3), Dr. Mubashar Yaqoob (P.W.4), Mubashar Hussain 2675/C (P.W.5), Muhammad Sharif 2476/C (P.W.6), Muhammad Shabbir S.I. (P.W.7) and Muhammad Iqbal S.I. (P.W.8). Thereafter, the appellant was examined under section 342, Cr.P.C., whereby he professed his absolute innocence in the matter and denied all the charges against him. He did not opt either to depose under section 340(2), Cr.P.C. or to adduce evidence in defence. The contention adopted by him in reply to question as to why this case against him and why the P.Ws. deposed against him, reads as under:-

"I am innocent. I am general secretary of Khatm-e-Nabuwat organization, Gujranwala and Khateeb in Mosque where I delivered sermon against Ahmdees as complainant of this case and his son both are also Ahmdees and they nourished grudge against me and falsely involved me in this case in connivance with local police. Neither pistol nor live bullets and nor car as alleged by the prosecution witnesses was recovered from me or at my instance and these articles have been falsely planted upon me only to strengthen the prosecution case against me and I am innocent. I am not related to the house from where allegedly abductee was recovered. My resident is in Usman Colony, Chicherwali, which is at about 213 kilo meters from the said place within the jurisdiction of Police Station Satellite Town, Gujranwala."

The learned trial Judge on conclusion of the trial held him guilty of the offence charged and sentenced him as mentioned hereinabove.

6. Learned counsel for the appellant has contended that the prosecution case is filled with countless contradictions, pitfalls and inconsistencies, which have not been attended to by the learned trial court while passing the impugned judgment; it is virtually a case of no evidence and appellant has been held guilty and awarded sentence by the learned trial court merely on conjectures and surmises; the prosecution has badly failed to bring home the guilt of the appellant beyond reasonable shadow of doubt, hence, the impugned judgment may be set aside and appellant may be acquitted of the charge.

7. In negation to the above, learned Deputy Prosecutor-General Punjab assisted by learned counsel for the complainant has submitted that the abductee, Munib Ahmad appeared as P.W.2 during trial and his testimony is well-corroborated by the statement of the complainant Abdul Majeed (P.W.1) and Dr.Mubashir Yaqoob (P.W.4), coupled with the statement of the Investigating Officer Muhammad Iqbal SI (P.W.8); the prosecution did its duty well at the trial and proved the guilt of the appellant beyond all shadows of doubts, hence, the impugned judgment may be maintained and appeal-in-hand may be dismissed.

8. We have heard learned counsel for the parties and gone through the relevant record. The written application (Exh.PA) submitted by Abdul Majeed (complainant/ P.W.1) relates to forcible abduction of his son Munib Ahmad (P.W.2), a young man of 25/26 years of age, at about 8.15 p.m. on 22-1-2009, by three unknown armed men, in his presence, as he also rode Motorcycle No.7170/GAH together with his son at the crucial hour. The unknown accused sped away their car along with the abductee. The complainant (P.W.1) reported the crime to the police pretty quickly as is evident from the formal F.I.R. (Exh.PA/2), which shows the time of its registration, 12.20 a.m. on 23-1-2009, about four hours after the occurrence. By looking at the prosecution case as a whole, we find that the ocular account has been furnished by Abdul Majeed-complainant (P.W.1) and his abducted son Munib Ahmad (P.W.2), whereas the evidence of recovery of a few articles, a car bearing Registration No.LEF-6463 (P1) and pistol .30-bore (P2) with five live bullets (P3/1-5) has been furnished by Mubashar Hussain 2675/C (P.W.5), Muhammad Sharif 2476/C (P.W.6) and Muhammad Iqbal S.H.O. (P.W.8), whereas medical evidence has been tendered by Dr.Manzoor Ahmad Butt (P.W.3), who after medically examining Abdul Majeed-complainant (P.W.1) issued Medico-legal Report (Exh.PB) and Dr.Mubashar Yaqoob (P.W.4), who after examining the injuries of Munib Ahmad (P.W.2) on 2-2-2009 issued Medico-legal Report (Exh.PC) in respect thereto.

9. First of all, we take up the ocular account, comprising statements of Abdul Majeed-complainant (P.W.1) and Munib Ahmad, the abductee (P.W.2). Does this particular account inspire confidence or does it ingrain an element of believability are the crucial questions, the answer to which would mean a lot to the outcome of this case. Abdul Majeed (P.W.1), who as per his written application (Exh.PA) failed to nominate any of the abductors of his son except for alleging therein that his son was abducted by three unknown young armed men. He astonishingly, did not talk about his supplementary statement as pointed to by the Investigating Officer in his examination-in-chief as P.W.8, but he uttered a very crucial sentence therein that Abdul Samad accused had been identified by him. When and where, no clue to it was hinted at by him. Did he mean that Abdul Samad (appellant) was previously known to him? He removed this ambiguity in his testimony by deposing that the appellant used to visit his Mohallah before the occurrence and he had heard that he was teaching in the Karimia-mosque, which was at a distance of about one furlong from his house. He further claimed in his testimony that he had identified Abdul Samad accused (appellant) at the spot. He, however, in his statement contradicted himself when he said that he did not know Abdul Samad accused before the occurrence and that he saw him for the first time at Police Station Civil Lines, after his arrest on 1-2-2009. Munib Ahmad, the abductee, who appeared as P.W.2 stated in his testimony that Abdul Samad accused (appellant) was one of the three abductors who abducted him on 22-1-2009; his father, like him, was thrashed by them during the occurrence; they confined and chained him in a room and snatched from him cash Rs.1200, the documents of his motorcycle and his national identity card. He also deposed that the wife

of Abdul Samad (appellant) used to provide him meals during the period of his confinement. He further stated in his testimony that the accused had threatened, if their demand of ransom was not met with, they would murder him. About his rescue from the clutches of the accused, he categorically stated that an encounter took place on 31-1-2009 between the police and the accused, during the course of which a companion of Abdul Samad (appellant), namely, Khalid was killed and rest of the accused including the appellant fled the spot under the cover of darkness through the backdoor of the house and as a result of this clash, he was recovered and released by the police.

Both the witnesses of ocular account admitted in their statements that they were Ahmadees by faith. Both of them showed obliviousness rather they seemingly denied the suggestion that Abdul Samad (appellant) had made a speech against the Ahmadees and for this reason he had been falsely involved in this case by the complainant. As narrated earlier, the complainant did not nominate anyone in the F.I.R. It can easily be gathered from his testimony that he was well acquainted with the appellant prior to the occurrence as he (appellant) taught in a mosque of the locality, which was at the distance of a crow's flight from his house. It may not be a surprising factor, if he being a teacher/muallam in a mosque, situated close to the locality where many a houses of Ahmadees were situated, he delivered a speech or speeches against them and for this reason the complainant and his son might have felt annoyed over it. Being a teacher in the said mosque and being a visitor to the Mohallah of the complainant, it was reasonably believable that he was well-known to the complainant-side prior to the occurrence. That's why the sentence uttered by the complainant in his testimony that he "identified Abdul Samad accused on the spot" does not convey any other meaning than the one, mentioned herein earlier. The appellant's name as an abductor of Munib Ahmad, would have got into the F.I.R. straightaway, had he been linked with the said abduction-incident in any manner. The complainant by having categorically mentioned the age, the height and general physique of the unknown abductors in the crime-report (Ex.PA/2) gave clear signal that the perpetrators of the crime were not previously known to him and in this backdrop, the implication of the accused-appellant in the instant case looks dubious and skeptical. The same mohallah, the same vicinity, the profession of being a teacher in a nearby mosque, the complainant's admission and that of his son that they were Ahmadees, are such factors, which lead to believe that the elements of deliberations and consultations could not be ruled out in respect of involvement of the appellant in the instant case. The learned trial court appears to have overlooked the startling contention of the complainant about having identified Abdul Samad (appellant) at the spot and still not naming him in the F.I.R., so casually that one could feel sorry for such a careless and irresponsible way of misreading the prosecution evidence. The complainant failed to highlight the circumstance in his testimony through which he involved the appellant in the instant case nor he burdened him anywhere in his testimony, if he ever demanded any ransom amount from him either telephonically or otherwise. In brief, the nomination of the appellant in the instant case as an accused is enveloped in a thick layer of haze, which has eclipsed the veracity of the case, set up by the prosecution against the appellant.

10. So far as the recovery and release of the abductee on 31-1-2009 in consequence to a police encounter is concerned, suffice it to say, we find no corroboration to the said claim of the abductee (P.W.2), according to which he burdened the appellant and his co-accused, to have fired at the police-party and run away from the hot-spot under the sheath of darkness by

leaving behind the dead body of their crime-partner, Khalid. Who conducted the raid, who were the members of the raiding-party and what weaponry they possessed at that time, how and when the raiding-party reached the place of confinement of the abductee, how the encounter started and finished, how did Khalid die and what was the evidence to believe as to his cause of death are the questions, the prosecution has failed to tender any answer in respect thereto. It definitely leads to creating certain breaches not only in the evidence of the eye-witnesses but also in the case as a whole. We find on the record, though not a part of the prosecution evidence, a photocopy of an application, having been written by the Inspector/S.H.O. on 1-2-2009, pertaining to the above stated police-encounter, which led to registration of case-F.I.R. No.55/2009, under sections 324, 353, 148, 149, 212 P.P.C. read with sections 6/7 of the Anti-Terrorism Act, 1997 and section 13 of the Pakistan Arms Ordinance, XX of 1965, at Police Station Civil Lines, Gujranwala, but none of the police-officials, twenty nine (29) in all, has been produced as a prosecution witness in the instant case. The testimony of the abductee for want of corroboration is held unbelievable and untrustworthy. The ocular account, therefore, is brushed aside being a hollow and incredible affair.

11. Insofar as the recovery of pistol .30-bore (P2) along with five live bullets (P3/1-5) on 20-2-2009 at the instance of the appellant is concerned, though we find an unexhibited report of Forensic Science Laboratory on the record, it is of no consequence as Investigating Officer Muhammad Iqbal SI (P.W.8) failed to collect any crime empty (-ies) from the place of abduction/occurrence at the time of spot-inspection. The prosecution appears to have withheld the report of the Forensic Science Laboratory for the said reason. The recovery of car (P1) bearing Registration No.6463/LEF is equally inconsequential as complainant did not mention any such registration number in the F.I.R. Even in their testimonies, both the prosecution witnesses failed to mention the said registration number. How could it be connected with the commission of offence, remains an unresolved question. Interestingly, we find from the statements of Abdul Majeed-complainant (P.W.1) and Munib Ahmad (P.W.2) that they rode a Honda Motorcycle, 7170/GAH, at the time of the occurrence of abduction of the latter, which according to the allegations had not been snatched by the accused, was not produced by the complainant during the course of investigation or trial. The evidence of the recoveries of the noted-articles, tendered by Mubashar Hussain 2675/C (P.W.5), Muhammad Sharif 2476/C (P.W.6) and Muhammad Iqbal SI (P.W.8) does not convey any sense and means less than nothing qua the case-in-hand.

12. Now, we are only left with the medical evidence, tendered by Dr.Manzoor Ahmad (P.W.3), who vide Medico-legal Report Exh.PB medically examined Abdul Majeed (complainant) at about 1.00 p.m. on 23-1-2009 and Dr.Mubashar Yaqoob (P.W.4), who examined the injuries of Munib Ahmad (P.W. 2) at 6.05 p.m. on 2-2-2009. The blunt-weapon-injuries, three in number, of Abdul Majeed (P.W.1) were declared as Shajjah-i-hashimah (337-A(iii) P.P.C.), Shajjah-i-Khafifah (337-A(i) P.P.C.) and Ghayr-jaifah-damiyah (337-F(i) P.P.C.), whereas one of those of Munib Ahmad-abductee (P.W.2) was declared as Ghayr-jaifah-damiyah (337-F(i), P.P.C.) and the rest three were declared to fall within the definition of section 337-L(2), P.P.C. Both the witnesses were left uncross-examined by the defence and rightly so. It has been held time and again that the medical evidence may provide all the necessary informations about the bodily injuries of a living or a dead person, but it cannot identify as to who authored them. The medical evidence thus also runs inconsequential like rest of the prosecution evidence, as discussed earlier.

13. For the discussion (supra), we conclude that the prosecution has badly failed to bring home the guilt of the accused-appellant beyond reasonable shadows of doubt. The impugned judgment passed by the learned trial court suffers from misreading, non-reading and misunderstanding the evidence, available on the record. No other option is left but to accept this appeal, which is accordingly done. The conviction/sentence of the appellant is set aside and he is acquitted of the charge. He shall be released forthwith if not required in any other case.

HBT/A-17/L Appeal accepted.

2014 Y L R 2288

[Lahore]

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

MUHAMMAD ARSHAD and others---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos. 1243 of 2012, 2088 of 2010 and Capital Sentence Reference No.55-T of 2010, heard on 31st January, 2014.

Penal Code (XLV of 1860)---

----Ss. 365-A & 34---Anti-Terrorism Act (XXVII of 1997), S.7(e)---Kidnapping or abduction for ransom, act of terrorism---Appreciation of evidence---Complainant, was not the eye-witness of the kidnapping of his minor daughter---Both eye-witnesses, resiled from their previous statements while rendering testimonies before the Trial Court and stated that alleged abductee, had been kidnapped by some unknown persons, and they were declared hostile---Alleged abductee, who was star witness of the prosecution case, her statement suffered from inherent contradictions and number of loopholes; her statement stood contradicted by her real grand father and other prosecution witness---Deposition of the child-witness/ alleged abductee, was self-contradictory and was hard to believe---Abductee had not stated even a word that she had been kidnapped by accused on way to her house from school and did not mention about the motorcycle used in the occurrence---Testimony of alleged abductee did not provide any clue as to demand of ransom, or its payment by her father to accused persons; and her release as a matter of bargain, between them and her father, nor she mentioned that she had been rescued by the Police, her statement could not be relied upon---Innocence of the child-witness could not be allowed to exceed limits so as to abridge the inconsistencies and pitfalls, caused by her in the case; her testimony as a prosecution witness had changed the tenor of F.I.R.---Prosecution produced no evidence regarding telephone linkage between accused and the complainant at any stage---Testimonies of the prosecution witnesses did not inspire confidence due to inherent contradictions, inconsistencies---No evidence was on record, which could connect accused persons with the commission of alleged crime---Case appeared to be a badly investigated one, which had shown mindlessness and incompetence of the Investigating Officers---Participation of accused persons, having not been established beyond a reasonable doubt, conviction and sentence recorded against accused persons by the Trial Court, were set aside, they were acquitted and released, in circumstances.

Rai Bashir Ahmed Assisted by Rana Maqsood-ul-Haq for Appellant.

Khurram Khan, Deputy Prosecutor General Punjab for Respondents.

Date of hearing: 31st January, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.---Muhammad Arshad, Khurshid Ahmad and Abdul Majeed-appellants were held guilty under section 365-A/34, P.P.C. and under section 7(e) of the Anti-Terrorism Act, 1997, by learned Judge, Anti-Terrorism Court No.II, Lahore, vide judgment dated 19-7-2010 and sentenced as under:--

(I) UNDER SECTION 365-A/34 P.P.C.:

(a) Muhammad Arshad-convict: to death, with forfeiture of his movable and immovable properties in favour of the State.

(b) Khurshid Ahmad and Abdul Majeed-convicts; to imprisonment for life each with forfeiture of their movable and immovable properties in favour of the State.

(II) UNDER SECTION 7(e) of ATA, 1997:

(a) Muhammad Arshad-convict: to death.

(b) Khurshid Ahmad and Abdul Majeed-convict: to imprisonment for life each.

All the sentences were ordered to run concurrently. Benefit of section 382-B, Cr.P.C. was, however, extended to Khurshid Ahmad and Abdul Majeed, convicts.

2. Muhammad Arshad-appellant by filing Criminal Appeal No.1243 of 2012, whereas Khurshid Ahmad and Abdul Majeed by filing Criminal Appeal No.2088 of 2010 have called in question their conviction and sentence under the impugned judgment. The learned trial Court has submitted reference under section 374, Cr.P.C. (C.S.R.No.55/T of 2010) for confirmation of the sentence of death of Muhammad Arshad-appellant. We propose to dispose of all these matters together through this single judgment.

3. The facts, as unfolded by Qaiser Mehmood-complainant (P.W.4) in his complaint (Exh.PA) are that he was an agriculturist and also ran the transport-business; he has four children; the elder daughter Mst.Shabeen Shehr, aged eight, was student of prep-class in the Girls Millat Islamia High School, Chah Road Singh, which was situated at a distance of two furlongs from his house; he would take to and bring her back from the school every day; on 17-2-2010, he went to Kasur in connection with his transport-business and on return to his house at 3.00 p.m., he learnt that his daughter had not returned after closure of her school at 2.00/2.30 p.m.; he started searching for her; he reached Chowk Bazaar Road Singh, where he met Noor Muhammad (P.W.2) and his father Master Muhammad Ramzan (P.W.3), who informed him that his missing daughter had been taken away by three armed young motorcyclists, including Abdul Majeed (appellant), riding Motorcycle No.GAK-8057 along with an unknown person and Muhammad Arshad, accused (appellant), riding Motorcycle No.LEY-6826; it was Muhammad Arshad-accused (appellant), who lifted and made her sit in between Abdul Majeed and another on their motorcycle; the accused were armed with pistol .30-bore each, who threatened the people, if anyone drew near, they would kill him; Nock

Muhammad and Master Muhammad Ramzan also raised alarm, which attracted many others to the spot; the accused drove away their motorcycles along with baby-girl Shabeen Shehr; he (complainant), joined by his relatives hectically searched for the kidnapped child and informed the police by making a telephone-call to Emergency-15, but to no avail. The complainant further contended in the F.I.R. that his business flourished by leaps and bounds in recent years, which caught many evil-eyes and due to this reason some criminals had abducted his minor daughter for ransom. The complainant came across Ghulam Abbas, SI at Adda Chah Road Singhwala, who reduced into writing complaint (Exh.PA), at 4.00 p.m., on 17-2-2010 and despatched it to the police station through Iftikhar Ahmad, constable, on the basis of which, Maqbool Ahmad, A.S.-I. (P.W.9) drew up formal F.I.R. (Exh.PA/1), at 4.25 p.m., the same day.

4. After registration of the case, Ghulam Abbas S.-I. (P.W.10) took over the investigation and immediately reached the venue of crime, inspected it and prepared visual site plan (Exh.PS); he recorded statements of the prosecution witnesses under section 161 Cr.P.C. and searched for the accused; on 19-2-2010, he recorded supplementary statement of the complainant whereby he nominated the unknown accused as Khurshid; at about 2.00 p.m., on 4-3-2010, when he along with his fellow police officials was present at Gagarr Chowk, the complainant informed him that the accused were present at an abandoned brick-kiln, where they had asked him to arrive at so as to receive the ransom amount of Rs.1,00,000; on receipt of this information, the Investigating Officer along with his companions reached the said brick-kiln, where Qaiser Mehmood-complainant passed on the ransom amount to the accused; the police-party encircled the accused, apprehended them and recovered the kidnapped-child and handed over her to her father, the complainant; on personal search of accused Arshad (appellant), ransom amount of Rs.50,000 consisting of ten currency notes of the denomination of Rs.5000 each (P1/1-10), a pistol .30-bore (P2) with ten live bullets (P11/1-10), Nokia mobile-phone-1208 (P3), charger-Nokia (P4) with lead (P5) and five tablets of Ativan-2mg (P6/1-5) were recovered, which were secured by the Investigating Officer vide memo Exh.PF, Exh.PG, Exh.PH, Exh.PJ & Exh.PK, respectively; motorcycle bearing Registration No.6826/LEY (P7) was also recovered at the instance of Muhammad Arshad (appellant), the same day, which was taken into possession by the Investigating Officer vide memo Exh.PL; the personal search of Abdul Majeed-accused (appellant) yielded ransom amount of Rs.25,000 consisting of five notes of the denomination of Rs.5000 each (P8/1-5), a 30-bore pistol (P9) along with eight live bullets (P10/1-8), Nokia-mobile (P12) with SIM (P13), motorcycle No.8057/GAK (P14), which were secured vide recovery memos Exh.PM, Exh.PN, Exh.PO & Exh.PP, respectively; the personal search of Khurshid Ahmad, accused/appellant resulted in recovery of ransom amount of Rs.25,000 consisting of five notes of the denomination of Rs.5000 each (P15/1-5) and a pistol .30-bore (P16) with seven live bullets (P17/1-7), which were seized vide recovery memos Exh.PQ and Exh.PR, respectively; all the recovery memos were attested by the same set of witnesses, i.e. Maqbool Ahmad A.S.-I. (P.W.9) and Falak Sher A.S.-I. P.W. (not produced); Muhammad Arshad and Abdul Majeed, accused/appellants were sent to judicial lock up on 5-3-2010, whereas Khurshid Ahmad was sent to judicial lock up for test identification parade, which was held on 11-3-2010 under the supervision of Muhammad Sher Abbas, Civil Judge/ Judicial, Magistrate (P.W.6); on 16-3-2010, he recorded statement of Abdul Latif (P.W.7), the owner of Motorcycle No.LEY/6826; on completion of investigation, he prepared challan under section 173, Cr.P.C. and submitted it before the Court for trial of the accused in accordance with law.

5. The appellants on indictment pleaded not guilty and claimed a trial. The prosecution, in order to prove its case, produced ten witnesses, namely, Muhammad Younas 175/MHC (P.W.1), Noor Muhammad (P.W.2), Muhammad Ramzan (P.W.3), Qaiser Mehmood-complainant (P.W.4), Muhammad Iqbal 879/C (P.W.5), Muhammad Sher Abbas, Civil Judge/Magistrate First Class (P.W.6), Abdul Latif (P.W.7), Shabeen Shehr-abductee (P.W.8),

Maqbool Ahmad A.S.-I. (P.W.9) and Ghulam Abbas S.I. (P.W.10). Thereafter, the appellants were examined under section 342, Cr.P.C., whereby they professed their absolute innocence in the matter and denied all the charges against them. They did not opt to depose under section 340(2), Cr.P.C. nor they adduced any evidence in defence. The contentions adopted by them in reply to question as to why this case against them and why the PWs deposed against them, read as under:-

(I) MUHAMMAD ARSHAD:

"I have been falsely implicated by the complainant on totally hearsay evidence. I have not committed any offence. The case has been registered due to grudge of property bargain as the same was being struck by me in favour of the complainant Qaiser. In order to avoid the commission of bargain, Qaiser has lodged the instant complaint falsely against me.

No P.W. has deposed regarding the alleged offence against me."

(II) ABDUL MAJEED:

"Due to my relation with Arshad as a friend, the complainant has involved me in a false and fabricated case. I have committed no offence at all as stated in the F.I.R."

(III) KHURSHID AHMAD:

"Due to my relation with Arshad as a friend, the complainant has involved me in a false and fabricated case. I have committed no offence at all as stated in the F.I.R."

The learned trial Judge on conclusion of the trial held them guilty of the offences charged and sentenced them as mentioned hereinabove.

6. Learned counsel for the appellants has submitted that there is no connecting evidence in respect of kidnapping of Shabeen Shehr (P.W.8) by the appellants; the contention of the complainant (P.W.4) regarding payment of the ransom amount, Rs.1,00,000 to the appellants for release of the kidnapped child is unbelievable and does not appeal to reason; the statements of the complainant (P.W.4) Shabeen Shehr (P.W.8), Noor Muhammad (P.W.2) and Muhammad Ramzan (P.W.3) materially contradict each other, therefore, conviction and sentence on a capital charge on the basis of discrepant evidence is not sustainable; the evidence of the star-witness, the kidnapped child (P.W.8) has virtually caused collapse of the prosecution case as she did not name the appellants, Khurshid Ahmad and Abdul Majeed in her testimony at all and her version regarding involvement of Muhammad Arshad-accused (appellant) is also discrepant and ambiguous, which renders no corroboration to the statement of the complainant (P.W.4); the recovery of the ransom amount at the instance of the appellants hardly connects them with the commission of offence as currency-notes involved were not tainted with any distinguishing marks; the evidence of recovery of cell-phones does not advance the prosecution case in any way, as the Investigating Officer failed to find any link between the cell-phones recovered from the accused and that of the complainant; the discrepancy-laden prosecution evidence has been misread and misunderstood by the learned trial court while passing the impugned judgment, which may be annulled and appellants may be acquitted of the charge.

7. Learned Deputy Prosecutor General Punjab while supporting the impugned judgment submits that the case of the accused falls within the definition of section 7(e) of the Anti-Terrorism Act, 1997 read with section 365-A P.P.C. as they kidnapped a baby-girl for ransom, which was virtually paid to them by the complainant to rescue his daughter; the statements of

the complainant (P.W.4) and the kidnapped-child (P.W.8) are in line inter se, which connect the appellants with the commission of offence beyond any shadow of doubts; the recoveries of motorcycles, the ransom amount and the cell-phones from the appellants fully connect them with the offence charged; the kidnapped-child delivered a spontaneous and believable testimony during trial as P.W.8, which has been properly appraised and given importance by the learned trial court; the trivial contradictions in the testimonies of the witnesses hardly do any damage to the prosecution case, rather they lend a touch of spontaneity to it; lastly submits that the appellants have committed a heinous offence and they do not deserve any leniency.

8. We have heard at length the learned counsel for the parties and perused the record with their assistance. Qaiser Mehmood (P.W.4) is the complainant of this case, who cited the name of his father Master Muhammad Ramzan (P.W.3) and that of Noor Muhammad (P.W.2) in the F.I.R. (Exh.PA/1) with the assertion that they were the eye-witnesses of kidnapping of his minor daughter Shabeen Shehr (P.W.8), aged eight, on 17-2-2010. He has also mentioned the registration numbers of the Motorcycles, GAK-8057 (P14) and LEY-6826 (P7), used by the accused/ appellants during the occurrence. The complainant admittedly is not the eye-witness of the kidnapping of his minor daughter (P.W.8). He, however, has claimed that he paid ransom amount of Rs.1,00,000 to the appellants on 4-3-2010 at a brick kiln , where police also reached in time and they apprehended the abductors red-handed and recovered from them not only the ransom amount but also the kidnapped child. There are certain other recoveries in this case, the evidentiary value whereof shall be discussed in the paragraphs to follow.

There is another important piece of evidence in this case, which relates to the test-identification of Khurshid Ahmad accused/appellant, which was supervised by Muhammad Sher Abbas, Judicial Magistrate Section 30, Kasur (P.W.6). Barring the statements of the child-witness Shabeen Shehr (P.W.8), there are two other testimonies having been rendered by the eye-witnesses of her kidnapping, namely, Noor Muhammad (P.W.2) and Muhammad Ramzan (P.W.3), who is the grandfather of the victim. Surprisingly, both the eye-witnesses (P.W.2 and P.W.3) resiled from their previous statements while rendering testimonies before the trial court and they categorically stated that Shabeen Shehr had been kidnapped by some unknown persons. They were declared hostile and subjected to cross-examination by the learned public prosecutor but they emphatically denied to have made any statement before the Investigating Officer against Muhammad Arshad, Abdul Majeed and Khurshid Ahmad appellants in terms that they had kidnapped the minor daughter of the complainant. Both the prosecution witnesses dented the prosecution story further by stating that they had identified Khurshid Ahmad accused in District Jail, Kasur on 11-3-2010 on the asking of the police and that they had seen the said accused in the lock-up of police station Theh Shekham earlier than the date of their test-identification, with the cooperation of the police. Muhammad Ramzan (P.W.3) further testified that he had not rendered any statement before the police on 21-2-2010 qua the fact that the accused had demanded ransom from the complainant for releasing his minor daughter, within his hearing. They (P.W.2 & P.W.3) categorically denied to have deposed falsely on account of having been won over by the accused. Both of them also denied the suggestion that the said accused had kidnapped baby Shabeen Shehr in their presence. They did not utter a word if they ever informed Qaiser Mehmood (complainant/P.W.4) about involvement of Khurshid accused in the occurrence. Their testimonies have been brushed aside by the learned trial court, as is manifest from the impugned judgment.

9. Qaiser Mehmood-complainant (P.W.4) has categorically admitted that his daughter had not been kidnapped in his presence. Baby Shabeen Shehr was recorded by the learned trial court as P.W.8 after she prudently replied to a few questions put to her by the court. She in her statement-in-chief said that she was kidnapped by accused Arshad, who took her to a

brick kiln and he put his hand on her mouth. While facing cross-examination, she rendered quite a few contradictory depositions which cannot be overlooked easily by assuming that she may have stated so out of innocence. She categorically stated that Arshad accused kidnapped her when she slept at her house; further said that she never slept at the brick kiln and that she never slept at a place outside her house; she always stayed with her parents at her house; no one else accompanied Arshad accused when he kidnapped her; Arshad accused administered to her sleeping pills during period of captivity and that she did not make any statement about the occurrence before the police. The aforementioned depositions of the child-witness are self-contradictory and hard to believe. If she had been kidnapped only by Arshad accused from her house, it should have been so alleged by the complainant in the F.I.R. She has not stated even a word that she had been kidnapped by the accused on way to her house from the school. She did not mention about the motorcycle(s) used in the occurrence. According to the prosecution's case, she was rescued from the clutches of the accused by the police, seventeen (17) days after her kidnapping but she categorically stated that she never slept at a place, other than her house. Her testimony does not provide any clue as to demand of ransom or its virtual payment by her father to the accused/appellants and her release as a matter of bargain, between them and her father nor she mentioned that she had been rescued by the police. Apparently there are many gaps and loopholes in her statement, which makes it very difficult for this court to rely on it. Once prosecution took risk of producing her at trial as a witness, they should bear the brunt of their ill-advised act. The innocence of the child-witness cannot be allowed to exceed limits so as to abridge the inconsistencies and pitfalls, caused by her in the case. Her testimony as a prosecution witness has changed the tenor of F.I.R. and if both kept in juxtaposition inter se, they would appear to have annulled each other, to the detriment of the prosecution's case.

10. It transpires from the statement of Qaiser Mehmood-complainant (P.W.4) that the accused demanded ransom amount of Rs.10,00,000 from him for the first time on 21-2-2010, which was finally settled between them at Rs.1,00,000. He through the courtesy of the defence, introduced the factum of some telephone-calls, having been made by the accused, but he failed to identify their SIM-number(s) in his testimony. He contended to have received seven/eight telephone calls from them before the recovery of his kidnapped child on 4-3-2010 but his memory failed, as he made an attempt to recollect their phone numbers. The Investigating Officers Maqbool Ahmad SI (P.W.9) and Ghulam Abbas S.I. (P.W.10) could not collect any call-details-record (CDR) of the cell-phones of the accused or that of the cell-phone of the complainant during investigation. The prosecution produced no evidence regarding telephone linkage between the accused and the complainant at any stage. This particular part of the statement of the complainant for want of corroboration cannot be relied on.

11. The crucial aspect of the prosecution case relates to payment of the ransom amount, Rs.1,00,000 by the complainant (P.W.4) on 4-3-2010 to the accused and recovery of his kidnapped daughter from the captivity of the accused, the same day. We come across the statements of Qaiser Mehmood-complainant (P.W.4), Shabeen Shehr (P.W.8), Maqbool Ahmad, S.I. (P.W.9) and Ghulam Abbas SI (P.W.10) in this respect. The complainant has asserted in his testimony that he informed the police before taking a decision to pay the ransom amount, Rs.1,00,000 to the accused on 4-3-2010, which fact is also admitted by the Investigating Officers (P.W.9 & P.W.10). The complainant fetched twenty currency notes, bearing the denomination of Rs.5000 each with him, so as to deliver it to the accused. As per demand of the accused, he was supposed to pay the ransom amount to them at an abandoned brick kiln, which was a few kilometers away from his residence. The police party arrived at the brick kiln almost at the same time when complainant reached there. This is, what can be found from the testimonies of Maqbool Ahmad S.I. (P.W.9) and Ghulam Abbas S.I. (P.W.10). The currency notes were not tainted with any distinguishing mark(s). Muhammad Arshad accused received the ransom amount from the complainant and on receiving it, he distributed

Rs.25000 each to Abdul Majeed and Khurshid Ahmad accused by retaining Rs.50000 with him. The complainant has not pointed out in his testimony whether his abducted daughter was in the grip of the accused at that time nor he has specified the place or corner of the brick kiln wherefrom she was recovered by the police. The receipt of ransom amount by the accused in aforesaid fashion has also been deposed about by the Investigating Officers but not the kidnapped child (P.W.8), who has said nothing in her testimony in this regard. The complainant recorded an interesting answer in his testimony, "when I paid ransom money to the accused persons and they handed over my daughter to me, police reached there." He also deposed that "deserted brick kiln of Jahangir Dogar where the accused handed over my daughter to me after receipt of ransom money is at a distance of about 8 k.m. from my village Teekhanwali." He further contended that "after the demand made by accused Arshad of ransom, I first time met him at the brick kiln where after receiving the ransom money accused handed my daughter over to me". He, however, deposed in his statement-in-chief that it was the police who recovered the kidnapped child from the accused. Maqbool Ahmad SI/IO (P.W.9) did not say a word in his examination-in-chief qua the recovery of the kidnapped child by the police from the accused and even in his cross-examination, conducted in a mindless way by the defence, he failed to bring it on the record that the police effected the recovery of the kidnapped child. Ghulam Abbas SI/IO (P.W.10), however, stated in his testimony that the police encircled the accused, apprehended them and got released the minor before handing over to her father. The complainant has not stated anywhere in his testimony that he saw his daughter Shabeen Shehr (P.W.8) in the company/grip of the accused when he went to the brick kiln to pay the ransom amount, and so is the tenor of the testimony of Maqbool Ahmad SI/IO (P.W.9). One gets the impression from the statement of the complainant that his daughter may not have been at the place where he paid the ransom amount to the accused and she might have been delivered to him at a later stage. Shabeen Shehr (P.W.8) kept silent about payment of ransom-money by her father to accused Arshad and she did not utter a word as to arrival of the police at the brick kiln or any role having been played by them _in her recovery before she met her father. She is undoubtedly the star witness of the _prosecution case. Her statement suffers from inherent contradictions and a number of loopholes. It also stands contradicted by her real grandfather Muhammad Ramzan (P.W.3) and Noor Muhammad (P.W.2). The events of 4-3-2010 have been narrated contradictorily by Qaiser Mehmood-complainant (P.W.4), Shabeen Shehr (P.W.8), Maqbool Ahmad S.I. (P.W.9) and Ghulam Abbas S.I. (P.W.10), which renders the story of payment of ransom by the complainant to the accused and recovery of the kidnapped child from them unbelievable. The distribution of the ransom amount amongst themselves by the accused at the spot looks unnatural and hard to digest. It appears that a fake event has been fabricated by the prosecution to implicate all three accused/appellants and in their bid to do so they cast thick shadows of doubt over their own case. The testimonies of the prosecution witnesses do not inspire confidence and despite raw-handling of the case by the defence during trial, they look unworthy of reliance and credibility. The testimonies of the complainant (P.W.4), the kidnapped child (P.W.8) and those of the Investigating Officers (P.W.9 and P.W.10) owing to inherent contradictions, inconsistencies and ingrained discrepancies cannot be held creditworthy or worth reliance, hence, stand discarded.

12. There, we find another important but faulty piece of evidence, which relates to test identification of accused Khurshid Ahmad (appellant), which has been tendered by Muhammad Sher Abbas, learned Judicial Magistrate Section 30, Kasur (P.W.6), who submitted his report Exh.PD along with letter Exh.PE of the learned District and Sessions Judge, Kasur. Astonishingly, this witness said nothing to prove identification of the said accused in jail and the methods adopted except for submitting report Exh.PD and letter Exh.PE in evidence. One cannot understand the strategy of the prosecution to have examined P.W.6 in aforesaid fashion, as it was not only contrary to law but violated the elementary principles of evidence. Even if the exhibits in question were to be accepted as proper record of

the witness's evidence, it would not materially assist the prosecution-case. In an identical situation, a Division Bench of this Court while dealing with the case of Lal Singh accused/ appellant (ILR 1924 (Vol.V) Lahore 396) observed as under:--

"Mr.Phalibus, a Magistrate of Montgomery, was called to prove the identification in the Montgomery Jail and the methods adopted. Instead, however, of stating in Court the details and the results, he merely refers to certain documents which are described as exhibits, in which he states that his evidence is to be found. These documents are put on the record as his evidence. It is quite obvious that the procedure adopted in this matter offends against the most elementary principles of evidence, and Mr.Sawhney can only attempt to justify it by saying that it was done to save time. This is obviously no excuse for an attempt to record the evidence of a witness in a manner which is not only contrary to law but which violates the first principles of evidence. There is no doubt that it would shorten the labours of a trial Judge if he were to be permitted to record written statements of witnesses in the form of exhibits by the mere production of the witnesses and their testimony that the exhibits embody the details of their evidence. But any person with any knowledge of and regard for judicial procedure should know that such a method of recording testimony would if applied to all the witnesses reduce the trial to a mere travesty."

The learned Bench went on to observe.---"The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It might merely mean that the witness happens to know that accused person. The principal evidence of identification is the evidence of a witness given in Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused took in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court, but otherwise the evidence of identification furnished by an identification parade can only be hearsay except as to the simple fact that a witness was in a position to show that he knew a certain accused person by sight."

The evidence given by the learned Magistrate (P.W.6) does no good and remains inconsequential to the prosecution-case.

13. Insofar as the recovery of ransom amount of Rs.1,00,000 (Rs.50,000

(P1/1-10) from Arshad-appellant and Rs.25,000 each (P8/1-5 & P15/1-5) from Abdul Majeed and Khurshid Ahmad-appellants), pistols (P2, P9 & P16), motorcycles (P7 & P14), mobile-phones (P3 & P 12), charger-Nokia (P4) with lead (P5), five tablets of Ativan (P6/1-5) and other articles, at the instance of the appellants, mentioned hereinabove, are concerned, it has lost relevance/ importance in view of the evidence, as tendered by P.W.4, P.W.8, P.W.9 and P.W.10 having been rejected and disbelieved by us, in preceding paragraphs. There hardly exists any such evidence on the record, which may connect the appellants with the commission of the crime alleged. It appears to be a badly investigated case, which shows mindlessness and incompetence of the Investigating Officers, whose clumsy and blundering approach has virtually cost the prosecution their case.

14. On the whole of the evidence, we are unable to come to the conclusion that the participation of the appellants in the crime in question has been established beyond a reasonable doubt. We, therefore, accept these appeals, set aside the conviction/sentence recorded against them by the learned trial court and acquit them of all the charges. They be released forthwith, if not required in any other case.

15. Death sentence awarded to Muhammad Arshad-appellant is NOT confirmed and Capital Sentence Reference is answered in the negative.

HBT/M-75/L Appeal accepted.

2014 Y L R 2534

[Lahore]

Before Shahid Hameed Dar and Sardar Muhammad Shamim Khan, JJ

ATIF ALI---Petitioner

Versus

SPECIAL JUDGE OF ATC-IV, LAHORE and 4 others---Respondents

Writ Petition No.7996 of 2012, heard on 28th May, 2014.

Penal Code (XLV of 1860)---

----Ss.302, 148 & 149---Anti-Terrorism Act (XXVII of 1997), Ss. 6, 7 & 23---Qatl-e-amd, rioting armed with deadly weapon, every member of unlawful assembly guilty of offence committed in prosecution of common object---Cognizance of cases by Anti-Terrorism Court---Determining factors---Demanding Bhatta---Transfer of accused's case from Anti-Terrorism Court to court of ordinary jurisdiction---Validity---Accused demanded Bhatta from deceased and on refusal murdered his father thereby conveying message to complainant and people living in the area that if anyone refused accused's demand would suffer the fate of deceased---Occurrence was bound to spread panic and feeling of insecurity---Under S.6(k) of the Anti-Terrorism Act, 1997 demanding Bhatta was offence punishable under S.7 of the Anti-Terrorism Act, 1997---Demanding Bhatta constituted a scheduled offence which was triable by Anti-Terrorism Court constituted under Anti-Terrorism Act, 1997---Cumulative effect of the contents of F.I.R., attending circumstances and record of case would determine whether alleged offence fell within purview of any of the provisions of Anti-Terrorism Act, 1997---Act done by accused created a sense of insecurity among people and was covered by Ss.6 & 7 of the Anti-Terrorism Act, 1997---Trial Court's order transferring accused's case to regular court having no cogent and plausible reasons, was set aside.

Nazir Ahmad and others v. Nooruddin and another 2012 SCMR 517 and Mst.Raheela Nasreen v. The State and another 2002 SCMR 908 rel.

Ch. Muhammad Farooq Ahmad for Petitioner.

Sittar Sahil A.A.-G. with Umar Farooq S.I. for the State.

Ch. Muhammad Shaukat for Respondents Nos. 2 to 4.

Date of hearing: 28th May, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.---The petitioner, through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, calls in question the legality of order dated 13-3-2014, whereby an application moved by the respondent-accused under section 23, Anti-Terrorism Act, 1997 (hereinafter to be read as the Act) has been allowed by the learned Judge, Anti-Terrorism Court No.IV, Lahore.

2. Relevant facts for consideration in this case are that Atif Ali (complainant) got registered F.I.R. No.343, dated 29-9-2013, under sections 302, 148, 149, P.P.C. read with section 7 of the Act, at Police Station Saddar Chunian (Kasur) with the allegation that he had set up fire-place (bhattie) to bake bamboos in the village; accused, Afzaal alias Jala & others were record-holders as well as money-extorters and they frequently demanded/received bhatta from the people of the area; they came to his bhattie at 6.00 p.m. on 28-9-2013 and threatened him, if he did not pay Rs.5000 to them, they would not spare him; they got into his house at about 10.30 p.m., the same day, abused and tortured him for having not sent the demanded money; in the meanwhile, his father Wazir Ali came, who resisted demand of the accused, whereon Afzaal fired straight with his repeater-gun, which landed at his chest, due to which he fell down and died at the spot; the other fire of the accused hit main gate and front wall of the house; the accused committed the crime to terrorize the people so as to receive bhatta. The respondent-accused moved an application under section 23 of the Act before the learned trial court for transfer of their case to an ordinary court of jurisdiction, which was allowed by it through the impugned order. Hence, the instant petition.

3. Learned counsel for the petitioner has contended that the learned trial court misread the record to pass the impugned order, which makes it patently illegal; the story of F.I.R., statement of the lone eye-witness, the medical evidence and other attending circumstances of the case clearly established that the accused had committed the crime after they failed to receive bhatta from the complainant and murdered his innocent father only for the said reason; the offence allegedly committed by the respondent-accused and their co-accused fell within the mischief of an act of terrorism, which is exclusively triable by the Anti-Terrorism Court; the offence committed by the accused certainly caused panic and fear to the public at large, therefore, it is not material if it was committed inside the house or outside it.

4. Learned counsel for respondents Nos.2 to 4 as well as the learned Law Officer have opposed this petition with the contentions that the alleged offence took place inside the house of the complainant in the dark hours of the night, hence, it is a case, essentially to be tried by a court of ordinary jurisdiction; the impugned order has been passed with correct appreciation of facts and the prevalent law, which make it a valid order; no one from the complainant-side paid bhatta to the accused nor any such amount was recovered during the course of investigation; the Investigating Officer failed to verify the allegation regarding bhatta during investigation and he opined that the complainant's version in this regard was false; lastly submit in unison that the impugned order has been passed within the limits of law, which does not call for interference by this court.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the learned trial court probably forgot about its earlier order, passed on 11-12-2013, which contained crucial observations that "allegation of demand of Bhatta and on refusal of which the committing of occurrence of murder by the accused persons is levelled in the F.I.R. The witness in statements under section 161, Cr.P.C. also made statement in this respect. So, at this stage, the allegation of demand of Bhatta is clear on record. The I.O. has not added offence for demand of Bhatta. He is directed to add offence for demand of Bhatta." It is not a case wherein complainant paid any amount of bhatta to the respondent-accused or their co-

accused, rather they allegedly demanded bhatta amount of Rs.5000 from him and on his denial, they attacked him at his house and murdered his father instantaneously, transmitting a clear message to the complainant, his family members and everyone living around, if any one showed defiance and refused to submit to them, he would be treated the same way. The general conduct and demeanour of the accused has not only been hinted at in the F.I.R., rather Investigating Officer also opined vide case diary dated 27-3-2014 that the accused were known notorious characters in the village, they openly drank, intimidated the people and received bhatta from them at their choice. The occurrence allegedly committed by them was bound to grip people of the vicinity in fear, panic, frustration and fright, all leading to feeling of insecurity in their minds. The statement of the complainant is fully corroborated by Amjad Ali, the only eye-witness of the occurrence, who too has alleged that the accused committed the gruesome offence on their failure to receive bhatta from the complainant. It is not a case where bhatta was paid to the accused, hence, recovery thereof from the accused is out of question. The trial court's observations in the impugned order that "Extortion money was not recovered from the accused …… Demanding BHATTA has not been established during investigation." are out of place, which tendered a distorted and twisted version of the prosecution case. The trial court failed to take notice of the fact that the Investigating Officer did not mention anywhere in report under section 173, Cr.P.C. that the accused had not demanded bhatta from the complainant, what he has mentioned therein is that receipt of bhatta by the accused could not be verified by him during investigation, albeit it was not the case, that the complainant paid bhatta to the accused.

6. It may have been at the back of mind of the learned trial judge that an attempt to charge bhatta was not covered by section 6(k) of the Act, as such the impugned order had been made. An examination of section 6 of the Act would show that charging of bhatta has been made an offence under sub-clause (k) thereof. The offence of charging bhatta as defined under section 6(k) is punishable under section 7(h) of the Act, which underlines that "the act of terrorism committed falls under clauses (h) to (n) of subsection (2) of section 6, shall be punishable, on conviction, to imprisonment of not less than five year but may extend to imprisonment for life and with fine". If we look at the Schedule of offences annexed with the Act, item No.1 would construe that any act of terrorism within the meaning of this Act would constitute a scheduled offence and language of item No.2, any other offence punishable under this Act, being also a relevant factor, in respect thereto. Looking at the Third Schedule in descending manner, item No.3 catches the eye, which reads, "Any attempt to commit, or any aid or abetment of, or any conspiracy to commit, any of the aforesaid offences." The conjoint effect of the above-said provisions of law would be that attempt of charging bhatta constitutes a scheduled offence, which is triable by the Anti-Terrorism Court, constituted under the Act. The argument of the learned counsel for the respondent-accused that the alleged act of the accused, being an in-house affair had not created any feeling of insecurity or it did not strike terror is wholly fallacious, as law does not require that in order to determine whether a particular act, committed by the accused created terror or feeling of insecurity or it fell within the mischief of the act of terrorism, the evidence of the witnesses should be recorded. It is the descriptive text of the F.I.R., the record of the case and other attending circumstances, which accumulatively would tell, if the alleged offence fell within the purview of any of the provisions of the Act. The manner in which, the respondent-accused and their co-accused behaved themselves at the time of the alleged occurrence clearly suggests that the act done by them had a nexus with the object of the Act and thus it was squarely covered under sections 6 and 7 thereof. Guidance in this regard may be had from Nazir Ahmad and others v. Nooruddin and another (2012 SCMR 517) and Mst.Raheela Nasreen v. The State and another (2002 SCMR 908). How can it be considered that the alleged crime had gone unnoticed, as argued by the learned counsel for the respondents. Though it was committed in the house of the complainant at night, yet, its details were immensely shocking, which create either a sense of insecurity amongst the people of the area or it was likely to terrorize them. The ferocity of

the alleged offence must have emitted shock waves and signals of unknown fear, dislodging people's mental peace with the feeling of insecurity and vulnerability.

7. The result drawn by the trial court that the case was exclusively triable by the ordinary court is not based on any cogent and plausible reason. The impugned order, therefore, is set aside, resultantly, application of the respondent-accused under section 23 of the Act also meets the same fate. The case against the respondent-accused shall be tried by an Anti-Terrorism Court. The judicial-record, if transferred, shall be remitted back to the learned Anti-Terrorism Court, Lahore forthwith.

8. This petition stands allowed in above terms.

ARK/4-13/L Petition accepted.

2014 Y L R 2676

[Lahore]

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

MUHAMMAD SHAHBAZ---Appellant

Versus

The STATE---Respondent

Criminal Appeals Nos. 1069, 1126 and Capital Sentence Reference No.29/T of 2010, heard on 22nd January, 2014.

Penal Code (XLV of 1860)---

----Ss. 302(b), 365-A & 34---Anti-Terrorism Act (XXVII of 1997), Ss.6(2)(a) & 7(a)---Qatl-e-amd, kidnapping for ransom, common intention, act of terrorism---Appreciation of evidence---Both the witnesses had not only rendered discrepant statements inter se, but also made some self-contradictory depositions---Witnesses of last seen had made certain improvements in their statements, for which they were duly confronted with their previous statements under S.161, Cr.P.C.---Evidence of last seen had been fabricated by the Police so as to involve accused persons in the case, and create a linkage between them and the crime committed---Discrepancies and self-contradictory depositions of both the prosecution witnesses, had rendered their statement worthless and incredible, which could not be given any weight---Evidence of last seen, was the weakest type of circumstance, which could easily be manoeuvred by the prosecution, wherever direct connecting evidence against an accused, did not come in their way---Law required unimpeachable corroboration of such like evidence, but such particular piece of evidence alone was untrustworthy and unreliable---Continuous chain of events, without any breach could, establish the guilt of accused, based on circumstantial evidence, but in the present case, it appeared to be a ragged, shaken and shabby situation which had dwindled the idea of building an uninterrupted chain by the prosecution---Medical evidence hardly advanced the prosecution case in plausible terms---Prosecution, in circumstances, had failed to prove the charge against accused persons beyond reasonable shadow of doubt---Impugned judgment being unsustainable was annulled and conviction and sentence of accused persons were set aside, they were acquitted of the charge and were directed to be released, in circumstances.

Naqibullah and another v. The State PLD 1978 SC 21; Rehmat alias Rahman alias Waryam alias Badshah v. The State PLD 1977 SC 515; Fazal Elahi alias Sajawal v. The State PLD 1953 FC 214; Allah Ditta v. The State 1980 PCr.LJ 163 and 1977 SCMR 20 rel.

Azam Nazeer Tarar for Appellant.

Khurram Khan, Deputy Prosecutor General Punjab for the State.

Mian Muhammad Rauf Ahmad for the Complainant.

Date of hearing: 22nd January, 2014.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Shehbaz and Muhammad Shakeel-appellants were held guilty under sections 302(b)/34, 365-A/34 P.P.C. and under section 7(a) read with section 6(2)(a) of the Anti-Terrorism Act, 1997, by learned Judge, Anti-Terrorism Court No.II, Lahore, vide judgment dated 22-4-2010 and sentenced them as under:--

(I) UNDER SECTION 365-A/34 P.P.C.:

To death, each with forfeiture of their movable and immovable properties in favour of the State.

(II) UNDER SECTION 302(b)/34 P.P.C.:

To death, each with direction to pay a sum of Rs.2,00,000, each to the legal heirs of the deceased as compensation under section 544-A, Cr.P.C. or in default thereof to undergo simple imprisonment for six months each.

(III) UNDER SECTION 7(a) r/w 6(2)(a) of ATA, 1997:

To death, each with fine of Rs.2,00,000, each or in default thereof to undergo simple imprisonment for three years each.

2. The convict-appellants by filing Criminal Appeal No.1069 of 2010 and Criminal Appeal No.1126 of 2010, respectively, have called in question their conviction and sentence under the impugned judgment, whereas, the learned trial Court has submitted reference under section 374 Cr.P.C. (C.S.R.No.29/T of 2010) for confirmation of the sentence of death of the appellants. We propose to dispose of all these matters together through this single judgment.

3. The facts, as unfolded by Muhammad Akram-complainant in his written application (Exh.PA) moved to the S.H.O., Police Station Baghbanpura, Lahore, on 17-8-2009 are that on 11-8-2009, his son Muhammad Zubair, aged five, went out of his house to fetch something, but did not return home; he contacted the inhabitants of the area as well as his relatives to locate the whereabouts of his son Muhammad Zubair and also flashed an advertisement regarding his missing on the TV screens, but all his efforts ended in smoke; he raised a suspicion that his son had been abducted by some unknown accused. On the basis of said application (Exh.PA), Muhammad Khaliq, A.S.-I. (P.W.1), drew up F.I.R. (Exh.PA/1) on the same day at 6.45 p.m.

4. After registration of case, investigation into the crime was entrusted to Asghar Ali, S.I. (P.W.14), who immediately reached the place of occurrence, inspected it and prepared visual site plan (Exh.PN) thereof; he recorded statements of the complainant, Muhammad Akram

and Ghulam Mustafa P.Ws., under section 161, Cr.P.C., wherein they nominated the appellants and their co-accused Muhammad Amin alias Meena (since dead); on 18-8-2009, the complainant through written application informed him about the demand of ransom money by the accused persons, whereafter offence under section 365-A, P.P.C. was added and investigation was entrusted to Muhammad Aslam, Inspector (P.W.17) on 20-8-2009, who, on the same day, on a spy information conducted a raid and arrested Muhammad Amin-accused (since dead); on his search, a sum of Rs.1,00,000 (P5/1-20), a mobile phone (P7) and a handkerchief (P6) were recovered from his possession, which were secured vide memo Exh.PK, duly attested by the complainant (P.W.10) and Ghulam Mustafa (P.W.13); on 21-8-2009, accused Muhammad Amin was found dead in the lock-up of the CIA Kotwali and in this regard a case was registered against certain police officials; on 24-8-2009, he received an information about recovery of dead body of the abducted-child Muhammad Zubair, having been effected from the B.R.B. Canal, by some officials of Police Station Barki, where, in relation to it, case-F.I.R. No.369/2009 already stood registered on 15-8-2009 for an offence under section 302, P.P.C. against some unknown accused. The complainant had been accordingly informed by the police qua the said fact. Thereafter he (I.O.) along with the complainant and others reached the said Police Station, where Nazeer SI, Investigating Officer of case F.I.R. No.369/2009, produced before him the photograph (P2), knickers (P3) and shirt (P4) of the deceased-child, which were secured by him vide recovery memo Exh.PC; the complainant after identifying the photograph (P2) as that of his son Muhammad Zubair, moved an application before the learned Magistrate for disinterment of the dead body thereof, which was allowed and the dead body was disinterred; when the dead body was brought home. Mst.Shabana, wife of the complainant, also identified it to be that of her son Muhammad Zubair; postmortem examination on the dead body had already been conducted by Dr.Rafaqat Ali (P.W.8) on 16-8-2009; on 12-9-2009, the Investigating Officer obtained call-log-data (CLD) consisting eight pages (P1/1-8) of mobile phones of the complainant as well as that of the accused persons and secured it vide memo Exh.PB; on 14-9-2009, he arrested Muhammad Shakeel and Muhammad Shehbaz (appellants), who were riding a motorcycle Honda CD-70 (P8), which was seized vide memo Exh.PM; on 16-9-2009, on the disclosure of Muhammad Shakeel (appellant), he took into possession rental form (Exh.PL), vide recovery memo Exh.PP; on the same day, Muhammad Shehbaz (appellant) got recovered brick (P9) from a trench (Morcha) B-626-L, BRB-canal, which was taken into possession vide recovery memo Exh.PO; on completion of the investigation, challan against the accused-appellants was submitted before the court for their trial in accordance with law. The appellants on indictment pleaded not guilty and claimed a trial. The prosecution, in order to prove its case, produced seventeen witnesses, namely, Muhammad Khaliq A.S.-I. (P.W.1), Rehmat Ali 64/HC (P.W.2), Akhtar Ali 7630/C (P.W.3), Muhammad Ilyas, photographer (P.W.4), Amjad Ali 12090/C (P.W.5), Muhammad Hussain SI (P.W.6), Muhammad Nafees A.S.-I. (P.W.7), Dr. Rafaqat Ali (P.W.8), Muhammad Arslan Inspector (P.W.9), Muhammad Akram-complainant (P.W.10), Mst.Shabana Yasmin (P.W.11), Shahid Iqbal (P.W.12), Ghulam Mustafa (P.W.13), Asghar Ali S.I. (P.W.14), Muhammad Ilyas (P.W.15), Muhammad Razzaq (P.W.16) and Muhammad Aslam Inspector (P.W.17). Thereafter, the appellants were examined under section 342, Cr.P.C., whereby they professed their absolute innocence in the matter and denied the allegations levelled against them. They did not opt either to depose within the scope of section 340(2), Cr.P.C. or to adduce evidence in defence. The contentions adopted by them separately in reply to question as to why this case against them and why the P.Ws. had deposed against them, read as under:--

MUHAMMAD SHEHBAZ:

"I am innocent, I have been falsely involved in this case. Otherwise I have nothing to do with this alleged crime. I was implicated by the witnesses and complainant due to Sharika Baraderi (relationship) and due to this reason the complainant and PWs who are closely

related with each other falsely implicated me in this false case in order to harass and blackmail my mother and sister who is the wife of complainant's brother and had strained relations with the complainant party. During the trial complainant being interested witness has deposed against me falsely."

MUHAMMAD SHAKEEL:

"I am innocent, I have been falsely involved in this case. Otherwise I have nothing to do with this alleged crime. I was co-worker with Shehbaz as a Lath workshop and Shehbaz has a relative with complainant Muhammad Akram due to the hesitation of the public the police with the connivance of the complainant has been implicated me falsely to show their fake and fictitious efficiency before their highups. I have been involved in this case suspicion. During the trial complainant being interested witness has deposed against me falsely."

5. The learned trial Judge on culmination of trial proceeded to convict/ sentence the appellants as mentioned hereinabove.

6. It has been argued by learned counsel for the appellants that the circumstantial evidence produced by the prosecution at trial is not worthy of reliance being full of contradictions and pregnant with countless discrepancies; the last seen evidence tendered by Ghulam Mustafa (P.W.13) and Muhammad Ilyas (P.W.15) suffers from unexplained delay of seven days, which has badly marred its veraciousness; it is, in fact, a case of no evidence against the appellants and impugned judgment has been passed by the learned trial court in sheer disregard to the settled principles of law, which renders it a whimsical and unsustainable document.

7. On the other hand, learned counsel for the complainant by taking the court to various bits of the prosecution evidence has argued that the prosecution case is studded with overwhelming incriminating evidence against the appellants, who have committed a devilish and gruesome act by abducting Muhammad Zubair, aged four/five, the ill-fated son of Muhammad Akram-complainant (P.W.10) for the purpose of ransom and committing his callous murder only for their lust of money; the circumstantial evidence produced by the prosecution creates a complete chain of events, which connects the appellants with the story alleged against them; the prosecution has successfully discharged its burden to prove the charge against the appellants beyond reasonable shadows of doubt, hence, the impugned judgment may be sustained. Being in agreement with the contentions of the learned counsel for the complainant, the learned Deputy Prosecutor General Punjab has added that the ransom amount of Rs.1,00,000 (P5/1-20) paid by the complainant to Muhammad Amin (since dead), a co-accused of the appellants, was recovered from the custody of the recipient of the said amount, the same day, vide recovery memo Exh.PK, by the police; the motorcycle (P8) used during the occurrence was taken on rent by Muhammad Shakeel (appellant) vide rent receipt/pro forma (Exh.PL), which was got recovered by the police vide recovery memo Exh.PM on 14-9-2009; the medical evidence, the recovery of brick (P9) at the instance of Muhammad Shahbaz (appellant), handkerchief (P6), cell-phone (P7) and that of the ransom amount (P5/1-20) provide necessary corroboration to the evidence of last seen adduced by Ghulam Mustafa (P.W.13) and Muhammad Ilyas (P.W.15); lastly submits that the prosecution has proved the guilt of the appellants to the hilt, hence, their appeal may be dismissed.

8. We have heard the learned counsel for the parties at length and gone through the entire record of the case minutely.

The circumstances of this case real touch the heart as victim Muhammad Zubair happens to be an innocent child of four/five years of age, who went missing on 11-8-2009,

when he left his house to fetch something and did not return alive, having fallen into the hands of some beastly characters. A massive campaign launched by the complainant Muhammad Akram (P.W.10) for locating the whereabouts of his lost son yielded no results and an advertisement flashed on the TV screens about missing of the child also did not work. The complainant finally reported the matter to the police through a written application (Exh.PA) by raising suspicion that his minor son had been abducted by some unknown accused, which led to registration of case-F.I.R. (Exh.PA/1) bearing No.872, on 17-8-2009, for an offence under section 363 P.P.C. at Police Station Baghbanpura, Lahore, Muhammad Khaliq, ASI (P.W.1) being the scribe thereof. After having reported the crime to the police on 17-8-2009, the complainant-Muhammad Akram (P.W.10) returned to his house, where he found his maternal cousin Ghulam Mustafa (P.W.13) and his companion Muhammad Ilyas (P.W.15) already present there, who informed him that they on their previous visit to his house on 11-8-2009 had witnessed Muhammad Shahbaz (appellant), Muhammad Amin (since dead) and Muhammad Shakeel (appellant) taking Muhammad Zubair away on a motorcycle at about 1/1.30 p.m. before they entered the house but they did not smell a rat as they knew about their relationship and acquaintance with him (complainant). On receipt of this information, the complainant moved a written application (Exh.PA/3) before the Investigating Officer and thereby named the appellants and Muhammad Amin (since dead) as abductors of his son. The agony and pain of the complainant still continued when he received a telephone call at about 6/7.00 p.m. on 18-8-2009 on his cell-phone/SIM loaded with SIM No.0323-4878845 from an unknown caller, cell-phone No.0308-4567658, who demanded ransom of Rs.10,00,000 for releasing his minor son. He was constrained to present another application (Exh.PA/4) to the police with the request that the abductors of his son might be traced and his son be recovered. The complainant continued his efforts zealously but fortune refused to smile on him as Sadaqat Ali A.S.-I. of Police Station Barki (Lahore) pulled the dead body of an unknown child, aged four/five, clad in red-colour knickers and clay-colour shirt with an injury on the head from the waters of the BRB-canal, at siphon-Karbath at about 7.30 p.m. on 15-8-2009 and reported the matter vide complaint (Exh.PG) to the said police-station, which led to registration of case-F.I.R. No.369/2009 (supra) against some unknown accused. This particular F.I.R. also entailed the fact that the dead body of the child could not be identified by anyone. The complainant after some negotiations with the accused succeeded in settling the amount of ransom as Rs.1,00,000 for releasing of his missing son and to deliver this amount to the accused, he wrapped it in a blue colour handkerchief (P6). He, as demanded by the accused, placed the bundle of currency notes in the bushes at Usmanpura, Lahore and returned to his house. He learnt about the arrest of accused-Muhammad Amin (since dead), the same day.

9. The heavens fall upon the complainant when a constable from Police Station Barki (Lahore) visited his house on 28-8-2009 and told him that the dead body of a child was recovered from the BRB-canal, so he should visit the said police station to identify the deceased-child. He, on receipt of this information, reached the said police station, where the police showed him the photograph (P2) of the corpse, which he identified as that of his missing son. He was also shown last worn clothes of the deceased, knickers (P3) and shirt (P4), which he picked out as last worn dress of his lost son. The police after postmortem examination thereof had already buried the dead body, being that of some unknown person, therefore, he moved an application (Exh.PA/5) before the duty Magistrate, Lahore with the request that the dead body of his son might be disinterred and handed over to him for its postmortem examination afresh and again burial thereof subsequent thereto. This application was allowed and he resultantly received the dead body of his son, Muhammad Zubair, vide receipt (Exh.PA/6). He brought it to the house, where his wife and mother of the ill-fated child duly identified it as that of her son Muhammad Zubair. Thereafter, it was buried in Shaghor Peer graveyard. The complainant witnessed the apprehension of Muhammad Amin accused (since dead) and recovery of ransom-amount, Rs.1,00,000 comprising twenty

currency-notes of the denomination of Rs.5000 each (P5/1-20) from him with its wrapper-handkerchief (P6) and cell-phone (P7), which were secured by the police vide recovery memo Exh.PK.

10. The most important and crucial evidence in this case has been tendered by Ghulam Mustafa (P.W.13) and Muhammad Ilyas (P.W.15), who claimed to have last-seen the deceased-child in the company of the accused, Muhammad Shehbaz (appellant), Muhammad Shakeel (appellant) and Muhammad Amin (since dead) on 11-8-2009 when they took him (Muhammad Zubair) with them on a motorcycle, just from a distance of ten paces from the house of the complainant. Their relationship with him has been admitted by the complainant in his testimony, rather he has mentioned about them as his cousins. The complainant did not mention their names in application (Exh.PA) while reporting the matter to the police. He, however, categorically stated in the said application that he had inquired about his missing son from the inhabitants of the area and also established contact with all of his relatives in this regard but to no avail. Ghulam Mustafa (P.W.13) has had with him a mobile phone prior to the occurrence, which he occasionally used to establish contact with his relatives. The complainant while appearing as P.W.10 contended that he had informed the police soon after the disappearance of his son on 11-8-2009 but he did not know if they had recorded some proceedings in this regard or not. He also stated that his relatives used to visit him after disappearance of his son and they also made efforts to locate his whereabouts. He further stated that he kept on contacting his relatives telephonically so as to inquire about his lost son and his relatives also contacted him in this regard. He too has admitted that Ghulam Mustafa P.W. had his own cell-phone prior to the occurrence. Muhammad Ilyas (P.W.15) admitted his relationship with the complainant in his testimony and introduced another fact that he was an employee of Ghulam Mustafa P.W. being his driver. Both the witnesses have not only rendered discrepant statements inter se but also made some self-contradictory depositions. Ghulam Mustafa (P.W.13) stated in his testimony that he along with Muhammad Ilyas P.W. visited the house of the complainant on 11-8-2009, where they stayed for about half an hour but they could not meet the complainant then. He also stated that he had come from his house, situated at Muridke on 11-8-2009 along with Muhammad Ilyas PW, to his relative Muhammad Akram (complainant) and they remained together since morning "on the day of meeting with complainant", whereas Muhammad Ilyas (P.W.15) has deposed about the fact that he along with Ghulam Mustafa P.W. visited the house of his relative Muhammad Akram (complainant) at about 1/1.30 p.m. on 11-8-2009 and they met him before returning to their houses at Muridke. He, however, took a somersault and contended that Ghulam Mustafa P.W. entered the house of the complainant on 11-8-2009, where he stayed for about 1/1½ hour and he, in the meanwhile, stayed outside the house. About another important fact, they have contradicted each other, which relates to seeking knowledge of abduction of the poor son of the complainant. Ghulam Mustafa (P.W.13) did not utter a word as to when he got the knowledge of abduction of Muhammad Zubair nor he stated anywhere that he had told the complainant about the incident on 11-8-2009, when he saw the deceased-child in the company of the appellants and their late co-accused. Muhammad Ilyas (P.W.15) has categorically stated that he in the company of Ghulam Mustafa P.W. came to the house of Muhammad Akram (complainant) at about 6.00 p.m. on 17-8-2009 and found the complainant (P.W.10) to have gone to the Police Station, therefore, they awaited him for about 1/1½ hour, whereafter he (complainant) returned to home and told them that his child had gone missing and was not traceable since 11-8-2009. He made another description in his testimony that it was Ghulam Mustafa PW, who entered the house of the complainant on 17-8-2009, whereas he sat on a shop, in front of the house of Muhammad Akram (complainant) where, Ghulam Mustafa P.W. brought some water for him to drink from inside the house and told him about the abduction of Muhammad Zubair. Both the witnesses of last-seen evidence made certain improvements in their statements for which they were duly confronted with their previous statements under section 161, Cr.P.C. (Exh.DA and Exh.DC). They introduced the factum of

reaching the house of the complainant at about 6.00 p.m. on 17-8-2009 in their testimonies and on confrontation of their previous statements it was found that they had not mentioned it therein. The time of registration of F.I.R. has been mentioned as 6.45 p.m. on 17-8-2009 with distance of place of occurrence from the police station as one kilometer towards north east. If Ghulam Mustafa (P.W.13) and Muhammad Ilyas (P.W.15) had reached the house of the complainant at 6.00 p.m. on 17-8-2009 and learnt about the abduction of Muhammad Zubair, they could easily disclose the incident of abduction by the appellants on 11-8-2009 to the inmates of the house including the mother of the abductee/ deceased or they could have made a telephone call to the complainant, informing him about the said incident, so that the names of the appellants and their co-accused (since dead) could figure in the F.I.R. Ghulam Mustafa (P.W.13) frankly admitted in his testimony that he had not told the police in his statement under section 161, Cr.P.C. that when they reached the house of the complainant, he had gone to the police station. The statement of this witness under section 161, Cr.P.C. (Exh.DA) categorically shows that when he along with Muhammad Ilyas P.W. came to see Muhammad Akram (complainant) on 17-8-2005 he was present at his house and it was he who informed them about his son having gone lost on 11-8-2009. It appears that the evidence of last seen had been fabricated by the police on 17-8-2009 so as to involve the appellants in this case and create a linkage between them and the crime committed. Had any such occurrence of abduction of the poor child taken place on 1-8-2009, the complainant would have been informed without any delay by Ghulam Mustafa (P.W.13) and Muhammad Ilyas (P.W.15) as they all possessed and used the cell-phones in daily life. It cannot be digested that the complainant did not establish contact with his related P.Ws. to inquire about his missing son, nor can it be believed that the P.W.13 and P.W.15 learnt about the occurrence on 17-8-2009. The discrepant and self-contradictory depositions of both the prosecution witnesses have rendered their statements worthless and incredible, hence cannot be given any weight. It has been held time and again by this court as well as by the apex court that the evidence of last seen is the weakest type of a circumstance which could easily be manoeuvred by the prosecution wherever direct connecting evidence against an accused does not come their way. Guidance in this regard may advantageously be had from many a judgments, to quote a few, Naqibullah and another v. The State (PLD 1978 SC 21), Rehmat alias Rahman alias Waryam alias Badshah v. The State (PLD 1977 SC 515), Fazal Elahi alias Sajawal v. The State (PLD 1953 FC 214) and Allah Ditta v. The State (1980 PCr.LJ 163). In another judgment 1977 SCMR 20 qua identical circumstances, the Hon'ble Supreme Court of Pakistan while allowing appeal of Nazo alias Ali Nawaz-accused observed that "the mere circumstance that the deceased and the appellant and his companions were seen together is not incompatible with the innocence of the appellant, and is therefore not sufficient to base his conviction on". The law requires unimpeachable corroboration of such like evidence, let alone this particular piece of evidence itself be untrustworthy and unreliable. A continuous chain of events, without any break can, of course, establish the guilt of an accused in a criminal case, based on circumstantial evidence but here, in this case, it appears to be a ragged, shaken and shabby situation, which has dwindled the idea of building an uninterrupted chain by the prosecution. We strongly believe that the fallacies found in the evidence of last-seen, produced in this case cannot be explained away by the prosecution on any hypothesis other than the innocence of the accused, hence, it is brushed aside, being unbelievable.

11. Insofar as the recovery of ransom amount of Rs.1,00,000 (P5/1-20) vide recovery memo Exh.PK, on 20-8-2009, at the instance of Muhammad Amin-accused (since dead), recovery of motorcycle (P8) vide memo (Exh.PM) on 14-9-2009, at the instance of the appellants, a brick (P9), not blood stained, vide recovery memo Exh.PO, on 16-9-2009, The CLD (call-log-data) vide recovery memo Exh.PB, on 12-9-2009, and rental receipt/form (Exh.PL), secured through memo Exh.PP on 16-9-2009, are concerned, they have lost relevance/ importance in view of the last-seen evidence, as tendered by P.W.13 and P.W.15 having been rejected and disbelieved by us, in preceding paragraphs, there hardly exists any evidence on the record,

which may establish that Muhammad Amin-accused (since dead) ever acted in collaboration with the appellants, so far as demand and receipt of the above-said ransom amount by him is concerned. All of these factors might have attained cruciality, had afore-rejected piece of last-seen evidence been given weightage and believed as a connecting circumstance against the appellants. The registration number of the above-said motorcycle (P8) has not been mentioned by the witnesses of last-seen evidence or by the complainant in their testimonies, prior to its recovery by the appellants. The call-log-data (CLD) appears to have been fetched by the Investigating Officer in a blindfolded manner as it creates no link between the cell-Phone No.0323-4878845 of the complainant and the cell-phone No.0308- 4567658 of the unknown caller demanding ransom from the complainant. The brick (P9) without being blood stained carries no evidentiary value at all.

12. Insofar as medical evidence, tendered by Dr. Rafaqat Ali (P.W.8) is concerned, it hardly advances the prosecution case in plausible terms as it, being a corroboratory circumstance may tell everything about the bodily injuries of a living or a dead person, but it cannot identify the author or inflictor thereof. The instant case is no exception, as regards the settled principles regulating the said sort of evidence. It appears to be a badly investigated case, which shows the mindlessness and incompetence of the Investigating Officer, whose clumsy and blundering approach has cost the prosecution their case.

13. The upshot of the above discussion is that the prosecution has badly failed to prove the charge against the appellants beyond reasonable shadow of doubt and they certainly fell miles short of the required yardstick, which might be adhered to for sustaining conviction in a case, like the one in hand. The impugned judgment being unsustainable is hereby annulled as a consequence of the titled appeals having been allowed. The conviction/sentence of the appellants is set aside and they are acquitted of the charge. They are directed to be released from jail forthwith if not required in any other case.

14. Death sentence awarded to the appellants is NOT confirmed and Capital Sentence Reference is answered in the negative.

HBT/M-38/L Appeals accepted.

2014 Y L R 2734

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD AZHAR IQBAL---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.7189-B of 2014, decided on 16th June, 2014.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), S.379---Theft of fuel (oil)---Pre-arrest bail, confirmation/grant of---Complainant did not produce any documentary evidence or account-

books during investigation to show storage or drainage of fuel on relevant day by accused to support prosecution story--- Extra-judicial confession was weaker of the weakest of all types of evidence---Malice and ulterior motives of complainant could not be ruled out---Ad interim pre-arrest bail granted to accused was confirmed.

Muhammad Imran Butt for Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State.

Mian Muhammad Ahmad for the Complainant.

Muhammad Ashraf S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---The allegation against the petitioner, Muhammad Azhar Iqbal is that he was a filler at Sunny Filling Station (Total), owned by Nadeem Haider (complainant); the petitioner joined by five fillers and manager of the said Filling Station committed theft of 20,000 liters of fuel, valuing at Rs.22,60,000 within the view of Muhammad Hussain and Abid Shakoor on 4-3-2014; the accused/petitioner and his co-accused jointly admitted their guilt qua theft of 20,000 liters of oil when they were interrogated by the complainant.

2. After hearing learned counsel for the parties and perusing the record, it is observed that allegation against the petitioner is somewhat hazy and ambiguous. Learned Deputy Prosecutor General Punjab submits that a filler, at any filling-station, only works at the dispensing-unit where fuel is supplied to the commuters and he has nothing to do with the storage and drainage thereof from the main tank, which is the exclusive job of the manager and the other staff, working there for the said purpose. The statements of the witnesses Muhammad Hussain and Abid Shakoor add to obfuscation of allegation against the petitioner, rather than making it vivid. Unlike the story of F.I.R., an impression arises from the statements of the witnesses under section 161, Cr.P.C., that the accused sold the said quantity of fuel to an oil-tanker-rider in the presence of the complainant which rendered the matter, as regards involvement of the petitioner in this case, still hazier. The complainant did not produce any documentary evidence or account-books during the course of investigation as to storage and drainage of the fuel on the said day, before the investigating officer, which he could have easily done to support the story alleged. The evidence of extra judicial confession of all the accused, being joint in nature, would be considered weaker of the weakest type, as acknowledged by the law. The argument of the learned counsel that the petitioner has been falsely involved in this case due to malice or ulterior motives of the complainant may not be without substance, as record available also hints at it. Therefore, this application is accepted and ad-interim pre-arrest bail granted to the petitioner vide order dated 26-5-2014 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of the learned trial Court.

ARK/M-273/L Bail granted.

2015 M L D 165

[Lahore]

Before Shahid Hameed Dar, J

AFTAB AHMED BUTT and others---Petitioners

Versus

The STATE and another---Respondents

Criminal Miscellaneous. No.8331-B of 2013, decided on 17th July, 2013.

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

----S.498---Penal Code (XLV of 1860), Ss.324, 337-A(i), 148 & 149---Attempt to commit Qatl-i-amd, Shajjah-i-Khafifa and rioting armed with deadly weapons---Pre-arrest bail, grant of---Fire-shots, determination of---F.I.R. revealed that it was not less than a mob which committed alleged occurrence and a number of accused were declared innocent during the course of investigation and many others were held guilty only to the extent of being present at the spot, empty handed without doing anything at all---Complainant categorically alleged that his maternal nephews, when they had already been deflated to the ground in injured condition, were fired at by all accused 26/27 in number and they caused injuries to both of them---Validity---Number of injuries as described in Medico-legal Reports did not commensurate with number of accused and in such eventuality it could not be said as to whose fire shot hit the injured and whose did not---None of accused persons present before High Court had been assigned any specific role regarding the injured, hence every probability existed to believe that they all might have been falsely involved in case due to malice or ulterior motives of complainant---Allegations against accused persons were of generalized and collective nature which ingrained an element of suspicion regarding their participation in occurrence alleged---Pre-arrest bail was confirmed in circumstances.

Shahid Imran's case 2011 SCMR 1614 and Muhammad Ashraf and another v. The State 1982 PCr.LJ 1286 rel.

(b) Criminal Trial---

----Innocent person, punishing of---Principle---Held, it was better to leave hundred guilty persons instead of confining / punishing an innocent man.

Ch. Sabir Ali Padyar for Petitioners.

Nasir Mahmood Sial, Deputy District Public Prosecutor for the State.

Ch. Ahmad Khan Gondal for the Complainant.

Bahu Khan S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---At the very outset, learned counsel for the petitioners

submits that four of the petitioners Aftab Ahmad, Sajid Mahmood, Rafaqat Ali and Mukhtar Ahmad have not turned up and he has no information as to the reason qua their absence.

Dismissed due to non-prosecution to the extent of said accused. The ad interim pre-arrest bail granted to them vide order dated 3-7-2013 is recalled.

2. The petitioners nine (9), in number, Bilal Ahmed Butt, Kashif Ahmad Butt, Muhammad Inayat Butt, Walayat Ahmad Butt, Ghulam Qadir, Khurram Shahzad, Fayyaz Ahmed, Muhammad Nawaz and Sana-Ullah, seek bail-before-arrest, as they apprehend their arrest at the hands of the police in respect of case-F.I.R. No.146/13, dated 6-6-2013, registered for offences under sections 324, 337-A(i), 148, 149 P.P.C., at police station Pahrianwali district Mandi Bahauddin.

Ghulam Sarwar is the complainant of above said F.I.R. who has nominated twenty-three (23) accused therein, all armed with firearms besides mentioning about five/six unknown persons to have participated in the occurrence; specific role of firing at Sohail Anwar and Usman Haider injured has been attributed to accused Abdal and Aftab Ahmad, while all others faced collective charge of firing at the said injured; the motive alleged pertained to a spy information, given by him and his nephew to the police against the accused.

The MLR of Sohail Anwar injured reveals six (6) firearm entry wounds, the nature whereof is still under observation and medico-legal-report of Usman Haider injured revealed two firearm injuries, which too, have not been declared so far by the medical officer and third injury on his person, which is a blunt-weapon-wound, is Shajjah-e-Khafifah (337-A(i), P.P.C.).

3. Learned Deputy District Public Prosecutor on instructions submits that seven (7) of the nominated accused have been declared guilty by the investigating officer and they include, Aftab Ahmad, Muhammad Inayat son of Fazal Ahmad (petitioner), Walayat (petitioner), Sajid Mehmood, Rafaqat Ali, Muhammad Nawaz (petitioner) and Mukhtar Ahmad; six (6) accused, as per opinion of the investigating officer merely remained present being empty handed at the spot and they include Bilal Ahmed Butt (petitioner), Kashif Ahmed Butt (petitioner), Ghulam Qadir (petitioner), Fayyaz Ahmed (petitioner), Sana Ullah (petitioner) and Khurram Shahzad (petitioner); six (6) of the other accused namely, Aqib, Zafar Iqbal, Muhammad Inayat son of Allah Ditta, Sohail Babar, Nasir Ali and Faisal Nadeem have been declared innocent by the Investigating Officer.

4. After hearing learned counsel for the parties and perusing the record, it is observed that the story of F.I.R. specifically burdens accused Abdal and Aftab Ahmad with the liability of causing firearm injuries to Sohail Anwar and Usman Haider, which factum is fully corroborated by the medico-legal-reports of the injured. Sulaiman Ali, the third injured is not named in the F.I.R. as a victim rather, factum of receipt of injuries by him, during the occurrence has been mentioned in the supplementary statement of the complainant, recorded by the investigating officer, the same day. His MLR, however, reveals two blunt-weapon-injuries which are simple and trivial. According to the story of F.I.R., it was not less than a mob which committed the occurrence alleged. A number of accused have been declared innocent during the course of investigation and many others have been held guilty only to the extent of being present at the spot, empty-handed, without doing anything at all. The complainant has categorically alleged that his maternal nephew Sohail Anwar and Usman Haider, when they had already been deflated to the ground in injured condition by accused Abdal and Aftab, were fired at by all the accused, 26/27 in number and they caused injuries to both of them. The number of injuries as described in the said MLRs do not commensurate with the number of accused and in such an eventuality it cannot be commented upon at this

stage, as to whose fire shot hit the injured and whose didn't. None of the petitioners-in-attendance has been assigned any specific role qua the injured, hence, every probability exists to believe that they all may have been falsely involved in this case due to malice or ulterior motives of the complainant. The allegation against them is of generalized and collective nature which ingrains an element of suspicion qua their participation in the occurrence alleged. It is better to leave a hundred guilty persons instead of confining/punishing an innocent man. The petitioners case certainly calls for further probe into their guilt within the meaning of section 497(2), Cr.P.C., therefore, the argument of the learned Deputy District Public Prosecutor that they are required by the police for recovery of the crime weapons loses relevance, as per law laid down by the Hon'ble Supreme Court of Pakistan in Shahid Imran's case 2011 SCMR 1614 as well as by this court in case titled Muhammad Ashraf and Another v. The State (1982 PCr.LJ 1286). Therefore, I allow this application to the extent of the accused/petitioners-in-attendance Bilal Ahmed Butt, Kashif Ahmad Butt, Muhammad Inayat Butt, Walayat Ahmad Butt, Ghulam Qadir, Khurram Shahzad, Fayyaz Ahmed, Muhammad Nawaz and Sana-Ullah and confirm their ad interim pre-arrest bail granted to them vide order dated 3-7-2013 subject to 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.

MH/A-106/L Bail allowed.

2015 M L D 884

[Lahore]

Before Shahid Hameed Dar, J

SHAHID NAZIR---Petitioner

versus

The STATE and another---Respondents

Criminal Miscellaneous No.5200-B of 2014, decided on 4th June, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), S.302---Qatl-i-amd---Bail, grant of---Further inquiry---Story narrated in FIR was not convincing---Medical report showed that deceased might not have died as alleged by prosecution---Guilt (or innocence) of the accused would be determined during trial---Case of accused called for further inquiry under S.497(2), Cr.P.C.---Bail was granted.

Jabbar Qadir for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General and Tariq S.I. for the State.

Ch. Muhammad Jehangir Wahla for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---Shahid Nazir (petitioner) allegedly tortured and administered some poisonous item to his wife Mst. Shamim Sarwar, real sister of Mehboob Sarwar (complainant) on 9-2-2014 whereafter he himself shifted her to emergency ward of Allied Hospital, Faisalabad where she breathed her last on 11-2-2014; the complainant has alleged that his sister, when on bed, told him and his companions that she had been forced to take some poisnous thing by her husband who tortured her as well; the motive alleged was that Shahid Nazir (petitioner) wanted to contract second marriage which was resisted by his wife, the deceased-lady.

2. The autopsy on the dead body of Mst. Shamim Sarwar was conducted by lady doctor Tanveer Zafar on 11-2-2014 who found four blunt weapon injuries on the forehead, left side of head and the left side of her trunk; she declared these injuries ante mortem and caused by blunt weapon; she deferred recording her remarks about the cause of death of the deceased, till receipt of reports from the offices of the Chemical Examiner and the Histopathologist. During pendency of this petition we noticed that cause of death was continuously shrouded in mystery, therefore, a direction was given to the autopsy-conducting medical officer as well as to the Medical Superintendent of Allied Hospital, Faisalabad to ensure declaration thereof expeditiously. The reports received from the Forensic Science Agency were negative in nature, hence they helped little in determining the cause of death. Dr.Tanveer Zafar and Medical Superintendent of Allied Hospital appeared before this court on 22-5-2014 to undertake that the cause of death shall be recorded, without further delay, after consulting the treatment record etc. of the deceased-lady.

3. Learned Deputy Prosecutor General Punjab has tendered written remarks of the said lady-doctor as to the said fact, which read as under:--

"On reviewing the case in the light of initial autopsy findings, reports of Chemical Examiner, Histopathologist, treatment chart/death certificate, mortality summary of the patient and on verbal discussion with the treating physicians of Medical Unit-I, the probable cause of death is Diabetic Ketoacidosis (DKA), a complication of diabetes Mellitus."

The medical officer appears to have reached the conclusion that the ill-fated lady met the natural death being a patient of diabetic-ketoacidosis (DKA).

4. After hearing learned counsel for the parties and perusing the record, it is observed that the story of FIR, as narrated by the complainant does not look impressive. How can it be believed that he being real brother of Mst.Shamim Sarwar, heard from her mouth that she had been administered some poisonous material by her husband and that she was also tortured by him, still he, as per his own assertion, came back. This particular contention of the complainant does not fit in with the common principles of human psychology, as he being the real brother would have been the last person to leave his real sister in lurches, who was apparently moving towards the eventuality. The women medical officer may have erred somewhere in postmortem examination process but fact remains that the cause of death, recorded by her hints at a strong probability that Mst.Shamim Sarwar died in some other way, than the one, as alleged by the complainant in the FIR. Four external injuries, caused by blunt weapon stand recorded in the necropsy report of the deceased which certainly have no nexus with her death as is manifest from the said report. Learned counsel for the complainant looked a bit enthusiastic when proceedings started in this case, but on seeing remarks of the women medical officer, as to cause of death of the deceased-lady, he turned perplexed and felt short of words. The guilt of the petitioner may better be adjudged by the learned trial court during the course of the trial. Prima facie there exist sufficient reasons to believe that the petitioner's case calls for further probe into his guilt under section 497(2), Cr.P.C. Therefore, we allow this petition and grant him post arrest bail subject to furnishing bail bonds in the

sum of Rs.5,00,000 with two sureties each in the like amount to the satisfaction of the learned trial court.

5. Before parting with this order, it is clarified that the observations contained hereinabove are tentative in nature which would have no bearing on the merits of the trial.

ARK/S-107/L Bail granted.

2015 M L D 921

[Lahore]

Before Shahid Hameed Dar, J

SARWAR KHAN alias LALA---Petitioner

versus

The STATE and another---Respondents

Criminal Miscellaneous No. 755-B of 2014, decided on 9th July, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), S.302---Qatl-i-amd---Bail, grant of---Further inquiry---Abscondence---Complainant did not disclose the source through which he came to know about the occurrence---Eye-witnesses did not offer any explanation for not informing the complainant about occurrence despite the fact that they were residents of the same village---Wajtakkar evidence was not consistent with postmortem examination report---Even otherwise, evidence of Wajtakkar was a weak incriminating circumstance, which could easily be manoeuvred by prosecution---False implication could not be ruled out---Case of accused called for further probe into his guilt within scope of S.497(2), Cr.P.C.---Mere abscondence was not sufficient for denying bail to accused---Bail was granted.

Ehsan Ullah v. The State 2015 SCMR 1137; Ikram-ul-Haq v. Raja Naveed Sabir and others 2012 SCMR 1273 rel.

Mubaris Khan Alizai for Petitioner.

Naveed Ahmad Warraich, Assistant District Public Prosecutor for the State.

Sh. Ahsan-ud-Din for the Complainant.

Mudassar A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---The complainant, Niyaz Muhammad has alleged in the FIR that his behnoi, Moman Khan was confined in jail in a murder case; to see her imprisoned husband, his sister Mst. Zaro Bibi along with her daughter Mst. Nosheen Bibi

alias Noshi went to District Jail Attock on 27-2-2012 but they did not return home for a considerable period of time; he along with others started searching for them and learnt on 29-2-2012 that they had been forcibly abducted and taken away in their cars, at about 5:00 p.m. on 27-2-2012 by Sarwar Khan alias Lala (petitioner) and five others; the search operation launched by them led to the recovery of the dead-bodies of the missing ladies at about 4:00 p.m. on 29-2-2012 from a far off/deserted nullah, with firearm injuries on their heads; the motive behind the occurrence pertained to a couple of previous criminal cases which were pending trial and in one of them, case FIR No.155/2011 dated 25-3-2011 under section 365-B, P.P.C. police station Hazro, Mst. Nosheen Bibi alias Noshi was supposed to testify against the accused and for this reason she along with her mother Mst. Zaro had been abducted and murdered by the accused.

2. Learned counsel for the petitioner submits that there is inordinate delay of two days in reporting the crime to the police which has not been explained by the complainant in any manner; the eyewitnesses regarding abduction of the deceased-ladies have not been cited in the FIR despite they happened to be close relation to the complainant; the witness of Wajtakkar evidence namely Sajid also does not figure anywhere in the FIR; it is a case of no evidence against the petitioner and he has been languishing in jail for many months despite being innocent; the petitioner's case calls for further probe into his guilt within the mischief of section 497(2), Cr.P.C, hence, his so called abscondence may not impede his quest for bail.

3. On the other hand, learned Assistant District Public Prosecutor assisted by learned counsel for the complainant opposes this petition with the contention that the poor-ladies, who are mother and daughter inter se, have been callously murdered by the accused only for the reason that one of them, Mst. Nosheen Bibi alias Noshi was supposed to tender evidence against them in near future; the prosecution case brims with connecting circumstantial evidence against the petitioner and chain of events is complete in all respects, creating a close link between the crime and the accused; the petitioner led to the recovery of pistol .30 bore on 8-12-2013, which gathers importance, as investigating officer collected three spent bullets of the same caliber during spot inspection; lastly submits that the petitioner remained an absconder in this case for more than a year and his unexplained abscondence would result in loss of some of his normal rights guaranteed under the substantive law as well as the procedural law.

4. After hearing learned counsel for the parties and perusing the record, it is observed that heart bleeds when one looks at the tragic end of the poor ladies, but it has to be remembered that courts are not driven by the emotional sentiments and it is the data available alone, which matters most, while considering question of bail of an under-trial prisoner. The complainant has alleged in the FIR that he along with his brother Said Muhammad and maternal nephew Aadat Khan searched for the missing ladies and in the process they learnt on 29-2-2012 that they had been forcibly abducted on 27-2-2012 by Sarwar Khan alias Lala (petitioner) and his co-accused, who drove them away in their cars. The complainant did not disclose the source through which he gathered the said knowledge nor did he cite any witness in this regard in the FIR. He, however, produced two witnesses, Syed Rustam Shah and Mst. Fatima Bibi, brother and sister inter se, before the investigating officer on 29-2-2012, who while rendering statements under section 161, Cr.P.C. categorically admitted their close relationship with the ill-fated ladies and alleged that both of them had been abducted, within their view, by Sarwar Khan alias Lala (petitioner) and his five co-accused on 27-2-2012. They did not offer any explanation as to why they kept this fact hidden from the complainant for two days despite being residents of the same village. The said witnesses told in their statements that Mst. Zaro Bibi was the wife of their maternal uncle (Mamani) and Mst. Nosheen Bibi alias Noshi was her daughter. It itches the mind, why they kept quiet for two long days over the incident of their kindred ladies' abduction by the

accused-petitioner and his co-accused. The complainant is the resident of village Bahadur Khan (Attock) and both of the eyewitnesses also hailed from the same village. It is hard to digest that they allegedly witnessed the incident of abduction of the ill-starred females and they silently went back to their home, instead of making it to the house of the complainant to break this news to him and stay back till such time, that they would be murdered by their captors, before they would open their lips. The witness of Wajtakkar evidence, Sajid son of Noor Elahi is also resident of the same village, who allegedly saw the accused-petitioner and his co-accused emerging from the fields being armed with firearms, at about 3.00 p.m. on 29-2-2012 and he informed the complainant accordingly. The postmortem examination on the dead bodies of the deceased-persons was conducted at 6.30 p.m. and 7.00 p.m. on 29-2-2012, about three hours after the alleged emergence of the accused from the said fields, the same day, but woman medical officer recorded in the necropsy reports that probable time, elapsed between death and the postmortem examination was "within 24 hours" and rigor-mortis on the dead bodies had developed. The time mentioned by the witness of Wajtakkar evidence in his statement under section 161, Cr.P.C. does not truly co-relate with the timings, recorded by the woman medical officer in the postmortem examination reports. Even otherwise, evidence of Watjakkar is a weak incriminating circumstance, which may easily be manoeuvred by the prosecution, wherever direct connecting evidence against an accused does not come their way. The petitioner is not linked with the motive-incident case in any manner, which fact is also admitted by the learned Assistant District Public Prosecutor as well as by the learned counsel for the complainant. The probability cannot be ruled out that the petitioner may have been falsely involved in this case by the complainant on account of his close relationship with his co-accused.

5. So far as the factum of abscondence of the accused-petitioner concerned, suffice it to say, it would have no relevance at this stage, as his case calls for further probe into his guilt, within the scope of section 497(2), Cr.P.C. It has been held in Ehsan Ullah v. The State (2012 SCMR 1137 Ikram-ul-Haq v. Raja Naveed Sabir and others (2012 SCMR 1273) and Mitho Pitafi v. The State (2009 SCMR 299) that mere abscondence of an accused may not be sufficient to refuse bail to him, if, on the basis of other circumstances, the case called for further inquiry into his guilt and in such a situation, bail should be allowed to him as a matter of right and not by way of grace or concession. It has also been held by the apex court that bail was sometimes refused to an accused on account of his abscondence, but such a refusal proceeded primarily upon the question of propriety and if question of propriety was confronted with the question of right of an accused, the former had to give way to the latter. It was so held by the apex court in Mithu Pitafi's case (ibid) that "it is well-settled principle of law that bail can be granted if an accused has good case for bail on merit and mere absconsion would not come in way while granting the bail." Mere abscondence of an accused may not be deemed sufficient to refuse bail to him, if his case called for further probe into his guilt within the scope of section 497(2), Cr.P.C. A reference in this respect may be made to Ehsan Ullah's case (ibid). The petitioner's case is no exception, being fully covered by the above-noted illustrious judgments of the apex court.

6. For the discussion supra, this application is allowed and the petitioner is granted post-arrest bail subject to furnishing bail bonds in the sum of Rs.5,00,000 (five lacs) with two sureties each in the like amount to the satisfaction of the learned trial court.

ARK/S-106/L Bail granted.

2015 P Cr. L J 153

[Lahore]

Before Shahid Hameed Dar, J

TAHIR MEHMOOD---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.6507-B of 2013, decided on 9th July, 2013.

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

----S. 497(1), fifth proviso---Penal Code (XLV of 1860), Ss. 302, 392, 394 & 411---Qatl-i-amd, robbery, voluntarily causing hurt in committing robbery, dishonestly receiving stolen property---Bail, refusal of---Delay in conclusion of trial occasioned by adjournments sought by defence side---Effect---Bail was moved by accused on ground of statutory delay in conclusion of his trial, however accused and his co-accused had shown delinquency at trial and sought adjournments one after the other---On seventeen (17) occasions adjournments were sought when prosecution witnesses were in attendance for their examination by Trial Court---Adjournments earned by defence side in a particular situation, may cause wastage of dozen ensuing dates of hearing, which prolonged proceedings of the trial---Accused had been implicated by the complainant and witnesses for not only forcibly snatching mobile phones but also killing one person in the process---Such an offence made the accused a desperate or hardened character, bringing his case within the exception clause of S. 497(1), fifth proviso, Cr.P.C.---Bail application of accused was dismissed in circumstances with a direction to Trial Court to conclude trial within six months.

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

----S. 497(1), fifth proviso---Bail---Delay in conclusion of trial, computation of---Adjournments sought by prosecution and defence side---Law did not require that adjournments sought by defence may be compared with adjournments obtained by the other side, so as to draw a mathematical equation as to who outnumbered whom, nor digits could be juggled with for said purpose.

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

----Ss. 497(1), fifth proviso & 154---Bail sought on ground of statutory delay in conclusion of trial---Desperate and hardened nature of accused, determination of---Story of F.I.R. could be validly gone into while adjudicating a bail application under S. 497(1), fifth proviso, Cr.P.C. to formulate an opinion as to whether or not, mode of occurrence hinted at desperate/hardened character or disposition of the accused.

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

----S. 497(1), fifth proviso---Penal Code (XLV of 1860), S. 396---Dacoity with murder---Bail sought on ground of statutory delay in conclusion of trial---Desperate and hardened nature of accused, determination of---Accused committing offence of dacoity-cum-murder could

definitely be held to be of a desperate or hardened character, which would bring his case within the mischief of exception clause to S. 497(1), fifth proviso, Cr.P.C.---Illustration.

Mian Pervaiz Hussain for Petitioner.

Mrs. Muqadass Tahira, Additional Prosecutor-General Punjab for the State.

Ch. Walayat Ali for the Complainant.

Muhammad Nawaz, A.S.-I. with record.

ORDER

SHAHID HAMEED DAR, J.---Tahir Mehmood (petitioner) seeks bail after arrest in case-F.I.R. No.1084/2010, dated 27-10-2010, registered under sections 302, 394, 392, 411, P.P.C. read with section 13 of Pakistan Arms Ordinance (XX) 1965, at Police Station City-B-Division, Sheikhupura.

2. After dismissal of his earlier post arrest bail application (Criminal Miscellaneous No. 6510-B of 2011) vide order dated 23-6-2011, the petitioner approached the Hon'ble Supreme Court of Pakistan for seeking bail, through Criminal Petition No.547-L of 2011, which again met the same fate, as learned counsel for the petitioner preferred to withdraw it after having argued it at some length. He, now, pleads statutory ground of delay in conclusion of the trial, which, according to his learned counsel, has not concluded as yet despite more than two years' incarceration of the petitioner, since 27-1-2011.

3. Learned counsel for the petitioner submits that the earlier bail declining orders may not be deemed injurious to the bail plea of the accused/petitioner for the sole reason that he pressed for bail on the statutory ground of delay in conclusion of the trial which envisages and confers a compulsory right upon the petitioner to seek bail; the petitioner or any other person acting on his behalf did not occasion any delay in conclusion of the trial and an accumulative look at the proceedings of the trial would suggest that it was the prosecution, which, through its various tactics equally contributed towards perpetuation of proceedings of the trial which created a favourable circumstance for the accused/ petitioner to be granted bail; out of fifty five (55) adjournments, by the learned trial Court till today, the petitioner sought seventeen (17), of course, not for a vexatious purpose but for valid reasons which do not infringe his case in any manner; the complainant and his co-witnesses departed from their previous stance, they took at the investigation stage, during their examination as P.Ws. at trial, which gives rise to a fresh ground, as acknowledged by law; the petitioner does not have any previous criminal antecedents therefore, he may not be considered a desperate or hardened criminal. Relies upon cases titled Liaqat and another v. The State (1995 SCMR 1819), Nazir Hussain v. Ziaul Haq and others (1983 SCMR 72), Haji Javed Ahmad and another v. The State (PLD 1997 Karachi 156), Muhammad Sadiq and 2 others v. State (1996 PCr.LJ 1440), Ali Hassan alias Mithu v. The State (1997 PCr.LJ 411), Abdul Razak Zangejo v. The State (PLD 2012 Sindh 218) and Shaukat Ali v. Ghulam Abbas and others (1998 SCMR 228).

4. On the other hand, learned Additional Prosecutor-General Punjab assisted by learned counsel for the complainant opposes the contention that the accused/petitioner actively contributed towards delay in conclusion of the trial and on every such occasion when prosecution evidence was available, he got proceedings adjourned on one pretext or the other; the mode of occurrence and overall picture of the prosecution case, easily paints the petitioner as a hardened and desperate criminal; no such mathematical equation can be drawn as asked

by the other side nor proceedings of a trial can be messed up for doing favour to the accused/petitioner; it is the petitioner alone who can be saddled with the liability as enshrined in Exceptional Clause of the 5th Proviso to section 497(1), Cr.P.C.

5. After hearing learned counsel for the parties and perusing the record, an immediate impression can be gathered that the accused petitioner and his co-accused showed delinquency at trial and sought adjournments one after the other, in fact on seventeen (17) occasions, when prosecution witnesses were in attendance for their examination by the learned trial Court. There can be no contrary view to the onerousness of the complainant of a criminal case, who has to take rigours in not only preserving his witnesses from lurking fears of the other side but also ensuring their presence and examination as per the case built by the prosecution, before the learned trial Court. It is a matter of common observance that the adjournments sought by the accused/defence, in presence of the prosecution witnesses, who, unluckily leave without being examined due to non-cooperative and evasive conduct of the accused, certainly results in their demoralization and discouragement. An adjournment earned by the defence in a particular situation, may cause wastage of a dozen ensuing dates of hearing which perpetuate proceedings of the trial and for such a circumstance, the accused cannot claim innocence or being not at fault. It is not the requirement of the law that the adjournments sought by the defence may be compared with the adjournments obtained, by the other side, so as to draw a mathematical equation as to who outnumbers whom, nor digits can be juggled with for the said purpose. The language of the 5th and 6th Provisos to section 497(1), Cr.P.C. is precise and clear which does not permit such a mind-itching exercise, as suggested by the learned counsel, to extract favours for a particular party. Let us have the definitions of the said provisos reproduced hereunder:--

"Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail.

(a) Who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding on year or in case of a woman exceeding six months and whose trial for such offence has not concluded; or

(b) Who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of a woman exceeding one year and whose trial for such offence has not concluded:

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

Learned counsel for the petitioner repeatedly desired and in fact did reopen the merits of the case, wherefore he was reminded by the Court of his curtailments, especially after dismissal of earlier bail application (Criminal Miscellaneous No.6510-B of 2011) of the accused on merits by this Court vide order dated 23-6-2011, and dismissal of another one, (Criminal Petition No.547-L of 2011) by the Hon'ble Supreme Court of Pakistan after it had been argued at some length. So far as, story of F.I.R. is concerned it can be validly gone into while adjudicating this bail-application, under 5th proviso to section 497(1), Cr.P.C., with a view to formulate an opinion, as to whether or not, the mode of occurrence hinted at the desperate/hardened character or disposition of the accused. It is discernable from the record that the petitioner was implicated by the complainant and other witnesses with the contention, they adopted at the time of his test identification on 1-2-2011 that he not only

forcibly snatched mobile-phones from Muhammad Rafiq and Abdul Khaliq but also fired at Amanullah (deceased) which severed his life-line. A person committing an offence of dacoity-cum-murder, like the petitioner is pitted against, can definitely be held a desperate or hardened character which brings his case within the mischief of the Exceptional Clause of the 5th Proviso to section 497(1), Cr.P.C. The argument of learned counsel for the petitioner that the prosecution witnesses improved upon their previous statements while rendering evidence before the trial Court appears to be a submission -in-vacuum, as the learned counsel has failed to produce any supporting material in this regard. Even otherwise, it would be up to the learned trial Court to adjudge, whether or not any such improvement had been made by the witnesses in their testimonies and if yes, its effect in the long run. Not a valid ground to be considered at this stage in a bail petition. The judgments relied upon by the learned counsel, being distinguishable on facts hardly lend a sense of fortification to the submissions made on behalf of the petitioner.

6. Therefore, I am not inclined to accept this petition, which is accordingly dismissed.

7. Before parting with this order, the learned trial Court is directed to speed up the proceedings of the trial and conclude it within six months, excluding the summer-vacation, from the date of communication of this order. It is desired that the learned trial court would record receipt of the instant order in the order sheet and ensure compliance thereof in letter and spirit, may it be a day-to- day or twice-a-week affair.

A copy of this order be sent to the learned trial Court for information and compliance through some swift means, preferably within six (6) days from today.

MWA/T-18/L Petition dismissed.

2015 P Cr. L J 904

[Lahore]

Before Shahid Hameed Dar, J

WAQAR AHMAD and another---Petitioners

versus

The STATE and another---Respondents

Criminal Miscellaneous No. 7334-B of 2013, decided on 21st June, 2013.

Criminal Procedure Code (V of 1898)---

----Ss. 498 & 497(2)---Penal Code (XLV of 1860), Ss. 380, 457 & 411---Theft in dwelling house, lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment---Ad-interim pre-arrest bail, confirmation of---Further inquiry---Pending civil litigation between parties over property---Statements of witnesses of the occurrence doubtful---Effect---Accused persons allegedly broke into complainant's shop at night and stole certain items and documents---Complainant was not an eye-witness of the occurrence and was informed about the same the next morning by two witnesses, who stated in their

statements under S. 161 , Cr.P.C., that they witnessed the accused persons committing the crime (during the night), however they did not mention the time of occurrence or reason as to why they did not inform the complainant well in time---Both the alleged witnesses of the occurrence stated in their statements under S. 161, Cr.P.C. that accused persons got into the shop by making a hole in the rear wall, however interestingly house of one of the said witnesses was adjacent to the rear wall of the shop---Such circumstances reflected (adversely) on the claim of the witnesses that they witnessed the accused persons committing the crime---Civil litigation qua shop in question was pending between the parties---Both parties, in their own right, had strong claims over ownership and possession of the shop---Case was one of further inquiry---Ad interim pre-arrest bail already granted to accused persons was confirmed in circumstances.

Sultan Mehmood Dar for Petitioners.

Mrs. Muqadass Tahira, Additional Prosecutor-General Punjab for the State.

Muzafar Ali for the Complainant.

Ghafoor SI with record.

ORDER

SHAHID HAMEED DAR, J.---Waqar Ahmad and Intizar Ahmad (petitioners) seek bail-before-arrest in case-FIR No.286/2013, dated 17-4-2013, registered for offences under sections 457, 380, P.P.C. at police station Hujra Shah Muqeem (Okara).

2. Precisely, the prosecution case as narrated by Ghulam Farid (complainant) is that he ran a motorcycle showroom and a spare-parts shop at Attari road; he shut his shops as usual at night between 15/16-4-2013 and went to his home; Waqar Ahmad (petitioner) and Intizar Ahmad (petitioner) joined by their co-accused broke into his shops and stole Mobil oil, spare parts, certain documents including registration books etc. worth Rs.26,17,000; he learnt about this incident when he went to his shops in the following morning, where Ghulam Hussain and Muhammad Ashfaq met him who disclosed that his shops had been broken into by the said accused; the accused committed the occurrence only to forcibly occupy his property, whereas, he had obtained an injunctive order from a civil court.

3. After hearing learned counsel for the parties and perusing the record, it is observed that the complainant is not an eyewitness of the alleged occurrence and he was informed about the incident by Ghulam Hussain and Muhammad Ashfaq, who joined investigation on 17-4-2013 and rendered statements under section 161, Cr.P.C., wherein they endorsed the story of FIR with the contention that they witnessed the occurrence alleged, without mentioning as to the time of occurrence, or why they did not inform the complainant well in time, especially when one of them Ghulam Husin, hailed from the same village. Both the witnesses have mentioned the direction in their statements under section 161, Cr.P.C. wherefrom the shops of the complainant were allegedly burgled and it was the rear wall through which the accused allegedly got into the shops by making a hole therein. Interestingly, it is the house of the complainant Ghulam Farid, which is adjacent to the rear wall of the said shops. The complainant, who is in attendance admits said fact with the addition that he owned another shop which was adjacent to the burgled shops on its west and that the residential house of the accused was adjacent to his house, on it back. The contention of the witnesses in such a scenario reflects on their claim that they witnessed the accused' commit the crime. Learned Additional Prosecutor-General Punjab while referring to visual

site plan, prepared by the investigating officer during spot inspection, verifies aforesaid contention of the complainant. Civil litigation, admittedly, is pending between the parties qua the shops-in-issue. The I.O. has recorded a finding of guilt qua the petitioners, which looks improbable as well as ridiculous as finding recorded shows that Waqar Ahmad (petitioner) purchased said shops in year 2008 from Muhammad Afzal and Abdul Ghaffar, the owners, whereafter, Ghulam Farid (complainant) purchased the said property from one Muhammad Mansha son of Gulab Din about 2 months prior to the occurrence. The contents of the FIR reveal that the complainant got lodged it with a fear at the back of his mind that the accused intended to "forcibly occupy" his shops and it may be a reason for their false involvement in this case. Both the parties, in their own right, have strong claims over ownership and possession of the said shops, which can be easily perceived from the circumstances enumerated hereinabove. There exist sufficient reasons to believe that the petitioners' case calls for further probe into their guilt within the purview of section 497(2), Cr.P.C., hence concluding argument of the learned counsel for the complainant that person of the accused was required by the police for recovery of 'stolen-property' loses relevance. Guidance in this regard may be had from cases, titled Shahid Imran v. The State and others (2011 SCMR 1614) and Muhammad Ashraf and another v. The State (1982 PCr.LJ 1286).

For the reasons supra, the instant petition is accepted and the ad interim pre-arrest bail granted to the petitioners vide order dated 14-6-2013 is confirmed subject to 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.

MWA/W-9/L Petition dismissed.

2015 P Cr. L J 1315

[Lahore]

Before Shahid Hameed Dar, J

Malik JAVED and another---Petitioners

versus

The STATE and another---Respondents

Crl. Misc. No.1179-B of 2014, decided on 19th June, 2014.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), S. 462-C---Theft of sui-gas---Pre-arrest bail, refusal of---Prima facie case---Both the accused were owners of steel re-rolling mills allegedly consuming stolen sui-gas---Raiding party consisted of special task force team of Sui-gas department, besides district administration officials and local police, which on receipt of spy information as to theft of gas, raided steel re-rolling mills--- Raiding party dug up suspected spot and unearthed theft of gas through no-return valve fixed on 4 diameter distribution pipeline and stolen gas was being supplied to steel mills---Raiding party also discovered a tunnel between dug up place and factory---No-return valve and consumer meter station (CMS) were removed and taken into possession---Prosecution case brimmed with connecting evidence against

accused persons and there existed no material to believe at bail stage that they had been falsely involved in case due to malice or ulterior motives of complainant or they had not committed offence alleged---Pre-arrest bail was refused in circumstances.

Dr. Muhammad Riaz Akhtar alias Dr. Shahid v. The State and another 2012 SCMR 1685 and Ghulam Ahmad Chishti's case 2013 SCMR 385 ref.

Aitzaz Ahsan for Petitioners.

Rana Tassawar Ali Khan, Deputy Prosecutor-General Punjab.

Rana Zia-ul-Islam Manj for the Complainant.

Muhammad Zia Ahmed, General Manager Sui-Gas and Iqbal Hassan Shah, DSP.

ORDER

SHAHID HAMEED DAR, J.---The petitioners, Malik Javed and Malik Pervez seek pre- arrest bail, as they apprehend their arrest by the police in case-FIR No.778/2013, dated 3-7-2013, under section 462-C, P.P.C., Police Station Baghbanpura, Lahore.

2. In fact, the petitioners are not named in the FIR and what we learn therefrom is, that the area allegedly dug-up by the raiding party, headed by Shah Nawaz Khan, Superintendent Admn, Sui-Gas Office Gulberg, Lahore (complainant) to unearth unauthorized supply of gas to a factory/foundry, belonged to Khawar Sadiq, the owner of Malik Steel Re-rolling Mills and Saifullah accused, who was arrested by the police then, was apparently shown his employee/representative; according to the allegations, the raiding party on digging the place discovered that Malik Steel Re-rolling Mills committed theft of gas through a no-return-valve, fixed on a 4" dia. pipeline which connected the factory and the spot where said valve had been fixed, through an underground tunnel; Khawar Sadiq was booked in this case for the said charge and his consumer number was mentioned in the FIR as 6170741000; the raiding party removed and took into possession the no-return valve and consumer meter station (CMS) from the spot, as is evident from the record.

3. The complainant allegedly rendered a supplementary statement, the same day, whereby he corrected himself by mentioning that the spot which had been dug-up by the raiding party was situated in close proximity of Malik Steel Re-rolling Mills, which was owned by Malik Javed and Malik Pervaiz accused, and it were they, who had committed theft of gas at a large-scale and incurred huge loss to the national exchequer, which ran into millions of rupees. Zahid Mahmood, Halqa Patwari was recorded as a witness in this case by the Investigating Officer, who through his statement under section 161, Cr.P.C. verified the fact from the revenue record, that the site of crime belonged to the accused/petitioners.

4. Learned counsel for the petitioners submits that the petitioners are certainly not named in the FIR nor they have any link with the crime alleged and they have been falsely involved in this case under a conspiracy so as to save Khawar Sadiq, who was an influential person of the area and a known sympathizer of the ruling party; the FIR has been lodged with precise details vis-a-vis, the names of the accused, the consumer number, the nomenclature of the Steel Re-Rolling Mills and removal of no-return valve and consumer meter station (CMS) etc. which left little doubt that the offence had been committed by Khawar Sadiq and not by the petitioners; the area allegedly dug by the raiding party is at a distance of 600 to 1100 ft. from the petitioners' factory and no such pipeline, with an alike length, had been taken into

custody by the police from the spot; the petitioners though, have been served with a detection bill of Rs. 59 millions, yet they have no liability whatsoever in this regard to pay it; the petitioners on the day of the alleged occurrence, as admitted by the other side, were not within the country and their plea in this respect had been verified by the Investigating Officer during the course of investigation; the petitioners so far as facts of the case are concerned, are stranger herein and their case is hardly distinguishable from the case of Saifullah, who has already been granted bail by the learned trial court vide order dated 8-7-2013; lastly submits that the petitioners case constitutes need for further probe into their guilt, therefore, they may be saved from the lurking danger of being arrested at the hands of the hostile police. Relies on case titled Dr. Muhammad Riaz Akhtar alias Dr. Shahid v. The State and another (2012 SCMR 1685).

5. On the other hand, learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant opposes this petition with the submission that the facts regarding involvement of Khawar Sadiq accused, as mentioned in the FIR, were based on an innocent misunderstanding/omission on the part of the complainant; the attending circumstances of the case, including geographical position of the area and the documentary evidence clearly hinted at direct involvement of the petitioners in this case; the area dug-up by the raiding party to uncover theft of gas was at a distance of a few yards from the factory of the accused/petitioners and it is not correct that their factory was 600 to 1100 ft. away from the dug-up spot; the petitioners themselves filed some suits before different civil courts, wherein, they mentioned detailed particulars of their factory(-ies), which assimilate the ones, as mentioned in the FIR; the last suit filed by them in this regard also contained description of the alleged occurrence, as given in the FIR and they have categorically admitted that the said area belonged to them; Saifullah accused, on many occasions, represented the petitioners before the Sui-Gas officials and documentary evidence in this regard is available; the petitioners have the history of having a number of complaints made against them qua tampering with their gas meter; video footages and still-snapshots have been collected by the Investigating Officer, which would verify each and every bit of the allegation against the accused; the petitioners have been issued the detection bill of Rs.59 millions by the SNGPL and they have not deposited a penny so far in direction thereto; the petitioners' case falls within the mischief of prohibitory clause of section 497(1), Cr.P.C; lastly submits that the petitioners have not been falsely involved in this case, therefore, their plea for bail may be turned down.

6. After hearing learned counsel for the parties and perusing the record it is observed that the petitioners, though not named in the FIR due to mindless and careless doings of the complainant, visibly stand connected with the offence of theft of gas at a massive scale. While reporting crime to the police, the name of Khawar Sadiq was mentioned by Shah Nawaz Khan, Superintendent Admn. (complainant), as owner of Malik Steel Re-rolling Mills, situated at Moman Pura main G.T. Road Daroghawala, Lahore. The raiding party consisted of special task-force-team of the Sui-Gas department, besides district administration officials and the local police,' which on receipt of spy information as to theft of gas, raided Malik Steel Re-rolling Mills, at Momanpura G.T. Road Daroghawala, Lahore, dug-up the suspected spot and unearthed theft of gas through a no-return-valve, fixed on 4" dia distribution-pipeline and stolen gas was being supplied to the said Steel Mills. The raiding party also discovered a tunnel between the dug-up place and the factory. The no-return-valve and consumer meter station (CMS) were removed and taken into possession. The crux of the arguments of the learned counsel for the petitioners relates to the fact that the petitioners were not named in the FIR and the factory which allegedly received unauthorized supply of gas did not belong to them.

7. Whether the petitioners' owned-Malik Steel Re-rolling Mills was situated at G.T.

Road, Momanpura Daroghawala, the site of the alleged crime, or at some other place, was a crucial question which could only be resolved by scanning record of the Sui-Gas department. Likewise it could also be verified from the record, if Khawar Sadiq accused ran a steel re-rolling mills with identical name and style at the said venue or he had, his factory located at some other site. To resolve this riddle the General Manager of the Sui-Gas Department was summoned along with original record of the Mills of both the consumers, who entered appearance and produced the relevant record. We find that the petitioners' steel re-rolling mills/factory was situated at Momanpura G.T. Road Daroghawala, (consumer No.41100030610) whereas that of Khawar Sadiq bearing identical nomenclature, but different consumer number (6170741000) was situated many miles away from the said spot, at Bhini Road Shadi Pura, Lahore. Learned counsel for the petitioners when confronted with this situation, offered a few clarifications but, sans confidence and cogency.

8. The visual site plan prepared by the Investigating Officer negated the arguments of the learned counsel for the petitioners that the area, dug-up by the raiding party was at a distance of about 600 to 1100 ft. as, it showed the dug-up spot and the said factory in near vicinity inter se. A couple of arguments made by the learned counsel, as to distance of the dug-up place from the factory of the accused and presence of Saifullah accused, an, employee at the mills of the petitioners, at the spot at the relevant time of the occurrence, looked self-contradictory as, on previous dates of hearing, the learned counsel categorically adopted the version that the petitioners mills were nowhere near the dug up area nor Saifullah accused was known to the petitioners. Learned counsel, however, frankly admitted today that Saifullah was an employee/representative of the petitioners and he represented them everywhere, whenever the situation so demanded. After going through the relevant record, maintained both by the police and the Sui-Gas department it is apparently settled that the venue of the crime alleged, belonged to the petitioners.

9. Besides, separate declaratory suits have been filed by the petitioners wherein they have mentioned the address of Malik Steel Re-rolling Mills, in identical terms, as can be found from the contents of the FIR. In another declaratory suit filed by Malik Javed (petitioner) Sui Northern Gas Pipeline Limited and two others on 19-8-2013, the plaintiff gave a description of removal of gas meter of their steel re-rolling mills by the defendants as well as issuing of a bill amounting to Rs.5,63,88,380 to them by the defendants and also mentioned about the occurrence, by referring to FIR No.778/2013 (supra) in para-7 of the plaint, categorically transmitting a message that the area/mills raided on by the raiding party on 2-7-2013 belonged to none-else than the petitioners. Hence mentioning of the name of Khawar Sadiq in the FIR as proprietor of the said premises, offers no relief to the petitioners.

10. The gadgets used for pilfering gas have been recovered by the police through a memo. of recovery. This case was partly heard on 26-5-2014. The complainant of the case on the said date behaved strangely, as he at once stated before the court that no unauthorized gas-supply had been detected at the time of raid conducted by a team of the Sui-Gas department, joined by the district administration officials and it only surfaced that the main gas pipe line had been repaired by someone. He, however, sought time to tender his affidavit in this regard. He attended the court today but firmly stood behind the General Manager of the SNGPL and made no effort to come forward to submit his sworn affidavit as to his distorted version. Learned counsel for the petitioners too did not agitate the said version of the complainant during his arguments. Whatever the complainant said on the said occasion, even if taken into consideration, at the most be considered an attempt on the part of the accused to tamper with the prosecution evidence.

11. The petitioners' plea of alibi, that they were not within the country on the day of the alleged occurrence and having gone to Masqat (Capital of Sultanate of Oman) on 29-6-2013

and returned therefrom on 3-7-2013 although verified during investigation, means little at this stage, being a situation which could legally be gone into depth by the learned trial Court after recording evidence of the parties at trial. Guidance in this respect may be had from Ghulam Ahmad Chishti's case (2013 SCMR 385).

12. During arguments it transpired that the petitioners had been issued the detection bill of Rs. 5,90,00,000 by the SNGPL, whereon it was inquired from them if they were willing to pay the said bill or had they any intention to defray 50% of it, in answer to which they categorically denied to have any such plan. The prosecution case brims with connecting evidence against the petitioners and there exists no material at this stage to believe that they have been falsely involved in this case due to malice or ulterior motives of the complainant or they have not committed the offence alleged.

13. For the discussion supra, this petition is liable to be dismissed, which is accordingly done. The ad interim pre-arrest bail granted to the petitioners vide order dated 28-1-2014 is recalled.

MH/J-19/L Pre-arrest bail refused.

2015 P Cr. L J 1395

[Lahore]

Before Shahid Hameed Dar, J

RASHID AHMAD---Petitioner

versus

The STATE and another---Respondents

Cr. Misc. No.1 of 2015 in Criminal Appeal No. 185, decided on 20th May, 2015.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), S. 496-B---Fornication---Suspension of sentence---Accused was convicted by Trial Court and sentenced to five years imprisonment---Validity---Trial Court concluded that it was not a case of rape punishable under S. 376(2), P.P.C. but it was a case of fornication punishable under S. 496-B, P.P.C.---High Court found it to be an interesting question to deal with at the time of final adjudication of appeal, whether only a male person could be convicted/sentenced for the charge of fornication and female was to be believed as a witness against male partner in such a situation---Accused was taken into custody by police on 29-1-2015, after pronouncement of judgment and he had been languishing in jail since then---High Court suspended the sentence awarded to accused by Trial Court as his continued incarceration would not be of any consequence to prosecution case---Bail was allowed in circumstances.

Azam Nazeer Tarar for Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor-General Punjab for the State.

Muhammad Ahsan Bhoon for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioner, Rashid Ahmad seeks release on bail by way of suspension of his sentence awarded to him by the learned Additional Sessions Judge, Piplan (Mianwali), vide judgment dated 29-1-2015, whereby he was convicted under section 496-B, P.P.C. and sentenced to rigorous imprisonment for five years along with fine of Rs.10,000, in default whereof to further undergo simple imprisonment for one month with benefit of section 382-B, Cr.P.C. He was originally indicted for an offence under section 376(2), P.P.C. in a private complaint-case, filed by Mst.Rabia Bibi (prosecutrix), after she felt dissatisfied with the investigation of case FIR No.69/11, dated 9-4-2011, under section 376(2), P.P.C., Police Station Piplan (Mianwali).

2. After hearing the learned counsel for the parties and perusing the record, it is observed that Mst. Rabia Bibi (P.W.4) moved a written application (Exh.DA) before the police for registration of FIR (Exh.C.W.1/A) with the allegation that she on receipt of a telephone call went to see Muhammad Rafique accused, who took her to the dera of Malik Rashid Ahmad (petitioner) where they both committed rape on her one by one; on arrival of her family members at the spot, the accused/petitioner and his co-accused managed to push the prosecutrix out of their dera through the backdoor and then they dropped her at a place, which was near the house, where she and her other family members had been invited to as guests in a marriage ceremony; this is how the prosecutrix returned to the said house.

3. She filed a private complaint whereby she disowned and discarded the story of FIR (Exh.CW-1/A) with the contention that three accused including Rashid Ahmad (petitioner) being armed with firearms forcibly abducted her at about 9-00 p.m. on 7-4-2011 and they took her to their dera where two of them including the petitioner committed zina with her, one by one; her father and others reached the dera of the accused and rescued her from their clutches.

4. The story as contained in the FIR categorically showed that it was a consenting affair between the unmarried prosecutrix and the accused, whereas in the private-complaint-case she was shown to have been raped by the accused. Learned trial Court rightly observed in paragraph 12 of the impugned judgment that there were two different stances of the prosecution, one contained in the FIR (Exh.C.W.1/A) and the other in the private complaint-case, which allegations-wise, were miles apart inter se. In paragraph l8 of the impugned judgment, it has been observed that the prosecutrix was a consenting party to the whole affair and she enjoyed sex with the accused of her free will; she herself went to the dera/baithak of Rashid Ahmad accused (petitioner) in the company of Muhammad Rafique accused, where she involved herself in sex play with them; she left the dera/baithak of the accused silently through the backdoor/window and at no stage she felt like raising the alarm; the contention of the prosecutrix as contained in the private complaint-case was not correct and the one, she mentioned in the FIR was credible. Learned trial court concluded in the said paragraph that it was not a case of rape punishable under section 376(2), P.P.C. but it was a case of fornication punishable under section 496-B, P.P.C.

4(sic.) It would be an interesting question to deal with, at the time of final adjudication of the titled appeal, whether only a male person could be convicted/sentenced for the charge of fornication and the female could be believed as a witness against the male-partner in such a situation. The petitioner was taken into custody by the police on 29-1-2015, after pronouncement of the impugned judgment and he has been languishing in jail since then. His continued incarceration may not be of any consequence to the prosecution case. Therefore,

this application is allowed and sentence of the petitioner is suspended. He is directed to be released from the prison subject to furnishing bail bonds in the sum of Rs.5,00,000 (five lacs) with two sureties each in the like amount to the satisfaction of the learned trial Court. He shall appear before this court on each and every date of hearing of the main appeal.

MH/R-25/L Sentence suspended.

PLJ 2015 Cr.C. (Lahore) 17
[Multan Bench Multan]
Present: SHAHID HAMEED DAR, J.
AMJAD HUSSAIN--Petitioner
versus
STATE and another--Respondents
Crl. Misc. No. 3826-B of 2014, decided on 23.7.2014.

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

----S. 497(2)--Bail, grant of--Further inquiry--Real father of deceased showed his firm belief in his written application, he presented, before Investigating Officer against accused-petitioner by contending that it was he who had murdered his son--He did not disclose source through which he acquired knowledge, as to culpability of accused-petitioner in this case--Witnesses of extra judicial confession, were allegedly approached by accused to admit his guilt and seek their help in matter, but they did not disclose this fact immediately to Investigating Officer or complainant and they remained tight-lipped for two long days, which reflected on veracity of their assertions, as to admission of guilt by accused before them--It has been held time and again that extra judicial confession is weakest type of evidence which can easily be maneouveredby prosecution wherever direct connecting evidence does not come their way--So far as recovery of cell phone of deceased at instance of petitioner was concerned, its evidentiary value may better be assessed by trial Court after recording evidence of parties during trial--Investigating Officer however did not prepare a memo. of identification in this regard--There was no other evidence on record which may incriminate petitioner in this case--There exist sufficient reasons to believe that petitioner's case constitutes need for further probe into his guilt, within scope of Section 497(2), Cr.P.C.--Bail granted [P. 18] A

Rana Zulfiqar Ali Sadiq, Advocate for Petitioner.

Mian Abdul Qayyum, Additional Prosecutor General Punjab for State.

Date of hearing: 23.07.2014.

ORDER

The complainant, Israr-ul-Haq was informed by Nazir Ahmad and Munir Ahmad about presence of a dead body, packed in a shopping bag, in front of their house whereon he along with them went to the spot and found the dead body of an unknown male person, which was at advanced stage of decomposition, hence unidentifiable.

2. One Maqbool Ahmad joined investigation on 05.08.2012 and he identified the said dead body as that of his son Imran Ahmad, at the mortuary, Nishtar Hospital, Multan. He presented a written application before the Investigating Officer whereby he contended that he

was of firm belief that his son Imran Ahmad was murdered, by Amjad Hussain, the petitioner.

3. A team of three witnesses, Saeed Ahmad, Muhammad Arshad and Mushtaq joined investigation on 10.11.2012 and rendered statements under Section 161, Cr.P.C. with the contentions that Muhammad Amjad accused-petitioner had approached Saeed Ahmad at his baithak in presence of the other witnesses on 08.11.2012 and admitted to have murdered Imran Ahmad (deceased) under a conspiracy so that he could swindle some amount of money from his family members.

4. After hearing learned counsel for the parties and perusing the record, it is found that Maqbool Ahmad, real father of Imran Ahmad deceased showed his firm belief in his written application, he presented, before the Investigating Officer on 05.08.2012. against Amjad Hussain accused-petitioner by contending that it was he who had murdered his son. He did not disclose the source through which he acquired the knowledge, as to culpability of the accused-petitioner in this case. The witnesses of extra judicial confession, Saeed Ahmad, Muhammad Arshad and Mushtaq were allegedly approached by the accused on 08.11.2012 to admit his guilt and seek their help in the matter, but they did not disclose this fact immediately to the Investigating Officer or the complainant and they remained tight-lipped for two long days, which reflected on the veracity of their assertions, as to admission of guilt by the accused before them. It has been held time and again that extra judicial confession is the weakest type of evidence which can easily be mancouvered by the prosecution wherever direct connecting evidence does not come their way. So far as recovery of cell phone of the deceased on 13.12.2012 at the instance of the petitioner is concerned, its evidentiary value may better be assessed by the learned trial Court after recording evidence of the parties during trial. The Investigating Officer however did not prepare a memo. of identification in this regard. There is no other evidence on the record which may incriminate the petitioner in this case. There exist sufficient reasons to believe that the petitioner's case constitutes need for further probe into his guilt, within the scope of Section 497(2), Cr.P.C. Resultantly, this application is allowed and petitioner is

granted post arrest bail subject to furnishing bail bonds in the sum of Rs.5,00,000/- with two sureties each in the like amount to the satisfaction of the learned trial Court.

5. Before parting with this order, it is underlined that observations contained hereinabove are of tentative nature which would have no bearing upon the merits of the case at trial.

(A.S.) Bail granted

PLJ 2015 Cr.C. (Lahore) 167 (DB)

[Multan Bench, Multan]

Present: SHAHID HAMEED DAR AND JAMES JOSEPH, JJ.

GHULAM HUSSAIN--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 3661-B of 2014, decided on 12.11.2014.

Bhang--

----Word 'bhang', according to various dictionaries of English language is known as 'hemp'. Whether bhang is a narcotic substance/drug is a question, the answer to which may be found from Section 2(s) of the Control of Narcotic Substances Act 1997, where narcotic drug has been defined to be coca leaf, cannabis heroin, opium, poppy straw and all manufactured drugs. [P. 168] A

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail, grant of--Recovery of Bhang--Definition, as given in Section 2(d)(ii) above thus indicates, if bhang (hemp) is referred to without specifying particular parts thereof, in mentioned terms, offence would fall within purview of Prohibition (Enforcement of Hadd) Order IV of 1979--Situation, however, would change if specific parts, flowering or fruit tops of cannabis-plant, from which resin has not been extracted, are alleged to have been recovered from accused, his case shall be covered by Control of Narcotic Substances Act 1997 and recovery of bhang/hemp would fall within mischief of Section 9(a) or 9(b) or 9(c) of Act (ibid), as situation may be--In instant case, recovery of bhang has not taken place from physical possession of accused, rather it was made from Dalla, being driven by him--Probability cannot be ruled out that said bags may not belong to him or he may not be within conscious knowledge of contents thereof, which factor may be determined by trial Court after recording evidence of parties at trial--Contents of F.I.R. do not reveal that recovered stuff consisted of flowering or fruit tops wherefrom resin had not been extracted, hence, its recovery may not fall within mischief of Section 2(d)(ii) of Act (ibid) and it may attract provisions of article 4 of Prohibition Order (ibid) instead--Controversy in this regard may, however, be taken care of by trial Court during trial--Petitioner was behind bars and he was no more required for purpose of any recovery etc. Keeping him continuously confined would serve no useful purpose--Therefore, this application was allowed and petitioner was granted post-arrest bail.

[P. 169] B

Mr. Muhammad Asif Kareem, Advocate for Petitioner.

Malik Muhammad Jaffar, D.P.G. Punjab for State.

Date of hearing: 12.11.2014.

ORDER

The complainant, Muhammad Zikria ASI and his co-police officials intercepted Dalla Shahzore bearing Registration No. 6280-MLF, driven by Ghulam Hussain(petitioner) with Ali Raza as helper, on a spy information that it was loaded with some contraband material; on checking, twenty nine bhang-filled plastic-bags (gattoos) were recovered from it, which weighed around 510 kilograms when put on the scale; the petitioner told the complainant-ASI that the material loaded in truck belonged to Ashfaq Ahmad.

2. After hearing learned counsel for the parties and perusing the record, it is observed that word 'bha`ng', according to various dictionaries of English language is known as 'hemp'. Whether bhang is a narcotic substance/drug is a question, the answer to which may be found from Section 2(s) of the Control of Narcotic Substances Act 1997, where narcotic drug has been defined to be coca leaf, cannabis heroin, opium, poppy straw and all manufactured drugs. The term cannabis (hemp) as defined by Section 2(d) of the Act (ibid) means:--

(i) cannabis resin (*charas*) that is, the separated resin, whether crude or purified obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(ii) the flowering or fruiting tops of the cannabis plant (excluding the seed and leaves when not accompanied by the tops) from which the resin has not been extracted by whatever name they may be designated or known; and

(iii) any mixture with or without neutral materials of any of the above forms of cannabis or any drink prepared therefrom.

The definition, as given in Section 2(d)(ii) above thus indicates, if bhang (hemp) is referred to without specifying particular parts thereof, in mentioned terms, the offence would fall within the purview of the Prohibition (Enforcement of Hadd) Order IV of 1979. The situation, however, would change if specific parts, flowering or fruit tops of the cannabis-plant, from which resin has not been extracted, are alleged to have been recovered from the accused, his case shall be covered by the Control of Narcotic Substances Act 1997 and recovery of bhang/hemp would fall within the mischief of Section 9(a) or 9(b) or 9(c) of the Act (*ibid*), as the situation may be. In the instant case, the recovery of bhang has not taken place from physical possession of the accused, rather it was made from the Dalla, being driven by him. The probability cannot be ruled out that the said bags may not belong to him or he may not be within conscious knowledge of the contents thereof, which factor may be determined by the learned trial Court after recording evidence of the parties at trial. The contents of the F.I.R. do not reveal that the recovered stuff consisted of flowering or fruit tops wherefrom resin had not been extracted, hence, its recovery may not fall within the mischief of Section 2(d)(ii) of the Act (ibid) and it may attract provisions of Article 4 of the Prohibition Order (ibid) instead. The controversy in this regard may, however, be taken care of by the trial Court during trial. The petitioner is behind the bars since 11.6.2014 and he is no more required for the purpose of any recovery etc. Keeping him continuously confined would serve no useful purpose. Therefore, this application is allowed and the petitioner is granted post-arrest bail subject to furnishing bail bonds in the sum of Rs.5,00,000/- (five lacs) with two sureties each in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail granted

PLJ 2015 Cr.C. (Lahore) 190

Present: SHAHID HAMEED DAR, J.

MUMTAZ *alias* Nanha--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 7795-B of 2014, decided on 27.6.2014.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 324, 337-F(i), 337-F(iv), 337-LII, 337-AI, 337-AII, 337-AIII, 148 & 149--Bail, grant of--Further inquiry--Allegation of--Petitioner was being armed with *sota*--Petitioner allegedly caused an injury, by means of his weapon (sota) on injured person was which falls within definition of Section 337-L(2), P.P.C. and constitutes a bailable offence--As per allegations, he did not touch deceased or other injured PWs--Did he have community of intention with his co-accused at relevant time of alleged occurrence is a question, which may better be taken care of by trial Court during course of trial--Counsel for complainant has enthusiastically pointed out that petitioner admitted his guilt during course of investigation before Investigating Officer and accepted liability of making a fire shot at deceased, whereafter he led to recovery of rifle .8 mm--Counsel believed that such a confession on part of petitioner was a crucial circumstance which may validly be resolved against him--Even if this contention of counsel was taken into consideration, it would become a case of more than one version, on prosecution side--It would be for trial Court to assess whether case set up by prosecution, on completion of investigation was to be believed against petitioner or case set up by complainant in FIR was more plausible--Eyewitnesses who rendered statements under Section 161, Cr.P.C immediately after registration of FIR still stick to story of FIR, as narrated by complainant--Sufficient reasons exist to believe that petitioner's case calls for further probe into his guilt, within scope of Section 497(2), Cr.P.C--Therefore, this application was allowed and petitioner wais admitted to bail. [P. 191] A

Mr. Mansoor Raza Cheema, Advocate Petitioner.

Rana Tasawar Ali Khan, D.P.G. Punjab for State.

Mr. Qamar Abbas, Advocate for Complainant.

Date of hearing: 27.6.2014.

ORDER

The allegation against the petitioner, Mumtaz *alias* Nanha is that he being armed with sota joined by his twenty armed co-accused launched an attack on the complainant party and murdered Muhammad Nazir, besides causing injuries to *Mst.* Sajida Bibi, Mumtaz, Muhammad Ramzan and Muhammad Boota.

2. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner allegedly caused an injury, by means of his weapon (sota) on the person of *Mst.*Sajida Bibi which falls within the definition of Section 337-L(2), P.P.C. and constitutes a bailable offence. As per allegations, he did not touch the deceased or the other injured PWs.

Did he have the community of intention with his co-accused at the relevant time of the alleged occurrence is a question, which may better be taken care of by the learned trial Court during the course of the trial. Learned counsel for the complainant has enthusiastically pointed out that the petitioner admitted his guilt during the course of investigation before the Investigating Officer and accepted the liability of making a fire shot at the deceased, whereafter he led to the recovery of rifle .8 mm on 04.04.2014. Learned counsel believes that such a confession on the part of the petitioner is a crucial circumstance which may validly be resolved against him. Even if this contention of the learned counsel is taken into consideration, it would become a case of more than one version, on the prosecution side. It would be for the learned trial Court to assess whether the case set up by the prosecution, on completion of the investigation is to be believed against the petitioner or the case set up by the complainant in the FIR is more plausible. The eye-witnesses who rendered statements under Section 161, Cr.P.C. immediately after registration of the FIR still stick to the story of FIR, as narrated by the complainant, Nabi Ahmad. Sufficient reasons exist to believe that the petitioner's case calls for further probe into his guilt, within the scope of Section 497(2), Cr.P.C. Therefore, this application is allowed and petitioner is admitted to bail subject to furnishing bail bonds in the sum of Rs.2,00,000/- with two sureties each in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail allowed

PLJ 2015 Cr.C. (Lahore) 193 (DB)

Present: SHAHID HAMEED DAR AND MAZHAR IQBAL SIDHU, JJ.

Haji AMAN ULLAH & 2 others--Petitioners

versus

STATE & another--Respondents

Crl. Appeal No. 644 of 2013 and Crl. Misc. No. 1 of 2004,
decided on 9.2.2015.

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

----S. 426--Suspension of sentence--Application for--It was observed that trial Court has categorically observed in impugned judgment that it was (co-convict of petitioners), who had committed murder of deceased on pretext of Ghairat and his brother petitioner joined by his son petitioner helped him with community of intention to commit crime--It has not been clarified in said judgment as to how and in what manner convict/petitioners had helped their co-accused--Medical evidence tendered by Dr. P.W gives rise to a strong impression that injuries sustained by deceased had been caused by soft-bore weapon as some pieces of wads were noticed by autopsy-performer in brain-matter of deceased, giving strength to idea that a 12-bore weapon had been used to murder him--Testimonies rendered by eye-witnesses, have been referred to in the impugned judgment, which showed that they had burdened petitioners with liability of holding rifles at time of alleged occurrence--Besides trial Court brushed aside testimonies of eye-witnesses being highly doubtful--If eye-witnesses had been disbelieved, how come witnesses of last seen

evidence could be believed to hand down sentence of imprisonment for life each to petitioners--It would be a crucial question to be taken care of at time of final adjudication of appeal filed by petitioners against their conviction/sentence--They were taken into custody and they have been languishing in jail ever since--Keeping them continuously confined in jail would not serve any useful purpose--Therefore, this application was allowed and sentence of petitioners was suspended.

[Pp. 194 & 195] A

Mr. Mansoor Raza Cheema, Advocate for Petitioners.

Mr. Hamayoon Aslam, D.P.G. Punjab for State.

Date of hearing: 9.2.2015.

ORDER

The petitioners, Haji Aman Ullah and Maqsood Khan seek release on bail by way of suspension of their sentence awarded to them by the learned Additional Sessions Judge, Bhakkar *vide* judgment dated 23.4.2013, whereby they were convicted under Sections 302(b)/149 P.P.C. and sentenced to imprisonment for life each with direction to pay a sum of Rs. 1,00,000/-each to the legal heirs of the deceased as compensation under Section 544-A, Cr.P.C. or in default whereof to undergo simple imprisonment for six months each and under Sections 364/149, P.P.C. to rigorous imprisonment for ten years with fine of Rs.50,000/- or in default whereof to undergo simple imprisonment for six months each. Benefit of Section 382-B, Cr.P.C. was, however, extended to them.

2. After hearing learned counsel for the parties and perusing the record, it is observed that the learned trial Court has categorically observed in the impugned judgment that it was Hafeez Ullah Khan (co-convict of the petitioners), who had committed murder of Liaqat Hussain deceased on the pretext of *Ghairat* and his brother Aman Ullah (petitioner) joined by his son Maqsood Khan (petitioner) helped him with the community of intention to commit the crime. It has not been clarified in the said judgment as to how and in what manner *Haji* Aman Ullah and Maqsood Khan convict/petitioners had helped their co-accused Hafeez Ullah Khan. The medical evidence tendered by Dr.Zil-e-Hasnain (P.W.5) gives rise to a strong impression that the injuries sustained by the deceased had been caused by soft-bore weapon as some pieces of wads were noticed by the autopsy-performer in the brain-matter of the deceased, giving strength to the idea that a .12-bore weapon had been used to murder him. The testimonies rendered by the eye-witnesses, Mukhtar (P.W.8) and Akhtar Hussain(P.W.10) have been referred to in the impugned judgment, which showed that they had burdened the petitioners with the liability of holding rifles at the time of the alleged occurrence. Besides learned trial Court brushed aside the testimonies of the eye-witnesses (P.W.8 & P.W.10) being highly doubtful. If eye-witnesses had been disbelieved, how come the witnesses of last seen evidence could be believed to hand down the sentence of imprisonment for life each to the petitioners. It would be a crucial question to be taken care of at the time of final adjudication of the appeal (Crl.A.No. 644/2013), filed by the petitioners against their conviction/sentence. They were taken into custody on 5.10.2010 and they have been languishing in jail ever since. Keeping them continuously confined in jail would not serve any useful purpose. Therefore, this application is allowed and sentence of the petitioners is suspended. They are directed to

be released from the prison subject to furnishing bail bonds in the sum of Rs.5,00,000/- (five lacs) each with two sureties each in the like amount to the satisfaction of the learned trial Court. They shall appear before this Court on each and every date of hearing of the main appeal.

(A.S.) Application allowed

PLJ 2015 Cr.C. (Lahore) 195

[Multan Bench Multan]

Present: SHAHID HAMEED DAR, J.

MUHAMMAD HUSSAIN--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 4128-B of 2014, decided on 25.7.2014.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 324--Bail, grant of--Further inquiry--Contents of medico-legal report of complainant-lady do not corroborate story of F.I.R--Rather, perusal thereof, paints situation a bit blurred and hazy for prosecution--Alleged occurrence took place at 9.00 p.m., whereas medical officer has mentioned date and ime of arrival of injured in hospital as "(10.00 AM)" in medico-legal report, which reveals three injuries, one on vertex of head, other on right arm and third one on her right knee--Interestingly, medical officer found her wounds either at healing stage or fully healed--description of injuries was important in this regard--How could injuries of complainant show signs of healing at 10.00 a.m. if she had received said injuries at "9.00 p.m. on 12.5.2014". time of alleged occurrence and that of prosecutrix medical examination are nugatory inter-se--Alleged occurrence must have taken place about a week before and complainant's version that it took place on said date does not look convincing, at this stage--Medical evidence in its present form was massively in conflict with F.I.R. story--Petitioner was behind bars and his further incarceration may be of no use to prosecution's case, as Kassi, not stained with blood, has already been recovered at his instance--His case squarely calls for further probe into his guilt, within scope of Section 497(2), Cr.P.C.

Pp. 196 & 197] A

Mr. Mehroze Aziz Khan Niazi, Advocate for Petitioner.

Mian Abdul Qayyum, Addl.P.G. Punjab for State.

Complainant in Person.

Date of hearing: 25.7.2014.

ORDER

The complainant, *Mst.* Sughran Mai has alleged in the F.I.R. that her ex-husband, Muhammad Hussain (petitioner) trespassed on her house, being armed with Kassiat 9.00 p.m. on 12.5.2014 and inflicted multiple injuries on her person, besides causing injuries to her sons

Aamir and Shehroze; on arrival of the witnesses, he ran away; she remained unconscious, therefore, she reported the matter belatedly.

2. After hearing learned counsel for the parties and perusing the record, it is observed that the contents of the medico-legal report of the complainant-lady do not corroborate the story of F.I.R. rather, perusal thereof, paints the situation a bit blurred and hazy for the prosecution. The alleged occurrence took place at 9.00 p.m. on 12.5.2014, whereas medical officer has mentioned date and time of arrival of the injured in the hospital as "12.5.2014 (10.00 a.m.)" in the medico-legal report, which reveals three injuries, one on the vertex of head, the other on the right arm and the third one on her right knee. Interestingly, the medical officer found her wounds either at the healing stage or fully healed. The description of Injuries No. 1 and 3 is important in this regard. How could injuries of the complainant show signs of healing at "10.00 a.m. on 12.5.2014", if she had received the said injuries at "9.00 p.m. on 12.5.2014". The time of the alleged occurrence and that of the prosecutrix medical examination are nugatory inter-se. The alleged occurrence must have taken place about a week before 12.5.2014 and complainant's version that it took place on the said date does not look convincing, at this stage. The medical evidence in its present form is massively in conflict with the F.I.R. story. The petitioner is behind the bars since 18.5.2014 and his further incarceration may be of no use to the prosecution's case, as Kassi, not stained with blood, has already been recovered at his instance on 21.5.2014. His case squarely calls for further probe into his guilt, within the scope of Section 497(2), Cr.P.C. Therefore, this application is allowed and petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- (one lac) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail granted

PLJ 2015 Cr.C. (Lahore) 260 (DB)

Present: SHAHID HAMEED DAR AND MISS AALIA NEELUM, JJ.

MISSAL KHAN--Appellant

versus

STATE and another--Respondents

Crl. Appeal No. 908 of 2012, heard on 2.12.2014.

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

----S. 9(c)--Sentence to rigorous imprisonment for seven years--Challenge to--Recovery of five packets of *charas*--Question of--Whether sample of ten grams was segregated from one slab or from all slabs of packet--Validity--Only one estimation can be made that one slab each from all packets had been used by S.I. to segregate five sample, weighing ten grams each for transmitting them to office of chemical examiner for analysis--Prosecution had failed to establish its case against accused u/S. 9(c) of Acts, 1997 and what they could ably substantiate during trial, it was an offence u/S. 9 (b) of Act--Conviction of accused recorded for an offence u/S. 9(C) of Act, was converted into one u/S. 9(b) of CNIC--Accused was behind bars which

means that his continued incarceration is almost treble period of sentence, as awarded through the judgment which could not only cover substantive sentence of imprisonment-- Appeal was partly allowed. [Pp. 264 & 265] A, B, C & D

PLD 2009 Lah. 362, *ref.*

Mr. Javed Zahid Warraich, Advocate for Appellant.

Mr. Hamayoon Aslam, D.P.G. for Respondents.

Date of hearing: 2.12.2014.

JUDGMENT

Shahid Hameed Dar, J.--The appellant, Missal Khan, by filing the instant appeal, has challenged judgment dated 14.4.2012 passed by learned Additional Sessions Judge/Special Judge under CNSA, Kharian (Gujrat), whereby he was held guilt under Section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced to rigorous imprisonment for seven years with fine of Rs. 30,000/- or in default thereof to further undergo simple imprisonment for six months. Benefit of Section 382-B, Cr.P.C. was, however, extended to him.

2. Concisely, the prosecution story as unfurled by Talib Hussain SI (complainant/P.W.5) in the F.I.R. (Exh.PC/1), is that he along with fellow police officials was present at Guliyana More on patrol duty, at 2.10 a.m., on 1.9.2010, when he received a spy information that a Mazda truck bearing Registration No. 3133/ Peshawar loaded with *charas* was coming from Gujrat side, whereon he barricaded the G.T. road near village Thikrian and stopped the said truck when it reached there; he found' five packets of *charas* weighing five kilograms, lying between the feet of Missal Khan (appellant), who sat on the front seat beside the driver of the truck; he segregated ten grams each from each packet, for onward transmission to the office of Chemical Examiner for its analysis; the segregated samples were rendered into a sealed parcel and so was done with the bulk left the complainant reduced into writing complaint (Exh.PC) and despatched it to the Police Station concerned through Qadeer Ahmad 2742/C for registration of formal F.I.R.; on receipt thereof, Sajjad Akhtar ASI/DO (P.W.2) drew up F.I.R. (Exh.PC/1), at 2.30 a.m. the same day.

3. After completion of the investigation, challan against the appellant was prepared and submitted before the Court for his trial in accordance with the law. On his indictment; the trial commenced. He pleaded not guilty and claimed a trial. The prosecution produced six witnesses, namely, Hameed Akhtar3100/C (P.W.1), Sajjad Akhtar ASI (P.W.2), Nasar Ullah Khan 147/C (P.W.3), Imtiaz-ul-Haq 842/MHC (P.W.4), Talib Hussain SI-complainant (P.W.5) and Khalid Hussain SI/IO (P.W.6). Thereafter, the appellant was examined under Section 342, Cr.P.C., whereby he proclaimed his absolute innocence in the matter. He while answering the question, "Why this case against you and why the PWs have deposed against you", stated as under:

> "All the PWs are police officials. On the relevant date and proximately at the same time huge quantity of narcotics was recovered and cases under FIR No. 206 and 207 was registered against the accused of those cases. I was taken into custody from a truck hotel within the premises of LalamusaCity while I was taking a tea and could not meet illegal demands of gratification and on my refusal abuses were exchanged

between me and the police officials and the police got annoyed with me and lateron falsely involved in this case and some *charas* recovered in cases FIR No. 206 and 207 were bifurcated and was involved in this false case. This my assertion is very much testify by the stamp used with the abbreviation of TH used in case FIR No. 206 and 207, and in this case also which indicate that all the parcels were prepared at one place and I have make an escape goat in this case."

He did not opt to appear under Section 340(2), Cr.P.C., but intended to adduce evidence in defence and produced FIR No. 206/2010 P.S Sadar Lalamusa & FIR No. 207/2010, both dated 1.9.2010, as Exh.DA & Exh.DB, respectively for the said purpose.

4. After culmination of the trial, the learned trial Court pronounced its verdict and awarded punishment to the appellant in mentioned terms.

5. We have heard learned counsel for the parties and perused the record with their able assistance.

6. The main argument pressed into service by learned counsel for the appellant is that the contraband allegedly recovered at the instance of the appellant was wrapped in five packets and each packet contained more than one slab, but the Investigating Officer did not take a separate sample from each cake/slab/piece and took only ten grams each from each packet and packed them in separate sealed parcels for transmission to the office of Chemical Examiner. The learned counsel has further contended that if proper calculations were made keeping in view the weight recorded by Talib Hussain SI (complainant/P.W.5), the number of slices in each packet should be between nine to ten with approximate weight of 111.11 grams to 100 grams of each slice. He has further calculated that weight of each packet, keeping in view total weight of the narcotic substance i.e. 5000 grams, should weigh around 1000 grams. It has been submitted by the learned counsel that the solitary sample-test-report by the office of Chemical Examiner would lead to believe that the contraband substance, recovered from the possession of the appellant merely weighed 50 grams and rest of the quantity as shown in the complaint (Exh.PC) was not a contraband item because there was no evidence on the record to believe that "slices of *charas*" not even touched by the Investigating Officer for segregation of samples, were a narcotic substance.

7. On the other hand, learned Deputy Prosecutor General Punjab has submitted that it was not legally required to take a separate sample from each cake/slice of the narcotic substance recovered nor it was legally essential to send every such sample separately to the office of Chemical Examiner for analysis. He has maintained that the learned trial Court had committed no illegality in convicting and awarding sentence to the appellant for the entire quantity of five kilograms of *charas* and that the argument raised by learned counsel for the appellant were based on misconception of the law and facts.

8. Whether or not the arguments of the learned counsel for the appellant contain any substance therein, is a question which can easily be answered in the light of a mega judgment of the Hon'ble Supreme Court of Pakistan, titled *Ameer Zeb v. The State,* reported as P.L.D. 2012 S.C. 380. While dealing with an identical proposition, the apex Court referred to many a case-law on the subject and concluded 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."

9. Insofar as case in hand is concerned, we learnt from the contents of the F.I.R. (Exh.PC) and from the testimonies of Hameed Akhtar 3100/C (P.W.1) and Talib Hussain SI (P.W.5) that the appellant possessed five packets of *charas*, weighing five kilograms, which lay in between his feet, when he occupied a seat, beside the driver of the above-said truck. Talib Hussain SI (P.W.5) segregated ten grams each from all five packets for chemical analysis, by the office of the Chemical Examiner for the Punjab, Lahore. The net weight of five samples read as fifty grams in toto. We do not find from the complaint (Exh.PC) as to how many slabs/cakes/slices were there in one packet nor this fact was disclosed in the seizure-memo. (Exh.PA), attested by Kashif Sohail3213/C PW (since given up) and Hameed Akhtar 3100/C (P.W.1). This detail, however, appeared on the record when Talib Hussain SI (P.W.5) deposed about in his testimony that each packet consisted of 9/10 slabs/slices. The attesting witness Hameed Akhtar 3100/C (P.W.1) could not tell about the exact number of slabs/slices in one packet but he certainly admitted that there were slabs of *charas* in each packet. He showed ignorance if sample was taken from every slab of a packet nor he could clarify as to how many slabs were used by the complainant-SI for chopping-off the samples of ten grams each. The deposition made by P.W.5 as to number of slabs in a packet, weighing one kilogram leads us to believe that each packet contained 9/10 slices, each showing weight of 111.11 grams or 100 grams. The report of the Chemical Examiner (Exh.PE) confirms that five sealed parcels/packets weighing fifty grams contained *charas*. The obscurity hovering over the prosecution case as to whether sample of ten grams was segregated by the complainant-SI (P.W.5) from one slab/slice or from all 9/10 slabs of a packet gives rise to a crucial question, which has not been viably answered by the prosecution during the course of the trial. In such a situation of ambiguity only one estimation can be made that one slab each from all five packets had been used by the complainant-SI to segregate five samples, weighing ten grams each, for transmitting them to the office of the Chemical Examiner for analysis. It has been worked out in the preceding lines that each slab or slice of the recovered stuff either weighed around 111.11 grams or about 100 grams. The estimation, one going to the favour of the accused is preferred for the safe administration of justice, to draw a conclusion that the prosecution had succeeded in establishing the guilt of the appellant only to the extent of possessing 500 grams of contraband *charas* by him at the crucial hour. With a small mental exercise, it can safely be arrived at that 45 slabs/slices of the recovered stuff had gone unrepresented and it was indiscernible whether they were 'a narcotic substance' within the mischief of the Control of Narcotic Substances Act, 1997. Hence, rest of the material recovered shall be rejected as mere junk. So far as the merits of the case are concerned, learned counsel for the appellant showed little interest in challenging the conviction of the appellant in this case and he mainly focused on a probability, whereby he could derive benefit from the aforesaid mega judgment of the apex Court, in terms of reduction in the sentence of the appellant. The crux of the above discussion is that the prosecution had failed to establish its case against the appellant under Section 9(c) of the Control of Narcotic Substances Act, 1997

and what they could ably substantiate during trial, it was an offence under Section 9(b) of the Act (*ibid*).

10. In this view of the matter, this appeal is partly allowed, the conviction of the appellant recorded for an offence under Section 9(c) of the Control of Narcotic Substances Act, 1997 is converted into one under Section 9(b) of the said Act and following the sentencing policy, as enshrined in the case of *Ghulam Murtaza and another v. The State* (P.L.D. 2009 Lahore 362), the appellant is sentenced to rigorous imprisonment for one year and six months and to pay a fine of Rs. 11,000/- only and in default of payment thereof, to undergo simple imprisonment for four months. The benefit of Section 382-B, Cr.P.C. shall be extended to him. We gather from the record that the appellant is behind the bars since 1.9.2010, which means that his continued incarceration is almost treble the period of sentence, as awarded to him through the instant judgment, which would not only cover the substantive sentence of imprisonment, but also the period of simple imprisonment, as to default in paying the fine-amount. Therefore, it is concluded that the appellant be released from the prison forthwith, if not required in any other case.

11. This appeal is disposed of in above terms.

(R.A.) Appeal partly allowed

PLJ 2015 Cr.C. (Lahore) 343

[Multan Bench Multan]

Present: SHAHID HAMEED DAR, J.

NASIR HUSSAIN--Petitioner

versus

STATE & another--Respondents

Crl. Misc. No. 3097-B of 2014, decided on 25.7.2014.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 376--Bail, grant of--Further inquiry--Allegation of--Sexually assaulted prosecutrix--Woman medical officer, while examining alleged victim did not find marks of violence on any part of her body--Vaginal swab and a buccal swab of prosecutrix together with a buccal swab of accused (petitioner) and buccal swab of husband of prosecutrix were tested by Punjab Forensic Science Agency for detection of semen and forensic DNA analysis, but it remained unproductive for prosecution's case--On receipt of above report, woman medical officer has opined that no rape had been committed on examinee--Prosecutrix was a married lady and mother of a child--Investigating officer has opined in case diary that complainant did not produce any believable evidence against accused--He, however, deferred recording his final opinion as to guilt or innocence of accused till receipt of report(s) from laboratory--Report received from Forensic Science Agency is negative and declaration of her final opinion as to commission of rape, by woman medical officer also does not help prosecution in any manner--Delay of one day in reporting crime, in

this particular situation, gathers importance--*Prima-facie*, there exist sufficient reasons to believe that petitioner's case calls for further probe into his guilt as envisaged by Section 497, Cr.P.C.--Bail was granted. [Pp. 343] A & B

Malik Muhammad Farooq, Advocate for Petitioner.

Mian Abdul Qayyum, Addl. APG Punjab for State.

Sardar Manzoor Ahmad Khan, Advocate for Complainant.

Date of hearing: 25.7.2014.

ORDER

The allegation against the petitioner, Nasir Hussain is that he sexually assaulted the prosecutrix, *Mst.*Shamim Bano at 1.30 p.m. on 12.3.2014, when she was cutting grass in the fields.

2. After hearing learned counsel for the parties and perusing the record, it is observed that the woman medical officer, while examining the alleged victim did not find marks of violence on any part of her body. The vaginal swab and a buccal swab of the prosecutrix together with a buccal swab of NasirHussain accused (petitioner) and buccal swab of Umar Hayat, the husband of the prosecutrix were tested by the Punjab Forensic Science Agency for detection of semen and forensic DNA analysis, but it remained unproductive for the prosecution's case, as is evident from the said Agency's report prepared on 14.7.2014, which reads as follows:--

"Item No. Description

1. One vaginal swab from Shamim Bano,

V1. Buccal swab standards of Shamim Bano.

S1. Buccal swab standards of Nasir Hussain.

E1. Buccal swab standards of Umar Hayat.

<u>Forensic Serological Examination</u>

Item # 1 was examined for the presence of seminal material.

<u>Results and Conclusion</u>

No seminal material was detected on item # 1; therefore no further DNA profiling (STR analysis) was conducted on this item.

No analysis was conducted on item # S1, E1 and V1."

On receipt of above report, the woman medical officer has opined that no rape had been committed on the examinee. The prosecutrix is a married lady and mother of a child. The Investigating Officer has opined in case diary dated 31.3.2014 that the complainant did not produce any believable evidence against the accused. He, however, deferred recording his final opinion as to guilt or innocence of the accused till receipt of report(s) from the laboratory. As mentioned above, the report received from the Forensic Science Agency is negative and declaration of her final opinion as to commission of rape, by the woman medical

officer also does not help the prosecution in any manner. The delay of one day in reporting the crime, in this particular situation, gathers importance. *Prima-facie*, there exist sufficient reasons to believe that the petitioner's case calls for further probe into his guilt as envisaged by Section 497, Cr.P.C. Therefore, this application is allowed and petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000/- (two lacs) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail granted

PLJ 2015 Lahore 677 (DB)

Present: SHAHID HAMEED DAR AND ALI BAQAR NAJAFI, JJ.

BILAL FAROOQ--Petitioner

versus

STATE & 4 others--Respondents

W.P. No. 2855 of 2014, heard on 15.5.2014.

Constitution of Pakistan, 1973--

----Art. 199--Anti Terrorism Act, (XXVII of 1997), Ss. 6 & 23--Pakistan Penal Code, (XLV of 1860), Ss. 302 7 34--Constitutional petition--Transfer of case to Court of regular jurisdiction--Dismissal of application--Offence did not fall within jurisdiction of Special Court--Brutality committed by doctor on a nurse of hospital--Scheduled offence was committed, feeling of insecurity and terror in staff nurse--Sufficient to constitute a terrorist act--Validity--Unfortunate budding staff nurse would never had thought that doctor of same hospital where she studied as student would turn monster, tear her virginity apart and take her life to conceal his evil doing--Deceased nurse met with, was most unfortunate and pathetic--Each and every bit of offence allegedly committed by accused hints at their fiendish conduct and demeanour, which is likely to cause fright and terror to any who learnt about such shocking incident--Ghastly act of witness, Dr. had gripped all the students in indescribable fear and their nursing school looked a haunted place--Though it was committed in a room of hospital at night, yet, its detail which surfaced later on was immensely shocking, which created either a sense of insecurity, especially amongst nurses as shocking, which created either sense of insecurity, especially amongst nurses as a whole or it was likely to terrorize them--*Prima facie* accused were taken over by their criminal and lecherous self and they joined kinds satanically to revish and murder a poor staff nurse--Ferocity of alleged offence must have omitted shock waves and signals of unknown fear, dislodging their mental peace with feeling of insecurity and vulnerability--Case was being tried by Court established under Act in lawful manner--No jurisdictional defect in impugned order does not warrant interference by High Court--Petition was dismissed.

[Pp. 680, 681 & 682] A, B, C & D

Khawaja Awais Mushtaq, Advocate for Petitioner.

Mr. Khadim Hussain Qaiser, Addl. A.G. for State.

Ch. Muhammad Rafique Jathol, Advocate for Respondent No. 5.

Date of hearing: 15.5.2014.

JUDGMENT

Shahid Hameed Dar, J.--Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, the petitioner calls in question the legality of order dated 18.1.2014, whereby an application moved by him under Section 23, Anti-Terrorism Act, 1997 (hereinafter to be read as the Act), for transfer of his case to a Court of regular jurisdiction, has been dismissed by the learned Judge, Anti-Terrorism Court No. I, Gujranwala.

2. The facts relevant to this petition are that *Mst.* Madiha Hanif, aged 20, a student of 4th year in Nursing School, Civil Hospital, Sialkot, real daughter of Muhammad Hanif (Respondent No. 5), was murdered by some unknown accused, who threw her dead body at *Khawaja Safdar Road near Kashmir Park;* she lived in a rented house, which she left on 17.11.2013 (Sunday) for the house of her aunt, as told by daughter of master of the said house, at 6.30 p.m. the same day, to Muhammad Hanif (complainant), who worked as Wireless Operator in the Police department; he searched for his daughter, who did not return home till late night; he received an information at 8.30 a.m. on 18.11.2013 that his daughter's dead body lay at *Khawaja Safdar Road*, whereon he along with his companions reached the said road and found this information correct; he reported the crime to the police, which led to registration of case F.I.R. No. 765, dated 18.11.2013, under Section 302/34 P.P.C., at Police Station Cantt., Sialkot; he rendered a supplementary statement on 19.11.2013, wherein he named Dr.Eman, Hafiz Bilal Farooq (petitioner) and an unknown person, on the information of Muhammad Idrees and Muhammad Arshad PWs, as accused for having ravished and murdered his daughter; the petitioner, Hafiz Bilal Farooq, after having been arrested on 28.11.2013, rendered a confessional statement under Section 164 Cr.P.C. before the learned special judicial magistrate, Sialkot on 2.12.2013, whereby he furnished detailed account of the unfortunate incident with the contention that Dr. Eman Hakim had called *Mst.* Madiha Hanif, staff nurse, to Allama Iqbal Memorial Hospital, Sialkot, drank to his fill, raped her, tortured her, injected same intoxicant into her body, due to which she gradually turned enervated, whereafter he asked him (petitioner) to have sex with her, so he too followed by another boy committed *zina* with her; the girl succumbed to the heavy dose of intoxication and her dead body was put in his car by Dr.Eman and taken to Christian Town late night; they all threw it at Khawaja Safdar Road and slipped away; Dr.EmanHakim, a Christian, did not surrender before the police and he surreptitiously left the country, probably for Dubai or Thailand; on finalization of investigation, challan against the petitioner was submitted before the learned Anti-Terrorism Court, Gujranwala for trial of the accused, where it is pending now.

3. The petitioner having developed the notion that the offence allegedly committed by him did not fall within the jurisdiction of the Special Court constituted under the Act, moved an application under Section 23 thereof, for transfer of his case to a Court of regular jurisdiction, but failed, as the learned trial Court did not agree to his whimsical thought and observed that the alleged offence committed by him and his co-accused fell within the ambit of Section 6 of the Act, which defines terrorist act, therefore, the same was exclusively triable by it. The reasoning which prevailed with the learned trial Court to reach the said conclusion was that brutality committed by the doctor and his companions on a nurse of the same

hospital was likely to strike terror and fright, leading to an atmosphere of insecurity and self-doubt amongst the nurses.

4. Learned counsel for the petitioner has argued that none of the staff nurses made any statement that the alleged act of the accused had created any feeling of insecurity or caused terror to them; the alleged offence was committed in a room of the hospital, in the dark hours of the night, which must have gone unnoticed by the hospital staff or the people living around, therefore, question as to spreading of terror, fright or sense of insecurity does not arise; lastly submits that the petitioner's trial by the Special Court would not only be *ultra-vires* of the Act but it would be against the law laid down by the august Supreme Court of Pakistan.

5. Learned Additional Advocate General Punjab assisted by learned counsel for the Complainant/Respondent No. 5 has opposed the petition by submitting that the accused have committed a scheduled offence, which must have led to a feeling of insecurity and terror, particularly in the staff nurses of the country, wherever they were posted and it is sufficient to constitute a terrorist act within the meaning of Section 6 of the Act.

6. After hearing learned counsel for the parties and perusing the record, we have straightaway noticed that the petitioner and his co-accused have committed a gruesome and barbaric act, the details whereof are hair-raising. The unfortunate budding staff nurse would never have thought that a doctor of the same hospital, where she studied as a student of 4th year, would turn monster, tear her virginity apart and take her life to conceal his evil-doing. The end, the deceased nurse met with, is most unfortunate and pathetic. Dr.Eman must be a trusted person for the ill-fated nurse, who might not have thought twice before leaving her residence for going to Allama Iqbal Memorial Hospital, Sialkot on the asking of the said doctor-accused. It must have been beyond, even her wild imagination that the doctor, she daily worked with, for many hours would betray the confidence and faith, she reposed in him. Each and every bit of the offence allegedly committed by the petitioner and his co-accused hints at their fiendish conduct and demeanour, which is likely to cause fright and terror to any, who learnt about this shocking incident, let it be the class of nurses alone.

7. It would be useful to reproduce Section 6 of the Act, which reads as under:

> "(b) commits a scheduled offence, the effect of which will be, or be likely to be, to strike terror, or create a sense of fear and insecurity in the people, or any section of the people, or to adversely affect harmony among different Sections of the people."

The argument of the learned counsel for the petitioner that none of the staff nurses made any statement to the effect that the alleged act of the accused had created any feelings of insecurity or it was likely to strike terror, is wholly fallacious, as the law does not require that in order to determine whether a particular act, committed by the accused created terror or feeling of insecurity or it fell within the mischief of the act of terrorism, the evidence of the witnesses should be recorded. It is the descriptive text of the F.I.R. and other attending circumstances of the case, which accumulatively would tell whether the alleged offence would fall within the purview of any of the provisions of the Act. The manner in which, the accused petitioner and his co-accused behaved themselves at the time of the alleged occurrence clearly suggests that the act done by them had a nexus with the object of the Act and thus it was squarely covered

under Sections 6 and 7 thereof. It has been held in case titled *Nazir Ahmad and others v. Nooruddin and another* (2012 S.C.M.R. 517) that neither motive nor intention for commission of the offence is relevant for the purpose of conferring jurisdiction on the Anti-Terrorism Court, rather it is the act, designed to create sense of insecurity or to destabilize the public-at-large, which attracts the provisions of Section 6 of the Act. To determine if an offence fell within the ambit of Section 6 of the Act, it would be essential to have a glance over the allegations made in the F.I.R., record of the case and surrounding circumstances, besides looking into the essentialities whether the ingredients of the alleged offence had any nexus with the object of the Act, as contemplated under Sections 6, 7 and 8 thereof. In an equally sensitive case, *Mst. Raheela Nasreen v. The State and another,* reported as 2002 S.C.M.R. 908, wherein Major Sajjad Naseer, who was a serving officer in Pakistan army, was allegedly killed by the female-accused, his wife, in connivance of WajidFaqir, his Batman, the Hon'ble Supreme Court of Pakistan observed as under:

> "7. From a bare, reading of Section 6(b) of the Act, it is manifest that it is not necessary that the offence as alleged had in fact, caused terror as the requirement of the said provision of law could be adequately satisfied if the same was likely to strike terror or sense of fear and insecurity in the people.
>
> 8. The learned Judges of the High Court came to the conclusion that a Batman who was a trusted person of an army officer if he kills as alleged his master in connivance with his (master's) wife, the same was likely to strike terror or feeling of insecurity among the army officers which reasoning in our view are based on relevant consideration having logical nexus with the relevant law and do not suffer from any legal infirmity."

7. The record reveals that many a staff nurses of the Nursing School, Allama Iqbal Memorial Teaching Hospital, Sialkot, moved an application before the Investigating Officer on 4.12.2013 stating therein that they all were under tremendous mental pressure and agony because of the terrifying act of Dr. Eman and his co-accused. They further contended therein that ghastly act of the accused had gripped all the students in indescribable fear and their nursing school looked a haunted place. How can it be considered that the alleged crime had gone unnoticed, as argued by the learned counsel for the petitioner. Though it was committed in a room of the hospital at night, yet, its detail, which surfaced later on, was immensely shocking, which created either a sense of insecurity, especially amongst the nurses as a whole or it was likely to terrorize them. *Prima facie*, Dr. Eman and his co-accused including the petitioner were taken over by their criminal and lecherous self and they joined hands satanically to ravish and murder a poor staff nurse. The appalling savagery of crime allegedly committed by them was not an ordinary incident. The doctor was a trusted companion, who played false and slabbed in the back. It must have shocked and jolted the staff nurses all over. The ferocity of the alleged offence must, have emitted shock waves and signals of unknown fear, dislodging their mental peace with the feeling of insecurity and vulnerability. The case is being tried by the Court established under the Act in a lawful manner. We find no jurisdictional defect in the impugned order, hence, it does not warrant interference by this Court. There being no merit in this petition, it is hereby dismissed.

(R.A.) Petition dismissed.

2015 Y L R 397

[Lahore]

Before Shahid Hameed Dar and Sardar Muhammad Shamim Khan, JJ

Dr. MUHAMMAD ASLAM---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.7740-B of 2014, decided on 12th June, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497---Propagating, publishing religious/sectarian hatred among youth, provoking terrorist attacks and militancy, recovery of books containing contemptuous, sacrilegious material---Bail, grant of---Heinousness or seriousness of an offence meant little unless same (allegation) was backed by cogent and believable evidence which lacked in the present case---'Rebellious conduct' of accused had been highlighted in F.I.R. by using different adjectives without hinting at any incriminating circumstance against him---No evidence existed to show that accused possessed books in question to stir up religious, sectarian or ethnic differences---Contents of books recovered from accused were blown out of proposition---Books in question contained no mutinous material---Accused wrote books in accord with his understanding of Islam seeking guidance from the Holy Quran---Whether possession of said books constituted alleged offence would be determined at trial---Allegations against accused were not backed by connecting evidence---Offences did not fall under the prohibitory clause of S.497(1), Cr.P.C.---Accused had been behind bars for last one month and was no more required for the purpose of recovery---Bail application was accepted.

Muhammad Zubair Khalid Chaudhary for Petitioner.

Khurram Khan, Deputy Prosecutor General Punjab.

Sabir Hussain S.I. with record.

ORDER

SHAHID HAMEED DAR, J.---The story of F.I.R. as narrated by Sabir Hussain S.I. (complainant) is that he received a spy information that Dr. Muhammad Aslam (petitioner) who had set-up a Hepatitis Research Center/Clinic at Qadir Colony Bhimber road Gujrat, propagated religious/sectarian hatred amongst the youth, considered militant-attacks on Pak-Army justified, held the army apostate, published and disseminated his detestable thoughts amongst the public-at-large and that he possessed incendiary literature, whereon he constituted a raiding party and raided his clinic at 11:35 a.m. on 16-5-2014; he (petitioner) was present there and he had before him a number of books and journals, including one of his own, placed on a table which contained contemptuous, sacrilegious and infuriating material against the Pakistan Armed Forces, besides highly provocative, inflammatory and stirring stuff, inducing the youth to launch terrorist attacks and cause mass-scale destruction; these

books and journals were taken into possession by the police through a memo of recovery, the accused/petitioner was taken into custody for having possessed, published and disseminated highly infuriating, noxious and poisonous material which could malign the youth and drive them to militancy against the interests of the country.

2. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioner, who is a doctor by profession and runs a clinic, has been burdened with the liability of such allegations, which are horrifying as well as unfortunate. The language used in the F.I.R. paints the petitioner, as though he was a devil and bent on reducing everything around him to ashes. Is it only the blame-game or an incident worth believing. Mere heinousness or gravity of an offence means little in the eye of law, unless it is backed by cogent and believable evidence which, incidentally lacks in this case. The "rebellious conduct" of the petitioner has been highlighted in the F.I.R. by using different adjectives or locutions but without hinting at any incriminating circumstance against him. Some books and journals, with the description as given above lay on his table but there existed no evidence that he possessed them with intent to stir up religious, sectarian or ethnic differences or he was likely to do so. The contents of the book, written by the petitioner, appear to have been blown out of proportion by the complainant, as argued by the former's learned counsel, who believed that freedom of thought and expression thereof stood guaranteed by the Constitution of Islamic Republic of Pakistan, 1973 and petitioner's book contained no mutinous material, which he wrote in accord with his understanding of the tenets of Islam, seeking enlightenment from the Glorious Qura'an. This argument of the learned counsel may be a food for thought for the learned trial court, at trial. Would possession of the said books and journals by the petitioner be enough to constitute the offences, he is confronted with, is a question of crucial nature which may be best answered during the course of the trial. All other allegations regarding propagation of his "nefarious thoughts" and maligning the minds of the youth are not presently backed by any connecting evidence. The offences against him do not fall under the prohibitory clause of section 497(1), Cr.P.C He is behind the bars since 16-5-2014 and is no more required for the purpose of recovery etc. Hence, his further incarceration may be of no consequence to the prosecution case. Therefore, this application is accepted and petitioner is admitted to post-arrest-bail subject to furnishing bail bonds in the sum of Rs.5,00,000 with one surety in the like amount to the satisfaction of the learned trial Court.

ARK/M-271/L Bail granted.

2015 Y L R 450

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD IQBAL---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 141 and Criminal Revision No.141 of 2008, heard on 20th June, 2013.

Penal Code (XLV of 1860)--- Ss. 302(b) & 302(c)---Qatl-i-amd---Appreciation of evidence---

Sentence, reduction in---Sudden provocation---Trespassing---Deceased, on the day of occurrence, went to Ihata of father of accused as trespasser, where he showed unruly behaviour, which led to incident severing his lifeline---Deceased lost his life due to a fire shot made by accused but the circumstances whereunder he did so needed serious consideration---Stories narrated by both the sides were polluted with certain amount of exaggeration but court was not precluded from drawing its own independent result based on available record---Accused committed offence under compelling circumstances which over-whelmingly contributed to occurrence---High Court altered conviction of accused under S.302(b) to S.302(c), P.P.C. and reduced his sentence from imprisonment for life to rigorous imprisonment for fourteen years---Appeal was dismissed accordingly.

Nasir Mehboob Tiwana for Appellant.

Muqadass Tahira, Additional Prosecutor General Punjab for the State.

Malik Shafqat Rasool Gorchha for the Complainant (in Criminal Revision No.141 of 2008).

Date of hearing: 20th June, 2013.

JUDGMENT

SHAHID HAMEED DAR, J.---Muhammad Iqbal-appellant was held guilty under section 302(b) P.P.C. for the murder of Rab Nawaz, brother of the complainant, by learned Sessions Judge, Bhakkar vide judgment dated 24-1-2008 and sentenced to imprisonment for life with a direction to pay a sum of Rs.2,00,000 to the legal heirs of the deceased as compensation under section 544-A, Cr.P.C. or in default thereof to undergo simple imprisonment for six months. Benefit of section 382-B, Cr.P.C. was also extended to him. His co-accused, Rab Nawaz and Ghulam Eesa, were, however, acquitted of the charge on extension of benefit of doubt.

2. The convict/appellant has filed Criminal Appeal No.141 of 2008 against his conviction/sentence, whereas the complainant preferred Criminal Revision No.141 of 2008 seeking enhancement in the sentence awarded to the appellant. I propose to dispose of both the matters together through this single judgment.

3. The facts, as unfolded by Muhammad Bilal complainant (P.W.9), son of Muhammad Azeem, in F.I.R. (Exh.PF/1) are that he was an Imam Masjid in village Bharmi Nawab; he came to his village, Bharmi Chiragh to see his family on 5-10-2005; he along with Muhammad Ibrahim P.W. (not produced) and Inayat Ullah (P.W.10) heard hue and cry, at about 3.00 p.m., whereon they came out of the house and saw Muhammad Iqbal (appellant), armed with pistol .30-bore, Rab Nawaz (since acquitted) son of Qadir Bakhsh, armed with rifle .44-bore and Ghulam Eesa (since acquitted), empty handed, quarrelling with his brother Rab Nawaz and pressurizing him not to operate the peter-engine; when his brother stepped forward, Muhammad Iqbal (appellant) raised Lalkara and fired a pistol shot at him, which hit left side of his eye below the nose; Rab Nawaz accused (since acquitted) fired through his rifle, but it went missing; his brother fell onto the ground badly wounded and succumbed to the injuries instantaneously; he and his aforesaid companions witnessed the occurrence; the accused fled the spot on catching sight of the witnesses; the motive behind the occurrence pertained to a previous dispute, which took place on 4-10-2005 between Muhammad Iqbal (appellant), his co-accused and Rab Nawaz (deceased) over operating the peter-engine, jointly owned by the mentioned accused and his brother Rab Nawaz (deceased). This statement of the complainant

was reduced into writing as fard biyan (Exh.PF) by Abdul Hameed, S.I. (P.W.11), at 4.45 p.m., on 5-10-2005, at the place of occurrence, on the basis of which F.I.R. (Exh.PF/1) was drafted by Hafeez-ur-Rehman Khan, S.I./DO (P.W.7).

4. After despatch of fard biyan, from the place of occurrence to the police station through Kaleem Ullah, 355/C, Abdul Hameed, S.I. (P.W.11) started investigating the matter; he examined the dead body of the deceased, prepared inquest report (Exh.PC), and sent the dead body to the mortuary under the escort of Muhammad Ramzan constable (P.W.6) for postmortem examination; he inspected the place of occurrence, drew visual-site-plan Exh.PJ, collected blood-stained earth from the spot vide memo Exh.PH, got prepared in duplicate site plan in-scale Exh.PD and Exh.PD/1 by Muhammad Aslam, Patwari Halqa (P.W.4); he arrested Muhammad Iqbal (appellant) on 7-10-2005, who while in custody led to the recovery of pistol (P5) and two live bullets (P6/1-2) from the kitchen of his house, which was taken into possession by him vide memo Exh.PG, attested by Ijaz Ahmad, 471/C (P.W.8) and Shujaat Ali, 557/HC (not produced). After completion of investigation, the appellant along with Rab Nawaz and Ghulam Eesa (acquitted co-accused) was sent up to face trial. On denial of charge by him, the trial commenced.

5. During trial, the prosecution produced eleven witnesses in all in support of its case. The ocular account was furnished by Muhammad Bilal complainant (P.W.9) and Inayat Ullah (P.W.10), who also deposed about the motive set up. Ijaz Ahmad, constable (P.W.8) stated about the recovery of pistol (P5) and live bullets (P6/1-2) vide memo Exh.PG at the instance of the appellant.

6. The medical evidence was presented by Dr. Muhammad Ramzan (P.W.3), who conducted autopsy on the dead body of Rab Nawaz (deceased), at 9.00 p.m., on 5-10-2005, vide necropsy report Exh.PA (pictorial diagram Exh.PA/1) and found following injuries thereon:-

(1) A firearm entry wound measuring 1 cm x 1 cm on left cheek 2 cm from the nose. Tattooing was present.

(2) A firearm exit wound measuring 2 cm x 1 cm on back of left side of head 12 cm from left ear.

(3) A lacerated wound measuring 2 cm x 1/2 cm on the right side of lower lip.

The cause of death, recorded by the medical officer was due to injuries Nos.1 and 2, which were sufficient to cause death in the ordinary course of nature. All the injuries were ante-mortem and caused by firearm. The probable time that elapsed between injuries and death was "within ten minutes", whereas between death and postmortem examination, it was within about six hours.

7. Learned prosecutor gave up remaining prosecution witnesses as unnecessary and tendered in evidence report of the Chemical Examiner (Exh.PL) and that of the Serologist (Exh.PM) before declaring the prosecution case closed.

8. After closure of the prosecution evidence, statements of the appellant and those of his acquitted co-accused were recorded under section 342, Cr.P.C. The accused entered the plea of innocence and their false involvement in the case, opting not to depose under section 340(2), Cr.P.C. as their own witnesses or adducing the defence evidence except for a school leaving certificate (Exh.DA), which was tendered in defence by the appellant to claim

minority. The answer given by the appellant to the question as to his involvement in the case and tendering of evidence by the prosecution witnesses against him, is reproduced hereunder for ready references:--

"The case against me and my co-accused is false. So far as the P. Ws are concerned, they are close relatives of Rabnawaz deceased and are interested in my conviction as well as in conviction of my co-accused. So they deposed falsely against me and my co-accused. The eye-witnesses are chance witnesses and inimical towards me and my co-accused.

In fact, occurrence did not take place as mentioned by the prosecution. Actually, Mst. Ghulam Skina is my sister, Muhammad Ramzan son of Karim Bakhsh, Caste Kamboh is "chachazad" of Muhammad Bilal complainant and Rabnawaz deceased. Rabnawaz deceased demanded the hand of my sister Mst.Skina for above said Muhammad Ramzan but my father Rabnawaz flatly refused with the remarks that Muhammad Ramzan was not enjoying good character. Rabnawaz deceased took it ill and had a grudge due to this reason particularly with regard to the remarks against Muhammad Ramzan.

When Rabnawaz deceased was murdered, I was student of Govt. High School, Jhoke Samtia and studying there in those days. On the day and time of occurrence, Rabnawaz deceased along with Muhammad Nawaz P.W armed with weapon, emerged to my house and used filthy and dirty language and abused to my father in presence of women fake. My mother and sisters caught hold my father and took him in a room, where my father was confined by them and closed the door to avoid any incident at the hands of the deceased. On hue and cry, our closed relatives residing nearby, gathered there and tried to catch hold the deceased and grappled with deceased. During this process, pistol of Rabnawaz deceased was fired and hit to him as of result, Rabnawaz expired.

The complainant and eye-witnesses were not present at the spot and after the death of the deceased, they came there and concocted false story against me and my co-accused.

9. The learned Additional Sessions Judge on culmination of trial proceeded to convict/sentence the appellant as mentioned hereinabove.

10. Learned counsel for the appellant has argued that it was proved during the trial that the appellant's father and acquitted co-accused Rab Nawaz was lessee of the disputed land; it also proved beyond any shadow of doubt that the place of occurrence was owned by Rab Nawaz accused and one Faiz Muhammad jointly; in fact the unfortunate incident took place due to stubbornness and aggressive conduct of the deceased, who trespassed onto the land of the accused to dictate terms and commit roguery, which ended in termination of his own life; no independent evidence was produced by the prosecution and one, Muhammad Ramzan P.W. (not produced), who was a disinterested person was given up by them so as to conceal the real facts; though a specific plea of sudden provocation has not been adopted by the appellant during trial, yet, it oozes from the prosecution case, the benefit whereof may be extended to the appellant, who, in particular circumstances of the case, has committed no offence and he merits acquittal like his acquitted co-accused.

11. Contrary to it, learned Additional Prosecutor General Punjab duly assisted by learned counsel for the complainant has supported the judgment passed by the learned trial court with the submission that the prosecution proved its case against the appellant beyond all reasonable shadows of doubt and that the complainant has filed a revision petition as well for awarding capital punishment to the appellant, who took the life of an innocent youth in an un-provocative attack; though the witnesses were closely related to the complainant, yet, their

statements could not be brushed aside on this score alone; the motive stood fully proven and learned trial court committed an error by disbelieving it on flimsy grounds; Rab Nawaz had been murdered in a pre-meditated attack, therefore, the impugned judgment may not only be maintained, but sentence of the appellant may be enhanced to the optimum by allowing the revision petition filed by the complainant.

12. I have heard learned counsel for the parties at length and gone through the entire record of the case minutely.

The most vital question in the circumstances of the case is, whether it was a case of pre-meditation or situation exploded all at once into the occurrence alleged or if the deceased, Rab Nawaz son of Muhammad Azeem, was a trespasser, having invited the trouble himself. The prosecution evidence is based on oral statements of Muhammad Bilal-complainant (P.W.9) and Inayat Ullah (P.W.10), who stated during trial that the fire shot made by Muhammad Iqbal, accused-appellant, landed below the left eye, near the nose of Rab Nawaz (deceased), which proved fatal. It can easily be found from the testimonies of both the examined eye-witnesses that the occurrence took place just close to the house of the appellant, rather opposite to it, on its eastern side, which fact can be verified from the visual site-plan (Exh.PJ). The complainant-Muhammad Bilal (P.W.9), who is real brother of the deceased has admitted during cross-examination that Rab Nawaz accused (since acquitted) had obtained fourteen (14) kanals of land on lease from one Muhammad son of Hussaino, caste Kamboh, where peter-engine was installed, but he in the same breath denied a suggestion, put to him by the defence in an unwisely manner, whereby he contended that the place of occurrence was owned by Rab Nawaz accused (since acquitted), who was the father of Muhammad Iqbal-appellant, along with one Faiz Muhammad jointly. The other eye-witness Inayat Ullah (P.W.10) frankly admitted during cross-examination that the house of Rab Nawaz accused was near the place of occurrence towards west and there was a street in between the place of occurrence and the said house. The land where peter-engine was installed fell at a distance of about 35/40 karams from the house of the accused and 50/60 karams from the house of the complainant as admitted by him in his statement. A question arises, if at all, the dispute between the parties related to peter-engine-operation, why the occurrence took place just in front of the house of Rab Nawaz (acquitted accused), father of the appellant. The Ihata, wherein the occurrence took place, was exclusively owned by Rab Nawaz accused (since acquitted) and probably by Faiz Muhammad as well, as deposed about by the complainant (P.W.9), but, latter did not appear at trial to prove the said factum. Nevertheless, Rab Nawaz (deceased) neither owned nor possessed the said Ihata. The fact that his dead body lay therein, when recovered by the Investigating Officer, certainly causes eyebrow-raising and it lends a sense of strength to a crucial observation of the learned trial court made in the impugned judgment though not taken to its logical end, that "The plea taken by accused that deceased had gone to the house of Rabnawaz accused and used filthy language and female members of Rabnawaz accused confined him in a room, cannot be ruled out.", which also gives rise to an impression that the plea taken by the accused in his statement under section 342, Cr.P.C. as regards his sister Mst.Ghulam Sakina might be partially correct, whose hand was demanded by Rab Nawaz deceased for his chachazad Muhammad Ramzan, but on denial of her father Rab Nawaz accused, he (deceased) got furious and used filthy language against the latter in presence of the women-folk of his house, who struggled hard to confine Rab Nawaz accused (since acquitted) in a room of the house to avoid any untoward incident, but, unluckily it did take place and resulted in the death of the deceased. Only one impression can be gathered from the statements of the witnesses forming the ocular account that the lone shot to the deceased was fired by Muhammad Iqbal-appellant, though he categorically adopted the plea that he did not participate in the occurrence. The presence of the eye-witnesses at the relevant time of occurrence at the spot stands fully proven, but with an irrefutable conclusion that they did not speak the whole truth, as Rab Nawaz deceased had

trespassed onto the Ihata of the accused with a threatening posture to the father of the appellant, as stated above. Being a young man of about 19/20 years of age, the appellant might have felt his blood bubbling in the veins when he heard Rab Nawaz (deceased) abusing his father in presence of the women-folk while standing in his Ihata, and in this situation of being effervescent, he fired the only but fatal shot and murdered Rab Nawaz, a trespasser. The medical evidence, tendered by Dr.Muhammad Ramzan (P.W.3) lends necessary corroboration to the role, played by the appellant during the occurrence.

13. So far as motive alleged is concerned, it has been rightly disbelieved by the learned trial court as no evidence could be presented by the prosecution during trial to the said effect. The recovery of pistol (PS) along with two live bullets (P6/1-2) vide memo Exh.PG on 13-10-2005, at the instance of the appellant is inconsequential and irrelevant as, Investigating Officer failed to recover any crime empty(ies) from the place of occurrence during inspection thereof.

14. In the light of the aforementioned facts, it becomes abundantly clear that on 5-10-2005, the deceased went to the Ihata of the father of the appellant as a trespasser, where he showed an unruly behaviour as discussed earlier, which led to an unfortunate incident severing his lifeline. It has been proved that the deceased lost his life due to a fire-shot, made by the appellant but, the circumstances whereunder he did so needed serious consideration. The stories narrated by both the sides are polluted with certain amount of exaggeration, but it does not mean that the court stands precluded from drawing its own independent result, certainly based on the available record. This court is of the considered opinion that the appellant-Muhammad Iqbal committed the offence under a compelling circumstance, discussed as above, which Rab Nawaz (deceased) overwhelmingly contributed to. Therefore, I alter conviction of the appellant under sections 302(b), P.P.C. to 302(c) P.P.C. and reduce his sentence from life imprisonment to rigorous imprisonment for fourteen (14) years with a direction to pay a sum of Rs.2,00,000 to the legal heirs of the deceased as compensation under section 544-A, Cr.P.C. or in default whereof to undergo simple imprisonment for six months. Benefit of section 382-B, Cr.P.C. already extended to the appellant by the learned trial court is maintained.

16(sic). With the above modifications in the sentence of the appellant, this appeal is dismissed. Likewise Criminal Revision No.141 of 2008 filed by the complainant for enhancement of sentence of the appellant, for the discussion supra, also stands dismissed.

MH/M-223/L Order accordingly.

2015 Y L R 580

[Lahore]

Before Shahid Hameed Dar and Arshad Mahmood Tabassum, JJ

ZAFAR MEHMOOD---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.110 of 2014, decided on 8th July, 2014.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), Ss.302 & 34---Qatl-i-amd, acts done by several persons in furtherance of common intention---Suspension of sentence---Complainant had disowned the contents of complaint while her son stated in his testimony that he had not seen any of the accused on the spot---Observations recorded by Trial Court regarding guilt of accused would be open to serious reconsideration during adjudication of appeal---Sentence of accused was suspended.

Hafiz Tanveer v. The State and another PLD 2010 Lah. 156; Abdul Rehman v. The State and another 2008 SCMR 1381 and Raja Shamshad Hussain v. Gulraiz Akhtar and others PLD 2007 SC 564 ref.

Tanveer Iqbal for Appellant.

Ch. Qaiser Mushtaq, Assistant District Public Prosecutor for the State.

Raja Guftar Ahmad Khan for the Complainant.

Muhammad Nadeem Khan P.W. in person.

ORDER

Criminal Miscellaneous No.553-M of 2014

Seeks placement of certain documents to support the instant petition. Allowed subject to all just and legal exceptions.

Criminal Miscellaneous No.416-M/2014.

The petitioner, Zafar Mehmood was handed down the death sentence vide judgment dated 13-3-2014 by the learned Additional Sessions Judge, Rawalpindi on culmination of his trial in case-F.I.R. No.767, dated 15-11-2011, under section 302/34, P.P.C., registered at Police Station Saddar Berooni, Rawalpindi. His co-accused, Muhammad Aamir was awarded life imprisonment by the learned trial court through the same judgment.

2. Learned counsel for the petitioner as well as learned counsel for the complainant submit in unison that petition-in-hand may be allowed and petitioner, Zafar Mehmood may

be set at liberty on bail by way of suspension of his sentence. Learned Assistant District Public Prosecutor, however, opposes this petition, though in a lukewarm manner.

3. After hearing learned counsel for the parties and perusing the record, it is observed that learned trial court appears to have stretched the matter too far, so as to dishing out the capital sentence to the petitioner by overlooking the fact that Mst.Mohallan Bibi, the complainant, who appeared as P.W.6, disowned the contents of the complaint (Exh.PC) with the contention that she knew nothing about the text thereof. The other eye-witness of this case, Muhammad Nadeem (P.W.5), who happened to be the real son of Mst.Mohallan Bibi (complainant) did the worse, as he stated in his testimony that he had not seen any of the accused at the spot with his own eyes. The learned trial court touched these facts in paragraph 9 of the impugned judgment before recording a verdict of guilt against the petitioner-convict, but left it in the middle without finding a rational- answer to the said riddle. The observations recorded by the learned trial court as to the guilt of the petitioner shall be open to serious reconsideration, when titled appeal is taken up for final adjudication. Surprisingly, it does not ooze from the impugned judgment that the said eye-witnesses, who disowned the prosecution case in mentioned terms, were declared hostile or prosecution ever asked for an opportunity to cross-examine them. Muhammad Nadeem Khan (P.W.5) has tendered his sworn affidavit, wherein he has adopted an overlapping version, as he did while rendering testimony as a prosecution witness and maintained that Zafar Mehmood (petitioner) was innocent and he had nothing to do with the murder of his sister Mst.Maryam Ayub. There is no other eye-witness of the occurrence, than the ones noted hereinabove. By relying on the judgments, Hafiz Tanveer v. The State and another (PLD 2010 Lahore 156), Abdul Rehman v. The State and another (2008 SCMR 1381) and Raja Shamshad Hussain v. Gulraiz Akhtar and others (PLD 2007 SC 564), the learned counsel for the petitioner and that of the complainant have jointly submitted that a capital sentence may be suspended in appropriate cases and there was no absolute rule that it could not be suspended under any circumstance. Learned Assistant District Public Prosecutor, too, seems to be in agreement with this particular limb of the argument of the learned counsel. The paragraph wherein learned trial court has inferred a conclusion qua guilt of the petitioner does not look much impressive at this stage and for this reason, we find it a fit case, wherein sentence of the petitioner should be suspended.

4. For the discussion supra, we allow this application, suspend the sentence of the petitioner accordingly and he shall be released on bail subject to furnishing bail bonds in the sum of Rs.5,00,000 (five lacs) with two sureties each in the like amount to the satisfaction of the learned trial court. He shall appear on each and every date of hearing of the instant appeal.

ARK/Z-29/L Application allowed.

2015 Y L R 822

[Lahore]

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

BILAL HUSSAIN---Appellant

Versus

The STATE---Respondent

Criminal Appeals Nos.884 and 1202 of 2012, heard on 3rd February, 2014.

Penal Code (XLV of 1860)---

----Ss. 365-A & 34---Anti-Terrorism Act (XXVII of 1997), S.7(e)---Kidnapping for ransom, common intention, act of terrorism---Appreciation of evidence---Unexplained inordinate delay of about thirty two hours in lodging FIR, had caused eye brow-raising and signals at the mala fide of the complainant, which did no good to prosecution case---Prosecution witness did not corroborate the contents of FIR to the effect that he and his co-witness allegedly had seen alleged abductee in the company of accused---Minor/alleged abductee nowhere alleged in his testimony that he was kidnapped by accused, while holding a 'chhura' in his hand---Complainant had admitted that his minor son/abductee, on return to the house, did not bear any mark of violence/torture on his body---Police did not collect any call-data of cell-phone/SIM during investigation---Complainant, had admitted in his testimony to have some money dispute with the father of accused, on account of which he had lodged a criminal case against him regarding "dishonour of cheque"---Kidnapped child, did not paint an unblemished picture qua the prosecution case as testimonies in the case were inconsistent, discrepant and contradictory inter se, besides entailing countless improbabilities---Case with regard to involvement of accused appeared to be a cock and bull story---Conviction of accused and sentence, could not be maintained on quality of evidence---Conviction and sentence, awarded to accused by the Trial Court, were set aside, he was acquitted of the charge, and was released, in circumstances.

Kashif Saeed Bhatti for Appellant.

Hamayun Aslam, Deputy Prosecutor General Punjab for the State.

Omar Farooq Khan for the Complainant.

Date of hearing: 3rd February, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.---Bilal Hussain-appellant was held guilty under section 365-A/134 P.P.C. and under section 7(e) of the Anti-Terrorism Act, 1997, by the learned Judge, Anti-Terrorism Court No.1, Gujranwala, vide judgment dated 30-4-2012 and sentenced as under:--

(I) Under section 365-A/34, P.P.C.: to imprisonment for life with forfeiture of his property.

(II) Under section 7(e) of ATA, 1997: to imprisonment for life with forfeiture of his property.

All the sentences were ordered to run concurrently with benefit of section 382-B, Cr.P.C.

His co-accused, Muhammad Waris and Muhammad Yousaf were, however, acquitted of the charge on extension of benefit of doubt.

2. The convict/appellant by filing the instant appeal (Criminal Appeal No.884 of 2012) has called in question his conviction and sentence under the impugned judgment, whereas Tariq Mehmood-complainant by filing Criminal Appeal No.1202 of 2012 has challenged the acquittal of Muhammad Waris and Muhammad Yousaf, co-accused of the appellant. We propose to dispose of both the matters together through this single judgment.

3. Precisely, the prosecution case as unfurled by Tariq Mehmood-complainant (P.W.7) in the written application (Exh.PA/1) moved by him before the SHO, Police Station Saddar Sialkot, was that at about 6.00 a.m. on 29-8-2011, his son Abu Huraira, aged nine, was returning to home after offering Fajar prayer and reciting Holy Qur'an from the mosque, Gulzar-e-Madina; when he reached near the factory of Muhammad Waris (since acquitted), all of a sudden Bilal Hussain (appellant), holding chhura kidnapped him with intent to kill and demand ransom; he confined him in a room of the factory; he got worried when Abu Huraira did not return home; Khalid Mehmood P.W. (not produced) and Ansar Ali (P.W.5) informed him that they saw his son at about 6:00 a.m, in the company of Bilal Hussain accused; he received a call on his Mobile Phone, SIM No.0333-8603619 from cell phone-SIM No. 0322-5848836 at about 1:00 p.m.; the caller asked him not to worry and make arrangement of Rs.20,00,000, drop this amount at a place as directed by him, so as to save his son's life and warned him not to inform the police at all; he (complainant) told the caller that he was a man of limited means; ultimately ransom-amount was settled as Rs.5,00,000 after some dialogue; he was still arranging the ransom amount, when at about 4:00 p.m. his son suddenly reached home, badly perturbed and told him about the incident of his kidnapping by Bilal Hussain (appellant) and his companions Muhammad Waris and Muhammad Yousaf besides two unknown persons, who all carried arms then; on the basis of the complainant's application (Exh.PA/1), formal FIR (Exh.PA) was drawn up by Khalid Hussain SI (P.W.1), at 2.00 p.m., on 30-8-2011.

4. After registration of the case, investigation into the crime was entrusted to Muhammad Riaz, ASI (P.W.10), who proceeded to the place of occurrence, inspected it and prepared visual site plan (Exh.PJ); he searched for the accused; on 31-8-2011, he conducted a raid for arrest of the accused, but they ran away by leaving two motorcycles, which were seized under section 550, Cr.P.C. vide recovery memo Exh.PE; on 16-9-2011, he arrested Bilal Hussain (appellant), who, during the course of investigation, led to the place of confinement of the kidnapped child and got recovered a string (P3), tape (P4) and shoe of the victim (P2), which were taken into possession vide memo Exh.PC, duly attested by Muhammad Tufail 685/C (P.W.2) and Ghulam Abbas 357/C P.W. (not produced); on 23-9-2011, Bilal Hussain (appellant) also led to the recovery of a chhura (P5) and a mobile-phone Nokia-1202 (P6), which were secured by the Investigating Officer vide memo Exh.PD, duly attested by Muhammad Tufail 685/C (P.W.2) and Muhammad Iqbal 817/C P.W. (not produced); thereafter investigation of the case was transferred to Tariq Mehmood Inspector (P.W.11), who again interrogated Bilal Hussain (appellant) and also joined previous Investigating Officer, Muhammad Riaz, ASI (P.W.10), three constables, the complainant, the kidnapped child, the eye-witnesses of the occurrence and Bilal Jamshaid, a computer operator, in the investigation; he recorded opinion of innocence in favour of Muhammad Waris and

Muhammad Yousaf-accused (since acquitted); on completion of investigation, he prepared the challan under section 173, Cr.P.C. and submitted it before the Court for trial of the accused in accordance with law.

5. The appellant as well as his acquitted co-accused on indictment (pleaded not guilty and claimed a trial. The prosecution, in order to prove its case, produced eleven witnesses, namely, Khalid Hussain A.S.-I. (P.W.1), Muhammad Tufail 685/C (P.W.2), Muhammad Shafique (P.W.3), Yaqoob Ali Bhatti (P.W.4), Ansar Ali (P.W.5), Gul Nawaz (P.W.6), Tariq Mehmood-complainant (P.W.7), Abu Huraira-kidnapped-child (P.W.8), Bilal Jamshaid 1567/C (P.W.9), Muhammad Riaz ASI (P.W.10) and Tariq Mehmood Inspector (P.W.11). Thereafter, the accused were examined under section 342, Cr.P.C., whereby they professed their absolute innocence in the matter and denied all the charges against them. They did not opt to depose under section 340(2), Cr.P.C. nor they opted to adduce any evidence in defence. The contention adopted by Bilal Hussain (appellant) in reply to question as to why this case against him and why the P.Ws. deposed against him, read as under:--

"I am innocent. The complainant of this case belongs to my village. He had money dispute with my father. My father had paid the whole amount to him and he refused to return the cheque to my father which he had given to the complainant as guarantee. My father is in Saudi Arabia for earning his livelihood. In his absence my uncles Muhammad Yousaf and Waris (co-accused) before registration of this case asked the complainant to return the cheque but he refused and a false case was registered against me and my co-accused the P.Ws. have deposed falsely being interested and in league with the complainant."

The learned trial Judge on conclusion of the trial held the appellant guilty of the offences charged and sentenced him as mentioned hereinabove.

6. Learned counsel for the appellant has contended that the story qua kidnapping of his son Abu Huraira (P.W.8) has been fabricated by the complainant (P.W.7) under a conspiracy, so as to evade his liability to return the guarantee-cheque, given to him by the father of the appellant; the evidence on the record has been misread and misappraised by the learned trial court for holding the appellant guilty and awarding him the sentence under appeal; the prosecution miserably failed to prove its case during trial beyond reasonable shadow of doubt and for this reason the impugned judgment is not sustainable in the eyes of law; the evidence rendered by the prosecution witnesses is deficient as well as discrepant and learned trial court's reliance on it has caused gross miscarriage of justice.

7. The learned counsel appearing on behalf of the complainant argued that there existed no enmity between the parties nor there was any ill-will on the part of the complainant to falsely involve the appellant in this case; the evidence tendered by the complainant (P.W.7) and the minor kidnapped child (P.W.8) cannot be brushed aside as incredible nor any such element of un-believability floats across their testimonies; each accused commits the crime with a particular frame of mind, therefore, crime so enacted cannot be adjudged in the light of whimsical improbabilities imagined by the other side.

8. Learned Deputy Prosecutor General Punjab submitted that charge against the appellant stood fully proven, beyond any doubt, therefore, the impugned judgment may not be declared faulty nor it may be undone on the basis of imaginary fallacies, as pointed to by the accused.

9. We have minutely gone through the entire record and attentively considered the submissions of the learned counsel for the parties.

It all started when Abu Huraira (P.W.8), the minor son of Tariq Mehmood-complainant (P.W.7) after offering fajar prayer and reciting the Holy Qur'an did not return to his house from the mosque, Gulzar-e-Madina on 29-8-2011 as, he on way to his house was kidnapped by Bilal Hussain (appellant), who held a Chhura then and after kidnapping him with intent to kill and demand ransom, he forcibly took him to factory of Waris accused (since acquitted) where he confined him in a room. The worries of the complainant (P.W.7) multiplied when Khalid Mehmood P.W. (not produced) and Ansar Ali (P.W.5) informed him that his son had been witnessed by them in the company of the accused/appellant, followed by receipt of a phone-call (SIM No.0322-5848836) from an unknown caller, on his cell-phone (SIM No.0333-8603619), who demanded ransom of Rs.20,00,000 for releasing his minor son. The strange aspect of the case is that the complainant (P.W.7), on one hand, settled the ransom amount with the kidnapper as Rs.5,00,000 after some telephonic-dialogue with him and on the other hand his kidnapped child unexpectedly reached home at 4.00 p.m., the same day panting and he looked highly perturbed. He told his father that he had been kidnapped by Bilal Hussain (appellant) and his crime-partners Muhammad Waris and Muhammad Yousaf (since acquitted), joined by two unknown persons, all armed with firearms. This is what written application (Exh.PA/1), moved by the complainant (P.W.7) on 30-8-2011 and formal FIR (Exh.PA) tell us about the occurrence qua kidnapping of minor Abu Huraira (P.W.8). The FIR suffers from unexplained delay of about thirty two (32) hours and by no way, it can be termed a promptly lodged case. The FIR (Exh.PA) discloses the distance of the place of occurrence from the police station three kilometers, which may not be the distance, more than a crow's flight and could easily have been covered by the complainant within a few minutes. The complainant preferred to keep silent as to the delay caused, which renders his conduct a bit dubious. He learnt about the kidnapping of his son by the appellant and he also learnt about the place, where, after kidnapping, he had been taken to, followed by his telephonic-contact with the kidnapper(s) by 1.00 p.m. on 29-8-2011. What else he needed to report the crime to the police? He appears to have indulged himself in long consultations and deliberations before submitting the written application (Exh.PA/1) to the police at 2.00 p.m. on 30-8-2011. Even in his testimony, he bothered not to explain the circumstances, which compelled him to delay reporting of crime to the police. The unexplained inordinate delay in registration of the FIR causes eyebrow-raising and signals at the mala fide of the complainant, which certainly does no good to the prosecution's case.

10. It was Ansar Ali (P.W.5) and his co-witness Khalid Mehmood (not produced), who as per contents of the FIR informed the complainant that they had seen his son Abu Huraira at 6.00 a.m. on 29-8-2011 in the company of Bilal Hussain (appellant) and this is what the complainant deposed about in his testimony. Ansar Ali (P.W.5), however, did not corroborate the said fact in entirety as he did not name his co-witness Khalid Mehmood to have seen the said incident nor he stated about the appellant and kidnapped child going together and what he said was that he saw his son Abu Huraira with Bilal near his dera. He (P.W.5) categorically stated in his testimony that Tariq Mehmood-complainant visited his factory at 11.30 a.m. when he disclosed to him the aforesaid position of his missing son. This P.W. did not join investigation for four/five days, which fact has been admitted by him in his testimony, nor did he put forth any explanation for having not done so. The delayed joining of this P.W. with the investigation reduces the efficacy of his statement almost to nothing. The prosecution, as noted earlier, did not produce Khalid Mehmood P.W. to corroborate the aforesaid factum, as stated by Ansar Ali (P.W.5).

11. The kidnapping/abduction for ransom is certainly a serious charge wherein many actors, on and off and behind the scene, participate and perform. Here in this case, Abu Huraira (P.W.8) was forcibly taken away by Bilal Hussain (appellant) at about 6.00 a.m. on 29-8-2011, whereafter according to the allegations he was confined by the accused in bathroom of the factory of Muhammad Waris (since acquitted) by putting an adhesive tape on his mouth and by

tying his hands and legs with a string. The cumulative contention of Tariq Mehmood-complainant (P.W.7) and Abu Huraira (P.W.8) makes the prosecution case one of escape of the child from the captivity of the accused at about 4.00 p.m., the same day. The complainant contended in his testimony that on return of his son, he took the police to the factory of the accused, where, the bathroom, wherein the child was confined, was found locked and main gate of the factory was open. He further said that the lock of the room, wherein his son was confined was opened by the police by fetching a key from the accused and they observed the "ventilator" through which his son had managed his escape. This bathroom, as told by P.W.7, was 8/8-1/2 feet high and there was a hole in the roof of the said bathroom and not in any of its walls. This bathroom was fitted with a basin as well as a mirror and basin was fixed in a wall at the height of about 3/3-1/2 feet from the floor. The kidnapped child testified in this case as P.W.8, after he was found prudent enough to depose by the trial court. His statement does not inspire confidence at all. It is simply unimaginable that being a child of about 8/9 years of age, he without the help of any, untied his hands and legs and climbed the roof of the bathroom, wherein he was statedly confined. The complainant has stated that his son remained confined in the said room for ten/fifteen minutes. If so, the kidnapped child should have returned to his house hours before 4.00 p.m. as he was abducted by the accused at 6.00 a.m. and taken straight to the said factory, which fact is evident from the testimony of Abu Huraira (P.W.8). The minor has nowhere alleged in his testimony that he was kidnapped by the accused while holding a chhura in his hand and what he contended is that the accused threatened him by means of a chhuri, at the time of his confinement in the bathroom. The complainant admitted that his minor son, on return to the house, did not bear any mark of violence/torture on his body. It also oozes from his testimony that the police did not collect any call-data of his cell-phone/SIM during investigation. He also admitted in his testimony to have some money dispute with the father of Bilal Hussain accused/appellant, on account of which he had lodged a criminal case against him regarding "dishonour of cheque". He further admitted that father of Bilal Hussain accused had obtained loan of Rs.2,00,000 from him and he repaid an amount of Rs.1,28,000 in instalments to him and for rest of the amount he issued to him a cheque, which was dishonoured by the bank. The appellant also referred to a money dispute between his father, who lived in Saudi Arabia for earning livelihood and the complainant, in his statement under section 342, Cr.P.C, with the elaboration that his father had defrayed the entire amount to the complainant, who, however, did not return the cheque to his father whereon his uncles Muhammad Yousaf and Muhammad Waris (since acquitted) asked him to return it but he refused and instead, he got a false case registered against him and his co-accused. Who knows that aforesaid contention of the appellant may be wholly true.

12. So far as the statement of Muhammad Riaz, ASI/IO (P.W.10) is concerned, he has contended that child Abu Huraira could not touch the roof of the bathroom while standing on the floor of the bathroom as he was 4/4.05 feet in height. He, however, introduced unlike the statement of the complainant and the abducted-child, that he found a table, stool and chairs inside the bathroom, when he visited it on day one. The visual-site-plan (Exh.PC/1) does not show any hole in the roof of the bathroom and this fact has been mentioned by the Investigating Officer (P.W.10) in his testimony. Ansar Ali (P.W.5), Tariq Mehmood-complainant (P.W.7) and Abu Huraira, the kidnapped-child (P.W.8) do not paint an unblemished picture qua the prosecution case, as there testimonies are inconsistent, discrepant and contradictory inter se besides entailing countless improbabilities, hence, liable to be brushed aside.

13. Insofar as the recovery of call-details-record (CDR) (P1), vide memo Exh.PB, attested by Muhammad Tufail 685/C (P.W.2) and Muhammad Iqbal 817/C (not produced) is concerned, it hardly connects the appellant with the cell-phone of the complainant as it relates to the cell-phones/SIMs of Dalawar Hussain and Gul Nawaz (P.W.6). The prosecution in their bid to prove the case against the appellant also produced Gul Nawaz (P.W.6), whose

testimony virtually means nothing to the story of kidnapping, escape and return of the minor Abu Huraira from the bathroom of the factory owned by the accused, nor does it create any link between the cell-phone/SIM of the appellant and that of the complainant. The contention of this witness that a copy of his national identity card had been used by the accused/appellant to fetch a SIM for his own use, remains uncorroborated and it does not inspire confidence in any manner. The Investigating Officer Muhammad Riaz ASI (P.W.10) visited the room of confinement of Abu Huraira again on 19-9-2011 to recover shoe (P2) of the kidnapped-child, rope (P3) and crystal tape (P4) vide recovery memo Exh.PC, which was attested by Muhammad Tufail 685/C (P.W.2) and Muhammad Iqbal 817/C (not produced). The recovery of these items is hardly believable and an element of mischief in its provision cannot be ruled out. The Investigating Officer had visited the said cell/room, on the very day of the registration of the FIR together with the complainant and the kidnapped child but nothing of the sort was recovered on that occasion. The repeated visit of the said room by the Investigating Officer resulted in recovery of the aforesaid items, which cannot be believed a circumstance, worth reliance or worth credence. The prosecution cannot offer any plausible explanation as to how the first visit of the Investigating Officer to the said cell remained unproductive. There is a couple of other items, churra (P5) and mobile-phone-Nokia (P6) alleged to have been recovered at the instance of the appellant from his house on 23-9-2011. This piece of evidence virtually adds nothing to the prosecution case, which, as already held in the preceding paragraphs of this judgment, has gone unsubstantiated and unproved.

14. All, what has been discussed above, sounds us to be more of a cock and bull story as far as involvement of the appellant in this case is concerned. His conviction and sentence, therefore, cannot be maintained on this quality of evidence. For the discussion supra, we allow this appeal, set aside the conviction and sentences of the appellant recorded by the trial court and acquit him of the charge. He be released forthwith if not required in any other case.

15. Insofar as Criminal Appeal No.1202 of 2012, filed by the complainant against acquittal of the respondent-accused, Muhammad Waris and Muhammad Yousaf, is concerned it has no legs to stand on, for the reasons, as entailed hereinabove, hence, dismissed in limine.

HBT/B-6/L Appeal allowed.

2015 Y L R 1930

[Lahore]

Before Shahid Hameed Dar and Ali Baqar Najafi, JJ

The STATE---Petitioner

versus

UMER MEHMOOD and others---Respondents

Crl. Misc. Nos.5545/CB and 5613/CB of 2013, decided on 8th May, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497(5)---Penal Code (XLV of 1860), Ss.148, 149, 186, 353, 427, 436, 324, 295-A & 397---

Anti-Terrorism Act (XXVII of 1997), S.7---Rioting armed with deadly weapon, every member of unlawful assembly guilty of offence committed in prosecution of common object, obstructing public servant in discharge of public functions, assault or criminal force to deter public servant from discharge of his duty, mischief causing damage to the amount of fifty rupees, mischief by fire or explosive substance with intent to destroy house, etc., attempt to commit qatl-e-amd, deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs, robbery or dacoity, with attempt to cause death or grievous hurt, acts of terrorism---Bail, cancellation of---Grounds---Principles---Scope--- Case of accused/petitioner was not different from cases of co-accused who had been granted bail by High Court earlier---Cancellation of bail could be ordered only on very strong and exceptional grounds such as repetition of offence by accused, hampering of process of investigation or trial or intimidation of prosecution witnesses, abscondence or misuse of concession of bail---No exceptional circumstances existed which might warrant interference with bail granting order---Bail granting order was subject of interference under S.497(5), Cr.P.C. if such order was arbitrary, absurd or fanciful---Discretion of court under S.497(5), Cr.P.C. was pari materia with the principles of setting aside an order of acquittal---Justice could not be allowed to be brutalized in the name of terrorism---Petitions for cancellation of bail were dismissed.

Mian Dad v. The State and another 1992 SCMR 1286; Muzaffar Iqbal v. Muhammad Imran Aziz and others 2004 SCMR 231 and Malik Muhammad Ishaq's case 2011 SCMR 1350 rel.

Abdul Samad, Additional Prosecutor General Punjab assisted by Tariq Javed, Deputy District Public Prosecutor for Petitioner.

Muhammad Anwar Bhatti for Respondents (in Crl.Misc.No.5545/CB-13 and Crl.Misc.No.5613/CB-13).

ORDER

This order will dispose of forty five (45) inter se connected cancellation of bail applications moved by the State under section 497(5), Cr.P.C. being offended of orders dated 12-4-2013, 6-5-2013, 14-5-2013 and 29-5-2013, passed by the learned Judge, Anti-Terrorism Court No.II Lahore, whereby some of the respondents-accused (thirty eight (38) in number) have been granted bail before-arrest vide orders dated 14-5-2013 and 29-5-2013 and some of them (fifty one (51) in number) have been allowed post-arrest-bail vide orders dated 12-4-2013, 6-5-2013, 14-5-2013 and 29-5-2013. Necessary particulars of the petitions, to be dealt with herein, are drawn hereunder:--

Sr. No.	Petition No.	Title:	Date of impugned order	Nature of bail granted.
1	Cr.M.No.5545/ CB-2013	The State v. Umar Mehmood and 3 others	12-4-2013.	Post-arrest
2	Cr.M.No.5546/ CB-2013	The State v. Fazal Hussain.	12-4-2013	Post-arrest
3	Cr.M.No.5605/ CB-2013	The State v. Sheikh Khalil and 3 others	12-4-2013.	Post-arrest
4	Cr.M.No.5606/CB-2013	The State v. Mubashar and 4	12-4-2013.	Post-arrest

		others		
5	Cr.M.No.5607/ CB-2013.	The State v. Tariq and another	12-4-2013.	Post-arrest
6	Cr.M.No.5608/ CB-2013.	The State v. Muhammad Riaz	12-7-2013.	Post-arrest
7	Cr.M.No.5609/CB-2013.	The State v. Fazal Akbar Khan alias Akbar Khan	12-4-2013.	Post-arrest
8	Cr.M.No.5610/ CB-2013.	The State v. Mukhtar Ahmad	12-4-2013.	Post-arrest
9	Cr.M.No.5611/ CB-2013.	The State v. Muhammad Munawar Khan	12-4-2013.	Post-arrest
10	Cr.M.No.5612/ CB-2013.	The State v. Inam-ul-Haq and another	12-4-2013.	Post-arrest
11	Cr.M.No.5613/ CB-2013.	The State v. Haji Khar Bakhsh	12-4-2013.	Post-arrest
12	Cr.M.No.5614/ CB-2013.	The State v. Muhammad Nazir alias Jeera and another	12-4-2013.	Post-arrest
13	Cr.M.No.5615/ CB-2013.	The State v. Abdul Rasheed and 4 others.	12-4-2013.	Post-arrest
14	Cr.M.No.6308/ CB-2013.	The State v. Bashir Khan and another	6-5-2013.	Post-arrest
15	Cr.M.No.6309/ CB-2103.	The State v. Jaffar Khan	6-5-2013.	Post-arrest
16	Cr.M.No.6310/ CB-2013.	The State v. Amjad Ali Khan and another	6-5-2013.	Post-arrest
17	Cr.M.No.6311/ CB-2013.	The State v. Nadeem	6-5-2013.	Post-arrest
18	Cr.M.No.6312/ CB-2013.	The State v. Gulshad Khan and 2 others	6-5-2013.	Post-arrest
19	Cr.M.No.6313/ CB-2013.	The State v. Muhammad Nadeem	6-5-2013.	Post-arrest
20	Cr.M.No.6314/ CB-2013.	The State v. Amir Hamza and another	6-5-2013.	Post-arrest
21	Cr.M.No.6427/ CB-2013.	The State v. Muhammad Shabbir	6-5-2013.	Post-arrest
22	Cr.M.No.6609/ CB-2013.	Faisal Masih v. Gulshad Khan	14-5-2013.	Post-arrest

		and 5 others.		
23	Cr.M.No.6863/ CB-2013.	Aslam Masih v. Muhammad Usman and 27 others.	14-5-2013.	Pre-arrest/ Post-arrest
24	Cr.M.No.7095/ CB-2013.	The State v. Muhammad Iqbal	14-5-2013.	Pre-arrest
25	Cr.M.No.7096/ CB-2013.	The State v. Muhammad Asghar	14-5-2013.	Pre-arrest
26	Cr.M.No.7097/ CB-2013.	The State v. Muhammad Usman Butt	14-5-2013.	Pre-arrest
27	Cr.M.No.7098/ CB-2013.	The State v. Liaqat	14-5-2013.	Pre-arrest
28	Cr.M.No.7099/ CB-2013.	The State v. Abdullah and another	14-5-2013.	Pre-arrest
29	Cr.M.No.7100/ CB-2013.	The State v. Rasheed Ahmad alias Sheeda	14-5-2013.	Post-arrest
30	Cr.M.Nos.7101/ CB-2013.	The State v. Sajid Mushtaq	14-5-2013.	Post-arrest
31	Cr.M.No.7102/ CB-2013.	The State v. Muhammad Rashid and 2 others.	14-5-2013.	Pm-arrest
32	Cr.M.No.7103/ CB-2013.	The State v. Shahid Imran	14-5-2013.	Pre-arrest
33	Cr.M.No.7104/ CB-2013.	The State v. Amjad alias Mian and 2 others.	14-5-2013.	Post-arrest
34	Cr.M.No.7105/ CB-2013.	The State v. Muhammad Tariq.	14-5-2013.	Pre-arrest
35	Cr.M.No.7106/ CB-2013.	The State v. Mohsin Ali and another.	14-5-2013.	Pre-arrest
36	Cr.M.No.7107/ CB-2013.	The State v. Fayyaz and another	14-5-2013.	Pre-arrest
37	Cr.M.No.7108/ CB-2013.	The State v. Razzaq alias Jaka	14-5-2013.	Pre-arrest
38	Cr.M.No.7109/ CB-2013.	The State v. Tariq Gujjar and 3 others	14-5-2013.	Pre-arrest
39	Cr.M.No.7110/ CB-2013.	The State v. Safdar and 2 others	14-5-2013.	Pre-arrest
40	Cr.M.No.7111/ CB-	The State v.	14-5-2013.	Pre-arrest

	2013.	Muhammad Nawaz Sharif.		
41	Cr.M.No.7112/ CB-2013.	The State v. Bilal Khan.	14-5-2013.	Pre-arrest
42	Cr.M.No.7387/ CB-2013.	The State v. Muhammad Sadiq alias Accha and 3 others	14-5-2013.	Pre-arrest
43	Cr.M.No.7388/ CB-2013.	The State v. Abid Yaqoob.	14-5-2013.	Pre-arrest
44	Cr.M.No.7389/ CB-2013.	The State v. Muhammad Shafique alias Chiko.	29-5-2013.	Post-arrest
45	Cr.M.No.7390/ CB-2013.	The State v. Basharat and 5 others.	29-5-2013.	Pre-arrest

2. The beneficiaries of afore-noted orders of bail-before-arrest may be enlisted as under:--

(1) Muhammad Usman Butt, (2) Muhammad Asim, (3) Muhammad Nawaz Sharif (4) Fayyaz, (4) Majid Hussain, (5) Tariq Gujjar, (6) Sharafat Hameed, (7) Mian Saleem, (8) Iftikhar Ahmad, (9) Sher Gujjar, (10) Muhammad Rashid, (11) Muhammad Shehzad, (12) Muhammad Asif, (13) Muhammad Asghar, (14) Mohsin Ali, (15) Liaqat Ali alias Liaqi, (16) Murad Ali, (17) Safdar, (18) Muhammad Ashraf, (19) Aman Ullah, (20) Razzaq alias Jaka, (21) Liaqat, (22) Abdullah, (23) Saif Ullah, (24) Bilal Khan, (25) Muhammad Tariq, (26) Muhammad Iqbal, (27) Shahid Imran, (28) Muhammad Sadiq, (29) Muhammad Hanif, (30) Muhammad Riaz alias Raja, (31) Muhammad Saleem, (32) Abid Yaqoob, (33) Basharat, (34) Ghulam Abbas, (35) Chan alias Chani, (36) Muhammad Siddique, (37) Sajjad Hussain and (38) Moin Khan.

3. Whereas those, who were granted post-arrest bail vide mentioned orders read as follows:--

(1) Inam-ul-Haq, (2) Ch. Muhammad Bashir, (3) Umar Mehmood, (4) Ali Muhammad, (5) Muhammad Nabeel, (6) Muhammad Adil, (7) Muhammad Nazir, (8) Muhammad Rafique, (9) Abdul Rashid, (10) Zahid Qadeer, (11) Muhammad Akbar, (12) Naeem Khan, (13) Muhammad Israr, (14) Muhammad Riaz, (15) Tariq, (16) Sher Muhammad, (17) Mubashar, (18) Muhammad Ahmad, (19) Muhammad Tariq, (20) Muhammad Ali, (21) Muhammad Afzal, (22) Sh.Khalil, (23) Sh. Muhammad Imran, (24) Muhammad Irfan, (25) Mukhtar Ahmad, (26) Muhammad Munawar Khan, (27) Haji Kher Bakhsh, (28) Fazal Hussain, (29) Muhammad Imran, (30) Fazal Akbar Khan, (31) Nadeem, (32) Muhammad Nadeem, (33) Amjad Ali, (34) Zabid Khan, (35) Bashir Khan, (36) Khan Wadha, (37) Amir Hamza, (38) Hukam Khan, (39) Muhammad Shabbir, (40) Jaffar Khan, (41) Gulshad Khan, (42) Khurshid Khan, (43) Aitbar Gull, (44) Rashid Ahmad alias Sheeda, (45) Amjad alias Mian, (46) Abdul Latif alias Chairman, (47) Muhammad Hussain, (48) Shahid Imran, (49) Sajid Mushtaq, (50) Muhammad Imran, and (51) Muhammad Shafique alias Chiko.

4. All the respondents-accused along with their co-accused stand involved in case-FIR

No.114, dated 9-3-2013, for offences under sections 148, 186, 353, 427, 436, 324, 295-A, 397, 149, P.P.C., read with section 7 of the Anti-Terrorism Act, 1997, registered at Police Station Badami Bagh, Lahore, which precisely entails a story narrated by Hafiz Abdul Majid Inspector/S.H.O. (complainant) to the effect that one Sawan Masih alias Bodi Masih, an accused of case FIR No.112/13, registered for offence under section 295-C, P.P.C. at Police Station Badami Bagh, Lahore, was arrested by the police and this was in the knowledge of all Muhallahdars and owners of iron-godowns, but in spite of it, heavy contingents of the police were deployed in the area to avoid any law and order situation; the Christians of the locality were asked to shift to some other places so as to stay away from any untoward incident; it was at about 1.30 p.m., the same day (9-3-2013), that DSP Badami Bagh learnt through his sources that some miscreants intended to attack Christian's habitat, Joseph Colony, whereon re-enforcement was called-in through wireless control and a number of teams were posted at the spot to thwart the lurking danger; in the meanwhile, thousands of subverters, majority whereof was armed, attacked Joseph Colony, ransacked the houses, torched shops, houses and a church and fired straight at the police, whereon law-enforcers took measures to check the evildoings; fire-tenders attempted to extinguish the fire, but being at a large scale, it burnt many a houses and shops; the criminal act of the accused caused injuries to 40/50 police officials, who were sent to the hospital for treatment; the saboteurs included Tariq Gujjar etc. (eighty three (83) named) besides, thousands of others, who might be identified through video-footages.

5. Learned counsel for the petitioners have submitted in unison that the bail-granting orders are illogical and illegal besides being gratuitous, which are liable to be set-aside; the barbaric act of the respondents-accused has not been properly viewed and analyzed by the learned bail granting court and it passed the impugned orders as if a minor offence had been committed by them; the evidence of the victims as well as that of the injured police-officials has not been given due apprecia-tion and settled principles for grant/refusal of bail have been contemptuously over-looked by the learned trial court while making the impugned orders; the prosecu-tion case brimmed with incriminating evidence against the accused, which was not given due weight while setting the respondents-accused at liberty; the barbarity shown by the accused was of the worst degree, which left hundreds of houses and shops of the Christian community gutted and razed to the ground, but the learned trial court overlooked the ferociousness of crime, almost in a blindfolded manner; the offence committed, squarely constituted an act of terrorism, which is covered by the prohibitory clause of section 497(1), Cr.P.C., besides the other offences, which also catch the prohibition of the Code; the impugned orders have resulted in grave miscarriage of justice, hence, they may be recalled and respondents-accused may be ordered to be arrested and sent to jail.

6. On the other hand, learned counsel for the respondents-accused have contended that the allegations against the respondents were vague and of generalized nature, which were hardly supported by any material, worthwhile; the impugned orders perfectly fit in with the settled principles of dispensation of criminal justice, hence, they do not call for any interference by this court; the complainant's version, as contained in the FIR, clearly shows that it was merely speculative and estimative, not even remotely linked with the ground realities; the nomination of some of the respondents-accused in the FIR and that of the others, in the supplementary statements of the complainant is based on dishonesty, mischievousness and mala fide intention of the police; the impugned orders are based on sound foundations and they have been passed unerringly by the learned trial court, hence, they may be sustained at the cost of top-listed petitions.

7. After hearing learned counsel for the parties and perusing the record, it is observed that there exists a crucial circumstance on the record, which probably could not catch the eye of both the sides and it relates to dismissal of seven cancellation of bail applications, Criminal

Petition No.701-L/2013 to Criminal Appeal No.707-L/2013, filed by the State through Prosecutor General Punjab, by the Hon'ble Supreme Court of Pakistan vide order dated 22-7-2013, as they were found time-barred and miscellaneous applications annexed thereto, seeking condonation of delay in filing of the said petitions, had not been found by the apex court, based on sufficient and acceptable reasons. The state had filed the above-noted criminal petitions against orders dated 7-5-2013, passed by this court in Crl. Misc. Nos.4657-B, 4666-B, 4674-B, 4816-B, 4848-B, 4928-B and 5362-B of 2013, through which a number of accused of this case, who faced identical allegations like the respondents-accused herein did, were granted post-arrest-bail. In brief, the bail granting order passed by this court on 7-5-2013, noted as above, is still intact. Learned counsel for the petitioners in fact were required to draw a line of distinction between the beneficiaries of the bail granting order dated 7-5-2013 of this court, against whom afore-referred seven cancellation of bail applications were dismissed by the apex court and the respondents-accused herein, but they failed to do so and they merely harped on the string that the accused committed the crime barbarously; thirty eight (38) respondents-accused had been granted extra-ordinary relief of bail-before-arrest gratuitously; the appalling savagery of the accused had not been drastically dealt with by the court below and impugned orders were patently illegal and unsustainable. The above said applications, though, have been dismissed by the apex court on the technical ground, yet outcome and effect thereof added strength to validity and maintainability of the orders called-in-question before this court. On the face of it, the respondents-accused, as named in para 3 above, have a case, which impeccably assimilates the case of the respondents as mentioned in Criminal Petition No.701-L/2013 to Criminal Petition No.707-L/2013 (supra). So far as the case of thirty eight (38) respondents-accused, as named in para 2 above, is concerned, it too, merit-wise, is not much different from that of the other respondents, mentioned in para 3 above, albeit they have been granted bail before arrest by the learned trial court. Both sets of the respondents are seemingly united with a common bond, which is none other than the one that their case squarely constituted need for further probe into their guilt within the scope of section 497(2), Cr.P.C. The law requires that equity of treatment has to be maintained amongst the accused placed in similar or identical circumstances. The story of FIR contains such sort of accusations, which may require the prosecution to make an extra effort and use additional ounces of its energy to prove at trial that they were not fictional or exaggerative. Apparently, the petitioners have an insurmountable obstacle to climb up and it is the afore-noted order of the apex court, which stands sky-high in their way. The petitioners present endeavour has to be nipped right now before letting it swell further.

8. We have not come across even a single circumstance in the impugned orders, which may render them unsustainable in the eyes of law. Cancellation of bail can be ordered only on very strong and exceptional grounds like, the accused being on bail repeats the offence, hampers process of investigation or that of the trial, commits the folly of suborning or intimidating prosecution witnesses, shows a mood to run away from the control of the sureties or misuses the concession of bail in any other way. Once an accused has been admitted to bail, by a competent Court of jurisdiction, exceptional circumstances would be required to interfere with the bail-granting order and here, in the instant case, no such circumstance exists, as mentioned herein-above, which may warrant interference therewith by this Court. The impugned orders do not appear to have been passed in vacuum, nor they are seemingly hit by a terminal infirmity. A bail granting order may only be prone to interference under section 497(5), Cr.P.C., if the same is arbitrary, absurd or fanciful, which is not the situation in the instant case. The discre-tion left in the Court under section 497(5), Cr.P.C. is pari materia with the principles, which apply to setting aside of the orders of acquittal. Reference in this regard may be advantageously made to the case titled: Mian Dad v. The State and another (1992 SCMR 1286) and Muzaffar Iqbal v. Muhammad Imran Aziz and others (2004 SCMR 231).

9. A few words about the quality of investigation conducted in this case, which we have simply found disgusting. To investigate the crime, is one of the primary tasks of the police. The graver the offence, wider, broader and deeper should be the scale of knowledge, professionalism and expertise. A high profile case certainly requires a competent and brainy investigating officer to investigate the matter. The occurrence as contained in the above said FIR, without second thought, required the services of the investigating officer of the highest caliber, so as to bring the real culprits to books. It was a tragic incident, which left many a question marks on the competence and competitiveness of the police and other law enforcing agencies. The police used their, often rejected and unapproved of, tactics during the investigation of this case without ever perceiving the sensitivity of the matter.

10. Massive unexplained delay in holding the test identification parade, the collective and generalized nature of the allegations, thick haziness and speculativeness looming large on the tenor of the prosecution case and fictional description of the events, without hinting at any believable evidence, have left a big question mark on the veracity of the allegations against the respondents-accused. The impugned orders passed by the learned trial Court are seemingly in line with a glittering observation, made by the Hon'ble Supreme Court of Pakistan in Malik Muhammad Ishaq's case (2011 SCMR 1350), that justice in the name of terrorism cannot be allowed to be brutalized. There exists no reason to believe that the impugned orders are factually incorrect or illegal, hence sustained.

11. Resultantly, all the petitions, as mentioned in para 1 of this order, are dismissed being destitute of merits.

ARK/S-102/L Petition dismissed.

2015 Y L R 2049

[Lahore]

Before Shahid Hameed Dar and Muhammad Tariq Abbasi, JJ

AHMAD JALEEL RAJA---Appellant

versus

The STATE---Respondent

Criminal Appeal No.1842 of 2002, heard on 18th September, 2014.

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

----S. 26---Defective and delinquent investigation in the case---Appreciation of evidence---Accused an Assistant Director-ANF, was Investigating Officer in a case and was held guilty of defective, delinquent investigation, and was convicted and sentenced without any notice from the Trial Court within the meaning of S.26 of Control of Narcotic Substances Act, 1997---Impugned judgment did not reveal as to how the investigation conducted by accused, was defective; or the same was based on mala fide---Section 26 did not require that Investigating Officer should be condemned at his back, without affording him opportunity of hearing---Accused was never put to any notice, nor he was called upon to clarify the shortcomings, and

defects of the investigation conducted by him---Principles of natural justice required that the Trial Court should have issued a notice to accused, requiring him to explain his position as to "glaring illegalities committed" by him during the course of investigation---Trial Court could not observe that there was no need to further probe into the matter so as to convict and sentence accused---Accused certainly deserved to be heard before he was treated in that way by the Trial Court---Impugned conviction/sentence of accused, was not sustainable in any way nor methodology practised by the Trial Court, could be approved---Conviction and sentence of accused, were set aside and he was discharged of all burdens put on him by the Trial Court---Remitting of the case for regular trial of accused by the Trial Court, would not serve the ends of justice, especially after an interval of twelve years.

Mazhar Ahmad's case 2012 SCMR 997 ref.

Muhammad Qasim for Appellant.

Tariq Saleem Sheikh, Special Prosecutor for Respondent.

Date of hearing: 18th September, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.---The appellant in fact was the investigating officer of case FIR No.10/1998, dated 29-4-1998, under sections 7, 8, 9(c), 15 of the Control of Narcotic Substances Act, 1997, registered at Police Station ANF, Lahore and he was examined as P.W.4 during trial of Sharaf-ud-Din Sheikh, the accused of the above-said case, but he (appellant) ended up in a situation, beyond his imagination, as he, without any notice from the trial court, within the meaning of section 26 of the Act (ibid) was held guilty for defective and delinquent investigation and awarded sentence of three months (what this period was meant for, not ascertainable) with fine of Rs.10,000, in default whereof he was supposed to undergo fifteen days imprisonment (simple or rigorous, a riddle), vide judgment dated 17-10-2002, by the learned Judge, Special Court, CNS, Lahore.

2. The appellant filed the titled appeal without having surrendered before the police, probably bearing in mind that he needed not court arrest because of the novel and ambiguous verdict, passed by the learned trial court. His appeal was admitted to regular hearing on 28-11-2002. He appeared before this court on 25-3-2013 in response to a notice issued to him vide order dated 6-3-2013. On appearing, he sought and obtained adjournment to engage a counsel. He was not questioned, if he was on bail or not. He did not appear on 15-9-2014, wherefore, a notice was issued to him for 18-9-2014. He entered appearance today along with his learned counsel, Mr. Muhammad Qasim, advocate. He was inquired if he was on bail in this case, in answer to which he replied that he had never been asked by anyone to seek bail in this case or surrender before the police, hence, he has no idea as to the recourse, to resort to. His learned counsel has submitted that the appellant has surrendered and put himself at the mercy of the court, therefore, he may be dealt with as per requirement of section 426, Cr.P.C. The learned Special Prosecutor for ANF did not appear much enthusiastic so as to oppose the stance taken by the appellant and he honestly submitted that the appellant might be granted bail by way of suspension of his sentence. The judgment passed by the learned trial court as to conviction/sentence of the appellant is so ridiculous and bizarre that we need not direct the appellant to file a regular petition under section 426, Cr.P.C. Learned counsel for the appellant has submitted that the impugned portion of the under discussion judgment is not sustainable by any stretch of imagination, hence, mercy and grace may be shown to set the appellant free by suspending his sentence. He has further submitted that he

is ready to argue the main appeal, if so asked. Learned Special Prosecutor for ANF too felt that the sentence of the appellant might be suspended even without any application by him in this regard and he also showed readiness to argue the main appeal, if directed. In this situation of concurrence of ideas, the sentence of the appellant is suspended and he is directed to submit personal surety bond to the satisfaction of this court, in the sum of Rs.10,000, to be recovered from him as penalty, if he violated terms thereof. Guidance in this regard may be had from Mazhar Ahmad's case, reported as 2012 SCMR 997. The academic discussion as to suspending the sentence of the appellant and setting him at liberty is wound-up and we proceed to hear the main appeal with the assistance of the learned counsel for the parties.

3. Precisely, the story of FIR No.10/1998 (supra) is that Syed Hassan Ijaz Kazmi, Deputy Director, ANF Lahore received a letter dated 23-2-1998 from Lt.Col.Latif, Joint Director (Operations), ANF Headquarters, Rawalpindi on 29-4-1998, which in fact was a forwarding instrument qua office memorandum dated 17-2-1998 issued by the Liaison Officer, Narcotics Branch, Embassy of Federal Republic of Germany. In the enclosed memorandum, the Liaison Officer had mentioned that huge quantity of Hasheesh weighing 302 kilograms was seized at Frankfort Airport, Germany on 23-1-1998, which consignment had been flown into Germany vide flight No.PK-715, the consigner being Razzaq International Lahore. The narcotic substance was packed in ship-cylinders, sealed in four wooden crates. It was requested in the said memorandum that necessary data might be collected as to the whole affair. Syed Hassan Ijaz Kazmi conducted an inquiry and found that one Faheem Babar, joined by his cronies, Ali Akbar, Anwar Shah and Pervaiz Malik had exported said consignment of Hasheesh to Netherland through their front-man Aslam, the proprietor of Aslam Traders, Lahore. In this background, F.I.R. No.10/1998 (supra) was registered against the above-said notorious exporters of the said drug.

4. Ahmad Jaleel Raja-appellant was the Assistant Director-ANF and he being the investigating officer arrested Faheem Babar, Sharaf-ud-Din, who was already confined in jail in case F.I.R. No.11/1995, Mujahid Pervaiz, Ilyas Muhammad and Rashid Aslam accused during the course of investigation. He also arrested Ali Akbar Shah, who had been arraigned as accused later on in this case. Some of the accused were declared absconders and one of them, Pervaiz Malik was also arrested by the investigating officer/appellant. During the course of the trial, Ilyas Muhammad, Mujahid Pervaiz and Rashid Aslam admitted their guilt and they were duly convicted/sentenced by the learned trial court on 8-12-1999. The other accused, Ali Akbar, Faheem Babar and Sharaf-ud-Din constantly denied the charge and faced the trial till Ahmad Jaleel Raja (appellant) was examined as P.W.4. It was at this stage when accused moved a petition under section 265-K, Cr.P.C., which was generously allowed by the learned trial court on 17-10-2002. It, however, held the appellant guilty of defective investigation and sentenced him unilaterally to the tune, noted as above. Hence, this appeal.

5. Learned counsel for the appellant has contended that the impugned portion of the above-said judgment, as to conviction of the appellant is patently illegal and liable to be set aside without second thought.

6. Learned Special Prosecutor for ANF is equally upset over the modus-operandi adopted by the learned trial court to condemn the appellant. He, however, has submitted that the case may be remanded to the trial court for fresh trial of the appellant.

7. After hearing learned counsel for the parties and perusing the available record, it is observed that the observations recorded by the learned trial court in awarding conviction/sentence to the appellant do not impress us at all. It would be an interesting feature to reproduce the impugned portion of the judgment under discussion, so as to get a feeling, how fallacious and unconvincing did it look:--

"It is not provided on the file as to what material was available with the I.O. for showing the arrest of the petitioner in the case in hand. The statement of the co-accused under section 164, Cr.P.C. was not sufficient to implicate the petitioner in the case unless the I.O. had proceeded to collect other independent evidence against the petitioner in the light of accusations made by Faheem Babar in his judicial confession. In the case in hand the petitioner is facing agony of trial and detention without any justifiable cause and due to mala fide, incompetency and inefficiency of I.O., therefore, it is fit case for proceedings against the I.O. under section 26 of CNSA, 1997. Since there are glaring illegalities committed by the Investigating Officer during the investigations against the petitioner, therefore, there is no need to further probe into the matter and as such the LO. namely Ahmad Jalil Raja Assistant Director, ANF, Lahore is convicted under section 26(c) of CNSA, 1997 and is awarded sentence of 3 (three) months with fine of Rs.10,000 (Rupees Ten Thousands only) and in default of payment of fine he shall further serve the imprisonment for 15 days."

The trial of the acquitted accused Sharaf-ud-Din Sheikh was at its fag end stage, when the learned trial court entertained petition under section 265-K, Cr.P.C. and acquitted him of the charge. The statement of Ahmad Jaleel Raja (appellant) as P.W.4 was still incomplete as is evident from paragraph 4 of the impugned judgment, when learned trial court rushed into acceptance of the above-said application and simultaneously convicting and sentencing the said P.W., who is none else than the appellant herein. It cannot be perceived from the impugned portion of the above judgment as to how the investigation conducted by the appellant was defective or how was it based on mala fide. It is not the requirement of section 26 of the Act (ibid) that investigating officer of a criminal case should be condemned at his back, without affording him an opportunity of hearing. The appellant was never put to any notice nor he was called upon to clarify the shortcomings and defects of the investigation conducted by him, as observed by the trial court in the impugned verdict of guilt. The principles of natural justice required that the trial court should have issued a notice to the appellant, requiring him to explain his position as to "glaring illegalities committed" by him during the course of investigation. How could it be observed by the trial court that there was no need to further probe into the matter so as to convict and sentence the appellant. Three co-accused of Sharaf-ud-Din Sheikh accused named as above, had confessed their guilt during trial, which was an important and crucial circumstance to be kept in view by the trial court while condemning the appellant, but it was not so done and conviction/sentence in question was slapped in his face without any just cause or reason. The appellant certainly deserved to be heard before he was treated in the said fashion by the trial court. The impugned conviction/sentence of the appellant is not sustainable in any way nor methodology practiced by the trial court, in mentioned terms, can be approved of by any stretch of imagination. The conviction/ sentence recorded against the appellant is liable to be set aside.

8. So far as request of the learned Special Prosecutor for ANF that the case the appellant may be remanded to the trial court for his fresh trial, we are afraid, is not worth entertaining. It happened about twelve years ago that the appellant got the condemnation-in-issue at the hands of the trial court and his appeal also remained pending for an equal period of time, which might have occasionally jotted him that he might be jailed one day to serve the said sentence. The lurking fear on the mind of the appellant of being arrested and confined in jail might have upset his inside chemistry off and on, which itself was not less than a mental trauma. Remitting the case back for regular trial of the appellant by the trial court would not serve the ends of justice in any manner, especially after an interval of twelve years. The contention of the learned Special Prosecutor is, therefore, given a negative nod.

9. The upshot of the above discussion is that the instant appeal is allowed, the conviction/sentence of the appellant is set aside and he is discharged of all the burdens, put on him by the learned trial court. The personal surety bond, which he submitted in the

meanwhile, stands discharged.

HBT/A-165/L Appeal allowed.

2015 Y L R 2225

[Lahore]

Before Shahid Hameed Dar and Muhammad Tariq Abbasi, JJ

IRFAN BUTT alias ARIF BUTT---Appellant

versus

The STATE---Respondent

Criminal Appeal No.1296 of 2002, heard on 19th September, 2014.

Penal Code (XLV of 1860)---

----Ss. 279 & 337-H(2)---Anti-Terrorism Act (XXVII of 1997), S.7(h)---Rash driving or riding on a public way, act of terrorism---Appreciation of evidence---Only one independent witness produced by the prosecution, disowned the prosecution case, and deposed that he did not hear any report of firing, nor he saw the accused present at the spot---Said witness, who was declared hostile, and was examined; his cross-examination did not generate any positive circumstance in favour of the prosecution, he adhesively stuck to the stance that he did not see the accused at the spot, nor he saw them firing there---Other prosecution witness, also did little good for the prosecution case in his testimony---Ocular account furnished by prosecution witnesses led to irresistible conclusion that the prosecution had failed to establish that accused had committed the crime, he was charged with---Ocular account, in circumstances, was brushed aside being discrepant and unreliable---Allegedly recovered crime empties and pistols .30-bore from accused in absence of the expert report from the Forensic Science Laboratory, would mean little to the prosecution case---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, he was acquitted of the charge levelled against him and his surety stood relieved of his liability, which he incurred by submitting bail bond on behalf of accused.

Intisar Hussain for Appellant.

Hamayun Aslam, Deputy Prosecutor General Punjab for the State.

Date of hearing: 19th September, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.---The record reveals that the appellant was convicted and sentenced vide judgment dated 29-7-2002, by the learned Judge, Anti-Terrorism Court, Faisalabad during trial of case FIR No.37/2001, dated

19-1-2001, under sections 279, 337-H(2), P.P.C. read with section 7 of the Anti-Terrorism Act, 1997, registered at Police Station Peoples Colony, Faisalabad in following terms:-

(i) Under section 337-H(2) P.P.C.: to undergo rigorous imprisonment for three months with fine of Rs.5,000 or in default whereof to undergo simple imprisonment for twenty days.

(ii) Under section 7(h) of Anti-Terrorism Act, 1997: to undergo rigorous imprisonment for one year with fine of Rs.10,000 or in default whereof to undergo simple imprisonment for three months.

2. Precisely, the prosecution case as recorded by Falak Sher, SI (P.W.5), vide complaint (Exh.PA) is that he along with his fellow police-officials, Muhammad Latif 1684/C P.W. (not produced), Maqsood Ahmad 4567/C (P.W.2) and Farman Ali 362/C P.W. (not produced) reached site of industrial exhibition, near Dattha Pull at 8.45 p.m. on 19-1-2001, where they, all of a sudden, heard report of reckless firing from the side of swings; the people present there ran to all directions in fear; some of them lay on the ground; he along with his companions went to the spot and saw Muhammad Arif Butt (appellant) and two others, whose names he learnt later on as Daood and Saqi, fleeing the spot aboard a white colour Suzuki car No.5554-FDV, after having made firing there. The complaint (Exh.PA) resulted into registration of FIR (Exh.PA/1) at 9.40 p.m., the same day.

3. Falak Sher SI (P.W.5) conducted investigation of this case. He, after necessary formalities, prepared report under section 173, Cr.P.C. and submitted it before the court for trial of the accused. The learned trial court indicted the accused, Muhammad Irfan Butt alias Arif Butt (appellant), Saqib Hussain (since acquitted) and Daood (since acquitted) on 18-7-2002 under three heads and asked the prosecution to lead evidence in support of its case. The prosecution produced five witnesses at trial, Muhammad Iqbal ASI (P.W.1), Maqsood Ahmad 4567/C (P.W.2), Muhammad Iqbal (P.W.3), Shahid Ali SI (P.W.4) and Falak Sher SI (P.W.5). On closure of prosecution case, the appellant and his acquitted co-accused were recorded under section 342, Cr.P.C. They all professed their innocence and contended that they had been falsely involved in this case by the police conspiratorially. The appellant, however, also contended that his brother Muhammad Abdullah was involved in case FIR No.184/89 and to cause his arrest Falak Sher, SI (P.W.5) raided his house, where he exchanged hot and bitter words with him, resultantly he was arrested and falsely involved in this case.

4. The learned trial court after hearing both the sides and having gone through the record convicted and sentenced the appellant, in mentioned terms. The co-accused of the appellant, named as above, were however acquitted of the charges.

5. The appellant challenged his conviction/sentence through the titled appeal within the period of limitation. His sentence was suspended by this court vide order dated 19-8-2002, consequently he was set at liberty. He, however, did not appear when this appeal was fixed for hearing on 20-6-2012. The learned counsel appearing on his behalf gave an undertaking on the said occasion that the appellant would appear before the court on the next date. He, however, is not in attendance. We, with a view to assess, if his presence is necessitated by the record, have decided to scan it and hear the learned counsel for the parties with their consent.

6. Learned counsel for the appellant has submitted that it is a case of no evidence and impugned judgment has been passed by the trial court gratuitously; the prosecution did not succeed at all in bringing home guilt of the appellant beyond any reasonable shadow of doubt, but learned trial court overlooked the fallacy of the prosecution case and delivered a whimsical and conjectural verdict against the appellant.

7. Learned Deputy Prosecutor General Punjab is also of the same viewpoint and he believes that the case against the appellant did not warrant the treatment, meted out to him, vide the impugned judgment, by the trial court.

8. After hearing learned counsel for the parties and perusing the record with their able assistance, we find that the prosecution produced only one independent witness, Muhammad Iqbal (P.W.3) during trial, who flatly disowned the prosecution case and deposed that he did not hear any report of firing nor he saw the accused present there. He was declared hostile (backed out) and examined as such. The cross-examination faced by P.W.3 from the public prosecutor did not generate any positive circumstance in favour of the prosecution and he adhesively stuck to the stance that he did not see the accused, including the appellant at the spot nor he saw them firing there. Maqsood Ahmad 4567/C (P.W.2) also did little good to the prosecution case in his testimony as he stated that he along with other police officials reached the place of incident within 2/2-1/2 minutes where people told them the names of the accused. He further testified that Messrs Shakeel and Javed told them that the accused had decamped in Suzuki car No.5554. This lone deposition of the prosecution witness is sufficient to hold that the police-party under the command of Falak Sher SI (P.W.5) reached the spot, after the incident was over. Falak Sher SI (P.W.5), however, did his best to support complaint (Exh.PA) when he contended that he saw three accused, namely, Irfan Butt (appellant), Daood and Saqib present at the spot and they fled in a Suzuki car. He admitted in his testimony that he along with his companions was present at a distance of about one acre from Dattha Pull, when he heard report of firing, whereon he reached there within 2/2-1/2 minutes, where Javed and Shakeel told them about the factum of firing. He, however, claimed to have seen the accused, leaving the spot in a car. His testimony contains a leading question by the defence, if he saw the accused firing at the spot with his own eyes, to which he answered in the affirmative. It may have been a crucial circumstance for the learned trial court to assess the guilt of the appellant, had other circumstances, available on the record, not sharply gone against the said fact. The putting of above leading question by the defence and an affirmative reply by the prosecution witness may be due to a mindless act of the defence counsel, but we have to remember that there is more than one circumstance, which categorically negate the prosecution case in entirety. Falak Sher SI (P.W.5) has not scribed in

complaint (Exh.PA) that he himself saw the accused firing at the spot. It may be inferred from the FIR that the accused including the appellant had driven away their car from the place of occurrence, but the act of firing could certainly not be attributed to them from the text of the complaint in any manner. The ocular account furnished by Maqsood Ahmad 4567/C (P.W.2), Muhammad Iqbal (P.W.3) and Falak Sher SI (P.W.5) lead to only irresistible conclusion that the prosecution had failed to establish that the appellant had committed the crime, he was charged with. The ocular account, therefore, is brushed aside being discrepant and unreliable.

9. So far as recovery of three crime empties (P1/1-3) vide memo Exh.PB is concerned, it could form a crucial evidence, had they been sent to the office of Forensic Science Laboratory together with the pistol 30-bore (P2) allegedly recovered from the appellant on 21-1-2001 vide memo Exh.PC. In absence of the expert report from the Forensic Science Laboratory, the recovery of crime empties and that of the pistol means little to the prosecution case. The other evidence needs not be discussed being trivial and of formal nature, which cannot strengthen the prosecution case in any manner after rejection of the aforesaid crucial accounts.

10. A nutshell of the above discussion is that the prosecution has badly failed to prove its case against the appellant beyond any shadow of doubt. The only irresistible conclusion oozing from the evidence available on the record is the acquittal of the appellant. In such a situation, personal appearance of the appellant may not be important at all, as envisaged by section 366(2), Cr.P.C. We allow this appeal, set aside conviction/sentence of the appellant awarded to him by the learned trial court and acquit him of the charges. His surety stands relieved of his liability, which he incurred by submitting bail bond on his (appellant) behalf, when he was confined in jail as a convict.

HBT/I-30/L Appeal allowed.

2015 L.N 247

[Lahore]

Present: **SHAHID HAMEED DAR and MUHAMMAD TARIQ ABBASI, JJ.**

Muhammad Raashid

Versus

The State, etc.

Criminal Miscellaneous No. 6080-B of 2014, decided on 23rd September, 2014.

BAIL BEFORE ARREST (MURDER) --- (Two versions)

Criminal Procedure Code (V of 1898)---

---Ss. 498/497(2)---Pakistan Penal Code, 1860, Ss. 302, 324, 337-F(i), 337-F(ii), 337-L(vi)/148/149 r/w S. 7, ATA---Case of two versions---Matter of bail before arrest---In F.I.R. only indiscriminate firing was attributed to petitioner---Due to firing of opposite

party, petitioner sustained as many as seven fire shot injuries one out of which was 'Jurh Jaifah' punishable under Section 337-D, P.P.C.---It would be seen and determined during trial if petitioner, while making return- firing had committed any offence or not---Petitioner's case was one of further inquiry---*Ad-interim* pre-arrest bail confirmed.

(Paras 6, 7)

دو ورشن کا مقدمہ /بجرم قتل میں قبل از گرفتاری ضمانت عطا ہوئی۔

[It was a case of two versions/pre-arrest bail was allowed in offence of murder].

Petitioner with Abdul Razzaq Yunas, Advocate.

For the State: **Khurram Khan, Deputy Prosecutor General.**

For the Injured: **Rao Muhammad Asghar, Advocate.**

Date of hearing: **23rd September, 2014.**

ORDER

The petitioner namely Muhammad Raashid seeks pre-arrest bail in case F.I.R. No. 29, dated 15.01.2014, registered under Sections 302/324, 337-F(i), 337-F(iii), 337-F(vi)/148, 149, P.P.C., read with Section 7-ATA, 1997 at Police Station Gawalmandi, Lahore.

2. The facts, as per F.I.R. are that on 14.01.2014 at about 11:30 p.m. when Ghulam Hussain complainant, alongwith his brother-in-law, Khalil Ahmad PW, nephews Suleman Ali (deceased), Saad Ali (injured PW) and maternal nieces namely Muskan and Erum (injured PWs) came at Gawalmandi Chowk to see illumination on the eve of Eid Meelad-ul-Nabi and stopped at the milk and yogurt shop of Raashid Gujjar (petitioner) to drink milk; in the meanwhile *M/s.* Farid Gujjar, Hamid *alias* Dora Gujjar, Kaka *alias* Saghar, Waseem *alias* Bahadar, Azeem *alias* Kag and two unknown accused, all armed with pistols, while raising Lalkaras reached there; on seeing them Raashid Gujjar (petitioner), opened direct firing with his pistol at the attackers and in return, Farid Gujjar, etc. also started firing; the fire shots made by Farid Gujjar hit Suleman Ali, the nephew of the complainant at backside of left shoulder and right thigh, who got injured and fell down; due to indiscriminate firing from both the sides, Saad Ali, Erum, Muskan as well as many others sustained the injuries; the injured were shifted to Mayo Hospital, Lahore, where Suleman Ali succumbed to the injuries.

3. The learned counsel for the petitioner has argued that the petitioner is innocent and has been falsely roped with *mala fide*; during the occurrence the petitioner received fire shot injuries at the hands of the opposite party and became seriously injured; neither in the F.I.R. nor in the statements of the injured PW: it was mentioned that minor Naseaha had also sustained the injury(-ies) but with the *mala fide*, statements of the above-named girl as well as that of her father Muhammad Shahzad Butt were concocted on the third day of the occurrence, just to falsely rope the petitioner in the case; the complainant as well as the injured PWs, and Khalil Ahmad an eye-witness have sworn the affidavits, whereby they all exonerated the petitioner.

4. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for *Mst.* Naseaha injured has vehemently opposed the petition.

5. After hearing learned counsel for the parties and perusing the record, it is observed that in the F.I.R. only indiscriminate firing was attributed to the petitioner. It was alleged that due to the firing made from both the sides, the above-named PWs had sustained the injuries, whereas Suleman Ali lost his life due to the injuries caused by Farid Gujjar. It is also noted that the petitioner was alone at his shop, when his rival party consisting of five nominated and two unknown persons attacked him. Due to firing of the opposite party, the petitioner sustained as many as seven fire shot injuries, one out of which was *Jurh Jaifah,* punishable under Section 337-D, P.P.C. It would be seen and determined during the trial if the petitioner, while making return-firing had committed any offence or not.

6. In the F.I.R. it is not mentioned if baby Naseaha or her father Muhammad Shahzad Butt were present at the spot or she had sustained any injury during the occurrence. On the third day of the alleged occurrence *i.e.*, on 16.01.2014 statements of the above-named persons were recorded, whereby they stated that injury at the foot of baby Naseaha was inflicted by the petitioner. When indiscriminate firing was being made from both the sides, how come the above-named girl and her father noticed that the injury to the minor girl had been caused by the petitioner? It seems as if above-named witnesses have been purposely introduced to falsely involve the petitioner in this case. The bail declining order passed by the learned Trial Court reveals that Ghulam Hussain-complainant, Khalil Ahmad, an eye-witness, Saad Ali, Muskan and Erum, the injured PWs tendered sworn affidavits before the police, whereby they exonerated the petitioner from the alleged act of firing with the addition that it was he who received injuries at the hands of attacking party. Learned Trial Court, however, did not give any importance to the said affidavits and observed that baby Naseaha still blamed the accused-petitioner *qua* fire-arm injuries on her foot. Copies of the mentioned affidavits are available on the record, the presentation of the original thereof before the police has been admitted by both the sides. Learned counsel for the petitioner has stated that regarding the alleged occurrence, the father of the petitioner has filed a private complaint under Sections 302/324, 337-F(1), 337-F(iii), 337-F(vi), P.P.C. and Section 7 of ATA, in which all the respondents-accused who attacked the petitioner, have been summoned and charge-sheeted. The other side has not rebutted the said fact. It is certainly a case of two versions. The correct one can only be hinted at and pointed to during the course of the trial.

7. All the above-mentioned facts, in our view, have rendered the petitioner's case one of further inquiry, entitling him to the concession of bail. Resultantly, the petition in hand is accepted and *ad-interim* pre-arrest bail granted to him on 05.05.2014 is confirmed subject to furnishing fresh bail bonds in the sum of Rs. 2,00,000/- with two sureties, each in the like amount to the satisfaction of the learned Trial Court.

Ad-interim pre-arrest bail confirmed.

2015 P.Cr.R. 15

[Lahore]

Present: **SHAHID HAMEED DAR and MUHAMMAD TARIQ ABBASI, JJ.**

Muhammad Raashid

Versus

The State, etc.

Criminal Miscellaneous No. 6080-B of 2014, decided on 23rd September, 2014.

BAIL BEFORE ARREST (MURDER) --- (Two versions)

Criminal Procedure Code (V of 1898)---

---Ss. 498/497(2)---Pakistan Penal Code, 1860, Ss. 302, 324, 337-F(i), 337-F(ii), 337-L(vi)/148/149 r/w S. 7, ATA---Case of two versions---Matter of bail before arrest---In F.I.R. only indiscriminate firing was attributed to petitioner---Due to firing of opposite party, petitioner sustained as many as seven fire shot injuries one out of which was 'Jurh Jaifah' punishable under Section 337-D, P.P.C.---It would be seen and determined during trial if petitioner, while making return- firing had committed any offence or not---Petitioner's case was one of further inquiry---*Ad-interim* pre-arrest bail confirmed.

(Paras 6, 7)

دو ورشن کا مقدمہ /بجرم قتل میں قبل از گرفتاری ضمانت عطا ہوئی۔

[It was a case of two versions/pre-arrest bail was allowed in offence of murder].

Petitioner with Abdul Razzaq Yunas, Advocate.

For the State: **Khurram Khan, Deputy Prosecutor General.**

For the Injured: **Rao Muhammad Asghar, Advocate.**

Date of hearing: **23rd September, 2014.**

ORDER

The petitioner namely Muhammad Raashid seeks pre-arrest bail in case F.I.R. No. 29, dated 15.01.2014, registered under Sections 302/324, 337-F(i), 337-F(iii), 337-F(vi)/148, 149, P.P.C., read with Section 7-ATA, 1997 at Police Station Gawalmandi, Lahore.

2. The facts, as per F.I.R. are that on 14.01.2014 at about 11:30 p.m. when Ghulam Hussain complainant, alongwith his brother-in-law, Khalil Ahmad PW, nephews Suleman Ali (deceased), Saad Ali (injured PW) and maternal nieces namely Muskan and Erum (injured PWs) came at Gawalmandi Chowk to see illumination on the eve of Eid Meelad-ul-Nabi and stopped at the milk and yogurt shop of Raashid Gujjar (petitioner) to drink milk; in the meanwhile *M/s.* Farid Gujjar, Hamid *alias* Dora Gujjar, Kaka *alias* Saghar, Waseem *alias* Bahadar, Azeem *alias* Kag and two unknown accused, all armed with pistols, while raising Lalkaras reached there; on seeing them Raashid Gujjar (petitioner), opened direct firing with his pistol at the attackers and in return, Farid Gujjar, etc. also started firing; the fire shots made by Farid Gujjar hit Suleman Ali, the nephew of the complainant at backside of left shoulder and right thigh, who got injured and fell down; due to indiscriminate firing from both the sides, Saad Ali, Erum, Muskan as well as many others sustained the injuries; the injured were shifted to Mayo Hospital, Lahore, where Suleman Ali succumbed to the injuries.

3. The learned counsel for the petitioner has argued that the petitioner is innocent and has been falsely roped with *mala fide*; during the occurrence the petitioner received fire shot injuries at the hands of the opposite party and became seriously injured; neither in the F.I.R. nor in the statements of the injured PW: it was mentioned that minor Naseaha had also sustained the injury(-ies) but with the *mala fide*, statements of the above-named girl as well as that of her father Muhammad Shahzad Butt were concocted on the third day of the occurrence, just to falsely rope the petitioner in the case; the complainant as well as the injured PWs, and Khalil Ahmad an eye-witness have sworn the affidavits, whereby they all exonerated the petitioner.

4. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for *Mst.* Naseaha injured has vehemently opposed the petition.

5. After hearing learned counsel for the parties and perusing the record, it is observed that in the F.I.R. only indiscriminate firing was attributed to the petitioner. It was alleged that due to the firing made from both the sides, the above-named PWs had sustained the injuries, whereas Suleman Ali lost his life due to the injuries caused by Farid Gujjar. It is also noted that the petitioner was alone at his shop, when his rival party consisting of five nominated and two unknown persons attacked him. Due to firing of the opposite party, the petitioner sustained as many as seven fire shot injuries, one out of which was *Jurh Jaifah,* punishable under Section 337-D, P.P.C. It would be seen and determined during the trial if the petitioner, while making return-firing had committed any offence or not.

6. In the F.I.R. it is not mentioned if baby Naseaha or her father Muhammad Shahzad Butt were present at the spot or she had sustained any injury during the occurrence. On the third day of the alleged occurrence *i.e.*, on 16.01.2014 statements of the

above-named persons were recorded, whereby they stated that injury at the foot of baby Naseaha was inflicted by the petitioner. When indiscriminate firing was being made from both the sides, how come the above-named girl and her father noticed that the injury to the minor girl had been caused by the petitioner? It seems as if above-named witnesses have been purposely introduced to falsely involve the petitioner in this case. The bail declining order passed by the learned Trial Court reveals that Ghulam Hussain-complainant, Khalil Ahmad, an eye-witness, Saad Ali, Muskan and Erum, the injured PWs tendered sworn affidavits before the police, whereby they exonerated the petitioner from the alleged act of firing with the addition that it was he who received injuries at the hands of attacking party. Learned Trial Court, however, did not give any importance to the said affidavits and observed that baby Naseaha still blamed the accused-petitioner *qua* fire-arm injuries on her foot. Copies of the mentioned affidavits are available on the record, the presentation of the original thereof before the police has been admitted by both the sides. Learned counsel for the petitioner has stated that regarding the alleged occurrence, the father of the petitioner has filed a private complaint under Sections 302/324, 337-F(1), 337-F(iii), 337-F(vi), P.P.C. and Section 7 of ATA, in which all the respondents-accused who attacked the petitioner, have been summoned and charge-sheeted. The other side has not rebutted the said fact. It is certainly a case of two versions. The correct one can only be hinted at and pointed to during the course of the trial.

7. All the above-mentioned facts, in our view, have rendered the petitioner's case one of further inquiry, entitling him to the concession of bail. Resultantly, the petition in hand is accepted and *ad-interim* pre-arrest bail granted to him on 05.05.2014 is confirmed subject to furnishing fresh bail bonds in the sum of Rs. 2,00,000/- with two sureties, each in the like amount to the satisfaction of the learned Trial Court.

Ad-interim pre-arrest bail confirmed.

2016 M L D 307

[Lahore]

Before Shahid Hameed Dar, J

FARYAD ALI alias MUHAMMAD NAWAZ---Petitioner

Versus

The STATE and another---Respondents

Crl. Misc. No.7112-B of 2014, decided on 12th June, 2014.

Criminal Procedure Code (V of 1898)---

----S.498---Penal Code (XLV of 1860), Ss.376 & 511---Rape and attempt to rape---Pre-arrest bail, grant of---Different statements---Complainant alleged in FIR that accused tried to commit Zina-bil-Jabr with her daughter but in her supplementary statement she stated that accused had forcibly raped her daughter---Prosecution witnesses followed same line in their secondary statements to the effect that accused had committed Zina-bil-Jabr with daughter of complainant---Validity---Such was a queer situation as to which of the statements the first one or the secondary of the complainant, alleged victim and of eyewitnesses was correct, could not be pointed at bail stage---Alleged victim was medically examined fourteen days after alleged occurrence and doctor found it an old case of rape as hymen of examinee was torn at multiple places and looked healed old---Alleged victim's medico-legal report showed that she was accustomed to act of coitus---No one could know that it was a consenting affair as to involvement of accused in sex play with alleged victim---Probability could not be ruled out that accused might have been falsely involved in case due to maliciousness and mala fides on the part of complainant---Pre-arrest bail was confirmed in circumstances.

Khadim Hussain Sidhu for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General and Khalid A.S.-I. for the State.

Muhammad Irfan Afzal for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The allegation against the petitioner, Faryad Ali alias Muhammad Nawaz is that he in absence of the complainant-lady, entered her house with a pistol in hand where he made an attempt to rape her daughter Mst.Yasmin aged 14/15 and broke string of her shalwar in the process; on raising alarm by her daughter, Javed Iqbal and Asif Ali reached the spot and on seeing them, he slipped away.

2. The complainant rendered a supplementary statement on 09.05.2014 whereby she amended the allegation by alleging that the accused had ravished her daughter. The alleged victim who in her first statement under section 161, Cr.P.C. supported the story of FIR as such, also improved upon her previous version by rendering another statement under section 161, Cr.P.C. on 09.05.2014 with the contention that the accused had committed rape upon her. She was medically examined by the women medical officer on 08.05.2014 and findings recorded by her were in line with the changed version of the complainant and that of the

alleged victim, but with the remark that it was an old case of rape.

3. After hearing learned counsel for the parties and perusing the record, it is observed that complainant reported the matter to the police through a written application about 21 hours after the alleged occurrence wherein she categorically alleged that Muhammad Nawaz accused had attempted to rape her young daughter but failed as witnesses on hearing the alarm timely reached the place of occurrence which made him runaway. The witnesses, Muhammad Asif, Muhammad Javed and the alleged victim, Mst.Yasmin recorded their statements under section 161 Cr.P.C., the same day whereby they all supported the FIR-story. The complainant-lady however took a changed stance when she rendered supplementary statement on 09.05.2014 with the assertion that the accused had forcibly raped her daughter but she being in a state of shock and fear merely alleged that he had made an attempt to violate her daughter. The alleged victim also rendered a similar statement, like that of her mother on 09.05.2014. The above named witnesses followed the same line in their secondary statements to the effect that the accused- petitioner had committed zina-bil-jabr with the daughter of the complainant. This is a queer situation. Which of the statements, the first one or the secondary, of the complainant, the alleged victim and that of the eye-witnesses is correct cannot be pointed to at this stage. Besides the alleged victim was medically examined on 08.05.2014, fourteen days after the alleged occurrence and women medical officer found it an old case of rape as hymen of the examinee was torn at multiple places and looked healed old. It may be gathered from the alleged victim's medico legal report that she was accustomed to the act of coitus. Who knows that it may be a consenting affair, as to involvement of the petitioner in sex play with the alleged victim. The probability cannot be ruled out that the petitioner may have been falsely involved in this case due to maliciousness and mala fides on the part of the complainant. Therefore, this application is allowed and ad interim bail granted to the petitioner vide order dated 23.05.2014 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.2,00,000/- with one surety in the like amount to the satisfaction of the learned trial court.

MH/F-25/L Pre-arrest bail confirmed.

2016 M L D 883

[Lahore]

Before Shahid Hameed Dar, J

MUDASSAR ALI---Petitioner

Versus

The STATE and others---Respondents

Crl. Misc. No.1798-B of 2015, decided on 23rd April, 2015.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), S. 302---Qatl-i-amd---Bail, grant of---Further inquiry---Supplementary statement after registration of FIR appeared to be well thought and deliberated move on the part of complainant to fill-in the gaps of the case---Complainant had

improved version as to witnessing the incident which had created the situation worse for the prosecution case---Accused was no more required for the purpose of any recovery---Case against the accused was of further inquiry---Accused was admitted to bail subject to furnishing bail bonds in the sum of Rs. 5,00,000/- with two sureties each in the like amount to the satisfaction of trial court.

Muhammad Arif Awan for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab for the State with Bilal ASI.

Ch. Aftab Iqbal Dhillon for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The allegation against the petitioner, Mudassar Ali is that he was a remiss and he often tortured his wife Mst. Sadaf without any reason; he was persuaded by his father-in-law (complainant) to mend himself and abstain from maltreating his wife but he would not listen to it; the complainant received a telephone call from his daughter on 29.04.2014 and learnt that her husband had turned ill-intentioned against her and she might be disposed of by him any moment; the accused and his family members did violence to Mst.Sadaf and strangulated her to death on 29.04.2014. The complainant was informed later in the day, at about 11.45 a.m. by the elder brother of Mudassar Ali that Mst.Sadaf had committed suicide.

2. The complainant rendered a supplementary statement, the same day, whereby he contended that he felt deeply grieved due to sudden death of his daughter, so he could not mention some relevant facts in the FIR; he said that on receipt of telephone call from his daughter, he contacted his son Hamid Hassan on telephone and asked him to rush to the house of his sister, whereon he joined by Sajid Ali went there and saw it themselves that his sister was being strangulated by her husband Mudassar Ali (petitioner), who happened to be his real paternal nephew. Both the witnesses were recorded under section 161, Cr.P.C. on 29.04.2014 and they supported the supplementary statement of the complainant.

3. Learned counsel for the petitioner has contended that the petitioner has been falsely involved in this case merely as a guess-work of the complainant and he was innocent; the complainant did not mention the names of the witnesses, Hamid Hassan and Sajid Ali in the FIR rather he introduced them in this case as such through a supplementary statement, recorded much after the registration of the FIR; the complainant introduced another fact in this case by moving a petition under sections 22-A and 22-B, Cr.P.C. before the Ex-Officio Justice of Peace Lahore whereby he contended that the occurrence of murder of his daughter had been witnessed by him along with Sajid Ali, Muhammad Abbas and Muhammad Omer; he showed no faith in his real son Hamid Hassan as he dropped his name from the list of eyewitnesses when he moved the said petition; the petitioner's case calls for further probe into his guilt therefore he may be granted the relief prayed for.

4. On the other hand, learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant has opposed this petition on the ground that the occurrence was witnessed by Hamid Hassan and Sajid Ali who still supported the prosecution case and their statements under section 161, Cr.P.C. were available on the record; the complainant had moved a petition, under section 22-A, 22-B, Cr.P.C. with a changed version but he withdrew it on 16.05.2014 which was no more a part of the record; the dead body of the deceased lady was

recovered from the house of the petitioner which constitutes a strong incriminating circumstance against him. Lastly submits that the petitioner's case entails capital punishment, therefore, he may not be set at liberty.

5. After hearing learned counsel for the parties and perusing the record, it is found that the complainant categorically alleged in the FIR that his daughter Mst.Sadaf had repeatedly informed him on telephone about the untoward and unmanly behaviour of her husband, the accused- petitioner, but he produced no evidence in support of this factual allegation. He did not cite anyone as an eyewitness in the FIR and he only pointed to a telephone call of real elder brother of the petitioner, who allegedly informed him that his daughter had committed suicide. He however introduced the name of his son Hamid Hassan and that of Sajid Ali in his supplementary statement with the contention that they both, on his asking, had gone to the house of his daughter where they saw Mudassar Ali accused throttling his wife. Both the eyewitnesses were recorded under section 161 Cr.P.C. on 29.04.2014 in support of the said fact.

6. Nothing can be said with certainty at this stage as to what idea struck to the complainant's mind when he moved a petition under section 22-A, 22-B, Cr.P.C. before the Ex-Officio Justice of Peace Lahore on 12.05.2014 whereby he changed the tenor of the incident by asserting that on receipt of telephone call from his ill-fated daughter, he along with Sajid Ali, Muhammad Abbas and Muhammad Omer rushed to her house where they all saw Mudassar Ali accused strangulating and murdering his wife. Interestingly, he did not mention the name of his real son Hamid Hassan as an eyewitness of the occurrence in this petition. He reconsidered his stance and withdrew the said petition on 16.05.2014 without ever perceiving as to the scale of damage having been done to the prosecution case by it. A copy each of the said petition and the order of the Ex-Officio Justice of Peace regarding its dismissal as withdrawn make a part of this petition.

7. The complainant who is present in the court has been repeatedly asked as to why he dropped the name of his son from the list of the witnesses and showed himself as an eyewitness of the occurrence and why did he include some other names as eyewitnesses in his petition under section 22-A, 22-B, Cr.P.C., in answer to which, he talked irrelevantly and looked absolutely puzzled. Learned Deputy Prosecutor General Punjab has read out statement under section 161, Cr.P.C. of Sajid Ali, an alleged eyewitness, which entails the fact that the complainant had reached the spot when he was still there and he disclosed the details of the occurrence to him forthwith. If so, why didn't he (complainant) narrate this crucial detail in the FIR which he got lodged at about 3.15 p.m., the same day and why did he omit to mention in his written application, that the occurrence of murder of his daughter had been witnessed by his son Hamid Hassan and Sajid Ali. To make afore-referred supplementary statement after registration of the FIR appears to be a well thought and deliberated move on the part of the complainant to fill-in the gaps of the case. His improved version as to witnessing the incident by himself along with the said companions creates a situation, still worse for the prosecution case. The petitioner was arrested by the police on 19.05.2014 and he has been in jail since then. He is no more required for the purpose of any recovery etc. The somersaults of the complainant in terms, discussed hereinabove render the petitioner's case one of further inquiry within the scope of section 497(2), Cr.P.C. Therefore, this application is allowed and he is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.5,00,000 with two sureties each in the like amount to the satisfaction of the learned trial Court.

ZC/M-278/L Bail granted.

2016 M L D 1468

[Lahore]

Before Shahid Hameed Dar, J

MEHMOOD AHMAD---Petitioner

Versus

The STATE and another---Respondents

Criminal Appeal No.830 of 2007, decided on 21st April, 2015.

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

---S. 302 (b)---Qatl-i-amd---Murder of wife by her husband---Appreciation evidence---No eye-witness of the occurrence---Children of deceased lady and other family members of accused could be considered as eye-witnesses---Witnesses produced by the prosecution might be labelled the res-gestae witnesses who could not be considered as eye-witnesses---None of the probable eye-witnesses appeared at trial for examination---Postmortem examination was conducted with considerable delay---Complaint and F. I. R might be the ante-timed documents---Evidence of res-gestae witnesses was unbelievable and untrustworthy---Medical evidence was corroboratory in nature which could reveal a few details with regard to infliction and duration of injuries, probable cause of death and other allied details, if any, but same could not identify the inflictor of such injuries---Prosecution had failed to prove guilt of accused beyond any reasonable shadow of doubt---Impugned judgment had been passed merely on conjectures and surmises without taking into account the infirmities and weakness in the prosecution's case---Conviction and sentence awarded to the accused were set aside and he was acquitted of the charge---Appeal was allowed in circumstances.

(b) Criminal trial---

----Medical evidence---Scope---Medical evidence would always be corroboratory in nature which could reveal a few details with regard to infliction and duration of injuries, probable cause of death and other allied details if any but same could not identify the inflictor of such injuries.

(c) Words and phrases---

---'Res-gestae'---Meaning.

Black's Law Dictionary-Eighth rel.

Ejaz Khalid Khan Niazi for Appellant.

Rana Tassawar Ali Khan, Deputy Prosecutor for Respondents.

Date of hearing: 21st April, 2016.

JUDGMENT

SHAHID HAMEED DAR, J.---The appellant, Mehmood Ahmad was held guilty under section 302(b), P.P.C. by the learned Sessions Judge, Faisalabad vide judgment dated 17.5.2007 and sentenced to imprisonment for life with the direction to pay an amount of Rs..1,50,000/- to the legal heirs of the deceased as compensation under section 544-A, Cr.P.C. or in default thereof to undergo simple imprisonment for six months. The benefit of section 382-B, Cr.P.C. was, however, extended to him.

2. The appellant by filing the instant appeal has assailed the impugned judgment.

3. Muhammad Sarwar-complainant (P.W.8) has alleged in the FIR (Exh.PB/1) that his sister Mst.Khalida Parveen was married to Mehmood Ahmad (appellant) about 13/14 years ago; three children, a daughter and two sons were born out of this wedlock; both the spouses often quarrelled with each other; he received a telephone call the previous night, at 1.00 a.m. from Maqsood Ahmad PW, who told him that his sister had been butchered by her husband Mehmood Ahmad (appellant); on this information, he joined by his brother Muhammad Arshad, Asad Ullah, Muhammad Yousaf, Muhammad Asghar, Muhammad Sadiq and Muhammad Ashiq reached the house of his sister, where they found her blood-soaked dead body placed on a cot, showing her throat, half cut; all the inmates of the house told him that his sister had been murdered by her husband; leaving Farooq Ahmad and Maqsood Ahmad, brothers of Mehmood Ahmad (appellant) nearby the dead body, he left for the police station and came across Ayaz Ahmad SI (P.W.9) at Mohallah Masoodabad, at 2.00 a.m. on 27.3.2004, who reduced into writing complaint (Exh.PB) on his dictation and despatched it to the Police Station through Shahbaz Ahmad 1293/C for registration of a case, on the basis whereof, Abdul Waheed 829/MHC (P.W.2) drew up formal F.I.R. (Exh.PB/I), at 2.15 a.m., the same day.

4. After registration of the case, Ayaz Ahmad SI (P.W.9) carried out the investigation, reached the spot, inspected the dead body, prepared injury statement (Exit PD), inquest report (Exh.PE) and despatched it to the mortuary for autopsy under the escort of Asif Munir 4917/C (P.W.5); he collected blood stained earth from the place of occurrence vide recovery memo Exh.PLI, duly attested by Farooq Ahmad and Maqsood Ahmad PWs (not produced); he inspected the venue of the crime and prepared visual site plan (Exh.P.D; after postmortem examination of the dead body, Asif Munir 4917/C (P.W.5) produced before him last worn clothes of the deceased, which he took into possession vide memo Exh.PF; he got prepared the site plan-in scale in duplicate (Exh.PA & Exh.PA/1) qua the place of occurrence by Aurangzeb. draftsman (P.W.1); he arrested the appellant on 29.3.2004, who during interrogation led to the recovery of blood-stained Chhuri (P4) which was seized vide memo Exh.PG. On completion of investigation, he prepared challan and submitted it before the court for trial of the accused in accordance with the law.

5. The accused on indictment pleaded not guilty and claimed a trial. The prosecution, in order to prove its case, produced nine witnesses, namely, Aurangzeb, draftsman (P.W.I), Abdul Waheed 829/MHC (P.W.2), Fida Hussain 306/C-I (P.W.3), lady doctor Tanvir Zafar (P.W.4), Asif Munir 4917/C (P.W.5), Abdul Raul, 3697/C-1 (P.W.6), Muhammad Arshad (P.W.7), Muhammad Sarwar-complainant (P.W.8) and Ayaz Ahmad SI/10 (P.W.9). Thereafter, the appellant was examined under section 342, Cr.P.C., whereby he professed his innocence in the matter and denied all the allegations levelled against him. The appellant did not opt to depose within the scope of section 340(2), Cr.P.C. or adduce evidence in defence. The contention adopted by him in reply to the question as to why this case against him and why the PWs had deposed against him, read as under:--

"The PWs are related inter se. I have been involved in this case due to personal grudge of the PWs. In fact it was a blind murder, committed by some un-known person and I have been entangled in the case due to strained relations wills my brothers-in-law."

The learned trial judge on conclusion of the trial held the appellant guilty of the offence charged and sentenced him as mentioned hereinabove.

6. Learned counsel for the appellant submits that the appellant has been falsely involved in this case due to erratic guess work and malicious intention of the complainant; the prosecution did not produce any connecting evidence against the appellant during the course of the trial, despite that he was pronounced guilty and handed down the sentence of imprisonment for life, which was not less than a joke with him; the prosecution case contained the name of only one probable eyewitness Maqsood Ahmad, but he was not produced at trial and he was given up by them as having been won over; the res-gestae account consisted of statements of Muhammad Arshad (P.W.7) kind Muhammad Samar (complainant/P.W.8) but they said nothing as to witnessing the occurrence of murder of Mst.Khalida Parveen and they only mentioned the name of Maqsood Ahmad as the source of their information, that the murder of Mst.Khalida Parveen had been committed by the appellant; the medical evidence as tendered by lady doctor Tanvir Zafar (P.W.4) is merely a corroboratory circumstance, which cannot take place of the substantive evidence; the recovery of blood-stained chhuri (P4) on 3.4.2004 at the instance of the appellant is hardly of any consequence being an embroidery of the main allegation, which could not be proven by the prosecution, through some concrete evidence; the case against the appellant is nothing but a pack of lies, each word whereof converges on' the innocence of the accused; the prosecution badly failed to bring home the guilt of the appellant beyond any reasonable shadow of doubt but learned trial court ignored all the fallacies of the prosecution case with surprising ease, rendering its pronouncement of guilt against him a funny story; the impugned judgment has been passed by the learned trial court without application of judicious mind and it looks unsustainable from all four corners.

7. In contrary to the above, learned Deputy Prosecutor General Punjab has contended that the appellant butchered his innocent wife in a cold-blooded manner and his guilt had been established beyond all shadows of doubt by the prosecution through tangible and cogent evidence; the ocular account, the medical evidence, recovery of chhuri (P4) at the instance of the appellant on 3.4.2004 and other allied circumstances made it a case of proven credibility against him, hence, the impugned judgment did not suffer from any frailty or legal o defect; the appellant committed brutal murder of his wife single handedly, hence, he did not deserve any leniency.

8. Arguments heard and record perused.

9. The fact and circumstances of the case do not suggest that the alleged occurrence of murder of Mst.Khalida Parveen at about 1.00 a.m. on 27.3.2004 had been witnessed by any. Learned trial court has observed in paragraph 23 of the impugned judgment that the occurrence in issue remained un-witnessed and prosecution could not prove it otherwise during the course of the trial. It, however, believed it to be a case of circumstantial evidence in the same paragraph. It held the telephone call of Maqsood Ahmad PW (not produced), which he allegedly made at 1.00 a.m. on 27.3.20.104 to Muhammad Sarwar (complainant/P.W.8) to inform him about the murder of his daughter Mst.Khalida Parveen by her husband Mehmood Ahmad (appellant), an incriminating circumstance falling within the definition of res-gestae in paragraph 24 of the impugned judgment. The term res-gestae, as per Black Law Dictionary-Eighth Edition means:--

"res-gestae (rays jes-tee. also jes-ti), n.pl. [Latin "things done"' The events at issue, or other events contemporaneous. with them. In evidence law, words and statements about the res gestae are usu. Admissible under a hearsay exception (such as present sense impression or excited. utterance). Where the Federal Rules of Evidence or state rules fashioned after them are in effect, the use of res gestae is now out of place. See Fed. R. Evid. 803(1), (2). - Also termed res gesta. [Cases: Criminal Law - 363 - 368; Evidence - 118 - 128. CJS. Criminal Law - 454, 831, 867 - 876; Evidence - - 342-363.]

"The Latin expression 'res gestae' or 'res gesta', literally 'things done' or 'things transacted', has long served as a catchword ..... [T]he phrase has frequently served both to let in utterances which in strictness were not admissible and to exclude utterances which might well have been admitted. And frequently also its indefiniteness has served as a basis for rulings where it was easier for the judge to invoke this imposing catchword than to think through. the real question involved; The phrase is antiquated. By modern judges it is being gradually discarded. It is superfluous, and serves only to obscure the logic of the rules. It should be left to oblivion." John H. Wigmore, A Students' Textbook of the Law of Evidence 279 (1935).

"The res gestae embraces not only the actual facts of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct casual connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence." State v. Fouquette, 221 P.2d 404, 416-17 (Nev. 1950)."

Maqsood Ahmad PW (not produced),.the children of the deceased-lady and other family members of the appellant most probably could be considered the eyewitnesses of the occurrence and the complainant-party, inclusive of Muhammad Sarwar (complainant/P.W.8), Muhammad Arshad (P.W.7), Asadullah, Muhammad Yousaf, Muhammad Asghar, Muhammad Sadiq and Muhammad Ashiq might be labelled the res-gestae witnesses, who under no circumstance could be considered the eyewitnesses. The record of the case reveals that none of the probable-eye-witnesses appeared at trial for their examination. Maqsood Ahmad PW, who was most important of them all was given up on 5.10.2004 by the prosecution, having been won over and Muhammad Yousaf PW, a companion of the complainant, was given up being unnecessary. Muhammad Sarwar (complainant/P.W.8) admitted in his testimony as correct that telephone facility was not available at his residential house. He, however, volunteered in terms that a telephone connection was available in his neighbourhood. He did not disclose the name of the neighbour and the telephone number whereon he had received a phone-call from Maqsood Ahmad PW, nor he disclosed the phone number of the caller. He frankly admitted in his testimony that his slain sister joined by her husband (appellant) and children visited him about a month before the occurrence and they stayed with him for two to three days and left his house for their own together. He also deposed about the fact that he along with his father participated in the marriage ceremony of Tariq Mehmood, real brother of the appellant, fifteen days after the visit of his slain sister and they both had a brief sojourn of three days at the house of the accused/appellant. He went on to state that his residential village was at a distance of about twenty two miles from the place of the occurrence. All of the aforesaid facts have also been admitted and stated by Muhammad Arshad P.W.7) in his testimony. The complainant maintained in his statement that the pakka road was at a distance of two miles from the village. Muhammad Arshad (P.W.7) mentioned in his testimony that his statement had not been recorded by the police during the course of investigation. One significant weakliness is attached with the testimonies of both the witnesses of res-gestae that they did not name any of the family members of the appellant, who allegedly provided them the information at the spot' that murder of his wife had been committed by Mehmood Ahmad-appellant. The prosecution made no effort to

produce adolescent children of the deceased-lady as witnesses during the trial.

10. There is another important circumstance, which probably skipped the eye of the learned trial court and it pertained to the postmortem examination of the ill-fated lady, conducted at 2.00 p.m. on 27.3.2004, about twelve hours after the registration of the FIR. (Exh.PB/1). It itches the mind as to how the complainant and his companions got together so quickly at one place at the midnight (1.00 a.m.) from different houses and how did they cover the distance of twenty two. (22) miles partly kacha & pakka so briskly and how did complainant succeed in reporting the matter to the police at 2.00 a.m. in Mohallah Masoodabad falling within the limits of police station Factory Area Faisalabad. The delayed postmortem examination of the dead body of Mst.Khalida Parveen, which was held at 2.00 p.m. on 27.3.2004 impliedly tells that the complaint (Exh.PB) and the FIR (Exh.PB/1) might be the ante-timed documents. The probability cannot he ruled out that the witnesses of res-gestae may have reached the spot mach after 2.00 a.m., the time so shown in the complaint (Exh.31.PB). Muhammad Sarwar (complainant/P.W.8) has stated in his testimony that autopsy on the dead body of their sister had been performed at 9.10 a.m., even though it was conducted at 2.00 p.m. Important enough, the names of the persons who identified the said dead body at the time of the dissection, have been mentioned as Farooq Ahmad and Maqsood Ahmad (given up PWs) in the postmortem examination report (Exh.PC), who happened to be the real brothers of the appellant. It is hard to digest that the complainant (P.W.8) and his real brother Muhammad Arshad (P.W.7) allowed entry of the names of the said identifiers in the necropsy report, even after having learnt about the murder of their real sister at the hands of their (identifiers) real brother. It points to another reason to believe that the complainant and his co-witnesses or his other companions had not reached the place of occurrence, at the time, as mentioned by them in the complaint (Exh.PB). It causes collapse of the house of cards built by them on the strength of res-gestae-evidence. The testimonies of P.W.7 and P.W.8 do not inspire confidence nor can they be believed as truthful witnesses. The evidence of res-gestae is unbelievable and untrustworthy, hence, brushed aside.

11. So far as medical) evidence as tendered by lady doctor Tanvir Zafar (P.W.4) is concerned, it only tells that she performed autopsy on the dead body of the slain lady at 2.00 p.m. on127.3.2004 and found the deceased's throat/neck deeply cut with a sharp-edged weapon, besides finding a lacerated wound on the middle finger of her right hand. The medical evidence is always corroboratory in nature, which can reveal a few details as to number of bodily injuries on a dead or a living person, the weapon used for infliction of such injuries, the duration of injuries, the probable cause of death and other allied details, if any, but it cannot identify the inflictor(s) of such injuries.

12. Insofar as recovery of blood-stained chhuri (P4) at the instance of the appellant from an open space on 3.4.2004 is concerned, its evidentiary value has apparently been damaged by the prosecution itself as they did not tender any expert report to establish at trial that it was stained with human blood. This frail aspect of the case has been taken care of by the learned trial court in paragraph 25 of the impugned judgment, wherein it observed that it could not be considered a corroboratory piece of evidence as to the prosecution's case.

13. Needless to mention, the motive part of the prosecution case has been disbelieved by the learned trial court as is manifest from paragraph 22 of the impugned judgment. Further remarks in this regard may be a sheer wastage of time.

14. The upshot of the above discussion is that the prosecution has badly failed to bring home the guilt of the appellant beyond any reasonable shadow of doubt. The impugned judgment appears to have been passed merely on conjectures and surmises, without taking into account scores of infirmities and weaknesses in the prosecution's case. The term res-

gestae appears to have been over-emphasized and blown out of proportions by the learned trial court while passing the impugned judgment, which is not sustainable by any stretch of imagination.

15. For the foregoing reasons, this appeal is accepted, the impugned judgment is undone and conviction/sentence of the appellant is set aside. He is acquitted of the charge. He shall be released from the jail forthwith if not required in any other case.

ZC/M-150/L Appeal allowed.

2016 M L D 1569

[Lahore]

Before Shahid Hameed Dar, J

FATEH MUHAMMAD and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.192 of 2005, decided on 9th July, 2015.

Penal Code (XLV of 1860)---

---Ss. 336, 324, 337-A (ii), 337-F (ii), 337-F (iv), 337-F (vi), 34 & 109---Itlaf-e-salahiyyat-e-udw, attempt to commit qatl-e-amd, shajjah-e-mudihah, ghayr-jaifah badi'ah, ghayr-jaifah mudihah, ghayr-jaifah munaqqilah, common intention and abetment---Appreciation of evidence---Statement of accused that they would not challenge their conviction and instead of they would pay Arsh and Daman amount to the injured if the sentence of imprisonment served by them so far was deemed sufficient and not objected to by the prosecution---Acceptance of said offer by the complainant party if payment was made to the injured forthwith before the court---Scope---Accused had injured prosecution witness by having lost self-control---Complainant party had received amount of Arsh and Daman fixed by the Trial Court---Parties had decided to bring end to their hostility---Sentence already served by the accused in jail before they were set at liberty on bail was sufficient to make it even with the accommodative approach of the parties---Conviction recorded by the Trial Court was sustained in circumstances---Appeal was dismissed with a modification of sentence of the accused.

Mubeen Ahmad Siddiqui for Appellants.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab the State.

Iftikhar Ahmad Mian and Muhammad Ashraf for the State.

JUDGMENT

SHAHID HAMEED DAR, J.---This judgment shall dispose of criminal appeal No.192

of 2005, instituted by Fateh Muhammad & Muhammad Arif (appellants), who had been held guilty of the charge, they were indicted for and sentenced to various terms of imprisonment and other pecuniary punishments, vide judgment dated 25.1.2005, pronounced by learned additional sessions judge, camp at Malakwal, district Mandi Baha-ud-Din, on conclusion of their trial in respect of case-FIR No.180/2001, dated 25.6.2001, under sections 324, 337-A(ii), 337-F(ii), 337-F(iv), 337-F(vi)/34, 109, P.P.C., registered at police station tvlalakwal (Mandi Baha-ud-Din). The detail of sentence awarded to the appellants read as under:--

I) FATEH MUHAMMAD:

a) Under section 337-A(ii) P.P.C. to rigorous imprisonment for three years with payment of Daman, Rs. 15,000/- and till its payment to remain in jail as a convict serving simple imprisonment.

b) Under section 337-L(2), P.P.C: to rigorous imprisonment for two years each for causing two injuries.

II) MUHAMMAD ARIF:

Under section 336 read with section 337-Q, P.P.C: to rigorous imprisonment for five years with. payment of Amh, equal to Diver!amount, Rs.3,00,000/- to Muhammad Ashraf injured PW and till its payment to remain in jail as. a convict serving simple imprisonment.

Their sentence of imprisonment was ordered to run concurrently- and benefit of section 382-B Cr.P.C. was also extended to them.

Their co-accused Mst.Razia Bibi was, however acquitted of the charge through the same judgment.

And this judgment shall also deal with Criminal Revision No.459 of 2005 filed by the complainant for enhancement of the sentence of respondents Nos.1 and 2, Muhammad Arif and Fateh Muhammad. Not to be forgotten, it has not been admitted to regular hearing as yet.

2. The prosecution case as narrated by Muhammad Aslam (complainant/P.W.6) in FIR (Exh.PC/1) is that his paternal nephew Muhammad Ashraf (P. W.1) went to irrigate the paddy-crop at about 6.00 a.m. on 25.6.2001; he along with Ijaz Ahmad (P.W.5) and Safdar Iqbal PW (not produced), a guest, worked at his dera then; when his paternal nephew reached near the dera of Muhammad Azam, he was ambushed by Fateh Muhammad (appellant), armed with hatchet, Muhammad Arif (appellant), armed with hatchet and Mst.Razia Bibi (since acquitted); armed with hatchet; Muhammad Arif accused felled Muhammad Ashraf by holding his legs; Fateh Muhammad accused sat on his neck and Muhammad Arif accused gave hatchet blows, one each at his right and left calves; Muhammad Ashraf screamed out of pain still lying on the ground; all the three armed persons collectively gave hatchet blows, which landed at different parts of his body; on hearing the alarm, he (complainant) along with his companions rushed to the spot while looking at the incident; the attackers saw the on-rushing complainant-party and fled the spot.

The motive behind the occurrence was that Muhammad Ashraf injured had lent a sum of Rs.800/- to the mother of Muhammad Arif accused, who died without repaying the said amount; Muhammad Ashraf demanded it from Muhammad Arif accused, who took it ill and it led to exchange of abuses between them; Muhammad Ashraf was attacked by

Muhammad Arif and others due to said grudge.

Muhammad Aslam (complainant/P.W.6) reported the matter to Gulzar Ahmad ASI at 7.45 a.m. on 25.6.2001 at Miani Chowk Malakwal, when he was on way to the police station Malakwal, Mandi Baha-ud-Din. Gulzar Ahmad ASI (P.W.8) scribed complaint (Exh.PC) on the statement of Muhammad Aslam and despatched it to police station Malakwal through Javed Iqbal 592/C, which led to registration of formal FIR No.180/2001, supra (Exh.PC/1). He prepared injury statement (Exh.PG) qua Muhammad Ashraf injured and sent him to RI-IC Malakwal under the escort of Muhammad Iqbal 407/C PW (not produced) for medical examination and treatment of his injuries.

Thereafter, he (P.W.8) reached the place of occurrence and started investigating the matter. He inspected the place of occurrence and prepared visual site plan (Exh.PH); collected blood stained earth vide memo of recovery (Exh.PD); recorded statements of the witnesses under section 161, Cr.P.C.; he collected blood stained clothes (P1 to P3) of the injured on 25.6.2001 vide memo of recovery (Exh.PA), courtesy Muhammad Iqbal 407 PW (not produced). He moved an application (Exh.PJ) before the medical officer for recording statement of the injured on 12.7.2001 and by knowing that he was fit enough to talk, recorded his statement under section 161, Cr.P.C., the same day; he arrested the accused/appellants on 25.6.2001 and interrogated them; Muhammad Arif accused/appellant got recovered hatchet (P4) on 28.6.2001 vide seizure-memo (Exh.PB); he prepared site plan (Exh.PB/1) of the place of the said recovery; he despatched both the accused to judicial lock-up on 29.6.2001; he finalized the investigation and submitted the relevant record before the SHO for preparation of report under section 173, Cr.P.C., who did it accordingly.

3. Learned trial court indicted the appellants on 3.10.2001, who pleaded not guilty to the charge and claimed a trial, whereon prosecution was directed to lead evidence against them. They produced eight witnesses in all, including Muhammad Ashraf injured (P.W.1), Riaz Ahmad 172/C (P.W.2), Muhammad Akbar 199/C (P.W.3), Sikandar Hayat AS1 (P.W.4), Ijaz Ahmad (P.W.5), Muhammad Aslam (complainant/P.W.6), Dr.Manzoor Rasool Awan (P.W.7) and Gulzar Ahmad SI/IO (P.W.8) to prove the charge against the accused. Learned deputy district attorney pronounced the case closed on 14.9.2004.

4. On his turn to make statement under section 342, Cr.P.C., Muhammad Arif (appellant) denied all the allegations against him as false and raised specific plea of having acted under grave and sudden provocation, when he saw Muhammad Ashraf (injured) attempting to commit zina-bil-jabr with his sister and acquitted co-accused Mst.Razia Bibi in the nearby field. He refuted the allegation of having attacked and injured Muhammad Ashraf and rendered the defence plea in answer to question No.2, in following words:--

> "It is correct. I was looking after my cattle at the "Bahk" in the fields and hatchet was with me. When I heard hue and cry of Mst.Razia Bibi from the nearby crop, he reached there and saw that Muhammad Ashraf was attempting to commit Zina Haram with my sister and on sudden provocation, I gave the hatchet blows to the legs of Muhammad Ashraf victim to save the honour of my sister. Fateh Muhammad my co-accused was not present at that time and he reached the spot after the occurrence."

While answering the question as to why this case against him and why the PWs had deposed against him, he contended that he had been involved in a baseless case and prosecution witnesses had deposed falsely against him being related inter-se. To another question (No.5), had he anything else to say, he came up with the answer that "my act was out of Ghairat and sudden provocation. I am innocent." He did not depose under section 340(2), Cr.P.C. but he tendered documentary evidence Exh.DC & Exh.DD in defence.

Fateh Muhammad accused (appellant) professed his absolute innocence in the matter and denied all the charges against him being false. He neither led the defence evidence nor he deposed under section 340(2), Cr.P.C.

5. Learned trial court found both the appellants guilty of the offences, they had been charged for and sentenced them accordingly, the details furnished as before.

6. Learned counsel for the appellants has submitted that the learned trial court categorically observed in the impugned judgment that the occurrence had taken place due to outrageousness and excesses of Muhammad Ashraf injured against Mst.Razia Bibi, real sister of Muhammad Arif (appellant) and real paternal niece of Fateh Muhammad (appellant), still it handed down the impugned verdict of guilt against them, which militated against the settled norms of justice; the circumstances of the case warranted a quick action by Muhammad Arif (appellant), otherwise his sister might have been ravished and ruined by the injured; the appellant, Muhammad Arif exercised right of private defence lawfully and committed no crime by inflicting injuries on the person of the transgressor; the other appellant Fateh Muhammad did not participate in the occurrence and he had been falsely involved in this case being real uncle of Muhammad Arif (appellant). In a sudden volte-face, after he smelt it otherwise, the learned counsel rearranged his card; and submitted that the appellants would not challenge their conviction and instead, pay the Arsh-amount and the Daman-amount to the injured instantaneously, if the sentence of imprisonment served by them so far was deemed sufficient and not objected to, on any score by the prosecution and that they should not be further prosecuted by them in this context.

7. Learned counsel for the complainant agreed to the idea, as advanced by the other side, with the contention that the offer made was acceptable to the complainant and the injured, if payment of the Arsh-amount and the Daman-amount was made to the injured forthwith. The complainant Muhammad Alam (P.W.6) and the injured Muhammad Ashraf (P.W.1), who were in attendance, endorsed the submission of their learned counsel in unison and submitted that the amounts of Arsh and Daman should be paid to them before the court. They tendered their sworn affidavits (Mark 'A' & Mark 13') in support of their verbal assertions. Besides the other factors as contained in his sworn affidavit (Mark `A'), the complainant also deposed about the factum of withdrawing the revision petition, which he had filed for enhancement of sentence of the respondents.

8. Learned Deputy Prosecutor General Punjab, who watched the proceedings silently, opened the lips at last and said that he had no objection. as to the consensus developed by the parties in mentioned terms.

9. After hearing the learned counsel for the parties and perusing the record, it is straightaway observed that it remained no more an issue, as to conviction of the appellants recorded by the learned trial court through the impugned judgment, since Offer made by the appellants in mentioned terms had been found reasonably acceptable to the all important person, the injured PW Muhammad Ashraf, besides the complainant Muhammad Aslant (P.W.6). The testimonies of the complainant (P.W.6) and that of the injured (P.W.1) are no more needed to be looked into inquisitively and these would be believed in the same way, as having been so done by the learned trial court through the impugned judgment, wherein it has been categorically observed that the accused Muhammad Arif and Patel Muhammad, who were real paternal nephew and uncle inter-se, had exceeded their right of private defence, when they attempted to save Mst.Razia Bibi from the excesses of the injured. The statements of the prosecution witnesses and the defence plea taken up by the accused categorically established that Muhammad Ashraf (P.W.I) had been injured by the accused (appellants), but they did so by having lost self-control, as they found their kin Mst.Razia Bib'

struggling against his lecherous advances. Their conviction, as recorded by the learned trial court, in view of the submissions made by both the sides is liable to be sustained. Sustained accordingly.

10. Midway through the proceedings of the day, Muhammad Arif (appellant) and Patch Muhammad (appellant) informed the court that they had brought the amount of Arsh, i.e. Rs.3,00,000/- and amount of Doman, Rs.I5,000/- with them so as to pay it to the injured Muhammad Ashruf, who appeared before the court on a wheelchair and looked prepared to receive the said amounts of money from them. His statement as to the offer made by the appellants and accepted by him in mentioned terms has been separately recorded, whereby he contended that on receipt of Arsh and Daman amounts, as fixed by the learned trial court through the impugned judgment, he would not stretch the issue any longer and he would go by the order/judgment of this court whatever might it he, without any intention to agitate the matter before any other judicial forum.

11. It was at this stage, when Muhammad Arif appellant paid the Arsh amount of Rs.3,00,000/- through the learned counsel for the complainant, to Muhammad Ashraf injured within the view of the court, whereafter Fateh Muhammad appellant paid Daman amount of Rs.15,000/- to him again through the learned counsel within the view of the court. The injured, the complainant, the appellants and their learned counsel all looked satisfied with the process of offer and acceptance of the parties and action taken in line therewith.

12. Now a few words about the quantum of sentence of the appellants, as to how should it be adjusted in accord with the mentioned events. The record reveals that Muhammad Arif appellant was arrested in this case on 25.6.2001 and he continuously remained is jail till he was released on bail by way of suspension of sentence as ordered by this court on 13.7.2005. In the meanwhile, the superintendent, district jail, Mandi Baha-ud-Din submitted a report before this court to the effect, that Muhammad Arif accused (appellant) had already served sentence of four years; one month and thirteen (13) days as on 29.4.2005. By taking into account, the date of suspension of his sentence, i.e. 13.7.2005, it could easily be calculated that he had served another 21/4 months in jail, since submission of the said report by the superintendent-jail. He had thus served sentence of four years and four months when he was released on bail. Another eight months in jail, would have served the entire sentence of five years RI, as inflicted on him by the learned trial court through the impugned judgment.

Fateh Muhammad appellant was also arrested on 25.6.2001 and he, as per report of the superintendent of the said jail, remained incarcerated as under trial-prisoner till 11.12.2001, when he was granted bail and set free. He was arrested again on 25:1.2005, when he was pronounced guilty by the learned trial court. He served another three months and seven days in jail, before his sentence was suspended by this court on 30.3.2005 and he was released on bail in consequence thereof. The above-said report of the superintendent jail would reveal that he had totally served about 91/4 months in jail. The prosecution did not burden him with any specific injury on the person of the injured in complaint (Exh.PC)/FIR (Exh.PC/1), rather a collective and joint role had been assign to him and that too, after infliction of grievous injuries on both the legs of the injured by his co-convict Muhammad Arif. Learned trial court observed in concluding paragraph of the impugned judgment that the injuries inflicted by Fateh Muhammad appellant fell within the mischief of section 337-A(ii) & 337-L(2) P.P.C. The incapacitation of the injured had nothing to do with the said injuries.

13. Keeping in view the circumstances enumerated hereinabove, it may be adjudged that the parties had probably decided to bring an end to their years long hostility and it could prove to be a lasting truce between them, as aforesaid offer made by the appellants had

readily been accepted by -the complainant side without any sign of hiccups. The sentence already served by the appellants in jail, before they were set at liberty on bail under section 426, Cr.P.C., ought to be sufficient to make it even with the accommodative approach of the parties, as shown above. Their newly developed softness for each other may usher in an era of permanent peace between them. The incumbent situation envisages the need that they should go hack to their homes with something constructive in their minds as to their future relationship. It is, therefore concluded that the period of sentence already served by the appellants in jail needed not to be stretched any further, as it was sufficient, by all means, to meet the ends of justice.

14. The appeal in hand is dismissed' with a modification of the sentence of the appellants, in mentioned terms.

15. The preparedness of the complainant to withdraw Criminal Revision No.459 of 2005, in view of the obliging gestures of the two sides, as shown in paragraph 7 hereof, warrants dismissal thereof as withdrawn. Done accordingly.

ZC/F-33/L Appeal dismissed.

2016 M L D 1941

[Lahore]

Before Shahid Hameed Dar and Arshad Mahmood Tabbasum, JJ

ASHFAQUE alias BHOLA and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.315 of 2012, heard on 21st October, 2015.

Penal Code (XLV of 1860)---

----S. 365-A----Anti-Terrorism Act (XXVII of 1997), S. 7(e)---Kidnapping or abducting for extorting property, valuable security---Act of terrorism---Appreciation of evidence---Prosecution witnesses, the Motorway Police officials, who had allegedly recovered the abductee from an abandoned car, had not said a word about abductee telling them the names of the abductors---Complainant and the abductee had named the captors belatedly and offered no explanation as to why the abductee had not disclosed their names immediately on his recovery---Complainant and the abductee had deposed that they had made their statement under S. 161, Cr.P.C. on their return journey to the police station, but same had been negated by the statement of the Investigation Officer, who had categorically stated during his testimony that he had reached the office of the Motorway Police along with the complainant, where he found the abductee, received a computerized statement from the abductee, recorded statements of the complainant and Motorway Police officials under S. 161, Cr.P.C. and received the car from which the abductee had been recovered---Presentation of a written computerized statement by the abductee before the Investigation Officer made a crucial circumstance, which reflected on the truthfulness of the story of his abduction by the

accused and recovery by the Motorway Police---Abductee appeared to have made the computerized statement even before he had been recovered so as to involve the accused in the present conspiratorial case---Abductee had contended that he was abducted by the accused from vacant plots and no shop existed there; whereas, the Investigation Officer had categorically stated that there was no vacant plot at the place and there were shops---Abductee had been recovered while his hands and legs were tied with ropes and mouth gagged with a piece of cloth/parna, which could be the job done by a friend or foe---Recovery of the rope and parna might have corroborated and given strength to the prosecution case, had the evidence of the abductee and the complainant stood the test of cross-examination---Impugned conviction/sentence was, therefore, set aside---Appeal against conviction was accepted accordingly.

Ms. Sheeba Kaiser (defence counsel at State expense) for Appellants.

Rana Tassawar Ali Khan, Deputy Prosecutor General for the State.

Date of hearing: 21st October, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---This appeal arises from the judgment. dated 2.2.2012, whereby learned Judge, Anti-Terrorism Court-I, Gujranwala convicted Ashfaq alias Bhola and Imtiaz Ahmad alias Ishtiaq alias Shaki (appellants) under section 365-A and section 7(e) of the Anti-Terrorism Act, 1997 and sentenced them to imprisonment for life each thereunder. Their properties were ordered to be forfeited by the state. Both the sentences were ordered to run concurrently and benefit of section 382-B, Cr.P.C. was extended to them. Their co-accused Nadir Khan was, however acquitted of the charge on extension of benefit of doubt. It all happened on conclusion of their trial in a private complaint-case, filed by Ch. Muhammad Arshad (complainant/P.W.6) for an offence under section 365-A, P.P.C. read with section 7(e) of the Anti-Terrorism Act, 1997.

2. Precisely, the prosecution story as narrated by Ch. Muhammad Arshad complainant (P.W.6) in the FIR (Exh.PF) is that he lived in Italy for years to earn the livelihood; he returned to Pakistan about two months before; he went to Islamabad to see his cousin Muqaddas Abbas (P.W.7) on 25.5.2011, who told him that he would go to his village Jatri to fetch some revenue record from the Patwari-halqa, so he should accompany him; they both left Islamabad at about 4.00 p.m. on 265.2011 for the said village; it was at about 7.00 p.m. when they reached Lala Musa, where Muqaddas Abbas (P.W.7) collected some amount of money through an ATM machine, whereafter they reached Ganja Phatak at about 7.30 p.m., which was near the house of Muqaddas Abbas; on reaching the said place Muqaddas Abbas asked him to stay there and said that he would be back after ten minutes, but he did not return even after half an hour, whereon he went to the house and office of the patwari, who told him that Muqaddas Abbas had not visited him; he made a phone-call to Muqaddas Abbas on his cell-phone (0300-5071100) but it was found turned-off; he along with many others started searching for the missing soul and also informed the local police telephonically in this regard; he received a phone call at 12.45 a.m. on 27.5.2011 on his cell-phone (0332-0410176) and 2/3 persons talked to him, who demanded ransom of rupees one crore (Rs.1,00,00,000/-) and threatened that they would murder Muqaddas Abbas if their demand was not met with; the callers/accused also let Muqaddas Abbas talked to him, who asked him to manage and pay the ransom amount to the accused, otherwise they would kill him. He moved an application (Exh.PE) to the S.H.O., police station Saddar Lala Musa (Gujrat), on 27.5.2011 for registration of case against the unknown accused, on the basis of which Muhammad Anwar Inspector/SI-IO (P.W.4) drew up formal FIR (Exh.PF) at 3.00 p.m., the same day.

3. After registration of the case, its investigation was entrusted to Shabbir Hussain SI (P.W.9) on 27.5.2011, who inspected the place of occurrence/abduction and prepared visual site-plan (Exh.P1) about it; he recorded supplementary statement of the complainant on 30.5.2011, in which he nominated Ashfaq accused (appellant); he proceeded to the office of DPO Gujranwala on 31.5.2011 and got issued a letter regarding the data of above-said cell-number and also moved an application for appointment of Joint Investigation Team; the complainant informed him at 2.00 a.m. on 1.6.2011 that the abductee had been found by the motorway police near Sial Mour; on receipt of this information, he along with Naveed Ahmad constable and the complainant proceeded to the office of motorway police, where the abductee produced before him a written subject, which he rendered into his statement under section 161 Cr.P.C.; he also recorded the motorway police officials under section 161, Cr.P.C.; a car bearing registration No.5787-LWL Vitz blue colour along with a rope was handed over to him, which he took into possession vide memo of recovery Exh.PG; thereafter, investigation into the crime was handed over to Ishtiaq Masood Inspector, Incharge/Joint Investigation Team, on 3.6.2011.

The complainant (P.W.6) being dissatisfied with the investigation conducted by the investigators, filed a private complaint (Exh.PH) on 25.6.2011 against the accused, Safdar Hussain (PO), Tasaddaq Hussain alias Mithu (PO), Nadir Khan (since acquitted), Ishtiaq alias Shaki (appellant), Ashfaq alias Bhola (appellant) and Riaz Ahmad (PO) on the same facts, as alleged in the FIR with the addition that after his recovery, the abductee Muqaddas Abbas told him that he had been abducted by Safdar Hussain, Tasaddaq Hussain and two unknown persons, whereafter lshtiaq alias Shaki and Ashfaq alias Bhola (appellants) took him to the confinement-cell where they confined him; Nadir Khan accused (since acquitted) occasionally visited the said place; the accused often contacted Riaz Ahmad accused (since PO) telephonically; they were taking the abductee to some other place at Sham Vela on 31.5.2011 on a vehicle, which had to be stopped by them as its tyre got punctured; on arrival of the motorway police, the accused decamped by leaving behind the abductee; the motorway police took control of the abductee and seized the crime-car; the accused were found not involved in the occurrence by the police during investigation, which prompted the complainant to file the said private complaint (Exh.PH).

4. Learned trial court after necessary proceedings under sections 200, 202, Cr.P.C. summoned all the accused (respondents therein), including the appellants to face the trial. The private complaint was taken up first by the learned trial court for trial of the accused.

5. On indictment, the appellants and their acquitted co-accused Nadir Khan pleaded not guilty and claimed a trial. The prosecution produced nine witnesses, namely Abid Hussain HC Motorway police (P.W.1), Tauqeer Abbas, SI Motorway (P.W.2), Nadeem Iqbal ASI (P.W.3), Muhammad Anwar Inspector (P.W.4), Muhammad Ejaz SI Motorway (P.W.5), Ch. Muhammad Arshad (complainant/P.W.6), Muqaddas Abbas anductee (P.W.7), Hasnat Ali Shah, SP (P.W.8) and Shabbir Hussain SI/IO (P.W.9) to prove the charge against them. Thereafter, they were examined under section 342, Cr.P.C., whereby they proclaimed their absolute innocence in the matter. The appellant, Ashfaq alias Bhola while answering the question why this case against him and why the PWs had deposed against him, stated as under:--

> "I have been falsely involved in this ease along with my co-accused Safdar Hussain, Tassadaq Hussain alias Mithu, Nadir Khan, Ishtiaq alias Shaki Riaz Ahmed and are innocent in this case. I have been falsely involved in this case along with co-accused mentioned above by the complainant (PW6) with ulterior motive and with the active connivance of Muqaddas Abbas PW7 alleged abductee who are related inter se and are inimical towards me and my co-accused direct to previous civil and criminal

litigations with my family. The background for false implication of this case is that father of Muqaddas Abbas (PW7) alleged abductee sold his land measuring 44 Kanals situated in village Jatrian Kalan to Muhammad Arif and Muhammad Asghar sons of Abdul Ghani, Caste Gujjar R/O Jatrian Kalan and mutation No.1151 dated 23.09.2004 was sanctioned in favour of above said vendees. The certified copy of the same is presented as Exh.DA.

Later on my brothers Abid Hussain and Riaz (co-accused) purchased the above mentioned land from the vendees i.e. Muhammad Arif and Asghar Ali vide mutation No.1214-1216 dated 08.11.2007. The certified copies of the same are presented as Exh.DB and Exh. DC. Rukhsar Ahmed son of Sher Muhammad, R/O Sukh Chanan, Tehsil Kharian who is Phuphizad of Muqaddas Abbas PW7 alleged abductee, prepared ante-dated forged sale agreement and filed a suit for specific performance on the basis of said agreement regarding the above mentioned land measuring 44 Kanals in Civil Court Kharian District Gujrat on 25.10.2007 against said Muhammad Arif and Muhammad Asghar. The certified copy of the same is presented as Exh.DD. Rukhsar Ahmad when came to know that the above mentioned land measuring 44 Kanals had been purchased by my real brothers Riaz Ahmad (co-accused) and Abid Hussain, then he filed an amended plaint against Muhammad Arif, Muhammad Asghar and my real brothers namely Riaz Ahmad and Abid Hussain. The certified copy of the same is presented as Exh.DE. The civil suit is still pending in the Court of Madam Farkhanda Ashraf Awan, learned Civil Judge, Kharian District Gujrat and next date of hearing is fixed for 25.01.2012, the certified copy of the order-sheet is presented as Exh.DF. Muhammad Arshad S/o Afzal Hussain who is real Khalazad of Muqaddas Abbas PW7 (alleged abductee) got registered this false FIR No.139/2011 dated 27.05.2011 under section 365-A, P.P.C. at P.S. Sadar Lala Musa against me and my co-accused mentioned above only to pressurize us and to get back the above said land from my real brothers. During investigation, I and my co-accused produced their defence before the I.O. in shape of documents and oral evidence which was found to be correct and he found the case to be false and baseless and recommended for cancellation.

Cancellation report of the above said case under section 173, Cr.P.C. was prepared on 11.06.2011 by the SHO P.S. Sadar Lala Musa and it was submitted in competent court of law for judicial verdict. The certified copy of the same is presented as Exh.DG. Learned Judge, Anti Terrorism Court-I. Gujranwala accepted Cancellation report vide order dated 10.09.2011. The certified copy of the same is presented as Exh. DH. My co-accused Riaz is residing in abroad in Dubai (UAE) since 28.04.2011. Certified copy of affidavit of co-accused Riaz Ahmad duly attested by High Commission Consulate General Dubai as well as Ministry of Foreign Affair, Lahore Exh.DI along with attested copy of his Passport No.KG878363 containing his travel history are presented as Exit Exh.D.J. As such my co-accused Safder Hussain is also residing in abroad in Sharjah (UAE) since 29.12.2010. Certified copy of affidavit of co-accused Safdar S/O Nadir Khan duly attested by High Commission Consulate General Dubai as well as Ministry of Foreign Affairs Islamabad Exh.DK along with attested copy of his Passport No.KG878363 containing his travel history Exit are presented as Exh.DL. The certified copy of FIR No.126/11, dated 11.05.2011, under sections 435/337-H2/148/149/109, P.P.C. P.S. Saddar Lala Musa Exh.DM, certified copy of FIR No.198/11 dated 09.07.2011, under sections 410/324/148/149, P.P.C., PS. Lala Musa Exh.DN, and certified copy of FIR No.300/2011, dared 17.09.2011, under sections 440/148/149 P.P.C., Sadar Lala Musa District Gujrat Exh.DO are presented which were falsely got registered by the complainant party of this case against me and my co-accused etc."

Imtiaz Ahmad alias Ishtiaq alias Shaki (appellant) and Nadir Khan (since acquitted) adopted the answer, almost in ditto, as given by Ashfaq alias Bhola (appellant) to the aforesaid question, when they deposed under section 342, Cr.P.C. All of them opted not to appear under section 340(2), Cr.P.C. nor they adduced any evidence in their defence.

5.(sic) Learned trial court concluded trial of the appellants through the impugned judgment by holding them guilty of the charge and awarded them the sentence, in mentioned terms.

6. Learned counsel for the appellants has submitted that prosecution case is filled with countless discrepancies and inconsistencies, which had been grossly overlooked by the learned trial court, when it pronounced the impugned judgment; the story narrated by the complainant as to abduction of Muqaddas Abbas (P.W.7) was found false during the course of investigation, as admitted by the complainant and other prosecution witnesses in their testimonies; the motorway police officials who allegedly recovered the abductee from an abandoned punctured car, did not say a word if the abductee disclosed the abductors names to them; the glaring discrepancies of the case have grossly been ignored while recording findings of guilt against the appellants, which only showed poor understanding of the law, besides non-reading and misreading of the evidence by the trial court; the impugned judgment is a product of conjectural and whimsical thoughts of the learned trial judge, which has resulted in gross miscarriage of justice, hence, may it be set aside.

7. On the contrary, learned Deputy Prosecutor General Punjab has supported the impugned judgment by contending that minor contradictions may commonly be found in every other case and the instant matter is no exception, but it may not be considered a fallible case, as it is free from major contradictions and irreconcilable conflicts. He maintained that the prosecution fully proved the charge against the appellants beyond all shadows of doubt, hence, the impugned judgment may be sustained.

8. On hearing the learned counsel for the parties and examining the record, it is straightaway found to be a case hit by many an improbabilities and inconsistencies. Although it was made sure by the prosecution that the abductee of this case Muqaddas Abbas (P. W.7) appeared before the trial court to tender evidence and depose about the circumstances in relation to his alleged abduction and confinement at a secret place by the accused, including the appellants, yet they overlooked a crucial aspect of the case, which related to the evidence of some of the motorway police-officials, including Muhammad Ijaz SI (P.W.5) and Hasnat Ali Shah SPO (P.W.8), who despite having recovered the abductee from an abandoned car with deflated wheels, did not say a word as to the names of the abductors, if told to them by the abductee or not. Their statements when considered in juxtaposition to the statement of the complainant (P.W.6) and the abductee (P. W.7) lend a strong impression that they both, the complainant and the abductee named the captors belatedly and offered no explanation as to why it was not so disclosed by the abductee, immediately on his recovery by the said witnesses, at motorway police camp office at Sial Mour, which was at a distance of eight kilometers from Pindi Bhattian Interchange. The evidence led by the prosecution does not resolve the riddle as to why the abductee had tightened his lips before the motorway police and not hinted at involvement of the accused/appellants or any other specific person in the crime alleged, and why did he distort the facts to assert, when he reached police station Sadar Lala Musa, there he rendered a statement, which entailed the story of his abduction, confinement, demand of ransom Rs.1,00,00,000/-, his shifting to some other place in the evening on 31.5.2011 and leaving him behind with tied hands, feet and gagged mouth by the accused before having been spotted and recovered by the motorway police. The contention of the abducted person as well as that of Muhammad Arshad (complainant/P.W.6) about the aforesaid factum of making statements under section 161, Cr.P.C. on their return-journey to the said police station is directly negated by Shabbir Hussain, SI (P.W.9), the investigating

officer of this case, who categorically stated in his testimony that he reached the office of motorway police, Sial Mour along with the complainant where he found Muqaddas Abbas abductee in the company of the motorway police-officials, who had effected his recovery. He recorded statement of the complainant under section 161, Cr.P.C. and received a written/computerized statement from the abductee, duly signed by him, which he reproduced under section 161 Cr.P.C. He also recorded similar sort of statement of the motorway police-officials and received from them a blue colour car, Vitz bearing registration No.LWL-5787 as case-property and started travelling back with the abductee and others.

9. The investigating officer did not say a word, unlike the contention of the complainant and the abductee that computerized statement of the abductee had been prepared by him or any other police-official. The witnesses belonging to the motorway police did not take the responsibility of preparing the said computerized statement of the abductee. If so, the presentation of a written statement by the abductee before Shabbir Hussain SI (P.W.9) makes a crucial circumstance, which reflected on the truthfulness of the story of his abduction by the accused and recovery by the motorway police. He appeared to have possessed the said computerized statement even before he was recovered, which led to a strong probability that it had been previously fabricated by him as a part of the plan, master-minded by him and the complainant so as to involve the accused in this conspiratorial-case. The investigation conducted on 31.5.2011 by Shabbir Hussain SI (P.W.9) at camp office of the motorway police virtually brought the prosecution case crashing down to earth. The complainant (P.W.6) and the abductee (P.W.7) probably grasped adverse effect of the folly of submitting a computerized signed statement before the investigating officer (P.W.9), hence, they rearranged their cards and improved upon their previous contentions in regard thereto and deposed that the computerized statement of the abductee had been prepared at police station Saddar Lala Musa, but they badly failed to repair the damage done.

10. The abductee (P.W.7) while narrating the story of his abduction contended that the place where he had been forcibly lifted from by the accused consisted of four/five vacant plots and that the passage leading to the house of the patwari was not sidelined by the shops. The investigating officer (P.W.9) stated otherwise and categorically contended that there was no vacant plot at the place of abduction of Muqaddas Abbas (P.W.7) and that there were shops on both the sides of the walkway. The tenor of testimony of the abductee (P.W.7) does not look impressive at all nor does it so look the statement of the complainant (P. W.6). The firsthand information as to his abduction and abandonment by the appellants and their co-accused should have been furnished by the abductee before Muhammad Ijaz, SI (P.W.5) and Hasnat Ali Shah, SPO (P.W.8), both of the motorway police, immediately on his recovery by them. Their testimonies are silent about the fact if the abductee had told them the names of his lifters. The abductee merely told them that some accused had left him at the said place five/seven minutes earlier. It is a matter of common observation and so admitted by the testifying officials of the motorway police, that there were iron fences on both sides of the motorway, which is an express highway, whereon the vehicular traffic smoothly flows without any interuption from any side and it is not like an ordinary road, whereon one can signal a bus to stop and board it. It is strange that no one could see the accused in those five/seven minutes after they left the abductee high and dry on the motorway. The abductee (P.W.7) frankly admitted in his testimony that he did not raise alarm at the time of his abduction nor on any other occasion thereafter, despite he had been taken through more than one motorway toll-plaza by the accused. His 'exemplary' cooperation with the accused throughout the alleged stint is surprising and furnished yet another reason for the court to look at his tale inquisitively. It may be a fictional drama of abduction, abandonment and recovery of the abductee from different places but not a real story, as it may easily be smelt from the evidence tendered. The evidence of the complainant (P.W.6) and the abductee (P.W.7) does not look impressive or believable from any angle being illogical, fantastic and

over-exaggerated, hence, brushed aside.

11. So far as the evidence of recovery of car (P1), rope (P2) and a parna (P3) vide seizure memo Exh.PG is concerned, it may have corroborated and given a sense of strength to the prosecution case, had the evidence of the abductee and the complainant stood the test of cross-examination, which they couldn't. It may be so that the abductee had his hands and legs tied with ropes and mouth gagged with a piece of cloth (parna) when he was spotted by the officials of the motorway police, but it could not be said with certainty, if it was the job done by a friend or a foe. To spend some more time in discussing the recovery evidence, may be an exercise in futility, hence, abstained from.

12. In a nutshell, the prosecution has failed to establish the guilt of the appellants beyond any reasonable shadow of doubt. The impugned judgment does not contain a single element of plausibility or reasonableness and it merited annulment. Therefore, this appeal is accepted at the cost of the impugned judgment. The appellants' conviction/sentence is set aside and they are acquitted of the charge. Be released from the prison, if not required to be imprisoned in any other case.

SL-A-38-L Appeal allowed.

2016 P Cr. L J 211

[Lahore]

Before Shahid Hameed Dar, J

Mst. MANZOOR ELAHI---Petitioner

Versus

SESSIONS JUDGE and 4 others---Respondents

Writ Petition No. 6603 of 2015, heard on 12th May, 2015.

Criminal Procedure Code (V of 1898)---

----Ss. 174 & 176(2)--- Constitution of Pakistan Art. 199---Constitutional petition--- Cause of death, determination of---Exhumation of dead body---Scope---Plea raised by petitioner was that exhumation of dead body of her daughter-in-law was required so as to ascertain cause of death of deceased---Validity---Mere fact that Investigating Officer mentioned two firearm injuries on the head of deceased lady in injury statement and Woman Medical Officer mentioned six other blunt weapon injuries on various parts of her body did not mean that postmortem examination report had unscrupulously been drawn by doctor---Blunt weapon injuries were merely some scratches on or around the neck with a couple of abrasions and contused swellings on such parts of her body which were covered under her dress, hence, could not have been examined by Investigating Officer, as morality did not permit it---Woman Medical Officer was in a far better position to examine dead body from all sides and whatever she noticed in such process, she mentioned it in the necropsy report and she did nothing wrong---High Court declined to allow exhumation of dead body on such discrepancy in injury statement prepared by Investigating Officer as she was buried on 7-1-2015 and her

dead body might have been reduced to a skeleton by then and exhumation of dead body would be an exercise in futility---Power to exhume dead body as envisaged by Ss.174 & 176, Cr.P.C., could not be exercised merely on the whims of a person---Inquest held by police in the earlier instance and the postmortem examination report left nothing to speculate about cause of death, as it stood unequivocally established---Order passed by Magistrate prohibiting second postmortem examination was within his competence and order passed by Lower Appellate Court in revisional jurisdiction was equally unexceptionable---Petition was dismissed in circumstances.

Arshad Ali Chohan for Petitioner.

Raza-ul-Karim Butt, Assistant Advocate-General Punjab with Maqsood SI for Respondents.

Saif Ullah Khan for the Complainant.

Date of hearing: 12th May, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, the petitioner has challenged the vires of order dated 14.2.2015, whereby learned Judicial Magistrate, Pakpattan Sharif dismissed an application, moved by her under sections 174 and 176(2), Cr.P.C. for exhumation of the dead body of Mst.Sumaira Bibi so as to ascertain cause of her death. She has also assailed herein the order, passed by learned Sessions Judge, Pakpattan Sharif, on 27.2.2015, whereby criminal revision filed by her against the order of the learned Magistrate was dismissed.

2. Precisely, the relevant facts of the case are that Mst. Sumaira Bibi was allegedly murdered by her husband Abid Hussain and others, at 7.30 a.m. on 7.1.2015; the motive behind the occurrence was that Abid Hussain suspected the deceased-lady's father of the murder of his father; the postmortem examination of the dead body of Mst. Sumaira Bibi was conducted by doctor Sabira Sultana, woman medical officer, DHQ Hospital, Pakpattan Sharif on 7.1.2015 and she recorded her remarks in the necropsy report that injury No.1-(a) had been caused by firearm and it was sufficient to cause her death in ordinary course of nature. She noticed injury No.1-(b) as the exit wound of injury No.1-(a) and declared the other injuries Nos.2 to 7 as blunt-weapon-trauma; the petitioner firstly moved an application for disinterment of grave of the deceased-lady and then filed the revision-petition, which were dismissed through the impugned orders. Hence, the instant petition.

3. After hearing the learned counsel for the parties and perusing the record, it is observed that the deceased-lady Mst. Sumaira Bibi was the daughter-in-law of Mst. Manzoor Elahi (petitioner), who was allegedly murdered by her husband Abid Hussain and others at 7.30 a.m. on 7.1.2015 at her residential house, within the view of her brother Muhammad Tufail, Muhammad Liaqat and Farman. The matter was reported to the police by Muhammad Tufail, which led to registration of case FIR No.4/2015, dated 7.1.2015, under sections 302, 148, 149 P.P.C. at Police Station Fareed Nagar, Pakpattan Sharif. According to the allegations, all five accused tortured Mst. Sumaira Bibi before she was fired at and killed by her husband Abid Hussain. The autopsy on the dead body of the deceased-lady was performed by doctor Sabira Sultana, the said woman medical officer at 8.45 p.m. on 7.1.2015, who found two firearm injuries, 1-(a) and 1-(b) on the sides of her head and six blunt weapon injuries on other parts of her body, including the neck. The skull-bone was found fractured and brain-matter

damaged during the postmortem-examination. The lady doctor categorically recorded her opinion that firearm entry wound 1-(a) was sufficient to cause death of the deceased- lady. It was an unambiguous opinion, which hardly left anything to speculate about the cause of death in some other terms. The purpose of holding an inquest into the cause of death of the slain-lady stood unequivocally served by the said opinion.

4. The police can conduct more than one investigation in the same case, of course, depending upon the circumstances of each case justifying such an extra-ordinary act. If more than one investigation can be done, then the inquest being a part of the investigation can also be conducted more than once, provided the circumstances would justify it. The magistrate can exercise powers under sections 174 and 176, Cr.P.C. to make an order for more than one postmortem examination and resultant inquests in the same case, if new circumstances emerged for exercise of such authority. The police officer has not been prohibited by the law from conducting the inquest. The magistrate can pass such an order, which might supersede the order already passed by the police officer relating to postmortem examination of a dead body, provided some new facts and circumstances justified such an extraordinary action. It would amount to some extent the supervision and control of the inquest conducted by a police officer, by a magistrate under section 174(5) read with section 176(1), Cr.P.C. The investigating officer took into possession the dead body of Mst. Sumaira Bibi and prepared the injury statement, wherein he mentioned two firearm injuries on her head. The skull bones were fractured and brain matter had been damaged by the bullet. He also prepared the inquest report on 7.1.2015 and despatched the dead body of the ill-fated lady to the mortuary for postmortem examination, which, discussed as earlier, was conducted at 8.45 p.m., the same day by the said woman medical officer. The cause of death, as recorded by the lady doctor unequivocally related to the head injuries (1-a and 1-b). She, however found eight injuries in all on the dead body, six out of which had been caused by the blunt-weapon. These injuries did not, however subscribe to the death of the deceased.

5. Learned counsel for the petitioner argued that second postmortem examination of the dead body of the deceased was necessary and it was not open to the learned magistrate nor to the learned Additional Sessions Judge to hold otherwise; Mst. Sumaira's father Muhammad Farooq, her paternal uncle Muhammad Iftikhar had been awarded death sentence and her maternal uncle Muhammad Yasin, imprisonment for life in the murder case of father of Abid Hussain, real son of the petitioner-lady and they were all confined in Central Jail, Sahiwal as convicts; Mst. Sumaira Bibi consistently persuaded her husband Abid Hussain to compound the offence with her father, paternal and maternal uncles but he refused to accept her demand due to which she was under tremendous pressure and she occasionally threatened to commit suicide; Mst. Sumaira Bibi could not sustain the pressure of her family members and she committed suicide on the fateful day; the parental family members of the deceased fabricated a fake event, won over the woman medical officer and got incorporated six blunt weapon injuries in the postmortem examination report, as against two mentioned by the investigating officer in the injury statement and the inquest report, which necessitated the exhumation and re-postmortem examination of the dead body.

6. Mr. Saif Ullah Khan, advocate appeared on behalf of the complainant Muhammad Tufail (respondent No.5), together with the learned Assistant Advocate General Punjab and submitted that there was no doubt with regard to the cause of death and that at present stage the dead body must have putrefied to an advance stage, therefore, no useful purpose would be served now even by directing disinterment and postmortem examination thereof. They vehemently argued that the learned magistrate as well as the learned Additional Sessions Judge were competent under sections 174/176, Cr.P.C. to deny the request of the petitioner or that of the police for repeated postmortem examination of the dead body.

7. It has been provided in subsection (1) of section 176, Cr.P.C. that the power of the magistrate to hold inquest in cases other than those in which the person dies in the custody of the police is "either instead of, or in addition to the investigation held by the police officer". This investigation is provided in subsection (1) of section 174, Cr.P.C. and it is in the nature of an inquest and it is why, when the investigating officer in the process of the said investigation draws a report of apparent cause of death describing wounds, fracture(s), weapon(s) etc., the process is described as inquest. Thus the investigation under section 174(1) or inquiry under section 176(1), Cr.P.C. is in reality, the inquest. The power to get the postmortem examination done emanates from the power of the police officer to conduct investigation in the nature of inquest. The magistrate would have at least the same powers in this regard, if not more as the police officer has under section 174, Cr.P.C. It would be legitimate to spell out a power from the same provision to direct otherwise, not to hold the postmortem examination again after having it been done by the police under section 174, Cr.P.C.

8. It transpires from the record that the deceased lady's father and paternal uncle had been convicted and sentenced to death and her maternal uncle, to imprisonment for life for the charge of murder of her husband's father, but she persistently stayed in the house of her in-laws and delivered two children, a son and a daughter, there. She had been married to Abid Hussain about four years before her death and her close relatives, noted as above, had been sentenced in a case, which was registered in year 2012. Her continuous stay at the house of her husband indicates that she had, most probably, left her parents and other family members far behind. Hence, the argument of the learned counsel for the petitioner that she was under tremendous mental strain and she committed suicide in a state of hopelessness did not look convincing. The record does not support in any manner the theory of committing suicide by her.

9. Mere fact that the investigating officer mentioned two firearm injuries on the head of the deceased-lady in the injury statement and the woman medical officer mentioned six other blunt weapon injuries on various parts of her body did not mean at all that the postmortem examination report had unscrupulously been drawn by the lady doctor. The blunt weapon injuries were merely some scratches on or around the neck with a couple of abrasions and contused swellings on such parts of her body, which were covered under her dress, hence, could not have been examined by the investigating officer as the morality would not permit it. The woman medical officer was in a far better position to examine the dead body from all sides and whatever she noticed in this process, she mentioned it in the necropsy report. She did nothing wrong. The so-called discrepancy in the injury statement prepared by the investigating officer is nothing but a hollow argument of the learned counsel.

10. She was buried on 7.1.2015 and her body might have been reduced to a skeleton by now. The exhumation of her dead body would be an exercise in futility. Such a power as envisaged by sections 174 and 176, Cr.P.C. cannot be exercised merely on the whims of a person. The inquest held by the police in the earlier instance and the postmortem examination report leave nothing to speculate about the cause of death, as it stood unequivocally established. It is, therefore, held that the impugned order passed by the learned magistrate on 14.2.2015 prohibiting the second postmortem examination was within his competence. The other impugned order, passed by the learned Additional Sessions Judge in revisional jurisdiction is equally unexceptionable.

11. The instant petition is devoid of any merits, which is accordingly dismissed. Parties are left to bear their own costs.

MH/M-167/L Petition dismissed.

2016 P Cr. L J 449

[Lahore]

Before Shahid Hameed Dar, J

GHULAM ISHAQ---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE GUJRANWALA and 3 others---Respondents

Writ Petition No. 19786 of 2014, decided on 19th December, 2014.

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

----Art. 133---Constitution of Pakistan, Art. 199---Constitutional petition---Cross-examination, right of---Petitioner was facing trial before criminal court and avoided to cross-examine the prosecution witnesses---Trial Court closed the right to cross-examine and said order was maintained by Lower Appellate Court---Validity---Interest of justice would be best served if, notwithstanding evasive conduct of petitioner, only one opportunity would be afforded to him to cross examine prosecution witnesses within the spirit of Qanun-e-Shahadat, 1984---High Court directed Trial Court to complete testimonies of prosecution witnesses after having them cross-examined by petitioner and conclude trial of petitioner as expeditiously and conveniently as possible---Petition was allowed in circumstances.

Muhammad Awais Kamboh for Petitioner.

Ch. Muhammad Shabbir Gujjar, Assistant Advocate-General Punjab with Javed Akhtar, ASI for Respondents.

ORDER

SHAHID HAMEED DAR, J.---The petitioner is aggrieved of a couple of orders made by the learned trial court (Judicial Magistrate, Gujranwala) on 06.05.2014 and by the learned revisional court (Additional Sessions Judge Gujranwala) on 13.05.2014 whereby his right to cross-examine Naseer Ahmad SI (PW-1) and Muhammad Tofail HC (PW-3) has been closed during trial of case-FIR No.628/2009, dated 07.12.2009, under sections 468, 471, 419, 420, P.P.C. read with section 30(2) of NADRA Ordinance, 2000, police station Sabzi Mandi (Gujranwala), the petitioner is an accused whereof.

2. Brief facts of the case are that Naseer Ahmad SI entered appearance before the trial court for his examination as a witness on 27.02.2013. His examination in chief was recorded as PW-1 and right of the petitioner to cross-examine him was closed the same day by the learned trial court, when petitioner made a request for keeping it reserved for some other day. Likewise Muhammad Tofail HC appeared before the trial court on 24.04.2013 for recording his evidence. His examination in chief was recorded as PW-3 and petitioner's right to cross-examine him was closed by the trial court for an identical reason, like it happened in the case of PW-1. The petitioner being aggrieved of the said orders filed a revision petition which was allowed by the learned Additional Sessions Judge Gujranwala on 29.01.2014 in terms that the petitioner was granted one opportunity to cross-examine the said witnesses. Learned trial court again closed the petitioner's right to cross-examine them on 06.05.2014 as his counsel

was not available on the said day due to a death in the family; the petitioner filed a revision petition again but without any success as it was dismissed by the learned revisional court vide order dated 13.05.2014.

3. After hearing learned counsel for the parties and perusing the record, it is observed that the conduct of the petitioner cannot be appreciated at all by any stretch of imagination but it does not mean that he should be unnecessarily punished only for the fact that his learned counsel could not make himself available for the cross-examination of PW-1 and PW-3 on the dates fixed. Learned counsel for the petitioner has submitted that half recorded statements of the Prosecution witnesses (PW-1 and PW-3) would be injurious to the case of the petitioner and he would be penalized for an offence which he had not committed. Learned Assistant Advocate General Punjab opposes this petition in a lukewarm manner and submits that the petitioner did not show any seriousness during the course of the trial and he deliberately slowed down himself to lengthen proceedings of the trial. When asked by the court, if only one opportunity to cross-examine the above named prosecution witnesses is given to the petitioner, how would he feel, in answer to which learned law officer merely smiled, which impliedly meant that he too believed that an opportunity to the petitioner, in the aforesaid context, would not injure the prosecution case in any manner rather it would help the learned trial court reach just decision of the case with added comfort.

4. The veracity of the statement of a witness can only be determined if it is properly questioned/grilled by the person against whom is has been made. Learned counsel for the petitioner has undertaken that an opportunity, if given to the petitioner for cross-examining PW-1 and PW-3 would not be thrown away by him and he would show fullest cooperation in this regard so as to save his case from unnecessary and uninvited complications. He further submits that the learned trial court may close the right of the petitioner in absolute terms, if he again showed laziness or evasiveness in cross-examining the said PWs. The interest of justice would be best served if, notwithstanding the aforesaid evasive conduct of the petitioner, only one, repeat one, opportunity is afforded to him to cross-examine the above said prosecution witnesses (PW-1 and PW-3) within the spirit of Qanun-e-Shahadat Order, 1984.

5. Therefore, this petition is allowed in terms, as mentioned hereinabove. Learned trial court is directed to complete testimonies of the aforesaid PWs, after having them cross-examined by the defence and conclude trial of the petitioner as expeditiously and conveniently as possible.

MH/G-6/L Petition allowed.

2016 P Cr. L J 756

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD HANIF and 3 others---Petitioners

Versus

ADDITIONAL SESSIONS JUDGE, PAKPATTAN SHARIF and 3 others---Respondents

Writ Petition No.5494 of 2015, heard on 19th June, 2015.

Criminal Procedure Code (V of 1898)---

----S. 176---Penal Code (XLV of 1860), S. 302---Constitution of Pakistan, Art. 199---Constitutional petition---Qatl-i-amd---Application for exhumation of dead body---Power to disinter corpses---Time for disinterment of dead body---Principles---Inquest report, preparation of---Cause of death---Determination---Requirement---Accused was alleged to have killed his wife through physical violence---Accused took plea that deceased had committed suicide by taking poison---Complainant filed application under S. 176, Cr.P.C. for exhumation of dead body of deceased, which was dismissed by Trial Court, but revisional court ordered disinterment of dead body of deceased for re-examination on ground that cause of death was still unknown---Contention raised by accused was that more than a year had elapsed since burial of deceased, so exhumation and re-examination of dead body could not reveal any mark of alleged violence---Held, deceased had admittedly died unnaturally---Medical Officer, having been informed by police that it was case of poison intake, might have shown lethargy in minutely examining dead body and in process over-looked marks of violence on that---Forensic report had categorically concluded that no poison could be detected in liver and stomach---Forensic report had ruled out possibility of deceased having committed suicide---Medical Officer could not find any traces of pathology during process of autopsy, nor could she find any signs of malfunctioning of heart, which lead to strong probability that her death was not natural phenomenon---Inquest report under S. 176, Cr.P.C. had to be taken to ascertain cause of death of deceased---First examination remained unconcluded as cause of death remained unknown---Mystery as to cause of death of deceased had to resolve, which was possibly only if her dead body was allowed to be disinterred and re-examined---No time limit was fixed by law for disinterment of dead body to determine cause of death---Disinterment could be ordered even after years under attending circumstance of present case---Process of knowing cause of death could not be left in the middle, and the same must have been taken to its logical end---Requirements of S. 176, Cr.P.C. had not been fulfilled as cause of death was still unknown---Impugned order of revisional court was maintained---Constitutional petition was dismissed in circumstances.

Majid Karim Khokhar for Petitioners.

Raza-ul-Karim Butt, Assistant Advocate-General Punjab with Nadeem, S.I.

Ch. Ijaz Ahmad for Respondent No.3.

Date of hearing: 19th June, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---The petitioners, who make one family, feel aggrieved of order dated 14.2.2015, whereby learned Additional Sessions Judge, Pakpattan Sharif allowed a revision filed by Ajmal Hussain (respondent No.3) against the order (dated 27.9.2014) of learned Judicial Magistrate section 30, Pakpattan Sharif qua dismissal of an application under section 176, Cr.P.C. for exhumation of the dead body of Mst. Fauzia Kiran, buried in the graveyard of Baba Taj Din Sarkar, Chishtian (Bahawalnagar) and directed the learned Judicial Magistrate section 30 to make arrangement for the exhumation of dead body of the deceased-lady.

2. Precisely, the facts of the case are that Mst. Fauzia Kiran, a graduate, real sister of Ajmal Hussain (respondent No.3) had been married to Muhammad Hanif (petitioner No.1) about 19-1/2 months before she met the eventuality on 27.11.2012; she was shown to have taken poison and committed suicide, as told by her husband and other in-laws, to respondent Ajmal Hussain, who along with some other family members reached the house of his sister and found her violence-stricken dead body lying there; the police shifted the dead body of the ill-fated lady to DHQ hospital Pakpattan Sharif, where Dr.Samreen Faisal, WMO performed autopsy on it on 27.11.2012; she did not find any marks of violence all over the dead body but she took out all internal viscera therefrom for despatching them to the office of the Chemical Examiner for chemical analysis, so as to detect poison therein; the lady doctor deferred her remarks as to cause of death of the deceased-female till receipt of report from the Chemical Examiner; the dead body, after postmortem examination, was received by her parental family members through police and took it to Chishtian, where they buried it in the graveyard of Baba Taj Din Sarkar; Ajmal Hussain (respondent No.3) approached the local police for registration of a case against Muhammad Hanif, Muhammad Ramzan, Mst. Parveen Bibi and Mst. Naziran Bibi (petitioners herein), but failed; he moved a petition under section 22-A and 22-B, Cr.P.C. in this context before the ex-officio justice of peace, Pakpattan Sharif on 4.12.2012, which was disposed of on 4.1.2013 with a direction to the S.H.O., police station Malka Hans, to record statement of Ajmal Hussain under section 154, Cr.P.C. It is how, FIR No.13/13, dated 17.1.2013, under section 302/34, P.P.C. was registered at police station Malka Hans, district Pakpattan Sharif against the petitioners; thereafter, respondent Ajmal Hussain moved a petition under section 176, Cr.P.C. on 14.1.2013 for exhumation of the dead body of his deceased sister, with the allegation that the private-respondents, as mentioned therein, had tortured her to death besides, they did not participate in her last rituals, therefore, her dead body might be disinterred for another postmortem examination; this petition was dismissed as withdrawn on 2.2.2013; Ajmal Hussain (respondent No.3) moved another petition under section 176, Cr.P.C. for the same purpose on 30.4.2013, which was dismissed by the learned Judicial Magistrate section 30, Chishtian on 10.7.2013 with the observation that it had been moved prematurely as report of the Chemical Examiner was still awaited; Ajmal Hussain instituted a revision petition against the said order, which was dismissed as withdrawn on 26.11.2013 by the learned Additional Sessions Judge, Chishtian (Bahawalnagar) for the same reason as to non-availability of the Chemical Examiner's report; respondent Ajmal Hussain did not call it a day and he moved another petition of alike nature on 6.6.2014, which was dismissed through a lengthy order on 27.9.2014 by the learned Judicial Magistrate section 30, Pakpattan Sharif; Ajmal Hussain (respondent No.3) filed a revision petition against the said order, which was allowed by the learned Additional Sessions Judge, Pakpattan Sharif on 14.2.2015 at the cost of the magisterial order with the direction that the learned Magistrate section 30 should make arrangements for the exhumation of the dead body of Mst. Fauzia Kiran. Hence, the instant petition.

3. Learned counsel for the petitioners has contended that Mst. Fauzia Kiran had committed suicide by taking poison herself as she felt mentally depressed; the petitioners

made every possible effort to save Mst. Fauzia Kiran and they immediately shifted her to a hospital but she could not be saved due to toxicity of the poison; the woman medical officer did not find any marks of violence on the dead body when she performed autopsy on it, which fact may be verified from the postmortem examination thereof; the dead body was buried years before and it may not be possible to locate any mark of violence even if it was dug out from the grave; learned Magistrate section 30 passed a well-reasoned order, denying the exhumation of the dead body but learned Additional Sessions Judge, Pakpattan Sharif undid the said order on flimsy ground, which is not sustainable; the impugned order has been passed without any cogent reason or plausible argument, therefore, it may be set aside.

4. On the other hand, learned counsel appearing on behalf of respondent No.3, Ajmal Hussain has vociferously argued that the contention of the petitioners as to taking poison and killing herself by Mst. Fauzia Kiran has been negated by the Punjab Forensic Science Agency's report, which is in negative as to presence of poison/drug in the internal viscera of the deceased; the woman medical officer has failed so far to record any cause of death about the deceased-female; the contention of respondent No.3 that his sister had been tortured to death could only be verified by causing exhumation of her dead body and re-examining it posthumously; mere fact that the dead body was buried about 2-1/2 years ago could not be a reason for disallowing its disinterment and re-postmortem examination thereof; the cause of death is still shrouded in mystery, which should be brought to a daylight and it was only possible if the impugned order would remain effective.

5. Learned Assistant Advocate General Punjab looked convinced that exhumation and re-postmortem examination of dead body of the deceased-lady was the only answer to settle the dispute as to cause of her death.

6. After hearing the learned counsel for the parties and perusing the record, it is observed that Mst. Fauzia Kiran admittedly died unnaturally, as it has been contention of both the sides. The plain allegation levelled by respondent No.3 is that his sister Mst. Fauzia Kiran did not lead a pleasant and peaceful matrimonial life, as she often bore brunt of her in-law's unkindness/cruelty and she perished as a sequel thereof. It only showed that she died in an unnatural way. The stance of the petitioners, on the other hand, is that she died due to toxicity of the poison, she took herself, which again means that she did not die naturally. The postmortem examination report of the deceased-lady, prepared by Dr. Samreen Faisal on 27.11.2012 reveals that she had been informed by the police that it was a case of poison intake, so she most probably dealt with the matter, overwhelmingly bearing in mind that it might be a case of self-immolation. She might have shown some lethargy in minutely examining the dead body and in the process, overlooking marks of violence on it. She extracted or completely took, out some internal viscera of the deceased for transmitting them to the office of the Punjab Forensic Science Agency for chemical analysis, so as to detect poison therein and she kept the cause of death undeclared. The report of the Punjab Forensic Science Agency has categorically concluded that no drug of abuse or poison was detected in liver and stomach contents, which being in negative ruled out the possibility of the deceased-lady having committed suicide. The woman medical officer recorded her final opinion as to cause of death on 8.4.2015 as under:-

> "Vide PFSA Report No.16 (27.11.2012), Agency Case No.PFSA-2012-23705, no drug of Abuse/Poison is detected in liver and stomach contents in Item #01. Keeping in view the postmortem findings and report of chemical examiner, the cause of death remains unknown."

The consistent claim of the petitioners that Mst. Fauzia Kiran committed suicide has gone to winds with the receipt of negative PFSA's report. By lodging the said claim, they categorically

told Ajmal Hussain (respondent No.3) and others that Mst. Fauzia Kiran had died in an unnatural way and so is the claim of the other side, but with the difference that, according to them, she had been murdered by her in-laws. The woman medical officer could not find any traces of pathology during the process of autopsy nor she found any signs of mal-functioning of the heart, which led to a strong probability that her death was not a, natural phenomenon. In such a situation, the provisions of section 174, Cr.P.C. would come into play, as inquest has to be taken to ascertain the cause of the death of the deceased-lady. The first exercise of postmortem examination has gone unconcluded, as cause of death continuously remained unknown. The mystery hovering over the death of the ill-fated lady has to be resolved, which could only be made possible, if her dead body was allowed to be disinterred and re-examined by a team of doctors for evaluating the reasons, leading to her death.

7. Learned Additional Sessions Judge has rightly observed in the impugned order that no time limit has been fixed by the law for disinterment of a dead body to determine the cause of death. The requirement of section 174, Cr.P.C. has not been fulfilled, as cause of death of the deceased-lady, despite petitioners oft-repeated but abortive claim of committing suicide by her, has not been determined as yet. So exhumation of dead body in order to discover the cause of her death can be ordered, in the attending circumstances of the case, even after years. The process of knowing the cause of death cannot and should not be left in the middle. It must be taken to its logical end. Who knows that the disinterment of the dead body may conclusively establish the cause of death and it may help the hidden truth see the daylight.

8. For the discussion supra, it is held that the impugned order has been passed on cogent and plausible reasons, which needs not to be interfered with by this court. Dismissed. Parties are left to bear their own costs.

SL/M-206/L Petition dismissed.

2016 P Cr. L J 1504

[Lahore (Rawalpindi Bench)]

Before Shahid Hameed Dar and Syed Shahbaz Ali Rizvi, JJ

ANTI-NARCOTIC FORCE through Regional Director/Force Commander, Regional Directorate, ANF---Petitioner

Versus

RAZIA KAUSAR alias RANI and another---Respondents

Criminal Revision No. 279 of 2010, heard on 9th September, 2015.

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

----S. 439--- Revision--- Maintainability--- Limitation---No period of limitation had been prescribed under S. 439, Cr.P.C., nor any specific number of days, as in case of an appeal, had been fixed whereafter a revision would not formally be entertained---While no limitation had been prescribed for filing a criminal revision, the same had to be filed within reasonable time-

limit which would depend upon the circumstances of each case---In the present case, revision petition was filed more than sixteen months after the pronouncement of judgment and about a year after complainant had obtained attested copy of the same---Complainant was the most relevant person to worry about the outcome of the case right from the beginning but he hardly showed any intent and had he been vigilant enough and on his toes, he would have come to know about its result well in time---Accused's release from the prison, in the present case, was a years old matter which showed that complainant took the matter too lightly and did not bother to challenge the accused's sentence within reasonable time---Delay caused was massive and filing of present revision petition had certainly gone past the boundaries of reasonableness, in terms of time-limit, hence, the same was not maintainable.

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

----S. 48(1)---Limitation Act (IX of 1908), S.3 & Sched.---Appeal---Limitation---Scope---Appeal under S. 48(1) of Control of Narcotic Substances Act, 1997 against judgment of conviction/sentence of Trial Court could be filed within a certain time-limit as envisaged by the First Schedule and S. 3 of Limitation Act, 1908---Limitation provided by the statute for filing an appeal against conviction, recorded by Trial Court, may be extended and delay caused, if any, be condoned under the relevant provisions of the Control of Narcotic Substances Act, 1997 provided the attending circumstances of the case warranted so---In the present case, time consumed by the petitioner in fetching attested copy of impugned judgment in filing the appeal spanned over a year, for which the appellant had no plausible explanation to offer---Delay caused was too massive and unreasonable to permit conversion of revision petition into appeal.

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

----S. 48(1)---Revision---Scope---Control of Narcotic Substances Act, 1997 did not provide any room for filing a revision petition against an order or judgment of the Trial Court---Section 48(1) of Control of Narcotic Substances Act, 1997 clearly and unambiguously contemplated an appeal to High Court against an order passed by Special Court comprising a Sessions Judge or an Additional Sessions Judge or a Special Court created under Control of Narcotic Substances Act, 1997 and right of appeal so conferred would cater to every kind of appeal from the very kind of order passed by Trial Court dealing with such cases---Complainant, in the present case, had no other alternative but to file an appeal under S. 48(1) of Control of Narcotic Substances Act, 1997 against order of Trial Court and that too within the period of limitation---Revision was dismissed, accordingly.

The State through Mehmood Ahmad Butt, Deputy Director, Regional Directorate, Anti-Narcotic Force, Lahore v. Mst. Fazeelat Bibi PLD 2013 SC 361 rel.

Syed Intekhab Hussain, Special Prosecutor for ANF.

Ch. Mushtaq Hussain with Respondent No.2.

Respondent No.1 in person.

Date of hearing: 9th September, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---The petitioner feels that the respondents, Mst. Razia

Kausar alias Rani and Nisar Hussain had not been lawfully dealt with nor handed down the sentence, ought to have been awarded to them by the learned trial court/Judge, Special Court (CNS), Rawalpindi, albeit they pleaded guilty to the charge on 1.6.2009 for an offence under section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced to rigorous imprisonment for three years each and fine of Rs.50,000/- each or in default thereof to undergo simple imprisonment for two months each with benefit of section 382-B, Cr.P.C., during his trial in case FIR No.6/2007, dated 1.2.2007, under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at police station ANF Rawalpindi. The petitioner filed the titled revision petition seeking for an amendment to and enhancement of the sentence of the respondent-convicts in accordance with the law.

2. The facts germane to the institution of this petition are that Abid Zulfiqar, Assistant Director/Incharge, police station ANF Attock, while heading a contingent of fellow ANF officials was present at GT road, near Iqbal Shaheed Toll Plaza, Attock, at about 5.30 a.m. on 1.2.2007, when he received a spy information that Nisar Hussain and Mst. Razia Kausar, the drug¬pushers/smugglers would smuggle heavy quantity of contraband-charas from the KPK through Toyota Hiace No.K-2335/Peshawar into Punjab; on receipt of this information, they kept vigil on all the Toyota-branded Hiace vehicles coming from Peshawar; it was at about 6.00 a.m. when above-noted vehicle appeared on the scene, which was signalled to stop and it halted there; a couple, occupying front seat of the Hiace had a black-colour travel-bag in their laps; they jointly claimed the ownership thereof; on asking of the men-in-uniform, both of them alighted the vehicle along with their bag; the woman introduced herself as Mst. Razia Kausar alias Rani (respondent No.1) and the male, as Nisar Hussain (respondent No.2); their travel-bag was checked and found packed with thirteen (13) packets of contraband-charas, each packet weighed 1250 grams, aggregate whereof read as 16.250 kilograms; the complainant-AD segregated ten grams each from every packet, rendered them into a sealed parcel for transmitting to the office of Chemical Examiner for its chemical analysis; rest of the bulk was also made into a sealed parcel; their personal search yielded recovery of cash and some other articles, which were also seized by him through separate memos. of recovery. The complaint (fard-bayan) prepared by the complainant-AD led to registration of case FIR No.6/2007 (supra). On completion of investigation, challan under section 173, Cr.P.C. was submitted against respondents Nos.1 and 2 before the trial court, which took cognizance of the matter and indicted them accordingly, to which they pleaded not guilty and claimed a trial; midway through their trial, when prosecution evidence was in progress, the respondents-accused professed their guilt on 1.6.2009, which persuaded the learned trial court to convict and sentence both of them in mentioned terms, vide the impugned judgment, the same day. Hence, the instant petition.

3. Learned counsel for respondent No.2 while referring to Mst. Fazeelat Bibi's case (PLD 2013 SC 361) has straightaway submitted that the instant revision petition is not maintainable as none of the provisions of the Control of Narcotic Substances Act, 1997 permitted institution thereof; the petitioner-ANF might have filed an appeal against the impugned judgment under section 48(1) of the said Act and filing of criminal revision by it was misconceived, therefore, liable to be dismissed.

4. Learned Special Prosecutor for ANF/petitioner did not look much enthusiastic about the fate of this revision petition and he made the submission that it might be converted into an appeal and allowed as such, for, the impugned judgment was patently illegal, having been made by the learned trial court in gross violation of the requirement of section 9(c) of the Control of Narcotic Substances Act, 1997, which is clamped with the proviso that if quantity of the contraband exceeded ten kilograms, the punishment should not be less than imprisonment for life.

5. After hearing learned counsel for the parties and perusing the record, it is observed that impugned judgment appears to have been passed in a reckless manner, without caring for the law on the subject, which reads as under:-

> "9. Punishment for contravention of sections 6, 7 and 8. - Whoever contravenes the provisions of section 6, 7 or 8 shall be punishable with -
>
> (a) imprisonment which may extend to two years, or with fine, or with both, if the quantity of the narcotic drug, psychotropic substance or controlled substance is one hundred grams or less;
>
> (b) imprisonment which may extend to seven years and shall also be liable to fine, if the quantity of the narcotic drug, psychotropic substance or controlled substance exceeds one hundred grams but does not exceed one kilogram;
>
> (c) death or imprisonment for life, or imprisonment for a term which may extend to fourteen years and shall also be liable to fine which may be upto one million rupees, if the quantity of the narcotic drug, psychotropic substance or controlled substance exceeds the limits specified in clause (b).
>
> Provided that if quantity exceeds ten kilogram the punishment shall not be less than imprisonment for life."

The afore-noted proviso entails the restriction of awarding imprisonment for life to an accused, in case he possessed a contraband-substance exceeding ten kilograms. The quantity of the contraband recovered herein certainly exceeds ten kilograms, being 16.250 kilograms. The impugned judgment being inherently defective looks fallible, but for the poor and deplorable show by the prosecution, as they filed the instant revision petition more than sixteen months after the pronouncement of the impugned judgment and about a year after they obtained attested copy of it on 28.10.2009 or 28.11.2009, the relevant dates of completion of copy of the judgment and that of its delivery to the petitioner, having been badly interpolated to read 28.10.2009 or 28.11.2009. It showed that the prosecution awoke from a deep slumber to file this petition, probably for silencing the critics, who could none else be than their high-ups. Could delay caused in filing this petition be deemed fatal to it, is a question which might not necessarily be answered in the affirmative, as the general rule of practice is that no period of limitation has been prescribed under section 439, Cr.P.C. nor any specific number of days as in case of an appeal, has been fixed whereafter a revision will not formally be entertained. It may, therefore, not be logical to take out few from the general rule of practice relating to limitation unless there was some exceptional circumstances governing a particular case. Of course, no limitation, as mentioned above, has been prescribed for filing a criminal revision but it has to be within the reasonable time-limit, which depends upon the circumstances of each case. Herein, the petitioner was obviously the most relevant person to worry about the outcome of the case right from the beginning but he hardly showed any. Had he been vigilant enough and on his toes, he would have come to know about its result well in time. He appeared to have slept over the matter and days ticked away one by one only due to his lethargic attitude. The respondents' release from the prison is a year's old matter now. All this shows that the petitioner took the matter too lightly and did not bother to challenge the respondents sentence within reasonable time. The delay caused is massive and the petitioner's learned counsel remained evasive, as to the said query of the court. The filing of this petition has certainly gone past the boundaries of reasonableness, in terms of time-limit, hence, its maintainability is seriously under clouds.

6. It was the main argument of the learned counsel for respondents Nos.1 and 2 that the trial court's proceedings, as conducted by it on 1.6.2009 could not be challenged through a revision petition, which has not been meticulously met with by the petitioner's side except for submitting that the revision so filed might be converted into an appeal, as envisaged by section 48(1) of the Act (ibid). There might have been a stage in taking to the said recourse, had the petitioner not shown sluggishness of the worst degree as elaborated above. An appeal under section 48(1) of the Act (ibid) against the judgment of conviction/ sentence of the learned trial court can be filed within a certain time-limit, as envisaged by THE FIRST SCHEDULE (section 3), Second Division-Appeals, of the Limitation Act, 1908. The limitation provided by the statute for filing an appeal against conviction, recorded by the trial court, may be extended and the delay caused, if any, be condoned under the relevant provisions of the Act (ibid), provided the attending circumstances of the case warranted so. Here, in the instant case, the time consumed by the petitioner in fetching attested copy of the impugned judgment and that exhausted in filing the titled-petition spans over a year, wherefor they have no plausible explanation to offer. The delay caused is too massive and unreasonable to permit conversion of this petition into an appeal. The contention of learned counsel for the petitioner in this regard is nothing but a childish wish, hardly finding any support from the law itself.

7. The statute, Control of Narcotic Substances Act, 1997, does provide any room for filing a revision petition against an order or judgment of the trial court, may it be that of a sessions court or a special court dealing with the cases thereunder. The Hon'ble Supreme Court of Pakistan has laid down in The State through Mehmood Ahmad Butt, Deputy Director, Regional Directorate, Anti-Narcotic Force, Lahore v. Mst. Fazeelat Bibi (PLD 2013 SC 361) that the provisions of section 48(1) of the Control of Narcotic Substances Act, 1997 clearly and unambiguously contemplated an appeal to a high court against an order passed by a special court comprising a sessions judge or an additional sessions judge or a special court created under the said statute and the right of appeal so conferred would cater to every kind of appeal from every kind of order passed by the trial court, dealing with such cases. The view taken by the apex court is reproduced hereunder:-

> ".....We have found such an impression entertained by the learned Division Bench of the Lahore High Court, Lahore to be erroneous because the provisions of section 47 of the Control of Narcotic Substances Act, 1997 have made the Code of Criminal Procedure applicable "to trials and appeals before a Special Court under this Act" which shows that only the procedure provided in the Code of Criminal Procedure is applicable to trials and appeals provided for under the Act of 1997 and section 47 of the Act of 1997 has not transposed any remedy of appeal or revision from the Code of Criminal Procedure to the Act of 1997. It ought to have been appreciated by the learned Division Bench of the Lahore High Court, Lahore that a remedy of an appeal, revision or review is a creation of a statute and applicability of the procedure prescribed in the Code of Criminal Procedure to proceedings under any other special statute does not ipso facto make the remedies provided in the Code of Criminal Procedure applicable to the other statute. The Control of Narcotic Substances Act, 1997 is a special law containing all the relevant remedies catering for different situations and section 47 of the said Act has only made the procedure contained in the Code of Criminal Procedure applicable to the proceedings under the Act of 1997.
>
> 4. The provisions of section 48(1) of the Control of Narcotic Substances Act, 1997 clearly and unambiguously contemplate an appeal to a High Court against an order passed by a Special Court comprising of a Sessions Judge or an Additional Sessions Judge and in the case in hand the learned Judge, Special Court, CNS, Lahore trying the respondent was a Sessions Judge. 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."

The petitioner had no other alternative but to file an appeal under section 48(1) of the Act (ibid) against the impugned judgment and that too within the period of limitation. By contemptuously wasting the time, the petitioner has let all of his chances and probabilities of succeeding herein, run down the drain. The impugned judgment, which otherwise might not have held the ground, would stay there, only due to ridiculous approach and queer understanding of the relevant law' by the petitioner, who has to pay the price for being so lazy, apathetic and lackadaisical throughout. And the price is, the instant petition. Dismissed.

RR/A-149/L Petition dismissed.

2016 P Cr. L J 1602

[Lahore]

Before Shahid Hameed Dar, J

MUSTAFA alias ARSHAD---Petitioner

Versus

The STATE and others---Respondents

Criminal Misc. No. 4524-B of 2015, decided on 23rd June, 2015.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss. 395 & 412---Dacoity, dishonestly receiving stolen property in commission of dacoity---Bail, grant of---Further inquiry---Co-accused implicated on basis of extra-judicial confession---Accused were alleged to have committed dacoity at house of complainant---Mere heinousness of crime was not sufficient while dealing with question as to grant of bail---No identification parade had been conducted to identify accused during investigation---Statement of complainant under S. 161, Cr.P.C. had been recorded after one year of alleged occurrence---Statement of accused, whereby they had implicated seven other accused alleging them all to have made joint confessional statement before them, was not plausible, as no details as to when and where said accused had admitted their guilt had been provided---Extra-judicial confession was weak type of evidence which might be manoeuvred by prosecution in a case where direct connecting evidence could not be produced---Investigating Officer, having recovered pistol and cash, had not prepared memo. of recovery---Accused had been behind bars for more than one year and was no more

required by police---Sufficient reasons existed to believe that further inquiry was required into guilt of accused--- Bail application was accepted accordingly.

(b) Criminal trial---

----Extra-judicial confession--- Evidentiary value--- Extra-judicial confession is weak type of evidence which may be manoeuvred by prosecution in a case where direct connecting evidence cannot be produced.

Malik Muhammad Riaz for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor-General Punjab with Umer Daraz, ASI for the State.

Mushtaq Ahmad Khan Bhutta for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The complainant, Muhammad Sher has alleged in the FIR that eleven (11) unknown armed persons clambered over the outer wall to enter his house at about mid-night, between 15/16.12.2012, rendered all the inmates hostages, broke open locks of the boxes to seize gold- ornaments, cash, unstitched cloth, wrist watches etc., confined all of them in a room and slipped away with the looted property; the electric bulbs were lit at the time of the occurrence, so he and his family members could identify the accused if they would see them again.

2. The complainant rendered a supplementary statement on 01.12.2013 whereby he quoted names of Falak Sher and Haji Sher Muhammad to nominate seven persons, including the petitioner as accused of this case. Falak Sher and Haji Sher Muhammad joined investigation the same day (01.12.2013) whereby they contended that seven accused, Muhammad Aslam, Qasim alias Zulfiqar, Arshad known as Ghulam Mustafa (petitioner), Shahzeb, Ghulam Shabbir, Aamir and Umar admitted their guilt before them, one by one, as to having committed dacoity in the house of Muhammad Sher (complainant). The petitioner was arrested on 28.01.2014 and he led to the recovery of pistol .30 bore on 09.02.2014 and Rs.10,000/- cash on 10.02.2014.

3. Learned counsel for the petitioner has contended that it is a case of no evidence against the petitioner and he has been sent to jail only to satisfy whimsical grudge of the complainant. Further contended that evidence of extra judicial confession is the weakest type of evidence which has been fabricated by the prosecution to fill-in the gaps of its case. Lastly urged that the scarcity of incriminating evidence brings the petitioner's case within the ambit of further inquiry as contemplated under section 497(2), Cr.P.C.

4. In contrary to it, the learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant has opposed this petition by contending in unison that the petitioner is a dacoit who in cahoots of his co-accused committed a heinous crime and seized precious articles from the house of the complainant, value whereof ran into lacs of rupees. Lastly urged that the prosecution case brimmed with connecting evidence against the petitioner, therefore, his plea for bail may be turned down.

5. After hearing the learned counsel for the parties and perusing the record, it is observed that the story of FIR looks hair-raising, so far as daredevilry of the accused and

haplessness of the complainant is concerned. The crime was committed by eleven (11) unknown men who all were armed with rifles and guns. They allegedly seized almost every costly item available at the residence of the complainant, after they confined all of them in a room. Arms of the complainant and his family members were tied on their back. It all makes it a heinous crime but it does not mean that mere heinousness may be held sufficient to deal with subtle question of grant of bail to the accused-petitioner. The material collected by the investigating officer during investigation shall be relevant in this regard.

6. The complainant has categorically alleged in the FIR that he and his companions could identify the unknown accused, if he would ever see them again. He contended so, probably bearing in mind, that they light be asked one day by the Investigating Officer to identify them, but it did not happen at all, as Investigating Officer showed customary laziness and ineptitude, when investigating this case. He recorded supplementary statement of the complainant about one year after the alleged occurrence without ever perceiving that such an effort could hardly prove beneficial to the prosecution case in the long run.

7. The complainant referred to names of Falak Sher and Haji Sher Muhammad, when he introduced names of seven persons, including that of the petitioner as accused of this case, whereafter both the witnesses, named as above, were recorded under section 161, Cr.P.C. the same day. Their statements do not impress, as they withheld some of the crucial details about sudden appearance of seven accused before them to admit their guilt of having committed dacoity at the house of Muhammad Sher (complainant). They did not disclose as to when and where the 'group of seven' appeared before them to admit their guilt. It looks as if a joint extra judicial confession of the accused had been brought on the record by the Investigating Officer through statements of the said witnesses. It has been held on so many occasions that extra judicial confession of an accused is a weak type of evidence which may be manoeuvred by the prosecution in any case where direct connecting evidence does not come their way. In case, it is a joint extra judicial confession, the lesser commented upon, better might it be for the prosecution.

8. The petitioner was arrested on 28.01.2014 and he allegedly led to the recovery of pistol on 09.02.2014 and Rs.10,000/- cash on 12.02.2014, regarding which no memo of identification has been prepared by the Investigating Officer. The efficacy of this particular piece of evidence may better be evaluated by the learned trial Court after recording evidence of the parties at trial. The petitioner has been languishing in jail since 28.01.2014 and he is no more needed by the police for any recovery etc. There exist sufficient reasons to believe that his case called for further probe into his guilt within the scope of section 497(2), Cr.P.C. Therefore, this application is allowed and he is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs.2,00,000/- with two sureties each in the like amount to the satisfaction of the learned trial court.

SL/M-204/L Bail granted.

2016 P Cr. L J 1783

[Lahore]

Before Shahid Hameed Dar, J

ASIF MUHAMMAD SULEHRI---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE SIALKOT and 6 others---Respondents

Writ Petition No. 17231 of 2011, heard on 10th December, 2014.

Criminal Procedure Code (V of 1898)---

----Ss. 154, 156, 173, 435 & 439-A---Penal Code (XLV of 1860), Ss. 420, 468 & 471---Cheating and dishonestly inducing delivery of property, forgery, using as genuine a forged document---Administrative order of Magistrate---Revision---Scope---Investigating Officer, on finalization of investigation, found case filed by the complainant false and submitted a cancellation report before Area Magistrate, who agreed to report of Investigating Officer---Complainant, being aggrieved of said order filed revision petition under S.439-A, Cr.P.C., before Court of Session, which having been allowed by Additional Sessions Judge vide impugned order, complainant had filed constitutional petition---Order regarding discharge of an accused or cancellation of a case pending investigation etc., was not amenable to revision under Ss.435 & 439-A, Cr.P.C., for the reason that said order would necessarily constitute an administrative order and not judicial order---Judicial order and not the administrative order was open to revision---Area Magistrate, would be deemed to have taken cognizance of an offence as a court of law and perform as a judicial officer, when he would formulate an opinion through application of mind, as to summoning of an accused under S.204, Cr.P.C.---Earlier to the stage of submission of challan under S.173, Cr.P.C., orders passed by a Magistrate, pending investigation of a case, had little to do the exercise of judicial powers vested in him under the law---Impugned order of Additional Sessions Judge was set aside, as one without jurisdiction, in circumstances.

Bahadur and another v. The State and another PLD 1985 SC 62; Muhammad Sharif and 8 others v. The State and another 1997 SCMR 304; Wazir v. The State PLD 1962 Lah. 405; Brahm Dev v. Emperor AIR 1938 Lahore 469 and Ramsarup v. State AIR 1951 Raj. 146 ref.

Ch. M. S. Shad for Petitioner.

Ch. Muhammad Shabbir Gujjar, Assistant Advocate General Punjab for the State.

Imran Abbas Khawaja for Respondent No.4.

Muhammad Afzal Butt for Respondents Nos. 3 to 6.

Date of hearing: 10th December, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.---Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, the petitioner calls in question the

legality of order dated 19.7.2011 passed by the learned Additional Sessions Judge, Sialkot, whereby a revision petition filed by Khawaja Muhammad Hussain (respondent No.3) was allowed at the cost of order dated 26.10.2010 passed by the learned Magistrate first class, Sialkot.

2. The facts relevant to the instant petition are that Khawaja Muhammad Hussain (respondent No.3) got registered case-FIR No.171, dated 4.4.2009, for offences under sections 420, 468, 471, P.P.C. at Police Station Uggoki, district Sialkot against Asif Muhammad Sulehri (petitioner); the investigating officer on finalization of the investigation found the case false and submitted a cancellation report before the learned area Magistrate, Sialkot, who vide order dated 26.10.2010 agreed to it; being aggrieved of the said order, the complainant (respondent No.3) filed a revision petition under section 439-A, Cr.P.C. before the court of sessions, which was allowed by the learned Additional Sessions Judge, Sialkot, vide order dated 19.7.2011. Hence, the instant petition.

3. The main argument pressed into service by the learned counsel for the petitioner was that the magisterial order agreeing or disagreeing with the report submitted under section 173, Cr.P.C. by the investigating officer is an administrative order and not a judicial one, therefore, the revision petition filed by respondent No.3 was not competent. Reliance in this regard has been placed on Bahadur and another v. The State and another (PLD 1985 SC 62) and Muhammad Sharif and 8 others v. The State and another (1997 SCMR 304).

4. On the contrary, learned counsel for respondents Nos.3 to 6 supported the impugned order, passed by the learned Additional Sessions Judge, Sialkot and submitted that a magistrate while cancelling a criminal case, acts on the report of the police under section 173, Cr.P.C., is required to act judicially, therefore, order passed by him as to cancellation of the case would be amenable to revisional jurisdiction under sections 435 to 439, Cr.P.C.; the impugned order may be considered sustainable by all means and titled petition filed by the petitioner may be dismissed.

5. After hearing learned counsel for the parties and perusing the record, let us see whether the impugned order of magisterial jurisdiction discharging the petitioner and cancelling the case is tantamount to an abuse of the process of the law so as to warrant interference, through revisional jurisdiction, exercised by the learned Additional Sessions Judge, Sialkot, on a revision petition filed by respondent No.3.

6. The brief facts of the case as contained in FIR No.171/2009 (supra) got lodged by Khawaja Muhammad Hussain (respondent No.3) were that he joined by Asif Muhammad Sulehri (petitioner), Dr. Muhammad Arif Malik (respondent No.5), Dr. Zahid Ghani Dar (respondent No.4) and Sajjad Ghani Dar (respondent No.6) set up a Firm in partnership inter se on 18.11.2004 at Sialkot to manufacture and export abroad the sport-wares/accessories (martial-arts); the capital was provided by respondents Nos.3 to 6 and Asif Muhammad Sulehri (petitioner) was inducted as a partner merely on the basis of his technical expertise with 20% share,; the petitioner disbursed some profit amongst partners of the Firm till May 2007; respondent No.3 asked the petitioner for rendition of accounts at the end of year 2007, but he put off the matter on various pretexts and finally informed them that the Firm stood dissolved as all the partners with their mutual consent had sold it to him (petitioner) on the strength of a 'dissolution deed'; the aforesaid deed had been forged by the petitioner as ' Firm' could not be dissolved or rendered dysfunctional, without the consent of respondent No.3 nor could it be alienated to any one; he (respondent No.3) learnt that an agreement-deed and some other documents had been forged by the accused, Asif Muhammad Sulehri (petitioner), who kept all original documents pertaining to the partnership and establishment of Firm in his custody from day one: he (respondent No.3) made the request in his written application

that the documents forged be sent to a handwriting-expert so as to verify his signatures. The petitioner too moved an application against respondent No.3, complainant of the FIR, which led to recording of a cross-case against him during investigation and it was still pending adjudication, when Investigating Officer of the case prepared a cancellation report under section 173, Cr.P.C. qua the FIR case, which was concurred with by the learned area magistrate on 26.10.2010. The operative part of the order is reproduced hereunder:-

> "Perusal of the record shows that there is no dispute with regard to the factum of partnership. Controversial point was that whether dissolution deed was a fake documents or not as according to plaintiff. He and other partners never signed the same. But on the other hand, report of Forensic Science Laboratory Lahore belies the stance of the complainant as according to the said report, signatures present on the dissolution deed was similar to the signature present on the partner-ship deed. In view of the above discussion, I agree with the cancellation report and cancellation report in hand is consigned to the record room after its due completion."

7. Khawaja Muhammad Hussain (respondent No.3) being aggrieved of the said order of the learned area magistrate invoked the revisional jurisdiction of the sessions court concerned and succeeded in having the order challenged undone on acceptance of his revision-petition by the learned Additional Sessions Judge, Sialkot vide order dated 19.7.2011, impugned herein. The learned Additional Sessions Judge did not touch the subtle point in the impugned order as to maintainability of the revision-petition filed before him and he allowed it, as per para 9 of the order in following words:-

> "The proceedings against I.O. and SHO have been recommended by Mr. Nadeem Gulzar learned ASJ, Sialkot. Clearly the Regional Investigation Branch held that in FIR case Asif Muhammad Sulehri and in cross-version Doctor Zahid Ghani Dar are guilty but by suppressing the facts the local police submitted a cancellation report to the learned Magistrate. In these circumstances, the order passed by learned Magistrate is not sustainable in the eyes of law, therefore, this revision petition is accepted and order passed by learned Magistrate is set aside and the local police is directed to act according to law keeping in view the findings of Regional Investigation Branch. Moreover, Doctor Zahid Ghani Dar also filed an application under sections 22-A/22-B, Cr.P.C. which has been decided today and it has been directed to the police that his petition under sections 22-A/22-B, Cr.P.C. be treated as his cross-version and this cross-version be also investigated."

Learned Additional Sessions Judge, though not dealt with the question of maintainability of the revision-petition, yet, allowed it by certainly bearing in mind that order passed by the learned magistrate was revisable, which notion, however was not well conceived, as in discharging the accused and cancelling a registered criminal case on a report under section 173, Cr.P.C., a magistrate does not act as court and order passed by him is administrative not amenable to revision under any of the provisions of sections 435 to 439, Cr.P.C., the following judgments may be referable in this context:-

i) Bahadur and another v. The State and another (PLD 1985 SC 62);

ii) Muhammad Sharif and 8 others v. The State and another (1997 SCMR 304);

iii) Wazir v. The State (PLD 1962 Lahore 405);

iv) Brahm Dev v. Emperor (AIR 1938 Lahore 469); and

v) Ramsarup v. State (AIR 1951 Raj. 146).

It has been held in Muhammad Sharif's case (supra) that a revision-petition filed against an order of discharge passed by a magistrate is not competent, as he, while concurring with a report submitted by the police under section 173, Cr.P.C. does not function as a criminal court and the order so passed by him is not amenable to the revisional jurisdiction under sections 435 to 439, Cr.P.C. It has been held by the Hon'ble Supreme Court in Bahadur's case (supra) that a magistrate stood entrusted with diverse duties under the Code of Criminal Procedure, 1898, and in discharging the same, he does not always function as a court. The relevant paragraph at page 67 is reproduced hereunder:-

> "The revisional powers under the Criminal Procedure Code (sections 435, 436, 439 and 439-A, Cr.P.C.) are exercisable only in respect of "any proceeding" conducted by "inferior", "criminal Court". The order cancelling a case qualifies as proceeding, equally so the Magistrate passing the order as inferior, in relation to Court of Session and the High Court. The only question requiring determination is whether the Magistrate in cancelling the case acts as a criminal Court. Criminal Procedure Code contains no definition of Court nor does the Penal Code. In section 20 of the Penal Code "Court of Justice" is defined as "a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially". This definition is of avail for the purposes of Criminal Procedure Code as subsection (2) of section 4 thereof provides "all words and expressions used herein and defined in the Pakistan Penal Code, and not hereinbefore defined shall be deemed to have the meanings respectively attributed to them by that Code". The High Court has taken the view, and we think rightly so, 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, conduct 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."

While dealing with the request of the police under section 173, Cr.P.C. about cancelling a criminal case, a magistrate is required to act judicially in that he has to act fairly, justly and honestly, a duty common to the exercise of all State powers. The judgment, PLD 1985 SC 62 (supra), deals with the subject, under discussion in the concluding paragraph thereof:-

> "Though a Magistrate in cancelling a registered criminal case is required to act judicially in that he has to act fairly, justly and honestly, a duty common to the exercise of all State powers, there is no lis before him, there is no duty to hear the parties, there is no decision given, no finality or irrevocability attaching to the order. The party is left free to institute a complaint on the same facts, and the same Magistrate does not even after passing such an order render himself functus officio. On the contrary he is quite competent to entertain and deal with such a complaint on material presented to him. These peculiarities establish beyond any doubt that in so concurring with a report submitted under section 173, Cr.P.C. he does not function as a criminal Court. For that reason his order is not amenable to revisional jurisdiction under sections 435 to 439, Cr.P.C."

A non-judicial act, order or decision is potentially open to attack for any material error or law or fact in either direct or collateral proceedings and it cannot reconstitute res-judicata. It is sometimes considered that a legislative or administrative act may always be rescinded by the body making it, whereas a valid judicial determination cannot save on very limited

grounds. A judicial decision made within the jurisdiction is binding and conclusive insofar as it cannot be impeached in collateral proceedings and it cannot in general be rescinded by the tribunal itself, as expressed in "DeSmith Administrative Laws 3rd Edition". It may, however remain a practical difficulty to find out as to at which point the administrative phase ends and judicial phase begins. The subtle line dividing the two remains unsurpassable inter se when it comes to making an executive order, as a persona-designata or a judicial order as a court. Therefore, it does not necessarily envisage that an executive order is prone to revisional jurisdiction of a court of law, whereas it is certainly so when it comes to a judicial order, categorized latterly as above.

An order regarding discharge of an accused or cancellation of a case pending investigation etc. is not amenable to revision under sections 435 and 439-A, Cr.P.C. for the reason that the said order would necessarily constitute an administrative order. There is no cavil to the proposition that a judicial order is open to revision but not an administrative order. A learned area magistrate shall be deemed to have taken cognizance of an offence as a court of law and perform as a judicial officer when he would formulate an opinion through application of mind, as to summoning of an accused under section 204, Cr.P.C. Earlier to the stage of submission of challan under section 173, Cr.P.C., the orders made by a magistrate, pending investigation of a case, have little to do with the exercise of judicial powers, vested in him under the law.

8. The submissions made by the learned counsel for the petitioner, as to the impugned order having been passed gratuitously and injudiciously by the learned Additional Sessions Judge, Sialkot, in a revision petition filed by respondent No.3 against aforesaid order of the learned magistrate, are convincingly weighty, and they easily overwhelm the contentions of the learned counsel appearing on behalf of respondents Nos.3 to 6. This petition, therefore, is allowed and impugned order of the learned Additional Sessions Judge is set aside as one without jurisdiction, with no order as to the cost.

HBT/A-21/L Petition allowed.

2016 P Cr. L J 1882

[Lahore]

Before Shahid Hameed Dar and Muhammad Qasim Khan, JJ

JAMSHED KHAN---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 245 and Capital Sentence Reference No. 11-N of 2010, heard on 22nd May, 2015.

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

----S. 9(c)---Possessing and trafficking of narcotics---Appreciation of evidence---Sentence, reduction in---Veracity of the allegation against accused was not doubtful, as counsel of

accused, had frankly conceded that, conviction had been correctly made by Trial Court; and there was nothing wrong with the same---Prosecution had successfully proved the possession of narcotics substance from accused---Conviction of accused was sustained---Prosecution had not agitated at any stage that accused was a previous convict; or he bore a nasty character, spotted with ugly allegation alike---Enigmatic abandoning of co-passengers of accused by the prosecution, was a crucial circumstance, which needed to be looked at with doubt, as to the award of capital punishment to accused---Accused's maiden involvement in such like offence could be considered a mitigating circumstance with regard to quantum of sentence---Extreme penalty of death would be too harsh to be inflicted on accused---Accused, did not have any previous criminal antecedent, so had to be believed the first offender---Death sentence of accused, was converted into imprisonment for life, in circumstances.

Muhammad Tariq's case 2009 SCMR 1220 and Gul Badshah v. The State 2011 SCMR 984 ref.

Ch. Dost Muhammad Kahoot for Appellant.

Dr. Muhammad Anwar Khan Gondal Additional Prosecutor General Punjab for the State.

Date of hearing: 20th May, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---This judgment shall dispose of Crl. A. No.245 of 2010 (Jamshed Khan v. The State) having been filed against judgment dated 25.01.2010, whereby learned Additional Sessions Judge Gujranwala held the appellant guilty under section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced him to death with fine of Rs.1 million, in default whereof, to serve six months in jail. The CSR No.11-N-2010, as submitted by the learned trial court under section 374, Cr.P.C. for confirmation of death sentence shall also be dealt with herein.

2. The prosecution story as given in the FIR (Exh.PA) by Muhammad Afzal Inspector/SHO (PW-4) is that he along with seven fellow-police-officials was present at Khan Town on 27.05.2007 when he received a spy information that a vehicle, Toyota diesel Land-Cruiser, bearing registration No.GB-672/IVT, loaded with huge quantity of charas, was heading towards Lahore from Gujranwala on the GT road; on receipt of this information, he barricaded the GT road at the point of Gul Gunian; a little while thereafter, the fast-moving vehicle appeared on the scene with three unknown persons seated therein; it was signalled to stop but it sped past them and stopped at a considerable distance from the barricade; the police used their official vehicle to get side by side it; one of the passengers, who told his name Jamshed Ali, resisted his arrest and received head injury in the process; the suspected vehicle was combed, which led to recovery of 25 nylon bags, packed with contraband charas, which weighed 18 maunds and 25 kilograms, when put on the scale; one pao (250 grams) charas each from every tora was separated and rendered into sealed parcels for chemical analysis; the samples and rest of the bulk were seized by the police through memo of recovery; the above said vehicle was also taken into possession by them under section 550 Cr.P.C. The complainant scribed complaint (Exh.PC) and dispatched it to police station Saddar Kamoki (Gujranwala) through Farooq Haider 1116/C for registration of case against the accused; Abdul Wahid 1042/HC (PW-3) drew up formal FIR (Exh.PC/1) No.271/2007 at 4.15 p.m., the same day for offences under sections 6, 9(c) of the Control of Narcotic Substances Act, 1997 read with section 156, the Customs Act, 1969 (deleted during investigation on 02.06.2007).

3. After necessary investigation, the police submitted report under section 173, Cr.P.C. before the learned trial court for trial of the accused-appellant in accordance with the law.

4. On indictment, the appellant pleaded not guilty and claimed a trial. The prosecution produced seven witnesses, Maqbool Ahmad 1878/HC (P.W.1), Iftikhar Ahmad 1633/MHC (P.W.2), Abdul Wahid 1042/HC (P.W.3), Muhammad Afzal Inspector/SHO (complainant/ P.W.4), Sajid Ali 2850/C (P.W.5), Muhammad Anjum Naveed, SJM (P.W.6) and Raza Rauf, Inspector/IO (P.W.7) to prove the charge against the appellant. The public prosecutor (Deputy District Public Prosecutor) tendered report of the chemical examiner (Exh.PG) in evidence and closed the prosecution case.

5. Thereafter, the accused/appellant was examined under section 342, Cr.P.C., whereby he professed his absolute innocence in the matter and denied all the allegations levelled against him, as false. In reply to the question, why this case against him and why the PWs had deposed against him, he contended as under:-

> "This case was registered against me due to mala fide of police. I was employee in the hotel namely "Kabal Khan" as waiter nearby P.S. Sadar Kamoke, Gujranwala and police officials often visit the hotel. One week prior to the registration of this case, the complainant of this case Muhammad Afzal SI came there with a female, I forbade them. Due to this, he turned against me and threatened me that he will teach me a lesson for this interference. So he falsely involved me in this case."

He did not lead any evidence in defence nor he deposed under section 340(2), Cr.P.C. Learned trial court held the appellant guilty of the charge and sentenced him accordingly, as noted in the opening paragraph hereof.

6. Learned counsel for the appellant has submitted that case against the appellant is false and it is a product of mala fides of the police; no independent evidence has been led by the prosecution to prove the charge against the appellant, who did not possess conscious knowledge about the narcotic substance having been packed in the loaded bags; the essential ingredient of the crime, the mens rea is absent; the narcotics substance was not recovered at the instance of the appellant which fact is evident from the prosecution case itself; the story of FIR is ambiguous as well as dubious as it did not tell as to what happened with the co-passengers of the appellant; the impugned judgment suffers from many a fallacies which may be annulled as a consequence thereof.

7. Learned Additional Prosecutor General Punjab defended the impugned judgment and contended that the appellant had exclusive knowledge as to placement of charas-filled bags in the vehicle, he boarded; a huge quantity of narcotic-substance i.e. 18 maunds and 25 kilograms charas was recovered from the Land-Cruiser, wherein the appellant and his co-accused were found seated by the police; the presumption under section 29 of the Control of Narcotic Substances Act 1997 would arise against the appellant as he failed to explain the recovery of the contraband or even about the truck; the prosecution had ably discharged the initial burden to prove the case beyond reasonable doubt, therefore, appeal in hand may be dismissed.

8. Learned Additional Prosecutor General Punjab had hardly exhausted himself, when learned counsel for the appellant made a surprising move and submitted that he honestly believed the impugned conviction to have been correctly made by the trial court but he humbly felt that sentence of death was too harsh to be awarded to the appellant as his past was blotless. He prayed that the sentence of death may be converted into imprisonment for life, which prayer was resisted in a lukewarm manner by the learned Additional Prosecutor

General Punjab.

9. We have heard the learned counsel for the parties, gone minutely through the evidence and given anxious consideration to the submissions made at the bar.

10. There hardly remains any doubt as to veracity of the allegation against the appellant as learned counsel representing him frankly conceded that the conviction had been correctly made by the learned trial court and there was nothing wrong with it. It can safely be concluded that the prosecution has successfully proved the possession of the narcotic-substance from the appellant, who in disproof of the presumption under section 29 of the Act did not appear under section 340(2), Cr.P.C., nor he produced any witness in defence. The allegation that he consciously possessed afore-noted massive quantity of the contraband, stood impeccably proven beyond reasonable doubt, hence prosecution has every right to ask for sustaining the conviction. Sustained accordingly. The appeal filed by the appellant is therefore dismissed.

11. Nevertheless, coming to the quantum of sentence of death to the appellant under section 9(c) of the Control of Narcotic Substances Act, 1997, it is observed that the prosecution did not agitate at any stage that the appellant was a previous convict or he bore a nasty character, spotted with ugly allegations like. The mystery hovering over the prosecution-case, as to who were the co-passengers travelling in the same vehicle with the appellant at the time of his arrest, where did they go from the spot and why were they let-off by the police, still remained unresolved. Who knows that they might have been the co-sharers/owners of the drug recovered and equally liable for its transportation from Gujranwala to Lahore. The enigmatic abandoning of the said travelling-duo by the prosecution is a crucial circumstance which needed to be looked at questioningly, as to the award of capital punishment to the appellant. Learned Additional Prosecutor General Punjab, in fact, on a court query, in all fairness admitted that the appellant's maiden involvement in a such like offence could be considered a mitigating circumstance with regard to quantum of sentence. He joined by the learned counsel for the appellant almost submitted in unison that irrespective of the quantity of the contraband recovered, no death sentence has been affirmed/upheld by the apex court so far in case of charas.

12. While dealing with an identical situation, the apex court observed in Muhammad Tariq's case (2009 SCMR 1220) as under:-

> "According to section 9(c) of the Control of Narcotic Substances Act, 1997 four kinds of punishments have been provided for an accused, who is found in possession of narcotics substance exceeding one kilogram. The followings are the four sentences, which have been enumerated in the aforementioned section 9(c) of the Act:---
>
> (i) Death. (ii) Imprisonment for life. (iii) Imprisonment for a term which may extend to 14 years, and (iv) Fine of one million rupees.
>
> 5. However, in the event of quantity of narcotics substance exceeding 10 kilograms, a limitation has been imposed that the punishment shall not be less than imprisonment for life. The question arises as to why death, imprisonment for life and imprisonment up-to 14 years, have been provided in section 9(c) of the Act. In our view, the imposition of punishment has been left upon the discretion of the Court, considering the facts and circumstances of each given case. There may be cases of different types of accused, who may be involved in the commission of the offence of section 9(c) of the Act, but their role, part, act or omission, character or conduct is such as to call for lesser punishment than of death. The case of first offender, who is not a drug baron

> can fall in this domain. An accused having no antecedents of any criminal case to his score, he being not an incorrigible, desperate, or hardened criminal, the punishment lesser to the death in such case can serve the purpose of dispensation of criminal justice. In such cases, the extreme penalty of death can be avoided to be handed down to the accused, to grant him a chance to mend his ways in his future life. In the present case, we have not been informed that the appellant was previously involved in any case of such nature."

In an unreported case, which related to recovery of 3000 kilograms of charas, the honourable Supreme Court of Pakistan while sorting out the issue of quantum of sentence of accused Syed Tanvir Hussain Naqvi (Crl. A. No.147/2006) and Khalid Khan Afridi (Crl. A. No.148/2006), who had been awarded the death sentence by the trial court and affirmed by this court vide judgment dated 18.05.2005 passed in Crl. A. No.232/2001, commuted it to imprisonment for life with the following observations:-

> "It is evident from the record and the judgments of the learned Courts below that they were, while awarding capital punishment to the appellants, swayed by the "huge quantity of narcotics" recovered in the case, weighing 3000 kgs, we are of the opinion that the premise on which capital punishment was awarded to the appellants is not proved beyond reasonable doubt and in accordance with law. We are, therefore, of the considered opinion that the award of death sentence to each appellant may result in a punishment which is in excess of the usual punishment awarded for comparatively smaller quantities recovered in similar cases. We are, conscious that even 400 kgs of charas is a substantial quantity but this amount is less than 15% of what was assumed by the Courts below as being proved against the appellants, thus justifying the sentence awarded to the appellants."

In yet another judgment, "Gul Badshah v. The State" reported as 2011 SCMR 984, the honourable Supreme Court of Pakistan commuted the death sentence of the appellant, who allegedly possessed 171 kilograms of charas, 70 kilograms of opium and 3 kilograms of heroin, to imprisonment for life on the ground that he might have not been consciously aware of concealment of contraband-items in secret cavities of the truck, being driven by him at the time, when it was intercepted, combed and taken custody of by the police.

In view of the discussion, supra, we believe that the extreme penalty of death would be too harsh to be inflicted on the appellant. He does not have any previous criminal antecedents so he has to be believed the first offender. His maiden involvement in a such like offence and the unsolved enigma, noted as above, certainly necessitate conversion of his death sentence to the punishment of imprisonment for life, within the mischief of the embargo, appended as a proviso to section 9(c) of the Act ibid, commuted accordingly.

13. The amount of fine and sentence of imprisonment in lieu thereof shall however remain intact. The benefit of section 382-B, Cr.P.C. shall be granted to the appellant.

14. The sentence of death of the appellant is NOT CONFIRMED and CSR No.11-N-2010 is answered in NEGATIVE.

HBT/J-11/L Sentence reduced.

P L D 2016 Lahore 23

Before Shahid Hameed Dar, J

MUHAMMAD AFZAL---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.634 of 2005, heard on 14th April, 2015.

Penal Code (XLV of 1860)--

---S. 228---Criminal Procedure Code (V of 1898), S.480---Intentional insult or interruption to public servant sitting in judicial proceedings--- Appreciation of evidence---Procedure in cases of contempt---Accused was police official who was convicted by the Trial Court trying murder case, alleging that he (police official) did not serve process to prosecution witness---Validity---Process specifically given to accused for service of Investigating Officer was executed as the witness turned up before court on following day and was examined as prosecution witness in court---Order of the court was not a circumstance to burden accused with a notice under S.228, P.P.C.---High Court observed that there could have been many factors and mixed feelings in the mind of Trial Court about working of police but it was not an occasion to issue a notice in such perspective and seek reply thereto just within 24 hours, let alone accused would have been held guilty and awarded sentence-- Everything was done gratuitously in undue haste, without any plausible reasons and justification by Trial Court---Procedure provided under S.480, Cr.P.C. for dealing with such proposition of law and fact was thrown to winds and accused was unluckily chosen to bear brunt of the fury of court---High Court disapproved the procedure adopted and judgment given by Trial Court, therefore, the same was set aside and accused was acquitted of the charge---Appeal was allowed in circumstances.

Rana Jamshed Hussain for Appellant.

Usman Iqbal, Deputy District Public Prosecutor for the State.

Date of hearing: 14th April, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---The appellant has challenged his conviction under section 228, P.P.C. and sentence of 10 days rigorous imprisonment with fine of Rs.2000/ in default whereof to undergo rigorous imprisonment for one day, thereunder through the titled appeal, as awarded to him, vide judgment dated 27-4-2005, passed by the learned Additional Sessions Judge, Sialkot.

2. Precisely, the relevant facts of the case are that one Allah Ditta was tried for the murder of Ghulam Khan, being accused of case FIR No.11/1999, dated 7-2-1999, under sections 302, 148, 149, P.P.C., Police Station Kotli Said Mir, District Sialkot and he was acquitted of the charge vide judgment dated 27-4-2005 pronounced by Mr. Tariq Mehmood Iqbal Khan, learned Additional Sessions Judge, Sialkot. Learned trial Judge, on one hand acquitted said Allah Ditta and on the other, handed down the impugned conviction and sentence to the appellant

summarily by holding him guilty of showing intentional insult to the order of the court and interrupting the judicial proceedings of the trial of Allah Ditta. The appellant was served with a show cause notice under section 228, P.P.C. on 25-4-2005 to explain as to why he should not be prosecuted for having shown defiance to order dated 21-4-2005 of the court and unnecessarily protracting the proceedings of the trial of Allah Ditta accused (since acquitted). The written reply to the show cause notice submitted by him was found unsatisfactory wherefore he was convicted and sentenced in mentioned terms by the learned trial court.

3. It has been contended by the learned counsel for the appellant that the conviction of the appellant is not sustainable in the eye of law as the procedure provided under section 480, Cr.P.C. for the trial of the offence under section 228, P.P.C. was not followed by the learned Additional Sessions Judge; further contended that section 480, Cr.P.C. enjoins that a civil, criminal or revenue court may take cognizance of the offence and sentence the offender to six months simple imprisonment or fine which may extend to Rs.3000/- or with both, if an offence under section 228, P.P.C. appears to have been committed in its view or presence; there did not exist any circumstance which might call for trial of the appellant under section 228, P.P.C.; the law and its procedure have been trampled over through the impugned judgment by the learned trial court which may be set aside and appellant may be acquitted of the charge.

4. Learned Deputy District Public Prosecutor believed that the contention of the learned counsel for the appellant was not without force as learned Additional Sessions Judge should have strictly followed the procedure, as provided under section 480, Cr.P.C., while trying the appellant under section 228, P.P.C.

5. After hearing learned counsel for the parties and perusing the record, it is observed that the language of the show cause notice under section 228, P.P.C., delivered to the appellant by the learned Additional Sessions Judge Sialkot on 25-4-2005 looks somewhat grinding as it emits a readable impression that the learned trial court was predetermined to punish the appellant right from the word go. It would be advantageously pertinent to reproduce the text of the show cause notice so as to assess, how "impartially and justifiably" it had been delivered to the appellant for tendering reply thereto. It reads:--

> "25-4-2005.
>
> Present:-Accused Allah Ditta in police custody with learned counsel.
>
> Learned DDA for State.
>
> PW Akhtar Ali C/429 in police custody examined. In view of his examination, he is relieved from the custody, however his matter is referred to DPO, Sialkot for departmental action against him for non-appearance in the court despite his personal service on 21-4-2005. The Ahlmad is directed to send a copy of process showing his service of process and copy of this order to the DPO, Sialkot for compliance.
>
> The remaining sole PW Khizar Hayat SI has not entered into appearance who is stated to have gone Faisalabad in connection with Investigation of any murder case but this court is mindful to observe dissatisfaction with the report on the ground that process was delivered Dasti on 21-4-2005 to Muhammad Afzal ASI, who despite knowing the fag-end of the trial of this case neglected this fact and as per routine practice, proceeded to the posting area of the PWs on 24-4-2005 as reflected from rapat No.5 dated 24-4-2005, registered at Police Station Kassuki, Distt. Hafizabad which further

embeds in the mind of the court that police officials are always in practice to create obstruction and impediments in the speedy trial of the case but this court is not last sight to the situation that without strong hands, the usual practice and negligent attitude of police, cannot be curbed down, accordingly, this court has no other option but to give a show cause notice to Muhammad Afzal ASI under section 228; P.P.C. to explain as to why he should not be proceeded in accordance with law and as to why he should not be dealt in accordance with law. He will submit his written reply in this connection while appearing in person on 26-4-2005 and he is also delivered the process of PW Khizar Hayat for its execution positively. Meanwhile, the salary of current month of the process server is, hereby, attached. A robkar in this context be sent to the DPO Sialkot and concerned account office for compliance. A report in this context be also procured.

Now to come up for remaining prosecution evidence on 26-4-2005. The process server is bound down to ensure the appearance of the PW in the court."

6. The judicial record of the trial of Allah Ditta accused is also before us along with the record of the case/trial of the appellant, which have been minutely gone into so as to adjudge, if appellant, an ASI in the police force, did his job responsibly or not. Learned trial court indicted Allah Ditta accused (since acquitted) for offence under sections 302, 148, 149, P.P.C. on 26-3-2005 and delivered the final judgment of acquittal on 27-4-2005, meaning thereby that trial of the accused (since acquitted) concluded within one month. Let us have a look at the order-in-issue, passed on 21-4-2005. On the said day, Ashfaq Hussain SI/investigating officer was recorded as PW-11, besides Muhammad Afzal ASI, (appellant) was recorded as process server qua the fact that some of the prosecution witnesses and the complainant had permanently settled in Afghanistan having abandoned their residences in Pakistan. On his statement, learned trial court closed the evidence of the complainant and some of the prosecution witnesses. Akhtar Ali constable/PW did not turn up for examination despite having been served upon, therefore, non-bailable warrant of arrest was issued against him. His salary was also ordered to be attached. Learned trial court adjourned the case for 25-4-2005 for recording remaining prosecution evidence with the direction that the process issued be routed through the SHO concerned for ensuring timely service of the prosecution witnesses. It was also said in order dated 21-4-2005 that statements of the accused, Allah Ditta under section 342, Cr.P.C. and under section 340(2), Cr.P.C. shall be recorded on the next date of hearing i.e. 25-4-2005.

7. What happened on 25-4-2005 and whether the appellant showed any lethargy in carrying out the said order of the learned trial court, the answer to it may be found from the order of the said day. It reveals that Akhtar Ali 429/C, whose non-bailable warrant of arrest had been issued was produced in handcuffs and he was examined as a PW forthwith. Khizar Hayat SI, the remaining sole PW, did not enter appearance, having gone to Faisalabad in connection with the investigation of a murder case. The report submitted by the process server (appellant) in this context was found dissatisfactory and he was straightaway held delinquent in the discharge of his duty. Learned trial court after passing a few bitter remarks about the working of the police as a whole, observed that the "negligent attitude" of the police should be dealt with drastically. A show cause notice under section 228, P.P.C. was ordered to be issued to the appellant and he was directed to tender his reply on 26-4-2005. Through the said order on 25-4-2005, the appellant was also delivered the process of Khizar Hayat SI/investigating officer PW for service. The process server, who the appellant was, surprisingly received the punishment of attachment of his salary for the "current month" the same day, with a separate direction to the DPO Sialkot to comply with the direction of attachment of his salary by taking up the matter with the accounts-office. What happened thereafter, can be visualized from order dated 26-4-2005 which shows production of Khizar Hayat SI/investigating officer

before the court and his examination as PW-13. Some expert reports were submitted by the learned public prosecutor who closed the prosecution case forthwith. The statement of the accused under section 342, Cr.P.C. was recorded then and matter was adjourned to the next date i.e. 27-4-5005 and on the said day, Allah Ditta accused was acquitted of the charge.

8. The circumstances detailed as above hardly show any laziness on the part of Muhammad Afzal ASI (appellant) while carrying out the directions of the learned trial court. It cannot be gathered from order dated 21-4-2005 that notice of the prosecution witnesses had been handed down to the petitioner dasti nor any such clue may be found from the proceedings of the said day that the appellant had been directed by the trial court in a particular manner to do the duty of the process server. In its order dated 25-4-2005, learned trial court has, however mentioned about delivery of the process of Khizar Hayat SI/SHO (PW) to Muhammad Afzal ASI (appellant) for its execution but no such direction can be found from order dated 21-4-2005. The process specifically given to the appellant for service of Khizar Hayat SI/investigating officer was certainly executed as he turned up before the court on the following day, 26-4-2005 and examined as PW-13. One fails to understand as to why to the learned trial court found order dated 21-4-2005 a circumstance to burden the appellant with a notice under section 228, P.P.C. There may be many a factors and mixed feelings in the mind of the trial court about the working of the police but it was certainty not an occasion to issue a notice in the said perspective and seek reply thereto just within 24 hours, let alone he would have been held guilty and awarded the impugned sentence. Everything appears to have been done gratuitously in undue haste, without any plausible reason and justification by the learned trial court. The procedure provided under section 480, Cr.P.C. for dealing with such a proposition of law and the fact was thrown to the winds and Muhammad Afzal (appellant) was unluckily chosen to bear the brunt of the fury of the court. The procedure adopted and judgment given by the trial court cannot be approved of by any stretch of imagination. The impugned judgment, therefore, is annulled and appellant is acquitted of the charge. He is present on bail and he is discharged of his liabilities as to the surety bond. Allowed.

MH/M-141/L Appeal allowed.

P L D 2016 Lahore 159

Before Shahid Hameed Dar, J

SAJID RAFIQUE---Petitioner

Versus

GHULAM DASTGIR KHAN and 3 others---Respondents

Criminal Original No.6 in Criminal Misc. No.75-H of 2006, decided on 29th May, 2015.

Contempt of Court Ordinance (IV of 2003)---

----Ss. 3, 4 & 5---Contempt of Court---Unconditional apology---Refusal to accept apology earlier by Court---Contemnors realized that no one was above law irrespective of his status and that even time factor could not defeat due process of law---Contemnors were really ashamed of what they did, felt sorry and penitent and they bow their heads in shame with drooped shoulders---Effect---Contemnors were really ashamed of what they did and their

unconditional apology was genuine and sincere---Contempt stood purged, when contemnor had thrown himself unconditionally at the mercy of Court---Mere fact that Court had earlier declined to accede to request of contemnors for seeking forgiveness could not take away the Court from giving second thought to their incumbent entreatment for unconditional apology---Grace was in forgiving and not in being harsh---Refusal by Court to show mercy to contemnor could go against Islamic jurisprudence---High Court wound up contempt proceedings and acceded to unconditional apology---Contempt notice was discharged in circumstances.

Fakhre Alam's case PLD 1973 SC 525 fol.

Rai Nadeem Kharal for Petitioner.

Raza-ul-Karim Butt, Asstt. Advocate-General, Punjab.

M.A. Fatimi with Respondent-contemnors Ghulam Dastgir Khan Inspector/SHO and Tariq Mehmood ASI.

ORDER

SHAHID HAMEED DAR, J.---The petitioner, Sajid Rafique by filing this petition under Article 204 of the Constitution of Islamic Republic of Pakistan, 1973 read with sections 3, 4 and 5 of the Contempt of Court Ordinance, 2003 has sought initiation of contempt proceedings against the respondents, Ghulam Dastgir Khan, Station House Officer, Police Station Defence, Lahore, Tariq Mehmood ASI, Incharge Police Post, Muhammad Altaf constable, Riaz Ahmad constable, Police Post Super Town, P.S. Defence, Lahore, for deliberately and intentionally disobeying the order of this court passed on 26.1.2006 in Crl.Misc.No.75/H-2006.

2. Precisely, the facts giving rise to the instant petition are that on an application under section 491, Cr.P.C. (Crl.Misc.No.75/H of 2006) moved by the petitioner, this court deputed a bailiff to recover Mian Khalid Rafique from the illegal and improper custody of respondents Nos.1 and 2; he raided the police station, but failed to recover the alleged detenu; respondents Nos.1 and 2 appeared before this court on 26.1.2006 and submitted that they were not aware of the whereabouts of the detenu; besides, respondent No.2 took special oath on Holy Qur'an and said that he neither arrested the alleged detenu nor he knew anything about him, whereon this court passed the following order:-

> "Both the parties have been heard. The alleged detenu was not found at the place mentioned in this petition at the time of raid by Bailiff, who was alleged to have been illegally confined by respondent No.2. Respondent No.2 present in the court has stated on special oath of Holy Quran that he absolute does not know about whereabouts of Khalid detenu nor he is in his custody and he had never arrested him. In this view of the matter learned counsel for the petitioner does not press this petition any more in order to avail the alternate remedy after having knowledge of whereabouts of the alleged detenu, which is disposed of accordingly. However, the petitioner can avail alternate remedy available to him under the law."

The petitioner again approached this court through W.P.No.709/2006, which was fixed for 30.1.2006 for the recovery of the said detenu. In the meanwhile, it transpired that one Mazhar Ali had filed a habeas corpus petition on 27.1.2006 for recovery of his brother Muhammad Alam, wherein learned Additional Sessions Judge, Lahore deputed a bailiff, who raided the

Police Post Super Town, within the area of Police Station Defence, Lahore, searched it thoroughly, but he could not recover the detenu, whereafter, he together with the petitioner (therein) and Muhammad Nawaz 7175/C raided a private torture cell, situated in haveli of one Rafaqat Ali Bhatti at Park View Society, near New Airport Lahore and recovered Muhammad Alam, the alleged detenu and produced him before the said court. The bailiff reported that at the time of the raid, he also found three other persons, Mian Khalid Rafique (detenu), Sohail Akhtar and Zahoor Ahmad confined in the said torture cell.

On knowing about the confinement of Mian Khalid Rafique (detenu) in the torture cell of the respondents, the petitioner approached this court through the instant petition contending therein that respondents Nos.1 and 2 had deliberately and wilfully defied the orders of this court and purposely told a lie so as to concealing true facts of the case and to save their own skin, which amounted to committing contempt of the court by them. Accordingly, respondents Nos.1 and 2 were issued the notices on 30.1.2006 with the direction to submit reply within seven days. Learned State counsel was appointed the prosecutor of this case. The respondent-contemnors submitted their replies, whereafter learned prosecutor was directed to submit list of the witnesses containing gist of the evidence to be adduced.

Learned counsel for the petitioner submitted on 10.3.2006 that parties had patched up the dispute and petitioner wished to withdraw this petition. This request was turned down by this court with the observation that contempt of court was necessarily an issue between the court and the contemnor. The respondents were charge-sheeted on 14.4.2006 in answer to which they pleaded not guilty and claimed trial. Two prosecution witnesses, Muhammad Iqbal, the bailiff of sessions court, Lahore (P.W.1) and Khalid Rafique (P.W.2) were examined on 26.5.2006. It is manifest from the record that the other witnesses as mentioned in the list submitted by the prosecutor, were summoned repeatedly but they did not enter appearance. With this, the learned prosecutor also kept himself away from the court. After elongated proceedings, spanning over years, learned counsel for the respondents submitted on 11.5.2015 that the respondent-contemnors felt ashamed of, what had done and they intended to tender unqualified apology in this regard. The petitioner, who had not appeared for a long time, was issued a notice and he turned up on 15.5.2015 and then on 22.5.2015 along with his learned counsel Rai Nadeem Kharal, advocate. The petitioner tendered his sworn affidavit (Mark 'A') to the effect that he had compromised the issue and forgiven the respondents, hence, he would not object to their exoneration by the court. The alleged contemnors also showed penitence and submitted their sworn affidavits (Mark 'B' and Mark 'C') with the contention that they sought an unconditional apology and they left them at the mercy of this court.

3. It was at this stage when learned counsel for the petitioner and learned counsel for the respondents joined together in submitting that the respondent contemnors, who looked repentant, might be forgiven and contempt proceedings be dropped in their favour.

4. I have considered the submissions made by the respondent contemnors and their learned counsel with care and found that they had shown correct attitude by now. They have thrown themselves at the mercy of this court so much that they tendered yet another sworn affidavit each (Mark 'D' and Mark `E') today with the same remorseful feelings, as expressed by them in their earlier affidavits (Mark 'B' and Mark 'C'), which they tendered on 22.5.2015. They by their demeanour felt repentant and apologetically gave assurance that they would remain careful in future and show complete obedience to the court orders and decorum. They have offered unqualified apology one after the other in a simple and pure way.

5. The alleged contemnors being police officials are the custodian of law and through whom the law is to be enforced. They were not expected to act in a such like manner as they did. It was a part of their duty, as members of the disciplined force, to respect the law and feel

abided by the decorum of the court. They could not, however live up to the said yardstick and made a false statement, as not to have illegally confined the detenu, Khalid Rafique. It has to be remembered that the respondents made the said misstatement in year 2006 and they have been facing the contempt proceedings since then. Tariq Mehmood ASI (respondent No.2) has submitted that he has been dismissed from the service many a years back and he had already paid a heavy price of his follies. Ghulam Dastgir Khan SHO (respondent No.1), who still served the police department, said that his promotion had become to a standstill since 2006 and he always thought that he had committed sheer stupidity by not making a fair statement about the confinement of the alleged detenu. Both the respondents unanimously said that they had learnt the lesson of their life, not to ever misstate before the court.

6. I was not inclined to accept the apology but for the fact that the respondent contemnors had realized that no one was above law irrespective of his status and that even the time factor could not defeat the due process of the law. They were really ashamed of what that did. They felt sorry and penitent. They bowed their heads in shame with drooped shoulders. Their unconditional apology was genuine and sincere. It has been observed by the apex court in the case of Fakhre Alam, reported as PLD 1973 SC 525 that the contemnor having thrown himself unconditionally at the mercy of the court, the contempt stood purged.

7. Mere fact that court had earlier declined to accede to request of the respondents for seeking forgiveness cannot take us away from giving second thought to their incumbent entreatment for unconditional apology. I feel that grace lies in forgiving and not in being harsh. The refusal by the court to show mercy to the contemnor may go against the Islamic Law of Jurisprudence, which underlines:-

> "To him who repents after his transgression and make amends, mercy will be shown and of the Islamic rule of administration of justice i.e. Adal Bil Ehsaan."

8. For the foregoing reasons, the instant proceedings are wound up, the respondent contemnors' request for unconditional apology is acceded to and they are discharged from the contempt notice issued on 30.1.2006.

9. Disposed of accordingly.

MH/S-81/L Order accordingly.

P L D 2016 Lahore 218

Before Shahid Hameed Dar, J

MAQSOOD MASIH---Appellant

Versus

The STATE and another---Respondents

Criminal Revision No.1020 of 2014, heard on 9th June, 2015.

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

----Ss. 420, 468 & 471---Cheating, forgery and using forged document---Appreciation of

evidence---Compromise---Effect---Parties entered into compromise but Trial Court convicted accused and sentenced him to imprisonment for one year for each offence---Conviction and sentence awarded by Trial Court were maintained by Lower Appellate Court---Validity---Compromise was fully applicable to mischief of S.420, P.P.C. and as the parties had resolved their differences amicably and voluntarily, accused was acquitted of the charge of cheating---Conviction under Ss. 468 & 471, P.P.C. was based on cogent and confidence inspiring evidence, led by prosecution against him during the course of trial---Testimonies of prosecution witnesses emitted sense of believability regarding allegation, the accused was tried for---No inconsistencies or major discrepancies were found in prosecution evidence, which bore the stamp of impartiality and credibility---High Court upheld the conviction awarded to accused under Ss.468 & 471, P.P.C. but reduced imprisonment from one year each to period already undergone by him---Appeal was allowed accordingly.

Mazhar Ahmad's case 2012 SCMR 997 and Ghulam Ali v. The State and another 1997 SCMR 1411 ref.

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

----S. 345---Compromise---Scope---Compromise has generally been considered a redeeming feature, bound to bring peace and harmony in society---Compromise may bring warring parties close to each other and motivate them to bury their hatchet for good---Courts often respected the will of parties to compound an offence, may it be compoundable or not---In case of compoundable offence, no extra argument is required to extend the fullest benefit of rapprochement to a convict but in a case that is not compoundable, its benefit may still be extended to him in viable terms, so as to translate parties' reconciliatory mood into an objective reality---Compromise always hints at noble spirit parties which ought to be respected and given an assent to by the Court of law.

Rana Hassam Kayani with Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor-General Punjab for the State.

Irshad Ullah Rana for the Complainant.

Date of hearing: 9th June, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.--Maqsood Masih-petitioner was held guilty under sections 420, 468, 471, P.P.C. by learned judicial magistrate section 30, Model Town, Lahore, vide judgment dated 25.5.2013 during trial of case F.I.R.No.308/2007, dated 18.6.2007, under sections 420, 468, 471 P.P.C., registered at Police Station Nishter Colony Lahore and sentenced to rigorous imprisonment for one year each with fine of Rs.10,000/- each or in default whereof to further undergo simple imprisonment for fifteen days each, under the said offences. All the sentences were ordered to run concurrently with benefit of section 382-B, Cr.P.C.

2. The petitioner filed an appeal against his conviction/sentence, which was dismissed by the learned Additional Sessions Judge, Lahore vide judgment dated 20.10.2014. He has called in question both the judgments of the learned courts below through the instant revision petition.

It is not to be forgotten that the petitioner filed the titled revision- petition without surrendering before the police, after his appeal was dismissed by the learned appellate court on 20.10.2014. He instituted this revision-petition along with an application under section 426, Cr.P.C. and surrendered himself before this court with the prayer that his sentence may be suspended. Keeping in view the fact that the sentence awarded to him was short one, being one year each under sections 420, 468, 471 P.P.C. and ordered to run concurrently, his sentence was suspended vide order dated 13.1.2015 in line with the ratio of Mazhar Ahmad's case, reported as 2012 SCMR 997.

3. Precisely, the allegation against the petitioner, as per contents of the written application (Exh.PA), on the basis of which aforesaid F.I.R was registered, is that he by posing himself owner of a particular plot sold it to Amanat Masih (complainant) for Rs.1,00,000/- and received full consideration- amount in four instalments, i.e. Rs.30,000/- as earnest money on 16.7.2002, Rs.40,000/- on 19.12.2002, Rs.20,000/- on 22.3.2003 and Rs.10,000/- in the last week of April 2003; he also received an amount of Rs.13,000/- from him as fee for local commission/patwari and purchase of stamp-papers, but did not transfer it to him; on insistence of the complainant, he disclosed that he had purchased the said plot from one Shahadat Masih, who had not transferred it to him so far; the complainant contacted Shahadat Masih, who also told him the same story, that Billa Masih had not alienated the said plot to him; thereafter, all three, Maqsood Masih (petitioner), Shahadat Masih (since acquitted) and Billa Masih joined hands to prepare sale-deed in favour of the complainant qua the said plot on 14.9.2013, but did not get it registered and put off the matter on one pretext or the other; the accused being in league with each other, committed fraud with the complainant.

4. On completion of investigation, the police submitted challan against the petitioner and his co-accused Shahadat Masih, who faced the ensuing trial; learned trial court held the petitioner guilty and sentenced him in mentioned terms, but acquitted his co-accused on extending benefit of doubt to him; the conviction/sentence of the petitioner was upheld by the learned appellate court, hence, the instant revision petition.

5. Learned counsel for the complainant submitted on 19.5.2015 that the parties had compounded the offence and Amanat Masih (complainant) had dropped the idea of further prosecuting the petitioner, as he had been duly compensated by him. The complainant endorsed the submission of his learned counsel then and tendered a sworn affidavit (Mark 'A') in recognition thereof, the contents whereof he exclusively owned.

6. The situation as to composition of offence by the parties has remained unchanged as learned counsel for the parties reiterated their stances in unison today that the matter stood patched up in final terms. Learned counsel for the petitioner while relying on Ghulam Ali v. The State and another (1997 SCMR 1411) submitted that the petitioner might be acquitted of the charge or his sentence might be reduced to already undergone by him, notwithstanding the nature of the allegation that it was not compoundable.

7. Learned Deputy Prosecutor General Punjab did not oppose aforesaid contentions of the learned counsel for the parties and submitted that benefit of compromise might be extended to the petitioner-convict, but without upsetting his conviction as recorded by the learned trial court.

8. After hearing the learned counsel for the parties and perusing the record, it is observed that only one of the offences, the petitioner has been charged with, is compoundable in nature and it is under section 420, P.P.C. The petitioner may get maximum benefit of compromise thereunder. It has categorically been stated by the complainant that his grievance

against the petitioner had been completely redressed and he had no objection, if he was acquitted of the charge. This particular assertion is fully applicable to the mischief of section 420, P.P.C., therefore, keeping in view the fact that the parties have resolved their differences amicably and voluntarily, the petitioner is acquitted of the charge thereunder.

9. So far as the petitioner's conviction under sections 468, 471 P.P.C. is concerned, it is based on cogent and confidence inspiring evidence, led by the prosecution against him during the course of the trial. The testimonies of the prosecution witnesses emit a sense of believability qua the allegation, the petitioner was tried for. I hardly find any inconsistency(-ies) or major discrepancy(-ies) in the prosecution evidence, which bore the stamp of impartiality and credibility. The impugned judgments looked impressive and irresistible from all angles, which left no space for the idea that they could be interfered with by any stretch of imagination. The observations recorded therein are impeccable and overwhelmingly impregnable. The conviction of the petitioner under aforesaid offences cannot be called in question for any reason.

10. The factum of compromise is, however, a circumstance which may legally ease and assuage the worries of the petitioner. The compromise has generally been considered a redeeming feature, bound to bring peace and harmony in the society. It may bring the warring parties close to each other and motivate them to bury the hatchet for good. It is why, the courts often respected the will of the parties to compound an offence, may it be compoundable or not. In case of a compoundable offence, no extra argument is required to extend fullest benefit of the rapprochement to a convict, but in a case that is not compoundable, its benefit may still be extended to him in viable terms, so as to translate the parties' reconciliatory mood into an objective reality. The compromise always hints at noble spirit of the parties, which ought to be respected and given an assent to by the courts of law and this is what exactly being done here.

11. The requisite report submitted by the superintendent of District Jail, Lahore reveals that the petitioner remained in jail for seven days as a convict before his sentence was suspended, pending his appeal and he was released on bail by the learned Additional Sessions Judge, Lahore. The other report, which has been submitted by the superintendent, Central Jail, Lahore reveals that he remained in the said jail from 15.3.2008 to 31.5.2008, as an under trial prisoner. The accumulative effect of both the reports is that he remained in jail for about 2-3/4 months, which may be sufficient for a repentant to learn lesson of the life. It would, therefore, be appropriate that his request for a shortened sentence may be given a sympathetic consideration, as he had fully compensated and appeased the complainant, which is manifest from his sworn affidavit (Mark 'A'). The petitioner's sentence ought to be reduced, as a natural consequence of the compromise arrived at.

12. That being so, the petitioner's conviction for offences under sections 468, 471 P.P.C. is upheld, but his sentence of imprisonment is reduced to the period, already undergone by him. The fine-amount is also reduced to Rs.1,000/- each with the direction that he would deposit it in the government treasury within seven days from today. In case he defaulted in this context, he shall be arrested by the police and sent to jail till recovery of the said amount. If he deposited the fine-amount well in time, he would submit the receipt thereof with the Deputy Registrar (Judl.) of this court.

13. With the above modification in the sentence of the petitioner, this revision petition is disposed of.

MH/M-189/L Order accordingly.

P L D 2016 Lahore 277

Before Shahid Hameed Dar and Ali Baqar Najafi, JJ

BILAL FAROOQ---Petitioner

Versus

The STATE and 4 others---Respondents

Writ Petition No.2855 of 2014, heard on 15th May, 2014.

Anti-Terrorism Act (XXVII of 1997)---

----Ss. 6(b) & 23---Penal Code (XLV of 1860), S.302---Constitution of Pakistan, Art. 199---Constitutional petition---Act of terrorism---Qatl-i-amd---Deceased was a student nurse who was raped by doctor (since absconder) and others and then she was murdered---Trial Court declined to transfer case from Anti-Terrorism Court to Court of planery jurisdiction---Validity---Rape was committed in a room of hospital at night but its detail was shocking which created either a sense of insecurity, especially amongst nurses as a whole or it was likely to terrorize them---Absconded accused and his co-accused including petitioner were taken-over by their criminal and lecherous self and they joined hands satanically to ravish and murder a poor staff nurse---Appalling savagery of crime allegedly committed by them was not an ordinary incident---Accused doctor was a trusted companion, who played false and stabbed in the back---As such the same had shocked and jolted staff nurses all over---Ferocity of alleged offence must have emitted shock waves and signals of unknown fear, dislodging their mental peace with feeling of insecurity and vulnerability---Trial was being conducted by Court established under Anti-Terrorism Act, 1997, in a lawful manner---High Court declined to interefere in the order passed by Trial Court as there was no jurisdictional defect---Petition was dismissed in circumstance.

Nazir Ahmad and others v. Nooruddin and another 2012 SCMR 517 and Mst. Raheela Nasreen v. The State and another 2002 SCMR 908 ref.

Khawaja Awais Mushtaq for Petitioner.

Khadim Hussain Qaiser, Addl. A.G. with Qasim Inspector and Abdul Razzaq SI.

Ch. Muhammad Rafique Jathol for Respondent No.5.

Date of hearing: 15th May, 2014.

JUDGMENT

SHAHID HAMEED DAR, J.--Through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, the petitioner calls in question the legality of order dated 18.1.2014, whereby an application moved by him under section 23, Anti-Terrorism Act, 1997 (hereinafter to be read as the Act), for transfer of his case to a court of regular jurisdiction, has been dismissed by the learned Judge, Anti-Terrorism Court No.1, Gujranwala.

2. The facts relevant to this petition are that Mst.Madiha Hanif, aged 20, a student of 4th

year in Nursing School, Civil Hospital, Sialkot, real daughter of Muhammad Hanif (respondent No.5), was murdered by some unknown accused, who threw her body at Khawaja Safdar Road near Kashmir Park; she lived in a rented house, which she left on 17.11.2013 (Sunday) for the house of her aunt, as told by daughter of master of the said house, at 6.30 p.m. the same day, to Muhammad Hanif (complainant), who worked as Wireless Operator in the Police department; he searched for his daughter, who did not return home till late night; he received an information at 8.30 a.m. on 18.11.2013 that his daughter's dead body lay at Khawaja Safdar Road, whereon he along with his companions reached the said road and found this information correct; he reported the crime to the police, which led to registration of case-F.I.R. No.765, dated 18.11.2013, under section 302/34 P.P.C., at Police Station Cantt., Sialkot; he rendered a supplementary statement on 19.11.2013, wherein he named Dr.Eman, Hafiz Bilal Farooq (petitioner) and an unknown person, on the information of Muhammad Idrees and Muhammad Arshad PWs, as accused for having ravished and murdered his daughter; the petitioner, Hafiz Bilal Farooq, after having been arrested on 28.11.2013, rendered a confessional statement under section 164, Cr.P.C. before the learned Special Judicial Magistrate, Sialkot on 2.12.2013, whereby he furnished detailed account of the unfortunate incident with the contention that Dr.Eman Hakim had called Mst.Madiha Hanif, staff nurse, to Allama Iqbal Memorial Hospital, Sialkot, drank to his fill, raped her, tortured her, injected some intoxicant into her body, due to which she gradually turned enervated, whereafter he asked him (petitioner) to have sex with her, so he too followed by another boy committed zina with her; the girl succumbed to the heavy dose of intoxication and her dead body was put in his car by Dr.Eman and taken to Christian Town late night; they all threw it at Khawaja Safdar Road and slipped away; Dr.Eman Hakim, a Christian, did not surrender before the police and he surreptitiously left the country, probably for Dubai or Thailand; on finalization of investigation, challan against the petitioner was submitted before the learned Anti-Terrorism Court, Gujranwala for trial of the accused, where it is pending now.

3. The petitioner having developed the notion that the offence allegedly committed by him did not fall within the jurisdiction of the Special Court constituted under the Act, moved an application under section 23 thereof, for transfer of his case to a court of regular jurisdiction, but failed, as the learned trial court did not agree to his whimsical thought and observed that the alleged offence committed by him and his co-accused fell within the ambit of section 6 of the Act, which defines terrorist act, therefore, the same was exclusively triable by it. The reasoning which prevailed with the learned trial court to reach the said conclusion was, that brutality committed by the doctor and his companions on a nurse of the same hospital was likely to strike terror and fright, leading to an atmosphere of insecurity and self-doubt amongst the nurses.

4. Learned counsel for the petitioner has argued that none of the staff nurses made any statement that the alleged act of the accused had created any feeling of insecurity or caused terror to them; the alleged offence was committed in a room of the hospital, in the dark hours of the night, which must have gone unnoticed by the hospital staff or the people living around, therefore, question as to spreading of terror, fright or sense of insecurity does not arise, lastly submits that the petitioner's trial by the Special Court would not only be ultra vires of the Act but it would be against the law laid down by the august Supreme Court of Pakistan.

5. Learned Additional Advocate General Punjab assisted by learned counsel for the complainant/respondent No.5 has opposed the petition by submitting that the accused have committed a scheduled offence, which must have led to a feeling of insecurity and terror, particularly in the staff nurses of the country, wherever they were posted and it is sufficient to constitute a terrorist act within the meaning of section 6 of the Act.

6. After hearing learned counsel for the parties and perusing the record, we have straightaway noticed that the petitioner and his co-accused have committed a gruesome and barbaric act, the details whereof are hair-raising. The unfortunate budding staff nurse would never have thought that a doctor of the same hospital, where she studied as a student of 4th year, would turn monster, tear her virginity apart and take her life to conceal his evil-doing. The end, the deceased nurse met with, is most unfortunate and pathetic. Dr. Eman must be a trusted person for the ill-fated nurse, who might not have thought twice before leaving her residence for going to Allama Iqbal Memorial Hospital, Sialkot on the asking of the said doctor-accused. It must have been beyond, even her wild imagination that the doctor, she daily worked with, for many hours would betray the confidence and faith, she reposed in him. Each and every bit of the offence allegedly committed by the petitioner and his co-accused hints at their fiendish conduct and demeanour, which is likely to cause fright and terror to any, who learnt about this shocking incident, let it be the class of nurses alone.

7. It would be useful to reproduce section 6 of the Act, which reads as under:-

> "(b) commits a scheduled offence, the effect of which will be, or be likely to be, to strike terror, or create a sense of fear and insecurity in the people, or any section of the people, or to adversely affect harmony among different sections of the people."

The argument of the learned counsel for the petitioner that none of the staff nurses made any statement to the effect that the alleged act of the accused had created any feelings of insecurity or it was likely to strike terror, is wholly fallacious, as the law does not require that in order to determine whether a particular act, committed by the accused created terror or feeling of insecurity or it fell within the mischief of the act of terrorism, the evidence of the witnesses should be recorded. It is the descriptive text of the F.I.R. and other attending circumstances of the case, which accumulatively would tell whether the alleged offence would fall within the purview of any of the provisions of the Act. The manner in which, the accused petitioner and his co-accused believed themselves at the time of the alleged occurrence clearly suggests that the act done by them had a nexus with the object of the Act and thus it was squarely covered under sections 6 and 7 thereof. It has been held in case titled: Nazir Ahmad and others v. Nooruddin and another (2012 SCMR 517) that neither motive nor intention for commission of the offence is relevant for the purpose of conferring jurisdiction on the Anti-Terrorism Court, rather it is the act, designed to create sense of insecurity or to destabilize the public-at-large, which attracts the provisions of section 6 of the Act. To determine if an offence fell within the ambit of section 6 of the Act, it would be essential to have a glance over the allegations made in the F.I.R., record of the case and surrounding circumstances, besides looking into the essentialities whether the ingredients of the alleged offence had any nexus with the object of the Act, as contemplated under sections 6, 7 and 8 thereof. In an equally sensitive case, Mst.Raheela Nasreen v. The State and another, reported as 2002 SCMR 908, wherein Major Sajjad Naseer, who was a serving officer in Pakistan Army, was allegedly killed by the female- accused, his wife, in connivance of Wajid Faqir, his Batman, the Hon'ble Supreme Court of Pakistan observed as under:-

> "7. From a bare reading of section 6(b) of the Act, it is manifest that it is not necessary that the offence as alleged had in fact, caused terror as the requirement of the said provision of law could be adequately satisfied if the same was likely to strike terror or sense of fear and insecurity in the people.
>
> 8. The learned Judges of the High Court came to the conclusion that a Batman who was a trusted person of an army officer if he kills as alleged his master in connivance with his (master's) wife, the same was likely to strike terror or feeling of insecurity among the army officers which reasonings in our view are based on relevant

consideration having logical nexus with the relevant law and do not suffer from any legal infirmity."

7(sic). The record reveals that many a staff nurses of the Nursing School, Allama Iqbal Memorial Teaching Hospital, Sialkot, moved an application before the Investigating Officer on 4.12.2013 stating therein that they all were under tremendous mental pressure and agony because of the terrifying act of Dr.Eman and his co-accused. They further contended therein that ghastly act of the accused had gripped all the students in indescribable fear and their nursing school looked a haunted place. How can it be considered that the alleged crime had gone unnoticed, as argued by the learned counsel for the petitioner? Though it was committed in a room of the hospital at night, yet, its detail, which surfaced later on, was immensely shocking, which created either a sense of insecurity, especially amongst the nurses as a whole or it was likely to terrorize them. Prima facie, Dr.Eman and his co-accused including the petitioner were taken over by their criminal and lecherous self and they joined hands satanically to ravish and murder a poor staff nurse. The appalling savagery of crime allegedly committed by them was not an ordinary incident. The doctor was a trusted companion, who played false and stabbed in the back. It must have shocked and jolted the staff nurses all over. The ferocity of the alleged offence must have emitted shock waves and signals of unknown fear, dislodging their mental peace with the feeling of insecurity and vulnerability. The case is being tried by the court established under the Act in a lawful manner. We find no jurisdictional defect in the impugned order, hence, it does not warrant interference by this court. There being no merit in this petition, it is hereby dismissed.

MH/B-23/L Petition dismissed.

P L D 2016 Lahore 408

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

FARAZ SHAUKAT---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.4771/M of 2014 in Criminal Appeal No.300 of 2008, decided on 26th January, 2015.

Criminal Procedure Code (V of 1898)--

----S.426(2-B)---Penal Code (XLV of 1860), S.302(b)---Qatl-i-amd---Petition for suspension of sentence---Death sentence awarded to accused by the Trial Court was converted into imprisonment for life---Petitioner challenged the judgment of High Court before Supreme Court, wherein leave to appeal had been granted to the petitioner---Petitioner, had filed petition for suspension of sentence pending disposal of appeal before Supreme Court---Delayed FIR; discrepant medical evidence as to the role of the petitioner; the inter se relationship of the eye-witnesses, as well likelihood of their being the chance witnesses; the materially improved testimonies of the eye-witnesses and motive having been discarded by the Trial Court, as well as by High Court, were the facts pressed into service by the counsel for the petitioner, which persuaded the Supreme Court to grant leave to appeal---All of the

contentions made would be open to detailed scrutiny by the Supreme Court; and probability could not be ruled out that the prosecution case could fall through in the long run---No two opinions existed about the argument of Deputy Prosecutor General that mere grant of leave to appeal, did not necessarily mean that the petitioner had become entitled to suspension of his sentence as a matter of right, but it could not be brushed aside either that in a suitable case of alike nature; sentence of accused could be suspended, as envisaged by S.426(2-B), Cr.P.C.---Accused, after having been arrested on 18-1-2005 had been languishing in jail ever since---Petitioner, had served sentence of eleven years and four months, inclusive of remission, being in jail---Continued incarceration of the petitioner for an indefinite period of time, could not serve any useful purpose for prosecution's case---Allowing petition, sentence of the petitioner, was suspended pending decision of his appeal before the Supreme Court---Petitioner, would be released from prison subject to furnishing of bail bond.

Raja Nadeem Haider, advocate for the Petitioner.

Hamayoon Aslam, Deputy Prosecutor General Punjab for the State.

Complainant in person.

ORDER

Faraz Shaukat (petitioner) has filed this petition under section 426(2-B), Cr.P.C. seeking for suspension of his sentence and consequential release on bail, pending disposal of his appeal before the Hon'ble Supreme Court of Pakistan.

2. A resume of the relevant facts would tell that the appellant was tried by the learned trial court (Additional Sessions Judge, Gujjar Khan) in case-F.I.R. No.226/2005, dated 3.10.2005, under section 302/34 P.P.C., Police Station Mandra, district Rawalpindi and he was held guilty for an offence under section 302(b), P.P.C. and sentenced to death as Ta'zir, with order to pay an amount of Rs.1,00,000/- as compensation under section 544-A Cr.P.C., in default whereof to undergo another term of six months simple imprisonment, vide judgment dated 30.10.2008 by the said court. The petitioner assailed his conviction through Criminal Appeal No.300/2008 and the learned trial court submitted Murder Reference No.34/2008 for seeking confirmation of the death sentence awarded by it to the petitioner. The appeal filed by the petitioner was disposed of by a learned Division Bench of this court vide judgment dated 19.3.2012 by converting his death sentence to imprisonment for life as Ta'zir. The other constituents of the sentence awarded by the learned trial court remained intact but petitioner was held entitled to the benefit of section 382-B Cr.P.C. The murder reference was answered in the negative. The petitioner challenged the judgment of this court through J.P. No.114/2012, wherein leave to appeal has been granted by the Hon'ble Supreme Court of Pakistan on 15.6.2012. Hence, the instant petition.

3. Learned counsel for the petitioner has contended that the prosecution case against the petitioner suffers from many a lacunae, a description whereof has been made in the leave-granting order by the august Supreme Court of Pakistan, which gives rise to a strong probability that the petitioner's appeal against the judgment of this court may succeed in the long run; the medical evidence being discrepant renders no corroboration to the ocular account rendered by P.W.11 and P.W.12, who were most probably the chance witnesses; maintains that the petitioner has been in jail for more than eleven years, his sentence has already been commuted to imprisonment for life by this court, therefore, he may be granted the relief sought after pending disposal of his appeal before the apex court.

4. In reply to the above, learned Deputy Prosecutor General Punjab has opposed this petition but conceding at the same moment as to reduction in death sentence of the petitioner to imprisonment for life by this court, pressing hard that the fire-shot attributed to the petitioner proved terminal as it cut the life-line of Mubeen Akhtar deceased; adds that grant of leave by the apex court does not necessarily mean that the petitioner is entitled to the relief prayed for.

5. We have heard at length the learned counsel for the parties and perused the available record. We find it a case which mainly hinges on an order of the august Supreme Court of Pakistan, passed on 15.6.2012 in Jail Petition No.114/2012, filed by the petitioner against afore-referred judgment of this court whereby his conviction under section 302(b) P.P.C. had been upheld but his sentence reduced to imprisonment for life. The apex court while referring to various contentions of the learned counsel for the petitioner in the aforesaid jail petition and that of another co-convict (JP No.113/2012) granted leave to appeal against the judgment of this court in the following manner:-

> **"Jail Petitions Nos.113 and 114 of 2012**
>
> It has inter alia been contended by the learned counsel for the petitioners that the FIR in this case had been lodged after a significant delay; Mubeen Akhtar deceased had initially been examined before his death by Dr.Farzana Murtaza (PW2) who had noticed only one entry wound in the abdomen of the deceased and before the learned trial court she had categorically stated that the deceased had been brought in an injured condition by Sajid Mehmood, FC who had not been produced by the prosecution as a witness; the statement made by Dr. Farzana Murtaza (PW2) established that the eye-witnesses produced by the prosecution before the learned trial court were not present with the deceased at the time of receipt of injuries by him; and the post-mortem examination of the dead body had been proved by Dr. Ahmad Farooq (PW8) and the Post-mortem Examination Report showed that the doctor had found two entry wounds in the abdomen of the deceased and it was not clear as to how a firearm entry wound had been added to the dead body during the deceased's medical examination by PW2 and conducting of post-mortem examination of the dead body. It has vehemently been argued by the learned counsel for the petitioners that the eye-witnesses produced by the prosecution were not only closely related to the deceased but they were also chance witnesses who had failed to establish the reason for their stated presence with the deceased at the relevant time. With reference to the statements made by the said eye-witnesses before the learned trial court the learned counsel for the petitioners has emphasized that the said statements were replete with material improvements which went a long way in establishing that the said eye-witnesses were nothing but planted witnesses. He has also highlighted that the motive set up by the prosecution had been discarded by both the learned courts below and the medical evidence did not provide full support to the ocular account. With these submissions the learned counsel for the petitioners has maintained that the prosecution had failed to prove its case against the petitioners beyond reasonable doubt entitling them to be acquitted by this Court.
>
> 2. The contentions and submissions of the learned counsel for the petitioners noted above require reappraisal of the evidence so as to secure the ends of justice. These petitions are, therefore, allowed and leave to appeal is granted therein for the purpose."

The delayed F.I.R., the discrepant medical evidence as to the role of the petitioner, the inter-se relationship of the eye-witnesses as well as likelihood of their being the chance

witnesses, the materially improved testimonies of the eye-witnesses and the motive having been discarded by the trial court as well as by this court were the factors, pressed into service by the learned counsel for the petitioner, which persuaded the apex court to grant leave to appeal in the above-noted petitions. All of the contentions made would be open to a detailed scrutiny by the apex court and probability cannot be ruled out that the prosecution case may fall through in the long run. There cannot be two opinions about the argument of the learned Deputy Prosecutor General Punjab that mere grant of leave to appeal did not necessarily mean that the petitioner had become entitled to suspension of his sentence as a matter of right, but it could not be brushed aside either that in a suitable case of alike nature, the sentence of a convict may be suspended, as envisaged by section 426(2-B) Cr.P.C. The petitioner, after having been arrested on 18.10.2005 has been languishing in jail ever since. The requisite report submitted by the jail superintendent reveals that the petitioner-convict had served sentence of eleven years and four months, inclusive of remissions, being in jail. His continued incarceration for an indefinite period of time may not serve any useful purpose for the prosecution's case.

6. For the foregoing reasons, we feel persuaded to allow this petition, which we do accordingly. The sentence of the petitioner is suspended pending decision of his appeal before the Hon'ble Supreme Court of Pakistan and he shall be released from the prison subject to furnishing bail bonds in the sum of Rs.5,00,000/- (five lacs) with two sureties each in the like amount to the satisfaction of the Deputy Registrar (Judl.) of this court.

HBT/F-9/L Petition allowed.

P L D 2016 Lahore 522

Before Shahid Hameed Dar, J

Khawaja MUHAMMAD HUSSAIN KHATEEB---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE, SIALKOT and 7 others---Respondents

Writ Petition No.5729 of 2015, decided on 26th October, 2015.

Constitution of Pakistan---

----Art. 199---Civil Procedure Code (V of 1908), S.11 & O.XXIII, R.1(3)---Constitutional petition---Dismissal of constitutional petition as withdrawn---Fresh constitutional petition---Maintainability---Earlier constitutional petition on the same subject was dismissed as withdrawn---No permission had ever been sought by the petitioner to file a fresh petition nor High Court had accorded the same---Earlier petition was not withdrawn on account of any technical or formal defect---Point or plea which was available to the petitioner; and was not taken by him in the earlier constitutional petition would be deemed to have been taken up and refused or abandoned---Dismissal of earlier petition could not be assumed to have generated a fresh ground in favour of the petitioner to file fresh petition---Provisions of Civil Procedure Code, 1908, would exclusively regulate and control constitutional proceedings---Subsequent constitutional petition on the same subject matter, and the relief sought for, was not maintainable in view of S.11 of Civil Procedure Code, 1908---Second petition being not

maintainable, was dismissed, in circumstances.

Hussain Bakhsh v. Settlement Commissioner, Rawalpindi and others PLD 1970 SC 1; Pir Bakhsh v. The Chairman, Allotment Committee and others PLD 1987 SC 145 and Hashim Khan v. National Bank of Pakistan PLD 2001 SC 325 ref.

Imran Abbas Khawaja for Petitioner.

Raza-ul-Karim Butt, Additional Advocate General, Punjab

ORDER

SHAHID HAMEED DAR, J.---The petitioner. Khawaja Muhammad Hussain Khateeb once instituted Writ Petition No.28613 of 2014 under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 with the prayer that learned trial court's (Magistrate 1st Class, Sialkot) order dated 26.10.2010 might be set aside besides the respondent I.O. might be proceeded against in the light of order dated 16.7.2011 passed by a learned Additional Sessions Judge at Sialkot and proceedings of the cross-version/case might be stayed till disposal of the said writ petition, and withdrew it on 28.10.2014 by adopting the plea, as to pendency of Writ Petition No.17231 of 2011 then without seeking the permission to institute it afresh.

2. The relevant facts of the case in brief, are that petitioner is the complainant of case-FIR No.171/2009, dated 4.4.2009. for offences under sections 420, 468, 471, P.P.C. Police Station Uggoki District Sialkot which was registered against Asif Muhammad Sulehri (respondent No.8) and others including Dr.Muhammad Arif Malik, Dr.Zahid Ghani Dar and Sajjad Ghani Dar; the investigating officer on finalizing the investigation found the case false and submitted a cancellation report under section 173, Cr.P.C. which was agreed to by the learned area magistrate Sialkot vide order dated 26.10.2010 the impugned order. The investigating officer also recorded a cross-version/case during investigation of the above-noted FIR case against Khawaja Muhammad Hussain Khateeb (petitioner) which stood the test of investigation and a challan under section 173, Cr.P.C. in respect thereto, was submitted before the learned trial court, wherein the petitioner's trial is still underway. The FIR case has, however, gone extinguished after the afore-noted developments.

3. Before proceeding further, it may not be out of place to mention here that the petitioner filed a revision petition against the above- said order of the learned area magistrate, which was allowed by the learned Additional Sessions Judge, Sialkot on 19.7.2011. Asif Muhammad Sulehri assailed the order of the revisional court through Writ Petition No.17231 of 2011, which was allowed by this court vide judgment dated 10.1.2.2014, resulting in annulment of the revisional court's order and resuscitation of the learned area magistrate's order dated 26.10.2010, which has been impugned herein.

4. Learned counsel for the petitioner was confronted with the crucial question of maintainability of this petition, after dismissal of the earlier one on the same subject on 28.10.2014, as the petitioner did not seek a permission from this court to institute it again, if he ever so needed. He has submitted that the petitioner committed no offence still he was going through the rigours of a regular trial in the cross-case and those who in reality, committed the crime had been let-off by the learned area magistrate through the impugned order, which rendered the FIR case dead. He has further submitted that the withdrawal and dismissal of the earlier constitutional petition on the subject was conditioned with the outcome of Writ Petition No.17231 of 2011, which had been decided on a technical ground other than the

merits, hence, petition-in-hand may not be viewed from the angle of its maintainability, in the backdrop of withdrawal of the earlier petition without permission to file a fresh one.

5. It may easily be perceived that learned counsel for the petitioner unequivocally understands as to what it exactly meant, when a constitutional petition is sought to be withdrawn without a permission for instituting it afresh and wouldn't it be invariably impossible to escape the bar, as contained in Order XXIII, rule 1(3) of the Code of Civil Procedure 1908, in such a situation. The main object of the above provisions is to avoid splitting of claim and restrict multiplicity of litigation in the matter. It would be advantageous to refer to the provisions of Order XXIII, rule 1(3), C.P.C., which read as under:-

> "**1. Withdrawal of suit or abandonment at part of claim.---**(1) At any time after institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of the claim.
>
> (2) Whether the Court is satisfied--
>
> (a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are other sufficient grounds for allowing the plaintiff to institute fresh suit for the subject-matter of a suit or part of claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon each part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of claim.
>
> (3) Where the plaintiff withdraws from a suit, or abandons part of claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.
>
> (4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

It is an unquestionably settled principle of the law that provisions of the Civil Procedure Code 1908 would exclusively regulate and control the constitutional proceedings as laid down by the Hon'ble Supreme Court of Pakistah in Hussain Bakhsh v. Settlement Commissioner, Rawalpindi and others (PLD 1970 SC 1). The subsequent constitutional petition on the same subject matter and the relief sought after, is not maintainable in view of section 11 of the Civil Procedure Code 1908, as held by the apex court in Pir Bakhsh v. The Chairman, Allotment Committee and others (PLD 1987 SC 145).

6. It cannot be assumed that dismissal of Writ Petition No.17231 of 2011 (supra) had generated a fresh ground in favour of the petitioner to file the instant petition. The order dated 28.10.2014, whereby earlier constitutional petition on the subject was dismissed as withdrawn clearly shows that no permission had ever been sought by the petitioner on the said occasion to file a fresh one, in case there need be, hence, no such permission was accorded by this court then. The petitioner did not withdraw the earlier one on account of any technical or formal defect. The point or plea, which was available to him and was not taken by him in the earlier writ petition would be deemed to have been taken up and refused or abandoned.

7. A strong impression arises from the earlier dismissal order that the petitioner therein,

who is none else than the petitioner herein, whimsically anticipated the outcome of Writ Petition No.17231 of 2011 (supra) going his way, otherwise he might have abstained from plainly withdrawing it, without lodging a request to file it again in the hour of need. He misconstrued the situation and committed such an error, the repercussions whereof, would terminally haunt the petition-in-hand and all those on the subject, still in the pipeline. It has been laid down by the Hon'ble Supreme Court of Pakistan in Hashim Khan v. National Bank of Pakistan (PLD 2001 SC 325) that withdrawal of suit without permission to file a fresh suit debars institution of any fresh proceedings. The petitioner certainly finds himself in a blind alley, so far as question of maintainability of this petition is concerned. It merits no other end but an outright dismissal. Done accordingly.

HBT/M-349/L Petition dismissed.

P L D 2016 Lahore 570

Before Shahid Hameed Dar, J

Mst. REHANA ANJUM---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE and 6 others---Respondents

Criminal Revision No.39 of 2015, heard on 6th March, 2015.

Penal Code (XLV of 1860)---

----Ss. 302, 34 & 109---Criminal Procedure Code (V of 1898), Ss.200, 202, 204 & 510---Qanun-e-Shahadat (10 of 1984), Arts.73, 74, 78 & 79---Qatl-i-amd, common intention---Abetment---Private complaint---Proof of segregation and handwriting---Execution of document required by law to be attested---Respondents/accused persons, produced in their defence, defence witness who was Statistical Assistant, whose examination was intercepted twice by the petitioner/complainant by raising couple of objections---Trial Court overruled said objections with direction that the statements of the defence witness be completed---Validity---Document produced by the defence witness, depicted electronically generated evidence, which in terms of Art.73 of Qanun-e-Shahadat, 1984, could be considered primary evidence---Print out or other form of output of an automated information system, could not be denied the status of primary evidence, solely for the reason that it was an output of automated information system---Document in question, was not prepared manually, nor had been marginally signed by the executors or the witnesses thereof---Such was the product of automated system, which was hardly required to be signed by any one---Tendering a document in evidence, was something different from proving same in contents thereof---Admissibility of a document in evidence by itself, would not absolve the party from proving its contents in terms of Art.79 of Qanun-e-Shahadat, 1984---Defence witness, did not fall within any of the categories mentioned in S.510, Cr.P.C.; he had to depose about contents of document in question; and petitioner/complainant, would be within her right to cross-examine him, so as to shake his credibility---Merely by tendering the said document in evidence, without saying a word to the contents thereof by defence witness, it would not be possible for the Trial Court to assess the evidentiary value thereof---Petitioner, appeared to have shown unnecessary haste in raising objections, without anticipating the intricacies and fall out thereof---All said and done

by the petitioner, as to her objections, was a circumstance which had been rightly dealt with by the Trial Court, through impugned order/observation at noted stage of the trial---Petition, filed by the petitioner was dismissed, in circumstances.

Mehram Ali Bali for Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State.

Mian Khadim Hussain for Respondents Nos. 2 to 6.

Date of hearing 6th March, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---This petition is directed against order dated 13.1.2015, whereby learned Additional Sessions Judge, Jhang overruled an objection taken by the petitioner, during examination of Javed Iqbal, Statistical Assistant, NRC (National Registration Centre), Jhang (D.W.4) and directed that the statement of the defence witness be completed.

2. The relevant facts of the case are that the petitioner's husband Ch.Jamshed Iqbal was murdered on 7.1.2012 regarding which case-F.I.R. No.17/12, dated 7.1.2012, under sections 109, 302/34 P.P.C. was registered at Police Station Kotwali Jhang, on the statement of respondent-Gul Sher; the petitioner did not feel satisfied with the demeanour of the complainant of the F.I.R. as well as that of the local police, therefore, she filed a private complaint for offences under sections 109, 302/34 P.P.C. against respondent-Gul Sher and others (Nos.2 to 6) for their trial on the charge of murder of her husband; after preliminary proceedings under section 200 and 202 Cr.P.C., respondents Nos.2 to 6 were summoned under section 204 Cr.P.C. by the learned trial court to face the trial; learned trial court indicted the said respondents on 6.11.2012, whereafter case was fixed for recording the prosecution evidence; some of the witnesses were recorded as PWs and some as CWs before the complainant's case was pronounced closed by the learned ADPP on 1.12.2014; the respondents-accused rendered statements under section 342 Cr.P.C., wherein they showed willingness to produce evidence in their defence; it was the fourth defence witness, namely Javed Iqbal, Statistical Assistant NRC, whose examination was intercepted twice by the prosecution/complainant by raising a couple of objections, one out of which relating to admissibility of a document (Exh.DW4/A) was ordered to be taken up by the trial court at the time of final arguments and the other as to deposing about the contents of the said document, by the DW was quickly overruled by the trial court with the direction that the statement of the defence witness be completed, which caused annoyance to the petitioner. Hence, the instant petition.

3. Learned counsel for the petitioner has contended that the petitioner is the complainant of the complaint-case, wherein respondents Nos.2 to 6 are facing the charge of murder of the husband of the petitioner; Gul Sher (respondent No.2) is the real brother of the deceased, whereas respondents Nos.5 and 6 are real sons of respondent No.2 and Hamayoun Saifullah alias Saifi (respondent No.3) is real maternal nephew of Gul Sher-accused; the respondents being in league with each other committed murder of Jamshed Iqbal only to evade the liability of repaying the debt-amount of rupees twenty millions to him; in their trial, the respondents produced Javed Iqbal, Statistical Assistant NRC, Jhang (D.W.4) in their defence, who presented record of E-Toll Plaza, NHA Islamabad, dated 7.1.2012, which was exhibited under an objection of the prosecution as Exh.DW4/A; this particular objection was

not immediately remarked about by the learned trial court and it kept the issue deferred till final arguments were advanced by the parties; the DW started narrating contents of the said document, which was seriously objected to by the prosecution, but learned trial court overruled the objection and asked DW to complete his statement; the impugned observation made by the learned trial court is patently illegal as document in question was not per-se admissible nor DW could prove its contents through his examination-in-chief; the defence witness was not scribe of the said document nor he had signed it; the DW4 should have merely tendered the electronic document-in-issue and not deposed about the contents thereof; the impugned order being patently unwarranted by law may be set aside.

4. On the other hand, learned counsel for respondents Nos.2 to 6 has opposed this petition by contending that electronically generated document may be treated as the primary evidence and Article 73 of the Qanun-e-Shahadat Order 1984 has provided so without any ambiguity; learned trial court received the Vehicle Tracking Ticket/information (Exh.DW4/A) in defence evidence without any irregularity or illegality and impugned observation made by it did not suffer from any legal defect; the electronically generated document is not supposed to be signed by anyone nor can its admissibility be objected to unless it could be shown that the automated information system was not in working order; the contents of the said document could be deposed about by DW4, as merely tendering the said document in evidence did not necessarily mean that its contents stood proved; lastly submitted that the impugned order/observation is legal, which may be sustained as per law.

5. Learned Deputy Prosecutor General Punjab felt inclined to support the arguments of learned counsel for respondents Nos.2 to 6 and he finished with the argument that the instant petition filed by the petitioner was misconceived, which may be declined.

6. After hearing learned counsel for the parties and perusing the available record, it is observed that the controversy under discussion started when Javed Iqbal, Statistical Assistant NRC, Jhang was produced by the respondents (Nos.2 to 6) in their defence as D.W.4. He tendered an attested copy of the Vehicle-Tracking/information certificate (Exh.DW4/A) in his statement by deposing that he had brought the electronic record of E-toll system NHA Islamabad pertaining to 7th day of January 2012 about the entry of car No.9333-LEA onto Ravi Toll Plaza Motorway Lahore and its exit from Toll Plaza Motorway Faisalabad. An objection was raised by the complainant-petitioner's counsel as to admissibility of the said document, for in his wisdom, it was not a public document. The learned trial court deferred recording its finding on the said objection till trial would reach the stage of final arguments. The defence witness deposed about another fact as to the ownership of the said vehicle when learned counsel for the complainant/petitioner raised an objection, "that the witness is neither scribe of the record nor he is the record keeper, nor he had prepared the copy of the document, therefore, he cannot be allowed to give contents of the document as per law." Learned trial court heard both the sides on this particular objection of the complainant-side and recorded its finding as under:-

> "The entries of E-toll are completely computerized, the record of computerized data is preserved by NADRA and the witness has come from NADRA with record. Let him complete his statement."

The objection raised was overruled. The petitioner did not let the trial court complete the examination-in-chief of D.W.4 or complete his evidence in all respects and sought an adjournment to challenge the said observation of the trial court before this court. It appears from the language of the objection taken that it was closely linked with the earlier objection taken by the complainant/petitioner and which has not been resolved by the learned trial court as yet. It may be understood from half-recorded statement-in-chief of D.W.4 that he was

an employee of NADRA and posted as a Statistical Assistant at National Registration Centre, Jhang, a subsidiary/wing of the NADRA. The document (Exh.DW4/A) produced depicts electronically generated evidence, which, in terms of Article 73 of the Order (ibid) may be considered primary evidence. It will be advantageous to reproduce the definition of Article 73 of the Order (ibid):-

> "**73. Primary evidence.** Primary evidence means the document itself produced for the inspection of the Court.
>
> **Explanation 1.** Where a document is executed in several parts, each part is primary evidence of the document.
>
> Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.
>
> **Explanation 2.** Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.
>
> **Explanation 3.** A printout or other form of output of an automated information system shall not be denied the status of primary evidence solely for the reason that it was generated, sent, received or stored in electronic form if the automated information system was in working order at all material times and, for the purposes hereof, in the absence of evidence to the contrary, it shall be presumed that the automated information system was in working order at all material times.
>
> **Explanation 4.** A printout or other form of reproduction of a electronic Document, other than a Document mentioned in Explanation 3 above, first generated, sent, received or stored in electronic form, shall be treated as primary evidence where a security procedure was applied thereto at the time it was generated, sent, received or stored. (In terms of S.29 of Electronic Transactions Ordinance, LI 2002, for the purpose of Ordinance LI 2002 the Qanun-e-Shahadat Order, 1984 shall be read subject to the amendments specified in the schedule to this Ordinance LI of 2002, Added by Ordinance LI of 2002, w.e.f. 11th September, 2002)."

7. As mentioned in Explanation No.3, a printout or other form of output of an automated information system could not be denied the status of primary evidence solely for the reason that it was an output of the automated information system. It has been admitted on both the sides that Exh.DW4/A was not a copy/photocopy of any other document rather it was a true account of the information generated during the oft-repeated automated information system, but it bore the signature of Deputy Assistant Director NRC Jhang. Learned counsel for the petitioner did not argue that the aforesaid document should have been received by the trial court as secondary evidence within the mischief of Article 74 and 76 of the Qanun-e-Shahadat Order, 1984. Leaving this particular issue aside for the trial court to deal with at some appropriate stage of the trial and confining the matter to the ambit of the objection-in-issue, it may be viewed that the objection raised was treble-facetted i.e. the witness was not the scribe of the record, he was not the record keeper nor he had prepared the copy of the document, therefore, he stood barred from proving the contents thereof. The aforesaid document was not manually prepared nor having been marginally signed by the executors or the witnesses thereof. It was the product of automated information system,

which was hardly required to be signed by anyone.

8. The entry and exit of a car through E-toil plaza of the motorway is regulated by an electronic system, which turns operative, the moment any vehicle would pass through it. The relevant data so generated shall be received or stored in electronic form, at the NADRA office and in absence of any evidence to the contrary, it shall be presumed that the automated system was in working order at all material times. A statistical assistant whose duty understandably is to deal with the statistical data maintained at the office of the NADRA, where he worked in the said capacity. There can hardly be found any fault or anything lacking in the potentiality of Javed Iqbal (D.W.4) to depose as a witness as to multi-information studded document. The only objection as to credibility of the said document may come from the situation, hinting at disorderly working of the system-installed, which is not the case here.

9. To tender a document in evidence is something different from proving it in contents thereof. Admissibility of a document in evidence by itself does not absolve the party from proving its contents in terms of Article 79 of the Order (ibid). An electronically generated document would not require any signature to be put on it by virtue of Electronic Transactions Ordinance 2002. Production of a document and proof of the document were two different subjects. A document can be produced in evidence, which is always subject to proof as required under Article 78 of the Order (ibid). If a document was relied upon by a party and it had been formally exhibited but was not proved in accordance with the law, therefore, it could not be relied upon in circumstances. A medical officer having scribed a medico-legal report or a necropsy report is required to prove each and every bit of the descriptions/contents, so as to prove the said documents, the reason being that the reports prepared by him do not have the coverage of provision of section 510, Cr.P.C., which underlines that "any document purporting to be a report, under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government or of the Chief Chemist of Pakistan, Security Printing Corporation Limited or any Serologist, finger print expert or fire-arm expert appointed by Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may without calling him as a witness, be used as evidence in any inquiry, trial or other proceeding under this Code." It is further provided that "the Court may if it considers necessary in the interest of justice summon and examine the person by whom such report has been made."

10. The DW does not fall within any of the categories mentioned in section 510 Cr.P.C., therefore, he has to depose about the contents of Exh.DW4/A and petitioner/complainant shall be within her right to cross-examine him so as to shake his credibility, if possible. Merely by tendering the said document in evidence, without saying a word to the contents thereof by the DW, it would not be possible for the trial court to assess the evidentiary value thereof.

11. The petitioner appears to have shown unnecessary haste in raising three-pronged objection, in mentioned terms without anticipating the intricacies and fallout thereof, probably bearing in mind that the statement of the defence witness might by brought to a pre-mature end. Who can deny that Exh.DW4/A had been generated by an automated information system and not by the said defence witness. How could it be presumed that D.W.4 would not say a word in his statement as to how and in what capacity he was linked with the preparation and production of the said record (Exh.DW4/A) in evidence before the court nor could it be objected to speculatively that he could not prove the contents thereof. All said and done by the petitioner, as to afore-referred objection(s) is a circumstance which has been rightly dealt with by the learned trial court through the impugned order/observation, at noted stage of the trial. The titled petition looks hollow at its base, hence, it merits dismissal. Done accordingly.

HBT/R-17/L Petition dismissed.

2016 Y L R 817

[Lahore]

Before Shahid Hameed Dar and Muhammad Qasim Khan, JJ

BABAR WILLIAM---Petitioner

Versus

ASIF YOUNAS alias CHHOTOO and 3 others---Respondents

Crl. Appeal No.43 of 2008, decided on 11th May, 2015.

Penal Code (XLV of 1860)---

----S. 302/34---Criminal Procedure Code (V of 1898), S. 417(2)A---Qatl-i-amd---Appreciation of evidence---Appeal against acquittal---Incriminating articles, non-producing of---Principle of double presumption---Complainant was aggrieved of judgment passed by Trial Court whereby accused persons were acquitted of the charge---Validity---Motorcycle on which deceased was allegedly shifted to hospital was neither produced before Investigating Officer nor during course of trial---Despite opinion of Investigating Officer, complainant did not file private complaint to prosecute the accused---Prosecution case looked more of jigsaw-puzzle than being a case-in-order---Observations made in judgment in question were compatible with evidence available on record, which was appraised unerringly by Trial Court---Judgment of acquittal could not be upset sparingly as accused enjoyed double presumption of innocence, one relating to pre-judgment stage that every accused was innocent till proved otherwise and the other one through a judicial verdict---Complainant though used adjectives, illegality, infirmity or improbability as to judgment in question but without any element of self-assurance and articulation---Judgment of acquittal could only be interfered with if it looked wholly perverse, capricious, arbitrary, artificial, speculative or based on misreading or non-appraisal of evidence on record resulting in miscarriage of justice---High Court declined to interfere in judgment passed by Trial Court as the result drawn was unexceptionable---Appeal was dismissed in circumstances.

Altaf Hussain and 4 others v. The State PLD 2000 Lah. 216 and Nazira v. Mukhtar Ahmad and 2 others 2003 SCMR 528 ref.

Alam Khan v. Swans Khan and 3 others 1996 SCMR 1742; Inayatullah Butt v. Muhammad Javaid and 2 others PLD 2003 SC 563 and Mst.Saira Bibi v. Muhammad Asif and others 2009 SCMR 946 rel.

Gohar Razzaq Awan for Appellant.

Dr. Muhammad Anwar Khan Gondal, Additional Prosecutor General Punjab (on court's call).

ORDER

The appellant by filing the instant appeal has called in question the acquittal of respondents Nos.1 to 3, Asif Younas alias Chhotu, Dilshad Masih and Haroon alias Pappee, pronounced vide judgment dated 28.1.2008, by the learned Additional Sessions Judge,

Lahore, on conclusion of their trial in case FIR No.206/2005, dated 30.3.2005, under sections 302/34, P.P.C., registered at Police Station South Cantt. Lahore.

2. Precisely, the prosecution story as narrated by Babar William-complainant/appellant (P.W.8) in FIR (Exh.P.W13/A) is that his brother Sajid William ran a billiard-shop at Sajjan Chowk, Mariam Nishat Colony, Lahore; he and his brother Sajid William were present at the shop at 4.00 p.m. on 29.3.2005, when respondent-Chhotu came there and started playing the game; after about half an hour's play, when he intended to leave the shop, Sajid William asked him to pay the game-charges, which he flatly refused to defray and left the shop threateningly and abusively; he, his brother Sajid Walliam and his friends Maqsood Masih, Bashir Masih and Taj Masih were about to put up the shutters of the shop at about 11.00 p.m., the same day, when Chhotu (respondent No.1), Dilshad alias Gagga (respondent No.2) and an unknown person, all armed with pistols, reached there; immediately on their arrival, respondent-Chhotu raised Lalkara to kill Sajid William as he had demanded game-charges from him and he at once fired straight into his abdomen; the fire shot of respondent Dilshad alias Gagga landed at left thigh of Sajid William and that of the unknown accused at his right calf, due to which he fell onto the ground; he raised alarm, which attracted many a persons to the spot; all the shooters made good their escape.

The motive behind the occurrence was that the above said persons used to play the billiard-game, but not pay the cost thereof, which led to a petty quarrel between Sajid William and them in the earlier hours of the day; they bore grudge against Sajid William and fired to murder him; Sajid William was shifted to the Services Hospital Lahore for treatment, where he succumbed to the injuries, sustained. The occurrence was witnessed by Babar William-complainant, Maqsood Masih, Bashir Masih and Sartaj Masih. The complainant reported the incident to Rab Nawaz SI (P.W.11) at Services Hospital, Lahore, who reduced into writing complaint (Exh.PW8/A) at 6.35 a.m. on 30.3.2005 and despatched it to the police station through Muhammad Akram 12872/C, on the basis of which formal FIR (Exh.PW13/A) was drawn up by Abdul Majeed SI (P.W.13), at 7.30 a.m., the same day.

3. After registration of the case, Muhammad Aslam SI (P.W.14) carried out the investigation of this case. He examined the dead body of Sajid William, prepared the injury statement (Exh.PW14/A), the inquest report (Exh.PW14/B), an application (Exh.PW14/C) for postmortem examination of the dead body and despatched it to the mortuary for autopsy under the escort of Muhammad Sarwar 11972/C (P.W.3) and Abdul Rashid/Rashid Ahmad 4561/C (P.W.4); he inspected the spot, during the course of which, he prepared visual site plan (Exh.PW14/D), collected blood stained earth vide seizure memo (Exh.PW9/A), secured three crime empties and a bullet-head vide recovery memo Exh.PW9/2; he got prepared the site plan-in-scale in duplicate (Exh.PA & Exh.PA/1) qua the place of occurrence by Syed Younas Bokhari, draftsman (P.W.2); he arrested Asif alias Chhotu and Dilshad (respondents Nos.1 and 2) on 29.4.2007; he recorded supplementary statement of the complainant on 3.5.2005, wherein he nominated Haroon alias Pappee (respondent No.3); he arrested the said respondent on 7.5.2005; he interrogated the respondents (Nos.1 to 3) and after extensive investigation, he reached the conclusion that actual culprits were Waqas Chaudhry, Adnan and Usman, not named in the FIR; the complainant, however, stuck to the allegation that crime had been committed by the respondents. On completion of investigation, challan was submitted before the learned trial court for trial of the respondents in accordance with the law.

4. To prove its case, the prosecution produced fifteen witnesses, namely, Muhammad Din 3525/HC (P.W.1), Syed Younas Bokhari, draftsman (P.W.2) Muhammad Sarwar 11972/C (P.W.3), Rashid Ahmad 4561/C (P.W.4), Dr.Fakhar-uz-Zaman (P.W.5), Azeem Akhtar (P.W.6), Pervaiz Masih (P.W.7), Babar William (complainant/P.W.8), Bashir Masih (P.W.9),

Dr.Muhammad Ashfaq (P.W.10), Rab Nawaz SI (P.W.11), Muhammad Javed 2109/C (P.W.12), Abdul Majeed SI (P.W.13), Muhammad Aslam SI (P.W.14) and Dr.Tahir Ayub (P.W.15). Thereafter, the respondents were examined under section 342 Cr.P.C., whereby they professed their innocence in the matter and denied all the allegations levelled against them. Their respective contentions, in reply to the question as to why this case against them and why the PWs had deposed against them, read as under:-

ASIF YOUNAS ALIAS CHHOTU:

"This case has been concocted against me because the complainant came under the impression that I sent these accused persons namely Waqas Chaudhry, Usman and Adnan for committing the murder of the deceased, whereas the fact of the matter is that I neither went to the Billiard shop of the deceased for playing game nor I extended threats to the deceased and similarly, on this suspicion that I disclosed the address of the Billiard shop of the deceased, I have been involved falsely in this murder case and no eye-witness of the locality has deposed against me and all the three eye-witnesses reside at a distance of 9 K.M. from the place of occurrence."

DILSHAD MASIH ALIAS GAGGA:

"Due to suspicion. The PWs are closely related to the deceased and have deposed falsely."

HAROON ALIAS PAPPEE:

"This case has been fabricated against me on the basis of suspicion and all the PWs have deposed against me due to relationship with the complainant party."

None of them deposed under section 340(2), Cr.P.C. nor did they adduce the defence evidence. The learned trial judge on conclusion of their trial pronounced them acquitted of the charge.

5. Learned counsel for the appellant has submitted that the impugned judgment has been passed in utter disregard to the data available on the record and the law on the subject; the ocular account furnished by Babar William (complainant/P.W.8) and Bashir Masih (P.W.9) was duly supported by the medical evidence and the allied incriminatory material, but all had been grossly overlooked by the trial court while pronouncing acquittal of the respondents; the observations, as contained in the impugned judgment have no nexus with the evidence produced by the prosecution, which would easily render the impugned judgment a nullity in the eye of law; the eye-witnesses categorically deposed about the individual fatal roles of the respondents (Nos.1 to 3) in their testimonies, which were further strengthened by the statements of three medical officers, Dr.Fakhar-uz-Zaman (P.W.5), Dr. Muhammad Ashfaq (P.W.10) and Dr.Tahir Ayub (P.W.15), but nothing could impress the trial court and it pre-supposedly held them innocent in a causal way; the opinion of the investigating officer as to innocence of the respondents has been given undue weightage by completely overlooking the settled principle of law that it was both irrelevant and inadmissible in evidence. Learned counsel has lastly contended that the impugned judgment is a product of whimsical and conjectural thoughts of the learned trial court, which may be set aside and respondents may be convicted/sentenced accordingly.

6. We have heard the learned counsel for the appellant and gone through the available record minutely.

The prosecution case mainly hinged on the ocular account furnished by Babar William (complainant/P.W.8) and Bashir Masih (P.W.9), who happened to be the relations to Sajid William (deceased). In fact, Babar William was the real brother and Bashir Masih, an unspecified kin of the deceased. Both of them had their independent jobs and they were not linked with the business of Sajid William (deceased) in any manner. As per his own contention, Babar William (complainant/ P.W.8) was employed at the Police Motor Workshop as a constable for last twelve years. He lived in Model Colony, Lahore, which was at a distance of about eleven kilometers from the place of his job. He mentioned the distance between his residence and the place of occurrence as four/five kilometers. Bashir Masih (P.W.9) admitted his relationship with the deceased in his statement. He was a rickshaw driver by profession and lived at a place, Model Colony No.2, Lahore, which was at a distance of about five kilometers from the hot-spot. Their presence at the spot at the relevant time of the occurrence could only be believed if they had offered any good reason or shown any justifiable purpose to be there, but they badly failed to establish this fact.

7. Haroon alias Pappee (respondent No.3) was not named in the FIR and he was involved in this case through supplementary statement of the complainant (P.W.8), which he rendered before Muhammad Aslam SI/IO (P.W.14) on 3.5.2005, about 35 days after the alleged occurrence. The complainant did not say a word as to making any supplementary statement in his examination-in-chief, but in cross-examination he stated that he made two statements before the police, one on 30.3.2005 and the other two/three days thereafter. He replied it in negative when he was put a suggestion that he had made the secondary statement about one and a half month after the first one. He stated to have reported the crime to the police through complaint (Exh.PW8/A), when they came to him at the Services Hospital Lahore. Bashir Masih (P.W.9) has categorically stated that his statement under section 161, Cr.P.C. was recorded at the police station at about 8.00 a.m. on 30.3.2005 and it was the time when statement of Babar William (complainant/ P.W.8) and that of Sajid Masih was recorded there simultaneously. This particular deposition of P.W.9 reflects on the veracity of the complainant's version as well as that of Rab Nawaz SI (P.W.11) that complaint/Fard Biyan (Exh.PW8/A) had been recorded at the emergency ward of the Services Hospital Lahore.

8. The preparation of the complaint (Exh.PW8/A) by Rab Nawaz SI (P.W.11) at 6.35 a.m. on 30.3.2005 and registration of F.I.R. (Exh.PW13/A) by Abdul Majeed SI (P.W.13) at 7.30 a.m., the same day, leads to suggest that the matter had been reported to the police after due deliberations and consultations by the complainant and his co-witnesses, as the alleged occurrence had taken place at 11.00 p.m. on 29.3.2005, besides it cast a serious doubt on the claim of the witnesses of ocular account (P.W.8 and P.W.9) that they had been present at the spot at the crucial hour and witnessed the occurrence. The medical officer, Dr. Muhammad Ashfaq (P.W.10) categorically stated that Sajid William, when alive and in injured condition, had been brought to the hospital by the police for his medical examination and treatment of his injuries. The medico-legal report (Exh.PW10/A) of the then injured also showed that he had been shifted to the hospital by the police. The relevant column "Name of relative or friend" has not been filled in by the medical officer and instead, the MLR bore the name of Abdul Rashid 4561/C (P.W.4), having accompanied the examinee then. The medical evidence, in no way, lends corroboration to the contention of Babar Walliam (complainant/P.W.8) and Bashir Masih (P.W.9) that they had brought Sajid William to the hospital in injured condition. The medico-legal report (Exh.PW10/A) shows that the deceased, when in injured condition, had been medically examined at 11.55 p.m. on 29.3.2005. The record does not tell, where the complainant and his co-witnesses were in between 11.55 p.m. to 6.35 a.m., the next morning. Abdul Rashid/Rashid Ahmad 4561/C (P.W.4) said nothing in his testimony, if he accompanied the injured Sajid William to Services Hospital, Lahore. What he has deposed about is that he along with Muhammad Sarwar 11972/C (P.W.3) escorted the dead body of

Sajid William to the dead house of Mayo Hospital, Lahore on 30.3.2005, besides he stated about the seizure of last worn clothes of the deceased through memo of recovery Exh.PB. It is not so that the police did not reach the Services Hospital, Lahore at 11.55 p.m. on 29.3.2005 nor could it be made a point by the prosecution that the police had not shifted the injured to the said hospital, before he expired there during surgical intervention. The autopsy on the dead body of the deceased was performed about 16-1/2 hours after his death, which occurred at 9:30 p.m. on 30.3.2005. This delay is massive and highly injurious to the prosecution case and no one ever felt the necessity of explaining it during trial. Ironically, none of the names of the eye-witnesses appeared in the postmortem examination report (Exh.PC) as identifier of the dead body nor could it be so found in the inquest report (Exh.PW14/B). The delay of about 7-1/2 hours in reporting the crime to the police has gone unexplained, which seriously dented truthfulness of the assertion of the eye-witnesses, as to having witnessed the incident.

9. The complainant (P.W.8) admitted to have furnished his sworn affidavit before the learned trial court with the contention that Dilshad alias Gagga (respondent No.2) had not taken part in the incident nor he was armed with any weapon at the time of the occurrence; the co-witnesses informed him later on that Dilshad alias Gagga had been present at the spot but not taken part in the incident; lastly contended that he had no objection if he was released on bail.

10. Bashir Masih (P.W.9), the rickshaw driver, contended in his statement that his rickshaw was parked at a distance of about twenty (20) feet from the spot when the alleged occurrence took place. It is unfathomable if he and his rickshaw were available at the place of occurrence, why did the complainant and Azeem Akhtar (P.W.6) shift Sajid William, in injured condition to the hospital by a motorcycle. His statement does not appeal to reason in any way. His contention was that Sajid William travelled by his rickshaw from and to his shop for years. His rickshaw would have been the best possible conveyance for shifting the injured to the hospital, but it was not used for the said purpose, which gave rise to a definite idea that it was not there at that time nor he too, had been there then. It looks literally impossible that an injured person with multiple firearm wounds and in ostensible excruciating pain could be handled by two persons on a two-wheeler for shifting him to the hospital. Sajid William, when in injured condition had most probably been shifted to the hospital by the police through their own arrangements and complainant and others had no idea whatsoever in this regard. They fabricated the story of his shifting on a motorcycle, which did not look convincing. The ocular account did not inspire confidence, hence, it was liable to be brushed aside being untrustworthy and rightly so done by the learned trial court.

11. The case set up by the prosecution failed to stand the test of investigation and it transpired that Sajid William had been fired at and murdered by one Waqas Chaudhry. Muhammad Aslam SI/IO (P.W.14) contended in his testimony that the crime had been committed by Waqas Chaudhry, Usman and Adnan. He further said that his opinion had been upheld by the high-ups of his department. He rather took pride in saying that the complainant looked satisfied with his investigation as he did not lodge any complaint against him before any forum. Learned trial court though reminisced that opinion of the investigating officer was irrelevant and inadmissible in evidence, yet it referred to a couple of judgments, Altaf Hussain and 4 others v. The State (PLD 2000 Lahore 216) and Nazira v. Mukhtar Ahmad and 2 others (2003 SCMR 528) in paragraphs 32 and 33 of the impugned judgment to formulate the point that "findings recorded by Investigating Officer though could not be sole basis for acquittal of the accused, but it could be considered as a circumstance in support of the independent findings arrived at to the effect that the prosecution has failed to prove the case beyond doubt against the accused."

12. The motorcycle whereby Sajid William had allegedly been shifted to the hospital was

neither produced before the investigating officer nor during the course of the trial. Despite the aforesaid opinion of the investigating officer, the complainant did not file a private complaint to prosecute the accused. The prosecution case looked more of a jigsaw-puzzle than being a case-in-order. The observations made and the arguments developed in the impugned judgments are compatible with the evidence available on the record, which appears to have been appraised unerringly by the learned trial court. The result drawn through the impugned judgment is unexceptionable, which does not call for interference by this court.

13. A judgment of acquittal cannot be upset sparingly as the accused would enjoy double presumption of innocence, one relating to the pre-judgment stage, that every accused is innocent till proved otherwise and the other one through a judicial verdict. Learned counsel for the appellant though repeatedly used the adjectives, illegality, infirmity or improbability as to the impugned judgment, but without any element of self-assurance and articulation. The well-settled principle of law is that a judgment of acquittal can only be interfered with if it looked wholly perverse, capricious, arbitrary, artificial, speculative or based on misreading or non-appraisal of the evidence on record resulting in miscarriage of justice, which incidentally is not the situation herein. Reliance in this regard may easily be had on, Alam Khan v. Swans Khan and 3 others (1996 SCMR 1742), Inayatullah Butt v. Muhammad Javaid and 2 others (PLD 2003 SC 563) and Mst.Saira Bibi v. Muhammad Asif and others (2009 SCMR 946).

14. For the discussion supra, we find this appeal too hollow at its base to issue a notice to the respondents Nos.1 to 3, hence, dismissed in limine.

MH/B-28/L Appeal dismissed.

2016 Y L R 931

[Lahore]

Before Shahid Hameed Dar and Muhammad Qasim Khan, JJ

SHAUKAT ALI and another---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos.2638 and 400-J of 2010 and Murder Reference No.13 of 2011, heard on 6th May, 2015.

Penal Code (XLV of 1860)---

----Ss. 302(b), 148, 149 & 337-J---Qatl-i-amd, rioting, common object, causing hurt by poison---Appreciation of evidence---Complainant and eye-witnesses were first cousins inter se, and they all were residents of the same village, which was 14/15 kilometers away from the place of occurrence; they made complete departure from their previous statements, which they rendered during the course of investigation; and they could not offer any plausible explanation in that context---Complainant, did not claim to be an eye-witness of the occurrence, and contended that he had seen accused and his four unknown companions running towards the river; and that he had suspected of the crime-in-issue---Complainant,

did not name any one as eye-witness of the occurrence, in the FIR---Complainant in the private complaint did not change his position of being a witness of circumstantial evidence, and kept it intact, as to the contents of the FIR---Testimony of the complainant rendered him an irrelevant person qua the occurrence---One prosecution witness rendered an equally ambiguous statement like the complainant, and he introduced such factors in his statement which simply were unbelievable---Said witness virtually failed to bring any worthwhile circumstance on the record which might incriminate accused persons---Other two prosecution witnesses were self-claimed eye-witnesses of the occurrence, as the complainant did not cite their names in the FIR as eye-witnesses, nor he quoted them as such in his supplementary statement, which he rendered on the following day of the registration of the FIR---Yet another prosecution witness stated to have witnessed the occurrence from a distance of four Kanals in the torch light, which torch was neither presented before the Investigating Officer, nor was it taken into possession---Testimony of said witness looked preposterous and hard to believe---One of the prosecution witnesses dishonestly improved upon his previous statement, and he failed to offer any explanation, as to why he posed himself an eye-witness of the occurrence; his testimony, like that of his co-witnesses, did not inspire confidence, nor could it be believed to have been rendered by a forthright person, his testimony was struck off---Statements of all the eye-witnesses suffered from material discrepancies and dishonest improvements they were neither present at the spot at the relevant hour, nor they had witnessed the occurrence---Deceased had callously been done to death, most probably by some unknown accused at some unknown time during the darkness of the night---Testimonies of the witnesses, were not above board nor could they be considered to have been rendered by truthful persons---Testimonies of said witnesses, was rejected---Recovered blood stained kassi, was sent to the office of Chemical Examiner, and report received therefrom was in positive, and report of the Serologist as to the origin of the blood, showed it as that of human being---Investigating Officer, in circumstances, ought to have preserved the finger prints thereon, and obtained expert report from the Forensic Science Agency, so as to use it as an incriminating piece of evidence against accused, but he did nothing of that sort, and virtually destroyed said crucial piece of evidence---Medical evidence being a corroboratory circumstance, could not identify the author of bodily injuries of a dead or a living person---Prosecution had failed to bring home the guilt of accused person beyond reasonable shadow of doubt---Impugned judgment had been passed merely on conjectural and whimsical reasons, which could not be approved of---Impugned conviction and sentence of accused persons, were set aside and accused were acquitted of the charges and were released, in circumstances.

Farman Ahmad v. Muhammad Inayat and others 2007 SCMR 1825 ref.

Mian Muhammad Waseem for Appellants.

Muhammad Atif Rao, District Public Prosecutor for the State.

Zafar Iqbal Tarhana for the Complainant.

Date of hearing: 6th May, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---Shaukat Ali, Muhammad Hussain and Muhammad Shafi were held guilty under sections 302(b)/149, 148 and 337-J P.P.C. by the learned Additional Sessions Judge, sub-division Tandlianwala. district Faisalabad vide judgment dated 30.10.2010 and sentenced as under:-

i) **Under sections 302(b)/149 P.P.C.:** to death each on three counts with the direction to pay an amount of Rs.3,00,000/- each to the legal heirs of the each deceased under section 544-A, Cr.P.C. or in default thereof to undergo simple imprisonment for three months each on three counts.

ii) **Under section 148 P.P.C.:** to undergo rigorous imprisonment for three years each.

iii) **Under section 337-J P.P.C.:** to undergo rigorous imprisonment for ten years each.

Their co-accused Yaseen and Ameen were declared proclaimed offenders and perpetual warrants of arrest were issued against them.

2. The convict-appellant, Shaukat Ali by filing Criminal Appeal No.2638 of 2010 and convict-appellants Muhammad Hussain and Muhammad Shafi by filing Criminal Appeal No.400-J of 2010 have called in question the impugned judgment, whereas the learned trial court has submitted Murder Reference No.13 of 2011, under section 374, Cr.P.C. for confirmation of the death sentence of the appellants. Muhammad Shafi (appellant in Cr.A.No.400-J/2010) was acquitted of the chargs on the basis of compromise by this court on 24.1.2012 and appeal to his extent was allowed. Now we propose to dispose of Crl.A.No.2638/2010 filed by Shaukat Ali-appellant and Crl.A.No.400-J/2010 by Muhammad Hussain-appellant together with Murder Reference No.13/2011 through this single judgment.

3. The prosecution story as unfurled by Muhammad Ashraf (complainant/P.W.1) in complaint (Exh.CW7/AA), is that he obtained agricultural land measuring 30 acres, situated in river-catchment area on lease; he along with his maternal nephew Nasir Abbas, brothers-in-law (Saale) Muhammad Nawaz and Muhammad Imran cultivated the said land; he temporarily lived in square No.44, killa No.14, within the revenue limits of Chappan Saee; he also erected a cattle-shed there; his brothers-in-law and paternal nephew slept at the said residence at night between 23/24.6.2009 to look after the cattle-head, whereas he along with Muhammad Tufail and Muhammad Hussain slept at a distance of about 1-1/2 acre to keep a vigil on the maize-crop; it was at about 2.30 a.m. when he heard the dogs barking; he got up and awoke his companions; they came towards the Dhari; he had a search-light with him, which he lit and saw Muhammad Hussain son of Yaqoob (appellant), his ex-servant, who had come to see him the previous evening, running away along with his four unknown companions towards river Ravi; they entered the Dhari and saw in the search light that his brothers-in-law Muhammad Nawaz, Muhammad Imran and maternal nephew Nasir Abbas lay on the cots drenched by blood; they found their throats cut and they were no more; a blood stained Kassi lay close to Nasir Abbas'cot; they found tea-leaves in a kettle and a cup; he strongly showed the suspicion that Muhammad Hussain (appellant) joined by his unknown co-accused administered some intoxicating fluid to his brothers-in-law and the maternal nephew and butchered them by means of Kassi. The complainant leaving Muhammad Tufail and Muhammad Hussain PWs at the spot went to the police station and came across Allah Rakha SI (C.W.7) at Thatha Ismail, at 6.00 a.m., on 24.6.2009, who reduced into writing complaint (Exh.CW-7/AA) and despatched it to the police station through Azhar Khan 4010/C (PW not produced) for registration of a case. On receipt thereof, Muhammad Umar Khan ASI/DO (C.W.8) drew up formal FIR (Exh.CW-8/CC), at 6.45 a.m., the same day.

4. After registration of the case, Allah Rakha SI (C.W.7) carried out the investigation, inspected the dead bodies of Muhammad Imran, Muhammad Nawaz and Nasir Abbas, prepared the injury statements (Exh.CW1/C, Exh.CW1/G & Exh.CW1/L), the inquest reports (Exh.CW1/D, Exh.CW1/H & Exh.CW1/M) and despatched them to the mortuary for

autopsy under the escort of Abbad Ali 2070/C (C.W.3); he inspected the venue of the crime and prepared visual site plan (Exh.CW7/BB); thereafter he collected blood stained earth from three places, vide seizure memos Exh.PB, Exh.PC & Exh.PD, respectively; he secured blood stained Kassi (P1) & Kettle (P2) with a cup from the place of occurrence vide memos of recovery Exh.PE & Exh.PF, duly attested by Aman Ullah (P.W.4) and Muhammad Abbas (P.W. not produced); after postmortem examination of the dead bodies, Abbad Ali 2070/C produced before him bloodstained last worn clothes of the deceased, which he took into possession vide memos Exh.CW3/Q, Exh.CW3/R & Exh.CW3/S; he got prepared the site plan-in scale in duplicate (Exh.CW2/N & Exh.CW2/P) qua the place of occurrence by Haq Nawaz, halqa patwari (C.W.2); he recorded supplementary statement of complainant on 25.6.2009, wherein he nominated four unknown persons, Ameen, Yaseen (since POs), Muhammad Shafi (since acquitted) and Shaukat Ali (appellant) as accused; Muhammad Shafi accused and the others joined investigation on 18.8.2009 and investigating officer kept his arrest pending; he arrested Muhammad Hussain (appellant) and Shaukat Ali (appellant) on 20.8.2009 and 18.10.2009, respectively; they were interrogated and sent to judicial lock-up; he declared Muhammad Shafi-accused (since acquitted) innocent. After completion of investigation, he handed over the file to SHO for preparation of report under section 173, Cr.P.C.

5. The complainant (P.W.1) being dissatisfied with the investigation, filed a private complaint (Exh.PA) on 19.11.2009 against the accused, Muhammad Hussain (appellant), Shaukat Ali (appellant), Muhammad Shafi (since acquitted), Yaseen and Ameen (since POs), wherein first three were tried and convicted. He introduced Muhammad Zaman (P.W.3) and Niaz alias Aman Ullah (P.W.4) along with others as eye-witnesses of the occurrence.

6. The learned trial Court after necessary proceedings under sections 200, 202, Cr.P.C. summoned all the accused to face the trial. The private complaint (Exh.PA) was taken up first by the learned trial Court for trial of the accused.

7. The accused on indictment pleaded not guilty and claimed a trial. The prosecution, in order to prove its case, produced four public persons, namely Muhammad Ashraf (complainant/P.W.1), Muhammad Tufail (P.W.2), Muhammad Zaman (P.W.3) and Niaz alias Aman Ullah (P.W.4) as eye-witnesses, while rest, Dr.Naseer Ahmad, Haq Nawaz Patwari, Abbad Ali 2070/C, Ahmad Yar 3722/C, Naveed Ahmad 3418/C, Ghazanfar Ali 3633/C, Allah Rakha SI/IO and Muhammad Umar Khan ASI were recorded as C.W.1 to C.W.8, respectively. Thereafter, the accused were examined under section 342, Cr.P.C., whereby they professed their innocence in the matter and denied all the allegations levelled against them as false. They did not opt to depose within the scope of section 340(2), Cr.P.C. or adduce evidence in defence. The contention of Muhammad Hussain-appellant in reply to question as to why this case against him and why the PWs have deposed against him, read as under:--

> "It was a blind murder and no body witnessed it. Due to suspicion, the complainant has involved me in this case falsely. The complainant and PWs are closely related to each other and with the deceased persons. I am innocent "

His co-accused Shaukat Ali (appellant) and Muhammad Shafi (since acquitted) adopted the same version, as above.

The learned trial Judge on conclusion of the trial held the appellants guilty of the offence charged and sentenced them as mentioned hereinabove.

8. In support of the appeals filed by the appellants, their learned counsel has contended

that it was a case of unseen occurrence having taken place in the darkness of the night with none of the prosecution witnesses anywhere near the spot; Shaukat Ali (appellant) was not named in the FIR and complainant (P.W.1) named him as an accused through his supplementary statement, recorded on 25.6.2009 whereby he also added three others, Ameen, Yasin and Muhammad Shafi as such, besides the motive behind the occurrence; the entire prosecution case stands on circumstantial evidence and the ocular account, which was not believable; the complainant filed private-complaint against the appellant and three others on 19.11.2009, about five months after the alleged occurrence and offered no explanation as to the delay caused; the case against the appellants is a pile of tainted pieces of evidence and established law is that one tainted piece of evidence cannot corroborate the other piece of alike nature; medical evidence does not support the prosecution case in any way; lastly contended that it was a case of no evidence and appellants merited acquittal herein.

9. On the other hand, learned state counsel assisted by the complainant's learned counsel has submitted that prosecution proved its case against the appellants beyond all shadows of doubt through credible evidence; the medical evidence fully supports the ocular version; all the eye-witnesses plausibly explained their presence at the spot at the relevant time of the occurrence; the appellants committed a gruesome offence by murdering three innocent youths for none of their fault, hence their sentence may be confirmed.

10. We have heard the learned counsel for the parties to the optimum and gone through the record with their able assistance.

11. The detail of the occurrence, as alleged in FIR (Exh.CW-8/CC) is hair-raising and it bleeds the heart, as the complainant (P.W.1) lost two youthful paternal cousins, Muhammad Imran and Muhammad Nawaz besides an equally young maternal nephew, Nasir Abbas. It was a bloody occurrence which took place about 2-1/2 hours after midnight i.e. at 2.30 a.m. at the dhari of the complainant. Unluckily, no one was present there, when murderer(s) started butchering the ill-fated deceased persons. The witnesses, however, claimed to have reached the spot after they heard the dogs barking at about 2.30 a.m. According to the story of FIR, Muhammad Hussain (appellant) was seen running along with four unknown persons towards river Ravi, by the complainant and his companions, Muhammad Tufail (P.W.2) and Muhammad Hussain son of Mughal (PW not produced). They reached the dhari and found blood soaked dead bodies of the deceased placed on the cots, with a blood stained kassi lying near the cot of Nasir Abbas (deceased). The complainant could not immediately name the unknown accused and he rendered a supplementary statement on 25.6.2009 whereby he named Shaukat Ali (appellant) and three others, including Muhammad Shafi (since acquitted on the basis of compromise). He also brought on record the motive through the said statement whereby he alleged that Muhammad Hussain (appellant) suspected his maternal nephew Nasir Abbas (deceased) of an illicit liaison with his wife.

12. The complainant being dissatisfied with the investigation filed private complaint against the appellants and three others on 19.11.2009 with a self-contradictory contention, as contained in paragraph 2 thereof, whereby he contended that he and his companions witnessed Muhammad Hussain (appellant) and his four unknown cronies sprinting towards river Ravi, when they reached the place of occurrence on barking of the dogs. He however named Shaukat Ali (appellant), Muhammad Shafi (since acquitted), Ameen and Yasin (since P.O.) as accused in the same paragraph without hinting at any evidence in this context. The complainant showed himself and all of his companions, mentioned herein, as eye-witnesses of the occurrence. Is n't it a sharp deviation from the text of the FIR, yes, it is.

13. To substantiate its case against the appellants, the prosecution has relied on following pieces of evidence:-

i) Eye-witness account;

ii) Medical Evidence &

iii) Recovery of kassi etc.

We will now appraise the prosecution evidence one by one.

The prosecution produced Muhammad Ashraf (complainant/P.W.1), Muhammad Tufail (P.W.2), Muhammad Zaman (P.W.3) and Niaz alias Aman Ullah (P.W.4) as eye-witnesses of the occurrence. They all are first cousins inter-se, as admitted by the complainant in his testimony and they all were residents of the same village, Thatha Madhoka, which was 14/15 kilometers away from the place of occurrence. They made complete departure from their previous statements, which they rendered during the course of investigation and they were duly confronted with them but they could not offer any plausible explanation in this context. Muhammad Ashraf (complainant) did not claim to be an eye-witness of the occurrence when he got lodged the FIR (EXh.CW-8/CC) and he speculatively contended to have seen Muhammad Hussain (appellant) and his four unknown companions running towards the river Ravi, at 2.30 a.m., and he suspected them of the crime-in-issue. He did not name anyone as eye-witness of the occurrence in the FIR. In the private-complaint case (Exh.PA) he did not change his position of being a witness of circumstantial evidence and kept it intact, as to the contents of the FIR with a variation that his paternal cousins Muhammad Zaman (P.W.3) and Niaz alias Aman Ullah (P.W.4) told him names of the unknown accused as Yasin (since P.O.), Ameen (since P.O.), Shaukat Ali (appellant) and Muhammad Shafi (since acquitted). He made a startling deposition in his testimony that Muhammad Hussain accused gave a kassi blow on the body of Nasir Abbas (deceased) and threw the kassi there. He said so as if he was an eye-witness of the occurrence. He was confronted with his previous statement (Exh.DA) and it was found that innovation made by him did not exist therein. About the nomination of the unknown accused, he did not disclose any source at all. He further said that he left Niaz alias Aman Ullah (P.W.4), Muhammad Zaman (P.W.3), Muhammad Hussain (PW not produced) and Muhammad Tufail (P.W.2) near the dead bodies and proceeded to the police station for registration of case against the accused. He did not give any clue in the FIR or in his statement as a PW, if he was told anything by his first cousins Niaz alias Aman Ullah (P.W.4) and Muhammad Zaman (P.W.3) about the identification of the unknown accused or they were the eye-witnesses of the occurrence. Had Muhammad Zaman (P.W.3) and Niaz alias Aman Ullah (P.W.4) been present at the spot and witnessed the occurrence, in presence of the complainant and Muhammad Tufail (P.W.2), the text of the FIR would have been entirely different, as we see now. He also said that he saw the dead bodies in the lit torch but he did not contend that he saw escape of the accused towards Ravi in the light thereof. He, unlike the FIR and the complaint, did not contend in his testimony that Muhammad Hussain appellant visited him the previous evening and stayed at his dera with the unfortunate souls at the fateful night. The net impact of his testimony renders him an irrelevant person qua the occurrence.

14. Muhammad Tufail (P.W.2) rendered an equally ambiguous statement like Muhammad Ashraf (P.W.1) and introduced such factors in his testimony which were simply unbelievable. He contended that he reached the place of occurrence along with Muhammad Ashraf (complainant/P.W.1) and Muhammad Hussain son of Mughla (PW not produced) after they got up due to barking of the dogs; on reaching the dhari they found Nasir Abbas, Muhammad Imran and Muhammad Nawaz dead, with slit throats and a blood stained kassi lying near the cot of Nasir (deceased); he saw Muhammad Hussain (appellant) and four others running away towards river Ravi. He maintained in his testimony that the names of the unknown accused were told to him by Niaz alias Aman Ullah and Muhammad Zaman, who had reached the place of occurrence before he came there. He admitted in his testimony

that his village was situated at a distance of 14/15 kilometers and he did not own any land close to the place of occurrence. He was confronted with his previous statement (Exh.DB) as to factum of arrival of Niaz alias Aman Ullah and Muhammad Zaman PWs at the place of occurrence before he reached there but it was not found so mentioned therein. He denied to have stated before the police that the crime 'appeared' to have been committed by Muhammad Hussain. accused (appellant) along with his co-accused but on confrontation with Exh.DB, it was found so mentioned by him. It was an assimilating circumstance, like the one, as found in the testimony of Muhammad Ashraf (complainant/P.W.1) whereby he declined to have stated before the police that he strongly suspected Muhammad Hussain (appellant) and his unknown accused of committing the crime and on confrontation it was found to have been so said by him in Exh.DA. Muhammad Tufail (P.W.2) virtually failed to bring any worthwhile circumstance on the record which might incriminate the appellants.

15. Muhammad Zaman (P.W.3) and Niaz alias Aman Ullah (P.W.4) are self-claimed eye-witnesses of the occurrence. One thing is common between them that the complainant (P.W.1) did not cite their names in the FIR as eye-witnesses nor he quoted them as such in his supplementary statement, which he rendered on the following day of the registration of the FIR Muhammad Zaman (P.W.3) stated to have witnessed the occurrence from a distance of four kanals in the torch light. According to his testimony, Shaukat Ali (appellant) and Muhammad Shafi (since acquitted) gripped hands/arms of the deceased, Yasin and Ameen (since P.O.) caught their legs and Muhammad Hussain (appellant) slit their throats one by one by means of kassi; after their murder, Muhammad Hussain (appellant) threw kassi at the spot and they decamped towards river Ravi, within the sight of the witnesses, who had a lit torch with them. He admitted in his testimony that he did not state before the police that Niaz alias Aman Ullah (P.W.4) was with him at the time of occurrence. He denied the suggestion that he had not witnessed the occurrence nor he had made any statement before the police in this regard. He innocently stated that he watched the accused commit the crime for about 15/20 minutes "without creating any disturbance to them". It does not appear from his statement that he disclosed names of the unknown accused to the complainant (P.W.1) or Muhammad Tufail (P.W.2). In a nutshell, his testimony looks preposterous and hard to believe.

16. Niaz alias Aman Ullah (P.W.4) deposed about his arrival at the spot along with Muhammad Zaman (P.W.3) after they heard the dogs barking and saw in the torch light that Shaukat Ali (appellant) and Muhammad Shafi (since acquitted) caught arms of the deceased persons one after the other, Yasin (since PO) and Muhammad Ameen (since PO) gripped their legs and Muhammad Hussain (appellant) slaughtered them with a kassi, which he threw near the cot of Nasir Abbas (deceased) after he killed all three. Further deposed that the accused decamped towards river Ravi. He did not exclaim as to how he knew the unknown persons or Muhammad Hussain (appellant) nor he contended that the names of the unknown accused were told to the complainant by his companion Muhammad Zaman. He is real brother of Muhammad Imran and Muhammad Nawaz (deceased) and maternal uncle of Nasir Abbas (deceased). He claimed to have seen the ghastly crime together with Muhammad Zaman (P.W.3) from a distance of two steps. Each and every word, he deposed about the commission of crime by the accused was put to him so as to draw his attention towards his statement Exh.DC recorded by the police under section 161, Cr.P.C. and it came to light that nothing of the sort had he mentioned therein. What left behind in his testimony related to the factum of recovery of blood stained earth from three places, the recovery of blood stained kassi (P1) and recovery of tea-leaves stained kettle (P2) with a cup. It only meant that he became an eye-witness of the occurrence, when complainant filed private-complaint (Exh.PA) against the appellants on 19.11.2009. He like Muhammad Zaman (P.W.3) dishonestly improved upon his previous statement and failed to offer any explanation as to why he posed himself an eye-witness of the occurrence. His testimony like that of his co-eye-witnesses does not inspire

confidence nor can it be believed to have been rendered by a forthright person, hence, struck off.

17. The statements of all the eye-witnesses suffer from material discrepancies and dishonest improvements. It appears from their statements that they were neither present at the spot at the relevant hour nor they had witnessed the occurrence. The ill-fated deceased had callously been done to death, most probably by some unknown accused at some unknown time during the darkness of the night. There exists every reason to believe that the complainant found his first cousins and the nephew butchered on the following morning of the deadly night, whereafter he and his co-witnesses deliberated over the situation and reported crime to the police, as contained in the FIR. The torch was neither presented before the investigating officer nor was it taken into possession by him. If initial stance of the complainant (P.W.1) and that of Muhammad Tufail (P.W.2) as contained in their previous statements recorded by the police that they saw the accused in lit search/torch light running towards river Ravi, is taken into consideration, even then the prosecution's case hardly advances beyond the boundaries of reasonable doubt. They themselves marred believability of their testimonies by making reckless dishonest improvements and they did so without caring for the impact thereof. Their testimonies are not aboveboard nor could they be considered to have been rendered by truthful persons. They did so to paint a graver picture qua the occurrence. Their conduct in making these improvements made them wholly unreliable. They did not appear to have any respect for the truth and they changed their versions without any prick of conscience, as and when it suited them. It is the settled principle of criminal jurisprudence, when a witness improves his version to strengthen the prosecution case, his changed statement could not be relied on being a dishonest rendition of events.

18. As discussed above, the witnesses of ocular account behaved unscrupulously and they showed little respect for preliminary lessons of morality and made uninhibited exaggerations/dishonest improvements in their statements, with a view to bring their case in conformity with the medical evidence and in order to fill-in the lacunae, which were left in the FIR or in the private- complaint (Exh.PA). They, for their polluted conduct, cannot be considered truthful witnesses and their testimonies which are laden with countless improvements, cannot be given any positive nod. It has been held by the apex court in Farman Ahmad v. Muhammad Inayat and others (2007 SCMR 1825) that:--

> "It is also a settled maxim when witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness had improved his statement dishonestly, therefore, his credibility becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witnesses."

The testimonies of the eye-witnesses, being untrustworthy are bound to be rejected, which we accordingly do.

19. Insofar as the evidence of recovery of blood stained kassi (P1) through seizure memo (Exh.PE) from the place of occurrence, attested by Niaz alias Aman Ullah (P.W.4) and Muhammad Abbas (PW not produced) is concerned, it was sent to the office of Chemical Examiner through Ghazanfar Ali 3633/C (C.W.6) and report (Exh.PG) received therefrom is in positive and report of the Serologist (Exh.PM) as to origin of the blood, shows it as that of human being. The investigating officer ought to have preserved the finger prints thereon and obtained expert report from the Forensic Science Agency, Punjab so as to use it as an incriminating piece of evidence against the accused, but he did nothing of the sort and virtually destroyed this crucial piece of evidence.

20. The medical officer, Dr. Naseer Ahmad (C.W.1), who performed autopsy on the dead bodies of Muhammad Nawaz, Nasir Abbas and Muhammad Imran through postmortem examination reports (Exh.CW1/E, Exh.CW1/J & Exh.CW1/A), prepared samples of liver, spleen, stomach, kidneys, small and large gut, heart and lungs of each deceased for transmission to the office of Chemical Examiner for detection of poison or sedatives or tranquilizers. The reports of the chemical examiner (Exh.PJ, Exh.PK & Exh.PL) were received in positive with identical conclusions, which read as follows:--

> "Tranquilizer belonging to Benzodiazepine group is detected in the above viscera. However quantitative estimation is not possible."

This exercise also went waste only due to the dishonestly rendered testimonies of the eye-witnesses, having been brushed aside by us in the preceding paragraphs. If ill-fated deceased had been administered tranquilizer and they had turned unconscious before they were murdered, how come it could be believed that their arms and legs had been caught by Shaukat Ali (appellant) and his co-accused, when their throats were allegedly cut by Muhammad Hussain (appellant). The blade of the weapon used must be as sharp as a razor otherwise such type of injuries (incised wounds), as mentioned by the medical officer in the necropsy reports (Exh.CW1/A, Exh.CW1/E & Exh.CW1/J) could not be caused by means of a kassi, which generally did not bear such sharpness. Alas, it would remain hidden as to how and by whom the said weapon had been used to commit such a catastrophic act. The delinquent in this regard would be the faltering investigating officer and 'not ready to tell the truth,' the prosecution witnesses. The medical evidence being a corroboratory circumstance, cannot identify the author(s) of bodily injuries of a dead or a living person and same is the situation here.

21. The upshot of the above discussion is that the prosecution has miserably failed to bring home the guilt of the appellants beyond reasonable shadow of doubt. The impugned judgment and has been passed merely on conjectural and whimsical reasons, which cannot be approved of. The impugned conviction and sentence of the appellants is set-aside and both the appellants, Shaukat Ali and Muhammad Hussain are acquitted of the charge. They shall be released forthwith if not required in connection with any other case. Their appeals stand accepted.

22. Death sentence awarded to the appellants is NOT confirmed and Murder Reference No.13 of 2011 is answered in negative.

HBT/S-72/L Appeals accepted.

2016 Y L R 1002

[Lahore]

Before Shahid Hameed Dar, J

SHAHZAD AKHTAR alias SAJJAD---Petitioner

Versus

The STATE and another---Respondents

Crl. Misc. No.5448-B of 2015, decided on 23rd June, 2015.

Criminal Procedure Code (V of 1898)---

----Ss. 497 & 87---Penal Code (XLV of 1860), S.489-F---Dishonoring of cheque---Bail, grant of---Abscondence of accused---Accused defrauded his brother-in-law and received a huge amount of Rs. 1,50,00,000 at the rate of 4% and 5% profit per month---Complainant got 10 FIRs under S.489-F, P.P.C., registered against accused and he had still with him 5 more cheques of Rs. 10,00,000 each allegedly issued by accused and bounced by Bank for identical reasons which had not been reported to police as yet---Accused remained as absconder for about one year and he was proceeded against under S.87, Cr.P.C., pending investigation on 21-6-2014---Effect---Accused could not claim that he had no knowledge about registration of case against him---Such was a situation wherein unexplained abscondence of accused would adversely affect his quest for bail---No extra importance could be given to the fact that offence was not covered by prohibitory clause of S. 497(1), Cr.P.C.---In a case not falling under prohibitory clause, accused could not claim bail as a matter of right, unless his case was open to further probe into the guilt within the scope of S.497(2), Cr.P.C., or no exceptionality was attached thereto---Case of accused neither fell within the ambit of further inquiry nor could it be so that it was sans any exceptional element---Details of occurrence revealed that each and every bit of it painted an exceptional situation, bringing it within the category of cases wherein bail could not readily be allowed--- Bail was declined in circumstances.

Shameel Ahmad v. The State 2009 SCMR 174 rel.

Ch. Muhammad Zafar Iqbal for Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State with Mazhar Hussain A.S.-I.

Complainant in person.

ORDER

SHAHID HAMEED DAR, J.---Shahzad Akhtar alias Sajjad (petitioner) is in fact real brother of the complainant's wife, who allegedly outwitted his behnoi Muhammad Saleem Shad Qureshi advocate and cleverly received a huge amount of money i.e. Rs.1,500,000/- at the rate of 4% and 5% profit per month from him against a couple of pronotes and an indemnity bond, which he allegedly executed in his favour on 1.11.2011 and 19.11.2011. It is learnt from the text of FIR No.8/14, dated 4.1.2014, under section 489-F, P.P.C., registered at Police Station Sanda Lahore that he (petitioner) disappeared after he failed to disburse settled

amount of profit to the lender or repay the debt to him; he was traced, after hectic efforts by the creditor (complainant), whom he issued a cheque of Rs.10,00,000/-, which was presented for encashment by him but it was bounced by the bank due to insufficient funds.

2. After hearing the learned counsel for the parties and perusing the record, it is observed that the petitioner allegedly lured his real sister's husband (complainant) into a trap and made him believe that he could fetch 4% to 5% profit per month against any amount of money, he would lend to him so as to bolster his business prospects. This is how he virtually wrested a massive amount of money, Rs.1,50,00,000/- from him by almost blindfolding him. He handed over to him two pronotes and an indemnity bond so as to satisfy him that the lent-amount did not involve any risk and it was absolutely safe for pinning hopes thereon to earn dividends against it. The rate of profit, allegedly offered by the petitioner was stunning as it was about ten times the rate, the bank would usually offer at per annum basis to the depositors or its clients. The complainant turned an easy prey and he tamely fell to the plot, allegedly carved out by the petitioner. As per allegations, the petitioner did not pay any profit to the complainant nor repaid the debt to him. He instead, showed a clean pair of heels to the related-creditor and went into hide-out without leaving any foot-marks behind. The complainant's hectic efforts, however bore fruit and he established contact with him at last. The petitioner slipped through his hands again after he issued the disputed cheque, value Rs.10,00,000/- and fourteen other instruments of equivalent face-value to the complainant, who presented all fifteen cheques one after the other for encashment, but none of them was honoured by the bank for sufficiency of funds. He could not help reporting the matter to the police and getting lodged ten cases against his once reliable kin, the petitioner. The detail is given hereunder:-

1. FIR No.1201/13, dated 31.12.2013, under section 489-F P.P.C., Police Station Sanda Lahore.

2. FIR No.3/14, dated 2.1.2014, under section 489-F P.P.C., Police Station Sanda Lahore.

3. FIR No.8/14, dated 4.1.2014, under section 489-F P.P.C., Police Station Sanda Lahore (under discussion herein).

4. FIR No.13/14, dated 6.1.2014, under section 489-F P.P.C., Police Station Sanda Lahore.

5. FIR No.24/14, dated 8.1.2014, under section 489-F P.P.C., Police Station Sanda Lahore.

6. FIR No.60/14, dated 17.1.2014, under section 489-F P.P.C., Police Station Sanda Lahore.

7. FIR No.65/14, dated 19.1.2014, under section 489-F P.P.C., Police Station Sanda Lahore.

8. FIR No.68/14, dated 19.1.2014, under section 489-F P.P.C.; Police Station Sanda Lahore.

9. FIR No.71/15, dated 21.1.2015, under section 489-F P.P.C., Police Station Sanda Lahore.

10. FIR No.72/15, dated 21.1.2015, under section 489-F P.P.C., Police Station Sanda Lahore.

The complainant has still with him five more cheques of Rs.10,00,000/- each, allegedly issued by the petitioner and bounced by the bank for identical reason, which have not been reported to the police as yet. He remained an absconder for about a year and he was proceeded against under section 87, Cr.P.C. pending investigation on 21.6.2014. He cannot claim that he had no knowledge about registration of this case against him. It is a situation, wherein his unexplained abscondence would adversely affect his quest for bail. The argument of the learned counsel for the petitioner that the offence, the petitioner is pitted against, is not covered by the prohibitory clause of section 497(1), Cr.P.C., so he is necessarily entitled to grant of bail, is not to be given any extra-importance, as in a case, not falling under the prohibitory clause, the accused cannot claim bail as a matter of right, unless his case was open to further probe into his guilt within the scope of section 497(2), Cr.P.C. or no exceptionality was attached thereto. The petitioner's case neither falls within the ambit of further inquiry nor could it be so that it was sans any exceptional element. The details of occurrence easily reveal that each and every bit of it painted an exceptional situation, bringing it within the category of the cases, wherein bail cannot readily be allowed. Reliance in this regard may be had on Shameel Ahmad v. The State reported as 2009 SCMR 174.

3. Learned Deputy Prosecutor General Punjab has hinted at another factor, which shows that examination-in-chief of the complainant, who is a practicing lawyer, has been recorded in all ten cases, detailed as above, but defence, was reluctant to cross-examine him. Only in a couple of cases, during pendency of this petition, he has been cross-examined but not in all. It has also been highlighted by the learned law officer that the petitioner has four other cases of alike nature got registered against him by some other victims besides the complainant's ten cases, listed as above. The petitioner may be dubbed a habitual offender, who can go for a kill without any discrimination, may it be a close relative or a distantly placed person.

4. For the foregoing reasons, I am not inclined to accept this application, which is accordingly dismissed.

5. Before parting with this order, it would be a likeable idea to direct the learned trial court to accelerate proceedings of the trial of the accused, so as to conclude it within three months from the date of communication of this order, excluding the summer vacation, may it be on day-to-day basis.

6. The office is directed to transmit a copy of this order to the learned trial court through some swift means, for necessary information and compliance.

MH/S-86/L Bail dismissed.

2016 Y L R 1640

[Lahore]

Before Shahid Hameed Dar, J

HAROON KALEEM USMANI---Petitioner

Versus

The STATE and another---Respondents

Crl. Misc. No.5866-B of 2015, decided on 7th July, 2015.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Bail, grant of---Contention of accused was that allegation against him was not based on any evidence, and he had been dragged into the case through clever tactics of complainant; and that he borrowed some amount of money on interest from complainant and ended up in a vicious circle---Accused also contended that complainant himself admitted before arbitrators that he had been receiving profits against debt amount from accused and it was merely an amount of Rs. 2,60,000 which figured in his books as receivable---Complainant's plea was that accused being a Bank Officer befooled complainant and usurped heavy amount of money from him under the garb of a mortgage-agreement and cheques having been dishonestly issued by accused to complainant were bounced by the Bank one after the other---High Court observed that the probability could not be ruled out that accused had been falsely involved in the present case by complainant through some exaggerative allegations based on malice or ulterior motives---Bail application was accepted and ad interim pre-arrest bail was granted to accused, in circumstances.

Musthaq Ahmad Mohal for Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State with Zafar SI.

Mian Muhammad Naseem for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The allegation against the petitioner, as per FIR No.1248/2014, dated 28.9.2014, under section 489-F, P.P.C., registered at Police Station Allama Iqbal Town, Lahore, is that he mortgaged his ten marlas' house for Rs.20,00,000/- to Muhammad Younas (complainant) on 2.12.2011 and received the entire amount through a mortgage-deed, executed in presence of the witnesses; he got the said house on rent at the rate of Rs.60,000/- per month from the mortgagee through tenancy agreement, the same day; he issued seventeen cheques of Rs.60,000/- each to the mortgagee, ten out of which were timely encashed but three of them were bounced by the bank; he refunded Rs.15,00,000/- to the creditor/mortgagee, who returned four cheques to him; for remaining amount of the mortgage-debt, Rs.5,00,000/, a fresh mortgage-deed and tenancy-agreement were scribed by the parties on 15.1.2013, in terms of which, he (mortgager) issued a cheque of Rs.5,00,000/- and six cheques of Rs.15,000/- each in relation to the rent, four out of which were encashed

and two, one of Rs.15,000/- and the other of Rs.5,00,000/-, were dishonoured by the bank; he did not pay the monthly rent from December 2013 to September 2014, amounting to Rs.1,40,000/- to the mortgagee/complainant; the total value of bounced cheques was Rs.7,10,000/-.

2. It has been submitted by the learned counsel for the petitioner that allegation against the petitioner is not based on any evidence and he has been dragged into this case through his clever tactics by the complainant; the petitioner committed mistake of borrowing some amount of money on interest from the complainant and ended up in a vicious circle, which virtually upset his routine life; the trap laid down by the complainant has already deprived the petitioner of his life-long savings and there is not left much with him to get out of the trouble; the complainant himself admitted before the arbitrators that he had been receiving profits against the debt-amount from the petitioner and it was merely an amount of Rs.2,60,000/-, which figured in his books as receivable.

3. On the contrary, learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant has opposed this application with the contention that the petitioner being a bank-officer befooled the complainant and usurped heavy amount of money from him under the garb of a mortgage-agreement; the cheques, having been dishonestly issued by the petitioner to the complainant were bounced by the bank one after the other and he owed lacs of rupees to the mortgagee-creditor; the petitioner has committed a non-bailable offence, hence, he may not be granted the extra-ordinary relief of bail-before-arrest.

4. After hearing the learned counsel for the parties and perusing the record, it is observed that the proposition involved herein is not as plain as it has been shown to be by the complainant in the FIR. The facts of the case look self-contradictory, giving rise to fair amount of doubt, as to authenticity of his claim. In the first mortgage-deed and tenancy agreement, executed between the parties on 2.12.2011, the mortgage-debt in relation to the said house was fixed as Rs.20,00,000/- with monthly rent of Rs.60,000/-, to be paid by the petitioner to the mortgagee/ complainant, wherefor the petitioner allegedly issued seventeen cheques of Rs.60,000/- each to the complainant. In the later mortgage and tenancy agreements, executed on 15.1.2013, the mortgage-debt of the same house was fixed as Rs.5,00,000/- and monthly rent thereof as Rs.15,000/-, wherefor the mortgager issued six cheques of Rs.15,000/- each to the creditor-mortgagee. The huge difference in terms of both the agreements gives rise to an impression that it was some other dispute between the parties than the one, brought on the record.

5. Learned counsel for the petitioner has categorically submitted that the petitioner obtained loan of Rs.20,00,000/- on interest from the complainant and he had already paid Rs.31,00,000/- by now to him, but his ledgers still showed lacs of rupees still to be paid by him. He further submitted that the petitioner had unluckily been dragged into a vicious circle by the cunning complainant, whose demands were ever increasing despite lacs of rupees repayment to him by the debtor. The learned counsel referred to an arbitration decision, which showed that a large amount of money had already been paid by the accused/petitioner as profit to the complainant and that the remaining amount was merely Rs.2,50,000/-. The learned counsel submitted a copy of the arbitration decision, duly signed by both the parties. This document was shown to the complainant for his comments thereto, who looked at it and said that the accused still owed an amount of Rs.2,50,000/- to him, which he would receive at any cost. The reply given by the complainant as to aforesaid amount of Rs.2,50,000/- is astounding as it falls no where near to his claim, that he made in the FIR. The probability cannot be ruled out that the petitioner may have been falsely involved in this case by the complainant through some exaggerative allegations, based on malice or some ulterior

motives. Therefore, this application is accepted and ad-interim pre-arrest bail granted to the petitioner vide order dated 6.5.2015 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.1,00,000/- (one lac) with one surety in the like amount to the satisfaction of the learned trial court.

RR/H-25/L Petition accepted.

2016 Y L R 1938

[Lahore]

Before Shahid Hameed Dar, J

ATTA MUHAMMAD---Petitioner

Versus

ILAM DIN and 9 others---Respondents

Criminal Appeal No.568 of 1994, decided on 3rd July, 2015.

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

----Ss. 325, 326, 452, 148 & 149---Criminal Procedure Code (V of 1898), Ss. 417(2) & 367---Attempt to commit suicide, thug, house-trespass after preparation for hurt, rioting armed with deadly weapon and unlawful assembly---Private complaint---Appeal against acquittal---Reappraisal of evidence---Plea of private defence---Judgment without discussion of evidence and giving any reason would not be a proper judgment and valid in the eye of law---Prosecution had failed to bring home the guilt of the accused beyond any reasonable shadow of doubt---Outcome of the case would have been the same as drawn by the Trial Court through impugned judgment---Plea of private defence could be raised in appeal if spelt out from the prosecution evidence though not specifically taken at trial---Accused had justifiably exercised their right of private defence and had not exceeded such right at any stage---Accused had not committed any offence for which they should be punished---Conclusion drawn by the Trial Court with regard to innocence and acquittal of accused was upheld---Appeal was dismissed in circumstances.

Phulail Khan v. The State 1972 SCMR 95 ref.

Abdul Rashid Munshi and 3 others v. The State PLD 1967 SC 498; Sahab Khan and 4 others v. The State and others 1997 SCMR 871; Ashiq Hussain and others v. The State and 2 others 2003 SCMR 698; Muhammad Osman v. The State 1992 PCr.LJ 88; Ghulam Hussain and others v. The State 1996 PCr.LJ 514 and Abdul Qayum v. The State 1996 PCr.LJ 1427 distinguished.

Latif v. The State 1980 PCr.LJ 1101; Sultan Khan and 3 others v. The State and 2 others 1987 SCMR 237; Askar Ali and others v. The State PLD 1959 SC (Pak.) 251; Muhammad Abdullah v. Muhammad Safdar Khan and another 1973 SCMR 26; Muhammad Yousaf's case 1994 SCMR 1733 and Ghulam Rasul and 3 others v. The State PLD 1970 Lah. 832 rel.

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

----S. 173---Report of police-officer---Evidentiary value---Report under S. 173, Cr.P.C was merely a gist of investigation which could not be proved being inadmissible in evidence.

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

----S. 367--- Judgment--- Points for determination, framing of---Scope---Judgment must be lucid, should contain discussion of evidence, reasons of the decision and not merely the conclusion.

(d) Criminal trial---

----Private defence---Plea of---Plea of private defence could be raised in appeal if spelt out from the prosecution evidence though not specifically taken at trial.

Ch. Ali Muhammad for Appellant.

Muhammad Ahsan Bhoon for Respondents Nos.1 to 9.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State.

Date of hearing: 3rd July, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---This judgment shall dispose of criminal Appeal No.568 of 1994 instituted by Atta Muhammad (complainant/appellant) against acquittal of respondents Nos.1 to 9, namely Ilam Din, Akbar, Liaqat, Asghar alias Akbar, Akram, Aslam alias Ashraf, Muhammad Din alias Manna, Shaukat and Muhammad Ramzan, vide judgment dated 2.12.1992, pronounced by learned magistrate section 30, Sheikhupura, on conclusion of their trial in private-complaint under sections 325, 326, 452, 148, 149, P.P.C., which pertained to an occurrence, that oozed from the statement of Atta Muhammad (P.W.3), rendered by him on 7.2.1989 before the investigating officer during investigation of case-FIR No.45/1989, dated 1.2.1989, under sections 307, 452/34, P.P.C. read with sections 325, 324, P.P.C. (added during investigation on 7.2.1989), registered at Police Station Farooqabad, District Sheikhupura.

2. The FIR case (supra) got registered by Ilam Din (respondent No.1 herein) with the contention that he purchased Ehata measuring 6/7 marlas, situated in village Jhandianwali, for Rs.12,000/- from Bashir Ahmad about nine months before; Muhammad Anwar (P.W.2 herein) occasionally attempted to grab the possession thereof, but he failed to do so; he instituted a civil suit against Muhammad Anwar before the learned Civil Judge Sheikhupura and obtained an injunctive order qua the said Ehata; Muhammad Anwar also filed a suit about the said place before the Senior Civil Judge, Sheikhupura; it was at about 7.30 p.m. on 1.2.1989, he was present at the Ehata when Muhammad Anwar (P.W.2 herein) armed with .12-bore gun, Munir Ahmad, armed with .12-bore gun and Muhammad Sarwar, armed with carbine scaled on the wall of his haveli and forcibly entered therein; they thrashed and befell him onto the ground; on hearing the noise, his paternal nephew Shaukat Ali (respondent No.8 herein) reached there to rescue him; Muhammad Anwar fired by means of his gun and hit right jaw of Shaukat Ali, who instantly fell onto the ground; in the meanwhile, Muhammad Akbar (respondent No.2 herein), armed with hatchet also reached there to help him; Munir Ahmad fired through his gun, which landed at left wrist of Muhammad Akbar; his son

Muhammad Aslam (respondent No.6 herein) rushed to the spot and he was fired at by Muhammad Sarwar, which injured his right hand; many a people of the village raised alarm in the street, but the intruders kept firing; Atta Muhammad (P.W.3 herein), while standing at his house, exhorted loudly and induced his companions to finish Ilam Din and others; the womenfolk entreated the accused and they ran away; he along with his companions shifted the injured to Sheikhupura hospital, where Shaukat Ali's condition was serious; the attack was carried out by the accused with a grudge, as to purchase of the said Ehata by him.

During investigation of the above-said case, Atta Muhammad (P.W.3) made statement before the investigating officer on 7.2.1989 and attempted in vain to setting up the cross-case, which, as per report under section 173, Cr.P.C., was found false by the police. Being aggrieved of the conduct of the police, he filed private-complaint against respondents Nos.1 to 9 on 9.12.1989, about ten months after the alleged occurrence, with the contention that he along with his son Muhammad Anwar (P.W.2) was present at his house on 1.2.1989 when Ilam Din armed with sota, Akram armed with gun, Liaqat armed with gun, Asghar alias Akbar armed with sota, Akram armed with hatchet, Aslam alias Munna armed with hatchet, Aslam alias Ashraf armed with sota, Ramzan armed with sota and Shaukat armed with sota (respondents Nos.1 to 9) jumped over the outer wall of his house and forcibly entered therein; Ilam Din (respondent No.1) raised lalkara that Anwar be taught a lesson for having filed an application before the police whereon Asghar alias Akbar (respondent No.4) inflicted a sota blow on the head of his son Muhammad Anwar, Aslam (respondent No.6) also dealt a sota blow on his head, due to which he fell on the ground; Ilam Din (respondent No.1) gave a sota blow at the left calf of Muhammad Anwar, whereafter all the intruders jointly injured his fallen son; on hearing the noise, his other son Muhammad Sarwar reached the spot, who attempted to snatch gun from Liaqat (respondent No.3) and in this scuffle it suddenly went off and the fire hit Shaukat and Akbar Ali (respondents Nos.8 and 2); the trespassers kept firing with their guns and shouted loudly, if anyone drew near they would kill him; in the meanwhile, Abdul Hameed (P.W.4) and Muhammad Saleem PW (not produced) reached the spot, who beseeched the invaders and rescued his injured son from them; Muhammad Anwar was shifted to DHQ Hospital, Sheikhupura for treatment of his injuries, whereafter he was referred to Services Hospital Lahore, as his condition turned serious; he had suffered seventeen (17) injuries during the occurrence.

3. Learned trial court took up the trial of both the episodes, i.e. the FIR-case and the complaint-case, side by side inter-se and continued it till 2.12.1992, when it pronounced the impugned verdict of acquittal in favour of the respondents (Nos.1 to 9) in the complaint-case and separately delivered a verdict of guilt against all four indictees of the challan-case by holding that they had committed the aggression against the complainant side of the FIR-case.

4. Insofar as the complaint-case is concerned, learned trial court indicted the respondents for offences under sections 325, 326, 452, 148, 149, P.P.C. and asked the complainant-side/prosecution to adduce evidence against them, in obedience thereof, they produced five witnesses in all, including Dr. Abdul Bari (P.W. 1), Muhammad Anwar injured (P.W.2), Atta Muhammad (complainant/P.W.3), Abdul Hameed (P.W.4) and Mehmood Ahmad Khan Inspector/I.O. (P.W.5), to establish the charge against them. Astonishingly, it was the complainant and not the public-prosecutor, who pronounced the complaint-case closed on 13.2.1991 by submitting attested copies of the injury-statement (Exh.PA) of Muhammad Anwar injured and that of a couple of civil suits, under objection of the other side.

5. It was the respondents turn then to depose under section 342, Cr.P.C., which they did, one after the other, by professing their absolute innocence in the matter. They denied all the charges against them being false and pressed their innocence in the matter by contending that

they had been falsely involved in this case due to previous enmity and party-friction. They did not opt to depose under section 340(2), Cr.P.C., but they intended to lead evidence in defence, which they probably didn't, as no such material is available on the record to verify it. The impugned judgment, however, tells that someone from them was examined under section 340(2), Cr.P.C. on 18.8.1992, but it cannot be known from the record as to who he was. Whosoever he might be, the impugned judgment revealed that he also tendered report under section 173, Cr.P.C. (Exh.DH) and closed the defence evidence. Learned trial court must have borne in mind that report under section 173, Cr.P.C. was merely a gist of the investigation, which could not be proved being inadmissible in evidence.

6. On conclusion of the trial in the complaint-ease, learned trial court held all the respondents innocent and acquitted them of the charge, by holding that they had acted in self-defence at the crucial hour. The challan-case, however, ended in conviction of the quartet, as noted earlier.

7. Learned counsel for the appellant, has strongly submitted that respondents Nos.1 to 9 being armed with lethal weaponry had committed aggression against the complainant-party, when they attacked him at his house and almost killed his youthful son Muhammad Anwar by inflicting seventeen (17) extensive wounds on his body; the disputed Ehata was in the possession of the appellant since long and acquitted-respondents had no concern with it; the accused of the FIR-case, who had been convicted and sentenced by the learned trial court on 02.12.1992 had been acquitted in appeal by the learned appellate court (Additional Sessions Judge, Sheikhupura) vide judgment dated 6.7.1998, whereby it was held that the complainant-party of the FIR-case had sparked off the aggression; learned Additional Sessions Judge, Sheikhupura also observed that respondent Shaukat Ali had been accidently injured, when Sarwar PW (not produced) attempted to snatch gun from respondent Liaqat and in this struggle it suddenly went-off and discharged pellets hit him, besides his aide Akbar; the respondents did not say a word in their statements under section 342, Cr.P.C. as to how Shaukat Ali and Akbar had received firearm injuries nor they pleaded right of self-defence, which virtually meant that they had accepted the prosecution case true; the impugned judgment did not contain a single argument or reason as to on what/which material learned trial court had acquitted the respondents and dubbed the complainant-party as aggressors; the impugned judgment is frail by all means and it does not fit in with the settled principles of the law on the subject nor could it be considered a judgment either, within the scope of section 367, Cr.P.C.; the impugned judgment being illegal may be knocked-down and the case may be remanded to the learned trial court for a decision afresh. In support of his contentions, learned counsel has relied on Abdul Rashid Munshi and 3 others v. The State (PLD 1967 SC 498), Sahab Khan and 4 others v. The State and others (1997 SCMR 871), Ashiq Hussain and others v. The State and 2 others (2003 SCMR 698), Muhammad Osman v. The State (1992 PCr.LJ 88), Ghulam Hussain and others v. The State (1996 PCr.LJ 514) and Abdul Qayum v. The State (1996 PCr.LJ 1427).

8. In rebuttal of the above, learned counsel for the acquitted respondents has vehemently argued that the place of occurrence exclusively belonged to the respondents and they were in its possession being owner thereof for many months; the investigating officer, Mehmood Ahmad Khan, Inspector (P.W.5) categorically stated in his testimony that the occurrence had not taken place at the house of Atta Muhammad appellant and it was the haveli of Ilam Din (respondent No.1) where Shaukat, Akbar and Aslam had sustained injuries at the hands of their adversaries; the appellant and his companions being armed with deadly weapons attacked the respondents at their haveli so as to roguishly usurp possession thereof and they badly wounded Shaukat, Akbar and Aslam in the wake of their unlawful act; the trespassers were resisted bravely by the respondents, hence, they committed no wrong if Muhammad Anwar had received multiple injuries on his body during the occurrence, as

against several firearm and blunt-weapon injuries to three persons of the latter-side; the right of exercise of self-defence directly flowed from the prosecution-case, so it was immaterial that the respondents had not taken a specific plea in this regard when they deposed under section 342, Cr.P.C.; the acquitted respondents have been facing the agony of protracted criminal litigation since year 1989, hence, setting aside the impugned judgment on technical grounds and remitting it to the learned trial court for a verdict anew would be too cumbersome for the respondents to endure; the judgment given by the learned Additional Sessions Judge, Sheikhupura, as the appellate court, in the FIR-case is hardly relevant being incompatible with the circumstances involved herein; the impugned judgment, even if vulnerable a bit, may not be reversed nor should it be asked to be rewritten after so many years had elapsed since pronouncement thereof by the learned trial court, as it may be put in writing with all the requisites in sight by this court; the acquittal of the respondents through a judicial verdict had imparted double presumption of innocence to them, therefore, it ought to be kept intact without being scratched by any alien factor. Learned counsel preferred reliance on Latif v. The State (1980 PCr.LJ 1101), Sultan Khan and 3 others v. The State and 2 others (1987 SCMR 237), Askar Ali and others v. The State (PLD 1959 Supreme Court (Pak.) 251) and Phulail Khan v. The State (1972 SCMR 95).

9. Learned Deputy Prosecutor General Punjab has chipped-in with the argument that the result drawn by the learned trial court through the impugned judgment was unexceptionable, hence, it merited to be retained.

10. The present case is not less than an antique as it was converted into an appeal in year 1994. Initially, P.S.L.A. No.6/1993 was admitted to regular hearing on 10.7.1993 without making any order, if special leave to appeal had been granted to the petitioner (appellant) or not. This issue was taken up again by this court on 16.11.1994 and after hearing the learned counsel for the parties, special leave to appeal was granted to the petitioner mainly on the ground, "that the trial court did not record any independent judgment in the complaint case and acquitted the respondents on the sole ground that the petitioner as well as three others (the complainant party) were convicted in the challan case." The office was directed to allot a number to the appeal and fix it for final hearing on 18.12.1994, but it could not be heard for another twenty one (21) years for a variety of reasons. It was noticed on 3.12.2012 that record of the complaint-case, wherein the impugned judgment was passed, had not been produced before this court till then, so it was ordered that the requisite record be immediately produced. The Deputy Registrar (Judl.) of this court was directed on 6.2.2013 to ensure availability of the relevant record, who submitted a report on 5.3.2013 stating therein that "as per information provided by the learned District and Sessions Judge, Sheikhupura the relevant record could not be traced and he has requested for extension in time to trace out the record; further that if the record could not be traced out a judicial officer will be directed to reconstruct the record from the all available sources." It transpires from the record that learned District and Sessions Judge, Sheikhupura directed Mr. Hassan Abbas Syed, Civil Judge First Class cum Judicial Magistrate, section 30 Sheikhupura on 18.3.2013, to reconstruct the missing judicial record from all available sources, within the provisions of rule 5 of Chapter 19-A of High Court Rules and Order Volume-IV and bound him to complete the process of reconstruction by 18.4.2013 without fail. Learned Judicial Magistrate made hectic efforts and succeeded in reconstructing the missing file/record, but not in complete terms, as it did not include the charge-sheet and the statement of one of the respondents (not decipherable) under section 340(2), Cr.P.C. In parallel to it, learned District and Sessions Judge, Sheikhupura got a preliminary inquiry held by Mr. Muhammad Aamir Habib, Additional District and Sessions Judge, Sheikhupura in the matter, who fixed the responsibility on Liaqat Ali, Ahlmad, in this context. Whereafter, a regular inquiry was initiated against him by Mr. Hassan Abbas Syed, Civil Judge First Class cum Judicial Magistrate section 30 Sheikhupura, the inquiry officer, which is still pending. Isn't surprising,

yes it is. An aide-memoir be issued to the learned Sessions Judge, Sheikhupura with the direction to take up the (probably) forgotten matter instan-taneously without further delay under intimation to the Deputy Registrar (Judicial) of this court. The process of inquiry be concluded latest by 30th September, 2015.

The requisite reconstructed record has however, been found sufficient for adjudication of this case.

11. Main line of attack against the impugned judgment, as preferred by the learned counsel for the appellant is that it was not passed on any argument or reason whatsoever, hence, it could not be considered a valid judgment within the definition of section 367, Cr.P.C. He maintained that the specific procedure as conditioned by the law should have strictly been followed without any short cuts and this is what, that has not been remembered by the learned trial court while passing the impugned judgment, which being bereft of any rationale may be annulled and directed to be rewritten by it within the essentialities enjoined. There may be no cavil to the said proposition of the law, as envisaged by the learned counsel, but this is such a rare case which necessitates compulsive departure from it mainly for the reason that its protractedness has already touched the limits of almost being scandalous. Bearing in mind niceties of the subtle issue involved herein, it is straightaway observed that the impugned judgment did not contain discussion of evidence and reasons for the decision made. To say the least it looks, for better part of it, unsatisfactory, shabbily crafted and not a valid judgment in the eye of law. Of the nine pages that it is consisted of, about 8-1/2 pages thereof have been devoted to mere narration of facts and statements of the witnesses. The finding of innocence qua the respondents (Nos.1 to 9) was recorded in remaining half of page No.9 with a frank observation, ".... During the trial of both the cases, it was proved beyond doubt that although the complainant and PWs of this complaint received injuries but they were the aggressors who attacked upon the complainant of the state case and his companions while they were present in a Ehata under their possession... that the complainant of the state case Ilam Din and his companions acted in their self-defence in this fight. This is established principle of law that even if the aggressors are harmed during the fight, they have no case and the persons who acted in their self-defence, cannot be punished for that." Learned trial court attached a copy of the judgment, passed by it in the challan-case, with the impugned judgment through a written direction made therein. Evidently this judgment did not satisfy necessary requirements of the law. The main requirement of section 367, Cr.P.C. is that the judgment must be lucid, should contain discussion of evidence, reasons for the decision and not merely the conclusion. A judgment written without discussion of evidence of witnesses or the effectiveness of corroborative evidence, if any and without giving any cogent reason is not a proper judgment, as held by this court in Latif v. The State (1980 PCr.LJ 1101). It was however found improper by this court on the said occasion to remand the case to the learned trial court for rewriting the judgment and thus prolong agony of the accused, who had awaited the final judgment at the trial for a long period of about five years.

The question raised by the learned counsel for the appellant as to vulnerability of the impugned judgment can be decided by this court by taking into account the material available on the record. In an identical situation, like the one in hand, the Hon'ble Supreme Court of Pakistan in Sultan Khan and others's case, reported as 1987 SCMR 237, observed as under:--

> "In Ajodha v. The State 1982 PSC 307 a Privy Council decision, it was held that where long time had elapsed between the commission of offence and the hearing of the appeal, retrial was not proper and it was not allowed. In Phulail Khan v. The State and Shah Wali v. The State 1972 SCMR 95 the accused was acquitted of murder charge by the trial Court and the High Court setting aside the acquittal had ordered

> retrial. Supreme Court however, set aside the order of retrial on finding that considerable time had elapsed between the date of occurrence as well as since the date of his acquittal and there was therefore, no likelihood of witnesses being available and retrial in the circumstances was likely to be an exercise in futility. In that case the time that had elapsed was about 5 years between his acquittal by the trial Court and Order of retrial. In the light of these authorities we are of the considered view that after almost 21 years in the instant case to set aside the acquittal and to order retrial would be a futile exercise. In that view of the matter the impugned judgment of the learned Single Judge of the Lahore High Court is hereby set aside and the appeal is allowed."

It was yet another case of alike nature, when this court, in its appellate jurisdiction dismissed criminal appeals filed by Askar Ali and others through a judgment, which did not contain examination of facts or legal issues and it simply agreed with the judgment of the learned trial court, completely ignoring arguments contained in sessions judge's judgment, in favour of acquittal of the accused. The Hon'ble Supreme Court of Pakistan considered it a matter for regret, "that learned Judges in the High Court did not see fit to take into consideration the grounds upon which the Sessions Judges had found it possible to deliver a considered judgment, which was practically a judgment of acquittal." The view expressed and observations made by the apex court in Askar Ali and others v. The State (PLD 1959 Supreme Court (Pak) 251), as to afore-noted proposition of law, are advantageously reproduced hereunder:--

> "It has often been said in judgments of Superior Courts that it is important that justice should not only be done but that it should be manifestly seen to be done. Among the most important of the persons by whom justice should be seen to be done are persons who have been convicted of criminal offences at judicial trials. It is evident that to the convicted persons in the present case, the summary judgment of the High Court, containing no examination or statement of the facts or the legal issues arising out of the case and merely declaring that the judgment of the trial Court was in all respects satisfactory and worthy of agreement, but ignoring entirely the arguments upon which the Sessions Judge had based the acquittal of the accused persons on practically all the charges levelled against them, cannot have given the impression of being a judicial act in the proper sense. It was in our opinion requisite in the present case, when the learned Judges in the High Court had formed a view unfavourable to the appellants, that they should have themselves explicitly examined the facts and circumstances and expressed their reasons for disagreeing with the views formulated thereon by the Sessions Judge, in his acquitting order. In the absence of such treatment by the High Court, it becomes necessary for us to go into the evidence and in the light of our own conclusions to consider the arguments which led the Sessions Judge to the conclusions he recorded."

The all important question if the respondents could be held innocent and acquitted of the charge on the evidence examined at the trial can be taken up and decided by this court herein. There is no need to remand the case to the learned trial court for rewriting the judgment, as endless agony of the parties may have already crossed the limits of forbearance by now, being it a case, more than quarter of a century old. The judgments, Abdul Rashid Munshi and 3 others v. The State (PLD 1967 SC 498), Sahab Khan and 4 others v. The State and others (1997 SCMR 871), Ashiq Hussain and others v. The State and 2 others (2003 SCMR 698), Muhammad Usman v. The State (1992 PCr.LJ 88), Ghulam Hussain and others v. The State (1996 PCr.LJ 514) and Abdul Qayum v. The State (1996 PCr.LJ 1427), relied on by the appellant's learned counsel, being distinctive on facts lend little strength to the hard-pressed argument.

12. It has unarguably been established on the record that Muhammad Anwar (P.W.2) and respondents Nos.2, 6 and 8, namely, Akbar, Aslam and Shaukat had been injured during the same incident, which, as per contents of the complaint (Exh.PB) took place at the residential house of Atta Muhammad (P.W.3), who is real father of Muhammad Anwar injured. The acquitted respondents persisted with their stance, as mentioned by them in the FIR-case, that the occurrence had taken place at their haveli/Ehata, which had been purchased by respondent Ilam Din for Rs.12,000/- about 8/9 months before and it was in their possession on the fateful day. The appellant contended in his testimony that the Ehata belonged to his paternal uncle Mehr Din, who had handed over it to one Lal Din about ten years ago for temporarily residing therein and respondents with intent to unlawfully grab it had trespassed on his house and injured Muhammad Anwar. His attention was drawn to his cursory statement, which he recorded on 10.12.1989 in this context, but it was not so mentioned therein. He was also confronted with the said statement for his deposition that respondents Muhammad Akram and Muhammad Din gave hatchet blows at left and right legs of Muhammad Anwar and that respondents Ramzan and Shaukat dealt sota blows at his right leg and it was not found so mentioned therein. He frankly admitted that he instituted private-complaint (Exh.PB) about one year after the occurrence as police did not listen to him. He rendered an explanation qua the injuries sustained by respondents Shaukat and Akbar by contending that his son Sarwar grappled with respondent Liaqat so as to disarm him and in this struggle, the gun went off and pellets hit both of them. He denied the suggestion as incorrect that Muhammad Anwar (P.W.2), Munir PW (not produced) and Sarwar PW (not produced) being armed with guns and carbine had injured respondents Shaukat, Akbar and Aslam when they stormed into the haveli of Ilam Din to forcibly occupy it. Muhammad Anwar injured (P.W.2) rendered partly resembling statement as like his father Atta Muhammad (P.W.3), when he contended that the respondents being armed with different weapons barged into his house at about 7.30 p.m. where they badly tortured him as they intended to forcibly occupy the Ehata, which was in their possession since they ousted Lal Din from it. He also stated that Bashir and Ramzan (respondent) claimed to have purchased the said Ehata from Lal Din. He did not attribute any injury on his person to respondent Liaqat, unlike his father (P.W.3), who burdened him with the liability of causing an injury at his left leg by the butt of his gun. He introduced altogether a new fact when he said that Ilam Din gripped his arms and respondent Liaqat shouted that he would fire at him. It was at this stage when his brother Sarwar came there and he took Liaqat in japha to snatch gun from him and in this scuffle it went off and fire hit respondent Shaukat. He also said that both the sides had filed suits about the said haveli against each other and obtained injunctive orders in their favour. He deposed that he was still admitted in the Services Hospital, Lahore as an indoor patient but he showed no evidence in this respect. He admitted that his statement had not been recorded by the police. He denied the suggestion as incorrect that he along with Sarwar and Munir being armed with guns and carbine had forcibly made their way into the Ehata of respondent Ilam Din so as to seize its possession and in this process they befell respondent Shaukat and Akbar to the ground by firing at them, besides they also injured respondent Aslam and that his father Atta Muhammad kept raising Lalkaras till the end. It was also suggested to him that respondents Ilam Din, Munshi, Aslam and Akbar had injured him in exercise of right of private defence at the violated Ehata. Abdul Hameed (P.W.4), who contradictorily stated not to have appeared before the police during investigation, stated that he lived at a distance of about 100 yards from the place of occurrence and reached there on hearing the noise. He attributed specific injuries at the head and left leg of Muhammad Anwar only to three respondents, Akbar, Ashraf and Ilam Din. He, unlike the other P.Ws., alleged that the respondents, who held guns resorted to firing at the spot. He averred in his testimony that Sarwar pounced upon Liaqat to snatch gun from him and in this tussle it went-off and pellets hit Shaukat and Akbar. He showed his obliviousness as to having mutated agricultural land of respondent Ilam Din and others to his own name in consolidation and that appeal filed by the affected respondents had been decided in their favour. His name was

not mentioned as an eye-witness by Atta Muhammad (P.W.3) in his statement. He was also tested with the same suggestions by the defence as were put to P.W.2 and P.W.3, that the complainant party being armed with different weapons had aggressed upon the respondents so as to usurp their Ehata, where they befell two persons/respondents with firearm injuries and one with blunt-weapon-injuries and that Muhammad Anwar had received injuries inside the Ehata when under-attack respondents defended themselves and their property. This P.W. admitted it as correct and showed his ignorance in the same breath as to purchase of the said Ehata by Ilam Din for Rs.12,000/-.

13. The statements of the above said witnesses are loaded with many a contradictions, discrepancies, and inconsistencies inter-se. A cloud of preposterousness and unbelievability hovers about them. Atta Muhammad (P.W.3) and Muhammad Anwar (P.W.2) could not produce any evidence as to their claim that Ehata-in-issue had transiently been given by their elders to Lal Din, who lived therein for ten years, before they expelled him to restore their possession over it. The material is scant to believe that the Ehata was in possession of the complainant-party on the crucial day. As per their own saying, Lal Din lived therein for about ten years before he made his way out, which meant that some constructions were already made over it. This place was being used as haveli by respondents Ilam Din etc. The veracity of the statements of P.W.2 to P.W.4 could only be adjudged once place of occurrence was located in the real sense. The bone of contention between the parties was admittedly the said Ehata and not the house of Atta Muhammad complainant/appellant. If respondents were not already in possession of the said spot, they should have gone there to occupy it instead of going to the house of the complainant. This particular contention of the prosecution witnesses that the occurrence took place inside the house of the complainant is not easily digestible. Naturally speaking and keeping in view previous litigation/hostility between the parties, the place of occurrence had to be the said Ehata (enclosure) and not the complainant's house. In absence of any other supporting material, the testimony of Mehmood Ahmad Khan Inspector (P.W.5) would be a determining factor as to locating the spot, where exactly the occurrence took place. He categorically mentioned in his testimony that the place of occurrence was not the residential house of Muhammad Anwar injured or Atta Muhammad complainant/appellant, but it was the haveli of Ilam Din etc. He admitted it as correct that the visual site plan (Exh.PF), which he prepared in the FIR-case, depicted the same haveli of Ilam Din as the place of occurrence. Inspector Mehmood Ahmad Khan, the investigating officer (PW-5) was examined as a prosecution witness and his testimony was not intercepted or objected to at any stage by the prosecution when he made the aforesaid depositions as to ownership of the said enclosure and its being the place of occurrence. He is the most important prosecution witness, when it comes to locating the exact place of occurrence and it is nothing else than the said haveli/Ehata (enclosure). The theory introduced by the prosecution witnesses as to mode of infliction of injuries on respondents Shaukat and Akbar is highly doubtful and improbable as they all three (P.W.2 to P.W.4) have rendered divergent statements in this regard. Muhammad Anwar (P.W.2) painted an altogether different picture from the one, as drawn by his father (P.W.3) qua the above-said fact, which has been taken care of in the preceding paragraphs of this judgment. Abdul Hameed (P.W.4) hardly added any strength to the complainant's case and he appeared to have tendered evidence out of sheer malice and previous heartburning against the respondents. His testimony did not show him a truthful person.

14. The medical evidence has been tendered by Dr.Abdul Bari (P.W.1), who medically examined Muhammad Anwar, at 1.25 a.m. on 2.2.1989 vide MLR (Exh.PA) and found the following injuries on his person:--

1. A lacerated wound 11 cm x 8 cm on front and inner part of left leg underlying bone is coming out of wound.

2. A lacerated wound 1.5 cm x.5 cm x bone deep on front of left leg upper part.

3. An incised wound 2 cm x .5 cm x bone deep on the inner side of left knee.

4. A lacerated wound 1.5 cm x .5 cm x bone deep on inner side of left ankle joint.

5. A lacerated wound 3.5 cm x.5 cm x bone deep on right side of forehead at hair line.

6. A lacerated wound 4 cm x.5 cm x bone deep on right side of head, 7 cm above the right ear.

7. An incised wound 1 cm x 1.5 cm x DNA on right scapular region, corresponding cuts on sweater Bunyan and Kameez which were blood stained.

8. An abrasion 3 cm x 1 cm on the back of right chest mid part.

9. A contusion 3 cm x 1 cm on back of left chest mid part.

10. An abrasion 4 cm x 1 cm back of right chest lower part.

11. An abrasion 1 cm x 1 cm back of right chest lower part.

12. A contusion 14 cm x 4 cm on outer and back side of right thigh.

13. A lacerated wound 2 cm x.5 cm bone deep on front of right leg upper part.

14. A lacerated wound 1.5 cm x .5 cm x bone deep on right leg mid part.

15. A lacerated wound 1 cm x.2 cm x bone deep on outer part of right leg mid part.

16. A contused swelling all over the right leg.

17. A swelling 12 cm x 6 cm on right ankle joint.

Injury No.1 was declared grievous but kept under observation for X-ray. Injuries Nos.2, 4 to 7, 13 to 17 were kept under for X-rays and clinical assessment, which was not done, as no x-rays or radiologist was produced in this regard.

NOTE: Patient was semi conscious, BP was 90/60 mm/HG. Pulse was 120 per minute. Skin was cold and clammy. There was profuse bleeding from the wounds. Treatment of shock given in emergency. Two pints of fresh blood transfused in emergency. The patient's condition was serious. The injuries looked dangerous to life.

He also medically examined respondent Shaukat Ali, at 9.30 p.m. on 1.2.1989 vide MLR (Exh.DA) and found the following injuries on his person:--

1. A firearm wound of entrance 9 cm x 8 cm covering the right side of mouth and damaging the right upper and lower lips totally. Lower jaw is fractured. Teeth dislocated but present in the mouth. There are multiple firearm wounds of entrance lacerations on right lower jaw.

2. A firearm wound of exit 5 x 2 cm on the right jaw extending from the angle of right jaw going towards the chin.

NOTE: Patient was semi conscious and in shock. BP was 90/60 mm/HG. Pulse was 120 per minute. Injury No.1 was declared grievous. Injury No.2 was kept under observation and for surgical opinion. Duration of injuries was fresh and the weapon was declared firearm.

On 30.1.1990, vide X-ray report No.111-12 dated 7.1.1990 "multiple metallic foreign bodies were seen in face and there was old fracture of left mandible" so injury No.2 was declared grievous.

On the same day; he medically examined another respondent, Akbar Ali as well at 9.30 p.m. vide MLR (Exh.DB) and found the following injuries on his person:--

1. A firearm wound of entrance 11 cm x 8 cm x DNP on the thumb side of left forearm upper part extending upto front of left elbow joint.

Injury was kept under observation for X-rays and surgical opinion. Injury was fresh and weapon was declared firearm.

On 30.1.1990, vide X-rays report No.113-14 dated 7.1.1990 "multiple metallic foreign bodies were seen in soft issues of left elbow. No bony lien was seen". So injury was declared simple.

This medical officer (PW-1) also tendered secondary evidence by recognizing the handwriting and signature of Dr.Manzoor Hussain Kazmi (since dead), who being the SMO, had medically examined respondent Muhammad Aslam at 3.10 p.m. on 02.02.1989 vide MLR (Exh.DC) and observed following injuries on his person:--

1. Four lacerated wounds 1 cm x .1 cm x .1 cm on back of index, middle, ring and little fingers proximal part of each finger.

2. An abrasion 2 cm x .7 cm x.3 cm on back of left forearm upper part.

Injury No.1 was kept under observation for X-rays. Injury No.2 was declared simple. Duration of injuries was 20 to 24 hours. Weapon was declared blunt.

On 11.3.1990, vide X-rays report No.1025/89, dated 5.2.1989, "fracture proximal phalanx of right ring finger" seen. So injury No.1 was declared grievous.

The medical officer found two of the above examinees, namely Muhammad Anwar and Shaukat Ali semi-conscious and in a state of shock at the time of their medical examination and he took special measures to save their lives. He referred Muhammad Anwar injured to the Services Hospital Lahore as his condition gradually deteriorated. The MLR (Exh.DA) of Shaukat Ali injured revealed that he had been referred to Mayo Hospital, Lahore for management/treatment and surgical operation of his injuries. What happened thereafter, the record is silent about it.

15. It can easily be gathered from the medical evidence that both Muhammad Anwar (P.W.2) and respondent Shaukat Ali, besides respondent Muhammad Aslam had received grievous injuries, which were certainly homicidal in nature, as nothing contrary to it existed on the record. Akbar Ali (respondent No.2) also received a big-sized (11 cm x 8 cm DNP)

firearm wound at his left forearm, which was declared simple, as X-ray films, despite presence of many a metallic/foreign bodies did not reveal any bony-lesion. Almost entire body of Muhammad Anwar injured was found battered and bruised and respondent Shaukat Ali's face had been noticed badly damaged at the time of his medical examination by the medical officer. Whenever he appeared before the court, he had his face half-covered by means of cloth, tightly wrapped around the chin area. He was asked by the court at the time of final hearing of this case to uncover the face, who did so and the area exposed was seen disfigured and defaced in permanent terms. On the other hand, Muhammad Anwar injured appeared before the court on a wheel-chair to tell that he had been rendered incapacitated for good, due to the injuries he sustained during the occurrence. The medical evidence did not, however prove the said fact as medical officer said nothing in this regard. His operation notes and remarks/reports of the surgeon(s), if any, have not been brought on the record. The statement of PW-1 showed only one fractural injury (No.1) at the locale of his left leg. Rest of the injuries, having been, kept under observation continuously remained as such.

16. The prosecution did not lodge any request before the learned trial court as to re-examining the medical officer so as to repel the impression that the injuries sustained by the injured-respondents were homicidal and not to have been inflicted other than the targetted firing by Muhammad Anwar (P.W.2). The testimonies of witnesses of ocular account (P.W.2 to P.W.4), when read-with the medical evidence, would lead to an irresistible conclusion that their assertion, as to snatching .12 bore gun by Muhammad Sarwar (PW not produced) from respondent Liaqat and in their test of muscles, its having suddenly gone-off with the fired pellets hitting respondents Shaukat Ali and Akbar, is nothing but a sheer lie. The divergent statements of the eye-witnesses as to jumping of Muhammad Sarwar in the fight and snatching the gun in aforesaid fashion belie the theory advanced, being nonsensical. None of them has said that Muhammad Sarwar had caught hold of the said gun to snatch it but they all stated about having taken Liaqat in japha by him. How could a .12-bore gun which is a long sized weapon could go-off in the situation, as deposed about by the PWs. The prosecution did not act wisely by having given up Muhammad Sarwar PW in such a situation, wherein his testimony might have been crucial in the real sense. There cannot be inferred any other result that both the injured-respondents had been aimed at before they were fired at and sent reeling to the ground in injured condition. The third injured-respondent Muhammad Aslam received four lacerated wounds at his right hand and an abrasion on the back of his left forearm which could also not be believed to have been caused with friendly hands. As pointed out earlier, it could only be the place of occurrence which would determine as to who had initiated the aggression in this case. It has no more remained a mystery now that the occurrence had taken place at the haveli/Ehata, which was owned and possessed by respondent Ilam Din and others. The testimony of Inspector Mehmood Ahmad Khan (P.W.5), who is the lone investigating officer examined, gives a clue to the said effect when he categorically contended that the occurrence had not taken place inside the house of Atta Muhammad (complainant/appellant) and that it took place in the haveli/Ehata of Ilam Din. Succinctly speaking, the complainant and his bond-men/co-witnesses looked the aggressors and the respondents, having been aggressed upon. The prosecution had thus, badly failed in bringing home the guilt of the acquitted respondents (Nos.1 to 9) beyond any reasonable shadow of doubt during trial. The outcome of the case would have certainly been the same, as drawn by the learned trial court through the impugned judgment which unluckily, did not contain any discussion on merits or examination of facts or legal issues which could provide basis to the said conclusions. Had it not been so, that more than 1/4th of a century had already elapsed since reporting of crime to the police and twenty three (23) years gone-by since pronouncement of the impugned judgment, it might have essentially been a good case to be remanded to the learned trial court for rewriting a decision afresh, but for the said reason.

17. The acquitted respondents did not take to a specific defence plea of exercising their right of private defence, while deposing under section 342, Cr.P.C., though, they suggested to all three eye-witnesses during their examination that they and their cronies being armed with different weapons had launched aggression against them so as to wrest possession of their Ehata/haveli and that they merely retaliated upon the aggression, in defence. Learned counsel for the appellant has argued with vehemence that in absence of any specific plea of exercising right of private defence having been taken by the respondents under section 342 Cr.P.C., no such claim could be advanced insistently by them while defending against this appeal. The objection taken cannot be considered an absolute bar, as plea of private defence can be raised in appeal if it so spelt out from the prosecution evidence, though not specifically taken at trial. The Hon'ble Supreme Court of Pakistan while dealing with a case, Muhammad Abdullah v. Muhammad Safdar Khan and another (1973 SCMR 26), wherein both the sides had received injuries and a person on the complainant side lost life, observed as under:--

> "In our opinion, in a case of this nature, where neither the prosecution nor the defence come out with the true version and the Court is called upon to sift the evidence in order to discover as to what portion of it can be accepted and what has to be rejected it is always a delicate and a difficult task. If the discrepancies are of such a serious nature that no reliance can be placed on the prosecution story at all then the benefit of that will necessarily have to go to the accused. Unless there is some independent and reliable evidence bringing home the guilt to one or the other of the accused persons, the prosecution cannot succeed.
>
> In the present case, since the respondent Safdar and his brother Rafiq had admitted their participation in the incident, it cannot be said that they were not there; but one has still to examine as to the part they played. Did they act in the manner alleged by the prosecution; if not, then is the evidence such that there may be a reasonable possibility of their having acted in a different manner which would altogether exculpate them or justify their action then the benefit of that possibility must be given to the accused persons.
>
> In the present case, as we have stated earlier, having found that both sides were suppressing the truth, we have, having regard to the number and the nature of injuries suffered by the accused persons, come to the conclusion that the possibility of their having acted in self-defence was more probable in the circumstances of this case. If this right accrued to them, then the firing of a single revolver shot, which unfortunately resulted in the death of one of the opposite party, cannot be said to have been done in excess of that right."

The apex court reiterated its view-point in Muhammad Yousaf's case, reported as 1994 SCMR 1733 by underlining that an accused, even in the absence of any evidence of his own defence, is entitled to support his plea of right of private defence from the circumstances appearing from prosecution evidence itself.

18. Respondents Nos.1 to 9, as claimed by them, were in possession of the Ehata/haveli through Ilam Din (respondent No.1), on the crucial day and they had every right to defend their possession over it. The evidence led would credibly suggest that they exercised their right quite lawfully and they exceeded it not at any stage. Their inability to have so claimed in their statements under section 342, Cr.P.C. does not deter this court in any manner, to reach the conclusion that compelling circumstances of the case had imparted to them a right to defend themselves and their property. Their taciturnity on this issue when they deposed under section 342, Cr.P.C. could not extinguish their right to recapitulate and press the once forgotten plus-point i.e. right of private defence. This court has held in Ghulam Rasul and 3

others v. The State (PLD 1970 Lahore 832), which implies similitude as to the facts and circumstances hereof, as follows:--

> "A feeble attempt was made on behalf of the State to show that neither the appellants took this plea nor they adopted this theory when they subjected the prosecution witnesses to cross-examination and, therefore, they are not entitled to the plea of defence of the property. Suffice it to say, the view of the superior Courts in granting such right to the accused persons enshrines in many judgments. If from the evidence of the prosecution such a plea can be spelt out, surely the appellants would be entitled to raise that plea even if it is not specifically so taken at the trial. Safder Ali v. The Crown (6) is an eminent judgment on this point. The latest pronouncement of the Supreme Court of Pakistan reported as Ali Muhammad v. The State (I) also approved this principle. We are clear in our mind that the appellants had the right of defence of property i.e. the use of water of which they were in possession on account of their turn and, therefore, any attempt to disrupt the water supply by the other party would entitle them to maintain the supply and in so doing if the obstructing party has received injuries the appellants were surely within their right to deal with the intruders. Even otherwise natural justice has been done in this case. If the complainant-party has lost one man the appellants have equally lost one person."

Learned counsel for the appellant has drawn attention of this court to judgment dated 6.7.1998, passed by the learned Additional Sessions Judge Sheikhupura, whereby judgment of the learned trial court, pronounced on 2.12.1992 in the FIR-case has been set aside and appellants therein, Muhammad Anwar, Atta Muhammad, Munir Ahmad and Muhammad Sarwar (PWs herein) have been acquitted of the charge with the observation that they had been attacked by the complainant-party of the FIR-case and Shaukat Ali (a respondent herein) had received firearm injuries on his face, when .12-bore gun held by his companion Liaqat accidentally went-off, on an attempt to snatching it by said Muhammad Sarwar. This judgment has not been challenged by the complainant-side but it did not mean that it had an overriding effect to the case in hand. The afore-noted observation and the discussions made in the said judgment tended to show that there was hardly anything to choose, in terms of legal acumen, between both the learned courts below. Lesser the comments/remarks in this context, better would it be for the courts concerned.

19. On the strength of the observations, quoted hereinabove, it is found to be a case wherein the respondents had justifiably exercised their right of private defence and exceeded it not at any stage. Thus, they cannot be considered to have committed any offence, wherefor they should be punished. The conclusion drawn by the learned trial court, as to their innocence and resultant acquittal through the impugned judgment, though not based on any expressive reason, is upheld for the discussion made hereinabove. The appeal in hand being devoid of merits is dismissed.

ZC/A-27/L Appeal dismissed.

2016 Y L R 2702

[Lahore]

Before Shahid Hameed Dar and Mazhar Iqbal Sidhu, JJ

MUHAMMAD ABBAS---Petitioner

Versus

SPECIAL JUDGE ATC and 6 others---Respondents

Writ Petition No.14739 of 2013, decided on 23rd January, 2014.

(a) Anti-Terrorism Act (XXVII of 1997)---

----S. 6---"Terrorism" or "terrorist act", components of---'Purpose', 'motivation', 'actus reus' and 'mens rea', would constitute the components of "terrorism" or "an act of terrorism"---Action designed to coerce and intimidate or overawe the government or the public or section of public or community or sector, if such an action was designed to create a sense of fear or insecurity---Society in the backdrop of religious, sectarian or ethnic cause, would constitute an act of terrorism or terrorist act---Private crime resulting into fear or insecurity as a by-product, a fall-out or an unintended consequence of fright etc., could not be termed as an act of terrorism---Mere gravity, heinousness, gruesomeness or shocking nature of any offence, committed in pursuance of personal enmity or in settlement of personal vendetta, could not by itself sufficient to brand such a crime as a terrorist act or an act of terrorism.

Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445; Muhabbat Ali and another v. The State and another 2007 SCMR 142 and Ahmad Jan v. Nasrullah and others 2012 SCMR 59 rel.

(b) Anti-Terrorism Act (XXVII of 1997)---

----Ss. 6 & 23---"Act of terrorism"---Transfer of case to the court of ordinary/regular jurisdiction---Case of accused person, was far lesser in severity and grievousness than that of the terrorists or sectarian criminals, who killed the innocent persons for none of their fault, only to threaten; and defeat the writ of the State, or to cause damage to other sect---Miscreants, the saboteurs or the terrorists did not have any personal grudge or motive against those, whom they targeted either by exploding some device or by immolating themselves, or by any other means, so as to shatter the prevailing peace, and tranquility in the society or to render the masses insecure---Mind-set of such persons was only to do maximum damage to the society or to a section of the society, so as to weaken the State or over-awe the government---Offence alleged against accused was necessarily a fall-out of the motive alleged in the FIR, according to which previous squabbling as to the insult of the children, led to the said human loss---Present case looked to be of private motive and settlement of personal vengeance, having been committed without any intent to creating sense of fear or insecurity in the society, or a section of society, or to public at large, nor it was designed to coerce or

intimidate, or overawe the government, or the public or section of a particular community, or sector fanning out religious, sectarian or ethnic ill-will or hatred---Nexus had to be shown between the act done and the objective or design by which said offence was committed; so as to formulate a finding, that said offence constituted an act of terrorism---Offence committed in the background of personal enmity, though having transmitted a wave of terror or fright was not necessarily an act of terrorism---Judge of Anti-Terrorism Court had rightly observed in the impugned order that the occurrence alleged against accused did not reflect any act of terrorism, as it was committed in the backdrop of previous animosity between the parties---Complainant himself had introduced the factum of previous heart-burning and rivalry between the parties in the FIR, which led to the unfortunate incident, which in circumstances could not be declared a "terrorist act"---Impugned order passed by Judge Anti-Terrorism Court, could not be interfered with, in circumstances.

Ahmad Jan's case 2012 SCMR 59; PLD 2009 SC 11; PLD 2004 Lah. 199; PLD 2001 SC 521 and PLD 2002 SC 841 ref.

Asghar Ali Gill for Petitioner.

Khurram Khan, Deputy Prosecutor General Punjab for the State.

Syed Zulfiqar Ali Bokhari for Respondent No.2.

Muhammad Zubair Khalid Chaudhary for Respondent No.4.

ORDER

Through this single order, we propose to dispose of two connected constitutional petitions bearing Writ Petition No.14739 of 2013 (Muhammad Abbas v. Special Judge, Anti-Terrorism Court and 6 others) and Writ Petition No.18344 of 2013 (The State v. Manzoor Hussain and 5 others), as both arise from order dated 30.5.2013 passed by the learned Judge, Anti- Terrorism Court No.III, Lahore, whereby an application under section 23 of the Anti-Terrorism Act, 1997 moved by the accused-respondents was allowed and trial of case FIR No.15, dated 20.1.2013, registered for offences under sections 302, 324, 148, 149, 337-F(i), 337-F(iii), 337 P.P.C. read with section 7 of the Anti-Terrorism Act, 1997, at Police Station Hadyara, Lahore, lodged by Muhammad Abbas-complainant (petitioner in W.P. No. 14739/2013) was transferred to the court of ordinary/ regular jurisdiction.

2. Muhammad Abbas-complainant and the State through Deputy Prosecutor General Punjab, by filing the mentioned writ petitions, respectively, have assailed the said order.

3. Precisely, the relevant facts are that Muhammad Abbas (complainant) along with his five companions reached Chowk Chakianwala Hadyara at about 4.00 p.m. on 20.1.201.3, where they were ambushed by the respondent-accused and others, who were armed with deadly weapons, like Kalashnikovs, rifles .44 bore and 9-MM besides other firearms. Due to indiscriminate firing of the accused, Farhan Akbar, Salman Akbar, Muhammad Ashraf and Afyan fell badly wounded. According to FIR, the firing made by the accused spread terror in the area; the injured were immediately shifted to Services Hospital, where three of them,

Salman Akbar, Farhan Akbar and Muhammad Ashraf succumbed to the injuries. Afyan injured, however, was admitted in the hospital as indoor patient; the motive behind the occurrence, as spelt out from the FIR, was that children of the accused party had been insulted by the other side.

4. After investigation, report under section 173 Cr.P.C. was submitted against the accused before the Anti-Terrorism Court-III, Lahore. During the course of the trial, the accused moved an application under section 23 of the Anti-Terrorism Act, 1997 seeking for transfer of the case to the court of ordinary jurisdiction. The learned Judge, Anti-Terrorism Court vide order dated 30.5.2013 found it a fit case for transfer to the court of regular jurisdiction. Hence, the instant writ petitions.

5. Learned counsel for the petitioner by heavily relying on the provisions of section 6 of the Act (ibid) submitted that the occurrence took place at a busy Chowk, where the respondent-accused made incessant firing by means of lethal weapons and thereby murdered three persons and almost killed another one; the act of the accused created sense of fear and insecurity amongst the people at large. He has further submitted that the motive alleged even if believed was so trivial that it could easily be ignored or forgotten by the accused if they had no other intention but to commit an act of terrorism. The learned counsel has relied on an unreported order of this court having been made on 2.10.2013 in Writ Petition No.2878 of 2012. The learned counsel looked a bit hesitant and hiccupy when he submitted last that the learned trial court, in case the instant petition failed, may be directed to conclude the trial expeditiously.

6. The learned Deputy Prosecutor General Punjab appearing on behalf of the State has adopted in unison the line of arguments of the learned counsel for the petitioner.

7. Contrary to it, learned counsel for the respondent-accused have contended that previous rivalry between the parties over quarrel of the children was admitted in the FIR., hence, it was a case of private motive; the allegation of heavy firing with sophisticated weapons may not be deemed sufficient to bring the case within the scope of Anti-Terrorism Act, 1997; the place of occurrence was not a populous area nor it was near any bazaar; mere heinousness of offence without other pre-requisites is no reason to consider it an act of terrorism and order made by the learned Judge, Anti-Terrorism Court for transfer of the case to a court of ordinary jurisdiction is unexceptionable. The learned counsel has relied on Ahmad Jan v. Nasrullah and others (2012 SCMR 59).

8. We have heard all concerned and perused the relevant record minutely.

Does element of personal vendetta or satisfaction of personal vengeance give rise to terrorism or a terrorist-act, is a question, the answer whereto lies in the definition of section 6(2)(a to n) of the Act (ibid). The 'purpose', the motivation, the 'actus reus' and the 'mens-rea' constitute the components of terrorism or an act of terrorism. An action designed to coerce and intimidate or over-awe the government or the public or section of public or community or sect or, if such an action is designed to create a sense of fear or insecurity in society in the backdrop of religious, sectarian or ethnic cause, shall constitute an act of terrorism or a terrorist act. A private crime resulting into fear or insecurity as a by-product, a fall-out or an

unintended consequence of fright etc. cannot be termed as an act of terrorism. Mere gravity, heinousness, gruesomeness or shocking nature of any offence, committed in pursuance of personal enmity or in settlement of personal vendetta is not by itself sufficient to brand such crime as a terrorist act or an act of terrorism. The reliance in this regard may be made on "Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445), "Muhabbat Ali and another v. The State and another" (2007 SCMR 142) and Ahmad Jan v. Nasrullah and others (2012 SCMR 59).

9. In our opinion, the case of the respondent-accused and that of their co-accused was far lesser in severity and grievousness than that of the terrorists or sectarian criminals, who killed the innocent persons for none of their fault, only to threaten and defeat the writ of the State or to cause damage to the other sect. It is not a hidden truth that the miscreants, the saboteurs or the terrorists do not have any personal grudge or motive against those, whom they target either by exploding some device or by immolating themselves or by any other means so as to shatter the prevailing peace and tranquility in the society or to render the masses insecure. Their mind-set is only to do maximum damage to the society or to a section of the society, so as to weaken the state or over-awe the government. The offence alleged against the respondent-accused is necessarily a fall-out of the motive alleged in the FIR, according to which previous squabbling as to the insult of the children, led to the said human loss. It certainly looks a case of private motive and settlement of personal vengeance, having been committed without any intent to creating sense of fear or insecurity in the society or a section of society or to public-at-large nor it was designed to coerce or intimidate or overawe the government or the public or section of a particular community or sect or fanning out religious, sectarian or ethnic ill-will or hatred. A nexus has to be shown between the act done and the objective or design by which the said offence was committed, so as to formulate a finding that the said offence constitutes an act of terrorism. Mehram Ali's case (supra) provides necessary guidelines in this regard. In the absence of such linkage, it cannot be said that an offence committed in the background of personal enmity, though having transmitted a wave of terror or fright was is necessarily an act of terrorism. The Hon'ble Supreme Court of Pakistan in dealing with an identical matter in Ahmad Jan's case (2012 SCMR 59), referred to PLD 2009 SC 11, PLD 2004 Lahore 199, PLD 2001 SC 521 and PLD 2002 SC 841 and observed as under:--

> "The motive for the occurrence is enmity inter se the parties on account of some previous murders. In this view of the matter, we are of the opinion that since motive was enmity inter se the parties, the application of section 7 of the Act, which primarily requires the spread of sense of insecurity and fear in the common mind is lacking in the present case. The occurrence neither reflects any act of terrorism nor it was a sectarian matter instead the murders in question were committed owing to previous enmity between the two groups."

We find that the learned Judge, Anti-Terrorism Court has rightly observed in the impugned order that the occurrence alleged against the accused did not reflect any act of terrorism, as it was committed in the backdrop of previous animosity between the parties. The complainant himself has introduced the factum of previous heart-burning and rivalry between the parties in the FIR, which led to the unfortunate incident, hence, it cannot be

declared a terrorist act for the discussion supra.

10. Resultantly, we are not inclined to interfere with the impugned order passed by the learned Judge, Anti-Terrorism Court. These petitions are accordingly dismissed.

11. During arguments, learned counsel for the petitioner made an alternate submission as well that the learned trial court may be directed to conclude the trial expeditiously, as above-said occurrence took place almost a year ago. This particular submission of the learned counsel is appreciable, hence, it is directed that the learned trial court (Ch. Muhammad Tariq Javed, Additional Sessions Judge, Lahore) on communication of this order would record this fact in the order-sheet and accelerate the proceedings of the trial, so as to conclude it within four months from the said date, may it be a day-to-day or twice-a-week affair. A copy of the judgment passed by the learned trial court would be submitted to the Registrar of this court for our perusal in chambers. The judicial record of this case be returned forthwith.

HBT/M-37/L Petition dismissed.

2016 Y L R 2808

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD MUMTAZ---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No.1573 of 2010, heard on 15th December, 2015.

Penal Code (XLV of 1860)---

----Ss. 376 & 337-J----Rape, causing hurt by means of poison---Appreciation of evidence---FIR had not been produced during recording of statement of the complainant at trial---Scribe of the FIR/police official had not been produced during recording of the evidence, and the record did not show that he had been given up by the prosecution---Investigation Officer of the case had deposed nothing about recording of the FIR---FIR of the case had been lodged with delay of about twenty-four hours without any plausible explanation; however, the delay, in such like cases, might not be significant, as people generally hesitate and took time in reporting such matters involving their family name or dignity of their woman---Victim's clothes, which had been torn due to resistance shown by her, had not been produced during the course of investigation---Testimony of the victim and that of the eye-witnesses were full of contradictions and the same were permeated by an element of unnatural-ness---Victim's father and cousins had allegedly entered the house on hearing her hue and cries, who, being grown up persons, could have easily overpowered the accused, who was not armed at the time---Statement of the victim had not suggested that the accused had sex with her against her will---Victim's mother, who was allegedly sleeping at a close distance from the victim at

the time of the occurrence, had not been produced at trial---Complainant, the father of the victim, being a person of hard/ impaired hearing, could not have possibly listened to the screaming of the victim---Victim could not explain as to how she had been intoxicated by the accused---Victim's brother had also been alleged to have been intoxicated along with the victim and medically examined for the same, but no medical evidence had been produced in that regard---Male doctor had although deposed that the accused a potent person in terms of performing sexual act, but the female doctor, after receiving the DNA report, had opined that the vaginal swabs of the victim did not generate any male DNA profile and that the victim had not been subjected to sexual intercourse by anyone; said doctors had not examined the victim and her brother regarding alleged administration of intoxication material---Medical evidence, therefore, had not lent any corroboration to the prosecution case---Abscondance of the accused for two years was of no significance after rejection of oral statements of the victim and eye-witness and medical evidence---Impugned conviction/sentences were, therefore, set aside---Appeal against conviction was allowed accordingly.

Mian Muhammad Ismail Thaheem for Appellant with Appellant (on bail).

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for Respondents.

Date of hearing: 15th December, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---This criminal appeal arises from the judgment dated 22.5.2010, whereby the learned Additional Sessions Judge, Sargodha convicted Muhammad Mumtaz (appellant) under sections 376, 337-J, P.P.C. and sentenced him on conclusion of his trial in case-FIR No.240/07, dated 7.6.2007, registered for offences under sections 376, 337-J, P.P.C. at Police Station Saddar Sargodha, as follows:--

i) **Under section 376, P.P.C.** to rigorous imprisonment for ten years with fine of Rs.50,000/- or in default thereof to undergo simple imprisonment for six months.

ii) **Under section 337-J, P.P.C.** to rigorous imprisonment for five years as Ta'zir.

He was extended the benefit of section 382-B, Cr.P.C. with the observation that his sentences would run concurrently.

2. Precisely, the prosecution story as narrated by Imam Bakhsh, the complainant (P.W.2) in the FIR is that he along with his wife Mst.Bano, son Amanullah, aged 22 and daughter Mst.Iqbal Bibi, aged 18/19, was present at his house on 5.6.2007; his maternal nephew Mumtaz (appellant) visited him at Shamvela; he went to his haveli after taking supper so as to look after his cattle- head; he heard some noise at about 11.00 p.m., so he awoke Zulfiqar (P.W.3) and Mukhtar PW (not produced) and they all ran to his house, where they saw Mumtaz (appellant) committing rape on his daughter Mst.Iqbal Bibi; the rapist saw the on-rushers and he jumped outer-wall of the house to runaway, after he picked-up his shalwar from the cot; the complainant found his son Amanullah unconscious; his daughter Mst.Iqbal Bibi also fainted a little while thereafter; he could not manage any conveyance at night so he took his son and daughter to Civil Hospital Sargodha for treatment, the following morning in the company of Zulfiqar (P.W.3) and Mukhtar PW (not produced). He took both of them to the police station, after they regained their senses and contended before the police that Mumtaz accused (appellant) had administered some intoxicating juice/liquid to them and forcibly violated his daughter Mst.Iqbal Bibi. The complainant reported the matter to Muhammad Hanif ASI, PW (not produced), at the police station, who, as per his narration,

registered FIR No.240/07 (supra).

3. The appellant-accused was arrested on 7.11.2009. On completion of necessary investigation, report under section 173, Cr.P.C. was submitted against him before the learned trial court for his trial in accordance with the law.

4. On indictment, the appellant pleaded not guilty and claimed a trial. The prosecution, in order to prove its case, produced ten witnesses, namely Dr.Muhammad Afzal (P.W.1), Imam Bakhsh (complainant/P.W.2), Zulfiqar (P.W.3), Mst.Iqbal Bibi (P.W.4), Amanullah (P.W.5), Mst.Shazia Naureen SI (P.W.6), Fazal Elahi 1262/C (P.W.7), Muhammad Ramzan ASI (P.W.8), Mukhtar Ahmad SI (P.W.9) and Dr.Rehana Rashid (P.W.10). Learned public prosecutor submitted DNA-profile report, which was in negative, in evidence as Exh.PH and closed the prosecution case. Thereafter, the appellant was examined under section 342, Cr.P.C., whereby he proclaimed his absolute innocence in the matter. While answering the question, why this case was registered against him and why the PWs had deposed against him, he stated as under:--

> "The complainant is my real maternal uncle, who got Rs.50,000/- loan from me and just to usurp that loan, he has falsely implicated me in this case and the PWs are the son and nephew of the complainant and belong to the complainant family and are inimical to me."

He declined to make statement on oath or lead any evidence in defence.

Learned trial court concluded trial of the accused through the impugned judgment by holding him guilty of the charge and awarded him the sentence, in mentioned terms.

5. Learned counsel for the appellant has submitted that the appellant did not commit any excesses against Mst.Iqbal Bibi (P.W.4) nor he forcibly subjected her to sexual intercourse and contention of the complainant in this regard was patently false; there existed no evidence as to the allegation that the appellant had administered any foul material to Mst.Iqbal Bibi (P.W.4) and Amanullah (P.W.5) or they had been rendered unconscious by him; the testimonies rendered by the alleged victim and the eye-witnesses are loaded with many a contradictions and discrepancies, which had reduced their credibility to nothing; the prosecution could not establish the charge against the appellant during trial and he had been held guilty by the learned trial court conjecturally; the impugned judgment is not based on any cogent or plausible reasons, therefore, it may be set aside and the appellant may be acquitted of the charge.

6. On the contrary, learned Deputy Prosecutor General Punjab has argued that the appellant acted in a beastly way as he betrayed trust of his real maternal uncle by forcibly doing sex with his daughter; the testimonies of the victim-lady and that of the eye-witnesses are confidence inspiring and supportive inter-se, through which prosecution has proved its case against the appellant beyond all shadows of doubt; the impugned judgment is based on judiciously drawn conclusions, hence, it may be sustained.

7. Learned counsel for the parties have been heard at length and the relevant record perused in depth.

This is a case whereby prosecution did not feel the necessity of tendering FIR No.240/07 (supra) in evidence. A carbon copy thereof is, however, available on the record, which showed that it had been scribed by Muhammad Hanif ASI, PW (not produced) on the

statement of Imam Bakhsh (complainant/P.W.2) at 12.30 a.m. on 7.6.2007, as regards the occurrence which took place at 11/12.00 midnight on 5.6.2007. The record is silent as to what the prosecution did of Muhammad Hanif ASI, for he had not been given up by the public prosecutor at any stage of the trial. The complainant Imam Bakhsh appeared as P.W.2 and submitted that he had got lodged the FIR against, Muhammad Mumtaz accused/appellant on 7.6.2007, but he did not claim if it had been drawn in line with his contention nor did he tender it as a piece of evidence. Mukhtar Ahmad SI (P.W.9), who investigated this case did not say anything qua recording of FIR by Muhammad Hanif ASI. It may be found from the order sheet that learned trial court summoned said Muhammad Hanif ASI through non-bailable warrant of arrest on 6.5.2010 and fixed the next date as 7.5.2010, but interim order of the said date followed by a couple of other orders dated 10.5.2010 and 17.5.2010 did not reveal as to what happened with the non-bailable warrants of arrest issued against him nor did he turn up for his evidence. It could, however, be seen that the learned public prosecutor (ADPP) tendered a negative DNA-test report and closed the prosecution evidence on 17.5.2010 and learned trial court recorded statement of the accused (appellant) under section 342, Cr.P.C., the same day. The delay in lodgment of FIR probably spans over twenty-four (24) hours and though it has not plausibly been explained by the complainant, yet, in such like cases, this interval might not be as significant as it may be in respect of cases of some other kind. The people generally hesitate and take time in reporting such like matters, involving their family name or dignity of the women-folk. Besides, FIR is a beginning point of any criminal case, which would set the machinery of law into motion and process of collecting evidence of the parties involved would start thereafter. Hence, it may not be an important circumstance, if FIR (supra) had not been tendered in evidence either due to carelessness or forgetfulness by the prosecution. It, however, revealed the allegation that Muhammad Mumtaz accused (appellant), who was nephew of the complainant (P.W.2), had administered some intoxicating material to the complainant's son Amanullah (P.W.5) and his daughter Mst. Iqbal Bibi (P.W. 4) before he forcibly violated her and ran away, when complainant Imam Bakhsh (P.W.2) and his co-witnesses, Zulfiqar (P.W.3) and Mukhtar PW (not produced) came running to the spot at the crucial hour.

8. Mst.Iqbal Bibi (P.W.4), the alleged victim, is the star witness of the prosecution's case, whose testimony is full of self-contradictions and permeated by an element of unnaturalness. She contended that she was fully conscious when raped by the accused but she was unable to resist the sexual onrush of the accused being under effect of the intoxicating stuff, having been administered to her by the violator. She contradicted herself by contending that she was in a position to resist even though, under trance of intoxication. The cot, whereon she had allegedly been raped by the appellant, was laid in the same compound close to the cots of his brother Amanullah (P.W.5) and mother Mst.Bano PW (not produced). Her father Imam Bakhsh, who told himself deaf and a person of weak eyesight in his testimony that he rendered as P.W.2, contentiously came running to the spot along with his nephew Zulfiqar (P.W.3) and another nephew Mukhtar PW (not produced) from the cattle-shed on his daughter's hue and cry but his wife Mst.Bano, who too was deaf like him, could not hear the cries despite being on a cot next to her daughter's cot, which location may be beheld from the visual site-plan (Exh.PB), drawn by Mukhtar Ahmad SI/I.O. (P.W.9). It emerges from the victim's statement that her mother's cot laid close to that of her own and it was so near that she could touch her arm to evade lewdly offensive of the accused but she did not do so. Should it be understood that she enjoyed sexual act of the accused being a consenting party thereto. She calculated duration of the licentious stint as 10/12 minutes but she could not recollect, if they both had ejaculated or not. She claimed that her clothes (shirt and shalwar) were torn due to resistance shown by her but she did not produce these items during the course of investigation. She clearly looked double-minded in her statement when she said that she had raised hue and cry but she "had no power to resist the commission of rape". She in the same breath also stated that she had resisted the accused when he committed rape on

her. She could not tell as to how she had been intoxicated by the accused/appellant and her contention in this regard looked vague and evasive. She was sure that outer door of her house was not bolted and it was open at the time of occurrence and through this inlet her father and her cousins, Zulfiqar (P.W.3) and Mukhtar PW (not produced) had entered the house, after they heard her screaming. They were three grown up persons and they could easily overpower the lone accused, who was not armed then. The unchained outer door would lead to suggest that the eye-witnesses had not seen the accused riding Mst.Iqbal Bibi when they reached there. The statement of the victim does not inspire confidence in any manner nor did it suggest that she had been done sex with by the accused against her will, if at all he had done it so.

9. The testimony of father of the victim-lady, Imam Bakhsh (complainant/ P.W.2) is also full of many a contradictions and discrepancies. He admitted in his statement that when he reached the place of occurrence, her daughter Mst.Iqbal Bibi laid unconscious but her wife Mst.Bano was fully conscious, though asleep. He also contended to have raised alarm when he reached the doorstep of his house and found Mumtaz accused committing rape on her daughter. He and his own nephews could easily catch the bottomless accused, who was admittedly alone and empty handed. He too told about the outer door being unbolted and found it ajar at the time of occurrence. His wife Mst.Bano is a crucial witness of this case, but she was not produced at trial, probably having declined to falsely depose against the accused. He despite being deaf heard shrieks of his daughter from a distance, while sleeping in the cattle-shed but his wife, who too was a person of impaired-hearing could not hear her daughter from the very next cot to that of hers. She might have or not seen anything, as alleged by her husband (P.W.2) and her daughter (P.W.4), but her hesitation to depose against the accused certainly reflects on veracity of the tale told.

The testimony of Zulfiqar (P.W.3), a cousin-brother of Mst.Iqbal Bibi, the victim (P.W.4) is also no exception, when it comes to adjudging truthfulness thereof as it is equally pregnant with many an improbabilities, like that of those, as found in the testimonies of the victim-lady and the complainant. His arrival at the place of occurrence along with his real brother Mukhtar PW (not produced) could only be deemed possible if it was believed that the deaf-complainant, who was their paternal uncle, had heard shrieks of his daughter at the cattle-shed and gone to their place to awaken them. It has been observed in the preceding lines that the complainant, being a person of hard of hearing could not possibly listen to screams of his daughter, if at all raised, for, those could not be heard by the mother, sleeping next to her cot, hence, Zulifqar's claim of being there at the spot at relevant time of the occurrence is not credible. He introduced an interesting fact when he said that there was no outer door of the house of the complainant but he also said in the same breath that the outer door was shut with an iron chain. He deposed that he and his companions tried to apprehend the accused but he made good his escape, though it was not so contended by the victim or by the complainant. The testimony of this witness (P.W.3) does no good to the statements of Imam Bakhsh (P.W.2) and Mst.Iqbal Bibi (P.W.4) being equally improbable and incredible.

10. Amanullah (P.W.5), real brother of the victim-lady, said nothing but about the fact that Mumtaz accused had visited his house as a guest on 5.6.2007 and during his stay he drank some of the milk that he served to him and rest was taken by him (P.W.5) as a result of which he fell unconscious. He stated to have been medically examined for having been administered some intoxicant be the accused but there existed no such medical evidence to prove this fact. He contended that Mumtaz accused was his phuphizad and he talked with him till 2.00 a.m. and said it again that they talked till 11/12.00 midnight. If they both chit-chatted till midnight, it only meant that he was within his senses by then.

11. It may or may not be so that some intoxicating material had been administered to

Mst.Iqbal Bibi (P.W.4) and Amanullah (P.W.5) but nothing is available on the record in terms of medical evidence to prove this allegation. The accumulative effect of the testimonies of Mst.Iqbal Bibi (P.W.4), her brother Aman Ullah (P.W.5), her father Imam Bakhsh (complainant/ P.W.2) and her cousin Zulfiqar (P.W.3) is that they have not spoken the truth nor could they render it a case of forcible act of coitus against the appellant. Their testimonies being devoid of truth and believability are rejected forthwith.

12. The medical evidence, as tendered by Dr.Muhammad Afzal (P.W.1) merely tells that Muhammad Mumtaz accused was a potent person in terms of performing a sexual act and his MLR (Exh.PA) verified this fact. It is Dr.Rehana Rashid WMO (P.W.10), who medically examined Mst.Iqbal Bibi (P.W.4) and through MLR (Exh.PG) she found that the examinee admitted two fingers easily with hymen-tears healed old. On receipt of the DNA-profile report (Exh.PH), she opined that "no male has committed intercourse with the victim." The requisite DNA-report (Exh.PH) entailed the conclusion that "the vaginal swabs of victim Iqbal Bibi (item 1.0) did not generate any male DNA profile." None of the male doctor (P.W.1) and lady doctor (P.W.10) examined Amanullah (P.W.5) or Mst.Iqbal Bibi (P.W.4) in terms of locating the probability, if they had been administered some intoxicating material or not. The medical evidence, as referred to above, does not lend any corroboration to the prosecution case, rather concluding deposition of the woman medical officer (P.W.10) had sealed its fate, when she observed that the female examinee had not been subjected to sexual intercourse by any.

13. Insofar as the abscondence of the appellant for about two years is concerned, it comes from the mouth of Fazal Elahi 1262/C (P.W.7). Though he has not been cross-examined by the defence, yet his deposition as to non-bailable warrant of arrest (Exh.PC), the proclamation (Exh.PD) and the reports thereon (Exh.PC/1 and Exh.PD/1) hardly advanced the prosecution case in any manner. The ocular account inclusive of statement of the alleged victim Mst.Iqbal Bibi (P.W.4), having already been rejected and the medical evidence being unreliable, to further dilate upon abscondence of the appellant would do no good to the prosecution, rather would it more be an exercise in futility.

14. The defence plea taken by the accused in his statement under Section 342, Cr.P.C. is as absurd and unbelievable as there could be any in this perspective. The prosecution case has already been rejected in the preceding paragraphs hereof, hence, searching something meaningful or otherwise in the defence plea would not be advisable. It, however, remains a case of denial on the part of the accused.

15. The crux of the discussion made hereinabove is that prosecution has failed to establish charge against the accused beyond any reasonable shadow of doubt. The impugned judgment contains as many fallacies and improbabilities as may be found from the prosecution evidence itself. The verdict of guilt of the appellant as given by the learned trial Court, is not sustainable by any stretch of imagination. Therefore, this pronouncement is annulled. The conviction and sentence of the appellant is set aside and he is acquitted of the charge. He is present on bail, for, his sentence had been suspended by this Court on 6.11.2012. His bail bonds are cancelled and surety discharged. The appeal stands accepted.

SL/M-65/L Appeal allowed.

2016 Law Notes 604

[Lahore]

Present: **SHAHID HAMEED DAR, J.**

Shahbaz

Versus

The State and another

Criminal Miscellaneous Nos. 2129-B and 2120-B of 2015, decided on 14th April, 2015.

BAIL (INJURIES) --- (Vicarious liability)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 337-A(i), 337-F(i), 337-A(ii), 337-A(iii), 337-L(2), 148, 149, 109---Bail after arrest, grant of---Vicarious liability---Tentative assessment of record---Contents of F.I.R. and statements of eye-witnesses as well as that of injured witnesses under Section 161, Cr.P.C. did not explain in specific term as to which one of said injuries had been caused by petitioner---It led to a fair amount of doubt and inquisitiveness as to whether petitioner had committed a bailable or non-bailable offence, the benefit whereof may be resolved in his favour even at bail stage---To be vicariously liable for entire occurrence was an issue which may better be dealt with by Trial Court---Delay of 7 days in lodgment of F.I.R. had not been explained by complainant in any manner---Case was open to further inquiry---Bail after arrest granted.

(Para 5)

یہ امر تحقیق طلب تھا کہ مذکورہ ضربات میں کون سی ضربات سائل سے منسوب تھیں۔ ضمانت عطا ہوئی۔

[It needed to be ascertained which one of injuries had been caused by petitioner. Bail was allowed].

For the Petitioners: **Malik Aftab Aslam, Advocate.**

For the State: **Rana Tasawar Ali Khan, Deputy Prosecutor General, Punjab.**

For the Complainant: **Irfan Yousaf Rai, Advocate.**

Date of hearing: **14th April, 2015.**

ORDER

SHAHID HAMEED DAR, J. --- The petitioner, Shahbaz has sought post-arrest bail through Criminal Miscellaneous No. 2129-B/2015 and petitioners, Muhammad Imran, Sakhawat Ali Sodagar and Muhammad Aslam seek bail before arrest through Criminal Miscellaneous No. 2120-B/2015, being accused of case-F.I.R. No. 532/2014, dated 01.09.2014, under Sections 337-A(i), 337-F(i), 337-A(ii), 337-A(iii), 337-L(2), 148, 149, 109, P.P.C., registered at Police Station *Tatlay Aali,* Gujranwala. Both the petitions shall be decided compositely through this single order.

2. The complainant, Inayat Ullah has alleged in the F.I.R. that Shahbaz (petitioner), Sakhawat Ali Sodagar (petitioner) and Muhammad Aslam (petitioner), all armed with *dandas,* joined by their armed co-accused attacked the complainant-party and mercilessly beat them to inflict multiple injuries on various parts of their bodies; Manzoor

Ahmad, Muhammad Ali, his mother *Mst.* Hajran Bibi, his wife *Mst.* Mumtaz Bibi and Muhammad Farooq were injured by the accused during the occurrence; the motive behind the occurrence pertained to a previous dispute between the parties.

3. It has been contended by the learned counsel for the petitioners that the story of F.I.R. as narrated by the complainant could not be verified by the Investigating Officer during the course of investigation and he found the petitioners innocent by labelling the complainant-side the liars; the medical evidence is inconsistent with the eye-witness account and it does not divulge any such injury on the persons of the injured witnesses, which may fall within the mischief of a non-bailable offence; the case of Shahbaz accused categorically opens to further probe as prosecution is short of evidence as to which of the two injuries on his head, one falling under Section 337-A(iii), P.P.C. and the other under Section 337-A(i), P.P.C. had been caused by him; the other petitioners did not do much during the alleged occurrence and opinion of the Investigating Officer *qua* their innocence makes the situation still rosier for them; they have joined the investigation and no longer required for the said purpose.

4. The petitioners' quest for bail has been opposed by the learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant who have contended that the petitioners are named in the F.I.R. with specific roles of inflicting injuries on *Mst.* Hajran Bibi, the mother, *Mst.* Mumtaz Bibi, the wife of the complainant, Manzoor Ahmad, Muhammad Ali and Farooq; the injury attributed to Shahbaz accused on the head of Manzoor Ahmad injured has been declared *Shajjah-i-Hashimah,* which is punishable under Section 337-A(iii), P.P.C., with 10 years' imprisonment; all the petitioners alongwith their co-accused committed the crime with community of intention, hence each of them is vicariously liable for the crime committed; three of the petitioners, Muhammad Imran, Sakhawat Ali Sodagar and Muhammad Aslam seek bail before arrest, which may not be granted as weapons of offence are still to be recovered from them; lastly submits that the prosecution case overflows with incriminating material against the petitioners.

5. After hearing learned counsel for the parties and perusing the record, it is observed that Shahbaz accused has been saddled with the liability of inflicting an injury at the head of Manzoor Ahmad by means of *danda.* The medico-legal-report of Manzoor Ahmad injured reveals three blunt weapon injuries on his person, two (injury Nos. 1 & 2) out of which are on his head while the third one is at his forearm. The medical officer has declared injury No.1 as *Shajjah-i-Khafifah* (337-A(i), P.P.C.) and injury No. 2 *Shajjah-i-Hashimah* (337-A(iii), P.P.C.). The third one has been found *Ghayr-Jaifah Damiyah* (337-F(i), P.P.C.). According to the story of F.I.R., Shahbaz accused caused only one injury by means of his weapon at the head of Manzoor Ahmad but his MLR, as referred to above, shows two injuries at the said locale, one (injury No. 1) constituting a bailable offence and the other (injury No. 2) giving rise to an offence, punishable under Section 337-A(iii), P.P.C. with 10 years' imprisonment, which is covered by the prohibitory clause of Section 497(1), Cr.P.C. The contents of the F.I.R. and the statements of the eye-witnesses, as well as that of the injured witnesses recorded under Section 161, Cr.P.C. do not explain in specific terms as to which one of the said injuries had been caused by Shahbaz

accused/petitioner. It leads to a fair amount of doubt and inquisitiveness, as to whether the petitioner had committed a bailable or a non-bailable offence, the benefit whereof may be resolved in his favour even at this stage. To be vicariously responsible for the entire occurrence is an issue, which may better be dealt with by the learned Trial Court at trial. Learned Deputy Prosecutor General Punjab and learned counsel for the complainant have been asked time and again to hint at some evidence which may establish in some believable terms that fractural injury on the head of Manzoor Ahmad injured had been caused by Shahbaz/petitioner. The delay of seven days in lodgment of F.I.R. has not been explained by the complainant in any manner. The petitioner was taken into custody on 26.11.2014 and he allegedly led to the recovery of a *danda* on 29.11.2014, which, according to the record, is not blood-stained. Tentative assessment of the material available renders it a case, one of further inquiry in favour of Shahbaz accused (petitioner) within the scope of Section 497(2), Cr.P.C. He has, therefore, earned a right to be set at liberty. His bail application (Crl. Misc. No. 2129-B/2015) stands accepted and he is granted post-arrest bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned Trial Court.

6. So far as the other petitioners, Muhammad Imran, Sakhawat Ali Sodagar and Muhammad Aslam, who seek bail before arrest, are concerned, they have not caused any such injury on the persons of Farooq and Manzoor Ahmad injured which may constitute a non-bailable offence. The injury attributed to Muhammad Imran accused/petitioner at the right shoulder of Farooq injured has been declared *Ghayr-Jaifah Damiyah* (337-F(i), P.P.C.) and similar is the situation in respect of an injury at the wrist of Manzoor Ahmad injured, which was allegedly caused by Muhammad Aslam petitioner. Sakhawat Ali Sodagar accused (petitioner) has not been assigned any specific role in the F.I.R. They were found innocent during the course of first round of investigation and result of the second investigation conducted by the DSP/SDPO, Circle *Kamonkey* was not much different as he found them merely present at the spot empty-handed. Sending them to jail would not serve any useful purpose, as their case not only calls for further probe into their guilt within the ambit of further inquiry as envisaged by Section 497(2), Cr.P.C. but also within the mischief of, most probably, a bailable offence. Their application (Crl. Misc. No. 2120-B/2015), therefore, is accepted and *ad-interim* pre-arrest bail granted to them *vide* order dated 18.02.2015 is confirmed subject to 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 learned Trial Court.

Bail after arrest granted.

2016 Law Notes 730

[Lahore]

Present: **SHAHID HAMEED DAR, J.**

Qasim Bilal

Versus

Muhammad Iqbal and others

Criminal Revisions No. 874 and 883 of 2010, decided on 25th November, 2011.

CONCLUSION

(1) The test identification parade report is not a document which per se is admissible in evidence.

DACOITY---(Identification test)

Criminal Procedure Code (V of 1898)---

---Ss. 435/439---Pakistan Penal Code, 1860, Ss. 395/397/412---Commission of offence---Charge---Impugned conviction/sentence---identification test---Appreciation of evidence---Validity---Said Civil Judge/PW simply tendered in evidence test identification parade report and did not utter even a single word as to contents thereof---Unless the contents of such report were proven by scribe thereof, it could not be readily accepted as a piece of evidence, nor details thereof could be used against the accused who had been allegedly identified by PWs during such parade---In order to render it a piece of evidence against petitioners/accused, the concerned Magistrate-cum-Civil Judge ought to have furnished the details of the test identification parade---Concerned Magistrate did not utter even a single word as to what was the number of dummies, the mode of the identification parade, the contention of the accused so identified by the witnesses, the conduct of the complainant at relevant time of picking-up the accused---Whether or not he (complainant) had highlighted the alleged role of accused at the time of identification of accused-petitioners during test identification parade---Trial Court adopted a novel way to record evidence of PW which was not only contrary to law but violated basic principle of Qanun-e-Shahadat Order, 1984 and such evidence, therefore, had to be entirely ignored---Evidence qua identification of petitioners could not be accepted an admissible piece of evidence which was accordingly rejected and brushed aside---Other evidence regarding recovery of pistols at instance of petitioner was hardly relevant in instant case---There was no other worthwhile evidence which may connect petitioners with commission of alleged offence---Both the Courts below committed a patent illegality while relying upon evidence of test identification parade of accused-petitioners---Impugned conviction/sentence was set aside---Criminal revision petition allowed. ***[IDENTIFICATION PARADE]***

(Paras 12,13,14)

Ref. *ILR 1924 Lah. 396.*

ہائیکورٹ نے نگرانی درخواست منظور کرتے ہوئے ملزمان /سائلان کو مقدمہ مذکور میں بری کر دیا۔

[High Court while allowing revision acquitted petitioners of the charge].

For the Petitioners: **Javed Imran Ranjha and M.M. Iqbal, Advocates.**

For the State: **Rana Tasawar Ali Khan, Deputy Prosecutor General, Punjab.**

Date of hearing: **25th November, 2011.**

JUDGMENT

SHAHID HAMEED DAR, J. -- Through this single judgment I intend to dispose of Crl. Rev. No. 874 of 2010 filed by Qasim Bilal (petitioner) and Crl. Rev. No. 883 of 2010 filed by Ijaz Ahmad (petitioner), as both arise out of the same judgments of the learned Courts below. The petitioners were the accused of case F.I.R. No. 324 of 2006, dated 10.5.2006 registered under Sections 395, 397, 412, PPC at Police Station, Saddar Mandi Bahauddin and convicted/sentenced under Section 397, PPC to the tune of seven years' R.I. each by the learned Magistrate Section-30, Mandi Bahauddin through judgment dated 20.10.2008. Whereas, their co-accused Abdul Jabbar and Muhammad Riaz were also awarded the same quantum of sentence except that Abdul Jabbar was also convicted and sentenced under Section 412, PPC in terms of seven years' R.I. with payment of fine to the tune of Rs. 5,000/- and in default thereof he was ordered to further undergo simple imprisonment for three months. All the sentences were ordered to run concurrently and benefit of Section 382-B, Cr.P.C. was extended to the accused-petitioners and their co-convicts. All the above-said convicts filed appeals against the above-said impugned judgments which were dismissed by the learned Additional Sessions Judge, Mandi Bahauddin *vide* judgment dated 6.3.2010.

2. The convicts Abdul Jabbar and Muhammad Riaz challenged the impugned judgment passed by the learned Trial Court as well as the judgment passed by the learned Appellate Court, referred to hereinabove through Crl. Rev. No. 494 of 2010 and Crl. Rev. No. 495 of 2010 which were allowed by this Court *vide* judgment dated 15.7.2010 with the following observations:--

> *"11. The record shows that after the investigation, the petitioner Muhammad Riaz was not challenged by the police and his name was mentioned in column No. 2 of the report under Section 173, Cr.P.C. whereas the petitioner Abdul Jabbar was not nominated in the F.I.R. and he was implicated in the supplementary statement. No recovery of any weapon of offence was effected from the petitioners, what to talk about the other recoveries. The record is also silent about the fact that whether without having been armed the unlawful assembly was constituted by the petitioners or not. There is a clear observation given by the learned Trial Court in Para-22 of the impugned judgment dated 20.10.2008 that the snatched car was recovered from the possession of accused Faisal Naseem, who is P.O. Simply there is recovery of Mobile Phone from the accused Abdul Jabbar (one of the petitioners) and the possibility that the same was planted cannot be ruled out. As vide Paras-21 and 22 of the impugned judgment passed by the learned Trial Court, the infirmity qua the present petitioners is quite obvious, therefore, by allowing both the revision petitions filed by the petitioners namely Abdul Jabbar son of Lala Khan and Muhammad Riaz son of Ghulam Rasool, their conviction and sentences recorded by the learned Trial Court through the impugned judgment are set aside. They shall be released forthwith if not required in any other case."*

3. The brief facts of the case are that the above-said F.I.R. was registered against two nominated accused namely Faisal Naseem and Riaz both sons of Ghulam Rasool besides three unknown accused but seven accused were booked in the instant case. The other five were Kamran Zafar son of Muhammad Zafar, Qasim Bilal (petitioner), Ijaz Ahmad (petitioner), Adnan Arshad (since P.O.) son of Muhammad Arshad and Abdul Jabbar (since acquitted) son of Lala Khan. All but Faisal Naseem and Adnan Arshad accused faced the trial. The charge against the accused except for Muhammad Riaz was framed on 27.9.2006 under Sections 397 and 412, PPC which was re-framed on 16.1.2007 for the same offences as accused Muhammad Riaz (since acquitted) was arrested, in the meanwhile by the police. The accused pleaded not guilty and claimed a trial.

4. Brief facts of the case are that complainant Muhammad Iqbal alleged in his statement (Exh.PA), which formed basis for registration of F.I.R. Exh.PA/1 that he was resident of village *Raika* and served in Income Tax Department; he returned from village *Khiwa* on his brother's car, Toyota Corolla Model 2006, bearing registration No. 99/MBA, which he reached King Road at about 9.30 p.m. ahead of railway crossing, he was intercepted by a Suzuki Car bearing No. 9327/LWB wherefrom three youthful persons armed with pistols emerged; one of them pointed his pistol towards the head of the complainant, dragged him out of his car, tied his hands, forced him to sit on the rear seat of the car and drove it towards sugar mills; the car was stopped at Rasul Road near Raja Tyre Service and the Suzuki Car was parked in the house of one Muhammad Iqbal and the other car (Toyota Corolla No. 523/LWG) started chasing the car of the complainant, driven by an accused; both the vehicles were stopped near *Shahana Loak* wherefrom accused Faisal (since P.O.) and Riaz (since acquitted) alighted and commanded their co-accused to kill the complainant, otherwise, he would get them arrested, having identified them all; thereafter the accused blind-folded the complainant and turned the vehicles towards '*sem nullah*' and stopped the cars nearby it; the complainant was taken out of the car, one of the accused fired at him which landed at his tied hands and left foot; because of the darkness, the fire-shot did not hit any vital part of the body of the complainant who raised shrieks being hit by the fire-shot; more fire-shots were made but none hit him; the accused also strangulated him and after deeming him dead, they fled the scene of occurrence; the complainant struggled to untie his hands, removed the bandage from his eyes and reached his village *Shaheedanwali* while sitting on a she-ass, in an injured condition; on reaching his village he informed his family members about the alleged occurrence, hence, case F.I.R. No. 324/06 *supra* was registered.

5. Originally the F.I.R. was registered under Section 394, PPC but, Sections 395, 397 and 412, PPC were added, as investigation progressed. The accused, however, were indicted under Sections 397 and 412, PPC.

6. The investigation of this case was conducted by Aziz Ahmad, S.I., PW-9 who recorded the statement Exh.PA of the complainant at Civil Hospital, Mandi Bahauddin, at 12.05 a.m. on 10.5.2006 which led to the registration of F.I.R. Exh.PA/1. Besides doing many other important deeds during investigation, he also got conducted the test identification parade of accused Kamran Zafar, Ijaz (petitioner) and Qasim Bilal (petitioner); the test identification parade was conducted on 29.5.2006 under the

supervision of learned Illaqa Magistrate during the course of which Muhammad Iqbal complainant correctly picked-up the petitioners and Kamran Zafar accused; Qasim Bilal (petitioner) got recovered pistol (P-2) *vide* recovery memo. Exh.PD and Ijaz Ahmad (petitioner) got recovered pistol 32 bore P-6 *vide* recovery memo. Exh.PE; accused Abdul Jabbar *alias* Chacha (since acquitted) got recovered mobile phone alongwith its SIM (P-10 & P-11) through recovery memo. Exh.PG. After completion of investigation the accused were challaned to the Court.

7. The prosecution produced as many as 10 witnesses to bring home the guilt of the accused at trial. The learned ADPP by giving-up Muhammad Siddique and Muhammad Iqbal PWs, as having been won over by the accused and the witnesses Muhammad Mahdi, ASI, Akhtar Mehmood, ASI, Riaz 285/HC, Khalid Pervaiz, Muhammad Ilyas 384/C and Abid Hussain, 80-HC as unnecessary, closed the prosecution case.

8. The petitioners and their co-accused facing the trial, denied all the charges against them in their statements under Section 342, Cr.P.C. and professed their complete innocence. None of them opted to produce any defence evidence nor anyone of them appeared as his own witness under Section 340(2), Cr.P.C. anyhow, after completion of the trial, the petitioners were convicted and sentenced by the learned Trial Court as mentioned above.

9. Learned counsel submits that the petitioners are entitled to acquittal simply for the reason that their case is at par with that of Abdul Jabbar and Muhammad Riaz accused who had been acquitted by this Court as revision petitions filed by them had been accepted on 15.7.2010; the evidence led by the prosecution regarding identification of the accused cannot be read against the petitioners because of the legal infirmity attached thereto. Lastly, submits that it is a case of no evidence so far as the petitioners are concerned so they may be acquitted of the charges.

10. On the other hand learned Deputy Prosecutor General, Punjab has supported the impugned judgments and submits that the case of the petitioners is distinguishable on facts, hence, the dictum of consistency is not applicable in this case.

11. Heard. Record perused.

12. The record shows that the co-accused of the petitioners namely Abdul Jabbar and Muhammad Riaz who had been convicted-sentenced by the learned Trial Court almost in identical fashion, had been acquitted by this Court as revision petitions (Crl. Rev. No. 494/2010 and Crl. Rev. No. 495/2010) had been allowed by this Court on 15.7.2010. Accused Muhammad Riaz was nominated in the F.I.R. with a specific role but his case was not found fit enough for maintenance of his conviction and sentence and he was acquitted of the charge. The main evidence against the petitioners is that of the test identification parade, reduced into report Exh.PQ, tendered in evidence during the course of examination of Nadeem Abbas Saqi, Civil Judge, Chakwal who while deposing as PW-10 simply tendered in evidence test identification parade report Exh.PQ and did not utter even a single word as to the contents thereof. He was not cross-examined by the defence despite having been afforded an opportunity. The test identification parade

report is not a document which *per se* is admissible in evidence. Unless the contents of such report are proven by the scribe thereof, it cannot be readily accepted as a piece of evidence, nor details thereof could be used against the accused who had been allegedly identified by the PWs during such parae. The contention of learned Deputy Prosecutor General, Punjab that PW-10 had not been cross-examined by the defence, therefore, they had admitted the authenticity of the identification parade, is not legally correct. By having not cross-examined the above-said PW it may be argued that the authenticity of test identification parade report (Exh.PQ) had been admitted by the accused but not the contents thereof. In order to render it a piece of evidence against the petitioners-accused, the learned Magistrate-*cum*-Civil Judge (PW-10) ought to have furnished the details of the test identification parade, as regards the mode and method, the identification of the accused-petitioners had been conducted. The learned Magistrate did not utter even a single word as to what was the number of dummies, the mode of the identification parade, the contention of the accused so identified by the witnesses, the conduct of the complainant at the relevant time of picking-up the accused. Whether or not he (complainant) had highlighted the alleged role of the accused at the time of identification of the accused-petitioners during test identification parade. The learned Trial Court adopted a novel way to record the evidence of PW-10 which was not only contrary to law but violated the basic principles of Qanun-e-Shahadat Order, 1984 and such evidence, therefore, has to be entirely ignored. Guidance in this regard may be advantageously had from *Lal Singh's case* (ILR 1924 Lahore 396). The relevant excerpt appearing at pages 399 & 400 is reproduced hereunder for ready reference:--

> *"Mr. Phailbus, a Magistrate of Montgomery, was called to prove the identification in the Montgomery Jail and the methods adopted. Instead, however, of stating in Court the details and the results, he merely refers to certain documents which are described as exhibits, in which he states that his evidence is to be found. These documents are put on the record as his evidence. It is quite obvious that the procedure adopted in this matter offends against the most elementary principles of evidence, and Mr. Sawhney can only attempt to justify it by saying that it was done to save time. This is obviously no excuse for an attempt to record the evidence of a witness in a manner which is not only contrary to law but which violates the first principles of evidence. There is no doubt that it would shorten the labours of a Trial Judge if he were to be permitted to record written statements of witnesses in the form exhibits by the mere production of the witnesses and their testimony that the exhibits embody the details of their evidence. But any person with any knowledge of and regard for judicial procedure should know that such a method of recording testimony would if applied to all the witnesses reduce the trial to a mere travesty. I may add that these so-called exhibits were not even read out in Court. They are marked with the usual stamp certifying that they were "Read out, admitted in evidence and added to Sessions file," but the words "Read out" have in each case been deleted, and upon the printed Record the certificate is merely to the effect that the document has been "admitted in evidence and added to Sessions file".*
>
> *The result of the mode adopted in the present case is that there is no evidence before us of the details of the identification parades held by Mr. Phailbus. But even if the exhibits in question were to be accepted as a proper record of his evidence it would not materially*

assist the Crown case. The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It might merely mean that the witness happens to know that accused person. The principle evidence of identification is the evidence of a witness given in Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused took in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court, but otherwise the evidence of identification furnished by an identification parade can only be hearsay except as to the simple fact that a witness was in a position to show that he knew a certain accused person by sight."

Notwithstanding, the aforesaid infirmity attached with the statement of PW-10, I do not find from the contents of the report Exh.PQ that the complainant Muhammad Iqbal PW-2 had pointed out the role of the petitioners at the time of their identification and what has been mentioned in report Exh.PQ is, that to identify the accused, the complainant simply placed his hand on their heads. In these circumstances, the evidence *qua* identification of the petitioners cannot be accepted an admissible piece of evidence which is accordingly rejected and brushed aside.

13. The petitioners were admittedly not known to the complainant who had been brutally dealt with by the accused during the occurrence of dacoity in the dark hours of the night *i.e.* at 9.30 p.m. which fact is evident not only from the F.I.R. Exh.PA/1 but also from the statement of the complainant (PW-2). The chances that the complainant in the peculiar circumstances of the case could identify the accused after about 13 days of the occurrence, are bleak. The entire prosecution's case against the petitioners revolved around the evidence of test identification parade, which in the preceding paragraph has been rejected. The other evidence regarding recovery of pistols at the instance of the petitioners is hardly relevant in this case as their co-accused Abdul Jabbar, from whom a mobile phone of the victim (PW-2) had been recovered, has already been acquitted of the charge. There is no crime empty in this case, hence, no report of Ballistic Expert could be fetched by the prosecution during the course of investigation. The evidence of recovery of the above-said fire-arms from the possession of the petitioners is inconsequential. There is no other worthwhile evidence which may connect the petitioners with the commission of offence. Both the learned Courts below committed a patent illegality while relying upon the evidence of test identification parade of the accused-petitioners.

14. Therefore, by allowing both the revision petitions filed by the petitioners Qasim Bilal and Muhammad Ijaz, their conviction and sentence recorded by the learned Trial Court and upheld by the learned Appellate Tribunal, through the impugned judgments, is set aside. They shall be released forthwith, if not required in any other criminal case.

Criminal revision petition allowed.

2017 M L D 185

[Lahore]

Before Shahid Hameed Dar and Syed Shahbaz Ali Rizvi, JJ

BILAWAL ALI---Petitioner

Versus

The JUDGE ATC-III and 2 others---Respondents

W.P. No.29575 of 2015, decided on 8th December, 2015.

Criminal Procedure Code (V of 1898)---

----S. 540---Penal Code (XLV of 1860), Ss. 302, 365-A & 34---Anti-Terrorism Act (XXVII of 1997), S. 7(a)---Qatl-i-amd and kidnapping for ransom with common intention---Summoning of witnesses---During pendency of trial, accused sought summoning of four persons as defence witnesses---Complainant had no objection to summoning of the witnesses provided the trial be concluded in 30 days---Validity---Complainant categorically submitted and pledged that trial of accused would conclude necessarily within 30 days from the date of examination of persons intended to be called as defence witnesses---Stance was reiterated by complainant so as to lend an impression of certainty and purity of pledge made in words that a day would not exceed the limit of 30 days, as suggested by complainant, for concluding of trial of accused---High Court appreciated such statements of parties in unison---Constitutional petition was allowed in circumstances.

Ch. Muhammad Qasim for Petitioner.

Ms. Asma Hamid, Addl. Advocate General, Punjab.

Muhammad Akram Qureshi for the Complainant/respondent No.2.

ORDER

This petition is directed against order dated 30.09.2015 whereby, learned Judge, Anti-Terrorism Court-III, Lahore dismissed an application of the petitioner for summoning Professor Khalid Rasheed, Professor Muhammad Shakeel, Professor Azman and Professor Saman of the Punjab College of Commerce, Okara as DWs, which he had moved during his trial in case-FIR No.224/2013 under sections 302/34/365-A, P.P.C. read with Section 7 of the Anti-Terrorism Act, 1997, police station Chung, Lahore.

2. Before could it be opened for arguments by the learned counsel for the petitioner, a real practical approach has been shown by the learned counsel for the complainant (respondent No.2) as he submitted that application of the petitioner, having been rejected by the learned trial court, might be accepted and he might be permitted to examine the quartet of professors, as mentioned therein, as defence witnesses but not before the learned counsel for the petitioner should make an undertaking before this court that the petitioner and his co-accused would necessarily ensure conclusion of their trial in the above said FIR-case within 30 days from the date of examination of the said defence witnesses before the learned trial court.

3. Learned counsel for the petitioner, who clearly looked overawed by the grace, shown by learned counsel for the complainant, has categorically submitted and pledged that trial of the petitioner in the said FIR-case would conclude, necessarily within 30 days from the date of examination of afore named professors of the Punjab College of Commerce, Okara as the defence witnesses. The learned counsel reiterated the stance, so as to lend an impression of certainty and purity of the pledge made, in words that a day would not exceed the time limit of 30 days, as suggested by learned counsel for the complainant, for concluding trial of the petitioner, come what may.

4. Learned Addl. Advocate General, Punjab seems amused with the welcoming gestures of the warring parties for each other and submitted that a direction may be given to the learned trial court to translate their mutual intentions, as shown hereinbefore, into conclusion of the trial of the accused within given time-frame.

5. The submissions made by learned counsel for the parties in unison are immensely praiseworthy. This constitutional petition is therefore accepted in terms as suggested by the learned counsel for the complainant/respondent No.2 and reciprocated to by the learned counsel for the petitioner, strictly in line with the spirit shown.

6. Let a copy of this petition be transmitted to the learned trial court for necessary information and compliance through some swift means.

MH/B-5/L Order accordingly.

2017 M L D 230

[Lahore]

Before Shahid Hameed Dar and Syed Shahbaz Ali Rizvi, JJ

MUHAMMAD BASHIR KHAN---Petitioner

Versus

The STATE and 4 others---Respondents

Criminal Appeal No.1730 of 2010, heard on 25th January, 2016.

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

----Ss. 302, 449 & 34----Criminal Procedure Code (V of 1898), S. 417(2-A)---Qatl-i-amd; house-trespass in order to commit offence punishable with death; common intention---Appeal against acquittal---Appreciation of evidence---Delay of nine years in reporting murder---Effect---Application for registration of the FIR had been prepared in 1998 and presented before the police in 2007 after nine years after the alleged murder of complainant's daughter and grand-daughter---Motive behind the murder of the deceased persons, as disclosed by the complainant, was that the deceased having inherited the landed property from her father had transferred the same to her brother and sons of other brothers giving nothing to the accused persons---Dead bodies of the deceased persons had not been subjected to postmortem examination, nor had the same been disinterred for the said purpose---Police had although

moved an application to the Magistrate for disinterment of the dead bodies, but the same had been dismissed due to the complainant's disinclination to the disinterment---Complainant, during the course of the investigation, had not contended that a panchayat had been convened and the accused persons had confessed their guilt before the same---Police had prepared a cancellation report under S. 173, Cr.P.C. and submitted the same before the Magistrate---Complainant, in his private complaint with the same allegations, had made an addition in her story alleging that the accused, having admitted the murder of the deceased persons before the panchayat, had promised to pay a certain amount of money as the blood-money to her, and that she, instead of taking the blood-money, had preferred lodging the FIR---Complainant had not been cited as a witness in the case, which meant that the private complaint had been filed against her will---None of the complainant's witnesses was eyewitness of the occurrence, despite the fact they lived at the same place and compound; hence, their silence for about nine years would adversely reflect on the veracity of their statements---Police had concluded during the investigation that both mother and daughter had been electrocuted and not murdered by anyone, and for the same reason the complainant had not let the dead bodies disinterred for holding an inquest into the cause of their death---Evidence of the extra-judicial confession of the accused persons before the panchayat was nothing but a mere gossip, having been maliciously fabricated by the complainant together with his co-witnesses to frustrate and pressurize the accused---Both the FIR and the private complaint, in view of the facts and circumstances of the case, should have been extinguished at earlier stage, instead of proceedings with the same for too long---Impugned judgment of acquittal was therefore maintained---Appeal against acquittal was dismissed accordingly.

Alam Khan v. Swans Khan and 3 others 1996 SCMR 1742; Inayatullah Butt v. Muhammad Javaid and 2 others PLD 2003 SC 563 and Mst. Saira Bibi v. Muhammad Asif and others 2009 SCMR 946 rel.

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

----S. 417 (2-A)----Appeal against acquittal---Principles---Judgment of acquittal can only be interfered with, if it looks wholly perverse, capricious, arbitrary, artificial, speculative or based on misreading or non-appraisal of the evidence on record.

Malik Matee Ullah for Appellant.

Munir Ahmad Sial, Deputy Prosecutor General Punjab for the State.

Mazhar Abbas Khokhar for Respondents Nos. 2 to 5.

Date of hearing: 25th January, 2016.

JUDGMENT

SHAHID HAMEED DAR, J.---This judgment shall dispose of Criminal Appeal No.1730 of 2010 instituted by Muhammad Bashir (appellant) against acquittal of respondents Nos.2 to 5, namely Fazal-ur-Rehman, Saeed Ullah Khan, Salah-ud-Din Khan and Hameed Ullah Khan, vide judgment dated 21.1.2010, pronounced by learned Additional Sessions Judge, Mianwali, on conclusion of their trial in a private-complaint (not exhibited in evidence), filed by the appellant (P.W.2), under sections 302, 449/34, P.P.C, which was virtually an off-shoot of case-FIR No.190/07, dated 7.8.2007, registered for offences under sections 302, 449/34, P.P.C., at police station Saddar Mianwali (Exh.PC), at the instance of Mst.Mehr Khatoon, real sister of the appellant.

2. The FIR-case (supra) was got registered by the complainant, Mst. Mehr Khatoon (since dead) with the allegation that her daughter Mst.Gul Khatoon widow of Abdul Raheem Khan and maternal grand-daughter Mst.Sajida, aged 12, lived at Abadi Noori Khelanwala, village Watta Khel. Pakka, where she stayed with them at night between 18/19.7.1998; they locked the outer-door from inside and slept in the compound of the house; Fazal-ur-Rehman, Saeed Ahmad Khan, Salah-ud-Din and Hameed Ullah Khan (respondents Nos.2 to 5) jumped outer-wall of the house, in the pitched darkness, to get into it; she got up as she heard the footfall; the respondents pounced upon her daughter and granddaughter, and forcibly took them to a room in the west, where they strangulated both of them to death; they clutched her as well and warned, if she disclosed their identity to anyone, it would be too risky for her; she lost her senses when she saw the dead bodies of her daughter and grand-daughter; the respondents got managed forced burial of the dead bodies and there was none to help her; the motive behind the occurrence was that her daughter inherited landed property of her deceased father. Muhammad Yaqoob Khan, which she transferred later on to the sons of her brothers Bashir Khan and Ahmad Khan, besides, her brother Mehr Khan himself but gave nothing out of it to Muhammad Khan, which grudged the respondents and due to this reason they murdered hapless mother and daughter; she kept quiet for fear of the accused and did not report the matter to the police earlier. She lastly submitted an application dated 24.8.1998 (Mark-A) before the police on 7.8.2007, which formed basis for lodgment of FIR (Exh.PC), at 10.35 a.m., the same day. Prior to it, two orders had been made by the Ex-Officio Justice of Peace, Mianwali on 12.9.2006 and 29.5.2007 under section 22-A(6), Cr.P.C. for registration of a case against the accused/respondents.

3. After registration of the case, its investigation was conducted by Sanaullah SI (C.W.1), who inspected the place of occurrence and prepared visual site-plan (Exh.PA/2) about it; he got prepared site plan in-scale (Exh.PA/1) from Shafique Ahmad draftsman (P.W.1); he moved an application before the learned Ilaqa magistrate for exhumation of the dead bodies, but it was later on (28.8.2007) dismissed on the statement of Mst.Mehr Khatoon (complainant) that she made before the area magistrate; Salah-ud-Din, Hameed Ullah and Fazal-ur-Rehman joined the investigation, but he deferred their arrest in the face of insufficient evidence against them. On completion of investigation, the police found the case false and submitted cancellation-report under section 173, Cr.P.C. before the area magistrate.

4. Being aggrieved of the investigation, Muhammad Bashir (P.W.2), son of Mst. Mehr Khatoon (complainant of FIR case) filed private-complaint against respondents Nos.2 to 5 on 19.3.2008, reproducing the story of the FIR, but with a little variation, that a panchayat had been convened on 23.8.1998, wherein the respondents confessed their guilt, as to committing murder of Mst.Gul Khatoon and her minor daughter Mst.Sajida, in presence of Muhammad Bashir (appellant/P.W.2), Ahmad Khan (P.W.3) and Mehr Khan PW (not produced). Learned trial court fulfilled requirement of sections 200 and 202, Cr.P.C. before it summoned the respondents to stand trial in the complaint-case. It appears from the record that learned trial Court most probably, conducted consolidated proceedings in the challan-case and the private complaint-case.

5. On indictment, the respondents pleaded not guilty and claimed a trial. The prosecution in order to prove its case produced three witnesses, namely Shafique Ahmad Khan draftsman (P.W.1), Muhammad Bashir (complainant/P.W.2) and Ahmad Khan (P.W.3), while rest, Sana Ullah SI/IO, Muhammad Altaf Khan, stamp vendor and Mushtaq Ahmad ASI were recorded as C.W.1 to C.W.3, respectively. Thereafter, the respondents were examined under section 342, Cr.P.C., whereby they proclaimed their absolute innocence in the matter. Their consistent standpoint, that they rendered one by one, while answering the question "why this case against you and why the PWs have deposed against you", read as under:--

"In the year 2005-06 civil litigation between the legal heirs of Mst. Gul Khatoon mentioned above with the present complainant and Ahmad Khan and Mehr Khan PWs initiated. In order to deter the legal heirs of Mst. Gul Khatoon from pursuing the civil litigation, Muhammad Bashir Khan complainant forced his mother Mst. Mehr Khatoon to start proceeding on baseless allegations altogether according to the prosecution, Mst. Gul Khatoon and Mst. Sajida died in the year 1998. The proceedings started in the year 2006, which shows that the allegations are baseless and are counter blast of the suit mentioned above. The PWs are party to the civil litigation and they are deeply interest in the prosecution. Our family help the legal heirs of Mst. Gul Khatoon in the civil litigation and due to that grudge, I and my co-accused was involved in this false case."

They opted not to appear under section 340(2), Cr.P.C. nor they adduced any evidence in their defence.

6. Learned trial court concluded trial of the respondents and pronounced their acquittal through the impugned judgment.

7. Learned counsel for the appellant has submitted that the respondents callously murdered poor mother and daughter within the view of Mst. Mehr Khatoon, whom they silenced under threat of dire consequences; it was not too late when callousness of the respondents became talk of the town and in this background a panchayat of elders of the area was convened in the village on 23.8.1998, which questioned the respondents, who after a few hiccups admitted their guilt before a packed house with the contention that they had been deprived of their hereditary share by Mst.Gul Khatoon, so they did away with the deceased; the delay in lodgment of FIR had been caused by the police as Mst.Mehr Khatoon had submitted an application for registration of case on 24.8.1998, the next day of the panchayat; Mst.Mehr Khatoon was more than ninety (90) years of age and a perennially sick person, hence, Muhammad Bashir (appellant) took up the issue and filed a private complaint against the respondents so as to take them to task for their barbarous act; the witnesses of extra-judicial confession tendered impeccable evidence against the respondents, which has not been properly appraised by the learned trial court, dealing with the matter too casually and acquitting the respondents in a slipshod manner; the impugned judgment is patently illegal, which may be set aside and respondents may be dealt with drastically for their heartlessness.

8. Learned counsel for respondents Nos.2 to 5 has submitted that the respondents were innocent and they had been falsely involved in this case by the appellant and his co-witnesses only to pressurize and blackmail them; the slain ladies were closely related to the respondents and they could not think of harming them in any manner; Mst.Mehr Khatoon fully knew about their innocence and she admitted this fact in her lifetime on more than one occasion; the locality where the unfortunate incident took place, was buzzed with the news that poor ladies had been murdered by some unknown persons in the darkness of the night, it is why Mst.Mehr Khatoon kept quiet for years before she wilted under the pressure of the appellant and others to lodge a false case against them; further submitted that the police found the respondents innocent and cancelled the case, whereafter Muhammad Bashir (appellant) filed a dishonest and mischievous complaint against them, as a civil suit had been instituted by the heirs of Muhammad Khan and others about the same landed property, against him (Muhammad Bashir) and his co-sharers; the learned counsel maintained that the respondents were not even remotely linked with the alleged occurrence and they had been rightly acquitted of the charge by the trial court.

9. Learned Deputy Prosecutor General Punjab showed satisfaction about the infallibility of the impugned judgment and submitted that the respondents had justly been acquitted by

the learned trial court, therefore, this appeal might be dismissed.

10. We have heard the learned counsel for the parties at length and gone through the relevant record with their intelligible assistance.

Mst. Mehr Khatoon, complainant of FIR (Exh.PC) was aged about 85, when she allegedly saw the respondents, Fazal-ur-Rehman, Saeed Ullah Khan, Salah-ud-Din and Hameed Ullah Khan strangulate her daughter Mst. Gul Khatoon and daughter's daughter/maternal grand-daughter Mst.Sajida aged 12, to death at night between 18/19.7.1998 in a room of the house, where she was also present then. She was badly terrorized by the murderers, who threatened her to keep quiet or be ready for the consequences. She saw the dead bodies and lost her senses. Both the slain mother and daughter were buried the following morning without any information to the police. The motive alleged was that Mst. Gul Khatoon had transferred her agricultural land to the sons of her brothers Muhammad Bashir Khan (appellant) and Ahmad Khan, besides, her brother Mehr Khan, but gave nothing to Muhammad Khan, another brother of hers, which angered the killers, who took the vengeance and murdered her along with her daughter. It was the story told by Mst. Mehr Khatoon through her written application (Mark-A), which bore date of its preparation as 24.8.1998, but presented before the police on 7.8.2007, more than nine years after the tragic incident. The dead bodies of the ill-fated ladies were not subjected to postmortem examination nor those were ever disinterred for the said purpose. The police, though once moved for exhumation of the dead bodies through a written application, but Mst. Mehr Khatoon appeared before the learned Magistrate, seized with the matter, to show her disinclination to their disinterment and thus, caused dismissal thereof on 28.8.2007. She had obtained a couple of directory orders from the Ex-Officio Justice of Peace, Mianwali on 12.9.2006 and 29.5.2007, before she got lodged FIR No.190/2007 (Exh.PC), which entailed the facts as precedingly narrated. She did not ever contend during investigation of this case that a panchayat of elders of the area on the issue of murder of her daughter and grand-daughter had been convened on 23.8.1998 and the respondents had confessed their guilt as to the said disaster before it. She failed the police in making any advancement in the sorrowful tale, so they prepared a cancellation report under section 173, Cr.P.C. in the FIR case and presented it before the learned area magistrate in due course of time.

11. In the meanwhile, Muhammad Bashir Khan (appellant) chipped in with a private complaint under sections 302, 449/34, P.P.C. that he filed against the respondents on 19.3.2008 on the basis of the same allegations as mentioned in FIR (Exh.PC), but with the addition that the respondents had admitted their guilt as to murder of the poor ladies before participants of a panchayat and promised to pay Rs.15,00,000/- as blood-money to Mehr Khatoon but she did not like the idea and got FIR lodged against them. Mst.Mehr Khatoon was not cited as a witness in the complaint-case, which might mean that it had been instituted against her wish and will. Muhammad Bashir Khan appellant (P.W.2) and Ahmad Khan (P.W.3) are real sons of Mst.Mehr Khatoon and real brothers of Mst.Gul Khatoon (deceased). Their sons were beneficiaries of the generosity of Mst.Gul Khatoon as she transferred her landed property to them and some portion of it to her brother Mehr Khan as well. She did not oblige her other brother Muhammad Khan or any of his off-spring. Muhammad Khan, who is father of respondent Fazal-ur-Rehman Khan, instituted a civil suit about the same landed property, as having been gifted by Mst.Gul Khatoon (deceased) on 17.8.2006 against Ahmad Khan (P.W.3), Muhammad Bashir Khan (P.W.2) and Mehr Khan PW (not produced) and about a year thereafter when this suit was still pending, Mst.Mehr Khatoon got registered the FIR (Exh.PC) against the respondents. There is another glaring aspect of the case that Mst.Mehr Khatoon got first order from the Ex-Officio Justice of Peace for registration of case against the respondents on 12.9.2006, twenty five (25) days after filing of the above suit by Muhammad Khan and she obtained the second order under sections 22-A and 22-B, Cr.P.C. on 29.5.2007.

All these informations have been rendered by Muhammad Bashir Khan (appellant/P.W.2) and Ahmad Khan (P.W.3) in their testimonies. It remains a fact that none of them is an eye-witness of the occurrence, despite they lived at the same place, as deposed about by Muhammad Bashir Khan (appellant/P.W.2). It looked as if Mst. Gul Khatoon, Mst. Mehr Khatoon, Muhammad Bashir Khan appellant, Ahmad Khan and Mehr Khan all lived in the same compound, hence, their silence for about nine years would adversely reflect on the veracity of their statements. They both said that the occurrence was witnessed only by Mst. Mehr Khatoon but they did not cite her a witness in the private-complaint, which fact is sufficient to demolish their case.

12. The police apparently concluded during investigation that both mother and daughter had been electrocuted and not murdered by anyone. It is why Mst. Mehr Khatoon or anyone else did not let dead bodies of the female deceased disinterred for holding an inquest into the cause of their death. An attempt made by the police in this regard was foiled by Mst.Mehr Khatoon herself on 28.8.2007 as stated by Sana Ullah SI/IO (C.W.1) in his testimony.

13. The contentions of Muhammad Bashir Khan (appellant/P.W.2) and Ahmad Khan (P.W.3) as to extra-judicial confession of the respondents before participants of a panchayat on 23.8.1998 surfaced for the first time on 19.3.2008, when private-complaint, not exhibited in evidence, was filed by Muhammad Bashir Khan (appellant/P.W.2), who contended that all the murderers (respondents) jointly admitted their guilt as to the murder of female-deceased and offered to pay Rs.15,00,000/- as blood-money but this idea was ejected by Mst. Mehr Khatoon. Ahmad Khan (P.W.3) also talked about confession of the respondents before the panchayat, but he termed it as having separately been made by them, with the addition that all four paid Rs.15,00,000/- to Liaqat Ali, paternal nephew of Inayat Ullah, real brother of the husband of Mst. Gul Khatoon (deceased). The evidence of extra-judicial confession of the respondents is nothing but a mere gossip, having been maliciously fabricated by the appellant together with his co-witnesses so as to frustrate and pressurize the respondents who stood along side Muhammad Khan and supported him in his legal battle against Muhammad Bashir Khan (appellant) and others, who had instituted a civil suit against them. The private complaint had certainly been filed by the appellant regarding a non-issue and so was the case of FIR (Exh.PC). Both Mst. Mehr Khatoon and the appellant together with their group members kept sleeping for years over the issue of murder of the ill-fated duo and occasionally pulled and loosened the strings to move their case a bit, only to terrorize and harass the respondents, otherwise they fully knew about its untruthfulness and non existence.

14. The prosecution case was bound to collapse and it met the fate, it deserved. Learned trial court took rigours in discussing each and every bit of the non-issue and made some useful discussion by referring to various nonsensical depositions of the witnesses and to the irrelevant documents tendered in evidence. It was a case, which was inherently fallible and it fell to the ground with a thud in small pieces. There cannot be a worse example of some case having been conspiratorially and maliciously fabricated than the instant one, satanically brought forth against the respondents by the appellant. Two innocent female deceased probably died of electrocution but their nears and dears used their dead bodies to wreak vengeance upon the respondents, who were no strangers to them. They all did so only out of their lust for worldly gains. The FIR-case (Exh.PC) and the complaint-case having been taken up and rejected together through the impugned judgment by the learned trial court shouldn't have proceeded too long and they must have been extinguished at the nascent stage like an evil be nipped in the bud. The vulnerability of the prosecution case was per-se viewable and it was bound to fall in splinters, which it did, but after unnecessary delays. Nevertheless, it got finished and rightly so. It was virtually a case of no evidence and held as such by the learned trial court. It was certainly a hard earned acquittal by the respondents as they faced agony of the trial for years despite being innocent. Their acquittal through a judicial verdict has doubly

enhanced potentiality of their innocence, which initially oozed from the time-old principle that every accused is innocent, till proved otherwise.

15. The well-settled principle of law is that a judgment of acquittal can only be interfered with if it looks wholly perverse, capricious, arbitrary, artificial, speculative or based on misreading or non-appraisal of the evidence on record, which incidentally is not the situation herein. Reliance in this regard may easily be had on, Alam Khan v. Swans Khan and 3 others (1996 SCMR 1742), Inayatullah Butt v. Muhammad Javaid and 2 others (PLD 2003 SC 563) and Mst. Saira Bibi v. Muhammad Asif and others (2009 SCMR 946).

16. For the discussion supra, this appeal being meritless is dismissed.

SL/M-119/L Appeal dismissed.

2017 M L D 399

[Lahore]

Before Shahid Hameed Dar, J

SHARAFAT ALI and another---Petitioners

Versus

The STATE and another---Respondents

Crl. Misc. No.3352-B of 2016, decided on 19th September, 2016.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 324, 364-A, 337-A(i), 337-F(i), 337-L(2), 336, 148 & 149---Juvenile Justice System Ordinance (XXII of 2000), S. 10(7)(a)---Attempt to commit qatl-i-amd, rioting armed with deadly weapons, kidnapping a person under the age of fourteen years, causing shajjah-i-khafifah, damiyah, hurt and causing itlaf-i-udws---Bail, grant of---Statutory ground of delay in conclusion of trial---Joint trial of accused persons (petitioners) and co-accused persons---Prosecution produced witnesses only on four occasions during the period of last two years, but only when some of the co-accused and some times a few of them were not produced from jail---Accused-persons could not be held responsible for the idleness of the prosecution, as being in jail---Accused persons and some of the co-accused were being tried jointly---Only because some of the co-accused persons had been playing hide and seek with the trial court or causing delay in conclusion of their trial, accused persons could not be deprived of bail---Nothing was available on record to the effect that accused-persons were hardened, desperate or dangerous criminals---Accused-persons were not shown to have ever committed an act of terrorism, punishable under the Anti-Terrorism Act, 1997 or the other allied laws---Accused were granted bail, in circumstances.

Muhammad Afzal Butt alias Aphi v. The State and others 2015 SCMR 1696 rel.

Mehr Zakir Hussain for Petitioners (in Crl. Misc. Nos.3352-B/2016 and Crl.Misc.No.11028-B/2016).

Qamar Zaman Qureshi for Petitioner (in Crl. Misc. No.9220-B/2016).

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State with Falak Sher AS1.

Muhammad Imran Chaudhry for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioners, Sharafat Ali, Muhammad Khan (Crl.Misc.No.3352-B/2016), Jaffar Ali Zafar (Crl. Misc. No. 9220-B/2016) and Muhammad Tayyab Raza (Crl. Misc. No. 11028-B/2016), a juvenile, seek post-arrest bail on the statutory ground of delay in conclusion of their trial in case-FIR No. 383/2013, dated 5.9.2013, under sections 324, 364-A, 337-A(i), 337-F(i), 337-L(2), 336, 148, 149 P.P.C., registered at police station Chak Baidi (Pakpattan Sharif), on the complaint of Muhammad Haroon. All three above-noted applications are compositely decided hereby.

2. Precisely, the story of FIR as narrated by the complainant is that his maternal nephew Atta Ullah, a student of seventh class and paternal nephew Muhammad Waqas, a student of eighth class in Government Elementary School of the village were forcibly dragged out from the school by the accused-petitioners and their co-accused, all armed with different weapons, at about 7.30 a.m. on 5.9.2013, where they rendered them naked and committed violence on them; on hearing the noise of the children, he, his brothers Muhammad Ishaq, Zahoor Ahmad and his two sons, Abdul Jabbar and Muhammad Altaf reached the spot; the accused raised Lalkaras, when they saw them; Muhammad Khan accused fired into the chest of his son Abdul Jabbar by means of .12-bore repeater-gun and Sharafat Ali accused fired at left calf and buttock of his brother Zahoor Ahmad, due to which they both fell on the ground badly wounded; Muhammad Yaqoob co-accused inflicted a sota blow on the head of Muhammad Altaf, whereas Muhammad Nasir co-accused caused an injury on the head of Muhammad Ishaq and one, at a finger of left hand of Atta Ullah; the motive behind the occurrence pertained to a previous quarrel between his paternal nephew Muhammad Waqas and Muhammad Tayyab (petitioner), that took place a day earlier.

A cross-case was set up by the accused on 5.9.2013 for offences under sections 324, 148, 149, P.P.C, which was recommended for cancellation by the Investigating Officer vide case-diary dated 11.1.2014. The complainant's name thereof was Khadim Hussain.

3. After hearing the learned counsel for the parties and perusing the record, it is observed that Muhammad Tayyab Raza (petitioner), who was declared a juvenile by the learned trial court on 28.7.2016, was arrested on 8.3.2015 and Sharafat Ali, Muhammad Khan and Jaffar Ali Zafar (petitioners) on 30.1.2014. Their trial has not concluded as yet, nor did there exist any symptoms thereof, anywhere near. The petitioners were indicted long before, on 1.7.2015, but no prosecution witness has been recorded so far, for a variety of reasons, not necessarily attributable to the petitioners. Learned counsel for the complainant repeatedly contended that jail authorities did not produce the accused before the trial court on many an occasions, being in league with them and thus constructively subscribed toward protracting the trial; besides, a sizeable chunk of time was lost, as some of the accused maliciously moved baseless applications, under a calculated plan, to occasion delay in conclusion of their trial. When asked to identify those applications, the learned counsel submitted that sometimes it was the question of juvenility of an accused or it involved a frivolous subject, bound to cause sheer wastage of time. It appeared from the record that in more than two years time, the prosecution produced some of its witnesses only on four occasions, 17.9.2015, 9.10.2015, 24.11.2015 and 9.12.2015, but only whence, some of the co-accused of the petitioners and

sometimes a few of them were not produced from the jail. The petitioners could not be held responsible for the said idleness of the prosecution, as being in jail, their movements were curtailed and regulated by the jail authorities.

4. It has been brought to the knowledge of this court that Ghulam Rasool, a co-accused of the petitioner has been granted bail before arrest by the Hon'ble Supreme Court of Pakistan vide order dated 28.6.2016 passed in Criminal Petition No.796-L of 2016. For majority of the facts, his case assimilated with that of the petitioners, hence, his admission to bail by the apex court, is a significant circumstance, which warranted close following thereof, in the instant case(s). There existed little to believe that the petitioners are hardened, desperate or dangerous criminals. They have not been shown to have ever committed an act of terrorism, punishable under the Anti-Terrorism Act, 1997 or the other allied laws. Being in jail for such a long period of time, easily exceeding the statutory limits, they have earned a valuable right of being released on bail under the 5th proviso to section 497(1), Cr.P.C. If some of their co-accused have been playing hide and seek with the trial court or causing delay in conclusion of their trial, the petitioners could not be saddled with any responsibility in this regard nor could they be penalized for it. Reliance in this regard may be had on Muhammad Afzal Butt alias Aphi v. The State and others (2015 SCMR 1696).

5. For the foregoing reasons, these applications (Crl. Misc. No.3352-B/2016, Crl.Misc.No.9220-B/2016 and Crl.Misc.No.11028-B/ 2016) are accepted and the petitioners, Sharafat Ali, Muhammad Khan, Jaffar Ali Zafar and Muhammad Tayyab Raza are admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.5,00,000/- (five lac) each with two sureties each in the like amount to the satisfaction of the learned trial court.

6. Before parting with this order, it is directed that the learned trial court would speed up proceedings of the trial of the petitioners, so as to conclude it within six months from the date of communication of this order. If the petitioners hesitated in cooperating with the trial court as regards conclusion of their trial, the prosecution/complainant would be at liberty to move against them under section 497(5), Cr.P.C.

7. A copy of this order be transmitted to the learned trial court through some sift means for necessary information and compliance.

JK/S-77/L Bail granted.

2017 M L D 730

[Lahore]

Before Shahid Hameed Dar, J

AHMAD ALI---Petitioner

Versus

The STATE and another---Respondents

Crl. Misc. No.7863-B of 2016, decided on 26th July, 2016.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 302, 201, 109, 148, 149 & 34---Qatl-i-amd, causing disappearance of evidence, abetment, rioting with deadly weapon, common intention---Bail, grant of---Complainant alleged that accused persons took his brother with them for doing labour on their land where he was murdered by a fire shot---Deceased's father had stated that his son died because of bullet shot fired from his own pistol which he had concealed in fold of his shalwar (pantaloons)---Extra-judicial confession of accused before complainant and his co-witness was weakest type of evidence---Eye-witnesses remained silent for seven long days and did not disclose as to when they informed complainant about factum of having seen the occurrence---FIR mentioned that accused had tried to stop bleeding of deceased and shifted him to hospital---Nothing was recovered from accused during physical remand---Investigating Officer had concluded that deceased was injured by his own pistol which accidently went off while kept in his shalwar (pantaloons)---Accused was arrested after four and half years after alleged occurrence but no proceedings under S.87, Cr.P.C. were initiated against him---Abscondance did not affect bail application of accused---Case of accused being that of further inquiry, bail application was accepted accordingly.

Mushtaq Ahmad Mohal for Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State with Abdul Majeed S.I.

Muhammad Akbar Awan for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The complainant of FIR No.747/2011, dated 5.8.2011, under sections 302, 201, 109, 148, 149 and 34, P.P.C., registered at police station Khurrianwala, District Faisalabad, namely Fiaz Ahmad has alleged that Gohar Ali, armed with Mauzar and his brother Hassan came to his baithak at about 10.00 p.m. on 1.5.2011 and took his brother Altaf Hussain with them for doing labour on their land, where they planned to thresh their wheat crop by means of a thresher; it was at about 2.00 p.m. on 2.5.2011 that Hassan and Ashfaq informed him at his house that Altaf Hussain had been hit by a fire shot and he was admitted in District Headquarters Hospital, Faisalabad in injured condition, whereon his father rushed to the hospital and found Altaf Hussain lying there dead; Abdul Razzaq, Gohar Ali, Ahmad (petitioner) and Taj Muhammad were also present there; his father, on seeing the dead body of his son, lost his senses; Abdul Razzaq etc. had already called the police there and they asked his father to thumb mark a blank paper, so as to receive the dead body, who did so and learnt that he would receive a copy of the postmortem examination report, the next day; his brother's dead body was buried on the following day; he and his family members inquired Abdul Razzaq etc. about the postmortem examination report but they put them off; it was on 8.5.2011, when Fatah Muhammad and Muhammad Ramzan told them that they watered their fields at about 11.00/11.30 p.m. on 1.5.2011 and went to killa No.2, square No.12 to know about availability of the threshing-machine, where they saw Altaf Hussain having been overpowered by Mohsin Ali and Arslan while their co-accused Ahmad (petitioner) repeatedly fired at him, one out of which landed at his right lumber region, due to which he fell on the ground badly bleeding; Gohar Ali etc. attempted to stop the bleeding by means of a cloth and then took him to the village by putting him on a vehicle; on hearing it, he along with his paternal uncle Des Muhammad, Fateh Muhammad and Muhammad Ramzan went to the accused, who admitted to have murdered his brother Altaf Hussain and sought apology from them, but he did not agree to it; Qurban Ali and Muhammad Ramzan informed him and his companions that they witnessed and overheard Abdul Razzaq and

Ashfaq Ali inducing Gohar Ali, Hassan Ahmad, Arslan and Mohsin Ali accused at about 8.00 p.m. on 30.4.2011, to murder Altaf Hussain, as he had not stopped visiting their house and assuring them that they would take care of the developing situation thereafter; the motive behind the occurrence was that Altaf Hussain was on visiting terms with the accused and they suspected him to have developed illicit liaison with someone in their house and due to this grudge, they committed his murder vicariously.

2. After hearing the learned counsel for the parties and perusing the record, it is observed that three co-accused of the petitioner, namely, Gohar Ali, Hassan Ahmad and Mohsin Ali had been granted post-arrest bail by this court vide order dated 20.12.2011, made in Crl.Misc.No.15494-B/2011, a couple of observations whereof were equally relevant in this case, one, pertaining to Rapar No.5, got lodged by the deceased's father, Muhammad Iqbal to the effect that his son Altaf Hussain had died because Muhammad of a bullet shot fired from his own pistol, which he had concealed in the fold of his Shalwar, so he was not interested in prosecuting anyone for the murder of his son nor did he have any enemies around him, and the other, that pertained to extra-judicial confession of the accused about the murder of Altaf Hussain before the complainant and his co-witnesses, which could be termed joint in nature and thus weaker of the weakest type of evidence, beside being inordinately delayed, regarding which no explanation had been offered by the witnesses thereof. The eye-witnesses, namely, Fateh Muhammad and Muhammad Ramzan lived in the same village, where the complainant and the deceased hailed from, hence, their silence for seven long days after they allegedly witnessed the occurrence of murder of Altaf Hussain on 1.5.2011, was not a factor to be easily overlooked. It is found mentioned in the FIR that the accused made an attempt to stop bleeding of Altaf Hussain by pressing his wound with cloth and shifted him to the village and then to District Headquarters Hospital, Faisalabad, which showed that they made every possible effort to save his life. If they had intended to murder him, why would they have done all that, which they did. The eyewitnesses rendered statements under section 161, Cr.P.C. on 5.8.2011, wherein they did not disclose as to when they informed the complainant about the factum of having seen the occurrence, rather they did not say it at all that they had informed him in this regard. It looked surprising that father of the deceased had been sidelined by his own son Fiaz Ahmad (complainant), who never let him join the investigation, for the obvious reason, that he had adopted a particular version through Rapat No.5 dated 2.5.2011 (supra), which was later on abandoned by the complainant. The witnesses of extra-judicial confession rendered this piece of evidence still hazier, when they did not mention any date as to when they had allegedly visited the accused in this backdrop. The petitioner underwent physical remand for fourteen (14) days, but nothing was recovered from him in this interval. The Investigating Officer concluded during investigation that Altaf Hussain had been injured at his own hand, as the pistol, that he had concealed in the fold of his Shalwar accidently went off and penetrated his body. He dubbed the murder of Altaf Hussain as Qatl-e-Khata, but he held the petitioner involved in the occurrence, being present at the spot at the crucial hour. He was arrested by the police on 19.1.2016, about four and a half years after the alleged occurrence, but not before he had been proceeded against under section 87, Cr.P.C. on 19.10.2011, followed by submission of challan under section 512, Cr.P.C. against him on 26.10.2011. The record reveals that he had left for Dubai in 2011 for earning the livelihood, where he stayed till his return to Pakistan in 2016. His case, for the reasons discussed supra, called for further probe into his guilt within the scope of section 497(2), Cr.P.C., hence, factum of abscondence would not come in the way of this application.

3. Therefore, this application is accepted and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum of Rs.5,00,000/- (five lacs) with two sureties each in the like amount to the satisfaction of the learned trial court.

WA/A-85/L Bail granted.

2017 M L D 767

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD KAMIL alias DEWAN KAMIL---Petitioner

Versus

The STATE and another---Respondents

Crl. Misc. No.1593-B of 2016, decided on 28th April, 2016.

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

----S. 497---Penal Code (XLV of 1860), Ss. 302, 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapon and unlawful assembly---Bail, grant of---Plea of alibi---Accused remained on physical remand for 14 days but nothing was recovered from him---Investigating Officer had opined that accused had not taken part in the incident, being physically away from the place of occurrence, however, his involvement in the case by way of abetment was not ruled out---Bail could be granted in a capital charge on the plea of alibi if peculiar facts and circumstances of the case so justified---Abdominal injury of the deceased allegedly attributed to the accused but said injury could not cause death of deceased---Bail was allowed in circumstances.

Ajmal Khan v. Liaqat Hayat and another PLD 1998 SC 97; Akram Khan v. The State and another 1978 SCMR 242; Ch. Muhammad Shafi v. Ch. Muhammad Anwar Samma and another 1975 SCMR 219 and Meeran Bux v. The State and another PLD 1989 SC 347 rel.

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

----S. 497---Penal Code (XLV of 1860), Ss. 302, 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapon and unlawful assembly---Bail, grant of---Further inquiry---Obstructing the proceedings of trial---Trial court granted repeated adjournments, during trial for different reasons, not necessarily attributable to the accused---Accused allegedly abetted the crime, as had opined by the investigating officer, which was not based on any worthwhile incriminating material---Attending circumstances made the case of accused being one of further inquiry as envisaged by S. 497(2), Cr.P.C.---Bail was allowed accordingly.

Muhammad Ahsan Bhoon for Petitioner.

Rana Tasawar Ali Khan, Deputy Prosecutor General Punjab along with Ishtiaq S.I. for the State.

Azam Nazeer Tarar for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The allegation against the petitioner, Muhammad Kamil alias Dewan Kamil, as per FIR No.611/15, dated 09.06.2015, under sections 302, 324.

148, 149 P.P.C., Police Station A-Division, Okara is that he being armed with rifle, joined by his armed co-accused, fired at and murdered Khalid Mehmood, a paternal uncle of Muhammad Ikram (complainant) at about 7:30 p.m. on 08.06.2015, when he returned from the mosque after offering maghrab prayer. The motive behind the occurrence was that Khalid Mehmood bid the highest offer for local council's lorry Adda on 06.06.2015, which caused grudge to the accused and they murdered him for this reason alone. The specific attribution to the petitioner is that his rifle's fire shot hit the abdomen of Khalid Mehmood (deceased).

2. Learned counsel for the petitioner has submitted that allegation against the petitioner could not he verified by the investigating officer, who opined that he was not present at the spot at the crucial hour nor he caused any injury to the deceased, but he held him an abettor of the crime, committed by his co-accused; the injury allegedly caused by the petitioner was not found terminal by the medical officer, who performed autopsy on the dead body of the deceased.

3. On the contrary, learned Deputy Prosecutor General Punjab, assisted by learned counsel for the complainant has opposed this application by contending that medical evidence is in line with the eyewitness account which categorically burdened the accused/petitioner with the liability of causing an abdominal firearm injury to the deceased; all the eyewitnesses still support the prosecution case as they did on day one; the opinion of the Investigating Officer is not based on any material nor did it render any strength to the bail-plea of the accused, who had been placed in column No.3 of the challan; further submits that plea of alibi of the accused may be looked into by the learned trial court during the course of the trial; the petitioner and his co-accused have badly hampered proceedings of the trial and learned trial court looked annoyed over it when it passed an order in this regard on 12.03.2016.

4. After hearing the learned counsel for the parties and perusing the record, it is observed that the abdominal injury of the deceased, allegedly caused by the petitioner, did not enter the body-cavity, as is manifest from the operation-notes, submitted by the surgeons, DHQ Hospital Okara, who performed exploratory laparotomy on the body of the then injured and found no internal bleeding in the abdominal cavity or any visceral damage. The autopsy conductor found abdominal walls "normal and healthy", as is mentioned in the necropsy report. The deceased, when alive, was shifted to Mayo Hospital Lahore, where he was operated upon for his leg-injuries, besides, laparotomy wound on his body was reopened on 09.06.2015. The surgeons of Mayo Hospital, as per operation-notes, again found the abdominal viscera intact before debriding the wound. They, however, mentioned in the operation-notes that the abdominal injuries were skin/muscle deep and they found a subcutaneous track between injuries Nos.1 and 3, as mentioned therein, lending an impression of connectivity between the said injuries. The autopsy conductor held lower limbs'firearm injuries, allegedly caused by the co-accused, sufficient to cause death in ordinary course of life. The deceased had, in fact, received two firearm injuries in the abdominal area, one out of which was allegedly caused by the petitioner and the other, by Fakhar Hussain accused.

5. The petitioner underwent physical remand for fourteen (14) days, but it all went waste, as nothing was recovered from him in this interval. The Investigating Officer could not verify the allegation against the petitioner and he opined that he had not taken part in the incident, being physically away to Bismillah Filling Station, Faisalabad Road, Okara. His involvement in this case by way of abetment was not, however, ruled out by him, so he placed his name in column No.3 of the challan.

6. The trial court is certainly the best forum to adjudge evidentiary value of plea of alibi

of an accused during the course of his trial, as held by the apex court in Ghulam Ahmad Chishti's case, reported as 2013 SCMR 385, but it may not be made a hard and fast rule or an absolute bar that plea of alibi taken by the accused could not be considered at the bail-stage, as fruit of prohibited-tree. It may not be inappropriate for the court to consider any plea taken by the accused, including that of alibi along with the material produced by the prosecution, but doing it otherwise by considering a particular plea of the accused a taboo, may be, but paradoxical. This plea is not prohibited but takeable at the bail stage, as may be gathered from Ajmal Khan v. Liaqat Hayat and another (PLD 1998 SC 97), Akram Khan v. The State and another (1978 SCMR 242) and Ch.Muhammad Shafi v. Ch.Muhammad Anwar Samma and another (1975 SCMR 219). The Hon'ble Supreme Court of Pakistan restored a bail-granting order of the trial court, made in favour of Meeran Bux accused, who had successfully set up plea of alibi during investigation of a murder case, by setting aside bail-recalling order of the Hon'ble Sindh High Court. Reference in this regard may be had to Meeran Bux v. The State and another (PLD 1989 SC 347).

7. Whether the petitioner obstructed proceedings of the trial, cannot be known from order dated 12.03.2016, as referred to by the learned counsel for the complainant, for learned trial court granted repeated adjournments, "in the interest of justice", during trial for a variety of reasons, not necessarily attributable to the petitioner. He allegedly abetted the crime, as opined by the Investigating Officer, which is not based on any worthwhile incriminating material. His case, for the noted reasons, falls within the ambit of further inquiry as envisaged by section 497(2), Cr.P.C.

8. Therefore, this application is allowed and the petitioner is admitted to post-arrest bail subject to furnishing bail bonds in the sum or Rs.5,00,000/- (five lacs) with two sureties each in the like amount to the satisfaction of the learned trial court.

JK/M-140/L Bail granted.

2017 P Cr. L J 459

[Lahore]

Before Shahid Hameed Dar, J

The STATE through Prosecutor General Punjab---Appellant

Versus

KHALID RASHEED KAMBHO---Respondent

Criminal Appeal No.1181 of 2013, decided on 9th November, 2015.

Penal Code (XLV of 1860)---

----S. 161---Prevention of Corruption Act (II of 1947), S. 5(2)---Criminal Procedure Code (V of 1898), Ss. 417 & 249-A---Illegal gratification---Appreciation of evidence---Appeal against acquittal---Complainant, resiling of---Evidence of Magistrate---Trial Court acquitted accused in exercise of jurisdiction under S. 249-A, Cr.P.C.---Validity---When complainant was cross examined by accused he deposed about his written application as having been presented by

him due to some misunderstanding---Complainant stated that accused neither demanded nor received any bribe from him and such was evidence of complainant who was the sole victim of the crime---Evidence of Magistrate, who allegedly conducted raid and caught accused red-handed was in possession of tainted currency notes, could have been at the most corroboratory in nature, if complainant had supported prosecution case---Trial Court dealing with such cases was adequately empowered by statute to acquit accused at any stage of trial under S. 249-A, Cr.P.C., once it had formulated the opinion that further proceedings of trial, because of the attending facts, would be meaningless as to awarding conviction or sentence to accused---Trial Court committed no illegality and had rightly observed that rest of prosecution witnesses were of formal nature and prosecution case would not advance in case they were summoned and recorded, after the complainant had disowned his earlier stance and pushed the case in cul-de-sac---High Court observed that it would be sheer wastage of time and energy if Trial Court proceeded with trial of accused, which would lead to any direction but to his conviction in the trial---Order or judgment of acquittal brought double presumption of innocence to accused after initial one, that everyone innocent till proved otherwise---High Court declined to interfere in the order passed by Trial Court as no material existed---Appeal was dismissed in circumstances.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for Appellant.

ORDER

SHAHID HAMEED DAR, J.---The appellant is aggrieved of order dated 19.03.2013, whereby, learned Special Judge Anti-Corruption (Provincial), Gujranwala Division, Gujranwala has acquitted respondent Khalid Rasheed Kamboh, the TMO/TOR, Narowal of the charge under section 161, P.P.C. read with section 5(2) of the Prevention of Corruption Act, 1947, midway through his trial in case-FIR No.41/2012, dated 29.11.2012 for offences as mentioned above, registered at police station ACE, Narowal, in exercise of powers under section 249-A, Cr.P.C.

2. Precisely the relevant facts leading to this appeal are that Syed Ghulam Jaffar Gillani (not respondent herein) got FIR No.41/2012 (supra) lodged against respondent Khalid Rasheed Kamboh (TMO/TOR Narowal) with the allegation that he moved an application for getting himself listed as nikah Registrar of village Derianwala (Narowal) before the administrator of the said union council, the respondent Khalid Rasheed Kamboh, who demanded Rs.5000/- as illegal gratification from him to allow it; he entreated the administrator not to be unfair with him as he intended to serve inhabitants of the village as a social service, but he did not listen to him; after some bargaining he reduced his demand of bribery to Rs.3000/-; the complainant showed belief that the bribe-giver and recipient thereof would be thrown in hell on the day of resurrection; he lastly contended that he intended to get a raid conducted on the corrupt official as it was a jihad in his eyes. The investigating officer conducted the investigation in the matter and found the respondent official involved in the occurrence; he submitted report under section 173, Cr.P.C. against him by placing his name in its column No.3. The complainant Syed Ghulam Jaffar Shah Gillani resiled from his previous statement during trial and he disowned the prosecution case, when he tendered evidence as PW-1; the learned trial court acquitted the respondent under section 249-A, Cr.P.C., hence, the instant appeal.

Learned counsel has submitted that the learned trial court showed undue haste in acquitting the respondent-official as certain other incriminating pieces of evidence were still available with the prosecution which could connect him with the commission of offence. He further contended that the learned area magistrate who conducted raid and effected recovery of the bribed-amount from the possession of the respondent was still to be examined and his

statement along with the statements of certain other police officials could easily bring home the guilt of the respondent beyond any doubt; he also asserted that the complainant merely deposed in his examination-in-chief that he had compounded the offence and forgiven the accused which meant that he still believed in truthfulness of the contents of his application Exh.PA, therefore, learned trial court should have proceeded with the trial, recorded the evidence of rest of the prosecution witnesses and then decided it by taking into account all the attending circumstances hereof. He maintained that the impugned order is gratuitous in nature, which may be set aside.

After hearing the learned counsel for the appellant and going through the impugned order, it is observed that the complainant, who has not been rendered a party herein, certainly lodged a complaint against the respondent with the assertion that he demanded and received bribery from him when he presented a written application Exh.PA before him for enlistment of his name as nikah registrar of his village. He stuck to the said stance during the course of investigation and it was why, the investigating officer found the respondent involved in the occurrence and submitted report under section 173, Cr.P.C. against him before the learned trial court for his trial in accordance with the law. After indictment of the respondent, he (complainant) appeared as PW-1 and hardly said a word in his examination¬-in-chief as to falsity of the allegation, as contained in his application Exh.PA and confined himself only to the deposition that he had forgiven the accused and dropped the idea of further prosecuting him. Learned Public Prosecutor while cross-examining him (PW-1) adopted such a line of grilling, which virtually brought the prosecution case crashing down to the earth. In reply to almost every question put to him by the public-prosecutor, the complainant not only answered the suggestions in negative but also made it unequivocally clear that the accused had not demanded or taken any illegal gratification from him. He denied to have been won over by .the accused or having twisted real facts of the case being in league with him. He also denied the fact that a raid had been conducted on the accused by a magistrate on his asking or that any amount of tainted-money had been recovered from him. He flatly refused in his evidence that he had been recorded by the learned magistrate before he conducted the raid on the accused, rather he straightaway refuted, if any such raid had been conducted by him. Learned law officer virtually sealed fate of the case when he put a suggestion to the only recorded prosecution witness in terms that he had deposed falsely in his examination-in-chief notwithstanding the fact that he had said nothing, prejudicial to the prosecution case therein. When he was cross-examined by the learned defence counsel he deposed about his written application Exh.PA, as having been presented by him due to some misunderstanding. He maintained that the accused (respondent herein) neither demanded nor received any bribe from him. This is what it is all about, the evidence of the complainant, who happened to be the sole victim of this case.

The evidence of the learned magistrate, who had allegedly conducted raid and caught the respondent red-handed being in possession of the tainted currency notes, could have, at the most, been corroboratory in nature, if the complainant had supported the prosecution case. The police officials who allegedly accompanied the learned magistrate at the time of raid could have been beneficial to the prosecution, if the complainant had not taken the U-turn or completely resiled from his previous statement. He (complainant/PW-1) disowned each and every bit of the allegation as contained in his application Exh.PA during his testimony and, thus, damaged the prosecution case irreparably. The only allegation against the respondent, as to demand and receipt of bribery from the complainant was sent down the drain by the complainant himself, hence, no other witness or the evidence could repair the damage or create a situation of bringing home the guilt of the respondent beyond any shadow of doubt. The damage done by the complainant was of immense nature and hard to be stitched by any other circumstance. Learned counsel for the appellant failed to answer the query as to how could the learned magistrate or a couple of other official witnesses, which were simply formal, prove the charge against the respondent, once very basis of the case had been dismantled by the erector thereof.

It is not so that the learned trial court could not record acquittal of the respondent prematurely during trial, once it found, that the case wouldn't result in his conviction in the long run. A trial court, dealing with such cases as like herein, has adequately been empowered by the statute to acquit the accused at any stage of the trial under section 249-A, Cr.P.C., once it formulated the opinion that further proceedings of the trial, because of the attending facts, would be meaningless as to awarding conviction or sentence to him. Learned trial court has apparently committed no illegality herein and has rightly observed that rest of the prosecution witnesses were of formal nature and the prosecution case would not advance, in case they were summoned and recorded, after the complainant had disowned his earlier stance and pushed the case in a cul-de-sac. It would have certainly been a situation of sheer wastage of time and energy if learned trial court proceeded with the trial of the respondent, which could lead to any direction but to his conviction herein.

An order or judgment of acquittal brings double presumption of innocence to a person after the initial one, that every one is innocent till proved otherwise. No such material exists on the record to interfere with the impugned order. Therefore, this appeal is dismissed in limine.

MH/S-14/L Appeal dismissed.

P L D 2017 Lahore 228

Before Shahid Hameed Dar, J

ALI RAZA---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE, SHEIKHUPURA and 2 others---Respondents

Criminal Revision No.1714 of 2016, heard on 18th November, 2016.

Criminal Procedure Code (V of 1898)---

----Ss. 161 & 172---Statement made by complainant before the investigating officer---Right of accused to obtain copy of such statement---Scope----Statements of all persons examined by the police in connection with the case were to be supplied irrespective of the fact, whether they had or had not been cited by the prosecution as witnesses, and it was immaterial whether the investigating officer did or did not choose to say that he was recording the statements under S.161 Cr.P.C.---Accused could not be deprived of the right of having access to statements made by witnesses before the police on the hyper-technicality that the investigating officer did not describe them as statements under S.161 Cr.P.C,---All statements made before the police, whether recorded under S.161 Cr.P.C. or not, should be supplied to the accused before the trial---Accused must have access to every statement recorded by the investigating officer, either under S.161 Cr.P.C. separately or having embodied it in a case-diary prepared under S.172 Cr.P.C.

Ch. Muhammad Ashraf Kamboh for Petitioner.

Rana Tassawar Ali Khan, Deputy Proscutor General Punjab for the State.

Tahir Shahzad Kamboh for Respondent No.2.

Date of hearing: 18th November, 2016.

JUDGMENT

SHAHID HAMEED DAR, J.--The petitioner is aggrieved of order dated 27.9.2016, whereby his application for obtaining copies of the statements of Mudassar Sharif (complainant) and Mst. Sobia accused has been rejected by the learned trial court (Additional Sessions Judge, Sheikhupura) during his trial in respect of case-F.I.R. No.1079/14, dated 27.11.2014, under sections 302/34, 109, P.P.C., registered at Police Station B-Division Sheikhupura.

2. At the outset, learned counsel for the petitioner, realizing bizarreness of the prayer as regards statement of Mst. Sobia accused, wishes to withdraw this petition to the said extent. Dismissed, as prayed for.

3. So far as the other part of the petitioner's contention is concerned, it related to statement of the complainant, statedly recorded by the investigating officer on 3.12.2014.

4. Ali Raza (petitioner) is an accused of case-F.I.R. No.1074/14 (supra), whose trial is pending adjudication before the learned Additional Sessions Judge at Sheikhupura. He thought that the complainant's statement, as recorded by the investigating officer vide case-diary dated 3.12.2014 was crucial to his case, therefore, he moved an application to get a copy thereof, which was dismissed by the learned trial court through the impugned order. Hence, the instant petition.

5. After hearing the learned counsel for the parties and perusing the record, it is observed that the police has the power to examine persons acquainted with the facts and circumstances and not necessarily only those, who had supported the prosecution version. It goes without saying that statements of all persons examined by the police in connection with the case are to be supplied irrespective of the fact, whether they have or have not been cited by the prosecution as witnesses. It is immaterial whether the investigating officer did or did not choose to say that he was recording the statements under section 161 Cr.P.C. The accused cannot be deprived of the right of having access to statements made by witnesses before the police on the hyper technicality that the investigating officer did not describe them as statements under section 161 Cr.P.C. All statements made before the police, whether recorded under section 161 Cr.P.C or not, should be supplied to the accused before the trial. In an identical case Ghulam Muhammad v. The State (1985 SCMR 1442), the , Hon'ble Supreme Court of Pakistan remanded the case, while hearing an appeal, for enabling the appellant to cross-examine the complainant with regard to his statement, separately recorded by the Deputy Superintendent of Police, and for examining the DSP, if necessary, for proving the correctness or otherwise of its contents. In another case, Khalid Pervez v. The State 1989 PCr.LJ 1824, this court observed that the petitioners/accused were entitled to copies of the statements of all the persons recorded during investigation, whether the same supported the case of prosecution or of the defence, and whether they were cited as PWs or not, provided such statements were recorded during investigation separately under section 161 Cr.P.C. or in Zimnies or under section 172 Cr.P.C. in body of the case-diaries.

6. Learned trial court ought to have supplied a copy of the statement of the complainant, if it had been recorded by the investigating officer vide case- diary dated 3.12.2014. The accused must have access to every statement recorded by the investigating officer, either

under section 161, Cr.P.C. separately or having embodied it in a case-diary prepared under section 172, Cr.P.C.

7. This revision petition is, thus, allowed in terms that the petitioner would be provided with a copy of the statement (supra) of Mudassar Sharif (complainant), so as to enable him to defend himself appropriately.

MWA/A-121/L Petition allowed.

2017 Y L R 204

[Lahore]

Before Shahid Hameed Dar, J

ALLAH YAR and 2 others---Petitioners

Versus

The STATE and another---Respondents

Crl. Misc. No.2712-B of 2014, decided on 12th March, 2014.

Criminal Procedure Code (V of 1898)---

----S. 498---Bail before arrest, cancellation of---Scope---Failure to furnish bail bonds and surety---Leniency shown by court in not cancelling pre-arrest bail---Uneducated accused lacking understanding of condition of bail---Accused persons were accused of abducting the alleged victim, who thereafter was allegedly subjected to rape by co-accused persons---Sessions Judge allowed pre-arrest bail to accused persons with the condition that they should furnish fresh bail bonds in the sum of Rs. 50,000 each with one surety in the like amount within seven days, failing which their bail petition would be deemed to have been dismissed---Accused persons failed to satisfy the said condition and consequently Session Judge cancelled their pre-arrest bail---Validity---Accused persons should have shown their sincerity and bona fide to the condition attached with their bail order, however if they had not done so, the Sessions Judge ought to have shown leniency and grace to afford them some more time to submit the requisite bail bonds---Bail order of accused persons was recalled seven months after being made by the Sessions Judge, and during such time, an application to cancel their bail was pending, however during pendency of said application they were not once directed to submit their bail bonds and surety---Valid bail order obtained by accused persons was cancelled for a technical reason, only due to their folly and probably because of their lack of understanding, as they did not look educated---Co-accused persons had already been granted post-arrest bail on merits---Bail facility of accused persons had been cancelled/withdrawn by Sessions Judge, independent of the merits of the case---Bail cancellation order of accused persons was set-aside in circumstances and resultantly bail granting order passed by Sessions Judge was restored subject to furnishing the requisite bail bonds as directed by the Sessions Judge, within three weeks, failing which the law would take its own course.

Rai Wali Muhammad Khan Kharal for Petitioner.

Abdul Rauf Wattoo, Deputy Prosecutor General Punjab for the State with Amjad SI.

Ch. Jamil Ahmad Sandhu for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The petitioners, Allah Yar, Nasir Ali and Mst.Rasheedan Bibi face the allegation that they being armed with firearms, abducted Mst. Fauzia Bibi, aged 13/14, the daughter of the complainant, Muhammad Boota at 4.00 p.m. on 25.05.2013 and took her away in a carry-dabba, which act of the accused was witnessed by Allah Ditta and Faazil who informed the complainant in this regard; Mst. Fauzia Bibi telephonically contacted her father/complainant on 07.06.2013 whereon he, in the company of his co-witnesses reached Police Training Centre, Baidian Road, Lahore and recovered his daughter, who told him that Rehmat Ali and Amanat Ali accused forcibly raped her and the other accused stood guard at that time; she also alleged that the accused had obtained her thumb impressions on some papers.

2. The petitioners application for bail before arrest was allowed by the learned Sessions Judge, Nankana Sahib on 28.06.2013 with the condition that they would furnish fresh bail bonds in the sum of Rs.50,000/- each with one surety each in the like amount to the satisfaction of the learned area magistrate within seven days, failing which their bail petitions would be deemed to have been dismissed. The petitioners failed to satisfy the said condition and paid the penalty, as their bail was cancelled by the learned bail-granting court on 14.02.2014, hence, the instant petition.

3. After hearing learned counsel for the parties and perusing the record, it is observed that the petitioners should have shown sincerity and their bona fide as to the condition attached with their bail order and if, they had not done so, the learned Sessions Judge ought to have shown the leniency and grace to afford them some more time to submit the requisite bail bonds. No doubt, the bail granting order was recalled more than seven months after it had been made but record does not reveal that the petitioners, during pendency of the petition under section 497(5), Cr.P.C. against them, were directed even once to do the needful. A valid order, obtained by the petitioners on 28.06.2013 fell apart for a technical reason, only due to their folly and probably, lack of understanding, as they did not look an educated trio.

4. It transpires from the record that Rehmat Ali and Amanat Ali accused who allegedly subjected Mst.Fauzia Bibi to rape have already been granted post arrest bail vide order dated 25.10.2013 by the learned Sessions Judge, on the ground that the alleged abductee rendered divergent statements in favour and against the accused on different occasions besides, she belatedly joined investigation i.e. about twelve days after she returned to her father's house on 07.06.2013 and this delay reflected on the veracity of her statements under section 161, Cr.P.C. and under section 164, Cr.P.C. Rehmat Ali accused claimed during investigation, on the strength of a registered nikahnama showing age of bride eighteen (18) years, that Mst.Fauzia Bibi had solemnized nikah with him of her free will and accord on 28.04.2013 and this fact might have gone to his benefit, in terms of grant of bail to him. It is noteworthy that none of the petitioners is a signatory to the said nikahnama, hence it hardly does any damage to the petitioners, if this document has been found fabricated and forged by a new investigating agency, the RIB Sheikhupura. Its repercussions, however may be felt by the accused concerned. The petitioners need not bother about it. As, the bail-facility of the accused-petitioners had been withdrawn/cancelled by the learned Sessions Judge, independent of the merits of the case hence, bail recalling order, made on 14.02.2014 is set-aside resulting in restoration of the order passed by the said learned court on 28.06.2013 in favour of the petitioners subject to furnishing the requisite bail bonds by the petitioners, as

directed therein, within three weeks from today, failing which the law shall have its own course.

5. This petition stands disposed of in above mentioned terms.

MWA/A-69/L Application accepted.

2017 Y L R 752

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD QASIM---Appellant

Versus

MUHAMMAD IQBAL and another---Respondents

Criminal Appeal No.204 of 2007, heard on 13th May, 2015.

Immigration Ordinance (XVIII of 1979)---

----Ss. 17 & 22---Criminal Procedure Code (V of 1898), S. 417(2-A)---Human trafficking---Appeal against acquittal---Reappraisal of evidence---Complainant alleged that accused swindled amount in piecemeal from him on the pretext of sending him abroad but Trial Court acquitted the accused---Validity---Appraisement made by Trial Court for pronouncing judgment did not suffer from any legal defect and everything was dealt with lawfully by it---Accused won double presumption of innocence, one relating to basic principle of law that every accused was innocent till proved otherwise and the other through judicial verdict, passed by Trial Court---Judgment of acquittal could not be upset unless it could be shown that it was a product of non-reading, mis-reading or mis-appraisement of evidence or it had been passed arbitrarily or foolishly or it had resulted in miscarriage of justice---Judgment passed by Trial Court was not hit by any of such infirmities---High Court declined to interfere in the judgment of acquittal passed by Trial Court---Compromise between parties, as pressed into service by complainant was added factor not to undo the judgment in question---Appeal was dismissed in circumstances.

Ch. Nazir Ahmad Ranjha and Abdul Raheem for Appellant.

Ch. Majid Hussain for Respondent No.1.

Malik Faiz Rasool Rajwana, Standing Counsel for the Federation.

Date of hearing: 13th May, 2015.

JUDGMENT

SHAHID HAMEED DAR, J.---The appellant, Muhammad Qasim (PW-1) is the complainant of case-FIR No.77/2005 dated 09.06.2005 under section 17/22 of the Immigration

Ordinance 1979, which he got registered at Police Station FIA-Faisalabad against Muhammad Iqbal (respondent No.1) and his absconding co-accused Naser Iqbal with the allegation that they had swindled an amount of Rs.2,82,000/- in piecemeals, from him, Muhammad Boota Tahir (PW-2) and Tanvir Abbas (PW-3) in year 2003 on the pretext of sending them to Masqat for employment besides, they also got their passports for issuance of visas for them but they did not keep the word and digested the said amount, except for Rs.10,000/-, which they returned to the complainant-side on their consistent demand. The respondent, Muhammad Iqbal was tried for the said offences and acquitted of the charge vide judgment dated 25.01.2007, pronounced by learned Special Judge (Central), Faisalabad, hence, the instant appeal under section 417(2-A), Cr.P.C. against him by the appellant-complainant.

2. The prosecution, in order to prove its case against respondent No.1, Muhammad Iqbal produced seven (7) witnesses, including Muhammad Qasim (complainant-PW-1), Muhammad Boota Tahir (PW-2), Tanvir Abbas (PW-3), Muhammad Akram (PW-4), Shoaib Ahmad Haroon SI-FIA (PW-5), Rai Nasrullah Khan Inspector-FIA (PW-6) and Wali Muhammad SI/I.O-FIA (PW-7) during the trial but they failed in doing so, as is manifest from the impugned judgment.

3. It was Muhammad Amanullah Khan Inspector/SHO P.S FIA, Faisalabad who, in absence of a regular public prosecutor, pronounced the prosecution case closed on 09.01.2007. Thereafter, Muhammad Iqbal (respondent No.1) tendered statement under section 342, Cr.P.C., whereby he professed his complete innocence in the matter and refuted all the allegations against him being false. In reply to the question, why this case against him and why the PWs had deposed against him, he contended as under:--

> "Muhammad Akram-P.W.4 is a real brother of Muhammad Qasim-PW.1. Muhammad Akram was our teacher. I had a dispute and altercation with said Muhammad Akram. Muhammad Qasim-P.W.1 in fact got some amount from P.W.2 Muhammad Boota Tahir and P.W3 Tanveer Abbas for sending them abroad but Muhammad Akram Tahir due to said dispute and enmity with me got implicated myself in this case through Muhammad Qasim-his brother."

4. He did not produce any evidence in defence nor he opted to depose under section 340(2), Cr.P.C.

5. As mentioned in the opening paragraph of this judgment, the respondent's trial ended in his acquittal on 25.01.2007.

6. Learned counsel for the appellant-complainant did not look much enthusiastic about pressing this appeal and he came-up with the only submission that the parties had settled the dispute outside the court and complainant/appellant had dropped the idea of prosecuting respondent-Muhammad Iqbal any further. Learned counsel was flanked by the complainant (appellant), who endorsed the said submission and tendered his sworn affidavit (Mark-A) in endorsement thereof, the contents whereof he exclusively owned. A team of advocates, in fact represented the appellant who submitted in unison that the matter in hand might be disposed of in terms of compromise between the parties.

7. Although, learned counsel appearing on behalf of respondent No.1 also subscribed to the factum of compromise, as agitated by the other side, yet he forcefully submitted that respondent No.1 had been acquitted of the charge on sound reasons and that the prosecution had badly failed to establish his guilt during the course of the trial.

8. Learned Standing Counsel showed little interest in supporting the instant appeal and

submitted that the impugned judgment was sustainable by all means.

9. The factum of compromise, as arrived at by the warring-parties is a significant circumstance but it wouldn't conclusively affect the merits of this case, as offences involved herein are not compoundable. Learned trial court found countless infirmities in the prosecution evidence and considering it a disappointedly flopped affair, acquitted the respondent with convincing reasons.

10. It all started when appellant (complainant) moved a written application (Exh.PC), on 05.08.2004 before the Director General FIA Islamabad with the allegation that Muhammad Iqbal (respondent No.1), his real brother and absconding co-accused Muhammad Naser and father Hakeem Ghulam Hussain had conned many a persons of the area and fleeced heavy amounts of money from them on the excuse of sending them abroad and fetching them jobs there; they befooled him to extract money from him about 2-1/2 years before and did the same to a couple of other persons, Muhammad Boota Tahir (PW-2) and Tanvir Abbas (PW-3) two years thereafter in presence of Muhammad Akram (PW-4), who is real brother of the appellant. According to the contents of the above said application, the transaction-in-issue was made at Rawalpindi, where the parties lived then. If period of 2-1/2 years, as mentioned in application Exh.PC, is arithmetically calculated, it would turn out to be a deal of year 2001, whereby respondent No.1 and his runaway accused allegedly squeezed aforesaid amount of money from the victims. The prosecution witnesses PW-1 to PW-4, however, mentioned in their testimonies that the incident took place in June 2003.

11. The victims (PW-1 to PW-3) did not produce any independent witness/ evidence to corroborate their testimonies. Muhammad Akram, who appeared as PW-4 happened to be the real brother of Muhammad Qasim, the appellant. The depositions made by the said witnesses, as to payment of certain amounts of money to the acquitted respondent and his absconding co-accused are contradictory inter se, both in terms of time and amount of money. The appellant could not recollect the date, day and the month qua payment of Rs.1,50,000/- by him to the accused. He contended in his statement that all three victims paid Rs.50,000/- each to Muhammad Iqbal (respondent No.1) simultaneously which sharply goes against contents of the application Exh.PC. He stated about settlement of the dispute with the acquitted respondent by all the victims but it could not be so learnt from the said application. Muhammad Boota Tahir (PW-2) and Tanvir Abbas (PW-3) also showed some sort of forgetfulness in their testimonies like the complainant did and they too could not mention any specific date, time and place, when they paid certain amounts of money to the respondent and his co-accused. Tanvir Abbas (PW-3) frankly admitted that he never had direct conversation with the respondent and his matter was dealt with by Muhammad Qasim (appellant/complainant) and his brother Muhammad Akram (PW-4). He also admitted that none of the victims made any payment to the accused within his view. All of the victims (PW-1 to PW-3) are interested witnesses and they failed to produce any independent evidence during trial in corroboration to their respective stances. Their testimonies had been found contradictory and discrepant inter se by the learned trial court and so found by this court. The investigating officer Wali Muhammad SI (PW.7) also admitted in his statement that no independent witness had been produced by the complainant-side before him during investigation.

12. Learned trial court categorically observed in paragraph 17 of the impugned judgment that evidence led by the prosecution was loaded with many a major and fatal contradictions. The evidence adduced was found untrustworthy and unreliable from all angles by it. The fallacies and inconsistencies as noted down in the impugned judgment were bound to cause collapse of the prosecution-case. The observations recorded and results drawn by the learned trial court are unexceptionable which exclude all the probabilities of interfering with the

impugned judgment by this court. No other conclusion, as to one drawn by the learned trial court was possible off the evidence available on the record.

13. The appraisement of evidence, as made by the learned trial court for pronouncing the impugned judgment does not suffer from any legal defect and everything appears to have been dealt with lawfully by it. The respondent-Muhammad Iqbal has certainly won double presumption of innocence, one relating to basic principle of the law that every accused is innocent till proved otherwise and the other, through the judicial verdict, impugned herein. A judgment of acquittal cannot be upset sparingly unless it could be shown that it was a product of non-reading, mis-reading or misappraisement of evidence or it had been passed arbitrarily or foolishly or it had resulted in miscarriage of justice. The impugned judgment is certainly not hit by any of such infirmities. Not a fit case, worth-interfering with by this court. The compromise between the parties, as pressed into service by the complainant would be an added factor not to undo the impugned judgment. Dismissed.

MH/M-286/L Appeal dismissed.

2017 Y L R 872

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD RAZA---Petitioner

Versus

The STATE and another---Respondents

Crl. Misc. No.12586-B of 2015, decided on 4th November, 2015.

Criminal Procedure Code (V of 1898)---

----Ss.498/497---Penal Code (XLV of 1860), Ss.337-L (2), 342, 380, 411, 420, 440, 468 & 471---Hurt; wrongful confinement; theft in dwelling house; dishonestly receiving stolen property; cheating and dishonestly inducing delivery of property; mischief committed after preparation to commit death or hurt; forgery for purpose of cheating; using as genuine a forged document---Bail, recalling of---Delay---Allegations as to hurt caused by the accused person was supported by the medical evidence---Delay in lodging of the FIR, though had not been explained by the complainant, could not be considered damaging at bail stage, nor could the delay be held to be an ultimate circumstance to grant extraordinary relief of bail before-arrest to the accused---Accused had concealed the fact as to dismissal of his pre-arrest bail by the court below from the Investigation Officer at the time of joining of the investigation of the case---Investigation Officer had declared the accused as innocent on the same day of his joining the investigation, without caring for the fact that the report under S.512, Cr.P.C. had already been submitted against him before the court---Accused had also been proceeded against under S.87, Cr.P.C.---No reason existed to believe that due to mala fide or malice on part of the complainant, the accused had been falsely implicated in the case---Ad-interim bail already granted to the accused was recalled---Application for pre-arrest bail was dismissed accordingly.

Rana Muhammad Aslam Nadeem for Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State with Iqbal SI.

Ch. Umar Hayat Kamran Rajoka for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---The allegation against the petitioner, Muhammad Raza, as per FIR No.17/2013, dated 20.1.2013, for offences under sections 440, 342, 380, 411, 337-L(2), 420, 468, 471, P.P.C., registered at Police Station Ahmadpur Sial (Jhang) is that he along with his co-accused, all being armed with guns trespassed on the mansion of Nawazish Ali (complainant) at about 10.00 a.m. on 11.12.2012 and started dismantling an intervening wall between the said mansion and their residential house, which had been erected by an order of the court; the complainant and his companions abstained them from doing so, whereon they pulled out a stamp-paper/agreement to sell and told the complainant that he had sold the said house to them; the complainant being distraught told them that they had committed forgery as he had not sold his house to them; the accused tortured him by encircling a rope around his neck and also dragged him at the spot; they felled the four wall, snatched his cell-phone and forcibly drove him to their dera where they confined him in a room, they also took away a hundred feet long water-pipe, a hand-cart and some other building-tools with them.

2. It has been submitted by the learned counsel for the petitioner that the accusations as contained in the FIR are baseless and do not depict a true picture of the allegedly built intervening wall and demolition thereof, for, no such incident had ever taken place; the delay of about forty (40) days in lodgment of FIR has not been explained at all by the complainant; the allegation qua forged agreement-deed showing sale of his house by the complainant to the accused was not the subject-matter of the petition, which he had moved under sections 22-A and 22-B, Cr.P.C. before the Ex-Officio Justice of Peace, Jhang for registration of case against the petitioner. It has lastly been contended by the learned counsel that the petitioner has not committed any offence and being innocent he may be granted the relief prayed, for.

3. Learned Deputy Prosecutor General Punjab assisted by learned counsel for the complainant has opposed this bail application on the ground that the accused not only showed roguishness at the crucial hour but they also made a mockery of the court order, whereby intervening wall between the house of the complainant and that of their own had been rebuilt, as they all including the petitioner razed it to the ground to grab again a portion of the house of the complainant; the delay in lodgment of FIR had been caused due to traditional laziness of the police, otherwise complainant had immediately reported the crime to them; lastly contended that the complainant had no ill-will or grudge against the petitioner and others, for having lodged a criminal case against them, therefore, this application may be turned down.

4. After hearing the learned counsel for the parties and perusing the record, it is observed that the petitioner joined by his co-accused allegedly committed the worst sort of roguery, as they demolished that part of the house of the complainant, which had been got built by a court of law, after longstanding civil litigation between them came to an end. The accused had, in fact, forcibly occupied vacant area of the complainant's house sometimes in the past by demolishing the intervening wall between their house and that of the latter and made it a part of their own. The possession of the grabbed area was salvaged to the complainant and the intervening wall was reconstructed by the orders of the court, which was allegedly demolished by the accused at the time of the alleged occurrence. The medico-legal report of Nawazish Ali (complainant) showed a contusion of 8 cm x 1/2 cm on the front

and middle of his neck, with pain at the chest, back, legs and arms, which corroborated the allegation that he had been dragged by the accused with a rope around his neck. The delay in lodgment of FIR, though not explained by the complainant, cannot be considered damaging to his case at this stage, nor could it be held an ultimate circumstance to grant extra-ordinary relief of bail-before-arrest to the petitioner.

5. There is another important aspect of the case, which really damaged the petitioner's quest for bail, as he, after having his pre-arrest bail application dismissed by the sessions court concerned in the last ten days of December 2013, joined investigation on 15.1.2014 and contended that he was on an ad-interim pre-arrest bail then, which was believed as such by the investigating officer without asking for any evidence in this regard and he readily declared him innocent, the same day, without caring for the fact that a report under section 512, Cr.P.C. had already been submitted against him before the court concerned on 3.11.2013. The petitioner's second application for bail-before-arrest was dismissed by the additional sessions judge, Ahmadpur Sial (Jhang) on 21.9.2015 with a reference to his exaggerative contention before the investigating officer of being on ad-interim pre-arrest bail on 15.1.2014, despite being not so placed. The petitioner's learned counsel was asked as to what he had to offer in this regard, in answer to which he said nothing, except for submitting that the petitioner's first pre-arrest bail application had been dismissed a few days before he joined the investigation on 15.1.2014. It may be learnt from the record that the petitioner had been proceeded against under section 87, Cr.P.C. on 8.5.2013. There exists no reason to believe that he has been falsely involved in this case due to some mala fide or malice of the complainant. Dismissed. The ad-interim pre-arrest bail granted to him on 23.9.2015 is recalled.

SL/M-27/L Bail declined.

2017 Y L R 902

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD NASEER---Petitioner

Versus

The STATE and another---Respondents

Crl. Misc. No.6957-B of 2016, decided on 4th July, 2016.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 365, 496-A & 376---Abduction, rape---Bail, refusal of---Accused was charged for abducting and committing rape with his step-mother---Accused alleged that his father divorced her and he had married his step-mother of her free will---Validity---Word 'mother' applied to one's step-mother as well as to one's real mother---Accused admittedly committed abhorrent and immoral offence---Bail was refused in circumstances.

Holy Quran, Verse No. 23, Surah-IV (An-Nisa) rel.

Azmat Hussain Sindhu for Petitioner.

Rana Tassawar Ali Khan, Deputy Prosecutor General Punjab for the State with Mehmood, ASI.

Mughees Mazhar for the Complainant.

ORDER

SHAHID HAMEED DAR, J.---Muhammad Irshad, the complainant of case FIR No.52/16, dated 20.2.2016, under sections 365, 496-A and 376, P.P.C., registered at Police Station Mananwala, district Sheikhupura, has alleged that his siter Mst. Safia Bibi married Ghaus Muhammad and delivered four sons, who all were minors; Ghaus Muhammad's first wife Mst. Aisha Bibi had died about twenty (20) years back, but not before she gave birth to four sons and four daughters; Muhammad Naseer (petitioner), who is real son of Ghuas Muhammad from his first wife, threatened Mst. Safia Bibi, with intent to grab residential house and other immovable property of his father, that he would murder her and her children, if she would not leave his father's house; she informed him (complainant) about this incident, whereafters she disappeared from her husband's house and her particulars remained unknown for about 1-1/4 years; he searched for his missing sister every-where, but in vain; during this search-campaign, he learnt it from Muhammad Anwar and Irfan about eight days before that Muhammad Naseer (petitioner) had disclosed it to them that he had abducted Mst. Safia Bibi and confined her at some unknown place with the intent to murder her or not to ever release her, if immovable property of his father was not alienated to him, beside his brothers and sisters.

Mst. Safia Bibi, all of a sudden, appeared on the scene to make statement under section 161, Cr.P.C. on 8.3.2016, whereby she contended that she had been abducted and subjected to sexual intercourse by Muhammad Naseer (petitioner) due to which she got pregnant and gave birth to a female baby, which was four months of age and lived with her. She rendered an assimilating statement under section 164, Cr.P.C., the same day, but showed herself to be the wife of Muhammad Naseer (petitioner).

2. After hearing the learned counsel for the parties and perusing the record, it is observed that Muhammad Naseer (petitioner) has committed an abhorrent and immoral offence of the worst degree, as he allegedly abducted legally wedded wife of his father, who was his step-mother and raped her for years till she turned gravid and delivered a 'bastard' child, who was four months old, when she tendered statement under section 161, Cr.P.C. on 8.3.2016. Learned counsel for the petitioner heavily relied on a Nikahnama, by contending that Ghaus Muhammad had verbally divorced Mst.Safia Bibi in year 2014, whereafter Muhammad Naseer (petitioner) solemnized Nikah with her on 1.6.2014. Learned counsel referred to the Nikahnama time and again in his arguments by contending that the accused-petitioner and Mst.Salia Bibi consummated their marriage only after registration of their Nikahnama with the respective union council. This particular contention of the learned counsel militates against the teachings of the Holy Qur'an, refer Verse No 23. Surah-IV (An-Nisa). Chapter-4. whereby it has been ordained by the Almighty. "Forbidden unto you are your mothers, and your daughters and your sisters and your father's sisters, and your mother's sisters, and your brother's daughters and your sister's daughters, and your foster-mothers, and your foster-sisters, and your mother-in-law, and your step-daughters who are under your protection (born) of your women unto whom ye have gone in - but if ye have not gone in unto them, then it is no sin for you (to marry their daughters) - and the wives of your sons who (spring) from your own loins. And (it is forbidden unto you) that ye should have two sisters together, except what hath already happened (of that nature) in the past. Lo! Allah

is every Forgiving, Merciful." The word 'mother' applies to one's step-mother as well, as to one's real mother, hence, the prohibition extends to both. These injunctions also includes prohibition of the grand-mother, both paternal and maternal.

3. The stance of the petitioner during the course of investigation, that he had married his step-mother, Mst.Safia Bibi of her free will and accord, only after she had been divorced by his father, was sufficient to hold, though tentatively, that he had committed the offence alleged, which fell within the mischief of prohibition of section 497(1), Cr.P.C. Therefore. I am not inclined to accept this application, which is accordingly dismissed.

JK/M-161/L Petition dismissed.

2017 Y L R 1036

[Lahore]

Before Shahid Hameed Dar, J

MUHAMMAD BASHIR---Petitioner

Versus

KHAIR DIN and 20 others---Respondents

W.P. No.1572 of 2011, decided on 26th October, 2015.

Criminal Procedure Code (V of 1898)---

----Ss. 200, 204 & 403---Private-complaint was admitted for regular hearing by the Trial Court but Appellate Court dismissed the same---Validity---Claim of complainant was not supported by any documentary evidence---Contention of complainant was found false during the course of investigation of FIR-case registered against the accused---Complainant had failed to produce any incriminating evidence against the accused which led to cancellation of FIR-case by the area Magistrate--- Private-complaint subsequently brought by the complainant could not be dismissed merely on the ground that on the very cause of action his case lodged through FIR had failed the test of investigation---Private-complaint would proceed independently on its own merits---Summonses or warrants should not be issued for causing the accused to be brought or to appear before the court in every FIR-case or a private-complaint-case---Impugned order had been passed in accordance with law---No illegality had been pointed out by the complainant in the impugned order passed by the Appellate Court---Constitutional petition was dismissed in circumstances.

Ch. Umair Ahmad for Petitioner.

Raza-ul-Karim Butt, Additional Advocate General Punjab for the State.

Ashfaq Ahmad Malik for Respondents Nos. 1 to 20.

ORDER

SHAHID HAMEED DAR, J.---Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, the petitioner has challenged the vires of order dated 13.1.2011 passed by the learned Additional Sessions Judge, Toba Tek Singh, whereby an order of the learned magisterial/trial court, made on 27.10.2010 was set aside and the complaint-case filed by Muhammad Bashir (petitioner herein) was dismissed.

2. The relevant facts of the case, in brief, are that Muhammad Bashir (petitioner) got lodged case-FIR. No.191/2010, dated 30.7.2010. under sections 382, 337-H(2), 148, 149 P.P.C. at Police Station Arooti District Toba Tek Singh with the contention that Khair Din and others (respondents Nos.1 to 20), joined by seven unknown persons, all armed with firearms, dandas and sotas trespassed on his agricultural land at about 8.00 p.m. on 21.4.2010 and forcibly harvested the wheat and barseem crops by means of a harvester and sickles; he reached there and showed them a copy of the injunctive order, issued by the civil court so as to stop them from their illegal act but they tore it apart and refused to listen to him and his companions, who had also reached there then; the accused made firing at the spot and took away the harvested crops on a tractor-trolley and a camel-cart; he moved an application before the learned Additional Sessions Judge, Kamalia and obtained the order for registration of a case against the accused.

This case was found false during the course of investigation and a cancellation report under section 173, Cr.P.C. was prepared by the investigating officer on 10.8.2010, which, as per learned counsel for the parties, was concurred with by the learned area magistrate later on. The petitioner/complainant filed a private-complaint against the above said individuals, which was admitted to regular hearing on 27.10.2010 by the learned Judicial Magistrate, Kamalia (camp at Peer Mehal), District Toba Tek Singh and all the respondents impleaded therein were summoned under section 204, Cr.P.C. to stand trial therein. One of the respondents filed a revision petition against the aforesaid order of the learned trial court which was accepted on 13.1.2011 and the impugned order therein, was set aside. Hence, the instant petition.

3. Learned counsel for the petitioner has submitted that the petitioner cultivated the crops-in-issue being lessee-in-possession of the agricultural land, which was leased out to him by the FESCO (WAPDA) from time to time; the petitioner filed a private-complaint against the respondents on 8.9.2010 and adduced incriminating cursory evidence under sections 200, 202, Cr.P.C. against them, which prima-facie connected them with the crime alleged; though learned area magistrate had cancelled the petitioner's FIR case in an earlier development, yet order passed by the learned trial court on 27.10.2010 under section 204, Cr.P.C. was sustainable by all means as it was based on supportive statement of the complainant (petitioner herein) and identical cursory statements of Muhammad Ramzan and Muhammad Siddique; the impugned order has been passed by making deeper evaluation of the evidence, which couldn't have been resorted to at this stage; the petitioner though does not have any revenue record in support of his contention, yet oral statements produced by him at the preliminary stage sufficiently proved his stance of having grown the harvested crops, and the crime committed by the respondents.

4. On the other hand, learned counsel for respondents Nos.1 to 20 has submitted that the petitioner's contention was extensively investigated and found false by the police, which led to preparation of a cancellation report under section 173, Cr.P.C. on 10.8.2010 by them, having been subsequently agreed to by the learned area magistrate; the occurrence narrated by the petitioner had not taken place at all and he fabricated it falsely only to pressurize the respondents and make them surrender before his clever tactical moves; the impugned order entails the sound reasons, hence, it may by sustained.

5. Learned Additional Advocate General Punjab looked inclined to support the contentions of the learned counsel for the respondents and he submitted that the impugned order did not suffer from any illegality, hence, this petition may be dismissed.

6. After hearing the learned counsel for the parties and perusing the available record including the impugned order, it is observed that the petitioner's claim of having sown the wheat and barseem crops, allegedly harvested by the respondents on 21.4.2010, is not supported by any revenue record nor could he hint at the evidence so as to establish his claim of being a lessee-in-possession of the agricultural land, which originally belonged to the Faisalabad Electric Supply Company Limited (FESCO/WAPDA). His contention as contained in FIR No.191/2010 (supra) was found false during the course of investigation as he failed to produce any incriminating evidence against the accused, who are the respondents herein, which led to cancellation thereof by the learned area magistrate as submitted by the learned counsel for the respondents and admitted by the petitioner's learned counsel. They did not, however produce a copy of the order of the learned area magistrate.

7. There can be no cavil to the idea that a private-complaint subsequently brought by the complainant under section 200, Cr.P.C. could not be dismissed merely on the ground that on that very cause of action, the complainant's case got lodged by him through FIR had failed the test of investigation, as the circumstances would not attract the provisions of double jeopardy as laid down by section 403, Cr.P.C. The private complaint before a judicial magistrate would certainly proceed independently on its own merits as regulated by Chapter XVI, Chapter XVII, Chapter XIX and Chapter XX of the Code of Criminal Procedure, 1898. The issuance of process to the respondent(s) shall take place under section 204, Cr.P.C. which envisages that if in the opinion of the court, taking cognizance of offence, there is sufficient grounds for proceeding ahead and the case appears to be one in which, according to the fourth column of the second schedule, a summons should be issued in the first instance, it shall issue the summons for the attendance of the accused. The term 'sufficient ground' is not a vague or hollow proposition of law nor does it mean by any stretch of imagination that summons or a warrant should invariably issue for causing the accused to be brought or to appear at a certain time before the court. In every FIR case or a private-complaint-case instituted under section 200, Cr.P.C.

8. The petitioner showed himself a lessee of the FESCO/WAPDA and allegedly cultivated the land-in-issue in the said capacity but he did not hint at a speck of corroboratory evidence in this regard. Learned counsel for the petitioner has vociferously argued that the petitioner made the highest bid in an open auction to win possession of the said agricultural land on lease, but he could not show or refer to any documentary evidence in this regard. A couple of receipts, that he placed on the record are deficient and lend little support to his claim of being a lessee of the disputed land on the day of the alleged occurrence. He could not show any Khasra Girdawari or record of rights to establish the claim of being the possessor and tiller thereof. He admittedly did not challenge the order of the learned area magistrate, whereby the above-said FIR case was cancelled. The civil suit, which he had instituted had been dismissed years before by the learned civil court concerned. The impugned order has been passed in accordance with the settled principles of law on the subject and the dispensation of criminal justice. No illegality appears to have been committed by the learned revisional court in making the impugned order, hence, it does not call for interference.

9. For the discussion supra, the instant petition being meritless is dismissed.

ZC/M-351/L Petition dismissed.

2017 Y L R 1042

[Lahore]

Before Shahid Hameed Dar, J

ABID HUSSAIN BHATTI---Petitioner

Versus

The STATE and another---Respondents

Crl. Revision No.382 of 2016, decided on 25th March, 2016.

Penal Code (XLV of 1860)---

----Ss.302 & 324---Criminal Procedure Code (V of 1898), S. 540---Qatl-i-amd and attempt to qatl-i-amd---Application of summoning prosecution witness---Petitioner, who was indicted for qatl-i-amd and attempt to commit qatl-i-amd, moved application under S.540, Cr.P.C., to re-summon and re-examine the injured/ prosecution witness---Said application was dismissed by the Trial Court---Said witness had got her statement recorded and also faced the process of cross-examination---Defence counsel had used every bit of his intellect to cross-examine the said female witness---Counsel for the petitioner had made a queer argument that cross-examination on the said witness was completed, which could not be considered plenteous nor did it show an ideal approach to interview an eye-witness---Section 540 of the Criminal Procedure Code, 1898 did not ingrain any such interpretation whereby it should be allowed to be used by a party to fill-in the lacunae of its case or to unnecessarily protract proceedings of the trial to defeat the ends of justice---Revision petition was dismissed in circumstances.

Hafiz Adnan Farooq for Petitioner.

ORDER

SHAHID HAMEED DAR, J.---The petitioner is aggrieved of order dated 28.1.2015, whereby an application moved by him under section 540, Cr.P.C. for re-summoning and re-examining Mst. Sadia Bibi (P.W.11) has been dismissed by the learned trial court (Additional Sessions Judge Lahore).

2. The relevant facts of the case are that petitioner, Abid Hussain Bhatti is involved in case-FIR No.958/2011, dated 18.8.2011, under section 302/324, P.P.C., Police Station Kot Lakhpat Lahore, as an accused with the allegation, as brought forth by Hashim Khan (respondent No.2/ complainant) that he, being armed with pistol, directly fired at Muhammad Abid and Mst.Sadia Bibi, the complainant's offspring, at 4.20 p.m. on 18.8.2011, due to which they fell onto the ground badly wounded; Muhammad Abid succumbed to the injuries at the spot while Mst.Sadia Bibi was shifted to General Hospital, Lahore in serious condition for treatment of her injuries.

The petitioner's trial commenced on 20.9.2012, but he did not engage any counsel for him till he lodged a request before the learned trial court on 14.11.2012 for providing him a defence counsel at state expense as he was a pauper; his request was acceded to and Rao Amjad Ali Khan advocate was appointed as defence counsel at state expense on his behalf,

who, dealt with the statements of five formal prosecution witnesses, the same day; some other prosecution witnesses were recorded in different intervals by the learned trial court, which also included examination of Mst.Sadia Bibi (P.W.11) on 2.3.2013; the prosecution case was at its fag end stage, when petitioner moved, an application under section 540, Cr.P.C. on 12.11.2014 with the prayer to re-summon and re-examine Mst.Sadia Bibi (P.W.11), which was dismissed by the learned trial court through the impugned order, hence, the instant petition.

3. Learned counsel for the petitioner has submitted that learned trial court showed undue haste in recording the prosecution evidence as it compelled Rao Amjad Ali Khan advocate to cross-examine as many as five prosecution witnesses, the same day, when it appointed him as defence counsel at state expense on behalf of the petitioner; Mst.Sadia Bibi (P.W.11) is an eye-witness of the occurrence, who should have been recorded by affording a fair opportunity to the learned defence counsel to prepare the brief, but it did not so happen and learned trial court hurriedly recorded her to the disadvantage of the petitioner; learned defence counsel had too a little time at his disposal to prepare the brief, therefore, he could not properly cross-examine P.W.11, which put the petitioner's case in a perilous condition; the application moved by the petitioner has not been given due consideration by the learned trial court and it has been rejected by it on flimsy grounds, thus causing serious prejudice to him.

4. After hearing the learned counsel and going through the available record, it is observed that the impugned order does not appear to have been passed implausibly or irrationally, nor could it be considered to have been drawn in violation to the settled principles of law on the subject. Learned trial court made every possible effort to remain as within the spirit of the law as possible and gradually-proceeded ahead with the trial of the petitioner by affording him every opportunity to defend himself in the best possible way. It transpired from the record that the petitioner was provided the services of a defence counsel at state expense, on 14.11.2012 only after he showed his disability to engage a private counsel on his own, being a person of little means. It was Rao Amjad Ali Khan advocate, who did the duty of defence counsel at state expense on behalf of the accused/petitioner and he was flanked by Malik Amjad Pervaiz advocate, when he filed Wakalatnama on his behalf on 7.12.2012, as his privately engaged counsel. It was a duo of the counsel, which defended him at trial.

5. The statement of Mst.Sadia Bibi (P.W.11) was recorded on 2.3.2013, about 31/2 months after the petitioner had been provided with the services of a defence counsel at state expense and about three months, after he had privately engaged a counsel to represent him at the trial. He, however, reposed higher degree of confidence in Rao Amjad Ali Khan advocate, the learned defence counsel, as he called upon him to cross-examine P.W.11. The interlocutory order of the said date did not reveal that the petitioner showed any reservations about the capability of the learned defence counsel, when he grilled the said prosecution witness. It looked all fine about the said day's proceedings. The trial of the petitioner inched along and team of the counsel representing him got further strengthened by the joining of Mr.Liaqat Ali advocate, who also submitted his Wakalatnama on his behalf on 19.3.2014. It was for the first time on 11.7.2013, when Muhammad Ramzan SI/IO, the only prosecution witness left to be examined then, appeared before the learned trial court for his examination but he could not be recorded due to power-failure. Thereafter, he appeared before the court off and on and his statement-in-chief was lastly recorded by the learned trial court on 27.5.2014 as P.W.12. He was, however, cross-examined by the defence on 9.5.2015, about a year thereafter. The petitioner is now bound to make statement under section 342, Cr.P.C. on 28.3.2016.

6. It was in between the recording of examination-in-chief of P.W.12 on 27.5.2014 and cross-examination on him on 9.5.2015, when the petitioner moved an application under

section 540, Cr.P.C. on 12.11.2014, envisaging therein re-summoning and re-examining Mst. Sadia Bibi (P.W.11), real daughter of the petitioner, with the contention that she had not been properly cross-examined by the learned defence counsel, who represented him at state expense. This application was dismissed by the learned trial court through the impugned order on 28.1.2015. The record would tell that it was not the learned defence counsel alone who represented the petitioner then, rather a privately engaged counsel Malik Amjad Pervaiz advocate also represented him on the said occasion. They had all the time in the world to prepare the brief, so it could not be argued that preparation of case by the petitioner's counsel suffered from paucity of time, when they confronted the said witness to grill her. The provision of a defence counsel at State expense was a right of the accused to be respected, who for reason of his poverty or otherwise, showed inability to engage a counsel privately, so he was timely obliged by the learned trial court, as it provided him the services needed and made sure that no injustice or inequity was done to him due to any rash, though not there, act of the court. Being a favourite child of the law, he was dealt with in a motherly way by the learned trial court, despite it occasionally found his conduct disorderly, stubborn or unethical, meant to delay the trial by erecting stumbling block in its way. He was patiently extended as number of opportunities to cross-examine the said prosecution witness as he sought for, so it could not be said by him that he had been dealt with unjustly or discriminately by the court. His team of advocates had months of time at their disposal to get ready for the day when they cross-examined Mst. Sadia Bibi (P.W.11), though learned defence counsel at state expense led from the front. He must have used every bit of his intellect to cross-examine the female witness. Learned counsel for the petitioner has made a queer argument, that cross-examination on P.W.11. was completed by the learned defence counsel in about 1-1/4 page, which could not be considered plenteous nor did it show an ideal approach to interview an eye-witness. When asked, what should be the size of cross-examination on an eye-witness, the learned counsel offered a sheepish smile. Learned trial Court has certainly been vested with adequate powers under section 540, Cr.P.C. to summon and examine or re-summon and re-examine any witness in the trial before pronouncing the final verdict, but said provisions of the Code did not ingrain any such interpretation whereby it should be allowed to be used by a party to fill-in the lacunae of its case or to unnecessarily protract proceedings of the trial to defeat the ends of justice. This is what the learned trial Court has kept in view while dealing with the application of the petitioner under section 540, Cr.P.C. There was no occasion for the learned trial court to have thought in terms, otherwise. The impugned order has been passed strictly in accordance with the requirement of the law and it did not lack any virtue of a goodly legal order. This petition, being bereft of merits, is dismissed in limine.

JK/A-61/L Petition dismissed.

--The End--