LAHORE HIGH COURT
JUDGE

Mr. Justice Sardar Ahmad Naeem's judicial career can be considered a true source of inspiration. Especially for legal practitioners who aspire to excel in the field. Born in the year 1960 in Faisalabad (then Lyallpur), His Lordship was brought up and educated in the heartland of Pakistan, Lahore. His academic life started at "N.S. Model High School" at Temple Road where he matriculated in the year 1975. Soon, he graduated from "Islamia College Civil Lines" in 1980. From there on, His Lordship sought a path that would challenge and stimulate his inquisitive personality. This meant choosing a profession that rewarded his remarkable intellect and career goals. For Mr. Justice Sardar Ahmad Naeem, it was law. His Lordship enrolled in "Punjab University Law College" to live a multifaceted student life. His passion for athletics led him to be a member of the University's Hockey and Football teams. Moreover, he also served as the Vice-Captain of the University's Rowing Team. As a holder of this title, he represented Punjab in the National Rowing Championship in the year 1982.

Along with sports, His Lordship excelled in the leadership domain as well. Punjab University established the

“Justice Ameer Ali Quiz Society” in his tenure. For this, His Lordship had the honor of becoming the first President of the society. Alongside, he was the “College Color” holder as well. With many titles already under his name, the institute awarded His Lordship a law degree in 1983. Throughout his academic & professional life, His Lordship remained an avid linguaphile at heart. His immense interest in languages and dialects stemmed in 1974 through "Fazil Punjabi". In 1977, he obtained a Diploma from "Jamia Ashrafia" in Arabic. With that followed a Diploma in the German language from “Goethe Institute” in 1982. By the year 1989, "Khana-e-Farhang" in Iran awarded His Lordship with a Diploma in Farsi.

Mr. Justice Sardar Ahmad Naeem also performed as an educator throughout his life. This started in 1990 with him teaching about the intricacies of the English language. He worked on an audio/visual language course under the leadership of BBC English at Parle Center, Gulberg. He also taught himself to speak fluent Saraiki later in his career. His Lordship dedicates this linguistic prowess to his posting in Muzaffargarh. His Lordship enrolled as a member of the Lahore Bar Association on December 24, 1983. In due course, he also enrolled as an Advocate High Court in the year 1985. His successful career as an advocate spanned over 17 years. He spent every single day with assiduousness and determination. He possesses honorary memberships of Tehsil Bar Association Jatoi, District Bar Association Multan, and High Court Bar Association Rawalpindi. He also served as a visiting faculty member at "Quaid-e-Azam Law College" through the years. Yet, soon destiny led him toward his true calling.

On January 2, 1999, Mr. Justice Sardar Ahamad Naeem was appointed as the Additional District & Sessions Judge through competitive examinations. As an ASJ, he served in Bahawalnagar, Haroonabad, Lahore, Ferozwala & Okara. Soon followed promotion to District & Sessions Judge in 2007. Under this appointment came districts such as Muzaffargarh, Mianwali, Pakpattan, Multan, and Gujranwala. He also served as Judge Anti-Terrorism Court, DG Khan, in 2009. Alongside his District Judge tenure, His Lordship possesses an extensive Ex cadre portfolio. He succored as a Returning Officer in the General Body Elections of 2001, 2005, and General Elections of 2002. He assisted as the Sector in Charge during the 2002 Pakistan Referendum. He also fulfilled his appointment as District Returning Officer General Elections in 2008. He was also the Polling Officer for 2013's Presidential Elections. For this, he was the only officer from the District Judiciary to participate. Apart from this, he has served as a Returning Officer for Tehsil Nazim Elections, Shalamar Town, Aziz Bhatti Town Lahore, Ferozwala, and a few other by-elections for National and Provincial Assemblies. His Lordship remained on the Member Inspection Team (MIT) from 2011 to 2012. He served as Lahore High Court Registrar from 2012 to 2014. In 2013, he attended the "Serious Crimes Conference" at Warick University. He visited the Judicial Academies of Ireland, Scottland, and the Judicial College London. In the same year, he was also appointed as the Officiating Director General at "Punjab Judicial Academy". His Lordship attended the Sharia Course in 2015. He made official visits to the Turkish Peace Courts (Sulh Mahkemeleri) and Turgut Ozal Ozal University. Such visits were also made to The Shariah Academy,

Jordan, and The Supreme Court of Riyadh, Kingdom of Saudi Arabia. He also served in Sharia Academy Islamabad as a faculty member from February 2015 to May 2015.

Under district judiciary, he performed his judicial tasks with extraordinary zeal and enthusiasm. He rendered remarkable judgments and decisions. His elevation to the Bench of Hon'ble Lahore High Court on June 8, 2015, endorsed all his positive attributes. During his career as a Judge of the Lahore High Court, Mr. Sardar Ahmad Naeem passed notable judgments. Alongside, he completed strenuous administrative duties as well. This included the role of "Inspection Judge" of Muzaffargarh, Vehari, and Chiniot. Moreover, his memberships to the Departmental Examination Committee, Rules Committee (CPC), Examination Committee for Recruitment of District Judiciary Establishment, Examination Committee for Recruitment of High Court Establishment, Exemption Committee for Advocates/Officers/Officials of LHC, District Judiciary, and Employees of other departments for their enrollment as Advocate High Court. He also remained a member of the Board of Management Punjab Judicial Academy. He also served as Special Bench for hearing service appeals of the members of the establishment filed against the orders of Hon'ble Chief Justice, and Performa promotion recommendation committee for District Judiciary. He also remained a syndicate member at the University of Engineering & Technology Lahore. Parallel to his administrative endeavors, His Lordship has made rich contributions to the criminal justice system of Pakistan. He has rendered several astounding landmark judgments on copious vital issues, such as appreciation of evidence, particularly medical

evidence and circumstantial evidence. He called attention to the method by which a mentally challenged witness is to be dealt with under the law. He also highlighted the principles to record evidence from witnesses who can not hear or speak. His Lordship's prospective endeavors include researching the Qur'an and the Seerah as well. Something that has always enraptured him throughout his life. The entire career of Mr. Justice Sardar Ahmad Naeem is an exemplification of a memorable judicial métier. It is a great source of inspiration for the members of the judiciary. Members whom His Lordship has always tried to educate and guide through his career. Such a stunning inning in the field of law will always remain here for others to learn from. And its attribution will always be present in golden words in the judicial history of Punjab.

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LAHORE HIGH COURT
JUDGE

2016 P Cr. L J 70
[Lahore]
Before Muhammad Tariq Abbasi and Sardar Ahmed Naeem, JJ
WARIS ALI and others---Appellants
Versus
The STATE and others---Respondents

Criminal Appeals Nos.116-J, 700 of 2011 and Murder Reference No.222 of 2011, heard on 1st October, 2015.

Penal Code (XLV of 1860)---

----Ss. 302(b), 148 & 149--- Qatl-i-amd, rioting, common object---Appreciation of evidence---Sentence, reduction in---Motive as set up by the prosecution, was not proved---None of accused persons, caused any injury, either to the complainant or prosecution witness, despite the fact that they were at the mercy of accused---No pre-mediation and pre-consultation existed---Co-accused having been acquitted by the Trial Court on the same set of evidence, it was a fit case, which called for interference by High Court only to the extent of sentence---Mitigating circumstances existed in favour of accused---While maintaining conviction of accused under S. 302(b), P.P.C., his sentence of death was converted to imprisonment for life, with benefit of S. 382-B, Cr.P.C.---With said modification in the sentence, appeal filed by accused was dismissed, in circumstances.

Mst. Fazal Bibi v. Muhammad Rafiq and another 1984 SCMR 1373; Muhammad Iqbal v. The State 1990 ALD 693(1); Naveed alias Needu and others v. The State and others 2014 SCMR 1464; Maqsood Khan v. The State and another 2003 PCr.LJ 1165; Saadullah Jan v. The State and another 2002 PCr.LJ 1463; Muhammad Ashraf v. Tahir alias Billoo and another 2005 SCMR 383 and Mst. Sughra Begum and another v. Qaiser Pervez and others 2015 SCMR 1142 rel.

Malik Rabnawaz for Appellant (in Criminal Appeal No.116-J of 2011).

Malik Muhammad Jaffar, Deputy Prosecutor General Punjab for the State.
Azam Nazir Tarrar for the Complainant (in Criminal Appeal No.700 of 2011).

Date of hearing: 1st October, 2015.

JUDGMENT

SARDAR AHMED NAEEM, J.---Waris (appellant) and Zafar, Nasir alias Lachho, Hakim alias Hakoo, Nosher and Muhammad Yar, accused of case FIR No.842/2009, dated 04.11.2009, under sections 302/148/149 of the Pakistan Penal Code, 1860, registered at Police Station Bhowana, District Chiniot, at the instance of Mst. Fatima Bibi complainant (PW-3), were tried by the learned Addl. Sessions Judge, Chiniot, for committing intentional murder of Noor Muhammad. At the conclusion of the trial vide judgment dated 21.03.2011, accused Zafar, Nasir, Hakim, Nosher and Muhammad Yar were acquitted of the charge, whereas Waris appellant was convicted and sentenced as under:-

> "under section 302(b), P.P.C. to death as Tazir with a direction to pay Rs.3,00,000/- to the legal heirs of deceased as compensation under section 544-A, Cr.P.C., and in default in payment of the amount of compensation, undergo Simple Imprisonment for six months"

2. Waris convict has lodged Crl. Appeal No.116-J/2011 from Jail against his conviction and sentence. Mst. Fatima Bibi complainant has filed Criminal Appeal No.700 of 2011 against the acquittal of respondents No.1 to 5. Murder Reference No.222 of 2011 was also sent to us under section 374, Cr.P.C. for confirmation, or otherwise, of death sentence of Waris. All the matters are being disposed of through this judgment.

3. Brief facts of the prosecution case, as disclosed in FIR Exh.PB/1 registered on the basis of statement/ complaint (Exh.PB) of Mst. Fatima Bibi complainant (PW-3), were that on 04.11.2009 at about, 8.00 A.M.,

the appellant armed with Kassi along with acquitted co-accused, some of them armed with their respective weapons and some empty-handed, committed murder of Noor Muhammad.
Motive for the occurrence was the dispute of lease of the land of Auqaf Department between the deceased and Waris appellant.

4. Sarfraz Hussain Sub-Inspector (PW-9) after receiving information about the present incident on 04.11.2009 proceeded to the place of occurrence along with other constables and recorded the statement (Exh.PB) of Mst. Fatima Bibi complainant and sent the same to the police station for registration of formal FIR. Thereafter, he prepared the injury statement Exh.PE, inquest report Exh.PF of the deceased and sent the dead body to the mortuary through Sajid Ali Constable for postmortem examination. He collected the blood-stained earth from the place of occurrence, sealed it into parcel and secured vide memo Exh.PC. After postmortem examination Sajid Ali C/487 produced before him the last-worn clothe of the deceased i.e. chadar (P.2) which he secured vide memo Exh.PH. He recorded the statements of the witnesses under section 161, Cr.P.C. and thereafter he was transferred on 13.11.2009.

Muhammad Akram SI (PW-10) was entrusted the investigation of this case on 15.11.2009. On 8.12.2009 he arrested Waris appellant and acquitted accused Zafar. On 09.12.2009, Waris appellant during interrogation got recovered weapon of offence Kassi (P.1) from his house, which was secured vide memo Exh.PG. Thereafter, he got prepared the report under section 173, Cr.P.C.

5. Dr. Muhammad Rehmat Ullah, Medical Officer, RHC Bhowana (PW-5), on 4.11.2009 conducted postmortem examination on the dead body of Noor Muhammad and found five injuries on his person. In his opinion, death was caused due to haemorrhage and shock because of injury to vital organ, i.e. the brain, which was sufficient to cause death in ordinary course of nature. Injuries Nos.1 to 3 individually and collectively were sufficient to cause death. All the injuries were ante mortem. Injuries Nos.1 to 4 were caused by sharp-edged weapon whereas injury No.5 was

caused by blunt means. Injury No.4 was jurh ghayr jaifah Badiah and injury No.5 was jurh ghayr jaifah damiah. Probable time between injury and death was immediate and between death and postmortem was about 4 to 12 hours. Exh.PD was the correct carbon copy of the postmortem report and Exh.PD/1 was pictorial diagram of the injuries. He also endorsed injury statement Exh.PE and inquest report Exh. PF.

6. After submission of the challan, the learned trial court framed charge under sections 302/148/149, P.P.C. against the appellant and acquitted accused on 24.02.2010, to which they pleaded not guilty and claimed trial.

7. In order to prove its case against the appellant and the acquitted accused, prosecution produced ten, witnesses in all. Haq Nawaz, Halqa Patwari (PW-1) prepared the scaled site plan of the place of occurrence Exh.PA and Exh.PA/1 on 09.11.2009 on the directions of the investigating officer and on the pointation of the PWs. Mst. Fatima Bibi (PW-3) was complainant of the case and eye-witness of the occurrence. Umar Hayat of tender-age (PW-4) also gave the eye-witness account of the occurrence. Dr. Muhammad Rehmat Ullah conducted postmortem examination on the dead body of Noor Muhammad deceased. Saif Ullah ASI (PW-6) drafted the formal FIR Exh.PB/ 1 on the basis of complaint Exh.PB. Imran Ali C/266 (PW-7) witnessed the recovery of weapon of offence Kassi (P.1) effected from the appellant. Sajid Ali C/487 (PW-8) escorted the dead body of Noor Muhammad to RHC Bhowana on 4.11.2010 for postmortem examination and also produced the last worn blood stained chader (P.2) of the deceased before the investigating officer. Sarfraz Hussain SI (PW-9) and Muhammad Akram SI (PW-10) investigated the case. Learned DDPP gave up Mst. Jannat Bibi PW being unnecessary and after tendering in evidence report of the Chemical Examiner Exh.PJ and report of the Serologist Exh.PK closed the prosecution evidence.

8. At the close of the prosecution evidence, the appellant Waris was examined under section 342, Cr.P.C. In answer to question No.6 "Why

this case against you and why the PWs have deposed against you", appellant Waris replied in the following manner:-

> "The PWs are related inter-se and also bore grudge against me. It was a blind murder and none of PW had seen it. I and other my brothers falsely roped in this case on the suspicion. The complainant party also nourished a grudge against me. My co-accused afar got registered a criminal case against Fatima Bibi PW, Noor Muhammad deceased and Mulazim etc. The agricultural land of Anjuman Hussainia owned by Sarfraz Mahdi and my brother namely Zafar accused had taken the land on lease. Noor Muhammad deceased had also earned enmity and having a dispute with Nasir son of Shahamand and said Noor Muhammad had initiated civil and criminal cases against many persons. Father-in-law of Noor Muhammad deceased booked an abduction case against him in connection of his daughter Mst. Jannat Bibi. The police reached at the spot after receiving the information of blind murder and escorted the dead body of Noor Muhammad deceased to mortuary. Later on police called Mst. Fatima for becoming the complainant of this case. Said Fatima involved me and other co-accused merely on suspicion."

Out of the acquitted accused, three accused, namely, Hakim alias Hakoo, Nasir alias Lachoo and Zafar adopted the reply of their co-accused/Waris (appellant) offered to the question "Why this case against you and why the PWs have deposed against you".

Remaining acquitted co-accused, namely Nosher and Muhammad Yar in answer to the same question "Why this case against you and why the PWs have deposed against you" replied as under:

> "I am innocent and falsely implicated in this case."

Neither the appellant nor any of the acquitted accused made statement on oath under section 340(2), Cr.P.C. nor they opted to produce any defence evidence.

9. After arguing the case at some length, learned counsel for the appellant submits that mitigating circumstances are floating from the FIR and the statements of the witnesses. To augment his contention, learned counsel relied upon "Mst. Fazal Bibi v. Muhammad Rafiq and another" (1984 SCMR 1373) and "Muhammad Iqbal v. The State" (1990 ALD 693(1)). He lastly submits that it is not a case of capital sentence.

10. Learned Deputy Prosecutor General assisted by learned counsel for the complainant opposed the submission with vehemence and submitted that the appellant along with his co-accused was nominated in promptly lodged FIR with specific role of causing fatal injuries to the deceased which finds support from the medical evidence available on record; that the witnesses have no grudge or grouse to falsely implicate the appellant; that the case of the prosecution was corroborated by medical and recovery effected from the appellant and that the normal penalty provided under section 302(b), P.P.C. for committing qatl-i-amd was death. The judgment of the trial court was balanced and not opened to exception, learned counsel further submitted.

11. We have heard the learned counsel for the parties at length and gone through the entire evidence minutely. As far as the implication of the appellant in this case is concerned, we have no doubt in our mind that it was the appellant who committed murder of the deceased. Learned counsel for the appellant has rightly submitted that mitigating circumstances are flowing from the first information report which was lodged with reasonable promptitude. The prosecution set up a motive but could not prove. We reproduce relevant part as mentioned in the FIR.

12. The complainant in her statement have admitted that she had not provided any proof about litigation between Waris and Noor Muhammad regarding the motive of this case. She was unaware if she produced some

witness in the evidence to prove motive. She also admitted that no quarrel took place 8/9 days prior to the occurrence between the accused and Noor Muhammad. Umar Hayat PW.4 also failed to provide deeper details regarding motive. Learned Deputy Prosecutor General could not persuade this Court that the motive was proved by the prosecution at trial. The Investigating Officer had also admitted this fact that the complainant did not produce any document regarding the motive of the occurrence, thus, motive as set up by the prosecution was not proved. All the accused were armed with Kassi's. The witnesses had seen the entire occurrence while standing at one place and in the same condition but none of them caused any injury either to the complainant or Umar Hayat despite the fact that they were at the mercy of the accused and this fact has been admitted by Umar Hayat in his statement. There appears no premeditation and pre-consultation. The co-accused of the appellant has been acquitted by the trial court on the same set of evidence. So it is a fit case which calls for interference by this Court only to the extent of sentence.

13. After having heard the learned counsel for the parties and taking into consideration submissions made by them respectively, having gone through the record with their able assistance and relying upon the judgments cited by the learned counsel for the appellant we are of the opinion that mitigating circumstances exists in favour of the appellant, so while maintaining conviction of the appellant under section 302(b), P.P.C. we convert his sentence to imprisonment for life. Benefit of section 382-B, Cr.P.C. shall also be extended. Reliance in this respect can be placed on the cases of "Naveed alias Needu and others v. The State and others" (2014 SCMR 1464), "Maqsood Khan v. The State and another" (2003 PCr.LJ 1165), "Saadullah Jan v. The State and another" (2002 PCr.LJ 1463), "Muhammad Ashraf v. Tahir alias Billoo and another" (2005 SCMR 383) and "Mst. Sughra Begum and another v. Qaiser Pervez and others" (2015 SCMR 1142).

14. With the above modification in sentence Criminal Appeal No.116-J of 2011 titled "Waris v. The State" filed by the appellant is hereby dismissed. Death sentence of appellant, namely, Waris is not confirmed

and Murder Reference No.222 of 2011 titled "The State v. Waris" is answered in the NEGATIVE.

15. For the same reasons, Criminal Appeal No.700 of 2011 titled "Mst. Fatima Bibi v. Zafar, etc." filed by the complainant against acquittal of respondents Nos.1 to 5 is DISMISSED.
HBT/W-18/L Sentence reduced.

2016 M L D 1325
[Lahore]
Before Muhammad Tariq Abbasi and Sardar Ahmed Naeem, JJ
MUHAMMAD SAFDAR through Attorney---Appellant
Versus
The STATE---Respondent

Criminal Appeal No.1114 of 2011 and Murder Reference No.272 of 2011, heard on 7th October, 2015.

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

----S.302----Qatl-i-amd---Appreciation of evidence---Motive not proved---Postmortem report being silent, and not containing necessary details, as to cause of death---Delay in lodging FIR was suggestive of consultation and deliberation---Recovery of dead body from house of accused alone would not show that accused had killed the deceased---Accused was alleged to have murdered his wife by manually strangulating her---Trial court, having convicted the accused under S. 302(b), P.P.C., sentenced him to death with direction to pay one hundred thousand to legal heir of the deceased---Doctor, while relying upon report of Chemical Examiner, had opined that cause of death was asphyxia due to throttling and due to injuries, which were ante-mortem in nature---Large number of symptoms were absent, which ordinarily pointed out to cause of death being asphyxia by throttling---Prosecution had failed to give necessary details regarding alleged cause of death---High Court observed that where there was contradiction between medical and ocular account, the ocular testimony was to be preferred over medical evidence---Place of occurrence was residential room of house of the deceased---Eye-witnesses were in unison that they were healthy and energetic than the accused---Nothing had prevented both the eye-witnesses to move forward to rescue the deceased, particularly, when the accused was empty handed---Eye-witnesses had not offered any resistance to the accused to save life of the deceased, which was unusual and unnatural---Eye-witnesses, having seen the incident, should have reported the same with reasonable promptitude---Eye-witnesses informed the complainant, brother of deceased, telephonically, and FIR was registered upon his arrival, which suggested consultation or deliberation---Prosecution had not examined any independent witness---Witnesses, being closely related to complainant and being inmates of house of the deceased, were best witnesses, but their evidence found no corroboration from material available on record---Dead body of the deceased although had been recovered from house of the

accused, but the same would not show that deceased had been killed by him---Motive set by prosecution was that the accused intended to contract second marriage as the deceased (lady) was issueless; however, no information had been provided regarding the lady with whom he intended to get married---Prosecution witnesses had not even mentioned name of the lady---Said motive was, therefore, not proved---Prosecution could not prove that deceased had met un-natural death as result of strangulation---Prosecution, in circumstances, had failed to bring home guilt of the accused beyond any shadow of doubt---High Court, setting aside conviction, acquitted the accused---Appeal against conviction was accepted in circumstances.

Abdul Majeed v. The State 2011 SCMR 941; Saeed Ahmad v. The State 2015 SCMR 710; Ali Sher v. The State 2015 SCMR 142; Muhammad Rafique v. The State 2014 SCMR 1698; Muhammad Ashraf v. The State 2012 SCMR 419 and Abid Ali and 2 others v. The State 2011 SCMR 208 ref.

Abdur Rehman v. The State 1998 SCMR 1778 and Riaz Masih alias Bhola v. The State 2001 YLR 279 rel.

(b) Criminal trial---

----Medical examination/postmortem report---Object and scope---Medical examination or post mortem of deceased is done for limited purpose of only corroboration and support the substantive or circumstantial evidence.

Abdur Rehman v. The State 1998 SCMR 1778 rel.

(c) Criminal trial---

---Medical examination or postmortem report, absence of---Effect---Failure to conduct postmortem or medical examination of deceased would not allow to disbelieve that deceased has died 'unnatural' death.

Abdur Rehman v. The State 1998 SCMR 1778 rel.

(d) Medical jurisprudence---

----'Asphyxia' and 'Asphyxiation'---Meaning and scope---Asphyxia or asphyxiation come from Ancient Greek---Asphyxia means 'without' and 'sphyxis' means 'squeeze', which is a condition in which there is severely deficient supply of oxygen to body, that arises from abnormal breathing---Asphyxiation is defined as hypoxia or anoxia that is caused when respiratory function is hampered by interference with mechanics of breathing.

(e) Medical jurisprudence---

----Strangulation--- Meaning and scope---Neck anatomy---Injuries resulting from strangulation---Determination---Strangulation is a form of asphyxia (lack of oxygen) characterized by closure of blood vessels or air passages of neck as result of external pressure on the neck---Rudimentary knowledge of neck anatomy is critical in order to

understand adequately the clinical features of strangled victim---General clinical sequence of victim, who is being strangled, is one of severe pain followed by unconsciousness, which is followed by brain death---Victim loses consciousness by any one or all of the following: blocking of carotid arteries (depriving brain of oxygen); blocking of jugular veins (preventing deoxygenated blood from exiting brain); and, closing off airway, causing victim to be unable to breathe---Visible injuries to neck include scratches, abrasion and scrapes---Said injuries may be from victim's own fingernails as defensive manoeuvre, but the same commonly are combination of lesions caused by both victim's and assailant's fingernails---Lesion location varies depending on whether victim or assailant has used one or two hands, and whether the assailant has strangled the victim from the front or back---Three types of fingernail markings may occur, singly or in combination: impression; scratch; or claw marks---Chin abrasions are also common in victims of manual strangulation as victim lowers the chin in an instinctive effort to protect neck and in so doing , scrapes the chin against the assailant's hands.

Barrister Salman Safdar for Appellant.

Tariq Javed, District Public Prosecutor for the State.

Mian Javed Iqbal for the Complainant.

Date of hearing: 7th October, 2015.

JUDGMENT

SARDAR AHMED NAEEM, J.---Muhammad Safdar (appellant), accused of case FIR No.80/2010 dated 06.02.2010, under section 302 of the Pakistan Penal Code, 1860, registered at Police Station, City Gojra, District Toba Tek Singh, at the instance of Shoukat Ali, complainant, was tried by the learned Addl. Sessions Judge, Gojra for committing Qatl-i-Amd of Mst. Aysha. At the conclusion of the trial, vide judgment dated 15.06.2011, the appellant was convicted and sentenced as under:--

> "under section 302(b), P.P.C. to death with a direction to pay Rs.1,00,000/- to the legal heirs of the deceased as compensation under section 544-A, Cr.P.C., and in case of default of payment thereof, undergo simple imprisonment for six months".

2. The appellant has challenged his conviction and sentence through Criminal Appeal No.1114 of 2011. The learned trial Court has also sent Murder Reference No.272 of 2011, under section 374, Cr.P.C. for confirmation, or otherwise, of death sentence of the appellant. We intend to decide both the matters through this judgment.

3. Prosecution story, as narrated by Shaukat Ali complainant in his complaint Exh.PA, on the basis whereof formal FIR Exh.PA/1 was registered, was that on 06.02.2010 at 2.00 P.M. the appellant committed intentional murder of his

wife/complainant's sister, namely, Mst. Aysha Bibi in her house situated in Chak No.298/JB, within the area of Police Station City Gojra, District Toba Tek Singh. The occurrence was witnessed by Muhammad Sarwar and Muhammad Shahid Nadeem PWs.

Motive behind the occurrence was that accused always used to chastise his wife for not having any offspring and intended to contract second marriage, therefore, he time and again extended threats to kill her.

4. Muhammad Quresh, SI (PW-10) after getting the case registered on 06.02.2010 on the written application Exh.PA moved by Shoukat Ali complainant, proceeded to the place of occurrence and examined the dead body of Mst. Aysha, prepared injury statement and inquest report. He handed over the dead body along with police papers to Javed Iqbal 802/C for autopsy. He inspected the place of occurrence along with PWs, prepared site plan Exh.PI. After postmortem examination Javed Iqbal 802/C produced before him the last worn clothes of the deceased i.e. Qameez P-1, Shalwar P-2 and Dopatta P-3 along with three sealed jars, which he secured vide recovery memo Exh.PJ. On 12.02.2010, he got non-bailable warrants of arrest of Safdar, accused, and handed over to Muhammad Akhtar 739/C for execution. On 17.02.2010, he obtained the proclamation of Safdar accused. On 18.02.2010, he arrested Safdar accused. On 19.02.2010, he obtained physical remand of the accused. He got confronted both the parties on 20.02.2010. On 21.02.2010, he got sent the accused to judicial lock up. On 22.10.2010, he recorded statements of the Moharrir and Javed Iqbal 802/C with regard to sending of parcels to the office of Chemical Examiner, Punjab, Lahore. On 23.02.2010, he got challaned the accused.

5. Dr. Faiza Kanwal (PW-8), conducted postmortem examination of Mst. Aysha Bibi on 07.02.2010 and found four injuries on her person. Time between injuries and death was immediate and between death and postmortem examination was within 12 to 24 hours. Exh.PC was the correct carbon copy of Postmortem examination report of Mst. Aysha Bibi deceased which was in her handwriting and bore her signatures. Exh.PC/1 and Exh.PC/1-2 were the pictorial diagrams of the seats of injuries which were also in her handwriting and bore her signatures. She also endorsed the injury statement of Mst. Aysha Bibi deceased Exh.PD and inquest report Exh.PE. On receipt of report of Chemical Examiner, Punjab, Lahore Exh.PF, she made her report Exh.PG which was in her handwriting and bore her signatures. According to her findings on report Exh.PG, cause of death in this case was asphyxia due to throttling on account of injuries Nos.1, 2 and 4 which were ante mortem and sufficient to cause death in ordinary course of nature. However, the injury No.3 was also ante mortem in nature but was insufficient to cause death.

6. Learned trial court after receipt of the challan, formulated charge sheet against the appellant on 31.03.2010, under section 302, P.P.C., to which he pleaded not guilty and claimed to be tried.

7. In order to prove its case against the appellant, prosecution produced ten (10) witnesses in all. Muhammad Sarwar (PW-6) and Shahid Nadeem (PW-7) furnished the ocular account of the occurrence. Zahid Mahmood ASI, PW.2 on receipt of complaint Exh.PA recorded formal FIR Exh.PA/1. Javed Iqbal 802/C (PW.3) deposited the three sealed parcels said to contain three boxes and three envelopes in the office of Chemical Examiner, Lahore. Mian Muhammad Rafiq, Draftsman (PW.4) prepared the scaled site-plan Exh.PB and Exh.PB/1 of the place of occurrence. Shoukat Ali PW.5 reiterated the contents of his complaint Exh.PA. Muhammad Quresh, SI (PW-10) investigated the case, who has already been discussed above. Dr. Faiza Kanwal (PW-8), as discussed above, performed autopsy of the deceased, namely Mst. Ayesha Bibi. Rest of the witnesses are formal in nature, therefore, need not be discussed. Learned DDPP after tendering in evidence attested copy of report of Forensic Histopathologist Exh.PK closed the prosecution evidence.

8. At the close of prosecution evidence, Muhammad Safdar (appellant) was examined under section 342, Cr.P.C. wherein he refuted the prosecution evidence and pleaded innocence. While responding to question No.10 "Why this case against you and why the PWs have deposed against you" he replied in the following manner:--

> " The complainant is real brother of Mst. Asia Bibi alias Aysha deceased. From Dubai, I sent money for my wife, who was living at Faisalabad with her parents, through complainant and he misappropriated the said money and to avoid the explanation regarding said money he changed the natural death of my wife Mst. Asia Bibi alias Aysha into a murder with the connivance of local police and doctor. The other witnesses of the alleged occurrence are also his behnoi and real brother who are under the influence of the complainant. No independent witness from the vicinity of occurrence has deposed against me or about the alleged motive of the occurrence"

The appellant neither made his statement on oath under section 340 (2) Cr.P.C. nor opted to produce any defence evidence.

9. Learned counsel for the appellant argued that the ocular account does not inspire confidence as both the witnesses are interested and has reason to depose falsely against the appellant. It was submitted that the prosecution evidence is contradictory and that ocular account is at variance with the medical evidence in this case. He argued that the evidence regarding existence of motive was very weak and although the occurrence had taken place within the house of the appellant but no independent witness was cited or produced by the prosecution and that the PWs examined in this case are closely related to each other and were chance witnesses. Learned counsel

further contended that it was unseen occurrence and that the conduct of the eye-witnesses was un-natural. The eye-witnesses were real uncle and behnoi of the deceased but they did not intercept the appellant till the completion of the incident, in particular, when he was empty handed and physically weaker than the eye-witnesses, which makes the story of the prosecution improbable. Learned counsel bitterly criticized that no cause of death was mentioned by the Medical Officer at the time of postmortem examination and then, death was found to be a result of strangulation/asphyxia prior to report of Histopathologist and that the Medical Officer found all the injuries sustained by the deceased as ante-mortem, after considerable time of the postmortem examination, which belies the story of the prosecution. The defence version if taken into juxtaposition appears to be reasonable/probable; that the motive in this case was not proved and the prosecution failed to prove its case beyond reasonable doubt against the appellant, thus, he was entitled to acquittal. In support of above contentions, learned counsel relied upon "Abdul Majeed v. The State" (2011 SCMR 941), "Saeed Ahmad v. The State" (2015 SCMR 710), "Ali Sher v. The State" (2015 SCMR 142), "Muhammad Rafique v. The State" (2014 SCMR 1698) "Muhammad Ashraf v. The State" (2012 SCMR 419) and "Abid Ali and 2 others v. The State" (2011 SCMR 208).

10. Learned District Public Prosecutor assisted by the learned counsel for the complainant submitted that the witnesses for the prosecution have no personal animosity with the appellant to falsely implicate him; that all the witnesses are natural witnesses being close relative of the deceased inside the house of the appellant and that their evidence cannot be discarded merely on the basis of their relationship with the deceased/inter-se; that the medical evidence corroborated the prosecution version; that the medical evidence was never challenged in cross-examination; that it was a daylight occurrence, parties were closely related to each other, thus, there was no question of mis-identity; that it was a single accused and substitution in such like cases is a real phenomenon; that the discrepancies pointed out by the learned defence counsel were minor in nature; that the defence was not able to demolish the prosecution case and the witnesses firmly withstood the test of cross examination; that the prosecution proved its case against the appellant beyond reasonable doubt and that he deserves normal penalty of death as provided under the law

11. We have heard the learned counsel for the contending parties and gone through the record of the case.

12. The question as to the cause of death was central in this case, as argued by the learned counsel for the appellant. Did the victim die as a result of throttling caused by

the appellant? He bitterly criticized the Postmortem report with specific reference to its contents and statement of the Medical Officer. The postmortem report Exh.PC is silent about the cause of death. In order to determine the cause of death in this case, the following points deserve consideration:--

i) The statement of the Medical Officer/contents of the postmortem report.

ii) The symptoms regarding asphyxia, if any, observed by the Medical Officer.

iii) The final opinion of the Medical Officer about cause of death based on the report of Chemical Examiner four months prior to the report of Histopathologist, in particular, when she had not declared the injuries as ante-mortem in the postmortem report.

As mentioned above, the postmortem report is silent about cause of death. However, Dr. Faiza Kanwal (PW.8) while relying upon the report of Chemical Examiner (Exh.PF) opined that the cause of death in this case was asphyxia due to throttling and due to injuries Nos.1, 2 and 4 ante-mortem in nature.

Asphyxia

Asphyxia or asphyxiation from Ancient Greek a "without" and sphyxis, "squeeze" is a condition of severely deficient supply of oxygen to the body that arises from abnormal breathing. Asphyxia is something that many people died of throughout the world and it is something that many people think simply the act of suffocation or smothering a victim until he can no longer breathe. Asphyxiation is defined as hypoxia/anoxia that is caused when respiratory function is hampered by interference with the mechanics of breathing.

In this case, the deceased died of strangulation/throttling.

Strangulation

Strangulation is defined as form of asphyxia (lack of oxygen) characterized by closure of blood vessels/or air passages of neck as a result of external pressure on the neck.

Manual Strangulation (throttling) is usually done with the hands.

Neck anatomy

A rudimentary knowledge of neck anatomy is critical in order to understand adequately the clinical features of strangled victim.

The hyoid bone a small horseshoe shaped bone in the neck helps to support the tongue.

The larynx, made up of cartilage, not bone, consist of two parts: the thyroid cartilage and the tracheal rings.

Carotids are the major vessels that transport oxygenated blood from the heart and lungs to the brain. These are the arteries at the side of the neck that persons administering CPR (cardio-pulmonary resuscitation) check for pulses.

Jugular veins are the major vessels that transport deoxygenated blood from the brain back to the heart.

The general clinical sequence of a victim who is being strangled is one of severe pain followed by unconsciousness, followed by brain death. The victim will lose consciousness by any one or all of the following:-

i. Blocking of the carotid arteries (depriving the brain of oxygen);

ii. Blocking of the jugular veins (preventing deoxygenated blood from exiting the brain;) and

iii. Closing off the airway, causing the victim to be unable to breathe

Visible injuries to the neck include scratches, abrasion and scrapes. These may be from the victim's own fingernails as a defensive maneuver, but commonly are a combination of lesions caused by both the victim and the assailant fingernails. Lesion location varies depending on whether the victim or assailant used one or two hands and whether the assailant strangled the victim from the front or back. Three types of fingernail marking may occur, singly or in combination: impression, scratch, or claw marks. Chin abrasions are also common in victims of manual strangulation as the victim lowers the chin in an instinctive effort to protect the neck and in so doing, scrapes the chin against the assailant's hands.

We wish the expert would have been forthright in her view in regard to the cause of death. A different conclusion was required to be arrived at keeping in view the fact that a large number of symptoms were absent which ordinarily point out to the cause of death of asphyxia by throttling. Even, the prosecution failed to furnish the following details:--

i. Whether deceased was strangled with one or two hands? Forearms?

ii. How long did the accused strangled the deceased?

iii. How many time and how many different methods were used to strangled the deceased?

iv. Was the deceased thrown against the wall, floor or ground?

v. How much pressure or how hard was the grip?

vi. Did the deceased have difficult breathing? and

vii. Did the deceased attempt to protect herself?

In view of the above it is not proved by the prosecution that the deceased met the un-natural death as result of strangulation. Admittedly, the postmortem examination of the deceased was conducted; however, the nature of the injuries and cause of death was not mentioned in the said report. The defence taking the benefit of the same had agitated that Mst. Aysha did not meet violent death. However, the fact that she died on 06.02.2010 is not disputed. It is well settled law that medical examination/postmortem examination of a deceased is made for limited purposes only to corroborate and support the substantive /circumstantial evidence. Failure to conduct postmortem/medical examination of the deceased would not allow to disbelieve that the deceased died natural death. Respectful reliance can be placed on case titled "Abdur Rehman v. The State" (1998 SCMR 1778).

In another case titled "Riaz Masih alias Bhola v. The State" (2001 YLR 279) where there was contradiction between medical and ocular account, it was held that the ocular testimony is to be preferred over medical evidence and that if ocular account proves the injuries and the unnatural death, the same cannot be brushed aside only because the medical examination/postmortem examination was not conducted. Assuming that postmortem examination was not conducted in the instant case, therefore, we decided to undertake the exercise to evaluate the ocular account furnished by PWs Muhammad Sarwar (PW-6) and Shahid Nadeem (PW-7) at trial.

13. The incident in the present case took place on 06.02.2010 at about 2.00 p.m inside the house of the appellant situated within the area of Chak No.298-JB Tehsil Gojra, District Toba Tek Singh. The distance between the place of occurrence and Police Station was two kilometer. The FIR Exh.PA/I was registered at the instance of Shoukat Ali, the real brother of the deceased. However, he was not the eye-witness and was informed regarding this occurrence by Muhammad Sarwar PW.6 and Muhammad Shahid Nadeem PW.7. They were sent to the house of the deceased by the complainant so that they could resolve the dispute between the appellant and the deceased. The eye-witnesses, at trial, deposed that on 06.02.2010, they reached in the house of the deceased at about 11.00 a.m and beseeched the appellant that the deceased may not be teased and then, at 2.00 p.m., the appellant had altercation with the deceased and strangulated her to death. The place of occurrence was a residential room of the house of the deceased. They raised hue and cry and informed the complainant telephonically regarding this occurrence and upon his arrival, the proceedings in this case were initiated. The eye-witnesses were in unison that they were healthy/energetic than the appellant but they did nothing to save the life of the deceased, though, Muhammad Shahid Nadeem PW.7 claimed to have intervened/ intercepted to save her from the clutches of the appellant. There was no hurdle in

their way. They all were present/sitting in the same room. What prevented both the eye-witnesses not to move forward to rescue the deceased, in particular, when the appellant was empty handed or they only had gone to the place of occurrence just to witness the incident. If it is believed that the appellant said in their presence that he would murder the deceased, it was not difficult for him to eliminate her, in their absence, any time as she was living with him. How did the appellant run away from the place of occurrence and why did the witnesses allow him to leave the place of occurrence was also a question mark. They have not offered any resistance to the appellant to save the life of the deceased, which is un-natural/unusual. If they had seen the incident, matter should have been reported to the police with reasonable promptitude. They informed the complainant telephonically and the FIR was registered upon his arrival, which suggests consultation/deliberation. No independent witness was examined by the prosecution during trial. Admittedly, the occurrence took place inside the house of the appellant and witnesses being closely related to the complainant and being inmates of the house/family members of the deceased were the best witnesses but their evidence finds no corroboration from the material available on record. Either they have not seen the occurrence or they came to the crime scene after having information of the incident or the occurrence took place in a different mode as claimed by the prosecution. No doubt, the dead body of the deceased was seized from the house of the appellant but this alone would not show that the deceased was killed by him.

It was a case of manual strangulation and thus, there was no recovery. Regarding motive, it was mentioned in Exh.PA that the appellant intended to contract second marriage as the deceased was issueless, however, no information was provided regarding the lady with whom he intended to get married even her name was not mentioned by any of the witness during trial and thus, motive as set up by the prosecution was not proved.

14. As a result of the observations made above, we have come to the conclusion that the prosecution has failed to bring home the guilt to the appellant beyond any shadow of doubt and that the learned trial Court was not justified in convicting him. We, accordingly, accept the appeal and set aside the conviction and sentence by acquitting the appellant. He be released forthwith, if not required in any other criminal case.

15. The Murder Reference is answered in the Negative and death sentence is not confirmed.

SL/M-357/L Appeal allowed.

2016 Y L R 1863
[Lahore]
Before Sardar Ahmed Naeem, J
ALI RAZA---Petitioner
Versus
The STATE and another---Respondents

Crl. Misc. No.1941-B of 2016, decided on 3rd March, 2016.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), S.440---Mischief committed after preparation made for causing death or hurt---Pre-arrest bail, refusal of---Accused was specifically nominated in the FIR with specific role of firing at the complainant and committing mischief---Investigating Officer, during the spot inspection, took into possession ten empties---Prosecution witnesses implicated accused in their statements recorded under S. 161, Cr.P.C.---Recovery was yet to be effected---Accused failed to establish mala fide on the part of the complainant, or the Police for his false involvement in the case---Accused failed to make out a case for confirmation of his ad interim pre-arrest bail---Bail petition being meritless, was dismissed, in circumstances.

Shahzad Saleem Warraich for Petitioner.

Abdul Jabbar, Deputy District Public Prosecutor along with Sabir Nasir, ASI for the State.

Muhammad Shoaib Khokhar for the Complainant.

ORDER

SARDAR AHMED NAEEM, J.---The petitioner seeks pre-arrest bail in case FIR No.422/15, dated 11.08.2015, under section 440, P.P.C., registered at Police Station Bhatti Gate, Lahore.

2. Allegedly, the petitioner while armed with Pistol attempted at the life of the complainant and committed mischief.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed:--

i. That the petitioner was specifically nominate in the FIR with specific role of firing at the complainant and committing mischief;

ii. That during the spot inspection, the Investigating Officer took into possession ten empties;

iii. That the prosecution witnesses implicated the petitioner in their statements recorded under section 161, Cr.P.C.;

iv. That the recovery was yet to be effected;

v. That the petitioner failed to establish mala fide on the part of the complainant or the police for his false involvement in this case; and

vi. That the petitioner failed to make out a case for confirmation of his ad-interim pre-arrest bail.

4. For the reasons mentioned above, there is no merit in this petition which is whereby dismissed.

HBT/A-47/L Bail refused.

PLJ 2016 Cr.C. (Lahore) 197
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**
MUHAMMAD AMJAD--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 5235-B of 2015, decided on 18.11.2015.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 462-D--Bail before arrest, confirmed--Principle of consistency--Case of petitioner is at better footing than that of co-accused, who had been allowed pre-arrest bail by High Court thus, principle of consistency is applicable to petitioner's case. [P. 198] A & B

Mr. Muhammad Bilal Butt, Advocate for Petitioner.

Date of hearing: 18.11.2015.

ORDER

The petitioner, namely, Muhammad Amjad seeks pre-arrest bail in case FIR No. 151/2013, dated 27.8.2013, under Sections 406/109/462-E and 462-D, PPC, registered at Police Station FIA, Multan, at the instance of Irtaza Haider, Assistant Director, FIA, Multan.

2. Allegedly, the petitioner committed theft of gas.

3. Learned counsel for the petitioner argued the application at some length and focused on the point that the co-accused of the petitioner with similar role have been admitted to pre-arrest bail by the Court *vide* order dated 11.06.2015 passed in Criminal Misc. No. 977-B/2015 titled *"Muhammad Taufique vs. The State, etc"* and Criminal Misc. No. 1620-B/2015 titled *"Abdul Hameed vs. The State and another"*. He further added that allegedly the petitioner was recipient of that illegal supply made/arranged by the co-accused and since the detection bill has already been deposited with the concerned quarter and as the requisite connections have already been restored, thus, the arrest of the petitioner would not serve any purpose to the prosecution. Learned counsel referring to the case reported as *Azmatullah vs The*

State and another (2011 SCMR 1935), and *Shaukat Ali vs. The State* (2008 P.Cr.R. 873) canvassed for confirmation of pre-arrest bail of the petitioner.

4. No-body entered appearance on behalf of the State despite valid service.

5. After hearing the arguments of the learned counsel for the petitioner and perusing the record, it was observed that the case of the petitioner is at better footing than that of co-accused, namely, Muhammad Taufique and Abdul Hameed who have been allowed pre-arrest bail by this Court *vide* order dated 11.06.2015, passed in Criminal Misc. No. 977-B/2015 and Criminal Misc. No. 1620-B/2015, thus, principle of consistency is applicable to the petitioner's case.

6. For the reasons mentioned above, this application is accepted subject to furnishing fresh 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 within seven days pre-arrest bail earlier granted to the petitioner *vide* order dated 01.09.2015 is confirmed.

(R.A.) Bail allowed

PLJ 2016 Cr.C. (Lahore) 226
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**
MUHAMMAD JAFFAR and 5 other--Petitioners
versus
STATE and another--Respondents

Crl. Rev. No. 70 of 2015, heard on 12.11.2015.

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

----Ss. 376, 380, 496(A) & 365-B--Criminal Procedure Code, 1898--S. 265-K--Nominated in FIR with specific role--Cancellation of FIR--Recommendations of investigating agency, disagreed by magistrate--Acquittal application was dismissed--Challenge to--Criminal jurisprudence--Sufficient material--Validity--It is settled principle of law that neither prosecution nor defence should be deprived of producing its evidence merely because according to Court either evidence was not necessary/sufficient or not required by Court for recording verdict of acquittal. [P. 227] A

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

----Ss. 161 & 265-K--Acquittal--Nominated in FIR with specific role--Criminal jurisdiction--Validity--Under criminal jurisprudence both parties should be provided opportunity to put and prove its case before Court and provision of Section 265-K, Cr.P.C. are not meant to bury case of prosecution in its infancy even otherwise, there was no mention in application moved under Section 265-K, Cr.P.C. by petitioner that charge was groundless or there was no likelihood of petitioner under any offence, only ground to invoke Section 265-K, Cr.P.C.--Order of ASJ was neither illegal nor suffering from jurisdictional defect and calls for no interference by High Court. [P. 228] B

Mr. Saif Ullah Khan, Advocate for Petitioners.

Mr. Sarfraz Ahmed Khan Khichi, D.D.P.P. for State.

Mr. Muhammad Faisal Bashir Chaudhry, Advocate for Respondent No. 2.

Date of hearing: 12.11.2015.

JUDGMENT

The petitioners are nominated accused of case F.I.R. No. 124/2013 dated 20.8.2013, under Sections 376, 380, 496-A, 365-B, PPC, registered at Police Station Haji Pur, District Rajanpur.

2. After the investigation, the cancellation of the F.I.R. was recommended by the investigating agency, disagreed by the learned Judicial Magistrate. The petitioners moved an application under Section 265-K, Cr.P.C. seeking their acquittal, dismissed by the trial Court *vide* order dated 25.02.2015, being impugned before the Court.

3. Learned counsel for the petitioners submitted that *Mst.* Nasreen Bibi, the alleged abductee was the wedded wife of Abid, one of the petitioner and thus no offence was made out but the learned trial Court proceeded to dismiss the application moved under Section 265-K, Cr.P.C. in great haste without appreciating/considering the law on the point. It was submitted that the powers under Section 265-K, Cr.P.C. can be exercised at any stage of the trial and that there was no likelihood of the conviction of any of the petitioner under any offence.
4. Learned Deputy District Public Prosecutor assisted by learned counsel for the complainant opposed the petition with vehemence and submitted that the petitioners are specifically nominated in the F.I.R. with specific role, which finds support from the statements of the prosecution witnesses recorded under Section 161, Cr.P.C.; that the abductee, namely, *Mst.* Yasmeen was produced before the Court and she confirmed the contents of her statement recorded under Section 161, Cr.P.C.; that the provision of Section 265-K, Cr.P.C. are not meant to throttle the prosecution's case, that under the criminal jurisprudence both the parties should be provided opportunity to put and prove its case before the Court and that there was sufficient material available on record to link the petitioners with the titled occurrence, thus, the impugned order was unexceptional.
5. I have considered the points raised at the bar and have gone through the record.
6. It is settled principle of law that neither the prosecution nor the defence should be deprived of producing its evidence merely because according to the Court either the said evidence was not necessary/sufficient or not required by the Court for recording the verdict of acquittal. In this respect cases of *"The State through Advocate-General, Sindh High Court of Karachi v. Raja Abdul Renman"* (2005 SCMR 1544) and *"Nazir Ahmad v. Muhammad Ishaque and another"* (1998 P.Cr.L.J 1563) may be referred to with advantage. In this case, the complainant reported the incident to police against the petitioner and assigned specific role. The prosecution witnesses got recorded their statements under Section 161, Cr.P.C. and *Mst.* Yasmin owned/confirmed her statement recorded under Section 161, Cr.P.C. implicating the petitioners with the titled occurrence. Under the criminal jurisprudence both the parties should be provided opportunity to put and prove its case before the Court and the provision of Section 265-K, Cr.P.C. are not meant to bury the case of prosecution in its infancy even otherwise, there was no mention in the application moved under Section 265-K, Cr.P.C. by the petitioner that charge was groundless or there was no likelihood of the petitioner under any offence, the only ground to invoke the Section 265-K, Cr.P.C. The order of learned Additional Session Judge is neither illegal nor suffering from jurisdictional defect and calls for no interference by this Court.
7. For the reasons mentioned above, there is no merit in this revision petition which is hereby dismissed.
(R.A.) Petition dismissed

PLJ 2016 Cr.C. (Lahore) 729 (DB)

***Present*: ABDUL SAMI KHAN AND SARDAR AHMED NAEEM, JJ.**

ATHAR NADEEM--Appellant

versus

ZAHOOR AHMAD and another--Respondents

Crl. Appeal No. 108 of 2013, heard on 23.2.2016.

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

----Ss. 302 & 34--*Qatl-e-amd*--Sentence--Common intention--Benefit of doubt--Plea of *alibi*--Proverbial *lalkara*--Appreciation of evidence--Validity--It is by now settled that to establish guilt against accused beyond shadow of reasonable doubt, prosecution is supposed to bring trust worthy, convincing and coherent evidence for purpose of awarding conviction--Needless to emphasize, to convict a person on a capital charge, evidence would be of high quality/standard which is not available--When an accused person is acquitted of charge by a Court of competent jurisdiction, then, double presumption of innocence is attached to its order, if with which High Court and apex Court normally does not interfere with unless impugned order is fanciful and against record which is not in instant case.

[Pp. 731 & 732] A & B

1992 SCMR 489 & 1995 SCMR 635, *ref.*

Mr. Ashiq Hussain, Advocate vice *Mr. Abdul Rehman,* Advocate for Appellant.

Date of hearing: 23.2.2016.

JUDGMENT

Sardar Ahmed Naeem, J.--Through this criminal appeal, the appellant Athar Nadeem has called in question the judgment dated 19.12.2012 delivered by the learned Addl. Sessions Judge, Narowal whereby, Respondent No. 1 Zahoor Ahmad, was tried in case FIR No. 85 dated 21.5.2011 under Section 302, 34, PPC registered at Police Station Ahmadabad, District Narowal, for

committing *Qatl-e-Amd* of Javaid Iqbal, the deceased by sharing common intention with his co-accused and acquitted of the charge on the basis of benefit of doubt.

2. The prosecution story in brief was that on 21.05.2011 at about 4.00 p.m., the appellant with his brother Pervaiz Akhtar, Javaid Iqbal and Aitzaz Ahmad was standing at his agricultural land when Zahoor Ahmad accused-respondent along-with his co-accused Ghulam Murtaza emerged at the scene on their motorbike. Ghulam Murtaza fired at Javaid Iqbal hitting on front of his left shoulder on the instigation/*lalkara* raised by Respondent No. 1, thereafter, they managed their escape.

3. In order to prove its case, the prosecution produced twelve witnesses and the said respondent also produced defence evidence including DW.1 to DW.4/1. He pleaded *alibi* in his statement recorded under Section 342, Cr.P.C.

4. The learned trial Court after evaluating the evidence and considering the merits of the case acquitted Zahoor Ahmad extending benefit of doubt, whereas, his co-accused Ghulam Murtaza was sentenced to death.

5. The learned counsel for the appellant contended that the judgment passed by the learned trial Court was perverse and the reasoning of the learned trial Court is artificial and not in conformity with the evidence on record; that the grounds on which the learned trial Court proceeded to acquit the accused-respondent were not supported by the evidence on record and the acquittal of the said respondent is not sustainable under the law. He further argued that the medical evidence fully corroborates the charge; that learned trial Court wrongly believed the plea of *alibi* raised by the said respondent. Concluding his arguments, learned counsel submitted that the minor contradictions in the statements of prosecution witnesses were natural and that the learned trial Court failed to appreciate that the *lalkara* raised by the respondent was of commanding nature. To augment the contentions, reliance

was placed on *"Iftikhar Hussain and others v. The State"* (2004 SCMR 1185) and *"Ghulam Sikandar and another v. Mamaraz Khan and others"* (PLD 1985 SC 11).

6. Heard. Record perused.

7. The occurrence in this case took place on 21.05.2011. Javaid Iqbal lost his life during the occurrence. The episode was enacted by Ghulam Murtaza and Zahoor Ahmad, who was admittedly empty handed. Only proverbial *lalkara* was attributed to him. This aspect of the matter was dealt with by the learned trial Court in detail. As mentioned above, the said respondent pleaded *alibi* right, from the day, he joined the investigation. To prove the said *alibi*, he examined DW.1 and DW.2. They also appeared before the police during the investigation. The learned trial Court observed in para-32 of the impugned judgment that Aitzaz PW was the star witness who in his statement Exh.DB admitted that he had quarrel with Ghulam Murtaza accused in which while narrating the incident of Qila Ahmad Abad and did not nominate the accused-respondent Zahoor Ahmad. The learned trial Court further observed that DW.1 and DW.2 remained consistent and they had no axe to grind against the appellant. He accepted the plea of *alibi* and acquitted the said respondent.

It is by now settled that to establish guilt against the accused beyond shadow of reasonable doubt, the prosecution is supposed to bring trust worthy, convincing and coherent evidence for the purpose of awarding conviction. Needless to emphasize, to convict a person on a capital charge, the evidence should be of high quality/standard which is not available in this case. The judgment written by the learned trial Court is by all means a fair judgment, based, on proper, just and legal appreciation of evidence on record. The appellant miserably failed to show that the impugned judgment was fanciful or capricious, Even otherwise, when an accused

person is acquitted of the charge by a Court of competent jurisdiction, then, double presumption of innocence is attached to its order, with which this Court and the apex Court normally does not interfere with unless the impugned order is fanciful and against the record which is not in this case. Admittedly, the scope of appeal against the acquittal is considerably narrow and limited as observed by the apex Court in *"Muhammad Usman and 2 others v. The State"* (1992 SCMR 489), *"The State v. Muhammad Sharif and 3 others* (1995 SCMR 635). The acquittal of respondent does not suffer from any illegality calling for interference by this Court. The learned trial Judge has advanced the valid and cogent reason for recording a finding of acquittal in favour of the said respondent and we see no legal justification to upset the same. Consequently, the appeal fails which is hereby dismissed in limine.

(R.A.) Appeal dismissed

PLJ 2016 Cr.C. (Lahore) 737
[Multan Bench Multan]
***Present*: SARDAR AHMAD NAEEM, J.**
NABEEL--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 3008-B of 2016, decided on 27.6.2016.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(iii), 148 & 149--Bail, grant of--Further inquiry--Unexplained delay of about 14 days--Complainant was medically examined with unexplained delay of six days--Punishment--Punishment prescribed by way of Tazir may extend up to ten years and it is yet to be determined by trial Court if Section 337-N(2), P.P.C. is applicable/attracted--Recovery of pistol 30-bore had been recovered from accused during course of investigation and he was no more required by investigating agency--Petitioner had got no previous record and would be believed as first offender--Petitioner was behind bars from last more than three months and that his detention would serve no purpose to prosecution--There were sufficient grounds calling for further probe within meaning of Section 497(2), Cr.P.C.--Bail was accepted.

[P. 738] A & B

Mr. Shahzad Saleem Balouch, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, D.P.G. for State.

Mr. Muhammad Bilal Butt, Advocate for Complainant.

Date of hearing: 27.6.2016.

ORDER

The petitioner seeks post arrest bail in case F.I.R. No. 975/2015 dated 09.10.2015, under Sections 337-A(iii), 148, 149, P.P.C., registered at Police Station Cantt. Multan.

2. Allegedly, the petitioner being member of unlawful assembly and in prosecution of its common object inflicted injuries to the complainant.

3. Having heard the arguments addressed at the bar and after perusing the record, it was observed:--

(i) That there was unexplained delay of about fourteen days in lodging the F.I.R.;

(ii) That the occurrence, allegedly, took place on 25.09.2015 but the complainant was medically examined with unexplained delay of six days;

(iii) That the primary punishment provided under Section 337-A(iii), P.P.C. is Arsh, however, the punishment prescribed by way of Tazir may extend up to ten years and it is yet to be determined by the learned trial Court if Section 337-N(2), P.P.C. is applicable/attracted in this case or otherwise;

(iv) That recovery of pistol 30-bore has been recovered from the petitioner during the course of investigation and he was no more required by the Investigating Agency;

(v) That the petitioner has got no previous record and would be believed as first offender;

(vi) That the petitioner is behind the bars from the last more than three months and that his detention would serve no purpose to the prosecution;

(vii) That there are sufficient grounds calling for further probe within the meaning of Section 497(2), Cr.P.C.

4. For the reasons mentioned above, the application is accepted and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/-with one surety in the like amount to the satisfaction of learned trial Court/duty Judge.

(R.A.) Bail accepted

PLJ 2016 Cr.C. (Lahore) 809
[Multan Bench Multan]
***Present*: SARDAR AHMAD NAEEM, J.**
AAMIR ABBAS--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 2394-B of 2016, decided on 13.6.2016.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 324, 337-F(i), 337-F(ii), 337-F(v), 354, 148 & 149--Bail, grant of--Discretion of--Inordinate/unexplained delay of about sixty hours in lodging F.I.R.--Co-accused, were declared innocent during investigation--No allegation of repetition of fire against petitioner and, thus, if he intended to eliminate co-accused would, be determined by trial Court after recording some evidence at trial--Recovery had been effected from petitioner during course of investigation--Petitioner was behind bars since his arrest which would serve no purpose to prosecution, in particular, when investigation is complete--Petitioner was not involved in instant case, thus, High Court was inclined to exercise my discretion in favour of petitioner.

[Pp. 810 & 811] A

Khawaja Qaisar Butt, Advocate for Petitioner.

Mirza Abid Majeed, D.P.G. for State.

Date of hearing: 13.6.2016.

ORDER

Aamir Abbas, the petitioner seeks post-arrest bail in case F.I.R. No. 9/2016 dated 15.1.2016, under Sections 324, 337-F(i), 337-F(ii), 337-F(v), 354, 148, 149, P.P.C., registered at Police Station Haveli Koranga, Khanewal.

2. Allegedly, the petitioner being member of unlawful assembly and in prosecution of its common object caused injuries to Ghulam Hussein, a son of the complainant.

3. After hearing the learned counsel for the parties and perusing the record, it was observed:

(i) That there was inordinate/unexplained delay of about sixty hours in lodging the F.I.R.;

(ii) That the co-accused, of the petitioner including Haq Nawaz, Mureed Abbas and Zaheer were declared innocent during the investigation. Ref: *"Aabid. v. The State and others"* (2012 SCMR 647).

(iii) That there is no allegation of repetition of fire against the petitioner and, thus, if he intended to eliminate Ghulam Hussain would be determined by the learned trial Court after recording some evidence at trial;

(iv) That recovery has been effected from the petitioner during the course of investigation;

(v) That the petitioner is behind the bars since his arrest which would serve no purpose to the prosecution, in particular, when the investigation is complete;

(vi) That there are reasonable grounds exist to believe that the petitioner was not involved in this case, thus, I am inclined to exercise my discretion in favour of the petitioner.

4. For the reasons mentioned above, the application is accepted and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court/duty judge.

(R.A.) Bail accepted

PLJ 2016 Cr.C. (Lahore) 811

***Present*: SARDAR AHMAD NAEEM, J.**

AMAN ULLAH--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2326-B of 2016, decided on 19.4.2016.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Bail, grant of--Further inquiry--*Qatl-e-amd*--Vicarious liability--Extra-judicial confession--Accused was nominated by complainant through supplementary statement recorded after about eight months of occurrence and evidentiary value of supplementary statement would be adjudged by trial Court after recording some evidence at trial--Incriminating evidence against petitioner available on record is that of extra-judicial confession made by petitioner before witnesses and that he was seen by witnesses coming from place of occurrence--There is no direct evidence available on record against petitioner to connect him with titled occurrence--Question of vicarious liability of petitioner will be determined at trial--That petitioner is behind bars since his arrest which would serve no purpose to prosecution--That case of petitioner needs further enquiry into his guilt within meaning of Section 497 (2), Cr.P.C. [P. 812] A

Mr. Qalandar Hussain Bhatti, Advocate for Petitioner.

Mr. Abdul Jabbar, D.D.P.P. for State.

Rai Muhammad Abdullah Saleem Bhatti, Advocate for Complainant.

Date of hearing: 19.4.2016.

ORDER

Aman Ullah, the petitioner seeks post-arrest bail in case registered *vide* F.I.R. No. 387/14 dated 1.9.2014, under Sections 302, 34, P.P.C., at Police Station Sadar, Jhang.

2. In the FIR, the complainant reported *Qatal-e-Amd* of his brother, namely, Mumtaz Hussain against unknown accused.

Later on, the petitioner along with his co-accused was nominated through a supplementary statement recorded on 21.04.2015.

3. After hearing the learned counsel for the parties and perusing the record, it was straightaway observed:

(i) That the petitioner was not nominated in the F.I.R. and was nominated by the complainant through supplementary statement recorded after about eight months of the occurrence and the evidentiary value of the supplementary statement would be adjudged by the learned trial Court after recording some evidence at trial;

(ii) That the incriminating evidence against the petitioner available on record is that of extra-judicial confession made by the petitioner on 2.9.2014 before the witnesses and that he was seen by the witnesses coming from the place of occurrence;

(iii) That there is no direct evidence available on record against the petitioner to connect him with the titled occurrence;

(iv) That the question of vicarious liability of the petitioner will be determined at trial;

(v) That the petitioner is behind the bars since his arrest which would serve no purpose to the prosecution; and

(vi) That the case of the petitioner needs further enquiry into his guilt within the meaning of Section 497 (2), Cr.P.C.

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

(A.A.) Bail accepted

PLJ 2016 Cr.C. (Lahore) 826
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**
DEHRAN--Appellant
versus
STATE, etc.--Respondents

Crl. Appeal No. 195 of 2013, heard on 23.5.2016.

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

----Ss. 302, 148, 149 & 109--Conviction and sentence--Post mortem was conducted with delay of seven hours--No independent witness--Chance witnesses--Validity--By know it is settled that a chance witness is one who claims that he was present on crime scene at fateful time albeit his presence there was a sheer chance and in ordinary course of business, he was not supposed to be there but at place where he lives, carried on business--Evidence of chance witness ordinarily is not accepted unless justifiable reasons are shown to establish their presence at crime scene. [P. 831] A

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

----Ss. 302, 148, 149 & 109--Sentence--Acquittal of majority accused on account of false implication--It is settled law that if majority of accused nominated in a case is acquitted on account of false implication by eye-witnesses, then, allegations qua remaining accused on basis of same set of evidence cannot be sustained without strong/independent corroboration, thus, case would be examined on touch stone of principle of law. [P. 831] B

2012 SCMR 440, 2009 SCMR 1188 & PLD 1985 SC 11, *rel.*

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

----S. 161--Pakistan Penal Code, (XLV of 1860), Ss. 302, 148, 149 & 109--Sentence--No specific role was attributed--Appreciation of evidence--Dishonest improvements--No specific role was attributed to accused in F.I.R as well as in statements of witnesses recorded under Section 161, Cr.P.C.--Accused was nominated with generalized role of inflicting kick blows to deceased--Almost all accused were attributed kick blows to deceased but he sustained only three

injuries--Injury was not specifically attributed to accused--In F.I.R. was attributed to accused and at trial, injury was assigned to mother of appellant--Medical Officer also admitted in his statement that injuries sustained by deceased could also be result of a fall--Witnesses had made dishonest improvements in their statements. [P. 832] C

Benefit of doubts--

----Motive--Prosecution is under duty to prove charge against accused but, neither proved motive; nor implicated accused with cogent/convincing evidence makes story of prosecution highly doubtful--By now it is settled law that benefit of even a single doubt must be resolved in favour of accused and his conviction cannot be sustained on doubtful evidence adduced by prosecution. [P. 833] D

M/s. Nadeem Ahmed Tarrar, Rana Muhammad Shakeel and Malik Muhammad Siddique Kamboh, Advocates for Appellant.

Mr. Hassan Mehmood Tareen, D.P.G. Punjab for State.

Nemo for Complainant.

Date of hearing: 23.5.2016.

JUDGMENT

Dehran (appellant), Alam Ali Khan, Muhammad Akram, Muhammad Ashraf, *Mst.* Razia Bibi and *Mst.* Sajida Bibi, accused of case F.I.R. No. 178/2011 dated 29.06.2011, under Sections 302, 148, 149, 109, P.P.C., registered at Police Station City Vehari, were tried by the learned Additional Sessions Judge, Vehari. At the conclusion of the trial, *vide* judgment dated 30.03.2013, learned trial Court acquitted of the charges Muhammad Alam Khan, Muhammad Akram, Muhammad Ashraf *Mst.* Razia Bibi and, *Mst.* Sajida Bibi, whereas convicted and sentenced Dehran as under:--

(i) Under Section 302(b), P.P.C. to imprisonment for life with direction to pay Rs.50,000./- as compensation to the legal heirs of deceased Muhammad Ajmal under Section 544-A, Cr.P. C. and in case of default in payment of the same to undergo S.I. for six months;

(ii) under Section 337-A(i), P.P.C. to imprisonment for six months for causing injuries to Charagh injured PW;

(iii) under Section 337-F(i), P.P.C. to six months imprisonment.

All the sentences were to run concurrently. Benefit of Section 382-B, Cr.P.C. was also extended to him.

The convict has lodged the instant appeal against his convictions and sentences.

2. Prosecution story, in brief, as narrated by Muhammad Aslam Khan complainant in the F.I.R (Exh.PB) registered, on 29.06.2011 on the basis of his complaint Exh.PG, was that two days before the present occurrence there was a dispute of money between Muhammad Akram and Muhammad Ashraf regarding which a Punchayat was convened at the shop of Tahir Sharif Gujjar in Gallah Mandi, Vehari on 29.06.2011 at about 11.45 A:M.; that Dehran (appellant) along with acquitted co-accused emerged there and grappled with complainant's son Muhammad Ajmal; that Dehran caught him from his hair and made him fall on the ground; that the appellant and other co-accused caused him injuries with brick-blows as well as kick blows and damaged his motorcycle; that Muhammad Charagh, Naseer Ahmad, Muhammad Shahbaz. stepped forward, for the rescue of Ajmal whereupon Muhammad Charagh was also inflicted injury on his forehead; that Muhammad Ajmal succumbed to the injuries in the Hospital. Motive as alleged in the F.I.R, was dispute of money.

3. After completion of investigation and submission of challan, charge was framed by the learned trial Court on 03.12.2011, under Sections 302, 148, 149, 337-A(i), 337-F(i) and 427, P.P.C. to which the appellant pleaded not guilty and claimed to be tried.

4. In order to prove the case against the appellant, prosecution examined nine witnesses.

Shaukat Muneer, S.I. (PW-8) Investigating Officer recorded the statement Exh.PG of Muhammad Aslam complainant on 29.06.2011 and sent the same to the Police Station for recording of formal F.I.R. Thereafter, he prepared the injury statement of Muhammad Charagh injured, the prosecution witness. He inspected the place of occurrence. He secured the last-worn clothes of the deceased i. e. Qameez (P.3), Shalwar (P.4) and String (P.5) *vide* memo. Exh.PK. He prepared the inquest report Exh.PE of the deceased. He arrested Dehran appellant on 17.08.2011, who on 22.08.2011 got recovered brick (P.2) which was secured *vide* memo. Exh.PM. He recorded the statements of the P.Ws under Section 161, Cr.P.C. and after completion of investigation submitted challan in the Court.

Dr. Muhammad Aslam, Medical Officer, DHQ Hospital, Vehari (PW-3) on 29.06.2011 conducted post-mortem examination on the dead-body of Muhammad Ajmal and observed three injuries on his body. In his opinion, death had caused due to asphyxia and injury to vital organs i.e. heart and due to blunt injury to left chest on account of Injury No. 2 which was ante-mortem caused with blunt weapon and was sufficient to cause death in ordinary course of nature. Exh.PC was correct carbon copy of his original post-mortem report, which was in his hand and bore his signatures. Similarly Exh.PC/1 diagram showing location of the injuries was also in his hand and bore his signatures. He also endorsed injury statement Exh.PD and inquest report Exh.PE.

Dr. Abdul Qayyum Khan SMO, DHQ Hospital Vehari (PW-1) medically examined Charagh injured PW on 29.06.2011 and observed three injuries on his person. Exh.PA was correct carbon copy of the original M.L.R, which was in his hand and bore his signatures. Exh.PA/1 was diagram showing locale 'of injuries which also was in his hand and bore his signatures.

Mehdi Hassan, A.S.I. (PW-2) recorded formal F.I.R Exh.PB on the basis of written complaint. Raja Muhammad Iqbal, Draftsman (PW-4) prepared the scaled site-plan (Exh.PF and Exh.PF/1-2) of the place of occurrence on 12.07.2011 on the directions of police and pointation of the witnesses. Muhammad Aslam Khan, the complainant (PW-5), Naseer Ahmad (PW-6) and Muhammad Charagh injured (PW-7) furnished the ocular account of the occurrence. Rang Ali T-ASI (PW-9) escorted the dead-body of Muhammad Ajmal to the mortuary of D.H.Q. Hospital Vehari for post-mortem examination. Rest of the witnesses are of formal nature, therefore, they need not be discussed.

Learned Assistant District Public Prosecutor gave up Shahbaz Ahmad (P.W.) being unnecessary and closed the prosecution evidence.

5. After closure of the prosecution evidence, Dehran appellant made his statement under Section 342, Cr.P.C. wherein he denied he prosecutions allegations and in answer to the question “Why this case against you and why the PWs have deposed against you” he replied as under:--

> “PWs are interested interse and inimical towards me. Complainant and PWs intentionally made improvements and changed their version. No occurrence of fight had taken place on 29.6.2011. It is incorrect that on 29.6.2011 a Punchayat was fixed, in Gallah Mandi Vehari in connection with to resolve a dispute between

> Muhammad Ashraf, my brother Muhammad Akram and Muhammad Aslam complainant. Our father Muhammad Aslam complainant did not reach in Gallah Mandi Vehari. My brother Muhammad Ajmal (deceased) boarded on motorcycle for taking Muhammad Aslam complainant, for the purpose of participation in the Punchayat but due to high-speed, the motorcycle struck against electricity pole and damage caused by bricks. No one hit any one nor fight had taken place. PW-6 Naseer Ahmad and PW-7 Charagh due to their own grudge misguided the complainant Muhammad Aslam. I am by profession a mason. On 29.6.2011 under the supervision of Aslam contractor was working in the Kothi of one Sunny Gujjar. My father Bashir Ahmad supported the version of Muhammad Akram due to that complainant party falsely involved me in this case. Charagh PW is father-in-law of my sister. My sister Azra Bashir filed family suit against Muhammad Shahbaz son of Charagh Din due to that they are inimical to me and my family. My father is a 70-years old man and a paralyzed person. I am only adult male member of my family and bread-earner."

The appellant neither opted to make his statement on oath under Section 340(2), Cr.P.C. nor produced any defence evidence.

6. Learned counsel for the appellant contends, that all the prosecution witnesses were related inter-se/the deceased; that the occurrence took place during a punchayat even then no independent witness was cited by the prosecution; that the prosecution witnesses made dishonest improvements to implicate the appellant; that the alleged recovery effected from the appellant was just a piece of brick which was not blood stained and thus no reliance can be placed on it; that the co-accused of the appellant with similar role have been acquitted by the learned trial Court on the same set of evidence whereas no independent corroboration is forthcoming on the record qua the guilt of the appellant; that the case of prosecution is replete with doubts and the benefit of doubt is always resolved in favour of the accused.

7. Conversely, learned Deputy Prosecutor General assisted by the learned counsel for the complainant while supporting the impugned judgment had opposed the contentions raised by the learned counsel for the appellant.

8. I have considered the points raised at the bar and have gone through the record.

9. A careful examination of the record reveals that the parties were closely related to each other. The appellant is the real "Chachazad" of the deceased. The occurrence took place at 11:45 A.M. The place of occurrence is at a distance of two

furlong from the Police Station but the F.I.R. was registered with unexplained delay of about two hours. The post-mortem of the deceased was also conducted with the delay of about seven hours. No independent witness was cited by the prosecution. Muhammad Charagh PW was "Tayazad" of the complainant, Shahbaz was son of said Muhammad Charagh and Naseer Ahmad was "Damaad" of the complainant. Muhammad Charagh PW was resident of Sadiqabad. Raheem Yar Khan and Naseer Ahmad PW was resident of Khanewal. They could not justify their presence at the time and place of occurrence. Thus, the eye-witnesses could be held to be chance witnesses as at the fateful time they were residing hundred miles away from the place of occurrence. By know it is settled that a chance witness is the one who claims that he was Present on the crime scene at the fateful time albeit his presence there was a sheer chance and in the ordinary course of business, he was not supposed to be there but at the place where he lives, carried on business. It is in this context that the evidence of chance witness ordinarily is not accepted unless justifiable reasons are shown to establish their presence at the crime scene. In normal course the presumption of law would operate about his absence from the spot.

It is settled law that if majority of the accused nominated in a case is acquitted on account of false implication by the eye-witnesses, then, allegations qua remaining accused on the basis of same set of evidence cannot be sustained without strong/independent corroboration, thus, the case would be examined on the touch stone of principle of law laid down by their lordships in the cases of *"Muhammad Akram v. The State"* (2012 SCMR 440), *"Mir Muhammad alias Miro v. the State"* (2009 SCMR 1188) and *"Ghulam Sikandar and another v. Mamaraz Khan and others"* (PLD 1985 SC 11).

No specific role was attributed to the appellant in the F.I.R as well as in the statements of the witnesses recorded under Section 161, Cr.P.C. He was nominated with generalized role of inflicting kick blows to the deceased. Almost all the accused were attributed kick blows to the deceased but he sustained only three injuries. Injury No. 2 was not specifically attributed to the appellant. In the F.I.R. Injury No. 3 is attributed to the appellant and at trial, the said injury was assigned to *Mst.* Razia Bibi, the mother of the appellant. The Medical Officer also admitted in his statement that Injury Nos. 1 to 3 sustained by the deceased could also be result of a fall. The witnesses have made dishonest improvements in their statements.

The appellant, in this case, was arrested on 17.08.2011 and got recovered brick. (P.1) from Ghala Mandi besides electric-pole. It was a common piece of brick. It was not blood-stained, thus, was not dispatched to the office of public analyst. Recovery was also effected after about 33 days of the occurrence. The Hon'ble Supreme Court of Pakistan in the case of *"Basharat and-another v. The State"* (1995 SCMR 1735) disbelieved the evidence of blood stained *"Chhuri"* which was allegedly recovered from the accused after ten days from the occurrence. Relevant excerpt of the said judgment at Page No. 1739 is reproduced hereunder for ready reference:

> "11. The occurrence took place on 20.4.1988. Basharat appellant was arrested on 28.4.1988. The blood-stained *Chhuri* was allegedly recovered from his house on 30.4.1988. It is not believable that he would have kept blood-stained *Chhuri*, intact in his house for ten days when he had sufficient time and opportunity to wash away and clean the blood on it..."

Reliance can also be placed on *"Muhammad Jamil v. Muhammad Akram and others"* (2009 SCMR 120), wherein at page 123, it was observed as under:

> "... It is borne out from the record that the alleged recovery of blood-stained *Chhuri* has effected after about one month of the occurrence from an open plot which was not in exclusive possession of the respondent and was accessible to all. It was also not likely that the blood would not disintegrate meanwhile. So the reasons advanced by the learned Judge in Chambers are not arbitrary or fanciful for not believing the recovery...."

10. Allegedly, the appellant caused damage to the motorbike then being driven by the deceased but it was not recovered from the appellant rather was produced by Muhammad Aslam during the course of investigation. It was also in the evidence that the punchayat was convened in the shop of Tahir Sharif and in the said market there was soling in the veranda/cemented floor, thus, possibility of falling the deceased on the said hard surface can also not be ruled out. The learned trial Court *vide* its impugned judgment acquitted co-accused of the appellant on the same set of evidence.

Unfortunately, in the present case, the prosecution evidence including Muhammad Aslam, Naseer Ahmad and Muhammad Charagh do not find any corroboration from any of the material piece of evidence available on record rather they have contradicted each other on some material aspects. They were duly confronted with their previous statements to establish the improvements made by them at trial to implicate the appellant with the titled occurrence.

11. The prosecution is under duty to prove the charge against the accused but, in the instant case, neither proved motive; nor implicated the present appellant with cogent/convincing evidence makes the story of prosecution highly doubtful. By now it is settled law that benefit of even a single doubt must be resolved in favour of the accused and his conviction cannot be sustained on doubtful evidence adduced by the prosecution. In the case of *"Tariq Pervez v. The State"* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page-1347, was pleased to observe as under:

> "5. ...The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

In *"Ayub Masih v. The State"* (PLD 2002 SC 1048), at page 1056 the Hon'ble Apex Court has been pleased to observe as under:

> "....It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (P.B.U.H.) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of *"Muhammad Akram v. The State"* (2009 SCMR 230), at page 236, observed as under:

> "13. ...It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of *Tariq Pervez v. The State* 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

12. In the light of above discussion, the prosecution has miserably failed to prove the charge against the appellant. Resultantly, while allowing the Criminal Appeal No. 195 of 2013 filed by Dehran, the appellant, I set aside his convictions and sentences recorded by the learned trial Court and acquit him of the charge. He is in custody, be set free forthwith if not required in any other criminal case.

(R.A.) Appeal allowed

PLJ 2016 Cr.C. (Lahore) 238
[Multan Bench Multan]

***Present*: SARDAR AHMED NAEEM, J.**

KHALID MEHMOOD GULZAR--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 6923-B of 2015, decided on 24.11.2015.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 462-L--Electricity Act, 190, S. 39-A--Bail before arrest, confirmed--Nominated in FIR--Dispute of outstanding amount--Validity--Regarding disputed bill a suit is also pending adjudication between parties--*Mala fide* was also asserted in application and that there was not allegation of misuse of interim pre-arrest bail already granted to accused. [P. 239] A

Mr. Muhammad Bilal Butt, Advocate for Petitioner.

Mr. Sarfraz Ahmed Khan Khichi, D.D.P.P. for State.

Date of hearing: 24.11.2015.

ORDER

The petitioner seeks pre-arrest bail in case F.I.R. No. 424/2015 dated 9.9.2015, under Sections 39-A Electricity Act read with Section 462-L, P.P.C. registered at Police Station Saddar, Dunya Pur District Lodhran.

2. Allegedly, the petitioner committed theft of electricity.

3. After hearing the learned counsel for the parties and perusing the record it was observed that the petitioner was nominated in the F.I.R. which was registered after four days without any plausible explanation. The disputed outstanding amount has been paid by the petitioner as revealed by a bill evidencing deposit of Rs. 87,142/- by the petitioner on 17.11.2015. Regarding the disputed bill a suit is also pending adjudication between the parties. *Malafide* is also asserted in the application and that there is not allegation of misuse of interim pre-arrest bail already granted to the petitioner, thus, I am inclined to exercise my discretion in favour of the petitioner.

4. For the reasons mentioned above, the application is accepted and I proceed to confirm the ad-interim pre-arrest bail already granted to the petitioner subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/-, with one surety in the like amount, to the satisfaction of the learned trial Court.

(R.A.) Bail confirmed

PLJ 2017 Cr.C. (Lahore) 134
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**
MUHAMMAD AKBAR--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 2976-B of 2016, decided on 23.6.2016.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 365-B, 376(1) & 380--Bail, grant of--Unexplained delay of two days--Not nominated in FIR--Supplementary statement--Evidentiary value--Nikahnama was registered in union council--Validity--Petitioner was medically examined and no date and time of incident finds mention in medico-legal report and that no marks of violence were observed by medical officer during examination of victim--Accused was behind bars since his airest and to keep him, continuously in jail would be unfair--There were sufficient grounds calling for further probe into guilt of petitioner within meaning of Section 497(2), Cr.P.C.--Bail was allowed. [P. 136] A & B

Rana Asif Saeed, Advocate for Petitioner.
Mr. Hassan Mehmood Tareen, D.P.G. for Respondent.
Complainant in person.
Date of hearing: 23.6.2016.

ORDER

Muhammad Akbar, the petitioner has sought post arrest bail in case FIR No. 59 dated 25.03.2016 under Section 365-B, 376(1), 380, PPC registered at Police Station Jallah Arain, District Lodhran.

2. Allegedly the complainant reported that nominated accused abducted Sajida Bibi sister of the complainant, so that she may be seduced to illicit inter-course.

3. After hearing the learned counsel for the parties and perusing the record, it was observed:

(i) That there was unexplained delay of about two days in lodging the FIR;

(ii) That the petitioner was not nominated in the FIR;

(iii) That the complainant got recorded his supplementary statement on 12.04.2016 and nominated the petitioner, evidentiary value whereof, shall be determined by the learned trial Court, at trial;

(iv) That supplementary statement of the complainant is based on extra-judicial confession of the petitioner, which is always considered a weak type of evidence;

(v) That co-accused of the petitioner including *Mst.* Rani Bibi and Amna Bibi have been declared innocent during the investigation which makes the veracity of the prosecution story as doubtful;

(vi) That neither *Mst.* Sajida Bibi nor *Mst.* Rabia Bibi were recovered from, the petitioner during the investigation;

(vii) That a Photostat copy of Nikah Nama between the petitioner and *Mst.* Sajida Bibi is available on the record which is supported by the statement of Iftikhar Hussain secretary Union Council No. 69 Bedian, Chak No. 35 Tehsil Pattoki, District Kasur that the said nikah nama was registered in the said union council;

(viii) That the petitioner was medically examined on 23.3.16 and no date and time of incident finds mention in the medico-legal report and that no marks of violence were observed by the medical officer during examination of the victim;

(ix) That the petitioner is behind the bars since his arrest and to keep him, continuously in jail would be unfair;

(x) That there are sufficient grounds calling for further probe into the guilt of the petitioner within the meaning of Section 497(2), Cr.P.C., thus, I am inclined to exercise my discretion in his favour.

4. For the reasons mentioned above, the application 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 one surety in the like amount to the satisfaction of learned trial Court/Duty Judge.

(R.A.) Bail accepted

2017 M L D 889
[Lahore]
Before Sardar Ahmed Naeem, J
MUBARIK ALI---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.433 of 2012, heard on 2nd February, 2017.

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

---Ss. 337-A(i), 337-A(ii), 337-L(2), 147 & 148---Shajjah-i-khafifah, Shajjah-i-madihah, hurt, rioting armed with deadly weapons---Appreciation of evidence---Benefit of doubt-Ocular account---Scope-- Prosecution case was that complainant sustained injuries at the hands of the accused as well the co-accused---Complainant had not attributed any specific injury to the accused in his statement recorded under S.161, Cr.P.C.---Complainant and eye-witnesses had not mentioned date, month or year of the occurrence---No independent corroboration was forthcoming to support the eye witnesses---Complainant was injured which indicated his presence at the relevant time but there was no guarantee of truthfulness---Circumstances established that prosecution had failed to prove its case against accused through unimpeachable ocular testimony beyond any shadow of doubt, thus the conviction of accused could not be maintained--Accused was acquitted, in circumstances, by setting aside conviction and sentence recorded by Trial Court.

(b) Penal Code (XLV of 1860)-

----Ss. 337-A(i), 337-A(ii), 337-L(2), 147 & 148---Shajjah-i-khafifah, Shajjah-i-madihah, hurt, rioting armed with deadly weapons---Appreciation of evidence---Benefit of doubt---Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case would be resolved in favour of the accused.

Muhammad Khan and another v. The State 1999 SCMR 1220 rel.

Ch. Muhammad Saeed Gujjar for Petitioner.

Ch. Muhammad Akram Tahir, DDPP for the State.

Date of hearing: 2nd February, 2017.

JUDGMENT

SARDAR AHMED NAEEM, J.---Mubarik Ali, the petitioner along-with his co-accused was tried by the Magistrate 1st Class, Lahore Cantt: in case FIR

No.220 dated 10.6.2014 under sections 337-A(i), 337-A(ii), 337-L(2), 147,148, P.P.C. registered at Police Station Batapur, Lahore.

2. The learned trial Court vide its judgment dated 12.12.2011 acquitted Umer Hayat, Shukar Hayat and Muhammad Ilyas (co-accused of the petitioner), convicted and sentenced the petitioner along-with his accused, namely, Muhammad Amir as follows:

> **Mubarik Ali petitioner**
>
> (i) under section 337-A(ii), P.P.C. and sentenced to undergo rigorous imprisonment for two years and was held liable to pay Arsh of five per cent of Diyat
>
> **Amir accused**
>
> (ii) under section 337-L(2), P.P.C. and sentenced to undergo rigorous imprisonment of one year and was held liable to pay Daman of Rs.5000/-
>
> Benefit of section 382-B, Cr. P. C. was also extended to them.

3. On appeal, Muhammad Amir was acquitted. The appeal was dismissed with the modification in the sentence awarded to the petitioner, which is as under:-

> "Appeal was dismissed with the modification to undergo rigorous imprisonment for six months. However, the Diyat as ordered by the learned trial Court was maintained. Benefit of section 382-B, Cr.P.C. was also extended to him."

4. The facts, in brief are that the complainant sustained injuries at the hands of the petitioner as well as his co-accused. The matter was reported to police.

5. After usual investigation, the challan was submitted in the Court. The petitioner/co-accused were formally charge sheeted. The parties, both, led their respective evidence and the learned trial Court vide impugned judgment convicted/sentenced the petitioner. The learned Court of appeal dismissed the appeal filed by the petitioner with the modification detailed above. Now, this revision petition.

6. Learned counsel for the petitioner submitted that no independent witness was cited by the prosecution; that prosecution witnesses were at variance on material aspect of the matter; that co-accused 'of the petitioner have been acquitted on the same set of evidence and no independent corroboration was forthcoming to the extent of the petitioner; that the parties were inimical towards each other on account of previous litigation; that the case of the prosecution was replete with doubts and that the benefit of doubt was the vested right of the accused, thus, he was entitled to be acquitted.

7. Learned DDPP, maintained the validity of the impugned judgment.
8. Arguments heard. Record, perused.
9. The occurrence in this case took place on 10.6.2004 at 6.00 a.m. within the area of Mauza "Bhamma". The complainant was intercepted by the accused including the petitioner, who, allegedly was armed with a danda. The complainant, Binyamin and Muhammad Ashiq PWs have assigned a role of causing danda on the head of the complainant. Muhammad Shabbir appeared as PW.4 and deposed that the occurrence took place on 06.6.2004 and that' the head injury was inflicted by Muhammad Amir co-accused, then armed with hatchet. The complainant also have not attributed a specific injury to the petitioner in his statement recorded under section 161, Cr.P.C. He was confronted with his statement and it was found correct. The complainant as well as the eye witnesses including Binyamin and Muhammad Ashiq have neither mentioned some date nor month or year of the occurrence. The complainant happened to be the paternal uncle of Binyamin, whereas, Muhammad Ashiq PW.3 was the real brother of the complainant. Admittedly, the parties were locked into litigation on account of landed dispute.

The co-accused of the petitioner including Umer Hayat, Shukar Hayat and Muhammad Ilyas were found innocent during the investigation and ultimately were acquitted by the learned trial Court. The conviction-sentence awarded to Muhammad Amir co-accused was set aside by the learned appellate Court. No independent corroboration is forthcoming to support the eye witnesses mentioned above. They failed to provide the complete details regarding the occurrence, in particular, the date, time, month and year. As a matter of fact, the prosecution is always bound to prove its case beyond any shadow of doubt. Though the complainant bearing the stamp of injuries but that stamp only indicates his presence at the relevant time and has got no guarantee of truthfulness. In criminal jurisprudence, where the rule of appreciation of evidence is that want of interest or absence of enmity does not stamp the statement by a particular witness with presumption of truth and that much depends on the intrinsic value of a statement of a witness. The real test is, as to whether the statement of a witness is in consonance with the probabilities, whether it fits in with the other evidence and it inspires confidence in the mind: Ref- "Muhammad Iqbal v. The State" (1984 SCMR 930), "Muhammad Arshad alias Achhi v. The State" (1995 SCMR 1639), "Haroon alias Harooni v. The State and another" (1995 SCMR 1627) It is also fundamental principle of jurisprudence, that is, to disbelieve a witness, it is not necessary that there will be numerous infirmities. If there is one, which impeaches

the credibility of the witness, that may make the entire statement doubtful. It has been now, settled that the conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution's case must be resolved in favour of the accused. Reliance in this regard is placed -on "Muhammad Khan and another v. The State" (1999 SCMR 1220)

10. For what has been discussed above and after scanning the evidence from all angles, I am of the view that prosecution has failed to prove its case against the petitioner through unimpeachable ocular testimony. Since the prosecution has failed to prove the guilt of the petitioner beyond any shadow of doubt, thus the conviction of the petitioner cannot be maintained. Resultantly, while extending benefit of doubt to the petitioner, this petition is accepted. Conviction-sentence awarded to the petitioner is hereby set aside. He is acquitted of the charges. The sentence awarded to the petitioner was suspended by this Court on 26.4.2012. He is on bail. His bail bonds are cancelled and surety is discharged.

JK/M-22/L Petition accepted.

PLJ 2017 Cr.C. (Lahore) 322

***Present*: SARDAR AHMED NAEEM, J.**

MUHAMMAD HANIF and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 16626-B of 2016, decided on 27.1.2017.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 397 & 412--Bail, refusal of--Committing dacoity with attempt to cause grievous hurt--Not nominated in FIR--Involved through supplementary statement--Effect of recovery--Validity--Petitioners were proceeded against under Section 87, Cr.P.C. and being fugitive from law have lost some of their normal rights in particular, right of audience--A similar question came up under consideration before their lordships in case--Recoveries have been effected from them during course of investigation--There was sufficient incriminating material to connect petitioners with titled occurrence, Court is not inclined to exercise its discretion in their favour--Bail was dismissed. [P. 323] A & B

Ch. Sarfraz Ali Deyal, Advocate for Petitioners.

Ch. Muhammad Akram Tahir, DDPP for State.

Mr. Akhtar Javaid, Advocate for Complainant.

Date of hearing: 27.1.2017.

ORDER

Muhammad Hanif and Saud-ur-Rehman the petitioners have sought post arrest bail in case F.I.R No. 244 dated 09.05.2013 registered at Police Station Haji Pura, District Sialkot for offences under Sections 397, 412, PPC.

2. The allegations against the petitioners are that of committing dacoity with attempt to cause grievous hurt.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the occurrence took place at 2.50 p.m. on 09.05.2013 and the matter was reported with promptitude at 3.55 p.m. Though the petitioners were not nominated in the F.I.R but they were nominated by the complainant in his supplementary statement recorded on the same day. The witnesses supported the complainant's version in their statements recorded under Section 161, Cr.P.C. The

petitioners were proceeded against under Section 87, Cr.P.C. and being fugitive from law have lost some of their normal rights in particular, the right of audience. A similar question came up under consideration before their lordships in case of *"Awal Gul v. Zawar Khan and others"* reported as (PLD 1985 SC 402). I cannot do better than quoting the relevant observations appearing at page 405 which reads as under:

> "---- that a fugitive from law and Courts loses some of the normal rights granted by the procedural as also substantive law. It is also a well-established proposition that unexplained noticeable abscondence disentitles a period to the concession of bail notwithstanding the merits of the case-- the principle being that the accused by his conduct thwarts the investigation qua him in which valuable evidence (like recoveries etc.) is simply lost or is made impossible to be collected (by his conduct). He cannot then seek a reward for such a conduct (in becoming fugitive from law).

4. The petitioners are also involved in cases of similar nature. The recoveries have been effected from them during the course of investigation. There was sufficient incriminating material to connect the petitioners with the titled occurrence, thus, I am not inclined to exercise my discretion in their favour.

5. For the foregoing reasons, there is no merit in this petition which is hereby dismissed.

(R.A.) Bail dismissed

PLJ 2017 Cr.C. (Lahore) 326
[Multan Bench Multan]
***Present*: SARDAR AHMAD NAEEM, J.**
MUHAMMAD RIZWAN--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 2578-B of 2016, decided on 15.6.2016.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 365-B--Bail, grant of--Further inquiry--Abduction--Delay of eleven days in FIR--Validity--That abductee has not been recovered so far and to keep petitioner in jail for indefinite period would not advance case of prosecution in any manner--Petitioner is behind bars since his arrest which would not serve prosecution in any manner--There are sufficient grounds calling for further enquiry into guilt of petitioner within meaning of Section 497(2), Cr.P.C.--Bail was allowed. [P. 327] A

Rana Asif Saeed, Advocate for Petitioner.
Mirza Abid Majeed, D.P.G. for State.
Rao Muhammad Zafar, Advocate for Complainant.
Date of hearing: 15.6.2016.

ORDER

The petitioner, namely, Muhammad Rizwan seeks post-arrest bail in case FIR No. 72 dated 17.02.2016 under Section 365-B, PPC registered at Police Station Saddar Lodhran, District Lodhran at the instance of Muhammad Bakhsh (Hereinafter the complainant)

2. Allegedly, the petitioner abducted *Mst.* Samina Bibi a daughter of the complainant with intent to seduce her to illicit intercourse.

3. After hearing the learned counsel for the parties and perusing the record, it was observed:

(i) That there was unexplained delay of eleven days in lodging the FIR;

(ii) That no weapon has been recovered from the petitioner during the course of investigation;

(iii) That the allegation of abduction of *Mst.* Samina Bibi by the petitioner was found false during the investigation;

(iv) That the abductee has not been recovered so far and to keep the petitioner in jail for indefinite period would not advance the case of prosecution in any manner;

(v) That the petitioner is behind the bars since his arrest which would not serve the prosecution in any manner;

(vi) That there are sufficient grounds calling for further enquiry into guilt of the petitioner within the meaning of Section 497(2), Cr.P.C.

4. For the reasons mentioned above, the application 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 one surety in the like amount to the satisfaction of learned trial Court/Duty Judge.

(R.A.) Bail allowed

PLJ 2017 Cr.C. (Lahore) 677
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**

MUHAMMAD SHAKEEL--Appellant

versus

STATE and another--Respondents

Crl. Appeal No. 331 of 2015, heard on 17.5.2016.

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

----Ss. 302, 393, 397 & 34--Conviction and sentence--Challenge to--Benefit of doubt--**Held**: It is axiomatic principle of law that in case of doubt, benefit thereof must accrue in favour of accused as a matter of right and not of grace--It was observed by Hon'ble Supreme Court of Pakistan that for giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts--If a simple/single circumstance creates reasonable doubt in a prudent mind about guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right--Appeal was accepted. [P. 681] A 1995 SCMR 1345, *ref.*

M/s. Naeem Ullah Khan and Syed Jaffar Tayyar Bokhari, Advocate for Appellant.

Mr. Hassan Mehmood Khan Tareen, D.P.G. for State.

Mr. Shahzad Saleem, Advocate for Complainant.

Date of hearing: 17.5.2016.

JUDGMENT

Muhammad Shakeel (appellant) along with Allah Ditta and Rab Nawaz (co-convicts) accused of case F.I.R. No. 126/2011 dated 21.05.2011, under Sections 302, 393, 397 of the Pakistan Penal Code, 1860, Police Station Ghazi Abad, Sahiwal, registered at the instance of Muhammad Khitab, the complainant, was tried by the learned Additional Sessions Judge, Chichawatni. At the conclusion of the trial, *vide* judgment dated 20.05.2015, the learned trial Court acquitted the appellant of the charge under Section 302, 397, 34, P.P.C. and convicted and sentenced him under Section 393, P.P.C. as follows:

> "to imprisonment for seven years R.I. with fine of Rs. 50,000/- and in default in payment thereof, undergo Simple Imprisonment for six months. Benefit of Section 382-B, Cr.P.C. was also given to him."

2. Muhammad Shakeel accused/appellant has lodged the instant appeal against his conviction and sentence.

3. According to the F.I.R (Exh.PA/1) registered on 21.05.2011 at 1.45 A.M. at night on the basis of statement (Exh.PA) of Muhammad Khitab complainant, the complainant along with his father Nazar Muhammad and Muhammad Israr were sleeping at the place outside their house where cattle-heads were tied, when at about 12.00 in the night four unknown persons armed with fire-arms came there in order to commit 'Wardat'; that on the resistance shown by them one accused inflicted Sota-blow on the left arm of his father; on the hue and cry raised by them the accused persons fled away; complainant's brother Muhammad Nadeem who was watering the nearby fields came to them on hearing the noise; that they chased, the accused persons who started straight firing and one fire hit Muhammad Nadeem on his chest, whereupon he fell down on the ground, who was shifted to cot and after some time succumbed to the said injury.

4. After receiving the challan the learned trial Court framed the charge against the accused-appellant and his co-accused on 14.02.2014, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined fourteen witnesses in all. On 21.05.2011, Barkat Ali, S.I. (PW-11) was present at Adda Ghaziabad where he recorded statement Exh.PA of the complainant and sent the same to Police Station through Muhammad Irshad 45-C for registration of formal FIR and then proceeded to the place of occurrence, secured blood-stained earth and blood stained cot *vide* recovery memo. Exh.P.B and Exh.P.C, respectively. He examined the dead-body, prepared injury statement (Exh.PN) and inquest report (Exh.PP). He sent the dead body through Muhammad Iqbal 542-C, for autopsy. Muhammad Iqbal 542-C (PW.12) after postmortem examination produced before the Investigating Officer last-worn blood-stained clothes of the deceased i.e. Qameez P.1, Shalwar P-2 and String P-3, which he secured through recovery memo. Exh.PE. Nazir Ahmad, S.I. (PW.10) arrested accused Muhammad Shaban on 17.06.2011. Muhammad Aslam, S.I. (PW.4) and Muhammad Yar, S.I. (PW.3) also partly investigated the case.
Dr. Tanveer-ul-Haq (PW-5) conducted postmortem examination of Muhammad Nadeem (deceased) on 21.05.2011 and noted three injuries on his person.

In his opinion, death had occurred due to massive intrathoracic hemorrhage caused by Injury No. 2 which was ante-mortem and sufficient to cause death in ordinary course of nature. The probable duration between injury and death was 30 minutes and time elapsed between death and post mortem was 12 hours. Exh.PM was

correct carbon copy of original postmortem report whereas Exh.PM/1 was correct copy of diagram which were in his handwriting.

Muhammad Khitab (PW. 1) and Nazar Muhammad (PW.2) furnished the ocular account of the occurrence. Muhammad Nawaz, Patwari (PW.9) prepared scaled site plan Exh.PR and Exh.PR/1. Rest of the witnesses are formal in nature, therefore, need not to be discussed.

6. Learned Deputy District Public Prosecutor gave up Zahoor ul Haq 775/C, Abdul Majeed 276/'C, Muhammad Hussain, S.I., Muhammad Riaz, 728/C and Muhammad Hassan 270/C being unnecessary and after tendering in evidence report of Chemical Examiner (Exh.PZ) and report of Serologist Exh.P.Z/1, closed the prosecution evidence.

7. After close of the prosecution evidence, the appellant was examined under Section 342, Cr.P.C. In answer to question "Why this case against you and why the PWs deposed against you", Muhammad Shakeel accused/appellant replied as under:--

> "It is a false case. It was un-witnessed and blind murder. The complainant and PWs involved me in this case falsely on the asking of police and the I.O for showing his efficiency before the high-ups. No PW was present at the time and place of occurrence. PWs are related to inter-se. The prosecution evidence proves that I had been malafidely implicated in this case with the help of the I.O who investigated the case dishonestly."

The accused/ appellant neither opted to appear as his own witness under Section 340 (2), Cr.P.C. nor produced any defence evidence.

8. Learned counsel for the appellant submitted that he was not nominated in the F.I.R. and thus question of assigning any role does not arise; that the complainant nominated Khalid and Shaban being accused in this case but on the basis of compromise exonerated them; that the appellant along with his other co-accused was nominated in a supplementary statement recorded on 06.07.2011; that no evidence was led by the prosecution regarding source of information; that no recovery was effected from the appellant during the course of investigation; that he was not put to test identification parade; that Nazar Muhammad (PW.2) was also not examined by the Medical Officer and, thus, injury attributed to the appellant was not proved; that the acquittal of the appellant under Section 302(b), P.P.C. has not been challenged by the prosecution, therefore, attained finality and it was unseen occurrence, not proved by the prosecution beyond reasonable doubt which is always resolved in favour of the accused.

9. Learned Deputy District Public Prosecutor assisted, by the learned counsel for the complainant conceded that it was a case of no evidence.

10. Arguments heard. Record perused.

11. The prosecution produced as many as 14 witnesses to prove its case. The occurrence took place on 20/21 May 2011 at midnight. During the attempt to commit robbery, the brother of the complainant, namely, Nadeem lost his life at the hands of the assailant/unknown robbers. The appellant, however, was not nominated in the F.I.R. His name was mentioned in the supplementary statement got recorded by the complainant on 06.07.2011 and prior to that another set of the nominated accused including Khalid and Shaban were given a clean-chit. There was no evidence that appellant was known to the complainant and the appellant was not put to test identification parade, in this case, however, the co-accused of the appellant was put to identification parade. It was a midnight occurrence. No recovery was effected from the appellant. The injury attributed to the appellant was not proved through medical evidence though claimed to have been sustained by the father of the deceased. The complainant as well as his father admitted in their statements that they made no mention of the Sota blow of the appellant in the F.I.R. and that the appellant was not nominated by them. The prosecution has not challenged the acquittal of the co-accused of the appellant. One of the co-convict, namely, Rabnawaz has not filed the appeal whereas Mukhtar *alias* Mokha was declared proclaimed offender by the trial Court and the co-convict Allah Ditta also escaped at the time of pronouncement of final judgment and thus no appeal was filed by him revealed by office report.

It is axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. It was observed by the Hon'ble Supreme Court of Pakistan in *"Tariq Pervez v. The State"* (1995 SCMR 1345) that for giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts. If a simple/single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right.

12. The upshot of the above discussion and observations is that the prosecution could not prove the case against the appellant beyond reasonable shadow of doubt. Resultantly, Criminal Appeal No. 331 of 2015 is accepted and the impugned judgment dated 20.5.2015 is hereby set aside. The appellant is acquitted of the charge. He is in custody, be set free forthwith if not required in any other criminal case. The record of the learned trial Court be sent back immediately.

(A.A.K.) Appeal accepted

PLJ 2017 Cr.C. (Lahore) 681 (DB)
[Multan Bench Multan]
***Present*: CH. MUSHTAQ AHMAD AND SARDAR AHMED NAEEM, JJ.**
MUHAMMAD JAVED and others--Appellants
versus
STATE, etc.--Respondents

Crl. A. Nos. 70-ATA to 74-ATA of 2011, Crl. Rev. No. 408 of 2011, heard on 24.4.2017.

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

----S. 365-A--Anti-Terrorism Act, (XXV of 1997), S. 7(c)--Conviction and sentence--Challenge to--Abduction--Prosecution could not establish the place of abduction if it was Sahiwal or Islamabad. No body had seen the abductee in the company of the appellants. The complainant did not nominate the caller, who settled the amount of ransom, though, two appellants including two person, allegedly, received and counted the amount for ransom. The abductee failed to describe the place of his confinement, made mere mention of "Katcha room"--**Held:** It is by now settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to extend benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story--Hon'ble Supreme Court of Pakistan, was pleased to observe that the concept of benefit of doubt to an accused person is deep rooted in our country--For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then, the accused unit be entitled to the benefit not as a matter of grace and concession but as a matter of right--Apex Court reiterated the same principle--Prosecution had not been able to prove its case against the appellants beyond any shadow of doubt--Appeals are allowed. [Pp. 686 & 687] A & C 2007 SCMR 230, *ref.*

Onus of Proof--

----Principle--It is settled law that the onus of proof in criminal cases never shifts and it is imperative for the prosecution to prove its case against the accused, beyond reasonable doubt. [P. 687] B

Prince Rehan Iftikhar Sheikh, Advocate for Appellant (Muhammad Javed in Crl. A. No. 70-ATA of 2011 and *Mst. Tabassam alias Robina* in Crl. A. No. 73-ATA of 2011).

Malik Muhammad Ahsan Karol, Advocate for Appellants (*Raheem Zada alias Gul Khan* in Crl. A. No. 71-ATA of 2011, *Abdul Hameed* in Crl. A. No. 72-ATA of 2011 and *Nawaz Khan* in Crl. A. No. 74-ATA of 2011).

Mr. Abdul Aziz Khan, Advocate for Petitioner (*Bashir Ahmad* in Criminal Revsion No. 408 of 2011).

Mr. Riaz Ahmad Saghla, Deputy Prosecutor General for State.

Date of hearing: 24.4.2017.

JUDGMENT

Sardar Ahmed Naeem, J.—

Muhammad Javed, Raheem Zada *alias* Gul Khan, Abdul Hameed, *Mst.* Tabassam *alias* Robina, and Nawaz Khan accused/appellants were tried by the learned Judge, Anti-Terrorism Court No. II Multan in case F.I.R No. 407 dated 03.07.2010 under Sections 365-A, PPC read with Section 7 of the Anti-Terrorism Act, 1997 registered at Police Station Farid Town, District Sahiwal. At the conclusion of the trial *vide* judgment dated 24.08.2011, the learned trial Court convicted and sentenced the appellants as under:--

(i) Under Section 365-A, PPC and sentenced to imprisonment for life to each appellant. The property of each appellant was ordered to be forfeited in favour of the State.

(ii) Under Section 7 (e) of the Anti-Terrorism Act, 1997 and sentenced to imprisonment for life to each appellant. The property of each appellant was ordered to be forfeited in favour of the State.

Benefit of Section 382-B was also extended to them.

The ransom amount having been recovered was ordered to be handed over to Bashir Ahmad complainant, subject to the decision of appeal or revision, if any, filed against the judgment.

All the sentences were ordered to run concurrently.

2. The convict/accused Muhammad Javed filed Criminal Appeal No. 70-ATA of 2011, Raheem Zada *alias* Gul Khan convict/accused filed Criminal Appeal No. 71-ATA of 2011, Abdul Hameed convict/accused filed Criminal Appeal No. 72-ATA of 20111, *Mst.* Tabassam *alias* Robina convict/accused filed Criminal Appeal No. 73-ATA of 2011 and Nawaz Khan convict/accused filed Criminal Appeal No. 74-ATA of 2011 challenging their conviction and sentence whereas Bashir Ahmad complainant filed Criminal Revision No. 408/2011 for enhancement of life Imprisonment to capital punishment. All these matters shall be decided through single judgment.

3. Briefly narrated the facts evincing from complaint Exh.PC made by Bashir Ahmad complainant on the basis of which formal FIR Exh.PH was chalked out are that on 01.07.2010 at about 7.00 p.m. his son namely Usman Ahmad (aged

about 27 years) was missing. On 02.07.2010 at 9.00 p.m, his son told him regarding his abduction through telephone and requested to do something. The abductors talked the complainant and demanded One Crore Rupees as ransom for his release within three days on which, complainant requested the abductors that he was not so financially sound. The abductors telephonically repeated their demands three times. The abductors also extended threats of dire consequences.

4. After usual investigation, challan was submitted before the Court.

5. The prosecution in order to prove its case produced as many as six witnesses including Muhammad Sajid Khan, Civil Judge Cum Judicial Magistrate (PW-1), Bashir Ahmad (PW-2), Ch. Usman Ahmad (PW-3), Muhammad Shoaib ASI (PW-4), Zahoor Ahmad SI (PW-5) and Saeed Ahmad SHO (PW-6).

Learned Public Prosecutor closed the prosecution case *vide* his separate statement dated 18.7.2011.

6. After conclusion of the prosecution evidence, statements of the accused were recorded. They refuted the prosecution allegations leveled against them and claimed innocence. Replying to a question why this case against him and why the PWs have deposed against him, Muhammad Javed appellant deposed as under:

> "It is a false case. Police has arrested me just to show their efficiency as it was an unseen occurrence committed by unknown persons. All the PWs are inter related with each other. Private PWs are father and son while official PWs just to show their efficiency have deposed against me"

The remaining appellants also replied the same question in the same manner as described by Muhammad Javed, appellant.

They did not opt to appear as their own witnesses under Section 340(2), Cr.P.C. nor opt to produce any witness in defence.

7. Learned counsel for the appellants at the very outset emphasized that the prosecution has utterly failed to furnish the evidence on the point of payment of ransom. It was argued that there was no eye-witness of this occurrence; that there was no question of holding the test identification parade, in particular, when the complainant had earlier nominated all the appellants in his supplementary statement and when the abductee has spent ten days of his captivity with all the accused; that the place of abduction was not established by the prosecution if it was Chak No. 86/6-R or Peshawar Mor Islamabad; that the story of prosecution that all the appellants came from Mala Kand to Noor Shah Chatha Garden Sahiwal was highly improbable; that the prosecution evidence was replete with doubts regarding mode and manner of making the payment of ransom amount and the recipient of that amount; that there was no detail regarding place of confinement of the abductee except a "Katcha room"; that the offence of abduction for ransom within the meaning of Section 365-A, PPC was not made out; that even the offence under Section 365, PPC has not been made out; that the complainant himself was not the eye-witness of the occurrence; that the case of the prosecution was full of

discrepancies/contradictions as well as doubts, thus, the appellants are entitled to acquittal. Learned counsel in this context relied upon *"Mst. Safdar Jan v. The State and another"* (1997 PCr.LJ 1553), *"Abdul Karim alias Raja and another v. The State"* (1996 PCr.LJ 503), *"Khadim Hussain v. The State"* (1985 SCMR 721) and *"Imdad Jakhro v. The State"* (1994 PCr.LJ 1648)

8. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant argued that the prosecution has proved its case against the appellants beyond reasonable doubt; that in cases of abduction for ransom the determining factor is the objective behind the crime; that cases of abduction for ransom are to be dealt with iron hands and even if there are minor discrepancies and deviation in evidence or short falls on the part of investigating agency, the approach of the Court should always be dynamic and pragmatic, drawing the correct and rational inferences and questions arising out of the facts and circumstances of each case; that the defects, if any, in holding the test identification parade, was not fatal to the prosecution case as the abductee during his captivity had ample time to see the accused; that passing of money was not a prerequisite to prove Section 365-A, PPC; that the recovery of the ransom amount was effected from the appellants; that the abductee has no ill will, grudge or grouse for false implication of the appellants; that all the witnesses were consistent; that the appellants abducted Usman Ahmad and demanded/received ransom amount from the complainant and thus, the prosecution discharged its initial burden and it was for the appellants to dislodge the same. They supported the impugned judgment.

9. The complainant Bashir Ahmad. (PW.2) was father of Usman Ahmad, abductee. He went out of his house on 01.7.2010 and did not return. On 02.7.2010, a phone call was received by the complainant regarding abduction of his son Usman Ahmad and demand of ransom and then after the ransom call, the complainant got registered the FIR against the unknown accused. It was in the evidence that the appellants abducted Usman Ahmad from outside of his house. It was in the evening, however, no exact time finds mention in the statements of the witnesses. Initially, Rs. 10 (million) was the demand of the appellants and ultimately, it was settled as Rs. 01(M). The case of the prosecution was that on 12.7.2010, all the appellants came to Noor Shah Chatha Garden Sahiwal by their own car and after receiving the ransom amount handed over the abductee to the complainant, who got recorded his supplementary statement on 12.7.2010, nominating the appellants. In his statement, he has not mentioned the source of information regarding the acquaintance with the appellants.

10. As mentioned above, learned counsel for the appellants criticized the manner of holding the test identification parade and, submitted that holding of such parade was overdoing on the part of the prosecution.

11. In case titled *"Zakir Khan and others v. The State"* (1995 SCMR 793), it was observed that where the abductee remained with the accused during the

captivity and had abeady seen their faces, holding of an identification parade was not a mandatory requirement. View taken in *"Muhammad Akbar v. The State",* (1998 SCMR 2538) was also on the same lines wherein observation has been made as reproduced below dispensing with the test identification parade in the peculiar circumstances of the case:

> "……It is only one of the methods to test veracity of the evidence of an eye-witness who has had an occasion to see the accused and claims to identify him. The observations made in the three judgments of this Court, relied upon by the learned counsel for the petitioner, do not advance the petitioner's case as it is not a case where the witnesses had a momentary glimpse of the accused. Where a witness has spent considerable time with the accused and has had an opportunity to take a good look at him, holding of such test would not be necessary."

12. In view of the principle laid down by the Supreme Court in the above mentioned case, it is to be assessed to what extent the abductee has identified and involved the accused-appellants and, additionally need normal rules of appraisal of evidence, if his evidence is inherently believable, confidence inspiring and free from a motive to implicate the appellants falsely.

13. As mentioned above, the prosecution could not establish the place of abduction if it was Sahiwal or Islamabad. No body had seen the abductee in the company of the appellants. The complainant did not nominate the caller, who settled the amount of ransom, though, two appellants including Abdul Hameed and Rahim Zada, allegedly, received and counted the amount for ransom. The abductee failed to describe the place of his confinement, made mere mention of "Katcha room". The appellants are resident of Khyber Pakhtoon Khawa and thus, it was mentioned by the abductee that he was confined/kept at Mala Kand. Who brought the abductee to Mala Kand and how was he shifted to that place, there was no material on the file. The offences like abduction for ransom are pre-planned and always committed through a gang with different assignments to different accused including abduction, shifting, security, settlement of ransom, receiving the amount and the ultimate release of the abductee. In this case, the prosecution failed to produce any evidence regarding the date and time of abduction of the appellants. There was no specific mention regarding abductor (s). Who shifted the appellant from Sahiwal to Mala Kand no evidence was led by the prosecution. Though the approach of the Criminal Courts in such like cases should be dynamic and technicalities should be avoided but it is settled law that the onus of proof in criminal cases never shifts and it is imperative for the prosecution to prove its case against the accused, beyond reasonable doubt. The survey of the entire evidence available on the record suggests the following shortcomings in the prosecution's case:

(i) The prosecution was uncertain regarding the place of abduction, if Sahiwal or Islamabad;
(ii) No specific role was assigned to any of the appellant;
(iii) The story of the prosecution about the arrival of the appellant from Mala Kand to Sahiwal by a white coloured car and then handing over the abductee after receiving the ransom amount was highly improbable as in abduction cases, the accused tried their best to conceal their identity;
(iv) No details find mention in the statement of the omplainant regarding the caller, who initially made call for ransom and then, settled the ransom amount and received the same;
(v) The white coloured car was never taken into possession;
(vi) No fard Shanakhat of place of recovery of abductee was prepared during the investigation.

14. It is by now settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to extend benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In *"Tariq Pervez v. The State"* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page No. 1347, was pleased to observe that the concept of benefit of doubt to an accused person is deep rooted in our country.
For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then, the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. The apex Court reiterated the same principle, in the case of *"Muhammad Akram v. The State"* (2009 SCMR 230).

15. For what has been discussed above, we have come to the irresistible conclusion that the prosecution had not been able to prove its case against the appellants beyond any shadow of doubt. Hence, the Crl. Appeal No. 70-ATA of 2011, Crl. Appeal No. 71-ATA of 2011, Crl. Appeal No. 72-ATA of 2011, Crl. Appeal No. 73-ATA of 2011, Crl. Appeal No. 74-ATA of 2011 are hereby accepted. The impugned judgment of conviction and sentence recorded by the learned trial Court *vide* judgment dated 24.8.2011 against the appellants is set aside and they are acquitted of the charges by extending them benefit of doubt. They shall be released from jail forthwith if not required in any other criminal case.

16. In view of the above, there is no merit in Criminal Revision No. 408 of 2011 which is hereby dismissed.

(A.A.K.) Appeals allowed

PLJ 2017 Cr.C. (Lahore) 701
[Multan Bench Multan]
***Present*: Sardar Ahmed Naeem, J.**
FAYYAZ HUSSAIN--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 2014-B of 2017, decided on 8.5.2017.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 376(i)--Bail, grant of--Further inquiry--Allegation of rape--There was unexplained delay of about thirty two hours in lodging FIR--Co-accused of petitioner, was found innocent during investigation which reflects against prosecution story--No mark of violence on private parts was observed during medical examination of victim--A Photostat copy of affidavit of complainant and is available on record which reflects that nomination of co-accused of petitioner, in this case was a result of sheer misunderstanding and thus, his involvement in this occurrence was not confirmed and he was found innocent--During investigation nothing has been recovered from petitioner--Opinion of Medical Officer is subject to report of Punjab Forensic Science Agency which is still awaited--Petitioner is behind bars since his arrest and his continuous detention in circumstances would be unfair--Petitioner has got no previous record, and thus, would be believed as first offender--Case of petitioner needs thorough probe in circumstances, within meaning of Section 497(2), Cr.P.C.--Bail was allowed. [Pp. 702 & 703] A & B

PLJ 2012 Cr.C. (Lahore) 187 & 2016 P.Cr.R. 211, *ref.*

Mr. Faisal Aziz Ch. Advocate for Petitioner.

Mr. Hassan Mehmood Tareen, D.P.G. for State.

Mr. Ahsan Raza Hasmi, Advocate for Complainant.

Date of hearing: 8.5.2017.

ORDER

Fayyaz Hussain, petitioner has sought post arrest bail in case registered *vide* FIR No. 31 dated 20.1.2017 under Section 376(i), PPC registered at Police Station Chowk Azam, District Layyah.

2. Allegedly, the petitioner committed rape with *Mst.* Sofia, the victim.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that there was unexplained delay of about thirty two hours in lodging the FIR. The co-accused of the petitioner, namely, Muhammad Saleem was found innocent during the investigation which reflects against the prosecution story. No mark of violence on the private parts was observed during the medical examination of the victim. A Photostat copy of the affidavit of the complainant and Fazal Abbas is available on the record which reflects that nomination of co-accused of the petitioner, namely, Muhammad Saleem in this case was a result of sheer misunderstanding and thus, his involvement in this occurrence was not confirmed and he was found innocent. During the investigation nothing has been recovered from the petitioner. The opinion of the Medical Officer is subject to the report of Punjab Forensic Science Agency which is still awaited. The petitioner is behind the bars since his arrest and his continuous detention in the circumstances would be unfair. Ref: *"Mustafa v. State & another"* (PLJ 2O12 Cr.C. (Lahore) 787) and *"Shah Nawaz v. The State"* (2016 P.Cr.R 211). The petitioner has got no previous record, and thus, would be believed as first offender. The case of the petitioner needs thorough probe in the circumstances, within the meaning of Section 497(2), Cr,P.C, thus, I am inclined to exercise my discretion in his favour.

4. For what has been discussed above, the application is accepted and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court/Duty Judge.

(A.A.K.) Bail allowed

PLJ 2017 Cr.C. (Lahore) 717
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**
GHULAM MUSTAFA--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 523-B of 2017, decided on 11.4.2017.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 392, 397 & 411--Bail, grant of--Delay of two days in FIR--Petitioner is involved in a few cases of similar nature but High Court is only seized of the present bail application filed by the accused and the embargo of those cases was not relevant for the decision of the instant petition--Petitioner is behind the bars since his arrest and his detention would not serve any purpose to the prosecution, in particular, when the investigation is complete--Petition was allowed. [P. 718] A & B

Prince Rehan Iftikhar, Advocate for Petitioner.
Syed Nadeem Haider Rizvi, DDPP for State.
Mr. Shahzad Fareed Langrial, Advocate for Complainant.
Date of hearing: 11.4.2017.

ORDER

Ghulam Mustafa, petitioner seeks post arrest bail in case FIR No. 166 dated 03.4.2016 under Sections 392, 397, 411, PPC registered at Police Station Yousaf Wala, District Sahiwal.

2. In this case, the complainant reported the commission of robbery against unknown accused.

Later on, the petitioner was arrested in this case.

3. Having heard the arguments addressed at the bar and after perusing the record, it was noticed that there was unexplained delay of about two days in lodging the FIR. The petitioner was not nominated in the crime report. He was arrested in case FIR No. 367 dated 28.5.2016 under Sections 392, 397, PPC and consequent to a

disclosure made by his co-accused was arrested in this case. The test identification parade was held after about twenty six days of his arrest. Ref: *"Imran v. The State"* (2011 YLR 1944) and *"Rizwan Zafar v. The State"* (2013 Cr.LJ 220). During the investigation, he got recovered the robbed items but no memo. of identification was prepared by the Investigating Officer. The petitioner is involved in a few cases of similar nature but this Court is only seized of the present bail application filed by the accused and the embargo of those cases was not relevant for the decision of the instant petition Ref: *Qurban Ali v. The State and others"* (2017 SCMR 279). The petitioner is behind the bars since his arrest and his detention would not serve any purpose to the prosecution, in particular, when the investigation is complete. The case of the petitioner needs thorough probe within the meaning of Section 497(2), Cr.P.C. He has made out a case for his enlargement on bail.

4. For the foregoing reasons, the bail application is accepted and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court/Duty Judge.

(M.Y.A.) Bail allowed

PLJ 2017 Cr.C. (Lahore) 789
***Present*: SARDAR AHMED NAEEM, J.**
ZAHIDA PARVEEN--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 1275-B of 2017, decided on 29.3.2017.

Criminal Procedure Code, 1898 (V of 1860)—

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 147, 149--Bail after arrest--Grant of--Further inquiry--Allegation of--Member of unlawful assembly--Common object--Committed *Qatl-i-Amd*--No poison was administered to deceased reflected by report of Punjab Forensic Science Agency--No evidence of sexual assault was found by Medical Officer--Cause of death was neurological damage consequent to injury not specifically attributed to petitioner--During investigation, recovery of "Thapi" was effected from petitioner--She is behind bars since her arrest and her long incarceration would not serve any purpose to prosecution, in particular, when investigation is complete--Case of petitioner, in circumstances, needs thorough probe within meaning of S. 497(2), Cr.P.C.--Bail was allowed. [P. 790] A

Ch. Nisar Ahmed Sheikhhu, Advocate for Petitioner.

Mr. Muhammad Akram Tahir, Deputy District Public Prosecutor for State.

Mian Shahzad Khadim Monday, Advocate for Complainant-Respondent No. 2.

Date of hearing: 29.3.2017.

ORDER

Zahida Parveen, Petitioner seeks post-arrest bail in case F.I.R. No. 448/2016 dated 03.05.2016, under Sections 302, 147, 149, P.P.C., registered at Police Station Saddar, Faisalabad.

2. Allegedly, the petitioner being member of unlawful assembly and in prosecution of its common object committed *Qatl-i-Amd* of *Mst.* Saima, the deceased.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that there was unexplained delay of about three months in lodging the

F.I.R. and no specific role has been attributed to the petitioner. The co-accused of the petitioner with similar role were declared innocent during the investigation of this case. No poison was administered to the deceased reflected by the report of Punjab Forensic Science Agency dated 31.03.2017. No evidence of sexual assault was found by the Medical Officer. The cause of death was neurological damage consequent to Injury No. 1 not specifically attributed to the petitioner. During the investigation, recovery of "Thapi" was effected from the petitioner. She is behind the bars since her arrest and her long incarceration would not serve any purpose to the prosecution, in particular, when the investigation is complete. The case of the petitioner, in the circumstances, needs thorough probe within the meaning of Section 497(2), Cr.P.C.

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

(A.A.K.) Bail allowed

PLJ 2017 Cr.C. (Lahore) 891 (DB)

***Present*: MUHAMMAD ANWAAR-UL-HAQ AND SARDAR AHMED NAEEM, JJ.**

JABIR HUSSAIN, etc.--Appellants

versus

STATE, etc.--Respondents

Crl. A. No. 612 & M.R. No. 119 of 2014, decided on 1.6.2017.

Circumstantial Evidence--

----It is well settled that in a case based on a circumstantial evidence, prosecution must prove that within all human probabilities, act must have been done by accused--Case of prosecution is required to be covered by leading cogent, believable and credible evidence. [Pp. 897 & 898] A

Conviction--

----Circumstantial evidence--There is no prohibition in law that in a murder case conviction cannot be based on circumstantial evidence--In fact, it is not quantity but sufficiency and quality of evidence which matters--In a number of cases, including following imposition of death sentence has been approved by Hon'ble Supreme Court of Pakistan purely on basis and in appreciation of circumstantial evidence. [P. 901] B

PLD 2007 SC 237 & 1999 SCMR 845, *ref.*

Criminal Jurisprudence--

----Principle--Circumstantial evidence--**Held:** It is settled principle of criminal jurisprudence that circumstantial evidence can only be based for conviction when it is incompatible with innocence of accused and is incapable of explanation of any other reasonable hypothesis than that of guilt of accused--**Further held:** It is also settled by now that concealing a dead body by accused himself does not amount to causing disappearance of evidence as contemplated by Section 201, PPC--No doubt, this murder is diabolical in conception and cruel in execution--Totality of circumstances, unerringly, unfailingly and unshakably proves that appellant alone was perpetrator of this heinous crime--Conviction of appellant and sentences awarded to him u/S. 302(b) and 377, PPC are maintained and impugned judgment is modified only to extent of setting aside conviction under Sections 201, 364-A, PPC--With this modification appeal was dismissed. [P. 903] C & D

1999 SCMR 955, *ref.*

Mr. Muhammad Irfan Malik, Advocate for Appellant.
Mr. Zubair Ahmed Farooq, Additional Prosecutor General for State.
Mr. Kazim Ali Malik, Advocate for Complainant.
Date of hearing: 1.6.2017.

JUDGMENT

Sardar Ahmed Naeem, J.--Jabir Hussain son of Abdul Aziz appellant-accused of case FIR No. 433 dated 23.12.2012 under Sections 364-A/377/302/201, PPC registered at Police Station City Wazirabad, was tried by the learned Addl. Sessions Judge, Wazirabad. At the conclusion of the trial, the appellant was convicted and sentenced as under:--

1. Under Section 302(b), PPC: Sentenced to death with the direction to pay Rs. 2,00,000/- as compensation to the legal heirs of the deceased under Section 544-A, Cr.P.C., in default whereof to further undergo six months simple imprisonment.
2. Under Section 364-A: Sentenced to death.
3. Under Section 377, PPC: Sentenced to undergo Rigorous Imprisonment for life with fine of Rs. 50,000/-, in default whereof to further undergo simple imprisonment for three months.
4. Under Section 201, PPC: Sentenced to Rigorous Imprisonment for seven years with fine of Rs. 10,000/- in default whereof to further undergo simple imprisonment for one month.

All the sentences awarded to the appellant were ordered to run concurrently with benefit of Section 382-B, Cr.P.C.

2. The appellant has filed Crl. Appeal No. 612 of 2014 against his conviction. Murder Reference No. 119/2014 is also before us for confirmation or otherwise of the death sentence.

3. The prosecution story, in brief, as unfolded in the complaint Ex.PK, on the basis of which FIR No. 433/2012 (Ex.PK/1) was lodged by Muhammad Shahid complainant, was that on 23.12.2012 at 5.00 p.m., his son namely Ameer Hamza went to the shop of the Mohalla and did not return. He searched his son but could not succeed. The matter was reported to the police against unknown persons. On 25.12.2012, the complainant moved another application Ex.PR suspecting that Jabir

Hussain appellant, whose shop was closed for two days and was also not traceable, has abducted his son. Hence the present FIR was got registered against him.

4. Muhammad Suleman, S.I. (PW.15), on entrustment of investigation of this case, on 24.12.2012, proceeded to the place of occurrence, inspected the spot and also visited house of the complainant. He prepared un-scaled site plan, investigated the matter and started searching the accused. On 25.12.2012, at 5.00, complainant Muhammad Shahid moved an application implicating Jabir Hussain appellant as accused of abduction of his son. He recorded statements of the witnesses. On 26.12.2012, he arrested the appellant who disclosed that he committed sodomy with the victim Ameer Hamza, who raised hue and cry whereupon the appellant strangulated him with hands at his throat. The appellant further disclosed that he put the dead body into a deep freezer lying in his shop after tightening his hands and legs with cloth and got recovered the dead body in the presence of witnesses which was taken into possession *vide* (Memo. Ex.PS). He prepare rough site plan of the place of recovery of the dead body *vide* (Memo. Ex.PV). He also took into possession deep freezer *vide* Memo. (Ex.PE), prepared inquest report Ex.PW and injury statement (Ex.PX). He deputed Nisar Ahmad Constable for conducting post-mortem examination of the dead body. After conducting post-mortem examination, Nisar Ahmad Constable handed over last worn clothes of the deceased along with post-mortem report and other articles which were taken into possession *vide* Memo. (Ex.PT). He recorded the statements of the witnesses under Section 161, Cr.P.C. He took physical remand of the accused on 27.12.2012 and on the same day, the accused led to the recovery of last worn clothes of the deceased which were taken into possession *vide* Memo. (Ex.PG). On 28.12.2012 Aamer Sattar Constable handed over seven snaps of the deceased P1-P7 which were taken into possession *vide* Memo. (Ex.PB). He summoned Bilal Masood Bhatti Draftsman, who took rough notes on the pointation of the PWs and drafted site plan (Ex.PA) and (Ex.PA/1). On 29.12.2012, he got examined the accused for potency test *vide* written application (Ex.PM) and report (Ex.PM/1). He also joined in the investigation, *Mst.* Shagufta Nawaz wife of Muhammad Nawaz, (PW.13) owner of the shop, who disclosed that the appellant was tenant in the shop and paid Rs. 2,000/- per month as rent. On 03.01.2013, he visited Gujranwala and recorded statement of Jabbar Ahmad, Sales Officer of the PEPSI and took into possession agreement deed (Ex.PJ) whereby accused was entrusted a freezer by the company.

5. Talib Hussain S.I. (PW16) partially investigated the case. On 21.2.2013, *Mst.* Shagufta Nawaz joined investigation and produced copy of registered sale deed of the house (Ex.PD). On the same day, Faisal Aslam (PW-14) produced before him agreement (Ex.PC) which was taken into possession *vide* recovery

Memo. (Ex.PC/1). After completion of investigation, the challan was prepared and submitted before the Court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 21.02.2013, to which he pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution examined as many as sixteen witnesses.

7. The medical evidence was furnished by Dr. Zakir Ali Rana Medical Officer, (PW.8). On 26.12.2012 at 11.30 P.M, he conducted the post-mortem examination on the dead body of Ameer Hamza deceased.

In his opinion, the death was occurred due to asphyxia as a result of throttling. Probable duration between injuries and death was approximately 3 to 5 minutes whereas, between death and post-mortem examination was three days.

8. Muhammad Shahid, complainant (PW-11) supported the prosecution story as mentioned in the FIR. Sarfraz Ahmad (PW-12) was witness of arrest and disclosure of the accused, made before the police and also witness of recovery of dead body. *Mst.* Shagufta Nawaz (PW-13), owner of the shop stated that the appellant was his tenant. Faisal Aslam (PW-14), Sales Officer of Naubahar Bottling Company, Gujranwala stated that company has delivered deep freezer to the appellant for his shop. Bilal Masood Draftsman (PW-1) prepared scaled site plans (Ex.A) and (Ex.PA/1) of the place of occurrence Rest of the witnesses are of formal in nature, therefore, need not to be discussed.

9. Learned Deputy District Public Prosecutor gave up Mubarik Ali 100/C, Muhammad Anwar 2181/C, Sajjad Ahmad, Riaz Ahmad, Muhammad Tariq and Muhammad Khalid PW being unnecessary and after tendering in evidence the report of Punjab Forensic Science Agency (Ex.PZ) close the case of prosecution.

10. In his statement recorded under Section 342, Cr.P.C., the appellant pleaded false implication. He neither appeared as his own witness under Section 340(2), Cr.P.C. nor produced any witness in his defene. In answer to a question why this case against you and "why the PWs deposed against you", the appellant stated as under:

> "I have been falsely implicated in this case. I am totally innocent. Neither I abducted Ameer Hamza deceased nor committed sodomy with him, nor murdered him. It is a case of no evidence. The evidence produced against

me is totally false, fake, frivolous and fabricated and the story introduced by the prosecution is concocted one. In fact, I have not taken this shop on rent and I am also not owner of the said rented shop. Neither I obtained the shop on rent from Shagufta Bibi nor entered into any agreement regarding said shop with any body. The freezer which has been shown by the prosecution as to be taken by me from Nau Bahar Bottling Company nor I signed any agreement. The said freezer was not owned by me. "PW.11 Muhammad Shahid admitted that dacoity was committed into the jewelry shop of his brother prior to the present occurrence. They got recorded FIR in Police Station Sadar Wazirabad and named accused in said FIR. But accused could not be traced out".

After my arrest in this case about ten people met the complainant party as well as during course of investigation for proving my innocence but in vain. It is pertinent to mention here that neither I made disclosure or extra judicial confession before I.O. nor dead body of the deceased was recovered on my pointation. In fact deceased Ameer Hamza was abducted by some unknown persons who committed dacoity into the shop of complainant's brother. These unknown persons who committed this occurrence. Actually they demanded ransom from complainant party and these unknown persons were in the knowledge of the complainant party as well as police but they could not be traced out. The complainant party in connivance with the police wrongly and *mala fide*ly falsely implicated me in this case. The local police in order to get rid of this case wrongly challaned me in this false case. I am a married person having three children and earning head of my family. I am a law-abiding religious and noble person of the society. The PWs are related interse, hence they have deposed falsely against me."

11. After evaluating the evidence and considering the merits of the case, the learned trial Court held the appellant guilty, convicted and sentenced him as detailed above. Now, this appeal.

12. Learned counsel for the appellant contended that he was not nominated in the FIR rather, his name finds mention in the application (Exh.PR) moved on 25.12.2012; that the case of prosecution entirely rests on circumstantial evidence and there was no direct evidence to connect the appellant with this occurrence; that the prosecution has badly failed to prove the charge levelled against the appellant; that the evidence produced by the prosecution suffered from the material contradictions; that there was no independent witness to support the prosecution version; that the

case of the prosecution does not fall under Article 40 of the Qanun-e-Shahadat Order, 1984, therefore, on the basis of such evidence, conviction and sentence awarded to the appellant cannot be sustained; that the prosecution could not establish through convincing-cogent evidence that the appellant was running the shop wherefrom the dead body of the deceased was recovered lying inside a deep freezer; that no evidence was brought on the file to establish the tenancy of the appellant; that the scaled/unscaled site plans, both, reflected that there was nothing in the shop except deep freezer; that there was no eye-witness of the occurrence; that the investigation in this case was dishonest and *mala fide* from the very inception as the police investigating the case did everything with a set mind to pin the crime on the appellant and though an out of the way, effort was made to strain every evidence against the appellant, yet the investigating agency failed to collect any evidence as could prove that it was the appellant who killed the deceased. Learned counsel for the appellant contended that the death sentence is not warranted in a case which rests upon circumstantial evidence. He submitted that there was no credible evidence available with the prosecution to prove the guilt of the appellant beyond reasonable doubt, thus, it was a fit case for acquittal.

13. On the other hand, learned Additional Prosecutor General assisted by the learned counsel for the complainant argued that the case against the appellant was proved beyond any shadow of reasonable doubt. It was submitted that the learned trial Court had thoroughly examined the entire evidence adduced by the prosecution and reached to the conclusion that the guilt of the appellant was fully proved, therefore, such findings being based on proper and careful appreciation of evidence called for no interference on mere discrepancies. It was contended that nomination of the accused in Exh.PR shows the bona fide of the complainant; that the disclosure made by the appellant in police custody resulted into the recovery of the dead body/deep freezer from the shop run by the appellant, thus, Article 40 of Qanun-i-Shahdat Order was attracted; that the prosecution produced the independent witnesses having no malice/animus for false implication; that the case of prosecution is further supported by the medical evidence suggesting injuries on both thighs and anal canal of the deceased who was just five years old; that no link in the chain was missing and even capital sentence can be awarded on the basis of circumstantial evidence. Learned counsel for the complainant frankly conceded that Sections 364-A and 201, PPC were not attracted in this case. Lastly, it was contended that the trial Court was quite justified to convict the appellant on the basis of material available on the record as there was no glaring contradictions in the testimony of the prosecution witnesses.

14. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

15. Before adverting to the arguments advanced by the learned counsel for the appellant, we shall at the threshold point out that in the present case, there was no direct evidence to connect the appellant with the offence in question and the prosecution rests its case solely on circumstantial evidence. The apex Court in the series of judgments has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following test:

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) Those circumstances should be of a definite tendency pointing towards guilt of the accused;

(iii) The circumstances should form a chain so completely that there is no escape from the conclusion that the crime was committed by the accused; and

(iv) The circumstantial evidence in order to sustain conviction must be complete and capable of explanation of any other hypotheses than that of the guilt of the accused and such evidence should not only be consisted upon the guilt of the accused but should be inconsistent with his innocence;

16. Bearing the above principles of law enunciated by the Hon'ble Supreme Court of Pakistan, we shall scrutinize scrupulously and examine carefully the circumstances appearing in this case with serious and onerous responsibility imposed on the Court.

17. Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is well settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. The case of prosecution is required to be covered by leading cogent, believable and credible evidence.

18. The circumstantial evidence (Al-Qarinah) is also one of mode to find out guilt or innocence of the accused under the Islamic law. The terms " Qarinah" comes from the root word "Qarana" which signifies "connecting something" Technically "Qarinah" means any sign, proof or evidence which is circumstantial in nature which may corroboratively give a definite impression of an occurrence of any relevant fact or any fact in issue in a case. "Qarinah" in its literal meaning, means connection, conjunction, relation, union, affiliation, linkage or association. However, in legally speaking, it refers to logical inference to be drawn from the circumstances.

By now, “Al-Qarinah” has been accepted and recognized as one of the means of proof. The reason for admitting “Qarinah” is based from sources in Holy Quran:

> “They stained his shirt with false blood. He said: “Nay, but your minds have made up a tale (that may pass) with you (for me) patience is most fitting: against that which ye assert it is ALLAH(alone) whose help can be sought.” (Al- Quran, 12:18)
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> “So they both raced each other to the door, and she tore his shirt from the back: they both found her lord near the door. She said: “What is the (fitting) punishment for the one who found formed an evil design against thy wife, but prison or grievous chastisement?”. He said: “it was she that sought to seduce me from my (true) self.” and one of her household saw(this) and bore witness, (thus) “if it be that his shirt is rent from front, then is her tale true, and he is a liar! “but if it be that his shirt is torn from the back, then is she the lair, and he is telling the truth. (Al-Quran 1225-27)
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> In fact, awareness has been given to this world 1437 years ago by the Allah Almighty in the Holy Book of Quran in Surah Yousaf wherein this method of proving a guilt or innocence has been highlighted. The applicability of “Qarinah” in proving a case is nowhere expressly provided by the Holy Quran. However, its applicability could be gleaned by references of several verses in the Holy Quran together with analogical deduction.

19. The instant case is entirely based upon circumstantial evidence. The deceased, namely, Ameer Hamza (05 years old boy), on 23.12.2012 at 5.00 p.m, left for a shop in his street to fetch some candies but never returned. The complainant reported the kidnapping/disappearance of his son to police on 23.12.2012 through an application Exh.PQ. Thereafter, got registered FIR (Exh.PK) regarding incident against unknown accused on 24.12.2012 and then, nominated the appellant in his application Exh.PR moved on 25.12.2012. The appellant was arrested on 26.12.2012 and disclosed that he could not control his sexual lust and that after committing sodomy with Ameer Hamza eliminated him by way of strangulation and then got recovered his dead body as a result of said disclosure from a deep freezer lying in his shop. However, learned counsel for the appellant raised objection regarding admissibility of the disclosure made by the appellant.

20. In order to apply Article 40 of Qanun-i-Shahdat Order, 1984 the prosecution must establish that information given by the accused led to the discovery of some fact deposed by him and discovery must be of some fact which the police had not previously learnt from any other source and that the knowledge of the fact

was first derived from the information given by the accused. In the instant case, the police had no previous knowledge if the appellant kept the dead body of the deceased inside a deep freezer lying in his shop and when the appellant disclosed such fact, the Investigating Officer in presence of marginal witnesses, discovered the above referred deep freezer, dead body of the deceased, so the information of the appellant fully comes within the scope of Article 40 of Qanun-i-Shahdat Order, 1984: *Ref: "Mst. Askar Jan and others v. Muhammad Daud and others"* (2010 SCMR 1604).

21. In order to prove its case, the prosecution produced Faisal Aslam as PW.14. He served for three years being Sales Officer and deposed that on 07.3.2011, the appellant approached his company "Nau Bahar Bottling Company" (Pvt.) Ltd, for the delivery of a deep freezer of Pepsi company for his shop. He referred to an agreement entered into between the appellant and the company (Exh.PC) evidencing the delivery of deep freezer against the terms and conditions mentioned therein. The prosecution also produced *Mst.* Shagufta Nawaz, wife of Muhammad Nawaz the owner of the shop (PW.13). She deposed that she had rented out the shop to the appellant on a monthly rent of Rs. 2000/-. The appellant was running that shop in the name and style of "Inam Karyana Store". During investigation, it revealed that Inam was a son of the appellant.

The appellant pleaded false implication that he was involved in this case because local police wanted to get rid of this false case, as reflected by his statement recorded under Section 342, Cr.P.C. It was not imperative for the appellant to appear as his own witness under Section 340(2), Cr.P.C. in disproof of the allegations or to examine some witnesses in his defence but in this case, he could not substantiate his plea that he was not running the shop as stated by *Mst.* Shagufta Nawaz (PW.13). The trend of cross- examination rather, suggested that he was running "Inam Karyana Store" as borne out from the statements of Bilal Masood draftsman (PW:1) and Sarfraz Ahmad (PW.12). At this juncture, we may mention that the plea of the appellant of not running a shop is after-thought as no such suggestion was put to any witness till the examination of *Mst.* Shagufta Nawaz (PW.13).

22. The appellant got recovered the deep freezer (P-10) delivered to him by the Pepsi company through memo. (Exh.PE). It was lying in his shop and also shown in the scaled and unscaled site plans of the place of occurrence. The dead body of the deceased was lying frozen inside the said deep freezer in the month of December and was identified by Sarfraz Ahmad (PW.12). The appellant could not produce any witness or any local to establish that he was not running a shop in "Sipaal" colony. The prosecution witnesses including Faisal Aslam, Shaghufta Nawaz and Sarfraz Ahmad have no relation, whatsoever, with the deceased. They had no ostensible reason to depose against the appellant for his false implication.

They remained firm and nothing favourable to the appellant was elicited during the cross-examination, thus, there was no reason to disbelieve their evidence.

The autopsy was held by Dr. Zakir Ali Rana M.O (PW.8). He observed a ligature mark around the neck and found a nylon string on the neck of the deceased , taken into possession *vide* memo. Exh.PT. He also observed the following injuries on his neck, head, thighs and anus.

(i) Ligature mark on neck anterior side around the neck;
(ii) Abrasion 3 x 4 cm under right thigh;
(iii) Abrasion 3 x 4 cm under left thigh;
(iv) Lacerated wound 4 x 2 cm on the back and middle of head;
(v) Perianal anal tear 1.5 x .2 cm at 6'O clock on upper border;
(vi) Perianal tear 1.5 x 2 cm at 6'O clock on the lower border.

No seminal material was identified on any item examined for the presence of semen, therefore, no further DNA profiling was conducted on these items as reflected by the report of Punjab Forensic Science Agency Exh.PZ. However, in view of injuries No. (ii), (iii), (v), (vi), Section 377, PPC is attracted.

23. As regard the contentions of the learned counsel for the appellant that imposition of death sentence awarded in the instant case which wholly rests upon circumstantial evidence, was not warranted, it may be mentioned here that the contentions appears to have been raised perhaps under the misconception. There is no prohibition in law that in a murder case conviction cannot be based on circumstantial evidence. In fact, it is not the quantity but sufficiency and quality of the evidence which matters. In a number of cases, including following imposition of death sentence has been approved by the Hon'ble Supreme Court of Pakistan purely on the basis and in appreciation of circumstantial evidence which are as follows:

(i) *"Inayatullah v. The State"* (PLD 2007 SC 237). In this case, the plea was raised by the accused that capital punishment could not be awarded on the basis of circumstantial evidence and the Hon'ble Supreme Court of Pakistan observed that generally capital punishment could not be awarded to accused persons on the basis of circumstantial evidence, however, in the present case, if the pieces of circumstantial evidence collected during the investigation were put in juxtaposition then they would bring the case in the area where the accused was connected with the commission of offence coupled with the fact that the prosecution witnesses were disinterested:

(ii) In case *"Muhammad Aslam and others v. The State" "Daulat Ali v. Muhammad Aslam and others"* (1999 SCMR 845), none had seen

the occurrence. The dead body of the girl was found in the house of the accused for which he lodged misguiding report at Police Station. The accused had himself pointed to the blood stained churri buried by him in the Courtyard of his house. The accused persons were acquitted by the learned trial Court, however, on appeal to the Federal Shariat Court, they were convicted. The conviction and sentence of both the male accused persons including the sentence of death were maintained by the Hon'ble Supreme Court of Pakistan in the case purely resting on circumstantial evidence. In the wake of above, it thus, follows that in cases, where either direct evidence is not available or has not been found trustworthy, conviction can be recorded on the basis of circumstantial evidence alone subject to the condition that all the circumstances must lead to the guilt of the accused and no link in the chain should be missing

(iii) *"Khubaib Ahmad v. The State"* (1992 SCMR 398). In this case, evidence of last seen together with extra-judicial confession, corroborated by the medical evidence and recovery of dead body of the victim at the instance of the accused was believed.

(iv) In the case of *"Khuda Bukhsh v. The State"* (2003 SD 690), the prosecution was depending completely on circumstantial evidence but the conviction and sentence of death inflicted on the appellant by the trial Court and confirmed by the Federal Shariat Court, was upheld by the Shariat Bench of the Hon'ble Supreme Court of Pakistan. In this view, we are fortified by the following reported judgments as well:

(1) *"Khuda Bukhsh v. The State"* (2004 SCMR 331)
(2) *"Sheraz Tufail v. The State"* (2007 SCMR 518)
(3) *"Muhammad Latif v. The State"* (PLD 2008 SC 503)
(4) *"Mobashar Ahmad v. The State"* (2009 SCMR 1133) and:
(5) *"Gul Muhammad v. The State"* (2011 SCMR 670)

24. In this case there is strong circumstantial evidence which leads to the inference that Ameer Hamza was done to death after commission of sodomy by the appellant. The prosecution case is based on the recovery of deep freezer, dead body, a piece of string, medical evidence and the statements of PWs.12 to 14 having no reason for false implication of the appellant. The events which took place subsequently, disappearance of the appellant after closing his shop and then, recovery of the dead body after his arrest from his shop also cannot be doubted. The appellant could not point out any defect in the statements of the independent witnesses. The statements of the prosecution witnesses have been thrashed out, who all have

supported the prosecution version and stood firm to the test of cross-examination and nothing beneficial could be elicited casting any doubt in their veracity.

25. It is settled principle of criminal jurisprudence that circumstantial evidence can only be based for conviction when it is incompatible with the innocence of the accused and is incapable of explanation of any other reasonable hypothesis than that of the guilt of the accused. It was held in the case *"Ali Khan v. The State"* (1999 SCMR 955) that where the case is resting on the testimony of circumstantial evidence, no chain in the link should be missing and that all the circumstances must lead to the guilt of the accused.

26. In view of the above discussion, the prosecution has been successful in establishing the guilt of the appellant. Acting like a beast, he subjected a boy of tender age to his unnatural lust and then strangulated him to death. The prosecution version finds support from the recovery of deep freezer, dead body, "Fard Nishandahi" and medical evidence. Another fact worth consideration is that the complainant or for that purpose other witnesses have had no motive to falsely implicate the appellant and instant case is also not a case of substitution of the accused, therefore, it does not appeal to reason as to why the legal heirs of the deceased would let go the real culprit and instead make the appellant scapegoat just for nothing.

27. So far as the charges under Sections 201,364-A, PPC are concerned, suffice it to observe that no evidence was brought on record that the appellant forcibly kidnapped the minor/deceased. It is also settled by now that concealing a dead body by the accused himself does not amount to causing disappearance of evidence as contemplated by Section 201, PPC.

28. No doubt, this murder is diabolical in conception and cruel in execution. The totality of the circumstances, unerringly, unfailingly and unshakably proves that the appellant alone was the perpetrator of this heinous crime. The result is that the conviction of the appellant and sentences awarded to him under Section 302(b), and 377, PPC are maintained and the impugned judgment is modified only to the extent of setting aside the conviction under Sections 201, 364-A, PPC.

29. With this modification, the appeal is hereby dismissed.

Murder Reference is answered in the affirmative and death sentence is confirmed.

(A.A.K.) Appeal dismissed

2018 Y L R 1181
[Lahore]
Before Qazi Muhammad Amin Ahmed and Sardar Ahmad Naeem, JJ
REHMAT ALI alias REHMA and others---Appellants
Versus
The STATE and others---Respondents

Criminal Appeals Nos.60-J, 59-J, 506 of 2011, Criminal Revision No.335 of 2011, Criminal Appeal No.2200 of 2015 and Murder Reference No.186 of 2011, heard on 17th October, 2017.

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

----Ss. 302, 324, 109, 419, 420, 427, 201, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, abetment, cheating by personation, cheating and dishonestly inducing delivery of property, mischief causing damage to the amount of fifty rupees, causing disappearance of evidence of offence, or giving false information to screen offender, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---Prosecution case was that complainant party coming from a function on a jeep driven by complainant was intercepted by the accused party, who were on a tractor trolley, opened fire hitting the said jeep from front, rear side and on left/right doors---Front and rear screen of the jeep were broken and occurrence was completed inside the jeep, as a result of which, three members of the complainant party died while four persons sustained injuries---Ocular account of the occurrence was furnished by three witnesses including complainant---Ocular testimony was not inspiring confidence as minute details of the occurrence were given by the witnesses---Record showed that tractor trolley in question was not taken into possession from any of the accused persons, but was recovered from a workshop---No blood was taken into possession from the jeep---Blood laid underneath cots was taken into possession whereupon deceased were laid thus place of occurrence was not convincingly established by the prosecution---Occurrence was allegedly committed within a few minutes, and it was humanly impossible to provide minute details in such a photographic manner or to assign the specific role and furnish detailed description of the same---Such description would show that prosecution had tried to rope accused persons---Lodging of FIR with the minutest details of the case ruled out the possibility of truthfulness, and narratives of the FIR suggested the exaggeration

and improvements made by the eye-witnesses---Complainant sustained injuries during the occurrence, was sent to the hospital by his sons on their car, but neither said car was produced during the investigation nor taken into possession---Complainant claimed to have sustained a firearm injury on his forehead, but medico-legal report showed that injury was caused by blunt weapon---Another injured in his statement recorded under S.161, Cr.P.C. mentioned three injuries, while his medico-legal report showed that he sustained fifteen injuries---Said aspect of the case showed that there was conflict between the ocular and the medical evidence---Complainant allegedly had reported the incident to police prior to his moving to the hospital, but there was no plausible explanation as to why the injured were not shifted to hospital by police and how did the sons of the complainant emerge at the crime scene---Jeep then driven by the complainant had fire shots/marks on its different sides but when the case property was produced during trial, no such fire mark was there and the complainant explained that he got repaired the said jeep, meanwhile---No seat, seat cover or foot mat laid inside the jeep were taken into possession during the investigation---Place of occurrence was a thoroughfare, but nobody had witnessed the occurrence as deposed by the complainant during the investigation---Undeniably, four accused were brothers while their co-accused were from the same brotherhood---Previous enmity existed between the parties regarding murder of acquitted accused---Criminal cases were registered against the complainant party, thus it was established on the record that both the parties were inimical to each other---All the eye-witnesses were inimical towards the accused persons---Record showed that there was no evidence to provide independent corroboration to their statements---In absence of any corroboration, reliance could not be placed on the oral statements of the eye-witnesses alone---Nothing was available on record to establish as to who was damaged or harmed with the act of which accused person---Record revealed that seven co-accused were acquitted who actively participated in the occurrence---Allegedly person closed to the victim would have been hurt or injured, but the eye-witnesses and sons of complainant did not receive a scratch during the incident and assailants would not have spared them---Circumstances established that prosecution had failed to prove its case against the accused persons beyond shadow of reasonable doubt---Appeal was allowed and accused were acquitted in circumstances by setting aside convictions and sentences recorded by the Trial Court.

Muhammad Saleem v. The State 2010 SCMR 374 rel.

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

----Ss. 302, 324, 109, 419, 420, 427, 201, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, abetment, cheating by personation, cheating and dishonestly inducing delivery of property, mischief causing damage to the amount of fifty rupees, causing disappearance of evidence of offence, or giving false information to screen offender, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Medical evidence---Scope---Medical evidence itself could never be primary source of evidence for the crime---Medical evidence was only corroborative which could confirm the ocular evidence with regard to the seat and nature of injury and kind of weapon used in the occurrence---Medical evidence could not connect the accused with the commission of offence.

Bagh Ali v. Muhammad Anwar and another 1983 SCMR 1292; Sardar Baig v. The State 1978 PCr.LJ 690; Gul Nawab Khan v. The State PLD 1980 Pesh. 193; Muhammad Pervez and others v. The State and others 2007 SCMR 670 and Nazir Ahmad v. Muhammad Iqbal and another 2011 SCMR 527 rel.

(c) Criminal trial---

----Motive---Scope---Motive was a double-edged weapon---If the accused could have motive to commit crime, eye-witnesses could falsely implicate the accused.

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

----Ss. 302, 324, 109, 419, 420, 427, 201, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, abetment, cheating by personation, cheating and dishonestly inducing delivery of property, mischief causing damage to the amount of fifty rupees, causing disappearance of evidence of offence, or giving false information to screen offender, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Recovery of weapons of offence from accused and empties---Reliance---Scope---Record showed that 222-bore rifle, 12-bore pump action, 30-bore pistol, rifle 44-bore and 12-bore gun were recovered from the houses of the accused persons---Said recoveries would not support the prosecution as no evidence was produced to establish that the places of recovery were in the exclusive possession of the accused persons nor that the houses being locked and who was occupying those houses at the time of recovery and who was in possession of the keys and how they were unlocked-

--Investigating Officer took crime empties into possession from the crime scene, but the same were not mentioned in the inquest report---Such recoveries could not be relied in circumstances.

Muhammad Asif v. The State 2017 SCMR 486 rel.

(e) Criminal trial---

----Witness---Evidence of eye-witnesses, reliance on---Scope---If the eye-witnesses produced by the prosecution were disbelieved to the extent of some accused with specific attribution, then the said eye-witnesses could not be relied upon for convicting the other accused attributed similar role, without independent corroboration.

Sarfraz alias Sappi and 2 others v. The State 2000 SCMR 1758; Shahbaz v. The State 2016 SCMR 1763 and Sardar Bibi and another v. Munir Ahmed and others 2017 SCMR 344 rel.

(f) Criminal trial---

----Benefit of doubt---Principle---Single circumstance, which created doubt regarding the prosecution case, would be sufficient to extend benefit to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

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

----Ss. 410 & 417---"Appeal against acquittal" and "appeal against conviction"---Parameters---Appeal against conviction would be different and distinguishable from appeal against acquittal, because presumption of double innocence was attached in the case of "appeal against acquittal".

Haji Riaz-ud-Din v. Muhammad Iqbal and others 2001 MLD 830 rel.

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

----S. 417---Appeal against acquittal---Interference---Scope---If the accused was acquitted of the charge by court of competent jurisdiction, double presumption of

innocence would be attached to its order---Acquittal order could not be disturbed/interfered with by superior court unless the impugned order was shown to be capricious and fanciful---Appreciation of evidence in appeal against acquittal was stringent and presumption of innocence was doubled and multiplied after a finding of not guilty recorded by competent court---Judgment of acquittal would not be disturbed even though second opinion might be reasonably possible.

Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others PLD 2009 SC 53 rel.
Muhammad Shaukat, Nighat Saeed Mughal and Usman Naseem, Defence Counsel for Appellants (in Criminal Appeal No.60-J of 2011).
Ghulam Murtaza for Appellants (in Criminal Appeal No.59-J of 2011).
Muhammad Waqas Anwar, Deputy Prosecutor General for the State.
Syed Zahid Hussain Bokhari and Ali Muhammad Zahid for the Complainant.
Syed Zahid Hussain Bukhari and Ali Muhammad Zahid for Appellants (in Criminal Appeals Nos.506 of 2011, 2200 of 2015 and Criminal Revision No.335 of 2011).
Riaz Ahmad for Respondents (in Criminal Appeal No.506 of 2011).
Babar Siddique Mughal for Respondent (in Criminal Appeal No.506 of 2011).
Date of hearing: 17th October, 2017.

JUDGMENT

SARDAR AHMED NAEEM, J.---Rehmat Ali alias Rehma, Sarja, Sooja, Ahmad Din alias Ahma sons of Sardar Ali, Munir Hassan, son of Qamar Din, Muhammad Hussain alias Hassan son of Sooja, Muhammad Hassan son of Sooja and Muhammad Arif son of Jamal Din, appellants along with Munir Ahmad son of Ahmad Din, Sardar Muhammad Ashiq son of Shahab Din, Muhammad Din alias Manda son of Nizam Din, Muhammad Akram son of Muhammad Din, Jehangir Ahmad son of Sardar Ahmad, Shahid Nisar son of Taj Din, Muhammad Ahmad son of Sardar Muhammad Ashiq, Ahmad Din son of Ghulam Muhammad, Muhammad Umar son of Haji Muhammad, Muhammad Hassan son of Sooja and Shahid Nisar son of Taj Din co-accused (since acquitted), were tried by the learned Addl. Sessions Judge, Kasur in a private complaint lodged by Haji Ahmad Din, complainant (PW. 1) being dissatisfied with the investigation of case FIR No.99 dated 12.3.2005, for offences under sections 302, 324, 109, 427, 420, 419, 201, 148, 149, P.P.C. registered at Police Station Khudian, District Kasur, for committing Qatl-e-Amd of Haji Muhammad Sabir, Haider Ali and Sher Muhammad deceased and causing injuries to

Ahmad Din complainant, Younas, Asifa Sabir and Zeba Sabir. At the conclusion of the trial vide judgment dated 10.3.2011, learned trial Court acquitted Munir Ahmad son of Ahmad Din, Sardar Muhammad Ashiq son of Shahab Din, Muhammad Din alias Manda son of Nizam Din, Muhammad Ahmad son of Sardar Muhammad Ashiq, Ahmad Din son of Ghulam Muhammad, Muhammad Umar son of Haji Muhammad, Shahid Nisar son of Taj Din co-accused whereas convicted and sentenced the accused/appellants as under:-

Sarja, Sooja, Rehmat, Ahmad Din alias Ahma sons of Sardar Ali alias Dara, Muhammad Hussain son of Sooja and Munir Hussain son of Qamar Din appellants:

(i) under Section 302(b) each read with section 149 each P.P.C. and sentenced to death each on three counts each with a direction to pay a sum Rs.1,00,000/-each as compensation to the legal heirs of the deceased, under section 544-A, Cr.P.C. in equal shares, recoverable as arrears of land revenue, in default thereof, to undergo six months S.I. each.

(ii) under sections 419/109, P.P.C. and sentenced to five years R.I. each for abetment/conspiracy

(iii) under section 148, P.P.C. and sentence to three years' R.I. each.

(iv) under section 324/149, P.P.C. each and sentenced to ten years' R.I. each with fine of Rs.5,000/- each, in default thereof, to further undergo S.I. for 3 months each with further order to pay jointly 1/3rd of Diyat as Arsh to Ahmad Din complainant and Muhammad Younas PW and to remain in prison till payment.

(v) under section 440/149, P.P.C. each and sentenced to two years' R.I. each with fine of Rs.5000/- each, in default to suffer S.I. for three months each.

Muhammad Hassan and Muhammad Arif:

(i) under section 302(b) read with section 109, P.P.C. and sentenced to life imprisonment each sans any order under section 544-A, Cr.P.C. with benefit of section 544-A, Cr.P.C.

(ii) under section 419, P.P.C. and sentenced to five years each.

All the sentences were ordered to run concurrently with benefit of section 382-B, Cr.P.C.

2. Rehmat alias Rehma, Munir Hassan alias Hassan, Sarja, Sooja, Ahmad Din alias Ahma and Muhammad Hussain alias Hassan filed Criminal Appeal No.60-J of 2011, challenging convictions and sentences awarded to them. Muhammad Hassan and Muhammad Arif appellants also filed Criminal Appeal No.59-J of 2011, challenging conviction and sentence awarded to them, Haji Ahmad complainant filed Criminal Appeal No.506 of 2011 against acquittal of Munir Ahmad, Sardar Muhammad Ashiq, Muhammad Din alias Manda, Muhammad Ahmad, Ahmad Din, Muhammad Umer and Shahid Nisar. Haji Ahmad complainant filed Criminal Revision No.335 of 2011 for enhancement of compensation awarded to Sarja, Ahmad Din alias Ahma, Rehmat alias Rehma, Sooja, Muhammad Hussain, Munir Hussain and awarding maximum punishment and compensation to respondents Nos.7 to 8 already sentenced for life imprisonment by the learned trial Court. Sardar Ahmad Din complainant has also filed Criminal Appeal No.2200 of 2015 against the acquittal of Muhammad Akram and Jehangir Ahmad accused/respondents. Murder Reference No.186 of 2011 is also before us for confirmation or otherwise of the death sentences awarded to the death convicts. Through this single judgment, we propose to decide all these matters.

3. The complainant reported the incident on 12.3.2005 a about 6.05 p.m. (Exh.PA). During this occurrence, three persons including Haji Sabir Sher Muhammad and Haider Ali lost their lives and Haji Ahmad Din complainant, Younas, Zeba Sabir and Asifa Sabir sustained injuries. The complainant nominated Munir Ahmad, Jehangir Ahmad, Zulifqar Ali (since dead), Muhammad Akram, Sarja, Muhammad Ahmad, Ahmad Din, Muhammad Umar, Sooja, Rehmat Ali for causing injuries to Haji Muhammad Sabir, Sher Muhammad and Haider Ali deceased whereas Muhammad Hassan, Muhammad Ahmad, Zulifqar, Muhammad Umar, Akram and Hassan fired with their respective firearm weapons hitting the complainant, Younas, Zeba Sabir and Asifa Sabir. Allegedly, Muhammad Din, Muhammad Ashiq and Shahid Nisar

(co-accused) hatched conspiracy with their co-accused for the commission of offence. The occurrence took place within the area of village Dholan Haithar.

4. After registration of FIR, Haji Muhammad Qasim S.I. (PW-18) initially investigated the case but he could not arrest any of the accused persons. On 21.3.2005, firstly he obtained warrants of arrest of the accused, thereafter proclamation Exh.PTT/ 1 to Exh.PTT/14 and after completion of proceedings under sections 87/88, Cr.P.C. submitted challan Exh.PW under section 512, Cr.P.C. on 30.3.2005 before the Court. Thereafter, the investigation was entrusted to Ashiq Hussain S.I. (PW-19). He arrested Sarja, Sooja, Ahmad Din alias Ahma, Rehmat Ali and Munir Hussain accused. On 1.7.2005, Rehmat alias Rehma appellant while in police custody disclosed that on the day of occurrence, he was in police custody of Police Station City Raiwind. Sarja appellant disclosed that on the day of occurrence he was in police custody of Police Station Nawan Kot, Lahore. Munir Hussain appellant also took plea that he was in police custody of Police Station City Raiwind. In order to verify about the said disclosures, the S.I. examined the record at Police Station City Raiwind and Police Station Nawan Kot, Lahore. He examined criminal cards of Rehmat Ali and Munir Hussain appellants. It transpired that on the card of Rehmat Ali, there was photo Exh.PYY of Hassan son of Sooja which was secured into possession vide Memo Exh.PZZ. On the card of Munir Hussain appellant, there was photo Exh.PAAA of his brother Naveed which was secured into possession vide Memo Exh.PVVV. The said Hassan and Naveed had themselves got arrested in fake cases under Sections 13 of the Arms Ordinance, 1965 in the names of Rehmat and Munir Hussain. The copies of the said FIRs are Exh.PCCC and Exh.PDDD. He also examined criminal cards of Sarja appellant. It transpired that on the card of Sarja appellant, there was photo of one Arif son of Jamal Din, who got himself arrested in a fake case of 13 of the Arms Ordinance, 1965 and was sent to Camp Jail, Lahore. The S.I. visited Camp Jail, Lahore and inspected the register of entry of the Sarja, who found that instead of Sarja, the photograph of Arif son of Jamal Din was pasted on the register. According to the investigation, Sarja, Rehmat and Munir Hussain fabricated alibi by sending their relatives namely Arif, Hassan and Naveed in jail in cases under Arms Ordinance. He also arrested Arif and Hassan co-accused in the abetment of the occurrence. On 3.7.2005, during investigation, Rehmat appellant while in police custody got recovered 222 bore rifle Exh.P-41 which was taken into possession vide Memo Exh.PEEE. On the same day, Ahmad Din alias Ahma

appellant got recovered Pistol P-45 which was taken into possession vide Memo Exh.PFFF. On the same day, Munir Hussain appellant got recovered Pistol P-43 which was taken into possession vide Memo Exh.PGGG. On 8.7.2005, Sarja appellant got recovered 444 bore rifle Exh.P-45 which was taken into possession vide Memo Exh.PJJJ. On the same day, Sooja appellant got recovered 12 bore gun P-46 which was taken into possession vide Memo Exh.PKKK. The tractor used during occurrence was also taken into possession vide Memo Exh.PLLL. He also arrested Muhammad Hussain alias Hasan appellant and on 28.4.2007 got recovered Pistol P-48 which was taken into possession vide Memo Exh.PMMM. Besides the investigation made by Ashiq Hussain, S.I. it was conducted by Qamar-uz-Zaman, SSP (Investigation) (CW-1), who found Munir Ahmad, Jehangir Muhammad Akram, Ahmad Din son of Ghulam Muhammad, Zulifqar, Muhammad Umer, Muhammad Ahmad, Muhammad Din son of Nazim Din and Muhammad Ashiq innocent. Being satisfied with the investigation, Haji Ahmad complainant filed a private complaint Exh. PC.

5. In the private complaint, after recording cursory statements of the witnesses, the accused were summoned and charge against them was framed to which, they pleaded not guilty and claimed trial, hence the prosecution evidence was invited.

6. In order to prove its case, the prosecution examined as many as twenty nine witnesses in all and the learned trial Court examined Qamar uz Zaman, SSP (CW-1) who also investigated the case.

7. The eye-witness account was furnished by Haji Ahmad Din complainant (PW-1), Muhammad Younas (PW-7) and Munawar Hussain (PW-17), who supported the prosecution story as mentioned in the private complaint.

8. Medical evidence was furnished by Doctor Muhammad Azam (PW-4), Doctor Hazir Ahmad (PW-8) and Doctor Mumtaz Ahmad (PW-9). On 12.3.2005, Doctor Muhammad Azam (PW-4) conducted medical examination of Miss Zeiba daughter of Haji Sabir and found the following injuries on his person:--

"INJURIES:

1. A lacerated wound of 1 x 1/4 cm on frontal part of head, margins of the wound were abraded and muscles were exposed.

2. Lacerated wounds of 1/2 x 1/4 cm total 4 in number on left side of head on frontal part. Wounds were bleeding excessively. Depth was not probed.

3. Lacerated wound, of 1/4 x 1/4 cm on left side of chest in upper part. Wounds were circular in shape, abraded margins' and depth was not probed.

4. A Lacerated wound of 1/4 x 1/4 cm on left side of chest 7 cm below and on left side of injury No.3. Wound was circular in shape with abraded margins. Depth was not probed."

9. On the same day, he conducted medical examination of Miss Asifa and found the following injuries on his person:--

"INJURIES:

1. A lacerated wound of 1/4 x 1/4 cm with surrounding swelling of 1 x 1 cm on forehead, skin was exposed.

2. A lacerated wound of 1/4 x 1/4 cm upper and outer side of right shoulder. Movements were painful. Wound was circular in shape with surrounding abrasion of 1/2 x 1/2 cm. Depth was not probed.

3. A lacerated wound of 3 x 1/2 cm on postlateral side of neck with surround swelling of 4 x 1 c.m. muscles were exposed. X-Ray of left and right shoulder was advised and all the injuries were kept under observation. Wounds were fresh in nature and were caused by firearm weapon."

10. The doctor also conducted medical examination of Muhammad Younas injured and found the following injuries on his person:-

"INJURIES:

1) A lacerated wound of 1 x 1/4 c.m. on left shoulder upper side with surrounding swelling of 2 x 1 c.m. Wound was bleedings excessively. Movements were painful and depth was not probed.
2) An abrasion with surrounding swelling of 2 x 2 c.m front of left shoulder.
3) A lacerated wound of 1 x 1/2 cm on left nipple with surrounding swelling of 4 x 4 c.m depth was not probed.
4) An abrasion of 1 x 1 c.m on front of left side of upper part of abdomen. Tenderness was present.
5) An abrasion about 1 x 1/2 c.m on left side of arm outer and lower side.
6) 4 lacerated wounds each 1/2 x 1/2 c.m on dorsum of left hand with contused swelling on hand and fingers, each wound was circular in shape, with abraded margins, depth was not probed.
7) A lacerated wound of 2 1/2 x 1 c.m. on outer side of left knee, muscles were exposed and movements were painful.
8) Contused swelling was present on whole of left thigh.
9) A lacerated wound of 1 x 1/4 c.m. on medial side of left thigh, depth was not probed,
10) A lacerated wound of 1/2 x 1/2 c.m. on dorsal side of left forearm, depth was not probed.
11) Three abrasion of different sizes on left forearm surrounding the injury No. 10.
12) A lacerated wound of 1/2 x 1/4 c.m. on medial side of left eye, muscles were exposed with surrounding swelling of 4 x 4 cm. Eye was clear."

11. Doctor Nazir Ahmad (PW-8) conducted medical examination of Ahmad Din complainant and observed the following injuries:-

"INJURIES:

1) A punctured lacerated wound with inverted margins oval in shape, measuring 2 x 1 c.m. was present on superior surface of left shoulder joint over the acromioclavicular joint on probing. It was directed informedially.

2) A lacerated wound measuring 3 x 3/4 x 1/2 cm was present 7 cm above the lateral end of left eyebrow on left frontal area."

12. Doctor Mumtaz Ahmad (PW-9) conducted post-mortem examination on the dead body of Sher Muhammad deceased on 13.3.2005 and observed as under:--

"INJURIES:

1) A lacerated wound 4 x 1-1/2 c.m. margins inverted 3 c.m. above right eyebrow on the right side outer part of forehead (entry wound).
2) A lacerated wound 1 x 1 cm margins inverted just below right eyebrow (entry wound).
3) A lacerated wound 1 x 1 c.m. on the inner side of left eyebrow (entry).
4) A lacerated wound 1 x 1 c.m. everted margins on the left side of forehead just above left eyebrow and internally communicated with injury No.3.
5) A lacerated wound 1 x 1 c.m. margins everted on the top of head in midline and communicating with injury No.2 (exit).
6) A lacerated wound 1 x 1 can margins everted on the right temporal region 1-1/2 c.m. above right ear (exit).
7) A grazing wound 1-1/2 x 2 c.m. on the right side of face near angle of mouth.
8) An extensive lacerated firearm wound in area 10 x 5 c.m on the left side face, broken bone and tissues was seen through wound. Left eye was damaged. It was result of multiple overlapping wound.
9) Five lacerated wounds in area 8 x 5 c.m. margins inverted and abraded on the front of right shoulder (entry wound).
10) Four lacerated wounds in area 5 x 4 c.m. on the back and outer side of right shoulder communicating with injury No.9 (exit)
11) Three grazing wounds each 2 x 1 c.m. on the outer and middle part of right upper arm.
12) A lacerated wound 1-1/2 x 1 c.m. on the outer and back of right chest 1 1/2 cm below lower border of scapula (exit).
13) A penetrated wound 3/4 x 3/4 cm on the front and left side of abdomen 8 c.m. above and left to umbilicus (entry).
14) A grazing wound 3/4 x 1 c.m. on the back of left hand.

15) A grazing wound 3/4 x 1 c.m. on the inner side of left middle finger.

16) A grazing wound 1 x 1/2 c.m. on the back of left little finger.

17) A lacerated wound 1 x 1 c.m. margins were inverted on the upper part of left lower leg 6 c.m. below knee joint."

In his opinion, death was a result of shock due to haemorrhage and injury to vital organs i.e. brain and liver due to injuries on skull and abdomen which were sufficient to cause death in the ordinary course of nature. All the injuries were ante-mortem and caused by fire arm. The time between the injuries and death was almost immediately and time between death and postmortem was about eighteen hours approximately. Exh.PJ is the correct carbon copy of the postmortem report and Exh.PJ/1 and Exh.PJ/2 were the diagrams showing the locale of injuries on the dead body which were in his hand and signed by him.

13. On the same day, he conducted autopsy on the dead body of Haji Muhammad Sabir deceased and observed as under:-

INJURIES:

1) An extensive lacerated wound 8 x 3 c.m. margins inverted brain matter and plastic cardvad was found through the wound. Wound was on the left side of head in left tempo parietal region 4-1/2 c.m. above left ear (entry) Card vad was removed and sealed in glass phial.

2) A tip of distorted twisted bullet jacket was seen on the left side of neck which was recovered by skin incision and sealed in glass phial. It was only muscle deep.

3) A lacerated wound 1 x 1 c.m margins inverted on the left side chin lower part (entry).

4) A lacerated wound 1-1/2 c.m x 1 cm margins everted near the angle of mouth on left side and on probing communicating with injury No.3 (exit).

5) Three lacerated wound each 1 x 1 c.m. in area 6 x 3 c.m. on the back of left shoulder upper part in area between shoulder and neck (exit).

6) Five penetrating wounds with abraded margins in area 5 x 5 c.m. on the outer and back of left upper arm (entry).

7) Two lacerated wounds each 1 x 1 c.m. and 1-1/2 x 1 c.m. and on probing communicating with each other on the outer side of left upper arm just below and outer to injury No.6. (entry and exit).

8) A metallic foreign body was felt and the metallic pellet was recovered by skin incision from outside on the back of left shoulder and sealed in glass phial.

9) A penetrating wound 1 x 1 c.m. just above the inner part of left clavicle (entry).

10) A lacerated wound 2 x 2 c.m. margins everted on the outer of left chest 15 c.m. below axilla near the mid axillary line (exit).

11) A lacerated wound 1 1/2 x 1 c.m. on the left side of chest and abdomen 13 c.m. below and medial to left nipple (entry).

12) Two adjacent wounds each 2 x 3 c.m. in area 6 x 4 c.m. on lower most part of left abdomen just above inguinal region. Lops of small intestine and omentiem were coming through the wound on removing loops the margins of wound were abraded and bluish (entry).

13) A lacerated wound 2-1/2 x 1 c.m. on the outer side of left abdomen 1-1/2 c.m back to injury No.11 (exit).

14) A lacerated wound 2 x 1-1/2 c.m. on the back of left abdomen and loin just above left buttock crease. (exit).

15) An extensive lacerated wound in an area 5 x 4 c.m. formed by multiple injuries with abraded margins on the back and middle of left buttock (entry).

16) A lacerated wound 3/4 x 3/4 cm muscle deep on the back of left thigh upper part with metallic foreign body felt and distorted bullet was removed by forceps and squeezing and sealed in glass phial."

In his opinion, death was a result of shock due to haemorrhage and injuries to vital organs i.e. brain, heart, liver and kidney which were sufficient to cause death in the ordinary course of nature. All the injuries were ante-mortem and caused by fire arm. The time between the injuries and death was immediate and time between death and postmortem was nineteen hours approximately. Exh.PK was the correct carbon copy of the postmortem report and Exh.PK/1 and Exh.PK/2 were the diagrams showing the locale of injuries on the dead body which were in his hand and signed by him.

14. On the same day, the doctor conducted autopsy on the dead body of Haider Ali deceased and observed as under:

"INJURIES:

1. Five penetrating wounds in the area of 5 x 3 c.m. each 3/ 4 x 3/4 c.m margins inverted on the outer and back side of left chest 7 c.m. below scapula border (entry).
2. A grazing wound 8 x 3 c.m on the back of right chest upper part.
3. A penetrating wound 3/4 x 3/4 cm on the back of left chest upper part 3 c.m from injury No.2 (entry).
4. A lacerated wound 1 x 1 cm margins everted on the back of right chest. Lower part 5 c.m from midline (exit).
5 A lacerated wound 3/4 x 3/4 c. m on the outer of right chest in mid axillary line, margins everted (exit).
6. A lacerated wound 6 x 3 c.m bone deep on the back of right forearm near elbow joint. Elbow joint was visibly damaged through the wound (entry and exit).
7. A grazing lacerated wound 3-1/2 x 2-1/2 c.m. on the right upper arm middle part outer side.
8 A grazing wound 4 x 1-1/2 c.m on the back of right hand."

In his opinion, death was a result of shock due to haemorrhage and injury to vital organs i.e. lung and liver which were sufficient to cause death in the ordinary course of nature. All the injuries were ante-mortem and caused by fire arm. The time between the injuries and death was almost immediate and time between death and postmortem was about twenty one hours approximately. Exh.PL was the correct carbon copy of the postmortem report and Exh.PL/ 1 and Exh.PL/ 2 were the diagrams showing the locale of injuries on the dead body which were in his hand and signed by him.

15. Irfan Ahmad (PW-13) son of the complainant was witness of recoveries of weapons of offence allegedly recovered from Rehmat, Ahmad Din and Munir Hussain appellants. He was also witness of abetment being hatched by Muhammad Din and Muhammad Ashiq accused. Farooq Ahmad (PW-15) besides being witness

of recovery of Pistol from Hussain appellant was a witness of abetment of the accused by Muhammad Din and Muhammad Ashiq accused.

16. Sardar Ali (PW-16) was witness of recovery of rifle and gun from Sarja and Sooja appellants.

17. Ch. Muhammad Ashraf, Deputy Superintendent of Kot Lakhpat Jail, Lahore (PW-22) gave evidence regarding alibi of three accused persons.

18. Abdul Jabbar (PW-24) was a Photographer who had taken photographs of the Jeep (Exh.P29) on the direction of Muhammad Qasim, S.I.

19. Qalab-e-Abbas S.I. (PW-25) stated that on 5.3.2005, he while posted at Police Station City Raiwind, arrested a suspected person who disclosed his name to be Munir Hussain son of Qamar Din. He also recovered unlicensed Pistol from his possession. On the same day, Shaukat Ali (PW-26) also arrested a suspected person who disclosed his name to be Rehmat Ali and unlicensed revolver was recovered from his possession. On 12.3.2005, Muhammad Ashiq S.I. Police Station Nawan Kot, Lahore (PW27) also arrested a suspected person with unlicensed Pistol who disclosed his name to be Sarja. All the above mentioned three accused persons could not produce licenses, therefore, cases under Sections 13 of the Arms Ordinance, 1965 were got registered against them and their photographs were also obtained.

20. Khadim Hussain Bhatti, Assistant Superintendent Jail (PW-28) deposed that three accused persons namely Rehmat, Munir Hussain and Sarja were admitted in jail, their thumb impressions and photographs were obtained.

21. Muhammad Rafique S.I. (PW-29) prepared injury statement of four injured persons.

22. The prosecution while tendering in evidence reports of Chemical Examiner Exh.POOO, Exh.PPPP and Exh.PQQQ and reports of Forensic Science Laboratory Exh.RRR and Exh.PSSS close its case.

23. After close of the prosecution evidence, the appellants along-with their co-accused were examined under section 342, Cr.P.C. They refuted the allegations attributed to them and pleaded innocence. Replying to a question No.23 "why this

case against him and why the PWs deposed against him", appellant Sarja deposed as under:--

> "This false case has been registered against me and all other male members of my family at the behest of Ashraf and Arshad nominated accused in the murder of my brother Muhammad Din alias Mandha who according to the complainant took him to hospital. We were having no animus against the deceased persons and thus we are facing this protracted trial since our arrest. The PWs deposed against me due to enmity and relationship inter-se."

24. Ahmad Din alias Ahma, appellant in reply of Question No.20 deposed as under:--

> "I was present at my residence house situated in village Najabat which is about 20-KM away from the alleged place of occurrence. My brother Rehmat, false evidence has been produced in order to involve all male family members in this false case. All the PWs are related inter-se and are inimical towards me, thus they deposed falsely."

25. Rehmat alias Rehma, appellant in reply to Question No.22 deposed as under:--

> "This false case has been registered against me and all other male members of my family at the behest of Ashraf and Arshad nominated accused in the murder of my brother Muhammad Din alias Mandha who according to the complainant took him to hospital. We were having no animus against the deceased persons and thus we are facing this protracted trial since our arrest. The PWs are related inter-se and are inimical towards us"

26. Sooja appellant in reply to Question No.20, deposed as under:

> "I was present at the alleged time of occurrence at my residential house situated in village Saddar which is at a distance of 30-KM from the alleged place of occurrence as such was not present at the spot. I along-with other male family members have been involved at the behest of Ashraf and Arshad. The PWs deposed against me due to relationship inter-se and enmity."

27. Muhammad Hussain appellant in reply to Question No.20 deposed as under:

> "This false case has been registered against me and all other male members of my family at the behest of Ashraf and Arshad nominated accused in the murder of Muhammad Din alias Mandha who according to the complainant took him to hospital. We were having no animus against the deceased persons and thus we are facing this protracted trial since our arrest. All the PWs are related inter-se and are inimical and deposed false"

28. Munir Hussian appellant in reply to Question No.22 deposed as under:

> "I have involved in this case due to relationship with Sarja etc. This false case has been registered against me and all other male members of my family at the behest of Ashraf and Arshad nominated accused in the murder case of Muhammad Din alias Mandha who according to the complainant took him to hospital. We were having no animus against the deceased persons and thus we are facing this protracted trial since our arrest. The PWs deposed falsely as they are related inter-se and also inimical"

29. Arif appellant in reply to Question No.7 deposed as under:

> "I was present at my residence house situated at Bacierkay village and I have been involved in this case just to shatter the plea of alibi of Sarja co-accused."

30. Muhammad Hassan appellant in reply to Question No.7 deposed as under:

> "I along-with all other male family members have been involved in this false case at the behest of Arshad and Ashraf who are Sala of the complainant and who according to the complainant took him to the hospital after the alleged incident. I am facing the agony of this protracted trial since my arrest"

Appellants Sarja, Rehmat alias Rehma and Munir Hassan opted to appear as their own witnesses under section 340(2), Cr.P.C. and produce evidence in their defence whereas, remaining appellants did not opt to appear as their witnesses under section 340(2), Cr.P.C. nor produce some evidence in their defence. Rehmat alias Rehma,

appellant only produced documentary evidence in his defence vide his statement dated 17.2,2011 whereas, Sarja and Munir Hussain endorsed the documentary evidence adduced by his co-accused Rehmat alias Rehma. However, all the three appellants did not appear as their own witnesses under section 340(2), Cr.P.C. and closed their defence evidence vide their statements dated 21.2.2011.

31. Learned counsel for the appellants contends that their co-accused including Munir Ahmad, Jahangir, Muhammad Akram, Ahmad Din son of Ghulam Muhammad, Zulfiqar, Muhammad Umer, Muhammad Ahmad, Muhammad Din son of Nizam Din and Muhammad Ashiq were declared innocent during the first investigation; that the prosecution case rests on the statements of the eye-witnesses including Haji Ahmad Din, Muhammad Munawar and Muhammad Hassan sons of Haji Wali Muhammad and the complainant, all are closely related inter-se as well as with all the three deceased and as the complainant earned acquittal in a case wherein father of Munir Ahmad and Jehangir accused was murdered, thus, have motive to falsely implicate the appellants in the present case; that they were interested witnesses; that the occurrence took place on a thoroughfare and no independent witness was cited by the prosecution; that the story as described by the eye-witnesses was not in consonance with the probabilities; that the tractor trolley was not taken into possession; that no blood was obtained by the Investigating Officer from inside the Jeep, then being driven by the complainant and instead of that, the Investigating Officer had the photographs; that the occurrence took place inside the Jeep wherein, three persons lost their lives and four sustained injuries and it was difficult for a driver being fired at from different sides to memorize the occurrence or to describe the story with mathematical precision; that two injured Zeba and Asifa were not produced during trial; that they are interested witnesses; that all the eye-witnesses were not truthful and they were only chance witnesses as admittedly Muhammad Munawar and Muhammad Hassan PWs were residing at a distance of about 6/7 kilometers from the place of occurrence and they failed to show any just reason for their presence at the crime scene; that section 419, P.P.C. was neither made out nor attracted; that co-accused of the appellants were acquitted on the same set of evidence and it was difficult to decipher the case of the appellants from their acquitted co-accused; that no independent corroboration was forthcoming on the record and thus, the appellants were also to be treated alike; that the ocular account was belied by the medical evidence; that the false recoveries were planted upon the appellants; that the

prosecution evidence was full of contradictions/doubts; that the motive was not proved; that the prosecution evidence was not sufficient for conviction of the appellants; that the case of prosecution was full of doubts and a fit case for acquittal of the appellants while accepting their appeals and the impugned judgment being based on surmises and conjectures, is liable to be set aside.

32. Conversely, learned Deputy Prosecutor General assisted by the learned counsel for the complainant opposed the above said appeals on the ground that the FIR was lodged immediately after the incident and specific roles were ascribed to the appellants; that the statements of the eye-witnesses were supported by the medical evidence; that the motive was also proved; that the minor contradictions pointed out by the learned counsel for the appellants were not sufficient for their acquittal; that the prosecution evidence was inspiring confidence, sufficient to connect the appellants with the commission of the crime; that the co-accused of appellants hatched up a conspiracy and, resultantly, the appellants committed Qatl-e-Amd of three innocent persons, through their brutal act in a cold blooded manner and injured Ahmad Din, Muhammad Younas, Zeba and Asifa PWs; that there was admitted enmity between the parties; that all the appellants were armed with their respective weapons and got recovered those weapons during the investigation; that the number and locale of injuries sustained by all the deceased suggested that this episode was result of preconcert; that the mere relationship of the witnesses inter-se/with the deceased was not a ground to discard their evidence; that the witnesses withstood the test of cross-examination firmly but no favrouable material was extracted by the defence; that as the co-accused of the appellants were declared innocent during the investigation, thus, the complainant filed a private complaint and reiterated the narratives of the FIR; that section 419, P.P.C. was fully attracted as Hassan and Arif accused got themselves arrested by way of impersonation and, thus, rightly held guilty; that there was sufficient convincing material available on the file that the appellants with their co-accused committed murder of Haji Muhammad Sabir, Haider Ali and Sher Muhammad and caused injuries to the above said injured persons; that the normal penalty provided for the offence of Qatl-e-Amd was death; that the prosecution has proved its case against the appellants beyond reasonable doubt, thus, the appeals merit dismissal.

33. In Criminal Appeal No.506 of 2011 and Criminal Appeal No.2200 of 2015 (appeals against acquittal) learned counsel for the appellant/ complainant also argued

that the learned trial Court has acquitted Muhammad Akram son of Muhammad Din, Jahangir son of Sardar Ahmad; Munir Ahmad son of Ahmad Din, Sardar Muhammad Ashiq son of Shahab Din, Muhammad Din alias Manda son of Nizam Din, Muhammad Ahmad son of Sardar Muhammad Ashiq, Ahmad Din son of Ghulam Muhammad, Muhammad Umar son of Haji Muhammad, Shahid Nisar son of Taj Din (respondents) without considering the material available on record and the impugned judgment was the outcome of misreading and non-reading of evidence. Learned counsel further argued that the ocular testimony had fully supported the case of prosecution and all the eye-witnesses stated in clear terms that the accused (respondents) while armed with their respective weapons, committed brutal murders and caused injuries to Zeba, Asifa, Haji Ahmad Din and Muhammad Younas. He further contended that so far as the belated postmortem and medical evidence was concerned, the complainant and the injured witnesses were first referred to THQ Chunian, then to Lahore General Hospital and thereafter, to Jinnah Hospital, Lahore for treatment, thus, delay in postmortem examination was immaterial; that all the prosecution witnesses were the natural witnesses and mere relationship of the prosecution witnesses with the complainant and the deceased was no ground for treating the witnesses interested; that the prosecution proved that Arif and Hassan conspired and their co-accused committed Qatl-e-Amd of the three deceased on a thoroughfare in a brutal manner but the learned trial Court acquitted the co-accused-respondents for extraneous reasons; that reasons given by the learned trial Court for the acquittal of the respondents were artificial and sketchy, caused miscarriage of justice and, thus, impugned judgment cannot be sustained.

At this stage, learned counsel for the respondents (since acquitted) raised an objection that as the respondents were acquitted in a case instituted on a private complaint, thus, petition for special leave to appeal should have been filed as directed by subsection (2) of section 417, Cr.P.C. and the instant appeal could have been filed subject to the grant of special leave to appeal. Learned counsel for the respondents maintained the validity of the impugned judgment and submitted that the Court would not interfere with the acquittal merely because on re-appraisement of the evidence it can come to a conclusion different from that of the Court acquitting the accused provided that both the conclusions are reasonably possible; that when the accused earns acquittal from a Court of competent jurisdiction, then double presumption of innocence is attached to its judgment which is not ordinarily

interfered with by the superior Courts unless the impugned judgment is arbitrary, capricious and fanciful; that the law relating to appreciation of evidence in appeal against acquittal is stringent and the presumption of innocence is doubled and multiplied after a finding of not guilty recorded by a competent Court of law; that the learned trial Court has acquitted the respondents after full-fledged trial and considering/ discussing the prosecution evidence minutely and as the petitions for special leave to appeal have not been filed, thus, appeals are liable to be dismissed on this score also.

34. Mr. Zahid Hussain Bokhari, learned counsel for the appellant argued that under subsection 2(A) of section 417, Cr.P.C, inserted through Act XX of 1994, any person aggrieved of an order of acquittal could prefer an appeal to this Court against such acquittal within thirty days of the order without applying for special leave to appeal. He contended that the appellant was an aggrieved person and as the appeals were instituted within the statutory period, thus, maintainable

35. We have lent our ears to the arguments of the respective counsel, perused the record and have made detailed exegesis of the case law.

36. After survey of the prosecution evidence, it can safely be concluded that the ocular testimony was not inspiring confidence as it was quite strange to describe such occurrence with minute details. The occurrence in this case took place, on-12.3.2005 at 5.30 p.m. within the area of Dholan Hathar, Chunian, Kasur. The complainant was resident of said Mauza and was coming from "Satwan" of one Mahna along with Haji Muhammad Sabir Hussain, Sher Muhammad, Haider Ali, Muhammad Younas, Zeba and Asifa. The complainant was driving the Jeep having Haji Muhammad Sabir and Haider Ali on front seat whereas, Sher Muhammad, Muhammad Younas, Zeba and Asifa were sitting on the rear seats. When they reached within the area of Dholan Hathar, were intercepted by a tractor trolley and all the accused nominated in the FIR concealed themselves behind the said trolley and then opened fire hitting the said Jeep No.881/ BRB from front, rear side and on right/ left doors. It was in the evidence that front and rear wind screens/ window panes were broken. The occurrence was completed inside the Jeep. The injured including Haji Muhammad Sabir, Haider Ali, Sher Muhammad, Muhammad Younas, Zeba and Asifa were taken out of the Jeep by Muhammad Irfan, Muhammad Farooq sons of the complainant. All the three deceased, succumbed to their injuries then and there. The complainant was

dispatched to THQ Chunian, then referred to Lahore General Hospital and afterward to Jinnah Hospital, Lahore. However, on his way to hospital, he got recorded the FIR nominating the appellants and their co-accused with their respective roles. He himself sustained two injuries on his person during the occurrence. After recording the FIR, he left for hospital and stayed in Jinnah hospital for about 10/ 15 days. At this stage, it may be mentioned that Haji Qasim (PW.15) deposed that he received complaint dispatched by the complainant through Muhammad Irfan at 6.00 p.m and he met the complainant at Larri Adda and then, he proceeded to the place of occurrence, thus, contradicted the complainant.

All the three deceased/ injured were related. Haji Muhammad Sabir was the sala of the complainant. Whereas, Sher Muhammad was sala of Haji Muhammad Sabir and Haider Ali was son of Haji Muhammad Sabir. The complainant-deceased/injured were being followed by Muhammad Hassan and Muhammad Munawwar and they were coming on their motorbikes and had witnessed the occurrence from a distance of about 50/ 100 feet. They were also closely related to the deceased Haji Muhammad Sabir, Sher Muhammad and the complainant, who at trial being PW.1 deposed against the accused-appellants as under:

> "On 12.03.2005 at about 5.30 p.m., I along with Haji Muhammad Sabir, Sher Muhammad, Muhammad Younas, Haider Ali son of Haji Sabir Ali aged 5-6 years, Zeba Sabir daughter of Haji Sabir aged 12 years, Asifa Sabir aged 8-9 years, we were going on Suzuki Jeep owned by me bearing registration No.BRB-881 from Khudian towards Baqarkay. I was driving the said Jeep. Muhammad Munawar and Muhammad Hassan sons of Haji Wali Muhammad were coming on a motorcycle at a distance of 100 feet behind us. When we reached while crossing village Dholan village ahead about 8-9 acres on the way tractor troola was standing on the way. The persons were standing while talking shelter of trolla and concealing themselves. That since the trolla was parked on a road and the Jeep was stopped near the trolla. Accused persons namely Munir Ahmad armed with 222 rifle, Jahangir Ahmad was armed with 44 bore rifle, Muhammad Akram was armed with 44 bore rifle, Zulfiqar Ahmad (since dead) was armed with pump action 12 bore, Muhammad Umar armed with 12 bore gun double barrel accused Zulfiqar and Muhammad Umar are sons of Haji Muhammad). Ahmad Din son of Ghulam Muhammad was armed with rifle,

Muhammad Ahmad son of Muhammad Ashiq was armed with rifle, Serja son of Dara armed with 44 bore rifle, Ahmad Din son of Dara armed with 12 bore pump action, Rehmat Ali alias Rehma son of Dara was armed with rifle, Suja son of Dara was armed with 12 bore gun, Munir Hussain alias Hassan son of Qamar Din was armed with 30 bore pistol, Muhammad Hussain alias Hassan son of Suja was armed with pistol 30 bore emerged and came in front of us. Munir Ahmad accused present in the Court raised lalkara that Haji Sabir, Haji Ahmad Din (myself) and Sher Muhammad be not spared and Munir Ahmad fired with his rifle 222 bore, which inflicted at the left side of the head of Haji Sabir, Munir Ahmad accused made a second fire which inflicted at the left side of neck of Haji Sabir. Thereafter Jahangir accused present in the Court fired with his rifle which hit at the left flank of Haji Sabir. Akram accused present in the Court made a fire which hit at left side of head of Haji Sabir. Zulfiqar accused since died made a fire with his pump action which hit Haider Ali on his left flank. Thereafter Akram accused made a fire which inflicted at the back of right hand of Haider Ali. Serja accused present in the Court fired which inflicted at Sher Muhammad on right side of head. Suja son of Dara accused present in the Court made a fire which hit at right side of the face of Sher Muhammad. Thereafter, Rehmat Ali alias Rehma son of Dara made a fire shot with his rifle which inflicted at left cheek of Sher Muhammad, Ahmad Din son of Dara accused made a fire which inflicted at the right hand of Sher Muhammad. Ahmad Din son of Ghulam Muhammad made a fire which inflicted at the right shoulder of Sher Muhammad. Muhammad Ahmad accused made a fire which inflicted at the below of left knee of Sher Muhammad. Muhammad Umer accused made a fire which hit Sher Muhammad on left wrist joint back side of Sher Muhammad. Muhammad Hussain alias Hassan son of Suja made a fire with his pistol 30 bore which inflicted at my forehead. Muhammad Ahmad son of Muhammad Ashiq fired with his rifle which inflicted at my left shoulder, on front side. Zulfiqar Ahmad accused since died made a fire which inflicted at Muhammad Younas on his left leg. Muhammad Umar accused made a fire which inflicted at the left hand and arm of Muhammad Younas. Muhammad Akram accused present in the Court made a fire which inflicted at the front side of left shoulder. Munir Hussain alias Hassan son

> of Qamar Din fired with his pistol 30 bore, which inflicted at the chest of Zeba Sabir. Ahmad Din son of Dara Zulifqar Ahmad fired with their respective weapons which inflicted on different parts of the body of Zeba Sabir and Asifa Sabir. In the meanwhile, Muhammad Munawar and Muhammad Hassan also reached at the place of occurrence and witnessed the whole occurrence, and due to the above mentioned firing Haji Muhammad Sabir, Sher Muhammad and Haider succumbed to the injuries at the spot "

The record divulges that tractor trolley in this case was not taken into possession from any accused, rather, it was taken into possession on 29.3.2005 from one Abdul Ghaffar, when the tractor was parked in a workshop run by one Abdul Majeed in Chak No.78 Adda Khano Ana. It may also be observed that the episode was enacted/ completed inside the Jeep but no blood was taken into possession from the said Jeep, however, the blood lying underneath cots was taken into possession whereupon Sher Muhammad and Haji Muhammad Sabir were lying and from the place where Haider Ali was lying, thus, place of occurrence was not convincingly established by the prosecution. The scrutiny of prosecution evidence reflects the falsity of eye-witnesses as the occurrence was committed within a few minutes, it was humanly impossible to provide such minute details in such a photographic manner or to assign the specific role and furnish detailed description of the same, would rather infer to falsely rope in the accused persons, as such, lodging of the FIR with such minutest details of the case rules out the possibility of truthfulness, and narratives of the FIR suggest the exaggeration and improvements made by the eye-witnesses admittedly inimical towards the appellants.

37. In criminal jurisprudence, the general rule of appreciation of evidence is that want of interest or absence of enmity does not stamp the statement of a particular witness with presumption of truth and that much depends on the intrinsic value of the statement of a witness. The real tests are that (i) whether the statement of a witness is in-consonance with the probabilities (ii) whether it fits in with the other evidence and (iii) whether it inspires confidence in a common prudent mind, if these elements are present, the statement of a worst enemy of an accused can be accepted and relied upon without corroboration but without these elements the statement of a pious man can be rejected out-rightly. In "Muhammad Saleem v. The State" (2010 SCMR 374) at page 377, the apex Court was pleased to observe as under:

> " General rule is that statement of a witness must be in-consonance with the probabilities fitting in the circumstances of the case and also inspires confidence in the mind of a reasonable and prudent mind. If these elements are present, then the statement of a worst enemy of the accused, can be accepted and relied upon without corroboration but if these elements are missing then the statement of a pious man can be rejected without second thought. Reference is invited to Haroon alias Harooni v. The State and another 1995 SCMR 1627. The acid test of veracity of a witness is the inherent merit of his own statement. It is not necessary that an impartial and independent witness, who is neither related to the complainant nor inimical towards the accused would stamp his testimony necessarily to be true. The statement itself has to be scrutinized thoroughly and it is to be seen as to whether in the circumstances of the case the statement is reasonable, probable or plausible and could be relied upon. The principle, that a disinterested witness is always to be relied upon even his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a very dangerous consequences. Reference is invited to Muhammad Rafique v. State 1977 SCMR 454 and Haroon v. The State 1995 SCMR 1627"

38. The complainant was dispatched to THQ Chunian by his sons on their car neither produced during the investigation nor taken into possession. The complainant has shown ignorance if his blood stained clothes were taken into possession. He claimed to have sustained a firearm injury on his forehead (injury No.2) and according to the medico legal report, this injury was caused by blunt weapon. Muhammad Younas was the other injured PW. In his statement recorded under section 161, Cr.P.C. mentioned three injuries and did not assign the reason of reporting three injuries. According to the medico legal report, he sustained fifteen injuries. He was seriously injured and was also shifted to the hospital by the sons of the complainant. If Ahmad Din has reported the incident to police prior to his moving to THQ Chunian, why the injured were not shifted to THQ by police and how did the sons of the complainant emerged at the crime scene, there was no plausible explanation. The Jeep was then being driven by the complainant having fire shots/ marks on its different sides but when the case property was produced during trial, no such fire mark was there and the complainant explained that he got repaired the said Jeep, meanwhile. No seat, seat

cover or foot mat lying inside the Jeep were taken into possession during the investigation, however, the Investigating Officer took the photographs of the crime scene. The place of occurrence was a thoroughfare, a road, ten feet in width. It was main road of the Mauza, 8/10 acres before Dholan Hathar. No body had witnessed the occurrence as deposed by the complainant during the investigation except PWs. The complainant reported a single fire shot which hit Muhammad Younas injured PW which is also belied by the medical evidence, whereas, Zeba and Asifa were not produced during trial. The parties had strong enmity. They were facing trials in different cases registered against each other.

The complainant was a political figure of the area. He was Nazim of a Union Council (Rajo Nau) in 2001. Muhammad Younas was the councilor. However, the complainant lost his election in the year 2005 against one Asghar Ali. The parties have different political affiliations as well. Undeniably, Sarja, Sooja, Rehmat alias Rehma and Ahmad Din alias Ahma were brothers while their co-convicts were from the same brotherhood. Previous enmity existed between the parties regarding murders of Muhammad Din and Manda. Criminal cases were registered against the complainant party. Hence, it was established on the record that both the parties were inimical to each other.

39. All the eye-witnesses were inimical towards the appellants. There was no evidence to provide independent corroboration to their statements in absence, thereof, it is not safe to rely upon the oral statements of the eye-witnesses alone. To maintain the convictions of the appellants in a case of capital charge, no doubt, finding of the police is not binding on the Court but it also cannot be ignored that co-accused of the appellants mentioned in the above paras were declared innocent during the first investigation. On the other hand, against the appellants, there was only evidence furnished by the interested witnesses. The possibility cannot be ruled out that it was un witnessed occurrence and the appellants were involved in the present case due to previous enmity.

The medical evidence alone does not provide independent corroboration to the ocular account. The medical evidence can never be primary source of evidence for the crime itself but is only corroborative which may confirm the ocular evidence with regard to the seat of injury, nature of injury and kind of weapon used in the occurrence and it cannot connect the accused with the commission of crime. As mentioned above

injury No.2 sustained by the complainant is belied by the medical evidence. The injured Muhammad Younas sustained single firearm injury at the hands of assailants whereas, medical officer observed fifteen injuries on his person. He himself deposed that he reported only three injuries. On the element of conflict between the ocular and the medical evidence, it was held by the apex Court in the case "Bagh Ali v. Muhammad Anwar and another" (1983 SCMR 1292) that prosecution and not the accused is obliged to clarify the position when there is apparent contradiction in medical report and ocular testimony. It was held in case "Sardar Baig v. The State" (1978 PCr.LJ 690) that if only eye-witness stands clearly belied by the medical evidence, then in those circumstances, the medical evidence is to be preferred and further, it would be highly dangerous to rely upon the evidence of such witness for the purpose of conviction. In the case of "Gul Nawab Khan v. The State" reported in PLD 1980 Peshawar 193, it was held that generally the evidence of the doctor is considered to be independent and more reliable and in case of conflict can be given preference with the ocular evidence. Even otherwise, it is settled law that injuries of PW are only indicative of his presence at the spot but are not affirmative proof of his credibility and truth. Ref: "Muhammad Pervez and others v. The State and others" (2007 SCMR 670) and "Nazir Ahmad v. Muhammad Iqbal and another" (2011 SCMR 527).

40. The reasons for the outbreak of this episode were that father of Munir Hassan and Jehangir accused, namely, Muhammad Din was done to death and the complainant along-with his co-accused was nominated being accused in that case and ultimately they were acquitted by the learned trial Court. Appeal against their acquittal was dismissed, however, special petition for leave to appeal was admitted to regular hearing by the apex Court suggested by the evidence available on record. Another reason mentioned by the complainant was that Manda son of Dara was murdered and Sarja etc had suspicion that the accused of that case were supported by the complainant and Haji Muhammad Sabir.

It may be mentioned that Manda son of Dara was father of Muhammad Din accused, who abetted the occurrence, however, acquitted by the learned trial Court. The complainant admitted during the cross-examination that he was informed about the abetment after this occurrence by Muhammad Ashiq son of Rehmat Ali (PW.14) and Farooq Ahmad (PW.15) who could not inform regarding said conspiracy/ abetment to the complainant as they could not meet with each other. No date, time and place of

abetment find mentioned in the statement of the prosecution witnesses. Motive is always a double edged weapon. If the convicts-appellants had motive to murder the deceased, the eye-witnesses had also motive to falsely implicate the appellants in this case.

During the investigation, all the six appellants got recovered following weapons from their houses. Details are given below:

Name	Weapon	Place/ date of recovery.	Exhibit
Rehmat alias Rehma	222 bore rifle	Residential room of his house. 03.7.2005	P.41
Ahmad Din alias Ahma	12 bore pump action	Residential room of his house	P.42
Munir Hussain alias Hassan	.30 bore pistol	Residential room of his house 03.7.2005	P.43.
Serja	Rifle 44 bore	Residential room of his house 08.7.2005	P.45
Suja	12 bore gun	Residential room of his house 08.7.2005	P.46.

All the above recoveries lent no support to the prosecution as no evidence was produced to establish that the places of recovery were in exclusive possession of the accused-appellants. It was not proved that those houses were locked, who was occupying those houses at the time of recovery and who was in possession of the keys and how it was unlocked. A similar question came up before their lordships in case "Muhammad Asif v. The State" (2017 SCMR 486) and the relevant observations of their lordships appearing in para. 17 at pages 492-493 read as under:

> "17 It is, normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to conceal their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy each piece of evidence incriminating in nature which, might be used against them in the future thus, human faculty of prudence would not accept the present story rather, after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other place and no

> circumstances would have chosen to preserve it in his own shop if believed so because that was susceptible to recovery by the police."

The recovery memo Exh. P.S. P.7/1-15, P.8/1-6, P.9/1-2, P.10/1-2, P.11/1 and P.12 reveal that Investigating Officer took crime empties into possession from the crime scene but column No.23 of all the inquest reports was blank.

41. So far as, allegation of section 419, P.P.C. is concerned, the charge was framed against Arif, Hassan and Naveed. They got themselves confined in jail in different cases for the plea of alibi posing themselves as Sarja, Munir Hussain and Rehmat Ali, Arif, appellant personated Sarja, Hassan being Munir Hussain and Naveed for Rehmat Ali. No date, time/place of occurrence was mentioned in the charge which is violative of section 232, Cr.P.C. Even otherwise, in order to attract section 419, P.P.C., it is necessary to show that personation caused or was likely to cause damage or harm to someone in body, mind, reputation of property. It may also be mentioned that damage or harm to the mind does not mean, mental embarrassment but the injury to the mental faculty or mental pain i.e. a situation where a person is mentally harmed in some serious manner by the personation. There is no evidence brought on the file to establish that who was damaged or harmed with the act of personation attributed to the said appellants. There are certain other admissions made by the Investigating Officer (PW-19). He has admitted during the cross-examination that he visited jail on his own and got no permission from any authority to check the record of jail. He recorded no entry in jail regarding such visit and no formal permission was sought for by the Investigating Officer under the rules from the District Police Officer. Regarding personation of Sarja etc. no formal permission was obtained from Illaqa Magistrate. No evidence was brought on the file that the appellants including Arif and Hassan acted fraudulently or that their act was likely to cause damage or harm to someone's reputation. In this case, one of the general element to make out a case of cheating is also not there. Even the FIR was silent about this charge, however, charge under section 419, P.P.C. was framed by the learned trial Court. In these circumstances, we have no hesitation to hold that the prosecution failed to prove the charge under section 419, P.P.C. against the appellants.

42. The learned trial Court acquitted Munir Ahmad son of Ahmad Din, Sardar Muhammad Ashiq son of Shahab Din, Muhammad Din alias Manda son of Nizam Din, Muhammad Ahmad son of Sardar Muhammad Ashiq, Ahmad Din son of

Ghulam Muhammad, Muhammad Umar son of Haji Muhammad, Shahid Nisar son of Taj Din co-accused meaning thereby that the ocular account to the extent of said co-accused who actively participated in the occurrence. The law on the point is settled that if the private witnesses produced by the prosecution are disbelieved to the extent of same accused with specific attribution, then the said eye-witnesses cannot be relied upon for convicting the other accused attributed a similar role, without availability of independent corroboration to the extent of such accused which is not forthcoming in this case. Reference in this respect can be placed on "Sarfraz alias Sappi and 2 others v. The State" (2000 SCMR 1758), "Shahbaz v. The State" (2016 SCMR 1 763) and "Sardar Bibi and another v. Munir Ahmed and others" (2017 SCMR 344.)

43. It is settled by now that onus of proof in criminal cases never shifts and it is for the prosecution to prove its case against the accused beyond reasonable doubt. It is also well-settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to extend benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In "Tariq Pervez v. The State" (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page No.1347, was pleased to observe that the concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then, the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. The apex Court reiterated the same principle in the case of "Muhammad Akram v. The State" (2009 SCMR 230).

44. In this case, the prosecution evidence alone was not sufficient to connect the appellants and if we consider the medical evidence in juxtaposition and host of circumstances, presence of the eye-witnesses at the spot seems to be doubtful as the ocular testimony regarding the alleged injuries sustained by Ahmad Din, Younas, were neither corroborated nor in conformity with the medical evidence adduced by the doctor.

45. As observed above, no convincing evidence was led at the trial to show that any "Satwan" of Mahna was held in his village. It is also matter of common knowledge that minors/children are not invited to such offerings and only men/ women take part

in such rituals. Thus, departure of Zeba and Asifa with the complainant for the purposes of "Satwan" seems to be improbable. The eye-witness account is also suspected. According to medical evidence, the deceased were fired at from different sides. In case the prosecution witnesses were chasing the jeep, they would not have allowed the accused to run away after enacting the episode, in particular, when the sons of the complainant had also emerged at the crime scene on their car. There was another aspect of the matter, in case shooting had taken place as alleged, the person close by the victim would have been hurt or injured but the eye-witnesses and sons of the complainant did not receive a scratch during the incident and that the assailants would not have spared them. Prosecution had failed to bring home guilt against appellants beyond any shadow of doubt.

46. The case of the prosecution is not supported by any other independent witness or person from the locality where the occurrence took place. Material brought on record qualitatively was not of a degree to have warranted conviction of appellants on a capital charge. The enmity between the parties was admitted. The overall view of the case shows that incident was an un-witnessed one and appellants were involved in the case due to suspicion which lurked in the mind of the complainant party.

47. In appeals against acquittal, we may observe that while examining defect in the order of acquittal substantial weight is to be given to the finding of the trial Court whereby the accused were exonerated from the commission of crime. Obviously, dealing with appeal against conviction would be different and distinguishable from appeal against acquittal because presumption of double innocence is attached in the latter case. At this stage it may also be mentioned that the complainant filed appeal against acquittal without seeking permission to file petition for leave to appeal. The arguments of the learned counsel for the appellants has no substance that in such eventuality, the case of the complainant would be covered under section 2-A of section 417, Cr.P.C. being the aggrieved person. Suffice it to observe that section 417(2-A), Cr.P.C. talks of the aggrieved person including the legal heirs of the deceased or the injured if any or whosoever, the Court thinks fit in the circumstances of a case. However, section 417(2), Cr.P.C. clearly stipulates that a complainant shall file a petition for special leave to appeal within sixty days. A similar question came up under consideration before a Division Bench of this Court in "Haji Riaz-ud-Din v. Muhammad Iqbal and others" (2001 MLD 830) and in para-9 at page 832, their lordships observes that:

> "Undoubtedly, the complainant aggrieved by such an order of acquittal is in the first instance required to make an application to the High Court seeking leave to appeal and once leave is granted, he may present such an appeal to the High Court"

48. We may also observe that when the accused person is acquitted of the charge by a Court of competent jurisdiction, then double presumption of innocence is attached to its order which is not disturbed/interfered with by a superior Court unless the impugned order is capricious and fanciful and relating to appraisal of evidence in appeal against acquittal is stringent and presumption of innocence is doubled and multiplied after a finding of not guilty recorded by a competent Court of law which requires that the judgment of the acquittal shall not be disturbed even though second opinion may be reasonably possible. Ref. "Muhammad Tasaweer v. Hafiz Zulkarnain and 2 others" (PLD 2009 SC 53). For the reasons mentioned above, we are of the view that the conclusions drawn by the learned trial Court were neither arbitrary, fanciful nor artificial in nature. The appellant has failed to show that the judgment of the acquittal was fanciful or based on no evidence. It has not been demonstrated that some material evidence was not taken into consideration by the learned trial Court which had caused miscarriage of justice. The learned trial Court has disbelieved the prosecution evidence for valid reasons and it is not possible for us to take a different view.

49. In view of the above, we are of the considered view that the prosecution. miserably failed to prove its case against the appellants beyond shadow of reasonable doubt. Thus, Criminal Appeal No.59-J of 2011 and Criminal Appeal No.60-J of 2011 are allowed. The impugned judgment dated 10.3.2011 is hereby set aside. The appellants are acquitted of the charges. The appellants, excluding Muhammad Hassan and Muhammad Arif are in jail. They be released forthwith if not required in any other criminal case whereas, the appellants Muhammad Hassan and Muhammad Arif are on bail. Their bail bonds are cancelled and sureties discharged.

Murder Reference No.186 of 2011 is answered in the negative and the death sentences awarded to Sarja, Sooja, Rehmat, Ahmad Din alias Ahma sons of Sardar Ali alias Dara, Muhammad Hussain son of Sooja and Munir Hussain son of Qamar Din appellants by the learned trial Court are not confirmed.

50. For the foregoing reasons, Criminal Appeal No.506 of 2011 and Criminal Appeal No.2200 of 2015 filed by the complainant/ appellant against the acquitted co-accused are hereby dismissed.

51. Criminal Revision No.335 of 2011 filed by the complainant for enhancement of compensation awarded to Sarja, Ahmad Din alias Ahma, Rehmat alias Rehma, Sooja, Muhammad Hussain, Munir Hussain and awarding maximum punishment and compensation to respondents Nos.7 to 8 already sentenced to life imprisonment by the learned trial Court is also hereby dismissed in view of the preceding paras.

JK/21/L Order accordingly.

PLJ 2018 Cr.C. (Lahore) 499
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**
SHAREEFAN BIBI--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 873-B of 2017, decided on 10.4.2017.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(i), 336 & 34--Pre-arrest bail--Confirmed--Allegation--Common intention, caused Salahiyyat-i-udw--Unexplained delay of nine days in lodging FIR--Question of applicability of Sections 334/337(U), PPC would be adjudged by trial Court after recording evidence in view of allegation--Petitioner has joined investigation and nothing was recovered from her possession--She is female and sending petitioner behind bars at this stage would not serve any purpose to prosecution and this would be a colour of ludicrousness to send petitioner behind bars, if she has to come out after a few days--She has asserted *mala fide* in instant petition without allegation of misuse of ad-interim pre arrest bail. [P. 500] A, C & D

Muhammad Aslam v. The State 1999 Cr.LJ 749, *rel*.

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

----S. 334--If any organ or limb is amputated whereas fingers of hand or toes of foot are not organs and similarly tooth are not organs, the whole jaw is an organ. [P. 500] B

Zahoor Ahmad and another v. The State 2005 YLR 1664, *ref.*

Ch. Khawar Saddique Sahi, Advocate with Petitioner.

Syed Nadeem Haider Rizvi, DDPP alongwith Akram.

Mr. Tariq Zulfiqar Ch. Advocate with Complainant.

Date of hearing: 10.4.2017.

ORDER

Shareefan Bibi, petitioner seeks pre-arrest bail in case FIR No. 21 dated 21.1.2017 under Sections 337-A(i), 336, 34, PPC registered at Police Station Ghaziabad, District Sahiwal.

2. Allegedly, the petitioner alongwith his co-accused and in furtherance of common intention caused Salahiyyat-i-Udw (up-rooted tooth of the complainant)

3. After hearing the arguments advanced by the learned counsel for the parties and perusing the record, it was noticed that there was unexplained delay of nine days in lodging the FIR. The question of applicability of Sections 334/337(U), PPC would be adjudged by the learned trial Court after recording the evidence in view of the allegation. In *"Zahoor Ahmad and another v. The State"* (2005 YLR 1664), this Court observed that the case under Section 334, PPC is made out if any organ or limb is amputated whereas fingers of hand or toes of foot are not organs and similarly tooth are not organs, the whole jaw is an organ. The petitioner has joined the investigation and nothing was recovered from her possession. She is female and sending the petitioner behind the bars at this stage would not serve any purpose to the prosecution and this would be a colour of ludicrousness to send the petitioner behind the bars, if she has to come out after a few days. Reliance, in this respect can be placed on *"Muhammad Aslam v. The State"* (1999 CrLJ 749). She has asserted *mala fide* in the instant petition without allegation of the misuse of ad-interim pre arrest bail.

4. For the reasons mentioned above, the application is accepted and the ad-interim pre-arrest bail earlier granted to the petitioner is confirmed subject to her 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/Duty Judge.

(A.A.K.) Bail confirmed

PLJ 2018 Cr.C. (Lahore) 507
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**
MUHAMMAD ASLAM--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 639-B of 2018, decided on 15.2.2018.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 462(1)--Pre-arrest bail--Confirmed--Allegation of--Theft of energy/electricity--Unexplained delay of twenty seven days in lodging FIR--No cable or device was taken into possession at time of raid No such, LT line was observed by Investigating Officer in radius of meter of house of petitioner--**Held:** Apex Court observed that at per-arrest bail stage, it was difficult for accused to prove element *mala fide* through positive/solid evidence/material, therefore, same was to be deduced and inferred from facts and circumstances of case and that where events or hints to such effect are available, same would validly constitute element of *mala fide*. [P. 508] A & C

Pre-arrest Bail--

----*Malafide*--Petitioner has joined that investigation and nothing was recovered from him--There was no allegation of misuse of ad-interim pre-arrest bail against petitioner. [P. 508] B

Khalil Ahmed Soomro v. The State PLD 2017 SC 730, *ref*.
Sardar Muhammad Rashid Khan Balouch, Advocate for Petitioner.
Mr. Hassan Mehmood Tareen, DPG for State.
Date of hearing: 15.2.2018.

ORDER

Muhammad Aslam petitioner seeks pre-arrest bail in case FIR No. 277 dated 25.5.2017 under Section 462(i), PPC registered at police station Saddar Muzaffargarh, District Muzaffargarh.

2. Allegedly, the petitioner committed theft of energy/ electricity.

3. Having heard the arguments addressed at the bar and after perusing the record, it was straightway noticed that there was unexplained delay of twenty seven days in lodging the FIR. No cable or device was taken into possession at the time of raid. No such, LT line was observed by Investigating Officer in the radius of meter of the house of the petitioner. The statements of the PWs recorded under Section 161, Cr.P.C. were also recorded with inordinate delay. The petitioner has asserted *mala fide* in the application in a recent judgment, the apex Court observed that at pre-arrest bail stage, it was difficult for the accused to prove the element of *mala fide* through positive/solid evidence/material, therefore, the same was to be deduced and inferred from the facts and circumstances of the case and that where events or hints to such effect are available, same would validly constitute the element of *mala fide*. Ref: *"Khalil Ahmed Soomro v. The State"* **(PLD 2017 SC 730).** The petitioner has joined the investigation and nothing was recovered from him. There was no allegation of misuse of ad-interim pre-arrest bail against the petitioner.

4. For the reasons mentioned above, the application is accepted and the ad-interim pre-arrest bail earlier granted to the petitioner is confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- with on surety in the like amount to the satisfaction of the learned trial Court/Duty Judge.

(A.A.K.) Bail confirmed

2019 P Cr. L J 316
[Lahore]
Before Sardar Ahmed Naeem, J
SAQIB IQBAL and others---Petitioners
Versus
The STATE and others---Respondents

Criminal Miscellaneous No. 226268-B of 2018, decided on 18th September, 2018.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss. 420, 468 & 471---Cheating, forgery for the purpose of cheating, using as genuine a forged document which is known to be forged---Ad interim bail, confirmation of---Mala fide, proof of---Scope---Unexplained delay of seven years in registration of FIR---Pendency of civil suit between the parties---Effect---Record revealed that FIR was registered with unexplained delay of about seven years---Complainant was not a party to the disputed agreement to sell---During investigation, executants of said agreement had not joined the investigation---Civil suit between the parties was pending adjudication prior to the registration of FIR---Subject matter of the said suit was the property mentioned in the FIR---Petitioners had joined the investigation and as the agreement in question was appended with the said suit, thus no recovery was to be effected from them---Investigating Officer had not supported the version of the complainant and there was no evidence against the petitioners except the statement of the complainant---Accused, at bail stage, could not prove the element of mala fide through solid material, therefore, the same was to be deduced and inferred from the facts and circumstances of the case---Where events or hints to such effect were available, the same would validly constitute the element of mala fide---Ad interim pre-arrest bail already granted to the petitioners was confirmed , in circumstances.

Khalil Ahmed Soomro v. The State PLD 2017 SC 730 ref.

Muhammad Ajmal Adil for Petitioner.

Azhar Hussain Malik, Additional Prosecutor-General along with Maqsood Hussain, S.-I. for the State.

Complainant in person.

ORDER

SARDAR AHMED NAEEM, J.---The petitioners seek pre-arrest bail in case FIR No.289/ 2018 dated 09.05.2018, under sections 420, 468, 471, P.P.C., registered at Police Station Jhumra, Faisalabad.

2. The allegation against the petitioner is that of committing fraud/forgery.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the occurrence took place on 20.04.2011 and the FIR was registered with unexplained delay of about seven years. The complainant is not a party to the disputed agreement to sell. During the investigation, the executant of the said agreement including Khalid Iqbal and Tanveer Kausar has not joined the investigation. A civil suit between the parties was pending adjudication prior to the registration of FIR. The subject matter of the said suit is the property mentioned in the FIR. The petitioners have joined the investigation and as the agreement is appended with the said suit, thus, no recovery is to be effected from them. Above all, the Investigating Agency has not supported the complainant version and categorically opined that there was no evidence against the petitioners except the balled statement of the complainant. In a recent judgment, the apex Court observed that at pre-arrest bail stage, it was difficult for the accused to prove the element of mala fide through positive/solid evidence/material, therefore, the same was to be deduced and inferred from the facts and circumstances of the case and that where events or hints to such effect are available, same would validly constitute the element of mala fide. Reference, in this context, can be placed on "Khalil Ahmed Soomro v. The State" (PLD 2017 SC 730). Mala fide was also pleaded in the application and there was no allegation of the misuse of ad-interim pre-arrest bail.

4. In view of the above, the application is accepted and ad-interim pre-arrest bail earlier granted to the petitioner is confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/ - with one surety in the like amount to the satisfaction of learned trial Court/ duty Judge.

MQ/S-61/L Bail confirmed.

PLJ 2019 Cr.C. 17
[Lahore High Court, Multan Bench]
***Present*: SARDAR AHMED NAEEM, J.**
MUHAMMAD IQBAL--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 1540-B of 2017, decided on 24.4.2017.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(v), 458, 34--Bail after arrest, grant of--Further inquiry--Allegation of--Inflicted a Butt blow to injured--During investigation, Sections 365-B, 376(i), PPC have been deleted--Allegedly, petitioner was armed with a gun, injured was at his mercy but no fire-arm injury was attributed to petitioner and he did not repeat injury to injured--Petitioner is behind bars since his arrest and his continuous detention in jail would be unfair--Case of petitioner, in circumstances, need further probe within meaning of Section 497(2), Cr.P.C.--Bail was allowed. [P. 18] A

Mr. Muhammad Ajmal Kanju, Advocate for Petitioner.
Mr. Hassan Mehmood Tareen, Dy.P.G. for State.
Mr. Arif Kamal Noon, Advocate for Complainant.
Date of hearing: 24.4.2017.

ORDER

Muhammad Iqbal, petitioner seeks post arrest bail in case FIR No. 334 dated 18.2.2016 under Sections 337-A(v), 458, 34, PPC registered at Police Station Saddar Kehror Pacca, District Multan.

2. Allegedly, the petitioner inflicted a Butt blow to Ghulam Abbas, injured.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the occurrence took place on 16.8.2016 at 1.30 (a.m) and the matter was reported to police on 18.8.2016 at 9.30 a.m. During investigation, Sections 365-B, 376(i), PPC have been deleted. Allegedly, petitioner was armed with

a gun, the injured was at his mercy but no fire-arm injury was attributed to the petitioner and he did not repeat the injury to Ghulam Abbas. The petitioner is behind the bars since his arrest and his continuous detention in jail would be unfair. The case of the petitioner, in the circumstances, need further probe within the meaning of Section 497(2), Cr.P.C., thus, I am inclined to exercise my discretion in his favour.

4. For the foregoing reasons, the application is accepted and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court/Duty Judge.

(A.A.K.) Bail allowed

PLJ 2019 Cr.C. 23
[Lahore High Court, Multan Bench]
***Present*: SARDAR AHMAD NAEEM, J.**
ALI NAWAZ--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 2991-B of 2018, decided on 20.8.2018.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 324, 337-F(i), 337(v), 34--Post arrest bail--Grant of--Unexplained delay of one and half hour in lodging FIR--Accused was armed with rifle and injured was at his mercy, but her inflicted no injury on upper part/vital part of body--Trial has not witnessed any witness--Concession of bail cannot be deneid merely on ground that he was fugitive from law--Bail allowed. [Pp. 23 & 24] A

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

----S. 497--Absconsion--Concession of bail to an accused cannot be denied merely on ground that he was fugitive from law if he has good case for bail on merits, and his absconsion would not come in his way. [P. 24] B

2009 SCMR 299, *ref.*
Mr. Muhammad Ajmal Kanju, Advocate for Petitioner.
Syed Nadeem Haider Rizvi, Dy.P.G. for State.
Syed Asad Abbas, Advocate for Complainant.
Date of hearing: 20.8.2018.

ORDER

Ali Nawaz, petitioner seeks post-arrest bail in case F.I.R. No. 206/2016 dated 04.06.2016, under Sections 324, 337-F(i), 337-F(v), 34, P.P.C., registered at Police Station Saddar Kehror Pacca, Lodhran.

2. Allegedly, the petitioner attempted at the life of Sajjad, the injured.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that there was unexplained delay of one and half hour in lodging the

F.I.R. Despite the fact that the petitioner was armed with rifle and that the injured was at his mercy but he inflicted no injury on the upper part/vital part of the body. It would be interesting question for the learned trial Court if he intended to eliminate the injured. The petitioner was arrested in this case on 01.02.2018 and since then he is behind the bars. The trial has not witnessed any material progress so far. The concession of bail to an accused cannot be denied merely on the ground that he was fugitive from law if he has good case for bail on merits and his absconsion would not come in his way. Ref *"Mitho Pitafi v. The State"* (2009 SCMR 299). The petitioner is in jail since his arrest and his continuous detention for indefinite period would be unfair. All these considerations render the case of the petitioner one of through probe within the meaning of Section 497(2), Cr.P.C.

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

(K.Q.B.) Bail allowed

PLJ 2019 Cr.C. 24
[Lahore High Court, Multan Bench]
***Present*: SARDAR AHMED NAEEM, J.**
KAMRAN and another--Petitioners
versus
STATE and another--Respondents

Crl. Misc. No. 3607-B of 2018, decided on 15.8.2018.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 148, 149--Post arrest bail--Grant of--Further inquiry--No time of occurrence in FIR--General Allegation--A kick blow was attributed--No other role to other accused--Cause of death is myocardial inforction and asphyxia opined by medical officer--Non of injury in fatal--Further inquiry--Bail allowed. [P. 25] A

PLD 1989 SC 585, 2013 SCMR 49, *ref.*

Mr. Khalid Ibni Aziz, Advocate for Petitioner.

Malik Ashfaq, Dy.D.P.P. for State.

Khawaja Qaisar Butt, Advocate for Complainant.

Date of hearing: 15.8.2018.

ORDER

Kamran and Kaleem Akhtar *alias* Nadir, petitioners seek post bail in case FIR No. 515 dated 25.11.2017 under Sections 302,148, 149, PPC registered at Police Station City Vehari, District Vehari.

2. Allegedly, the petitioners being members of unlawful assembly and in prosecution of its common object committed *Qatl-e-Amd* of Muhammad Younas, the deceased.

3. After hearing the learned counsel for the parties and perusing the record, it was straightway observed that no time of occurrence find mentioned in the FIR. Apart from general allegation of causing injury, a kick blow was attributed to Kamran, the petitioner whereas, no other role has been assigned to Kaleem Akhtar *alias* Nadir. The cause of death in this case was Myocardial infarction and asphyxia opined by the medical officer. None of the injury attributed to

the petitioners was fatal. They are behind the bars since their arrest and their continuous detention for indefinite period would not advance the case of prosecution, in particular, when the investigation is complete. The commencement of trial is also not clog in the way of grant of bail when an accused is entitled to the same; Ref: *"Muhammad Ismail v. Muhammad Rafique and another"* (PLD 1989 SC 585) and *"Mst. Maria Khan v. The State and another"* (2013 SCMR 49). All these considerations render the case of the petitioners one of thorough probe within the meaning of Section 497(2), Cr.P.C., thus, I am inclined to exercise my discretion in their favour.

4. For the foregoing reasons, the instant application is accepted and the petitioners are admitted to post arrest bail subject to furnishing their bail bonds in the sum of Rs.2,00,000/- each with one surety each in the like amount to the satisfaction of the learned trial Court/Duty Judge.

(K.Q.B.) Bail allowed

PLJ 2019 Cr.C. 26
[Lahore High Court, Multan Bench]
***Present*: SARDAR AHMED NAEEM, J.**
SUDHEER AHMAD *alias* Chan--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 3006-B of 2018, decided on 15.8.2018.

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

----Ss. 497--Pakistan Penal Code, (XLV of 1860) Ss. 395 & 412--Post arrest bail--Grant of--Delay of four days in lodging FIR--Not nominate in FIR--Identification parade--Name of petitioner appeared in daily newspaper and thus legality of identification parade requires serious consideration--Recovery is not supported by memo. of identification--Bail allowed. [P. 26] A

Khawaja Qaisar Butt, Advocate for Petitioner.

Malik Ashfaq, D.D.P.P. with for State.

Date of hearing: 15.8.2018.

ORDER

Sudheer Ahmad *alias* Chan, petitioner seeks post arrest bail in case FIR No. 04 dated 02.1.2018 under Sections 395, 412, PPC registered at Police Station Muzaffarabad, Multan.

2. Allegedly, the petitioner committed dacoity.

3. Having heard the arguments addressed at the bar and after perusing the record, it transpired that there was unexplained delay of about five hours in lodging the FIR. The petitioner is not nominated therein. He was arrested under Section 54, Cr.P.C. A photostat copy not disputed by the learned DDPP, revealed that name of the petitioner appeared in the Daily Express Multan dated 17.1.2018 and, thus, the legality of identification parade requires serious consideration. The recovery allegedly effected from the petitioner and is not supported by memo. of identification. The petitioner is behind the bars and his continuous detention for indefinite period would be unfair. He has, however, got no previous conviction at his credit, thus, I am inclined to exercise my discretion in his favour.

4. In view of the above, the application is allowed and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court/Duty Judge.

(K.Q.B.) Bail allowed

PLJ 2019 Cr.C. 52
[Lahore High Court, Multan Bench]
***Present*: SARDAR AHMED NAEEM, J.**
ABDUL RAZZAQ *alias* Kora--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 5011-B of 2018, decided on 9.10.2018.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 380 & 457--Pre-arrest bail, confirmed--There was inordinate/unexplained delay of about one month in lodging F.I.R. No direct evidence was available with complainant--Case of prosecution entirely rests on circumstantial evidence statement of foot tracker was also not recorded during investigation--No recovery was effected from petitioner by investigating agency--One of his co-accused was admitted to post arrest bail--Pre-arrest bail confirmed. [Pp. 52 & 53] A

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

----*Mala fide*--Prove elements of *mala fide*--It is difficult for accused to prove element of *mala fide*, at this stage, through positive/solid evidence/material therefore same was to be deduced and inferred fro facts and circumstances of case and that where events or hints to such effect are available, same would validly constitute element of *mala fide*--Petitioner pleaded *mala fide* in his application. [P. 53] B

Khawaja Qaiser Butt, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, Dy.P.G. for State.

Mr. Muhammad Asif Rasheed, Advocate for Complainant.

Date of hearing: 9.10.2018.

ORDER

Abdul Razzaq *alias* Kora, the petitioner seeks pre-arrest bail in case F.I.R. No. 67/2018 dated 6.2.2018, under Sections 457, 380, P.P.C., registered at Police Station Shaher Sultan, Muzaffargarh.

2. Allegedly, the petitioner alongwith his co-accused committed theft.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that there was inordinate/ unexplained delay of about one month in lodging the F.I.R. No direct evidence was available with the complainant. The case of prosecution entirely rests on the circumstantial evidence. The statement of foot tracker was also not recorded during the investigation. No recovery was effected from the petitioner by the Investigating Agency. One of his co-accused was admitted to post-arrest bail. It is difficult for the accused to prove the element of *mala fide*, at this stage, through positive/solid evidence/material, therefore, the same was to be deduced and inferred from the facts and circumstances of the case and that where events or hints to such effect are available, same would validly constitute the element of *mala fide*. The petitioner pleaded *mala fide* in his application. There was no allegation of the misuse of ad - interim pre-arrest bail.

4. For the reasons mentioned above, the application is accepted and ad-interim pre-arrest bail earlier granted to the petitioner is confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court/duty judge.

(K.Q.B.) Bail confirmed

PLJ 2019 Cr.C. 105

[Lahore High Court, Multan Bench]

***Present*: SARDAR AHMED NAEEM, J.**

SOHAIL IQBAL--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 5607-B of 2018, decided on 8.11.2018.

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

----S. 498--Electricity Act, 1910, S. 39-A--Pre-arrest bail--Confirmation of--No time of occurrence find mentioned in the FIR--Outstanding bill have been paid by the petitioner--No loss is caused to the exchequer--Even otherwise, the punishment prescribed u/S. 39-A is three years and would be deemed as bailable--No recovery is to be effected from the petitioner, thus, sending the petitioner behind the bars, at this stage, would not serve any purpose to the prosecution and this would be a colour of ludicrousness if he is sent to jail for some time by dismissing the instant application so as to enable him to come out of jail on post arrest bail--He has successfully made out a case for confirmation his ad-interim pre-arrest bail. [P. 106] A & B NLR 1999 Criminal 1, *ref.*

Mr. Qadir Asif, Advocate vice counsel with Petitioner.

Mr. Najaf Ali Malik, Assistant Attorney General (Pakistan) for State.

Date of hearing: 8.11.2018.

ORDER

Sohail Iqbal, petitioner seeks pre-arrest bail in case F.I.R. No. 280/2018 dated 11.07.2018, under Section 39-A of the Electricity Act, 1910, registered at Police Station F.I.A./C.C.,Multan.

2. Allegedly, the petitioner committed theft of electricity.

3. Having heard the arguments addressed at the bar and after perusing the record, it was noticed that no time of occurrence find mentioned in the F.I.R. The outstanding bill of Rs.80,000/- have been paid by the petitioner in the month of August, 2018 and November 2018. A Photostat copy of the provisional bill dispatched to the petitioner by MAPCO is appended with the file as Annexure-C evidencing payment of Rs.40,000/- and the original copy of the bill for the month of October 2018 was produced before the Court which reflects the payment of

Rs.42,435/ - with Post Office, Gulgasht Colony, Multan. In the circumstances, no loss is caused to the exchequer. Even otherwise, the punishment prescribed under Section 39-A is three years and would be deemed as bailable in view of law laid down in the case of "*Anjum Sheraz v. The State"* (NLR 1999 Criminal 1). No recovery is to be effected from the petitioner, thus, sending the petitioner behind the bars, at this stage, would not serve any purpose to the prosecution and this would be a colour of ludicrousness if he is sent to jail for some time by dismissing the instant application so as to enable him to come out of jail on post arrest bail. He has successfully made out a case for confirmation of his ad-interim pre-arrest bail.

4. For the reasons mentioned above, the application is accepted and ad-interim pre-arrest bail earlier granted to the petitioner is confirmed subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court/duty judge.

(K.Q.B.) Bail confirmed

PLJ 2019 Cr.C. 119
[Lahore High Court, Multan Bench]
***Present*: SARDAR AHMED NAEEM, J.**
MUHAMMAD HASNAIN *alias* HASNI--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 5015-B of 2018, decided on 10.10.2018.

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

-----S. 498--Pakistan Penal Code, (XLV of 1860), S. 380--Pre-arrest bail, confirmed--FIR was registered with unexplained delay of about 19/20 days--No direct evidence is available--No time of occurrence find mentioned in the FIR--Detail of extra judicial confession cannot be gathered from the available material--Case of the prosecution rests only on the statement of the foot tracker having no formal qualification/skill--Petitioner has joined the investigation and nothing was recovered from his possession--It is difficult to prove the element of *mala fide* by the accused through positive/solid evidence/material and the same is to be deduced and inferred from the facts and circumstances of the case--Pre-arrest bail was confirmed. [P. 120] A

Mr. Muhammad Qadir Asif Toor, Advocate with Petitioner.

Mr. Hassan Mehmood Tareen, D.P.G. for State.

Malik Allah Ditta Maitla, Advocate for Complainant.

Date of hearing: 10.10.2018.

ORDER

Muhammad Hasnain *alias* Hasni, petitioner seeks pre-arrest bail in case FIR No. 267 dated 4.6.2018 under Section 380, PPC registered at Police Station Jahanian, District Khanewal.

2. Allegedly, the petitioner committed theft.

3. Having heard the arguments addressed at the bar and after perusing the record it transpired that the FIR was registered with unexplained delay of about 19/20 days. No direct evidence is available on the file. No time of occurrence find mentioned in the FIR. The details of extra judicial confession cannot be gathered from the available material. The case of the prosecution rests only on the statement of

the foot tracker having no formal qualification/ skill. The petitioner has joined the investigation and nothing was recovered from his possession. It is difficult to prove the element of *mala fide* by the accused through positive/ solid evidence/material and the same is to be deduced and inferred from the facts and circumstances of the case. The petitioner has joined the investigation and nothing was recovered from him. He has pleaded *mala fide* and there was no allegation of misuse of ad-interim pre-arrest bail against the petitioner.

4. For the reasons mentioned above the application is allowed and the ad-interim pre-arrest bail earlier granted to the petitioner is confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court / Duty Judge.

(S.N.) Bail confirmed

PLJ 2019 Cr.C. (Note) 9 (DB)
[Lahore High Court, Multan Bench]
***Present*: SARDAR AHMED NAEEM AND ASJAD JAVAID GHURAL, JJ.**
***Mst.* RAZIA BIBI--Petitioner**
versus
STATE, etc.--Respondents

Crl.A. No. 708 of 2010, decided on 29.10.2018.

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

----S. 417--Pakistan Penal Code, (XLV of 1860), S. 302--Appeal against acquittal--Criminal conspiracy--Dismissal of--**Held:** It is settled law that to get the accused convicted in an offence of capital punishment, the prosecution is bound to prove its case, wherein no weakness could be found to extend benefit of doubt to the accused--Allegedly, deceased, was done to death by respondents alongwith their co-accused i.e. the husband of the deceased--Deceased, who came back to the complainant after ten months of her marriage on account of some misunderstanding with her husband--She was brought back by the accused to their home and that she was found dead on the following day--Complainant leveled the allegation of conspiracy with their coaccused for the commission of offence but no such evidence was brought on the file showing hatching up of criminal conspiracy to eliminate the deceased--Appeal against acquittal is a difficult job and task for the prosecution to get the acquittal converted into conviction--It is like a free bird who had flown away in the space but now prosecution wants to get him back again into its cage--When rights of liberty have once be granted to an accused by a Court of law on sound judicial principals of appreciation of evidence after observing and delivering cogent explanation in accordance with judicial conscience especially with regard to their acquittal--Judgment cannot be set aside merely to satisfy the complainant--Appreciation of evidence has not raised the one and only conclusion of guilt--Appeal dismissed.

[Para 6, 7 & 8] A, B, C & 1994 SCMR 1928, *ref.*

Khawaja Qaisar Butt, Advocate for Appellant.

Date of hearing: 29.10.2018.

ORDER

This appeal calls in question the legality/ propriety of judgment dated 12.05.2010 rendered by learned Additional Sessions Judge, Lodhran whereby Respondents No. 2 and 3 were acquitted in case F.I.R. No. 50/2007 dated 27.02.2007, under Section 302, P.P.C., registered at Police Station Galiay Wal Lodhran.

2. Allegedly, *Mst.* Tahira Manzoor was found dead in her house. The complainant/ appellant nominated Muhammad Sajjad Haider being principle offender, whereas, Respondents No. 2 and 3 facilitated the commission of crime.

3. After the submission of report submitted under Section 173, Cr.P.C., respondent-accused were indicted. He pleaded not guilty to the charge and claimed trial.

4. The learned trial Court after evaluating the evidence and considering the merits of the case, convicted Muhammad Sajjad (co-accused) and acquitted Respondent Nos. 2 and 3 by extending benefit of doubt. Hence, this appeal.

5. Learned counsel appearing on behalf of the appellant argued that the judgment in question was delivered without fully appreciating the evidence of prosecution. According to the learned counsel, it was a fit case for conviction of the accused. When enquired as to what portion of the material evidence was not appreciated by the learned trial Court, learned counsel was not able to point out any important piece of the evidence, which could form the basis of conviction. In fact, the learned counsel for the appellants wants us to reappraise the evidence and to reach an independent conclusion.

6. It is settled law that to get the accused convicted in an offence of capital punishment, the prosecution is bound to prove its case, wherein no weakness could be found to extend benefit of doubt to the accused. In the instant case, we have found that edifice of the prosecution case has been built on the following factors:

i. Motive;
ii. Extra-judicial confession;
iii. Last-seen evidence; and
iv. Medical evidence.

7. To satisfy our conscience we have gone through the available record which reflects that allegedly, deceased, namely, Tahirah Manzoor was done to death by Respondent Nos.2 and 3 alongwith their co-accused i.e. the husband of the deceased. The complainant is mother of the deceased, who came back to the complainant after ten months of her marriage on account of some misunderstanding with her husband. She was brought back by the accused including Respondent Nos.2 and 3 to their home and that she was found dead on the following day. The learned trial Court acquitted the said respondents for the reasons detailed hereunder:

i. No motive was attributed to the said respondents;
ii. They were declared innocent during the investigation;
iii. Their names were not mentioned in the report (CW1/A), made by the complainant; and
iv. Maqsood Bibi PW though saw them but she slept in her room and might not have seen the accused in the company of the said respondents.

8. The complainant levelled the allegation of conspiracy with their co-accused for the commission of offence but no such evidence was brought on the file showing hatching up of criminal conspiracy to eliminate the deceased. It is settled law that the appeal against acquittal is a difficult job and task for the prosecution to

get the acquittal converted into conviction. It is like a free bird, who had flown away in the space but now prosecution wants to get him back again into its cage. When rights of liberty have once be granted to an accused by a Court of law on sound judicial principles of appreciation of evidence after observing and delivering cogent explanations in accordance with judicial conscience especially with regard to their acquittal, the judgment cannot be set aside merely to satisfy the complainant. The judgment must be proved to have been delivered with wrong appreciation of evidence, with perverse actions while delivering the judgment or a mind of prudent man cannot accept the reasons advance for the acquittal of accused. The appreciation of evidence has not raised the one and only conclusion of guilt. So, the requirements of *"Muhammad Iqbal v. Abid Hussain alias Mithu and 6 others"* (1994 SCMR 1928), having been fulfilled, the acquittal cannot be held as unsustainable.

9. We have not found any fault with the impugned judgment rendered by the learned trial Court, therefore, we dismiss this appeal, *in limine*.

(K.Q.B.) Appeal dismissed

PLJ 2019 Cr.C. 217 (DB)
[Lahore High Court, Multan Bench]
Present: **SARDAR AHMED NAEEM AND ANWAAR-UL-HAQ PANNUN, JJ.**
ZAMEER AHMAD, etc.--Appellants
versus
STATE etc.--Respondents

Crl. A. No. 1265 of 2017, M.R. No. 144 of 2017, heard on 5.12.2018.

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

----S. 302(b)/34--Criminal Procedure Code, (V of 1898), S. 410--Conviction and sentence--Challenge to--Appreciation of evidence--Identification parade--Acquittal of--Identification parade can be traced as back as March 1860--It is essential for investigating officer to get such suspect identified from eye-witnesses in a test identification parade--Precautions are necessary to conceal identity of accused while he is being removed from one place to order and it is also duty of police that all necessary steps should be taken to ensure that accused should not be seen by witnesses before identification parade--Arrest of accused/ appellants was published in newspaper and that complainant/PWs went to Police Station to congratulate Investigation Officer--Accused was not nominated by PWs during test identification parade for causing injury to deceased--Holding of joint test identification parade was not controverted either by learned Deputy Prosecutor General or learned counsel for complainant--Pistol was recovered from appellant during investigation but such recovery was legally inconsequential as no crime empty was taken into possession or secured from place of occurrence so as to connect recovery with alleged weapon--Acquittal--Appeal was allowed.
[Pp. 222, 223, 224 & 226] A, B, C, D, E, F 2010 SCMR 374 *ref.*

Identification Parade--

----Object of identification parade is to ascertain involvement of an accused in a crime--It is not rule of law rather rule of prudence to eliminate possibility of mistaken involvement of accused in an offence--This test is a check against false implication and also serves as piece of evidence against real culprits--Identification based upon glimpse of accused is retained by witnesses when they saw accused at scene of crime or at a place directly connected with criminal activities--Positive identification of person involved in a crime is an

indispensable requirement for investigation of crime--Positive identification of offenders is legal requirement, while solving of crimes can only proceed once victim has been positively identified. [P. 222] A

Identification Parade--

----Duty of police officer--Police officer, who arrests accused should get his face covered and take him Police Station in that state--In police lock-up such accused should be covered with a curtain so that no one is able to see his face and when he is taken to Court or to jail his face should be covered--In jail no outsider should be allowed to see his face. [P. 223] B

Joint identification parade--

----The holding of joint test identification parade of multiple accused in one go has been disapproved. [P. 223] C 2017 SCMR 1189, 2018 SCMR 577 *ref.*

Recovery--

----The pistol was recovered from appellant during investigation but such recovery was legally inconsequential as no crime empty was taken into possession or secured from place of occurrence so as to connect recovery with alleged weapon. [P. 224] E

Benefit of doubt--

----Golden rule--It is also settled principle of criminal administration of justice that if there is element of doubt, as to guilt of accused, it must be resolved in his favour--The golden rule of benefit is initially a rule of prudence which cannot be ignored, while dispensing justice in accordance with law--It is based on maxim that it is better to acquit ten guilty persons rather than it is better to acquit ten guilty persons rather than to convict one innocent person--For acquittal of accused in an offence, how-so heinous it may be, only a single doubt in prosecution evidence is sufficient. [P. 226] F

M/s. Khawaja Qaiser Butt, Sheikh Muhammad Rahim, Malik Majid Shahbaz and Qasim Thaheem, Advocate for Appellants.

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

Mr. Malik Fayyaz Ahmad Khakh, Advocate for Complainant.

Date of hearing: 5.12.2018.

JUDGMENT

Sardar Ahmed Naeem, J.--Zameer Ahmad and Muhmmad Shohid (appellants) were tried by the learned Addl. Sessions Judge Kot Addu in case FIR No. 319 dated 15.9.2013 under Sections 302, 34, PPC registered at Police Station Sanawan, District Muzaffargarh, At the conclusion of trial, *vide* judgment dated 12.10.2017, learned trial Court held the appellants guilty, convicted and sentenced them as under:

<u>Zameer Ahmad (appellant)</u>

Under Section 302(b), PPC and sentenced to death with a direction to pay a sum of Rs. 2,00,000/- as compensation under Section 544-A, Cr.P.C. ordered to be paid to the legal heirs of the deceased, in default thereof, to undergo simple imprisonment for six months.

<u>Muhammad Shahid (appellant)</u>

Under Section 302(b), PPC and sentenced to imprisonment for life with a direction to pay a sum of Rs. 2,00,000/- as compensation under Section 544-A, Cr.P.C. ordered to be paid to the legal heirs of the deceased in default thereof to under go simple imprisonment for six months.

2. The convicts-appellants have filed the instant appeal against their convictions and sentences. The state has also transmitted Murder Reference No. 144 of 2017 for confirmation, or otherwise, of the death sentence of the appellant, namely, Zameer Ahmad, Both the matters are being disposed of through this judgment.

3. Briefly history of the prosecution story as narrated in complaint Exh.PB was that on receiving information telephonically from Muhammad Ikhlaq regarding snatching of his motorcycle CD 70 and mobile phone on pistol point by the unknown dacoits (the details of description/complexions given in the FIR), complainant, his brother Muhammad Nadeem, Muhammad Younas and Muhammad Yousaf proceeded on motorcycles for search of unknown accused and reached on the bank canal 3-R “Chah wang Wala” two persons riding on motorcycle came from their behind. The complainant party tried to intercept them who stopped their motorcycle and started firing with their fire-arms and the fire shot made by the accused wearing black colour clothes hit Muhammad Nadeem (deceased) on right side of his chest and crossed left side who fell down in injured condition and succumbed to the injuries.

4. After usual investigation, the report under Section 173, Cr.P.C. was submitted. The charge was framed against them. They pleaded not guilty and claimed trial.

5. In order to prove its case, prosecution examined as many as 14 witnesses and one CW. The gist of prosecution evidence is as under:

> "Ahmad Ali 1835-C (PW-2) deposited two sealed parcels one containing blood stained earth and other two empty cartridges of pistol .30 bore in the concerned offices. Abdul Ghaffar 1863-C (PW.3) got conducted the post-mortem examination and also handed over the last worn clothes of the deceased to the Investigating Officer who secured the same *vide* recovery memo. Exh.PA, Naseer Ahmad (PW-5) reiterated the contents of the FIR and also gave evidence regarding ocular account. Muhammad Younas (PW-6) also gave evidence regarding ocular account, Dr. Allah Bakhsh (PW-7) conducted post-mortem examination on the dead body of Muhammad Nadeem (deceased) and found two injuries on is person, Zaigham Abbas SI (PW-8) chalked out the formal FIR Exh.PM. Muhammad sami 1849-C (PW-9) deposited one sealed parcel containing pistol .30 bore in the concerned office. Shaukat Ali (PW-10) got conducted the test identification parade and gave evidence regarding the identification proceeding during test identification parade. Abid Hussain draftsman (PW-11) drafted scaled site-plan Exh.PP and Exh.PP/1 on the direction of Investigating Officer and pointation of the PWs Ikhaq Ahmed (CW.1) gave evidence regarding snatching of his motorbike and mobile phone by the unknown assailants. He also participated in the identification proceedings, Muhammad Yasin SI and Ghulam Rasool SI PW-13 and PW-14 gave statements regarding the proceedings carried out by them during investigation. The remaining evidence is of formal nature therefore need not to be discussed here."

Prosecution gave up PWs Muhammad Yousaf and Muhammad Ismail being unnecessary and tendered into evidence the reports of PFSA Exh.PN, Exh.PQ and documents Exh.PS and Exh.PT, closed the prosecution case.

6. Statements of the appellants were recorded under Section 342, Cr.P.C. They denied all the prosecution allegations and pleaded innocence. Responding to question **"why this case against him and why the PWs have deposed against him"** Zameer Ahmad (appellant) deposed as under:

> "In fact, some unknown persons committed murder of Muhammad Nadeem, police wrongly involved me and Muhammad Shahid just to show efficiency, Police firstly involved us in case FIR No. 573/13 under Section 392, PPC at Police Station Kot Addu. Thereafter they involved me in the instant case. PWs deposed against me on the asking of the Investgating Officer."

Muhammad Shahid (appellant) adopted the stance gave by his co-convict in his statement recorded under Section 342, Cr.P.C.

7. Both the appellants neither appeared as their own witnesses under Section 340(2), Cr.P.C. nor produced some witness in their defence.

8. Learned Counsel for the appellants contended that it was unseen occurrence; that the incident was reported against unknown accused and their features/complexions were not disclosed in the FIR; that the case of prosecution was entirely based on recovery of pistol and identification parade, having little value being joint in nature; that no independent witness was cited by the prosecution; that no conviction can be based on the basis of mere presumption, conjectures and surmises; that the prosecution miserably failed to prove its case against the appellants; that the case of prosecution was swollen with doubts and every doubt even slightest is always resolved in favour of the accused.

9. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant opposed this appeal with vehemence and submitted that the appellants were identified by the eye-witnesses during the test identification parade supervised by PW.10; that role of the appellants was described by the witnesses during parade; that the medical evidence was in line with the complainant version; that the recovery of pistol from Zameer accused lends corroboration to the prosecution story; that the eye-witnesses have no reason for false implication of the appellants; that the discrepancies/contradictions hinted at by the learned counsel for the appellants were not fatal to the prosecution which proved its case beyond reasonable shadow of doubt. They supported the judgment rendered by the learned trial Court.

10. We have considered the arguments advanced by the learned counsel for the parties and have carefully perused the record with their able assistance.

11. The case of prosecution was that on 15.9.2013, Ikhlaq Ahmad (CW.1) informed the complainant that his motorbike was snatched by three unknown persons/rabbers in the area of Mauza Shadi Khan whereupon the complainant along-with Muhammad Yousaf and Muhammad Younas (PWs) went out on their motorbikes to search the snatched motorbike/unknown persons and when they reached near Chah wala, in the area of pull Ghulam Ali Gharbi, they found two motorcyclists on their bike. The deceased, namely, Muhmmad Nadeem was fired at

by one of those unknown accused who succumbed to the injuries and that after enacting the episode, they fled away from the crime scene.

12. During the investigation, the appellants were arrested by the police on 11.10.2013. The test identification parade was held and supervised by Shaukat Ali Magistrate (PW.10). The witnesses identified the appellants during the test identification parade with the allegation that the deceased was fired at by Zameer Amad appellant, whereas ineffective firing was attributed to co-accused, namely, Muhammad Shahid, appellant.

13. The object of identification parade is to ascertain the involvement of an accused in a crime. It is not rule of law, rather rule of prudence to eliminate possibility of mistaken involvement of the accused in an offence. This test is a check against the false implication and also serves as piece of evidence against the real culprits, Identification based upon glimpse of accused is retained by witnesses when they saw the accused at scene of crime or at a place directly connected with the criminal activities. The positive identification of person involved in a crime is an indispensable requirement for the investigation of crime. Positive identification of offenders is legal requirement, while the solving of crimes can only proceed once the victim has been positively identified. Identification parade can be traced as back as March 1860, when they were instituted by Metropolitan Police Order in England. The order stated that the police could place suspect amongst his/her peers and then asked the witness to select the person seen performing the crimes. In cases where the identity of the accused is not known to the eye-witnesses, it is essential for the Investigating Officer to get such suspect identified from eye-witnesses in a test identification parade. There are certain principles which must be followed while conducting the identification parade. The test identification parade in this case was supervised by Shaukat Ali Judicial Magistrate (PW.10). The mechanism of identification proceedings is well-known and does not require repetition. Reference in this regard may be made to Rules 26.7, 26.32 and also Rule 27.25 of the Police Rules, 1934 and Chapter 11-C of the Lahore High Court Rules and Orders Volume-III. However, to ensure that the proceedings are properly conducted and entirely above suspicion it is essential that the rules and principle for holding the test identification parade should be strictly followed. So far as, the identification of persons is concerned, it is very weak type of evidence. The value of which is easily destroyed if there is any suspicion that the conduct of the investigating agency was

not absolutely above board. Therefore, precautions are necessary to conceal the identity of the accused while he is being removed from one place to the other and it is also the duty of the police that all necessary steps should be taken to ensure that the accused should not be seen by the witnesses before the identification parade. The Police Officer, who arrests the accused should get his face covered and take him to Police Station in that state. In the police lock-up such accused should be covered with a curtain so that no one is able to see his face and when he is taken to Court or to jail his face should be covered. In jail no outsider should be allowed to see his face. All these precautions should not only be taken but should be proved to have been taken and should be recorded in official record like the general diary of the Police Station and the jail register and the same should be produced in the Court. In the absence of such evidence, no value can be attached to the identification of an accused person made by a witness. In other words, it is imperative for the prosecution to establish during trial that every necessary precaution was taken to ensure fair identification. Above all, the proceeding of the test identification parade available on the file reflect that the appellant had not been picked by PWs with reference to any role played by him during the occurrence.

14. The material available on the file suggests that arrest of the accused/appellants was published in the newspaper and that the complainant/PWs went to police station to congratulate the Investigating Officer. The accused also informed PW.10 that they were shown to the PWs, who had their photographs Shaukat Ali (PW.10) also admitted during the cross-examination that Zameer Ahmed accused was not nominated by the PWs during the teas identification parade for causing injury to the deceased. The holding of joint test identification parade was not controverted either by the learned Deputy Prosecutor General or the learned counsel for the complainant. In a similar case titled *"Gulfam and another versus The State"* (2017 SCMR 1189), the apex Court ruled as under:

> "5. The prosecution had maintained that the present appellants, had correctly been identified by the above mentioned eye-witnesses during a test identification parade conducted and supervised by a Magistrate but we note that the parade so conducted and held was a joint parade in which both the present appellants had been made to stand along with many other dummies. Holding of a joint identification parade of multiple accused persons in one go has been disapproved by this Court in many a judgment and a reference in this respect may be made to the cases of *Lal Pasand v. The State* (PLD 1981 SC 142), *Ziaullah alias Jaji v. The Sate* (2008 SCMR

> 1210), *Bacha Zed v. The State* (2010 SCMR 1189) and *Shafqat Mehmood and others v. The State* (2011 SCMR 537)".

15. A similar question came up for consideration before their lordships in case titled *"Kamal Din alias Kamala v. The State"* (2018 SCMR 577) and the relevant observations of their lordships appearing in Para No. 3 of the judgment, read as under:

> "It has repeatedly been held by this Court that identification of an accused person without reference to the role allegedly played by him during the occurrence as shorn of any evidentiary value and a reference in this respect may be made to the cases of *Azhar Mehmood and others v. The State* (2017 SCMR 135), *Muhammad Fayyaz v. The State* (2012 SCMR 522), *Shafqat Mehmood and others v. The State* (2011 SCMR 537) and *Sabir Ali alias Fauji v. The State* (2011 SCMR 563). Apart from that the test identification parade held in this case was a joint parade wherein two accused persons had been made to stand with dummies in two lines and their identification had taken place simultaneously in one go. This Court has also clarified in the cases of *Lal pasand v. The State* (PLD 1981 SC 142), *Ziaullah alias Jaji v. The State* (2008 SCMR 1210), *Bacha Zeb v. The State* (2010 SCMR 1189), *Shafqat Mehmood and others v. The State* (2011 SCMR 537) and *Gulfam and another v. The State* (2017 SCMR 1189) that identification of many accused persons in one go is not proper besides being unsafe. As if this were not enough, Shabbir Ahmed (PW.14), one of the injured eye-witnesses, had acknowledged before the trial Court in so many words that the accused persons had been shown to him at the Police Station before holding of the test identification parade. This had surely taken the wind out of the prosecution's case against the appellant."

16. It was asserted by the prosecution that the pistol was recovered from Zameer Ahamd appellant during the investigation but such recovery was legally inconsequential as no crime empty was taken into possession or secured from the place occurrence so as to connect the recovery with the alleged weapon. The motorcycle allegedly used by the accused during the commission of crime was never taken into possession during the investigation of this case. Moreover, no colour, registration number of motorbike was mentioned either in the FIR or in the statements of the eye-witnesses.

17. It is settled law that the prosecution is duty bound to establish charge against the accused beyond shadow of doubt, that evidence produced in support of the charge must be confidence inspiring and there should not be any inconsistency between direct and circumstantial evidence of the case. The prosecution version should not admit of any other, hypothesis favourable to the accused and the story

described by the prosecution witnesses must be probable and fit in with the probabilities. In this case Ikhlaq Ahmad (CW.1) informed the complainant regarding his motorbike then snatched by unknown rabbers. The complainant along with Muhammad Younas and Muhammad Yousaf started searching the said motorbike in their area. It was in the evidence that complainant had a licenced gun and was supposed to be armed with some weapon, in particular, when they were searching for a snatched motorbike. In any case, motorcylcle of Ikhlaq Ahmad was not lost but snatched. The complainant described that they stopped two unknown accused/assailants coming on their back on their motorbike and they were stopped, in front of them and it was Nadeem accused who attempted to overpower those assailants meaning thereby that the complainant along-with his companions resisted, those unknown accused wherein the deceased lost his life. In any case, story appeared to be improbable and hard to digest. A similar question came up for consideration before apex Court in *"Muhammad Saleem v. The State"* (2010 SCMR 374) at page 377, the apex Court was pleased to observe as under:

> "….. General rule is that statement of a witness must be in-consonance with the probabilities fitting in the circumstances of the case and also inspires confidence in the mind of a reasonable and prudent mind. If these elements are present, then the statement of a worst enema of the accused can be accepted and relied upon without corroboration but if these elements are missing then the statement of a pious man can be rejected without second thought. Reference is invited to *Haroon alias Harooni v. The State and another* 1995 SCMR 1627, The acid test of veracity of a witness is the inherent merit of his own statement. It is not necessary that an impartial and independent witness, who is neither related to the complainant nor inimical towards the accused would stamp his testimony necessarily to be true. The statement itself has to be scrutinized thoroughly and it is to be seen as to whether in the circumstances of the case the statement is reasonable, probable or plausible and could be relied upon. The principle, that a disinterested witness is always to be relied upon even his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a very dangerous consequences. Reference is invited to *Muhammad Rafique v. State* 1977 SCMR 454 and *Haroon v. The State* 1995 SCMR 1627"

18. It is settled principle of law that prosecution primarily is bound to establish guilt against the accused, beyond shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence enabling the Court to draw the conclusion whether the prosecution has succeeded in establishing accusation or otherwise and if it comes to the conclusion that the charge was imputed against the

accused and have not been proved beyond reasonable doubt, then, the accused becomes entitled to acquittal on getting the benefit of doubt.

19. It is also settled that benefit of doubt, if found in the prosecution's case, the accused shall be held entitled to the benefit, thereof. It is also settled principle of criminal administration of justice that if there is element of doubt, as to the guilt of accused, it must be resolved in his favour. The golden rule of benefit is initially a rule of prudence which cannot be ignored, while dispensing justice in accordance with law. It is based on maxim that it is better to acquit ten guilty persons rather than to convict on innocent person. For acquittal of accused in an offence, how-so heinous it may be, only a single doubt in the prosecution evidence is sufficient. Reliance in this respect can be made on *"Mst. Nazia Anwar versus The State and others"* (2018 SCMR 911) and the relevant observations of their lordships appearing in page-922 at para-12 read as under:

> "…. The cardinal principle in the criminal justice system in a situation like this, is to extend benefit of doubt to an accused to acquit him/her of capital charge, instead of reducing the sentence. Once doubts about the genuineness of the story lurk into the minds of the Judges, the only permissible course is to acquit the accused and not go for the alternative sentence of life imprisonment. In this regard reference may be made to the following case laws:
>
> "(I) *Ayub Masih v. The State* (PLD 2002 SC 1048)
>
> (II) *Muhammad Zaman v. The State and others* (2014 SCMR 749)
>
> (III) *Hashim Qasim v. The State* (2017 SCMR 986)
>
> It is also well entrenched rule and principle of law that on the basis of probabilities, accused person may be extended benefit of doubt acquitting him/her of a capital charge however, such probabilities, high howsoever could not be made basis for conviction of an accused person and that too on a capital charge"

20. For the reasons mentioned above, the Criminal Appeal No. 1265 of 2017 is allowed. The impugned judgment dated 12.10.2017 is set aside. The appellants are acquitted of the charges. They are in jail and be released forthwith if not required in any other criminal case.

21. **Murder Reference No. 144 of 2017** is answered in the negative and the **death sentence is not confirmed.**

(I.A.K.) Appeal allowed

PLJ 2019 Cr.C. 241
[Lahore High Court, Multan Bench]
***Present:* SARDAR AHMED NAEEM, J.**
STATE through Deputy Prosecutor General Punjab, Multan--Petitioner
versus
MUHAMMAD SHAUKAT--Respondents

Crl. Misc. No. 5711-CB of 2018, decided on 13.12.2018.

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

----S. 497(5)--Cancellation of post arrest bail--Petitioner seeks recall of order whereby respondents were admitted to post-arrest bail by Additional Sessions Judge--Respondents were not nominated in FIR--MLR was in conflict with DNA report, not received and it was difficult to determine in absence of report regarding actual culprit of offence and that nothing was recovered from said respondents during investigation--Application for cancellation of bail and that consideration for cancellation of bail are quite different from grounds for grant of bail--Grounds for cancellation of bail are akin to grounds for appeal against acquittal--It is required to show that order whereby bail was granted is perverse, no other conclusion could be drawn except guilt of accused or that there was material substance not considered by Court resulting in miscarriage of justice--Petition dismissed. [Pp. 242 & 243] A, B, C & D1992 SCMR 1286 *ref.*

Mr. Iftikhar-ul-Haq, Addl Prosecutor General for State.

Mr. Muhammad Shahid Khan, Advocate for Respondents No. 1 and 2.

Date of hearing: 13.12.2108.

ORDER

Through this petition moved under Section 497(5), Cr.P.C., petitioner seeks recall of order dated 07.9.2018 whereby Respondents No. 1 and 2 were admitted to post arrest bail by the learned Addl. Sessions Judge, Multan in case FIR No. 225 dated 27.3.2018 under Sections 365-B, 376(ii), 371-A, PPC registered at Police Station New Multan, District Multan.

2. Learned counsel for the petitioner submitted that the impugned order is result of misreading and non reading of evidence; that sufficient incriminating material was available on record against Respondents No. 1 and 2 but learned trial

Court did not appreciate it; that it was, in fact, the case of gang rape but learned trial Court exercised its jurisdiction contrary to law on the subject, thus, impugned order was liable to be set aside.

3. Learned counsel for Respondents No. 1 and 2 maintained the validity of the impugned order.

4. Heard. Available record perused.

5. A review of the record demonstrates that the learned Addl. Sessions Judge admitted the Respondents No. 1 and 2 on post arrest bail. Learned Addl. Sessions Judge dealt with the merits of the case in Para-6 of the impugned order which reflects that the respondents were not nominated in the FIR. MLR was in conflict with DNA report, not received and it was difficult to determine in absence of the report regarding actual culprit of the offence and that nothing was recovered from the said respondents during the investigation.

6. It may be noted that this is an application for cancellation of bail and that consideration for cancellation of bail are quite different from the grounds for grant of bail. The grounds for cancellation of bail are akin to the grounds for appeal against acquittal This was the view taken by the Hon'ble Supreme Court of Pakistan in case reported as *"Mian Dad v. The State and another"* (1992 SCMR 1286).

As such, in order to succeed, the learned counsel is required to show that the order whereby the bail was granted is perverse, no other conclusion could be drawn except the guilt of the accused or that there was material substance not considered by the Court resulting in miscarriage of the justice. It may be noted that the learned counsel did not make any submission on these lines and therefore, I am of the considered view that the instant petition has no merits and is dismissed.

(M.A.K.) Petition dismissed

PLJ 2019 Lahore 66
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**

MUHAMMAD SHAHBAZ--Petitioner

versus

EX-OFFICIO JUSTICE OF PEACE/ASJ, MAILSI and 4 others--Respondents

W.P. No. 13475 of 2018, decided on 8.11.2018.

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

----Ss. 22-A & 22-B--Ex-officio justice of peace--Application of--Allegations--Ex-Officio Justice of Peace requisitioned a report from Ilaqa police which revealed that matter was enquired into *vide* rapat and Section 174, Cr.P.C. was resorted to--Medical officer could not determine exact cause of death--No enmity was found between parties by investigating agency--Ex-Officio Justice of Peace directed SHO to record version of respondent and then to proceed in due course of law--Police report apparently is not against petitioner and also not favourable to said respondent--S.H.O. directed to record version of petitioner and to proceed under the law, whichever is found correct--Petition disposed of. [Pp. 67 & 68] A & C

Ex-officio justice of peace--

----Under law, Ex-Officio Justice of Peace is not bound to call for such a report and if report is requisitioned then it is either to .be relied upon or Ex-Officio Justice of Peace would mention reason to ignore said report. [P. 68] B

Mr. Khalid Naseem, Advocate for Petitioner.

Mian Adil Mushtaq, A.A.G. for Respondent.

Mr. Muhammad Qadeer Asif Toor, Advocate for Respondent No. 5.

Date of hearing: 8.11.2018.

ORDER

The petitioner challenges the order dated 12.9.2018 passed by Respondent No. 1 whereby Respondent No. 4 was directed to record statement of Respondent No. 5 and to proceed under the law.

2. Learned counsel for the petitioner submitted that the learned Ex-Officio Justice of Peace proceeded in haste and directed the SHO to record version of

Respondent No. 5 and then to proceed, under the law. Concluding his arguments, learned counsel for the petitioner submitted that non cognizable offence was spelt out as earlier the matter was thoroughly probed/ enquired into by the Ilaqa police under Section 174, Cr.P.C. and now Respondent No. 5 making somersault and only to blackmail the petitioner filed the application moved under Section 22-A and 22-B, Cr.P.C. and that the order of the learned Ex-Officio Justice of Peace was liable to be set aside being violative of law on the subject.

3. Learned counsel for Respondent No. 5 maintained the validity of the impugned order.

4. Heard. Available record perused.

5. A review of the record demonstrates .that Respondent No. 5 moved an application under Sections 22-A and 22-B, Cr.P.C. to the learned Ex-Officio Justice of Peace on 25.6.2018. The allegations find mentioned in para-1 of the petition. Learned-Ex- Officio Justice of Peace requisitioned a report from the Ilaqa police which revealed that the matter was enquired into *vide* Rapat No. 20 dated 13.2.2018 and Section 174, Cr.P.C. was resorted to. The record further reflects that the medical officer could not determine the exact cause of death. No enmity was found between the parties by the investigating agency. The learned Ex-Officio Justice of Peace directed the SHO to record version of the Respondent No. 5 and then to proceed in due course of law. The police report dated 07.9.2018 apparently is not against the petitioner and also not favourable to the said respondent.

6. Under the law, learned Ex-Officio Justice of Peace is not bound to call for such a report and if report is requisitioned then it is either to be relied upon or the Ex-Officio Justice of Peace would mention the reason to ignore the said report. As mentioned above, in this case the report is favourable to the petitioner.

7. In the circumstances, the SHO (Respondent No. 4) is directed also to record version of the petitioner and to proceed strictly under the law on the basis of version, whichever is found correct.

8. Disposed of, accordingly.

(A.A.K.) Petition disposed of

PLJ 2019 Lahore (Note) 19
[Multan Bench Multan]
***Present*: SARDAR AHMED NAEEM, J.**
***Rao* MUHAMMAD HANIF--Petitioner**
versus
JUSTICE OF PEACE/ASJ, etc.--Respondents

W.P. No. 4424 of 2016, decided on 25.10.2018.

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

----Ss. 22-A & 22-B--Application for registration of FIR--Civil Dispute--Scope of police comments--Validity--Ex-Officio Justice of Peace requisitioned a report from local police, which revealed that it was a civil dispute--A report of respondent was also requisitioned by this Court--Report has been submitted by respondent which reflect that petitioner was innocent and all allegations leveled in petition were false--Allegations leveled against petitioner by respondent are thus, falsified by police report, neither considered nor discussed in impugned order, which is contrary to law, cannot be sustained and liable to be set aside--Petition was dismissed. [Para 5 & 6] A & B PLD 2005 Lah. 470, *ref.*

Mr. Nadeem Ahmad Tarar, Advocate for Petitioner

Mr. Muhammad Tariq Nadeem, Assistant Advocate General for State.

Date of hearing: 25.10.2018.

ORDER

The petitioner challenges the order dated 25.2.2016 passed by learned Respondent No. 1 whereby the application moved by Respondent No. 3 under Section 22-A & 22-B, Cr.P.C for registration of the FIR was disposed of with the direction to the SHO to record his version and to proceed under the law.

2. Learned counsel for the petitioner submitted that the impugned order runs contrary to the facts and the law on the subject. Adds that the impugned order was outcome of misreading and non reading of the available record, in particular the police report which reflects that it was, in fact, a civil dispute.

3. Learned law officer opposed the application half heartedly.

4. Heard. Available record perused.

5. A review of the record demonstrates that the application was filed by Respondent No. 3 and the allegation levelled against the petitioner find mentioned in para-2 of the said petition. Learned Ex-Officio Justice of Peace requisitioned a report from the local police, which revealed that it was a civil dispute. A report of

Respondent No. 2 was also requisitioned by this Court *vide* order dated 22.3.2016. In compliance therewith, a report has been submitted by Respondent No. 2 which reflect that the petitioner was innocent and all the allegations leveled in the petition were false. The scope of police comments were considered by their lordship in *"Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others"* (PLD 2005 Lah 470) appearing at page No. 534-535 in para No. 16 reads as under:

> *"---It is prudent and advisable for an ex-officio Justice of the Peace to call for comments of the officer in charge of the relevant Police Station in respect of complaints of this nature before taking any decision of his own in that regard so that he may be apprised of the reasons why the local police have not registered a criminal case in respect of the complainant's allegations. It may well be that the complainant has been economizing with the truth and the comments of the local police may help in completing the picture and making the situation clearer for the ex-officio Justice of the Peace facilitating him in issuing a just and correct direction, if any.*
>
> *The officer in charge of the relevant Police Station may be under a statutory obligation to register an F.I.R. whenever information disclosing commission of a cognizable offence is provided to him but the provisions of Section 22-A(6), Cr.P.C. do not make it obligatory for an ex-officio Justice of the Peace to necessarily or blind foldedly issue a direction regarding registration of a criminal case whenever a complaint is filed before him in that regard. An Ex-Officio Justice of Peace should exercise caution and restraint in this regard and he may call for comments of the officer in charge of he relevant Police Station in respect of complaints of this nature before taking any decision of his own in that regard so that he may be apprised of the reasons why the local police have not registered a criminal case in respect of the complainant's allegations. If the comments furnished by the officer in charge of the relevant Police Station disclose no justifiable reason for not registering a criminal case on the basis of the information supplied by the complaining person then an ex-officio Justice of the Peace would be justified in issuing a direction that a criminal case be registered and investigated---."*

6. The allegations leveled against the petitioner by Respondent No. 2 are thus, falsified by the police report, neither considered nor discussed in the impugned order, which is contrary to law, cannot be sustained and liable to be set aside.

7. In view of the above, this petition is allowed and the impugned order dated 25.2.2016 is hereby set aside. Resultantly, the application moved by the Respondent No. 3 seeking registration of the FIR stands dismissed.

(M.M.R.) Petition allowed

2019 P Cr. L J Note 56
[Lahore]
Before Sardar Ahmed Naeem and Ch. Abdul Aziz, JJ
LATIF MASIH and others---Appellants
Versus
The STATE and others---Respondents

Criminal Appeals Nos. 78, 388, Criminal Revision No. 202 of 2014 and Murder Reference No. 178 of 2015, heard on 18th April, 2018.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt--- Accused was charged for the murder of son of the complainant---Motive of the occurrence was that the deceased forbade the accused to sell the narcotics---Record showed that the place of occurrence was surrounded by different shops and houses---Evidence of the witnesses showed that many others were attracted to the spot but no independent witness was cited by the prosecution---Complainant being father and witnesses being close relatives of the deceased did not make even abortive attempt to save the deceased from the clutches of the accused---Conduct of said witnesses was unnatural as no father or real uncle would let anybody to commit murder of their son in their presence---Complainant had claimed to have gone to the hospital sitting besides rickshaw driver, whereas, witnesses were sitting on both sides of the deceased bleeding profusely but neither their clothes were stained with blood nor secured/taken into possession during the investigation---Production and securing of their clothes would have been a very important circumstance to establish the presence of the witnesses inside the rickshaw and with the injured as stated by the eyewitnesses---Complainant had reported the incident in clear terms that the accused brought out churri from the fold of his shalwar and stabbed his son---Complainant levelled the same allegation during trial but the Medical Officer observed incised wound against the allegation of stabbing---Medical evidence produced by the prosecution in the present case could not provide much support to the ocular account---Medical evidence could only provide support to the ocular evidence regarding various details and had no supportive value where the eye-witnesses themselves did not inspire confidence---Injured expired in the hospital at

10.25 p.m.---Complainant got recorded his statement and the FIR was registered at 11.15 p.m.---Dead-body was shifted to the hospital at 12.10 a.m. but the post-mortem was conducted on the next day at 1.15 p.m.---Time elapsed between the post-mortem and the death was 15 to 24 hours, mentioned in the statement of Medical Officer, who claimed that the police papers were not provided to him and being handicapped for that reason, he could not conduct the post-mortem which reflected that the police papers were not prepared till the next day and suggested deliberation and consultation---Record transpired that accused was a drug dealer and the deceased was an addict who quite often refrained the accused from selling the narcotics in the area---Complainant had admitted in cross examination that his son/deceased was an addict, though occasionally, thus, story of shunning a drug peddler by the addict did not appeal to prudent mind---Investigating Officer also admitted during his cross-examination that no evidence was produced during the investigation to support the motive and there was no record of the appellant being drug peddler, thus, the evidence about the motive was virtually next to nothing and the prosecution failed to substantiate the same---Trial Court tried all the accused and acquitted co-accused person on the same set of evidence---Conviction on a capital charge could only be sustained on strong corroboration of the material available on record which was not forthcoming in the present case---Facts and circumstances of the present case showed that the eye-witnesses, whose very presence at the time and place of occurrence was highly doubtful, did not find ample corroboration from the other available evidence---Medical evidence did not furnish requisite corroboration to the eye-witnesses---No evidence regarding motive was produced during investigation or at trial---Prosecution case was, thus, replete with doubts---Prosecution had failed to prove its case against the accused beyond any reasonable shadow of doubt---Appeal was allowed and accused was acquitted by setting aside conviction and sentence recorded by the Trial Court.

Muhammad Akram v. The State 2012 SCMR 440 and Ulfat Hussain v. State 2018 SCMR 313 rel.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Recovery of weapon of offence from accused---Reliance---Scope---Accused fled away from the crime scene after the occurrence and was arrested after twelve days of the occurrence and led to the recovery of churri from a place not exclusively in his

possession rather it was State land---Recovered churri was blood-stained, however, the same was dispatched to the office of Public Analyst after 4-1/2 months of the occurrence---Report of the Chemical Examiner revealed that it was stained with blood---Last worn clothes of the deceased were also found to be blood-stained and taken into possession but no report of serologist was available on the file regarding blood grouping, thus, the recovery of churri would not help the prosecution in any manner.

Muhammad Asif v. The State 2017 SCMR 486 rel.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Burden of proof---Prosecution was to prove its case against the accused beyond any reasonable doubt---In absence of any direct or circumstantial evidence, conviction of accused could not be sustained merely on account of his failure to explain the circumstances appeared in evidence against him. [Para. 24 of the judgment]

Abdul Majeed v. The State 2011 SCMR 941 rel.

(d) Criminal trial---

----Benefit of doubt---Principle---If there was element of doubt, as to the guilt of accused, it would be resolved in his favour.

Ayub Masih v. The State PLD 2002 SC 1048 and G.M. Niaz v. The State 2018 SCMR 506 rel.
Barrister Moman Malik and Javaid Gill for Appellants (in Criminal Appeal No. 78 of 2014).
Ch. Zubair Ahmad Farooq, Additional Prosecutor-General for the State.
Zafar Mahmood Chaudhary for Appellants/Petitioner (in Criminal Appeal No. 388 and Criminal Revision No. 202 of 2014).
Date of hearing: 18th April, 2018.

JUDGMENT
SARDAR AHMED NAEEM, J.---Latif Masih appellant along with Natin Masih and Yasir Masih (co-accused) were tried by the learned Addl. Sessions Judge, Lahore in case FIR No.856 dated 10.8.2010, for offences under sections 302/34, P.P.C., registered at Police Station South Cantt. District Lahore, lodged by Saleem Masih

complainant, for committing murder of Akbar Masih deceased. At the conclusion of the trial, vide judgment dated 04.01.2014, the learned trial Court acquitted Natin Masih and Yasir Masih co-accused and convicted and sentenced the appellant Latif Masih as under:-

"Under section 302(b), P.P.C. and sentenced to death with a 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., in default thereof, to further undergo six months' Simple Imprisonment. In case of non-payment of the compensation, the amount was ordered to be recovered as arrears of land revenue."

2. The appellant filed Criminal Appeal No.78 of 2014, challenging his conviction and sentence awarded by the learned trial Court. Saleem Masih appellant/complainant filed Criminal Appeal No.388 of 2014 challenging acquittal of Yasir Masih and Natin Masih, respondents and also filed Criminal Revision No.202 of 2014 for enhancement of compensation from Rs.2,00,000/- to Rs.10,00,000/-. Murder Reference No.178 of 2015 is also before us for confirmation or otherwise of the death sentence awarded to Latif Masih, appellant. Through this single judgment, we propose to decide all the above mentioned matters.

3. The epitome of the prosecution story as mentioned in FIR Exh.PA/2 was that on 10.8.2010, the complainant along with his family members was present in his home. Meanwhile, some one knocked at the main door of the house and Akbar Masih (deceased) went out. On hearing the hue and cry, complainant along with Akram Masih (son) and Pervaiz Masih (brother) went in the street and saw Natin Masih and Yasir Masih armed with pistols encircled Akbar Masih (deceased). Complainant along with PWs moved forward to save him but threatened that if some one tried to move forward would be done to death. Natin Masih raised lalkara to teach a lesson to Akbar Masih (deceased) for forbidding them to sell the narcotics, on which Latif Masih (appellant) took out Churri from 'naifa' of his shalwar and inflicted churri blow at the neck of Akbar Masih (deceased) who fell down in injured condition. Accused while brandishing their weapons fled away from the crime scene. Akbar Masih (deceased) was taken to hospital where he succumbed to the injuries.

4. After usual investigation, the appellant along with acquitted co-accused was sent to the Court for trial. They were charge sheeted. They pleaded not guilty and claimed trial, hence the prosecution evidence was summoned.

5. In order to prove its case, the prosecution examined as many as twelve witnesses in all.

6. Saleem Masih complainant (PW-1) supported the prosecution story as mentioned in the FIR. Pervaiz Masih (PW-2) being eye-witness of the occurrence also corroborated the statement of PW.1.

7. Dr. Ahmad Raza Khan (PW-5) conducted post-mortem examination of the deceased Akbar Masih and observed following injury on his person:

"An open gapping incised wound 3 x 1 cm with clean cut margins and well defined angles, crescentic in shape. On the lower part of front aspect of right side neck, 4 cm right of midline and 1 cm above the medial end of clavicle."

According to his opinion, said injury was ante-mortem in nature and caused by sharp edge weapon. The death of the deceased occurred due to the damage of major blood vessels of the right side of the neck under injury No.1 leading to hemorrhage, shock and death and sufficient to cause death in ordinary course of nature. Probable time between the injury and death was within few minutes and time between death and post mortem was 15 to 24 hours. Copy of the postmortem report was Exh.PE and diagrams Exh.PE/1 and Exh.PE/2 showing the locale of injuries were in his hand and signed by him.

8. Faqeer Muhammad S.I. (PW-9) conducted the investigation of the instant case. On 10.8.2010, after learning about the occurrence, he proceeded to the hospital where dead body of Akbar Masih was lying. He prepared injury statement Ex.PM and inquest report Ex.PO of the deceased and then handed over the dead body to the medical officer for post-mortem. On the same day at night, he went to the place of occurrence, prepared rough site plan Ex.PN and recorded statements of the PWs under section 161, Cr.P.C.

9. On 14.1.2010, he inspected the spot along with Draftsman. On 16.08.2010, he obtained non bailable warrants of arrest of Latif Masih Ex.PF, Natin Masih Ex.PG and Yasir Masih Ex.PH. On 22.08.2010, he arrested Latif Masih appellant. On 29.08.2010, he interrogated Latif Masih appellant and recovered churri P-1 which he took into possession vide Memo Ex.PC. On 30.08.2010, he sent Latif Masih appellant to the Judicial Lock up.

10. Muhammad Imran Haider Inspector (PW-10) partially investigated the case. On 16.10.2010, he arrested accused Yasir Masih and Natin Masih and sent both the accused to the judicial lock up and prepared report under section 173, Cr.P.C. Rest of the PWs are of formal nature, therefore, need not to be discussed.

11. The prosecution while tendering in evidence report of Chemical Examiner Ex.PP and report of Serologist as Ex.PQ, closed its case.

12. After close of the prosecution evidence, the appellant was examined under section 342, Cr.P.C. He denied the prosecution allegations and pleaded innocence. Responding to a question "why this case against him and why the PWs deposed against him", the accused/appellant Latif Masih replied as under:-

"The deceased was a drug addict. On 10.08.2010 at about 7.00 p.m. a quarrel took place between my children and the deceased upon mobile prior to the occurrence. On the same night I was playing snooker in the Snooker Club at about 8.30 p.m. Akbar deceased called me. I came out from Snooker Club and the deceased used filthy language against my mother and we entered into a scuffle with each other. Akbar deceased wanted to take revenge of the evening quarrel and had brought churri from his house. During this scuffle the deceased suffered a churri blow. The deceased attacked upon me. He was aggressor person. I had no intention to kill the deceased at the time of occurrence. I did not give a churri blow to Akbar deceased. I have no motive to kill the deceased at the time of occurrence. Motive set up in the FIR was concocted and afterthought. The complainant was not present at the spot and was called from his house after the occurrence. The other PWs of the FIR were also not present at the spot. They are also related to the deceased. My first version was not properly recorded by the I.O. in league with the complainant party. I am innocent and pray for justice."

The appellant appeared as his own witness in his statement under section 340(2), Cr.P.C., in disproof of the prosecution evidence and stated as under:-

"On 10.08.2010, I had a quarrel with the deceased Papa over a trivial matter relating to mobile phone. The matter thereafter, was resolved. Thereafter, after some time, the deceased again came back to snooker club where I was playing the game, dragged me and we had a scuffle there. During scuffle the deceased put out a knife (churri) and wanted to assault upon me, accidentally slipped there and inflicted himself with the said churri, was done to death due to said injury. I did nothing nor assaulted upon the deceased. It was his mistake as he was under intoxication, due to which he succumbed to his wound."

The appellant, however, did not produce any witness in his defence.

It was observed that Criminal Appeal No.78 of 2014 did not reach the Court after its institution, however, learned Additional Prosecutor General assisted by the learned counsel for the complainant accepted the notice and the case was decided as 'Pucca' matter.

13. Learned counsel for the appellant submitted that no independent witness was cited by the prosecution; that there were contradictions between the medical and the ocular account; that the postmortem examination in this case was held on the following day of the occurrence; that prosecution failed to prove the motive; that blood stained churri allegedly recovered from the appellant was dispatched to the office of public analyst after the lapse of 4-1/2 months and was found blood stained, improbable and unusual; that co-accused of the appellant were acquitted on the same set of evidence and no corroboration was forthcoming; that place of occurrence was at a distance of 7/8 kilometers from the Lahore General Hospital and the witnesses shifted the deceased to hospital by a rickshaw but neither their clothes were stained with blood nor produced during the investigation; that the case of prosecution was riddled with doubts and the doubt even slightest is always resolved in favour of the accused. Concluding the arguments, learned counsel submitted that the prosecution miserably failed to prove its case, thus, the appellant was entitled to acquittal.

14. Learned Additional Prosecutor General assisted by the learned counsel for the complainant submitted that the witnesses had no grudge or grouse to falsely implicate the appellant; that the learned trial Court held the appellant guilty after fair appraisal of the evidence; that case of prosecution was corroborated by the medical evidence as well as recovery of churri; that the motive was proved; that the minor discrepancies hinted at by the learned counsel for the appellant do creep up with the passage of time; that the prosecution has proved its case against the appellant beyond reasonable doubt. Learned counsel supported the judgment rendered by the learned trial Court.

15. We have considered the arguments advanced by the learned counsel for the parties and have perused the record.

16. The gist of the prosecution's case was that on 10.8.2010 at 9.00 p.m. some one knocked at complainant's door whereupon the deceased went outside his home. The alarm then being raised in the street attracted the complainant along with Akram Masih and Pervaiz Masih. They went outside and saw that the appellant along with his co-accused intercepted the deceased in front of Gugo Snooker Club. The co-accused, namely, Natin and Yasir Masih stood at guard and that Latif Masih appellant stabbed the deceased with churri hitting on front side of his neck. The complainant along with the eye-witnesses shifted the injured to Lahore General Hospital in a rickshaw but the deceased expired in the hospital.

17. The place of occurrence was surrounded by different shops and houses. It was in the evidence that many others were attracted to the spot but no independent witness

was cited by the prosecution. The complainant being father and Akram Masih and Pervaiz Masih being close relatives of the deceased did not make even an abortive attempt to save the deceased from the clutches of the accused. Their conduct was, thus, unnatural as no father or real uncle would let anybody to commit murder of their son in their presence. The complainant claimed to have gone to Lahore General Hospital sitting besides rickshaw driver, whereas, Akram Masih and Pervaiz Masih were sitting on both sides of the deceased, was bleeding profusely but neither their clothes were stained with blood nor secured/taken into possession during the investigation. The production and securing of their clothes would have been a very important circumstance to establish the presence of the witnesses inside the rickshaw and with the injured as stated by the eye-witnesses.

The place of occurrence was at a distance of 7/8 kilometers from the Lahore General Hospital and it takes about 15 to 20 minutes to get from Gugo Snooker Club to hospital. It is also hard to believe that the clothes of the eye-witnesses would not have been stained with blood if they actually carried the injured. The absence of blood stains on the clothes of eye-witnesses clearly indicate that none of them was sitting beside the injured or shifted him to hospital.

18. The ocular account was furnished by the complainant and Pervaiz Masih, real Chacha of the deceased, whereas, Akram Masih was given up being unnecessary. The complainant reported the incident in clear terms that the appellant brought out churri from the fold of his shalwar and stabbed his son. He also levelled the same allegation during trial that appellant ( ) but the Medical Officer observed incised wound against the allegation of stabbing.

19. A stab wound is produced when force is delivered along the long axis of a narrow or pointed object, such as knife, dagger, spear, arrow, screw driver etc. in the depth of the body. It is deeper than its length and width on skin. This can occur by driving the object into the body or from the body's pressing or falling against the object. They are called penetrating stab wound, when they enter in a cavity of body.

The factors that determine how much force is needed for penetration to occur are:-

(i) The sharpness of the tip of the weapon: the sharper the tip, the easier it is to penetrate the skin.

(ii) The speed of the contact: the faster the contact, the greater the force applied and the easier it is to penetrate the skin.

(iii) Whether clothing has been penetrated: clothing increases the resistance to penetration.

(iv) Whether bone or cartilage has been injured: skin offers very little resistance to a stabling action by a sharp knife, but penetration of these denser tissues will require greater force.

When the weapon enters into the body one side and comes out from the other side, perforating through and through puncture wounds are produced. The entry is larger with inverted edges, and the exit is smaller with everted edges, due to tapering of blade.

Whereas, the incised wounds are wounds caused by a clean sharp object such as a knife, broken piece of glass or razor. There are different types of incised wounds including cuts to the skin during shaving, cutting of skin from a broken glass, accidentally cutting one-self with a knife, surgical incisions, etc. Since these wounds are result of clean sharp object cutting into the skin, these are usually pretty straight without any jagged edges to the wound. The autopsy in this case was held by Dr. Ahmed Raza Khan (PW.5), who observed incised wound of Churri 3 X 01 c.m with clean cut margins and well defined angles, crescentraic in shape and on the lower part of front aspect of right side neck, 04 c.m right of mid line and 01 c.m above medial end of clavical, thus, said injury does not appear to be result of stabbing as stated by the complainant.

The medical evidence produced by the prosecution in this case could not provide much support to the ocular account. It can only provide support to the ocular evidence regarding various details. However, medical evidence has no supportive value where the eye-witnesses themselves do not inspire confidence and, thus, there is nothing left to be supported.

20. The eye-witnesses reached at the crime scene on the alarm raised in the street and after the occurrence, the deceased then injured was shifted by them on a rickshaw to hospital. He expired in the hospital at 10.25 p.m. The Investigating Officer having information of the occurrence also reached in the hospital. The complainant got recorded his statement Exh.PA and the FIR was registered at 11.15 p.m. It was also in the evidence that the dead body was shifted to hospital at 12.10 a.m. but the postmortem was conducted on 11.08.2010 at 01.15 p.m. The time which elapsed between the postmortem and the death was 15 to 24 hours, mentioned in the statement of PW.5, who further claimed that the police papers were not provided to him and being handicapped for that reason, he could not conduct the postmortem which reflects that the police papers were not prepared till the next day and suggests deliberation and consultation.

21. The reasons for the outbreak of this episode was that Latif Masih was a drug seller and the deceased was an addict who quite often refrained the appellant from selling the narcotics in the area. The complainant has admitted in cross-examination that his son i.e. the deceased was an addict, though occasionally, thus, story of shunning a drug peddler by an addict does not appeal to prudent mind. The Investigating Officer also admitted during his cross-examination that no evidence was produced during the investigation to support the motive and there was no record of the appellant being the drug peddler, thus, the evidence about the motive was virtually next to nothing and the prosecution failed to substantiate the allegation.

22. After the occurrence, the appellant fled away from the crime scene and was arrested after twelve days of the occurrence and led to the recovery of churri P-1 from a place not exclusively in his possession rather it was state land. The recovered Churri (P.1) was blood stained, however, dispatched to the office of Public Analyst after 4-1/2 months of the occurrence. The report of the chemical examiner reveals that it was stained with blood. The last worn clothes of the deceased were also found to be blood stained and taken into possession vide memo Exh.PD but no report of serologist was available on the file regarding blood grouping, thus, the recovery of churri P-1 would not help the prosecution in any manner. The Hon'ble Supreme Court in another identical case titled "Muhammad Asif v. The State" (2017 SCMR 486) observed as under:

"17. It is, normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to conceal their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy each piece of evidence incriminating in nature which, might be used against them in the future thus, human faculty of prudence would not accept the present story rather, after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other place and no circumstances would have chosen to preserve it in his own shop if believed so because that was susceptible to recovery by the police.

18. Before parting with this judgment, we deem it essential to point out that, mere sending the crime weapons, blood stained to the chemical examiner and serologist would not serve the purpose of the prosecution nor it will provide any evidence to inter link different articles.

19. We have noticed that the Punjab Police invariably indulge in such a practice which is highly improper because unless the blood stained earth or cotton and blood

stained clothes of the victim are not sent with the same for opinion of serologist to the effect that it was human blood on the crime weapons and was of the same group which was available on the clothes of the victim and the blood stain was available on the clothes of the victim and the blood stained earth/cotton, such inconclusive opinion cannot be used as a piece of corroboratory evidence. Therefore, copy of this judgment be sent to the Prosecutor General, Punjab, and Chief Incharge of Investigation, Punjab Provincial Police to issue instructions to the investigating agencies in this regard."

23. It may also be mentioned that the learned trial Court tried all the accused and acquitted Natin Masih and Yasir Masih on the same set of evidence. It is settled law that if the co-accused of the appellant are acquitted on the same set of evidence, then, conviction on a capital charge can only be sustained on strong corroboration of the material available on record which is not forthcoming in this case. Reliance in this context, can be placed on "Muhammad Akram v. The State" (2012 SCMR 440) and "Ulfat Hussain v. State" (2018 SCMR 313).

24. It is necessary for the prosecution to prove its case against the accused beyond any reasonable doubt and in absence of any direct or circumstantial evidence, conviction of a person cannot be sustained merely on account of his failure to explain the circumstances appearing in the evidence against him. In this respect, reliance may be placed on the case titled "Abdul Majeed v. The State" (2011 SCMR 941). It is by now settled that benefit of doubt, if found in the prosecution's case, the accused shall be held entitled to the benefit, thereof. It is also settled principle of criminal administration of justice that if there is element of doubt, as to the guilt of accused, it must be resolved in his favour. The golden rule of benefit is initially a rule of prudence which cannot be ignored, while dispensing justice in accordance with law. It is based on maxim that it is better to acquit ten guilty persons rather than to convict one innocent person. For acquittal of accused in an offence, how-so heinous it may be, only a single doubt in the prosecution evidence is sufficient. In this respect, reference may be made to case titled "Ayub Masih v. The State" (PLD 2002 SC 1048) and "G.M. Niaz v. The State" (2018 SCMR 506).

The instant case as discussed above is replete with serious doubts and the appellant is entitled to the benefit, thereof.

25. The overall effect of the discussion of above facts and circumstances is that the eye-witnesses, whose very presence at the time and place of occurrence, is highly doubtful, does not find ample corroboration from the other available

evidence/material. The medical evidence did not furnish requisite corroboration to the eye-witnesses. No evidence regarding motive was produced during investigation or at trial. This case is replete with doubts, which leads us to hold that the prosecution failed to prove its case against the appellant beyond any reasonable shadow of doubt.

26. In view of above, the Criminal Appeal No.78 of 2014 is accepted. The conviction/sentence awarded to the appellant is hereby set aside. He is in custody and be released forthwith if not required in any other criminal case.

27. In sequel of the above discussion, Criminal Appeal No.388 of 2014 against the acquittal of co-accused namely Yasir Masih and Natin Masih and Criminal Revision No.202 of 2014 for enhancement of compensation from Rs.2,00,000/- to Rs.10,00,000/- moved by the appellant/petitioner are hereby dismissed.

28. The death sentence is not confirmed and the Murder Reference No.178 of 2015 is answered in the negative.

The record of the learned trial Court be remitted immediately and the case property be dealt with as directed by the learned trial Court.

JK/L-9/L Order accordingly.

PLJ 2019 Cr.C. (Note) 86
[Lahore High Court, Multan Bench]
Present: **SARDAR AHMED NAEEM AND ASJAD JAVAID GHURAL, JJ.**
MUHAMMAD SAJID--Appellant
versus
STATE and another--Respondents

Crl. A. No. 808 of 2018, decided on 29.10.2018.

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

----S. 417--Pakistan Penal Code, (XLV of 1860), Ss. 302, 377, 337-J, 148 & 149--Appeal against acquittal--*Qatl-i-Amd*--Dismissal of--Appellant challenges judgment rendered by Additional Sessions Judge, whereby respondent no. 2 was acquitted of charges--Respondent No. 02 was tried for committing *Qatl-i-Amd* of one 9/10 years old boy--Allegation against said respondent was that of throttling and committing sodomy with deceased, who was taken away from his house on day of occurrence and was crying, when seen by prosecution witnesses--Cause of death was asphyxia witnesses claimed to have seen occurrence i.e. commission of sodomy and then throttling by respondent--Trial Court disbelieved eye-witnesses for following reasons--Conclusion drawn by learned trial judge is neither arbitrary, fanciful nor artificial in nature--Judgment returned by learned trial Court is a fair judgment based on proper, just and legal appreciation of evidence available on record--Appellant failed to show that impugned judgment was fanciful or based on no evidence--Appeal against acquittal and ground which may justify interference have engage attention of apex Court in several cases--It may not be possible to refer all precedents case law on point, however, in a celebrated judgment--Appraisal of evidence it comes to conclusion different from that of Court acquitting accused provided both conclusion are reasonably possible--Important test visualized in this case was that finding sought to be interfered

with, after scrutiny should be found wholly as artificial, shocking and ridiculous--No illegality, perversity or infirmity was hinted--Appeal is dismissed.

[Para 1, 6, 8 & 10] A, B, C, D & E PLD 1985 SC 11, *ref.*

Khawaja Qaisar Butt, Advocate for Appellant.

Date of hearing: 29.10.2018.

ORDER

Muhammad Sajid, appellant challenges the judgment dated 20.12.2017 rendered by learned Additional Sessions Judge, Chichawatni, in case F.I.R. No. 450/2016 dated 16.08.2016, under Sections 302, 377, 337-J, 148, 149, P.P.C., registered at Police Station Saddar Chichawatni, Sahiwal whereby Respondent No. 2 was acquitted of the charges.

2. The facts, in brief, are that on 16.08.2016, Respondent No. 2 alongwith one Abdul Rehman after committing sodomy with Muhammad Sajjad, one after the other, committed his *Qatl-i-amd* by way of throttling.

3. After the trial, the learned trial Court acquitted Respondent No. 2. Hence, this appeal.

4. Learned counsel for the appellant mainly contended that the learned trial Court could not appreciate the evidence on the file in its true perspective; that the learned trial Court has failed to give cogent and convincing reasons while acquitting the accused-respondent and that minor and inconsequential discrepancies in the statements of the prosecution witnesses have been taken into consideration and made basis of the impugned judgment which has resulted in complete failure of justice.

5. We have heard the learned counsel for the appellant at length and perused the available record.

6. A review of the record demonstrates that Respondent No. 2 was tried for committing *Qatl-i-Amd* of one Muhammad Sajjad 9/10 years old boy. The allegation against the said respondent was that of throttling and committing sodomy with the deceased, who was taken away by Mushtaq from his house on the day of occurrence

and was crying, when seen by the prosecution witnesses including Ishtiaq Ahmad and Muhammad Nadeem. The cause of death was asphyxia. The witnesses claimed to have seen the occurrence i.e. commission of sodomy by Abdul Rehman and Respondent No. 2 one after the other and then throttling by Respondent No. 2. The learned trial Court disbelieved the eye-witnesses for the following reasons:--

i. *Their conduct at the crime scene was highly improbable/unnatural;*

ii. *The medical evidence did not support the prosecution version i.e. the commission of sodomy; and*

iii. *The witnesses were chance witnesses.*

7. The occurrence took place in the standing crops of Mehboob Ali Dogar in Square No. 56, Acre No. 11 in Chak No. 10/11-L, Chichawatni but was neither cited by the prosecution nor examined at trial. The learned trial Court discussed the merits of the case at great length in Para No. 18 to 29 of the impugned judgment.

8. Having concentrated on the arguments of the learned counsel for the appellant in the light of available record, we are of the view that conclusions drawn by the learned trial judge are neither arbitrary, fanciful nor artificial in nature. The judgment returned by the learned trial Court is a fair judgment based on proper, just and legal appreciation of the evidence available on record. The appellant failed to show that the impugned judgment was fanciful or based on no evidence. It has not been demonstrated that some material evidence was not taken into consideration by the learned trial Court, which had caused miscarriage of justice.

9. Needless to emphasize that a judgment of acquittal is not to be interfered with and due consideration and weight is to be given to the observations of the learned trial Court. The view and approach for dealing with the appeal against conviction is different and distinguishable from the appeal against acquittal because presumption of double innocence of the accused is attached to the judgment of acquittal.

10. The appeal against acquittal and the ground which may justify interference have engage attention of the apex Court in several cases. It may not be possible to refer all the precedents case law on the point, however, in a celebrated

judgment titled *"Ghulam Sikandar and another v. Mamaraz Khan and others"* (PLD 1985 SC 11), the Hon'ble apex Court observed that the acquittal would not be interfered with merely because on re-appraisal of evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. The importance test visualized in this case was that the findings sought to be interfered with, after scrutiny should be found wholly as artificial, shocking and ridiculous.

11. No illegality, perversity or infirmity was hinted at by the learned counsel for the appellant in the impugned judgment which is based on fair appraisal of the evidence as observed above.

12. For the foregoing reasons, there is no force in this appeal, which is dismissed, *in limine*.

(M.A.K.) Appeal dismissed

PLJ 2019 Cr.C. (Note) 90
[Lahore High Court, Lahore]
***Present*: SARDAR AHMAD NAEEM, J.**
SARFRAZ ANWER--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 257269-B of 2018, decided on 8.3.2019.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 489-F--Pre-arrest bail, dismissal of--Allegation of--Dishonoured of cheque--Petitioner has not denied execution of cheque and maintaining bank account with said branch--No animosity or ill will with PWs was hinted at by counsel for petitioner for his false involvement in this case--Deeper appreciation of evidence cannot be undertaken at this stage and Court only has to sift material tentatively--Even otherwise, pre-arrest bail can only be granted in cases of exceptional circumstances and not a substitute for post arrest bail--Investigating agency has also concluded against petitioner--Petitioner also failed to explain that his intended arrest was tainted with *mala fide*--He has failed to make out a case for confirmation of his ad-interim pre-arrest bail. [Para 3] A

Mr. Abdul Rehman, Advocate with petitioner *Mr. Haroon Rasheed Ch,* Deputy District Public Prosecutor for State.

Mr. Akhtar Hussain Bhatti, Advocate for Complainant.

Date of hearing: 8.3.2019.

ORDER

Sarfraz Anwer, petitioner seeks pre-arrest bail in case registered *vide* FIR No. 675 dated 05.9.2018 at Police Station Saddar Okara, District Okara for offence under Section 489-F, PPC.

2. The allegation against the petitioner is that of issuing a bogus cheque in favour of the complainant, dishonoured on its presentation.

3. Having heard the arguments addressed at the bar and after perusing the record, it was noticed that the petitioner was nominated in the FIR with specific role of executing a cheque in favour of the complainant, dishonoured on its presentation which finds support from the cheque return memo. available on the file. The petitioner has not denied the execution of cheque and maintaining the bank account with the said branch. No animosity or ill will with the PWs was hinted at by the learned counsel for the petitioner for his false involvement in this case. Deeper appreciation of evidence cannot be undertaken at this stage and the Court only has to sift the material tentatively. Even otherwise, pre-arrest bail can only be granted in cases of exceptional circumstances and not a substitute for post arrest bail. The investigating agency has also concluded against the petitioner. The petitioner also failed to explain that his intended arrest was tainted with *mala fide*. He has failed to make out a case for confirmation of his ad-interim pre-arrest bail.

4. For the foregoing reasons, there is no merit in this petition which is hereby dismissed.

(A.A.K.) Bail dismissed

PLJ 2019 Cr.C. 654
[Lahore High Court, Multan Bench]
***Present:* SARDAR AHMED NAEEM, J.**
IRSHAD HUSSAIN--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 443-B of 2019, decided on 14.2.2019.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail after arrest, grant of--Allegation of--Recovery of two and half kg bhang--No mention or specification as to which particular part the plant was recovered from the petitioner and, the requirements of Section 2(d)(ii) of the Act *ibid* are not fulfilled, and it would be adjudged by the trial Court after recording evidence at trial if the case of the petitioner falls within the ambit of Section 2(d)(ii) of the Control of Narcotic Substances Act, 1997--Petitioner was in jail since his arrest and his continuous detention for indefinite period would be unfair--Petitioner has got no previous record and, thus, would be believed as first offender. [P. 655] A & B 2018 MLD 1416 *ref.*

Speedy trial--

----Right of accused--The speedy trial is the right of the accused and nobody can be detained in jail by way of advance punishment. [P. 655] C

Barrister Muhammad Rehan Khalid Joiya, Advocate for Petitioner.

Mrs. Asmat Parveen, Deputy District Public Prosecutor for State.

Date of hearing: 14.2.2019.

ORDER

Irshad Hussain, petitioner seeks post-arrest bail in case registered *vide* F.I.R. No. 656/2018 dated 23.12.2018, under Section 9(c) of the Control of Narcotic Substances Act, 1997, at Police Station Rohilanwali, Muzaffargarh.

2. Allegedly a police contingent apprehended the petitioner and got recovered two and half kilogram Bhang.

3. I have considered the arguments of the learned counsel for the parties and have perused the record, which reflects that no time of occurrence find mentioned in the crime report registered on 23.12.2018 at 08:55 p.m. There was no mention or specification as to which particular part of the plant was recovered from the petitioner and, thus, the requirements of Section 2(d)(ii) of the Act ibid are not fulfilled, and it would be adjudged by the learned trial Court after recording evidence at trial if the case of the petitioner falls within the ambit of Section 2(d)(ii) of the Control of Narcotic Substances Act, 1997. Ref: *"Muhamamd Zafar v. The State and others"* (2018 MLD 1416). The petitioner is in jail since his arrest and his continuous detention for indefinite period would be unfair. The petitioner has got no previous record and, thus, would be believed as first offender. The speedy trial is the right of the accused and nobody can be detained in jail by way of advance punishment. The petitioner is still awaiting his trial without some material progress.

4. For what has been discussed above, this petition is allowed and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- with one surety in the like amount to the satisfaction of learned trial Court/duty judge.

(A.A.K.) Bail allowed

PLJ 2019 Cr.C. 1053
[Lahore High Court, Multan Bench]
Present **: SARDAR AHMED NAEEM, J.**
MUHAMMAD ASGHAR--Petitioner
versus
STATE etc--Respondents

Criminal Appeal No. 17-J of 2016, decided on 18.12.2018.

Pakistan Penal Code, 1860 (XLV of 1860)

----Ss. 302(b)/364/109--Conviction and sentence--Challenge to--*Qatl-e-Amd*--Confession in police custody--Contradiction in medical evidence--Recovery of dead body from a blind well--Recovery of articles not from any hidden place-Appreciation of Evidence--Benefit of doubt--Acquittal of--Appellant had abducted to deprive him from mobile phone and cash amount--Complainant got recorded his statement and reported incident against appellant--Later on, his father, was also nominated through a supplementary statement being abettor of occurrence--Appellant was statedly a friend of deceased, who took deceased away from his shop--On his disclosure, I.O. got recovered dead body of deceased, then lying in a blind well followed by recovery of "Pakka" brick with which he inflicted various blows on body of deceased--Prosecution connecting appellant in form of last seen, recovery and confession--Injuries were caused by a sharp edged weapon--Cause of death was an injury, also an incised wound-Recovery of article cannot be termed as discovery, when it was not recovered from any hidden place and if in normal course, investigating officer/ agency was able to see it and take in possession without any statement of accused for pointing it out--No case of abduction within ambit of section 364, PPC could be therefore, made out against appellant and as such, conviction recorded under section 364 PPC cannot be sustained--Prosecution case suffers from certain infirmities/ illegalities on basis whereof, conviction/ punishment recorded against appellant is not sustainable--Appeal allowed.

[Pp. 1055, 1057, 1058] A, B, C, D, E, F and G

2010 SCMR 1604; 1995 SCMR 1350, *ref.*

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Art. 39--Article 39 of Qanun-e-Shahadat, confession by accused of his guilt under custody of police which is not made in presence of Magistrate, in absence of any strong corroborative piece of evidence is of no legal value. [P. 1057] D

Medical evidence--

----Medical evidence may confirm seat and time of injuries but cannot connect accused with crime in absence of any other direct or corroborative evidence. [P. 1058] E

Mr. Tazeem Ahmad Bajwa, Advocate /Defence counsel on State expense.

Ms. Asmat Parveen, Deputy District Prosecutor General for State.

Nemo for Complainant.

Date of hearing: 18.12.2018.

JUDGMENT

Muhammad Asghar (appellant) was tried by the learned Addl. Sessions Judge (Juvenile Court) Jalalpur Pirwala in case FIR No.30 dated 30.1.2009 under Sections 302, 364, 109, PPC registered at police station City Jalalpur Pirwala. At the conclusion of trial, *vide* judgment dated 05.6.2015, learned trial Court held the appellant guilty, convicted and sentenced him as under:

(i) Under Section 302(b), PPC: Imprisonment for life as 'tazir'

(ii) Under Section 364 PPC: imprisonment for life;

Both the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.P.C. was also extended to him.

2. The convicts-appellant has filed the instant appeal against his convictions and sentences.

3. Briefly history of the prosecution story as narrated in the FIR was that on 27.1.2009 at about 8.00 a.m, Muhammad Naeem (deceased) was present at his shop adjacent to the house. Appellant came there and took the deceased on some pretext. When Muhammad Naeem (deceased) did not return home till evening, his family members made telephone contact with him which was off. Then it was suspected that appellant had abducted Muhammad Naeem to deprive him from mobile phone and cash amount. Muhammad Iqbal Rab Nawaz and Muhammad Amin PWs witnessed the deceased in the company of the Muhammad Asghar (deceased).

During the investigation, appellant confessed his guilt regarding commission of murder of Muhammad Naeem by giving him "Pakka" brick blows on his head and different parts of his body and got recovered the same. Consequently, offence under Section, 302, PPC was added.

4. After usual investigation, the report under Section 173, Cr.P.C was submitted. The charge was framed against him. He pleaded not guilty and claimed trial.

5. In order to prove its case, prosecution examined as many as 19 witnesses including Saeed Ahmad (PW.1), Habib-Ur-Rehman (PW.2) Muhammad Arif (PW.3), Abdul Razzaq 2252-HC (PW.4), Dr. Muhammad Arshad (PW.5), Allah Nawaz 1606-C (PW. 6), Hafeez Ahmad (PW.7), Muhammad Aslam (PW.8), Muhammad Iqbal (PW.9), Muhammad Sadiq (PW. 10) Rab Nawaz (PW.11), Muhammad Amin (PW.12), Haji Muhammad (PW. 13), Abdul Rahim (PW. 14), Iqbal Hussain (PW.15), Muhammad Ramzan (PW. 16), Bashir Ahmad S.I (PW. 17), Riasat Ali S.I (retired) (PW. 18), Nauman Ashraf Bodla (PW. l9) and Ghulam Mustafa T/ASI(PW. 20)

Prosecution gave up PWs namely, Muhammad Sharif 682-C, Liaquat Hussain, Ijaz Hussain and Mazhar Hayat Hiraj inspector being unnecessary and after tendering into evidence the reports Exh.PO, Exh.PR and Exh. PS closed the prosecution case.

6. Statement of the appellant was recorded under Section 342, Cr.P.C. He denied all the prosecution allegations and pleaded innocence. Responding to question ***"why this case against him and why the PWs have deposed against him"*** (appellant) deposed as under:

> ***"Actually, I and my brothers were working under the supervision of the complainant who was a Garden contractor at Sargodha. He did not give us the wages to me and my brothers namely Akram, Aslam and they worked under the supervision for a period of about six months. When I demanded our wages, an other brother of the complainant give beating to me, as a result of which I left the job and came to my home. Due to said grudge, the complainant of the case falsely involved me and my father in this case. PWs are inter-se related with each other and they have deposed falsely against me in connivance with the complainant"***

7. Appellant neither appeared as his own witness under Section 340(2), Cr.P.C nor produced some witness in his defence.

8. Learned counsel for the appellant contended that no direct evidence was available against the appellant; that the case of prosecution is entirely based on circumstantial evidence and important links of chain are missing, thus, conviction cannot be sustained in the circumstances; that co-accused of the appellant tried separately but was acquitted on the same set of evidence, thus, the appellant is also to be treated alike; that confession before police was inadmissible; that the medical evidence is in conflict with the version of the PWs; that the recoveries also lend no support to the prosecution; that the evidence of last seen was also inconclusive and weak; that the learned trial Court misread/misinterpreted the evidence available on record; that the prosecution miserably failed to prove its case beyond reasonable shadow of doubt and that the case of prosecution was full of doubts and every doubt even slightest is always resolved in favour of the accused.

9. Learned Deputy District Public Prosecutor assisted by the learned counsel for the complainant opposed this appeal with vehemence and submitted that the complainant has got no reason for false implication of the appellant; that he led to the recovery of dead body and pointed out the place of occurrence, Fard Nishandahi was prepared followed by recovery of "Pakka" brick; that the medical evidence was also in line with the possession evidence; that the evidence of last seen further strengthened the prosecution case; that the contradictions/ discrepancies if any do creep up with the passage of time; that the substitution in such like cases is a rare phenomenon. Concluding the arguments, it was submitted that the prosecution proved its case against the appellant beyond reasonable shadow of doubt and that they supported the judgment rendered by the learned trial Court

10. I have considered the points raised at the bar and have gone through the record.

11. The case of prosecution was that on 27.1.2009, the deceased, namely, Muhammad Naeem was taken away from his shop at 8.00 a.m. by the accused on some pretext. At that time, Muhammad Iqhal (PW.9) was sitting at the shop of the deceased, thereafter, Rab Nawaz (PW.11) met the deceased as well as the accused in Basti Nai Wala on the same day at 8.15 a.m. They claimed to have seen the deceased in the company of the accused but they informed the complainant after about 3/4 days on 30.1.2009.

12. The complainant got recorded his Statement (Exh.PB/1) and reported the incident against the appellant. Later on, his father, namely, Muhammad Rafique was also nominated through a supplementary statement being abettor of the occurrence. The appellant was statedly a friend of the deceased, who took the deceased away from his shop on the pretext that he had a stolen cell phone lying in a room of tube-well of one Ghulam Farid at Omer Pur. The appellant, allegedly, threw the deceased in a blind well while he was sitting on the wall of well. Thereafter, the appellant went inside the well, inflicted different injuries with "Pakka" brick (P. 5), got recovered after his arrest.

13. Investigating Officer, namely, Bashir Ahmad S.I was examined as PW. 17. He arrested the appellant on the same day and on his disclosure got recovered the dead body of the deceased, then lying in a blind well followed by recovery of "Pakka" brick with which he inflicted various blows on the body of the deceased. The prosecution evidence further revealed that the accused after his arrest in presence of Rab Nawaz and Muhammad Amin (PW.11) and (PW.12) while in police custody confessed his guilt and described that he wanted to snatch money of the deceased, sent to him by the complainant for payment to the garden labour. The entire evidence of the prosecution connecting the appellant with the commission of this offence is in the form, of last seen, recovery and confession. Under Article 39 of the Qanun-i-Shahadat, confession by accused of his guilt under custody of the police which is not made in the presence of magistrate, in the absence of any strong corroborative piece of evidence is of no legal value. In the present case, admittedly, the appellant confessed his guilt when he was being interrogated by the police after his arrest, thus, this piece of evidence cannot be used against the appellant. The trial Court has miserably failed to understand rather to distinguish between the Articles 38 and 39 of the Qanun-i-Shahadat. The evidence of last seen in this backdrop is unrealistic and flawed. The appellant pointing out the place of occurrence in police custody and a memo. in support thereof also cannot be admitted in evidence. A piece of circumstantial evidence must come from an unimpeachable source with such quality which must exclude every hypothesis of innocence. One weak piece of evidence cannot corroborate another. The circumstantial evidence must constitute a nexus through a chain of circumstances linking the crime with the culprit and, thus, recovery and last seen cannot sustain the charge as it sans proximity in time and space.

14. The second limb of the prosecution case is recovery of crime weapon "Pakka" brick (P.5). It was in the evidence that the appellant went inside the well and inflicted injuries to the deceased with "Pakka" brick. The medical officer observed nine injuries on the body of the deceased. Injuries No. 5 to 9 were caused by a sharp edged weapon. The cause of death was Injury No. 1, also an incised wound. The medical evidence may confirm the seat and time of injuries but cannot connect the accused with the crime in the absence of any other direct or corroborative evidence. There is also nothing on the file that the brick was used/caused the death of the deceased. It is also imperative to note that recovery of article cannot be termed as discovery, when it was not recovered from any hidden place and if in normal course, the Investigating Officer/agency was able to see it and take its possession without any statement of the accused for pointing it out. Reference in this context can be made on "*Mst. Askar Jan and others versus Muhammad Daud and others"* (2010 SCMR 1604).

15. So far, conviction and sentence recorded under Section 364, PPC is concerned, I find in evidence no use of force against. Muhammad Naeem, in particular, when he on the call of accused accompanied him from his shop on 27.1.2009, in my view no case of abduction within the ambit of Section 364, PPC could be therefore, made out against the appellant and as such, the conviction recorded under Section 364, PPC cannot be sustained.

16. The prosecution case suffers from certain infirmities/illegalities on the basis whereof conviction/punishment recorded against the appellant is not sustainable. Hence, it can safely be concluded that the prosecution case being full of doubts is not worth of credence for holding conviction in view of the judgment rendered by the apex Court in the case titled *"Falak Sher alias Sheru versus The State"* (1995 SCMR 1350), therefore it is clear that it is a case of no evidence against the appellant and conviction and sentence is not sustainable.

17. In view of above, the appeal is allowed. The convictions and sentences of the appellant are hereby set aside and he stands acquitted of the charges. He is in jail be released forthwith if not required in any other criminal case.

The record of the learned trial Court be sent down immediately.

(K.Q.B.) Appeal allowed

PLJ 2019 Cr.C. 1195
[Lahore High Court, Multan Bench]
Present **: SARDAR AHMED NAEEM, J.**
RAB NAWAZ and 3 others--Petitioners.
versus
STATE and another--Respondents

Crl. Misc. No.4966-B of 2018, decided on 16.10.2018

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

----S. 498--Pakistan Penal Code, 1860, S. 380--Pre-arrest bail--Confirmation of--Foot tracker--Occurrence took place at odd hours of night--Foot-tracker was not examined during investigation u/S. 161, Cr.P.C.--Case is based on circumstantial evidence/extra-judicial confession--Investigating agency concluded that Rs. 6,00,000/- of accused party was outstanding against complainant party received for sending accused abroad and that complainant party itself handed over stolen articles/cows to petitioners--*Malafide* was also asserted in petition and there was no allegation of misuse of ad-interim pre-arrest bail--Pre-arrest bail confirmed. [P. 1196] A & B

Mr. Muhammad Qadir Asif Toor, Advocate for Petitioner
Mr. Hassan Mehmood Khan Tareen, Deputy Prosecutor General for State.
Malik Muhammad Usman Bhatti, Advocate for Complainant.
Date of hearing: 16.10.2018.

ORDER

The petitioners seek pre-arrest bail in case F.I.R. No.263/2018 dated 02.06.2018, registered at Police Station Jahanian, Khanewal, for offences under Section 380, P.P.C.

2. Allegationn against the petitioner is that of committing theft.

3. After hearing the learned counsel for the parties and perusing the record, it transpired that the F.I.R. was registered with unexplained delay of two days. The occurrence took place at odd hours of night. The foot-tracker was not examined during the investigation under Section 161, Cr.P.C. and the case of the prosecution is totally based on circumstantial evidence/extra-judicial confession. The Investigating

Agency concluded that Rs.6,00,000/- of the accused party was outstanding against the complainant party received for sending the accused abroad and that the complainant party itself handed over the stolen articles/cows to the petitioners. They had joined the investigation and nothing was recovered from them. It is difficult for the accused to prove the element of *mala fide*, at this stage, through positive/solid evidence/material, therefore, the same was to be deduced and inferred from the facts and circumstances of the case and that where events or hints to such effect are available, same would validly constitute the element of *mala fide*. *Mala fide* was also asserted in the petition and there was no allegation of the misuse of ad-interim pre-arrest bail.

4. For the reasons mentioned above, the application is accepted and ad-interim pre-arrest bail earlier granted to the petitioners is confirmed subject to their furnishing fresh bail bonds in the sum of Rs. 1,00,000/- each with one surety in the like amount to the satisfaction of learned trial Court/ duty Judge.

(K.Q.B.) Bail Confirmed

PLJ 2019 Cr.C. 1284 (DB)
[Lahore High Court, Multan Bench]
***Present* : SARDAR AHMED NAEEM AND TARIQ SALEEM SHEIKH, JJ.**
GHULAM MURTAZA and another--Appellants
versus
STATE and another--Respondents

Criminal Appeal No.98-J of 2013, Criminal Appeal No. 643 of 2012, & Murder Reference No. 13 of 2016, heard on 13.2.2019.

Eye-witnesses--

----It is settled by now that if the eye-witnesses have been disbelieved against some accused persons attributed effective role the same eye-witnesses cannot be believed against another accused with the same role unless those eye-witnesses received independent corroboration about the other accused. [P. 1289] A

PLD 1985 SC 11, 2000 SCMR 1758 & 2008 SCMR 6, *rel*.

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

----Ss. 302(b)/34--Conviction and sentence--Challenge to--Benefit of doubt--Place of occurrence was a street/thoroughfare--No independent witness was attracted to spot--Deceased himself had gone there on his motorbike--Eye-witnesses shifted deceased from place of occurrence to main road on auto rickshaw and then accompanied him to hospital--They stayed with deceased in hospital whole night--Witnesses raised no hue and cry--Their statements were at variance on some aspects--Complainant was not eye-witness--He reported incident to police at 01:00 p.m. eye-witness could justify their presence at crime scene nor had witnessed occurrence in view of their statements available on record--No document whatsoever showing admission of deceased in hospital, his stay in ICU Ward and then his examination under order of Magistrate itself is a circumstance which is sufficient to raise an eyebrow--Prosecution miserably failed to prove case against appellant beyond reasonable doubt.

[Pp. 1289, 1290 & 1291] B, C, D, E & G

2018 SCMR 772 & 2019 SCMR 129, *ref*.

Benefit of doubt--

----Principle--It is axiomatic principle of law that benefit of doubt is always extended in favour of accused--Case of prosecution if found to be doubtful then every doubt even slightest is to be resolved in favour of accused. [P. 1291] F

2018 SCMR 772, *ref.*

Sheikh Muhammad Rahim and Syed Athar Hasan Shah Bukhari, Advocates for Appellants.

Mr. Ashfaq Ahmad Malik, Deputy District Public Prosecutor for State.

Nemo for Complainant.

Date of hearing : 13.2.2019.

JUDGMENT

Sardar Ahmed Naeem, J.--Ghulam Murtaza (appellant) alongwith Ghulam Mustafa and Muhammad Ramzan co-accused (since acquitted) were tried by the learned. Addl. Sessions Judge, Multan, in case F.I.R. No. 1129 of 2008 dated 26.12.2008, under Sections 302/34 PPC, registered at Police Station New Multan, District Multan. At the conclusion of the trial, *vide* judgment dated 18.07.2012, the learned, trial Court held the appellant Ghulam Murtaza guilty, convicted him under Section 302(b), PP.C. and sentenced to death with compensation of Rs. 3,00,000/- under Section 544-A, Cr.P.C. payable to the legal heirs of the deceased, in default thereof to further undergo simple imprisonment for six months. The learned trial Court, however, acquitted co-accused of the appellant namely Ghulam Mustafa and Muhammad Ramzan, by giving them benefit of doubt.

2. The convict/ appellant filed the instant Criminal Appeal No.98-J of 2013 against his conviction and sentence whereas Qari Muhammad Rafique, complainant filed Crl. Appeal No.643/2012 against the acquittal of Ghulam Mustafa, and Muhammad Ramzan Respondent Nos.2 and 3. Murder Reference No. 13 of 2016 is also before us for confirmation or otherwise of the death sentence awarded to Ghulam Murtaza convict. By way of this single judgment, we proposed to dispose of all the above mentioned three matters.

3. Allegedly, on 26.12.2008 at about 11/12.00 noon, Ghulam Murtaza appellant, alongwith co-accused Muhammad Ramzan and Ghulam Mustafa armed

with "*churries*" inflicted "*churri"* blows on the person of Tariq Mehmood and committed his murder.

4. After usual investigation, challan was submitted before the Court. The learned trial Court framed charge against them to which, they pleaded not guilty and claimed trial. Hence, the prosecution evidence was summoned.

5. In order to prove its case, the prosecution examined as many as thirteen witnesses in all.

6. Doctor Asif Jameel Ansari, Senior Demonstrator, Nishtar Medical College Multan (FW-1) conducted medical examination of Tariq Mehmood injured. He was admitted in ICU and was unconscious. He was on ventilator and endotracneal tube was passed. He further observed bandage applied over neck and left hand and left forearm. Injury No.1 and 2 were kept under observation. Riaz Hussain HC (PW-2) after receiving complaint Ex.PB recorded formal FIR Ex.PB/1.

7. Doctor Fayyaz Khan Durrani, Senior Demonstrator, Forensic Department. Nishtar Medical College, Multan (PW-3) conduced post-mortem examination on the dead body of Tariq Mehmood deceased and found following injuries:--

i. *An abrasion 1.5 cm x 3/4 cm just blow lower lip on left side with red scab formation was present;*

ii. *A superficial skin deep cut 2 cm x 1/4 cm with red scab formation was present in front of chain;*

iii. *A stitched wound 5 cm in length with eight stiches on left side of upper part of neck just below chin;*

iv. *A long stitched wound 17 cm in length with 20 stitches in place encircling the right side of neck, front of neck and extending to left side of neck at the level thyroid cartilage. It was 3½ cm below from injury No.3;*

v. *A carved stitched wound 8 cm in length with eight stitches in place on back of left hand extending from base of left index index to middle finger's proximal pharyax;*

vi. Two fine surgical cuts with two stitches, each on both lower legs 2 cm above left ankles medial side of maintaining intravenous line."

8. Khalid Mehmood (PW-4) was telephonically informed by Muhammad Ramzan co-accused that his brother Tariq Mehmood deceased was in his custody and they will teach him a lesson. He informed the matter to his uncle Qari Muhammad Hanif (PW-6) on telephone, upon which, Qari Muhammad Hanif alongwith Muhammad Iqbal (PW-7) went to the place of occurrence. He was also witness of identification parade and blood stained earth.

9. Qari Muhammad Rafique, complainant (PW-5) supported the prosecution story as mentioned in the FIR. Qari Muhammad Hanif (PW-6) was eye witness of the occurrence. Muhammad Iqbal (PW-7) corroborated the statement of Qari Muhammad Hanif (PW6).

10. Irfan Hayat Draftsman (PW-9) visited the place of occurrence and took rough notes on the direction of the police and on the pointation of PWs. On 09.01.2009, he handed over scaled site-plan Ex.PH, Ex.PH/1 and Ex.PH/2.

11. Muhammad Ashraf S.I. (PW-10) investigated the case. Rest of the PWs are of formal nature, therefore, need not to be reproduced.

12. The prosecution while tendering report of Chemical Examiner (Exh.PM) regarding blood stained *churri*, report of Serologist (Exh.PN) regarding blood stained *churri*, report of Chemical Examiner (Exh.PQ) regarding blood stained earth and report of Serologist (Exh.PR) regarding blood stained earth closed its case.

13. After close of the prosecution evidence, the accused were examined under section 342 Cr.P.C. In answer to a question ***"why this case against you and why the PWs deposed against you"***, the appellant Ghularn Murtaza stated as under:--

> *"The present case was wrongly registered against me. On the day of alleged occurrence, Tariq Mahmood deceased came on motorcycle to my house where I was alone present. Five years prior to occurrence, the sister of Tariq Mahmood deceased was engaged with me. Later on, I refused, to marry with the sister of deceased. The deceased came there having a*

Chhuri and he attempted to assault on my person with the intention to finish me. During the scuffle, the deceased received injuries and later on died in hospital. In fact, the deceased was aggressor. The occurrence took placed in front of my house. The deceased came to my house from a distance of 8 milometers from his house which is situated at Qasimpur Colony. My brothers Ghulam Mustafa and Muhammad Ramzan were not present at the time of occurrence."

14. The appellant neither opted to appear as their own witnesses under Section 340 (2) Cr.P.C. nor produce any evidence in defence.

15. Learned counsel for the appellant has argued that two witnesses namely, Qari Muhammad Hanif and Muhammad Iqbal claimed to be the eye witnesses of the occurrence were not present at the scene of come and they have given evidence in support of the prosecution because of their close relationship with the deceased, thus, they were interested witnesses and partisan; that their statements are also belied by the site-plan as according to the witnesses the deceased was sitting on his motorbike and after sustaining injuries fell down but neither the motorbike was taken into possession nor into blood of the deceased was secured from the seat of motorbike.

It was next argued that if two witnesses named above, were present at the crime scene, they would have re-acted at-least by raising hue and cry if physically it was not possible for them to rescue the deceased who was under attack by the three persons giving him *churri* blows.

Learned counsel also challenged their presence on the ground that neither two witnesses were resident of the same locality to which the deceased belongs because the place of ordinary residence of Muhammad Iqbal is at a distance of kilometer and Qari Muhammad Hanif resided at Mohallah Qasim Pur at a distance of 7/8 kilometer from the place of occurrence.

Learned counsel for the appellant has also challenged the various recoveries allegedly, made on the pointing out of the accused-appellant including the recovery of churn. His submissions was that to support the recovery prosecution

examined Abdul Jabbar (PW.8) and his evidence has also been challenged by the learned counsel on the ground that he was not inhabitant of the place where from alleged recovery was made much less he was not notable of the area. He further added that, if the evidence of recovery is believed even then in absence of reliable ocular account, mere recoveries of certain articles belonging to the deceased would not be sufficient to legally justify the conviction of the appellant on the charge of the murder.

It was argued that the prosecution version was belied by the medical evidence and that the motive was also not proved. Concluding the arguments, learned counsel submitted that the prosecution miserably failed to prove its case against the appellant beyond reasonable shadow of doubt and every doubt even slightest is always resolved in favour of the accused.

16. At this stage, it may be mentioned that the complainant did not turn up despite valid service.

17. Learned Deputy District Public Prosecutor supported the judgment rendered by the learned trial Court and submitted that the appellant and other co-accused were related inter-se Their joining hands in the commission of crime in the backdrop of motive was natural; that the presence of the eye witnesses at the crime scene was not unnatural as they both were together and rushed to the spot after receiving the phone call of PW.4; that no serious challenge was thrown to their presence at the spot; that the recovered article was said to be strong corroborative evidence supporting the statements of the eye witnesses.

18. We have carefully gone through the entire evidence thoroughly and considered the submissions made at the bar.

19. From the available record it can be discerned that co-accused of the appellant, namely, Ghulam Mustafa who held the deceased and Muhammad Ramzan, who inflicted "*Churri*" blows on the hand of the deceased have been acquitted by learned trial Court. It is settled by now that if the eye-witnesses have been disbelieved against some accused persons attributed effective role the same eye-witnesses cannot be believed against another accused with the same role unless those

eye-witnesses received independent corroboration about the other accused. Reliance, in this context can be placed on *'Ghulam Sikandar and another v. Mamaraz Khan and others"* (PLD 1985 SC 11), *"Sarfraz alias Sappi and 2 others v. the State"* (2000 SCMR 1758) and *"Akhtar Ali and others v. The State"* (2008 SCMR 6).

In this case, no independent corroboration to the ocular account was forthcoming. The place of occurrence was a street/thoroughfare. No independent witness was attracted to the spot. The deceased himself had gone there on his motorbike. The witnesses claimed to have reached at the spot after having been informed by PW.4 and they claimed to have witnessed the occurrence from the distance of 40/50 feet. The eye-witnesses were closely related the deceased. Muhammad Hanif (PW.5) was real "*Chacha*" and Muhammad Iqbal (PW.6) was "*Phuphizad*" of the deceased. Muhammad Hanif PW. was resident of Qasimpur at a distance of 7/8 kilometer from the place of occurrence whereas Muhammad Iqbal was permanent resident of Jatoi, Muzaffargarh and also admitted his residence in Sharjah 4/5 months prior to the occurrence. They reached to the spot after having been informed by PW.4. The appellant alongwith his co-accused managed their escape after enacting the episode. The PWs could not move forward to rescue the deceased as they were threatened by the accused. The eye-witnesses shifted the deceased from the place of occurrence to the main road on auto rickshaw and then accompanied him to hospital. They stayed with the deceased in the hospital the whole night. The witnesses raised no hue and cry. Their statements were at variance on some aspects. Muhammad Hanif PW stated that his statement was recorded by the Investigation Officer at the crime scene whereas Muhammad Iqbal deposed that he was examined under Section 161 Cr.P.C. in the hospital on the same day. There was soling in the street and the Investigation Officer admitted during the investigation that he took the blood stained earth into possession after the death of the deceased, thus, the same cannot determined the place of occurrence. The deceased was sitting on a motorbike, when received injury at the hands of the appellant and then fell down on the ground after the second blow inflicted by the acquitted co-accused, namely, Muhammad Ramzan, described by PW.6, whereas, the first injury was inflicted by Muhammad Ramzan followed by the injury attributed to the appellant mentioned by Muhammad Iqbal PW. The dimension of injury No.4 suggests that the deceased bled profusely, also admitted by the eye-witnesses but the motorbike of the deceased was not taken into possession during the investigation.

20. The complainant was not the eye-witness. He reported the incident to police on 26.12.2008 at 01:00 p.m. The eye-witnesses neither could justify their presence at the crime scene nor had witnessed the occurrence in view of their statements available on record.

21. The motive behind the occurrence was that the complainant denied the hand of his daughter to the appellant about five years ago but the witnesses have admitted during the cross-examination that, the deceased had gone to the accused to collect certain photographs meaning thereby that he was on visiting terms with accused and had there been some strained relations between the parties he could not have-gone there to collect the photographs, thus, the motive also comes to the ground.

22. So far as the medical evidence is concerned, suffice it to observe that medical evidence may confirm the seat of injuries, nature of injures and kind of weapon used in the occurrence but would not connect the accused with the commission of crime It is strange to observe that the deceased sustained injury on 26.12.2008 at 11:00 a.m. and was shifted to hospital by the PWs on the same day at 12:00 (noon). The Illaqa police reached there at 12:30 (noon). Thereafter, the incident was reported and the F.I.R. was registered against the accused person. The Medical Officer appealed as PW.1 and described that he examined the deceased then injured, on 01.01.2009 at 03:00 p.m. and that the deceased was already admitted in hospital in I.C.U. Ward, Bed No.3. He further described that he medically examined the deceased by the order of the Illaqa Magistrate. He observed two injuries on the neck and over left hand/forearm of the deceased, and both the injuries were kept under observation for Ward report never received by the officer till the time of his examination at trial, thus, he mentioned no dimension of the injuries or the weapon used in this case. He also has not provided the duration of the injuries sustained by the deceased. Dr. Fayyaz Khan Durrani appeared as PW.3. he conducted postmortem of the deceased on 02.01.2009 at 11:00 a.m. and observed five injuries on the body of the deceased Injury No.4 was declared fatal. The case of death was excessive bleeding and stasis of blood in both lungs. In his statement PW.1 further admitted that Medico Legal Certificate has not issued by him as a police case, thus, the sustaining of injuries at the hands of the accused, then shifting of the deceased to hospital and the medical examination of the deceased not as a police case is a

mystery, which has not been explained by the prosecution through some convincing material/evidence. The peculiar feature of this case that no document whatsoever showing admission of the deceased in hospital, his stay in ICU Ward and then his examination under the order of the Magistrate itself is a circumstance which is sufficient to raise an eyebrow.

23. It is axiomatic principle of law that benefit of doubt is always extended in favour of the accused. The case of the prosecution if found to be doubtful then every doubt even slightest is to be resolved in favour of the accused. In this case prosecution miserably failed to prove the case against the appellant beyond reasonable doubt. Reliance in this context can be placed on *"Muhammad Mansha v. The State"* (2018 SCMR 772) and relevant observations of their lordships appearing in para-4 at page No. 778 can advantageously be reproduced hereunder:

> *"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilty of the accused, than the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, it is better that ten guilty persons be acquitted rather than one innocent person be convicted" Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749) "*

In another recent judgment titled *"Abdul Jabbar v. The State and another"* (2019 SCMR 129), their lordships observed:

> *"It is settled principle of law that once single loophole is observed in a case presented by the prosecution much less glaring conflict....benefit of such loophole in the prosecution case automatically goes in favour of the accused."*

24. For what has been discussed above, Criminal Appeal No.98-J of 2013 is allowed. The conviction and sentence of the appellant recorded by the learned trial Court *vide* impugned judgment dated 18.07.2012 is set aside. The appellant is acquitted of the charge. He is in jail and be released forthwith if not required in any other criminal case.

25. For the same reasons, **Criminal Appeal No.643 of 2012** against acquittal of respondent Nos.2 and 3 is **DISMISSED**.

26. **Murder Reference No.13 of 2016** is answered in the **NEGATIVE** and sentence of death awarded to the appellant by the learned trial Court is **NOT CONFIRMED**.

(A.A.K.) Appeal dismissed

PLJ 2019 Cr.C. 1401
[Lahore High Court, Lahore]
***Present* : SARDAR AHMED NAEEM, J.**
SAQIB JAMEEL, etc.--Petitioners
versus
STATE, etc.--Respondents.

Crl. Misc. No.34910-B of 2019, decided on 28.6.2019

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

----S. 497(2)--Pakistan Penal Code, 1860 S. 366-A--Bail accepted--Further inquiry--Procuration of minor girl--No recovery--Unexplained delay of 21 hours--Medical report--No attempt of rape--Petitioners are in jail since their arrest and their long incarceration would, not serve any purpose to prosecution, in particular, when investigation is complete--Case of petitioners, in circumstances, needs thorough probe within meaning of Section 497(2), Cr.P.C. [P.] B

Criminal Trial--

----Advance Punishment--Speedy trial is right of accused and nobody can be detained in jail by way of advance punishment. [P.] A

Rai Zameer-ul-Hassan, Advocate for petitioners.

Mr. Muhammad Irfan Zia, Deputy Prosecutor General for State.

Ch. Tariq Mahmood Kamboh, Advocate for Complainant.

Date of hearing: 28.6.2019.

ORDER

The petitioners seek post-arrest bail in case registered *vide* F.I.R. No.32/2019 dated 15.01.2019, under Section 366-A, P.P.C., at Police Station Sadar Farooqabad, Sheikhupura.

2. Allegation, against the petitioners is that of procuration of minor girl.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the occurrence took place on 14.01.2019 and the incident was reported on 15.01.2019 with unexplained delay of about 21 hours. No recovery was effected from the petitioners. They have not been attributed any overt act leading towards commission of the crime. Even according to the medical report there was no

attempt of rape. During the investigation statement of Adil son of Jameel was not reduced, into writing. This would be a moot question for the learned trial Court to adjudge after recording evidence at trial if Section 366-A, P.P.C. is attracted in this case, thus, question regarding culpability of the petitioners requires serious consideration. The speedy trial is the right of the accused and nobody can be detained in jail by way of advance punishment. The petitioners are in jail since their arrest and their long incarceration would, not serve any purpose to the prosecution, in particular, when the investigation is complete. The case of the petitioners, in the circumstances, needs thorough probe within the meaning of Section 497(2), Cr.P.C.

4. For the foregoing reasons, the application is accepted and the petitioners are admitted to post-arrest bail subject to their furnishing bail bonds in the sum of Rs.2,00,000/- each with one surety in the like amount to the satisfaction of learned trial Court/duty judge.

(S.A.B.) Bail accepted

PLJ 2019 Cr.C. 1405
[Lahore High Court Lahore]
***Present* : SARDAR AHMED NAEEM, J.**
INJUM SAQIB and others--Petitioners
versus
STATE, etc.—Respondents

Crl. Misc. Nos. 28432-B, 28468-B & 28942-B of 2019, decided on 19.6.2019

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

----S. 498--Pakistan Penal Code, 1860--Ss. 221, 224, 225, 344 & 109--Police Order, 2002, S. 155-C & 157--Bail before arrest--Confirmed--Illegal confinement--Offence of Intentional omission to apprehend accused--Accused was police official--Influenced on his subordinate--It is difficult for accused to prove element of *mala fide*, at this stage, through positive/solid evidence/material, therefore, same was to be deduced and inferred from facts and circumstances of case and that where events or hints to such effect are available, same would validly constitute element of *malafide*. [P. 1407] A

Bail Before Arrest--

----Scope--Pre-arrest bail cannot be granted by way of routine, however, can be extended in exceptional circumstances. [P. 1407] B

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

----S. 498--Bail before arrest--*Prima Facie*--Not available material--Validity--No material is available on file showing prima facie nexus of petitioners with this crime, thus, sending them behind bars would not serve any purpose to prosecution and this would be would be colour of ludicrousness if petition.ers are sent to jail for a few days by dismissing application so as to enable them to come out of jail after a few days on post arrest bail. *Malafide* Was asserted in petition and there was no allegation of misuse of ad-interim pre-arrest bail. [P. 1407] C

Malik Ghulam Abbas Nissoana, Advocate with Petitioner.

Rai Zameer-ul-Hassan Kharal, Advocate with Petitioner (in Criminal Miscellaneous No.28468-B of 2019).

Mr. Muhammad Mehmood Chaudhry, Advocate with Petitioner (in Criminal Miscellaneous No.28942-B of 2019).

Mr. Muhammad Irfan Zia, Deputy Prosecutor General for State.

Date of hearing : 19.6.2019.

ORDER

Through this single order, I intend to decide above mentioned bail petitions arising out of case F.I.R. No. 135/2019 dated 19.04.2019, registered at Police Station City Pindi Bhattian, Hafizabad, for offence under Sections 221, 224, 225, 344, 109, P.P.C. read with Section 155-C, 157, Police Order 2002.

2. The petitioners including Malik Amanat Ali are police officers are charged with offence of intentional omission to apprehend an accused. Allegation of illegal confinement was in addition to that. Allegedly, Malik Amanat Ali also participated in this

occurrence as the accused who managed his escape was handed over to him by his co-accused.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that Rai Riasat Ali accused was performing his duty as Incharge Police Post. The narratives of the F.I.R. suggested that S.H.O. Police Station Saddar Pindi Bhattian asked him to bring accused from Police Station Defence, Lahore and accordingly, the said accused was brought back by the petitioner Rai Riasat Ali but neither his arrest was incorporated in the roznamcha nor he was locked in police lockup. The record further divulged that the said accused managed his escape, allegedly in connivance with all the petitioners. Available record does not suggest that the petitioner Rai Riasat Ali was bound to record his arrest or put him in the police lockup.

So far as, Anjum Saqib is concerned, he was then performing as D.S.P. Circle and the only allegation against the said petitioner was that he influenced his subordinate managing escape of the accused, however, no evidence was collected during the investigation showing the mode of exercising his influence or nothing in black and white was available reflecting his direction for the said purpose. Amazingly Malik Amanat Ali, who is neither the police official nor has link with the police department was blamed for handing over the said accused but, once again, the Investigating Agency has not collected any evidence during the investigation showing his nexus with the above crime. Learned Deputy Prosecutor General pointed out that he was servant of the D.S.P. Circle and was handed over the custody of the said accused but no cogent or solid evidence to substantiate said charge is available on the file. However, the then S.H.O. has been admitted to post-arrest bail by the learned Illaqa Magistrate as pointed out by the Deputy Prosecutor General after having instructions from the officer present with record. It is difficult for the accused to prove the element of *mala fide*, at this stage, through positive/solid evidence/material, therefore, the same was to be deduced and inferred from the facts and circumstances of the case and that where events or hints to such effect are available, same would validly constitute the element of *mala fide*. The petitioners have joined the investigation and nothing was recovered from them. The pre-arrest bail cannot be granted by way of routine, however, can be extended in exceptional circumstances. No material is available on the file showing *prima facie* nexus of the petitioners with this crime, thus, sending them behind the bars would not serve any purpose to the prosecution and this would be colour of ludicrousness if the petitioners are sent to jail for a few days by dismissing the application so as to enable them to come out of jail after a few days on post arrest bail. *Mala fide* was asserted in the petition and there was no allegation of the misuse of ad-interim pre-arrest bail.

4. In view of the above, the bail applications are accepted and ad-interim pre-arrest bail earlier granted to the petitioners is confirmed subject to their furnishing fresh bail bonds in the sum of Rs. 1,00,000/- each with one surety in the like amount to the satisfaction of learned trial Court/duty judge.

(S.A.B.) Bail Confirmed

2020 Y L R Note 6
[Lahore (Multan Bench)]
Before Sardar Ahmad Naeem, J
MUHAMMAD TARIQ---Appellant
Versus
STATION HOUSE OFFICER and others---Respondents

Writ Petition No. 18060 of 2018, decided on 22nd January, 2019.

Criminal Procedure Code (V of 1898)---

----S. 491---Habeas corpus petition---Custody of minors---No allegation of snatching minor---Violation of agree-ment regulating the custody of minors---Scope---Petitioner sought custody of minors on the ground that their mother had violated the written agreement by contracting second marriage, therefore, she had lost her right of hizanat---Held; legality of agreement could not be determined by the court during the proceedings under S. 491, Cr.P.C.---Parties had already appeared before the proper forum for determination of their rights---Petitioner had not alleged that minors were snatched by their mother---Constitutional petition was dismissed.

Humayoun Syed Rasool for Petitioner.
Malik Shoukat Mehmood Marha, Assistant Advocate-General for the State.
Malik Zafar Mehboob Langrial for Respondent No.2.
Date of hearing: 22nd January, 2019.

ORDER

SARDAR AHMAD NAEEM, J.---Through this petition filed in terms of Article 199 of the of Islamic Republic of Pakistan, 1973, the petitioner prayed for the following relief:

> " prayed that instant petition may kindly be accepted and the order dated 27.11.2018 passed by the learned Additional Sessions Judge, Muzaffargarh to the extent of handing over the custody of the minors namely, Kausar Bibi aged 7-years, Asima Bibi aged 5-years to the Respondent No. 2 may kindly be declared illegal, against the law and facts and be set aside and in consequence thereof, respondent No. 1

may kindly be directed to recover the said detenues from the illegal, unlawful and improper confinement of the private respondents, be ordered to produce them before this Hon'ble Court, and detenues be handed over to the petitioner/real father of the minors/detenues, in the supreme interest of justice.

Any other relief "

2. Learned counsel for the petitioner submitted that as a result of private settlement, the minors were handed over to their mother and now she has contracted second marriage which is violation of written agreement earlier executed between the parties, thus, respondent No. 2 had lost right of Hazanat and that the custody of the minors may be handed over to the petitioner, in particular, when their elder brothers/sister are already with the petitioner.

3. Learned counsel for respondent No. 2 opposed this petition with vehemence and submitted that the instant petition was based on mala fide and that regarding the custody of the minors, both the parties are before the competent forum, thus, the petition was liable to be dismissed.

4. Having heard the arguments addressed at the bar and after perusing the record, it was noticed that the minors were living with their mother since long. An agreement was executed between the parties, legality whereof cannot be determined by the Court during these proceedings. The parties are already before the proper forum for the determination of their rights. There is also no allegation if respondent No.2 snatched the minors from the petitioner, who has failed to make out a case for interference by the Court.

5. There is no merit in this petition which is hereby dismissed.

SA/M-156/L Petition dismissed.

2020 P Cr. L J Note 34
[Lahore]
Before Sardar Ahmed Naeem, J
MUHAMMAD IQBAL---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No. 250742-B of 2018, decided on 26th June, 2019.

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

----S. 497---Penal Code (XLV of 1860), Ss. 302, 337-A(i), 337-F(i) & 34---Qatl-i-amd, shajjah-i-khafifah, ghayr-jaifah-damiyah, common intention---Post-arrest bail, refusal of---Petitioner, member of unlawful assembly in prosecution of its common object committed qatl-i-amd of the deceased---Record showed that the petitioner was nominated in the FIR with specific role of causing firearm injury hitting on the back of the deceased, which contributed towards his death as suggested by the post-mortem report---Version of the complainant got support from the statements of the witnesses recorded under S. 161, Cr.P.C.---Investigating Agency had concluded that the petitioner was empty handed and mere presence at the crime scene was not based on some convincing evidence---No other evidence was collected during the investigation to record such findings---Trial had commenced and reportedly seven witnesses had been examined---Offence was heinous and catches the prohibition contained under S. 497, Cr.P.C.---Petition was dismissed accordingly.

Mohsin Ali v. The State and others 2016 SCMR 1529 rel.

(b) Criminal trial---

----Ipse dixit of police---Not binding on the court.

Muhammad Ahsan Bhoon and Ch. Muhammad Akram Khaksar for Petitioner.

Muhammad Irfan Zia, Deputy Prosecutor-General along with Babar, ASI for the State.

Ch. Amin Rehmat for the Complainant.

ORDER

SARDAR AHMED NAEEM, J.---Muhammad Iqbal, petitioner seeks post-arrest bail in case registered vide No.579/2018 dated 19.06.2018, at Police

Station Saddar, Faisalabad, for offence under sections 302, 337-A(i), 337-F(i), 34, P.P.C.

2. Allegedly, the petitioner being member of unlawful assembly and in prosecution of its common object committed Qatl-i-amd of Zahoor Ahmad, the deceased.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the petitioner was nominated in the FIR with specific role of causing firearm injury hitting on the back of the deceased, which contributed towards death as suggested by the postmortem report. The version of the complainant gets support from the statements of the witnesses recorded under section 161, Cr.P.C. Deeper appreciation of evidence cannot be undertaken at this stage. The Investigating Agency concluded that the petitioner was empty handed and merely present at the crime scene is not based on some convincing evidence. Ipse dixit of police is not binding upon the Court. No other evidence was collected during the investigation to record such findings. In a similar case titled "Mohsin Ali v. The State and others" (2016 SCMR 1529), the apex Court turned down the petition with the observation, which read as under:

> "It is not disputed that the eye-witnesses mentioned in the FIR have so far stood by their statements made before the police fully implicating the petitioner in the murder in issue and prima facie the medical evidence lends sufficient support to the allegation levelled against the petitioner.... The Investigating Agency had opined in its report submitted under section 173, Cr.P.C. that the petitioner was guilty only of providing behind the scene abetment to his co-accused and that he was not present at the scene of crime at the relevant time...... that the opinion so recorded by the Investigating Agency is not based upon sound material."

4. The trial in this case has been commenced and reportedly seven witnesses have been examined. The offence is heinous and catches the prohibition contained under section 497, Cr.P.C., thus, I would refrain to comment upon the merits of this case lest the case of the parties is prejudice.

4(sic.) For the foregoing reasons, there is no merit in this petition which is hereby dismissed.

However, the learned trial court is directed to conclude the trial within three months after the receipt of the copy of this order.

JK/M-160/L Petition dismissed.

PLJ 2020 Cr.C. (Lahore) 412
[Multan Bench, Multan]

***Present:* SARDAR AHMED NAEEM , J.**

***Haji* MUHAMMAD--Petitioner**

versus

STATE, and another--Respondents

Crl. Misc. No. 6659-B of 2018, decided on 18.2.2019.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 364 & 34--Post-arrest bail, grant of--Rule of consistency--Incident war, reported with unexplained delay of two day. The petitioner was not nominated in the F.I.R. and his name find mentioned in the statement of the complainant recorded admissibility whereof shall be adjudged by the trial Court after recording evidence at trial. The co-accused of the petitioner have been admitted to post-arrest bail by the Court. The case of the petitioner is at par with that of his co-accused earlier admitted to bail and, thus, rule of consistency is attracted in this case. The petitioner is in jail since his arrest and his continuous detention for indefinite period would be unfair. The petitioner has successfully made out a case for his enlargement on bail. [P. 413] A

Mr. Nadeem Ahmad Tarar, Advocate for Petitioner.

Mrs. Asmat Parveen, Deputy District Public-Prosecutor for State.

Mian Gohar Mahmood Paracha and *Mr. Shafqat Raza Thaheem,* Advocate s for Complainant.

Date of hearing: 18.2.2019.

ORDER

Haji Muhammad, petitioner has sought post-arrest bail in- case registered vide F.I.R. No. 25/2018 dated 21.01.2018, at Police Station Saddar, Multan, for offences under Sections 302, 365, 34, P.P.C.

2. The complainant reported, abduction of her son. Later on, he was murdered and the petitioner was arrested in this case.

3. After hearing the learned counsel for the parties and perusing the record, it was, straightaway observed that the incident war, reported with unexplained delay of two day. The petitioner was not nominated in the F.I.R. and his name find mentioned in the statement of the complainant recorded on 08.02.2018 admissibility whereof shall be adjudged by the learned trial Court after recording evidence at trial. The co-accused of the petitioner including Muhammad Riaz and Muhammad Javaid have been admitted to post-arrest bail by the Court vide order dated 15.10.2018 passed in Criminal Miscellaneous No. 3963-B of 2018 and Criminal Miscellaneous No. 3966-B of 2018. The case of the petitioner is at par with that of his co-accused earlier admitted to bail and, thus, rule of consistency is attracted in this case. The petitioner is in jail since his arrest and his continuous detention for indefinite period would be unfair. The petitioner has successfully made out a case for his enlargement on bail.

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

(A.A.K.) Bail allowed

2020 Y L R 1346

[Lahore]

Before Sayyed Mazahar Ali Akbar Naqvi and Sardar Ahmed Naeem, JJ

IMRAN and another---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos. 101222 and 101223 and Murder Reference No. 600 of 2017, heard on 17th December, 2019.

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

----Ss. 302, 109 & 34---Qatl-i-amd, abetment, common intention---Appreciation of evidence---Sentence, reduction in---Ocular account and medical evidence---Corroboration---Accused were charged for committing murder of nephew of the complainant---Motive behind the occurrence was previous enmity---Ocular account of the occurrence had been furnished by two witnesses including complainant---Admittedly, said witnesses were closely related to the deceased/inter-se---Said witnesses withstood the test of cross-examination firmly but nothing favourable to the accused could be extracted---Record showed that it was a day light occurrence and the presence of the eye-witnesses at the crime scene could not be doubted as the parties were known to each other---Eye-witnesses had furnished the mode and manner of occurrence that the accused murdered the deceased and managed their escape good---Eye-witnesses had assigned a specific role to accused of causing firearm injuries to the deceased, corroborated by medical evidence---Incident was promptly reported---Eye-witnesses stated that accused was responsible for fire-arm injuries to the deceased which proved fatal---Accused led to the recovery of pistol .30-bore as well as churra---Enmity between the parties was not only established rather admitted by the defence in their statement recorded under S. 342, Cr.P.C.---Record transpired that the case of co-accused was distinguishable from the accused---Investigating Agency had not confirmed participation of co-accused in the occurrence---Name of the co-accused was mentioned in column No. 2 of the report submitted under S.173, Cr.P.C. being innocent---Said co-accused was not arrested in the present case---Declaration of innocence was never challenged by the complainant party before any forum by way of private complaint or

otherwise---Co-accused was attributed repeated churra blows---Investigating Agency confirmed that co-accused was disabled and was suffering from polio---Investigating Officer had admitted in the cross-examination that co-accused joined the investigation voluntarily---No recovery was effected from the co-accused---Prosecution had failed to prove beyond reasonable doubt the presence of co-accused with the accused at the time of the occurrence in furtherance of common intention of both of them to murder the deceased---Motive set up by the prosecution was that brother of the accused was murdered and brother of the deceased was nominated as accused in that case---Said fact constituted mitigating circumstance in favour of the accused---In such circumstances, conviction of accused was maintained under S. 302(b), P.P.C., but the sentence of death awarded to him was altered to that of imprisonment for life---Appeal of co-accused was allowed and he was acquitted by setting aside conviction and sentence recorded by the Trial Court, in circumstances.

Ajun Shah v. The State PLD 1967 SC 185; Shera and others v. The State 1976 PCr.LJ 1028 and Niamat v. The State 1986 PCr.LJ 2820 ref.

(b) Criminal trial---

----Witness---Related and interested witness---Scope---Interested witness was one who had animosity towards the accused---Mere relationship of such witness with the deceased was not enough to discard his testimony---Worth of testimony of a witness determined his credibility.

Raqib Khan v. The State and another 2000 SCMR 163 rel.

Muhammad Aurangzeb and Muhammad Rizwan Qadir for Appellant (Imran).

Malik Muhammad Matee Ullah for Appellant (Muhammad Khan.)

Usman Iqbal, Deputy Prosecutor Geneal for the State.

Hammad Akbar Wallana for the Complainant.

Date of hearing: 17th December, 2019.

JUDGMENT

SARDAR AHMED NAEEM, J.---Muhammad Khan and Imran (appellants) along with their co-accused Sami Ullah Khan, Shafi Ullah Khan, Ameer Abdullah Khan son of Allah Dad, Ameer Abdullah son of Haji Muhammad Khan

and Haji Iqbal (since acquitted) were tried by the learned Additional Sessions Judge, Mianwali in case FIR No.207/2013 dated 28.05.2013, for offence under sections 302, 109, 34, P.P.C., registered at Police Station City Mianwali. The learned trial Court vide judgment dated 31.10.2017, while extending benefit of doubt acquitted Sami Ullah Khan, Shafi Ullah Khan, Ameer Abdullah son of Allah Dad, Ameer Abdullah Khan son of Haji Muhammad Khan and Iqbal Khan (co-accused) whereas by holding the appellants Muhammad Khan and Imran guilty, convicted them under section 302(b), P.P.C. and sentenced them to death for committing murder of Alam Khan (deceased) with compensation of Rs.5,00,000/- each to the legal heirs of the deceased under section 544-A, Cr.P.C., in default thereof to further undergo simple imprisonment for six months each.

2. Imran and Muhammad Khan (appellants) filed Criminal Appeal No.101222 of 2017 and Criminal Appeal No.101223 of 2017, respectively, challenging their conviction and sentences. Murder Reference No.600 of 2017 is also before us for confirmation or otherwise of death sentence awarded to the appellants. Through this single judgment, we proposed to decide all the above mentioned matters.

3. Allegedly, on 28.05.2013 at about 11:30 a.m., the appellant Muhammad Khan armed with .30-bore pistol along with his co-accused Imran armed with "churra", made successive fire shots and "churra" blows hitting different parts of body of Alam Khan deceased, who after receiving fire shots and "churra" blows fell down on the ground. The accused persons fled away from the spot. The complainant along with PWs removed the injured to the hospital where he succumbed to the injuries. The murder was committed with the abetment of Sami Ullah, Ameer Abdul son of Allah Dad Khan, Ameer Abdullah son of Haji Muhammad Khan and Iqbal Khan co-accused. Hence, the present FIR.

4. After usual investigation, the challan was submitted before the Court. The learned trial Court framed charge against them to which, they pleaded not guilty and claimed trial, hence the prosecution evidence was invited.

5. The prosecution in order to prove its case produced as many as fourteen PWs.

6. Doctor Sohaib Hassan Niazi, Medical Officer (PW.1) conducted post-mortem examination of the dead body of Alam Khan deceased on 28.05.2013 and found following injuries:--

i. A fire arm entry wound 1 x 1 cm over right side of upper abdomen (epigastrivm) 4 c.m. lateral to midline and 13 c.m. above umbilicus having inverted margins.

ii. An incised wound, stab wound 3.5 x 2 c.m. over left upper chest, having sharp margins, 3 c.m. lateral to midline and 9 c.m. above left nipple.

iii. An incised wound 10 x 3 c.m. having sharp margin over medial aspect of right arm, 3 c.m. from right exilla and 16 c.m. above right elbow.

iv An incised wound 4 x 2 c.m. over right cubical fossa of right arm. 11 c.m. below injury No.3, muscle deep.

v. An incised wound 2 x 1 c.m. over right lateral chest, 7 c.m. below right nipple. 15 c.m. lateral to midline.

vi. An incised wound muscle deep 7 x 3 c.m. over left upper abdomen, 4 c.m. lateral to midline, 15 c.m. below left nipple.

vii. An incised wound 1 x 05 c.m. over intero medial aspect of left arm, 8 c.m. from axilla, 11 c.m. above elbow.

viii. An incised wound 2 x 1.5 c.m. over left lateral aspect of left arm, 10 c m. from left shoulder, 20 c.m. from elbow.

ix. A stab wound 2 x 1 c.m. over left posterior chest, 2 c.m. lateral to midline, 4 cm. medial to left scapula, horizontal shaped.

x. A stab wound 2 x 1 an vertical shaped over left posterior chest, 8 c.m. below injury No.9.

xi. 11-A. An entry wound of fire arm 1 x 0.5 c.m. over lateral aspect of left thigh 2 c.m. above left knee joint.

xii. 11-B. Exit wound of injury No.11-A, 2 x 2 am. over posterior medial left thigh 20 cm from left knee joint.

xiii. 12-A. Entry wound of firearm 1 x 1 c.m. over right posterior thigh 12 c.m. above knee joint.

xiv. 12-B. Exit wound of injury No.12-A, 3 x 2 c.m. over right posterior thigh 22 cm. above knee joint.

xv. An incised wound 7 x 2 c.m. over right posterior thigh 5 cm. above knee joint. A foreign metallic objection was retrieved from subcutaneous tissues of left posterior chest.

7. Abdul Waheed Constable (PW.2) was witness of blood stained earth and 30 bore Pistol along with two crime empties. Alam Khan ASI (PW.3) was also witness of keeping in safe custody blood stained earth and two empties, which he

handed over to Abdul Waheed Constable for onwards transmission to the Punjab Forensic Science Agency, Lahore. Muhammad Shafiq Khan (PW.6) was Draftsman, visited the place of occurrence on 01.06.2013 and prepared rough notes for preparation of scaled site plan on the pointation of PWs. He also prepared scaled site plan of the place of occurrence and handed over the same the I.O.

8. Ikram Ullah Khan H.C. (PW.7) deposed about the safe custody of Pistol 30-bore and Knife allegedly recovered from the appellants which he handed over to Kashif Rasool Constable for onward transmission to the office of Punjab Forensic Science Agency, Lahore. Muhammad Imtiaz Constable (PW.8) witnessed the recovery of .30 bore Pistol along with magazine (P-1) and bullets (P-2/ 1-4) and blood stained knife (P-3). Earlier on 28.05.2013, Saif Ullah handed over to him dead body of Alam Khan deceased for mortuary. After post-mortem examination of the dead body, the doctor handed over to him last worn clothes of the deceased which he handed over to the Investigating Officer who secured the same through Memo Ex.PH. Kaleem Ullah (PW.9) was witness of identification of the dead body. Nadir Khan (PW.10) was complainant of the case who supported the prosecution story. Ibrahim Khan (PW.11) was eye-witness of the occurrence. He was also witness of recovery of blood stained cotton and crime empties from the place of occurrence.

9. Sami Ullah Khan S.I. (PW.12) conducted investigation of the case. Kashif Rasool Constable (PW.13) deposited .30-bore Pistol and knife in the office of Punjab Forensic Science Agency, Lahore, intact. Ghulam Muhammad S.I. also partly conducted the investigation and challaned the accused.

10. The learned D.D.P.P. gave up Muhammad Zubair and Maskeen Ullah Constable being unnecessary and closed the prosecution evidence after tendering the reports of Punjab Forensic Science Agency, Lahore regarding blood stained cotton (Exh.PN), weapon of offence (Exh.PO) and photostat copy of blood stained Robkar as Mark-A.

11. After the prosecution evidence, statements of the accused were recorded. They denied the prosecution story and claimed innocence. In reply to a question "why this case against you and why did the witnesses depose against you", the appellant Imran stated as under:-

> "I am innocent. All the PWs are not only inter-se related but they also are inimical towards me. The sole purpose of the present case against me

and my co-accused persons is just to blackmail us by putting pressure upon our family for compromise in the murder case of Rehmat Ullah. The complainant introduced the motive part of the present case of case of murder of my cousin Rehmatullah however the said motive could not be proved by the complainant and in this way as false motive had been shown by the complainant against me. There is no plausibility of presence of the complainant as well as PWs at the place of occurrence and this factum also shows our innocence. During investigation version of the complainant was found false and due to false story mentioned in the FIR the complainant had obliged to improve his statement before this Court. I have no nexus with the occurrence. I offered all kinds of special oath in respect of my as well as of my co-accused's innocence however, the complainant party being false one did not accept the same.'

While answering to same question, Muhammad Khan appellant replied as under:

> "I am innocent. All the PWs are not only inter se related but they also are inimical towards me. The sole purpose of the present case against me and my co-accused persons is just to blackmail us by putting pressure upon our family for compromise in the murder case of Rehmat Ullah. The complainant introduced the motive part of the present case of murder of Rehmatullah however said motive could not be proved by the complainant and in this way as false motive had been shown by the complainant against me. There is no plausibility of presence of the complainant as well as PWs at the place of occurrence and this factum also shows our innocence. During investigation version of the complainant was found false and due to false story mentioned in the FIR the complainant had obliged to improve his statement before this court. I have no nexus with the occurrence. I offered all kinds of special oath in respect of my as well as of my co-accused's innocence however, the complainant party being false one did not accept the same."

The appellants produced in defence evidence i.e. copy of FIR No.237/2012 Police Station Mochh as Mark DA, copy of FIR No.270/2012 as Mark D.B., copy of FIR No.243/ 2011 P.S. Mochh as Mark-D.C., copy of FIR No.147/ 2011 as Mark-D.D., copy of FIR No.18/2013 as Mark D-E, attested copy Emergency Call Form summoned by the court on application of accused side (containing two pages) as Ex.D-C and Exh.D.C/1. The accused persons did not appear on oath under section 340(2), Cr.P.C. in disproof of allegations levelled against them by prosecution.

12. The learned trial Court after evaluating the evidence and considering the merits of the case, found the appellants guilty, convicted and sentenced them as detailed above. Hence, this appeal.

13. Learned counsel for the appellant contended that the occurrence had taken place on a thoroughfare at mid-day and many persons had witnessed the occurrence but no independent witness was cited by the prosecution; that the eye-witnesses were closely related to the deceased/ inter-se and failed to justify their presence at the crime scene; that the conduct of the eye-witnesses at the crime scene was un-natural; that their testimony was full of discrepancies which shattered the prosecution's case; that motive was not proved; that the recoveries were disbelieved by the learned trial court; that the participation of the appellant, namely, Imran Khan was not confirmed by the Investigating Agency and he was mentioned in column No.2 of the report submitted under section 173, Cr.P.C. being innocent and was also summoned on the request of the complainant made through an application, thus, he could not have been convicted by the learned trial court; that benefit of doubt is vested right of the accused, which is always resolved in his favour.

14. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant vehemently opposed this appeal and submitted that the eye-witnesses withstood the test of cross-examination firmly and remained consistent on all material aspect of the case; that motive was proved; that it was day light occurrence, parties were known to each other and there was no question of mistaken identity; that the appellants were nominated in a promptly lodged FIR which excludes the possibility of consultation and deliberation; that medical evidence lend further corroboration to the complainant version and that prosecution has proved its case against the appellant beyond shadow of doubt.

15. We have heard the learned counsel for the parties and carefully perused the record.

16. It is evident from the record that accused and the complainant party had enmity between them. The occurrence took place on 28.05.2013 at 11:30 a.m. at Jahaz Chowk, Mianwali. It is in the evidence that both the parties had come to Sessions Court to attend some criminal case fixed for hearing on the fateful day. The accused party emerged at the crime scene and enacted the episode. During this occurrence, Alam Khan real nephew of the complainant was murdered. The complainant Nadir Khan reported the incident against Muhammad Khan, Imran

Khan and acquitted co-accused. The Investigating Agency did not confirm the participation of all the accused in the occurrence except Muhammad Khan, the appellant. At trial, an application was moved by the complainant for summoning the accused mentioned in column No.2 of the report submitted under section 173, Cr.P.C. and the learned trial court summoned all those accused to face trial vide order dated 14.04.2014. The learned trial court also acquitted all the accused except the appellants, held them guilty, convicted and sentenced them as mentioned above.

17. The occurrence was witnessed by the complainant (PW.10) and Ibrahim Khan (PW.11). Admittedly, they were closely related to the deceased/ inter-se. They withstood the test of cross-examination firmly but nothing favourable to the accused could be extracted. It was a day light occurrence. The presence of the eye-witnesses at the crime scene cannot be doubted as the parties were known to each other. The deceased sustained as many as 14 injuries. There were three firearm injuries and the remaining were either incised or stab wound. The eye-witnesses have furnished the mode and manner of occurrence that the accused eliminated the deceased and managed their escape good.

18. It is settled law that an interested witness is one who has animosity towards the accused and mere relationship with the deceased is not enough to discard his testimony and in fact it is the worth of testimony of a witness which determines his credibility. In this respect reliance can be placed on "Raqib Khan v. The State and another" (2000 SCMR 163). It is also not absolute principle that statement of a witness related to the deceased should be corroborated, rather the statement of a worst enemy could be relied upon if it inspires confidence and worth of his statement is not shaken. It is also observed that mere relationship of a witness with the deceased does not provide ground for discarding his statement. Now applying the above principle to the instant case, by determining the credibility of PW.10 and PW.11 on the touchstone of the principles laid down by the superior Courts.

19. As discussed above, the eye-witnesses have assigned a specific role to Muhammad Khan appellant of causing firearm injuries to the deceased, corroborated by medical evidence. The incident was promptly reported. The eye-witnesses saddled him with the responsibility of the said firearm injuries, proved fatal. He led to the recovery of pistol 30-bore as well as "Churra". The enmity between the parties was not only established rather admitted by the defence-

appellant in their statements recorded under section 342, Cr.P.C. The material available on the record suggested that Rehmat Ullah real brother of Shafi Ullah appellant was murdered and Shahid Iqbal real brother of Alam Khan, the deceased was nominated accused in the said case and as both the parties had come to Sessions Court, thus, Alam Khan was done away with by the accused-appellant, in that backdrop. In the circumstances, conviction of the appellant under section 302 (b), P.P.C. was quite proper and is accordingly maintained.

20. At this stage, we may mention that the case of Imran appellant is distinguishable from the co-convict-appellant. The Investigating Agency has not confirmed his participation in the occurrence. His name find mention in column No.2 of the report submitted under section 173, Cr.P.C. being innocent. He was not arrested in this case. The complainant moved the application for summoning all those accused enlisted in column No.2 of the report submitted under section 173, Cr.P.C. The declaration of innocence was never challenged by the complainant party before any forum by way of private complaint or otherwise. He was attributed repeated "Churra" blows. The Investigating Agency confirmed that he was disable and was suffering from Polio. PW.14 admitted in the cross-examination that Imran joined the investigation voluntarily. The said investigation was verified by S.H.O., S.D.P.O., Saddar Circle and S.D.P.O. Esa Kheel circle. No recovery was effected from him. We are of the view that the prosecution has failed to prove beyond reasonable doubt the presence of appellant Imran with Muhammad Khan at the time of the occurrence in furtherance of common intention of both of them to murder the deceased, in particular, when there is no proof of common intention. Assuming for the sake of arguments that he was present at the crime scene but mere presence by itself, in the circumstances of the case, is not enough to hold Imran guilty, thus, he is entitled to the benefit of doubt.

The motive behind the occurrence was that Rehmat Ullah real brother of the appellant, namely, Shafi Ullah was murdered and real brother of Alam Khan, namely, Shahid Khan was nominated accused of that case. Even this fact stands admitted by the accused/ appellants in their statement recorded under section 342, Cr.P.C. In the circumstances motive set up by the prosecution stands proved.

At this stage, it was argued by the learned counsel that if the appellant had committed the crime of murdering the deceased then it must also be considered

that Rehmat Ullah was done to death and Muhammad Khan the appellant committed Qatl-i-Amd of the deceased on that account. Consequently, it was argued that this should be considered as mitigating circumstance and a case was made out for awarding lesser penalty to the appellant. Learned counsel relied upon "Ajun Shah v. The State" (PLD 1967 SC 185), "Shera and others v. The State" (1976 PCr.LJ 1028) and "Niamat v. The State" (1986 PCr.LJ 2820).

21. The appellant Muhammad Khan had murdered the deceased as he was the real brother of Shahid lqbal, who committed murder of Rehmat Ullah. This constituted mitigating circumstance in favour of the appellant. The result is that although his conviction is maintained under section 302(b), P.P.C. but the sentence of death awarded to him is altered to that of imprisonment for life.

22. In the above circumstances, we are of the view that the prosecution has fully succeeded in bringing home the guilt to the appellant, namely, Muhammad Khan beyond any shadow of doubt. He was rightly convicted by the learned trial court. As regard sentence, we considered that there are mitigating circumstances in withholding the death penalty for the reasons mentioned above i.e. nomination of Shahid Iqbal for committing murder of Rehmat Ullah. We think that the ends of justice will be met if the death sentence awarded to Muhammad Khan is altered to imprisonment for life. We order accord-ingly. The direction regarding compensa-tion awarded under section 544-A, Cr.P.C. is, however, maintained. The appellant shall also be extended benefit of section 382-B, Cr.P.C. in commuting the period of imprisonment. Resultantly, Criminal Appeal No.I01223 of 2017 is dismissed.

23. However, Criminal Appeal No.101222 of 2017 moved by appellant, namely, Imran son of Abdullah is allowed and the impugned judgment to his extent is set aside. He shall be released forthwith if not required in any other criminal case.

23. Murder Reference No.600 of 2017 is answered in the NEGATIVE and death sentences of the appellants are NOT CONFIRMED.

The case property shall be dealt with as directed by the learned trial Court and the record of learned trial Court be remitted immediately.

JK/I-1/L Order accordingly.

2020 P Cr. L J 885

[Lahore]

Before Muhammad Tariq Abbasi and Sardar Ahmed Naeem, JJ

MUHAMMAD FAROOQ ---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 34-J and Murder Reference No. 102 of 2011, heard on 8th September, 2015.*

(a) Criminal trial---

----Circumstantial evidence--- Scope--- Standard of adjudging the criminality of an act may not be different but each circumstance must be linked with other---If there was no break in link of circumstances, there can be no difficulty to reach at a definite conclusion.

(b) Criminal trial---

----Circumstantial evidence--- Requirements--- Circumstances from which conclusion is to be drawn should be fully established; all facts should be consistent with hypothesis; circumstances should be of a conclusive nature and should lead to a moral certainty and actually exclude every hypothesis but one proposed to be proved.

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

----S. 302---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Circumstantial evidence---Chance witness---Unnatural conduct of witness---Scope---Accused was charged for committing murder of his wife and two daughters---Admittedly, it was an unseen occurrence---Prosecution case against the accused was based on circumstantial evidence---Accused was not nominated in the FIR, however, the evidence of wajtakar offered by the witness revealed that he was coming along with another person from his duty at 12:30 at night and had seen that the accused wearing white coloured blood stained shalwaar kameez while coming out of his own house and sitting in a car hurriedly---On the next morning said witness went to his job/work and observed that so many people had

gathered there and once again upon his return from his duty, he had seen the Police Officials standing there in connection with the incident and then he informed the Investigating Officer about the fact that he had seen the accused/appellant hurriedly going away---No explanation was offered by the prosecution as to why the witness kept quiet for about 24 hours, in particular, when early in the morning so many people had gathered there and he did not inquire from any of them as to what had happened---Behavior of the said witness was questionable---Said witness did not enquire/ask anyone the purpose of that gathering and on the other hand nobody was inquired by the witness about the purpose of their gathering---Witness made no effort, whatsoever, throughout the day to describe the story to anybody---Another aspect of the matter could not be lost sight of that the complainant was informed about the occurrence by two other persons that they both were coming back after relieving a bus bound for other city and then they both had seen the accused coming out of his house at 12.00 at night---If it was believed that the complainant was told about the disappearance/departure of the accused in blood stained clothes at odd hours then the complainant should have apprised the Investigating Officer of that fact but FIR was silent about that aspect of the matter which suggested that either the complainant was not informed by the said two persons or the witnesses were planted after about 24 hours of the occurrence---Evidence of wajtakar produced by the prosecution, in the instant case was neither confidence inspiring nor reliable---Prosecution had failed to prove its case against the accused beyond the shadow of any reasonable doubt---Appeal against conviction was allowed, in circumstances.

Akhtar Ali and others v. The State 2008 SCMR 6; Ahmed v. The State 2008 SCMR 119 and Zafar Iqbal and others v. The State 2006 SCMR 463 ref.

(d) Criminal trial---

----Evidence---Wajtakar evidence---Scope---Evidence of wajtakar alone was not a strong evidence and being a weak evidence could not corroborate another enervated evidence---Weak evidence could not become the basis of conviction---Evidence must be unimpeachable to sustain conviction.

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

----S. 302---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Extra judicial confession--- Scope--- Accused was charged for committing murder of his wife and two daughters---Extra judicial confession was made by the accused before two witnesses, one was given up---Witness of extra judicial confession had described that the accused came to them and apprised of the fact that he had slaughtered his wife and daughters as he intended to contract second marriage---Accused requested to resolve the matter amicably and by way of compromise---Accused was asked to stay there but he slipped away as witness went out on a pretext to ask the legal heirs of the deceased---Accused had made extra judicial confession after four days of the occurrence, before said witness who was not authoritative socially or officially---Said witness was neither a close confident nor friend having some common habits and that there was no convincing reason that the accused had gone onto the witness to ventilate his suffocating conscience---Witness had admitted that he informed the complainant party about the confession of the accused on the same very night---If it was so, why the complainant kept quiet and why the witnesses made no effort to apprehend/arrest the accused as he was alone and witness was sitting in his baithak along with other given up witness---Extra judicial confession was not helpful to the prosecution, in circumstances---Appeal against conviction was allowed, in circumstances.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231 rel.

(f) Criminal trial---

----Extra judicial confession---Scope---Extra judicial confession being not a direct evidence, needed corroboration from available material---No reliance could be placed on the evidence of extra judicial confession produced by the prosecution, which even otherwise was not corroborated by any other independent evidence.

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

----S. 302---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Weapon of offence recovered at the instance of accused---Reliance---Scope---Accused was charged for committing murder of his wife and two daughters---Churri was recovered at the instance of the accused but same did not connect him with the

commission of crime, even if it was accepted as correct and the medical evidence only confirmed the ocular evidence with regard to seat/nature of injuries, weapon used in the case but it could not link the accused with commission of crime---Existence of injuries on the person of all the three deceased was of no avail to the prosecution, in circumstances---Appeal against conviction was allowed, in circumstances.

Ghulam Mustafa and another v. State 2009 SCMR 916 rel.

Miss Saiqa Javed for Appellant.

Muhammad Jafar, Deputy Prosecutor-General for the State.

Saqib Jillani, Defence Counsel for the Complainant.

Date of hearing: 8th September, 2015.

JUDGMENT

SARDAR AHMED NAEEM, J.---This judgment shall dispose of Criminal Appeal No.34-J of 2011 titled as "Muhammad Farooq v. The State and another" filed by Muhammad Farooq against his conviction and sentence and Murder Reference No.102 of 2011 titled as "The State v. Muhammad Farooq" submitted by the trial court for confirmation or otherwise of the sentence of death awarded to the appellant as both these matters have arisen out of judgment dated 09.02.2011 passed by learned Sessions Judge, Sargodha, in case FIR No.1007 dated 25.10.2009, under section 302, P.P.C., registered at Police Station Satellite Town Sargodha whereby the appellant was held guilty, convicted and sentenced as follows:-

Under section 302(b), P.P.C. as Tazir and punished to death as tazir on three counts with compensation amounting to rupees two lacs on three counts to the legal heirs of Mst. Yasmin, Mst. Iqra and Mst. Insa deceased and this compensation will be recoverable as arrears of land revenue and in default of payment of compensation the convict will suffer further S.I for six months on three counts.

2. Brief facts of the case, as given by Muhammad Javed (PW.7) are that his sister Mst. Yasmin got married to appellant nine years ago and have two daughters including Mst. Iqra (07-years) and Mst. Insa (05-years). On the fateful day the complainant had gone to Chak No.46 North to attend the Chahlum ceremony but the appellant along with his wife could not reach. Thereafter, the

complainant sent his sister, namely Jamila, who informed the complainant that Mst. Yasmin, Mst. Iqra and Mst. Insa were lying dead and their throats were cut. The complainant got recorded FIR No.1007 dated 25.10.2009, under section 302, P.P.C. at Police Station Satellite Town, Sargodha against the unknown accused.

3. Shah Nawaz, Sub-Inspector (PW.10) chalked out the FIR Ex.P.F and then proceeded to place of occurrence. He prepared the injury statements of Mst. Yasmin (Ex.P.L), Mst. Insa (Ex.PM) and Mst. Iqra (Ex.PN), respectively. The dead bodies of all the three deceased were dispatched to the mortuary through Fida Hussain, ASI. He visited the place of occurrence and took blood-stained earth from the points where the dead bodies were lying vide memo Ex.P.G (Mst. Yasmin), Ex.P.H (Mst. Iqra) and Ex.P.I (Mst. Insa) respectively. He took blood stained earth and made three different sealed parcels and recorded the statements of witnesses under section 161, Cr.P.C. On the same day Fida Hussain, ASI produced before him the post-mortem reports of the said three deceased along with their last worn clothes, three envelops and six phials. The details of the last worn clothes of the deceased are given hereunder:-

Mst. Yasmin

(i) Shirt (P.1) (ii) Shalwar (P.2) (iii) Brazier (P.3)

All blood stained along with two sealed parcels and the sealed envelope.

Mst. Insa

(i) Shirt (P.4) (ii) Shalwar (P.5)

All blood stained along with two sealed parcels and the sealed envelope.

Mst. Iqra

(i) Shirt (P.6) (ii) Shalwar (P.7)

All blood stained along with two sealed parcel and the sealed envelope.

4. On the same day at 09:30 p.m. Mulazam Hussain and Yaqoob Masih appeared before him and informed that they saw the appellant on the night of occurrence hurriedly coming out from his house wearing blood stained clothes. He recorded the statements of Yaqoob Masih and Mulazam Hussain, the prosecution witnesses.

On 26.10.2009 he got prepared scaled site plan Ex.P.A and Ex.PA/I handed over to him on 28.11.2009. On 25.10.2009 he also drew un-scaled site plan of the place of occurrence (Ex.P.Q). He prepared inquest report of Iqra (Ex.P.R), Yasmin (Ex.P.S) and Insa (Ex.P.T).

On 29.10.2009 Gul Zaman and Saif ur Rehman, the prosecution witnesses appeared before him and apprised of the fact that the appellant confessed his guilt for committing murder of all the three deceased.

On 01.11.2009 at about 12:30 p.m., he arrested the accused. He led the police party to the place of occurrence and got recovered 'Churri' P.8, secured vide memo (Ex.P.J). The un- scaled site plan of the place of recovery was Ex. P. U. Thereafter, the appellant got recovered his blood stained Shirt (P-9) secured vide memo (Ex.P.K) from the office situated at University Road, Sargodha. The un-scaled site plan was Ex.P.V.

Dr. Naureen (PW.3) held autopsy, on 25.10.2009 at 06:00 p.m.. She observed one incised wound of 16 x 10 cm on front of the neck of Mst. Yasmin. In her opinion the cause of death was damage to main blood vessels, trachea and excessive blood loss leading to cardiopulmonary arrest.

The injury was ante-mortem and sufficient to cause death in ordinary course of nature. The time elapsed between injuries and death was within five to ten minutes and between death and postmortem was within five hours.

5. After the postmortem examination she handed over police paper, postmortem report, sample of stomach, liver, spleen, two sealed bottles to Fida ASI. Ex.P.B was the correct carbon copy of her postmortem report and Ex.PB/1 and Ex.P.B/2 were pictorial diagram prepared and signed by the witness.

6. She conducted the postmortem of Mst. Insa on the same day and observed an incised wound of 8 x 6 cm on front of neck.

In her opinion the cause of death was damage to main blood vessels, trachea, vertebral, spinal cord, leading to excessive blood loss and cardiopulmonary arrest.

The injury was ante-mortem and was sufficient to cause death in ordinary course of nature. She sent sample of stomach, liver, and spleen to Chemical Examiner for detection of any poison. The time elapsed between injuries and death was within five to ten minutes and between death and postmortem was within six hours. After postmortem, police papers along with postmortem report, samples of stomach, liver, spleen, two sealed bottles were handed over to Fida Hussain ASI. Ex.P.C was the correct carbon copy of postmortem report whereas Ex.P.C/1 and Ex.P.C/2 was the pictorial diagram.

On the same day at 07:30 p.m. she also conducted the postmortem examination of Iqra and found an incised wound extending across the middle of front of neck about 12 x 6 cm. margins.

The cause of death, in her opinion was damage to main blood vessels, trachea, vertebral, leading to excessive blood loss and cardiopulmonary arrest. The samples of stomach, liver and spleen were sent to chemical examiner for detection of poison. The injury was ante-mortem and was sufficient to cause death in ordinary course of nature. The time between injuries and death was within five to ten minutes and between death and postmortem was within seven hours. After the postmortem examination she handed over dead body, police paper, postmortem report, sample of stomach, liver, spleen and two sealed bottles to Fida Hussain, ASI. Ex.P.D was the correct carbon copy of the postmortem report and Ex.P.D/1 and Ex.P.D/2 were the pictorial diagram.

7. In his statement recorded under section 342, Cr.P.C. the appellant pleaded false implication and that it was a blind murder. He neither appeared as his own witness under section 340(2), Cr.P.C. nor produced some evidence in defence.

8. Learned counsel for the appellant contends that there was no direct evidence in this case; that nobody was nominated being accused in the FIR; that the statements of Mulazam Hussain (PW.9) cannot be relied upon as he could not plausibly explain his presence at the spot and the story narrated by him of coming out the appellant from his own house in blood-stained clothes during the odd hours of the night was not probable; that he admitted during cross-examination that from 12:30 a.m. till the following day, he did not apprise anybody regarding the above said facts which clearly reflects about the intrinsic worth of his evidence; that there was also no reason for the appellant to make such a confession before Saif ur Rehman (PW.8) as he was neither a close confident of the appellant nor a person authorized socially or officially and had no status to permit the appellant to make such a confession before him and that, this extra judicial confession was not corroborated by any independent piece of evidence. Learned counsel further added that the occurrence was not witnessed by anybody; that the whole case rests upon the circumstantial evidence; that circumstantial evidence always considered a weak type of evidence; that the conviction on such type of evidence cannot be maintained; that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt and that he was not named in the FIR as an accused; that there was no incriminating

material to connect him with the commission of crime and that the case of prosecution was replete with doubts and benefit of doubt was inherent right of the accused. Learned counsel placed reliance on "Akhtar Ali and others v. The State" (2008 SCMR 6), "Ahmed v. The State" (2008 SCMR 119), "Zafar Iqbal and others v. The State" (2006 SCMR 463) and "Wazir Muhammad and another v. The State" (2005 SCMR 277).

9. Conversely, the learned DPG assisted by the learned counsel for the complainant submitted that the prosecution has proved its case against the appellant beyond the reasonable doubt; that Mulazam Hussain (PW.9) had seen the appellant coming out of his house in a perplexed condition and that appellant could not offer any reasonable/ plausible explanation; that there was no enmity between the complainant and the appellant; that the appellant could have been named by the complainant in the FIR even on the basis of suspicion which shows lack of any mala fide; that the extra judicial confession made by the appellant was voluntary in nature: that the prosecution case consists of evidence of Wajtakkar, extra judicial confession made by the appellant before PW.8, medical evidence and the recovery; that the prosecution has proved its case against the appellant with cogent/ convincing evidence and beyond any shadow of doubt, thus, the appeal deserves dismissal.

10. We have heard the learned counsel for the parties, given anxious consideration to their arguments and gone through the record with their valuable assistance.

11. It is settled by now that a person is deemed innocent unless he proved to be guilty through strong and admissible evidence and generally in criminal law, the charge is proved either through direct or circumstantial evidence. In a case of direct evidence, the reliability depends upon the probative value of the evidence through the settled principle and in cases of circumstantial evidence the basic consideration is that the offence allegedly, committed by a person must be incompatible with any reasonable hypothesis of innocence of that person. Therefore, in cases of circumstantial evidence, the standard of adjudging the criminality of an act may not be different but each circumstance must be linked with other and if there is no break in link of circumstances, there can be no difficulty to reach at a definite conclusion. The fundamental principle of universal application in the cases depending on circumstantial evidence is that in order to justify the inference of guilt, the incriminating fact must be incompatible

with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The circumstantial evidence may some time be conclusive but it always needs narrow examination to exclude any possibility of fabrication and to exclude coexisting circumstances which would weaken or destroy the inference of guilt. In a case having indication of designs in the preparation of a case resting on circumstantial evidence, the Court must be on its guard against the possibility of being misled into a false inference. Therefore, the essential principle applicable to the scrutiny of proof adduced if not followed in drawing an inference in such cases, the same would result in failure of justice. To prove a case through circumstantial evidence four essentials are required:-

i. Circumstances from which conclusion is to be drawn should be fully established;
ii. All facts should be consistent with hypothesis;
iii. Circumstances should be of a conclusive nature; and
iv. Circumstances should lead to a moral certainty and actually exclude every hypothesis but one proposed to be proved.

Admittedly, it was unseen occurrence. The prosecution case against the appellant is based on circumstantial evidence comprising upon (i) Wajtakkar offered by Mulazam Hussain (PW.9) and extra judicial confession made by the appellant before Saif-ur-Rehman (PW.8) and Gul Zaman (given up PW). The instant case is entirely based on the circumstantial evidence, therefore, the utmost care and caution is required for reaching at a just conclusion. As mentioned above the appellant was not nominated in the FIR, however, the evidence of Wajtakkar offered by Mulazam Hussain (PW. 9) revealed that he was coming along with Yaqoob Masih from his duty at 12:30 at night and saw the appellant wearing white coloured blood stained Shalwar Kameez while coming out of his own house and sitting in a car hurriedly. On the next morning this witness went to his job/ work and observed that so many people have gathered there, and, once again, upon his return from his duty, saw the police officials standing there in connection with the incident and then he informed the Investigating Officer about the fact that he saw the accused/appellant hurriedly going away. No explanation was offered by the prosecution as to why the witness kept mum for about 24 hours, in particular, when early in the morning so many people had gathered there and he did not inquire from any of them as to

what had happened. The behavior of this witness is questionable. He did not enquire/ ask anyone the purpose of that gathering and on the other hand nobody was inquired by the witness about the purpose of their gathering. He made no effort whatsoever throughout the day to describe the story to anybody. Another aspect of the matter cannot be lost sight of that the complainant was informed about the occurrence by Noor Masih and one Qureshi and that they both were coming back from "Qanchi Mor" after relieving a bus bound for Faisalabad and then they both saw the appellant coming out of his house at 12:00 a.m. (at night). If it is believed that the complainant was told about the disappearance/ departure of the appellant in blood stained clothes at odd hours, then the complainant should have apprised the Investigating Officer of this fact but FIR is silent about this aspect of the matter which suggests either the complainant was not informed by the said Noor Masih or Qureshi or the witnesses were planted after about 24 hours of the occurrence. Wajtakkar alone is not a piece of strong evidence and the weak piece of evidence cannot corroborate another enervated evidence. Weak evidence cannot become the basis of conviction. To sustain conviction the evidence must be unimpeachable. Best possible evidence must be produced by the prosecution. In un-witnessed occurrences strong circumstantial evidence may successfully implicate an accused person but the evidence of Wajtakkar produced by the prosecution, in the instant case, is neither confidence inspiring nor reliable.

12. The next piece of incriminating evidence produced by the prosecution was extra judicial confession made by the appellant on 29.10.2009 at about 07/07:15 p.m. before Gul Zaman (given up PW) and Saif ur Rehman (PW.8). He described that the appellant came to them and apprised of the fact that he had slaughtered his wife and daughters as he intended to contract second marriage. He requested to resolve the matter amicably and by way of compromise. The appellant was asked to stay there but he slipped away as Saif-ur-Rehman went out on a pretext to ask the legal heirs of the deceased. The occurrence in this case took place on 25.10.2009 and after four days of the occurrence, the appellant professed his guilt before Saif-ur-Rehman (PW.8) who is not authoritative socially or officially. He was neither a close confident nor friend having some common habits and that there was no convincing reason that the appellant had gone on to Saif-ur-Rehman to ventilate his suffocating conscience. He had admitted that he informed the complainant party about the confession of the

appellant on the same very night. If it was so, why the complainant kept mum and why the witnesses made no effort to apprehend/arrest the appellant as he was alone and Saif-ur- Rehman was sitting in his Baithak along with Gul Zaman. The question of placing reliance on extra judicial confession came up for consideration before the Hon'ble Supreme of Pakistan in case of "Sajid Mumtaz and others v. Basharat and others" (2006 SCMR 231), wherein, at page 238, the apex Court of Pakistan held as under:-

> "This Court and its predecessor Courts (Federal Court) have elaborately laid down the law regarding extra judicial-confession starting from Ahmad v. The Crown (PLD 1951 FC 103-107) upto the latest. Extra-Judicial confession has always been taken with a pinch of salt. In Ahmad v. The Crown, it was observed that in this country (as a whole) extra-judicial confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial confession, the Court must inquire into all material points and surrounding circumstances to satisfy itself fully that the confession cannot but be true."

As, the extra-judicial-confession is not a direct evidence, thus it needs corroboration from available material. Therefore, in the circumstances of this case, no reliance can be placed on the evidence of Wajtakkar/extra judicial confession produced by the prosecution, which even, otherwise is not corroborated by any other independent piece of evidence.

So far as, recovery of 'Churri' at the instance of the appellant is concerned that does not connect the appellant with the commission of crime even it is accepted as correct and the medical evidence only confirms the ocular evidence with regard to seat/ nature of injuries, weapon used in the instant case but cannot link the accused with the commission of crime, therefore, existence of injuries on the person of all the three deceased to of no avail to the prosecution. Respectful reliance, in this regard can be placed on "Ghulam Mustafa and another v. State" (2009 SCMR 916).

13. In the light of above discussion, we are of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of any reasonable doubt, therefore, we accept Criminal Appeal No.34-J of 2011 filed by Muhammad Farooq (appellant), set aside his conviction and sentences recorded by the learned trial court and acquit him from the charge levelled against him by

extending him the benefit of doubt. He is in custody, be released forthwith if not required in any other case.

14. Murder Reference No.102 of 2011 is answered in the NEGATIVE and the sentence of death of Muhammad Farooq (convict) is NOT CONFIRMED.

JK/M-63/L Appeal accepted.

2020 P Cr. L J 939
[Lahore]
Before Sardar Ahmed Naeem and Farooq Haider, JJ
AHAD KHAN CHEEMA and another---Petitioners
Versus
NATIONAL ACCOUNTABILITY BUREAU and others---Respondents

Writ Petitions Nos. 35056 of 2019 and 11006 of 2020, decided on 13th April, 2020.

(a) National Accountability Ordinance (XVIII of 1999)---
----S. 9(a)---White collar crime---Proof---Evidence, quality of---White collar crime cases are usually committed in planned manner by well-organized persons and they work underhand mechanism---In such cases standard of evidence normally available in ordinary circumstances cannot be expected---White collar crime is totally different in nature from common crimes that take place in society--- Documents in such cases are generally prior to or during commission of the offence which is essential and normally make up the major part of evidence---Bank records, accounting records, legal documents or instruments are normally the basis for the case---Documents may very well prove circumstances around alleged offence but they may not necessarily provide all essential elements of criminal charge e.g. the intention of subject---Personal correspondence, notes in daily timers, mobile phone records must not be overlooked as there may be evidence needed to prove element that was not readily apparent in the books and record.
(b) National Accountability Ordinance (XVIII of 1999)---
----Ss. 9(a)(iv)(vi) & 9(b)--- Constitution of Pakistan, Art. 199---Constitutional petition---Bail, refusal of---Prima facie case---Contract for construction of a housing project was awarded and both the accused were arrested on the allegations that one had misused his authority while the other was beneficiary---Validity---Offences alleged to have been committed by accused persons were within the purview of 'white collar crimes' and such offence had effect on the society at large---Allegations against accused persons were not only of cheating or defrauding an individual but causing huge loss to public exchequer---Prima facie the case against accused persons did not fall in exceptional circumstances where bail could only be granted when Court had come to the conclusion that

material available on record prima facie was not sufficient to link accused with commission of offence such would bring the case within the meaning of 'further inquiry' where release of accused was a matter of right---For recovery of state money and for checking corruption and corrupt practices and for taking action against those who misused their power and authority while enriching themselves at the cost of society, the National Accountability Ordinance, 1999, was promulgated---Contract in question was not a civil liability as the same was covered by National Accountability Ordinance, 1999--- Alleged offence and its mode of commission fell within the ambit of 'white collar crimes' which had its own salient features and peculiar circumstances---Line of distinction was to be drawn between ordinary offence and that of a 'white collar crime' which was to be kept in view while sifting evidence---Approach for such evaluation must be dynamic so that conjectural presumptions and hyper technicalities having no nexus with merits of the case could be eliminated even at bail stage---High Court declined to interfere in the arrest of accused persons---Bail was declined in circumstances.

Tallat Ishaq v. National Accountability Bureau through Chairman and others PLD 2019 SC 112 and Muhammad Yousaf Butt v. P.C. Abdul Lateef Shar and another 2012 SCMR 1945 rel.

Ashtar Ausaf Ali for Petitioner (in Writ Petition No.11006 of 2020).

Azam Nazir Tarar and Muhammad Amjad Pervaiz for Petitioner (in Writ Petition No.35056 of 2019).

Syed Faisal Raza Bokhari and Mr. Asad Ullah Malik, Special Prosecutors for NAB along with Muhammad Ikram and Muhammad Ali Anwar, Assistant Directors/Investigating Officers.

ORDER

Through this single order, we intend to decide above mentioned writ petitions whereby the petitioners seek bail in Reference No.50/2018 filed by the National Accountability Bureau under section 18(g) read with section 24(b) of the National Accountability Ordinance, 1999 wherein the charge framed against the petitioners is as under:

Ahad Khan Cheema (petitioner)

i. that you accused Ahad Khan Cheema by misusing your authority entrusted the project to Strategic Project Unit which had no experience,

whatsoever, regarding housing project under Public Private Partnership mode and you accused Ahad Khan Cheema in aid and abetment with your co-accused Bilal Kidwai and Israr Saeed (Approver), Chief Engineer, LDA prepared fraudulent and deceitful Request for Proposal (RFP) and bidding documents to grant undue and illegal benefit to Messrs SPARCO group (later Lahore CASA Developers) in the form of award of contract and your co-accused Bilal Kidwai malafidely drafted/prepared the said documents in violation of provisions of Public Private Partnership Act without mentioning the ratio of members of the consortium/JV which were, subsequently, approved by you accused Ahad Khan Cheema by misusing your authority in order to render illegal benefit to Messrs SPARCO Group (later Lahore CASA Developers).

ii. that you accused Ahad Khan Cheema, Bilal Kidwai, Imtiaz Haider and Israr Saeed with criminal intent and in order to extend illegal benefit to Messrs SPARCO Group ignored percentage shareholdings of each member of JV/Consortium despite written confirmation to PPP Steering Committee in meeting held on 20.11.2014 with mala fide intentions and in order to grant illegal benefit to Messrs SPARCO Group.

iii. that you accused Ahad Khan Cheema in connivance with accused Shahbaz Sharif approved feasibility study, bidding documents and PFR which were prepared in violation of PPP Act, 2014 without mentioning the respective shareholdings and role of the JV members which resulted in award of contract to an ineligible firm. Moreover, you accused Ahad Khan Cheema with mala fide intentions failed to comply deliberate with the directions of PPP Steering Committee regarding restriction on dilution of lead member shareholdings and continued the process of awarding the contract even after submission of JV agreement by Lahore CASA Developers having actual shareholdings of JV members was in sheer violation of documents submitted at pre-qualification stage but you also failed to exercise your duty to prevent any undue and illegal benefit to your co-accused. You also obtained illegal gratification from accused Nadeem Zia and Khalid Hussain (since PO) in the form of land measuring 99-Kanal 17-Marla valuing Rs.136,900/- million approximately in your own name and in the name of close relatives.

Shahid Shafiq Alam Faridi (petitioner)

i. that you accused Shahid Shafiq Alam Faridi in connivance with your co-accused presented false documents of JV and obtained the contract in illegal, corrupt and dishonest manner as being C-4 company which was not eligible for the contract. However, you accused fraudulently represented Messrs SPARCO as lead member of JV whereas, as per JV agreement dated 18.05.2015 signed by you, actual lead member was Messrs Bismillah Engineering Services Co. but you accused with fraudulent intentions obtained constructive possession of land reserved for Ashiana Iqbal project and wilfully failed to complete the project which caused loss to Government Exchequer;

ii. that you all the accused persons, in active aid, abetment and connivance with each other and your co-accused (since PO) dishonestly and with mala fide intentions misused the authority in order to gain/render illegal benefit for themselves and for your co-accused. Furthermore you all accused also wilfully failed to exercise your authority in order to prevent grant of contract to your co-accused and also accepted illegal gratification while indulging in offences of corruption and corrupt practices. Hence, you accused in connivance with each other, have fraudulently and dishonestly caused loss to the National Exchequer to the tune of Rs.660/- Million approximately. Thus, in connivance with each other have committed offence of corruption and corrupt practices as defined under section 9(a)(i)(ii)(iv)(vi) and (xii) punishable under section 10 of the National Accountability Ordinance, 1999 and schedule thereto which is within the cognizance of this Court.

2. Learned counsel for the petitioner, namely, Ahad Khan Cheema argued as under:

i. that the mandate of the petitioner was documentation and the execution and that contract was not awarded by the petitioner;

ii. that an application was filed under section 20 of the Arbitration Act, 1940 by the petitioner Shahid Shafiq Alam Faridi, Chief Executive Lahore CASA Developers/SPARCO group against Punjab Land Development Company which is pending adjudication and thus the dispute is civil in nature;

iii. that no loss, whatsoever, was caused to the public exchequer;

iv. that no recovery was effected from the petitioner during the investigation;

v. that the assumption of jurisdiction by the respondent bureau upon an anonymous complaint containing general and bald allegations without any supportive evidence was illegal and without lawful authority;

vi. that the cancellation of the contract on 17.04.2017 by the PLDC board many months prior to any complaint negates the false motive setup by the prosecution;

vii. that it was established through overwhelming evidence available on record that the project was publicized both at National and International level, convening investors conference, availability of RFP, bid documents free of cost on both LDA and PPRA websites, receiving of the same by 86 parties, two extension in bid submission deadline and 30 minute extra time for bid submission also negate the hypotheses that this exercise was for any personal gain to the petitioner;

viii. that multiple department, bid opening project and financial evaluation committee including representatives of various departments as members was constituted by the petitioner, thus, allegation of any influence by the petitioner upon the said committee was unfounded and unjustified;

ix. that no one, whosoever, lodged any complaint before any forum, whatsoever, to doubt the process and this fact alone was sufficient to belie the allegation of awarding contract inclusion or in connivance with anyone;

x. that as per record no dilution of share members have taken place after submission of JVA till termination of contract and that the information under section 14(d) of PPP Act ibid has no consequence, whatsoever, because this proposed shareholding was submitted for information and not for evaluation;

xi. that the statements of Israr Saeed and Arif Majeed were recorded in absence of the petitioner, thus, the admissibility of those statements would be adjudged by the learned trial court, at trial;

xii. that the relatives of the petitioner including Ahmad Hassan and Masoor Hussain filed writ petition before this Court and denied to be "benamidar" of the petitioner or any interest of the petitioner

in their properties and that they are contesting their ownership before the trial court;

xiii. that the petitioner was arrested on 21.02.2018 and is behind the bars from the last more than two years;

xiv. that there were 86 prosecution witnesses and 9 witnesses have been recorded so far, the trial has not witnessed any material progress and the conclusion thereof is not insight in near future, the delay cannot be attributed to the petitioner in any manner; and

xv. that the question of the guilt of the petitioner requires further inquiry, thus, the petitioner be released on bail.

3. Learned counsel for the petitioner Shahid Shafique Alam Faridi contended that contract awarded to the petitioner was cancelled by the PLDC well in time, the petitioner has incurred huge expenses from his own pocket and the project remained unexecuted as no development work including the completion of metalled road, electrification etc was carried out at the spot; that co-accused of the petitioner including Sajjad and Munir Zia have been admitted to bail by the apex Court, thus, rule of consistency is attracted in this case and the petitioner is also to be treated alike; that all the co-accused except petitioners and proclaimed offenders have been admitted to bail by this Court and the apex Court; that the physical custody of the petitioner was not required to the Investigating Agency; that no recovery was effected from the petitioner; commencement of trial is no clog to the grant of bail if the accused is entitled to the same relief, on merits; that there is no likelihood of the early conclusion of the trial; that the kind of allegation levelled against the petitioner requires deeper appreciation of evidence not permissible at this stage; that the petitioner was first offender and have no previous record. Adds that culpability of the petitioner needs serious consideration, in the circumstances, the petitioner is entitled to bail.

4. Learned Special prosecutor for NAB submitted that the delay in the trial is not attributable to the prosecution; that after the framing of the charge nine witnesses have been examined; that the prosecution may not examine all the witnesses and that trial is likely to be concluded in near future. He further contended that the PWs implicated the petitioners in their statements recorded under section 161, Cr.P.C.; that the approvers also lend sufficient corroboration to the prosecution story; that during the investigation certain recoveries were also effected from the petitioner Ahad Khan Cheema, reports of experts were

also collected; that the petitioner was a public office holder, involved in case of corruption and corrupt practices and as there was sufficient incriminating material available against them on record, thus, this court may not allow bail to the petitioners in Constitutional Jurisdiction.

5. We have given hearing to the learned counsel for the parties, gone through the record and given anxious considerations to the submissions made.

6. It is emerged from record that a complaint dated 31.10.2017 was received by Chairman NAB against management of Public Sector Companies. Allegations of misappropriation and embezzlement were also levelled against the management of those companies. Accordingly, inquiry No.1(9)HQ/1826/NAB-L was authorized on 15.11.2017. Another complaint dated 17.11.2017 against M/s Paragon City (Pvt.) Limited and management of Punjab Land Development Company was also received. The complainant alleged illegal occupation of 3100-Kanal State land against Messrs Paragon City in connivance with officers/officials of Punjab Land Development. This land was proposed for the project of Ashiana-e-Iqbal. The inquiry was authorized on 10.01.2018, later on, this inquiry was upgraded into investigation and ultimately, A.C.R. No.50/2018 was filed.

Punjab Land Development Company is owned by Government of Punjab and was registered on 09.03.2010 under section 32 of the Companies Ordinance, 1984. Its prime responsibility was to develop modern housing schemes for low-income groups in various Districts of Punjab. Initially, the company accomplished projects including Ashiana-e-Quaid, Lahore, Ashiana Sahiwal and Ashiana Faisalabad under Government Financing Mode. Another project, namely, Ashiana-e-Iqbal was also initiated at Burki Road, Lahore in the year 2011-2012 under the same mode. After observing the formalities, the lowest bidder, namely, Messrs Ch. A. Latif & sons was awarded contract on 24.01.2013. The contractor was issued mobilization advance of PKR 75.00 Million. The contractor also started work at the project. However, said contractor was paid Rs.5.9 million by Punjab Land Development Company as a settlement with mutual consent to withdraw from said contract. After the cancellation of the contract, the then Chief Minister directed the Punjab Land Development Company to entrust the project of Ashiana-e-Iqbal to Lahore Development Authority for the purposes of planning, designing and execution of the project.

At that time Lahore Development Authority was headed by the petitioner Ahad Khan Cheema as Director General.

At this stage, it may be mentioned that at pre-qualification stage a consortium was formed including first China Metallurgical Construction Company and then substituted by Messrs Anhui construction Company, Messrs SPARCO Construction Company and Messrs Bismillah Engineering Services Company. The amended partnership of firm reflects that petitioner Muhammad Shahid Shafique Alam Faridi had 80% share whereas, the remaining 20% share were owned by Munir Zia, co-accused of the petitioner. The award of illegal contract in favour of Bismillah Engineering Service Company and accomplishment of the task contrary to law and rules, by the petitioner Ahad Khan Cheema are precisely the allegation levelled against the petitioners and subject matter of the Reference.

7. First, we shall deal with the role of the petitioner, namely, Muhammad Shahid Shafique Alam Faridi. A consortium, namely, Lahore CASA Developers was awarded contract to execute the project. It was to be completed under Public Private Partnership (PPP) mode. The proposed 3100-Kanal land for the project was, allegedly, adjacent to Messrs Paragon City (Pvt.) Limited, thus, the said company had keen interest in the land of the project. Amongst the directors of the said company was Nadeem Zia (P.O.), a real brother of the co-accused of the petitioner, namely, Munir Zia. The record revealed that Bismillah Engineering Services Company was a proxy company, which acted on behalf of Messrs Paragon City (Pvt.) Limited as the bid security amount of Rs.50,000 million and equity amount of Rs.1.600 million was arranged from the bank accounts maintained by Nadeem Zia, Director of Messrs Paragon City, which established the link between both the companies. We may also mention that according to the contract awarded, Lahore CASA Development had to construct 6400 flats on 1000-Kanals in the form of G Plus 3 High rise flats and the consortium had to get 2000-Kanal land from the Government. The land, however, was to be transferred to the contractor in proportionate manner i.e. equal to percentage of completed flats. The worth of construction of 6400 flats was Rs.13.46 Billion and worth of remaining 2000-Kanal land was 15.400 Billion. The available record reflects that Messrs Bismillah Engineering Services Company got the license of Category C-4 from Pakistan Engineering Council, the construction/capital cost of which could not exceed Rs.200 million. It is also

worth mentioning that at pre-qualification stage Memo of understanding was filed by the consortium. There was no mention regarding percentage of the respective shares, which is violative of section 14(d) of Public Private Partnership Act, 2014. It would not be out of place to mention here that a joint venture agreement dated 15.05.2015 was shown by the Special Prosecutor NAB, not controverted by the learned counsel, evidencing that Messrs Bismillah Engineering Services Company was lead member with 90% share. Whereas, Messrs SPARCO second JV Member and third JV Member had 9% and 1% shares, respectively. Why the percentage of respective shares was not mentioned in Memo of Understanding and how Messrs Bismillah Engineering Services, a company of category C-4 assumed the role of lead member with 90% shares?, learned counsel for the petitioner could not explain the circumstance, satisfactorily. Admittedly, the petitioner being partner of category C-4 firm was the main beneficiary of the contract. The PWs have also implicated the petitioner in their statements recorded during the investigation.

The case of the petitioner is also distinguishable from his co-accused including Munir Zia and Sajjad as they were not signatory to the Joint Venture Agreement and the petitioner claimed himself to be a Chief Executive of Lahore CASA Developers in the above referred application filed under section 20 of the Arbitration Act, 1940 and, thus, the case of the petitioner is not at par with the said co-accused and rule of consistency is not attracted, in the case.

8. A review of record demonstrates that the petitioner, namely, Ahad Khan Cheema performed as Director General, Lahore Development Authority from 2013 to 2016. The project of Ashiana-e-Iqbal was entrusted to Lahore Development Authority. The mandate of the petitioner was planning, designing and execution of the project. The procedure opted for earlier projects i.e. Government Finance mode was not to be adopted and the project was to be completed under Public Private Partnership. The government of Punjab never undertook a housing project under the Public Private Partnership mode earlier. The petitioner got prepared the feasibility report from his co-accused, namely, Bilal Kidwai. At this stage, it may be mentioned that under government financing mode, feasibility for this project was prepared by Messrs KPMG, a renowned international audit and consultant firm which opined that project was feasible under the Government Financing Mode. It is required under section 7(d)

of Public Private Partnership Act, 2014 to hire transaction advisors for preparation of feasibility studies and bidding documents if the government agency does not have relevant expertise but the petitioner got prepared feasibility of the project, bidding documents, i.e. request for proposal (RFP) and draft development agreement through his co-accused, namely, Bilal Kidwai admittedly, not expert within the meaning of Public Private Partnership Act, 2014 and presented the same in 17th meeting of steering committee constituted under the Public Private Partnership Act, 2014. The Public Private Partnership cell also made certain observations. One of the observations was that dilution of lead member shareholding shall be restricted in view of section 14(d) of Public Private Partnership Act, 2014, which stipulates that in case the person is consortium, its members, their roles and their proposed shareholdings shall be disclosed at the pre-qualification stage. As mentioned in the preceding para Memo of Understanding signed by the JV Members was silent about their shares. However, Messrs SPARCO was on top i.e. at No.1 and Messrs Bismillah Engineering Services Company at serial No.3 suggesting Messrs SPARCO as lead member whereas, in the JV agreement Bismillah Engineering Services Company by way of somersault was at No.1 being lead member with 90% shares. Though the petitioner agreed before the committee to proceed in accordance with the said observation but failed to rectify the said defects. During the investigation, convener of the Technical Financial and Evaluation Committee, namely, Israr Saeed got recorded his statement under section 161, Cr.P.C. which suggested that the petitioner directed him to follow RFP criteria, violative of Public Private Partnership Act, 2014. During the investigation Agha Waqar Javed Head of Public Private Partnership Cell got recorded his statement under section 161, Cr.P.C. to the same effect. Formal agreement regarding Ashiana-e-Iqbal project between Punjab Land Development Company and Lahore Development Authority was signed on 27.01.2015, however, after award of the contract, the petitioner failed to execute the same. This fact is also confirmed by the statement of Arif Majeed Butt, examined under section 161, Cr.P.C. His statement also supported Israr Saeed that pre-qualification was carried out strictly in accordance with RFP, in violation of Public Private Partnership Act, 2014.

9. The allegation of illegal gratification finds support from the statements of Mohsin Nadeem recorded during the investigation giving details of the properties alienated in favour of Shahid Shafique Alam Faridi, Ahmed Hussain, Sadia Mansoor, Mansoor Ahmad and Nazia Ashraf (close relatives of Ahad Khan Cheema), the petitioner. The statements of witnesses including Muhammad Kashif son of Muhammad Shafique, Akbar Ali son of Din Muhammad and Akbar Ali son of Boota lend further strength to the above allegation. No ill-will or animosity was attributed to any of the PWs for false implication of the petitioner. Deeper appreciation of evidence cannot be undertaken at this stage and the Court only has to sift the material tentatively. The investigation agency also concluded against the petitioner.

10. It is one of the white collar crimes case which are usually committed in planned manner by well-organized persons and they work underhand mechanism. In such cases, the standard of evidence normally available in the ordinary circumstances cannot be expected. They are totally different in nature from common crimes that take place in the society.

11. In such like cases, documents are generated prior to or during the commission of that offence which is essential and normally make up the major part of evidence. Bank records, accounting records, legal documents or instruments are normally the bases for the case. They may very well prove the circumstances around the alleged offence but they may not necessarily provide all the essential elements of the criminal charge e.g. the intention of the subject. The personal records like items including personal correspondence, notes in daily timers, mobile phone records must not be overlooked as there may be the evidence needed to prove the element that was not readily apparent in the books and record.

12. With regard to the contention that this matter does not fall within the purview of NAB under the National Accountability Ordinance as it falls within the exclusive domain of civil law being contractual liability. The National Accountability Ordinance, 1999 is a special law with overriding effect over other laws and provided that the transaction/act complained of falls within section 9 of the National Accountability Ordinance, 1999, thus, National Accountability Bureau has jurisdiction over the matter and can proceed to inquire and investigate into the same. The offences alleged to have been committed by the petitioners come within the purview of white collar crimes and such offence

affect the society at large. The allegations against the petitioners were not only of cheating or defrauding an individual but causing huge loss to Public-exchequer. Hence, prima facie, the case of the petitioners falls in exceptional circumstances where the bail could only be granted when the court comes to the conclusion that material available on record, prima facie, is not sufficient to link the accused with the commission of offence as this brings a case within the meaning of "further enquiry" where release of the accused becomes a matter of right.

13. We find that National Accountability Ordinance, 1999 was promulgated as a measure for recovering state money and for checking corruption and corrupt practices and for taking action against those who misused their power and authority while enriching themselves at the cost of society. Therefore, to say that this was a civil liability under the circumstances is no argument for a case covered by the National Accountability Ordinance, 1999. It is worth mentioning here at this juncture that alleged offence and its mode of commission falls within the ambit of "white collar crimes" which has its own salient features and peculiar circumstances and, therefore, a line of distinction is to be drawn between an ordinary offence and that of a "white collar crime" which is to be kept in view while sifting the evidence and approach for such evaluation must be dynamic so that conjectural presumptions and hyper technicalities having no nexus with the merits of the case could be eliminated even at the bail stage.

Thus, it is imperative for the accused to show that he has no nexus with crime even if the material collected by prosecution is tentatively taken as correct. On the other hand, the available record suggests that the petitioner Ahad Khan Cheema was key-player and as the documentation was his domain so he managed the award of contract to his co-accused i.e. the petitioner Muhammad Shafique Alam Faridi. Thus, in our view, there was sufficient incriminating material to believe that the petitioners were linked interse and with the offences with which they are charged. The charged offence is one of causing loss to public Exchequer, thus, it was not an ordinary offence.

The ground of hardship/inordinate delay in conclusion of trial was also urged by the learned counsel for the petitioner. The record divulged that the petitioner was arrested in this case on 21.02.2018. The trial commenced on 18.02.2019. During trial, nine witnesses have reportedly been examined. However, the interim order sheet of the learned trial court appended by the learned counsel for

the petitioner along with Criminal Miscellaneous No.1 of 2020 reflects that certain adjournments were sought for on behalf of the petitioner, thus, the delay cannot be attributed to the prosecution alone. This question was also dealt with by the apex Court in case titled 'Tallat Ishaq v. National Accountability Bureau through Chairman and others' (PLD 2019 SC 112) wherein their lordships ruled:

(d) In an appropriate case through exercise of its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 a High Court may grant bail to an accused person arrested in connection with an office under the National Accountability Ordinance, 1999 and section 9(b) of the said Ordinance does not affect the jurisdiction of a High Court conferred upon it by the Constitution. The Constitutional Jurisdiction of a High Court is, however, an extraordinary jurisdiction meant to be exercised in extraordinary circumstances and not in run of the mill cases or as a matter of course.

(e) .

(f) Ordinarily bail is allowed to an accused person on the ground of delay only where the delay in the trial or the period of custody of the accused person is shocking, unconscionable or inordinate and not otherwise. The primary consideration for grant of bail on the ground of such delay is undue hardship and more often than not prima facie merits of the case against the accused person are also looked into before admitting him to bail on the ground of delay.

14. The petitioners have been specifically named and assigned specific role as perpetrators of the crime. The statement of the PWs recorded during the investigation can validly be taken into consideration at this stage. There is sufficient material to believe that the petitioners are linked with the offences and one of the charge is causing huge loss to public exchequer, therefore, it was not an ordinary offence. Reference can be made to the case of "Muhammad Yousaf Butt v. P.C. Abdul Lateef Shar and another" (2012 SCMR 1945) wherein the Hon'ble Supreme Court of Pakistan cancelled the bail with the following observations:

"We are cognizant of the law that once the High Court has exercised his discretion of granting bail to the respondent No.1, there has to be very special and overwhelming circumstances to cancel the bail. In the case of "Naseem Malik v. The State" (2004 SCMR 283), this Court has

> cancelled the bail on inter alia, the ground that the accused was specifically named and comprehensively described in the FIR as one of the conspirators and perpetrators of the crime and it was noted that the statement of co-accused implicating the accused can validly be taken into consideration while deciding such matters. As discussed above, there is an apparent connection of the respondent No.1 in the commission of alleged crime in this case and there is sufficient material to connect him with the same. The High Court apparently has misread the record in this regard in granting of bail to respondent No.1. We, therefore, do not consider this case was such that respondent No.1 ought to have been granted bail."

The petitioner Ahad Khan Cheema, at the relevant time, was a public servant. The petitioners played definite roles. The record suggested that they facilitated each other to obtain pecuniary advantage within the meaning of section 9 of National Accountability Ordinance, 1999. Their acts were anything but not intended in the public interest. It was argued that no actual loss has been occasioned thereby to public-exchequer but record reflects otherwise. It goes without saying that white collar crimes of such a nature affect the whole society even though they may not have any immediate victim.

15. Considering in totality the facts and circumstances of the case and the allegation against the petitioners, the material available on record connects them with commission of alleged offence, therefore, they do not deserve to be enlarged on bail. Accordingly, we proceed to dismiss the petitions, being meritless.

However, it is clarified that the above observations are based on available record and tentative in nature, thus, the learned trial court shall not be influenced thereby in any manner, at trial.

We may also observe that it is an old matter and still under adjudication, thus, the learned trial court is directed to conclude the trial within four months after the receipt of copy of this order.

MH/A-31/L Petition dismissed.

2020 P Cr. L J 1004
[Lahore]
Before Sardar Ahmed Naeem and Farooq Haider, JJ
Mrs. SHAHINA SHAKEEL and another---Petitioners
Versus
The CHAIRMAN NAB and others---Respondents

Writ Petitions Nos. 15993 and 17809 of 2020, heard on 7th April, 2020.

(a) National Accountability Ordinance (XVIII of 1999)---

----S. 19--- Notice for attendance--- Necessary ingredients---Notice should contain a specific reference of required information in respect of the offence alleged or any material which can suggest that provision of Ordinance/Rule or order made thereunder have been contravened.

(b) National Accountability Ordinance (XVIII of 1999)---

----Ss. 9(a)(b) & 24---Qanun-e-Shahadat (10 of 1984), Art. 129(e)---Bail, refusal of---Physical remand---Official acts---Petitioner was arrested by NAB who sought his release on bail on the plea that his arrest was illegal and physical remand allowed by Accountability Court was also illegal---Validity---Warrants of arrest were issued by Chairman NAB who had also authorized inquiry---Allegation against petitioner was regarding the period when "Mian Muhammad Nawaz Sharif" was Chief Minister of Punjab---Petitioner had acknowledged receipt of call up notice and did not plead that contents of those notices were ambiguous or incomplete and Accountability Court had extended remand of petitioner---Plea of his false involvement on account of mala fide in retaliation to video clip or audio transcript at bail stage was not well founded---Presumption under Art. 129(e) of Qanun-e-Shahadat, 1984 was that official acts were regularly performed i.e. with due regard to relevant formalities and within the relevant powers and that a conclusion of excess and irregularity was not to be reached lightly--- No immunity from accountability was available to any person particularly when the matter concerned commission of crime or fraud and question was loss to public exchequer and misuse of public power---Question of violation of Art. 13 of the Constitution did not arise at bail stage---If someone hampered the inquiry deliberately and with malice, provision of S. 31 of

National Accountability Ordinance, 1999, would take care of such situation---No law conferred immunity from criminal prosecution--- Information laid down before Accountability Court was not false which raised suspicion that petitioner had committed offence within the purview of National Accountability Ordinance, 1999---Custody of petitioner could neither be termed as illegal nor improper for the purpose of maintaining a Constitutional petition to declare his arrest as unlawful---High Court declined to interfere in remand order passed by Accountability Court---Petition was dismissed in circumstances.

Muhammad Hanif and 2 others v. National Accountability Bureau (NAB), Sindh through Director General, Sindh and another PLD 2007 Kar. 429; Rehman v. The State 2009 SCMR 181 and Maj-Gen. (Retd.) Mian Ghulam Jilani v. The Federal Government through the Secretary, Government of Pakistan, Interior Division, Islamabad PLD 1975 Lah. 65 ref.

Brig. (Retd.) Imtiaz Ahmad v. Government of Pakistan through Secretary, Interior Division, Islamabad and 2 others 1994 SCMR 2142 fol.

Aitzaz Ahsan, Shaukat Ali Javed, Shahid Saeed, Barrister Tayyab Jan and Malik Amjad Pervaiz for Petitioners.

Syed Faisal Raza Bukhari, Muhammad Asim Mumtaz Special Prosecutors for NAB, Muhammad Ali Shahab, Deputy Prosecutor General with Muhammad Abid Hussain AD/IO, Muhammad Sultan Nazir, case officer and Khawar Ilyas Director for the State.

Date of hearing: 7th April, 2020.

JUDGMENT

SARDAR AHMED NAEEM, J.---Through this single order, we intend to decide the above mentioned petitions as common questions of law and facts are involved therein.

2. Petitioner, namely, Shahina Shakeel filed Writ Petition No.15993-2020, on 14.3.2020, against the respondents and prayed for the following relief:

(i) Accept the instant petition;

(ii) Declare that the conduct of respondents Nos.1, 2, 4, 5 and 6 is contrary to the Directive/Policy Guidelines dated 08.10.2019 and including the warrant of arrest dated 12.03.2020 are illegal, without jurisdiction, arbitrary, mala fide and to set them aside accordingly;

(iii) Declare that the conduct of respondent No.3 refusing to provide reasons for the order dated 13.03.2020 on the fictitious grounds since it was the first order of remand and the learned Judge was not required to give any reasons under section 24(d), N.A.O., 1999 is illegal without lawful authority and of no effect in law and to set it aside accordingly;

(iv) Declare the arrest and continued custody and detention of the detenue by the respondents/NAB as illegal and without lawful authority with the detenue being discharged and set at liberty forthwith;

(v) Declare that any action contrary to the Directive/Policy Guidelines dated 08.10.2019 against the detenue would be discriminatory, illegal and ultra vires thereof;

(vi) Restrain the respondents/NAB from acting in violation of the Directive/Policy Guidelines dated 08.10.2019 or arresting the detenue in any other manner in an action with the allegations that are the subject matter of the instant petition; and

(vii) Grant such other relief to the petitioner as this Hon'ble Court may deem just and appropriate in the circumstances of the case"

3. The Court vide order dated 16.3.2020 requisitioned a report-para-wise comments from the NAB authorities, submitted by the respondents.

4. Mir Shakil Ur Rehman, petitioner filed Writ Petition No.17809-2020 and sought the following declarations and directions:

(i) Accept the instant petition;

(ii) Declare the warrant of arrest dated 12.3.2020 as illegal, arbitrary, mala fide and to set it aside accordingly;

(iii) Declare that the conduct of respondent No.3 in refusing to provide reasons for the order dated 13.3.2020 (and orders issued subsequent thereto) as void, illegal, without lawful authority and of no effect in law and to set them aside accordingly;

(iv) Direct the release of the petitioner forthwith, on such conditions, as this Honourable Court may deem appropriate;

(v) Restrain the respondents/NAB from acting in violation of the Directive/Policy Guidelines dated 08.10.2019 or arresting the petitioner in any other manner in an action with the allegations that are the subject matter of the instant petition; and

(vi) Grant such other relief to the petitioner as this Honourable Court may deem just and appropriate in the circumstances of the case"

5. The facts as emerged from the record, in brief are that two complaints were received by the NAB on 26.12.2019 and 10.02.2020 with the allegation that the petitioner, namely, Mir Shakil Ur Rehman having general power of attorney of Hakim Ali, Hadayat Ali and others was illegally allotted 54 plots measuring 01-Kanal each against 180-Kanals and 18-marlas of land acquired in Mauza Niaz Baig, Lahore by way of exemption. The allegation of undue favour to the petitioner in violation of the relevant laws/rules governing exemption with the connivance of the then Chief Minister Punjab, namely, Mian Muhammad Nawaz Sharif, was in addition to that.

6. The complaint verification was authorized by respondent No.1 vide concurrence dated 10.2.2020. The authority also authorized an enquiry against Mir Shakil Ur Rehman, the petitioner and ex-Chief Minister Punjab Mian Muhammad Nawaz Sharif, officers/officials of LDA and others vide Letter No.3-1(1)(7599)/L/MW-I/NAB/HQ/2020 dated 12.3.2020. The chairman NAB also issued warrants of arrest of the petitioner Mir Shakil Ur Rehman, whereupon he was arrested on 12.3.2020 in execution of warrants of arrest. Hence, these petitions.

7. Learned counsel for the petitioners, inter alia, contends:

(i) that it was thirty-four years old matter, civil in nature does not fall within the ambit of N.A.O., 1999,

(ii) The prosecution has not collected any incriminating evidence against the petitioner and there was no justification to arrest him;

(iii) that the exemption policy in respect of M.A Johar Town has been misconstrued and misinterpreted as the case of the petitioner was that he was entitled to 30 percent exemption in the shape of developed plots;

(iv) that the petitioner was summoned at the stage of complaint verification and was arrested on 12.3.2020 and that warrants of arrest by respondent No.1 were also issued on the same date without affording an opportunity of hearing to the petitioner, thus, smacks mala fide;

(v) that the remand is not to be granted mechanically without application of mind, rather, it is to be granted only in cases of real necessity and that the detention of any person for want of competent or valid remand

order would amount to illegal confinement and the same can be a valid ground to release that person on bail;

(vi) that the petitioner was suffering from various ailments which cannot be attended to or addressed by the facilities currently available at the place of his custody;

(vii) that there is violation of SOP dated 08.10.2019 which has binding force and cannot be completely bypassed or ignored;

(viii) that arrest of the petitioner is a result of vindictiveness as an embarrassing video of respondent No.1 went viral. Geo News while broadcasting said news questioned that why authenticity of video should not be believed blindly;

(ix) that the Constitution of Islamic Republic of Pakistan, 1973 jealously guards the respect of a citizen provides through Article 4 thereof that to enjoy the protection of law and to be treated in accordance with law is an inalienable right of every citizen whereas, Article 9 of the Constitution protects every person against any deprivation of life/liberty save in accordance with law.

In support of his contentions, learned counsel for the petitioners, has placed his reliance on "Muhammad Hanif and 2 others v. National Accountability Bureau (NAB), Sindh through Director General, Sindh and another" (PLD 2007 Karachi 429), "Rehman v. The State" (2009 SCMR 181) and "Maj. Gen. (Retd). Mian Ghulam Jilani v. The Federal Government through the Secretary, Government of Pakistan, Interior Division, Islamabad" (PLD 1975 Lahore 65)".

8. On the other hand, learned Special Prosecutor for NAB contended that the complaint verification was authorized by respondent No.1 and enquiry was also authorized followed by warrants of arrest, thus, the arrest of the petitioner was neither improper nor illegal, in any manner; that the petitioner was not arrested in pursuit of any business transactions, rather, as beneficiary of the loss to the public exchequer and the said offence comes under the ambit of N.A.O., 1999; that the factual controversies have been raised which cannot be resolved in constitutional jurisdiction; that the PWs examined under section 161, Cr.P.C., so far have implicated the petitioner; that the call up notice was perfectly legal and flawless; that the remand orders of the petitioner are based on cogent and solid reasons and the enquiry was still underway, thus, the petitions, both, are liable to be dismissed.

9. Before dilating upon merits of this case, it would be appropriate to examine the scope of National Accountability Ordinance, 1999 regarding enquiry, investigation and submission of report. A bare reading of section 18(b) of the Ordinance insists that an enquiry/investigation could be initiated either by the Chairman or an officer of the NAB duly authorised by him, thus the officer, so authorised shall enjoy all the powers as are available to all officers incharge of a police station within the meaning of Chapter-XIV of the Criminal Procedure Code. This aspect is also confirmed by section 18(e) of the Ordinance. Whereas, section 19 of the Ordinance provides additional powers of the officer conducting enquiry/investigation. It is manifest from section 19(c) of the Ordinance that authorised officer has powers to examine any person acquainted with facts of the case including the witness or an accused as well. However, when a notice is issued under this section, the person, so required to be examined, such notice should contain a specific reference of required information in respect of the offence alleged or any material which can suggest that the provision of Ordinance/Rule or Order made thereunder have been contravened. Keeping in view the above touchstone, we can examine whether call up notice served upon the petitioner, prima facie, serves its purpose. The impugned call up notice is reproduced hereunder:-

"2. You are required to appear in person along with complete record/documents to record your plea pertaining to illegal Exemption of 54x plots in Block-H. Johar Town Phase-II/allotted to you in the year 1986, being the holder of General Power of Attorney on behalf of Hidayat Ali and Hikmat Ali, by the then Chief Minsiter, Punjab, Mian Muhammad Nawaz Sharif in violation of the relevant Laws/Rules before Ms. Nirmal Hasni, Deputy Director, complaint verification Cell NAB Complex, Thokar Niaz Baig, Lahore on 05th March, 2020 at 10:00 a.m., positively, without fail".

Grounds of arrest are also given hereunder:

(a) Accused Mir Shakeel Ur Rehman in connivance with officers/officials of LDA, Ex-Chief Minister Mian Muhammad Nawaz Sharif and others illegally got exempted/allotted 54 x plots measuring 1x Kanal each situated at Canal Bank H-Block, M.A Johar Town, Lahore in sheer violation of provisions of Exemption Policy of 1986 formulated for

M.A Johar Town, Lahore etc. against 180 x Kanals of land purportedly acquired in Mouza Niaz Baig, Lahore.

(b) Accused got allotted/exempted these plots in sheer violation of Exemption Policy and illegally obtained all the plots of 1 x Kanal each despite the fact that as per Exemption Policy, maximum 15 x plots of 1 x Kanal denomination could be exempted/allotted but accused being in league with co-accused illegally got exempted 54x plots measuring 1 x kanal each including 2 x streets and in a compact block at prime location on canal.

(c) The accused in connivance with other co-accused persons illegally got included 2 x streets which were a thorough fare/state land in illegally exempted plots against the rules/regulation and law.

(d) The land so acquired was situated in 3 x different chunks/pockets but in violation of rules a compact block of land was obtained/allotted to the accused.

(e) In order to cover himself, the accused in connivance with other co-accused persons transferred the illegally exempted plots in the names of his wife as well as minor children and then got transferred the same in his own name.

(f) Furthermore, the accused in connivance with co-accused persons got allotted excess land at throw away price, therefore, accused obtained illegally pecuniary advantages through illegal means.

(g) The accused Mir Shakeel Ur Rehman is an influential person and may tamper the prosecution record, so his arrest is necessary;

(h) Further said accused may abscond abroad, so to restrict his abscondance his arrest is necessary.

10. A perusal of the above notice and grounds of arrest reflects that enquiry being conducted is to for which purpose the examination and production of documents are necessary, is evident, therefore, call up notice cannot be declared as illegal, in particular, when the petitioner has not challenged the contents of call up notice or referred to some ambiguity.

11. Learned counsel for the petitioner has thrown a serious challenge to remand orders dated 13.3.2020 and 25.3.2020 by submitting that learned Accountability Court acted with excessive coercion and failed to exercise the authority vested in him. A review of the record demonstrates that application

under section 24(D) of National Accountability Ordinance, 1999 for obtaining 15-days physical remand of the petitioner was moved by Muhammad Abid Hussain, Assistant Director/Investigating Officer of NAB and the learned Administrative Judge (Accountability Court), Lahore, vide order dated 13.03.2020 allowed 12-days remand after hearing the parties and observed as under:-

> 'The contention by learned counsel for the accused that the accused is entitled to be discharged from the case. The perusal of record shows that Mir Shakeel ur Rehman accused has yet to explain the extra ordinary exemption in his favour by the then Chief Minister Punjab. Therefore, the contention by the learned counsel for the accused is premature, therefore, the physical remand of the petitioner was extended till 07.04.2020 through a detailed and well-reasoned order dated 25.03.2020.

12. The petitioner is still under custody and on physical remand till 07.04.2020. The legal requirements of the grounds and substance of arrest were duly/admittedly conveyed to him as envisaged under section 24(a) of the National Accountability Ordinance, 1999 and Article 10 of the Constitution of Islamic Republic of Pakistan, 1973. A well reasoned order was passed by learned Administrative Judge after satisfying its judicial conscience as there were reasonable grounds for believing that accusations or information were well founded justifying custody of the petitioner. The argument of learned counsel for the petitioner that it was a transaction between the private parties and, thus, NAB is precluded to interfere in the matter has no force as transaction between the parties is not the dispute rather exemption of 54 plots along with two streets is the subject matter of the enquiry. A review of the record demonstrates that the petitioner got General Power of Attorney from Hidayat Ali, Hikmat Ali and others on 22.05.1986, for making statement before the L.D.A. He filed the application for interim development of the land on 04.06.1986, summary was approved on 11.07.1986 and 54 kanals land along with area of two streets were exempted on 05.08.1986. Ultimately, the petitioner sold the said land to his wife/children on 29.09.1986 against consideration of Rs.18,00,000/- and then the entire land was transferred in favour of the petitioner on 02.12.1998. At this juncture, it may be mentioned that petitioner being Mukhtar-e-Aam got exempted 54 kanals of land situated at M.A. Johar Town facing canal along with

02 streets which were merged/formed into a bigger plot of 58 kanals 18 marlas. It was asserted that the petitioner paid the outstanding price/dues of the excess land but it goes without saying that neither through exemption policy nor under any other law state land comprising upon the area of two streets/thoroughfare could be given to anyone, which also resulted into smashing/destroying the lay out plan/map of the scheme. Even the entitlement of the petitioner to have the excess land measuring 04 kanals 18 marlas is not borne out from the available record.

Another limb of the argument was misreading and misinterpretation of the exception policy. Suffice it to observe that question of misinterpretation of 'exemption policy' does not arise as the allegation against the petitioner is that he in connivance with holders of concerned public office, through illegal means i.e. in multiple violations of 'Exemption Policy' and law obtained valuable property including state land i.e. area of two streets/thoroughfare, which prima facie, attracts offence under section 9(a) of the National Accountability Ordinance, 1999; furthermore, the above available record suggests that exemption policy was stretched in favour of the petitioner as reflected by the statements of the then Director General L.D.A. and Secretary to Chief Minister, recorded during the enquiry as it was recommended that this case may not be quoted as precedent. Admittedly the matter is 34 years old but the National Accountability Ordinance, 1999 has retrospective effect and the matter squarely falls within the domain of National Accountability Bureau in the light of section 2 of the National Accountability Ordinance, 1999.

13. Another ground urged by the learned counsel for the petitioner was his ailment as he was suffering from different/multiple diseases. To augment his contention, learned counsel for the petitioner referred two Photostat copies of certificate of Acupuncturist, namely Hellen Attwool and Dr. Nazar Qureshi. The certificates, both, indicate that petitioner was patient of "Tinnitus" and was advised M.R.I. for the treatment of kidney pain and headache. He was also referred to consultant orthopaedic surgeon for management of his disease. A similar submission was made by the learned counsel when Writ Petition No.15993-2020 was taken up by the Court and on 16.03.2020, Special Prosecutor, NAB made the following statement:

> " Learned Prosecutor submits that the detenu shall be provided immediate medical checkup, daily medical checkup, CPAP machine (for sleep

> Apnea), medicines, home food, clothes, newspapers, books, writing material and will be permitted to see his blood related relatives, his counsels (who are signatory of the power of attorney) and Dr. Azmat, his personal physician whenever so required. However, the request of the petitioner will be entertained in accordance with law".

Learned counsel for the petitioners has not appended any material on record that the above diseases are hazardous to his life.

14. Learned counsel for the petitioners seeking shelter of Memo No.3-5/COD/NHQ/19/(48-P/S) dated 08.10.2019 on the subject "Procedure for summoning of businessmen in NAB proceedings/policy guidelines" contended that the petitioner was never delivered a questionnaire and the petitioner could not have been examined in disregard of the said policy. Assuming that the petitioner is a businessman but the matter under enquiry is not regarding a business or business transaction, thus the petitioner could not make out a case to avail the benefit of said policy.

15. It was argued that the petitioner was involved in this case by respondent No.1 as the petitioner being head of Jang/Geo Group continued factual reporting including audio/video tapes against the said respondent. However, it was a mere assertion and no admissible material was available on record in support of such assertion.

16. It is not denied by the petitioner that the warrants of arrest were issued by Chairman NAB and that he also authorized enquiry on 12.3.2020. The allegation against him is regarding the period, when Mian Muhammad Nawaz Sharif was Chief Minister Punjab. He has acknowledged the receipt of call up notice and has not pleaded that contents of said notice were ambiguous or incomplete. The learned Administrative Judge Accountability Court extended remand of the petitioner. The plea of his false involvement on account of mala fide in retaliation to video clip or audio transcript at this stage does not appear to be well founded. Under Article 129(e) of Qanun-e-Shahadat, there is presumption that official acts have been regularly performed i.e. with due regard to the relevant formalities and within the relevant powers and that a conclusion of

excess and irregularity is, therefore, not to be lightly reached. No immunity from accountability is available to any person particularly when the matter concerns the commission of crime or fraud and the question being of loss to public exchequer and misuse of public power, thus, question of violation of Article 13 of the Constitution also could not arise. If someone hampers the enquiry deliberately and with malice section 31 of National Accountability Ordinance, 1999 has also taken care of such like situation. There is no law conferring immunity from criminal prosecution. The information laid before the Judge Accountability Court was not false, which raised suspicion that petitioner committed the offence within the purview of National Accountability Ordinance, 1999 and, thus, his custody can neither be termed as illegal nor improper for the purpose of maintaining a constitutional petition to declare his arrest as unlawful. Perusal of the case laws cited by learned counsel for the petitioners reveals that the facts and circumstances of the said cases were not identical to the facts and circumstances of the case in hand and are distinguishable and not applicable to the facts and circumstances of the instant case. In such like cases regarding exercise of writ jurisdiction, the apex court in case titled "Brig. (Retd.) Imtiaz Ahmad v. Government of Pakistan through Secretary, Interior Division, Islamabad and 2 others" (1994 SCMR 2142), in para 12 of page 2153 observed as under:

> "12. The power under Article 199 of the Constitution is the power of judicial review. That power "is a great weapon in the hands of Judges, but the Judges must observe the Constitutional limits set by our parliamentary system on their exercise of this beneficial power, namely, the separation of powers between the Parliament, the Executive and the Courts". (Lord Scarman in Nottinghamshire C.C. v. Secretary of State (1986) (All ER 199, 204). Judicial review must, therefore, remain strictly judicial and in its exercise, Judges must take care not to intrude upon the domain of the other branches of Government. As was

succinctly put by Hamoodur Rehman, J. (as he then was) in Mir Abdul Baqi Baluch v. The Government of Pakistan (PLD 1968 SC 313, 324), under a Constitutional system which provides for judicial review of executive actions:-

> "It is, in my opinion, a fallacy to think that such a judicial review must be in the nature of an appeal against the decision of the executive authority. It is not the purpose of judicial authority reviewing executive actions to sit on appeal over the executive or to substitute the discretion of the Court for that of the administrative agency".

Seeking guidance from the observations of their lordships and respectfully following the same, we proceed to dismiss the above petitions, being meritless and premature.

17. Before we part with this judgment, it may be mentioned that as the matter is still being enquired and at its initial stage, however, the petitioner may avail the remedy for his release on bail at appropriate stage, if so advised.

18. It is also clarified that the observations made above are based on available material and tentative in nature, thus, the learned trial court shall not be influenced thereby in any manner, at trial.

MH/S-21/L Petition dismissed.

PLJ 2020 Cr.C. (Lahore) 852

Present: **SARDAR AHMED NAEEM, J.**

AAMIR MATEEN--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 72818 of 2019, decided on 16.3.2020.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail before arrest, confirmed--Dishonoured of cheque--Specific role of executing a cheque--Nominated in FIR--**Held:** Accused could not establish that his intended arrest was tainted with *mala fide*--I.O. confirmed involvement of accused--Accused had failed to make out a case for confirmation of *ad-interim* bail--Bail was dismissed. [P. 853] A

Mr. Irfan Hayat Bajwa, Advocate with Petitioner.

Mr. Muhammad Irfan Zia, Deputy Prosecutor General for State.

Mr. Ashtar Ausaf Ali, Advocate for Complainant.

Date of hearing: 16.3.2020.

ORDER

Aamir Mateen, petitioner seeks pre-arrest bail in case registered *vide* F.I.R. No. 630/2019 dated 18.06.2019, under Section 489-F, P.P.C at Police Station Iqbal Town Lahore.

2. Allegedly, the petitioner issued a bogus cheque in favour of the complainant, dishonoured after the presentation.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the incident was reported with reasonable promptitude. The petitioner is nominated in the crime report with specific role of executing a cheque in favour of the complainant, allegedly, dishonoured after its presentation. The version of the complainant is supported by the disputed cheque as well as cheque return memo. The statement of PWs recorded under Section 161, Cr.P.C. also strengthened the prosecution story. Deeper appreciation of evidence cannot be undertaken at this stage and the Court only has to sift the material in a

tentative manner. Even otherwise, pre-arrest bail is not a substitute for post-arrest bail. The apex Court in a recent judgment titled *"Ghulam Farooq Channa v. Special Judge ACE (Central-I) Karachi & another"* passed in Criminal Petition No. 169 of 2020 observed that remedy oriented in equity cannot be invoked in every run of the mill criminal case, *prima facie* supported by material and evidence, constituting a non-bailable/ cognizable offence, warranting arrest, an inherent attribute to the dynamics of Criminal Justice System with a deterrent impact; it is certainly not a substitute for post-arrest bail. Reliance in this respect can also be placed on *"Rang Abdul Khaliq v. The State and others"* (2019 SCMR 1129). Learned counsel for the petitioner also could not establish that his intended arrest was tainted with *mala fide*. The Investigating Agency confirmed the involvement of the petitioner in this case. In the circumstances, the petitioner failed to make out a case for confirmation of ad-interim bail.

4. In view of the above, there is no merit in this petition which is hereby dismissed. Ad-interim pre-arrest bail earlier granted to the petitioner is recalled.

(S.A.B.)

PLJ 2020 Cr.C. (Lahore) 994

Present: **SARDAR AHMED NAEEM, J.**

RUKHSANA MUZAMMIL--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 1092-B of 2020, decided on 5.3.2020.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 302--Bail before arrest, confirmed--Qatl-i-amd--Nominated through supplementary statement--Allegation of lalkara--Delay of 3 hours--No specific role except lalkara was attributed--No recovery was effected--It is difficult to prove element of *mala fide* by accused through positive/solid evidence/material and same is to be deduced and inferred from facts and circumstances of case--*Mala fide* was asserted in petition and there was no allegation of misuse of ad-interim pre-arrest bail--It is settled by now that liberty of a person is valuable right guaranteed under constitution and one cannot be refuted premium of bail only on ground of involvement in a heinous offence--Such aspect was sufficient to lean in favour of accused for grant of pre-arrest bail. [Pp. 995 & 996] A

Ch. Babar Waheed, Advocate for Petitioner.

Ms. Umm-ul-Baneen, District Public Prosecutor for State.

Mr. Umar Hayat Bhatti, Advocate for Complainant.

Date of hearing: 5.3.2020.

ORDER

Rukhsana Muzammil, petitioner seeks pre-arrest bail in case registered *vide* FIR No. 554 dated 21.10.2019 at Police Station Housing Colony, District Sheikhupura for offence under Section 302 PPC.

2. The complainant reported Qatl-i-Amd of his real brother, namely, Muhammad Usman, the deceased against unknown accused. Later on, the petitioner was nominated through supplementary statement with the allegation of raising lalkara.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the FIR was registered with unexplained delay of three hours. The petitioner is not nominated in the crime report. Her name find mentioned in the supplementary statement of the complainant recorded on the same day. The petitioner admittedly had. neither caused any injury to the deceased nor attempted to do so, rather the complainant saddled the co-accused namely, Sumeer Sohail with responsibility of causing sole fatal shot to the deceased. Admittedly, the petitioner, was empty handed and no recovery is to be effected from her. The co-accused, namely Arsalan with somewhat similar role has been admitted to pre-arrest bail which is still intact. The apex Court in the case of *"Mst. Zakia Moazzam versus The State"* confirmed pre-arrest bail of an accused who had been imputed the proverbial *lalkara*. Reliance in this context can also be placed on *"Rizwan Ahmad and 5 others Versus The State and another"* (2012 PCr.LJ 73) and *"Mst. Suqhran Bibi versus The State and another"* (2019 PCr.LJ 1297). The investigating agency found connection of the petitioner with this occurrence on the basis of the call data, the record divulged which cannot be appreciated at this stage and would be adjudged by the learned trial Court after recording evidence at trial. Even otherwise, it is difficult to prove the element of *mala fide* by the accused through positive/solid evidence/material and the same is to be deduced and inferred from the facts and circumstances of the case. *Mala fide* was asserted in the petition and there was no allegation of misuse of ad-interim pre-arrest bail. It is settled by now that liberty of a person is valuable right guaranteed under the constitution and one cannot be refuted the premium of bail only on the ground of involvement in a heinous offence. Such aspect was sufficient to lean in favour of the accused for grant of pre-arrest bail.

4. For the foregoing reasons, the application is allowed and the ad-interim pre-arrest bail earlier granted to the petitioner is confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court/Duty Judge.

(S.A.B.) Bail confirmed

PLJ 2020 Cr.C. (Note) 70

[Lahore High Court, Lahore]

Present: **SARDAR AHMED NAEEM, J.**

MUHAMMAD RAFIQUE and others--Appellants

versus

STATE and others--Respondents

Crl. A. No. 524, 698 and Crl. Rev. No. 409 of 2016, heard on 10.5.2018.

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

----Ss. 367-A & 377--Sentence--Challenge to--Charge of committing sodomy--Unexplained delay of six hours--No independent corroboration of statement--No direct or indirect evidence--No source of light--Conduct of victim--No hue and cry on way was raised by victim--No injury, mud, or dust was observed during medical examination--Validity--There is a delay of one day in lodging FIR--No doubt in FIR, delay was explained but complainant did not state so in his statement before Court--Narration given in FIR not being a substantive piece of evidence, explanation given in FIR thus, cannot be considered--Since, at trial stage prosecution did not care to explain palpable delay--It is a case of unexplained delay of about six hours--This was evidence brought to connect appellants with commission of offence, but it is not confidence inspiring and witnesses are not reliable--Prosecution case against accused was highly doubtful and they were entitled to benefit of doubt. [Para 10 & 13] A & C

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

----S. 342--Pakistan Penal Code, (XLV of 1860), Ss. 367-A & 377--Statement of accused--It is settled by now that no weight can be attached to a piece of evidence if not put to accused during his examination under Section 342, Cr.P.C--Report cannot be read against accused and prosecution could not prove that victim was subjected to sodomy. [Para 12] B

M/s. Adnan Liaqat and Irfan Ali, Advocate for Appellants.

Ms. Umm-ul-Baneen, Deputy Prosecutor General for State.

Mr. Sheraz Ahmad, Advocate for Complainant/Appellants (in Crl. Appeal No. 524 of 2016, Crl Appeal No. 698 of 2016 and Criminal Revision No. 409 of 2016).

Date of hearing: 10.5.2018.

JUDGMENT

Sardar Ahmed Naeem, J.--The facts giving rise to this appeal, briefly stated, are that the appellants, namely, Muhammad Rafique and Shahid Mahmood were tried by

the learned Addl. Sessions Judge, Jaranwala, District Faisalabad in case FIR No. 258 dated 20.8.2015 under Sections 367-A, 377, PPC registered at Police Station Balochani District Faisalabad on the charge of committing sodomy upon Saqlain (PW.3). They denied the charges and claimed to be tried. 2. To prove its case, prosecution examined as many as eight witnesses. Manzoor Ahmad (PW.1) was the complainant of the case. Haroon Rasheed (PW.2) was attracted to the place of occurrence on hearing the alarm of the victim, who appeared as PW.3 and supported the contents of the FIR. The victim as well as the appellants were medically examined by Dr. Sadaqat Ali (PW.4) and another important witness was Zafar Iqbal SI (PW.6) who investigated this case. The report of Forensic Science Agency Exh.PJ is to the effect that Rafique was contributory to the seminal stains.

3. When examined under Section 342, Cr.P.C., the appellants denied all the incriminating circumstances. Neither they appeared as their own witness as envisaged under Section 340(2), Cr.P.C. nor produced any witness in their defence. On conclusion of trial, the appellants were held guilty under Section 377, PPC, convicted and sentenced as under:

> ***"Under Section 377, PPC and sentenced to six years rigorous imprisonment each with fine of Rs. 20,000/-each, in default thereof, to further undergo thirty days simple imprisonment each"***
>
> ***Benefit of section under Section 382-B, Cr.P.C. was also extended to them.***

4. Feeling aggrieved, convicts have filed Criminal Appeal No. 524 of 2016 to assail the judgment rendered by the learned trial Court. Complainant also filed Criminal Appeal No. 698 of 2016 for awarding conviction under Section 367-A, PPC and Criminal Revision No. 409 of 2016 for enhancement of sentence to the appellants.

5. Learned counsel for the appellants contended that the evidence adduced by the prosecution has not been appreciated in accordance with the guiding principle laid down by the superior Courts for the appreciation of evidence in such like cases. He argued that there was unexplained delay of six hours in lodging the FIR; that Saqlain was not a reliable witness; that there was no independent corroboration of his statement; that there was no either direct or indirect evidence to suggest that the victim was subjected to sodomy; that no independent witness was cited by the prosecution; that no body has witnessed the occurrence; that there was no source of light; that it was a false case planted upon the appellants on account of political rivalry; that the prosecution case was riddled with doubts, always resolved in favour of the accused, thus, they are entitled to be acquitted.

6. Conversely, learned Deputy Prosecutor General assisted by the learned counsel for the complainant opposed this appeal with vehemence and submitted that

Section 367-A, PPC was made out; that the conviction even can be sustained on the basis of dependable solitary evidence of the victim having no axe to grind against the appellants; that the medical report was available on the file showing bruise around the anal area; that the report of Punjab Forensic Science Agency was positive; that the witnesses were cross-examined at length but no favourable material was extracted during the cross-examination; that a young boy of fourteen years was subjected to this brutal act at the hands of the appellants, thus, the sentence awarded to them may suitably be enhanced and they be also convicted under Section 367-A, PPC.

7. I have heard the arguments of the learned counsel for the parties with their able assistance and have gone through the record.

8. A review of the prosecution evidence reveals that the occurrence took place at 7.30 p.m. in the standing crops near MTM, Mills. Though PW.2 claimed to have witnessed the occurrence in the light of mills but the Investigating Officer admitted during the cross examination that he had not shown any light in the site plan Exh.PD. Admittedly, the complainant and Haroon Rasheed was not accompanying the victim at the place and time of occurrence. They were not the eye-witnesses. The victim attributed the act of sodomy against the appellants one after the other but .this fact is not mentioned in the statement of the complainant, which reflects that it was only Rafique who committed sodomy with him and similar history find mentioned in the Medico Legal Report and also admitted by the medical officer when appeared as PW.4.

9. The conduct of the victim is also to be seen. He had gone out to purchase ice from a nearby shop. He was, allegedly, abducted at gun point and was brought to a field near MTM Mills, at a distance of 2½ acres from the shop of Mudassar but the victim raised no hue and cry on the way, even, at the time and place of occurrence which is surrounded by 2/3 houses. The witnesses, namely, Haroon Rasheed, claimed to have seen the occurrence in the light of Mills but the victim took the stand that he told the complainant and Haroon Rasheed on the way that the accused committed sodomy with him. No injury, mud, or dust etc, was observed/found by the medical officer during the medical examination of the victim, on his clothes.

10. There is a delay of one day in lodging the FIR. No doubt in the FIR, the delay was explained but Manzoor Ahmad complainant did not state so in his statement before the Court. The narration given in the FIR not being a substantive piece of evidence, the explanation given in the FIR thus, cannot be considered. Since, at trial stage the prosecution did not care to explain the palpable delay, therefore, it can safely be said that it is a case of unexplained delay of about six hours.

11. The Investigating Officer has also admitted during cross- examination that no prosecution witness admitted to have seen the occurrence or while the appellants

abducted the victim. He further admitted that no body came forward during the investigation to confirm the act of sodomy/ abduction. He candidly conceded that he could not confirm his opinion qua the commission of offence till the report of chemical examiner. He gone on to add that ninety locals joined the investigation and supported the innocence of the appellants and that he found Shahid Mahmood appellant empty handed and his participation in the occurrence was not confirmed.

12. The prosecution case is, thus, based on solitary statement of Saqlain (PW.3), the alleged victim. As mentioned above, he narrated very woeful story and stated that the appellants committed sodomy with him one after the other. It is true that even solitary statement can be made basis for conviction provided that the same inspires confidence and is supported or corroborated by some other piece of evidence. He could have been corroborated by the medical evidence available on the file but the medical officer has not rendered the final opinion till the receipt of report of Punjab Forensic Science Agency. It was tendered in the evidence as Exh.PJ and cannot give support to the prosecution for the reason that in the statements of the appellants recorded under Section 342, Cr.P.C., ExhPJ was not put to the accused. It is settled by now that no weight can be attached to a piece of evidence if not put to the accused during his examination under Section 342, Cr.P.C. On account of this, the report Exh.PJ cannot be read against the appellants and, in these circumstances, the prosecution could not prove that the victim was subjected to sodomy.

13. This was the evidence brought to connect the appellants with the commission of offence, but it is not confidence inspiring and the witnesses are not reliable. The prosecution case against the appellants was highly doubtful and they were entitled to the benefit of doubt. The learned trial Court did not carefully appreciate the evidence and drew wrong conclusion, thus, the impugned judgment cannot be sustained.

14 For what has been stated above, giving them the benefit of doubt, Criminal Appeal No. 524 of 2016 is allowed, the impugned judgment is set aside and the appellants are acquitted of the charge. They shall be released forthwith if not required in any other case.

15. For the reasons mentioned above, the Criminal Appeal No. 698 of 2016 and Criminal Revision No. 409 of 2016 are also dismissed.

(S.A.B.) Order accordingly

PLJ 2020 Lahore 330
***Present*: SARDAR AHMED NAEEM, J.**
MUHAMMAD IRFAN--Petitioner
versus
EX-OFFICIO JUSTICE OF PEACE/ADDITIONAL SESSIONS JUDGE, GUJRANWALA and 2 others--Respondents

W.P No. 2409 of 2016, decided on 05.04.2016.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Business relations between parties--Report of Illaqa police--Civil dispute--Non-consideration of police report--Application of correct law--JOP obtained reply/report from Illaqa Police which suggested that, in fact, it was a civil dispute between parties and that it was basically a cheque given by way of guarantee--A similar report was filed by S.H.O. before this Court--There is no cavil to preposition that JOP is not bound to call for report/comments from police once report is requisitioned, it should be considered and must not be ignored--JOP neither considered police report nor applied correct law, thus, impugned order is liable to be set aside--Petition was allowed. [P. 331] A & B PLD 2005 Lah. 470 *ref.*

Munir Hussain Bhatti, Advocate for the petitioner.
Mr. Waqar Ahmed Ch., Assistant Advocate General along with Farooq, A.S.I.
Ch. Shoukat Mehmood Cheema, Advocate for Respondent No. 3.
Date of hearing: 05.04.2016.

ORDER

An application moved by Respondent No. 3 under Sections 22-A, 22-B, Cr.P.C. was disposed of by the learned Ex-Offico Justice of Peace, Gujranwala with the direction to the S.H.O. to proceed under the law *vide* order dated 19.01.2016, being impugned before the Court.

2. It was argued that no cognizable offence was spelt out by the contents of the application but the learned Ex-Officio Justice of Peace failed to appreciate the facts and law in its true perspective.

3. Learned counsel for Respondent No. 3 maintained the validity of the impugned order.

4. Arguments heard. Record perused.

5. The contents of the application moved by Respondent No. 3 revealed that there was business relation between the parties. Learned Ex-Officio Justice of Peace obtained reply/report from the Illaqa Police which suggested that, in fact, it was a civil dispute between the parties and that it was basically a cheque given by way of guarantee. A similar report was filed by the S.H.O. before this Court. There is no cavil to the preposition that learned Ex-Officio Justice of Peace is not bound to call for report/comments from the police once the report is requisitioned, it should be considered and must not be ignored. In this regard, reliance is placed on *"Khizer Hayat and others v. Inspector- General of Police (Punjab), Lahore and others"* (PLD 2005 Lah 470). Learned Ex-Officio Justice of Peace neither considered the police report nor applied the correct law, thus, the impugned order is liable to be set aside.

6. For the reasons mentioned above, the writ is issued and the impugned order dated 19.01.2016 is hereby set aside.

(Y.A.) Petition allowed

PLJ 2020 Cr.C. (Lahore) 1627 (DB)

Present: **SARDAR AHMED NAEEM AND TARIQ SALEEM SHEIKH, JJ.**

MUHAMMAD SHABBIR--Appellant

versus

STATE and another--Respondents

Crl. A. No. 8343 of 2019, heard on 2.5.2019.

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

----S. 9(c)--Sentence--Challenge to--Recovery of heavy quantity of narcotics--Appreciation of evidence--Discrepancies--Recovery of--Appellant was notorious drug paddler but neither any previous conviction nor any previous record was brought on file showing the appellant being the drug paddler. Moreover, the recovery in question was effected in a thickly populated area but no independent witness was associated by the Investigating Officer with the said recovery. The above discrepancies, directly relate to the allegedly recovered charas, thus, cannot be termed as minor rather the same makes the prosecution case *qua* recovery of charas from the possession of the appellant as doubtful--If offence charged against the accused is proved then any clause of section 9 of the Control of Narcotic Substances Act, 1997 can be attracted--**Held:** It is cardinal principal of law that findings of guilt against accused must rest surely in the evidence of unimpeachable character, thus, all the factors and circumstances leading to doubt have to be resolved in favour of the accused and could not be withheld in favour of the prosecution--Appeal was allowed. [P. 1631] A, B & C

Mr. Usman Sher Gondal, Advocate for Appellant.

Rana Sultan Mehmood Khan, Additional Prosecutor General for State.

Date of hearing: 2.5.2019.

JUDGMENT

Sardar Ahmed Naeem, J.--The appellant was tried for an offence punishable under section 9(c) of the Control of Narcotic Substance Act, 1997

and *vide* judgment dated 28.01.2019, rendered by Special Court CNSA/ASJ, Mandi Bahauddin, in case F.I.R. No. 551/2017 dated 09.07.2017, registered at Police Station Civil Line Mandi Bahauddin, convicted him under section 9(c) of the Control of Narcotic Substances Act, 1997 and sentenced to four years rigorous imprisonment with fine of Rs. 15,000/-, in default thereof to further undergo simple imprisonment for four months.

2. Shortly put the facts are that pursuant to spy information stated to have been received by Azhar Bashir, S.I. (PW.3) that notorious drug peddler Muhammad Shabbir is coming from Gujrat to deliver a heavy quantity of narcotics. The complainant along with his colleagues constituted a raiding party, made a "Nakabandi" at Purani Mandi, Rasool Road. At about 08:15 P.M., a Hi-Ace van was stopped in front of Government Boys School and the accused, on seeing the police party, tried to manage his escape, who was apprehended. Upon his personal search two packets of charas (weighing 700 gram each) was recovered from him. Out of the recovered charas, 35 gram from each packet was separated for chemical analyses and the remainder was sealed into another parcel. He then drafted the complaint (Exh.PB) and dispatched through Azhar Iqbal 1290/C for the registration of formal F.I.R.

3. Thereafter, report under section 173, Cr.P.C. was submitted. A formal charge was framed. The appellant pleaded not guilty and claimed trial. At trial, Muhammad Waris No. 438/C appeared as PW.1, Muhammad Shoaib 457/C was examined as PW.2, Azhar Bashi, S.I. entered the witness dock as PW.3, Asjid Imran 891/C appeared as PW.4, Ghulam Abbas T/ASI appeared as PW.5 and Syed Qalib Abbas was examined as PW.6.

4. Learned Assistant District Public Prosecutor after tendering into evidence report of Punjab Forensic Science Agency (Exh.PD), closed its case.

5. In his statement recorded under section 342, Cr.P.C, the appellant pleaded false implication and question No. 4 "Why this case has been made against you?" was responded by the appellant in the following manners:

> "This false and frivolous case was registered against me by the police officials just to show efficiency before police high-up. Actually nothing was recovered from me. All the proceedings with regard to this case had been carried out by the police officials while sitting in the police station and I had been made escape goat in this case by the police to show their efficiency in department.
>
> The ill design and biased attitude of the police officials is evident from this fact that I was shown to be notorious drug paddler in police complaint but not a single case of such nature is ever registered against me which factor shows ulterior motive and malice of the police officials."

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

6. After evaluating the evidence and considering the merits of the case, the learned trial Court found the appellant guilty, convicted and sentenced him as highlighted above. Hence, this appeal.

7. It is contended by the learned counsel for the appellant that he was innocent and has falsely been involved in this concocted case, the charas was planted upon him by the complainant. He further contended that the prosecution case is based on surmises and conjectures and there are material contradictions in the deposition of the PWs regarding mode and manner of occurrence. He submitted that the best evidence in this case was withheld by the prosecution and thus adverse inference under Qanoon-i-Shahadat Order must be drawn against the prosecution; that the prosecution failed to prove the recovery of the contraband from the appellant. He further added that the entire prosecution case is without foundation and the impugned

judgment passed by the learned trial Court is based on misreading and non-reading of the evidence, liable to be set aside.

8. On the other hand, learned Additional Prosecutor General supported the judgment with the submission that the prosecution has successfully proved its case against the appellant and the impugned judgment does not call for any interference by this Court.

9. The occurrence in this case had taken place on 09.07.2017 at 08:00 p.m. near Purani Mandi, Rasool Road "Qainchi", Mandi Bahauddin. Consequent to a spy information a raiding party was constituted, headed by Azhar Bashir, S.I. (PW.4). A wagon Toyota Hi-Ace coming from Kharian side was intercepted by the raiding party near Government Boys School. A passenger alighted from the said wagon started running, given a chase by the raiding party and was apprehended with 1400 gram charas lying in two packets containing 700 gram each. Out of the recovered charas 35/35 gram were separated for the Chemical Analysis and the complainant prepared three sealed parcel and took into possession *vide* recovery memo. Exh.PA. The above charas was hidden in elastic belt worn by the appellant under his shirt. In their depositions, the PWs stated that the complainant drafted the complaint and dispatched the same for registration of F.I.R. through Azhar Iqbal 1290/C not produced during trial. He was also member of the raiding party but this piece of evidence was withheld by the prosecution. Thus, necessary inference must be raised against the prosecution under Article 129(g) of the Qanoon-i-Shahadat Order, 1984. The prosecution witnesses are at variance regarding the manner of occurrence. For example, PW.4 admitted during the cross-examination that the recovered contraband charas was weighed at the crime scene by the complainant on the bonnet of vehicle, whereas, PW.5 added that they were standing and the recovered material was weighed on the ground. The black elastic belt was taken into possession also reflected by recovery memo. Exh.PA but it was not produced during trial. Azhar Bashir, S.I.

entered in the witness stand as (PW.3) and admitted that there was elastic belt and a contradictory reply was given by PW.4 that he was unaware about the said elastic belt/band then worn by the appellant at the time of raid. The occurrence had taken place at 08:30 p.m. It is in the evidence that at the spot there was street light and it was on but no such light find mentioned in the site-plan. No evidence was adduced, during trial in which direction, the appellant was running and how was he apprehended by the raiding party, in particular, when he was given some chase. The prosecution witnesses mentioned that the appellant was notorious drug paddler but neither any previous conviction nor any previous record was brought on file showing the appellant being the drug paddler. Moreover, the recovery in question was effected in a thickly populated area but no independent witness was associated by the Investigating Officer with the said recovery. The above discrepancies, directly relate to the allegedly recovered charas, thus, cannot be termed as minor rather the same makes the prosecution case *qua* recovery of charas from the possession of the appellant as doubtful. It was held by the apex Court in case titled *"Muhammad Imran v. The State"* (2011 SCMR 954) that stringent sentences have been provided under Control of Narcotic Substances Act, 1997 if offence charged against the accused is proved then any clause of section 9 of the Control of Narcotic Substances Act, 1997 can be attracted. For such reason, the Act has to be construed strictly and the relevant provision of law dealing with the procedure as well as furnishing the proof are to be followed strictly in the interest of justice otherwise it becomes difficult to hold that commodity recovered from the possession of the appellant was narcotic. The rationale behind the dictum is that while dealing with such like cases special attention should be paid at the time of apprehension of the accused regarding his search, recovery proceedings and each and every detail should be brought on record so that it could be ascertained that the proceedings conducted by the Investigating Officer were

transparent. It is against the natural justice and in contravention of dictum laid down by the apex Court to convict the accused on the basis of such tainted evidence.

10. It is cardinal principal of law that findings of guilt against accused must rest surely in the evidence of unimpeachable character, thus, all the factors and circumstances leading to doubt have to be resolved in favour of the accused and could not be withheld in favour of the prosecution. The apex Court in the case of *"Tariq Pervaiz v. The State"* (1995 SCMR 1345) held as follows:

> "The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

In another recent judgment titled *"Abdul Jabbar v. The State and another"* (2019 SCMR 129), their lordships observed:

"It is settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict ... benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused."

11. In view of above discussion we set aside the conviction and sentence inflicted upon the appellant *vide* judgment dated 28.01.2019 and acquit him of the charge by giving benefit of doubt. He shall be released forthwith if not required in any other criminal case.

The case property shall be dealt with as directed by the learned trial Court and record be sent down immediately.

(S.A.B.) Appeal allowed

PLJ 2020 Cr.C. (Note) 131

[Lahore High Court, Lahore]

***Present*: SARDAR AHMED NAEEM, J.**

ABID--Appellant

versus

STATE etc.--Respondents

Crl. A. No. 743 of 2016, heard on 29.11.2017.

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

----S. 302(b)--Conviction and sentence--Challenge to--Qatl-e-amd--Motive--Appellant had business with deceased and failed to make payment of outstanding amount to deceased--Motive was concerned, there was no detail regarding volume of business and the investment made by the deceased in the business being run as a joint-partner--No specific outstanding amount was mentioned--No number of animal purchased by the appellant from the deceased was described by the witnesses--Motive was rather weak and there was no reason why the appellant committed murder of the deceased on account of recovery of outstanding amount--So far as enmity is concerned, it is double edge weapon and cuts both ways--If it is considered as sufficient motive for commission of offence, it can also be considered as sufficient for false implication as well The significance and importance of motive cannot be ignored--It cannot be sine qua non for bringing an offence home to accused, yet relevant and significant enough to determine the fact of intention and can be considered in view of facts and circumstances of the case--It is pointed out that the witnesses were neither hostile nor inimical to accused, would not stamp their testimony unnecessarily with truth--The acid test of veracity of a witness is the inherent merit of his own statement--Furthermore, mere assertion of witness does not prove that he has come forward with a true statement but the statement itself is to be scrutinized thoroughly and is to be seen as to whether in the circumstances of the case the statement is reasonable, probable or plausible and can be relied upon--If we accept the rule of assessment and appraisal of evidence, that a disinterested witness is always to be relied upon even if his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a very dangerous consequence--It is also pointed out that veracity of a witness and rule governing such aspect of the evidence is that statement of a witness must be in consonance with the probabilities fitting in the circumstances of the case and also inspires confidence in the mind of a reasonable and prudent person--If these elements are present, then the statement of a

worst enemy of the accused can be accepted and relied upon without corroboration--However, if these elements are missing then the statement of a pious man can be rejected without second thought--After evaluating the evidence led by the prosecution, that prosecution failed to prove its case against the appellants beyond reasonable doubt, thus, the impugned judgment cannot be maintained.

[Para 14, 15, 16, 17 & 19] A, B, G, H & J

1997 SCMR 457, 1995 SCMR 1627 and 2017 SCMR 986.

Motive--

----Once motive is specifically alleged then prosecution is bound to prove the same--There is no doubt that ordinarily the weakness and insufficiency of motive or even the absence of motive in murder cases cannot be considered as a circumstance to justify the acquittal but where motive would be the only reason for committing the murder and in the absence of such motive there would have been no possibility of murder at all, the complexion of the preposition would be changed. [Para 15] C & D 1999 SCMR 172

Motive--

----It is so plain a situation that the reasoning needs no illustration--Even otherwise it is well settled that the motive once set; it is imperative for the prosecution to prove such motive in failure whereof adverse inference is to be drawn and the prosecution has to suffer the consequences. [Para 15] E

PLD 1995 SC 590 and 1971 SCMR 432.

Eye-witness--

----Both the eye-witnesses are related to the deceased--They were resident of same village--It is now settled that the statements of prosecution witnesses cannot be discarded on the basis of mere relationship with the deceased but it is the intrinsic worth, which always matters. [Para 16] F

Benefit of doubt--

----It is axiomatic principle of law that benefit of doubt is always extended in favour of the accused--The case of the prosecution if found to be doubtful then every doubt I even slightest is to be resolved in favour of the accused. [Para 18] I PLD 2002 SC 1048

Mr. Nasir Mehboob Tiwana, Advocate for Appellant.

Mr. Imran Sra, District Public Prosecutor, for State.

Date of hearing: 29.11.2017.

JUDGMENT

Abid son of Walidad (appellant) alongwith Zulfiqar son of Manak (since acquitted) were tried by the learned Additional Sessions Judge, Jhang in case F.I.R. No. 517 dated 14.09.2011 for offences under Sections 302, 34, P.P.C., registered at Police Station Mochiwala, District Jhang. At the conclusion of the trial, vide judgment dated 18.03.2016, the learned trial Court acquitted Zulfiqar co-accused by extending benefit of doubt, whereas convicted and sentenced the appellant Abid as under:-

> ***Under Section 302(b), P.P.C., to life imprisonment with fine & of Rs. 1,00,000/- (rupees one lac) to the legal heirs of the deceased as compensation, in default thereof, to further undergo six months simple imprisonment. Benefit of Section 332-B, Cr.P.C. was also given to the appellant.***

2. Allegedly, on 13.09.2011 at 09.00 P.M., Abid appellant armed with .30 bore Pistol along with his co-accused Zulfiqar in furtherance of their common intention committed the murder of Sultan Ahmad.

3. After usual investigation, challan was submitted against the appellant Abid while placing him in Column No. 3 of the challan whereas Zulfiqar co-accused was mentioned in Column No. 2. The learned trial Court framed charge against both the accused to which, they pleaded not guilty and claimed trial, hence the prosecution evidence was invited.

4. The prosecution, in order to prove its case, produced as many as twelve witnesses. Ocular account was furnished by Muhammad Ramzan, complainant (PW.10) and Alam Sher (PW.11). Dr. Jahangir, Naul, Retired SMO, District Headquarter Hospital, Jhang (PW.4) conducted post-mortem examination of the dead body of Sultan Ahmad and found the following injuries on his person:--

1-A. A fire-arm wound of entrance 1 cm 1 x 1 cm through and through on the left side of abdomen upper part, margins inverted, collar of abrasion present.

1-B. A fire-arm wound of exit 1.5 cm x 1.5 cm on the back of right abdomen upper part, margins everted 13 cm from midline.

In his opinion, cause of death was hemorrhagic shock resulting from injury to the stomach and mesenteric vessels caused by Injury No. 1 which was sufficient to cause death in ordinary course of nature. Injury was ante-mortem and was caused by fire-arm. The probable duration between injury and death was about within one hour and the between death and postmortem was about 12 to 15 hours.

5. Amjad Hussain Shah S.I. (PW.7) investigated the case. On the intervening night of 13/14.9.2011, he alongwith other police officials on receiving information of occurrence reached DHQ Hospital, Jhang recorded the statement of Muhammad Ramzan complainant and sent the same to the Police Station for registration of formal F.I.R. He inspected the spot and prepared inquest report (Exh.PD) and injury statement (Exh.PE). He arrested the appellant on 10.10.2011, who on 17.10.2011, after making disclosure, got recovered pistol .30-Bore. He prepared rough site plan of the place of recovery. He found Zulfiqar co-accused innocent, Abid (appellant) guilty of the offence and submitted challan before the Court.

6. Haqnawaz, Patwari Halqa (PW.1) prepared scaled site plans (Ex.PA & Ex.PA/1). Mumtaz Hussain 1163/HC chalked out the formal F.I.R. (Exh.PF/1). Muhammad Iqbal, (PW.8) was witness of recovery of pistol .30-Bore from the possession of Abid Hussain appellant. Noor Muhammad (PW.9) identified the dead body of Sultan Ahmad deceased. Rest of the PWs are of formal nature, therefore, need not to be discussed.

7. Learned Deputy District Public Prosecutor gave up Talib Hussain and Muhammad Ramzan being unnecessary and after tendering in evidence reports of Punjab Forensic Science Agency, Lahore (Exh.PM and Exh.PM/1) and REPORT OF Chemical Examiner Punjab, Lahore (Exh.PN), closed the case for prosecution.

8. The statement of the appellant, under Section 342 of the Code of Criminal Procedure, was recorded on 29.02.2016. He refuted the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you?", the appellant replied as under:

> "All the PWs are related inter se and they have deposed against me due to suspicion."

9. The appellant neither opted to appear as his own witnesses under Section 340 (2), Cr.P.C. nor produce any evidence in defence.

10. The learned trial Court vide its judgment dated 18.03.2016, found the appellant guilty, convicted and sentenced him as mentioned and detailed above.

11. Learned counsel for the appellant contends that it was un-witnessed occurrence; that no independent witness was cited by the prosecution; that motive was not proved; that recovery of pistol .30-bore from the appellant was inconsequential; that the ocular account was in

conflict with the medical evidence; that the prosecution evidence was full of contradictions/discrepancies; that benefit of doubt was vested right of the accused, therefore, the appellant was entitled to acquittal.

12. Learned District Public Prosecutor opposed the appeal with vehemence and submitted that the appellant was specifically nominated in the F.I.R. with specific role of firing at the deceased; that the ocular account was verified by the medical evidence, which confirms the ocular account; that the witnesses have got no ill will for false implication of the appellant; that the fatal injury was attributed to him, and was corroborated by the medical evidence and the recovery of pistol .30-bore; that the contradictions/discrepancies do creep up with the passage of time and being negligible not fatal to the prosecution's, case. The judgment rendered by the learned trial Court was supported by the learned District Public Prosecutor.

13. I have considered the points raised at the bar and have gone through the record.

14. The occurrence in this case had taken place on 13.09.2011 at 09:00 P.M. within the area of Chak No. 262/JB, in the Sugarcane field of Jahangir and Manak near Kachi Puli. Allegedly, the appellant fired at the deceased, namely, Sultan Ahmed.

The motive behind this occurrence was that the appellant had business with the deceased and failed to make payment of the outstanding amount to the deceased and thus eliminated him alongwith his co-accused, namely, Zulfiqar (since acquitted). In order to establish its case, the prosecution produced as many as twelve witnesses. The ocular account was furnished by the complainant Muhammad Ramzan (PW. 10) and Alam Sher (PW.11). They accompanied the deceased to the Dera of the appellant situated in Chak No. 262-JB. After having some dialogue, the appellant took the deceased along towards the Sugarcane field. He was followed by his co-accused Zulfiqar. The complainant and the eye-witnesses followed them and claimed to have seen the occurrence in the light of torch. It was admittedly night time occurrence, which took place in the month of September 2011. The place of occurrence was surrounded by the Sugarcane filed as described by the eye-witnesses. The appellant was, allegedly, armed with pistol .30-bore and fired at the deceased in the Sugarcane field of Jahangir and Manak. The moving of the deceased alongwith the appellant from his own Dera to the sugarcane field appears to be improbable. In any case, the appellant brought the deceased with him inside the Sugarcane field, which suggests that they were close to each other. However, no blackening or tattooing was observed during the postmortem examination by the Medical Officer. The scaled site-plan was almost copied by the draftsman as admitted by the Patwari during his

cross-examination at trial. No point was shown, where Zulfiqar (acquitted co-accused) was raising lalkara. No height of the Sugarcane find mentioned in the site plan. If the crop was still standing or had been removed, there was no explanation or material available on the file. After sustaining the injury, the deceased was shifted to hospital but before reaching in hospital, he succumbed to the injuries at the main entrance of the hospital. His postmortem examination was conducted, on 14.09.2011 at 11:30 a.m. There was no reason for the postmortem examination with such noticeable delay of about fourteen and half hours, in particular, when the deceased breathed his last, while entering the main gate of hospital. All these factors suggests a possibility that the murder in issue was, in fact, un-witnessed and time was consumed by the local police in procuring and planting eye-witnesses and in cooking up a story for the prosecution. As if this was not enough the record of the case shows that the related witnesses produced by the prosecution failed to receive strong corroboration or support. A similar question came up before their lordships in *"Muhammad Ashraf v. The State"* (2012 SCMR 419), observations of the apex Court can advantageously be reproduced hereunder:

> *"If F.I.R. was recorded with such a promptitude then why the postmortem was conducted with such a delay. Even otherwise, according to P.W.3 Dr. Asghar Ali Hunjra, the time between death and postmortem was 15 to 16 hours. So, the F.I.R. was recorded with a delay and cannot be used against the appellant as a corroborative piece of evidence."*

Similarly, in the case of *"Khalid alias Khalidi and 2 others v. The State"* (2012 SCMR 327), the Hon'ble Supreme Court of Pakistan considered the delay of 13 hours in conducting the postmortem examination on the dead body of the deceased, to be an adverse fact against the prosecution and it was ruled that FIR. was not reported at the given time. Thus, this belated postmortem examination suggested some deliberation and consultation.

During the investigation, the appellant got recovered pistol .30-bore from "Dhari" on 17.10.2011. It was sent to Punjab Forensic Science Agency and was found in working order, thus, it was inconsequential.

So far as motive was concerned, there was no detail regarding volume of business and the investment made by the deceased in the business being run as a joint-partner. No specific outstanding amount was mentioned. No number of animal purchased by the appellant from the deceased was described by the witnesses.

15. I find that the learned trial Court did not appreciate that the motive was rather weak and there was no reason why the appellant committed murder of the deceased on account of recovery of outstanding amount. So far as enmity is concerned, it is double edge weapon and cuts both ways. If it is considered as

sufficient motive for commission of offence, it can also be considered as sufficient for false implication as well The significance and importance of motive cannot be ignored. It cannot be sine qua non for bringing an offence home to accused, yet relevant and significant enough to determine the fact of intention and can be considered in view of facts and circumstances of the case. However, once motive is specifically alleged then prosecution is bound to prove the same. In this respect, reliance can be placed on case titled *"Muhammad Aslam Khan v. The State"* (1999 SCMR 172) which is reproduced hereunder:

> *"Enmity of the deceased with persons other than the accused having been established on record, possibility of his having been killed by his other enemies could not be ruled out. Testimony of eye-witnesses being tainted with animus, they could not corroborate each other...no independent corroborative evidence existed on record to connect the accused with the commission of crime ... medical evidence had falsify the ocular account ... accused was acquitted in the circumstances."*

There is no doubt that ordinarily the weakness and insufficiency of motive or even the absence of motive in murder cases cannot be considered as a circumstance to justify the acquittal but where motive would be the only reason for committing the murder and in the absence of such motive there would have been no possibility of murder at all, the complexion of the preposition would be changed. It is so plain a situation that the reasoning needs no illustration. Even otherwise it is well settled that the motive once set; it is imperative for the prosecution to prove such motive in failure whereof adverse inference is to be drawn and the prosecution has to suffer the consequences. If an authority is needed in this behalf reference may be made to the case of *"Muhammad Khan and others v. Zakir Hussain and others"* (PLD 1995 SC 590) and *"Hakim Ali and 4 others v. The State and another"* (1971 SCMR 432).

16. Both the eye-witnesses are related to the deceased. They were resident of same village. It is now settled that the statements of prosecution witnesses cannot be discarded on the basis of mere relationship with the deceased but it is the intrinsic worth, which always matters.

It is pointed out that the witnesses were neither hostile nor inimical to accused, would not stamp their testimony unnecessarily with truth. The acid test of veracity of a witness is the inherent merit of his own statement. Furthermore, mere assertion of witness does not prove that he has come forward with a true statement but the statement itself is to be scrutinized thoroughly and is to be seen as to whether in the circumstances of the case the statement is reasonable, probable or plausible and can be relied upon. *Ref: "Abdul Sattar v. Shamim. Akhtar and others"* (1997 SCMR 457) and *"Maroon alias Harooni v. The State and another"* (1995 SCMR 1627).

17. If we accept the rule of assessment and appraisal of evidence, that a disinterested witness is always to be relied upon even if his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a very dangerous consequence. It is also pointed out that veracity of a witness and rule governing such aspect of the evidence is that statement of a witness must be in consonance with the probabilities fitting in the circumstances of the case and also inspires confidence in the mind of a reasonable and prudent person. If these elements are present, then the statement of a worst enemy of the accused can be accepted and relied upon without corroboration. However, if these elements are missing then the statement of a pious man can be rejected without second thought.

18. It is axiomatic principle of law that benefit of doubt is always extended in favour of the accused. The case of the prosecution if found to be doubtful then every doubt even slightest is to be resolved in favour of the accused. In *"Ayub Masih v. The State"* (PLD 2002 SC 1048), at page 1056 the Hon'ble apex Court has observed as under:

> *".... It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (P.B.U.H) that the mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."*

In a recent Judgment reported as *"Hashim Oasim and another v. The State"* (2017 SCMR 986), the apex Court observed as under:

> *"20. Even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of Justice. Reference may be made to the case of Riaz Masih @ Mithoo v. The State (1995 SCMR 1730).*

19. After evaluating the evidence led by the prosecution, I have concluded that prosecution failed to prove its case against the appellants beyond reasonable doubt, thus, the impugned judgment cannot be maintained.

20. For the foregoing reasons, instant **Criminal Appeal No. 743 of 2016 is allowed** and the impugned judgment rendered by the learned trial Court dated 18.03.2016 is hereby set aside. Resultantly, the appellant is acquitted of the charges. He is in jail, be released forthwith if not required in any other criminal case.

(A.A.K.) Appeal allowed

PLJ 2020 Cr.C. (Note) 137
[Lahore High Court, Lahore]
***Present*: SARDAR AHMED NAEEM, J.**
ALI HUSNAIN--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 51647-B of 2017, decided on 16.10.2017.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 212, 109, 148 & 149--Bail after arrest, dismissal of--Being member of unlawful assembly--With common object committed qatl-i-amd of deceased--Petitioner was specifically nominated in F.I.R. registered with reasonable promptitude--Petitioner, allegedly, caused firearm injury to deceased hitting in his chest, which is further strengthened/corroborated by medical evidence available on file--Deeper appreciation of evidence is not permissible at this stage and Court only has to sift material tentatively--All prosecution witnesses, so far, implicated petitioner in their statements recorded under section 161, Cr.P.C--Offence is heinous in nature and catches prohibition contained under section 497, Cr.P.C--Conclusion arrived at by Investigating Agency that petitioner was abettor and facilitated crime was not based on sound material--During investigation, recovery was effected from petitioner--There is sufficient incriminating material to connect petitioner with titled occurrence--Offence under Section 302, P.P.C. catches prohibition contained under Section 497, Cr.P.C--Counsel for complainant pointed out that trial, in this case, has been commenced and now case if fixed for prosecution evidence, thus, am not inclined to exercise my discretion in favour of petitioner. [Para 3] A

Mr. Azam Nazeer Tarar, Advocate for Petitioner.

Mr. Azhar Hussain Malik, Additional Prosecutor for State.

Mr. Nasir Mahboob Tiwana, Advocate for Complainant.

Date of hearing: 16.10.2017.

ORDER

Ali Husnain, petitioner seeks post-arrest in case F.I.R. No. 327/2016 dated 24.08.2016, under Sections 302, 212, 109, 148, 149, P.P.C., registered at Police Station Shahpur Saddar, Sargodha.

2. Allegedly, the petitioner being member of unlawful assembly and in prosecution of its common object committed Qatl-i-Amd of Sarfraz, the deceased.

The fire attributed to the petitioner landed on the chest of the deceased.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the petitioner was specifically nominated in the F.I.R. registered with reasonable promptitude. The petitioner, allegedly, caused fire-arm injury to the deceased hitting in his chest, which is further strengthened/corroborated by the medical evidence available on the file. Deeper appreciation of evidence is not permissible at this stage and the Court only has to sift the material tentatively. All the prosecution witnesses, so far, implicated the petitioner in their statements recorded under Section 161, Cr.P.C. The offence is heinous in nature and catches the prohibition contained under Section 497, Cr.P.C. The conclusion arrived at by the Investigating Agency that the petitioner was the abettor and facilitated the crime was not based on the sound material. During the investigation, recovery was effected from the petitioner. There is sufficient incriminating material to connect the petitioner with the titled occurrence. The offence under Section 302, P.P.C. catches the prohibition contained under Section 497, Cr.P.C. Learned counsel for the complainant pointed out that trial, in this case, has been commenced and now the case if fixed for prosecution evidence, thus, I am not inclined to exercise my discretion in favour of the petitioner.

4. For the reasons mentioned above, there is no merit in this petition which is hereby dismissed.

(Y.A.) Petition dismissed

PLJ 2020 Cr.C. (Lahore) 1494
[Multan Bench Multan]
Present: **SARDAR AHMED NAEEM, J.**

MUHAMMAD SHARIF--Appellant

versus

STATE, etc.--Respondents

Crl. A. No. 771 of 2016, decided on 28.1.2019.

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

----Ss. 420, 468 & 471--Registration of FIR--Allegation of fraud and forgery--Report regarding cancellation of FIR--Non-mentioning name of accused in application--Assessment of evidence--Conclusion of trial--Acquittal of--Challenge to--Complainant being PW.1 had admitted material suggestions during the cross-examination like political rivalry and that Patwan Circle got executed process from him and one on 20.6.2010--He further admitted that he did not mention the name of accused SDO in his application and that he made no attempt to get the forged, notification cancelled--Assessment of evidence in appeal against acquittal is different than the appeal against conviction and single circumstance creating doubt is enough to acquit, an accused--Consistent view of the superior Courts is that appraisal of evidence in appeal against acquittal is different than the appeal against conviction--Impugned, judgment is find no perversity or illegality--Impugned judgment is based on valid reasoning warranting no interference of the Court--Appeal was dismissed. [Pp. 1496 & 1497] A, B & C 1995 SCMR 635 *ref.*

M/s. Khawaja Qaiser Butt and Muhammad Yousaf Zubair, Advocates for Petitioner.

Date of hearing: 28.1.2019.

ORDER

The appellant got registered case FIR No. 393 under Sections 420, 468, 471, PPC on 20.10.2012, at Police Station Kassowal, District Sahiwal against Respondents No. 2 to 7.

2. The allegation against the said respondents was that of committing fraud by way of forgery.

3. In order to prove its case prosecution produced, as many as seven witnesses. The learned trial Court after scrutiny of the evidence concluded the trial in favour of the respondents by observing that the prosecution failed to prove its case against them *vide* judgment dated 18.7.2016, impugned, herein.

4. Learned, counsel for the appellant argued at length and submitted that the impugned judgment was out-come of misreading and non-reading of evidence; that there was complete concordance in the PWs regarding mode and manner of occurrence, that, the forged document/notification was available on the file but the learned trial Court acquitted all the respondents for the reasons, not supported either by the record or prosecution evidence, thus, the impugned judgment is liable to be set aside.

5. I have considered the points raised at the bar and have gone through the record.

6. The learned trial Court acquitted the respondents for the following reasons:--

(i) The appellant failed to avail the appropriate remedy by way of appeal under Section 5 of Punjab Irrigation and Drainage Authority Farmers Organization (Elections) Regulations, 2011;

(ii) During the investigation, the case was found bogus and the cancellation report was prepared.

7. The complainant being PW.1 had admitted material suggestions during the cross-examination like political rivalry and that Patwari Circle got executed process from him and one Kamal Din on 20.6.2010. He further admitted that he did not mention the name of accused Liaqat Ali SDO in his application and that he made no attempt to get the forged notification cancelled.

8. It may be observed that assessment of evidence in appeal against acquittal is different than the appeal against conviction and single circumstance creating doubt is enough to acquit, an accused. The consistent view of the superior Courts is that appraisal of evidence in appeal against acquittal is different than the appeal against conviction. Reliance in this context can be placed, on *"The State v. Muhammad Sharif and 3 others"* (1995 SCMR 635), and the relevant observations of their lordships are as follows:

> "There is marked difference between appraisement of evidence in the appeal against conviction, and in the appeal against acquittal. In the appeal against conviction, appraisal of evidence is done strictly and in the appeal against acquittal, the same rigid method of appraisement is not to be applied as there is already finding of acquittal given by the Court or Courts below after proper analysis of evidence made or done according to law. In the acquittal appeal, interference is made only when it appears that there has been gross misreading of the evidence which amounts to miscarriage of justice. In an appeal against acquittal, Supreme Court could not, on principle, ordinarily interfere and instead would give due weight and consideration to the findings of the Court acquitting the accused. This approach is slightly different from that in an appeal against conviction in which leave is granted only for reappriasment of evidence, which then is

undertaken so as to see that benefit of every reasonable doubt should be extended to the accused."

9. I have gone through the available record and impugned, judgment and found, no perversity or illegality. The impugned judgment is based on valid reasoning warranting no interference of the Court.

10. In view of the above, there is no merit in this appeal which is hereby dismissed, *in limine*.

(M.M.R.) Appeal dismissed

PLJ 2020 Cr.C. (Lahore) 1561 (DB)
[Rawalpindi Bench, Rawalpindi]
***Present:* SADAQAT ALI KHAN AND SARDAR AHMED NAEEM, JJ.**
MUHAMMAD ASHIQ, etc.--Appellants
versus
STATE, etc.--Respondents

Crl. A. No. 552-J of 2017 & M.R. No. 51 of 2017, heard on 3.6.2020.

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

----S. 302(b)--Conviction and sentence--Challenge to--Circumstantial evidence--It is fundamental principle of universal application in cases depending upon circumstantial evidence that in order to justify the inference of guilt, the incriminating fact must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt--It is also not necessary to look for many circumstances in order to grant benefit of doubt to an accused and a single circumstance creating a reasonable doubt entitles the accused to such benefit which is not a mere principle of law but a rule of prudence which cannot be ignored because it is his vested right--**Held:** It is settled principle of criminal justice that prosecution has to stand on its own legs and any doubt arising out of the case, has to be resolved in favour of the accused--The case in hand, entirely rests on the circumstantial evidence of the above witnesses and while examining the worth of their testimony, we are fortified with the parameters laid down by the apex Court--Where entire prosecution versions rests on the circumstantial evidence, all circumstances from which conclusion of guilt is to be drawn must be fully established--The prosecution has to travel all the way to establish fully a chain of evidence which should be consistent only with the hypothesis of the guilt of the accused person and this circumstance should be of conclusive nature--It is not necessary that each circumstance by itself be conclusive, but cumulatively must form unbroken chain of event leading to the proof of the guilt--In assessing the evidence, in such like cases, imaginary possibilities have no role to play--When there is no direct evidence to the commission of crime and case rests entirely on circumstantial evidence, the chain of events corroborated by circumstances should be so for complete as not to leave any reasonable ground

for conclusion consistent with the innocence of accused--Therefore, on the basis of what has come on record, the conviction of the appellants cannot be maintained under section 302(b), P.P.C. and there is no escape but to allow this appeal by setting aside the conviction and sentence awarded by means of impugned judgment. [Pp. 1567, 1569 & 1570] B, C & D

1994 PCr.LJ 1580, 1994, PCr.LJ 1587, 2005 PCr.LJ 310 and PLD 1966 SC 664 *ref.*

Circumstantial evidence--

----Case of prosecution entirely based on circumstantial evidence--To claim conviction in a case depending upon circumstantial evidence, the prosecution must establish four basic requirements:

i. The circumstances from which the conclusions are drawn should be fully established;
ii. All the facts must be consistent with the hypothesis;
iii. The circumstances should be of a conclusive nature; and
iv. The circumstances, should to a moral sanctity, actually exclude every hypothesis but the one proposed to be proved. [P. 1567] A

M/s. Muhammad Faisal Malik and Raja Haseeb Sultan, Advocates for Appellants.

Mr. Sajjad Hussain Bhatti, Deputy Prosecutor General for State.

c, Advocate for Complainant.

Date of hearing: 3.6.2020.

JUDGMENT

Sardar Ahmed Naeem, J.--This judgment shall dispose of Criminal Appeal No. 552-J of 2017 titled as *Muhammad Ashiq, etc v. The State* filed by Muhammad Ashiq and *Mst.* Naseem Bibi (appellants) against their convictions and sentences and Murder Reference No. 51 of 2017 titled as *The State v. Muhammad Ashiq* transmitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to the appellant, being originated from the same judgment dated 02.05.2017 passed by the learned Additional Sessions Judge, Taxila in case F.I.R. No. 32/2016 dated 05.02.2016, under sections 302, 365, 201, 34, P.P.C., registered at Police Station Wah Cantt, Rawalpindi whereby the learned trial Court

acquitted Raja Asif Ali, Javaid Iqbal and Muhammad Nadeem by extending them benefit of doubt whereas convicted and sentenced the appellants as under:

MUHAMMAD ASHIQ (ACCUSED-APPELLANT)

i. Convicted under section 302(b), P.P.C. and sentenced to Death with compensation of Rs. 2,00,000/- to the legal heirs of the deceased Liaqat Ali Khan under section 544-A, Cr.P.C., in default thereof to further undergo simple imprisonment for six months. In case of non-payment of compensation, the same would be a liability against the person and property of the convict.

ii. Convicted under section 201, P.P.C. read with section 34, P.P.C. to seven years rigorous imprisonment with fine of Rs. 50,000/-, in default thereof to further undergo simple imprisonment for three months.

MST. NASEEM BIBI (ACCUSED-APPELLANT)

i. Convicted under section 302(b), P.P.C. and sentenced to imprisonment for life with compensation of Rs. 2,00,000/- to the legal heirs of the deceased Liaqat Ali Khan under section 544-A, Cr.P.C., in default thereof to further undergo simple imprisonment for six months. In case of non-payment of compensation, the same would be a liability against the person and property of the convict.

ii. Convicted under section 201, P.P.C. read with section 34, P.P.C. and sentenced to seven years rigorous imprisonment with fine of Rs. 50,000/-, in default thereof to further undergo simple imprisonment for three months.

All the sentences shall run-concurrently and benefit of section 382-B, Cr.P.C. was, however, extended to her.

2. Brief facts of the case, as disclosed by Mubashir Shahzad, complainant (PW.12) in his statement (Exh.PJ) on the basis of which formal F.I.R. (Exh.PA) was registered are that his father was employee of Sui Gas Department. On 25.01.2016 at 12:00 (noon) his father went to barbar for hair cutting and did not return back. He (complainant) searched for his missing father but in vain.

Allegedly, the appellants alongwith their co-accused committed Qatl-i-Amd of Liaqat Ali Khan (the deceased).

3. Muhammad Ashiq (appellant) was arrested on 06.02.2016 by Yasir Mehmood Abasi, S.I. (PW.15) who, on 12.02.2016, while in police custody, after making disclosure, got recovered service card of the deceased (P.2) which was secured vide recovery memo Exh-PC. He also got recovered last worn clothes of the deceased including cap (P. 8), jersey (P. 9), Shalwar (P. 10) and qameez (P. 11), taken into possession vide recovery memo Exh.PM. and Karandi (P. 12), Garmala (P. 13), Gaz (P. 14) and Spade (P. 15), secured vide recovery memo Exh.PN. On 15.02.2016, he also got recovered amount of Rs. 50,000/- from his residential room which were taken into possession vide recovery memo Exh.PL.

Mst. Naseem Bibi (accused-appellant) was arrested on 17.02.2016, she got recovered wrist watch (P.3) and glasses (P. 4) of the deceased, secured vide recovery memo Exh.PD.

4. Learned trial Court after observing all the pre-trial codal formalities, charge sheeted the appellants and their acquitted co-accused to which they pleaded not guilty and claimed to by tried.

5. The prosecution, in order to prove its case, produced as many as sixteen witnesses during the trial. The complainant Mubashir Shahzad entered the dock as (PW.12). Muhammad Khan, A.S.I. (PW.1) chalked out the formal F.I.R. (Exh.PA). Waqas Raza 7608/C (PW.3) escorted the dead body of the deceased for postmortem examination. Zafar Mehmood (PW.4), Nasir Ali Butt (PW.5) and Cecil Kazimi (PW.6) were witnesses of recovery of dead body from the gutter. Naveed Zareen (PW.10) identified the dead body of the deceased. Shamroz (PW. 11) was owner of the house wherefrom the dead body was recovered.

The medical evidence was furnished by Dr. Abu Hanifa, Medical Officer (PW.8) who, on 06.02.2016 conducted postmortem examination on the dead body of Liaqat Ali Khan (deceased). Probable time between injury and death was within 30 minutes and between death and postmortem was two weeks.

Bashir Ahmad Awan, Draftsman (PW.14) prepared scaled site plan Exh.PY/1-2. Shaukat Hayat Khan, A.S.I. (PW.15) arrested Muhammad Ashiq appellant, on 06.02.2016. Yasir Mehmood Abasi, S.I. (PW.16) was the Investigation Officer of this case.

6. Learned Deputy District Public Prosecutor gave up Ghulam Akbar, Qurban Ali, Muhammad Arif Abdul Waheed, PWs being unnecessary.

7. The statement of the appellants under Section 342, of the Code of Criminal Procedure, 1898, were recorded. They refuted the allegations levelled against them and professed their innocence. Responding to question No. 19 “Why this case against you and why the PWs have deposed against you?, the appellant Muhammad Ashiq stated that all the prosecution witnesses were interested witnesses and have deposed falsely.

However, to same question, *Mst.* Naseem Bibi (appellant) replied in the following manner:

> “The complainant registered a false and cooked up a false story just to grab money. The deceased was not murdered and he was not a good character, rather he was a womanizer, having scattered affairs in connection with numbers of females in vicinity and also involved in the business of prostitution. Deceased rented out the house for his lust and for the above said purpose. The deceased is also a patient of depression, anxiety and asphyxia (DAMMA) and he took medicines for that, and his death was caused due to above said disease and for not taking the medicine property. The deceased was not murdered, later on the complainant party concocted false story and roped me in a false case. All the PWs are the police officials

and all the private witnesses are interested and related to each other. No independent person from the vicinity was cited or produced by the prosecution in the case in hand and they deposed falsely."

8. The appellants did not appear as their own witness as provided under Section 340(2) of The Code of Criminal Procedure, 1898 in disproof of the allegations levelled against them. However, Muhammad Ashiq appellant produced application moved by complainant to P.S. Sadar Wah as Exh.DC and copy of Rapt No. 18 dated 31.01.2016 Police Station Sadar Wah as Exh.DD in his defence.

9. The learned trial judge acting on the material available on the record, arrived at the conclusion that prosecution has succeeded to establish its case beyond pale of reasonable doubt. He held the appellants guilty, convicted and sentenced them as detailed above.

10. Learned counsel for the appellants taken us through the evidence available on the record and contended that no direct evidence in this case is available and the prosecution case is based on circumstantial evidence. He further contended that circumstantial evidence produced by the prosecution is defective, inconsistent and unreliable. He has contended that there is no evidence of commission of crime by the appellants and the prosecution miserably failed to prove its case beyond reasonable shadow of doubt, thus, the impugned judgment is liable to be set aside and the appellants may be acquitted of the charges. To augment his contention, learned counsel has relied upon *"Aftab State and others v. Rahim Dad and others"* (2005 MLD 1620), *"Muhammad Shafigue Ahmad v. The State"* (PLD 1981 SC 472), *"Ziaul Rehman v. The State"* (2001 SCMR 1405).

11. Learned Deputy Prosecutor General argued that though the case is based upon circumstantial evidence but pointing out of the place of incident by the appellant Muhammad Aashiq, recovery of dead body from their house and postmortem report regarding unnatural death of the deceased provide proof of commission of crime by the appellants.

12. Learned counsel for the complainant submitted that the appellants lead to the recoveries of personal belongings of the deceased from their exclusive

possession coupled with the recovery of dead body from a house rented out to them by Shamroz (PW. 11). He has contended that the cause of death in this case was asphyxia and the prosecution has proved conclusively that the deceased was done to death by them. In support of his submissions, learned counsel relied upon *“Aftab Masih v. State”* (1994 P.Cr.L.J. 1580), *“Nisar Ahmad v. State”* (1994 P.Cr.L.J. 1587) and *“Shamsud Doha v. The State and another”* (2005 P.Cr.L.J. 310).

13. We have considered the submissions made by the learned counsel for the parties and have gone through the record.

14. The case of prosecution entirely based on circumstantial evidence. To claim conviction in a case depending upon circumstantial evidence, the prosecution must establish four basic requirements:

i. The circumstances from which the conclusions are drawn should be fully established;

ii. All the facts must be consistent with the hypothesis;

iii. The circumstances should be of a conclusive nature; and

iv. The circumstances, should to a moral sanctity, actually exclude every hypothesis but the one proposed to be proved.

15. It is fundamental principle of universal application in cases depending upon circumstantial evidence that in order to justify the inference of guilt, the incriminating fact must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also not necessary to look for many circumstances in order to grant benefit of doubt to an accused and a single circumstance creating a reasonable doubt entitles the accused to such benefit which is not a mere principle of law but a rule of prudence which cannot be ignored because it is his vested right.

16. The incident was reported by Mubashir Shahzad (PW.12) son of Liaqat Ali Khan (the deceased), who left his house on 25.01.2016 at about 12:00 (noon) for his hair cut then having rupees seven lac (committee amount) with him. When the

deceased did not turn up, the complainant moved the application (Exh.PJ) at police post No. 3, Wah Cantt for the registration of case. He nominated the appellants alongwith their acquitted co-accused including Muhammad Nadeem, Asif Ali and Javaid Iqbal. The only evidence collected during the investigation was recovery of dead body from a gutter of a house statedly occupied by the appellants. The house, however, was owned by Shamroz (PW.11). He never produced any document confirming the title of the house rented out to the appellants. It was in the evidence that at the time of recovery of dead body the house was lying open and without any luggage. The record further suggested that the appellants were also living in Mohallah Shaheedabad, Hassan Abdal. The prosecution has not produced any rent agreement confirming the tenancy between Shamroz and the appellants. It was also not registered with the rent tribunal. The Investigating Officer relied upon police verification form regarding the said house. We may mention that an affidavit, allegedly, sworn by Naseem Bibi is available on record without any details of the tenement. The subject matter of the affidavit (Exh.PG) was the clean antecedent of the tenant. The affidavit, however, does not bear the signature of the appellants and was also not attested by some oath commissioner. So far as, police verification form is concerned, the details of the rented house are not reflected from any column. It appears that the said form has been maneuvered and prepared in haste as certain important columns are blank. In any case, the tenancy and exclusive possession of the house situated in Mehmoodabad by the appellants is not suggested by the evidence adduced by the prosecution during trial.

At this stage we may also mention that the Investigating Officer concluded that the story of keeping Rs. 7,00,000/- by the deceased at the time of his disappearance was not confirmed during the investigation.

17. After the recovery of dead body, the autopsy was held and the Medical Officer opined that asphyxia was cause of death. There was no evidence if the asphyxia was result of throttling, strangulation or hanging, etc. There was no ligature mark around the neck. No mark or bruise was observed by the Medical Officer around the neck of the deceased and above all, nobody came forward to assert that the deceased was done to death by the appellants.

18. After their arrest, the appellants led to certain recoveries including Service Card, watch and glasses of the deceased but no memo of identification was

available on the file. The appellant Ashiq Ali also got recovered Rs. 50,000/- (P. 7/1-50), cap (P.8), Jersey (P. 9), Shalwar (P. 10), Qameez (P.11) but as mentioned above, the story of keeping Rs. 7,00,000/- by the deceased at the time of his disappearance was not endorsed by the Investigating Officer. There was also no evidence that the deceased was deceitfully called by the appellants-accused. The call data secured by the Investigating Officer has also not proved any link or conversation between the appellants or the deceased at or around the time of occurrence.

19. Thus, in view of the above discussion, the statements of PW.9 to PW.12 are not free from doubt, which do not inspires confidence. It may be observed that the dead body was recovered from a house owned by Shamroz (PW.11), who was also living in the adjacent house but none from the Mohalah came to know about the occurrence. There was no luggage and the house was lying open, thus, in these circumstances, it appears that only to show efficiency the Investigating Agency managed to strength and support the prosecution case.

20. It is settled principle of criminal justice that prosecution has to stand on its own legs and any doubt arising out of the case, has to be resolved in favour of the accused. The case in hand, entirely rests on the circumstantial evidence of the above witnesses and while examining the worth of their testimony, we are fortified with the parameters laid down by the apex Court in Criminal Appeal No. 1 of 1965 *(The State v. Manzoor Ahmed)* and Criminal Appeal No. 2 of 1965 *(Muhammad Ismail Khan v. Manzoor Ahmed and others)* (PLD 1966 SC 664) wherein following observations were made:

> *"Learned counsel appearing for the respondent has urged the necessity of exercising minute care before drawing any inference adverse to his client. It is no doubt true that in a case resting wholly on circumstantial evidence the Court must, as observed by Wills in his Treatise on Circumstantial evidence, remember that the "processes of inference and deduction are essentially involved-frequently of a delicate and perplexing character-liable to numerous causes of fallacy." Mere suspicion will not be sufficient to justify conviction. Before the guilt of the accused can be inferred merely from inculpatory circumstances those circumstances must be found to be incompatible with the innocence of the accused and "incapable of explanation upon any other reasonable hypothesis than that of his guilt? It is also equally well-settled that*

the circumstances sought to be relied upon must have been established beyond all doubt. But this only means a reasonable doubt, i.e. a doubt such as would assail a reasonable mind and no any and every kind of doubt and much less a doubt conjured up by pre-conceived notions. But once the circumstances have been found to be so established they may well-furnish a better basis for decision than any other kind of evidence. As Heward, I.C.J., observed in the case of Percival Leonard Taylor, James Weaver & George Thomas Danovan (1) "it is no derogation of evidence to say that is circumstances."

21. As mentioned above, where entire prosecution versions rests on the circumstantial evidence, all circumstances from which conclusion of guilt is to be drawn must be fully established. The prosecution has to travel all the way to establish fully a chain of evidence which should be consistent only with the hypothesis of the guilt of the accused person and this circumstance should be of conclusive nature. It is not necessary that each circumstance by itself be conclusive, but cumulatively must form unbroken chain of event leading to the proof of the guilt. In assessing the evidence, in such like cases, imaginary possibilities have no role to play. When there is no direct evidence to the commission of crime and case rests entirely on circumstantial evidence, the chain of events corroborated by circumstances should be so for complete as not to leave any reasonable ground for conclusion consistent with the innocence of accused. Therefore, on the basis of what has come on record, in our view, the conviction of the appellants cannot be maintained under section 302(b), P.P.C. and there is no escape but to allow this appeal by setting aside the conviction and sentence awarded by means of impugned judgment.

22. In view of the above, we accept this appeal, set aside the conviction and sentences awarded by the learned trial Court to appellants and acquit them of the charges. *Mst.* Naseem Bibi, the appellant is on bail. Her bail bonds are cancelled and surety is discharged. Muhammad Ashiq, appellant is in jail. He is ordered to be released forthwith if not required in any other criminal case.

23. **Murder Reference No. 51 of 2017** is answered in the **NEGATIVE** and sentence of death awarded to Muhammad Ashiq son of Wali Dad appellant is **NOT CONFIRMED**.(A.A.K.)

Appeal accepted

2021 P Cr. L J 71
[Lahore]
Before Sardar Ahmed Naeem and Farooq Haider, JJ
Ch. SHAHID MEHMOOD and others---Petitioners
Versus
NATIONAL ACCOUNTABILITY BUREAU (NAB) and others---Respondents

Writ Petitions Nos. 72985, 73658, 78784, 78785 of 2019 and 16367 of 2020, decided on 7th May, 2020.

National Accountability Ordinance (XVIII of 1999)---

----Ss. 9(a)(ix) & 9(b)--- Constitution of Pakistan, Art. 199---Constitutional petition---Bail, refusal of---Cheating members of public at large---Prima facie case---Accused persons were arrested for cheating members of public-at-large by establishing a Cooperative Housing Society---Validity---Deeper appreciation of evidence could not be undertaken at such stage and the Court was to only sift available material in a tentative manner---Witnesses examined by investigating agency supported version of complainant suggesting involvement of accused persons in the scam---Creation of Society, then its re-activation after about twenty five years, the manner of exercising authority by the then/and present office bearers in making payments to builders, then amending original agreement to justify increase/enhancement in price, suggested a strong nexus of accused persons with one another and with the crime---No performance guarantee of developers as per agreement was available on record---Till date, the members of the Society were without any plot or possession---Proposed land of Society was visited by investigating agency which found that it was deserted land till the day of visit---No development was made by the developers---Investigating agency collected sufficient incriminating material against accused persons regarding their culpability---High Court declined to exercise discretion in favour of accused persons---Bail was declined, in circumstances.

Sardar Muhammad Latif Khan Khosa and Mian Muhammad Hussain Chotya for Petitioners.

Yasir Munawar Cheema for Petitioners (in Writ Petition No.73658 of 2019).

Muhammad Asad Manzoor Butt and Hafiz Muhammad Nauman for Petitioners (in Writ Petitions Nos. 78785 and 78784 of 2019).

Ch. Salman Zahoor for Petitioner (in Writ Petition No. 16367 of 2020).

Yasir Siddique Mughal, Special Prosecutor for NAB with Rashid Badar, AD/NAB.

ORDER

Through this single order, we intend to decide the above mentioned writ petitions filed by the petitioners seeking their post-arrest bail in Investigation No. 1(61)/HQ/992-NAB-L dated 11.10.2019, however, through Writ Petition No. 16367 of 2020, the petitioners have sought pre-arrest bail.

2. Allegedly, the petitioners in connivance with each other defrauded members of Co-operative Society, namely, "The Professional Co-operative Housing Society, Limited, Lahore". The allegations of misuse of authority and criminal breach of trust were in addition to that.

3. Learned counsel for the petitioner, namely, Ch. Shahid Mahmood contended that the petitioner has no nexus with the crime; that no ground of arrest finds support from the material collected during the investigation; that the case against the petitioner was replete with doubts and such doubt can also be extended even at bail stage; that the petitioner being president of the society was only a signatory to the cheques executed in favour of the Asian Developers and no mens rea can be attributed to the petitioner, in particular, when no recovery was effected from him. Concluding his arguments, learned counsel submitted that it was a civil dispute converted into criminal action on the basis of malice, National Accountability Bureau has no jurisdiction and as the physical custody of the petitioner was not required to the investigating agency, thus, his detention for indefinite period would not serve any purpose to the prosecution, in particular, when the investigation is complete, thus, the petitioner may be released on bail.

4. Learned counsel representing Qaiser Mehmood petitioner adopted the same arguments with the addition that the petitioner was Finance Secretary of the society and no material whatsoever was collected by the investigating agency

showing his connectivity with the above crime in any manner and that as his psychical custody was not required, he may be released on bail.

5. Learned counsel for the petitioners including Muhammad Ilyas and Yasir Hayat Tarar argued that they being developers entered into agreement with "The Professional Co-operative Housing Society, Limited Lahore" to develop land of the society and to execute the project at site; that prices were enhanced with consensus of the parties by way of amended agreement, that after December 2018 no practical work was possible as the matter was pending with National Accountability Bureau; that till date, 358 Kanals of land stands transferred in favour of the society; that the petitioners themselves were the aggrieved persons as value of the transferred property is more than the amount received by the firm from the society; that no mens rea has been attributed to any of the petitioners; that even their individual liability has not been determined by the investigating agency; that no recovery was effected from the petitioners; that they were behind the bars since arrest and their continuous detention for indefinite period would be unfair. Adds that no body can be detained in jail by way of advance punishment and that the case of the petitioners, in the circumstances, needs thorough probe, therefore, the petitioners may be released on bail.

6. In Writ Petition No.16367 of 2020, learned counsel for the petitioners submits that initially the payments were made by their predecessors and that they were elected as office bearers of the management committee for a term of three years commencing from December 2017 to 2020 and all the attributed payments were made by the petitioners under the law/rules, thus, no offence was made out that the complete mechanism to deal such like matters has been provided in Co-Operative Societies Act, 1925 but the National Accountability Bureau on the basis of mala fide converted this civil dispute into criminal action without any convincing/cogent evidence showing connectivity of the petitioners in the crime in any manner; that no incriminating material is available on record; that during the investigation no recovery was effected from the petitioners, thus, sending them behind the bars at this stage would not advance the case of prosecution and this would be a colour of ludicrousness if they are sent to jail for sometime by dismissing the instant petition so as to enable them to come out of jail on post-arrest bail and prayed for the confirmation of ad interim pre-arrest bail earlier granted to them.

7. Learned Special Prosecutor for NAB opposed these petitions with vehemence and submitted that it was a mega scam wherein all the petitioners in league with each other deprived more than eight hundred members of the society of their hard-earned money equivalent to Rs.800 million; that till date, no member was allotted even a single plot by the society despite receiving the dues outstanding against the members; that the layout plan was not approved; that the amended agreement with the developers was executed/completed without permission of the co-operative department; that there were serious violation of the agreement entered into between the society and the developers; that the value of the land transferred in favour of the society is much less than the amount received by all the petitioners in connivance and in league with each other; that the recoveries were yet to be effected from the petitioners including Muhammad Imran, Nafees Ahmad and Muhammad Saleem and, in particular, they failed to establish that their intended arrest was tainted with mala fide; that there was sufficient incriminating material available on record showing involvement of the petitioners in this scam, therefore, all these petitions are liable to be dismissed.

8. We have given ardent hearing to the learned counsel for the petitioners and the Special Prosecutor for NAB and perused the record with their able assistance.

9. A review of the record demonstrates that initially a society, namely, "The Fine Co-operative Housing Society, was registered under Registration No.1349 on 23.11.1989. The society remained dormant for about twenty five years and it was under the control of the co-operative department till 07.2.2014. The area of its operation was Lahore city. However, as a result of special general meeting, the name of the society was changed on 27.12.2014 as "The Professional Co-operative Housing Society, Limited, Lahore". The area of its operation was also extended throughout the Punjab. The by-laws of the society were also amended. The objects of the society were to promote the economic interests of its members on the principle of co -operation, self help, on no profit or no loss basis. The society launched a project in the name and style of "Lahore City Garden". It was advertised in the national newspaper. To execute the project, the society entered into an agreement with the firm "Asian Developers". The record divulged that the society advertised in the "Daily Express" for the appointment of land provider/ builders/private land developers for developing land and plots. A perusal of the advertisement suggests that the society wanted a land provider

having reasonable experience in land purchase and land development but surprisingly, the society entered into an agreement with the firm, namely, "Asian Developers" which came into being in the year 2015, meaning thereby it has got no such experience prior to the agreement. The matter does not end here, one of the managing partner i.e. the petitioner Muhammad Ilyas was a member of executive committee of "The Professional Co- operative Housing Society Limited, Lahore" till 06.01.2015 and become the managing partner of the "Asian Developers" after 3/4 days even prior to proper resignation from such society. To maintain transparency, no effort seems to have been made by the office bearers of the society without inviting any other competitors or the bidders and only after the advertisement referred to above which appeared to be a mere formality approved the project in favour of the developers. The petitioners including Muhammad Ilyas and Yasir Hayat Tarrar were the managing partners of the said firm. The three years time was agreed between the parties for the completion of the project and according to the agreement dated 22.06.2015, the developers had to purchase land within the area of mauzas, Jia Bagga and Karyal. Initially, the price of raw land per kanal was settled between the parties as Rs.9,50,000/ thereafter, the developers wrote a letter to the society for the increase/enhancement of price for the reasons described in the said letter and then the parties agreed to increase the price per kanal from Rs.9,50,000/- to Rs.25,00,000/- to be rockoned from 01.7.2016 to 30.6.2017 and, thereafter, at the rate of Rs.30,00,000/- per kanal. This amendment of the contract was neither laid before the Registrar Co-operative Societies nor brought into the knowledge of the competent authority. The parties amended clause-14(2)(1) of the original agreement. We are tempted to re produce the said stipulation for ready reference:

> "14. Payment of plots to second party (Developer)
>
> 1) xxxxxx
>
> 2) xxxxxx
>
> (i) It is understood that the second party (The Developers) will purchase land for the development of the housing scheme and transfer the land in the name of First Party in segments. It is agreed that 57.6 percent of the agreed price of the plot will constitute price of land and 42.4 percent of the agreed price will cover the development charges. It is assumed that an average of four (4) kanal developed land will be available from an acre of raw land after leaving space for roads, parks, public spaces etc.

Therefore, a payment equivalent to land payment (57.6 percent) of four kanal of residential plots will become due upon transfer of one (1) acre of raw land to the society. For further clarification, this calculation is done in numeric as under:

Price of one kanal of Developed plot= Rs.3,300,000/-

62.5 percent payment against land=Rs. 1,900,800/-

Payment due against one (1) acre land = 57.6 percent of 4 kanal plots payments=Rs.7,603,200/. Conclusion: The first party will pay Rs.7,603,200/- to the second party on each transfer of one acre land in the name of PCHS by the land provider and land developers.

10. The parties amended the agreement dated 22.6.2015 to the extent of Clause-14(2)(1) in the following manner:

"Clause-14(2)(1)" Price of raw land measuring one kanal to be paid by the first party to the second party for the period commencing from 1st July, 2016 to 30th June, 2017 will be Rs.25,00,000/- (Rs.25 lac) per kanal. Where-after for the period commencing from 1st of July, 2017 and onward will be paid Rs.30,00,000/- (Rs.30 lac).

These revised and amended rates mentioned in this agreement are applicable at once.

11. If clause-14(2) of both the agreements is conjunctively read, it appears that the parties have entered into amended agreement in a haphazard manner without even realizing the contents of clause-14 of the original agreement, its spirit and intent. No other amendment/change or substitution was ever made or claim to have been made by the petitioners regarding any stipulation of original/amended agreement.

12. Leaving aside the condition of reasonable experience, no convincing reason or material is available on the record for the enhancement of the price of the plots except photostat copies of certain letter pads which depicted the market price of the raw land in the area. The investigating agency examined/interrogated Qaiser Aleem proprietor of "Hussain Nagar", Muhammad Javaid owner of "Al-Renman Associates", whereas, "Butter Associates" was owned by Ch. Tariq and "Ma-Shallah" Associates was being run by Ch. Muhammad Riaz. All the four got

recorded their statements under section 161, Cr.P.C. and specifically mentioned that their letter pads were misused. All those letter pads were not issued by their respective offices. In short, the certificates produced by the developers to justify the enhancement of price were fake. We have gone through those certificates/photostat copies and observed that one of the certificate issued by "Butter Associates" is neither signed nor sealed by the proprietor or any authorized person. Whereas, the certificates of "Al-Rehman Estates Developers" and "Hussain Nagar" also have no seal/stamp. We may mention at the cost of repetition that the society and the developers entered into agreement regarding Mauzas "Jia Dagga" and "Karyal" but all these certificates even if believed or relied upon are not for the said areas, rather Mauzas "Jaido" and "Kung Sharif" in addition to Jia Bagga find mentioned in these certificates. These two mauzas are not mentioned in the basic agreement for the purpose of development.

13. At this stage, we may mention that according to the agreement entered into between the parties, the society was bound to make payment to developers after transfer/possession of the land. Till date, not even a single plot has been allotted to any of the member, submitted by the learned special prosecutor for NAB and learned counsel for the petitioners could not controvert the said aspect. Admittedly, the layout plan is yet to be approved. The Lahore Development Authority declared the society as illegal for such reason and the Court was apprised that the society has now applied to preliminary permission council to remove the bottlenecks. Learned counsel for the petitioners referring to the provisional allotment letters argued that it was, in fact, a reservation of the rights of the members concerned but this submission find no support from the agreement which has got no such stipulation and further enshrined that no plot can be allotted to any member without approval of the layout plan. The record further highlights that the developers claimed to have purchased 56 plots, so far, and transferred the same in favour of the society. The investigating agency recorded statement of Syed Zulfiqar Ali Registry Moharrir and secured the attested copies of 56 sale deeds. A careful calculation of the amount incurred by the developers for the purchase of said land comes out to Rs.164851745/- much less than the price paid by the office bearers of the said society in advance to the Asian Developers. The material available on record suggested that office bearers of the society misused their authority by ignoring agreement between the parties, also against the object of the society. The record also divulged that office bearers

of the society for the period from 2014 to 2017 made payment of Rs.533.65 million to the Asian Developers whereas, their successors including Imran Shah, Saleem and Nafees paid Rs.277.58 million to the developers. The society registered twenty two hundred members. Later on 1390 committed default leaving behind eight hundred and ten active members for which more than five hundred kanals land was required but assertedly 359 kanals land was purchased by the developers not sufficient to cater the needs of the members despite the expiry of the completion period i.e. 22.6:7018.

14. Learned counsel representing Yasir Hayat Tarrar, petitioner mentioned that he was cardiac patient and also suffered from diabetes mellitus, hypertension and backache. In support of his contention, certified copies have been appended with the petition but no convincing material was available on record suggesting that any of the disease was hazardous or fatal to his life or that the petitioner cannot be treated inside jail or his detention in jail could adversely affect his health.

15. It is settled by now that deeper appreciation of evidence cannot be undertaken at this stage and the Court only has to sift the available material in a tentative manner. The witnesses examined by the investigating agency supported the version of the complainant suggesting involvement of the petitioners in this scam. The creation of the society then its re-activation. After about twenty five years, the manner of exercising authority by the then/present office bearers in making payments to the builders then amending the original agreement to justify the increase/enhancement in the price suggested a strong nexus of the petitioners with each other and with the above crime. No performance guarantee of the developers as per agreement is available on record. Till date, the members of the society are without any plot or possession. The proposed land of the society was visited by the investigating agency which found that it was deserted land till the day of visit suggesting that no development was made by the developers. The investigating agency has collected sufficient incriminating material against the petitioners regarding their culpability, thus, we are not inclined to exercise our discretion in favour of the petitioners.

16. In view of the discussion made above, the titled petitions are dismissed, being meritless.
MH/S-33/L Bail refused.

PLJ 2021 Cr.C. (Lahore) 298

Present: **SARDAR AHMED NAEEM, J.**

ZAIGHAM ABBAS--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 49280-B of 2019, decided on 30.9.2019.

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

----S. 9(c)--Post arrest bail--Allowed--Recovery of charas--Advance punishment--Non-corroboration of report of Punjab Forensic Science Agency--Exercising of discretion--Quantity of alleged contraband charas recovered from petitioner marginally exceeds from one kilogram and thus this would be interesting question for trial Court to determine if case of petitioner falls under Section 9(b) or 9(c) of CNSA, 1997--Record is silent if case property was put on scale with or without wrapper--Petitioner is behind bars since his arrest and no body can be detained in jail by way of advance punishment--investigation in this case is complete--report of Punjab Forensic Science Agency does not wholly corroborate prosecution version--Petitioner is in jail since his arrest and his continuous detention for indefinite period would be unfair--Case of petitioner is also not hit by embargo of Section 51 of CNSA, 1997, thus, Court is inclined to exercise its discretion in favour of petitioner--Petition was allowed. [Pp. 298 & 299] A

Mr. Javed Iqbal, Advocate for Petitioner.

Ms. Noshi Malik, Deputy Prosecutor General for Respondents.

Date of hearing: 30.9.2019.

ORDER

Zaigham Abbas, petitioner seeks post arrest bail in case F.I.R. No. 326, dated 18.6.2019 under Section 9(c) of Control of Narcotic Substances Act, 1997 registered at Police Qilla Deedar Singh, district Gujranwala.

2. Allegedly, 1120 grams charas was recovered from the petitioner.

3. Having heard the arguments addressed at the bar and after perusing the record, it was noticed that the quantity of the alleged contraband charas recovered

from the petitioner marginally exceeds from one kilogram and thus this would be interesting question for the learned trial Court to determine if the case of the petitioner falls under Section 9(b) or 9(c) of CNSA, 1997. The record is silent if the case property was put on the scale with or without wrapper. The petitioner is behind the bars since his arrest and no body can be detained in jail by way of advance punishment. The investigation in this case is complete. The report of Punjab Forensic Science Agency does not wholly corroborate the prosecution version. The petitioner is in jail since his arrest and his continuous detention for indefinite period would be unfair. The case of the petitioner is also not hit by the embargo of Section 51 of CNSA, 1997, thus, I am inclined to exercise my discretion in favour of the petitioner.

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

(Y.A.) Petition allowed

2021 P Cr. L J 713
[Lahore]
Before Sardar Ahmed Naeem and Farooq Haider, JJ
The STATE through Prosecutor General Punjab, Lahore---Petitioner
Versus
MUHAMMAD SHAHZAD---Respondent

Criminal Miscellaneous No. 3295-BC of 2020, decided on 3rd December, 2020.

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

----S. 497(5)---Drugs Act (XXXI of 1976), Ss. 23 & 27---Imports, manufacture and sale of drugs---Bail, cancellation of---Scope---Prosecution case was that huge quantity of thirteen unregistered and expired drugs were recovered from the medical store of accused whereas case of accused was that a Drug Inspector along with his Naib Qasid had come to his medical store; that he started inspection of the store but the accused restrained them from the inspection on the ground that he was not a notified area Drugs Inspector; that the said Drugs Inspector telephonically called the complainant (Drugs Inspector having jurisdiction) at the spot; that during the intervening period Drugs Inspector placed a shopper on the table before the arrival of the complainant and later on told him that it was recovered from the store of the accused---Reasons which prevailed upon the Trial Court for confirmation of pre-arrest bail were that the raid was not conducted by a notified area Drugs Inspector; that fake/managed recovery was planted upon the accused; that investigating agency had failed to evaluate the version of the accused; that statements of the witnesses including Drugs Inspector and Naib Qasid under S. 161, Cr.P.C. were not available on the file; that accused was a self-qualified person and was running a medical store since fifteen years; that the accused was a first offender and that nothing was recovered from the possession of the accused---Findings of the Trial Court were based on mis-reading as the accused was specifically nominated in the crime report with specific role of keeping unregistered/expired medicines in his medical store of which he had failed to produce warranty/invoices---Signatures of accused at the foot of Form-V negated his own version of planting a fake recovery---Statements of Drugs Inspector and Naib Qasid recorded under S. 161, Cr.P.C., were available on the police file---Accused had filed the application seeking pre-arrest bail without asserting mala fide in the petition---No ill will or animosity was attributed to any of the prosecution witnesses for his false implication---Impugned order was neither based on proper evaluation of facts nor the law on the subject, thus, could not be

sustained and was liable to be set aside---Petition for cancellation of pre-arrest bail was allowed, in circumstances.

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

----S. 497(5)---Bail cancellation of---Scope---Ordinarily, where the accused after the grant of bail misuses the same, interferes in the proceedings of the trial, extends threats to the witnesses or create any sort of hindrance in conclusion of trial, the court granting bail can cancel the same on the basis of evidence before him by exercising jurisdiction under S. 497(5), Cr.P.C. but if the bail granting order is without jurisdiction and is passed without observing mandatory provisions of law then High Court has jurisdiction to entertain the application under S. 497(5), Cr.P.C. for cancellation of bail earlier granted to the accused.

Nazir's case 1971 SCMR 637; Zia-ul-Hassan v. The State PLD 1984 SC 192 and Muhammad Irfan v. The State and another 2020 SCMR 2017 rel.

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

----S. 498---Pre-arrest bail---Scope---Mala fide on the part of the prosecution especially the police has to be shown through some cogent and convincing reasons to get concession of pre-arrest bail.

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

----S. 498---Pre-arrest bail---Scope---Concession of pre-arrest bail is a remedy of an exceptional and extraordinary nature which has to be granted in exceptional cases and discretion has to be used with care/caution---If in all cases, the concession of pre-arrest bail is allowed to each and every accused of a case, the process of investigation would be strangulated and the investigating agency would not be able to complete its investigation in a smooth manner.

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

----S. 498---Pre-arrest bail---Scope---Pre-arrest bail cannot be granted on the basis of bald assertions of an accused by ignoring material evidence collected during the investigation.

Gulshan Ali Solangi and others v. The State through P.G Sindh 2020 SCMR 249 rel.

Imdad Hussain Chatha, Deputy Prosecutor General for Petitioner.

Saeed Akhtar Khan for Respondent.

Amir, ASI with record for the State.

ORDER

Through this petition filed in terms of section 497(5), Cr.P.C., the petitioner seeks cancellation of bail granted to respondent by the Drug Court, Faisalabad vide order dated 27.11.2019 in case FIR No.1719 dated 20.11.2019 under

sections 23/27, 27(1), 27(4) of the Drugs Act, 1976 registered at Police Station Ghulam Muhammad Abad, District Faisalabad.

2. Learned counsel for the petitioner, inter-alia, contends that pre-arrest bail cannot be granted as a matter of routine and in absence of strong evidence that the accused was being implicated maliciously or due to mala fide; that huge quantity of thirteen drugs unregistered and expired were recovered from the premises occupied by the respondent; that the offences with which the respondent is charged are against society but the learned trial Court has admitted the respondent to pre-arrest bail by ignoring this aspect; that no extra-ordinary circumstances were brought to the notice of the Court which confirmed the ad-interim pre-arrest bail of the respondent and the impugned order is neither based on facts nor law, thus, liable to be re-called and the respondent be committed to jail.

3. Learned counsel for the respondent contended that the principles governing grant and cancellation of bail are altogether different; that the provision of section 497(5), Cr.P.C. was not punitive in nature and a bail once granted can only be cancelled in exceptional circumstances. Added that the petition under section 497(5), Cr.P.C. directly before this Court is not maintainable and no reason for bypassing the trial Court has been mentioned, thus, the petition is liable to be dismissed on this score also.

4. We have considered the arguments of the learned counsel for the parties and perused the record with their able assistance.

5. Before we proceed to decide the application on merits, it is appropriate to dispose of the preliminary objection raised by the learned counsel for the respondent regarding maintainability of this petition under section 497(5), Cr.P.C. directly before this Court without approaching the trial Court concerned for cancellation of bail. Ordinarily, where the accused after the grant of bail misuse the same, interferes in the proceedings of the trial, extends threats to the witnesses or creates any sort of hindrance in conclusion of trial, the Court granting bail can cancel the same on the basis of evidence before him by exercising jurisdiction under section 497(5), Cr.P.C. but if the bail granting order is without jurisdiction and without observing mandatory provisions of law, then this Court has jurisdiction to entertain the application under section 497(5), Cr.P.C. for cancellation of bail earlier granted to the accused. In the case of Nazir (1971 SCMR 637), the apex Court while interpreting the provisions of section 497(5), Cr.P.C. observed that "the High Court under mistaken belief that the learned Sessions Judge had ignored the evidence of the threats mentioned in the revision petition, although the same were never placed before him" and set aside bail cancellation order of the High Court.

In another case titled "Zia-Ul-Hassan v. The State" (PLD 1984 SC 192), the apex Court ruled:

"Similarly it is not in all cases that the Court granting bail is to be approached in the first instance for cancellation under section 497(5), Cr.P.C. The learned Judge in the High Court has after taking due note of the case law cited before him, has correctly understood, applied and distinguished the relevant rulings. It may be observed that in some cases further wastage of time in moving the lower Court (when time factor is prima facie involved), would be an additional reason for not making direction for moving the lower Court in the first instance. In this case there was ample justification in this behalf."

The apex Court has reiterated similar view in case titled "Muhammad Irfan v. The State and another" (2020 SCMR 2017), the observations of their lordships appearing in para-3 at page 2019, read as under:

3. A different regime, somewhat narrowly jacketed, is applied to consider the propriety/desirability of cancellation of bail, once granted by a competent tribunal, on the assumption that apprehended fallout of interim freedom under a interlocutory arrangement, even though granted under error, can be indemnified through final adjudication, however, the benign concept of condonation cannot be applied, without being unconscionable in cases structured upon findings inherently anomalous, flawed or mutually destructive and inconsistent, more so in category of offences with restrictions statutorily heavier on offender's release on bail...."

6. On the touch stone of section 497(5), Cr.P.C. and the law laid down in above mentioned cases, we have gone through the facts of the case and examined the impugned order. While admitting respondent to pre-arrest bail, the learned trial Court observed in para-2, as under:

"The petitioner claim that Shehbaz Drugs Inspector along with Liaquat Naib Qasid came at his medical store and started inspection of the store but the petitioner restrained him from the inspection on the ground that he is not a notified area Drugs Inspector, then Shahbaz Drugs Inspector telephonically called present complainant Drugs Inspector Khalid Mustafa at the spot who was notified for the Punjab and Shehbaz Drugs Inspector placed the shopper on the table before arrival of Khalid Mustafa complainant and asked the complainant Drugs Inspector Khalid Mustafa that has been recovered from the store of the petitioner. Petitioner has denied the recovery from his medical store and claimed that recovery has been

attributed and planted falsely as well as malafidely by Shehbaz Drugs Inspector with connivance of present Drugs Inspector."

It is an admitted position on record that the occurrence took place on 24.10.2019 and the incident was reported on 20.11.2019 by Khalid Mustafa Provincial Inspector of Drugs Iqbal Town, Faisalabad. The respondent was running "Rehman Medical Store" at Nishasta Chowk Ghulam Muhammad Abad, Faisalabad and the complainant during inspection recovered fourteen different drugs lying in the shelves. A few drugs were un-registered and the remaining expired. The recovery of above drugs by the complainant was acknowledged by the respondent who signed at the foot of Form-V. As mentioned above, the incident was reported on 20.11.2019, application for pre-arrest bail was filed on 21.11.2019 and the respondent was admitted to pre-arrest bail just after six days of the registration of the FIR i.e. on 27.11.2019. The reasons which prevailed upon the learned trial Court for confirmation of pre-arrest bail as reflected from the order read as under:

(i) the raid was not conducted by a Notified Area Drugs Inspector;

(ii) a fake/ managed recovery was planted upon the petitioner;

(iii) the investigating agency failed to evaluate the version of the respondent;

(iv) the statements of witnesses including Shahbaz and Liaquat Naib Qasids under section 161, Cr.P.C. were not available on the file;

(v) the respondent was self qualified person and running medical store since fifteen years in the area;

(vi) that the respondent was first offender and;

(vii) that nothing was recovered from the possession of the petitioner;

7. We have gone through the record and observed that the above findings/observations of the learned trial Court are based on misreading as the respondent is specifically nominated in the crime report with specific role of keeping unregistered/expired medicines in his medical store, failed to produce the warranty/invoices thereof. His signatures at the foot of Form-V negates his own version of planting a fake recovery. The statements of the above mentioned two witnesses recorded under section 161, Cr.P.C. are also available on the police file. Admittedly, the principles governing grant and cancellation of bail are altogether different but it is also settled principle of law that to get concession of pre-arrest bail, mala fide on the part of the prosecution specially the police has to be shown through some cogent/convincing reasons. The innocent and respectable person was going to be involved in a case so as to humiliate him and degrade him in the eyes of society to gain some advantage or to take indirect benefit is also necessary for the said concession. In fact, the concession of pre-arrest bail is a remedy of an exceptional

and extra-ordinary nature which has to be granted in exceptional cases and discretion has to be used with care/caution. If in all the cases, the concession of pre-arrest bail is allowed to each and every accused of a case, the process of investigation would be strangulated and the investigating agency would not be able to complete its investigation in a smooth manner.

8. A review of the record further demonstrates that the respondent filed the application seeking pre-arrest bail without asserting mala fide in the said petition. We are unable to understand how the learned trial Court concluded that mala fide was lurking behind arrest of the respondent when it was even not asserted in the petition filed by him. It is settled by now that no pre-arrest bail can be granted on the basis of bald assertions of an accused by ignoring material/evidence collected during the investigation. In case titled "Gulshan Ali Solangi and others v. The State through P.G Sindh" (2020 SCMR 249), the apex Court ruled:

> "Grant of pre-arrest bail is a remedy rooted into equity; at a cost to hamper the investigation, this judicial protection is extended, solely to save the innocent from the horrors of abuse of process of law with a view to protect his dignity and honour. It cannot be granted in every run of the mill criminal case, particularly to the accused confronting prima facie charges structured upon material/evidence, warranting custody, that too, on the basis of petitions/pleas, verification whereof, is consequent upon recording of evidence...."

9. The record divulged that the respondent was afforded opportunity of hearing by the District Quality Control Board, Faisalabad on 02.11.2019. The version of the complainant gets support from the material available on the file. No ill-will or animosity was attributed to any of the PWs for false implication of respondent. The impugned order is neither based on proper evaluation of facts nor the law on the subject, thus, cannot be sustained and liable to be set aside.

10. In view of the above, this petition is allowed. The order of the learned trial Court dated 27.11.2019 is set aside/ recalled. The bail granted to the respondent is cancelled.

SA/S-74/Sindh Bail cancelled.

PLJ 2021 Cr.C. (Note) 50
[Lahore High Court, Lahore]
***Present*: SARDAR AHMAD NAEEM, J.**
WASEEM KHAN etc.--Appellants
versus
STATE etc.--Respondents

Crl. A. Nos. 1102 & 1123 & Crl. Rev. No. 690 of 2012, heard on 7.12.2018.

Identification parade--

----Object of identification parade is to ascertain involvement of an accused in a crime--It is not rule of law rather rule of prudence to eliminate possibility of mistaken involvement of accused in an offence--This test is a check against false implication and also serves as piece of evidence against real culprits--Identification based upon glimpse of accused is retained by witnesses when they saw accused at scene of crime or at a place directly connected with criminal activities--Positive identification of person involved in a crime is an indispensable requirement for investigation of crime--Positive identification of offenders is legal requirement, while solving of crimes can only proceed once victim has been positively identified--Identification parade can be traced as back as March 1860, when they were instituted by Metropolitan Police Order in England--order stated that police could place suspect amongst his/her peers and then asked witness to select person seen performing crimes--In cases where identity of accused is not known to eye-witnesses, it is essential for Investigating Officer to get such suspect identified from eye-witnesses in a test identification parade. [Para 15] A

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

----S. 302(b)/34--Conviction and sentence--Challenge to--Benefit of doubt--Qatl-e-amd--There are certain principles which must be followed while conducting identification parade--test identification parade in this case was supervised by Altaf Ahmad Shahzad Judicial Magistrate--Mechanism of identification proceedings is well-known and does not require repetition--It is essential, that rules and principle for holding test identification parade should be strictly followed--So far as, identification of persons is concerned, it is very weak type of evidence--value of which is easily destroyed if there is any suspicion that conduct

of investigating agency was not absolutely above board--Therefore, precautions are necessary to conceal identity of accused while he is being removed from one place to other and it is also duty of police that all necessary steps should be taken to ensure that accused should not be seen by witnesses before identification parade--Police Officer, who arrests accused should get his face covered and take him to Police Station in that state--In police lock-up such accused should be covered with a curtain so that no one is able to see his face and when he is taken to Court or to jail his face should be covered--In jail no outsider should be allowed to see his face--All these precautions should not only be taken but should be proved to have been taken and should be recorded in official record like general diary of Police Station and jail register and same should be produced in Court--In absence of such evidence, no value can be attached to identification of an accused person made by a witness--In other words, it is imperative for prosecution to establish during trial that every necessary precaution was taken to ensure fair identification--Above all, proceedings of test identification parade available on file reflect that appellant had not been picked by PWs with reference to any role played by him during occurrence--As observed above, appellant was not nominated in FIR--He was arrested in this case during investigation--No injury to deceased was ascribed to him--Allegedly, he caused injury to one person "M" never examined at trial--offence under Section 397 PPC was not proved as recovery memos were not available on file--There was also no identification memo of articles allegedly recovered from appellant--There was no evidence of common intention--Nothing can be gathered from record that there was some pre-meditation or pre-concert of mind, thus, Section 34 PPC was not attracted--prosecution adduced no evidence to prove fact of theft--**Held:** It is settled principle of law that prosecution primarily is bound to establish guilt against accused, beyond shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence enabling Court to draw conclusion whether prosecution has succeeded in establishing accusation or otherwise and if it comes to conclusion that charge was imputed against accused and have not been proved beyond reasonable doubt, then, accused becomes entitled to acquittal on getting benefit of doubt. [Para 15, 16 & 18] B, C, D & F

Benefit of doubt--

----It is by now settled that benefit of doubt, if found in prosecution's case, accused shall be held entitled to benefit, thereof--It is also settled principle of criminal

administration of justice that if there is element of doubt, as to guilt of accused, it must be resolved in his favour--Golden rule of benefit is initially a rule of prudence which cannot be ignored, while dispensing justice in accordance with law--It is based on maxim that it is better to acquit ten guilty persons rather than to convict one innocent person--For acquittal of accused in an offence, how-so heinous it may be, only a single doubt in prosecution evidence is sufficient. [Para 17] E 2018 SCMR 911.

Mr. Salman Haider Hashmi, Advocate for Appellant.

Ms. Tahira Parveen District Public Prosecutor for State.

Nemo for Complainant.

Date of Hearing: 7.12.2018.

JUDGMENT

Waseem Khan (appellant) along-with his co-accused Azhar *alias* Shera, Ijaz Ahmad and Sheraz were tried in case FIR No. 108 dated 04.3.2011 under Sections 302, 324, 397, 109 PPC registered at Police Station Shakargarh, District Narowal. At the conclusion of trial, *vide* judgment 30.5.2012, learned trial Court acquitted the Co-accused and the appellant was held guilty, convicted and sentenced under:--

(i) under Section 302(b)/34, PPC and sentenced to imprisonment for life with a direction to pay a sum of Rs. 3,00,000/- to the legal heirs of the deceased under Section 544-A Cr.P.C, in default thereof to undergo six months simple imprisonment;

(ii) under Section 397, PPC and sentenced to rigorous imprisonment for ten years with fine of Rs. 50,000/-, in default thereof to undergo six months simple imprisonment.

Both the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.P.C was also extended to him.

2. The convict has filed the Criminal Appeal No. 1102 of 2012 against his convictions and sentences. Complainant has also filed Criminal Appeal No. 1123 of 2012 against acquittal of co-accused/Respondents No. 1 to 3. He also filed Criminal Revision No. 690 of 2012 for awarding death penalty from imprisonment to life to Respondent No. 1. All these matters shall be decided through this single judgment.

3. Briefly, stated the facts as mentioned in complaint Exh.PB/I was that on 04.3.2011 at about 9.30 p.m, Muhammad Asghar and Muhammad Sheraz were robbed by two unknown persons armed with fire-arms near the Shrine of Mai Lakhni (the details of articles mentioned in the complaint). Later on, four known accused persons came from the side of village Dedher on foot and the altercation took place between the unknown accused already present there. Muhammad Sheraz grappled with the accused. Accused standing nearer to them opened firing towards the four pedestrians and resultantly, Muhammad Zubair son of Amanat Ali received injuries. The fire shot made by the accused standing near to the complainant hit Muhammad Asghar, who succumbed to the injuries.

4. After usual investigation, report under Section 173, Cr.P.C was submitted. The appellant along-with co-accused was charge sheeted. They pleaded not guilty and claimed trial.

5. In order to prove its case prosecution examined as many as fifteen witnesses including Muhammad Anwar (PW.1), Muhammad Arif 346-C(PW.2), Muhammad Afzal ASI (PW.3), Zafar Iqbal 230-HC (PW.4), Mirza Tahir draftsman (PW.5), Muhammad Ilyas (PW. 6), Muhammad Imran (PW. 7), Dr. Khalil Ahmed M.O (PW.8), Matloob 32-C(PW.9), Muhammad Tufail (PW.10), Muhammad Rasheed (PW. 11), Altaf Ahmed Shahzad (PW. 12), Muhammad Shafique (PW.l3) and Khadim Hussain SI (PW. 14) and Muhammad Arif SI (PW. 15).

6. Prosecution gave up Ghulam Murtaza, Muhammad Islam 261-C, Muhammad Irfan 834-C, Rasheed Ahmad, Muhammad Naeem, Muhammad Akash, Abid Saeed, Muhammad Raza, Muhammad Iqbal, Mukhtar Ahmad, Simama Riasat Magistrate, Orangzaib, Muhammad Boota, Muhammad Yasin 650-C being unnecessary and Zubair being won over and after tendering into evidence the reports of Chemical Examiner Exh.PX and Forensic Science Agency Exh.PY, closed the prosecution case.

7. Statement of the appellant under Section 342, Cr.P.C was recorded. He denied all the prosecution allegations and pleaded innocence. Responding to question *"why this case against him and why the PWs have deposed against him"*, replied as under:

> "I was not nominated by any of the PWs nor was made accused in this case. Police subsequently, after inordinate delay of approximately three months involved me falsely in this case without any incriminating evidence just to get rid of this case and to show their efficiency and PWs in connivance

with the police and on their behest deposed falsely against me just to support this false prosecution case. PWs deposed falsely against me regarding allegedly injuring one Zubair PW, who was not produced by the complainant party neither he appeared in the Court as PW, as he would not have supported the false prosecution story against me. I have no enmity with the deceased nor with the injured PW Zubair, nor I know both of them and I have no motive to kill the deceased. I have no relation or any concern with any of the co-accused, I neither belong to their brotherhood nor belong to their villages. Police to get rid of this case subsequently falsely involved me in this case and PWs falsely deposed against me in connivance with the police and of my Sharika/local opponents, as my father is an old, disable person and he was not in a position to pursue this case properly. Police have committed highhandedness with me and they have manoeuvred false and fake proceedings. Police have shown my false arrest in this case, subsequently and shown myself to the PWs at police station on 27.5.2011, and also taken my snaps which were provided to the PWs prior to the identification parade and police in connivance with the PWs have manouvred false identification parade just to create false evidence to support the false prosecution story. None of the PWs duly identified me nor assigned any overt act or specific role to me as I have not participated in the alleged occurrence nor I have any concern with the other co-accused and the alleged occurrence and police planted false and fake recoveries upon me just to strengthen this false case against me. No such alleged recoveries of stolen property were got recovered from me nor ever identified by any of the PWs and nor alleged recovery of Kalashnikov was recovered from me and same was not wedded with the empties. All such manoeuvred proceedings on the part of the police shows the *mala fide* on their part and speaks volume about my innocence in this case".

Appellant neither appeared as his own witness under Section 340(2), Cr.P.C nor produced some witness in his defence.

8. Learned counsel for the appellant contended that the prosecution miserably failed to prove its case beyond reasonable shadow of doubt; that the appellant was not nominated in the FIR; that he was identified during the test identification parade, held contrary to law and no specific role/overt act was attributed to the appellant by the prosecution witnesses; that no direct evidence was

available with the prosecution and the entire case was based on circumstantial evidence; that the evidence of extra judicial confession is always very weak and is fabricated only to fill in lacuna in the prosecution story; that the recoveries of Kalashnikov (P.6), cell phone and identity card from the appellant lend no support to the prosecution; that Zubair injured was not produced during trial; that statement of witnesses were full of contradictions/discrepancies *qua* mode and manner of the occurrence and that no charge under Section 397, PPC was framed by the learned trial Court, thus, conviction on such account was bad in the eye of law; that no independent witness was cited by the prosecution; that the case of prosecution was full of doubts and every doubt even slightest is always resolved in favour of the accused; that co-accused of the appellant including Sheraz, Azhar Ashfaq *alias* Shera and Ijaz Ahmad were acquitted by the learned trial Court on the same set of evidence; that as no independent corroboration was forthcoming on the record, thus, the appellant was entitled to the same treatment.

9. Learned counsel for the complainant did not enter appearance. Office was directed to issue notice pairvi to the learned counsel for the complainant *vide* order dated 24.3.2017. The name of the learned counsel for the complainant is also reflected in the cause list of the day but neither the complainant nor did his learned counsel appear. There is no intimation *qua* his absence. However, learned Deputy District Public Prosecutor opposed this appeal with vehemence and submitted that the appellant was rightly identified during the test identification parade; that he emerged at the crime scene being armed with lethal weapon which reflects his intention; that there was evidence of extra judicial confession and recovery of Kalashnikov, cell phone and CNIC. The medical evidence also supported the prosecution version and discrepancies/contradictions hinted at by the learned counsel for the appellant do creep up with the passage of time and not fatal to the prosecution case. She supported the impugned judgment rendered by the learned trial Court.

10. I have considered the points raised at the bar and have perused the record.

11. The occurrence in this case had taken place on 04.3.2011 at 9.30 p.m. in the area of Darbar Mai Lakhni situated in Mauza Dhedri. The deceased Muhammad Asghar, a medical practitioner lost his life during this occurrence at the hands of four known accused, however, one of the accused namely, Sheraz was accompanying Muhammad Imran (PW. 7) towards Darbar of Mai Lakhni. The telephonic call was

received by Muhammad Imran at Darbar Mai Lakhni that his brother Muhammad Asghar was murdered by unknown accused. The name of the informant was not disclosed by said Imran, real brother of the deceased. He sustained a fire-arm injury on his head and one other Muhammad Zubair also sustained fire-arm injury.

12. During the investigation, the appellant was arrested. He was put to test identification parade and was identified by Muhammad Tufail complainant (PW.10) and Muhammad Rasheed (PW.11). Admittedly, none of them ascribed any role to the appellant except indiscriminate firing at the crime scene hitting one of the passerby, never produced during trial. The fatal injury was, however, ascribed to Muhammad Safdar (P.O) co-accused of the appellant. The deceased sustained two injuries as reflected by the post-mortem report conducted by Dr. Khalil Ahmad (PW.8).

13. The appellant after his arrest in this case got recovered Kalashnikov (P.6) along with five live bullets (P. 7/1-5) secured *vide* recovery memo Exh.PL. On 9.6.2011, he led to the recovery of cell phone and on 13.6.2011, he got recovered wrist watch of the deceased (P. 9) and identity card of Muhammad Shafique (P. 10) but the recovery memos of the stolen properties were not prepared during the investigation and were not brought on file of this case. So far as, Kalashnikov (P.6) is concerned, it was not sent to the office of Punjab Forensic Science Agency and thus, does not advance the case of prosecution in any manner.

14. The prosecution examined Muhammad Rasheed (PW. 11). Accused Sheraz statedly visited the haveli of the complainant on 14.6.2011 at about 2.00 p.m. and made extra judicial confession that his brother Ijaz and the deceased had strained relations and that Ijaz got the deceased eliminated through two unknown friends, then standing outside the haveli, thereafter, Sheraz and his companions departed. The conduct of the witness is open to serious objection. It was haveli of the complainant *i.e.* father of the deceased. The accused Sheraz came to haveli and professed his guilt before PW. 11 but no re-action was shown to him by the witness despite the fact that two unknown persons were standing outside the haveli. It appears that he had only come to make extra judicial confession and was let off by the witness which is not plausible. There was nothing on record that he was person in authority or influential person or numberdar or nazim etc. No material is available on the record that he could influence the complainant to seek pardon for the accused from the complainant. The evidence of extra judicial confession is always considered weak type of evidence. The occurrence took place on 04.3.2011 and the extra judicial

confession was made on 14.6.2011, thus, the fact of extra judicial confession cannot be relied upon being inconclusive and weak type of evidence.

15. The test identification parade in this case was held by Altaf Ahmad Shahzad (PW.12). He conducted test identification parade on 31.5.2011. The witness identified the appellant. During the cross- examination he admitted that none of the witnesses disclosed to him the specific overt act committed by Waseem Khan (appellant).

The object of identification parade is to ascertain the involvement of an accused in a crime. It is not rule of law rather rule of prudence to eliminate possibility of mistaken involvement of the accused in an offence. This test is a check against the false implication and also serves as piece of evidence against the real culprits. Identification based upon glimpse of accused is retained by witnesses when they saw the accused at scene of crime or at a place directly connected with the criminal activities. The positive identification of person involved in a crime is an indispensable requirement for the investigation of crime. Positive identification of offenders is legal requirement, while the solving of crimes can only proceed once the victim has been positively identified. Identification parade can be traced as back as March 1860, when they were instituted by Metropolitan Police Order in England. The order stated that the police could place suspect amongst his/her peers and then asked the witness to select the person seen performing the crimes. In cases where the identity of the accused is not known to the eye-witnesses, it is essential for the Investigating Officer to get such suspect identified from eye-witnesses in a test identification parade.

There are certain principles which must be followed while conducting the identification parade. The test identification parade in this case was supervised by Altaf Ahmad Shahzad Judicial Magistrate (PW. 12). The mechanism of identification proceedings is well-known and does not require repetition. Reference in this regard may be made to rules 26.7, 26.32 and also Rule 27.25 of the Police Rules, 1934 and Chapter 11-C of the Lahore High Court Rules and Orders Volume-III. However, to ensure that the proceedings are properly conducted and entirely above suspicion it is essential, that the rules and principle for holding the test identification parade should be strictly followed. So far as, the identification of persons is concerned, it is very weak type of evidence. The value of which is easily destroyed if there is any suspicion that the conduct of the investigating agency was not absolutely above board. Therefore, precautions are necessary to conceal the identity of the accused

while he is being removed from one place to the other and it is also the duty of the police that all necessary steps should be taken to ensure that the accused should not be seen by the witnesses before the identification parade. The Police Officer, who arrests the accused should get his face covered and take him to Police Station in that state. In the police lock-up such accused should be covered with a curtain so that no one is able to see his face and when he is taken to Court or to jail his face should be covered. In jail no outsider should be allowed to see his face. All these precautions should not only be taken but should be proved to have been taken and should be recorded in official record like the general diary of the Police Station and the jail register and the same should be produced in the Court. In the absence of such evidence, no value can be attached to the identification of an accused person made by a witness. In other words, it is imperative for the prosecution to establish during trial that every necessary precaution was taken to ensure fair identification. Above all, the proceedings of the test identification parade available on the file reflect that the appellant had not been picked by PWs with reference to any role played by him during the occurrence.

16. As observed above, the appellant was not nominated in the FIR. He was arrested in this case during the investigation. No injury to the deceased was ascribed to him. Allegedly, he caused injury to one Muhammad Zubair never examined at trial. The offence under Section 397 PPC was not proved as the recovery memos were not available on the file. There was also no identification memo of the articles allegedly recovered from the appellant. There was no evidence of common intention. Nothing can be gathered from the record that there was some pre-meditation or pre-concert of mind, thus, Section 34 PPC was not attracted. The prosecution adduced no evidence to prove the fact of theft.

17. It is by now settled that benefit of doubt, if found in the prosecution's case, the accused shall be held entitled to the benefit, thereof. It is also settled principle of criminal administration of justice that if there is element of doubt, as to the guilt of accused, it must be resolved in his favour. The golden rule of benefit is initially a rule of prudence which cannot be ignored, while dispensing justice in accordance with law. It is based on maxim that it is better to acquit ten guilty persons rather than to convict one innocent person. For acquittal of accused in an offence, how-so heinous it may be, only a single doubt in the prosecution evidence is sufficient. Reliance in this respect can be made on *"Mst. Nazia Anwar versus The*

State and others" (2018 SCMR 911) and the relevant observations of their lordships appearing in page-922 at para-12 read as under:

> "The cardinal principle in the criminal justice system in a situation like this, is to extend benefit of doubt to an accused to acquit him/her of capital charge, instead of reducing the sentence. Once doubts about the genuineness of the story lurk into the minds of the judges, the only permissible course is to acquit the accused and not go for the alternative sentence of life imprisonment. In this regard reference may be made to the following case laws:
>
> "(i) *Ayub Masih v. The State* (PLD 2002 SC 1048)
>
> (ii) *Muhammad Zaman v. The State and others* (2014 SCMR 749)
>
> (iii) *Hashim Oasim v. The State* (2017 SCMR 986)
>
> It is also well entrenched rule and principle of law that on the basis of probabilities, accused person may be extended benefit of doubt acquitting him/her of a capital charge however, such probabilities, high howsoever could not be made basis for conviction of an accused person and that too on a capital charge"

18. It is settled principle of law that prosecution primarily is bound to establish guilt against the accused, beyond shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence enabling the Court to draw the conclusion whether the prosecution has succeeded in establishing accusation or otherwise and if it comes to the conclusion that the charge was imputed against the accused and have not been proved beyond reasonable doubt, then, the accused becomes entitled to acquittal on getting the benefit of doubt.

19. For the reasons mentioned above, the Criminal Appeal No. 1102 of 2012 is allowed. The impugned judgment dated 30.5.2012 is set aside. The appellant is acquitted of the charges. He is in jail and be released forthwith if not required in any other criminal case.

For the reasons mentioned above, the above Criminal Appeal No. 1123 of 2012 and Criminal Revision No 690 of 2012 are hereby dismissed.

(A.A.K.) Appeal allowed

2021 P Cr. L J 1026
[Lahore]
Before Sardar Ahmed Naeem, J
MUHAMMAD ASIF---Petitioner
Versus
AMJAD ALI and 5 others---Respondents

Criminal Revision No. 57092 of 2020, decided on 9th November, 2020.

(a) Criminal trial---

----Witness---Hostile or un-favourable witness---Determination---Hostile witness can only be declared by a Court though it is generally at the request of attorney posing the questions---In determining as to who can be considered a hostile witness, Court decides based on witness demeanor and credibility, if the witness should be treated as hostile---Court can also rule that witness is un-favourable witness and not hostile witness---Just because a witness is providing un-favourable evidence, it does not mean such witness is doing so in an effort to be vindictive.

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

----Ss. 302 & 109---Qanun-e-Shahadat (10 of 1984), Arts. 133 & 151---Qatl-i-amd and abetment---Appreciation of evidence---Hostile witness---Right to cross-examine---Locus standi---Petitioner was a prosecution witness who intended to cross examine another prosecution witness on the plea of his being hostile to prosecution---Credibility of statement of a witness could be permitted to be impeached by prosecution of its own witness, if statement of such witness in examination in chief was in deviation to his previous statement or such statement was adverse to the interest of prosecution---No such permission could be granted to prosecution on the basis of averment of statement of witness in cross examination by defence---Permission could not be granted to prosecution to cross examine a witness after he was cross examined by accused to impeach credibility of his statement made by him during cross examination---Application was not filed at appropriate stage and no request was made by complainant or legal heir of deceased for invoking powers of Trial Court under Art. 150 of Qanun-e-Shahadat, 1984---Petitioner was only a witness and not amongst legal

heirs and had no locus standi to file application for such declaration---High Court declined to interfere in the order passed by Trial Court declining to declare the witness as hostile---Revision was dismissed in circumstances.

Dahyabhai Chhaganbhai Thakkar v. State of Gujarat AIR 1964 SC 1563; Mukhtar Ahmad v. The State 2003 SCMR 1374; Gura Singh v. State AIR 2001 SC 330; State of Bihar v. Lalu Prasad alias Lalu Prasad Yadav AIR 2002 SC 2432; Bashir Ahmad v. The State and another PLD 2019 Lah. 594 and Muhammad Boota and another v. The State 1984 SCMR 560 distinguished.

(c) Words and phrases---

----"Party"---Meaning.

Webster's Third New International Dictionary; Corpus Juris Secundum; Bouvier's Law Dictionary and advanced law lexican P. Ramanatha Aiyar's rel.

Asif Javed Qureshi for Petitioner.

ORDER

SARDAR AHMED NAEEM, J.---The petitioner assails the order dated 13.10.2020, passed by learned Additional Sessions Judge, Lahore whereby the application filed by the petitioner seeking permission to cross-examine Muhammad Ashraf, PW.1, examined during trial of case FIR No.97/2015 dated 06.03.2015, under sections 302, 109, 34, P.P.C., Police Station Hair, Lahore, was dismissed.

2. The facts, in brief, are that during trial of above mentioned case, the complainant, namely, Muhammad Ashraf was examined as PW.1 on 10.12.2018, however, on 07.03.2020, during the cross-examination, he had not supported the prosecution story, thus, on the same day, the application was filed by the petitioner and real brother of the deceased, namely, Rehmat Ali, not a party to these proceedings forwarded by the learned Deputy District Public Prosecutor seeking permission to declare PW.1 as hostile so that he could be cross-examined by the petitioner.

3. Learned counsel for the petitioner contends that the application was filed by the petitioner on the same day; that both the parties should be provided fair and adequate opportunity to put and prove their case before the Court; that the petitioner being real nephew of the deceased was within his rights to move the application but the learned trial court observed otherwise and proceeded to dismiss the petition on erroneous assumption of law, thus, the impugned order is liable to be set aside. To augment his contentions, learned counsel relied upon "Dahyabhai Chhaganbhai Thakkar v. State of Gujarat" (AIR 1964 SC 1563) and "Mukhtar Ahmad v. The State" (2003 SCMR 1374).

4. After hearing the learned counsel for the petitioner and perusing the available record, it was noticed that the examination-in-chief of PW.1 was recorded on 10.12.2018 and he was cross-examined on 07.03.2020. On the same day, an application was filed by the petitioner and Rehmat Ali to declare the said witness being hostile. It was asserted in the said application that PW.1 connived with the opposite party and was won over and, thus, be declared hostile.

5. A hostile witness is someone who appears to be refusing to tell the truth in a court of law or one who, by his actions or statements, is contrary to the party who called him. Witnesses provide what are known as "pre-trial statement", which are statements that essentially sum up the relevance of that witness to that particular case. Included in the statements are the facts and evidence that a witness agrees to provide in open court at the trial of the case.

6. A witness is declared as hostile, however, when his account under oath changes significantly from that which was provided in his pre-trial statement. For example, a hostile witness can no longer be trusted, and, as such, his own attorney can treat him as if he was working for the opposition and can question him accordingly.

7. Hostile witness can only be declared as such by a court, though it is generally at the request of the attorney posing the questions. In determining who can be considered a hostile witness, the court decides, based on the witness demeanor and credibility, if the witness should, in fact, be treated as hostile. The court can also rule that the witness is unfavourbale witness, not a hostile witness.

This means that, just because the witness is providing unfavourable evidence, it does not mean he is doing so in an effort to be vindictive.

8. When a witness is declared as hostile, he is being accused of contradicting his pre-trial statement. When a party suspects a witness of being hostile, it makes an application to the court asking to treat the witness as hostile and if the request is allowed then the person who took to pre-trial statement is asked to prove before the court that the statement was made. It is settled principle of criminal administration of justice that the Court may permit re-examination of a witness if considered proper and necessary on a material question which has been omitted by the prosecution to bring on record in his examination-in-chief but the prosecution is not allowed to cross-examine the witness after cross-examination of defence in respect of the facts narrated by him either in his examination-in-chief or cross-examination. The order of examination-in-chief and cross-examination of a witness find mentioned in Article 133 of Qanun-e-Shahadat, 1984.

133. Order of examination.

i. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

ii. .

iii. The re-examination shall be directed to the explanation of matters brought on record during cross-examination and if new matter is by permission of the Court, introduced in re-examination, the adverse party may further cross-examine that matter.

9. The hostility is a terms which is relevant to the statement in examination-in-chief and if a witness is allowed to be cross-examined by the prosecution after the cross-examination by the defence, the purpose of right of cross-examination would be defeated and provision of Articles 133 and 151 of Qanun-e-Shahadat, 1984 relating to the examination and cross-examination of a witness would be negated. The credibility of a statement of a witness may be permitted to be

impeached by the prosecution of its own witness, if, his statement in examination-in-chief is in deviation to his previous statement or the statements is adverse to the interest of prosecution but no such permission can be granted to the prosecution on the basis of averment of the statement of witness in cross-examination by defence. The logic of law is not in favour of grant of permission to the prosecution to cross-examine a witness after being cross-examined by the defence, to impeach the credibility of his statement made by him during cross-examination.

10. The court is empowered, at any stage, to recall a witness for re-examination for the removal of any doubt regarding facts if dictates of justice and equity so demands but such permission cannot be granted to either party to fill in lacunae in the case or to cover a gap in the evidence adverse to the interest of other party. The law having taken care of the situation in which an ambiguity is created in the statement of a material witness, has empowered the court under section 540, Cr.P.C. to recall a witness for re-examination and permit the adverse party to cross-examine the witness after re-examination.

However, the discretion is vested with the Court to grant permission to cross-examine or otherwise. Normally when the Public Prosecutor requested for permission to put cross questions to a witness called by him the courts used to grant it, and if the Public Prosecutor had sought permission at the end of the examination-in-chief itself the trial court is having no good reason for declining the permission sought for. But in this case, the petitioner or the Public Prosecutor did not do so at appropriate stage.

11. As mentioned above grant of permission prayed for is in the discretion of the trial court to be exercised in a judicious manner as observed in the case titled "Gura Singh v. State" (AIR 2001 SC 330), the relevant observations read as under:

> "Section 154 authorized the Court in its discretion to permit the persons who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The Courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the

attending circumstances. Permission for cross-examination in terms of section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness."

12. In the case titled "State of Bihar v. Lalu Prasad alias Lalu Prasad Yadav" (AIR 2002 SC 2432), the prosecution did not seek permission to cross-examine a hostile witness during the statement. Such permission sought later on, was refused. This question also came up before learned Division Bench of the Court in case titled "Bashir Ahmad v. The State and another" (PLD 2019 Lahore 594) and the relevant observations of their lordships appearing in para 6 of the judgment read as under:

" The court has the due empowerment and the jurisdiction to call any witness at any stage of trial, on its own motion and even upon an application of either of the parties. But the question is as to what circumstances shall warrant for the exercise of the said power and/or whether a party to the trial has an absolute right, or as a matter of course can require the court to invoke its power and call a witness for the re-examination at any point of time and the stage of proceedings, because it shall be a mere technicality to do so? The answer to the above is in the negative. In our view, the parties have no such absolute right at all; the witness also should not be summoned by the court while exercising its discretion as a matter of routine, rather it all depends upon the facts of each case."

Referring to the law laid down in "Muhammad Boota and another v. The State" (1984 SCMR 560), their lordships observed as follows:

" that a witness who is unfavourable is not necessarily hostile, for a hostile witness is one who from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the court; that the witnesses answer to certain question is in direct conflict with evidence of other witnesses and is not and can never be a reason for allowing a witness to be treated as hostile and permitted to be cross-examined .It is possible that if the prosecution is allowed to re-summon and re-examine Niaz Ahmad Khar, ASI (PW-1) then in fact it would not be an

exercise in the discovery of truth but rather an aberration to fill the lacunae of the one party"

13. Reverting to the merits of this case it was observed that in para No.3 of the application filed by the petitioner seeking permission for re-examination, the petitioner asserted connivance between the complainant, namely, Muhammad Ashraf (PW-1) and the accused but the application of the petitioner is silent regarding details of said connivance. It was asserted that the deceased, namely, Atta Muhammad alias Naiko was real paternal uncle of the petitioner. Admittedly, the petitioner is a witness of the case as mentioned in the preceding para, however, it is to be seen if he is a party to the proceedings as word "party" find mention in Article 150 of Qanun-e-Shahadat, 1984. I considered it proper to have dictionary meaning of word "party" as the word "party" has not been defined in Qanun-e-Shahadat, The Code of Criminal Procedure and The General Clauses Act, thus, dictionary meaning of a word can be ascertained to have correct interpretation. In Webster's Third New International Dictionary word "party" denotes one directly disclosed by record to be so involved in the prosecution of defence of a proceeding as to be bound by the decision or the judgment therein; one indirectly disclosed by the record as being directly interested in the subject matter of a suit or as having power to make a defence or control the proceedings or appeal from the judgment.

In Corpus Juris Secundum, it has been defined as follows:

"With reference to judicial proceedings, the word "party" is generally used as meaning one of two opposing litigants, he or they by or against whom a suit is brought, whether at law or in equity, the plaintiff or defendant, whether natural or legal persons."

14. According to Bouvier's Law Dictionary, "parties" in law may be said to be those united in interest in the performance of an act. In advanced law lexican P. Ramanatha Aiyar's, the word "party" is defined as under:

"When the word "party" is used, its primary meaning is a litigant. It means a person who is a part to play in the proceedings and word "party"

> includes not only private parties but also the State if it happens to be the party as in police cases."

Having surveyed the above definitions, I am of the view that the petitioner may be relative of the deceased and a witness of the case but not a party to the proceedings.

15. It is also pertinent to mention that in cases of homicide the personal right to recover compensation by way of "Diyat or Khoon Baha" is vested in legal heirs of the deceased recognized by Islamic Sharia. All such cases are now compoundable by the legal heirs/victim as mentioned in the table given under section 345, Cr.P.C. So in the prevailing legal system, legal heirs of the deceased also have some rights in their personal capacity to look after prosecution but no other person be he a witness or related to the deceased.

Learned counsel for the petitioner after consulting the record apprised that the deceased was 45 years old and married. Referring to list of legal heirs of the deceased, he conceded that the petitioner was not amongst legal heir of the deceased. It may further be observed that the application was not filed or moved by the complainant but was simply forwarded by Prosecutor. The application was also not filed at an appropriate stage and no request was made by the complainant or any legal heir of the deceased for invoking powers of the Court under Article 150 of the Qanun-e-Shahadat, 1984.

16. As mentioned above, the petitioner in this case is only a witness. He is not amongst the legal heirs and thus had no locus standi to file application for such declaration. The judgments relied upon by the learned counsel for the petitioner have distinguishable facts and are not applicable to this case. The impugned order is based on sound reasons. No illegality or perversity was found therein, warranting interference of this Court.

17. For the foregoing reasons, there is no merit in this petition, which is hereby dismissed.

MH/M-2/L Revision dismissed.

PLJ 2021 Cr.C (Lahore) 833
[Multan Bench Multan]
Present: **SARDAR AHMED NAEEM, J.**

MUHAMMAD AZEEM--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 1379-B of 2021, decided on 8.4.2021.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(iii), 337-F(iii), 337-L(2), 337-F(v), 337-F(vi), 148 & 149--Bail, grant of--Common object--Unexplained delay--Commencement of trial is no clog to grant of bail if petitioner is entitled to same relief on merits--In these circumstances, case of petitioner needs serious consideration within meaning of Section 497(2), Cr.P.C, thus High Court am inclined to exercise my discretion in favour of petitioner--Bail was allowed. [P. 834] A & B

Mr. Shamim Riaz Ahmad Langrial, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, Deputy Prosecutor General for State.

Ch. Mazhar Iqbal Chadhar, Advocate for Complainant.

Date of hearing: 8.4.2021.

ORDER

Muhammad Azeem, petitioner seeks post-arrest bail in case registered *vide* F.I.R. No. 248/2017 dated 15.07.2017, under Section 337-A(iii), 337-F(iii), 337-L(2), 337-F(v), 337-F(vi), 148, 149, P.P.C., at Police Station Harrapa, District Sahiwal.

2. Allegedly, the petitioner being member of unlawful assembly and in prosecution of its common object inflicted injuries to Muhammad Zubair, the injured.

3. Having heard the arguments addressed at the bar and after perusing the record, it was noticed that the occurrence took place on 06.07.2017 but the incident was reported on 15.07.2017 with unexplained delay of about 09 days. Co-accused of the

petitioner including Muhammad Yasin and Muhammad Amin have been admitted to

post arrest bail by the Court *vide* order dated 20.08.2018 passed in Criminal Miscellaneous No. 3157-B of 2018 and order dated 03.04.2018 passed in Criminal Miscellaneous. No. 1041-B of 2018. During the investigation, no recovery was effected from the petitioner. The investigating agencies successively concluded that the petitioner was merely present at the crime scene, thus, it is a case of two versions. One introduced by the complainant/injured and the other as concluded by the Investigating Agency. In similar situation the apex Court in case titled *"Ehsan Ullah vs. The State, etc."* (2012 SCMR 1137) admitted the accused to post arrest bail. The petitioner is in jail since arrest and his long incarceration would serve no purpose to the prosecution, in particular, when the investigation is complete. The petitioner has got no previous record at his credit and, thus, would be believed as first offender. The speedy trial is the right of the accused and there is ho likelihood of the early conclusion of the trial. Even otherwise, commencement of trial is no clog to the grant of bail if the petitioner is entitled to the same relief on merits. Ref: *"Muhammad Ismail vs. Muhammad Rafique & another* (PLD 1989 SC 585). In these circumstances, the case of the petitioner needs serious consideration within the meaning of Section 497(2), Cr.P.C, thus, I am inclined to exercise my discretion in favour of the petitioner.

4. In view of the above, the application is accepted and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 200,000/- with one surety in the like amount to the satisfaction of learned trial Court/duty Judge.

(R.A.) Bail allowed

PLJ 2021 Cr.C. (Note) 68

[Lahore High Court, Lahore]

Present: **SARDAR AHMED NAEEM AND ABDUL SAMI KHAN, JJ.**

ABID AZEEM and others--Appellants

versus

STATE and others--Respondents

Crl. A. Nos. 409-J, 410-J of 2012, Crl. Rev. No. 5 & P.S.L.A. No. 2 of 2013, decided on 21.3.2017.

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

----S. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--Qatl-e-amd--**Held:** It is settled law that if co-accused of appellants are acquitted on same set of evidence, then, conviction on a capital charge can only be sustained on strong corroboration of material available on record which is not forthcoming in this case and statement of PW is not corroborated from evidence of a unimpeachable source--**Further held:** It is settled by now that onus of proof in criminal cases never shifts and it is for prosecution to prove this case against accused beyond reasonable doubt--It is by now well settled law that if there is a single circumstance which creates doubt regarding prosecution case, same is sufficient to extend benefit of doubt to accused, whereas, instant case is replete with number of circumstances which have created serious doubts about prosecution story--Hon'ble Supreme Court of Pakistan, at page No. 1347, was pleased to observe that concept of benefit of doubt to an accused person is deep-rooted in our country--For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts--If there is a circumstance which creates reasonable doubt in a prudent mind about guilt of accused, then, accused will be entitled to benefit not as a matter of grace and concession but as a matter of right--Prosecution has failed to prove its case against the appellants--Appeal was accepted [Para 31 & 32] A, B & C

2012 SCMR 440, 2009 SCMR 1188 and 2009 SCMR 230.

M/s. Sadiq Mehmood Padhiar Khurram and Syed Zeeshan Haider and *Rustam Khan Badhiar,* Advocates for Appellants.

Mr. Usman Iqbal, Deputy District Public Prosecutor for State.

M/s. Rai Bashir Ahmad and *Zafar Iqbal Cheema,* Advocates for Complainant.

Date of hearing: 21.3.2017.

JUDGMENT

Sardar Ahmed Naeem. J.--Amjad Nawaz, Muhammad Amin, Abdullah *alias* Dulli, Abid Azeem and *Mst.* Irshad Begum accused of Private complainant, under Sections 302/109/148/149 of the Pakistan Penal Code, 1860, Police Station City Chishtian, District Bahawalnagar, lodged by *Mst.* Fareeha Fatima, complainant, were tried by the learned Addl. Sessions Judge, Lodhran, for committing Qatl-i~Amd of Ghulam Muhammad Azeem. At the conclusion of the trial *vide* judgment dated 04.12.2012, the learned trial Court acquitted Abdullah. Muhammad Amin, Irshad Begum, Tariq Azeem, Sajid Azeem and Arif Azeem of the charge, whereas convicted and sentenced Amjad Nawaz and Abid Azeem appellants as under:

> "under Section 302(b), PPC to life imprisonment each with a direction to pay Rs. 1,00,000/- each to the legal heirs of deceased as compensation under Section 544-A, Cr.P.C. Benefit of 382-B, Cr.P.C. was also extended"

2. Abid Azeem convict/accused has lodged Crl. Appeal No. 409-J of 2012 challenging his conviction and sentence. Amjad Nawaz convict/accused has also lodged Crl. Appeal No. 410-J of 2012 against the conviction and sentence. *Mst.* Fareeha Fatima filed Criminal Revision No. 05/2013 for enhancement of life imprisonment awarded to Abid Azeem and Amjad Nawaz accused/respondents. *Mst.* Fareeha Fatima complainant filed Criminal Petition for Special Leave to Appeal No. 2 of 2013 against the acquittal of respondents No. 1 to 5, namely *Mst.* Irshad Begum, Tariq Azeem, Arif Azeem, Sajid Azeem and Abdullah *alias* Dulli. This petition was directed to be heard along with connected matters. This judgment will dispose of all the above mentioned matters.

3. It is observed that initially FIR No240/2007, dated 30.5.2007 under Sections 302/148/149/109, PPC was got registered with regard to the murder of Ghulam Muhammad Azeem, husband of the complainant at Police Station City Chishtian, District Bahawalnagar. During investigation, the police found the accused persons innocent, therefore, feeling dissatisfied with the investigation of the police,

the complainant lodged the private complainant (Exh.PA) regarding the same occurrence.

4. Case of the complainant, as set-forth in the above said FIR as well as the private complaint (ExhPA) filed by *Mst.* Fareeha Fatima, complainant, was that her marriage was solemnized with Ghulam Muhammad Azeem (deceased) on 19.11.2005. About few months prior to the registration of the F.I.R, her husband divorced his 1st wife *Mst.* Irshad Begum. On 29.5.2007, Abid Azeem appellant alongwith his brothers and mother *Mst.* Irshad Bibi telephonically threatened the complainant and her husband Ghulam Muhammad Azeem of dire consequences that if they went to the Court. On 30.5.2007 at about 10.00 A.M. when the complainant alongwith her husband came to the Ihata of the Court of Addl. Sessions Judge, Chishtian, Amjad Nawaz appellant alongwith Abid Azeem appellant, Muhammad Azeem (since acquitted) and Abdullah *alias* Dulli accused (since acquitted) all armed with Pistols came there. Amjad Nawaz appellant fired with his Pistol hitting Ghulam Muhammad Azeem, husband of the complainant on his chest Abid Azeem appellant fired second shot of Pistol which also hit Ghulam Muhammad Azeem. on his chest. Abdullah *alias* Dulli accused (since acquitted) made successive shots of Pistol which hit Ghulam Muhammad Azeem on different parts of his body, who after receiving fire shots fell down on the ground. The accused fled away from the spot while riding on motor cycles. The injured was removed to the hospital but he succumbed to the injuries. Motive for the occurrence was second marriage of the deceased Ghulam Muhammad Azam with the complainant.

5. In order to prove the case against the accused persons, the complainant produced as many as 12 witnesses in all. Muhammad Saleem Constable (CW-1) escorted the deadbody of the deceased to the mortuary for post-mortem examination. He delivered the last worn clothes of the deceased to the I.O. Mahmood-ul-Hassan Constable (CW-2) was the witness of blood-stained earth which was delivered to him by the Moharrar on 28.6.2007 for onward transmission to the office of Chemical Examiner, Lahore who deposited there on the same day. Muhammad Nawaz Moharrar ASI (CW-3) was also witness of blood-stained earth, crime empty and last worn clothes.

6. Muhammad Azam ASI (CW-4) was the witness of arrest of Abid Azeem appellant and recovery of Pistol etc.

7. Dr. Muhammad Afzal Medical Officer (CW-5) conducted post-mortem examination of the deceased and found following injuries:

Injury No. 1-A.

Lacerated wound measuring 1.25 cm x 1.00 cm into deep going (depth not ascertained) slightly oval in shape present at third intercostals space on right side of chest anteriorly 7. cm from mid line. Margins of would inverted (wound of entry) no burning blackening present around wound. Abrasion ring present around wound.

On exploration muscle under the wound damage, third rib on the right side fractured. A hole in right pleura, upper lobe of right lung punctured. Right pleura cavity full of blood. Hole is pleura posteriorly.

Injury No. 1-B.

Another lacerated wound measuring 1.5 cm x 1.25 cm into deep going, slightly oval in shape on back of left side of chest. In fourth intercostals space, 4 cm from mid line. Margins of wound everted. No burning blackening present around wound. Muscles under the wound damaged. Injury No. 1-B is the continuation of Injury No. 1-A. Injury No. 1-B was mentioned in the injury statement as Injury No. 5.

Injury No. 2-A.

Lacerated wound measuring 1.5 cm x 1.25 cm into deep going (depth not ascertained), slightly oval in shape on left 9th intercostals space in the line of nipple. Margins of wound inverted. No burning blackening present around wound. Abrasion ring present on exploration. Lower lobe of left lung damaged. There was also hole in pleura. Left pleura! cavity full of blood. There was hole in left pleura posteriorly. Corresponding holes in shirt, Bunyan also present.

Injury No. 2-B.

A lacerated wound measuring 1.75 cm x 1.50 cm into deep going, slightly oval in shape, back of left side of chest 11th intercostal space, 3 cm from mid line. No burning blackening present around wound. Muscle under the wound damaged. Corresponding hole in Bunyan and Shirt were present. Injury No. 2-B is continuation of Injury No. 2-A. Injury No. 2-B was mentioned in injury statement as No. 6.

Injury No. 3-A.

Lacerated wound measuring 1.25 cm x 1 cm into deep going (depth not ascertained) present on 5th intercostals space on right side of chest interiorly 3 cm from mind line. Margins of wound inverted. No burning blackening present. Abrasion ring present on exploration, muscles under the wound damaged. Hole in the right pleura, lower lone of right lung punctured. Right pleural cavity full of blood. Heart completely damaged. Hole is left pleura posteriorly, middle lobe of left lung also punctured. Corresponding holes in Bunyan and Shirt were also present.

Injury No. 3-B.

Lacerated wound measuring 1.5 cm x 1.25 into deep going, slightly oval in shape on back of left side of chest in 6th intercostals space, 15 cm from mid line. Margins of would everted. No burning blacking present. Muscles under the wound damaged. Corresponding holes in Bunyan and Shirt were present. Injury No. 3-B is continuation of Injury No. 3-A. Injury No. 3-B was mentioned in injury statement as Injury No. 7.

Injury No. 4-A.

A lacerated wound measuring 1.25 cm x 1 cm into skin deep present on left upper arm, at upper 1/3 antrolateraly. Margins of wound inverted. No burning blackening present. Abrasion ring present. Hole in shirt corresponding to injury present.

Injury No. 4-B.

Another lacerated wound measuring 1.5 cm x 1.25 cm into skin deep present on postrolateral aspect of left upper arm at upper 1/3.3 cm lateral and 1 cm blow the Injury No. 4-A. Margins of would everted. No burning blackening present. A hole in shirt corresponding to would also present. Injury No. 4-B is continuation of Injury No. 4-A.

8. Muhammad Jamil Civil Draftsman (CW6) prepared rough site plan on the pointation of the complainant and witnesses.

9. Syed Akhtar Hussain S.I. (CW-7) lodged formal F.LR Ex. CW7/Ex.PA/1 on the basis of complaint Ex.PA.

10. Liaqat Ali S.I. (CW-9) initially investigated the case. He deposed that on 30.5.2007, after getting information about the occurrence, he went to the Civil Hospital, Chishtian where complainant *Mst.* Fareeha Fatima submitted application Ex.PA which he sent to the police station for registration of the formal F.LR. He prepared injury statement Ex.CW.5/C and inquest report Ex.CW.5/B of the deceased. He took into possession blood-stained earth Exh.PC, four empties Bxh.P. 1/1-4 and a magazine of Pistol 30 (P-2) bore from the place of occurrence. He prepared site plan Ex.CW.9/1 of the place of occurrence. He declared Amjad Nawaz and Abid Azeem appellants innocent and arrested Abdullah and Muhammad Amin accused.

11. Masood Ahmad S.I. (CW-8) subsequently investigated the case, arrested Abid Azeem appellant and recovered Pistol (P-6) etc. from his possession.

12. Liaqat Ali DSP Investigating Cell Punjab, Lahore (CW-10) member of the Penal of Investigating Officers approved the investigation.

13. Syed Ali Raza DSP (CW-11) deposed that investigation was entrusted to him by the order of SSP RIB. On 7.12.2007, the complainant appeared and got recorded her supplementary statement and nominated Khadim Hussain and Manzoor Bhatti. On 17.01.2008, Tahir Hussan Butt and Khalid Hameed Arain appeared. before him and got recorded their statements regarding extra judicial confession of Amjad Nawaz accused. On his investigation Irshad Begum, Abid Azeem, Muhammad Amjad Nawa, Abdullah *alias* Dulli, Khadi Hussain and Manzoor Ahmad

Bhatti were declared guilty and Arif Azeem, Tariq Azeem, Sajid Azeem and Muhammad Ameen accused were declared innocent.

14. Abdul Karim SSP/DPO, Jhang (CW-12) deposed that on 25.8.2009, investigation of the case was entrusted to him. Both the parties joined the investigation number of times and according to his investigation Amjad Nawaz, Abid Azeem, Abdullah and Irshad Begum abetted the occurrence and the murder was committed by Khadim Hussain and Manzoor Hussain. He also found Muhammad Ameen, Arif Azeem, Tariq Azeem and Sajid Azeem innocent.

15. After conclusion of the prosecution evidence, statements of the accused persons was recorded. They refuted the prosecution allegation and claimed innocence.

Amjad Nawaz appellant in his statement under Section 342, Cr.P.C. stated as under:

> "I have falsely been involved in this case by the complainant due to her enmity with me. I had no motive to kill Ghulam Muhammad Azeem. In fact my grandfather and Ghulam Muhammad Azeem were cousin (phophizad) interse who was having good terms with my family. In the year 1994-95 my family shifted to Bahawalpur from Chistian and remained alone at my agricultural land at Chistian whereupon Ghulam Muhammad Azeem, offered me to cultivate his land at Bahawalpur, thereafter I shifted to Bahawalpur and started to cultivate the land of Ghulam Muhammad Azeem deceased on lease during this period. Fariha Fatima complainant started to live with Ghulam Muhammad Azeem where Fariha Fatima developed illicit relations with Ghulam Muhammad Azeem. In the year 2003 I was called for by Ghulam Muhammad Azeem to his house in order to go with him to an advocate in connection with a civil suit regarding a plot about which I was named as a witness. I visited the room of Ghulam Muhammad Azeem but he was not present in his room there. I went another room where I found Fariha Fatima and Ghulam Muhammad Azeem in an objectionable condition which fell me in grief and then I disclosed this to my father who directed me not to cultivate the land of Ghulam Muhammad Azeem and my father also forbade my family to permit

Ghulam Muhammad Azeem to enter into our house. Ghulam Muhammad Azeem made efforts to reinstate the relations with me and my family but I refused to do so. After lapse of sometime relations between Ghulam Muhammad Azeem and his sons-became strained and they continued to get register cases against each other then Ghulam Muhammad Azeem again called for me and pressurized me to support him in affairs pending against his sons but I refused to interfere in their family disputes whereupon Ghulam Muhammad Azeem threatened me that he will involve me in my criminal cases and then he started to implicate me in criminal cases alongwith his sons and others and all the cases registered by Ghulam Muhammad Azeem were found false and I was declared as innocent but due to the visiting terms of Abdul Azeem with me Fariha Fatima, Shafique-ur-Rehman and Ghulam Muhammad Azeem became inimical towards me and issued threats to me and in this regard got lodged a rapat against Ghulam Muhammad Azeem. Elders of Ghulam Muhammad Azeem and Abid Azeem tried to effect compromise between Ghulam Muhammad Azeem and his sons and arbitrators were appointed to resolve the issues and date was fixed for compromise as 27.5.2007 but due to the non-availability of the Arbitrator appointed on behalf of Ghulam Muhammad Azeem *i.e.* Ali Akbar Wains compromise could not be finalized and date was changed. On 30.5.2007 I alongwith Abdul Rehman s/o Barkat Ali resident of Bahawalnagar went to attend Bahawalpur Civil Court and we reached at the chamber of Ch. Noor Hussain Advocate who was then gone to Lahore High Court and I alongwith clerks and clients of Ch. Noor Hassan remained present at his chamber till 12.00 p.m. and then I went to the house of Abdur Rehman my friend. I produced the clerks of Ch. Noor Hassan and other persons before the police during the course of investigation and my plea of alibi was investigated by all the investigating officers and found as true. I was declared innocent by the local police which was verified till DSP but on the influence of Fariha Fatima and her supports RIB illegally arrested and challenged me as an abettor without any evidence. Even Chistian Bar Association passed a unanimous resolution regarding the commission of murder by some unknown persons and not by us. Even no incriminating evidence is available against me. I Just have been implicated by complainant and PWs due to their previous grudge against me as I

refused to support them, neither I was present at the place of murder of Ghulam Muhammad Azeem at the alleged time of occurrence nor I have had my knowledge *qua* the murder of Ghulam Muhammad Azeem. My plea of alibi thoroughly investigated by all the investigating officers and was found true. Ulterior motive of the complainant forced her to drag me in this case. Both prosecution witnesses are related interse and are inimical towards me due to their previous enmity with me and due to this reason they falsely involved me in this case."

Abid Azeem appellant in his statement under Section 342, Cr.P.C. stated as under:

> "The reason of the false involvement of myself, my mother and real brothers has been described in the above lines in reply to different questions. At the time of alleged threats, planning and instigation on telephone, a night before the alleged occurrence my brother, Sajid Azeem, Tariq Azeem and Arif Azeem were living different places in London, The prosecution has failed to prove the telephonic contract with the deceased on behalf of either of the accused. The reason of the false involvement of me in the present case is that amongst the sons of the deceased, I was the only one with some knowledge of our affairs in Pakistan as I had lived and studied here for some time whilst also managing my own and brothers financial affairs here. The fact of the matter is that my parents shifted from Pakistan to UK quite a long time before. All of us put hard efforts and earned money from abroad and thereby jointly purchased properties in District Bahawalpur, Bahawalnagar and Lahore. Some of the properties were in the name of each of my brother including myself and many of the properties were purchased by the joint pool of earning in the name of my deceased father out of which some of the properties were alienated by my father through gift and most of the properties were still joint and in this respect certain cases of civil litigation are also pending in different Courts in District Bahawalpur and Bahawalnagar. The lady complainant with *mala fide* motive to usurpation of property of the deceased, succeeded to get rid of him and by involving me there is no male member of the family in Pakistan to challenge her *mala fide* motives and defend the present case and to bring incriminating material against her. Complainant has also involved me and my family to blackmail us in order to give her crores and

more money and property and also to cover the real crime as it happened and the real culprits who are themselves the complainant and witnesses. Therefore, I alongwith my mother and brothers have been falsely involved in the case. The complainant has given up the alleged PWs except Snafique-ur-Rehman who is husband of her real sister and is availing the monetary gains from the lady complainant since the enstart of intimacy and its culmination into murder of my father till today. It is questionable that a person of no means at all Shafique-ur-Rehman PW has been living in a life luxury with money, cars, vehicles with guard ever since the murder of my father."

The appellants did not opt to appear as their own witnesses under Section 340(2), Cr.P.C. However they produced defence evidence.

16. In defence evidence, the accused persons produced Hafiz Abid Hassan (DW-1) stamp vendor who stated that on 30.5.2007 Abid Azeem appellant purchased Stamp of Rs. 100/- Mark-B/1 from him for the purposes of lease agreement in favour of Mian Abdul Ghaffar who signed and put his thumb impression before him.

17. Salman Ali Khan (DW-2) deposed that on 30.5.2007 at about 9.00 to 9.15 a.m., he alongwith his brother picked Abid Azeem appellant and went to the chamber of Ch. Muhammad Jameel Advocate at Court premises Bahawalpur and completed the documents of Mustajri Nama regarding agricultural land. After sometime they went to the house of their common friend Ejaz Safdar. Thereafter they went to the chamber of Stamp vendor and left the Court premises at 10.45 a.m.

18. Ch. Muhammad Jameel Advocate (DW-3) deposed that on 30.5.2007 at 9.30 a.m., appellant Abid Azeem came in his chamber in order to draft lease deed.

19. Muhammad Zafar Iqbal Qureshi Advocate (DW-4) was General Secretary of Bar Association Chistian.

20. Muhammad Asif Advocate (DW-5) was President of Bar Association Chistian. On 30.5.2007 at 10.00 a.m. Ch. Ghulam. Muhammad Azeem, member of the Bar was murdered within the Court premises and resolution was passed.

21. Muhammad Zahid Munir Advocate (DW-6) deposed that on 30.5.2007 Ch, Noor Hassan Advocate sent him to the Court ofASJ Chishtian. The deceased entered into the Court premises on which an unknown assailant fired at him who fell down. The complainant *Mst.* Fareeha Fatima was not there. Police removed the injured to the hospital.

22. Muhammad Siddique Joyia Advocate (DW-7) and deposed that on the fateful day some unknown person fired at the deceased and murdered him and stated that Abid Azeem and Amjad Nawaz appellants were not at the spot.

23. Learned counsel for the appellants submitted that the prosecution miserably failed to prove its case against the appellants beyond reasonable doubt; that that it was un- witnessed occurrence; that no independent witness was cited by the prosecution; that there was previous enmity existed between the parties, so possibility of false implication cannot be ruled out. Further adds that no crime empty have been recovered from the spot and no recovery whatsoever was effected during the course of investigation from any of the accused-appellants. According to learned counsel all the accused nominated in the F.I.R were declared innocent during three consecutive investigations; that ultimately at the conclusion of the trial, five out of seven accused were acquitted; that the trial Court disbelieved the complainant. Adds that the prosecution case was full of discrepancies/contradictions; that the defence evidence produced during trial was not appreciated in its true perspective and that the appellants were entitled to be acquitted.

24. Learned DDPP assisted by the learned counsel for the complainant opposed this appeal with vehemence and submitted that the appellants were specifically nominated in the F.I.R with specific role of causing fire-arm injuries to the complainant which. finds support from the statements of the eye-witnesses; that the medical evidence was in line with the ocular account; that mere relationship of the witnesses or with the deceased was no ground to discard their statements; that the accused party was aggrieved being deprived of their property after second marriage of the deceased and thus, the accused Abid Azeem, etc committed Qatl of their real father, which act was abominable; that the discrepancies/contradictions are minor and negligible and do creep up with the passage of time; that the prosecution has proved its case against the appellants beyond reasonable doubt, thus, the sentence awarded to the appellants may suitably be enhanced. Adds that there were sufficient evidence to

connect all the accused including the acquitted co-accused with this occurrence, thus, they may also be summoned and punished under the law.

25. We have heard the respective arguments of the learned counsel for the parties and perused the record with their able assistance.

26. The occurrence in this case, took place on 30.5.2007 at 10.00 a.m within precinct of Sessions Court Tehsil Chishtian, District Bahawalnagar. During this occurrence, Ghulam Muhammad Azeem, lost his life at the hands of the accused named in the F.I.R. The incident was reported to the police by his second wife, namely, Fareeha Fatima. Amongst the nominated accused were included the first wife of the deceased, namely, Irshad Begum (divorcee) and sons of the deceased including Tariq Azeem, Abid Azeem, Sajid Azeem and Muhammad Arif, Muhammad Amjad Nawaz, Muhammad Amin and Abdullah *alias* Dulli. All the accused mentioned in the F.I.R were declared innocent during three consecutive investigations and then, *Mst.* Fareeha Fatima filed a private complaint (Exh.PB) against the accused mentioned therein for committing Qatl-i-Amd of her husband namely, Ghulam Muhammad Azeem.

The occurrence took place at the peak hours inside the Sessions Court. The incident was witnessed by the complainant Shafiq-ur-Rehman, Muhammad Asghar and Shahzad Rasheed.

27. At this stage, it may be mentioned that Shahzad Rasheed and Muhammad Asghar were given up by the prosecution being won over. The eye-witness, Shafiq-ur-Rehman appeared as PW during trial and stated that he was moving ahead of the deceased, when he was fired at by the accused and then he along-with Shahzad Rasheed went towards the wall to save himself. The complainant party was intercepted by the accused then armed with their respective weapons but no injury, whatsoever, was sustained either by Shafiq-ur-Rehman or by any other PW. None of the PW came to rescue the deceased.

28. The learned trial Court after considering/discussing the discrepancies in the statement of Fareeha Fatima disbelieved her as she admitted that she was sitting in the Prado of the deceased at the time of incident, which admittedly was parked outside the Sessions Court and boundary wall was intervening between the

complainant and the assailants. She was disbelieved and rightly so leaving behind Shafiq-ur-Rehman, the solitary eye-witness. He was the real behoni of the complainant and father of the complainant was *"mamun zad"* of his mother. He was doing his business at Faisalabad and leaving everything behind came to Chishtian at the request of the deceased, who wanted him there for his moral support and to pursue the litigation. It was in the evidence that Shafiq-ur-Rehman accompanied the deceased 15 to 20 times, in 2-3 months prior to the occurrence. He was neither intimidated nor fired at by any of the accused. He was living with Fareeha Fatima after the death of Ghulam Muhammad Azeem and it was the complainant, who was maintaining Shafiq-ur-Rehman as well as his family. In a way, he was performing as body guard to the deceased and after his demise to his family. He was biased and interested for the reasons that his wife got registered a case against the accused and thereafter, the accused booked this witness in other criminal cases. It was also in his evidence that he shifted the deceased to hospital in injured condition and his clothes stained with blood but he did not produce those blood-stained clothes before the police during the investigation.

29. According to the medical evidence, the deceased sustained eight fire-arm injuries and Injures No. 1-B, 2-B, 3-B, 4-B were observed as exit wound but attributed to Abid Azeem and Amjad Nawaz, the appellants, whereas, PWs attributed no role to Abdullah and Ameen (since acquitted).

30. On the same evidence, co-accused of the appellant have been acquitted by the learned trial Court. No witness uttered a single word to prove the conspiracy/abetment.

31. There was admittedly, a chain of civil litigation pending between the parties. The deceased was a rich person and after pronouncing divorce to *Mst.* Irshad Begum contracted marriage with Fareeha Fatima, real "Bhateeji" of *Mst.* Irshad Begum. After the marriage, he transferred considerable immovable property in the name of the complainant, thus, Irshad Begum filed various suits against the deceased and others and so did the complainant party, thus, the enmity between the parties was established and admitted.

As mentioned above, the best evidence was withheld as Muhammad Asghar and Shahzad Rasheed were not produced at trial and thus, necessary inference under Article 129(g) of the Qanun-e-Shahdat Order 1984, can be drawn against the

prosecution. Had they been produced by the prosecution they would have not supported its version. The co-accused of the appellants, namely, *Mst.* Irshad Begum, Tariq Azeem, Arif Azeem and Sajid Azeem have been acquitted on the same set of evidence.

It is settled law that if the co-accused of the appellants are acquitted on the same set of evidence, then, conviction on a capital charge can only be sustained on strong corroboration of the material available on record which is not forthcoming in this case and the statement of Shafiq-ur-Rehman is not corroborated from the evidence of a unimpeachable source. Ref; *"Muhammad Akram v. The State"* (2012 SCMR 440) and *"Mir Muhammad @Miro v. the State"* (2009 SCMR 1188).

32. It is settled by now that onus of proof in criminal cases never shifts and it is for the prosecution to prove this case against the accused beyond reasonable doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to extend benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubts about the prosecution story. In *"Tariq Pervez v. The State''* (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page No. 1347, was pleased to observe that the concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then, the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. The apex Court reiterated the same principle in the case of *"Muhammab Akram v. The State"* (2009 SCMR 230).

33. For all the reasons mentioned above, we are of the considered view that the prosecution has failed to prove its case against the appellants beyond reasonable shadow of doubt, therefore, we accept Criminal Appeal No. 409-J of 2012 and Criminal Appeal No. 410-J of 2012, set aside their convictions and sentences recorded by the learned trial Court *vide* judgment dated 04.12.2012 and acquit them of the respective charges by extending benefit of doubt. They are in custody. They be released forthwith if riot required in any other criminal case.

For the foregoing reasons, the <u>Criminal Revision No. 05 of 2013</u> for enhancement of sentence against the appellants and <u>PSLA No. 02 of 2013</u> for conviction of the acquitted co-accused filed by the complainant are hereby dismissed.

(A.A.K.) Appeal accepted

PLJ 2021 Cr.C. 976

[Lahore High Court, Multan Bench]

***Present:* SARDAR AHMAD NAEEM, J.**

***Syed* MUHAMMAD MOABBAR --Petitioner**

versus

STATE, etc.--Respondents

Crl. Misc. No. 1914-B of 2021, decided on 23.4.2021.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail, grant of--No prohibitory clause--Occurrence was reported after three months--No recovery was affected during the investigation--Offence does not fall within the prohibitory clause of S. 497, Cr.P.C.--Bail allowed. [P. 977] A & B

Kh. Qaisar Butt, Advocate for Petitioner.

Mr. Hassan Mahmood Khan Tareen, Deputy Prosecutor General for State.

Mr. Sajjad Haider Maitla, Advocate for Complainant.

Date of hearing: 23.4.2021.

ORDER

Syed Muhammad Moabbar, petitioner seeks post-arrest bail in case registered *vide* F.I.R. No. 278/2020 dated 27.03.2020, under Section 489-F, P.P.C., at Police Station Bahau Din Zakriya, Multan.

2. Allegation against the petitioner is that of executing a bogus cheque in favour of the complainant, dishonoured after presentation.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the occurrence took place on 02.12.2019 but the incident was reported on 27.03.2020 with unexplained delay of more than three months. No plausible explanation is forthcoming on record for such delay. During the investigation, no recovery was effected from the petitioner as the original cheque coupled with cheque return memo were lying with the complainant. The offence under Section 489-F, P.P.C. does not fall under the prohibitory clause of Section 497, Cr.P.C., and grant of bail in such like cases is rule and refusal thereto is an exception. No exceptional circumstance was pointed out either by the learned

Deputy Prosecutor General or by the learned counsel for the complainant. The petitioner has got no previous record, thus, would be believed as first offender. He is in jail since arrest and his continuous detention for indefinite period would not advance the case of the prospection, in particular, when the trial has not witnessed any material progress till date. In the circumstances, I am inclined to exercise my discretion in favour of the petitioner.

4. In view of the above, this petition is allowed and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court/duty Judge.

(M.A.B.) Bail allowed

PLJ 2021 Cr.C. 1026 (DB)

[Lahore High Court, Lahore]

***Present*: SARDAR AHMED NAEEM AND TARIQ SALEEM SHEIKH, JJ.**

MUHAMMAD ANWAR--Appellant

versus

STATE etc.--Respondents

Crl. A. No. 86016 of 2017, heard on 21.03.2019.

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

----S. 9(c)--Criminal Procedure Code, (V of 1898), Ss. 340(2) & 342--Conviction & sentence--Challenge to--Daylight occurrence--Recovery of contraband material--Positive report PFSA--Independent witnesses--No defence evidence--Admittedly, occurrence took place on a thoroughfare and no independent witness was cited by prosecution but police witnesses are as good as any other, in particular, when no enmity is assigned to any of witness--They have supported prosecution version by making their statements on oath and withstood test of cross-examination successfully--During cross-examination, no dent was created by defence--They have supported each other on all material aspects--Defence also could not shake during cross-examination veracity of recovery witnesses--They have unanimously justified that on date, time and place of occurrence, 1500 gram Bhukki was recovered from a polythene bag then held by appellant in his hand while he was coming from Nowshera Road--Defence has not thrown serious challenge either to recovered charas or if it was tampered with at Malkhana or during transmission--All witnesses had described events in a natural sequence--Their statements are further supported by report of Punjab Forensic Science Agency which has been drawn under law/rules--Report depicts that contraband material recovered from appellant was Bhukki appellant has not challenged if recovered material was not Bhukki or something else--Plea raised by appellant in his statement recorded under Section 342, Cr.P.C.--Also get no support from material available on file--He himself did not appear as his own witness under Section 340(2), Cr.P.C. in support of his plea--He also not produced any other evidence in his defence, thus, defence plea appears to be after thought and absurd--It was a daylight occurrence--Sizeable quantity of contraband Bhukki was recovered from appellant, which cannot be foisted by police through its own source--Witnesses had no animosity for his false

implication They withstood test of cross-examination firmly and remained unshaken on all material aspects of case--Prosecution has proved its case against appellant beyond reasonable shadow of doubt--Appeal was dismissed. [Pp. 1028 & 1029] A, B & C

Ch. Nazir Hussain, Advocate for Appellant.

Syed Shahbaz Akram Shah, District Public Prosecutor for State.

Date of hearing: 21.3.2019.

JUDGMENT

Sardar Ahmed Naeem, J.--The appellant, namely, Muhammad Anwar was tried by learned Additional Sessions Judge, Nowshera Virkan in case F.I.R. No. 158/2016 dated 18.05.2016, under Section 9(c) of the Control of Narcotic Substance Act, 1997, registered at Police Station Tatlay Aali, Mianwali who *vide* judgment dated 19.09.2017 held the appellant guilty, convicted him under Section 9(c) of the Control of Narcotic Substance Act, 1997 and sentenced to three years rigorous imprisonment with fine of Rs. 8,000/- in default thereof to further undergo simple imprisonment for two months.

The appellant-convict was given benefit of Section 382-B, Cr.P.C.

2. Calling in question the impugned judgment, the appellant filed the instant appeal.

3. The case of the prosecution in nutshell is that on 18.05.2016 at about 02:45 p.m. 1500 gram Bhukki was recovered from a polythene bag then held by the accused-appellant.

4. After the completion of investigation the appellant was challaned. He was charge sheeted on 22.09.2016. He pleaded not guilty and claimed trial.

To establish its case, the prosecution examined Gareeb Aalam 2213/HC (PW.1), Ali Anwar, A.S.I (PW.2), Ali Hassan 3859/C (PW.3), Sana Ullah, A.S.I. (PW.4) and Muhammad Shafi, S.I. (PW.5).

5. Learned Assistant District Public Prosecutor gave up Rafaqat Ali 911/C, constable being un-necessary and after tendering into evidence reports of Punjab Forensic Science Agency (Exh.PD) closed the prosecution evidence.

6. The appellant was examined under Section 342, Cr.P.C. He denied the allegations leveled against him. He neither appeared as his own witness under Section 340(2), Cr.P.C. nor produced any evidence in defence.

7. Learned counsel for the appellant submitted that no independent witness was cited by the prosecution; that the statements of the prosecution witnesses were full of contradictions/discrepancies, fatal to prosecution; that the safe custody and transmission of the case property was also not proved and that the report of Punjab Forensic Science Agency being inconclusive was of no help to the prosecution.

8. Learned District Public Prosecutor opposed this appeal with vehemence.

9. Heard. Available record perused.

10. A police contingent headed by Sana Ullah, A.S.I. (PW.4) intercepted the appellant on 18.05.2016 at 02:45 p.m. at Chowk Tatlay Aali, while he was coming from Nowshera Virkan Road, Gujranwala. Upon his search, a polythene bag was taken into possession having 1550 gram Bhukki. After observing the formalities, the officer handed over the accused and the case property to Ghareeb Aalam (PW. 1), who handed over the said property to Sana Ullah, A.S.I. (PW.4) on 03.06.2016 for its onward transmission to the office of Chemical Examiner. Admittedly, the occurrence took place on a thoroughfare and no independent witness was cited by the prosecution but police witnesses are as good as any other, in particular, when no enmity is assigned to any of the witness. They have supported the prosecution version by making their statements on oath and withstood the test of cross-examination successfully. During the cross-examination, no dent was created by the defence. They have supported each other on all material aspects. The defence also could not shake during the cross-examination the veracity of the recovery witnesses. They have unanimously justified that on the date, time and place of occurrence, 1500 gram Bhukki was recovered from a polythene bag then held by the appellant in his hand while he was coming from Nowshera Road. The defence has not thrown serious challenge either to the recovered charas or if it was tampered with at Malkhana or during transmission. All the witnesses had described the events in a natural sequence. Their statements are further supported by the report of Punjab Forensic Science Agency which has been drawn under the law/rules. The report depicts that the

contraband material recovered from the appellant was Bhukki The appellant has not challenged if the recovered material was not Bhukki or something else. The plea raised by the appellant in his statement recorded under Section 342, Cr.P.C. also get no support from the material available on the file. He himself did not appear as his own witness under Section 340(2), Cr.P.C. in support of his plea. He also not produced any other evidence in his defence, thus, the defence plea appears to be afterthought and absurd.

11. The above discussion leads us to hold that it was a daylight occurrence. Sizeable quantity of contraband Bhukki was recovered from the appellant, which cannot be foisted by the police through its own source. The witnesses had no animosity for his false implication They withstood the test of cross-examination firmly and remained unshaken on all material aspects of the case. We have come to an inescapable conclusion that the prosecution has proved its case against the appellant beyond reasonable shadow of doubt.

12. In view of the above, there is not merit in this appeal, which is hereby dismissed.

The case property shall be dealt with as directed by the learned trial Court and record be remitted immediately.

(M.M.R.) Appeal dismissed

PLJ 2021 Cr.C. 1116

[Lahore High Court, Multan Bench]

***Present*: SARDAR AHMED NAEEM, J.**

MUHAMMAD IKRAM--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2212-B of 2021, decided on 26.4.2021.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 392 & 411--Bail, grant of--Incident was reported with unexplained delay of about nine days--Petitioner is not nominated in the crime report--He was arrested and was put to test identification parade--Witnesses have not assigned any specific role to the petitioner except his mere presence--Co-accused of the petitioner has been admitted to post-arrest bail by the learned trail Court--Nobody can detained in jail by way of advance punishment and speedy trail is the right of every accused--Bail was allowed. [P. 1117] A & B

Khawaja Qaisar Butt, Advocate for Petitioner.

Mr. Hassan Mehmood Tareen, Deputy Prosecutor General for State.

Malik Muhammad Usman Bhatti, Advocate for Complainant.

Date of hearing: 26.4.2021.

ORDER

Muhammad Ikram, petitioner seeks post-arrest bail in case F.I.R. No. 224/2020 dated 09.06.2020, under Sections 392, 411, P.P.C. registered at Police Station Fateh Shah, Vehari.

2. The complainant reported a robbery against unknown accused. Later on, the petitioner was arrested in this case.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the occurrence took place on 31.05.2020 but the incident was reported with unexplained delay of about nine days on 09.06.2020. No plausible explanation was forthcoming on record for such delay. The petitioner is not nominated in the crime report. He was arrested on 15.08.2020 and was put to test identification parade. The witnesses have not assigned any specific role to the petitioner except his mere presence. However, the Investigating Agency recovered a

pistol and PKR 50,000/- from the petitioner. The co-accused of the petitioner, namely, Ghulam Qadir has been admitted to post-arrest bail by the learned trial Court. The petitioner has got no previous conviction at his credit and his behind the bars since arrest without any material progress at trial. Nobody can be detained in jail by way of advance punishment and speedy trial is the right of every accused. All these considerations render the case against the petitioner one of thorough probe within the meaning of Section 497(2), Cr.P.C.

4. For the forgoing reasons, this petition is allowed and the petitioner is admitted to post-arrest bail subject to his 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/duty judge.

(M.A.B.) Bail allowed

PLJ 2021 Cr.C. 1404 (DB)

[Lahore High Court, Multan Bench]

Present: **SARDAR AHMED NAEEM AND SHAKIL AHMED, JJ.**

MUNIR--Appellant

versus

STATE etc.--Respondents

Crl. A. No. 329 of 2018 & M.R No. 102 of 2016, heard on 9.6.2021.

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

----S. 302(b)--Conviction and sentence--Challenge to--Qatl-e-amd--Benefit of loophole--Ocular account--Occurrence took place and he was arrested in this case after lapse of more than three years--Abscondance has been denied and it was claimed that he did not abscond--**Held:** It is settled by now that abscondance alone cannot be a substitute for real evidence and mere abscondance of accused in absence of any other evidence against absconding accused--Complainant also admitted during cross-examination that she along-with other PWs made statements regarding occurrence before police after consulting with each other--No plausible explanation was brought on record for delayed post-mortem report and said noticeable delay suggested deliberation and consultation--Motive mentioned in crime report was that deceased was done to death due to revenge of divorce whereas, *Mst.* "S" during trial stated that Saima Bibi filed a suit for dissolution of marriage, thus, accused-appellant nourished grudge against them and they committed murder of deceased--Admittedly, motive is not a component of murder and prosecution is not bound to introduce any motive but once a motive is set up and not proved then it adversely effect case of prosecution--Motive set up in FIR for incident was either not proved or remained too vague and generalized--Court have no hesitation to hold that eye-witnesses produced by prosecution before trial Court were actually not present with deceased at time of occurrence and, thus, ocular account furnished by them was ruled out of consultation--After ruling out ocular account, other circumstances of case providing support to ocular account had automatically collapsed--After scrutinizing prosecution evidence availably on record, that prosecution has failed to prove case against appellant beyond reasonable doubt--**Further held:** It is settled principle of law that once a single loophole is observed in a case presented

by prosecution much less glaring conflict in ocular account, benefit of such loophole lacuna in prosecution case goes in favour of accused. [Pp. 1410 & 1411] A, B, C, D & E

PLD 1980 SC 201, PLD 2009 SC 53, 2011 SCMR 1190 & 2021 SCMR 736.

Prince Rehan Iftikhar Sheikh, Advocate for Appellant.

M/s. Daud Ahmad Wains, Ch. Muhammad Saeed, Mian Yasir Hameed Butt and Qurat-ul-Ain Ijaz Advocates for Complainant.

Malik Mudassar Ali, Deputy Prosecutor General for State.

Date of hearing: 9.6.2021.

JUDGMENT

Sardar Ahmed Naeem, J.--Munir s/o Ameer appellant was tried by the learned Addl Sessions Judge, Sahiwal, in case FIR No. 109/2012 dated 19.4.2012, under Sections 302/34, P.P.C., registered at Police Station Kameer, Sahiwal. The learned trial Court *vide* judgment dated 22.06.2016 held the appellant Munir guilty under Section 302(b), P.P.C. convicted and sentenced him to death, with the direction to pay Rs. 2,00,000/- as compensation to the legal heirs of the deceased, under Section 544-A, Cr.P.C. and in case of default to further undergo simple imprisonment for six months.

2. Feeling aggrieved of the above said judgment, Munir appellant filed Criminal Appeal No. 329/2018 titled as *Munir versus The State etc.* challenging conviction and sentences awarded to him by the learned trial Court. Murder Reference No. 102/2016 titled as *The State versus Munir* is also before us for confirmation or otherwise of the death sentence awarded to the appellant. Through this single judgment, we propose to decide both these matters.

3. Brief facts of the case, as disclosed in the FIR by *Mst.* Shakila Bibi complainant are that, on 19.4.2012 at 1.00 a.m. (night), Munir appellant alongwith Farid and Ameer co-accused (since P.Os.) armed with deadly weapons entered into house of the complainant and threatened inmates of the house, who were sleeping on the roof. On the warning of accused persons, Muhammad Mansha and Muhammad Bashir PWs also woke up. Munir appellant made fire shot with his Pistol hitting the head of Muhammad Jaffar deceased, husband of the complainant, who after receiving fire shot succumbed to the injury at the spot. The accused persons fled away from the place of occurrence.

4. After usual investigation, challan against the accused was submitted before the Court. The learned trial Court after observing all the pre-trial codal formalities, charge sheeted the appellant to which he pleaded not guilty and claimed to be tried.

5. The prosecution, in order to prove its case, produced as many as 13 PWs during the trial. The ocular account, in this case, was furnished by *Mst.* Shakeela Bibi complainant (PW.3) and Muhammad Mansha (PW. 7).

6. The medical evidence was furnished by Dr. Shakeel David, CMO (PW.8) who, on 19.4.2012 at about 1.00 p.m. conducted post-mortem examination of Muhammad Jaffar deceased and observed following injury on his person:

1) **A lacerated wound with inverted and blackened margins 2 cm x 2½ cm x deep going into head on the top right side of head, 7 cm away from the right ear (entry wound).**

The Medical Officer opined as under:

> "In my opinion, the cause of death in this case was injury No. 1 which caused severe damage to the brain and upper spinal cord with perfused bleeding, hemorrhage, shock and death. This injury was sufficient to cause death in ordinary course of nature. This injury was anti mortem and caused by fire-arm. After post-mortem examination, he handed over the stitched dead body, police papers, most mortem report, last worn clothes of the deceased and a scaled phial said to contain metallic piece of bullet. Ex.FN is the correct attested copy of post-mortem report of Muhammad Jaffar deceased which is in his hand and bars his signatures. Ex.PN/1 is the pictorial diagram to locale of injury which is also signed by him, he also endorsed the injury statement Ex.PO and he also endorsed the inquest report which is Ex.PQ."

7. Muhammad Yar ASI (P. W. 1) on receipt of complaint for registration of case on 19.4.2012, chalked out formal FIR on the basis of complaint Ex.PA without any addition or omission. Muhammad Amin Constable (P.W.2) escorted the dead body of the deceased for post-mortem examination. Amanat Ali (P. W.5) identified the dead body of Muhammad Jaffar deceased. Zahid Ali Draftsman (P.W.6) visited the place of occwrence on 22.4.2012 and took rough notes on the pointation of the complainant as well as PWs and on the direction of the police prepared scaled site plans Ex.PJ and Ex.PJ/1. Jaffar Ali retired S.I (P.W.10) conducted partial investigation of the case. Muhammad Ashraf S.I. (P.W.11) also conducted

investigation of the case. Whereas, Ghulam Rasool S.I. (P.W.I2) investigated the case at initial stage. Rest of the PWs are formal, therefore, need not to be discussed.

8. The prosecution gave up Muhammad Bashir PW being dead, Muhammad Ashraf Kfiadim Hussain and Muhammad Amin S.I. PWs being unnecessary and the learned Assistant District Public Prosecutor after tendering into evidence reports of Chemical Examiner regarding blood-stained earth Ex.PW, serologist regarding the blood-stained earth Ex.PX and Punjab Forensic Science Agency, Lahore regarding pistol 30-bore Ex.PY, closed the prosecution evidence.

9. The statement of the appellant under Section 342, of The Code of Criminal Procedure, 1898, was recorded. He refuted the allegations levelled against him and professed innocence. Responding to “Why this case was registered against you and why the PWs deposed against you? Munir Ahmad appellant replied as under:

> “All the PWs as well as complainant are related inter-se due to close relationship they have deposed falsely against me and my co-accused (since P.Os). The complainant of this case after committing the murder of the deceased by some unknown persons after consulting and deliberating with the PWs and other relatives made a false story and registered a false complaint cancealing and hiding the real facts with regard to the occurrence registered the instant case. The real facts are that the deceased was a spoon of love and womanizer and had many paramours in his life time. All the family members except the deceased were sleeping into the room on the fateful night. The deceased was all alone at the roof of the room who was done to death by some unknown culprits by unknown mode and manner. I divorced *Mst.* Saima Bibi the daughter of the deceased as well as complainant in those days. *Mst.* Saima Bibi was residing with her parents and she was also on the fateful night sleeping into the room in her parents, house. On the day breaking the deceased was attended and he was found in dead condition on the roof of the room and the dead body of the deceased was alighted from the roof into the Courtyard and informed the local police. Then the local police came at the place of occurrence, when the real culprits of the instant occurrence could not be found, then the complainant and the PWs twisted a false story and involved me and my co-accused persons (since P.Os) due to the grudge with regard to divorce to *Mst.* Saima Bibi. The murder of the deceased was not committed by me and my co-

accused (since P.Os). I and my co-accused persons (since P.Os) are innocent in this case."

10. The appellant did not appear as his own witness on oath as provided under Section 340(2) of The Code of Criminal Procedure, 1898 in disproof of the allegations levelled against him.

11. The learned trial Court *vide* its judgment dated 22.06.2016, held the appellant guilty, convicted and sentenced him as mentioned and detailed above.

12. Learned counsel for the appellant advanced the following arguments:

i. The occurrence took place in the house of the deceased/complainant situated in Street No. 3, Katchi Abadi, Kameer Town, shared by the other family members and then also sleeping on the roof top but no other family member was cited during trial;

ii. The best evidence has been withheld by the prosecution, thus, necessary inference under Article 129(g) of Qanun-e-Shahdat, 1984 must be raised against the prosecution;

iii. That the prosecution failed to establish the source of light at the time and place of occurrence as neither any bulb was secured by the investigating officer nor produced by the complainant during the investigation;

iv. The post-mortem examination was conducted with unexplained delay of about thirteen hours which suggests deliberation and consultation;

v. The prosecution miserably failed to prove the motive against the appellant;

vi. The recovery of pistol (P-4)also lends no corroboration to the prosecution as the crime weapon was found not in working order;

vii. No cot, pillow or any bedspread of the deceased was taken into possession;

viii. The story of the prosecution was not only unnatural but also does not fit in with the probabilities;

ix. That the statements of the eye-witnesses were full of discrepancies and contradictions;

x. The case of the prosecution was swollen with doubts and every doubt even slightest is always resolved in favour of the accused, thus, the appellant was entitled to acquittal;

13. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant opposed this appeal with vehemence. It was argued that the prosecution failed to shatter the credibility of the eye-witnesses; that the appellant was specifically nominated in a promptly lodged FIR being the principal offender; that the version of the complainant gets full support from the medical evidence; that the motive was also sufficiently proved and the recovery of pistol (P-4) lends further corroboration to the prosecution story; that the discrepancies hinted at by the learned counsel for the appellant were minor and negligible; that the eye-witnesses have rendered the ocular account in a straightforward manner and that the PWs firmly withstood the test of cross-examination but no favourable material was extracted; that the prosecution successfully proved its case against the appellant and that the appeal deserves dismissal.

14. We have given patient hearing to the arguments advanced by the learned counsel for the parties and have perused the available record with their available assistance.

15. The occurrence in this case took place on 19.4.2012 at 1:00 a.m. (night). The place of occurrence was roof top of the house of the deceased/complainant, where, they were sleeping along-with their guest, namely, Muhammad Bashir and other family members. While, real brother of the deceased, namely, Muhammad Mansha (PW.7) was also sleeping with his own family members on the roof of his house adjacent to the place of occurrence. The crime report suggested that the complainant got up on the arrival of the appellant along-with his co-accused including Farid and Ameer (POs). They all were armed with weapons. A bulb was fixed on common wall intervening the house of the complainant and Muhammad Mansha (PW.7) and it was on. The complainant was threatened by all the accused to keep quiet. Meanwhile, Muhammad Mansha and Muhammad Bashir also got up and in their presence, the appellant then standing near the cot fired at the deceased hitting on his head. The alarm raised by the Complainant and the PWs also attracted Ghulam Hussain. After enacting the episode the accused fled away from the crime scene. The deceased succumbed to the injuries. In the FIR (ExhP-A/1), it was mentioned that the complainant along-with her family members were sleeping on the roof top along-with a guest, namely, Muhammad Bashir but neither any family member was interrogated nor said Muhammad Bashir was examined during the investigation and there appeared no reason for the accused to leave the PWs alive to depose against them. The neighbourer of the complainant, namely, Khadim Hussain

was also not examined under Section 161, Cr.P.C. and Investigating Officer admitted during the cross-examination that statement of Khadim Hussain was not recorded by him. He had come to the place of occurrence consequent to alarm raised by the eye-witnesses. He was independent witness but his evidence was withheld by the prosecution, thus, necessary inference under Article 129(g) of Qanun-e-Shahadat, 1984 can be raised that had he been produced during trial, he would not have supported the prosecution case. The prosecution also produced PW:2 to prove the absconsion of the appellant. The occurrence took place on 19.4.2012 and he was arrested in this case on 11.5.2015 after the lapse of more than three years. The abscondance has been denied and it was claimed that he did not abscond. It is settled by now that abscondance alone cannot be a substitute for real evidence and mere abscondance of accused in absence of any other evidence against absconding accused, cannot be considered enough to sustain conviction of accused as held in *"Farman Ali and 3 others versus The State"* (PLD 1980 SC 201). The law laid down in *"Muhammad Tasaweer versus Hafiz Zulkarnain and 2 others"* PLD 2009 SC 53) can also be referred to.

16. The occurrence took place at mid night (1:00 a.m) but the post-mortem was conducted by Dr. Shakil David (PW.8) on the same day at 1:00 p.m who observed a lacerated wound with inverted and blackened margins 2 cm x 2½ cm x deep going into head on the top right side of head, 7 cm away from the right ear. It was wound of entry. The probable duration between the injury and death was within fifteen minutes and between death and post-mortem was about thirteen hours. He has admitted during the cross-examination that according to the inquest report Exh.PQ, there was no mention in column No. 7 regarding blood-stained clothes of the deceased. The complainant also admitted during the cross-examination that she along-with other PWs made statements regarding the occurrence before the police after consulting with each other. No plausible explanation was brought on the record for the delayed post-mortem report and the said noticeable delay suggested deliberation and consultation. A similar question came up before their lordships in case titled *"Irshad Ahmed versus The State"* (2011 SCMR 1190) and the relevant observations of their lordships are as follows:

> "3. ...We have further observed that the post-mortem examination of the deadbody of Shehzad Ahmed deceased had been conducted with a noticeable delay and such delay is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-

witnesses and in cooking up a story for the prosecution before preparing police papers necessary for getting a post-mortem examination of the deadbody conducted ...”

17. The motive behind the occurrence was that the appellant got married to Saima Bibi a daughter of the complainant/deceased two years prior to the occurrence. In the wedlock, there was a baby girly then living with the appellant. The marriage was dissolved through Court. The record further divulged that Saima Bibi was not willing for her divorce. She was also not examined or interrogated by the investigating agency at any stage. The record further divulged that the parties were not on speaking terms and after the divorce, no altercation ever took place between them, thus, there was no apparent reason for the appellant to launch murderous assault upon the deceased, in particular, when their marital ties had come to an end, and in particular, when his daughter was living with him. The motive mentioned in the crime report was that the deceased was done to death due to revenge of the divorce whereas, *Mst.* Shakila Bibi (PW. 3) during trial stated that Saima Bibi filed a suit for dissolution of marriage, thus, the accused-appellant nourished grudge against them and they committed murder of the deceased. Admittedly, motive is not a component of murder and the prosecution is not bound to introduce any motive but once a motive is set up and not proved then it adversely effect the case of the prosecution. The motive set up in the FIR for the incident was either not proved or remained too vague and generalized.

18. During the investigation, investigating officer took a crime empty (P-3) from the crime scene, however, it was not dispatched to Punjab Forensic Science Agency, thus, the recovery of crime weapon shown to have been effected at the instance of the appellant was inconsequential.

19. For all these reasons, we have no hesitation to hold that the eye-witnesses produced by the prosecution before the trial Court were actually not present with the deceased at the time of occurrence and, thus, the ocular account furnished by them was ruled out of consultation. After ruling out the ocular account, the other circumstances of the case providing support to the ocular account had automatically collapsed. After scrutinizing the prosecution evidence availably on record, we are of the view that the prosecution has failed to prove the case against the appellant beyond reasonable doubt. It is settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account, benefit of such loophole/lacuna in the prosecution case goes in favour of the

accused. In a recent case, titled *Najaf Ali Shah versus The State* (2021 SCMR 736), the apex Court observed as under:

> "9. Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the Court to do complete Justice. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English Jurist William Blackstone wrote, "Better that then guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer. All the contradictions noted by the learned High Court are sufficient to cast a shadow of doubt on the prosecution's case, which entitles the petitioner to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the petitioner. This Court in the case of *Mst. Asia Bibi v. The State* (PLD 2019 SC 64) while relying on the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of *Tariq Pervaiz v. The State* (1998 SCMR 1345) and *Ayub Masih v. The State* (PLD 2002 SC 1048)." *The same view was reiterated in Abdul Jabbar v. State* (2010 SCMR 129), when this Court observed that once a single loophole is observed in a case presented by the prosecution, such in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."

20. Seeking guidance from the law declared by the apex Court in the above mentioned cases and respectfully following the same, we allow Criminal Appeal No. 329 of 2018. The conviction and sentence awarded to the appellant *vide* impugned

judgment dated 22.6.2016 is set aside. The appellant is acquitted of the charge. He is in jail, be released forthwith if not required in any other criminal case.

Murder Reference No. 102 of 2016 is answered in the negative and the death sentence is not confirmed.

(A.A.K.) Appeal allowed

PLJ 2021 Cr.C. (Note) 128
[Lahore High Court, Multan Bench]
***Present:* SARDAR AHMED NAEEM, J.**
MUZAMMIL etc.--Appellants
versus
STATE etc.--Respondents

Crl. A. Nos. 574, 568 & Crl. Rev. Nos. 241 & 240 of 2010, heard on 8.12.2015.

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

----S. 164(3)--Confessional statement--Mandatory requirement--Aforementioned statement of magistrate shows that he' has not followed mandatory requirement for recording confessional statement u/S. 164 (3) of, Cr.P.C--Admittedly, magistrate failed to observe prescribed procedure while recording confession in this case as such, no implicit can be placed over it--**Held:** It is now well settled that retract confession should not be acted upon, unless it is corroborated in material particulars--In instant case, no corroboration worth mentioning has been brought by prosecution in support of above. [Para 14] B

1984 PCr.LJ 611 & PLD 1987 FSC 43.

Statement of witnesses--

----It is settled law that persons making contradictions and improvements cannot be held worth of credence. [Para 14] C

PLD 1981 SC 472, PLD 1977 SC 557 and 1987 SCMR 42.

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

----Ss. 302(b)/34/364-A/376-A/377--Conviction and sentence--Chalelnge to--Qatl-i-amd--Benefit of doubt--Circumstantial evidence--Confessional statement--Admission of magistrate that after recording confessional statement, he sent accused to judicial custody, through same police officer who had brought accused, to him for confession, such act of handing over accused to same police officer had detracted from sanctity of judicial confession as voluntarily confession of that judicial confession, it was essential pre-requisite became doubtful--Principle for basing conviction on device of circumstantial evidence has been found in a number of decisions of Hon'ble Supreme Court--**Held:** Law

is now well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and circumstance so proved must form chain of confession from which, only irresistible conclusion that could be drawn is guilt of accused and that no other hypothesis against guilt is possible--Court must satisfy itself that various circumstances in chain of confession have been established clearly and such complete chain of confession must be such as to rule out a reasonable likelihood of innocence of accused as there is a long mental distance between "may be true and "must be true and same device conjecturers from a sure conclusions--In this case no direct evidence was led by prosecution--Case of prosecution was based on extra/judicial confession of appellants, not proved in accordance with law, thus, inadmissible/irrelevant--entire case of prosecution was based on confession above mentioned, not proved, thus, prosecution miserably failed to discharge its onus against accused beyond shadow of doubt--**Further held:** It is an axiomatic principle of law that in case of doubt, benefit thereof must resolve in favour of accused--For giving benefit of doubt it was not necessary that there may be many circumstances creating doubts and if there is circumstance which creates reasonable doubt in a prudent mind about guilt of accused, then accused would be entitled to benefit of doubt.

[Para 14 &15] A, D & E

PLD 2000 Karachi 128, 1995 SCMR 1345 and 2009 SCMR 230.

Mian Bashir Ahmad Bhatti, Advocate for Appellants.

Mr. Sarfraz Khan Khichi, DDPP for State.

Mr. Muhammad Irfan Arbi, Advocate for Complainant.

Date of hearing: 8.12.2015.

JUDGMENT

Muzammil and Ansar (appellants), accused of case FIR No. 376, dated 28.09.2007 under Sections 364-A, 376(ii), 377, 302 of the Pakistan Penal Code, 1860, registered at Police Station, Shaher Sultan, District Muzaffargarh, at the instance of Muhammad Ajmal, complainant, was tried by the learned Addl. Sessions Judge, Jatoi, District Muzaffargarh. At the Conclusion of the trial *vide* judgment dated 14.04.2010, the learned trial Court convicted and sentenced appellants as under:--

(i) under Section 302(b)/34, PPC to life imprisonment R.I each with a direction to pay Rs. 1,00,000/- each to the legal heirs of deceased each as compensation under Section 544-A, Cr.P.C. and in default in payment thereof, undergo Simple Imprisonment for six months each.

(ii) under Section 364-A, PPC to life imprisonment R.I. each.

(iii) under Section 376(2), PPC to life imprisonment R.I. each.

(iv) Under Section 377, PPC to ten years R.I each along-with fine of Rs. 10,000/- and in case of default thereof, undergo six months S.I each.

Benefit of Section 382-B, Cr.P.C. was also given to them.

2. Muzammil and Ansar appellants have lodged Criminal Appeals No. 574 of 2010 and 568 of 2010 respectively against their convictions and sentences. Complainant Muhammad Ajmal has also filed the Revision Petitions No. 241 of 2010 and 240 of 2010 for enhancement of sentences of the appellants. All the above mentioned matters shall be disposed of through this judgment.

3. Briefly stated the facts in statement Exh.PE got recorded by Muhammad Ajmal complainant are that his niece namely, Asma Bibi daughter of Muhammad Tariq aged 5/6 years went to the house of her aunt *Mst.* Nasreen at about 8.00 a.m on 27.9.2007 who did not turn up for about 2/3 hours. The complainant and his father started her search and went to the house of *Mst.* Nasreen where *Mst.* Nasreen and her husband Safdar told them that Asma Bibi has not come to their house. They searched Asma Bibi here and there. They also got announcement in the mosque of the area about missing of Asma Bibi but till night Asma was not traced out. Muhammad Tariq, the father of Asma Bibi was informed about kidnapping/misplacement of Asma Bibi on telephone, at that time he was at Karachi. On 28.09.2007, they again made search of Asma Bibi. Allah Bachaya and Khan Muhammad PWs were also with the complainant for search. At about 9.00 a.m, when they reached near the cotton crop of Haji Allah Yar, they saw that Asma Bibi was lying in dry water course. She was checked but she was dead.

4. On 28.09.2007, Munir Ahmad SI along-with police officials was present near telephone Exchange where complainant along-with Khan Muhammad appeared

and gave statement Exh.PE on the basis of which FIR Exh.PE/2 was registered. He along-with police officials proceeded to the place of occurrence and inspected, the same and prepared un-scaled site-plan Exh.PJ. He also prepared injury statement Exh.PD and inquest report Exh.PD/1. He got sent the dead body through Amir Bakhsh constable to the hospital for autopsy. After autopsy, Amir Bakhsh constable produced before him the last worn clothes of the deceased *i.e.* Qamiz P-1, Shalwar P-2, ten sealed plastic boxes, six sealed, phials four sealed envelopes, three closed envelopes which were secured by the Investigating Officer *vide* recovery memo. Exh.PC. On 04.10.2007, the complainant submitted his affidavit Exh.PF in which he nominated accused persons. On the same day, he arrested the accused persons from Shaher Sultan Gulistan Colony. On 05.10.2007, the appellant Ansar led the police party to the place of recovery, and got recovered Gathari of clothes of deceased in which Dupatta P-3, Qamiz P-4 and Shalwar P-5 and a pair of shoes P-6 were present from sugarcane crop owned by Haji Allah Yar which were taken into possession through recovered memo. Exh.PG. Muzammil, the appellant got recovered a kuppi of plastic containing a little chemical from the field of sugarcane which was taken into possession *vide* recovery memo. Exh.PH. He produced the appellants before the learned Illaqa Magistrate and moved application Exh.PK for recording statements of the appellant who recorded their statements under Section 164, Cr.P.C. in which appellants confessed their guilt. He got sent the appellants to jail on judicial remand. He prepared un-scaled site-plan of place of recovery of the dead body Exh.PL. He found the accused guilty and produced the file before the SHO who prepared the report under Section 173, Cr.P.C. and sent to the Court.

5. Dr. Tahira Shamim WMO PW.6 conducted autopsy of Asma Bibi deceased. On general examination, she observed that there were signs of chemical burnt on both eyes, bridge of nose, Pina of left ear, all around and within the mouth, on and within both nostrils, in the front and both sides of neck, on the front of both shoulders. The signs of chemical burnt were absent on the back of neck. There were multiple contusion marks indicating some animal paw on the back of middle right fore-arm on the back of left hand, on the inner side of middle of right lower leg, on the outer side of left ankle. In her opinion, the deceased was raped per vaginal and per rectum and some chemical material was put on eyes, mouth, left ear, nostrils, neck and front of shoulders. The carbon copy of post-mortem Report No. 05 of 2007 was the true copy of original post-mortem report which was Exh.D/2 which were in her hand and bore her signatures. She also drew the drawing of chemical burns and

animal paw on diagram which was Exh.PD/3 which also in her hand and bore her signatures.

6. After receiving the challan, the learned trial Court framed, charge against the appellants to which they pleaded not guilty and claimed trial.

7. During trial, appellant Ansar was found under the age of eighteen years, therefore, police was directed, to submit a separate challan against appellant Ansar under Juvenile Justice System Ordinance, 2000 and police submitted, separate challan under the said ordinance against him.

8. In order to prove its case, prosecution produced 13 witnesses in all. On 04.10.2007, Muhammad Riaz 696/C PW. 1 deposited sealed parcel and one envelope sealed, and four plastic phials for DNA test to the office of DNA test Laboratory, Lahore. He also deposited, four sealed packets to the office of pathologist, Lahore on 05.10.2007. Muhammad Fayyaz 1241/C PW.2 deposited four sealed phials and one sealed envelope to the office of chemical examiner Multan on 4.10.2007. Ghulam Muhammad Patwari PW.3 prepared scaled site plan in triplicate Exh.PA and Exh.PA/1 and. Exh.PA/2 on the pointation of the complainant and on the direction of I.O. Dr. Sajid Saeed, PW.4 medically examined. Ansar and Muzammil appellants with regard to their potency. Dr. Tahira Shamim PW.6 conducted autopsy of Asma Bibi, deceased mentioned earlier. Muhammad Ajmal PW. 7 reiterated the contents of his statement Exh.PE and FIR Exh.PE/2. Muhammad Khalid PW.8 was the PW before whom Haji Allah Yar stated that the appellants committed rape with Asma Bibi and murdered her. On 04.10.2007, Ajmal complainant purchased a stamp paper from Mirza. & Imran stamp vendor. Ibrahim was also sitting with Imran who typed the same. He marked his thumb impression on the stamp paper and complainant signed on that stamp paper. Ghulam Farid was also with them who also marked his thumb impression on the stamp paper, and then that stamp paper was handed over to police. The police also recorded his statement. Ghulam Farid PW.9 endorsed the statement of PW.8. Munir Ahmad SI PW.11 was the Investigating Officer of this case discussed earlier. Muhammad Ayyaz Malik Civil Judge 1st Class/Magistrate Section 30, Multan recorded confessional statements of appellant under Section 164, Cr.P.C. on the application Exh.PK moved by Munir Ahmad SI. Exh.PK/1 containing of six pages was true and correct account of the same which bore his signatures on each page and Exh.PK/2 was a certificate for correctness of the statements of the appellant which also bore his signatures. After recording the statement of appellants, the same

were transmitted to the Worthy District & Sessions Judge by the said PW. The remaining PWs are of formal in nature therefore, need not be discussed. Learned ADPP gave up PWs Khan Muhammad , Manzoor Ahmad, Ghulam Muhammad, Bilal and. Imam Bakhsh ASI/D.O being unnecessary and after tendering reports of Chemical Examiner Exh.PM and report of Histopathologist Exh.PN closed the prosecution case.

9. After close of the prosecution evidence, the appellants were examined under Section 342, Cr.P.C. in which they denied all the allegations levelled, against them. In answer to question "Why this case against you and why the PWs have deposed against you", Muzammil, appellant, replied as under:

> "The PWs are related inter se and are inimical towards me. The complainant being greedy one had been demanding money in lacs during the investigation and I being innocent and coming of a poor family, my parents refused to accede illicit, demand whereafter, I have been falsely roped into this case at the instigation of some mischievous persons. At the time of alleged occurrence, I was below the age of 17 years."
>
> Appellant Namely Ansar adopted the statement of Muzammil appellant. However, he added that at the time of alleged occurrence he was below 15 years.

The appellants neither made their statements on oath under Section 340 (2), Cr.P.C. nor produced any defence evidence.

10. Learned counsel for the appellants submitted that the FIR in this case was registered with unexplained delay of twenty six hours; that the appellants were not nominated in the FIR; that no body is the eye witness of the occurrence; that all the eye witnesses are related inter se and no independent witness was cited by the prosecution; that only the evidence produced by the prosecution against the appellants was that of extra judicial confession which is the weak type of evidence and the judicial confession retracted by the appellants and thus, the case of the prosecution is based on circumstantial evidence; that the recovery effected from the appellants led no support to the prosecution; that the story of the prosecution was doubtful and benefit of doubt was the vested right of the accused.

11. Learned Mr. Sarfraz Khan Khichi, DDPP assisted by the learned counsel for the complainant refuted the contentions and submitted that the prosecution witnesses have no grudge or grouse for false implication of the appellants; that they got effected the recoveries which proved their nexus with the crime; that the contradictions/discrepancies do occur with the afflux of time; that even if the extra judicial confession is excluded from consideration, the judicial confession got recorded by the appellants was sufficient to sustain the conviction; that the prosecution proved its case against the appellants beyond, reasonable doubt, thus, appeals may be dismissed.

Learned counsel for the complainant further added that the appellants committed heinous offence. There was no mitigation in the case and that only sentence provided/prescribed by Section 302(b) PPC was death, thus, the sentence awarded to the appellants may be enhanced in view of the law.

12. Having heard the arguments addressed at the bar and perusing the record, it was observed that the appellants were not nominated in the FIR which was registered with unexplained delay of about twenty seven hours. The complainant claimed to have searching for his missing niece for the whole day but never reported the matter to the police. It is in the evidence that the dead body of the deceased was found in an abandoned "Khaal" (کھال) on 28.09.2007 at about 8/9.00 a.m. and was witnessed by Allah Bachaya and Khan Muhammad PWs. It is also in the evidence that on 29.09.2007 at about 9.00 a.m., the complainant along-with Allah Bachaya, Khan Muhammad and Ghulam Farid and many other persons were sitting outside his house. Meantime, Haji Allah Yar came there and offered "fateh" for the departed soul i.e. the deceased and after some time he requested that she was done to death by the accused/the appellants, who happened to be his paternal grand sons after committing rape. On the same day at about 4.00 p.m, the complainant along-with Allah Bachaya visited the house of Allah Yar, who informed him that the appellants had escaped and would be produced on their arrival and then, Allah Yar, never produced the accused before the complainant. So far as the extra judicial confession is concerned, none of the appellants made the confession before the complainant and it was Haji.Allah Yar, who apprised the complainant regarding this occurrence. He was never examined/interrogated by the Investigating Officer during the course of investigation and never produced by the prosecution during trial. He could have been summoned through the Court but no such endeavour was made by the prosecution

even at trial, thus, the evidence to the extent of extra judicial confession is based on hearsay and thus, inadmissible/irrelevant. Assuming for the sake of arguments that the extra judicial confession made by Allah Yar before the complainant being admissible, even then, no date, time or place of extra judicial. confession, allegedly made by the accused was mentioned by the prosecution witnesses and no reason for committing murder of the deceased was mentioned by the witnesses in their statements. The evidence regarding extra judicial confession allegedly made by the accused/appellants was also produced by the prosecution through statement of another prosecution witness and there was no other witness produced by the prosecution regarding extra judicial confession allegedly made by the accused. Three fold proof is required to make extra judicial confession the basis of conviction:- (i) that in fact it was made; (ii) secondly, that it was voluntarily made and thirdly it was truly made. There was no evidence that it was actually, voluntarily and truly made by any of the appellants. They were arrested in this case on 04.10.2007. The Investigating Officer moved an application to the Illaqa Magistrate for recording their confessional statements in this case. To prove the judicial confession, prosecution produced Muhammad Ayyaz Malik, Civil Judge 1st Class, Magistrate Section 30, Multan PW. 13. In his deposition, he provided the details that all the legal/procedural formalities were observed before recording the judicial confession of the appellants. He was cross-examined by the learned defence counsel at length and the learned counsel for the appellants referred to certain pieces of his statement to show that the formalities as prescribed by the law were not observed by the learned Magistrate and thus, confession, retracted by the appellants was irrelevant and inadmissible. The judicial confession was recorded by PW. 13, who during the cross-examination admitted as follows:

(i) He did not examine the bodies of the accused persons to rule out the possibility of this violence.

(ii) They were not sitting all alone when pondered over.

(iii) That police officials/officers were asked to leave the Court room, when they were given time to think over.

(iv) That the report was silent regarding return of the custody of the accused to police after their confessional statements.

(v) That the Court room was not got vacated from all the persons.

(vi) That questions were put to both the accused jointly;

(vii) That the accused were handcuffed;

(viii) That the report Exh.PK was silent if their handcuff was removed;

(ix) That no certified was recorded by the magistrate at the foot of their statements;

(x) That there was a joint certificate recorded by the magistrate;

(xi) That the confessional statement was neither signed nor thumb marked by the maker.

13. The accused/appellants were arrested in this case on 4.10.2007 and were produced before the Ilaqa Magistrate on 5.10.2007. It is settled law that the delay of over twenty four hours would, normally be fatal to the acceptance of judicial confession as laid down by the apex Court in *Naqib Ullah's case* (PLD 1978 SC 21) coupled with the fact that the prosecution failed to explain such delay which created doubts regarding confessional pieces of evidence. There is no doubt that mere delay of twenty four hours in recording the confessional statement is not fatal to surrounding circumstances are also to be considered to believe or disbelieve the confessional statement. It is in the evidence that after recording the confessional statement of the appellants were handed back to the police as is evident from the statement of magistrate as well as the Investigating Officer (PW. 11) which revealed that he produced the application for judicial remand of the accused persons to the learned magistrate who sent the accused in jail on judicial remand. Such type of confession keeping in view the peculiar circumstances appears to be irrelevant as laid down by the apex Court in *Khuda Bux's case*, (1969 SCMR 390). It is an admitted fact that the appellants remained in police custody before and after recording the confessional statement and the magistrate might have consumed one hour to record their confession, thus, such type of confession would not fall in the category of voluntarily confession. A bare perusal of the order Exh.PK/1 reveals that the provisions of sub Section 3 of 164 Cr.P.C. were not observed in the strict sense. The said order revealed that the police remained present during that time and in such a situation, the appellants were hardly in a position to say no, specifically when they

were never assured that after recording their statements they were not to be handed over to the police.

In the case of *"Ghulam Muhammad v. The State"* (PLD 1971, Lahore 850) while commenting upon the confession recorded under Section 164, Cr.P.C., read with Section 364, Cr.P.C., the learned Division Bench of this Court, observed as under:

> "All that the Magistrate told the accused was that he should sit down and think over the matter and then make a statement according to his own free will. This warning was not sufficient to bring to the mind of the confessor the serious results that had to follow the confession. The warning is to be administered in the language used in sub-section (3) of Section 164, Cr.P.C. and where it is administered in a casual way the Courts have refused to rely on such a confession. The Magistrate even did not explain to the accused before time was allowed for consideration that he was not bound to make a confession and if he made one, it will be used against him. The warning administered by the Magistrate in this case does not conform the one prescribed by the Statute and this failure is enough to vitiate the confession apart from other circumstances which make it unacceptable."

14. Suffice it to observe that in view of the admission of the magistrate that after recording confessional statement, he sent the accused to judicial custody, through same police officer who had brought the accused to him for confession, such act of handing over the accused to the same police officer had detracted from sanctity of judicial confession as voluntarily confession of that judicial confession, it was essential pre-requisite became doubtful, as held in the case of *"Muhammad Ibrahim v. The State"* (PLD 2000 Karachi, 128). Aforementioned statement of magistrate shows that he has not followed the mandatory requirement for receding confessional statement under Section 164 (3) of Cr.P.C. Admittedly, the magistrate failed to observe the prescribed procedure while recording the confession in this case as such, no implicit can be placed over it. It is now well settled that retract confession should not be acted upon, unless it is corroborated in material particulars. In the instant case, no corroboration worth mentioning has been brought by the prosecution in support of the above. The law laid down in 1984 PCr.LJ 611 and PLD 1987 FSC 43 can be advantageously referred to. In case, the statement of recorded witnesses be read with

the Investigating Officer and sending the same to the expert after considerable delay was not sufficient to provide any corroboration. It is pertinent to mention that learned counsel for the complainant placed much reliance upon the recoveries at the pointing of the appellants but these pieces of evidence were not sufficient to connect them with the commission of offence. The statement of other witnesses was also not in consonance with each other and there were material contradictions and improvements in their statements not noted by the trial Court. It is settled law that persons making contradictions and improvements cannot be held worth of credence. See *Muhammad Shafique Ahmad's case* (PLD1981 SC 472), *Roshan's case* (PLD 1977 SC 557) and *Shahbaz Jugrani* (1987 SCMR 42).

15. The principle for basing conviction on the device of circumstantial evidence has been found in a number of decisions of the Hon'ble Supreme Court and. the law is now well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstance so proved must form chain of confession from which, the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible. The Court must satisfy itself that various circumstances in the chain of confession have been established clearly and such complete chain of confession must be such as to rule out a reasonable likelihood of innocence of the accused as there is a long mental distance between "may be true and "must be true and the same device conjecturers from a sure conclusions. In this case no direct evidence was led by the prosecution. The case of prosecution was based on extra/judicial confession of the appellants, not proved in accordance with law, thus, inadmissible/irrelevant. The entire case of the prosecution was based on the confession above mentioned, not proved, thus, the prosecution miserably failed to discharge its onus against the accused beyond shadow of doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must resolve in favour of the accused. It was observed by the Hon'ble apex Court in case *Tariq Pervaiz v. The State* (1995 SCMR 1345) that for giving benefit of doubt it was not necessary that there may be many circumstances creating doubts and if there is circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then accused would be entitled to the benefit of doubt.

In this context case of *Muhammad Akram v. The State* 2009 SCMR 230 can also be referred to.

16. For reasons mentioned above, the above appeals are allowed. Resultantly, the judgment 14.04.2010 handed over by the trial Court is hereby set aside. The accused are acquitted of the charges. They are on bail. Their bail bonds are cancelled and sureties are discharges.

17. For the reasons mentioned above, the criminal revision No. 241 of 2010 and Criminal Revision No. 240 of 2010 are dismissed on the same grounds.

(A.A.K.)   Appeal allowed

PLJ 2021 Lahore 958
[Multan Bench, Multan]
***Present:* SARDAR AHMAD NAEEM, J.**
NAZAR HUSSAIN--Petitioner
versus
ADDITIONAL SESSIONS JUDGE/JUSTICE OF PIECE LAYYAH and 2 others--Respondents

W.P. No. 6886 of 2021, decided on 21.6.2021.

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

---Ss. 22-A & 22-B--ASJ/JOP directed to SHO to record statement and proceed under law--JOP requisitioned a report from police--disputed cheque was executed by petitioner, however delivered as guarantee--Execution of cheque, dishonor of said cheque and maintaining account with said branch was not disputed--No illegality or perversity was observed--Petition dismissed.

[P. 959 & 960] A, B & C

Malik Khalil Ahmad Kalroo, Advocate for Petitioner.

Haji Dilber Khan Mahaar, Assistant Advocate General for Respondents.

Mr. Kashif Nadeem Malik, Advocate for Respondent No. 3.

Date of hearing: 21.6.2021.

ORDER

Through this petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner challenges the order dated 27.04.2021 passed by /Respondent No. 1 with the direction to S.H.O. to record statement of Respondent No. 3 and, proceed under the law.

2. No cognizable offence was made out from the contents of the application but the learned Ex-Officio Justice of Peace misdirected himself and directed the S.H.O. concerned to record statement of Respondent No. 3 without adverting to the facts of the case and law on the subject, thus, the impugned order was liable to be set aside.

3. Learned counsel for the Respondent No. 3 maintained the validity of the impugned order.

4. A review of the record demonstrates that Respondent No. 3 filed the application under Section 22-A, 22-B, Cr.P.C. on 06.05.2021 and levelled the allegation against the petitioner in Para No. 1 of the said application. The learned Ex-Officio Justice of Peace requisitioned a report from the Illaqa Police. A report dated 11.04.2021 is available on record which revealed that disputed cheque was executed by the petitioner however, delivered to the said respondent by way of guarantee. The execution of chuque, dishonour of said cheque and maintaining the account with the said branch of Bank was not disputed by the learned counsel for the petitioner, however, it was argued that the cheque was handed over by way of guarantee. Was there an endorsement on the cheque regarding "guarantee", learned counsel for the petitioner could not answer the said question satisfactorily and submitted that there was no such endorsement. I have gone through the impugned order. No illegality or perversity was observed therein, thus, I would refrain to interfere in the well-reasoned order handed down by the learned Ex-Officio Justice of Peace.

5. In view of the above, there is no merit in this petition which is hereby dismissed.

(K.Q.B.) Petition dismissed

2022 Y L R 189
[Lahore (Multan Bench)]
Before Sardar Ahmad Naeem and Shakil Ahmad, JJ
ZAHOOR AHMAD and others---Appellants
Versus
The STATE and others---Respondents

Criminal Appeals Nos. 362-J of 2018, 278 of 2016, Criminal Revision No. 439 of 2015 and Murder Reference No. 88 of 2015, heard on 8th June, 2021.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Ocular account and medical evidence---Contradictions---Accused was charged for committing murder of the brother of the complainant by firing---Non-payment of outstanding amount by the deceased was motive behind the occurrence---Ocular account of the occurrence had been furnished by the brother/ complainant and behnoi of the deceased being eye-witnesses---Both the eye-witnesses were not natural witnesses---Though, they claimed that they had seen the incident but had failed to explain one injury which was on the medial aspect of right thigh as it was exit wound---Both the eye-witnesses in their statements recorded during trial, had described that two injuries were sustained by the deceased by making dishonest improvements to bring the case of prosecution in line with the medical evidence---Said witnesses had specifically attributed that fire shots made by the accused landed on the right side below belly and near thigh joint of the deceased---Eye-witnesses lifted/shifted the deceased through Rescue 1122 and, thus, their clothes might have stained with blood but neither any such clothes were taken into possession nor produced during the investigation---Medical Officer held the autopsy and observed three injuries including two entry wounds and the other was exit of injury---During the cross-examination, the Medical Officer admitted that he observed no corresponding holes on the clothes of the deceased---Had he seen any hole, he would have definitely mentioned the same in post-mortem examination report---Statement of said witness further reflected that it was possible that fire shots strike the body of the deceased in naked condition---Medical evidence, therefore, contradicted the ocular account---Circumstances

established that the prosecution had failed to prove its case against the accused beyond reasonable doubt---Appeal against conviction was allowed, in circumstances. [pp. 194, 195] A & E

Muhammad Akram v. The State and others 2016 SCMR 2081; Nasrullah alias Nasro v. The State 2017 SCMR 724; Nadeem alias Kala v. The State 2018 SCMR 153 and Najaf Ali Shah v. The State 2021 SCMR 736 rel.

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

----Ss. 302(b) & 34---Qanun-e-Shahadat (10 of 1984), Art.129(g)---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---With-holding best evidence---Scope---Accused was charged for committing murder of the brother of the complainant by firing---Complainant was a regular practicing lawyer but he did not report the incident to police---Place of occurrence was a Mor, which was busy area surrounded by various shops and houses---Occurrence took place in front of a shop but none from the surrounding was examined during trial---Investigating Officer was also informed regarding the occurrence by someone---Investigating Officer thereafter, reached the Hospital, however, did not examine any personnel of 1122---Eye-witnesses claimed their presence at the time and place of occurrence along with the deceased but the story described by them did not fit in with the probabilities---Circumstances established that the prosecution had failed to prove its case against the accused beyond reasonable doubt---Appeal against conviction was allowed, in circumstances.

Muhammad Saleem v. The State 2010 SCMR 374 rel.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention--- Appreciation of evidence---Benefit of doubt---Motive not proved---Scope---Accused was charged for committing murder of the brother of the complainant by firing---Reasons for the outbreak of the incident/episode was an altercation which took place between the deceased and the accused prior to the occurrence at a Adda but none from the said Adda was examined to prove the earlier altercation--- Complainant attempted to explain that fact that he was told by the deceased regarding the incident of motive---Even the trial court observed that failure to prove motive was not fatal to the prosecution in view of the confidence inspiring evidence of

the eye-witnesses meaning thereby that no categorical finding was recorded by the Trial Court regarding motive---Circumstances established that the prosecution had failed to prove its case against the accused beyond reasonable doubt---Appeal against conviction was allowed, in circumstances.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention--- Appreciation of evidence---Benefit of doubt---Weapon of offence and crime empties were recovered---Scope---Accused was charged for committing murder of the brother of the complainant by firing---Recovery of pistol and report of Forensic Science Agency were useless as number of magazine of the pistol dispatched the Forensic Science Agency was 27665, whereas, recovery memo of the pistol suggested number of the magazine as 27685, which was altogether different---Circumstances established that the prosecution had failed to prove its case against the accused beyond reasonable doubt---Appeal against conviction was allowed, in circumstances.

Prince Rehan Iftikhar Sheikh for Appellant (Zahoor Ahmad).

Malik Mudassar Ali, Deputy Prosecutor General for the State.

Sardar Ashfaq Ahmad for the Complainant (Muhammad Moeen Khan).

Date of hearing: 8th June, 2021.

JUDGMENT

SARDAR AHMED NAEEM, J.---This judgment shall dispose of Criminal Appeal No.362 of 2018 titled as Zahoor Ahmad v. The State filed by Zahoor Ahmad (appellant) against his conviction and sentences, Criminal Appeal No.278 of 2016 titled as Muhammad Moeen Khan v. Sabir Ali, etc. filed by Muhammad Moeen Khan (appellant) against the acquittal of Sabir Hussain (respondent), Criminal Revision No.439 of 2015 titled as Muhammad Moeen Khan v. Zahoor Ahmad etc. filed by Muhammad Moeen Khan (petitioner) for enhancement of compensation awarded to Zahoor Ahmad (respondent No.1) from Rs.2,00,000/- to Rs.5,00,000/- and Murder Reference No.88 of 2015 titled The State v. Zahoor Ahmad transmitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to the appellant, being originated from the same judgment dated 27.10.2015 passed by the learned Additional Sessions Judge, Sahiwal in case FIR No.118/ 2013 dated 31.03.2013,

under sections 302, 34, P.P.C., registered at Police Station Dera Rahim, District Sahiwal, whereby Zahoor Ahmad appellant was held guilty under section 302(b), P.P.C., convicted and sentenced to death, with the direction to pay Rs.2,00,000/ - as compensation to the legal heirs of the deceased, Naeem Hassan under section 544-A, Cr.P.C., recoverable as arrears of land revenue and in case of default to further undergo simple imprisonment for six months.

2. Brief facts of the case, as disclosed by Muhammad Moeen Khan, complainant are that, on 31.03.2013 at about 05:00 p.m., Zahoor Ahmad appellant armed with Pistol 30- bore along with co-accused Sabir Ali (since acquitted) committed Qatl-i-Amd of Naeem Hassan deceased by causing firearm injuries on different parts of his body.

3. After usual investigation, challan against the accused was submitted before the Court. The learned trial court after observing all the pre-trial codal formalities, charge sheeted the appellant and his co-accused to which they pleaded not guilty and claimed trial.

4. The prosecution, in order to prove its case, produced as many as 12 PWs during the trial. The ocular account, in this case, was rendered by Muhammad Moeen Khan, complainant (PW.4) and Muhammad Hanif (PW.5).

5. Medical evidence was furnished by Dr. Furqan Hussain, M.O. D.H.Q. Hospital Sahiwal (PW.6) who, on 31.03.2013 conducted post-mortem examination on the dead body of Naeem Hassan deceased and observed following injuries on his person:

i. A lacerated wound 1 cm x 1 cm x deep going with blackened margin on the right mid part of right inguinal region (entry wound).

ii. A lacerated wound 1/2 cm x 1/2 cm x deep going 2 cm below the injury No.1 with blackened margin (entry wound).

iii. A lacerated wound 1 x 1.5 cm on the medial aspect of right thigh 8 cm below the injury No.2 with everted margins (exit of injury No.2).

In his opinion, the cause of death in this case was injury No.1 which damaged right femoral artery, profuse bleeding, hemorrhagic shock and death. This injury was sufficient to cause death in ordinary course of nature. The injuries were ante-mortem in nature and caused by fire-arm. Probable duration between injury and death was within 20 minutes and between death and post-mortem was five hours. Ex.PF is the carbon copy of post-mortem report of Naeem Hassan

deceased which was written and signed by him. Ex.PF/ 1 was pictorial diagrams showing the locale of injuries.

6. Zahid Ali, Draftsman (PW.2) visited the place of occurrence. He prepared scaled site plan (Exh.PA and Exh.PA/ 1) and handed over to the Investigating Officer. Shahid Rajab (PW.3) identified the dead body of the deceased. On 31.03.2013, Shahzad Akbar, Moharrar H.C. (PW.8) on receipt of written complaint (Exh.PC), chalked out the formal FIR without any omission or addition. Liaquat Ali, Constable (PW.10) escorted the dead-body of Naeem Hassan deceased for post-mortem examination. Gulshair Ahmad (PW.11) was witness of recovery of Pistol 30 bore (P.5) along with three live bullets (P.6/1-3) at the instance of Zahoor Ahmad appellant, which was taken into possession vide Memo Exh.PK. He was also witness of recovery of Motorcycle No.SLK/2549,Road Prince (P.7) from Sabir Ali co-accused which was taken into possession vide recovery Memo Exh.PL. Muhammad Siddique, S.I. (PW.12) was the Investigating Officer of this case. Rest of the PWs were formal, therefore, need not to be discussed.

7. Learned Assistant District Public Prosecutor gave up Muhammad Waseem, PW being unnecessary and after tendering into evidence reports of Punjab Forensic Science Agency (Exh.PM and Exh.PN) closed the prosecution evidence.

8. Statements of the accused under section 342, of the Code of Criminal Procedure, 1898, were recorded. They refuted all the allegations levelled against them and professed their innocence. Responding to question No.8 "Why this case against you and why the PWs have deposed against you?, Zahoor Ahmad appellant replied as under:

> "I am innocent in this case. The occurrence was taken place by some unknown culprits at the place of occurrence. The story of FIR was twisted by the complainant consulting with the PWs, when the real culprits could not be traced out then the PWs and the complainant who are all close inter-se concocted a false story and due to party friction involved me in this false case, real facts have not been mentioned in the FIR by the complainant, on the fateful day, a rumor was in the mouth of people that at Bhallaywala More Naeem Hassan deceased was in a drunk position and was making commotion there in naked condition, he quarreled with some unknown persons at the time of alleged occurrence

and the deceased was armed with pistol and assaulted at some unknown persons during that scuffling the unknown persons were trying to snatch the pistol which was in the hand of the deceased Naeem Hassan. In that situation, the pistol was activated and fire arm injuries sustained on the body of the deceased and he succumbed to the injuries. The deceased was a drunker, many cases of narcotics were registered against him and many time he had gone in the jail. All the PWs and complainant are relative inter-se, some days prior the instant occurrence, the elder brother of the deceased and the complainant quarreled with me in the village who is Lumberdar of the village. Due to that grudge and feeling insult the complainant falsely booked me in this case."

While answering to same question, Sabir Ali (since acquitted) stated as under:

"I am innocent in this case. My co-accused Zahoor Ahmad was rival with the complainant party in the village in every election. My co-accused Zahoor Ahmad had remained against the complainant party and I remained supporter in favour of my co-accused and against the complainant party and due to village party friction, the complainant falsely involved me in this case."

9. They did not appear as their own witness on oath as provided under section 340(2) of The Code of Criminal Procedure, 1898 in disproof of the allegations levelled against them, however, Zahoor Ahmad appellant produced report issued by Rescue 1122 Sahiwal as Exh.DC, copy of FIR No.377/ 2010 under section 11/4/79 of Police Station Dera Rahim (Mark-A) and copy of challan regarding FIR No.377/2010, Police Station Dera Rahim, Sahiwal as Mark-B in documentary evidence.

10. The learned trial Court vide its judgment dated 27.10.2015, held the appellant guilty, convicted and sentenced him as mentioned and detailed above.

11. Learned counsel for the appellant contended that no independent witness was cited by the prosecution; that the ocular account was contradicted with the medical evidence; that the witnesses made dishonest improvements during trial, just to bring the ocular account in line with the medical evidence; that story of the prosecution does not fit in with the probabilities; that prosecution failed to prove motive and the positive report of Punjab Forensic Science Agency tendered into evidence as Exh.PN also lend no corroboration to the prosecution;

that the statement of the eye-witnesses were full of contradictions/discrepancies and that the prosecution failed to prove its case against the appellant beyond reasonable shadow of doubt.

12. Learned Deputy Prosecutor General and the learned counsel for the complainant opposed this appeal with vehemence. It was argued that it was a daylight occurrence and there was no question of mistaken identity as the parties were known to each other; that the PWs have no grudge or grouse for false implication of the appellant; that the eye-witnesses rendered straightforward account of the occurrence and firmly withstood the test of cross-examination; that nothing favourable could be extracted in favour of defence despite searching cross-examination; that motive was proved; that medical evidence could not be given preference over the ocular account and that the positive report of Punjab Forensic Science Agency (Exh.PN) confirmed that the weapon recovered from the appellant was used during the commission of this crime, thus, the appeal deserves dismissal.

13. Heard. Available record perused.

14. The crime report suggested that during this occurrence, Naeem Hassan, the deceased lost his life. The occurrence took place at 05:00 p.m. on 31.03.2013 at Balleywala Mor within the area of Chak No.100/ 9-L. The appellant was armed with 30-bore pistol and emerged at the crime scene along with his acquitted co-accused, namely, Sabir Ali on a motorbike. The appellant raised a lalkara that the deceased would be done to death for non-payment of the outstanding amount and fired thrice hitting the deceased on various parts of his body. After sustaining injuries, the deceased fell down and the appellant as well as his co-accused fled away from the scene while extending threats of dire consequences to the complainant and the eye-witnesses. The crime report further suggested that the complainant along with Muhammad Hantf and Muhammad Waseem PWs lifted the deceased and informed rescue 1122 and got the deceased shifted to Civil Hospital, who succumbed to the injuries on his way to hospital.

15. The reason for the outbreak of this episode was, as mentioned above, non-payment of outstanding amount by the deceased.

16. In order to prove its case, the prosecution had produced two eye-witnesses including Muhammad Moeen Khan (PW.4) and Muhammad Hanif (PW.5). The complainant Muhammad Moeen Khan was real brother of the deceased while Muhammad Hanif PW. was their Behnoi. Both the eye-witnesses

were related inter-se and with the deceased. The parties were inimical towards each other. The complainant as well as Muhammad Hanif (PW.5) claimed that they were standing at Balleywala Mor. Meanwhile, the appellant along with his acquitted co-accused launched attack upon the deceased, who succumbed to those injuries. At trial, none from the rescue 1122 was examined, thus, best evidence in this case was withheld. Both the eye-witnesses were not natural witnesses. Though, they claimed that they had seen the incident but had failed to explain injury No.3 which is on the medial aspect of right thigh as it was exit wound. Whereas, in their statements recorded during trial, the eye-witnesses, both, have described that two injuries were sustained by the deceased by making dishonest improvements to bring the case of prosecution in line with the medical evidence. They had specifically attributed that fire shots made by the appellant landed on the right side below belly and near thigh joint of the deceased. They lifted/shifted the deceased through rescue 1122 and, thus, their clothes might have stained with blood but neither any such cloth was taken into possession nor produced during the investigation. The complainant was a regular practicing lawyer but he did not report the incident to police. The place of occurrence i.e. Balleywala Mor was busy area surrounded by various shops and houses. The occurrence took place in front of a shop owned by Muhammad Sadiq Kumhar but none from the surrounding was examined during trial. The Investigating Officer Muhammad Rustam (PW.7) was also informed regarding this occurrence by someone. Thereafter, he reached DHQ Hospital at 07:00 p.m., however did not examine any personnel of 1122. The eye-witnesses claimed their presence at the time and place of occurrence along with the deceased but the story described by them does not fit in with the probabilities. A similar question came up before the Hon'ble Supreme Court of Pakistan in "Muhammad Saleem v. The State" (2010 SCMR 374) and the relevant observations of their lordships appearing in para 5 of the judgment at page 377 can advantageously be reproduced hereunder:

> "5. ....General rule is that statement of a witness must be in consonance with the probabilities fitting in the circumstances of the case and also inspires confidence in the mind of a reasonable and prudent person. If these elements are present, then the statement of a worst enemy of the accused can be accepted and relied upon without corroboration but if these elements are missing then the statement of a pious man can be

> rejected without second thought. Reference is invited to Haroon v. State 1995 SCMR 1627. The acid test of veracity of a witness is the inherent merit of his own statement. It is not necessary that an impartial and independent witness, who is neither related and independent witness, who is neither related to the complainant nor inimical towards the accused would stamp his testimony necessarily to be true. The statement itself has to be scrutinized thoroughly and it is to be seen as to whether in the circumstances of the case the statement is reasonable, probable or plausible and could be relied upon. The principle that a disinterested witness is always to be relied upon even if his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a very dangerous consequence. Reference is invited to Muhammad Rafique v. State 1977 SCMR 457 and Haroon v. State 1995 SCMR 1627."

17. The reasons for the outbreak of this episode was an altercation which took place between the deceased and the appellant prior to this occurrence at Adda 100/9-L but none from the said Adda was examined to prove the earlier altercation. The complainant attempted to explain this fact that he was told by the deceased regarding the incident of motive. Even the learned trial court in para No.30 of the judgment observed that failure to prove motive was not fatal to the prosecution in view of the confidence inspiring evidence of the eye-witnesses meaning thereby that no categorical finding was recorded by the learned trial court regarding motive.

18. Recovery of pistol and report of Punjab Forensic Science Agency (Exh.PN) was also useless as number of magazine of the pistol dispatched the Punjab Forensic Science Agency was 27665, whereas, recovery memo of the pistol (Exh.PK) suggested number of the magazine as 27685, which is altogether different.

19. On 31.03.2013 at 10:00 p.m. Dr. Furqan Hussain held the autopsy and observed three injuries including two entry wounds and the other was exit of injury No.2. During the cross-examination, the Medical Officer admitted that he

observed no corresponding holes on the clothes of the deceased and had he seen any hole, he would have definitely mentioned the same in postmortem examination report. His statement further reflected that it was possible that fire shots strike the body of the deceased in naked condition. Thus, medical evidence contradicts the ocular account. A similar question came up before the apex Court in case titled "Muhammad Akram v. The State and others" (2016 SCMR 2081) the honorable Supreme Court held that:-

> "...after hearing the learned counsel for the petitioner and going through the record of the case with his assistance we have noticed that the eye-witnesses produced by the prosecution were chance witnesses who had failed to establish the stated reason for their presence at the place of occurrence. The post-mortem examination of the deadbody of the deceased had been conducted with a noticeable delay. The medical evidence had contradicted the ocular account. The motive set up by the prosecution had remained far from being established. The report received from the Forensic Science Laboratory was in the negative. In view of the above mentioned factors the High Court had concluded that the prosecution had failed to prove its case against respondent No.2 beyond reasonable doubt and we have not been able to take any legitimate exception to the said conclusion reached by the High Court. This petition is, therefore, dismissed and leave to appeal is refused."

In another case reported as "Nasrullah alias Nasro v. The State" (2017 SCMR 724), the Hon'ble Supreme Court observed as under:-

> " the eye-witnesses produced by the prosecution had been clearly contradicted in this case by the medical evidence and no independent corroboration had been received by them through any other source inasmuch as the motive set up by the prosecution had not been proved and the alleged recovery of the weapon of offence was legally inconsequential. In a case of this nature the appellant could not have been convicted for the alleged murder merely because he happened to be the husband of the deceased."

In case reported as "Nadeem alias Kala v. The State" (2018 SCMR 153), the Hon'ble Supreme Court observed as under:-

> "(c) The medical evidence is merely a supportive/corroborative piece of evidence but in this case the same is not in line with the ocular account because Dr. Monum Javed (PW.2) noted a firearm entry wound on the front of right thigh whereas it is case of the complainant in the FIR and both the witnesses of ocular account stated before the learned trial court that the other accused had caught hold of Maqsood Ahmad (deceased) from the front side."

A similar question also came up before their lordships, in a recent case titled "Najaf Ali Shah v. The State" (2021 SCMR 736), relevant observations of their lordships appearing in para No.9 of the judgment, are as under:

> "9. Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the court to do complete justice. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English Jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer." All the contradictions noted by the learned High Court are sufficient to cast a shadow of doubt on the prosecution's case, which entitles the petitioner to the right of benefit of doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048)." The same view was

> reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/ lacuna in the prosecution's case automatically goes in favour of an accused."

20. The resume of the above discussion is that the eye-witnesses produced by the prosecution were actually not present with the deceased at the place and time of occurrence and after ruling out of the ocular account, the other circumstances of the case, if any, providing corroboration or support to the ocular account had categorically collapsed.

21. For what has been discussed above, a conclusion is inescapable that the prosecution had failed to prove its case against the appellant beyond reasonable doubt. This appeal is, therefore, allowed. The conviction and sentence of the appellant recorded by the learned trial court is set aside and he is acquitted of the charge on the basis of benefit of doubt. He shall be released from jail forthwith if not required to be detained in connection of any other case.

22. Murder Reference No.88 of 2015 is answered in the NEGATIVE and death sentence of Zahoor Ahmad (convict) is NOT CONFIRMED.

23. For the foregoing reasons, Criminal Appeal No.278 of 2016 and Criminal Revision No.439 of 2015 filed by the complainant are also dismissed.

JK/Z-10/L Order accordingly.

PLJ 2022 Lahore 61

[Multan Bench, Multan]

Present: **SARDAR AHMED NAEEM, J.**

SHAZIA AFZAL--Petitioner

versus

JUSTICE OF PEACE and 2 others--Respondents

W.P. No. 3022 of 2019, decided on 6.4.2021.

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

----S. 22-A--Scope of report submitted by police--Police report, supporting petitioner's version, could not have been kept out of consideration--Report from local police suggested that application filed by Respondent No. 3 was frivolous and baseless--Scope of report submitted by police came under consideration before their lordships in case of "Khizer Hayat"--This petition is allowed and impugned order dated 09.02.2019 is set-aside. Resultantly, application filed by the Respondent No. 3 under Section 22-A, Cr.P.C. stands dismissed--Petition was allowed. [Pp. 62 & 63] A, B, C & D PLD 2005 Lahore 470 *ref.*

Mr. Abu Bakar Khalid, Advocate for Petitioner.

Mr. Muhammad Ayub Buzdar, Assistant Advocate General for Respondents.

Date of hearing: 6.4.2021.

ORDER

Through this petition filed in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner challenges the order dated 09.02.2019 passed by the learned Ex-Officio Justice of Peace, Kabirwala, whereby the application filed under Section 22-A, Cr.P.C. by Respondent No. 3 was disposed of with the direction to the Station House Officer concerned to register a case after recording his statement.

2. Learned counsel for the petitioner argued at some length. The crux of the arguments was that no cognizable offence was made out and that the police report, supporting his version, could not have been kept out of consideration. To augment his contention learned counsel for the petitioner relied upon *"Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others"*

(PLD 2005 Lahore 470).

3. Learned law officer opposed this petition and supported the order rendered by the Respondent No. 1.

4. Heard. Available record perused.

5. A review of the record demonstrates that the Respondent No. 3 filed an application under Section 22-A, Cr.P.C. on 29.01.2019 and levelled the allegation

against the proposed accused in Para No. 2 of the petition. The learned Ex-Officio Justice of Peace requisitioned a report from the local police which is available on record and suggested that the application filed by the Respondent No. 3 was frivolous and baseless. In para No. 5 of the impugned order, the learned Ex-Officio Justice of Peace dealt with the merits of the case and observed that the Station House Officer concerned has not denied the missing of the daughter of the Respondent No. 3. I have gone through the report submitted by the Zafar Iqbal A.S.I. of Police Station City Kabirwala and it was not a report of Station House Officer rather forwarded by the Station House Officer which indicates that the learned Ex-Officio Justice of Peace dealt with the matter in a cursory/slipshod manner. The scope of the comments/report submitted by the police came under consideration before their lordships in the case of *"Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others"* (PLD 2005 Lahore 470), wherein at page No. 534-535 in para No. 16, their lordships observed as under:

> *".--It is prudent and advisable for an. Ex-Officio Justice of the Peace to call for comments of the officer Incharge of the relevant Police Station in respect of complaints of this nature before taking any decision of his own in that regard so that he may be apprised of the reasons why the local police has not registered a criminal case in respect of the complainant's allegations. It may well be that the complainant has been economizing with the truth and the comments of the local police may help in completing the picture and making the situation clearer for the Ex-Officio Justice of the Peace facilitating him in issuing a just and con eel direction, if any.*
>
> *The officer in charge of the relevant Police Station may be under a statutory obligation to register an F.I.R. whenever information disclosing commission of a cognizable offence is provided to him but the provisions of Section 22-A(6), Cr.P.C. do not make it obligatory for an Ex-Officio Justice of the Peace to necessarily or blindfoldedly issue a direction regarding registration of a criminal case whenever a complaint is filed before him in that regard. An Ex-Officio Justice of Peace should exercise caution and restraint in this regard and he may call for comments of the officer at-charge the relevant Police Station in respect of complaints of this nature before taking any decision of his own in that regard so that he may be apprised of the reasons why the local police have not registered, a, criminal case in respect of the complainant's allegations. If the comments furnished by the office incharge of the relevant Police Station disclose no justifiable reason for not registering a criminal case on the basis of the information supplied by the complaining person then an Ex-Officio Justice of the Peace would be justified in issuing a direction that a criminal case be registered and investigated.*

6. Seeking guidance from the observations, I am of the view that it is a fit case wherein interference is called for

7. In the circumstances, this petition is allowed and the impugned order dated 09.02.2019 is set-aside. Resultantly, application filed by the Respondent No. 3 under Section 22-A, Cr.P.C. stands dismissed.

(K.Q.B.)   Petition allowed

2022 P Cr. L J 314
[Lahore (Bahawalpur Bench)]
Before Sardar Ahmed Naeem and Muhammad Waheed Khan, JJ
MUHAMMAD ASLAM---Appellant
Versus
The STATE---Respondent

Criminal Appeal No. 624-J and Murder Reference No. 81 of 2016, heard on 9th February, 2021.

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

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Accused was charged for committing murder of his wife by inflicting hatchet blows---Motive behind the incident was stated to be that the deceased had a Jhoti (young buffalo) and the accused wanted to sell that which resulted into altercation between the spouses---Record showed that the occurrence took place at 04:00 a.m.---No source of light was mentioned by the witnesses at the crime scene---Occurrence took place in the residential room of the house situated at the Dera---Evidence and the scaled site plan showed that the deceased after sustaining injuries fell on a cot lying in the said room but no cot was taken into possession during the investigation---Material available on record further suggested that the complainant was living at a distance of 4/5 acre from the place of occurrence with his family in a nearby 'Basti' having about 100 houses---Accused was also chased by her family members---Family of a witness also came to the crime scene and witnessed the occurrence admitted by the complainant, but none from their families was cited as witness---Accused got married to the deceased 15/16 years ago and had three sons aged about 15 years, 12 years and 10 years respectively---Sons of the accused except elder were present inside the room but they were also not examined at the crime scene---Evidence showed that the place of occurrence i.e. the room had no outlet/window, thus, it appeared to be improbable that the accused could manage his escape, in particular, leaving behind the hatchet in presence of so many family members/relatives of the deceased---Statement of eye-witness was at variance with that of the complainant which reflected that he had witnessed the occurrence along with the children standing outside the room---Said witness had also admitted that they made no effort to shut the door or bolt the same from

outside---Circumstances established that the prosecution had failed to prove its case against the accused beyond reasonable shadow of doubt--- Appeal against conviction was allowed, in circumstances.

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

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Recovery of weapon of offence on the pointation of accused---Reliance---Scope---Accused was charged for committing murder of his wife by inflicting hatchet blows---Accused was arrested but amazingly, he got recovered hatchet from the back side of his room lying under the sugarcane---Crime report further suggested that the accused was given a chase by the eye-witnesses but he managed his escape and no material was available on the file that while leaving the spot, the accused concealed the crime weapon behind the crime scene i.e. his residential room---Investigating Officer further admitted that the recovery memo did not suggest if it was blood-stained---Circumstances established that the prosecution had failed to prove its case against the accused beyond reasonable shadow of doubt---Appeal against conviction was allowed, in circumstances.

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

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Delay in reporting the matter---Scope---Accused was charged for committing murder of his wife by inflicting hatchet blows---Record showed that the Medical Officer conducted post-mortem examination at 02:00 p.m. and observed seven incised wounds on the upper part of the body of the deceased---Post-mortem reflected that the rigor mortis was fully developed---Medical Officer also admitted during the cross-examination that rigor mortis fully developed in 24 hours---Occurrence took place at 04:00 a.m. on the same day---Incident was reported at 09:00 a.m. with unexplained delay of five hours and the post-mortem was conducted at 02:00 p.m., meaning thereby that the occurrence had taken place not at the time as mentioned by the witnesses in their statements---Circumstances established that the prosecution had failed to prove its case against the accused beyond reasonable shadow of doubt--- Appeal against conviction was allowed, in circumstances.

(d) Criminal trial---

----Benefit of doubt---Principle---Benefit of doubt is always extended in favour of the accused---Case of the prosecution if found to be doubtful then every doubt even slightest is to be resolved in favour of the accused.

Muhammad Mansha v. The State 2018 SCMR 772; Abdul Jabbar v. The State and another 2019 SCMR 129 and Muhammad Adnan and another v. The State and others 2021 SCMR 16 rel.

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

----S. 302(b)---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---With-holding material evidence---Effect---Accused was charged for committing murder of his wife by inflicting hatchet blows---Record showed that nobody came forward from the families of the complainant and eye-witness to depose against the accused---Similarly, the independent witnesses were also not examined at trial, thus, best evidence in the case was withheld by the prosecution and thus necessary inference must be raised against the prosecution under Art. 129(g) of Qanun-e-Shahadat, 1984---Circumstances established that the prosecution had failed to prove its case against the accused beyond reasonable shadow of doubt--- Appeal against conviction was allowed, in circumstances. [p. 322] E

Farooq Haider Malik for Appellant.

Najeeb Ullah Jatoi, Deputy Prosecutor General for the State.

Rao Nasir Mehmood Khan for the Complainant.

Date of hearing: 9th February, 2021.

JUDGMENT

SARDAR AHMED NAEEM, J.---This judgment shall dispose of Criminal Appeal No.624-J of 2016 titled as Muhammad Aslam v. The State filed by Muhammad Aslam (appellant) and Murder Reference No.81 of 2016 titled as The State v. Muhammad Aslam transmitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to the appellant, being originated from the same judgment dated 23.12.2016 passed by the learned Additional Sessions Judge, Chishtian, District Bahawalnagar in case FIR No.117/2016, under section 302, P.P.C., registered at Police Station Shaher Farid, Tehsil Chishtian, District Bahawalnagar, whereby Muhammad Aslam (appellant-accused) was convicted under section 302(b), P.P.C. and sentenced to death, with the direction to pay Rs.1,00,000/- as compensation to the legal heirs of the deceased, under section 544-A, Cr.P.C. and in case of default to further undergo simple imprisonment for six months.

2. The prosecution story, in brief, is that on 05.05.2016 at 04:00 a.m. Muhammad Aslam appellant armed with hatchet inflicted successive blows

hitting on different parts of the body of the deceased, namely, Mst. Atta Elahi, who succumbed to the injuries.

3. After usual investigation, challan was submitted in the Court. The learned trial court after observing all the pre-trial codal formalities, charge sheeted the appellant to which he pleaded not guilty and claimed to be tried.

4. The prosecution, in order to prove its case, produced as many as ten PWs during the trial. Medical evidence, in this case, was furnished by W.M.O. Shaista Khalid (PW.1). On 05.05.2016 at 2:00 p.m., she conducted post-mortem examination of Mst. Atta Elahi deceased and found following injuries on her person:-

1. Multiple incised wound in front of neck:-

i. Incised wound 12 cm x 4 cm, into cutting the muscle of the right side of the neck. Hyoid bone, larynx trachea, esophagus starting from near the right ear lobule up till 2 cm lateral to mid line on left side the neck.

ii. An incised wound 10 cm x 4 cm into cutting the trachea esophagus. 3rd cervical vertebra and all the muscles of the right side of the neck.

iii. Incised wound 8 cm x 2 can over right supra clavicular region cutting the right caroted artery.

2. Incised wound 15 cm x 4 cm into cutting on the flap of the skin is present over the posterior aspect of right ear.

3. Incised wound with 8 cm x 4 cm into the bone expose/indirection on the posterior aspect of right hand and forearm.

4. Incised wound 2 cm x 1 cm into muscle deep on right side of chin.

5. Incised wound 8 cm x 3 cm into skin deep and on the internal aspect of the left shoulder.

6. Incised wound 4 cm x 5 cm into bone expose on the posterior aspect of the body above the right scapular region slightly lateral to mid line.

7. Incised wound 4 cm x 3 cm into bone expose over the right scapular region below the above mentioned injury.

In her opinion, cause of death in this case was cardio respiratory failure due to excessive bleeding, hemorrhage and shock from injury No.1 which was sufficient to cause death in the ordinary course of nature. All the injuries were ante-mortem in nature and were caused with sharp edge weapon. The duration between injuries and death was within 5 minutes and between death and post mortem examination was within 24 hours.

5. Ocular account in this case was furnished by Allah Ditta complainant (PW.5) and Muhammad Ashiq (PW.6). Both the PWs supported the prosecution story as mentioned in the FIR.

6. Muhammad Akram, Constable (PW.3) escorted the dead body of the deceased. Syed Abdul Razaq, S.I. (PW.4) reached at the spot on 05.05.2016, recorded statement of the complainant (Exh.PD) and sent complaint to the Police Station for registration of FIR.

7. Younas Ali, Inspector (PW.8) investigated the case. Abdul Razaq Patwari (PW.10) visited the place of occurrence and inspected the spot on the direction of the police and on the pointing out of PWs. He prepared the scaled site plan (Ex.PK) Rest of the PWs are of formal nature, therefore, need not to be reproduced.

8. The prosecution gave up Bashir Ahmad and Muhammad Siddique PWs being unnecessary and after tendering into evidence reports of P.F.S.A. (Exh.PL and Exh.PM) closed the prosecution evidence.

9. The statement of the appellant under section 342, of The Code of Criminal Procedure, 1898, was recorded. He refitted the allegations levelled against him and professed their innocence. Responding to the question "Why this case is against you and why PWs deposed against you?, appellant replied as under:

> "In fact, instant occurrence was blind one. I am a patient of TB and chest infection and suffering from asthma due to which I cannot even walk speedily. On the day of occurrence, I was not present at my house. Some unknown persons committed the murder of my wife Attah Elahi and most probably it can be said that accused persons of case FIR No.206/14, under section 376, P.P.C. committed the murder of my wife but the complainant party designed a concocted story to falsely implicate me just to grab money from me. It is evident from record that death of my wife was not caused at the time and date as narrated by the complainant party rather, it is badly contradicted by medical evidence and other important aspects of this case. The PWs allegedly stated a countless witnesses present at the time of occurrence but only one person who is patient of T.B could not be overpowered by them. In spite of this fact, the prosecution case is (accused fled away from the place of occurrence while throwing his hatchet in crops beside the room place of occurrence and further it is very mating the complainant

himself stated that accused thrown his hatchet at the place of occurrence). I am innocent. I pray mercy from Almighty Allah and justice from Hon'ble Court."

10. The appellant neither appeared as his own witness on oath as provided under section 340(2) of The Code of Criminal Procedure, 1898 in disproof of the allegations levelled against him nor produce evidence in his defence.

11. The learned trial Court vide its judgment dated 23.12.2016, held the appellant guilty, convicted and sentenced him as mentioned and detailed above.

12. Learned counsel for the appellant, inter alia, contended that the prosecution miserably failed to prove its case against the appellant; that no independent witness was cited by the prosecution; that all the witnesses failed to justify their presence at the crime scene; that the best evidence in this case was withheld; that the recovery of hatchet in the peculiar circumstances of the case was of no help; that the motive remained unproved; that medical evidence lend no corroboration to the prosecution story; that the learned trial court failed to appreciate the prosecution evidence in its true perspective, thus, the impugned judgment cannot be sustained.

13. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant opposed the appeal with vehemence and submitted that the parties were known to each other, there was no question of mistaken identity; that the eye -witnesses had no grudge or grouse for false implication of the appellant; that conviction on a capital charge can be awarded on a single testimony; that part of onus was shifted upon the appellant as to how his wife met un-natural death in his house; that the ocular account furnished the details in a straight forward manner and no favourable material was extracted during the cross-examination of the eye-witnesses, thus, appeal deserves dismissal.

14. We have given our anxious considerations to the arguments advanced by the learned counsel for the parties and have minutely perused the record with their able assistance.

15. The parties in this case are related to each other. The complainant was `sala' of the appellant and Mst. Atta Elahi (deceased) was wife of the appellant. It was in the evidence that the appellant along with his wife and children shifted to a room in the dera of Mian Qudrat Ullah Matiyana one month prior to the occurrence. The spouses had strained relations and the deceased with her children stayed with the complainant for about one and half year prior to the

occurrence. The deceased had a "Jhoti" (young buffalo) and the appellant wanted to sell that which resulted into altercation between the spouses. The hue and cry of the children of the deceased at about 04:00 a.m. attracted the complainant, who rushed' to the crime scene along with Ashiq and Bashir Ahmad, PWs. They claimed to have witnessed the occurrence and saddled the appellant with the responsibility of causing hatchet blows to the deceased hitting on various parts of her body. Upon apprehending the PWs, the appellant fled away from the crime scene leaving behind the hatchet.

16. The occurrence took place on 05.05.2016 at 04:00 a.m. No source of light was mentioned by the PWs at the crime scene. The occurrence took place in the residential room of the house situated at the Dera of Mian Qudrat Ullah Matiyana. It was in the evidence and also suggested by the scaled site plan that the deceased after sustaining injuries fell on a cot lying in the said room but no cot was taken into possession during the investigation. The material available on record further suggested that the complainant was living at a distance of 4/5 acre from the place of occurrence with his family in a nearby `Basti' having about 100 houses. The appellant was also chased by her family members. The family of Bashir Ahmad PW. also came to the crime scene and witnessed the occurrence admitted by the complainant, namely, Allah Ditta (PW.5) but none from their families was cited as witness. The appellant got married to the deceased 15/16 years ago and had three sons including Shahbaz (aged about 15 years), Sarfraz (12 years) and Zahid (10 years). The sons of the appellant except Shahbaz were present inside the room but they were also not examined at the crime scene. It was in the evidence that the place of occurrence i.e. the room had no outlet/window, thus, it appears to be improbable that the appellant could manage his escape, in particular, leaving behind the hatchet in presence of so many family members/relatives of the deceased. The statement of Muhammad Ashiq (PW.6) is at variance with that of the complainant which reflected that he had witnessed the occurrence along with the children standing outside the room. He had also admitted that they made no effort to shut the door or bolt the same from outside.

17. It was in the evidence that many people had come to the crime scene at the time of occurrence. It was admitted by Younas Ali, Inspector (PW.8) that he separately recorded statements of Syed Chan Peer, Bashir Ahmad, Muhammad Mazhar, Nazar Khan and Zulfiqar but none of them was cited as a witness nor

examined during trial. The Investigating Officer further admitted that in unsealed site plan there was no mention' of the appellant and the PWs along with the children. The names of the PWs were also not mentioned in the unsealed site plan and that cot was not taken into possession. Abdul Razzaq (PW.10) also admitted that he was not shown the point of presence of the appellant by the PWs, thus, he has not mentioned any particular point showing his presence in the scaled site plan (Exh.PK).

18. It was case of the prosecution that the appellant inflicted hatchet blows to his wife and managed his escape from the place of occurrence in their presence leaving behind the hatchet (P.5). He was arrested on 12.05.2016 but amazingly, he got recovered hatchet (P.5) from the back side of his room lying under the sugarcane. The crime report further suggested that the appellant was given chase by the eye-witnesses but he managed his escape and no material was available on the file that while leaving the spot, the appellant concealed the crime weapon behind the crime scene i.e. his residential room. The Investigating Officer further admitted that the recovery memo does not suggest if it was blood-stained.

19. The dead body of the deceased was shifted to hospital by the PWs including Muhammad Ashiq son of Ghulam Muhammad and Muhammad Siddique son of Muhammad Hussain. She was bleeding profusely and, thus, there was a possibility of having the blood-stains on the clothes of those persons, who shifted the dead body to hospital but none from the said PWs produced their clothes before the Investigating Officer during the investigation.

20. The Medical Officer conducted post-mortem examination on 05.05.2016 at 02:00 p.m. and observed seven incised wound on the upper part of the body of the deceased. The postmortem (Exh.PA) reflected that the Rigor mortis was fully developed. He also admitted during the cross-examination that Rigor mortis fully developed in 24 hours. The occurrence took place at 04:00 a.m. on the same day. The incident was reported at 09:00 a.m. with unexplained delay of five hours and the postmortem was conducted at 02:00 p.m. meaning thereby that the occurrence had taken place not at the time as mentioned by the PWs in their statements.

21. The contention of the learned counsel for the complainant has substance that part of the onus lies on the accused person to explain as to how and in which circumstances the accused person's wife had died an unnatural death inside the confines of the matrimonial home but at the same time it has also been clarified

by the apex Court in the case "Abdul Majeed v. The State" (2011 SCMR 941) that where the prosecution completely failed to discharge its initial onus then no part of the onus shifts to the accused person at all.

22. It is an axiomatic principle of law that benefit of doubt is always extended in favour of the accused. The case of the prosecution if found to be doubtful then every doubt even slightest is to be resolved in favour of the accused. In this case prosecution miserably failed to prove the case against the appellant beyond reasonable doubt. Reliance in this context can be placed on "Muhammad Mansha v. The State" (2018 SCMR 772) and relevant observations of their lordships appearing in para-4 at page No.778 can advantageously be reproduced hereunder:

> "4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilty of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted" Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."

In another judgment titled "Abdul Jabbar v. The State and another" (2019 SCMR 129), their lordships observed:

> "It is settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict... benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused."

Reliance can also be placed on case titled "Muhammad Adnan and another v. The State and others" (2021 SCMR 16).

23. The resume of the above discussion is that the ocular account is belied by the host of circumstances. No source of light was shown at or around the crime scene. The complainant admitted in the cross-examination that in the summer season people usually sleep in the open space. Inside the room there was no other

item except the cot. Children of the deceased witnessed the occurrence inside the room. The Medical Officer observed seven incised wound on her body but the postmortem report negates the version of the complainant and contradicted the statements of the eye-witnesses including the time of occurrence due to the complete development of rigor mortis. The fact of throwing hatchet by the accused at crime scene and then recovery of the said hatchet at the instance of the appellant after his arrest was also astonishing. Nobody came forward from the families of the complainant and Bashir Ahmad to depose against the appellant. Similarly the independent witnesses Syed Chan Peer, Bashir Ahmad, Muhammad Mazhar, Nazar Khan and Zulfiqar Khan was also not examined at trial, thus, best evidence in this case was withheld by the prosecution and thus necessary inference must be raised against the prosecution under Article 129(g) of Qanun-e Shahadat, 1984. The dispute of the deceased to sell her 'Jhoti' leading to the altercation between the spouses was also not proved. The aspect of shifting the deceased along with her family to the Dera of Mian Qudrat Ullah Matiyana one month prior to the occurrence was also not thrashed by the Investigating Officer during the investigation and the fact that Muhammad Ashiq and Bashir Ahmad PWs were also the witnesses of case FIR No.206/2014, under section 376, P.P.C., got registered at Shaher Farid by the deceased established that on such sketchy evidence the conviction on a capital charge cannot be sustained.

24. For the reasons mentioned above, the conclusion is inescapable that the prosecution had failed to prove its case against the appellant beyond reasonable shadow of doubt. The appeal is, therefore, allowed, the conviction and sentences of the appellant is set aside. He is acquitted of the charge. He shall be released from jail forthwith if not required to be detained in any other criminal case.

25. Murder Reference No.81 of 2016 is answered in the NEGATIVE and death sentence of Muhammad Aslam (convict)/appellant is NOT CONFIRMED.

The case property shall be dealt with strictly in accordance with law and the record of the learned trial court be sent down immediately.

JK/M-63/L Appeal allowed.

PLJ 2022 Cr.C. 354

[Lahore High Court, Multan Bench]

***Present:* SARDAR AHMAD NAEEM, J.**

ABDUL GHAFFAR, etc.--Petitioners

versus

STATE etc.--Respondents

Crl. Misc. No. 3771-B of 2021, decided on 30.6.2021.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 381--Incident was reported with unexplained delay of about six months--No specific date, time or place of commission of theft was either mentioned in the FIR--Petitioners have been nominated in the crime report without any specific role--Record further suggested that there was a dispute between the parties requiring rendition of accounts--Pre-arrest bail Confirmed. [P. 355] A & B

Khawaja Qaisar Butt, Advocate with Petitioners.

Mr. Hassan Mehmood Tareen, Deputy Prosecutor General for State.

Date of hearing: 30.6.2021.

ORDER

Petitioner seeks pre-arrest bail in case registered *vide* FIR No. 538 dated 03.6.2020 at police station Muzafarabad, District Multan, for offence under Section 381, PPC.

2. The allegation against the petitioners is that of committing theft being servant of the complainant.

3. Heard. Available record perused.

4. A review of the record demonstrates that the occurrence took place between 8.10.2019 to 06.12.2019 but the incident was reported on 03.6.2020 with unexplained delay of about six months. No reason for such delay was forthcoming on record. No specific date, time or place of commission of theft was either mentioned in the FIR or hinted at by the learned Deputy Prosecutor General. The petitioners have been nominated in the crime report without any specific role and on the basis of material collected, during the investigation, their roles cannot be deciphered. What

item was stolen by the petitioners being servants of the complainant?, Learned Deputy Prosecutor General could not satisfactorily explain this fact. Even otherwise, it is difficult to prove the element of mala fide by the accused through positive/solid evidence/material and the same is to be deduced and inferred from the facts and circumstances of the case. The record further suggested that there was a dispute between the parties requiring rendition of accounts. The offence does not fall under the prohibitory clause of Section 497, Cr.P.C. *Mala fide* was asserted in the petition and there was no allegation of misuse of ad-interim pre-arrest bail.

5. For the reasons mentioned above, the application is accepted and the ad-interim pre-arrest bail earlier granted to the petitioners is confirmed subject to furnishing their 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/Duty Judge.

(M.A.B.) Bail confirmed

PLJ 2022 Lahore 127
[Multan Bench, Multan]
Present: **Sardar Ahmed Naeem, J.**
MANZAR ABBAS--Petitioner
versus
INSPECTOR GENERAL OF POLICE, LAHORE
and 7 others--Respondents

W.P. No. 7766 of 2021, decided on 15.6.2021.

Constitution of Pakistan, 1973--

----Art. 199--Order for re-investigation of case--Commencement of trial--Framing of charge--Commencement of trial was not denied by Respondent No. 8--Charge against accused was framed, investigation after commencement of trial could not have been ordered--Memo. dated 20.05.2021 circulated by office of Respondent No. 8 is hereby declared as illegal, without lawful authority having no legal affect--Petition allowed. [Pp. 128 & 129] A & B

2014 SCMR 1488 *ref.*

Mr. Muhammad Sharif Karkhi Khaira, Advocate for Petitioner.

Maher Imtiaz Hussain Mirali, Assistant Advocate General for Respondent.

Mr. Muhammad Younas Sheikh, Advocate for Respondent No. 8.

Date of hearing: 15.6.2021.

Order

Through this petition filed in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner challenges the memo/order served upon the petitioner by Respondent No. 6 suggesting/ indicating the re-investigation of case F.I.R. No. 115 dated 05.08.2020, registered at Police Station Havali Koranga, Khanewal.

2. Learned counsel for the petitioner argued at some length and concluded with the submission that after the commencement of trial, transfer of investigation was impermissible under the law.

3. Learned counsel for the Respondent No. 8 opposed this petition with vehemence and submitted that the privilege of the Investigating Agency cannot be

curtailed as submission of report under Section 173, Cr.P.C. can be submitted at any stage of the trial, thus, the petition was liable to be dismissed.

4. Heard. Available record perused.

5. A review of the record demonstrates that the petitioner is nominated accused of case mentioned above and challenged the vires of the direction of Respondent No. 8. The memo. dated 20.05.2021 signed by Respondent No. 8 is available on record as Annexure-C. Commencement of trial was not denied by Respondent No. 8. The charge against the accused was framed on 07.05.2021, thus, the investigation after the commencement of trial could not have been ordered. Reliance, in this respect, can be placed on (2014 SCMR 1488). The relevant observations of their lordships can be reproduced advantageously, which read as under:

> "It would be seen that as per settled law, there is no bar to the reinvestigation of a criminal case and the police authorities are at liberty to file a supplementary challan even after submission of the final report under Section 173, Cr.P.C. However this cannot be done after the case has been disposed of by the learned trial Court (see **Bahadur Khan (Supra)** Similarly there is no cavil to the proposition that a Court of law is not bound by the *Ipsi Dixit* of the police. authorities and rather should formulate its own independent views irrespective of the investigation whether or not to charge the accused with a particular crime. Seen in this view of the matter, perhaps no exception can be taken to the Judgment of the learned High Court which has held as such *i.e.* that a charge under Section 380, P.P.C. can also be framed against the accused if sufficient material is placed on the record which would convince the learned trial Court to do so. However this aspect does not debar the police authorities from carrying out further investigation in the case. In this regard reference can be made to Article 18(6) of the Police Order, 2002 (Supra).

6. Seeking guidance from the observations of their lordships and respectfully following the same, the writ is issued and the memo. dated 20.05.2021 circulated by the office of Respondent No. 8 is hereby declared as illegal, without lawful authority having no legal affect.

(Y.A.) Petition allowed

PLJ 2022 Cr.C. 564
[Lahore High Court, Multan Bench]
***Present:* SARDAR AHMED NAEEM, J.**
MUHAMMAD KASHIF--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 553-B of 2021, decided on 22.4.2021.

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

----S. 497--Pakistan Penal Code, 1860 (XLV of 1860), Ss. 392 & 411--Bail after arrest, grant of--Incident was reported with unexplained delay of about five days--Petitioner was never put to test identification parade by investigating agency--Accused is not known to complainant or witnesses--Physical custody was not required by investigating agency--Speedy trial is right of accused and no body can be detained in jail by way of advance punishment--Bail allowed.

[P. 565] A & B

Peer Syed Muhammad Najmul Husnain, Advocate for Petitioner.

Mr. Hassan Mehmood Tareen, Deputy Prosecutor General for State.

Date of hearing: 22.4.2021.

ORDER

Muhammad Kashif, petitioner seeks post arrest bail in case registered *vide*, FIR No. 502 dated 07.10.2020 at police station Tibba Sultanpur, District Vehari for offences under Sections 392,411, PPC.

2. The complainant reported a robbery against unknown accused. Later on, the petitioner was arrested in this case.

3. Having heard the arguments addressed at the bar and after perusing the record, it was noticed that the occurrence took place on 02.10.2020 but the incident was reported with unexplained delay of about five days *i.e.* on 07.10.2020. The petitioner was never put to test identification parade by the investigating agency. In such like cases, the accused is not known to the complainant or the witnesses, holding of test identification parade could not be dispensed with because accused who had allegedly committed the robbery had been subsequently found in possession of robbed goods. Reliance in this context can be placed on *"Farman Ali*

Versus The State" (1997 SCMR 971). During the investigation, the recovery stands effected from the petitioner and thus, his physical custody was not required by the investigating agency. The trial has not witnessed any material progress. It is settled by now that the speedy trial is the right of the accused and no body can be detained in jail by way of advance punishment. The petitioner has got no previous conviction at his credit. The continuous and indefinite detention of the petitioner would not serve any purpose to the prosecution. In the circumstances, I am inclined to exercise my discretion in favour of the petitioner.

4. In view of the above, this petition is accepted and the petitioner is admitted 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/Duty Judge.

(A.A.K.) Bail allowed

PLJ 2022 Cr.C. 593
[Lahore High Court, Lahore]
Present: **SARDAR AHMED NAEEM, J.**
LUQMAN--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 75319-B of 2021, decided on 1.2.2022.

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

----Ss. 497(2), 161 & 164--Pakistan Penal Code, (XLV of 1860), Ss. 365-B & 376--Bail, allowed--Unexplained delay of ten hours--Statement of victim u/S. 161, Cr.P.C. was silent regarding abduction--Victim attributed forcible rape to petitioner but said allegation is neither corroborated by medico legal report of victim nor by report of Forensic Expert--Even her hymen is shown as intact in her medical report--No recovery was effected from petitioner--Even during investigation, victim has not shown place where she was subjected to forcible rape--Petitioner is in jail since arrest and his continuous detention for indefinite period would be unfair, in particular, when commencement/conclusion of trial in near future is not insight--All these considerations rendered case against petitioner one of thorough probe within meaning of Section 497(2), Cr.P.C. [P. 594] A

Syed Afzal Shah Bukhari, Advocate for Petitioner.

Mr. Sana Ullah, Deputy Prosecutor General for State.

Date of hearing: 1.2.2022.

ORDER

Luqman, petitioner seeks post arrest bail in case registered *vide* F.I.R No. 341 dated 25.7.2021 under Sections 365-B, 376, PPC at Police Station Tarkhani, Faisalabad.

2. Allegedly, petitioner raped upon Saira Parveen, the victim.

3. After hearing the learned counsel for the parties and perusing the record, it was noticed that the incident was reported with unexplained delay of about ten hours. No plausible explanation was forthcoming on record for the said delay. The crime report suggests that the episode was enacted by three persons but during the

investigation, the victim was examined under Section 161, Cr.P.C. wherein no other co-accused is nominated except the petitioner. Whereas, the statement of the victim recorded under Section 161, Cr.P.C. is also not in line with the crime report. The statement of the victim recorded under Section 164, Cr.P.C. is silent regarding her abduction by three persons, rather reflects as if she was a consenting party. The victim attributed forcible rape to the petitioner but the said allegation is neither corroborated by the medico legal report of the victim nor by the report of Forensic Expert. Even her hymen is shown as intact in her medical report. No recovery was effected from the petitioner. Even during the investigation, the victim has not shown the place where she was subjected to forcible rape. The petitioner is in jail since arrest and his continuous detention for indefinite period would be unfair, in particular, when commencement/conclusion of trial in near future is not insight. All these considerations rendered the case against the petitioner one of thorough probe within the meaning of Section 497(2), Cr.P.C.

4. For the foregoing reasons, the application is allowed and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court/Duty Judge.

(A.A.K.) Bail allowed

PLJ 2022 Lahore 325

[Multan Bench, Multan]

***Present:* SARDAR AHMAD NAEEM, J.**

ANEELA IRSHAD--Petitioner

versus

ADDITIONAL SESSIONS JUDGE and 3 others etc.--Respondents

W.P. No. 7828 of 2021, decided on 7.6.2021.

Constitution of Pakistan, 1973--

----Arts. 199--Guardian and Wards Act, 1890, S. 25--Petition for recovery of minors--Similar petition was filed by petitioner--Petitioner was afforded opportunity of meeting with minors-- Principle of togetherness--Maintainability--Minors including Azan Ali Shah and Aliyaan Ali Shah stated in unison that they had to live with their father whereas, Hania Fatima, other minor opted for both *i.e.* petitioner as well as her father--Petition is silent if minors were snatched by Respondent No. 3 from petitioner, thus,

petition is not maintainable--Hania Fatima expressed her desire to join her parents but keeping in view principle of togetherness, it was expedient that she should not be deprived company of her brothers--Petition dismissed. [P. 326] A & B

Mr. Shafqat Raza Thaheem, Advocate for Petitioner.

Maher Imtiaz Hussain Marali, Assistant Advocate General for State.

Mr. Nadeem Ahmad Tarar, Advocate for Respondent No. 3.

Minor produced.

Date of hearing: 7.6.2021.

ORDER

Through this petition filed in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has prayed for the following relief:

> "... prayed that the writ petition in hand may very kindly be accepted and order dated 08.05.2021 passed by learned Justice of Peace/ASJ, Respondent No. 1 may very kindly be declared ab-initio absolutely illegal, capricious, perverse, null and void and the proceedings upon the impugned order is requested to be quashed cancelled/set aside and this Hon'ble Court may very graciously be pleased to issue an appropriate direction to the Respondent No. 2 to recover the detenues namely, Azan Ali Shah aged about 7 years, Aliyaan Ali Shah aged about 5 years and Hania Fatima aged about 4 years from the illegal and improper custody of Respondent No. 3 and 4 and produce them before

this Hon'ble Court and set them at liberty as well as custody of minors be handed over to the petitioner being a real mother and natural Guardian."

2. Learned counsel for the petitioner argued at some length. The crux of the arguments was that the petitioner being real mother has got the preferential right of Hazanat and was also the best suitable person under the Muhammadan Law, thus, the custody of the minors may be handed over to the petitioner.

3. Learned counsel for the Respondent No. 3 opposed this petition with vehemence and submitted that the order the learned Additional Sessions Judge was in accordance with law; that it was not a case of recent snatching; that Respondent No. 3 has filed petition under Section 25 of the Guardian and Ward Act and, thus, the matter which requires the evidence can be resolved by the said forum provided under the law, thus, the petition is liable to be dismissed.

4. A review of the record demonstrates that a similar petition was filed by the petitioner before Sessions Judge, Khanewal and was dismissed by the learned Additional Sessions Judge, Jahanian *vide* order dated 08.05.2021. The merits of the case have been dealt with in details in para No. 6 to para No. 8 of the said order.

5. The detenues/minors were accompanied by their father and the petitioner was afforded an opportunity of a meeting with her children outside the Court. The case was called on for hearing at the fag-end of the day. The minors though were not mature but intelligent enough to form their opinion. The minors including Azan Ali Shah and Aliyaan Ali Shah stated in unison that they had to live with their father whereas, Hania Fatima, the other minor opted for both *i.e.* the petitioner as well as her father.

6. The petition is silent if minors were snatched by Respondent No. 3 from the petitioner, thus, the petition is not maintainable in view of the law laid down by their lordships in "*Mst. Nadia Parveen v. Mst. Almas Noreen and others*" (PLD 2012 SC 758).

As mentioned above, Hania Fatima expressed her desire to join her parents but keeping in view the principle of togetherness, it was expedient that she should not be deprived the company of her brothers including Azan Ali Shah and Aliyaan Ali Shah.

7. For the foregoing reasons, I proceed to dismiss this petition, being meritless.

However, Respondent No. 3 asserted if a petition for the custody of the minors is filed under the law for the custody of the minors before the competent forum, the learned Guardian Judge shall not be influenced with any of the observation made hereinabove or any findings recorded by the learned Additional Sessions Judge *vide* order dated 08.05.2021.

(Y.A.) Petition dismissed

PLJ 2022 Cr.C. (Note) 43
[Lahore High Court, Multan Bench]
Present: **SARDAR AHMED NAEEM AND ANWAARUL HAQ PANNUN, JJ.**
TAALAT MEHMOOD--Appellant
versus
STATE, etc.--Respondents

Crl. A. No. 25-J of 2016 & M.R. No. 05 of 2014, decided on 19.12.2018.

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

----Ss. 302(b), 380 & 411--Conviction and sentence--Challenge to--Benefit of doubt--Qatl-e-amd--Murder reference--Circumstantial evidence--Last seen evidence was not impressive--It is settled rule of circumstantial evidence that failure of prosecution to prove one link of chain of circumstances destroys all links--In case, three important links set up by prosecution connecting accused-appellant with commission of offence are not proved through convincing/cogent evidence--**Held:** It is established rule of law that where conviction is based on circumstantial evidence alone, facts proved must be incompatible with innocence of accused and are incapable of being explained upon any reasonable hypothesis other than guilt of accused--Circumstantial evidence should be inter-connected that it forms such a continuous chain that its one end touches dead body and other neck of accused thereby excluding all hypothesis of his innocence. [Para 16] A & B

1996 SCMR 188 & 2010 SCMR 374.

Benefit of doubt--

----Principle--It is axiomatic principle of law that benefit of doubt is always extended in favour of accused--The case of prosecution if found to be doubtful then every doubt even slightest is to be resolved in favour of accused--In this case prosecution miserably failed to prove case against appellant beyond reasonable doubt. [Para 18] C

2018 SCMR 772 and 2018 SCMR 911.

Malik Waqar Haider Awan and *Mr. Javaid Iqbal Bhatti,* Advocates for Appellant.

Mr. Muhammad Irfan Aarbi, Advocate at State.

Mr. Shahid Aleem, Additional Prosecutor General for State.

Mr. Khanwar Intizar Muhammad Khan, Advocate for Complainant.

Date of hearing: 19.12.2018.

JUDGMENT

Sardar Ahmed Naeem, J.--Tallat Mehmood (appellant) was tried by learned Sessions Judge, Multan in case F.I.R. No. 768/2011 dated 29.11.2011, under

sections 302, 380, 411, P.P.C., registered at Police Station Sital Mari, Multan for committing murders of Rasheeda Bibi (wife of complainant) and Sultan Bano (mother-in-law of the complainant). At the conclusion of the trial, vide judgment dated 12.12.2013, the learned trial Court held the appellant guilty, convicted and sentenced him as under:

i. ***Under Section 302(b)P.P.C.:*** *Death on two counts with compensation of Rs. 2,00,000/- to the legal heirs of each deceased, in default thereof to further undergo simple imprisonment for six months.*

ii. ***Under Section 380, P.P.C.:*** *Three years rigorous imprisonment with fine of Rs. 10,000/-, in default of the payment of fine, to further undergo simple imprisonment for one month.*

iii. ***Under Section 411, P.P.C.:*** *two years rigorous imprisonment with fine of Rs. 5000/-and in default thereof to further undergo simple imprisonment for fifteen days.*

All the sentences were ordered to run con-currently.

2. Being dissatisfied with the said judgment, the appellant filed Criminal Appeal No. 25-J of 2016 against his convictions and sentences. Murder Reference No. 05 of 2014 is also before us for confirmation or otherwise of death sentence awarded to the appellant by the learned trial Court.

3. The prosecution story, in brief, as narrated in the F.I.R. lodged by Muhammad Ashraf, complainant is that on 29.11.2011, he received telephone call that some unknown accused committed murders of *Mst.* Rasheeda Bibi and *Mst.* Sultan Bano, his wife and mother-in-law, respectively. He reached at the place of occurrence and saw their dead bodies. *Mst.* Rasheeda Bibi received sharp edged injury on her neck whereas *Mst.* Sultan Bano received sharp edged injury on her chest. The accused persons also took away LCD and two mobile phones alongwith them. Hence, the present F.I.R.

4. After usual investigation, challan was submitted before the Court. The learned trial Court framed charge against the appellant to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined as many as fifteen witnesses.

Muhammad Ashraf (PW.11) was complainant of this case. He narrated the story as mentioned in the F.I.R. Ghulam Farooq (PW.1) and Mumtaz Ahmed (PW.2) were witnesses of "Wajtakar". Irfan Hayat Draftsman (PW.3) prepared scaled site plans (Exh.PA and Exh.PA/1). Muhammad Shahzad 176/C (PW.5) escorted the dead bodies to mortuary at Nishtar Hospital, Multan. Muhammad Irfan 1716/HC (PW.6) chalked out for the formal F.I.R. (Exh.PD/1).

Medical evidence, in this case, was furnished by Dr. Tasneem Kousar Malik (PW.10). She, on 30.11.2011 conducted post-mortem examination on the dead body of *Mst.* Rasheeda Bibi and found following injuries on her person:-

i. An abrasion 3x2 cm on bridge of nose,
ii. Contused and cyanosed lips.
iii. Multiple incised stab wounds with narrow distance were on area of 6 x 5 cm on front and right side of neck going deep.
iv. An abrasion on front leg 8 cm below knee joint.

In her opinion cause of death was Injury No. 3 inflicted by sharp edge weapon causing damage to underlying major vessels leading to hemorrhage and shock, sufficient to cause death in ordinary course of nature. All the injuries were ante-mortem in nature. Probable duration between injury and death was immediate and between death and post-mortem was within 12-24 hours. Exh.PG is correct carbon copy of post-mortem report and Exh.PG/1 is pictorial diagram.

On the same day at 10:30 a.m. she also conducted post-mortem examination of *Mst.* Sultan Bano and noted the following injuries on her body:

i. Contusion was piresent on whole of nose and right and left cheek.
ii. A lacerated wound of 2 x ½ cm was present on the left side of chin which was skin deep.
iii. An incised stab wound 2 x ½ cm on the front and left side of neck going deep.
iv. Incised stab wound 1 x ½ cm on the front of neck above thyroid cartilage going deep.
v. Incised wound 1 x 3/4 on the front of chest on sternum. It was skin deep.
vi. Incised wound stab 3x3/4 cm on the front and the left side of chest, 3 cm below Injury No. 5.
vii. Multiple incised, stab wounds on front of abdomen 6x5 cm on midline and front of abdomen.
viii. Incised wound skin deep 1 x 1/3 cm on the left hand thumb. It was skin deep.

He was of the following opinion:

> *"In my opinion, cause of death was Injury No. 6 individually inflicted by sharp edge weapon causing damage to major vessels aorta leading to hemorrhage and shock and same was sufficient to cause death. Injury No. 7 also contributed to cause death. Time elapsed between injury and death was immediate and between death and post mortem was 12 to 24 hours .... Post-mortem report Exh.PK and pictorial diagram Exh.PK/1 are in my hand and bear my signature. Injury statement Exh.PL and inquest report Exh.PM were produced to me and I signed the same."*

6. Muhammad Ashraf (PW. 7) was witness of extra-judicial confession. Ghulam Murtaza (PW.9) identified the dead bodies of Rasheeda Bibi and Sultan Bono. Allah Ditta 75/C (PW.12) was witness of recovery of 'Churri' (P. 9) at the instance of the appellant. Arshad Abbas, S.I. (PW.13) Tahir Mahmood, S.I. (PW.15) were Investigating Officers of this case. Rest of the witnesses are formal in nature.

7. Learned Deputy District Public Prosecutor gave up Abdul Rehman and Khalid Aziz PWs being unnecessary and after tendering in evidence reports of Chemical Examiner (Exh.PR, Exh.PS and Exh.PT) and that of Serologist (Exh.PU and Exh.PV) closed the prosecution evidence.

8. After close of the prosecution evidence, the appellant was examined under Section 342, Cr.P.C. In answer to a question *"Why this case against you and why the PWs deposed against you?"*, the appellant replied as under:

> *"Instant case was registered against unknown accused. I have been involved in this case due to suspicion. Ghulam Farooq PW is close relative of Muhammad Ashraf first informant as well as Muhammad Ashraf son of Gul Muhammad PW. Mumtaz PW is close friend of first informant. Mumtaz PW is not neighbourer of the first informant. Muhammad Ashraf son of Gul Muhammad PW is resident of district Khushab and he deposed against me just to create enmity between my family and the family of first informant."*

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

9. The learned trial Court after considering the merits of the case, held the appellant guilty, convicted and sentenced him as mentioned and detailed above. Now, this appeal.

10. Learned counsel for the appellant while challenging the legality of the impugned judgment submitted that it was unseen occurrence wherein the appellant had been falsely involved on the basis of engineered fabrication; that the entire case of the prosecution rests upon the circumstantial evidence but the chain of circumstances which should touch the dead body of the deceased and neck of the accused is not complete. Learned counsel submitted that the evidence *i.e.* last seen, extra-judicial confession and recoveries at the instance of the appellant was tailored during the investigation. Learned counsel further added that Ghulam Farooq and Mumtaz Ahmad PWs had seen the deceased coming out of the house of the deceased with L.C.D. and wearing blood-stained clothes but did not inform the complainant till 05.12.2012, thus, the conduct of the witnesses were sufficient to doubt their credibility and their evidence could not be relied upon. Learned counsel further pointed out that the evidence of recovery at the instance of appellant was a classic example of fabrication as 'Churri' (P4) was recovered from open plot and so did the cellular phones, without any identification memo and, thus, lend no support to the prosecution's case; that the case of prosecution was full of contradictions/discrepancies; that no independent witness was cited by the

prosecution; that extra-judicial confession was always considered a weak type of evidence; that the instant case was nothing but a pack of lies, thus, the impugned judgment was liable to be set aside.

11. Conversely, learned Additional Prosecutor General assisted by the learned counsel for the complainant supported the impugned judgment and submitted that through legal and plausible evidence the charge stood proved against the appellant; that the witnesses withstood the test of cross-examination firmly and no favourable material was extracted during the cross-examination; that no link in the chain was broken; that no grudge was attributed to any of the PW for false involvement of the appellant; that the prosecution evidence including last-seen, extra-judicial confession and incriminating articles leaving no room to create doubt qua the involvement of the appellant and in this case, learned trial Court while relying upon the evidence produced by the prosecution had rightly convicted and sentenced the appellant.

12. After minutely going through the record and hearing lengthy arguments of the learned counsel for the parties, we have observed that it was a case of circumstantial evidence *i.e.* last-seen, extra-judicial confession and recovery of incriminating articles at the instance of the accused-appellant.

13. The occurrence in this case had taken place on 29.11.2011 at 10:30/11:00 a.m. in the house of the complainant/the deceased, namely, *Mst.* Rasheeda Bibi. The, complainant was away to Lahore for his official training and got the information of this occurrence. During the incident, two persons lost their lives including *Mst.* Rasheedan Bibi, wife of the complainant whereas, Sultan Bono was his mother-in-law. The incident was reported against unknown accused. The appellant was nominated, later on. He was real nephew of the complainant. In order to establish the charge, the prosecution produced Ghulam Farooq (PW. 1) and Mumtaz Ahmed (PW.2). They had last-seen the appellant while moving in the street having L.C.D. with him and wearing blood stained clothes. These witnesses could not justify their presence at that time in the street. Ghulam Farooq PW admitted in cross-examination that his business place was at Lahore whereas, Mumtaz Ahmad PW acknowledged that he used to go to his work at 08:00 a.m. and came back at 04:00 p.m. Mumtaz Ahmad was neighbourer of the complainant and claimed to have seen the accused-appellant while standing in his own door. He was residing at a distance of 10/15 yards. Ghulam Farooq (PW. 1) even could not describe the exact place of his presence. Though it was not necessary to mention the size of L.C.D. but could the appellant comfortably moved in the street with L.C.D. wearing blood-stained clothes, in particular, when it was not the claim of those witnesses that the accused was armed with some firearm weapon even then they made no effort whatsoever to apprehend the accused at the crime scene. Mumtaz Ahmed on that very day left for Okara whereas, Ghulam Farooq did not inform anyone and came to know through his cousin on 04.12.2011 regarding this

occurrence. They, both remained mum till 05.12.2012 and then informed the complainant regarding movement of the accused-appellant with L.C.D. and blood stained clothes inside the street on 30.11.2012. So far as the complainant is concerned, suffice it to observe that he nominated the appellant being accused merely on the basis of the statement/information furnished by Ghulam Farooq, Mumtaz Ahmed and Muhammad Ashraf.

14. The next evidence adduced by the prosecution was extra-judicial confession. Muhammad Ashraf (PW. 7) entered in the dock that on 09.12.2011 he alongwith Khalid Aziz given up PW was sitting in his house situated in Mouza Sarkai, Khushab. The accused visited his house and confessed his guilt that he was unemployed and then managed this occurrence and committed theft, etc. Muhammad Ashraf (PW.7) was brother-in-law (Sala/Behnoi) of the complainant. *Mst.* Rasheeda Bibi was his real sister and Sultan Bano was his real mother. The accused-allegedly, visited his house, described the whole story but this witness also offered no resistance or made no attempt to arrest the accused rather let of the accused. Muhammad Ashraf PW came to Farrukah Colony alongwith Khalid Aziz PW not produced at trial. Khalid Aziz was also resident of Mianwali whereas Muhammad Ashraf worked at Rawalpindi. Assuming for the sake of arguments that the parties were related inter-se and may be on that account, the appellant visited the house of Muhammad Ashraf (PW.7) and assuming that he was a person who could exercise his influence on the complainant but his conduct/reaction towards the accused/appellant was highly un-natural. How could he let off the culprit, who had committed murder of his sister and mother. It is hard to digest. It seems improbable and the extra-judicial confession is nothing but seems to be a fabricated evidence.

15. During the investigation, Tahir Mahmood, S.I. (PW.15) arrested the appellant on 17.02.2012 and got recovered 'Churri' (P.9) on 24.02.2012. He also led to the recovery of L.C.D. (P. 10) and cell phones (P. 11/12) and ear rings (P. 13) from. an open plot not in his exclusive possession rather accessible to everyone. The occurrence took place on 29.11.2011 and the incriminating articles were recovered on 24.02.2011 almost after three months of the occurrence and, thus, the blood stains on 'Churri' and recovery of incriminating articles also seems to be improbable. The recovery memo (Exh.PO) suggests that those were not sealed in parcels and, thus, lend no support to the prosecution which failed to prove their safe custody at 'Malkhana'.

16. It is settled rule of circumstantial evidence that failure of the prosecution to prove one link of the chain of circumstances destroys all links. In this case, the three important links set up by the prosecution connecting the accused-appellant with the commission of offence are not proved through convincing/cogent evidence. It is established rule of law that where conviction is based on circumstantial evidence alone, the facts proved must be incompatible with the innocence of the accused and are incapable of being explained upon any reasonable hypothesis other

than the guilt of the accused. It was further held in case title *"Sarfraz Khan v. The State and 2 others"* (1996 SCMR 188) that circumstantial evidence should be inter-connected that it forms such a continuous chain that its one end touches the dead body and other neck of the accused thereby excluding all the hypothesis of his innocence.

17. Above all, the story described by the complainant seems to be improbable and does not appeal to common sense, in particular, the story of extra-judicial confession and letting off the accused-appellant by Muhammad Ashraf (PW.7) real brother/son of the deceased including *Mst.* Rasheeda Bibi and Sultan Bano. The story of the last-seen is also not impressive. The version of the PWs was improbable. The question of probability came up before their lordships in *"Muhammad Saleem v. The State"* (2010 SCMR 374) and the relevant observations of their lordships appearing in para 5 of the judgment at page 377 can advantageously be reproduced hereunder:

> *"5. ... General rule is that statement of a witness must be in consonance with the probabilities fitting in the circumstances of the case and also inspires confidence in the mind of a reasonable and prudent person. If these elements are present, then the statement of a worst enemy of the accused can be accepted and relied upon without corroboration but if these elements are missing then the statement of a pious man can be rejected without second thought. Reference is invited to Haroon v. State 1995 SCMR 1627. The acid test of veracity of a witness is the inherent merit of his town statement. It is not necessury that that an impartial and independent witness, who is neither related and independent witness, who is neither related to the complainant nor inimical towards the accused would stamp his testimony necessarily to be true. The statement itself has to be scrutinized thoroughly and it is to be seen as to whether in the circumstances of the case the statement is reasonable, probable or plausible and could be relied upon. The principle that a disinterested witness is always to be relied upon even if his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a. very dangerous consequence. Reference is invited to Muhammad Rafique v. State 1977 SCMR 457 and Haroon v. State 1995 SCMR 1627."*

18. It is axiomatic principle of law that benefit of doubt is always extended in favour of the accused. The case of the prosecution if found to be doubtful then every doubt even slightest is to be resolved in favour of the accused. In this case prosecution miserably failed to prove the case against the appellant beyond reasonable doubt. Reliance in this context can be placed on *"Muhammad Mansha v. The State"* (2018 SCMR 772) and relevant observations of their lordships appearing in Para-4 at page No. 778 can advantageously be reproduced hereunder:

"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilty of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted" Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)."

In another case titled *"Mst. Nazia Anwar versus The State and others"* (2018 SCMR 911), the apex Court ruled:

"..... The cardinal principle in the criminal justice system in a situation like this, is to extend benefit of doubt to an accused to acquit, him/her of capital charge, instead of reducing the sentence. Once doubts about the genuineness of the story lurk into the minds of the judges, the only permissible course is to acquit the accused and not go for the alternative sentence of life imprisonment. In this regard reference may be made to the following case laws:

i. *Ayub Masih v. The State* (PLD 2002 SC 1048)
ii. *Muhammad Zaman v. The State and others* (2014 SCMR 749)
iii. *Hashim. Qasim v. The State* (2017 SCMR 986).

It is also well entrenched rule and principle of law that on the basis of probabilities, accused person may be extended benefit of doubt acquitting him/her of a capital charge however, such probabilities, high howsoever could not be made basis for conviction of an accused person and that too on a capital charge"

19. In view of the above, **Criminal Appeal No. 25-J of 2016** is allowed, the convictions and sentences of the appellant are set aside. He is acquitted of the charges. He is in jail and be released forthwith if not required in any other criminal case.

20. **Murder Reference No. 05 of 2014** is answered in the **NEGATIVE** and sentence of death awarded to the appellant by the learned trial Court is **NOT CONFIRMED**.

(A.A.K.) Appeal allowed

Form No: HCJD/C-121
ORDER SHEET

LAHORE HIGH COURT, RAWALPINDI BENCH, RAWALPINDI

JUDICIAL DEPARTMENT
Case No. Criminal Appeal No.760-2019
Rizwan Ullah Versus State

S. No of order / proceedings	Date of order of proceeding	Order with signature of Judge, and that of Parties or counsel, where necessary

31.5.2022. Mr. Safdar Iqbal Khatak, Advocate for the appellant.

Mr. Sajjad Hussain Bhatti, Deputy Prosecutor General

The appellant challenges the judgment dated 02.3.2019 rendered by the Judge Anti-Terrorism Court No.1, Rawalpindi Division, Rawalpindi in case FIR No.25 dated 17.9.2018 under section 4/5 of the Explosive Substances Act, 1908 read with section 13(2)(A) of the Punjab Arms Ordinance, 2015 and section 7 of the Anti-Terrorism Act, 1997 registered at police station CTD Rawalpindi.

2. The learned trial Court vide impugned judgment held the appellant guilty, convicted and sentenced him as under:

i. **Under section 4 of the Explosive Substances Act, 1908 and sentenced to imprisonment for life;**
ii. **Under section 7(ff) of the Anti-Terrorism Act 1997 and sentenced to imprisonment for life;**
iii. **Under section 5 of the Explosive Substances Act, 1908 and**

sentenced to rigorous imprisonment for fourteen years;

iv. **Under section 5-A of the Explosive Substances Act, 1908 whole of the property was ordered to forfeit in favour of the State;**

All the sentences were ordered to run concurrently. Benefit of section 382-B, Cr.P.C was also extended to him.

3. Learned counsel for the appellant argued at some length. The crux of his arguments was that the impugned judgment rendered by the learned trial Court was violative of the law and against the facts, thus, conviction awarded to the appellant cannot be sustained.

4. Learned Deputy Prosecutor General opposed this appeal with vehemence and prayed for its dismissal.

5. Heard. Available record perused.

6. It evinces from the record that the appellant was a nominated accused of the above FIR. He was charge sheeted along-with co-accused including Sher Hassan, Lal Badeen, Adnan and Malik Jaan, on 19.11.2018.

7. The learned trial Court appointed Mr. Naseer Ahmad Tanoli, Advocate on the request of the appellant and his co-accused including Lal Badeen and Sher Hassan. On 22.1.2019, the appellant moved an application for his ossification test. Meanwhile, the prosecution evidence was being produced and recorded. On 19.2.2019, the learned trial Court received a report of Additional Medical Superintendent DHQ Rawalpindi regarding ossification test of the appellant and in view of the said report, declared him juvenile and directed the SHO to submit separate challan against appellant under the law without any further delay. On 25.2.2019, a separate report under section 173,

Cr.P.C was submitted. The order sheet of the joint trial does not reflect if the trial of other co-accused was separated from the appellant and no formal/interim order was passed by the trial Court.

8. The learned trial Court has not supplied the copies to the appellant in terms of section 265-C, Cr.P.C for the reasons that he was delivered copies of all the relevant documents on 14.11.2018 i.e. in joint trial. However, in separate trial a formal charge under section 4/5 of the Explosive Substances Act, 1908 and section 7(ff) of the Anti-Terrorism Act, 1997 was framed against the appellant on 25.2.2019. The prosecution got examined as many as fifteen witnesses as suggested by the available record on the following day i.e. 26.2.2019. Though it is not impossible to record fifteen witnesses in a day and it is also true that to cross-examine fifteen witnesses at such length was also not impracticable, however, it is not a matter of routine. We are at total loss to understand why the learned trial Court recorded fifteen witnesses with undue haste?. We have scanned the record and observed that in this case statements of all the prosecution witnesses recorded at the joint trial of the appellant have been recorded verbatim. Though, sanctity to judicial proceedings cannot be questioned but amazingly recording of fifteen witnesses in one day suggested mechanism adopted by the learned trial Court to conclude the trial at the earliest without considering the adverse effect to the stake holders including the prosecution/defence.

9. At this stage, we may mention that in joint trial, the charge was framed on 19.11.2018 and the statements of the prosecution witnesses were completely recorded till 19.2.2019. If it was so, then how fifteen witnesses have been examined by the trial Court in a row i.e. on 26.2.2019 which appears to be mockery of law/procedure and this practice adopted by the

learned trial Court must be deprecated, in particular, when the appellant was provided services of a counsel at state expense. It is also interesting to note that the interim order sheet dated 26.2.2019 does not suggest presence of the learned defence counsel.

10. As mentioned above, the appellant was declared by the learned trial Court being juvenile as his bony age was determined on the basis of ossification test and SHO was directed to submit separate challan under section 173, Cr.P.C. The occurrence in this case took place on 17.9.2018 and, thus, Juvenile Justice System Act, 2018 comes to the rescue of the appellant.

11. In the above backdrop, we have to resolve following issues:

> (i) Whether the appellant has been denied his fundamental rights guaranteed under the Constitution of Islamic Republic of Pakistan, 1973 including the right to fair trial and to be treated under the law;
>
> (ii) Whether the Islamic principles to try a child have been violated;
>
> (iii) Whether the procedure adopted by the learned trial Court was against the Magna Carta(Child Rights) i.e, United Nations Convention on the Rights of Child, 1989; and
>
> (iv) Whether the learned trial Court failed to follow the law to try a juvenile i.e. Juvenile Justice System Act, 2018.

12. The chapter of fundamental rights provided in the Constitution of Islamic Republic of Pakistan, 1973, has an important provision in this regard

i.e. Article 10-A , which reads as under:

> **"10-A. Right to fair trial----**For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process"

13. Article 8 of the constitution stipulates that any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this chapter, shall, to the extent of such inconsistency, be void.

14. The Constitution has also a mandate for the State to bring all laws in conformity with the Islamic injunctions. Article 227 (1) of the Constitution reads:

> **"227. Provisions relating to the Holy Qur'an and Sunnah. (1)** All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah, in this Part referred to as the injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions."

15. How a person/citizen is to be treated in the Islamic Republic of Pakistan is enshrined in Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 reads as under:

> **4. Right of individuals to be dealt with in accordance with law etc.**(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

(2) In Particular-----

(a) no action detriment to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

(c) no person shall be compelled to do that which the law does not require him to do.

16. The above reading of the Constitutional text clearly established that the laws in Pakistan have to be in-conformity with the Islamic injunctions and any law that is ultra vires to the Islamic injunctions cannot remain on the statute book.

17. In Islamic jurisprudence, the minor is considered to be a person who has not attained the age of maturity and this is also enshrined in the Article 1 of the Covenant of Organization of Islamic Countries on the Rights of the Children in Islam.

18. The juveniles are naturally different from adults in respect of physical, psychological and mental strength. They need to be treated specially. Islam pronounces direction to show mercy and kind treatment to child.

19. Islam does not allow to state or the Court to take life and property of any one either by arbitrary and by unfair trial before the Court. Another important rule under Islam concerning trial of juvenile is “the right to a fair trial before an impartial judge. Fair and impartial trial is the key point to ensure justice which is highest moral value. The Qur’an sets great

highlighting on the justice and the obligation of judge to do justice.

The Qur'an says:

> "Oh ye who believes! stand out firmly for justice, as witness to Allah, even against yourselves , or your parents, or your Kin and whether it be against rich or poor" (Qur'an 4,135)".

Al-Qur'an further declares:

> "And I am commanded to judge justly between you (42,15). Allah categorically says "And if you judge, judge between them with justice. Indeed Allah loves who act justly (5,42)."

These all verses firmly established that, assurance justice is divine responsibility and obligation upon the judge. All these principles are similarly applicable to a child accused of an offence.

20. Founded on the ancient legal doctrine of parens patriae (the State as parent) which declared the king to be the guardian of all his subjects, the children Court assumed the right to intervene on behalf of youth deemed to be in need of help based on their life circumstances or their delinquent acts. The first juvenile Court was established in 1899 in Chicago and the movement spread rapidly throughout the world. The primary motive of the juvenile Court was to provide rehabilitation and protective supervision for youth. The Court was intended to be a place where the child would receive individualized attention from the concerned judge. The Courts hearings were informal and judges exercised broad discretion on how each case was to be handled. The juvenile Court was originally founded as a coercive social work

agency, rather than as a criminal Court.

21. At present, cases of juvenile offenders, in Pakistan are being dealt with under the Juvenile Justice System Act, 2018 which is also inconsonance with the Convention of United Nations on the Rights of Child. Article 40 of The United Nations Convention on the Rights of the Child (UNCRC), 1990 postulates that right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforce the child's respect for human rights and fundamental frame and all others and which takes into account the child's age and desirability of promoting child's/integrity and child's assuming constructive role in the society. The present law dealing with the juvenile's offender has taken care of children/youth offender in better terms. According to section 2(h), a child who may be dealt with for an offence in a manner different from an adult is a juvenile and section 2(b) postulates that whosoever has not attained the age of eighteen years is a child.

The Juvenile Justice System Act, 2018 provides mechanism to protect the rights of a child and way to attend/deal with his case keeping in view the best interest of the child.

Sub-section 7 of section 4 enshrines that a case of juvenile shall be transferred to the juvenile Court if a Court which earlier has taken cognizance of a case comes to this conclusion, whereas interrogation of a juvenile by sub inspector under the supervision of Superintendent of Police or SDPO is suggested by section 7 of the Act.

22. If a juvenile Court is satisfied that attendance of juvenile is not essential for the purpose of trial his attendance can be dispensed with under section 11(4). The procedure of a juvenile Court is detailed in section 11. However, section 12 provides that a juvenile can be tried with an adult person but subject to a rider i.e. satisfaction of the Court in joint trial. Sub-section 1 of section 12 says that no juvenile may be charged or with an adult and his physical presence may be dispensed with by the Court and the juvenile may be allowed to join the Court proceedings through audio and video technical link. We have described the background of the subject i.e. protection of the child's right universally, nationally and locally in the preceding paras and, once again, we are at pain to reiterate that the learned trial Court dealt with the matter in a casual manner.

23. As mentioned above number of prosecution witnesses recorded in both trials is the same. The statement of the PWs and the questions of cross examination have no change at all as if the entire prosecution evidence recorded in the trial of the co-accused have been copied/re-printed without observing the legal formalities provided by the code of criminal procedure.

24. We may also add that even the number of paragraphs of the impugned judgment as well as the judgment rendered in the connected trial are same and it appears that only the names, particulars and roles have been changed/filled in, thus, section 367 Cr.P.C has also been violated because the points of determination and their resolution on the basis of evidence adduced during trial do not find mention in the stereotyped judgment, which is result of over speeding which attracts the saying that justice rushed is justice crushed.

In the circumstances, we are of the considered view that the learned trial Court proceeded in haste and not only violated the principles of Islamic law regarding trial of juvenile and international covenant but also denied a fair trial to the appellant thus, it would be expedient and in the interest of justice that this case is remanded for re-trial.

25. The criteria for remanding any case on account of any irregularity committed during trial are two folds: firstly, appellate Court has to examine as to whether the irregularity committed by the learned trial Court prejudiced the accused in any manner and secondly, whether objection qua the said irregularity or illegality was raised at the earliest stage.

26. In this case, we conclude that as the charge was framed on 25.2.2021 and as the prosecution evidence was recorded on the following day of the charge, the question of raising any objection does not arise because the appellant was not provided copies as envisaged under section 265-C, Cr.P.C after submission of separate report under section 173, Cr.P.C. No time was given for preparing case/defence as stipulated under the law and immediately after framing the charge i.e. on the following day, all the prosecution witnesses were examined. We are of the considered view that the above exercise of the learned trial Court is nothing but overdoing which is neither approved nor appreciated and must be deprecated in strongest terms

27. For the foregoing reasons, this appeal is allowed. The impugned judgment is set aside. The case is remanded to the learned trial Court for re-trial under the law/observations made above. The accused-appellant shall be kept as under trial prisoner till the conclusion of trial.

28. However, it is expected that as it is an old matter, thus, the learned trial Court shall conclude the case at the earliest, preferably within four months after the receipt of this judgment under intimation to the Deputy Registrar (Criminal) of this Court.

(MUHAMMAD AMJAD RAFIQ)
(SARDAR AHMED NAEEM)

JUDGE *JUDGE*

*irfan**

APPROVED FOR REPORTING

Judge

Form No:HCJD/C-121
ORDER SHEET
LAHORE HIGH COURT
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT
Criminal Appeal No.356 of 2021
Niaz Khan versus The State
Criminal Revision No.134 of 2021
Hussain Ahmad versus Niaz Khan

J U D G M E N T

Date of hearing	***01.06.2022***
Appellant (Niaz Khan) represented by:	***Mr. Muhammad Suleman, Advocate at state expense.***
The State by:	***Khawaja Sohail Iqbal, District Public Prosecutor along with Azmat, S.I.***
Complainant represented by:	***Mr. Muhammad Bashir Paracha, Advocate .***

SARDAR AHMED NAEEM, J.- The appellant challenges the judgment dated 15.02.2021 rendered by learned Sessions Judge, Attock, in case F.I.R. No.88 dated 17.09.2018, under section 302, 311, P.P.C., registered at Police Station Rango, Attock.

2. The appellant was tried by the learned trial court, which held the appellant guilty under section 302(b), P.P.C., convicted and sentenced to imprisonment for life with compensation of Rs.1,00,000/- payable to the legal heirs of the deceased under section 544-A, Cr.P.C., in default whereof to further undergo simple imprisonment for six months. Benefit permissible under section 382-B, Cr.P.C. was also extended to him.

3. Niaz Khan convict/appellant has filed Criminal Appeal No.356 of 2021 against his conviction and sentences. The complainant also filed Criminal Revision

No.134 of 2021 for enhancement of sentence awarded to Niaz Khan (respondent). This judgment will dispose of both the above mentioned matters.

4. Learned counsel for the appellant argued this appeal at some length. The crux of his arguments was that the appellant was incapable to face trial or to defend himself and that the learned trial court was cognizant of this fact but could not determine this issue under the law, which caused miscarriage of justice, thus, the impugned judgment of conviction is not sustainable.

5. Learned District Public Prosecutor assisted by the learned counsel for the complainant opposed this appeal with vehemence and argued that the appellant committed Qatl-i-Amd of his wife, namely, Bibi Zainab in his own house; that the case of prosecution was supported by the ocular as well as medical evidence; that motive was also proved which gets further corroboration from the recovery of weapon i.e. 'churri'; that the prosecution witnesses firmly withstood the test of cross-examination and remained unshaken. Added that prosecution proved its case against the appellant to the hilt, thus, appeal deserves dismissal.

6. I have given anxious considerations to the arguments advanced by the learned counsel for the parties and perused the record with their able assistance.

7. The occurrence in this case took place on 17.09.2018 at 09:55 a.m. in the area of Tajak. During the occurrence Bibi Zainab wife of the appellant lost her life. The appellant was charge sheeted on 15.11.2018 under section 302, P.P.C. The case was posted for prosecution evidence. At trial, the prosecution produced as many as 11 witnesses.

8. The appellant was examined under section 342, Cr.P.C. He did not appear as his own witness under section 340(2), Cr.P.C. but tendered into evidence letter

No.3556 dated 12.03.2019 (Exh.DA) and medical report of District Standing Medical Board (Exh.DB) suggesting his mental illness and closed defence evidence.

9. The learned trial court held the appellant guilty, convicted and sentenced as detailed above but the impugned judgment is totally silent about the mental illness of the appellant.

10. The record divulged that on 21.12.2018, the appellant was produced before the trial court in custody. The Court observed that the appellant appeared to be abnormal. Then he was not represented by his counsel. However, the order of the learned trial Court dated 21.12.2018 can advantageously be reproduced hereunder:

> ***"From the physical appearance of the accused, apparently, he seems to be abnormal. Therefore, M.S DHQ Hospital Attock is directed to medically examine about his mental health condition through Medical Board and submit his report before this Court, on or before 07.01.2019. Superintendent, District Jail, Attock is directed to have liaison with M.S and make arrangements for production of accused before medical board."***

On 27.09.2019, report of Medical Board was submitted along with the report of psychiatrist suggesting behavioural disorder/Schizophrenia but the learned trial court concluded that the appellant was fit to stand trial and on his request, Malik Zameer Abbas, Advocate was appointed as defence counsel at state expense.

11. The record further divulged that at the time of final arguments, the mental illness was pleaded by the learned defence counsel but the impugned judgment is

totally silent about this aspect of the case. The appellant, as mentioned above, was husband of the deceased, who sustained 15 'Churri' blows at his hand as suggested by the evidence available on record. Despite the fact that the learned trial court itself referred the appellant for evaluation of his capability to stand trial but concluded that the appellant was able to defend himself. No question, whatsoever, was put by the learned trial court for its satisfaction. Within the contemplation of section 84, P.P.C., whenever the plea is raised regarding the state of mind of accused at the time of commission of offence, the onus would be on the defence to prove such a plea as contemplated in Article 121 of the Qanun-e-Shahadat, 1984.

The learned trial court failed to determine the question regarding capability of the appellant to face trial. The record revealed that on 26.11.2019, an application was also filed by the defence counsel for summoning Dr. Tameez-ud-Din as CW., turned down by the learned trial court vide order dated 28.11.2019 with the observation that Dr. Tameez-ud-Din was neither the prosecution witness nor acquainted with the material facts in issue and thus concluded that the evidence of Dr. Tameez-ud-Din was not essential.

12. A similar question came up for hearing before the apex Court in a recent judgment titled (PLD 2021 SC 488), their lordships in para No.54 at page 521 observed as under:

> ***"54. Once the Court has formed a prima facie tentative opinion that the accused may be incapable of understanding the proceedings of trial or make his/her defence, it becomes obligatory upon the Court to embark upon conducting an inquiry to decide the issue of incapacity of the accused to face trial due to mental***

illness. Medical opinion is sine qua non in such an inquiry. For this purpose, the Court must get the accused examined by a Medical Board, to be notified by the Provincial Government, consisting a qualified medical experts in the field of mental health, to examine the accused person and opine whether accused is capable or otherwise to understand the proceedings of trial and make his/her defence. The report/opinion of the Medical Board must not be a mere diagnosis of a mental illness or absence thereof. It must be a detailed and structured report with specific reference to psychopathology (if any) in the mental functions of consciousness, intellect, thinking, mood, emotions, perceptions, cognition, judgment and insight. The head of the Medical Board shall then be examined as Court witness and such examination shall be reduced in writing. Both the prosecution and defence should be given an opportunity to cross-examine him in support of their respective stance. Thereafter, if the accused wishes to adduce any evidence in support of his/her claim, then he/she should be allowed to produce such evidence, including expert opinion with the prosecution given an opportunity to cross-examine. Similarly, the prosecution may also be allowed to produce evidence which it deems relevant to this preliminary issue with opportunity given to the defence to cross-examine. It is upon the consideration of this evidence procured and

> ***adduced before the Court that a finding on this question of fact i.e. the capability of the accused to face trial within the contemplation of section 464 and 465, Cr.P.C. shall be recorded by the Court."***

13. The reports of Psychiatrist and Medical Board are available on record as Exh.DA and Exh.DB. The appellant was diagnosed as patient of behavioural disorder and Schizophrenia. The reports were neither detailed nor comprehensive. The application moved by the learned counsel for the appellant was turned down by the learned trial court and, thus, head of the Medical Board could not enter the witness dock. The learned trial court have dealt with the case contrary to law declared by the apex Court in above mentioned judgment.

14. It is inalienable right of every citizen to be treated in accordance with law as envisaged by Article 4 of the Constitution and it is the duty and obligation of the public functionaries to act in accordance with law. Right to fair trial is also guaranteed under Article 10-A of Constitution of Islamic Republic of Pakistan, 1973.

15. Islam also gives a great deal of attention to all groups within the society; each has their own rights, including individuals with a disability. In order to understand the disabilities in Islamic text, based on some examples of physical conditions, such as blindness, deafness, lameness, mental retardation and leprosy. An example of such is in the Qur'an (48,17).

> "There is not upon the blind any guilt or upon the lame any guilt or upon ill any guilt. And whoever obeys Allah and His messenger-He will admit him to gardens beneath which rivers flow: but whoever turns away-He will punish him with a painful punishments".

16. The generic term " disability" was not mentioned in the Qur'an; the term "disadvantaged people" was being used to refer to those with special needs. In fact, society's civil responsibility is illustrated in the Qur'an, which stresses that society is responsible for taking care of such individual and is responsible for improving their conditions. Disadvantaged situations (lack of some physical, economic or social characteristic) are believed to be a result of barriers produced by society.

17. To us, prophet (SAW) was the earliest initiator/ defender of disability right and 1400 years ago, way before the UN convention on the Rights of Persons with disability was enacted, he already worked hard to ensure that people with disabilities were catered for and were given their rights and privileges, including the right to a normal life just like anyone else.

18. The prophet (SAW) transformed the lives of the disabled people by teaching the society that there were no stigma or bad attitudes for those with disabilities. The Prophet reassured the disabled that their disabilities are not punishments but it is a means for their sins to be forgiven.

The Sunnah supports the notion of social responsibility towards the individuals. A few examples of this are found in the following two Hadith.

According to prophetic tradition, mentioned in Sahih Muslim, "the Similitude of believers in regard to mutual love, affection, feeling is that we are all one body; When any limb aches, the whole body aches, because of sleeplessness and fever.(32,6258). Another Hadith narration from Sunnan Al-Tirmidhi states "the person is not one of us, who is not mercifulness to our youth and respect to our elders.

19. Disadvantaged people's rights are mentioned in the text of the Qur'an on several occasions. For instance, their civil rights in terms of marriage and inheritance are clarified in the Qur'an: " And do not give the weak-minded your property, which Allah has made a means of sustenance for you, but provide for them with it and clothe them and speak to them words of appropriate kindness. (4,5):

> "And test the orphans (in their abilities) until they reach marital age. Then if you perceive them to be of sound judgment, release their property to them And do not consume it excessively and quickly (anticipating) that they will grow up. And whoever(when acting as guardian), is self sufficient should refrain (from taking a fee); and whoever is poor-let him take according to what is acceptable. And then, when you release their property to them, bring witnesses upon them. And sufficient is Allah as accountant (4.6)"

20. Another Quranic verse in the same chapter tells us " And concerning the oppressed among children and that you maintain for orphans(their right) in justice" (4,127).

21. From the sources and texts mentioned above from the Qur'an, following can be deduced:

- First, "Weak minded" is generic term that could comprise several groups, such as very young children, mentally retarded and mentally ill-individuals and so forth;
- Second, the texts lay down the idea of guardianship for disadvantaged individual such as the weak minded or orphans;
- Third, this guardianship is subject to a sense of duty, fairness and kindness.

22. Islam views disability as challenge set by Allah. The Qur'an urges people to treat people with intellectual disabilities with kindness and to protect people with disabilities.

23. It is said in the Qur'an that "whosoever does an atom's weight of good will see it, and whosoever does an atom's weight of evil will see it. (99,7-8). In-fact, several other Qur'an and Hadith narrations promises both those who are in a disadvantaged situation and those who are taking care of them, rewards, both, in this life and in the hereafter for their patience. Indeed, this promise usually motivates people to support the disadvantaged whether are strangers or close relations.

24. The inclusion is another example of Islam's concerns for those who are in a disadvantaged situation. The prophet used to visit sick, pray for them and console them instilling confidence in their souls and lifting their hearts.

25. The notion of disability and its existence in the Qur'an and Hadith has been mentioned above in which the idea of individuals being in disadvantaged situation has been clearly stated.

26. Reverting to the facts/merits of this case, it may be mentioned that every man is presumed to be sane and possessed of a sufficient decree of reasons to be responsible for his actions, until the contrary is proved. This clearly follows from Article 121 of the Qanun-i-Shahdat, 1984, which provides that burden of proving that the case of an accused person falls within an exception is on him.

27. There are 650 million individuals in the world, who are disabled as a result of mental, physical and sensory impairments. The medical and the legal standards of sanity are also not identical. Chapter XXXIV of the Criminal Procedure Code, 1898 provides mechanism for the trial and other related matters of the person, appear to

the Court of unsound mind. The person of unsound is a person who from infirmity of mind is incapable of managing himself or his affairs. Dealing with a similar question in case titled Fauqual Bashar versus The State (1997 SCMR 239), the relevant observations of their lordships appearing in para-5 of the judgment read as under:

"5. In context of insanity, the state of mind of an accused person, firstly, at the time of occurrence and, secondly, at the time of inquiry of trial is a question of fact. When a Court is confronted with the question during an inquiry or trial, whether or not an accused is of unsound mind and incapable of understanding the proceedings against him, it has to take action under sections 464 and 465, Cr.P.C. according as one of other is attracted to the case.

. . . .

In Ata Muhammad's case supra, a fine comparison of the two provisions was drawn by this Court in paragraph 12 of the report which is as under:-

> ***"In cases of trials before the Court of Session or a High Court, if it appears to the Court at the trial that an accused person is of unsound mind and consequently incapable of making his defence, the Court, in the first instance has to try the fact of such unsoundness and incapacity and the trial of this question shall be deemed to be a part of the trial under subsection (2) of section 465 of the Criminal Procedure Code. The legal position which emerges from the two sections is that under section 464 the Magistrate must have reason to believe that the accused person before him is of unsound***

> ***mind and incapable of understanding the proceedings, and under section 465 it should appear to the Court at the trial that the accused person suffers from unsoundness of mind and thus is incapable of making his defence. In either case the action is to follow the subjective reaction of the Magistrate or the Court to the situation that arises before him. If, during the inquiry, nothing comes to the notice of a Magistrate to induce a belief in him that an accused person is of unsound mind and if at the trial before the Sessions Court it does not appear to the latter that the accused is of unsound mind and consequently incapable of making his defence, there is nothing for them to do except to proceed with the inquiry or the trial in the normal manner. The words appear to the Court are used in section 465 while the words has reason to believe are used in section 464, but it is clear that in practical effect they mean almost the same thing. The phrase to appear in my judgment used in the context of section 465 in the meaning is nearest to the phrase to be in one's opinion as given in the Shorter Oxford Dictionary"..***

28. The above mentioned formality/requirement of the law, in particular, in the instant case, are the reports of psychiatrist as well as the said medical board constituted for this purpose, have established that the appellant was suffering from behavioral disorder and schizophrenia. More so when the manner of committing the offence by the person of unsound mind is also falling squarely within the four corners of criminal responsibility, which include:

i. The personal history of the accused, who may be eccentric, melancholic, degenerate or neuroasthenic;
ii. Absence of motive, not only does a mentally ill person commit without any motive but also often kills his nearest and dearest relations;
iii. Absence of secrecy, because if the accused happens to be mentally ill does not try to conceal body of victim, nor does he attempt to evade law by destroying the evidence of his crime;
iv. The manner of committing occurrence;
v. Want of preparation or pre-arrangement, a mentally ill person does not make any prearranged plan to kill any body, but a sane person, in routine, makes all the necessary preparation prior to committing of crime; and
vi. A mentally ill person has no accomplice in the criminal act.

29. Now, it is to be seen whether there was any such material to call for enquiry in terms of section 465 Cr.P.C. The record reveals that his abnormality was observed by the Court itself and at some stage, an application was moved by the learned defence counsel for summoning Dr. Tameez Ud Din head of the special medical board as a witness, who opined that the appellant was suffering from schizophrenia. But strange is the fact that this application was rejected by the learned trial Court without application of mind. I am unable to understand what was the haste on the part of the learned trial Court to deal with this aspect of the case in such a summary and slipshod manner notwithstanding the fact that this is a mandate of the statute itself. The learned trial Court did not realize altogether that if such plea or enquiry envisaged by the above mentioned provision is found false, it at its worst, would prolong trial for a month or so but if found true, it at its best, would save a person from verdict of guilt. When stakes in the latter case as compared to the former are far greater and far more damaging such enquiry should not be dispensed with so casually.

The learned trial Court failed to determine the issue of mental illness and proceeded with undue haste and decided the case contrary to the law/observations of their lordships, thus, judgment of conviction cannot be sustained.

30. For the foregoing reasons, this appeal is allowed . The impugned judgment 15.2.2021 is set aside and the case is remanded to the learned trial Court with the direction to obtain fresh, complete/comprehensive reports in view of observations of the apex Court referred to in para-10 of this judgment and then to determine the capability of the appellant to face trial within parameters of section 464 and 465 Cr.P.C. The appellant shall be kept as under trial prisoner till the conclusion of trial. The learned trial Court shall, thereafter proceed further and conclude the trial in the light of the above mentioned law declared by the apex Court.

(Sardar Ahmed Naeem)

Judge

Irfan

APPROVED FOR REPORTING

JUDGE