Foreword

I have always found his lordship Mr. Justice Muhammad Tariq Abbasi, a delightful person to meet with and a pleasant personality to interact with. His company, as a fellow brother Judge, was always a moment to rejoice and cherish; and his contributions as a Judge of this Court was astounding and spectacular as he made his mark for expeditious disposal of around forty thousand cases while his lordship graced the Benches of this prestigious Court.

Retirement for his Lordship must certainly be a moment of accomplishment, gratification and contentment for the longstanding journey he tread upon in the corridors of law and justice, firstly being a lawyer, then being a judge of District Judiciary, and ultimately as Judge of Lahore High Court. His experience was multidimensional and so are his accomplishments. Although, on the eve of his well-deserved and well-earned retirement farewell, I am saddened, yet I am equally excited for him on his high water mark of achievements during his judicial career as well.

The judicial pronouncements of Justice Muhammad Tariq Abbasi are remarkable for their clarity, lucidity and exposition of the law. The degree of precision and meticulousness in resolving multifaceted and complex legal and factual controversies have been exceptionally outstanding. Moreover his faithfulness to constitutionalism and rule of law has been a hallmark of his decisions. In fact, he has been a judge of profound judicial insight and always turned out to be a true asset of the judiciary.

His Lordship was not just a distinguished member of the Bench but a very valuable asset of this Institution. Under his leadership and guidance, many young minds have bloomed and he has shown them the way to success. Goals and tasks have been simpler for him to take the enthusiastic lead. Very rarely do we get to see a person like his lordship with a unique combination of vision, comprehension and fairness. He has made a mark with hard work and passion, in this Court, which will always be remembered with pride.

Mr. Justice Muhammad Tariq Abbasi,

On behalf of all brother and sister Judges of this Court, I want to congratulate you on the next milestone in your remarkable life, after retirement. You are an inspiration for all of us with your unflagging optimism and team spirit as Judge of Lahore High Court and we appreciate the way you enlightened the lawyers, your fellow Judges as well as Judges of District Judiciary through your landmark judgments and marvelous display of professional conduct. You have earned the undying love and respect of both Bar and the Bench alike. I also want to let you know how much we have loved working alongside you throughout the years.

On the occasion of your retirement, we all take the honor of thanking you for your peerless performance during these past seven years in High Court. You have always been a very dedicated and diligent member of our Bench, whose efficiency is unsurpassed. I know retirement is not going to slow you down, so I would not tell you to relax, and I wish you all the best in your new endeavors.

We all offer you heart-felt best wishes for a happy retirement. You will be dearly missed. We wish you a healthy and prosperous future life.

MUHAMMAD QASIM KHAN
CHIEF JUSTICE

HON'BLE MR. JUSTICE MUHAMMAD TARIQ ABBASI

JUDGE LAHORE HIGH COURT, LAHORE

(OCT. 29, 2013 TO MAR. 30, 2021)

Hon'ble Mr. Justice Muhammad Tariq Abbasi, was born on 31.3.1959. He received his Elementary Education at his native village Malkot, whereas Secondary Education from Government High School, Khanaspur, Ayubia. His lordship passed F.Sc examination from Government Degree College Satellite Town, Rawalpindi; obtained degree of Graduation from the Punjab University, Lahore and the degree of LLB (Shariah and Law) from the International Islamic University, Islamabad.

His lordship was enrolled as an Advocate of the District Courts and High Court, in the years 1986 and 1988 respectively, and his journey, as a dedicated practicing lawyer thereafter continued till 1998, when he was appointed as an Additional District & Sessions Judge, through a competitive examination. After appointment as Additional District & Sessions Judge, His lordship remained posted at various stations including Vehari, Gujranwala and Islamabad. After promotion as District & Sessions Judge in the year 2006, His lordship was posted as Judge Anti-Terrorism Court, Rawalpindi Division, Rawalpindi/Islamabad Capital Territory and thereafter as District & Sessions Judge Attock, Special Judge (Central), Rawalpindi/Islamabad, Administrative Judge, Accountability Courts, Rawalpindi/Islamabad, and District & Sessions Judge, Gujrat. His lordship has also been looking after affairs of Banking Court, CNS Court, Drug Court and Custom Court, Rawalpindi. His outstanding legal acumen, exceptional abilities for comprehending the intricacies of law, thorough professionalism and unparalleled administrative skills stood him in good stead to ensure his elevation as a Judge of Lahore High Court Lahore on 28.10.2013. His lordship has developed jurisprudence on different areas of law, decided a record number of 40 thousand cases as a Judge of Lahore High Court; and thus significantly contributed to expeditious disposal of cases which is no mean feat.

His lordship has made his marks, in various administrative assignments of Lahore High Court, Lahore, being Chairman of Punjab Subordinate Judiciary Service Tribunal as well as Administrative Judge of Punjab Revenue Appellate Tribunal. His lordship remained Inspection Judge for the District Courts of Attock, Chakwal, Pakpattan Sharif, M.B.Din, Toba Tek Singh. Muzaffargarh and Vehari. His lordship acted as Member of Syndicate of Muhammad Nawaz Sharif University of Agriculture, Multan. Besides this, His lordship also remained member of various committees of Lahore High Court, Lahore i.e.,

- Member of Expunction of Adverse Remarks Committee.
- Member Perks & Privileges/Pension Committee (For Permanent/Confirmed Judges).
- Member Rules Committee (CPC).
- Member IT Committee (DJ).
- Member Building & Maintenance Committee-II (District Judiciary).

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MUHAMMAD QASIM KHAN
CHIEF JUSTICE

CONTENTS

2014 C L C 1038

[Lahore]

Before Muhammad Tariq Abbasi, J

Syed NADEEM ABBAS----Petitioner

Versus

Mst. SADIA FIDA KHAN and others----Respondents

Writ Petition No.9982 of 2009, heard on 4th December, 2013.

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

----S. 5, Sched & S.17---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for dissolution of marriage, recovery of maintenance allowance, dowry articles and dower---Trial Court decreed the suit which was upheld by the Appellate Court with certain modifications---Validity---Wife in order to substantiate her claim with regard to dowry articles not only appeared herself but also produced her witnesses and also brought on record the proof regarding purchase of such articles---List of dowry articles was tendered in evidence and during said evidence plaintiff-wife reiterated her contention raised and grounds taken in the plaint---Trial Court had rightly concluded that wife was entitled to receive a sum of Rs. 6 lac as price of dowry articles and rest of her claim was turned down---Wife instead of filing appeal erroneously filed cross-objection/counter-claim which had not only been entertained by the Appellate Court but had also been accepted by the said Court---Proceedings of Appellate Court with regard to cross-objection/counter-claim, findings on the same and judgment and decree passed by the said court could not be sustained, however its finding passed on the appeal of husband were reasonable and the result of correct appreciation of evidence and material available on record---Impugned judgment and decree passed by the Appellate Court with regard to cross-objection/counter-claim was set aside and rest of its findings were maintained and those of Trial Court were restored---Constitutional petition was disposed of accordingly.

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

----S. 14---Appeal---Scope---Decree passed by the Family Court (dower or dowry) exceeding Rs. 30,000/- , maintenance allowance exceeding Rs.1000/- could only be challenged by filing an appeal.

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

----S. 17---Appeal---Filing of cross-objection/counter-claim against the decree passed by the Family Court---Scope---Decree passed by the Family Court could only be challenged by filing appeal and in family matters/suits Qanun-e-Shahadat, 1984 and Civil Procedure Code, 1908 (except sections 10 & 11) were not applicable---Cross-objection/ counter-claim could not be filed in family matters which was the subject of Civil Procedure Code, 1908.

Ch. Abdul Ghani for Petitioners.
Mehar Haq Nawaz Humayun for Respondents.
Date of hearing: 4th December, 2013.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--- Through the instant writ petition, the judgments and decrees dated 31-3-2009 and 6-11-2009, respectively passed by the learned Judge Family Court and learned Additional District Judge, Burewala have been called in question.

2. The facts are that the respondent No.1 filed a suit against the petitioner, through which she had claimed dissolution of marriage, recovery of dowry amounting to Rs.13,81,150/-, dower valuing Rs.1,00,000/- and past eight months maintenance allowance @ Rs.10,000/- per month total Rs.80,000/-. The said suit was contested through written statement, whereby the contentions raised in the plaint were vehemently denied.

3. During the pre-trial, reconciliation proceedings dated 6-12-2008 the marriage was dissolved on the basis of Khula, subject to the payment of dower amounting to Rs.one lac to the petitioner. To resolve the remaining controversy between the parties, issues were framed, the evidence of the parties was recorded and finally the impugned judgment and decree dated 31-3-2009 was passed, whereby the respondent No.1 was held entitled to receive Rs.6 lac as price of the dowry articles and rest of her claims were dismissed.

4. The petitioner assailed the above said judgment and decree of the learned trial Court, before the learned Additional District Judge, Burewala through an appeal. The respondent No.1 also preferred cross-objections/counter-claim in the appeal filed by the petitioner. The learned Appellate

Court through the consolidated judgment and decree dated 6-11-2009, dismissed the appeal filed by the petitioner, whereas while accepting cross-objections/counter-claim, preferred by respondent No.1, enhanced the amount of dowry to Rs.8,61,350/- and also held her entitled to recover maintenance allowance @ Rs.10,000/- per month from 15-4-2008, till expiry of the "Iddat" period.

5. Feeling aggrieved, the instant writ petition has been preferred, with the contentions and the grounds that nothing in support of the claims made in the plaint was brought or available on the record but erroneously, the learned trial Court had decreed the suit in the terms mentioned above; that when the matter went in appeal, the learned Appellate Court had falsely dismissed the appeal and accepted the cross-objections/counter-claims filed by the respondent No.1. It has been requested that by setting aside both the decrees of the above-said learned courts, the suit may be dismissed.

6. Arguments pro and contra have been heard and record perused.

7. It has been observed that before the learned Trial Court to substantiate the claim of the dowry, not only the respondent No.1 herself had appeared and got recorded her statement as P.W.1, but also produced a witness namely Haroon Fida Khan as P.W.2 and also brought on the record proof regarding purchase of the dowry. The list of the claimed dowry was also tendered in evidence as Exh.P-1. During the said evidence, the contention raised and grounds taken in the plaint were reiterated. On the other hand, the petitioner himself appeared in the witness-box as D.W.1, whereby he denied the claims and contentions of the respondent No.1.

8. The learned trial Court, while minutely examining the material available before it and evaluating the stance of both the parties had rightly come to the conclusion that respondent No.1 was entitled to receive a sum of Rs.6 lac as price of the dowry, whereas rest of her claim was turned down. In family matters section 14 of the West Pakistan Family Courts Act, 1964 (hereinafter will be read as Act) prescribes a procedure of filing appeal, against decree passed by a Family Court. For sake of reference, the said provision is reproduced hereinbelow:---

Appeal.--- [(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable--

(a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge, or a person notified by Government to be of the rank and status of a District Judge or a Additional District Judge, and

(b) to the District Court, in any other case.]

(2) No appeal shall lie from a decree passed by a Family Court---

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of section (2) of the Dissolution of Muslim Marriages Act, 1939.

(b) for dower (or dowry) not exceeding rupees [thirty thousand);

(c) for maintenance of, rupees [one thousand) or less per month.

(3) No appeal or revision shall against an interim order passed by a Family Court.

(4) The appellate Court referred to in subsection (1) shall dispose of the appeal within a period of four months.]

9. The above mentioned provision, clearly describes that a decree passed by a Family Court (dower or dowry exceeding Rs.30,000/--, maintenance allowance exceeding Rs.1000), can only be challenged by filing an appeal and nothing else. It was the right of the petitioner to object the decree dated. 31-3-2009, passed by the learned Family Court through appeal, hence he had rightly exercised his said right.

10. Section 17 of the Act, prohibits applicability of the provisions of Qanun-e-Shahadat Order, 1984, and the Civil Procedure Code 1908, (except sections 10 and 11), in family cases. For guidance, the said section is highlighted hereunder:---

"17. Provisions of Evidence Act and Code of Civil Procedure not to apply.--- (1) Save as otherwise expressly provided by or under this Act, the provisions of the (Qanun-e-Shahadat, 1984 (P.O. No.10 of 1984), and the Code of Civil Procedure, 1908 (except sections 10 and 11) shall not apply to proceedings before any Family Court (in respect of Part I of Schedule).
(2) .."

11. The above mentioned provisions have confirmed that a decree passed by a Family Court (Dower or dowry exceeding Rs.30,000/- and maintenance allowance exceeding Rs.1.000/- per month) can only be objected by filing an appeal and that in family matters/suits, the Qanun-e-Shahadat Order, 1984 and Code of Civil Procedure 1908 (Except sections 10 and 11) are not applicable. Meaning thereby that a decree passed by a family court, by no imagination, can be challenged by way of filing cross objections/counter-claim, as it is the subject of Civil Procedure Code, 1908.

12. It is an established principle of law that when law provides a thing to be done in a particular manner then it must be done in the said manner or should not be done. In the situation in hand, despite the above mentioned settled provisions, the respondent No.1 instead of filing an appeal, erroneously has filed cross-objections/counter-claim, in the appeal preferred by the present petitioner and astonishingly the learned Additional District Judge has not only entertained the said objections/ claim, but by accepting the same has enhanced the price of dowry from Rs.6,00,000/- to Rs.8,61,350/- and also granted interim maintenance allowance @ Rs.10,000/- per month, in favour of the respondent No.l.

13 Consequently, the proceedings of the learned Additional District Judge, Burewala towards entertainment of the cross-objections/counter-claim filed by the respondent No.1, the findings regarding the said objections/claim and the judgment and decree dated 6-11-2009, whereby the said objections/counterclaim have been accepted could not be permitted under the law.

14. The other findings of the learned. Appellate Court, whereby the appeal filed by respondent No.1 has been dismissed have also been perused. The said findings being quite reasonable and result of correct appreciation of the

evidence and material available on the record are not open to any exception, hence warrant no interference.

15. Resultantly, this writ petition is partially accepted. The impugned judgment and decree dated 6-11-2009 passed by the learned Additional District Judge, Burewala whereby, cross-objections counter-claim, filed by respondent No.1 have been accepted, is set aside being not acceptable under the law. Rest of the, findings as well as the judgment and decree impugned are maintained. The result is that the judgment and decree dated 31-3-2009 passed by the learned trial Court shall hold the field.

AG/N-9/L Order accordingly.

K.L.R. 2014 Civil Cases 60

[Multan]

Present: **MUHAMMAD TARIQ ABBASI, J.**

Muhammad Aslam

Versus

S.H.O., etc.

Writ Petition No. 538 of 2014, decided on 15th January, 2014.

ILLEGAL DISPOSSESSION COMPLAINT --- (Qabza group)

Constitution of Pakistan (1973)---

---Art. 199---Illegal Dispossession Act, 2005, Ss. 3/4---Complaint regarding illegal dispossession---Qabza Group---Maintainability criteria---Trial Court dismissed complaint---Impugned order---Validity---In instant case, neither any previous history or record of respondents was with petitioner nor brought on record on basis of which they could be termed as Qabza Group or Land Mafia---Neither in complaint nor statements, any detail had been given on basis of which respondents had been alleged to be of said Group---Mere mentioning of two words that respondents belonged to Qabza Group was not sufficient to hold them so and as such complaints were not maintainable---No illegality, infirmity or any other defect in impugned order could be found---Writ petition dismissed. (Paras 9,10,11,13,14,15) Ref. 2012 SCMR 1533.

[Nothing was brought on record that respondents belonged to Qabza Group. Complaint filed under Illegal Dispossession Act was rightly dismissed and High Court dismissed writ petition].

For the Petitioners: Khawaja Qaisar Butt, Advocate.

For the Respondents: Khawar Siddique Sahi, Advocate and Hassan Mehmood Khan, Tareen, D.P.G.

Date of hearing: 15th January, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This single judgment is intended to decide the Writ Petitions No. 538/2014 and 539/2014 as common questions of law and facts are involved in both the above-said petitions.

2. Through the above-mentioned writ petitions, the orders dated 8.5.2012 passed by the learned Additional Sessions Judge, Chichawatni, District Sahiwal have been called in question, whereby the complaints, filed by Muhammad Aslam and Muhammad Akram, petitioners in the above titled writ petitions (hereinafter will be referred as the petitioners) under Section 3/4 of the Illegal Dispossession Act, 2005 have been dismissed.

3. Initially the above-mentioned orders were impugned through Criminal Revisions, but as in the matters, writ petitions were competent, hence the Revision Petitions were converted in the writ petitions, in hand.

4. The facts are that the petitioners, filed two private complaints, against the respondents No. 2 to 5 (hereinafter will be referred as the respondents), with the contention that through mutation No. 1182, dated 8.2.2011, they became owner of Square No. 42, Kila No. 17, falling in Khata No. 21, Khatooni No. 94, in Mauza Chichawatni, District Sahiwal; that the respondents who belonged to Qabza Group, on 8.4.2011, while armed with fire-arms had forcibly taken possession of the above-mentioned property of the petitioners; that when the petitioners alongwith Rasheed Ahmad and Haji Taj Muhammad went to the respondents, they extended threats of dire consequences by saying that the petitioners will be killed and the possession will not be restored to them and that the petitioners through applications also approached the concerned SHO, but no action. Hence it was requested that the respondents may be summoned, proceeded accordingly and not only punished, but possession of the property in question may also be restored in favour of the petitioners.

5. The learned Additional Sessions Judge, before whom the above-mentioned complaints were filed, carried on the due proceedings, during which recorded cursory evidence of the petitioners and the witnesses produced by them and also obtained the reports from the Police and finally passed the impugned orders, whereby the complaints were dismissed.

6. Feeling aggrieved, the instant writ petitions have been preferred with the contention and the grounds that sufficient oral as well as documentary proof in support of the facts and circumstances narrated in the complaints were brought before the learned Additional Sessions Judge, but erroneously not considered and the impugned orders, which being purely illegal, are not sustainable.

7. The learned counsel for the petitioners has advanced his arguments, in the above-mentioned lines and the grounds. Whereas the learned counsel appearing on behalf of the respondents has opposed the writ petitions by holding the impugned orders to be quite justified and demand of the situation.

8. Arguments of both the sides have been heard and the record has been perused.

9. The record shows that in the complaints, on two occasions, it was mentioned only that the respondents were belonging to Qabza Group. In the cursory statement, again the petitioners and their witnesses had only alleged

the respondents to be from Qabza Group. Neither in the complaint nor the statements, any detail had been given on the basis of which the respondents had been alleged to be of the above-said group.

10. Mere mentioning of above-mentioned two words that the respondents belonged to Qabza Group was not sufficient to hold them so and as such the complaints under the Illegal Dispossession Act, 2005 were not competent and proceedable. In this regard the august Supreme Court of Pakistan has given an exhaustive judgment reported as *'Habib Ullah and others v. Abdul Manan and others'* (2012 SCMR 1533), whereby criteria for filing the complaints under the Illegal Dispossession Act, 2005 have been settled and that mere mentioning that the respondents belong to Qabza Group or Qabza Mafia is not sufficient to file the above-said complaint as the above- mentioned Act is applicable only to those accused persons who have credentials or antecedents of Qabza Group and remained involved in illegal activities and belonged to a gang of land grabbers or land mafia. For guidance, the relevant portion of the above-said judgment is reproduced herein below:---

"Complainant while appearing as PW-1 has not stated a single word that the appellants belong to a Qabza Group and were involved in such activities. So it is the complainant side who has failed to establish that the appellants belong to Qabza Group or they were land grabbers. The complainant side has not produced any evidence oral or documentary to establish that the appellants had the credentials or antecedents of being property grabbers. So, it was a dispute between two individuals over immovable property and as per allegation the appellants have taken illegal possession of the property, being rightful owners, from the tenant who has taken the property on rent and committed the default in payment of rent and electricity bills inasmuch as the appellants do not belong to a class of property grabbers or Qabza Group and no case was made out under Section 3 of Illegal Dispossession Act. Reference is made to the judgment of a Full Bench of the Lahore High Court in Zahoor Ahmad and others v. The State and others (PLD 2007 Lahore 231) wherein it has been held that the Illegal Dispossession Act, 2005 was restricted in its scope and applicability only to those cases whereas dispossession from immovable property has allegedly come about through the hands of a class or group of persons who could qualify as property grabbers/Qabza Group/land mafia and the said Act was being invoked and utilized by the aggrieved persons against those who have credentials or antecedents being members of the Qabza Group or land mafia. It was further held that the Illegal Dispossession Act, 2005 has been found to be completely nugatory to its

contents as well as objectives. The aforesaid view was upheld by this Court in the case of 'Mobashir Ahmad v. The State' (PLD 2010 SC 665). In view of the case-law referred above, it is established that the said law is applicable only to those accused persons who have the credentials or antecedents of Qabza Group and are involved in illegal activities and belong to the gang of land grabbers or land mafia. In the case in hand it has been found that by us that there is no evidence oral or documentary to establish that the appellants belong to the Qabza Group or land grabbers. Even otherwise no such allegation has been made against the appellants in the complaint filed by the respondent Abdul Manan or in the FIR for the same incident lodged on the next day, or by the PWs in their depositions made by them before the learned Trial Court. Even PW-1 Azhar Hussain, IO during the cross-examination has admitted that he had never heard about the appellants involvement in such like activities or their belonging to the group of land grabbers or Qabza Group rather the complainant is involved in such like cases."

11. In the case in hand, admittedly, neither any previous history or record, of the respondents, is with the petitioners nor brought on the record, on the basis of which they can be termed as Qabza Group or Land Mafia. Whereas as stated above, a complaint, under Illegal Dispossession Act, 2005, is only competent against person(s) belonging to the above-mentioned class.

12. Furthermore, it has been observed that the above-mentioned mutations, through which the petitioners had claimed ownership of the land in question, had been cancelled by the competent forum.

13. It has also been found that a civil suit filed by the petitioners against Muhammad Riaz (respondent No. 3) and the Province of Punjab, is also *sub-judice* in the Court of learned Civil Judge at Sahiwal, whereby the petitioners have claimed themselves to be in possession of the property in question and that the respondents may be restrained from interfering into the said possession. The said suit is nothing but a contradictory stance, as in the above-mentioned complaints, the petitioners have claimed that they have been dispossessed by the respondents, but the suit, they have sought protection from their dispossession and interference into their possession.

14. For what has been discussed above, as no illegality, infirmity or any other defect, in the impugned orders could be found, hence the same do not warrant any interference in writ jurisdiction.

15. Resultantly, both the writ petitions in hand, being devoid of any merit and force are dismissed.

Petition dismissed.

K.L.R. 2014 Criminal Cases 141
[Multan]
Present: **MUHAMMAD TARIQ ABBASI, J.**
Bashir-ud-Din
Versus
The State

Criminal Misc. No. 43-B of 2014, decided on 28th January, 2014.

BAIL --- (Nikahnama)

Criminal Procedure Code (V of 1898)---
---S. 497(2)---Pakistan Penal Code, 1860, Ss. 365-B/376---Commission of rape after abduction---Bail concession---Nikahnama---Free-will marriage---Held: An un-explained delay of abut 40 days in registration of F.I.R. had been found---Alleged abductee was medically examined after 10 days and during said examination, no swabs were secured for any examination---Alleged abductee had confirmed her marriage with petitioner through marriage registration certificate, complaint filed by her against her father and others, Court statement---Case called for further inquiry---Bail after arrest granted.
(Paras 5, 6, 7, 8)
نکاح نامہ/بجرم زنا میں ضمانت عطا ہوئی۔
[Nikahnama/Bail was allowed in offence of zina].
For the Petitioner: Prince Rehan Iftikhar Sheikh, Advocate.
For the State: Hassan Mehmood Khan Tareen, DPG with Ghulam Rasool, ASI.
For the Complainant: Muhammad Aslam Khan Langah, Advocate.
Date of hearing: 28th January, 2014.

ORDER
ARSHAD MAHMOOD TABASSUM, J. --- The petitioner seeks post arrest bail in case F.I.R. No. 216/2013, dated 2.8.2013 registered under Sections 365-B/376, PPC at Police Station, Kameer, District Sahiwal.

2. The precise allegations against the petitioner as per F.I.R. are that he alongwith his co-accused had abducted Noor Sain daughter of the complainant and had been committing rape with her and ultimately she fled away and reached at the house on 22.7.2013.

3. The learned counsel for the petitioner has argued that the petitioner is innocent and has falsely been roped in the case with *mala fides*; that in fact the above-mentioned lady being *sui-juris*, according to her own volition had contracted marriage with the petitioner and the same fact had been confirmed in different proceedings, initiated on the applications/complaints filed by the lady; that the case against the petitioner is of further inquiry; that the petitioner has been sent to the judicial lock-up, he is no more required for any further investigation and he does not have any previous criminal history.

4. The learned DPG assisted by learned counsel for the complainant has vehemently opposed the petition.

5. As per FIR, the above-named girl, who was abducted on 22.6.2013 had returned home on 22.7.2013, but the F.I.R. was got lodged on 2.8.2013. In this way, an un-explained delay of about 40 days in registration of the F.I.R. has been found. As per record, although the girl was available on 22.7.2013, but she was medically examined after 10 days and during the said examination, no swab was secured for any examination.

6. As per prosecution story, the girl came to the complainant on 22.7.2013, but in a suit for restitution of conjugal rights filed by the petitioner, her attendance, before the Court on 23.7.2013 has been marked. Copies of Nikahnama between the petitioner and the above-named girl dated 25.6.2013, the marriage, registration certificate, the complaint filed by the girl against her father and others, her statement before the Court and other documents are available on the record, whereby she has confirmed her marriage with petitioner.

7. All the above-mentioned facts and circumstances to my mind, have made the case against the petitioner as of further inquiry.

8. For what has been discussed above, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to his furnishing bail bond.? in the sum of Rs. 1,00,000/- (Rupees one lac only) with one surety in the like amount to the satisfaction of learned Trial Court.

Bail after arrest granted.

2014 LAW NOTES 964

[Rawalpindi]

Present: MUHAMMAD TARIQ ABBASI, J.

Fauji Foundation

Versus

Habib Bank Ltd., etc.

Civil Revision No. 803 of 2011, decided on 12th June, 2014.

CONCLUSION

(1) Law always favours decision on merits and condemns the technicalities.

(a) Technicalities---

---Law always favours decision on merits and condemns the technicalities.

(Para 10)

Ref. 2012 CLC 1503, 2002 CLD 345, 2009 YLR 2475, 2009 SCMR 574.

(b) Civil Procedure Code (V of 1908)---

---S. 115---Suit for recovery of money---Issues---Right to cross-examine PWs---An application for adjournment was made on ground of ailment of respective counsel---Despite said fact, Trial Court had preferred to close right of cross-examination---Technicalities---Impugned order was set aside.

(Para 9) CLOSURE OF RIGHT TO PRODUCE DOCUMENTARY EVIDENCE --- (Sufficient/good cause)

(c) Civil Procedure Code (V of 1908)---

---S. 115---Suit for recovery of money---Issues---Oral evidence was recorded and for documentary evidence, opportunities were granted but petitioner had failed to produce same---Right of petitioner to produce documentary evidence was closed---Impugned order---Good and justified cause---Miscarriage of justice---Documents intended to be tendered were the cheques which were part of record of a criminal case---To got copies of said cheques, petitioner had already filed application---Held: There was good and justified cause, for not producing documentary evidence with petitioner---It seemed that Trial Court was in hurry to disposal of suit, hence failed to give an opportunity to petitioner for said evidence---Impugned order was set aside---It was directed that one opportunity to petitioner to lead documentary evidence be granted---Civil revision petition allowed. (Paras 8, 11)

(d) Civil Procedure Code (V of 1908)---

---S. 115---Exercise of revisional jurisdiction of High Court---Scope---High Court under revisional jurisdiction is fully competent to examine record of any subordinate Court and if any jurisdictional error, towards passing of any order is found, then to cure it. (Para 8) Ref. 2012 MLD 1062, 2012 CLC 271.

دستاویزی شہادت متنازعہ چیک ہائے پر مشتمل تھی جو فوجداری مقدمہ میں فائل پر تھےجن کی نقول کیلئے باقاعدہ درخواست دی گئی لیکن دعویٰ بمراد دلا پانے میں ٹرائل کورٹ نے غلط طور پر سائلان کا دستاویزی شہادت پیش کرنے کا حق قلمزن کیا۔ ہائی کورٹ میں نگرانی درخواست منظور ہوئی۔

[Documentary evidence consisting of disputed cheques was the subject-matter of criminal case copies whereof were already applied for. Trial Court had incorrectly closed right of petitioner to produce documentary evidence. High Court allowed revision petition].

For the Petitioner: Muhammad Azam Chattha, Advocate.

For the Respondent No. 1: Mian Abdul Rauf, Advocate.

For the Respondent No. 2: Malik Muhammad Iqbal, Advocate.

Date of hearing: 12th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- Through this revision petition, the order dated 5.9.2011, passed by the learned Civil Judge, Rawalpindi has been called in question, whereby the right of the petitioner to lead documentary evidence has been closed.

2. The facts in short are that the petitioner filed a suit for recovery Rs. 76,69,666.90, against the respondents, wherein the written statements were filed, the issues were framed, the oral evidence of the petitioner was recorded and for documentary evidence, opportunities were granted, but the petitioner had failed to lead the said evidence, hence through the impugned order, right of the produce such evidence was closed.

3. The learned counsel for the petitioner has argued that towards documentary evidence, the cheques which were part of the file of a criminal case, pending in the Court of learned Special Judge, Central, Rawalpindi, were to be tendered and that to get copies of the said cheques, application was accordingly filed and that for delivery of the copies, the date was given as 7.9.2011, but the Iearned Civil Judge had failed to give two days' time to the petitioner for producing the cheques in documentary evidence and had knocked out the petitioner from his valuable rights, hence the impugned order is not sustainable under the law.

4. The learned counsel for respondent No. 2 has not seriously objected the revision petition, whereas the learned counsel appearing on behalf of respondent No. 1 has stated that a serious high-handedness and miscarriage of justice has also been done by the learned Trial Court with the respondent No. 1, through order dated 28.7.2011, whereby his right to cross-examine the PW-1 and PW-2 has been closed and that under the revisional jurisdiction, the above-said order dated 28.7.2011 may also be cured.

5. Arguments of all the sides have been heard and record has been perused.

6. As per record, the petitioner in his above-mentioned suit had oral evidence and when the date for the documentary evidence of the petitioner was fixed as 5.9.2011, his right was closed, with the observations that despite final opportunity, he had failed to produce documentary evidence.

7. The record shows that the documents intended to be tendered cheques, which were part of the record of a criminal case, pending in the Court of learned Special Judge Central, Rawalpindi. To get copies of the cheques, the petitioner had moved an application on 27.8.2011 and for supply of the copies, the date was given as 7.9.2011. When the above-mentioned good and justified cause, for not producing the documentary evidence was with the petitioner and before the learned Trial Court, then two days wait should have been made, but it seems that the learned Trial Court was in a hurry to dispose of the suit, hence failed to give an opportunity to the petitioner for the above-mentioned evidence. Hence the impugned order dated 5.9.2011 could not be termed to be justified.

8. Under Section 115 of C.P.C., this Court under revisional jurisdiction is fully competent to examine record of any subordinate Court and if any jurisdictional error, towards passing of any order is found, then to cure it. Reliance in this regard may be placed upon the judgments reported as *Allah Ditta v. Lahore Development Authority and 5 others* (2012 CLC 271) and *Malik Bahadur Sher Khan v. Haji Shah Alam Khan and others* (2012 MLD 1062).

9. It has been observed that the PW-1 and PW-2 were examine and when for their cross-examination, on behalf of respondent No. 1, the date was fixed as 28.7.2011, an application for adjournment was made, with the contention that the learned counsel for respondent No. 1 due to backache was unable to attend the Court, but despite the said fact, the learned Trial Court had preferred to close the right of the respondent No. 1 to cross-examine the above-said witnesses. In this way, again a try to knock out the respondent No. 1 purely on technical ground had been made by the learned Trial Court, which was not mandate of the law and procedure.

10. Law always favours decision on merits and condemns the technicalities. Reliance in this respect is placed upon *Haji Lal Shah v. Mst. Nooran through LRs and others* (2012 CLC 1503), *Muhammad Nazir v. Haji Zaka Ullah Khan* (2002 CLD 345), *Hafiz Muhammad Saeed and 3 others v. Government of the Punjab, Home Department through Secretary, Lahore and 2 others* (2009 YLR 2475) and *Kathiawar Cooperative Housing Society Ltd., Macca Masjid Trust and others*" (2009 SCMR 574). But in the situation in hand, as stated above, the learned Trial Court was bent upon to dispose of the suit purely on technical grounds, which could not be appreciated.

11. Resultantly, by accepting the instant revision petition, not only the order dated 5.9.2011 of the learned Trial Court, which has been impugned in the instant petition, is set aside, but also the above-mentioned other order dated 28.7.2011, whereby the right of cross-examination of the respondent No. 1 has been closed, is also set aside. Consequently, it is directed that one opportunity to the petitioner to lead the documentary evidence as well as the respondent No. 1 to cross-examine the PW-1 and PW-2 be granted for a date to be fixed by the learned Trial Court. If on the fixed date, the petitioner fails to perform his above-mentioned job, then no further opportunity shall be granted and in the said eventuality, the instant revision petition will be deemed to have been dismissed. If the respondent No. 1 fails to cross-examine the PWs-1 & 2 on the fixed date, then the above-mentioned concession granted in his favour shall be considered to have been withdrawn.

Civil revision petition allowed.

2014 LAW NOTES 1004
[Multan]
Present: MUHAMMAD TARIQ ABBASI, J.
Muhammad Nasir
Versus
Addl. Sessions Judge, etc.

Criminal Revision No. 388 of 2011, decided on 20th January, 2014.

SUMMONING OF WITNESS --- (Relevancy of fact)

Criminal Procedure Code (V of 1898)---

---Ss. 439/540---Pakistan Penal Code, 1860, Ss. 302/324/148/149---Criminal trial---Summoning of person as CW---Relevancy of fact---Petitioner/accused moved an application whereby he sought summoning of named Taxi Driver as a CW on ground that during investigation of case, I.O. had recorded his statement but with *mala fide* his name was not involved in the calendar of witnesses---Trial Court dismissed such application---Impugned order---Validity---When it had been brought on record that during investigation, proposed witness had appeared before I.O. and narrated certain facts towards occurrence, then surely he as well as his statement became relevant and important for first decision of case---Trial Court should have given proper consideration to said fact and adopted required mode for his examination---Impugned order was set aside---Summoning and recording of proposed witness was allowed but not as a CW rather as DW---Criminal revision petition allowed.

(Paras 7, 8)

مذکور ٹیکسی ڈرائیور کا دوران تفتیش مقدمہ ھذا بیان قلمبند کیا گیا تھا۔ اور وقوعہ قتل کے متعلق اہم واقعات بتائے تھے لہٰذا بطور گواہ دفاع طلب کرنا چاہیے تھا۔ ہائی کورٹ نے نگرانی درخواست منظور کی۔

[Statement of said taxi driver was recorded during investigation of case who narrated important facts towards occurrence, therefore, he should have been summoned as Defence DW. High Court allowed revision petition].

For the Petitioner: Khalid Ibn-e-Aziz, Advocate.
For the Respondents: Hassan Mahmood Khan Tareen, DPG.
Malik Ghulam Muhammad Langrial, Advocate.
Date of hearing: 20th January, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This criminal revision is directed against order dated 27.9.2011, passed by the learned Addl. Sessions Judge, Vehari, whereby an application moved by the petitioner for summoning and recording Allah Rakha as a Court witness has been refused.

2. The facts are that during the trial of a criminal case registered *vide* No. 430, dated 2.10.2010 under Sections 302, 324, 148, 149, P.P.C. at Police Station, Luddan, District Vehari, the present petitioner, being an accused moved an application, whereby he sought summoning and recording of Allah Rakha, a Taxi Driver as a Court witness, on the ground that during the investigation of the case, the Investigating Officer had recorded statement of the above-named person on 7.11.2010, but with *mala fide* his name was not included in the calendar of the witnesses, despite the fact that he was an important witness, hence his statement for reaching at a just conclusion was very necessary. The learned Trial Court through the impugned order had held that as statement of the above-named had already been brought on the record as Ex.DD, hence not necessary for just decision of the case and as such had dismissed the petition.

3. Consequently, the instant revision petition has been preferred with the contention that the impugned order being a patent illegality is not sustainable in the eye of law; that when admittedly the above-named during investigation

had appeared before the Investigating Officer and his statement was also recorded, he was a very relevant and important witness but erroneously the learned Trial Court had observed otherwise.

4. The learned DPG as well as learned counsel for the complainant (respondent No. 2) has vehemently opposed the petition.

5. Arguments heard and record perused.

6. It has been admitted on record that during the investigation Allah Rakha had joined the proceedings and his statement/version was reduced into writing by the Investigating Officer through case diary No. 15, dated 7.11.12010. During the said narration, certain facts towards the case in hand, were brought on the record. Under Section 510 of the Code of Criminal Procedure, 1898, a Trial Court may at any stage, summon any person as a witness or examine any person in attendance, though not summoned as a witness or recall or re-examine any person already examined but subject to a condition that his evidence should be essential for just decision of the case. For reference the said provision is reproduced herein below:---

"Power to summon material witness or examine persons present---Any Court, may at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

7. In the matter in hand, when it has been brought on the record that during the investigation, the above- named had appeared before the Investigating Officer, and narrated certain facts towards the occurrence, then surely he as well as his statement become relevant and important for just

decision of the case. Therefore, the learned Trial Court should have given proper consideration to the said fact and in the light of the above-mentioned provision, adopted the required mode for his examination.

8. Resultantly, the impugned order, could not be termed as justified, hence set aside. Consequently, summoning and recording of the above-named is allowed but not as a Court witness rather as a defence witness.

Criminal revision petition allowed.

2014 LAW NOTES 1060

[Lahore]

Present: **MUHAMMAD TARIQ ABBASI, J.**

Abdul Hameed

Versus

Addl. Sessions Judge, etc.

Criminal Revision No. 32 of 2012, decided on 7th November, 2013.

CONCLUSION

(1) There is no cavil to the proposition that an accused charge-sheeted for a major offence can be convicted for a minor offence.

CONVICTION/SENTENCE --- (Framing of charge)

Criminal Procedure Code (V of 1898)---

---S. 435---Pakistan Penal Code, 1860, Ss. 324/34---Criminal trial---Charge---Said respondent was convicted/sentenced but in addition to offence under Section 324, P.P.C. for which he was charge-sheeted, he was also convicted/sentenced for offences under Sections 337-D, 337-F(iii), 337-F(vi)---Appellate Court below while accepting appeal remanded case holding that no charge was framed under Sections 337-D, 337-F(iii) and 337-F(vi), P.P.C.---Minor offences---Validity---When in addition to offence under Section 324, P.P.C., said respondent had also caused injuries to said PWs and committed offence under Sections 337-D, 337-F(iii) and 337-F(vi), P.P.C. which were distinct offences, then the charge under said offence was mandatory and as such without framing of charge, for said offence, it was not valid to punish him for said offences/injuries/hurts caused to PWs---Offence under Section 338-D, P.P.C. could not be treated as minor offence *vis-a-vis* the offence under Section 324, P.P.C.---While convicting/sentencing respondent for said offence, without framing of charge, he till conviction was kept ignored and as such a great prejudice was caused to him---Criminal revision petition dismissed.

(Paras 8, 10, 11) Ref. 2012 SCMR 1066.

مذکور جرم کے تحت فرد جرم کے بغیر رسپانڈنٹ کو سزایاب کیا تھا۔ اپیلیٹ کورٹ ما تحت نے درست طور پر مقدمہ ریماند کیا۔ ہائی کورٹ نے نگرانی درخواست خارج کر دی۔

[Respondent was convicted/sentenced under said section without framing of charge. Appellate Court below had correctly remanded case. High Court dismissed writ petition].

For the Petitioner: Allah Bakhsh Khan Kalachi, Advocate.

For the State: Hassan Mahmood Khan Tareen, DPG.

For the Respondent No. 1: Malik Ali Muhammad Dool, Advocate.

For the Respondent No. 2: Khadim Hussain Khosa, Advocate.
Date of hearing: 7th November, 2013.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This revision petition has been directed against judgment dated 19.12.2011 passed by learned Additional Sessions Judge, D.G. Khan, (respondent No. 1), whereby in appeal, the judgment passed by the learned Trial Court dated 21.10.2011, was set aside and case was remanded back to the learned Trial Court, for deciding it afresh under the proceedings, suggested in the judgment.

2. The facts are that respondent No. 2 and one Riaz being involved in case F.I.R. No. 452, dated 29.06.2009, registered under Sections 324/34, P.P.C. at Police Station, Saddar, D.G. Khan, were challaned to the Court. The above-named accused, were charge-sheeted by the learned Trial Court under Sections 324/34 of P.P.C. and trial was carried on. Riaz had absconded, hence, declared proclaimed offender. On completion of the trial, through judgment dated 21.10.2011, the, respondent No. 2 (Allah Wasaya) was convicted but in addition to the offence under Section 324, P.P.C. for which he was charge-sheeted, he was also convicted and sentenced for the offences under Sections 337-D, 337-F(iii), 337-F(vi), P.P.C. in the terms, mentioned in the judgment.

3. Respondent No. 2 assailed the above-said judgment and conviction before the learned Sessions Court, D.G. Khan from where the judgment dated 19.12.2011 (impugned in this petition) was pronounced, whereby while holding that no charge under Sections 337-D, 337-F(iii) and 337-F(vi), P.P.C. was framed by the learned Trial Court, hence the sentence and conviction in the said offences was not warranted under the law and as such while accepting the appeal, the case was remanded back for fresh decision after framing the charge under all the above-mentioned heads.

4. Feeling aggrieved from the above-mentioned judgment the Appellate Court, instant revision petition has been preferred with the contention and on the ground that the learned Trial Court was fully competent to pass conviction and sentence for the above-mentioned offences, regarding which the respondent No. 2 was not charge-sheeted, hence the impugned judgment being mis-interpretation of the law was nothing but nullity.

5. The learned counsel appearing on behalf of the petitioner has advanced his arguments in the above-mentioned lines and grounds, whereas the learned DPG as well as learned counsel for respondent No. 2 has vehemently opposed the appeal while submitting that the impugned judgment being in accordance with law and procedure is quite justified, hence not interfereable.

6. Arguments heard and record perused.

7. There is no denial of the fact that the respondent No. 2 (Allah Wasaya) was charge-sheeted only for the offence under Section 324 of P.P.C. It is also an admitted position that the learned Trial Court, while deciding the matter had convicted and sentenced, the respondent No. 2 not only in offence under Section 324 of P.P.C., but also in the offences under Sections 337-D, 337--F(iii) and 337-F(vi), P.P.C. As per Section 324 of P.P.C. if an accused during commission of the said offence, causes injuries to the victim, then besides offence under Section 324 of P.P.C., he will also be liable to the punishment, provided for the said injuries. But it does not mean that regarding the offences of injuries, he will not be charge-sheeted.

8. In the situation in hand, when in addition to the offence under Section 324 of P.P.C., the respondent No. 2 had also caused injuries to the PWs and committed offence under Sections 337-D, 337-F(iii) and 337-F(vi) of P.P.C., which were distinct offences, having maximum imprisonment for 10 years, 3 years, and 7 years respectively, then the charge under the said offence was mandatory and as such without framing of the charge, for the said offence, it was not valid to punish him, for the said offence/injuries/hurts, caused to the PWs.

9. There is no cavil to the preposition that an accused charge-sheeted for a major offence can be convicted for a minor offence. In the matter in hand, the offence under Section 337-D, P.P.C., in addition to payment of *Arsh* also carries sentence of 10 years imprisonment. The offence under Section 324, P.P.C. prescribe maximum sentence of 10 years' imprisonment and fine. Therefore the offence under Section 337-D, P.P.C. cannot be treated as minor offence *vis-a-vis* the offence under Section 324, P.P.C. The same is the situation of the above-mentioned other offences under Sections 337-F(iii) and 337-F(vi), P.P.C., which besides *Daman* also have maximum imprisonment for three years and seven years, respectively. The above-mentioned view has been borrowed from the dictum laid down in the case-law titled, "*Khizar Hayat v. The State* (2012 SCMR 1066) where the following has been observed:---

"We have also attended to the provisions of Section 238, Cr.P.C. which allow the Court to convict a person for a 'minor' offence rather than for the major offence with which he has been charged but we have found that the provisions of Section 337-D, P.P.C. could not have been treated as constituting a minor offence vis-a-vis the offence under Section 324, P.P.C. We have noticed in this context that at the relevant time an offence under Section 324, P.P.C. carried a maximum sentence of 10 years' imprisonment and fine whereas an offence under Section 337-D, P.P.C. carried a maximum sentence of ten years' imprisonment and payment of arsh to the injured victim. We have, thus, failed to understand as to how the learned Judge-in-Chamber of the Lahore High Court, Multan Bench, Multan could have treated an offence under Section 337-D, P.P.C. to be a minor offence vis-a-vis the offence under Section 324, P.P.C. and could have invoked the provisions of Section 238, Cr.P.C. for the purpose."

10. The offences under Sections 337-D, 337-F(iii) and 337-F(vi), P.P.C. having the above-mentioned punishment were not minor offences, hence, while convicting and sentencing the respondent No. 2 for the said offence, without framing of the charge, he till conviction was kept ignorant and as such a great prejudice was caused to him.

11. It has been noted that on one hand, the petitioner through the instant revision petition is objecting seriously to the above-mentioned findings made by the learned Appellate Court but simultaneously he through an application, before the learned Trial Court has got amended and framed, the charge against Riaz co-accused, under the above-mentioned offences (337-D, 337-F(iii) and 337-F(vi) of P.P.C.). The said act and behaviour of the petitioner being blowing hot and cold in one breath is not acceptable.

12. For the forgoing reasons, the petition in hand being devoid of any force is dismissed.

Criminal revision petition dismissed.

2014 M L D 614
[Lahore]
Before Muhammad Tariq Abbasi, J
ABDUL QADEER---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.2915-B of 2013, decided on 5th November, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 109, 337-A(i), 337-F(i)(ii), 148 & 149---Qatl-e-amd, abetment, causing Shajjah-i-Khafifah, Shajjah-i-Mudihah, Damiyah, and badiah, rioting---Bail, grant of---Further inquiry---Injury found at the right side of the neck of the deceased being through and through, exit of said injury was the other injury observed on the left side of the neck---Except said injury, no other injury to the deceased had been attributed to accused---Co-accused to whom injuries on the person of prosecution witnesses, were attributed, had been admitted to bail---Chhuri allegedly been used and recovered from accused, could not be found to be stained with blood of human origin, during forensic analysis---Case of accused was that of further inquiry---Accused was admitted to post-arrest bail, in circumstances.

Mudassar Altaf Qureshi for Petitioner.
Sh. Ghayas-ul-Haq for the Complainant.
Hassan Mahmood Khan Tareen, D.P.G. with Mehdi Khan, S.I. for the State.

ORDER
MUHAMMAD TARIQ ABBASI, J.---The petitioner seeks post-arrest bail in case F.I.R. No.365 of 2012 dated 26-10-2012, registered under sections 302/109/337-A(i), 337-F(i), 337-F(ii), 148/149 P.P.C. at Police Station, Mehmood Kot, District Muzaffargarh.

2. The prosecution version embodied in the F.I.R. is that Khadim Hussain complainant had reported the matter to the police while deposing that on 26-10-2012 at about 9.30 a.m., his son namely Muhammad Azam along with his friends namely Muhammad Tahir, Muhammad Arif and Tariq Mahmood had

gone to play cricket and when after about 10 minutes, on hearing hue and cry, he along with Haji Ghulam Qasim, Haji Manzoor Hussain, rushed to the spot, saw that Muhammad Hussain, Munir Ahmad (co-accused) Qadeer Ahmad (petitioner), Mahboob Ahmad, Muhammad Tanvir, Waseem Raja, all armed with Chhuri and Muhammad Sharif armed with a gun were quarreling with Muhammad Azam, Muhammad Tahir, Muhammad Arif and Muhammad Tariq; that Muhammad Sharif co-accused, who was standing at a side of the ground was telling the above named boys that Muhammad Azam, Muhammad Tahir, Muhammad Arif and Muhammad Tariq be killed so that they may not dare to quarrel with them; that within the view of the above named complainant and P.Ws., Munir Ahmad (co-accused), while armed with Chhuri, attacked at Muhammad Azam and caused injury at right side of his neck; that Qadeer Ahmad (petitioner) inflicted a Chhuri blow on left side of the neck of Muhammad Azam, whereas, Mahboob (co-accused), made such blow at the chest of Muhammad Azam; that Munir Ahmad co-accused again made a Chhuri blow which landed at the back of Muhammad Azam, whereupon he fell down; that when P.W. Muhammad Tahir stepped forward to rescue Muhammad Azam, Waseem Raja (co-accused) inflicted a Chhuri blow, which landed on his right side of shoulder and when Muhammad Tariq P.W. step forward, Muhammad Tanveer (co-accused) caused injury to him at right side of his neck, below right ear and back of the head; that when Muhammad Arif P.W., stepped forward, Mahboob, Muhammad Hanif, Qadeer Ahmad and Waseem Raja, co-accused attacked at him and caused injuries to him; that on hue and cry the inhabitants of the locality attracted whereupon the accused fled away and that motive behind the occurrence was a quarrel which occurred a day earlier during playing of volley ball and that Muhammad Azam when was being shifted to the hospital, he succumbed to the injuries.

3. It has been argued that the petitioner is innocent and has falsely been roped in this case with mala fide; that as per prosecution version, the petitioner has inflicted a Chhuri blow at left side of the neck of Muhammad Azam, but according to the medical report the said injury (injury No.2) was the exit wound of the injury No.1; that in this way no injury to the deceased could be attributed to the petitioner; that co-accused of the petitioner who allegedly had caused injuries to Muhammad Tahir, Muhammad Arif and Muhammad Tariq (P.Ws.) had been granted bail and as such the present petitioner is also entitled for the said relief under the rule of consistency; that the case against

the petitioner is of further inquiry; that the petitioner is behind the bars for the last about one year and as such is no more required for further investigation.

4. The learned D.P.-G. as well as learned counsel for the complainant has vehemently opposed the petition and the grounds taken therein with the contentions that the present petitioner is main accused, who had caused injury on the vital part of the body of the deceased, which resulted into his death; that the alleged contradiction between ocular account and the medical evidence will be seen during the trial and at present it could not be given any importance and that as present petitioner is responsible for committing the murder of an innocent person, hence is not entitled for the concession of bail.

5. Arguments heard and record perused.

6. It has been observed that when previously during the arguments on 22-10-2013, my learned brother Sardar Muhammad Shamim Khan, J, had come to know that Injury No. 2 (on left side of the neck of the deceased) which was attributed to the present petitioner, as per post-mortem report was declared as an exit wound, it was directed that for clarification the doctor who had conducted the above said examination, be directed to appear in person before this Court today.

7. Today, the above named doctor has appeared in the court and stated that during the post-mortem examination, the injury No.1 found at the right side of the neck of the deceased was through and through and as such exit of the said injury was the injury No.2 observed on the left side of the neck.

8. Under the above-mentioned situation, when as per alleged prosecution story, the present petitioner had caused injury at the left side of the neck of the deceased, but as per doctor, the said injury was exit of the injury No.1 as it was through and through, the case of the petitioner has become of further inquiry. Further it has been found that except the abovementioned injury, the status of which has been found as mentioned above, no injury to the deceased has been attributed to the present petitioner.

9. It has further been observed that co-accused of the present petitioner to whom injuries of Muhammad Tahir, Muhammad Tariq and Muhammad Arif have been attributed, have been admitted to bail by this Court. It has further

been noticed that use of Chhuri has been alleged to the petitioner, but during the investigation a Chopper was been recovered from him which during the forensic analysis could not be found to be stained with blood of human origin.

10. As a result of above discussion, the instant petition is accepted and the petitioner is admitted to post arrest bail subject to his furnishing of bail-bonds in the sum of Rs.2,00,000 (Rupees two lac only) with two sureties each in the like amount to the satisfaction of learned Trial Court.

HBT/A-1/L Bail granted.

2014 M L D 977

[Lahore]

Before Muhammad Tariq Abbasi, J

ABDUL JABBAR and others---Petitioners

Versus

ALLAH BUKHSH and others---Respondents

Writ Petition No.14988 of 2013, decided on 2nd December, 2013.

Guardians and Wards Act (VIII of 1890)---

----S. 7---Constitution of Pakistan, Art. 199---Constitutional petition---Appointment of guardian of person and property of minor---Scope---Father moved application for his appointment as guardian of person and property of minors which was accepted and with the permission of court he sold their property---Guardian court recalled order passed by it with regard to permission of sale of property of minors on the ground that list of expenses/sale deed was not submitted within time---Vendees of said sale filed application that they had purchased property through sale deed and they should not be penalized for the act of guardian which was accepted and order re-calling the permission to sell the property of minors was recalled---Validity---Vendees were not party when guardian of person and property of minors was appointed---Mother of minors got recorded her consenting statement that she had no objection with regard to appointment of her husband as guardian of person and property of minors---Guardian of minors got permission for sale of property and same was sold to the applicants against consideration---Guardian was bound to submit details of expenses and sale deed but he could not submit the same---No reason, cause or justification existed for the Guardian Court to cancel the order for sale of property as sale had become final and sale deed had been executed in favour of applicants---Guardian Court had correctly passed order re-calling its previous order with regard to cancellation of permission to sell property of minors which had not prejudiced any party---Appeal was filed with the mala fide on behalf of minors through their mother as guardian of minors was appointed legally and their mother was not competent to pose herself to be the guardian of minors and prefer the appeal---Appellate Court had passed the impugned order against the facts and erroneously order of Guardian Court was set aside---He, who had sought equity, must do equity and he, who had come to the court, must come with clean hands---Guardian and his wife had not approached the

Appellate Court with clean hands---Impugned judgment passed by the Appellate Court was not sustainable in the eye of law which was set aside---Constitutional petition was accepted in circumstances.

Ch. Abdul Ghani for Petitioners.

Saghir Ahmad Bhatti for Respondents.

Date of hearing: 2nd December, 2013.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--The impugned judgment dated 25-9-2009, passed by the learned Additional District Judge, Burewala, in the appeal filed against the order dated 13-9-2008 of learned Guardian Judge, Burewala, was challenged by way of civil revision. As against the said judgment, revision was not competent, but writ petition was maintainable, hence revision petition was converted into the writ petition in hand.

2. Through this writ petition, the order dated 25-9-2009, passed by the learned Additional District Judge, Burewala, whereby in appeal, the order dated 13-9-2008, passed by the learned Guardian Judge, Burewala has been set aside, has been called in question.

3. The facts are that Allah Bukhsh (respondent No. 1) being father of respondents Nos. 2 and 3 (both minors) filed an application, before the learned Guardian Judge, Burewala, District Vehari, requesting therein that he may be appointed as guardian of the person and property of the above named minors. The said application was accepted and respondent No. 1 was appointed as guardian of the person and property of the minors. Thereafter, respondent No. 1 preferred an application before the learned Guardian Court, with a request that permission to sale out the property of the minors measuring 17 kanal 6 marla may be accorded and the learned Guardian Court, granted the permission, through order dated 14-2-2005. Accordingly the above mentioned property of the minors was sold by the respondent No. 1 and purchased by the present petitioners, through registered sale deed No 250 dated 7-3-2005. Thereafter, the learned Guardian Court through order dated 19-3-2008 had recalled the order dated 14-2-2005, through which permission of sale of the above property of the minors was granted, with the contention that list of the expenses/sale deed was not submitted by Allah Bukhsh (respondent No. 1), in the Court, within the prescribed period. The present petitioners filed an application before the learned Guardian Judge, for recalling of the order dated 19-3-2008 on the ground that they had purchased

the property through sale deed for valuable consideration and that the expenses/sale deed was to be submitted in the Court by Allah Bukhsh (respondent No. 1), hence for his act, they could not be penalized. The learned Trial Court on the basis of the attending facts and circumstances had passed the order dated 13-9-2008, whereby the above said previous order dated 19-3-2008 was recalled. The minors namely Muhammad Sajid and Tahir Javed (respondents Nos. 2 and 3) preferred appeal before the learned Additional District Judge, Burewala against the above mentioned recall order dated 13-9-2008 and the learned Additional District Judge while accepting the appeal had set aside the said order, on 25-9-2009. Hence the petition in hand.

4. Arguments heard. Record perused.

5. Admittedly, when Allah Bukhsh (respondent No. 1) was appointed as guardian of the person and property of the minors (respondents Nos. 2 and 3), the present petitioners were not in picture. At that time Mst. Rashida Bibi, mother of the above named minors had appeared before the learned Guardian Court and made a consenting statement, whereby she had not objected the appointment of her husband Allah Bukhsh (respondent No. 1) to be the guardian of her above named minor sons. Thereafter, Allah Bukhsh had sought and got permission for sale of the property of the minors and the property was sold out to the present petitioners, against the handsome consideration. It was for Allah Bukhsh (respondent No. 1) to submit before the learned Guardian Court, the detail of expenses and the sale deed, but for the reasons best known to him, he had failed to do so. Therefore, there was no reason, cause or justification for the learned Guardian Judge to cancel the order for sale of the property, because by that time, the sale was finalized and the sale deed was executed in favour of the present petitioners. When the learned Guardian Judge was informed, about the actual situation by the present petitioners, through an application, he justifiably had passed the order dated 13-9-2008 and recalled the previous order dated 19-3-2008. The said order of recall had not prejudiced any of the parties, but it seems that with mala fide, the appeal was got filed in names of the minors (respondents Nos. 2 and 3) through Mst. Rashida Bibi, their mother, despite the fact that Allah Bukhsh (respondent No. 1) was legally appointed guardian of the minors and as such the above named lady was not at all competent to pose herself to be the guardian of the minors and prefer the appeal. The learned Additional District Judge, Burewala without realizing the real facts and circumstances that on one hand, Allah Bukhsh (respondent No. 1) while selling the property

of the minors, to the present petitioners had received a huge amount, but on the other hand had got filed the appeal through his wife, despite the fact that in presence of appointed guardian, she was having no authority to file the appeal, had passed the impugned judgment dated 25-9-2009, whereby erroneously the order dated 13-9-2008 of the learned Guardian Judge had been set aside.

6. It is well settled preposition that he, who seeks equity must do equity and he who comes to the Court, must come with clean hands. But in the situation in hand, Allah Bukhsh (respondent No. 1) and his wife Mst. Rashida Bibi, in the light of the facts and circumstances narrated above, had not approached the learned Additional District Judge, Burewala with clean hands, but despite that the impugned judgment dated 25-9-2009 had been pronounced, in the manner mentioned above.

7. As a result of the above mentioned discussion, I am of the view that the impugned judgment dated 25-9-2009 is not sustainable in the eye of law. Consequently, by accepting the instant revision petition, the impugned judgment is set aside and the order dated 13-9-2008 of the learned Guardian Judge is restored.

AG/A-24/L Petition accepted.

2014 M L D 1043
[Lahore]
Before Muhammad Tariq Abbasi, J
Mst. JANNAT---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.358 of 2010, decided on 4th November, 2013.

Criminal Procedure Code (V of 1898)---

----Ss.88 (6A) & 88 (6D)---Penal Code (XLV of 1860), Ss.302 & 324---Qatl-e-Amd and attempt to Qatl-e-Amd---Proclaimed offender---Attachment of property---Objections---Accused was declared proclaimed offender and Trial Court attached his property---Wife of proclaimed offender filed objection on the plea that property in question had been given to her as dower but Trial Court dismissed the objection---Validity---Wife of proclaimed offender filed objection petition to the effect that property in question had been given to her by her husband, hence she had interest in the property and as such it could not be sold---Wife of proclaimed offender also instituted suit before Family Court, which had been decreed, therefore, objection was not ignorable and needed consideration---High Court set aside the order and remanded the matter to Trial Court for decision afresh on objection petition filed by wife of proclaimed offender---Revision was allowed accordingly.

Tahir Mehmood for Petitioner.
Hasan Mehmood Khan, D.P.G. for the State.
Rana Muhammad Shakeel for the Complainant.
Date of hearing: 4th November, 2013

JUDGMENT
MUHAMMAD TARIQ ABBASI, J.---Through the instant revision validity of the orders dated 17-3-2010 and 19-8-2010 passed by learned Additional Sessions Judge, at D.G. Khan have been questioned.

2. Facts giving rise to the instant revision petition are that a case through F.I.R. No. 644 dated 10-9-2007 under sections 302/324/34, P.P.C. was registered at Police Station Saddar D.G. Khan, against Abdul Rasheed (husband of the present petitioner) and two others namely Muhammad Younis and Takiya. Abdul Rasheed did not join into the proceedings and absconded himself, hence after adopting all the legal formalities was declared as P.O. Consequently through order dated 21-4-2008, the learned Additional Sessions Judge D.G. Khan while separating the case of Younis and Takiya, from the case of Abdul Rasheed (proclaimed offender) had ordered for attachment of his property and accordingly directed the DOR to do the needful. Thereafter Muhammad Bilal (respondent No. 2/complainant in the above mentioned case) through an application requested the concerned court to sale out the property of Abdul Rasheed (P.O.). In the said application learned concerned court through its order dated 17-3-2010 directed the DOR to sell out the property of the above mentioned P.O. Mst. Jannat (present petitioner) challenged the above mentioned order with the contention that property which was going to be sold was given to her as dower hence was not saleable but the learned concerned court through order dated 19-8-2010 had turned down the above mentioned objection petition made by the present petitioner.

3. Feeling aggrieved the instant revision has been filed with the contention and on the grounds that when the property allegedly belonging to the above mentioned proclaimed offender does not relate to him rather has been acquired by the present petitioner as dower and in this regard her suit has also been decreed from the learned family court then there is no fun of sale of the property and not giving any consideration to the above mentioned petition filed by the petitioner.

4. The revision petition has been opposed by the learned D.P.G. as well as the learned counsel for the respondent No. 2.

5. The contentions raised from all the sides have been heard and record has been considered.

6. Under section 88(6A) Cr.P.C. of 1898, a person having an interest in the property belonging to a proclaimed offender which has been attached can

prefer objections in the concerned court. For guidance the said section is reproduced herein below:--

"If any claim is preferred to, or objection made to the attachment of, any property attached under this Section within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this Section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part:

Provided that any claim preferred or objection made within the period allowed by this subsection may, in the event of death of the claimant or objector, be continued by his legal representative."

7. Under section 88(6D) of the Cr.P.C., if the claim or objection preferred by any such person is disallowed, then within one year he may institute a suit to establish the claimed right and the order passed in objections shall be subject to the result of the suit and shall be conclusive. The said section speaks as under:--

"Any person whose claim or objection has been disallowed in whole or in part by an order under subsection (6A) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of property in dispute; but subject to the result of such suit, if any, the order shall be conclusive."

8. In the matter in hand, the present petitioner had filed the objection petition to the effect that the property in question had been given to her by her husband (Abdul Rasheed P.O.), hence, she had interest in the property and as such it should not to be sold. She had interest in the property and as such it should not to be sold. She had also instituted the suit before the family court, which had been decreed on 8-9-2011. Hence, the above mentioned objection/contention was not ignorable and needed weight and consideration.

9. Resultantly, the revision petition is accepted. The impugned orders are set aside and the matter is referred back to the learned concerned court with the

direction that in the light of the above mentioned attending circumstances, the objection petition filed by the present petitioner be decided afresh, within a span of three months from receipt of this order.

MH/J-4/L Case remanded.

2014 M L D 1100
[Lahore]
Before Muhammad Tariq Abbasi, J
NAZIR HUSSAIN---Petitioner
Versus
AMJAD HUSSAIN---Respondent

Civil Revision No. 1072 of 2009, decided on 26th November, 2013.

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

----Arts. 75, 76 & 77---Civil Procedure Code (V of 1908), O. XXXVII, Rr. 2 & 3 & O. XI, R. 14---Institution of summary suit on negotiable instrument---Production of secondary evidence---Scope---Contention of defendant was that impugned pronote was not against consideration but same was result of arbitration decision and both the parties had executed pronotes, receipts and agreement in favour of each other---Application of defendant for production of secondary evidence with regard to pronote, receipt and Iqrar Nama was accepted by the Trial Court---Validity---Defendant had fully described about the execution of pronote, receipt and agreement in his written statement---Application for production of secondary evidence was moved when such documents were denied by the possessor of the same---Defendant was to prove that such documents were executed in favour of each other through permissible modes---Defendant moved an application to summon the possessor of such documents who denied the possession of said documents---Documents must be proved by primary evidence except in the circumstances narrated in Art. 76 (a) & (c) of Qanun-e-Shahadat, 1984---Secondary evidence could be produced when original document was not in existence---If during evidence execution of documents in question and their afterward loss was not proved then secondary evidence would have no value---Impugned order had not prejudiced anyone and production of such documents would be

helpful for the Trial Court for just conclusion---Revision was dismissed in circumstances.

Sagheer Ahmad Bhatti for Petitioner.
Nadeem Ahmad Tarar and Malik Muhammad Siddique Kamboh for Respondents.
Date of hearing: 26th November, 2013.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through the instant revision petition, the order dated 24-10-2009 passed by the learned Additional District Judge, Chichawatni, District Sahiwal has been called in question, whereby secondary evidence in respect of a pro note, receipt and 'Iqrar Nama' dated 24-8-2004 by Nazir Hussain (present petitioner) in favour of Amjad Hussain (respondent) has been permitted.

2. The facts are that in the suit filed by the petitioner, against the respondent, under Order XXXVII, Rule 2 of the Civil Procedure Code, 1908, on the basis of a pro note dated 24-8-2004, leave to appear and defend the suit was granted to the respondent. Accordingly the respondent filed the written statement, wherein he alleged that the pro note in question was not against consideration, but as a result of arbitration decision (Faisla Salsi), whereby both the parties had executed pro notes, receipts and agreements in favour of each other and handed over to Ch. Afzaal Ahmad, Advocate. It was further contended that the pro note, receipt and agreement, executed by the petitioner (Nazir Hussain), in favour of the respondent (Amjad Hussain) were duly entered in the register of stamp vendor and petition writer at S.Nos. 1320, 1321 and 1322 dated 24-8-2004 and that similarly the above mentioned documents were also entered in the register of Ch. Muhammad Nawaz Advocate Chichawatni at Serial Nos. 3908, 3909 and 3910.

3. After filing of the written statement and framing of the issues, the respondent had moved an application under Order XI, Rule 14 of the Civil Procedure Code, 1908 before the learned Trial Court with a request that Ch. Muhammad Afzaal Tarar Advocate, in possession of whom, the above mentioned documents, executed by the petitioner in his favour were lying, may be directed to produce the same before the Court. The said request was opposed by the petitioner, but the learned Trial Court, vide order dated 13-7-2009, issued notice to the above named Advocate, for production of the above

said documents. The Advocate appeared in the Court on 19-9-2009 and stated that the alleged documents were not in his possession. Thereafter the respondent filed an application before the learned Trial Court, whereby he sought permission of proving the above mentioned documents through secondary evidence, which through the impugned order was allowed. Consequently the revision petition in hand.

4. Arguments of both the sides have been heard and the record has been perused.

5. The record shows that in Para-2 of the written statement, the respondent had fully described about execution of the pro note, receipt and agreement by the present petitioner, in his favour. The numbers through which the above mentioned documents were entered with the stamp vender and the petition writer, as well as Ch. Muhammad Nawaz Advocate were fully described. When the Advocate in whose possession, as per the respondent, the documents in question were lying had come before the Court and denied the documents with him, the application for secondary evidence was moved and dealt with in the manner mentioned above.

6. It has been observed that the defence of the respondent was that the pro note on the basis of which the suit had been filed was not against any consideration, but both the parties under a decision made by arbitration had executed the pro notes and receipts in favour of each other. It was for the respondent to strive for proving and establishing his above mentioned alleged defence, through permissible modes. For the said purpose as first step, he had got called Ch. Afzaal Ahmad Advocate, in the possession of whom, as per him, the original documents in question were lying. When the said Advocate denied the possession of the documents, with him, as subsequent resort, he had moved the above mentioned application, seeking therein permission for bringing on the record, photo copies of the above mentioned documents, through secondary evidence and the learned Trial court through the impugned order had permitted the same.

7. Herein below, it would be seen and determined if the above mentioned procedure, adopted by the respondent and the learned Trial Court, was justified being permitted under the law or otherwise.

8. According to the Article 75 of the Qanun-e-Shahadat Order, 1984 (hereinafter will be referred as Order 1984), documents must be proved by primary evidence. Article 76 of the Order 1984 is exception to the above mentioned rule and describes the situations, under which secondary evidence, relating to a document can be given. For sake of convenience, the said Article is reproduced as under:--

"76. Cases in which secondary evidence relating to document may be given. Secondary evidence may be given of the existence, condition to contents of a document in the following cases:

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court; or of any person legally bound to produce it; and when, after the notice mentioned in Article 77, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when due to the volume or bulk of the original, copies thereof have been made by means of microfilming or other modern devices;

(e) when the original is of such a nature as not to be easily movable;

(f) when the original is a public document within the meaning of Article 85;

(g) when the original is a document of which a certified copy is permitted by this Order, or by any other law in force in Pakistan, to be given in evidence;

(h) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection;

(i) when an original documents forming part of a judicial record is not available and only a certified copy thereof is available, certified copy of that certified copy shall also be admissible as a secondary evidence.
In cases (a), (c), (d) and (e), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.
In case (f) or (g), certified copy of the documents, but no other kind of secondary evidence, is admissible.

In case (h), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

9. In the situation in hand, as stated above, the respondent had described execution of the documents in question and their custody with the above named Advocate, who when as per application and request of the respondent was called by the learned Trial Court had denied the possession of the documents. The above said application and the request of the respondent, in fact was a notice as prescribed by the Article 77 of the Order 1984. If in the said application, another provision had been mentioned, then only due to the said sole reason, the struggle made, for fulfilling the conditions for leading secondary evidence could not be turned down, because the very purpose of the application was to fulfill the pre-requisites for leading the secondary evidence. The situation in hand, fully covers the circumstances narrated in sub-Articles (a) and (c) of the Article 76 highlighted above.

10. It has been objected that firstly non-existence of the original documents should have been established and then the secondary evidence could be allowed. The said objection is answered in the terms that non-existence of the original documents and secondary evidence can be produced simultaneously, but the former has to precede the latter. If during the evidence execution of the documents in question and their afterward loss will not be proved, then the secondary evidence will have no legal value. In this regard, I am fortified by the dictum laid down in case of 'Mst. Khurshid Begum and 6 others v. Chiragh Muhammad' reported in 1995 SCMR 1237.

11. The impugned order, which due to the reasons mentioned above is quite justified being demand of the law and situation has not prejudiced anyone. The proceedings permitted through the impugned order, rather will help the learned Trial Court in reaching at just conclusion, hence there is no reason, cause or justification, for the petitioner to object the said proceedings and the order.

12. For what has been discussed above, the revision petition in hand has no legal value and as such is dismissed.

AG/N-10/L Revision dismissed.

2014 M L D 1300

[Lahore]

Before Muhammad Tariq Abbasi, J

MUHAMMAD TAJ and others---Petitioners

Versus

MUHAMMAD NAWAZ---Respondent

Civil Revision No.241-D of 2009, heard on 7th May, 2014.

Punjab Pre-emption Act (IX of 1991)---

----Ss. 6 & 13---Suit for pre-emption---Shafi-Sharik, Shafi Khalit and Shafi Jar--- Talbs---Proof---Requireinents/essentials--- Talb-e-Muwathibat and Talb-e-Ishhad were pre-requisites for filing suit for' pre-emption---Specific mention of time, date and place of Talb-e-Muwathibat in plaint as well as notice of Talb-e-Ishhad was mandatory---Pre-emptor did not mention either in plaint or notice of Talb-e-Ishhad the place where he received information of sale of suit land---No proof of sending any notice to defendant was brought on record of Trial Court---Notice of Talb-e-Ishhad was not proved which was fatal to the suit---Pre-emptor claimed that notice had been sent to defendants but they did not receive the same---Pre-emptor was bound to get the postman examined even if service of notice had been admitted--Pre-emptor failed to perform his obligation---Courts below failed to appreciate evidence by ignoring material contradiction regarding pre-emptor's knowledge of sale---Revision was allowed---Impugned judgments were set aside---Suit was dismissed.

Muhammad Ali and 7 others v. Humaira Fatima and 2 others 2013 SCMR 178; Munawar Hussain and others v. Afaq Ahmed 2013 SCMR 721 and Allah Ditta through L.Rs. and others v. Muhammad Anar 2013 SCMR 866 rel.

Mumtaz Ali Khan for Petitioners.

Muhammad Ijaz Chaudhry for Respondent.

Date of hearing: 7th May, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through the revision petition in hand, the judgments and decrees dated 29-11-2008 and 27-4-2009 respectively, passed by the learned Civil Judge and Additional District Judge, Rawalpindi have been called in question.

2. Through the above mentioned judgment and decree dated 29-11-2008, the suit for possession through pre-emption, filed by the respondent against the petitioners had been decreed. Whereas vide the judgment and decree dated 27-4-2009, an appeal preferred by the petitioners had also been turned down.

3. The facts are that the respondent filed a suit, against the petitioners, whereby he sought possession through pre-emption, of the property, fully described in the plaint. The grounds were that Abdul Rahim was the owner of the property measuring 11 Kanals 3 Marlas situated in Khewat No. 788, Khatooni Nos. 1586 and 1587, Khasra Nos.344 and 387 of Village Ghela Kalan, Tehsil and District Rawalpindi, who sold out the said land, in favour of the petitioners against consideration of Rs.70,000, but to defeat the right of respondent a false sale consideration was described as Rs.1,20,000; that the respondent came to know about the above mentioned sale on 25-10-2001 at about 11.00 a.m. through Mian Khan in presence of Raees Khan, whereupon the respondent immediately declared that he will exercise right of pre-emption and get the land back, hence made Talb-e-Muwathibat; that thereafter, the respondent sent notice of Talb-e-Ishad, to the petitioners through registered A.D., which was attested by the above named witnesses; that as the respondent was Shafi-e-Shareek, Shafi-e-Khaleet, and Shafi-e-Jar, in the suit property, hence had superior right of pre-emption qua the petitioners and that the petitioners were asked to accept the right of the respondent and while receiving the actual sale amount of Rs.70,000, transferred the property in his favour, but refused.

4. The suit was contested by the petitioners through filing written statement, whereby several legal as well as the factual objections were raised and the claim of the respondent was denied.

5. To resolve the controversy between the parties, the learned Trial Court had framed the following issues:-

(1) Whether plaintiff is entitled for a decree for possession through his superior right of pre-emption? OPP

(2) Whether plaintiff has not fulfilled the requirement of talbs within time as described by law? OPD

(3) Whether the plaintiff has no locus standi hence the instant suit is liable to be dismissed" OPD

(4) Whether plaintiff has not come to the court with clean hands? OPD

(5) Whether the value of the suit for the purpose of court fee and jurisdiction has not been properly assessed by the plaintiff if so its effect? OPD

(5-A) Whether suit property was purchased for a consideration of Rs. 70, 000 and intentionally it was written as Rs.1, 20, 000 only to frustrate the pre-emption right of plaintiff? OPP

(5-B)If above issue is not proved in affirmative, then what is actual sale consideration? OPP

(6) Relief.

6. The evidence of the parties was recorded, during which Muhammad Nawaz, respondent/plaintiff himself appeared and made the statement as P.W. and also got examined Mian Khan as P.W.2 and Raees Khan as P.W.3. During the said evidence, the grounds taken in the plaint were reiterated. Towards the documentary evidence, the postal receipts were tendered as Ex.P.l and Ex.P.2, attested copy of the mutation as Ex.P.3, attested copy of 'Aks Shajra' as Ex.P.4, copy of record of rights as Ex.P.5, attested copy of the Jamabandi as Ex.P.6, copy of envelope as Ex.P.7, photo copy of receipt as Mark-A, copy of the notice as Mark-B and Mark-C, whereas receipts of the post office as Ex.P.8 and Ex.P.9.

7. From the other side, Muhammad Ansar had made the statement as DW-1, Muhammad Yaqoob as DW-2 and Muhammad Ayub being attorney of the petitioners/defendants as 'DW-3. Power of attorney and copy of Aks Shajra were also tendered in evidence as Ex.D.l and Ex.D.2 respectively.

8. After completing the proceedings, the learned Trial Court had pronounced the judgment and decree dated 29-11-2008, whereby the suit was decreed.

9. The petitioners had challenged the above mentioned decree through appeal, before the learned District Judge, Rawalpindi, which for hearing came before the learned Additional District Judge at Rawalpindi, from where the judgment and decree dated 27-4-2009 was pronounced and the appeal was dismissed.

10. Feeling aggrieved, the instant revision petition has been preferred, with the contention and the grounds that findings of both the learned courts below, which resulted into passing of the impugned judgments and decrees being based on conjectures, surmises, misreading and non-reading of the material available on the record and non-consideration of the law on the subject are not sustainable in the eye of law, hence liable to be set aside.

11. The learned counsel for the petitioners has advanced his arguments in the above mentioned lines and the grounds, whereas the learned counsel who has put appearance on behalf of the respondent, has supported the impugned judgments and decrees and vehemently opposed the revision petition.

12. Arguments of both the sides have been heard and the record has been perused.

13. As per law, there are certain pre-requisites for filing a suit of pre-emption. The said requirements are called Talb-e-Muwathibat and Talb-e-Ishad.

14. As per the latest dictum laid down by the august Supreme Court of Pakistan in the cases titled `Muhammad Ali and 7 others v. Humaira Fatima and 2 others' (2013 SCMR 178), and 'Munawar Hussain and others v. Afaq Ahmed' (2013 SCMR 721), it is mandatory that in the plaint, as well as notice of Talb-e-Ishad, time, place and date of Talb-e-Muwathibat must be specifically mentioned, otherwise the suit will fail.

15. It has been observed that in the plaint as well as the notice of Talb-e-Ishhad (Mark-PB and Mark PC), the place, where the respondent/ plaintiff had allegedly gained the information of the sale was not given.

16. It has further been noted that postal envelope towards sending of the notice to Karam Dad (petitioner No. 2/defendant No. 2) was tendered as Ex.P.7, but no proof of sending any notice through registered post acknowledgment due, to Muhammad Taj, (petitioner No. 1/defendant No.1) was ever brought on the record of the learned Trial Court. Therefore, the notice of Talb-e-Ishhad to Muhammad Taj (petitioner No.1/defendant No.1) was not established on the record. The said lapse in the light of the judgment of the august Supreme Court of Pakistan titled 'Munawar Hussain and others v. Afaq Ahmed (2013 SCMR 721) was fatal for the suit.

17. Furthermore, the contention of the respondent/plaintiff was that the notices of Talb-e-Ishhad were sent to the petitioners through registered post, but not received by them. In the said eventuality, as per the precedent laid down by the august Supreme Court of Pakistan in the case titled 'Allah Ditta through L.Rs. and others v. Muhammad Anar (2013 SCMR 866), it was mandatory for the respondent/plaintiff to get the postman examined, even service of the notice was admitted by the petitioners/defendants. Admittedly the respondent/plaintiff had failed to perform his above mentioned part of obligation.

18. The record shows that Raees Khan (P.W.3), in whose presence, the respondent/plaintiff had gained knowledge of the sale, during his statement had admitted that on 21-8-2001, the respondent/plaintiff had come to know about the sale. The above mentioned material contradiction towards the knowledge of the sale was very important and notable, but both the learned courts below had ignored the same while saying that the above named witness was illiterate. The said material discrepancy, in the light of the above cited judgment (2013 SCMR 866) was also fatal for the suit.

19. Due to the above mentioned reasons and in the light of the above mentioned case-laws, the issue No. 2 above was not proved, hence on the sole ground, the suit was not competent and was liable to be dismissed, but the learned Trial Court had erred in not considering the above mentioned facts and deciding the above said issue against the petitioners/defendants.

20. The learned appellate court while hearing the appeal, had also failed to consider the above mentioned facts and circumstances and preferred to

dismiss the appeal in a slipshod manner, which could not termed to be justified.

21. Resultantly, the instant revision petition is accepted, the impugned judgments and decrees dated 29-11-2008 and 27-4-2009 passed by both the learned courts below are set aside and the suit of the respondent is dismissed with no order as to costs.

ARK/M-193/L Revision accepted.

2014 M L D 1428
[Lahore]
Before Muhammad Tariq Abbasi, J
MUZAMIL HUSSAIN---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.63 of 2014, heard on 5th March, 2014.

Criminal Procedure Code (V of 1898)---

----S. 239---Penal Code (XLV of 1860), Ss.302, 148 & 149---Qatl-e-amd, rioting, common object---Joint trial---Criminal case was registered against accused and other six co-accused---One of said co-accused was proclaimed offender, and charge against accused and other five co-accused was framed---Trial continued and during the same substantial prosecution evidence was recorded---Proclaimed offender, thereafter was arrested; and challaned but Trial Court had separately charge-sheeted said co-accused and his five co-accused---Validity---Accused as well as his co-accused persons were involved in the case, and mandate of law on the subject was that they all should be charge-sheeted and tried together---As all accused persons were facing the charge for similar offence during same occurrence/transaction, as per provisions of S.239, Cr.P.C., joint trial was required---Impugned order passed by the court below was set aside, with direction to the Trial Court to carry on the joint trial of all accused who were available before it.

Ghulam Abbas Niazi v. Federation of Pakistan and others PLD 2009 SC 866 rel.
Mudassar Altaf Qureshi for Petitioner.
Hassan Mehmood Khan Tareen for the State.
Tahir Mehmood for Respondent No. 2.
Date of hearing: 5th March, 2014.

JUDGMENT
MUHAMMAD TARIQ ABBASI, J. Through this revision petition, the order dated 10-2-2014 passed by the learned Additional Sessions Judge, Burewala of District Vehari has been assailed.

2. By way of the above mentioned impugned order, the objection raised by the defence that instead of separate one trial of all the accused involved in the case should be conducted, has been turned down.

3. The facts are that a criminal case, through F.I.R. No. 172 dated 11-4-2009 under sections 302, 148/149 of P.P.C. at Police Station, Gaggoo, District Vehari was registered against the present petitioner and the others.

4. The report under section 173 of Cr.P.C./challan was submitted in the court of competent jurisdiction, against the present petitioner and his co-accused, namely Muhammad Tufail, Ghulam Rasool, Muhammad Sarwar, Muhammad Ayub and Muhammad Afzaal alias Phala. At that time another accused namely Muhammad Adil, was proclaimed offender. The charge against the petitioner and his above named co-accused was framed. The trial was carried on, during which substantial prosecution evidence was recorded. Thereafter Muhammad Adil, proclaimed offender was arrested and challaned to the court, but the learned Trial Court had separately charge sheeted him and started two trials, one against the present petitioner and his above named co-accused, whereas the other against Muhammad Adil.

5. The defence raised an objection that as per law, separate trials of the accused involved in one case, could not be held and that all the accused may be re-charge sheeted and tried jointly, but the learned Trial Court through the impugned order had rejected the said objection, with the contention that separate trials were quite acceptable and permissible under the law.

6. The learned counsel for the petitioner has argued that the impugned order is a patent illegality because by any stretch of imagination, simultaneous separate trials of the accused involved in one case are not permissible and acceptable under the law.

7. The learned Deputy Prosecutor General as well as the learned counsel for respondent No. 2 has opposed the revision petition and supported the impugned order being quite justified and demand of the situation.

8. Arguments have been heard and record perused.

9. Section 239 of Criminal Procedure Code 1898, deals with joint trial, which reads as under:--

"The following persons may be charged and tried together, namely:--

(a) Persons accused of the same offence committed in the courses of the same transaction;

(b) Persons accused of an offence and persons accused or abetment or of an attempt to commit such offence;

(c) Persons accused of more than one offence of the same kind, within the meaning of section 234 committed by them jointly within the period of twelve months;

(d) Persons accused of different offences committed in the course of the same transaction;

(e) Persons accused of an offence which includes theft, extortion or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal of concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last named offence;

(f) Persons accused of offences under sections 411 and 414 of the Pakistan Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and

(g) Persons accused of any offence under Chapter XII of the Pakistan Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence;"

10. Admittedly the present petitioner as well as all of his above named co-accused are involved in the above mentioned case, hence the mandate of the law, on the subject is that they should be charge sheeted and tried together. The reliance may be placed in the judgment reported as "Ghulam Abbas Niazi

v. Federation of Pakistan and others" (PLD 2009 Supreme Court 866), the relevant portion whereof reads as under:--

"It is another settled principle of law in every civilized State of the world that people charged of similar offence during same transaction or transactions, are to be jointly tried. This rule of law, practice and procedure is strictly derived from the principles of equality. The wisdom behind is that those who are co-accused in the same transaction and tried for the same offence or cognate offences, as the case may be, should be in a position to defend themselves equally against the same narration of facts as well as charges. Another reason is that if one accused shifts his burden to the other one, the other should be in a position to defend himself and rebut the allegations there and then, in the presence of the other co-accused."

11. Admittedly, the petitioner and his above named co-accused are facing charge, for similar offence, committed during same occurrence/transaction, hence as per the above mentioned provision, principle, criteria and the dictum, joint trial is required. Consequently the instant revision petition is allowed and the impugned order dated 10-2-2014 is set aside, with a direction to the learned Trial Court to carry on the join trial of all the accused who are available before it, and ensure completion of the proceedings within a span of six months.

HBT/M-132/L Petition allowed.

2014 M L D 1804

[Lahore]

Before Muhammad Tariq Abbasi, J

ALTAF HUSSAIN and others---Petitioners

Versus

The STATE and others---Respondents

Criminal Miscellaneous No. 3129-B of 2014, decided on 3rd July, 2014.

Criminal Procedure Code (V of 1898)---

----Ss.497 (2) & 498---Penal Code (XLV of 1860), S.324---Attempt to commit Qatl-i-Amd---Pre-arrest bail, grant of---Further inquiry, case of---Medical and ocular evidence---Conflict---Accused as alleged to have caused injury by firing with 12 bore repeater gun, at left knee of complainant---During medical examination, no firearm injury to complainant was found rather an incised wound at the back of left leg of complainant was observed having been caused with sharp edged weapon---Effect---Pre-arrest bail could be granted to accused if his case was found to be of further inquiry, as no useful purpose would be served in sending accused behind bars for a few days---Pre-arrest bail was confirmed in circumstances.

Farhat Husain Shah and another v. The State and others 2010 SCMR 1986; Ghulam Mohi-ud-Din Shah v. Hafiz Muhammad Ramzan and others 2007 SCMR 1931 and Kh. Masood-ul-Hassan v. The State and another 2013 PCr.LJ 1420 rel.

Malik Imtiaz Haider Maitla for Petitioner.

Shaukat Ali Ghauri, Addl. P.G. Farrukh Durrani A.S.-I. for the State.

Mehr Mazhar Hussain Hiraj for the Complainant.

ORDER

MUHAMMAD TARIQ ABBASI, J.---The petitioners namely Altaf Hussain, Muhammad Ishaq alias Ballu and Ghulam Abbas seek pre-arrest bail

in case F.I.R. No. 252/2014 dated 13-4-2014, registered under sections 324/34 of P.P.C. at Police Station Basti Malook, District Multan.

2. The facts are that Mumtaz Ahmad had reported the matter to the Police, with the contention that during night between 12/13-4-2014 at about 12.30 AM, when he along with Muhammad Akram and Muhammad Tassawar PWs was going to check the crop, suddenly, Messrs Ghulam Abbas (petitioner No. 3) while armed with a repeater .12 bore, Altaf Hussain and Muhammad Ishaq alias Ballu (petitioners Nos. 1 and 2) emerged; that Altaf Hussain (petitioner No. 1) raised a 'Lalkara' that the complainant will be taught a taste of teasing women folk, whereupon Altaf Hussain and Ballu (petitioners Nos. 1 and 2) caught hold of the complainant from his collar and started beating him; that Ghulam Abbas (petitioner No. 3) with 12 bore repeater made direct fire at the complainant, which hit at his left knee and he became injured; that Muhammad Akram and Muhammad Tassawar P.Ws. tried to apprehend the accused, but Ghulam Abbas (petitioner No. 3) threatened that whosoever will come near, will also be dealt with in the same manner and that after commission of the occurrence, the above named assailants fled away.

3. The arguments advanced by the learned counsel for the petitioners, learned counsel for the complainant as well as the learned Additional Prosecutor General have been heard and the record has been perused.

4. Admittedly, Altaf Hussain and Muhammad Ishaq alias Ballu (petitioners Nos. 1 and 2) were empty handed. The allegations against them are that they had caught hold of the complainant and beaten him, but during medical examination, no such injury at the person of the complainant could be found.

5. The prosecution story is that Ghulam Abbas (petitioner No. 3) by firing with 12 bore repeater has caused injury at left knee of the complainant, but during medical examination, no firearm injury to the complainant has been

found, rather an incised wound at the back of left leg of the complaint was observed being caused with sharp edged weapon.

6. In the above stated situation, the contention of the prosecution regarding firearm injury to the complainant, by Ghulam Abbas (petitioner No. 3) could not be confirmed.

7. It has been observed that to re-examine the above mentioned injury of the complainant, a standing Medical Board was constituted, which had again examined the complainant, but the above mentioned findings made during first examination that the injury at the complainant was inside in nature and caused by a sharp edged weapon, was confirmed.

8. The above mentioned contradictions in the alleged prosecution story and the medical evidence has not only shaken whole of the prosecution version, but also made the case against the petitioners as of further inquiry.

9. It has been held by the superior courts in a number of judgments that even pre-arrest bail can be granted to an accused if his case is found to be of further inquiry, because no useful purpose will be served in sending him behind the bars just for a few days. Reliance in this regard may be placed on the cases reported as "Farhat Husain Shah and another v. The State and others" (2010 SCMR 1986), "Ghulam Mohi-ud-Din Shah v. Hafiz Muhammad Ramzan and others" (2007 SCMR 1931) and "Kh. Masood-ul-Hassan v. The State and another" (2013 PCr.LJ 1420).

10. For what has been discussed above, the petition in hand is accepted and the ad interim pre-arrest bail already granted to the above named petitioners is confirmed subject to their furnishing fresh bail bonds in the sum of

Rs.1,00,000 (Rupees one lac only) each, with one surety each, in the like amount to the satisfaction of the learned trial Court.

MH/A-130/L Bail allowed.

2014 P Cr. L J 1133
[Lahore]
Before Muhammad Tariq Abbasi, J
ABDUL SATTAR KHAN---Petitioner
Versus
The STATE and others---Respondents

Criminal Revision No.117 of 2013, heard on 19th March, 2014.

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

----Ss. 200, 435 & 439-A---Revision petition filed against dismissal of a private complaint by the Judicial Magistrate---Forum---Although under S. 439-A, Cr.P.C. the Sessions Court concerned also had power to entertain a revision petition (filed against dismissal of a private complaint by the Judicial Magistrate), however if such a revision petition was filed (directly) before the High Court, even then it was quite competent and maintainable.

Haji Jamil Hussain v. Illaqa Magistrate Section 30, Multan and 7 others 2012 PCr.LJ 159 ref.

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

----S. 200---Private complaint---Examination of complainant by the Magistrate---Scope---Complainant must bring on record whatever substance and material he had for evaluation by the Magistrate.

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

----Ss. 200, 202, 203 & 204--- Private complaint--- Dismissal of complaint or issue of process, order for---Material/evidence to be considered by Judicial Magistrate before passing such orders---Order under S. 203 or S.204, Cr.P.C. should be made only while considering the material brought on record during cursory evidence and that which was a result of investigation or inquiry, if any, under S. 202, Cr.P.C.---No other material was to be considered for such purposes---Where Judicial Magistrate dismissed private complaint on the basis of material, which was not on the file of the private complaint, but part

of the State case, which already had been cancelled, then such an order would not be valid and justified.

Mian Fazal Hussain Bhatti for Petitioner.

Hassan Mehmood Khan Tareen, D.P.-G. and Mazhar Jamil Qureshi, A.A.-G. for the State.

Ch. Liaqat Ali Gujjar for Respondents Nos.2 to 5.

Date of hearing: 19th March, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this Criminal Revision, the order dated 1-3-2013, passed by the learned Judicial Magistrate, Jehanian, District Khanewal has been called in question.

2. Through the above-mentioned impugned order, a private complaint filed by the petitioner, against the respondents Nos. 2 to 4 has been dismissed.

3. The learned counsel for the petitioner has argued that it was the duty of the learned Judicial Magistrate to pass an order, towards summoning of the respondents, named in the private complaint or otherwise, on the basis of the material, brought on the record during cursory statements, but instead of adopting the prescribed procedure, the learned Judicial Magistrate, had passed the impugned order, on the basis of the facts and circumstances, which were not available on the record of the private complaint, hence the said order is not sustainable in the eye of law.

4. The learned Deputy Prosecutor-General appearing on behalf of the State and the learned counsel for the respondents Nos. 2 to 5 have seriously opposed the revision petition, with the contention that the impugned order being well-reasoned is not open to any exception and as such the petition is liable to be dismissed.

5. Arguments of all the sides have been heard and the record has been perused.

6. The record shows that on the complaint of the present petitioner, an F.I.R. No. 339 dated 11-7-2012, under section 394, P.P.C. at Police Station Jehanian, District Khanewal was registered against the respondents Nos. 2 to 5. During the investigation, the F.I.R. was found to be false, hence recommended for cancellation and accordingly the cancellation report was prepared by the Police and submitted in the court of learned Judicial Magistrate, Jehanian.

7. When the petitioner came to know, the above stated situation, he preferred a private complaint, which was duly entertained by the learned Judicial Magistrate, Jehanian. The cursory statements of the petitioner and one Abid Mehmood were recorded as P.W.1 and P.W.2 respectively. Thereafter, the learned Judicial Magistrate had passed the impugned order and dismissed the complaint, on the grounds that the report of Radiologist and District Medical Board had not confirmed the alleged injuries and declared the same to be self-inflicted and that as per the report of the Investigating Officer, there was previous enmity between the parties and the present petitioner was an accused in a criminal case, got lodged by the respondents' side and that to force for compromise, a false occurrence was concocted, hence the allegations were false.

8. It has been observed that against the impugned order, passed by the learned Judicial Magistrate, the instant revision petition has directly been filed before this court. Although under section 439-A of Cr.P.C., the Sessions Court concerned has also power to entertain the matter under revisional jurisdiction, but there is no denial of the fact that under sections 435 and 439 of Cr.P.C., this court has vast powers to watch proceedings of the subordinate courts, under revisional jurisdiction. Through section 439-A of Cr.P.C., the revisional powers were extended to the Sessions Courts to lower the burden of the High Courts. Therefore if the instant revision petition has directly been filed before this court, then no strange has been committed and the revision petition in hand is quite competent and maintainable. In this regard, reference may be

made to a judgment of this Court reported as "Haji Jamil Hussain v. Illaqa Magistrate Section 30, Multan and 7 others" (2012 PCr.LJ 159).

9. Section 200 of Cr.P.C., prescribes a procedure for entertaining a private complaint. The said provision speaks as under:--

"Examination of complainant. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:

Provided as follows:

(a) when the complaint is made in writing nothing herein contained shall be deemed to require a Magistrate to examine the complaint before transferring the case under section 192 [or sending it to the Court of Session].

[(aa) when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complainant has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties:]

(b) * * * * *

(c) when the case has been transferred under section 192 and the Magistrate so transferring it has already examined the complainant, Magistrate to whom it is so transferred shall not be bound to re-examine the complainant."

10. From the above-mentioned provision, it is quite clear that on receiving a private complaint, the concerned Judicial Magistrate shall immediately examine the complainant on oath and his statement shall be reduced into writing, which shall be signed by him as well as the Magistrate. Meaning thereby that whichever the substance and the material the complainant has, must be brought on the record, for evaluation by the Magistrate.

11. According to the section 203 of Cr.P.C., the court, before whom a complaint is made or transferred, can dismiss it. The said section reads as under:--

"Dismissal of complaint. [The Court] before whom a complaint is made or to whom it has been transferred or [sent] may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry if any under section 202 there is in his judgment no sufficient ground for proceeding in such case he shall briefly record his reasons for so doing."

12. Section 204 of Cr.P.C., deals with issuance of process. It is reproduced herein below:--

"Issue of process.---(1) If in the opinion of a [Court] taking cognizance of an offence there is sufficient in which, according to the fourth column of the second schedule a summons should issue in the first instance, [it] shall issue its summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, [it] may issue a warrant, or, if, [it] thinks fit, a summons for causing the accused to be brought or to appear at a certain time before such court or (if [it] has no jurisdiction [itself]) some other Court having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provision of section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the [Court] may dismiss the complaint."

13. From the above mentioned, it is clear that an order under section 203 or 204 of Cr.P.C. shall be made only from the above-mentioned, it is clear that after considering the material brought on the record, during cursory evidence and the result of the investigation or inquiry, if any under section 202 of Cr.P.C. and nothing else.

14. It has been observed that in the matter in hand, the statements of the complainant and Abid Mehmood, recorded during cursory evidence as P.W.1 and P.W.2 were on the record and before the learned Judicial Magistrate,

which, for the purpose of section 203 or 204 of Cr.P.C. should have considered, evaluated and then an appropriate order should have been passed, but it has been found that while passing the impugned order, the learned Judicial Magistrate has not even touched the above mentioned evidence and has preferred to pass the order on the basis of the material, which was not in the file of the complaint, but part of the State case, which was already cancelled and while dissatisfying the private complaint was preferred.

15. As a result of the above mentioned discussion, the impugned order could not be termed, requirement of the law and procedure and as such could not be held valid and justified.

16. Consequently, while accepting the instant revision petition, the impugned order is set aside, with a direction to the learned Judicial Magistrate to strictly follow the above-mentioned procedure and then pass an appropriate order, afresh.

MWA/A-61/L Petition allowed.

2014 P Cr. L J 1146
[Lahore]
Before Muhammad Tariq Abbasi, J
MUREED HUSSAIN---Petitioner
Versus
ADDITIONAL SESSIONS JUDGE/JUSTICE OF PEACE JAMPUR and 3 others---Respondents

Writ Petition No.9076 of 2013, heard on 25th March, 2014.

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

----Ss. 22-A, 22-B & 154---Ex-Officio Justice of Peace---Calling of police report before issuing directions for registration of F.I.R.---Scope---Ex-Officio Justice of Peace was not bound to seek report from the police at every cost and he was fully competent to decide the application and pass an order, even without any report by the police---However when a report was called, to know the truth and real facts, then the same should not be ignored---Where Ex-Officio Justice of Peace did not agree with the police report, then he should give reasons for doing so---Seeking and obtaining a police report but subsequently ignoring the same and passing an order, contrary to it, without assigning any reason could not be appreciated---Special care was required in such a situation.

Khizar Hayat and others v. Inspector-General of Police (Punjab) Lahore and others PLD 2005 Lah. 470 rel.

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

----Ss. 22-A & 22-B--- Constitution of Pakistan, Art. 199---Constitutional petition---Ex-Officio Justice of Peace calling for police report but ignoring same without assigning any reasons---Legality---Ex-Officio Justice of Peace failed to give weight to the police report, (which he himself called for) and failed to even discuss same and preferred to issue directions to police for recording statement of complainant under S. 154, Cr.P.C.---Police report was important so that real facts came on the record, but in the present case, Ex-Officio Justice of Peace sought report from police and despite its availability, ignored the same and failed to give reasons for not believing the same---Record showed that allegations made by complainant were not true---Police report showed that complainant's son was involved in an F.I.R. lodged by the accused-petitioner, therefore possibility of moving an application before Ex-Officio Justice of Peace for registration of case against petitioner-accused

while concocting a false story could not be ruled out---Constitutional petition was allowed and impugned order of Ex-Officio Justice of Peace was set aside and application for registration of case was dismissed.

Nasir-ud-Din Mahmood Ghazlani for Petitioner.

Hafiz Muhammad Naveed Akhtar for Respondent No.2.

Mazhar Jamil Qureshi, A.A.-G. with Abdul Rehman, A.S.-I. for the State.

Date of hearing: 25th March, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This writ petition is directed against the order dated 25-7-2013, passed by the learned Ex-Officio Justice of Peace (respondent No.1), whereby in an application moved by respondent No.4, for registration of a criminal case against the present petitioner, a direction to the SHO has been made that he should record statement of the respondent No.4, under section 154 of Cr.P.C. and perform the statutory duties.

2. It has been observed that abovementioned application has been made with the contention that Mumtaz Ahmad son of respondent No.4 was serving with the present petitioner but due salary was not paid to him; that when the son of the respondent No.4 demanded his salary, the petitioner levelled false allegations of committing theft, from his petrol pump and expelled the son of respondent No.4, from the employment; that Sajjad Ahmad another son of respondent No.4 returned home, but Mumtaz Ahmad did not come; that when despite lapse of four days, Mumtaz Ahmad, son of respondent No.4 did not return home, he was worried and started searching and when contacted the present petitioner, he made threats of dire consequences and that the above-named was confined by the present petitioner.

3. It has been noticed that when the matter in shape of the above-mentioned application came before the Ex-Officio Justice of Peace, a report was sought from the concerned police station, which was made and filed. According to the report, the sons of respondent No.4 namely Sajjad Ahmad and Mumtaz Ahmad, were involved in case F.I.R. No.268 dated 20-7-2013, registered under section 381, P.P.C. at Police Station, Muhammad Pur, who did not join into investigation and that the respondent No.4 while concocting a false story had filed the abovementioned application.

4. It has been found that the learned Ex-Officio Justice of Peace has failed to give any weight to the above-mentioned report, made by the police or even discuss it and preferred to pass the impugned order.

5. The purpose of the report/comments from the police has been described in detail in the case titled "Khizar Hayat and others v. Inspector General of Police (Punjab) Lahore and others", reported as (PLD 2005 Lahore 470) in the following terms:--

"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 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 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 the Peace should exercise caution and restraint in this regard and he may 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 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. The above-mentioned dictum clearly indicates importance of the report of the police, so that real facts, should come on the record, but in the matter in hand, as stated above, the learned Ex-Officio Justice of Peace, although has sought report from the police but despite its availability on the record, has ignored it and failed to give any reason for not believing the same.

7. An Ex-Officio Justice of Peace is not bound to seek report from the police at every cost and he is fully competent to decide the application and pass an order, even without any report by the police. But when a report is called, to know the truth and real facts, as per the above-mentioned dictum, then it

should not be ignored. If Ex-Officio Justice of Peace does not agree with the report, then should give the reasons. Seeking and obtaining a police report but ignoring and passing an order, contrary to it, without assigning any reason could not be appreciated. Special care to this situation is required.

8. The record shows that on 25-6-2013, Mumtaz Ahmad, the alleged abductee was available before the learned Magistrate Section-30, Jampur, in case F.I.R. No.464 dated 27-9-2009, registered under sections 324, 381-A, 148/149 of P.P.C. at Police Station, Fazilpur. Therefore, the application moved by the respondent No.4, before the DPO Rajanpur on 27-6-2013 that his above-named son was kept in illegal confinement by the petitioner for last for 3/4 days, has been found to be not true.

9. It has further been noticed that Mumtaz Ahmad, was involved in case F.I.R. No.268 dated 20-7-2013 registered under section 381 of P.P.C. at Police Station, Muhammad Pur, District Rajanpur on the complaint of the present petitioner towards commission of the theft at his petrol pump. Therefore, possibility of moving above-mentioned application for registration of the case while concocting false story and to get rid of the above-mentioned criminal case could not be ruled out.

10. Resultantly, the instant writ petition is accepted, the impugned order is set aside and the application for registration of the case is dismissed.

11. Despite of the abovementioned, the respondent No.4, if so advised, shall have the remedy of filing a private complaint, according to the dictum laid down in the cases reported as KHIZER HAYAT and others v. INSPECTOR-GENERAL OF POLICE (PUNJAB), LAHORE and others (PLD 2005 Lahore 470) and RAI ASHRAF and others v. MUHAMMAD SALEEM BHATTI and others (PLD 2010 SC 691).

MWA/M-137/L Petition accepted.

2014 P Cr. L J 1352
[Lahore]
Before Muhammad Tariq Abbasi, J
NASIR HUSSAIN---Petitioner
Versus
The STATE and others---Respondents

Criminal Revision No.218 of 2013, heard on 13th May, 2014.

Criminal Procedure Code (V of 1898)---

----Ss. 464, 465 & 466---Penal Code (XLV of 1860), S.302---Qatl-e-amd---Plea of mental illness---Prayer for constitution of Medical Board---Petitioner/accused who claimed to be suffering from serious mental illness prior to the occurrence, filed application to the effect that to determine his mental health, Medical Board be constituted; and that record of Institute of Mental Health in which he remained admitted be summoned---Said application of accused, having been dismissed by the Trial Court---Validity---Trial Court, which firstly had to know about mental condition of accused, had already carried on the preliminary inquiry towards the mental status of accused---Trial Court had directed to obtain opinion of psychiatrists, for which MRI and EEG of brain of accused were carried on---When every thing was found to be healthy, Trial Court, while dismissing the application of accused, deemed it proper to proceed further, and held the accused to be fit to face the trial---Report of Pakistan Institute of Medical Science, available on record indicated that the result of MRI of accused was normal---Accused had not urged that at the time of commission of alleged occurrence, he was suffering from any mental disease, entitling him for any special concession---Trial Court had discussed in the impugned order, each and every aspect of the case, and when accused was found to be fit to face the trial, his application was dismissed---Revision against dismissal of application being devoid of any force, was dismissed, in circumstances.
Atta Muhammad v. The State PLD 1960 (W.P.) Lahore 111 and Jalal Din v. The State 1968 PCr.LJ 187 ref.
Imran Haider for Petitioner.
Qaisar Mushtaq, A.D.P.P. for the State.
Fauzia Nazir for Respondent No.3.
Date of hearing: 13th May, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the order dated 26-10-2013 passed by the learned Sessions Judge, Rawalpindi, whereby an application, moved by the petitioner for constitution of a medical board, to determine his physical/mental condition and summoning of the record relating to him, from Punjab Institute of Mental Health, Lahore, has been dismissed.

2. The facts are that the petitioner is facing trial in a case F.I.R. No.66 dated 2-3-2013 registered under section 302 of P.P.C. at Police Station, Kallar Syedan, District Rawalpindi. He moved the above mentioned application, with the contention that prior to occurrence, he remained admitted in Pakistan Institute of Mental Health, Lahore from 23-1-2012 to 5-4-2012 for rehabilitation and treatment; that he is suffering from serious mental illness, hence to determine his mental health, medical board may be constituted. The learned trial Court has dismissed the said application moved by the petitioner. Hence the instant revision petition.

3. Arguments heard and record perused.

4. It has been observed that the learned trial Court, to know the mental health of the petitioner, directed the Superintendent of Central Jail, Rawalpindi to obtain report of the Psychiatrists, about mental condition of the accused/petitioner, on his visit to Central Jail, Rawalpindi. Consequently the due proceedings were carried on, during which, MRI and EEG of brain of the petitioner/accused were conducted, but found to be normal.

5. The plea agitated by the petitioner/accused has to be seen in the light of provisions applicable to such situation i.e. sections 464, 465 and 466 of Cr.P.C. Section 465 of Cr.P.C. deals with a situation, when a person facing the trial before the Court of Session or High Court is found to be a lunatic. The said provision reads as under:--

"465. Procedure in case of person [sent for trial] before Court of Session or High Court being lunatic.---(1) If any person before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Court shall;. in the first instance, try the fact of such unsoundness and incapacity, and if the Court is

satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case."

6. The plain reading of the above mentioned provision shows that the trial Court, firstly has to determine if an accused is of unsound mind and consequently incapable of making his defence and if the court is satisfied of the fact, it shall make a finding to the said effect and postpone further proceedings in the case.

7. In the case of Atta Muhammad v. The State PLD 1960 (West Pakistan) Lahore 111, it was held, after drawing a fine comparison in sections 464 and 465, Cr.P.C. as under:--

"The legal position which emerges from the two sections is that under section 464 of Cr.P.C. 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."

8. A keen and careful reading of the above quoted paragraph would indicate that it is the court which firstly has to know about mental condition of an accused, facing trial before it.

9. In the matter in hand, the plea of the petitioner/accused is that, he remained admitted in a hospital for rehabilitation and treatment, hence record from the said hospital may be summoned and medical board for determination of his mental health may be constituted.

10. The learned trial Court has already carried on the preliminary inquiry, towards the mental status of the petitioner/accused, during which directed opinion of Psychiatrists, for which MRI and EEG of brain of the petitioner/accused were carried on and when everything was found to be healthy, while dismissing the application of the petitioner, deemed it proper to proceed further and held the petitioner/accused to be fit to face the trial.

11. A report of Pakistan Institute of Medical Sciences, attached with the report of Superintendent Central Jail, Rawalpindi is also available in this file, which indicates that the result of MRI of the petitioner/accused is normal.

12. At present, the case of the petitioner/accused is not at all that at the time of commission of the alleged occurrence, he was suffering from any mental disease, hence entitled for any special concession. The only stance of the petitioner/accused is that to know his mental condition, his medical check-up may be got conducted. The said check-up has accordingly been carried on and no defect in present mental status of the petitioner/accused has been found, hence the learned trial Court has rightly proceeded for subsequent proceedings in the trial.

13. The Hon'ble Supreme Court of Pakistan in the judgment reported as 1968 PCr.LJ (SC) 187 titled Jalal Din v. The State has held that burden of proof of insanity, lies on the accused. It was further held in the judgment (supra) that under section 84 of P.P.C., the crucial point of time at which unsoundness of mind should be established, is the time when the act constituting the offence is committed.

14. The learned trial Court has discussed in the impugned order, each and every aspect of the case and when found the petitioner to be fit to face the trial, accordingly dismissed the application.

15. Due to all the above mentioned, the instant Criminal Revision, being devoid of any force and merit is dismissed.

HBT/N-26/L Petition dismissed.

2014 P Cr. L J 1795

[Lahore]

Before Muhammad Tariq Abbasi, J

NAZIM HAYAT---Petitioner

Versus

GHULAM HASSAN and 2 others---Respondents

Writ Petition No.1549 of 2014, decided on 18th June, 2014.

(a) Administration of justice---

----Doing of an act---Principle---If law prescribes an act to be done in a particular manner, then it must be done in the prescribed manner or should not be done at all.

Raja Hamayun Sarfraz Khan and others v. Noor Muhammad 2007 SCMR 307; Muhammad Akram v. Mst. Zainab Bibi 2007 SCMR 1086 and Tehsil Nazim TMA, Okara v. Abbas Ali and 2 others 2010 SCMR 1437 rel.

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

----Ss. 205 & 540-A--- Constitution of Pakistan, Art. 199---Constitutional petition---Personal attendance, dispensing with---Non-appointing of pleader---Personal appearance of accused was dispensed with by Trial Court during trial of private complaint, without appointing any pleader--- Validity---Exemption from personal appearance of accused could only be granted if he was represented by pleader who had to undertake before Court to be available on behalf of the accused---Trial Court while ignoring such mandatory procedure passed the order---High Court in exercise of Constitutional jurisdiction set aside application filed by accused for his exemption from personal attendance, as the same was not according to mandate/provisions of law---Petition was allowed in circumstances.

Sardar Muhammad Ijaz Khan for Petitioner.

Raja Muhammad Hameed, A.A.-G. for Respondents.

ORDER

MUHAMMAD TARIQ ABBASI, J.---This writ petition is directed against the orders dated 16-4-2014 and 15-5-2014, respectively passed by the learned Judicial Magistrate, Jand and the learned Additional Sessions Judge, Jand of District Attock.

2. Through the above mentioned earlier order dated 16-4-2014, an application moved by Ghulam Hussain (respondent No.1), for dispensation from personal appearance has been accepted and his personal appearance has been dispensed

with. Whereas through the above said lateral order, a revision petition, filed by the petitioner, challenging the above mentioned order of the learned Judicial Magistrate has been dismissed.

3. The facts are that in a private complaint, filed by the present petitioner, against Sultan, Ghulam Hussain (respondent No. 1) and Abdul Ghaffar, under sections 382, 506(ii)/34, P.P.C., all the above named accused were summoned by the learned Judicial Magistrate to face the trial. Thereafter, Ghulam Hussain (respondent No. 1) preferred an application, before the learned Judicial Magistrate, whereby he sought dispensation of his personal appearance, on the grounds that due to his employment at Karachi, he was unable to personally attend the court, hence may be exempted and that in the said eventuality, his co-accused will keep in appearing, in the court, also on his behalf. The learned Judicial Magistrate through the order dated 16-4-2014 had accepted the above mentioned application and exempted personal appearance of the respondent No. 1, subject to the condition that his brother namely Abdul Ghaffar will be bound to appear on his behalf.

4. The petitioner while challenging the above mentioned order had filed a revision petition, before the learned Additional Sessions Judge, Jand, but dismissed on 15-5-2014. Consequently the writ petition in hand.

5. Arguments heard and the record perused.

6. In the Criminal Procedure Code, 1898, there are two provisions, under which, personal appearance of an accused can be dispensed with. Those provisions are sections 205 and 540-A of Cr.P.C. For convenience, both the said provisions are reproduced herein below:--

Section 205

"Magistrate may dispense with personal attendance of accused.---(1) Whenever a Magistrate issues a summons, he may, if he sees reasons so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore-provided."

Section 540-A

"Provision of inquiries and trial being held in the absence of accused in certain cases.---(1) At any stage of an inquiry or trial under this code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied for reasons to be recorded, that any one or more of such accused is or

incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

7. In both the above mentioned provisions, besides other conditions, one mandatory is that the accused must be represented by his pleader, who should make an undertaking before the learned trial Court that he, on behalf of the accused shall join into the proceedings and keep in appearing on each and every date of hearing. In the situation in hand, in the application, whereby the respondent No. 1 had sought exemption from personal appearance, he had contended that on his behalf, his co-accused will appear in the court. The learned trial Court in the order dated 16-4-2014 had also granted the exemption and allowed Abdul Ghaffar, brother of the respondent No. 1 to appear on his behalf.

8. Firstly, mentioning in the application that in case the exemption is granted, the co-accused of the respondent will appear in the court on his behalf, was not the requirement of the above mentioned provisions. Secondly, it was mandatory for the learned trial Court to know the relevant law on the subject and while relying on it, an order should have been passed. But it has been observed that the learned trial Court had granted the exemption to the respondent No. 1 and allowed his brother namely Abdul Ghaffar to join into the proceedings on his behalf, which at all was not the mandate of the provisions highlighted above.

9. It is well settled principle of law that if law prescribes an act to be done in a particular manner, then it must be done in the prescribed manner or should not be done at all. Reliance in this respect is respectfully placed upon the judgments reported as "Raja Hamayun Sarfraz Khan and others v. Noor Muhammad" (2007 SCMR 307), "Muhammad

Akram v. Mst. Zainab Bibi" (2007 SCMR 1086), "Tehsil Nazim TMA, Okara v. Abbas Ali and 2 others" (2010 SCMR 1437).

10. In the situation in hand, as stated above, the law on the subject clearly prescribes that an exemption from personal appearance of an accused could only be granted if he is represented by a pleader, who undertakes before the Court to be available on behalf of the accused. But the learned trial Court while ignoring the said mandatory procedure has passed the above mentioned order in the above stated manner.

11. The learned Additional Sessions Judge was supposed to watch the proceedings of the courts subordinate to it, and if any deviation from a procedure or law is noted, to cure the defect and bring the concerned court at right path. But unfortunately, when the above mentioned erroneous and unwarranted proceedings of the learned trial Court had been brought before the learned Additional Sessions Judge in shape of a revision petition, he instead of realizing the above mentioned defect committed by the learned trial Court and curing it, in a mechanical and slipshod manner had affixed stamp of confirmation on the above mentioned erroneous findings made by the learned trial Court and dismissed the revision petition.

12. It is expected that herein after, the learned trial Court will sit in the chair with open eyes and the mind and also the learned Additional Sessions Judge being Appellate Authority shall be vigilant about the proceedings carried on by the courts subordinate to it and shall act as a true supervisor/watcher, so that in future, any instant like matter may not come before this Court.

13. For what has been discussed above, the writ petition in hand is accepted, the above mentioned impugned orders are set aside and the application moved by the respondent No. 1 for exemption of his personal appearance being not according to the above mentioned mandate/provision is dismissed. However, if the respondent No. 1 files any fresh petition, while fulfilling the required criteria, then should be entertained, proceeded with and decided on merits, without being prejudiced from the above mentioned findings.

MH/N-45/L Petition allowed.

2014 P L C 275
[Lahore High Court]
Before Muhammad Tariq Abbasi, J
Messrs SYNGENTA PAKISTAN LTD. through Authorized Officer and another
Versus
MUHAMMAD FIAZ and 4 others

Writ Petition No.15716 of 2013, heard on 22nd January, 2014.

Punjab Industrial Relations Act (XIX of 2010)---

----Ss. 33(4) & 44(4)(g)---Constitution of Pakistan, Art. 199---Constitutional petition---Termination---Interim relief---Suspension of termination order---Scope---Workman challenged his termination order before Labour Court through grievance petition---Labour Court, on the application of interim relief filed by workman, suspended the impugned termination order---Employer/petitioner aggrieved by the temporary injunction given by Labour Court filed revision petition before Labour Appellate Tribunal which was also dismissed---Contention of the petitioner/employer was that temporary injunction granted by Labour Court would amount giving of the final relief, therefore the interim relief was not justified---Validity---Interim relief should not be the whole relief that the workman would get if he succeeded finally---Interlocutory order granting a relief of the nature, which would amount to allowing the main case without trial was not justified---Order of Labour Court suspending the order impugned in the main petition could not be termed to have been passed while exercising lawful authority---Impugned orders were set aside---Constitutional petition was allowed.

Delhi Cloth and General Mills Co. v. Shri Rameshwar Dayal and another AIR 1961 SC 689; Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Zaman Khan and others 1997 SCMR 1508 and Qazi Inamul Haq v. Heavy Foundry and Forge Engineering (Pvt.) Ltd. and another 1989 SCMR 1855 rel.

Shahid Anwar Bajwa for Petitioners.
Ch. Muhammad Siddique Attique for Respondents Nos.1 to 3.
Date of hearing: 22nd January, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--- Through the instant writ petition the order dated 29-1-2013 passed by the learned Labour Court No.X, Sahiwal and the judgment dated 29-10-2013 delivered by the learned Labour Appellate Tribunal No.II, Multan have been called in question.

2. The facts leading to filing of the instant writ petition are that the respondents Nos.1 to 3 filed grievance petition under section 33(10) of the Punjab Industrial Relations Act, 2010 before the Punjab Labour Court No.X, Sahiwal, whereby the orders dated 24-9-2012 and 20-12-2012 of the petitioners towards termination of the respondents Nos.1 to 3 from their employment with the petitioners at warehouse, Sahiwal were challenged to be illegal, against procedure and liable to cancelled. The said petition was taken up by the learned Presiding Officer of the Labour Court on 29-1-2013, when notices to the present petitioners were issued for 25-2-2013. On the same day, the learned Presiding Officer also proceeded with the application moved for grant of temporary injunction and suspended the above mentioned orders which were challenged in the above said grievance petition. Feeling aggrieved, the petitioners approached the learned Punjab Labour Appellate Tribunal No.II, Multan in shape of revision petition, but dismissed through judgment dated 29-10-2013. Consequently the petition in hand.

3. Arguments advanced by the learned counsel for the petitioners as well as learned counsel for the respondents Nos.1 to 3 have been heard and the record has been perused.

4. The main objection is that the learned Presiding Officer of the Labour Court at the first stance as interim relief, while suspending the orders dated 24-9-2012 and 20-12-2012, which were impugned in the grievance petition, in fact had granted, the main relief claimed in the grievance petition, which at all was not acceptable and permissible under the law.

5. The point in issue before this Courts is whether the suspension of the orders dated 24-9-2012 and 20-12-2012, in application for grant of temporary injunction would amount giving of the relief claimed in the main petition and is justified or otherwise.

6. The instant like situation, in shape of an appeal titled 'The Delhi Cloth and General Mills Co. v. Shri Rameshwar Dayal and another' came up before the Supreme Court from Punjab (India) in the year 1960 and decided through a judgment reported in AIR 1961 Supreme Court 689, relevant portion whereof is reproduced as under:---

"Therefore, when a tribunal is considering a complaint under S.33-A and it has finally to decide whether an employee should be reinstated or not, it is not open to the tribunal to order reinstatement as an interim relief, for that would be giving the workman the very relief which he could get only if on a trial of the complaint the employer failed to justify the order of dismissal. The interim relief ordered in this case was that the workman should be permitted to work: in other words he was ordered to be reinstated; in the alternative it was ordered that if the management did not take him back they should pay him his full wages. We are of opinion that such an order cannot be passed in law as an interim relief, for that would amount to giving the respondent at the outset the relief to which he would be entitled only if the employer failed in the proceedings under S.33-A. As was pointed out in Hotel Imperial's case, AIR 1959 SC 1342 ordinarily, interim relief should not be the whole relief that the workmen would get if they succeeded finally. The order therefore of the tribunal in this case allowing reinstatement as an interim relief or in lieu thereof payment of full wages is manifestly erroneous and must therefore be set aside. We therefore allow the appeal, set aside the order of the High Court as well as of the tribunal dated May 16, 1957, granting interim relief."

7. The august Supreme Court of Pakistan while deciding the case titled 'Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Zaman Khan and others' reported in 1997 SCMR 1508 had held that through an interlocutory order, granting a relief of the nature, which will amount to allowing the main case without trial will not be justified. The relevant portion of the said judgment is reproduced herein below:---

"As regards the merits of the case, it may be pointed out that it is a well-settled proposition of law that the object of passing of an interlocutory order or status-quo is to maintain the situation obtaining on the date when the party concerned approaches the Court and not to create a new situation. Another well settled principle of legal jurisprudence is that generally a Court cannot

grant an interlocutory relief of the nature which will amount to allowing the main case without trial/hearing of the same. In this regard, reference may be made to the judgment of this Court in the case of 'Qazi Inamul Haq v. Heavy Foundry and Forge Engineering (Pvt.) Ltd. and another' 1989 SCMR 1855, in which the petitioner had been prematurely retired from service. He filed a suit and obtained a temporary injunction from a learned Civil Judge, which was vacated by a learned Additional District Judge. The petitioner then preferred a revision petition before the High Court of Sindh, which was declined for the following reasons:---

(a) The order of retirement had already taken effect before the civil suit was instituted to challenge it; and

(b) even if the petitioner had merely an arguable case, the other two essential factors, i.e. presence of balance of convenience, which is in fact balance of inconvenience and causing of irreparable loss did not exist."

8. From the above mentioned dictums, it has been confirmed that an interlocutory order amounting, grant of main relief should not be passed. Consequently the order dated 29-1-2013 passed by the learned Presiding Officer of the Labour Court, whereby without giving notice to the present petitioners and affording them opportunity of hearing, the orders impugned in the main petition have been suspended, could not be termed to have been passed while exercising lawful authority. Consequently, by accepting the instant writ petition, the said order i.e. 29-1-2013 as well as the impugned judgment dated 29-10-2013 are set aside. The learned Presiding Officer of Punjab Labour Court No.X Sahiwal, is directed to decide the matter within four months positively, from the receipt of this judgment.

JJK/S-13/L Petition accepted.

P L D 2014 Lahore 574

Before Muhammad Qasim Khan and Muhammad Tariq Abbasi, JJ

TALIB HUSSAIN---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous Nos.84-M, 625-M, 450-M, 937-M of 2013 and 40-M, 81-M and 127-M of 2014, decided on 24th June, 2014.

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

----S. 426(2B)---Suspension of sentence---History of insertion of S.426(2B), Cr.P.C. and amendments therein traced.
Lala Jairam Das and others v. Emperor AIR (32) 1945 PC 94 ref.

(b) Constitution of Pakistan---

----Art. 185(3)---Supreme Court Rules, 1980, O.XIII & XXIII---Leave to appeal, grant of---Grant of leave to appeal was only the prerogative of the Supreme Court---No law in the country provided any authority to any High Court to issue leave to appeal, in any manner.

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

----S. 426(2B)---Constitution of Pakistan, Art.185(3)---Supreme Court Rules, 1980, O.XXIII---Suspension of sentence---Grant of leave to appeal by the Supreme Court---When against any sentence, imposed or maintained by a High Court, a convicted person was granted special leave to appeal by the Supreme Court then under S.426(2B), Cr.P.C. a High Court, pending the appeal before the Supreme Court, may suspend the sentence or order appealed against, and release the convict on bail.

Syed Badar Raza Gillani and Muhammad Waseem Sarwar for Petitioners (in Crl.Misc.No.84-M of 2013).
Muhammad Aqeel for the Complainant (in Crl.Misc.No.84-M of 2013).
Prince Rehan Iftikhar Sheikh for Petitioners (in Crl. Misc.No.625-M of 2013).
Ch. Faqir Muhammad for the Complainant (in Crl. Misc.No.625-M of 2013).

Prince Rehan Iftikhar Sheikh for Petitioners (in Crl. Misc.No.450-M of 2013).
Muhammad Naeem Iqbal for the Complainant (in Crl. Misc.No.450-M of 2013).

Ch. Imran Khalid Amartasri for Petitioner (in Crl. Misc.No.127-M of 2014).
Muhammad Bilal Butt for the Complainant (in Crl. Misc.No.127-M of 2014).
Sardar Muhammad Sarfraz Dogar for Petitioner (in Crl. Misc.No.937-M of 2013).

Ch. Shakir Ali for the Complainant (in Crl. Misc.No.937-M of 2013).
Miss Fozia Kausar (in Crl. Misc.No.40-M of 2014).
Miss Fozia Kausar (in Crl. Misc.No.81-M of 2014).
Muhammad Ali Shahab, Deputy Prosecutor-General and Malik Muhammad Jaffar, Deputy Prosecutor-General for Respondents.
Date of hearing: 12th March, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single order is intended to decide (i) Crl. Misc. No.84-M/2013 "TALIB HUSSAIN v. THE STATE, ETC", (ii) Crl. Misc. No.625-M/2013 "AMJAD FAROOQ v. THE STATE, ETC", (iii) Crl. Misc. No.450-M/2013 "ANWAAR v. THE STATE, ETC", (iv) Crl. Misc. N0.127-M/2014 "MUHAMMAD SAFDAR v. THE STATE, ETC", (v) Crl. Misc. No.937-M/2013 "QAZAFI v. THE STATE, ETC", (vi) Crl. Misc. No.40-M/2014 "MUHAMMAD BILAL v. THE STATE, ETC" and (vii) Crl. Misc.No.81-M/2014 "MUHAMMAD ASLAM v. THE STATE, ETC" as all these petitions have been filed under section 426(2B) Cr.P.C. to seek suspension of sentence, after grant of leave to appeal by the Hon'ble Supreme Court of Pakistan in respective cases, and involve similar question of law relating to an objection raised by the learned Deputy Prosecutor General .that an application under section 426(2B) of Cr.P.C. is only competent, before the High Court, if it at the time of deciding an appeal, imposes or maintains the sentence and grants Special Leave to Appeal to the Supreme Court of Pakistan.

2. For convenience the above mentioned provision is re-produced herein below:-
"426. Suspension of sentence pending appeal. Release of appellant on bail.—

(1) Pending any appeal by a convicted *person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

[(2-A) [Subject to provisions of section 382-A] When any person other than a person accused of a non-bailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court, may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail, for a period sufficient in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under subsection (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.]

[(2-B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to [the [Supreme Court]] against any sentence which it has imposed or maintained, it may, if it is so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if the said person is in confinement, that he be released on bail.]

(3) When the appellant is ultimately sentenced to imprisonment or [imprisonment for life] the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

3. Subsection (2B) of section 426 was inserted in the Code of Criminal Procedure, 1898, by way of second amendment, made through the Act IV of 1946, with the following object:---

"Object.---In a recent case before the Privy Council it was held that a High Court possess no power to grant bail to a person who has been sentenced to imprisonment and who has been granted special leave to appeal to His Majesty in council against such sentence. At the same time their Lordships observed, "it may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court.....But..... this desirable object can only be achieved by legislation." By this bill it is proposed to insert

provision in section 426 of the Code of Criminal Procedure, 1898, conferring on High Courts the power to suspend sentence and grant bail where special leave to appeal to His Majesty in Council has been granted."

4. At that time, subsection (2B) of Section 426 of Cr.P.C. was having the following language:-
"(2B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal, to His Majesty in Council against any sentence which it has imposed or maintained, or has been granted leave to appeal to his Majesty in Council against an order of the Federal Court on an appeal from the High Court involving the imposition or maintenance of a sentence it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if the said person is in confinement, that he be released on bail."

5. The above mentioned amendment was a result of Privy Council judgment titled "Lala Jairam Das and others v. Emperor,"reported as AIR (32) 1945 Privy Council, 94, wherein, it was held that High Court in India has no power to grant bail to a convict to whom His Majesty in Council has given special leave to appeal against his conviction or sentence. Further, in the cited case it was held:-

"It may well be that the case of an appeal from a High Court to His Majesty in Council was not within the contemplation of the framers of the Code. It may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court. Their Lordships fully appreciate the propriety and utility of such a power, exercisable by Judges acquainted with the relevant _facts of each case, and (if exercised) with power to order that the bail period be excluded from the term of any sentence. But in their Lordships' opinion this desirable object can only be achieved by legislation. In the meantime there is a section of the Code to which, pending legislation, recourse may be had, and by means of which the ends of justice may be secured, viz., S.401 which enables the Provincial Government to "suspend" the execution of a sentence. As hereinbefore appears recourse has been had to this section on previous occasions. For the reasons indicated, their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. In view of the general importance of the question which has been raised and decided their Lordships make no order as to the costs of this appeal."

6. From the above mentioned, it is clear that at that time it was "His Majesty" who was competent to grant special leave to appeal, against conviction and sentence, passed by a High Court. At that time after decision of a criminal appeal, being functus officio, High Court concerned had got no power or authority to deal with any matter of suspension of sentence and grant bail. Therefore, it was considered appropriate that such a power should be exercised by High Court acquainted with the relevant facts of each case. Hence, required legislation to that effect was recommended and finally as stated above subsection, (2B) in section 426, Cr.P.C. was inserted.

7. After creation of Pakistan, Federal Laws (Revision and Declaration) Act 1951 was promulgated, whereby certain Acts and Ordinances mentioned in the First Schedule were completely repealed, some described in the Second Schedule were partially repealed, whereas, amendment in the laws,' described in The Third Schedule of the Act, 1951 were made. Accordingly, subsection (2B) of Section 426 of Cr.P.C. 1898 was amended in the following terms.
"In subsection (2B) of section 426; for the words "His Majesty in Council" where they first occur the words "the Federal Court" shall be substituted."
Thereafter, by President's Order No.1 of 1961 (CENTRAL LAWS (ADAPTATION) ORDER, 1961, further amendment was brought in section 426(2B) and for the word "Federal Court," the word "Supreme Court" was used. Under Articles 158 and 159 of the said Constitution, the appellate jurisdiction of the Supreme Court in Civil and Criminal matters was described as follows:-

"158. Appellate jurisdiction of the Supreme Court in civil matter.--(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in civil proceedings--

(a) If the amount or value of the subject-matter of the dispute in the Court of first instance was, and also in dispute on appeal is, not less than fifteen thousand rupees or such other sum as may be specified in that behalf by Act of Parliament; or

(b) If the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) If the High Court certifies that the case is a fit one for appeal to the Supreme Court.

(2) Notwithstanding anything in this Article, no appeal shall, unless an Act of Parliament otherwise provides, lie to the Supreme Court from the judgment, decree or final order of a Judge of a High Court sitting alone."

"159. Appellate jurisdiction of the Supreme Court in criminal matters.--An appeal shall lie to the Supreme Court from any judgment, final order or sentence of a High Court in criminal proceedings, if the High Court---

(a) has on appeal ,reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life; or

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority, and has in such trial convicted the accused person and sentenced him as aforesaid; or

(c) certifies that the case is a fit for appeal to the Supreme Court; or

(d) has imposed any punishment on any person for contempt of the High Court:

Provides that where a certificate is issued under paragraph (c) of this Article an appeal shall lie subject to such rules as may be made in that behalf under paragraph 3 of the Third Schedule, and to such other rules, not inconsistent with the aforesaid rules, as may be made in that behalf by the High Court."

8. The above mentioned Articles clearly contend that besides other circumstances, for filing an appeal before the Supreme Court of Pakistan, one of circumstance was a certificate issued by the High Court that the case was a fit one for appeal to the Supreme Court.

9. Under Article 160 of the above said Constitution, appeal to the Supreme Court by special leave of the Court was also granted in the following terms:-

"160. Appeal to the Supreme Court by special leave to the Court.--- Notwithstanding anything in this Part, the Supreme Court may grant special leave to appeal from any judgment, decree, order or sentence of any Court or

tribunal in Pakistan, other than a Court or tribunal constituted by or under any law relating to the Armed Forces."

10. When the Constitution of 1956, was repealed and the Constitution of 1962 was promulgated, in it through Article 58, appellate jurisdiction of the Supreme Court was described as follows:--

"58. Appellate jurisdiction of Supreme Court.---(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of a High Court.

(2) An appeal to the Supreme Court from a judgment decree order or sentence of a High Court shall lie as of right where---

(a) the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution;

(b) the High Court has sentenced a person to death or to transportation for life; or

(c) the High Court has imposed punishment on a person in pursuance of the powers conferred on the Court by Article 123.

(3) An appeal to the Supreme Court from a judgment decree order or sentence of a High Court in a case to which clause (2) of this Article does not apply shall lie only if the Supreme Court grants leave to appeal."

11. It is notable that in the Constitution of Pakistan, 1962 under the Article 58, the above stated Articles 158, 159 and 160 of the Constitution of Pakistan, 1956 were united and the word "Special Leave to Appeal" was changed to the word "Leave to Appeal".

12. In the Provisional Constitution of 1972, under Article 186, the jurisdiction of the Supreme Court vested through the Article 58 of the Constitution, 1962 was kept the same.

13. Ultimately, the Constitution of the Islamic Republic of Pakistan, 1973 was promulgated, which still is enforced. Under Article 185 of the said Constitution, the appellate jurisdiction of the Supreme Court of Pakistan has been described in the following language:-

"185. Appellate jurisdiction of Supreme Court.--(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court.

(2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence of a High Court----

(a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or

imprisonment for life; or, on revision, has enhanced a sentence to a sentence as aforesaid; or .
(b) if the High Court has withdrawn for trial before itself any case from any Court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or
(c) if the High Court has imposed any punishment on any person for contempt of the High Court; or
(d) if the amount or value of the subject matter of the dispute in the Court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of Parliament and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the Court immediately below; or
(e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the Court immediately below: or
(f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.
(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal."
14. Order XIII of the Supreme Court Rules, 1956 was relating to the petitions for Special Leave to Appeal in Civil proceedings. Relevant provision was as under:-
"1. A petition for special leave shall be lodged in this Court within sixty days of the judgment or order sought to be appealed from or as the case may be within thirty days from the date of the refusal of grant of certificate under Article 58(2) (a) of the Constitution, by the High Court.

Provided that the Court may for sufficient cause extend the time."
Whereas Order XXIV of the above mentioned rules was dealing with the petitions for Special Leave to Appeal, in criminal proceedings. The relevant provision was as follows:--
"1. Save as hereinafter provided the provisions with respect to petitions for special leave to appeal in civil proceedings contained in Order XIII of this Part of the Rules, shall with necessary modifications and adaptations apply to applications for special leave to appeal in criminal matters:"

15. At present the Supreme Court Rules, 1980 are in field. Order XIII of the said rules, deals with the petitions for leave to appeal in Civil proceedings, whereas, Order XXIII of the rules relates to the petitions for leave to appeal and appeals arising therefrom in criminal proceedings.
16. Order XIII of the Supreme Court Rules, 1980 deal with the petitions for leave to appeal in civil proceedings, the relevant portion whereof reads as under:--
"1. A petition for leave shall be lodged in this Court within sixty days of the judgment, decree or final order sought to be appealed from or as the case may be, within thirty days from the date of the refusal of grant of certificate under Article 185(2)(f) by the High Court:

Provided that the Court may for sufficient cause extend the time.

2. A petition for leave to appeal shall state succinctly and clearly [all points of law which arise for determination and], all such facts as it may necessary to state in order to enable the Court to determine whether such leave ought to be granted, and shall be signed by the counsel and or Advocate-on-Record for the petitioner or by the party himself if he appears in person. The petition shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which leave to appeal is sought and where petition is moved through an Advocate-on-Record, it shall cite all previous decisions of the Court, which to the best of his knowledge, bear on the question sought to be raised in the petition."

17. The relevant paragraphs of Order XXIII of the Supreme Court Rules, 1980 are as under:--

"I. Save as hereinafter provide the provisions with respect to petitions for leave to appeal in civil proceedings contained in Order XIII of this Part shall mutatis mutandis apply to petitions for leave to appeal in criminal matters except that no court fee, process fee or search fee shall be charged but the copying fee shall be charged except in petitions through jail.

2. A Petition for leave to appeal in criminal matter shall be lodged within thirty days from the date of judgment or final order sought to be appealed from, or as the case may be, from the date of the order refusing certificate under sub-clause (f) of clause (2) of Article 185 of the Constitution.'

From the above mentioned provisions and discussion, it is clear that special leave to appeal/leave to appeal and certificate issued by a High Court that a case is fit for appeal to the Supreme Court are two different proceedings. "Special Leave to appeal," which at present is termed as "leave to appeal" is always granted by the Supreme Court of Pakistan, whereas, the above mentioned certified is issued by a High Court.

19. There is no provision, in any law of Pakistan, which provides any authority to any High Court to issue leave to appeal, in any manner. The same is only the prerogative of the Supreme Court of Pakistan being vested to it by the Constitution and the Rules.

20. Resultantly, we are of the confirmed view that when against any sentence, imposed or maintained by a High Court, a convicted person is granted special leave to appeal by the Supreme Court of Pakistan, then under section 426(2B) of the Cr.P.C., a High Court, pending the appeal, before the Supreme Court, may suspend the sentence or order, appealed against and release the convict on bail. As a necessary corollary, the objection raised by the learned Deputy Prosecutor General is overruled.

21. Consequently, it is directed that all the petitions be sent back to the respective learned Benches, for proceedings and decision on merit.

MWA/T-14/L Cases remanded.

P L D 2014 Lahore 644

Before Muhammad Tariq Abbasi and Muhammad Qasim Khan, JJ

MUHAMMAD YOUSAF---Petitioner

Versus

THE STATE and another---Respondents

Writ Petitions Nos.8568 and 9029 of 2013, 1614 and 2158 of 2014, decided on 10th April, 2014.

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

----Preamble, Third Sched., Ss.1, 6, 7, 23 & 34---Constitution of Pakistan, Art.199---Constitutional petition---Transfer of case from Anti-Terrorism Court to regular court---Scope of S.23 of the Anti-Terrorism Act, 1997---Anti-Terrorism Court dismissed applications of accused involved in different offences namely murder by firing, acid throwing and injury caused by firing in mosque, for transfer of their cases to regular courts---Validity---Purpose of Anti-Terrorism Act, 1997 was to prevent terrorism, sectarian violence and conducting speedy trial of heinous offences---In order to decide whether an offence was triable under the Anti-Terrorism Act, 1997 or not, the courts had to see whether the act had tendency to create sense of fear and insecurity in the mind of people or a section of society---Such act might not necessarily have taken place within the view of general public---Schedule annexed to a statute was as important as the statute itself---Schedule could be used to construe the provisions of the body of the Act---Third Schedule to the Anti-Terrorism Act, 1997 had to be given its due importance and, first three paragraphs of the same were general in nature while the fourth paragraph specifically described offences---In order to bring an offence within ambit of Anti-Terrorism Act, 1997 and the jurisdiction of the Anti-Terrorism Court, nexus of such offence with S.6 of the Anti-Terrorism Act, 1997 was a pre-requisite---Paragraph 4 of the Schedule to the Anti-Terrorism Act, 1997 categorically mentioned the offences which would be tried only by the Anti-Terrorism Court---Offences in question were within the purview/ambit of the paragraph 4 of the Third Schedule to the Anti-Terrorism Act, 1997 and were triable by the Anti-Terrorism Court---Petitions were dismissed.

State through Advocate-General, N.-W.F.P., Peshawar v. Muhammad Shafiq PLD 2003 SC 224; Rana Abdul Ghaffar v. Abdul Shakoor and 3 others PLD 2006 Lah. 64 and Saif Ullah Saleem and others v. The State and others 2013 PCr.LJ 1880 rel.

Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445; Ch. Bashir Ahmad v. Naveed lqbal and 7 others PLD 2001 SC 521; Mohabbat Ali and another v. The State and another 2007 SCMR 142; Bashir Ahmad v. Muhammad Sadique and others PLD 2009 SC 11 and Ahmed Jan v. Nasrullah and others 2012 SCMR 59 ref.

Ch. Sagheer Ahmad and M.A. Hayat Haraj for Petitioner (in Writ Petition No. 8568 of 2013).

Syed Badar Raza Gillani for Respondent No.2.

Malik Muhammad Bashir Lakhesir, A.A.G. and Muhammad Ali Shahab, D.P.G.

Date of hearing: 12th March, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single judgment is intended to decide all the above captioned writ petitions as common questions of law and facts are involved in the all.

2. The above titled writ petitions have been preferred against the orders passed, by the learned Anti Terrorism Courts (trial Courts) whereby applications moved by the petitioners in the writ petitions, for transfer of the cases to ordinary courts have been refused.

3. The precise facts of the cases, relating to the above captioned writ petitions are as under:-

1. Writ Petition No. 8568 of 2014

In this matter by firing in Court premises a person, namely, Muhammad Qasim has been murdered.

2. Writ Petition No. 9029 of 2013

In the instant matter while throwing acid two ladies, namely, Azizan Mai and Sania have been done to death, whereas, another, namely, Sonia sustained injuries.

3. Writ Petition No. 1614 of 2014
Regarding this matter, by throwing acid on Muhammad Ramzan he has been done to death.

4. Writ Petition No. 2158 of 2014
In the instant matter by firing in the mosque injury to Muneer Ahmed has been caused.

4. From the writ petitioners' side, it has been argued that all the above mentioned occurrences were result of personal grudge and vendetta, having no nexus with Section 6 or 7 of Anti-Terrorism Act, 1997, hence, triable by the ordinary Courts but erroneously the applications moved under Section 23 of the Anti-Terrorism Act, 1997 have been dismissed.

5. Whereas from the respondents' side the writ petitions have been opposed with the contention that the offences charged being Scheduled, are very much triable by the Special Courts constituted under the Anti Terrorism Act, 1997 and as such the impugned orders have justifiably been passed.

6. Arguments of all the sides have been heard and the record has been perused.

7. For convenience, herein after the Anti Terrorism Act, 1997 will be referred as "The Act", the Anti Terrorism Court as "The Court" and the Third Schedule as "The Schedule".

8. The only issue before us is, whether all the offences described in The Schedule, attached to The Act would only be triable by The Court, if they will have nexus with Section 6 of the Act or some specified offences are straightaway triable by The Court.

9. For better appreciation of the above mentioned question, it would be appropriate to refer some of the provisions of The Act, herein below:--
The preamble of The Act reads as under:-

"An act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences.

Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto."

10. From the above mentioned provision it is clear that very purpose of The Act is to prevent terrorism, sectarian violence and speedy trial of the heinous offences and the matters relating thereto. To constitute an offence triable under the Act, the courts have only to see whether act has a tendency to create sense of fear and insecurity in the mind of people or a section of society. Psychological impact created upon the minds of the people has to be kept in view. It is not necessary that act must have taken place within the view of general public. Even an offence committed in a barbaric and gruesome manner, if had created fear and insecurity, would come within the ambit of The Act. In this regard reliance can be placed in case "State through Advocate General N.W.F.P Peshawar v. Muhammad Shafiq" (PLD 2003 SC 224).

11. Under Section 1 of The Act, for the province of Punjab, the following amendment has been made:-
"For the purposes of the provision and punishment of the commission of terrorist acts and scheduled offences to have resort to the provisions of the said Act for the whole of the province of Punjab."

12. "Schedule" and "Scheduled offence" have been defined in sections 2(s) and (t) as under:-
"Schedule" means a Schedule to This Act." "Scheduled offence" means an offence as set-out in the Third schedule."

13. As per Section 12 of The Act, a Scheduled offence shall only be triable by The Court.

14. According to Section 34 of The Act, the government may, by notification, amend the First, Third and Fifth Schedule, so as to add any entry thereto or modify or omit any entry therein.
The Third Schedule of the Act speaks as under:--
THE THIRD SCHEDULE
(Scheduled Offences)
[Sec Section 2(t)]

1. Any act of terrorism within the meaning of this Act including those offences which may be added or amended in accordance with the provisions of Section 34 of this Act.
2. Any other offence punishable under this Act.
3. Any attempt to commit, or any aid or abetment of or any conspiracy to commit, any of the aforesaid offences.
4. Without prejudice to the generality of the above paragraph, the Anti-terrorism Court to the exclusion of any other Court shall try the offences relating to the following, namely:--
(i) Abduction or kidnapping for ransom;
(ii) use of fire-arms or explosives by any device, including bomb blast in a mosque imambargah, church, temple or any other place of worship, whether or not any hut or damage is caused thereby; or
(iii) firing or use of explosives by any device, including bomb blast in the Court premises.
Punjab Amendment
(iv) Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance; and
(v) Unlawful possession of an explosive substance or abetment for such an offence under the Explosive Substances Act, 1908 (VI of 1908).

15. A schedule appended with a statute is as much important as the statute is. A schedule can be used in construing provisions in body of the Act. It for all purposes of constructions must be read together with the Act. The liability imposed in schedule is equally binding for all the concerned. Therefore, the Third Schedule of the Anti-Terrorism Act should be given due importance and should be strictly acted upon.

16. It has been observed that first three paragraphs of The Schedule are general in nature, whereas paragraph No. 4 is specific regarding certain offences described therein. Initially above mentioned three paragraphs, which were general in nature, were inserted in The Schedule. In the said paragraphs no specific offence was mentioned, hence, for brining an offence within the ambit of The Act and jurisdiction of The Court, nexus of said offence, with Section 6 of the Act was the pre-requisite.

17. When with the passage of time, commission of certain heinous offences was increased, the legislature had thought that by a Special amendment such

heinous offence be included in The Schedule, so that they may be straightaway brought before The Court. The very language of paragraph No. 4 above, shows that it is specific, whereas, the above mentioned other paragraphs (1, 2 & 3) are general in nature. In the said paragraph No. 4, it is categorically mentioned the offences narrated thereunder shall only be tried by The Court. The above mentioned wisdom of the legislature should be given due weight and importance and as such the above said particular offences included under para-4 of the Schedule, while keeping in view the special circumstances, should not be ignored and should be dealt with as per intention of the parliament.

18. Therefore, we are of the view that regarding the offences, mentioned under paragraph 4 above, the Court shall have direct jurisdiction and relating to the said offences no nexus should be searched because very commission of the said offences creates terror, panic and sense of insecurity amongst the general public.

19. Our above mentioned view has been fortified by the dictum laid down by the august Supreme Court of Pakistan in case titled Rana Abdul Ghaffar v. Abdul Shakoor and 3 others PLD 2006 Lahore 64), whereby regarding an offence of abduction or kidnapping for ransom described in paragraph No.4 of the schedule, the following has been held.

"After introduction of the Anti Terrorism (Second Amendment) Act, 2004, the case had to be transferred to Anti Terrorism Court because now only such a Court as constituted under the Anti Terrorism Act, 1997 had the exclusive jurisdiction to try the same and sentence, if any, to be passed against any accused person found guilty in the case by the judge, Anti Terrorism Court, could not be greater than, or of a kind different from the sentence prescribed by the relevant law for the relevant offence at the time the said offence was committed.... According to subsection (1) of section 12 of the Anti-Terrorism Act, 1997 an offence mentioned in the Third Schedule appended with the Anti-Terrorism Act, 1997 can be tried only by an Anti-Terrorism Court constituted under the said Act and no other Court has any jurisdiction in that regard. The Third Schedule appended with the Anti-Terrorism Act, 1997 not only mentions the offence of 'terrorism' but also mentions other offences which now, through the above mentioned amendment introduced on 11-1-2005 includes an offence of abduction or kidnapping for ransom."

20. It has been observed that a learned Division Bench of this Court in case titled "SAIF ULLAH SALEEM and others v. The STATE and others" (2013 PCr.LJ 1880) has transferred a case of acid bearing registered through F.I.R. No.725 of 2012, under sections 324/336-B/337-F(i) P.P.C. and 7 of Anti Terrorism Act, 1997 at Polite Station Chahlyak, District Multan, from Anti Terrorism Court to the Court of ordinary jurisdiction. When the said matter in shape of Civil Petition No.700 of 2013 titled "Malik Zafar Hussain v. Saif Ullah Saleem Arshad 'and others" came before the august Supreme Court of Pakistan, the following observations, were made.

"We have heard the learned counsel for the petitioner and have also gone through the impugned judgment, particularly para 7 thereof reproduced herein above. The learned High Court after having taken into consideration the peculiar facts and circumstances of the case, rightly, came to the conclusion that Section 7 of the Act does not attract in this case as the offence did not create panic or sense of insecurity among the people in terms of the provisions of the Act.

In view of the foregoing discussion, we find no merit in this petition which is dismissed and leave to appeal is declined. However, we leave it open for examination the jurisdiction of Anti Terrorism Court in respect of the offence of causing hurt by corrosive substance or attempt to cause hurt by means of a corrosive substance, as inserted in the Third Schedule vide notification noted hereinabove."

21. From the above mentioned verdict of the august Supreme Court of Pakistan, it is clear that above said judgment passed by the learned Division Bench of this Court was confined to the fact and circumstances of the case in question and point of jurisdiction in respect of the offences of causing hurt by corrosive substance or attempt to cause hurt by means of corrosive substance as inserted in Third Schedule was kept open for Anti Terrorism Court.

22. During arguments, the learned counsel for the petitioners have cited the cases reported as "Mehram Ali and others v. Federation of Pakistan and others" (PLD 1998 SC 1445), "Ch. Bashir Ahmad v. Naveed lqbal and 7 others" (PLD 2001 SC 521 "Mohabbat Ali and another v. The State and another (2007 SCMR 142), "Bashir Ahmad v. Muhammad Sadique and others" (PLD 2009 SC 11) and "Ahmed Jan v. Nasrullah and others" (2012 SCMR 59). It has been observed that the said judgments either pertain to the

period prior to the above mentioned amendments made in the Third Schedule of The Act or the facts and circumstances of the cases are not the same as are in the matters in hand.

23. As a result of what has been discussed above, we are of the view that all the above mentioned offences relating to the above said writ petitions, being falling under above referred paragraph No.4 of Third Schedule of The Act are straightaway triable by the Anti Terrorism Courts concerned. Hence, the applications moved under Section 23 of the Act for transferring the matters to ordinary Courts, have rightly been dismissed.

24. Consequently, all the above captioned writ petitions are dismissed.

ARK/M-226/L Petitions dismissed.

PLJ 2014 Cr.C. (Lahore) 735
[Multan Bench Multan]
Present: Muhammad Tariq Abbasi, J.
MUHAMMAD ADEEL--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 3527-B of 2014, decided on 15.7.2014.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302/34--Bail, grant of--Further injury--There were two versions--One was mentioned made by complainant in F.I.R. that his father has been murdered by accused named in F.I.R--Whereas, other was introduced by police in shape of statements of PWs implicating present petitioner to be murderer of deceased--Complainant while dissatisfying from above mentioned proceedings of police has also filed a private complaint, against those nominated in F.I.R., with contention that police with mala-fide, in order to destroy his case has let off his nominated accused and falsely implicated present petitioner--All above mentioned have made case of present petitioner as of further inquiry, entitling him for concession of bail--Petitioner has been sent to judicial lock was he was no more required for any further investigation and was previously non-convict.

[P. 737] A, B, C & D

Syed Zia Haider, Advocate for Petitioner.

Mr. Shoukat Ali Ghouri, Addl. P.G. for State.

Complainant in Person.

Date of hearing: 15.7.2014.

Order

The petitioner, namely, Muhammad Adeel, seeks post arrest bail in case F.I.R, No. 125 dated 3.5.2013, registered under Sections 302/34, P.P.C. at Police Station Makhdoom Pur, District Khanewal.

2. The precise facts are that Muhammad Asif, complainant had reported the matter to the police with the contention that within his view and presence as well as of Muhammad Hussain and Rasheed Ahmed, P.Ws, Messrs Rana Sohail, Rana Muhammad Zaheer (both armed with .30 bore pistols), Dr. Muhammad Afzal and Muhammad Tufail attacked at his father, Zahoor Hussain, during which Rana Sohail and Rana Muhammad Zaheer, accused with their respective pistols fired and fire-shots hit at the chest of his father, who fell down and died at the spot. During investigation, the above named persons, nominated in the F.I.R. were declared by the police to be innocent and on the basis of statements made by two persons, namely, Muhammad Shabbir and Khushi Muhammad under Sections 161 of Cr.P.C. on 29.5.2013 that they had seen the present petitioner while firing at Zahoor Hussain and committing his murder, the present petitioner has been arrested. Hence, the petition in hand.

3. The learned counsel for the petitioner has argued that the petitioner is innocent, who has falsely been involved and arrested in the case with mala fides; that the complainant, who at present, is available in the Court confirms his stance narrated in the F.I.R. and does not at all involve the present petitioner, towards commission of the alleged occurrence, in any manner whatsoever; that the complainant has also filed a private complaint against the above named accused nominated in the F.I.R.; that case against the petitioner requires further probe and inquiry; that the petitioner has been sent to the judicial lock up, he is no more required for any further investigation and is previously non-convict.

4. The learned Additional Prosecutor General has vehemently opposed the bail application but the complainant has not contested the bail petition, with the contention that present petitioner is not his accused, rather those named in the F.I.R. are murderer of his father.

5. Arguments of all the sides have been heard and the record has been perused.

6. The petitioner is not named in the F.I.R. As stated above, the complainant in the F.I.R. has categorically contended that within his view and that of Muhammad Hussain and Rasheed Ahmed P.Ws, the above said accused persons, nominated in the F.I.R. have committed murder of his father by firing.

7. The above named witnesses (Muhammad Hussain and Rasheed Ahmed) during their statements under Section 161 of Cr.P.C. have also implicated the above named persons, narrated in the F.I.R., towards commission of murder of Zahoor Hussain and have not named the present petitioner in any manner whatsoever.

8. The record shows that on 29.5.2013 i.e. after twenty six days of registration of the F.I.R., two persons, namely, Muhammad Shabbir and Khushi Muhammad have been introduced and their statements under Section 161 of Cr.P.C. have been recorded with the contention that they have seen the present petitioner, while committing murder of Zahoor Hussain by firing and then fleeing away.

9. There are two versions. One is the above mentioned made by the complainant in the F.I.R. that his father has been murdered by the accused named in the F.I.R. Whereas, the other is introduced by the police in the shape of statements of Muhammad Shabbir and Khushi Muhammad, implicating the present petitioner to be murderer of Zahoor Hussain.

10. It will be seen and determined during the trial that which of the above mentioned versions is true and correct.

11. The complainant while dissatisfying from the above mentioned proceedings of the police has also filed a private complaint, against those nominated in the F.I.R., with the contention that police with mala-fide, in order to destroy his case has let off his nominated accused and falsely implicated the present petitioner.

12. All the above mentioned have made the case of the present petitioner as of further inquiry, entitling him for the concession of bail.

13. The petitioner has been sent to the judicial lock up, he is no more required for any further investigation and is previously non-convict.

14. Resultantly, instant petition is accepted and the petitioner is admitted to bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- (rupees one lac only) with one surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail granted

PLJ 2014 Lahore 827
[Multan Bench Multan]
Present: Muhammad Tariq Abbasi, J.
MUHAMMAD AMIN--Petitioner
versus
JOP etc.--Respondents

W.P. No. 14868 of 2012, decided on 13.2.2014.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), Ss. 22-A & 22-B--Constitutional petition--Registriation of criminal case--Justice of Peace was not at all competent to recall order--Validity--Once an order permissible under law has been passed by Justice of Peace, then without any reason, cause or justification, its review or withdrawal is not permissible. [P. 829] A

2009 YLR 83 ref.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), S. 155--Non-cognizable offence--Reason was not sufficient for withdrawal of earlier order--Commission of non-cognizable offence as stated by Justice of Peace in the impugned order was no ground, not to carry on any proceedings--Even for commission of non-cognizable offence, due proceedings had been prescribed u/S. 155, C.P.C. [P. 829] B

Malik Muhammad Zafar Iqbal, Advocate for Petitioner.
Mr. Mazhar Jamil Qureshi, AAG.
Nemo for Respondents.

Date of hearing: 13.2.2014.

Order

Through the instant writ petition, the order dated 12.11.2012, passed by learned Ousticq of Peace (Respondent No. 1) has been challenged, whereby, the earlier order dated 31.10.2012 has been recalled.

2. The facts are that upon an application, moved by the present petitioner, under Section 22-A and 22-B, Cr.P.C., before the learned Justice of Peace, on 31.10.2012, a direction to the SHO concerned was issued to record version of the petitioner and if commission of a cognizable offence was made out, to register a criminal case. Thereafter, Mapal Khan (Respondent No. 5) moved another application, before the iearned Justice of Peace, for suspension and withdrawal of the abovementioned earlier order and consequently the learned Justice of Peace through order dated 12.11.2012 had recalled the above said earlier order. Hence the instant writ petition.

3. The learned counsel for the petitioner has argued that the learned Justice of Peace was not at all competent to recall the order dated 31.10.2012 being passed in due course of law and as such the impugned order dated 12.11.2012 being a patent illegality, is not sustainable.

4. The learned Law Officer has opposed the writ petition.

5. The arguments have been heard and record has been perused.

6. It has been observed that the abovementioned earlier order dated 31.10.2012 was not baseless but conditional that if commission of a cognizable offence was found to be made out then a criminal case should be registered. It has been found that the said order has been withdrawn through the order dated 12.11.2012, with the contention that commission of any cognizable offence was not made out.

7. I am afraid, the above said reason was not sufficient for withdrawal of the earlier order because towards its implementation, the Investigating Officer was obliged to see whether commission of a cognizable offence was made out or not.

8. Even otherwise, once an order permissible under the law has been passed by the learned Justice of Peace, then without any reason, cause or justification, its review or withdrawal is not permissible. Reference may be made, to case titled Aurangzeb Khan vs. District Police Officer and 4 others (2009 YLR 83). The relevant Paragraph of the judgment speaks as under:
"It is strange that despite categorical assertion of the applicant that the said S.H.O. was favouring the opposite party, the Court of learned 1st Additional Sessions Judge Hyderabad, instead of enforcing his earlier order, dated 11.12.2004, accepted/ entertained the application of S.H.O. of Police Station Makki Shah dated 22-12-2004 and passed the impugned order dated 1-2-2005 reviewing his earlier order and directing the applicant for filing of direct complaint. Passing of such order by the learned 1st Additional Sessions Judge Hyderabad, seems to be patent illegality which is liable to be corrected in exercise of revisional powers of this Court. Accordingly, this criminal revision application is allowed and disposed of in the terms that the applicant shall appear before the S.H.O. Police Station Makki Shah for recording of his statement, whereafter further action shall follow strictly in accordance with law."

9. Due to the reasons mentioned above, the order dated 12.11.2012 of the learned Justice of Peace, whereby the earlier order passed on 31.10.2012 has been recalled/reviewed, could not be termed to be justified, hence is not acceptable in the eye of law.

10. Furthermore,/commission of a non-cognizable offence, as stated by the learned Justice of Peace in the impugned order, is no ground, not to carry on any proceeding. Even for commission of non-cognizable offence, the due proceedings have been prescribed unc Section 155 of Cr.P.C.

11. Resultantly, the instant writ petition is allowed and order dated 12.11.2012 passed by learned Justice of Peace, whereby earlier order dated 31.10.2012 has been recalled, is set aside. However, it is made clear that the SHO concerned shall strictly follow the earlier order dated 31.10.2012 and shall carry on the proceedings within the four corners of law and procedure, i.e. under Sections 154, 155 or 157 of, Cr.P.C. and if required, under Section 182 of PPC.

(R.A.) Petition allowed

PLJ 2014 Lahore 830

[Multan Bench Multan]

Present: Muhammad Tariq Abbasi, J.

SADIQ HUSSAIN--Petitioner

versus

ADDITIONAL DISTRICT JUDGE, MULTAN etc.--Respondents

W.P. No. 1555 of 2011, heard on 9.4.2014.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Ex-parte decree--Application for setting aside of ex-parte decree--Petition was dismissed for non-prosecution--Ex-parte proceedings were initiated against respondent hence an application was moved by her to set aside proceedings--Due proceedings in the application were in progress, but due to absence of petitioner, his petition for setting aside of ex-parte decree was dismissed--It has been observed that trial Court, towards passing order, whereby during proceeding in an application moved by respondent for setting aside exparte proceedings was dismissed--Even when an application for restoration of petition for setting aside of ex-parte decree was moved, it was also turned down--Decision of the matter would be made on merit in accordance with law, after recording pro and contra evidence of the parties and technicalities would be avoided. [Pp. 831 & 832] A, B & C

2012 CLC 1503, 2002 CLD 345, 2009 PCr.LJ 619 & PLD 2011 Lah. 14 rel.

Mr. Muhammad Fazil, Advocate for Petitioner.

Rana Ayub Elahi, Advocate for Respondents.

Date of hearing: 9.4.2014.

Judgment

Through this writ petition judgment dated 11.1.2011, passed by the learned Addl. District Judge, Multan has been called in-question, whereby an appeal filed by the petitioner against the order dated 28.10.2009, passed by the learned Trial Court, through which an application moved by the petitioner for restoration of the petition, for setting aside of the ex-patte decree has been dismissed.

2. The precise facts are that the Respondent No. 3 filed a suit, against the petitioner, whereby she claimed maintenance allowance of herself as well as

two daughters namely Mst. Razia Bibi, Mst Fauzia Bibi (Respondents No. 4 & 5) and two sons namely Wajid Ali and Sajjad Hussain (Respondents No. 6 & 7). In the said suit, the petitioner appeared and requested for filing of the written statement but subsequently, became absent. Consequently, the suit was ex-parte decreed on 20.1.2007. The petitioner preferred a petition on 20.2.2007, whereby he sought setting aside of the abovementioned ex-parte decree. In the said petition, the issues were framed and the evidence of the petitioner was recorded but he again became ab5>ent, hence the petition was dismissed due to non-prosecution on 5.6.2009. For restoration of the said petition, the petitioner moved an application on 21.7.09, but the learned trial Court had dismissed if through order dated 28.10.2009. The petitioner filed an appeal but the same was dismissed through the impugned judgment dated 11.1.2011.

3. Feeling aggrieved, the instant writ petition has been preferred with the contention and the grounds that law always favours decision of cases on merits and not on the basis of technicalities but unfortunately both the learned Courts below, while not realizing the abovementioned preposition have knocked out the petitioner purely on the basis of technicalities and as such a great miscarriage of justice has done with him.

4. The learned counsel for the petitioner has advanced his arguments in the aoovementioried lines and grounds, whereas the learned counsel who has put appearance on behalf of the other side has vehemently opposed the petition.

5. Arguments of all the sides have been heard and the record has been perused.

6. A very strange situation has been noted. Through the plaint, the Respondent No. 3, has claimed maintenance for herself as well as her above-named daughters and sons. But both above-named sons of the parties who are of reasonable ages, are available in the Court standing at the side of the petitioner, with the contention that prior to filing of the suit, they are residing with the petitioner and as such, their mother has wrongly claimed the maintenance allowance, to their extent.

7. It has been observed that the ex-parte decree was passed on 20.1.2007, whereby the petitioner was held entitled for the maintenance allowance of the Respondent No. 3 as well as her above-named daughters and sons. But as stated above, the sons have come forward with the abovementioned contention. The petition for setting aside of the ex-parte decree was moved within time on 20.2.2007. In the said petition, evidence of the petitioner was recorded. In the meanwhile, the ex-parte proceedings were initiated against the Respondent No. 3, hence an application was moved by her to set aside the proceedings. The due proceedings in the said application were in progress, but due to the absence of the petitioner, his petition for setting aside of the ex-parte decree was dismissed on the abovementioned date (05.06.2009).

8. It has been observed that the learned trial Court, towards passing the order dated 5.6.2009, whereby during the proceeding in an application moved by the Respondent No. 3, for setting aside ex-party proceedings the petition for setting aside of the ex-parte decree, filed by the petitioner has been dismissed, has acted harshly. Even when an application for restoration of petition for setting aside of the ex-parte decree was moved, it was also turned down.

9. If the learned trial Court was bent upon to decide the petition for setting aside of the ex-parte decree, even then it should have discussed the evidence of the petitioner, available on the record and then decided the petition on merit and not in the manner as stated above.

10. When the matter in the shape of appeal came before the learned Addl. District Judge concerned, the abovementioned facts and circumstances were totally ignored and in a slipshod manner, the appeal was dismissed through the impugned judgment.

11. While considering all the abovementioned facts and circumstances, especially that two sons, maintenance of whom was also claimed and decreed ex-parte are with the petitioner with the abovementioned contention, I am of the view that the decision of the matter should be made on merit in accordance with law, after recording pro and contra evidence of the parties and technicalities should be avoided. Reliance in this respect is placed upon Haji Lal Shah vs Mst. Nooran through L.Rs. and others (2012 CLC 1503), Muhammad Nazir vs. Haji Zaka Ullah Khan (2002 CLD 345), Hafiz

Muhammad Saeed and 3 others vs. Government of the Punjab, Home Department through Secretary, Lahore and 2 others (2009 YLR 2475), Nasreen Bibi vs. The State (2009 P.Cr.LJ 619) and Mst. Safeer Begum and others vs. Additional District Judge and others (PLD 2011 Lahore 14).

12. The above said view has been strengthened/fortified by the august Supreme Court of Pakistan in the case reported as Kathiawar Cooperative Housing Society Ltd vs. Macca Masjid Trust (2009 SCMR 574).

13. Resultantly, the instant writ petition is accepted, the impugned judgment is set aside and the petition for setting aside of the ex-parte decree is restored with a direction to the learned trial Court to decide the petition within two months on receipt of this judgment. The abovementioned shall be subject to payment of all the outstanding interim maintenance allowance fixed by the learned Trial Court in respect of above-named minor girls namely Mst. Razia Bibi and Mst. Fauzia Bibi, by the petitioner, before the learned trial Court, within one month from today, failing which the instant writ petition shall be deemed to have been dismissed.

(R.A.) Petition accused

PLJ 2014 Cr.C. (Lahore) 956
[Multan Bench Multan]
Present: Muhammad Tariq Abbasi, J.
MUHAMMAD IMRAN--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 1650-B of 2014, decided on 21.4.2014.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 365-B & 376--Bail, grant of--False occurrence--Affidavit of eye-witness--Record showed that during investigation, Police reached at conclusion that alleged occurrence was not taken place and case was false, hence, recommended for its cancellation, but Area Magistrate did not agree to cancellation report prepared by Police--It has further been found that a star witness named in FIR has sworn an affidavit, to effect that alleged occurrence was never taken place--Above mentioned facts/proceedings could not be ignored and can rightly be termed to have made case of petitioner as of further inquiry--Bail granted. [P. 957] A, B & C

Ch. Khalid Mehmood Arain, Advocate for Petitioner.

Mian Abdul Qayyum, Additional Prosecutor General for State.

Mr. Safdar Hussain Sarsana, Advocate for Complainant.

Date of hearing: 21.4.2014.

Order

The petitioner namely Muhammad Imran seeks post arrest bail in case FIR No. 230/2013, dated 15.05.2013 registered under Sections 365B/376, PPC at Police Station, Luddan, District Vehari.

2. The precise allegations against the petitioner, as per FIR are that he as well as the other accused named in the FIR alongwith two unknown persons while scaling over the well, entered into the house and abducted the complainant and thereafter the petitioner and his co-accused had committed rape with the complainant, one after the other.

3. Earlier, the instant like bail applications filed by the petitioner have been dismissed and the instant petition has been preferred on the fresh ground that during the investigation, the alleged occurrence was found to be false, hence cancellation of the case was recommended and that an alleged eye-witness of the occurrence namely Salma Bibi had sworn the affidavit that no occurrence as alleged in the FIR was taken place.

4. Arguments of both the sides have been heard and the record has been perused.

5. The record shows that during the investigation, the Police reached at the conclusion that the alleged occurrence was not taken place and the case was false, hence, recommended for its cancellation, but the learned Area Magistrate did not agree to the cancellation report prepared by the Police.

6. It has further been found that Mst. Salma Bibi, a star witness named in the FIR has sworn an affidavit, to the effect that the alleged occurrence was never taken place.

7. The above mentioned facts/proceedings could not be ignored and can rightly be termed to have made the case of the petitioner as of further inquiry. In this regard, reliance can be placed on the cases reported as PLJ 2001 Cr.C. (Lahore) 1124" and "PLJ 2009 Cr.C. (Lahore) 629..

8. Resultantly the instant petition is accepted and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two lac only) with one surety in the like amount to the Satisfaction of the learned Trial Court.

(R.A.) Bail granted

PLJ 2014 Cr.C. (Lahore) 958

[Multan Bench Multan]

Present: Muhammad Tariq Abbasi, J.

HASNAIN ABBAS--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 5752-B of 2013, decided on 5.12.2013.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(iii), 337-L(ii), 148 & 149--Bail before arrest confirmed--Injury of bone of nose--Delay in FIR--Held: During investigation it has been found that only altercation at time of alleged occurrence look place and that neither any weapon was used nor is required to be recovered from petitioner--Medical person report of complainant is available on record and it is mentioned in it that possibility of fabrication could not be ruled out--Delay of eight days in lodging FIR has also been noted without any explanation. [P. 959] A & B

Ch. Khalid Mahmood Arain, Advocate for Petitioner.

Mr. Hassan Mahmood Khan Tareen, DPG for State.

Date of hearing: 5.12.2013.

Order

The petitioner seeks pre-arrest bail in case FIR No. 359/2013 dated 30.8.2013 registered under Sections 337-A(iii), 337-L(ii), 148/149, PPC at Police Station, Tulamba, District Khanewal.

2. The prosecution version embodied in the FIR is that the petitioner inflicted a sota blow at the nose of the complainant and consequently bone of the nose was bent.

3. Arguments heard. Record perused.

4. During investigation it has been found that only altercation at the time of alleged occurrence took place and that neither any weapon was used nor is required to be recovered from the petitioner.

5. It has transpired that the alleged occurrence took place on 22.8.2013 and the complainant had got him medically examined on 23.8.2013. The medical report of the complainant is available on the record and it is mentioned in it that possibility of the fabrication could not be ruled out. The delay of eight days in lodging the FIR has also been notice without any explanation.

6. All the above facts and circumstances to my mind, have made the case of the petitioner as that of further inquiry.

7. Resultantly, this petition is allowed and ad-interim pre-arrest bail already granted to the petitioner is confirmed subject to his furnishing fresh bail-bond in the sum of Rs. 50,000/- (Rupees fifty thousand only) with one surety in the like amount to the satisfaction of learned Trial Court.

(R.A.) Bail allowed

PLJ 2014 Lahore 1040

[Multan Bench Multan]

Present: Muhammad Tariq Abbasi, J.

MUREED HUSSAIN--Petitioner

versus

ADDL. SESSIONS JUDGE/JUSTICE OF PEACE, JAMPUR and 3 others--Respondents

W.P. No. 9076 of 2013, heard on 25.3.2014.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), Ss. 22-A, 22-B & 154--Constitutional petition--Registration of criminal case--Ex-officio justice of peace despite availability of Police report on record ignored it and failed to give any reason for not believing same--Validity--An Ex-officio justice of peace is not bound to seek report from police at every cost and he is fully competent to decide application and pass an order, even without any report by police--When a report is called, to know truth and real facts, then it should not be ignored--If Ex-officio Justice of Peace does not agree with report, then should give reasons, seeking and obtaining a police report but ignoring and passing an order, contrary to it, without assigning any reason could not be appreciated--Special care to such situation is required--Possibility of moving application for registration of case while concocting false story and to get rid of criminal case could not be ruled out--Petition was accepted. [P. 1042] A, B & C

Mr. Nasir-ud-Din Mahmood Ghazlani, Advocate for Petitioner.

Hafiz Muhammad Naveed Akhtar, Advocate for Respondent No. 2.

Mr. Mazhar Jamil Qureshi, AAG for State.

Date of hearing: 25.3.2014.

Judgment

This writ petition is directed against the order dated 25.7.2013 passed by the learned ex-officio justice of peace (Respondent No. 1), whereby in an application moved by Respondent No. 4, for registration of a criminal case against the present petitioner, a direction to the SHO has been made that he should record statement of the Respondent No. 4 under Section 154 of Cr. P. C. and perform the statutory duties.

2. It has been observed that abovementioned application has been made with the contention that Mumtaz Ahmad son of Respondent No 4 was serving with the present petitioner but due salary was not paid to him; that when the son of the Respondent No. 4 demanded his salary, the petitioner levelled false allegation of committing theft, from his petrol pump and expelled the son of Respondent No, 4 from the employment; that Sajjad Ahmad another son of Respondent No 4 returned home but Mumtaz Ahmad did not come; that when despite lapse of four days Mumtaz Ahmad, son of Respondent No. 4 did not return home, he was worried and started searching and when contacted the present petitioner, he made threats of dire consequences and that the above-named was confined by the present petitioner.

3. It has been noticed that when the matter in shape of the above-mentioned application came before the Ex-officio justice of Peace, a report was sought from the concerned police station, which was made and filed. According to the report, the sons of Respondent No. 4 namely Sajjad Ahmad and Mumtaz Ahmad, were involved in case FIR No. 268 dated 20.7.2013, registered under Section 381, PPC at police Station, Muhammad Pur, who did not join into investigation and that the Respondent No. 4 while concocting a false story had filed the above-mentioned application.

4. It has been found that the learned Ex-officio justice of Peace has failed to give any weight to the above-mentioned report, made by the police or even discuss it and preferred to pass the impugned order.

5. The purpose of the report/comments from the police has been described in detail in the case titled "Khizar Hayat and others vs. Inspector General of Police (Punjab) Lahore and others", reported as (PLD 2005 Lahore 470) in the following terms:--

"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 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-office 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 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 the peace should exercise caution and restraint in this regard and he may 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 complainants allegations. If the comments furnished by the office 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 above-mentioned dictum clearly indicates importance of the report of the police, so that real facts, should come on the record, but in the matter in hand, as stated above, the learned Ex-officio justice of peace, although has sought report from the police but despite its availability on the record, has ignored it and failed to give any reason for not believing the same.

7. An Ex-officio justice of peace is not bound to seek report from the police at every cost and he is fully competent to decide the application and pass an order, even without any report by the police. But when a report is called, to know the truth and real facts, as per the above-mentioned dictum, then it

should not be ignored. If Ex-officio justice of Peace does not agree with the report, then should give the reasons, Seeking and obtaining a police report but ignoring and passing an order, contrary to it, without assigning any reason could not be appreciated. Special care to this situation is required.

8. The record shows that on 25.6.2013, Mumtaz Ahmad, the alleged abductee was available before the learned Magistrate Section 30, Jampur, in case FIR No. 464 dated 27.7.2009, registered under Sections 324, 381-A, 148/149 of PPC at Police Station, Fazilpur. Therefore, the application moved by the Respondent No. 4, before the DPO Rajanpur on 27.6.2013 that his above-named son was kept in illegal confinement by the petitioner for last for 3/4 days has been found to be not true.

9. It has further been noticed that Mumtaz Ahmad, was involved in case FIR No. 268 dated 20.7.2013 registered under Section 381 of PPC at Police Station, Muhammad Pur, District Rajanpur on the complaint of the present Petitioner towards commission of the theft at his petrol pump. Therefore, possibility of moving above-mentioned application for registration of the case while concocting false story and to get rid of the above-mentioned criminal case could not be ruled out.

10. Resultantly, the instant writ petition is accepted, the impugned order is set aside and the application for registration of the case is dismissed.

11. Despite of the above-mentioned, the Respondent No. 4, if so advised, shall have the remedy of filing a private complaint, according to the dictum laid down in the cases reported as Khizer Hayat and others vs. Inspector-General of Police (Punjab), Lahore and others (PLD 2005 Lahore 470) and Rai Ashraf and others vs. Muhammad Saleem Bhatti and others (PLD 2010 SC 691).

(R.A.) Petition accepted

2014 Y L R 1921
[Lahore]
Before Muhammad Tariq Abbasi, J
GULZAR HUSSAIN SHAH and others---Petitioners
Versus
Mst. BIBI CHANGI and others---Respondents

Civil Revision No.531-D of 2003, heard on 8th May, 2014.

Islamic Law---
----Gift---Essentials---Declaration of gift by donor, acceptance by donee and delivery of possession were three essentials of gift---All elements of a valid gift had been proved in the present case, in favour of defendant through confidence-inspiring evidence---Donor remained alive for 12 years after execution of gift deed and never challenged the same in his life time---No evidence existed to indicate that donor was a sick or infirm person at the time of execution of gift deed or that such deed had been obtained through fraud, coercion or undue pressure---Donor did not revoke the gift either---Fraud could easily be asserted but to prove the same was very difficult---Both gift deeds were registered documents, presumption of truth was attached to such documents unless such presumption was rebutted through strong and cogent evidence---Plaintiffs failed to bring cogent evidence---Concurrent findings of courts below did not warrant interference---Revision was dismissed.
Siraj Din v. Mst. Jamilan and another PLD 1997 Lah. 633; Mst. Nagina Begum v. Mst. Tahzim Akhtar and others 2009 SCMR 623; Ghulam Ghous v. Muhammad Yasin and another 2009 SCMR 70; Mirza Muhammad Sharif and 2 others v. Mst. Nawab Bibi and 4 others 1993 SCMR 462; Abbas Ali Shah and 5 others v. Ghulam Ali and another 2004 SCMR 1342 and Muhammad Ali Khan v. Muhammad Ashraf 1989 SCMR 1415 rel.
Shaki Muhammad Kahut for Petitioners.
Ch. Imran Hassan Ali for Respondents.
Date of hearing: 8th May, 2014.

JUDGMENT
MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the judgments and decrees dated 24-1-2002, and 20-5-2003,

respectively, passed by the learned Senior Civil Judge, Chakwal and learned Additional District Judge, Chakwal.

2. Through the above mentioned judgment and decree dated 24-1-2002, a suit filed by Gulzar Hussain (petitioner No. 1), Zahoor Hussain Shah (petitioner No. 3) and Imdad Hussain Shah (predecessor-in-interest of the petitioner No. 2(a) to 2(f)), against the respondents Nos. 1 and 2, challenging the gift deeds dated 3-9-1980 and 16-4-1984 by Qurban Hussain Shah, in favour of Mst. Bibi Changi (respondent No. 1) to be based on fraud, hence illegal and void had been dismissed. Whereas through the above said judgment and decree dated 20-5-2003, the appeal filed by the petitioners had also been turned down.

3. Brief facts of the case are that the petitioners Nos. 1 and 3 and Predecessor-in-interest of the petitioners Nos. 2(a) to 2(f) had filed a suit, challenging the gift deeds dated 3-9-1980 and 16-4-1984 by Qurban Hussain Shah, in favour of Mst. Bibi Changi (respondent No.1), to be based on fraud. The said suit was contested by the respondent No. 1 through written statement, whereby the execution of the gift deeds was held to be quite in accordance with law, whereas the contentions narrated in the plaint to be totally incorrect, false and based on malafides.

4. To resolve the controversy between the parties, the learned Trial Court had framed the following issues:-

(1) Whether the suit is time-barred? OPD

(2) Whether the suit is barred under section 42 & 54 of the Specific Relief Act? OPD

(3) Whether the suit is under valued and the plaintiffs have not paid proper Court fee? OPD

(4) Whether the plaintiffs are owners in possession and Hissadar of the suit land? OPP

(5) Whether the Hibbanama dated 16-4-1984, on behalf of the Qurban Hussain Shah in favour of the defendant No. 1 (Mst. Bibi Changi) is illegal, without disposing mind, void and ineffective on the rights of the plaintiffs? OPP

(6) Relief.

5. Oral as well as documentary evidence of both the sides was recorded and finally the suit was dismissed through the judgment and decree dated 24-1-2002.

6. An appeal was preferred by the present petitioners Nos. 1 and 3, as well as the predecessor-in-interest of the petitioners No. 2(a) to 2(f), before the District Court, which for hearing came before the learned Additional District Judge at Chakwal, from where the judgment and decree dated 20-5-2003 was pronounced and the appeal was dismissed.

7. Consequently, the instant revision petition has been preferred, with the contention and the grounds that the judgments and decrees of both the learned courts below being based on conjectures, surmises, misreading and non reading of the material available on the record are not acceptable under the law and liable to be set aside.

8. The learned counsel for the petitioners has advanced his arguments in the above mentioned lines. Whereas the learned counsel appearing on behalf of other side has vehemently opposed the revision petition and the grounds taken therein.

9. Arguments heard and record perused.

10. The making of a valid gift is dependent upon three essential requirements as are enumerated in section 149 of the book of Muhammadan law by D.F. Mulla:--

(1) A declaration of gift by donor.

(2) The acceptance of gift by the donee.

(3) Delivery of the possession of the subject property of the gift by the donor to the donee.

In a reported judgment titled as Siraj Din v. Mst. Jamilan and another (PLD 1997 Lahore 633) it is laid down that when the making of a gift have been claimed by a legal heir then the three ingredients of declaration of the gift, its acceptance by the donee and delivery of possession must be proved through unambiguous and even impeachable evidence by the donee of such a gift. All the elements of a valid gift in favour of defendant/ respondent No.1 by her husband Qurban Hussain Shah are proved in the instant case by confidence-inspiring evidence; even the reading of the document Exh. P-4 makes out a clear and an express intension of the donor to make the gift of the subject property in favour of his wife. Perusal of Exh.P-6 (Register Haqdaran Zamin for the years 1991-92) produced by the plaintiffs/petitioners themselves would reveal that the defendant No.1/respondent No.1 is in possession of the disputed property, hence the basic three ingredients of a valid gift, were fulfilled, as held by the Apex Court in the Judgment 2009 SCMR 623 titled Mst. Nagina Begum v. Mst. Tahzim Akhtar and others.

11. The record shows that the gift deeds in question were executed by Qurban Hussain Shah, in favour of his wife namely Mst. Bibi Changi (respondent No. 1) on 3-9-1980 and 16-4-1984.

12. There appears to be no controversy between the parties that Qurban Hussain Shah was the original owner of the suit property and he transferred the property in question in favour of his wife, (respondent No.1) through registered gift deeds dated 3-9-1980 and 16-4-1984. After execution of the above mentioned deeds, the above named executant/donor, remained alive for about 12 years and died on 30-8-1996. The donor during his life time had never challenged the deeds. No doubt, it is true that a gift executed by a sick person dependent at the mercy of his legal heirs under compelling circumstances, is illegal and is not binding upon donor but is equally true that in the present case nothing exists on the file to indicate that Qurban Hussain Shah was sick and infirm at the time of execution of the documents in

question and the same had been obtained by the respondent No.1 through fraud, coercion and undue pressure.

13. The record shows that during his life time, Qurban Hussain Shah, (deceased) neither revoked the gift nor he made any indication of any fraud or undue influence exercised on him to constitute the said gift. The present petitioners, who are his distinct kindred, remained satisfied and silent and after his death, they had filed the suit.

14. It is available on the record that at the time of execution of the above mentioned documents and even thereafter, the above-named donor remained healthy, therefore the version narrated in the plaint that the donor was not in senses, could not be established on the record. The mere assertion of the petitioners that a fraud had been practised upon them and they had been deprived of their shares in the estate of Qurban Hussain Shah (deceased), without a positive attempt on their part to substantiate the same, is of no consequence. Needless to add that it is very easy to assert fraud but it is difficult to prove the same. Reliance in this respect is placed upon the judgment of the Hon'ble Supreme Court of Pakistan reported as (2009 SCMR 70) titled Ghulam Ghous v. Muhammad Yasin and another.

15. Both the above mentioned deeds are registered documents, hence presumption of truth is attached to them, until and unless they are rebutted through strong and cogent evidence and the petitioners have failed to bring any such evidence on the record. Therefore, no reason, cause or justification to hold the documents otherwise. In this regard, reliance can be made to the cases titled "Mirza Muhammad Sharif and 2 others v. Mst. Nawab Bibi and 4 others" (1993 SCMR 462); and "Abbas Ali Shah and 5 others v. Ghulam Ali and another" (2004 SCMR 1342).

16. It has been observed that Qurban Hussain Shah was issueless and was looked after and cared by his wife (respondent No. 1) and the present petitioners came into picture after the death of the above named executant, just to get his property.

17. Concurrent findings of two courts below with regard to the validity and genuineness of gift were recorded against the petitioners which are not interferable in revisional jurisdiction as held by the Hon'ble Supreme Court in the judgment reported as (1989 SCMR 1415) titled Muhammad Ali Khan v. Muhammad Ashraf.

18. No illegality, irregularity or jurisdictional error, in the concurrent findings of the learned courts below, which resulted into the impugned judgments and decrees, could either be pointed out or observed, hence not interferable in revisional jurisdiction.

19. Resultantly, the revision petition being devoid of any force and merit is dismissed, with no order as to costs.

ARK/G-29/L Revision dismissed.

2014 Y L R 1947

[Lahore]

Before Abdus Sattar Asghar and Muhammad Tariq Abbasi, JJ

NISAR AHMAD alias SARU---Petitioner

Versus

The STATE---Respondent

Criminal Appeal No.76-J and Murder Reference No.117-RWP of 2009, heard on 15th May, 2014.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Incident was a broad daylight occurrence, which had taken place on the road side, and was witnessed by prosecution witnesses who had established their presence at the spot; to whom no enmity or grudge against accused had been suggested---Was not believable nor expected that actual and real culprit had been let off and accused had been substituted without any reason or cause---Matter having been reported to the Police there was promptly, there was no chance of any deliberation or consultation---Accused was a desperate criminal---Presence and availability of both the complainant and prosecution witness in the bus in question and at the spot, which was natural, could not be held objectionable---Complainant being real brother, and prosecution witness being real mother of deceased, were closely related to each other and the deceased, but the defence had failed to suggest any enmity or grudge against accused---Due to mere relationship, their evidence could not be discarded, which otherwise was trustworthy and confidence-inspiring---Injuries on the body of the deceased had been found to be of same description and locale as narrated in the F.I.R., and the statements of prosecution witnesses---Defence version that medical evidence and ocular account contradicted each other had no weight---Empties recovered from the spot and recovery of Kalashnikov from accused were sealed and were sent to Forensic Science Laboratory, report of which was positive---Accused after commission of offence fled away, and was arrested after two months and ten days---Statements of the prosecution witnesses, especially eye-witnesses were concurrent, corroborated and confidence-inspiring---Minor discrepancies being casual in nature and sign of natural deposition, were ignorable---Defence had itself discarded its defence version---Impugned judgment, not suffering from any legal infirmity, warranted no interference---Desperate behaviour and act of accused, which resulted into

death of two innocent persons, without any fault, did not entitle accused for any leniency or concession in sentence.

Saeed and 2 others v. The State and another 2003 SCMR 747; Haji v. The State 2010 SCMR 650; Farooq Shah v. The State 2013 PCr.LJ 688; Muhammad Aslam and others v. The State and another PLD 2009 SC 777; Muhammad Javaid v. The State 2007 SCMR 324 and Khurram Malik and others v. The State and others PLD 2006 S C 354 and Muhammad Ahmad (Mahmood Ahmed) and another v. The State 2010 SCMR 660 rel.

Basharat Ullah Khan and Syeda B.H. Shan for Appellant.

Raja Shakeel Ahmad for the Complainant.

Mirza Muhammad Usman, D.P.G. for the State.

Date of hearing: 15th May, 204.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single judgment is intended to decide the above-captioned Murder Reference No.117/Rwp of 2009 and Criminal Appeal No.76-J of 2009, as both have emanated from the single judgment dated 23-10-2009, passed by the learned Addl. Sessions Judge, Jhelum.

2. Through the abovementioned impugned judgment, Nisar Ahmad alias Saru, appellant, has been convicted under section 302(b) of P.P.C., on two counts, for commission of Qatal-e-amad of Farhat Hussain and Mst. Parveen Akhtar and sentenced to death, with compensation of Rs.50,000 each under section 544-A of Cr.P.C, payable to the legal heirs of the above-named deceased, otherwise to undergo S.I for six months each.

3. The facts are that Babar Hussain complainant (P.W.12), had reported the matter to the police through statement (Exh.P.G) with the contention that he was resident of village Alang; that his elder brother namely Nasir Hussain, was having a bus Registration No.1398/CHF, which was being plied from Jhelum to Nara rout; that his elder brother Farhat Hussain (deceased) was conductor in the said bus, whereas Ghulam Mehdi was the driver; that on the day of occurrence, the bus proceeded from Jhelum, for Nara at about 1.40 p.m. and when reached at Alang Bus stop, the complainant and his mother Mst. Parvin Akhtar (P.W.13) to get the medicine, also boarded in the bus and sat at the front side; that at about 3.30 p.m., the bus stop at Chak Mohamada and his brother Farhat Hussain (deceased) de-boarded from the bus and stood at the front of the hotel of Ghulam Rasool, while facing towards east; that in the meanwhile, Nisar Ahmad alias Saru, (appellant) armed with Kalashankov

emerged from the small street and from the backside, fired a burst at Farhat Hussain (deceased), which landed at his back and he fell down; that from the window of the bus, Mst. Parveen Akhtar, (deceased) came down and when she was standing in front of Farhat Hussain (deceased), she also sustained bullets of burst at right side of her chest and she also fell down; that Shahid Raza, who was coming down from the bus also sustained fire-shots at his right (shin) and he became injured; that Farhat Hussain and Mst. Parvin Akhtar succumbed to the injuries at the spot; that the occurrence was witnessed by the complainant (P.W.12), his mother Mst. Parveen Akhtar (P.W.13) and the passengers of the bus; that the motive of the occurrence was demand of money by Nisar Ahmad alias Saru (appellant) from Farhat Hussain (deceased) about a week earlier, which was not paid to him by the deceased, due to which the appellant had committed the murder of Farhat Hussain and Mst. Parvin Akhtar without any fault and also caused injury to Shahid Raza.

4. On the basis of abovementioned complaint, F.I.R. No.263 (Exh.PG/1), dated 13-12-2008 under sections 302/324 P.P.C. was registered at Police Station, Chhotala, District Jhelum. The investigation of the case was carried on and the appellant was challaned to the court.

5. The learned Trial Court, had conducted the preliminary proceedings and formally charge-sheeted the appellant on 18-6-2009. He pleaded not guilty and claimed trial hence the prosecution witnesses were summoned and recorded.

P.W.1, Dr. Shahid Baig, had conducted the post-mortem examination of the dead-body of Farhat Hussain (deceased) on 13-12-2008 vide the report (Exh.PA) and diagrams (Exh.PA/1 and Exh.PA/2). During the said examination, three firearm entry wounds at the back side of the chest at the level of sixth vertebra, eight thoracic vertebra and eleventh vertebra whereas three exit wounds were observed on the body. As per the doctor, the injuries were ante-mortem in nature which were sufficient to cause death in ordinary course of nature and that within few minutes of the receipt of the injuries, the deceased had lost his life. This witness had also examined Shahid Raza injured through MLR (Exh.PB), when a firearm entry and exit wound at his right leg was observed.

P.W.2, Ghulam Abbas, Constable had transmitted a sealed parcel allegedly containing Kalashankov from the police to the office of FSL, Lahore, intact.

P.W.3 Talat Sabir, Constable had got conducted the post-mortem examination of the dead body of Parveen Akhtar and also attested the memo Exh.PC, through which the last worn cloths and ornaments of the deceased (P-1, P-2,

P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10 & P-11) were taken into possession by the Investigating Officer.

P.W.4, Shafaqat Ahmad, Head Constable had kept a Kalashankov along with 15 live bullets in the Malkhana on 23-2-2009 and the parcel of which was prepare on 27-2-2009 was handed over by him to Ghulam Abbas Constable on 4-3-2009 for its dispatch in the office of FSL, Lahore, intact.

P.W.5, Muhammad Siddique S.I, had taken into possession, the last worn clothes of the Farhat Hussain, (deceased) (P-12, P-13, P-14 and P-15), through memo Exh.PT, attested by Khizar Hayat Constable (P.W.6). This witness had also secured the last worn clothes of Mst. Parveen Akhtar (deceased) (P-1 to P-11) through memo Exh.PC, attested by Talat Sabir, Constable (P.W.3).

P.W.6, Khizar Hayat Constable, had got conducted the post-mortem examination of the dead-body of Farhat Hussain (deceased) and also attested the memo Exh.PD through which the abovementioned last worn clothes of the deceased were taken into possession by the Investigating Officer.

P.W.7, Muhammad Khalil Patwari, had drafted the scale-site plans of the spot, Exh.PE, Exh.PE/1, Exh.PE/2 and handed over the same to the Investigating Officer.

P.W.8, Sajid Hussain Constable had transmitted three parcels relating to this case, one containing empties, the other blood-stained earth and the third not remember to him to the FSL, Lahore.

P.W.9 Naqeeb Sultan, Constable, had made the report Exh.PE/1 on the non-bailable warrant of arrest Exh.PE, issued against the appellant. He had also conducted service of proclamation Exh.PF, issued for appearance of the appellant and made the report Exh.PF/1.

P.W.10, Muhammad Nawaz, had chalked out the formal F.I.R., Exh.PG.

P.W.11, Lady Dr. Adeela Kanwal, had carried on the post- mortem examination of the dead-body of Mst. Parveen Akhtar and prepared the report Exh.PF and diagrams Exh.PF/1 and Exh.PF/2. During the said examination, a firearm entry wound at the right side of her breast and an entry wound at outer of the right breast, whereas an abrasion in the left lumber-region of the deceased were noticed. As per doctor, the abovementioned firearm injuries were sufficient to cause death in ordinary course of nature and that immediately on receipt of the injuries, the death of the lady had occurred.

P.W.12 Babar Hussain, the complainant and an eye-witness of the occurrence, had narrated the same facts as were stated by him in his statement before the police (Exh.PG). He had also attested the memos Exh.PH, Exh.PK, through

which parcels of blood-stained earth and two empties of Kalashankov collected from the spot were respectively taken by the Investigating Officer into possession. This witness had also attested the memo Exh.PK, through which a sealed parcel of the Kalashankov was secured by the Investigating Officer.

P.W.13 Mst. Parveen Akhtar, the mother of the deceased and also an eye-witness of the occurrence, during her statement had supported and corroborated the version of the P.W.12 in all its four corners.

P.W.14, Muhammad Aslam, had identified the dead-body of Farhat Hussain at the time of its post-mortem examination.

P.W.15, Mashooq Hussain, had attested the memo Exh.PJ, through which, the sealed parcel allegedly containing the cotton swabs through which the blood from the place of murder of Mst. Parveen Akhtar was taken into possession by the Investigating Officer. This witness had also identified the dead-body of the above-named deceased at the time of its post-mortem examination.

P.W.16, Malik Ghulam Abbas Inspector had conducted the investigation of the case, through which he carried on proceedings fully narrated in his statement.

P.W.17, Muhammad Saleem, S.I had also investigated the case and conducted the proceedings described in his statement.

P.W.18, Nisar Ahmad, S.I had also conducted the proceedings towards issuance, execution and service of the warrant and proclamations issued for appearance of the appellant. He had also formally arrested the appellant, in this case on 23-2-2009, when the appellant was already in custody in case F.I.R. No.37/09, under sections 324/353 and 186 of P.P.C. registered at Police Chotala and taken into possession Kalashankov (P-17) after making a sealed parcel thereof through memo Exh.PK, attested by the P.W. This witness had also got transmitted the parcel of the Kalashankov to the office of FSL, Lahore.

6. After got examining the above-named witnesses, the learned Prosecutor had tendered in evidence the reports of Chemical Examiner, Serologist and FSL as Exh.PT, Exh.PU, Exh.PV, Exh.P.W. and Exh.PX respectively and closed the case for the prosecution.

7. After conclusion of the prosecution evidence and closure of the case, the statement of the appellant as required under section 342 of Cr.P.C was recorded, during which the question arising out of the prosecution evidence

were put to him and he denied almost all such question. In reply to question, "why this case against you and why the P.Ws. have deposed against you", the appellant had made the following statement:--

"I am innocent. Ghulam Abbas SHO/Inspector has registered a false case against me in connivance with the complainant of this case due to the fact that Ghulam Abbas SHO has a personal grudge against me. Actually the relatives of Mst. Parveen Akhtar have committed the murder of Farhat Hussain and Parveen Akhtar after finding them in objectionable condition and due to Ghairat and injured Shahid Raza as passerby. All the P.Ws are related inter se. They are interested witnesses. They were not present at the time of occurrence."

8. At that time, the appellant had opted to lead evidence in his defence and refused to make statement under section 340(2) of Cr. P.C, but had not led any evidence in his defence.

9. After completing all the abovementioned proceedings, the learned trial Court had pronounced the impugned judgment dated 23-10-2009, whereby the appellant was convicted and sentenced in the abovementioned terms. Consequently, the murder reference and the appeal in hand.

10. The learned counsel for the appellant has argued that the appellant is innocent and has falsely been involved in the case with mala fide despite the fact that neither he was available at the spot nor taken any part in the occurrence; that the appellant has been made an escape-goat due to his grudge with the SHO; that the medical evidence has negated the ocular account; that dimension of the injuries indicates that same were not caused by Kalashankov, but caused with some weapons of different bore; that the statements of the prosecution witnesses are full of material contradictions, almost on all material particulars; that the alleged recoveries could not be proved; that the alleged motive could not be established and has made whole of the prosecution version highly doubtful; that the eye-witnesses were not available at the spot, but introduced subsequently; that independent and natural witnesses were not associated into the proceedings, hence the presumptions is that they were not supporting the prosecution version; that the deceased when were seen by the relatives of the lady deceased in an objectionable condition, were done to death by them, but the appellant was

falsely substituted; that charge against the appellant was not proved but the learned Trial Court had erred in passing the impugned judgment and convicting the appellant, hence the appellant deserves acquittal.

11. The learned D.P.G. assisted by learned counsel for the complainant while supporting the impugned judgment to be passed on correct appreciation and evaluation of the evidence and the material available on the record have vehemently opposed the appeal.

12. Arguments of all the sides have been heard and record has been perused.
13. It was a broad-daylight occurrence, which was taken place at the roadside. The matter was immediately reported to the police, hence no chance of any deliberation or consultation as alleged by the defence.

14. The complainant (P.W.12) in the complaint (Exh.PG) has narrated the specific motive that the appellant demanded the amount from the deceased, which was not paid to him, hence the appellant had fired at the deceased, which not only had resulted into his death but also of Mst. Parveen Akhtar and injuries to Shahid Raza. During evidence, the complainant (P.W.12) as well as Mst. Parveen Akhtar (P.W.13), the brother and mother of Farhat Hussain (deceased), had explained the abovementioned motive that the demand of amount by the appellant was "Jagga", which was not paid by Farhat Hussain (deceased). The defence had failed to contradict the above-named witnesses towards abovementioned motive; hence it can rightly be believed that the appellant was a desperate criminal.

15. Babar Hussain, complainant (P.W.12) and Mst. Parveen Akhtar (P.W.13) had justified their presence and availability in the bus that they had boarded in it to get medicine. During cross-examination, an explanation had come on the record that the medicine was to be obtained by them from the "Hakeem". Therefore, the presence and availability of both the above-named witnesses in the bus and at the spot could not be held objectionable, as alleged by the defence.

16. Although, Babar Hussain, complainant (P.W.12) being real brother and Mst. Parven Akhtar (P.W.13) being real mother of Farhat Hussain, deceased are closely related to each other and the said deceased but during whole of the evidence, the defence has failed to suggest their any enmity or grudge with

the appellant, hence due to mere relationship, their evidence could not be discarded, which otherwise, is trustworthy and confidence-inspiring. In this regard, reliance may be placed on the case-law reported as (2003 SCMR 747) titled Saeed and 2 others v. The State and another Judgment of Apex Court reported as Haji v. The State (2010 SCMR 650). The relevant portion whereof reads as under:--

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

17. During medical examination of the deceased, the injuries have been found to be of the same description and location as narrated in the complaint the F.I.R. and the statements of the above-named eye-witnesses (P.W.12 and P.W.13), hence the defence version that the medical evidence and ocular account contradict each other has no weight.

18. It has been brought on the record that the empties of the Kalashankov were recovered from the spot which were made into a sealed parcel and then sent to the Laboratory. After recovery of the Kalashankov from the appellant, it was also made into a sealed parcel and sent to the Laboratory for the purpose of matching. The report of the FSL, Exh.PX, is positive, meaning thereby that the empties collected from the spot were fired from the Kalashankov recovered from the appellant.

19. It has been brought on the record that after commission of the occurrence, the appellant fled away and despite adoption of all the legal modes, did not turn up and declared a proclaimed offender. Thereafter, he was arrested in this case, on 23-2-2009 i.e. after two months and ten days that too when he was under arrest in a police encounter case vide F.I.R. No.37/09 registered under sections 324, 353, 186 P.P.C. At the time of arrest in the above said case, a Kalashankov was recovered from him, which later on was taken into

possession in the instant case, made into a sealed parcel and then sent to the Laboratory for analysis, from where the abovementioned report was made. Therefore, taking the Kalashankov into possession in the instant case, although recovered in the abovementioned police encounter case, could not be termed to be a strange and as such the defence objection in this regard is not valid.

20. As stated above, it was a daylight occurrence, which was witnessed by the above-named witnesses, who had established their presence at the spot, to whom no enmity or grudge with the appellant had even been suggested, hence it is not believable and expectable that actual and real culprit had been let off and the appellant had been substituted without any reason or cause.

21. The statements of the prosecution witnesses, especially eye-witnesses, are concurrent, corroborative and confidence-inspiring. No material contradiction in the statements of the witnesses could be pointed out or observed. The minor discrepancies being casual in nature and sign of natural deposition are ignorable. Reliance in this regard is respectfully placed upon the judgments reported as FAROOQ SHAH v. THE STATE (2013 PCr.LJ 688).

22. The appellant/accused, had taken a defence of his alleged grudge with the S.H.O., but has failed to establish the same despite due opportunity.

23. If Shahid Raza, due to fear of the appellant had not joined into the investigation, then due to said sole reason, whole of the prosecution story could not be brushed aside.

24. It is very strange that on one hand, the defence had alleged that the deceased when were seen in an objectionable ondition, by the relatives of the Mst. Parveen Akhtar, (deceased), were done to death by them, but on the other hand, by putting the suggestion to the P.W.12 and P.W.13, had admitted the time and place of occurrence as stated by the prosecution to be of broad daylight and at the roadside. Therefore, the defence itself had discarded its abovementioned alleged version.

25. In a number of judgments the Hon'ble Supreme Court of Pakistan has held that normal sentence of Qatl-e-Amd is death and in the absence of any mitigating or extenuating circumstances the sentence of death cannot be

converted into life imprisonment. Reliance is respectfully placed upon MUHAMMAD ASLAM and others v. THE STATE and another (PLD 2009 SC 777) MUHAMMAD JAVAID v. THE STATE (2007 SCMR 324) and KHURRAM MALIK AND OTHERS v. THE STATE AND OTHERS (PLD 2006 S C 354).

26. The Hon'ble Supreme Court of Pakistan in the case titled "MUHAMMAD AHMAD (MAHMOOD AHMED) and another v. THE STATE (2010 SCMR 660) at page 676 observed as under:--

"34. Mr. Muhammad Akram Sheikh, the learned Senior Advocate Supreme Court, finally prayed, in the alternative, for reduction in the quantum of punishment awarded to the said eight appellants.

35. This prayed of the learned counsel, to say the least, comes as a surprise to us. The lesser of the two penalties prescribed for qatl-e-amd, is meant only for situations where the circumstances which had led to a murder or the manner in which such a crime had got committed invoked some sympathy for the convict. The present occurrence, however, was a barbaric, a brutal and a savage display of a reckless disregard for human lives where the perpetrators of the crime did not deserve any mercy or leniency."

27. As a result for what has been discussed above, we are of the confirmed view that the impugned judgment does not suffer from any legal infirmity, hence warrants no interference. The abovementioned desperate behavior and act of the appellant which resulted into death of two innocent persons without any fault, does not entitle him for any leniency or concession in the sentence. Consequently, Criminal Appeal No.76-J of 2009 is dismissed, M.R. No.117/Rwp of 2009 is answered in positive and death sentence awarded to Nisar Ahmad alias Saru is confirmed.

HBT/N-27/L Appeal dismissed.

2014 Y L R 2167
[Lahore]
Before Muhammad Tariq Abbasi, J
MUHAMMAD ABID RASHEED---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.49 of 2014, heard on 10th February, 2014.

Criminal Procedure Code (V of 1898)---

----S. 514---Forfeiture of surety bond---Procedure to be adopted---Accused for whom petitioner stood surety, having absented himself from the court, bail of accused was dismissed in default and notice under S.514, Cr.P.C. was issued to the petitioner/surety; and attachment of the property of the petitioner, was directed---For proceedings under S.514, Cr.P.C., procedure which was to be adopted, was; (i) cancellation and forfeiture of bail bonds in favour of the State; (ii) issuance of show-cause notice to the surety that why penalty of the forfeited amount of bail bond could not be imposed and recovered from him; (iii) if the reply to the show-cause notice was made, or not made without any justification, then on the basis of the attending facts and circumstances, an order towards imposition of the penalty or otherwise, should be passed; (iv) for the recovery of the penalty amount, the proceedings towards attachment, and sale of the movable property of the surety, should be carried on; and (v) if the surety did not have any movable property, and failed to make payment of the penalty amount, then he could be sent to the civil jail for a term which could extend to six months---In the present case, Special Judge had not cancelled and forfeited the bail bonds, but had directly issued the notice under S.514, Cr.P.C.; and without making any struggle for reply to the show-cause notice, firstly had issued a warrant for attachment of the property of the surety; and without waiting for the same, had also issued bailable warrant of arrest against the surety---Impugned order could not be termed as justified, and was set aside with direction to the court to carry on the proceedings, accordingly.

Syeda Nazli Naz for Petitioner.
Hassan Mehmood Khan Tareen, D.P.G. for Respondent.
Date of hearing: 10th February, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through the instant Revision Petition, the orders dated 13-3-2013 and 25-4-2013 passed by the learned Special Judge (Central), Multan have been called in question.

2. The learned Deputy Prosecutor General, who is available before the Court, has been called, who has joined into the proceedings.

3. The facts, leading to the instant revision petition, are that in a bail application filed by Muhammad Imran Shazi, before the learned Special Judge (Central), Multan, Muhammad Abid Rasheed (present petitioner) stood surety of the above named accused. Subsequently, the accused absented himself from the Court on 13-3-2013, hence his bail was dismissed in default and notice under section 514, Cr.P.C. was issued to the surety (present petitioner) and then through order dated 25-4-2013, attachment of the property of the petitioner through Collector was directed.

4. It has been observed that the learned Trial Courts are not carrying on the proceedings, under section 514 of Cr.P.C. as per the prescribed criteria. Hence not only the orders passed by the said Courts are set aside by the higher forum(s), but also nasty(s) succeeds in getting undue advantage/concession. Therefore, for proper care and caution, by the learned Trial Courts, in initiating and carrying on the proceedings under section 514 of Cr.P.C., is required.

5. For guidance and perusal, the above mentioned provision is reproduced herein below:--

"Procedure on forfeiture of bond.---(1) Whenever it is proved to the satisfaction of the court by which a bond under this Code has been taken, or of the Court of a Magistrate of the First Class,

or when the bond is for appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall authorize the attachment and sale of any movable property belonging to such person without such limits, when endorsed by the District Officer (Revenue) within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

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

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(7) When any person who has furnished security under section 107 or section 118 is convicted of an offence the commission of which constitutes a breach of the conditions of this bond, or of a bond executed in lieu of his bond under section 514-B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety, or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

6. From the above mentioned provision, it can safely be determined that for the proceedings under section 514 of Cr.P.C., the following procedure should be adopted:--

(i) Cancellation and forfeiture of the bail bonds in favour of the State.

(ii) Issuance of show-cause notice to the surety that why penalty of the forfeited amount of bail bonds may not be imposed against, and recovered from him.

(iii) If the reply to the show cause notice is made or not made without any justification, then on the basis of the attending facts and circumstances, an order towards imposition of the penalty or otherwise should be passed.

(iv) For recovery of the penalty amount, if imposed, the proceedings towards attachment and sale of the movable property of the surety should be carried on.

(v) If the surety does not have any movable property and fails to make payment of the penalty amount, then he can be sent to the civil jail for a term which may extend to six months.

7. In the situation in hand, it has been found that the learned Special Judge (Central), Multan has not cancelled and forfeited the bail bonds, but has directly issued the notice under section 514, Cr.P.C. and without making any struggle for reply to the show cause notice, has firstly issued a warrant for attachment of the property of the surety/petitioner and then without waiting for the same has also issued bailable warrant of arrest against the surety/petitioner.

8. In the light of the above quoted provision and the criteria, the impugned orders could not be termed justified. Hence while accepting the instant revision petition, the impugned orders are set aside with a direction to the learned court concerned to carry on the proceedings, strictly as per the above mentioned procedure/criteria.

HBT/M-97/L Petition allowed.

2014 Y L R 2623

[Lahore]

Before Muhammad Tariq Abbasi, J

ZULFIQAR ALI---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No.357 of 2009, heard on 16th April, 2014.

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

----Ss. 302, 337-H(2) & 34---Qatl-e-amd, hurt by rash or negligent act, common intention---Appreciation of evidence---Benefit of doubt---Injured-victim deposing in favour of accused---Effect---No injury on the person of deceased was attributed to the accused---Accused was only alleged to have inflicted a club blow on the jaw of the injured-victim during the occurrence---Said injured-victim was not examined as a prosecution witness but was given up as being won-over---Said injured victim in fact made a statement in defence of accused by stating that no injury was caused to him; that accused reached the spot empty handed, after the occurrence; that accused was involved in the case as he was closely related to the co-accused persons, and also because his father was a rich person---Investigating Officer admitted in his cross-examination that many persons appeared before him to state that accused only tried to rescue/ intervene during the occurrence, and was empty-handed and did not cause any injury to anyone---Prosecution witnesses did not utter a single word to the effect that accused and co-accused persons arrived at the spot with pre-planning and pre-meditation or after sharing a common intention---Accused was acquitted of the charge in such circumstances, while giving him benefit of doubt---Appeal was allowed accordingly.

(b) Criminal trial---

----Evidence---Standard of proof---Prosecution should prove its case against accused beyond shadow of all reasonable doubts---Decision of criminal cases on the basis of presumptions was not allowed at all.

Ch. Faqir Muhammad for Appellant.

Mian Abdul Qayyum, A.P.-G. for the State.

Sardar Usman Sharif Khosa for Complainant.

Date of hearing: 16th April, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this appeal, Zulfiqar Ali, appellant has challenged his conviction and sentence, awarded to him through the judgment dated 25-5-2009 passed by the learned Addl. Sessions Judge, Dera Ghazi Khan.

2. Through the abovementioned judgment, the appellant was convicted under section 302(b) read with section 34, P.P.C. and sentenced to imprisonment for life, with compensation of Rs.50,000 under section 544-A of Cr.P.C. payable to the legal heirs of the deceased, otherwise, to further undergo six months' S.I. He was also convicted under section 337-H(2) of P.P.C. and sentenced to three months' R.I. It was directed that both the abovementioned sentences shall run concurrently and the appellant will be entitled for the benefit of section 382-B of Cr.P.C.

3. The precise facts are that the appellant, along with two others namely Riaz and Fayyaz (since P.O.) was booked in case F.I.R. No.761 dated 15-9-2008 registered under sections 302, 337-H(2), 324/34, P.P.C. at Police Station, Saddar D.G. Khan, with the allegation of attacking at Ghulam Yasin complainant (P.W.4), Munir Ahmad (given up P.W.), Sadiq Hussain (P.W.5), Atta Muhammad (DW-1) and Saeed Ahmad (deceased), during which the appellant had allegedly inflicted a club blow and caused injury at the jaw of Atta Muhammad (DW-1), whereas Riaz accused (P.O) inflicted a hatchet blow at the head of Saeed Ahmad, who later on succumbed to the injury and that during the occurrence Fayyaz accused (since P.O.) had made aerial firing.

4. During the investigation, Riaz and Fayyaz co-accused were declared to be proclaimed offenders whereas the appellant was challaned to the court.

5. After the required proceedings, the appellant was formally charge sheeted on 3-12-2008. He pleaded not guilty and claimed trial, hence the prosecution witnesses were summoned and recorded.

P.W.1 Riaz Hussain, Constable, had got conducted the post-mortem examination of the dead-body of Saeed Ahmad at Nishtar Hospital, Multan and produced the last worn clothes of the deceased, which were handed over to him by the doctor, to the Investigating Officer.

P.W.2, Zaka Ullah Moharrar/Head Constable, had kept a sealed parcel relating to this case, allegedly containing blood-stained earth, in the Malkhana and thereafter handed it over to Muhammad Boota Constable for its onward transmission and dispatch in the office of Chemical Examiner, Lahore intact.

P.W.3, Muhammad Boota, Constable had transmitted a sealed sample parcel relating to this case, allegedly containing blood-stained earth, from the Malkhana of the police station to the office of Chemical Examiner at Lahore intact.

P.W.4, Ghulam Yasin complainant as well as an alleged eye-witness, during statement had narrated almost the same facts as were stated by him in the complaint Exh.PA. He had also attested the memo Exh.PB, through which the blood-stained earth collected from the spot was taken into possession by the Investigating Officer.

P.W.5 Sadiq Hussain another eye witness had supported the version of the Ghulam Yasin complainant (P.W.4).

P.W.6 Muhammad Ibrahim, had identified the dead-body of Saeed Ahmad, before the doctor, at the time of its postmortem examination. He had also attested memo Exh.PC, through which the Investigating Officer had taken into possession the last worn blood-stained clothes of the deceased (P-1, P-2 and P-3). He had also attested recovery memo Exh.PD, through which club/sota (P-4) allegedly got recovered by Zulfiqar appellant was taken into possession by the Investigating Officer.

P.W.7, Dr. Khalid Naveed had firstly medically examined Saeed Ahmad, the then injured and Atta Ullah (DW-1) and prepared the reports. After death of Saeed Ahmad, this witness had also conducted post-mortem examination of the body, through the report Exh.PE and the diagrams Exh.PE/1 and Exh.PE/2.

P.W.8, Irshad Hussain, S.I, had investigated the case, during which he interrogated Zulfiqar Ali appellant, who made a disclosure and then led to the recovery of club/sota (P-4), which was taken into possession, through recovery memo Exh.PD. This witness had also recorded statements of the concerned witnesses under section 161 of Cr.P.C.

P.W.9, Ghulam Shabbir, S.I, had also investigated the case, during which he recorded the statement/complaint (Exh.P.A) made by Ghulam Yasin and for registration of the case sent it to the police station. During his further proceedings, he prepared the documents fully described in his statement and also recorded the statements under section 161 of Cr.P.C. of the concerned witness and finally challaned Zulfiqar appellant to the court. He had also given secondary evidence towards drafting of the F.I.R. (Exh.PA/2) by Muhammad Ismail, S.I.

P.W.10, Sajjad Hussain, Patwari, had drafted the un-scaled site plans Exh.PN, Exh.PN/1 and Exh.PN/2, of the spot and handed over the same, to the Investigating Officer.

6. During the trial, Atta Muhammad and Murid Hussain P. Ws. were given up being won over by the accused, whereas Munir Ahmad, PW, being un-necessary.

7. After leading the abovementioned evidence, the learned Prosecutor through the statement dated 29-4-2009, had tendered in evidence, the reports of the Chemical Examiner and the Serologist as Exh.PP and Exh.P.Q respectively and closed the case for the prosecution.

8. After closure of the prosecution case, the statement of the appellant was recorded, under section 342 of Cr.P.C, during which questions arising out of the prosecution evidence were put to him and he denied almost all the said questions. In reply to the question "why this case against you and why the P.Ws. deposed against you"? the appellant stated as under:--

"I did not participate in the occurrence nor I injured any person. Murid had a dispute of land with Fayyaz and Riaz both P.O. of this case. As a result of which occurrence took place actually I am resident of Band Hotwala and my house is near the place of occurrence. On the noise I came out from my house empty handed to rescue the occurrence but complainant party falsely involved me in this case due to my relationship with Fayyaz and Riaz both P.O. who are my maternal cousins. All the P.Ws. are inter se related and interested witnesses."

The appellant did not opt to make his statement on oath, but opted to lead evidence in his defence.

9. In defence, Atta Muhammad, who as per prosecution story, allegedly sustained injury at the hands of the appellant, had made a statement as DW-1, during which he deposed that Zulfiqar Ali, appellant, reached at the spot after the occurrence empty handed; that nobody caused injuries to him and on the next day of the occurrence, his brother Murid (given up PW) had taken him into the hospital, despite the fact that he was not injured; that the complainant party had involved Zulfiqar appellant due to close relation with Riaz and Fayyaz accused (since P.O) and also due to the reason that his father was at Saudi Arabia and he was a rich person.

10. Muhammad Jalil, another witness had made statement as DW-2, whereby he deposed that Zulfiqar appellant during the occurrence was not available at the spot and that when fight was over, the appellant reached at the spot empty handed and that he was innocent and falsely involved in the case.

11. After got examining the above named witnesses, in defence, the appellant had tendered the documents as Exh.DB, Exh.DC and Exh.DD and closed his defence.

12. After all the abovementioned proceedings, the learned trial Court had decided the case through the impugned judgment. Consequently, the appeal in hand.

13. The learned counsel for the appellant has argued that the appellant is innocent and has falsely been roped in the case with mala fides; that admittedly, the deceased did not sustain any injury at the hands of the appellant and that Atta Muhammad, who as per the alleged prosecution version has sustained injury at the hands of the appellant, during his statement as DW-1, has not supported the said version; that non-attendance of the appellant at the spot and non-participation in the occurrence has also been narrated by the Investigating Officer during his statement as P.W.8; that the learned trial Court has erred in not considering the attending facts and circumstances and the material available on the record and falsely convicted the appellant only with the allegation of common intention and that the

impugned judgment being based on misreading and non-reading of the material available on the record is not sustainable under the law.

14. The learned Additional Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the appeal, while supporting the impugned judgment to be well reasoned and quite in accordance with law.

15. Arguments of all the sides have been heard and record has been perused.

16. Admittedly, no injury of Saeed Ahmad deceased had been attributed to Zulfiqar Ali, appellant. The only allegation against the appellant was that he had inflicted club blow and caused injury at the jaw of Atta Muhammad PW.

17. It has been observed that during the prosecution evidence, Atta Muhammad PW, who allegedly had sustained the abovementioned injury at the hands of the appellant was not got examined as a prosecution witness but given up being won over.

18. It has been noticed that when the Investigating Officer of the case namely Irshad Hussain, S.I, came in the witness box, as P.W.8, during cross-examination, he had admitted that the version of the Zulfiqar Ali appellant, was that he was innocent. He had further admitted it correct that many persons, appeared before him and stated that Zulfiqar Ali appellant was empty handed and did not cause any injury to anyone and that the people told that the appellant had tried to rescue/intervene the occurrence.

19. It has been found that not only during the prosecution evidence, the above mentioned stance/version had come on the record but Atta Muhammad, in defence of the appellant had also made a statement as DW-1, during which he had categorically deposed that the appellant reached at the spot after the occurrence, empty handed; that nobody caused injuries to him and on the next day, he was taken to the hospital by his brother Murid (given up PW) despite the fact that he was not injured; that the complainant party had involved Zulfiqar appellant being close relative of Riaz and Fayyaz (since P.Os) and also due to the reason that father of the appellant was at Saudi Arabia and he was a rich fellow.

20. The learned trial Court had very much considered the above mentioned facts and evidence, but even then had convicted the appellant towards the commission of murder of Saeed Ahmad and also for the aerial firing, which as stated above, were not committed by him, while assigning reasons that he had shared common intention with his co-accused since proclaimed offenders.

21. The prosecution witnesses namely Ghulam Yasin (P.W.4) and Sadiq Hussain (P.W.5) during their statements had not uttered even a single word that the appellant and his co-accused had arrived at the spot with pre-planning and premeditation or sharing common intention. It is a settled principle of law that the prosecution should prove its case against an accused beyond shadow of all reasonable doubts. The decisions of criminal cases on the basis of presumptions are not allowed at all. It has been observed that the learned trial Court had failed to observe the above mentioned principle/criteria and had convicted the appellant for an act, which at all was not committed by him.

22. The learned trial Court while passing the impugned judgment and convicting the appellant, has ignored the golden principle of law "It is better that ten guilty persons be acquitted, rather than one innocent person be convicted". Reliance in this regard is placed upon the case reported as "Muhammad Ayub Masih v. The State" (PLD 2002 SC 1048), where, the hon'ble apex Court has made the following observations:--

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

23. As a result of the above discussion, the appeal in hand is accepted and the impugned judgment dated 25-5-2009 is set aside. Consequently, Zulfiqar Ali appellant is acquitted of the charge, while giving him the benefit of doubt.

24. The appellant is on bail through suspension of the sentence, under section 426 of Cr.PC, hence his bail bonds are discharged.

MWA/Z-15/L Appeal allowed.

2015 C L C 229

[Lahore]

Before Muhammad Tariq Abbasi, J

ABDUL GHAFOOR----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others----Respondents

Writ Petition No.7814 of 2014, decided on 7th July, 2014.

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

----Ss. 24 & 15---Constitution of Pakistan, Art. 199---Constitutional petition---Ejectment of tenant---Default in payment of rent---Effect---Rent Tribunal directed the tenant to deposit monthly rent till 10th of each following month but same was not deposited and eviction petition was accepted---Validity---Rent Tribunal not only had power to pass an order for deposit of rent due within a specified time and continue to deposit the same in the bank account of landlord or in the Rent Tribunal till final order was passed but had also power to forthwith pass final order if tenant had failed to comply with such order---Leave to contest was granted to the tenant and he was directed to pay rent of the premises in the court till 10th of each following month---Tenant had failed to comply with such direction and he had not deposited any amount---Provision of S.24(4) of Punjab Rented Premises Act, 2009 was mandatory and tenant, in circumstances, had committed default in payment of rent---Rent Tribunal had no other option except to pass impugned judgment and accept the ejectment petition---No infirmity or defect had been pointed out in the judgments passed by the courts below---Constitutional petition was dismissed in circumstances.

Javed Masih and others v. Additional District Judge, Lahore and others 2010 SCMR 795; Muhammad Arshad Khokhar v. Mrs. Zohra Khanum and others 2010 SCMR 1071; Muhammad Naseer v. Sajid Hussain 2009 SCMR 784; Waheed Ullah v. Mst. Rehana Nasim and others 2004 SCMR 1568; Muhammad Nazir v. Saeed Subhani 2002 SCMR 1540; Muhammad Ashraf v. Qamar Sultana PLD 2003 SC 228; Amin and others v. Hafiz Ghulam Muhammad and others PLD 2006 SC 549 rel.

Ch. Muhammad Mehmood-ul-Hassan for Petitioner.

Qazi Atta Ullah for Respondents Nos.3 and 4.

Date of hearing: 7th July, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--- By way of this writ petition, the judgments dated 31-1-2013 and 12-4-2014, respectively passed by the learned Special Judge (Rent), Rajanpur and the learned Additional District Judge, Rajanpur have been called in question.

2. Through the above mentioned earlier judgment, the ejectment petition filed by the respondents Nos.3 and 4, against the petitioner, in respect of the shop fully described in the petition has been accepted and eviction of the petitioner from the shop in question has been ordered. Whereas, through the above said other judgment, an appeal preferred by the petitioner, challenging the above mentioned judgment of the learned Special Judge (Rent), Rajanpur has been dismissed.

3. The facts in short are that the respondents Nos.3 and 4 had filed an ejectment petition against the petitioner, in respect of a shop fully described in the petition. In the said matter, the petitioner appeared and filed application for leave to contest the ejectment petition, which was allowed. The learned Special Judge (Rent) through order dated 25-2-2011 had directed the petitioner to deposit the rent at the rate of Rs.2500 per month till 10th of each following month, in the court. The petitioner had failed to comply with the said order, hence the learned Special Judge (Rent) through the judgment dated 31-1-2013 had accepted the ejectment petition, with a direction to the petitioner to vacate the disputed shop within a period of 30 days. Against the said judgment, the petitioner preferred an appeal which for hearing came before the learned Additional District Judge, Rojhan, (Camp at Rajanpur), from where the judgment dated 12-4-2014 was pronounced and the appeal was dismissed.

4. Consequently, the instant writ petition has been preferred, with the contention and the grounds that the judgments of both the learned courts below being against the record and the law on the subject are not sustainable.

5. The learned counsel for the petitioner has advanced his arguments in the above mentioned lines, whereas the learned counsel appearing on behalf of respondents Nos.3 and 4 has vehemently opposed the petition.

6. Arguments of both the sides have been heard and the record has been perused.

7. The record shows that when leave to contest was granted to the petitioner, the learned Rent Tribunal had passed the order dated 25-2-2011, whereby directed the petitioner to pay the rent of the shop in question at the rate of Rs.2500 per month, in the court till 10th of each following month. The said order was as per section 24 of the Punjab Rented Premises Act, 2009, which empowered the Rent Tribunal to make such like order. The said provision reads as under:---

"Payment of rent and other dues pending proceedings.--- (1) If an eviction application is filed, the Rent Tribunal, while granting leave to contest, shall direct the tenant to deposit the rent due from him within a specified time and continue to deposit the same in accordance with the tenancy agreement or as may be directed by the Rent Tribunal in the bank account of the landlord or in the Rent Tribunal till the final order.

(2) If there is a dispute as the amount of rent due or rate of rent, the Rent Tribunal shall tentatively determine the dispute and pass the order for deposit of the rent in terms of subsection (1).

(3) In case the tenant has not paid a utility bill, the Rent Tribunal shall direct the tenant to pay the utility bill.

(4) If a tenant fails to comply with a direction or order of the Rent Tribunal, the Rent Tribunal shall forthwith pass the final order."

8. A plain reading of the above mentioned section, clearly indicates that the Rent Tribunal not only has a power to pass an order directing the tenant for deposit of the rent due, within a specified time and continue to deposit the same, in the Bank account of the landlord or in the Rent Tribunal, till the final order is passed in the ejectment petition, but if tenant fails to comply with the above mentioned direction to forthwith pass the final order. Reliance in this regard may be placed upon the judgments titled "Javed Masih and others v. Additional District Judge, Lahore and others" (2010 SCMR 795), "Muhammad Arshad Khokhar v. Mrs. Zohra Khanum and others" (2010 SCMR 1071), "Muhammad Naseer v. Sajid Hussain" (2009 SCMR 784),

"Waheed Ullah v. Mst. Rehana Nasim and others" (2004 SCMR 1568), "Muhammad Nazir v. Saeed Subhani" (2002 SCMR 1540), "Muhammad Ashraf v. Qamar Sultana (PLD 2003 Supreme Court 228), "Amin and others v. Hafiz Ghulam Muhammad and others" (PLD 2006 Supreme Court 549).

9. In the situation in hand, admittedly, the petitioner has failed to comply with the above mentioned direction, made by the learned Rent Tribunal, towards the above said deposit of the rent, in the above stated manner. Even today, the learned counsel for the petitioner has admitted that in consequence of the above mentioned direction, till date, the petitioner has not deposited any amount.

10. Subsection (4) of section 24 above is mandatory. When default in deposit of the rent, by the petitioner, as directed under the above mentioned provision was proved and admitted on the record, there was no other option for the Rent Controller except to pass the judgment dated 31-1-2013 and accept the ejectment petition.

11. As the above mentioned judgment pronounced by the learned Rent Tribunal was demand of the situation, as well as the law, hence the learned Appellate Court had rightly decided the appeal and dismissed it through the judgment dated 12-4-2014.

12. The concurrent judgments, passed by the two learned courts below did not suffer from any legal infirmity or defect, hence warrant no interference by this Court in constitutional jurisdiction.

13. Resultantly, the writ petition in hand being devoid of any force and merit is dismissed.

AG/A-131/L Petition dismissed.

2015 Law Notes 1384

[Multan]

Present: **MUHAMMAD TARIQ ABBASI, J.**

Sher Muhammad, etc.

Versus

The State

Criminal Appeal No. 727 of 2003, decided on 13th May, 2015.

CONCLUSION

(1) It is bounden duty of the prosecution to prove its case against the accused beyond any shadow of doubt.

OCCURRENCE OF MURDER --- (Benefit of doubt)

Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, Ss. 302/324/34---Commission of offence---Charge---Criminal trial---Impugned conviction/sentence of imprisonment for twenty-five years---Benefit of doubt---Appreciation of evidence---Validity---Occurrence did not take place at time mentioned in F.I.R. and stated by complainant/PW---Said fact caused serious doubt towards availability of complainant at spot---There was no source of light at place of occurrence to identify accused person and that during investigation it transpired that accused persons were with muffled faces and at time of occurrence, it was darkness---It was not believable that appellants had shared common intention with the co-accused and participated in alleged occurrence---Evidently, no weapon recovered from appellants, was blood-stained or made I.O./PW into any sealed parcel---During investigation appellants were found to be innocent, hence recommended to be discharged from case---Said facts and circumstances had cast serious doubts into alleged prosecution story---Prosecution had badly failed to bring home the charge against appellants---Benefit of doubt was given---Criminal appeal allowed.

(Paras 10, 11, 13, 14, 15)

Ref. 1995 SCMR 1345, 1999 SCMR 1220.

مبینہ واردات قتل اِس انداز میں نہ ہوئی تھی جیسا کہ ایف آئی آر میں درج تھا۔ اپیلانٹس کی شناخت مشکوک تھی۔ سزایابی کے خلاف اپیل منظور ہوئی۔

[Occurrence of murder did not take place as mentioned in F.I.R. Identity of appellants was doubtful. Impugned conviction/sentence was set aside].

For the Appellants: Mudassar Altaf Qureshi, Advocate.

For the State: Hassan Mehmood Khan Tareen, Deputy Prosecutor General.

For the Complainant: Prince Rehan Iftikhar Sheikh and Arslan Masood Sh., Advocates.
Date of hearing: 13th May, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This appeal is directed against the judgment dated 30.9.2003, passed by the learned Additional Sessions Judge, Chichawatni, District Sahiwal, whereby in case F.I.R. No. 247, dated 09.9.2000, registered under Sections 302/324/34, P.P.C. at Police Station Kassowal, Tehsil Chichawatni, District Sahiwal, the appellants were convicted and sentenced in the following terms:---

Sher Muhammad son of Khan Muhammad (appellant)

Under Section 302(c), P.P.C. imprisonment for twenty-five years and compensation of Rs. 1,00,000/-, payable to the legal heirs of the deceased, otherwise, to further undergo imprisonment for six months.

Sher Muhammad @ Mahni son of Allah Ditta (appellant)

Under Section 324, P.P.C. R.I. for five years and fine of Rs. 25,000/-, in default to further undergo six months' imprisonment.

Under Section 337-F(ii), P.P.C. Daman of Rs. 10,000/- and R.I. for three years.

It was directed that sentences of Sher Muhammad *alias* Mahni, appellant shall run concurrently and both the appellants would be entitled for the benefit of Section 382-B, Cr.P.C.

2. The facts are that Sikandar Ali (PW-4) had got recorded the F.I.R. (Ex.PC) contended therein that on 9.9.2000, at about 8:30 p.m., when he alongwith his sons Ghualm Shabbir (PW-5) and Ghulam Zaheer (deceased) and brother-in-law *(Sala)*, namely, Ghulam Muhammad, after filing an application against Sharif, etc., in the police station was returning back; Ghulam Shabbir (PW-5) and Ghulam Zaheer (deceased) were travelling on a bicycle ahead of them, whereas they on their respective bicycles were behind them; when they reached near the school, suddenly Sher Muhammad son of Muhammad Khan and Sher Muhammad *alias* Mahni son of Allah Ditta (appellants) and Sharif (co-accused since P.O.), all armed with daggers, emerged from the cotton crop and got stopped the bicycle of the above-named sons of the complainant; Sharif (co-accused since P.O.) stated that a taste of moving an application in the police station be taught to the complainant party and inflicted a dagger blow, which landed at left flank of Ghulam Zaheer (deceased); Sher Muhammad son of Khan Muhammad (appellant) also caused a dagger blow injury at the back of the above-named deceased; Sher Muhammad *alias* Mahni son of Allah Ditta (appellant) inflicted a dagger blow injury at the chest of Ghulam Shabbir (PW-5); Sharif (co-accused since P.O.) inflicted a dagger blow at left upper arm of Ghulam Shabbir (PW-5); they (complainant and Ghulam Muhammad), while raising a lalkara reached at the spot and the accused while giving threats and waived their weapons fled away; the injured were transported to the hospital but Ghulam Zaheer succumbed to the injuries, whereas Ghulam Shabbir (PW-5) was admitted in the hospital. The motive as alleged by the complainant was that there was a grudge of *"Rishtadari"* between the complainant party, Sharif (co-accused since P.O.) and Sher Muhammad etc., regarding which an application was filed in the police station and due to the said grudge the accused had committed the occurrence.

3. The case was investigated and the appellants were challaned to the Court. Formal charge against them was framed on 30.7.2002, to which they pleaded not guilty and claimed the trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as eleven persons as PWs, whereas one was examined as CW and two as DWs. Gist of the evidence lead by the material witnesses was as under:---

(i) PW-4 Sikandar AIi, the complainant stated almost the same facts as were narrated by him in the F.I.R. (Ex.PC).

(ii) PW-5 Ghulam Shabbir, injured as well as an eye-witness of the alleged occurrence had supported the version of the complainant (PW-4) in all its four corners.
(iii) PW-8 Dr. Muhammad Sarwar, had conducted post-mortem examination of the dead-body of Ghulam Zaheer on 10.9.2000 and three injuries were observed on his body. He prepared the post-mortem report (Ex.PG) and pictorial diagrams (Ex.PG/1 & Ex.PG/2). According to the doctor, the said injuries were anti-mortem in nature and injury No. 1 was the cause of immediate death. He also examined Ghulam Shabbir (PW-5) through report (Ex.PH) when three incised wounds, one on his chest and two on left arm were noticed.
(iv) PW-11 Mehr Noor Muhammad, Inspector, had investigated the case, prepared the documents and carried on the proceedings fully described in his statement.

4. After completion of the prosecution evidence, the appellants were examined under Section 342, Cr.P.C., during which the questions arising out of the prosecution evidence were put to them and they denied almost all such questions while pleading their innocence and false involvement in the case with *mala fide*. The question *"Why this case against you and why the PWs have deposed against you?"* was replied by both the appellants in the following similar words:---
"The PWs are related inter se and interested persons. All the PWs are residents of another village which is at a distance of about 3/4 K.Ms. from the place of occurrence. The PWs have deposed due to enmity against me and I have been falsely implicated on account of enmity."

5. They opted to lead evidence in their defence but not to make statements under Section 340(2), Cr.P.C. In defence Ijaz Minhas and Muhammad Sadiq had made statements as DW-1 and DW-2, respectively. After got examining the above-named DWs and tendering the documents as Ex.DB to Ex.DD, the appellants had closed their defence evidence. On completion of the proceedings, the impugned judgment was passed in the above-mentioned terms. Consequently, the appeal in hand.

6. The learned counsel for the appellants has argued that the appellants were innocent and falsely involved in the case with *mala fide*, while concocting a false story and introducing false witnesses; it was a blind murder, neither the complainant nor anybody else was available at the spot and the false witnesses had made false statements against the appellants; the statements of the alleged eye-witnesses were full of material contradictions and improvements on every material particular; motive was not attributed to the appellants rather to Muhammad Sharif (co-accused since P.O.); the prosecution case and the charge against the appellants was not established and proved, hence they were entitled for acquittal and as such the impugned judgment could not be termed to be justified and is liable to be set aside.

7. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the appeal while supporting the impugned judgment to be well-reasoned and call of the day.

8. Arguments heard. Record perused.

9. In the F.I.R. (Ex.PC) as well as during statement as PW-4, Sikandar Ali complainant had stated that the deceased had sustained two injuries; one at left flank, whereas other on back but during medical evidence led by Dr. Muhammad Sarwar (PW-8) and the post-mortem report (Ex.PG) three injuries on the dead-body were noticed. According to the medical evidence, the injury No. 1 on abdomen (flank) was cause of death. The said injury was attributed to Muhammad Sharif (co-accused since P.O.). The doctor had categorically deposed that duration between the death and post-mortem examination was about 11½ hours. As the post-mortem examination was conducted on 10.9.2000 at 10:00 a.m., hence on calculation, the time of occurrence does not become 8:30 p.m., as alleged by the complainant party. The doctor further stated that during examination neither any cut on the clothes of the injured PW Ghulam Shabbir was noticed nor any blood on his cloth was found. He categorically stated that possibility of the injuries to the deceased as well as the above-named injured PW, through one kind of weapon could not be ruled out. He further contended that from his proceedings happening of the occurrence in-between 10:00 p.m. and 11:00 p.m. was found.

10. From the above-mentioned, it is clear that the injuries to the deceased as well as the injured PW were with one weapon and the occurrence did not take place at the time mentioned in the F.I.R. and stated by the complainant. The said fact has also caused serious doubt towards availability of the complainant at the spot.

11. The complainant (PW-4) had admitted that there was no source of light at the place of occurrence to identify the accused persons and that during investigation it transpired that accused persons were with muffled faces and at the time of occurrence it was darkness. By deposing so, the complainant had created a serious doubt towards witnessing of the occurrence and identifying the appellants. The complainant had further admitted that Rani the mother of Sharif (co-accused since P.O.) was abducted by the present appellants and taken to Karachi. In this way, it was not believable that the appellants had shared common intention with their above-named co-accused and participated in the alleged occurrence. The complainant had further admitted that a case of abduction got lodged by him, against the present appellants and their co-accused was cancelled during investigation. In this way, he himself had negated the alleged motive as when the case was cancelled against the appellants then surely they had no motive or grudge against the complainant party. The complainant further admitted it correct that the appellants were arrested on the night of the occurrence and kept in the police station for about one month and four days, without any proceeding and that they were found by Rana Iftikhar Ahmed Khan, Inspector (CW-2) to be innocent. It was admitted on the record that during the investigation no proof of any application moved by the complainant, in the police station, on the day of alleged occurrence was brought on the record. The complainant while saying that the investigating officer of this case visited the spot, interrogated the PWs and after probe registered the case against the accused persons had confirmed on the record that the F.I.R. was result of preliminary inquiry, deliberation and consultation, hence result of after thought, which was not acceptable under the law. He had further contended that for the first time, the police arrived at the spot on 10.9.2002 at about 10:30 a.m. While saying so he had negated the proceedings of the police allegedly carried on, on the first day of occurrence. Admittedly, during whole of the occurrence, the complainant, who had moved an application in the police station, was not even touched by anyone, which fact had also created a doubt about presence of the complainant at the spot. He, while admitting that no criminal litigation between the appellants and his sons was existing and neither the deceased nor Ghulam Shabbir PW was ever

witness in any case against the appellant, had casted a doubt into the story of causing injuries to his son's by the appellants

12. PW-5 Ghulam Shabbir had admitted that Sharif (co-accused since P.O.) was inimical towards them and he had raised a lalkara. He had denied the time of occurrence as 8:30 p.m. and as such had shaken whole of the alleged prosecution story. He admitted that in his medical examination report (Ex.PH) his admission in the hospital was mentioned as 8:00 p.m. on 9.9.2000, which fact had also made the alleged occurrence doubtful because as per the complainant it was held on 9.9.2000 at 8:30 p.m. This witness had admitted that during investigation motive of the occurrence was found to be false. Nazar Muhammad PW-6 also admitted it correct that at the spot there was no source of light.

13. The investigating officer (PW-11) stated that no weapon recovered from the appellants, was blood-stained or made by him into any sealed parcel. During statement of Rana Iftikhar (CW-2), it was confirmed on the record that during investigation the appellants were found to be innocent, hence recommended to be discharged from the case. During deposition of Ijaz Hussain Minhas and Muhammad Sadiq Cheema as DW-1 and DW-2 respectively, it was brought on the record that when the occurrence was taken place the complainant was not available there and two persons in an injured condition were found lying at the spot.

14. All the above-mentioned facts and circumstances, have casted serious doubts into the alleged prosecution story and the prosecution had badly failed to bring home the charge against the appellants. Hence, it is unsafe to maintain their conviction on the basis of such type of evidence because it is bounden duty of the prosecution to prove its case against the accused beyond any shadow of doubt. I am fortified by the dictum laid down in the case *"Muhammad Khan and another v. The State" (1999 SCMR 1220),* wherein the Hon'ble Supreme Court of Pakistan, has held as under:---

"It is an axiomatic and universally recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be

unsafe to rely on the ocular evidence which has been molded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct respective".

It has been further held by the Hon'ble Supreme Court of Pakistan in the case *" Tariq Pervaiz v. The State" (1995 SCMR 1345)* that if a simple circumstance creates reasonable doubt, in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right.

15. Resultantly, the appeal in hand is *accepted*, the impugned judgment is *set aside* and the appellants are *acquitted* of the charge, while extending them the benefit of doubt. They, by way of suspension of sentences are on bail, hence their bail bonds are discharged. The disposal of case property shall be as directed by the learned Trial Court.

Criminal appeal allowed.

2015 M L D 54
[Lahore]
Before Muhammad Tariq Abbasi, J
MUHAMMAD AKRAM---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.51 of 2014, decided on 10th February, 2014.

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

----Art. 78---Penal Code (XLV of 1860), Ss.302, 324, 148, 149 & 109---Qatl-i-amd, attempt to commit qatl-i-amd, rioting, common object, abetment---Recording of secondary evidence---Petitioner had challenged order of the Trial Court whereby Head Constable was called for recording his statement as secondary evidence---During trial of the case, it was revealed that Investigating Officer in the case was found accused in other criminal case registered against him under S.302, P.P.C. and he was not available to record his statement---Trial Court on the basis of application moved by the complainant, directed Head Constable, who remained associated with said Investigating Officer, and was acquainted with handwriting and signature of Investigating Officer, to be summoned to give secondary evidence---Contention of counsel for the petitioner was that no provision existed in law for calling and examining a person for secondary evidence---Contention was repelled as Art.78 of Qanun-e-Shahadat, 1984, dealt with that procedure---Said Head Constable, who remained posted with Investigating Officer, being acquainted with handwriting and signatures of Investigating Officer, was very much relevant to adduce secondary evidence about the proceedings---If the Head Constable, had already been recorded as a prosecution witness, there was no bar for his appearing again in the court for recording secondary evidence.

Mian Tahir Iqbal for Petitioner.
Hassan Mahmood Khan Tareen, D.P.G. on Court's call.

ORDER

MUHAMMAD TARIQ ABBASI, J.---Through the instant petition, order dated 6-2-2014 passed by learned Addl. Sessions Judge, Vehari, has been challenged, whereby Muhammad Afzal, Head Constable, has been called for recording his statement as secondary evidence.

2. The learned counsel for the petitioner has argued that as there is no provision in the law, to call a person to adduce secondary evidence, hence the impugned order is not sustainable in the eye of law and that when the above-named Head Constable has already been examined as P.W.5, no need of his re-examination as directed in the impugned order.

3. The learned DPG has opposed the petition.

4. Arguments heard and record perused.

5. The record shows that during the trial before the learned Addl. Sessions Judge, Vehari, in case F.I.R. No.47/2011 dated 29-1-2011, registered under sections 302, 324, 148, 149 and 109, P.P.C. against the present petitioner and 9 others, when after examination of five prosecution witnesses, it revealed that the Investigating Officer namely Raja Zafar Iqbal, S.I. being an accused in a criminal case registered against him under section 302 of P.P.C., was proclaimed offender, hence not available, the learned trial Court on the basis of an application moved by respondent No.2 (complainant) directed that Muhammad Afzal, Head Constable, who remained associated with the above named S.I. and as such acquainted with his handwriting and signatures, be summoned to give secondary evidence.

6. There is no force in the arguments advanced by learned counsel for the petitioner that in the law there is no provision for calling and examining a person for secondary evidence. Article 78 of the Qanun-e-Shahadat Order, 1984, deals with the said procedure. For guidance and perusal, the said Article is reproduced hereunder:--

"Proof of signature and handwriting of person alleged to have signed or written document produced.---If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the documents as is alleged to be in that person's handwriting must be proved to be in his handwriting."

7. As per the above mentioned provision, a document can be proved by:-

(i) admission.

(ii) calling the person who had written and signed it.

(iii) calling the persons in whose presence it was reduced to writing.

(iv) calling the person who was acquainted with the handwriting and signatures of the person by whom the document was supposed to be written or signed.

(v) comparison in the Court, disputed handwriting or signatures with admitted signatures and handwriting.

(vi) calling Hand Writing Expert.

8. When in the situation in hand, it has been proved on the record that the above named S.I. being Investigating Officer had carried on certain proceedings and prepared certain documents, who being a proclaimed offender, in a criminal case is not traceable/available, then to carry on proceedings, in the trial and its conclusion, bringing on the record, the proceedings/documents, conducted and prepared, by the above named S.I./Investigating Officer, secondary evidence is demand of the situation.

9. It has been brought on the record that the above named Head Constable remained posted with the above named S.I./Investigating Officer and as such acquainted with his handwriting and signatures, hence the said Head Constable is very much relevant to adduce evidence about the proceedings carried on and the documents prepared and signed by the S.I./Investigating Officer. Therefore, if the above named Head Constable has already been recorded as a prosecution witness, then for the purpose of abovementioned secondary evidence, there is no bar for not appearing again, in the witness box.

10. Resultantly, the instant revision petition being devoid of any force and merits is hereby dismissed.

HBT/M-95/L Petition dismissed.

2015 M L D 463

[Lahore]

Before Muhammad Tariq Abbasi, J

MUHAMMAD AMIN---Petitioner

Versus

JUSTICE OF PEACE/ADDITIONAL SESSIONS JUDGE, SAHIWAL and 7 others---Respondents

Writ Petition No.14868 of 2012, decided on 13th February, 2014.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A, 22-B, 154, 155 & 157---Registration of criminal case---Withdrawal of earlier order---Petitioner had challenged earlier order passed by Justice of Peace, whereby direction was given to S.H.O. for recording version of the petitioner---On application of respondent, Justice of Peace had recalled/withdrawn earlier order---Earlier order was not baseless, but conditional, that if commission of a cognizable offence was found to be made out; then a criminal case should be registered---Said earlier order had been withdrawn through impugned order on the ground that commission of any cognizable offence was not made out---Said reason was not sufficient for withdrawal of the earlier order---Once an order permissible under the law had been passed by the Justice of Peace, then without any reason, cause or justification, its review or withdrawal, was not permissible---Commission of a non-cognizable offence, was no ground, not to carry on any proceedings---Even for commission of non-cognizable offence, due proceedings had been prescribed under S.155, Cr.P.C.---Order of Justice of Peace whereby the earlier order had been recalled/reviewed, could not be termed to be justified, and was not acceptable in the eye of law---Impugned order was set aside.

Aurangzeb Khan v. District Police Officer and 4 others 2009 YLR 83 ref.

Malik Muhammad Zafar Iqbal for Petitioner.

Mazhar Jamil Qureshi, A.A.-G. for Respondents Nos. 1 to 4.

Nemo for other Respondents.

ORDER

MUHAMMAD TARIQ ABBASI, J.---Through the instant writ petition, the order dated 12-11-2012, passed by learned Justice of Peace (respondent No.1) has been challenged, whereby, the earlier order dated 31-10-2012 has been recalled.

2. The facts are that upon an application, moved by the present petitioner, under sections 22-A and 22-B, Cr.P.C., before the learned Justice of Peace, on 31-10-2012, a direction to the S.H.O. concerned was issued to record version of the petitioner and if commission of a cognizable offence was made out, to register a criminal case. Thereafter, Mapal Khan (respondent No.5) moved another application, before the learned Justice of Peace, for suspension and withdrawal of the abovementioned earlier order and consequently the learned Justice of Peace through order dated 12-11-2012 had recalled the above said earlier order. Hence the instant writ petition.

3. The learned counsel for the petitioner has argued that the learned Justice of Peace was not at all competent to recall the order dated 31-10-2012 being passed in due course of law and as such the impugned order dated 12-11-2012 being a patent illegality, is not sustainable.

4. The learned Law Officer has opposed the writ petition.

5. The arguments have been heard and record has been perused.

6. It has been observed that the abovementioned earlier order dated 31-10-2012 was not baseless but conditional that if commission of a cognizable offence was found to be made out then a criminal case should be registered. It has been found that the said order has been withdrawn through the order dated 12-11-2012, with the contention that commission of any cognizable offence was not made out.

7. I am afraid, the above said reason was not sufficient for withdrawal of the earlier order because towards its implementation, the Investigating Officer was obliged to see whether commission of a cognizable offence was made out or not.

8. Even otherwise, once an order permissible under the law has been passed by the learned Justice of Peace, then without any reason, cause or justification, its review or withdrawal is not permissible. Reference may be made, to case titled 'Aurangzeb Khan v. District Police Officer and 4 others' (2009 YLR 83). The relevant paragraph of the judgment speaks as under:--

"It is strange that despite categorical assertion of the applicant that the said S.H.O. was favouring the opposite party, the Court of learned Ist Additional Sessions Judge Hyderabad, instead of enforcing his earlier order, dated 11-12-2004, accepted/entertained the application of S.H.O. of Police Station Makki Shah dated 22-12-2004 and passed the impugned order dated 1-2-2005 reviewing his earlier order and directing the applicant for filing of direct complaint. Passing of such order by the learned Ist Additional Sessions Judge Hyderabad, seems to be patent illegality which is liable to be corrected in exercise of revisional powers of this Court. Accordingly, this criminal revision application is allowed and disposed of in the terms that the applicant shall appear before the S.H.O. Police Station Makki Shah for recording of his statement, whereafter further action shall follow strictly in accordance with law."

9. Due to the reasons mentioned above, the order dated 12-11-2012 of the learned Justice of Peace, whereby the earlier order passed on 31-10-2012 has been recalled/reviewed, could not be termed to be justified, hence is not acceptable in the eye of law.

10. Furthermore, commission of a non--cognizable offence, as stated by the learned Justice of Peace in the impugned order, is no ground, not to carry on any proceeding. Even for commission of non-cognizable offence, the due proceedings have been prescribed under section 155 of Cr.P.C.

11. Resultantly, the instant writ petition is allowed and order dated 12-11-2012 passed by learned Justice of Peace, whereby earlier order dated 31-10-2012 has been recalled, is set aside. However, it is made clear that the S.H.O.

concerned shall strictly follow the earlier order dated 31-10-2012 and shall carry on the proceedings within the four corners of law and procedure i.e. under sections 154, 155 or 157 of Cr.P.C and if required, under section 182 of P.P.C.

HBT/M-96/L Petition allowed.

2015 M L D 553
[Lahore]
Before Muhammad Tariq Abbasi, J
AMEEN KHAN and another---Appellants
versus
The STATE---Respondent

Criminal Appeal No.357 of 2010, heard on 28th May, 2014.

(a) Penal Code (XLV of 1860)---
----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---No direct evidence was available on record and prosecution case rested upon the circumstantial evidence---Complainant, who had not seen the alleged occurrence, had not narrated any motive, and contended that the cause of the occurrence was unknown, but in the court he had narrated the motive, which could be treated as an afterthought/improvement, which was not only discarded, but that had created serious doubt about his credibility---Ocular account of one of the prosecution witnesses, had not helped the prosecution---Conduct of other prosecution witness, had cast serious doubt about his veracity and credibility---Blood-stained clothes, which during the alleged occurrence were being worn by accused, were recovered and taken into possession, but nothing was available on the record to suggest that blood on the clothes was that of the deceased---Said recovery, did not benefit the prosecution---Confession/admission allegedly made by accused before the Police, was not admissible/acceptable under the law---Prosecution had failed to establish its case, and charge against accused was not proved beyond any doubt---Trial Court was not justified in convicting accused through impugned judgment which was set aside---Accused were acquitted extending them the benefit of doubt, in circumstances.
Muhammad Wasif Khan and others v. The State and others 2011 PCr.LJ 470; Farman Ahmed v. Muhammad Inayat and others 2007 SCMR 1825; Muhammad Ashraf and another v. The State 2011 YLR 767; Qazi alias Dost Muhammad and another v. The State 2014 PCr.LJ 611; The State through Deputy Director Anti-Narcotic Force, Karachi v. Syed Abdul Qayum 2001 SCMR 14 and Salim Javed Durrani v. State through Dy. Attorney General, N.-W.F.P., Peshawar and 4 others 2005 PCr.LJ 22 rel.

(b) Criminal trial---

----Evidence---Circumstantial evidence---Scope---Each and every circumstance should be unified in such a manner that a continuous chain should be made, one end of which should touch the dead-body, whereas the other end should be around the neck of accused---If chain link was missing, then its benefit must go to the accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State and 2 others 1996 SCMR 188; Asadullah and another v. State and another 1999 SCMR 1034; Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

Qazi Muhammad Amin for Appellants.

Sh. Najaf Hanif for the Complainant.

Qaisar Mushtaq, ADPP for the State.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This appeal is directed against the judgment dated 12-5-2010, passed by the learned Addl. Sessions Judge, Chakwal, whereby in the case FIR No.203 dated 30-8-2007, registered under Sections 302/34, P.P.C. at Police Station, Kallar Kahar, District Chakwal, towards murder of Muhammad Ilyas, the appellants have been convicted under section 302(b), of P.P.C. and sentenced to the imprisonment for life. A fine of Rs.one lac has also been imposed against Ameen Khan (appellant No.1), whereas of Rs.3 lac against Ameer Khan (the appellant No.2), in default to further undergo S.I. for three months and six months respectively. It was directed that the amount of fine if realized 50% be paid to the legal heirs of the deceased as compensation. The benefit of section 382-B of Cr.P.C. was also extended to the appellants.

2. The facts are that Ayaz Khan (P.W.12) had made a statement (Exh.PG) before the police contending therein that about few days ago, Ameen Khan (appellant No.1) had brought his nephew Muhammad Ilyas (deceased), in the area of Kallar Kahar for work in the coal mines; that a rumor was got spread, by Ameen Khan (appellant No.1) that Ilyas deceased had disappeared; that he (complainant) tried to contact Ameer Khan (appellant No.2) but failed, whereupon he (complainant) along with Haji Bostan Khan and Sajjad Khan, Muhammad Riaz and Zargul came at village 'Warala' on 29-8-2007; that they contacted Ameer Khan (appellant No.2) through telephone, who told them that the dead-body of Muhammad Ilays was lying in a watercourse (Kas) of

Sangrala Hill, in the area of Warala; that due to shortage of time, the complainant party could not reach at the spot; that on 30-8-2007, the complainant along with above named, reached at the spot and found dead-body of Muhammad Ilyas lying there which was putrefied and bad-smell was coming from it; that the nephew of the complainant was murdered by the appellants through torture due to unknown reasons.

3. On the basis of the above said complaint, FIR (Exh.PG/1) was chalked out. The case was investigated and finally the appellants were challaned to the court.

4. The learned Trial Court had framed the charge against the appellants on 14-4-2009, they pleaded not guilty and claimed the trial, hence as many as 14 witnesses were examined.

5. After examination of the above-said witnesses, and closure of the prosecution case, the appellants were examined as required under section 342 of Cr.P.C. They denied almost all the questions, put to them, emerging from the prosecution evidence and pleaded their innocence and false implication in the case with mala fides. They did not opt to lead any evidence in their defence or make statements under section 340(2) of Cr.P.C.

6. After completing the above mentioned proceedings, the learned trial court had pronounced the impugned judgment, whereby convicted and sentenced the appellants in the above mentioned terms.

7. Consequently, the instant appeal has been preferred with the contention and the grounds that there was no direct evidence against the appellants and that the prosecution had failed to prove its case and charge against the appellants, but the learned Trial Court had erred in not considering the attending facts and circumstances and convicting the appellants through the impugned judgment, which is not acceptable under the law.

8. The learned ADPP assisted by learned counsel for the complainant has vehemently opposed the appeal and supported the impugned judgment, being quite well reasoned and demand of the situation.

9. Arguments of both the sides have been heard and the record has been perused.

10. Admittedly, in this case, there is no direct evidence. The prosecution case rests upon the circumstantial evidence. The criteria in such like situation is that each and every circumstance should be united in such a manner that a continuous chain should be made, one end of which should touch the dead-body, whereas the other end should be around the neck of the accused. But if chain link is missing then its benefit must go to the accused. In this regard, reliance can respectfully be placed upon the judgments reported as Ch. Barkat Ali v. Major Karam Elahi Zia and another (1992 SCMR 1047), Sarfraz Khan v. The State and 2 others (1996 SCMR 188) and Asadullah and another v. State and another 1999 SCMR 1034. In the case reported as Ch. Barkat Ali v. Major Karam Elahi Zia and another (1992 SCMR 1047), the august Supreme Court of Pakistan at page 1055 observed as under:--

"Law relating to circumstantial evidence is that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See "Siraj v. The Crown" PLD 1956 FC 123. The prosecution evidence in this case was of the deceased last seen with the accused and from the latter was recovered a handle of the hatchet blood stained and he was absent from the forest after the murder. The learned Federal Court held that the evidence was not sufficient and the accused was acquitted. In the case of "Karamat Hussain v. The State" 1972 SCMR 15 it was laid down that "In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypotheses other than the guilt of the accused."

Further reliance in this context is placed upon the judgment reported as Altaf Hussain v. Fakhar Hussian and another (2008 SCMR 1103), wherein at page 1105 it was held by the Hon'ble Supreme Court as under:--

"Needless to emphasise that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain."

11. While keeping in mind the above mentioned criteria, it would be seen and evaluated, whether the prosecution has proved, its case satisfactorily or otherwise.

12. As per the Doctor (P.W.1), two lacerated wounds, one at right side of neck on the lower jaw, whereas the other on back of the right chest were observed

at the dead-body, which was at the advance stage of putrefaction with maggots. According to the doctor, the above-said injuries which were ante-mortem in nature, had caused death to the deceased and that probable time which elapsed between the death and post-mortem examination was 3 to 10 days. This witness during cross-examination had admitted that the injuries were not caused by firearm weapon and that the possibility of injuries by means of pointed stone cannot be ruled out.

13. Ayaz Khan, complainant (P.W.12) as stated above, had not seen the alleged occurrence, but when he was allegedly told on 29-8-2007 that the dead body of Muhammad Ilyas was lying in a watercourse, he did not make any struggle on the said date to reach to the dead-body and remained satisfied and thereafter on the following day he attended the spot. In the complaint Exh.PG, this witness had not narrated any motive and contended that the cause of the occurrence was unknown but when he entered in the witness box, he had narrated a motive which can rightly be treated as an afterthought improvement, which is not only discarded but the same fact has also made serious doubt into his credibility. Reliance is placed upon Muhammad Wasif Khan and others v. The State and others (2011 PCr.LJ 470), Farman Ahmed v. Muhammad Inayat and others (2007 SCMR 1825) and Muhammad Ashraf and another v. The State (2011 YLR 767).

14. Inayat Ullah Khan (P.W.6), had deposed that Muhammad Ameen, (appellant No.1) had told before him that Muhammad Ameer (appellant No.2) had done Muhammad Ilyas to death by firing. Firstly, as stated above, during the evidence of the doctor, it has been confirmed on the record that the death of Muhammad Ilyas, did not occur due to firing and secondly the abovementioned version of the above named appellant being exculpatory in nature could not be given any weight under the law. Therefore, the statement of the P.W.6, has not given any benefit to the prosecution.

15. Muhammad Ameen, (P.W.7), during his statement has contended that on 24-8-2007, at about 7 a.m., he along with Inayat Ullah, Najeeb, Muhammad Ameen (appellant No.1) and Muhammad Ilyas (deceased) had reached at Adda Malot, from where the deceased and the appellant No.1 went to mine No.15, whereas he and remaining persons to Warrala by bus. This witness had further contended that he did not join into the police investigation however, the police had recorded his statement under section 161 of Cr.P.C. During cross-examination of this witness, it had come on the record that whichever he

had stated during examination-in-chief was contradictory to his- version, narrated during statement under section 161 of Cr.P.C. Therefore, in the light of the judgment reported as Qazi alias Dost Muhammad and another v. The State (2014 PCr.LJ 611) the above mentioned conduct of the above-named P.W. has cast serious doubt into his veracity and credibility.

16. It has been brought on the record that the blood-stained clothes, which during the alleged occurrence were being worn by Muhammad Ameen (appellant No.1) were recovered and taken into possession, but nothing is available on the record to suggest that the said blood was of the deceased. Therefore, the said recovery had not given any benefit to the prosecution.

17. Ayaz Khan complainant (P.W.12) had also narrated about confession/admission, allegedly made by Ameer Khan (appellant No.2) in his presence before the police. Certainly, the said alleged statement being made by an accused before the police is not admissible/acceptable under the law. Reliance in this regard is respectfully placed upon the judgment reported as The State through Deputy Director Anti-Narcotic Force, Karachi v. Syed Abdul Qayum, (2001 SCMR 14) and Salim Javed Durrani v. State through Dy. Attorney General, N.-W.F.P., Peshawar and 4 others 2005 PCr.LJ 22 (DB).

18. All the above mentioned facts, circumstances and reasons clearly indicate that the prosecution had badly failed to establish its case as per the criteria mentioned above. In this way, the charge against the appellant was not proved beyond any doubt, but the learned Trial Court had erred in not considering the same and convicting the appellants through the impugned judgment.

19. Resultantly, the appeal in hand is accepted, the impugned judgment is set aside and both the appellants namely Ameen Khan and Ameer Khan are acquitted of the charge while extending them the benefit of doubt. Both the appellants by way of suspension of their sentence are on bail hence their bail-bonds are discharged.

HBT/A-166/L Appeal accepte

2015 P Cr. L J 58

[Lahore]

Before Muhammad Tariq Abbasi, J

MUHAMMAD NAWAZ---Petitioner

Versus

The STATE and another---Respondents

Criminal Revision No. 43 of 2014, heard on 2nd April, 2014.

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

----S. 540-A---Exemption to an accused from personal appearance---Conditions to be fulfilled for grant of exemption to an accused enumerated.

Following are the conditions that should be fulfilled to claim and grant exemption to an accused from personal appearance during trial:--

(i) There should be two or more accused before the court;

(ii) The accused seeking exemption should be before the court;

(iii) The accused should be incapable of remaining before the court;

(iv) The accused should be represented by a pleader;

(v) The Court should be satisfied about the incapability of the accused to remain before it.

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

----Ss. 205 & 540-A---Exemption to an accused from personal appearance---Grounds and conditions---Accused earning his livelihood abroad---Accused faced trial along with the co-accused and sought dispensation from personal appearance on the grounds that he was working and earning his livelihood abroad, for which purpose he had obtained a visa after incurring heavy expenditure; that during investigation he had been declared innocent, but appeared and joined the trial on summoning of the court, and that in his place an advocate would appear in the court on each and every date of hearing and join the proceedings---Validity---Incapability to appear before the Trial Court, as pleaded by the accused could be termed a fit (ground) for exemption---Accused fulfilled all the conditions that were required to be fulfilled to claim and grant exemption to an accused from personal appearance during trial---After grant of dispensation by the Trial Court, no hurdle had occurred in the trial due to non-availability of accused--- Revision petition against dispensation allowed to accused was dismissed in circumstances with the direction that if at any stage of trial, Trial Court felt any hurdle due to non-availability of accused or his advocate, then it should not hesitate in withdrawing the concession and requiring personal appearance of accused.

Haji Aurangzeb v. Mushtaq Ahmad and another PLD 2004 SC 160 rel.

Usman Sharif Khosa for Petitioner.

Mian Abdul Qayyum, Additional Prosecutor-General for the State.
Malik Muhammad Saleem for Respondent No.2.
Date of hearing: 2nd April, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the order dated 19-9-2013, passed by the learned Additional Sessions Judge, Dera Ghazi Khan, whereby personal appearance of Irshad, the respondent No. 2 has been dispensed with and the application moved by the petitioner for cancellation of the bail bonds of the said respondent has been dismissed.

2. The facts are that Irshad (respondent No. 2) along with his co-accused was facing trial in case F.I.R. No. 284/2012 registered under sections 302/324/148/149/109 of P.P.C. at Police Station Choti, District Dera Ghazi Khan, in the court of learned Additional Sessions Judge at Dera Ghazi Khan. The said respondent preferred an application under sections 205/540-A of Cr.P.C., whereby he sought dispensation from personal appearance, in the court, on the grounds that he for labour and to earn the livelihood had to go to Saudi Arabia as his visa was going to expire. The said application was entertained by the learned trial Court on 19-1-2013. Thereafter on 9-2-2013, the petitioner had moved an application before the learned trial Court, whereby he sought cancellation of the bail bonds of Irshad (respondent No. 2) on the grounds that he had proceeded abroad, hence became absent. Both the above mentioned petitions were taken up by the learned trial Court and decided through the impugned order, whereby personal appearance of the respondent No. 2 was dispensed with, whereas the application of the petitioner for cancellation of the bail bonds of the said respondent was dismissed.

3. Feeling aggrieved, the instant revision petition has been preferred, with the contention and the grounds that the respondent No. 2 had left the country prior to passing of the impugned order, hence no reason, cause or justification to grant him the dispensation, and as such the impugned order is not acceptable under the law.

4. The learned counsel appearing on behalf of the petitioner has advanced his arguments in the above-mentioned lines, whereas the learned counsel for the respondent No. 2 has supported the impugned order and opposed the revision petition.

5. Arguments heard and record perused.

6. Section 540-A of the Code of Criminal Procedure, 1898 deals with exemption to an accused from personal appearance, in a trial or the inquiry. The said provision reads as under:--

"540-A. Provision for inquiries and trial being held in the absence of accused in certain cases.---(1) At any stage of an inquiry or trial under this code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied for reason to be recorded, that any one or more of such accused is or incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

7. Plain reading of the above mentioned provision shows that to claim and grant, exemption to an accused, the following conditions should be fulfilled:-

(i) There should be two or more accused before the court.

(ii) The accused seeking exemption should be before the court.

(iii) The accused should be incapable to remain before the court.

(iv) The accused should be represented by a pleader.

(v) The court should be satisfied about incapability of the accused to remain before it.

8. In the matter in hand, Irshad (respondent No. 2) along with his co-accused (more than two) was facing the trial before the learned Additional Sessions Judge, Dera Ghazi Khan. On 19-1-2013, he filed an application, before the learned trial Court under sections 205/540-A of Cr.P.C., whereby he sought dispensation from personal appearance, on the grounds that during investigation, he had been declared innocent, but appeared and joined into the trial on summoning of the court and that he to earn livelihood was serving at Saudi Arabia, for which purpose he obtained visa while incurring heavy expenditures, which was going to expire and that in his place, Malik Muhammad Shiraz Arshad Advocate will appear in the court on each and every date of hearing and join into the proceedings.

9. The august Supreme Court of Pakistan in the case titled 'Haji Aurangzeb v. Mushtaq Ahmad and another' (PLD 2004 SC 160) has held that in the above mentioned like situation, exemption to an accused should be given. The relevant portions of the said judgment read as under:--

"Incapability is word of wide import and may cover all circumstances beyond the control of the accused. The exemption could be granted in absence in extremely exceptional cases like ailment of accused which rendered his

movement difficult (like the case of paralysis) or departure from country or station is absolutely necessary and there is no time to have recourse to the court for seeking permission/exemption."

"The provisions of section 540-A, Cr.P.C. are to be interpreted with benevolence, because it is an enabling provision not meant to punish some one. The section, in the circumstances, aims at achieving three-fold benefit. One benefit being that of the exempted accused, second being that of the co-accused under trial and third being the convenience of the Court itself."

10. In the situation in hand, all the above mentioned conditions are fulfilled. There are more than two accused. Only one (respondent No. 2) has claimed the exemption, while showing the above mentioned incapability, which, as per the above mentioned dictum of the august Supreme Court of Pakistan can rightly be termed to be a fit one, for grant of exemption. He has categorically stated that if exemption is granted, then in his place, the above named Advocate will appear in the court and join into the proceedings on his behalf.

11. Undoubtedly, at the time of filing of the application, the respondent No. 2 was personally before the learned trial Court, but due to his above mentioned hardships, subsequently he had proceeded to Saudi Arabia and as such at the time of grant of exemption on 19-9-2013, he was incapable to be before the court. The learned trial Court was fully aware of the above-mentioned facts and circumstances, but while realizing that the respondent No. 2 had gone abroad due to unavoidable circumstances had granted exemption to him.

12. It has been observed that the learned trial Court, while dealing with and deciding the above mentioned application, had narrated each and every aspect, including the law on the subject in detail. Therefore, the impugned order could not be termed to be having any legal objection.

13. In the impugned order, it has been categorically mentioned that whenever the respondent is required and summoned, he will be bound to appear in the court.

14. It has been noted that after grant of the dispensation, due to non-availability of the respondent No. 2, no hurdle in the trial has occurred.

15. For what has been discussed above, the revision petition in hand being devoid of any force and merit is dismissed. However, the learned trial Court is directed that if at any stage, it feels any hurdle in trial, due to non-appearance of the respondent No. 2 or his above named Advocate, then it will not hesitate in withdrawing the above mentioned concession and requiring personal appearance of the respondent No. 2.

MWA/M-138/L Petition dismissed.

2015 P.Cr.R. 39
[Multan]
Present: **MUHAMMAD TARIQ ABBASI, J.**
Muhammad Azam
Versus
The State, etc.

Criminal Appeal No. 97 of 2014 and Murder Reference No. 23 of 2014, decided on 22nd October, 2014.

MURDER --- (Compromise)

Criminal Procedure Code (V of 1898)---

---Ss. 410, 345---Pakistan Penal Code, 1860, Ss. 302/311/114---Murder appeal---Compromise between appellant-convict and the legal heirs of deceased---Reportedly parties had compromised whereby legal heirs of the deceased had forgiven appellant-convict in the name of Allah Almighty, without any compensation and had no objection, if in consequence of the compromise, the appellant-convict was acquitted of charge---No clear offence was made out to constitute offence covering element /mischief of (fasd-fil-arz)---Impugned conviction/sentence of death was set aside---Criminal appeal allowed.
(Paras 4, 5, 6, 7)

Ref. 2011 MLD 1919, 2014 SCMR 1155.
مذکورہ قتل کاروکاری اور سیاہ کاری کا نتیجہ نہ تھا۔ ما بین فریقین راضی نامہ کی بنیاد پر سزائے موت کے خلاف اپیل منظور ہوئی۔

[Offence of murder was not in consequence of Karokari and Siakari. On basis of compromise between parties. Impugned conviction/sentence of death was set aside].

For the Appellant: Malik Muhammad Saleem, Advocate.
For the State: Malik Riaz Ahmad Saghla, Deputy Prosecutor General.

Date of hearing: 22nd October, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This judgment shall dispose of the above-captioned Murder Reference and the Criminal Appeal as both are outcome of same judgment dated 28.2.2014, passed by the learned Additional Sessions Judge, Jampur, District Rajanpur, whereby in case F.I.R. No. 51, dated 01.10.2012, registered under Sections 302/311, 114 P.P.C. at Police Station Laal Garb, Muhammad Azam (appellant) has been convicted under Section 302(b), P.P.C. and sentenced to death, with compensation of Rs.1,00,000/-, payable to the legal heirs of the deceased, otherwise to serve simple imprisonment for six months.

2. The precise facts are that in the above-mentioned case, the appellant was challaned for commission of 'Qatal-e-Amd' of *Mst.* Tasleem Mai, which was received in the Court of learned Additional Sessions Judge, Jampur, District Rajanpur, the appellant was charge-sheeted; he pleaded not guilty and claimed the trial; all the proceedings including recording of the prosecution evidence, statement under Section 342, Cr.P.C. were completed and finally the judgment was pronounced in the above-mentioned terms. Consequently, the Murder Reference and the Appeal in hand.

3. During pendency of the above-said matters, criminal miscellaneous No. 204-M/2014 was preferred, with the contention that a compromise between the appellant/convict and the legal heirs of the deceased has been arrived at, whereby he has been forgiven, hence the proceedings under Section 345, Cr.P.C. may be carried on and the matters may be disposed of.

4. To know genuineness or otherwise of the compromise, the matter was referred to the leamed Sessions Judge, Rajanpur, where the due proceedings were carried on and accordingly a report has been submitted. As per the report, *Mst.* Tasleem Mai (deceased) was unmarried and survived by her parents namely Zafar Khan and *Mst.* Malka Mai; both made the statements to the effect that they have effected compromise with the appellant/convict (Muhammad Azam), whereby they forgiven him, the murder of their above-named daughter in the name of Allah Almighty, without any compensation and have no objection if, in consequence of the compromise, the appellant/convict (Muhammad Azam) is acquitted of the charge. The learned Sessions Judge, Rajanpur has held the compromise to be genuine, voluntary and in interest of the parties. Even today, the above-named parents of the deceased are available before the Court and confirm the factum of compromise as reported by the learned Sessions Judge, Rajanpur.

5. The learned Deputy Prosecutor General has contended that as the murder was on the pretext of *'karokari' and 'siyakari'*, hence, the appellant may be dealt with under Section 311, P.P.C. Although the F.I.R. was also registered under the said provision and the appellant, besides offence under Section 302, P.P.C., was also charge-sheeted under Section 311, P.P.C., but he was sentenced only in offence under Section 302(b), P.P.C., meaning thereby that the learned Trial Court while considering the attending facts and circumstances and evidence on the record did not deem it necessary to convict and sentence the appellant in offence under Section 311, P.P.C. Even as per Section 345(2-A), Cr.P.C., if an offence under Chapter XVI of the Pakistan Penal Code, 1860, has been committed in the name or on the pretext of '*karokari' and 'siyakari',* or on other similar customs or practices, such offence may be waived or compounded subject to such conditions as the Court may deem it to impose with the consent of the parties having regard to the facts and circumstances of the case. No clear evidence is available on the record to constitute the offence involving the element/mischief *of (fasad-fil-arz).* The Hon'ble Supreme Court of Pakistan in the judgment *"Iqrar Hussain and others v. The State and another"* (2014 SCMR 1155), while discussing Sections 345, Cr.P.C. and 311, P.P.C., has held as under:-----*Ss. 302 & 311---Criminal Procedure Code (V of 1898), S. 345---Qatl-e-Amd---Reappraisal of evidence--Compromise between parties---Compounding of right of "Qisas" by legal heirs of the deceased---Offence not constituting "fasad-fil-arz"---Accused were convicted and sentenced for murder of deceased----During pendency of appeal before the High Court, compromise was effected between the parties, which was duly verified to be genuine by the Trial Court---High Court, however held that present case was of the nature which fell within the definition of "fasad-fal-arz" and because the accused acted in a brutal manner, the crime committed was outrageous to public conscious, therefore, compounding right of* "Qisas" *by the "walis" would not completely exonerate the accused nor could they go without any punishment---High Court convicted the accused under S. 311, P.P.C. despite the compromise effected between the parties---Validity---Section 311, P.P.C. was attracted in cases punishable with "Qisas" and not to cases punishable under "Ta'azir"---Section 302, P.P.C. was compoundable in view of provisions of S. 345, Cr.P.C.---Accused entered into a genuine compromise with the complainant/legal heirs of deceased---No clear evidence was available to constitute the offence involving the element/mischief of fasad-fil-arz, thus the High Court was not justified in law to convert the punishment of the accused*

to one under S. 311, P.P.C. instead *of acquitting them on the basis of compromise--- High Court had committed a legal error in convicting and sentencing the accused for crime under S. 311, P.P.C., which caused serious miscarriage of justice---Appeal was allowed on the basis of compromise, and accused were acquitted of the charge leveled against them.*

A learned Division Bench of this Court in the case of *"Abdul Hameed v. The State and another"* (2011 MLD 1919), while dealing with the instant like situation, had made the following conclusion:---

"The above discussion brings us to the conclusion that the offences falling under Chapter XVI of P.P.C. and mentioned in the schedule under Section 345, Cr.P.C. even if committed in the name of "ghayrat" "Karo Kari", "Sayah Kari" and similar other customs, are compoundable and may be waived."

6. The parents of the deceased frankly contend that the offence in question was not in consequence of *`karokari and 'Siyakari',* hence they are not inclined to impose any condition upon the appellant/convict.

7. As a result of the above-mentioned discussion, in our view, there is no hurdle to accept the compromise. Consequently, the Criminal Appeal No. 97/2014 is accepted, the impugned judgment is set aside and Muhammad Azam is acquitted of the charge. The Murder Reference No. 23/2014 is answered in negative and the death sentence of Muhammad Azam is not confirmed.

Criminal appeal allowed.

PLJ 2015 Cr.C. (Lahore) 57

[Multan Bench Multan]

Present: MUHAMMAD TARIQ ABBASI, J.

Mst. SHAHNAZ KAUSAR--Petitioner

versus

S.H.O., POLICE STATION CIVIL LINE, DISTRICT MUZAFFARGARH and 4 others--Respondents

Crl. Misc. No. 69-H of 2014, decided on 19.2.2014.

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

----S. 491--Petition of Habeas Corpus--Illegal and improper custody of petitioner's daughter--Alleged detenue has contended she has come to Court from house of her husband (respondent No. 2) with whom she according to her free will and consent has contracted 'Nikah'--As per request of petitioner, lady has been made to sit with here for a reasonable time and when case has again been called, she has categorically stated that she would go and live with her above named husband and not at all with petitioner--Petition dismissed. P. 58] A

Rai Muhammad Zahid, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, DPG for State.

Mr. Muhammad Bilal Butt, Advocate for Respondent No. 2.

Date of hearing: 19.2.2014.

ORDER

Ghulam Rasool, SI has put appearance with the contention that despite best and honest efforts, the alleged detenue namely Abeera Bashir could not be traced. Contentions laid down by the SI seems doubtful, hence it is directed that the DPO Muzaffargarh alongwith the SHO of the concerned Police Station should appear before the Court on 1.30 PM.

Called again. At this time, Mr. Usman Akram Gondal, DPO, Muzaffargarh alongwith Javed Iqbal SHO of Police Station Civil Lines have attended the Court. If has been informed that just after passing of the above mentioned earlier order, the above named lady was brought in the Court and that she still is available here, When the DPO has been intimated about the above mentioned situation that non production of the lady in the Court during the earlier hours and her subsequent production, when the above mentioned order was passed, amounts that the concerned SI namely Ghulam Rasool was aware of the lady and to achieve some ulterior motive had narrated a wrong story to the Court. The DPO has contended that strict action against the delinquent will be taken. He has specifically been directed that the nasty(s) should not be spared so that all the system should be streamlined and no embarrassment may occur to anyone including the Police Department, which is considered and presumed to be a disciplined one.

2. *Mst.* Abira Bashir has contended she has come to the Court from the house of her husband Syed Shahanshah Bukhari (Respondent No. 2) with whom she according to her free will and consent has contracted 'Nikah' on 5.12.2013. As per request of the petitioner, the lady has been made to sit with here for a reasonable time and when the case has again been called, she has categorically stated that she would go and live with her above named husband and not at all with the petitioner.

3. In the light of the above stated situation, the petition in hand has failed and as such dismissed.

(A.S.)

Petition dismissed.

PLJ

2015 Cr.C. (Lahore) 89 (DB)
[Multan Bench Multan]
Present: **MUHAMMAD TARIQ ABBASI AND JAMES JOSEPH, JJ.**
MUHAMMAD SAFDAR--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 127-M of 2014, decided on 21.10.2014.

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

----S. 426(2-B)--Petition--Suspension of sentence--Petitioner has remained behind bars and after getting benefit of-Section 382-B, Cr.P.C. and remission earned by him from time to time has undergone more than half sentence and there was no likelihood of his appeal being disposed of in near future, therefore, sentence awarded to petitioner was hereby suspended. [P. 91] A

Ch. Imran Khalid Amratsari, Advocate for Petitioner.
Mr. Muhammad Bilal Butt, Advocate for Complainant.
Malik Riaz Ahmad Saghla, DPG for State.
Date of hearing: 21.10.2014.

ORDER

The petitioner was convicted by the learned Additional Sessions Judge, Multan *vide* judgment dated 08.06.200.6 in case FIR No. 397/2001 dated 22.10.2001 under Section 302/324/365/337-F(iii)/337-L(ii)/148/149, PPC registered at PS Mumtazabad, Multan and was sentenced as follows:

(i) Under Section 302 (b), PPC. Death Rs.50,000/- as compensation under Section 544 (A), Cr.P.C.

(ii) Under Section 365 readwith Section 148/149, PPC 5-years R.I. and a fine of Rs.5,000/- in default S.I. for 3-months.

(iii) Under Section 337-L (ii), PPC 2-years R.I. and Rs.5000/as Daman

(iv) Under Section 33 7-F (iii), PPC 3-years R.I. as Tazir and Daman of Rs. 100,000/-

All sentences shall run concurrently and benefit of Section 382(b), Cr.P.C. was also extended to the petitioner.

2. On appeal the learned Division Bench of this Court *vide* order dated 11.11.2010 disposed of Crl. Appeal No. 315/2006 and M.R. No. 705/2006 filed by the petitioner and altered the death sentence of the petitioner into life imprisonment whereas he was acquitted of the remaining charges.

3. The petitioner preferred Jail Appeal No. 326/2011 and Crl. Petitions No. 679 & 680.of 2010 before the Apex Court of Pakistan and *vide* order dated 23.01.2014 the Apex Court was pleased to observe as under:

> "It has *inter alia* been contended by the learned counsel for the petitioner that Haji Muhammad Yaqoob (PW-9) was a pivotal figure in the occurrence in issue and he had applied before the local police for registration of a criminal case against the present accused party and in his application he had given a version of the incident which was totally different from the version of the occurrence mentioned in the FIR lodged by Maqsood Ahmed (PW8); the said Haji Muhammad Yaqoob (PW-9) had got his statement recorded before the police under Section 161, Cr.P.C. and in that statement he had advanced a version of the incident different from the FIR and had exonerated some of the accused persons attributed fire-arm injuries to the deceased in the FIR; the impugned judgment passed by the Lahore High Court, Multan Bench, Multan shows that the eye-witnesses produced before the learned trial Court had been changing their stance at different stages of the case; two co-accused of the petitioner attributed effective and fatal firing at Liaquat Ali deceased had been acquitted by the learned trial Court and the same evidence could not

have been safely relied upon against the present petitioner; the motive set up by the prosecution had been discarded by the Lahore High Court, Multan Bench; and, therefore, the prosecution had failed to prove its case against the petitioner beyond reasonable doubt.

2. The contentions of the learned counsel for the petitioner noted above require reappraisal of the evidence so as to secure the interests of justice. This petition is, therefore, allowed and leave to appeal is granted for the purpose.

4. It in this background that the petitioner has approached this Court under Section 426 (2-B), Cr.P.C. for suspension of sentence awarded to him by the learned trial Court and upheld by this Court, maintaining that there is likelihood of the acquittal of the petitioner in the long run and simultaneously, there is no likelihood of his appeal being heard and decided in the near future by the Apex Court, hence, the sentence awarded to him be suspended.

5. Learned counsel for the complainant assisted by the learned Law Officer vehemently opposed the submissions made by the learned counsel for the petitioner.

6. We have heard learned counsel for the parties and perused the record.

7. Keeping in view the leave granting order of the Apex Court, as reproduced above, and also the fact that the petitioner has remained behind the bars since 07.11.2001 and after getting benefit of-Section 382-B, Cr.P.C. and remission earned by him from time to time has undergone more than half sentence and there is no likelihood of his appeal being disposed of in the near future, therefore, sentence awarded to the petitioner is hereby suspended and he is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs.200,000/- (Rupees two lac only) with one surety in the like amount

to the satisfaction of the Deputy Registrar (Judl.) of this Court. However, he is directed to appear before the Apex Court on each and every date of hearing till the final decision of the appeal.

(A.S.) Sentence suspended

PLJ 2015 Cr.C. (Lahore) 378 (DB)

[Multan Bench Multan]

Present: **MUHAMMAD TARIQ ABBASI AND QAZI MUHAMMAD AMIN AHMAD, JJ.**

MUHAMMAD RAFIQUE--Appellant

versus

STATE & another--Respondents

Crl. Appeal No. 76 and Capital Sentence Reference No. 3 of 2011, heard on 12.12.2014.

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

----S. 302(b)--Anti-Terrorism Act, (XXVII of 1997), S. 7--Conviction and sentence--Challenge to--Compromise--Appellant has been convicted and sentenced for commission of offence u/S. 302(b), PPC and 7 of Anti-Terrorism Act, 1997--Compromise can only be effected regarding offences mentioned in Section 345, Cr.P.C. and none else--Compromise is permissible and acceptable only to extent of offence u/S. 302(b), PPC--Consequently, on basis of compromise, conviction and sentence of appellant in offence under Section 302(b), PPC was set aside and he was acquitted of charge under said offence--As regards above mentioned other offence under Section 7 of Anti-Terrorism Act, 1997, it is stated that in light of above mentioned dictum, as said offence was not compoundable, hence compromise in it could not be permitted and accepted--Appellant had committed offence inside Court room, hence under third Schedule of Anti-Terrorism Act; 1997, provision of Section 7 of Anti-Terrorism Act, 1997 were fully attracted and as such appellant was rightly convicted under above mentioned provision--When from charge of offence under Section 302(b), PPC, appellant has been acquitted as a consequence of compromise--He deserves concession in quantum of his sentence for above mentioned offence of Anti-Terrorism Act, 1997--There was only one life, which has been spared, by accepting compromise in offence u/S. 302(b), PPC, hence it would not be justified to again take said life for offence u/S. 7 of Anti-Terrorism Act, 1997--Said fact in our view is also an extenuating circumstance for lesser penalty to appellant in above mentioned offence.

[Pp. 380 & 381] A, B, C, D & E

2004 SCMR 1170, PLD 2014 Supreme Court 383 and PLD 2014 Supreme Court 809 *ref.*

Mr. Iftikhar Ibrahim Qureshi, Advocate for Appellant.
Malik Muhammad Jaffer, D.P.G. for State.
Date of hearing: 12.12.2014.

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned matters being outcome of single judgment dated 23.7.2011, passed by the learned Judge Anti-Terrorism Court No. 1, Multan, whereby Muhammad Rafique (hereinafter referred to as the 'appellant') was convicted and sentenced in the following terms:--

(a) Under Section 302(b), PPC to death and compensation of Rs. 5,00,000/-, payable to the legal heirs of *Mst.* Gullan Bibi (deceased), failing which to undergo simple imprisonment for six months.

(b) Under Section 7 of the Anti-Terrorism Act, 1997 to death with fine of' Rs. 5,00,000/-, in default whereof to undergo simple imprisonment for six months.

2. The facts are that case FIR No. 837 dated 21.12.2010 under Section 302, PPC and 7 of the Anti-Terrorism Act, 1997 at Police Station City Arifwala, District Pakpattan was registered against the appellant, with the allegations that he by firing, committed *qatal-e-amd* of his mother *Mst.* Gullan Bibi, in the Court room of Mr. Saeed Raza, Judicial Magistrate Arifwala, District Pakpattan. On completion of the investigation, the challan against the appellant was submitted in the Court of learned Judge Anti-Terrorism Court No. 1, Multan, where he was charge sheeted. As the charge was denied by him, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 11 witnesses, whereas one was recorded as CW. On completion of all the proceedings, the learned trial Court had passed the impugned judgment in the above mentioned terms. Consequently, the matters in hand.

3. During pendency of the matters, an application (Criminal Misc. 1145-M of 2011) under Section 309/310 read with Section 345, Cr.P.C. was moved by the appellant, with the contention that a compromise between him and the legal heirs of the deceased had been arrived at, hence on the basis of the compromise, he may be acquitted of the charge. Regarding the alleged compromise, a report from the learned trial Court was requisitioned, and accordingly submitted. As per the report, the above named deceased was survived by *Mst.* Zaiban Bibi (mother), Nazir Ahmad (husband), Ahmad Saeed, Rasheed Ahmed, Shahid Fareed,

Muhammad Asad (sons), *Mst.* Surriya Bibi & *Mst.* Abida Bibi (daughters). Out of the above mentioned legal, heirs, Muhammad Asad was the minor, whereas rest were major. The major legal heirs had got recorded their respective statements, whereby confirmed their compromise with the appellant, without any compensation and no objection on his acquittal. Share in *diyat* of the minor was determined as Rs. 2,03,670/- and his interest was protected by transferring a plot measuring 05 *Marla*, valuing Rs.2,00,000/- in his favour, through Mutation No. 861 dated 23.1.2012 and deposit of the balance amount Rs. 4,000/- in his account, opened in Habib Bank Limited. Consequently, it was reported that the compromise was genuine and complete.

4. As stated above, the appellant has been convicted and sentenced for commission of offence under Section 302(b), PPC and 7 of the Anti-Terrorism Act, 1997. As per the dictum laid down by the august Supreme Court of Pakistan in cases *"Muhammad Rawab Versus The State"* (2004 SCMR 1170) and *"Muhammad Nawaz Versus The State"* (PLD 2014 Supreme 383), compromise can only be effected regarding the offences mentioned in Section 345, Cr.P.C. and none else. Therefore, in the matter in hand, the compromise is permissible and acceptable only to the extent of the offence under Section 302(b), PPC. Consequently, on the basis of the compromise, the conviction and sentence of the appellant in offence under Section 302(b), PPC is set aside and he is acquitted of the charge under the said offence. As regards the above mentioned other offence under Section 7 of the Anti-Terrorism Act, 1997, it is stated that in the light of the above mentioned dictum, as the said offence is not compoundable, hence compromise in it could not be permitted and accepted.

5. It has been confirmed on the record that the appellant had committed the offence inside Court room, hence under the third Schedule of Anti-Terrorism Act; 1997, the provision of Section 7 of the Anti-Terrorism Act, 1997 were fully attracted and as such the appellant was rightly convicted under the above mentioned provision. When from the charge of offence under Section 302(b), PPC, the appellant has been acquitted as a consequence of compromise, then as per law laid down in cases *"Muhammad Nawaz versus The State* (PLD 2014 Supreme Court 383)" and *"Shahid Zafar and 3 others Versus The State* (PLD 2014 Supreme Court 809) he deserves concession in quantum of his sentence for the above mentioned offence of Anti-Terrorism Act, 1997. In the case of *Muhammad Nawaz (Supra)* the Hon'ble Supreme Court of Pakistan observed as under:--

"9. However, this fact can also not be over sighted that in respect of murder of Muhammad Mumtaz, Constable, the petitioner was also sentenced to death and now the parties have compounded the offence under Section 302(b), P.P.C.. and according to the record compensation has also been paid. Therefore, question for quantum of sentence under Section 7 of ATA can be examined in view of the judgment in the case of *M. Ashraf Bhatti v. M. Aasam Butt* (PLD 2006 SC 182) wherein after the compromise between the parties sentence of death was altered to life imprisonment.

10. It is to be noted that both the sentences i.e., death and life imprisonment are legal sentences, therefore, under the circumstances either of them can be awarded to him. Thus in view of the peculiar circumstances noted hereinabove, sentence of death under Section 7 ATA, 1997 is converted into life imprisonment ……."

Furthermore, there is only one life, which has been spared, by accepting compromise in offence under Section 302(b), PPC, hence it would not be justified to again take the said life for offence under Section 7 of Anti-Terrorism Act, 1997. The said fact in our view is also an extenuating circumstance for lesser penalty to the appellant in the above mentioned offence.

6. Consequently, conviction of the appellant under Section 7 of the Anti-Terrorism Act, 1997 is maintained. However, his sentence is altered from death to imprisonment for life. The amount of fine prescribed by the learned trial Court and imprisonment in case of default in its payment is maintained and upheld. The benefit of Section 382-B, Cr.P.C. is provided to the appellant. The Criminal Appeal No. 76/2011 is decided in the above mentioned terms and CSR No. 03/2011 is answered in negative.

(A.S.) Order accordingly

PLJ 2015 Cr.C. (Lahore) 478 (DB)
[Multan Bench Multan]
***Present*: MUHAMMAD TARIQ ABBASI AND JAMES JOSEPH, JJ.**
AHMED DIN--Appellant
versus
STATE--Respondents

Crl. A. No. 390 of 2010 and M.R. No. 98 of 2009, heard on 20.10.2014.

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

----S. 302(b)--Conviction and sentence--Modification in sentence--Challenge to--It was a day light occurrence--Matter was reported to Police immediately--Appellant/convict was nominated to be person, who had fired and caused death of deceased--Prosecution witnesses had satisfactorily explained their presence and availability at spot-- PW-7 was resident of vicinity, whereas PW-2 had justifiably explained his presence at spot that he had come at house of his brother (deceased)--Contentions made by counsel for appellant/ convict that said witnesses were chance witnesses, was nothing, but a bald assertion--Although said witnesses were related inter se as well as with deceased, but their no enmity or grudge with appellant/convict could be established on record, hence their mere relationship was not sufficient to discard their testimony, which otherwise was confidence inspiring--Alleged motive was not proved and established and was yet shrouded into mysteries--Even trial Court had failed to discuss alleged motive, in impugned judgment--Failure of prosecution to prove motive may result in reduction of sentence of death to that of imprisonment for life--Empties from spot were allegedly collected, appellant/convict was arrested and recovery of pistol from him was effected, but empties were sent to laboratory, meaning thereby that empties and pistol remained in Police Station for a considerable long time and empties were dispatched to laboratory after about 1 1/2 months of recovery of pistol--No explanation or justification of above mentioned alarming lapse committed by prosecution has been brought on record--Said reason has made report of Forensic Science Laboratory, regarding matching of empties with pistol recovered from appellant convict, has made of no consequence--Conviction of appellant was maintained but his sentence was converted from death to imprisonment for life--Appeal was dismissed. [Pp. 483, 484 & 485] A, B & C

2010 SCMR 650, 2013 SCMR 782 & 2013 YLR 2748, *rel*.

Benefit of doubt--

----Principle--It is well settled principle, by now that accused is entitled for benefit of doubt as an extenuating circumstance while dealing his question of sentence as well. [P. 485] D

2009 SCMR 1188, *ref*.

Malik Imtiaz Haider Maitla, Advocate for Appellant.

Mr. Riaz Ahmad Saghla, D.P.G. for State.

Date of hearing: 20.10.2014.

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned matters, being result of the judgment dated 22.7.2009 passed by the learned Additional Sessions Judge, Muzaffargarh, whereby Ahmad Din (appellant in Criminal Appeal No. 390/2010) was convicted under Section 302(b), PPC for commission of '*Qatal-e-Amd*' of Abdul Latif and sentenced to death, with compensation of Rs.2,00,000/-, payable to the legal heirs of the deceased, failing which, to further undergo simple imprisonment for six months.

2. The precise facts are that Muhammad Siddique (complainant) had made the statement/'Fard Bian' (Ex.PA/1), which resulted into registration of the FIR (Ex.PA), with the contention that on 12.3.2006, at about 9.00 a.m., he alongwith his brother Abdul Latif (deceased) was available in the house, when M/s. Ahmad Din (appellant/convict) and Yasin (co-accused since acquitted) started digging the earth from their land (complainant party) and taking it to their (accused party) house, who were abstained by him and the deceased; after sometime, the above named again started digging and lifting the earth, whereupon Abdul Latif (deceased) again abstained them; after a short while, Abdul Latif (deceased) cried (bachau bachau) and the complainant saw that Ahmad Din (appellant/convict) while armed with a pistol .30 bore and Yasin (co-accused since acquitted), having an iron rod were running behind the deceased, to beat him; hue and cry attracted Saeed Ahmad (PW-7) and Sadiq Hussain (given up PW), who ran to save Abdul Latif (deceased); the deceased when reached near the house of Hafiz Rab Nawaz and called him to save him, but in the meanwhile, Ahmad Din (appellant/convict), reached there and made two fires with his pistol,

which landed at the chest of Abdul Latif and he fell down; Ahmad Din (appellant/convict) fired four other successive shots, which hit at left side and arm of Abdul Latif (deceased); Yasin (accused since acquitted) inflicted iron rod blows at right arm and different parts of the body or the deceased; the complainant and the prosecution witnesses when stepped forward, they were threatened by the accused, hence did not go near; Abdul Latif succumbed to the injuries at the spot and the accused fled away. The motive as alleged by the complainant was forbidding the accused from lifting earth from the land of the deceased.

3. The matter was investigated, the appellant/convict as well as his above named co-accused were found to be involved, hence challaned to the Court. The pre-trial proceedings were carried on and the appellant/convict and his co-accused (since acquitted) were charge sheeted on 10.2.2007. They pleaded not guilty and claimed the trial, hence the prosecution evidence was summoned and recorded.

4. The prosecution had got examined as many as 10 witnesses. The gist of evidence, led by the important/material witnesses is as under:-

(i) **PW-2 Muhammad Siddique,** complainant as well as an eye-witness of the alleged occurrence had narrated almost the same facts as were stated by him in his Fard Bian' (Ex.PA/1). He had also attested memo. (Ex.PE), through which the empties collected by the Investigating Officer from the spot were taken into possession. In his presence, the appellant/convict had made disclosure and then led to the recovery of .30 bore pistol, which was secured by the I.O. through memo. (Ex.PB), attested by him.

(ii) **PW-4 Muhammad Hussain,** ASI, on 12.3.2006 had kept a sealed parcel containing five empties, in the Malkhana, then handed over it to Muhammad Mohsin, Head Constable (PW-5) on 12.5.2006 for its onward transmission to the office of Forensic Science Laboratory, Lahore.

(iii) **PW-5 Muhammad Mohsin,** Head Constable had transmitted a sealed parcel allegedly containing the empties from the Police Station to the office of Forensic Science Laboratory, Lahore on 12.5.2006.

(iv) **PW-6 Altaf Hussain.** Constable had transmitted a sealed parcel allegedly containing the pistol, from the Police Station to the office of Forensic Science Laboratory, Lahore on 3.8.2006.

(v) **PW-7, Ahmad Saeed,** an alleged eye-witness of the occurrence, during statement in the Court had stated and corroborated version of Muhammad Siddique (complainant/PW-2) in all its four corners. He had also attested the memo. (Ex.PE), through which the I.O. had taken five empties into possession and the memo. (Ex.PD), through which last worn clothes of the deceased were secured by the I.O.

(vi) **PW-9, Ghulam Hussain,** Sub-Inspector had recorded the statement (Ex.PA) of the complainant (P W-2) and also carried on the investigation, during which, inspected the dead body and prepared injury statement (Ex.PG) and inquest report (Ex.PH); got conducted the post-mortem examination of the deceased; prepared the rough site-plan of the spot (Ex.PJ); collected five empties (P-1 to P-5) from the spot and secured them through recovery memo. (Ex.PE); took into possession the last worn clothes through memo. (Ex.PD), arrested Ahmad Din (appellant/convict) on 26.3.2006; took into possession .30 bore pistol (P-4), which was got recovered by the above named appellant/convict on 29.3.2006, through memo. (Ex.PB).

(vii) **PW-10, Dr. Muhammad Rafique** had conducted the post-mortem examination of the dead body of Abdul Latif (deceased) on 12.3.2006 *vide* report (Ex.PL) and the diagrams (Ex.PL/1). During the said examination, the following injuries were found on the dead body:--

(a) A lacerated wound 1 cm x 1 cm on left arm outer side near elbow, margins inverted and black.

(b) A lacerated wound 1 cm x 1 cm on left arm outer side below the Injury No. 1. Margins inverted.

(c) A lacerated wound 3 cm x 2 cm on inner side of left arm near Injury No. 5. Margins averted (outlet).

(d) A lacerated wound 1 cm x 1 cm (two in number) on front of chest below nipples. Margins inverted and black (inlet).

(e) A lacerated wound 2 cm x 2 cm on chest left side below nipple margins inverted and black (inlet) corresponding marks of

aperture were present. Thoracic and abdominal cavity were full of liquid blood.

(f) A lacerated wound 5 cm x 3 cm x skin deep on right foot near heel outsider.

The cause of death recorded by the doctor, was the result of above mentioned injuries, which were anti-mortem in nature and sufficient to cause death in ordinary course of nature and that the time between the injuries and death was immediate.

5. After examination of all the prosecution witnesses, report given by the Forensic Science Laboratory, Lahore was tendered in evidence as Ex.PM and case for the prosecution was got closed, whereafter the appellant/convict was examined as required under Section 342 Cr.PC, during which the questions emerging from the prosecution evidence were put to him, but he denied almost all such questions, while pleading his innocence and false involvement, in the case with *mala fides*. The question "Why this case against you and why the PWs have deposed against you?", was replied by the appellant/convict in the following terms:

> "Deceased Abdul Latif was our "Behnoi". We had suspicion of illicit liaison of our sister *Mst.* Amir Mai with brother of Muhammad Siddique complainant due to which brother of the deceased shifted his residence to Multan. Out "Behnoi" had enmities with other persons of the locality and he was murdered by some unknown persons. The occurrence was not witnessed by anyone and blind one. We had no enmity with our "Behnoi". We have been false involved in this case due to previous enmity and have been made scapegoat. PW-2 Muhammad Siddique and PW-7 Ahmad Saeed being related with the deceased and inter se have deposed falsely."

6. The appellant/convict did not opt to lead any evidence in his defence or make statement under Section 340(2) Cr.PC. On completion of the trial, the learned trial Court had passed the impugned judgment, in the above mentioned terms. Consequently the Appeal and the Murder Reference in hand.

7. The learned counsel for the appellant has argued that the appellant is innocent and falsely roped, in the case, with *mala fides*, while concocting a

false and frivolous story; neither the complainant (PW-2) nor Ahmad Saeed (PW-7) were available at the spot or had witnessed any occurrence and both with *mala fide*s were introduced at subsequent stage; both the above named were chance witnesses, hence not believable; the above named witnesses were related inter se as well as the deceased, hence their statements were not credible; the alleged recoveries were not proved/established, hence not believable; the statements of the eye-witnesses were full of material contradictions, but erroneously not considered by the learned trial Court; the prosecution case as well as the charge was not proved and established, hence the appellant was entitled for acquittal and as such the impugned judgment is not sustainable in the eye of law.

8. Learned Deputy Prosecutor General has vehemently opposed the appeal, while supporting the impugned judgment to be quite justified.

9. Arguments of the learned counsel for the appellant as well as the learned Deputy Prosecutor General have been heard and the record has been perused.

10. Muhammad Siddique, complainant (PW-2) and Ahmad Saeed (PW-7) had categorically deposed that in their presence and within their view, Abdul Latif was done to death, by Ahmad Din (appellant/convict), by firing with a pistol and that on receipt of the injuries, the deceased died at the spot. The above mentioned contention of the above named witnesses has been supported by the statement of the doctor (PW-10), the post-mortem report (Ex.PL) and that the diagram report; (Ex.PL/1) as five fire shot injuries on the dead body were observed and that on receipt of the injuries, the death was instant.

11. The above mentioned version of the above named witnesses was corroborative, concurrent and confidence inspiring. The defence despite lengthy cross-examination had failed to contradict the above said version or bring on the record, any other material favourable to the appellant/convict.

12. It was a day light occurrence. The matter was reported to the Police immediately. The appellant/convict was nominated to be the person, who had fired and caused death of Abdul Latif. The prosecution witnesses had satisfactorily explained their presence and availability at the

spot. Saeed Ahmad (PW-7) was resident of vicinity, whereas Muhammad Siddique (PW-2) had justifiably explained his presence at the spot that he had come at the house of his brother (deceased). The contentions made by the learned counsel for the appellant/convict that the above said witnesses were chance witnesses, is nothing, but a bald assertion. Although the above said witnesses are related inter se as well as with the deceased, but their no enmity or grudge with the appellant/convict could be established on the record, hence their mere relationship is not sufficient to discard their testimony, which otherwise is confidence inspiring. Our above mentioned view is fortified by the case of *"Haji vs. The State* (2010 SCMR 650), wherein the Hon'ble Supreme Court of Pakistan has observed as under:

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

13. In `Fard Bian' (Ex.PA/1), the FIR (Ex.PA) as well as in the statement, Muhammad Siddique had narrated the dispute to be digging and lifting of earth by the appellant/convict, from the land belonging to the deceased and that when the appellant/convict was forbidden from the said activity, the deceased was done to death. During cross-examination, the complainant deposed that the deceased did not tell him about any dispute with the appellant, and that before the occurrence, there was no dispute of any nature between the deceased and the appellant. The complainant had further contended that when he alongwith his brother (deceased) went to forbid the appellant/convict from digging of the earth, no exchange of hot words was taken place. Ahmad Saeed (PW-7) contended that at the time of

quarrel/digging of soil, he was not available there. Murid Mussain Patwari (PW-8), who had inspected the spot and drafted scaled site-plans, had contended that during the spot inspection, no ditch or any sign towards digging or lifting of the earth was noticed by him. The same was the contention of the I.O. (PW-9) that during the spot inspection, no sign towards digging or lifting of the earth was found.

14. All the above mentioned facts and circumstances, lead to the conclusion that the alleged motive was not proved and established and is yet shrouded into mysteries. It is pertinent to mention here that even the learned trial Court had failed to discuss the alleged motive, in the impugned judgment. Failure of the prosecution to prove the motive may result in reduction of sentence of death to that of imprisonment for life. Reliance in this respect may be placed upon the judgment reported as *"Muhammad Imran @ Asif versus The State"* (2013 SCMR 782) and *"Naveed alias Needu and others versus The State and others"* (2014 SCMR 1464), the relevant portion whereof reads as under:

> "Upon our own assessment of the evidence available on the record we have felt no hesitation in concluding that the specific motive set up by the prosecution had indeed remained for from being established on the record. The law recently declared by this Court in the cases of *Ahmed Nawaz and another v. The State* (2011 SCMR 593), *Iftikhar Mehmood and another v. Qaiser Iftikhar and others* (2011 SCMR 1165) and *Muhammad Mumtaz and another v. The State and another* (2012 SCMR 267) reiterates the settled and longstanding principle that failure of the prosecution to prove the motive set up by it may have a bearing upon the question of sentence and in an appropriate case such failure may result in reduction of a sentence of death to that of imprisonment for life for safe administration of justice."

15. It has been observed that empties from the spot were allegedly collected on 12.03.2006, the appellant/convict was arrested on 26.3.2006 and

recovery of pistol from him was effected on 29.3.2006, but the empties were sent to the laboratory on 12.5.2006, meaning thereby that the empties and the pistol remained in the Police Station for a considerable long time and the empties were dispatched to the laboratory after about 1½ months of recovery of the pistol. No explanation or justification of the above mentioned alarming lapse committed by the prosecution has been brought on the record. The said reason has made the report of the Forensic Science laboratory, Lahore regarding matching of the empties with the pistol recovered from the appellant/convict, has made of no consequence. Reliance in this regard may be placed upon the judgments reported as *"Ali Sher and others versus The State"* (2008 SCMR 707) and *"Nazer Abbas versus The State"* (2013 YLR 2748).

16. For what has been discussed above, we are of the view that the impugned judgment towards conviction of Ahmad Din (appellant) is quite justified and call of the day, but in the light of the non-establishment of the alleged motive and the above mentioned status of the report of the Forensic Science Laboratory, Lahore (Ex.PM), the quantum of sentence needs consideration being harsh. It is well settled principle, by now that accused is entitled for benefit of doubt as an extenuating circumstance while dealing his question of sentence as well. In this regard, reference may be made to the case of *"Mir Muhammad alias Miro vs. the State"* (2009 SCMR 1188), wherein the Hon'ble Supreme Court of Pakistan had held as under:

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

17. Consequently, the conviction of Ahmad Din (appellant) under Section 302(b), PPC awarded by the learned trial Court through the impugned judgment is maintained, but his sentence is converted from **death** to **imprisonment for life**. The amount of compensation awarded

by the learned trial Court and the sentence for its default is maintained. The appellant shall be entitled for the benefit of Section 382-B of Cr.PC.

18. In view of the foregoing discussion, with the above mentioned modification, in the sentence of the appellant, Criminal Appeal No. 390 of 2010 is dismissed. Murder Reference No. 98/2009 is answered in negative and death sentence of the appellant is not confirmed.
(A.S.) Appeal dismissed

PLJ 2015 Cr.C. (Lahore) 494 (DB)

Present: **MUHAMMAD TARIQ ABBASI AND ABDUL SAMI KHAN, JJ.**

STATE etc.--Petitioners

versus

MUNAWAR HUSSAIN etc.--Respondents

M.R. No. 456 of 2009, Crl. A. No. 446-J of 2014 & 167-J of 2009, decided on 30.3.2015.

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

----S. 302(b)--Conviction and sentence--Challenge to--Evidentiary value of Extra Judicial confession--During proceedings by Police, complainant never appeared anywhere and as stated above, she for first time had come into picture after about ten months of alleged occurrence--It is very strange that father of deceased did not implicate or nominate any of accused, but complainant had implicated her real mother and sister--Said complainant, in complaint! had stated about a window, in house from where lady appellants had been witnessing occurrence and talking with male appellant, but as per scaled site-plan prepared by PW at spot, there was no window--As per complainant, fire was made while placing pistol at head of deceased, but during post-mortem examination, no sign of close range firing was observed--According to complainant, deceased was tied by a rope with cot, but neither any rope, nor any cot was recovered or taken into possession--Complainant during cross-examination had admitted that house of occurrence was located in a populated area, but erroneously during occurrence alleged by her or thereafter, nobody had attracted as name of none was given in complaint--Recovery of a pistol at instance of appellant had been alleged and as per report of forensic Science Laboratory, said weapon was in working condition, but as no empty from spot was collected, or sent for comparison with weapon, hence said recovery and report has become inconsequential--Evidence of extra-judicial confession furnished by PWs could not be believed, for reasons, firstly, why appellants have made such a confession before said PWs as there was no evidence on record regarding their social status or influence over bereaved family, secondly, from narration of facts given by both these PWs in their statements, alleged extra-judicial confession made by appellants, appears to be of joint nature--Apart from above, they were related inter-se and were also related to complainant party, so, their statements cannot be relied upon without independent corroboration which was very much lacking in this case-

-Extra-judicial confession is always considered a weak type of evidence. [P. 498, 499 & 500] A, C & D

2006 SCMR 231, 2009 SCMR 166, *ref*.

Believe or disbelieve of witness--

----It is settled law that to believe or disbelieve a witness all depends upon intrinsic value of his statement--It is not person but statement of that person which is to be seen and adjudged by Court. [Pp. 498 & 499] B 2011 SCMR 208, *ref*.

Benefit of doubt--

----Principle--If a simple circumstance creates reasonable doubt in a prudent mind, about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. [P. 500] E 1995 SCMR 1345, *rel*.

Principle of Law--

----Golden Principle of law--It is better that ten guilty persons be acquitted, rather than one innocent person be convicted.

[P. 500] F

Ms. Sheeba Qaisar, Advocate for Appellant (in Crl. A. No. 446-J of 2014).

Mr. Maqbool Ahmad Qureshi, Advocate for Appellant (in Crl. A. No. 167-J of 2009).

Mr. Khurram Khan, D.P.G. for State.

Nemo for Complainant.

Date of hearing: 30.3.2015.

JUDGMENT

Muhammad Tariq Abbasi, J.--This single judgment shall decide the above captioned Murder Reference as well as the appeals, as all are outcome of single judgment dated 28.8.2008, passed by the learned Additional Sessions Judge, Sangla Hill, District Nankana Sahib, whereby in a private complainant, filed by *Mst.* Rabia Bibi (hereinafter referred to as the complainant), Muhammad Munawar Hussain, Sajida Parveen and Washfa Noreen (hereinafter referred to as the appellants) have been convicted and sentenced in the following terms:--

Muhammad Munawar Hussain

Under Section 302(b), PPC to death, with compensation of Rs.1,00,000/-, payable to the legal heirs of deceased Arshad Mehmood, in default to further undergo simple imprisonment for six months.

Sajida Parveen and Washfa Noreen

Under Section 302, PPC to imprisonment for life, each with compensation of Rs.50,000/- each, payable to the legal heirs of the deceased, failing which to further undergo simple imprisonment for six months each, with benefit of Section 382-B Cr.PC.

2. The facts as narrated in the FIR (Ex. PB) are that one Sultan Ahmad had got lodged FIR No. 200 dated 9.7.2005 under Section 302/109/34, PPC at Police Station Sadar Sangla Hill, District Nankana Sahib, with the contention that his son Arshad Mehmood (deceased), alongwith his family members was residing in village Dugree, whereas he with his family was settled at Mohalla Abbas Park, Street No. 3, Faisalabad; on 8.7.2005, he, to meet his son Arshad Mehmood, came at Village Dugree; during the night between 8/9.7.2005 at about 1.00 a.m., when he, his son Arshad Mehmood deceased, daughter-in-law (Bahu) Sajida Bibi and grand children were sleeping in Courtyard of the house, four unknown armed persons, while scaling the wall, attracted there and on gun-point got awakened him, his daughter-in-law and grand children and threatened them to remain silent, otherwise, will be shot; his son Arshad Mehmood was still-sleeping and an unknown armed person stood by him, whereas the other three took them (complainant party) in a room and confined them, with the contention that they would kill Arshad Mehmood; thereafter suddenly report of fire was heard and the accused while scaling over the wall, fled away; due to fear, they remained silent and at about 4.00 a.m., raised alarm, which attracted Abdul Wahid Numberdar and Amjad Ali PWs, who brought them out of the room and all saw that Arshad Mehmood was dead due to firing.

3. Thereafter, Rabia Bibi, daughter of Arshad Mehmood deceased came forward, with a private complaint against the appellants, on the grounds that there were illicit relations between Washfa Noreen and Muhammad Munawar Hussain appellants and both wanted to marry, for which Sajida Parveen appellant was also agreed, but the deceased was not inclined, due to which he for several times had abstained Sajida Parveen and Washfa Noreen appellants; on 8.7.2005, the above named appellants called Muhammad Munawar Hussain appellant, in their house, for murder of Arshad Mehmood deceased, so that he may not come in the way and all may lead peaceful life; all decided to administer the sleeping tablets to the deceased and then murder him; consequently Muhammad Munawar Hussain appellant supplied the said tablets to the other appellants and when the complainant abstained them, they threatened her to keep silent, otherwise would be killed; the lady appellants got the children asleep in a room and at about 11.00 p.m., Muhammad

Munawar Hussain appellant came their and all had been talking in the Courtyard; after about 1/2 hour, the lady appellants tied the arms and legs of Arshad Mehmood deceased with a cot and all the appellants came in a room, where Washfa Noreen appellant handed over a pistol to Muhammad Munawar Hussain appellant and asked him to lock the room from outside and then shot the above named deceased; the lady appellants started watching from the window and after about two minutes, Muhammad Munawar Hussain appellant came at the window and told that bullet was missed, whereupon Washfa Noreen appellant again loaded a bullet in the pistol and handed over it to the above named male appellant, with direction that fire should be made while placing the pistol at the head and while going, arms and legs of Arshad Mehmood should be untied; accordingly Muhammad Munawar Hussain appellant while shooting at Arshad Mehmood and telling to the lady appellants, went away; at the morning lady appellant started hue and cry and the people came there and brought them out of the room; the said appellants threatened the complainant that if she would tell the incident to anyone, would be dealt with in the same manner; Sajida Parveen appellant, for recovery of the complainant, filed writ petition in the Lahore High Court, but dismissed, which encouraged the complainant and she narrated all the facts to her paternal grant parents and aunt (Phuphi) and the Police was also approached, but of no consequence, hence the complainant was forced to file the complaint (sic)

(sic) judgment, in the above mentioned terms. Consequently, the matters in hand.

6. The learned counsel for the appellants has argued that the appellants have falsely been involved, with *mala fide*, after, due deliberation and consultation, despite the fact that they have not committed the alleged occurrence; the true facts of the occurrence were those, which were narrated by Sultan Ahmad, father of the deceased in the FIR (Ex.PB); the complainant after registration of the FIR and proceedings by the Police remained satisfied, for a considerable time, when she came forward, with the above mentioned unacceptable story, which even during trial could not be substituted, hence the charge against the appellants was not at all proved, but the learned trial Court had erred in not considering the same and passing the impugned judgment, on the basis of false presumptions and assumptions.

7. On the other hand, the learned Deputy Prosecutor General has vehemently opposed the appeals, on the grounds that the findings of the learned trial Court, which resulted into the impugned judgment being result of

correct appreciation and evaluation of the material available on the record, should not be disturbed.

8. We have heard the arguments of both the sides and have perused the record.

9. In this case, initially, the matter was reported to the Police by Sultan Ahmad, father of the deceased, with the above mentioned contention, during which presence or availability of Rabia Bibi (present complainant) or Washfa Noreen (appellant) was not at all shown or alleged anywhere. The father of the complainant had alleged the death of his son by unknown accused. The story narrated by him was also not plausible, because despite murder of his son at 1.00 a.m., he remained satisfied till 4.00 a.m., when he and other family members raised alarm, which attracted Amjad Ali and Abdul Wahid PWs at the spot, but during whole of the trial, they never came forward. The other version was described by Rabia Bibi, (present complainant), whereby she had narrated almost a different story, during which she did not show presence or availability of Sultan Ahmad (complainant of the FIR) anywhere, rather had shown her presence at the spot and witnessing the alleged occurrence. It is pertinent to mention here that during the proceedings by the Police, Rabia Bibi complainant never appeared anywhere and as stated above, she for the first time had come into picture after about ten months of the alleged occurrence. It is very strange that father of the deceased did not implicate or nominate any of the accused, but *Mst.* Rabia Bibi complainant had implicated her real mother and sister. The said complainant, in the complaint had stated about a window, in the house from where the lady appellants had been witnessing the occurrence and talking with male appellant, but as per the scaled site-plan (Ex.PC & Ex.PC/1) prepared by Khalid Mehmood (PW-10) at the spot, there was no window. As per the complainant, the fire was made while placing the pistol at the head of the deceased, but during post-mortem examination, no sign of close range firing was observed. According to the complainant, the deceased was tied by a rope with the cot, but neither any rope, nor any cot was recovered or taken into possession. The complainant during cross-examination had admitted that the house of occurrence was located in a populated area, but erroneously during the occurrence alleged by her or thereafter, nobody had attracted as name of none was given in the complaint. It is settled law that to believe or disbelieve a witness all depends upon the intrinsic value of his statement. It is not the person but the statement of that person which is to be seen and adjudged by the Court. In this regard reliance may be made to the case of *Abid Ali and 2*

others vs. The State (2011 SCMR 208), wherein, the Hon'ble Supreme Court of Pakistan, has observed as under:

> "21. To believe or disbelieve a witness all depends upon intrinsic value of the statement made by him. Even otherwise, there cannot be universal principle that in every case interested witness shall be disbelieved or disinterested witness shall be believed. It all depends upon the rule of prudence and reasonableness to hold that a particular witness was present on the scene of crime and that he is making true statement. A person who is reported otherwise to be very honest, above board and very respectable in society if gives a statement which is illogical and unbelievable, no prudent man despite his nobility would accept such statement.
>
> 22. As a rule of criminal prudence, prosecution evidence is not tested on the basis of quantity but quality of the evidence. It is not that who is giving the evidence and making statement; what is relevant is what statement has been given. It is not the person but the statement of that person which is to be seen and adjudged".

10. Recovery of a pistol at the instance of Muhammad Munawar Hussain (appellant) had been alleged and as per the report of the forensic Science Laboratory, Lahore, the said weapon was in working condition, but as no empty from the spot was collected, or sent for comparison with the weapon, hence the said recovery and report has become inconsequential.

11. PW-5 Mushtaq and PW-6 Shaista Parveen, remained satisfied and never joined into the investigation and for the first time appeared in the Court on 12.9.2006 i.e. after about 01 year and 02 months of the alleged occurrence. Their statements being made with the above mentioned alarming and un-explained delay should not be given any weight. It is pertinent to mention here that Sultan Ahmad, complainant of the FIR during whole of the trial, did not come forward and make any statement in the Court. The evidence of extra-judicial confession furnished by the above named PWs could not be believed, for the reasons, firstly, why the appellants have made such a confession before said PWs as there is no evidence on the record regarding their social status or influence over the bereaved family, secondly, from the narration of facts given by both these PWs in their statements, the alleged extra-judicial confession made by the appellants, appears to be of joint nature. Apart from above, they are related inter-se and are also related to the complainant party, so, their statements cannot be relied upon without independent corroboration which is very much lacking in this case. Extra-

judicial confession is always considered a weak type of evidence. The evidentiary value of the extra-judicial confession (joint or otherwise) came up for consideration before the before the Hon'ble Supreme Court of Pakistan in the cases of *"Sajid Mumtaz and others vs. Basharat and others"* (2006 SCMR 231) and *"Tahir Javed vs. The State"* (2009 SCMR 166). The relevant portion of the case of Tahir Javed (Supra) reads as under:

> "10. ... It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time therefore, normally it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of *Ahmed v. The Crown* PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:--(1) *Sajid Mumtaz and others v. Basharat and others* 2006 SCMR 231, (2) *Ziaul Rehman v. The State* 2001 SCMR 1405, (3) *Tayyab Hussain Shah v. The State* 2000 SCMR 683, (4) *Sarfraz Khan v. The State and others* 1996 SCMR 188."

12. All the above mentioned facts & circumstances, lead us to the conclusion that the charge against the appellants could not be proved and established, as per the prescribed criteria. It is well-settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind, about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. Reliance in this respect may be placed on the case *"Tariq Pervaiz vs. The State"* (1995 SCMR 1345). This view has further been fortified in the case of *"Ayub Masih vs. The State"* (PLD 2002 SC 1048), whereby it has been directed that while dealing with a criminal case, the golden principle of law **"it is better that ten guilty persons be acquitted, rather than one innocent person be convicted"** should always be kept in mind. Relevant portion of the case of *Ayub Masih (Supra)*, reads as under:

> "It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or

artificial. The rule of benefit of doubt, which is described as the golden rule is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

13. Resultantly, the above captioned Criminal Appeals No. 167-J/2009 and 446-J/2014 are **accepted,** impugned judgment is set aside and the appellants namely Sajida Parveen, Washfa Noreen and Muhammad Munawar Hussain are **acquitted** of the charge, while extending them the benefit of doubt. Muhammad Munawar Hussain appellant is in judicial custody, hence be released forthwith, if not required to be detained in any other criminal matter, whereas *Mst.* Sajida Parveen and Washfa Noreen appellants are on bail, through suspension of their sentence, hence their bail bonds are discharged. As a consequence, the **Murder Reference No. 456/2009 is answered in negative** and death sentence of Muhammad Munawar Hussain is **not confirmed**.

(A.S.) Appeals accepted

PLJ 2015 Cr.C. (Lahore) 507 (DB)
[Multan Bench Multan]
Present: **MUHAMMAD**
TARIQ ABBASI AND QAZI MUHAMMAD AMIN AHMED, JJ.
MUHAMMAD ISHAQUE etc.--Appellants
versus
STATE, etc.--Respondents

Crl. Appeal No. 693 of 2009 & M.R. No. 143 of 2009, heard on 15.12.2014.

Related witnesses--

----Although witnesses are closely related to deceased but their no grudge with appellant could be brought on record, hence their mere relationship is no ground to discard their testimony, which otherwise is confidence inspiring. [P. 511] A

2010 SCMR 650, *rel*.

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

----S. 302(b)--Conviction and sentence--Challenge to--It is not acceptable and believable that actual and real culprit was let of and appellant was substituted because substitution is a rare phenomena and said phenomenon does not exist in matter in hand--It is not believable that when complainant and witnesses were available at spot and the deceased as well as appellant had gone to sleep in a room, appellant done her to death due to family dispute/quarrel--It seems that motive which resulted into murder of lady at hands of appellant was something else, which either was not known to complainant party or deliberately not brought before Court and as such actual motive which resulted into occurrence is still shrouded in mystery--Prosecution has successfully proved and established its case and charge against appellant and trial Court rightly convicted him--As about quantum of sentence to appellant, that non-establishment of alleged motive, coupled with other facts and circumstances that appellant is husband of deceased and inflicted only one blow without any repetition, are sufficient grounds to give him premium

towards quantum of his sentence. [Pp. 511, 512 & 513] B, C & D

PLD 2002 SC 52, 2013 SCMR 782 & 2014 SCMR 1464, *rel*.

Malik Imtiaz Haider Maitla, Advocate for Appellant.

Mr. Muhammad Javed Iqbal Adum, Advocate for Complainant.

Malik Riaz Ahmed Saghla, Deputy Prosecutor General for State.

Date of hearing: 15.12.2014

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned criminal appeal and the murder reference as both are result of single judgment dated 30.9.2009, passed by the learned Additional Sessions Judge, Multan, whereby in case FIR No. 164 dated 2.5.2008, registered under Section 302, PPC at Police Station Alpa, District Multan, Muhammad Ishaque (hereinafter referred to as the appellant) has been convicted under Section 302(b) PPC and sentenced to death with compensation of Rs. 2,00,000/-, payable to the legal heirs of *Mst.* Razia Mai deceased, in default to undergo SI for six months.

2. The facts are that Zahoor Ahmad (PW-4) made a statement/Fard Biyan (Ex.PD), contending therein that marriage of his daughter *Mst.* Razia Mai (deceased) was solemnized with Muhammad Ishaque (appellant), resident of Gulshan Kareem Town, Band Bohsan and his another son in law (Damad) namely, Muhammad Asim was also residing in the same house; on 01.5.2008, the complainant alongwith his brother Manzoor Hussain (PW-5) and Bashir Ahmed (given up PW) went to see his daughters and passed the night there; the appellant and the deceased slept in a room, whereas the complainant and the above named witnesses in the Courtyard; at about 4:00 a.m. a voice from the room was heard, hence they woke up and saw that the appellant was holding a rugine (Raiti) and inflicted it at the neck of *Mst.* Razia Mai and she became injured; the appellant while scaling over

the wall fled away; *Mst.* Razia Mai was attended but found dead. The motive as described by the complainant was usual quarrel between the appellant and deceased and for the purpose of patching up, he and the witnesses arrived in the house.

3. On the basis of above said complaint, the case was registered through FIR (Ex.PC) and investigated. The appellant was found to be involved, hence challaned. The learned trial Court charge sheeted him, he pleaded not guilty and claimed trial, hence the prosecution evidence was summoned and recorded. The prosecution produced as many as nine witnesses. The material witnesses and the evidence led by them was as under:--

(i) **PW-1 Dr. Shagufta Khatoon Naqvi** conducted the post-mortem examination of dead body of *Mst.* Razia Mai through report Ex.PA and observed the following injury:--

1.5 cm x 1 cm punctured lacerated wound over the right side of neck 2 cm from midline below the level of thyroid cartridge. Wound was deep cutting skin muscle and main blood vessel of right side of neck i.e. carotid artery.

As per the doctor, the above said injury, which was anti-mortem and sufficient to cause death, was result of immediate death.

(ii) **PW-4 Zahoor Ahmad** the complainant as well as an eye-witness of the alleged occurrence, narrated almost the same facts, as were stated by him in the complaint (Ex.PD).

(iii) **PW-5 Manzoor Hussain** another eye-witness of the alleged occurrence supported and corroborated the version of the above named complainant (PW-4). He also attested the memos. Ex.PE, Ex.PF and Ex.PG, through which blood stained earth, Raiti (P-1), and last wearing (P-2 and P-3) of the deceased were respectively taken into possession by the I.O.

(iv) **PW-6 Muhammad Sadiq, SI,** secured Raiti (P-1) through memo. Ex.PF, which was got recovered by the appellant.

(v) **PW-9 Qamar Zia, SI** investigated the case, during which he recorded statement of the complainant (Ex.PD); inspected the dead body and prepared inquest report (Ex.PH); drafted rough site-plan (Ex.PJ); secured the blood stained earth and last worn clothes (P-2 & P-3) of the deceased through memos. Ex.PE & Ex.PG.

4. When evidence of the prosecution witnesses was completed, the reports of the chemical examiner and serologist were tendered as Ex.PK, Ex.PL and Ex.PM and case for the prosecution was closed. Thereafter, the appellant was examined under Section 342, Cr.P.C. and the questions emerging from the prosecution evidence were put to him but he denied almost all the questions, while pleading his innocence and false involvement in the case with the contentions that death of the lady was a result of falling on the ground and receiving injury by chance. He opted not to lead any evidence in his defence or make statement under Section 340(2), Cr.P.C.

5. On completion of all the proceedings, the learned trial Court pronounced the impugned judgment in the terms mentioned above. Consequently, the matters in hand.

6. The learned counsel for the appellant has argued that the appellant is innocent and has falsely been involved in the case with *mala-fide*, despite the fact that the PWs were not available at the place of the occurrence and were introduced later on, who after due consultation made false statements against him; the statements of the witnesses are full of material contradictions, hence not believable; the witnesses are closely related to the deceased, hence their statements could not be given any importance; the motive alleged in the complaint could not be proved and established; the recovery of rugine (Raiti) has been falsely planted against the appellant; the case of the prosecution and charge against the appellant was not proved and established, hence he was

entitled for acquittal and as such the impugned judgment towards his conviction and sentence is not acceptable under the law.

7. The learned Deputy Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the appeal, while declaring it result of correct appreciation and evaluation of the material available on the record, hence not interfereable.

8. Arguments of both the sides have been heard and the record has been perused.

9. Both Zahoor Ahmad, complainant (PW-4) and Manzoor Hussain (PW-5), categorically deposed that when they were sleeping in the Courtyard of the house, whereas the appellant and the deceased in the room, a voice was heard, hence they woke up and attended the spot, saw that the appellant while holding a rugine (Raiti) was available there, who within their view inflicted it at the neck of the lady, which resulted into her death then and there. The above named witnesses despite lengthy cross-examination remained confident and consistent towards involvement of the appellant for the commission of murder of the lady in the above stated manner. No material contradiction in their statements either could be pointed out or observed, hence the arguments made by the learned counsel for the appellant that statements of the witnesses are full of material contradictions are nothing but a bald assertion. Although the witnesses are closely related to the deceased but their no grudge with the appellant could be brought on the record, hence their mere relationship is no ground to discard their testimony, which otherwise is confidence inspiring. In this regard, reliance is placed in case *Haji vs. The State* (2010 SCMR 650), in which it has been held by the Hon'ble Supreme Court of Pakistan that:

> "Both the ocular witnesses undoubtedly are inter se related and to the deceased, but their relationship *ipso facto* would not reflect adversely against the veracity of the evidence of these witnesses in absence of any motive wanting in the case, to falsely involve the appellant with

the commission of the offence and there is nothing in their evidence to suggest that they were inimical towards the appellant and mere inter se relationship as above noted would not be a reason to discard their evidence, which otherwise in our considered opinion is confidence-inspiring for the purpose of conviction of the appellant on the capital charge being natural and reliable witnesses of the incident."

10. The witnesses have satisfactorily explained and justified their presence and availability at the spot. Therefore, the contention of the learned counsel for the appellant that the witnesses were not available at the spot is ill founded, hence discarded. It is not acceptable and believable that actual and real culprit was let of and the appellant was substituted because substitution is a rare phenomena and the said phenomenon does not exist in the matter in hand. In this regard, reliance is placed in case *Allah Ditta versus The State (*PLD 2002 Supreme Court 52). The relevant portion whereof reads as under:

"It is also to be noted that admittedly prosecution witnesses Muhammad Sadiq and two others have no enmity of whatsoever nature against Allah Ditta and they have also no reason to falsely involve him in the commission of murder of their brother Muhammad Sabir. In addition to it, it is also not possible for them that they would allow real culprit to go scot-free and falsely involve another person for the commission of the offence. Even otherwise it is well-settled by now that substitution of real culprit is a rare phenomenon in our system of criminal justice."

The above mentioned ocular account has gained further support from the medical evidence led by Dr. Shagufta Khatoon Naqvi (PW-1) and the repot Ex.PA as during the post-mortem examination the injury described by PWs was confirmed on the dead body. On one hand, the prosecution has successfully established and proved involvement of the appellant towards commission of the alleged occurrence and on the other hand, the appellant had

alleged the death of the lady by accidental falling but failed to substantiate the said version.

11. It has been brought on the record that the above mentioned weapon, through which the appellant caused the above mentioned injury to the lady, which resulted into her death was got recovered by him and sent to the laboratory. Reports Ex.PK and Ex.PM made by the chemical examiner and the serologist, whereby blood of human origin on the weapon was detected has further supported and corroborated the version of the prosecution that through the said weapon the appellant had caused injury to the deceased.

12. In the complaint (Ex.PD) as well as the FIR (Ex.PC) the alleged motive was given to be a quarrel between the appellant and deceased. The complainant (PW-4) as well as Manzoor Hussain (PW-5) also described the motive in the above mentioned terms. It is not believable that when the complainant and the witnesses ware available at the spot and the deceased as well as the appellant had gone to sleep in a room, the appellant done her to death due to family dispute/quarrel. It seems that the motive which resulted into murder of the lady at the hands of the appellant was something else, which either was not known to the complainant party or deliberately not brought before the Court and as such the actual motive which resulted into the occurrence is still shrouded in mystery.

13. For what has been discussed above, we have come to the conclusion that the prosecution has successfully proved and established its case and the charge against the appellant and the learned trial Court rightly convicted him. As about quantum of sentence to the appellant, it is stated that non-establishment of the alleged motive, coupled with the other facts and circumstances that the appellant is husband of the deceased and inflicted only one blow without any repetition, in our view are sufficient grounds to give him premium towards quantum of his sentence. Reliance in this respect is placed in cases *Muhammad Imran @ Asif versus The State"* (2013 SCMR 782) and *Naveed @ Needu and others versus The State & others* (2014

SCMR 1464). The relevant portion of case *Naveed alias Needu (Supra)* reads as under:--

> "Upon our own assessment of the evidence available on the record we have felt no hesitation in concluding that the specific motive set up by the prosecution had indeed remained for from being established on the record. The law recently declared by this Court in the cases of *Ahmed Nawaz and another v. The State* (2011 SCMR 593), *Iftikhar Mahmood and another v. Qaisar Iftikhar and others* (2011 SCMR 1165) and *Muhammad Mumtaz and another v. The State and another* (2012 SCMR 267) reiterates the settled and long standing principle that failure of the prosecution to prove the motive set up by it may have a bearing upon the question of sentence and in an appropriate case such failure may result in reduction of a sentence of death to that of imprisonment for life for safe administration of justice."

Resultantly, the conviction of the appellant is maintained but his sentence is converted from death to imprisonment for life. The compensation awarded to him by the learned trial Court and sentence in its default is maintained and upheld. Benefit of Section 382-B, Cr.P.C. is also extended to him.

14. Consequently, with the above said modification in sentence of the appellant, Crl. Appeal No. 693 of 2008 is dismissed. Murder Reference No. 143 of 2009 is answered in negative and death sentence awarded to the appellant by the learned trial Court is not confirmed.

(A.S.) Appeal dismissed

PLJ 2015 Cr.C. (Lahore) 553 (DB)

[Multan Bench Multan]

***Present*: MUHAMMAD**

TARIQ ABBASI AND QAZI MUHAMMAD AMIN AHMED, JJ.

TALIB HUSSAIN, etc.--Appellant

versus

STATE, etc.--Respondents

Crl. Appeal No. 91 of 2010 & M.R. No. 136 of 2009, heard on 16.12.2014.

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

----S. 302(b)--Conviction and sentence--Challenge to--Circumstantial evidence--Appellants were involved on basis of circumstantial evidence--Settled principle/criteria for such like cases is that all circumstances should be connected in such a manner that they should make a continuous chain, one end of which should touch dead body, whereas other around neck of accused--Missing of even a single ring would break chain and fatal for prosecution--Prosecution story is that one person while nothing foot prints had informed complainant that same were of appellants, hence complainant through a supplementary statement had nominated them--Firstly above named person, who had informed, had not appeared in witness box and secondly supplementary statement does not have any legal value--Sequel of above discussion is that prosecution has failed to make out chain and establish case as per above mentioned principle/criteria and as such charge against appellants is doubtful and it is unsafe to maintain their conviction on basis of such type of evidence--It has been directed that while dealing with a criminal case, golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind--Appeal was accepted. [Pp. 559, 560 & 561] A, B, C & F

PLD 1966 SC 664, PLJ 1999 SC 1018, 1992 SCMR 104, 1996 SCMR 188, 2008 SCMR 1103, 2009 SCMR 407, 1995 SCMR 1350, 2003 SCMR 1419 & 2010 SCMR 385, *ref.*

Duty of Prosecution--

----It is bounden duty of prosecution to prove its case against accused beyond any shadow of doubt--It is an axiomatic and universally recognized principle of law that conviction must be based on unimpeachable evidence and certainly of guilt and any doubt arising in prosecution case must be resolved in favour of accused. [P. 560] D 1999 SCMR 1220 & 2009 SCMR 230, *ref.*

Benefit of Doubt--

----Principle--It is well settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. [P. 561] E

1995 SCMR 1345 & PLD 2002 SC 1048, *ref*.

M/s. Prince Rehan Iftikhar Sheikh and Arsalan Masood Sheikh, Advocates for Appellant.

Mr. Aman Ullah Khan Pahor, advocate for Appellant.

Mr. Muhammad Ali Shahab, D.P.G. for State.

Mehr Zauq Muhammad Sipra, Advocate for Complainant.

Date of hearing: 16.12.2014.

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned Criminal Appeal and the Murder Reference, being outcome of same judgment dated 18.4.2009, passed by the learned Additional Sessions Judge, Kabirwala, District Khanewal, whereby in case FIR No. 484 dated 14.11.2004, registered under Sections 302, 392, PPC at Police Station Saddar Kabirwala, District Khanewal, Muhammad Ashfaq and Talib Hussain (hereinafter referred to as `appellants') have been convicted and sentenced in the following terms:--

Muhammad Ashfaq

(i) Under Section 302(b), PPC to death, with compensation of Rs. 2,00,000/- payable to the legal heirs of Muhammad Saleem (deceased), in default whereof to undergo simple imprisonment for six months; and

(ii) Under Section 392, PPC to rigorous imprisonment for ten years and fine of Rs. 20,000/- in default whereof to further undergo simple imprisonment for three months.

Talib Hussain

(i) Under Section 302(b), PPC to imprisonment for life, with compensation of Rs. 2,00,000/- payable to the legal heirs of the deceased, otherwise to undergo simple imprisonment for six months; and

(ii) Under Section 392, PPC to rigorous imprisonment for ten years and fine of Rs. 20,000/- in default whereof to further undergo simple imprisonment for three months.

It was also directed that all the above sentences will run concurrently, with the benefit of Section 382-B, Cr.P.C.

2. The facts are that Abdul Razzaq (PW-9) made a statement/ Frad Biyan (Ex. PF), before the Police, contending therein that on 13.11.2004 at about 8.00 p.m., he alongwith his sons Muhammad Saleem (deceased), Muhammad Nadeem (PW-10) and another namely Muhammad Aslam (given up PW), on a tractor Registration No. 4029/MNX was coming to Bilawal; the tractor was being driven by Muhammad Nadeem (PW-10) and when reached near tube-well of Mushtaq, suddenly two unknown persons, who were armed with fire-arms, came in front of the tractor, whereas another unknown remained standing at a sides the accused, who came in front of the tractor, got it stopped on gun-point and demanded from the complainant and his companions, their belongings; Muhammad Nadeem (PW-10) gave Rs. 3,000/- to them and accused who was armed with rifle, asked Muhammad Saleem (deceased) to also hand over to them his belongings; Muhammad Saleem (deceased) started raising hue and cry, whereupon the said person with rifle made a fire shot, which hit Muhammad Saleem at left side of shoulder and passed through and through; the other accused also started firing and thereafter all fled away; Muhammad Saleem succumbed to the injuries at the spot; many persons of the hearby locality attracted at the spot and due to darkness, the matter could not be reported to the police immediately. On the basis of the above said complainant/Fard Biyan, the case was registered through FIR (Ex. PF/1) against unknown accused. During the investigation, the appellants were found to be involved, hence challaned to the Court. They were formally charged sheeted, but denied the charge and claimed the trial, hence the prosecution evidence was summoned and recorded. The prosecution got examined as many as 15 witnesses. The material witnesses and gist of their evidence was as under:--

(i) PW-1 Dr. Muhammad Akhtar conducted post-mortem examination of the dead body of Muhammad Saleem on 14.11.2004 and prepared the post-mortem report (Ex. PA) and diagram (Ex. PA/1). The following injuries on the dead body were noticed:--

(1) Wound of entrance. Lacerated wound 1 cm x 1 cm on the back of left chest 14 cm below the upper margin of left shoulder 9 cm from mid line. Margins were inverted.

(2) Wound of exit. Lacerated wound 5 x 2 cm on the front of right upper chest just above the medial end of right clavicle. Margins were everted.

As per the doctor, the above said injuries were anti-mortem in nature, caused by fire-arm weapons and cause of death, which was within an hour.

(ii) PW-8 Syed Sikandar Ali Shah Bukhari, supervised the test identification parade dated 6.2.2006 and prepared the report (Ex. PE); during which Muhammad Ashfaq appellant was allegedly identified by the PWs.

(iii) PW-9 Abdul Razzaq complainant as well as an eye-witness narrated almost the same facts as were stated by him in the complaint (Ex. PF); he also participated in the test identification parades, during which Talib Hussain and Muhammad Ashfaq appellants were identified by him.

(iv) PW-10 Muhammad Nadeem, another eye-witness of the alleged occurrence, supported the version of the above named complainant (PW-9); he attested the memos. (Ex. PG. Ex. PH, Ex.PJ & Ex.PK), through which the blood stained earth, empties, pistol (P-4) got recovered by Talib Hussain appellant and rifle (P-6) recovered at the instance of Muhammad, Ashfaq appellant, were respectively taken into possession by the investigating officer; he also participated in the test identification parades and identified the appellants.

(v) PW-11 Muhammad Tahir narrated about extra judicial confession, allegedly made by the appellants, before him and Muhammad Hussain as well as Ashfaq (PWs).

(vi) PW-12 Syed Naveed Raza Bukhari supervised the test identification parade proceedings dated 14.5.2005 and prepared the report (Ex.PM), during which Talib Hussain appellant was identified by the PWs.

(vii) PW-14 Falak Sher SI investigated the case; he arrested Muhammad Ashfaq appellant, who was a proclaimed offender in the case and sent him to the jail for test identification parade; he presented application (Ex.PE) to the learned Sessions Judge, Khanewal for test identification parade, which was held on 6.2.2006; he obtained physical remand of the above named accused, who got recovered rifle (P-6), which was taken into possession through (Ex.PK); he recorded statement under Section 161 Cr.P.C. of the relevant witnesses at relevant stages.

(viii) PW-15 Zafar Ullah Khan, Inspector also investigated the case; recorded statement (Ex. PF) of the complainant; prepared injury statement (Ex. PB) and inquest report (Ex. PC) of the deceased; drafted rough site-plan (Ex. PO) of the spot; secured last worn clothes (P-1, P-2 & P-3) of the deceased through Memo (Ex.PD); collected blood stained earth from the spot and took it into possession through Memo (Ex. PG); secured two empties of .7mm rifle and three empties of .30 bore pistol *vide* Memo (Ex. PH); got drafted the scaled site-plans (Ex. PN, Ex. PN/1 & Ex. PN/2) from the draftsman; arrested Talib Hussain appellant and sent him to the jail for test identification parade, which was held on 14.5.2005; obtained physical remand of the above named appellant, who got recovered 30 bore pistol (P-4), which was secured through Memo (Ex. PJ); recorded statements under Section 161, Cr.P.C. of the concerned witnesses at relevant stages.

3. After examination of the prosecution witnesses, the reports of Chemical Examiner, serologist and Forensic Science Laboratory were tendered in evidence as Ex. PQ, Ex. PR & Ex.PS respectively and case for the prosecution was closed, whereafter the appellants were examined under Section 342, Cr.P.C.; and they took the following stance:--

Muhammad Ashfaq – "I was arrested by the police much earlier and was kept at police station for so many days but on record my arrest was deferred. During this, I was shown to the complainant and other PWs, on so many days and later on fake and fictitious proceedings of identification proceedings were introduced to create a fake piece of

evidence against me. All the recovery proceedings are fake and fictitious. I never led to the recovery of rile etc. It has been planted to strengthen the prosecution case.

PWs are related interse and interested. They are under influence/pressure of our deadly against political, personal opponent namely Rao Jamshed Ali Lumberdar Bilawalpur and Union Nazim, permanent political figure. Said Rao Jamshed Ali Lumberdar falsely got me involved in this case during investigation to satisfy his personal grudge. So in this state of affairs, I was falsely involved in this case and PWs deposed falsely against me.
Actually, it was a blind occurrence. Neither the PWs were present at the time of occurrence nor they have witnessed the occurrence. These witnesses were later on introduced after coming to know about the occurrence. I have no concern with his occurrence. I have not committed this occurrence."

Talib Hussain – "It is a false case. I have been involved in this case due to enmity. All the witnesses are related interse and have deposed against me falsely. Actually it was a blind occurrence taking place in the darkness of night. The culprits could not be identified during the occurrence. I was implicated in this case without any cogent evidence and simply on the basis of suspicion. I was arrested by the police under pressure of the complainant party, kept in police unlawful custody for a sufficient time, shown to the witnesses and got identified by the PWS during identification parade. I am absolutely innocent."

Both did not opt to lead any evidence in their defence or make statements under Section 340(2), Cr.P.C. Ultimately the learned trial Court pronounced the impugned judgment, in the above mentioned terms and consequently, the matters in hand.

4. The learned counsel for the appellants has argued that it was a blind occurrence, which was not seen by anyone, but with *mala fide*, while concocting false story and evidence, the appellants were involved and implicated; the prosecution had badly failed to establish the case and prove the charge against the appellants as per the prescribed criteria, but the learned

trial Court had failed to consider the said fact and as such the impugned judgment towards conviction and sentence of the appellants is not acceptable under the law. It has been prayed that by accepting the appeal, the appellants may be acquitted of the charge.

5. Conversely, the learned Deputy Prosecutor General, assisted by the learned counsel for the complainant has vehemently opposed the appeal, while supporting the impugned judgment to be well-reasoned and call of the day.

6. Arguments advanced by both the sides have been heard and the record has been consulted.

7. Admittedly, at the time of reporting the matter to the Police through Ex.PF, nobody was named as an accused. The appellants were involved on the basis of circumstantial evidence. The settled principle/criteria for such like cases is that all the circumstances should be connected in such a manner that they should make a continuous chain, one end of which should touch the dead body, whereas the other around neck of accused. Missing of even a single ring would break the chain and fatal for the prosecution. In this regard, reference may be made to cases *"The State versus Manzoor Ahmad"* (PLD 1966 Supreme Court 664), *"Asadullah and another versus the State and another*" (PLJ 1999 SC 1018), *"Ch. Barkat Ali versus Major Karam Elahi Zia and another"* (1992 SCMR 1047), *"Sarfraz Khan versus The State*" (1996 SCMR 188), *"Altaf Hussain versus Fakhar Hussain and another"* (2008 SCMR 1103) and *"Ibrahim and others versus The State"* (2009 SCMR 407). Herein below, it would be evaluated whether the case has been established as per the above mentioned criteria or otherwise.

8. This prosecution story is that one Habib while nothing foot prints had informed the complainant that the same were of the appellants, hence the complainant through a supplementary statement had nominated them. Firstly the above named person, who had informed, had not appeared in the witness box and secondly the supplementary statement does not have any legal value, hence the above said story could not be given any importance in view of dictum laid down by the Hon'ble Supreme Court of Pakistan in cases *Falak Sher alias Sheru versus The State* (1995 SCMR

1350), *Khalid Javed and another versus the State* (2003 SCMR 1419) and *Muhammad Rafique and others versus The State and others* (2010 SCMR 385). Relevant portion of case *Falak Sher (Supra)* reads as under:--

> "18. The learned counsel for the State insisted that in supplementary statement recorded by S.I. Muhammad Ayub on same day the complainant had disclosed name of the appellant. The supplementary statement of the complainant be read as part of the F.I.R. The contention is devoid of force. It may be observed that F.I.R. is the document which is entered into 154, Cr.P.C. Book maintained at the police station at the complaint of informant. It brings the law into motion. The police under Section 156, Cr.P.C. starts investigation of the case.
>
> 19. Any statement or further statement of the first informant recorded during the investigation by police would neither be equated with First Information Report not read as part of it."

9. The second stance of the prosecution is that during test identification parade proceedings dated 14.5.2005 and 2.6.2006, Talib Hussain and Muhammad Ashfaq appellants were respectively identified by PW-9 and PW-10. As stated above, when the appellants were already named by the complainant, through a supplementary statement, made on the next day of the occurrence, then the proceedings of the test identification parade were immaterial. Furthermore, as per Falak Sher SI/Investigating officer (PW-14), Muhammad Ashfaq appellant was a proclaimed offender in the case, hence after his arrest, test identification parade was having no legal consequence. During evidence of Abdul Razzaq complainant (PW-9), it came on the record that after arrest of the appellants, the PWs had been visiting the Police Station and telling the complainant the progress of the investigation. The above said fact has also made the proceedings of test identification parade immaterial, especially when the Magistrate (PW-12) had categorically stated that according to him, the appellants were shown to the PWs, before the test identification parade. The PW-10 had specifically contended that he was having sound suspicion that the appellants had committed the occurrence. He during this statement got recorded on 14.11.2004 under Section 161, Cr.P.C., which was brought on the record as Ex.DC, had categorically

nominated the appellants towards commission of the alleged occurrence. The said fact had also made the above mentioned test identification parade proceedings useless.

10. Sequel of the above discussion is that the prosecution has failed to make out the chain and establish the case as per the above mentioned principle/criteria and as such the charge against the appellants is doubtful and it is unsafe to maintain their conviction on the basis of such type of evidence because it is bounden duty of the prosecution to prove its case against the accused beyond any shadow of doubt. It is an axiomatic and universally recognized principle of law that conviction must be based on unimpeachable evidence and certainly of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. We are fortified by the dictum laid down in the cases *"Muhammad Khan and another versus The State"* (1999 SCMR 1220) and *Muhammad Akram versus The State* (2009 SCMR 230). In the case *Muhammad Khan (Supra)* Hon'ble Supreme Court of Pakistan, has held as under:--

> "It is an axiomatic and universally is recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arsises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be unsafe to reply on the ocular evidence which has been molded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct respective".

11. It is well settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. In this regard, reference may be made to the

case *"Tariq Pervaiz vs. The State"* (1995 SCMR 1345). This view has further been fortified in the case of "*Ayub Masih vs. The State"* (PLD 2002 SC 1048), whereby it has been directed that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind.

12. Resultantly, the above captioned Criminal Appeal No. 91/2010 is accepted, the impugned judgment is set aside and the appellants namely Muhammad Ashfaq and Talib Hussain are acquitted of the charage, while extending them the benefit of doubt. Both are in custody, hence be released forthwith, if not required to be detained in any other matter. The disposal of the case property shall be as directed by the learned trial Court. As a consequence, Murder Reference No. 136/2009 is answered in **negative** and death sentence awarded by the learned trial Court to Muhammad Ashfaq appellant is **not confirmed.**

(A.S.) Appeal accepted

PLJ 2015 Cr.C. (Lahore) 563
[Multan Bench Multan]
***Present*: MUHAMMAD TARIQ ABBASI, J.**
MAQSOOD AHMAD--Appellant
versus
STATE--Respondent

Crl. Appeal No. 490 of 2006, heard on 19.5.2015.

Prevention of Corruption Act, 1947 (II of 1947)--

----S. 5(2)--Pakistan Penal Code, (XLV of 1860), S. 161--Conviction and sentence--Challenge to--Mutation of tamleek--Demanded an amount as government charges--*Malafide*--Charge was not at all established and proved--Entitled to acquittal--Currency notes recovered from accused did not contain any mark--No independent and impartial person was associated material irregularity--Conversion between parties was not heared--Validity--Appellant never demanded any illegal gratification from them for sanctioning mutation in question; complainant had identified him before Revenue Officer and initiated proceedings in question at instance of Raja Riaz--In this way, not only prosecution case and charge against appellant was not proved beyond any doubt but appellant had also succeeded to disprove/rebut allegations leveled against him--Impugned judgment was set aside, appellant was acquitted while extending him benefit of doubt--Appeal was allowed.

[Pp. 567] A & B

Sheikh Jamshed Hayat, Advocate for Appellant.

Mr. Muhammad Ali Shahab, D.P.G. for State.

Date of hearing: 19.5.2015.

JUDGMENT

This appeal is directed against the judgment dated 20.9.2006, passed by the learned Special Judge, Anti-Corruption, Dera Ghazi Khan, Camp at Muzaffargarh, whereby in case FIR No. 01, dated 1.1.2002, registered under Section 161, PPC, read with Section 5(2) of the Prevention of

Corruption Act, 1947, at Police Station ACE, Vehari, the appellant was convicted and sentenced as under:--

(1) **Under Section 161, PPC,** R.I, for one year and fine of Rs. 5,000/-, in default to further undergo R.I. for two months.

(2) **Under Section 5(2)47 PCA,** R.I. for one year and fine of Rs. 5000/-, in default to further suffer R.I. for two months.

It was directed that both the sentences shall run concurrently and benefit of Section 382-B, Cr.P.C., would also be available to the appellant.

2. The facts as per FIR (Exh.PG) are that Abdul Majeed, PW-2 got entered from the appellant a mutation of Tamleek regarding 23 acres of agricultural land belonging to his relatives; the appellant demanded a sum of Rs. 23,000/- from the complainant as government charges; the complainant asked the appellant that as till that time price of cotton was not received, hence demanded time till 31st of December, whereupon the appellant told the complainant that the mutation would be entered on receipt of amount on 1.1.2002, otherwise it would be cancelled; thereafter the complainant came to know that the mutation fee was not of the above mentioned amount demanded by the appellant. Consequently, he informed the Anti-Corruption Authorities, whereupon a raid was conducted and the appellant was arrested, when the above mentioned amount was recovered from his possession. After registration of the case, the investigation was carried on when the appellant was found to be involved, hence, challaned to the Court.

3. The learned trial Court framed the charge against the appellant on 17.9.2002 to which he pleaded not guilty and claimed trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined Muhammad *Arsh*ad Ali, Senior Civil Judge/Magistrate as PW-1, Abdul Majeed, complainant as PW-2, Ghulam Dastigeer, SHO as (PW-3) and Mehr Nazar Hussain Circle Officer, ACE as PW-4. Sabir Ali Constable and Abdul Latif, Constable were given up being unnecessary.

4. After examination of the above named witnesses, statement of the appellant as provided under Section 342, Cr.P.C., was recorded, during which, the questions arising out of the prosecution evidence were put to him and he denied almost all such questions, while pleading his innocence and false involvement in the case with *mala fide*. At that time, he opted to lead evidence in his defence and also made statement under Section 340(2), Cr.P.C., but while got examining Muhammad Bashir as DW-1, he had closed his defence.

5. After completion of all the proceedings, the learned trial Court had pronounced the impugned judgment in the above mentioned terms. Consequently, the appeal in hand.

6. Learned counsel for the appellant has argued that the appellant is innocent and falsely involved in the case with *mala fide*; during the prosecution evidence, the prosecution case and the charge against the appellant was not at all established and proved, hence he was entitled for acquittal and as such, the impugned judgment being against the norms of natural justice is liable to be set aside.

7. The learned Deputy Prosecutor General has vehemently opposed the appeal while holding the impugned judgment to be well reasoned and call of the day.

8. Arguments of both the sides have been heard and record has been perused.

9. Muhammad *Arsh*ad Ali, Civil Judge/Magistrate who had supervised raid proceedings, when entered into the witness-box as PW-1, stated the date of his alleged proceedings as 1.12.2002. By deposing so he had rebutted/contradicted the alleged prosecution version that raid proceedings were carried on, on 1.1.2002. The Magistrate further deposed that not only numbers of currency notes in question were noted by him but he also marked currency notes and also obtained photocopies thereof but it has been noticed that the currency notes in question do not contain any mark, made by the PW.

This witness further deposed that they stayed at a distance of 100 yards away from the office of the appellant and when the complainant signaled, they entered in the office, searched the appellant and not only currency notes in question but other amount of Rs. 24,000/- was also recovered from the pocket of his shirt. The witness further contended that from the place, where they were available, neither door of the room was visible nor they heard the conversation between the complainant and the appellant or saw passing of the amount in question. Meaning thereby that what conversation between the complainant and the appellant was taken place and the facts and circumstances under which the amount in question came into possession of the appellant, was not known to anyone. Reliance in this respect may be placed upon the cases of *Rashid Ahmad versus The State* (2001 SCMR 41) and *Bashir Ahmad versus The State* (2001 SCMR 634). Relevant portion of the case of *Bashir Ahmad (Supra)* reads as under:

> "...It is well settled by now that "in such like transactions not only the payment of bribe money to the accused by the complainant is to be seen but also the conversation between the above parties has to be heard by the members of the raiding party. This would be necessary to eliminate the chances of involvement of innocent people."

This witness admittedly had not written statement (Exh.PB) of the complainant rather his reader had drafted the same. In this way, a material irregularity was committed by him. In his statement, it came on the record that the spot was a busy place but no independent and impartial person was associated in the proceedings. As per this witness, recovered currency notes were taken into possession by him, through memo. Exh. PC and Exh.PD but the record had negated the said stance because the above said recovery memos. were prepared by Circle Officer, Anti-Corruption Establishment and not at all by this witness.

10. Abdul Majeed, complainant (PW-2) admitted it correct that the office of the appellant was situated in a Bazar and the appellant was not

visible from the place where the raiding party was present. This witness had contended that the appellant for verification and attestation of *Tamleek Nama* demanded the above mentioned amount from him and the date of payment was fixed as 1.1.2002 when the raid was conducted but as stated above, the raiding Magistrate had not supported the above said date while deposing that the proceedings were carried on 1.12.2002.

11. Ghulam Dastigeer, SHO, (PW-3) during cross-examination stated that the currency notes was recovered from the appellant and taken into possession *vide* recovery memos. Exh.PC and Exh.PD which besides him were signed by the Magistrate (PW-1), Abdul Majeed and Sabir Ali. He while not specifying the person who had prepared the said memos. had tried to conceal the preparation of the memos. by him as by that time he was nobody to take the currency notes into possession, because till then he was not an investigating officer.

12. On one hand, the above mentioned strange and erroneous proceedings have come on the record, whereas on the other hand Muhammad Bashir in whose favour his father, namely, Noor Ahmad had gifted the land had got recorded statement as DW-1, stating therein that they themselves had reported the matter to the appellant being Patwari and deposited the fee in National Bank of Pakistan, Burewala; they never authorized the complainant to deal with the appellant about attestation of the mutation; the appellant never demanded any illegal gratification from them for sanctioning the mutation in question; the complainant had identified him (DW-1) before the Revenue Officer and initiated the proceedings in question at the instance of Raja Riaz. In this way, not only the prosecution case and the charge against the appellant was not proved beyond any doubt but the appellant had also succeeded to disprove/rebut the allegations leveled against him.

13. As a result of what has been discussed above, the appeal in hand is **allowed** the impugned judgment is **set aside** and the

appellant Maqsood Ahmed is **acquitted** of the charge, while extending him the benefit of doubt. He by way of suspending of his sentence is on bail; hence his bail bonds are discharged. The disposal of the case property shall be as directed by the learned trial Court.

(R.A.) Appeal allowed

PLJ 2015 Cr.C. (Lahore) 583
[Multan Bench Multan]
***Present*: MUHAMMAD TARIQ ABBASI, J.**
SAID MUHAMMAD etc.--Appellants
versus
STATE, etc.--Respondents

Crl. Appeal No. 405 of 2003 & Crl. Rev. No. 225 of 2003, heard on 29.4.2015.

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

----S. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--When deceased for grazing sheep entered state land, which was disputed between parties, he was abstained by appellant when an altercation between both had taken place and accordingly said appellant pelted-stones at deceased and he became injured--Nothing was available on record to suggest that intention of appellant was to commit murder of but he died in consequence of injuries which he had sustained at hands of above named appellant--In this way, offence of intentional murder is not made out rather offence of *Qatl Shibh-i-amd* is attracted--Facts and circumstances of case in hand fully correspond above mentioned situations under which above mentioned provision attracts--Therefore, appellant was liable for commission of offence under Section 316, PPC, which prescribes payment of *Diyat*, and an accused may also be punished with imprisonment of either description, for a which may extent to twenty five years as Tazir--Appellant was convicted under Section 316, PPC for payment of *Diyat* amounting to Rs. 2,90,372/- (which at relevant time was prevailing), payable to legal heirs of deceased--Said appellant was an Army Personnel and nothing was available on record that he was a previous convict, habitual, hardened, desperate or dangerous criminal, hence to my mind imprisonment for five years, which he had already undergone, would meet ends of justice, hence awarded--As above mentioned amount of *Diyat* has been imposed against appellant, hence no compensation under Section 544-A of Cr.P.C. was required and as such imposition of Rs. 50,000/- as compensation against appellant, by trial Court was waived. [Pp. 587 & 588] A, B, C & D

Malik Saeed Ahmed Gumb and Sh. Muhammad Rahim, Advocate for Appellants.

Mr. Shaukat Ali Ghorui, Addl. P.G. for State.
Syed Irfan Haider Shamshi, Advocate for Complainant.
Date of hearing: 29.4.2015.

JUDGMENT

This single judgment shall decide the above captioned criminal appeal as well as the criminal revision, as both are outcome of single judgment dated 21.5.2003, passed by the learned Additional Sessions Judge, Taunsa Sharif, District Dera Ghazi Khan, whereby in case FIR No. 51, dated 26.6.2002, registered under Sections 302/34, PPC, at Police Station Raitra, District Dera Ghazi Khan, the appellants, namely, Said Muhammad and Muhammad Hayat, were convicted under Section 302(b), PPC and sentenced to imprisonment for life, with compensation of Rs. 50,000/-, each, payable to the legal heirs of the deceased, otherwise, to further undergo SI for six months each, with benefit of Section 332-B Cr.P.C.

2. The facts are that Allah Wasaya (PW-5) had got recorded a statement (Ex.PE), before the police, contending therein that on 24.6.2002 at about 7:00 a.m, his father Muhammad Bakhsh (deceased) had gone to graze the sheep; after a short while hue and cry was heard by him, hence he alongwith his brother Manzoor Ahmed and Elahi Bakhsh (PW-6) rushed to the spot; they saw that Said Muhammad and Muhammad Hayat (appellants) had encircled Muhammad Bakhsh and within their view the appellants one after the other pelted stones at Muhammad Bakhsh, which hit at his urinary bladder and he fell down; on their intervention, the appellants went away; the motive was a landed dispute between the appellants and the complainant party, due to which they caused injuries to Muhammad Bakhsh. On the basis of above mentioned complaint, initially the FIR (Ex.PE/2) was chalked out under Sections 324/34, PPC but on the death of Muhammad Bakhsh, the offence under Section 324, PPC was substituted to Section 302, PPC.

3. The investigation was carried on when the appellants were found to be involved, hence challaned to the Court. The learned trial Court had framed the charge against the appellants on 25.3.2003; they pleaded not guilty and claimed the trial, hence the prosecution evidence was summoned and recorded. The prosecution had got examined as many as nine witnesses. Gist of the evidence led by the material witnesses was as under:--

PW-1 Dr. Ahmad Khan, firstly had medically examined Muhammad Bakhsh on 24.6.2002 through report (Ex.PA) when he was in an injured condition and found the following injuries:--

"(i) Reddish swollen contused area 2 cm in diameter on right appendicular area of the abdomen.
(ii) Reddish swollen contused area 2½ cm in diameter in the right side of abdomen 2 inches above Injury No. 1. Patient complains of server abdominal pain and distress. Both injuries were K.U.O."

Due to critical condition of the injured he was referred to DHQ, Hospital, Dera Ghazi Khan where he died and consequently on 26.6.2002 post-mortem examination of the dead body was conducted by this witness through the post-mortem report (Ex.PB). At that time the following injuries on the dead body were observed:--

"(i) There was a reddish blue contused area at the lower part of the right side of the abdomen 2 inch in dia-meter.
(ii) There was another reddish blue contused area 2½ in diameter in the right side of abdomen 2" above Injury No. 1."

As per opinion of the doctor, the injuries to the liver and small intestine were sufficient to cause death which occurred after about two days of receipt of the injuries.

PW-5 Allah Wasaya complainant as well as an eye-witness had narrated almost the same facts as were stated by him in the above mentioned complaint.

PW-6 Ilahi Bakhsh, another eye-witness had supported the version of the complainant (PW-5).

PW-8 Muhammad Hayat, Inspector, had investigated the case during which carried on the proceedings and prepared the documents fully detailed in his statement.

PW-9 Mushtaq Ahmad, SI, also investigated the case, prepared the documents and carried on the proceedings, detailed in his statement.

4. After examination of the prosecution witnesses, the prosecution case was got closed, whereafter the appellants were examined under Section 342 Cr.P.C., during which the questions arising out of the prosecution evidence and record were put to them and they denied almost all such questions while pleading their innocence and false involvement in the case with *mala-fide*. Both had replied the questions "why this case against you and why the PWs have deposed against you?" in the following words:--

Said Muhammad (appellant)

"Being a close relative of Hayat accused I have been falsely involved in this case and the complainant party has thrown net wide to implicate as many as persons as possible from the family of Hayat accused. The complainant party has involved me in this case at the instance of Nawaz and Qaisar with whom I am locked in cross murder case. They are funding the complainant and pursuing the case. The PWs are interse related with each other and with the deceased."

Muhammad Hayat (appellant)

"I am permanent employee of F.C. Department. On the day of occurrence I was on leave and was present at my home. I saw the deceased who was trying to occupy and wanted to illegally possession of Govt. land. I went towards him as he was my close relative and asked him not to occupy illegally the Govt. land, on which he started abusing me and inflicted a hatchet blow from which I luckily saved. He picked up stone and threw towards me which landed on my body. In retaliation and to save the Govt. property & myself I threw the same towards him. I am innocent. Being the kith and kin of the deceased, the PWs after suppressing the real facts of the case gave twist to the facts to bring the case with the preview of Section 302, PPC being in connivance with the police."

5. They did not opt to lead evidence in their defence or make statements under Section 340(2) Cr.P.C.. On completion of the trial, the impugned judgment was passed in the above mentioned terms, hence the matters in hand.

6. The learned counsel for the appellants have argued that they are innocent and falsely involved in the case with *mala-fide*; the statements of the prosecution witnesses were full of material contradictions but erroneously not considered by the learned trial Court; the prosecution case and the charge against the appellants was not proved and established, hence they were

entitled for acquittal and as such the impugned judgment is liable to be set-aside.

7. The learned Additional Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the appeal while holding the impugned judgment towards conviction of the appellants to be quite well reasoned and call of the day. The learned counsel for the complainant has also requested for acceptance of the revision petition and award of major penalty of death to the appellants.

8. Arguments of both the sides have been heard and the record has been perused.

9. The alleged motive was a landed dispute between Muhammad Hayat (Appellant No. 2) and the complainant party. It was brought on the record that Muhammad Hayat, appellant had abstained the deceased from interfering into the property which was a state land. In this way, the alleged motive could not be attributed to Said Muhammad (Appellant No. 1). In the complaint as well as during statements of Allah Wasaya complainant (PW-5) and Elahi Bakhsh (PW-6) it had been contended that stones were pelted by Muhammad Hayat appellant at Muhammad Bakhsh, which hit at his urinary bladder. At the said part of the body of deceased two injuries were observed. In this way, the case of Said Muhammad (Appellant No. 1) has become doubtful. Possibility of his false involvement, under e wider net being relative of Muhammad Hayat (Appellant No. 2) could not be ruled out, hence, charge against Said Muhammad (Appellant No. 1) is doubtful.

10. As about the case of Muhammad Hayat (Appellant No. 2), it is stated that Allah Wasaya complainant (PW-5) and Elahi Bakhsh (PW-6) had not only implicated him for pelting stones at Muhammad Bakhsh, deceased, which resulted into injuries to him but during medical examination the said injuries were also confirmed on the record and the said appellant during statement under Section 342 Cr.P.C. had also admitted his above mentioned act/role.

11. It seems that when the deceased for grazing the sheep entered the state land, which was disputed between the parties, he was abstained by Muhammad Hayat (Appellant No. 2) when an altercation between both had taken place and accordingly the said appellant pelted-stones at the deceased and he became injured. Nothing is available on the record to suggest that intention of the Appellant No. 2 was to commit murder of Muhammad Bakhsh but he died in consequence of the injuries which he had

sustained at the hands of above named appellant. In this way, in my view, offence of intentional murder is not made out rather offence of *Qatl Shibh-i-amd* is attracted, which is defined under Section 315, PPC in the following words:

> **"315 *Qatl* Shibh-i-amd.** Whoever, with intent to cause harm to the body or mind of any person causes the death of that or of any other person by means of a weapon or an act which in the ordinary course of nature is not likely to cause death is said to commit *qatl Shibh-i-amd."*

The facts and circumstances of the case in hand fully correspond the above mentioned situations under which the above mentioned provision attracts. Therefore, Muhammad Hayat (Appellant No. 2) is liable for commission of the offence under Section 316, PPC, which prescribes payment of *Diyat*, and an accused may also be punished with imprisonment of either description, for a term which may extent to twenty five years as Tazir.

12. Consequently, Muhammad Hayat (Appellant No. 2) is convicted under Section 316, PPC for payment of *Diyat* amounting to Rs. 2,90,372/- (which at the relevant time was prevailing), payable to the legal heirs of the deceased. The said appellant is an Army Personnel and nothing is available on the record that he is a previous convict, habitual, hardened, desperate or dangerous criminal, hence to my mind the imprisonment for five years, which he had already undergone, would meet the ends of justice, hence awarded.

13. As the above mentioned amount of *Diyat* has been imposed against the Appellant No. 2, hence no compensation under Section 544-A of Cr.P.C. is required and as such imposition of Rs. 50,000/- as compensation against the Appellant No. 2, by the learned trial Court is waived.

14. As a result of what has been discussed above, the appeal in hand to the extent of Said Muhammad (Appellant No. 1) is accepted, impugned judgment to his extent is set-aside and he is acquitted of the charge while extending him benefit of doubt. Whereas the appeal to the extent of Muhammad Hayat (Appellant No. 2), with the above mentioned modification and alteration is dismissed. Both, by way of suspension of their sentences are on bail, hence their bail bonds are discharged. The disposal of case property shall be as directed by the learned trial Court.

15. The Criminal Revision No. 225 of 2003 filed by the complainant for the foregoing reasons, is without any substance, hence dismissed.

(A.S.) Appeal dismissed

PLJ 2015 Lahore 607

[Multan Bench Mutlan]

Present: **MUHAMMAD TARIQ ABBASI, J.**

AMANAT ALI--Petitioner

versus

KHALID NAWAZ--Respondent

Civil Revision No. 247 of 2010, heard on 21.4.2014.

Civil Procedure Code, 1908 (V of 1908)--

----O.XXXVII Rr. 1 & 2--Cancellation of cheque--Court passesses *suo motu* revisional jurisdiction--Procedure and jurisdiction--Court can *suo motu* rectify any illegality or material irregularity found in any judgment or order of lower Court--Whereby till decision of suit for cancellation of cheque, proceedings to other suit filed under Order XXXVII Rr. 1 & 2 of CPC were stayed. [Pp. 608] A & B

Mian Muhammad Akram, Advocate for Petitioner.

Nemo (Still *ex-parte*.)

Date of hearing: 21.4.2014.

JUDGMENT

This revision petition is directed against the order dated 4.2.2010, passed by the learned District Judge, Vehari, whereby a suit filed by the petitioner, against the respondent, for cancellation of cheque has been withdrawn from the Court of learned Civil Judge, Vehari, and transferred to the Court of learned Additional District Judge at Vehari, where another suit under Order XXXVII Rules 1 & 2, CPC, filed by the respondent, against the petitioner, in respect of the same cheque was subjudice.

2. Arguments heard and record perused.

3. The brief facts are that the petitioner filed a suit against the respondent, whereby he sought cancellation of the Cheque No. 28710043, dated 8.11.2003 valuing Rs. 2,00,000/-. The said suit was pending in the Civil Court at Vehari, when the respondent, on the basis of the same cheque, filed a suit under Order XXXVII Rules 1 & 2 of CPC, against the petitioner, which was entrusted to the learned Additional District Judge, Vehari.

4. The petitioner, moved an application, before the learned Additional District Judge, Vehari, where the above said suit under Order XXXVII Rules 1 & 2 of CPC was pending. Through the said application, the petitioner had sought, stay of the proceedings of the said suit, till decision of

the above mentioned other suit, filed for cancellation of the cheque. The application was allowed by the learned Additional District Judge, Vehari, through order dated 20.01.2010 and the proceedings of the suit filed by the respondent under Order XXXVII Rules 1 & 2, CPC were stayed.

5. Thereafter, the respondent moved an application before the learned District Judge, Vehari, whereby he sought transfer of the above captioned suit for cancellation of the cheque, from the Court of learned Civil Judge to the Court of the learned Additional District Judge at Vehari, where the above mentioned other suit under Order XXXVII was pending. The said application was accepted through the impugned order.

6. In the light of the dictum laid down by a Division Bench of this Court, in the case titled *"A.B.L. vs. Khalid Mahmood"* (2009 CLC 308), neither the above captioned order dated 20.01.2010, towards stay of the above mentioned suit was competent nor consolidation of both the suits before one Court *vide* order dated 04.02.2010 was permissible, because nature, procedure and jurisdiction of the suits and the Courts was different.

7. This Court possesses *suo motu* revisional jurisdiction. In exercise of the said power, the Court can *suo motu* rectify any illegality or material irregularity found in any judgment or order of lower Court. In this regard, reliance may be placed on the cases titled *"Muhammad Yousaf and 3 others vs. Khan Bahadur through Legal Heirs"* (1992 SCMR 2334), *"Ilam Din vs. Hassan Din and others"* (PLD 2006 Lahore 121), *"Mahram Khan vs. Fateh Khan and 3 others"* (2003 CLC 1434), and *"Allah Ditta vs. Lahore Development Authority and 5 others"* (2012 CLC 271).

8. In exercise of the above mentioned jurisdiction, when the above mentioned order dated 20.01.2010, passed by the Additional District Judge, Vehari, whereby till decision of the suit for cancellation of the cheque, the proceedings in other suit filed under Order XXXVII Rules 1 & 2, CPC have been stayed, has been adjudged and evaluated, the same in the light of the above stated dictum (2009 CLC 308) has been found to be unwarranted under the law.

9. As a result of the above mentioned discussion, both the above said orders could not be termed to be justified, hence are set aside, with a direction to the respective Courts to carry on the proceedings in the suits, as per the prescribed procedure.

(R.A.) Petition accepted

PLJ 2015 Cr.C. (Lahore) 687 (DB)

[Multan Bench Multan]

Present: **CH. MUSHTAQ AHMAD AND ASLAM JAVED MINHAS, JJ.**

SABOOR KHAN--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. Nos. 4149-B of 2015 and 4455-B of 2015, decided on 4.8.2015.

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

----S. 497(1)--Pakistan Penal Code, (XLV of 1860), S. 365-A--Anti-Terrorism Act, (XXV of 1997), S. 7--Bail, dismissal of--Allegation of--Specifically nominated for abduction--Abductee specifically nominated all the accused for his abduction--Alleged abductee was abducted had been taken into possession during the investigation by the police--Petitioner, fully participated in occurrence and facilitated abduction of alleged abductee to give an impression that a family was travelling in the car--Whether the ransom had been paid or not is immaterial, demand of ransom was sufficient constitute an offence under Section 365, PPC--Trial has commenced and the charge has been framed--Petitioners were the tenants of the complainant, therefore, they had been involved with *mala fide* intention but petitioners had failed to point out any ill-will or ulterior motive on the part of the complainant for false involvement of the petitioners--Alleged offence falls under the prohibitory clause of Section 497, Cr.P.C.--Bail was dismissed. [P. 689] A

Malik Sajjad Haider Maitla, Advocate for Petitioner (in Crl. Misc. No. 4149-B of 2015).

Sardar Mehboob, Advocate for Petitioner (in Crl. Misc. No. 4455-B of 2015).

Ch. Muhammad Islam and Ch. Muhammad Imtiaz, Advocates for Complainant.

Malik Riaz Ahmad Saghla, DPG for Respondents.

Date of hearing: 4.8.2015.

ORDER

By this single order we intend to dispose of Crl. Misc. No. 4149-B/2015 titled Saboor Khan vs. The State, etc, and Crl. Misc. No. 4455-B/2015 titled *Sanoobar Shaheen etc. vs. The State etc.* as both are outcome of the same F.I.R.

2. Saboor Khan, Sanoobar Shaheen and Zahoor Hussain, petitioners seek their post arrest bail in a case Bearing FIR No. 504/2014, dated 30.12.2014,

offence under Section 365-A, PPC read with Section 7 of Anti Terrorism Act, 1997, registered at Police Station Saddar Khanewal, for abduction of son of the complainant namely, Masood Aqeel.

3. Learned counsel for the petitioner contended that the alleged abductee came back on his own and he was never abducted by the petitioners; that the alleged abductee stated that he was kept in Balochistan but in a few hours how he came at the office of DSP Kehror Pakka which creates serious doubt in the prosecution story; that previously the petitioners were the tenants of the complainant and they have been involved with *mala fide* intention; that six persons have been involved from the family; that nothing has been recovered from the possession of the petitioners, therefore, case of the petitioners requires further inquiry.

4. On the other hand learned Deputy Prosecutor General assisted by the learned counsel for the complainant opposed the petition and argued that there is no *mala fide* or ill-will of the complainant or the alleged abductee to falsely involve the petitioners in this case.

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

6. Admittedly, during the investigation all the petitioners have been found involved in the occurrence. The alleged abductee namely, Masood Aqeel Mehmood specifically nominated all the accused for his abduction. The car in which the alleged abductee was abducted has been taken into possession during the investigation by the police. As far as petitioner, Sanoobar Shaheen is concerned, she fully participated in the occurrence and facilitated abduction of the alleged abductee to give an impression that a family was travelling in the car. Whether the ransom has been paid or not is immaterial, demand of ransom is sufficient to constitute an offence under Section 365, PPC. The trial has commenced and the charge has been framed. The argument of the learned counsel for the petitioners that previously the petitioners are the tenants of the complainant, therefore, they have been involved with *mala fide* intention but the learned counsel for the petitioners have failed to point out any ill-will or ulterior motive on the part of the complainant for false involvement of the petitioners. The alleged offence falls under the prohibitory clause of Section 497, Cr.P.C. This being so, these petitions have no force and same stand dismissed.

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

(A.S.) Bail dismissed

2015 Y L R 2514

[Lahore]

Before Muhammad Tariq Abbasi, J

Ch. MUHAMMAD AKRAM---Petitioner

Versus

Mst. ZEBA ZAREEN and others---Respondents

Writ Petition No.1979 of 2011, heard on 5th June, 2014.

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

----S. 15---Constitution of Pakistan, Art. 199---Constitutional petition---Eviction petition---Default in payment of rent-- Denial of relationship of tenant and landlord---Petitioner/new owner had purchased the demised property through registered sale deed from person claimed by tenant to be her landlord---By purchasing the house, petitioner/vendee had stepped into the shoes of the previous owner---In the absence of notice to tenant, eviction petition itself would be the notice of eviction to tenant---Previous owner had sent declaration/affidavit duly attested by Consulate of Pakistan in favour of petitioner/vendee admitting sale of the house to petitioner through registered sale deed---Purchase of house by petitioner and change of ownership had been confirmed---Order of Additional District Judge was set aside while order of Special Judge (Rent) was restored---Constitutional petition was accepted.

Bahauddin Bootwala v. Muhammad Afzal 2000 YLR 2716; Sher Jang v. District Judge, Islamabad and 4 others 2004 SCMR 1852; Pakistan National Shipping Corporation v. Messrs General Service Corporation 1992 SCMR 871; Ashiq Hussain v. Niaz Muhammad" 2000 CLC 376; Ahmad Ali alias Ali Ahmad v. Nasar ud-Din and another PLD 2009 SC 453 and Buzarg Jamil and another v. Haji Abdul Bari and others PLD 2003 SC 477 rel.

Sadiq Nawaz Khattak for Petitioner.

Qazi Shaharyar Iqbal for Respondents.

Date of hearing: 5th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this writ petition, the judgment dated 8-7-2011, passed by the learned Additional District Judge, Rawalpindi has been called in question. Through the said judgment, an appeal preferred by respondent No. 1, challenging the order dated 21-1-2011 passed by the learned Special Judge #Rent), Rawalpindi has been accepted and by setting aside the said order, the ejectment petition, preferred by the petitioner has been dismissed.

2. The facts are that the petitioner moved a petition under Section 15 of the Punjab Rented Premises Ordinance, 2007, against the respondent No. 1, whereby eviction of the respondent No. 1 from first floor of the house No. NE-297/C-2, situated at Tipu Road, Jinnah Colony, Rawalpindi was sought on the grounds of default in payment of the rent as well as expiry of the period of tenancy.

3. The respondent No. 1 filed a petition to contest, on the grounds that she was not tenant under the present petitioner, but of one Muhammad Ishaq deceased. The said petition of respondent No. 1 was allowed and accordingly the subsequent proceedings were carried on, during which the present petitioner, by filing affidavit as Exh.P.1 had made his statement as P.W.1, whereas Muhammad Tasleem Khan and Karamat Hussain by way of affidavits (Exh.P.2 and Exh.P3) had made the statements as P.W.2 and P.W.3 respectively. From the other side, the respondent No.1 had made the statement as RW-1 and also got examined Taimoor Ijaz Hassan and Malik Muhammad Ali as RW2 and RW-3 respectively.

4. On completion of the proceedings, the learned Special Judge (Rent), Rawalpindi had passed the order dated 21-1-2011, whereby while holding the relationship between. the parties as landlord and tenant, the ejectment petition was accepted, with a direction to the respondent No. 1 to vacate the rented premises within 45 days and also make the payment of arrear of the rent from April, 2008 onward Rs.3500 per month.

5. The respondent No. 1 had challenged the above mentioned order dated 21-1-2011 through an appeal, which for hearing was entrusted to the learned Additional District Judge, Rawalpindi, from where the judgment dated 8-7-2011 was pronounced, whereby the appeal was accepted, the order of the learned Special Judge (Rent), Rawalpindi was set aside and the ejectment petition was dismissed with cost.

6. Consequently, the writ petition in hand has been preferred, with the contention and the grounds that the learned Special Judge (Rent), Rawalpindi had rightly evaluated the material available on the record and passed the order dated 21-1-2011, but the learned Appellate Court had erred in passing the impugned judgment dated 8-7-2011, without considering the attending facts and circumstances and the law on the subject.

7. The learned counsel for the petitioner has advanced his arguments on the above mentioned lines, whereas the learned counsel appearing on behalf of respondent No. 1 has vehemently opposed the writ petition.

8. Arguments of both the sides have been heard and the record has been perused.

9. As stated above, the ejectment petition filed by the petitioner was denied by the respondent No. 1, to the effect that she was not tenant of the petitioner, therefore, herein below, it will be evaluated and adjudged if on the basis of the material available on the record, the order of the learned Special Judge (Rent), Rawalpindi was justified or the impugned judgment was the demand of the situation.

10. The record shows that during the proceedings, the petitioner had brought on the record that the house No. NE-297/C-2, in first floor of which the respondent No. 1 was residing as a tenant was purchased by hini through registered sale deed No. 6842 dated 31-8-2005, registered with Sub-Registrar, Rawalpindi. The said purchase by the petitioner was from Masoom Zaman son of Ch. Muhammad Zaman, through his attorney namely Muhammad Ishaq, who was being claimed by the respondent No. 1 to be her landlord. In this way, the present petitioner had become owner of the house in question in the year 2005. As per the dictum laid down in the case titled "Bahauddin Bootwala v. Muhammad Afzal" (2000 YLR 2716), through purchase of the house in question, the present petitioner had stepped into the shoes of its previous owner. The relevant portion of the said judgment reads as under:--

> "---Relationship of landlord and tenant was denied by tenant on the ground that he was inducted as a tenant by the previous owner---Rent Controller accepting the relationship of landlord and tenant between the parties allowed the ejectment application--- Validity Previous owner, after purchase of the property, transferred the same to the present landlord by way of gift, therefore, the present landlord had stepped into the shoes of the previous owner---In absence of an agreement to the contrary, relationship of landlord and tenant existed between the parties---Rent Controller had rightly exercised jurisdiction"

11. The record shows that the respondent No. 1 had contended that no notice was ever issued to her, by the present petitioner, regarding purchase of the house in question by him, hence she was unaware of the ownership of the petitioner and as such not tenant under him. Nothing has been brought on the, record that after purchase of the house, till filing of the ejectment petition, the petitioner had issued any notice to the respondent No. 1, towards purchase of the house by him, but it could not be ignored that in the above mentioned eventuality, filing of the ejectment petition, itself was a notice to the respondent No. 1. In this regard, reliance may be placed on the cases titled "Sher Jang v. District Judge, Islamabad and 4 others" (2004 SCMR 1852),

"Pakistan National Shipping Corporation v. Messrs General Service Corporation" (1992 SCMR 871) and "Ashiq Hussain v. Niaz Muhammad" (2000 CLC 376).

12. Furthermore Masoom Zaman, vendor of the house in question, in favour of the petitioner, who is residing abroad in England, has sent a declaration/affidavit duly attested by the Consulate of Pakistan at Bradford, whereby sale of the house in question by him to the present petitioner, through his uncle Muhammad Ishaq as attorney, vide the above mentioned registered sale deed, has been admitted and that the tenants residing in the house in question were accordingly informed by, the petitioner and his uncle Muhammad Ishaq, about sale of the house in favour of the petitioner and change of ownership.

13. On one hand, the purchase of the house in question by the petitioner and change of ownership has been confirmed in the above mentioned terms, whereas on the other hand, the respondent No. 1 has denied the petitioner to be her landlord, but in the light of the above mentioned documents, she is precluded to do so. It has been brought on the record that the respondent No. 1 has not paid the rent of the property in question, to anyone since October, 2010, hence as per dictum laid down by the august Supreme Court of Pakistan in the case titled "Ahmad Ali alias Ali Ahmad v. Nasar-ud-Din and another" (PLD 2009 SC 453), the respondent No.1 is liable to be ejected straightaway. The relevant portion of the said judgment reads as under:--

> "Application of landlord for ejectment of tenant having been based on default, and the required relationship of landlord and tenant having been denied by the tenant, he was liable to be ejected straightaway when the required relationship has been proved in affirmative."

Similar view has been rendered by the Apex Court in the case titled "Buzarg Jamil and another v. Haji Abdul Bari and others" (PLD 2003 Supreme Court 477).

14. As a result of the above discussion, the impugned judgment dated 8-7-2011 passed by the learned Additional District Judge, Rawalpindi could not be termed to be justified. Hence while accepting the instant writ petition, the said judgment is set aside and reversed. Meaning thereby that the appeal filed by the respondent No. 1 is dismissed and the order dated 21-1-2011 of the learned Special Judge (Rent), Rawalpindi is restored.

ARK/M-242/L Petition accepted.

2015 Y L R 2576

[Lahore]

Before Shahid Hameed Dar and Muhammad Tariq Abbasi, JJ

AKMAL and 2 others---Petitioners

Versus

The STATE---Respondent

Criminal Appeal No.679 of 2006, Murder Reference No.484 and Criminal Revision No.156 of 2007, heard on 24th September, 2014.

Penal Code (XLV of 1860)---

----Ss. 302(b), 324 & 337-F(vi)---Qatl-i-amd, attempt to commit qatl-i-amd, causing Munaqqilah---Appreciation of evidence---Sentence, reduction in---Alleged motive, which did not appeal to a prudent mind, had not been established---Witnesses, admitted that each of accused persons, made only one fire shot without repetition---Said version of the witnesses, was concurrent, consistent and confidence inspiring---Despite lengthy cross-examination, no material contradiction in the said version was brought on the record---Trial Court, in circumstances, had rightly believed the said version to be true---Place of occurrence, was confirmed to be outside the house of the complainant; accused persons were the aggressors, who succeeded in getting lives of two innocent persons, and causing grievous injuries to one---Matter was, promptly reported to the Police---No chance existed in circumstances, of any deliberation, consultation or false implication of accused persons---Defence had failed to contradict presence of injured witness at the spot and sustaining of injuries---Inconsistency between the medical evidence and the ocular account had been alleged by counsel for accused persons, but, no such contradiction had been noticed---Ocular account was in line with the medical evidence---Principle of "falsus in uno falsus in omnibus", was not applicable and maxim "sifting of grain out of chaff", was to be adopted---Acquittal of co-accused and conviction of accused persons, in circumstances, were not objectionable---Investigating Officer, despite admitting before the court that no documentary evidence about innocence of accused was produced before him, findings of the Investigating Officer, towards innocence of accused persons, was without any substance which could rightly be termed as ipse dixit of the Police, and same could not be given any weight---Trial Court had rightly appreciated said fact and discarded said findings of the Investigating

Officer---If there was any specific stance/ plea of accused, same should have been established during the trial through cogent and convincing evidence, but despite opportunity, accused failed to do so---Empties, allegedly collected from the spot were dispatched to the Laboratory after about three months---Mandatory procedure/ requirement of sending the empties to the laboratory just after the recovery, having been violated, report of Forensic Science Laboratory, was not admissible in evidence---As the charge against accused persons was proved beyond any doubt, impugned judgment, towards conviction of accused persons, being result of correct evaluation and appreciation of evidence, was quite justified---Non-establishment of the alleged motive, the recovery of weapon, report of the Forensic Science Laboratory, and non-repetition of firing by accused persons, were sufficient circumstances for concession, in the sentence awarded to accused persons by the Trial Court---Accused were entitled for benefit of doubt as an extenuating circumstance while dealing with quantum of sentence, as well---Maintaining conviction of two accused persons under S.302(b), P.P.C., their sentences were altered from death to imprisonment for life---If the accused fail to pay compensation amount provided under S.544-A(2), Cr.P.C., they will undergo simple imprisonment of six months---Benefit of S.382-B, Cr.P.C. was also given to the accused persons---Sentence of co-accused for charge under Ss.324 & 337-F(vi), P.P.C., was reduced to served out imprisonment for 2 years, 8 months and 15 days, as he made only fire shot at non-vital part of injured.

Iftikhar Hussain and another v. State 2004 SCMR 1185 and Akhtar Ali and others v. The State 2008 SCMR 6 ref.
Muhammad Akram Qureshi for Appellants Nos. 1 and 3.
Azam Nazir Tarar and Kausar Jabeen for Appellant No.2.
Khurram Khan, Deputy Prosecutor General for the State.
Mian Muzaffar Hussain for the Complainant.
Date of hearing: 24th September, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This judgment shall decide the above captioned matters, being outcome of the judgment dated 15-4-2006, passed by the learned Additional Sessions Judge, Chiniot, whereby Akmal, Muzaffar and Zafar (appellants in Criminal Appeal No. 679 of 2006) were convicted and sentenced in the following terms:-

Muzaffar and Akmal

Under Section 302(b), P.P.C. to death and compensation of Rs.50,000 each, payable to the legal heirs of the deceased persons.

Zafar

(i) Under Section 324, P.P.C. to rigorous imprisonment for ten years and fine of Rs.5000, in default whereof to further undergo simple imprisonment for four months.
(ii) Under Section 337-F(vi), P.P.C. to rigorous imprisonment for seven years with Daman of Rs.30,000, payable to Rab Nawaz injured.

(iii) It was directed that all the sentences awarded to Zafar (appellant/convict) shall run concurrently and benefit of section 382-B of Cr.P.C., will be permissible to him.

2. Facts of the case are that on 29-8-2002, Ali Muhammad (complainant) made a statement (Exh.PA), before the police, contending therein that he and his brother Muhammad Anwar (deceased) were residing together; along with his above named brother, Rab Nawaz (injured/PW), Mahmood Amjad (deceased) and Ansar, at about 7.30 p.m. was sitting in front of his house and talking; suddenly M/s Akmal, Muzaffar and Zafar (convicts/appellants), Ashraf, Asghar, Nasrullah and Sajid (since acquitted), while armed with firearms, attracted there; Akmal (convict/appellant) raised a ('lalkara' that they had come to take revenge of their murder, whereupon they (complainant party) to save themselves, started running to their house; Akmal with his gun made a fire shot, which hit Muhammad Anwar upper side of right flank and he fell down; Muzaffar (convict/appellant) fired a shot of his gun, which landed at back side of the head of Mahmood Amjad, who also fell down; the fire shot made by Zafar (convict/appellant), with his gun hit at the buttock of Rab Nawaz; thereafter Nazar with .44 bore rifle, Ashraf with 303 bore rifle; Asghar with 8 mm rifle, Nasrullah with 8 mm rifle and Sajid with 223 bore rifle also made indiscriminate firing; on. hearing reports of firing, many persons of the locality ran towards the spot, whereupon the accused, fled away; Muhammad Anwar and Mahmood Amjad succumbed to the injuries, whereas Rab Nawaz in an injured condition was shifted to the hospital; the

motive was previous enmity of murder. As a result of the above mentioned complaint, the FIR No. 456 dated 29-8-2002 under Sections 302/324/148/149, P.P.C. was registered at Police Station Saddar Chiniot. During the investigation, the police declared some of the accused innocent, hence the complainant filed a private complaint (Exh.PB), against the appellants/convicts and five others (since acquitted), almost on the same grounds as were narrated in the above mentioned Fard Biyan (Exh.PA). In the said complaint, the due proceedings were carried on and the nominated respondents/accused were summoned. Pre-trial proceedings were conducted, whereafter appellants/convicts and their co-accused (since acquitted) were formally charge sheeted, by the learned trial Court on 18-12-2003. All pleaded not guilty and claimed the trial, hence, the prosecution evidence was summoned and recorded.

3. Prosecution got examined as many as five persons as PWs, whereas, ten as CWs. Gist of evidence of the material witnesses is as under:--

(i) **P.W.1 Ali Muhammad** was the complainant as well as an eye-witness of the alleged occurrence, who narrated almost the same facts as were stated by him in the Fard Biyan (Exh.PA) and the private complaint (Exh.PB). He had also received a phial containing pallets, from the doctor being recovered from the body of Rab Nawaz (PW) and produced it before the investigating officer, who had taken the same into possession, through memo (Exh.PC), attested by him.

(ii) **P.W.2 Rab Nawaz**, who during the occurrence received injury had supported the version of Ali Muhammad complainant (P.W.1), in all its four corners.

(iii) **P.W.5 Dr. Mushtaq Bashir** conducted the post mortem examination of the dead bodies of Muhammad Anwar and Mahmood Amjad and prepared the reports (Exh.PF and Exh.PJ). At that time the following injuries were found on the dead body of Muhammad Anwar deceased: -

(a) Nine lacerated wounds 1 cm x 1 cm each in an area of 12cm x 1 cm on the outer and middle of right chest. Margins were inverted,

corresponding holes were present on the Qameez, these were wounds of entrance.

(b) Seven lacerated wounds 1-1/2 cm x 1 cm each in an area of 9cm x 9cm on the front and upper part of the right chest. Margins were everted, holes were present on the Qameez, these were wounds of exit.

(c) Lacerated wound 2 cm x 1 cm on the back and upper part of right scapular area, margins were everted, hole present on the Qameez, it was wound of exit.

During autopsy of Mahmood Amjad, the following injury was noticed:-

"Crushed lacerated wound 20cm x 16cm on the left and slightly back side of the head and left ear. Margins were inverted, brain matter was coming out, underlying skull bone was fractured into multi-pieces. Plastic wad was removed from the brain matter, it was wound of entrance.

As per doctor, the above mentioned injuries were caused by firearms, ante-mortem in nature, sufficient to cause death and that the deceased, died just on receipt of the injuries.

(iv) CW-1 Muhammad Nawaz Head Constable chalked out the formal FIR. (Exh. CW-A/1), received the parcels containing blood stained earth and the empties, from the investigating officer, kept the same in the Malkhana and thereafter handed over them to Allah Rakha Constable, for their onward transmission to the office of Forensic Science Laboratory, Lahore intact.

(v) CW-2 Allah Rakha 624/C transmitted sealed sample parcels, relating to the case to the concerned offices`..

(vi) CW-4 Muhammad Baqir 665/MHC kept in the Malkhana parcels containing .12 bore guns and rifle and thereafter got them dispatched in the office of Forensic Science Laboratory, Lahore.

(vii) CW-5 Zafar Iqbal 870/C Constable got conducted the post mortem examination of the dead bodies and also produced the last

worn clothes of the deceased (P-1 to P-4) before the investigating officer, who took the same into possession through memo (Exh.CW.5/E). This witness also attested the memo (Exh.CW.5/F) through which .12 bore gun (P15) along with four live cartridges (P-6), allegedly got recovered by Muzaffar (convict/ appellant) from his house was taken into possession by the investigating officer.
(viii) CW-7 Jamil Akhtar drafted the scaled site plans (Exh.CW.7/J and Exh.CW.7/K) of the spot.

(ix) CW-8 Babar Nawaz S.I. investigated the case. During his proceedings, he recorded the statement (Exh.PA) of Ali Muhammad complainant and for registration of the formal FIR sent it to the Police Station; prepared injury statements (Exh.PG & Exh.PK) and the inquest reports (Exh.PH & Exh.PL) relating to the dead bodies; collected the blood stained earth from the spot, made it into sealed parcels and took the same into possession through memo (Exh.PD); collected seven empties of .12 bore gun (P-1/1-7) and ten of .44 bore rifle (P-2/1-10) from the spot and took the same into possession through memo (Exh.PE); prepared rough site plan (Exh.CW.8/L) of the spot; prepared injury statement (Exh.PN) of Rab Nawaz (injured PW) and also recorded his statement; took into possession the last worn clothes of the deceased (Exh.P-1 to Exh. P-4); got prepared the scaled site plans (Exh.CW-7/J and Exh.CW-7/K) from the draftsman; deferred arrest of Akmal, Zafar, Nazar and Ashraf, accused when they appeared before him on
10-9-2002, but arrested Muzaffar and Asghar accused on 8-11-2002; took into possession the gun (P-5) along with four live cartridges (P6/1-4) got recovered by Muzaffar convict/appellant from his house, through memo (Exh.CW-5/F); referred Rab Nawaz PW to Allied Hospital, Faisalabad for the purpose of operation and took into possession a pallet which was removed from his body; deposited the case property with Moharar at the relevant stages and also recorded statements of the concerned witnesses; finally, prepared the challan while placing the names of Akmal, Zafar (appellants/convicts), Nazar, Hayat and Ashraf (accused since acquitted) in Column No. 2 of the report under section 173 of Cr.P.C.

(x) CW-9 Dr. Arshad Ali examined Rab Nawaz (injured PW) and prepared the medico legal report (Exh.CW-9/P). Two fire shot injuries, one at right buttock and other at right thigh of the injured were noted.

4. After examination of the above said witness, the complainant tendered the reports of the Chemical Examiner, Serologist and Forensic Science Laboratory as Exh.PR, Exh.PS & Exh.PT respectively and closed the prosecution case, whereafter the appellants/convicts as well as their acquitted co-accused were examined as required under Section 342 Cr.P.C., during which the questions emerging from the prosecution evidence were put to them and they denied almost all such questions, while pleading their innocence and false involvement, in the case with mala fides. The question "Why this case against you and why the PWs have deposed against you?" was replied by the appellants with the following three words:--

"Due to enmity."

5. At that time, Akmal (appellant/ convict) opted to lead evidence in his defence but refused to make statement under Section 340(2), Cr.P.C., whereas Zafar and Muzaffar (appellants/convicts) did not opt to lead any evidence in their defence or make statements on oath. Later on, Akmal also refused to lead any defence evidence.

6. On completion of the trial, the learned trial Court pronounced the impugned judgment, whereby the appellants were convicted and sentenced, in the above mentioned terms, whereas their above named co-accused were acquitted of the charge. Consequently the matters in hand.

7. Learned counsel for the appellants have argued that the appellants are innocent and falsely roped in the case, with mala fide, while concocting a false and frivolous story; during the investigation, Akmal and Zafar (appellants) were found to be not involved, being not available at the spot, hence declared innocent, but the learned trial Court failed to consider the said fact and erred in convicting and sentencing them; during the investigation, no incriminating was recovered from Akmal and Zafar, (appellants); the gun allegedly recovered from Muzaffar (appellant) was a planted weapon and as such the said recovery could not be believed; the statements of the prosecution witnesses were full of material contradictions but not considered

by the learned trial Court; in consistency between the ocular account and the medical evidence was also not taken into consideration by the learned trial Court; the prosecution had failed to prove the charge against the appellants, hence they were entitled for acquittal and as such the impugned judgment is not sustainable in the eye of law.

8. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant has not only vehemently opposed the appeal but also reiterated the grounds taken in Criminal Revision (No. 156 of 2007) and prayed for enhancement of the compensation awarded to the appellants.

9. Argument of learned counsel for the appellants, learned counsel for the complainant as well as learned Deputy Prosecutor General have been heard and the record has been perused.

10. Ali Muhammad complainant (P.W.1) at the time of the reporting the matter to the police on 29-8-2002 through Exh.PA, alleged the motive as previous enmity of murder. At that time he did not make any detail of the said enmity, but when he filed the complaint on 13-1-2003 (Exh.P.B), contended that in the year 1987, Bahu was murdered, who was real uncle of Akmal, Zafar (appellants), Muhammad Ashraf and Asghar (since acquitted), whereas, first cousin (Chacha Zad) of Nazar (since acquitted) and Muzaffar (appellant/convict); a criminal case against Anwar deceased and others was registered at Police Station Saddar Chiniot, wherein Anwar deceased was sentenced to twenty five years imprisonment, who after serving out was released; the accused to get revenge of the said murder, with common intention, had committed Qatal of Muhammad Anwar and Mahmood Amjad, whereas murderous assault at Rab Nawaz (P.W.2). During statement of the complainant (P.W.1) it came on the record that one Ahmed, who was also challaned for murder of Bahu, was acquitted in the year 1989, whereas Anwar (deceased) and Nazir, after serving out their sentences came back about 3/4 years before the occurrence. In the above said back ground, the alleged motive does not appeal to a prudent mind because no action against Ahmed was ever taken by the accused party, who according to the complainant, was also a murderer of Bahu and acquitted in the year 1989. Anwar (deceased) was enlarged from the jail about 3/4 years prior to the instant occurrence, but just after his release, he was not questioned by the accused party in any manner, despite the fact that both the parties were residing in the same

locality. Therefore, the alleged motive could not be termed to have been established.

11. Ali Muhammad complainant (P.W.1) and Rab Nawaz injured (P.W.2) during the trial categorically deposed that when they along with Muhammad Anwar and Mahmood Amjad (deceased) were available at the spot, the appellants/ convicts, while armed with firearms attracted and attacked at them and when they to save themselves started running towards their house, Akmal (appellant/ convict) made a fire shot with his gun which hit at back side of right flank of Muhammad Anwar (deceased); Muzaffar (appellant/convict) with his gun fired at Mahmood Amjad (deceased) hitting on the back side of his head, whereas Zafar (appellant/convict) fired and caused injuries at right buttock of Rab Nawaz (P.W.2); due to the injuries sustained by Muhammad Anwar and Amjad Mahmood at the hands of Akmal and Muzaffar (appellants), both died then and there. The witnesses however, admitted that each of the appellants made only one fire shot without any repetition. The above mentioned version of the above named witnesses was concurrent, consistent and confidence inspiring. Despite lengthy cross-examination, no material contradiction in the said version was brought on the record, hence the learned trial Court had rightly believed the version to be true. The place of occurrence was confirmed to be outside the house/haveli of the complainant, hence admittedly the appellants were the aggressors, who succeeded in getting lives of two innocent persons and causing grievous injuries to one. The matter was promptly reported to the Police, hence no chance of any deliberation, consultation or false implication. The defence had failed to contradict presence of the above named injured witness at the spot and sustaining of the injuries. Inconsistency between the medical evidence and the ocular account has been alleged by the learned counsel for the appellants, but on perusal of the record, no such contradiction has been noticed, hence the said contention has no force. It can rightly and safely be held that the ocular account is in line with the medical evidence.

12. The contention of the learned counsel for the appellants that when on the basis of same evidence, co-accused were acquitted, then no justification of conviction of the appellants, is answered in the terms that now-a-days principle of "falsus in uno falsus in omnibus" is not applicable, rather maxim "sifting of grain out of chaff' is to be adopted. Hence acquittal of the above mentioned co-accused and conviction of appellants being result of application

of the above mentioned maxim, is not objectionable. If any case-law is needed to fortify this view, reference can be made to the case of "Iftikhar Hussain and another v. State" (2004 SCMR 1185), wherein the Hon'ble Supreme Court of Pakistan at page 562 held as under:--

> "...It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular, testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts."

Similar view was reiterated in the subsequent judgment of the Hon'ble Supreme Court of Pakistan reported as "Akhtar Ali and others v. The State" (2008 SCMR 6).

13. The Investigating Officer, during the investigation, had declared Akmal and Zafar (appellants) innocent, being not available at the spot and as such challaned them in Column No. 2 of the report under Section 173, Cr.P.C. The investigating officer (CW-8) during his statement in the Court had admitted it correct that no documentary evidence about innocence of the above named accused was produced before him, meaning thereby that the findings of the investigating officer, towards innocence of the above named appellants was without any substance, hence can rightly be termed as ipse dixit of the police and as such could not be given any weight. The learned trial court had rightly appreciated the said fact and discarded the above said findings made by the investigating officer. Even otherwise, if there was any specific stance/plea of any appellant, then it should have been established during the trial, through cogent and convincing evidence but despite opportunity, the appellants had failed to do so.

14. Admittedly as Akmal and Zafar (appellants) were declared innocent and even not arrested, hence no recovery from them was effected. Recovery of 12 bore gun from Muzaffar (appellant) was alleged and it was also sent to the

laboratory for comparison, with the empties collected from the spot. A photo copy of report of the Forersic Science Laboratory was brought on the record of the learned trial Court as Exh.PK, which at all was not admissible in evidence, hence no weight could be given to the said document. Furthermore as per the record, the empties allegedly collected from the spot were dispatched to the laboratory after about three months and as such the mandatory procedure/requirement of sending the empties to the laboratory just after the recovery was violated. The said reason had also made the comparison, if any, useless.

15. As a result of what has been discussed above, we are of the considered view that as the charge against the appellants was proved beyond any doubt, hence the impugned judgment, towards conviction of the appellants, in the above mentioned terms being result of correct evaluation and appreciation of evidence was quite justified and call of the day. But non-establishment of the alleged motive, the recovery of weapons, report of the Forensic Science Laboratory and non-repetition of firing by the appellants, according to us are sufficient circumstances for concession, in the sentence awarded to the appellants by the learned trial court. It is well recognized principle, by now that an accused is entitled for the benefit of doubt as an extenuating circumstance, while dealing his quantum of sentence as well. In this regard, reference may be made to the case of Mir Muhammad alias Miro v. The State (2009 SCMR 1188), wherein the Hon'ble Supreme Court of Pakistan had held as under:--

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

16. Consequently, the conviction of Akmal and Muzaffar (appellants) under Section 302(b), P.P.C. awarded through the impugned judgment is maintained but their sentence is altered from the death to imprisonment for life. The compensation awarded to the appellants by the learned trial court is maintained. However, we have noticed that learned trial court has not awarded any sentence in default of payment of compensation provided under section 544-A(2), Cr.P.C. Therefore, we direct that if the appellant fails to pay the compensation amount, he will undergo simple imprisonment for six

months. The benefit of section 382-B of Cr.P.C. is also given to the appellants.

17. As stated above Zafar (appellant) during the investigating was not arrested and he was taken into custody at the time of announcement of the impugned judgment. As per the information made by the jail authorities, where he remained confined, he was dispatched to the jail on 15-4-2006 and released on bail, on 30-6-2008, hence he served out imprisonment for 2 years, 8 months and 15 days. He made only fire shot at the buttock (non vital part) of the above named injured, hence due to the reasons, mentioned above, he also deserves concession in his sentence. Therefore, his sentence for charge under Sections 324 and 337F(vi), P.P.C. is reduced to the imprisonment for 2 years, 8 months and l5 days each, which he has already undergone. The fine of Rs.5000 and Daman of Rs.30,000 imposed against him by the learned trial court shall remain intact. He is directed to make the payment of the above mentioned amounts, within thirty days from today and submit the receipt(s) in the office of Deputy Registrar (Judicial) of this Court, failing which he shall undergo the imprisonment, which in default of the above mentioned fine has been prescribed by the learned trial court.

18. In view of the foregoing discussion, with the above mentioned modification in the sentence of the above mentioned appellants Criminal Appeal No. 679 of 2006 is dismissed. Murder Reference No. 484 of 2006 is answered in negative and death sentence of Muzaffar and Akmal is not confirmed. Zafar appellant, by way of suspension of sentence is on bail, hence his bail bonds are discharged.

19. The above stated facts are sufficient towards dismissal of Criminal Revision No. 156 of 2007, hence it is dismissed.

HBT/A-187/L Sentence reduced.

2016 C L C Note 80
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
MUHAMMAD HANIF and others---Petitioners
Versus
MUHAMMAD ASLAM and others---Respondents

Civil Revisions Nos. 40 and 41 of 2005, heard on 19th June, 2014.

Civil Procedure Code (V of 1908)---

----O. XLI, R. 31---Judgment in appeal---Points for determination---Scope---Appellate Court below had passed judgment and decree in an ambiguous manner without adopting the requirements of O. XLI, C.P.C. and without discussing any issue or setting aside any findings---When law had prescribed that a thing should be done in a particular manner then same must be done in the said particular manner or should not be done at all---Appellate Court should have recorded issue-wise findings but said procedure had not been complied with--Impugned judgment and decree could not be termed to have been passed while considering the law and procedure on the subject---Judgment and decree passed by the Appellate Court were set aside with a direction to pass a valid judgment---Revision was accepted in circumstances. [Paras. 9, 11 & 13 of the Judgment]

Tehsil Nazim TMA, Okara v. Abbas Ali and 2 others 2010 SCMR 1437; Muhammad Akram v. Mst. Zainab Bibi 2007 SCMR 1086; Khalil-ur-Rehman and another v. Dr. Manzoor Ahmed and others PLD 2011 SC 512; Raja Hamayun Sarfraz Khan and others v. Noor Muhammad 2007 SCMR 307; Madan Gopal and 4 others v. Marn Bepari and 3 others PLD 1969 SC 617 and Ch. Muhammad Shafi v. Shamim Khanum 2007 SCMR 838 rel.

Mukhtar Ahmad Gondal for Petitioners (in C.Rs. Nos. 40 and 41 of 2005).
Raja Sajid Mehmood for Respondents (in C.Rs. Nos. 40 and 41 of 2005).
Date of hearing: 19th June, 2014.

JUDGMENT
MUHAMMAD TARIQ ABBASI, J.---This single judgment is intended to decide the above captioned revision petitions, as in the both

consolidated judgment and decrees dated 13.12.2004, passed by the learned Additional District Judge, Rawalpindi, has been called in question.

2. The facts in short are that Muhammad Hanif etc. (the petitioners in Civil Revision No.41), filed a suit, against Muhammad Aslam (the respondent in the said Civil Revision), whereby possession of four rooms and courtyard, fully described in the plaint, was sought. Muhammad Aslam, Mst. Fazal Jan, Mst. Raheem Jan and Mst. Qudrat Jan (the respondents in Civil Revision No. 40 of 2005), also preferred a suit against the above named Muhammad Hanif etc., whereby the possession of a house consisting of one room, fully narrated in the plaint, was demanded.

3. Both the above mentioned suits were proceeded in the learned trial Court and decided through judgments and decrees dated 23.11.2002, whereby the suit filed by Muhammad Hanif etc. was decreed and that of Muhammad Aslam etc., was dismissed.

4. Muhammad Aslam etc. preferred appeals, which came up for hearing before the learned Additional District Judge, Rawalpindi, from where consolidated judgments and decrees 13.12.2004 were pronounced, whereby the suit filed by Muhammad Hanif etc. was dismissed, whereas preferred by Muhammad Aslam etc. was decreed. Consequently, the revision petitions in hand.

5. Arguments of both the sides have been heard and the record has been perused.

6. The record shows that in the suit filed by Muhammad Hanif etc. the following issues were framed:-

(1) Whether the plaintiffs have no cause of action to bring the suit?

(2) Whether the suit is time barred?

(3) Whether the suit has not been correctly valued for the purposes of court fee and jurisdiction? If so what is its correct valuation for both the purposes?

(4) Whether the suit is bad for non-joinder of necessary parties?

(5) Whether the plaintiffs are owners of the suit property and as such are entitled to the decree for possession of same?

(6) Relief.

(6-A) Whether the defendants are licensee on the suit property of the plaintiffs? OPP

(6-B) Whether the suit property had been purchased by the father of defendant from father of plaintiffs? OPD

7. Whereas in the above mentioned other suit preferred by Muhammad Aslam etc. the following issues were settled by the learned trial Court:-

(1) Whether present suit is time barred? OPD

(2) Whether the present suit is bad for non-joinder of necessary party? OPD

(3) Whether the present suit is incorrectly valued for the purpose of court fee and jurisdiction, if so, what is correct valuation? OPD

(4) Whether the plaintiff is entitled to a decree for possession of the property in dispute and as a consequential relief for permanent injunction to restrain the defendants from changing the condition of the suit house and from alienating the same? OPP

(5) Relief.

The learned trial Court, in both the suits, had given the issue wise findings and ultimately passed the judgments and decrees dated 23.11.2002, in the above mentioned terms.

8. The decree by the learned trial Court in favour of Muhammad Hanif etc. was as a result of the findings given under issue Nos.5, 6-A and 6-B mentioned above. Whereas the dismissal of the suit of Muhammad Aslam etc. was in consequence of the decision made under issue No.4 described above.

9. It has been observed that when the matters have gone before the learned Additional District Judge, Rawalpindi, in shape of the above mentioned appeals, the learned Additional District Judge without adopting the requirements of Order XLI of C.P.C. and without discussing any issue or setting aside any findings made therein, in an ambiguous manner has passed the judgment and decrees dated 13.12.2004.

10. When the above mentioned situation was confronted to the learned counsel appearing on behalf of the respondents he has frankly stated that the judgment of the learned Appellate Court is not issue wise and that

findings of the learned trial Court regarding any issue has not been disturbed, however, the appeals have been decided, as mentioned above.

11. When the law prescribed that as thing should be done in a particular manner then the said thing must be done in the said particular manner or should not be done at all. Reliance in this regard is placed upon Tehsil Nazim TMA, Okara v. Abbas Ali and 2 others (2010 SCMR 1437), Muhammad Akram v. Mst. Zainab Bibi (2007 SCMR 1086), Khalil-ur-Rehman and another v. Dr. Manzoor Ahmed and others (PLD 2011 SC 512), Raja Hamayun Sarfraz Khan and others v. Noor Muhammad (2007 SCMR 307). In the situation in hand, under Order XLI of C.P.C., it has clearly been mentioned that the learned Appellate Court should record the issue wise findings but, as stated above, the said procedure has not been complied with. In the judgments reported as Madan Gopal and 4 others v. Marn Bepari and 3 others (PLD 1969 SC 617) and Ch. Muhammad Shafi v. Shamim Khanum (2007 SCMR 838) the Hon'ble Supreme Court of Pakistan has laid down the law that the appellate Court must give his judgment with reasoning and also meet out all the points of the judgment of trial Court.

12. Resultantly, the impugned judgment and decrees of the learned Appellate Court could not be termed to have been passed while considering the law and the procedure on the subject.

13. Consequently, both the revision petitions in hand are accepted, the impugned judgment and decrees dated 23.12.2004 are set aside, with a direction to the learned Appellate Court to take up the appeals again and while hearing all the concerned, pass a valid judgment, warranted under the law, and procedure positively, within a period of one month from the date of receipt of this order. No order as to costs.

ZC/M-281/L Petition allowed.

2016 M L D 380

[Lahore]

Before Shahid Hameed Dar and Muhammad Tariq Abbasi, JJ

MUHAMMAD RAASHID---Petitioner

Versus

The STATE and others---Respondents

Crl. Misc. No.6080-B of 2014, decided on 23rd September, 2014.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss.302, 324, 337-F(i)(iii)(vi), 148 & 149---Anti-Terrorism Act (XXVII of 1997), S.7---Qatl-i-amd, attempt to commit qatl-i-amd, causing damiyah, Mutalahimah, Munaqqilah, rioting, common object, act of terrorism---Pre-arrest bail, grant of---FIR showed that only indiscriminate firing was attributed to accused---Accused was alone at his shop, when his rival party, consisted of five nominated and two unknown persons attacked him---Due to firing of the opposite party, accused sustained as many as seven fire shot injuries, out of which one was Jurh Jaifah---Question whether accused, while making return firing had committed any offence or not was to be determined at the trial---Whether the minor girl or her father were present at the spot, or she had sustained any injury during the occurrence was not mentioned in the FIR---Statements of said persons whereby they stated that injury at the foot of baby was inflicted by accused were recorded on the third day of alleged occurrence---Fact that when indiscriminate firing was being made from both the sides, how it was noted that injury to the baby had been caused by accused---Said witnesses, seemed to have been purposely introduced to falsely involve accused in the case---Complainant and other witnesses sworn affidavits, whereby they exonerated accused from alleged act of firing---Trial Court did not give any importance to the affidavits---Present case was that of two versions; and correct version could only be hinted at and pointed to during the course of trial---Case of accused was one of further inquiry, entitling him to concession of bail---Ad interim pre-arrest bail granted to accused, was confirmed, in circumstances.

Abdul Razzaq Yunas for Petitioner.

Khurram Khan, Deputy Prosecutor General and Ashraf S.I. for the State.

Rao Muhammad Asghar for the injured.

ORDER

The petitioner namely Muhammad Raashid seeks pre-arrest bail in case FIR No.29, dated 15.01.2014, registered under Sections 302/324, 337-F(i), 337-F(iii), 337-F(vi)/148, 149, P.P.C., read with Section 7-ATA, 1997 at Police Station Gawalmandi, Lahore.

2. The facts, as per FIR are that on 14.01.2014 at about 11;30 p.m. when Ghulam Hussain complainant, along with his brother-in-law, Khalil Ahmad PW, nephews Suleman Ali (deceased), Saad Ali (injured PW) and maternal nieces namely Muskan and Erum (injured PWs) came at Gawalmandi Chowk to see illumination on the eve of Eid Meelad-ul-Nabi and stopped at the milk and yogurt shop of Raashid Gujjar (petitioner) to drink milk; in the meanwhile Messrs Farid Gujjar, Hamid alias Dora Gujjar, Kaka alias Saghar, Waseem alias Bahadar, Azeem alias Kag and two unknown accused, all armed with pistols, while raising Lalkaras reached there; on seeing them Raashid Gujjar (petitioner), opened direct firing with his pistol at the attackers and in return, Farid Gujjar etc. also started firing; the fire shots made by Farid Gujjar hit Suleman Ali, the nephew of the complainant at backside of left shoulder and right thigh who got injured and fell down; due to indiscriminate firing from both the sides, Saad Ali, Erum, Muskan as well as many others sustained the injuries; the injured were shifted to Mayo Hospital, Lahore, where Suleman Ali succumbed to the injuries.

3. The learned counsel for the petitioner has argued that the petitioner is innocent and has been falsely roped with mala fide; during the occurrence the petitioner received fire shot injuries at the hands of the opposite party and became seriously injured; neither in the FIR nor in the statements of the injured PWs it was mentioned that minor Naseaha had also sustained the injury(-ies) but with the mala fide, statements of the above named girl as well as that of her father Muhammad Shahzad Butt were concocted on the third day of the occurrence, just to falsely rope the petitioner in the case; the complainant as well as the injured PWs and Khalil Ahmad an eye-witness have sworn the affidavits, whereby they all exonerated the petitioner.

4. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for Mst. Naseaha injured has vehemently opposed the petition.

5. After hearing learned counsel for the parties and perusing the record it is observed that in the FIR only indiscriminate firing was attributed to the petitioner. It was alleged that due to the firing made from both the sides, the above named PWs had sustained the injuries, whereas Suleman Ali lost his life due to the injuries caused by Farid Gujjar. It is also noted that the petitioner was alone at his shop, when his rival party consisting of five nominated and two unknown persons attacked him. Due to firing of the opposite party, the petitioner sustained as many as seven fire shot injuries, one out of which was Jurh Jaifah, punishable under Section 337-D, P.P.C. It would be seen and determined during the trial if the petitioner, while making return- firing had committed any offence or not.

6. In the FIR it is not mentioned if baby Naseaha or her father Muhammad Shahzad Butt were present at the spot or she had sustained any injury during the occurrence. On the third day of the alleged occurrence i.e., on 16.01.2014 statements of the above named persons were recorded, whereby they stated that injury at the foot of baby Naseaha was inflicted by the petitioner. When indiscriminate firing was being made from both the sides, how come the above named girl and her father noticed that the injury to the minor girl had been caused by the petitioner? It seems as if above named witnesses have been purposely introduced to falsely involve the petitioner in this case. The bail declining order passed by the learned trial court reveals that Ghulam Hussain-complainant, Khalil Ahmad, an eyewitness, Saad Ali, Muskan and Erum, the injured PWs tendered sworn affidavits before the police, whereby they exonerated the petitioner from the alleged act of firing with the addition that it was he who received injuries at the hands of attacking party. Learned trial court, however, did not give any importance to the said affidavits and observed that baby Naseaha still blamed the accused-petitioner qua firearm injuries on her foot. Copies of the mentioned affidavits are available on the record, the presentation of the original thereof before the police has been admitted by both the sides. Learned counsel for the petitioner has stated that regarding the alleged occurrence, the father of the petitioner has filed a private complaint under Sections 302/324,337-F(i),337-F(iii),337-F(vi), P.P.C. and section 7 of ATA, in which all the respondents-accused who attacked the petitioner have been summoned and charge sheeted. The other side has not rebutted the said fact. It is certainly a case of two versions. The correct one can only be hinted at and pointed to during the course of the trial.

7. All the above mentioned facts, in our view, have rendered the petitioner's case one of further inquiry, entitling him to the concession of bail. Resultantly, the petition in hand is accepted and ad-interim pre-arrest bail granted to him on 05.05.2014 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.2,00,000/- with two sureties, each in the like amount to the satisfaction of the learned trial court.

HBT/M-347/L Bail confirmed.

2016 M L D 621

[Lahore]

Before Muhammad Tariq Abbasi and James Joseph, JJ

ALI ASGHAR---Petitioner

Versus

The STATE and others---Respondents

Crl. Misc. No.4569-B of 2014, decided on 15th October, 2014.

Criminal Procedure Code (V of 1898)---

----S.497---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Possessing and controlling narcotics---Bail, grant of---No particular part of the allegedly recovered substance (bhang), had been described---Report of Chemical Examiner was still awaited---Nature and kind of alleged recovered substance, could not be confirmed---Question as to whether the offence would fall under provision of Control of Narcotic Substances Act, 1997 or the Prohibition (Enforcement of Hadd) Order, 1979 would be resolved during the trial---Accused was no more required for any further investigation, and nothing was to be recovered from him---Keeping accused, confined in the jail, in circumstances, would serve no useful purpose---Accused was admitted to bail.

Fazeelat Bibi v. The State 2007 YLR 3021 rel.

Ch. Muhammad Naeem and Muhammad Malik Khan Langah for Petitioner.

Malik Riaz Ahmad Saghla, DPG and Saleem, SI for the State.

Date of hearing: 15th October, 2014.

ORDER

MUHAMMAD TARIQ ABBASI, J.---The petitioner namely Ali Asghar seeks post arrest bail in case FIR No. 394/2014, dated 08.06.2014, registered under Section 9(c) of the Control of Narcotic Substances Act, 1997, at Police Station Seetal Maari, District Multan.

2. The precise facts, as per FIR are that on 8.6.2014, when Muhammad Saleem, SI (complainant), along with other Police officials was on patrolling, he received a spy information that the petitioner having 'bhang' was available at Samejabad, Multan; the complainant along with his companions, reached at the spot and apprehended the petitioner; during search, from a bundle (Gattu), which he was lifting, 'bhang' weighing five kilogram was recovered.

3. After hearing learned counsel for the parties and perusing the record, it is observed that in the FIR, only recovery of 'bhang', without specifying particular parts thereof, is alleged. In various dictionaries of English language, the word 'bhang' is defined as 'hemp'. Whether 'bhang' a narcotic substance, is a question, the answer of which could be found in Section 2(s) of the Control of Narcotic Substances Act, 1997, where narcotic drug has been defined as Coca leaf, cannabis heroin, opium, poppy straw and all manufactured drugs. The term "cannabis (hemp)" has been defined in Section 2(d) of the Act ibid, in the following terms:--

(i) cannabis resin (charas) that is, the separated resin, whether crude or purified obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(ii) the flowering or fruiting tops of the cannabis plant (excluding the seed and leaves when not accompanied by the tops) from which the resin has not been extracted by whatever name they may be designated or known; and

(iii) any mixture with or without neutral materials of any of the above forms of cannabis or any drink prepared therefrom;

From the above mentioned definition, given in Section 2(d)(ii), it is clear that if "bhang (hemp)" contains specific parts, flowering or fruiting tops, from which resin has not been extracted, then the case would be covered by the Act ibid and punishable under Section 9 of the Act. In this regard, reliance may be placed to the case of "Fazeelat Bibi v. The State" (2007 YLR 3021), the relevant portion whereof reads as under:--

"This clearly establishes that when Bhang/hemp is referred to without specification of any particular part of the said plant and without the other details mentioned above the offence would be covered by the provisions of the Prohibition (Enforcement of Hadd) Order, 1979 and recovery of Bhang/hemp would attract the provisions of the Control of Narcotic Substances Act, 1997 only when the requirements of section 2(d) thereof are fulfilled. In the case in hand the FIR, the Memorandum of Recovery and the report of the Chemical Examiner do not specify as to whether the substance allegedly recovered from the petitioner's possession was the flowering or fruiting tops of the cannabis plant or not, as to whether the same excluded the seeds and leaves when not accompanied by the tops or not and as to whether resin had been extracted from the recovered substance or not. In these circumstances prima facie it is difficult for us to hold that the requirements of section 2(d) of the Control of Narcotic Substances Act, 1997, were fulfilled in the case in hand so as to attract the said Act to the present case. Thus, we have no other option but to fall back upon the provisions of the Prohibition (Enforcement of Hadd) Order, 1979 vis-a-vis the allegation against the petitioner."

4. As stated above in the situation in hand, no particular part of the alleged recovered substance (bhang) has been described. The report of the chemical examiner is still awaited, hence till now the nature and kind of alleged recovered substance could not be confirmed. It would be seen during the trial whether the offence would fall under the provisions of the Act ibid or the Prohibition (Enforcement of Hadd) Order, 1979.

5. The petitioner is behind the bars, he is no more required for any further investigation in this case and nothing is to be recovered from him. Keeping him, confined in the jail would serve no useful purpose.

Resultantly, this petition is allowed, and the petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two lac only) with two sureties each, in the like amount to the satisfaction of the learned trial Court.

HBT/A-171/L Bail granted.

2016 M L D 730

[Lahore]

Before Sayyed Mazahar Ali Akbar Naqvi and Muhammad Tariq Abbasi, JJ

MUHAMMAD WASEEM KHAN---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.641 and Murder Reference No.77 of 2010, heard on 19th June, 2014.

Penal Code (XLV of 1860)---

----Ss. 302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Sentence, reduction in---Accused was proved to have strong motive against the deceased for commission of the offence---Complainant had satisfactorily and confidently brought on the record each and every aspect of the case, not only during his examination-in-chief, but also in cross-examination---Defence, despite lengthy cross-examination had badly failed to shake the testimony of sole witness, could not create any dent, or defect in the prosecution story or bring on the record any material favourable to the accused---Conviction could be based on evidence of a solitary eye-witness, if it was found truthful and natural and not interested in deceased or any inimical terms with accused---Complainant had established his presence at the spot and witnessing of the occurrence---Mere relationship of complainant with the deceased, was not sufficient to discard his testimony which otherwise was confidence inspiring---Medical evidence had not contradicted the ocular story---Availability of accused at the spot and his full participation in the alleged occurrence was established---Accused at the time of commission of occurrence being 19 years of age, that was sufficient to consider for premium to him, towards quantum of sentence---Death sentence awarded to accused, was altered to the imprisonment for life, in circumstances.

Muhammad Ashraf v. State 1971 SCMR 530; Allah Bukhsh v. Shammi and others PLD 1980 SC 225; Mali v. State 1969 SCMR 76; Farooq Khan v. State 2008 SCMR 917;Ziaullah v. The State 1993 SCMR 155; Ghulam Sarwar and others v. Sajid Ullah and others 2005 SCMR 1054 and Muhammad Imran @ Asif v. The State 2013 SCMR 782 rel.

Taqdeer Samsuddin Sheikh v. State of Gujarat 2012 SCMR 1879 and Haji v. State 2010 SCMR 650 ref.

Fakhar Hayat Awan for Appellant.

Mirza Muhammad Usman, A.P.G. for the State.

Raja Mehfooz Ali Satti for the Complainant.
Date of hearing: 19th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single judgment is intended to decide the above captioned Murder reference and the Criminal Appeal as the both are outcome of single judgment dated 28.7.2010, passed by the learned Additional Sessions Judge, Rawalpindi.

2. Through the above mentioned judgment, in a criminal case registered through FIR No. 361 dated 16.5.2008 under Sections 302/34 of P.P.C., at Police Station Civil Lines, Rawalpindi, towards commission of Qatl-i-Amd of Ibrar Hussain, the appellant has been convicted and sentenced to death, with compensation of Rs.2,00,000/- payable to the legal heirs of the deceased, failing which to undergo 06 months S.I.

3. The facts are that Zahid Hussain, complainant (PW-5) had made a statement (Ex.PJ) before the Police, contending therein that he was serving in a printing press, situated at Rehmanabad, Murree Road, Rawalpindi; that on 16.5.2008, he alongwith his brother Ibrar Hussain (deceased) and sister-in-law (Bhabi) namely Mst. Gultaj Bibi came in the court of Mr. Abdul Noor Nasir, Additional Sessions Judge, Rawalpindi, to appear in a case; that after attending the court, when they were going back and reached near the chamber of Raja Shaukat Ali, Advocate, at about 10.00 AM, suddenly M/s Muhammad Waseem (appellant), Muhammad Shakeel and Muhammad Shabbir (co-accused since acquitted) attracted there; that Muhammad Shabbir and Muhammad Shakeel (co-accused since acquitted) raised a 'Lalkara' that a taste to abduct Mst. Gultaj will be taught, whereupon Muhammad Waseem (appellant) pulled a knife (Chhuri) from his dub and inflicted successive blows at Ibrar Hussain (deceased), which hit at his chest, abdomen and back; that Ibrar Hussain while becoming injured, fell down and the above named accused fled away; that Ibrar Hussain (deceased) was being shifted by the complainant and his sister-in-law (Bhabi) to the hospital, but he succumbed to the injuries. The motive narrated by the complainant was that against Ibrar Hussain (deceased) and Mst. Gultaj Bibi, a case of abduction was got lodged by Muhammad Shabbir etc. and that due to the said grudge, Muhammad Waseem etc. with common intention had murdered Ibrar Hussain. On the basis of the above said complaint, the FIR (Ex.PE) was chalked out. The case was investigated and finally the challan was submitted, which for trial reached in the court of learned Additional Sessions Judge, Rawalpindi.

4. Muhammad Waseem (appellant) and his above named co-accused (since acquitted) were formally charge sheeted. They pleaded not guilty and claimed the trial, hence the following prosecution witnesses were summoned and recorded:--

PW-1 Muhammad Kashif Constable had got conducted the postmortem examination of the dead body of Ibrar Hussain (deceased). He had also produced the last worn clothes of the deceased (P-1, P-2 & P-3/1-2 before the Investigating Officer and attested the recovery memo (Ex.PA), through which the said articles were taken into possession.

PW-2 Aamir Riaz had attested the memo (Ex.PB), through which the parcel containing the blood stained earth, collected from the spot was taken into possession by the I.0.

PW-3 Muhammad Dawood had identified the dead body of Ibrar Hussain at the time of its postmortem examination.

PW-4 Bashir Ahmad Awan, Draftsman had drafted the scaled site plans (Ex.PD and Ex.PD/1) of the spot and produced before the I.0.

PW-5 Zahid Hussain was the complainant as well as eye witness of the alleged occurrence, who during his statement had deposed in the same manner as stated in his "Fard Bian"/complaint (Ex.PJ). He had also attested the memo (Ex.PF), through which blood stained knife (Chhuri) got recovered by Muhammad Waseem (appellant) was taken into possession by the I.O.

PW-6 Aamir Shahzad had attested the memo (Ex.PF), through which the knife (Chhuri) recovered at the instance of Muhammad Waseem (appellant) was taken into possession by the 1.0.

PW-7 Muhammad Saeed, SI had chalked out the formal FIR (Ex.PE), correctly without any addition/omission.

PW-8 Dr. Abbas Malik had conducted the postmortem examination of the dead body of Ibrar Hussain at District Headquarter Hospital, Rawalpindi and prepared the report (Ex.PG). During the said examination, as many as 13, incised wounds at different parts of the body of the deceased were noted. As per the doctor, the injuries Nos. 1, 2, 4, 5, 8 & 9, which were caused by sharp edged weapon and ante-mortem in nature were the cause of death.

PW-9 Muhammad Kausar SI had investigated the case and carried on the proceedings and prepared the documents fully described in his statement.

5. During the trial, Mst. Gultaj Bibi and Muhammad Azam PWs as were given up being unnecessary and while tendering the reports Ex.PL and Ex.PM, the case for the prosecution was closed.

6. After the above mentioned proceedings, the appellant as well as his above named co-accused (since acquitted) were examined as required under Section 342 of Cr.PC. The questions emerging from prosecution evidence were put to the appellant and he denied almost all such questions. In reply to question "Why this case against you and why the PWs have deposed against you?", the appellant had made the following statement:--

> "I am innocent and we are falsely implicated in this case. Complainant Zahid Hussain has failed to prove his presence in the Court premises on the fateful day, with cogent and plausible evidence. Admittedly the complainant was called to become the complainant of this case by the I.O. from Kotli Sattian. The presence of complainant at the place of occurrence is belied by the prosecution evidence. Complainant admitted during his cross-examination that he volunteered himself to become complainant of this case only for the reason that the deceased was his real brother. Complainant Zahid Hussain otherwise admitted during the cross-examination that it was only Ibrar Hussain and Gultaj, who has visited the Court on the fateful day. The conduct of Zahid Hussain complainant and manner of the occurrence as narrated by prosecution witnesses prima facie suggest that it was an unseen occurrence and out of grudge and animosity, complainant has falsely nominated me, my father and my uncle as accused in this case. Complainant Zahid Hussain also admitted that he was aggrieved by the registration of FIR No. 555 registered against Ibrar Hussain his real brother by my father. According to the story of the FIR Mst. Gultaj could be the most natural witness in this case who was malafidely given up as unnecessary by the prosecution and so withheld the best evidence, as she was not ready to support the false prosecution story. The complainant was inimical towards me, my father and my uncle and falsely deposed against us due to enmity."

7. The appellant had opted to lead evidence in his defence, but refused to make statement under Section 340(2) of Cr.P.C.

8. Muhammad Zebaish and Umar Khattab, while appearing in defence of the appellant had made statements as DW-1 and DW-2 respectively.

9. After completing the above mentioned proceedings, the learned Trial Court had passed the impugned judgment, whereby acquitted Shakeel Ahmad and Muhammad Shabbir, co-accused and convicted the appellant in the above mentioned terms. Consequently the murder reference and criminal appeal in hand.

10. The learned counsel for the appellant has argued that the complainant was not present at the spot, but called afterwards and made a false witness; that the conduct of the complainant being unnatural had also confirmed his unavailability at the spot; that the alleged motive was relating to the year 2002 and till 2008, no untoward incident between the parties had taken place, hence the alleged motive could not be termed to be the cause of the occurrence; that the medical evidence has contradicted the ocular story; that the statement of the only eye witness namely Zahid Hussain (PW-5) being not supported and corroborated from any independent source could not be believed; that the alleged recovery of knife (Chhuri) from a place which was accessible to everyone is unbelievable and that the prosecution case and the charge against the appellant was not proved and as such the learned Trial Court had erred in convicting and sentencing the appellant in the above mentioned terms, who is entitled for acquittal.

11. The learned Assistant Prosecutor General assisted by Raja Mehfooz Ali Satti, Advocate for the complainant, while supporting the impugned judgment to be justified and demand of the situation has vehemently opposed the appeal.

12. Arguments of all the sides have been heard and the record has been perused.

13. In the complaint (Ex.PJ), the FIR (Ex.PE), as well as the statement as PW-5, Zahid Hussain, complainant had narrated the motive, which resulted into commission of the occurrence, a criminal case of abduction got lodged by Muhammad Shabbir etc. against Ibrar Hussain (deceased) and Mst. Gultaj Bibi and that due to the said grudge, the murder of the deceased was committed. During the evidence, not only the complainant (PW-5) had affirmed the motive narrated by him in the complaint (Ex.PJ), but the defence had also got explained the same to the effect that Mst. Gultaj Bibi after getting divorce from Muhammad Shabbir Khan (co-accused since acquitted) had contracted marriage with Ibrar Hussain (deceased), whereupon the criminal case FIR No. 555 dated 19.9.2002 was registered under Section 16 of the offence of Zina (Enforcement of Hadood) Ordinance, 1979, against the deceased and the above named lady, at the complaint of Muhammad Shabbir

(co-accused since acquitted). It has also been brought on the record that the said case was pending in the court of the above named learned Additional Sessions Judge, Rawalpindi and on the date of the occurrence, the said case was fixed for hearing.

14. The learned counsel for the appellant, while declaring the above mentioned motive to be very remote, has contended that it could not be a cause of the alleged occurrence. The said objection has already been answered by the learned Trial Court with the following reasoning:-

> "The learned counsel for the accused argued that it was only a remote motive and could not be believed as a reason for happening of the instant occurrence. In my view, some weight may be given to this argument but only to the extent of accused Shakeel Ahmad and Muhammad Shabbir. It is pertinent to mention here that Shakeel Ahmad accused is the step-brother of Muhammad Shabbir accused. But to my view, it was a very strong motive for the accused Waseem for committing the Qatl-i-Amd of deceased Ibrar Hussain who had solemnized marriage with his mother after her abduction and thus deprived the accused Waseem from the love and affection of his mother. Because when her mother left his father and her children, the accused Waseem was aged only 13 years at that time. Years passed and when he grew up and moved among the society and felt the disgrace which the abduction of her mother by the deceased had brought to the family, he would have developed a strong grudge in his heart to take revenge of the disgrace. He would certainly have been inflamed by listening of taunting of the society. The registration of a criminal case regarding the said abduction and its pendency in the court at the time of occurrence is admitted. Therefore, it was a strong motive and the prosecution has successfully proved it."

15. The learned counsel for the appellant has failed to contradict the above mentioned findings made by the learned Trial Court regarding the motive. Therefore, it can safely be said that Muhammad Waseem (appellant) had a strong motive against the deceased for commission of the occurrence.

16. Although only Zahid Hussain complainant (PW-5) had narrated the occurrence. It has been observed that he had satisfactorily and confidently brought on the record each and every aspect of the case, not only during his examination-in-chief, but also the cross-examination. The defence despite lengthy cross- examination had badly failed to shake the testimony of the

above named sole witness, create any dint, or defect in the prosecution story or bring on the record any material favourable to the appellant.

17. In the light of the above type of evidence, of the above named sole witness, if any other corroboration has not come on the record, it has made no difference.

18. Conviction can be based on evidence of a solitary eye witness, if it is found truthful and natural and not interested in deceased or on any inimical terms with accused. In this regard, reliance may be placed upon the cases reported as Muhammad Ashraf v. State (1971 SCMR 530), Allah Bukhsh v. Shammi and others (PLD 1980 SC 225), Mali v. State (1969 SCMR 76), Farooq Khan v. State (2008 SCMR 917). Not only in Pakistan, in the light of the above mentioned judgments, the superior court of the country are of the above mentioned view, but even in India, the courts have the similar view that even a single statement of an eye witness is sufficient to convict an accused. In this regard a judgment reported as Taqdeer Samsuddin Sheikh v. State of Gujarat (2012 SCMR 1879) can be referred.

19. The above named PW-5 not only during examination-in-chief has established his presence at the spot, but during cross-examination made by the defence, the availability of the above named witness at the spot has also been confirmed.

20. There is no force in the arguments of the learned counsel for the appellant that the medical evidence has contradicted the ocular story because no such contradiction has either been pointed out or observed.

21. It is a fact that the complainant is real brother of the deceased, but it should not be ignored that as stated above, he has established his presence at the spot and witnessing of the occurrence, therefore his mere relationship with the deceased is not sufficient to discard his testimony, which otherwise is confidence inspiring. In this regard, reference can be made to the case reported as Haji v. State (2010 SCMR 650).

22. As about the contention of the learned counsel for the appellant that the best and natural evidence with the prosecution was Mst. Gultaj Bibi, who although was cited as a witness, but given up, hence the presumption would go against the prosecution. In this regard, it is stated that the above named lady was the real mother of Muhammad Waseem (appellant) and she after getting divorce from Muhammad Shabbir, the father of the appellant had contracted marriage with Ibrar Hussain (deceased). When the second husband of the lady was also murdered, then surely she was left alone, hence not inclined to give evidence against her real son and as such the prosecution had

given her up. Therefore, the above said contention could not be given any weight.

23. On one hand, the availability of the appellant and full participation in the alleged occurrence was established on the record, whereas on the other hand, the above named DW-1 and DW-2 had tried to create benefit for the appellant, through their above mentioned statements, which had rightly been rejected by the learned Trial Court.

24. During the arguments and also on perusal of the record, it has been found that at the time of commission of the occurrence, the appellant was 19 years of age. The above mentioned reasons, which had caused the appellant to commit the murder of the deceased, coupled with his age, in our view, are sufficient to consider for premium to him, towards quantum of sentence. Reliance in this regard may be placed upon the cases reported as Ziaullah v. The State (1993 SCMR 155), Ghulam Sarwar and others v. Sajid Ullah and others (2005 SCMR 1054) and Muhammad Imran @ Asif v. The State (2013 SCMR 782).

25. Resultantly, the conviction awarded to Muhammad Waseem (appellant) by the learned Trial Court, through the impugned judgment is maintained, but his sentence is altered from death to the imprisonment for life. The compensation awarded to the appellant by the learned Trial Court and the sentence in its default is maintained. The appellant shall be entitled for the benefit of Section 382-B of Cr.P.C.

26. Consequently, with the above mentioned modification in the sentence of the appellant, the Criminal Appeal No. 641/2010 is dismissed. The murder reference No. 77/2010 is answered in negative and death sentence of Muhammad Waseem Khan (appellant) is not confirmed.

HBT/M-243/L Sentence reduced.

2016 M L D 789
[Lahore]
Before Muhammad Tariq Abbasi, J
MUHAMMAD AQIB---Petitioner
Versus
The STATE and others---Respondents

Criminal Revision No.321 of 2014, heard on 15th October, 2014.

Penal Code (XLV of 1860)---

----Ss. 302 & 34---Juvenile Justice System Ordinance (XXII of 2000), S.7---Qatl-i-amd, common intention---Age of accused, determination of---Accused filed application before Trial Court, contending that he being a juvenile, his case should be proceeded under Juvenile Justice System Ordinance, 2000---Accused tendered birth certificate and his school leaving certificate---Accused was also examined by the District Medical Board, and his age was opined as 15 to 17 years---Trial Court for further satisfaction, directed examination of accused through the Provincial Standing Medical Board---Said order of the Trial Court had been impugned contending that when towards his age, sufficient material, in shape of documentary evidence was available before the Trial Court, there was no need to direct examination through the Provincial Standing Medical Board---Validity---When accused, during the trial, claimed himself to be minor, proceedings as required under the Juvenile Justice System Ordinance, 2000, should carry on---Court, however, for its satisfaction, could conduct any permissible proceedings, which were necessary to reach at just and fair conclusion---No limit of such proceeding could be prescribed or determined---Birth Certificate and school leaving certificate, as well as report of the District Medical Board, though were available before the Trial Court but when court considered the said documents to be insufficient for reaching at just and fair conclusion, court directed examination of accused, through the Provincial Standing Board---When for medico-legal work, said Board had been established and constituted as third tier, its utilization for the purpose of determination of age, could not be termed objectionable, or strange---Order accordingly.

Sultan Ahmed v. Additional Sessions Judge-I Mianwali and 2 others PLD 2004 SC 758 and Niaz Muhammad v. Umar Ali and another 2009 PCr.LJ 91 rel.

Qazi Sadaruddin Alvi for Petitioners.

Malik Muhammad Jaffar, Deputy Prosecutor General for the State.

Date of hearing: 15th October, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this revision petition, the order dated 09.9.2014, passed by the learned Sessions Judge, Dera Ghazi Khan has been called in question, whereby during inquiry under section 7 of the Juvenile Justice System Ordinance, 2000, to determine age of Muhammad Aqib petitioner, his examination through the Provincial Standing Medical Board has been directed.

2. The precise facts, leading to filing of the instant revision petition are that the petitioner alongwith his co-accused (Abdul Rehman) is facing trial in case FIR No. 58 dated 25.2.2014 registered under sections 302/34, P.P.C. at Police Station Saddar Dera Ghazi Khan. He filed an application before the learned trial court, contending therein that he was a juvenile, hence his case was proceedable, under the Juvenile Justice System Ordinance, 2000. The learned Sessions Judge, Dera Ghazi Khan/trial court, carried on the inquiry proceedings as required under Section 7 of the Ordinance (ibid); school leaving certificate and birth certificate of the petitioner was tendered in the learned trial court; the medical examination of the petitioner, was also directed; he was examined by the District Medical Board and his age was opined as 15 to 17 years. The learned trial court, for further satisfaction, directed examination of the petitioner, through the Provincial Standing Medical Board. The said order has aggrieved the petitioner, hence he through the instant criminal revision has approached this court.

3. The learned counsel for the petitioner has argued that when towards age of the petitioner, sufficient material, in shape of documentary evidence was available before the learned trial court, there was no need to direct examination of the petitioner, through the Provincial Standing Medical Board, hence the impugned order dated 09.9.2014 was not acceptable under the law and as such liable to be set-aside.

4. The arguments have been heard and the record has been perused.

5. It is a well settled principle of law that when during a trial, an accused claims himself to be minor, then the proceedings as required under the Juvenile Justice System Ordinance, 2000 should be carried on. In the said proceedings, first step is determination of age of the accused, as provided under section 7 of the Ordinance (ibid). For convenience the said section is reproduced herein below:--

> "Determination of Age.---If a question arises as to whether a person before it is a child for the purpose of this Ordinance, the Juvenile Court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child."

Under the above mentioned provision, for determination of age of an accused, who claims himself to be a minor an inquiry by the court has been provided, which should include a medical report.

6. The court, for its satisfaction may conduct and carry on any permissible proceeding, which according to it is necessary to reach at just and fair conclusion. No limit of such proceeding could be prescribed or determined. For the said proceeding/inquiry, the court may go to any extent. In this regard reliance may be made to the cases reported as "Sultan Ahmed v. Additional Sessions Judge-I Mianwali and 2 others (PLD 2004 Supreme Court 758) and Niaz Muhammad v. Umar Ali and another (2009 PCr.LJ 91)." The relevant portion of the judgment of the Hon'ble Supreme Court, referred above, is reproduced herein under:--

> "The word "INQUIRY" is defined by clause (k) of sub-section (1) of section 4 of the Cr.P.C. but the said definition is not exhaustive. Various kinds of inquiries are envisaged by the Code of Criminal Procedure e.g. the one ordained by section 117 thereof. We know it by now from the judicial precedents that the purpose of holding an inquiry, amongst others, is to determine the existence or non-existence of a fact or the falsity or correctness thereof and further that an inquiry is a judicial proceeding in which evidence could be legally taken. Therefore, whenever a Court is confronted with the question of the age of an accused person, it is incumbent upon it to hold an inquiry and the learned Presiding Officers should always feel free to requisition the original record; to summon and examine the authors

and the custodians of such record and documents to determine the genuineness of the same; to summon person, if need be, who on account of some special knowledge, could depose about the age of the concerned accused person and to take such other and further steps which could help the Court in reaching a just conclusion about the said matter."

7. In the case in hand, although birth Certificate and school leaving certificate, as well as report of the District Medical Board is available before the learned trial court but when it has considered the said documents to be insufficient for reaching at just and fair conclusion, has directed, examination of the petitioner, through the Provincial Standing Medical Board. When for medico-legal work, the said board has been established and constituted as third tier, then its utilization, for the purpose of determination of age could not be termed objectionable or strange as alleged by the learned counsel for the petitioner.

8. For what has been discussed above, the revision petition in hand, being devoid of any force and merit, is dismissed.

HBT/M-362/L Petition dismissed.

2016 M L D 960

[Lahore]

Before Muhammad Tariq Abbasi and James Joseph, JJ

RAB NAWAZ---Petitioner

Versus

The STATE and 6 others---Respondents

Crl. Misc. No.771-M of 2014, heard on 12th February, 2015.

Criminal Procedure Code (V of 1898)---

----S. 417---Appeal against acquittal---Delay, condonation of---Appellant/applicant, seeking condonation of delay in filing delayed appeal, had contended that due to summer vacations, appeal was not entertained and that when the court opened, he immediately filed appeal---Validity---During the year 2014, High Court remained closed for summar vacations from 1-7-2014 to 6-9-2014; and opened on 8-9-2014---Appeal, which was to be filed on the very first day on opening of court i.e. 8-9-2014, was filed on 12-9-2014 after 4 days of opening of the court---Delay could not be condoned in appeal filed against acquittal, until and unless it was shown that appellant was precluded from filing appeal within time, due to some act of acquitted respondents, or by some other circumstances of a compelling nature, beyond control of appellant---No such contention had been either alleged or found in the record---Appellant was supposed to act vigilantly and file appeal within time, but he was indolent which resulted in lapse of prescribed time---Equity aids vigilant and not indolent---Each and every day should have been satisfactorily explained, but in the present case, said requirement was missing---No reason, cause or justification being available to condone the delay in filing appeal, application for condonation of delay, was dismissed, in circumstances.

Lahore Development Authority v. Muhammad Rashid 1997 SCMR 1224; Nazar v. The State 1968 SCMR 71; Jalal Khan v. Lakhmir 1968 SCMR 1345; Piran Ditta v. The State 1970 SCMR 282; Nur Muhammad v. The State 1972

SCMR 331 and Mian Abdul Rahim Sethi and others v. Federation of Pakistan through Minister of Defence and others 2000 SCMR 1197 ref.

Safdar Hussain Sarsana for Petitioner.

Hassan Mehmood Khan Tareen, Deputy Prosecutor General for the State.

Date of hearing: 12th February, 2015.

ORDER

MUHAMMAD TARIQ ABBASI, J.---By way of this application condonation of delay in filing of the Criminal Appeal has been sought.

2. The record shows that initially, the appeal against acquittal was preferred on 26.6.2014; the office raised certain objections and sought their removal within seven days and as such the petitioner took back the appeal; he again filed the appeal on 12.9.2014 i.e. after about two and a half months, hence became time barred.

3. The learned counsel for the petitioner has contended that due to summer vacation, the appeal was not entertained and when the court opened, he immediately filed it, hence the delay is liable to be condoned.

4. Arguments heard and record perused.

5. We are afraid, the reasons given by the learned counsel for the petitioner can be accepted because as per notification, during the year 2014, the High Court remained closed for summer vacation from 1.7.2014 to 6.9.2014 and as such the courts opened on 8.9.2014. If the above mentioned stance of learned counsel for the petitioner is taken as correct, even then, it was for the petitioner to file the appeal on the first day on opening of the courts i.e. 8.9.2014, but came on 12.9.2014.

6. Time required for removal of objection is to be adhered to and failure to refile the appeal as directed by the office would become time barred. It is, therefore, clear that if the appellant/petitioner fails to refile the memorandum of appeal, within the time specified by the office, the extra time taken for removal of the objection would not be excluded while computing the period

of limitation. Reliance in this regard may be made to the case of "Lahore Development Authority v. Muhammad Rashid" (1997 SCMR 1224).

7. It has been the consistent view of the Superior Courts that in appeal filed against acquittal, delay cannot be condoned until and unless it is shown that the appellant/petitioner was precluded from filing appeal within time, due to some acts of the acquitted respondents or by some other circumstances of a compelling nature, beyond control of the petitioner/appellant. No such contention has been either alleged or found in the record. It was quite easier for the petitioner/appellant to act vigilantly and file appeal within time, but he preferred to behave indolently, which resulted in-lapse of prescribed time. It is well-recognized principle of law that equity aids vigilant and not indolent. Therefore, the petitioner/appellant could not get any benefit of his indolence. We are fortified in our view from the dictum laid down in the cases of Nazar v. The State (1968 SCMR 71), Jalal Khan v. Lakhmir (1968 SCMR 1345), Piran Ditta v. The State (1970 SCMR 282) and Nur Muhammad v. The State (1972 SCMR 331). Relevant portion of the case of Nur Muhammad (Supra) reads as under:-

> "It has been held by this court repeatedly that in petitions against acquittal delay cannot be condoned unless it is shown that the petitioner was precluded from filing this petition in time due to some act of the acquitted respondent. See Muhammad Khan v. Sultan and others (1969 SCMR 82). No such act on the part of the acquitted respondent is alleged in the application for condonation of delay filed by the petitioner. The petition is, therefore, dismissed as barred by time."

8. Furthermore, as per law laid down by the august Supreme Court of Pakistan in the case of "Mian Abdul Rahim Sethi and others v. Federation of Pakistan through Minister of Defence and others" (2000 SCMR 1197), in time barred cases, each and every day should have been satisfactorily explained, but in the instant case, the said requirement is missing.

9. For what has been discussed above, as there is no reason, cause or justification to condone the delay in filing appeal, hence the petition in hand being devoid of any force and merit is dismissed.

HBT/R-13/L Application dismissed.

2016 P Cr. L J 200

[Lahore]

Before Muhammad Tariq Abbasi and Sardar Ahmed Naeem, JJ

ZULFIQAR alias ZULLI---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 44 of 2012 and Murder Reference No. 271 of 2011, heard on 17th September, 2015.

Penal Code (XLV of 1860)---

----Ss. 302(b) & 324---Qatl-i-amd, attempt to commit qatl-i-amd---Appreciation of evidence---Sentence, reduction in---Statements of the complainant and injured prosecution witness regarding involvement of accused for commission of murder of the deceased and injury to the prosecution witness, were consistent and confidence inspiring---Defence, had failed to contradict the stance of said witnesses, or bring on the record any other material favourable to accused---Presence of said witnesses at the spot had not been denied---No material contradiction in the statements of said witnesses had been pointed out---Some minor discrepancies in the statements of said witnesses, being casual in nature, could not be taken into account---No previous enmity or grudge of the witnesses with accused, having been established on the record, their inter se relationship, would not discard their testimony, which otherwise was trustworthy and confidence inspiring---Motive alleged in the complaint, remained un-established and un-proved---Variation in ocular account with regard to injury sustained by the deceased and medical evidence would not adversely affect the prosecution case, because the witnesses, were not supposed to give photographic picture of the injuries---No empty having been collected from the spot, alleged recovery of pistol at the instance of accused had not given much benefit to the prosecution, due to lack of comparison---Findings of the Trial Court, in the impugned judgment, resulting in conviction of accused for commission of offence under S.302(b), P.P.C., were quite justified---Conviction and sentence awarded to accused in the charge under S.324, P.P.C., being call of the day were maintained---Deceased, sustained only one fire shot injury at the hands of accused and motive remained unestablished---Said facts, were sufficient to give premium to accused in quantum of sentence---Accused was entitled to benefit of doubt as an extenuating circumstance, while deciding question of quantum his sentence as well---Conviction of accused awarded by the Trial Court under S.302(b), P.P.C., was maintained, but his sentence, was altered

from death to life imprisonment---Conviction and sentence of accused awarded under S.324, P.P.C., would remain intact---Accused would be entitled to the benefit of S.382-B, Cr.P.C.

Dilbar Masih v. The State 2006 SCMR 1801; Haji v. The State 2010 SCMR 650; Abdul Rauf v. The State and another 2003 SCMR 522; Ellahi Bukhsh v. Rab Nawaz and another 2002 SCMR 1842; Ghulam Ullah and another v. The State and another 1996 SCMR 1887; Hasil Khan v. The State and others 2012 SCMR 1936 and Abid Ali and 2 others v. The State and others 2014 SCMR 1034 ref.

Malik Rab Nawaz for Appellant.

Gohar Nawaz Sindhu for the Complainant.

Tariq Javed, District Public Prosecutor for the State.

Date of hearing: 17th September, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through the above titled appeal, Zulfiqar @ Zulli (hereinafter referred to as the appellant) has challenged his conviction and sentence, awarded to him through the judgment dated 6.6.2011, passed by the learned Sessions Judge, Chiniot, whereby in case FIR No. 790, dated 24.9.2009, registered under sections 302/324, P.P.C., at Police Station Saddar Chiniot, the appellant has been convicted and sentenced as under:-

> (i) Under section 302(b), P.P.C. - to death, with compensation of Rs.2,00,000/-, payable to legal heirs of the deceased, in default to undergo simple imprisonment for six months.
>
> (ii) Under section 324, P.P.C. - rigorous imprisonment for 10 years and fine of Rs.50,000/-, in default whereof to undergo simple imprisonment for one year.
>
> It was directed that the appellant shall be entitled to the benefit of section 382-B, Cr.P.C.

2. The State, through the above mentioned Murder Reference has sought confirmation of death sentence, awarded to the appellant. Therefore, this judgment shall decide the above captioned matters.

3. The facts, in short, which resulted into registration of FIR (Ex.PD), were that Ameer Ali (PW-8) had moved an application (Ex.PD/1) in the Police Station, contending therein that the appellant, with .30 bore pistol, made firing and caused an injury to Atif Ali (hereinafter referred to as the deceased) and also to Walait Ali (PW-9);-consequently Atif Ali succumbed to the injury in the way to hospital, whereas Walait Ali (PW-9) was admitted in the hospital. The motive, as alleged in the compliant, was a quarrel between the appellant and the deceased as well as Walait Ali (PW-9) over playing Snooker.

4. The appellant was challaned to the court. Formal charge against him was framed on 5.1.2010. He pleaded not guilty and claimed the trial. Hence, the prosecution evidence was summoned and recorded by the learned Trial Court. As many as 11 witnesses had made statements. The material witnesses and summary of their evidence were as under:-

(i) PW-2 Dr. Muhammad Arshad, had conducted postmortem examination of dead body of Atif Ali on 24.9.2009 and prepared the report (Ex.PA), when a fire shot entry wound on back side of head, whereas an exit wound on right eye brow of the deceased was noticed. Both the injuries were ante-mortem in nature, caused by firearm and result of death.

(ii) PW-6 Dr. Siraj-ud-Din, had medically examined Walait Ali, injured (PW-9), when a firearm wound on his neck was noticed.

(iii) PW-8 Ameer Ali, was the complainant as well as an eye-witness of the alleged occurrence, who deposed almost the same facts as were described by him in the complaint (Ex.PC/1).

(iv) PW-9 Walait Ali injured had supported the version of the above named complainant (PW-8) in all its four corners.

(v) PW-10 Jaffer Ali, SI had investigated the case, during which he carried on the proceedings and prepared the documents, fully detailed in his statement.

5. After completion of the prosecution evidence, the appellant was examined under section 342, Cr.P.C., during which the questions, arising out of prosecution evidence were put to him, but he denied almost all such questions, while pleading his innocence and false involvement in the case with mala fide. The question "Why this case against you and why the PWs deposed against you?" was replied by him in the following words:-

> "PWs are related inter se and are inimical towards me as the PWs were always voting in favour of Ex-MNA Zafar Abbas Syed, who was always in a position to snub me and my family, due to which this case was falsely registered against me."

At that time, he opted to lead evidence in his defence, but refused to make statement under section 340(2), Cr.P.C. Later on, through statement dated 3.5.2011, he also declined to lead any evidence in his defence. On completion of all the proceedings, the impugned judgment was passed in the above mentioned terms. Consequently, the matters in hand.

6. The learned counsel appearing on behalf of the appellant argued that appellant was innocent and falsely involved in the case, with mala fide; neither he was available at the spot nor participated in the alleged occurrence, in any manner whatsoever and as such his involvement was a substitution; the statement of the material witnesses being full of alarming contradictions were not believable, but erroneously not considered by the learned Trial Court; the medical evidence had not supported the ocular account, but ignored by the learned Trial Court; eye-witnesses being closely related inter se as well as with the deceased had made false statements; the prosecution case and the charge against the appellant was not established and proved, hence he was entitled to acquittal and as such the impugned judgment could not be termed justified.

7. Conversely, the learned District Public Prosecutor, assisted by the learned counsel for the complainant has vehemently opposed the appeal, with the contentions that the impugned judgment towards conviction and sentence of the appellant being result of correct appreciation and evaluation of the material available on the record, is call of the day, hence not interferable.

8. Arguments of all the sides have been heard and record has been perused.

9. Ameer Ali, complainant, when appeared in the witness box as PW-8, categorically deposed that when he along with Munir Ahmad and Muhammad Nawaz (given up PWs), to inquire about his son Atif Ali (deceased), reached near Government Boys Primary School, the deceased and Walait Ali (PW-9) were found there; in the meanwhile, the appellant while holding .30 bore pistol attracted there and fired at the deceased and the shot landed on his forehead above right eye brow, which passed through and through; another fire shot made by the appellant hit Walait Ali (PW-9) on right side of his neck; consequently, both fell down and when were being shifted to Allied Hospital, Faisalabad, Atif Ali succumbed to the injury, whereas Walait Ali (PW-9) was got admitted there. Walait Ali (PW-9) while supporting and corroborating the above said version of the complainant (PW-8), confidently stated that when he along with the deceased was available at the spot, the appellant while, armed with a pistol, arrived there and by firing, caused injuries to him and the deceased; the injury to the deceased proved fatal and consequently, he died.

10. The statements of the above named witnesses, regarding involvement of the appellant for commission of murder of Atif Ali and injury to Walait Ali (PW-9) are consistent, corroborative and confidence inspiring. The defence has failed to contradict their above mentioned stance or bring on the record any other material, favourable to the appellant. Even during cross-examination, presence of the above named witnesses at the spot has not been denied.

11. No material contradiction in the statements of the above named witnesses has either been pointed out by the learned defence counsel or observed during perusal of the record. Therefore, the stance of the learned defence counsel that the statements of the witnesses are full of material contradictions, is nothing but a bald assertion. Although some minor discrepancies in statements of the witnesses have been noticed, but the same being casual in nature and sign of natural deposition, should not be taken into account. In this regard, we are fortified by the law laid down in the case titled "Dilbar Masih v. The State" reported as (2006 SCMR 1801), the relevant portion of which reads as under:-

> "We find that the ocular account would also be supported by the medical evidence to the extent of sustaining the fire-arm injury by the deceased at the hand of petitioner and in these circumstances, the minor discrepancies and contradictions pointed out by the learned

counsel for the petitioner would not be material either to effect the credibility of the evidence of eye-witness or create any doubt or dent in the prosecution case."

12. Ameer Ali, complainant (PW-8) is real father of the deceased, whereas no direct relationship of Walait Ali (PW-9) with the complainant could be brought on the record. Even otherwise, as no previous enmity or grudge of the witnesses, with the appellant could be established on the record, therefore, their inter se relationship, if any, would not discard their testimony, which otherwise is trustworthy and confidence inspiring. In this respect, reference may be made to the case titled "Haji v. The State" reported as 2010 SCMR 650, wherein the Hon'ble Supreme Court of Pakistan has held as under:-

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

13. In the complaint (Ex.PD/1), Ameer Ali (PW-8) had narrated the alleged motive as a quarrel between the appellant, deceased and Walait Ali (PW-9) for playing Snooker, but when the above named complainant and the injured witness appeared in the witness box, failed to state any kind of motive, hence the motive alleged in the complaint remained un-established and un-proved.

14. It has been observed that the above named PWs stated that the deceased had sustained a fire shot injury on his forehead, near right eye brow but during the postmortem examination, it revealed that in fact, the said injury was an exit wound, whereas the entry wound was back side of the head. The said variation in ocular account and medical evidence would not adversely affect the prosecution case, because the witnesses were not supposed to give photographic picture of the injuries. Our said view has gained support from the dictum laid down by the august Supreme Court of Pakistan in the cases titled "Abdul Rauf v. The State and another" (2003 SCMR 522); "Ellahi

Bukhsh v. Rab Nawaz and another" (2002 SCMR 1842) and "Ghulam Ullah and another v. The State and another" (1996 SCMR 1887). The relevant para of the case of "Abdul Rauf (Supra)" reads as under:-

> "We may observe that the minor discrepancies in the medical evidence relating to the set of injuries would also not negate the direct evidence as the witnesses are not supposed to give photo picture of each detail of injuries in such situation, therefore, the conflict of nature of ocular account with medical as pointed out being not material would have no adverse affect on the prosecution case."

15. Recovery of a pistol at the instance of the appellant has been alleged, but admittedly from the spot, no empty was collected, hence no comparison was made. Therefore, the said recovery has not given much benefit to the prosecution.

16. For what has been discussed above, we are of the considered view that the findings of the learned Trial Court, recorded in the impugned judgment, resulting into conviction of the appellant for commission of offence under section 302(b), P.P.C. are quite justified. Similarly, the conviction and sentence awarded to the appellant in charge under section 324, P.P.C. being call of the day, is not interferable, hence maintained. As about quantum of sentence, awarded to the appellant under section 302(b), P.P.C., it is stated that the motive alleged by the prosecution, in the complaint could not be proved and established. Furthermore, the deceased sustained only one fire shot injury at the hands of the appellant. The said facts, in our view, are sufficient to give premium to the appellant in quantum of sentence. It is well-recognized principle, by now that an accused is entitled for benefit of doubt as an extenuating circumstance, while deciding question of quantum of his sentence as well. In this regard, reference may be made to the cases titled "Hasil Khan v. The State and others" (2012 SCMR 1936) and "Abid Ali and 2 others v. The State and others (2014 SCMR 1034), wherein the august Supreme Court of Pakistan has held that if motive is alleged and not proved, it would be a mitigating circumstance to award lesser punishment to an accused. The relevant portion of the judgment is reproduced herein below:-

> "..... Moreover, as rightly observed by the leaned Trial Court the immediate motive remained shrouded in mystery and the Trial Court rightly did not award the maximum sentence of death provided under section 302(b), P.P.C. to the appellant. The enhancement of sentence

by the learned High Court, we observe with respect, is not in accord with the law laid down by this court in Muhammad Ashraf Khan Tareen v. The State (1996 SCMR 1747) wherein at page 1755, the Court dismissed complainant's appeal and did not enhance the sentence by holding as follows:-

"In respect of sentence, learned counsel for the complainant/State wanted conversion of the life imprisonment into death sentence. Learned counsel cited case of Iftikhar Ahmad v. The State (PLD 1990 Supreme Court 820) where criminal petition by the complainant challenging reduction of sentence by the High Court, was dismissed by this Court on the ground that the principle of origin of offence remained shrouded in mystery. This authority does not further prayer of the complainant for awarding death penalty to the appellant. In the present case prosecution did not allege any specific motive for commission of the offence. In the circumstances, the appellant could not have been awarded the death penalty."

17. Resultantly, the conviction of the appellant awarded by the learned Trial Court under section 302(b), P.P.C. is maintained, but his sentence is altered from death to life imprisonment. The amount of compensation and imprisonment in its default, prescribed by the learned Trial Court is upheld. As stated above, the conviction and sentence of the appellant awarded under section 324, P.P.C., through the above mentioned judgment shall remain intact. The appellant shall be entitled to the benefit of section 382-B, Cr.P.C. It is also directed that both the above mentioned sentences shall run concurrently. The disposal of the case property shall be as directed by the learned Trial Court, in the impugned judgment.

18. With the above mentioned modification, the Criminal Appeal No. 44/2011 is dismissed, whereas Murder Reference No.271/2011 is answered in Negative and death sentence of Zulfiqar @ Zulli appellant is not confirmed.

HBT/Z-17/L Sentence reduced.

2016 P Cr. L J 953

[Lahore]

Before Muhammad Tariq Abbasi and Aslam Javed Minhas, JJ

ANTI-NARCOTICS FORCE through Assistant Director, ANF, Multan----Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 354 of 2007, heard on 24th June, 2015.

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

----Ss. 9(b) & 47---Probation of Offenders Ordinance (XLV of 1960), Ss.3 & 5---Criminal Procedure Code (V of 1898), S.562---Possessing and trafficking narcotics---Sending accused on probation---Appreciation of evidence---Heroin weighing 450 grams was recovered from female accused, whereas 300 grams from male accused who was juvenile---Accused persons, who made confession, and both admitted that narcotic in question, was recovered from them---Accused persons, requested for pardon, with an undertaking that in future they would never indulge in such like activity---On the basis of said confessional statements Trial Court convicted accused persons under S.9(b) of the Control of Narcotic Substances Act, 1997, and sentenced them to R.I. for two years and nine months, each with fine of Rs.20,000 each, with benefit of S.382-B, Cr.P.C.---Accused persons were dealt with under S.5 of Probation of Offenders Ordinance, 1960, and given under the supervision of the Probation Officer for a period of three years; with the reasoning that female was of young age and household lady, whereas male accused was a juvenile being less than 18 years, and also sole earning member of his family---Said order of sending accused persons on probation was objected to by Special Prosecutor for ANF, contending that court constituted under Control of Narcotic Substances Act, 1997, was not at all competent to send accused persons on probation---Under S.3 of Probation of Offenders Ordinance, 1960, High Court, a court of Session, a Magistrate 1st Class, and any other Magistrate, especially empowered in that behalf, could exercise powers under said Ordinance, whether the case came before it for original hearing, or in appeal or in revision---Provisions of Code of Criminal Procedure, 1898, would be applicable during trial and appeal, unless not expressly excluded---Criminal Procedure Code, 1898 being applicable to narcotic cases, S. 562, Cr.P.C., could not be brushed aside---Court in narcotic case, if deemed it proper, could

send accused on probation---Objection being misconceived was rejected; and appeal having no force, was dismissed.

Ms. Humaira Naheed Khand, Advocate/Special Prosecutor for ANF.
Date of hearing: 24th June, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this appeal, a portion of order dated 28.8.2007, passed by the learned Additional Sessions Judge, Multan has been called in question, whereby respondents Nos. 2 and 3, namely, Mst. Rani and Muhammad Ashiq alias Kali (hereinafter referred to as the respondents) have been sent on probation, for a period of three years and given under the supervision of Probation Officer, Multan, appointed under the Probation of Offenders Ordinance, 1960 (hereinafter referred to as the Ordinance).

2. The facts are that the respondents were challaned in case FIR No. 17, dated 22.11.2005, registered under section 9(b) of the Control of Narcotic Substances Act, 1997 (hereinafter referred to as the Act), at police Station, ANF, Multan, with the allegations that Heroin weighing 450-Grams was recovered from Mst. Rani respondent, whereas 300-Grams from Muhammad Ashiq alias Kali, respondent. During pendency of the trial, on 2 & 8.8.2007, the respondents opted to make confessional statements, hence recorded by the learned trial court, whereby both admitted that the above mentioned quantities of narcotic were, respectively recovered from their possession. However, they requested for pardon with an undertaking that in future they would never indulge in such like activity. On the basis of above said confessional statements, the learned trial court passed the order dated 28.8.2007, whereby convicted the respondents under section 9(b) of the Act and sentenced them to RI for two years and nine months, each, with fine of Rs.20,000/- each, in default to further undergo SI for three months each. Benefit of section 382-B, Cr.P.C. was also extended to them. Instead of sending them to prisons, they were dealt with under section 5 of the Ordinance and given under the supervision of the Probation Officer, for a period of three years, with the reasoning that Mst. Rani respondent was of young age and household lady, whereas Muhammad Ashiq alias Kali respondent was a juvenile being less then eighteen years old and also sole earning member of his family.

3. The learned Special Prosecutor for ANF has objected the impugned order to the extent of sending the respondents on probation, with the contention that a court constituted under the Act was not at-all competent to send the respondents on probation.

4. Arguments heard. Record perused.

5. The only point before us is, whether in narcotic cases registered under the Act, a convict can be dealt with under the Ordinance and sent on probation or otherwise.

6. Under section 3 of the Ordinance, a High Court, a Court of Session, a Magistrate of Ist Class and any other Magistrate especially empowered in this behalf, may exercise powers under the Ordinance, whether the case comes before it for original hearing or in appeal or in revision.

7. Section 47 of the Act has made the provisions of the Code of Criminal Procedure 1898 (herein after referred to as the Code), applicable, in a trial or appeal before a Special Court in the following terms:-

> **"47, Application of the Code of Criminal Procedure, 1898.---** Except as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), hereinafter referred to as the Code (including provisions relating to confirmation of a death sentence) shall apply, to trials and appeals before a Special Court under this Act."

From the above mentioned provision, it is clear that until and unless not expressly excluded, provisions of the Code would be applicable during trial and appeals, in the narcotic cases.

8. When the Code is applicable in narcotic cases then section 562 of the Code could not be brushed-aside, which speaks as under:-

> "562. Powers of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment. When any person not under twenty one years of age is convicted of an offence punishable with imprisonment for not more than seven year or when any person under twenty one years of age or any woman is

convicted of an offence not punishable with death or [imprisonment] for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender and to the circumstances in which the offence was committed that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be good behaviour.

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the provincial Government in this behalf and the Magistrate is of opinion that the powers conferred by this section should be exercised he shall record his opinion to that effect, and submit the proceedings to Magistrate of the first class [x x x] forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380."

9. In this way, it can safely be held that even in narcotic cases, where the court would deem it proper, for betterment of an offender, instead of sending him to imprisonment can send him on probation.

10. Resultantly, the above mentioned objection being misconceived is rejected and consequently the appeal having no force or merit is dismissed.

HBT/A-105/L Appeal dismissed.

2016 P.Cr.R. 501

Present: **MUHAMMAD TARIQ ABBASI and QAZI MUHAMMAD AMIN AHMED, JJ.**

Muhammad Nawaz

Versus

The State, etc.

Criminal Appeal No. 8 of 2009 and Capital Sentence Reference No. 14 of 2009, decided on 25th November, 2014.

CONCLUSION

(1) An accused is entitled to benefit of doubt as an extenuating circumstance while dealing his quantum of sentence as well.

MURDER --- (Quantum of sentence)

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

---Ss. 25, 7 r/w Ss. 302/324/186/353/34, , P.P.C.---Charge---Quantum of sentence---Benefit of doubt---No specific injury to deceased and injured PW was attributed to appellant-convict---Impugned death sentence was altered to imprisonment for life---Sentence reduced.

(Para 9)

Ref. 2009 SCMR 1188.

مقتول یا مضروب گواہاں استغاثہ پر کوئی مخصوص ضرب اپیلانٹ سے منسوب نہ تھی۔ سزائے موت کو عمر قید میں تبدیل کر دیا گیا۔

[No specific injury to deceased or injured PW was attributed to appellant. Impugned death sentence was altered to life imprisonment].

For the Appellant: Prince Rehan Iftikhar Sheikh and Arsalan Masood Sheikh, Advocates.

For the State: Malik Muhammad Jaffer, Deputy Prosecutor General.

Date of hearing: 25th November, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- By way of this judgment, the above-captioned Criminal Appeal and the Murder Reference shall be disposed of as both are result of single judgment dated 31.3.2009, passed by the learned Judge Anti-terrorism Court No. 1, Multan, whereby in case F.I.R. No. 395, dated 22.10.2000, registered under Sections 302, 324, 186, 353/34, P.P.C. and 7, ATA, 1997, Muhammad Nawaz (hereinafter referred to as the "appellant/convict") was convicted and sentenced in the following terms:---

(a) Under Section 302(b), P.P.C. to death and compensation of Rs. 50,000/-, payable to the legal heirs of Muhammad Yousaf, Constable, in default whereof to suffer six months' S.I.

(b) Under Section 302(b), P.P.C. read with Section 34, , P.P.C. to imprisonment for life for sharing common intention with his co-accused towards commission of murder of Muhammad Khan, SI.

(c) Under Section 7, ATA, 1997 to death and fine of Rs. 50,000/- in default to undergo SI for six months.

(d) Under Section 324/34, P.P.C. imprisonment for five years and fine of Rs. 5,000/-, in default whereof to further undergo three months' S.I.

(e) Under Section 186, P.P.C. to three months' imprisonment.

(f) Under Section 353, P.P.C. to one year's R.I.

It was directed that all the sentences shall run concurrently and benefit of Section 382-B, Cr.P.C. shall be available to the appellant/convict.

2. The facts are that Riaz Ahmad, SI/SHO (PW-19) had made the complaint (Ex.PK), with the contentions that during the night of 22.10.2000, he alongwith Khan Muhammad, SI (deceased), Muhammad Zafar, ASI, Muhammad Yousaf, Constable (deceased), Akhtar Ali, Najam-ul-Hassan, Asghar Ali and Tariq Mehmood, Constables was on patrolling in an official vehicle, which was being driven by Zahid Hussain, Constable (PW-9); they were available at Adda Siray Sidhu, when received an information that *M/s.* Nasir (co-accused since convicted), Abid (co-accused since dead), who were involved in case F.I.R. No. 392/2000, registered under Sections 324/452/34, P.P.C. at Police Station Siray Sidhu, at that time were available in the house of Nasir (co-accused since convicted); the complainant alongwith his companions, raided at the house of Nasir (co-accused since convicted), but it was found locked; the Police party returned back and when reached near the house of Mumtaz, in the headlights of the vehicle, Nasir (co-accused since convicted) and Abid (co-accused since dead), armed with 30 bore pistols, alongwith an unknown accused, who was also armed with 30 bore pistol, came in front of the vehicle and started firing at the Police party; Muhammad Khan, SI received fire shots and died at the spot, whereas Zahid Hussain, Driver (PW-9) and Muhammad Yousaf, Constable became seriously injured the accused while getting benefit of darkness succeeded in fleeing away. On the basis of the above-said complaint, the F.I.R. (Ex.PK/1) was chalked out. Later on, Muhammad Yousaf, Constable also succumbed to the injuries. Earlier, trial of Nasir was held and he was convicted. At that time, the appellant/convict was a proclaimed offender, who later on was arrested and challaned to the Court. The learned Trial Court carried on the due proceedings, charge-sheeted the appellant/convict on 27.01.2009, but he pleaded not guilty and claimed the trial. The prosecution had got examined as

many as 19 witnesses. Gist of the evidence led by the star witnesses was as under:---

(i) PW-1 Dr. Ghulam Murtaza had medically examined Muhammad Yousaf, Constable deceased (then injured) through the report (Ex.PA) and found the following injuries caused by fire-arm weapons:---

(1) A lacerated fire-arm wound 0.9 cm x 0.9 cm going deep on the back of right upper chest with inverted margins bleeding from the wound was positive. 10 cm from the right shoulder it is wound of entrance.

(2) A lacerated fire-arm wound 0.8 cm x 0.8 cm with averted margins bleeding from the wound was positive on the front of right chest just below the right clavicle. It was wound of exit.

(3) An abrasion 0.5 cm x 0.5 cm on the back of right chest 02 cm from injury No. 1.

This witness had also examined Zahid Hussain, Constable/injured (PW-9) vide the report (Ex.PB) and noticed the following fire-arm injuries:---

(1) A lacerated fire-arm wound 1.5 cm x 1 cm with inverted margin bleeding from the wound positive with swelling on the nose.

(2) A lacerated fire-arm wound 1 cm x 0.5 cm on left side of nose with averted margin bleeding from the wound positive swelling on the whole nose.

(ii) PW-2 Dr. Naeem Ahsan stated that he was the member of Medical Board which had conducted post-mortem examination of the dead-body of Muhammad Khan, SI and prepared the reports (Ex.PC and Ex.PC/1). At that time the following injuries on the dead-body were found:---

(1) Fire-arm entry wound 0.8 cm x 0.8 cm on the back of head 7.5 cm from the top of right ear.

(2) Fire-arm exit wound on the left side of head measuring 1 cm x 0.9 cm 2 cm from top of left ear pinna above and medially.

(3) 2.3 x 0.6 cm abrasion on the middle of forehead.

The injuries No. 1 & 2 were found anti-mortem in nature, caused by fire-arm and result of death, which was immediate.

The above-said Board also performed post-mortem examination of the dead-body of Muhammad Yousaf, head Constable through the reports (Ex.PD and Ex.PD/1) and noticed the following injuries, which had caused death:---

(1) A lacerated fire-arm wound 0.9 x 0.9 cm going deep on back of right upper chest with inverted margins. 10 cm from right shoulder (wound of entrance).

(2) A lacerated fire-arm wound 0.8 x 0.8 cm with averted margins. It is wound of exit on front of right chest just below the right clavicle.

(3) An abrasion 0.5 cm x 0.5 cm on back of right chest 2 cm from injury No. 1.

(iii) PW-6 Javed Iqbal, Constable attested the Memo. (Ex.PN), through which 30 bore pistol (P-7) got recovered by the appellant/convict was taken into possession by the investigating officer.

(iv) PW-7 Liaqat Ali, PW-13 Muhammad Yousaf and PW-18 Khadim Hussain deposed about extra-judicial confession allegedly made by the appellant/convict, before them regarding commission of the occurrence.

(v) PW 8 Muhammad Masood Bilal, Judicial Magistrate had carried on the proceedings of test identification parade (Ex.PM).

(vi) PW-9 Zahid Hussain, Constable (an injured witness), PW-10 Tarig Mehmood Constable, PW-11 Muhammad Zafar, Inspector (then SI) deposed about participation of the appellant/convict into the occurrence, which resulted into death of Muhammad Khan, SI and Muhammad Yousaf, Head Constable as well as injuries to Zahid Hussain, Constable (PW-9). They had also deposed about joining into the test identification parade held on 27.11.2008 at Central Jail, Multan, for identification of the appellant/convict. PW-10 and PW-11 had also attested the Memo. (Ex.PP), through which the empties (P-10/1-7 and P-11/1-6) collected from the spot and blood-stained pieces of seat cover (P-12/1-2) were taken into possession by the investigating officer.

(vii) PW-16 Fazal Hussain, SI had formally arrested the appellant/convict on 21.10.2008 and on 22.10.2008, he moved an application (Ex.PV), to the Area Magistrate for the purpose of test identification parade.

(viii) PW-17 Abdul Hayee, SI had produced the witnesses, in the jail for the purpose of test identification parade, held on 27.11.2008. He had also obtained physical remand of the appellant/convict and interrogated him when on 23.12.2008, he led to the recovery of 30 bore pistol (P-7) from his residential house, which was taken into possession through recovery memo. (Ex.PN).

(ix) PW-19 Muhammad Riaz Ahmad, Inspector was the complainant as well as an eye-witness. He deposed almost the same facts as were described by him in the complaint (Ex.PK). He also carried on the proceedings fully described in his statement.

3. After examination of the prosecution witnesses, the reports of the Chemical Examiner, Serologist and Forensic Science Laboratory were tendered in evidence as Ex.PX, Ex.PY and Ex.PZ respectively and case for the prosecution was closed. Thereafter, the appellant/convict was examined as

required under Section 342, Cr.P.C., during which the questions emerging from the prosecution evidence were put to him and he denied almost all such questions. In reply to the question "why this case against you and why the PWs have deposed against you?", he contended as under:---

"This is false and frivolous case got chalked out at the instance of Barkat Ali father of accused Nasir. The said Barkat Ali abducted my paternal cousin. I resisted that nefarious act of Barkat Ali and prosecuted my cause against him, however, in a Punchayati proceedings he delivered back the said abductee. Talib paternal uncle of accused Nasir and his son Bashir and Nasir himself had attempted on my life on number of occasions. It is due to enmity, I have been involved in this case.

PWs being police officials subordinate to the complainant and I.O. have deposed falsely against me."

The appellant did not opt to lead any evidence in his defence or make statement under Section 340(2), Cr.P.C. After completion of the proceedings, the learned Trial Court pronounced the impugned judgment in the above-mentioned terms. Consequently, Criminal Appeal and Murder Reference in hand.

4. The learned counsel for the appellant/convict has argued that he was not named in the F.I.R. and subsequently roped with *mala fide;* the proceedings of test identification parade, which resulted into the involvement of the appellant/convict in the case were not held as per the settled principle of law, hence illegal; the prosecution had not produced any independent witness as all the material witnesses were police officials; whose statements were full of contradictions, but the learned Trial Court had failed to give any consideration to the said aspect; the recovery of pistol was planted, hence reports of the Forensic Science Laboratory are not believable; the prosecution case and the charge against the appellant/convict was not proved, hence he was entitled for acquittal. Consequently, it has been prayed that by accepting the appeal in hand, the appellant/convict may be acquitted of the charge.

5. The learned Deputy Prosecutor General has vehemently opposed the appeal, while supporting the impugned judgment to be result of correct appreciation of the evidence and material available on the record, hence not interferable.

6. Arguments of both the sides have been heard and the record has been perused.

7. In the complaint (Ex.PK) and the F.I.R. (Ex.PK/1), Muhammad Riaz Ahmad, SI/SHO of Police Station Siray Sidhu (PW-19) had categorically

stated that when he alongwith the Police officials, named in complaint and F.I.R. was on patrolling and received the information about availability of Nasir (co-accused since convicted) and Abid (co-accused since dead), in the house of Nasir, who were involved in case F.I.R. No. 392/2000, registered at the above-said Police Station, hence raided at the house, but it was found locked; when the police party was returning, in the way, Nasir (co-accused since convicted) and Abid (co-accused since dead) alongwith an unknown, the description of whom was given, all armed with 30 bole pistols, came in front of the official vehicle and started firing, which resulted into death of Muhammad Khan, SI at the spot, whereas injuries to Zahid Hussain Constable/Driver of the vehicle (PW-9) and Muhammad Yousaf, Head Constable, who later on, succumbed to the injuries. When the above-named complainant entered in the witness-box, he satisfactorily repeated the above-mentioned contentions and disclosed that the unknown companion of the above-named accused was Muhammad Nawaz (appellant/convict), who fully participated in the occurrence by making the firing. Same was the contention of Zahid Hussain, Constable (PW-9), who sustained injury at the spot as well asTariq Mehmood, Constable and Muhammad Zafar, Inspector (PW-10 and PW-11), who had witnessed the occurrence. All had nominated and implicated the appellant/convict towards commission of the occurrence, which resulted into death of two Police officials and injuries to another. It has been observed that after registration of the case, the appellant/convict became absconder and remained so for about eight years and ultimately arrested on 21.10.2008, when for the purpose of test identification parade, he was sent to the jail. During the above-said parade, which was held under the supervision of Muhammad Masood Bilal, Judicial Magistrate (PW-8), the appellant/convict was rightly identified by the above-named witnesses. The statements of the above-named witnesses, towards full participation and involvement of the appellant/convict in the occurrence were corroborative with each other. The defence had failed to contradict the versions of the witnesses, narrated in the respective statements or bring on the record any material favourable to the appellant/convict. When the appellant/convict, after the proceedings of test identification parade was joined into the investigation, he made a disclosure and then led to the recovery of 30 bore pistol (P-7) from his residential house, which was secured by the Investigating Officer namely Abdul Hayee, SI (PW-17) through Memo. (Ex.PN), attested by Javed Iqbal (PW-6). The above-mentioned versions of the above-named witnesses gained support from the medical evidence led by Dr. Ghulam Murtaza (PW-1) and

Dr. Naeem Ahsan (PW-2), as well as the above-mentioned reports, prepared by them as the fire-arm injuries on person of the above-named deceased and injured PW were confirmed.

8. No doubt material witnesses in this case are police officials but they are as good witnesses as any other private persons, hence their statements could not be discarded only for the reason that they are police employees. Reliance in this regard may be placed upon the cases of *Muhammad Azam v. The State (PLD 1996 Supreme Court 67), Naseer Ahmad v. The State (2004 SCMR 1361), Aala Muhammad and another v. The State (2008 SCMR 649)* and *Muhammad Khan v. The State (2008 SCMR 1616).* The relevant portion of case of Muhammad Khan *(Supra)* reads as under:---

"They are as good and respectable witnesses as other public witnesses and their statements cannot be discarded merely for the reason that they were the police employees."

9. As a result of the above discussion, we are of the opinion that the findings of the learned Trial Court, which resulted into the impugned judgment, towards conviction of the appellant/convict, are justified and call of the day. But on the basis of the attending facts and circumstances, especially when no specific injury to the deceased and injured PW was attributed to the appellant/convict, we are of the view that the penalty of death is harsh one. It is well-recognized principle, by now that an accused is entitled for benefit of doubt as an extenuating circumstance while dealing his quantum of sentence as well. In this regard, reference may be made to the case *of "Mir Muhammad alias Mira v. The State" (2009 SCMR 1188).* The relevant portion whereof reads as under:---

"It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

10. Consequently, while dismissing the appeal (08 of 2009), the conviction of the appellant/convict, awarded to him by the learned Trial Court is maintained, but his sentence of death is altered to imprisonment for life. The rest of the above-mentioned sentences are upheld. The amount of fine and compensation imposed to the appellant/convict, by the learned Trial Court and the imprisonment, in their default are maintained. All the sentences of the appellant shall run concurrently. He shall also be entitled for the benefit of

Section 382-B, Cr.P.C. Resultantly the Capital Sentence Reference No. 14/2009 is answered in negative and death sentence awarded to Muhammad Nawaz (appellant/convict) by the learned Trial Court is not confirmed.

Sentence reduced.

2016 P.Cr.R. 597

[Multan]

Present: **MUHAMMAD TARIQ ABBASI, J.**

Muhammad Hashim *alias* Sunny

Versus

The State and another

Crl. Misc. No. 5410-B of 2014, decided on 1st December, 2014.

BAIL (RAPE)---(Medical report)

Criminal Procedure Code (V of 1898)---

---S. 497---Pakistan Penal Code, 1860, Ss. 365-B/376---Bail plea---Medical evidence---Petitioner was named in F.I.R.---Alleged abductee got recorded statement u/S. 161, Cr.P.C. in which she fully implicated petitioner towards abduction and commission of rape with her---Medical evidence was in positive---Held: Sufficient material was available on record to, prima facie, connect petitioner with commission of alleged offence falling within prohibitory clause---Challan had also been submitted in Court of competent jurisdiction---Bail after arrest refused. [MEDICAL EVIDENCE]

(Paras 4,5)

مبینہ مغویہ نے اپنے بیان زیر دفعہ 161 ض ف میں سائل کو اغواء و زناء کے الزام میں پوری طرح ملوث کیا تھا۔ میڈیکل رپورٹ اثبات میں تھی۔ ضمانت سے انکار۔

[Alleged abductee had fully implicated petitioner in her S. 161, Cr.P.C. Statement in offence of abduction and rape. Medical report was in positive. Bail was refused].

For the Petitioner: Hafiz Mian Muhammad Riaz, Advocate.

For the Complainant: Ch. Khalid Mehmood Arain, Advocate.

For the State: Ch. Aamir Raza, A.P.G.

Date of hearing: 1st December, 2014.

ORDER

MUHAMMAD TARIQ ABBASI, J. -- The petitioner namely, Muhammad Hashim *alias* Sunny seeks post-arrest bail in case F.I.R. No. 1, dated 1.1.2014, registered under Sections 365-B/376, PPC, at Police Station, Tulamba, District Khanewal.

2. The precise allegations, against the petitioner are that he abducted *Mst.* Khalida Manzoor, took her to Lahore where had been committing rape with her.

3. Arguments heard. Record perused.

4. The petitioner is not only named in the F.I.R. towards abduction of the above-named lady but when the lady rescued herself and got recorded statement under Section 161, Cr.P.C., fully implicated him towards abduction and commission of rape with her. During medical examination of the lady, it was found that she was subjected to rape. Sufficient material is available on record to, *prima facie*, connect the petitioner with the alleged offences, which fall within the prohibitory clause of Section 497, Cr.P.C. Deeper appreciation is not permissible at this stage. The challan has also been submitted in the Court of competent jurisdiction.

5. Resultantly, I am not inclined to extend concession of bail, to the petitioner, hence, the petition in hand is dismissed.

Bail after arrest refused.

2016 P L C (C.S.) 813

[Punjab Subordinate Judiciary Service Tribunal]

Before Shahid Waheed, Chairman, Faisal Zaman Khan and Muhammad Tariq Abbasi, Members

ZAFAR IQBAL CHAUDHRY

Versus

REGISTRAR, LAHORE HIGH COURT, LAHORE

Service Appeal No.18 of 2013, heard on 18th March, 2016.

Punjab Subordinate Judiciary Service Tribunal Act (XII of 1991)---

---S. 5-Judicial officer---Remarks recorded by the Authority while deciding a matter---Proforma promotion---Scope---Appellant was directed by the Authority to remain careful in future and he was kept under observation for one year---Work, conduct and integrity of appellant was declared excellent during the said period---Effect-- Appellant had not earned any adverse entry during whole of judicial service---Ground and reason on the basis of which appellant was deprived of his promotion had subsequently been extinguished---Withholding of due right of appellant would not meet the ends of justice---Appellant was entitled to proforma promotion with effect from the date when the next junior to him was so promoted---Appeal was allowed in circumstances.

Syed Ijaz Qutab for Appellant.

Ishfaq Qayyum Cheema along with Muhammad Shafiq, Assistant and Nasrullah Khan Niazi, Deputy Registrar for Respondent.

Date of hearing: 18th March, 2016.

JUDGMENT

MUHAMMAD TARIQ ABBASI, MEMBER--- By way of this appeal, filed under Section 5 of the Punjab Subordinate Judiciary Service Tribunals Act, 1991, Zafar Iqbal Chaudhry (hereinafter referred to as the appellant) has called in question, letter of the Registrar, Lahore High Court, Lahore dated 10.6.2013, whereby the appellant has been informed that his representation for proforma promotion as District and Sessions Judge, has been declined.

2. The facts are that the appellant was appointed as Civil Judge on 21.12.1983; he was promoted as Senior Civil Judge on 23.11.1999 and as Additional District and Sessions Judge, on 4.9.2000; the Additional District and Sessions Judges, junior to him were promoted as District and Sessions Judges, through Notification No. 234/RHC/AD&SJJ, dated 10.7.2009, but he was deferred and later on promoted to the said post through Notification No. 108/RHC/D&SJJ, dated 11.05.2011; he made a representation, for his promotion from 10.7.2009, when Mr. Abdul Hameed-I, next junior to him was promoted as District and Sessions Judge, but declined, through the impugned letter. Consequently, the appeal in hand.

3. The learned counsel for the appellant has argued that during whole of the service career, the record of the appellant remained unblemished, except an occasion that during preliminary proceedings in Criminal Appeals Nos.546/2007 and 547/2007, a learned Division Bench of the Lahore High Court had made certain remarks, whereupon he was asked to remain careful in future and his work and conduct was kept under observation for a period of one year, during which quarterly reports were made by the concerned District and Sessions Judge, and his work and conduct was declared as 'excellent'; later on, the above mentioned appeals were decided, through judgment dated 4.6.2015, whereby the matter was remanded to the learned Trial Court, for re writing of the judgment; consequently, the case has been decided afresh, whereby all the accused have been acquitted of the charge, hence depriving the appellant from his due right would be highly unjustified.

4. On the other hand, the learned counsel appearing on behalf of the respondent has vehemently opposed the appeal.

5. Arguments of both the parties have been heard and record has also been perused.

6. It is a fact that during whole of judicial service, the appellant has not earned any adverse entry. When he was posted as Additional District and Sessions Judge, Shakargarh, District Narowal, decided a criminal case FIR No. 99, dated 4.6.2006, registered under Sections 302/324/452/148/149, P.P.C., at Police Station Kat Naina, District Narowal, through judgment dated 29.3.2007, whereby Jalal Din, Mushtaq Ahmad, Ghulam Sarwar were convicted and sentenced, whereas Iftikhar Ahmad, Shahnaz Bibi, Nazir

Ahmad, Ghulam Hussain, Muhammad Ramzan, Siraj Din, Muhammad Ashraf Papoo, Allah
Rakhi and Mehmood were acquitted of the charge; against the above said conviction and acquittal, the Criminal Appeals Nos.545, 546, 616 and 824 of 2007 and Criminal Revision No.263/2007 were preferred before the Lahore High Court; during preliminary hearing of Appeals Nos.545 and 546 of 2007, on 24.9.2007, a learned Division bench of the said Court had made the following observations:-

> "Admittedly, it is a case in which Munir was murdered. We fail to understand that what reasons and under what circumstances the trial court has acquitted the respondents under Section 302(b), P.P.C. and the judgment impugned in this regard is silent. We cannot remain oblivious of the fact that it is a murder case and the judgment impugned is not foolish only but speaks of some extraneous consideration. We therefore recommend that the Presiding Officer be suspended, made an OSD and then a regular inquiry should be held."

7. The Registrar of Lahore High Court, through letter dated 23.11.2007, while reproducing the above mentioned observations, had directed the learned District and Sessions Judge, Sialkot (as by that time the appellant was posted there), to warn the appellant to remain careful in future, keep him under observation for a period of one year and make quarterly special reports about his work and conduct. In compliance of the above said direction, the appellant was kept under observation for a period of one year, during which special reports were made by the concerned District and Sessions Judge on 4.4.2008, 12.7.2008, 28.8.2008 and 31.1.2009, whereby his work, conduct and integrity was declared as excellent. The above mentioned appeals were later on decided, through the judgment dated 4.6.2015, and the case was remanded to the learned Trial Court for re-writing of the judgment. The matter was again taken up by learned Additional Sessions Judge, Shakargarh and decided through judgment dated 3.9.2015, whereby all the accused (whether they were convicted or acquitted by the appellant through the above mentioned judgment) were acquitted of the charge. In this way, when the ground and reason, on the basis of which, on due date, the appellant was deprived of his promotion as District and Sessions Judge, had subsequently, met the above mentioned fate, withholding his due right would not meet the ends of justice.

8. Resultantly, the appeal in hand is accepted, and the appellant is held entitled to proforma promotion with effect from 10.7.2009, the date when Mr. Abdul Hameed-I, next junior to him was promoted as District and Sessions Judge.

ZC/7/PST Appeal allowed.

PLJ 2016 Cr.C. (Lahore) 13

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

SALAMAT ALI--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 209-B of 2015, decided on 25.2.2015.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 161--Prevention of Corruption Act, 1947, Ss. 5(2) & 47--Bail, allowed--Demand and receipt of amount for preparation and submission of challan--Validity--Amount was not recovered from direct possession of petitioner rather lying on seat of vehicle wherein petitioner as well as complainant was boarded--Said fact is sufficient one to hold case of petitioner as of further inquiry--Offences charged against petitioner do not fall within prohibitory clause of Section 497, Cr.P.C.--Accused was behind bars and as such no more required for any further investigation--No previous criminal antecedent was available on record maintained by police--Bail was allowed. [Pp. 14] A & B

Rana Muhammad Asif Saeed, Advocate for Petitioner.

Malik Muhammad Jafar, D.P.G. for State.

Mr. Rashid Mehmood Ch., Advocate for Complainant.

Date of hearing: 25.2.2015.

ORDER

The petitioner namely, Salamat Ali seeks post arrest bail in case FIR No. 01 dated 08.01.2015, registered under Section 161, P.P.C. read with Section 5(2)47, P.C.A., at Police Station A.C.E., District Khanewal.

2. The precise allegations, against the petitioner, as per F.I.R. are that he demanded and received illegal gratification of Rs. 50,000/- from the complainant.

3. Arguments heard. Record perused.

4. Demand and receipt of the above-mentioned amount, by the petitioner, from the complainant for preparation and submission of challan in case F.I.R. No. 424 dated 13.11.2014 registered under Sections 337-A(i)/337-F(v)/337-L(ii)/34, P.P.C., at Police Station Jahanian District Khanewal has

been alleged. The above-mentioned amount was not recovered from the direct possession of the petitioner rather lying on the seat of vehicle wherein the petitioner as well as the complainant was boarded. The said fact to my mind is sufficient one to hold the case of the petitioner as of further inquiry. The offences charged against the petitioner do not fall within the prohibitory clause of Section 497, Cr.P.C. He is behind the bars and as such no more required for any further investigation in this case. His no previous criminal antecedent is available on the record maintained by the police.

5. Resultantly, the instant petition is allowed and petitioner is admitted to bail subject to furnishing bail bonds in the sum of .Rs. 1,00,000/-, with one surety, in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail allowed

PLJ 2016 Cr.C. (Lahore) 22

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

HASNAIN AHMAD--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2810-B of 2015, decided on 1.7.2015.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Bail, admitted--Further inquiry--Version of accused was not recorded--Private complaint--Cross-version--Validity--It would be determined during trial that which of party was aggressor and which was aggressed upon--Case of petitioner requires further probe and inquiry, within meaning of Section 497(2), Cr.P.C.--Accused was behind bars and as such no more required for any further investigation--Bail was allowed. [P. 23] A

M/s. Ch. Dawood Ahmad Wains, Khawaja Qaiser Butt & Mian Haq Nawaz Saqib, Advocates for Petitioner.

Mr. Shaukat Ali Ghauri, Addl. P.G. for State.

Ch. Khawar Siddique Sahi, Advocate for Complainant.

Date of hearing: 1.7.2015.

ORDER

The petitioner namely Hasnain Ahmad seeks post arrest bail in case FIR No. 161 dated 06.05.2013, registered under Section 302/34, PPC, at Police Station Shah Kot, District Sahiwal.

2. The precise allegations, against the petitioner, as per FIR, are that he alongwith his co-accused attacked at the complainant party, during which he with a Pump Action fired and caused injury on the left side of chest of Ameer Hamza, deceased.

3. Arguments heard. Record perused.

4. During the occurrence the petitioner also sustained fire shot injuries. Due to his serious condition he was referred to Mayo Hospital

Lahore, where a lot of pallets were found in his body. Besides the petitioner his father Allah Ditta was also injured. When the police did not hear version of the petitioner, he preferred a private complaint under Sections 302/324/337-A(i)/337-F(i)/148/149, PPC, against the present complainant party and the accused of the private complaint, have been summoned to face the trial. In this way the matter has become of cross-version. It would be determined during the trial that which of the party was aggressor and which was aggressed upon. The case of the petitioner requires further probe and inquiry, within the meaning of sub-section (2) of Section 497, Cr.P.C. He is behind the bars and as such no more required for any further investigation, in this case. As per record maintained by the police, he does not have any previous criminal antecedent.

5. Resultantly, the petition in hand is allowed and the petitioner is admitted to post arrest bail, subject to furnishing bail bonds in the sum of Rs. 1,00,000/-(Rupees one lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail allowed

PLJ 2016 Cr.C. (Lahore) 104
[Multan Bench Multan]
***Present*: MUHAMMAD TARIQ ABBASI, J.**
ABDUL HAMEED--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 104-B of 2015, decided on 10.3.2015.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail, allowed--Dishonored of cheque--Business transaction--Outstanding specific amount toward payment--Further inquiry--Validity--Business between parties was admitted in FIR--Suit filed by petitioner for cancellation of cheque and rendition of account much before registration of FIR was still pending in Court of competent jurisdiction--Offence charged against him does not fall within prohibitory clause of Section 497, Cr.P.C.--Accused was behind bars and as such no more required for any further investigation.

[Pp. 104 & 105] A & B

Ch. Umar Hayat, Advocate for Petitioner.
Malik Muhammad Jaffar, D.P.G. for State.
Mr. Dawood Ahmed Wains, Advocate for Complainant.
Date of hearing: 10.3.2015.

ORDER

The petitioner, namely, Abdul Hameed, seeks post arrest bail in case F.I.R. No. 449, dated 05.12.2014, registered under Section 489-F, PPC, at Police Station. Jahaian, District Khanewal.

2. The precise allegations against the petitioner, as per FIR, are that in connection with business transaction between the petitioner and the complainant, a sum of Rs. 34,94,000/- was outstanding against the petitioner, towards payment of which, he issued a cheque in favour of the complainant, but dishonoured.

3. Arguments heard. Record perused.

4. Business between the parties is admitted in the FIR. A suit filed by the petitioner for cancellation of the cheque in question and rendition of account much before registration of the FIR is still pending in the Court of competent jurisdiction. As per the document dated 15.3.2014 annexed with the petition at Page No. 25, the cheque in question was open, i.e. without date and amount.

5. All the above-mentioned facts and circumstances, to my mind, have made the case against the petitioner as of further inquiry. The offence charged against him does not fall within the prohibitory clause of Section 497 Cr.PC. He is behind the bars and as such no more required for any further investigation in this case.

6. Resultantly, the petition in hand is accepted and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs. 5,00,000/- (rupees five lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail accepted

PLJ 2016 Cr.C. (Lahore) 176 (DB)

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI AND JAMES JOSEPH, JJ.**

ADNAN and another--Appellants

versus

STATE, etc.--Respondents

Crl. Appeal Nos. 462 and 517 of 2011, heard on 18.2.2015.

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

----Ss. 9(b) & (c)--Charge sheeted for commission of offence punishable under Section 9(b) but convicted u/S. 9(c) of CNSA--Illegality--It is well settled law that when charge is for a major offence but a minor offence is proved, accused may be convicted of latter but on other hand, an accused charged of a minor offence cannot be convicted for a major offence--Whereby accused were charge sheeted for commission of offence under Section 9-(b) of Act but sentenced under Section 9-(c) of Act, should not be ignored being not curable--Resultantly, there is no other option except to set-aside impugned judgment and remand case to trial Court, for due proceedings strictly in accordance with law. [P. 177] A & B

2007 PCr.LJ 340, *rel*.

M/s. Muhammad Ajmal Kanju and Kh. Qaiser Butt, Advocates for Appellant (in Criminal Appeal No. 462 of 2011).

Ch. Faqir Muhammad, Advocate for Appellant (in Criminal Appeal No. 517 of 2011).

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

Date of hearing: 18.2.2015.

JUDGMENT

Muhammad Tariq Abbasi, J.--This single judgment shall dispose of the above captioned matters being outcome of single judgment dated 02.05.2011 passed by learned Additional Sessions Judge Multan, whereby in case FIR No. 354 dated 1.10.2006 registered under Section 9-(c) of CNSA 1997, Adnan and Bashir Ahmad *alias* Lila, appellants although were charge sheeted under Section 9-(b) of CNSA, 1997 but convicted under Section 9-(c) CNSA, 1997 and sentenced to imprisonment for life with fine of Rs. 2,00,000/- each, in default to further undergo S.I. for six months each with benefit of Section 382-B, Cr.P.C.

2. At the very outset of the proceedings, the learned counsel appearing on behalf of the appellants has pointed out that the appellants were charge sheeted on 17.04.2007 for commission of offence punishable under Section 9-(b) of CNSA, 1997 but convicted under Section 9-(c) of Act *ibid* and sentenced in the above mentioned terms, hence the impugned judgment being a patent illegality is not sustainable in the eye of law.

3. The learned Deputy Prosecutor General while realizing the above mentioned situation contends that the attending facts and circumstances demand, remand of the case. The learned counsel for the appellants is also the same view.

4. It is well settled law that when charge is for a major offence but a minor offence is proved, the accused may be convicted of the latter but on the other hand, an accused charged of a minor offence cannot be convicted for a major offence. Reliance in this regard may be made to the case of *Muhammad Ashraf Khan Versus The State* (2007 P.Cr.L.J 340).

5. The above glaring illegality, whereby the appellants were charge sheeted for commission of offence under Section 9-(b) of the Act *ibid* but sentenced under Section 9-(c) of Act *ibid*, should not be ignored being not curable. Resultantly, there is no other option for us except to set-aside the impugned judgment and remand the case to the learned trial Court, for due proceedings strictly in accordance with law.

6. Consequently, the impugned judgment is set-aside, with a directin to the learned trial Court to take up the matter again and while observing strict compliance of the procedure and law, ensure its decision within a span of three months from receipt of the order.

(R.A.) Case remanded

PLJ 2016 Cr.C. (Lahore) 551

Present: **MUHAMMAD TARIQ ABBASI, J.**

MUHAMMAD FAYYAZ--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 648-M of 2013, decided on 10.2.2014.

Superdari of Vehicle--

----Tampering with main petroleum line of parco--Stealing and filling of diesel in oil tanker was found--Validity--When 15000 litres of diesel was lying in vehicle, and till conclusion of trial, said oil could not be removed or handed over to anybody, then vehicle alongwith oil could not be given to anyone, especially petitioner, who had got vehicle transferred in his name after 08 months of registration of case. [P. 553] A

Rana Muhammad Shakeel, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, DPG for State.

Mr. Muhammad Farooq Buzdar, Advocate for Respondent No. 3.

Date of hearing: 10.2.2014.

ORDER

Through the instant petition, Superdari of the oil tanker having Registration No. 7449/DNA, which has been taken into possession, in case FIR No. 4/2013 dated 10.1.2013 registered under Sections 379, 411, 462-B and 462-F, PPC at Police Station Saddar, District Rajanpur has been sought.

2. Previously the instant like petition filed by the petitioner before the learned Area Magistrate has been refused through order dated 28.5.2013 and Criminal Revision has also been dismissed from the Court of learned Additional Sessions Judge, Rajanpur on 04.07.2013.

3. The learned counsel for the petitioner has argued that the petitioner is registered owner of the oil tanker, which is lying in the Police Station under unsafe and unfavorable atmosphere, hence is destroying and as such may be handed over to the petitioner on superdari and that the petitioner will produce the said vehicle, as and when required by the Court.

4. The learned Deputy prosecutor General assisted by the learned counsel for Respondent No. 3 has vehemently opposed the petition.

5. Arguments have been heard and record perused.

6. The record shows that when while tampering with the main petroleum line of PARCO, stealing and filling of 15000 litres of diesel in the above mentioned oil tanker was found, not only tanker was taken into custody, but the above mentioned case was also registered against the responsibles for committing the above mentioned offence. It has been told and also confirmed that the tanker is not empty, but even at present, the above mentioned quantity of the stolen oil is lying in it.

7. It has been noticed that the occurrence was committed on 10.1.2013, when the oil tanker was being driven by one Abdul Kareem and the present petitioner had got the vehicle transferred in his name on 6.9.2013 i.e. about 08 months after the occurrence and taking the vehicle into possession. When 15000 litres of diesel is lying in the vehicle, and till conclusion of the trial, the said oil could not be removed or handed over to anybody, then the vehicle in question alongwith the oil could not be given to anyone, especially the petitioner, who has got the vehicle transferred in his name after 08 months of registration of the case.

8. For what has been discussed above, the petition in hand is dismissed. However, the learned Trial Court is directed to ensure the conclusion and decision of the case within a span of three months from today and also pass a speaking order regarding the above mentioned vehicle.

(R.A.) Petition dismissed.

2016 Y L R 1191

[Lahore]

Before Muhammad Tariq Abbasi, J

MUHAMMAD ALTAF---Petitioner

Versus

DISTRICT JUDGE and 3 others---Respondents

Writ Petition No.3150 of 2011, decided on 2nd June, 2014.

Civil Procedure Code (V of 1908)---

----S. 12(2)---Constitution of Pakistan, Art.199---Constitutional petition---Consent decree, setting aside of---Contention of applicant was that he had decree of same property in his favour---Application moved under S. 12(2), C.P.C. was dismissed concurrently---Validity---Framing of issues was not always necessary in an application filed under S. 12(2), C.P.C. but same would not mean that issues in such application should not be framed at all---Issues should be framed and evidence should be recorded if serious questions of facts and law were involved which could not be decided without evidence---Framing of issues and recording of evidence/version of both the parties was necessary to decide present application---Applicant should be given an opportunity to prove the document and respondents to contradict the same---Criminal proceedings against the applicant for preparing forged document and filing the same in the court should be initiated if such document was found to be a forged one---Way in which both the courts below had decided the present application was not justified---Impugned orders were set aside and case was remanded to the Trial Court for deciding the same after framing of issues---

Constitutional petition was accepted in circumstances.

Muhammad Umar Awan for Petitioner.

Haider Mehmood Mirza for Respondents.

ORDER

MUHAMMAD TARIQ ABBASI, J.---By way of this writ petition, the order dated 30.6.2010, passed by the learned Civil Judge Attock, judgment dated 4.8.2010 and order dated 27.6.2011 passed by the learned District Judge, Attock have been called in question.

2. Through the above mentioned order dated 30.6.2010, an application moved by the petitioner under Section 12(2) of C.P.C. for setting aside the judgment and decree dated 4.1.1988 has been dismissed. Whereas through the judgment dated 4.8.2010, a revision petition preferred by the petitioner has been dismissed and vide order dated 27.6.2011, a review petition moved by the petitioner has also been turned down.

3. The precise facts are that in a civil suit filed by Sheikh Afaq Ahmad (predecessor in interest of the respondents Nos. 3-A to 3-D), against the respondents Nos. 4-A to 4-F, regarding the property bearing old No. B-V/53, recent No.B-V/64, Committee No. E-108, situated at Attock, a consent decree was passed on 4.1.1988, from the court of learned Senior Civil Judge, Attock.

4. The petitioner had filed an application under Section 12(2) of C.P.C., whereby he had challenged the above mentioned consent decree, on the grounds that earlier, in a suit filed by him against Sheikh Jamshed Elahi (predecessor in interest of the respondents Nos. 4A to 4-F) regarding the same property, a decree had been passed in his favour on 4.2.1969, hence the above mentioned decree dated 4.1.1988, being obtained through misrepresentation, fraud and collusion, was not sustainable.

5. The respondents contested the above said application to be based on mala fide. The learned Trial Court had heard both the sides and dismissed the

application filed under Section 12(2) of C.P.C., through order dated 30.6.2010.

6. Feeling aggrieved, the petitioner had challenged the above mentioned order of the Civil Court, before the District Court in shape of a revision petition, but dismissed through judgment dated 4.8.2010. Then the petitioner had preferred an application, whereby he sought review of the above said judgment, but dismissed on 27.6.2011. Consequently the writ petition in hand.

7. Arguments of both the sides have been heard and record has been perused.

8. The record shows that the petitioner along with his application under section 12(2) of C.P.C. had annexed attested copies of the order and decree dated 4.2.1969, allegedly passed in his favour. In such like situation, it was necessary to frame the issues arising out of pleadings of the parties, record, version/evidence of both the sides and then decide the application filed under section 12(2) of C.P.C. But it has been observed that the learned Trial Court while giving the reasoning, which required evidence, had dismissed the above said application.

9. Although it is not always necessary to frame the issues in an application under Section 12(2) of C.P.C., but it does not mean that issues in such like application should not be framed at all. If serious questions of facts and law are involved in the application, which could not be decided without evidence, then issues should be framed, evidence should be recorded and then the matter should be decided.

10. Even today, the petitioner is alleging the judgment and decree, copies of which were annexed by him with the application, under Section 12(2) of C.P.C. to be quite correct, genuine and rightly passed in his favour. Whereas

the other party is denying any such decision in his favour. To resolve the controversy and determining the fate of the above mentioned document, it is necessary to frame the relevant issues and give an opportunity to the petitioner to prove the said document and the respondents to contradict it. If at the end, the document in the hand of the petitioner is found to be forged, then not only his application should be dismissed, but criminal proceedings against him for preparing the forged document and filing it in the court of law should also be initiated.

11. In the light of the above stated discussion, the way in which the learned courts below have decided the above mentioned application, could not be termed to be justified and demand of the law and procedure.

12. Resultantly, this writ petition is accepted, the above mentioned orders and judgment are set aside, with a direction that besides other issues arising out of pleadings, towards genuineness of the decree dated 4.2.1969, alleged by the petitioner to be in his favour and annexed with the petition under section 12(2) of C.P.C., an issue should also be framed, both the parties should be given an opportunity to lead respective evidence and then the petition should be decided as proposed above.

ZC/M-263/L Petition allowed.

2016 Y L R 1613
[Lahore]
Before Muhammad Tariq Abbasi, J
Sheikh ABDUL WAHEED---Appellant
Versus
SAEED QALBI and another---Respondents

Criminal Appeal No.835 of 2003 and Criminal Revision No.24 of 2004, heard on 14th April, 2015.

Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Case was of two versions and story of the complainant, was not correct and it was established that complainant and witnesses were not present at the spot---Nothing was recovered from accused---Motive was not proved---Prosecution story and charge against accused were highly doubtful---If a simple circumstance would create reasonable doubt in a prudent mind about guilt of an accused, then he would be entitled to such benefit, not as a matter of grace or concession, but as of right---Impugned judgment, was set aside, accused was acquitted of the charge, while extending him the benefit of doubt---Accused being on bail his bail bonds were discharged.

Tariq Pervaiz v. The State 1995 SCMR 1345 and Ayub Masih v. The State PLD 2002 SC 1048 ref.
Muhammad Bilal Butt for Appellant (in Criminal Appeal No.835 of 2003).
Shaukat Ali Ghauri, Addl. Prosecutor General for the State.
Tariq Zulfiqar Ahmad Chaudhry for the Complainant (in Criminal Revision No.24 of 2004).
Date of hearing: 14th April, 2015.

JUDGMENT
MUHAMMAD TARIQ ABBASI, J.---This single judgment shall decide the above captioned Criminal Appeal and the Revision Petition, as both are outcome of single judgment dated 28.10.2003, passed by learned Additional Sessions Judge, Sahiwal, whereby in a private complainant, filed by Saeed Qalbi, respondent No. 1 in the above mentioned Criminal Appeal and petitioner in the above titled Criminal Revision No. 24/2004 (hereinafter referred to as the complainant), Sheikh Abdul Waheed, appellant in Criminal

Appeal and respondent No. 1 in the revision petition (hereinafter referred to as the appellant) was convicted under Section 302(b), P.P.C. and sentenced to imprisonment for life, with compensation of Rs.1,00,000/-, payable to the legal heirs of the deceased, otherwise to further undergo simple imprisonment for six months, with benefit of Section 382-B Cr.P.C.

2. The precise facts are that the complainant moved an application (Ex.PA/1) before the SHO of Police Station City Sahiwal, District Sahiwal, contending therein that on 12.11.2001, he along with his brother Daud Saleemi (deceased), father Muhammad Ashraf (given up PW) and Muhammad Zahid (PW-3), to purchase fertilizer was going to Sahiwal city on a tractor trolley registration No. SLB-2724; at about 4.15 PM, when they were passing in front of the shop of Sheikh Munir Ahmad (co-accused since acquitted), he asked his son Sheikh Waheed (appellant) that Daud Saleemi (deceased) was going on a tractor and be taught a taste of not paying money and disgracing them; Sheikh Waheed (appellant) while waiving a pistol and Sheikh Munir (co-accused since acquitted) empty handed, started running behind them (complainant party), whereupon, the complainant tried to accelerate speed of the tractor, but due to rush, failed; in the meanwhile, when they (complainant party) reached at the road, situated in front of judicial colony, the appellant and his co-accused (since acquitted) reached near, when the acquitted accused again raised 'lalkara' that Daud (deceased) should not go alive and be killed by firing, hence the deceased jumped down the tractor and started running towards western direction; when he ran a few feet and in order to save himself was about to enter the gate of the house (kothi) known as 'Rana House', the appellant with his pistol fired at him and he became injured and died then and there; the occurrence was witnessed by the complainant (PW-2), his father Muhammad Ashraf and Muhammad Zahid (PW-3) and the accused fled towards their house; the motive was that about 8/9 months ago, the deceased borrowed cotton sacks (bardana) from Sheikh Munir (co-accused since acquitted) and had to pay Rs.8,400/-, but as the crop was not good, hence could not pay the amount, for which an altercation between Sheikh Munir and the deceased had taken place, due to which the accused, with common intention had committed 'qatal' of Daud Saleemi. On the basis of the above mentioned application/complaint, the case was registered through FIR (Ex.PA) and investigated, during which the case was found to be false, hence recommended to be cancelled, whereupon the complainant filed a private complaint (Ex.PA/2) against the appellant, Sheikh Munir Ahmad (since

acquitted), Talha Muhammad DSP, Muhammad Rasheed SI and lmdad Hussain, SI. In the said private complaint (Ex.PA/2), the above mentioned contentions made in the complaint (Ex.PA/1) were reiterated, but with addition that during investigation, unjustified favour was extended to the appellant and his co-accused (since acquitted) and the case was spoiled.

3. In the private complaint, the appellant and his father Sheikh Munir Ahmed (co-accused since acquitted) were summoned, to face the trial, whereas names of the above said Police officials were deleted. Both were formally charge sheeted on 2.8.2002. They pleaded not guilty and claimed the trial, hence the prosecution evidence was summoned and recorded. As many as nine witnesses were recorded as prosecution witnesses, two as CWs and two as DWs.

The gist of the evidence led by important witnesses was as under:--

i) **PW-2 Saeed Qalbi (complainant)** had narrated almost the same facts as were stated by him in the private complaint (Ex.PA/2).

ii) **PW-3 Muhammad Zahid,** an alleged eye-witness of the occurrence stated about firing made by the appellant at Daud Saleemi, which resulted into his death.

iii) **PW-4 Dr. Waseem Azhar** conducted postmortem examination of dead body of Daud Saleemi (deceased) on 13.11.2001 and prepared the reports (Ex.PB & Ex.PB/1). During the said examina-tion, a fire shot entry wound at front side of left lower chest and exit wound at back of right lower chest were noted. According to the doctor, the above said injuries were ante-mortem in nature, sufficient to cause death and that the death had occurred within half an hour of the receipt of the injuries.

iv) **PW-9 Muhammad Saeed Akhtar,** Draftsman drafted scaled site plans (Ex.PD & Ex.PD/1) of the spot and handed over to the investigating officer.

v) **CW-1 Abdul Ghaffar** attested the memo (Ex.CW-1/1), through which 30 bore pistol recovered from the deceased was taken into possession by the investigating officer.

vi) **CW-2 Imdad Hussain,** SI had investigated the case, during which carried on the proceedings and prepared the documents fully detailed in his statement

4. After examination of the PWs and CWs, the prosecution case was closed, whereafter the appellant was examined under Section 342 Cr.P.C., during which the questions arising out of the evidence available on the record were put to him and he denied almost all such questions, while pleading his innocence and false involve-ment, in the case with mala fide. The question "Why this case against you and why the PWs have deposed against you?", was replied by him in the following words:--

> "It is a false case. All the PWs are closely related inter se and also with the deceased. They have made false statements against me due to their ill-will with me. The PWs were not present at the spot. The deceased was all alone at the time of occurrence when he was hit by the fire. The PWs learnt about the occurrence much late in the night and thereafter they visited DHQ Hospital, Sahiwal, where the dead body of the deceased was lying and thereafter they booked a false story and built up a false case against us."

In reply to the question "Have you anything else to say?", he made the following statement:--

> "I am innocent. This case was investigated by many police officers including DSP. I and my co-accused were found not involved in the murder of the deceased, rather it came to light during investigation that Daud Saleemi deceased entered in the High Career Commercial College situated on the Katchery Road, Sahiwal which is adjacent to Rana House, the residence of Rana Muhammad Aslam and then the deceased went on the roof top of Rana House where from he jumped into the courtyard of Rana House and then came to the veranda of the same house where he was challenged by Zahid Hussain son of Faqir Hussain caste Rajput, Chowkidar of Rana House, whereupon the deceased who was having a pistol with him fired at Zahid Hussain Chowkidar who while exercising the right of self defence of his person fired at the deceased taking him a dacoit who fell injured in the said veranda and died there. The police after thorough investigation of this case found me and my co-accused not involved in the murder of the deceased Daud Saleemi and cancelled the case being false and also recommended action against the complainant under section 182, P.P.C."

The appellant opted to lead evidence in his defence, but refused to make statement under Section 340(2) Cr.P.C. In defence, Rana Muhammad Aslam and Zahid Mehmood had got recorded statements as DW-1 and DW-2 respectively. The DW-1 had deposed that in fact, the deceased entered into a house adjacent to his house for the purpose of an offence, from where he jumped into his house and apprehended by his Chowkidar Zahid Mehmood (DW-2) and when the deceased tried to make firing, DW-2 made two fire shots, which hit the deceased and he fell down in veranda of the house. Zahid Mehmood (DW-2) during examination-in-chief stated about lying of a dead body in veranda of the house of Rana Aslam (DW-1), where he was Chowkidar. This witness was declared hostile and cross-examined by the defence, during which he admitted about making of statements before the Police.

5. On completion of all the above mentioned proceedings, the learned Trial Court had passed the impugned judgment, in the above mentioned terms. Consequently, the matters in hand.

6. The learned counsel for the appellant has argued that the appellant is innocent and was falsely involved in the case with mala fide, while concocting a false and frivolous story; that during investigation, when the Police arrived at the conclusion that the facts and circumstances narrated in the FIR were false and incorrect, accordingly recommended it to be cancelled, whereupon the complainant came forward with a private complaint, wherein stated false facts and circumstances; that even during the trial, the facts narrated in the complaint were not proved or substantiated, rather the conclusion derived by the Police was established, but the learned Trial Court had erred in not considering the actual facts and circumstances and the material available on the record and passed the impugned judgment, which being result of misreading and non-reading of the evidence is not sustainable in the eye of law and is liable to be set aside.

7. Conversely, the learned Additional Prosecutor General, assisted by the learned counsel for the complainant, has not only supported the impugned judgment towards conviction of the appellant, but have also requested for acceptance of the revision and award of major penalty to the appellant.

8. Arguments of all the sides have been heard and the record has also been perused.

9. In this case, there are two versions. One is narrated by Saeed Qalbi, complainant (PW-2) in his above mentioned application (Ex.PA/1), which resulted into registration of the above said FIR (Ex.PA), whereas the other is the above mentioned, which came into lime light during investigation.

10. The stance of the complainant (PW-2) and Muhammad Zahid (PW-3) was that Daud Saleemi (deceased) was fired by the appellant from his backside and done to death, at the gate of the house (Rana House) belonging to Rana Muhammad Aslam (DW-1). During postmortem examination, it was found that the deceased had received fire shot injury from front side and the same fact was established on the record through postmortem report (Ex.PB) and pictorial diagram (Ex.PB/1), prepared by Dr. Waseem Azhar (PW-4). It was an admitted fact that the dead body was found lying in the veranda of the above said house and that a pistol was also lying near the dead body. The distance between the main gate of the house and the veranda, where dead body was lying, was measured by Muhammad Saeed Akhtar, Draftsman (PW-9) and became 142 feet. During cross-examination of PW-9, it also came on the record that from the spot, an empty bullet, fired by the deceased, by .30 bore pistol was also recovered. The above mentioned facts had negated the above mentioned version of the complainant (PW-2) and the above named PW-3 that the deceased was fired by the appellant from his backside, at the main gate of the house of Rana Muhammad Aslam.

11. The matter was repeatedly investigated, when it revealed that the story of the complainant was not correct as the deceased entered into the house situated adjacent to Rana House, from where he jumped into Rana House, having a pistol and intercepted by Chowkidar Zahid Mehmood (DW-2) and also fired at and consequently, the deceased fell down in the veranda of the house. Due to the above said reason, the FIR was got cancelled by the Police. Imdad Hussain Inspector, who made his statement as CW-1, had categorically denied the above mentioned story of the complainant, rather had supported the above said conclusion and as such exonerated the appellant from commission of the alleged occurrence.

12. The stance of the complainant (PW-2) was that the deceased expired then and there, but it was established on the record that after receipt of fire shot injury, the deceased remained alive for about half an hour, hence the behaviour of the complainant and PW-3, whereby they did not make any struggle to save the injured, rather attempted to get the case registered was quite unnatural and not appealing to a prudent mind. The said fact had suggested that the complainant and the witnesses were not available at the spot.

13. On one hand, status of the alleged story of the complainant was as mentioned above, whereas on the other hand, Rana Muhammad Aslam, the owner of the house, where the dead body was lying, had appeared in the witness box as DW-1 and narrated a detailed story to the effect that the deceased, jumped into his house from the neighboring house, having a pistol in his hand and when seen by his Chowkidar (DW-2), was fired at, which resulted into his death at the spot, hence the story of the complainant was negated. Not only the above named DW-1 had contended as mentioned above, but the Chowkidar namely Zahid Mehmood (DW-2), who although during examination-in-chief had tried to suppress the real facts, but during cross-examination had admitted that he during investigation had made statements before the Police and got the same exhibited as Ex.DW-2/A, during which the above mentioned stance of DW-1 was supported.

14. Admittedly, nothing was recovered from the appellant and the learned Trial Court in the impugned judgment had also held the alleged motive to be not proved.

15. All the above mentioned facts and circumstances, to my mind, are sufficient to hold the alleged prosecution story and charge against the appellant highly doubtful. It is well-settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. In this regard, reference may be made to the case "Tariq Pervaiz v. The State" (1995 SCMR 1345). This view has further been fortified in the case of "Ayub Masih v. The State" (PLD 2002 SC 1048), whereby it has been held that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than

one innocent person be convicted" should always be kept in mind. Relevant portion of the case of Ayub Masih (Supra) reads as under:--

> "It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

16. For what has been discussed above, the Criminal Appeal No. 835 of 2003 is allowed, the impugned judgment is set aside and the appellant (Sheikh Abdul Waheed) is acquitted of the charge, while extending him the benefit of doubt. He by way of suspension of his sentence is on bail, hence his bail bonds are discharged. The disposal of the case property shall be as directed in the impugned judgment.

17. The Criminal Revision No.24/2004 filed by the complainant (Saeed Qalbi) for the foregoing reasons, is without substance, hence dismissed.

HBT/A-146/L Appeal allowed.

2016 Y L R 1725

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

ANJUM IQBAL and others---Petitioners

Versus

The STATE and others---Respondents

Crl. Misc. No.56-M of 2014, heard on 10th June, 2014.

Criminal Procedure Code (V of 1898)---

----Ss. 145 & 561-A---Constitution of Pakistan, Art.20---Proceedings under S.145, Cr.P.C.---Scope---Freedom to profess religion and to manage religious institutions---Magistrate ordered sealing of mosque apprehending breach of peace---Validity---Proceedings under S.145, Cr.P.C. were meant for special purpose, regarding particular property---Dispute endangering breach of peace must be regarding any land or water including a building, markets, fisheries, crops or other produce of land, and the rents or profits of any such property---Mosque did not fall under any of the categories contemplated under S.145, Cr.P.C.---Magistrate should have mentioned reasons for the passing of the order---Magistrate ordered the sealing on the sole ground that the mosque belonged to the sect but that ground was found false as the mosque belonged to the Sunni sect---Mosque admittedly was the "House of Allah Almighty", same could not be sealed to deprive people from worship according to their sect---Under Art.20 of the Constitution every citizen had a right to profess, practice and propagate his religion---Petition was accepted---Proceedings under S.145, Cr.P.C. were set aside.

Abdul Majeed v. The State and others 1968 PCr.LJ 659 and Abdul Razzaq v. The State and others 2013 PCr.LJ 718 rel.

Malik Itaat Hussain Awan for Petitioners.

Naveed Ahmad Warraich, A.D.P.P. for the State.

Ch. Mehmood Akhtar Khan for Respondents.

Date of hearing: 10th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI J.---Through the instant petition, the orders dated 6.7.2013 and 19.11.2013, respectively passed by the learned Judicial Magistrate and learned Additional Sessions Judge, Chakwal have been called in question.

2. Through the above mentioned earlier order dated 6.7.2013, in the proceedings, initiated by the Police under Section 145 of Cr.P.C., to seal a mosque, sealing of it has been ordered. Whereas, through the above said

lateral order dated 19.11.2013, a revision petition filed by the petitioners has been dismissed.

3. The facts as per record are that the petitioners' party built a mosque, having the name "Jamia Masjid Toheed Muslim" at Mohallah Madina Town, Chakwal. The inhabitants of the locality raised objections over establishment of the said mosque. The matter went to the Police. The Police carried on the proceedings under Section 145 of Cr.P.C. and recommended that the mosque should be sealed. When the said proceedings were filed in the court of learned Judicial Magistrate, Chakwal, the request of the Police was accepted and sealing of the mosque was directed, through order dated 6.7.2013, in the following words:--

> "While perusing the record it reveals that Anjum Afzal and Shahzad Afzal constructed a mosque at Mohallah Madina Town Chakwal, they belong to Qadiani Sect' and Haji Bostan Khan and Haq Nawaz party at Mohallah Madina Town have raised objections for registration of mosque. So, there is apprehension at Mohallah Madina Town due to registration of mosque of Qadiani. In this situation it is appropriate property/mosque be sealed till further orders to maintain peace and tranquility in the society of Mohallah Madina Town Chakwal City. SHO/Inspector of P.S. City Chakwal is directed to comply the order of this court forthwith. To come up for further proceedings on 07.09.2013."

4. The petitioners had challenged the above mentioned order, before the learned Sessions Court, Chakwal in shape of a revision petition, which was entrusted to the learned Additional Sessions Judge, Chakwal, from where the order dated 19.11.2013 was pronounced and the revision petition was dismissed.

5. Consequently, the instant petition has been preferred, with the contention and the grounds that the petitioners being Muslims had built the mosque for the worship of Sunni Muslims but with mala fide, the proceedings under Section 145 of Cr.P.C. were carried on, with the contention that the petitioners belonged to Qadiani sect and the mosque was also of the said sect, hence not permitted; that the learned Judicial Magistrate in a blind manner, without any inquiry or probe had acted as a tool at the hands of the Police and while holding the petitioners and the mosque to be of Qadiani sect had ordered to seal it; that when the petitioners had brought the matter in shape of a revision petition before the learned Sessions Court, without considering the attending facts and circumstances, in a slipshod and mechanical manner, a

stamp of confirmation was affixed at the above mentioned unjustified and unreasoned order of the learned Judicial Magistrate and the revision had been dismissed and that the above mentioned orders of both the learned courts below being unreasonable, unjustifiable and against all the norms of natural justice and law on the subject are not sustainable.

6. The learned counsel for the petitioners has advanced his arguments in the above mentioned lines and the grounds. The learned ADPP has not seriously opposed the petition. Whereas the learned private counsel for Muhammad Nawaz etc., the inhabitants of the locality, who are not party in the petition, has seriously objected and opposed the petition in hand.

7. Arguments heard and record perused.

8. The proceedings under Section 145 of Cr.P.C. are meant for special purpose, regarding particular property. For convenience, the said provision is reproduced herein below:--

> **"145. Procedure where dispute concerning land, etc., is likely to cause breach of peace.**---(1) Whenever a [Magistrate of the 1st Class] is satisfied from a police-report or other information that dispute likely to cause breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statement of their respective claims as respects the fact of actual possession of the subject of dispute.
>
> (2) For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.
>
> (3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.
>
> (4) **Inquiry as to possession.** The Magistrate shall then, without reference to the merits or the claims of any such parties to a right to possess the subject of dispute, pursue the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further

evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date:

Provided also, that if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under subsection (1) shall be final.

(6) Party in possession to retain possession until legally evicted. If the Magistrate decides that one of the parties was or should under the first proviso to subsection (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction and when he proceeds under the first proviso to subsection (4), may restore to possession the party forcibly and wrongfully dispossessed.

(7) When any party to any such proceedings dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceedings is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceedings under this section pending before him is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale proceeds thereof as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107. "

9. From the above mentioned provision, it is clear that dispute endangering breach of peace must be regarding any land or water, which has been explained to be a building, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

10. In the situation in hand, the mosque does not fall in any of the above mentioned categories. Furthermore, for passing an order under Section 145 of Cr.P.C., a Magistrate should mention the reasons for passing the order. But as highlighted above, the Judicial Magistrate has directed for seal of the mosque, on the sole ground that it belongs to Qadiani sect. The said reason has been found totally false and incorrect, because the mosque has been built for worship of 'Sunni/Hanfi sect'. Neither the petitioners are Qadiani nor the mosque belongs to the said sect or having any concern with the said class. This fact has not only been observed by the learned revisional court, but also admitted by the above named private learned counsel, appearing on behalf of Muhammad Nawaz etc.

11. Therefore, the above mentioned stance narrated by the learned Judicial Magistrate that as the petitioners as well as the mosque is for Qadiani sect, hence its establishment could not be permitted, is totally unjustified and unreasonable.

12. It is very strange that on the basis of unjustified and unreasonable order, the Judicial Magistrate has directed seal of the mosque, for worship and when the matter went to the learned Additional Sessions Judge, in shape of a revision petition, again the attending facts and circumstances were not realized and the order of the Judicial Magistrate was maintained. The learned Judicial Magistrate as well as the learned Additional Sessions Judge have failed to consider that they were going to seal the mosque, which admittedly is "House of Allah Almighty", hence one should not dare to seal such a House and deprive the concerned from worship according to their sect. In this regard, reference can be made to the cases reported as Abdul Majeed v. The State and others (1968 PCr.LJ 659) and Abdul Razzaq v. The State etc. (2013 PCr.LJ 718). The relevant portion of the above mentioned citation (1968 PCr.LJ 659) reads as under:--

"The house of God cannot be possessed by any individual. It vests in God and as such cannot be sealed under Section 145, Cr.P.C. Even a prohibitory order under Section 144, Cr.P.C. was held to be illegal and undesirable by a Division Bench of the Calcutta High Court. That order is also based on the principle that no Muslim can be prohibited from saying his prayers in a mosque. The entire case law in the Indo-Pak sub-continent regarding the use of mosque is also on the same line that any Muslim can go and say his prayers in a mosque, of course without disturbing the congregation even if the congregation is led by another sect. Surely, two congregations cannot be held in a mosque and nobody can claim to introduce a congregation of his own choice in the mosque. It is the right of the Mutwali to make arrangements for the congregation and the control in the mosque. However, if there is any dispute regarding the use of the mosque and there exists an apprehension of breach of peace, in such a case the Magistrate under Section 147 Cr.P.C. can only prohibit interference with such a user. On the other hand if the dispute is regarding the control and management of a mosque and there is an apprehension of breach of peace, a Criminal Court under Section 145, Cr.P.C., cannot decide such a dispute."

13. The Constitution of the Islamic Republic of Pakistan, 1973 also gives a right to every citizen to profess, practice and propagate his religion. In this regard, the relevant Article is 20, which is as under:--

"20. Freedom to profess religion and to manage religious institutions--Subject to law, public order and morality--

(a) every citizen shall have the right to profess, practice and propagate his religion; and

(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

14. As a result of the above discussion, the instant petition is accepted, the impugned orders dated 6.7.2013 and 19.11.2013 are set aside and the proceedings under Section 145 of Cr.P.C. are quashed/dropped.

ARK/A-121/L Petition accepted.

2016 Y L R 1909

[Lahore]

Before Abdul Sami Khan and Muhammad Tariq Abbasi, JJ

MUHAMMAD MUNAWAR HUSSAIN and others---Appellants

Versus

The STATE---Respondent

Criminal Appeals Nos. 446-J of 2014 and 167-J of 2009 and Murder Reference No.456 of 2009, heard on 30th March, 2015.

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

----Ss. 302(b), 109 & 34---Qatl-i-amd, abetment, common intention---Appreciation of evidence---Extra-judicial confession---Value---Scope---Benefit of doubt---Story as narrated by the complainant, was not plausible, because despite murder of his son at 1.00 a.m., he remained satisfied till 4.00 a.m., when he and other family members raised alarm---As per the complainant, the fire was made while placing the pistol at the head of the deceased, but during post mortem examination, no sign of close range firing was observed---House of occurrence was located in a populated area, but name of none was given in the complaint---As per report of Forensic Science Laboratory, pistol allegedly recovered at the instance of accused, was in working condition, but no empty having been collected from the spot, or sent for comparison with weapon/ pistol, said recovery and report was inconsequential---Complainant, during whole of the trial, did not come forward and make any statement in the court---Evidence of extra judicial confession furnished by the prosecution witnesses could not be believed for the reason; firstly, as to why accused persons had made such confession before said prosecution witnesses as no evidence was on record regarding their social status or influence over the bereaved family; secondly, from the narration of facts given by both said prosecution witnesses in their statement alleged extra judicial confession made by accused persons appeared to be of joint nature---Said prosecution witnesses, were related inter se and were also related to the complainant party, their statements could not be relied upon without independent corroboration, which was very much lacking in the case; and charge against accused persons could not be proved and established on such extra judicial confession---Impugned judgment of the Trial Court, was

set aside, and accused were acquitted of the charge, while extending them benefit of doubt.

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

----Art. 3--- Witness--- Believing or disbelieving a witness depended upon the intrinsic value of his statement---Statement and not the person (witness) was to be seen and adjudged by the court.

Abid Ali and 2 others v. The State 2011 SCMR 208 rel.

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

----S. 164---Extra judicial confession---Evidentiary value---Extra judicial confession, was always considered a weak type of evidence.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231 and Tahir Javed v. The State 2009 SCMR 166 ref.

(d) Criminal trial---

----Benefit of doubt---If a single circumstance would create reasonable doubt in the prudent mind about guilt of an accused, then he would be entitled to such benefit, not as a matter of grace or concession, but as of right---Better that ten guilty persons be acquitted, rather than one innocent person be convicted.

Tariq Pervaiz v. The State 1995 SCMR 1345 and Ayub Masih v. The State PLD 2002 SC 1048 rel.
Ms. Sheeba Qaisar for Appellant (in Criminal Appeal No.446-J of 2014).
Maqbool Ahmad Qureshi for Appellants (in Criminal Appeal No.167-J of 2009).
Khurram Khan, Deputy Prosecutor General for the State.
Nemo for the Complainant.
Date of hearing: 30th March, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single judgment shall decide the above captioned Murder Reference as well as the appeals, as all are outcome of single judgment dated 28.8.2008, passed by the learned Additional Sessions Judge, Sangla Hill, District Nankana Sahib, whereby in a private complaint, filed by Mst. Rabia Bibi (hereinafter referred to as the complainant), Muhammad Munawar Hussain, Sajida Parveen and Washfa Noreen (hereinafter referred to as the Appellants) have been convicted and sentenced in the following terms:--

Muhammad Munawar Hussain

> Under Section 302(b), P.P.C. to death, with compensation of Rs.1,00,000/-, payable to the legal heirs of deceased Arshad Mehmood, in default to further undergo simple imprisonment for six months.

Sajida Parveen and Washfa Noreen

> Under Section 302, P.P.C. to imprisonment for life, each with compensation of Rs.50,000/- each, payable to the legal heirs of the deceased, failing which to further undergo simple imprisonment for six months each, with benefit of Section 382-B, Cr.P.C.

2. The facts as narrated in the FIR (Ex. PB) are that one Sultan Ahmad had got lodged FIR No. 200 dated 9.7.2005 under Sections 302/109/34, P.P.C. at Police Station Sadar Sangla Hill, District Nankana Sahib, with the contention that his son Arshad Mehmood (deceased), along with his family members was residing in village Dugree, whereas he with his family was settled at Mohalla Abbas Park, Street No.3, Faisalabad; on 8.7.2005, he, to meet his son Arshad Mehmood, came at Village Dugree; during the night between 8/9.7.2005 at about 1.00 a.m. when he, his son Arshad Mehmood deceased, daughter-in-law (Bahu) Sajida Bibi and grand children were sleeping in courtyard of the house, four unknown armed persons, while scaling the wall, attracted there and on gunpoint got awakened him, his daughter-in-law and grand children and threatened them to remain silent, otherwise, will be shot; his son Arshad Mehmood was still sleeping and an unknown armed person stood by him, whereas the other three took them (complainant party) in a room and confined them, with the contention that they would kill Arshad Mehmood; thereafter

suddenly report of fire was heard and the accused while scaling over the wall, fled away; due to fear, they remained silent and at about 4.00 a.m., raised alarm, which attracted Abdul Wahid Numberdar and Amjad Ali PWs, who brought them out of the room and all saw that Arshad Mehmood was dead due to firing.

3. Thereafter, Rabia Bibi, daughter of Arshad Mehmood deceased came forward, with a private complaint against the appellants, on the grounds that there were illicit relations between Washfa Noreen and Muhammad Munawar Hussain appellants and both wanted to marry, for which Sajida Parveen appellant was also agreed, but the deceased was not inclined, due to which he for several times had abstained Sajida Parveen and Washfa Noreen appellants; on 8.7.2005, the above named appellants called Muhammad Munawar Hussain appellant, in their house, for murder of Arshad Mehmood deceased, so that he may not come in the way and all may lead peaceful life; all decided to administer the sleeping tablets to the deceased and then murder him; consequently Muhammad Munawar Hussain appellant supplied the said tablets to the other appellants and when the complainant abstained them, they threatened her to keep silent, otherwise would be killed; the lady appellants got the children asleep in a room and at about 11:00 p.m., Muhammad Munawar Hussain appellant came there and all had been talking in the courtyard; after about 1/2 hour, the lady appellants tied the arms and legs of Arshad Mehmood deceased with a cot and all the appellants came in a room, where Washfa Noreen appellant handed over a pistol to Muhammad Munawar Hussain appellant and asked him to lock the room from outside and then shot the above named deceased; the lady appellants started watching from the window and after about two minutes, Muhammad Munawar Hussain appellant came at the window and told that bullet was missed, whereupon Washfa Noreen appellant again loaded a bullet in the pistol and handed over it to the above named male appellant, with direction that fire should be made while placing the pistol at the head and while going, arms and legs of Arshad Mehmood should be untied; accordingly Muhammad Munawar Hussain appellant while shooting at Arshad Mehmood and telling to the lady appellants, went away; at the morning lady appellant started hue and cry and the people came there and brought them out of the room; the said appellants threatened the complainant that if she would tell the incident to anyone, would be dealt with in the same manner; Sajida Parveen appellant, for recovery of the complainant, filed writ petition in the Lahore High Court, but dismissed,

which encouraged the complainant and she narrated all the facts to her paternal grand parents and aunt (Phuphi) and the Police was also approached, but of no consequence, hence the complainant was forced to file the complaint.

4. In the above mentioned private complaint, the appellants were summoned, whereafter pre-trial proceedings were carried on and formal charge against them was framed on 27.6,2006, to which they pleaded not guilty and claimed the trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 12 witnesses. The gist of evidence led by the material witnesses was as under:-

i) **P.W.4 Rabia Bibi** complainant had narrated almost the same facts as were stated by her in the above mentioned private complaint.

ii) **P.W.5. Mushtaq and P.W.6 Shaista Parveen** had stated about extra-judicial confession allegedly made by the above named lady accused/appellants before them.

iii) **PW-11 Muhammad Saeed** Inspector had conducted the investigation, during which carried on the proceedings fully narrated in his statement.

iv) **PW-12 Dr. Muhammad Naseer Ahmad Kahloon** had conducted post mortem examination of the dead body of Arshad Mehmood deceased and prepared the report (Ex.PK and PK/1). During the said examination, a firearm injury at the head of the deceased was noticed, which was ante-mortem in nature and sufficient to cause death.

5. After examination of the prosecution witness, the case was got closed by the complainant, whereafter statements of the appellants as provided under Section 342, Cr.P.C. were recorded, during which questions emerging out of prosecution evidence were put to them and they denied almost all such questions, while pleading their innocence and false involvement in the case, with mala fide. The appellants did not opt to lead any evidence in their defence or make statements under Section 340(2), Cr.P.C. On completion of the proceedings, the learned Trial Court had pronounced the impugned judgment, in the above mentioned terms. Consequently, the matters in hand.

6. The learned counsel for the appellants has argued that the appellants have falsely been involved, with mala fide, after due deliberation and consultation, despite the fact that they have not committed the alleged occurrence; the true facts of the occurrence were those, which were narrated by Sultan Ahmad, father of the deceased in the FIR (Ex.PB); the complainant after registration of the FIR and proceedings by the Police remained satisfied, for a considerable time, when she came forward, with the above mentioned unacceptable story, which even during trial could not be substituted, hence the charge against the appellants was not at all proved, but the learned Trial Court had erred in not considering the same and passing the impugned judgment, on the basis of false presumptions and assumptions.

7. On the other hand, the learned Deputy Prosecutor General has vehemently opposed the appeals, on the grounds that the findings of the learned Trial Court, which resulted into the impugned judgment being result of correct appreciation and evaluation of the material available on the record, should not be disturbed.

8. We have heard the arguments of both the sides and have perused the record.

9. In this case, initially, the matter was reported to the Police by Sultan Ahmad, father of the deceased, with the above mentioned contention, during which presence or availability of Rabia Bibi (present complainant) or Washfa Noreen (appellant) was not at all shown or alleged anywhere. The father of the complainant had alleged the death of his son by unknown accused. The story narrated by him was also not plausible, because despite murder of his son at 1.00 a.m., he remained satisfied till 4.00 a.m., when he and other family members raised alarm, which attracted Amjad Ali and Abdul Wahid PWs at the spot, but during whole of the trial, they never came forward. The other version was described by Rabia Bibi, (present complainant), whereby she had narrated almost a different story, during which she did not show presence or availability of Sultan Ahmad (complainant of the FIR) anywhere, rather had shown her presence at the spot and witnessing the alleged occurrence. It is pertinent to mention here that during the proceedings by the Police, Rabia Bibi complainant never appeared anywhere and as stated above, she for the first time had come into picture after about ten months of the alleged

occurrence. It is very strange that father of the deceased did not implicate or nominate any of the accused, but Mst Rabia Bibi complainant had implicated her real mother and sister. The said complainant, in the complaint had stated about a window, in the house from where the lady appellants had been witnessing the occurrence and talking with male appellant, but as per the scaled site plan (Ex.PC & Ex.PC/1) prepared by Khalid Mehmood (PW-10) at the spot, there was no window. As per the complainant, the fire was made while placing the pistol at the head of the deceased, but during postmortem examination, no sign of close range firing was observed. According to the complainant, the deceased was tied by a rope with the cot, but neither any rope, nor any cot was recovered or taken into possession. The complainant during cross-examination had admitted that the house of occurrence was located in a populated area, but erroneously during the occurrence alleged by her or thereafter, nobody had attracted as name of none was given in the complaint. It is settled law that to believe or disbelieve a witness all depends upon the intrinsic value of his statement. It is not the person but the statement of that person which is to be seen and adjudged by the Court. In this regard reliance may be made to the case of Abid Ali and 2 others v. The State (2011 SCMR 208), wherein, the Hon'ble Supreme Court of Pakistan, has observed as under:--

> "21. To believe or disbelieve a witness all depends upon intrinsic value of the statement made by him. Even otherwise, there cannot be universal principle that in every case interested witness shall be disbelieved or disinterested witness shall be believed. It all depends upon the rule of prudence and reasonableness to hold that a particular witness was present on the scene of crime and that he is making true statement. A person who is reported otherwise to be very honest, above board and very respectable in society if gives a statement which is illogical and unbelievable, no prudent man despite his nobility would accept such statement.
>
> 22. As a rule of criminal prudence, prosecution evidence is not tested on the basis of quantity but quality of the evidence. It is not that who is giving the evidence and making statement; what is relevant is what statement has been given. It is not the person but the statement of that person which is to be seen and adjudged".

10. Recovery of a pistol at the instance of Muhammad Munawar Hussain (appellant) had been alleged and as per the report of the forensic Science Laboratory, Lahore, the said weapon was in working condition, but as no empty from the spot was collected, or sent for comparison with the weapon, hence the said recovery and report has become inconsequential.

11. PW-5 Mushtaq and PW-6 Shaista Parveen, remained satisfied and never joined into the investigation and for the first time appeared in the court on 12.9.2006 i.e. after about 01 year and 02 months of the alleged occurrence. Their statements being made with the above mentioned alarming and un-explained delay should not be given any weight. It is pertinent to mention here that Sultan Ahmad, complainant of the FIR during whole of the trial, did not come forward and make any statement in the court. The evidence of extra-judicial confession furnished by the above named PWs could not be believed, for the reasons, firstly, why the appellants have made such a confession before said PWs as there is no evidence on the record regarding their social status or influence over the bereaved family, secondly, from the narration of facts given by both these PWs in their statements, the alleged extra-judicial confession made by the appellants, appears to be of joint nature. Apart from above, they are related inter-se and are also related to the complainant party, so, their statements cannot be relied upon without independent corroboration which is very much lacking in this case. Extra-judicial confession is always considered a weak type of evidence. The evidentiary value of the extra-judicial confession (joint or otherwise) came up for consideration before the Hon'ble Supreme Court of Pakistan in the cases of "Sajid Mumtaz and others v. Basharat and others" (2006 SCMR 231) and "Tahir Javed v. The State" (2009 SCMR 166). The relevant portion of the case of Tahir Javed (Supra) reads as under:--

> "10. ...It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time therefore, normally it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of Ahmed v. The Crown PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from

unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:--(1) Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231, (2) Ziaul Rehman v. The State 2001 SCMR 1405, (3) Tayyab Hussain Shah v. The State 2000 SCMR 683, (4) Sarfraz Khan v. The State and others 1996 SCMR 188."

12. All the above mentioned facts and circumstances, lead us to the conclusion that the charge against the appellants could not be proved and established, as per the prescribed criteria. It is well-settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind, about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. Reliance in this respect may be placed on the case "Tariq Pervaiz v. The State" (1995 SCMR 1345). This view has further been fortified in the case of "Ayub Masih v. The State" (PLD 2002 SC 1048), whereby it has been directed that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind. Relevant portion of the case of Ayub Masih (Supra) reads as under:--

> "It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

13. Resultantly, the above captioned Criminal Appeals Nos. 167-J/2009 and 446-J/2014 are accepted, impugned judgment is set aside and the appellants namely Sajida Parveen, Washfa Noreen and Muhammad Munawar Hussain are acquitted of the charge, while extending them the benefit of doubt. Muhammad Munawar Hussain appellant is in judicial custody, hence be released forthwith, if not required to be detained in any other criminal matter, whereas Mst. Sajida Pareen and Washfa appellants are on bail, through

suspension of their sentence, hence their bail bonds are discharged. As a consequence, the Murder Reference No.456 of 2009 is answered in negative and death sentence of Muhammad Munawar Hussain is not confirmed.

HBT/M-122/L Appeals accepted.

2016 Y L R 2085
[Lahore (Multan Bench)]
Before Muhammad Tariq Abbasi, J
MUHAMMAD JAFFAR---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.226 of 2014, heard on 11th March, 2015.

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

----Ss. 336 & 337-A(ii)---Itlaf-i-Salahiyyat-i-Udw, causing Shajjah-i-Mudihah---Accused had not challenged his conviction and sentence, but had requested for instalments, towards payment of amount of 'Arsh'---Deputy Prosecutor General, as well as counsel for the complainant/victim, had no objection in determining the instalments for payment to the amount of 'Arsh', and release of accused from jail---Accused was awarded imprisonment of five years under S.336, P.P.C., and two years under S.337-A(ii), P.P.C.---Accused had served out imprisonment of 4 years, 1 month and 26 days, and remaining portion of sentence was 10 months and 4 days---In the light of settlement arrived at between the parties, un-served portion of sentence, should be forgiven, as the term of sentence which accused had already undergone, was sufficient to meet the ends of justice---Upholding conviction and sentence of 'Arsh' awarded to accused, High Court directed to make payment of amount of 'Arsh' in instalments mentioned in the settlement---Sentence of imprisonment of accused was reduced to already undergone.

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

----S. 331---Recovery of Diyat---Object and purpose---Object and purpose of recovery of Diyat amount, was that the victim should be compensated according to the rate which was prevailing at the time of pronouncement of judgment.

Tariq Mehmood Dogar for Petitioner.
Malik Muhammad Jaffer, D.P.G. for the State.
Mehr Ashraf Sial for the Complainant.
Date of hearing: 11th March, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the judgments dated 24.9.2013 and 22.5.2014, respectively passed by the learned Judicial Magistrate Section-30, Sahiwal and learned Additional Sessions Judge, Sahiwal. Through the above mentioned former judgment, in case FIR No. 239 dated 18.8.2010, registered under Sections 336, 337A(i), 337A(ii), 337F(v), 109, 148/149, P.P.C. at Police Station Kameer, District Sahiwal, the petitioner was convicted and sentenced in the following terms:--

> i) Under Section 336, P.P.C.--'Arsh, equal to 1/2 of "diyat", payable to Abid Hussain complainant/victim, and simple imprisonment for five years.
>
> ii) Under Section 337A(ii), P.P.C. - 'Arsh' equal to 5% of "diyat", payable to the above named complainant/victim and ' simple imprisonment for two years.

It was directed that both the above mentioned sentences shall run concurrently and the petitioner shall be entitled for the benefit provided under Section 382-B, Cr.P.C.

2. The above mentioned conviction and sentence was challenged by the petitioner in shape of an appeal, whereas the complainant also filed revision petition and sought enhancement in the above mentioned sentence. Both the matters were heard by the learned Additional Sessions Judge, Sahiwal and decided through judgment dated 22.5.2014, whereby the above mentioned conviction and sentence awarded to the petitioner by the learned Trial Court was maintained and accordingly both the above mentioned matters were dismissed. Feeling aggrieved, the revision petition in hand has been preferred.

3. The learned counsel for the petitioner has contended that the above mentioned period of sentence awarded to the petitioner by the learned courts below has been served out by him and now he is lying in the jail only due to non-payment of above mentioned 'Arsh', which as per law is payable in instalments, hence the learned counsel has not challenged the conviction and sentence of the petitioner, but has requested for instalments, towards payment of the above said 'Arsh'.

4. The learned Deputy Prosecutor General as well as the learned counsel for the complainant/victim has got no objection in determining the instalments, for payment of the amount of 'Arsh' and release of the petitioner from jail.

5. The learned counsel for the petitioner as well as of the complainant/ victim sat together and then came out with a settlement that during the relevant period, the amount of 'diyat' was prescribed by the government as Rs.25,32,073, hence half of the said 'diyat' amount becomes Rs.12,66,037/-, whereas 5% of the said 'diyat' is Rs.1,26,603/-, hence as per the judgment dated 24.9.2013, total amount of 'Arsh' payable by the petitioner to Abid Hussain complainant/victim becomes Rs.13,92,640/-. It has been settled that out of the said amount, a sum of Rs.4,00,000/- would be paid, on behalf of the petitioner to the above named complainant/victim, who is in attendance, today in the court, whereas the remaining amount of Rs.9,92,640/- would be payable in four equal instalments, each of Rs.2,48,160 payable after every 1-1/2 month and that first instalment shall be payable after 1-1/2 month of release of the petitioner from the jail and the rest, as stated above. Consequently, Rs.4,00,000/- has been paid and received by Abid Hussain complainant/victim, in the court.

6. The object and purpose of recovery of DIYAT amount is that the victim should be compensated according to the rate, which is prevailing at the time of pronouncement of judgment. Section 331 of Pakistan Penal Code, 1860 provides payment of 'diyat' in instalments spreading over a period of five years from the date of final judgment. The said provision reads as under:--

> "**Payment of diyat.**---(1) The diyat may be made payable in lump sum or in instalments spread over a period of [five] year from the date of the final judgment.
> (2) Where a convict fails to pay diyat or any part thereof within the period specified in sub-section (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until the diyat is paid full or may be released on bail if he furnishes security [or surety] equivalent to the amount of diyat to the satisfaction of the Court [or may be released on parole as may be prescribed in the rules].
> (3) Where a convict dies before the payment of diyat or any part thereof, it shall be recovered from his estate."

7. As per report made by the Superintendent, Central Jail, Sahiwal, where the petitioner is confined, he was dispatched to jail on 14.1.2011, hence till now he has served out imprisonment of 04 years, 01 month and 26 days and that the remaining portion is 10 months and 04 days. In the light of the above mentioned settlement, the above said un-served portion of sentence should be forgiven, as the term of sentence, which the petitioner has already undergone, is sufficient to meet the ends of justice.

8. Resultantly, the above mentioned conviction and sentence of 'Arsh' awarded to the petitioner by the learned Trial Court and maintained by the learned Appellate court is upheld, with a direction to make its payment as per the above mentioned settled schedule. In the same manner, conviction of the petitioner in offences under Sections 336 and 337A(ii), P.P.C. is also maintained, but sentence of imprisonment is reduced to the above mentioned period, which he has already undergone. It is made clear that if the petitioner, makes even a single default in payment of the above mentioned instalments, then whole of the remaining amount shall become due and if not paid, he shall be taken into custody and sent back to jail till realization of whole of the amount, as provided under Subsection (2) of Section 331 mentioned above

9. With the above mentioned observations/modification in term of imprisonment, the revision petition is dismissed.

HBT/M-95/L Order accordingly.

P L D 2017 Lahore 106

Before Muhammad Tariq Abbasi, J

HASSAN---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.1888-M of 2015, decided on 16th February, 2016.

Criminal Procedure Code (V of 1898)---

----Ss. 31, 439(3), 439-A & 561-A---Enhancement of sentence of imprisonment and compensation by revisional court beyond sentencing powers of Trial Court---Scope---Trial court, convicting the accused of the charge under S. 377, P.P.C. sentenced him to undergo imprisonment for 3 years along with payment of compensation, but the revisional court enhanced the sentence of imprisonment to 10 years and also enhanced the compensation awarded by the Trial Court---Question before the High Court was whether under revisional jurisdiction, the sentence exceeding to the competency of Trial Court could be awarded---Under S. 439-A, Cr.P.C, Sessions Judge, while exercising revisional jurisdiction, would exercise the same powers and jurisdiction as provided under S. 439, Cr.P.C---Section 439, Cr.P.C provided that under revisional jurisdiction, a sentence greater than the competency of Trial Court could not be awarded---Assistant Sessions Judge was a judicial officer, who for all purposes, exercised powers which were vested in Magistrate of Section 30, which meant that the latter could rightly be termed as an Assistant Sessions Judge---Trial Court/Magistrate Section-30 was not competent to impose sentence to an accused beyond 7 years imprisonment; accordingly, as provided under S. 439 (3), Cr.P.C, the revisional court was not competent to enhance the sentence beyond the jurisdiction of the Trial Court---Enhancement of sentence to 10 years by the revisional court was therefore illegal ab initio and abuse of process of the court, which could be looked into under inherent powers of S. 561-A, Cr.P.C---High Court, setting aside the impugned order of the revisional court as to enhancement of the sentence of

imprisonment, maintained the same regarding enhancement of compensation---Application under S. 561-A, Cr.P.C was partially allowed accordingly.

Mst. Sarwar Jan v. Ayub and another 1995 SCMR 1679 rel.

Shahid Nazir Jarra for Petitioner.

Dr. Muhammad Anwar Khan Gondal, Addl. Prosecutor-General for the State.

Javed Imran Ranjha for Respondent No.2.

Date of hearing: 16th February, 2016.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this petition, the judgment dated 22.4.2015, passed by the learned Additional Sessions Judge, Phalia, District Mandi Bahauddin, has been called in question, whereby not only an appeal filed by Hassan (hereinafter referred to as the petitioner), against his conviction, recorded through the judgment dated 6.4.2015, by the learned Magistrate Section-30, Phalia, District Mandi Bahauddin has been dismissed, but revision petition preferred by Mansabdar (hereinafter referred to as the respondent), for enhancement of sentence has been allowed.

2. The petitioner was challaned in FIR No. 286 dated 14.8.2013, registered under Section 377, P.P.C., at Police Station Phalia, with the allegations that he committed unnatural offence with Abdul Rehman, son of the complainant; he was tried in the court of learned Magistrate Section-30, Phalia, during which formal charge against him was framed, which was denied, hence the prosecution evidence was summoned and recorded; as many as 11 witnesses had got recorded their evidence, before the learned Trial Court, during statements of whom the documents fully detailed in their respective statements were also brought on the record; on conclusion of the prosecution evidence and closure of the case, the petitioner was examined under Section 342 Cr.P.C., during which the questions arising out of the prosecution evidence were put to him, but he denied almost all such questions, while pleading his innocence and false involvement in the case, with mala fide; he

did not opt to lead any evidence in his defence or make statement under Section 340(2), Cr.P.C; finally through the judgment dated 6.4.2015, on the basis of tender age, he was convicted, for charge under Section 377, P.P.C. and sentenced to simple imprisonment for 03 years and fine of Rs.5,000/-, in default whereof to further undergo 15 days' simple imprisonment; he had challenged his conviction and sentence, through an appeal before the learned concerned Sessions Court, whereas the respondent, by filing a revision petition, had sought enhancement in the sentence of the petitioner; both the matters were decided by the learned Additional Sessions Judge, through the impugned judgment dated 22.4.2015, whereby the appeal preferred by the petitioner was dismissed, whereas the revision petition filed by the respondent was accepted and while maintaining conviction of the petition, his sentence was enhanced from 03 years S.I. to 10 years' R.I. The amount of fine was also enhanced from Rs.5 000/- to Rs.50,000/-, with a direction that Rs.30,000/- would be Payable to the victim as compensation under Section 544-A, Cr.P.C., otherwise the petitioner would further suffer simple imprisonment for 06 months. Consequently, the petition in hand.

3. The main stance of the learned counsel for the petitioner is that as the learned Trial Court was competent to award sentence up to 07 years, hence the learned revisional court while enhancing the sentence to 10 years' R.I. has exceeded its jurisdiction, therefore, the impugned judgment is not sustainable in the eye of law.

4. Conversely, the learned Additional Prosecutor General, assisted by the learned counsel for the respondent has supported the impugned judgment, with the contentions that when from the attending facts and circumstances, the learned revisional court had reached at the conclusion that sentence awarded by the learned Trial Court was unjustified, it had accordingly enhanced the same, hence committed no illegality.

5. Arguments of all the sides have been heard and the record has been perused.

6. The main question is whether, under revisional jurisdiction, the sentence exceeding to the competency of learned Trial Court can be awarded or not. Section 439 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the Code), which deals with revisional powers of High Court, reads as under:--

> "**High Court's powers of revision**.--(1) In the case of any proceeding the record of which has been called for by itself [...] or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a court by section 338, and may enhance the sentence; and, when the Judges composing the court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.
>
> (3) Where the sentence dealt with under this section has been passed by Magistrate [...], the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by Magistrate of the first class.
>
> [(4) Nothing in this section shall be deemed to authorize a High Court:
>
> (a) to convert a finding of acquittal into one of conviction; or
>
> (b) to entertain any proceedings in revision with respect to an order made by the Sessions Judge under section 439-A.]
>
> (5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under subsection (2) of showing cause why his sentence should not be enhanced, shall, in showing cause, be entitled also to show cause against his conviction."

7. Section 439-A of the Code, empowers a Sessions Judge to exercise revisional jurisdiction, in the following manner:--

"**Sessions Judge's powers of revision**.--(1) In the case of any proceeding before a Magistrate the record of which has been called for by the Sessions Judge or which otherwise comes to his knowledge, the Sessions Judge may exercise any of the powers conferred on the High Court by section 439.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him under any general or special order of the Sessions Judge."

8. A plain reading of the above cited provision shows that while exercising revisional jurisdiction, a Sessions Judge would have the same powers and jurisdiction as provided under Section 439 of the Code. Although section 439 of the Code, gives powers of revision, but subject to certain restrictions, one is described in subsection (3) that under revisional jurisdiction, a sentence greater than the competency of trial court could not be awarded.

9. Under Section 31 of the Code, power of High Courts, Sessions Judges and Assistant Sessions Judges to pass sentences has been detailed as under:-

"**Sentences which High Courts and Session Judges may pass**.--(1) A High Court may pass any sentence authorized by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or of [imprisonment for a term exceeding seven years]."

10. Undoubtedly, an Assistant Sessions Judge is a judicial officer, who for all purposes, exercises powers which vest in Magistrate Section-30 of the Code. Meaning thereby that a Magistrate Section-30 can rightly be termed as an Assistant Sessions Judge. In this way, a Magistrate Section-30 is not competent to impose sentence to an accused beyond 07 years' imprisonment.

11. From the above mentioned discussion, it is evident that competency of the learned Trial Court, being Magistrate Section 30 was to award maximum sentence of 07 years' R.I. In this way, as provided under Section 439(3) of the Code, the learned revisional court was not competent to enhance the sentence, beyond jurisdiction of the learned Trial Court. Therefore, the findings of the learned revisional court, recorded in the impugned judgment, towards the above mentioned enhancement in sentence of the petitioner are ab initio illegal and abuse of the process of court, which surely can be looked into, under inherent power of Section 561-A of the Code, which is meant for the following purposes:--

i) To give effect to any order under the Code.

ii) To prevent abuse of process of any court.

iii) To secure the ends of justice.

If to fortify the above mentioned view, any case law is needed, reference can be made to the case Mst. Samar Jan v. Ayub and another" reported as 1995 SCMR 1679.

12. For what has been discussed above, the petition in hand is partially accepted and the impugned judgment, towards enhancement in sentence of imprisonment of the petitioner is set aside. However, the amount of fine and compensation prescribed by the learned revisional court is maintained.

SL/H-14/L Order accordingly.

PLJ 2017 Lahore 147 (DB)

***Present*: MUHAMMAD TARIQ ABBASI AND MIRZA VIQAS RAUF, JJ.**

WASSI ULLAH KHAN--Petitioner

versus

STATE, etc.--Respondents

W.P. No. 19737 of 2015, decided on 15.2.2016.

Constitution of Pakistan, 1973--

----Art. 199--Bail in accountability Court, refusal of--Allegations of misappropriation/embezzlement on pretext of trading of share in stock exchange--Reference against accused--Civil liabilities--Entitlement of bail--Validity--Mere pendency of proceedings under Companies Ordinance, 1984 are not sufficient to absolve petitioner from criminal liability which is otherwise made out from allegations levelled in Reference--Even otherwise, it is well settled principle of law that civil and criminal proceedings can proceed side by side--At bail stage, only tentative assessment is required and deeper appreciation is not permissible--Petitioner is involved in alleged offence and he being director of company had cheated public at large--Petition was dismissed. [P. 148] A & B

Malik Akhtar Javaid, Advocate for Petitioner.

Mr. Arif Mehmood Rana, Addl. D.P.G. alongwith Dy. Director NAB for Respondents.

Mr. Umair Mansoor, Advocate for Respondent No. 5.

Mr. Muhammad Ali Malik, Advocate for Respondent No. 6.

Date of hearing: 15.2.2016.

ORDER

Through instant petition, the petitioner namely Wassi Ullah Khan seeks post arrest bail in Accountability Court Reference No. 52 of 2015.

2. Precisely the allegations against the petitioner are that being Director of M/s. Wassi Securities (SMC) Private Limited, he mis-appropriated/embezzled Rs. 67.76 million from the accounts of general public on the pretext of trading of shares in Lahore Stock Exchange.

3. Learned counsel for the petitioner submitted that no offence is made out against the petitioner under the NAB Ordinance, 1999. He added that the petitioner has already moved winding up petition and in view of the pendency of the same, NAB authorities are precluded to proceed against the petitioner. Learned counsel maintained that at the most, a civil liability is made out from the allegations levelled in the Reference and the petitioner is

entitled to be released on bail as he is suffering behind the bars before his guilt is proved.

4. Conversely, learned Addl. Deputy Prosecutor General appearing on behalf of NAB has vehemently opposed the instant petition.

5. We have heard the learned counsel for the petitioner as, well as learned Addl. Deputy Prosecutor General for NAB and also perused the record with their assistance.

6. The prosecution against the petitioner was started on the complaint of Chairman, Securities and Exchange Commission of Pakistan on the allegations of mis-appropriation/embezzlement of Rs. 52.48 millions from the accounts of general public on the pretext of trading of shares in the Lahore Stock Exchange. The inquiry was initiated on 19.05.2014 whereafter the same was upgraded into investigation on 16.10.2014. The petitioner was arrested on 20.5.2015 and after investigation, Reference No. 52/2015 was filed in the Accountability Court Lahore against the petitioner for an amount of Rs. 67.76 millions as total liability of the petitioner. As per record, there are 152 claimants who have voiced their grievance before the NAB authorities on account of alleged embezzlement committed by the petitioner being Director of M/s. Wassi Securities (Pvt.) Limited. The petitioner though has filed company petition for winding up of his company before the learned Company Judge. However, the same was admittedly dismissed by way of order dated 25.11.2015, against which, an Intra Court Appeal was filed which is statedly pending. Mere pendency of proceedings under the Companies Ordinance, 1984 are not sufficient to absolve the petitioner from the criminal liability which is otherwise made out from the allegations levelled in the Reference.

7. Even otherwise, it is well settled principle of law that civil and criminal proceedings can proceed side by side. At bail stage, only tentative assessment is required and deeper appreciation is not permissible. There are sufficient reasons to believe that the petitioner is involved in the alleged offence and he being the Director of the Company had cheated the public-at-large.

8. In view of the above discussion, we are not inclined to allow the instant petition. Consequently, the same is **dismissed**.

(R.A.) Petition dismissed

PLJ 2017 Cr.C. (Lahore) 836 (DB)
[Bahawalpur Bench Bahawalpur]
***Present*: MUHAMMAD TARIQ ABBASI AND**
MUHAMMAD BASHIR PARACHA, JJ.
SIKANDAR ILYAS and another--Petitioners
versus
STATE and another--Respondents

Crl. Misc. No. 2358-B of 2016 & 162-B of 2017, decided on 21.2.2017.

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

----S. 497--Anti-Terrorism Act, (XXVII of 1997), Ss. 7 & 9--Arms Ordinance, (XX of 1965), S. 13--ESA, S. 4--Bail, grant of--Rule of consistency--Principle of consistency is fully applicable to the present petitioners and as held by the august Supreme Court of Pakistan--They also deserve the same concession, as provided to their above named co-accused--Bail was granted. [P.] A 1979 SCMR 9 & 1982 SCMR 909, *ref*.

Mr. Muhammad Zafar Iqbal Awan, Advocate for Petitioners (in Crl. Misc. No. 2358-B/2016).

Kh. Muhammad Aslam, Advocate for Petitioner (in Crl. Misc. No. 162-B/2017).

Malik Muhammad Latif, Dy.P.G. for Respondents.

Date of hearing: 21.2.2017.

ORDER

This single order shall decide the above captioned post arrest bail applications, as both are outcome of same FIR No. 44, dated 9.5.2016, registered under Sections 7 & 9 of Anti-Terrorism Act, 1997, Section 13 of the Arms Ordinance XX, 1965 and Section 4 of ESA, at Police Station CTD, District Multan.

2. The precise facts, as per FIR, are that when due to a spy information, the present petitioners, along with their co-accused namely Muhammad Nauman, Usman Arif and Mohib Ullah were apprehended and searched, from the possession of everyone, explosive substance and other articles, fully detailed in the FIR, were recovered.

3. Arguments heard and record perused.

4. It is alleged that Sikandar Ilyas petitioner was lifted from his house on 31.03.2016 and taken to some unknown place, whereafter, while concocting a false story, he was roped in the case; regarding taking of the

above named petitioner to some unknown place, Rapat No. 56, dated 31.03.2016, was chaked out at Police Station Allama Iqbal Town, Lahore. On behalf of Abdul Hameed petitioner, similar allegations have been leveled and that lifting of the said petitioner was duly brought into the notice of the SHO of Police Station Mustafa Town, Lahore and entertained through Diary No. 69-5B-MT, dated 31.03.2016.

5. In the light of the above stated situation, case of the present petitioners has become at par with their co-accused Muhammad Nauman, from whom similar kind of recovery was alleged and on his behalf, the above mentioned facts & circumstances were narrated, whereupon the Hon'ble Supreme Court of Pakistan, through order dated 12.01.2017, passed in Criminal Petition No. 1188/2016, had, admitted bail to him.

6. The learned Prosecutor has failed to draw any distinction between the case of the present petitioners and that of their above named co-accused, who has been treated in the above mentioned manner. Consequently, we are of the considered opinion that principle of consistency is fully applicable to the present petitioners and as held by the august Supreme Court of Pakistan in the cases titled *"Muhammad Fazal alias Bodi vs. The State"* (1979 SCMR 9) and *"Abdus Sattar and others vs. The State"* (1982 SCMR 909), they also deserve the same concession, as provided to their above named co-accused.

7. Resultantly, the petitions in hand are allowed and the petitioners are admitted to bail, subject to their furnishing bail bonds, in the sum of Rs. 2,00,000/- (Rupees two lac only) each, with two sureties, each, in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) Bail allowed

PLJ 2017 Cr.C. (Lahore) 838 (DB)
[Bahawalpur Bench Bahalwapur]
***Present*: MUHAMMAD TARIQ ABBASI AND**
MUHAMMAD BASHIR PARACHA, JJ.
SAJJAD AHMAD--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 363-B of 2017, decided on 28.2.2017.

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

----S. 497--ESA, Ss. 4 & 5--Anti-Terrorism Act, (XXVII of 1997), S. 7--Bail, grant of--Further inquiry--Application to S.H.O. DPO--No action was taken by police--Another application u/S. 22-A & 22-B, Cr.P.C. to sessions judge was dismissed being infructuous--Petitioner was in custody of police and police registered present F.I.R. after almost 80 days of his arrest--In given circumstances, whether petitioner was already in custody of police and recovery was effected from accused, make case of petitioner as one of further inquiry--Petition was allowed. [P. 839] A & B

Mr. Zafar Iqbal Awan, Advocate for Petitioner.

Ch. Asghar Ali Gill, Dy.P.G. for Respondents.

Date of hearing: 28.2.2017.

ORDER

Through this Criminal Miscellaneous, Sajjad Ahmad petitioner seeks his post arrest bail in case F.I.R. No. 03 dated 23.01.2017 registered under Sections 4,5 ESA and Section 7 of Anti-Terrorism Act, 1997 at Police Station CTD, Multan.

2. Precisely, according to the contents of F.I.R., on 23.01.2017 at about 2.40 p.m, petitioner was apprehended and one hand grenade along with detonator and assembly was recovered from the right side pocket of the petitioner. Accordingly, the instant F.I.R was registered.

3. Arguments heard. Record perused.

4. On 02.11.2016, Qurat-ul-Ain wife of Sajjad Ahmad petitioner moved an application to S.H.O. P.S Hafizabad with the contention that at about 7:00 p.m, police employees while muffled faces tress-passed into the shop of her husband and took him away. On 19.11.2016, when the S.H.O. P.S Hafizabad did not taken any action on the application submitted by Qurat-ul-Aain, she moved application before DPO Hafizabad with the same averments as was mentioned in the application submitted by her before

S.H.O. Hafizabad. On 29.11.2016, said Qurat-ul-Ain moved an application before DCO Hafizabad who sent the same to the DPO Hafizabad on the same day. On 25.11.2016, when no action was taken by the Police, Qurat-ul-Ain filed application under Sections 22-A & 22-B of Cr.PC before learned Sessions Judge, Hafizabad, the same was entrusted to learned Additional Sessions Judge, Hafizabad. Record reveals that after filing of said application on 01.12.2016 police registered a case under Section 365, P.P.C. Hence her petition under Section 22-A & 22-B of Cr.PC was dismissed being infructuous. On the very first day *i.e.* 02.11.2016 wife of the petitioner moved an application against the police for taking his husband with them, whereas, according to the contents of F.I.R., police of P.S CTD, Multan arrested the petitioner on 23.01.2017. Attested copies of documents attached with the petition reflect that the petitioner was in the custody of police since 02.11.2016 and the police registered the present F.I.R. after almost 80 days of his arrest.

5. In the given circumstances, whether the petitioner was already m the custody of police and the recovery was effected from the accused, make the case of the petitioner as one of further inquiry. Hence, this petition is allowed and petitioner is admitted to bail subject to furnishing bail bonds in the sum of Rs. 100,000/- (One hundred thousand only), with one surety in the like amount to the satisfaction of the leaned trial Court.

6. The findings recorded above are of tentative in nature, which will not affect the merits of the case in any manner.

(A.A.K.) Bail allowed

2017 Y L R 686

[Lahore (Multan Bench)]

Before Qazi Muhammad Amin Ahmed and Muhammad Tariq Abbasi, JJ

MUHAMMAD IQBAL alias BALI---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.663 and Murder Reference No.149 of 2009, heard on 2nd December, 2014.

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

----S. 302---Qatl-i-amd---Appreciation of evidence---Sentence, reduction in---Ocular version of the witnesses having remained consistent and corroborative during cross-examination, could not be contradicted---No material contradiction in the statements of the witnesses, could be pointed out or observed---Complainant, though was close relative of the deceased yet no grudge or enmity with accused was on record---No reason, cause or justification existed to discard statement of the complainant only on the basis of his relationship with the deceased as the same was confidence inspiring---Both the witnesses had successfully established and justified their presence, and availability at the spot---Version of the witnesses, had been supported by the medical evidence---Fact that accused had fired at the deceased with pistol recovered from him was confirmed---Motive alleged in the complaint was not proved or established and was shrouded in mystery---Impugned judgment of conviction of accused, being based on correct appreciation and evaluation of the material available on record, was quite justified---Cause of occurrence, being still shrouded in mystery and accused having made only one fire shot, without any repetition, due consideration was required towards quantum of sentence awarded to accused by the Trial Court---Maintaining the conviction of accused, his sentence was modified from death to imprisonment for life, in circumstances.

Hasil Khan v. The State and others 2012 SCMR 1936 rel.

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

----S. 302---Criminal Procedure Code (V of 1898), Ss.544-A & 382-B---Qatl-i-amd---Appreciation of evidence---Grant of compensation for heirs of the deceased---Trial Court despite holding accused guilty of qatl-i-amd, refused to grant compensation as provided under S.544-A, Cr.P.C., on the ground that the deceased being a criminal record holder, and involved in 32 criminal cases, his legal heirs were not entitled to any compensation---Provision of

S.544-A, Cr.P.C., was mandatory in nature, and compensation under said section could not be withheld, unless there were strong reasons for refusal thereof, which must be specifically highlighted---Nothing was available on record, if the deceased was convicted in any criminal case---Mere registration of criminal cases against accused, had not given any licence to anyone to take law into his own hands, and commit his murder---When it was proved on the record, that death of the deceased was at the hands of accused and he was convicted and sentenced, grant of compensation under S.544-A, Cr.P.C. was obligatory---Compensation of Rs.5,00,000 was also granted under S.544-A, Cr.P.C., which if realized, would be paid to the legal heirs of the deceased, as per their legal entitlement, otherwise, accused would undergo simple imprisonment for six months---Benefit of S.382-B, Cr.P.C. was also provided to the accused .

The State v. Rab Nawaz and another PLD 1974 SC 87; Khalid and others v. The State 1975 SCMR 500 and Saeed Shah and others v. The State and others 2005 MLD 389 rel.

Mirza Azeem Baig and Iftikhar Ibrahim Qureshi for Appellant.

Malik Riaz Ahmad Saghla, D.P.G. for the State.

Date of hearing: 2nd December, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through this judgment, the above captioned Criminal Appeal and Murder Reference shall be disposed of, as both are outcome of single judgment dated 05.08.2009, passed by the learned Sessions Judge, Sahiwal, whereby in case FIR No. 55, dated 03.02.2008, registered under Section 302, P.P.C. at Police Station Noor Shah, District Sahiwal, Muhammad Iqbal alias Bali (hereinafter referred to as "the appellant"). has been convicted and sentenced to death.

2. The facts are that Naseer Ahmad complainant (PW-8) made a statement/Fard Biyan (Ex.PE), with the contention that on 03.02.2008, at about 10.00 a.m. he for personal work was available at Chak No.53/GD; his nephew (Bhanja) Murtaza alias Murti (deceased) along with Jaffer Ali (PW-6) and Muhammad Iqbal (given up PW) arrived there on a motor cycle; when they reached at the thoroughfare, opposite to the house of Zahoor, due to rain, there was mud in the street; the appellant, armed with .30 bore pistol, attracted and raised a 'Lalkara' that the deceased would be taught a taste of helping his opponents; the appellant made a fire shot, which landed at right cheek of the deceased and passed through and through, whereupon he fell down; the appellant while making aerial firing, fled away; Murtaza alias Murti

succumbed to the injuries at the spot; the motive was that the appellant had grudge against the deceased for helping Haq Nawaz etc., the opponents of the appellant. On the basis of the above said Fard Biyan, the case was registered through FIR (Ex.PH/1). The investigation was carried on and the appellant was challaned. The learned Trial Court charge sheeted him. He pleaded not guilty and claimed the trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 09 witnesses. Gist of evidence led by the Material witnesses was as under:--

i) **PW-1 Dr. Mabashar Hussain Sherazi** conducted postmortem examination of dead body of Murtaza alias Murti on 3.2.2008 through report (Ex. PA) and pictorial diagrams (Ex.PA/1 and Ex.PA/2). At that time the following injuries at the dead body were observed:--

1) A firearm entry wound 1 cm x 1 cm deep going on the right cheek near right border of lips.

2) A firearm exit wound 1 cm x 1 cm deep going on the left side of neck just below left ear.

3) Abrasion 6 cm x 1/2 cm on front mid of right leg.

As per the doctor, the injury. No. 1, which was caused by firearm and anti-mortem in nature, was result of death, which was immediate.

ii) **PW-4 Nasarullah Constable** transmitted the parcels containing blood stained earth and empty, from the Police Station to the office of Chemical Examiner, Lahore. He also witnessed the proceedings, during which the appellant got recorded .30 bore pistol (P-6) from his residential house and taken into possession by the Investigating Officer, through Memo (Ex.PD). The parcel of pistol was also deposited by him in the office of Forensic Science Laboratory, Lahore.

iii) **PW-8 Naseer Ahmad Complainant** as well as an eye-witness of the alleged occurrence narrated almost the same facts as were stated by him in the complaint (Ex. PH).

iv) **PW-6 Jaffer Ali**, another eye-witness of the occurrence supported and corroborated the version of the above named complainant (PW-8). He also attested the memos (Ex.PC, Ex.PE, Ex.PF & Ex.PG), through which the last worn clothes of the deceased, crime empty got recovered from the spot, motor cycle and blood stained earth were respectively taken into possession by the investigating officer.

v) **PW-9 Muhammad Ashraf, S.I.** investigated the Case. He recorded statement (Ex.PH) of the complainant; inspected the dead body and prepared the injury statement (Ex.PJ) and inquest report (Ex.PK); collected the blood stained earth from the spot and took it into possession through Memo (Ex.PG); collected an empty (P-7) of .30 bore pistol from the spot and secured it through Memo (Ex. PE); took into possession the motor cycle through Memo (Ex.PF); drafted the rough site plan (Ex.PL) of the spot; secured the last worn clothes (P-1 to P-5) of the deceased through Memo (Ex.PC); got prepared the scaled site plan (Ex.PB and Ex.PB/1) from the draftsman; arrested the appellant and obtained his physical remand; secured the pistol (P-6) through Memo (Ex. PD), which was got recovered by the appellant; recorded statements under Section 161, Cr.P.C. of the relevant witnesses at relevant stages.

3. After examination of the prosecution witnesses, the reports of the chemical examiner and Forensic Science Laboratory, Lahore were tendered in evidence as Ex.PM and Ex.PN respectively and case for the prosecution was closed. Thereafter, the appellant was examined under Section 342, Cr.P.C., during which, the questions arising out of the prosecution evidence were put to him and he denied almost all such questions. The question "why this case against you and why the PWs have deposed against you?" was replied by him in the following words:--

> "It is a false case. The PWs have deposed falsely due to their relationship inter-se and with the deceased and being inimical towards me. I was also earlier involved in a false case and was acquitted and after my release from jail, Nazim of the area Mazhar Shah Khagga has again got me involved in this false case. It was an unwitnessed occurrence. The assailant was not known. I was not present at the spot at the time of occurrence. The case was registered after due deliberations and preliminary inquiry due to the influence of Mazhar Shah Khagga who is an influential person of the area. The deceased was a hardened criminal and was proclaimed offender in several criminal cases and had many enemies. Many persons were made to join the investigation as suspects who were let of by the police for monitory considerations. I am absolutely innocent."

He opted to lead evidence in his defence, but refused to make statement under section 340(2), Cr.P.C. In defence, he only tendered previous record of the deceased as Ex.DB and closed the defence.

4. After completing all the required proceedings, the learned Trial Court had decided the case, through the impugned judgment, whereby convicted and sentenced the appellant in the above mentioned terms. Consequently, Criminal Appeal and Murder Reference in hand.

5. The learned counsel for the appellant have argued that it was an unseen occurrence, but false witnesses were introduced with mala fide, who falsely deposed against the appellant; the statements of the witnesses being full of material contradictions are not believable; the witnesses failed to establish their presence and availability at the spot; the recovery of the pistol could not be established; the charge against the appellant was not proved, hence he was entitled for acquittal, therefore the impugned judgment is not sustainable under the law.

6. Conversely, the learned Deputy Prosecutor General has vehemently opposed the appeal, with the contention that sufficient material in shape of oral as well as documentary evidence to connect the appellant with the occurrence was brought on the record, hence as the charge against him was successfully proved, therefore, the learned Trial Court had rightly passed the impugned judgment, which being well-reasoned and call of the day warrants no interference.

7. Arguments of both the sides have been heard and the record has been perused.

8. Naseer Ahmad complainant (PW-8) and Jaffer Ali (PW-6), categorically deposed that in their presence and within their view, the appellant while armed with .30 bore pistol attracted at the spot, raised a 'lalkara' and then made a fire shot, which landed at right side cheek of the deceased and passed through and through, consequently the deceased died then and there. The above mentioned version of the witnesses could not be contradicted, as during the cross-examination, they remained consistent and corroborative. Neither during the arguments nor perusal of the record, any material contradiction in the statements of the witnesses could be pointed out or observed. Therefore, the arguments of the learned counsel for the appellant that the statements of the witnesses are full of material contradictions are nothing, but bald assertion. Although the complainant is a close relative of the deceased, but his no grudge or enmity with the appellant could be brought on the record. Hence no reason, cause or justification to discard his statement, which otherwise is confidence inspiring, only on the basis of his relationship with the deceased. Both the above named witnesses have successfully established and justified their presence and availability at the spot. Therefore, the objection of the

defence towards non-availability of the witnesses at the spot is discarded. The above mentioned version of the witnesses has been supported by the medical evidence led by Dr. Mubashar Hussain Sherazi (PW-1) and the report (Ex.PA, Ex.PA/1 and Ex.PA/2), as the injuries described by them were confirmed on the dead body.

9. It is available on the record that the empty recovered from the spot on 3.2.2008 was deposited in the office of Forensic Science Laboratory on 6.2.2008. Thereafter, the pistol (P-6) was recovered from the appellant on 4.3.2008, which for comparison with the above mentioned empty was also sent to the laboratory. Due proceedings in the laboratory were carried on and the report (Ex.PN) was prepared, according to which the empty was fired from the above mentioned pistol. The said fact has also confirmed that it was the appellant, who fired at the deceased with the above mentioned pistol.

10. In the complaint/Fard Biyan (Ex.PH) and the FIR (Ex.PH/1), the alleged motive was described as grudge of the appellant against the deceased that he was helping the opponents of the appellant. But when the complainant appeared in the witness box as PW-8, failed to narrate the above mentioned alleged motive. He rather contended that there was no previous enmity. In this way, the motive alleged in the complaint was not proved or established. This fact was also highlighted by the learned Trial Court under Para No. 13 of the impugned judgment. Consequently either the motive was not known to the complainant or deliberately concealed from everyone, including the learned Trial Court. Till now, the motive is shrouded in mystery.

11. For what has been discussed above, we have come to the conclusion that the impugned judgment, towards conviction of the appellant, being based on correct appreciation and evaluation of the material available on the record is quite justified. As stated above, the motive alleged in the complaint could not be proved and the cause of occurrence is still shrouded in mystery and the appellant made only one fire shot without any repetition, hence according to our opinion, due consideration is required towards quantum of sentence awarded to him by the learned Trial Court. Our above mentioned view has been fortified by the dictum laid down in case "Hasil Khan v. The State and others" (2012 SCMR 1936), whereby the august Supreme Court of Pakistan held as under:--

> " ..Moreover, as rightly observed by the learned Trial Court the immediate motive remained shrouded in mystery and the Trial Court rightly did not award the maximum sentence of death provided under

section 302(b), P.P.C. to the appellant. The enhancement of sentence by the learned High Court, we observe with respect, is not in accord with the law laid down by this court in Muhammad Ashraf Khan Tareen v. The State (1996 SCMR 1747) wherein at page 1755, the Court dismissed complainant's appeal and did not enhance the sentence by holding as follows:--

'In respect of sentence, learned counsel for the complainant/State wanted conversion of the life imprisonment into death sentence. Learned counsel cited case of Iftikhar Ahmad v. The State (PLD 1990 Supreme Court 820) where criminal petition by the complainant challenging reduction of sentence by the High Court, was dismissed by this Court on the ground that the principle of origin of offence remained shrouded in mystery. This authority does not further prayer of the complainant for awarding death penalty to the appellant. In the present case prosecution did not allege any specific motive for commission of the offence. In the circumstances, the appellant could not have been awarded the death penalty.'

10. Similarly, in Jehanzeb v. The State (2003 SCMR 98), the Court altered the sentence of death of the convict to life imprisonment by observing that where motive alleged by the prosecution has not been satisfactorily proved, this may be considered as a mitigating circumstance qua the quantum of sentence."

12. Resultantly, while maintaining the conviction of the appellant, awarded by the learned Trial Court, through the impugned judgment, his sentence is modified from death to imprisonment for life.

13. It has been noticed with great concern that the learned Trial Court on one hand, held the appellant guilty for qatl-i-amd of the above named deceased, hence convicted and sentenced him, but on the other hand refused to impose compensation against him, as provided under section 544-A, Cr.P.C., on the ground that the deceased was a record holder and involved in 32 cases, hence his legal heirs were not entitled for any compensation. Section 544-A, Cr.P.C. reads as under:--

[544-A. Compensation to the heirs of the person killed, etc. [(1) Whenever a person is convicted of an offence in the commission whereof the death of or hurt, injury, or mental anguish or psychological damage to, any person is caused or damage to or loss or destruction of any property is caused, the Court shall when convicting such person, unless for reasons to be recorded in writing it otherwise

directs, order the person convicted to pay to the heirs of the person whose death has been caused, or to the person hurt or injured, or to the person to whom mental anguish or psychological damage has been caused, or to the owner of the property damaged, lost or destroyed, as the case may be, such compensation as the Court may determine having regard to the circumstances of the case";] and

(2) . . . . . .

(3) . . . . . .

(4) . . . . . .

(5) An order under this section may also be made by an appellate Court or by a Court when exercising its powers of revision.

From bare reading of the above mentioned provision, it is crystal clear that it is mandatory in nature and compensation under it could not be withheld, unless there are strong reasons for refusal, which must be specifically highlighted. Nothing is available on the record if the deceased was convicted, in any criminal case. Mere registration of criminal cases had not given any licence to anyone to take law into his own hands and commit his murder. When it was proved on the record that death of the deceased was at the hands of the appellant and he was convicted and sentenced, then imposition of the compensation under Section 544-A Cr.P.C. was obligatory. In this regard, reliance may be placed to the cases "The State v. Rab Nawaz and another" (PLD 1974 Supreme Court 87) and "Khalid and others v. The State" (1975 SCMR 500). If the learned Trial Court has not awarded the compensation as required under section 544-A, Cr.P.C, even then this Court is fully empowered to award the same. We are fortified by the dictum laid down in case "Saeed Shah and others v. The State and others" (2005 MLD 389). Resultantly, the compensation of Rs.5,00,000/- under section 544-A, Cr.P.C. is also imposed against the appellant, which if realized, shall be paid to the legal heirs of the deceased as per their legal entitlement, otherwise the appellant shall undergo simple imprisonment for six months. The benefit of Section 382-B, Cr.P.C. is also provided to him.

14. Consequently, with the above mentioned modification in the sentence of the appellant, Criminal Appeal No. 663/ 2009 is dismissed. The Murder Reference No. 149/2009 is answered in negative and death sentence awarded to Muhammad Iqbal alias Bali (appellant) is not confirmed.

HBT/M-37/L Order accordingly.

2017 Y L R Note 62

[Lahore (Multan Bench)]

Before Muhammad Tariq Abbasi, J

MUHAMMAD AKRAM---Petitioner

Versus

The STATE and 3 others---Respondents

Writ Petition No.9158 of 2014, heard on 15th January, 2015.

Criminal Procedure Code (V of 1898)---

----Ss. 516-A & 517---Cancellation of superdari---Judicial Magistrate gave "superdari" of buffaloes to the applicant---Application of respondent for cancellation of said superdari, was dismissed and revisional court cancelled superdari---Validity---Petitioner had no concern with the buffaloes---Said buffaloes were never case property, hence their superdari, was not warranted---Revisional Court had rightly passed impugned order; and by cancelling superdari of the buffaloes in favour of the petitioner, had rightly handed over them to the respondent whose stance of being owner of buffaloes, was found to be cogent and convincing---Constitutional petition, being devoid of any force, was dismissed, in circumstances. [Paras. 2, 5 & 6 of the judgment]

Mazhar Ali v. Ansar Ali and others 2014 SCMR 1536 and Khalid Saleem v. Muhammad Jameel alias Billa and 6 others 1996 SCMR 1544 rel.

Muhammad Khalid Farooq for Petitioner.

Mehr Tahir Amjad and Rizwan Ahmad Khan for Respondents.

Date of hearing: 15th January, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This writ petition is directed against the order dated 10.6.2014, passed by the learned Additional Sessions Judge, Burewala, District Vehari, whereby in revision, the order dated 30.3.2010 of the learned Judicial Magistrate, Burewala, District Vehari has been set aside and 'superdari' of buffaloes in favour of the petitioner has been cancelled and their 'superdari' to the respondent No. 4 has been granted.

2. The precise facts are that on complaint of the petitioner, a case FIR No.151 dated 14.3.2010 under Section 379, P.P.C. at Police Station

Saddar Burewala, District Vehari was registered, with the contentions that on 26.2.2010, the complainant while locking his tube well, went to sleep and in the morning, it was found that tube well wires valuing Rs.35,000/- were stolen; in presence of the witnesses, foot prints of five unknown accused were searched, which ended at the metalled road; the complainant of his own had been searching for the accused and stolen property when Sabir Hussain alias Bhutto, Muhammad Siddique, Safdar Hussain and Muhammad Hussain, in a 'panchait' admitted commission of the offence and return of the wires, but later on refused; during the same night, the accused also committed theft of the wires belonging to Faqir Muhammad and Haji Muhammad Aslam Kamboh, amounting to Rs.35,000/- and Rs.30,000/- respectively. The investigation of the case was in progress, when on 16.3.2010, the petitioner told the Police that Safdar Hussain, an accused had given him two buffaloes, with the contention that they were purchased from the sale amount of the wires. Thereafter, the complainant applied before the learned Trial Court for 'superdari' of the buffaloes and succeeded in getting the same through order dated 30.3.2010. The respondent No.4 filed an application before the learned Trial Court for cancellation of 'superdari' of the buffaloes, in favour of the petitioner and their 'superdari' to her, with the contention that her buffaloes, with mala fide, were taken by the petitioner into the Police Station and on the basis of the false proceedings and pretext, he got their 'superdari' in his favour. The learned Trial Court through order dated 11.10.2011, dismissed her above said application. She preferred a revision petition, which came up for hearing before the learned Additional Sessions Judge, Burewala, District Vehari, from where the impugned order was passed, whereby 'superdari' of the buffaloes in favour of the petitioner was cancelled, and their 'superdari' to respondent No. 4 was ordered. Consequently, the writ petition in hand.

3. Arguments heard and record perused.

4. The above mentioned FIR was registered, with the contention that electric wires, belonging to the petitioner and the above named others were stolen by the above named accused person. In this way, the case property was the above said wires and not at all any cattle. Even if the accused had sold out the electric wires and purchased the buffaloes the said cattle do not become case property. It is very strange and astonishing that on

16.3.2010 i.e. third day of the registration of the FIR, the petitioner himself produced the buffaloes in the Police Station, with the contention that they were given to him by Safdar Hussain, an accused and also obtained their 'superdari'. It is pertinent to mention here that the above named Safdar Hussain during pendency of the revision petition, appeared in the court and by submitting a sworn affidavit, contended that he never handed over the buffaloes in question to the petitioner and that in connivance with the Police, the petitioner had taken them from the house of respondent No. 4 to the Police Station and obtained on 'superdari'. The Hon'ble Supreme Court of Pakistan in the case of Mazhar Ali v. Ansar Ali and others (2014 SCMR 1536) held that the superdari could not be given with regard of an alternate property. Furthermore, as stated above the buffaloes were not stolen property as the same were produced by the petitioner before the police with the contention that they were purchased by the accused from sale proceed of stolen electric wires. In such like situation the petitioner was not entitled for superdari of the buffaloes and their owner was entitled to get the same. Reliance in this respect may be made to the case of "Khalid Saleem v. Muhammad Jameel alias Billa and 6 others" (1996 SCMR 1544) in which it was held as under:--

" .. Similarly the articles recovered by the police during the investigation of the case allegedly belonging to Muhammad Ashraf alias Mehboob which are stated to have been purchased from the money which he had received by the sale of ornaments the subject of dacoity in this case, which were later on given on Superdari to the complainant, along with Mazda Car and Honda Motorcycle belonging to Nain Sukhia, who had allegedly purchased it with the sale proceed of the case property, all these are to be returned to their respective owners."

5. When, as stated above, no concern of the petitioner with the buffaloes was developed and his above mentioned stance was rebutted by Safdar Hussain accused in the above mentioned manner and even otherwise the cattle were never case property, then their 'superdari' in favour of the petitioner was not warranted, hence the learned revisional court had rightly passed the impugned order and by cancelling the 'superdari' of the cattle, in favour of the petitioner, handed over them to the respondent No. 4 as her stance was found to be cogent and convincing.

6. As a result of the above discussion, the writ petition in hand being devoid of any force and merit, is dismissed.

HBT/M-94/L Petition dismissed.

2017 Y L R Note 376

[Lahore (Multan Bench)]

Before Muhammad Tariq Abbasi and Qazi Muhammad Amin Ahmed, JJ

MUHAMMAD RAFIQUE---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No.76 and Capital Sentence Reference No.3 of 2011, heard on 12th December, 2014.

Penal Code (XLV of 1860)---

----Ss. 302(b), 309 & 310---Anti-Terrorism Act (XXVII of 1997), S.7---Criminal Procedure Code (V of 1898), S.345---Qatl-i-amd, act of terrorism---Appreciation of evidence--- Compromise--- Scope---Compromise was arrived at between accused and legal heirs of the deceased, on the basis of which accused could be acquitted---Trial Court submitted report regarding alleged compromise and the report revealed that deceased was survived by her mother, husband, four sons, including one minor, and two daughters---Major legal heirs got recorded their respective statements, whereby they confirmed their compromise with the accused, without any compensation and there was no objection on acquittal of accused---Share of diyat of the minor was determined, and was paid accordingly---Report of the Trial Court further showed that the compromise was genuine and complete---Compromise, could only be effected regarding the offences mentioned in S.345, Cr.P.C.---Conviction and sentence of accused in offence under S.302(b), P.P.C. was set aside on the basis of compromise and he was acquitted under the offence---Offence under S.7 of Anti-Terrorism Act, 1997, being not compoundable, compromise in that respect, could not be permitted and accepted---Accused having committed offence inside the court room, provisions of S.7 of Anti-Terrorism Act, 1997, were fully attracted and accused was rightly convicted under the section---Where the accused had been acquitted from the charge under S.302(b), P.P.C. as a consequence of compromise, he deserved concession in quantum of sentence for offence under Anti-Terrorism Act, 1997---Which was an extenuating circumstance for lesser penalty---Conviction of the accused under S.7 of Anti-Terrorism Act, 1997, was maintained, but his sentence was altered from death to imprisonment for life with benefit of S.382-B, Cr.P.C.; payment of amount of fine, was maintained. [Paras. 3, 4 & 5 of the judgment]

Muhammad Rawab v. The State 2004 SCMR 1170; Muhammad Nawaz v. The State PLD 2014 SC 383 and Shahid Zafar and 3 others v. The State PLD 2014 SC 809 ref.
Iftikhar Ibrahim Qureshi for Appellant.

Malik Muhammad Jaffer, Deputy Prosecutor-General for the State.
Date of hearing: 12th December, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This judgment shall decide the above captioned matters being outcome of single judgment dated 23.7.2011, passed by the learned Judge Anti-Terrorism Court No. 1, Multan, whereby Muhammad Rafique (hereinafter referred to as the 'appellant') was convicted and sentenced in the following terms:-

a) Under section 302(b), P.P.C. to death and compensation of Rs.5,00,000/-, payable to the legal heirs of Mst. Gullan Bibi (deceased), failing which to undergo simple imprisonment for six months.

b) Under section 7 of the Anti-Terrorism Act, 1997 to death with fine of Rs.5,00,000/-, in default whereof to undergo simple imprisonment for six months.

2. The facts are that case FIR No. 837 dated 21.12.2010 under sections 302, P.P.C. and 7 of the Anti-Terrorism Act, 1997 at Police Station City Arifwala, District Pakpattan was registered against the appellant, with the allegations that he by firing, committed qatl-e-amd of his mother Mst. Gullan Bibi, in the court room of Mr. Saeed Raza, Judicial Magistrate Arifwala, District Pakpattan. On completion of the investigation, the challan against the appellant was submitted in the court of learned Judge Anti-Terrorism Court No.1, Multan, where he was charge sheeted. As the charge was denied by him, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 11 witnesses, whereas one was recorded as CW. On completion of all the proceedings, the learned Trial Court had passed the impugned judgment in the above mentioned terms. Consequently, the matters in hand.

3. During pendency of the matters, an application (Criminal Misc. 1145-M of 2011) under sections 309/310 read with section 345, Cr.P.C. was moved by the appellant, with the contention that a compromise between him and the legal heirs of the deceased had been arrived at, hence on the basis of the

compromise, he may be acquitted of the charge. Regarding the alleged compromise, a report from the learned Trial Court was requisitioned, and accordingly submitted. As per the report, the above named deceased was survived by Mst. Zaiban Bibi (mother), Nazir Ahmad (husband), Ahmad Saeed, Rasheed Ahmed, Shahid Fareed, Muhammad Asad (sons), Mst. Surriya Bibi and Mst. Abida Bibi (daughters). Out of the above mentioned legal heirs, Muhammad Asad was the minor, whereas rest were major. The major legal heirs had got recorded their respective statements, whereby confirmed their compromise with the appellant, without any compensation and no objection on his acquittal. Share in diyat of the minor was determined as Rs.2,03,670/- and his interest was protected by transferring a plot measuring 05 Marla, valuing Rs.2,00,000/- in his favour, through mutation No. 861 dated 23.1.2012 and deposit of the balance amount Rs.4,000/- in his account, opened in Habib Bank Limited. Consequently, it was reported that the compromise was genuine and complete.

4. As stated above, the appellant has been convicted and sentenced for commission of offence under section 302(b), P.P.C. and 7 of the Anti-Terrorism Act, 1997. As per the dictum laid down by the august Supreme Court of Pakistan in cases "Muhammad Rawab v. The State" (2004 SCMR 1170) and "Muhammad Nawaz v. The State" (PLD 2014 Supreme 383), compromise can only be effected regarding the offences mentioned in section 345 Cr.P.C. and none else. Therefore, in the matter in hand, the compromise is permissible and acceptable only to the extent of the offence under section 302(b), P.P.C. Consequently, on the basis of the compromise, the conviction and sentence of the appellant in offence under section 302(b), P.P.C. is set aside and he is acquitted of the charge under the said offence. As regards the above mentioned other offence under section 7 of the Anti-Terrorism Act, 1997, it is stated that in the light of the above mentioned dictum, as the said offence is not compoundable, hence compromise in it could not be permitted and accepted.

5. It has been confirmed on the record that the appellant had committed the offence inside court room, hence under the third Schedule of Anti-Terrorism Act, 1997, the provision of section 7 of the Anti-Terrorism Act, 1997 were fully attracted and as such the appellant was rightly convicted under the above mentioned provision. When from the charge of offence under section 302(b), P.P.C., the appellant has been acquitted as a consequence of compromise, then as per law laid down in cases "Muhammad Nawaz v. The State (PLD 2014 Supreme Court 383)" and "Shahid Zafar and 3 others v. The State (PLD

2014 Supreme Court 809)" he deserves concession in quantum of his sentence for the above mentioned offence of Anti-Terrorism Act, 1997. In the case of Muhammad Nawaz (Supra) the Hon'ble Supreme Court of Pakistan observed as under:--

> "9. However, this fact can also not be over sighted that in respect of murder of Muhammad Mumtaz, Constable, the petitioner was also sentenced to death and now the parties have compounded the offence under section 302(b), P.P.C. and according to the record compensation has also been paid. Therefore, question for quantum of sentence under section 7 of ATA can be examined in view of the judgment in the case of M. Ashraf Bhatti v. M. Aasam Butt (PLD 2006 SC 182) wherein after the compromise between the parties sentence of death was altered to life imprisonment.
>
> 10. It is to be noted that both the sentences i.e. death and life imprisonment are legal sen-tences, therefore, under the circumstances either of them can be awarded to him. Thus in view of the peculiar circumstances noted hereinabove, sentence of death under section 7 ATA, 1997 is converted into life imprisonment .."

Furthermore, there is only one life, which has been spared, by accepting compromise in offence under section 302(b), P.P.C., hence it would not be justified to again take the said life for offence under section 7 of Anti-Terroriqm Act, 1997. The said fact in our view is also an extenuating circumstance for lesser penalty to the appellant in the above mentioned offence.

6. Consequently, conviction of the appellant under section 7 of the Anti-Terrorism Act, 1997 is maintained. However, his sentence is altered from death to imprisonment for life. The amount of fine prescribed by the learned Trial Court and imprisonment in case of default in its payment is maintained and upheld. The benefit of Section 382-B Cr.P.C. is provided to the appellant. The Criminal Appeal No. 76/2011 is decided in the above mentioned terms and C.S.R. No. 03/2011 is answered in negative.

HBT/M-38/L Order accordingly.

2017 Y L R 48

[Lahore (Multan Bench)]

Before Muhammad Tariq Abbasi and Qazi Muhammad Amin Ahmed, JJ

SAMAR ABBAS---Petitioner

Versus

The STATE and others---Respondents

Criminal Appeals Nos.621, 630, 901 of 2010, 896 of 2011, Criminal Revision No.332 and Murder Reference No.159 of 2010 heard on 10th December, 2014.

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

----S.302(b)---Qatl-e-amd---Circumstantial evidence---Scope---All the circumstances should be connected in such a manner that those should make a continuous chain; one end of which should touch the dead body; whereas the other around neck of accused---Missing of even a single string would break the chain and fatal for the prosecution.

The State v. Manzoor Ahmad PLD 1966 SC 664; Asadullah and another v. The State and another 1999 SCMR 1034; Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State and 2 others 1996 SCMR 188; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Ibrahim and others v. The State 2009 SCMR 407 ref.

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

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Nobody was nominated in the case by the complainant---Deceased, when injured, had stated that some unknown persons had caused injuries to him---Complainant made a supplementary statement, whereby accused persons were named to be assailant---Alleged extra-judicial confession, which was joint in nature and made in one sitting, had no value in the eye of law---Involvement of accused persons on the basis of extra-judicial confession, which otherwise had no value, was also against mendate of law, being statement of one co-accused against the other---Proceedings of test identification parade a long after nomination of accused persons, were inconsequential, having no legal value---Prosecution failed to establish the case against accused persons---Charge against accused persons was doubtful, and the accused persons were entitled to the benefit of doubt, not as a matter of grace, but as of right---Conviction, could only be based upon unimpeachable evidence and certainty of guilt, and any doubt, arising in the prosecution case, must be resolved in favour of accused---Impugned judgment was set aside and all accused persons

were acquitted of the charge, while extending them the benefit of doubt and they were released, in circumstances.

Tahir Javed v. The State 2009 SCMR 166; Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231; Muhammad Khan and another v. The State 1999 SCMR 1220; Ghulam Akbar and another v. The State 2008 SCMR 1064; Muhammad Akram v. The State 2009 SCMR 230 and Ayub Masih v. The State PLD 2002 SC 1048 ref.

Syed Badar Raza Gillani, Haji Muhammad Tariq Aziz Khokhar and Wajid Ali Bhatti for Appellants.

Bashir Ahmad Khan Buzdar and Waseem Sarwar for the Complainant (in Crl. Revision No.332 of 2010).

Malik Riaz Ahmad Saghla, D.P.G. for the State.

Date of hearing: 10th December, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This judgment shall decide the above captioned appeals, revision petition and the Murder Reference as all are outcome of same judgment dated 22.5.2010, passed by the learned Additional Sessions Judge, Layyah, whereby, in a private complaint filed by Manzoor Hussain (hereinafter referred to as the 'complainant') under sections 302/109/34, P.P.C. against Samar Abbas, Ghulam Sajjad, Muhammad Nawaz and Imtiaz Ahmad (hereinafter referred to as the 'appellants'), they have been convicted under section 302(b), P.P.C. and sentenced in the following terms:--

Samar Abbas and Muhammad Nawaz, to death, with compensation of Rs.1,00,000/- each payable to the legal heirs of Irshad Hussain (deceased), in default to undergo simple imprisonment for six months each.

Ghulam Sajjad and Imtiaz Ahmad, imprisonment for life and compensation of Rs.1,00,000/- each payable to the legal heirs of the above named deceased, failing which to further serve simple imprisonment for six months each.

2. The facts are that on 13.5.2007, Manzoor Hussain complainant (PW-13) made statement/Fard Biyan (Ex.PA), contending therein that at about 8.00 p.m., when he along with his brother Nazar Hussain and cousin (Mamu Zad) Kazim Hussain (PW-15) was available at the house of Irshad Hussain (deceased), two unknown persons, while armed with pistols, entered in the Haveli through the main gate; one of the person, who was taller than the other, asked Irshad Hussain (deceased) for hands-up, whereby the other accused made two successive fires, which hit at the abdomen of Irshad

Hussain (deceased) and he fell down; the accused while making aerial firing succeeded in fleeing away; on hearing reports of firing, Mohalladars attracted at the spot; Irshad Hussain, who was unconscious, was shifted to District Headquarter Hospital, Layyah. The complainant further contended that his brother Irshad Hussain (deceased), who was a Patwari, was assaulted by some unknown assailants. On the basis of the above said complaint, FIR No.184 dated 13.5.2007 (Ex.PA/1) was registered under section 324/34, P.P.C. at Police Station City Layyah. The injured succumbed to the injuries on 27.5.2007, hence the offence under section 302, P.P.C. was also added. During the investigation, the complainant through a supplementary statement dated 16.5.2007, nominated the appellants as murderers of the deceased, with the contention that just after the occurrence, they while running in the street were seen by Niaz Hussain (PW-11) and that Samar Abbas and Ghulam Sajjad (appellants) also made extra-judicial confession before Muhammad Ilyas Raza and Jawad Hussain Khan (PW-6 and PW-7). Hence the appellants were involved in the occurrence. Subsequently, the complainant preferred a private complaint (Ex.PM) under section 302/109/34, P.P.C., against the appellants, with the contention that the Police did not investigate the case honestly as statements of Riaz Hussain and Ahmad Bukhsh towards the motive were not recorded and brought on the record. Consequently, the proceedings in the private complaint were carried on, the appellants were summoned and charge sheeted. They pleaded not guilty and claimed the trial, hence the prosecution evidence was summoned and recorded. As many as 19 witnesses were recorded as PWs, whereas two as CWs. Gist of the evidence, led by the material witnesses was as under:--

(i) **PW-2 Dr. Muhammad Aslam Bhular** conducted the postmortem examination of the dead body of Irshad Hussain Khan on 27.5.2007, prepared postmortem reports (Ex.PB) and diagrams (Ex.PB/1 and Ex.PB/2). He observed as under:--

"His abdomen was dressed interiorly. (1) Anterior abdominal was upto sheath in its central part was deprived off, extending from epigastrium towards the public sympses. The margin of wound were septic, gangerous and discharging pus. (2) Central part of the sheath with abdominal muscle were stiched with prolene. (3) A partially healed firearm wound measuring about 1-1/2 x 1-1/2 cm was present on anterior lateral upper part of abdomen on the right side. (4) A partially healed firearm wound (geliptical shape) measuring 1-1/2 cm x 1-1/2 cm on anterior lateral upper part of abdomen on the left side.

(5) Transverse colon was present on the anterior abdominal wall (as colostomy). (6) Multiple incised wound partially healed in the lower parts of abdomen on both sides (for drains). (7) Sigmoid colon as muscus fistula present exteriorly on the lower part of the abdomen.
According to this witness, all the above mentioned injuries were anti-mortem in nature, caused by firearm and cause of death.

ii) **PW-3 Dr. Abdul Majeed,** medically examined Irshad Hussain through report (Ex.PD) on 13.5.2007, when he was in an injured condition and noticed following injuries:--

1) A lacerated wound 1-1/2 x 1-1/2 cm going deep on the abdominal cavity on the upper most and lateral part of right abdomen. Margin of the wounds were inverted and slightly black in colour and rough. It was fire-arm entrance wound.

2) A lacerated wound 2 cm x 1-1/2 cm eleptical wound in shape, margins were inverted and blackish in colour. This wound was going deep into the abdominal cavity and was on the upper most and lateral side of abdomen on left side. It was fire-arm entrance wound.

iii) **PW-6 Muhammad Ilyas Raza and PW-7 Jawad Hussain Khan** narrated about extra-judicial confession allegedly made by Samar Abbas and Ghulam Sajjad appellants before them on 15.5.2007.

iv) **PW-11 Niaz Hussain** stated that on 13.5.2007 at about 8.05 p.m., he saw Samar Abbas and Ghulam Sajjad appellants along with two unknown persons, all armed with pistols, while running in the street of house of Irshad Hussain (deceased) and that later on during the test identification parades, the unknown were found to be Muhammad Nawaz and Imtiaz (appellants).

v) **PW-12 Riaz Hussain and PW-14 Ahmad Bukhsh** disclosed the worries of the deceased, allegedly narrated by him before them that Samar Abbas (appellant) was suspecting illicit relations of the deceased with Mst. Tasneem Bibi, sister of the above named appellant.

vi) **PW-13 Manzoor Hussain** narrated almost the same facts as were described by him in the private complaint (Ex.PM). He also attested the Memos (Ex.PK) and (Ex. PL), through which blood stained earth and shalwar (P-9) of the deceased was taken into possession respectively; joined into the proceedings, during which Ghulam Sajjad appellant got recovered .30 bore pistol (P-10) & 3 live bullets

(P11/1-3) and secured by the investigating officer through Memo (Ex.PN); participated in the proceedings of test identification parade dated 6.1.2010, during which Imtiaz appellant was identified and also attested the Memo (Ex.PH), by which a pistol (P-4) got recovered by the said appellant was taken into possession by the investigating officer.

vii) **PW-15 Kazim Hussain**, an eye-witness of the alleged occurrence narrated almost the same facts as were stated by the above named complainant (PW-13); participated in the proceedings of test identification parades dated 3.6.2008 and 6.1.2010, during which Muhammad Nawaz and Imtiaz appellants were respectively identified; attested the Memo (Ex.PN), through which pistol (P-10) and 3 live bullets (P11/1-3), got recovered by Ghulam Sajjad appellant were secured by the investigating officer.

viii) **PW-16 Muhammad Azam Cheema SI** investigated the case, during which arrested Ghulam Sajjad appellant and obtained his physical remand; secured 30 bore pistol (P-10) and 3 live bullets (P11/1-3) through Memo (Ex.PN), which were got recovered by the above named appellant; recorded the statements under Section 161 Cr.P.C. of the concerned witnesses.

ix) **PW-17 Muhammad Saleem Akbar SI** also investigated the case; got transferred Imtiaz appellant from Central Jail, Gujranwala, through application (Ex.PR); submitted application (Ex.PS) for test identification parade of the above named appellant, which was held on 6.1.2010; obtained physical remand of the appellant and secured pistol (P-4) and 3 live bullets (P5/1-3), got recovered by him through Memo (Ex.PH); recorded statements under Section 161, Cr.P.C. of the concerned witnesses.

x) **PW-18 Manzoor Hussain SI** was also an investigating officer, who arrested Muhammad Nawaz appellant and sent him to the jail for test identification parade; moved application (Ex.PT) for the said parade, which was accordingly held on 3.6.2008; obtained physical remand of the appellant, who got recovered .30 bore pistol (P-2) and 4 live bullets (P3/1-4)), and taken into possession through Memo (Ex.PG); recorded statements under Section 161, Cr.P.C. of the concerned witnesses at relevant stages.

xi) **PW-19 Mahr Masood Ahmad Judicial Magistrate** supervised the test identification parades proceedings dated 3.6.2008 and 6.1.2010 and also prepared the reports (Ex.PU & Ex.PV) respectively.

xii) **CW-1 Mushtaq Ahmad SI** recorded statement (Ex.PA) of Manzoor Hussain (complainant) on 13.5.2007; Prepared injury statement (Ex.PD-3/1) of Irshad Hussain (then injured); inspected the spot and drafted the rough site plan (Ex.CW1/ A); collected blood stained earth from the place of occurrence and secured it through Memo (Ex.PK); collected two empties (P-1/1-2) from the spot and secured through Memo (Ex.PF); took into possession blood stained clothes (P-6 & P-7) of Irshad Hussain (then injured) through Memo (Ex.PJ); submitted application (Ex.PW) for statement of Irshad Hussain (then injured) and recorded his statement dated 15.5.2007 (Ex.CW-1/B); recorded supplementary statement of the complainant on 16.5.2007, whereby the appellants were nominated; on death of Irshad Hussain on 27.5.2007, prepared inquest report (Ex.PC) and injury statement (Ex.PD/1) for the purpose of postmortem examination; secured blood stained (shalwar) (P-9) of the deceased through Memo (Ex.PL); recorded statements under Section 161, Cr.P.C. of the relevant witnesses at relevant stages.

xiii) **CW-2 Fiaz Haider SI arrested Samar Abbas,** appellant on 21.8.2007 and thereafter, got sent him to the judicial custody; obtained warrant of arrest against Ghulam Sajjad, Muhammad Nawaz and Imtiaz appellants from the Area Magistrate; got prepared the scaled site plans of the spot (Ex.PE) & Ex.PE/1; prepared the challan against the appellants.

3. After examination of the prosecution as well as court witnesses, reports of the Chemical Examiner, Forensic Science Laboratory and serologist were tendered in evidence as Ex.PX, Ex.PY and Ex.PZ respectively and the prosecution evidence was closed. Thereafter, the appellants were examined under Section 342, Cr.P.C., during which the questions arising out of the prosecution evidence were put to them and they denied almost all the questions while pleading their innocence and false involvement in the case with mala fide. The question "Why this case against you and why the PWs have deposed against you?" was replied by Samar Abbas appellant in the following words:--

> "All the private PWs are related inter se and inimical to me and witnesses of police were biased and under the influence of

complainant party. It was a blind murder. Prosecution has collected tainted fabricated and concocted pieces of evidence at belated stage malafidely in order to falsely implicate me. Motive alleged by the prosecution is absolutely false. Evidence of extra judicial confession is concocted one which has no reality at all. Similarly evidence of Wajtakar is improbable and unbelievable and false one. All the prosecution story is false. All the pieces of evidence were malafidely manipulated about 2 to 3 months after the occurrence but dates of recording of evidence were fictitiously shown by the police to render the same prompt and weighty. I have been falsely booked in this case by the complainant after demise of the deceased as he was having grudge against me due to the reason that after my engagement with daughter of the complainant namely Shakeela Bibi. I refused to marry with her due to her bad repute, thereafter she was betrothed with another relative of Brothery but that engagement was also broken. This created annoyance in the mind of the complainant as he makes me responsible for this insult among the Brothery and in order to wreck vengeance from me in connivance with the police a false story has been cooked up. I am innocent."

The above mentioned question was answered by Ghulam Sajjad appellant in the following terms:--

"I am innocent. The PWs are inimical to me and related inter se. All the PWs have falsely deposed against me. Till today being an unseen occurrence the real culprits have not been traced out. Whole of the investigation is dishonest. DPO Layyah on 8.6.2007 vide dispatch No.984/ F.A. constituted an investigation team to trace out the culprits of this un-witnessed occurrence. As per record till 10.7.2007 when the I.O. received letter No. 984/F.A the culprits of this case were not known. I did not make any extra judicial confession. The statements of witnesses of extra judicial confession were recorded with ante-date. The I.O. dishonestly tampered with the record of Goshwara of this FIR and the dates were re-written on it by applying fluid to suppress his forgery with respect to preparation of statement of extra judicial confession fabricated with ante dates. In the post mortem application moved by the I.O. Exh.PD/1, inquest report Exh.PC, the names of the accused were not mentioned. Had the statements of extra judicial confession, Wajtakar etc., have been recorded on 15.5.2007, 16.5.2007 or 18.5.2007, then these documents

must have contained the names of the known accused. Even otherwise, the alleged evidence of extra judicial confession given and recorded under section 161, Cr.P.C. is in-admissible in evidence as being joint extra judicial confession. No pistol was recovered from me. After having been tutored by the learned private counsel of the complainant they made dishonest improvements especially w.r. to extra judicial confession and made false statements of extra judicial confession. During my physical remand the complainant got me tortured by police and provided pistol, the recovery of which was fabricated against me."

Muhammad Nawaz appellant replied the above said question in the following manner:--

"I have no concern with the murder of Irshad Hussain deceased. Irshad Hussain deceased was done to death by some unknown person as evident from the FIR of the case and the assailant of Irshad Hussain were not traced out upto 08.06.2007 and it remained as a blind murder and on strict orders of DPO police with the connivance of complainant fabricated evidence of extra judicial confession. Wajtakar, motive and police on one hand has involved his relatives to whom I have no concern has also involved me because long ago, I had given evidence in a bribe case against Irshad Hussain deceased who was a Patwari and the PWs are inter related with each other, so they have falsely deposed against me."

Whereas, the reply made by Imtiaz appellant towards the above mentioned question was as follows:--

"I have no concern with the murder of Irshad Hussain deceased. Irshad Hussain deceased was done to death by some unknown person as evident from the FIR of the case and the assailant of Irshad Hussain were not traced out upto 8.6.2007 and it remained as a blind murder and on strict orders of DPO police with the connivance of complainant fabricated evidence of extra judicial confession. Wajtakar, motive and police on one hand has involved his relatives to whom I have no concern has also involved me because long ago I had given evidence in a bribe case against Irshad Hussain deceased who was a Patwari and the PWs are inter related with each other, so they have falsely deposed against me."

4. At that time, all had opted to lead evidence in their defence, but refused to make statements under section 340(2), Cr.P.C. Later on, through statements dated 13.5.2010, they refused to lead any evidence in their defence.

5. After completion of all the proceedings, the learned Trial Court pronounced the impugned judgment, whereby convicted and sentenced the appellants in the above mentioned terms. Consequently the matters in hand.

6. The learned counsel for the appellants have argued that the occurrence was committed by unknown persons and the said fact was reported by the complainant to the Police through his statement (Ex.PA), which resulted into registration of the FIR (Ex.PA/1) against unknown accused; Irshad Hussain when was in an injured condition, also made statement on 15.5.2007 that some unknown assailants had caused injuries to him; thereafter with mala fide, while concocting false story and introducing false witnesses, the appellants were implicated; when the appellants were nominated on 16.5.2007, then the proceedings of test identification parade dated 3.6.2008 and 6.1.2010 were immaterial; the alleged extra judicial confession made by Samar Abbas and Ghulam Sajjad appellants being fabricated and concocted as well as joint in nature has no legal value; the recoveries were planted and concocted, hence not believable; the prosecution had badly failed to establish the case and the charge against the appellants as per the prescribed/settled criteria, hence the appellants were entitled for acquittal and as such the impugned judg-ment towards their conviction and sentence is not acceptable under the law, therefore by accepting the appeals, the impugned judgment may be set aside and the appellants may be acquitted of the charge.

7. Conversely, the learned Deputy Prosecutor General, assisted by the learned counsel for the complainant has vehemently opposed the appeals, while supporting the impugned judgment towards conviction of the appellants to be quite justified and call of the day. The learned counsel for the complainant while arguing the Criminal Revision No. 332/2010 has also requested that Imtiaz and Ghulam Sajjad appellants may be sentenced in the same manner as Samar Abbas and Muhammad Nawaz appellants have been dealt with.

8. Arguments advanced by all the sides have been heard and the record has been consulted.

9. Admittedly, the case was of circumstantial evidence. The settled principle/criteria for such like cases is that all the circumstances should be connected in such a manner that they should make a continuous chain, one end of which should touch the dead body, whereas the other around neck of accused. Missing of even a single ring would break the chain and fatal for the

prosecution. In this regard, reference may be made to cases "The State v. Manzoor Ahmad" (PLD 1966 Supreme Court 664), Asadullah and another v. The State and another" (1999 SCMR 1034), "Ch. Barkat Ali v. Major Karam Elahi Zia and another" (1992 SCMR 1047), "Sarfraz Khan v. The State and 2 others" (1996 SCMR 188), "Altaf Hussain v. Fakhar Hussain and another" (2008 SCMR 1103) and "Ibrahim and others v. The State" (2009 SCMR 407). Herein below it would be evaluated whether the case has been established as per the above mentioned criteria or otherwise.

10. Admittedly, Samar Abbas appellant is first cousin of the complainant and the deceased. At the time of reporting the occurrence to the Police through Ex.PA, nobody was nominated by the complainant (PW-13). Similarly on 15.5.2007, when Irshad Hussain deceased (then injured) was examined under section 161, Cr.P.C., he stated that some unknown persons had caused injuries to him. On 16.5.2007, the complainant made a supplementary statement, whereby the appellants were named to be the assailants, with the contention that on 13.5.2007, they were seen by Niaz Hussain (PW-11), while running in the street of the house of the deceased, and that on 15.5.2007, Samar Abbas and Ghulam Sajjad appellants also made extra judicial confession, before Muhammad Ilyas Raza and Jawad Hussain Khan (PW-6 & PW-7), whereby they not only admitted their guilt, but also stated about participation of Muhammad Nawaz and Imtiaz appellants in the occurrence. When just after the occurrence, the appellant were seen by the above named PW-11, then why he remained satisfied for two days and then informed the complainant on 15.5.2007 and appeared before the Police on 18.5.2007. The above said conduct of the above named PW seems unnatural, hence unbelievable. Even otherwise, it is not understandable as to why the appellants would make such confession before these witnesses. Admittedly the above said alleged extra judicial confession was joint in nature and made in one sitting, therefore has no value in the eye of law. The question of evidentiary value of the extra judicial confession came up for consideration before the august Supreme Court of Pakistan in the cases "Tahir Javed v. The State" (2009 SCMR 166) and "Sajid Mumtaz and others v. Basharat and others" (2006 SCMR 231), when the following emphasis was laid:--

> "17. ... This Court and its predecessor Court (Federal Court) have elaborately laid down the law regarding extra-judicial confessions 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, an extra-judicial confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

18. It has been further held that the status of the person before whom the extra-judicial confession is made must be kept in view, that joint confession cannot be used against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule prescribed by this Court."

Furthermore, involvement of Muhammad Nawaz and Imtiaz appellants on the basis of the above mentioned extra judicial confession (which otherwise has no legal value), is also against the mandate of law, being statement of one co-accused against another. Admittedly, as stated above, the appellants were nominated on 16.5.2007, hence the proceedings of test identification parade dated 3.6.2008 and 6.1.2010 were inconsequential, having no legal value. During the statement of CW-1, it came on the record that on 8.6.2007, the DPO Layyah constituted an investigation team to trace out the culprits of the blind murder, meaning thereby that till the above mentioned date, the real culprits were not known or traceable.

11. Sequel of the above discussion is that the prosecution has failed to make out the chain and establish the case as per the above mentioned principle/criteria and as such the charge against the appellants is doubtful, hence they are entitled to the benefit of doubt not as a matter of grace but as of right. It is a settled and universally recognized principle of law that conviction can only be based upon unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. We have fortified our view by the judgments of the Hon'ble 'Supreme Court of Pakistan reported as Muhammad Khan and another v. The State (1999 SCMR 1220), Ghulam Akbar and another v. The State (2008 SCMR 1064), Muhammad Akram v. The State (2009 SCMR 230) and Ayub Masih v. The State (PLD 2002 Supreme Court 1048). In the case of "Ayub Masih (Supra), while quoting a saying of the Holy Prophet (PBUH) "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent" and making reference to the maxim, 'it is better that ten guilty

persons be acquitted rather than one innocent person be convicted', the Hon'ble Supreme Court observed as under:--

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

12. Resultantly, the above captioned appeals are accepted, the impugned judgment is set aside and all the appellants namely Samar Abbas, Muhammad Nawaz, Ghulam Sajjad and Imtiaz Ahmad are acquitted of the charge, while extending them the benefit of doubt. They are in custody, hence, while extending them the benefit of doubt. They are in custody, hence be released forthwith, if not required to be detained in any other matter. As a consequence, Murder Reference No.150/2010 is answered in negative and death sentence awarded to Samar Abbas appellant in Criminal Appeal No.621/2010) and Muhammad Nawaz (appellant in Criminal Appeal No.896/2011) is not confirmed.

13. In the light of the above stated discussion, Criminal Revision No.332/2010, fails, hence dismissed.

HBT/S-7/L Appeal accepted.

2017 Y L R 102
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
Mst. SABIRA BIBI and others---Petitioners
Versus
HIKMAT KHAN and others---Respondents

Civil Revision No.570 of 2012, heard on 20th June, 2014.

(a) Limitation Act (IX of 1908)---

----S. 14---Civil Procedure Code (V of 1908), S.24 & O.VII, R.10---Partition suit---Exclusion of time of proceedings before wrong forum---Principle---Trial Court decreed suit---Defendant filed appeal within 90 days before High Court on the basis of value of suit property determined by the local commission---High Court upholding the objections of plaintiff to maintainability of the appeal, sent the appeal to District Judge for adjudication on merits---District Judge dismissed appeal on the ground of limitation---Validity---Limitation for filing appeal before High Court was 90 days whereas appeal could be filed before District Judge within 30 days---Under S.14 of the Limitation Act, 1908, when a party failed to justify the filing of plaint/appeal before wrong forum, time of proceedings before such forum would not be excluded from the period of limitation---Under S.24, C.P.C. where a matter was transferred, such matter would proceed from the point at which it was transferred, unless otherwise directed---In the present case, appeal was not returned by High Court to defendants for its presentation before the proper forum, rather same was sent/remitted/ transferred to the District Court---Appeal was filed within time before High Court, so District Court was obliged to proceed with the appeal from the time/point the same was sent to the District Court---Even if defendants had moved application for condonation of delay appellate court should have appreciated the legal proposition that appeal before High Court had been filed within time and the same had not become time-barred on transfer by High Court---Revision was accepted.

(b) Civil Procedure Code (V of 1908)---

----S. 24---Transfer of case---Limitation---Under S.24, C.P.C. when a matter was transferred, such matter would proceed from the point at which it was transferred, unless otherwise directed.

Sheikh Zameer Hussain for Petitioner.
Rafaqat Hussain Shah for Respondents Nos. 1 and 2.
Raja Muhammad Kamran Respondents Nos. 3 to 8.
Date of Hearing: 20th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the judgment and decree dated 12.6.2012 passed by the learned Additional District Judge, Taxila, District Rawalpindi, whereby the appeal filed against the judgment and decree dated 31.1.2011, made by the learned Trial Court has been dismissed, on the point of limitation.

2. The facts in short are that the respondents Nos. 1 and 2 filed a suit for possession through partition, against the present petitioners and the respondents Nos. 3 to 5. In the said suit, the preliminary decree was passed and on the basis of the report made by the local Commission, which was objected by the present petitioners, but ruled out, the final decree was made on 31.1.2011. Against the said decree, the petitioners preferred R.F.A. No. 82/2011, before this Court. An objection was raised by the respondents Nos. 1 and 2 that the appeal was not proceedable before this Court, rather acceptable before the learned District Court concerned. Consequently, the appeal through order dated 5.7.2011, passed by the learned Division Bench of this Court was sent to the learned District Judge, Rawalpindi for adjudication on merit. Accordingly, the Deputy Registrar (Judicial) of this Court through letter dated 12.7.2011 had sent the file of the appeal to the learned District Judge, Rawalpindi, from where it was entrusted to the learned Additional District Judge, Taxila. The proceedings in the matter were carried on by the learned Additional District Judge, Taxila and finally the judgment and decree dated 12.6.2012 was pronounced, whereby the appeal was dismissed on the sole ground and reason that it was time barred.

3. Consequently, the instant revision petition has been preferred, with the contentions and the grounds that the regular first appeal was filed before this Court on the basis of the report made by the local Commission, whereby the value of the property in issue was determined as Rs.3,17,50,000 being Rs.50,000/- per Marla, hence was beyond the pecuniary jurisdiction of the District Court concerned; that through order dated 5.7.2011, the appeal was sent by this Court to the learned District Judge, Rawalpindi and as such the

period of limitation was to be considered regarding filing of the appeal before this Court and not the District Court; that the learned Appellate Court without considering the attending facts and circumstances and the law on the subject has knocked out the petitioners from their valuable rights purely on technical grounds, hence the impugned judgment and decree is not sustainable in the eye of law.

4. The learned counsel for the petitioners has advanced his arguments in the above mentioned lines, whereas the learned counsel, who has put appearance on behalf of respondents Nos. 1 and 2 has seriously opposed the revision petition, while supporting the impugned judgment and decree to be quite in accordance with law.

5. Arguments of both the sides have been heard and the record has been perused.

6. As stated above, the petitioners had challenged the judgment and decree dated 31.1.2011, passed by the learned Trial Court before this Court, in shape of R.F.A. No. 82/2011, with the contention that in the light of the report made by the local Commission, value of the property in issue, was exceeding the pecuniary jurisdiction of the District Court.

7. As highlighted above, from the respondents' side an objection was raised, towards maintainability of the Regular First Appeal before this Court, which was upheld through order dated 5.7.2011. Consequently, the learned Division Bench of this Court had sent the appeal to the learned District Judge, Rawalpindi for adjudication on merits. Accordingly, the Deputy Registrar (Judicial) of this Court through letter No. 18310/Civil dated 12.7.2011 had transmitted the record of the RFA to the learned District Judge, Rawalpindi, from where it was entrusted to the learned Additional Ditrict Judge, Taxila.

8. For filing R.F.A. before this Court, the law prescribed a period of 90 days, whereas for filing an appeal before the District Courts, 30 days period has been allowed by the law.

9. It has been observed that the appeal before this Court was filed within the above mentioned prescribed period of 90 days.

10. The learned Additional District Judge, Taxila has dismissed the appeal, which was transmitted by this Court to him, purely on the basis of limitation, with the contention that even in case of transfer of the appeal, the prescribed period of limitation was 30 days.

11. There is a difference between the return of plaint as provided under Order VII, Rule 10 of C.P.C. and transfer of a case as provided under Section 24 of the procedure. For convenience, both the provisions are reproduced herein below:--

Order VII Rule 10, C.P.C..

Return of plaint.--(1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Procedure on returning plaint.---(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Section 24, C.P.C.

General power of transfer and withdrawal.---(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage-

(a) transfer any suit, appeal or other proceeding pending in any court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under subsection (1), the Court which thereafter tries such suit may, subject to any special directions in the case of any order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this Section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this Section from a court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

12. No doubt if a plaint/appeal is returned under the above mentioned provision and the concerned fails to justify the filing of the plaint/appeal, before a wrong forum, then the period provided under Article 14 of the Limitation Act, 1908 shall not be excluded, from the period of limitation. But as per the above mentioned section 24, in case of transfer of a matter, unless otherwise directed, the matter will proceed from the point at which it was transferred.

13. In the situation in hand, as stated above, the appeal was not returned by this Court, to the petitioners, for its presentation before the proper forum, rather it was sent/remitted/transferred to the concerned learned District Court, and when filing of the appeal before this Court was within time, the learned District Court was obliged to proceed with the appeal, from the point it was sent to it and decide the same on merits.

14. If due to wrong advice or lack of knowledge, the petitioners have moved any application for condonation of delay, even then the learned Appellate Court should have realized the legal proposition that the appeal before this forum was filed within time and on its transfer, it has not become time barred, and should have not decided the application for condonation of delay, in the manner it has been decided.

15. For what has been discussed above, the revision petition in hand is accepted, the impugned judgment and decree dated 12.6.2012 passed by the

learned Additional District Judge, Taxila is set aside, with a direction to take up the appeal, hear both the parties and decide it on merits.

ARK/S-92/L Revision accepted.

2018 M L D 389
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
RIAZ AHMED---Petitioner
Versus
The STATE---Respondent

Crl. Misc. No.680-M and 728-M of 2017, heard on 4th May, 2017.

Criminal Procedure Code (V of 1898)---

----Ss. 497, 86, 86-A & 561-A---Penal Code (XLV of 1860), Ss. 324 & 109---Constitution of Pakistan, Art. 246---Attempt to commit qatl-i-amd and abetment---Bail, grant of---Tribal area---Transfer of custody---Principle---Petitioner was prosecution witness in a case registered at place J in which four persons were arrested who were facing trial---Police from tribal area wanted to arrest petitioner on the ground that he was accused in a case registered there and had been declared proclaimed offender---Petitioner filed application under S. 86, Cr.P.C. for submitting bail bonds to attend court at tribal area but Sessions Judge at place J declined to accept bail bonds---Validity---Petitioner was not principal accused and he was cited as an abettor---Petitioner, at the time of commission of occurrence, was not available at the spot---Complainant of case registered at tribal area was accused in a case registered at place J where petitioner was a prosecution witness---Stance of petitioner that case registered in tribal area was lodged with mala fide in order to prevent petitioner s party from pursuing the case registered at place J could not be thrown to winds---Such facts were sufficient for Sessions Judge at place J to exercise jurisdiction provided under second proviso to S. 86, Cr.P.C. and refusal from exercising such powers was unjustified---High Court directed the authorities to release the petitioner to approach Trial Court at tribal area and set aside the order passed by Sessions Judge at place J ---Bail was allowed in circumstances.

Ansar Nawaz Mirza, S.M. Areeb Abdul Khafid Shah Bukhari and Ch. Asif Mehmood Lakhan for Petitioner.
Sheikh Istajabat Ali, Deputy Prosecutor General for the State.
Basharat Ullah Khan for the Complainant.
Date of hearing: 4th May, 2017.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single order shall disposed of the above captioned petitions, as similar questions of law and facts are involved in the both.

2. The facts are that a case FIR No. 434 dated 25.12.2016, under Sections 324/109, P.P.C., at Police Station Batkhela, District Malakand, was got lodged by Majrooh Shahid Khan, with the precise allegations that Muhammad Riaz son of Abdul Haq had caused a firearm injury to him and that the said accused had committed the alleged occurrence, at the abetment of Riaz alias Rajoo son of Noor Hussain (present petitioner). In the said case, the petitioner was declared as a proclaimed offender, hence his perpetual non-bailable warrant of arrest was issued by the learned Sessions Judge/District Qazi, Batkhela, District Malakand. Umar Jan, Head Constable of Police Station Batkhela, District Kalakand, for execution of the warrants, had arrived at Jhelum and with assistance of the local Police, the present petitioner was arrested and produced before the learned Judicial Magistrate, Jhelum. In the said learned court, the proceedings under Section 86-A of Criminal Procedure Code (hereinafter referred to as the Code) were carried on and till completion of the codal proceedings for transfer of the petitioner to the Police Station Batkhela, vide order dated 31.03.2017, his lodgment in District Jhelum was ordered. The petitioner, through an application under Section 86 of the Code, had requested the learned Sessions Judge, Jhelum, that while receiving bail bonds, he may be released, so that he may be able to approach the competent court at District Malakand, but the learned Sessions Judge, through order dated 05.04.2017, had declined the said request. Consequently, the matters in hand.

3. Under Article 246(b) of The Constitution of Islamic Republic of Pakistan, 1973, District Malakand has been declared as Provincially Administered Tribal Area. The said Article reads as under:--

246. Tribal Areas. In the constitution---

> (a) "Tribal Areas" means the areas in Pakistan which, immediately before the commencing day, were Tribal Areas, and includes---

(i) the Tribal Areas of [Balochistan] and the [Khyber Pakhtunkhwa]; [***]

(ii) the former States of Amb, Chitral, Dir and Swat;

(iii) omitted ***]

(iv) omitted * * *]

(b) "Provincially Administered Tribal Areas" means---

(i) the districts of Chitral, Dir and Swat (which includes Kalam), [the Tribal Area in Kohistan district] Malakand Protected Area, the Tribal Area adjoining [Mansehra] district and the former State of Amb; and

(ii) Zhob district, Loralai district (excluding Duki Tehsil), Dalabandis Tehsil of Chagai District and Marri and Bugti tribal territories of Sibi district; and

(c) "Federally Administered Tribal Areas" includes

(i) Tribal Areas adjoining Peshawar district;

(ii) Tribal Areas adjoining Kohat district;

(iii) Tribal Areas adjoining Bannu district;

[(iiia)Tribal Areas adjoining Lakki Marwat district;]

(iv) Tribal Areas adjoining Dera Ismail Khan district;

[(iva) Tribal areas adjoining Tank district;]

[(v) Bajaur Agency;

(va) Orakzai Agency;]

(vi) Mohmand Agency;

(vii) Khyber Agency;

(viii) Kurram Agency;

(ix) North Waziristan Agency; and

(x) South Waziristan Agency.

Therefore, when in consequence of a warrant of arrest, issued by the learned court of the said area, the petitioner was arrested and brought before the learned Judicial Magistrate, Jhelum, he should have completed the proceedings, as required under Section 86-A of the Code, which speaks as under:--

> **"[86-A. Procedure for removal in custody to Tribal Area**. Where a person arrested under Section 85 is to be removed in custody to any place in the Tribal Area, he shall be produced before a [Magistrate] within the local limits of whose jurisdiction the arrest was made, and such Magistrate in directing the removal shall hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including the power to order the production of evidence, as if the person arrested were charged with an offence committed within the jurisdiction of such Magistrate: and such Magistrate shall direct the removal of the arrested person in custody if he is satisfied that the evidence produced before him raises a strong or probable presumption that the person arrested committed the offence mentioned in the warrant.]"

4. Section 86 of the Code, prescribes a procedure, when an accused is arrested in the above mentioned circumstances. For convenience, the said provision is reproduced hereinbelow:-

> **"86. Procedure by Magistrate before whom person arrested is brought**. (1) Such Magistrate or District Superintendent shall, if the person arrested appears to be the person intended by the Court which issued the warrant direct his removal in custody to such Court:
>
> Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent, or a direction has been endorsed under Section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent

shall take such bail or security, as the case may be, and forward the bond to the Court, which issued the warrant:

[Provided further that, if the offence is not bailable or no direction has been endorsed under Section 76 on the warrant, the Sessions Judge of the Sessions division in which the person is arrested may, subject to the provisions of Section 497 and for sufficient reasons, release the person on an interim bail on such bond or security as the Sessions Judge thinks fit and direct the person to appear by a specified date before the Court which issued the warrant and forward the bond to that Court.]

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under section 76."

5. The learned Judicial Magistrate, Jhelum, through proceedings under Section 86-A of the Code had lodged the petitioner in District Jail, Jhelum and under Section 86 of the Code, the learned Sessions Judge, Jhelum was quite competent to exercise jurisdiction, as provided under the above mentioned second proviso to the above said provision i.e. Section 86 of the Code, but he had refused to exercise his powers.

6. In the above mentioned case, the petitioner was not the principal accused, rather cited as an abettor. Admittedly, at the time of commission of the occurrence, the petitioner was not available, at the spot. It is also evident from the record that Majrooh Shahid Khan son of Gull Zareen, the complainant of the above said case is an accused in FIR No. 17 dated 09.01.2013, registered under sections 395/412, P.P.C., at Police Station Saddar Jhelum, at the instance of Abdul Haq, wherein the present petitioner is a prosecution witness. In this way, the stance of the petitioner, that the above mentioned case, at District Malakand was got lodged with mala fide, in order to prevent the petitioner's party, from pursuing the case registered at District Jhelum, should not be thrown to winds.

7. All the above mentioned facts and circumstances, were sufficient for the learned Sessions Judge, Jhelum, to exercise jurisdiction, provided under second proviso to Section 86 of the Code, hence his refusal from exercising the said powers was totally unjustified.

8. Resultantly, the instant petitions are accepted, the order dated 05.04.2017, passed by the learned Sessions Judge, Jhelum is set aside and the application under Section 86 of the Code, preferred by the petitioner, is allowed. It is directed that subject to furnishing of bail bonds, amounting to Rs.2,00,000/-, with two sureties each, in the like amount to the satisfaction of learned Sessions Judge, Jhelum, he be released from the jail. The petitioner is directed that within 15 days from the release, he should approach the competent forum at Batkhela, District Malakand, failing which the law shall take its own course.

MH/R-7/L Petition allowed.

2018 P Cr. L J 558

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

RAB NAWAZ---Petitioner

Versus

MUBRI KHAN and 4 others---Respondents

Criminal Revision No. 82 of 2017, heard on 19th April, 2017.

Penal Code (XLV of 1860)---

----Ss. 380, 448 & 411---Criminal Procedure Code (V of 1898), S. 250---Theft, house trespass and recovery of stolen property---Compensation, imposition of---Trial Court acquitted accused persons of the charge and directed complainant to pay compensation to them---Appeal against compensation was dismissed by Lower Appellate Court on the ground that appeal against acquittal was pending before High Court---Validity---Order of acquittal and order for payment of compensation by complainant were two separate orders although out of the same proceedings but were appealable through separate appeals before different forums---Proceedings of one appeal should not affect the other appeal---If against an order/judgment two remedies were provided under law, then the person concerned to avail the remedies, could approach proper forums which were to decide matters, independently, without being influenced or prejudiced by proceedings pending before other forum---Lower Appellate Court had wrongly dismissed appeal against compensation on the ground that appeal against acquittal was pending before High Court---Said court at the most could have adjourned the appeal sine die---High Court set aside the order passed by Lower Appellate Court and remanded the appeal for decision afresh---Revision was allowed in circumstances.

Raja Muhammad Faisal Ghani Janjua for Petitioner.

Naveed Ahmad Warraich, D.D.P.P. with Faisal, A.S.-I. for the State.

Respondents Nos. 1 and 3 in person.

Date of hearing: 19th April, 2017.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition calls in question the judgments dated 01.03.2014 and 26.01.2017, respectively passed by the learned Magistrate Section-30 and learned Additional Sessions Judge, Talagang, District Chakwal.

2. Through the former judgment, in case FIR No. 28, dated 11.04.2011, registered under sections 380/448/411, P.P.C., at Police Station Lawa, District

Chakwal, the respondents Nos. 1 to 4 (hereinafter referred to as the respondents) were acquitted of the charge, with a direction to the petitioner (complainant), to pay a sum of Rs.25,000/-, as compensation, under section 250, Cr.P.C., to the respondents. Whereas, through the lateral judgment, an appeal preferred by the petitioner, challenging the above said compensation has been turned down, on the sole ground, that acquittal of the respondents has been challenged by the petitioner, before this court.

3. Arguments heard and record perused.

4. Through the above mentioned judgment of the learned Trial Court, not only the respondents were acquitted of the charge, but the petitioner being complainant was also asked to pay the above said compensation under section 250, Cr.P.C., to the respondents.

5. The petitioner, against the above said decision, had availed two remedies, one through an appeal before this court, whereby acquittal of the respondents was challenged, whereas other by an appeal, before the learned Additional Sessions Judge, Talagang, questioning imposition of the above mentioned compensation, against him.

6. In order to appreciate the issue involved in the present proceeding, it would be appropriate to reproduce the relevant provisions of law i.e. sections 417 and 250, Cr.P.C., herein below:-

> **417. Appeal in case of acquittal**. (1) Subject to the provision of subsection (4), the Provincial Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.
>
> (2) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal the complainant may present such an appeal to the High Court.
>
> [(2-A) A person aggrieved by the order of acquittal passed by any Court other than a High Court, may, within thirty days, file an appeal against such order.]
>
> (3) .....
>
> (4) .....
>
> **250. False frivolous or vexatious accusations.** (1) If in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused

before a Magistrate of any offence triable by a Magistrate, and the Magistrate, by whom the case is heard [xxxxx] acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may by his order of [xxxxx] acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or if such person is not present direct the issue of a summons to appear and show cause as aforesaid.

(2) The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious, may, for reasons to be recorded, direct that compensation to such amount not exceeding [twenty five thousand rupees] or if the Magistrate is a Magistrate of the third class not exceeding [two thousand and five hundred] rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.

(2-A) .....

(2-B) .....

(2-C) .....

(3). A complainant or informant who has been ordered under subsection (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal form the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) When an order for payment of compensation to an accused person is made, in case which is subject to appeal under subsection (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.

7. It is manifest from the above mentioned provisions of law that if an accused is acquitted, then under section 417, Cr.P.C., his acquittal through an appeal

can be challenged before this court. In case, compensation under section 250(2), Cr.P.C., is imposed, then under subsection (3) of the said provision, the aggrieved may file an appeal, before the competent forum which in the present case is Sessions Court concerned. The procedure laid down by section 250, Criminal Procedure Code is quite distinct from the procedure for acquitting an accused. The language of the section itself contemplates separate proceedings. Order of acquittal and order for payment of compensation by complainant, are two separate orders although have born out of same proceedings, but are appealable through separate appeals before different forums. Proceedings of one appeal should not affect the other appeal. There is no denial of the fact that if against an order/judgment two remedies are provided under the law, then the concerned to avail the remedies, may approach the proper forums which should decide the matters, independently, without being influenced or prejudiced from the proceedings pending before other forum. Thus stance of the learned appellant court that as an appeal against acquittal was pending before this court, hence appeal before it was not competent, was quite unjustified because at the most the learned Appellant Court should have adjourned the appeal sine die. Furthermore, it has been told that the appeal against acquittal has been dismissed from this forum.

8. Resultantly, the above said judgment dated 26.01.2017 of the learned Additional Sessions Judge, Talagang, District Chakwal is set aside, with a direction to take up the appeal and decide it on merit.

9. Disposed of.

MH/R-6/L Revision allowed.

PLJ 2018 Cr.C. (Lahore) 163 (DB)

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI AND JAMES JOSEPH, JJ.**

DILNAWAZ @ JAVED--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 370-B of 2015, decided on 17.2.2015.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail after arrest--Admitted--Allegation of--Charas was recovered--*Charas* was weighing 01-KG and 500-grams--In application moved by police before Area Magistrate for judicial remand of petitioner, recovered substance has been described to be 01-KG and 05-grams--In rough site-plan prepared on day of occurrence, quantity of alleged recovered substance has been written as 01-KG and 10-grams--Deputy Prosecutor General has failed to justify above mentioned alarming contradictions regarding weight of alleged narcotic substance--He has frankly stated that till now above mentioned contradictions have not been cured and as such are available on record--Above mentioned facts and circumstances, have made case to be a fit one for grant of bail within meaning of Section 51 of Act *ibid*--Petitioner is behind bars, hence no more required for any further investigation--As per record maintained by police, he does not have any previous criminal antecedent--Bail was admitted. [Pp. 164 & 165] A & B

Syed Muhammad Jaffar Tayyar, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, Deputy Prosecutor General for State.

Date of hearing: 17.2.2015.

ORDER

The petitioner, namely, Dilnawaz *alias* Javed, seeks post arrest bail in case F.I.R. No. 575, dated 12.08.2014, registered under Section 9(c) of the Control of Narcotic Substances Act, 1997 at Police Station Farid Town, District Sahiwal.

2. The precise facts, as per FIR, are that when upon a spy information, the petitioner was over powered and searched by the police party, from a shopping bag which was with him, *charas* was recovered, which on weighing became 01-KG and 500-grams.

3. Arguments heard. Record perused.

4. In the FIR, recovery of *charas* weighing 01-KG and 500-grams has been alleged but in the application moved by the police before the learned Area Magistrate for judicial remand of the petitioner, the recovered substance has been described to be 01-KG and 05-grams. In the rough site-plan prepared on the day of occurrence, the quantity of the alleged recovered substance has been written as 01-KG and 10-grams. The learned Deputy Prosecutor General has failed to justify the above mentioned alarming contradictions regarding weight of the alleged narcotic substance. He has frankly stated that till now the above mentioned contradictions have not been cured and as such are available on the record.

5. The above mentioned facts and circumstances, in our view, have made the case to be a fit one for grant of bail within the meaning of Section 51 of the Act *ibid*. The petitioner is behind the bars, hence no more required for any further investigation in this case. As per the record maintained by the police, he does not have any previous criminal antecedent.

6. Resultantly, the petition in hand is accepted and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (rupees two lac only) with one surety in the like amount to the satisfaction of learned trial Court.

7. A copy of this order be sent to the District Police Officer, Sahiwal, who shall note the above mentioned difference, in the weight of the alleged recovered narcotic substance, in the above mentioned documents. He shall probe if above mentioned has been made deliberately to give undue concession to the accused and shall not spare any one, who is found at-fault.

(A.A.K.) Bail admitted

PLJ 2018 Cr.C. 615

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

SATTAR SHAH--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 292-B of 2018, decided on 21.2.2018.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 496-A, 376 380, 381-A & 411--Bail after arrest, grant of--Ground--Further inquiry--Allegation of--Petitioner along with his co-accused, had administered some intoxicant to son of complainant and abducted wife of complainant and also taken away motorycle, gold ornaments and cash--Abduct lady herself had attend judicial magistrate and requested that she had danger from her husband, she may be sent to Dar-ul-Aman, she has never mischief by present petitioner--Son of complainant (intoxicant) was not medically examined hence allegation had gone without medical support--Case was of further inquiry--Bail was allowed. [P. 616] A, B & C

Syed Muhammad Jaffer Tayyar, Advocate for Petitioner.

Mirza Abid Majeed, DPG for State.

Pir Qamar-ul-Hasnain Chishti, Advocate for Complainant.

Date of hearing: 21.2.2018.

ORDER

Through the instant petition, the petitioner namely Sattar Shah seeks post arrest bail in case FIR No. 305, dated 23.08.2017, registered under Sections 496-A/376/380/381-A/411, PPC, at Police Station Sahoka, District Vehari.

2. The precise allegations against the petitioner, as per FIR, are that he along with his co-accused, had administered some intoxicant to Ali Haider, son of the complainant and abducted *Mst.* Sidra Bibi, wife of the complainant and had also taken away Honda motorcycle, gold ornaments and cash of Rs. 47,500/-, belonging to the complainant.

3. Arguments heard and record perused.

4. It is alleged that Abdul Wahid, Mukhtar Ahmad, Ibrahim., Zulfiqar Ali and two unknown have also committed the alleged occurrence, but Mukhtar Ahmad, Ibrahim, Zulfiqar Ali, Ismail Shah and Hasnain Shah have been granted pre-arrest bail, by this Court, through order dated 07.12.2017, passed in Crl.Misc. No. 6946-B/2017. The lady

herself had attended the learned judicial Magistrate, Layyah, on 25.08.2017 and requested that as she had danger from her husband (complainant), hence she may be sent to Dar-ul-Aman, Consequently, she was dispatched to Dar-ul-Aman, where she remained till 29.08.2017, whereafter, she again requested the learned judicial Magistrate for (sic) from Dar-ul-Aman and consequently she was let off. At both the above mentioned occasions, she never disclosed any mischief by the present petitioner or any other accused, therefore her stance, given in her statements under Section 161 & 164 Cr.PC, shall be evaluated during the trial. Ali Haider, to whom intoxicant was allegedly administered, was not medically examined, hence the said allegation had gone without any medical support. The matter, for investigation, had gone to DIB and it was found that there was no role of the petitioner, in the alleged occurrence.

5. All the above mentioned facts and circumstances, lead to the conclusion, that there are grounds of further inquiry into the guilt of the petitioner, within the meaning of sub-section(2) of Section 497 Cr.PC. He is behind the bars, hence no more required to the Police, for further investigation in this case. Furthermore, as per record maintained by the Police, he is previously a non-convict.

6. Resultantly, the petition in hand is allowed and the petitioner is admitted to bail, subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount to the satisfaction of the learned trial Court.

(M.N.K.) Bail allowed

PLJ 2018 Cr.C. 628

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

ABDUL WAHID--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 1224-B of 2018, decided on 13.3.2018.

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

----Ss. 497--Pakistan Penal Code, (XLV of 1860), Ss. 496-A/376/ 380/381-A/411--Post arrest bail, allowed--Principle of consistency--Complainant alleged that petition along with his co-accused had administered some Intoxicant to son of complainant and abducted wife of complainant and taken away motor cycle, gold ornaments and cash--Already co-accused "Sattar Shah" having same allegation has been admit to bail--Petitioner also deserve same treatment in this way principle of consistency is fully applicable to case of petitioner--Bail is allowed. [P. 629] A & B

M/s. Syed Jaffer Tayyar Bukari and Naeem Ullah Khan, Advocate for Petitioner.

Mr. Shaukat Ali Ghauri, APG for State.

Date of hearing: 13.3.2018.

ORDER

Through the instant petition, the petitioner namely Abdul Wahid seeks post arrest bail in case FIR No. 305, dated 23.08.2017, registered under Sections 496-A/376/ 380/381-A/411, PPC, at Police Station Sahoka, District Vehari.

2. The precise allegations against the petitioner, as per FIR, are that he along with his co-accused, had administered some intoxicant to Ali Haider and abducted *Mst.* Sidra Bibi; the accused had also taken away motorcycle, gold ornaments and cash of Rs. 47,500/-, belonging to the complainant.

3. Arguments heard and record perused.

4. At the very outset, the learned counsel for the petitioner has argued that a co-accused namely Sattar Shah, having the same allegations and role as against the petitioner, has been admitted to bail, through order dated 21.02.2018, passed in Crl.Misc. No. 292-B/2018, hence the petitioner also deserves the same treatment.

5. When the above mentioned proposition has been put to the learned Prosecutor in attendance, he has failed to draw any major distinction between

the case of the present petitioner and his above named co-accused. In this way, principle of consistency is fully applicable to the case of the petitioner, hence he is entitled to the same relief, as has already been extended to his co-accused.

6. Resultantly, on the basis of the above said principle, the petition in hand is allowed and the petitioner is admitted to bail, subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount to the satisfaction of the learned trial Court.

(M.N.K.) Bail allowed

PLJ 2018 Lahore 939 (DB)

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI AND ASJAD JAVAID GHURAL, JJ.**

MUHAMMAD ISMAIL--Petitioner

versus

SPECIAL JUDGE, ANTI-TERRORISM COURT, D.G. KHAN and 2 others--Respondents

W.P. No. 3626 of 2017, decided on 12.3.2018.

Anti Terrorism Act, 1997 (XXVII of 1977)--

----S. 23--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 336(B)--Constitution of Pakistan, 1973--Art. 199--Application for trial in Court of ordinary jurisdiction--Dismissed--Lodging of FIR--Applicability of Section 336-B of, PPC--Question of--Whether from attending facts and circumstances as well as material available on record offence, defend under Section 336-A, which has been made punishable under Section 336-B is made out or otherwise--Acid was poured on face of dead body--Concealment of identification of dead body--It can safely be said that if a corrosive substance is thrown on a dead body, it does amount to hurt, as defined under Section 332 or 336-A, PPC and punishable under Section 336-B, PPC--In situation in hand, as stated above, acid has been poured on dead body, so that its identity may be concealed--Therefore at most offence under Section 201, PPC may be applicable and Section 336, PPC would not attract, and as such case does not come, within jurisdiction of Anti-Terrorism Court--Petition was accepted.

[P. 941] A & B

Mr. Muhammad Ashraf Qureshi, Advocate for Petitioner.

Mehr Nazar Abbas Chawan, Asstt. Attorney General for State.

Mr. Abdul Rehman Tariq Khand, Advocate for Respondent No. 2.

Date of hearing: 12.3.2018.

JUDGMENT

Muhammad Tariq Abbasi, J.--This writ petition, calls in question, the order dated 15.02.2017, passed by the learned Judge Anti-Terrorism Court, Dera Ghazi Khan, whereby application under Section 23 of Anti-Terrorism Act, 1997 **(hereinafter referred to as the Act),** moved by the petitioner, has been dismissed.

2. The FIR No. 580, dated 24.12.2012, under Section 302, PPC, at Police Station Kot Mithan, District Rajanpur, was got lodged by Umer Khan S.I. with the precise contentions that dead body of a woman having strangulation in her neck was recovered and that forehead, left cheek and feet of the body were also cut by some animal.

3. The case was investigated when the present petitioner and six others, namely, Muhammad Saleem, Rana Mehmood Ahmad, Muhammad Ahmad Faiz Rasool, Muhammad Bilal, Ghulam Mustafa and Qari Ghulam Abbas, were found to be involved, hance arrayed as accused. It was found that in the occurrence acid was also used, therefore offence under Section 336-B, PPC, was added and consequently matter was referred to the learned Judge Anti-Terrorism Court, Dera Ghazi Khan.

4. During proceedings before the Anti-Terrorism Court, the petitioner, through an application under Section 23 of the Act had requested that as from the attending facts and circumstances, applicability of Section 336-B, PPC, was not found, hence the case was triable by an ordinary Court and as such, it may be transmitted to the said Court. The learned Judge Ant-Terrorism Court, through the impugned order had turned down the above said request of the petitioner. Resultantly, the writ petition in hand.

5. The learned counsel for the petitioner has re-iterated the grounds taken in the writ petition. Whereas the learned Law Officer as well as the learned counsel for the Respondent No. 2/complainant has opposed the petition, while holding the impugned order to be justified and call of the day.

6. Arguments advanced by all the sides have been heard and the record has been perused.

7. The main question before us is, whether from the attending facts and circumstances as well as material available on the record, the offence, defined under Section 336-A, PPC, which has been made punishable under Section 336-B, PPC, is made out or otherwise. The said provisions read as under:

> **"336-A. Hurt caused by corrosive substance**. Whoever with the intention or knowingly causes or attempts to cause hurt by means of a

corrosive substance or any substance which is deleterious to human body when it is swallowed, inhaled, comes into contact or received into human body or otherwise shall be said to cause hurt by corrosive substance."

"336-B. Punishment for hurt by corrosive substance. Whoever caused hurt by corrosive substance shall be punished with imprisonment for life or imprisonment of either description which shall not be less than fourteen years and a minimum fine of one million rupees."

8. In the above mentioned provisions, hurt to a human being is stated. Therefore, it is clear that if by using of a corrosive substance, including acid, any hurt is caused to a human being, only then the above mentioned provisions will come in field.

9. Evidence of Mst. Hameeda Mai complainant (PW-5) and Muhammad Saeed (PW-6), is available on the record, whereby both have deposed that after strangulation, dead body of *Mst.* Kalsoom was thrown in a sugarcane crop and to conceal its identity, acid was poured on face of the body. Meaning thereby that corrosive substance i.e. acid was poured on the dead body of the above named lady.

10. Another point before the Court is that when a harm is caused to a dead body, through a corrosive substance, even then the accused shall be dealt with, under the above mentioned provisions or otherwise.

"Hurt" has been defined, in Section 332, PPC, in the following words:--

"332. Hurt. (1) Whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables, disfigures, defaces or dismembers any organ or the body or part thereof of any person without causing his death, is said to cause hurt."

11. Plain reading of the said provision suggests that if hurt is caused to a living human being, only then it shall be considered as an injury and punishable accordingly. Therefore, it can safely be said that if a corrosive

substance is thrown on a dead body, it does amount to hurt, as defined under Section 332 or 336-A, PPC and punishable under Section 336-B, PPC.

12. In the situation in hand, as stated above, the acid has been poured on the dead body, so that its identity may be concealed. Therefore at the most offence under Section 201, PPC may be applicable and Section 336, PPC would not attract, and as such the case does not come, within jurisdiction of the Anti-Terrorism Court.

13. As result of what has been discussed above, the instant writ petition is ***accepted***, the impugned order dated 15.02.2017 is ***set-aside*** and reversed. Meaning thereby that application under Section 23 of the Act, moved on behalf of the petitioner, is *allowed*, with a direction to the learned Judge Anti-Terrorism Court, Dera Ghazi Khan, to transfer the file of the case to the Court of ordinary jurisdiction.

(Y.A.) Petition accepted

2018 Y L R Note 18
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
SHER AFZAL and others---Appellants
Versus
The STATE and others---Respondents

Criminal Appeal No.91-J and Criminal Revision No.199 of 2016, heard on 20th April, 2017

Penal Code (XLV of 1860)---

----Ss.302, 148 & 149---Qatl-i-amd, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---Prosecution case was that the accused-appellant and co-accused armed with fire-arms had committed murder of the deceased---Ocular account was furnished by witnesses including complainant---Said witnesses stated the details of occurrence with the specific role attributed to each accused---Record showed that five accused persons were implicated in the case---Co-accused, in view of role and charge, as narrated by the witnesses, was convicted and sentenced to death---Co-accused filed appeal against his conviction and sentence, which was allowed and acquitted by disbelieving the eye-witnesses---Eye-witnesses having already been disbelieved about involvement of co-accused, for believing them against the accused-appellant, some strong and independent corroboration was required, which in the present case was missing---If evidence of eye-witnesses were excluded from the account, except absconsion of accused-appellant, nothing against him was available on the record---Mere absconsion could not be considered as a proof of guilt of the accused---Circumstances and facts made the case and the charge against the accused-appellant doubtful, benefit of which would resolved in favour of accused-appellant, not as a matter of grace or concession but as of right---Accused-appellant was acquitted in circumstances by setting aside conviction and sentence recorded by the Trial Court. [Paras. 2, 4, 5, 6 & 7 of the judgment]

Muhammad Akram v. The State 2012 SCMR 440; Rasool Muhammad v. Asal Muhammad and another 1995 SCMR 1373 and Muhammad Khan and another v. The State 1999 SCMR 1220 rel.

Raja Ghaneem Aabir Khan for Appellants.
Sheikh Istajabat Ali, Deputy Prosecutor General for the State.
Raja Muhammad Nasrullah Waseem for the Complainant.
Date of hearing: 20th April, 2017.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--This single judgment shall decide the above captioned matters, as both are outcome of same judgment dated 03.05.2.016, passed by the learned Additional Sessions Judge, Jhelum, whereby in case FIR No. 16, dated 30.01.2010, registered under sections 302/ 148/149, P.P.C., at Police Station Chotala, District Jhelum, Sher Afzal (hereinafter referred to as the appellant), was convicted under section 302(b), P.P.C. and sentenced to imprisonment for life, with compensation of Rs.2,00,000/-, payable to legal heirs of the deceased, failing which to further undergo simple imprisonment for six months. The benefit of section 382-B, Cr.P.C., was also extended in favour of the appellant.

2. The above mentioned case was registered, with the precise allegations, that the appellant as well as his co-accused, namely Shahzad alias Shadu, Abdul Waheed, Ibrar, Mazhar Hussain and Talib Hussain had attacked at Rajjab Hussain (hereafter referred to as the deceased) and caused him following injuries:--

i) Shahzad alias Shadu (murdered during trial) made a burst of Kalashnikov, which landed at pelvis of the deceased.

ii) Sher Afzal alias Sheri (present appellant), with 244 bore rifle, had caused injury on left shin of the deceased.

iii) Abdul Waheed (co-accused sentenced to death by the trial court, but acquitted in appeal), with 24 bore rifle had caused injury on left thigh and knee of the deceased.

iv) Ibrar (co-accused acquitted by the learned trial court, with 30 bore pistol, had caused an injury on left wrist of the deceased.

v) Mazhar Hussain and Talib Husain (co-accused) since acquitted by the learned trial court), while armed with firearms, remained with him at the spot.

The alleged prosecution story was that the above named accused, while committing the above mentioned role, were seen by Rashid Mehmood complainant (PW-12) and Abid Husain (PW-13).

3. As stated above, Shahzad alias Shadu (co-accused) was murdered during the trial, hence trial to his extent was abated. Ibrar and Mazhar Hussain (co-accused), having the above mentioned role and charge, were acquitted, through judgment dated 07.05.2012, passed by the Additional Sessions Judge, Jhelum, whereas Talib Hussain co-accused, with the charge mentioned above, was relieved by the learned Trial Court, through judgment dated 26.10.2010.

4. Abdul Waheed co-accused, having the above mentioned allegations, role and charge, through judgment dated 07.05.2012, passed by the learned Trial Court, was convicted and sentenced to death. He had challenged his conviction, before this court, through Crl. Appeal No. 238/2012, whereas the State had forwarded Murder Reference bearing No. 49/2012. Both were decided by a learned Division Bench of this court on 25.05.2016, whereby the appeal was accepted and the above named convict was acquitted of the charge, under the following reasons and grounds:--

> "According to the prosecution, what brought the deceased in the company of eye-witnesses, at the venue was a proposed settlement/compromise with the accused at their residence and in this backdrop, he confronted the appellant and co-accused at 8:25 p.m. in the month of January; it related to a case of robbery registered at the instance of the appellant wherein the deceased was a nominated accused. The manner in which the deceased was allegedly induced to visit his opponent at an odd hour of night for the stated purpose is far from being plausible and even if it is believed to have actually happened, there was no occasion for Shahzad alias Shadu co-accused to inquire from the appellant about his identity. Equally unbelievable is the receipt of multiple fire shots by the deceased with an automatic weapon while he was statedly grappling with the appellant as the latter could not possibly escape consequence thereof; Sher Afzal alias Sheri co-accused as well as the appellant were alleged to have made burst fire shots on to the deceased, hardly needed when he was already hit Shahzad alias Shadu, so was absolutely unnecessary and purposeless for Ibrar accused to hit the deceased with a single shot of

30-caliber pistol. Presence of Rashid Mehmood (PW-11) and Abid Hussain (PW-12) so as to witness the occurrence and leave the spot unscathed is also outside the ambit of probability of their presence at the scene. Shifting of the deceased to DHQ Hospital Rawalpindi by the witnesses when he was already lying dead is yet another intriguing aspect of the case. Argument that occurrence did not take place as alleged seemingly is not entirely beside the mark as the circumstances referred to above admit a real possibility suggestive of a situation incompatible with the story related in Ex.PL. Acquittal of Mazhar Hussain, Ibrar Hussain and Talib Hussain co-accused, warrants a more cautious and careful scrutiny of prosecution evidence qua the appellant as Ibrar Hussain accused is assigned an effective shot to the deceased."

5. From the above mentioned findings, it is clear that the above named eye-witnesses, were disbelieved. In this way, when the alleged eye-witnesses have already been disbelieved qua involvement of the above named co-accused, then for believing them against the appellant, some strong and independent corroboration is required, which in the present case is missing. In this regard, reliance may be made to the case titled "Muhammad Akram v. The State" reported as 2012 SCMR 440, wherein the august Supreme Court of Pakistan has held as under:--

> "Except for the oral statements of eye-witnesses there is nothing on record which could establish the presence of both the eye-witnesses at the spot and as their presence at the spot appears to be doubtful, no reliance could be placed on their testimonies to convict the appellant on a capital charge. Since the same set of evidence has been disbelieved qua the involvement of Muhammad Aslam, a such, the same evidence cannot be relied upon in order to convict the appellant on a capital charge as the statements of both the eye-witnesses do not find any corroboration from any piece of independent evidence."

6. The learned Prosecutor as well as the learned counsel for the complainant have frankly conceded that if the above named eye-witnesses are excluded from the account, then except absconsion of the appellant, nothing else against him is available on the record. It has been held by the superior courts of the country in a number of judgments that mere absconsion could not be

considered as a proof of guilt of an accused. If any case law is needed to fortify this view, reference could be made to the case of "Rasool Muhammad v. Asal Muhammad and another" (1995 SCMR 1373), where the Hon'ble Supreme Court of Pakistan observed as under:--

> "Furthermore, disappearance of a person named as a murderer/culprit after the occurrence, is but natural, whether named rightly or wrongly. Abscondence per se is not a proof of the guilt of an accused person."

7. All the above mentioned facts and circumstances, to my mind, have made the prosecution case and the charge against the appellant highly doubtful and as such he is entitled to due benefit, not as a matter of grace or concession, but as of right. In this regard, I am fortified by the dictum laid down in the case titled "Muhammad Khan another v. The State" reported as 1999 SCMR 1220 relevant para whereof reads as under:--

> "It is axiomatic and universally recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be unsafe to rely on the ocular evidence which has been moulded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct perspective."

8. Resultantly, the impugned judgment ending into conviction and sentence of the appellant could not be termed as justified. Consequently, the appeal in hand is accepted, the impugned judgment is set aside and the appellant is acquitted of the charge, while extending him the benefit of doubt. He is in custody, hence it is directed that be leased forthwith, if is not required to be

detained in any other case. The disposal of the case property shall be as directed by the learned Trial Court, in the impugned judgment.

9. As a consequence, the Crl. Revision No. 199/2016, for enhancement of sentence of the appellant Sher Afzal, filed by the complainant (Rashid Mahmood), for the foregoing reasons, is without substance, hence dismissed.

JK/S-43/L Appeal accepted.

2018 Y L R 985

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

Mst. PARVEEN AKHTAR and 4 others---Petitioners

Versus

JUDICIAL MAGISTRATE SECTION 30 and another---Respondents

Crl. Misc. No.1056-Q of 2017, heard on 6th June, 2017.

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

----Ss. 200, 204 & 561-A---Private complaint---Issuance of process against accused---Summoning of accused by trial Court to face trial---Powers and jurisdiction of High Court---Scope---Powers and jurisdiction of High Court under S. 561-A, Cr.P.C. were discretionary in nature and were exercised only if the Court was satisfied that no adequate remedy was provided by law---Exercise of powers under S. 561-A Cr.P.C. was an exception and not a rule. Chaudhary Munir v. Mst. Surriya and others PLD 2007 SC 189 rel.

(b) Criminal trial---

----Two versions---Scope---When there were two versions of an incident, one version put forward by one party and counter version by its adversary; Trial Court while assessing evidence brought on record by the parties had to keep both versions in juxtaposition and then arrive at a final conclusion.

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

----Ss. 561-A, 200 & 204---Penal Code (XLV of 1860), Ss. 337-F(i), 427, 447, 506, 147 & 149---Private complaint---Issuance of process against accused---Summoning of accused by Trial Court to face trial---Powers and jurisdiction of High Court---Scope---Respondent had filed a private complaint against the petitioners and six others---Trial Court had summoned the petitioners and the others to face the trial---Petitioners contended that respondent had filed the private complaint as a counter blast of FIR got lodged by the petitioners and as such the complaint was not maintainable---Validity---Filing of complaint, recording cursory evidence in it and then on the basis of available evidence, order for summoning of an accused, could not be termed as abuse of process of law---Such like proceedings could not be challenged under S. 561-A, Cr.P.C. but it might be called in question, through a revision petition and that too, before the revisional court of first instance---

Petitioners, instead of adopting the legal mode of challenging the summoning order, through a revision petition before the competent court, had sought quashing of the said order by way of petition under S. 561-A, Cr.P.C., which was not competent and maintainable, thus dismissed in limine.

Syed Zulfiqar Abbas Naqvi for Petitioners.
Sheikh Istajabat Ali Deputy Prosecutor General for the State.
Date of hearing: 6th June, 2017.

ORDER

MUHAMMAD TARIQ ABBASI, J.--This petition, filed under section 561-A, Cr.P.C. carries the following relief:--

> "It is therefore, respectfully prayed that the instant petition may ordered to be accepted and the order dated 10.04.2017 may ordered to be set aside, in the best interest of justice."

2. Brief facts of the case are that the respondent No.1 has filed a private complaint under sections 337-F(i)/427/ 447/506/147/149, P.P.C., against the petitioners and six others in which the learned Judicial Magistrate Section-30, Jand, District Attock, through order dated 10.04.2017, has summoned the petitioners and the others, named in the complaint, to face the trial. Hence the petition in hand.

3. Arguments heard. Record perused.

4. It is noted that the petitioners have invoked the jurisdiction of this Court under section 561-A, Cr.P.C. The said powers and jurisdiction are discretionary in nature and are exercised only if the Court is satisfied that no adequate remedy is provided by law. The principles and law enunciated by the august Supreme Court of Pakistan has narrowed down the scope of the exercise of power under the above mentioned provision to an extent that the same can only be exercised sparingly and under extraordinary and exceptional circumstances. Exercise of powers under section 561-A, Cr.P.C. is an exception and not a rule. The Apex Court in a number of cases had laid down a criteria for interference of the High Court, in exercise of its jurisdiction under section 561-A, Cr.P.C. which are summarized as under:--

(i) The said provision should never be understood to provide an additional or an alternate remedy nor could the same be used to over-ride the express provision of law.

(ii) The said provision can ordinarily be exercised only where no provision exists in the Code to cater for a situation or where the Code offers no remedy for the redress of a grievance.

(iii) The inherent powers can be invoked to make a departure from the normal course prescribed only in exceptional cases of extraordinary nature and reasons must be offered to justify such a deviation.

The Hon'ble Supreme Court of Pakistan while dealing with the question of exercise of jurisdiction under the above mentioned provision of law, in the case titled "Chaudhary Munir v. Mst. Surriya and others" reported as PLD 2007 Supreme Court 189, held as under:--

> "....The powers as conferred upon High Court in section 561-A, Cr.P.C. being extraordinary in nature must be exercised sparingly with utmost care and caution and it should not be exercised in a casual and cursory manner because inherent jurisdiction as conferred upon the High Court pursuant to the provisions as enumerated in section 561-A, Cr.P.C. are neither "alternative" nor "additional" in its character and is to be rarely invoke only in the interest of justice so as to seek redress of grievances for which no other procedure is available and that the provisions should not be used to obstruct or divert the ordinary course of criminal procedure."

5. The contention of the learned counsel for the petitioners that the respondent No. 1 has filed the private complaint as a counter blast of FIR No. 194 dated 12.12.2012 got lodged by the petitioners' party and as such, the said complaint is not maintainable, is also without any substance because it is well settled proposition that when there are two versions of an incident, one version put forward by one party and counter version by its adversary, the trial Court while assessing evidence brought on record by the parties has to keep both versions in juxtaposition and then arrive at a final conclusion.

6. The mere claim of innocence by an accused could never be considered sufficient to justify such a departure from normal procedure because if this is so permitted then every accused would opt to stifle the prosecution and to have his guilt or innocence determined under section 561-A, Cr.P.C. The

result would be decisions of criminal trials in a summary and cursory manner rendering the trials as a superfluous activity. This never was and could never been the intention of the law maker in adding section 561-A to the Code. Inherent powers can be invoked to make a departure from the normal course prescribed by law only and only in exceptional cases of extraordinary nature so that the powers meant to prevent the abuse of process of law, are not abused, themselves.

7. Reverting back to the present case, filing of a private complaint, recording cursory evidence in it and then on the basis of available evidence, order for summoning of an accused, could not be termed as abuse of process of law. In this way, such like proceedings, could not be challenged under section 561-A, Cr.P.C, rather may be called in question, through a revision petition and that too, before the revisional court of first instance. The petitioners, instead of adopting the above mentioned legal mode of challenging the summoning order, through a revision petition before the competent court, are seeking quashing of the said order by way of the instant petition under Section 561-A, Cr.P.C, which being not competent and maintainable, is dismissed in limine.

JK/P-14/L Revision dismissed.

2019 C L C Note 27

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

Malik ZAHEER ABBAS---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No. 1970 of 2013, decided on 15th May, 2014.

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

----S. 15---Ejectment of tenant---Wilfull default in payment of monthly rent---Scope---Oral tenancy agreement---Scope---Petitioner/tenant contended that Rent Tribunal had wrongly dismissed his application to contest the ejectment petition filed by the respondent/landlord---Respondent contended that from the very beginning of the tenancy the petitioner was irregular towards payment of monthly rent---Validity---Record revealed that the Rent Tribunal had dismissed the application of the petitioner to contest the ejectment petition on the ground that he (petitioner) had failed to give any proof regarding payment of the monthly rent---In case of oral agreement, the tenancy was from month to month and when not extended/accepted by the landlord, the same would have been terminated---Findings of the Rent Tribunal were on the basis of correct appreciation and evaluation of the available material and the law on the subject---High Court observed that when the matter in shape of an appeal came before the District Court, again both the parties were heard, the facts and circumstances of the case were re-visited, law on the subject was considered and as no defect in the order passed by the Rent Controller was found, the appeal was dismissed---No illegality or infirmity having been noticed in the concurrent findings passed by the two Courts below, constitutional petition was dismissed accordingly.

Sh. Muhammad Matee-ur-Rehman for Petitioner.

Naureen Kausar Mughal for Respondent No.3.

ORDER

MUHAMMAD TARIQ ABBASI, J.---By way of this writ petition, the order dated 15.1.2013, passed by the learned Special Judge (Rent), Rawalpindi and the judgment dated 31.8.2013 passed by the learned Additional District Judge, Rawalpindi have been called in question.

2. Through the above mentioned order, in an ejectment petition, filed by the respondent No. 3 against the petitioner, the application for leave to contest, moved by the petitioner, has been dismissed. Whereas through the above mentioned judgment, an appeal preferred by the petitioner against the above said order of the learned Rent Tribunal has also been turned down.

3. Arguments heard and record perused.

4. The record shows that the respondent No. 3 had filed the ejectment petition, against the petitioner, in respect of the house described in the petition. The grounds were that the house was obtained by the petitioner from respondent No. 3 in the month of August, 2011 on monthly rent of Rs.6,000/-; that from the very beginning, the petitioner was irregular towards payment of the monthly rent and ultimately from May, 2012, he failed to make the payment of the monthly rent, despite the fact that in the month of August, 2012, the tenancy had expired.

5. The petitioner appeared before the learned Rent Tribunal and filed an application, whereby he sought leave to contest the ejectment petition. But the learned Rent Tribunal had dismissed the same through the order dated 15.1.2013, on the grounds that the petitioner had failed to give any proof regarding payment of the rent as claimed in the ejectment petition and that in case of oral agreement, the tenancy was from month to month and when nor extended or accepted, by the respondent No. 3, it had been terminated.

6. It has been observed that the above mentioned findings of the learned Rent Tribunal were on the basis of correct appreciation and evaluation of the material available before it and the law on the subject. When the matter in shape of an appeal came before the learned Additional District Judge, again both the parties were heard, the facts and circumstances of the case were re-visited and law on the subject was considered and as no defect in the order passed by the Special Judge (Rent) was found, the appeal was dismissed.

7. No defect of any nature in the order/judgment passed by the learned courts below could be pointed out or observed, hence the said concurrent findings are not interferable in writ jurisdiction and as such the writ petition in hand is dismissed.
MQ/Z-7/L Petition dismissed.

2019 P Cr. L J 883
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
ASAD NAWAZ---Petitioner
Versus
ZULFIQAR AFZAL KHAN and others---Respondents

Criminal Revision No. 191 of 2017, heard on 21st December, 2017.

Criminal Procedure Code (V of 1898)---
----S. 540---Qanun-e-Shahadat (10 of 1984), Arts. 132 & 133---Penal Code (XLV of 1860), S. 302---Re-examination of witness before cross-examination---Petitioner was aggrieved of order passed by Trial Court allowing reexamination of witness prior to cross-examination---Validity---Procedure prescribed through S. 540, Cr.P.C. and Arts. 132 & 133 of Qanun-e-Shahadat, 1984 was quite different---Court was empowered under S. 540, Cr.P.C. that while realizing appropriate and necessary, could call and examine a person or re-examine a witness who had already been examined---Mode and order was not provided under S. 540, Cr.P.C. under which examination of a witness should be carried out---Provisions of Art. 132 of Qanun-e-Shahadat, 1984 defined classes of examination and Art. 133 of Qanun-e-Shahadat, 1984 prescribed mode by which examination-in-chief, cross-examination, re-examination and re-cross-examination should be recorded---Trial Court was justified in allowing re-examination of witness but its intention to re-examine witness prior to cross-examination by defence was not as per requirements---High Court directed that firstly, cross-examination of witness be got conducted and thereafter he should be re-examined and if defence wanted to re-cross examine him, same be allowed---Petition was disposed of accordingly.

Malik Waheed Anjum for Petitioner.

Sh. Istajabat Ali, D.P.P. with Dil Pazeer, ASI for the State.

Tanvir Iqbal Khan for Respondent No.1.

Date of hearing: 21st December, 2017.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition calls in question, the order dated 09.09.2017, passed by the learned Additional Sessions Judge, Hassan Abdal, District Attock, whereby while accepting

application under section 540, Cr.P.C., moved by the prosecution, re-examination of Dr. Ishtiaq Hussain (PW-6) has been allowed.

2. The learned counsel for the petitioner has argued that act of the learned trial court, for allowing re-examination of the above named witness, prior to cross-examination by the defence i.e. petitioner's party, being against the procedure and law, could not be appreciated, hence may be set aside.

3. The learned counsel appearing on behalf of respondent No. 1 has contended that section 540, Cr.P.C. fully empowers a court to re-examine a witness, hence the impugned order, whereby re-examination of the above named PW-6 has been directed, is quite in accordance with law. The learned Prosecutor has supported the contentions made by the learned counsel for respondent No. 1.

4. Arguments of all the sides have been heard and the record has been perused.

5. During the trial, in case FIR No. 76, dated 14.03.2015, registered under sections 302/34, P.P.C., at Police Station Saddar Hassan Abdal, District Attock, examination-in-chief of Dr. Ishtiaq Hussain as PW-6, was recorded on 10.04.2017 and cross-examination was reserved for 17.04.2017. Thereafter, on 02.05.2017, the prosecution, through an application under section 540, Cr.P.C., had sought re-examination of the above named witness, on the grounds that a statement, allegedly made by the deceased Irfan Afzal Khan (then injured), before the Police, in the hospital was signed by the said doctor, hence to bring the said fact and the statement on the record, his re-examination was necessary. The learned trial court, through the impugned order, had allowed the above said application and granted the requisite permission.

6. In Criminal Procedure Code, 1898 (hereinafter referred to as the Code), Section 540 deals with a procedure, under which a person can be called and recorded as a witness. The said provision reads as under:-

"540. Power to summon material witness or examine persons present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or

examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

7. In Qanun-e-Shahadat Order, 1984 (hereinafter referred to as the Order), there are Articles 132 and 133, which prescribe order and mode of examination of a witness. For guidance, the above mentioned Articles are reproduced herein below:-

"132. Examination-in-chief, etc. (1) The examination of a witness by the party who calls him shall be called his examination-in-chief.

(2) The examination of a witness by the adverse party shall be called his cross-examination.

(3) The examination of a witness subsequent to the cross-examination by the party who called him, shall be called his re-examination."

"133. Order of examination. (1) 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.

(2) The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examinations and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine that matter."

8. Bare reading of the above mentioned three provisions clearly suggest that procedure, prescribed through section 540 of the Code and Articles 132 and 133 of the Order, is quite different. Section 540 of the Code, empowers a court that it, while realizing appropriate and necessary, can call and examine a person or re-examine a witness, who has already been examined. The said provision does not provide the mode and order, under which examination of a witness should be carried on. Whereas, Article 132 of the Order defines classes of examination and Article 133 prescribes the modes by which examination-in-chief, cross-examination, re-examination and re-cross examination should be recorded.

9. In the matter in hand, the examination-in-chief of the above named doctor has been recorded as PW-6. Thereafter, the learned trial court has felt that he should be re-examined, so that certain proceedings and documents relating to him may come on the record. The order of the learned trial court, for allowing re-examination of the above said witness is quite justified, but its intention to re-examine the witness, prior to cross-examination by the defence is not as per the requirement and order, prescribed, through the above mentioned Articles. Therefore, it is directed that firstly, cross-examination of the witness be got conducted and thereafter he should be re-examined and if the defence wants to re-cross-examine him, it be allowed.

10. Disposed of in the above mentioned terms.

MH/A-11/L Order accordingly.

2019 P Cr. L J 1241

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

Ch. ABID MEHMOOD---Appellant

Versus

Mirza ZAFAR JAVED and others---Respondents

Criminal Appeal No. 1041 and Criminal Miscellaneous No. 1-M of 2018, heard on 5th March, 2019.

Criminal Procedure Code (V of 1898)---

----Ss. 249-A, 417(2A) & 493---Appeal against acquittal---Power of Magistrate to acquit accused at any stage---Public Prosecutor to conduct prosecution---Delay in filing appeal against acquittal by Trial Court---Condonation of delay---Hearing on application under S. 249-A, Cr.P.C. without notice to complainant---Effect---Appellant assailed judgment of Trial Court whereby it acquitted respondents while allowing application under S. 249-A, Cr.P.C.---Appeal against acquittal was barred by time and appellant sought condonation of delay on the sole ground that no notice to the appellant or his witnesses was served and as such he remained unaware of passing of impugned judgment---Validity---Trial Court, after hearing Public Prosecutor as well as counsel for accused, had pronounced the judgment, hence the procedure prescribed under S. 249-A, Cr.P.C. was duly complied with---Under S. 493, Cr.P.C., it was only Public Prosecutor who had to conduct the prosecution and if there was any private counsel, engaged by the complainant, he was required to act under the instructions of the Public Prosecutor---Stance of the appellant that he should have been given notice was of no legal value---No reason, cause or justification to condone the delay was made out---Appeal, being barred by time, was dismissed.

Rizwan Haider Afzal and Malik Mushtaq Ahmad for Appellant.

Afzal Khan Jadoon for Respondents Nos. 1 to 3.

Date of hearing: 5th March, 2019.

ORDER

MUHAMMAD TARIQ ABBASI, J.---Although, in the instant appeal, filed in terms of section 417(2A), Cr.P.C., against acquittal of Mirza Zafar Javed, Mirza Waqas and Mirza Muhammad Bilal (hereinafter referred to as the respondents), through judgment dated 26.09.2018, delivered by Sumaira Alamgir, learned Judicial Magistrate 1st Class, Rawalpindi, respondents Nos. 2 and 3 have been summoned, but it has been observed that the appeal is time barred and for condonation of delay, an application bearing No. 01-M/2018, has also been preferred. Therefore firstly, it would be seen whether the delay in filing the appeal, requires condonation or otherwise.

2. The judgment in question was passed on 26.09.2018, whereby in an application under section 249-A, Cr.P.C., moved by the respondents, the learned A.D.P.P. as well as counsel for the respondents were heard and thereafter, the said application was allowed and consequently, the respondents were acquitted of the charge.

3. The appellant had applied for attested copies of the judgment on 11.12.2018 i.e. after 02 months and 15 days, which were supplied on the same day and thereafter, the appeal was filed on 17.12.2018.

4. Section 417(2-A), Cr.P.C., prescribes a period of thirty days, for filing an instant like appeal, but the appeal in hand has been preferred, with a delay of about 01 month and 20 days. In the application i.e. Crl. Misc. No. 01-M/2018, condonation of delay has been sought, on the sole ground, that no notice to the appellant or his witnesses was ever served and as such he remained unaware of passing of the impugned judgment. The said stance is totally unjustified, because through an order dated 14.02.2017, passed in Crl. Misc. No. 232-B/2017, with consent of the parties, a direction to the learned trial court, for early decision of the case was given, in the following words:-

> "However, with the concurrence of both the parties, learned trial court is directed to conclude the trial expeditiously, preferably within three months of the copy of receipt of this order. In order to

comply with this direction the trial court may proceed with the trial on day to day basis under intimation to this Court through Deputy Registrar (Judl.)."

Thereafter, a number of opportunities were given to the appellant, to lead his evidence and even to procure attendance of the appellant and his witnesses, non-bailable warrants of arrest were also issued. Therefore, it could not be presumed that the appellant remained unaware of pendency of the case, in the trial court.

5. Furthermore, as per section 249-A, Cr.P.C., to invoke jurisdiction under it, the Prosecutor and the accused should be heard. The said provision reads as under:-

"249-A. Power of Magistrate to acquit accused at any stage. Nothing in this Chapter shall be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if after hearing the prosecutor and the accused and for reasons to be recorded, he considers that the charge is groundless or that there is no probability of the accused being convicted of any offence."

6. The learned trial court, after hearing the learned Prosecutor as well as counsel for the respondents/accused, had pronounced the judgment, hence the prescribed procedure was duly complied with. Even otherwise, according to section 493, Cr.P.C., it is only the Public Prosecutor, who shall conduct the prosecution and if there is any private counsel, engaged by the complainant, he should act under instructions of the Public Prosecutor. For convenience, the above said enactment is reproduced hereinbelow:-

"493. Public Prosecutor may plead in all Courts in cases under his charge. Pleaders privately instructed to be under his direction. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct prosecution, and the pleader so instructed shall act therein, under his directions."

In this way, even in the light of the above said provision, the alleged stance of the appellant, that he should have been given notice, is of no legal value.

7. Due to the reasons mentioned above, there is no reason, cause or justification, to condone the delay, hence the request made through Crl. Misc. No. 01-M/2018, is declined. Consequently the appeal being hopelessly time barred, is dismissed.

SA/A-42/L Appeal dismissed.

PLJ 2019 Cr.C. 184

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

MAJID ALI KHAN--Petitioner

versus

STATE and 14 others--Respondents

Crl. Rev. No. 375 of 2013, decided on 22.1.2015.

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

----Ss. 234 & 439--Joint trial of criminal cases--Revision petition--Petitioner is neither an accused nor he has any concern with the occurrence, alleged in the said matters but erroneously through the impugned order, joint trial of the petitioner, in the above said matters has also been ordered which is not acceptable under the law--Plain reading of the above mentioned provision indicates that joint trial of cases could be held when Accused in all the cases should be the same, Offences should be of same kind, and Number of cases should not exceed three--Joint trial under the above mentioned provision would only be permissible, if the above mentioned requirements are fulfilled--Joint trial is not permissible--Revision petition was allowed. [Pp. 185 & 186] A, B, C & D 2013 YLR 548, *ref*.

Mr. Muhammad Masood Bilal, Advocate for Petitioner.

Mr. Muhammad Ali Shahab, DPG for State.

Date of hearing: 22.1.2015.

ORDER

This criminal revision is directed against the order dated 4.11.2013, passed by the learned Special Judge, Anti-Corruption, Multan whereby joint trial of FIR No. 340/2011 registered at Police Station Jalalpur Pirwala, district Multan and FIRs No. 6/2012 and 53/2012, both registered at Police Station Anti Corruption Establishment, Multan has been ordered.

2. It is contended by the learned counsel for the petitioner that in FIRs No. 06 of 2012 and 53 of 2012, petitioner is neither an accused nor he has any concern with the occurrences, alleged in the said matters but erroneously through the impugned order, joint trial of the petitioner, in the above said matters has also been ordered which is not acceptable under the law.

3. Arguments heard. Record perused.

4. Section 234 of the Criminal Procedure Code, 1898 provides joint trials of cases. Said Sections reads as under:--

234. Three offences of same kind within one year may be charged together. (i) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, and number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same Sections of the Pakistan Penal Code or of any special or local law:

Provides that, for the purpose of this section, an offence under Section 379 of the Pakistan Penal Code shall be deemed to be an offence of the same kind as an offence punishable under Section 380 of the said Code, and that an offence punishable under any Sections of the Pakistan Penal Code or of any special or local law shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

Plain reading of the above mentioned provision indicates that joint trial of cases could be held under the following circumstances:--

1. **Accused in all the cases should be the same.**
2. **Offences should be of same kind.**
3. **Number of cases should not exceed three.**

5. It has been observe that in the above mentioned case FIR No. 340/2011 there are fourteen accused, including the present petitioner. Whereas, in the other FIRs Nos. 6/2012 and 53/2012, the petitioner is not an accused. Joint trial under the above mentioned provision would only be permissible, if the above mentioned requirements are fulfilled. Applying the above mentioned criteria to the facts of the instant matter, it is observed that when the panel of accused is different and separate challans have been submitted in respect of each FIR then the joint trial of accused is a patent illegality and violation of Section 234, Cr.P.C. Reliance in this respect may be made to the case of *"Amjad Ali and another Versus The State and another"* (2013 YLR 548).

6. For the foregoing reasons, the situation in hand does not qualify the above mentioned requirements, hence joint trial is not permissible. Consequently, the instant revision petition is allowed, the impugned order is set-aside with a direction that trial of case FIR No. 340/2011 be conducted separately, whereas the above mentioned other cases may be tried jointly.

(K.Q.B.) Revision allowed

PLJ 2019 Lahore 521 (DB)

[Multan Bench, Multan]

***Present*: MUHAMMAD TARIQ ABBASI AND MUJAHID MUSTAQEEM AHMED, JJ.**

BASHIR AHMAD--Appellant

versus

ADDITIONAL SESSIONS JUDGE/EX-OFFICIO JUSTICE OF PEACE, TAUNSA SHARIF, DISTRICT D.G. KHAN and 4 others etc.--Respondents

I.C.A. No. 305 of 2018, decided on 6.5.2019.

Law Reforms Ordinance, 1972 (XII of 1972)--

----S. 3--Theft of Electricity—Registration of FIRs--Pre-arrest bails were granted on basis of payment of deduction bills--Bills were found as bogus—Petitions for lodging FIRs—Allowed--Filling of W.P.--Dismissed--Challenge to--Learned Sessions Judge, Dera Ghazi Khan is directed to ask concerned Additional Sessions Judge, Tounsa Sharif, to take up matter in question and if it is found that appellant and others, by filing false documents, had obtained unjustified concession of extraordinary relief of pre-arrest bail, then not only said concession should be withdrawn, but SHO of concerned Police Station should also be asked to entertain above said application of SDO MEPCO, Tounsa Sharif and take criminal action, against nasty(s), as warranted under law--Intra Court Appeal was disposed of. [P. 522] A

Syed Jaffer Tayyar Bukhari Advocate for Appellant.

Mr. Amjad Ali Ansari, AAG, for Respondents.

Mr. Amir Aziz Qazi, Advocate for Respondent No. 5.

Date of hearing : 6.5.2019.

ORDER

This Intra Court Appeal, filed under Section 3 of Law Reforms Ordinance, 1972, calls in question, the order dated 25.09.2018, passed by the learned Single Judge in Chamber, in Writ Petition No. 13715 of 2018, whereby the said petition has been dismissed in *limini*.

2. An application was moved by the S.D O. MEPCO, Tounsa Rural Sub-Division, Tounsa Sharif, District Dera Ghazi Khan, before the *Ex-officio* Justice of Peace, Tounsa Sharif, whereby registration of a criminal case, under Sections 419/420/468/471 PPC, against the appellant and others was sought, on the grounds that FIRs No. 195/2017, 230/2017, 234/2017,

252/2017, 04/2018, 10/2018, 18/2018 and 19/2018, for theft of electricity, were registered against the present appellant and others, named in the application; all had applied for pre-arrest bail before the learned Additional Sessions Judge, Tounsa Sharif, when on 24.02.2018, the appellant and others had contended that they had paid the deduction bills, issued to them and submitted the same in the Court and the Court had confirmed pre-arrest bail of the appellant and others. It was further contended in the application, that on verification, the above said bills, alleged and submitted by the appellant and others, before the Court, were found as bogus, hence criminal action against them was required. The Ex-officio Justice of Peace, through order dated 11.09.2018, had directed the SHO of Police Station City Tounsa Sharif, to record statement of the SDO MEPCO, Taunsa Sharif and proceed in accordance with law.

3. The above mentioned direction of the Ex-officio Justice of Peace, was challenged by the appellant, through Writ Petition No. 13175/2018, which was taken up on 25.09.2018, but dismissed in *limini*.

4. The stance of the learned counsel for the appellant is that no forged document was prepared by the appellant or anybody else and that true documents were filed in the Court, hence the application for registration of criminal case was totally unjustified and that even otherwise, it was the learned Court, where the documents were tendered, to look into the situation and then proceed in accordance with law.

5. Consequently, the learned Sessions Judge, Dera Ghazi Khan is directed to ask the concerned Additional Sessions Judge, Tounsa Sharif, to take up the matter in question and if it is found that the appellant and others, by filing false documents, had obtained unjustified concession of extraordinary relief of pre-arrest bail, then not only the said concession should be withdrawn, but the SHO of the concerned Police Station should also be asked to entertain the above said application of SDO MEPCO, Tounsa Sharif and take criminal action, against the nasty(s), as warranted under the law.

6. All the above mentioned proceedings should be completed within a fortnight, with intimation to Deputy Registrar (Judicial) of this Court.

7. **Disposed of.**

(MMR) Appeal disposed of

PLJ 2019 Cr.C. 585

[Lahore High Court, Rawalpindi Bench]

Present: **MUHAMMAD TARIQ ABBASI, J.**

RAB NAWAZ--Petitioner

versus

MUBRI KHAN etc.--Respondents

Crl. Rev. No. 127 of 2018, heard on 30.1.2019.

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

----S. 250/367--Pakistan Penal Code, (XLV of 1860), Ss. 380/411/448--Acquittal in criminal trial--Show-cause notice--Compensation--Verbal order--Proceeding of no value--If a Magistrate, on finalization of a criminal trial, comes to conclusion that accusation/ charge, against an accused was false, frivolous or vexatious, then he, in addition to an order of acquittal of an accused, may ask the complainant of the case to pay compensation, upto Rs. 25,000/- to such an accused--There is no separate finding of the learned Magistrate, whereby the accusation, leveled by the petitioner, has been declared as false, frivolous or vexatious--Similarly, no express show cause notice has been issued to the petitioner and even no reply from him has been sought or received--Petitioner was orally asked for the compensation, but he had failed to make any justification--The said procedure, adopted by the Magistrate, orally, could not be appreciated, because the judicial system does not allow oral criminal proceedings as every act of a Court, should be express and unambiguous--Proceedings in question, ending into imposition of the compensation, to the petitioner, of no legal value--Resultantly, the revision petition is allowed.

[Pp. 587, 588, 589 & 590] A, B, C, D, E & F

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

----S. 250--Pre-requisites, to be followed by a Magistrate:

i) There should be acquittal of an accused;

ii) The Magistrate should be of the opinion that the accusation/charge was false, frivolous or vexatious;

iii) The complainant should be called to show cause that why he should not pay compensation to acquitted accused(s);

iv) The Magistrate should record, any cause made by the complainant;

v) The Magistrate should consider the cause and then record an opinion that cause is unjustified and the accusation/charge was false. [P. 588] B

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

----S. 24-A--Verbal order and proceeding of a Court or authority, could not be given any legal value. Even if an order or proceeding by a competent authority is written, but not signed, it is nothing in the eye of law. Section 24-A of General Clauses Act, 1897 provides that any order or direction, given by any authority, office or person must be express i.e. in written form. A written order and proceeding identify their author and recipient. Written form is the only medium, that brings to fore the reason behind an order or proceeding, which may undergo accountability of judicial review. Therefore, an order or proceeding to be in writing is integral to rule of law. Verbal Order has no legal existence and as such does not constitute an order, as envisaged u/S. 367, Cr.P.C. [P. 589] E

1998 SCMR 611; 2007 SCMR 1328 *ref.*

Raja Muhammad Faisal Ghani Janjua, Advocate for Petitioner.

Mr. Umer Hayat Gondal, Additional Prosecutor General for State.

Malik Ihsan Haider, Advocate for Complainant.

Date of hearing: 30.01.2019.

JUDGMENT

This revision petition calls in question, the judgment dated 01.03.2014 and order dated 09.02.2018, respectively passed by the learned Judicial Magistrate Section-30, Talagang and learned Additional Sessions Judge, Talagang, District Chakwal.

2. Through the judgment, in a case, got registered by the petitioner, against Mubri Khan, Muhammad Kamran, Ahmed Khan, and Muhammad Sher ***(hereinafter referred to as the respondents),*** through FIR No. 28, dated 11.04.2011, under Sections 380/448/411, PPC, at Police Station Lawa, Tehsil Talagang, District Chakwal, not only the respondents were acquitted of the charge, but the petitioner was also directed to pay compensation of Rs. 25,000/- to them, as provided under Section 250, Cr.P.C. Whereas through the order, an appeal preferred by the petitioner, challenging imposition of the above said compensation, upon him, has been dismissed.

3. The above mentioned case was got lodged, by the petitioner, against the respondents, with the precise charge, that they while armed with lethal weapons, had entered into a 'Haveli', belonging to the petitioner and stolen away the articles, lying therein. The trial was held in the Court of learned Magistrate Section-30, Talagang and finally, the judgment dated 01.03.2014 was pronounced, whereby not only the respondents were acquitted of the charge, but the petitioner was also burdened under Section 250, Cr.P.C. and directed to pay compensation of Rs. 25,000/- to the respondents.

4. There is no denial of the fact that if a Magistrate, on finalization of a criminal trial, comes to the conclusion that accusation/charge, against an accused was false, frivolous or vexatious, then he, in addition to an order of acquittal of an accused, may ask the complainant of the case to pay compensation, upto Rs. 25,000/- to such an accused. For reference, the above said provision is reproduced hereunder:

> *"**250. False frivolous or vexatious accusations.** (1) If in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate, by whom the case is heard [xxxxx] acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may by his order of [xxxxx] acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show-cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or if such person is not present direct the issue of a summons to appear and show cause as aforesaid.*
>
> *(2) The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious, may for reasons to be recorded, direct that compensation to such amount not exceeding [twenty five thousand rupees] or if the Magistrate is a Magistrate of the third class not exceeding [two thousand and five hundred] rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.*

[(2-A) The compensation payable under sub-section (2) shall be recoverable as an arrear of land revenue.]

(2-B) When any person is imprisoned under sub-section (2A), the provisions of Sections 68 and 69 of the Pakistan Penal Code shall, so far as may be, apply.

(2-C) No person who has been directed to pay compensation under the section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him:

Provided that any amount paid to an accused person under this section shall be taken into account, in awarding compensation to such person in any subsequent civil suit relating to the same matter.]

(3) A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal form the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) When an order for payment of compensation to an accused person is made, in case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.

*[(5)*****]"*

5. A plain reading of the provision mentioned above, suggests certain pre-requisites, to be followed by a Magistrate, which can be summed as under:

i) There should be acquittal of an accused;

ii) The Magistrate should be of the opinion that the accusation/charge was false, frivolous or vexatious;

iii) The complainant should be called to show cause that why he should not pay compensation to acquitted accused(s);

iv) The Magistrate should record, any cause made by the complainant;

v) The Magistrate should consider the cause and then record an opinion that cause is unjustified and the accusation/charge was false.

6. In the matter in hand, admittedly, there is no separate finding of the learned Magistrate, whereby the accusation, leveled by the petitioner, has been declared as false, frivolous or vexatious. Similarly, no express show cause notice has been issued to the petitioner and even no reply from him has been sought or received. In the judgment of the learned Magistrate, it is mentioned that the petitioner was orally asked for the compensation, but he had failed to make any justification. The said procedure, adopted by the Magistrate, orally, could not be appreciated, because the judicial system does not allow oral criminal proceedings as every act of a Court, should be express and unambiguous.

7. Verbal order and proceeding of a Court or authority, could not be given any legal value. Even if an order or proceeding by a competent authority is written, but not signed, it is nothing in the eye of law. Section 24-A of General Clauses Act, 1897 provides that any order or direction, given by any authority, office or person must be express i.e. in written form. A written order and proceeding identify their author and recipient. Written form is the only medium, that brings to fore the reason behind an order or proceeding, which may undergo accountability of judicial review. Therefore, an order or proceeding to be in writing is integral to rule of law. Verbal Order has no legal existence and as such does not constitute an order, as envisaged under Section 367, Cr.P.C. If any case law in this regard is needed, reference may be made to the dictum laid down in the cases titled *"Zahid Hussain and another*

versus The State" reported as 1998 SCMR 611 and *"Capital Development Authority through Chairman and another versus Mrs. Shaheen Farooq and another"* reported as 2007 SCMR 1328. The relevant portion of 2007 SCMR 1328, reads as under:

> ***"Verbal order has no sanctity in law and such orders are alien to the process of the law and the Courts. All orders passed and acts performed, particularly, by the State/public functionaries and adversely affecting anyone must be in writing, as Section 24-A(1) of the General Clauses Act, 1897 envisages that the powers shall be exercised reasonably, fairly and justly and subsection (2) further makes it necessary that the authority passing orders shall, so far as necessary or appropriate, give reasons for making the orders and unless the order is in writing, the reasons and fairness etc. thereof cannot be ascertained/ adjudged."***

8. The foregoing reasons, have made the proceedings in question, ending into imposition of the compensation, to the petitioner, of no legal value. Resultantly, the revision petition in hand is **allowed,** the impugned judgment of the learned Magistrate towards imposition of compensation to the petitioner and the order dated 09.02.2018, passed by the learned Additional Sessions Judge, Talagang, District Chakwal are set aside.

(K.Q.B.) Petition allowed

PLJ 2019 Cr.C. 1355

[Lahore High Court, Rawalpindi Bench]

***Present* : MUHAMMAD TARIQ ABBASI, J.**

ANAM SHAHZAD --Appellant

versus

STATE and others--Respondents

Crl. Appeal No. 413 of 2017, heard on 11.2.2019.

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

----S. 410--Pakistan Penal Code, (XLV of 1860), Ss. 302/324/148/149--Conviction and sentence--Challenge to--Appreciation of evidence--Acquittal of--In formal FIR u/S. 302/34 PPC, police investigated case and found other accused persons to be innocent, hence declared them so--Feeling aggrieved, complainant filed private complaint wherein same story was reiterated appellant and her co-accused were summoned to fact trial--Formal charge sheet was framed and it was denied by accused--Non-correspondence of evidence with findings and observations made by doctor--It was not clarified that how complainants gained knowledge about availability of deceased in house of accused--**Held** : Facts and circumstances of case are sufficient to hold prosecution case and charge against appellant highly doubtful--**Further held:** It is an admitted principle and prosecution of law that prosecution should establish its case and prove charge against and accused beyond shadow and all reasonable doubts, even a slightest doubt would entitle and accused due benefit of acquittal, not as a matter of grace or concession but as of right--Appeal accepted and conviction was set aside. [P. 1360] A

2012 SCMR 440, *ref.* 1995 SCMR 1345, *rel*.

Barrister Osama Amin Qazi, Advocate for Appellant.

Mr. Umer Hayat Gondal, Additional Prosecutor General for State.

Syed Tanvir Suhail Shah, Advocate for Complainant.

Date of hearing : 11.2.2019

JUDGMENT

By way of this appeal, *Mst.* Anam Shahzad (hereinafter referred to as the appellant) has called in question the judgment dated 18.05.2017, passed by the learned Sessions Judge, Jhelum, whereby in a private complaint, filed under Section 302/34, PPC, by Muhammad Latif ***(hereinafter referred to as the complainant),*** against her as well as *Mst.* Abida Parveen, Shahid Javed and Nauman *alias* Mani, she has been

convicted under Section 302(b) PPC, for committing murder of Muhammad Sheraz ***(hereinafter referred to as the deceased)*** and sentenced for imprisonment for life, with compensation of Rs. 10,00,000/-, payable to legal heirs of the deceased, failing which to undergo simple imprisonment for six months, alongwith benefit of Section 382-B, Cr.PC.

2. Initially, the matter was reported to the Police by the complainant, through *fard biyan* (Ex.PD), with the contentions that marriage of his son namely Muhammad Shahzad, was solemnized with the appellant; on 19.08.2016, Muhammad Shahzad came at Jhelum, but called back by the appellant; at about 7.00 PM, the appellant had called Muhammad Sheraz deceased, in the house of *Mst.* Abida Parveen (co-accused since acquitted), hence the deceased told him (complainant), that as per calling of the appellant, he was going to the house of *Mst.* Abid Parveen (co-accused since acquitted); during the night, the phone of the deceased was found off, hence the complainant became worried, who at about 2:30 AM (mid-night), alongwith Nauman Younas (PW-11) and Bilal Younas, reached at the house of *Mst.* Abida Parveen (co-accused since acquitted), where they found dead body of the deceased, lying in a room and the appellant was removing the snare (phanda) from his neck, who on seeing them, fled away thereafter *Mst.* Abida Parveen and Shahid Javed (co-accused since acquitted) also fled away; Muhammad Sheraz was done to death, as character of the appellant was not fair and the deceased used to abstain her from such like activities.

3. On the basis of the above said complaint, formal FIR (Ex.PD/1) bearing No. 163, dated 20.08.2016, under Section 302/34, PPC, at Police Station Civil Lines, District Jhelum was registered. The Police had investigated the case and found *Mst.* Abid Parveen, Shahid Javed and Nauman *alias* Mani (co-accused since acquitted) to be innocent, hence declared them so.

4. Feeling aggrieved, the complainant had filed the private complaint (Ex.PL), wherein the above mentioned story was reiterated. The appellant and her co-accused (since acquitted) were summoned to face the trial. Formal charge against the all was framed on 09.02.2017, which was denied and trial was claimed, hence the prosecution evidence was summoned and recorded. During the trial, as many as eleven persons were recorded as PWs, whereas two as CWs. The material witnesses, with gist of their evidence were as under:--

i) ***PW-1 Dr. Hammad Mehmood,*** *had conducted postmortem examination of dead body of Muhammad Sheraz on 20.08.2016 and prepared the report (Ex.PA) and pictorial diagram (Ex.PA/1 & PA/2). As many as six injuries on different parts of body of the deceased were noticed and Injury No. 1, found on the neck was declared as fatal and cause of death. The probable time between the injury and death was 20 to 30 minutes, whereas between death and postmortem examination as 12 to 24 hours.*

ii) ***PW-10 Muhammad Latif,*** *complainant had narrated almost the same story, as was described by him, in the fard biyan (Ex.PD) and private complaint (Ex.PL).*

iii) ***PW-11 Nauman Younas,*** *had tried to support version of the complainant (PW-10).*

iv) ***CW-1 Mazhar Hussain Shah ASI and CW-2 Ikram Hussain SI*** *were Investigating Officers of the case, who during their respective proceedings, had performed the functions and prepared the documental, fully highlighted in their statements.*

5. On completion of the prosecution evidence, the appellant and her co-accused were examined, as required under Section 342, Cr.PC, during which questions arising out of the prosecution evidence were put to them, but they had denied almost all such questions, while pleading their innocence and false involvement in the case. The question ***"Why this case against you and why the PWs deposed against you?"*** was replied by the appellant in the following words:--

> ***"I contracted love marriage with Muhammad Shahzad son of the complainant/real brother of the deceased due to which the complainant and his whole family became inimical towards me and they used to quarrel with me, therefore, I alongwith my husband was shifted to a rented house in Jhelum and then to Dongi AJ&K. The deceased Sheraz was involved in immoral and illegal activities and was also an addict. He also had relations with persons of bad repute. Due to his immoral and illegal activities, some unknown persons committed his murder at some unknown place and that is why his motorcycle was recovered from the area of PP: Kala Gujran, PS: Sadar, Jhelum. Neither I was present in Jhelum at the time of alleged occurrence nor I committed the same, due to***

which my husband Shahzad did not join the funeral ceremony of his deceased brother Sheraz as we were not aware of his death. As I have contracted love marriage with son of the complainant, therefore, I was falsely implicated in this case and all the P.Ws have deposed against me due to said grudge because they were interse related. I am innocent."

At that time, the appellant had opted to lead evidence in her defence, but not to make statement under Section 340(2) Cr.PC. But thereafter, through statement dated 09.05.2017, she had refused to produce any evidence in her defence. Finally, the impugned judgment was pronounced, in the above mentioned terms. Consequently, the appeal in hand.

6. Arguments advanced by learned counsel for the appellant as well as learned Prosecutor, assisted by the learned counsel for the complainant have been heard and record has also been perused.

7. The complainant's stance was that his son was done to death on 20.08.2016, at about 2:30 a.m. (mid-night). At the time of post-mortem examination of dead body of the deceased on 20.08.2016 at 8:30 a.m, the doctor (PW-1) declared the time between death and post-mortem examination as 12 to 24 hours. If 12 hours are considered, then time of the alleged occurrence becomes 8:30 p.m. of 19.08.2016, whereas if 24 hours time is taken into account, then the death had occurred on 8:30 a.m. on 19.08.2016. In this way, the time of death, described by the complainant, in *fard biyan* (Ex.PD), private complaint (Ex.PL) as well as during statement before the learned trial Court does not correspond with the above mentioned findings and observations, made by the doctor.

8. According to the doctor (PW-1) as well as the post-mortem report (Ex.PA), the dead body was received in the mortuary on 20.08.2016, at about 6:00 a.m., whereas the Police had provided the complete documents to the doctor at 8.30 a.m. The above mentioned delay, regarding non-provision of necessary documents by the Police, to the doctor was a clear indication that time was consumed in introducing unjustified evidence and documents. In the complaint (Ex.PD) before the Police, the complainant had got written that he alongwith Nauman Younas (PW-11) had directly gone to the house of *Mst.* Abida Parveen (co-accused since acquitted). In the said document, it was not clarified that how they had gained knowledge about availability of the deceased, in the said house. During evidence before the Court, the complainant (PW-10) had contended that as motorcycle of the deceased was found parked, in front of house of Abida Parveen (co-accused since

acquitted), hence they went inside the house, whereas version of Nauman Younas (PW-11) was that at about 1:40 a.m. a shopkeeper had indicated them about house of the above named lady accused. The complainant (PW-10) had not disclosed about any information, made to them, by any shopkeeper, whereas PW-11 never stated about parking of motorcycle of the deceased at any place. Furthermore, it is not appealable to a prudent mind that at 1:40 a.m., any shop was functional and its shopkeeper had met the complainant's party and informed it about any house. The complainant (PW-10) as well as Nauman Younas (PW-11) were not residents of the vicinity, where house of Abida Parveen was situated, hence their alleged availability at the house during odd hours of the night, had made them as chance witnesses.

9. Admittedly, the room in question, was having only one door, therefore it is not believable that the present appellant was seen by the complainant and his above named companion (PW-11), while performing the above stated alleged function, but despite that, she was allowed to cross the door, where the complainant and the above named other witness were standing and both remained silent spectators. It is also not believable that after the alleged departure of the appellant, from the spot, her co-accused (since acquitted) also left the place, but the complainant's party again remained silent spectators. The said conduct of the complainant (PW-10) and the above named other witness (PW-11) had made their presence at the spot, highly improbable.

10. The house in question was of *Mst.* Abida Parveen, who alongwith Shahid Javed and Nauman *alias* Mani, has been acquitted of the charge, as the above named witnesses have been disbelieved to their extent. Therefore, believing witnesses qua the appellant, strong independent corroboration is required, which is missing in the case in hand. In this regard, reference may be made to the case titled *"Muhammad Akram versus The State"* reported as 2012 SCMR 440, wherein the august Supreme Court of Pakistan has held as under:--

> ***"Except for the oral statements of eye-witnesses there is nothing on record which could establish the presence of both the eye-witnesses at the spot and as their presence at the spot appears to be doubtful, no reliance could be placed on their testimonies to convict the appellant on a capital charge. Since the same set of evidence has been disbelieved qua the involvement of Muhammad Aslam? as such, the same evidence cannot be relied***

upon in order to convict the appellant on a capital charge as the statements of both the eye-witnesses do not find any corroboration from any piece of independent evidence."

11. The facts and circumstances highlighted above, are sufficient enough to hold the prosecution case and charge against the appellant highly doubtful. It is an admitted principle and proposition of law, that the prosecution should establish its case and prove charge, against an accused, beyond shadow of all reasonable doubts and even a slightest doubt would entitle an accused, due benefit of acquittal, not as a matter of grace or concession, but as of right. In this regard reliance may be placed upon the dictum laid down by the august Supreme Court of Pakistan in the case titled *"TARIQ PERVAIZ Vs. THE STATE"* reported as 1995 SCMR 1345, wherein it has been held as under:

"If a simple 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 or concession, but as a matter of right."

The same view has been reiterated in a subsequent judgment titled *"Ayub Masih Vs. The State"* reported as, PLD 2002 SC 1048, whereby it has been directed that while dealing with a criminal case, the golden principle of law ***"it is better that ten guilty persons be acquitted, rather than one innocent person be convicted"*** should always be kept in mind.

12. Resultantly, the appeal is ***allowed***, impugned judgment towards conviction and sentence of *Mst.* Anam Shahzad appellant is set aside and she is acquitted of the charge, while extending her the benefit of doubt. The appellant is in custody, therefore it is directed that she be released from the jail, if not required to be detained in any other case. The disposal of the case property shall be as directed by the learned trial Court, in the impugned judgment.

(Z.A.S.) Appeal accepted

PLJ 2019 Cr.C. 1490

[Lahore High Court, Rawalpindi Bench]

***Present* : MUHAMMAD TARIQ ABBASI, J**

NADEEM AKHTAR--Appellant

versus

STATE--Respondent

Crl. Appeal No.83-J of 2016, heard on 18.3.2019

Criminal Procedure Court, 1898 (V of 1898)

----S. 410--Pakistan Penal Code, (XLV of 1860), Ss. 302(b)/324/148/149--Convicted U/s 302(b) and sentenced to life imprisonment with compensation--Challenge to--Appreciation of evidence--Benefit of doubt--Acquittal of--As per complaint, occurrence took place at about 5.40 p.m. whereas complaint was got lodged at about 7.00 p.m.--FIR was chalked out at 07.20 p.m.-Post mortem report shows occurrence of death at 5.30 p.m. whereas dead body was received in dead house at 6.00 p.m. and documents from police were received by Doctor at 06.30 p.m. whereas autopsy was conducted at 6.45 p.m.--Neither learned Prosecutor for state nor learned counsel for complainant are in a position to give any explanation that how prior to reporting matter to police and registration of police papers were prepared and handed over to Doctor and even post mortem examination was conducted and completed--**Further held** : Fact is a clear sign that after autopsy whole of proceedings including drafting complaint, registration of FIR and preparation of other documents were concocted which had made alleged prosecution story and charge against appellant highly doubtful--**Held** : It is well settled principle of law that even a single doubt in prosecution story makes an accused entitled for due benefit of acquittal not as a matter of grace or concession but as of right--Appeal accepted and conviction was set aside. [Pp. 1491, 1492] A & B

Barrister Usama Amin Qazi, Advocate for Appellant.

Mr. Muhammad Sharif Ijaz, District Public Prosecutor for State.

Mr. Muhammad Ilyas Siddiqui, Advocate for Complainant.

Date of hearing : 18.3.2019.

JUDGMENT

Muhammad Tariq Abbasi, J.--This appeal is directed, against the judgment dated 28.04.2016, passed by the learned Sessions Judge, Attock, whereby in case FIR No.431, dated 26.11.2012, registered under Sections

302/324/148/149, PPC, at Police Station Saddar Attock, District Attock, Nadeem Akhtar **(hereinafter referred to as the appellant),** was convicted under Section 302(b), PPC and sentenced to imprisonment for life, alongwhith compensation of Rs.2,00,000/-, payable to legal heirs of deceased, failing which to further undergo S.I. for six months, with benefit to Section 382-B, Cr.PC, whereas his co-accused, namely, Mumtaz, *Mst.* Bushran and Tauqeer Ahmad, were acquitted of the charge.

2. The precise charge, against the appellant was that he by firing had done Ghulam Habib **(thereinafter referred to as the deceased),** to death.

3. The trial was held in the Court of learned Sessions Judge, Attack, and finally through the impugned judgment, the appellant was convicted and sentenced in the above mentioned terms. Consequently, the appeal in hand.

4. The arguments advanced by the learned counsel for the appellant, the learned Prosecutor, assisted by learned counsel for the complainant, have been heard and the record has been perused.

5. As per complaint (Ex.PH), made by Muhammad Ismail (PW-8), the occurrence had taken place on 26.11.2012 at about 05:40 p.m., whereas the complaint was got lodged at about 07:00 p.m. and the FIR (Ex.PH/1) was chalked out at 07:20 p.m. The post-mortem report (Ex.PB) shows that the death had occurred on 26.11.2012 at 05:30 p.m. whereas the dead body was received in dead house at 06:00 p.m., the documents from the police were received by the doctor (PW-5) at 06:30 p.m. and autopsy was conducted at 06:45 p.m. The above mentioned time given in the post mortem report about receipt of the dead body, in the hospital, the documents from the police and conducting autopsy are prior to make the complaint (Ex.PH) and registration of the FIR (Ex.PH/1).

6. Neither the learned Prosecutor for the State nor the learned counsel for the complainant are in a position to give any explanation that how prior to reporting the matter to the police and registration of the FIR, the police papers were prepared and handed over to the doctor and even post mortem examination was conducted and completed. The said fact is a clear sign that after the autopsy, whole of the proceedings, including drafting the complaint

(Ex.PH), registration of FIR (Ex.PH/1) and preparation of the other documents were concocted, which fact had made the alleged prosecution story and the charge, against the appellant, highly doubtful.

7. It is a well settled principle of law that even a single doubt in the prosecution story makes an accused entitled for due benefit of acquittal, not as a matter of grace or concession, but as of right. In this regard, I am fortified by the dictum laid down by the august Supreme Court of Pakistan in cases titled '*Ayub Masih Versus The State'* reported as (PLD 2002 Supreme Court 1048) and '*Tariq Pervez Versus The State'* reported as 1995 SCMR 1345, wherein it is held that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. In the case of *Ayub Masih* (Supra), while quoting a saying of the Holy Prophet (PBUH) ***'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent'***, and making reference to the maxim, ***'It is better that ten guilty persons be acquitted rather than one innocent person be convicted'***, the Hon'ble Supreme Court observed as under:--

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

8. Resultantly, the instant appeal is ***accepted***, the impugned judgment is set-aside and the appellant, namely, ***Nadeem Akhtar*** is ***acquitted*** of the charge, while extending him the benefit of doubt.

The appellant is in custody, hence be released forthwith, if not required to be detained in any other case. The disposal of the case property shall be as directed by the learned trial Court, in the impugned judgment.

(Z.A.S.) Appeal accepted

PLJ 2019 Cr.C 1522 (DB)
[Lahore High Court, Lahore]
***Present*: MALIK SHAHZAD AHMAD KHAN AND MUHAMMAD TARIQ ABBASI, JJ.**
MUQADAS BIBI--Appellant
versus
STATE etc.--Respondents

Crl. Appeal No. 224710 of 2018, heard on 20.6.2019

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

----S. 9(c)--Sentence--Recovery of four packets of *charas*--Lady accused--Conviction was altered from Section 9(c) to 9(b) Act--Validity--Consequently, after calculating and reducing 1/3rd of sentence of appellant, same becomes *"Rigorous imprisonment for 10 months, alongwith fine of Rs.6,000/-, in default whereof to further suffer simple imprisonment for 02 months and 10 days"* and resultantly, appellant is awarded above mentioned sentence, with benefit of Section 382-B Cr.PC--With alteration/modification in conviction and sentence of appellant, appeal is dismissed. [P. 1524] B & C

Sentence--

----Sentencing policy--Female accused--Gender--Furthermore, as per above mentioned sentencing policy, a women and a child, because of their gender and tender age, are to be awarded 1/3rd lesser sentence of imprisonment, fine and sentence in default of payment of fine, than normal sentence prescribed above. [P. 1524] A

Rai Zameer-ul-Hassan, Advocate for Appellant.
Mr. Nisar Ahmad Virk, Deputy Prosecutor General for State.
Date of hearing : 20.6.2019.

JUDGMENT

Muhammad Tariq Abbasi, J.--By way of this appeal, Muqadas Bibi ***(hereinafter referred to as the appellant)***, has called in question the judgment dated 18.05.2018, passed by the learned Additional

Sessions Judge/Judge CNS, Pindi Bhattian, District Hafizabad, whereby in case FIR No. 372, dated 30.06.2017, registered under Section 9(c) of the Control of Narcotic Substances Act, 1997 ***(hereinafter referred to as the Act)***, at Police Station Jalalpur Bhattian, District Hafizabad, she has been convicted under Section 9(c) of the Act and sentenced to rigorous imprisonment for 04 years and 04 months, alongwith fine of Rs. 20,000/-, in default whereof to further undergo simple imprisonment for four months, with benefit of Section 382-B Cr.PC.

2. The appellant was challaned to the Court, with the precise charge of recovery of four packets of *'charas'*, each weighing 01 kilogram, thus total weighing 04 kilograms, from her possession. She had denied the charge and claimed the trial, hence prosecution witnesses namely Rai Muhammad ASI, Nazia Lady Constable, Asif Javed Head Constable, Amjad Hussain SI and Muhammad Yaqoob SI were summoned and recorded as PW-1, PW-2, PW-3, PW-4 and PW-5 respectively. Thereafter, the appellant was examined under Section 342 Cr.PC, during which the questions emerging from the prosecution evidence were put to her, but she had denied almost all such questions, while pleading her innocence and false involvement in the case with *malafide*. The appellant did not opt to lead any evidence in her defence or to make statement under Section 340(2) Cr.PC. On completion of all the proceedings, the impugned judgment was passed, in the above mentioned terms. Consequently, the appeal in hand.

3. Arguments advanced by learned counsel for the appellant as well as learned Prosecutor have been heard and the record has been perused.

4. As per the complaint (Ex.PC), made by Amjad Hussain SI (PW-4), four packets of '*charas*' were recovered from the appellant and that 50 grams of '*charas*' was separated from each of the packets, as sample. But during statement before the learned trial Court, the said witness, had made following admissions:--

> ***"It is correct that recovered charas is wrapped in white shopper. It is correct that one packet of charas is in four small pieces which are separately wrapped in a shopper. Those four small pieces are in different shape and size. Similarly remaining packets also consist of 03/04 slices and are packed in separate shoppers. It is correct that I***

have taken sample from one piece from each packet. It is correct that I have taken sample from one of the four pieces from each packet."

5. From the above mentioned admission of PW-4, it has been confirmed on the record that the recovered narcotic was consisting of many pieces. In such like situation, according to the law, laid down by the august Supreme Court of Pakistan in the case titled *"Ameer Zeb versus The State"* reported as PLD 2012 Supreme Court 380, it was necessary for the PW-4, to separate sample, from each piece and prepare separate sample parcels, but instead of adopting the said procedure, the above mentioned sample parcels, total weighing 200 grams, were prepared and sent to the Punjab Forensic Science Agency, Lahore, where they were analyzed and report (Ex.PE)was made, whereby contents of the said parcels were found as *charas*. Weight of each piece is not known to anyone, therefore according to the procedure laid down in the above said case law, weight of the sample parcels should be taken into account. When the said weight is considered, the case of the appellant falls within the ambit of Section 9(b) of the Act and as such he should be dealt with, for the said offence.

6. Resultantly, conviction of the appellant is altered from Section 9(c) to 9(b) of the Act. As per sentencing policy, promulgated through the judgment reported as "PLD 2009 Lahore 362", the possession of 200 grams of *charas*, prescribes the following sentence:--

"Rigorous imprisonment for 01 year and 03 months, alongwith fine of Rs.9,000/-, in default whereof to suffer simple imprisonment for 03 months and 15 days.

Furthermore, as per above mentioned sentencing policy, a women and a child, because of their gender and tender age, are to be awarded 1/3rd lesser sentence of imprisonment, fine and sentence in default of payment of the fine, than the normal sentence prescribed above.

7. Consequently, after calculating and reducing 1/3rd of the sentence of the appellant, the same becomes *"Rigorous imprisonment for 10 months, alongwith fine of Rs.6,000/-, in default whereof to further suffer simple imprisonment for 02 months and 10 days"* and resultantly, the

appellant is awarded the above mentioned sentence, with benefit of Section 382-B Cr.PC. The disposal of the case property shall be as directed by the learned Trial Court, in the impugned judgment.

8. With the above mentioned alteration/modification in conviction and sentence of the appellant, the instant appeal is **dismissed.**

(S.A.B.) Appeal Dismissed

PLJ 2019 Cr.C. (Note) 10

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

MUHAMMAD RAFIQUE *alias* Kali--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 1059-B of 2018, decided on 8.3.2018.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 324/34--Post arrest bail--Grant of--Further inquiry--Only one fire arm injury on the above said non vital part of the PW has been assigned to the petitioner--Injury has not yet been declared and as such presumption would be that it was simple in nature--Applicability of Section 324, PPC, against the petitioner, shall be seen during the trial, which fact has made the case against the petitioner as of further inquiry--Petitioner is behind the bars, hence no more required for further investigation--No previous criminal history is available in the record, as such he can rightly be termed as a first offender--Post arrest bail allowed. [Para 4 & 5] A

Mr. Faisal Aziz Chaudhry, Advocate for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor General for Respondents.

Mr. Fakhar Raza Malana, Advocate for Complainant.

Date of hearing: 8.3.2018

ORDER

Through the instant petition, the petitioner, namely, Muhammad Rafique @ Kali seeks post arrest bail in case FIR No. 365, dated 4.9.2017, registered under Sections 324/34, PPC, at Police Station Saddar Mianchannu, District Khanewal.

2. As per FIR the petitioner while firing with a pistol had caused an injury on left thigh of Muhammad Mumtaz PW.

3. Arguments heard. Record perused.

4. Only one fire arm injury on the above said non vital part of the above named PW has been assigned to the petitioner. The injury has not yet been declared and as such presumption would be that it was simple in nature. In this way, applicability of Section 324, PPC, against the petitioner, shall be seen during the trial, which fact has made the case against the petitioner as of further inquiry.

5. The petitioner is behind the bars since 26.10.2017, hence no more required for any further investigation, in this case. His no previous criminal history is available in the record, maintained by the police and as such he can rightly be termed as a first offender.

6. Consequently, the petitioner in hand is ***allowed*** and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount, to the, satisfaction of the learned trial Court.

(K.Q.B.) Bail allowed

PLJ 2019 Cr.C. (Note) 24

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI AND ANWAARUL HAQ PANNUN, JJ.**

ALLAH BACHAYA and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 6172-B of 2018, decided on 8.11.2018.

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

----S. 497(2)--Punjab Food Authority Act, 2011, S. 22-A--Punjab Drugs Act, 1976, S. 23--Forest Act, S. 24-A--Post arrest bail--Grant of--Further inquiry--Petitioners along with their co-accused were found in possession of adulterated milk, injurious to health being transported while one of the petitioner was driving the vehicle and other was helper, whereas the owner had fled away--Adulterated milk was transported in a vehicle being driven and looked after by the petitioners under the command of owner of the milk, therefore, presently it is difficult to assess whether the petitioners had any mens-rea for committing the offence as they were under the command of the owner who had fled away and were performing their services against consideration, renders the case of the petitioners one of further inquiry--Post arrest bail granted.

[Para 2 & 3] A & B

Mr. Muhammad Ajmal Kanju, Advocate for Petitioners.

Mr. Shahid Aleem, Addl. Prosecutor General for State.

Date of hearing: 8.11.2018.

ORDER

After having been unsuccessful before the subordinate Court, the petitioners Allah Bachaya son of Muhammad Nawaz and Malko Khan son of Sadiq through the instant petition seek their release on post arrest bail in case FIR. No. 613/2018 dated 16.09.2018, under Section 22A, of Punjab Food Authority Act, 2011, (amended 2016), 23 of Punjab Drugs Act, 1976, (amended 2018) read with Section 24-A of the Forest Act, registered at Police Station Mumtazabad, District Multan wherein it has been alleged that the petitioners along with their co-accused were found in possession of adulterated milk, injurious to health being transported while one of the petitioners was driving the vehicle and other was helper, whereas the owner had fled away.

2. On Court query, that as to how Section 23 of Punjab Drugs Act, 1976 as amended 2018 and Section 24-A. Forest Act are attracted in this case, learned Prosecutor has frankly stated that it has wrongly been mentioned in the FIR.

3. Allegedly, the adulterated milk was transported in a vehicle being driven and looked after by the petitioners under the command of owner of the milk therefore, presently it is difficult to assess whether the petitioners had any mens-rea for committing the offence as they were under the command of the owner who had fled away and were performing their services against consideration, renders the case of the petitioners one of further inquiry. In these circumstances, we are persuaded to accept this petition and direct release of the petitioners on post arrest bail subject to furnishing their bail bonds in the sum of Rs. 50,000/- each with one surety each in the like amount to the satisfaction of the learned trial Court.

(M.A.I.) Bail granted

PLJ 2019 Cr.C. (Note) 130

[Lahore High Court, Rawalpindi Bench]

Present **: MUHAMMAD TARIQ ABBASI AND SAYYED MAZAHAR ALI AKBAR NAQVI, JJ**

SAJJAD HAIDER --Appellant

versus

STATE--Respondent

Crl. Appeal No.376 of 2017, decided on 6.12.2017.

Control of Narcotic Subtances Act, 1997 (XXV of 1997)--

----Ss. 48 & 9(c)--Appeal--Petition for superdari of vehicle was declined--Allegation of recovery of *charas*--Out of vehicle contraband *charas* weighing 7-KGs and 260-grams was recovered and in this regard offence under Section 9(c) of Control of Narcotic Substances Act, 1997, was registered at Police Station which is pending adjudication before trial Court--Stance of appellant is that he is lawful owner of vehicle, which stands registered against his name in relevant record--Admittedly registration of case in name of appellant has also been verified by Investigating Officer--According to version of appellant, he is involved in business of 'Rent-A-Car' and subject vehicle was given to accused of case FIR offence under Section 9(c) of Control of Narcotic Substances Act, 1997, Police Station on rent after due receipt, which is also available on record--This aspect is also denied by other side--For foregoing reasons, Court allow this appeal as a consequence whereof custody of vehicle Toyota Corolla silver colour handed over to appellant temporarily subject to furnishing surety bonds in sum of Rs. 15,00,000/- with one surety in like amount to satisfaction of trial Court and after valid receipt.

[Para 6 & 8] A & C

Control of Narcotics Substances Act, 1997 (XXV of 1997)--

----S. 74--Proviso--Scope of--Custody of vehicle--Wherein it has been categorically, held that if owner of vehicle is not accused of case and has no knowledge that his vehicle would be used for trafficking narcotics, provisions of Section 74 of CNSA, 1997, shall not create any bar for giving vehicle to him on temporary custody. [Para 7] B

2010 SCMR 1181, *ref*.

Barrister Osama Amin Qazi, Advocate for Appellant.

Mr. Naveed Ahmed Warraich, DDPP for State.

Date of hearing : 6.12.2017.

ORDER

Through the instant appeal filed under Section 48 of the Control of Narcotic Substances Act, 1997, the appellant has assailed the vires of impugned order dated 29.03.2017, passed by learned Additional Sessions Judge, Taxilla, District Rawalpindi; whereby his petition seeking superdari of vehicle Toyota Corolla silver colour bearing registration No. QIL-059 was declined.

2. Facts of the case succinctly required for determination of the lis in hand are that on 11.11.2016 during the course of investigation in case FIR No.659/2016, dated 01.01.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, Police Station Saddar Wah, accused Faqeer Hussain after making disclosure led towards Mala Kand Stop where a vehicle Toyota Corolla silver colour bearing registration No.QIL-059 was standing in which one Amir Khan son of Bakhsh was sitting. On search from the vehicle contraband *charas* weighing 7-KGs and 260-grams was recovered and in this regard case FIR No.661/2016, dated 11.11.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, was registered at Police Station Saddar Wah. The vehicle was taken into custody by the police. The petitioner being real owner of the vehicle applied for its superdari, which was declined by the learned trial Court *vide* impugned order. Hence, this appeal.

3. At the very outset learned counsel appearing on behalf of the appellant submits that the impugned order has been passed by the learned trial Court in a stereotype manner without adverting to real facts of the case and material available on record. Further contends that the appellant is lawful owner of vehicle Toyota Corolla silver colour bearing registration No. QIL-059. Next submits that as a matter of fact appellant runs the business of Rent-A-Car in the name and style of *'Bala Hissar Rent-A-Car, Peshawar"* who gave the subject vehicle on rent to Amir Khan accused *vide* receipt dated 11.11.2016. Adds that neither the appellant has any concern whatsoever with the alleged traffic king of the narcotic substance nor he is accused in the case. It is vehemently argued that as the appellant has no concern with the case, therefore, keeping in view the pronouncement of Apex Court in the case of *Allah Pitta vs. The State* (2010 SCMR 1181) he is entitled to possession of the vehicle. Submits that the condition of the vehicle while lying at Police Station is deteriorating day-by-day. Learned counsel further submits that the

appellant is ready to furnish surety to the satisfaction of the learned trial Court with the undertaking to produce it during the course of trial as and when required.

4. On the other hand, learned DDPP vehemently opposes the contentions raised on behalf of the appellant mainly due to bar contained in Section 74 of the Control of Narcotic Substances Act, 1997. He further submits that if the vehicle is given on superdari to the appellant and the same is stolen it may prejudice the prosecution case during the course of trial.

5. We have considered the arguments advanced by learned counsel for the parties and gone through the record available on file.

6. Record available on file reveals that during the course of investigation in case FIR No.659/2016, dated 01.01.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, Police Station Saddar Wah, on the disclosure of the accused of that case, Investigating Officer conducted raid at Mala Kand Stop from where vehicle Toyota Corolla silver colour bearing registration No. QIL-059 was taken into possession and at that time one Amir Khan son of Bakhsh was sitting in the vehicle. Out of the vehicle contraband *charas* weighing 7-KGs and 260-grams was recovered and in this regard case FIR No. 661/2016, dated 11.11.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, was registered at Police Station Saddar Wah, which is pending adjudication before the learned trial Court. The stance of the appellant is that he is lawful owner of the vehicle, which stands registered against his name in the relevant record. Admittedly the registration of the case in the name of the appellant has also been verified by the Investigating Officer. According to version of the appellant, he is involved in the business of 'Renat-A-Car' and the subject vehicle was given to Amir Khan accused of case FIR No.661/2016, dated 11.11.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, Police Station Saddar Wah on rent on 11.11.2016 after due receipt, which is also available on record as Annexure-D. This aspect is also denied by the other side.

7. As far as bar contained in Section 74 of the Control of Narcotic Substances Act, 1997, as raised by leaned DDPP is concerned, the same has been deliberated by august Supreme Court of Pakistan in the case of *Allah Ditta vs. The State* (2010 SCMR 1181) wherein it has been

categorically, held that if the owner of the vehicle is not accused of the case and has no knowledge that his vehicle would be used for trafficking the narcotics, the provisions of Section 74 of CNSA, 1997, shall not create any bar for giving the vehicle to him on temporary custody. Relevant portion of the judgment is reproduced as under:--

> *"---S. 74, Proviso—Scope—Proviso of S. 74 of the Control of Narcotic Substances Act, 1997, does not prohibit the release of vehicle involved in the trafficking of narcotics to its owners, who is not connected in any way with the commission of the crime or the accused and was unaware that his vehicle was being used for the crime."*

Therefore while examining the case in hand on the touchstone of guidelines given in the pronouncement of the Apex Court referred to above, we are of the considered view that it is a fit case where the appellant is entitled to temporary custody of the vehicle.

8. For the foregoing reasons, we allow this appeal as a consequence whereof custody of vehicle Toyota Corolla silver colour bearing registration No.QIL-059 is handed over to the appellant temporarily subject to furnishing surety bonds in the sum of Rs. 15,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court and after valid receipt. It is made clear that before handing over custody of the vehicle to the appellant, its relevant pictures would be taken and placed on the record. Moreover, the appellant shall produce the vehicle as and when directed/required during the course of trial, without fail.

(A.A.K.) Appeal allowed

2019 Y L R 1175

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi and Raja Shahid Mehmood Abbasi, JJ

AHMED KHAN alias AHMED QAIS and others---Appellants

Versus

The STATE and others---Respondents

Criminal Appeal No.484 of 2017, heard on 14th January, 2019.

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

----Ss.9(c) & 15---Recovery of narcotics---Benefit of doubt---Secondary evidence---Principle---Accused persons were arrested for carrying 5 kilograms of heroin---Trial Court convicted accused persons and sentenced them to imprisonment for 7 years along with fine---To substantiate proceedings of raid, recovery of narcotics and arrest of accused persons, complainant/ investigating officer did not appear before Trial Court and such fact was fatal for prosecution and sufficient to demolish entire structure of prosecution case---Secondary evidence could be led through another witness who must remain associated with actual witness and was acquainted with his handwriting and signatures---Neither circumstances requiring to lead secondary evidence were brought on record nor witness who was produced as secondary evidence remained associated with complainant/ investigating officer and was not acquainted with his handwriting and signatures--- Prosecution witness appearing as secondary evidence never worked with complainant/investigating officer and witness had not seen any document prepared by him---Prosecution failed to substantiate proceedings allegedly carried out by complainant/ investigating officer---Prosecution had alleged that complainant/investigating officer was responsible for concocting false FIRs against innocent persons who was removed from service---Such allegation of prosecution also discredited complaint against accused persons---High Court set aside conviction and sentence awarded by Trial Court to accused persons and they were acquitted of the charge---Appeal was allowed in circumstances.

State v. Muhammad Rafeeque 1984 PCr.LJ 961 and Muhammad Akram v. The State 2012 SCMR 440 rel.

(b) Criminal trial---

----Benefit of doubt---Principle---Prosecution was to establish its case and prove charge against accused beyond shadow of reasonable doubts---Even a slightest doubt entitles an accused due benefit of acquittal not as a matter of grace or concession but as of right.

Tafiq Pervaiz v. The State 1995 SCMR 1345 and Ayub Masih v. The State PLD 2002 SC 1048 rel.

Raja Aamir Abbas for Appellant.

Syed Intikhab Hussain Shah, Special Prosecutor ANF for the State.

Date of hearing: 14th January, 2019.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this appeal, Ahmed Khan alias Ahmed Qais and Awais Khan (hereinafter referred to as the appellants) have challenged the judgment dated 11.05.2017, passed by the learned Judge Special Court (CNS), Rawalpindi, whereby in case FIR No. 70, dated 18.05.2015, registered under Sections 9(c)/14/15 of the Control of Narcotic Substances Act, 1997 (hereinafter referred to as the Act), at Police Station ANF RD North, Rawalpindi, they have been convicted and sentenced as under:--

Ahmed Khan @ Ahmed Qais

i) Under Section 9(c) of the Act --- simple imprisonment for 07 years, along with fine of Rs.50,000/-, in default whereof to further undergo simple imprisonment for 07 months.

ii) Under Section 15 of the Act --- simple imprisonment for 07 years, with fine of Rs.50,000/-, in default whereof to further undergo simple imprisonment for 07 months.

Awais Khan

i) Under Section 9(c) of the Act --- simple imprisonment for 06 years, along with fine of Rs.30,000/-, in default whereof to further undergo simple imprisonment for 06 months.

ii) Under Section 15 of the Act --- simple imprisonment for 07 years, with fine of Rs.50,000/-, in default whereof to further undergo simple imprisonment for 07 months.

It was directed that benefit of Section 382-B, Cr.P.C. would be available to the appellants.

2. The matter was reported to the Police by Shakeel Ahmed Inspector, through complaint (Ex.PA/1-2), which resulted into registration of the FIR (Ex.PA), on the grounds that he received an information that Muhammad Saleem and Akif Shuaib, along with their companions, namely Ahmed Khan @ Ahmed Qais and Awais Khan (appellants) would smuggle a huge quantity of narcotics to a foreign country and that for the said purpose, the appellants would bring narcotics in the office of Kings Cargo Company, situated at 79-Jinnah Avenue, Airport Housing Society, Rawalpindi, hence a raiding party was constituted and checking was started; at about 8.40 PM, a car registration No. CU-130/ICT, arrived at the office of above said Cargo Company; two persons de-boarded the vehicle and while taking two shoppers, from its dickey, started moving towards gate of the company; on pointation of the informer, the persons were apprehended, who told their names as Ahmed Khan alias Ahmed Qais and Awais Khan (appellants); the shopping bag, which was being carried by Ahmed Khan alias Ahmed Qais (appellant), was checked and from it, three packets of heroin, each weighing 01 kilogram, were recovered; from the shopping bag, lying in the hand of Awais Khan (appellant), two packets of heroin, each weighing 01 kilogram emerged; the complainant separated 10 grams from each of the packets, for the purpose of chemical analysis and prepared 05 sealed sample parcels, whereas 02 sealed parcels of the remaining quantity were also prepared and all the parcels were taken into possession, through recovery memo (Ex.PB); during personal search of the appellants, the articles and the documents were recovered and secured through memos Ex.PC and PD.

3. The prosecution had alleged that thereafter, on pointation of the appellants, 4300 Ecstasy tablets, weighing 720 grams were also recovered from a vehicle registration No. BC-3636, parked at House No. 156, Street No. 01, Phase-II, Bahria Town, Rawalpindi, where Alamgir Khan and Mushtaq (co-accused since acquitted) were available, hence the said narcotic, along with the vehicle was secured, through memo Ex.PE-1.

4. The case was investigated and the appellants as well as their co-accused, namely Alamgir Khan and Mushtaq (since acquitted) were challaned to the court. Formal charge against the all was framed on 12.10.2015, which was denied and trial was claimed, hence the prosecution witnesses namely Syed Mehboob Hussain Shah Head Constable, Wajid Hameed SI, Muhammad Tauqeer Shahzad Constable and Umair Fahim SI were summoned and recorded, as PW-1, PW-2, PW-3 and PW-4 respectively. On completion of the prosecution evidence and closure of the case, the appellants and their co-accused (since acquitted) were examined under Section 342 Cr.P.C. during which the questions arising out of the prosecution evidence were put to them, but they had denied almost all the questions, while pleading their innocence and false involvement in the case, with mala fide. The questions "Why this case against you and why the PWs have deposed against you?" were replied by the appellants in the following similar words:--

> "It is false case. Inspector Shakeel has made this bogus case against us, because earlier on, he had removed house hold articles worth Rs.03 Crors, from our house regarding which FIR has been lodged and said Inspector Shakeel had also demanded huge amount, which was denied hence he falsely involved us in the instant case and had abducted us on 15.05.2015. Hence, on his instruction PWs have falsely deposed against me."

The appellants opted to lead evidence in their defence and also to make statements under Section 340(2), Cr.P.C. Consequently, the appellants had made statements on oath and also got examined Adnan Ayub, Aamir Jahangir Khan, Haroon Aitimad and Wajid Gul, as DW-1, DW-2, DW-3 and DW-4 respectively. During the evidence of the DWs, documents were also brought on the record, as Mark DA/1-3, Mark-DB/1-2 and Ex.DW-4/A. Finally, the impugned judgment was passed, whereby the appellants were convicted and sentenced in the above mentioned terms, whereas their above named co-accused were acquitted of the charge. Consequently, the appeal in hand.

5. Arguments advanced by the learned counsel for the appellants as well as the learned Prosecutor ANF, have been heard and record has been perused.

6. The complainant namely Shakeel Ahmed, Inspector ANF, who allegedly:-

i) received the above mentioned information;

ii) arranged raiding party;

iii) apprehended the appellants and recovered narcotics;

iv) separated samples;

v) prepared sealed parcels and took the same into possession, through recovery memo (Ex.PB);

vi) secured the articles, document and cash, recovered during personal search of the appellants vide memos (Ex.PC and Ex.PD);

vii) took into possession the vehicle registration No. CE-130/ICT, by way of memo (Ex.PE);

viii) recovered the Ecstasy tablets weighing 720 grams and secured the same as well as the vehicle No. BC-3636, through memo (Ex.PE-1); and

ix) drafted the complaint (Ex.PA/1-2);

to substantiate the above said proceedings, did not appear before the learned trial court, which fact is fatal for the prosecution and sufficient to demolish the entire structure of the prosecution case. If any case law in this regard is needed, reference may be made to the case titled "State v. Muhammad Rafeeque" reported as 1984 PCr.LJ 961, relevant portion whereof reads as under:--

"in addition to this neither I.O nor police Official who recorded the FIR and conducted investigation were examined by prosecution at trial and consequently respondent was seriously prejudiced and in our opinion trial was vitiated on this ground, as well."

7. The stance of the prosecution was that the complainant was responsible to book different persons in different FIRs, hence criminal proceedings against him were in progress, wherein he was a proclaimed offender, which were the reasons of his non-association in the case in hand and that to bring on the record, the proceedings conducted by him, secondary evidence had been led, through Umair Fahim (PW-4). To lead secondary evidence, certain pre-requisites should be fulfilled. Some of them are that the concerned witness should either be:-

i) not alive;

ii) incapable to make a statement;

iii) out of reach of the court; or

iv) his whereabouts are not known to anyone.

8. In any of the above stated situations, secondary evidence can be led, through another witness, who must remain associated with the actual witness and must be acquainted with his hand-writing and signatures. In the situation in hand, neither any of the above mentioned circumstances has been brought on the record nor the PW-4 remained associated with Shakeel Ahmed Inspector and as such was not acquainted with his hand-writing and signatures as the PW-4 had frankly conceded that previously he never worked with Shakeel Ahmed Inspector and that no document prepared by the Inspector was seen by him. In this way, it can safely be said that the prosecution has failed to substantiate the above said proceedings, allegedly carried on by Shakeel Ahmed Inspector. Furthermore, the prosecution stance remained that Shakeel Ahmed Inspector was responsible for concocting false FIRs, against innocent persons, hence under due proceedings, he had been removed from service. By saying so, the prosecution had also discredited the above named complainant.

9. The prosecution version was that Rs.7000/- were recovered from the appellant Ahmed Khan alias Ahmed Qais, Rs.5000/- from Awais Khan appellant, whereas Rs.2000/- each from Alamgir Khan and Mushtaq (co-accused since acquitted). But during the trial, three currency notes of denomination of Rs.5000/- each, whereas two notes of Rs.500/- each, have

been produced and got exhibited. The said fact also speaks a volume about the proceedings, carried on by the above named Inspector.

10. The defence stance was that Shakeel Ahmed Inspector (complainant) had taken away the articles valuing Rupees three crore, from the house of the appellant's party, hence an FIR No. 21, dated 28.01.2016 under Sections 380/ 381A/506(ii), P.P.C., at Police Station Lohi Bher, Islamabad had been registered against him. Tauqeer Shahzad (PW-3) had showed his ignorance about installation of tracker system in the vehicle Registration No. CU-130/ICT or CCTV cameras at Bahria Town, Rawalpindi, but during evidence of Haroon Aitimad (DW-3), it was confirmed on the record that in the above said vehicle, the above mentioned system was installed and that according to their data, from 16.05.2015 to 18.05.2015, the car remained parked at F-11/3, Islamabad and that thereafter, it came at Gulzar-e-Quaid, Rawalpindi. In the evidence led by Aamir Jahangir Khan (DW-2), it had come on the record that CCTV cameras were installed in Bahria Town and according to the footage of the cameras on 17.05.2015, black coloured car, along with two double door vehicles, entered in the said Town. The above mentioned evidence, led by the above said DWs, coupled with the documents, tendered by them, had cast a serious doubt into the alleged story, narrated in the complaint (Ex.PA/1-2). The statements of PW-3 and PW-4 qua Alamgir Khan and Mushtaq (co-accused since acquitted) had been disbelieved by the learned trial court and as such for believing their testimony, to the extent of the appellants, strong corroboration was required, which was missing in the file. In this regard, reference may be made to the case titled "Muhammad Akram v. The State" reported as 2012 SCMR 440, wherein the august Supreme Court of Pakistan has held as under:-

> "Except for the oral statements of eye-witnesses there is nothing on record which could establish the presence of both the eye-witnesses at the spot and as their presence at the spot appears to be doubtful, no reliance could be placed on their testimonies to convict the appellant on a capital charge. Since the same set of evidence has been disbelieved qua the involvement of Muhammad Aslam, as such, the same evidence cannot be relied upon in order to convict the appellant on a capital charge as the statements of

both the eye-witnesses do not find any corroboration from any piece of independent evidence."

11. The facts and circumstances highlighted above, have made the alleged prosecution story and charge against the appellants, highly doubtful. It is an admitted principle and proposition of law, that the prosecution should establish its case and prove charge, against an accused, beyond shadow of all reasonable doubts and even a slightest doubt would entitle an accused, due benefit of acquittal, not as a matter of grace or concession, but as of right. In this regard reliance may be placed upon the dictum laid down by the august Supreme Court of Pakistan in the case titled "Tariq Pervaiz v. The State" reported as 1995 SCMR 1345, wherein it has been held as under:--

"If a simple 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 or concession, but as a matter of right."

The same view has been reiterated in a subsequent judgment titled "Ayub Masih v. The State" reported as PLD 2002 SC 1048, whereby it has been directed that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind.

12. Resultantly, the appeal is allowed, impugned judgment towards conviction and sentence of the appellants is set aside and they are acquitted of the charge, while extending them the benefit of doubt. The appellants are in custody, therefore it is directed that they be released from the jail, if not required to be detained in any other case. The vehicles in question be returned to the rightful owner(s), whereas the articles and cash, recovered during personal search of the appellants and secured through memos (Ex.PC and Ex.PD), be handed over to the respective appellants and the narcotics be destroyed, in accordance with law.

MH/A-10/L Appeal allowed.

2020 M L D 548

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi and Raja Shahid Mahmood Abbasi, JJ

STATE through Prosecutor General Punjab---Appellant

Versus

NASEEB SHAH and 5 others---Respondents

Criminal Appeal No. 58 of 2014, heard on 25th September, 2019.

Explosive Substances Act (VI of 1908)---

----Ss. 4, 5 & 7---Anti-Terrorism Act (XXVII of 1997), Ss. 7 & 19(8-B)---Criminal Procedure Code (V of 1898), S. 417---Act of terrorism---Attempt to cause explosion or making or keeping explosive with intent to endanger life or property, making or possessing explosives under suspicious circumstances---Appeal against acquittal---Restriction on trial of offences---Failure of prosecution to apply for consent of Provincial Government---Effect---Accused persons were charged under S. 5 of Explosive Substances Act, 1908---Sanction of the Provincial Government under S. 7 of Explosive Substances Act, 1908 for holding trial was mandatory and a condition precedent for prosecution of the accused persons---Entire proceedings, in the absence of requisite sanction/permission, were void and without jurisdiction---Word "shall" used in S. 7 of Explosive Substances Act, 1908 left no room for any departure therefrom---Section 19(8-B), Anti-Terrorism Act, 1997, however, made a relaxation to the effect that if sanction was applied but not granted by the competent authority within 30 days then the due proceedings towards initiation of trial could be carried on---Section 19(8-B), Anti-Terrorism Act, 1997 required the request for prosecution to have been made---When there was mention of receipt of consent or sanction within thirty days, it impliedly indicated to sending and seeking consent/sanction---No such request having been made, prosecution and trial under S. 7 of Explosive Substances Act, 1908 and S. 19(8-B) of Anti-Terrorism Act, 1997 was not competent and possible---Such fact alone was sufficient to give premium of acquittal to the accused persons---Impugned judgment was not open to any exception and as such did not warrant any interference---Appeal against acquittal was dismissed.

Naveed Ahmed Warraich, DDPP with Sohail, Inspector for the State.
Rao Abdur Raheem for Respondents Nos. 4 and 5.
Respondent No.3 has since died.

Date of hearing: 25th September, 2019.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through this appeal, the State has challenged acquittal of the respondents, recorded through judgment dated 20.12.2013, passed by the learned Judge, Anti Terrorism Court-II, Rawalpindi Division, Rawalpindi.

2. Notices to the respondents were issued and in consequence thereof respondents Nos. 4 and 5 had entered appearance. It has been reported that respondent No. 3 has died, whereas non-bailable warrants of arrest issued, against the remaining respondents have been received back with the reports that they were Afghani, hence returned to their native country.

3. Under the above mentioned circumstances as the appeal can be decided on the basis of arguments of the State as well as the respondents in attendance, therefore, it is being disposed of.

4. The respondents were booked in case FIR No. 82 dated 15.2.2013, registered under Sections 4/5/6 of Explosive Substances Act, 1908, Section 7 of Anti Terrorism Act, 1997 and 13 of the Arms Ordinance XX, 1965 at Police Station Taxila, District Rawalpindi, with the precise allegations of possessing Explosive material. They were challaned to the Court and trial was held before the learned Judge, Anti Terrorism Court No.II, Rawalpindi Division, Rawalpindi and finally through the above mentioned judgment they were acquitted of the charge.

5. The offence under Section 5 of the Explosive Substances Act, 1908 was charged against the respondents but according to Section 7 of the said Act, prior permission for prosecution by the competent authority was required. The above mentioned provision reads as under:--

"7. Restriction on trial of offences. No Court shall proceed to the trial of any person for an offence against this Act except with the

consent of * * * the [Provincial Government] [to which intimation shall be sent within two days of the registration of the case:]

[Provided that if the consent is neither received nor refused within sixty days of the registration of case the Government such consent shall be deemed to have been duty given.]"

It is crystal clear from the bare reading of the above mentioned provision of law that sanction for prosecution for holding trial under Explosive Substances Act is mandatory and a condition precedent for prosecution, of the respondents, under section 5 of the said Act. In absence of the requisite sanction/permission, entire proceedings taken would be void and without jurisdiction. The word "shall" used in above mentioned section leaves no room for any departure therefrom. Although, Section 19(8-B) of Anti Terrorism Act, 1997 makes a relaxation to the effect that if sanction is applied but not granted by the competent authority within 30-days, then the due proceedings towards initiation of trial may be carried on. For ready reference the said provision is reproduced herein below:--

"19. Procedure and Powers of [Anti Terrorism Court.

[(1)

[(1A)

(2)

(3)

[(4)

(5)

(6)

[(7)

(8)

[(8-A)

(8-B) Notwithstanding anything contained in section 7 of the Explosive Substances Act, 1908 (VI of 1908), or any other law for the time being in force, if the consent or sanction of the appropriate authority, where required, is not received within thirty days of the submission of challan in the Court, the same shall be deemed to have been given or accorded and the Court shall proceed with the trial of the case.]"

From the above mentioned provision, one thing is clear that request for prosecution should have been made. When there is mention of receipt of consent or sanction within thirty days, it impliedly indicates to sending and seeking consent/sanction. Admittedly, in the instant case no such request has been made and as such under Section 7 of the Explosive Substances Act, 1908, as well as Section 19(8-B) of Anti Terrorism Act, 1997, prosecution and trial was not competent and possible.

6. The above mentioned fact alone was sufficient to give premium of acquittal to the respondents and as such learned trial Court on the basis of said ground, coupled with others, fully detailed in the impugned judgment, had rightly awarded the said premium to the respondents. In this way, the impugned judgment, being well reasoned and call of the day is not open to any exception and as such does not warrant any interference.

7. Due to the reasons mentioned above, the appeal in hand being devoid of any force or merit is dismissed. Consequently, notices issued to the respondents are withdrawn.

SA/S-84/L Appeal dismissed.

2020 M L D 1132

[Lahore]

Before Muhammad Tariq Abbasi and Sardar Ahmad Naeem, JJ

MUHAMMAD ASIF---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No.112-J and Murder Reference No.165 of 2011, decided on 29th September, 2015[*].

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

----Ss. 302(b) & 460---Qatl-i-amd, person jointly concerned in lurking house-trespass or house-breaking by night---Appreciation of evidence---Benefit of doubt---Night time occurrence---No source of light---Scope---Accused was charged for committing murder of the deceased---In the FIR, neither any person as accused was nominated nor features of any accused were given or any source of light at the spot was described---One month after the alleged occurrence, the complainant mentioned in his subsequent application that he identified one of the accused, who entered in his house and by firing, done his brother to death and that the witnesses told him the particulars of the accused---No feature of the accused was given in the FIR and in the subsequent application, it was not mentioned that on the basis of which feature, the accused was identified---Grounds taken in the said application were nothing but an afterthought concoction---No source of light at the spot was described in the FIR, and the complainant, during cross-examination, had admitted that no source of light on the roof of the house was available, then his stance that he had identified the accused to be the person, who, on the roof of the house, had fired and caused injury to his brother, which resulted into his death, was surely a false statement---Admittedly, no test identification parade was held and if for a moment, it was presumed that the complainant had identified the appellant, even then he, for the purpose of test identification parade, should have been brought before witnesses, but without any reason, cause or justification, the said exercise was not done---Circumstances established that the prosecution had failed to bring home the appellant beyond shadow of all reasonable doubts---Appeal against conviction allowed, in circumstances.

Tariq Pervaiz v. The State 1995 SCMR 1345 and Ayub Masih v. The State PLD 2002 SC 1048 rel.

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

----Ss. 302(b) & 460---Qatl-i-amd, person jointly concerned in lurking house-trespass or house-breaking by night---Appreciation of evidence---Benefit of doubt---Contradiction in the statement of witnesses---Effect---Accused was charged for committing murder of the deceased---Complainant, in his statement had contended that he had seen the appellant at a Adda, whereas the version of witness was that at that time, he along with the complainant was available in the commission shop of a person, who never came forward to fortify the above said contention---Appeal against conviction was allowed, in circumstances.

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

----Ss. 302(b) & 460---Qatl-i-amd, person jointly concerned in lurking house-trespass or house-breaking by night---Appreciation of evidence---Benefit of doubt---Crime empty recovered from the spot---Reliance---Scope---Accused charged for committing murder of the deceased---Nothing incriminating could be recovered from accused during his physical remand---Empty of .30 bore pistol, collected from the spot was not sent to any Laboratory and as such its benefit could not be given to the prosecution.

Aiyan Tariq Bhutta and Saqib Jillani for Appellant.

Mehmood Ahmad Chadhar for the Complainant.

Malik Muhammad Jaffer, Deputy Prosecutor General for the State.

Date of hearing: 29th September, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This judgment shall decide the above captioned Criminal Appeal as well as the Murder Reference, as both are outcome of single judgment dated 15.3.2011, passed by the learned Additional Sessions Judge, Sambrial, District Sialkot, whereby in case FIR No. 301, dated 12.6.2007 , registered under Sections 460/302, P.P.C., at Police Station Sambrial, District Sialkot, Muhammad Asif (hereinafter referred to as the appellant) was convicted and sentenced as under:--

i) Under Section 302(b), P.P.C. -- death, with compensation of Rs.3,00,000/-, payable to legal heirs of the deceased, otherwise to undergo simple imprisonment for six months.

ii) Under Section 460, P.P.C. - rigorous imprisonment for ten years.

2. The precise facts, as per the application (Ex.PH), moved by Muhammad Amjad, complainant (PW-5), which resulted into registration of the FIR (Ex.PA), were that during the night between 11/12.6.2007, when the complainant, along with his family members was sleeping at the roof of

house, suddenly three unknown accused, armed with firearms, came there and got them awoken; Qaisar Mehmood (hereinafter referred to as the deceased), when obstructed the dacoits, they started abusing him and during scuffle, one dacoit fell down in the crop and the others started firing; a fire shot hit on the abdomen of Qaisar Mehmood and he became seriously injured; in the meanwhile, two dacoits, who were available in the courtyard, while firing, came on the roof and thereafter fled away; Qaisar Mehmood in an injured condition was shifted to Civil Hospital, Sialkot, from where he was referred to Lahore, but succumbed to the injuries. Thereafter, the complainant (PW-5) on 11.7.2007 again moved an application (Ex.P), with the contention that on the said date at about 10.00 AM, when he along with Ghulam Qadir (PW not produced) and Liaqat Ali (PW-8) was available at Adda Sahuwala, one of the dacoits, who had done Qaisar Mehmood to death by firing, passed on a motor cycle and identified by him; the above named PWs told the complainant that the said accused was the appellant, hence he was nominated and arrested. The case was investigated, when the appellant was found to be involved, hence challaned to the court. Formal charge against him was framed on 27.5.2009, which was denied and trial was claimed, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 13 witnesses. The gist of evidence led by the material witnesses was as under:-

i) PW-3 Dr. Iftikhar Ahmad had conducted postmortem examination of the dead body of Qaisar Mehmood on 12.6.2007 and prepared the postmortem report (Ex.PD) and pictorial diagrams (Ex.PD/1 and Ex.PD/2), when an incised stitched wound on left lumber region, having blackening around the margins and another stitched wound on right lumber region of the deceased were noticed. The injury No. 1 was caused by firearm and sufficient to cause death.

ii) PW-5 Muhammad Amjad was the complainant as well as an eye witness of the alleged occurrence, who narrated almost the same facts as were disclosed by him in above mentioned complaint (Ex. PH) and subsequent application (Ex.PJ).

iii) PW-6 Mst. Aasia Bibi and PW-7 Mst. Uzma Bibi the witnesses of the alleged occurrence, firstly had supported the version narrated in the FIR and thereafter contended that on 9.8.2007, the appellant was identified by them, in the lock-up of the Police Station, being

one of the dacoits, who by firing committed murder of the deceased.

iv) PW-8 Liaqat Ali, stated that on 11.7.2007, when he along with Muhammad Amjad complainant (PW-5) and Ghulam Qadir (PW not produced) was available at Adda Sahuwala, the appellant passed from the said place on a motor cycle and identified by the complainant to be one of the accused, who entered in his house and done his brother Qaisar Mehmood to death.

v) PW-13 Muhammad Arif, S.I. had investigated the case, during which carried on the proceedings and prepared the documents, fully detailed in his statement.

3. On completion of the prosecution evidence, the appellant was examined under Section 342, Cr.P.C., during which the questions arising out of prosecution evidence were put to him, but he denied almost all such questions, while pleading his innocence and false involvement in the case with mala fide. The question "Why this case against you and why the PWs have deposed against you?"' was answered by him in the following words:- "It is correct that complainant Amjad was abroad and after one year, he returned to Pakistan. Deceased Qaisar Mehmood had developed illicit relations with Mst. Uzma, wife of complainant. On fateful night, Uzma Bibi and deceased Qaisar Mehmood were present at the roof of their house in naked position and on seeing them in such objectionable position, complainant Amjad Mehmood made a fire, which landed on the deceased. The story of illicit relation between deceased and Mst. Uzma was very well published in Mohallah and I was also informed by deceased in order to suppress the fact of aforesaid illicit relationship and that of murder of deceased by complainant, he concocted this false story and implicated me in this occurrence. It is pertinent to mention that co-accused Shamas Din was also arrested by the Police and was subsequently bailed out. The complainant after grabbing his house, effected compromise with said co-accused and due to compromise, no proceedings were initiated against said co-accused. PWs are interested witnesses because they are closely related to the complainant. Police did not investigate the case on merits due to their having been in league with the complainant and thus wrongly challaned me in this case."

He did not opt to lead any evidence in his defence or make statement under Section 340(2), Cr.P.C. Finally, the impugned judgment was passed in the above mentioned terms. Consequently, the matters in hand.

4. The learned counsel for the appellant has argued that it was a dark night occurrence, but with mala fide, while concocting a false story and introducing false witnesses, the appellant was roped in the case; the alleged identification of the appellant, in the Police Station by PWs-6 and 7 was not acceptable under the law; no incriminating were recovered from the appellant; the prosecution case and the charge against the appellant was not established and proved, hence he was entitled to acquittal and as such the impugned judgment could not be termed justified.

5. On the other hand, the learned Deputy Prosecutor General, assisted by the learned counsel for the complainant, has opposed the appeal, while supporting the impugned judgment, resulting into conviction of the appellant to be well-reasoned and call of the day, hence not interferable.

6. Arguments of all the sides have been heard and the record has also been perused.

7. The occurrence had taken place during the night between 11/12.6.2007. At the time of reporting the matter to the Police through application (Ex.PH) and registration of the FIR (Ex.PA), neither any person, as accused was nominated nor features of any assailant were given or any source of light at the spot was described. After about a month of the alleged occurrence, the appellant had moved the above mentioned subsequent application (Ex.PJ), with the above mentioned contentions. In the said subsequent application (Ex.PJ), it was contended that when the complainant had identified the appellant to be one of the accused, who entered in his house and by firing, done his brother to death, Liaqat Ali (PW-8) and Ghulam Qadir (PW not produced) told him the particulars of the appellant. When in the FIR, no feature of the accused was given and in the subsequent application (Ex.PJ), it was not mentioned that on the basis of which feature, the appellant was identified to be an accused of the occurrence, then the grounds taken in the said application were nothing, but an after-thought concoction. As stated above, in the FIR, no source of light at the spot was described and the complainant (PW-5), during cross-examination had admitted that no source of light on the roof of the house was available, then his stance that he had identified the appellant to be the person, who, on the roof of the house, had fired and caused injury to Qaisar Mehmood, which resulted into his death, was surely a false stance.

8. Admittedly, no test identification parade was held and if, for a moment, it is presumed that the complainant had identified the appellant, even then he, for the purpose of test identification parade, should have

been brought before Mst. Aasia Bibi (PW-6) and Mst. Uzma Bibi (PW-7), but without any reason, cause or justification, the said exercise was not done. When there was no hurdle in conducting the test identification parade, in the prescribed manner, then the alleged identification of the appellant by the above named ladies, in the Police Station was a false proceedings, hence should not be given any weight.

9. The complainant (PW-5), in his statement had contended that he had seen the appellant at Adda Sahuwala, whereas the version of Liaqat Ali (PW-8) was that at that time, he along with the complainant was available in the commission shop of Muhammad Akram, who never came forward to fortify the above said alleged contention.

10. The appellant remained on physical remand, but no incriminating could be recovered from him, hence the empty of .30 bore pistol, collected from the spot was not sent to any laboratory and as such had not given any benefit to the prosecution.

11. All the above mentioned facts and circumstances, lead us to the conclusion that the prosecution has failed to bring home the charge against the appellant, beyond shadow of all reasonable doubts. Admittedly in such like situation, the appellant deserves benefit of doubt, not as a matter of grace or concession, but as of right. In this regard, reference may be made to the case titled "Tariq Pervaiz v. The State" reported as 1995 SCMR 1345. This view has further been reiterated in the case titled "Ayub Masih v. The State" reported as PLD 2002 SC 1048, whereby it has been held that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind.

12. Resultantly, the above captioned Criminal Appeal No. 112- J of 2011 is accepted, the, impugned judgment is set aside and the appellant namely Muhammad Asif is acquitted of the charge, while extending him the benefit of doubt. He is in custody, hence be released forthwith, if not required to be detained in any other matter. The disposal of the case property shall be as directed by the learned Trial Court. As a consequence, Murder Reference No. 165 of 2011 is answered in negative and death sentence awarded by the learned Trial Court to Muhammad Asif appellant is not confirmed.

JK/M-62/L Appeal accepted.

2020 M L D 1384

[Lahore]

Before Muhammad Tariq Abbasi, J

DOST MUHAMMAD---Petitioner

Versus

The STATE and others---Respondents

Criminal Revision No. 24174 of 2019, heard on 31st January, 2020.

Juvenile Justice System Act (XXII of 2018)---

----S. 8---Age, determination of---Determination of age on the basis of medical examination report---Scope---Petitioner assailed order passed by Trial Court whereby request made by petitioner for ossification test of the accused was declined---Petitioner had got registered an FIR under S.302, P.P.C., against the accused for committing qatl-i-amd---Police had found the accused as minor, hence while declaring him so, had submitted the challan in the court constituted under the Juvenile Justice System Act, 2018---Section 8 of Juvenile Justice System Act, 2018 carried two steps: First was to be adopted by the Investigating Officer, whereas the other by the court---Where the accused claimed to be juvenile or from appearance he seemed so then the Investigating Officer or the court had to make an inquiry to that effect, which could include a medical report---Investigating Officer had only relied upon the documents produced before him by the accused---One of such documents was admittedly incorrect but even then no effort was made by Investigating Officer for medical examination of the accused---Even the Trial Court had failed to resolve the controversy in question---Revision petition was allowed, accordingly.

Naseem Ullah Khan Niazi for Petitioner.

Sana Ullah, Deputy Prosecutor General and Dr. Anwar Gondal, Additional

Prosecutor General for the State.

Date of hearing: 31st January, 2020.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition, calls in question the order dated 05.04.2019, of the learned Sessions Judge, Khushab, whereby request made by the petitioner, for ossification test of respondent No.2 namely Muhammad Ikram (hereinafter referred to as the respondent), has been declined.

2. The petitioner had got registered FIR No. 310, dated 28.09.2018, under Section 302, P.P.C., at Police Station Quaidabad, District Khushab, against the respondent for committing 'qatl-e-amd' of Qamar Hayat. The Police had found the respondent as minor, hence while declaring him so, had submitted the challan in the court, constituted under The Juvenile Justices System Act, 2018 (hereinafter referred to as the Act).

3. The petitioner while declaring the above mentioned findings of the Police, to be against the required procedure and based upon incorrect documents, had requested the learned trial court, that to reach at just and fair conclusion, ossification test of the respondent may be got conducted, but the said learned court, through the impugned order, had declined such a request.

4. Section 8 of the Act, deals towards determination of age of an accused, which reads as under:-

> "8. Determination of age.---(1) Where a person alleged to have committed an offence physically appears or claims to be a juvenile for the purpose of this Act, the officer-in-charge of the police station or the investigation officer shall make an inquiry to determine the age of such person on the basis of his birth certificate, education certifications or any other pertinent documents. In absence of such documents, age of such accused person may be determined on the basis of a medical examination report by a medical officer.
>
> (2) When an accused person who physically appears to be juvenile for the purpose of this Act is brought before a Court under Section 167 of the Code, the Court before granting further detention shall record its findings regarding age on the basis of available record

including the report submitted by the police or medical examination report by a medical officer."

5. The above mentioned provision carries two steps. First is to be adopted by investigation officer, whereas other by the Court. At both the occasions, if an accused claims himself to be juvenile or from appearance, he seems so, then the investigation officer or the court shall make an inquiry to this effect, which may include a medical report, made by a medical officer.

6. In the matter in hand, the investigation officer had only relied upon the documents produced before him, by the respondent. One of such documents, was admittedly incorrect, but even then, no effort by the investigation officer was made, for medical examination of the respondent. Even the learned court, where challan against the respondent had been submitted, had failed to resolve the controversy in question and order for the above mentioned examination.

7. It has further been noticed that the investigation officer, on one hand, had alleged the respondent to be a juvenile, whereas on the other hand, he had failed to comply with the mandatory requirements of Section 7 of the Act, which is as follows:-

"7. Investigation in juvenile cases.---(1) A juvenile shall be interrogated by a police officer not below the rank of Sub Inspector under supervision of Superintendent of Police or SDPO.

(2) The investigation officer designated under subsection (1) shall be assisted by a probation officer or by a social welfare officer notified by the Government to prepare social investigation report to be annexed with the report prepared under Section 173 of the Code."

The report under Section 173, Cr.P.C., filed in the juvenile court does not suggest that the respondent was interrogated under the supervision of Superintendent of Police or the SDPO concerned, with assistance of the Probation Officer or Social Welfare Officer, notified by the Government, for the purpose.

8. Under the above mentioned circumstances, it would be appropriate that for determination of age of the respondent, his medical examination should be got conducted.

9. Resultantly, the revision petition in hand is allowed, the order in question is set aside and reversed. Meaning thereby, that the above mentioned request of the petitioner, is acceded to, with a direction to the Medical Superintendent of DHQ Hospital, Khushab, to constitute a medical board, for determination of age of the respondent and submit the report, with the learned trial court, which in the light of such a report, shall proceed with the matter, in accordance with law.

SA/D-3/L Revision allowed.

2020 P Cr. L J Note 19
[Lahore]
Before Muhammad Tariq Abbasi, J
ZAIN-UL-ABIDEEN---Petitioner
Versus
ADDITIONAL SESSIONS JUDGE and 7 others---Respondents

Writ Petition No. 13446 of 2016, heard on 26th June, 2019.

Criminal Procedure Code (V of 1898)---

----S. 561-A---Penal Code (XLV of 1860), Ss. 365-B, 336, 337-A(ii), 337-F(iii) & 376---Anti-Terrorism Act (XXVII of 1997), S. 6---Kidnapping, abducting or inducing woman to compel for marriage etc., Itlaf-i-Salahiyat-i-Udw, shajjah-i-mudihah, mutalahimah and rape---Quashing of order---Objection raised by the petitioner that the case was triable by Anti-Terrorism Court, was overruled---Validity---Record showed that the alleged occurrence towards abduction of sister of the petitioner and causing her injuries by throwing acid upon her was committed on 01.09.2008---At that time, neither any penal clause for hurt through corrosive substance, including acid, was available in the Penal Code, 1860 nor in Third Schedule of the Anti-Terrorism Act, 1997, any such offence was described, because Ss. 336-A & 336-B were inserted in P.P.C. from 28.11.2011---Offence of hurt through corrosive substance was included in the Schedule of Anti-Terrorism Act, 1997 on 05.09.2012---Circumstances clearly showed that at the time of commission of the alleged occurrence, neither the said provisions of P.P.C., regarding hurt by corrosive substance were on the statute book nor in the Schedule of the Anti-Terrorism Act, 1997, any such offence was included---Accused could not be tried and punished for an offence which at the time of commission of occurrence was not made punishable---No retrospective effect to a penal provision could be given---Circumstances established that the objection of the petitioner before the Trial Court, for sending the case to Anti-Terrorism Court, was unjustified and as such rightly turned down, through the order in question---Constitutional petition having no force or merit, was dismissed accordingly.

Muhammad Fazal and others v. Saeedullah Khan and others 2011 SCMR 1137 and Khizar Hayat v. The State 2012 SCMR 1066 rel.

Syed Munawar Hussain Abid for Petitioner.

Zafar Hussain Ahmad, Assistant Advocate-General and Amjad Rafique, Additional Prosecutor-General with Qalab Abbas, ASI for the State.

Ch. Muhammad Lehrasab Khan Gondal for Respondent No. 7.

Date of hearing: 26th June, 2019.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---The instant Constitutional Petition, challenges the vires of an order dated 05.10.2015, passed by the learned Additional Sessions Judge, Mandi Bahauddin, whereby an objection raised by the present petitioner, that the case was triable by Anti-Terrorism Court, hence may be transmitted there, has been over ruled.

2. An FIR No. 392, dated 06.09.2008, under sections 365-B/ 336/337A(ii)/337F(iii)/376, P.P.C., at Police Station Saddar, District Mandi Bahauddin, was got lodged by the present petitioner, namely Zain-ul-Abideen, with the contentions that Azhar Hussain, present respondent No. 7 (hereinafter referred to as the respondent) and his two brothers namely Mazhar and Sajid (co-accused since acquitted) had abducted his sister Mst. Samia Khanam and they while sprinkling acid, had also caused injuries to her.

3. The respondent and his above named brothers (since acquitted), were found to be involved, hence challan against all, was prepared and forwarded to the Sessions Court, Mandi Bahauddin and entrusted to an Additional Sessions Judge of the said district. At that time, the respondent was a proclaimed offender, hence the proceedings, to the extent of his above named co-accused were carried on, during which the present petitioner as well as the above named lady, had got recorded their statements as PW-1 and PW-2 respectively, whereby both had exonerated the co-accused of the charge. Consequently, through judgment dated 03.01.2009, the above named co-accused were acquitted of the charge.

4. The respondent, who at the time of above mentioned proceedings, was a proclaimed offender, was arrested later on, hence the trial to his extent had commenced in the court of learned Additional Sessions Judge, Mandi Bahauddin, when an objection was raised from the petitioner's side

that as during the occurrence, acid was thrown upon the above named lady, hence offence, being described in third Schedule of the Anti-Terrorism Act, 1997, was triable by Anti-Terrorism Court and as such the case may be forwarded to the said forum. But the learned trial court, through the order in question, had refused to allow the objection and accept the request.

5. The alleged occurrence towards abduction of Mst. Samia Khanam and causing her the injuries by throwing acid upon her was committed on 01.09.2008. At that time, neither any penal clause for hurt through corrosive substance (including acid) was available in the Pakistan Penal Code, 1860 nor in third Schedule of the Anti-Terrorism Act, 1997, any such offence was described, because sections 336-A and 336-B, were inserted in the Pakistan Penal Code, through amendment dated 28.11.2011, whereas in the above said Schedule, the offence of hurt through corrosive substance was included on 05.09.2012.

6. From the above mentioned, it is clear that at the time of commission of the alleged occurrence, neither the above mentioned provisions of P.P.C., regarding hurt by corrosive substance were in field nor in the above said Schedule of the Anti-Terrorism Act, 1997, any such offence was included.

7. Article 12 of the Constitution of Islamic Republic of Pakistan, 1973, protects every citizen of Pakistan, against retrospective punishment. The said Article reads as under:-

12. Protection against retrospective punishment.---(1) No law shall authorize the punishment of a person---

(a) for an act or omission that was not punishable by law at the time of the act or omission; or

(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

(2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence."

8. All the above mentioned, lead to the conclusion that an accused could not be tried and punished for an offence, which at the time of commission of occurrence, was not made punishable, as retrospective effect to a penal provision could not be given. If any case law is needed, to fortify this view, reference can be made to the cases "Muhammad Fazal and others v. Saeedullah Khan and others" (2011 SCMR 1137) and "Khizar Hayat v. The State" (2012 SCMR 1066).

9. Consequently, permission could not be granted, for trial of the respondent, for offence of hurt by acid throwing, described in the above said provisions and the Schedule. In this way, the objection of the petitioner before the learned trial court, for sending the case to Anti-Terrorist Court, was totally unjustified and as such rightly turned down, through the order in question.

10. Resultantly, the writ petition in hand, having no force or merit, is dismissed.

JK/Z-11/L Petition dismissed.

2020 P Cr. L J 350

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi and Raja Shahid Mehmood Abbasi, JJ

TARIQ MEHMOOD---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 958 of 2017, heard on 30th October, 2018.

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

----S. 9(c)---Possession of narcotics---Appreciation of evidence---Benefit of doubt---Contradictory statements of witnesses---Scope---Accused was convicted by Trial Court for possession of 1110 grams of heroin---Complaint had mentioned that 60 grams were separated as sample and prepared two sealed parcels, one of the sample and other of the remaining quantity---Complainant during his statement before Trial Court deposed that his stance in the complaint regarding preparation of two sealed parcels was incorrect---Moharrar admitted that in his statement recorded under S. 161, Cr.P.C., he had not mentioned that two sealed parcels were delivered to him---Investigating officer admitted that he had not mentioned in any statement that he handed over the parcel of remaining recovered heroin to Moharrar---Facts and circumstances showed that prosecution case and the charge against the accused could not be proved beyond shadow of doubt---Appeal was accepted and impugned judgment was set aside.

(b) Criminal trial---

----Benefit of doubt---Scope---Accused is entitled for due benefit of acquittal not as a matter of grace or concession but as a matter of right.

Ayub Masih v. The State PLD 2002 SC 1048 and Tariq Pervez v. The State 1995 SCMR 1345 rel.

(c) Criminal trial---

----Benefit of doubt---Scope---Single circumstance creating reasonable doubt in a prudent mind about the guilt of accused will entitle him to such benefit, not as a matter of grace or concession but as a matter of right.

Ayub Masih v. The State PLD 2002 SC 1048 and Tariq Pervez v. The State 1995 SCMR 1345 rel.

(d) Criminal trial---

----Administration of justice---Mistake of Court in releasing a criminal is better than its mistake in punishing an innocent.

Ayub Masih v. The State PLD 2002 SC 1048 rel.

(e) Criminal trial---

----Administration of justice---High Court observed that it was better that ten guilty persons be acquitted rather than one person innocent be convicted.

Ayub Masih v. The State PLD 2002 SC 1048 rel.

Barrister Osama Amin Qazi for Appellant.

Umar Hayat Gondal, Additional Prosecutor-General with Waqas, SI for the State.

Date of hearing: 30th October, 2018.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Tariq Mehmood (hereinafter referred to as the appellant), has challenged the judgment dated 25.09.2017, passed by the learned Sessions Judge/Judge CNS, Chakwal, whereby in case FIR No. 88, dated 22.04.2017, registered under section 9(c) of the Control of Narcotic Substances Act, 1997 (hereinafter referred to as the Act), at Police Station Saddar District Chakwal, he was convicted under section 9(c) of the Act and sentenced to R.I. for 06 years, along with fine of Rs.30,000/-, in default whereof to further undergo S.I. for 06 months, with benefit of section 382-B, Cr.P.C.

2. The appellant was challaned to the Court, with the precise charge of recovery of 1110 grams of Heroin from his possession. He had denied the charge and claimed the trial, hence the prosecution witnesses namely Muhammad Adeel Safdar ASI (PW-1), Muhammad Saleem Constable (PW-2), Muhammad Shafique H.C. (PW-3), Muhammad Husnain Shah S.I. (PW-4) and Gulzar Hussain S.I. (PW-5) were summoned and recorded.

3. On completion of the prosecution evidence and closure of the case, the appellant was examined under section 342, Cr.P.C., during which the questions arising out of the prosecution evidence, were put to him but he had denied almost all such questions, while pleading his innocence and false involvement, in the case with mala fide. He did not opt to lead any evidence in his defence or to make statement under section 340(2), Cr.P.C. Finally, the impugned judgment was passed, in the above mentioned terms. Consequently, the appeal in hand.

4. Arguments heard. Record perused.

5. The prosecution stance was that out of recovered narcotic weighing 1110 grams, Gulzar Hussain S.I. (PW-5) separated 60 grams as sample and while preparing two sealed parcels, one of the sample and other of the

remaining quantity had taken the same into possession, through a recovery memo; PW-5 subsequently had handed over the above said parcels to Muhammad Hasnain Shah S.I/I.O (PW-4), who had deposited them with Muhammad Saleem Moharrar (PW-2).

6. Gulzar Hussain S.I/complainant during his statement as PW-5 deposed as under:-

> "I did not take shopping bag of white colour separately into possession. Volunteered, said Heroin was packed in said shopping bag, which remained packed in the shopping bag and we did not take Heroin out of it. Complaint Exh.P.4/1 is in my handwriting. It is correct that it is mentioned in complaint that "sample and remaining Charas were made into two separate parcels and were sealed with". Volunteered, mistakenly it is so written."

The above said deposition of the PW-5 means that his stance in the complaint Exh.PA/1, regarding preparation of two sealed parcels, one of the sample and the other of the remaining quantity was incorrect.

7. Muhammad Saleem Moharrar (PW-2) had admitted that in his previous statement under section 161, Cr.P.C. (Exh.DA), it was not mentioned that two sealed parcels were delivered to him and that in the said statement the word "Heroin" was written after cutting the word "Charas" and that there was cutting of date from 22.04.2017 to 24.04.2017.

8. Muhammad Husnain Shah S.I/I.O. during statement before the learned trial Court as PW-4, had made the following admissions:-

> "It is correct that I was duty bound to record the statement of Morarrar regarding every article or parcel which I had handed over to him. It is correct that I have not mentioned in any statement that I handed over the parcel of remaining recovered Heroin to Moharrir,"

9. The facts and circumstances highlighted above, lead to the conclusion that the prosecution case and the charge against the appellant could not be proved beyond shadow of all reasonable doubts. In such like situation an accused is always entitled for due benefit of acquittal not as a matter of grace or concession but as a right. In this regard, we are fortified by the dictum laid down by the august Supreme Court of Pakistan in cases titled Ayub Masih v. The State reported as (PLD 2002 Supreme Court 1048) and Tariq Pervez v. The State reported as 1995 SCMR 1345, wherein it is held that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such

benefit not as a matter of grace or concession, but as of right. In the case of Ayub Masih (Supra), while quoting a saying of the Holy Prophet (PBUH) 'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent', and making reference to the maxim, 'it is better that ten guilty persons be acquitted rather than one innocent person be convicted', the Hon'ble Supreme Court observed as under:-

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

10. Resultantly, the instant appeal is accepted, the impugned judgment is set-aside and the appellant, namely, Tariq Mehmood is acquitted of the charge, while extending him the benefit of doubt. The appellant is in custody, hence be released forthwith, if not required to be detained in any other case. The disposal of the case property shall be as directed by the learned trial Court, in the impugned judgment.

SA/T-20/L Appeal accepted.

2020 P Cr. L J 1358

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

GUL ASIF---Petitioner

Versus

The STATE and others---Respondents

Criminal Revision No. 184 of 2019, heard on 6th November, 2019.

Criminal Procedure Code (V of 1898)---

----S. 265-D---Framing of charge---Scope---Petitioner assailed order passed by Trial Court whereby it deleted the offences under Ss. 367-A, 377 & 511, P.P.C. and referred the matter to Judicial Magistrate for trial of other offences under Ss. 337-A(i) & 337-L(2), P.P.C.---Prosecution case was that the victim was going to his school when the respondents/accused persons abducted him on gun-point, took him near a shrine and demanded him to remove his pants, on his refusal, they started beating him; he raised hue and cry, which attracted prosecution witnesses, whereupon accused persons fled away---Section 265-D, Cr.P.C. indicated that the court, for the purpose of framing a charge, had to consult the police report, complaint, other documents, statements filed by prosecution and nothing else---Complaint, FIR and statements under S. 161, Cr.P.C. showed prima facie attraction of offences under Ss. 376-A, 377 & 511, P.P.C. but the Trial Court while ignoring the same had deviated from the powers given under S. 265-D, Cr.P.C.---Revision petition was allowed and the Trial Court was directed by the High Court to take up the file and carry on the proceedings warranted under the law.

Malik Muhammad Iqbal for Petitioner.

Ghulam Abbas Gondal, DPG with Abid Hayat, ASI for the State.

Ahsan Hamid Lillah for Respondents Nos. 2 to 5.

Date of hearing: 6th November, 2019.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition calls in question the order dated 18.06.2019 of the learned Additional Sessions Judge, Talagang, District Chakwal, whereby during proceedings in case FIR No. 23, dated 23.02.2019, registered under sections 337A(i)/ 337-L(2)/367-A/377/511 P.P.C., at Police Station Taman, District Chakwal, the offences under sections 367-A/377/511, P.P.C., have been deleted and for trial of the other offences under sections 337A(i)/ 337-L(2), P.P.C., the matter has been referred to the Judicial Magistrate.

2. The above mentioned case was got lodged by the present petitioner namely Gul Asif, against the respondents namely Noor Hassan, Muhammad Tariq, Ameer Hussain and Aziz (hereinafter referred to as the respondents), with the contentions that on 23.02.2019, at about 8:00 a.m., when Noman Asif PW was going to his school, the respondents on gun-point, while picking and throwing him in a vehicle, had taken him, near shrine of Baba Sheikh Ismail, where they demanded him to remove the pant, but he refused, whereupon they started beating him; he raised hue and cry, which attracted Imam Din and Ashiq Hussain PWs, whereupon the respondents fled away.

3. After registration of the FIR, the investigation was started, during which Noman Asif victim had got recorded a statement under section 161, Cr.P.C., whereby he had fully nominated and implicated the respondents to be the persons, who had forcibly lifted him from a place and taken to the above mentioned other, where, for the purpose of sodomy, had removed his pant, but when he refused and resisted, all had beaten him. This witness had also stated that when due to his hue and cry, Imam Din and Ashiq Hussain PWs arrived at the spot, the respondents fled away, whereupon a shalwar was provided to him and he while wearing it, returned home. The Police had completed the proceedings and submitted the report under section 173, Cr.P.C. But the learned trial court had behaved in the above stated manner.

4. Section 265-D, Cr.P.C., relates to the material, which at the time of framing of charge, should have been perused and considered by the trial court. The said provision reads as under: -

"265-D. When charge is to be framed. If, after perusing the police report or, as the case may be, the complaint, and all other documents and statements filed by the prosecution, the Court is of opinion that there is ground for proceedings with the trial of the accused it shall frame in writing a charge against the accused."

5. The above mentioned provision indicates that for the purpose of framing a charge, the Court should consult the police report, complaint, the documents and the statements filed by the prosecution and nothing else. On the basis of the said material, the Court has to decide whether cognizance is to be taken by it or not.

6. Furthermore, the prosecution agency, under the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006, enjoys the power to delete or add an offence, according to the facts and evidence collected, by the police, before submitting report under section 173, Cr.P.C., to the Court. Under the said law, it is the District Prosecutor to scrutinize the available record/evidence and applicability of an offence against an accused. At that stage, an offence can be deleted or added by the said forum.

7. In this case, when the Prosecution Agency while scrutinizing and analyzing, the material on the record and holding applicability of offences under sections 337-A(i)/337-L(2)/367-A/377/511, P.P.C. had forwarded the report under section 173, Cr.P.C. to the learned trial Court, then why and how the said learned Court had deleted the offences under sections 367-A/377/511, P.P.C. No explanation or answer to the said question is available in the order under revision.

8. As stated above, in the matter in hand, the complaint, FIR and statements under section 161, Cr.P.C., showing prima facie attraction of

the offences under sections 367-A/377/511, P.P.C., against the respondents were available before the Court, but it while ignoring the same and passing the order under revision had deviated from the powers given under the above stated section 265-D of Cr.P.C.

9. Resultantly, the revision petition in hand is allowed, impugned order is set aside, with a direction to the learned Additional Sessions Judge, Talagang, to take up the file and carry on the proceedings, warranted under the law.

SA/G-6/L Petition allowed.

2020 P Cr. L J 1438

[Lahore]

Before Muhammad Tariq Abbasi and Ch. Mushtaq Ahmad, JJ

FAWAD HASSAN FAWAD---Petitioner

Versus

FEDERATION OF PAKISTAN and others---Respondents

Writ Petition No. 74858 of 2019, heard on 21st January, 2020.

Constitution of Pakistan---

----Art. 199--- National Accountability Ordinance (XVIII of 1999), S. 9---Corruption and corrupt practices---Bail, grant of---Scope---Accused sought post arrest bail in a case lodged by National Accountability Bureau (NAB)---Held; NAB had failed to substantiate the grounds of arrest---National Accountability Bureau had alleged that the accused had acquired huge assets disproportionate to his known sources of income but no such assets in the name of accused were highlighted in the reference---National Accountability Bureau had alleged that the accused had no significant sources of income but his dependents owned a property worth Rs. 500 million but in the reference value of the property was stated to be Rs. 78.5 million and nothing was brought on record to prove that it was purchased or acquired through any amount, paid by accused---NAB had alleged that 14 Bank accounts were being maintained by accused and his family members but reference was silent to that extent---Family members of the accused were arrayed as accused in the reference, without any arrest---Accused was arrested without any cogent and convincing evidence/material---Accused was in confinement for about 01 year and 07 months without any progress in the case---Even the charge was not framed---Accused could not be kept behind the bars for indefinite period---Post-arrest bail was allowed, in circumstances.

Ashtar Ausaf Ali, Azam Nazir Tarrar, Barrister Asad Rahim Khan, Muhammad Amjad Pervaiz and Salman Sarwar Rao for Petitioner.

Syed Faisal Raza Bukhari, Special Prosecutor NAB with Usman Iftikhar, Assistant Director, NAB, Lahore/I.O. for the State/NAB.

Date of hearing: 21st January, 2020.

ORDER

MUHAMMAD TARIQ ABBASI, J.---By way of instant writ petition, the petitioner, namely, Fawad Hassan Fawad seeks his release on bail, in Accountability Reference No.21 of 2019.

2. The petitioner, during pendency of an inquiry, was arrested by the NAB on 05.07.2018, on the basis of following grounds and allegations:-

"Following facts form basis for immediate arrest of the accused:-

a. That accused Fawad Hassan Fawad being public office holder, acquired huge assets disproportionate to his known sources of income.

b. That the accused through his family members has executed a deed for purchase of commercial plot amounting to Rs.500 Million approx in Rawalpindi which, prima facie, is disproportionate to his known sources of income.

c. That dependent of the accused (his wife), sister-in-law and the brother of the accused have no significant sources of income yet they are the owners of Messrs Fehmida Yaqoob Construction (FYC) Company (Pvt.) Ltd. which owns a 15-floor plaza "The Mall" Rawalpindi worth Rs.5 Billion (approx), which is prima facie, disproportionate to known sources of income of the accused.

d. The accused maintains more than 14x bank accounts in his own name and in the name of his dependents/benamidars, having credit inflow of over Rs. 50 Million, which does not commensurate with his disclosed source of income.

e. That accused was given fair chance to explain sources of funds used for acquisition of assets however he could not offer any plausible explanation.

f. That arrest of the accused is essential to procure further evidence, detection of hidden assets, relevant incriminating material and recovery of crime proceeds."

3. Consequently, the petitioner for his release on bail had preferred a Writ Petition No.229141 of 2018 and decided on 14.02.2019, as dismissed.

4. Thereafter the petitioner for the same relief had approached the august Supreme Court of Pakistan, through Civil Petition No.648-L of 2019. By that time a reference was filed, against the petitioner and he had

also alleged delay in trial, hence through order dated 03.12.2010, the petition was withdrawn with the following reasons and grounds:-

> "Upon reconsideration the learned counsel for the petitioner wishes to withdraw this petition so as to advise the petitioner to approach the High Court again on two stated fresh grounds for bail, i.e. filing of a Reference against the petitioner and delay in conclusion of his trial. This petition is, therefore, disposed of as having been withdrawn."

Consequently, the petition in hand has been preferred on the grounds alleged in the petition and reiterated during the arguments.

The record shows that during the proceedings, subsequent to the inquiry, the NAB had failed to substantiate the above mentioned grounds of arrest, due to the following reasons:-

i) In Para (a), of the grounds of arrest, it was alleged that the petitioner had acquired huge assets, disproportionate to his known sources of income but no such asset, in the name of the petitioner could be dug out and highlighted in the reference.

ii) In ground (b), value of the property was described as 500 Million but in the reference it was stated as 78.5 million and nothing had been brought on the record that it was purchased or acquired, through any amount, paid by the petitioner.

iii) According to ground (c), Mst. Rubab Hassan (wife), Waqar Hassan (brother) and Mst. Anjum Hassan (sister-in law/ BHABHI) of the petitioner, being owner of Messrs Fehmida Yaqoob Construction (FYC) Company (Pvt.) Ltd, owned a plaza, known as "The Mall" Rawalpindi, worth Rs.5 Billion. Firstly no concern or nexus of the petitioner with the above mentioned company and the plaza has been established on the record and secondly the NAB while assessing whole of the assets of the petitioner and his family members as 1089 Million had rebutted the above said price, of the property.

iv) In ground (d), 14 bank accounts, maintained by the petitioner and his family members were alleged but the reference is silent to that extent.

5. Admittedly, in the reference no evidence had been annexed, suggesting any property, in the name of the petitioner. Similarly, there was no cogent or convincing evidence, on the record that the petitioner had

purchased any property from any vendor and got it transferred, in name of his above named relatives as benamidar.

6. Undisputedly, the above named relatives of the petitioner are directors/share holders, in the above said company (FYC) as well as another known as "Messrs Sprint Services (Pvt.) Ltd.", who are also owners of certain assets but they had categorically alleged that they had acquired the assets by their own means and not through the petitioner, in any manner whatsoever. Furthermore, the NAB has badly failed to bring on the record, any evidence to the effect that actually for purchase of the above said properties, the payments were made to the vendors by the petitioner.

7. The above named relatives of the petitioner, having the above mentioned properties have also been arrayed as accused, in the reference, without any arrest and as such they are appearing in proceedings of the reference, while at large. But the petitioner without cogent and convincing evidence/material, regarding any link or nexus, with the above mentioned business/properties, owned by the above named co-accused has been arrested even at inquiry stage.

8. On one hand, the above mentioned facts and circumstances are before the Court, whereas on the other hand, confinement of the petitioner for the last about 01 year and 07 months, without any progress in the case has been noticed. As till date even charge has not been framed, against the petitioner and his co-accused. Consequently, the petitioner could not be kept, behind the bars for an indefinite period.

9. For what has been discussed above, the writ petition in hand is allowed and it is directed that the petitioner be released on bail subject to his furnishing bail bonds in the sum of Rs.1,00,00,000/- (Rupees ten million only), with two sureties each, in the like amount, to the satisfaction of the learned Trial/Duty Accountability Court, Lahore.

SA/F-13/L Bail granted.

P L D 2020 Lahore 337

Before Muhammad Tariq Abbasi and Mujahid Mustaqeem Ahmed, JJ

SARDAR KHAN---Petitioner

Versus

The STATE and another---Respsondents

Writ Petition No.1095 of 2017, decided on 9th May, 2019.

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

---S. 397---Sentence of offender already sentenced for another offence---Concurrent sentences---Scope---Petitioner was awarded sentences of imprisonment for life and imprisonment for four years in two different trials/appeals however, no order for concurrent running of sentences was made---Petitioner was convicted and sentenced simultaneously and even his appeals were decided at the same time, however, while converting his death sentence into imprisonment for life appropriate orders for concurrent running of sentences escaped notice of the court---High Court directed that sentence of imprisonment for life and sentence of imprisonment for four years shall run concurrently---Constitutional petition was allowed.

Juma Khan and another v. The State 1986 SCMR 1573; Javaid Shaikh v. The State 1985 SCMR 153 and Mst.Zubaida v. Falak Sher and others 2007 SCMR 548 ref.

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

----S. 397---Sentence of offender already sentenced for another offence---Concurrent sentences---Scope---Section 397, Cr.P.C. contemplates that sentences awarded to a person in a subsequent trial would commence at the expiration of imprisonment for which he had been previously sentenced, however, discretion has been left with the court to direct concurrent running of sentence awarded in a subsequent trial---Command of law for consecutive sentences is general rule while discretion for concurrent sentences is discretionary power of the court.

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

----S. 397---Sentence of offender already sentenced for another offence---Concurrent sentences---Time for making such order---Scope---Appropriate order within the meaning of S.397, Cr.P.C. ought to be made at the time of deciding the case or appeal but if, for any reason or due to some inadvertent omission, direction could not be issued at that time there is no embargo that the same cannot be passed afterwards---Court can exercise discretionary power at any time to direct that sentences in two different trials would run concurrently.

Sajjad Ikram and others v. Sikandar Hayat and others 2016 SCMR 467 and Mst. Shahista Bibi and another v. Superintendent, Central Jail, Mach and 2 others PLD 2015 SC 15 rel.

Faiz Ahmed and another v. Shafiq-ur-Rehman and another 2013 SCMR 583; Shah Hussain v. The State PLD 2009 SC 460 and Ishfaq Ahmad v. The State 2017 SCMR 307 ref.

Ch. Muhammad Ashfaq Khan for Petitioner.

Amjad Ali Ansari, A.A.G. with Mudassar Ayyub, Assistant Superintendent, Jail.

ORDER

As a result of trial in case F.I.R. No. 316 dated 23.12.1996 under Articles 3/4 of the Prohibition (Enforcement of Hadd) Order 1979 rcad with Section 9(c) of the Control of Narcotic Substances Ordinance, (Ordinance No. XCIV) of 1996 registered at Police Station Tulamba, Distt. Khanewal for recovery of two kilograms charas Sardar Khan, petitioner was convicted under Section 9(c) of the Ordinancc No. XCIV of 1996 by the learned Addl. Sessions Judge, Mianchannu and sentenced to suffer four years' R.I. and a fine of Rs.4000/- in default of payment of which to further undergo four months' S.I. vide judgment dated 1.12.2005. It so happened that during investigation of above said case F.I.R. No.316/1996 the petitioner also made disclosure and then got recovered 110 kilograms charas as a result of which F.I.R. No. 317 dated 23.12.1996 under Section 9(c) of the Ordinance No.XCIV of 1996 was also chalked out against him and he was simultaneously tried in the the said case also, which culminated into his conviction by the learned Addl. Sessions Judge, Mianchannu who sentenced him to death with a fine of Rs.50,000/- or in default thereof to undergo imprisonment for one year vide judgment dated 1.12.2005.

2. The petitioner assailed his above convictions and sentences by way of filing two separate appeals i.e. Cr. Appeal No. 751 of 2005 against conviction in trial of case F.I.R. No. 316 of 1996 which was however, dismissed by this Court vide order dated 18.6.2009 having become infructuous by flux of time whereas in the other one i.e. Cr.Appeal No. 752 of 2005 against his conviction in case F.I.R. No.317/1996, his conviction was maintained by dismissing the appeal on merits but sentence of death was converted to that of imprisonment for life by this Court vide judgment dated 18.6.2009 while extending benefit of Section 382-B, Cr.P.C.

3. Feeling dissatisfied with the judgment passed by this Court in case F.I.R. 317/1996 the petitioner approached the apex Court by way of filing Jail Petition No. 939 of 2009. However, the same could not find favour and leave to appeal was declined by the Hon'ble Supreme Court vide order dated 1.3 2010.

4. By filing this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the petitioner prays for order for concurrent running of both the sentences awarded to him in above said two cases.

5. Relying on the provisions of Section 397 read with Section 35 Cr.P.C. 1898 learned counsel for the petitioner has contended that mandate of law required that the Court while awarding sentences of imprisonment ought to have passed appropriate orders for concurrent running of the sentences but the same has not been done as a result of which the petitioner is bound to undergo a sentence of about 29 years which is not intent of the legislature and consequently prays that sentences of imprisonment in both the cases be directed to run concurrently.

6. Conversely, learned Law Officer has vehemently opposed the petition on the ground that under Section 397, Cr.P.C. relief sought by the petitioner could be granted only by the trial/appellate court at the time of passing judgments of conviction and this constitutional petition cannot be substituted for the said forums and further that the petitioner was convicted and sentenced in two different trials/appeals for the commission of two different offences and as such the sentences awarded to the petitioner should run consecutively.

7. We have given our anxious consideration to the arguments advanced by both sides and relevant law on the subject.

8. Though the sentences of imprisonment for life and imprisonment for four years were awarded on conviction in two different trials/appeals, yet they pertain to one and the same person i.e. the petitioner. Section 397, Cr.P.C. contemplates that sentences awarded to a person in a subsequent trial would commence at the expiration of imprisonment for which he had been previously sentenced, however, discretion has been left with the court to direct concurrent running of sentence awarded in a subsequent trial. It would be advantageous to reproduce relevant portion of said provision which runs as under:

"397. Sentence on offender already sentenced for another offence. When a person already undergoing a sentence of imprisonment or

imprisonment for life, is sentenced to imprisonment, or impreisonment for life, such imprisonment, or imprisonment for life shall commence at the expiration of the imprisonment, or imprisonment for life to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence."

It is manifest from above quoted premision of law that command of law for consecutive sentenc is is general rule while direction for concurrent sentences is discretionary power of the court. Although appropriate order within the meaning of Section 397, Cr.P.C. ought to be made at the time of deciding the case or appeal but if, for any reason or due to some inadvertent omission, direction could not be issued at that time there is no embargo that the same cannot be passed afterward. In the safe administration of criminal justice, the court can exercise discretionary power at any time to direct that sentences in two differerd trials would run concurrently. While expounding this provision of law in the case titled Sajjad Ikram and others v. Sikandar Hayat and others (2016 SCMR 467) the Hon'ble Supreme Court held as under:

"12. The aggregate of punishment of imprisonment for several offences at one trial were deemed to be a single sentence. However, the position of an accused person is different who while already undergoing a sentence of imprisonment for life, is subsequently convicted and sentenced in another trial. Such subsequent sentence in view of section 397 Cr.P.C. would commence at the expiration of imprisonment for life for which he had been previously sentenced but even then in such cases, the said provision expressly enables the Court to direct that the subsequent sentence would run concurrently with the previous sentence. It is clear from section 397, Cr P.C. that the Court, while analyzing the facts and circumstances of every case, is competent to direct that sentences in two different trials would run concurrently. In that eventuality, the Court has wide power to direct that sentences in one trial would run concurrently. The provision of section 397, Cr.P.C. confers wide discretion on the Court to extend such benefit to the accused in a case of peculiar nature like the present one. Thus extending the beneficial provision in favour of the appellant, would clearly meet the ends of justice (emphasis supplied by us)

In the present case the 'petitioner was convicted and sentenced simultaneously and even his appeals were decidad at the same time. ft appears that while converting sentence of death into imprisonment for life passing appropriate orders for concurrent running of sentences escaped notice of this Court as it was not brought to its notice, that the petitioner was also convict of case F.I.R.No. 316 of 1996. Thus, to our mind, it would be in the fitness of things that benefit of this provision should be extended in favour of the petitioner in order to meet the ends of justice. Steering thought in this regard have been gathered from cases Juma Khan and another v. The State (1986 SCMR 1573), Javaid Shaikh v. The State (1985 SCMR 153) and Mst. Zubaida v. Falak Sher and others (2007 SCMR 548) So far as contention of learned Law Officer that the relief sought by the petitioner could be granted only by the trial/appellate Court at the time of passing judgments of conviction and this constitutional petition cannot be substituted for the said forums and that the petitioner was convicted and sentenced in two different trials/appeals for the commission of two different offences and as such the sentences awarded to the petitioner should run consecutively, is concerned, obserations of the Hon'ble Supreme Court in case Mst. Shahista Bibi and another v. Superintendent, Central Jail, Mach and 2 others (PLD 2015 SC 15), may be referred which are to the following effect:

> "8. Besides the provisions of section 35, Cr.P.C. the provisions of section 397, Cr.P.C. altogether provide entirely a different proposition widening the scope of discretion of the Court to direct that sentences of imprisonment or that of life imprisonment awarded at the same trial or at two different trials but successively, shall run concurrently. Once the Legislation has conferred the above discretion in the Court then in hardship cases, Courts are required to seriously take into consideration the same to the benefit of the accused so that to minimize and liquidate the hardship treatment, the accused person is to get and to liquidate the same as far as possible. In a situation like the present one, the Court of law cannot fold up its hands to deny the benefit of the said beneficial provision to an accused person because denial in such a case would amount to a ruthless treatment to him/her and he/she would certainly die while undergoing such long imprisonment in prison. Thus, the benefit conferred upon the appellant/ appellants through amnesty given by the Government, if the benefit of directitq the

sentences to run concurrently is denied to hint/them, would be brought at naught and ultimately the object of the same would be squarely defeated and that too, under the circumstances when the provision of S.397, Cr.P.C. confers wide discretion on the Court and unfettered one to extend such benefit to the accused in a case of peculiar nature like the present one. Thus construing the beneficial provision in favour of the accused would clearly meet the ends of justice and interpreting the same to the contrary would certainly defeat the same.

'9. It is also hard and fast principle relating to interpretation of criminal law, which curtails the liberty of a person that it should be construed very strictly and even if two equal interpretations are possible then the favourable to the accused and his liberty must be adopted and preferred upon the contrary one.

Reliance is also placed on cases Faiz Ahmed and another v. Shafiq-ur-Rehman and another (2013 SCMR 583), Shah Hussain v. The State (PLD 2009 SC 460) and Ishfaq Ahmad v. The State (2017 SCMR 307).

9. Resultantly, this petition is accepted and it is directed that sentence of imprisonment for life awarded to the petitioner by this Court vide judgment dated 18.6.2009 passed in Cr. Appeal No. 752 of 2005 shall run concurrently with the sentence of imprisonment for four years awarded to the petitioner by the learned trial Court vide judgment dated 1.12.2005 passed in tria1 of case FIR No.316 of 1996 of Police Station Tulamba, Distt. Khanewal, subject matter of Cr. Appeal No.751 of 2005.

SA/S-81/L Petition accepted.

PLJ 2020 Cr.C. (Note) 45

[Lahore High Court, Multan Bench]

Present: **MUHAMMAD TARIQ ABBASI AND ASLAM JAVED MINHAS, JJ.**

IJAZ AHMAD--Appellant

versus

STATE--Respondent

Crl. A. No. 521 of 2003, heard on 17.6.2015.

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

----S. 9(c)--Conviction and sentence--Challenge to--Recovery of charas--Sample was 20-grams but its ingredients were not confirmed, meaning thereby that recovered contraband was not confirmed to be charas--Proceedings towards obtaining second sample due to specific reasons were also objectionable, hence not established and as such prosecution story towards recovery of charas from accused was doubtful--**Held:** It is an axiomatic and universally recognized principle of law that conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in prosecution case must be resolved in favour of accused--If a simple circumstance creates reasonable doubt, in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. [Para 12] A, B & C

1999 SCMR 1220 and 1995 SCMR 1345.

Sh. Abdul Samad, Advocate for Appellant.

Mr. Muhammad Abdul Wadood, Deputy Prosecutor General for State.

Date of hearing: 17.6.2015.

JUDGMENT

Muhammad Tariq Abbasi, J.--This appeal is directed against the judgment dated 11.6.2003, passed by the learned Sessions Judge, Dera Ghazi Khan, whereby in case FIR No. 226, dated 31.10.2001 registered under Article 3/4 Prohibition of (Enforcement of Hadd) Order IV, 1979 and Section 9(c) of CNSA, 1997 at Police Station B-Division, Dera Ghazi Khan, the appellant was convicted under Section 9(c) of the act ibid and sentenced to RI for seven years and fine of Rs. 50,000/-, in default to further undergo SI for six months, with benefit of Section 382-B, Cr.P.C.

2. The precise facts as per complaint (Ex.PA) and the FIR (Ex.PA/1) were that on 31.10.2001 at about 9:25 a.m. when the police party headed

by Ijaz Hussain Bukhari, Inspector (PW-7) and other police officials were on patrolling and available at Eid Gha Road, a spy information was received that the appellant was selling narcotic in a plot situated behind Sabzi Mandi; a raid was conducted at the above mentioned place when the appellant while holding a shopping bag was found there, hence over powered; the shopping bag was checked and from it 2-KGs of Charas was recovered; PW-7 separated 20-Grams of narcotic as sample and while preparing two sealed parcels one of the sample and the other of the remaining quantity (P-1) had taken the same into possession through recovery memo. (Ex.PB), which was attested by Talib Hussain SI (PW-5) and Muhammad Bilal Head-constable (PW-6).

3. The matter was investigated when the appellant was found to be involved, hence challaned. Charge against him was framed on 27.8.2002, to which he pleaded not guilty and claimed the trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as eight witnesses, namely, Ghulam Qasim, Head-Constable (PW-1), Riaz Hussain Head-constable (PW-2), Ghulam Shabbir Constable (PW-3), Ghulam Akbar, Head-Constable (PW-4), Talib Hussain, SI (PW-5), Muhammad Bilal, Head-Constable (PW-6), Ijaz Hussain Bokhari, Inspector (PW-7) and Adnan Mushtaq Bhatti, Civil Judge/Magistrate 1st Class (PW-8). During the statements of above named witnesses the complaint (Ex.PA), FIR (Ex.PA/1), recovery memo. of Charas (Ex.PB), rough site-plan (Ex.PC), report of Chemical Examiner dated 12.11.2001 (Ex.PD), report of Chemical Examiner dated 27.12.2001 (Ex.PE), an application moved by the police to the Magistrate (Ex.PF), previous statements of the witnesses (Ex.DA & Ex.DB) were also brought on the record.

4. After examination of the prosecution witnesses, the case for the prosecution was closed, where-after the appellant was examined under Section 342 Cr.PC, during which the questions arising out of the prosecution evidence were put to him and he denied almost all such questions, while pleading his innocence and false involvement in the case with *mala-fide*. The

question *"Why this case against you and why the PWs have deposed against you"?* was replied by the appellant in the following words:

> ***"I am innocent. Nothing was recovered from me. Alleged recovered charas was planted by Ijaz Hussain Bokhari at the behest of Nasrullah Babar Inspector who has close terms with Ijaz Bokhari Inspector/SHO. Due to inimical terms with Nasrullah Babar Inspector I have been falsely involved in this case by Ijaz Hussain Bokhari SHO. I was arrested front my shop situated at General Bus Stand Muslim Town D.G Khan. All the PWs are police officials and they have deposed against me on the asking of Ijaz Hussain Bokhari SI/SHO."***

5. At that time, he opted to lead evidence in his defence but not to make statement under Section 340(2), Cr.P.C. On 10.5.2003, the appellant got recorded his statement that he did not want to produce any evidence in defence. On completion of the proceedings, the impugned judgment was passed in the above mentioned terms. Consequently, the appeal in hand.

6. The learned counsel for the appellant has argued that the appellant was innocent and falsely involved in the case with *mala-fide;* neither he was having any narcotic nor recovered from his possession and the alleged recovery was a planted one; false plantation was evident from the report of the Chemical Examiner (Ex.PD) when contents of the sample parcel were not confirmed, where-after false proceedings were again carried on and a false sample parcel was prepared and another favourable report was procured; the prosecution case and the charge against the appellant was not at-all proved, hence he was entitled for acquittal but while ignoring all the norms of natural justice, as a result of misreading and non-reading of evidence available on the record, the impugned judgment was passed, hence not sustainable in the eye of law.

7. On the other hand, learned Deputy prosecutor General has vehemently opposed the appeal while supporting the impugned judgment towards conviction of the appellant to be well reasoned and call of the day.

8. Arguments of both the sides have been heard and the record has been perused.

9. In the complaint (Ex.PA) and the FIR (Ex.PA/1) as well as during statement of Ijaz Hussain Bukhari, Inspector/complainant (PW-7) it was mentioned that out of above mentioned recovered contraband, 20-grams were separated for chemical analysis by Ijaz Hussain Bukhari Inspector (PW-7) and made into a sealed parcel which alongwith the main quantity was taken into possession, through recovery memo. (Ex.PB), attested by Talib Hussain SI (PW-5) and Muhammad Bilal Head-constable (PW-6). But when the above mentioned witnesses entered in the witness box, had failed to narrate the weight of the sample allegedly taken at the spot. The said sample parcel had reached in the office of Chemical Examiner, Multan on 10.11.2001 *i.e.* after ten days and when checked, its ingredients were not confirmed, hence a second sample was requisitioned. According to the prosecution story PW-7 wrote an application (Ex.PF) to Magistrate (PW-8), who summoned the case property and while desealing the parcel, separated sample and sent to the Laboratory from where another report (Ex.PE) was made that the contents , of the parcel were *Charas*.

10. According to the Magistrate (PW-8) fresh sample was taken by him on 24.12.2001 and alongwith a letter, handed over to Ghulam Qasim Constable (PW-1) for its dispatch in the office of Chemical Examiner. When Ghulam Qasim (PW-1) entered in the witness-box, categorically stated that the above said fresh parcel was delivered to him by the Moharir of the police station on 25.12.2001 and deposited in the Laboratory on 26.12.2001. He categorically refused that the said parcel was handed over to him by any Judicial Magistrate. In this way, transmission of

second sample parcel as alleged by the prosecution could not be proved and established.

11. It has been noticed that at the time of preparation of the second parcel, the appellant was in custody but neither he nor anybody else on his behalf was invited to join into the proceedings of taking out of the second sample. Even the alleged proceedings of taking the second sample were not reduced into any writing and this fact was admitted on the record during statement of the Magistrate (PW-8). In this way, preparation and transmission of second sample parcel, which resulted into the report (Ex.PE) was not proved and established, hence the above said report could not be given any value.

12. As stated above earlier sample was 20-grams but its ingredients were not confirmed, meaning thereby that the recovered contraband was not confirmed to be Charas. The proceedings towards obtaining second sample due to the a hove mentioned reasons were also objectionable, hence not established and as such the prosecution story towards recovery of the Charas from the appellant was doubtful. It is an axiomatic and universally recognized principle of law that conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. We are fortified by the dictum laid down in the case *"Muhammad Khan and another versus The State"* (1999 SCMR 1220), wherein the Hon'ble Supreme Court of Pakistan, has held as under:

> ***"It is an axiomatic and universally recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the***

prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be unsafe to rely on the ocular evidence which has been molded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct respective".

It has been further held by the Hon'ble Supreme Court of Pakistan in the case *"Tariq Pervaiz vs. The State"* (1995 SCMR 1345) that, if a simple circumstance creates reasonable doubt, in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right.

13. Resultantly, the appeal in hand is accepted, the impugned judgment is set-aside and the appellant, namely, Ijaz Ahmed is acquitted of the charge, while extending him the benefit of doubt. He, by way of suspension of sentence is on bail, hence his bail bonds are discharged. The disposal of case property shall be as directed by the learned trial Court.

(A.A.K.) Appeal accepted

PLJ 2020 Cr.C. (Lahore) 974 (DB)

Present: **MUHAMMAD TARIQ ABBASI AND SYED SHAHBAZ ALI RIZVI, JJ.**

SHAUKAT ALI and another--Appellants

versus

STATE etc.--Respondents

Crl. A. No. 1804 of 2011 and M.R. No. 48 of 2012, heard on 25.5.2016.

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

----Ss. 302(b) & 34--Sentence--Challenge to--Lalkara--Day-light occurrence--No chance of deliberation--Ocular account--Fire-arm injuries on different parts of body--Motive--Alleged motive was opposition of deceased against accused in election--No detail of any election was brought on record--Alleged motive could not be proved and rightly held so by trial Court--Real cause, resulting into death of deceased at hands of accused was still shrouded in mystery--Impugned judgment towards conviction of accused for charge u/S. 302(b), PPC being result of correct appreciation and evaluation of material available on record was quite justified--Conviction of accused awarded by trial Court was maintained.

[Pp. 979 & 980] B, D & F

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

----Ss. 302(b) & 34--Sentence--Challenge to--Day-light occurrence--Closely related inter se--Relationship--Validity--Both witnesses were closely related inter se as well as with deceased, but no previous grudge or enmity with accused could be established on record, therefore, no reason cause or justification to discard testimony on basis of mere relationship which otherwise was trustworthy and confidence inspiring. [P. 978] A

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

----S. 302(b) & 34--Sentence--Day-light occurrence--No chance of deliberation--Recovery of pump action gun--Quantum of sentence--Validity--Recovery of such kind of weapon from accused to neither any recovery memo tendered in evidence nor any witness was made any statement about alleged recovery--No empty collected from spot, for comparison was sent to Lab and as such alleged recoveries had become inconsequential--Alleged motive could not be established, both accused made on fire shot at deceased and recovery of weapon from them hade gone inconsequential. [P. 979 & 980] C & E

M/s. Muhammad Ahsan Bhoon and Zafar Iqbal Chohan, Advocates for Appellants.

Rana Muhammad Shafique, Deputy District Public Prosecutor for State.

Mr. Munir Hussain Bhatti, Advocate for Complainant.

Date of hearing: 25.5.2016.

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned Criminal Appeal and the Murder Reference, as both are outcome of same judgment dated 01.11.2011, passed by the learned Sessions Judge, Faisalabad, whereby in case FIR No. 111, dated 05.03.2007, registered under Section 302/34, PPC, at Police Station Dijkot, District Faisaiabad, Shaukat.Ali and Shakeel Ahmad (hereinafter referred to as the appellants) were convicted under Section 302(b), PPC and sentenced to death, with compensation of Rs. 50,000/- each, payable to legal heirs of the deceased and recoverable as arrears of land revenue.

2. The matter was reported to the Police by Muhammad Mushtaq (PW-2) through *'fard biyan'* (Ex.PB), with the contentions that on 5.3.2007, he alongwith his son Muhammad Ashfaq (***hereinafter referred to as the deceased***), brother Muhammad Ahmad (PW-3) and Iftikhar Ahmad (PW not examined), in order to proceed to Gojra, were standing at the bus stop; at about 1.30 pm, when the deceased was listening a phone, the appellants while armed with .12 bore repeater guns, attracted there; Shakeel Ahmad appellant raised a '*laIkara*' that the deceased should not go alive, whereupon Shaukat Ali appellant, fired at the deceased, hitting on his back, as a result of which he fell down; Shakeel appellant also fired, which hit on chest of the deceased; thereafter both the accused made firing and the fire shots hit on different parts of the body of the deceased; the complainant party due to fear did not come near and the accused while firing and raising *lalkaras*', that they had taken revenge of opposition of votes from the deceased, fled away. The deceased succumbed to the injuries at the spot; the occurrence was committed on the abetment of Muhammad Sadiq and Tariq Mehmood (co-accused since acquitted); on the basis of the above mentioned complaint, the-formal FIR (Ex.PA) was chalked out.

3. The case was investigated and challan was submitted in the Court. The formal charge against the appellants was framed on 6.7.2010, which was denied and trial was claimed, hence the prosecution witnesses were summoned and recorded; the prosecution had got examined as many as 19 witnesses. The material witnesses, with gist of their evidence were as under:

i) ***PW-2 Muhammad Mushtaq, complainant*** *as well as an eye-witness of the occurrence, had deposed the same facts, as were narrated by him in the complaint (Ex.PB).*

ii) ***PW-3 Muhammad Ahmad,*** *another eye-witness of the occurrence, had supported and corroborated the version of the complainant (PW-2) in all its four corners.*

iii) ***PW-4 Dr. Pervaiz Akhtar*** *had conducted post-mortem examination of dead body of Ashfaq deceased and prepared the post-mortem report (Ex.PD) and pictorial diagram (Ex.PD/1), Following injuries on the dead body, were noticed:-*

a) *A lacerated wound 5.05 cm x 4.05 cm x DNM on the left side close to sternum, 6 cm above and lateral to the above nipple.*

b) *Multiple wounds of exit on the right side of neck measuring each 3/4 cm x 3/4 cm at the area between 6 cm x 4 cm.*

c) *A lacerated wound of entry 2 cm x 3 cm on the left side of chest, 3 cm from the nipple.*

d) *Multiple wound of exit 6 in number on the right lateral side of chest at the area between 7 cm x 4 cm.*

e) *A lacerated wound of firearm entrance 5 cm x 3 cm on the right side of chest 1 cm below the right nipple.*

f) *Multiple wounds of Firearm injury 6 in number on the back of right side of chest, below the scapular bone of area between 7x4 cm.*

g) *Multiple wounds of firearm entrance 4 in number on the back of right side of abdomen at the area between 8 cm x 3.05cm.*

h) *Multiple wounds of exit 4 in number at the area between 4 cm x 3.05 cm on the right side of abdomen 3-1/2 cm from the umbilicus.*

i) *A wound of fire-arm entrance 4 cm x 3 cm on the left side of penis.*

j) *A wound of firearm exit 4 in number on the medial side of left buttock at the area between 5 cm x 3 cm.*

According to the witness, all the injuries were anti-mortem in nature, caused by fire-arms and cause of immediate death.

iv) ***PW-12 Sarfraz Khan, SI and PW-14 Muhammad Hussain, SI*** *had investigated the case, during which carried on the proceedings and prepared the documents, fully detailed in their statements.*

4. On conclusion of the prosecution evidence and closure of the case, the appellants were examined under Section 342, Cr.P.C., during which the questions arising out of prosecution evidence were put to them, but they denied almost all such questions, while pleading in their innocence and false

involvement in the case with *mala fide*. The question ***"Why this case against you and why the PWs have deposed against you?"*** was answered by both as under:

"I and my co-accused who is my real brother also, are quite innocent, we have no concern whatsoever with the commission of alleged offence. I was not present in the village on the date of occurrence rather I was available at the house of my in law about 20 miles away from the alleged place of event. Similarly my co-accused was also not present at the place of occurrence and he was also in his house. Deceased was also known as Januu notorious character of the village and was source of evils like money extorting and teasing of girls. He was done to death by some one unknown person or persons neither we nor the complainant are so call the eye-witnesses were present at the time of murder. On the other side complainant party was having grudge against us because two years back a fight took place between us and the complainant's side in which the leg of the deceased was fractured as result of cross firing. Besides 2/3 times quarrels arose between us and the boys of the complainant party prior to the present occurrence. Further we have no concern with the election as none from us ever contested the election of any public office, so there was no motive with us to commit the murder of deceased. Anyhow complainant or witnesses who are related to each was having motive to falsely implicate us as accused while playing in the hands of political personalities of the village/area."

They did not opt to lead evidence in their defence or make statements under Section 340(2), Cr.P.C. Finally, the impugned judgment was passed in the above mentioned terms. Consequently, the appeal in hand.

5. The learned counsel for the appellants have argued that the appellants are innocent and falsely involved in the case; neither the eye-witnesses were available at the spot nor they had seen the occurrence and they had become false witnesses; statements of eye-witnesses being full of material contradictions, were not believable, but the learned trial Court had erred in not considering the said aspect; the alleged motive was not proved and established and rightly observed so by the learned trial Court; no empty was sent to the laboratory, hence the alleged recoveries of weapons from the appellants were inconsequential, but the learned trial Court had failed to give any consideration to the said fact; the prosecution case and the charge against the appellants was not established and proved; hence they were entitled to acquittal and as such the impugned judgment could not be termed as valid and justified.

6. On the other hand, the learned Deputy District Public Prosecutor, assisted by the learned counsel for the complainant, has vehemently opposed the

appeal, while supporting the impugned judgment to be well-reasoned and call of the day.

7. Arguments of all the sides have been heard and record has been perused.

8. It was a day light occurrence and promptly reported to the Police, hence no chance of any deliberation or consultation. Muhammad Mushtaq complainant and Muhammad Ahmad, when entered in the witness box as PW-2 & PW-3 respectively, categorically deposed that in their presence and within their view, the appellants armed with firearms, attracted at the spot and by firing, caused injuries to Muhammad Ashfaq, resulting into his death at the spot. Both the witnesses were cross-examined by the defence at length, but their statements could not be contradicted. Admittedly, both the witnesses were closely related inter se as well as with the deceased, but their no previous grudge or enmity, with the appellants could be established on the record, therefore, no reason cause or justification to discard their testimony on the basis of mere relationship, which otherwise is trustworthy and confidence inspiring. In this regard, reliance can be placed on the case titled *"Ijaz Ahmad versus The State"* reported as 2009 SCMR 99, wherein the august Supreme Court of Pakistan has held as under:

"... mere relationship of a witness with any of the parties would not dub him as an interested witness because interested witnesses is one who has, of his own, a motive to falsely implicate the accused, is swayed away by a cause against the accused, is biased, partisan, or inimical towards on account of the occurrence, by no stretch of imagination can be regarded as an "interested witnesses". In the wake therefore, it proceeds that merely because the witnesses are kith and kin, their evidence cannot be rejected, if otherwise it is trustworthy."

9. The above mentioned ocular account gained support from the medical evidence, led by Dr. Pervaiz Akhtar (PW-4), post-mortem report (Ex.PD) and pictorial diagram (Ex.PD/1), when the above mentioned fire-arm injuries on different parts of the body of the deceased, resulting into immediate death were observed. In this way it can safely be held that the ocular account is in line with the medical evidence.

10. During statements of the above named eye-witnesses, it came on the record that their houses were situated at a distance of 02 acres from the spot. Both had satisfactorily explained and justified their presence at the spot and witnessing of the occurrence. In this way, the above mentioned arguments with regard to non-availability of the witnesses at the spot and not seeing the occurrence, are nothing, but bald contentions, hence discarded. The alleged motive was opposition of the deceased, against the appellants in some

election. No detail of any such election has been brought on the record. In this way, the alleged motive could not be proved and rightly held so by the learned trial Court, in the impugned judgment. Therefore, the real cause, resulting into death of the deceased at the hands of the appellants is still shrouded in mystery.

11. The recovery of .12 bore pump action gun from Shaukat Ali appellant and securing it through memo (Ex.PG) has been alleged. The recovery of such kind of weapon from Shakeel Ahmad appellant has also been stated, but neither any recovery memo has been tendered in evidence, nor any witness has made any statement about the alleged recovery. Furthermore, no empty collected from the spot, for comparison was sent to the laboratory and as such the above mentioned alleged recoveries have become inconsequential.

12. For what has been discussed above, we are of the view that the impugned judgment, towards conviction of the appellants for charge under

Section 302(b), PPC, being result of correct appreciation and evaluation of the material available on the record, is quite justified, hence does not requires any interference. As about quantum of sentence to the appellants, it is stated that as observed above, the alleged motive could not be established; both the appellants made one fire shot at the deceased and recovery of the weapons, from them have gone inconsequential, which facts, in the light of the law laid down in the cases titled *"Hasil Khan versus The State and others"* reported as 2012 SCMR 1936 and *"Naveed alias Needu and others versus The State and others"* (2014 SCMR 1464), are valid grounds for giving premium to the appellants in quantum of their sentence.

13. Resultantly, the conviction of the appellants awarded by the learned trial Court, through the impugned judgment is maintained, but their ***death sentence*** is altered to ***imprisonment for life.*** The appellants shall be entitled to the benefit of Section 382-B, Cr.P.C. The above mentioned amount of compensation prescribed by the learned Trial Court will remain the same but in case of its non-payment, the appellants would further undergo simple imprisonment for six months, each. The disposal of the case property shall be as directed by the learned trial Court, in the impugned judgment.

14. With the above mentioned modification in sentences of the appellants, the ***Criminal Appeal No. 1804 of 2011*** is ***dismissed,*** whereas ***Murder Reference No. 48 of 2012*** is answered in Negative and death sentence of the appellants Shaukat Ali and Shakeel Ahmad is ***not confirmed.***

(S.A.Q.) Order accordingly

PLJ 2020 Cr.C. (Lahore) 986

Present: **MUHAMMAD TARIQ ABBASI, J.**

GHULAM FAREED--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 3705-B of 2020, decided on 3.2.2020.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(i), 337-F(i), 337-F(v), 337-L(2), 148 & 149--Bail before arrest, confirmed--Medical report--Jurh-ghayer--Jaifah hashimah--Punishable--Injury on hands--Non-vital part--Ulterior motive--Further inquiry--Opinion of medical board had made applicability of Section 337-F(v), PPC as of further inquiry and probe making the accused entitled to relief calimed for, as possibility of his false involvement to achieve ulterior motive could not be ruled out--Bail was confirmed. [P. 987] A

Syed Afzal Shah Bukhari, Advocate for Petitioner.

Mr. Sana Ullah, Deputy Prosecutor General for State.

Ch. Sajjad Hussain, Advocate for Complainant.

Date of hearing: 3.2.2020.

ORDER

Through this petition, the petitioner seeks pre-arrest bail in case FIR No. 704, dated 09.10.2019, registered under Sections 337-A(i),337-F(i),337-F(v),337-L(2)/148/149, PPC at Police Station Baseerpur, District Okara.

2. As per FIR, the petitioner has caused injuries on right hand of Ahmed Ali, complainant and left arm of Ashiq Hussain, PW.

3. The injury on right hand of the complainant has been found as *jurh-ghayr-jaifah-damihah,* hence punishable under Section 337-F(i), PPC, which offence is bailable in nature. The first medical examiner had declared the injury of Ashiq Hussain PW *jurh-ghayr-jaifah-hashimah* and as such punishable under Section 337-F(v), PPC. The petitioner had questioned the above said injury of Ashiq Hussain

PW before a Medical Board, which had carried on the due proceeding and then framed the following opinion:

"The District Standing Medical Board is of the opinion that the possibility of fabrication regarding injury No. 1 cannot be ruled out."

4. The above mentioned opinion of the Medical Board had made applicability of Section 337-F(v), PPC, as of further inquiry and probe, making the petitioner entitled to the relief claimed for, as possibility of hjs false involvement to achieve some ulterior motive could not be ruled out.

5. Resultantly, the petition in hand is allowed and ad-interim pre-arrest bail already granted to the petitioner **is confirmed** subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount to the satisfaction of the learned trial Court.

(S.A.Q.) Bail confirmed

PLJ 2020 Cr.C. (Note) 112
[Lahore High Court, Rawalpindi Bench]
Present: **MUHAMMAD TARIQ ABBASI, J.**
Mst. **TAZEEM AKHTAR--Appellant**
versus
STATE--Respondent

Crl. A. No. 313 of 2013, heard on 2.5.2016.

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

----Ss. 302(b) & 34--Conviction & sentence--Challenge to--False implication--Non attribution of firing--Benefit of doubt--Acquittal of--Admittedly, the appellant had not made any firing nor she had committed any overt act, resulting into injury and death of Muhammad Ifrat--Only role assigned to her was that she provided a 12-bore gun to her husband Muhammad Baloch co-accused, who made firing, resulting into an injury and death of Muhammad Ifrat--Prosecution stance that she had provided 12-bore gun to her husband Muhammad Baloch, did not appeal to a prudent mind, because when the above mentioned weapon was available at the spot and within access of Muhammad Baloch, there was no occasion for the appellant to provide it to him--In this way possibility of false involvement of the appellant, under a wider net could not be ruled out--All the above mentioned facts and circumstances, to my mind, have made the case against the appellant doubtful--There is no denial of the fact that even a slightest doubt in the prosecution case, makes an accused entitled for due benefit as of right--Appeal accepted. [Para10 & 12] A & B

Mr. Arshad Mahmood Janjua, Advocate for Appellant.
Sh. Istajabat Ali, D.P.G for State.
Mr. Tariq Mehmood Butt, Advocate for Complainant.
Date of hearing: 2.5.2016.

JUDGMENT

This appeal is directed against the judgment dated 27.06.2013, passed by the learned Additional Sessions Judge Jhelum, whereby in case FIR No. 144, dated 09.10.2011, registered under Section 302/34, PPC, at Police Station Domeli, District Jhelum, Mst. Tazeem Akhtar **(hereinafter referred to as the appellant)**, was convicted under Section 302(b) read with Section

34, PPC and sentenced to imprisonment for life and compensation of Rs. 1,00,000/-, payable to legal heirs of the deceased, failing which to further undergo S.I. for six months, with benefit of Section 382-B, Cr.P.C.

2. The precise allegations, against the appellant, as per record are that on 09.10.2011 at about 01:30 p.m, when Muhammad Ifrat (**hereinafter referred to as the deceased**), was laying *'Lanter'* of his house, whereas the appellant alongwith her husband Muhammad Baloch (co-accused murdered during the occurrence), was available at roof of the house, a quarrel between both the parties started, during which the appellant brought .12-bore gun and handed it over to her husband Muhammad Baloch, who with it made a fire shot, which hit on left side of chest of Muhammad Irfat (deceased), who later on died in the hospital.

3. On the basis of the above mentioned complaint, the formal FIR was chalked out. During the occurrence Muhammad Baloch co-accused was also murdered, hence on the basis of statement made by the appellant, a cross-version was registered against Muhammad Ifrat (deceased), Muhammad Anwar, Waqas and Peeran Ditta.

4. The appellant was challaned to the Court and formal charge against her was framed, which was denied, hence the prosecution witnesses were summoned and recorded.

5. The prosecution had got examined as many as 11 witnesses, where-after the appellant was examined under Section 342, Cr.P.C, during which the questions arising out of the prosecution evidence, were put to her but she denied almost all such questions, while pleading her innocence and false involvement, in the case with malafide. She did not opt to lead any evidence in her defence or to make statement under Section 340(2), Cr.P.C. Finally the impugned judgment was passed in the above mentioned terms. Consequently, the appeal in hand.

6. The learned counsel for the appellant has argued that the appellant was innocent but while concocting a false story she was robed in the case; admittedly she did not fire at the deceased, rather her husband namely Muhammad Baloch was attributed firing at the deceased but erroneously on the basis of presumption, she was convicted and sentenced; the prosecution case and the charge against the appellant was not at all established and

proved, hence she was entitled to acquittal, therefore the impugned judgment towards her conviction and sentence could not be termed as justified.

7. The learned Deputy Prosecutor General, assisted by learned counsel for the complainant has vehemently opposed the appeal while supporting the impugned judgment to be well reasoned and call of the day.

8. Arguments of all the sides have been heard and the record has been perused.

9. The occurrence took place over construction of a house by Muhammad Ifrat (deceased). During the occurrence Muhammad Baloch with a .12-bore gun made firing and caused an injury on left side of chest of Muhammad Ifrat, which proved fatal and consequently he died in the hospital. When Muhammad Ifrat sustained injuries at the hands of Muhammad Baloch, his companions allegedly attacked at Muhammad Baloch and while inflicting spade and clubs blows caused him the injuries, which resulted into his death.

10. Admittedly, the appellant had not made any firing nor she had committed any overt act, resulting into injury and death of Muhammad Ifrat. The only role assigned to her was that she provided a .12-bore gun to her husband Muhammad Baloch co-accused, who made firing, resulting into an injury and death of Muhammad Ifrat. The prosecution stance that she had provided .12-bore gun to her husband Muhammad Baloch, did not appeal to a prudent mind, because when the above mentioned weapon was available at the spot and within access of Muhammad Baloch, there was no occasion for the appellant to provide it to him. In this way possibility of false involvement of the appellant, under a wider net could not be ruled out.

11. According to the statement of the I.O. (PW-11), when he attended the spot, found Muhammad Baloch and the appellant, lying on roof of the house, in unconscious condition.

12. All the above mentioned facts and circumstances, to my mind, have made the case against the appellant doubtful. There is no denial of the fact that even a slightest doubt in the prosecution case, makes an accused entitled for due benefit as of right. In this regard, am fortified by the dictum laid down by the august Supreme Court of Pakistan in the cases

titled *"Ayub Masih Versus The State"* reported as PLD 2002 SC 1048, and *"Taria Pervaiz Versus The State"* reported as 1995 SCMR 1345, wherein it is held that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. In the case of *"Ayub Masih* (Supra), while quoting a saying of the Holy Prophet (PBUH) ***'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent"***, and making reference to the maxim, ***'It is better that ten guilty persons be acquitted rather than one innocent person be convicted'***, the Hon'ble Supreme Court observed as under:--

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

13. Resultantly, the appeal in hand is accepted, the impugned judgment is **set-aside** and the appellant namely **Mst.Tazeem Akhtar** is acquitted of the charge, while extending her the benefit of doubt. She is one bail, her surety stands discharged. The disposal of the case property shall be as directed by the learned trial Court.

(M.M.R.) Appeal accepted

PLJ 2020 Cr.C. (Lahore) 1155

[Rawalpindi Bench, Rawalpindi]

Present: MUHAMMAD TARIQ ABBASI, J.

RAHEEL MOHY-UD-DIN--Petitioner

versus

STATE etc--Respondents

Crl. Misc. No. 319-B of 2020, decided on 5.3.2020.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail after arrest, grant of--Further inquiry--Dishonoured of cheque--On one hand, stance has been alleged in FIR, whereas on other hand, agreements between parties are in file showing certain other facts and circumstances--In a civil suit filed by petitioner against complainant a written statement has been submitted under which certain payments by petitioner, to complainant have been admitted--Above mentioned facts and circumstances are sufficient to hold case of petitioner, as of further inquiry within meaning of S. 497(2) Cr.P.C--Offence charged against petitioner does not fall

within prohibitory clause of Section 497 Cr.P.C. and in such like cases basic rule is bail and refusal an exception--No exceptional circumstance is available before Court on basis of which bail of petitioner may be refused--Petitioner is lying in jail, hence no more required to police for purpose of any further investigation--As per record maintained by police, he is previously a non-convict.

[P. 1156] A & B

Syed Akhlaq Ahmad, Advocate for Petitioner.

Mr. Ghulam Abbas Gondal, Deputy Prosecutor General for State.

Mr. Muhammad Waqas Siddique, Advocate for Complainant.

Date of hearing: 5.3.2020.

ORDER

Through this petition, the petitioner seeks post arrest bail in case FIR No. 233 dated 21.06.2019, registered under Section 489-F, PPC at Police Station Mograh, Rawalpindi.

2. As per FIR, the petitioner had borrowed Rs. 22,00,000/-, from the complainant and towards its return executed a cheque of the said amount, in favour of the complainant but dishonoured.

3. On one hand, the above mentioned stance has been alleged in the FIR, whereas on the other hand, agreements between the parties are in the file showing certain other facts and circumstances. A In a civil suit filed by the petitioner against the complainant a written statement has been submitted under Paragraphs Nos. 7, 8 & 9 of which certain payments by the petitioner, to the complainant have been admitted.

4. The above mentioned facts and circumstances are sufficient to hold the case of the petitioner, as of further inquiry within the meaning of sub-section (2) of Section 497, Cr.P.C. Furthermore, the offence charged against the petitioner does not fall within the prohibitory clause of Section 497, Cr.P.C. and in such like cases basic B rule is bail and refusal an exception. No exceptional circumstance is available before the Court on the basis of which bail of the petitioner may be refused. The petitioner is lying in the jail, hence no more required to the police for the purpose of any further investigation in this case. As per record maintained by the police, he is previously a non-convict.

5. Resultantly, the petition in hand is allowed and the petitioner is admitted to bail, subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) Bail allowed.

CONTENTS

2014 C L C 1038

[Lahore]

Before Muhammad Tariq Abbasi, J

Syed NADEEM ABBAS----Petitioner

Versus

Mst. SADIA FIDA KHAN and others----Respondents

Writ Petition No.9982 of 2009, heard on 4th December, 2013.

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

----S. 5, Sched & S.17---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for dissolution of marriage, recovery of maintenance allowance, dowry articles and dower---Trial Court decreed the suit which was upheld by the Appellate Court with certain modifications---Validity---Wife in order to substantiate her claim with regard to dowry articles not only appeared herself but also produced her witnesses and also brought on record the proof regarding purchase of such articles---List of dowry articles was tendered in evidence and during said evidence plaintiff-wife reiterated her contention raised and grounds taken in the plaint---Trial Court had rightly concluded that wife was entitled to receive a sum of Rs. 6 lac as price of dowry articles and rest of her claim was turned down---Wife instead of filing appeal erroneously filed cross-objection/counter-claim which had not only been entertained by the Appellate Court but had also been accepted by the said Court---Proceedings of Appellate Court with regard to cross-objection/counter-claim, findings on the same and judgment and decree passed by the said court could not be sustained, however its finding passed on the appeal of husband were reasonable and the result of correct appreciation of evidence and material available on record---Impugned judgment and decree passed by the Appellate Court with regard to cross-objection/counter-claim was set aside and rest of its findings were maintained and those of Trial Court were restored---Constitutional petition was disposed of accordingly.

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

----S. 14---Appeal---Scope---Decree passed by the Family Court (dower or dowry) exceeding Rs. 30,000/- , maintenance allowance exceeding Rs.1000/- could only be challenged by filing an appeal.

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

----S. 17---Appeal---Filing of cross-objection/counter-claim against the decree passed by the Family Court---Scope---Decree passed by the Family Court could only be challenged by filing appeal and in family matters/suits Qanun-e-Shahadat, 1984 and Civil Procedure Code, 1908 (except sections 10 & 11) were not applicable---Cross-objection/ counter-claim could not be filed in family matters which was the subject of Civil Procedure Code, 1908.

Ch. Abdul Ghani for Petitioners.
Mehar Haq Nawaz Humayun for Respondents.
Date of hearing: 4th December, 2013.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--- Through the instant writ petition, the judgments and decrees dated 31-3-2009 and 6-11-2009, respectively passed by the learned Judge Family Court and learned Additional District Judge, Burewala have been called in question.

2. The facts are that the respondent No.1 filed a suit against the petitioner, through which she had claimed dissolution of marriage, recovery of dowry amounting to Rs.13,81,150/-, dower valuing Rs.1,00,000/- and past eight months maintenance allowance @ Rs.10,000/- per month total Rs.80,000/-. The said suit was contested through written statement, whereby the contentions raised in the plaint were vehemently denied.

3. During the pre-trial, reconciliation proceedings dated 6-12-2008 the marriage was dissolved on the basis of Khula, subject to the payment of dower amounting to Rs.one lac to the petitioner. To resolve the remaining controversy between the parties, issues were framed, the evidence of the parties was recorded and finally the impugned judgment and decree dated 31-3-2009 was passed, whereby the respondent No.1 was held entitled to receive Rs.6 lac as price of the dowry articles and rest of her claims were dismissed.

4. The petitioner assailed the above said judgment and decree of the learned trial Court, before the learned Additional District Judge, Burewala through an appeal. The respondent No.1 also preferred cross-objections/counter-claim in the appeal filed by the petitioner. The learned Appellate

Court through the consolidated judgment and decree dated 6-11-2009, dismissed the appeal filed by the petitioner, whereas while accepting cross-objections/counter-claim, preferred by respondent No.1, enhanced the amount of dowry to Rs.8,61,350/- and also held her entitled to recover maintenance allowance @ Rs.10,000/- per month from 15-4-2008, till expiry of the "Iddat" period.

5. Feeling aggrieved, the instant writ petition has been preferred, with the contentions and the grounds that nothing in support of the claims made in the plaint was brought or available on the record but erroneously, the learned trial Court had decreed the suit in the terms mentioned above; that when the matter went in appeal, the learned Appellate Court had falsely dismissed the appeal and accepted the cross-objections/counter-claims filed by the respondent No.1. It has been requested that by setting aside both the decrees of the above-said learned courts, the suit may be dismissed.

6. Arguments pro and contra have been heard and record perused.

7. It has been observed that before the learned Trial Court to substantiate the claim of the dowry, not only the respondent No.1 herself had appeared and got recorded her statement as P.W.1, but also produced a witness namely Haroon Fida Khan as P.W.2 and also brought on the record proof regarding purchase of the dowry. The list of the claimed dowry was also tendered in evidence as Exh.P-1. During the said evidence, the contention raised and grounds taken in the plaint were reiterated. On the other hand, the petitioner himself appeared in the witness-box as D.W.1, whereby he denied the claims and contentions of the respondent No.1.

8. The learned trial Court, while minutely examining the material available before it and evaluating the stance of both the parties had rightly come to the conclusion that respondent No.1 was entitled to receive a sum of Rs.6 lac as price of the dowry, whereas rest of her claim was turned down. In family matters section 14 of the West Pakistan Family Courts Act, 1964 (hereinafter will be read as Act) prescribes a procedure of filing appeal, against decree passed by a Family Court. For sake of reference, the said provision is reproduced hereinbelow:---

Appeal.--- [(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable--

(a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge, or a person notified by Government to be of the rank and status of a District Judge or a Additional District Judge, and

(b) to the District Court, in any other case.]

(2) No appeal shall lie from a decree passed by a Family Court---

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (viii) of section (2) of the Dissolution of Muslim Marriages Act, 1939.

(b) for dower (or dowry) not exceeding rupees [thirty thousand);

(c) for maintenance of, rupees [one thousand) or less per month.

(3) No appeal or revision shall against an interim order passed by a Family Court.

(4) The appellate Court referred to in subsection (1) shall dispose of the appeal within a period of four months.]

9. The above mentioned provision, clearly describes that a decree passed by a Family Court (dower or dowry exceeding Rs.30,000/--, maintenance allowance exceeding Rs.1000), can only be challenged by filing an appeal and nothing else. It was the right of the petitioner to object the decree dated. 31-3-2009, passed by the learned Family Court through appeal, hence he had rightly exercised his said right.

10. Section 17 of the Act, prohibits applicability of the provisions of Qanun-e-Shahadat Order, 1984, and the Civil Procedure Code 1908, (except sections 10 and 11), in family cases. For guidance, the said section is highlighted hereunder:---

"17. Provisions of Evidence Act and Code of Civil Procedure not to apply.--- (1) Save as otherwise expressly provided by or under this Act, the provisions of the (Qanun-e-Shahadat, 1984 (P.O. No.10 of 1984), and the Code of Civil Procedure, 1908 (except sections 10 and 11) shall not apply to proceedings before any Family Court (in respect of Part I of Schedule).
(2) .."

11. The above mentioned provisions have confirmed that a decree passed by a Family Court (Dower or dowry exceeding Rs.30,000/- and maintenance allowance exceeding Rs.1.000/- per month) can only be objected by filing an appeal and that in family matters/suits, the Qanun-e-Shahadat Order, 1984 and Code of Civil Procedure 1908 (Except sections 10 and 11) are not applicable. Meaning thereby that a decree passed by a family court, by no imagination, can be challenged by way of filing cross objections/counter-claim, as it is the subject of Civil Procedure Code, 1908.

12. It is an established principle of law that when law provides a thing to be done in a particular manner then it must be done in the said manner or should not be done. In the situation in hand, despite the above mentioned settled provisions, the respondent No.1 instead of filing an appeal, erroneously has filed cross-objections/counter-claim, in the appeal preferred by the present petitioner and astonishingly the learned Additional District Judge has not only entertained the said objections/ claim, but by accepting the same has enhanced the price of dowry from Rs.6,00,000/- to Rs.8,61,350/- and also granted interim maintenance allowance @ Rs.10,000/- per month, in favour of the respondent No.l.

13 Consequently, the proceedings of the learned Additional District Judge, Burewala towards entertainment of the cross-objections/counter-claim filed by the respondent No.1, the findings regarding the said objections/claim and the judgment and decree dated 6-11-2009, whereby the said objections/counterclaim have been accepted could not be permitted under the law.

14. The other findings of the learned. Appellate Court, whereby the appeal filed by respondent No.1 has been dismissed have also been perused. The said findings being quite reasonable and result of correct appreciation of the

evidence and material available on the record are not open to any exception, hence warrant no interference.

15. Resultantly, this writ petition is partially accepted. The impugned judgment and decree dated 6-11-2009 passed by the learned Additional District Judge, Burewala whereby, cross-objections counter-claim, filed by respondent No.1 have been accepted, is set aside being not acceptable under the law. Rest of the, findings as well as the judgment and decree impugned are maintained. The result is that the judgment and decree dated 31-3-2009 passed by the learned trial Court shall hold the field.

AG/N-9/L Order accordingly.

K.L.R. 2014 Civil Cases 60

[Multan]

Present: **MUHAMMAD TARIQ ABBASI, J.**

Muhammad Aslam

Versus

S.H.O., etc.

Writ Petition No. 538 of 2014, decided on 15th January, 2014.

ILLEGAL DISPOSSESSION COMPLAINT --- (Qabza group)

Constitution of Pakistan (1973)---

---Art. 199---Illegal Dispossession Act, 2005, Ss. 3/4---Complaint regarding illegal dispossession---Qabza Group---Maintainability criteria---Trial Court dismissed complaint---Impugned order---Validity---In instant case, neither any previous history or record of respondents was with petitioner nor brought on record on basis of which they could be termed as Qabza Group or Land Mafia---Neither in complaint nor statements, any detail had been given on basis of which respondents had been alleged to be of said Group---Mere mentioning of two words that respondents belonged to Qabza Group was not sufficient to hold them so and as such complaints were not maintainable---No illegality, infirmity or any other defect in impugned order could be found---Writ petition dismissed. (Paras 9,10,11,13,14,15) Ref. 2012 SCMR 1533.

[Nothing was brought on record that respondents belonged to Qabza Group. Complaint filed under Illegal Dispossession Act was rightly dismissed and High Court dismissed writ petition].

For the Petitioners: Khawaja Qaisar Butt, Advocate.

For the Respondents: Khawar Siddique Sahi, Advocate and Hassan Mehmood Khan, Tareen, D.P.G.

Date of hearing: 15th January, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This single judgment is intended to decide the Writ Petitions No. 538/2014 and 539/2014 as common questions of law and facts are involved in both the above-said petitions.

2. Through the above-mentioned writ petitions, the orders dated 8.5.2012 passed by the learned Additional Sessions Judge, Chichawatni, District Sahiwal have been called in question, whereby the complaints, filed by Muhammad Aslam and Muhammad Akram, petitioners in the above titled writ petitions (hereinafter will be referred as the petitioners) under Section 3/4 of the Illegal Dispossession Act, 2005 have been dismissed.

3. Initially the above-mentioned orders were impugned through Criminal Revisions, but as in the matters, writ petitions were competent, hence the Revision Petitions were converted in the writ petitions, in hand.

4. The facts are that the petitioners, filed two private complaints, against the respondents No. 2 to 5 (hereinafter will be referred as the respondents), with the contention that through mutation No. 1182, dated 8.2.2011, they became owner of Square No. 42, Kila No. 17, falling in Khata No. 21, Khatooni No. 94, in Mauza Chichawatni, District Sahiwal; that the respondents who belonged to Qabza Group, on 8.4.2011, while armed with fire-arms had forcibly taken possession of the above-mentioned property of the petitioners; that when the petitioners alongwith Rasheed Ahmad and Haji Taj Muhammad went to the respondents, they extended threats of dire consequences by saying that the petitioners will be killed and the possession will not be restored to them and that the petitioners through applications also approached the concerned SHO, but no action. Hence it was requested that the respondents may be summoned, proceeded accordingly and not only punished, but possession of the property in question may also be restored in favour of the petitioners.

5. The learned Additional Sessions Judge, before whom the above-mentioned complaints were filed, carried on the due proceedings, during which recorded cursory evidence of the petitioners and the witnesses produced by them and also obtained the reports from the Police and finally passed the impugned orders, whereby the complaints were dismissed.

6. Feeling aggrieved, the instant writ petitions have been preferred with the contention and the grounds that sufficient oral as well as documentary proof in support of the facts and circumstances narrated in the complaints were brought before the learned Additional Sessions Judge, but erroneously not considered and the impugned orders, which being purely illegal, are not sustainable.

7. The learned counsel for the petitioners has advanced his arguments, in the above-mentioned lines and the grounds. Whereas the learned counsel appearing on behalf of the respondents has opposed the writ petitions by holding the impugned orders to be quite justified and demand of the situation.

8. Arguments of both the sides have been heard and the record has been perused.

9. The record shows that in the complaints, on two occasions, it was mentioned only that the respondents were belonging to Qabza Group. In the cursory statement, again the petitioners and their witnesses had only alleged

the respondents to be from Qabza Group. Neither in the complaint nor the statements, any detail had been given on the basis of which the respondents had been alleged to be of the above-said group.

10. Mere mentioning of above-mentioned two words that the respondents belonged to Qabza Group was not sufficient to hold them so and as such the complaints under the Illegal Dispossession Act, 2005 were not competent and proceedable. In this regard the august Supreme Court of Pakistan has given an exhaustive judgment reported as *'Habib Ullah and others v. Abdul Manan and others'* (2012 SCMR 1533), whereby criteria for filing the complaints under the Illegal Dispossession Act, 2005 have been settled and that mere mentioning that the respondents belong to Qabza Group or Qabza Mafia is not sufficient to file the above-said complaint as the above- mentioned Act is applicable only to those accused persons who have credentials or antecedents of Qabza Group and remained involved in illegal activities and belonged to a gang of land grabbers or land mafia. For guidance, the relevant portion of the above-said judgment is reproduced herein below:---

"Complainant while appearing as PW-1 has not stated a single word that the appellants belong to a Qabza Group and were involved in such activities. So it is the complainant side who has failed to establish that the appellants belong to Qabza Group or they were land grabbers. The complainant side has not produced any evidence oral or documentary to establish that the appellants had the credentials or antecedents of being property grabbers. So, it was a dispute between two individuals over immovable property and as per allegation the appellants have taken illegal possession of the property, being rightful owners, from the tenant who has taken the property on rent and committed the default in payment of rent and electricity bills inasmuch as the appellants do not belong to a class of property grabbers or Qabza Group and no case was made out under Section 3 of Illegal Dispossession Act. Reference is made to the judgment of a Full Bench of the Lahore High Court in Zahoor Ahmad and others v. The State and others (PLD 2007 Lahore 231) wherein it has been held that the Illegal Dispossession Act, 2005 was restricted in its scope and applicability only to those cases whereas dispossession from immovable property has allegedly come about through the hands of a class or group of persons who could qualify as property grabbers/Qabza Group/land mafia and the said Act was being invoked and utilized by the aggrieved persons against those who have credentials or antecedents being members of the Qabza Group or land mafia. It was further held that the Illegal Dispossession Act, 2005 has been found to be completely nugatory to its

contents as well as objectives. The aforesaid view was upheld by this Court in the case of 'Mobashir Ahmad v. The State' (PLD 2010 SC 665). In view of the case-law referred above, it is established that the said law is applicable only to those accused persons who have the credentials or antecedents of Qabza Group and are involved in illegal activities and belong to the gang of land grabbers or land mafia. In the case in hand it has been found that by us that there is no evidence oral or documentary to establish that the appellants belong to the Qabza Group or land grabbers. Even otherwise no such allegation has been made against the appellants in the complaint filed by the respondent Abdul Manan or in the FIR for the same incident lodged on the next day, or by the PWs in their depositions made by them before the learned Trial Court. Even PW-1 Azhar Hussain, IO during the cross-examination has admitted that he had never heard about the appellants involvement in such like activities or their belonging to the group of land grabbers or Qabza Group rather the complainant is involved in such like cases."

11. In the case in hand, admittedly, neither any previous history or record, of the respondents, is with the petitioners nor brought on the record, on the basis of which they can be termed as Qabza Group or Land Mafia. Whereas as stated above, a complaint, under Illegal Dispossession Act, 2005, is only competent against person(s) belonging to the above-mentioned class.

12. Furthermore, it has been observed that the above-mentioned mutations, through which the petitioners had claimed ownership of the land in question, had been cancelled by the competent forum.

13. It has also been found that a civil suit filed by the petitioners against Muhammad Riaz (respondent No. 3) and the Province of Punjab, is also *sub-judice* in the Court of learned Civil Judge at Sahiwal, whereby the petitioners have claimed themselves to be in possession of the property in question and that the respondents may be restrained from interfering into the said possession. The said suit is nothing but a contradictory stance, as in the above-mentioned complaints, the petitioners have claimed that they have been dispossessed by the respondents, but the suit, they have sought protection from their dispossession and interference into their possession.

14. For what has been discussed above, as no illegality, infirmity or any other defect, in the impugned orders could be found, hence the same do not warrant any interference in writ jurisdiction.

15. Resultantly, both the writ petitions in hand, being devoid of any merit and force are dismissed.

Petition dismissed.

K.L.R. 2014 Criminal Cases 141
[Multan]
Present: **MUHAMMAD TARIQ ABBASI, J.**
Bashir-ud-Din
Versus
The State

Criminal Misc. No. 43-B of 2014, decided on 28th January, 2014.

BAIL --- (Nikahnama)

Criminal Procedure Code (V of 1898)---
---S. 497(2)---Pakistan Penal Code, 1860, Ss. 365-B/376---Commission of rape after abduction---Bail concession---Nikahnama---Free-will marriage---Held: An un-explained delay of abut 40 days in registration of F.I.R. had been found---Alleged abductee was medically examined after 10 days and during said examination, no swabs were secured for any examination---Alleged abductee had confirmed her marriage with petitioner through marriage registration certificate, complaint filed by her against her father and others, Court statement---Case called for further inquiry---Bail after arrest granted.
(Paras 5, 6, 7, 8)
نکاح نامہ/بجرم زنا میں ضمانت عطا ہوئی۔
[Nikahnama/Bail was allowed in offence of zina].
For the Petitioner: Prince Rehan Iftikhar Sheikh, Advocate.
For the State: Hassan Mehmood Khan Tareen, DPG with Ghulam Rasool, ASI.
For the Complainant: Muhammad Aslam Khan Langah, Advocate.
Date of hearing: 28th January, 2014.

ORDER
ARSHAD MAHMOOD TABASSUM, J. --- The petitioner seeks post arrest bail in case F.I.R. No. 216/2013, dated 2.8.2013 registered under Sections 365-B/376, PPC at Police Station, Kameer, District Sahiwal.

2. The precise allegations against the petitioner as per F.I.R. are that he alongwith his co-accused had abducted Noor Sain daughter of the complainant and had been committing rape with her and ultimately she fled away and reached at the house on 22.7.2013.

3. The learned counsel for the petitioner has argued that the petitioner is innocent and has falsely been roped in the case with *mala fides*; that in fact the above-mentioned lady being *sui-juris*, according to her own volition had contracted marriage with the petitioner and the same fact had been confirmed in different proceedings, initiated on the applications/complaints filed by the lady; that the case against the petitioner is of further inquiry; that the petitioner has been sent to the judicial lock-up, he is no more required for any further investigation and he does not have any previous criminal history.

4. The learned DPG assisted by learned counsel for the complainant has vehemently opposed the petition.

5. As per FIR, the above-named girl, who was abducted on 22.6.2013 had returned home on 22.7.2013, but the F.I.R. was got lodged on 2.8.2013. In this way, an un-explained delay of about 40 days in registration of the F.I.R. has been found. As per record, although the girl was available on 22.7.2013, but she was medically examined after 10 days and during the said examination, no swab was secured for any examination.

6. As per prosecution story, the girl came to the complainant on 22.7.2013, but in a suit for restitution of conjugal rights filed by the petitioner, her attendance, before the Court on 23.7.2013 has been marked. Copies of Nikahnama between the petitioner and the above-named girl dated 25.6.2013, the marriage, registration certificate, the complaint filed by the girl against her father and others, her statement before the Court and other documents are available on the record, whereby she has confirmed her marriage with petitioner.

7. All the above-mentioned facts and circumstances to my mind, have made the case against the petitioner as of further inquiry.

8. For what has been discussed above, the instant petition is allowed and the petitioner is admitted to post arrest bail subject to his furnishing bail bond.? in the sum of Rs. 1,00,000/- (Rupees one lac only) with one surety in the like amount to the satisfaction of learned Trial Court.

Bail after arrest granted.

2014 LAW NOTES 964

[Rawalpindi]

Present: MUHAMMAD TARIQ ABBASI, J.

Fauji Foundation

Versus

Habib Bank Ltd., etc.

Civil Revision No. 803 of 2011, decided on 12th June, 2014.

CONCLUSION

(1) Law always favours decision on merits and condemns the technicalities.

(a) Technicalities---

---Law always favours decision on merits and condemns the technicalities.

(Para 10)

Ref. 2012 CLC 1503, 2002 CLD 345, 2009 YLR 2475, 2009 SCMR 574.

(b) Civil Procedure Code (V of 1908)---

---S. 115---Suit for recovery of money---Issues---Right to cross-examine PWs---An application for adjournment was made on ground of ailment of respective counsel---Despite said fact, Trial Court had preferred to close right of cross-examination---Technicalities---Impugned order was set aside.

(Para 9) CLOSURE OF RIGHT TO PRODUCE DOCUMENTARY EVIDENCE --- (Sufficient/good cause)

(c) Civil Procedure Code (V of 1908)---

---S. 115---Suit for recovery of money---Issues---Oral evidence was recorded and for documentary evidence, opportunities were granted but petitioner had failed to produce same---Right of petitioner to produce documentary evidence was closed---Impugned order---Good and justified cause---Miscarriage of justice---Documents intended to be tendered were the cheques which were part of record of a criminal case---To got copies of said cheques, petitioner had already filed application---Held: There was good and justified cause, for not producing documentary evidence with petitioner---It seemed that Trial Court was in hurry to disposal of suit, hence failed to give an opportunity to petitioner for said evidence---Impugned order was set aside---It was directed that one opportunity to petitioner to lead documentary evidence be granted---Civil revision petition allowed. (Paras 8, 11)

(d) Civil Procedure Code (V of 1908)---

---S. 115---Exercise of revisional jurisdiction of High Court---Scope---High Court under revisional jurisdiction is fully competent to examine record of any subordinate Court and if any jurisdictional error, towards passing of any order is found, then to cure it. (Para 8) Ref. 2012 MLD 1062, 2012 CLC 271.

دستاویزی شہادت متنازعہ چیک ہائے پر مشتمل تھی جو فوجداری مقدمہ میں فائل پر تھےجن کی نقول کیلئے باقاعدہ درخواست دی گئی لیکن دعویٰ بمراد دلا پانے میں ٹرائل کورٹ نے غلط طور پر سائلان کا دستاویزی شہادت پیش کرنے کا حق قلمزن کیا۔ ہائی کورٹ میں نگرانی درخواست منظور ہوئی۔

[Documentary evidence consisting of disputed cheques was the subject-matter of criminal case copies whereof were already applied for. Trial Court had incorrectly closed right of petitioner to produce documentary evidence. High Court allowed revision petition].

For the Petitioner: Muhammad Azam Chattha, Advocate.

For the Respondent No. 1: Mian Abdul Rauf, Advocate.

For the Respondent No. 2: Malik Muhammad Iqbal, Advocate.

Date of hearing: 12th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- Through this revision petition, the order dated 5.9.2011, passed by the learned Civil Judge, Rawalpindi has been called in question, whereby the right of the petitioner to lead documentary evidence has been closed.

2. The facts in short are that the petitioner filed a suit for recovery Rs. 76,69,666.90, against the respondents, wherein the written statements were filed, the issues were framed, the oral evidence of the petitioner was recorded and for documentary evidence, opportunities were granted, but the petitioner had failed to lead the said evidence, hence through the impugned order, right of the produce such evidence was closed.

3. The learned counsel for the petitioner has argued that towards documentary evidence, the cheques which were part of the file of a criminal case, pending in the Court of learned Special Judge, Central, Rawalpindi, were to be tendered and that to get copies of the said cheques, application was accordingly filed and that for delivery of the copies, the date was given as 7.9.2011, but the Iearned Civil Judge had failed to give two days' time to the petitioner for producing the cheques in documentary evidence and had knocked out the petitioner from his valuable rights, hence the impugned order is not sustainable under the law.

4. The learned counsel for respondent No. 2 has not seriously objected the revision petition, whereas the learned counsel appearing on behalf of respondent No. 1 has stated that a serious high-handedness and miscarriage of justice has also been done by the learned Trial Court with the respondent No. 1, through order dated 28.7.2011, whereby his right to cross-examine the PW-1 and PW-2 has been closed and that under the revisional jurisdiction, the above-said order dated 28.7.2011 may also be cured.

5. Arguments of all the sides have been heard and record has been perused.

6. As per record, the petitioner in his above-mentioned suit had oral evidence and when the date for the documentary evidence of the petitioner was fixed as 5.9.2011, his right was closed, with the observations that despite final opportunity, he had failed to produce documentary evidence.

7. The record shows that the documents intended to be tendered cheques, which were part of the record of a criminal case, pending in the Court of learned Special Judge Central, Rawalpindi. To get copies of the cheques, the petitioner had moved an application on 27.8.2011 and for supply of the copies, the date was given as 7.9.2011. When the above-mentioned good and justified cause, for not producing the documentary evidence was with the petitioner and before the learned Trial Court, then two days wait should have been made, but it seems that the learned Trial Court was in a hurry to dispose of the suit, hence failed to give an opportunity to the petitioner for the above-mentioned evidence. Hence the impugned order dated 5.9.2011 could not be termed to be justified.

8. Under Section 115 of C.P.C., this Court under revisional jurisdiction is fully competent to examine record of any subordinate Court and if any jurisdictional error, towards passing of any order is found, then to cure it. Reliance in this regard may be placed upon the judgments reported as *Allah Ditta v. Lahore Development Authority and 5 others* (2012 CLC 271) and *Malik Bahadur Sher Khan v. Haji Shah Alam Khan and others* (2012 MLD 1062).

9. It has been observed that the PW-1 and PW-2 were examine and when for their cross-examination, on behalf of respondent No. 1, the date was fixed as 28.7.2011, an application for adjournment was made, with the contention that the learned counsel for respondent No. 1 due to backache was unable to attend the Court, but despite the said fact, the learned Trial Court had preferred to close the right of the respondent No. 1 to cross-examine the above-said witnesses. In this way, again a try to knock out the respondent No. 1 purely on technical ground had been made by the learned Trial Court, which was not mandate of the law and procedure.

10. Law always favours decision on merits and condemns the technicalities. Reliance in this respect is placed upon *Haji Lal Shah v. Mst. Nooran through LRs and others* (2012 CLC 1503), *Muhammad Nazir v. Haji Zaka Ullah Khan* (2002 CLD 345), *Hafiz Muhammad Saeed and 3 others v. Government of the Punjab, Home Department through Secretary, Lahore and 2 others* (2009 YLR 2475) and *Kathiawar Cooperative Housing Society Ltd., Macca Masjid Trust and others*" (2009 SCMR 574). But in the situation in hand, as stated above, the learned Trial Court was bent upon to dispose of the suit purely on technical grounds, which could not be appreciated.

11. Resultantly, by accepting the instant revision petition, not only the order dated 5.9.2011 of the learned Trial Court, which has been impugned in the instant petition, is set aside, but also the above-mentioned other order dated 28.7.2011, whereby the right of cross-examination of the respondent No. 1 has been closed, is also set aside. Consequently, it is directed that one opportunity to the petitioner to lead the documentary evidence as well as the respondent No. 1 to cross-examine the PW-1 and PW-2 be granted for a date to be fixed by the learned Trial Court. If on the fixed date, the petitioner fails to perform his above-mentioned job, then no further opportunity shall be granted and in the said eventuality, the instant revision petition will be deemed to have been dismissed. If the respondent No. 1 fails to cross-examine the PWs-1 & 2 on the fixed date, then the above-mentioned concession granted in his favour shall be considered to have been withdrawn.

Civil revision petition allowed.

2014 LAW NOTES 1004
[Multan]
Present: MUHAMMAD TARIQ ABBASI, J.
Muhammad Nasir
Versus
Addl. Sessions Judge, etc.

Criminal Revision No. 388 of 2011, decided on 20th January, 2014.

SUMMONING OF WITNESS --- (Relevancy of fact)

Criminal Procedure Code (V of 1898)---

---Ss. 439/540---Pakistan Penal Code, 1860, Ss. 302/324/148/149---Criminal trial---Summoning of person as CW---Relevancy of fact---Petitioner/accused moved an application whereby he sought summoning of named Taxi Driver as a CW on ground that during investigation of case, I.O. had recorded his statement but with *mala fide* his name was not involved in the calendar of witnesses---Trial Court dismissed such application---Impugned order---Validity---When it had been brought on record that during investigation, proposed witness had appeared before I.O. and narrated certain facts towards occurrence, then surely he as well as his statement became relevant and important for first decision of case---Trial Court should have given proper consideration to said fact and adopted required mode for his examination---Impugned order was set aside---Summoning and recording of proposed witness was allowed but not as a CW rather as DW---Criminal revision petition allowed.

(Paras 7, 8)

مذکور ٹیکسی ڈرائیور کا دوران تفتیش مقدمہ ھذا بیان قلمبند کیا گیا تھا۔ اور وقوعہ قتل کے متعلق اہم واقعات بتائے تھے لہٰذا بطور گواہ دفاع طلب کرنا چاہیے تھا۔ ہائی کورٹ نے نگرانی درخواست منظور کی۔

[Statement of said taxi driver was recorded during investigation of case who narrated important facts towards occurrence, therefore, he should have been summoned as Defence DW. High Court allowed revision petition].

For the Petitioner: Khalid Ibn-e-Aziz, Advocate.
For the Respondents: Hassan Mahmood Khan Tareen, DPG.
Malik Ghulam Muhammad Langrial, Advocate.
Date of hearing: 20th January, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This criminal revision is directed against order dated 27.9.2011, passed by the learned Addl. Sessions Judge, Vehari, whereby an application moved by the petitioner for summoning and recording Allah Rakha as a Court witness has been refused.

2. The facts are that during the trial of a criminal case registered *vide* No. 430, dated 2.10.2010 under Sections 302, 324, 148, 149, P.P.C. at Police Station, Luddan, District Vehari, the present petitioner, being an accused moved an application, whereby he sought summoning and recording of Allah Rakha, a Taxi Driver as a Court witness, on the ground that during the investigation of the case, the Investigating Officer had recorded statement of the above-named person on 7.11.2010, but with *mala fide* his name was not included in the calendar of the witnesses, despite the fact that he was an important witness, hence his statement for reaching at a just conclusion was very necessary. The learned Trial Court through the impugned order had held that as statement of the above-named had already been brought on the record as Ex.DD, hence not necessary for just decision of the case and as such had dismissed the petition.

3. Consequently, the instant revision petition has been preferred with the contention that the impugned order being a patent illegality is not sustainable in the eye of law; that when admittedly the above-named during investigation

had appeared before the Investigating Officer and his statement was also recorded, he was a very relevant and important witness but erroneously the learned Trial Court had observed otherwise.

4. The learned DPG as well as learned counsel for the complainant (respondent No. 2) has vehemently opposed the petition.

5. Arguments heard and record perused.

6. It has been admitted on record that during the investigation Allah Rakha had joined the proceedings and his statement/version was reduced into writing by the Investigating Officer through case diary No. 15, dated 7.11.12010. During the said narration, certain facts towards the case in hand, were brought on the record. Under Section 510 of the Code of Criminal Procedure, 1898, a Trial Court may at any stage, summon any person as a witness or examine any person in attendance, though not summoned as a witness or recall or re-examine any person already examined but subject to a condition that his evidence should be essential for just decision of the case. For reference the said provision is reproduced herein below:---

"Power to summon material witness or examine persons present---Any Court, may at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

7. In the matter in hand, when it has been brought on the record that during the investigation, the above- named had appeared before the Investigating Officer, and narrated certain facts towards the occurrence, then surely he as well as his statement become relevant and important for just

decision of the case. Therefore, the learned Trial Court should have given proper consideration to the said fact and in the light of the above-mentioned provision, adopted the required mode for his examination.

8. Resultantly, the impugned order, could not be termed as justified, hence set aside. Consequently, summoning and recording of the above-named is allowed but not as a Court witness rather as a defence witness.

Criminal revision petition allowed.

2014 LAW NOTES 1060

[Lahore]

Present: **MUHAMMAD TARIQ ABBASI, J.**

Abdul Hameed

Versus

Addl. Sessions Judge, etc.

Criminal Revision No. 32 of 2012, decided on 7th November, 2013.

CONCLUSION

(1) There is no cavil to the proposition that an accused charge-sheeted for a major offence can be convicted for a minor offence.

CONVICTION/SENTENCE --- (Framing of charge)

Criminal Procedure Code (V of 1898)---

---S. 435---Pakistan Penal Code, 1860, Ss. 324/34---Criminal trial---Charge---Said respondent was convicted/sentenced but in addition to offence under Section 324, P.P.C. for which he was charge-sheeted, he was also convicted/sentenced for offences under Sections 337-D, 337-F(iii), 337-F(vi)---Appellate Court below while accepting appeal remanded case holding that no charge was framed under Sections 337-D, 337-F(iii) and 337-F(vi), P.P.C.---Minor offences---Validity---When in addition to offence under Section 324, P.P.C., said respondent had also caused injuries to said PWs and committed offence under Sections 337-D, 337-F(iii) and 337-F(vi), P.P.C. which were distinct offences, then the charge under said offence was mandatory and as such without framing of charge, for said offence, it was not valid to punish him for said offences/injuries/hurts caused to PWs---Offence under Section 338-D, P.P.C. could not be treated as minor offence *vis-a-vis* the offence under Section 324, P.P.C.---While convicting/sentencing respondent for said offence, without framing of charge, he till conviction was kept ignored and as such a great prejudice was caused to him---Criminal revision petition dismissed.

(Paras 8, 10, 11) Ref. 2012 SCMR 1066.

مذکور جرم کے تحت فرد جرم کے بغیر رسپانڈنٹ کو سزایاب کیا تھا۔ اپیلیٹ کورٹ ما تحت نے درست طور پر مقدمہ ریماند کیا۔ ہائی کورٹ نے نگرانی درخواست خارج کر دی۔

[Respondent was convicted/sentenced under said section without framing of charge. Appellate Court below had correctly remanded case. High Court dismissed writ petition].

For the Petitioner: Allah Bakhsh Khan Kalachi, Advocate.

For the State: Hassan Mahmood Khan Tareen, DPG.

For the Respondent No. 1: Malik Ali Muhammad Dool, Advocate.

For the Respondent No. 2: Khadim Hussain Khosa, Advocate.
Date of hearing: 7th November, 2013.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This revision petition has been directed against judgment dated 19.12.2011 passed by learned Additional Sessions Judge, D.G. Khan, (respondent No. 1), whereby in appeal, the judgment passed by the learned Trial Court dated 21.10.2011, was set aside and case was remanded back to the learned Trial Court, for deciding it afresh under the proceedings, suggested in the judgment.

2. The facts are that respondent No. 2 and one Riaz being involved in case F.I.R. No. 452, dated 29.06.2009, registered under Sections 324/34, P.P.C. at Police Station, Saddar, D.G. Khan, were challaned to the Court. The above-named accused, were charge-sheeted by the learned Trial Court under Sections 324/34 of P.P.C. and trial was carried on. Riaz had absconded, hence, declared proclaimed offender. On completion of the trial, through judgment dated 21.10.2011, the, respondent No. 2 (Allah Wasaya) was convicted but in addition to the offence under Section 324, P.P.C. for which he was charge-sheeted, he was also convicted and sentenced for the offences under Sections 337-D, 337-F(iii), 337-F(vi), P.P.C. in the terms, mentioned in the judgment.

3. Respondent No. 2 assailed the above-said judgment and conviction before the learned Sessions Court, D.G. Khan from where the judgment dated 19.12.2011 (impugned in this petition) was pronounced, whereby while holding that no charge under Sections 337-D, 337-F(iii) and 337-F(vi), P.P.C. was framed by the learned Trial Court, hence the sentence and conviction in the said offences was not warranted under the law and as such while accepting the appeal, the case was remanded back for fresh decision after framing the charge under all the above-mentioned heads.

4. Feeling aggrieved from the above-mentioned judgment the Appellate Court, instant revision petition has been preferred with the contention and on the ground that the learned Trial Court was fully competent to pass conviction and sentence for the above-mentioned offences, regarding which the respondent No. 2 was not charge-sheeted, hence the impugned judgment being mis-interpretation of the law was nothing but nullity.

5. The learned counsel appearing on behalf of the petitioner has advanced his arguments in the above-mentioned lines and grounds, whereas the learned DPG as well as learned counsel for respondent No. 2 has vehemently opposed the appeal while submitting that the impugned judgment being in accordance with law and procedure is quite justified, hence not interfereable.

6. Arguments heard and record perused.

7. There is no denial of the fact that the respondent No. 2 (Allah Wasaya) was charge-sheeted only for the offence under Section 324 of P.P.C. It is also an admitted position that the learned Trial Court, while deciding the matter had convicted and sentenced, the respondent No. 2 not only in offence under Section 324 of P.P.C., but also in the offences under Sections 337-D, 337--F(iii) and 337-F(vi), P.P.C. As per Section 324 of P.P.C. if an accused during commission of the said offence, causes injuries to the victim, then besides offence under Section 324 of P.P.C., he will also be liable to the punishment, provided for the said injuries. But it does not mean that regarding the offences of injuries, he will not be charge-sheeted.

8. In the situation in hand, when in addition to the offence under Section 324 of P.P.C., the respondent No. 2 had also caused injuries to the PWs and committed offence under Sections 337-D, 337-F(iii) and 337-F(vi) of P.P.C., which were distinct offences, having maximum imprisonment for 10 years, 3 years, and 7 years respectively, then the charge under the said offence was mandatory and as such without framing of the charge, for the said offence, it was not valid to punish him, for the said offence/injuries/hurts, caused to the PWs.

9. There is no cavil to the preposition that an accused charge-sheeted for a major offence can be convicted for a minor offence. In the matter in hand, the offence under Section 337-D, P.P.C., in addition to payment of *Arsh* also carries sentence of 10 years imprisonment. The offence under Section 324, P.P.C. prescribe maximum sentence of 10 years' imprisonment and fine. Therefore the offence under Section 337-D, P.P.C. cannot be treated as minor offence *vis-a-vis* the offence under Section 324, P.P.C. The same is the situation of the above-mentioned other offences under Sections 337-F(iii) and 337-F(vi), P.P.C., which besides *Daman* also have maximum imprisonment for three years and seven years, respectively. The above-mentioned view has been borrowed from the dictum laid down in the case-law titled, "*Khizar Hayat v. The State* (2012 SCMR 1066) where the following has been observed:---

"We have also attended to the provisions of Section 238, Cr.P.C. which allow the Court to convict a person for a 'minor' offence rather than for the major offence with which he has been charged but we have found that the provisions of Section 337-D, P.P.C. could not have been treated as constituting a minor offence vis-a-vis the offence under Section 324, P.P.C. We have noticed in this context that at the relevant time an offence under Section 324, P.P.C. carried a maximum sentence of 10 years' imprisonment and fine whereas an offence under Section 337-D, P.P.C. carried a maximum sentence of ten years' imprisonment and payment of arsh to the injured victim. We have, thus, failed to understand as to how the learned Judge-in-Chamber of the Lahore High Court, Multan Bench, Multan could have treated an offence under Section 337-D, P.P.C. to be a minor offence vis-a-vis the offence under Section 324, P.P.C. and could have invoked the provisions of Section 238, Cr.P.C. for the purpose."

10. The offences under Sections 337-D, 337-F(iii) and 337-F(vi), P.P.C. having the above-mentioned punishment were not minor offences, hence, while convicting and sentencing the respondent No. 2 for the said offence, without framing of the charge, he till conviction was kept ignorant and as such a great prejudice was caused to him.

11. It has been noted that on one hand, the petitioner through the instant revision petition is objecting seriously to the above-mentioned findings made by the learned Appellate Court but simultaneously he through an application, before the learned Trial Court has got amended and framed, the charge against Riaz co-accused, under the above-mentioned offences (337-D, 337-F(iii) and 337-F(vi) of P.P.C.). The said act and behaviour of the petitioner being blowing hot and cold in one breath is not acceptable.

12. For the forgoing reasons, the petition in hand being devoid of any force is dismissed.

Criminal revision petition dismissed.

2014 M L D 614
[Lahore]
Before Muhammad Tariq Abbasi, J
ABDUL QADEER---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.2915-B of 2013, decided on 5th November, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 109, 337-A(i), 337-F(i)(ii), 148 & 149---Qatl-e-amd, abetment, causing Shajjah-i-Khafifah, Shajjah-i-Mudihah, Damiyah, and badiah, rioting---Bail, grant of---Further inquiry---Injury found at the right side of the neck of the deceased being through and through, exit of said injury was the other injury observed on the left side of the neck---Except said injury, no other injury to the deceased had been attributed to accused---Co-accused to whom injuries on the person of prosecution witnesses, were attributed, had been admitted to bail---Chhuri allegedly been used and recovered from accused, could not be found to be stained with blood of human origin, during forensic analysis---Case of accused was that of further inquiry---Accused was admitted to post-arrest bail, in circumstances.

Mudassar Altaf Qureshi for Petitioner.
Sh. Ghayas-ul-Haq for the Complainant.
Hassan Mahmood Khan Tareen, D.P.G. with Mehdi Khan, S.I. for the State.

ORDER
MUHAMMAD TARIQ ABBASI, J.---The petitioner seeks post-arrest bail in case F.I.R. No.365 of 2012 dated 26-10-2012, registered under sections 302/109/337-A(i), 337-F(i), 337-F(ii), 148/149 P.P.C. at Police Station, Mehmood Kot, District Muzaffargarh.

2. The prosecution version embodied in the F.I.R. is that Khadim Hussain complainant had reported the matter to the police while deposing that on 26-10-2012 at about 9.30 a.m., his son namely Muhammad Azam along with his friends namely Muhammad Tahir, Muhammad Arif and Tariq Mahmood had

gone to play cricket and when after about 10 minutes, on hearing hue and cry, he along with Haji Ghulam Qasim, Haji Manzoor Hussain, rushed to the spot, saw that Muhammad Hussain, Munir Ahmad (co-accused) Qadeer Ahmad (petitioner), Mahboob Ahmad, Muhammad Tanvir, Waseem Raja, all armed with Chhuri and Muhammad Sharif armed with a gun were quarreling with Muhammad Azam, Muhammad Tahir, Muhammad Arif and Muhammad Tariq; that Muhammad Sharif co-accused, who was standing at a side of the ground was telling the above named boys that Muhammad Azam, Muhammad Tahir, Muhammad Arif and Muhammad Tariq be killed so that they may not dare to quarrel with them; that within the view of the above named complainant and P.Ws., Munir Ahmad (co-accused), while armed with Chhuri, attacked at Muhammad Azam and caused injury at right side of his neck; that Qadeer Ahmad (petitioner) inflicted a Chhuri blow on left side of the neck of Muhammad Azam, whereas, Mahboob (co-accused), made such blow at the chest of Muhammad Azam; that Munir Ahmad co-accused again made a Chhuri blow which landed at the back of Muhammad Azam, whereupon he fell down; that when P.W. Muhammad Tahir stepped forward to rescue Muhammad Azam, Waseem Raja (co-accused) inflicted a Chhuri blow, which landed on his right side of shoulder and when Muhammad Tariq P.W. step forward, Muhammad Tanveer (co-accused) caused injury to him at right side of his neck, below right ear and back of the head; that when Muhammad Arif P.W., stepped forward, Mahboob, Muhammad Hanif, Qadeer Ahmad and Waseem Raja, co-accused attacked at him and caused injuries to him; that on hue and cry the inhabitants of the locality attracted whereupon the accused fled away and that motive behind the occurrence was a quarrel which occurred a day earlier during playing of volley ball and that Muhammad Azam when was being shifted to the hospital, he succumbed to the injuries.

3. It has been argued that the petitioner is innocent and has falsely been roped in this case with mala fide; that as per prosecution version, the petitioner has inflicted a Chhuri blow at left side of the neck of Muhammad Azam, but according to the medical report the said injury (injury No.2) was the exit wound of the injury No.1; that in this way no injury to the deceased could be attributed to the petitioner; that co-accused of the petitioner who allegedly had caused injuries to Muhammad Tahir, Muhammad Arif and Muhammad Tariq (P.Ws.) had been granted bail and as such the present petitioner is also entitled for the said relief under the rule of consistency; that the case against

the petitioner is of further inquiry; that the petitioner is behind the bars for the last about one year and as such is no more required for further investigation.

4. The learned D.P.-G. as well as learned counsel for the complainant has vehemently opposed the petition and the grounds taken therein with the contentions that the present petitioner is main accused, who had caused injury on the vital part of the body of the deceased, which resulted into his death; that the alleged contradiction between ocular account and the medical evidence will be seen during the trial and at present it could not be given any importance and that as present petitioner is responsible for committing the murder of an innocent person, hence is not entitled for the concession of bail.

5. Arguments heard and record perused.

6. It has been observed that when previously during the arguments on 22-10-2013, my learned brother Sardar Muhammad Shamim Khan, J, had come to know that Injury No. 2 (on left side of the neck of the deceased) which was attributed to the present petitioner, as per post-mortem report was declared as an exit wound, it was directed that for clarification the doctor who had conducted the above said examination, be directed to appear in person before this Court today.

7. Today, the above named doctor has appeared in the court and stated that during the post-mortem examination, the injury No.1 found at the right side of the neck of the deceased was through and through and as such exit of the said injury was the injury No.2 observed on the left side of the neck.

8. Under the above-mentioned situation, when as per alleged prosecution story, the present petitioner had caused injury at the left side of the neck of the deceased, but as per doctor, the said injury was exit of the injury No.1 as it was through and through, the case of the petitioner has become of further inquiry. Further it has been found that except the abovementioned injury, the status of which has been found as mentioned above, no injury to the deceased has been attributed to the present petitioner.

9. It has further been observed that co-accused of the present petitioner to whom injuries of Muhammad Tahir, Muhammad Tariq and Muhammad Arif have been attributed, have been admitted to bail by this Court. It has further

been noticed that use of Chhuri has been alleged to the petitioner, but during the investigation a Chopper was been recovered from him which during the forensic analysis could not be found to be stained with blood of human origin.

10. As a result of above discussion, the instant petition is accepted and the petitioner is admitted to post arrest bail subject to his furnishing of bail-bonds in the sum of Rs.2,00,000 (Rupees two lac only) with two sureties each in the like amount to the satisfaction of learned Trial Court.

HBT/A-1/L Bail granted.

2014 M L D 977

[Lahore]

Before Muhammad Tariq Abbasi, J

ABDUL JABBAR and others---Petitioners

Versus

ALLAH BUKHSH and others---Respondents

Writ Petition No.14988 of 2013, decided on 2nd December, 2013.

Guardians and Wards Act (VIII of 1890)---

----S. 7---Constitution of Pakistan, Art. 199---Constitutional petition---Appointment of guardian of person and property of minor---Scope---Father moved application for his appointment as guardian of person and property of minors which was accepted and with the permission of court he sold their property---Guardian court recalled order passed by it with regard to permission of sale of property of minors on the ground that list of expenses/sale deed was not submitted within time---Vendees of said sale filed application that they had purchased property through sale deed and they should not be penalized for the act of guardian which was accepted and order re-calling the permission to sell the property of minors was recalled---Validity---Vendees were not party when guardian of person and property of minors was appointed---Mother of minors got recorded her consenting statement that she had no objection with regard to appointment of her husband as guardian of person and property of minors---Guardian of minors got permission for sale of property and same was sold to the applicants against consideration---Guardian was bound to submit details of expenses and sale deed but he could not submit the same---No reason, cause or justification existed for the Guardian Court to cancel the order for sale of property as sale had become final and sale deed had been executed in favour of applicants---Guardian Court had correctly passed order re-calling its previous order with regard to cancellation of permission to sell property of minors which had not prejudiced any party---Appeal was filed with the mala fide on behalf of minors through their mother as guardian of minors was appointed legally and their mother was not competent to pose herself to be the guardian of minors and prefer the appeal---Appellate Court had passed the impugned order against the facts and erroneously order of Guardian Court was set aside---He, who had sought equity, must do equity and he, who had come to the court, must come with clean hands---Guardian and his wife had not approached the

Appellate Court with clean hands---Impugned judgment passed by the Appellate Court was not sustainable in the eye of law which was set aside---Constitutional petition was accepted in circumstances.

Ch. Abdul Ghani for Petitioners.

Saghir Ahmad Bhatti for Respondents.

Date of hearing: 2nd December, 2013.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--The impugned judgment dated 25-9-2009, passed by the learned Additional District Judge, Burewala, in the appeal filed against the order dated 13-9-2008 of learned Guardian Judge, Burewala, was challenged by way of civil revision. As against the said judgment, revision was not competent, but writ petition was maintainable, hence revision petition was converted into the writ petition in hand.

2. Through this writ petition, the order dated 25-9-2009, passed by the learned Additional District Judge, Burewala, whereby in appeal, the order dated 13-9-2008, passed by the learned Guardian Judge, Burewala has been set aside, has been called in question.

3. The facts are that Allah Bukhsh (respondent No. 1) being father of respondents Nos. 2 and 3 (both minors) filed an application, before the learned Guardian Judge, Burewala, District Vehari, requesting therein that he may be appointed as guardian of the person and property of the above named minors. The said application was accepted and respondent No. 1 was appointed as guardian of the person and property of the minors. Thereafter, respondent No. 1 preferred an application before the learned Guardian Court, with a request that permission to sale out the property of the minors measuring 17 kanal 6 marla may be accorded and the learned Guardian Court, granted the permission, through order dated 14-2-2005. Accordingly the above mentioned property of the minors was sold by the respondent No. 1 and purchased by the present petitioners, through registered sale deed No 250 dated 7-3-2005. Thereafter, the learned Guardian Court through order dated 19-3-2008 had recalled the order dated 14-2-2005, through which permission of sale of the above property of the minors was granted, with the contention that list of the expenses/sale deed was not submitted by Allah Bukhsh (respondent No. 1), in the Court, within the prescribed period. The present petitioners filed an application before the learned Guardian Judge, for recalling of the order dated 19-3-2008 on the ground that they had purchased

the property through sale deed for valuable consideration and that the expenses/sale deed was to be submitted in the Court by Allah Bukhsh (respondent No. 1), hence for his act, they could not be penalized. The learned Trial Court on the basis of the attending facts and circumstances had passed the order dated 13-9-2008, whereby the above said previous order dated 19-3-2008 was recalled. The minors namely Muhammad Sajid and Tahir Javed (respondents Nos. 2 and 3) preferred appeal before the learned Additional District Judge, Burewala against the above mentioned recall order dated 13-9-2008 and the learned Additional District Judge while accepting the appeal had set aside the said order, on 25-9-2009. Hence the petition in hand.

4. Arguments heard. Record perused.

5. Admittedly, when Allah Bukhsh (respondent No. 1) was appointed as guardian of the person and property of the minors (respondents Nos. 2 and 3), the present petitioners were not in picture. At that time Mst. Rashida Bibi, mother of the above named minors had appeared before the learned Guardian Court and made a consenting statement, whereby she had not objected the appointment of her husband Allah Bukhsh (respondent No. 1) to be the guardian of her above named minor sons. Thereafter, Allah Bukhsh had sought and got permission for sale of the property of the minors and the property was sold out to the present petitioners, against the handsome consideration. It was for Allah Bukhsh (respondent No. 1) to submit before the learned Guardian Court, the detail of expenses and the sale deed, but for the reasons best known to him, he had failed to do so. Therefore, there was no reason, cause or justification for the learned Guardian Judge to cancel the order for sale of the property, because by that time, the sale was finalized and the sale deed was executed in favour of the present petitioners. When the learned Guardian Judge was informed, about the actual situation by the present petitioners, through an application, he justifiably had passed the order dated 13-9-2008 and recalled the previous order dated 19-3-2008. The said order of recall had not prejudiced any of the parties, but it seems that with mala fide, the appeal was got filed in names of the minors (respondents Nos. 2 and 3) through Mst. Rashida Bibi, their mother, despite the fact that Allah Bukhsh (respondent No. 1) was legally appointed guardian of the minors and as such the above named lady was not at all competent to pose herself to be the guardian of the minors and prefer the appeal. The learned Additional District Judge, Burewala without realizing the real facts and circumstances that on one hand, Allah Bukhsh (respondent No. 1) while selling the property

of the minors, to the present petitioners had received a huge amount, but on the other hand had got filed the appeal through his wife, despite the fact that in presence of appointed guardian, she was having no authority to file the appeal, had passed the impugned judgment dated 25-9-2009, whereby erroneously the order dated 13-9-2008 of the learned Guardian Judge had been set aside.

6. It is well settled preposition that he, who seeks equity must do equity and he who comes to the Court, must come with clean hands. But in the situation in hand, Allah Bukhsh (respondent No. 1) and his wife Mst. Rashida Bibi, in the light of the facts and circumstances narrated above, had not approached the learned Additional District Judge, Burewala with clean hands, but despite that the impugned judgment dated 25-9-2009 had been pronounced, in the manner mentioned above.

7. As a result of the above mentioned discussion, I am of the view that the impugned judgment dated 25-9-2009 is not sustainable in the eye of law. Consequently, by accepting the instant revision petition, the impugned judgment is set aside and the order dated 13-9-2008 of the learned Guardian Judge is restored.

AG/A-24/L Petition accepted.

2014 M L D 1043
[Lahore]
Before Muhammad Tariq Abbasi, J
Mst. JANNAT---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.358 of 2010, decided on 4th November, 2013.

Criminal Procedure Code (V of 1898)---

----Ss.88 (6A) & 88 (6D)---Penal Code (XLV of 1860), Ss.302 & 324---Qatl-e-Amd and attempt to Qatl-e-Amd---Proclaimed offender---Attachment of property---Objections---Accused was declared proclaimed offender and Trial Court attached his property---Wife of proclaimed offender filed objection on the plea that property in question had been given to her as dower but Trial Court dismissed the objection---Validity---Wife of proclaimed offender filed objection petition to the effect that property in question had been given to her by her husband, hence she had interest in the property and as such it could not be sold---Wife of proclaimed offender also instituted suit before Family Court, which had been decreed, therefore, objection was not ignorable and needed consideration---High Court set aside the order and remanded the matter to Trial Court for decision afresh on objection petition filed by wife of proclaimed offender---Revision was allowed accordingly.

Tahir Mehmood for Petitioner.
Hasan Mehmood Khan, D.P.G. for the State.
Rana Muhammad Shakeel for the Complainant.
Date of hearing: 4th November, 2013

JUDGMENT
MUHAMMAD TARIQ ABBASI, J.---Through the instant revision validity of the orders dated 17-3-2010 and 19-8-2010 passed by learned Additional Sessions Judge, at D.G. Khan have been questioned.

2. Facts giving rise to the instant revision petition are that a case through F.I.R. No. 644 dated 10-9-2007 under sections 302/324/34, P.P.C. was registered at Police Station Saddar D.G. Khan, against Abdul Rasheed (husband of the present petitioner) and two others namely Muhammad Younis and Takiya. Abdul Rasheed did not join into the proceedings and absconded himself, hence after adopting all the legal formalities was declared as P.O. Consequently through order dated 21-4-2008, the learned Additional Sessions Judge D.G. Khan while separating the case of Younis and Takiya, from the case of Abdul Rasheed (proclaimed offender) had ordered for attachment of his property and accordingly directed the DOR to do the needful. Thereafter Muhammad Bilal (respondent No. 2/complainant in the above mentioned case) through an application requested the concerned court to sale out the property of Abdul Rasheed (P.O.). In the said application learned concerned court through its order dated 17-3-2010 directed the DOR to sell out the property of the above mentioned P.O. Mst. Jannat (present petitioner) challenged the above mentioned order with the contention that property which was going to be sold was given to her as dower hence was not saleable but the learned concerned court through order dated 19-8-2010 had turned down the above mentioned objection petition made by the present petitioner.

3. Feeling aggrieved the instant revision has been filed with the contention and on the grounds that when the property allegedly belonging to the above mentioned proclaimed offender does not relate to him rather has been acquired by the present petitioner as dower and in this regard her suit has also been decreed from the learned family court then there is no fun of sale of the property and not giving any consideration to the above mentioned petition filed by the petitioner.

4. The revision petition has been opposed by the learned D.P.G. as well as the learned counsel for the respondent No. 2.

5. The contentions raised from all the sides have been heard and record has been considered.

6. Under section 88(6A) Cr.P.C. of 1898, a person having an interest in the property belonging to a proclaimed offender which has been attached can

prefer objections in the concerned court. For guidance the said section is reproduced herein below:--

"If any claim is preferred to, or objection made to the attachment of, any property attached under this Section within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this Section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part:

Provided that any claim preferred or objection made within the period allowed by this subsection may, in the event of death of the claimant or objector, be continued by his legal representative."

7. Under section 88(6D) of the Cr.P.C., if the claim or objection preferred by any such person is disallowed, then within one year he may institute a suit to establish the claimed right and the order passed in objections shall be subject to the result of the suit and shall be conclusive. The said section speaks as under:--

"Any person whose claim or objection has been disallowed in whole or in part by an order under subsection (6A) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of property in dispute; but subject to the result of such suit, if any, the order shall be conclusive."

8. In the matter in hand, the present petitioner had filed the objection petition to the effect that the property in question had been given to her by her husband (Abdul Rasheed P.O.), hence, she had interest in the property and as such it should not to be sold. She had interest in the property and as such it should not to be sold. She had also instituted the suit before the family court, which had been decreed on 8-9-2011. Hence, the above mentioned objection/contention was not ignorable and needed weight and consideration.

9. Resultantly, the revision petition is accepted. The impugned orders are set aside and the matter is referred back to the learned concerned court with the

direction that in the light of the above mentioned attending circumstances, the objection petition filed by the present petitioner be decided afresh, within a span of three months from receipt of this order.

MH/J-4/L Case remanded.

2014 M L D 1100
[Lahore]
Before Muhammad Tariq Abbasi, J
NAZIR HUSSAIN---Petitioner
Versus
AMJAD HUSSAIN---Respondent

Civil Revision No. 1072 of 2009, decided on 26th November, 2013.

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

----Arts. 75, 76 & 77---Civil Procedure Code (V of 1908), O. XXXVII, Rr. 2 & 3 & O. XI, R. 14---Institution of summary suit on negotiable instrument---Production of secondary evidence---Scope---Contention of defendant was that impugned pronote was not against consideration but same was result of arbitration decision and both the parties had executed pronotes, receipts and agreement in favour of each other---Application of defendant for production of secondary evidence with regard to pronote, receipt and Iqrar Nama was accepted by the Trial Court---Validity---Defendant had fully described about the execution of pronote, receipt and agreement in his written statement---Application for production of secondary evidence was moved when such documents were denied by the possessor of the same---Defendant was to prove that such documents were executed in favour of each other through permissible modes---Defendant moved an application to summon the possessor of such documents who denied the possession of said documents---Documents must be proved by primary evidence except in the circumstances narrated in Art. 76 (a) & (c) of Qanun-e-Shahadat, 1984---Secondary evidence could be produced when original document was not in existence---If during evidence execution of documents in question and their afterward loss was not proved then secondary evidence would have no value---Impugned order had not prejudiced anyone and production of such documents would be

helpful for the Trial Court for just conclusion---Revision was dismissed in circumstances.

Sagheer Ahmad Bhatti for Petitioner.
Nadeem Ahmad Tarar and Malik Muhammad Siddique Kamboh for Respondents.
Date of hearing: 26th November, 2013.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through the instant revision petition, the order dated 24-10-2009 passed by the learned Additional District Judge, Chichawatni, District Sahiwal has been called in question, whereby secondary evidence in respect of a pro note, receipt and 'Iqrar Nama' dated 24-8-2004 by Nazir Hussain (present petitioner) in favour of Amjad Hussain (respondent) has been permitted.

2. The facts are that in the suit filed by the petitioner, against the respondent, under Order XXXVII, Rule 2 of the Civil Procedure Code, 1908, on the basis of a pro note dated 24-8-2004, leave to appear and defend the suit was granted to the respondent. Accordingly the respondent filed the written statement, wherein he alleged that the pro note in question was not against consideration, but as a result of arbitration decision (Faisla Salsi), whereby both the parties had executed pro notes, receipts and agreements in favour of each other and handed over to Ch. Afzaal Ahmad, Advocate. It was further contended that the pro note, receipt and agreement, executed by the petitioner (Nazir Hussain), in favour of the respondent (Amjad Hussain) were duly entered in the register of stamp vendor and petition writer at S.Nos. 1320, 1321 and 1322 dated 24-8-2004 and that similarly the above mentioned documents were also entered in the register of Ch. Muhammad Nawaz Advocate Chichawatni at Serial Nos. 3908, 3909 and 3910.

3. After filing of the written statement and framing of the issues, the respondent had moved an application under Order XI, Rule 14 of the Civil Procedure Code, 1908 before the learned Trial Court with a request that Ch. Muhammad Afzaal Tarar Advocate, in possession of whom, the above mentioned documents, executed by the petitioner in his favour were lying, may be directed to produce the same before the Court. The said request was opposed by the petitioner, but the learned Trial Court, vide order dated 13-7-2009, issued notice to the above named Advocate, for production of the above

said documents. The Advocate appeared in the Court on 19-9-2009 and stated that the alleged documents were not in his possession. Thereafter the respondent filed an application before the learned Trial Court, whereby he sought permission of proving the above mentioned documents through secondary evidence, which through the impugned order was allowed. Consequently the revision petition in hand.

4. Arguments of both the sides have been heard and the record has been perused.

5. The record shows that in Para-2 of the written statement, the respondent had fully described about execution of the pro note, receipt and agreement by the present petitioner, in his favour. The numbers through which the above mentioned documents were entered with the stamp vender and the petition writer, as well as Ch. Muhammad Nawaz Advocate were fully described. When the Advocate in whose possession, as per the respondent, the documents in question were lying had come before the Court and denied the documents with him, the application for secondary evidence was moved and dealt with in the manner mentioned above.

6. It has been observed that the defence of the respondent was that the pro note on the basis of which the suit had been filed was not against any consideration, but both the parties under a decision made by arbitration had executed the pro notes and receipts in favour of each other. It was for the respondent to strive for proving and establishing his above mentioned alleged defence, through permissible modes. For the said purpose as first step, he had got called Ch. Afzaal Ahmad Advocate, in the possession of whom, as per him, the original documents in question were lying. When the said Advocate denied the possession of the documents, with him, as subsequent resort, he had moved the above mentioned application, seeking therein permission for bringing on the record, photo copies of the above mentioned documents, through secondary evidence and the learned Trial court through the impugned order had permitted the same.

7. Herein below, it would be seen and determined if the above mentioned procedure, adopted by the respondent and the learned Trial Court, was justified being permitted under the law or otherwise.

8. According to the Article 75 of the Qanun-e-Shahadat Order, 1984 (hereinafter will be referred as Order 1984), documents must be proved by primary evidence. Article 76 of the Order 1984 is exception to the above mentioned rule and describes the situations, under which secondary evidence, relating to a document can be given. For sake of convenience, the said Article is reproduced as under:--

"76. Cases in which secondary evidence relating to document may be given. Secondary evidence may be given of the existence, condition to contents of a document in the following cases:

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court; or of any person legally bound to produce it; and when, after the notice mentioned in Article 77, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when due to the volume or bulk of the original, copies thereof have been made by means of microfilming or other modern devices;

(e) when the original is of such a nature as not to be easily movable;

(f) when the original is a public document within the meaning of Article 85;

(g) when the original is a document of which a certified copy is permitted by this Order, or by any other law in force in Pakistan, to be given in evidence;

(h) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection;

(i) when an original documents forming part of a judicial record is not available and only a certified copy thereof is available, certified copy of that certified copy shall also be admissible as a secondary evidence.
In cases (a), (c), (d) and (e), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.
In case (f) or (g), certified copy of the documents, but no other kind of secondary evidence, is admissible.

In case (h), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

9. In the situation in hand, as stated above, the respondent had described execution of the documents in question and their custody with the above named Advocate, who when as per application and request of the respondent was called by the learned Trial Court had denied the possession of the documents. The above said application and the request of the respondent, in fact was a notice as prescribed by the Article 77 of the Order 1984. If in the said application, another provision had been mentioned, then only due to the said sole reason, the struggle made, for fulfilling the conditions for leading secondary evidence could not be turned down, because the very purpose of the application was to fulfill the pre-requisites for leading the secondary evidence. The situation in hand, fully covers the circumstances narrated in sub-Articles (a) and (c) of the Article 76 highlighted above.

10. It has been objected that firstly non-existence of the original documents should have been established and then the secondary evidence could be allowed. The said objection is answered in the terms that non-existence of the original documents and secondary evidence can be produced simultaneously, but the former has to precede the latter. If during the evidence execution of the documents in question and their afterward loss will not be proved, then the secondary evidence will have no legal value. In this regard, I am fortified by the dictum laid down in case of 'Mst. Khurshid Begum and 6 others v. Chiragh Muhammad' reported in 1995 SCMR 1237.

11. The impugned order, which due to the reasons mentioned above is quite justified being demand of the law and situation has not prejudiced anyone. The proceedings permitted through the impugned order, rather will help the learned Trial Court in reaching at just conclusion, hence there is no reason, cause or justification, for the petitioner to object the said proceedings and the order.

12. For what has been discussed above, the revision petition in hand has no legal value and as such is dismissed.

AG/N-10/L Revision dismissed.

2014 M L D 1300

[Lahore]

Before Muhammad Tariq Abbasi, J

MUHAMMAD TAJ and others---Petitioners

Versus

MUHAMMAD NAWAZ---Respondent

Civil Revision No.241-D of 2009, heard on 7th May, 2014.

Punjab Pre-emption Act (IX of 1991)---

----Ss. 6 & 13---Suit for pre-emption---Shafi-Sharik, Shafi Khalit and Shafi Jar--- Talbs---Proof---Requireinents/essentials--- Talb-e-Muwathibat and Talb-e-Ishhad were pre-requisites for filing suit for' pre-emption---Specific mention of time, date and place of Talb-e-Muwathibat in plaint as well as notice of Talb-e-Ishhad was mandatory---Pre-emptor did not mention either in plaint or notice of Talb-e-Ishhad the place where he received information of sale of suit land---No proof of sending any notice to defendant was brought on record of Trial Court---Notice of Talb-e-Ishhad was not proved which was fatal to the suit---Pre-emptor claimed that notice had been sent to defendants but they did not receive the same---Pre-emptor was bound to get the postman examined even if service of notice had been admitted--Pre-emptor failed to perform his obligation---Courts below failed to appreciate evidence by ignoring material contradiction regarding pre-emptor's knowledge of sale---Revision was allowed---Impugned judgments were set aside---Suit was dismissed.

Muhammad Ali and 7 others v. Humaira Fatima and 2 others 2013 SCMR 178; Munawar Hussain and others v. Afaq Ahmed 2013 SCMR 721 and Allah Ditta through L.Rs. and others v. Muhammad Anar 2013 SCMR 866 rel.

Mumtaz Ali Khan for Petitioners.

Muhammad Ijaz Chaudhry for Respondent.

Date of hearing: 7th May, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through the revision petition in hand, the judgments and decrees dated 29-11-2008 and 27-4-2009 respectively, passed by the learned Civil Judge and Additional District Judge, Rawalpindi have been called in question.

2. Through the above mentioned judgment and decree dated 29-11-2008, the suit for possession through pre-emption, filed by the respondent against the petitioners had been decreed. Whereas vide the judgment and decree dated 27-4-2009, an appeal preferred by the petitioners had also been turned down.

3. The facts are that the respondent filed a suit, against the petitioners, whereby he sought possession through pre-emption, of the property, fully described in the plaint. The grounds were that Abdul Rahim was the owner of the property measuring 11 Kanals 3 Marlas situated in Khewat No. 788, Khatooni Nos. 1586 and 1587, Khasra Nos.344 and 387 of Village Ghela Kalan, Tehsil and District Rawalpindi, who sold out the said land, in favour of the petitioners against consideration of Rs.70,000, but to defeat the right of respondent a false sale consideration was described as Rs.1,20,000; that the respondent came to know about the above mentioned sale on 25-10-2001 at about 11.00 a.m. through Mian Khan in presence of Raees Khan, whereupon the respondent immediately declared that he will exercise right of pre-emption and get the land back, hence made Talb-e-Muwathibat; that thereafter, the respondent sent notice of Talb-e-Ishad, to the petitioners through registered A.D., which was attested by the above named witnesses; that as the respondent was Shafi-e-Shareek, Shafi-e-Khaleet, and Shafi-e-Jar, in the suit property, hence had superior right of pre-emption qua the petitioners and that the petitioners were asked to accept the right of the respondent and while receiving the actual sale amount of Rs.70,000, transferred the property in his favour, but refused.

4. The suit was contested by the petitioners through filing written statement, whereby several legal as well as the factual objections were raised and the claim of the respondent was denied.

5. To resolve the controversy between the parties, the learned Trial Court had framed the following issues:-

(1) Whether plaintiff is entitled for a decree for possession through his superior right of pre-emption? OPP

(2) Whether plaintiff has not fulfilled the requirement of talbs within time as described by law? OPD

(3) Whether the plaintiff has no locus standi hence the instant suit is liable to be dismissed" OPD

(4) Whether plaintiff has not come to the court with clean hands? OPD

(5) Whether the value of the suit for the purpose of court fee and jurisdiction has not been properly assessed by the plaintiff if so its effect? OPD

(5-A) Whether suit property was purchased for a consideration of Rs. 70, 000 and intentionally it was written as Rs.1, 20, 000 only to frustrate the pre-emption right of plaintiff? OPP

(5-B)If above issue is not proved in affirmative, then what is actual sale consideration? OPP

(6) Relief.

6. The evidence of the parties was recorded, during which Muhammad Nawaz, respondent/plaintiff himself appeared and made the statement as P.W. and also got examined Mian Khan as P.W.2 and Raees Khan as P.W.3. During the said evidence, the grounds taken in the plaint were reiterated. Towards the documentary evidence, the postal receipts were tendered as Ex.P.l and Ex.P.2, attested copy of the mutation as Ex.P.3, attested copy of 'Aks Shajra' as Ex.P.4, copy of record of rights as Ex.P.5, attested copy of the Jamabandi as Ex.P.6, copy of envelope as Ex.P.7, photo copy of receipt as Mark-A, copy of the notice as Mark-B and Mark-C, whereas receipts of the post office as Ex.P.8 and Ex.P.9.

7. From the other side, Muhammad Ansar had made the statement as DW-1, Muhammad Yaqoob as DW-2 and Muhammad Ayub being attorney of the petitioners/defendants as 'DW-3. Power of attorney and copy of Aks Shajra were also tendered in evidence as Ex.D.l and Ex.D.2 respectively.

8. After completing the proceedings, the learned Trial Court had pronounced the judgment and decree dated 29-11-2008, whereby the suit was decreed.

9. The petitioners had challenged the above mentioned decree through appeal, before the learned District Judge, Rawalpindi, which for hearing came before the learned Additional District Judge at Rawalpindi, from where the judgment and decree dated 27-4-2009 was pronounced and the appeal was dismissed.

10. Feeling aggrieved, the instant revision petition has been preferred, with the contention and the grounds that findings of both the learned courts below, which resulted into passing of the impugned judgments and decrees being based on conjectures, surmises, misreading and non-reading of the material available on the record and non-consideration of the law on the subject are not sustainable in the eye of law, hence liable to be set aside.

11. The learned counsel for the petitioners has advanced his arguments in the above mentioned lines and the grounds, whereas the learned counsel who has put appearance on behalf of the respondent, has supported the impugned judgments and decrees and vehemently opposed the revision petition.

12. Arguments of both the sides have been heard and the record has been perused.

13. As per law, there are certain pre-requisites for filing a suit of pre-emption. The said requirements are called Talb-e-Muwathibat and Talb-e-Ishad.

14. As per the latest dictum laid down by the august Supreme Court of Pakistan in the cases titled `Muhammad Ali and 7 others v. Humaira Fatima and 2 others' (2013 SCMR 178), and 'Munawar Hussain and others v. Afaq Ahmed' (2013 SCMR 721), it is mandatory that in the plaint, as well as notice of Talb-e-Ishad, time, place and date of Talb-e-Muwathibat must be specifically mentioned, otherwise the suit will fail.

15. It has been observed that in the plaint as well as the notice of Talb-e-Ishhad (Mark-PB and Mark PC), the place, where the respondent/ plaintiff had allegedly gained the information of the sale was not given.

16. It has further been noted that postal envelope towards sending of the notice to Karam Dad (petitioner No. 2/defendant No. 2) was tendered as Ex.P.7, but no proof of sending any notice through registered post acknowledgment due, to Muhammad Taj, (petitioner No. 1/defendant No.1) was ever brought on the record of the learned Trial Court. Therefore, the notice of Talb-e-Ishhad to Muhammad Taj (petitioner No.1/defendant No.1) was not established on the record. The said lapse in the light of the judgment of the august Supreme Court of Pakistan titled 'Munawar Hussain and others v. Afaq Ahmed (2013 SCMR 721) was fatal for the suit.

17. Furthermore, the contention of the respondent/plaintiff was that the notices of Talb-e-Ishhad were sent to the petitioners through registered post, but not received by them. In the said eventuality, as per the precedent laid down by the august Supreme Court of Pakistan in the case titled 'Allah Ditta through L.Rs. and others v. Muhammad Anar (2013 SCMR 866), it was mandatory for the respondent/plaintiff to get the postman examined, even service of the notice was admitted by the petitioners/defendants. Admittedly the respondent/plaintiff had failed to perform his above mentioned part of obligation.

18. The record shows that Raees Khan (P.W.3), in whose presence, the respondent/plaintiff had gained knowledge of the sale, during his statement had admitted that on 21-8-2001, the respondent/plaintiff had come to know about the sale. The above mentioned material contradiction towards the knowledge of the sale was very important and notable, but both the learned courts below had ignored the same while saying that the above named witness was illiterate. The said material discrepancy, in the light of the above cited judgment (2013 SCMR 866) was also fatal for the suit.

19. Due to the above mentioned reasons and in the light of the above mentioned case-laws, the issue No. 2 above was not proved, hence on the sole ground, the suit was not competent and was liable to be dismissed, but the learned Trial Court had erred in not considering the above mentioned facts and deciding the above said issue against the petitioners/defendants.

20. The learned appellate court while hearing the appeal, had also failed to consider the above mentioned facts and circumstances and preferred to

dismiss the appeal in a slipshod manner, which could not termed to be justified.

21. Resultantly, the instant revision petition is accepted, the impugned judgments and decrees dated 29-11-2008 and 27-4-2009 passed by both the learned courts below are set aside and the suit of the respondent is dismissed with no order as to costs.

ARK/M-193/L Revision accepted.

2014 M L D 1428
[Lahore]
Before Muhammad Tariq Abbasi, J
MUZAMIL HUSSAIN---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.63 of 2014, heard on 5th March, 2014.

Criminal Procedure Code (V of 1898)---

----S. 239---Penal Code (XLV of 1860), Ss.302, 148 & 149---Qatl-e-amd, rioting, common object---Joint trial---Criminal case was registered against accused and other six co-accused---One of said co-accused was proclaimed offender, and charge against accused and other five co-accused was framed---Trial continued and during the same substantial prosecution evidence was recorded---Proclaimed offender, thereafter was arrested; and challaned but Trial Court had separately charge-sheeted said co-accused and his five co-accused---Validity---Accused as well as his co-accused persons were involved in the case, and mandate of law on the subject was that they all should be charge-sheeted and tried together---As all accused persons were facing the charge for similar offence during same occurrence/transaction, as per provisions of S.239, Cr.P.C., joint trial was required---Impugned order passed by the court below was set aside, with direction to the Trial Court to carry on the joint trial of all accused who were available before it.

Ghulam Abbas Niazi v. Federation of Pakistan and others PLD 2009 SC 866 rel.
Mudassar Altaf Qureshi for Petitioner.
Hassan Mehmood Khan Tareen for the State.
Tahir Mehmood for Respondent No. 2.
Date of hearing: 5th March, 2014.

JUDGMENT
MUHAMMAD TARIQ ABBASI, J. Through this revision petition, the order dated 10-2-2014 passed by the learned Additional Sessions Judge, Burewala of District Vehari has been assailed.

2. By way of the above mentioned impugned order, the objection raised by the defence that instead of separate one trial of all the accused involved in the case should be conducted, has been turned down.

3. The facts are that a criminal case, through F.I.R. No. 172 dated 11-4-2009 under sections 302, 148/149 of P.P.C. at Police Station, Gaggoo, District Vehari was registered against the present petitioner and the others.

4. The report under section 173 of Cr.P.C./challan was submitted in the court of competent jurisdiction, against the present petitioner and his co-accused, namely Muhammad Tufail, Ghulam Rasool, Muhammad Sarwar, Muhammad Ayub and Muhammad Afzaal alias Phala. At that time another accused namely Muhammad Adil, was proclaimed offender. The charge against the petitioner and his above named co-accused was framed. The trial was carried on, during which substantial prosecution evidence was recorded. Thereafter Muhammad Adil, proclaimed offender was arrested and challaned to the court, but the learned Trial Court had separately charge sheeted him and started two trials, one against the present petitioner and his above named co-accused, whereas the other against Muhammad Adil.

5. The defence raised an objection that as per law, separate trials of the accused involved in one case, could not be held and that all the accused may be re-charge sheeted and tried jointly, but the learned Trial Court through the impugned order had rejected the said objection, with the contention that separate trials were quite acceptable and permissible under the law.

6. The learned counsel for the petitioner has argued that the impugned order is a patent illegality because by any stretch of imagination, simultaneous separate trials of the accused involved in one case are not permissible and acceptable under the law.

7. The learned Deputy Prosecutor General as well as the learned counsel for respondent No. 2 has opposed the revision petition and supported the impugned order being quite justified and demand of the situation.

8. Arguments have been heard and record perused.

9. Section 239 of Criminal Procedure Code 1898, deals with joint trial, which reads as under:--

"The following persons may be charged and tried together, namely:--

(a) Persons accused of the same offence committed in the courses of the same transaction;

(b) Persons accused of an offence and persons accused or abetment or of an attempt to commit such offence;

(c) Persons accused of more than one offence of the same kind, within the meaning of section 234 committed by them jointly within the period of twelve months;

(d) Persons accused of different offences committed in the course of the same transaction;

(e) Persons accused of an offence which includes theft, extortion or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal of concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last named offence;

(f) Persons accused of offences under sections 411 and 414 of the Pakistan Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and

(g) Persons accused of any offence under Chapter XII of the Pakistan Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence;"

10. Admittedly the present petitioner as well as all of his above named co-accused are involved in the above mentioned case, hence the mandate of the law, on the subject is that they should be charge sheeted and tried together. The reliance may be placed in the judgment reported as "Ghulam Abbas Niazi

v. Federation of Pakistan and others" (PLD 2009 Supreme Court 866), the relevant portion whereof reads as under:--

"It is another settled principle of law in every civilized State of the world that people charged of similar offence during same transaction or transactions, are to be jointly tried. This rule of law, practice and procedure is strictly derived from the principles of equality. The wisdom behind is that those who are co-accused in the same transaction and tried for the same offence or cognate offences, as the case may be, should be in a position to defend themselves equally against the same narration of facts as well as charges. Another reason is that if one accused shifts his burden to the other one, the other should be in a position to defend himself and rebut the allegations there and then, in the presence of the other co-accused."

11. Admittedly, the petitioner and his above named co-accused are facing charge, for similar offence, committed during same occurrence/transaction, hence as per the above mentioned provision, principle, criteria and the dictum, joint trial is required. Consequently the instant revision petition is allowed and the impugned order dated 10-2-2014 is set aside, with a direction to the learned Trial Court to carry on the join trial of all the accused who are available before it, and ensure completion of the proceedings within a span of six months.

HBT/M-132/L Petition allowed.

2014 M L D 1804

[Lahore]

Before Muhammad Tariq Abbasi, J

ALTAF HUSSAIN and others---Petitioners

Versus

The STATE and others---Respondents

Criminal Miscellaneous No. 3129-B of 2014, decided on 3rd July, 2014.

Criminal Procedure Code (V of 1898)---

----Ss.497 (2) & 498---Penal Code (XLV of 1860), S.324---Attempt to commit Qatl-i-Amd---Pre-arrest bail, grant of---Further inquiry, case of---Medical and ocular evidence---Conflict---Accused as alleged to have caused injury by firing with 12 bore repeater gun, at left knee of complainant---During medical examination, no firearm injury to complainant was found rather an incised wound at the back of left leg of complainant was observed having been caused with sharp edged weapon---Effect---Pre-arrest bail could be granted to accused if his case was found to be of further inquiry, as no useful purpose would be served in sending accused behind bars for a few days---Pre-arrest bail was confirmed in circumstances.

Farhat Husain Shah and another v. The State and others 2010 SCMR 1986; Ghulam Mohi-ud-Din Shah v. Hafiz Muhammad Ramzan and others 2007 SCMR 1931 and Kh. Masood-ul-Hassan v. The State and another 2013 PCr.LJ 1420 rel.

Malik Imtiaz Haider Maitla for Petitioner.

Shaukat Ali Ghauri, Addl. P.G. Farrukh Durrani A.S.-I. for the State.

Mehr Mazhar Hussain Hiraj for the Complainant.

ORDER

MUHAMMAD TARIQ ABBASI, J.---The petitioners namely Altaf Hussain, Muhammad Ishaq alias Ballu and Ghulam Abbas seek pre-arrest bail

in case F.I.R. No. 252/2014 dated 13-4-2014, registered under sections 324/34 of P.P.C. at Police Station Basti Malook, District Multan.

2. The facts are that Mumtaz Ahmad had reported the matter to the Police, with the contention that during night between 12/13-4-2014 at about 12.30 AM, when he along with Muhammad Akram and Muhammad Tassawar PWs was going to check the crop, suddenly, Messrs Ghulam Abbas (petitioner No. 3) while armed with a repeater .12 bore, Altaf Hussain and Muhammad Ishaq alias Ballu (petitioners Nos. 1 and 2) emerged; that Altaf Hussain (petitioner No. 1) raised a 'Lalkara' that the complainant will be taught a taste of teasing women folk, whereupon Altaf Hussain and Ballu (petitioners Nos. 1 and 2) caught hold of the complainant from his collar and started beating him; that Ghulam Abbas (petitioner No. 3) with 12 bore repeater made direct fire at the complainant, which hit at his left knee and he became injured; that Muhammad Akram and Muhammad Tassawar P.Ws. tried to apprehend the accused, but Ghulam Abbas (petitioner No. 3) threatened that whosoever will come near, will also be dealt with in the same manner and that after commission of the occurrence, the above named assailants fled away.

3. The arguments advanced by the learned counsel for the petitioners, learned counsel for the complainant as well as the learned Additional Prosecutor General have been heard and the record has been perused.

4. Admittedly, Altaf Hussain and Muhammad Ishaq alias Ballu (petitioners Nos. 1 and 2) were empty handed. The allegations against them are that they had caught hold of the complainant and beaten him, but during medical examination, no such injury at the person of the complainant could be found.

5. The prosecution story is that Ghulam Abbas (petitioner No. 3) by firing with 12 bore repeater has caused injury at left knee of the complainant, but during medical examination, no firearm injury to the complainant has been

found, rather an incised wound at the back of left leg of the complaint was observed being caused with sharp edged weapon.

6. In the above stated situation, the contention of the prosecution regarding firearm injury to the complainant, by Ghulam Abbas (petitioner No. 3) could not be confirmed.

7. It has been observed that to re-examine the above mentioned injury of the complainant, a standing Medical Board was constituted, which had again examined the complainant, but the above mentioned findings made during first examination that the injury at the complainant was inside in nature and caused by a sharp edged weapon, was confirmed.

8. The above mentioned contradictions in the alleged prosecution story and the medical evidence has not only shaken whole of the prosecution version, but also made the case against the petitioners as of further inquiry.

9. It has been held by the superior courts in a number of judgments that even pre-arrest bail can be granted to an accused if his case is found to be of further inquiry, because no useful purpose will be served in sending him behind the bars just for a few days. Reliance in this regard may be placed on the cases reported as "Farhat Husain Shah and another v. The State and others" (2010 SCMR 1986), "Ghulam Mohi-ud-Din Shah v. Hafiz Muhammad Ramzan and others" (2007 SCMR 1931) and "Kh. Masood-ul-Hassan v. The State and another" (2013 PCr.LJ 1420).

10. For what has been discussed above, the petition in hand is accepted and the ad interim pre-arrest bail already granted to the above named petitioners is confirmed subject to their furnishing fresh bail bonds in the sum of

Rs.1,00,000 (Rupees one lac only) each, with one surety each, in the like amount to the satisfaction of the learned trial Court.

MH/A-130/L Bail allowed.

2014 P Cr. L J 1133
[Lahore]
Before Muhammad Tariq Abbasi, J
ABDUL SATTAR KHAN---Petitioner
Versus
The STATE and others---Respondents

Criminal Revision No.117 of 2013, heard on 19th March, 2014.

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

----Ss. 200, 435 & 439-A---Revision petition filed against dismissal of a private complaint by the Judicial Magistrate---Forum---Although under S. 439-A, Cr.P.C. the Sessions Court concerned also had power to entertain a revision petition (filed against dismissal of a private complaint by the Judicial Magistrate), however if such a revision petition was filed (directly) before the High Court, even then it was quite competent and maintainable.

Haji Jamil Hussain v. Illaqa Magistrate Section 30, Multan and 7 others 2012 PCr.LJ 159 ref.

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

----S. 200---Private complaint---Examination of complainant by the Magistrate---Scope---Complainant must bring on record whatever substance and material he had for evaluation by the Magistrate.

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

----Ss. 200, 202, 203 & 204--- Private complaint--- Dismissal of complaint or issue of process, order for---Material/evidence to be considered by Judicial Magistrate before passing such orders---Order under S. 203 or S.204, Cr.P.C. should be made only while considering the material brought on record during cursory evidence and that which was a result of investigation or inquiry, if any, under S. 202, Cr.P.C.---No other material was to be considered for such purposes---Where Judicial Magistrate dismissed private complaint on the basis of material, which was not on the file of the private complaint, but part

of the State case, which already had been cancelled, then such an order would not be valid and justified.

Mian Fazal Hussain Bhatti for Petitioner.

Hassan Mehmood Khan Tareen, D.P.-G. and Mazhar Jamil Qureshi, A.A.-G. for the State.

Ch. Liaqat Ali Gujjar for Respondents Nos.2 to 5.

Date of hearing: 19th March, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this Criminal Revision, the order dated 1-3-2013, passed by the learned Judicial Magistrate, Jehanian, District Khanewal has been called in question.

2. Through the above-mentioned impugned order, a private complaint filed by the petitioner, against the respondents Nos. 2 to 4 has been dismissed.

3. The learned counsel for the petitioner has argued that it was the duty of the learned Judicial Magistrate to pass an order, towards summoning of the respondents, named in the private complaint or otherwise, on the basis of the material, brought on the record during cursory statements, but instead of adopting the prescribed procedure, the learned Judicial Magistrate, had passed the impugned order, on the basis of the facts and circumstances, which were not available on the record of the private complaint, hence the said order is not sustainable in the eye of law.

4. The learned Deputy Prosecutor-General appearing on behalf of the State and the learned counsel for the respondents Nos. 2 to 5 have seriously opposed the revision petition, with the contention that the impugned order being well-reasoned is not open to any exception and as such the petition is liable to be dismissed.

5. Arguments of all the sides have been heard and the record has been perused.

6. The record shows that on the complaint of the present petitioner, an F.I.R. No. 339 dated 11-7-2012, under section 394, P.P.C. at Police Station Jehanian, District Khanewal was registered against the respondents Nos. 2 to 5. During the investigation, the F.I.R. was found to be false, hence recommended for cancellation and accordingly the cancellation report was prepared by the Police and submitted in the court of learned Judicial Magistrate, Jehanian.

7. When the petitioner came to know, the above stated situation, he preferred a private complaint, which was duly entertained by the learned Judicial Magistrate, Jehanian. The cursory statements of the petitioner and one Abid Mehmood were recorded as P.W.1 and P.W.2 respectively. Thereafter, the learned Judicial Magistrate had passed the impugned order and dismissed the complaint, on the grounds that the report of Radiologist and District Medical Board had not confirmed the alleged injuries and declared the same to be self-inflicted and that as per the report of the Investigating Officer, there was previous enmity between the parties and the present petitioner was an accused in a criminal case, got lodged by the respondents' side and that to force for compromise, a false occurrence was concocted, hence the allegations were false.

8. It has been observed that against the impugned order, passed by the learned Judicial Magistrate, the instant revision petition has directly been filed before this court. Although under section 439-A of Cr.P.C., the Sessions Court concerned has also power to entertain the matter under revisional jurisdiction, but there is no denial of the fact that under sections 435 and 439 of Cr.P.C., this court has vast powers to watch proceedings of the subordinate courts, under revisional jurisdiction. Through section 439-A of Cr.P.C., the revisional powers were extended to the Sessions Courts to lower the burden of the High Courts. Therefore if the instant revision petition has directly been filed before this court, then no strange has been committed and the revision petition in hand is quite competent and maintainable. In this regard, reference may be

made to a judgment of this Court reported as "Haji Jamil Hussain v. Illaqa Magistrate Section 30, Multan and 7 others" (2012 PCr.LJ 159).

9. Section 200 of Cr.P.C., prescribes a procedure for entertaining a private complaint. The said provision speaks as under:--

"Examination of complainant. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:

Provided as follows:

(a) when the complaint is made in writing nothing herein contained shall be deemed to require a Magistrate to examine the complaint before transferring the case under section 192 [or sending it to the Court of Session].

[(aa) when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complainant has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties:]

(b) * * * * *

(c) when the case has been transferred under section 192 and the Magistrate so transferring it has already examined the complainant, Magistrate to whom it is so transferred shall not be bound to re-examine the complainant."

10. From the above-mentioned provision, it is quite clear that on receiving a private complaint, the concerned Judicial Magistrate shall immediately examine the complainant on oath and his statement shall be reduced into writing, which shall be signed by him as well as the Magistrate. Meaning thereby that whichever the substance and the material the complainant has, must be brought on the record, for evaluation by the Magistrate.

11. According to the section 203 of Cr.P.C., the court, before whom a complaint is made or transferred, can dismiss it. The said section reads as under:--

"Dismissal of complaint. [The Court] before whom a complaint is made or to whom it has been transferred or [sent] may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry if any under section 202 there is in his judgment no sufficient ground for proceeding in such case he shall briefly record his reasons for so doing."

12. Section 204 of Cr.P.C., deals with issuance of process. It is reproduced herein below:--

"Issue of process.---(1) If in the opinion of a [Court] taking cognizance of an offence there is sufficient in which, according to the fourth column of the second schedule a summons should issue in the first instance, [it] shall issue its summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, [it] may issue a warrant, or, if, [it] thinks fit, a summons for causing the accused to be brought or to appear at a certain time before such court or (if [it] has no jurisdiction [itself]) some other Court having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provision of section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the [Court] may dismiss the complaint."

13. From the above mentioned, it is clear that an order under section 203 or 204 of Cr.P.C. shall be made only from the above-mentioned, it is clear that after considering the material brought on the record, during cursory evidence and the result of the investigation or inquiry, if any under section 202 of Cr.P.C. and nothing else.

14. It has been observed that in the matter in hand, the statements of the complainant and Abid Mehmood, recorded during cursory evidence as P.W.1 and P.W.2 were on the record and before the learned Judicial Magistrate,

which, for the purpose of section 203 or 204 of Cr.P.C. should have considered, evaluated and then an appropriate order should have been passed, but it has been found that while passing the impugned order, the learned Judicial Magistrate has not even touched the above mentioned evidence and has preferred to pass the order on the basis of the material, which was not in the file of the complaint, but part of the State case, which was already cancelled and while dissatisfying the private complaint was preferred.

15. As a result of the above mentioned discussion, the impugned order could not be termed, requirement of the law and procedure and as such could not be held valid and justified.

16. Consequently, while accepting the instant revision petition, the impugned order is set aside, with a direction to the learned Judicial Magistrate to strictly follow the above-mentioned procedure and then pass an appropriate order, afresh.

MWA/A-61/L Petition allowed.

2014 P Cr. L J 1146
[Lahore]
Before Muhammad Tariq Abbasi, J
MUREED HUSSAIN---Petitioner
Versus
ADDITIONAL SESSIONS JUDGE/JUSTICE OF PEACE JAMPUR and 3 others---Respondents

Writ Petition No.9076 of 2013, heard on 25th March, 2014.

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

----Ss. 22-A, 22-B & 154---Ex-Officio Justice of Peace---Calling of police report before issuing directions for registration of F.I.R.---Scope---Ex-Officio Justice of Peace was not bound to seek report from the police at every cost and he was fully competent to decide the application and pass an order, even without any report by the police---However when a report was called, to know the truth and real facts, then the same should not be ignored---Where Ex-Officio Justice of Peace did not agree with the police report, then he should give reasons for doing so---Seeking and obtaining a police report but subsequently ignoring the same and passing an order, contrary to it, without assigning any reason could not be appreciated---Special care was required in such a situation.

Khizar Hayat and others v. Inspector-General of Police (Punjab) Lahore and others PLD 2005 Lah. 470 rel.

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

----Ss. 22-A & 22-B--- Constitution of Pakistan, Art. 199---Constitutional petition---Ex-Officio Justice of Peace calling for police report but ignoring same without assigning any reasons---Legality---Ex-Officio Justice of Peace failed to give weight to the police report, (which he himself called for) and failed to even discuss same and preferred to issue directions to police for recording statement of complainant under S. 154, Cr.P.C.---Police report was important so that real facts came on the record, but in the present case, Ex-Officio Justice of Peace sought report from police and despite its availability, ignored the same and failed to give reasons for not believing the same---Record showed that allegations made by complainant were not true---Police report showed that complainant's son was involved in an F.I.R. lodged by the accused-petitioner, therefore possibility of moving an application before Ex-Officio Justice of Peace for registration of case against petitioner-accused

while concocting a false story could not be ruled out---Constitutional petition was allowed and impugned order of Ex-Officio Justice of Peace was set aside and application for registration of case was dismissed.

Nasir-ud-Din Mahmood Ghazlani for Petitioner.

Hafiz Muhammad Naveed Akhtar for Respondent No.2.

Mazhar Jamil Qureshi, A.A.-G. with Abdul Rehman, A.S.-I. for the State.

Date of hearing: 25th March, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This writ petition is directed against the order dated 25-7-2013, passed by the learned Ex-Officio Justice of Peace (respondent No.1), whereby in an application moved by respondent No.4, for registration of a criminal case against the present petitioner, a direction to the SHO has been made that he should record statement of the respondent No.4, under section 154 of Cr.P.C. and perform the statutory duties.

2. It has been observed that abovementioned application has been made with the contention that Mumtaz Ahmad son of respondent No.4 was serving with the present petitioner but due salary was not paid to him; that when the son of the respondent No.4 demanded his salary, the petitioner levelled false allegations of committing theft, from his petrol pump and expelled the son of respondent No.4, from the employment; that Sajjad Ahmad another son of respondent No.4 returned home, but Mumtaz Ahmad did not come; that when despite lapse of four days, Mumtaz Ahmad, son of respondent No.4 did not return home, he was worried and started searching and when contacted the present petitioner, he made threats of dire consequences and that the above-named was confined by the present petitioner.

3. It has been noticed that when the matter in shape of the above-mentioned application came before the Ex-Officio Justice of Peace, a report was sought from the concerned police station, which was made and filed. According to the report, the sons of respondent No.4 namely Sajjad Ahmad and Mumtaz Ahmad, were involved in case F.I.R. No.268 dated 20-7-2013, registered under section 381, P.P.C. at Police Station, Muhammad Pur, who did not join into investigation and that the respondent No.4 while concocting a false story had filed the abovementioned application.

4. It has been found that the learned Ex-Officio Justice of Peace has failed to give any weight to the above-mentioned report, made by the police or even discuss it and preferred to pass the impugned order.

5. The purpose of the report/comments from the police has been described in detail in the case titled "Khizar Hayat and others v. Inspector General of Police (Punjab) Lahore and others", reported as (PLD 2005 Lahore 470) in the following terms:--

"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 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 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 the Peace should exercise caution and restraint in this regard and he may 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 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. The above-mentioned dictum clearly indicates importance of the report of the police, so that real facts, should come on the record, but in the matter in hand, as stated above, the learned Ex-Officio Justice of Peace, although has sought report from the police but despite its availability on the record, has ignored it and failed to give any reason for not believing the same.

7. An Ex-Officio Justice of Peace is not bound to seek report from the police at every cost and he is fully competent to decide the application and pass an order, even without any report by the police. But when a report is called, to know the truth and real facts, as per the above-mentioned dictum, then it

should not be ignored. If Ex-Officio Justice of Peace does not agree with the report, then should give the reasons. Seeking and obtaining a police report but ignoring and passing an order, contrary to it, without assigning any reason could not be appreciated. Special care to this situation is required.

8. The record shows that on 25-6-2013, Mumtaz Ahmad, the alleged abductee was available before the learned Magistrate Section-30, Jampur, in case F.I.R. No.464 dated 27-9-2009, registered under sections 324, 381-A, 148/149 of P.P.C. at Police Station, Fazilpur. Therefore, the application moved by the respondent No.4, before the DPO Rajanpur on 27-6-2013 that his above-named son was kept in illegal confinement by the petitioner for last for 3/4 days, has been found to be not true.

9. It has further been noticed that Mumtaz Ahmad, was involved in case F.I.R. No.268 dated 20-7-2013 registered under section 381 of P.P.C. at Police Station, Muhammad Pur, District Rajanpur on the complaint of the present petitioner towards commission of the theft at his petrol pump. Therefore, possibility of moving above-mentioned application for registration of the case while concocting false story and to get rid of the above-mentioned criminal case could not be ruled out.

10. Resultantly, the instant writ petition is accepted, the impugned order is set aside and the application for registration of the case is dismissed.

11. Despite of the abovementioned, the respondent No.4, if so advised, shall have the remedy of filing a private complaint, according to the dictum laid down in the cases reported as KHIZER HAYAT and others v. INSPECTOR-GENERAL OF POLICE (PUNJAB), LAHORE and others (PLD 2005 Lahore 470) and RAI ASHRAF and others v. MUHAMMAD SALEEM BHATTI and others (PLD 2010 SC 691).

MWA/M-137/L Petition accepted.

2014 P Cr. L J 1352
[Lahore]
Before Muhammad Tariq Abbasi, J
NASIR HUSSAIN---Petitioner
Versus
The STATE and others---Respondents

Criminal Revision No.218 of 2013, heard on 13th May, 2014.

Criminal Procedure Code (V of 1898)---

----Ss. 464, 465 & 466---Penal Code (XLV of 1860), S.302---Qatl-e-amd---Plea of mental illness---Prayer for constitution of Medical Board---Petitioner/accused who claimed to be suffering from serious mental illness prior to the occurrence, filed application to the effect that to determine his mental health, Medical Board be constituted; and that record of Institute of Mental Health in which he remained admitted be summoned---Said application of accused, having been dismissed by the Trial Court---Validity---Trial Court, which firstly had to know about mental condition of accused, had already carried on the preliminary inquiry towards the mental status of accused---Trial Court had directed to obtain opinion of psychiatrists, for which MRI and EEG of brain of accused were carried on---When every thing was found to be healthy, Trial Court, while dismissing the application of accused, deemed it proper to proceed further, and held the accused to be fit to face the trial---Report of Pakistan Institute of Medical Science, available on record indicated that the result of MRI of accused was normal---Accused had not urged that at the time of commission of alleged occurrence, he was suffering from any mental disease, entitling him for any special concession---Trial Court had discussed in the impugned order, each and every aspect of the case, and when accused was found to be fit to face the trial, his application was dismissed---Revision against dismissal of application being devoid of any force, was dismissed, in circumstances.
Atta Muhammad v. The State PLD 1960 (W.P.) Lahore 111 and Jalal Din v. The State 1968 PCr.LJ 187 ref.
Imran Haider for Petitioner.
Qaisar Mushtaq, A.D.P.P. for the State.
Fauzia Nazir for Respondent No.3.
Date of hearing: 13th May, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the order dated 26-10-2013 passed by the learned Sessions Judge, Rawalpindi, whereby an application, moved by the petitioner for constitution of a medical board, to determine his physical/mental condition and summoning of the record relating to him, from Punjab Institute of Mental Health, Lahore, has been dismissed.

2. The facts are that the petitioner is facing trial in a case F.I.R. No.66 dated 2-3-2013 registered under section 302 of P.P.C. at Police Station, Kallar Syedan, District Rawalpindi. He moved the above mentioned application, with the contention that prior to occurrence, he remained admitted in Pakistan Institute of Mental Health, Lahore from 23-1-2012 to 5-4-2012 for rehabilitation and treatment; that he is suffering from serious mental illness, hence to determine his mental health, medical board may be constituted. The learned trial Court has dismissed the said application moved by the petitioner. Hence the instant revision petition.

3. Arguments heard and record perused.

4. It has been observed that the learned trial Court, to know the mental health of the petitioner, directed the Superintendent of Central Jail, Rawalpindi to obtain report of the Psychiatrists, about mental condition of the accused/petitioner, on his visit to Central Jail, Rawalpindi. Consequently the due proceedings were carried on, during which, MRI and EEG of brain of the petitioner/accused were conducted, but found to be normal.

5. The plea agitated by the petitioner/accused has to be seen in the light of provisions applicable to such situation i.e. sections 464, 465 and 466 of Cr.P.C. Section 465 of Cr.P.C. deals with a situation, when a person facing the trial before the Court of Session or High Court is found to be a lunatic. The said provision reads as under:--

"465. Procedure in case of person [sent for trial] before Court of Session or High Court being lunatic.---(1) If any person before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Court shall;. in the first instance, try the fact of such unsoundness and incapacity, and if the Court is

satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case."

6. The plain reading of the above mentioned provision shows that the trial Court, firstly has to determine if an accused is of unsound mind and consequently incapable of making his defence and if the court is satisfied of the fact, it shall make a finding to the said effect and postpone further proceedings in the case.

7. In the case of Atta Muhammad v. The State PLD 1960 (West Pakistan) Lahore 111, it was held, after drawing a fine comparison in sections 464 and 465, Cr.P.C. as under:--

"The legal position which emerges from the two sections is that under section 464 of Cr.P.C. 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."

8. A keen and careful reading of the above quoted paragraph would indicate that it is the court which firstly has to know about mental condition of an accused, facing trial before it.

9. In the matter in hand, the plea of the petitioner/accused is that, he remained admitted in a hospital for rehabilitation and treatment, hence record from the said hospital may be summoned and medical board for determination of his mental health may be constituted.

10. The learned trial Court has already carried on the preliminary inquiry, towards the mental status of the petitioner/accused, during which directed opinion of Psychiatrists, for which MRI and EEG of brain of the petitioner/accused were carried on and when everything was found to be healthy, while dismissing the application of the petitioner, deemed it proper to proceed further and held the petitioner/accused to be fit to face the trial.

11. A report of Pakistan Institute of Medical Sciences, attached with the report of Superintendent Central Jail, Rawalpindi is also available in this file, which indicates that the result of MRI of the petitioner/accused is normal.

12. At present, the case of the petitioner/accused is not at all that at the time of commission of the alleged occurrence, he was suffering from any mental disease, hence entitled for any special concession. The only stance of the petitioner/accused is that to know his mental condition, his medical check-up may be got conducted. The said check-up has accordingly been carried on and no defect in present mental status of the petitioner/accused has been found, hence the learned trial Court has rightly proceeded for subsequent proceedings in the trial.

13. The Hon'ble Supreme Court of Pakistan in the judgment reported as 1968 PCr.LJ (SC) 187 titled Jalal Din v. The State has held that burden of proof of insanity, lies on the accused. It was further held in the judgment (supra) that under section 84 of P.P.C., the crucial point of time at which unsoundness of mind should be established, is the time when the act constituting the offence is committed.

14. The learned trial Court has discussed in the impugned order, each and every aspect of the case and when found the petitioner to be fit to face the trial, accordingly dismissed the application.

15. Due to all the above mentioned, the instant Criminal Revision, being devoid of any force and merit is dismissed.

HBT/N-26/L Petition dismissed.

2014 P Cr. L J 1795

[Lahore]

Before Muhammad Tariq Abbasi, J

NAZIM HAYAT---Petitioner

Versus

GHULAM HASSAN and 2 others---Respondents

Writ Petition No.1549 of 2014, decided on 18th June, 2014.

(a) Administration of justice---

----Doing of an act---Principle---If law prescribes an act to be done in a particular manner, then it must be done in the prescribed manner or should not be done at all.

Raja Hamayun Sarfraz Khan and others v. Noor Muhammad 2007 SCMR 307; Muhammad Akram v. Mst. Zainab Bibi 2007 SCMR 1086 and Tehsil Nazim TMA, Okara v. Abbas Ali and 2 others 2010 SCMR 1437 rel.

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

----Ss. 205 & 540-A--- Constitution of Pakistan, Art. 199---Constitutional petition---Personal attendance, dispensing with---Non-appointing of pleader---Personal appearance of accused was dispensed with by Trial Court during trial of private complaint, without appointing any pleader--- Validity---Exemption from personal appearance of accused could only be granted if he was represented by pleader who had to undertake before Court to be available on behalf of the accused---Trial Court while ignoring such mandatory procedure passed the order---High Court in exercise of Constitutional jurisdiction set aside application filed by accused for his exemption from personal attendance, as the same was not according to mandate/provisions of law---Petition was allowed in circumstances.

Sardar Muhammad Ijaz Khan for Petitioner.

Raja Muhammad Hameed, A.A.-G. for Respondents.

ORDER

MUHAMMAD TARIQ ABBASI, J.---This writ petition is directed against the orders dated 16-4-2014 and 15-5-2014, respectively passed by the learned Judicial Magistrate, Jand and the learned Additional Sessions Judge, Jand of District Attock.

2. Through the above mentioned earlier order dated 16-4-2014, an application moved by Ghulam Hussain (respondent No.1), for dispensation from personal appearance has been accepted and his personal appearance has been dispensed

with. Whereas through the above said lateral order, a revision petition, filed by the petitioner, challenging the above mentioned order of the learned Judicial Magistrate has been dismissed.

3. The facts are that in a private complaint, filed by the present petitioner, against Sultan, Ghulam Hussain (respondent No. 1) and Abdul Ghaffar, under sections 382, 506(ii)/34, P.P.C., all the above named accused were summoned by the learned Judicial Magistrate to face the trial. Thereafter, Ghulam Hussain (respondent No. 1) preferred an application, before the learned Judicial Magistrate, whereby he sought dispensation of his personal appearance, on the grounds that due to his employment at Karachi, he was unable to personally attend the court, hence may be exempted and that in the said eventuality, his co-accused will keep in appearing, in the court, also on his behalf. The learned Judicial Magistrate through the order dated 16-4-2014 had accepted the above mentioned application and exempted personal appearance of the respondent No. 1, subject to the condition that his brother namely Abdul Ghaffar will be bound to appear on his behalf.

4. The petitioner while challenging the above mentioned order had filed a revision petition, before the learned Additional Sessions Judge, Jand, but dismissed on 15-5-2014. Consequently the writ petition in hand.

5. Arguments heard and the record perused.

6. In the Criminal Procedure Code, 1898, there are two provisions, under which, personal appearance of an accused can be dispensed with. Those provisions are sections 205 and 540-A of Cr.P.C. For convenience, both the said provisions are reproduced herein below:--

Section 205

"Magistrate may dispense with personal attendance of accused.---(1) Whenever a Magistrate issues a summons, he may, if he sees reasons so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore-provided."

Section 540-A

"Provision of inquiries and trial being held in the absence of accused in certain cases.---(1) At any stage of an inquiry or trial under this code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied for reasons to be recorded, that any one or more of such accused is or

incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

7. In both the above mentioned provisions, besides other conditions, one mandatory is that the accused must be represented by his pleader, who should make an undertaking before the learned trial Court that he, on behalf of the accused shall join into the proceedings and keep in appearing on each and every date of hearing. In the situation in hand, in the application, whereby the respondent No. 1 had sought exemption from personal appearance, he had contended that on his behalf, his co-accused will appear in the court. The learned trial Court in the order dated 16-4-2014 had also granted the exemption and allowed Abdul Ghaffar, brother of the respondent No. 1 to appear on his behalf.

8. Firstly, mentioning in the application that in case the exemption is granted, the co-accused of the respondent will appear in the court on his behalf, was not the requirement of the above mentioned provisions. Secondly, it was mandatory for the learned trial Court to know the relevant law on the subject and while relying on it, an order should have been passed. But it has been observed that the learned trial Court had granted the exemption to the respondent No. 1 and allowed his brother namely Abdul Ghaffar to join into the proceedings on his behalf, which at all was not the mandate of the provisions highlighted above.

9. It is well settled principle of law that if law prescribes an act to be done in a particular manner, then it must be done in the prescribed manner or should not be done at all. Reliance in this respect is respectfully placed upon the judgments reported as "Raja Hamayun Sarfraz Khan and others v. Noor Muhammad" (2007 SCMR 307), "Muhammad

Akram v. Mst. Zainab Bibi" (2007 SCMR 1086), "Tehsil Nazim TMA, Okara v. Abbas Ali and 2 others" (2010 SCMR 1437).

10. In the situation in hand, as stated above, the law on the subject clearly prescribes that an exemption from personal appearance of an accused could only be granted if he is represented by a pleader, who undertakes before the Court to be available on behalf of the accused. But the learned trial Court while ignoring the said mandatory procedure has passed the above mentioned order in the above stated manner.

11. The learned Additional Sessions Judge was supposed to watch the proceedings of the courts subordinate to it, and if any deviation from a procedure or law is noted, to cure the defect and bring the concerned court at right path. But unfortunately, when the above mentioned erroneous and unwarranted proceedings of the learned trial Court had been brought before the learned Additional Sessions Judge in shape of a revision petition, he instead of realizing the above mentioned defect committed by the learned trial Court and curing it, in a mechanical and slipshod manner had affixed stamp of confirmation on the above mentioned erroneous findings made by the learned trial Court and dismissed the revision petition.

12. It is expected that herein after, the learned trial Court will sit in the chair with open eyes and the mind and also the learned Additional Sessions Judge being Appellate Authority shall be vigilant about the proceedings carried on by the courts subordinate to it and shall act as a true supervisor/watcher, so that in future, any instant like matter may not come before this Court.

13. For what has been discussed above, the writ petition in hand is accepted, the above mentioned impugned orders are set aside and the application moved by the respondent No. 1 for exemption of his personal appearance being not according to the above mentioned mandate/provision is dismissed. However, if the respondent No. 1 files any fresh petition, while fulfilling the required criteria, then should be entertained, proceeded with and decided on merits, without being prejudiced from the above mentioned findings.

MH/N-45/L Petition allowed.

2014 P L C 275
[Lahore High Court]
Before Muhammad Tariq Abbasi, J
Messrs SYNGENTA PAKISTAN LTD. through Authorized Officer and another
Versus
MUHAMMAD FIAZ and 4 others

Writ Petition No.15716 of 2013, heard on 22nd January, 2014.

Punjab Industrial Relations Act (XIX of 2010)---

----Ss. 33(4) & 44(4)(g)---Constitution of Pakistan, Art. 199---Constitutional petition---Termination---Interim relief---Suspension of termination order---Scope---Workman challenged his termination order before Labour Court through grievance petition---Labour Court, on the application of interim relief filed by workman, suspended the impugned termination order---Employer/petitioner aggrieved by the temporary injunction given by Labour Court filed revision petition before Labour Appellate Tribunal which was also dismissed---Contention of the petitioner/employer was that temporary injunction granted by Labour Court would amount giving of the final relief, therefore the interim relief was not justified---Validity---Interim relief should not be the whole relief that the workman would get if he succeeded finally---Interlocutory order granting a relief of the nature, which would amount to allowing the main case without trial was not justified---Order of Labour Court suspending the order impugned in the main petition could not be termed to have been passed while exercising lawful authority---Impugned orders were set aside---Constitutional petition was allowed.

Delhi Cloth and General Mills Co. v. Shri Rameshwar Dayal and another AIR 1961 SC 689; Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Zaman Khan and others 1997 SCMR 1508 and Qazi Inamul Haq v. Heavy Foundry and Forge Engineering (Pvt.) Ltd. and another 1989 SCMR 1855 rel.

Shahid Anwar Bajwa for Petitioners.
Ch. Muhammad Siddique Attique for Respondents Nos.1 to 3.
Date of hearing: 22nd January, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--- Through the instant writ petition the order dated 29-1-2013 passed by the learned Labour Court No.X, Sahiwal and the judgment dated 29-10-2013 delivered by the learned Labour Appellate Tribunal No.II, Multan have been called in question.

2. The facts leading to filing of the instant writ petition are that the respondents Nos.1 to 3 filed grievance petition under section 33(10) of the Punjab Industrial Relations Act, 2010 before the Punjab Labour Court No.X, Sahiwal, whereby the orders dated 24-9-2012 and 20-12-2012 of the petitioners towards termination of the respondents Nos.1 to 3 from their employment with the petitioners at warehouse, Sahiwal were challenged to be illegal, against procedure and liable to cancelled. The said petition was taken up by the learned Presiding Officer of the Labour Court on 29-1-2013, when notices to the present petitioners were issued for 25-2-2013. On the same day, the learned Presiding Officer also proceeded with the application moved for grant of temporary injunction and suspended the above mentioned orders which were challenged in the above said grievance petition. Feeling aggrieved, the petitioners approached the learned Punjab Labour Appellate Tribunal No.II, Multan in shape of revision petition, but dismissed through judgment dated 29-10-2013. Consequently the petition in hand.

3. Arguments advanced by the learned counsel for the petitioners as well as learned counsel for the respondents Nos.1 to 3 have been heard and the record has been perused.

4. The main objection is that the learned Presiding Officer of the Labour Court at the first stance as interim relief, while suspending the orders dated 24-9-2012 and 20-12-2012, which were impugned in the grievance petition, in fact had granted, the main relief claimed in the grievance petition, which at all was not acceptable and permissible under the law.

5. The point in issue before this Courts is whether the suspension of the orders dated 24-9-2012 and 20-12-2012, in application for grant of temporary injunction would amount giving of the relief claimed in the main petition and is justified or otherwise.

6. The instant like situation, in shape of an appeal titled 'The Delhi Cloth and General Mills Co. v. Shri Rameshwar Dayal and another' came up before the Supreme Court from Punjab (India) in the year 1960 and decided through a judgment reported in AIR 1961 Supreme Court 689, relevant portion whereof is reproduced as under:---

"Therefore, when a tribunal is considering a complaint under S.33-A and it has finally to decide whether an employee should be reinstated or not, it is not open to the tribunal to order reinstatement as an interim relief, for that would be giving the workman the very relief which he could get only if on a trial of the complaint the employer failed to justify the order of dismissal. The interim relief ordered in this case was that the workman should be permitted to work: in other words he was ordered to be reinstated; in the alternative it was ordered that if the management did not take him back they should pay him his full wages. We are of opinion that such an order cannot be passed in law as an interim relief, for that would amount to giving the respondent at the outset the relief to which he would be entitled only if the employer failed in the proceedings under S.33-A. As was pointed out in Hotel Imperial's case, AIR 1959 SC 1342 ordinarily, interim relief should not be the whole relief that the workmen would get if they succeeded finally. The order therefore of the tribunal in this case allowing reinstatement as an interim relief or in lieu thereof payment of full wages is manifestly erroneous and must therefore be set aside. We therefore allow the appeal, set aside the order of the High Court as well as of the tribunal dated May 16, 1957, granting interim relief."

7. The august Supreme Court of Pakistan while deciding the case titled 'Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Zaman Khan and others' reported in 1997 SCMR 1508 had held that through an interlocutory order, granting a relief of the nature, which will amount to allowing the main case without trial will not be justified. The relevant portion of the said judgment is reproduced herein below:---

"As regards the merits of the case, it may be pointed out that it is a well-settled proposition of law that the object of passing of an interlocutory order or status-quo is to maintain the situation obtaining on the date when the party concerned approaches the Court and not to create a new situation. Another well settled principle of legal jurisprudence is that generally a Court cannot

grant an interlocutory relief of the nature which will amount to allowing the main case without trial/hearing of the same. In this regard, reference may be made to the judgment of this Court in the case of 'Qazi Inamul Haq v. Heavy Foundry and Forge Engineering (Pvt.) Ltd. and another' 1989 SCMR 1855, in which the petitioner had been prematurely retired from service. He filed a suit and obtained a temporary injunction from a learned Civil Judge, which was vacated by a learned Additional District Judge. The petitioner then preferred a revision petition before the High Court of Sindh, which was declined for the following reasons:---

(a) The order of retirement had already taken effect before the civil suit was instituted to challenge it; and

(b) even if the petitioner had merely an arguable case, the other two essential factors, i.e. presence of balance of convenience, which is in fact balance of inconvenience and causing of irreparable loss did not exist."

8. From the above mentioned dictums, it has been confirmed that an interlocutory order amounting, grant of main relief should not be passed. Consequently the order dated 29-1-2013 passed by the learned Presiding Officer of the Labour Court, whereby without giving notice to the present petitioners and affording them opportunity of hearing, the orders impugned in the main petition have been suspended, could not be termed to have been passed while exercising lawful authority. Consequently, by accepting the instant writ petition, the said order i.e. 29-1-2013 as well as the impugned judgment dated 29-10-2013 are set aside. The learned Presiding Officer of Punjab Labour Court No.X Sahiwal, is directed to decide the matter within four months positively, from the receipt of this judgment.

JJK/S-13/L Petition accepted.

P L D 2014 Lahore 574

Before Muhammad Qasim Khan and Muhammad Tariq Abbasi, JJ

TALIB HUSSAIN---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous Nos.84-M, 625-M, 450-M, 937-M of 2013 and 40-M, 81-M and 127-M of 2014, decided on 24th June, 2014.

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

----S. 426(2B)---Suspension of sentence---History of insertion of S.426(2B), Cr.P.C. and amendments therein traced.
Lala Jairam Das and others v. Emperor AIR (32) 1945 PC 94 ref.

(b) Constitution of Pakistan---

----Art. 185(3)---Supreme Court Rules, 1980, O.XIII & XXIII---Leave to appeal, grant of---Grant of leave to appeal was only the prerogative of the Supreme Court---No law in the country provided any authority to any High Court to issue leave to appeal, in any manner.

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

----S. 426(2B)---Constitution of Pakistan, Art.185(3)---Supreme Court Rules, 1980, O.XXIII---Suspension of sentence---Grant of leave to appeal by the Supreme Court---When against any sentence, imposed or maintained by a High Court, a convicted person was granted special leave to appeal by the Supreme Court then under S.426(2B), Cr.P.C. a High Court, pending the appeal before the Supreme Court, may suspend the sentence or order appealed against, and release the convict on bail.

Syed Badar Raza Gillani and Muhammad Waseem Sarwar for Petitioners (in Crl.Misc.No.84-M of 2013).
Muhammad Aqeel for the Complainant (in Crl.Misc.No.84-M of 2013).
Prince Rehan Iftikhar Sheikh for Petitioners (in Crl. Misc.No.625-M of 2013).
Ch. Faqir Muhammad for the Complainant (in Crl. Misc.No.625-M of 2013).

Prince Rehan Iftikhar Sheikh for Petitioners (in Crl. Misc.No.450-M of 2013).
Muhammad Naeem Iqbal for the Complainant (in Crl. Misc.No.450-M of 2013).

Ch. Imran Khalid Amartasri for Petitioner (in Crl. Misc.No.127-M of 2014).
Muhammad Bilal Butt for the Complainant (in Crl. Misc.No.127-M of 2014).
Sardar Muhammad Sarfraz Dogar for Petitioner (in Crl. Misc.No.937-M of 2013).

Ch. Shakir Ali for the Complainant (in Crl. Misc.No.937-M of 2013).
Miss Fozia Kausar (in Crl. Misc.No.40-M of 2014).
Miss Fozia Kausar (in Crl. Misc.No.81-M of 2014).
Muhammad Ali Shahab, Deputy Prosecutor-General and Malik Muhammad Jaffar, Deputy Prosecutor-General for Respondents.
Date of hearing: 12th March, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single order is intended to decide (i) Crl. Misc. No.84-M/2013 "TALIB HUSSAIN v. THE STATE, ETC", (ii) Crl. Misc. No.625-M/2013 "AMJAD FAROOQ v. THE STATE, ETC", (iii) Crl. Misc. No.450-M/2013 "ANWAAR v. THE STATE, ETC", (iv) Crl. Misc. N0.127-M/2014 "MUHAMMAD SAFDAR v. THE STATE, ETC", (v) Crl. Misc. No.937-M/2013 "QAZAFI v. THE STATE, ETC", (vi) Crl. Misc. No.40-M/2014 "MUHAMMAD BILAL v. THE STATE, ETC" and (vii) Crl. Misc.No.81-M/2014 "MUHAMMAD ASLAM v. THE STATE, ETC" as all these petitions have been filed under section 426(2B) Cr.P.C. to seek suspension of sentence, after grant of leave to appeal by the Hon'ble Supreme Court of Pakistan in respective cases, and involve similar question of law relating to an objection raised by the learned Deputy Prosecutor General .that an application under section 426(2B) of Cr.P.C. is only competent, before the High Court, if it at the time of deciding an appeal, imposes or maintains the sentence and grants Special Leave to Appeal to the Supreme Court of Pakistan.

2. For convenience the above mentioned provision is re-produced herein below:-
"426. Suspension of sentence pending appeal. Release of appellant on bail.—

(1) Pending any appeal by a convicted *person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

[(2-A) [Subject to provisions of section 382-A] When any person other than a person accused of a non-bailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court, may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail, for a period sufficient in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under subsection (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.]

[(2-B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to [the [Supreme Court]] against any sentence which it has imposed or maintained, it may, if it is so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if the said person is in confinement, that he be released on bail.]

(3) When the appellant is ultimately sentenced to imprisonment or [imprisonment for life] the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

3. Subsection (2B) of section 426 was inserted in the Code of Criminal Procedure, 1898, by way of second amendment, made through the Act IV of 1946, with the following object:---

"Object.---In a recent case before the Privy Council it was held that a High Court possess no power to grant bail to a person who has been sentenced to imprisonment and who has been granted special leave to appeal to His Majesty in council against such sentence. At the same time their Lordships observed, "it may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court.....But..... this desirable object can only be achieved by legislation." By this bill it is proposed to insert

provision in section 426 of the Code of Criminal Procedure, 1898, conferring on High Courts the power to suspend sentence and grant bail where special leave to appeal to His Majesty in Council has been granted."

4. At that time, subsection (2B) of Section 426 of Cr.P.C. was having the following language:-
"(2B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal, to His Majesty in Council against any sentence which it has imposed or maintained, or has been granted leave to appeal to his Majesty in Council against an order of the Federal Court on an appeal from the High Court involving the imposition or maintenance of a sentence it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if the said person is in confinement, that he be released on bail."

5. The above mentioned amendment was a result of Privy Council judgment titled "Lala Jairam Das and others v. Emperor,"reported as AIR (32) 1945 Privy Council, 94, wherein, it was held that High Court in India has no power to grant bail to a convict to whom His Majesty in Council has given special leave to appeal against his conviction or sentence. Further, in the cited case it was held:-

"It may well be that the case of an appeal from a High Court to His Majesty in Council was not within the contemplation of the framers of the Code. It may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court. Their Lordships fully appreciate the propriety and utility of such a power, exercisable by Judges acquainted with the relevant _facts of each case, and (if exercised) with power to order that the bail period be excluded from the term of any sentence. But in their Lordships' opinion this desirable object can only be achieved by legislation. In the meantime there is a section of the Code to which, pending legislation, recourse may be had, and by means of which the ends of justice may be secured, viz., S.401 which enables the Provincial Government to "suspend" the execution of a sentence. As hereinbefore appears recourse has been had to this section on previous occasions. For the reasons indicated, their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. In view of the general importance of the question which has been raised and decided their Lordships make no order as to the costs of this appeal."

6. From the above mentioned, it is clear that at that time it was "His Majesty" who was competent to grant special leave to appeal, against conviction and sentence, passed by a High Court. At that time after decision of a criminal appeal, being functus officio, High Court concerned had got no power or authority to deal with any matter of suspension of sentence and grant bail. Therefore, it was considered appropriate that such a power should be exercised by High Court acquainted with the relevant facts of each case. Hence, required legislation to that effect was recommended and finally as stated above subsection, (2B) in section 426, Cr.P.C. was inserted.

7. After creation of Pakistan, Federal Laws (Revision and Declaration) Act 1951 was promulgated, whereby certain Acts and Ordinances mentioned in the First Schedule were completely repealed, some described in the Second Schedule were partially repealed, whereas, amendment in the laws,' described in The Third Schedule of the Act, 1951 were made. Accordingly, subsection (2B) of Section 426 of Cr.P.C. 1898 was amended in the following terms.
"In subsection (2B) of section 426; for the words "His Majesty in Council" where they first occur the words "the Federal Court" shall be substituted."
Thereafter, by President's Order No.1 of 1961 (CENTRAL LAWS (ADAPTATION) ORDER, 1961, further amendment was brought in section 426(2B) and for the word "Federal Court," the word "Supreme Court" was used. Under Articles 158 and 159 of the said Constitution, the appellate jurisdiction of the Supreme Court in Civil and Criminal matters was described as follows:-

"158. Appellate jurisdiction of the Supreme Court in civil matter.--(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in civil proceedings--

(a) If the amount or value of the subject-matter of the dispute in the Court of first instance was, and also in dispute on appeal is, not less than fifteen thousand rupees or such other sum as may be specified in that behalf by Act of Parliament; or

(b) If the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) If the High Court certifies that the case is a fit one for appeal to the Supreme Court.

(2) Notwithstanding anything in this Article, no appeal shall, unless an Act of Parliament otherwise provides, lie to the Supreme Court from the judgment, decree or final order of a Judge of a High Court sitting alone."

"159. Appellate jurisdiction of the Supreme Court in criminal matters.--An appeal shall lie to the Supreme Court from any judgment, final order or sentence of a High Court in criminal proceedings, if the High Court---

(a) has on appeal ,reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life; or

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority, and has in such trial convicted the accused person and sentenced him as aforesaid; or

(c) certifies that the case is a fit for appeal to the Supreme Court; or

(d) has imposed any punishment on any person for contempt of the High Court:

Provides that where a certificate is issued under paragraph (c) of this Article an appeal shall lie subject to such rules as may be made in that behalf under paragraph 3 of the Third Schedule, and to such other rules, not inconsistent with the aforesaid rules, as may be made in that behalf by the High Court."

8. The above mentioned Articles clearly contend that besides other circumstances, for filing an appeal before the Supreme Court of Pakistan, one of circumstance was a certificate issued by the High Court that the case was a fit one for appeal to the Supreme Court.

9. Under Article 160 of the above said Constitution, appeal to the Supreme Court by special leave of the Court was also granted in the following terms:-

"160. Appeal to the Supreme Court by special leave to the Court.--- Notwithstanding anything in this Part, the Supreme Court may grant special leave to appeal from any judgment, decree, order or sentence of any Court or

tribunal in Pakistan, other than a Court or tribunal constituted by or under any law relating to the Armed Forces."

10. When the Constitution of 1956, was repealed and the Constitution of 1962 was promulgated, in it through Article 58, appellate jurisdiction of the Supreme Court was described as follows:--

"58. Appellate jurisdiction of Supreme Court.---(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of a High Court.

(2) An appeal to the Supreme Court from a judgment decree order or sentence of a High Court shall lie as of right where---

(a) the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution;

(b) the High Court has sentenced a person to death or to transportation for life; or

(c) the High Court has imposed punishment on a person in pursuance of the powers conferred on the Court by Article 123.

(3) An appeal to the Supreme Court from a judgment decree order or sentence of a High Court in a case to which clause (2) of this Article does not apply shall lie only if the Supreme Court grants leave to appeal."

11. It is notable that in the Constitution of Pakistan, 1962 under the Article 58, the above stated Articles 158, 159 and 160 of the Constitution of Pakistan, 1956 were united and the word "Special Leave to Appeal" was changed to the word "Leave to Appeal".

12. In the Provisional Constitution of 1972, under Article 186, the jurisdiction of the Supreme Court vested through the Article 58 of the Constitution, 1962 was kept the same.

13. Ultimately, the Constitution of the Islamic Republic of Pakistan, 1973 was promulgated, which still is enforced. Under Article 185 of the said Constitution, the appellate jurisdiction of the Supreme Court of Pakistan has been described in the following language:-

"185. Appellate jurisdiction of Supreme Court.--(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court.

(2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence of a High Court----

(a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or

imprisonment for life; or, on revision, has enhanced a sentence to a sentence as aforesaid; or .
(b) if the High Court has withdrawn for trial before itself any case from any Court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or
(c) if the High Court has imposed any punishment on any person for contempt of the High Court; or
(d) if the amount or value of the subject matter of the dispute in the Court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of Parliament and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the Court immediately below; or
(e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the Court immediately below: or
(f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.
(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal."
14. Order XIII of the Supreme Court Rules, 1956 was relating to the petitions for Special Leave to Appeal in Civil proceedings. Relevant provision was as under:-
"1. A petition for special leave shall be lodged in this Court within sixty days of the judgment or order sought to be appealed from or as the case may be within thirty days from the date of the refusal of grant of certificate under Article 58(2) (a) of the Constitution, by the High Court.

Provided that the Court may for sufficient cause extend the time."
Whereas Order XXIV of the above mentioned rules was dealing with the petitions for Special Leave to Appeal, in criminal proceedings. The relevant provision was as follows:--
"1. Save as hereinafter provided the provisions with respect to petitions for special leave to appeal in civil proceedings contained in Order XIII of this Part of the Rules, shall with necessary modifications and adaptations apply to applications for special leave to appeal in criminal matters:"

15. At present the Supreme Court Rules, 1980 are in field. Order XIII of the said rules, deals with the petitions for leave to appeal in Civil proceedings, whereas, Order XXIII of the rules relates to the petitions for leave to appeal and appeals arising therefrom in criminal proceedings.
16. Order XIII of the Supreme Court Rules, 1980 deal with the petitions for leave to appeal in civil proceedings, the relevant portion whereof reads as under:--
"1. A petition for leave shall be lodged in this Court within sixty days of the judgment, decree or final order sought to be appealed from or as the case may be, within thirty days from the date of the refusal of grant of certificate under Article 185(2)(f) by the High Court:

Provided that the Court may for sufficient cause extend the time.

2. A petition for leave to appeal shall state succinctly and clearly [all points of law which arise for determination and], all such facts as it may necessary to state in order to enable the Court to determine whether such leave ought to be granted, and shall be signed by the counsel and or Advocate-on-Record for the petitioner or by the party himself if he appears in person. The petition shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which leave to appeal is sought and where petition is moved through an Advocate-on-Record, it shall cite all previous decisions of the Court, which to the best of his knowledge, bear on the question sought to be raised in the petition."

17. The relevant paragraphs of Order XXIII of the Supreme Court Rules, 1980 are as under:--

"I. Save as hereinafter provide the provisions with respect to petitions for leave to appeal in civil proceedings contained in Order XIII of this Part shall mutatis mutandis apply to petitions for leave to appeal in criminal matters except that no court fee, process fee or search fee shall be charged but the copying fee shall be charged except in petitions through jail.

2. A Petition for leave to appeal in criminal matter shall be lodged within thirty days from the date of judgment or final order sought to be appealed from, or as the case may be, from the date of the order refusing certificate under sub-clause (f) of clause (2) of Article 185 of the Constitution.'

From the above mentioned provisions and discussion, it is clear that special leave to appeal/leave to appeal and certificate issued by a High Court that a case is fit for appeal to the Supreme Court are two different proceedings. "Special Leave to appeal," which at present is termed as "leave to appeal" is always granted by the Supreme Court of Pakistan, whereas, the above mentioned certified is issued by a High Court.

19. There is no provision, in any law of Pakistan, which provides any authority to any High Court to issue leave to appeal, in any manner. The same is only the prerogative of the Supreme Court of Pakistan being vested to it by the Constitution and the Rules.

20. Resultantly, we are of the confirmed view that when against any sentence, imposed or maintained by a High Court, a convicted person is granted special leave to appeal by the Supreme Court of Pakistan, then under section 426(2B) of the Cr.P.C., a High Court, pending the appeal, before the Supreme Court, may suspend the sentence or order, appealed against and release the convict on bail. As a necessary corollary, the objection raised by the learned Deputy Prosecutor General is overruled.

21. Consequently, it is directed that all the petitions be sent back to the respective learned Benches, for proceedings and decision on merit.

MWA/T-14/L Cases remanded.

P L D 2014 Lahore 644

Before Muhammad Tariq Abbasi and Muhammad Qasim Khan, JJ

MUHAMMAD YOUSAF---Petitioner

Versus

THE STATE and another---Respondents

Writ Petitions Nos.8568 and 9029 of 2013, 1614 and 2158 of 2014, decided on 10th April, 2014.

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

----Preamble, Third Sched., Ss.1, 6, 7, 23 & 34---Constitution of Pakistan, Art.199---Constitutional petition---Transfer of case from Anti-Terrorism Court to regular court---Scope of S.23 of the Anti-Terrorism Act, 1997---Anti-Terrorism Court dismissed applications of accused involved in different offences namely murder by firing, acid throwing and injury caused by firing in mosque, for transfer of their cases to regular courts---Validity---Purpose of Anti-Terrorism Act, 1997 was to prevent terrorism, sectarian violence and conducting speedy trial of heinous offences---In order to decide whether an offence was triable under the Anti-Terrorism Act, 1997 or not, the courts had to see whether the act had tendency to create sense of fear and insecurity in the mind of people or a section of society---Such act might not necessarily have taken place within the view of general public---Schedule annexed to a statute was as important as the statute itself---Schedule could be used to construe the provisions of the body of the Act---Third Schedule to the Anti-Terrorism Act, 1997 had to be given its due importance and, first three paragraphs of the same were general in nature while the fourth paragraph specifically described offences---In order to bring an offence within ambit of Anti-Terrorism Act, 1997 and the jurisdiction of the Anti-Terrorism Court, nexus of such offence with S.6 of the Anti-Terrorism Act, 1997 was a pre-requisite---Paragraph 4 of the Schedule to the Anti-Terrorism Act, 1997 categorically mentioned the offences which would be tried only by the Anti-Terrorism Court---Offences in question were within the purview/ambit of the paragraph 4 of the Third Schedule to the Anti-Terrorism Act, 1997 and were triable by the Anti-Terrorism Court---Petitions were dismissed.

State through Advocate-General, N.-W.F.P., Peshawar v. Muhammad Shafiq PLD 2003 SC 224; Rana Abdul Ghaffar v. Abdul Shakoor and 3 others PLD 2006 Lah. 64 and Saif Ullah Saleem and others v. The State and others 2013 PCr.LJ 1880 rel.

Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445; Ch. Bashir Ahmad v. Naveed lqbal and 7 others PLD 2001 SC 521; Mohabbat Ali and another v. The State and another 2007 SCMR 142; Bashir Ahmad v. Muhammad Sadique and others PLD 2009 SC 11 and Ahmed Jan v. Nasrullah and others 2012 SCMR 59 ref.

Ch. Sagheer Ahmad and M.A. Hayat Haraj for Petitioner (in Writ Petition No. 8568 of 2013).

Syed Badar Raza Gillani for Respondent No.2.

Malik Muhammad Bashir Lakhesir, A.A.G. and Muhammad Ali Shahab, D.P.G.

Date of hearing: 12th March, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single judgment is intended to decide all the above captioned writ petitions as common questions of law and facts are involved in the all.

2. The above titled writ petitions have been preferred against the orders passed, by the learned Anti Terrorism Courts (trial Courts) whereby applications moved by the petitioners in the writ petitions, for transfer of the cases to ordinary courts have been refused.

3. The precise facts of the cases, relating to the above captioned writ petitions are as under:-

1. Writ Petition No. 8568 of 2014

In this matter by firing in Court premises a person, namely, Muhammad Qasim has been murdered.

2. Writ Petition No. 9029 of 2013

In the instant matter while throwing acid two ladies, namely, Azizan Mai and Sania have been done to death, whereas, another, namely, Sonia sustained injuries.

3. Writ Petition No. 1614 of 2014
Regarding this matter, by throwing acid on Muhammad Ramzan he has been done to death.

4. Writ Petition No. 2158 of 2014
In the instant matter by firing in the mosque injury to Muneer Ahmed has been caused.

4. From the writ petitioners' side, it has been argued that all the above mentioned occurrences were result of personal grudge and vendetta, having no nexus with Section 6 or 7 of Anti-Terrorism Act, 1997, hence, triable by the ordinary Courts but erroneously the applications moved under Section 23 of the Anti-Terrorism Act, 1997 have been dismissed.

5. Whereas from the respondents' side the writ petitions have been opposed with the contention that the offences charged being Scheduled, are very much triable by the Special Courts constituted under the Anti Terrorism Act, 1997 and as such the impugned orders have justifiably been passed.

6. Arguments of all the sides have been heard and the record has been perused.

7. For convenience, herein after the Anti Terrorism Act, 1997 will be referred as "The Act", the Anti Terrorism Court as "The Court" and the Third Schedule as "The Schedule".

8. The only issue before us is, whether all the offences described in The Schedule, attached to The Act would only be triable by The Court, if they will have nexus with Section 6 of the Act or some specified offences are straightaway triable by The Court.

9. For better appreciation of the above mentioned question, it would be appropriate to refer some of the provisions of The Act, herein below:--
The preamble of The Act reads as under:-

"An act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences.

Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto."

10. From the above mentioned provision it is clear that very purpose of The Act is to prevent terrorism, sectarian violence and speedy trial of the heinous offences and the matters relating thereto. To constitute an offence triable under the Act, the courts have only to see whether act has a tendency to create sense of fear and insecurity in the mind of people or a section of society. Psychological impact created upon the minds of the people has to be kept in view. It is not necessary that act must have taken place within the view of general public. Even an offence committed in a barbaric and gruesome manner, if had created fear and insecurity, would come within the ambit of The Act. In this regard reliance can be placed in case "State through Advocate General N.W.F.P Peshawar v. Muhammad Shafiq" (PLD 2003 SC 224).

11. Under Section 1 of The Act, for the province of Punjab, the following amendment has been made:-
"For the purposes of the provision and punishment of the commission of terrorist acts and scheduled offences to have resort to the provisions of the said Act for the whole of the province of Punjab."

12. "Schedule" and "Scheduled offence" have been defined in sections 2(s) and (t) as under:-
"Schedule" means a Schedule to This Act." "Scheduled offence" means an offence as set-out in the Third schedule."

13. As per Section 12 of The Act, a Scheduled offence shall only be triable by The Court.

14. According to Section 34 of The Act, the government may, by notification, amend the First, Third and Fifth Schedule, so as to add any entry thereto or modify or omit any entry therein.
The Third Schedule of the Act speaks as under:--
THE THIRD SCHEDULE
(Scheduled Offences)
[Sec Section 2(t)]

1. Any act of terrorism within the meaning of this Act including those offences which may be added or amended in accordance with the provisions of Section 34 of this Act.
2. Any other offence punishable under this Act.
3. Any attempt to commit, or any aid or abetment of or any conspiracy to commit, any of the aforesaid offences.
4. Without prejudice to the generality of the above paragraph, the Anti-terrorism Court to the exclusion of any other Court shall try the offences relating to the following, namely:--
(i) Abduction or kidnapping for ransom;
(ii) use of fire-arms or explosives by any device, including bomb blast in a mosque imambargah, church, temple or any other place of worship, whether or not any hut or damage is caused thereby; or
(iii) firing or use of explosives by any device, including bomb blast in the Court premises.
Punjab Amendment
(iv) Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance; and
(v) Unlawful possession of an explosive substance or abetment for such an offence under the Explosive Substances Act, 1908 (VI of 1908).

15. A schedule appended with a statute is as much important as the statute is. A schedule can be used in construing provisions in body of the Act. It for all purposes of constructions must be read together with the Act. The liability imposed in schedule is equally binding for all the concerned. Therefore, the Third Schedule of the Anti-Terrorism Act should be given due importance and should be strictly acted upon.

16. It has been observed that first three paragraphs of The Schedule are general in nature, whereas paragraph No. 4 is specific regarding certain offences described therein. Initially above mentioned three paragraphs, which were general in nature, were inserted in The Schedule. In the said paragraphs no specific offence was mentioned, hence, for brining an offence within the ambit of The Act and jurisdiction of The Court, nexus of said offence, with Section 6 of the Act was the pre-requisite.

17. When with the passage of time, commission of certain heinous offences was increased, the legislature had thought that by a Special amendment such

heinous offence be included in The Schedule, so that they may be straightaway brought before The Court. The very language of paragraph No. 4 above, shows that it is specific, whereas, the above mentioned other paragraphs (1, 2 & 3) are general in nature. In the said paragraph No. 4, it is categorically mentioned the offences narrated thereunder shall only be tried by The Court. The above mentioned wisdom of the legislature should be given due weight and importance and as such the above said particular offences included under para-4 of the Schedule, while keeping in view the special circumstances, should not be ignored and should be dealt with as per intention of the parliament.

18. Therefore, we are of the view that regarding the offences, mentioned under paragraph 4 above, the Court shall have direct jurisdiction and relating to the said offences no nexus should be searched because very commission of the said offences creates terror, panic and sense of insecurity amongst the general public.

19. Our above mentioned view has been fortified by the dictum laid down by the august Supreme Court of Pakistan in case titled Rana Abdul Ghaffar v. Abdul Shakoor and 3 others PLD 2006 Lahore 64), whereby regarding an offence of abduction or kidnapping for ransom described in paragraph No.4 of the schedule, the following has been held.

"After introduction of the Anti Terrorism (Second Amendment) Act, 2004, the case had to be transferred to Anti Terrorism Court because now only such a Court as constituted under the Anti Terrorism Act, 1997 had the exclusive jurisdiction to try the same and sentence, if any, to be passed against any accused person found guilty in the case by the judge, Anti Terrorism Court, could not be greater than, or of a kind different from the sentence prescribed by the relevant law for the relevant offence at the time the said offence was committed.... According to subsection (1) of section 12 of the Anti-Terrorism Act, 1997 an offence mentioned in the Third Schedule appended with the Anti-Terrorism Act, 1997 can be tried only by an Anti-Terrorism Court constituted under the said Act and no other Court has any jurisdiction in that regard. The Third Schedule appended with the Anti-Terrorism Act, 1997 not only mentions the offence of 'terrorism' but also mentions other offences which now, through the above mentioned amendment introduced on 11-1-2005 includes an offence of abduction or kidnapping for ransom."

20. It has been observed that a learned Division Bench of this Court in case titled "SAIF ULLAH SALEEM and others v. The STATE and others" (2013 PCr.LJ 1880) has transferred a case of acid bearing registered through F.I.R. No.725 of 2012, under sections 324/336-B/337-F(i) P.P.C. and 7 of Anti Terrorism Act, 1997 at Polite Station Chahlyak, District Multan, from Anti Terrorism Court to the Court of ordinary jurisdiction. When the said matter in shape of Civil Petition No.700 of 2013 titled "Malik Zafar Hussain v. Saif Ullah Saleem Arshad 'and others" came before the august Supreme Court of Pakistan, the following observations, were made.

"We have heard the learned counsel for the petitioner and have also gone through the impugned judgment, particularly para 7 thereof reproduced herein above. The learned High Court after having taken into consideration the peculiar facts and circumstances of the case, rightly, came to the conclusion that Section 7 of the Act does not attract in this case as the offence did not create panic or sense of insecurity among the people in terms of the provisions of the Act.

In view of the foregoing discussion, we find no merit in this petition which is dismissed and leave to appeal is declined. However, we leave it open for examination the jurisdiction of Anti Terrorism Court in respect of the offence of causing hurt by corrosive substance or attempt to cause hurt by means of a corrosive substance, as inserted in the Third Schedule vide notification noted hereinabove."

21. From the above mentioned verdict of the august Supreme Court of Pakistan, it is clear that above said judgment passed by the learned Division Bench of this Court was confined to the fact and circumstances of the case in question and point of jurisdiction in respect of the offences of causing hurt by corrosive substance or attempt to cause hurt by means of corrosive substance as inserted in Third Schedule was kept open for Anti Terrorism Court.

22. During arguments, the learned counsel for the petitioners have cited the cases reported as "Mehram Ali and others v. Federation of Pakistan and others" (PLD 1998 SC 1445), "Ch. Bashir Ahmad v. Naveed lqbal and 7 others" (PLD 2001 SC 521 "Mohabbat Ali and another v. The State and another (2007 SCMR 142), "Bashir Ahmad v. Muhammad Sadique and others" (PLD 2009 SC 11) and "Ahmed Jan v. Nasrullah and others" (2012 SCMR 59). It has been observed that the said judgments either pertain to the

period prior to the above mentioned amendments made in the Third Schedule of The Act or the facts and circumstances of the cases are not the same as are in the matters in hand.

23. As a result of what has been discussed above, we are of the view that all the above mentioned offences relating to the above said writ petitions, being falling under above referred paragraph No.4 of Third Schedule of The Act are straightaway triable by the Anti Terrorism Courts concerned. Hence, the applications moved under Section 23 of the Act for transferring the matters to ordinary Courts, have rightly been dismissed.

24. Consequently, all the above captioned writ petitions are dismissed.

ARK/M-226/L Petitions dismissed.

PLJ 2014 Cr.C. (Lahore) 735
[Multan Bench Multan]
Present: Muhammad Tariq Abbasi, J.
MUHAMMAD ADEEL--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 3527-B of 2014, decided on 15.7.2014.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302/34--Bail, grant of--Further injury--There were two versions--One was mentioned made by complainant in F.I.R. that his father has been murdered by accused named in F.I.R--Whereas, other was introduced by police in shape of statements of PWs implicating present petitioner to be murderer of deceased--Complainant while dissatisfying from above mentioned proceedings of police has also filed a private complaint, against those nominated in F.I.R., with contention that police with mala-fide, in order to destroy his case has let off his nominated accused and falsely implicated present petitioner--All above mentioned have made case of present petitioner as of further inquiry, entitling him for concession of bail--Petitioner has been sent to judicial lock was he was no more required for any further investigation and was previously non-convict.

[P. 737] A, B, C & D

Syed Zia Haider, Advocate for Petitioner.

Mr. Shoukat Ali Ghouri, Addl. P.G. for State.

Complainant in Person.

Date of hearing: 15.7.2014.

Order

The petitioner, namely, Muhammad Adeel, seeks post arrest bail in case F.I.R, No. 125 dated 3.5.2013, registered under Sections 302/34, P.P.C. at Police Station Makhdoom Pur, District Khanewal.

2. The precise facts are that Muhammad Asif, complainant had reported the matter to the police with the contention that within his view and presence as well as of Muhammad Hussain and Rasheed Ahmed, P.Ws, Messrs Rana Sohail, Rana Muhammad Zaheer (both armed with .30 bore pistols), Dr. Muhammad Afzal and Muhammad Tufail attacked at his father, Zahoor Hussain, during which Rana Sohail and Rana Muhammad Zaheer, accused with their respective pistols fired and fire-shots hit at the chest of his father, who fell down and died at the spot. During investigation, the above named persons, nominated in the F.I.R. were declared by the police to be innocent and on the basis of statements made by two persons, namely, Muhammad Shabbir and Khushi Muhammad under Sections 161 of Cr.P.C. on 29.5.2013 that they had seen the present petitioner while firing at Zahoor Hussain and committing his murder, the present petitioner has been arrested. Hence, the petition in hand.

3. The learned counsel for the petitioner has argued that the petitioner is innocent, who has falsely been involved and arrested in the case with mala fides; that the complainant, who at present, is available in the Court confirms his stance narrated in the F.I.R. and does not at all involve the present petitioner, towards commission of the alleged occurrence, in any manner whatsoever; that the complainant has also filed a private complaint against the above named accused nominated in the F.I.R.; that case against the petitioner requires further probe and inquiry; that the petitioner has been sent to the judicial lock up, he is no more required for any further investigation and is previously non-convict.

4. The learned Additional Prosecutor General has vehemently opposed the bail application but the complainant has not contested the bail petition, with the contention that present petitioner is not his accused, rather those named in the F.I.R. are murderer of his father.

5. Arguments of all the sides have been heard and the record has been perused.

6. The petitioner is not named in the F.I.R. As stated above, the complainant in the F.I.R. has categorically contended that within his view and that of Muhammad Hussain and Rasheed Ahmed P.Ws, the above said accused persons, nominated in the F.I.R. have committed murder of his father by firing.

7. The above named witnesses (Muhammad Hussain and Rasheed Ahmed) during their statements under Section 161 of Cr.P.C. have also implicated the above named persons, narrated in the F.I.R., towards commission of murder of Zahoor Hussain and have not named the present petitioner in any manner whatsoever.

8. The record shows that on 29.5.2013 i.e. after twenty six days of registration of the F.I.R., two persons, namely, Muhammad Shabbir and Khushi Muhammad have been introduced and their statements under Section 161 of Cr.P.C. have been recorded with the contention that they have seen the present petitioner, while committing murder of Zahoor Hussain by firing and then fleeing away.

9. There are two versions. One is the above mentioned made by the complainant in the F.I.R. that his father has been murdered by the accused named in the F.I.R. Whereas, the other is introduced by the police in the shape of statements of Muhammad Shabbir and Khushi Muhammad, implicating the present petitioner to be murderer of Zahoor Hussain.

10. It will be seen and determined during the trial that which of the above mentioned versions is true and correct.

11. The complainant while dissatisfying from the above mentioned proceedings of the police has also filed a private complaint, against those nominated in the F.I.R., with the contention that police with mala-fide, in order to destroy his case has let off his nominated accused and falsely implicated the present petitioner.

12. All the above mentioned have made the case of the present petitioner as of further inquiry, entitling him for the concession of bail.

13. The petitioner has been sent to the judicial lock up, he is no more required for any further investigation and is previously non-convict.

14. Resultantly, instant petition is accepted and the petitioner is admitted to bail subject to furnishing bail bonds in the sum of Rs. 1,00,000/- (rupees one lac only) with one surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail granted

PLJ 2014 Lahore 827
[Multan Bench Multan]
Present: Muhammad Tariq Abbasi, J.
MUHAMMAD AMIN--Petitioner
versus
JOP etc.--Respondents

W.P. No. 14868 of 2012, decided on 13.2.2014.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), Ss. 22-A & 22-B--Constitutional petition--Registriation of criminal case--Justice of Peace was not at all competent to recall order--Validity--Once an order permissible under law has been passed by Justice of Peace, then without any reason, cause or justification, its review or withdrawal is not permissible. [P. 829] A

2009 YLR 83 ref.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), S. 155--Non-cognizable offence--Reason was not sufficient for withdrawal of earlier order--Commission of non-cognizable offence as stated by Justice of Peace in the impugned order was no ground, not to carry on any proceedings--Even for commission of non-cognizable offence, due proceedings had been prescribed u/S. 155, C.P.C. [P. 829] B

Malik Muhammad Zafar Iqbal, Advocate for Petitioner.
Mr. Mazhar Jamil Qureshi, AAG.
Nemo for Respondents.

Date of hearing: 13.2.2014.

Order

Through the instant writ petition, the order dated 12.11.2012, passed by learned Ousticq of Peace (Respondent No. 1) has been challenged, whereby, the earlier order dated 31.10.2012 has been recalled.

2. The facts are that upon an application, moved by the present petitioner, under Section 22-A and 22-B, Cr.P.C., before the learned Justice of Peace, on 31.10.2012, a direction to the SHO concerned was issued to record version of the petitioner and if commission of a cognizable offence was made out, to register a criminal case. Thereafter, Mapal Khan (Respondent No. 5) moved another application, before the iearned Justice of Peace, for suspension and withdrawal of the abovementioned earlier order and consequently the learned Justice of Peace through order dated 12.11.2012 had recalled the above said earlier order. Hence the instant writ petition.

3. The learned counsel for the petitioner has argued that the learned Justice of Peace was not at all competent to recall the order dated 31.10.2012 being passed in due course of law and as such the impugned order dated 12.11.2012 being a patent illegality, is not sustainable.

4. The learned Law Officer has opposed the writ petition.

5. The arguments have been heard and record has been perused.

6. It has been observed that the abovementioned earlier order dated 31.10.2012 was not baseless but conditional that if commission of a cognizable offence was found to be made out then a criminal case should be registered. It has been found that the said order has been withdrawn through the order dated 12.11.2012, with the contention that commission of any cognizable offence was not made out.

7. I am afraid, the above said reason was not sufficient for withdrawal of the earlier order because towards its implementation, the Investigating Officer was obliged to see whether commission of a cognizable offence was made out or not.

8. Even otherwise, once an order permissible under the law has been passed by the learned Justice of Peace, then without any reason, cause or justification, its review or withdrawal is not permissible. Reference may be made, to case titled Aurangzeb Khan vs. District Police Officer and 4 others (2009 YLR 83). The relevant Paragraph of the judgment speaks as under:
"It is strange that despite categorical assertion of the applicant that the said S.H.O. was favouring the opposite party, the Court of learned 1st Additional Sessions Judge Hyderabad, instead of enforcing his earlier order, dated 11.12.2004, accepted/ entertained the application of S.H.O. of Police Station Makki Shah dated 22-12-2004 and passed the impugned order dated 1-2-2005 reviewing his earlier order and directing the applicant for filing of direct complaint. Passing of such order by the learned 1st Additional Sessions Judge Hyderabad, seems to be patent illegality which is liable to be corrected in exercise of revisional powers of this Court. Accordingly, this criminal revision application is allowed and disposed of in the terms that the applicant shall appear before the S.H.O. Police Station Makki Shah for recording of his statement, whereafter further action shall follow strictly in accordance with law."

9. Due to the reasons mentioned above, the order dated 12.11.2012 of the learned Justice of Peace, whereby the earlier order passed on 31.10.2012 has been recalled/reviewed, could not be termed to be justified, hence is not acceptable in the eye of law.

10. Furthermore,/commission of a non-cognizable offence, as stated by the learned Justice of Peace in the impugned order, is no ground, not to carry on any proceeding. Even for commission of non-cognizable offence, the due proceedings have been prescribed unc Section 155 of Cr.P.C.

11. Resultantly, the instant writ petition is allowed and order dated 12.11.2012 passed by learned Justice of Peace, whereby earlier order dated 31.10.2012 has been recalled, is set aside. However, it is made clear that the SHO concerned shall strictly follow the earlier order dated 31.10.2012 and shall carry on the proceedings within the four corners of law and procedure, i.e. under Sections 154, 155 or 157 of, Cr.P.C. and if required, under Section 182 of PPC.

(R.A.) Petition allowed

PLJ 2014 Lahore 830

[Multan Bench Multan]

Present: Muhammad Tariq Abbasi, J.

SADIQ HUSSAIN--Petitioner

versus

ADDITIONAL DISTRICT JUDGE, MULTAN etc.--Respondents

W.P. No. 1555 of 2011, heard on 9.4.2014.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Ex-parte decree--Application for setting aside of ex-parte decree--Petition was dismissed for non-prosecution--Ex-parte proceedings were initiated against respondent hence an application was moved by her to set aside proceedings--Due proceedings in the application were in progress, but due to absence of petitioner, his petition for setting aside of ex-parte decree was dismissed--It has been observed that trial Court, towards passing order, whereby during proceeding in an application moved by respondent for setting aside exparte proceedings was dismissed--Even when an application for restoration of petition for setting aside of ex-parte decree was moved, it was also turned down--Decision of the matter would be made on merit in accordance with law, after recording pro and contra evidence of the parties and technicalities would be avoided. [Pp. 831 & 832] A, B & C

2012 CLC 1503, 2002 CLD 345, 2009 PCr.LJ 619 & PLD 2011 Lah. 14 rel.

Mr. Muhammad Fazil, Advocate for Petitioner.

Rana Ayub Elahi, Advocate for Respondents.

Date of hearing: 9.4.2014.

Judgment

Through this writ petition judgment dated 11.1.2011, passed by the learned Addl. District Judge, Multan has been called in-question, whereby an appeal filed by the petitioner against the order dated 28.10.2009, passed by the learned Trial Court, through which an application moved by the petitioner for restoration of the petition, for setting aside of the ex-patte decree has been dismissed.

2. The precise facts are that the Respondent No. 3 filed a suit, against the petitioner, whereby she claimed maintenance allowance of herself as well as

two daughters namely Mst. Razia Bibi, Mst Fauzia Bibi (Respondents No. 4 & 5) and two sons namely Wajid Ali and Sajjad Hussain (Respondents No. 6 & 7). In the said suit, the petitioner appeared and requested for filing of the written statement but subsequently, became absent. Consequently, the suit was ex-parte decreed on 20.1.2007. The petitioner preferred a petition on 20.2.2007, whereby he sought setting aside of the abovementioned ex-parte decree. In the said petition, the issues were framed and the evidence of the petitioner was recorded but he again became ab5>ent, hence the petition was dismissed due to non-prosecution on 5.6.2009. For restoration of the said petition, the petitioner moved an application on 21.7.09, but the learned trial Court had dismissed if through order dated 28.10.2009. The petitioner filed an appeal but the same was dismissed through the impugned judgment dated 11.1.2011.

3. Feeling aggrieved, the instant writ petition has been preferred with the contention and the grounds that law always favours decision of cases on merits and not on the basis of technicalities but unfortunately both the learned Courts below, while not realizing the abovementioned preposition have knocked out the petitioner purely on the basis of technicalities and as such a great miscarriage of justice has done with him.

4. The learned counsel for the petitioner has advanced his arguments in the aoovementioried lines and grounds, whereas the learned counsel who has put appearance on behalf of the other side has vehemently opposed the petition.

5. Arguments of all the sides have been heard and the record has been perused.

6. A very strange situation has been noted. Through the plaint, the Respondent No. 3, has claimed maintenance for herself as well as her above-named daughters and sons. But both above-named sons of the parties who are of reasonable ages, are available in the Court standing at the side of the petitioner, with the contention that prior to filing of the suit, they are residing with the petitioner and as such, their mother has wrongly claimed the maintenance allowance, to their extent.

7. It has been observed that the ex-parte decree was passed on 20.1.2007, whereby the petitioner was held entitled for the maintenance allowance of the Respondent No. 3 as well as her above-named daughters and sons. But as stated above, the sons have come forward with the abovementioned contention. The petition for setting aside of the ex-parte decree was moved within time on 20.2.2007. In the said petition, evidence of the petitioner was recorded. In the meanwhile, the ex-parte proceedings were initiated against the Respondent No. 3, hence an application was moved by her to set aside the proceedings. The due proceedings in the said application were in progress, but due to the absence of the petitioner, his petition for setting aside of the ex-parte decree was dismissed on the abovementioned date (05.06.2009).

8. It has been observed that the learned trial Court, towards passing the order dated 5.6.2009, whereby during the proceeding in an application moved by the Respondent No. 3, for setting aside ex-party proceedings the petition for setting aside of the ex-parte decree, filed by the petitioner has been dismissed, has acted harshly. Even when an application for restoration of petition for setting aside of the ex-parte decree was moved, it was also turned down.

9. If the learned trial Court was bent upon to decide the petition for setting aside of the ex-parte decree, even then it should have discussed the evidence of the petitioner, available on the record and then decided the petition on merit and not in the manner as stated above.

10. When the matter in the shape of appeal came before the learned Addl. District Judge concerned, the abovementioned facts and circumstances were totally ignored and in a slipshod manner, the appeal was dismissed through the impugned judgment.

11. While considering all the abovementioned facts and circumstances, especially that two sons, maintenance of whom was also claimed and decreed ex-parte are with the petitioner with the abovementioned contention, I am of the view that the decision of the matter should be made on merit in accordance with law, after recording pro and contra evidence of the parties and technicalities should be avoided. Reliance in this respect is placed upon Haji Lal Shah vs Mst. Nooran through L.Rs. and others (2012 CLC 1503), Muhammad Nazir vs. Haji Zaka Ullah Khan (2002 CLD 345), Hafiz

Muhammad Saeed and 3 others vs. Government of the Punjab, Home Department through Secretary, Lahore and 2 others (2009 YLR 2475), Nasreen Bibi vs. The State (2009 P.Cr.LJ 619) and Mst. Safeer Begum and others vs. Additional District Judge and others (PLD 2011 Lahore 14).

12. The above said view has been strengthened/fortified by the august Supreme Court of Pakistan in the case reported as Kathiawar Cooperative Housing Society Ltd vs. Macca Masjid Trust (2009 SCMR 574).

13. Resultantly, the instant writ petition is accepted, the impugned judgment is set aside and the petition for setting aside of the ex-parte decree is restored with a direction to the learned trial Court to decide the petition within two months on receipt of this judgment. The abovementioned shall be subject to payment of all the outstanding interim maintenance allowance fixed by the learned Trial Court in respect of above-named minor girls namely Mst. Razia Bibi and Mst. Fauzia Bibi, by the petitioner, before the learned trial Court, within one month from today, failing which the instant writ petition shall be deemed to have been dismissed.

(R.A.) Petition accused

PLJ 2014 Cr.C. (Lahore) 956
[Multan Bench Multan]
Present: Muhammad Tariq Abbasi, J.
MUHAMMAD IMRAN--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 1650-B of 2014, decided on 21.4.2014.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 365-B & 376--Bail, grant of--False occurrence--Affidavit of eye-witness--Record showed that during investigation, Police reached at conclusion that alleged occurrence was not taken place and case was false, hence, recommended for its cancellation, but Area Magistrate did not agree to cancellation report prepared by Police--It has further been found that a star witness named in FIR has sworn an affidavit, to effect that alleged occurrence was never taken place--Above mentioned facts/proceedings could not be ignored and can rightly be termed to have made case of petitioner as of further inquiry--Bail granted. [P. 957] A, B & C

Ch. Khalid Mehmood Arain, Advocate for Petitioner.

Mian Abdul Qayyum, Additional Prosecutor General for State.

Mr. Safdar Hussain Sarsana, Advocate for Complainant.

Date of hearing: 21.4.2014.

Order

The petitioner namely Muhammad Imran seeks post arrest bail in case FIR No. 230/2013, dated 15.05.2013 registered under Sections 365B/376, PPC at Police Station, Luddan, District Vehari.

2. The precise allegations against the petitioner, as per FIR are that he as well as the other accused named in the FIR alongwith two unknown persons while scaling over the well, entered into the house and abducted the complainant and thereafter the petitioner and his co-accused had committed rape with the complainant, one after the other.

3. Earlier, the instant like bail applications filed by the petitioner have been dismissed and the instant petition has been preferred on the fresh ground that during the investigation, the alleged occurrence was found to be false, hence cancellation of the case was recommended and that an alleged eye-witness of the occurrence namely Salma Bibi had sworn the affidavit that no occurrence as alleged in the FIR was taken place.

4. Arguments of both the sides have been heard and the record has been perused.

5. The record shows that during the investigation, the Police reached at the conclusion that the alleged occurrence was not taken place and the case was false, hence, recommended for its cancellation, but the learned Area Magistrate did not agree to the cancellation report prepared by the Police.

6. It has further been found that Mst. Salma Bibi, a star witness named in the FIR has sworn an affidavit, to the effect that the alleged occurrence was never taken place.

7. The above mentioned facts/proceedings could not be ignored and can rightly be termed to have made the case of the petitioner as of further inquiry. In this regard, reliance can be placed on the cases reported as PLJ 2001 Cr.C. (Lahore) 1124" and "PLJ 2009 Cr.C. (Lahore) 629..

8. Resultantly the instant petition is accepted and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two lac only) with one surety in the like amount to the Satisfaction of the learned Trial Court.

(R.A.) Bail granted

PLJ 2014 Cr.C. (Lahore) 958

[Multan Bench Multan]

Present: Muhammad Tariq Abbasi, J.

HASNAIN ABBAS--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 5752-B of 2013, decided on 5.12.2013.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(iii), 337-L(ii), 148 & 149--Bail before arrest confirmed--Injury of bone of nose--Delay in FIR--Held: During investigation it has been found that only altercation at time of alleged occurrence look place and that neither any weapon was used nor is required to be recovered from petitioner--Medical person report of complainant is available on record and it is mentioned in it that possibility of fabrication could not be ruled out--Delay of eight days in lodging FIR has also been noted without any explanation. [P. 959] A & B

Ch. Khalid Mahmood Arain, Advocate for Petitioner.

Mr. Hassan Mahmood Khan Tareen, DPG for State.

Date of hearing: 5.12.2013.

Order

The petitioner seeks pre-arrest bail in case FIR No. 359/2013 dated 30.8.2013 registered under Sections 337-A(iii), 337-L(ii), 148/149, PPC at Police Station, Tulamba, District Khanewal.

2. The prosecution version embodied in the FIR is that the petitioner inflicted a sota blow at the nose of the complainant and consequently bone of the nose was bent.

3. Arguments heard. Record perused.

4. During investigation it has been found that only altercation at the time of alleged occurrence took place and that neither any weapon was used nor is required to be recovered from the petitioner.

5. It has transpired that the alleged occurrence took place on 22.8.2013 and the complainant had got him medically examined on 23.8.2013. The medical report of the complainant is available on the record and it is mentioned in it that possibility of the fabrication could not be ruled out. The delay of eight days in lodging the FIR has also been notice without any explanation.

6. All the above facts and circumstances to my mind, have made the case of the petitioner as that of further inquiry.

7. Resultantly, this petition is allowed and ad-interim pre-arrest bail already granted to the petitioner is confirmed subject to his furnishing fresh bail-bond in the sum of Rs. 50,000/- (Rupees fifty thousand only) with one surety in the like amount to the satisfaction of learned Trial Court.

(R.A.) Bail allowed

PLJ 2014 Lahore 1040

[Multan Bench Multan]

Present: Muhammad Tariq Abbasi, J.

MUREED HUSSAIN--Petitioner

versus

ADDL. SESSIONS JUDGE/JUSTICE OF PEACE, JAMPUR and 3 others--Respondents

W.P. No. 9076 of 2013, heard on 25.3.2014.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), Ss. 22-A, 22-B & 154--Constitutional petition--Registration of criminal case--Ex-officio justice of peace despite availability of Police report on record ignored it and failed to give any reason for not believing same--Validity--An Ex-officio justice of peace is not bound to seek report from police at every cost and he is fully competent to decide application and pass an order, even without any report by police--When a report is called, to know truth and real facts, then it should not be ignored--If Ex-officio Justice of Peace does not agree with report, then should give reasons, seeking and obtaining a police report but ignoring and passing an order, contrary to it, without assigning any reason could not be appreciated--Special care to such situation is required--Possibility of moving application for registration of case while concocting false story and to get rid of criminal case could not be ruled out--Petition was accepted. [P. 1042] A, B & C

Mr. Nasir-ud-Din Mahmood Ghazlani, Advocate for Petitioner.

Hafiz Muhammad Naveed Akhtar, Advocate for Respondent No. 2.

Mr. Mazhar Jamil Qureshi, AAG for State.

Date of hearing: 25.3.2014.

Judgment

This writ petition is directed against the order dated 25.7.2013 passed by the learned ex-officio justice of peace (Respondent No. 1), whereby in an application moved by Respondent No. 4, for registration of a criminal case against the present petitioner, a direction to the SHO has been made that he should record statement of the Respondent No. 4 under Section 154 of Cr. P. C. and perform the statutory duties.

2. It has been observed that abovementioned application has been made with the contention that Mumtaz Ahmad son of Respondent No 4 was serving with the present petitioner but due salary was not paid to him; that when the son of the Respondent No. 4 demanded his salary, the petitioner levelled false allegation of committing theft, from his petrol pump and expelled the son of Respondent No, 4 from the employment; that Sajjad Ahmad another son of Respondent No 4 returned home but Mumtaz Ahmad did not come; that when despite lapse of four days Mumtaz Ahmad, son of Respondent No. 4 did not return home, he was worried and started searching and when contacted the present petitioner, he made threats of dire consequences and that the above-named was confined by the present petitioner.

3. It has been noticed that when the matter in shape of the above-mentioned application came before the Ex-officio justice of Peace, a report was sought from the concerned police station, which was made and filed. According to the report, the sons of Respondent No. 4 namely Sajjad Ahmad and Mumtaz Ahmad, were involved in case FIR No. 268 dated 20.7.2013, registered under Section 381, PPC at police Station, Muhammad Pur, who did not join into investigation and that the Respondent No. 4 while concocting a false story had filed the above-mentioned application.

4. It has been found that the learned Ex-officio justice of Peace has failed to give any weight to the above-mentioned report, made by the police or even discuss it and preferred to pass the impugned order.

5. The purpose of the report/comments from the police has been described in detail in the case titled "Khizar Hayat and others vs. Inspector General of Police (Punjab) Lahore and others", reported as (PLD 2005 Lahore 470) in the following terms:--

"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 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-office 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 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 the peace should exercise caution and restraint in this regard and he may 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 complainants allegations. If the comments furnished by the office 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 above-mentioned dictum clearly indicates importance of the report of the police, so that real facts, should come on the record, but in the matter in hand, as stated above, the learned Ex-officio justice of peace, although has sought report from the police but despite its availability on the record, has ignored it and failed to give any reason for not believing the same.

7. An Ex-officio justice of peace is not bound to seek report from the police at every cost and he is fully competent to decide the application and pass an order, even without any report by the police. But when a report is called, to know the truth and real facts, as per the above-mentioned dictum, then it

should not be ignored. If Ex-officio justice of Peace does not agree with the report, then should give the reasons, Seeking and obtaining a police report but ignoring and passing an order, contrary to it, without assigning any reason could not be appreciated. Special care to this situation is required.

8. The record shows that on 25.6.2013, Mumtaz Ahmad, the alleged abductee was available before the learned Magistrate Section 30, Jampur, in case FIR No. 464 dated 27.7.2009, registered under Sections 324, 381-A, 148/149 of PPC at Police Station, Fazilpur. Therefore, the application moved by the Respondent No. 4, before the DPO Rajanpur on 27.6.2013 that his above-named son was kept in illegal confinement by the petitioner for last for 3/4 days has been found to be not true.

9. It has further been noticed that Mumtaz Ahmad, was involved in case FIR No. 268 dated 20.7.2013 registered under Section 381 of PPC at Police Station, Muhammad Pur, District Rajanpur on the complaint of the present Petitioner towards commission of the theft at his petrol pump. Therefore, possibility of moving above-mentioned application for registration of the case while concocting false story and to get rid of the above-mentioned criminal case could not be ruled out.

10. Resultantly, the instant writ petition is accepted, the impugned order is set aside and the application for registration of the case is dismissed.

11. Despite of the above-mentioned, the Respondent No. 4, if so advised, shall have the remedy of filing a private complaint, according to the dictum laid down in the cases reported as Khizer Hayat and others vs. Inspector-General of Police (Punjab), Lahore and others (PLD 2005 Lahore 470) and Rai Ashraf and others vs. Muhammad Saleem Bhatti and others (PLD 2010 SC 691).

(R.A.) Petition accepted

2014 Y L R 1921
[Lahore]
Before Muhammad Tariq Abbasi, J
GULZAR HUSSAIN SHAH and others---Petitioners
Versus
Mst. BIBI CHANGI and others---Respondents

Civil Revision No.531-D of 2003, heard on 8th May, 2014.

Islamic Law---
----Gift---Essentials---Declaration of gift by donor, acceptance by donee and delivery of possession were three essentials of gift---All elements of a valid gift had been proved in the present case, in favour of defendant through confidence-inspiring evidence---Donor remained alive for 12 years after execution of gift deed and never challenged the same in his life time---No evidence existed to indicate that donor was a sick or infirm person at the time of execution of gift deed or that such deed had been obtained through fraud, coercion or undue pressure---Donor did not revoke the gift either---Fraud could easily be asserted but to prove the same was very difficult---Both gift deeds were registered documents, presumption of truth was attached to such documents unless such presumption was rebutted through strong and cogent evidence---Plaintiffs failed to bring cogent evidence---Concurrent findings of courts below did not warrant interference---Revision was dismissed.
Siraj Din v. Mst. Jamilan and another PLD 1997 Lah. 633; Mst. Nagina Begum v. Mst. Tahzim Akhtar and others 2009 SCMR 623; Ghulam Ghous v. Muhammad Yasin and another 2009 SCMR 70; Mirza Muhammad Sharif and 2 others v. Mst. Nawab Bibi and 4 others 1993 SCMR 462; Abbas Ali Shah and 5 others v. Ghulam Ali and another 2004 SCMR 1342 and Muhammad Ali Khan v. Muhammad Ashraf 1989 SCMR 1415 rel.
Shaki Muhammad Kahut for Petitioners.
Ch. Imran Hassan Ali for Respondents.
Date of hearing: 8th May, 2014.

JUDGMENT
MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the judgments and decrees dated 24-1-2002, and 20-5-2003,

respectively, passed by the learned Senior Civil Judge, Chakwal and learned Additional District Judge, Chakwal.

2. Through the above mentioned judgment and decree dated 24-1-2002, a suit filed by Gulzar Hussain (petitioner No. 1), Zahoor Hussain Shah (petitioner No. 3) and Imdad Hussain Shah (predecessor-in-interest of the petitioner No. 2(a) to 2(f)), against the respondents Nos. 1 and 2, challenging the gift deeds dated 3-9-1980 and 16-4-1984 by Qurban Hussain Shah, in favour of Mst. Bibi Changi (respondent No. 1) to be based on fraud, hence illegal and void had been dismissed. Whereas through the above said judgment and decree dated 20-5-2003, the appeal filed by the petitioners had also been turned down.

3. Brief facts of the case are that the petitioners Nos. 1 and 3 and Predecessor-in-interest of the petitioners Nos. 2(a) to 2(f) had filed a suit, challenging the gift deeds dated 3-9-1980 and 16-4-1984 by Qurban Hussain Shah, in favour of Mst. Bibi Changi (respondent No.1), to be based on fraud. The said suit was contested by the respondent No. 1 through written statement, whereby the execution of the gift deeds was held to be quite in accordance with law, whereas the contentions narrated in the plaint to be totally incorrect, false and based on malafides.

4. To resolve the controversy between the parties, the learned Trial Court had framed the following issues:-

(1) Whether the suit is time-barred? OPD

(2) Whether the suit is barred under section 42 & 54 of the Specific Relief Act? OPD

(3) Whether the suit is under valued and the plaintiffs have not paid proper Court fee? OPD

(4) Whether the plaintiffs are owners in possession and Hissadar of the suit land? OPP

(5) Whether the Hibbanama dated 16-4-1984, on behalf of the Qurban Hussain Shah in favour of the defendant No. 1 (Mst. Bibi Changi) is illegal, without disposing mind, void and ineffective on the rights of the plaintiffs? OPP

(6) Relief.

5. Oral as well as documentary evidence of both the sides was recorded and finally the suit was dismissed through the judgment and decree dated 24-1-2002.

6. An appeal was preferred by the present petitioners Nos. 1 and 3, as well as the predecessor-in-interest of the petitioners No. 2(a) to 2(f), before the District Court, which for hearing came before the learned Additional District Judge at Chakwal, from where the judgment and decree dated 20-5-2003 was pronounced and the appeal was dismissed.

7. Consequently, the instant revision petition has been preferred, with the contention and the grounds that the judgments and decrees of both the learned courts below being based on conjectures, surmises, misreading and non reading of the material available on the record are not acceptable under the law and liable to be set aside.

8. The learned counsel for the petitioners has advanced his arguments in the above mentioned lines. Whereas the learned counsel appearing on behalf of other side has vehemently opposed the revision petition and the grounds taken therein.

9. Arguments heard and record perused.

10. The making of a valid gift is dependent upon three essential requirements as are enumerated in section 149 of the book of Muhammadan law by D.F. Mulla:--

(1) A declaration of gift by donor.

(2) The acceptance of gift by the donee.

(3) Delivery of the possession of the subject property of the gift by the donor to the donee.

In a reported judgment titled as Siraj Din v. Mst. Jamilan and another (PLD 1997 Lahore 633) it is laid down that when the making of a gift have been claimed by a legal heir then the three ingredients of declaration of the gift, its acceptance by the donee and delivery of possession must be proved through unambiguous and even impeachable evidence by the donee of such a gift. All the elements of a valid gift in favour of defendant/ respondent No.1 by her husband Qurban Hussain Shah are proved in the instant case by confidence-inspiring evidence; even the reading of the document Exh. P-4 makes out a clear and an express intension of the donor to make the gift of the subject property in favour of his wife. Perusal of Exh.P-6 (Register Haqdaran Zamin for the years 1991-92) produced by the plaintiffs/petitioners themselves would reveal that the defendant No.1/respondent No.1 is in possession of the disputed property, hence the basic three ingredients of a valid gift, were fulfilled, as held by the Apex Court in the Judgment 2009 SCMR 623 titled Mst. Nagina Begum v. Mst. Tahzim Akhtar and others.

11. The record shows that the gift deeds in question were executed by Qurban Hussain Shah, in favour of his wife namely Mst. Bibi Changi (respondent No. 1) on 3-9-1980 and 16-4-1984.

12. There appears to be no controversy between the parties that Qurban Hussain Shah was the original owner of the suit property and he transferred the property in question in favour of his wife, (respondent No.1) through registered gift deeds dated 3-9-1980 and 16-4-1984. After execution of the above mentioned deeds, the above named executant/donor, remained alive for about 12 years and died on 30-8-1996. The donor during his life time had never challenged the deeds. No doubt, it is true that a gift executed by a sick person dependent at the mercy of his legal heirs under compelling circumstances, is illegal and is not binding upon donor but is equally true that in the present case nothing exists on the file to indicate that Qurban Hussain Shah was sick and infirm at the time of execution of the documents in

question and the same had been obtained by the respondent No.1 through fraud, coercion and undue pressure.

13. The record shows that during his life time, Qurban Hussain Shah, (deceased) neither revoked the gift nor he made any indication of any fraud or undue influence exercised on him to constitute the said gift. The present petitioners, who are his distinct kindred, remained satisfied and silent and after his death, they had filed the suit.

14. It is available on the record that at the time of execution of the above mentioned documents and even thereafter, the above-named donor remained healthy, therefore the version narrated in the plaint that the donor was not in senses, could not be established on the record. The mere assertion of the petitioners that a fraud had been practised upon them and they had been deprived of their shares in the estate of Qurban Hussain Shah (deceased), without a positive attempt on their part to substantiate the same, is of no consequence. Needless to add that it is very easy to assert fraud but it is difficult to prove the same. Reliance in this respect is placed upon the judgment of the Hon'ble Supreme Court of Pakistan reported as (2009 SCMR 70) titled Ghulam Ghous v. Muhammad Yasin and another.

15. Both the above mentioned deeds are registered documents, hence presumption of truth is attached to them, until and unless they are rebutted through strong and cogent evidence and the petitioners have failed to bring any such evidence on the record. Therefore, no reason, cause or justification to hold the documents otherwise. In this regard, reliance can be made to the cases titled "Mirza Muhammad Sharif and 2 others v. Mst. Nawab Bibi and 4 others" (1993 SCMR 462); and "Abbas Ali Shah and 5 others v. Ghulam Ali and another" (2004 SCMR 1342).

16. It has been observed that Qurban Hussain Shah was issueless and was looked after and cared by his wife (respondent No. 1) and the present petitioners came into picture after the death of the above named executant, just to get his property.

17. Concurrent findings of two courts below with regard to the validity and genuineness of gift were recorded against the petitioners which are not interferable in revisional jurisdiction as held by the Hon'ble Supreme Court in the judgment reported as (1989 SCMR 1415) titled Muhammad Ali Khan v. Muhammad Ashraf.

18. No illegality, irregularity or jurisdictional error, in the concurrent findings of the learned courts below, which resulted into the impugned judgments and decrees, could either be pointed out or observed, hence not interferable in revisional jurisdiction.

19. Resultantly, the revision petition being devoid of any force and merit is dismissed, with no order as to costs.

ARK/G-29/L Revision dismissed.

2014 Y L R 1947

[Lahore]

Before Abdus Sattar Asghar and Muhammad Tariq Abbasi, JJ

NISAR AHMAD alias SARU---Petitioner

Versus

The STATE---Respondent

Criminal Appeal No.76-J and Murder Reference No.117-RWP of 2009, heard on 15th May, 2014.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Incident was a broad daylight occurrence, which had taken place on the road side, and was witnessed by prosecution witnesses who had established their presence at the spot; to whom no enmity or grudge against accused had been suggested---Was not believable nor expected that actual and real culprit had been let off and accused had been substituted without any reason or cause---Matter having been reported to the Police there was promptly, there was no chance of any deliberation or consultation---Accused was a desperate criminal---Presence and availability of both the complainant and prosecution witness in the bus in question and at the spot, which was natural, could not be held objectionable---Complainant being real brother, and prosecution witness being real mother of deceased, were closely related to each other and the deceased, but the defence had failed to suggest any enmity or grudge against accused---Due to mere relationship, their evidence could not be discarded, which otherwise was trustworthy and confidence-inspiring---Injuries on the body of the deceased had been found to be of same description and locale as narrated in the F.I.R., and the statements of prosecution witnesses---Defence version that medical evidence and ocular account contradicted each other had no weight---Empties recovered from the spot and recovery of Kalashnikov from accused were sealed and were sent to Forensic Science Laboratory, report of which was positive---Accused after commission of offence fled away, and was arrested after two months and ten days---Statements of the prosecution witnesses, especially eye-witnesses were concurrent, corroborated and confidence-inspiring---Minor discrepancies being casual in nature and sign of natural deposition, were ignorable---Defence had itself discarded its defence version---Impugned judgment, not suffering from any legal infirmity, warranted no interference---Desperate behaviour and act of accused, which resulted into

death of two innocent persons, without any fault, did not entitle accused for any leniency or concession in sentence.

Saeed and 2 others v. The State and another 2003 SCMR 747; Haji v. The State 2010 SCMR 650; Farooq Shah v. The State 2013 PCr.LJ 688; Muhammad Aslam and others v. The State and another PLD 2009 SC 777; Muhammad Javaid v. The State 2007 SCMR 324 and Khurram Malik and others v. The State and others PLD 2006 S C 354 and Muhammad Ahmad (Mahmood Ahmed) and another v. The State 2010 SCMR 660 rel.

Basharat Ullah Khan and Syeda B.H. Shan for Appellant.

Raja Shakeel Ahmad for the Complainant.

Mirza Muhammad Usman, D.P.G. for the State.

Date of hearing: 15th May, 204.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single judgment is intended to decide the above-captioned Murder Reference No.117/Rwp of 2009 and Criminal Appeal No.76-J of 2009, as both have emanated from the single judgment dated 23-10-2009, passed by the learned Addl. Sessions Judge, Jhelum.

2. Through the abovementioned impugned judgment, Nisar Ahmad alias Saru, appellant, has been convicted under section 302(b) of P.P.C., on two counts, for commission of Qatal-e-amad of Farhat Hussain and Mst. Parveen Akhtar and sentenced to death, with compensation of Rs.50,000 each under section 544-A of Cr.P.C, payable to the legal heirs of the above-named deceased, otherwise to undergo S.I for six months each.

3. The facts are that Babar Hussain complainant (P.W.12), had reported the matter to the police through statement (Exh.P.G) with the contention that he was resident of village Alang; that his elder brother namely Nasir Hussain, was having a bus Registration No.1398/CHF, which was being plied from Jhelum to Nara rout; that his elder brother Farhat Hussain (deceased) was conductor in the said bus, whereas Ghulam Mehdi was the driver; that on the day of occurrence, the bus proceeded from Jhelum, for Nara at about 1.40 p.m. and when reached at Alang Bus stop, the complainant and his mother Mst. Parvin Akhtar (P.W.13) to get the medicine, also boarded in the bus and sat at the front side; that at about 3.30 p.m., the bus stop at Chak Mohamada and his brother Farhat Hussain (deceased) de-boarded from the bus and stood at the front of the hotel of Ghulam Rasool, while facing towards east; that in the meanwhile, Nisar Ahmad alias Saru, (appellant) armed with Kalashankov

emerged from the small street and from the backside, fired a burst at Farhat Hussain (deceased), which landed at his back and he fell down; that from the window of the bus, Mst. Parveen Akhtar, (deceased) came down and when she was standing in front of Farhat Hussain (deceased), she also sustained bullets of burst at right side of her chest and she also fell down; that Shahid Raza, who was coming down from the bus also sustained fire-shots at his right (shin) and he became injured; that Farhat Hussain and Mst. Parvin Akhtar succumbed to the injuries at the spot; that the occurrence was witnessed by the complainant (P.W.12), his mother Mst. Parveen Akhtar (P.W.13) and the passengers of the bus; that the motive of the occurrence was demand of money by Nisar Ahmad alias Saru (appellant) from Farhat Hussain (deceased) about a week earlier, which was not paid to him by the deceased, due to which the appellant had committed the murder of Farhat Hussain and Mst. Parvin Akhtar without any fault and also caused injury to Shahid Raza.

4. On the basis of abovementioned complaint, F.I.R. No.263 (Exh.PG/1), dated 13-12-2008 under sections 302/324 P.P.C. was registered at Police Station, Chhotala, District Jhelum. The investigation of the case was carried on and the appellant was challaned to the court.

5. The learned Trial Court, had conducted the preliminary proceedings and formally charge-sheeted the appellant on 18-6-2009. He pleaded not guilty and claimed trial hence the prosecution witnesses were summoned and recorded.

P.W.1, Dr. Shahid Baig, had conducted the post-mortem examination of the dead-body of Farhat Hussain (deceased) on 13-12-2008 vide the report (Exh.PA) and diagrams (Exh.PA/1 and Exh.PA/2). During the said examination, three firearm entry wounds at the back side of the chest at the level of sixth vertebra, eight thoracic vertebra and eleventh vertebra whereas three exit wounds were observed on the body. As per the doctor, the injuries were ante-mortem in nature which were sufficient to cause death in ordinary course of nature and that within few minutes of the receipt of the injuries, the deceased had lost his life. This witness had also examined Shahid Raza injured through MLR (Exh.PB), when a firearm entry and exit wound at his right leg was observed.

P.W.2, Ghulam Abbas, Constable had transmitted a sealed parcel allegedly containing Kalashankov from the police to the office of FSL, Lahore, intact.

P.W.3 Talat Sabir, Constable had got conducted the post-mortem examination of the dead body of Parveen Akhtar and also attested the memo Exh.PC, through which the last worn cloths and ornaments of the deceased (P-1, P-2,

P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10 & P-11) were taken into possession by the Investigating Officer.

P.W.4, Shafaqat Ahmad, Head Constable had kept a Kalashankov along with 15 live bullets in the Malkhana on 23-2-2009 and the parcel of which was prepare on 27-2-2009 was handed over by him to Ghulam Abbas Constable on 4-3-2009 for its dispatch in the office of FSL, Lahore, intact.

P.W.5, Muhammad Siddique S.I, had taken into possession, the last worn clothes of the Farhat Hussain, (deceased) (P-12, P-13, P-14 and P-15), through memo Exh.PT, attested by Khizar Hayat Constable (P.W.6). This witness had also secured the last worn clothes of Mst. Parveen Akhtar (deceased) (P-1 to P-11) through memo Exh.PC, attested by Talat Sabir, Constable (P.W.3).

P.W.6, Khizar Hayat Constable, had got conducted the post-mortem examination of the dead-body of Farhat Hussain (deceased) and also attested the memo Exh.PD through which the abovementioned last worn clothes of the deceased were taken into possession by the Investigating Officer.

P.W.7, Muhammad Khalil Patwari, had drafted the scale-site plans of the spot, Exh.PE, Exh.PE/1, Exh.PE/2 and handed over the same to the Investigating Officer.

P.W.8, Sajid Hussain Constable had transmitted three parcels relating to this case, one containing empties, the other blood-stained earth and the third not remember to him to the FSL, Lahore.

P.W.9 Naqeeb Sultan, Constable, had made the report Exh.PE/1 on the non-bailable warrant of arrest Exh.PE, issued against the appellant. He had also conducted service of proclamation Exh.PF, issued for appearance of the appellant and made the report Exh.PF/1.

P.W.10, Muhammad Nawaz, had chalked out the formal F.I.R., Exh.PG.

P.W.11, Lady Dr. Adeela Kanwal, had carried on the post- mortem examination of the dead-body of Mst. Parveen Akhtar and prepared the report Exh.PF and diagrams Exh.PF/1 and Exh.PF/2. During the said examination, a firearm entry wound at the right side of her breast and an entry wound at outer of the right breast, whereas an abrasion in the left lumber-region of the deceased were noticed. As per doctor, the abovementioned firearm injuries were sufficient to cause death in ordinary course of nature and that immediately on receipt of the injuries, the death of the lady had occurred.

P.W.12 Babar Hussain, the complainant and an eye-witness of the occurrence, had narrated the same facts as were stated by him in his statement before the police (Exh.PG). He had also attested the memos Exh.PH, Exh.PK, through

which parcels of blood-stained earth and two empties of Kalashankov collected from the spot were respectively taken by the Investigating Officer into possession. This witness had also attested the memo Exh.PK, through which a sealed parcel of the Kalashankov was secured by the Investigating Officer.

P.W.13 Mst. Parveen Akhtar, the mother of the deceased and also an eye-witness of the occurrence, during her statement had supported and corroborated the version of the P.W.12 in all its four corners.

P.W.14, Muhammad Aslam, had identified the dead-body of Farhat Hussain at the time of its post-mortem examination.

P.W.15, Mashooq Hussain, had attested the memo Exh.PJ, through which, the sealed parcel allegedly containing the cotton swabs through which the blood from the place of murder of Mst. Parveen Akhtar was taken into possession by the Investigating Officer. This witness had also identified the dead-body of the above-named deceased at the time of its post-mortem examination.

P.W.16, Malik Ghulam Abbas Inspector had conducted the investigation of the case, through which he carried on proceedings fully narrated in his statement.

P.W.17, Muhammad Saleem, S.I had also investigated the case and conducted the proceedings described in his statement.

P.W.18, Nisar Ahmad, S.I had also conducted the proceedings towards issuance, execution and service of the warrant and proclamations issued for appearance of the appellant. He had also formally arrested the appellant, in this case on 23-2-2009, when the appellant was already in custody in case F.I.R. No.37/09, under sections 324/353 and 186 of P.P.C. registered at Police Chotala and taken into possession Kalashankov (P-17) after making a sealed parcel thereof through memo Exh.PK, attested by the P.W. This witness had also got transmitted the parcel of the Kalashankov to the office of FSL, Lahore.

6. After got examining the above-named witnesses, the learned Prosecutor had tendered in evidence the reports of Chemical Examiner, Serologist and FSL as Exh.PT, Exh.PU, Exh.PV, Exh.P.W. and Exh.PX respectively and closed the case for the prosecution.

7. After conclusion of the prosecution evidence and closure of the case, the statement of the appellant as required under section 342 of Cr.P.C was recorded, during which the question arising out of the prosecution evidence

were put to him and he denied almost all such question. In reply to question, "why this case against you and why the P.Ws. have deposed against you", the appellant had made the following statement:--

"I am innocent. Ghulam Abbas SHO/Inspector has registered a false case against me in connivance with the complainant of this case due to the fact that Ghulam Abbas SHO has a personal grudge against me. Actually the relatives of Mst. Parveen Akhtar have committed the murder of Farhat Hussain and Parveen Akhtar after finding them in objectionable condition and due to Ghairat and injured Shahid Raza as passerby. All the P.Ws are related inter se. They are interested witnesses. They were not present at the time of occurrence."

8. At that time, the appellant had opted to lead evidence in his defence and refused to make statement under section 340(2) of Cr. P.C, but had not led any evidence in his defence.

9. After completing all the abovementioned proceedings, the learned trial Court had pronounced the impugned judgment dated 23-10-2009, whereby the appellant was convicted and sentenced in the abovementioned terms. Consequently, the murder reference and the appeal in hand.

10. The learned counsel for the appellant has argued that the appellant is innocent and has falsely been involved in the case with mala fide despite the fact that neither he was available at the spot nor taken any part in the occurrence; that the appellant has been made an escape-goat due to his grudge with the SHO; that the medical evidence has negated the ocular account; that dimension of the injuries indicates that same were not caused by Kalashankov, but caused with some weapons of different bore; that the statements of the prosecution witnesses are full of material contradictions, almost on all material particulars; that the alleged recoveries could not be proved; that the alleged motive could not be established and has made whole of the prosecution version highly doubtful; that the eye-witnesses were not available at the spot, but introduced subsequently; that independent and natural witnesses were not associated into the proceedings, hence the presumptions is that they were not supporting the prosecution version; that the deceased when were seen by the relatives of the lady deceased in an objectionable condition, were done to death by them, but the appellant was

falsely substituted; that charge against the appellant was not proved but the learned Trial Court had erred in passing the impugned judgment and convicting the appellant, hence the appellant deserves acquittal.

11. The learned D.P.G. assisted by learned counsel for the complainant while supporting the impugned judgment to be passed on correct appreciation and evaluation of the evidence and the material available on the record have vehemently opposed the appeal.

12. Arguments of all the sides have been heard and record has been perused.
13. It was a broad-daylight occurrence, which was taken place at the roadside. The matter was immediately reported to the police, hence no chance of any deliberation or consultation as alleged by the defence.

14. The complainant (P.W.12) in the complaint (Exh.PG) has narrated the specific motive that the appellant demanded the amount from the deceased, which was not paid to him, hence the appellant had fired at the deceased, which not only had resulted into his death but also of Mst. Parveen Akhtar and injuries to Shahid Raza. During evidence, the complainant (P.W.12) as well as Mst. Parveen Akhtar (P.W.13), the brother and mother of Farhat Hussain (deceased), had explained the abovementioned motive that the demand of amount by the appellant was "Jagga", which was not paid by Farhat Hussain (deceased). The defence had failed to contradict the above-named witnesses towards abovementioned motive; hence it can rightly be believed that the appellant was a desperate criminal.

15. Babar Hussain, complainant (P.W.12) and Mst. Parveen Akhtar (P.W.13) had justified their presence and availability in the bus that they had boarded in it to get medicine. During cross-examination, an explanation had come on the record that the medicine was to be obtained by them from the "Hakeem". Therefore, the presence and availability of both the above-named witnesses in the bus and at the spot could not be held objectionable, as alleged by the defence.

16. Although, Babar Hussain, complainant (P.W.12) being real brother and Mst. Parven Akhtar (P.W.13) being real mother of Farhat Hussain, deceased are closely related to each other and the said deceased but during whole of the evidence, the defence has failed to suggest their any enmity or grudge with

the appellant, hence due to mere relationship, their evidence could not be discarded, which otherwise, is trustworthy and confidence-inspiring. In this regard, reliance may be placed on the case-law reported as (2003 SCMR 747) titled Saeed and 2 others v. The State and another Judgment of Apex Court reported as Haji v. The State (2010 SCMR 650). The relevant portion whereof reads as under:--

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

17. During medical examination of the deceased, the injuries have been found to be of the same description and location as narrated in the complaint the F.I.R. and the statements of the above-named eye-witnesses (P.W.12 and P.W.13), hence the defence version that the medical evidence and ocular account contradict each other has no weight.

18. It has been brought on the record that the empties of the Kalashankov were recovered from the spot which were made into a sealed parcel and then sent to the Laboratory. After recovery of the Kalashankov from the appellant, it was also made into a sealed parcel and sent to the Laboratory for the purpose of matching. The report of the FSL, Exh.PX, is positive, meaning thereby that the empties collected from the spot were fired from the Kalashankov recovered from the appellant.

19. It has been brought on the record that after commission of the occurrence, the appellant fled away and despite adoption of all the legal modes, did not turn up and declared a proclaimed offender. Thereafter, he was arrested in this case, on 23-2-2009 i.e. after two months and ten days that too when he was under arrest in a police encounter case vide F.I.R. No.37/09 registered under sections 324, 353, 186 P.P.C. At the time of arrest in the above said case, a Kalashankov was recovered from him, which later on was taken into

possession in the instant case, made into a sealed parcel and then sent to the Laboratory for analysis, from where the abovementioned report was made. Therefore, taking the Kalashankov into possession in the instant case, although recovered in the abovementioned police encounter case, could not be termed to be a strange and as such the defence objection in this regard is not valid.

20. As stated above, it was a daylight occurrence, which was witnessed by the above-named witnesses, who had established their presence at the spot, to whom no enmity or grudge with the appellant had even been suggested, hence it is not believable and expectable that actual and real culprit had been let off and the appellant had been substituted without any reason or cause.

21. The statements of the prosecution witnesses, especially eye-witnesses, are concurrent, corroborative and confidence-inspiring. No material contradiction in the statements of the witnesses could be pointed out or observed. The minor discrepancies being casual in nature and sign of natural deposition are ignorable. Reliance in this regard is respectfully placed upon the judgments reported as FAROOQ SHAH v. THE STATE (2013 PCr.LJ 688).

22. The appellant/accused, had taken a defence of his alleged grudge with the S.H.O., but has failed to establish the same despite due opportunity.

23. If Shahid Raza, due to fear of the appellant had not joined into the investigation, then due to said sole reason, whole of the prosecution story could not be brushed aside.

24. It is very strange that on one hand, the defence had alleged that the deceased when were seen in an objectionable ondition, by the relatives of the Mst. Parveen Akhtar, (deceased), were done to death by them, but on the other hand, by putting the suggestion to the P.W.12 and P.W.13, had admitted the time and place of occurrence as stated by the prosecution to be of broad daylight and at the roadside. Therefore, the defence itself had discarded its abovementioned alleged version.

25. In a number of judgments the Hon'ble Supreme Court of Pakistan has held that normal sentence of Qatl-e-Amd is death and in the absence of any mitigating or extenuating circumstances the sentence of death cannot be

converted into life imprisonment. Reliance is respectfully placed upon MUHAMMAD ASLAM and others v. THE STATE and another (PLD 2009 SC 777) MUHAMMAD JAVAID v. THE STATE (2007 SCMR 324) and KHURRAM MALIK AND OTHERS v. THE STATE AND OTHERS (PLD 2006 S C 354).

26. The Hon'ble Supreme Court of Pakistan in the case titled "MUHAMMAD AHMAD (MAHMOOD AHMED) and another v. THE STATE (2010 SCMR 660) at page 676 observed as under:--

"34. Mr. Muhammad Akram Sheikh, the learned Senior Advocate Supreme Court, finally prayed, in the alternative, for reduction in the quantum of punishment awarded to the said eight appellants.

35. This prayed of the learned counsel, to say the least, comes as a surprise to us. The lesser of the two penalties prescribed for qatl-e-amd, is meant only for situations where the circumstances which had led to a murder or the manner in which such a crime had got committed invoked some sympathy for the convict. The present occurrence, however, was a barbaric, a brutal and a savage display of a reckless disregard for human lives where the perpetrators of the crime did not deserve any mercy or leniency."

27. As a result for what has been discussed above, we are of the confirmed view that the impugned judgment does not suffer from any legal infirmity, hence warrants no interference. The abovementioned desperate behavior and act of the appellant which resulted into death of two innocent persons without any fault, does not entitle him for any leniency or concession in the sentence. Consequently, Criminal Appeal No.76-J of 2009 is dismissed, M.R. No.117/Rwp of 2009 is answered in positive and death sentence awarded to Nisar Ahmad alias Saru is confirmed.

HBT/N-27/L Appeal dismissed.

2014 Y L R 2167
[Lahore]
Before Muhammad Tariq Abbasi, J
MUHAMMAD ABID RASHEED---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.49 of 2014, heard on 10th February, 2014.

Criminal Procedure Code (V of 1898)---

----S. 514---Forfeiture of surety bond---Procedure to be adopted---Accused for whom petitioner stood surety, having absented himself from the court, bail of accused was dismissed in default and notice under S.514, Cr.P.C. was issued to the petitioner/surety; and attachment of the property of the petitioner, was directed---For proceedings under S.514, Cr.P.C., procedure which was to be adopted, was; (i) cancellation and forfeiture of bail bonds in favour of the State; (ii) issuance of show-cause notice to the surety that why penalty of the forfeited amount of bail bond could not be imposed and recovered from him; (iii) if the reply to the show-cause notice was made, or not made without any justification, then on the basis of the attending facts and circumstances, an order towards imposition of the penalty or otherwise, should be passed; (iv) for the recovery of the penalty amount, the proceedings towards attachment, and sale of the movable property of the surety, should be carried on; and (v) if the surety did not have any movable property, and failed to make payment of the penalty amount, then he could be sent to the civil jail for a term which could extend to six months---In the present case, Special Judge had not cancelled and forfeited the bail bonds, but had directly issued the notice under S.514, Cr.P.C.; and without making any struggle for reply to the show-cause notice, firstly had issued a warrant for attachment of the property of the surety; and without waiting for the same, had also issued bailable warrant of arrest against the surety---Impugned order could not be termed as justified, and was set aside with direction to the court to carry on the proceedings, accordingly.

Syeda Nazli Naz for Petitioner.
Hassan Mehmood Khan Tareen, D.P.G. for Respondent.
Date of hearing: 10th February, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through the instant Revision Petition, the orders dated 13-3-2013 and 25-4-2013 passed by the learned Special Judge (Central), Multan have been called in question.

2. The learned Deputy Prosecutor General, who is available before the Court, has been called, who has joined into the proceedings.

3. The facts, leading to the instant revision petition, are that in a bail application filed by Muhammad Imran Shazi, before the learned Special Judge (Central), Multan, Muhammad Abid Rasheed (present petitioner) stood surety of the above named accused. Subsequently, the accused absented himself from the Court on 13-3-2013, hence his bail was dismissed in default and notice under section 514, Cr.P.C. was issued to the surety (present petitioner) and then through order dated 25-4-2013, attachment of the property of the petitioner through Collector was directed.

4. It has been observed that the learned Trial Courts are not carrying on the proceedings, under section 514 of Cr.P.C. as per the prescribed criteria. Hence not only the orders passed by the said Courts are set aside by the higher forum(s), but also nasty(s) succeeds in getting undue advantage/concession. Therefore, for proper care and caution, by the learned Trial Courts, in initiating and carrying on the proceedings under section 514 of Cr.P.C., is required.

5. For guidance and perusal, the above mentioned provision is reproduced herein below:--

"Procedure on forfeiture of bond.---(1) Whenever it is proved to the satisfaction of the court by which a bond under this Code has been taken, or of the Court of a Magistrate of the First Class,

or when the bond is for appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall authorize the attachment and sale of any movable property belonging to such person without such limits, when endorsed by the District Officer (Revenue) within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

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

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(7) When any person who has furnished security under section 107 or section 118 is convicted of an offence the commission of which constitutes a breach of the conditions of this bond, or of a bond executed in lieu of his bond under section 514-B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety, or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

6. From the above mentioned provision, it can safely be determined that for the proceedings under section 514 of Cr.P.C., the following procedure should be adopted:--

(i) Cancellation and forfeiture of the bail bonds in favour of the State.

(ii) Issuance of show-cause notice to the surety that why penalty of the forfeited amount of bail bonds may not be imposed against, and recovered from him.

(iii) If the reply to the show cause notice is made or not made without any justification, then on the basis of the attending facts and circumstances, an order towards imposition of the penalty or otherwise should be passed.

(iv) For recovery of the penalty amount, if imposed, the proceedings towards attachment and sale of the movable property of the surety should be carried on.

(v) If the surety does not have any movable property and fails to make payment of the penalty amount, then he can be sent to the civil jail for a term which may extend to six months.

7. In the situation in hand, it has been found that the learned Special Judge (Central), Multan has not cancelled and forfeited the bail bonds, but has directly issued the notice under section 514, Cr.P.C. and without making any struggle for reply to the show cause notice, has firstly issued a warrant for attachment of the property of the surety/petitioner and then without waiting for the same has also issued bailable warrant of arrest against the surety/petitioner.

8. In the light of the above quoted provision and the criteria, the impugned orders could not be termed justified. Hence while accepting the instant revision petition, the impugned orders are set aside with a direction to the learned court concerned to carry on the proceedings, strictly as per the above mentioned procedure/criteria.

HBT/M-97/L Petition allowed.

2014 Y L R 2623

[Lahore]

Before Muhammad Tariq Abbasi, J

ZULFIQAR ALI---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No.357 of 2009, heard on 16th April, 2014.

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

----Ss. 302, 337-H(2) & 34---Qatl-e-amd, hurt by rash or negligent act, common intention---Appreciation of evidence---Benefit of doubt---Injured-victim deposing in favour of accused---Effect---No injury on the person of deceased was attributed to the accused---Accused was only alleged to have inflicted a club blow on the jaw of the injured-victim during the occurrence---Said injured-victim was not examined as a prosecution witness but was given up as being won-over---Said injured victim in fact made a statement in defence of accused by stating that no injury was caused to him; that accused reached the spot empty handed, after the occurrence; that accused was involved in the case as he was closely related to the co-accused persons, and also because his father was a rich person---Investigating Officer admitted in his cross-examination that many persons appeared before him to state that accused only tried to rescue/ intervene during the occurrence, and was empty-handed and did not cause any injury to anyone---Prosecution witnesses did not utter a single word to the effect that accused and co-accused persons arrived at the spot with pre-planning and pre-meditation or after sharing a common intention---Accused was acquitted of the charge in such circumstances, while giving him benefit of doubt---Appeal was allowed accordingly.

(b) Criminal trial---

----Evidence---Standard of proof---Prosecution should prove its case against accused beyond shadow of all reasonable doubts---Decision of criminal cases on the basis of presumptions was not allowed at all.

Ch. Faqir Muhammad for Appellant.

Mian Abdul Qayyum, A.P.-G. for the State.

Sardar Usman Sharif Khosa for Complainant.

Date of hearing: 16th April, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this appeal, Zulfiqar Ali, appellant has challenged his conviction and sentence, awarded to him through the judgment dated 25-5-2009 passed by the learned Addl. Sessions Judge, Dera Ghazi Khan.

2. Through the abovementioned judgment, the appellant was convicted under section 302(b) read with section 34, P.P.C. and sentenced to imprisonment for life, with compensation of Rs.50,000 under section 544-A of Cr.P.C. payable to the legal heirs of the deceased, otherwise, to further undergo six months' S.I. He was also convicted under section 337-H(2) of P.P.C. and sentenced to three months' R.I. It was directed that both the abovementioned sentences shall run concurrently and the appellant will be entitled for the benefit of section 382-B of Cr.P.C.

3. The precise facts are that the appellant, along with two others namely Riaz and Fayyaz (since P.O.) was booked in case F.I.R. No.761 dated 15-9-2008 registered under sections 302, 337-H(2), 324/34, P.P.C. at Police Station, Saddar D.G. Khan, with the allegation of attacking at Ghulam Yasin complainant (P.W.4), Munir Ahmad (given up P.W.), Sadiq Hussain (P.W.5), Atta Muhammad (DW-1) and Saeed Ahmad (deceased), during which the appellant had allegedly inflicted a club blow and caused injury at the jaw of Atta Muhammad (DW-1), whereas Riaz accused (P.O) inflicted a hatchet blow at the head of Saeed Ahmad, who later on succumbed to the injury and that during the occurrence Fayyaz accused (since P.O.) had made aerial firing.

4. During the investigation, Riaz and Fayyaz co-accused were declared to be proclaimed offenders whereas the appellant was challaned to the court.

5. After the required proceedings, the appellant was formally charge sheeted on 3-12-2008. He pleaded not guilty and claimed trial, hence the prosecution witnesses were summoned and recorded.

P.W.1 Riaz Hussain, Constable, had got conducted the post-mortem examination of the dead-body of Saeed Ahmad at Nishtar Hospital, Multan and produced the last worn clothes of the deceased, which were handed over to him by the doctor, to the Investigating Officer.

P.W.2, Zaka Ullah Moharrar/Head Constable, had kept a sealed parcel relating to this case, allegedly containing blood-stained earth, in the Malkhana and thereafter handed it over to Muhammad Boota Constable for its onward transmission and dispatch in the office of Chemical Examiner, Lahore intact.

P.W.3, Muhammad Boota, Constable had transmitted a sealed sample parcel relating to this case, allegedly containing blood-stained earth, from the Malkhana of the police station to the office of Chemical Examiner at Lahore intact.

P.W.4, Ghulam Yasin complainant as well as an alleged eye-witness, during statement had narrated almost the same facts as were stated by him in the complaint Exh.PA. He had also attested the memo Exh.PB, through which the blood-stained earth collected from the spot was taken into possession by the Investigating Officer.

P.W.5 Sadiq Hussain another eye witness had supported the version of the Ghulam Yasin complainant (P.W.4).

P.W.6 Muhammad Ibrahim, had identified the dead-body of Saeed Ahmad, before the doctor, at the time of its postmortem examination. He had also attested memo Exh.PC, through which the Investigating Officer had taken into possession the last worn blood-stained clothes of the deceased (P-1, P-2 and P-3). He had also attested recovery memo Exh.PD, through which club/sota (P-4) allegedly got recovered by Zulfiqar appellant was taken into possession by the Investigating Officer.

P.W.7, Dr. Khalid Naveed had firstly medically examined Saeed Ahmad, the then injured and Atta Ullah (DW-1) and prepared the reports. After death of Saeed Ahmad, this witness had also conducted post-mortem examination of the body, through the report Exh.PE and the diagrams Exh.PE/1 and Exh.PE/2.

P.W.8, Irshad Hussain, S.I, had investigated the case, during which he interrogated Zulfiqar Ali appellant, who made a disclosure and then led to the recovery of club/sota (P-4), which was taken into possession, through recovery memo Exh.PD. This witness had also recorded statements of the concerned witnesses under section 161 of Cr.P.C.

P.W.9, Ghulam Shabbir, S.I, had also investigated the case, during which he recorded the statement/complaint (Exh.P.A) made by Ghulam Yasin and for registration of the case sent it to the police station. During his further proceedings, he prepared the documents fully described in his statement and also recorded the statements under section 161 of Cr.P.C. of the concerned witness and finally challaned Zulfiqar appellant to the court. He had also given secondary evidence towards drafting of the F.I.R. (Exh.PA/2) by Muhammad Ismail, S.I.

P.W.10, Sajjad Hussain, Patwari, had drafted the un-scaled site plans Exh.PN, Exh.PN/1 and Exh.PN/2, of the spot and handed over the same, to the Investigating Officer.

6. During the trial, Atta Muhammad and Murid Hussain P. Ws. were given up being won over by the accused, whereas Munir Ahmad, PW, being un-necessary.

7. After leading the abovementioned evidence, the learned Prosecutor through the statement dated 29-4-2009, had tendered in evidence, the reports of the Chemical Examiner and the Serologist as Exh.PP and Exh.P.Q respectively and closed the case for the prosecution.

8. After closure of the prosecution case, the statement of the appellant was recorded, under section 342 of Cr.P.C, during which questions arising out of the prosecution evidence were put to him and he denied almost all the said questions. In reply to the question "why this case against you and why the P.Ws. deposed against you"? the appellant stated as under:--

"I did not participate in the occurrence nor I injured any person. Murid had a dispute of land with Fayyaz and Riaz both P.O. of this case. As a result of which occurrence took place actually I am resident of Band Hotwala and my house is near the place of occurrence. On the noise I came out from my house empty handed to rescue the occurrence but complainant party falsely involved me in this case due to my relationship with Fayyaz and Riaz both P.O. who are my maternal cousins. All the P.Ws. are inter se related and interested witnesses."

The appellant did not opt to make his statement on oath, but opted to lead evidence in his defence.

9. In defence, Atta Muhammad, who as per prosecution story, allegedly sustained injury at the hands of the appellant, had made a statement as DW-1, during which he deposed that Zulfiqar Ali, appellant, reached at the spot after the occurrence empty handed; that nobody caused injuries to him and on the next day of the occurrence, his brother Murid (given up PW) had taken him into the hospital, despite the fact that he was not injured; that the complainant party had involved Zulfiqar appellant due to close relation with Riaz and Fayyaz accused (since P.O) and also due to the reason that his father was at Saudi Arabia and he was a rich person.

10. Muhammad Jalil, another witness had made statement as DW-2, whereby he deposed that Zulfiqar appellant during the occurrence was not available at the spot and that when fight was over, the appellant reached at the spot empty handed and that he was innocent and falsely involved in the case.

11. After got examining the above named witnesses, in defence, the appellant had tendered the documents as Exh.DB, Exh.DC and Exh.DD and closed his defence.

12. After all the abovementioned proceedings, the learned trial Court had decided the case through the impugned judgment. Consequently, the appeal in hand.

13. The learned counsel for the appellant has argued that the appellant is innocent and has falsely been roped in the case with mala fides; that admittedly, the deceased did not sustain any injury at the hands of the appellant and that Atta Muhammad, who as per the alleged prosecution version has sustained injury at the hands of the appellant, during his statement as DW-1, has not supported the said version; that non-attendance of the appellant at the spot and non-participation in the occurrence has also been narrated by the Investigating Officer during his statement as P.W.8; that the learned trial Court has erred in not considering the attending facts and circumstances and the material available on the record and falsely convicted the appellant only with the allegation of common intention and that the

impugned judgment being based on misreading and non-reading of the material available on the record is not sustainable under the law.

14. The learned Additional Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the appeal, while supporting the impugned judgment to be well reasoned and quite in accordance with law.

15. Arguments of all the sides have been heard and record has been perused.

16. Admittedly, no injury of Saeed Ahmad deceased had been attributed to Zulfiqar Ali, appellant. The only allegation against the appellant was that he had inflicted club blow and caused injury at the jaw of Atta Muhammad PW.

17. It has been observed that during the prosecution evidence, Atta Muhammad PW, who allegedly had sustained the abovementioned injury at the hands of the appellant was not got examined as a prosecution witness but given up being won over.

18. It has been noticed that when the Investigating Officer of the case namely Irshad Hussain, S.I, came in the witness box, as P.W.8, during cross-examination, he had admitted that the version of the Zulfiqar Ali appellant, was that he was innocent. He had further admitted it correct that many persons, appeared before him and stated that Zulfiqar Ali appellant was empty handed and did not cause any injury to anyone and that the people told that the appellant had tried to rescue/intervene the occurrence.

19. It has been found that not only during the prosecution evidence, the above mentioned stance/version had come on the record but Atta Muhammad, in defence of the appellant had also made a statement as DW-1, during which he had categorically deposed that the appellant reached at the spot after the occurrence, empty handed; that nobody caused injuries to him and on the next day, he was taken to the hospital by his brother Murid (given up PW) despite the fact that he was not injured; that the complainant party had involved Zulfiqar appellant being close relative of Riaz and Fayyaz (since P.Os) and also due to the reason that father of the appellant was at Saudi Arabia and he was a rich fellow.

20. The learned trial Court had very much considered the above mentioned facts and evidence, but even then had convicted the appellant towards the commission of murder of Saeed Ahmad and also for the aerial firing, which as stated above, were not committed by him, while assigning reasons that he had shared common intention with his co-accused since proclaimed offenders.

21. The prosecution witnesses namely Ghulam Yasin (P.W.4) and Sadiq Hussain (P.W.5) during their statements had not uttered even a single word that the appellant and his co-accused had arrived at the spot with pre-planning and premeditation or sharing common intention. It is a settled principle of law that the prosecution should prove its case against an accused beyond shadow of all reasonable doubts. The decisions of criminal cases on the basis of presumptions are not allowed at all. It has been observed that the learned trial Court had failed to observe the above mentioned principle/criteria and had convicted the appellant for an act, which at all was not committed by him.

22. The learned trial Court while passing the impugned judgment and convicting the appellant, has ignored the golden principle of law "It is better that ten guilty persons be acquitted, rather than one innocent person be convicted". Reliance in this regard is placed upon the case reported as "Muhammad Ayub Masih v. The State" (PLD 2002 SC 1048), where, the hon'ble apex Court has made the following observations:--

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

23. As a result of the above discussion, the appeal in hand is accepted and the impugned judgment dated 25-5-2009 is set aside. Consequently, Zulfiqar Ali appellant is acquitted of the charge, while giving him the benefit of doubt.

24. The appellant is on bail through suspension of the sentence, under section 426 of Cr.PC, hence his bail bonds are discharged.

MWA/Z-15/L Appeal allowed.

2015 C L C 229

[Lahore]

Before Muhammad Tariq Abbasi, J

ABDUL GHAFOOR----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others----Respondents

Writ Petition No.7814 of 2014, decided on 7th July, 2014.

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

----Ss. 24 & 15---Constitution of Pakistan, Art. 199---Constitutional petition---Ejectment of tenant---Default in payment of rent---Effect---Rent Tribunal directed the tenant to deposit monthly rent till 10th of each following month but same was not deposited and eviction petition was accepted---Validity---Rent Tribunal not only had power to pass an order for deposit of rent due within a specified time and continue to deposit the same in the bank account of landlord or in the Rent Tribunal till final order was passed but had also power to forthwith pass final order if tenant had failed to comply with such order---Leave to contest was granted to the tenant and he was directed to pay rent of the premises in the court till 10th of each following month---Tenant had failed to comply with such direction and he had not deposited any amount---Provision of S.24(4) of Punjab Rented Premises Act, 2009 was mandatory and tenant, in circumstances, had committed default in payment of rent---Rent Tribunal had no other option except to pass impugned judgment and accept the ejectment petition---No infirmity or defect had been pointed out in the judgments passed by the courts below---Constitutional petition was dismissed in circumstances.

Javed Masih and others v. Additional District Judge, Lahore and others 2010 SCMR 795; Muhammad Arshad Khokhar v. Mrs. Zohra Khanum and others 2010 SCMR 1071; Muhammad Naseer v. Sajid Hussain 2009 SCMR 784; Waheed Ullah v. Mst. Rehana Nasim and others 2004 SCMR 1568; Muhammad Nazir v. Saeed Subhani 2002 SCMR 1540; Muhammad Ashraf v. Qamar Sultana PLD 2003 SC 228; Amin and others v. Hafiz Ghulam Muhammad and others PLD 2006 SC 549 rel.

Ch. Muhammad Mehmood-ul-Hassan for Petitioner.

Qazi Atta Ullah for Respondents Nos.3 and 4.

Date of hearing: 7th July, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--- By way of this writ petition, the judgments dated 31-1-2013 and 12-4-2014, respectively passed by the learned Special Judge (Rent), Rajanpur and the learned Additional District Judge, Rajanpur have been called in question.

2. Through the above mentioned earlier judgment, the ejectment petition filed by the respondents Nos.3 and 4, against the petitioner, in respect of the shop fully described in the petition has been accepted and eviction of the petitioner from the shop in question has been ordered. Whereas, through the above said other judgment, an appeal preferred by the petitioner, challenging the above mentioned judgment of the learned Special Judge (Rent), Rajanpur has been dismissed.

3. The facts in short are that the respondents Nos.3 and 4 had filed an ejectment petition against the petitioner, in respect of a shop fully described in the petition. In the said matter, the petitioner appeared and filed application for leave to contest the ejectment petition, which was allowed. The learned Special Judge (Rent) through order dated 25-2-2011 had directed the petitioner to deposit the rent at the rate of Rs.2500 per month till 10th of each following month, in the court. The petitioner had failed to comply with the said order, hence the learned Special Judge (Rent) through the judgment dated 31-1-2013 had accepted the ejectment petition, with a direction to the petitioner to vacate the disputed shop within a period of 30 days. Against the said judgment, the petitioner preferred an appeal which for hearing came before the learned Additional District Judge, Rojhan, (Camp at Rajanpur), from where the judgment dated 12-4-2014 was pronounced and the appeal was dismissed.

4. Consequently, the instant writ petition has been preferred, with the contention and the grounds that the judgments of both the learned courts below being against the record and the law on the subject are not sustainable.

5. The learned counsel for the petitioner has advanced his arguments in the above mentioned lines, whereas the learned counsel appearing on behalf of respondents Nos.3 and 4 has vehemently opposed the petition.

6. Arguments of both the sides have been heard and the record has been perused.

7. The record shows that when leave to contest was granted to the petitioner, the learned Rent Tribunal had passed the order dated 25-2-2011, whereby directed the petitioner to pay the rent of the shop in question at the rate of Rs.2500 per month, in the court till 10th of each following month. The said order was as per section 24 of the Punjab Rented Premises Act, 2009, which empowered the Rent Tribunal to make such like order. The said provision reads as under:---

"Payment of rent and other dues pending proceedings.--- (1) If an eviction application is filed, the Rent Tribunal, while granting leave to contest, shall direct the tenant to deposit the rent due from him within a specified time and continue to deposit the same in accordance with the tenancy agreement or as may be directed by the Rent Tribunal in the bank account of the landlord or in the Rent Tribunal till the final order.

(2) If there is a dispute as the amount of rent due or rate of rent, the Rent Tribunal shall tentatively determine the dispute and pass the order for deposit of the rent in terms of subsection (1).

(3) In case the tenant has not paid a utility bill, the Rent Tribunal shall direct the tenant to pay the utility bill.

(4) If a tenant fails to comply with a direction or order of the Rent Tribunal, the Rent Tribunal shall forthwith pass the final order."

8. A plain reading of the above mentioned section, clearly indicates that the Rent Tribunal not only has a power to pass an order directing the tenant for deposit of the rent due, within a specified time and continue to deposit the same, in the Bank account of the landlord or in the Rent Tribunal, till the final order is passed in the ejectment petition, but if tenant fails to comply with the above mentioned direction to forthwith pass the final order. Reliance in this regard may be placed upon the judgments titled "Javed Masih and others v. Additional District Judge, Lahore and others" (2010 SCMR 795), "Muhammad Arshad Khokhar v. Mrs. Zohra Khanum and others" (2010 SCMR 1071), "Muhammad Naseer v. Sajid Hussain" (2009 SCMR 784),

"Waheed Ullah v. Mst. Rehana Nasim and others" (2004 SCMR 1568), "Muhammad Nazir v. Saeed Subhani" (2002 SCMR 1540), "Muhammad Ashraf v. Qamar Sultana (PLD 2003 Supreme Court 228), "Amin and others v. Hafiz Ghulam Muhammad and others" (PLD 2006 Supreme Court 549).

9. In the situation in hand, admittedly, the petitioner has failed to comply with the above mentioned direction, made by the learned Rent Tribunal, towards the above said deposit of the rent, in the above stated manner. Even today, the learned counsel for the petitioner has admitted that in consequence of the above mentioned direction, till date, the petitioner has not deposited any amount.

10. Subsection (4) of section 24 above is mandatory. When default in deposit of the rent, by the petitioner, as directed under the above mentioned provision was proved and admitted on the record, there was no other option for the Rent Controller except to pass the judgment dated 31-1-2013 and accept the ejectment petition.

11. As the above mentioned judgment pronounced by the learned Rent Tribunal was demand of the situation, as well as the law, hence the learned Appellate Court had rightly decided the appeal and dismissed it through the judgment dated 12-4-2014.

12. The concurrent judgments, passed by the two learned courts below did not suffer from any legal infirmity or defect, hence warrant no interference by this Court in constitutional jurisdiction.

13. Resultantly, the writ petition in hand being devoid of any force and merit is dismissed.

AG/A-131/L Petition dismissed.

2015 Law Notes 1384

[Multan]

Present: **MUHAMMAD TARIQ ABBASI, J.**

Sher Muhammad, etc.

Versus

The State

Criminal Appeal No. 727 of 2003, decided on 13th May, 2015.

CONCLUSION

(1) It is bounden duty of the prosecution to prove its case against the accused beyond any shadow of doubt.

OCCURRENCE OF MURDER --- (Benefit of doubt)

Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, Ss. 302/324/34---Commission of offence---Charge---Criminal trial---Impugned conviction/sentence of imprisonment for twenty-five years---Benefit of doubt---Appreciation of evidence---Validity---Occurrence did not take place at time mentioned in F.I.R. and stated by complainant/PW---Said fact caused serious doubt towards availability of complainant at spot---There was no source of light at place of occurrence to identify accused person and that during investigation it transpired that accused persons were with muffled faces and at time of occurrence, it was darkness---It was not believable that appellants had shared common intention with the co-accused and participated in alleged occurrence---Evidently, no weapon recovered from appellants, was blood-stained or made I.O./PW into any sealed parcel---During investigation appellants were found to be innocent, hence recommended to be discharged from case---Said facts and circumstances had cast serious doubts into alleged prosecution story---Prosecution had badly failed to bring home the charge against appellants---Benefit of doubt was given---Criminal appeal allowed.

(Paras 10, 11, 13, 14, 15)

Ref. 1995 SCMR 1345, 1999 SCMR 1220.

مبینہ واردات قتل اِس انداز میں نہ ہوئی تھی جیسا کہ ایف آئی آر میں درج تھا۔ اپیلانٹس کی شناخت مشکوک تھی۔ سزایابی کے خلاف اپیل منظور ہوئی۔

[Occurrence of murder did not take place as mentioned in F.I.R. Identity of appellants was doubtful. Impugned conviction/sentence was set aside].

For the Appellants: Mudassar Altaf Qureshi, Advocate.

For the State: Hassan Mehmood Khan Tareen, Deputy Prosecutor General.

For the Complainant: Prince Rehan Iftikhar Sheikh and Arslan Masood Sh., Advocates.
Date of hearing: 13th May, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This appeal is directed against the judgment dated 30.9.2003, passed by the learned Additional Sessions Judge, Chichawatni, District Sahiwal, whereby in case F.I.R. No. 247, dated 09.9.2000, registered under Sections 302/324/34, P.P.C. at Police Station Kassowal, Tehsil Chichawatni, District Sahiwal, the appellants were convicted and sentenced in the following terms:---

Sher Muhammad son of Khan Muhammad (appellant)

Under Section 302(c), P.P.C. imprisonment for twenty-five years and compensation of Rs. 1,00,000/-, payable to the legal heirs of the deceased, otherwise, to further undergo imprisonment for six months.

Sher Muhammad @ Mahni son of Allah Ditta (appellant)

Under Section 324, P.P.C. R.I. for five years and fine of Rs. 25,000/-, in default to further undergo six months' imprisonment.

Under Section 337-F(ii), P.P.C. Daman of Rs. 10,000/- and R.I. for three years.

It was directed that sentences of Sher Muhammad *alias* Mahni, appellant shall run concurrently and both the appellants would be entitled for the benefit of Section 382-B, Cr.P.C.

2. The facts are that Sikandar Ali (PW-4) had got recorded the F.I.R. (Ex.PC) contended therein that on 9.9.2000, at about 8:30 p.m., when he alongwith his sons Ghualm Shabbir (PW-5) and Ghulam Zaheer (deceased) and brother-in-law *(Sala)*, namely, Ghulam Muhammad, after filing an application against Sharif, etc., in the police station was returning back; Ghulam Shabbir (PW-5) and Ghulam Zaheer (deceased) were travelling on a bicycle ahead of them, whereas they on their respective bicycles were behind them; when they reached near the school, suddenly Sher Muhammad son of Muhammad Khan and Sher Muhammad *alias* Mahni son of Allah Ditta (appellants) and Sharif (co-accused since P.O.), all armed with daggers, emerged from the cotton crop and got stopped the bicycle of the above-named sons of the complainant; Sharif (co-accused since P.O.) stated that a taste of moving an application in the police station be taught to the complainant party and inflicted a dagger blow, which landed at left flank of Ghulam Zaheer (deceased); Sher Muhammad son of Khan Muhammad (appellant) also caused a dagger blow injury at the back of the above-named deceased; Sher Muhammad *alias* Mahni son of Allah Ditta (appellant) inflicted a dagger blow injury at the chest of Ghulam Shabbir (PW-5); Sharif (co-accused since P.O.) inflicted a dagger blow at left upper arm of Ghulam Shabbir (PW-5); they (complainant and Ghulam Muhammad), while raising a lalkara reached at the spot and the accused while giving threats and waived their weapons fled away; the injured were transported to the hospital but Ghulam Zaheer succumbed to the injuries, whereas Ghulam Shabbir (PW-5) was admitted in the hospital. The motive as alleged by the complainant was that there was a grudge of *"Rishtadari"* between the complainant party, Sharif (co-accused since P.O.) and Sher Muhammad etc., regarding which an application was filed in the police station and due to the said grudge the accused had committed the occurrence.

3. The case was investigated and the appellants were challaned to the Court. Formal charge against them was framed on 30.7.2002, to which they pleaded not guilty and claimed the trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as eleven persons as PWs, whereas one was examined as CW and two as DWs. Gist of the evidence lead by the material witnesses was as under:---

(i) PW-4 Sikandar AIi, the complainant stated almost the same facts as were narrated by him in the F.I.R. (Ex.PC).

(ii) PW-5 Ghulam Shabbir, injured as well as an eye-witness of the alleged occurrence had supported the version of the complainant (PW-4) in all its four corners.
(iii) PW-8 Dr. Muhammad Sarwar, had conducted post-mortem examination of the dead-body of Ghulam Zaheer on 10.9.2000 and three injuries were observed on his body. He prepared the post-mortem report (Ex.PG) and pictorial diagrams (Ex.PG/1 & Ex.PG/2). According to the doctor, the said injuries were anti-mortem in nature and injury No. 1 was the cause of immediate death. He also examined Ghulam Shabbir (PW-5) through report (Ex.PH) when three incised wounds, one on his chest and two on left arm were noticed.
(iv) PW-11 Mehr Noor Muhammad, Inspector, had investigated the case, prepared the documents and carried on the proceedings fully described in his statement.

4. After completion of the prosecution evidence, the appellants were examined under Section 342, Cr.P.C., during which the questions arising out of the prosecution evidence were put to them and they denied almost all such questions while pleading their innocence and false involvement in the case with *mala fide*. The question *"Why this case against you and why the PWs have deposed against you?"* was replied by both the appellants in the following similar words:---
"The PWs are related inter se and interested persons. All the PWs are residents of another village which is at a distance of about 3/4 K.Ms. from the place of occurrence. The PWs have deposed due to enmity against me and I have been falsely implicated on account of enmity."

5. They opted to lead evidence in their defence but not to make statements under Section 340(2), Cr.P.C. In defence Ijaz Minhas and Muhammad Sadiq had made statements as DW-1 and DW-2, respectively. After got examining the above-named DWs and tendering the documents as Ex.DB to Ex.DD, the appellants had closed their defence evidence. On completion of the proceedings, the impugned judgment was passed in the above-mentioned terms. Consequently, the appeal in hand.

6. The learned counsel for the appellants has argued that the appellants were innocent and falsely involved in the case with *mala fide*, while concocting a false story and introducing false witnesses; it was a blind murder, neither the complainant nor anybody else was available at the spot and the false witnesses had made false statements against the appellants; the statements of the alleged eye-witnesses were full of material contradictions and improvements on every material particular; motive was not attributed to the appellants rather to Muhammad Sharif (co-accused since P.O.); the prosecution case and the charge against the appellants was not established and proved, hence they were entitled for acquittal and as such the impugned judgment could not be termed to be justified and is liable to be set aside.

7. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the appeal while supporting the impugned judgment to be well-reasoned and call of the day.

8. Arguments heard. Record perused.

9. In the F.I.R. (Ex.PC) as well as during statement as PW-4, Sikandar Ali complainant had stated that the deceased had sustained two injuries; one at left flank, whereas other on back but during medical evidence led by Dr. Muhammad Sarwar (PW-8) and the post-mortem report (Ex.PG) three injuries on the dead-body were noticed. According to the medical evidence, the injury No. 1 on abdomen (flank) was cause of death. The said injury was attributed to Muhammad Sharif (co-accused since P.O.). The doctor had categorically deposed that duration between the death and post-mortem examination was about 11½ hours. As the post-mortem examination was conducted on 10.9.2000 at 10:00 a.m., hence on calculation, the time of occurrence does not become 8:30 p.m., as alleged by the complainant party. The doctor further stated that during examination neither any cut on the clothes of the injured PW Ghulam Shabbir was noticed nor any blood on his cloth was found. He categorically stated that possibility of the injuries to the deceased as well as the above-named injured PW, through one kind of weapon could not be ruled out. He further contended that from his proceedings happening of the occurrence in-between 10:00 p.m. and 11:00 p.m. was found.

10. From the above-mentioned, it is clear that the injuries to the deceased as well as the injured PW were with one weapon and the occurrence did not take place at the time mentioned in the F.I.R. and stated by the complainant. The said fact has also caused serious doubt towards availability of the complainant at the spot.

11. The complainant (PW-4) had admitted that there was no source of light at the place of occurrence to identify the accused persons and that during investigation it transpired that accused persons were with muffled faces and at the time of occurrence it was darkness. By deposing so, the complainant had created a serious doubt towards witnessing of the occurrence and identifying the appellants. The complainant had further admitted that Rani the mother of Sharif (co-accused since P.O.) was abducted by the present appellants and taken to Karachi. In this way, it was not believable that the appellants had shared common intention with their above-named co-accused and participated in the alleged occurrence. The complainant had further admitted that a case of abduction got lodged by him, against the present appellants and their co-accused was cancelled during investigation. In this way, he himself had negated the alleged motive as when the case was cancelled against the appellants then surely they had no motive or grudge against the complainant party. The complainant further admitted it correct that the appellants were arrested on the night of the occurrence and kept in the police station for about one month and four days, without any proceeding and that they were found by Rana Iftikhar Ahmed Khan, Inspector (CW-2) to be innocent. It was admitted on the record that during the investigation no proof of any application moved by the complainant, in the police station, on the day of alleged occurrence was brought on the record. The complainant while saying that the investigating officer of this case visited the spot, interrogated the PWs and after probe registered the case against the accused persons had confirmed on the record that the F.I.R. was result of preliminary inquiry, deliberation and consultation, hence result of after thought, which was not acceptable under the law. He had further contended that for the first time, the police arrived at the spot on 10.9.2002 at about 10:30 a.m. While saying so he had negated the proceedings of the police allegedly carried on, on the first day of occurrence. Admittedly, during whole of the occurrence, the complainant, who had moved an application in the police station, was not even touched by anyone, which fact had also created a doubt about presence of the complainant at the spot. He, while admitting that no criminal litigation between the appellants and his sons was existing and neither the deceased nor Ghulam Shabbir PW was ever

witness in any case against the appellant, had casted a doubt into the story of causing injuries to his son's by the appellants

12. PW-5 Ghulam Shabbir had admitted that Sharif (co-accused since P.O.) was inimical towards them and he had raised a lalkara. He had denied the time of occurrence as 8:30 p.m. and as such had shaken whole of the alleged prosecution story. He admitted that in his medical examination report (Ex.PH) his admission in the hospital was mentioned as 8:00 p.m. on 9.9.2000, which fact had also made the alleged occurrence doubtful because as per the complainant it was held on 9.9.2000 at 8:30 p.m. This witness had admitted that during investigation motive of the occurrence was found to be false. Nazar Muhammad PW-6 also admitted it correct that at the spot there was no source of light.

13. The investigating officer (PW-11) stated that no weapon recovered from the appellants, was blood-stained or made by him into any sealed parcel. During statement of Rana Iftikhar (CW-2), it was confirmed on the record that during investigation the appellants were found to be innocent, hence recommended to be discharged from the case. During deposition of Ijaz Hussain Minhas and Muhammad Sadiq Cheema as DW-1 and DW-2 respectively, it was brought on the record that when the occurrence was taken place the complainant was not available there and two persons in an injured condition were found lying at the spot.

14. All the above-mentioned facts and circumstances, have casted serious doubts into the alleged prosecution story and the prosecution had badly failed to bring home the charge against the appellants. Hence, it is unsafe to maintain their conviction on the basis of such type of evidence because it is bounden duty of the prosecution to prove its case against the accused beyond any shadow of doubt. I am fortified by the dictum laid down in the case *"Muhammad Khan and another v. The State" (1999 SCMR 1220),* wherein the Hon'ble Supreme Court of Pakistan, has held as under:---

"It is an axiomatic and universally recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be

unsafe to rely on the ocular evidence which has been molded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct respective".

It has been further held by the Hon'ble Supreme Court of Pakistan in the case *" Tariq Pervaiz v. The State" (1995 SCMR 1345)* that if a simple circumstance creates reasonable doubt, in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right.

15. Resultantly, the appeal in hand is *accepted*, the impugned judgment is *set aside* and the appellants are *acquitted* of the charge, while extending them the benefit of doubt. They, by way of suspension of sentences are on bail, hence their bail bonds are discharged. The disposal of case property shall be as directed by the learned Trial Court.

Criminal appeal allowed.

2015 M L D 54
[Lahore]
Before Muhammad Tariq Abbasi, J
MUHAMMAD AKRAM---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.51 of 2014, decided on 10th February, 2014.

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

----Art. 78---Penal Code (XLV of 1860), Ss.302, 324, 148, 149 & 109---Qatl-i-amd, attempt to commit qatl-i-amd, rioting, common object, abetment---Recording of secondary evidence---Petitioner had challenged order of the Trial Court whereby Head Constable was called for recording his statement as secondary evidence---During trial of the case, it was revealed that Investigating Officer in the case was found accused in other criminal case registered against him under S.302, P.P.C. and he was not available to record his statement---Trial Court on the basis of application moved by the complainant, directed Head Constable, who remained associated with said Investigating Officer, and was acquainted with handwriting and signature of Investigating Officer, to be summoned to give secondary evidence---Contention of counsel for the petitioner was that no provision existed in law for calling and examining a person for secondary evidence---Contention was repelled as Art.78 of Qanun-e-Shahadat, 1984, dealt with that procedure---Said Head Constable, who remained posted with Investigating Officer, being acquainted with handwriting and signatures of Investigating Officer, was very much relevant to adduce secondary evidence about the proceedings---If the Head Constable, had already been recorded as a prosecution witness, there was no bar for his appearing again in the court for recording secondary evidence.

Mian Tahir Iqbal for Petitioner.
Hassan Mahmood Khan Tareen, D.P.G. on Court's call.

ORDER

MUHAMMAD TARIQ ABBASI, J.---Through the instant petition, order dated 6-2-2014 passed by learned Addl. Sessions Judge, Vehari, has been challenged, whereby Muhammad Afzal, Head Constable, has been called for recording his statement as secondary evidence.

2. The learned counsel for the petitioner has argued that as there is no provision in the law, to call a person to adduce secondary evidence, hence the impugned order is not sustainable in the eye of law and that when the above-named Head Constable has already been examined as P.W.5, no need of his re-examination as directed in the impugned order.

3. The learned DPG has opposed the petition.

4. Arguments heard and record perused.

5. The record shows that during the trial before the learned Addl. Sessions Judge, Vehari, in case F.I.R. No.47/2011 dated 29-1-2011, registered under sections 302, 324, 148, 149 and 109, P.P.C. against the present petitioner and 9 others, when after examination of five prosecution witnesses, it revealed that the Investigating Officer namely Raja Zafar Iqbal, S.I. being an accused in a criminal case registered against him under section 302 of P.P.C., was proclaimed offender, hence not available, the learned trial Court on the basis of an application moved by respondent No.2 (complainant) directed that Muhammad Afzal, Head Constable, who remained associated with the above named S.I. and as such acquainted with his handwriting and signatures, be summoned to give secondary evidence.

6. There is no force in the arguments advanced by learned counsel for the petitioner that in the law there is no provision for calling and examining a person for secondary evidence. Article 78 of the Qanun-e-Shahadat Order, 1984, deals with the said procedure. For guidance and perusal, the said Article is reproduced hereunder:--

"Proof of signature and handwriting of person alleged to have signed or written document produced.---If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the documents as is alleged to be in that person's handwriting must be proved to be in his handwriting."

7. As per the above mentioned provision, a document can be proved by:-

(i) admission.

(ii) calling the person who had written and signed it.

(iii) calling the persons in whose presence it was reduced to writing.

(iv) calling the person who was acquainted with the handwriting and signatures of the person by whom the document was supposed to be written or signed.

(v) comparison in the Court, disputed handwriting or signatures with admitted signatures and handwriting.

(vi) calling Hand Writing Expert.

8. When in the situation in hand, it has been proved on the record that the above named S.I. being Investigating Officer had carried on certain proceedings and prepared certain documents, who being a proclaimed offender, in a criminal case is not traceable/available, then to carry on proceedings, in the trial and its conclusion, bringing on the record, the proceedings/documents, conducted and prepared, by the above named S.I./Investigating Officer, secondary evidence is demand of the situation.

9. It has been brought on the record that the above named Head Constable remained posted with the above named S.I./Investigating Officer and as such acquainted with his handwriting and signatures, hence the said Head Constable is very much relevant to adduce evidence about the proceedings carried on and the documents prepared and signed by the S.I./Investigating Officer. Therefore, if the above named Head Constable has already been recorded as a prosecution witness, then for the purpose of abovementioned secondary evidence, there is no bar for not appearing again, in the witness box.

10. Resultantly, the instant revision petition being devoid of any force and merits is hereby dismissed.

HBT/M-95/L Petition dismissed.

2015 M L D 463

[Lahore]

Before Muhammad Tariq Abbasi, J

MUHAMMAD AMIN---Petitioner

Versus

JUSTICE OF PEACE/ADDITIONAL SESSIONS JUDGE, SAHIWAL and 7 others---Respondents

Writ Petition No.14868 of 2012, decided on 13th February, 2014.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A, 22-B, 154, 155 & 157---Registration of criminal case---Withdrawal of earlier order---Petitioner had challenged earlier order passed by Justice of Peace, whereby direction was given to S.H.O. for recording version of the petitioner---On application of respondent, Justice of Peace had recalled/withdrawn earlier order---Earlier order was not baseless, but conditional, that if commission of a cognizable offence was found to be made out; then a criminal case should be registered---Said earlier order had been withdrawn through impugned order on the ground that commission of any cognizable offence was not made out---Said reason was not sufficient for withdrawal of the earlier order---Once an order permissible under the law had been passed by the Justice of Peace, then without any reason, cause or justification, its review or withdrawal, was not permissible---Commission of a non-cognizable offence, was no ground, not to carry on any proceedings---Even for commission of non-cognizable offence, due proceedings had been prescribed under S.155, Cr.P.C.---Order of Justice of Peace whereby the earlier order had been recalled/reviewed, could not be termed to be justified, and was not acceptable in the eye of law---Impugned order was set aside.

Aurangzeb Khan v. District Police Officer and 4 others 2009 YLR 83 ref.

Malik Muhammad Zafar Iqbal for Petitioner.

Mazhar Jamil Qureshi, A.A.-G. for Respondents Nos. 1 to 4.

Nemo for other Respondents.

ORDER

MUHAMMAD TARIQ ABBASI, J.---Through the instant writ petition, the order dated 12-11-2012, passed by learned Justice of Peace (respondent No.1) has been challenged, whereby, the earlier order dated 31-10-2012 has been recalled.

2. The facts are that upon an application, moved by the present petitioner, under sections 22-A and 22-B, Cr.P.C., before the learned Justice of Peace, on 31-10-2012, a direction to the S.H.O. concerned was issued to record version of the petitioner and if commission of a cognizable offence was made out, to register a criminal case. Thereafter, Mapal Khan (respondent No.5) moved another application, before the learned Justice of Peace, for suspension and withdrawal of the abovementioned earlier order and consequently the learned Justice of Peace through order dated 12-11-2012 had recalled the above said earlier order. Hence the instant writ petition.

3. The learned counsel for the petitioner has argued that the learned Justice of Peace was not at all competent to recall the order dated 31-10-2012 being passed in due course of law and as such the impugned order dated 12-11-2012 being a patent illegality, is not sustainable.

4. The learned Law Officer has opposed the writ petition.

5. The arguments have been heard and record has been perused.

6. It has been observed that the abovementioned earlier order dated 31-10-2012 was not baseless but conditional that if commission of a cognizable offence was found to be made out then a criminal case should be registered. It has been found that the said order has been withdrawn through the order dated 12-11-2012, with the contention that commission of any cognizable offence was not made out.

7. I am afraid, the above said reason was not sufficient for withdrawal of the earlier order because towards its implementation, the Investigating Officer was obliged to see whether commission of a cognizable offence was made out or not.

8. Even otherwise, once an order permissible under the law has been passed by the learned Justice of Peace, then without any reason, cause or justification, its review or withdrawal is not permissible. Reference may be made, to case titled 'Aurangzeb Khan v. District Police Officer and 4 others' (2009 YLR 83). The relevant paragraph of the judgment speaks as under:--

"It is strange that despite categorical assertion of the applicant that the said S.H.O. was favouring the opposite party, the Court of learned Ist Additional Sessions Judge Hyderabad, instead of enforcing his earlier order, dated 11-12-2004, accepted/entertained the application of S.H.O. of Police Station Makki Shah dated 22-12-2004 and passed the impugned order dated 1-2-2005 reviewing his earlier order and directing the applicant for filing of direct complaint. Passing of such order by the learned Ist Additional Sessions Judge Hyderabad, seems to be patent illegality which is liable to be corrected in exercise of revisional powers of this Court. Accordingly, this criminal revision application is allowed and disposed of in the terms that the applicant shall appear before the S.H.O. Police Station Makki Shah for recording of his statement, whereafter further action shall follow strictly in accordance with law."

9. Due to the reasons mentioned above, the order dated 12-11-2012 of the learned Justice of Peace, whereby the earlier order passed on 31-10-2012 has been recalled/reviewed, could not be termed to be justified, hence is not acceptable in the eye of law.

10. Furthermore, commission of a non--cognizable offence, as stated by the learned Justice of Peace in the impugned order, is no ground, not to carry on any proceeding. Even for commission of non-cognizable offence, the due proceedings have been prescribed under section 155 of Cr.P.C.

11. Resultantly, the instant writ petition is allowed and order dated 12-11-2012 passed by learned Justice of Peace, whereby earlier order dated 31-10-2012 has been recalled, is set aside. However, it is made clear that the S.H.O.

concerned shall strictly follow the earlier order dated 31-10-2012 and shall carry on the proceedings within the four corners of law and procedure i.e. under sections 154, 155 or 157 of Cr.P.C and if required, under section 182 of P.P.C.

HBT/M-96/L Petition allowed.

2015 M L D 553
[Lahore]
Before Muhammad Tariq Abbasi, J
AMEEN KHAN and another---Appellants
versus
The STATE---Respondent

Criminal Appeal No.357 of 2010, heard on 28th May, 2014.

(a) Penal Code (XLV of 1860)---
----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---No direct evidence was available on record and prosecution case rested upon the circumstantial evidence---Complainant, who had not seen the alleged occurrence, had not narrated any motive, and contended that the cause of the occurrence was unknown, but in the court he had narrated the motive, which could be treated as an afterthought/improvement, which was not only discarded, but that had created serious doubt about his credibility---Ocular account of one of the prosecution witnesses, had not helped the prosecution---Conduct of other prosecution witness, had cast serious doubt about his veracity and credibility---Blood-stained clothes, which during the alleged occurrence were being worn by accused, were recovered and taken into possession, but nothing was available on the record to suggest that blood on the clothes was that of the deceased---Said recovery, did not benefit the prosecution---Confession/admission allegedly made by accused before the Police, was not admissible/acceptable under the law---Prosecution had failed to establish its case, and charge against accused was not proved beyond any doubt---Trial Court was not justified in convicting accused through impugned judgment which was set aside---Accused were acquitted extending them the benefit of doubt, in circumstances.
Muhammad Wasif Khan and others v. The State and others 2011 PCr.LJ 470; Farman Ahmed v. Muhammad Inayat and others 2007 SCMR 1825; Muhammad Ashraf and another v. The State 2011 YLR 767; Qazi alias Dost Muhammad and another v. The State 2014 PCr.LJ 611; The State through Deputy Director Anti-Narcotic Force, Karachi v. Syed Abdul Qayum 2001 SCMR 14 and Salim Javed Durrani v. State through Dy. Attorney General, N.-W.F.P., Peshawar and 4 others 2005 PCr.LJ 22 rel.

(b) Criminal trial---

----Evidence---Circumstantial evidence---Scope---Each and every circumstance should be unified in such a manner that a continuous chain should be made, one end of which should touch the dead-body, whereas the other end should be around the neck of accused---If chain link was missing, then its benefit must go to the accused.

Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State and 2 others 1996 SCMR 188; Asadullah and another v. State and another 1999 SCMR 1034; Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047 and Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 rel.

Qazi Muhammad Amin for Appellants.

Sh. Najaf Hanif for the Complainant.

Qaisar Mushtaq, ADPP for the State.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This appeal is directed against the judgment dated 12-5-2010, passed by the learned Addl. Sessions Judge, Chakwal, whereby in the case FIR No.203 dated 30-8-2007, registered under Sections 302/34, P.P.C. at Police Station, Kallar Kahar, District Chakwal, towards murder of Muhammad Ilyas, the appellants have been convicted under section 302(b), of P.P.C. and sentenced to the imprisonment for life. A fine of Rs.one lac has also been imposed against Ameen Khan (appellant No.1), whereas of Rs.3 lac against Ameer Khan (the appellant No.2), in default to further undergo S.I. for three months and six months respectively. It was directed that the amount of fine if realized 50% be paid to the legal heirs of the deceased as compensation. The benefit of section 382-B of Cr.P.C. was also extended to the appellants.

2. The facts are that Ayaz Khan (P.W.12) had made a statement (Exh.PG) before the police contending therein that about few days ago, Ameen Khan (appellant No.1) had brought his nephew Muhammad Ilyas (deceased), in the area of Kallar Kahar for work in the coal mines; that a rumor was got spread, by Ameen Khan (appellant No.1) that Ilyas deceased had disappeared; that he (complainant) tried to contact Ameer Khan (appellant No.2) but failed, whereupon he (complainant) along with Haji Bostan Khan and Sajjad Khan, Muhammad Riaz and Zargul came at village 'Warala' on 29-8-2007; that they contacted Ameer Khan (appellant No.2) through telephone, who told them that the dead-body of Muhammad Ilays was lying in a watercourse (Kas) of

Sangrala Hill, in the area of Warala; that due to shortage of time, the complainant party could not reach at the spot; that on 30-8-2007, the complainant along with above named, reached at the spot and found dead-body of Muhammad Ilyas lying there which was putrefied and bad-smell was coming from it; that the nephew of the complainant was murdered by the appellants through torture due to unknown reasons.

3. On the basis of the above said complaint, FIR (Exh.PG/1) was chalked out. The case was investigated and finally the appellants were challaned to the court.

4. The learned Trial Court had framed the charge against the appellants on 14-4-2009, they pleaded not guilty and claimed the trial, hence as many as 14 witnesses were examined.

5. After examination of the above-said witnesses, and closure of the prosecution case, the appellants were examined as required under section 342 of Cr.P.C. They denied almost all the questions, put to them, emerging from the prosecution evidence and pleaded their innocence and false implication in the case with mala fides. They did not opt to lead any evidence in their defence or make statements under section 340(2) of Cr.P.C.

6. After completing the above mentioned proceedings, the learned trial court had pronounced the impugned judgment, whereby convicted and sentenced the appellants in the above mentioned terms.

7. Consequently, the instant appeal has been preferred with the contention and the grounds that there was no direct evidence against the appellants and that the prosecution had failed to prove its case and charge against the appellants, but the learned Trial Court had erred in not considering the attending facts and circumstances and convicting the appellants through the impugned judgment, which is not acceptable under the law.

8. The learned ADPP assisted by learned counsel for the complainant has vehemently opposed the appeal and supported the impugned judgment, being quite well reasoned and demand of the situation.

9. Arguments of both the sides have been heard and the record has been perused.

10. Admittedly, in this case, there is no direct evidence. The prosecution case rests upon the circumstantial evidence. The criteria in such like situation is that each and every circumstance should be united in such a manner that a continuous chain should be made, one end of which should touch the dead-body, whereas the other end should be around the neck of the accused. But if chain link is missing then its benefit must go to the accused. In this regard, reliance can respectfully be placed upon the judgments reported as Ch. Barkat Ali v. Major Karam Elahi Zia and another (1992 SCMR 1047), Sarfraz Khan v. The State and 2 others (1996 SCMR 188) and Asadullah and another v. State and another 1999 SCMR 1034. In the case reported as Ch. Barkat Ali v. Major Karam Elahi Zia and another (1992 SCMR 1047), the august Supreme Court of Pakistan at page 1055 observed as under:--

"Law relating to circumstantial evidence is that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See "Siraj v. The Crown" PLD 1956 FC 123. The prosecution evidence in this case was of the deceased last seen with the accused and from the latter was recovered a handle of the hatchet blood stained and he was absent from the forest after the murder. The learned Federal Court held that the evidence was not sufficient and the accused was acquitted. In the case of "Karamat Hussain v. The State" 1972 SCMR 15 it was laid down that "In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypotheses other than the guilt of the accused."

Further reliance in this context is placed upon the judgment reported as Altaf Hussain v. Fakhar Hussian and another (2008 SCMR 1103), wherein at page 1105 it was held by the Hon'ble Supreme Court as under:--

"Needless to emphasise that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain."

11. While keeping in mind the above mentioned criteria, it would be seen and evaluated, whether the prosecution has proved, its case satisfactorily or otherwise.

12. As per the Doctor (P.W.1), two lacerated wounds, one at right side of neck on the lower jaw, whereas the other on back of the right chest were observed

at the dead-body, which was at the advance stage of putrefaction with maggots. According to the doctor, the above-said injuries which were ante-mortem in nature, had caused death to the deceased and that probable time which elapsed between the death and post-mortem examination was 3 to 10 days. This witness during cross-examination had admitted that the injuries were not caused by firearm weapon and that the possibility of injuries by means of pointed stone cannot be ruled out.

13. Ayaz Khan, complainant (P.W.12) as stated above, had not seen the alleged occurrence, but when he was allegedly told on 29-8-2007 that the dead body of Muhammad Ilyas was lying in a watercourse, he did not make any struggle on the said date to reach to the dead-body and remained satisfied and thereafter on the following day he attended the spot. In the complaint Exh.PG, this witness had not narrated any motive and contended that the cause of the occurrence was unknown but when he entered in the witness box, he had narrated a motive which can rightly be treated as an afterthought improvement, which is not only discarded but the same fact has also made serious doubt into his credibility. Reliance is placed upon Muhammad Wasif Khan and others v. The State and others (2011 PCr.LJ 470), Farman Ahmed v. Muhammad Inayat and others (2007 SCMR 1825) and Muhammad Ashraf and another v. The State (2011 YLR 767).

14. Inayat Ullah Khan (P.W.6), had deposed that Muhammad Ameen, (appellant No.1) had told before him that Muhammad Ameer (appellant No.2) had done Muhammad Ilyas to death by firing. Firstly, as stated above, during the evidence of the doctor, it has been confirmed on the record that the death of Muhammad Ilyas, did not occur due to firing and secondly the abovementioned version of the above named appellant being exculpatory in nature could not be given any weight under the law. Therefore, the statement of the P.W.6, has not given any benefit to the prosecution.

15. Muhammad Ameen, (P.W.7), during his statement has contended that on 24-8-2007, at about 7 a.m., he along with Inayat Ullah, Najeeb, Muhammad Ameen (appellant No.1) and Muhammad Ilyas (deceased) had reached at Adda Malot, from where the deceased and the appellant No.1 went to mine No.15, whereas he and remaining persons to Warrala by bus. This witness had further contended that he did not join into the police investigation however, the police had recorded his statement under section 161 of Cr.P.C. During cross-examination of this witness, it had come on the record that whichever he

had stated during examination-in-chief was contradictory to his- version, narrated during statement under section 161 of Cr.P.C. Therefore, in the light of the judgment reported as Qazi alias Dost Muhammad and another v. The State (2014 PCr.LJ 611) the above mentioned conduct of the above-named P.W. has cast serious doubt into his veracity and credibility.

16. It has been brought on the record that the blood-stained clothes, which during the alleged occurrence were being worn by Muhammad Ameen (appellant No.1) were recovered and taken into possession, but nothing is available on the record to suggest that the said blood was of the deceased. Therefore, the said recovery had not given any benefit to the prosecution.

17. Ayaz Khan complainant (P.W.12) had also narrated about confession/admission, allegedly made by Ameer Khan (appellant No.2) in his presence before the police. Certainly, the said alleged statement being made by an accused before the police is not admissible/acceptable under the law. Reliance in this regard is respectfully placed upon the judgment reported as The State through Deputy Director Anti-Narcotic Force, Karachi v. Syed Abdul Qayum, (2001 SCMR 14) and Salim Javed Durrani v. State through Dy. Attorney General, N.-W.F.P., Peshawar and 4 others 2005 PCr.LJ 22 (DB).

18. All the above mentioned facts, circumstances and reasons clearly indicate that the prosecution had badly failed to establish its case as per the criteria mentioned above. In this way, the charge against the appellant was not proved beyond any doubt, but the learned Trial Court had erred in not considering the same and convicting the appellants through the impugned judgment.

19. Resultantly, the appeal in hand is accepted, the impugned judgment is set aside and both the appellants namely Ameen Khan and Ameer Khan are acquitted of the charge while extending them the benefit of doubt. Both the appellants by way of suspension of their sentence are on bail hence their bail-bonds are discharged.

HBT/A-166/L Appeal accepte

2015 P Cr. L J 58

[Lahore]

Before Muhammad Tariq Abbasi, J

MUHAMMAD NAWAZ---Petitioner

Versus

The STATE and another---Respondents

Criminal Revision No. 43 of 2014, heard on 2nd April, 2014.

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

----S. 540-A---Exemption to an accused from personal appearance---Conditions to be fulfilled for grant of exemption to an accused enumerated.

Following are the conditions that should be fulfilled to claim and grant exemption to an accused from personal appearance during trial:--

(i) There should be two or more accused before the court;

(ii) The accused seeking exemption should be before the court;

(iii) The accused should be incapable of remaining before the court;

(iv) The accused should be represented by a pleader;

(v) The Court should be satisfied about the incapability of the accused to remain before it.

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

----Ss. 205 & 540-A---Exemption to an accused from personal appearance---Grounds and conditions---Accused earning his livelihood abroad---Accused faced trial along with the co-accused and sought dispensation from personal appearance on the grounds that he was working and earning his livelihood abroad, for which purpose he had obtained a visa after incurring heavy expenditure; that during investigation he had been declared innocent, but appeared and joined the trial on summoning of the court, and that in his place an advocate would appear in the court on each and every date of hearing and join the proceedings---Validity---Incapability to appear before the Trial Court, as pleaded by the accused could be termed a fit (ground) for exemption---Accused fulfilled all the conditions that were required to be fulfilled to claim and grant exemption to an accused from personal appearance during trial---After grant of dispensation by the Trial Court, no hurdle had occurred in the trial due to non-availability of accused--- Revision petition against dispensation allowed to accused was dismissed in circumstances with the direction that if at any stage of trial, Trial Court felt any hurdle due to non-availability of accused or his advocate, then it should not hesitate in withdrawing the concession and requiring personal appearance of accused.

Haji Aurangzeb v. Mushtaq Ahmad and another PLD 2004 SC 160 rel.

Usman Sharif Khosa for Petitioner.

Mian Abdul Qayyum, Additional Prosecutor-General for the State.
Malik Muhammad Saleem for Respondent No.2.
Date of hearing: 2nd April, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the order dated 19-9-2013, passed by the learned Additional Sessions Judge, Dera Ghazi Khan, whereby personal appearance of Irshad, the respondent No. 2 has been dispensed with and the application moved by the petitioner for cancellation of the bail bonds of the said respondent has been dismissed.

2. The facts are that Irshad (respondent No. 2) along with his co-accused was facing trial in case F.I.R. No. 284/2012 registered under sections 302/324/148/149/109 of P.P.C. at Police Station Choti, District Dera Ghazi Khan, in the court of learned Additional Sessions Judge at Dera Ghazi Khan. The said respondent preferred an application under sections 205/540-A of Cr.P.C., whereby he sought dispensation from personal appearance, in the court, on the grounds that he for labour and to earn the livelihood had to go to Saudi Arabia as his visa was going to expire. The said application was entertained by the learned trial Court on 19-1-2013. Thereafter on 9-2-2013, the petitioner had moved an application before the learned trial Court, whereby he sought cancellation of the bail bonds of Irshad (respondent No. 2) on the grounds that he had proceeded abroad, hence became absent. Both the above mentioned petitions were taken up by the learned trial Court and decided through the impugned order, whereby personal appearance of the respondent No. 2 was dispensed with, whereas the application of the petitioner for cancellation of the bail bonds of the said respondent was dismissed.

3. Feeling aggrieved, the instant revision petition has been preferred, with the contention and the grounds that the respondent No. 2 had left the country prior to passing of the impugned order, hence no reason, cause or justification to grant him the dispensation, and as such the impugned order is not acceptable under the law.

4. The learned counsel appearing on behalf of the petitioner has advanced his arguments in the above-mentioned lines, whereas the learned counsel for the respondent No. 2 has supported the impugned order and opposed the revision petition.

5. Arguments heard and record perused.

6. Section 540-A of the Code of Criminal Procedure, 1898 deals with exemption to an accused from personal appearance, in a trial or the inquiry. The said provision reads as under:--

"540-A. Provision for inquiries and trial being held in the absence of accused in certain cases.---(1) At any stage of an inquiry or trial under this code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied for reason to be recorded, that any one or more of such accused is or incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

7. Plain reading of the above mentioned provision shows that to claim and grant, exemption to an accused, the following conditions should be fulfilled:-

(i) There should be two or more accused before the court.

(ii) The accused seeking exemption should be before the court.

(iii) The accused should be incapable to remain before the court.

(iv) The accused should be represented by a pleader.

(v) The court should be satisfied about incapability of the accused to remain before it.

8. In the matter in hand, Irshad (respondent No. 2) along with his co-accused (more than two) was facing the trial before the learned Additional Sessions Judge, Dera Ghazi Khan. On 19-1-2013, he filed an application, before the learned trial Court under sections 205/540-A of Cr.P.C., whereby he sought dispensation from personal appearance, on the grounds that during investigation, he had been declared innocent, but appeared and joined into the trial on summoning of the court and that he to earn livelihood was serving at Saudi Arabia, for which purpose he obtained visa while incurring heavy expenditures, which was going to expire and that in his place, Malik Muhammad Shiraz Arshad Advocate will appear in the court on each and every date of hearing and join into the proceedings.

9. The august Supreme Court of Pakistan in the case titled 'Haji Aurangzeb v. Mushtaq Ahmad and another' (PLD 2004 SC 160) has held that in the above mentioned like situation, exemption to an accused should be given. The relevant portions of the said judgment read as under:--

"Incapability is word of wide import and may cover all circumstances beyond the control of the accused. The exemption could be granted in absence in extremely exceptional cases like ailment of accused which rendered his

movement difficult (like the case of paralysis) or departure from country or station is absolutely necessary and there is no time to have recourse to the court for seeking permission/exemption."

"The provisions of section 540-A, Cr.P.C. are to be interpreted with benevolence, because it is an enabling provision not meant to punish some one. The section, in the circumstances, aims at achieving three-fold benefit. One benefit being that of the exempted accused, second being that of the co-accused under trial and third being the convenience of the Court itself."

10. In the situation in hand, all the above mentioned conditions are fulfilled. There are more than two accused. Only one (respondent No. 2) has claimed the exemption, while showing the above mentioned incapability, which, as per the above mentioned dictum of the august Supreme Court of Pakistan can rightly be termed to be a fit one, for grant of exemption. He has categorically stated that if exemption is granted, then in his place, the above named Advocate will appear in the court and join into the proceedings on his behalf.

11. Undoubtedly, at the time of filing of the application, the respondent No. 2 was personally before the learned trial Court, but due to his above mentioned hardships, subsequently he had proceeded to Saudi Arabia and as such at the time of grant of exemption on 19-9-2013, he was incapable to be before the court. The learned trial Court was fully aware of the above-mentioned facts and circumstances, but while realizing that the respondent No. 2 had gone abroad due to unavoidable circumstances had granted exemption to him.

12. It has been observed that the learned trial Court, while dealing with and deciding the above mentioned application, had narrated each and every aspect, including the law on the subject in detail. Therefore, the impugned order could not be termed to be having any legal objection.

13. In the impugned order, it has been categorically mentioned that whenever the respondent is required and summoned, he will be bound to appear in the court.

14. It has been noted that after grant of the dispensation, due to non-availability of the respondent No. 2, no hurdle in the trial has occurred.

15. For what has been discussed above, the revision petition in hand being devoid of any force and merit is dismissed. However, the learned trial Court is directed that if at any stage, it feels any hurdle in trial, due to non-appearance of the respondent No. 2 or his above named Advocate, then it will not hesitate in withdrawing the above mentioned concession and requiring personal appearance of the respondent No. 2.

MWA/M-138/L Petition dismissed.

2015 P.Cr.R. 39
[Multan]
Present: **MUHAMMAD TARIQ ABBASI, J.**
Muhammad Azam
Versus
The State, etc.

Criminal Appeal No. 97 of 2014 and Murder Reference No. 23 of 2014, decided on 22nd October, 2014.

MURDER --- (Compromise)

Criminal Procedure Code (V of 1898)---

---Ss. 410, 345---Pakistan Penal Code, 1860, Ss. 302/311/114---Murder appeal---Compromise between appellant-convict and the legal heirs of deceased---Reportedly parties had compromised whereby legal heirs of the deceased had forgiven appellant-convict in the name of Allah Almighty, without any compensation and had no objection, if in consequence of the compromise, the appellant-convict was acquitted of charge---No clear offence was made out to constitute offence covering element /mischief of (fasd-fil-arz)---Impugned conviction/sentence of death was set aside---Criminal appeal allowed.
(Paras 4, 5, 6, 7)

Ref. 2011 MLD 1919, 2014 SCMR 1155.
مذکورہ قتل کاروکاری اور سیاہ کاری کا نتیجہ نہ تھا۔ ما بین فریقین راضی نامہ کی بنیاد پر سزائے موت کے خلاف اپیل منظور ہوئی۔

[Offence of murder was not in consequence of Karokari and Siakari. On basis of compromise between parties. Impugned conviction/sentence of death was set aside].

For the Appellant: Malik Muhammad Saleem, Advocate.
For the State: Malik Riaz Ahmad Saghla, Deputy Prosecutor General.

Date of hearing: 22nd October, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- This judgment shall dispose of the above-captioned Murder Reference and the Criminal Appeal as both are outcome of same judgment dated 28.2.2014, passed by the learned Additional Sessions Judge, Jampur, District Rajanpur, whereby in case F.I.R. No. 51, dated 01.10.2012, registered under Sections 302/311, 114 P.P.C. at Police Station Laal Garb, Muhammad Azam (appellant) has been convicted under Section 302(b), P.P.C. and sentenced to death, with compensation of Rs.1,00,000/-, payable to the legal heirs of the deceased, otherwise to serve simple imprisonment for six months.

2. The precise facts are that in the above-mentioned case, the appellant was challaned for commission of 'Qatal-e-Amd' of *Mst.* Tasleem Mai, which was received in the Court of learned Additional Sessions Judge, Jampur, District Rajanpur, the appellant was charge-sheeted; he pleaded not guilty and claimed the trial; all the proceedings including recording of the prosecution evidence, statement under Section 342, Cr.P.C. were completed and finally the judgment was pronounced in the above-mentioned terms. Consequently, the Murder Reference and the Appeal in hand.

3. During pendency of the above-said matters, criminal miscellaneous No. 204-M/2014 was preferred, with the contention that a compromise between the appellant/convict and the legal heirs of the deceased has been arrived at, whereby he has been forgiven, hence the proceedings under Section 345, Cr.P.C. may be carried on and the matters may be disposed of.

4. To know genuineness or otherwise of the compromise, the matter was referred to the leamed Sessions Judge, Rajanpur, where the due proceedings were carried on and accordingly a report has been submitted. As per the report, *Mst.* Tasleem Mai (deceased) was unmarried and survived by her parents namely Zafar Khan and *Mst.* Malka Mai; both made the statements to the effect that they have effected compromise with the appellant/convict (Muhammad Azam), whereby they forgiven him, the murder of their above-named daughter in the name of Allah Almighty, without any compensation and have no objection if, in consequence of the compromise, the appellant/convict (Muhammad Azam) is acquitted of the charge. The learned Sessions Judge, Rajanpur has held the compromise to be genuine, voluntary and in interest of the parties. Even today, the above-named parents of the deceased are available before the Court and confirm the factum of compromise as reported by the learned Sessions Judge, Rajanpur.

5. The learned Deputy Prosecutor General has contended that as the murder was on the pretext of *'karokari' and 'siyakari'*, hence, the appellant may be dealt with under Section 311, P.P.C. Although the F.I.R. was also registered under the said provision and the appellant, besides offence under Section 302, P.P.C., was also charge-sheeted under Section 311, P.P.C., but he was sentenced only in offence under Section 302(b), P.P.C., meaning thereby that the learned Trial Court while considering the attending facts and circumstances and evidence on the record did not deem it necessary to convict and sentence the appellant in offence under Section 311, P.P.C. Even as per Section 345(2-A), Cr.P.C., if an offence under Chapter XVI of the Pakistan Penal Code, 1860, has been committed in the name or on the pretext of '*karokari' and 'siyakari',* or on other similar customs or practices, such offence may be waived or compounded subject to such conditions as the Court may deem it to impose with the consent of the parties having regard to the facts and circumstances of the case. No clear evidence is available on the record to constitute the offence involving the element/mischief *of (fasad-fil-arz).* The Hon'ble Supreme Court of Pakistan in the judgment *"Iqrar Hussain and others v. The State and another"* (2014 SCMR 1155), while discussing Sections 345, Cr.P.C. and 311, P.P.C., has held as under:-----*Ss. 302 & 311---Criminal Procedure Code (V of 1898), S. 345---Qatl-e-Amd---Reappraisal of evidence--Compromise between parties---Compounding of right of "Qisas" by legal heirs of the deceased---Offence not constituting "fasad-fil-arz"---Accused were convicted and sentenced for murder of deceased----During pendency of appeal before the High Court, compromise was effected between the parties, which was duly verified to be genuine by the Trial Court---High Court, however held that present case was of the nature which fell within the definition of "fasad-fal-arz" and because the accused acted in a brutal manner, the crime committed was outrageous to public conscious, therefore, compounding right of* "Qisas" *by the "walis" would not completely exonerate the accused nor could they go without any punishment---High Court convicted the accused under S. 311, P.P.C. despite the compromise effected between the parties---Validity---Section 311, P.P.C. was attracted in cases punishable with "Qisas" and not to cases punishable under "Ta'azir"---Section 302, P.P.C. was compoundable in view of provisions of S. 345, Cr.P.C.---Accused entered into a genuine compromise with the complainant/legal heirs of deceased---No clear evidence was available to constitute the offence involving the element/mischief of fasad-fil-arz, thus the High Court was not justified in law to convert the punishment of the accused*

to one under S. 311, P.P.C. instead *of acquitting them on the basis of compromise--- High Court had committed a legal error in convicting and sentencing the accused for crime under S. 311, P.P.C., which caused serious miscarriage of justice---Appeal was allowed on the basis of compromise, and accused were acquitted of the charge leveled against them.*

A learned Division Bench of this Court in the case of *"Abdul Hameed v. The State and another"* (2011 MLD 1919), while dealing with the instant like situation, had made the following conclusion:---

"The above discussion brings us to the conclusion that the offences falling under Chapter XVI of P.P.C. and mentioned in the schedule under Section 345, Cr.P.C. even if committed in the name of "ghayrat" "Karo Kari", "Sayah Kari" and similar other customs, are compoundable and may be waived."

6. The parents of the deceased frankly contend that the offence in question was not in consequence of *`karokari and 'Siyakari',* hence they are not inclined to impose any condition upon the appellant/convict.

7. As a result of the above-mentioned discussion, in our view, there is no hurdle to accept the compromise. Consequently, the Criminal Appeal No. 97/2014 is accepted, the impugned judgment is set aside and Muhammad Azam is acquitted of the charge. The Murder Reference No. 23/2014 is answered in negative and the death sentence of Muhammad Azam is not confirmed.

Criminal appeal allowed.

PLJ 2015 Cr.C. (Lahore) 57

[Multan Bench Multan]

Present: MUHAMMAD TARIQ ABBASI, J.

Mst. SHAHNAZ KAUSAR--Petitioner

versus

S.H.O., POLICE STATION CIVIL LINE, DISTRICT MUZAFFARGARH and 4 others--Respondents

Crl. Misc. No. 69-H of 2014, decided on 19.2.2014.

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

----S. 491--Petition of Habeas Corpus--Illegal and improper custody of petitioner's daughter--Alleged detenue has contended she has come to Court from house of her husband (respondent No. 2) with whom she according to her free will and consent has contracted 'Nikah'--As per request of petitioner, lady has been made to sit with here for a reasonable time and when case has again been called, she has categorically stated that she would go and live with her above named husband and not at all with petitioner--Petition dismissed. P. 58] A

Rai Muhammad Zahid, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, DPG for State.

Mr. Muhammad Bilal Butt, Advocate for Respondent No. 2.

Date of hearing: 19.2.2014.

ORDER

Ghulam Rasool, SI has put appearance with the contention that despite best and honest efforts, the alleged detenue namely Abeera Bashir could not be traced. Contentions laid down by the SI seems doubtful, hence it is directed that the DPO Muzaffargarh alongwith the SHO of the concerned Police Station should appear before the Court on 1.30 PM.

Called again. At this time, Mr. Usman Akram Gondal, DPO, Muzaffargarh alongwith Javed Iqbal SHO of Police Station Civil Lines have attended the Court. If has been informed that just after passing of the above mentioned earlier order, the above named lady was brought in the Court and that she still is available here, When the DPO has been intimated about the above mentioned situation that non production of the lady in the Court during the earlier hours and her subsequent production, when the above mentioned order was passed, amounts that the concerned SI namely Ghulam Rasool was aware of the lady and to achieve some ulterior motive had narrated a wrong story to the Court. The DPO has contended that strict action against the delinquent will be taken. He has specifically been directed that the nasty(s) should not be spared so that all the system should be streamlined and no embarrassment may occur to anyone including the Police Department, which is considered and presumed to be a disciplined one.

2. *Mst.* Abira Bashir has contended she has come to the Court from the house of her husband Syed Shahanshah Bukhari (Respondent No. 2) with whom she according to her free will and consent has contracted 'Nikah' on 5.12.2013. As per request of the petitioner, the lady has been made to sit with here for a reasonable time and when the case has again been called, she has categorically stated that she would go and live with her above named husband and not at all with the petitioner.

3. In the light of the above stated situation, the petition in hand has failed and as such dismissed.

(A.S.)

Petition dismissed.

PLJ

2015 Cr.C. (Lahore) 89 (DB)
[Multan Bench Multan]
Present: **MUHAMMAD TARIQ ABBASI AND JAMES JOSEPH, JJ.**
MUHAMMAD SAFDAR--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 127-M of 2014, decided on 21.10.2014.

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

----S. 426(2-B)--Petition--Suspension of sentence--Petitioner has remained behind bars and after getting benefit of-Section 382-B, Cr.P.C. and remission earned by him from time to time has undergone more than half sentence and there was no likelihood of his appeal being disposed of in near future, therefore, sentence awarded to petitioner was hereby suspended. [P. 91] A

Ch. Imran Khalid Amratsari, Advocate for Petitioner.
Mr. Muhammad Bilal Butt, Advocate for Complainant.
Malik Riaz Ahmad Saghla, DPG for State.
Date of hearing: 21.10.2014.

ORDER

The petitioner was convicted by the learned Additional Sessions Judge, Multan *vide* judgment dated 08.06.200.6 in case FIR No. 397/2001 dated 22.10.2001 under Section 302/324/365/337-F(iii)/337-L(ii)/148/149, PPC registered at PS Mumtazabad, Multan and was sentenced as follows:

(i) Under Section 302 (b), PPC. Death Rs.50,000/- as compensation under Section 544 (A), Cr.P.C.

(ii) Under Section 365 readwith Section 148/149, PPC 5-years R.I. and a fine of Rs.5,000/- in default S.I. for 3-months.

(iii) Under Section 337-L (ii), PPC 2-years R.I. and Rs.5000/as Daman

(iv) Under Section 33 7-F (iii), PPC 3-years R.I. as Tazir and Daman of Rs. 100,000/-

All sentences shall run concurrently and benefit of Section 382(b), Cr.P.C. was also extended to the petitioner.

2. On appeal the learned Division Bench of this Court *vide* order dated 11.11.2010 disposed of Crl. Appeal No. 315/2006 and M.R. No. 705/2006 filed by the petitioner and altered the death sentence of the petitioner into life imprisonment whereas he was acquitted of the remaining charges.

3. The petitioner preferred Jail Appeal No. 326/2011 and Crl. Petitions No. 679 & 680.of 2010 before the Apex Court of Pakistan and *vide* order dated 23.01.2014 the Apex Court was pleased to observe as under:

> "It has *inter alia* been contended by the learned counsel for the petitioner that Haji Muhammad Yaqoob (PW-9) was a pivotal figure in the occurrence in issue and he had applied before the local police for registration of a criminal case against the present accused party and in his application he had given a version of the incident which was totally different from the version of the occurrence mentioned in the FIR lodged by Maqsood Ahmed (PW8); the said Haji Muhammad Yaqoob (PW-9) had got his statement recorded before the police under Section 161, Cr.P.C. and in that statement he had advanced a version of the incident different from the FIR and had exonerated some of the accused persons attributed fire-arm injuries to the deceased in the FIR; the impugned judgment passed by the Lahore High Court, Multan Bench, Multan shows that the eye-witnesses produced before the learned trial Court had been changing their stance at different stages of the case; two co-accused of the petitioner attributed effective and fatal firing at Liaquat Ali deceased had been acquitted by the learned trial Court and the same evidence could not

have been safely relied upon against the present petitioner; the motive set up by the prosecution had been discarded by the Lahore High Court, Multan Bench; and, therefore, the prosecution had failed to prove its case against the petitioner beyond reasonable doubt.

2. The contentions of the learned counsel for the petitioner noted above require reappraisal of the evidence so as to secure the interests of justice. This petition is, therefore, allowed and leave to appeal is granted for the purpose.

4. It in this background that the petitioner has approached this Court under Section 426 (2-B), Cr.P.C. for suspension of sentence awarded to him by the learned trial Court and upheld by this Court, maintaining that there is likelihood of the acquittal of the petitioner in the long run and simultaneously, there is no likelihood of his appeal being heard and decided in the near future by the Apex Court, hence, the sentence awarded to him be suspended.

5. Learned counsel for the complainant assisted by the learned Law Officer vehemently opposed the submissions made by the learned counsel for the petitioner.

6. We have heard learned counsel for the parties and perused the record.

7. Keeping in view the leave granting order of the Apex Court, as reproduced above, and also the fact that the petitioner has remained behind the bars since 07.11.2001 and after getting benefit of-Section 382-B, Cr.P.C. and remission earned by him from time to time has undergone more than half sentence and there is no likelihood of his appeal being disposed of in the near future, therefore, sentence awarded to the petitioner is hereby suspended and he is ordered to be released on bail subject to his furnishing bail bonds in the sum of Rs.200,000/- (Rupees two lac only) with one surety in the like amount

to the satisfaction of the Deputy Registrar (Judl.) of this Court. However, he is directed to appear before the Apex Court on each and every date of hearing till the final decision of the appeal.

(A.S.) Sentence suspended

PLJ 2015 Cr.C. (Lahore) 378 (DB)

[Multan Bench Multan]

Present: **MUHAMMAD TARIQ ABBASI AND QAZI MUHAMMAD AMIN AHMAD, JJ.**

MUHAMMAD RAFIQUE--Appellant

versus

STATE & another--Respondents

Crl. Appeal No. 76 and Capital Sentence Reference No. 3 of 2011, heard on 12.12.2014.

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

----S. 302(b)--Anti-Terrorism Act, (XXVII of 1997), S. 7--Conviction and sentence--Challenge to--Compromise--Appellant has been convicted and sentenced for commission of offence u/S. 302(b), PPC and 7 of Anti-Terrorism Act, 1997--Compromise can only be effected regarding offences mentioned in Section 345, Cr.P.C. and none else--Compromise is permissible and acceptable only to extent of offence u/S. 302(b), PPC--Consequently, on basis of compromise, conviction and sentence of appellant in offence under Section 302(b), PPC was set aside and he was acquitted of charge under said offence--As regards above mentioned other offence under Section 7 of Anti-Terrorism Act, 1997, it is stated that in light of above mentioned dictum, as said offence was not compoundable, hence compromise in it could not be permitted and accepted--Appellant had committed offence inside Court room, hence under third Schedule of Anti-Terrorism Act; 1997, provision of Section 7 of Anti-Terrorism Act, 1997 were fully attracted and as such appellant was rightly convicted under above mentioned provision--When from charge of offence under Section 302(b), PPC, appellant has been acquitted as a consequence of compromise--He deserves concession in quantum of his sentence for above mentioned offence of Anti-Terrorism Act, 1997--There was only one life, which has been spared, by accepting compromise in offence u/S. 302(b), PPC, hence it would not be justified to again take said life for offence u/S. 7 of Anti-Terrorism Act, 1997--Said fact in our view is also an extenuating circumstance for lesser penalty to appellant in above mentioned offence.

[Pp. 380 & 381] A, B, C, D & E

2004 SCMR 1170, PLD 2014 Supreme Court 383 and PLD 2014 Supreme Court 809 *ref.*

Mr. Iftikhar Ibrahim Qureshi, Advocate for Appellant.
Malik Muhammad Jaffer, D.P.G. for State.
Date of hearing: 12.12.2014.

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned matters being outcome of single judgment dated 23.7.2011, passed by the learned Judge Anti-Terrorism Court No. 1, Multan, whereby Muhammad Rafique (hereinafter referred to as the 'appellant') was convicted and sentenced in the following terms:--

(a) Under Section 302(b), PPC to death and compensation of Rs. 5,00,000/-, payable to the legal heirs of *Mst.* Gullan Bibi (deceased), failing which to undergo simple imprisonment for six months.

(b) Under Section 7 of the Anti-Terrorism Act, 1997 to death with fine of' Rs. 5,00,000/-, in default whereof to undergo simple imprisonment for six months.

2. The facts are that case FIR No. 837 dated 21.12.2010 under Section 302, PPC and 7 of the Anti-Terrorism Act, 1997 at Police Station City Arifwala, District Pakpattan was registered against the appellant, with the allegations that he by firing, committed *qatal-e-amd* of his mother *Mst.* Gullan Bibi, in the Court room of Mr. Saeed Raza, Judicial Magistrate Arifwala, District Pakpattan. On completion of the investigation, the challan against the appellant was submitted in the Court of learned Judge Anti-Terrorism Court No. 1, Multan, where he was charge sheeted. As the charge was denied by him, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 11 witnesses, whereas one was recorded as CW. On completion of all the proceedings, the learned trial Court had passed the impugned judgment in the above mentioned terms. Consequently, the matters in hand.

3. During pendency of the matters, an application (Criminal Misc. 1145-M of 2011) under Section 309/310 read with Section 345, Cr.P.C. was moved by the appellant, with the contention that a compromise between him and the legal heirs of the deceased had been arrived at, hence on the basis of the compromise, he may be acquitted of the charge. Regarding the alleged compromise, a report from the learned trial Court was requisitioned, and accordingly submitted. As per the report, the above named deceased was survived by *Mst.* Zaiban Bibi (mother), Nazir Ahmad (husband), Ahmad Saeed, Rasheed Ahmed, Shahid Fareed,

Muhammad Asad (sons), *Mst.* Surriya Bibi & *Mst.* Abida Bibi (daughters). Out of the above mentioned legal, heirs, Muhammad Asad was the minor, whereas rest were major. The major legal heirs had got recorded their respective statements, whereby confirmed their compromise with the appellant, without any compensation and no objection on his acquittal. Share in *diyat* of the minor was determined as Rs. 2,03,670/- and his interest was protected by transferring a plot measuring 05 *Marla*, valuing Rs.2,00,000/- in his favour, through Mutation No. 861 dated 23.1.2012 and deposit of the balance amount Rs. 4,000/- in his account, opened in Habib Bank Limited. Consequently, it was reported that the compromise was genuine and complete.

4. As stated above, the appellant has been convicted and sentenced for commission of offence under Section 302(b), PPC and 7 of the Anti-Terrorism Act, 1997. As per the dictum laid down by the august Supreme Court of Pakistan in cases *"Muhammad Rawab Versus The State"* (2004 SCMR 1170) and *"Muhammad Nawaz Versus The State"* (PLD 2014 Supreme 383), compromise can only be effected regarding the offences mentioned in Section 345, Cr.P.C. and none else. Therefore, in the matter in hand, the compromise is permissible and acceptable only to the extent of the offence under Section 302(b), PPC. Consequently, on the basis of the compromise, the conviction and sentence of the appellant in offence under Section 302(b), PPC is set aside and he is acquitted of the charge under the said offence. As regards the above mentioned other offence under Section 7 of the Anti-Terrorism Act, 1997, it is stated that in the light of the above mentioned dictum, as the said offence is not compoundable, hence compromise in it could not be permitted and accepted.

5. It has been confirmed on the record that the appellant had committed the offence inside Court room, hence under the third Schedule of Anti-Terrorism Act; 1997, the provision of Section 7 of the Anti-Terrorism Act, 1997 were fully attracted and as such the appellant was rightly convicted under the above mentioned provision. When from the charge of offence under Section 302(b), PPC, the appellant has been acquitted as a consequence of compromise, then as per law laid down in cases *"Muhammad Nawaz versus The State* (PLD 2014 Supreme Court 383)" and *"Shahid Zafar and 3 others Versus The State* (PLD 2014 Supreme Court 809) he deserves concession in quantum of his sentence for the above mentioned offence of Anti-Terrorism Act, 1997. In the case of *Muhammad Nawaz (Supra)* the Hon'ble Supreme Court of Pakistan observed as under:--

"9. However, this fact can also not be over sighted that in respect of murder of Muhammad Mumtaz, Constable, the petitioner was also sentenced to death and now the parties have compounded the offence under Section 302(b), P.P.C.. and according to the record compensation has also been paid. Therefore, question for quantum of sentence under Section 7 of ATA can be examined in view of the judgment in the case of *M. Ashraf Bhatti v. M. Aasam Butt* (PLD 2006 SC 182) wherein after the compromise between the parties sentence of death was altered to life imprisonment.

10. It is to be noted that both the sentences i.e., death and life imprisonment are legal sentences, therefore, under the circumstances either of them can be awarded to him. Thus in view of the peculiar circumstances noted hereinabove, sentence of death under Section 7 ATA, 1997 is converted into life imprisonment ……."

Furthermore, there is only one life, which has been spared, by accepting compromise in offence under Section 302(b), PPC, hence it would not be justified to again take the said life for offence under Section 7 of Anti-Terrorism Act, 1997. The said fact in our view is also an extenuating circumstance for lesser penalty to the appellant in the above mentioned offence.

6. Consequently, conviction of the appellant under Section 7 of the Anti-Terrorism Act, 1997 is maintained. However, his sentence is altered from death to imprisonment for life. The amount of fine prescribed by the learned trial Court and imprisonment in case of default in its payment is maintained and upheld. The benefit of Section 382-B, Cr.P.C. is provided to the appellant. The Criminal Appeal No. 76/2011 is decided in the above mentioned terms and CSR No. 03/2011 is answered in negative.

(A.S.) Order accordingly

PLJ 2015 Cr.C. (Lahore) 478 (DB)
[Multan Bench Multan]
***Present*: MUHAMMAD TARIQ ABBASI AND JAMES JOSEPH, JJ.**
AHMED DIN--Appellant
versus
STATE--Respondents

Crl. A. No. 390 of 2010 and M.R. No. 98 of 2009, heard on 20.10.2014.

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

----S. 302(b)--Conviction and sentence--Modification in sentence--Challenge to--It was a day light occurrence--Matter was reported to Police immediately--Appellant/convict was nominated to be person, who had fired and caused death of deceased--Prosecution witnesses had satisfactorily explained their presence and availability at spot-- PW-7 was resident of vicinity, whereas PW-2 had justifiably explained his presence at spot that he had come at house of his brother (deceased)--Contentions made by counsel for appellant/ convict that said witnesses were chance witnesses, was nothing, but a bald assertion--Although said witnesses were related inter se as well as with deceased, but their no enmity or grudge with appellant/convict could be established on record, hence their mere relationship was not sufficient to discard their testimony, which otherwise was confidence inspiring--Alleged motive was not proved and established and was yet shrouded into mysteries--Even trial Court had failed to discuss alleged motive, in impugned judgment--Failure of prosecution to prove motive may result in reduction of sentence of death to that of imprisonment for life--Empties from spot were allegedly collected, appellant/convict was arrested and recovery of pistol from him was effected, but empties were sent to laboratory, meaning thereby that empties and pistol remained in Police Station for a considerable long time and empties were dispatched to laboratory after about 1 1/2 months of recovery of pistol--No explanation or justification of above mentioned alarming lapse committed by prosecution has been brought on record--Said reason has made report of Forensic Science Laboratory, regarding matching of empties with pistol recovered from appellant convict, has made of no consequence--Conviction of appellant was maintained but his sentence was converted from death to imprisonment for life--Appeal was dismissed. [Pp. 483, 484 & 485] A, B & C

2010 SCMR 650, 2013 SCMR 782 & 2013 YLR 2748, *rel*.

Benefit of doubt--

----Principle--It is well settled principle, by now that accused is entitled for benefit of doubt as an extenuating circumstance while dealing his question of sentence as well. [P. 485] D

2009 SCMR 1188, *ref*.

Malik Imtiaz Haider Maitla, Advocate for Appellant.

Mr. Riaz Ahmad Saghla, D.P.G. for State.

Date of hearing: 20.10.2014.

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned matters, being result of the judgment dated 22.7.2009 passed by the learned Additional Sessions Judge, Muzaffargarh, whereby Ahmad Din (appellant in Criminal Appeal No. 390/2010) was convicted under Section 302(b), PPC for commission of '*Qatal-e-Amd*' of Abdul Latif and sentenced to death, with compensation of Rs.2,00,000/-, payable to the legal heirs of the deceased, failing which, to further undergo simple imprisonment for six months.

2. The precise facts are that Muhammad Siddique (complainant) had made the statement/'Fard Bian' (Ex.PA/1), which resulted into registration of the FIR (Ex.PA), with the contention that on 12.3.2006, at about 9.00 a.m., he alongwith his brother Abdul Latif (deceased) was available in the house, when M/s. Ahmad Din (appellant/convict) and Yasin (co-accused since acquitted) started digging the earth from their land (complainant party) and taking it to their (accused party) house, who were abstained by him and the deceased; after sometime, the above named again started digging and lifting the earth, whereupon Abdul Latif (deceased) again abstained them; after a short while, Abdul Latif (deceased) cried (bachau bachau) and the complainant saw that Ahmad Din (appellant/convict) while armed with a pistol .30 bore and Yasin (co-accused since acquitted), having an iron rod were running behind the deceased, to beat him; hue and cry attracted Saeed Ahmad (PW-7) and Sadiq Hussain (given up PW), who ran to save Abdul Latif (deceased); the deceased when reached near the house of Hafiz Rab Nawaz and called him to save him, but in the meanwhile, Ahmad Din (appellant/convict), reached there and made two fires with his pistol,

which landed at the chest of Abdul Latif and he fell down; Ahmad Din (appellant/convict) fired four other successive shots, which hit at left side and arm of Abdul Latif (deceased); Yasin (accused since acquitted) inflicted iron rod blows at right arm and different parts of the body or the deceased; the complainant and the prosecution witnesses when stepped forward, they were threatened by the accused, hence did not go near; Abdul Latif succumbed to the injuries at the spot and the accused fled away. The motive as alleged by the complainant was forbidding the accused from lifting earth from the land of the deceased.

3. The matter was investigated, the appellant/convict as well as his above named co-accused were found to be involved, hence challaned to the Court. The pre-trial proceedings were carried on and the appellant/convict and his co-accused (since acquitted) were charge sheeted on 10.2.2007. They pleaded not guilty and claimed the trial, hence the prosecution evidence was summoned and recorded.

4. The prosecution had got examined as many as 10 witnesses. The gist of evidence, led by the important/material witnesses is as under:-

(i) **PW-2 Muhammad Siddique,** complainant as well as an eye-witness of the alleged occurrence had narrated almost the same facts as were stated by him in his Fard Bian' (Ex.PA/1). He had also attested memo. (Ex.PE), through which the empties collected by the Investigating Officer from the spot were taken into possession. In his presence, the appellant/convict had made disclosure and then led to the recovery of .30 bore pistol, which was secured by the I.O. through memo. (Ex.PB), attested by him.

(ii) **PW-4 Muhammad Hussain,** ASI, on 12.3.2006 had kept a sealed parcel containing five empties, in the Malkhana, then handed over it to Muhammad Mohsin, Head Constable (PW-5) on 12.5.2006 for its onward transmission to the office of Forensic Science Laboratory, Lahore.

(iii) **PW-5 Muhammad Mohsin,** Head Constable had transmitted a sealed parcel allegedly containing the empties from the Police Station to the office of Forensic Science Laboratory, Lahore on 12.5.2006.

(iv) **PW-6 Altaf Hussain.** Constable had transmitted a sealed parcel allegedly containing the pistol, from the Police Station to the office of Forensic Science Laboratory, Lahore on 3.8.2006.

(v) **PW-7, Ahmad Saeed,** an alleged eye-witness of the occurrence, during statement in the Court had stated and corroborated version of Muhammad Siddique (complainant/PW-2) in all its four corners. He had also attested the memo. (Ex.PE), through which the I.O. had taken five empties into possession and the memo. (Ex.PD), through which last worn clothes of the deceased were secured by the I.O.

(vi) **PW-9, Ghulam Hussain,** Sub-Inspector had recorded the statement (Ex.PA) of the complainant (P W-2) and also carried on the investigation, during which, inspected the dead body and prepared injury statement (Ex.PG) and inquest report (Ex.PH); got conducted the post-mortem examination of the deceased; prepared the rough site-plan of the spot (Ex.PJ); collected five empties (P-1 to P-5) from the spot and secured them through recovery memo. (Ex.PE); took into possession the last worn clothes through memo. (Ex.PD), arrested Ahmad Din (appellant/convict) on 26.3.2006; took into possession .30 bore pistol (P-4), which was got recovered by the above named appellant/convict on 29.3.2006, through memo. (Ex.PB).

(vii) **PW-10, Dr. Muhammad Rafique** had conducted the post-mortem examination of the dead body of Abdul Latif (deceased) on 12.3.2006 *vide* report (Ex.PL) and the diagrams (Ex.PL/1). During the said examination, the following injuries were found on the dead body:--

(a) A lacerated wound 1 cm x 1 cm on left arm outer side near elbow, margins inverted and black.

(b) A lacerated wound 1 cm x 1 cm on left arm outer side below the Injury No. 1. Margins inverted.

(c) A lacerated wound 3 cm x 2 cm on inner side of left arm near Injury No. 5. Margins averted (outlet).

(d) A lacerated wound 1 cm x 1 cm (two in number) on front of chest below nipples. Margins inverted and black (inlet).

(e) A lacerated wound 2 cm x 2 cm on chest left side below nipple margins inverted and black (inlet) corresponding marks of

aperture were present. Thoracic and abdominal cavity were full of liquid blood.

(f) A lacerated wound 5 cm x 3 cm x skin deep on right foot near heel outsider.

The cause of death recorded by the doctor, was the result of above mentioned injuries, which were anti-mortem in nature and sufficient to cause death in ordinary course of nature and that the time between the injuries and death was immediate.

5. After examination of all the prosecution witnesses, report given by the Forensic Science Laboratory, Lahore was tendered in evidence as Ex.PM and case for the prosecution was got closed, whereafter the appellant/convict was examined as required under Section 342 Cr.PC, during which the questions emerging from the prosecution evidence were put to him, but he denied almost all such questions, while pleading his innocence and false involvement, in the case with *mala fides*. The question "Why this case against you and why the PWs have deposed against you?", was replied by the appellant/convict in the following terms:

> "Deceased Abdul Latif was our "Behnoi". We had suspicion of illicit liaison of our sister *Mst.* Amir Mai with brother of Muhammad Siddique complainant due to which brother of the deceased shifted his residence to Multan. Out "Behnoi" had enmities with other persons of the locality and he was murdered by some unknown persons. The occurrence was not witnessed by anyone and blind one. We had no enmity with our "Behnoi". We have been false involved in this case due to previous enmity and have been made scapegoat. PW-2 Muhammad Siddique and PW-7 Ahmad Saeed being related with the deceased and inter se have deposed falsely."

6. The appellant/convict did not opt to lead any evidence in his defence or make statement under Section 340(2) Cr.PC. On completion of the trial, the learned trial Court had passed the impugned judgment, in the above mentioned terms. Consequently the Appeal and the Murder Reference in hand.

7. The learned counsel for the appellant has argued that the appellant is innocent and falsely roped, in the case, with *mala fides*, while concocting a

false and frivolous story; neither the complainant (PW-2) nor Ahmad Saeed (PW-7) were available at the spot or had witnessed any occurrence and both with *mala fide*s were introduced at subsequent stage; both the above named were chance witnesses, hence not believable; the above named witnesses were related inter se as well as the deceased, hence their statements were not credible; the alleged recoveries were not proved/established, hence not believable; the statements of the eye-witnesses were full of material contradictions, but erroneously not considered by the learned trial Court; the prosecution case as well as the charge was not proved and established, hence the appellant was entitled for acquittal and as such the impugned judgment is not sustainable in the eye of law.

8. Learned Deputy Prosecutor General has vehemently opposed the appeal, while supporting the impugned judgment to be quite justified.

9. Arguments of the learned counsel for the appellant as well as the learned Deputy Prosecutor General have been heard and the record has been perused.

10. Muhammad Siddique, complainant (PW-2) and Ahmad Saeed (PW-7) had categorically deposed that in their presence and within their view, Abdul Latif was done to death, by Ahmad Din (appellant/convict), by firing with a pistol and that on receipt of the injuries, the deceased died at the spot. The above mentioned contention of the above named witnesses has been supported by the statement of the doctor (PW-10), the post-mortem report (Ex.PL) and that the diagram report; (Ex.PL/1) as five fire shot injuries on the dead body were observed and that on receipt of the injuries, the death was instant.

11. The above mentioned version of the above named witnesses was corroborative, concurrent and confidence inspiring. The defence despite lengthy cross-examination had failed to contradict the above said version or bring on the record, any other material favourable to the appellant/convict.

12. It was a day light occurrence. The matter was reported to the Police immediately. The appellant/convict was nominated to be the person, who had fired and caused death of Abdul Latif. The prosecution witnesses had satisfactorily explained their presence and availability at the

spot. Saeed Ahmad (PW-7) was resident of vicinity, whereas Muhammad Siddique (PW-2) had justifiably explained his presence at the spot that he had come at the house of his brother (deceased). The contentions made by the learned counsel for the appellant/convict that the above said witnesses were chance witnesses, is nothing, but a bald assertion. Although the above said witnesses are related inter se as well as with the deceased, but their no enmity or grudge with the appellant/convict could be established on the record, hence their mere relationship is not sufficient to discard their testimony, which otherwise is confidence inspiring. Our above mentioned view is fortified by the case of *"Haji vs. The State* (2010 SCMR 650), wherein the Hon'ble Supreme Court of Pakistan has observed as under:

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

13. In `Fard Bian' (Ex.PA/1), the FIR (Ex.PA) as well as in the statement, Muhammad Siddique had narrated the dispute to be digging and lifting of earth by the appellant/convict, from the land belonging to the deceased and that when the appellant/convict was forbidden from the said activity, the deceased was done to death. During cross-examination, the complainant deposed that the deceased did not tell him about any dispute with the appellant, and that before the occurrence, there was no dispute of any nature between the deceased and the appellant. The complainant had further contended that when he alongwith his brother (deceased) went to forbid the appellant/convict from digging of the earth, no exchange of hot words was taken place. Ahmad Saeed (PW-7) contended that at the time of

quarrel/digging of soil, he was not available there. Murid Mussain Patwari (PW-8), who had inspected the spot and drafted scaled site-plans, had contended that during the spot inspection, no ditch or any sign towards digging or lifting of the earth was noticed by him. The same was the contention of the I.O. (PW-9) that during the spot inspection, no sign towards digging or lifting of the earth was found.

14. All the above mentioned facts and circumstances, lead to the conclusion that the alleged motive was not proved and established and is yet shrouded into mysteries. It is pertinent to mention here that even the learned trial Court had failed to discuss the alleged motive, in the impugned judgment. Failure of the prosecution to prove the motive may result in reduction of sentence of death to that of imprisonment for life. Reliance in this respect may be placed upon the judgment reported as *"Muhammad Imran @ Asif versus The State"* (2013 SCMR 782) and *"Naveed alias Needu and others versus The State and others"* (2014 SCMR 1464), the relevant portion whereof reads as under:

> "Upon our own assessment of the evidence available on the record we have felt no hesitation in concluding that the specific motive set up by the prosecution had indeed remained for from being established on the record. The law recently declared by this Court in the cases of *Ahmed Nawaz and another v. The State* (2011 SCMR 593), *Iftikhar Mehmood and another v. Qaiser Iftikhar and others* (2011 SCMR 1165) and *Muhammad Mumtaz and another v. The State and another* (2012 SCMR 267) reiterates the settled and longstanding principle that failure of the prosecution to prove the motive set up by it may have a bearing upon the question of sentence and in an appropriate case such failure may result in reduction of a sentence of death to that of imprisonment for life for safe administration of justice."

15. It has been observed that empties from the spot were allegedly collected on 12.03.2006, the appellant/convict was arrested on 26.3.2006 and

recovery of pistol from him was effected on 29.3.2006, but the empties were sent to the laboratory on 12.5.2006, meaning thereby that the empties and the pistol remained in the Police Station for a considerable long time and the empties were dispatched to the laboratory after about 1½ months of recovery of the pistol. No explanation or justification of the above mentioned alarming lapse committed by the prosecution has been brought on the record. The said reason has made the report of the Forensic Science laboratory, Lahore regarding matching of the empties with the pistol recovered from the appellant/convict, has made of no consequence. Reliance in this regard may be placed upon the judgments reported as *"Ali Sher and others versus The State"* (2008 SCMR 707) and *"Nazer Abbas versus The State"* (2013 YLR 2748).

16. For what has been discussed above, we are of the view that the impugned judgment towards conviction of Ahmad Din (appellant) is quite justified and call of the day, but in the light of the non-establishment of the alleged motive and the above mentioned status of the report of the Forensic Science Laboratory, Lahore (Ex.PM), the quantum of sentence needs consideration being harsh. It is well settled principle, by now that accused is entitled for benefit of doubt as an extenuating circumstance while dealing his question of sentence as well. In this regard, reference may be made to the case of *"Mir Muhammad alias Miro vs. the State"* (2009 SCMR 1188), wherein the Hon'ble Supreme Court of Pakistan had held as under:

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

17. Consequently, the conviction of Ahmad Din (appellant) under Section 302(b), PPC awarded by the learned trial Court through the impugned judgment is maintained, but his sentence is converted from **death** to **imprisonment for life**. The amount of compensation awarded

by the learned trial Court and the sentence for its default is maintained. The appellant shall be entitled for the benefit of Section 382-B of Cr.PC.

18. In view of the foregoing discussion, with the above mentioned modification, in the sentence of the appellant, Criminal Appeal No. 390 of 2010 is dismissed. Murder Reference No. 98/2009 is answered in negative and death sentence of the appellant is not confirmed.
(A.S.) Appeal dismissed

PLJ 2015 Cr.C. (Lahore) 494 (DB)

Present: **MUHAMMAD TARIQ ABBASI AND ABDUL SAMI KHAN, JJ.**

STATE etc.--Petitioners

versus

MUNAWAR HUSSAIN etc.--Respondents

M.R. No. 456 of 2009, Crl. A. No. 446-J of 2014 & 167-J of 2009, decided on 30.3.2015.

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

----S. 302(b)--Conviction and sentence--Challenge to--Evidentiary value of Extra Judicial confession--During proceedings by Police, complainant never appeared anywhere and as stated above, she for first time had come into picture after about ten months of alleged occurrence--It is very strange that father of deceased did not implicate or nominate any of accused, but complainant had implicated her real mother and sister--Said complainant, in complaint! had stated about a window, in house from where lady appellants had been witnessing occurrence and talking with male appellant, but as per scaled site-plan prepared by PW at spot, there was no window--As per complainant, fire was made while placing pistol at head of deceased, but during post-mortem examination, no sign of close range firing was observed--According to complainant, deceased was tied by a rope with cot, but neither any rope, nor any cot was recovered or taken into possession--Complainant during cross-examination had admitted that house of occurrence was located in a populated area, but erroneously during occurrence alleged by her or thereafter, nobody had attracted as name of none was given in complaint--Recovery of a pistol at instance of appellant had been alleged and as per report of forensic Science Laboratory, said weapon was in working condition, but as no empty from spot was collected, or sent for comparison with weapon, hence said recovery and report has become inconsequential--Evidence of extra-judicial confession furnished by PWs could not be believed, for reasons, firstly, why appellants have made such a confession before said PWs as there was no evidence on record regarding their social status or influence over bereaved family, secondly, from narration of facts given by both these PWs in their statements, alleged extra-judicial confession made by appellants, appears to be of joint nature--Apart from above, they were related inter-se and were also related to complainant party, so, their statements cannot be relied upon without independent corroboration which was very much lacking in this case-

-Extra-judicial confession is always considered a weak type of evidence. [P. 498, 499 & 500] A, C & D

2006 SCMR 231, 2009 SCMR 166, *ref*.

Believe or disbelieve of witness--

----It is settled law that to believe or disbelieve a witness all depends upon intrinsic value of his statement--It is not person but statement of that person which is to be seen and adjudged by Court. [Pp. 498 & 499] B 2011 SCMR 208, *ref*.

Benefit of doubt--

----Principle--If a simple circumstance creates reasonable doubt in a prudent mind, about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. [P. 500] E 1995 SCMR 1345, *rel*.

Principle of Law--

----Golden Principle of law--It is better that ten guilty persons be acquitted, rather than one innocent person be convicted.

[P. 500] F

Ms. Sheeba Qaisar, Advocate for Appellant (in Crl. A. No. 446-J of 2014).

Mr. Maqbool Ahmad Qureshi, Advocate for Appellant (in Crl. A. No. 167-J of 2009).

Mr. Khurram Khan, D.P.G. for State.

Nemo for Complainant.

Date of hearing: 30.3.2015.

JUDGMENT

Muhammad Tariq Abbasi, J.--This single judgment shall decide the above captioned Murder Reference as well as the appeals, as all are outcome of single judgment dated 28.8.2008, passed by the learned Additional Sessions Judge, Sangla Hill, District Nankana Sahib, whereby in a private complainant, filed by *Mst.* Rabia Bibi (hereinafter referred to as the complainant), Muhammad Munawar Hussain, Sajida Parveen and Washfa Noreen (hereinafter referred to as the appellants) have been convicted and sentenced in the following terms:--

Muhammad Munawar Hussain

Under Section 302(b), PPC to death, with compensation of Rs.1,00,000/-, payable to the legal heirs of deceased Arshad Mehmood, in default to further undergo simple imprisonment for six months.

Sajida Parveen and Washfa Noreen

Under Section 302, PPC to imprisonment for life, each with compensation of Rs.50,000/- each, payable to the legal heirs of the deceased, failing which to further undergo simple imprisonment for six months each, with benefit of Section 382-B Cr.PC.

2. The facts as narrated in the FIR (Ex. PB) are that one Sultan Ahmad had got lodged FIR No. 200 dated 9.7.2005 under Section 302/109/34, PPC at Police Station Sadar Sangla Hill, District Nankana Sahib, with the contention that his son Arshad Mehmood (deceased), alongwith his family members was residing in village Dugree, whereas he with his family was settled at Mohalla Abbas Park, Street No. 3, Faisalabad; on 8.7.2005, he, to meet his son Arshad Mehmood, came at Village Dugree; during the night between 8/9.7.2005 at about 1.00 a.m., when he, his son Arshad Mehmood deceased, daughter-in-law (Bahu) Sajida Bibi and grand children were sleeping in Courtyard of the house, four unknown armed persons, while scaling the wall, attracted there and on gun-point got awakened him, his daughter-in-law and grand children and threatened them to remain silent, otherwise, will be shot; his son Arshad Mehmood was still-sleeping and an unknown armed person stood by him, whereas the other three took them (complainant party) in a room and confined them, with the contention that they would kill Arshad Mehmood; thereafter suddenly report of fire was heard and the accused while scaling over the wall, fled away; due to fear, they remained silent and at about 4.00 a.m., raised alarm, which attracted Abdul Wahid Numberdar and Amjad Ali PWs, who brought them out of the room and all saw that Arshad Mehmood was dead due to firing.

3. Thereafter, Rabia Bibi, daughter of Arshad Mehmood deceased came forward, with a private complaint against the appellants, on the grounds that there were illicit relations between Washfa Noreen and Muhammad Munawar Hussain appellants and both wanted to marry, for which Sajida Parveen appellant was also agreed, but the deceased was not inclined, due to which he for several times had abstained Sajida Parveen and Washfa Noreen appellants; on 8.7.2005, the above named appellants called Muhammad Munawar Hussain appellant, in their house, for murder of Arshad Mehmood deceased, so that he may not come in the way and all may lead peaceful life; all decided to administer the sleeping tablets to the deceased and then murder him; consequently Muhammad Munawar Hussain appellant supplied the said tablets to the other appellants and when the complainant abstained them, they threatened her to keep silent, otherwise would be killed; the lady appellants got the children asleep in a room and at about 11.00 p.m., Muhammad

Munawar Hussain appellant came their and all had been talking in the Courtyard; after about 1/2 hour, the lady appellants tied the arms and legs of Arshad Mehmood deceased with a cot and all the appellants came in a room, where Washfa Noreen appellant handed over a pistol to Muhammad Munawar Hussain appellant and asked him to lock the room from outside and then shot the above named deceased; the lady appellants started watching from the window and after about two minutes, Muhammad Munawar Hussain appellant came at the window and told that bullet was missed, whereupon Washfa Noreen appellant again loaded a bullet in the pistol and handed over it to the above named male appellant, with direction that fire should be made while placing the pistol at the head and while going, arms and legs of Arshad Mehmood should be untied; accordingly Muhammad Munawar Hussain appellant while shooting at Arshad Mehmood and telling to the lady appellants, went away; at the morning lady appellant started hue and cry and the people came there and brought them out of the room; the said appellants threatened the complainant that if she would tell the incident to anyone, would be dealt with in the same manner; Sajida Parveen appellant, for recovery of the complainant, filed writ petition in the Lahore High Court, but dismissed, which encouraged the complainant and she narrated all the facts to her paternal grant parents and aunt (Phuphi) and the Police was also approached, but of no consequence, hence the complainant was forced to file the complaint (sic)

(sic) judgment, in the above mentioned terms. Consequently, the matters in hand.

6. The learned counsel for the appellants has argued that the appellants have falsely been involved, with *mala fide*, after, due deliberation and consultation, despite the fact that they have not committed the alleged occurrence; the true facts of the occurrence were those, which were narrated by Sultan Ahmad, father of the deceased in the FIR (Ex.PB); the complainant after registration of the FIR and proceedings by the Police remained satisfied, for a considerable time, when she came forward, with the above mentioned unacceptable story, which even during trial could not be substituted, hence the charge against the appellants was not at all proved, but the learned trial Court had erred in not considering the same and passing the impugned judgment, on the basis of false presumptions and assumptions.

7. On the other hand, the learned Deputy Prosecutor General has vehemently opposed the appeals, on the grounds that the findings of the learned trial Court, which resulted into the impugned judgment being result of

correct appreciation and evaluation of the material available on the record, should not be disturbed.

8. We have heard the arguments of both the sides and have perused the record.

9. In this case, initially, the matter was reported to the Police by Sultan Ahmad, father of the deceased, with the above mentioned contention, during which presence or availability of Rabia Bibi (present complainant) or Washfa Noreen (appellant) was not at all shown or alleged anywhere. The father of the complainant had alleged the death of his son by unknown accused. The story narrated by him was also not plausible, because despite murder of his son at 1.00 a.m., he remained satisfied till 4.00 a.m., when he and other family members raised alarm, which attracted Amjad Ali and Abdul Wahid PWs at the spot, but during whole of the trial, they never came forward. The other version was described by Rabia Bibi, (present complainant), whereby she had narrated almost a different story, during which she did not show presence or availability of Sultan Ahmad (complainant of the FIR) anywhere, rather had shown her presence at the spot and witnessing the alleged occurrence. It is pertinent to mention here that during the proceedings by the Police, Rabia Bibi complainant never appeared anywhere and as stated above, she for the first time had come into picture after about ten months of the alleged occurrence. It is very strange that father of the deceased did not implicate or nominate any of the accused, but *Mst.* Rabia Bibi complainant had implicated her real mother and sister. The said complainant, in the complaint had stated about a window, in the house from where the lady appellants had been witnessing the occurrence and talking with male appellant, but as per the scaled site-plan (Ex.PC & Ex.PC/1) prepared by Khalid Mehmood (PW-10) at the spot, there was no window. As per the complainant, the fire was made while placing the pistol at the head of the deceased, but during post-mortem examination, no sign of close range firing was observed. According to the complainant, the deceased was tied by a rope with the cot, but neither any rope, nor any cot was recovered or taken into possession. The complainant during cross-examination had admitted that the house of occurrence was located in a populated area, but erroneously during the occurrence alleged by her or thereafter, nobody had attracted as name of none was given in the complaint. It is settled law that to believe or disbelieve a witness all depends upon the intrinsic value of his statement. It is not the person but the statement of that person which is to be seen and adjudged by the Court. In this regard reliance may be made to the case of *Abid Ali and 2*

others vs. The State (2011 SCMR 208), wherein, the Hon'ble Supreme Court of Pakistan, has observed as under:

> "21. To believe or disbelieve a witness all depends upon intrinsic value of the statement made by him. Even otherwise, there cannot be universal principle that in every case interested witness shall be disbelieved or disinterested witness shall be believed. It all depends upon the rule of prudence and reasonableness to hold that a particular witness was present on the scene of crime and that he is making true statement. A person who is reported otherwise to be very honest, above board and very respectable in society if gives a statement which is illogical and unbelievable, no prudent man despite his nobility would accept such statement.
>
> 22. As a rule of criminal prudence, prosecution evidence is not tested on the basis of quantity but quality of the evidence. It is not that who is giving the evidence and making statement; what is relevant is what statement has been given. It is not the person but the statement of that person which is to be seen and adjudged".

10. Recovery of a pistol at the instance of Muhammad Munawar Hussain (appellant) had been alleged and as per the report of the forensic Science Laboratory, Lahore, the said weapon was in working condition, but as no empty from the spot was collected, or sent for comparison with the weapon, hence the said recovery and report has become inconsequential.

11. PW-5 Mushtaq and PW-6 Shaista Parveen, remained satisfied and never joined into the investigation and for the first time appeared in the Court on 12.9.2006 i.e. after about 01 year and 02 months of the alleged occurrence. Their statements being made with the above mentioned alarming and un-explained delay should not be given any weight. It is pertinent to mention here that Sultan Ahmad, complainant of the FIR during whole of the trial, did not come forward and make any statement in the Court. The evidence of extra-judicial confession furnished by the above named PWs could not be believed, for the reasons, firstly, why the appellants have made such a confession before said PWs as there is no evidence on the record regarding their social status or influence over the bereaved family, secondly, from the narration of facts given by both these PWs in their statements, the alleged extra-judicial confession made by the appellants, appears to be of joint nature. Apart from above, they are related inter-se and are also related to the complainant party, so, their statements cannot be relied upon without independent corroboration which is very much lacking in this case. Extra-

judicial confession is always considered a weak type of evidence. The evidentiary value of the extra-judicial confession (joint or otherwise) came up for consideration before the before the Hon'ble Supreme Court of Pakistan in the cases of *"Sajid Mumtaz and others vs. Basharat and others"* (2006 SCMR 231) and *"Tahir Javed vs. The State"* (2009 SCMR 166). The relevant portion of the case of Tahir Javed (Supra) reads as under:

> "10. ... It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time therefore, normally it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of *Ahmed v. The Crown* PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:--(1) *Sajid Mumtaz and others v. Basharat and others* 2006 SCMR 231, (2) *Ziaul Rehman v. The State* 2001 SCMR 1405, (3) *Tayyab Hussain Shah v. The State* 2000 SCMR 683, (4) *Sarfraz Khan v. The State and others* 1996 SCMR 188."

12. All the above mentioned facts & circumstances, lead us to the conclusion that the charge against the appellants could not be proved and established, as per the prescribed criteria. It is well-settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind, about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. Reliance in this respect may be placed on the case *"Tariq Pervaiz vs. The State"* (1995 SCMR 1345). This view has further been fortified in the case of *"Ayub Masih vs. The State"* (PLD 2002 SC 1048), whereby it has been directed that while dealing with a criminal case, the golden principle of law **"it is better that ten guilty persons be acquitted, rather than one innocent person be convicted"** should always be kept in mind. Relevant portion of the case of *Ayub Masih (Supra)*, reads as under:

> "It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or

artificial. The rule of benefit of doubt, which is described as the golden rule is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

13. Resultantly, the above captioned Criminal Appeals No. 167-J/2009 and 446-J/2014 are **accepted,** impugned judgment is set aside and the appellants namely Sajida Parveen, Washfa Noreen and Muhammad Munawar Hussain are **acquitted** of the charge, while extending them the benefit of doubt. Muhammad Munawar Hussain appellant is in judicial custody, hence be released forthwith, if not required to be detained in any other criminal matter, whereas *Mst.* Sajida Parveen and Washfa Noreen appellants are on bail, through suspension of their sentence, hence their bail bonds are discharged. As a consequence, the **Murder Reference No. 456/2009 is answered in negative** and death sentence of Muhammad Munawar Hussain is **not confirmed**.

(A.S.) Appeals accepted

PLJ 2015 Cr.C. (Lahore) 507 (DB)
[Multan Bench Multan]
Present: **MUHAMMAD**
TARIQ ABBASI AND QAZI MUHAMMAD AMIN AHMED, JJ.
MUHAMMAD ISHAQUE etc.--Appellants
versus
STATE, etc.--Respondents

Crl. Appeal No. 693 of 2009 & M.R. No. 143 of 2009, heard on 15.12.2014.

Related witnesses--

----Although witnesses are closely related to deceased but their no grudge with appellant could be brought on record, hence their mere relationship is no ground to discard their testimony, which otherwise is confidence inspiring. [P. 511] A

2010 SCMR 650, *rel*.

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

----S. 302(b)--Conviction and sentence--Challenge to--It is not acceptable and believable that actual and real culprit was let of and appellant was substituted because substitution is a rare phenomena and said phenomenon does not exist in matter in hand--It is not believable that when complainant and witnesses were available at spot and the deceased as well as appellant had gone to sleep in a room, appellant done her to death due to family dispute/quarrel--It seems that motive which resulted into murder of lady at hands of appellant was something else, which either was not known to complainant party or deliberately not brought before Court and as such actual motive which resulted into occurrence is still shrouded in mystery--Prosecution has successfully proved and established its case and charge against appellant and trial Court rightly convicted him--As about quantum of sentence to appellant, that non-establishment of alleged motive, coupled with other facts and circumstances that appellant is husband of deceased and inflicted only one blow without any repetition, are sufficient grounds to give him premium

towards quantum of his sentence. [Pp. 511, 512 & 513] B, C & D

PLD 2002 SC 52, 2013 SCMR 782 & 2014 SCMR 1464, *rel*.

Malik Imtiaz Haider Maitla, Advocate for Appellant.

Mr. Muhammad Javed Iqbal Adum, Advocate for Complainant.

Malik Riaz Ahmed Saghla, Deputy Prosecutor General for State.

Date of hearing: 15.12.2014

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned criminal appeal and the murder reference as both are result of single judgment dated 30.9.2009, passed by the learned Additional Sessions Judge, Multan, whereby in case FIR No. 164 dated 2.5.2008, registered under Section 302, PPC at Police Station Alpa, District Multan, Muhammad Ishaque (hereinafter referred to as the appellant) has been convicted under Section 302(b) PPC and sentenced to death with compensation of Rs. 2,00,000/-, payable to the legal heirs of *Mst.* Razia Mai deceased, in default to undergo SI for six months.

2. The facts are that Zahoor Ahmad (PW-4) made a statement/Fard Biyan (Ex.PD), contending therein that marriage of his daughter *Mst.* Razia Mai (deceased) was solemnized with Muhammad Ishaque (appellant), resident of Gulshan Kareem Town, Band Bohsan and his another son in law (Damad) namely, Muhammad Asim was also residing in the same house; on 01.5.2008, the complainant alongwith his brother Manzoor Hussain (PW-5) and Bashir Ahmed (given up PW) went to see his daughters and passed the night there; the appellant and the deceased slept in a room, whereas the complainant and the above named witnesses in the Courtyard; at about 4:00 a.m. a voice from the room was heard, hence they woke up and saw that the appellant was holding a rugine (Raiti) and inflicted it at the neck of *Mst.* Razia Mai and she became injured; the appellant while scaling over

the wall fled away; *Mst.* Razia Mai was attended but found dead. The motive as described by the complainant was usual quarrel between the appellant and deceased and for the purpose of patching up, he and the witnesses arrived in the house.

3. On the basis of above said complaint, the case was registered through FIR (Ex.PC) and investigated. The appellant was found to be involved, hence challaned. The learned trial Court charge sheeted him, he pleaded not guilty and claimed trial, hence the prosecution evidence was summoned and recorded. The prosecution produced as many as nine witnesses. The material witnesses and the evidence led by them was as under:--

(i) **PW-1 Dr. Shagufta Khatoon Naqvi** conducted the post-mortem examination of dead body of *Mst.* Razia Mai through report Ex.PA and observed the following injury:--

1.5 cm x 1 cm punctured lacerated wound over the right side of neck 2 cm from midline below the level of thyroid cartridge. Wound was deep cutting skin muscle and main blood vessel of right side of neck i.e. carotid artery.

As per the doctor, the above said injury, which was anti-mortem and sufficient to cause death, was result of immediate death.

(ii) **PW-4 Zahoor Ahmad** the complainant as well as an eye-witness of the alleged occurrence, narrated almost the same facts, as were stated by him in the complaint (Ex.PD).

(iii) **PW-5 Manzoor Hussain** another eye-witness of the alleged occurrence supported and corroborated the version of the above named complainant (PW-4). He also attested the memos. Ex.PE, Ex.PF and Ex.PG, through which blood stained earth, Raiti (P-1), and last wearing (P-2 and P-3) of the deceased were respectively taken into possession by the I.O.

(iv) **PW-6 Muhammad Sadiq, SI,** secured Raiti (P-1) through memo. Ex.PF, which was got recovered by the appellant.

(v) **PW-9 Qamar Zia, SI** investigated the case, during which he recorded statement of the complainant (Ex.PD); inspected the dead body and prepared inquest report (Ex.PH); drafted rough site-plan (Ex.PJ); secured the blood stained earth and last worn clothes (P-2 & P-3) of the deceased through memos. Ex.PE & Ex.PG.

4. When evidence of the prosecution witnesses was completed, the reports of the chemical examiner and serologist were tendered as Ex.PK, Ex.PL and Ex.PM and case for the prosecution was closed. Thereafter, the appellant was examined under Section 342, Cr.P.C. and the questions emerging from the prosecution evidence were put to him but he denied almost all the questions, while pleading his innocence and false involvement in the case with the contentions that death of the lady was a result of falling on the ground and receiving injury by chance. He opted not to lead any evidence in his defence or make statement under Section 340(2), Cr.P.C.

5. On completion of all the proceedings, the learned trial Court pronounced the impugned judgment in the terms mentioned above. Consequently, the matters in hand.

6. The learned counsel for the appellant has argued that the appellant is innocent and has falsely been involved in the case with *mala-fide*, despite the fact that the PWs were not available at the place of the occurrence and were introduced later on, who after due consultation made false statements against him; the statements of the witnesses are full of material contradictions, hence not believable; the witnesses are closely related to the deceased, hence their statements could not be given any importance; the motive alleged in the complaint could not be proved and established; the recovery of rugine (Raiti) has been falsely planted against the appellant; the case of the prosecution and charge against the appellant was not proved and established, hence he was

entitled for acquittal and as such the impugned judgment towards his conviction and sentence is not acceptable under the law.

7. The learned Deputy Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the appeal, while declaring it result of correct appreciation and evaluation of the material available on the record, hence not interfereable.

8. Arguments of both the sides have been heard and the record has been perused.

9. Both Zahoor Ahmad, complainant (PW-4) and Manzoor Hussain (PW-5), categorically deposed that when they were sleeping in the Courtyard of the house, whereas the appellant and the deceased in the room, a voice was heard, hence they woke up and attended the spot, saw that the appellant while holding a rugine (Raiti) was available there, who within their view inflicted it at the neck of the lady, which resulted into her death then and there. The above named witnesses despite lengthy cross-examination remained confident and consistent towards involvement of the appellant for the commission of murder of the lady in the above stated manner. No material contradiction in their statements either could be pointed out or observed, hence the arguments made by the learned counsel for the appellant that statements of the witnesses are full of material contradictions are nothing but a bald assertion. Although the witnesses are closely related to the deceased but their no grudge with the appellant could be brought on the record, hence their mere relationship is no ground to discard their testimony, which otherwise is confidence inspiring. In this regard, reliance is placed in case *Haji vs. The State* (2010 SCMR 650), in which it has been held by the Hon'ble Supreme Court of Pakistan that:

> "Both the ocular witnesses undoubtedly are inter se related and to the deceased, but their relationship *ipso facto* would not reflect adversely against the veracity of the evidence of these witnesses in absence of any motive wanting in the case, to falsely involve the appellant with

the commission of the offence and there is nothing in their evidence to suggest that they were inimical towards the appellant and mere inter se relationship as above noted would not be a reason to discard their evidence, which otherwise in our considered opinion is confidence-inspiring for the purpose of conviction of the appellant on the capital charge being natural and reliable witnesses of the incident."

10. The witnesses have satisfactorily explained and justified their presence and availability at the spot. Therefore, the contention of the learned counsel for the appellant that the witnesses were not available at the spot is ill founded, hence discarded. It is not acceptable and believable that actual and real culprit was let of and the appellant was substituted because substitution is a rare phenomena and the said phenomenon does not exist in the matter in hand. In this regard, reliance is placed in case *Allah Ditta versus The State (*PLD 2002 Supreme Court 52). The relevant portion whereof reads as under:

"It is also to be noted that admittedly prosecution witnesses Muhammad Sadiq and two others have no enmity of whatsoever nature against Allah Ditta and they have also no reason to falsely involve him in the commission of murder of their brother Muhammad Sabir. In addition to it, it is also not possible for them that they would allow real culprit to go scot-free and falsely involve another person for the commission of the offence. Even otherwise it is well-settled by now that substitution of real culprit is a rare phenomenon in our system of criminal justice."

The above mentioned ocular account has gained further support from the medical evidence led by Dr. Shagufta Khatoon Naqvi (PW-1) and the repot Ex.PA as during the post-mortem examination the injury described by PWs was confirmed on the dead body. On one hand, the prosecution has successfully established and proved involvement of the appellant towards commission of the alleged occurrence and on the other hand, the appellant had

alleged the death of the lady by accidental falling but failed to substantiate the said version.

11. It has been brought on the record that the above mentioned weapon, through which the appellant caused the above mentioned injury to the lady, which resulted into her death was got recovered by him and sent to the laboratory. Reports Ex.PK and Ex.PM made by the chemical examiner and the serologist, whereby blood of human origin on the weapon was detected has further supported and corroborated the version of the prosecution that through the said weapon the appellant had caused injury to the deceased.

12. In the complaint (Ex.PD) as well as the FIR (Ex.PC) the alleged motive was given to be a quarrel between the appellant and deceased. The complainant (PW-4) as well as Manzoor Hussain (PW-5) also described the motive in the above mentioned terms. It is not believable that when the complainant and the witnesses ware available at the spot and the deceased as well as the appellant had gone to sleep in a room, the appellant done her to death due to family dispute/quarrel. It seems that the motive which resulted into murder of the lady at the hands of the appellant was something else, which either was not known to the complainant party or deliberately not brought before the Court and as such the actual motive which resulted into the occurrence is still shrouded in mystery.

13. For what has been discussed above, we have come to the conclusion that the prosecution has successfully proved and established its case and the charge against the appellant and the learned trial Court rightly convicted him. As about quantum of sentence to the appellant, it is stated that non-establishment of the alleged motive, coupled with the other facts and circumstances that the appellant is husband of the deceased and inflicted only one blow without any repetition, in our view are sufficient grounds to give him premium towards quantum of his sentence. Reliance in this respect is placed in cases *Muhammad Imran @ Asif versus The State"* (2013 SCMR 782) and *Naveed @ Needu and others versus The State & others* (2014

SCMR 1464). The relevant portion of case *Naveed alias Needu (Supra)* reads as under:--

> "Upon our own assessment of the evidence available on the record we have felt no hesitation in concluding that the specific motive set up by the prosecution had indeed remained for from being established on the record. The law recently declared by this Court in the cases of *Ahmed Nawaz and another v. The State* (2011 SCMR 593), *Iftikhar Mahmood and another v. Qaisar Iftikhar and others* (2011 SCMR 1165) and *Muhammad Mumtaz and another v. The State and another* (2012 SCMR 267) reiterates the settled and long standing principle that failure of the prosecution to prove the motive set up by it may have a bearing upon the question of sentence and in an appropriate case such failure may result in reduction of a sentence of death to that of imprisonment for life for safe administration of justice."

Resultantly, the conviction of the appellant is maintained but his sentence is converted from death to imprisonment for life. The compensation awarded to him by the learned trial Court and sentence in its default is maintained and upheld. Benefit of Section 382-B, Cr.P.C. is also extended to him.

14. Consequently, with the above said modification in sentence of the appellant, Crl. Appeal No. 693 of 2008 is dismissed. Murder Reference No. 143 of 2009 is answered in negative and death sentence awarded to the appellant by the learned trial Court is not confirmed.

(A.S.) Appeal dismissed

PLJ 2015 Cr.C. (Lahore) 553 (DB)

[Multan Bench Multan]

***Present*: MUHAMMAD**

TARIQ ABBASI AND QAZI MUHAMMAD AMIN AHMED, JJ.

TALIB HUSSAIN, etc.--Appellant

versus

STATE, etc.--Respondents

Crl. Appeal No. 91 of 2010 & M.R. No. 136 of 2009, heard on 16.12.2014.

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

----S. 302(b)--Conviction and sentence--Challenge to--Circumstantial evidence--Appellants were involved on basis of circumstantial evidence--Settled principle/criteria for such like cases is that all circumstances should be connected in such a manner that they should make a continuous chain, one end of which should touch dead body, whereas other around neck of accused--Missing of even a single ring would break chain and fatal for prosecution--Prosecution story is that one person while nothing foot prints had informed complainant that same were of appellants, hence complainant through a supplementary statement had nominated them--Firstly above named person, who had informed, had not appeared in witness box and secondly supplementary statement does not have any legal value--Sequel of above discussion is that prosecution has failed to make out chain and establish case as per above mentioned principle/criteria and as such charge against appellants is doubtful and it is unsafe to maintain their conviction on basis of such type of evidence--It has been directed that while dealing with a criminal case, golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind--Appeal was accepted. [Pp. 559, 560 & 561] A, B, C & F

PLD 1966 SC 664, PLJ 1999 SC 1018, 1992 SCMR 104, 1996 SCMR 188, 2008 SCMR 1103, 2009 SCMR 407, 1995 SCMR 1350, 2003 SCMR 1419 & 2010 SCMR 385, *ref.*

Duty of Prosecution--

----It is bounden duty of prosecution to prove its case against accused beyond any shadow of doubt--It is an axiomatic and universally recognized principle of law that conviction must be based on unimpeachable evidence and certainly of guilt and any doubt arising in prosecution case must be resolved in favour of accused. [P. 560] D 1999 SCMR 1220 & 2009 SCMR 230, *ref.*

Benefit of Doubt--

----Principle--It is well settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. [P. 561] E

1995 SCMR 1345 & PLD 2002 SC 1048, *ref*.

M/s. Prince Rehan Iftikhar Sheikh and Arsalan Masood Sheikh, Advocates for Appellant.

Mr. Aman Ullah Khan Pahor, advocate for Appellant.

Mr. Muhammad Ali Shahab, D.P.G. for State.

Mehr Zauq Muhammad Sipra, Advocate for Complainant.

Date of hearing: 16.12.2014.

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned Criminal Appeal and the Murder Reference, being outcome of same judgment dated 18.4.2009, passed by the learned Additional Sessions Judge, Kabirwala, District Khanewal, whereby in case FIR No. 484 dated 14.11.2004, registered under Sections 302, 392, PPC at Police Station Saddar Kabirwala, District Khanewal, Muhammad Ashfaq and Talib Hussain (hereinafter referred to as `appellants') have been convicted and sentenced in the following terms:--

Muhammad Ashfaq

(i) Under Section 302(b), PPC to death, with compensation of Rs. 2,00,000/- payable to the legal heirs of Muhammad Saleem (deceased), in default whereof to undergo simple imprisonment for six months; and

(ii) Under Section 392, PPC to rigorous imprisonment for ten years and fine of Rs. 20,000/- in default whereof to further undergo simple imprisonment for three months.

Talib Hussain

(i) Under Section 302(b), PPC to imprisonment for life, with compensation of Rs. 2,00,000/- payable to the legal heirs of the deceased, otherwise to undergo simple imprisonment for six months; and

(ii) Under Section 392, PPC to rigorous imprisonment for ten years and fine of Rs. 20,000/- in default whereof to further undergo simple imprisonment for three months.

It was also directed that all the above sentences will run concurrently, with the benefit of Section 382-B, Cr.P.C.

2. The facts are that Abdul Razzaq (PW-9) made a statement/ Frad Biyan (Ex. PF), before the Police, contending therein that on 13.11.2004 at about 8.00 p.m., he alongwith his sons Muhammad Saleem (deceased), Muhammad Nadeem (PW-10) and another namely Muhammad Aslam (given up PW), on a tractor Registration No. 4029/MNX was coming to Bilawal; the tractor was being driven by Muhammad Nadeem (PW-10) and when reached near tube-well of Mushtaq, suddenly two unknown persons, who were armed with fire-arms, came in front of the tractor, whereas another unknown remained standing at a sides the accused, who came in front of the tractor, got it stopped on gun-point and demanded from the complainant and his companions, their belongings; Muhammad Nadeem (PW-10) gave Rs. 3,000/- to them and accused who was armed with rifle, asked Muhammad Saleem (deceased) to also hand over to them his belongings; Muhammad Saleem (deceased) started raising hue and cry, whereupon the said person with rifle made a fire shot, which hit Muhammad Saleem at left side of shoulder and passed through and through; the other accused also started firing and thereafter all fled away; Muhammad Saleem succumbed to the injuries at the spot; many persons of the hearby locality attracted at the spot and due to darkness, the matter could not be reported to the police immediately. On the basis of the above said complainant/Fard Biyan, the case was registered through FIR (Ex. PF/1) against unknown accused. During the investigation, the appellants were found to be involved, hence challaned to the Court. They were formally charged sheeted, but denied the charge and claimed the trial, hence the prosecution evidence was summoned and recorded. The prosecution got examined as many as 15 witnesses. The material witnesses and gist of their evidence was as under:--

(i) PW-1 Dr. Muhammad Akhtar conducted post-mortem examination of the dead body of Muhammad Saleem on 14.11.2004 and prepared the post-mortem report (Ex. PA) and diagram (Ex. PA/1). The following injuries on the dead body were noticed:--

(1) Wound of entrance. Lacerated wound 1 cm x 1 cm on the back of left chest 14 cm below the upper margin of left shoulder 9 cm from mid line. Margins were inverted.

(2) Wound of exit. Lacerated wound 5 x 2 cm on the front of right upper chest just above the medial end of right clavicle. Margins were everted.

As per the doctor, the above said injuries were anti-mortem in nature, caused by fire-arm weapons and cause of death, which was within an hour.

(ii) PW-8 Syed Sikandar Ali Shah Bukhari, supervised the test identification parade dated 6.2.2006 and prepared the report (Ex. PE); during which Muhammad Ashfaq appellant was allegedly identified by the PWs.

(iii) PW-9 Abdul Razzaq complainant as well as an eye-witness narrated almost the same facts as were stated by him in the complaint (Ex. PF); he also participated in the test identification parades, during which Talib Hussain and Muhammad Ashfaq appellants were identified by him.

(iv) PW-10 Muhammad Nadeem, another eye-witness of the alleged occurrence, supported the version of the above named complainant (PW-9); he attested the memos. (Ex. PG. Ex. PH, Ex.PJ & Ex.PK), through which the blood stained earth, empties, pistol (P-4) got recovered by Talib Hussain appellant and rifle (P-6) recovered at the instance of Muhammad, Ashfaq appellant, were respectively taken into possession by the investigating officer; he also participated in the test identification parades and identified the appellants.

(v) PW-11 Muhammad Tahir narrated about extra judicial confession, allegedly made by the appellants, before him and Muhammad Hussain as well as Ashfaq (PWs).

(vi) PW-12 Syed Naveed Raza Bukhari supervised the test identification parade proceedings dated 14.5.2005 and prepared the report (Ex.PM), during which Talib Hussain appellant was identified by the PWs.

(vii) PW-14 Falak Sher SI investigated the case; he arrested Muhammad Ashfaq appellant, who was a proclaimed offender in the case and sent him to the jail for test identification parade; he presented application (Ex.PE) to the learned Sessions Judge, Khanewal for test identification parade, which was held on 6.2.2006; he obtained physical remand of the above named accused, who got recovered rifle (P-6), which was taken into possession through (Ex.PK); he recorded statement under Section 161 Cr.P.C. of the relevant witnesses at relevant stages.

(viii) PW-15 Zafar Ullah Khan, Inspector also investigated the case; recorded statement (Ex. PF) of the complainant; prepared injury statement (Ex. PB) and inquest report (Ex. PC) of the deceased; drafted rough site-plan (Ex. PO) of the spot; secured last worn clothes (P-1, P-2 & P-3) of the deceased through Memo (Ex.PD); collected blood stained earth from the spot and took it into possession through Memo (Ex. PG); secured two empties of .7mm rifle and three empties of .30 bore pistol *vide* Memo (Ex. PH); got drafted the scaled site-plans (Ex. PN, Ex. PN/1 & Ex. PN/2) from the draftsman; arrested Talib Hussain appellant and sent him to the jail for test identification parade, which was held on 14.5.2005; obtained physical remand of the above named appellant, who got recovered 30 bore pistol (P-4), which was secured through Memo (Ex. PJ); recorded statements under Section 161, Cr.P.C. of the concerned witnesses at relevant stages.

3. After examination of the prosecution witnesses, the reports of Chemical Examiner, serologist and Forensic Science Laboratory were tendered in evidence as Ex. PQ, Ex. PR & Ex.PS respectively and case for the prosecution was closed, whereafter the appellants were examined under Section 342, Cr.P.C.; and they took the following stance:--

Muhammad Ashfaq – "I was arrested by the police much earlier and was kept at police station for so many days but on record my arrest was deferred. During this, I was shown to the complainant and other PWs, on so many days and later on fake and fictitious proceedings of identification proceedings were introduced to create a fake piece of

evidence against me. All the recovery proceedings are fake and fictitious. I never led to the recovery of rile etc. It has been planted to strengthen the prosecution case.

PWs are related interse and interested. They are under influence/pressure of our deadly against political, personal opponent namely Rao Jamshed Ali Lumberdar Bilawalpur and Union Nazim, permanent political figure. Said Rao Jamshed Ali Lumberdar falsely got me involved in this case during investigation to satisfy his personal grudge. So in this state of affairs, I was falsely involved in this case and PWs deposed falsely against me.
Actually, it was a blind occurrence. Neither the PWs were present at the time of occurrence nor they have witnessed the occurrence. These witnesses were later on introduced after coming to know about the occurrence. I have no concern with his occurrence. I have not committed this occurrence."

Talib Hussain – "It is a false case. I have been involved in this case due to enmity. All the witnesses are related interse and have deposed against me falsely. Actually it was a blind occurrence taking place in the darkness of night. The culprits could not be identified during the occurrence. I was implicated in this case without any cogent evidence and simply on the basis of suspicion. I was arrested by the police under pressure of the complainant party, kept in police unlawful custody for a sufficient time, shown to the witnesses and got identified by the PWS during identification parade. I am absolutely innocent."

Both did not opt to lead any evidence in their defence or make statements under Section 340(2), Cr.P.C. Ultimately the learned trial Court pronounced the impugned judgment, in the above mentioned terms and consequently, the matters in hand.

4. The learned counsel for the appellants has argued that it was a blind occurrence, which was not seen by anyone, but with *mala fide*, while concocting false story and evidence, the appellants were involved and implicated; the prosecution had badly failed to establish the case and prove the charge against the appellants as per the prescribed criteria, but the learned

trial Court had failed to consider the said fact and as such the impugned judgment towards conviction and sentence of the appellants is not acceptable under the law. It has been prayed that by accepting the appeal, the appellants may be acquitted of the charge.

5. Conversely, the learned Deputy Prosecutor General, assisted by the learned counsel for the complainant has vehemently opposed the appeal, while supporting the impugned judgment to be well-reasoned and call of the day.

6. Arguments advanced by both the sides have been heard and the record has been consulted.

7. Admittedly, at the time of reporting the matter to the Police through Ex.PF, nobody was named as an accused. The appellants were involved on the basis of circumstantial evidence. The settled principle/criteria for such like cases is that all the circumstances should be connected in such a manner that they should make a continuous chain, one end of which should touch the dead body, whereas the other around neck of accused. Missing of even a single ring would break the chain and fatal for the prosecution. In this regard, reference may be made to cases *"The State versus Manzoor Ahmad"* (PLD 1966 Supreme Court 664), *"Asadullah and another versus the State and another*" (PLJ 1999 SC 1018), *"Ch. Barkat Ali versus Major Karam Elahi Zia and another"* (1992 SCMR 1047), *"Sarfraz Khan versus The State*" (1996 SCMR 188), *"Altaf Hussain versus Fakhar Hussain and another"* (2008 SCMR 1103) and *"Ibrahim and others versus The State"* (2009 SCMR 407). Herein below, it would be evaluated whether the case has been established as per the above mentioned criteria or otherwise.

8. This prosecution story is that one Habib while nothing foot prints had informed the complainant that the same were of the appellants, hence the complainant through a supplementary statement had nominated them. Firstly the above named person, who had informed, had not appeared in the witness box and secondly the supplementary statement does not have any legal value, hence the above said story could not be given any importance in view of dictum laid down by the Hon'ble Supreme Court of Pakistan in cases *Falak Sher alias Sheru versus The State* (1995 SCMR

1350), *Khalid Javed and another versus the State* (2003 SCMR 1419) and *Muhammad Rafique and others versus The State and others* (2010 SCMR 385). Relevant portion of case *Falak Sher (Supra)* reads as under:--

> "18. The learned counsel for the State insisted that in supplementary statement recorded by S.I. Muhammad Ayub on same day the complainant had disclosed name of the appellant. The supplementary statement of the complainant be read as part of the F.I.R. The contention is devoid of force. It may be observed that F.I.R. is the document which is entered into 154, Cr.P.C. Book maintained at the police station at the complaint of informant. It brings the law into motion. The police under Section 156, Cr.P.C. starts investigation of the case.
>
> 19. Any statement or further statement of the first informant recorded during the investigation by police would neither be equated with First Information Report not read as part of it."

9. The second stance of the prosecution is that during test identification parade proceedings dated 14.5.2005 and 2.6.2006, Talib Hussain and Muhammad Ashfaq appellants were respectively identified by PW-9 and PW-10. As stated above, when the appellants were already named by the complainant, through a supplementary statement, made on the next day of the occurrence, then the proceedings of the test identification parade were immaterial. Furthermore, as per Falak Sher SI/Investigating officer (PW-14), Muhammad Ashfaq appellant was a proclaimed offender in the case, hence after his arrest, test identification parade was having no legal consequence. During evidence of Abdul Razzaq complainant (PW-9), it came on the record that after arrest of the appellants, the PWs had been visiting the Police Station and telling the complainant the progress of the investigation. The above said fact has also made the proceedings of test identification parade immaterial, especially when the Magistrate (PW-12) had categorically stated that according to him, the appellants were shown to the PWs, before the test identification parade. The PW-10 had specifically contended that he was having sound suspicion that the appellants had committed the occurrence. He during this statement got recorded on 14.11.2004 under Section 161, Cr.P.C., which was brought on the record as Ex.DC, had categorically

nominated the appellants towards commission of the alleged occurrence. The said fact had also made the above mentioned test identification parade proceedings useless.

10. Sequel of the above discussion is that the prosecution has failed to make out the chain and establish the case as per the above mentioned principle/criteria and as such the charge against the appellants is doubtful and it is unsafe to maintain their conviction on the basis of such type of evidence because it is bounden duty of the prosecution to prove its case against the accused beyond any shadow of doubt. It is an axiomatic and universally recognized principle of law that conviction must be based on unimpeachable evidence and certainly of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. We are fortified by the dictum laid down in the cases *"Muhammad Khan and another versus The State"* (1999 SCMR 1220) and *Muhammad Akram versus The State* (2009 SCMR 230). In the case *Muhammad Khan (Supra)* Hon'ble Supreme Court of Pakistan, has held as under:--

> "It is an axiomatic and universally is recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arsises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be unsafe to reply on the ocular evidence which has been molded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct respective".

11. It is well settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. In this regard, reference may be made to the

case *"Tariq Pervaiz vs. The State"* (1995 SCMR 1345). This view has further been fortified in the case of "*Ayub Masih vs. The State"* (PLD 2002 SC 1048), whereby it has been directed that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind.

12. Resultantly, the above captioned Criminal Appeal No. 91/2010 is accepted, the impugned judgment is set aside and the appellants namely Muhammad Ashfaq and Talib Hussain are acquitted of the charage, while extending them the benefit of doubt. Both are in custody, hence be released forthwith, if not required to be detained in any other matter. The disposal of the case property shall be as directed by the learned trial Court. As a consequence, Murder Reference No. 136/2009 is answered in **negative** and death sentence awarded by the learned trial Court to Muhammad Ashfaq appellant is **not confirmed.**

(A.S.) Appeal accepted

PLJ 2015 Cr.C. (Lahore) 563
[Multan Bench Multan]
***Present*: MUHAMMAD TARIQ ABBASI, J.**
MAQSOOD AHMAD--Appellant
versus
STATE--Respondent

Crl. Appeal No. 490 of 2006, heard on 19.5.2015.

Prevention of Corruption Act, 1947 (II of 1947)--

----S. 5(2)--Pakistan Penal Code, (XLV of 1860), S. 161--Conviction and sentence--Challenge to--Mutation of tamleek--Demanded an amount as government charges--*Malafide*--Charge was not at all established and proved--Entitled to acquittal--Currency notes recovered from accused did not contain any mark--No independent and impartial person was associated material irregularity--Conversion between parties was not heared--Validity--Appellant never demanded any illegal gratification from them for sanctioning mutation in question; complainant had identified him before Revenue Officer and initiated proceedings in question at instance of Raja Riaz--In this way, not only prosecution case and charge against appellant was not proved beyond any doubt but appellant had also succeeded to disprove/rebut allegations leveled against him--Impugned judgment was set aside, appellant was acquitted while extending him benefit of doubt--Appeal was allowed.

[Pp. 567] A & B

Sheikh Jamshed Hayat, Advocate for Appellant.

Mr. Muhammad Ali Shahab, D.P.G. for State.

Date of hearing: 19.5.2015.

JUDGMENT

This appeal is directed against the judgment dated 20.9.2006, passed by the learned Special Judge, Anti-Corruption, Dera Ghazi Khan, Camp at Muzaffargarh, whereby in case FIR No. 01, dated 1.1.2002, registered under Section 161, PPC, read with Section 5(2) of the Prevention of

Corruption Act, 1947, at Police Station ACE, Vehari, the appellant was convicted and sentenced as under:--

(1) **Under Section 161, PPC,** R.I, for one year and fine of Rs. 5,000/-, in default to further undergo R.I. for two months.

(2) **Under Section 5(2)47 PCA,** R.I. for one year and fine of Rs. 5000/-, in default to further suffer R.I. for two months.

It was directed that both the sentences shall run concurrently and benefit of Section 382-B, Cr.P.C., would also be available to the appellant.

2. The facts as per FIR (Exh.PG) are that Abdul Majeed, PW-2 got entered from the appellant a mutation of Tamleek regarding 23 acres of agricultural land belonging to his relatives; the appellant demanded a sum of Rs. 23,000/- from the complainant as government charges; the complainant asked the appellant that as till that time price of cotton was not received, hence demanded time till 31st of December, whereupon the appellant told the complainant that the mutation would be entered on receipt of amount on 1.1.2002, otherwise it would be cancelled; thereafter the complainant came to know that the mutation fee was not of the above mentioned amount demanded by the appellant. Consequently, he informed the Anti-Corruption Authorities, whereupon a raid was conducted and the appellant was arrested, when the above mentioned amount was recovered from his possession. After registration of the case, the investigation was carried on when the appellant was found to be involved, hence, challaned to the Court.

3. The learned trial Court framed the charge against the appellant on 17.9.2002 to which he pleaded not guilty and claimed trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined Muhammad *Arsh*ad Ali, Senior Civil Judge/Magistrate as PW-1, Abdul Majeed, complainant as PW-2, Ghulam Dastigeer, SHO as (PW-3) and Mehr Nazar Hussain Circle Officer, ACE as PW-4. Sabir Ali Constable and Abdul Latif, Constable were given up being unnecessary.

4. After examination of the above named witnesses, statement of the appellant as provided under Section 342, Cr.P.C., was recorded, during which, the questions arising out of the prosecution evidence were put to him and he denied almost all such questions, while pleading his innocence and false involvement in the case with *mala fide*. At that time, he opted to lead evidence in his defence and also made statement under Section 340(2), Cr.P.C., but while got examining Muhammad Bashir as DW-1, he had closed his defence.

5. After completion of all the proceedings, the learned trial Court had pronounced the impugned judgment in the above mentioned terms. Consequently, the appeal in hand.

6. Learned counsel for the appellant has argued that the appellant is innocent and falsely involved in the case with *mala fide*; during the prosecution evidence, the prosecution case and the charge against the appellant was not at all established and proved, hence he was entitled for acquittal and as such, the impugned judgment being against the norms of natural justice is liable to be set aside.

7. The learned Deputy Prosecutor General has vehemently opposed the appeal while holding the impugned judgment to be well reasoned and call of the day.

8. Arguments of both the sides have been heard and record has been perused.

9. Muhammad *Arsh*ad Ali, Civil Judge/Magistrate who had supervised raid proceedings, when entered into the witness-box as PW-1, stated the date of his alleged proceedings as 1.12.2002. By deposing so he had rebutted/contradicted the alleged prosecution version that raid proceedings were carried on, on 1.1.2002. The Magistrate further deposed that not only numbers of currency notes in question were noted by him but he also marked currency notes and also obtained photocopies thereof but it has been noticed that the currency notes in question do not contain any mark, made by the PW.

This witness further deposed that they stayed at a distance of 100 yards away from the office of the appellant and when the complainant signaled, they entered in the office, searched the appellant and not only currency notes in question but other amount of Rs. 24,000/- was also recovered from the pocket of his shirt. The witness further contended that from the place, where they were available, neither door of the room was visible nor they heard the conversation between the complainant and the appellant or saw passing of the amount in question. Meaning thereby that what conversation between the complainant and the appellant was taken place and the facts and circumstances under which the amount in question came into possession of the appellant, was not known to anyone. Reliance in this respect may be placed upon the cases of *Rashid Ahmad versus The State* (2001 SCMR 41) and *Bashir Ahmad versus The State* (2001 SCMR 634). Relevant portion of the case of *Bashir Ahmad (Supra)* reads as under:

> "...It is well settled by now that "in such like transactions not only the payment of bribe money to the accused by the complainant is to be seen but also the conversation between the above parties has to be heard by the members of the raiding party. This would be necessary to eliminate the chances of involvement of innocent people."

This witness admittedly had not written statement (Exh.PB) of the complainant rather his reader had drafted the same. In this way, a material irregularity was committed by him. In his statement, it came on the record that the spot was a busy place but no independent and impartial person was associated in the proceedings. As per this witness, recovered currency notes were taken into possession by him, through memo. Exh. PC and Exh.PD but the record had negated the said stance because the above said recovery memos. were prepared by Circle Officer, Anti-Corruption Establishment and not at all by this witness.

10. Abdul Majeed, complainant (PW-2) admitted it correct that the office of the appellant was situated in a Bazar and the appellant was not

visible from the place where the raiding party was present. This witness had contended that the appellant for verification and attestation of *Tamleek Nama* demanded the above mentioned amount from him and the date of payment was fixed as 1.1.2002 when the raid was conducted but as stated above, the raiding Magistrate had not supported the above said date while deposing that the proceedings were carried on 1.12.2002.

11. Ghulam Dastigeer, SHO, (PW-3) during cross-examination stated that the currency notes was recovered from the appellant and taken into possession *vide* recovery memos. Exh.PC and Exh.PD which besides him were signed by the Magistrate (PW-1), Abdul Majeed and Sabir Ali. He while not specifying the person who had prepared the said memos. had tried to conceal the preparation of the memos. by him as by that time he was nobody to take the currency notes into possession, because till then he was not an investigating officer.

12. On one hand, the above mentioned strange and erroneous proceedings have come on the record, whereas on the other hand Muhammad Bashir in whose favour his father, namely, Noor Ahmad had gifted the land had got recorded statement as DW-1, stating therein that they themselves had reported the matter to the appellant being Patwari and deposited the fee in National Bank of Pakistan, Burewala; they never authorized the complainant to deal with the appellant about attestation of the mutation; the appellant never demanded any illegal gratification from them for sanctioning the mutation in question; the complainant had identified him (DW-1) before the Revenue Officer and initiated the proceedings in question at the instance of Raja Riaz. In this way, not only the prosecution case and the charge against the appellant was not proved beyond any doubt but the appellant had also succeeded to disprove/rebut the allegations leveled against him.

13. As a result of what has been discussed above, the appeal in hand is **allowed** the impugned judgment is **set aside** and the

appellant Maqsood Ahmed is **acquitted** of the charge, while extending him the benefit of doubt. He by way of suspending of his sentence is on bail; hence his bail bonds are discharged. The disposal of the case property shall be as directed by the learned trial Court.

(R.A.) Appeal allowed

PLJ 2015 Cr.C. (Lahore) 583
[Multan Bench Multan]
***Present*: MUHAMMAD TARIQ ABBASI, J.**
SAID MUHAMMAD etc.--Appellants
versus
STATE, etc.--Respondents

Crl. Appeal No. 405 of 2003 & Crl. Rev. No. 225 of 2003, heard on 29.4.2015.

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

----S. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--When deceased for grazing sheep entered state land, which was disputed between parties, he was abstained by appellant when an altercation between both had taken place and accordingly said appellant pelted-stones at deceased and he became injured--Nothing was available on record to suggest that intention of appellant was to commit murder of but he died in consequence of injuries which he had sustained at hands of above named appellant--In this way, offence of intentional murder is not made out rather offence of *Qatl Shibh-i-amd* is attracted--Facts and circumstances of case in hand fully correspond above mentioned situations under which above mentioned provision attracts--Therefore, appellant was liable for commission of offence under Section 316, PPC, which prescribes payment of *Diyat*, and an accused may also be punished with imprisonment of either description, for a which may extent to twenty five years as Tazir--Appellant was convicted under Section 316, PPC for payment of *Diyat* amounting to Rs. 2,90,372/- (which at relevant time was prevailing), payable to legal heirs of deceased--Said appellant was an Army Personnel and nothing was available on record that he was a previous convict, habitual, hardened, desperate or dangerous criminal, hence to my mind imprisonment for five years, which he had already undergone, would meet ends of justice, hence awarded--As above mentioned amount of *Diyat* has been imposed against appellant, hence no compensation under Section 544-A of Cr.P.C. was required and as such imposition of Rs. 50,000/- as compensation against appellant, by trial Court was waived. [Pp. 587 & 588] A, B, C & D

Malik Saeed Ahmed Gumb and Sh. Muhammad Rahim, Advocate for Appellants.

Mr. Shaukat Ali Ghorui, Addl. P.G. for State.
Syed Irfan Haider Shamshi, Advocate for Complainant.
Date of hearing: 29.4.2015.

JUDGMENT

This single judgment shall decide the above captioned criminal appeal as well as the criminal revision, as both are outcome of single judgment dated 21.5.2003, passed by the learned Additional Sessions Judge, Taunsa Sharif, District Dera Ghazi Khan, whereby in case FIR No. 51, dated 26.6.2002, registered under Sections 302/34, PPC, at Police Station Raitra, District Dera Ghazi Khan, the appellants, namely, Said Muhammad and Muhammad Hayat, were convicted under Section 302(b), PPC and sentenced to imprisonment for life, with compensation of Rs. 50,000/-, each, payable to the legal heirs of the deceased, otherwise, to further undergo SI for six months each, with benefit of Section 332-B Cr.P.C.

2. The facts are that Allah Wasaya (PW-5) had got recorded a statement (Ex.PE), before the police, contending therein that on 24.6.2002 at about 7:00 a.m, his father Muhammad Bakhsh (deceased) had gone to graze the sheep; after a short while hue and cry was heard by him, hence he alongwith his brother Manzoor Ahmed and Elahi Bakhsh (PW-6) rushed to the spot; they saw that Said Muhammad and Muhammad Hayat (appellants) had encircled Muhammad Bakhsh and within their view the appellants one after the other pelted stones at Muhammad Bakhsh, which hit at his urinary bladder and he fell down; on their intervention, the appellants went away; the motive was a landed dispute between the appellants and the complainant party, due to which they caused injuries to Muhammad Bakhsh. On the basis of above mentioned complaint, initially the FIR (Ex.PE/2) was chalked out under Sections 324/34, PPC but on the death of Muhammad Bakhsh, the offence under Section 324, PPC was substituted to Section 302, PPC.

3. The investigation was carried on when the appellants were found to be involved, hence challaned to the Court. The learned trial Court had framed the charge against the appellants on 25.3.2003; they pleaded not guilty and claimed the trial, hence the prosecution evidence was summoned and recorded. The prosecution had got examined as many as nine witnesses. Gist of the evidence led by the material witnesses was as under:--

PW-1 Dr. Ahmad Khan, firstly had medically examined Muhammad Bakhsh on 24.6.2002 through report (Ex.PA) when he was in an injured condition and found the following injuries:--

"(i) Reddish swollen contused area 2 cm in diameter on right appendicular area of the abdomen.
(ii) Reddish swollen contused area 2½ cm in diameter in the right side of abdomen 2 inches above Injury No. 1. Patient complains of server abdominal pain and distress. Both injuries were K.U.O."

Due to critical condition of the injured he was referred to DHQ, Hospital, Dera Ghazi Khan where he died and consequently on 26.6.2002 post-mortem examination of the dead body was conducted by this witness through the post-mortem report (Ex.PB). At that time the following injuries on the dead body were observed:--

"(i) There was a reddish blue contused area at the lower part of the right side of the abdomen 2 inch in dia-meter.
(ii) There was another reddish blue contused area 2½ in diameter in the right side of abdomen 2" above Injury No. 1."

As per opinion of the doctor, the injuries to the liver and small intestine were sufficient to cause death which occurred after about two days of receipt of the injuries.

PW-5 Allah Wasaya complainant as well as an eye-witness had narrated almost the same facts as were stated by him in the above mentioned complaint.

PW-6 Ilahi Bakhsh, another eye-witness had supported the version of the complainant (PW-5).

PW-8 Muhammad Hayat, Inspector, had investigated the case during which carried on the proceedings and prepared the documents fully detailed in his statement.

PW-9 Mushtaq Ahmad, SI, also investigated the case, prepared the documents and carried on the proceedings, detailed in his statement.

4. After examination of the prosecution witnesses, the prosecution case was got closed, whereafter the appellants were examined under Section 342 Cr.P.C., during which the questions arising out of the prosecution evidence and record were put to them and they denied almost all such questions while pleading their innocence and false involvement in the case with *mala-fide*. Both had replied the questions "why this case against you and why the PWs have deposed against you?" in the following words:--

Said Muhammad (appellant)

"Being a close relative of Hayat accused I have been falsely involved in this case and the complainant party has thrown net wide to implicate as many as persons as possible from the family of Hayat accused. The complainant party has involved me in this case at the instance of Nawaz and Qaisar with whom I am locked in cross murder case. They are funding the complainant and pursuing the case. The PWs are interse related with each other and with the deceased."

Muhammad Hayat (appellant)

"I am permanent employee of F.C. Department. On the day of occurrence I was on leave and was present at my home. I saw the deceased who was trying to occupy and wanted to illegally possession of Govt. land. I went towards him as he was my close relative and asked him not to occupy illegally the Govt. land, on which he started abusing me and inflicted a hatchet blow from which I luckily saved. He picked up stone and threw towards me which landed on my body. In retaliation and to save the Govt. property & myself I threw the same towards him. I am innocent. Being the kith and kin of the deceased, the PWs after suppressing the real facts of the case gave twist to the facts to bring the case with the preview of Section 302, PPC being in connivance with the police."

5. They did not opt to lead evidence in their defence or make statements under Section 340(2) Cr.P.C.. On completion of the trial, the impugned judgment was passed in the above mentioned terms, hence the matters in hand.

6. The learned counsel for the appellants have argued that they are innocent and falsely involved in the case with *mala-fide*; the statements of the prosecution witnesses were full of material contradictions but erroneously not considered by the learned trial Court; the prosecution case and the charge against the appellants was not proved and established, hence they were

entitled for acquittal and as such the impugned judgment is liable to be set-aside.

7. The learned Additional Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the appeal while holding the impugned judgment towards conviction of the appellants to be quite well reasoned and call of the day. The learned counsel for the complainant has also requested for acceptance of the revision petition and award of major penalty of death to the appellants.

8. Arguments of both the sides have been heard and the record has been perused.

9. The alleged motive was a landed dispute between Muhammad Hayat (Appellant No. 2) and the complainant party. It was brought on the record that Muhammad Hayat, appellant had abstained the deceased from interfering into the property which was a state land. In this way, the alleged motive could not be attributed to Said Muhammad (Appellant No. 1). In the complaint as well as during statements of Allah Wasaya complainant (PW-5) and Elahi Bakhsh (PW-6) it had been contended that stones were pelted by Muhammad Hayat appellant at Muhammad Bakhsh, which hit at his urinary bladder. At the said part of the body of deceased two injuries were observed. In this way, the case of Said Muhammad (Appellant No. 1) has become doubtful. Possibility of his false involvement, under e wider net being relative of Muhammad Hayat (Appellant No. 2) could not be ruled out, hence, charge against Said Muhammad (Appellant No. 1) is doubtful.

10. As about the case of Muhammad Hayat (Appellant No. 2), it is stated that Allah Wasaya complainant (PW-5) and Elahi Bakhsh (PW-6) had not only implicated him for pelting stones at Muhammad Bakhsh, deceased, which resulted into injuries to him but during medical examination the said injuries were also confirmed on the record and the said appellant during statement under Section 342 Cr.P.C. had also admitted his above mentioned act/role.

11. It seems that when the deceased for grazing the sheep entered the state land, which was disputed between the parties, he was abstained by Muhammad Hayat (Appellant No. 2) when an altercation between both had taken place and accordingly the said appellant pelted-stones at the deceased and he became injured. Nothing is available on the record to suggest that intention of the Appellant No. 2 was to commit murder of Muhammad Bakhsh but he died in consequence of the injuries which he had

sustained at the hands of above named appellant. In this way, in my view, offence of intentional murder is not made out rather offence of *Qatl Shibh-i-amd* is attracted, which is defined under Section 315, PPC in the following words:

> **"315 *Qatl* Shibh-i-amd.** Whoever, with intent to cause harm to the body or mind of any person causes the death of that or of any other person by means of a weapon or an act which in the ordinary course of nature is not likely to cause death is said to commit *qatl Shibh-i-amd."*

The facts and circumstances of the case in hand fully correspond the above mentioned situations under which the above mentioned provision attracts. Therefore, Muhammad Hayat (Appellant No. 2) is liable for commission of the offence under Section 316, PPC, which prescribes payment of *Diyat*, and an accused may also be punished with imprisonment of either description, for a term which may extent to twenty five years as Tazir.

12. Consequently, Muhammad Hayat (Appellant No. 2) is convicted under Section 316, PPC for payment of *Diyat* amounting to Rs. 2,90,372/- (which at the relevant time was prevailing), payable to the legal heirs of the deceased. The said appellant is an Army Personnel and nothing is available on the record that he is a previous convict, habitual, hardened, desperate or dangerous criminal, hence to my mind the imprisonment for five years, which he had already undergone, would meet the ends of justice, hence awarded.

13. As the above mentioned amount of *Diyat* has been imposed against the Appellant No. 2, hence no compensation under Section 544-A of Cr.P.C. is required and as such imposition of Rs. 50,000/- as compensation against the Appellant No. 2, by the learned trial Court is waived.

14. As a result of what has been discussed above, the appeal in hand to the extent of Said Muhammad (Appellant No. 1) is accepted, impugned judgment to his extent is set-aside and he is acquitted of the charge while extending him benefit of doubt. Whereas the appeal to the extent of Muhammad Hayat (Appellant No. 2), with the above mentioned modification and alteration is dismissed. Both, by way of suspension of their sentences are on bail, hence their bail bonds are discharged. The disposal of case property shall be as directed by the learned trial Court.

15. The Criminal Revision No. 225 of 2003 filed by the complainant for the foregoing reasons, is without any substance, hence dismissed.

(A.S.) Appeal dismissed

PLJ 2015 Lahore 607

[Multan Bench Mutlan]

Present: **MUHAMMAD TARIQ ABBASI, J.**

AMANAT ALI--Petitioner

versus

KHALID NAWAZ--Respondent

Civil Revision No. 247 of 2010, heard on 21.4.2014.

Civil Procedure Code, 1908 (V of 1908)--

----O.XXXVII Rr. 1 & 2--Cancellation of cheque--Court passesses *suo motu* revisional jurisdiction--Procedure and jurisdiction--Court can *suo motu* rectify any illegality or material irregularity found in any judgment or order of lower Court--Whereby till decision of suit for cancellation of cheque, proceedings to other suit filed under Order XXXVII Rr. 1 & 2 of CPC were stayed. [Pp. 608] A & B

Mian Muhammad Akram, Advocate for Petitioner.

Nemo (Still *ex-parte*.)

Date of hearing: 21.4.2014.

JUDGMENT

This revision petition is directed against the order dated 4.2.2010, passed by the learned District Judge, Vehari, whereby a suit filed by the petitioner, against the respondent, for cancellation of cheque has been withdrawn from the Court of learned Civil Judge, Vehari, and transferred to the Court of learned Additional District Judge at Vehari, where another suit under Order XXXVII Rules 1 & 2, CPC, filed by the respondent, against the petitioner, in respect of the same cheque was subjudice.

2. Arguments heard and record perused.

3. The brief facts are that the petitioner filed a suit against the respondent, whereby he sought cancellation of the Cheque No. 28710043, dated 8.11.2003 valuing Rs. 2,00,000/-. The said suit was pending in the Civil Court at Vehari, when the respondent, on the basis of the same cheque, filed a suit under Order XXXVII Rules 1 & 2 of CPC, against the petitioner, which was entrusted to the learned Additional District Judge, Vehari.

4. The petitioner, moved an application, before the learned Additional District Judge, Vehari, where the above said suit under Order XXXVII Rules 1 & 2 of CPC was pending. Through the said application, the petitioner had sought, stay of the proceedings of the said suit, till decision of

the above mentioned other suit, filed for cancellation of the cheque. The application was allowed by the learned Additional District Judge, Vehari, through order dated 20.01.2010 and the proceedings of the suit filed by the respondent under Order XXXVII Rules 1 & 2, CPC were stayed.

5. Thereafter, the respondent moved an application before the learned District Judge, Vehari, whereby he sought transfer of the above captioned suit for cancellation of the cheque, from the Court of learned Civil Judge to the Court of the learned Additional District Judge at Vehari, where the above mentioned other suit under Order XXXVII was pending. The said application was accepted through the impugned order.

6. In the light of the dictum laid down by a Division Bench of this Court, in the case titled *"A.B.L. vs. Khalid Mahmood"* (2009 CLC 308), neither the above captioned order dated 20.01.2010, towards stay of the above mentioned suit was competent nor consolidation of both the suits before one Court *vide* order dated 04.02.2010 was permissible, because nature, procedure and jurisdiction of the suits and the Courts was different.

7. This Court possesses *suo motu* revisional jurisdiction. In exercise of the said power, the Court can *suo motu* rectify any illegality or material irregularity found in any judgment or order of lower Court. In this regard, reliance may be placed on the cases titled *"Muhammad Yousaf and 3 others vs. Khan Bahadur through Legal Heirs"* (1992 SCMR 2334), *"Ilam Din vs. Hassan Din and others"* (PLD 2006 Lahore 121), *"Mahram Khan vs. Fateh Khan and 3 others"* (2003 CLC 1434), and *"Allah Ditta vs. Lahore Development Authority and 5 others"* (2012 CLC 271).

8. In exercise of the above mentioned jurisdiction, when the above mentioned order dated 20.01.2010, passed by the Additional District Judge, Vehari, whereby till decision of the suit for cancellation of the cheque, the proceedings in other suit filed under Order XXXVII Rules 1 & 2, CPC have been stayed, has been adjudged and evaluated, the same in the light of the above stated dictum (2009 CLC 308) has been found to be unwarranted under the law.

9. As a result of the above mentioned discussion, both the above said orders could not be termed to be justified, hence are set aside, with a direction to the respective Courts to carry on the proceedings in the suits, as per the prescribed procedure.

(R.A.) Petition accepted

PLJ 2015 Cr.C. (Lahore) 687 (DB)

[Multan Bench Multan]

Present: **CH. MUSHTAQ AHMAD AND ASLAM JAVED MINHAS, JJ.**

SABOOR KHAN--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. Nos. 4149-B of 2015 and 4455-B of 2015, decided on 4.8.2015.

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

----S. 497(1)--Pakistan Penal Code, (XLV of 1860), S. 365-A--Anti-Terrorism Act, (XXV of 1997), S. 7--Bail, dismissal of--Allegation of--Specifically nominated for abduction--Abductee specifically nominated all the accused for his abduction--Alleged abductee was abducted had been taken into possession during the investigation by the police--Petitioner, fully participated in occurrence and facilitated abduction of alleged abductee to give an impression that a family was travelling in the car--Whether the ransom had been paid or not is immaterial, demand of ransom was sufficient constitute an offence under Section 365, PPC--Trial has commenced and the charge has been framed--Petitioners were the tenants of the complainant, therefore, they had been involved with *mala fide* intention but petitioners had failed to point out any ill-will or ulterior motive on the part of the complainant for false involvement of the petitioners--Alleged offence falls under the prohibitory clause of Section 497, Cr.P.C.--Bail was dismissed. [P. 689] A

Malik Sajjad Haider Maitla, Advocate for Petitioner (in Crl. Misc. No. 4149-B of 2015).

Sardar Mehboob, Advocate for Petitioner (in Crl. Misc. No. 4455-B of 2015).

Ch. Muhammad Islam and Ch. Muhammad Imtiaz, Advocates for Complainant.

Malik Riaz Ahmad Saghla, DPG for Respondents.

Date of hearing: 4.8.2015.

ORDER

By this single order we intend to dispose of Crl. Misc. No. 4149-B/2015 titled Saboor Khan vs. The State, etc, and Crl. Misc. No. 4455-B/2015 titled *Sanoobar Shaheen etc. vs. The State etc.* as both are outcome of the same F.I.R.

2. Saboor Khan, Sanoobar Shaheen and Zahoor Hussain, petitioners seek their post arrest bail in a case Bearing FIR No. 504/2014, dated 30.12.2014,

offence under Section 365-A, PPC read with Section 7 of Anti Terrorism Act, 1997, registered at Police Station Saddar Khanewal, for abduction of son of the complainant namely, Masood Aqeel.

3. Learned counsel for the petitioner contended that the alleged abductee came back on his own and he was never abducted by the petitioners; that the alleged abductee stated that he was kept in Balochistan but in a few hours how he came at the office of DSP Kehror Pakka which creates serious doubt in the prosecution story; that previously the petitioners were the tenants of the complainant and they have been involved with *mala fide* intention; that six persons have been involved from the family; that nothing has been recovered from the possession of the petitioners, therefore, case of the petitioners requires further inquiry.

4. On the other hand learned Deputy Prosecutor General assisted by the learned counsel for the complainant opposed the petition and argued that there is no *mala fide* or ill-will of the complainant or the alleged abductee to falsely involve the petitioners in this case.

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

6. Admittedly, during the investigation all the petitioners have been found involved in the occurrence. The alleged abductee namely, Masood Aqeel Mehmood specifically nominated all the accused for his abduction. The car in which the alleged abductee was abducted has been taken into possession during the investigation by the police. As far as petitioner, Sanoobar Shaheen is concerned, she fully participated in the occurrence and facilitated abduction of the alleged abductee to give an impression that a family was travelling in the car. Whether the ransom has been paid or not is immaterial, demand of ransom is sufficient to constitute an offence under Section 365, PPC. The trial has commenced and the charge has been framed. The argument of the learned counsel for the petitioners that previously the petitioners are the tenants of the complainant, therefore, they have been involved with *mala fide* intention but the learned counsel for the petitioners have failed to point out any ill-will or ulterior motive on the part of the complainant for false involvement of the petitioners. The alleged offence falls under the prohibitory clause of Section 497, Cr.P.C. This being so, these petitions have no force and same stand dismissed.

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

(A.S.) Bail dismissed

2015 Y L R 2514

[Lahore]

Before Muhammad Tariq Abbasi, J

Ch. MUHAMMAD AKRAM---Petitioner

Versus

Mst. ZEBA ZAREEN and others---Respondents

Writ Petition No.1979 of 2011, heard on 5th June, 2014.

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

----S. 15---Constitution of Pakistan, Art. 199---Constitutional petition---Eviction petition---Default in payment of rent-- Denial of relationship of tenant and landlord---Petitioner/new owner had purchased the demised property through registered sale deed from person claimed by tenant to be her landlord---By purchasing the house, petitioner/vendee had stepped into the shoes of the previous owner---In the absence of notice to tenant, eviction petition itself would be the notice of eviction to tenant---Previous owner had sent declaration/affidavit duly attested by Consulate of Pakistan in favour of petitioner/vendee admitting sale of the house to petitioner through registered sale deed---Purchase of house by petitioner and change of ownership had been confirmed---Order of Additional District Judge was set aside while order of Special Judge (Rent) was restored---Constitutional petition was accepted.

Bahauddin Bootwala v. Muhammad Afzal 2000 YLR 2716; Sher Jang v. District Judge, Islamabad and 4 others 2004 SCMR 1852; Pakistan National Shipping Corporation v. Messrs General Service Corporation 1992 SCMR 871; Ashiq Hussain v. Niaz Muhammad" 2000 CLC 376; Ahmad Ali alias Ali Ahmad v. Nasar ud-Din and another PLD 2009 SC 453 and Buzarg Jamil and another v. Haji Abdul Bari and others PLD 2003 SC 477 rel.

Sadiq Nawaz Khattak for Petitioner.

Qazi Shaharyar Iqbal for Respondents.

Date of hearing: 5th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this writ petition, the judgment dated 8-7-2011, passed by the learned Additional District Judge, Rawalpindi has been called in question. Through the said judgment, an appeal preferred by respondent No. 1, challenging the order dated 21-1-2011 passed by the learned Special Judge #Rent), Rawalpindi has been accepted and by setting aside the said order, the ejectment petition, preferred by the petitioner has been dismissed.

2. The facts are that the petitioner moved a petition under Section 15 of the Punjab Rented Premises Ordinance, 2007, against the respondent No. 1, whereby eviction of the respondent No. 1 from first floor of the house No. NE-297/C-2, situated at Tipu Road, Jinnah Colony, Rawalpindi was sought on the grounds of default in payment of the rent as well as expiry of the period of tenancy.

3. The respondent No. 1 filed a petition to contest, on the grounds that she was not tenant under the present petitioner, but of one Muhammad Ishaq deceased. The said petition of respondent No. 1 was allowed and accordingly the subsequent proceedings were carried on, during which the present petitioner, by filing affidavit as Exh.P.1 had made his statement as P.W.1, whereas Muhammad Tasleem Khan and Karamat Hussain by way of affidavits (Exh.P.2 and Exh.P3) had made the statements as P.W.2 and P.W.3 respectively. From the other side, the respondent No.1 had made the statement as RW-1 and also got examined Taimoor Ijaz Hassan and Malik Muhammad Ali as RW2 and RW-3 respectively.

4. On completion of the proceedings, the learned Special Judge (Rent), Rawalpindi had passed the order dated 21-1-2011, whereby while holding the relationship between. the parties as landlord and tenant, the ejectment petition was accepted, with a direction to the respondent No. 1 to vacate the rented premises within 45 days and also make the payment of arrear of the rent from April, 2008 onward Rs.3500 per month.

5. The respondent No. 1 had challenged the above mentioned order dated 21-1-2011 through an appeal, which for hearing was entrusted to the learned Additional District Judge, Rawalpindi, from where the judgment dated 8-7-2011 was pronounced, whereby the appeal was accepted, the order of the learned Special Judge (Rent), Rawalpindi was set aside and the ejectment petition was dismissed with cost.

6. Consequently, the writ petition in hand has been preferred, with the contention and the grounds that the learned Special Judge (Rent), Rawalpindi had rightly evaluated the material available on the record and passed the order dated 21-1-2011, but the learned Appellate Court had erred in passing the impugned judgment dated 8-7-2011, without considering the attending facts and circumstances and the law on the subject.

7. The learned counsel for the petitioner has advanced his arguments on the above mentioned lines, whereas the learned counsel appearing on behalf of respondent No. 1 has vehemently opposed the writ petition.

8. Arguments of both the sides have been heard and the record has been perused.

9. As stated above, the ejectment petition filed by the petitioner was denied by the respondent No. 1, to the effect that she was not tenant of the petitioner, therefore, herein below, it will be evaluated and adjudged if on the basis of the material available on the record, the order of the learned Special Judge (Rent), Rawalpindi was justified or the impugned judgment was the demand of the situation.

10. The record shows that during the proceedings, the petitioner had brought on the record that the house No. NE-297/C-2, in first floor of which the respondent No. 1 was residing as a tenant was purchased by hini through registered sale deed No. 6842 dated 31-8-2005, registered with Sub-Registrar, Rawalpindi. The said purchase by the petitioner was from Masoom Zaman son of Ch. Muhammad Zaman, through his attorney namely Muhammad Ishaq, who was being claimed by the respondent No. 1 to be her landlord. In this way, the present petitioner had become owner of the house in question in the year 2005. As per the dictum laid down in the case titled "Bahauddin Bootwala v. Muhammad Afzal" (2000 YLR 2716), through purchase of the house in question, the present petitioner had stepped into the shoes of its previous owner. The relevant portion of the said judgment reads as under:--

> "---Relationship of landlord and tenant was denied by tenant on the ground that he was inducted as a tenant by the previous owner---Rent Controller accepting the relationship of landlord and tenant between the parties allowed the ejectment application--- Validity Previous owner, after purchase of the property, transferred the same to the present landlord by way of gift, therefore, the present landlord had stepped into the shoes of the previous owner---In absence of an agreement to the contrary, relationship of landlord and tenant existed between the parties---Rent Controller had rightly exercised jurisdiction"

11. The record shows that the respondent No. 1 had contended that no notice was ever issued to her, by the present petitioner, regarding purchase of the house in question by him, hence she was unaware of the ownership of the petitioner and as such not tenant under him. Nothing has been brought on the, record that after purchase of the house, till filing of the ejectment petition, the petitioner had issued any notice to the respondent No. 1, towards purchase of the house by him, but it could not be ignored that in the above mentioned eventuality, filing of the ejectment petition, itself was a notice to the respondent No. 1. In this regard, reliance may be placed on the cases titled "Sher Jang v. District Judge, Islamabad and 4 others" (2004 SCMR 1852),

"Pakistan National Shipping Corporation v. Messrs General Service Corporation" (1992 SCMR 871) and "Ashiq Hussain v. Niaz Muhammad" (2000 CLC 376).

12. Furthermore Masoom Zaman, vendor of the house in question, in favour of the petitioner, who is residing abroad in England, has sent a declaration/affidavit duly attested by the Consulate of Pakistan at Bradford, whereby sale of the house in question by him to the present petitioner, through his uncle Muhammad Ishaq as attorney, vide the above mentioned registered sale deed, has been admitted and that the tenants residing in the house in question were accordingly informed by, the petitioner and his uncle Muhammad Ishaq, about sale of the house in favour of the petitioner and change of ownership.

13. On one hand, the purchase of the house in question by the petitioner and change of ownership has been confirmed in the above mentioned terms, whereas on the other hand, the respondent No. 1 has denied the petitioner to be her landlord, but in the light of the above mentioned documents, she is precluded to do so. It has been brought on the record that the respondent No. 1 has not paid the rent of the property in question, to anyone since October, 2010, hence as per dictum laid down by the august Supreme Court of Pakistan in the case titled "Ahmad Ali alias Ali Ahmad v. Nasar-ud-Din and another" (PLD 2009 SC 453), the respondent No.1 is liable to be ejected straightaway. The relevant portion of the said judgment reads as under:--

> "Application of landlord for ejectment of tenant having been based on default, and the required relationship of landlord and tenant having been denied by the tenant, he was liable to be ejected straightaway when the required relationship has been proved in affirmative."

Similar view has been rendered by the Apex Court in the case titled "Buzarg Jamil and another v. Haji Abdul Bari and others" (PLD 2003 Supreme Court 477).

14. As a result of the above discussion, the impugned judgment dated 8-7-2011 passed by the learned Additional District Judge, Rawalpindi could not be termed to be justified. Hence while accepting the instant writ petition, the said judgment is set aside and reversed. Meaning thereby that the appeal filed by the respondent No. 1 is dismissed and the order dated 21-1-2011 of the learned Special Judge (Rent), Rawalpindi is restored.

ARK/M-242/L Petition accepted.

2015 Y L R 2576

[Lahore]

Before Shahid Hameed Dar and Muhammad Tariq Abbasi, JJ

AKMAL and 2 others---Petitioners

Versus

The STATE---Respondent

Criminal Appeal No.679 of 2006, Murder Reference No.484 and Criminal Revision No.156 of 2007, heard on 24th September, 2014.

Penal Code (XLV of 1860)---

----Ss. 302(b), 324 & 337-F(vi)---Qatl-i-amd, attempt to commit qatl-i-amd, causing Munaqqilah---Appreciation of evidence---Sentence, reduction in---Alleged motive, which did not appeal to a prudent mind, had not been established---Witnesses, admitted that each of accused persons, made only one fire shot without repetition---Said version of the witnesses, was concurrent, consistent and confidence inspiring---Despite lengthy cross-examination, no material contradiction in the said version was brought on the record---Trial Court, in circumstances, had rightly believed the said version to be true---Place of occurrence, was confirmed to be outside the house of the complainant; accused persons were the aggressors, who succeeded in getting lives of two innocent persons, and causing grievous injuries to one---Matter was, promptly reported to the Police---No chance existed in circumstances, of any deliberation, consultation or false implication of accused persons---Defence had failed to contradict presence of injured witness at the spot and sustaining of injuries---Inconsistency between the medical evidence and the ocular account had been alleged by counsel for accused persons, but, no such contradiction had been noticed---Ocular account was in line with the medical evidence---Principle of "falsus in uno falsus in omnibus", was not applicable and maxim "sifting of grain out of chaff", was to be adopted---Acquittal of co-accused and conviction of accused persons, in circumstances, were not objectionable---Investigating Officer, despite admitting before the court that no documentary evidence about innocence of accused was produced before him, findings of the Investigating Officer, towards innocence of accused persons, was without any substance which could rightly be termed as ipse dixit of the Police, and same could not be given any weight---Trial Court had rightly appreciated said fact and discarded said findings of the Investigating

Officer---If there was any specific stance/ plea of accused, same should have been established during the trial through cogent and convincing evidence, but despite opportunity, accused failed to do so---Empties, allegedly collected from the spot were dispatched to the Laboratory after about three months---Mandatory procedure/ requirement of sending the empties to the laboratory just after the recovery, having been violated, report of Forensic Science Laboratory, was not admissible in evidence---As the charge against accused persons was proved beyond any doubt, impugned judgment, towards conviction of accused persons, being result of correct evaluation and appreciation of evidence, was quite justified---Non-establishment of the alleged motive, the recovery of weapon, report of the Forensic Science Laboratory, and non-repetition of firing by accused persons, were sufficient circumstances for concession, in the sentence awarded to accused persons by the Trial Court---Accused were entitled for benefit of doubt as an extenuating circumstance while dealing with quantum of sentence, as well---Maintaining conviction of two accused persons under S.302(b), P.P.C., their sentences were altered from death to imprisonment for life---If the accused fail to pay compensation amount provided under S.544-A(2), Cr.P.C., they will undergo simple imprisonment of six months---Benefit of S.382-B, Cr.P.C. was also given to the accused persons---Sentence of co-accused for charge under Ss.324 & 337-F(vi), P.P.C., was reduced to served out imprisonment for 2 years, 8 months and 15 days, as he made only fire shot at non-vital part of injured.

Iftikhar Hussain and another v. State 2004 SCMR 1185 and Akhtar Ali and others v. The State 2008 SCMR 6 ref.
Muhammad Akram Qureshi for Appellants Nos. 1 and 3.
Azam Nazir Tarar and Kausar Jabeen for Appellant No.2.
Khurram Khan, Deputy Prosecutor General for the State.
Mian Muzaffar Hussain for the Complainant.
Date of hearing: 24th September, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This judgment shall decide the above captioned matters, being outcome of the judgment dated 15-4-2006, passed by the learned Additional Sessions Judge, Chiniot, whereby Akmal, Muzaffar and Zafar (appellants in Criminal Appeal No. 679 of 2006) were convicted and sentenced in the following terms:-

Muzaffar and Akmal

Under Section 302(b), P.P.C. to death and compensation of Rs.50,000 each, payable to the legal heirs of the deceased persons.

Zafar

(i) Under Section 324, P.P.C. to rigorous imprisonment for ten years and fine of Rs.5000, in default whereof to further undergo simple imprisonment for four months.
(ii) Under Section 337-F(vi), P.P.C. to rigorous imprisonment for seven years with Daman of Rs.30,000, payable to Rab Nawaz injured.

(iii) It was directed that all the sentences awarded to Zafar (appellant/convict) shall run concurrently and benefit of section 382-B of Cr.P.C., will be permissible to him.

2. Facts of the case are that on 29-8-2002, Ali Muhammad (complainant) made a statement (Exh.PA), before the police, contending therein that he and his brother Muhammad Anwar (deceased) were residing together; along with his above named brother, Rab Nawaz (injured/PW), Mahmood Amjad (deceased) and Ansar, at about 7.30 p.m. was sitting in front of his house and talking; suddenly M/s Akmal, Muzaffar and Zafar (convicts/appellants), Ashraf, Asghar, Nasrullah and Sajid (since acquitted), while armed with firearms, attracted there; Akmal (convict/appellant) raised a ('lalkara' that they had come to take revenge of their murder, whereupon they (complainant party) to save themselves, started running to their house; Akmal with his gun made a fire shot, which hit Muhammad Anwar upper side of right flank and he fell down; Muzaffar (convict/appellant) fired a shot of his gun, which landed at back side of the head of Mahmood Amjad, who also fell down; the fire shot made by Zafar (convict/appellant), with his gun hit at the buttock of Rab Nawaz; thereafter Nazar with .44 bore rifle, Ashraf with 303 bore rifle; Asghar with 8 mm rifle, Nasrullah with 8 mm rifle and Sajid with 223 bore rifle also made indiscriminate firing; on. hearing reports of firing, many persons of the locality ran towards the spot, whereupon the accused, fled away; Muhammad Anwar and Mahmood Amjad succumbed to the injuries, whereas Rab Nawaz in an injured condition was shifted to the hospital; the

motive was previous enmity of murder. As a result of the above mentioned complaint, the FIR No. 456 dated 29-8-2002 under Sections 302/324/148/149, P.P.C. was registered at Police Station Saddar Chiniot. During the investigation, the police declared some of the accused innocent, hence the complainant filed a private complaint (Exh.PB), against the appellants/convicts and five others (since acquitted), almost on the same grounds as were narrated in the above mentioned Fard Biyan (Exh.PA). In the said complaint, the due proceedings were carried on and the nominated respondents/accused were summoned. Pre-trial proceedings were conducted, whereafter appellants/convicts and their co-accused (since acquitted) were formally charge sheeted, by the learned trial Court on 18-12-2003. All pleaded not guilty and claimed the trial, hence, the prosecution evidence was summoned and recorded.

3. Prosecution got examined as many as five persons as PWs, whereas, ten as CWs. Gist of evidence of the material witnesses is as under:--

(i) **P.W.1 Ali Muhammad** was the complainant as well as an eye-witness of the alleged occurrence, who narrated almost the same facts as were stated by him in the Fard Biyan (Exh.PA) and the private complaint (Exh.PB). He had also received a phial containing pallets, from the doctor being recovered from the body of Rab Nawaz (PW) and produced it before the investigating officer, who had taken the same into possession, through memo (Exh.PC), attested by him.

(ii) **P.W.2 Rab Nawaz**, who during the occurrence received injury had supported the version of Ali Muhammad complainant (P.W.1), in all its four corners.

(iii) **P.W.5 Dr. Mushtaq Bashir** conducted the post mortem examination of the dead bodies of Muhammad Anwar and Mahmood Amjad and prepared the reports (Exh.PF and Exh.PJ). At that time the following injuries were found on the dead body of Muhammad Anwar deceased: -

(a) Nine lacerated wounds 1 cm x 1 cm each in an area of 12cm x 1 cm on the outer and middle of right chest. Margins were inverted,

corresponding holes were present on the Qameez, these were wounds of entrance.

(b) Seven lacerated wounds 1-1/2 cm x 1 cm each in an area of 9cm x 9cm on the front and upper part of the right chest. Margins were everted, holes were present on the Qameez, these were wounds of exit.

(c) Lacerated wound 2 cm x 1 cm on the back and upper part of right scapular area, margins were everted, hole present on the Qameez, it was wound of exit.

During autopsy of Mahmood Amjad, the following injury was noticed:-

"Crushed lacerated wound 20cm x 16cm on the left and slightly back side of the head and left ear. Margins were inverted, brain matter was coming out, underlying skull bone was fractured into multi-pieces. Plastic wad was removed from the brain matter, it was wound of entrance.

As per doctor, the above mentioned injuries were caused by firearms, ante-mortem in nature, sufficient to cause death and that the deceased, died just on receipt of the injuries.

(iv) CW-1 Muhammad Nawaz Head Constable chalked out the formal FIR. (Exh. CW-A/1), received the parcels containing blood stained earth and the empties, from the investigating officer, kept the same in the Malkhana and thereafter handed over them to Allah Rakha Constable, for their onward transmission to the office of Forensic Science Laboratory, Lahore intact.

(v) CW-2 Allah Rakha 624/C transmitted sealed sample parcels, relating to the case to the concerned offices`..

(vi) CW-4 Muhammad Baqir 665/MHC kept in the Malkhana parcels containing .12 bore guns and rifle and thereafter got them dispatched in the office of Forensic Science Laboratory, Lahore.

(vii) CW-5 Zafar Iqbal 870/C Constable got conducted the post mortem examination of the dead bodies and also produced the last

worn clothes of the deceased (P-1 to P-4) before the investigating officer, who took the same into possession through memo (Exh.CW.5/E). This witness also attested the memo (Exh.CW.5/F) through which .12 bore gun (P15) along with four live cartridges (P-6), allegedly got recovered by Muzaffar (convict/ appellant) from his house was taken into possession by the investigating officer.
(viii) CW-7 Jamil Akhtar drafted the scaled site plans (Exh.CW.7/J and Exh.CW.7/K) of the spot.

(ix) CW-8 Babar Nawaz S.I. investigated the case. During his proceedings, he recorded the statement (Exh.PA) of Ali Muhammad complainant and for registration of the formal FIR sent it to the Police Station; prepared injury statements (Exh.PG & Exh.PK) and the inquest reports (Exh.PH & Exh.PL) relating to the dead bodies; collected the blood stained earth from the spot, made it into sealed parcels and took the same into possession through memo (Exh.PD); collected seven empties of .12 bore gun (P-1/1-7) and ten of .44 bore rifle (P-2/1-10) from the spot and took the same into possession through memo (Exh.PE); prepared rough site plan (Exh.CW.8/L) of the spot; prepared injury statement (Exh.PN) of Rab Nawaz (injured PW) and also recorded his statement; took into possession the last worn clothes of the deceased (Exh.P-1 to Exh. P-4); got prepared the scaled site plans (Exh.CW-7/J and Exh.CW-7/K) from the draftsman; deferred arrest of Akmal, Zafar, Nazar and Ashraf, accused when they appeared before him on
10-9-2002, but arrested Muzaffar and Asghar accused on 8-11-2002; took into possession the gun (P-5) along with four live cartridges (P6/1-4) got recovered by Muzaffar convict/appellant from his house, through memo (Exh.CW-5/F); referred Rab Nawaz PW to Allied Hospital, Faisalabad for the purpose of operation and took into possession a pallet which was removed from his body; deposited the case property with Moharar at the relevant stages and also recorded statements of the concerned witnesses; finally, prepared the challan while placing the names of Akmal, Zafar (appellants/convicts), Nazar, Hayat and Ashraf (accused since acquitted) in Column No. 2 of the report under section 173 of Cr.P.C.

(x) CW-9 Dr. Arshad Ali examined Rab Nawaz (injured PW) and prepared the medico legal report (Exh.CW-9/P). Two fire shot injuries, one at right buttock and other at right thigh of the injured were noted.

4. After examination of the above said witness, the complainant tendered the reports of the Chemical Examiner, Serologist and Forensic Science Laboratory as Exh.PR, Exh.PS & Exh.PT respectively and closed the prosecution case, whereafter the appellants/convicts as well as their acquitted co-accused were examined as required under Section 342 Cr.P.C., during which the questions emerging from the prosecution evidence were put to them and they denied almost all such questions, while pleading their innocence and false involvement, in the case with mala fides. The question "Why this case against you and why the PWs have deposed against you?" was replied by the appellants with the following three words:--

"Due to enmity."

5. At that time, Akmal (appellant/ convict) opted to lead evidence in his defence but refused to make statement under Section 340(2), Cr.P.C., whereas Zafar and Muzaffar (appellants/convicts) did not opt to lead any evidence in their defence or make statements on oath. Later on, Akmal also refused to lead any defence evidence.

6. On completion of the trial, the learned trial Court pronounced the impugned judgment, whereby the appellants were convicted and sentenced, in the above mentioned terms, whereas their above named co-accused were acquitted of the charge. Consequently the matters in hand.

7. Learned counsel for the appellants have argued that the appellants are innocent and falsely roped in the case, with mala fide, while concocting a false and frivolous story; during the investigation, Akmal and Zafar (appellants) were found to be not involved, being not available at the spot, hence declared innocent, but the learned trial Court failed to consider the said fact and erred in convicting and sentencing them; during the investigation, no incriminating was recovered from Akmal and Zafar, (appellants); the gun allegedly recovered from Muzaffar (appellant) was a planted weapon and as such the said recovery could not be believed; the statements of the prosecution witnesses were full of material contradictions but not considered

by the learned trial Court; in consistency between the ocular account and the medical evidence was also not taken into consideration by the learned trial Court; the prosecution had failed to prove the charge against the appellants, hence they were entitled for acquittal and as such the impugned judgment is not sustainable in the eye of law.

8. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant has not only vehemently opposed the appeal but also reiterated the grounds taken in Criminal Revision (No. 156 of 2007) and prayed for enhancement of the compensation awarded to the appellants.

9. Argument of learned counsel for the appellants, learned counsel for the complainant as well as learned Deputy Prosecutor General have been heard and the record has been perused.

10. Ali Muhammad complainant (P.W.1) at the time of the reporting the matter to the police on 29-8-2002 through Exh.PA, alleged the motive as previous enmity of murder. At that time he did not make any detail of the said enmity, but when he filed the complaint on 13-1-2003 (Exh.P.B), contended that in the year 1987, Bahu was murdered, who was real uncle of Akmal, Zafar (appellants), Muhammad Ashraf and Asghar (since acquitted), whereas, first cousin (Chacha Zad) of Nazar (since acquitted) and Muzaffar (appellant/convict); a criminal case against Anwar deceased and others was registered at Police Station Saddar Chiniot, wherein Anwar deceased was sentenced to twenty five years imprisonment, who after serving out was released; the accused to get revenge of the said murder, with common intention, had committed Qatal of Muhammad Anwar and Mahmood Amjad, whereas murderous assault at Rab Nawaz (P.W.2). During statement of the complainant (P.W.1) it came on the record that one Ahmed, who was also challaned for murder of Bahu, was acquitted in the year 1989, whereas Anwar (deceased) and Nazir, after serving out their sentences came back about 3/4 years before the occurrence. In the above said back ground, the alleged motive does not appeal to a prudent mind because no action against Ahmed was ever taken by the accused party, who according to the complainant, was also a murderer of Bahu and acquitted in the year 1989. Anwar (deceased) was enlarged from the jail about 3/4 years prior to the instant occurrence, but just after his release, he was not questioned by the accused party in any manner, despite the fact that both the parties were residing in the same

locality. Therefore, the alleged motive could not be termed to have been established.

11. Ali Muhammad complainant (P.W.1) and Rab Nawaz injured (P.W.2) during the trial categorically deposed that when they along with Muhammad Anwar and Mahmood Amjad (deceased) were available at the spot, the appellants/ convicts, while armed with firearms attracted and attacked at them and when they to save themselves started running towards their house, Akmal (appellant/ convict) made a fire shot with his gun which hit at back side of right flank of Muhammad Anwar (deceased); Muzaffar (appellant/convict) with his gun fired at Mahmood Amjad (deceased) hitting on the back side of his head, whereas Zafar (appellant/convict) fired and caused injuries at right buttock of Rab Nawaz (P.W.2); due to the injuries sustained by Muhammad Anwar and Amjad Mahmood at the hands of Akmal and Muzaffar (appellants), both died then and there. The witnesses however, admitted that each of the appellants made only one fire shot without any repetition. The above mentioned version of the above named witnesses was concurrent, consistent and confidence inspiring. Despite lengthy cross-examination, no material contradiction in the said version was brought on the record, hence the learned trial Court had rightly believed the version to be true. The place of occurrence was confirmed to be outside the house/haveli of the complainant, hence admittedly the appellants were the aggressors, who succeeded in getting lives of two innocent persons and causing grievous injuries to one. The matter was promptly reported to the Police, hence no chance of any deliberation, consultation or false implication. The defence had failed to contradict presence of the above named injured witness at the spot and sustaining of the injuries. Inconsistency between the medical evidence and the ocular account has been alleged by the learned counsel for the appellants, but on perusal of the record, no such contradiction has been noticed, hence the said contention has no force. It can rightly and safely be held that the ocular account is in line with the medical evidence.

12. The contention of the learned counsel for the appellants that when on the basis of same evidence, co-accused were acquitted, then no justification of conviction of the appellants, is answered in the terms that now-a-days principle of "falsus in uno falsus in omnibus" is not applicable, rather maxim "sifting of grain out of chaff' is to be adopted. Hence acquittal of the above mentioned co-accused and conviction of appellants being result of application

of the above mentioned maxim, is not objectionable. If any case-law is needed to fortify this view, reference can be made to the case of "Iftikhar Hussain and another v. State" (2004 SCMR 1185), wherein the Hon'ble Supreme Court of Pakistan at page 562 held as under:--

> "...It is true that principle of falsus in uno falsus in omnibus is no more applicable as on following this principle, the evidence of a witness is to be accepted or discarded as a whole for the purpose of convicting or acquitting an accused person, therefore, keeping in view prevailing circumstances, the Courts for safe administration of justice follow the principle of appraisal of evidence i.e. sifting of grain out of chaff i.e. if an ocular, testimony of a witness is to be disbelieved against a particular set of accused and is to be believed against another set of the accused facing the same trial, then the Court must search for independent corroboration on material particulars as has been held in number of cases decided by the superior Courts."

Similar view was reiterated in the subsequent judgment of the Hon'ble Supreme Court of Pakistan reported as "Akhtar Ali and others v. The State" (2008 SCMR 6).

13. The Investigating Officer, during the investigation, had declared Akmal and Zafar (appellants) innocent, being not available at the spot and as such challaned them in Column No. 2 of the report under Section 173, Cr.P.C. The investigating officer (CW-8) during his statement in the Court had admitted it correct that no documentary evidence about innocence of the above named accused was produced before him, meaning thereby that the findings of the investigating officer, towards innocence of the above named appellants was without any substance, hence can rightly be termed as ipse dixit of the police and as such could not be given any weight. The learned trial court had rightly appreciated the said fact and discarded the above said findings made by the investigating officer. Even otherwise, if there was any specific stance/plea of any appellant, then it should have been established during the trial, through cogent and convincing evidence but despite opportunity, the appellants had failed to do so.

14. Admittedly as Akmal and Zafar (appellants) were declared innocent and even not arrested, hence no recovery from them was effected. Recovery of 12 bore gun from Muzaffar (appellant) was alleged and it was also sent to the

laboratory for comparison, with the empties collected from the spot. A photo copy of report of the Forersic Science Laboratory was brought on the record of the learned trial Court as Exh.PK, which at all was not admissible in evidence, hence no weight could be given to the said document. Furthermore as per the record, the empties allegedly collected from the spot were dispatched to the laboratory after about three months and as such the mandatory procedure/requirement of sending the empties to the laboratory just after the recovery was violated. The said reason had also made the comparison, if any, useless.

15. As a result of what has been discussed above, we are of the considered view that as the charge against the appellants was proved beyond any doubt, hence the impugned judgment, towards conviction of the appellants, in the above mentioned terms being result of correct evaluation and appreciation of evidence was quite justified and call of the day. But non-establishment of the alleged motive, the recovery of weapons, report of the Forensic Science Laboratory and non-repetition of firing by the appellants, according to us are sufficient circumstances for concession, in the sentence awarded to the appellants by the learned trial court. It is well recognized principle, by now that an accused is entitled for the benefit of doubt as an extenuating circumstance, while dealing his quantum of sentence as well. In this regard, reference may be made to the case of Mir Muhammad alias Miro v. The State (2009 SCMR 1188), wherein the Hon'ble Supreme Court of Pakistan had held as under:--

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

16. Consequently, the conviction of Akmal and Muzaffar (appellants) under Section 302(b), P.P.C. awarded through the impugned judgment is maintained but their sentence is altered from the death to imprisonment for life. The compensation awarded to the appellants by the learned trial court is maintained. However, we have noticed that learned trial court has not awarded any sentence in default of payment of compensation provided under section 544-A(2), Cr.P.C. Therefore, we direct that if the appellant fails to pay the compensation amount, he will undergo simple imprisonment for six

months. The benefit of section 382-B of Cr.P.C. is also given to the appellants.

17. As stated above Zafar (appellant) during the investigating was not arrested and he was taken into custody at the time of announcement of the impugned judgment. As per the information made by the jail authorities, where he remained confined, he was dispatched to the jail on 15-4-2006 and released on bail, on 30-6-2008, hence he served out imprisonment for 2 years, 8 months and 15 days. He made only fire shot at the buttock (non vital part) of the above named injured, hence due to the reasons, mentioned above, he also deserves concession in his sentence. Therefore, his sentence for charge under Sections 324 and 337F(vi), P.P.C. is reduced to the imprisonment for 2 years, 8 months and l5 days each, which he has already undergone. The fine of Rs.5000 and Daman of Rs.30,000 imposed against him by the learned trial court shall remain intact. He is directed to make the payment of the above mentioned amounts, within thirty days from today and submit the receipt(s) in the office of Deputy Registrar (Judicial) of this Court, failing which he shall undergo the imprisonment, which in default of the above mentioned fine has been prescribed by the learned trial court.

18. In view of the foregoing discussion, with the above mentioned modification in the sentence of the above mentioned appellants Criminal Appeal No. 679 of 2006 is dismissed. Murder Reference No. 484 of 2006 is answered in negative and death sentence of Muzaffar and Akmal is not confirmed. Zafar appellant, by way of suspension of sentence is on bail, hence his bail bonds are discharged.

19. The above stated facts are sufficient towards dismissal of Criminal Revision No. 156 of 2007, hence it is dismissed.

HBT/A-187/L Sentence reduced.

2016 C L C Note 80
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
MUHAMMAD HANIF and others---Petitioners
Versus
MUHAMMAD ASLAM and others---Respondents

Civil Revisions Nos. 40 and 41 of 2005, heard on 19th June, 2014.

Civil Procedure Code (V of 1908)---

----O. XLI, R. 31---Judgment in appeal---Points for determination---Scope---Appellate Court below had passed judgment and decree in an ambiguous manner without adopting the requirements of O. XLI, C.P.C. and without discussing any issue or setting aside any findings---When law had prescribed that a thing should be done in a particular manner then same must be done in the said particular manner or should not be done at all---Appellate Court should have recorded issue-wise findings but said procedure had not been complied with--Impugned judgment and decree could not be termed to have been passed while considering the law and procedure on the subject---Judgment and decree passed by the Appellate Court were set aside with a direction to pass a valid judgment---Revision was accepted in circumstances. [Paras. 9, 11 & 13 of the Judgment]

Tehsil Nazim TMA, Okara v. Abbas Ali and 2 others 2010 SCMR 1437; Muhammad Akram v. Mst. Zainab Bibi 2007 SCMR 1086; Khalil-ur-Rehman and another v. Dr. Manzoor Ahmed and others PLD 2011 SC 512; Raja Hamayun Sarfraz Khan and others v. Noor Muhammad 2007 SCMR 307; Madan Gopal and 4 others v. Marn Bepari and 3 others PLD 1969 SC 617 and Ch. Muhammad Shafi v. Shamim Khanum 2007 SCMR 838 rel.

Mukhtar Ahmad Gondal for Petitioners (in C.Rs. Nos. 40 and 41 of 2005).
Raja Sajid Mehmood for Respondents (in C.Rs. Nos. 40 and 41 of 2005).
Date of hearing: 19th June, 2014.

JUDGMENT
MUHAMMAD TARIQ ABBASI, J.---This single judgment is intended to decide the above captioned revision petitions, as in the both

consolidated judgment and decrees dated 13.12.2004, passed by the learned Additional District Judge, Rawalpindi, has been called in question.

2. The facts in short are that Muhammad Hanif etc. (the petitioners in Civil Revision No.41), filed a suit, against Muhammad Aslam (the respondent in the said Civil Revision), whereby possession of four rooms and courtyard, fully described in the plaint, was sought. Muhammad Aslam, Mst. Fazal Jan, Mst. Raheem Jan and Mst. Qudrat Jan (the respondents in Civil Revision No. 40 of 2005), also preferred a suit against the above named Muhammad Hanif etc., whereby the possession of a house consisting of one room, fully narrated in the plaint, was demanded.

3. Both the above mentioned suits were proceeded in the learned trial Court and decided through judgments and decrees dated 23.11.2002, whereby the suit filed by Muhammad Hanif etc. was decreed and that of Muhammad Aslam etc., was dismissed.

4. Muhammad Aslam etc. preferred appeals, which came up for hearing before the learned Additional District Judge, Rawalpindi, from where consolidated judgments and decrees 13.12.2004 were pronounced, whereby the suit filed by Muhammad Hanif etc. was dismissed, whereas preferred by Muhammad Aslam etc. was decreed. Consequently, the revision petitions in hand.

5. Arguments of both the sides have been heard and the record has been perused.

6. The record shows that in the suit filed by Muhammad Hanif etc. the following issues were framed:-

(1) Whether the plaintiffs have no cause of action to bring the suit?

(2) Whether the suit is time barred?

(3) Whether the suit has not been correctly valued for the purposes of court fee and jurisdiction? If so what is its correct valuation for both the purposes?

(4) Whether the suit is bad for non-joinder of necessary parties?

(5) Whether the plaintiffs are owners of the suit property and as such are entitled to the decree for possession of same?

(6) Relief.

(6-A) Whether the defendants are licensee on the suit property of the plaintiffs? OPP

(6-B) Whether the suit property had been purchased by the father of defendant from father of plaintiffs? OPD

7. Whereas in the above mentioned other suit preferred by Muhammad Aslam etc. the following issues were settled by the learned trial Court:-

(1) Whether present suit is time barred? OPD

(2) Whether the present suit is bad for non-joinder of necessary party? OPD

(3) Whether the present suit is incorrectly valued for the purpose of court fee and jurisdiction, if so, what is correct valuation? OPD

(4) Whether the plaintiff is entitled to a decree for possession of the property in dispute and as a consequential relief for permanent injunction to restrain the defendants from changing the condition of the suit house and from alienating the same? OPP

(5) Relief.

The learned trial Court, in both the suits, had given the issue wise findings and ultimately passed the judgments and decrees dated 23.11.2002, in the above mentioned terms.

8. The decree by the learned trial Court in favour of Muhammad Hanif etc. was as a result of the findings given under issue Nos.5, 6-A and 6-B mentioned above. Whereas the dismissal of the suit of Muhammad Aslam etc. was in consequence of the decision made under issue No.4 described above.

9. It has been observed that when the matters have gone before the learned Additional District Judge, Rawalpindi, in shape of the above mentioned appeals, the learned Additional District Judge without adopting the requirements of Order XLI of C.P.C. and without discussing any issue or setting aside any findings made therein, in an ambiguous manner has passed the judgment and decrees dated 13.12.2004.

10. When the above mentioned situation was confronted to the learned counsel appearing on behalf of the respondents he has frankly stated that the judgment of the learned Appellate Court is not issue wise and that

findings of the learned trial Court regarding any issue has not been disturbed, however, the appeals have been decided, as mentioned above.

11. When the law prescribed that as thing should be done in a particular manner then the said thing must be done in the said particular manner or should not be done at all. Reliance in this regard is placed upon Tehsil Nazim TMA, Okara v. Abbas Ali and 2 others (2010 SCMR 1437), Muhammad Akram v. Mst. Zainab Bibi (2007 SCMR 1086), Khalil-ur-Rehman and another v. Dr. Manzoor Ahmed and others (PLD 2011 SC 512), Raja Hamayun Sarfraz Khan and others v. Noor Muhammad (2007 SCMR 307). In the situation in hand, under Order XLI of C.P.C., it has clearly been mentioned that the learned Appellate Court should record the issue wise findings but, as stated above, the said procedure has not been complied with. In the judgments reported as Madan Gopal and 4 others v. Marn Bepari and 3 others (PLD 1969 SC 617) and Ch. Muhammad Shafi v. Shamim Khanum (2007 SCMR 838) the Hon'ble Supreme Court of Pakistan has laid down the law that the appellate Court must give his judgment with reasoning and also meet out all the points of the judgment of trial Court.

12. Resultantly, the impugned judgment and decrees of the learned Appellate Court could not be termed to have been passed while considering the law and the procedure on the subject.

13. Consequently, both the revision petitions in hand are accepted, the impugned judgment and decrees dated 23.12.2004 are set aside, with a direction to the learned Appellate Court to take up the appeals again and while hearing all the concerned, pass a valid judgment, warranted under the law, and procedure positively, within a period of one month from the date of receipt of this order. No order as to costs.

ZC/M-281/L Petition allowed.

2016 M L D 380

[Lahore]

Before Shahid Hameed Dar and Muhammad Tariq Abbasi, JJ

MUHAMMAD RAASHID---Petitioner

Versus

The STATE and others---Respondents

Crl. Misc. No.6080-B of 2014, decided on 23rd September, 2014.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss.302, 324, 337-F(i)(iii)(vi), 148 & 149---Anti-Terrorism Act (XXVII of 1997), S.7---Qatl-i-amd, attempt to commit qatl-i-amd, causing damiyah, Mutalahimah, Munaqqilah, rioting, common object, act of terrorism---Pre-arrest bail, grant of---FIR showed that only indiscriminate firing was attributed to accused---Accused was alone at his shop, when his rival party, consisted of five nominated and two unknown persons attacked him---Due to firing of the opposite party, accused sustained as many as seven fire shot injuries, out of which one was Jurh Jaifah---Question whether accused, while making return firing had committed any offence or not was to be determined at the trial---Whether the minor girl or her father were present at the spot, or she had sustained any injury during the occurrence was not mentioned in the FIR---Statements of said persons whereby they stated that injury at the foot of baby was inflicted by accused were recorded on the third day of alleged occurrence---Fact that when indiscriminate firing was being made from both the sides, how it was noted that injury to the baby had been caused by accused---Said witnesses, seemed to have been purposely introduced to falsely involve accused in the case---Complainant and other witnesses sworn affidavits, whereby they exonerated accused from alleged act of firing---Trial Court did not give any importance to the affidavits---Present case was that of two versions; and correct version could only be hinted at and pointed to during the course of trial---Case of accused was one of further inquiry, entitling him to concession of bail---Ad interim pre-arrest bail granted to accused, was confirmed, in circumstances.

Abdul Razzaq Yunas for Petitioner.

Khurram Khan, Deputy Prosecutor General and Ashraf S.I. for the State.

Rao Muhammad Asghar for the injured.

ORDER

The petitioner namely Muhammad Raashid seeks pre-arrest bail in case FIR No.29, dated 15.01.2014, registered under Sections 302/324, 337-F(i), 337-F(iii), 337-F(vi)/148, 149, P.P.C., read with Section 7-ATA, 1997 at Police Station Gawalmandi, Lahore.

2. The facts, as per FIR are that on 14.01.2014 at about 11;30 p.m. when Ghulam Hussain complainant, along with his brother-in-law, Khalil Ahmad PW, nephews Suleman Ali (deceased), Saad Ali (injured PW) and maternal nieces namely Muskan and Erum (injured PWs) came at Gawalmandi Chowk to see illumination on the eve of Eid Meelad-ul-Nabi and stopped at the milk and yogurt shop of Raashid Gujjar (petitioner) to drink milk; in the meanwhile Messrs Farid Gujjar, Hamid alias Dora Gujjar, Kaka alias Saghar, Waseem alias Bahadar, Azeem alias Kag and two unknown accused, all armed with pistols, while raising Lalkaras reached there; on seeing them Raashid Gujjar (petitioner), opened direct firing with his pistol at the attackers and in return, Farid Gujjar etc. also started firing; the fire shots made by Farid Gujjar hit Suleman Ali, the nephew of the complainant at backside of left shoulder and right thigh who got injured and fell down; due to indiscriminate firing from both the sides, Saad Ali, Erum, Muskan as well as many others sustained the injuries; the injured were shifted to Mayo Hospital, Lahore, where Suleman Ali succumbed to the injuries.

3. The learned counsel for the petitioner has argued that the petitioner is innocent and has been falsely roped with mala fide; during the occurrence the petitioner received fire shot injuries at the hands of the opposite party and became seriously injured; neither in the FIR nor in the statements of the injured PWs it was mentioned that minor Naseaha had also sustained the injury(-ies) but with the mala fide, statements of the above named girl as well as that of her father Muhammad Shahzad Butt were concocted on the third day of the occurrence, just to falsely rope the petitioner in the case; the complainant as well as the injured PWs and Khalil Ahmad an eye-witness have sworn the affidavits, whereby they all exonerated the petitioner.

4. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for Mst. Naseaha injured has vehemently opposed the petition.

5. After hearing learned counsel for the parties and perusing the record it is observed that in the FIR only indiscriminate firing was attributed to the petitioner. It was alleged that due to the firing made from both the sides, the above named PWs had sustained the injuries, whereas Suleman Ali lost his life due to the injuries caused by Farid Gujjar. It is also noted that the petitioner was alone at his shop, when his rival party consisting of five nominated and two unknown persons attacked him. Due to firing of the opposite party, the petitioner sustained as many as seven fire shot injuries, one out of which was Jurh Jaifah, punishable under Section 337-D, P.P.C. It would be seen and determined during the trial if the petitioner, while making return- firing had committed any offence or not.

6. In the FIR it is not mentioned if baby Naseaha or her father Muhammad Shahzad Butt were present at the spot or she had sustained any injury during the occurrence. On the third day of the alleged occurrence i.e., on 16.01.2014 statements of the above named persons were recorded, whereby they stated that injury at the foot of baby Naseaha was inflicted by the petitioner. When indiscriminate firing was being made from both the sides, how come the above named girl and her father noticed that the injury to the minor girl had been caused by the petitioner? It seems as if above named witnesses have been purposely introduced to falsely involve the petitioner in this case. The bail declining order passed by the learned trial court reveals that Ghulam Hussain-complainant, Khalil Ahmad, an eyewitness, Saad Ali, Muskan and Erum, the injured PWs tendered sworn affidavits before the police, whereby they exonerated the petitioner from the alleged act of firing with the addition that it was he who received injuries at the hands of attacking party. Learned trial court, however, did not give any importance to the said affidavits and observed that baby Naseaha still blamed the accused-petitioner qua firearm injuries on her foot. Copies of the mentioned affidavits are available on the record, the presentation of the original thereof before the police has been admitted by both the sides. Learned counsel for the petitioner has stated that regarding the alleged occurrence, the father of the petitioner has filed a private complaint under Sections 302/324,337-F(i),337-F(iii),337-F(vi), P.P.C. and section 7 of ATA, in which all the respondents-accused who attacked the petitioner have been summoned and charge sheeted. The other side has not rebutted the said fact. It is certainly a case of two versions. The correct one can only be hinted at and pointed to during the course of the trial.

7. All the above mentioned facts, in our view, have rendered the petitioner's case one of further inquiry, entitling him to the concession of bail. Resultantly, the petition in hand is accepted and ad-interim pre-arrest bail granted to him on 05.05.2014 is confirmed subject to furnishing fresh bail bonds in the sum of Rs.2,00,000/- with two sureties, each in the like amount to the satisfaction of the learned trial court.

HBT/M-347/L Bail confirmed.

2016 M L D 621

[Lahore]

Before Muhammad Tariq Abbasi and James Joseph, JJ

ALI ASGHAR---Petitioner

Versus

The STATE and others---Respondents

Crl. Misc. No.4569-B of 2014, decided on 15th October, 2014.

Criminal Procedure Code (V of 1898)---

----S.497---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Possessing and controlling narcotics---Bail, grant of---No particular part of the allegedly recovered substance (bhang), had been described---Report of Chemical Examiner was still awaited---Nature and kind of alleged recovered substance, could not be confirmed---Question as to whether the offence would fall under provision of Control of Narcotic Substances Act, 1997 or the Prohibition (Enforcement of Hadd) Order, 1979 would be resolved during the trial---Accused was no more required for any further investigation, and nothing was to be recovered from him---Keeping accused, confined in the jail, in circumstances, would serve no useful purpose---Accused was admitted to bail.

Fazeelat Bibi v. The State 2007 YLR 3021 rel.

Ch. Muhammad Naeem and Muhammad Malik Khan Langah for Petitioner.

Malik Riaz Ahmad Saghla, DPG and Saleem, SI for the State.

Date of hearing: 15th October, 2014.

ORDER

MUHAMMAD TARIQ ABBASI, J.---The petitioner namely Ali Asghar seeks post arrest bail in case FIR No. 394/2014, dated 08.06.2014, registered under Section 9(c) of the Control of Narcotic Substances Act, 1997, at Police Station Seetal Maari, District Multan.

2. The precise facts, as per FIR are that on 8.6.2014, when Muhammad Saleem, SI (complainant), along with other Police officials was on patrolling, he received a spy information that the petitioner having 'bhang' was available at Samejabad, Multan; the complainant along with his companions, reached at the spot and apprehended the petitioner; during search, from a bundle (Gattu), which he was lifting, 'bhang' weighing five kilogram was recovered.

3. After hearing learned counsel for the parties and perusing the record, it is observed that in the FIR, only recovery of 'bhang', without specifying particular parts thereof, is alleged. In various dictionaries of English language, the word 'bhang' is defined as 'hemp'. Whether 'bhang' a narcotic substance, is a question, the answer of which could be found in Section 2(s) of the Control of Narcotic Substances Act, 1997, where narcotic drug has been defined as Coca leaf, cannabis heroin, opium, poppy straw and all manufactured drugs. The term "cannabis (hemp)" has been defined in Section 2(d) of the Act ibid, in the following terms:--

(i) cannabis resin (charas) that is, the separated resin, whether crude or purified obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(ii) the flowering or fruiting tops of the cannabis plant (excluding the seed and leaves when not accompanied by the tops) from which the resin has not been extracted by whatever name they may be designated or known; and

(iii) any mixture with or without neutral materials of any of the above forms of cannabis or any drink prepared therefrom;

From the above mentioned definition, given in Section 2(d)(ii), it is clear that if "bhang (hemp)" contains specific parts, flowering or fruiting tops, from which resin has not been extracted, then the case would be covered by the Act ibid and punishable under Section 9 of the Act. In this regard, reliance may be placed to the case of "Fazeelat Bibi v. The State" (2007 YLR 3021), the relevant portion whereof reads as under:--

"This clearly establishes that when Bhang/hemp is referred to without specification of any particular part of the said plant and without the other details mentioned above the offence would be covered by the provisions of the Prohibition (Enforcement of Hadd) Order, 1979 and recovery of Bhang/hemp would attract the provisions of the Control of Narcotic Substances Act, 1997 only when the requirements of section 2(d) thereof are fulfilled. In the case in hand the FIR, the Memorandum of Recovery and the report of the Chemical Examiner do not specify as to whether the substance allegedly recovered from the petitioner's possession was the flowering or fruiting tops of the cannabis plant or not, as to whether the same excluded the seeds and leaves when not accompanied by the tops or not and as to whether resin had been extracted from the recovered substance or not. In these circumstances prima facie it is difficult for us to hold that the requirements of section 2(d) of the Control of Narcotic Substances Act, 1997, were fulfilled in the case in hand so as to attract the said Act to the present case. Thus, we have no other option but to fall back upon the provisions of the Prohibition (Enforcement of Hadd) Order, 1979 vis-a-vis the allegation against the petitioner."

4. As stated above in the situation in hand, no particular part of the alleged recovered substance (bhang) has been described. The report of the chemical examiner is still awaited, hence till now the nature and kind of alleged recovered substance could not be confirmed. It would be seen during the trial whether the offence would fall under the provisions of the Act ibid or the Prohibition (Enforcement of Hadd) Order, 1979.

5. The petitioner is behind the bars, he is no more required for any further investigation in this case and nothing is to be recovered from him. Keeping him, confined in the jail would serve no useful purpose.

Resultantly, this petition is allowed, and the petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two lac only) with two sureties each, in the like amount to the satisfaction of the learned trial Court.

HBT/A-171/L Bail granted.

2016 M L D 730

[Lahore]

Before Sayyed Mazahar Ali Akbar Naqvi and Muhammad Tariq Abbasi, JJ

MUHAMMAD WASEEM KHAN---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.641 and Murder Reference No.77 of 2010, heard on 19th June, 2014.

Penal Code (XLV of 1860)---

----Ss. 302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Sentence, reduction in---Accused was proved to have strong motive against the deceased for commission of the offence---Complainant had satisfactorily and confidently brought on the record each and every aspect of the case, not only during his examination-in-chief, but also in cross-examination---Defence, despite lengthy cross-examination had badly failed to shake the testimony of sole witness, could not create any dent, or defect in the prosecution story or bring on the record any material favourable to the accused---Conviction could be based on evidence of a solitary eye-witness, if it was found truthful and natural and not interested in deceased or any inimical terms with accused---Complainant had established his presence at the spot and witnessing of the occurrence---Mere relationship of complainant with the deceased, was not sufficient to discard his testimony which otherwise was confidence inspiring---Medical evidence had not contradicted the ocular story---Availability of accused at the spot and his full participation in the alleged occurrence was established---Accused at the time of commission of occurrence being 19 years of age, that was sufficient to consider for premium to him, towards quantum of sentence---Death sentence awarded to accused, was altered to the imprisonment for life, in circumstances.

Muhammad Ashraf v. State 1971 SCMR 530; Allah Bukhsh v. Shammi and others PLD 1980 SC 225; Mali v. State 1969 SCMR 76; Farooq Khan v. State 2008 SCMR 917;Ziaullah v. The State 1993 SCMR 155; Ghulam Sarwar and others v. Sajid Ullah and others 2005 SCMR 1054 and Muhammad Imran @ Asif v. The State 2013 SCMR 782 rel.

Taqdeer Samsuddin Sheikh v. State of Gujarat 2012 SCMR 1879 and Haji v. State 2010 SCMR 650 ref.

Fakhar Hayat Awan for Appellant.

Mirza Muhammad Usman, A.P.G. for the State.

Raja Mehfooz Ali Satti for the Complainant.
Date of hearing: 19th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single judgment is intended to decide the above captioned Murder reference and the Criminal Appeal as the both are outcome of single judgment dated 28.7.2010, passed by the learned Additional Sessions Judge, Rawalpindi.

2. Through the above mentioned judgment, in a criminal case registered through FIR No. 361 dated 16.5.2008 under Sections 302/34 of P.P.C., at Police Station Civil Lines, Rawalpindi, towards commission of Qatl-i-Amd of Ibrar Hussain, the appellant has been convicted and sentenced to death, with compensation of Rs.2,00,000/- payable to the legal heirs of the deceased, failing which to undergo 06 months S.I.

3. The facts are that Zahid Hussain, complainant (PW-5) had made a statement (Ex.PJ) before the Police, contending therein that he was serving in a printing press, situated at Rehmanabad, Murree Road, Rawalpindi; that on 16.5.2008, he alongwith his brother Ibrar Hussain (deceased) and sister-in-law (Bhabi) namely Mst. Gultaj Bibi came in the court of Mr. Abdul Noor Nasir, Additional Sessions Judge, Rawalpindi, to appear in a case; that after attending the court, when they were going back and reached near the chamber of Raja Shaukat Ali, Advocate, at about 10.00 AM, suddenly M/s Muhammad Waseem (appellant), Muhammad Shakeel and Muhammad Shabbir (co-accused since acquitted) attracted there; that Muhammad Shabbir and Muhammad Shakeel (co-accused since acquitted) raised a 'Lalkara' that a taste to abduct Mst. Gultaj will be taught, whereupon Muhammad Waseem (appellant) pulled a knife (Chhuri) from his dub and inflicted successive blows at Ibrar Hussain (deceased), which hit at his chest, abdomen and back; that Ibrar Hussain while becoming injured, fell down and the above named accused fled away; that Ibrar Hussain (deceased) was being shifted by the complainant and his sister-in-law (Bhabi) to the hospital, but he succumbed to the injuries. The motive narrated by the complainant was that against Ibrar Hussain (deceased) and Mst. Gultaj Bibi, a case of abduction was got lodged by Muhammad Shabbir etc. and that due to the said grudge, Muhammad Waseem etc. with common intention had murdered Ibrar Hussain. On the basis of the above said complaint, the FIR (Ex.PE) was chalked out. The case was investigated and finally the challan was submitted, which for trial reached in the court of learned Additional Sessions Judge, Rawalpindi.

4. Muhammad Waseem (appellant) and his above named co-accused (since acquitted) were formally charge sheeted. They pleaded not guilty and claimed the trial, hence the following prosecution witnesses were summoned and recorded:--

PW-1 Muhammad Kashif Constable had got conducted the postmortem examination of the dead body of Ibrar Hussain (deceased). He had also produced the last worn clothes of the deceased (P-1, P-2 & P-3/1-2 before the Investigating Officer and attested the recovery memo (Ex.PA), through which the said articles were taken into possession.

PW-2 Aamir Riaz had attested the memo (Ex.PB), through which the parcel containing the blood stained earth, collected from the spot was taken into possession by the I.0.

PW-3 Muhammad Dawood had identified the dead body of Ibrar Hussain at the time of its postmortem examination.

PW-4 Bashir Ahmad Awan, Draftsman had drafted the scaled site plans (Ex.PD and Ex.PD/1) of the spot and produced before the I.0.

PW-5 Zahid Hussain was the complainant as well as eye witness of the alleged occurrence, who during his statement had deposed in the same manner as stated in his "Fard Bian"/complaint (Ex.PJ). He had also attested the memo (Ex.PF), through which blood stained knife (Chhuri) got recovered by Muhammad Waseem (appellant) was taken into possession by the I.O.

PW-6 Aamir Shahzad had attested the memo (Ex.PF), through which the knife (Chhuri) recovered at the instance of Muhammad Waseem (appellant) was taken into possession by the 1.0.

PW-7 Muhammad Saeed, SI had chalked out the formal FIR (Ex.PE), correctly without any addition/omission.

PW-8 Dr. Abbas Malik had conducted the postmortem examination of the dead body of Ibrar Hussain at District Headquarter Hospital, Rawalpindi and prepared the report (Ex.PG). During the said examination, as many as 13, incised wounds at different parts of the body of the deceased were noted. As per the doctor, the injuries Nos. 1, 2, 4, 5, 8 & 9, which were caused by sharp edged weapon and ante-mortem in nature were the cause of death.

PW-9 Muhammad Kausar SI had investigated the case and carried on the proceedings and prepared the documents fully described in his statement.

5. During the trial, Mst. Gultaj Bibi and Muhammad Azam PWs as were given up being unnecessary and while tendering the reports Ex.PL and Ex.PM, the case for the prosecution was closed.

6. After the above mentioned proceedings, the appellant as well as his above named co-accused (since acquitted) were examined as required under Section 342 of Cr.PC. The questions emerging from prosecution evidence were put to the appellant and he denied almost all such questions. In reply to question "Why this case against you and why the PWs have deposed against you?", the appellant had made the following statement:--

> "I am innocent and we are falsely implicated in this case. Complainant Zahid Hussain has failed to prove his presence in the Court premises on the fateful day, with cogent and plausible evidence. Admittedly the complainant was called to become the complainant of this case by the I.O. from Kotli Sattian. The presence of complainant at the place of occurrence is belied by the prosecution evidence. Complainant admitted during his cross-examination that he volunteered himself to become complainant of this case only for the reason that the deceased was his real brother. Complainant Zahid Hussain otherwise admitted during the cross-examination that it was only Ibrar Hussain and Gultaj, who has visited the Court on the fateful day. The conduct of Zahid Hussain complainant and manner of the occurrence as narrated by prosecution witnesses prima facie suggest that it was an unseen occurrence and out of grudge and animosity, complainant has falsely nominated me, my father and my uncle as accused in this case. Complainant Zahid Hussain also admitted that he was aggrieved by the registration of FIR No. 555 registered against Ibrar Hussain his real brother by my father. According to the story of the FIR Mst. Gultaj could be the most natural witness in this case who was malafidely given up as unnecessary by the prosecution and so withheld the best evidence, as she was not ready to support the false prosecution story. The complainant was inimical towards me, my father and my uncle and falsely deposed against us due to enmity."

7. The appellant had opted to lead evidence in his defence, but refused to make statement under Section 340(2) of Cr.P.C.

8. Muhammad Zebaish and Umar Khattab, while appearing in defence of the appellant had made statements as DW-1 and DW-2 respectively.

9. After completing the above mentioned proceedings, the learned Trial Court had passed the impugned judgment, whereby acquitted Shakeel Ahmad and Muhammad Shabbir, co-accused and convicted the appellant in the above mentioned terms. Consequently the murder reference and criminal appeal in hand.

10. The learned counsel for the appellant has argued that the complainant was not present at the spot, but called afterwards and made a false witness; that the conduct of the complainant being unnatural had also confirmed his unavailability at the spot; that the alleged motive was relating to the year 2002 and till 2008, no untoward incident between the parties had taken place, hence the alleged motive could not be termed to be the cause of the occurrence; that the medical evidence has contradicted the ocular story; that the statement of the only eye witness namely Zahid Hussain (PW-5) being not supported and corroborated from any independent source could not be believed; that the alleged recovery of knife (Chhuri) from a place which was accessible to everyone is unbelievable and that the prosecution case and the charge against the appellant was not proved and as such the learned Trial Court had erred in convicting and sentencing the appellant in the above mentioned terms, who is entitled for acquittal.

11. The learned Assistant Prosecutor General assisted by Raja Mehfooz Ali Satti, Advocate for the complainant, while supporting the impugned judgment to be justified and demand of the situation has vehemently opposed the appeal.

12. Arguments of all the sides have been heard and the record has been perused.

13. In the complaint (Ex.PJ), the FIR (Ex.PE), as well as the statement as PW-5, Zahid Hussain, complainant had narrated the motive, which resulted into commission of the occurrence, a criminal case of abduction got lodged by Muhammad Shabbir etc. against Ibrar Hussain (deceased) and Mst. Gultaj Bibi and that due to the said grudge, the murder of the deceased was committed. During the evidence, not only the complainant (PW-5) had affirmed the motive narrated by him in the complaint (Ex.PJ), but the defence had also got explained the same to the effect that Mst. Gultaj Bibi after getting divorce from Muhammad Shabbir Khan (co-accused since acquitted) had contracted marriage with Ibrar Hussain (deceased), whereupon the criminal case FIR No. 555 dated 19.9.2002 was registered under Section 16 of the offence of Zina (Enforcement of Hadood) Ordinance, 1979, against the deceased and the above named lady, at the complaint of Muhammad Shabbir

(co-accused since acquitted). It has also been brought on the record that the said case was pending in the court of the above named learned Additional Sessions Judge, Rawalpindi and on the date of the occurrence, the said case was fixed for hearing.

14. The learned counsel for the appellant, while declaring the above mentioned motive to be very remote, has contended that it could not be a cause of the alleged occurrence. The said objection has already been answered by the learned Trial Court with the following reasoning:-

> "The learned counsel for the accused argued that it was only a remote motive and could not be believed as a reason for happening of the instant occurrence. In my view, some weight may be given to this argument but only to the extent of accused Shakeel Ahmad and Muhammad Shabbir. It is pertinent to mention here that Shakeel Ahmad accused is the step-brother of Muhammad Shabbir accused. But to my view, it was a very strong motive for the accused Waseem for committing the Qatl-i-Amd of deceased Ibrar Hussain who had solemnized marriage with his mother after her abduction and thus deprived the accused Waseem from the love and affection of his mother. Because when her mother left his father and her children, the accused Waseem was aged only 13 years at that time. Years passed and when he grew up and moved among the society and felt the disgrace which the abduction of her mother by the deceased had brought to the family, he would have developed a strong grudge in his heart to take revenge of the disgrace. He would certainly have been inflamed by listening of taunting of the society. The registration of a criminal case regarding the said abduction and its pendency in the court at the time of occurrence is admitted. Therefore, it was a strong motive and the prosecution has successfully proved it."

15. The learned counsel for the appellant has failed to contradict the above mentioned findings made by the learned Trial Court regarding the motive. Therefore, it can safely be said that Muhammad Waseem (appellant) had a strong motive against the deceased for commission of the occurrence.

16. Although only Zahid Hussain complainant (PW-5) had narrated the occurrence. It has been observed that he had satisfactorily and confidently brought on the record each and every aspect of the case, not only during his examination-in-chief, but also the cross-examination. The defence despite lengthy cross- examination had badly failed to shake the testimony of the

above named sole witness, create any dint, or defect in the prosecution story or bring on the record any material favourable to the appellant.

17. In the light of the above type of evidence, of the above named sole witness, if any other corroboration has not come on the record, it has made no difference.

18. Conviction can be based on evidence of a solitary eye witness, if it is found truthful and natural and not interested in deceased or on any inimical terms with accused. In this regard, reliance may be placed upon the cases reported as Muhammad Ashraf v. State (1971 SCMR 530), Allah Bukhsh v. Shammi and others (PLD 1980 SC 225), Mali v. State (1969 SCMR 76), Farooq Khan v. State (2008 SCMR 917). Not only in Pakistan, in the light of the above mentioned judgments, the superior court of the country are of the above mentioned view, but even in India, the courts have the similar view that even a single statement of an eye witness is sufficient to convict an accused. In this regard a judgment reported as Taqdeer Samsuddin Sheikh v. State of Gujarat (2012 SCMR 1879) can be referred.

19. The above named PW-5 not only during examination-in-chief has established his presence at the spot, but during cross-examination made by the defence, the availability of the above named witness at the spot has also been confirmed.

20. There is no force in the arguments of the learned counsel for the appellant that the medical evidence has contradicted the ocular story because no such contradiction has either been pointed out or observed.

21. It is a fact that the complainant is real brother of the deceased, but it should not be ignored that as stated above, he has established his presence at the spot and witnessing of the occurrence, therefore his mere relationship with the deceased is not sufficient to discard his testimony, which otherwise is confidence inspiring. In this regard, reference can be made to the case reported as Haji v. State (2010 SCMR 650).

22. As about the contention of the learned counsel for the appellant that the best and natural evidence with the prosecution was Mst. Gultaj Bibi, who although was cited as a witness, but given up, hence the presumption would go against the prosecution. In this regard, it is stated that the above named lady was the real mother of Muhammad Waseem (appellant) and she after getting divorce from Muhammad Shabbir, the father of the appellant had contracted marriage with Ibrar Hussain (deceased). When the second husband of the lady was also murdered, then surely she was left alone, hence not inclined to give evidence against her real son and as such the prosecution had

given her up. Therefore, the above said contention could not be given any weight.

23. On one hand, the availability of the appellant and full participation in the alleged occurrence was established on the record, whereas on the other hand, the above named DW-1 and DW-2 had tried to create benefit for the appellant, through their above mentioned statements, which had rightly been rejected by the learned Trial Court.

24. During the arguments and also on perusal of the record, it has been found that at the time of commission of the occurrence, the appellant was 19 years of age. The above mentioned reasons, which had caused the appellant to commit the murder of the deceased, coupled with his age, in our view, are sufficient to consider for premium to him, towards quantum of sentence. Reliance in this regard may be placed upon the cases reported as Ziaullah v. The State (1993 SCMR 155), Ghulam Sarwar and others v. Sajid Ullah and others (2005 SCMR 1054) and Muhammad Imran @ Asif v. The State (2013 SCMR 782).

25. Resultantly, the conviction awarded to Muhammad Waseem (appellant) by the learned Trial Court, through the impugned judgment is maintained, but his sentence is altered from death to the imprisonment for life. The compensation awarded to the appellant by the learned Trial Court and the sentence in its default is maintained. The appellant shall be entitled for the benefit of Section 382-B of Cr.P.C.

26. Consequently, with the above mentioned modification in the sentence of the appellant, the Criminal Appeal No. 641/2010 is dismissed. The murder reference No. 77/2010 is answered in negative and death sentence of Muhammad Waseem Khan (appellant) is not confirmed.

HBT/M-243/L Sentence reduced.

2016 M L D 789
[Lahore]
Before Muhammad Tariq Abbasi, J
MUHAMMAD AQIB---Petitioner
Versus
The STATE and others---Respondents

Criminal Revision No.321 of 2014, heard on 15th October, 2014.

Penal Code (XLV of 1860)---

----Ss. 302 & 34---Juvenile Justice System Ordinance (XXII of 2000), S.7---Qatl-i-amd, common intention---Age of accused, determination of---Accused filed application before Trial Court, contending that he being a juvenile, his case should be proceeded under Juvenile Justice System Ordinance, 2000---Accused tendered birth certificate and his school leaving certificate---Accused was also examined by the District Medical Board, and his age was opined as 15 to 17 years---Trial Court for further satisfaction, directed examination of accused through the Provincial Standing Medical Board---Said order of the Trial Court had been impugned contending that when towards his age, sufficient material, in shape of documentary evidence was available before the Trial Court, there was no need to direct examination through the Provincial Standing Medical Board---Validity---When accused, during the trial, claimed himself to be minor, proceedings as required under the Juvenile Justice System Ordinance, 2000, should carry on---Court, however, for its satisfaction, could conduct any permissible proceedings, which were necessary to reach at just and fair conclusion---No limit of such proceeding could be prescribed or determined---Birth Certificate and school leaving certificate, as well as report of the District Medical Board, though were available before the Trial Court but when court considered the said documents to be insufficient for reaching at just and fair conclusion, court directed examination of accused, through the Provincial Standing Board---When for medico-legal work, said Board had been established and constituted as third tier, its utilization for the purpose of determination of age, could not be termed objectionable, or strange---Order accordingly.

Sultan Ahmed v. Additional Sessions Judge-I Mianwali and 2 others PLD 2004 SC 758 and Niaz Muhammad v. Umar Ali and another 2009 PCr.LJ 91 rel.

Qazi Sadaruddin Alvi for Petitioners.

Malik Muhammad Jaffar, Deputy Prosecutor General for the State.

Date of hearing: 15th October, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this revision petition, the order dated 09.9.2014, passed by the learned Sessions Judge, Dera Ghazi Khan has been called in question, whereby during inquiry under section 7 of the Juvenile Justice System Ordinance, 2000, to determine age of Muhammad Aqib petitioner, his examination through the Provincial Standing Medical Board has been directed.

2. The precise facts, leading to filing of the instant revision petition are that the petitioner alongwith his co-accused (Abdul Rehman) is facing trial in case FIR No. 58 dated 25.2.2014 registered under sections 302/34, P.P.C. at Police Station Saddar Dera Ghazi Khan. He filed an application before the learned trial court, contending therein that he was a juvenile, hence his case was proceedable, under the Juvenile Justice System Ordinance, 2000. The learned Sessions Judge, Dera Ghazi Khan/trial court, carried on the inquiry proceedings as required under Section 7 of the Ordinance (ibid); school leaving certificate and birth certificate of the petitioner was tendered in the learned trial court; the medical examination of the petitioner, was also directed; he was examined by the District Medical Board and his age was opined as 15 to 17 years. The learned trial court, for further satisfaction, directed examination of the petitioner, through the Provincial Standing Medical Board. The said order has aggrieved the petitioner, hence he through the instant criminal revision has approached this court.

3. The learned counsel for the petitioner has argued that when towards age of the petitioner, sufficient material, in shape of documentary evidence was available before the learned trial court, there was no need to direct examination of the petitioner, through the Provincial Standing Medical Board, hence the impugned order dated 09.9.2014 was not acceptable under the law and as such liable to be set-aside.

4. The arguments have been heard and the record has been perused.

5. It is a well settled principle of law that when during a trial, an accused claims himself to be minor, then the proceedings as required under the Juvenile Justice System Ordinance, 2000 should be carried on. In the said proceedings, first step is determination of age of the accused, as provided under section 7 of the Ordinance (ibid). For convenience the said section is reproduced herein below:--

> "Determination of Age.---If a question arises as to whether a person before it is a child for the purpose of this Ordinance, the Juvenile Court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child."

Under the above mentioned provision, for determination of age of an accused, who claims himself to be a minor an inquiry by the court has been provided, which should include a medical report.

6. The court, for its satisfaction may conduct and carry on any permissible proceeding, which according to it is necessary to reach at just and fair conclusion. No limit of such proceeding could be prescribed or determined. For the said proceeding/inquiry, the court may go to any extent. In this regard reliance may be made to the cases reported as "Sultan Ahmed v. Additional Sessions Judge-I Mianwali and 2 others (PLD 2004 Supreme Court 758) and Niaz Muhammad v. Umar Ali and another (2009 PCr.LJ 91)." The relevant portion of the judgment of the Hon'ble Supreme Court, referred above, is reproduced herein under:--

> "The word "INQUIRY" is defined by clause (k) of sub-section (1) of section 4 of the Cr.P.C. but the said definition is not exhaustive. Various kinds of inquiries are envisaged by the Code of Criminal Procedure e.g. the one ordained by section 117 thereof. We know it by now from the judicial precedents that the purpose of holding an inquiry, amongst others, is to determine the existence or non-existence of a fact or the falsity or correctness thereof and further that an inquiry is a judicial proceeding in which evidence could be legally taken. Therefore, whenever a Court is confronted with the question of the age of an accused person, it is incumbent upon it to hold an inquiry and the learned Presiding Officers should always feel free to requisition the original record; to summon and examine the authors

and the custodians of such record and documents to determine the genuineness of the same; to summon person, if need be, who on account of some special knowledge, could depose about the age of the concerned accused person and to take such other and further steps which could help the Court in reaching a just conclusion about the said matter."

7. In the case in hand, although birth Certificate and school leaving certificate, as well as report of the District Medical Board is available before the learned trial court but when it has considered the said documents to be insufficient for reaching at just and fair conclusion, has directed, examination of the petitioner, through the Provincial Standing Medical Board. When for medico-legal work, the said board has been established and constituted as third tier, then its utilization, for the purpose of determination of age could not be termed objectionable or strange as alleged by the learned counsel for the petitioner.

8. For what has been discussed above, the revision petition in hand, being devoid of any force and merit, is dismissed.

HBT/M-362/L Petition dismissed.

2016 M L D 960

[Lahore]

Before Muhammad Tariq Abbasi and James Joseph, JJ

RAB NAWAZ---Petitioner

Versus

The STATE and 6 others---Respondents

Crl. Misc. No.771-M of 2014, heard on 12th February, 2015.

Criminal Procedure Code (V of 1898)---

----S. 417---Appeal against acquittal---Delay, condonation of---Appellant/applicant, seeking condonation of delay in filing delayed appeal, had contended that due to summer vacations, appeal was not entertained and that when the court opened, he immediately filed appeal---Validity---During the year 2014, High Court remained closed for summar vacations from 1-7-2014 to 6-9-2014; and opened on 8-9-2014---Appeal, which was to be filed on the very first day on opening of court i.e. 8-9-2014, was filed on 12-9-2014 after 4 days of opening of the court---Delay could not be condoned in appeal filed against acquittal, until and unless it was shown that appellant was precluded from filing appeal within time, due to some act of acquitted respondents, or by some other circumstances of a compelling nature, beyond control of appellant---No such contention had been either alleged or found in the record---Appellant was supposed to act vigilantly and file appeal within time, but he was indolent which resulted in lapse of prescribed time---Equity aids vigilant and not indolent---Each and every day should have been satisfactorily explained, but in the present case, said requirement was missing---No reason, cause or justification being available to condone the delay in filing appeal, application for condonation of delay, was dismissed, in circumstances.

Lahore Development Authority v. Muhammad Rashid 1997 SCMR 1224; Nazar v. The State 1968 SCMR 71; Jalal Khan v. Lakhmir 1968 SCMR 1345; Piran Ditta v. The State 1970 SCMR 282; Nur Muhammad v. The State 1972

SCMR 331 and Mian Abdul Rahim Sethi and others v. Federation of Pakistan through Minister of Defence and others 2000 SCMR 1197 ref.

Safdar Hussain Sarsana for Petitioner.

Hassan Mehmood Khan Tareen, Deputy Prosecutor General for the State.

Date of hearing: 12th February, 2015.

ORDER

MUHAMMAD TARIQ ABBASI, J.---By way of this application condonation of delay in filing of the Criminal Appeal has been sought.

2. The record shows that initially, the appeal against acquittal was preferred on 26.6.2014; the office raised certain objections and sought their removal within seven days and as such the petitioner took back the appeal; he again filed the appeal on 12.9.2014 i.e. after about two and a half months, hence became time barred.

3. The learned counsel for the petitioner has contended that due to summer vacation, the appeal was not entertained and when the court opened, he immediately filed it, hence the delay is liable to be condoned.

4. Arguments heard and record perused.

5. We are afraid, the reasons given by the learned counsel for the petitioner can be accepted because as per notification, during the year 2014, the High Court remained closed for summer vacation from 1.7.2014 to 6.9.2014 and as such the courts opened on 8.9.2014. If the above mentioned stance of learned counsel for the petitioner is taken as correct, even then, it was for the petitioner to file the appeal on the first day on opening of the courts i.e. 8.9.2014, but came on 12.9.2014.

6. Time required for removal of objection is to be adhered to and failure to refile the appeal as directed by the office would become time barred. It is, therefore, clear that if the appellant/petitioner fails to refile the memorandum of appeal, within the time specified by the office, the extra time taken for removal of the objection would not be excluded while computing the period

of limitation. Reliance in this regard may be made to the case of "Lahore Development Authority v. Muhammad Rashid" (1997 SCMR 1224).

7. It has been the consistent view of the Superior Courts that in appeal filed against acquittal, delay cannot be condoned until and unless it is shown that the appellant/petitioner was precluded from filing appeal within time, due to some acts of the acquitted respondents or by some other circumstances of a compelling nature, beyond control of the petitioner/appellant. No such contention has been either alleged or found in the record. It was quite easier for the petitioner/appellant to act vigilantly and file appeal within time, but he preferred to behave indolently, which resulted in-lapse of prescribed time. It is well-recognized principle of law that equity aids vigilant and not indolent. Therefore, the petitioner/appellant could not get any benefit of his indolence. We are fortified in our view from the dictum laid down in the cases of Nazar v. The State (1968 SCMR 71), Jalal Khan v. Lakhmir (1968 SCMR 1345), Piran Ditta v. The State (1970 SCMR 282) and Nur Muhammad v. The State (1972 SCMR 331). Relevant portion of the case of Nur Muhammad (Supra) reads as under:-

> "It has been held by this court repeatedly that in petitions against acquittal delay cannot be condoned unless it is shown that the petitioner was precluded from filing this petition in time due to some act of the acquitted respondent. See Muhammad Khan v. Sultan and others (1969 SCMR 82). No such act on the part of the acquitted respondent is alleged in the application for condonation of delay filed by the petitioner. The petition is, therefore, dismissed as barred by time."

8. Furthermore, as per law laid down by the august Supreme Court of Pakistan in the case of "Mian Abdul Rahim Sethi and others v. Federation of Pakistan through Minister of Defence and others" (2000 SCMR 1197), in time barred cases, each and every day should have been satisfactorily explained, but in the instant case, the said requirement is missing.

9. For what has been discussed above, as there is no reason, cause or justification to condone the delay in filing appeal, hence the petition in hand being devoid of any force and merit is dismissed.

HBT/R-13/L Application dismissed.

2016 P Cr. L J 200

[Lahore]

Before Muhammad Tariq Abbasi and Sardar Ahmed Naeem, JJ

ZULFIQAR alias ZULLI---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 44 of 2012 and Murder Reference No. 271 of 2011, heard on 17th September, 2015.

Penal Code (XLV of 1860)---

----Ss. 302(b) & 324---Qatl-i-amd, attempt to commit qatl-i-amd---Appreciation of evidence---Sentence, reduction in---Statements of the complainant and injured prosecution witness regarding involvement of accused for commission of murder of the deceased and injury to the prosecution witness, were consistent and confidence inspiring---Defence, had failed to contradict the stance of said witnesses, or bring on the record any other material favourable to accused---Presence of said witnesses at the spot had not been denied---No material contradiction in the statements of said witnesses had been pointed out---Some minor discrepancies in the statements of said witnesses, being casual in nature, could not be taken into account---No previous enmity or grudge of the witnesses with accused, having been established on the record, their inter se relationship, would not discard their testimony, which otherwise was trustworthy and confidence inspiring---Motive alleged in the complaint, remained un-established and un-proved---Variation in ocular account with regard to injury sustained by the deceased and medical evidence would not adversely affect the prosecution case, because the witnesses, were not supposed to give photographic picture of the injuries---No empty having been collected from the spot, alleged recovery of pistol at the instance of accused had not given much benefit to the prosecution, due to lack of comparison---Findings of the Trial Court, in the impugned judgment, resulting in conviction of accused for commission of offence under S.302(b), P.P.C., were quite justified---Conviction and sentence awarded to accused in the charge under S.324, P.P.C., being call of the day were maintained---Deceased, sustained only one fire shot injury at the hands of accused and motive remained unestablished---Said facts, were sufficient to give premium to accused in quantum of sentence---Accused was entitled to benefit of doubt as an extenuating circumstance, while deciding question of quantum his sentence as well---Conviction of accused awarded by the Trial Court under S.302(b), P.P.C., was maintained, but his sentence, was altered

from death to life imprisonment---Conviction and sentence of accused awarded under S.324, P.P.C., would remain intact---Accused would be entitled to the benefit of S.382-B, Cr.P.C.

Dilbar Masih v. The State 2006 SCMR 1801; Haji v. The State 2010 SCMR 650; Abdul Rauf v. The State and another 2003 SCMR 522; Ellahi Bukhsh v. Rab Nawaz and another 2002 SCMR 1842; Ghulam Ullah and another v. The State and another 1996 SCMR 1887; Hasil Khan v. The State and others 2012 SCMR 1936 and Abid Ali and 2 others v. The State and others 2014 SCMR 1034 ref.

Malik Rab Nawaz for Appellant.

Gohar Nawaz Sindhu for the Complainant.

Tariq Javed, District Public Prosecutor for the State.

Date of hearing: 17th September, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through the above titled appeal, Zulfiqar @ Zulli (hereinafter referred to as the appellant) has challenged his conviction and sentence, awarded to him through the judgment dated 6.6.2011, passed by the learned Sessions Judge, Chiniot, whereby in case FIR No. 790, dated 24.9.2009, registered under sections 302/324, P.P.C., at Police Station Saddar Chiniot, the appellant has been convicted and sentenced as under:-

> (i) Under section 302(b), P.P.C. - to death, with compensation of Rs.2,00,000/-, payable to legal heirs of the deceased, in default to undergo simple imprisonment for six months.
>
> (ii) Under section 324, P.P.C. - rigorous imprisonment for 10 years and fine of Rs.50,000/-, in default whereof to undergo simple imprisonment for one year.
>
> It was directed that the appellant shall be entitled to the benefit of section 382-B, Cr.P.C.

2. The State, through the above mentioned Murder Reference has sought confirmation of death sentence, awarded to the appellant. Therefore, this judgment shall decide the above captioned matters.

3. The facts, in short, which resulted into registration of FIR (Ex.PD), were that Ameer Ali (PW-8) had moved an application (Ex.PD/1) in the Police Station, contending therein that the appellant, with .30 bore pistol, made firing and caused an injury to Atif Ali (hereinafter referred to as the deceased) and also to Walait Ali (PW-9);-consequently Atif Ali succumbed to the injury in the way to hospital, whereas Walait Ali (PW-9) was admitted in the hospital. The motive, as alleged in the compliant, was a quarrel between the appellant and the deceased as well as Walait Ali (PW-9) over playing Snooker.

4. The appellant was challaned to the court. Formal charge against him was framed on 5.1.2010. He pleaded not guilty and claimed the trial. Hence, the prosecution evidence was summoned and recorded by the learned Trial Court. As many as 11 witnesses had made statements. The material witnesses and summary of their evidence were as under:-

(i) PW-2 Dr. Muhammad Arshad, had conducted postmortem examination of dead body of Atif Ali on 24.9.2009 and prepared the report (Ex.PA), when a fire shot entry wound on back side of head, whereas an exit wound on right eye brow of the deceased was noticed. Both the injuries were ante-mortem in nature, caused by firearm and result of death.

(ii) PW-6 Dr. Siraj-ud-Din, had medically examined Walait Ali, injured (PW-9), when a firearm wound on his neck was noticed.

(iii) PW-8 Ameer Ali, was the complainant as well as an eye-witness of the alleged occurrence, who deposed almost the same facts as were described by him in the complaint (Ex.PC/1).

(iv) PW-9 Walait Ali injured had supported the version of the above named complainant (PW-8) in all its four corners.

(v) PW-10 Jaffer Ali, SI had investigated the case, during which he carried on the proceedings and prepared the documents, fully detailed in his statement.

5. After completion of the prosecution evidence, the appellant was examined under section 342, Cr.P.C., during which the questions, arising out of prosecution evidence were put to him, but he denied almost all such questions, while pleading his innocence and false involvement in the case with mala fide. The question "Why this case against you and why the PWs deposed against you?" was replied by him in the following words:-

> "PWs are related inter se and are inimical towards me as the PWs were always voting in favour of Ex-MNA Zafar Abbas Syed, who was always in a position to snub me and my family, due to which this case was falsely registered against me."

At that time, he opted to lead evidence in his defence, but refused to make statement under section 340(2), Cr.P.C. Later on, through statement dated 3.5.2011, he also declined to lead any evidence in his defence. On completion of all the proceedings, the impugned judgment was passed in the above mentioned terms. Consequently, the matters in hand.

6. The learned counsel appearing on behalf of the appellant argued that appellant was innocent and falsely involved in the case, with mala fide; neither he was available at the spot nor participated in the alleged occurrence, in any manner whatsoever and as such his involvement was a substitution; the statement of the material witnesses being full of alarming contradictions were not believable, but erroneously not considered by the learned Trial Court; the medical evidence had not supported the ocular account, but ignored by the learned Trial Court; eye-witnesses being closely related inter se as well as with the deceased had made false statements; the prosecution case and the charge against the appellant was not established and proved, hence he was entitled to acquittal and as such the impugned judgment could not be termed justified.

7. Conversely, the learned District Public Prosecutor, assisted by the learned counsel for the complainant has vehemently opposed the appeal, with the contentions that the impugned judgment towards conviction and sentence of the appellant being result of correct appreciation and evaluation of the material available on the record, is call of the day, hence not interferable.

8. Arguments of all the sides have been heard and record has been perused.

9. Ameer Ali, complainant, when appeared in the witness box as PW-8, categorically deposed that when he along with Munir Ahmad and Muhammad Nawaz (given up PWs), to inquire about his son Atif Ali (deceased), reached near Government Boys Primary School, the deceased and Walait Ali (PW-9) were found there; in the meanwhile, the appellant while holding .30 bore pistol attracted there and fired at the deceased and the shot landed on his forehead above right eye brow, which passed through and through; another fire shot made by the appellant hit Walait Ali (PW-9) on right side of his neck; consequently, both fell down and when were being shifted to Allied Hospital, Faisalabad, Atif Ali succumbed to the injury, whereas Walait Ali (PW-9) was got admitted there. Walait Ali (PW-9) while supporting and corroborating the above said version of the complainant (PW-8), confidently stated that when he along with the deceased was available at the spot, the appellant while, armed with a pistol, arrived there and by firing, caused injuries to him and the deceased; the injury to the deceased proved fatal and consequently, he died.

10. The statements of the above named witnesses, regarding involvement of the appellant for commission of murder of Atif Ali and injury to Walait Ali (PW-9) are consistent, corroborative and confidence inspiring. The defence has failed to contradict their above mentioned stance or bring on the record any other material, favourable to the appellant. Even during cross-examination, presence of the above named witnesses at the spot has not been denied.

11. No material contradiction in the statements of the above named witnesses has either been pointed out by the learned defence counsel or observed during perusal of the record. Therefore, the stance of the learned defence counsel that the statements of the witnesses are full of material contradictions, is nothing but a bald assertion. Although some minor discrepancies in statements of the witnesses have been noticed, but the same being casual in nature and sign of natural deposition, should not be taken into account. In this regard, we are fortified by the law laid down in the case titled "Dilbar Masih v. The State" reported as (2006 SCMR 1801), the relevant portion of which reads as under:-

> "We find that the ocular account would also be supported by the medical evidence to the extent of sustaining the fire-arm injury by the deceased at the hand of petitioner and in these circumstances, the minor discrepancies and contradictions pointed out by the learned

counsel for the petitioner would not be material either to effect the credibility of the evidence of eye-witness or create any doubt or dent in the prosecution case."

12. Ameer Ali, complainant (PW-8) is real father of the deceased, whereas no direct relationship of Walait Ali (PW-9) with the complainant could be brought on the record. Even otherwise, as no previous enmity or grudge of the witnesses, with the appellant could be established on the record, therefore, their inter se relationship, if any, would not discard their testimony, which otherwise is trustworthy and confidence inspiring. In this respect, reference may be made to the case titled "Haji v. The State" reported as 2010 SCMR 650, wherein the Hon'ble Supreme Court of Pakistan has held as under:-

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

13. In the complaint (Ex.PD/1), Ameer Ali (PW-8) had narrated the alleged motive as a quarrel between the appellant, deceased and Walait Ali (PW-9) for playing Snooker, but when the above named complainant and the injured witness appeared in the witness box, failed to state any kind of motive, hence the motive alleged in the complaint remained un-established and un-proved.

14. It has been observed that the above named PWs stated that the deceased had sustained a fire shot injury on his forehead, near right eye brow but during the postmortem examination, it revealed that in fact, the said injury was an exit wound, whereas the entry wound was back side of the head. The said variation in ocular account and medical evidence would not adversely affect the prosecution case, because the witnesses were not supposed to give photographic picture of the injuries. Our said view has gained support from the dictum laid down by the august Supreme Court of Pakistan in the cases titled "Abdul Rauf v. The State and another" (2003 SCMR 522); "Ellahi

Bukhsh v. Rab Nawaz and another" (2002 SCMR 1842) and "Ghulam Ullah and another v. The State and another" (1996 SCMR 1887). The relevant para of the case of "Abdul Rauf (Supra)" reads as under:-

> "We may observe that the minor discrepancies in the medical evidence relating to the set of injuries would also not negate the direct evidence as the witnesses are not supposed to give photo picture of each detail of injuries in such situation, therefore, the conflict of nature of ocular account with medical as pointed out being not material would have no adverse affect on the prosecution case."

15. Recovery of a pistol at the instance of the appellant has been alleged, but admittedly from the spot, no empty was collected, hence no comparison was made. Therefore, the said recovery has not given much benefit to the prosecution.

16. For what has been discussed above, we are of the considered view that the findings of the learned Trial Court, recorded in the impugned judgment, resulting into conviction of the appellant for commission of offence under section 302(b), P.P.C. are quite justified. Similarly, the conviction and sentence awarded to the appellant in charge under section 324, P.P.C. being call of the day, is not interferable, hence maintained. As about quantum of sentence, awarded to the appellant under section 302(b), P.P.C., it is stated that the motive alleged by the prosecution, in the complaint could not be proved and established. Furthermore, the deceased sustained only one fire shot injury at the hands of the appellant. The said facts, in our view, are sufficient to give premium to the appellant in quantum of sentence. It is well-recognized principle, by now that an accused is entitled for benefit of doubt as an extenuating circumstance, while deciding question of quantum of his sentence as well. In this regard, reference may be made to the cases titled "Hasil Khan v. The State and others" (2012 SCMR 1936) and "Abid Ali and 2 others v. The State and others (2014 SCMR 1034), wherein the august Supreme Court of Pakistan has held that if motive is alleged and not proved, it would be a mitigating circumstance to award lesser punishment to an accused. The relevant portion of the judgment is reproduced herein below:-

> "..... Moreover, as rightly observed by the leaned Trial Court the immediate motive remained shrouded in mystery and the Trial Court rightly did not award the maximum sentence of death provided under section 302(b), P.P.C. to the appellant. The enhancement of sentence

by the learned High Court, we observe with respect, is not in accord with the law laid down by this court in Muhammad Ashraf Khan Tareen v. The State (1996 SCMR 1747) wherein at page 1755, the Court dismissed complainant's appeal and did not enhance the sentence by holding as follows:-

"In respect of sentence, learned counsel for the complainant/State wanted conversion of the life imprisonment into death sentence. Learned counsel cited case of Iftikhar Ahmad v. The State (PLD 1990 Supreme Court 820) where criminal petition by the complainant challenging reduction of sentence by the High Court, was dismissed by this Court on the ground that the principle of origin of offence remained shrouded in mystery. This authority does not further prayer of the complainant for awarding death penalty to the appellant. In the present case prosecution did not allege any specific motive for commission of the offence. In the circumstances, the appellant could not have been awarded the death penalty."

17. Resultantly, the conviction of the appellant awarded by the learned Trial Court under section 302(b), P.P.C. is maintained, but his sentence is altered from death to life imprisonment. The amount of compensation and imprisonment in its default, prescribed by the learned Trial Court is upheld. As stated above, the conviction and sentence of the appellant awarded under section 324, P.P.C., through the above mentioned judgment shall remain intact. The appellant shall be entitled to the benefit of section 382-B, Cr.P.C. It is also directed that both the above mentioned sentences shall run concurrently. The disposal of the case property shall be as directed by the learned Trial Court, in the impugned judgment.

18. With the above mentioned modification, the Criminal Appeal No. 44/2011 is dismissed, whereas Murder Reference No.271/2011 is answered in Negative and death sentence of Zulfiqar @ Zulli appellant is not confirmed.

HBT/Z-17/L Sentence reduced.

2016 P Cr. L J 953

[Lahore]

Before Muhammad Tariq Abbasi and Aslam Javed Minhas, JJ

ANTI-NARCOTICS FORCE through Assistant Director, ANF, Multan----Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 354 of 2007, heard on 24th June, 2015.

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

----Ss. 9(b) & 47---Probation of Offenders Ordinance (XLV of 1960), Ss.3 & 5---Criminal Procedure Code (V of 1898), S.562---Possessing and trafficking narcotics---Sending accused on probation---Appreciation of evidence---Heroin weighing 450 grams was recovered from female accused, whereas 300 grams from male accused who was juvenile---Accused persons, who made confession, and both admitted that narcotic in question, was recovered from them---Accused persons, requested for pardon, with an undertaking that in future they would never indulge in such like activity---On the basis of said confessional statements Trial Court convicted accused persons under S.9(b) of the Control of Narcotic Substances Act, 1997, and sentenced them to R.I. for two years and nine months, each with fine of Rs.20,000 each, with benefit of S.382-B, Cr.P.C.---Accused persons were dealt with under S.5 of Probation of Offenders Ordinance, 1960, and given under the supervision of the Probation Officer for a period of three years; with the reasoning that female was of young age and household lady, whereas male accused was a juvenile being less than 18 years, and also sole earning member of his family---Said order of sending accused persons on probation was objected to by Special Prosecutor for ANF, contending that court constituted under Control of Narcotic Substances Act, 1997, was not at all competent to send accused persons on probation---Under S.3 of Probation of Offenders Ordinance, 1960, High Court, a court of Session, a Magistrate 1st Class, and any other Magistrate, especially empowered in that behalf, could exercise powers under said Ordinance, whether the case came before it for original hearing, or in appeal or in revision---Provisions of Code of Criminal Procedure, 1898, would be applicable during trial and appeal, unless not expressly excluded---Criminal Procedure Code, 1898 being applicable to narcotic cases, S. 562, Cr.P.C., could not be brushed aside---Court in narcotic case, if deemed it proper, could

send accused on probation---Objection being misconceived was rejected; and appeal having no force, was dismissed.

Ms. Humaira Naheed Khand, Advocate/Special Prosecutor for ANF.
Date of hearing: 24th June, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this appeal, a portion of order dated 28.8.2007, passed by the learned Additional Sessions Judge, Multan has been called in question, whereby respondents Nos. 2 and 3, namely, Mst. Rani and Muhammad Ashiq alias Kali (hereinafter referred to as the respondents) have been sent on probation, for a period of three years and given under the supervision of Probation Officer, Multan, appointed under the Probation of Offenders Ordinance, 1960 (hereinafter referred to as the Ordinance).

2. The facts are that the respondents were challaned in case FIR No. 17, dated 22.11.2005, registered under section 9(b) of the Control of Narcotic Substances Act, 1997 (hereinafter referred to as the Act), at police Station, ANF, Multan, with the allegations that Heroin weighing 450-Grams was recovered from Mst. Rani respondent, whereas 300-Grams from Muhammad Ashiq alias Kali, respondent. During pendency of the trial, on 2 & 8.8.2007, the respondents opted to make confessional statements, hence recorded by the learned trial court, whereby both admitted that the above mentioned quantities of narcotic were, respectively recovered from their possession. However, they requested for pardon with an undertaking that in future they would never indulge in such like activity. On the basis of above said confessional statements, the learned trial court passed the order dated 28.8.2007, whereby convicted the respondents under section 9(b) of the Act and sentenced them to RI for two years and nine months, each, with fine of Rs.20,000/- each, in default to further undergo SI for three months each. Benefit of section 382-B, Cr.P.C. was also extended to them. Instead of sending them to prisons, they were dealt with under section 5 of the Ordinance and given under the supervision of the Probation Officer, for a period of three years, with the reasoning that Mst. Rani respondent was of young age and household lady, whereas Muhammad Ashiq alias Kali respondent was a juvenile being less then eighteen years old and also sole earning member of his family.

3. The learned Special Prosecutor for ANF has objected the impugned order to the extent of sending the respondents on probation, with the contention that a court constituted under the Act was not at-all competent to send the respondents on probation.

4. Arguments heard. Record perused.

5. The only point before us is, whether in narcotic cases registered under the Act, a convict can be dealt with under the Ordinance and sent on probation or otherwise.

6. Under section 3 of the Ordinance, a High Court, a Court of Session, a Magistrate of Ist Class and any other Magistrate especially empowered in this behalf, may exercise powers under the Ordinance, whether the case comes before it for original hearing or in appeal or in revision.

7. Section 47 of the Act has made the provisions of the Code of Criminal Procedure 1898 (herein after referred to as the Code), applicable, in a trial or appeal before a Special Court in the following terms:-

> **"47, Application of the Code of Criminal Procedure, 1898.---** Except as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), hereinafter referred to as the Code (including provisions relating to confirmation of a death sentence) shall apply, to trials and appeals before a Special Court under this Act."

From the above mentioned provision, it is clear that until and unless not expressly excluded, provisions of the Code would be applicable during trial and appeals, in the narcotic cases.

8. When the Code is applicable in narcotic cases then section 562 of the Code could not be brushed-aside, which speaks as under:-

> "562. Powers of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment. When any person not under twenty one years of age is convicted of an offence punishable with imprisonment for not more than seven year or when any person under twenty one years of age or any woman is

convicted of an offence not punishable with death or [imprisonment] for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender and to the circumstances in which the offence was committed that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be good behaviour.

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the provincial Government in this behalf and the Magistrate is of opinion that the powers conferred by this section should be exercised he shall record his opinion to that effect, and submit the proceedings to Magistrate of the first class [x x x] forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380."

9. In this way, it can safely be held that even in narcotic cases, where the court would deem it proper, for betterment of an offender, instead of sending him to imprisonment can send him on probation.

10. Resultantly, the above mentioned objection being misconceived is rejected and consequently the appeal having no force or merit is dismissed.

HBT/A-105/L Appeal dismissed.

2016 P.Cr.R. 501

Present: **MUHAMMAD TARIQ ABBASI and QAZI MUHAMMAD AMIN AHMED, JJ.**

Muhammad Nawaz

Versus

The State, etc.

Criminal Appeal No. 8 of 2009 and Capital Sentence Reference No. 14 of 2009, decided on 25th November, 2014.

CONCLUSION

(1) An accused is entitled to benefit of doubt as an extenuating circumstance while dealing his quantum of sentence as well.

MURDER --- (Quantum of sentence)

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

---Ss. 25, 7 r/w Ss. 302/324/186/353/34, , P.P.C.---Charge---Quantum of sentence---Benefit of doubt---No specific injury to deceased and injured PW was attributed to appellant-convict---Impugned death sentence was altered to imprisonment for life---Sentence reduced.

(Para 9)

Ref. 2009 SCMR 1188.

مقتول یا مضروب گواہاں استغاثہ پر کوئی مخصوص ضرب اپیلانٹ سے منسوب نہ تھی۔ سزائے موت کو عمر قید میں تبدیل کر دیا گیا۔

[No specific injury to deceased or injured PW was attributed to appellant. Impugned death sentence was altered to life imprisonment].

For the Appellant: Prince Rehan Iftikhar Sheikh and Arsalan Masood Sheikh, Advocates.

For the State: Malik Muhammad Jaffer, Deputy Prosecutor General.

Date of hearing: 25th November, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J. --- By way of this judgment, the above-captioned Criminal Appeal and the Murder Reference shall be disposed of as both are result of single judgment dated 31.3.2009, passed by the learned Judge Anti-terrorism Court No. 1, Multan, whereby in case F.I.R. No. 395, dated 22.10.2000, registered under Sections 302, 324, 186, 353/34, P.P.C. and 7, ATA, 1997, Muhammad Nawaz (hereinafter referred to as the "appellant/convict") was convicted and sentenced in the following terms:---

(a) Under Section 302(b), P.P.C. to death and compensation of Rs. 50,000/-, payable to the legal heirs of Muhammad Yousaf, Constable, in default whereof to suffer six months' S.I.

(b) Under Section 302(b), P.P.C. read with Section 34, , P.P.C. to imprisonment for life for sharing common intention with his co-accused towards commission of murder of Muhammad Khan, SI.

(c) Under Section 7, ATA, 1997 to death and fine of Rs. 50,000/- in default to undergo SI for six months.

(d) Under Section 324/34, P.P.C. imprisonment for five years and fine of Rs. 5,000/-, in default whereof to further undergo three months' S.I.

(e) Under Section 186, P.P.C. to three months' imprisonment.

(f) Under Section 353, P.P.C. to one year's R.I.

It was directed that all the sentences shall run concurrently and benefit of Section 382-B, Cr.P.C. shall be available to the appellant/convict.

2. The facts are that Riaz Ahmad, SI/SHO (PW-19) had made the complaint (Ex.PK), with the contentions that during the night of 22.10.2000, he alongwith Khan Muhammad, SI (deceased), Muhammad Zafar, ASI, Muhammad Yousaf, Constable (deceased), Akhtar Ali, Najam-ul-Hassan, Asghar Ali and Tariq Mehmood, Constables was on patrolling in an official vehicle, which was being driven by Zahid Hussain, Constable (PW-9); they were available at Adda Siray Sidhu, when received an information that *M/s.* Nasir (co-accused since convicted), Abid (co-accused since dead), who were involved in case F.I.R. No. 392/2000, registered under Sections 324/452/34, P.P.C. at Police Station Siray Sidhu, at that time were available in the house of Nasir (co-accused since convicted); the complainant alongwith his companions, raided at the house of Nasir (co-accused since convicted), but it was found locked; the Police party returned back and when reached near the house of Mumtaz, in the headlights of the vehicle, Nasir (co-accused since convicted) and Abid (co-accused since dead), armed with 30 bore pistols, alongwith an unknown accused, who was also armed with 30 bore pistol, came in front of the vehicle and started firing at the Police party; Muhammad Khan, SI received fire shots and died at the spot, whereas Zahid Hussain, Driver (PW-9) and Muhammad Yousaf, Constable became seriously injured the accused while getting benefit of darkness succeeded in fleeing away. On the basis of the above-said complaint, the F.I.R. (Ex.PK/1) was chalked out. Later on, Muhammad Yousaf, Constable also succumbed to the injuries. Earlier, trial of Nasir was held and he was convicted. At that time, the appellant/convict was a proclaimed offender, who later on was arrested and challaned to the Court. The learned Trial Court carried on the due proceedings, charge-sheeted the appellant/convict on 27.01.2009, but he pleaded not guilty and claimed the trial. The prosecution had got examined as

many as 19 witnesses. Gist of the evidence led by the star witnesses was as under:---

(i) PW-1 Dr. Ghulam Murtaza had medically examined Muhammad Yousaf, Constable deceased (then injured) through the report (Ex.PA) and found the following injuries caused by fire-arm weapons:---

(1) A lacerated fire-arm wound 0.9 cm x 0.9 cm going deep on the back of right upper chest with inverted margins bleeding from the wound was positive. 10 cm from the right shoulder it is wound of entrance.

(2) A lacerated fire-arm wound 0.8 cm x 0.8 cm with averted margins bleeding from the wound was positive on the front of right chest just below the right clavicle. It was wound of exit.

(3) An abrasion 0.5 cm x 0.5 cm on the back of right chest 02 cm from injury No. 1.

This witness had also examined Zahid Hussain, Constable/injured (PW-9) vide the report (Ex.PB) and noticed the following fire-arm injuries:---

(1) A lacerated fire-arm wound 1.5 cm x 1 cm with inverted margin bleeding from the wound positive with swelling on the nose.

(2) A lacerated fire-arm wound 1 cm x 0.5 cm on left side of nose with averted margin bleeding from the wound positive swelling on the whole nose.

(ii) PW-2 Dr. Naeem Ahsan stated that he was the member of Medical Board which had conducted post-mortem examination of the dead-body of Muhammad Khan, SI and prepared the reports (Ex.PC and Ex.PC/1). At that time the following injuries on the dead-body were found:---

(1) Fire-arm entry wound 0.8 cm x 0.8 cm on the back of head 7.5 cm from the top of right ear.

(2) Fire-arm exit wound on the left side of head measuring 1 cm x 0.9 cm 2 cm from top of left ear pinna above and medially.

(3) 2.3 x 0.6 cm abrasion on the middle of forehead.

The injuries No. 1 & 2 were found anti-mortem in nature, caused by fire-arm and result of death, which was immediate.

The above-said Board also performed post-mortem examination of the dead-body of Muhammad Yousaf, head Constable through the reports (Ex.PD and Ex.PD/1) and noticed the following injuries, which had caused death:---

(1) A lacerated fire-arm wound 0.9 x 0.9 cm going deep on back of right upper chest with inverted margins. 10 cm from right shoulder (wound of entrance).

(2) A lacerated fire-arm wound 0.8 x 0.8 cm with averted margins. It is wound of exit on front of right chest just below the right clavicle.

(3) An abrasion 0.5 cm x 0.5 cm on back of right chest 2 cm from injury No. 1.

(iii) PW-6 Javed Iqbal, Constable attested the Memo. (Ex.PN), through which 30 bore pistol (P-7) got recovered by the appellant/convict was taken into possession by the investigating officer.

(iv) PW-7 Liaqat Ali, PW-13 Muhammad Yousaf and PW-18 Khadim Hussain deposed about extra-judicial confession allegedly made by the appellant/convict, before them regarding commission of the occurrence.

(v) PW 8 Muhammad Masood Bilal, Judicial Magistrate had carried on the proceedings of test identification parade (Ex.PM).

(vi) PW-9 Zahid Hussain, Constable (an injured witness), PW-10 Tarig Mehmood Constable, PW-11 Muhammad Zafar, Inspector (then SI) deposed about participation of the appellant/convict into the occurrence, which resulted into death of Muhammad Khan, SI and Muhammad Yousaf, Head Constable as well as injuries to Zahid Hussain, Constable (PW-9). They had also deposed about joining into the test identification parade held on 27.11.2008 at Central Jail, Multan, for identification of the appellant/convict. PW-10 and PW-11 had also attested the Memo. (Ex.PP), through which the empties (P-10/1-7 and P-11/1-6) collected from the spot and blood-stained pieces of seat cover (P-12/1-2) were taken into possession by the investigating officer.

(vii) PW-16 Fazal Hussain, SI had formally arrested the appellant/convict on 21.10.2008 and on 22.10.2008, he moved an application (Ex.PV), to the Area Magistrate for the purpose of test identification parade.

(viii) PW-17 Abdul Hayee, SI had produced the witnesses, in the jail for the purpose of test identification parade, held on 27.11.2008. He had also obtained physical remand of the appellant/convict and interrogated him when on 23.12.2008, he led to the recovery of 30 bore pistol (P-7) from his residential house, which was taken into possession through recovery memo. (Ex.PN).

(ix) PW-19 Muhammad Riaz Ahmad, Inspector was the complainant as well as an eye-witness. He deposed almost the same facts as were described by him in the complaint (Ex.PK). He also carried on the proceedings fully described in his statement.

3. After examination of the prosecution witnesses, the reports of the Chemical Examiner, Serologist and Forensic Science Laboratory were tendered in evidence as Ex.PX, Ex.PY and Ex.PZ respectively and case for the prosecution was closed. Thereafter, the appellant/convict was examined as

required under Section 342, Cr.P.C., during which the questions emerging from the prosecution evidence were put to him and he denied almost all such questions. In reply to the question "why this case against you and why the PWs have deposed against you?", he contended as under:---

"This is false and frivolous case got chalked out at the instance of Barkat Ali father of accused Nasir. The said Barkat Ali abducted my paternal cousin. I resisted that nefarious act of Barkat Ali and prosecuted my cause against him, however, in a Punchayati proceedings he delivered back the said abductee. Talib paternal uncle of accused Nasir and his son Bashir and Nasir himself had attempted on my life on number of occasions. It is due to enmity, I have been involved in this case.

PWs being police officials subordinate to the complainant and I.O. have deposed falsely against me."

The appellant did not opt to lead any evidence in his defence or make statement under Section 340(2), Cr.P.C. After completion of the proceedings, the learned Trial Court pronounced the impugned judgment in the above-mentioned terms. Consequently, Criminal Appeal and Murder Reference in hand.

4. The learned counsel for the appellant/convict has argued that he was not named in the F.I.R. and subsequently roped with *mala fide;* the proceedings of test identification parade, which resulted into the involvement of the appellant/convict in the case were not held as per the settled principle of law, hence illegal; the prosecution had not produced any independent witness as all the material witnesses were police officials; whose statements were full of contradictions, but the learned Trial Court had failed to give any consideration to the said aspect; the recovery of pistol was planted, hence reports of the Forensic Science Laboratory are not believable; the prosecution case and the charge against the appellant/convict was not proved, hence he was entitled for acquittal. Consequently, it has been prayed that by accepting the appeal in hand, the appellant/convict may be acquitted of the charge.

5. The learned Deputy Prosecutor General has vehemently opposed the appeal, while supporting the impugned judgment to be result of correct appreciation of the evidence and material available on the record, hence not interferable.

6. Arguments of both the sides have been heard and the record has been perused.

7. In the complaint (Ex.PK) and the F.I.R. (Ex.PK/1), Muhammad Riaz Ahmad, SI/SHO of Police Station Siray Sidhu (PW-19) had categorically

stated that when he alongwith the Police officials, named in complaint and F.I.R. was on patrolling and received the information about availability of Nasir (co-accused since convicted) and Abid (co-accused since dead), in the house of Nasir, who were involved in case F.I.R. No. 392/2000, registered at the above-said Police Station, hence raided at the house, but it was found locked; when the police party was returning, in the way, Nasir (co-accused since convicted) and Abid (co-accused since dead) alongwith an unknown, the description of whom was given, all armed with 30 bole pistols, came in front of the official vehicle and started firing, which resulted into death of Muhammad Khan, SI at the spot, whereas injuries to Zahid Hussain Constable/Driver of the vehicle (PW-9) and Muhammad Yousaf, Head Constable, who later on, succumbed to the injuries. When the above-named complainant entered in the witness-box, he satisfactorily repeated the above-mentioned contentions and disclosed that the unknown companion of the above-named accused was Muhammad Nawaz (appellant/convict), who fully participated in the occurrence by making the firing. Same was the contention of Zahid Hussain, Constable (PW-9), who sustained injury at the spot as well asTariq Mehmood, Constable and Muhammad Zafar, Inspector (PW-10 and PW-11), who had witnessed the occurrence. All had nominated and implicated the appellant/convict towards commission of the occurrence, which resulted into death of two Police officials and injuries to another. It has been observed that after registration of the case, the appellant/convict became absconder and remained so for about eight years and ultimately arrested on 21.10.2008, when for the purpose of test identification parade, he was sent to the jail. During the above-said parade, which was held under the supervision of Muhammad Masood Bilal, Judicial Magistrate (PW-8), the appellant/convict was rightly identified by the above-named witnesses. The statements of the above-named witnesses, towards full participation and involvement of the appellant/convict in the occurrence were corroborative with each other. The defence had failed to contradict the versions of the witnesses, narrated in the respective statements or bring on the record any material favourable to the appellant/convict. When the appellant/convict, after the proceedings of test identification parade was joined into the investigation, he made a disclosure and then led to the recovery of 30 bore pistol (P-7) from his residential house, which was secured by the Investigating Officer namely Abdul Hayee, SI (PW-17) through Memo. (Ex.PN), attested by Javed Iqbal (PW-6). The above-mentioned versions of the above-named witnesses gained support from the medical evidence led by Dr. Ghulam Murtaza (PW-1) and

Dr. Naeem Ahsan (PW-2), as well as the above-mentioned reports, prepared by them as the fire-arm injuries on person of the above-named deceased and injured PW were confirmed.

8. No doubt material witnesses in this case are police officials but they are as good witnesses as any other private persons, hence their statements could not be discarded only for the reason that they are police employees. Reliance in this regard may be placed upon the cases of *Muhammad Azam v. The State (PLD 1996 Supreme Court 67), Naseer Ahmad v. The State (2004 SCMR 1361), Aala Muhammad and another v. The State (2008 SCMR 649)* and *Muhammad Khan v. The State (2008 SCMR 1616).* The relevant portion of case of Muhammad Khan *(Supra)* reads as under:---

"They are as good and respectable witnesses as other public witnesses and their statements cannot be discarded merely for the reason that they were the police employees."

9. As a result of the above discussion, we are of the opinion that the findings of the learned Trial Court, which resulted into the impugned judgment, towards conviction of the appellant/convict, are justified and call of the day. But on the basis of the attending facts and circumstances, especially when no specific injury to the deceased and injured PW was attributed to the appellant/convict, we are of the view that the penalty of death is harsh one. It is well-recognized principle, by now that an accused is entitled for benefit of doubt as an extenuating circumstance while dealing his quantum of sentence as well. In this regard, reference may be made to the case *of "Mir Muhammad alias Mira v. The State" (2009 SCMR 1188).* The relevant portion whereof reads as under:---

"It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence."

10. Consequently, while dismissing the appeal (08 of 2009), the conviction of the appellant/convict, awarded to him by the learned Trial Court is maintained, but his sentence of death is altered to imprisonment for life. The rest of the above-mentioned sentences are upheld. The amount of fine and compensation imposed to the appellant/convict, by the learned Trial Court and the imprisonment, in their default are maintained. All the sentences of the appellant shall run concurrently. He shall also be entitled for the benefit of

Section 382-B, Cr.P.C. Resultantly the Capital Sentence Reference No. 14/2009 is answered in negative and death sentence awarded to Muhammad Nawaz (appellant/convict) by the learned Trial Court is not confirmed.

Sentence reduced.

2016 P.Cr.R. 597

[Multan]

Present: **MUHAMMAD TARIQ ABBASI, J.**

Muhammad Hashim *alias* Sunny

Versus

The State and another

Crl. Misc. No. 5410-B of 2014, decided on 1st December, 2014.

BAIL (RAPE)---(Medical report)

Criminal Procedure Code (V of 1898)---

---S. 497---Pakistan Penal Code, 1860, Ss. 365-B/376---Bail plea---Medical evidence---Petitioner was named in F.I.R.---Alleged abductee got recorded statement u/S. 161, Cr.P.C. in which she fully implicated petitioner towards abduction and commission of rape with her---Medical evidence was in positive---Held: Sufficient material was available on record to, prima facie, connect petitioner with commission of alleged offence falling within prohibitory clause---Challan had also been submitted in Court of competent jurisdiction---Bail after arrest refused. [MEDICAL EVIDENCE]

(Paras 4,5)

مبینہ مغویہ نے اپنے بیان زیر دفعہ 161 ض ف میں سائل کو اغواء و زناء کے الزام میں پوری طرح ملوث کیا تھا۔ میڈیکل رپورٹ اثبات میں تھی۔ ضمانت سے انکار۔

[Alleged abductee had fully implicated petitioner in her S. 161, Cr.P.C. Statement in offence of abduction and rape. Medical report was in positive. Bail was refused].

For the Petitioner: Hafiz Mian Muhammad Riaz, Advocate.

For the Complainant: Ch. Khalid Mehmood Arain, Advocate.

For the State: Ch. Aamir Raza, A.P.G.

Date of hearing: 1st December, 2014.

ORDER

MUHAMMAD TARIQ ABBASI, J. -- The petitioner namely, Muhammad Hashim *alias* Sunny seeks post-arrest bail in case F.I.R. No. 1, dated 1.1.2014, registered under Sections 365-B/376, PPC, at Police Station, Tulamba, District Khanewal.

2. The precise allegations, against the petitioner are that he abducted *Mst.* Khalida Manzoor, took her to Lahore where had been committing rape with her.

3. Arguments heard. Record perused.

4. The petitioner is not only named in the F.I.R. towards abduction of the above-named lady but when the lady rescued herself and got recorded statement under Section 161, Cr.P.C., fully implicated him towards abduction and commission of rape with her. During medical examination of the lady, it was found that she was subjected to rape. Sufficient material is available on record to, *prima facie*, connect the petitioner with the alleged offences, which fall within the prohibitory clause of Section 497, Cr.P.C. Deeper appreciation is not permissible at this stage. The challan has also been submitted in the Court of competent jurisdiction.

5. Resultantly, I am not inclined to extend concession of bail, to the petitioner, hence, the petition in hand is dismissed.

Bail after arrest refused.

2016 P L C (C.S.) 813

[Punjab Subordinate Judiciary Service Tribunal]

Before Shahid Waheed, Chairman, Faisal Zaman Khan and Muhammad Tariq Abbasi, Members

ZAFAR IQBAL CHAUDHRY

Versus

REGISTRAR, LAHORE HIGH COURT, LAHORE

Service Appeal No.18 of 2013, heard on 18th March, 2016.

Punjab Subordinate Judiciary Service Tribunal Act (XII of 1991)---

---S. 5-Judicial officer---Remarks recorded by the Authority while deciding a matter---Proforma promotion---Scope---Appellant was directed by the Authority to remain careful in future and he was kept under observation for one year---Work, conduct and integrity of appellant was declared excellent during the said period---Effect-- Appellant had not earned any adverse entry during whole of judicial service---Ground and reason on the basis of which appellant was deprived of his promotion had subsequently been extinguished---Withholding of due right of appellant would not meet the ends of justice---Appellant was entitled to proforma promotion with effect from the date when the next junior to him was so promoted---Appeal was allowed in circumstances.

Syed Ijaz Qutab for Appellant.

Ishfaq Qayyum Cheema along with Muhammad Shafiq, Assistant and Nasrullah Khan Niazi, Deputy Registrar for Respondent.

Date of hearing: 18th March, 2016.

JUDGMENT

MUHAMMAD TARIQ ABBASI, MEMBER--- By way of this appeal, filed under Section 5 of the Punjab Subordinate Judiciary Service Tribunals Act, 1991, Zafar Iqbal Chaudhry (hereinafter referred to as the appellant) has called in question, letter of the Registrar, Lahore High Court, Lahore dated 10.6.2013, whereby the appellant has been informed that his representation for proforma promotion as District and Sessions Judge, has been declined.

2. The facts are that the appellant was appointed as Civil Judge on 21.12.1983; he was promoted as Senior Civil Judge on 23.11.1999 and as Additional District and Sessions Judge, on 4.9.2000; the Additional District and Sessions Judges, junior to him were promoted as District and Sessions Judges, through Notification No. 234/RHC/AD&SJJ, dated 10.7.2009, but he was deferred and later on promoted to the said post through Notification No. 108/RHC/D&SJJ, dated 11.05.2011; he made a representation, for his promotion from 10.7.2009, when Mr. Abdul Hameed-I, next junior to him was promoted as District and Sessions Judge, but declined, through the impugned letter. Consequently, the appeal in hand.

3. The learned counsel for the appellant has argued that during whole of the service career, the record of the appellant remained unblemished, except an occasion that during preliminary proceedings in Criminal Appeals Nos.546/2007 and 547/2007, a learned Division Bench of the Lahore High Court had made certain remarks, whereupon he was asked to remain careful in future and his work and conduct was kept under observation for a period of one year, during which quarterly reports were made by the concerned District and Sessions Judge, and his work and conduct was declared as 'excellent'; later on, the above mentioned appeals were decided, through judgment dated 4.6.2015, whereby the matter was remanded to the learned Trial Court, for re writing of the judgment; consequently, the case has been decided afresh, whereby all the accused have been acquitted of the charge, hence depriving the appellant from his due right would be highly unjustified.

4. On the other hand, the learned counsel appearing on behalf of the respondent has vehemently opposed the appeal.

5. Arguments of both the parties have been heard and record has also been perused.

6. It is a fact that during whole of judicial service, the appellant has not earned any adverse entry. When he was posted as Additional District and Sessions Judge, Shakargarh, District Narowal, decided a criminal case FIR No. 99, dated 4.6.2006, registered under Sections 302/324/452/148/149, P.P.C., at Police Station Kat Naina, District Narowal, through judgment dated 29.3.2007, whereby Jalal Din, Mushtaq Ahmad, Ghulam Sarwar were convicted and sentenced, whereas Iftikhar Ahmad, Shahnaz Bibi, Nazir

Ahmad, Ghulam Hussain, Muhammad Ramzan, Siraj Din, Muhammad Ashraf Papoo, Allah
Rakhi and Mehmood were acquitted of the charge; against the above said conviction and acquittal, the Criminal Appeals Nos.545, 546, 616 and 824 of 2007 and Criminal Revision No.263/2007 were preferred before the Lahore High Court; during preliminary hearing of Appeals Nos.545 and 546 of 2007, on 24.9.2007, a learned Division bench of the said Court had made the following observations:-

> "Admittedly, it is a case in which Munir was murdered. We fail to understand that what reasons and under what circumstances the trial court has acquitted the respondents under Section 302(b), P.P.C. and the judgment impugned in this regard is silent. We cannot remain oblivious of the fact that it is a murder case and the judgment impugned is not foolish only but speaks of some extraneous consideration. We therefore recommend that the Presiding Officer be suspended, made an OSD and then a regular inquiry should be held."

7. The Registrar of Lahore High Court, through letter dated 23.11.2007, while reproducing the above mentioned observations, had directed the learned District and Sessions Judge, Sialkot (as by that time the appellant was posted there), to warn the appellant to remain careful in future, keep him under observation for a period of one year and make quarterly special reports about his work and conduct. In compliance of the above said direction, the appellant was kept under observation for a period of one year, during which special reports were made by the concerned District and Sessions Judge on 4.4.2008, 12.7.2008, 28.8.2008 and 31.1.2009, whereby his work, conduct and integrity was declared as excellent. The above mentioned appeals were later on decided, through the judgment dated 4.6.2015, and the case was remanded to the learned Trial Court for re-writing of the judgment. The matter was again taken up by learned Additional Sessions Judge, Shakargarh and decided through judgment dated 3.9.2015, whereby all the accused (whether they were convicted or acquitted by the appellant through the above mentioned judgment) were acquitted of the charge. In this way, when the ground and reason, on the basis of which, on due date, the appellant was deprived of his promotion as District and Sessions Judge, had subsequently, met the above mentioned fate, withholding his due right would not meet the ends of justice.

8. Resultantly, the appeal in hand is accepted, and the appellant is held entitled to proforma promotion with effect from 10.7.2009, the date when Mr. Abdul Hameed-I, next junior to him was promoted as District and Sessions Judge.

ZC/7/PST Appeal allowed.

PLJ 2016 Cr.C. (Lahore) 13

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

SALAMAT ALI--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 209-B of 2015, decided on 25.2.2015.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 161--Prevention of Corruption Act, 1947, Ss. 5(2) & 47--Bail, allowed--Demand and receipt of amount for preparation and submission of challan--Validity--Amount was not recovered from direct possession of petitioner rather lying on seat of vehicle wherein petitioner as well as complainant was boarded--Said fact is sufficient one to hold case of petitioner as of further inquiry--Offences charged against petitioner do not fall within prohibitory clause of Section 497, Cr.P.C.--Accused was behind bars and as such no more required for any further investigation--No previous criminal antecedent was available on record maintained by police--Bail was allowed. [Pp. 14] A & B

Rana Muhammad Asif Saeed, Advocate for Petitioner.

Malik Muhammad Jafar, D.P.G. for State.

Mr. Rashid Mehmood Ch., Advocate for Complainant.

Date of hearing: 25.2.2015.

ORDER

The petitioner namely, Salamat Ali seeks post arrest bail in case FIR No. 01 dated 08.01.2015, registered under Section 161, P.P.C. read with Section 5(2)47, P.C.A., at Police Station A.C.E., District Khanewal.

2. The precise allegations, against the petitioner, as per F.I.R. are that he demanded and received illegal gratification of Rs. 50,000/- from the complainant.

3. Arguments heard. Record perused.

4. Demand and receipt of the above-mentioned amount, by the petitioner, from the complainant for preparation and submission of challan in case F.I.R. No. 424 dated 13.11.2014 registered under Sections 337-A(i)/337-F(v)/337-L(ii)/34, P.P.C., at Police Station Jahanian District Khanewal has

been alleged. The above-mentioned amount was not recovered from the direct possession of the petitioner rather lying on the seat of vehicle wherein the petitioner as well as the complainant was boarded. The said fact to my mind is sufficient one to hold the case of the petitioner as of further inquiry. The offences charged against the petitioner do not fall within the prohibitory clause of Section 497, Cr.P.C. He is behind the bars and as such no more required for any further investigation in this case. His no previous criminal antecedent is available on the record maintained by the police.

5. Resultantly, the instant petition is allowed and petitioner is admitted to bail subject to furnishing bail bonds in the sum of .Rs. 1,00,000/-, with one surety, in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail allowed

PLJ 2016 Cr.C. (Lahore) 22

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

HASNAIN AHMAD--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2810-B of 2015, decided on 1.7.2015.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Bail, admitted--Further inquiry--Version of accused was not recorded--Private complaint--Cross-version--Validity--It would be determined during trial that which of party was aggressor and which was aggressed upon--Case of petitioner requires further probe and inquiry, within meaning of Section 497(2), Cr.P.C.--Accused was behind bars and as such no more required for any further investigation--Bail was allowed. [P. 23] A

M/s. Ch. Dawood Ahmad Wains, Khawaja Qaiser Butt & Mian Haq Nawaz Saqib, Advocates for Petitioner.

Mr. Shaukat Ali Ghauri, Addl. P.G. for State.

Ch. Khawar Siddique Sahi, Advocate for Complainant.

Date of hearing: 1.7.2015.

ORDER

The petitioner namely Hasnain Ahmad seeks post arrest bail in case FIR No. 161 dated 06.05.2013, registered under Section 302/34, PPC, at Police Station Shah Kot, District Sahiwal.

2. The precise allegations, against the petitioner, as per FIR, are that he alongwith his co-accused attacked at the complainant party, during which he with a Pump Action fired and caused injury on the left side of chest of Ameer Hamza, deceased.

3. Arguments heard. Record perused.

4. During the occurrence the petitioner also sustained fire shot injuries. Due to his serious condition he was referred to Mayo Hospital

Lahore, where a lot of pallets were found in his body. Besides the petitioner his father Allah Ditta was also injured. When the police did not hear version of the petitioner, he preferred a private complaint under Sections 302/324/337-A(i)/337-F(i)/148/149, PPC, against the present complainant party and the accused of the private complaint, have been summoned to face the trial. In this way the matter has become of cross-version. It would be determined during the trial that which of the party was aggressor and which was aggressed upon. The case of the petitioner requires further probe and inquiry, within the meaning of sub-section (2) of Section 497, Cr.P.C. He is behind the bars and as such no more required for any further investigation, in this case. As per record maintained by the police, he does not have any previous criminal antecedent.

5. Resultantly, the petition in hand is allowed and the petitioner is admitted to post arrest bail, subject to furnishing bail bonds in the sum of Rs. 1,00,000/-(Rupees one lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail allowed

PLJ 2016 Cr.C. (Lahore) 104
[Multan Bench Multan]
***Present*: MUHAMMAD TARIQ ABBASI, J.**
ABDUL HAMEED--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 104-B of 2015, decided on 10.3.2015.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail, allowed--Dishonored of cheque--Business transaction--Outstanding specific amount toward payment--Further inquiry--Validity--Business between parties was admitted in FIR--Suit filed by petitioner for cancellation of cheque and rendition of account much before registration of FIR was still pending in Court of competent jurisdiction--Offence charged against him does not fall within prohibitory clause of Section 497, Cr.P.C.--Accused was behind bars and as such no more required for any further investigation.

[Pp. 104 & 105] A & B

Ch. Umar Hayat, Advocate for Petitioner.
Malik Muhammad Jaffar, D.P.G. for State.
Mr. Dawood Ahmed Wains, Advocate for Complainant.
Date of hearing: 10.3.2015.

ORDER

The petitioner, namely, Abdul Hameed, seeks post arrest bail in case F.I.R. No. 449, dated 05.12.2014, registered under Section 489-F, PPC, at Police Station. Jahaian, District Khanewal.

2. The precise allegations against the petitioner, as per FIR, are that in connection with business transaction between the petitioner and the complainant, a sum of Rs. 34,94,000/- was outstanding against the petitioner, towards payment of which, he issued a cheque in favour of the complainant, but dishonoured.

3. Arguments heard. Record perused.

4. Business between the parties is admitted in the FIR. A suit filed by the petitioner for cancellation of the cheque in question and rendition of account much before registration of the FIR is still pending in the Court of competent jurisdiction. As per the document dated 15.3.2014 annexed with the petition at Page No. 25, the cheque in question was open, i.e. without date and amount.

5. All the above-mentioned facts and circumstances, to my mind, have made the case against the petitioner as of further inquiry. The offence charged against him does not fall within the prohibitory clause of Section 497 Cr.PC. He is behind the bars and as such no more required for any further investigation in this case.

6. Resultantly, the petition in hand is accepted and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs. 5,00,000/- (rupees five lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail accepted

PLJ 2016 Cr.C. (Lahore) 176 (DB)

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI AND JAMES JOSEPH, JJ.**

ADNAN and another--Appellants

versus

STATE, etc.--Respondents

Crl. Appeal Nos. 462 and 517 of 2011, heard on 18.2.2015.

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

----Ss. 9(b) & (c)--Charge sheeted for commission of offence punishable under Section 9(b) but convicted u/S. 9(c) of CNSA--Illegality--It is well settled law that when charge is for a major offence but a minor offence is proved, accused may be convicted of latter but on other hand, an accused charged of a minor offence cannot be convicted for a major offence--Whereby accused were charge sheeted for commission of offence under Section 9-(b) of Act but sentenced under Section 9-(c) of Act, should not be ignored being not curable--Resultantly, there is no other option except to set-aside impugned judgment and remand case to trial Court, for due proceedings strictly in accordance with law. [P. 177] A & B

2007 PCr.LJ 340, *rel*.

M/s. Muhammad Ajmal Kanju and Kh. Qaiser Butt, Advocates for Appellant (in Criminal Appeal No. 462 of 2011).

Ch. Faqir Muhammad, Advocate for Appellant (in Criminal Appeal No. 517 of 2011).

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

Date of hearing: 18.2.2015.

JUDGMENT

Muhammad Tariq Abbasi, J.--This single judgment shall dispose of the above captioned matters being outcome of single judgment dated 02.05.2011 passed by learned Additional Sessions Judge Multan, whereby in case FIR No. 354 dated 1.10.2006 registered under Section 9-(c) of CNSA 1997, Adnan and Bashir Ahmad *alias* Lila, appellants although were charge sheeted under Section 9-(b) of CNSA, 1997 but convicted under Section 9-(c) CNSA, 1997 and sentenced to imprisonment for life with fine of Rs. 2,00,000/- each, in default to further undergo S.I. for six months each with benefit of Section 382-B, Cr.P.C.

2. At the very outset of the proceedings, the learned counsel appearing on behalf of the appellants has pointed out that the appellants were charge sheeted on 17.04.2007 for commission of offence punishable under Section 9-(b) of CNSA, 1997 but convicted under Section 9-(c) of Act *ibid* and sentenced in the above mentioned terms, hence the impugned judgment being a patent illegality is not sustainable in the eye of law.

3. The learned Deputy Prosecutor General while realizing the above mentioned situation contends that the attending facts and circumstances demand, remand of the case. The learned counsel for the appellants is also the same view.

4. It is well settled law that when charge is for a major offence but a minor offence is proved, the accused may be convicted of the latter but on the other hand, an accused charged of a minor offence cannot be convicted for a major offence. Reliance in this regard may be made to the case of *Muhammad Ashraf Khan Versus The State* (2007 P.Cr.L.J 340).

5. The above glaring illegality, whereby the appellants were charge sheeted for commission of offence under Section 9-(b) of the Act *ibid* but sentenced under Section 9-(c) of Act *ibid*, should not be ignored being not curable. Resultantly, there is no other option for us except to set-aside the impugned judgment and remand the case to the learned trial Court, for due proceedings strictly in accordance with law.

6. Consequently, the impugned judgment is set-aside, with a directin to the learned trial Court to take up the matter again and while observing strict compliance of the procedure and law, ensure its decision within a span of three months from receipt of the order.

(R.A.) Case remanded

PLJ 2016 Cr.C. (Lahore) 551

Present: **MUHAMMAD TARIQ ABBASI, J.**

MUHAMMAD FAYYAZ--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 648-M of 2013, decided on 10.2.2014.

Superdari of Vehicle--

----Tampering with main petroleum line of parco--Stealing and filling of diesel in oil tanker was found--Validity--When 15000 litres of diesel was lying in vehicle, and till conclusion of trial, said oil could not be removed or handed over to anybody, then vehicle alongwith oil could not be given to anyone, especially petitioner, who had got vehicle transferred in his name after 08 months of registration of case. [P. 553] A

Rana Muhammad Shakeel, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, DPG for State.

Mr. Muhammad Farooq Buzdar, Advocate for Respondent No. 3.

Date of hearing: 10.2.2014.

ORDER

Through the instant petition, Superdari of the oil tanker having Registration No. 7449/DNA, which has been taken into possession, in case FIR No. 4/2013 dated 10.1.2013 registered under Sections 379, 411, 462-B and 462-F, PPC at Police Station Saddar, District Rajanpur has been sought.

2. Previously the instant like petition filed by the petitioner before the learned Area Magistrate has been refused through order dated 28.5.2013 and Criminal Revision has also been dismissed from the Court of learned Additional Sessions Judge, Rajanpur on 04.07.2013.

3. The learned counsel for the petitioner has argued that the petitioner is registered owner of the oil tanker, which is lying in the Police Station under unsafe and unfavorable atmosphere, hence is destroying and as such may be handed over to the petitioner on superdari and that the petitioner will produce the said vehicle, as and when required by the Court.

4. The learned Deputy prosecutor General assisted by the learned counsel for Respondent No. 3 has vehemently opposed the petition.

5. Arguments have been heard and record perused.

6. The record shows that when while tampering with the main petroleum line of PARCO, stealing and filling of 15000 litres of diesel in the above mentioned oil tanker was found, not only tanker was taken into custody, but the above mentioned case was also registered against the responsibles for committing the above mentioned offence. It has been told and also confirmed that the tanker is not empty, but even at present, the above mentioned quantity of the stolen oil is lying in it.

7. It has been noticed that the occurrence was committed on 10.1.2013, when the oil tanker was being driven by one Abdul Kareem and the present petitioner had got the vehicle transferred in his name on 6.9.2013 i.e. about 08 months after the occurrence and taking the vehicle into possession. When 15000 litres of diesel is lying in the vehicle, and till conclusion of the trial, the said oil could not be removed or handed over to anybody, then the vehicle in question alongwith the oil could not be given to anyone, especially the petitioner, who has got the vehicle transferred in his name after 08 months of registration of the case.

8. For what has been discussed above, the petition in hand is dismissed. However, the learned Trial Court is directed to ensure the conclusion and decision of the case within a span of three months from today and also pass a speaking order regarding the above mentioned vehicle.

(R.A.) Petition dismissed.

2016 Y L R 1191

[Lahore]

Before Muhammad Tariq Abbasi, J

MUHAMMAD ALTAF---Petitioner

Versus

DISTRICT JUDGE and 3 others---Respondents

Writ Petition No.3150 of 2011, decided on 2nd June, 2014.

Civil Procedure Code (V of 1908)---

----S. 12(2)---Constitution of Pakistan, Art.199---Constitutional petition---Consent decree, setting aside of---Contention of applicant was that he had decree of same property in his favour---Application moved under S. 12(2), C.P.C. was dismissed concurrently---Validity---Framing of issues was not always necessary in an application filed under S. 12(2), C.P.C. but same would not mean that issues in such application should not be framed at all---Issues should be framed and evidence should be recorded if serious questions of facts and law were involved which could not be decided without evidence---Framing of issues and recording of evidence/version of both the parties was necessary to decide present application---Applicant should be given an opportunity to prove the document and respondents to contradict the same---Criminal proceedings against the applicant for preparing forged document and filing the same in the court should be initiated if such document was found to be a forged one---Way in which both the courts below had decided the present application was not justified---Impugned orders were set aside and case was remanded to the Trial Court for deciding the same after framing of issues---

Constitutional petition was accepted in circumstances.

Muhammad Umar Awan for Petitioner.

Haider Mehmood Mirza for Respondents.

ORDER

MUHAMMAD TARIQ ABBASI, J.---By way of this writ petition, the order dated 30.6.2010, passed by the learned Civil Judge Attock, judgment dated 4.8.2010 and order dated 27.6.2011 passed by the learned District Judge, Attock have been called in question.

2. Through the above mentioned order dated 30.6.2010, an application moved by the petitioner under Section 12(2) of C.P.C. for setting aside the judgment and decree dated 4.1.1988 has been dismissed. Whereas through the judgment dated 4.8.2010, a revision petition preferred by the petitioner has been dismissed and vide order dated 27.6.2011, a review petition moved by the petitioner has also been turned down.

3. The precise facts are that in a civil suit filed by Sheikh Afaq Ahmad (predecessor in interest of the respondents Nos. 3-A to 3-D), against the respondents Nos. 4-A to 4-F, regarding the property bearing old No. B-V/53, recent No.B-V/64, Committee No. E-108, situated at Attock, a consent decree was passed on 4.1.1988, from the court of learned Senior Civil Judge, Attock.

4. The petitioner had filed an application under Section 12(2) of C.P.C., whereby he had challenged the above mentioned consent decree, on the grounds that earlier, in a suit filed by him against Sheikh Jamshed Elahi (predecessor in interest of the respondents Nos. 4A to 4-F) regarding the same property, a decree had been passed in his favour on 4.2.1969, hence the above mentioned decree dated 4.1.1988, being obtained through misrepresentation, fraud and collusion, was not sustainable.

5. The respondents contested the above said application to be based on mala fide. The learned Trial Court had heard both the sides and dismissed the

application filed under Section 12(2) of C.P.C., through order dated 30.6.2010.

6. Feeling aggrieved, the petitioner had challenged the above mentioned order of the Civil Court, before the District Court in shape of a revision petition, but dismissed through judgment dated 4.8.2010. Then the petitioner had preferred an application, whereby he sought review of the above said judgment, but dismissed on 27.6.2011. Consequently the writ petition in hand.

7. Arguments of both the sides have been heard and record has been perused.

8. The record shows that the petitioner along with his application under section 12(2) of C.P.C. had annexed attested copies of the order and decree dated 4.2.1969, allegedly passed in his favour. In such like situation, it was necessary to frame the issues arising out of pleadings of the parties, record, version/evidence of both the sides and then decide the application filed under section 12(2) of C.P.C. But it has been observed that the learned Trial Court while giving the reasoning, which required evidence, had dismissed the above said application.

9. Although it is not always necessary to frame the issues in an application under Section 12(2) of C.P.C., but it does not mean that issues in such like application should not be framed at all. If serious questions of facts and law are involved in the application, which could not be decided without evidence, then issues should be framed, evidence should be recorded and then the matter should be decided.

10. Even today, the petitioner is alleging the judgment and decree, copies of which were annexed by him with the application, under Section 12(2) of C.P.C. to be quite correct, genuine and rightly passed in his favour. Whereas

the other party is denying any such decision in his favour. To resolve the controversy and determining the fate of the above mentioned document, it is necessary to frame the relevant issues and give an opportunity to the petitioner to prove the said document and the respondents to contradict it. If at the end, the document in the hand of the petitioner is found to be forged, then not only his application should be dismissed, but criminal proceedings against him for preparing the forged document and filing it in the court of law should also be initiated.

11. In the light of the above stated discussion, the way in which the learned courts below have decided the above mentioned application, could not be termed to be justified and demand of the law and procedure.

12. Resultantly, this writ petition is accepted, the above mentioned orders and judgment are set aside, with a direction that besides other issues arising out of pleadings, towards genuineness of the decree dated 4.2.1969, alleged by the petitioner to be in his favour and annexed with the petition under section 12(2) of C.P.C., an issue should also be framed, both the parties should be given an opportunity to lead respective evidence and then the petition should be decided as proposed above.

ZC/M-263/L Petition allowed.

2016 Y L R 1613
[Lahore]
Before Muhammad Tariq Abbasi, J
Sheikh ABDUL WAHEED---Appellant
Versus
SAEED QALBI and another---Respondents

Criminal Appeal No.835 of 2003 and Criminal Revision No.24 of 2004, heard on 14th April, 2015.

Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Case was of two versions and story of the complainant, was not correct and it was established that complainant and witnesses were not present at the spot---Nothing was recovered from accused---Motive was not proved---Prosecution story and charge against accused were highly doubtful---If a simple circumstance would create reasonable doubt in a prudent mind about guilt of an accused, then he would be entitled to such benefit, not as a matter of grace or concession, but as of right---Impugned judgment, was set aside, accused was acquitted of the charge, while extending him the benefit of doubt---Accused being on bail his bail bonds were discharged.

Tariq Pervaiz v. The State 1995 SCMR 1345 and Ayub Masih v. The State PLD 2002 SC 1048 ref.
Muhammad Bilal Butt for Appellant (in Criminal Appeal No.835 of 2003).
Shaukat Ali Ghauri, Addl. Prosecutor General for the State.
Tariq Zulfiqar Ahmad Chaudhry for the Complainant (in Criminal Revision No.24 of 2004).
Date of hearing: 14th April, 2015.

JUDGMENT
MUHAMMAD TARIQ ABBASI, J.---This single judgment shall decide the above captioned Criminal Appeal and the Revision Petition, as both are outcome of single judgment dated 28.10.2003, passed by learned Additional Sessions Judge, Sahiwal, whereby in a private complainant, filed by Saeed Qalbi, respondent No. 1 in the above mentioned Criminal Appeal and petitioner in the above titled Criminal Revision No. 24/2004 (hereinafter referred to as the complainant), Sheikh Abdul Waheed, appellant in Criminal

Appeal and respondent No. 1 in the revision petition (hereinafter referred to as the appellant) was convicted under Section 302(b), P.P.C. and sentenced to imprisonment for life, with compensation of Rs.1,00,000/-, payable to the legal heirs of the deceased, otherwise to further undergo simple imprisonment for six months, with benefit of Section 382-B Cr.P.C.

2. The precise facts are that the complainant moved an application (Ex.PA/1) before the SHO of Police Station City Sahiwal, District Sahiwal, contending therein that on 12.11.2001, he along with his brother Daud Saleemi (deceased), father Muhammad Ashraf (given up PW) and Muhammad Zahid (PW-3), to purchase fertilizer was going to Sahiwal city on a tractor trolley registration No. SLB-2724; at about 4.15 PM, when they were passing in front of the shop of Sheikh Munir Ahmad (co-accused since acquitted), he asked his son Sheikh Waheed (appellant) that Daud Saleemi (deceased) was going on a tractor and be taught a taste of not paying money and disgracing them; Sheikh Waheed (appellant) while waiving a pistol and Sheikh Munir (co-accused since acquitted) empty handed, started running behind them (complainant party), whereupon, the complainant tried to accelerate speed of the tractor, but due to rush, failed; in the meanwhile, when they (complainant party) reached at the road, situated in front of judicial colony, the appellant and his co-accused (since acquitted) reached near, when the acquitted accused again raised 'lalkara' that Daud (deceased) should not go alive and be killed by firing, hence the deceased jumped down the tractor and started running towards western direction; when he ran a few feet and in order to save himself was about to enter the gate of the house (kothi) known as 'Rana House', the appellant with his pistol fired at him and he became injured and died then and there; the occurrence was witnessed by the complainant (PW-2), his father Muhammad Ashraf and Muhammad Zahid (PW-3) and the accused fled towards their house; the motive was that about 8/9 months ago, the deceased borrowed cotton sacks (bardana) from Sheikh Munir (co-accused since acquitted) and had to pay Rs.8,400/-, but as the crop was not good, hence could not pay the amount, for which an altercation between Sheikh Munir and the deceased had taken place, due to which the accused, with common intention had committed 'qatal' of Daud Saleemi. On the basis of the above mentioned application/complaint, the case was registered through FIR (Ex.PA) and investigated, during which the case was found to be false, hence recommended to be cancelled, whereupon the complainant filed a private complaint (Ex.PA/2) against the appellant, Sheikh Munir Ahmad (since

acquitted), Talha Muhammad DSP, Muhammad Rasheed SI and lmdad Hussain, SI. In the said private complaint (Ex.PA/2), the above mentioned contentions made in the complaint (Ex.PA/1) were reiterated, but with addition that during investigation, unjustified favour was extended to the appellant and his co-accused (since acquitted) and the case was spoiled.

3. In the private complaint, the appellant and his father Sheikh Munir Ahmed (co-accused since acquitted) were summoned, to face the trial, whereas names of the above said Police officials were deleted. Both were formally charge sheeted on 2.8.2002. They pleaded not guilty and claimed the trial, hence the prosecution evidence was summoned and recorded. As many as nine witnesses were recorded as prosecution witnesses, two as CWs and two as DWs.

The gist of the evidence led by important witnesses was as under:--

i) **PW-2 Saeed Qalbi (complainant)** had narrated almost the same facts as were stated by him in the private complaint (Ex.PA/2).

ii) **PW-3 Muhammad Zahid,** an alleged eye-witness of the occurrence stated about firing made by the appellant at Daud Saleemi, which resulted into his death.

iii) **PW-4 Dr. Waseem Azhar** conducted postmortem examination of dead body of Daud Saleemi (deceased) on 13.11.2001 and prepared the reports (Ex.PB & Ex.PB/1). During the said examina-tion, a fire shot entry wound at front side of left lower chest and exit wound at back of right lower chest were noted. According to the doctor, the above said injuries were ante-mortem in nature, sufficient to cause death and that the death had occurred within half an hour of the receipt of the injuries.

iv) **PW-9 Muhammad Saeed Akhtar,** Draftsman drafted scaled site plans (Ex.PD & Ex.PD/1) of the spot and handed over to the investigating officer.

v) **CW-1 Abdul Ghaffar** attested the memo (Ex.CW-1/1), through which 30 bore pistol recovered from the deceased was taken into possession by the investigating officer.

vi) **CW-2 Imdad Hussain,** SI had investigated the case, during which carried on the proceedings and prepared the documents fully detailed in his statement

4. After examination of the PWs and CWs, the prosecution case was closed, whereafter the appellant was examined under Section 342 Cr.P.C., during which the questions arising out of the evidence available on the record were put to him and he denied almost all such questions, while pleading his innocence and false involve-ment, in the case with mala fide. The question "Why this case against you and why the PWs have deposed against you?", was replied by him in the following words:--

> "It is a false case. All the PWs are closely related inter se and also with the deceased. They have made false statements against me due to their ill-will with me. The PWs were not present at the spot. The deceased was all alone at the time of occurrence when he was hit by the fire. The PWs learnt about the occurrence much late in the night and thereafter they visited DHQ Hospital, Sahiwal, where the dead body of the deceased was lying and thereafter they booked a false story and built up a false case against us."

In reply to the question "Have you anything else to say?", he made the following statement:--

> "I am innocent. This case was investigated by many police officers including DSP. I and my co-accused were found not involved in the murder of the deceased, rather it came to light during investigation that Daud Saleemi deceased entered in the High Career Commercial College situated on the Katchery Road, Sahiwal which is adjacent to Rana House, the residence of Rana Muhammad Aslam and then the deceased went on the roof top of Rana House where from he jumped into the courtyard of Rana House and then came to the veranda of the same house where he was challenged by Zahid Hussain son of Faqir Hussain caste Rajput, Chowkidar of Rana House, whereupon the deceased who was having a pistol with him fired at Zahid Hussain Chowkidar who while exercising the right of self defence of his person fired at the deceased taking him a dacoit who fell injured in the said veranda and died there. The police after thorough investigation of this case found me and my co-accused not involved in the murder of the deceased Daud Saleemi and cancelled the case being false and also recommended action against the complainant under section 182, P.P.C."

The appellant opted to lead evidence in his defence, but refused to make statement under Section 340(2) Cr.P.C. In defence, Rana Muhammad Aslam and Zahid Mehmood had got recorded statements as DW-1 and DW-2 respectively. The DW-1 had deposed that in fact, the deceased entered into a house adjacent to his house for the purpose of an offence, from where he jumped into his house and apprehended by his Chowkidar Zahid Mehmood (DW-2) and when the deceased tried to make firing, DW-2 made two fire shots, which hit the deceased and he fell down in veranda of the house. Zahid Mehmood (DW-2) during examination-in-chief stated about lying of a dead body in veranda of the house of Rana Aslam (DW-1), where he was Chowkidar. This witness was declared hostile and cross-examined by the defence, during which he admitted about making of statements before the Police.

5. On completion of all the above mentioned proceedings, the learned Trial Court had passed the impugned judgment, in the above mentioned terms. Consequently, the matters in hand.

6. The learned counsel for the appellant has argued that the appellant is innocent and was falsely involved in the case with mala fide, while concocting a false and frivolous story; that during investigation, when the Police arrived at the conclusion that the facts and circumstances narrated in the FIR were false and incorrect, accordingly recommended it to be cancelled, whereupon the complainant came forward with a private complaint, wherein stated false facts and circumstances; that even during the trial, the facts narrated in the complaint were not proved or substantiated, rather the conclusion derived by the Police was established, but the learned Trial Court had erred in not considering the actual facts and circumstances and the material available on the record and passed the impugned judgment, which being result of misreading and non-reading of the evidence is not sustainable in the eye of law and is liable to be set aside.

7. Conversely, the learned Additional Prosecutor General, assisted by the learned counsel for the complainant, has not only supported the impugned judgment towards conviction of the appellant, but have also requested for acceptance of the revision and award of major penalty to the appellant.

8. Arguments of all the sides have been heard and the record has also been perused.

9. In this case, there are two versions. One is narrated by Saeed Qalbi, complainant (PW-2) in his above mentioned application (Ex.PA/1), which resulted into registration of the above said FIR (Ex.PA), whereas the other is the above mentioned, which came into lime light during investigation.

10. The stance of the complainant (PW-2) and Muhammad Zahid (PW-3) was that Daud Saleemi (deceased) was fired by the appellant from his backside and done to death, at the gate of the house (Rana House) belonging to Rana Muhammad Aslam (DW-1). During postmortem examination, it was found that the deceased had received fire shot injury from front side and the same fact was established on the record through postmortem report (Ex.PB) and pictorial diagram (Ex.PB/1), prepared by Dr. Waseem Azhar (PW-4). It was an admitted fact that the dead body was found lying in the veranda of the above said house and that a pistol was also lying near the dead body. The distance between the main gate of the house and the veranda, where dead body was lying, was measured by Muhammad Saeed Akhtar, Draftsman (PW-9) and became 142 feet. During cross-examination of PW-9, it also came on the record that from the spot, an empty bullet, fired by the deceased, by .30 bore pistol was also recovered. The above mentioned facts had negated the above mentioned version of the complainant (PW-2) and the above named PW-3 that the deceased was fired by the appellant from his backside, at the main gate of the house of Rana Muhammad Aslam.

11. The matter was repeatedly investigated, when it revealed that the story of the complainant was not correct as the deceased entered into the house situated adjacent to Rana House, from where he jumped into Rana House, having a pistol and intercepted by Chowkidar Zahid Mehmood (DW-2) and also fired at and consequently, the deceased fell down in the veranda of the house. Due to the above said reason, the FIR was got cancelled by the Police. Imdad Hussain Inspector, who made his statement as CW-1, had categorically denied the above mentioned story of the complainant, rather had supported the above said conclusion and as such exonerated the appellant from commission of the alleged occurrence.

12. The stance of the complainant (PW-2) was that the deceased expired then and there, but it was established on the record that after receipt of fire shot injury, the deceased remained alive for about half an hour, hence the behaviour of the complainant and PW-3, whereby they did not make any struggle to save the injured, rather attempted to get the case registered was quite unnatural and not appealing to a prudent mind. The said fact had suggested that the complainant and the witnesses were not available at the spot.

13. On one hand, status of the alleged story of the complainant was as mentioned above, whereas on the other hand, Rana Muhammad Aslam, the owner of the house, where the dead body was lying, had appeared in the witness box as DW-1 and narrated a detailed story to the effect that the deceased, jumped into his house from the neighboring house, having a pistol in his hand and when seen by his Chowkidar (DW-2), was fired at, which resulted into his death at the spot, hence the story of the complainant was negated. Not only the above named DW-1 had contended as mentioned above, but the Chowkidar namely Zahid Mehmood (DW-2), who although during examination-in-chief had tried to suppress the real facts, but during cross-examination had admitted that he during investigation had made statements before the Police and got the same exhibited as Ex.DW-2/A, during which the above mentioned stance of DW-1 was supported.

14. Admittedly, nothing was recovered from the appellant and the learned Trial Court in the impugned judgment had also held the alleged motive to be not proved.

15. All the above mentioned facts and circumstances, to my mind, are sufficient to hold the alleged prosecution story and charge against the appellant highly doubtful. It is well-settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. In this regard, reference may be made to the case "Tariq Pervaiz v. The State" (1995 SCMR 1345). This view has further been fortified in the case of "Ayub Masih v. The State" (PLD 2002 SC 1048), whereby it has been held that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than

one innocent person be convicted" should always be kept in mind. Relevant portion of the case of Ayub Masih (Supra) reads as under:--

> "It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

16. For what has been discussed above, the Criminal Appeal No. 835 of 2003 is allowed, the impugned judgment is set aside and the appellant (Sheikh Abdul Waheed) is acquitted of the charge, while extending him the benefit of doubt. He by way of suspension of his sentence is on bail, hence his bail bonds are discharged. The disposal of the case property shall be as directed in the impugned judgment.

17. The Criminal Revision No.24/2004 filed by the complainant (Saeed Qalbi) for the foregoing reasons, is without substance, hence dismissed.

HBT/A-146/L Appeal allowed.

2016 Y L R 1725

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

ANJUM IQBAL and others---Petitioners

Versus

The STATE and others---Respondents

Crl. Misc. No.56-M of 2014, heard on 10th June, 2014.

Criminal Procedure Code (V of 1898)---

----Ss. 145 & 561-A---Constitution of Pakistan, Art.20---Proceedings under S.145, Cr.P.C.---Scope---Freedom to profess religion and to manage religious institutions---Magistrate ordered sealing of mosque apprehending breach of peace---Validity---Proceedings under S.145, Cr.P.C. were meant for special purpose, regarding particular property---Dispute endangering breach of peace must be regarding any land or water including a building, markets, fisheries, crops or other produce of land, and the rents or profits of any such property---Mosque did not fall under any of the categories contemplated under S.145, Cr.P.C.---Magistrate should have mentioned reasons for the passing of the order---Magistrate ordered the sealing on the sole ground that the mosque belonged to the sect but that ground was found false as the mosque belonged to the Sunni sect---Mosque admittedly was the "House of Allah Almighty", same could not be sealed to deprive people from worship according to their sect---Under Art.20 of the Constitution every citizen had a right to profess, practice and propagate his religion---Petition was accepted---Proceedings under S.145, Cr.P.C. were set aside.

Abdul Majeed v. The State and others 1968 PCr.LJ 659 and Abdul Razzaq v. The State and others 2013 PCr.LJ 718 rel.

Malik Itaat Hussain Awan for Petitioners.

Naveed Ahmad Warraich, A.D.P.P. for the State.

Ch. Mehmood Akhtar Khan for Respondents.

Date of hearing: 10th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI J.---Through the instant petition, the orders dated 6.7.2013 and 19.11.2013, respectively passed by the learned Judicial Magistrate and learned Additional Sessions Judge, Chakwal have been called in question.

2. Through the above mentioned earlier order dated 6.7.2013, in the proceedings, initiated by the Police under Section 145 of Cr.P.C., to seal a mosque, sealing of it has been ordered. Whereas, through the above said

lateral order dated 19.11.2013, a revision petition filed by the petitioners has been dismissed.

3. The facts as per record are that the petitioners' party built a mosque, having the name "Jamia Masjid Toheed Muslim" at Mohallah Madina Town, Chakwal. The inhabitants of the locality raised objections over establishment of the said mosque. The matter went to the Police. The Police carried on the proceedings under Section 145 of Cr.P.C. and recommended that the mosque should be sealed. When the said proceedings were filed in the court of learned Judicial Magistrate, Chakwal, the request of the Police was accepted and sealing of the mosque was directed, through order dated 6.7.2013, in the following words:--

> "While perusing the record it reveals that Anjum Afzal and Shahzad Afzal constructed a mosque at Mohallah Madina Town Chakwal, they belong to Qadiani Sect' and Haji Bostan Khan and Haq Nawaz party at Mohallah Madina Town have raised objections for registration of mosque. So, there is apprehension at Mohallah Madina Town due to registration of mosque of Qadiani. In this situation it is appropriate property/mosque be sealed till further orders to maintain peace and tranquility in the society of Mohallah Madina Town Chakwal City. SHO/Inspector of P.S. City Chakwal is directed to comply the order of this court forthwith. To come up for further proceedings on 07.09.2013."

4. The petitioners had challenged the above mentioned order, before the learned Sessions Court, Chakwal in shape of a revision petition, which was entrusted to the learned Additional Sessions Judge, Chakwal, from where the order dated 19.11.2013 was pronounced and the revision petition was dismissed.

5. Consequently, the instant petition has been preferred, with the contention and the grounds that the petitioners being Muslims had built the mosque for the worship of Sunni Muslims but with mala fide, the proceedings under Section 145 of Cr.P.C. were carried on, with the contention that the petitioners belonged to Qadiani sect and the mosque was also of the said sect, hence not permitted; that the learned Judicial Magistrate in a blind manner, without any inquiry or probe had acted as a tool at the hands of the Police and while holding the petitioners and the mosque to be of Qadiani sect had ordered to seal it; that when the petitioners had brought the matter in shape of a revision petition before the learned Sessions Court, without considering the attending facts and circumstances, in a slipshod and mechanical manner, a

stamp of confirmation was affixed at the above mentioned unjustified and unreasoned order of the learned Judicial Magistrate and the revision had been dismissed and that the above mentioned orders of both the learned courts below being unreasonable, unjustifiable and against all the norms of natural justice and law on the subject are not sustainable.

6. The learned counsel for the petitioners has advanced his arguments in the above mentioned lines and the grounds. The learned ADPP has not seriously opposed the petition. Whereas the learned private counsel for Muhammad Nawaz etc., the inhabitants of the locality, who are not party in the petition, has seriously objected and opposed the petition in hand.

7. Arguments heard and record perused.

8. The proceedings under Section 145 of Cr.P.C. are meant for special purpose, regarding particular property. For convenience, the said provision is reproduced herein below:--

> **"145. Procedure where dispute concerning land, etc., is likely to cause breach of peace.**---(1) Whenever a [Magistrate of the 1st Class] is satisfied from a police-report or other information that dispute likely to cause breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statement of their respective claims as respects the fact of actual possession of the subject of dispute.
>
> (2) For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.
>
> (3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.
>
> (4) **Inquiry as to possession.** The Magistrate shall then, without reference to the merits or the claims of any such parties to a right to possess the subject of dispute, pursue the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further

evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date:

Provided also, that if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under subsection (1) shall be final.

(6) Party in possession to retain possession until legally evicted. If the Magistrate decides that one of the parties was or should under the first proviso to subsection (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction and when he proceeds under the first proviso to subsection (4), may restore to possession the party forcibly and wrongfully dispossessed.

(7) When any party to any such proceedings dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceedings is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceedings under this section pending before him is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale proceeds thereof as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107. "

9. From the above mentioned provision, it is clear that dispute endangering breach of peace must be regarding any land or water, which has been explained to be a building, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

10. In the situation in hand, the mosque does not fall in any of the above mentioned categories. Furthermore, for passing an order under Section 145 of Cr.P.C., a Magistrate should mention the reasons for passing the order. But as highlighted above, the Judicial Magistrate has directed for seal of the mosque, on the sole ground that it belongs to Qadiani sect. The said reason has been found totally false and incorrect, because the mosque has been built for worship of 'Sunni/Hanfi sect'. Neither the petitioners are Qadiani nor the mosque belongs to the said sect or having any concern with the said class. This fact has not only been observed by the learned revisional court, but also admitted by the above named private learned counsel, appearing on behalf of Muhammad Nawaz etc.

11. Therefore, the above mentioned stance narrated by the learned Judicial Magistrate that as the petitioners as well as the mosque is for Qadiani sect, hence its establishment could not be permitted, is totally unjustified and unreasonable.

12. It is very strange that on the basis of unjustified and unreasonable order, the Judicial Magistrate has directed seal of the mosque, for worship and when the matter went to the learned Additional Sessions Judge, in shape of a revision petition, again the attending facts and circumstances were not realized and the order of the Judicial Magistrate was maintained. The learned Judicial Magistrate as well as the learned Additional Sessions Judge have failed to consider that they were going to seal the mosque, which admittedly is "House of Allah Almighty", hence one should not dare to seal such a House and deprive the concerned from worship according to their sect. In this regard, reference can be made to the cases reported as Abdul Majeed v. The State and others (1968 PCr.LJ 659) and Abdul Razzaq v. The State etc. (2013 PCr.LJ 718). The relevant portion of the above mentioned citation (1968 PCr.LJ 659) reads as under:--

"The house of God cannot be possessed by any individual. It vests in God and as such cannot be sealed under Section 145, Cr.P.C. Even a prohibitory order under Section 144, Cr.P.C. was held to be illegal and undesirable by a Division Bench of the Calcutta High Court. That order is also based on the principle that no Muslim can be prohibited from saying his prayers in a mosque. The entire case law in the Indo-Pak sub-continent regarding the use of mosque is also on the same line that any Muslim can go and say his prayers in a mosque, of course without disturbing the congregation even if the congregation is led by another sect. Surely, two congregations cannot be held in a mosque and nobody can claim to introduce a congregation of his own choice in the mosque. It is the right of the Mutwali to make arrangements for the congregation and the control in the mosque. However, if there is any dispute regarding the use of the mosque and there exists an apprehension of breach of peace, in such a case the Magistrate under Section 147 Cr.P.C. can only prohibit interference with such a user. On the other hand if the dispute is regarding the control and management of a mosque and there is an apprehension of breach of peace, a Criminal Court under Section 145, Cr.P.C., cannot decide such a dispute."

13. The Constitution of the Islamic Republic of Pakistan, 1973 also gives a right to every citizen to profess, practice and propagate his religion. In this regard, the relevant Article is 20, which is as under:--

"20. Freedom to profess religion and to manage religious institutions--Subject to law, public order and morality--

(a) every citizen shall have the right to profess, practice and propagate his religion; and

(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

14. As a result of the above discussion, the instant petition is accepted, the impugned orders dated 6.7.2013 and 19.11.2013 are set aside and the proceedings under Section 145 of Cr.P.C. are quashed/dropped.

ARK/A-121/L Petition accepted.

2016 Y L R 1909

[Lahore]

Before Abdul Sami Khan and Muhammad Tariq Abbasi, JJ

MUHAMMAD MUNAWAR HUSSAIN and others---Appellants

Versus

The STATE---Respondent

Criminal Appeals Nos. 446-J of 2014 and 167-J of 2009 and Murder Reference No.456 of 2009, heard on 30th March, 2015.

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

----Ss. 302(b), 109 & 34---Qatl-i-amd, abetment, common intention---Appreciation of evidence---Extra-judicial confession---Value---Scope---Benefit of doubt---Story as narrated by the complainant, was not plausible, because despite murder of his son at 1.00 a.m., he remained satisfied till 4.00 a.m., when he and other family members raised alarm---As per the complainant, the fire was made while placing the pistol at the head of the deceased, but during post mortem examination, no sign of close range firing was observed---House of occurrence was located in a populated area, but name of none was given in the complaint---As per report of Forensic Science Laboratory, pistol allegedly recovered at the instance of accused, was in working condition, but no empty having been collected from the spot, or sent for comparison with weapon/ pistol, said recovery and report was inconsequential---Complainant, during whole of the trial, did not come forward and make any statement in the court---Evidence of extra judicial confession furnished by the prosecution witnesses could not be believed for the reason; firstly, as to why accused persons had made such confession before said prosecution witnesses as no evidence was on record regarding their social status or influence over the bereaved family; secondly, from the narration of facts given by both said prosecution witnesses in their statement alleged extra judicial confession made by accused persons appeared to be of joint nature---Said prosecution witnesses, were related inter se and were also related to the complainant party, their statements could not be relied upon without independent corroboration, which was very much lacking in the case; and charge against accused persons could not be proved and established on such extra judicial confession---Impugned judgment of the Trial Court, was

set aside, and accused were acquitted of the charge, while extending them benefit of doubt.

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

----Art. 3--- Witness--- Believing or disbelieving a witness depended upon the intrinsic value of his statement---Statement and not the person (witness) was to be seen and adjudged by the court.

Abid Ali and 2 others v. The State 2011 SCMR 208 rel.

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

----S. 164---Extra judicial confession---Evidentiary value---Extra judicial confession, was always considered a weak type of evidence.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231 and Tahir Javed v. The State 2009 SCMR 166 ref.

(d) Criminal trial---

----Benefit of doubt---If a single circumstance would create reasonable doubt in the prudent mind about guilt of an accused, then he would be entitled to such benefit, not as a matter of grace or concession, but as of right---Better that ten guilty persons be acquitted, rather than one innocent person be convicted.

Tariq Pervaiz v. The State 1995 SCMR 1345 and Ayub Masih v. The State PLD 2002 SC 1048 rel.
Ms. Sheeba Qaisar for Appellant (in Criminal Appeal No.446-J of 2014).
Maqbool Ahmad Qureshi for Appellants (in Criminal Appeal No.167-J of 2009).
Khurram Khan, Deputy Prosecutor General for the State.
Nemo for the Complainant.
Date of hearing: 30th March, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single judgment shall decide the above captioned Murder Reference as well as the appeals, as all are outcome of single judgment dated 28.8.2008, passed by the learned Additional Sessions Judge, Sangla Hill, District Nankana Sahib, whereby in a private complaint, filed by Mst. Rabia Bibi (hereinafter referred to as the complainant), Muhammad Munawar Hussain, Sajida Parveen and Washfa Noreen (hereinafter referred to as the Appellants) have been convicted and sentenced in the following terms:--

Muhammad Munawar Hussain

> Under Section 302(b), P.P.C. to death, with compensation of Rs.1,00,000/-, payable to the legal heirs of deceased Arshad Mehmood, in default to further undergo simple imprisonment for six months.

Sajida Parveen and Washfa Noreen

> Under Section 302, P.P.C. to imprisonment for life, each with compensation of Rs.50,000/- each, payable to the legal heirs of the deceased, failing which to further undergo simple imprisonment for six months each, with benefit of Section 382-B, Cr.P.C.

2. The facts as narrated in the FIR (Ex. PB) are that one Sultan Ahmad had got lodged FIR No. 200 dated 9.7.2005 under Sections 302/109/34, P.P.C. at Police Station Sadar Sangla Hill, District Nankana Sahib, with the contention that his son Arshad Mehmood (deceased), along with his family members was residing in village Dugree, whereas he with his family was settled at Mohalla Abbas Park, Street No.3, Faisalabad; on 8.7.2005, he, to meet his son Arshad Mehmood, came at Village Dugree; during the night between 8/9.7.2005 at about 1.00 a.m. when he, his son Arshad Mehmood deceased, daughter-in-law (Bahu) Sajida Bibi and grand children were sleeping in courtyard of the house, four unknown armed persons, while scaling the wall, attracted there and on gunpoint got awakened him, his daughter-in-law and grand children and threatened them to remain silent, otherwise, will be shot; his son Arshad Mehmood was still sleeping and an unknown armed person stood by him, whereas the other three took them (complainant party) in a room and confined them, with the contention that they would kill Arshad Mehmood; thereafter

suddenly report of fire was heard and the accused while scaling over the wall, fled away; due to fear, they remained silent and at about 4.00 a.m., raised alarm, which attracted Abdul Wahid Numberdar and Amjad Ali PWs, who brought them out of the room and all saw that Arshad Mehmood was dead due to firing.

3. Thereafter, Rabia Bibi, daughter of Arshad Mehmood deceased came forward, with a private complaint against the appellants, on the grounds that there were illicit relations between Washfa Noreen and Muhammad Munawar Hussain appellants and both wanted to marry, for which Sajida Parveen appellant was also agreed, but the deceased was not inclined, due to which he for several times had abstained Sajida Parveen and Washfa Noreen appellants; on 8.7.2005, the above named appellants called Muhammad Munawar Hussain appellant, in their house, for murder of Arshad Mehmood deceased, so that he may not come in the way and all may lead peaceful life; all decided to administer the sleeping tablets to the deceased and then murder him; consequently Muhammad Munawar Hussain appellant supplied the said tablets to the other appellants and when the complainant abstained them, they threatened her to keep silent, otherwise would be killed; the lady appellants got the children asleep in a room and at about 11:00 p.m., Muhammad Munawar Hussain appellant came there and all had been talking in the courtyard; after about 1/2 hour, the lady appellants tied the arms and legs of Arshad Mehmood deceased with a cot and all the appellants came in a room, where Washfa Noreen appellant handed over a pistol to Muhammad Munawar Hussain appellant and asked him to lock the room from outside and then shot the above named deceased; the lady appellants started watching from the window and after about two minutes, Muhammad Munawar Hussain appellant came at the window and told that bullet was missed, whereupon Washfa Noreen appellant again loaded a bullet in the pistol and handed over it to the above named male appellant, with direction that fire should be made while placing the pistol at the head and while going, arms and legs of Arshad Mehmood should be untied; accordingly Muhammad Munawar Hussain appellant while shooting at Arshad Mehmood and telling to the lady appellants, went away; at the morning lady appellant started hue and cry and the people came there and brought them out of the room; the said appellants threatened the complainant that if she would tell the incident to anyone, would be dealt with in the same manner; Sajida Parveen appellant, for recovery of the complainant, filed writ petition in the Lahore High Court, but dismissed,

which encouraged the complainant and she narrated all the facts to her paternal grand parents and aunt (Phuphi) and the Police was also approached, but of no consequence, hence the complainant was forced to file the complaint.

4. In the above mentioned private complaint, the appellants were summoned, whereafter pre-trial proceedings were carried on and formal charge against them was framed on 27.6,2006, to which they pleaded not guilty and claimed the trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 12 witnesses. The gist of evidence led by the material witnesses was as under:-

i) **P.W.4 Rabia Bibi** complainant had narrated almost the same facts as were stated by her in the above mentioned private complaint.

ii) **P.W.5. Mushtaq and P.W.6 Shaista Parveen** had stated about extra-judicial confession allegedly made by the above named lady accused/appellants before them.

iii) **PW-11 Muhammad Saeed** Inspector had conducted the investigation, during which carried on the proceedings fully narrated in his statement.

iv) **PW-12 Dr. Muhammad Naseer Ahmad Kahloon** had conducted post mortem examination of the dead body of Arshad Mehmood deceased and prepared the report (Ex.PK and PK/1). During the said examination, a firearm injury at the head of the deceased was noticed, which was ante-mortem in nature and sufficient to cause death.

5. After examination of the prosecution witness, the case was got closed by the complainant, whereafter statements of the appellants as provided under Section 342, Cr.P.C. were recorded, during which questions emerging out of prosecution evidence were put to them and they denied almost all such questions, while pleading their innocence and false involvement in the case, with mala fide. The appellants did not opt to lead any evidence in their defence or make statements under Section 340(2), Cr.P.C. On completion of the proceedings, the learned Trial Court had pronounced the impugned judgment, in the above mentioned terms. Consequently, the matters in hand.

6. The learned counsel for the appellants has argued that the appellants have falsely been involved, with mala fide, after due deliberation and consultation, despite the fact that they have not committed the alleged occurrence; the true facts of the occurrence were those, which were narrated by Sultan Ahmad, father of the deceased in the FIR (Ex.PB); the complainant after registration of the FIR and proceedings by the Police remained satisfied, for a considerable time, when she came forward, with the above mentioned unacceptable story, which even during trial could not be substituted, hence the charge against the appellants was not at all proved, but the learned Trial Court had erred in not considering the same and passing the impugned judgment, on the basis of false presumptions and assumptions.

7. On the other hand, the learned Deputy Prosecutor General has vehemently opposed the appeals, on the grounds that the findings of the learned Trial Court, which resulted into the impugned judgment being result of correct appreciation and evaluation of the material available on the record, should not be disturbed.

8. We have heard the arguments of both the sides and have perused the record.

9. In this case, initially, the matter was reported to the Police by Sultan Ahmad, father of the deceased, with the above mentioned contention, during which presence or availability of Rabia Bibi (present complainant) or Washfa Noreen (appellant) was not at all shown or alleged anywhere. The father of the complainant had alleged the death of his son by unknown accused. The story narrated by him was also not plausible, because despite murder of his son at 1.00 a.m., he remained satisfied till 4.00 a.m., when he and other family members raised alarm, which attracted Amjad Ali and Abdul Wahid PWs at the spot, but during whole of the trial, they never came forward. The other version was described by Rabia Bibi, (present complainant), whereby she had narrated almost a different story, during which she did not show presence or availability of Sultan Ahmad (complainant of the FIR) anywhere, rather had shown her presence at the spot and witnessing the alleged occurrence. It is pertinent to mention here that during the proceedings by the Police, Rabia Bibi complainant never appeared anywhere and as stated above, she for the first time had come into picture after about ten months of the alleged

occurrence. It is very strange that father of the deceased did not implicate or nominate any of the accused, but Mst Rabia Bibi complainant had implicated her real mother and sister. The said complainant, in the complaint had stated about a window, in the house from where the lady appellants had been witnessing the occurrence and talking with male appellant, but as per the scaled site plan (Ex.PC & Ex.PC/1) prepared by Khalid Mehmood (PW-10) at the spot, there was no window. As per the complainant, the fire was made while placing the pistol at the head of the deceased, but during postmortem examination, no sign of close range firing was observed. According to the complainant, the deceased was tied by a rope with the cot, but neither any rope, nor any cot was recovered or taken into possession. The complainant during cross-examination had admitted that the house of occurrence was located in a populated area, but erroneously during the occurrence alleged by her or thereafter, nobody had attracted as name of none was given in the complaint. It is settled law that to believe or disbelieve a witness all depends upon the intrinsic value of his statement. It is not the person but the statement of that person which is to be seen and adjudged by the Court. In this regard reliance may be made to the case of Abid Ali and 2 others v. The State (2011 SCMR 208), wherein, the Hon'ble Supreme Court of Pakistan, has observed as under:--

> "21. To believe or disbelieve a witness all depends upon intrinsic value of the statement made by him. Even otherwise, there cannot be universal principle that in every case interested witness shall be disbelieved or disinterested witness shall be believed. It all depends upon the rule of prudence and reasonableness to hold that a particular witness was present on the scene of crime and that he is making true statement. A person who is reported otherwise to be very honest, above board and very respectable in society if gives a statement which is illogical and unbelievable, no prudent man despite his nobility would accept such statement.
>
> 22. As a rule of criminal prudence, prosecution evidence is not tested on the basis of quantity but quality of the evidence. It is not that who is giving the evidence and making statement; what is relevant is what statement has been given. It is not the person but the statement of that person which is to be seen and adjudged".

10. Recovery of a pistol at the instance of Muhammad Munawar Hussain (appellant) had been alleged and as per the report of the forensic Science Laboratory, Lahore, the said weapon was in working condition, but as no empty from the spot was collected, or sent for comparison with the weapon, hence the said recovery and report has become inconsequential.

11. PW-5 Mushtaq and PW-6 Shaista Parveen, remained satisfied and never joined into the investigation and for the first time appeared in the court on 12.9.2006 i.e. after about 01 year and 02 months of the alleged occurrence. Their statements being made with the above mentioned alarming and un-explained delay should not be given any weight. It is pertinent to mention here that Sultan Ahmad, complainant of the FIR during whole of the trial, did not come forward and make any statement in the court. The evidence of extra-judicial confession furnished by the above named PWs could not be believed, for the reasons, firstly, why the appellants have made such a confession before said PWs as there is no evidence on the record regarding their social status or influence over the bereaved family, secondly, from the narration of facts given by both these PWs in their statements, the alleged extra-judicial confession made by the appellants, appears to be of joint nature. Apart from above, they are related inter-se and are also related to the complainant party, so, their statements cannot be relied upon without independent corroboration which is very much lacking in this case. Extra-judicial confession is always considered a weak type of evidence. The evidentiary value of the extra-judicial confession (joint or otherwise) came up for consideration before the Hon'ble Supreme Court of Pakistan in the cases of "Sajid Mumtaz and others v. Basharat and others" (2006 SCMR 231) and "Tahir Javed v. The State" (2009 SCMR 166). The relevant portion of the case of Tahir Javed (Supra) reads as under:--

> "10. ...It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time therefore, normally it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of Ahmed v. The Crown PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from

unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:--(1) Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231, (2) Ziaul Rehman v. The State 2001 SCMR 1405, (3) Tayyab Hussain Shah v. The State 2000 SCMR 683, (4) Sarfraz Khan v. The State and others 1996 SCMR 188."

12. All the above mentioned facts and circumstances, lead us to the conclusion that the charge against the appellants could not be proved and established, as per the prescribed criteria. It is well-settled principle of law that if a simple circumstance creates reasonable doubt in a prudent mind, about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. Reliance in this respect may be placed on the case "Tariq Pervaiz v. The State" (1995 SCMR 1345). This view has further been fortified in the case of "Ayub Masih v. The State" (PLD 2002 SC 1048), whereby it has been directed that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind. Relevant portion of the case of Ayub Masih (Supra) reads as under:--

> "It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

13. Resultantly, the above captioned Criminal Appeals Nos. 167-J/2009 and 446-J/2014 are accepted, impugned judgment is set aside and the appellants namely Sajida Parveen, Washfa Noreen and Muhammad Munawar Hussain are acquitted of the charge, while extending them the benefit of doubt. Muhammad Munawar Hussain appellant is in judicial custody, hence be released forthwith, if not required to be detained in any other criminal matter, whereas Mst. Sajida Pareen and Washfa appellants are on bail, through

suspension of their sentence, hence their bail bonds are discharged. As a consequence, the Murder Reference No.456 of 2009 is answered in negative and death sentence of Muhammad Munawar Hussain is not confirmed.

HBT/M-122/L Appeals accepted.

2016 Y L R 2085
[Lahore (Multan Bench)]
Before Muhammad Tariq Abbasi, J
MUHAMMAD JAFFAR---Petitioner
Versus
The STATE and another---Respondents

Criminal Revision No.226 of 2014, heard on 11th March, 2015.

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

----Ss. 336 & 337-A(ii)---Itlaf-i-Salahiyyat-i-Udw, causing Shajjah-i-Mudihah---Accused had not challenged his conviction and sentence, but had requested for instalments, towards payment of amount of 'Arsh'---Deputy Prosecutor General, as well as counsel for the complainant/victim, had no objection in determining the instalments for payment to the amount of 'Arsh', and release of accused from jail---Accused was awarded imprisonment of five years under S.336, P.P.C., and two years under S.337-A(ii), P.P.C.---Accused had served out imprisonment of 4 years, 1 month and 26 days, and remaining portion of sentence was 10 months and 4 days---In the light of settlement arrived at between the parties, un-served portion of sentence, should be forgiven, as the term of sentence which accused had already undergone, was sufficient to meet the ends of justice---Upholding conviction and sentence of 'Arsh' awarded to accused, High Court directed to make payment of amount of 'Arsh' in instalments mentioned in the settlement---Sentence of imprisonment of accused was reduced to already undergone.

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

----S. 331---Recovery of Diyat---Object and purpose---Object and purpose of recovery of Diyat amount, was that the victim should be compensated according to the rate which was prevailing at the time of pronouncement of judgment.

Tariq Mehmood Dogar for Petitioner.
Malik Muhammad Jaffer, D.P.G. for the State.
Mehr Ashraf Sial for the Complainant.
Date of hearing: 11th March, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the judgments dated 24.9.2013 and 22.5.2014, respectively passed by the learned Judicial Magistrate Section-30, Sahiwal and learned Additional Sessions Judge, Sahiwal. Through the above mentioned former judgment, in case FIR No. 239 dated 18.8.2010, registered under Sections 336, 337A(i), 337A(ii), 337F(v), 109, 148/149, P.P.C. at Police Station Kameer, District Sahiwal, the petitioner was convicted and sentenced in the following terms:--

> i) Under Section 336, P.P.C.--'Arsh, equal to 1/2 of "diyat", payable to Abid Hussain complainant/victim, and simple imprisonment for five years.
>
> ii) Under Section 337A(ii), P.P.C. - 'Arsh' equal to 5% of "diyat", payable to the above named complainant/victim and ' simple imprisonment for two years.

It was directed that both the above mentioned sentences shall run concurrently and the petitioner shall be entitled for the benefit provided under Section 382-B, Cr.P.C.

2. The above mentioned conviction and sentence was challenged by the petitioner in shape of an appeal, whereas the complainant also filed revision petition and sought enhancement in the above mentioned sentence. Both the matters were heard by the learned Additional Sessions Judge, Sahiwal and decided through judgment dated 22.5.2014, whereby the above mentioned conviction and sentence awarded to the petitioner by the learned Trial Court was maintained and accordingly both the above mentioned matters were dismissed. Feeling aggrieved, the revision petition in hand has been preferred.

3. The learned counsel for the petitioner has contended that the above mentioned period of sentence awarded to the petitioner by the learned courts below has been served out by him and now he is lying in the jail only due to non-payment of above mentioned 'Arsh', which as per law is payable in instalments, hence the learned counsel has not challenged the conviction and sentence of the petitioner, but has requested for instalments, towards payment of the above said 'Arsh'.

4. The learned Deputy Prosecutor General as well as the learned counsel for the complainant/victim has got no objection in determining the instalments, for payment of the amount of 'Arsh' and release of the petitioner from jail.

5. The learned counsel for the petitioner as well as of the complainant/ victim sat together and then came out with a settlement that during the relevant period, the amount of 'diyat' was prescribed by the government as Rs.25,32,073, hence half of the said 'diyat' amount becomes Rs.12,66,037/-, whereas 5% of the said 'diyat' is Rs.1,26,603/-, hence as per the judgment dated 24.9.2013, total amount of 'Arsh' payable by the petitioner to Abid Hussain complainant/victim becomes Rs.13,92,640/-. It has been settled that out of the said amount, a sum of Rs.4,00,000/- would be paid, on behalf of the petitioner to the above named complainant/victim, who is in attendance, today in the court, whereas the remaining amount of Rs.9,92,640/- would be payable in four equal instalments, each of Rs.2,48,160 payable after every 1-1/2 month and that first instalment shall be payable after 1-1/2 month of release of the petitioner from the jail and the rest, as stated above. Consequently, Rs.4,00,000/- has been paid and received by Abid Hussain complainant/victim, in the court.

6. The object and purpose of recovery of DIYAT amount is that the victim should be compensated according to the rate, which is prevailing at the time of pronouncement of judgment. Section 331 of Pakistan Penal Code, 1860 provides payment of 'diyat' in instalments spreading over a period of five years from the date of final judgment. The said provision reads as under:--

> "**Payment of diyat.**---(1) The diyat may be made payable in lump sum or in instalments spread over a period of [five] year from the date of the final judgment.
> (2) Where a convict fails to pay diyat or any part thereof within the period specified in sub-section (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until the diyat is paid full or may be released on bail if he furnishes security [or surety] equivalent to the amount of diyat to the satisfaction of the Court [or may be released on parole as may be prescribed in the rules].
> (3) Where a convict dies before the payment of diyat or any part thereof, it shall be recovered from his estate."

7. As per report made by the Superintendent, Central Jail, Sahiwal, where the petitioner is confined, he was dispatched to jail on 14.1.2011, hence till now he has served out imprisonment of 04 years, 01 month and 26 days and that the remaining portion is 10 months and 04 days. In the light of the above mentioned settlement, the above said un-served portion of sentence should be forgiven, as the term of sentence, which the petitioner has already undergone, is sufficient to meet the ends of justice.

8. Resultantly, the above mentioned conviction and sentence of 'Arsh' awarded to the petitioner by the learned Trial Court and maintained by the learned Appellate court is upheld, with a direction to make its payment as per the above mentioned settled schedule. In the same manner, conviction of the petitioner in offences under Sections 336 and 337A(ii), P.P.C. is also maintained, but sentence of imprisonment is reduced to the above mentioned period, which he has already undergone. It is made clear that if the petitioner, makes even a single default in payment of the above mentioned instalments, then whole of the remaining amount shall become due and if not paid, he shall be taken into custody and sent back to jail till realization of whole of the amount, as provided under Subsection (2) of Section 331 mentioned above

9. With the above mentioned observations/modification in term of imprisonment, the revision petition is dismissed.

HBT/M-95/L Order accordingly.

P L D 2017 Lahore 106

Before Muhammad Tariq Abbasi, J

HASSAN---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.1888-M of 2015, decided on 16th February, 2016.

Criminal Procedure Code (V of 1898)---

----Ss. 31, 439(3), 439-A & 561-A---Enhancement of sentence of imprisonment and compensation by revisional court beyond sentencing powers of Trial Court---Scope---Trial court, convicting the accused of the charge under S. 377, P.P.C. sentenced him to undergo imprisonment for 3 years along with payment of compensation, but the revisional court enhanced the sentence of imprisonment to 10 years and also enhanced the compensation awarded by the Trial Court---Question before the High Court was whether under revisional jurisdiction, the sentence exceeding to the competency of Trial Court could be awarded---Under S. 439-A, Cr.P.C, Sessions Judge, while exercising revisional jurisdiction, would exercise the same powers and jurisdiction as provided under S. 439, Cr.P.C---Section 439, Cr.P.C provided that under revisional jurisdiction, a sentence greater than the competency of Trial Court could not be awarded---Assistant Sessions Judge was a judicial officer, who for all purposes, exercised powers which were vested in Magistrate of Section 30, which meant that the latter could rightly be termed as an Assistant Sessions Judge---Trial Court/Magistrate Section-30 was not competent to impose sentence to an accused beyond 7 years imprisonment; accordingly, as provided under S. 439 (3), Cr.P.C, the revisional court was not competent to enhance the sentence beyond the jurisdiction of the Trial Court---Enhancement of sentence to 10 years by the revisional court was therefore illegal ab initio and abuse of process of the court, which could be looked into under inherent powers of S. 561-A, Cr.P.C---High Court, setting aside the impugned order of the revisional court as to enhancement of the sentence of

imprisonment, maintained the same regarding enhancement of compensation---Application under S. 561-A, Cr.P.C was partially allowed accordingly.

Mst. Sarwar Jan v. Ayub and another 1995 SCMR 1679 rel.

Shahid Nazir Jarra for Petitioner.

Dr. Muhammad Anwar Khan Gondal, Addl. Prosecutor-General for the State.

Javed Imran Ranjha for Respondent No.2.

Date of hearing: 16th February, 2016.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this petition, the judgment dated 22.4.2015, passed by the learned Additional Sessions Judge, Phalia, District Mandi Bahauddin, has been called in question, whereby not only an appeal filed by Hassan (hereinafter referred to as the petitioner), against his conviction, recorded through the judgment dated 6.4.2015, by the learned Magistrate Section-30, Phalia, District Mandi Bahauddin has been dismissed, but revision petition preferred by Mansabdar (hereinafter referred to as the respondent), for enhancement of sentence has been allowed.

2. The petitioner was challaned in FIR No. 286 dated 14.8.2013, registered under Section 377, P.P.C., at Police Station Phalia, with the allegations that he committed unnatural offence with Abdul Rehman, son of the complainant; he was tried in the court of learned Magistrate Section-30, Phalia, during which formal charge against him was framed, which was denied, hence the prosecution evidence was summoned and recorded; as many as 11 witnesses had got recorded their evidence, before the learned Trial Court, during statements of whom the documents fully detailed in their respective statements were also brought on the record; on conclusion of the prosecution evidence and closure of the case, the petitioner was examined under Section 342 Cr.P.C., during which the questions arising out of the prosecution evidence were put to him, but he denied almost all such questions, while pleading his innocence and false involvement in the case, with mala fide; he

did not opt to lead any evidence in his defence or make statement under Section 340(2), Cr.P.C; finally through the judgment dated 6.4.2015, on the basis of tender age, he was convicted, for charge under Section 377, P.P.C. and sentenced to simple imprisonment for 03 years and fine of Rs.5,000/-, in default whereof to further undergo 15 days' simple imprisonment; he had challenged his conviction and sentence, through an appeal before the learned concerned Sessions Court, whereas the respondent, by filing a revision petition, had sought enhancement in the sentence of the petitioner; both the matters were decided by the learned Additional Sessions Judge, through the impugned judgment dated 22.4.2015, whereby the appeal preferred by the petitioner was dismissed, whereas the revision petition filed by the respondent was accepted and while maintaining conviction of the petition, his sentence was enhanced from 03 years S.I. to 10 years' R.I. The amount of fine was also enhanced from Rs.5 000/- to Rs.50,000/-, with a direction that Rs.30,000/- would be Payable to the victim as compensation under Section 544-A, Cr.P.C., otherwise the petitioner would further suffer simple imprisonment for 06 months. Consequently, the petition in hand.

3. The main stance of the learned counsel for the petitioner is that as the learned Trial Court was competent to award sentence up to 07 years, hence the learned revisional court while enhancing the sentence to 10 years' R.I. has exceeded its jurisdiction, therefore, the impugned judgment is not sustainable in the eye of law.

4. Conversely, the learned Additional Prosecutor General, assisted by the learned counsel for the respondent has supported the impugned judgment, with the contentions that when from the attending facts and circumstances, the learned revisional court had reached at the conclusion that sentence awarded by the learned Trial Court was unjustified, it had accordingly enhanced the same, hence committed no illegality.

5. Arguments of all the sides have been heard and the record has been perused.

6. The main question is whether, under revisional jurisdiction, the sentence exceeding to the competency of learned Trial Court can be awarded or not. Section 439 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the Code), which deals with revisional powers of High Court, reads as under:--

> "**High Court's powers of revision**.--(1) In the case of any proceeding the record of which has been called for by itself [...] or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a court by section 338, and may enhance the sentence; and, when the Judges composing the court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.
>
> (3) Where the sentence dealt with under this section has been passed by Magistrate [...], the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by Magistrate of the first class.
>
> [(4) Nothing in this section shall be deemed to authorize a High Court:
>
> (a) to convert a finding of acquittal into one of conviction; or
>
> (b) to entertain any proceedings in revision with respect to an order made by the Sessions Judge under section 439-A.]
>
> (5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under subsection (2) of showing cause why his sentence should not be enhanced, shall, in showing cause, be entitled also to show cause against his conviction."

7. Section 439-A of the Code, empowers a Sessions Judge to exercise revisional jurisdiction, in the following manner:--

"**Sessions Judge's powers of revision**.--(1) In the case of any proceeding before a Magistrate the record of which has been called for by the Sessions Judge or which otherwise comes to his knowledge, the Sessions Judge may exercise any of the powers conferred on the High Court by section 439.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him under any general or special order of the Sessions Judge."

8. A plain reading of the above cited provision shows that while exercising revisional jurisdiction, a Sessions Judge would have the same powers and jurisdiction as provided under Section 439 of the Code. Although section 439 of the Code, gives powers of revision, but subject to certain restrictions, one is described in subsection (3) that under revisional jurisdiction, a sentence greater than the competency of trial court could not be awarded.

9. Under Section 31 of the Code, power of High Courts, Sessions Judges and Assistant Sessions Judges to pass sentences has been detailed as under:-

"**Sentences which High Courts and Session Judges may pass**.--(1) A High Court may pass any sentence authorized by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or of [imprisonment for a term exceeding seven years]."

10. Undoubtedly, an Assistant Sessions Judge is a judicial officer, who for all purposes, exercises powers which vest in Magistrate Section-30 of the Code. Meaning thereby that a Magistrate Section-30 can rightly be termed as an Assistant Sessions Judge. In this way, a Magistrate Section-30 is not competent to impose sentence to an accused beyond 07 years' imprisonment.

11. From the above mentioned discussion, it is evident that competency of the learned Trial Court, being Magistrate Section 30 was to award maximum sentence of 07 years' R.I. In this way, as provided under Section 439(3) of the Code, the learned revisional court was not competent to enhance the sentence, beyond jurisdiction of the learned Trial Court. Therefore, the findings of the learned revisional court, recorded in the impugned judgment, towards the above mentioned enhancement in sentence of the petitioner are ab initio illegal and abuse of the process of court, which surely can be looked into, under inherent power of Section 561-A of the Code, which is meant for the following purposes:--

i) To give effect to any order under the Code.

ii) To prevent abuse of process of any court.

iii) To secure the ends of justice.

If to fortify the above mentioned view, any case law is needed, reference can be made to the case Mst. Samar Jan v. Ayub and another" reported as 1995 SCMR 1679.

12. For what has been discussed above, the petition in hand is partially accepted and the impugned judgment, towards enhancement in sentence of imprisonment of the petitioner is set aside. However, the amount of fine and compensation prescribed by the learned revisional court is maintained.

SL/H-14/L Order accordingly.

PLJ 2017 Lahore 147 (DB)

***Present*: MUHAMMAD TARIQ ABBASI AND MIRZA VIQAS RAUF, JJ.**

WASSI ULLAH KHAN--Petitioner

versus

STATE, etc.--Respondents

W.P. No. 19737 of 2015, decided on 15.2.2016.

Constitution of Pakistan, 1973--

----Art. 199--Bail in accountability Court, refusal of--Allegations of misappropriation/embezzlement on pretext of trading of share in stock exchange--Reference against accused--Civil liabilities--Entitlement of bail--Validity--Mere pendency of proceedings under Companies Ordinance, 1984 are not sufficient to absolve petitioner from criminal liability which is otherwise made out from allegations levelled in Reference--Even otherwise, it is well settled principle of law that civil and criminal proceedings can proceed side by side--At bail stage, only tentative assessment is required and deeper appreciation is not permissible--Petitioner is involved in alleged offence and he being director of company had cheated public at large--Petition was dismissed. [P. 148] A & B

Malik Akhtar Javaid, Advocate for Petitioner.

Mr. Arif Mehmood Rana, Addl. D.P.G. alongwith Dy. Director NAB for Respondents.

Mr. Umair Mansoor, Advocate for Respondent No. 5.

Mr. Muhammad Ali Malik, Advocate for Respondent No. 6.

Date of hearing: 15.2.2016.

ORDER

Through instant petition, the petitioner namely Wassi Ullah Khan seeks post arrest bail in Accountability Court Reference No. 52 of 2015.

2. Precisely the allegations against the petitioner are that being Director of M/s. Wassi Securities (SMC) Private Limited, he mis-appropriated/embezzled Rs. 67.76 million from the accounts of general public on the pretext of trading of shares in Lahore Stock Exchange.

3. Learned counsel for the petitioner submitted that no offence is made out against the petitioner under the NAB Ordinance, 1999. He added that the petitioner has already moved winding up petition and in view of the pendency of the same, NAB authorities are precluded to proceed against the petitioner. Learned counsel maintained that at the most, a civil liability is made out from the allegations levelled in the Reference and the petitioner is

entitled to be released on bail as he is suffering behind the bars before his guilt is proved.

4. Conversely, learned Addl. Deputy Prosecutor General appearing on behalf of NAB has vehemently opposed the instant petition.

5. We have heard the learned counsel for the petitioner as, well as learned Addl. Deputy Prosecutor General for NAB and also perused the record with their assistance.

6. The prosecution against the petitioner was started on the complaint of Chairman, Securities and Exchange Commission of Pakistan on the allegations of mis-appropriation/embezzlement of Rs. 52.48 millions from the accounts of general public on the pretext of trading of shares in the Lahore Stock Exchange. The inquiry was initiated on 19.05.2014 whereafter the same was upgraded into investigation on 16.10.2014. The petitioner was arrested on 20.5.2015 and after investigation, Reference No. 52/2015 was filed in the Accountability Court Lahore against the petitioner for an amount of Rs. 67.76 millions as total liability of the petitioner. As per record, there are 152 claimants who have voiced their grievance before the NAB authorities on account of alleged embezzlement committed by the petitioner being Director of M/s. Wassi Securities (Pvt.) Limited. The petitioner though has filed company petition for winding up of his company before the learned Company Judge. However, the same was admittedly dismissed by way of order dated 25.11.2015, against which, an Intra Court Appeal was filed which is statedly pending. Mere pendency of proceedings under the Companies Ordinance, 1984 are not sufficient to absolve the petitioner from the criminal liability which is otherwise made out from the allegations levelled in the Reference.

7. Even otherwise, it is well settled principle of law that civil and criminal proceedings can proceed side by side. At bail stage, only tentative assessment is required and deeper appreciation is not permissible. There are sufficient reasons to believe that the petitioner is involved in the alleged offence and he being the Director of the Company had cheated the public-at-large.

8. In view of the above discussion, we are not inclined to allow the instant petition. Consequently, the same is **dismissed**.

(R.A.) Petition dismissed

PLJ 2017 Cr.C. (Lahore) 836 (DB)
[Bahawalpur Bench Bahawalpur]
***Present*: MUHAMMAD TARIQ ABBASI AND**
MUHAMMAD BASHIR PARACHA, JJ.
SIKANDAR ILYAS and another--Petitioners
versus
STATE and another--Respondents

Crl. Misc. No. 2358-B of 2016 & 162-B of 2017, decided on 21.2.2017.

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

----S. 497--Anti-Terrorism Act, (XXVII of 1997), Ss. 7 & 9--Arms Ordinance, (XX of 1965), S. 13--ESA, S. 4--Bail, grant of--Rule of consistency--Principle of consistency is fully applicable to the present petitioners and as held by the august Supreme Court of Pakistan--They also deserve the same concession, as provided to their above named co-accused--Bail was granted. [P.] A 1979 SCMR 9 & 1982 SCMR 909, *ref*.

Mr. Muhammad Zafar Iqbal Awan, Advocate for Petitioners (in Crl. Misc. No. 2358-B/2016).

Kh. Muhammad Aslam, Advocate for Petitioner (in Crl. Misc. No. 162-B/2017).

Malik Muhammad Latif, Dy.P.G. for Respondents.

Date of hearing: 21.2.2017.

ORDER

This single order shall decide the above captioned post arrest bail applications, as both are outcome of same FIR No. 44, dated 9.5.2016, registered under Sections 7 & 9 of Anti-Terrorism Act, 1997, Section 13 of the Arms Ordinance XX, 1965 and Section 4 of ESA, at Police Station CTD, District Multan.

2. The precise facts, as per FIR, are that when due to a spy information, the present petitioners, along with their co-accused namely Muhammad Nauman, Usman Arif and Mohib Ullah were apprehended and searched, from the possession of everyone, explosive substance and other articles, fully detailed in the FIR, were recovered.

3. Arguments heard and record perused.

4. It is alleged that Sikandar Ilyas petitioner was lifted from his house on 31.03.2016 and taken to some unknown place, whereafter, while concocting a false story, he was roped in the case; regarding taking of the

above named petitioner to some unknown place, Rapat No. 56, dated 31.03.2016, was chaked out at Police Station Allama Iqbal Town, Lahore. On behalf of Abdul Hameed petitioner, similar allegations have been leveled and that lifting of the said petitioner was duly brought into the notice of the SHO of Police Station Mustafa Town, Lahore and entertained through Diary No. 69-5B-MT, dated 31.03.2016.

5. In the light of the above stated situation, case of the present petitioners has become at par with their co-accused Muhammad Nauman, from whom similar kind of recovery was alleged and on his behalf, the above mentioned facts & circumstances were narrated, whereupon the Hon'ble Supreme Court of Pakistan, through order dated 12.01.2017, passed in Criminal Petition No. 1188/2016, had, admitted bail to him.

6. The learned Prosecutor has failed to draw any distinction between the case of the present petitioners and that of their above named co-accused, who has been treated in the above mentioned manner. Consequently, we are of the considered opinion that principle of consistency is fully applicable to the present petitioners and as held by the august Supreme Court of Pakistan in the cases titled *"Muhammad Fazal alias Bodi vs. The State"* (1979 SCMR 9) and *"Abdus Sattar and others vs. The State"* (1982 SCMR 909), they also deserve the same concession, as provided to their above named co-accused.

7. Resultantly, the petitions in hand are allowed and the petitioners are admitted to bail, subject to their furnishing bail bonds, in the sum of Rs. 2,00,000/- (Rupees two lac only) each, with two sureties, each, in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) Bail allowed

PLJ 2017 Cr.C. (Lahore) 838 (DB)
[Bahawalpur Bench Bahalwapur]
***Present*: MUHAMMAD TARIQ ABBASI AND**
MUHAMMAD BASHIR PARACHA, JJ.
SAJJAD AHMAD--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 363-B of 2017, decided on 28.2.2017.

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

----S. 497--ESA, Ss. 4 & 5--Anti-Terrorism Act, (XXVII of 1997), S. 7--Bail, grant of--Further inquiry--Application to S.H.O. DPO--No action was taken by police--Another application u/S. 22-A & 22-B, Cr.P.C. to sessions judge was dismissed being infructuous--Petitioner was in custody of police and police registered present F.I.R. after almost 80 days of his arrest--In given circumstances, whether petitioner was already in custody of police and recovery was effected from accused, make case of petitioner as one of further inquiry--Petition was allowed. [P. 839] A & B

Mr. Zafar Iqbal Awan, Advocate for Petitioner.

Ch. Asghar Ali Gill, Dy.P.G. for Respondents.

Date of hearing: 28.2.2017.

ORDER

Through this Criminal Miscellaneous, Sajjad Ahmad petitioner seeks his post arrest bail in case F.I.R. No. 03 dated 23.01.2017 registered under Sections 4,5 ESA and Section 7 of Anti-Terrorism Act, 1997 at Police Station CTD, Multan.

2. Precisely, according to the contents of F.I.R., on 23.01.2017 at about 2.40 p.m, petitioner was apprehended and one hand grenade along with detonator and assembly was recovered from the right side pocket of the petitioner. Accordingly, the instant F.I.R was registered.

3. Arguments heard. Record perused.

4. On 02.11.2016, Qurat-ul-Ain wife of Sajjad Ahmad petitioner moved an application to S.H.O. P.S Hafizabad with the contention that at about 7:00 p.m, police employees while muffled faces tress-passed into the shop of her husband and took him away. On 19.11.2016, when the S.H.O. P.S Hafizabad did not taken any action on the application submitted by Qurat-ul-Aain, she moved application before DPO Hafizabad with the same averments as was mentioned in the application submitted by her before

S.H.O. Hafizabad. On 29.11.2016, said Qurat-ul-Ain moved an application before DCO Hafizabad who sent the same to the DPO Hafizabad on the same day. On 25.11.2016, when no action was taken by the Police, Qurat-ul-Ain filed application under Sections 22-A & 22-B of Cr.PC before learned Sessions Judge, Hafizabad, the same was entrusted to learned Additional Sessions Judge, Hafizabad. Record reveals that after filing of said application on 01.12.2016 police registered a case under Section 365, P.P.C. Hence her petition under Section 22-A & 22-B of Cr.PC was dismissed being infructuous. On the very first day *i.e.* 02.11.2016 wife of the petitioner moved an application against the police for taking his husband with them, whereas, according to the contents of F.I.R., police of P.S CTD, Multan arrested the petitioner on 23.01.2017. Attested copies of documents attached with the petition reflect that the petitioner was in the custody of police since 02.11.2016 and the police registered the present F.I.R. after almost 80 days of his arrest.

5. In the given circumstances, whether the petitioner was already m the custody of police and the recovery was effected from the accused, make the case of the petitioner as one of further inquiry. Hence, this petition is allowed and petitioner is admitted to bail subject to furnishing bail bonds in the sum of Rs. 100,000/- (One hundred thousand only), with one surety in the like amount to the satisfaction of the leaned trial Court.

6. The findings recorded above are of tentative in nature, which will not affect the merits of the case in any manner.

(A.A.K.) Bail allowed

2017 Y L R 686

[Lahore (Multan Bench)]

Before Qazi Muhammad Amin Ahmed and Muhammad Tariq Abbasi, JJ

MUHAMMAD IQBAL alias BALI---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.663 and Murder Reference No.149 of 2009, heard on 2nd December, 2014.

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

----S. 302---Qatl-i-amd---Appreciation of evidence---Sentence, reduction in---Ocular version of the witnesses having remained consistent and corroborative during cross-examination, could not be contradicted---No material contradiction in the statements of the witnesses, could be pointed out or observed---Complainant, though was close relative of the deceased yet no grudge or enmity with accused was on record---No reason, cause or justification existed to discard statement of the complainant only on the basis of his relationship with the deceased as the same was confidence inspiring---Both the witnesses had successfully established and justified their presence, and availability at the spot---Version of the witnesses, had been supported by the medical evidence---Fact that accused had fired at the deceased with pistol recovered from him was confirmed---Motive alleged in the complaint was not proved or established and was shrouded in mystery---Impugned judgment of conviction of accused, being based on correct appreciation and evaluation of the material available on record, was quite justified---Cause of occurrence, being still shrouded in mystery and accused having made only one fire shot, without any repetition, due consideration was required towards quantum of sentence awarded to accused by the Trial Court---Maintaining the conviction of accused, his sentence was modified from death to imprisonment for life, in circumstances.

Hasil Khan v. The State and others 2012 SCMR 1936 rel.

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

----S. 302---Criminal Procedure Code (V of 1898), Ss.544-A & 382-B---Qatl-i-amd---Appreciation of evidence---Grant of compensation for heirs of the deceased---Trial Court despite holding accused guilty of qatl-i-amd, refused to grant compensation as provided under S.544-A, Cr.P.C., on the ground that the deceased being a criminal record holder, and involved in 32 criminal cases, his legal heirs were not entitled to any compensation---Provision of

S.544-A, Cr.P.C., was mandatory in nature, and compensation under said section could not be withheld, unless there were strong reasons for refusal thereof, which must be specifically highlighted---Nothing was available on record, if the deceased was convicted in any criminal case---Mere registration of criminal cases against accused, had not given any licence to anyone to take law into his own hands, and commit his murder---When it was proved on the record, that death of the deceased was at the hands of accused and he was convicted and sentenced, grant of compensation under S.544-A, Cr.P.C. was obligatory---Compensation of Rs.5,00,000 was also granted under S.544-A, Cr.P.C., which if realized, would be paid to the legal heirs of the deceased, as per their legal entitlement, otherwise, accused would undergo simple imprisonment for six months---Benefit of S.382-B, Cr.P.C. was also provided to the accused .

The State v. Rab Nawaz and another PLD 1974 SC 87; Khalid and others v. The State 1975 SCMR 500 and Saeed Shah and others v. The State and others 2005 MLD 389 rel.

Mirza Azeem Baig and Iftikhar Ibrahim Qureshi for Appellant.

Malik Riaz Ahmad Saghla, D.P.G. for the State.

Date of hearing: 2nd December, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through this judgment, the above captioned Criminal Appeal and Murder Reference shall be disposed of, as both are outcome of single judgment dated 05.08.2009, passed by the learned Sessions Judge, Sahiwal, whereby in case FIR No. 55, dated 03.02.2008, registered under Section 302, P.P.C. at Police Station Noor Shah, District Sahiwal, Muhammad Iqbal alias Bali (hereinafter referred to as "the appellant"). has been convicted and sentenced to death.

2. The facts are that Naseer Ahmad complainant (PW-8) made a statement/Fard Biyan (Ex.PE), with the contention that on 03.02.2008, at about 10.00 a.m. he for personal work was available at Chak No.53/GD; his nephew (Bhanja) Murtaza alias Murti (deceased) along with Jaffer Ali (PW-6) and Muhammad Iqbal (given up PW) arrived there on a motor cycle; when they reached at the thoroughfare, opposite to the house of Zahoor, due to rain, there was mud in the street; the appellant, armed with .30 bore pistol, attracted and raised a 'Lalkara' that the deceased would be taught a taste of helping his opponents; the appellant made a fire shot, which landed at right cheek of the deceased and passed through and through, whereupon he fell down; the appellant while making aerial firing, fled away; Murtaza alias Murti

succumbed to the injuries at the spot; the motive was that the appellant had grudge against the deceased for helping Haq Nawaz etc., the opponents of the appellant. On the basis of the above said Fard Biyan, the case was registered through FIR (Ex.PH/1). The investigation was carried on and the appellant was challaned. The learned Trial Court charge sheeted him. He pleaded not guilty and claimed the trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 09 witnesses. Gist of evidence led by the Material witnesses was as under:--

i) **PW-1 Dr. Mabashar Hussain Sherazi** conducted postmortem examination of dead body of Murtaza alias Murti on 3.2.2008 through report (Ex. PA) and pictorial diagrams (Ex.PA/1 and Ex.PA/2). At that time the following injuries at the dead body were observed:--

1) A firearm entry wound 1 cm x 1 cm deep going on the right cheek near right border of lips.

2) A firearm exit wound 1 cm x 1 cm deep going on the left side of neck just below left ear.

3) Abrasion 6 cm x 1/2 cm on front mid of right leg.

As per the doctor, the injury. No. 1, which was caused by firearm and anti-mortem in nature, was result of death, which was immediate.

ii) **PW-4 Nasarullah Constable** transmitted the parcels containing blood stained earth and empty, from the Police Station to the office of Chemical Examiner, Lahore. He also witnessed the proceedings, during which the appellant got recorded .30 bore pistol (P-6) from his residential house and taken into possession by the Investigating Officer, through Memo (Ex.PD). The parcel of pistol was also deposited by him in the office of Forensic Science Laboratory, Lahore.

iii) **PW-8 Naseer Ahmad Complainant** as well as an eye-witness of the alleged occurrence narrated almost the same facts as were stated by him in the complaint (Ex. PH).

iv) **PW-6 Jaffer Ali**, another eye-witness of the occurrence supported and corroborated the version of the above named complainant (PW-8). He also attested the memos (Ex.PC, Ex.PE, Ex.PF & Ex.PG), through which the last worn clothes of the deceased, crime empty got recovered from the spot, motor cycle and blood stained earth were respectively taken into possession by the investigating officer.

v) **PW-9 Muhammad Ashraf, S.I.** investigated the Case. He recorded statement (Ex.PH) of the complainant; inspected the dead body and prepared the injury statement (Ex.PJ) and inquest report (Ex.PK); collected the blood stained earth from the spot and took it into possession through Memo (Ex.PG); collected an empty (P-7) of .30 bore pistol from the spot and secured it through Memo (Ex. PE); took into possession the motor cycle through Memo (Ex.PF); drafted the rough site plan (Ex.PL) of the spot; secured the last worn clothes (P-1 to P-5) of the deceased through Memo (Ex.PC); got prepared the scaled site plan (Ex.PB and Ex.PB/1) from the draftsman; arrested the appellant and obtained his physical remand; secured the pistol (P-6) through Memo (Ex. PD), which was got recovered by the appellant; recorded statements under Section 161, Cr.P.C. of the relevant witnesses at relevant stages.

3. After examination of the prosecution witnesses, the reports of the chemical examiner and Forensic Science Laboratory, Lahore were tendered in evidence as Ex.PM and Ex.PN respectively and case for the prosecution was closed. Thereafter, the appellant was examined under Section 342, Cr.P.C., during which, the questions arising out of the prosecution evidence were put to him and he denied almost all such questions. The question "why this case against you and why the PWs have deposed against you?" was replied by him in the following words:--

> "It is a false case. The PWs have deposed falsely due to their relationship inter-se and with the deceased and being inimical towards me. I was also earlier involved in a false case and was acquitted and after my release from jail, Nazim of the area Mazhar Shah Khagga has again got me involved in this false case. It was an unwitnessed occurrence. The assailant was not known. I was not present at the spot at the time of occurrence. The case was registered after due deliberations and preliminary inquiry due to the influence of Mazhar Shah Khagga who is an influential person of the area. The deceased was a hardened criminal and was proclaimed offender in several criminal cases and had many enemies. Many persons were made to join the investigation as suspects who were let of by the police for monitory considerations. I am absolutely innocent."

He opted to lead evidence in his defence, but refused to make statement under section 340(2), Cr.P.C. In defence, he only tendered previous record of the deceased as Ex.DB and closed the defence.

4. After completing all the required proceedings, the learned Trial Court had decided the case, through the impugned judgment, whereby convicted and sentenced the appellant in the above mentioned terms. Consequently, Criminal Appeal and Murder Reference in hand.

5. The learned counsel for the appellant have argued that it was an unseen occurrence, but false witnesses were introduced with mala fide, who falsely deposed against the appellant; the statements of the witnesses being full of material contradictions are not believable; the witnesses failed to establish their presence and availability at the spot; the recovery of the pistol could not be established; the charge against the appellant was not proved, hence he was entitled for acquittal, therefore the impugned judgment is not sustainable under the law.

6. Conversely, the learned Deputy Prosecutor General has vehemently opposed the appeal, with the contention that sufficient material in shape of oral as well as documentary evidence to connect the appellant with the occurrence was brought on the record, hence as the charge against him was successfully proved, therefore, the learned Trial Court had rightly passed the impugned judgment, which being well-reasoned and call of the day warrants no interference.

7. Arguments of both the sides have been heard and the record has been perused.

8. Naseer Ahmad complainant (PW-8) and Jaffer Ali (PW-6), categorically deposed that in their presence and within their view, the appellant while armed with .30 bore pistol attracted at the spot, raised a 'lalkara' and then made a fire shot, which landed at right side cheek of the deceased and passed through and through, consequently the deceased died then and there. The above mentioned version of the witnesses could not be contradicted, as during the cross-examination, they remained consistent and corroborative. Neither during the arguments nor perusal of the record, any material contradiction in the statements of the witnesses could be pointed out or observed. Therefore, the arguments of the learned counsel for the appellant that the statements of the witnesses are full of material contradictions are nothing, but bald assertion. Although the complainant is a close relative of the deceased, but his no grudge or enmity with the appellant could be brought on the record. Hence no reason, cause or justification to discard his statement, which otherwise is confidence inspiring, only on the basis of his relationship with the deceased. Both the above named witnesses have successfully established and justified their presence and availability at the spot. Therefore, the objection of the

defence towards non-availability of the witnesses at the spot is discarded. The above mentioned version of the witnesses has been supported by the medical evidence led by Dr. Mubashar Hussain Sherazi (PW-1) and the report (Ex.PA, Ex.PA/1 and Ex.PA/2), as the injuries described by them were confirmed on the dead body.

9. It is available on the record that the empty recovered from the spot on 3.2.2008 was deposited in the office of Forensic Science Laboratory on 6.2.2008. Thereafter, the pistol (P-6) was recovered from the appellant on 4.3.2008, which for comparison with the above mentioned empty was also sent to the laboratory. Due proceedings in the laboratory were carried on and the report (Ex.PN) was prepared, according to which the empty was fired from the above mentioned pistol. The said fact has also confirmed that it was the appellant, who fired at the deceased with the above mentioned pistol.

10. In the complaint/Fard Biyan (Ex.PH) and the FIR (Ex.PH/1), the alleged motive was described as grudge of the appellant against the deceased that he was helping the opponents of the appellant. But when the complainant appeared in the witness box as PW-8, failed to narrate the above mentioned alleged motive. He rather contended that there was no previous enmity. In this way, the motive alleged in the complaint was not proved or established. This fact was also highlighted by the learned Trial Court under Para No. 13 of the impugned judgment. Consequently either the motive was not known to the complainant or deliberately concealed from everyone, including the learned Trial Court. Till now, the motive is shrouded in mystery.

11. For what has been discussed above, we have come to the conclusion that the impugned judgment, towards conviction of the appellant, being based on correct appreciation and evaluation of the material available on the record is quite justified. As stated above, the motive alleged in the complaint could not be proved and the cause of occurrence is still shrouded in mystery and the appellant made only one fire shot without any repetition, hence according to our opinion, due consideration is required towards quantum of sentence awarded to him by the learned Trial Court. Our above mentioned view has been fortified by the dictum laid down in case "Hasil Khan v. The State and others" (2012 SCMR 1936), whereby the august Supreme Court of Pakistan held as under:--

> " ..Moreover, as rightly observed by the learned Trial Court the immediate motive remained shrouded in mystery and the Trial Court rightly did not award the maximum sentence of death provided under

section 302(b), P.P.C. to the appellant. The enhancement of sentence by the learned High Court, we observe with respect, is not in accord with the law laid down by this court in Muhammad Ashraf Khan Tareen v. The State (1996 SCMR 1747) wherein at page 1755, the Court dismissed complainant's appeal and did not enhance the sentence by holding as follows:--

'In respect of sentence, learned counsel for the complainant/State wanted conversion of the life imprisonment into death sentence. Learned counsel cited case of Iftikhar Ahmad v. The State (PLD 1990 Supreme Court 820) where criminal petition by the complainant challenging reduction of sentence by the High Court, was dismissed by this Court on the ground that the principle of origin of offence remained shrouded in mystery. This authority does not further prayer of the complainant for awarding death penalty to the appellant. In the present case prosecution did not allege any specific motive for commission of the offence. In the circumstances, the appellant could not have been awarded the death penalty.'

10. Similarly, in Jehanzeb v. The State (2003 SCMR 98), the Court altered the sentence of death of the convict to life imprisonment by observing that where motive alleged by the prosecution has not been satisfactorily proved, this may be considered as a mitigating circumstance qua the quantum of sentence."

12. Resultantly, while maintaining the conviction of the appellant, awarded by the learned Trial Court, through the impugned judgment, his sentence is modified from death to imprisonment for life.

13. It has been noticed with great concern that the learned Trial Court on one hand, held the appellant guilty for qatl-i-amd of the above named deceased, hence convicted and sentenced him, but on the other hand refused to impose compensation against him, as provided under section 544-A, Cr.P.C., on the ground that the deceased was a record holder and involved in 32 cases, hence his legal heirs were not entitled for any compensation. Section 544-A, Cr.P.C. reads as under:--

[544-A. Compensation to the heirs of the person killed, etc. [(1) Whenever a person is convicted of an offence in the commission whereof the death of or hurt, injury, or mental anguish or psychological damage to, any person is caused or damage to or loss or destruction of any property is caused, the Court shall when convicting such person, unless for reasons to be recorded in writing it otherwise

directs, order the person convicted to pay to the heirs of the person whose death has been caused, or to the person hurt or injured, or to the person to whom mental anguish or psychological damage has been caused, or to the owner of the property damaged, lost or destroyed, as the case may be, such compensation as the Court may determine having regard to the circumstances of the case";] and

(2) . . . . . .

(3) . . . . . .

(4) . . . . . .

(5) An order under this section may also be made by an appellate Court or by a Court when exercising its powers of revision.

From bare reading of the above mentioned provision, it is crystal clear that it is mandatory in nature and compensation under it could not be withheld, unless there are strong reasons for refusal, which must be specifically highlighted. Nothing is available on the record if the deceased was convicted, in any criminal case. Mere registration of criminal cases had not given any licence to anyone to take law into his own hands and commit his murder. When it was proved on the record that death of the deceased was at the hands of the appellant and he was convicted and sentenced, then imposition of the compensation under Section 544-A Cr.P.C. was obligatory. In this regard, reliance may be placed to the cases "The State v. Rab Nawaz and another" (PLD 1974 Supreme Court 87) and "Khalid and others v. The State" (1975 SCMR 500). If the learned Trial Court has not awarded the compensation as required under section 544-A, Cr.P.C, even then this Court is fully empowered to award the same. We are fortified by the dictum laid down in case "Saeed Shah and others v. The State and others" (2005 MLD 389). Resultantly, the compensation of Rs.5,00,000/- under section 544-A, Cr.P.C. is also imposed against the appellant, which if realized, shall be paid to the legal heirs of the deceased as per their legal entitlement, otherwise the appellant shall undergo simple imprisonment for six months. The benefit of Section 382-B, Cr.P.C. is also provided to him.

14. Consequently, with the above mentioned modification in the sentence of the appellant, Criminal Appeal No. 663/ 2009 is dismissed. The Murder Reference No. 149/2009 is answered in negative and death sentence awarded to Muhammad Iqbal alias Bali (appellant) is not confirmed.

HBT/M-37/L Order accordingly.

2017 Y L R Note 62

[Lahore (Multan Bench)]

Before Muhammad Tariq Abbasi, J

MUHAMMAD AKRAM---Petitioner

Versus

The STATE and 3 others---Respondents

Writ Petition No.9158 of 2014, heard on 15th January, 2015.

Criminal Procedure Code (V of 1898)---

----Ss. 516-A & 517---Cancellation of superdari---Judicial Magistrate gave "superdari" of buffaloes to the applicant---Application of respondent for cancellation of said superdari, was dismissed and revisional court cancelled superdari---Validity---Petitioner had no concern with the buffaloes---Said buffaloes were never case property, hence their superdari, was not warranted---Revisional Court had rightly passed impugned order; and by cancelling superdari of the buffaloes in favour of the petitioner, had rightly handed over them to the respondent whose stance of being owner of buffaloes, was found to be cogent and convincing---Constitutional petition, being devoid of any force, was dismissed, in circumstances. [Paras. 2, 5 & 6 of the judgment]

Mazhar Ali v. Ansar Ali and others 2014 SCMR 1536 and Khalid Saleem v. Muhammad Jameel alias Billa and 6 others 1996 SCMR 1544 rel.

Muhammad Khalid Farooq for Petitioner.

Mehr Tahir Amjad and Rizwan Ahmad Khan for Respondents.

Date of hearing: 15th January, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This writ petition is directed against the order dated 10.6.2014, passed by the learned Additional Sessions Judge, Burewala, District Vehari, whereby in revision, the order dated 30.3.2010 of the learned Judicial Magistrate, Burewala, District Vehari has been set aside and 'superdari' of buffaloes in favour of the petitioner has been cancelled and their 'superdari' to the respondent No. 4 has been granted.

2. The precise facts are that on complaint of the petitioner, a case FIR No.151 dated 14.3.2010 under Section 379, P.P.C. at Police Station

Saddar Burewala, District Vehari was registered, with the contentions that on 26.2.2010, the complainant while locking his tube well, went to sleep and in the morning, it was found that tube well wires valuing Rs.35,000/- were stolen; in presence of the witnesses, foot prints of five unknown accused were searched, which ended at the metalled road; the complainant of his own had been searching for the accused and stolen property when Sabir Hussain alias Bhutto, Muhammad Siddique, Safdar Hussain and Muhammad Hussain, in a 'panchait' admitted commission of the offence and return of the wires, but later on refused; during the same night, the accused also committed theft of the wires belonging to Faqir Muhammad and Haji Muhammad Aslam Kamboh, amounting to Rs.35,000/- and Rs.30,000/- respectively. The investigation of the case was in progress, when on 16.3.2010, the petitioner told the Police that Safdar Hussain, an accused had given him two buffaloes, with the contention that they were purchased from the sale amount of the wires. Thereafter, the complainant applied before the learned Trial Court for 'superdari' of the buffaloes and succeeded in getting the same through order dated 30.3.2010. The respondent No.4 filed an application before the learned Trial Court for cancellation of 'superdari' of the buffaloes, in favour of the petitioner and their 'superdari' to her, with the contention that her buffaloes, with mala fide, were taken by the petitioner into the Police Station and on the basis of the false proceedings and pretext, he got their 'superdari' in his favour. The learned Trial Court through order dated 11.10.2011, dismissed her above said application. She preferred a revision petition, which came up for hearing before the learned Additional Sessions Judge, Burewala, District Vehari, from where the impugned order was passed, whereby 'superdari' of the buffaloes in favour of the petitioner was cancelled, and their 'superdari' to respondent No. 4 was ordered. Consequently, the writ petition in hand.

3. Arguments heard and record perused.

4. The above mentioned FIR was registered, with the contention that electric wires, belonging to the petitioner and the above named others were stolen by the above named accused person. In this way, the case property was the above said wires and not at all any cattle. Even if the accused had sold out the electric wires and purchased the buffaloes the said cattle do not become case property. It is very strange and astonishing that on

16.3.2010 i.e. third day of the registration of the FIR, the petitioner himself produced the buffaloes in the Police Station, with the contention that they were given to him by Safdar Hussain, an accused and also obtained their 'superdari'. It is pertinent to mention here that the above named Safdar Hussain during pendency of the revision petition, appeared in the court and by submitting a sworn affidavit, contended that he never handed over the buffaloes in question to the petitioner and that in connivance with the Police, the petitioner had taken them from the house of respondent No. 4 to the Police Station and obtained on 'superdari'. The Hon'ble Supreme Court of Pakistan in the case of Mazhar Ali v. Ansar Ali and others (2014 SCMR 1536) held that the superdari could not be given with regard of an alternate property. Furthermore, as stated above the buffaloes were not stolen property as the same were produced by the petitioner before the police with the contention that they were purchased by the accused from sale proceed of stolen electric wires. In such like situation the petitioner was not entitled for superdari of the buffaloes and their owner was entitled to get the same. Reliance in this respect may be made to the case of "Khalid Saleem v. Muhammad Jameel alias Billa and 6 others" (1996 SCMR 1544) in which it was held as under:--

" .. Similarly the articles recovered by the police during the investigation of the case allegedly belonging to Muhammad Ashraf alias Mehboob which are stated to have been purchased from the money which he had received by the sale of ornaments the subject of dacoity in this case, which were later on given on Superdari to the complainant, along with Mazda Car and Honda Motorcycle belonging to Nain Sukhia, who had allegedly purchased it with the sale proceed of the case property, all these are to be returned to their respective owners."

5. When, as stated above, no concern of the petitioner with the buffaloes was developed and his above mentioned stance was rebutted by Safdar Hussain accused in the above mentioned manner and even otherwise the cattle were never case property, then their 'superdari' in favour of the petitioner was not warranted, hence the learned revisional court had rightly passed the impugned order and by cancelling the 'superdari' of the cattle, in favour of the petitioner, handed over them to the respondent No. 4 as her stance was found to be cogent and convincing.

6. As a result of the above discussion, the writ petition in hand being devoid of any force and merit, is dismissed.

HBT/M-94/L Petition dismissed.

2017 Y L R Note 376

[Lahore (Multan Bench)]

Before Muhammad Tariq Abbasi and Qazi Muhammad Amin Ahmed, JJ

MUHAMMAD RAFIQUE---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No.76 and Capital Sentence Reference No.3 of 2011, heard on 12th December, 2014.

Penal Code (XLV of 1860)---

----Ss. 302(b), 309 & 310---Anti-Terrorism Act (XXVII of 1997), S.7---Criminal Procedure Code (V of 1898), S.345---Qatl-i-amd, act of terrorism---Appreciation of evidence--- Compromise--- Scope---Compromise was arrived at between accused and legal heirs of the deceased, on the basis of which accused could be acquitted---Trial Court submitted report regarding alleged compromise and the report revealed that deceased was survived by her mother, husband, four sons, including one minor, and two daughters---Major legal heirs got recorded their respective statements, whereby they confirmed their compromise with the accused, without any compensation and there was no objection on acquittal of accused---Share of diyat of the minor was determined, and was paid accordingly---Report of the Trial Court further showed that the compromise was genuine and complete---Compromise, could only be effected regarding the offences mentioned in S.345, Cr.P.C.---Conviction and sentence of accused in offence under S.302(b), P.P.C. was set aside on the basis of compromise and he was acquitted under the offence---Offence under S.7 of Anti-Terrorism Act, 1997, being not compoundable, compromise in that respect, could not be permitted and accepted---Accused having committed offence inside the court room, provisions of S.7 of Anti-Terrorism Act, 1997, were fully attracted and accused was rightly convicted under the section---Where the accused had been acquitted from the charge under S.302(b), P.P.C. as a consequence of compromise, he deserved concession in quantum of sentence for offence under Anti-Terrorism Act, 1997---Which was an extenuating circumstance for lesser penalty---Conviction of the accused under S.7 of Anti-Terrorism Act, 1997, was maintained, but his sentence was altered from death to imprisonment for life with benefit of S.382-B, Cr.P.C.; payment of amount of fine, was maintained. [Paras. 3, 4 & 5 of the judgment]

Muhammad Rawab v. The State 2004 SCMR 1170; Muhammad Nawaz v. The State PLD 2014 SC 383 and Shahid Zafar and 3 others v. The State PLD 2014 SC 809 ref.
Iftikhar Ibrahim Qureshi for Appellant.

Malik Muhammad Jaffer, Deputy Prosecutor-General for the State.
Date of hearing: 12th December, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This judgment shall decide the above captioned matters being outcome of single judgment dated 23.7.2011, passed by the learned Judge Anti-Terrorism Court No. 1, Multan, whereby Muhammad Rafique (hereinafter referred to as the 'appellant') was convicted and sentenced in the following terms:-

a) Under section 302(b), P.P.C. to death and compensation of Rs.5,00,000/-, payable to the legal heirs of Mst. Gullan Bibi (deceased), failing which to undergo simple imprisonment for six months.

b) Under section 7 of the Anti-Terrorism Act, 1997 to death with fine of Rs.5,00,000/-, in default whereof to undergo simple imprisonment for six months.

2. The facts are that case FIR No. 837 dated 21.12.2010 under sections 302, P.P.C. and 7 of the Anti-Terrorism Act, 1997 at Police Station City Arifwala, District Pakpattan was registered against the appellant, with the allegations that he by firing, committed qatl-e-amd of his mother Mst. Gullan Bibi, in the court room of Mr. Saeed Raza, Judicial Magistrate Arifwala, District Pakpattan. On completion of the investigation, the challan against the appellant was submitted in the court of learned Judge Anti-Terrorism Court No.1, Multan, where he was charge sheeted. As the charge was denied by him, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 11 witnesses, whereas one was recorded as CW. On completion of all the proceedings, the learned Trial Court had passed the impugned judgment in the above mentioned terms. Consequently, the matters in hand.

3. During pendency of the matters, an application (Criminal Misc. 1145-M of 2011) under sections 309/310 read with section 345, Cr.P.C. was moved by the appellant, with the contention that a compromise between him and the legal heirs of the deceased had been arrived at, hence on the basis of the

compromise, he may be acquitted of the charge. Regarding the alleged compromise, a report from the learned Trial Court was requisitioned, and accordingly submitted. As per the report, the above named deceased was survived by Mst. Zaiban Bibi (mother), Nazir Ahmad (husband), Ahmad Saeed, Rasheed Ahmed, Shahid Fareed, Muhammad Asad (sons), Mst. Surriya Bibi and Mst. Abida Bibi (daughters). Out of the above mentioned legal heirs, Muhammad Asad was the minor, whereas rest were major. The major legal heirs had got recorded their respective statements, whereby confirmed their compromise with the appellant, without any compensation and no objection on his acquittal. Share in diyat of the minor was determined as Rs.2,03,670/- and his interest was protected by transferring a plot measuring 05 Marla, valuing Rs.2,00,000/- in his favour, through mutation No. 861 dated 23.1.2012 and deposit of the balance amount Rs.4,000/- in his account, opened in Habib Bank Limited. Consequently, it was reported that the compromise was genuine and complete.

4. As stated above, the appellant has been convicted and sentenced for commission of offence under section 302(b), P.P.C. and 7 of the Anti-Terrorism Act, 1997. As per the dictum laid down by the august Supreme Court of Pakistan in cases "Muhammad Rawab v. The State" (2004 SCMR 1170) and "Muhammad Nawaz v. The State" (PLD 2014 Supreme 383), compromise can only be effected regarding the offences mentioned in section 345 Cr.P.C. and none else. Therefore, in the matter in hand, the compromise is permissible and acceptable only to the extent of the offence under section 302(b), P.P.C. Consequently, on the basis of the compromise, the conviction and sentence of the appellant in offence under section 302(b), P.P.C. is set aside and he is acquitted of the charge under the said offence. As regards the above mentioned other offence under section 7 of the Anti-Terrorism Act, 1997, it is stated that in the light of the above mentioned dictum, as the said offence is not compoundable, hence compromise in it could not be permitted and accepted.

5. It has been confirmed on the record that the appellant had committed the offence inside court room, hence under the third Schedule of Anti-Terrorism Act, 1997, the provision of section 7 of the Anti-Terrorism Act, 1997 were fully attracted and as such the appellant was rightly convicted under the above mentioned provision. When from the charge of offence under section 302(b), P.P.C., the appellant has been acquitted as a consequence of compromise, then as per law laid down in cases "Muhammad Nawaz v. The State (PLD 2014 Supreme Court 383)" and "Shahid Zafar and 3 others v. The State (PLD

2014 Supreme Court 809)" he deserves concession in quantum of his sentence for the above mentioned offence of Anti-Terrorism Act, 1997. In the case of Muhammad Nawaz (Supra) the Hon'ble Supreme Court of Pakistan observed as under:--

> "9. However, this fact can also not be over sighted that in respect of murder of Muhammad Mumtaz, Constable, the petitioner was also sentenced to death and now the parties have compounded the offence under section 302(b), P.P.C. and according to the record compensation has also been paid. Therefore, question for quantum of sentence under section 7 of ATA can be examined in view of the judgment in the case of M. Ashraf Bhatti v. M. Aasam Butt (PLD 2006 SC 182) wherein after the compromise between the parties sentence of death was altered to life imprisonment.
>
> 10. It is to be noted that both the sentences i.e. death and life imprisonment are legal sen-tences, therefore, under the circumstances either of them can be awarded to him. Thus in view of the peculiar circumstances noted hereinabove, sentence of death under section 7 ATA, 1997 is converted into life imprisonment .."

Furthermore, there is only one life, which has been spared, by accepting compromise in offence under section 302(b), P.P.C., hence it would not be justified to again take the said life for offence under section 7 of Anti-Terroriqm Act, 1997. The said fact in our view is also an extenuating circumstance for lesser penalty to the appellant in the above mentioned offence.

6. Consequently, conviction of the appellant under section 7 of the Anti-Terrorism Act, 1997 is maintained. However, his sentence is altered from death to imprisonment for life. The amount of fine prescribed by the learned Trial Court and imprisonment in case of default in its payment is maintained and upheld. The benefit of Section 382-B Cr.P.C. is provided to the appellant. The Criminal Appeal No. 76/2011 is decided in the above mentioned terms and C.S.R. No. 03/2011 is answered in negative.

HBT/M-38/L Order accordingly.

2017 Y L R 48

[Lahore (Multan Bench)]

Before Muhammad Tariq Abbasi and Qazi Muhammad Amin Ahmed, JJ

SAMAR ABBAS---Petitioner

Versus

The STATE and others---Respondents

Criminal Appeals Nos.621, 630, 901 of 2010, 896 of 2011, Criminal Revision No.332 and Murder Reference No.159 of 2010 heard on 10th December, 2014.

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

----S.302(b)---Qatl-e-amd---Circumstantial evidence---Scope---All the circumstances should be connected in such a manner that those should make a continuous chain; one end of which should touch the dead body; whereas the other around neck of accused---Missing of even a single string would break the chain and fatal for the prosecution.

The State v. Manzoor Ahmad PLD 1966 SC 664; Asadullah and another v. The State and another 1999 SCMR 1034; Ch. Barkat Ali v. Major Karam Elahi Zia and another 1992 SCMR 1047; Sarfraz Khan v. The State and 2 others 1996 SCMR 188; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103 and Ibrahim and others v. The State 2009 SCMR 407 ref.

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

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Nobody was nominated in the case by the complainant---Deceased, when injured, had stated that some unknown persons had caused injuries to him---Complainant made a supplementary statement, whereby accused persons were named to be assailant---Alleged extra-judicial confession, which was joint in nature and made in one sitting, had no value in the eye of law---Involvement of accused persons on the basis of extra-judicial confession, which otherwise had no value, was also against mendate of law, being statement of one co-accused against the other---Proceedings of test identification parade a long after nomination of accused persons, were inconsequential, having no legal value---Prosecution failed to establish the case against accused persons---Charge against accused persons was doubtful, and the accused persons were entitled to the benefit of doubt, not as a matter of grace, but as of right---Conviction, could only be based upon unimpeachable evidence and certainty of guilt, and any doubt, arising in the prosecution case, must be resolved in favour of accused---Impugned judgment was set aside and all accused persons

were acquitted of the charge, while extending them the benefit of doubt and they were released, in circumstances.

Tahir Javed v. The State 2009 SCMR 166; Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231; Muhammad Khan and another v. The State 1999 SCMR 1220; Ghulam Akbar and another v. The State 2008 SCMR 1064; Muhammad Akram v. The State 2009 SCMR 230 and Ayub Masih v. The State PLD 2002 SC 1048 ref.

Syed Badar Raza Gillani, Haji Muhammad Tariq Aziz Khokhar and Wajid Ali Bhatti for Appellants.

Bashir Ahmad Khan Buzdar and Waseem Sarwar for the Complainant (in Crl. Revision No.332 of 2010).

Malik Riaz Ahmad Saghla, D.P.G. for the State.

Date of hearing: 10th December, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This judgment shall decide the above captioned appeals, revision petition and the Murder Reference as all are outcome of same judgment dated 22.5.2010, passed by the learned Additional Sessions Judge, Layyah, whereby, in a private complaint filed by Manzoor Hussain (hereinafter referred to as the 'complainant') under sections 302/109/34, P.P.C. against Samar Abbas, Ghulam Sajjad, Muhammad Nawaz and Imtiaz Ahmad (hereinafter referred to as the 'appellants'), they have been convicted under section 302(b), P.P.C. and sentenced in the following terms:--

Samar Abbas and Muhammad Nawaz, to death, with compensation of Rs.1,00,000/- each payable to the legal heirs of Irshad Hussain (deceased), in default to undergo simple imprisonment for six months each.

Ghulam Sajjad and Imtiaz Ahmad, imprisonment for life and compensation of Rs.1,00,000/- each payable to the legal heirs of the above named deceased, failing which to further serve simple imprisonment for six months each.

2. The facts are that on 13.5.2007, Manzoor Hussain complainant (PW-13) made statement/Fard Biyan (Ex.PA), contending therein that at about 8.00 p.m., when he along with his brother Nazar Hussain and cousin (Mamu Zad) Kazim Hussain (PW-15) was available at the house of Irshad Hussain (deceased), two unknown persons, while armed with pistols, entered in the Haveli through the main gate; one of the person, who was taller than the other, asked Irshad Hussain (deceased) for hands-up, whereby the other accused made two successive fires, which hit at the abdomen of Irshad

Hussain (deceased) and he fell down; the accused while making aerial firing succeeded in fleeing away; on hearing reports of firing, Mohalladars attracted at the spot; Irshad Hussain, who was unconscious, was shifted to District Headquarter Hospital, Layyah. The complainant further contended that his brother Irshad Hussain (deceased), who was a Patwari, was assaulted by some unknown assailants. On the basis of the above said complaint, FIR No.184 dated 13.5.2007 (Ex.PA/1) was registered under section 324/34, P.P.C. at Police Station City Layyah. The injured succumbed to the injuries on 27.5.2007, hence the offence under section 302, P.P.C. was also added. During the investigation, the complainant through a supplementary statement dated 16.5.2007, nominated the appellants as murderers of the deceased, with the contention that just after the occurrence, they while running in the street were seen by Niaz Hussain (PW-11) and that Samar Abbas and Ghulam Sajjad (appellants) also made extra-judicial confession before Muhammad Ilyas Raza and Jawad Hussain Khan (PW-6 and PW-7). Hence the appellants were involved in the occurrence. Subsequently, the complainant preferred a private complaint (Ex.PM) under section 302/109/34, P.P.C., against the appellants, with the contention that the Police did not investigate the case honestly as statements of Riaz Hussain and Ahmad Bukhsh towards the motive were not recorded and brought on the record. Consequently, the proceedings in the private complaint were carried on, the appellants were summoned and charge sheeted. They pleaded not guilty and claimed the trial, hence the prosecution evidence was summoned and recorded. As many as 19 witnesses were recorded as PWs, whereas two as CWs. Gist of the evidence, led by the material witnesses was as under:--

(i) **PW-2 Dr. Muhammad Aslam Bhular** conducted the postmortem examination of the dead body of Irshad Hussain Khan on 27.5.2007, prepared postmortem reports (Ex.PB) and diagrams (Ex.PB/1 and Ex.PB/2). He observed as under:--

"His abdomen was dressed interiorly. (1) Anterior abdominal was upto sheath in its central part was deprived off, extending from epigastrium towards the public sympses. The margin of wound were septic, gangerous and discharging pus. (2) Central part of the sheath with abdominal muscle were stiched with prolene. (3) A partially healed firearm wound measuring about 1-1/2 x 1-1/2 cm was present on anterior lateral upper part of abdomen on the right side. (4) A partially healed firearm wound (geliptical shape) measuring 1-1/2 cm x 1-1/2 cm on anterior lateral upper part of abdomen on the left side.

(5) Transverse colon was present on the anterior abdominal wall (as colostomy). (6) Multiple incised wound partially healed in the lower parts of abdomen on both sides (for drains). (7) Sigmoid colon as muscus fistula present exteriorly on the lower part of the abdomen.
According to this witness, all the above mentioned injuries were anti-mortem in nature, caused by firearm and cause of death.

ii) **PW-3 Dr. Abdul Majeed,** medically examined Irshad Hussain through report (Ex.PD) on 13.5.2007, when he was in an injured condition and noticed following injuries:--

1) A lacerated wound 1-1/2 x 1-1/2 cm going deep on the abdominal cavity on the upper most and lateral part of right abdomen. Margin of the wounds were inverted and slightly black in colour and rough. It was fire-arm entrance wound.

2) A lacerated wound 2 cm x 1-1/2 cm eleptical wound in shape, margins were inverted and blackish in colour. This wound was going deep into the abdominal cavity and was on the upper most and lateral side of abdomen on left side. It was fire-arm entrance wound.

iii) **PW-6 Muhammad Ilyas Raza and PW-7 Jawad Hussain Khan** narrated about extra-judicial confession allegedly made by Samar Abbas and Ghulam Sajjad appellants before them on 15.5.2007.

iv) **PW-11 Niaz Hussain** stated that on 13.5.2007 at about 8.05 p.m., he saw Samar Abbas and Ghulam Sajjad appellants along with two unknown persons, all armed with pistols, while running in the street of house of Irshad Hussain (deceased) and that later on during the test identification parades, the unknown were found to be Muhammad Nawaz and Imtiaz (appellants).

v) **PW-12 Riaz Hussain and PW-14 Ahmad Bukhsh** disclosed the worries of the deceased, allegedly narrated by him before them that Samar Abbas (appellant) was suspecting illicit relations of the deceased with Mst. Tasneem Bibi, sister of the above named appellant.

vi) **PW-13 Manzoor Hussain** narrated almost the same facts as were described by him in the private complaint (Ex.PM). He also attested the Memos (Ex.PK) and (Ex. PL), through which blood stained earth and shalwar (P-9) of the deceased was taken into possession respectively; joined into the proceedings, during which Ghulam Sajjad appellant got recovered .30 bore pistol (P-10) & 3 live bullets

(P11/1-3) and secured by the investigating officer through Memo (Ex.PN); participated in the proceedings of test identification parade dated 6.1.2010, during which Imtiaz appellant was identified and also attested the Memo (Ex.PH), by which a pistol (P-4) got recovered by the said appellant was taken into possession by the investigating officer.

vii) **PW-15 Kazim Hussain**, an eye-witness of the alleged occurrence narrated almost the same facts as were stated by the above named complainant (PW-13); participated in the proceedings of test identification parades dated 3.6.2008 and 6.1.2010, during which Muhammad Nawaz and Imtiaz appellants were respectively identified; attested the Memo (Ex.PN), through which pistol (P-10) and 3 live bullets (P11/1-3), got recovered by Ghulam Sajjad appellant were secured by the investigating officer.

viii) **PW-16 Muhammad Azam Cheema SI** investigated the case, during which arrested Ghulam Sajjad appellant and obtained his physical remand; secured 30 bore pistol (P-10) and 3 live bullets (P11/1-3) through Memo (Ex.PN), which were got recovered by the above named appellant; recorded the statements under Section 161 Cr.P.C. of the concerned witnesses.

ix) **PW-17 Muhammad Saleem Akbar SI** also investigated the case; got transferred Imtiaz appellant from Central Jail, Gujranwala, through application (Ex.PR); submitted application (Ex.PS) for test identification parade of the above named appellant, which was held on 6.1.2010; obtained physical remand of the appellant and secured pistol (P-4) and 3 live bullets (P5/1-3), got recovered by him through Memo (Ex.PH); recorded statements under Section 161, Cr.P.C. of the concerned witnesses.

x) **PW-18 Manzoor Hussain SI** was also an investigating officer, who arrested Muhammad Nawaz appellant and sent him to the jail for test identification parade; moved application (Ex.PT) for the said parade, which was accordingly held on 3.6.2008; obtained physical remand of the appellant, who got recovered .30 bore pistol (P-2) and 4 live bullets (P3/1-4)), and taken into possession through Memo (Ex.PG); recorded statements under Section 161, Cr.P.C. of the concerned witnesses at relevant stages.

xi) **PW-19 Mahr Masood Ahmad Judicial Magistrate** supervised the test identification parades proceedings dated 3.6.2008 and 6.1.2010 and also prepared the reports (Ex.PU & Ex.PV) respectively.

xii) **CW-1 Mushtaq Ahmad SI** recorded statement (Ex.PA) of Manzoor Hussain (complainant) on 13.5.2007; Prepared injury statement (Ex.PD-3/1) of Irshad Hussain (then injured); inspected the spot and drafted the rough site plan (Ex.CW1/ A); collected blood stained earth from the place of occurrence and secured it through Memo (Ex.PK); collected two empties (P-1/1-2) from the spot and secured through Memo (Ex.PF); took into possession blood stained clothes (P-6 & P-7) of Irshad Hussain (then injured) through Memo (Ex.PJ); submitted application (Ex.PW) for statement of Irshad Hussain (then injured) and recorded his statement dated 15.5.2007 (Ex.CW-1/B); recorded supplementary statement of the complainant on 16.5.2007, whereby the appellants were nominated; on death of Irshad Hussain on 27.5.2007, prepared inquest report (Ex.PC) and injury statement (Ex.PD/1) for the purpose of postmortem examination; secured blood stained (shalwar) (P-9) of the deceased through Memo (Ex.PL); recorded statements under Section 161, Cr.P.C. of the relevant witnesses at relevant stages.

xiii) **CW-2 Fiaz Haider SI arrested Samar Abbas,** appellant on 21.8.2007 and thereafter, got sent him to the judicial custody; obtained warrant of arrest against Ghulam Sajjad, Muhammad Nawaz and Imtiaz appellants from the Area Magistrate; got prepared the scaled site plans of the spot (Ex.PE) & Ex.PE/1; prepared the challan against the appellants.

3. After examination of the prosecution as well as court witnesses, reports of the Chemical Examiner, Forensic Science Laboratory and serologist were tendered in evidence as Ex.PX, Ex.PY and Ex.PZ respectively and the prosecution evidence was closed. Thereafter, the appellants were examined under Section 342, Cr.P.C., during which the questions arising out of the prosecution evidence were put to them and they denied almost all the questions while pleading their innocence and false involvement in the case with mala fide. The question "Why this case against you and why the PWs have deposed against you?" was replied by Samar Abbas appellant in the following words:--

> "All the private PWs are related inter se and inimical to me and witnesses of police were biased and under the influence of

complainant party. It was a blind murder. Prosecution has collected tainted fabricated and concocted pieces of evidence at belated stage malafidely in order to falsely implicate me. Motive alleged by the prosecution is absolutely false. Evidence of extra judicial confession is concocted one which has no reality at all. Similarly evidence of Wajtakar is improbable and unbelievable and false one. All the prosecution story is false. All the pieces of evidence were malafidely manipulated about 2 to 3 months after the occurrence but dates of recording of evidence were fictitiously shown by the police to render the same prompt and weighty. I have been falsely booked in this case by the complainant after demise of the deceased as he was having grudge against me due to the reason that after my engagement with daughter of the complainant namely Shakeela Bibi. I refused to marry with her due to her bad repute, thereafter she was betrothed with another relative of Brothery but that engagement was also broken. This created annoyance in the mind of the complainant as he makes me responsible for this insult among the Brothery and in order to wreck vengeance from me in connivance with the police a false story has been cooked up. I am innocent."

The above mentioned question was answered by Ghulam Sajjad appellant in the following terms:--

"I am innocent. The PWs are inimical to me and related inter se. All the PWs have falsely deposed against me. Till today being an unseen occurrence the real culprits have not been traced out. Whole of the investigation is dishonest. DPO Layyah on 8.6.2007 vide dispatch No.984/ F.A. constituted an investigation team to trace out the culprits of this un-witnessed occurrence. As per record till 10.7.2007 when the I.O. received letter No. 984/F.A the culprits of this case were not known. I did not make any extra judicial confession. The statements of witnesses of extra judicial confession were recorded with ante-date. The I.O. dishonestly tampered with the record of Goshwara of this FIR and the dates were re-written on it by applying fluid to suppress his forgery with respect to preparation of statement of extra judicial confession fabricated with ante dates. In the post mortem application moved by the I.O. Exh.PD/1, inquest report Exh.PC, the names of the accused were not mentioned. Had the statements of extra judicial confession, Wajtakar etc., have been recorded on 15.5.2007, 16.5.2007 or 18.5.2007, then these documents

must have contained the names of the known accused. Even otherwise, the alleged evidence of extra judicial confession given and recorded under section 161, Cr.P.C. is in-admissible in evidence as being joint extra judicial confession. No pistol was recovered from me. After having been tutored by the learned private counsel of the complainant they made dishonest improvements especially w.r. to extra judicial confession and made false statements of extra judicial confession. During my physical remand the complainant got me tortured by police and provided pistol, the recovery of which was fabricated against me."

Muhammad Nawaz appellant replied the above said question in the following manner:--

"I have no concern with the murder of Irshad Hussain deceased. Irshad Hussain deceased was done to death by some unknown person as evident from the FIR of the case and the assailant of Irshad Hussain were not traced out upto 08.06.2007 and it remained as a blind murder and on strict orders of DPO police with the connivance of complainant fabricated evidence of extra judicial confession. Wajtakar, motive and police on one hand has involved his relatives to whom I have no concern has also involved me because long ago, I had given evidence in a bribe case against Irshad Hussain deceased who was a Patwari and the PWs are inter related with each other, so they have falsely deposed against me."

Whereas, the reply made by Imtiaz appellant towards the above mentioned question was as follows:--

"I have no concern with the murder of Irshad Hussain deceased. Irshad Hussain deceased was done to death by some unknown person as evident from the FIR of the case and the assailant of Irshad Hussain were not traced out upto 8.6.2007 and it remained as a blind murder and on strict orders of DPO police with the connivance of complainant fabricated evidence of extra judicial confession. Wajtakar, motive and police on one hand has involved his relatives to whom I have no concern has also involved me because long ago I had given evidence in a bribe case against Irshad Hussain deceased who was a Patwari and the PWs are inter related with each other, so they have falsely deposed against me."

4. At that time, all had opted to lead evidence in their defence, but refused to make statements under section 340(2), Cr.P.C. Later on, through statements dated 13.5.2010, they refused to lead any evidence in their defence.

5. After completion of all the proceedings, the learned Trial Court pronounced the impugned judgment, whereby convicted and sentenced the appellants in the above mentioned terms. Consequently the matters in hand.

6. The learned counsel for the appellants have argued that the occurrence was committed by unknown persons and the said fact was reported by the complainant to the Police through his statement (Ex.PA), which resulted into registration of the FIR (Ex.PA/1) against unknown accused; Irshad Hussain when was in an injured condition, also made statement on 15.5.2007 that some unknown assailants had caused injuries to him; thereafter with mala fide, while concocting false story and introducing false witnesses, the appellants were implicated; when the appellants were nominated on 16.5.2007, then the proceedings of test identification parade dated 3.6.2008 and 6.1.2010 were immaterial; the alleged extra judicial confession made by Samar Abbas and Ghulam Sajjad appellants being fabricated and concocted as well as joint in nature has no legal value; the recoveries were planted and concocted, hence not believable; the prosecution had badly failed to establish the case and the charge against the appellants as per the prescribed/settled criteria, hence the appellants were entitled for acquittal and as such the impugned judg-ment towards their conviction and sentence is not acceptable under the law, therefore by accepting the appeals, the impugned judgment may be set aside and the appellants may be acquitted of the charge.

7. Conversely, the learned Deputy Prosecutor General, assisted by the learned counsel for the complainant has vehemently opposed the appeals, while supporting the impugned judgment towards conviction of the appellants to be quite justified and call of the day. The learned counsel for the complainant while arguing the Criminal Revision No. 332/2010 has also requested that Imtiaz and Ghulam Sajjad appellants may be sentenced in the same manner as Samar Abbas and Muhammad Nawaz appellants have been dealt with.

8. Arguments advanced by all the sides have been heard and the record has been consulted.

9. Admittedly, the case was of circumstantial evidence. The settled principle/criteria for such like cases is that all the circumstances should be connected in such a manner that they should make a continuous chain, one end of which should touch the dead body, whereas the other around neck of accused. Missing of even a single ring would break the chain and fatal for the

prosecution. In this regard, reference may be made to cases "The State v. Manzoor Ahmad" (PLD 1966 Supreme Court 664), Asadullah and another v. The State and another" (1999 SCMR 1034), "Ch. Barkat Ali v. Major Karam Elahi Zia and another" (1992 SCMR 1047), "Sarfraz Khan v. The State and 2 others" (1996 SCMR 188), "Altaf Hussain v. Fakhar Hussain and another" (2008 SCMR 1103) and "Ibrahim and others v. The State" (2009 SCMR 407). Herein below it would be evaluated whether the case has been established as per the above mentioned criteria or otherwise.

10. Admittedly, Samar Abbas appellant is first cousin of the complainant and the deceased. At the time of reporting the occurrence to the Police through Ex.PA, nobody was nominated by the complainant (PW-13). Similarly on 15.5.2007, when Irshad Hussain deceased (then injured) was examined under section 161, Cr.P.C., he stated that some unknown persons had caused injuries to him. On 16.5.2007, the complainant made a supplementary statement, whereby the appellants were named to be the assailants, with the contention that on 13.5.2007, they were seen by Niaz Hussain (PW-11), while running in the street of the house of the deceased, and that on 15.5.2007, Samar Abbas and Ghulam Sajjad appellants also made extra judicial confession, before Muhammad Ilyas Raza and Jawad Hussain Khan (PW-6 & PW-7), whereby they not only admitted their guilt, but also stated about participation of Muhammad Nawaz and Imtiaz appellants in the occurrence. When just after the occurrence, the appellant were seen by the above named PW-11, then why he remained satisfied for two days and then informed the complainant on 15.5.2007 and appeared before the Police on 18.5.2007. The above said conduct of the above named PW seems unnatural, hence unbelievable. Even otherwise, it is not understandable as to why the appellants would make such confession before these witnesses. Admittedly the above said alleged extra judicial confession was joint in nature and made in one sitting, therefore has no value in the eye of law. The question of evidentiary value of the extra judicial confession came up for consideration before the august Supreme Court of Pakistan in the cases "Tahir Javed v. The State" (2009 SCMR 166) and "Sajid Mumtaz and others v. Basharat and others" (2006 SCMR 231), when the following emphasis was laid:--

> "17. ... This Court and its predecessor Court (Federal Court) have elaborately laid down the law regarding extra-judicial confessions 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, an extra-judicial confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

18. It has been further held that the status of the person before whom the extra-judicial confession is made must be kept in view, that joint confession cannot be used against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule prescribed by this Court."

Furthermore, involvement of Muhammad Nawaz and Imtiaz appellants on the basis of the above mentioned extra judicial confession (which otherwise has no legal value), is also against the mandate of law, being statement of one co-accused against another. Admittedly, as stated above, the appellants were nominated on 16.5.2007, hence the proceedings of test identification parade dated 3.6.2008 and 6.1.2010 were inconsequential, having no legal value. During the statement of CW-1, it came on the record that on 8.6.2007, the DPO Layyah constituted an investigation team to trace out the culprits of the blind murder, meaning thereby that till the above mentioned date, the real culprits were not known or traceable.

11. Sequel of the above discussion is that the prosecution has failed to make out the chain and establish the case as per the above mentioned principle/criteria and as such the charge against the appellants is doubtful, hence they are entitled to the benefit of doubt not as a matter of grace but as of right. It is a settled and universally recognized principle of law that conviction can only be based upon unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. We have fortified our view by the judgments of the Hon'ble 'Supreme Court of Pakistan reported as Muhammad Khan and another v. The State (1999 SCMR 1220), Ghulam Akbar and another v. The State (2008 SCMR 1064), Muhammad Akram v. The State (2009 SCMR 230) and Ayub Masih v. The State (PLD 2002 Supreme Court 1048). In the case of "Ayub Masih (Supra), while quoting a saying of the Holy Prophet (PBUH) "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent" and making reference to the maxim, 'it is better that ten guilty

persons be acquitted rather than one innocent person be convicted', the Hon'ble Supreme Court observed as under:--

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

12. Resultantly, the above captioned appeals are accepted, the impugned judgment is set aside and all the appellants namely Samar Abbas, Muhammad Nawaz, Ghulam Sajjad and Imtiaz Ahmad are acquitted of the charge, while extending them the benefit of doubt. They are in custody, hence, while extending them the benefit of doubt. They are in custody, hence be released forthwith, if not required to be detained in any other matter. As a consequence, Murder Reference No.150/2010 is answered in negative and death sentence awarded to Samar Abbas appellant in Criminal Appeal No.621/2010) and Muhammad Nawaz (appellant in Criminal Appeal No.896/2011) is not confirmed.

13. In the light of the above stated discussion, Criminal Revision No.332/2010, fails, hence dismissed.

HBT/S-7/L Appeal accepted.

2017 Y L R 102
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
Mst. SABIRA BIBI and others---Petitioners
Versus
HIKMAT KHAN and others---Respondents

Civil Revision No.570 of 2012, heard on 20th June, 2014.

(a) Limitation Act (IX of 1908)---

----S. 14---Civil Procedure Code (V of 1908), S.24 & O.VII, R.10---Partition suit---Exclusion of time of proceedings before wrong forum---Principle---Trial Court decreed suit---Defendant filed appeal within 90 days before High Court on the basis of value of suit property determined by the local commission---High Court upholding the objections of plaintiff to maintainability of the appeal, sent the appeal to District Judge for adjudication on merits---District Judge dismissed appeal on the ground of limitation---Validity---Limitation for filing appeal before High Court was 90 days whereas appeal could be filed before District Judge within 30 days---Under S.14 of the Limitation Act, 1908, when a party failed to justify the filing of plaint/appeal before wrong forum, time of proceedings before such forum would not be excluded from the period of limitation---Under S.24, C.P.C. where a matter was transferred, such matter would proceed from the point at which it was transferred, unless otherwise directed---In the present case, appeal was not returned by High Court to defendants for its presentation before the proper forum, rather same was sent/remitted/ transferred to the District Court---Appeal was filed within time before High Court, so District Court was obliged to proceed with the appeal from the time/point the same was sent to the District Court---Even if defendants had moved application for condonation of delay appellate court should have appreciated the legal proposition that appeal before High Court had been filed within time and the same had not become time-barred on transfer by High Court---Revision was accepted.

(b) Civil Procedure Code (V of 1908)---

----S. 24---Transfer of case---Limitation---Under S.24, C.P.C. when a matter was transferred, such matter would proceed from the point at which it was transferred, unless otherwise directed.

Sheikh Zameer Hussain for Petitioner.
Rafaqat Hussain Shah for Respondents Nos. 1 and 2.
Raja Muhammad Kamran Respondents Nos. 3 to 8.
Date of Hearing: 20th June, 2014.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition is directed against the judgment and decree dated 12.6.2012 passed by the learned Additional District Judge, Taxila, District Rawalpindi, whereby the appeal filed against the judgment and decree dated 31.1.2011, made by the learned Trial Court has been dismissed, on the point of limitation.

2. The facts in short are that the respondents Nos. 1 and 2 filed a suit for possession through partition, against the present petitioners and the respondents Nos. 3 to 5. In the said suit, the preliminary decree was passed and on the basis of the report made by the local Commission, which was objected by the present petitioners, but ruled out, the final decree was made on 31.1.2011. Against the said decree, the petitioners preferred R.F.A. No. 82/2011, before this Court. An objection was raised by the respondents Nos. 1 and 2 that the appeal was not proceedable before this Court, rather acceptable before the learned District Court concerned. Consequently, the appeal through order dated 5.7.2011, passed by the learned Division Bench of this Court was sent to the learned District Judge, Rawalpindi for adjudication on merit. Accordingly, the Deputy Registrar (Judicial) of this Court through letter dated 12.7.2011 had sent the file of the appeal to the learned District Judge, Rawalpindi, from where it was entrusted to the learned Additional District Judge, Taxila. The proceedings in the matter were carried on by the learned Additional District Judge, Taxila and finally the judgment and decree dated 12.6.2012 was pronounced, whereby the appeal was dismissed on the sole ground and reason that it was time barred.

3. Consequently, the instant revision petition has been preferred, with the contentions and the grounds that the regular first appeal was filed before this Court on the basis of the report made by the local Commission, whereby the value of the property in issue was determined as Rs.3,17,50,000 being Rs.50,000/- per Marla, hence was beyond the pecuniary jurisdiction of the District Court concerned; that through order dated 5.7.2011, the appeal was sent by this Court to the learned District Judge, Rawalpindi and as such the

period of limitation was to be considered regarding filing of the appeal before this Court and not the District Court; that the learned Appellate Court without considering the attending facts and circumstances and the law on the subject has knocked out the petitioners from their valuable rights purely on technical grounds, hence the impugned judgment and decree is not sustainable in the eye of law.

4. The learned counsel for the petitioners has advanced his arguments in the above mentioned lines, whereas the learned counsel, who has put appearance on behalf of respondents Nos. 1 and 2 has seriously opposed the revision petition, while supporting the impugned judgment and decree to be quite in accordance with law.

5. Arguments of both the sides have been heard and the record has been perused.

6. As stated above, the petitioners had challenged the judgment and decree dated 31.1.2011, passed by the learned Trial Court before this Court, in shape of R.F.A. No. 82/2011, with the contention that in the light of the report made by the local Commission, value of the property in issue, was exceeding the pecuniary jurisdiction of the District Court.

7. As highlighted above, from the respondents' side an objection was raised, towards maintainability of the Regular First Appeal before this Court, which was upheld through order dated 5.7.2011. Consequently, the learned Division Bench of this Court had sent the appeal to the learned District Judge, Rawalpindi for adjudication on merits. Accordingly, the Deputy Registrar (Judicial) of this Court through letter No. 18310/Civil dated 12.7.2011 had transmitted the record of the RFA to the learned District Judge, Rawalpindi, from where it was entrusted to the learned Additional Ditrict Judge, Taxila.

8. For filing R.F.A. before this Court, the law prescribed a period of 90 days, whereas for filing an appeal before the District Courts, 30 days period has been allowed by the law.

9. It has been observed that the appeal before this Court was filed within the above mentioned prescribed period of 90 days.

10. The learned Additional District Judge, Taxila has dismissed the appeal, which was transmitted by this Court to him, purely on the basis of limitation, with the contention that even in case of transfer of the appeal, the prescribed period of limitation was 30 days.

11. There is a difference between the return of plaint as provided under Order VII, Rule 10 of C.P.C. and transfer of a case as provided under Section 24 of the procedure. For convenience, both the provisions are reproduced herein below:--

Order VII Rule 10, C.P.C..

Return of plaint.--(1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Procedure on returning plaint.---(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Section 24, C.P.C.

General power of transfer and withdrawal.---(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage-

(a) transfer any suit, appeal or other proceeding pending in any court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under subsection (1), the Court which thereafter tries such suit may, subject to any special directions in the case of any order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this Section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this Section from a court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

12. No doubt if a plaint/appeal is returned under the above mentioned provision and the concerned fails to justify the filing of the plaint/appeal, before a wrong forum, then the period provided under Article 14 of the Limitation Act, 1908 shall not be excluded, from the period of limitation. But as per the above mentioned section 24, in case of transfer of a matter, unless otherwise directed, the matter will proceed from the point at which it was transferred.

13. In the situation in hand, as stated above, the appeal was not returned by this Court, to the petitioners, for its presentation before the proper forum, rather it was sent/remitted/transferred to the concerned learned District Court, and when filing of the appeal before this Court was within time, the learned District Court was obliged to proceed with the appeal, from the point it was sent to it and decide the same on merits.

14. If due to wrong advice or lack of knowledge, the petitioners have moved any application for condonation of delay, even then the learned Appellate Court should have realized the legal proposition that the appeal before this forum was filed within time and on its transfer, it has not become time barred, and should have not decided the application for condonation of delay, in the manner it has been decided.

15. For what has been discussed above, the revision petition in hand is accepted, the impugned judgment and decree dated 12.6.2012 passed by the

learned Additional District Judge, Taxila is set aside, with a direction to take up the appeal, hear both the parties and decide it on merits.

ARK/S-92/L Revision accepted.

2018 M L D 389
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
RIAZ AHMED---Petitioner
Versus
The STATE---Respondent

Crl. Misc. No.680-M and 728-M of 2017, heard on 4th May, 2017.

Criminal Procedure Code (V of 1898)---

----Ss. 497, 86, 86-A & 561-A---Penal Code (XLV of 1860), Ss. 324 & 109---Constitution of Pakistan, Art. 246---Attempt to commit qatl-i-amd and abetment---Bail, grant of---Tribal area---Transfer of custody---Principle---Petitioner was prosecution witness in a case registered at place J in which four persons were arrested who were facing trial---Police from tribal area wanted to arrest petitioner on the ground that he was accused in a case registered there and had been declared proclaimed offender---Petitioner filed application under S. 86, Cr.P.C. for submitting bail bonds to attend court at tribal area but Sessions Judge at place J declined to accept bail bonds---Validity---Petitioner was not principal accused and he was cited as an abettor---Petitioner, at the time of commission of occurrence, was not available at the spot---Complainant of case registered at tribal area was accused in a case registered at place J where petitioner was a prosecution witness---Stance of petitioner that case registered in tribal area was lodged with mala fide in order to prevent petitioner s party from pursuing the case registered at place J could not be thrown to winds---Such facts were sufficient for Sessions Judge at place J to exercise jurisdiction provided under second proviso to S. 86, Cr.P.C. and refusal from exercising such powers was unjustified---High Court directed the authorities to release the petitioner to approach Trial Court at tribal area and set aside the order passed by Sessions Judge at place J ---Bail was allowed in circumstances.

Ansar Nawaz Mirza, S.M. Areeb Abdul Khafid Shah Bukhari and Ch. Asif Mehmood Lakhan for Petitioner.
Sheikh Istajabat Ali, Deputy Prosecutor General for the State.
Basharat Ullah Khan for the Complainant.
Date of hearing: 4th May, 2017.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This single order shall disposed of the above captioned petitions, as similar questions of law and facts are involved in the both.

2. The facts are that a case FIR No. 434 dated 25.12.2016, under Sections 324/109, P.P.C., at Police Station Batkhela, District Malakand, was got lodged by Majrooh Shahid Khan, with the precise allegations that Muhammad Riaz son of Abdul Haq had caused a firearm injury to him and that the said accused had committed the alleged occurrence, at the abetment of Riaz alias Rajoo son of Noor Hussain (present petitioner). In the said case, the petitioner was declared as a proclaimed offender, hence his perpetual non-bailable warrant of arrest was issued by the learned Sessions Judge/District Qazi, Batkhela, District Malakand. Umar Jan, Head Constable of Police Station Batkhela, District Kalakand, for execution of the warrants, had arrived at Jhelum and with assistance of the local Police, the present petitioner was arrested and produced before the learned Judicial Magistrate, Jhelum. In the said learned court, the proceedings under Section 86-A of Criminal Procedure Code (hereinafter referred to as the Code) were carried on and till completion of the codal proceedings for transfer of the petitioner to the Police Station Batkhela, vide order dated 31.03.2017, his lodgment in District Jhelum was ordered. The petitioner, through an application under Section 86 of the Code, had requested the learned Sessions Judge, Jhelum, that while receiving bail bonds, he may be released, so that he may be able to approach the competent court at District Malakand, but the learned Sessions Judge, through order dated 05.04.2017, had declined the said request. Consequently, the matters in hand.

3. Under Article 246(b) of The Constitution of Islamic Republic of Pakistan, 1973, District Malakand has been declared as Provincially Administered Tribal Area. The said Article reads as under:--

246. Tribal Areas. In the constitution---

> (a) "Tribal Areas" means the areas in Pakistan which, immediately before the commencing day, were Tribal Areas, and includes---

(i) the Tribal Areas of [Balochistan] and the [Khyber Pakhtunkhwa]; [***]

(ii) the former States of Amb, Chitral, Dir and Swat;

(iii) omitted ***]

(iv) omitted * * *]

(b) "Provincially Administered Tribal Areas" means---

(i) the districts of Chitral, Dir and Swat (which includes Kalam), [the Tribal Area in Kohistan district] Malakand Protected Area, the Tribal Area adjoining [Mansehra] district and the former State of Amb; and

(ii) Zhob district, Loralai district (excluding Duki Tehsil), Dalabandis Tehsil of Chagai District and Marri and Bugti tribal territories of Sibi district; and

(c) "Federally Administered Tribal Areas" includes

(i) Tribal Areas adjoining Peshawar district;

(ii) Tribal Areas adjoining Kohat district;

(iii) Tribal Areas adjoining Bannu district;

[(iiia)Tribal Areas adjoining Lakki Marwat district;]

(iv) Tribal Areas adjoining Dera Ismail Khan district;

[(iva) Tribal areas adjoining Tank district;]

[(v) Bajaur Agency;

(va) Orakzai Agency;]

(vi) Mohmand Agency;

(vii) Khyber Agency;

(viii) Kurram Agency;

(ix) North Waziristan Agency; and

(x) South Waziristan Agency.

Therefore, when in consequence of a warrant of arrest, issued by the learned court of the said area, the petitioner was arrested and brought before the learned Judicial Magistrate, Jhelum, he should have completed the proceedings, as required under Section 86-A of the Code, which speaks as under:--

> **"[86-A. Procedure for removal in custody to Tribal Area**. Where a person arrested under Section 85 is to be removed in custody to any place in the Tribal Area, he shall be produced before a [Magistrate] within the local limits of whose jurisdiction the arrest was made, and such Magistrate in directing the removal shall hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including the power to order the production of evidence, as if the person arrested were charged with an offence committed within the jurisdiction of such Magistrate: and such Magistrate shall direct the removal of the arrested person in custody if he is satisfied that the evidence produced before him raises a strong or probable presumption that the person arrested committed the offence mentioned in the warrant.]"

4. Section 86 of the Code, prescribes a procedure, when an accused is arrested in the above mentioned circumstances. For convenience, the said provision is reproduced hereinbelow:-

> **"86. Procedure by Magistrate before whom person arrested is brought**. (1) Such Magistrate or District Superintendent shall, if the person arrested appears to be the person intended by the Court which issued the warrant direct his removal in custody to such Court:
>
> Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent, or a direction has been endorsed under Section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent

shall take such bail or security, as the case may be, and forward the bond to the Court, which issued the warrant:

[Provided further that, if the offence is not bailable or no direction has been endorsed under Section 76 on the warrant, the Sessions Judge of the Sessions division in which the person is arrested may, subject to the provisions of Section 497 and for sufficient reasons, release the person on an interim bail on such bond or security as the Sessions Judge thinks fit and direct the person to appear by a specified date before the Court which issued the warrant and forward the bond to that Court.]

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under section 76."

5. The learned Judicial Magistrate, Jhelum, through proceedings under Section 86-A of the Code had lodged the petitioner in District Jail, Jhelum and under Section 86 of the Code, the learned Sessions Judge, Jhelum was quite competent to exercise jurisdiction, as provided under the above mentioned second proviso to the above said provision i.e. Section 86 of the Code, but he had refused to exercise his powers.

6. In the above mentioned case, the petitioner was not the principal accused, rather cited as an abettor. Admittedly, at the time of commission of the occurrence, the petitioner was not available, at the spot. It is also evident from the record that Majrooh Shahid Khan son of Gull Zareen, the complainant of the above said case is an accused in FIR No. 17 dated 09.01.2013, registered under sections 395/412, P.P.C., at Police Station Saddar Jhelum, at the instance of Abdul Haq, wherein the present petitioner is a prosecution witness. In this way, the stance of the petitioner, that the above mentioned case, at District Malakand was got lodged with mala fide, in order to prevent the petitioner's party, from pursuing the case registered at District Jhelum, should not be thrown to winds.

7. All the above mentioned facts and circumstances, were sufficient for the learned Sessions Judge, Jhelum, to exercise jurisdiction, provided under second proviso to Section 86 of the Code, hence his refusal from exercising the said powers was totally unjustified.

8. Resultantly, the instant petitions are accepted, the order dated 05.04.2017, passed by the learned Sessions Judge, Jhelum is set aside and the application under Section 86 of the Code, preferred by the petitioner, is allowed. It is directed that subject to furnishing of bail bonds, amounting to Rs.2,00,000/-, with two sureties each, in the like amount to the satisfaction of learned Sessions Judge, Jhelum, he be released from the jail. The petitioner is directed that within 15 days from the release, he should approach the competent forum at Batkhela, District Malakand, failing which the law shall take its own course.

MH/R-7/L Petition allowed.

2018 P Cr. L J 558

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

RAB NAWAZ---Petitioner

Versus

MUBRI KHAN and 4 others---Respondents

Criminal Revision No. 82 of 2017, heard on 19th April, 2017.

Penal Code (XLV of 1860)---

----Ss. 380, 448 & 411---Criminal Procedure Code (V of 1898), S. 250---Theft, house trespass and recovery of stolen property---Compensation, imposition of---Trial Court acquitted accused persons of the charge and directed complainant to pay compensation to them---Appeal against compensation was dismissed by Lower Appellate Court on the ground that appeal against acquittal was pending before High Court---Validity---Order of acquittal and order for payment of compensation by complainant were two separate orders although out of the same proceedings but were appealable through separate appeals before different forums---Proceedings of one appeal should not affect the other appeal---If against an order/judgment two remedies were provided under law, then the person concerned to avail the remedies, could approach proper forums which were to decide matters, independently, without being influenced or prejudiced by proceedings pending before other forum---Lower Appellate Court had wrongly dismissed appeal against compensation on the ground that appeal against acquittal was pending before High Court---Said court at the most could have adjourned the appeal sine die---High Court set aside the order passed by Lower Appellate Court and remanded the appeal for decision afresh---Revision was allowed in circumstances.

Raja Muhammad Faisal Ghani Janjua for Petitioner.

Naveed Ahmad Warraich, D.D.P.P. with Faisal, A.S.-I. for the State.

Respondents Nos. 1 and 3 in person.

Date of hearing: 19th April, 2017.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition calls in question the judgments dated 01.03.2014 and 26.01.2017, respectively passed by the learned Magistrate Section-30 and learned Additional Sessions Judge, Talagang, District Chakwal.

2. Through the former judgment, in case FIR No. 28, dated 11.04.2011, registered under sections 380/448/411, P.P.C., at Police Station Lawa, District

Chakwal, the respondents Nos. 1 to 4 (hereinafter referred to as the respondents) were acquitted of the charge, with a direction to the petitioner (complainant), to pay a sum of Rs.25,000/-, as compensation, under section 250, Cr.P.C., to the respondents. Whereas, through the lateral judgment, an appeal preferred by the petitioner, challenging the above said compensation has been turned down, on the sole ground, that acquittal of the respondents has been challenged by the petitioner, before this court.

3. Arguments heard and record perused.

4. Through the above mentioned judgment of the learned Trial Court, not only the respondents were acquitted of the charge, but the petitioner being complainant was also asked to pay the above said compensation under section 250, Cr.P.C., to the respondents.

5. The petitioner, against the above said decision, had availed two remedies, one through an appeal before this court, whereby acquittal of the respondents was challenged, whereas other by an appeal, before the learned Additional Sessions Judge, Talagang, questioning imposition of the above mentioned compensation, against him.

6. In order to appreciate the issue involved in the present proceeding, it would be appropriate to reproduce the relevant provisions of law i.e. sections 417 and 250, Cr.P.C., herein below:-

> **417. Appeal in case of acquittal**. (1) Subject to the provision of subsection (4), the Provincial Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.
>
> (2) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal the complainant may present such an appeal to the High Court.
>
> [(2-A) A person aggrieved by the order of acquittal passed by any Court other than a High Court, may, within thirty days, file an appeal against such order.]
>
> (3) .....
>
> (4) .....
>
> **250. False frivolous or vexatious accusations.** (1) If in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused

before a Magistrate of any offence triable by a Magistrate, and the Magistrate, by whom the case is heard [xxxxx] acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may by his order of [xxxxx] acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or if such person is not present direct the issue of a summons to appear and show cause as aforesaid.

(2) The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious, may, for reasons to be recorded, direct that compensation to such amount not exceeding [twenty five thousand rupees] or if the Magistrate is a Magistrate of the third class not exceeding [two thousand and five hundred] rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.

(2-A) .....

(2-B) .....

(2-C) .....

(3). A complainant or informant who has been ordered under subsection (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal form the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) When an order for payment of compensation to an accused person is made, in case which is subject to appeal under subsection (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.

7. It is manifest from the above mentioned provisions of law that if an accused is acquitted, then under section 417, Cr.P.C., his acquittal through an appeal

can be challenged before this court. In case, compensation under section 250(2), Cr.P.C., is imposed, then under subsection (3) of the said provision, the aggrieved may file an appeal, before the competent forum which in the present case is Sessions Court concerned. The procedure laid down by section 250, Criminal Procedure Code is quite distinct from the procedure for acquitting an accused. The language of the section itself contemplates separate proceedings. Order of acquittal and order for payment of compensation by complainant, are two separate orders although have born out of same proceedings, but are appealable through separate appeals before different forums. Proceedings of one appeal should not affect the other appeal. There is no denial of the fact that if against an order/judgment two remedies are provided under the law, then the concerned to avail the remedies, may approach the proper forums which should decide the matters, independently, without being influenced or prejudiced from the proceedings pending before other forum. Thus stance of the learned appellant court that as an appeal against acquittal was pending before this court, hence appeal before it was not competent, was quite unjustified because at the most the learned Appellant Court should have adjourned the appeal sine die. Furthermore, it has been told that the appeal against acquittal has been dismissed from this forum.

8. Resultantly, the above said judgment dated 26.01.2017 of the learned Additional Sessions Judge, Talagang, District Chakwal is set aside, with a direction to take up the appeal and decide it on merit.

9. Disposed of.

MH/R-6/L Revision allowed.

PLJ 2018 Cr.C. (Lahore) 163 (DB)

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI AND JAMES JOSEPH, JJ.**

DILNAWAZ @ JAVED--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 370-B of 2015, decided on 17.2.2015.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail after arrest--Admitted--Allegation of--Charas was recovered--*Charas* was weighing 01-KG and 500-grams--In application moved by police before Area Magistrate for judicial remand of petitioner, recovered substance has been described to be 01-KG and 05-grams--In rough site-plan prepared on day of occurrence, quantity of alleged recovered substance has been written as 01-KG and 10-grams--Deputy Prosecutor General has failed to justify above mentioned alarming contradictions regarding weight of alleged narcotic substance--He has frankly stated that till now above mentioned contradictions have not been cured and as such are available on record--Above mentioned facts and circumstances, have made case to be a fit one for grant of bail within meaning of Section 51 of Act *ibid*--Petitioner is behind bars, hence no more required for any further investigation--As per record maintained by police, he does not have any previous criminal antecedent--Bail was admitted. [Pp. 164 & 165] A & B

Syed Muhammad Jaffar Tayyar, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, Deputy Prosecutor General for State.

Date of hearing: 17.2.2015.

ORDER

The petitioner, namely, Dilnawaz *alias* Javed, seeks post arrest bail in case F.I.R. No. 575, dated 12.08.2014, registered under Section 9(c) of the Control of Narcotic Substances Act, 1997 at Police Station Farid Town, District Sahiwal.

2. The precise facts, as per FIR, are that when upon a spy information, the petitioner was over powered and searched by the police party, from a shopping bag which was with him, *charas* was recovered, which on weighing became 01-KG and 500-grams.

3. Arguments heard. Record perused.

4. In the FIR, recovery of *charas* weighing 01-KG and 500-grams has been alleged but in the application moved by the police before the learned Area Magistrate for judicial remand of the petitioner, the recovered substance has been described to be 01-KG and 05-grams. In the rough site-plan prepared on the day of occurrence, the quantity of the alleged recovered substance has been written as 01-KG and 10-grams. The learned Deputy Prosecutor General has failed to justify the above mentioned alarming contradictions regarding weight of the alleged narcotic substance. He has frankly stated that till now the above mentioned contradictions have not been cured and as such are available on the record.

5. The above mentioned facts and circumstances, in our view, have made the case to be a fit one for grant of bail within the meaning of Section 51 of the Act *ibid*. The petitioner is behind the bars, hence no more required for any further investigation in this case. As per the record maintained by the police, he does not have any previous criminal antecedent.

6. Resultantly, the petition in hand is accepted and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (rupees two lac only) with one surety in the like amount to the satisfaction of learned trial Court.

7. A copy of this order be sent to the District Police Officer, Sahiwal, who shall note the above mentioned difference, in the weight of the alleged recovered narcotic substance, in the above mentioned documents. He shall probe if above mentioned has been made deliberately to give undue concession to the accused and shall not spare any one, who is found at-fault.

(A.A.K.) Bail admitted

PLJ 2018 Cr.C. 615

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

SATTAR SHAH--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 292-B of 2018, decided on 21.2.2018.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 496-A, 376 380, 381-A & 411--Bail after arrest, grant of--Ground--Further inquiry--Allegation of--Petitioner along with his co-accused, had administered some intoxicant to son of complainant and abducted wife of complainant and also taken away motorycle, gold ornaments and cash--Abduct lady herself had attend judicial magistrate and requested that she had danger from her husband, she may be sent to Dar-ul-Aman, she has never mischief by present petitioner--Son of complainant (intoxicant) was not medically examined hence allegation had gone without medical support--Case was of further inquiry--Bail was allowed. [P. 616] A, B & C

Syed Muhammad Jaffer Tayyar, Advocate for Petitioner.

Mirza Abid Majeed, DPG for State.

Pir Qamar-ul-Hasnain Chishti, Advocate for Complainant.

Date of hearing: 21.2.2018.

ORDER

Through the instant petition, the petitioner namely Sattar Shah seeks post arrest bail in case FIR No. 305, dated 23.08.2017, registered under Sections 496-A/376/380/381-A/411, PPC, at Police Station Sahoka, District Vehari.

2. The precise allegations against the petitioner, as per FIR, are that he along with his co-accused, had administered some intoxicant to Ali Haider, son of the complainant and abducted *Mst.* Sidra Bibi, wife of the complainant and had also taken away Honda motorcycle, gold ornaments and cash of Rs. 47,500/-, belonging to the complainant.

3. Arguments heard and record perused.

4. It is alleged that Abdul Wahid, Mukhtar Ahmad, Ibrahim., Zulfiqar Ali and two unknown have also committed the alleged occurrence, but Mukhtar Ahmad, Ibrahim, Zulfiqar Ali, Ismail Shah and Hasnain Shah have been granted pre-arrest bail, by this Court, through order dated 07.12.2017, passed in Crl.Misc. No. 6946-B/2017. The lady

herself had attended the learned judicial Magistrate, Layyah, on 25.08.2017 and requested that as she had danger from her husband (complainant), hence she may be sent to Dar-ul-Aman, Consequently, she was dispatched to Dar-ul-Aman, where she remained till 29.08.2017, whereafter, she again requested the learned judicial Magistrate for (sic) from Dar-ul-Aman and consequently she was let off. At both the above mentioned occasions, she never disclosed any mischief by the present petitioner or any other accused, therefore her stance, given in her statements under Section 161 & 164 Cr.PC, shall be evaluated during the trial. Ali Haider, to whom intoxicant was allegedly administered, was not medically examined, hence the said allegation had gone without any medical support. The matter, for investigation, had gone to DIB and it was found that there was no role of the petitioner, in the alleged occurrence.

5. All the above mentioned facts and circumstances, lead to the conclusion, that there are grounds of further inquiry into the guilt of the petitioner, within the meaning of sub-section(2) of Section 497 Cr.PC. He is behind the bars, hence no more required to the Police, for further investigation in this case. Furthermore, as per record maintained by the Police, he is previously a non-convict.

6. Resultantly, the petition in hand is allowed and the petitioner is admitted to bail, subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount to the satisfaction of the learned trial Court.

(M.N.K.) Bail allowed

PLJ 2018 Cr.C. 628

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

ABDUL WAHID--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 1224-B of 2018, decided on 13.3.2018.

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

----Ss. 497--Pakistan Penal Code, (XLV of 1860), Ss. 496-A/376/ 380/381-A/411--Post arrest bail, allowed--Principle of consistency--Complainant alleged that petition along with his co-accused had administered some Intoxicant to son of complainant and abducted wife of complainant and taken away motor cycle, gold ornaments and cash--Already co-accused "Sattar Shah" having same allegation has been admit to bail--Petitioner also deserve same treatment in this way principle of consistency is fully applicable to case of petitioner--Bail is allowed. [P. 629] A & B

M/s. Syed Jaffer Tayyar Bukari and Naeem Ullah Khan, Advocate for Petitioner.

Mr. Shaukat Ali Ghauri, APG for State.

Date of hearing: 13.3.2018.

ORDER

Through the instant petition, the petitioner namely Abdul Wahid seeks post arrest bail in case FIR No. 305, dated 23.08.2017, registered under Sections 496-A/376/ 380/381-A/411, PPC, at Police Station Sahoka, District Vehari.

2. The precise allegations against the petitioner, as per FIR, are that he along with his co-accused, had administered some intoxicant to Ali Haider and abducted *Mst.* Sidra Bibi; the accused had also taken away motorcycle, gold ornaments and cash of Rs. 47,500/-, belonging to the complainant.

3. Arguments heard and record perused.

4. At the very outset, the learned counsel for the petitioner has argued that a co-accused namely Sattar Shah, having the same allegations and role as against the petitioner, has been admitted to bail, through order dated 21.02.2018, passed in Crl.Misc. No. 292-B/2018, hence the petitioner also deserves the same treatment.

5. When the above mentioned proposition has been put to the learned Prosecutor in attendance, he has failed to draw any major distinction between

the case of the present petitioner and his above named co-accused. In this way, principle of consistency is fully applicable to the case of the petitioner, hence he is entitled to the same relief, as has already been extended to his co-accused.

6. Resultantly, on the basis of the above said principle, the petition in hand is allowed and the petitioner is admitted to bail, subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount to the satisfaction of the learned trial Court.

(M.N.K.) Bail allowed

PLJ 2018 Lahore 939 (DB)

[Multan Bench Multan]

***Present*: MUHAMMAD TARIQ ABBASI AND ASJAD JAVAID GHURAL, JJ.**

MUHAMMAD ISMAIL--Petitioner

versus

SPECIAL JUDGE, ANTI-TERRORISM COURT, D.G. KHAN and 2 others--Respondents

W.P. No. 3626 of 2017, decided on 12.3.2018.

Anti Terrorism Act, 1997 (XXVII of 1977)--

----S. 23--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 336(B)--Constitution of Pakistan, 1973--Art. 199--Application for trial in Court of ordinary jurisdiction--Dismissed--Lodging of FIR--Applicability of Section 336-B of, PPC--Question of--Whether from attending facts and circumstances as well as material available on record offence, defend under Section 336-A, which has been made punishable under Section 336-B is made out or otherwise--Acid was poured on face of dead body--Concealment of identification of dead body--It can safely be said that if a corrosive substance is thrown on a dead body, it does amount to hurt, as defined under Section 332 or 336-A, PPC and punishable under Section 336-B, PPC--In situation in hand, as stated above, acid has been poured on dead body, so that its identity may be concealed--Therefore at most offence under Section 201, PPC may be applicable and Section 336, PPC would not attract, and as such case does not come, within jurisdiction of Anti-Terrorism Court--Petition was accepted.

[P. 941] A & B

Mr. Muhammad Ashraf Qureshi, Advocate for Petitioner.

Mehr Nazar Abbas Chawan, Asstt. Attorney General for State.

Mr. Abdul Rehman Tariq Khand, Advocate for Respondent No. 2.

Date of hearing: 12.3.2018.

JUDGMENT

Muhammad Tariq Abbasi, J.--This writ petition, calls in question, the order dated 15.02.2017, passed by the learned Judge Anti-Terrorism Court, Dera Ghazi Khan, whereby application under Section 23 of Anti-Terrorism Act, 1997 **(hereinafter referred to as the Act),** moved by the petitioner, has been dismissed.

2. The FIR No. 580, dated 24.12.2012, under Section 302, PPC, at Police Station Kot Mithan, District Rajanpur, was got lodged by Umer Khan S.I. with the precise contentions that dead body of a woman having strangulation in her neck was recovered and that forehead, left cheek and feet of the body were also cut by some animal.

3. The case was investigated when the present petitioner and six others, namely, Muhammad Saleem, Rana Mehmood Ahmad, Muhammad Ahmad Faiz Rasool, Muhammad Bilal, Ghulam Mustafa and Qari Ghulam Abbas, were found to be involved, hance arrayed as accused. It was found that in the occurrence acid was also used, therefore offence under Section 336-B, PPC, was added and consequently matter was referred to the learned Judge Anti-Terrorism Court, Dera Ghazi Khan.

4. During proceedings before the Anti-Terrorism Court, the petitioner, through an application under Section 23 of the Act had requested that as from the attending facts and circumstances, applicability of Section 336-B, PPC, was not found, hence the case was triable by an ordinary Court and as such, it may be transmitted to the said Court. The learned Judge Ant-Terrorism Court, through the impugned order had turned down the above said request of the petitioner. Resultantly, the writ petition in hand.

5. The learned counsel for the petitioner has re-iterated the grounds taken in the writ petition. Whereas the learned Law Officer as well as the learned counsel for the Respondent No. 2/complainant has opposed the petition, while holding the impugned order to be justified and call of the day.

6. Arguments advanced by all the sides have been heard and the record has been perused.

7. The main question before us is, whether from the attending facts and circumstances as well as material available on the record, the offence, defined under Section 336-A, PPC, which has been made punishable under Section 336-B, PPC, is made out or otherwise. The said provisions read as under:

> **"336-A. Hurt caused by corrosive substance**. Whoever with the intention or knowingly causes or attempts to cause hurt by means of a

corrosive substance or any substance which is deleterious to human body when it is swallowed, inhaled, comes into contact or received into human body or otherwise shall be said to cause hurt by corrosive substance."

"336-B. Punishment for hurt by corrosive substance. Whoever caused hurt by corrosive substance shall be punished with imprisonment for life or imprisonment of either description which shall not be less than fourteen years and a minimum fine of one million rupees."

8. In the above mentioned provisions, hurt to a human being is stated. Therefore, it is clear that if by using of a corrosive substance, including acid, any hurt is caused to a human being, only then the above mentioned provisions will come in field.

9. Evidence of Mst. Hameeda Mai complainant (PW-5) and Muhammad Saeed (PW-6), is available on the record, whereby both have deposed that after strangulation, dead body of *Mst.* Kalsoom was thrown in a sugarcane crop and to conceal its identity, acid was poured on face of the body. Meaning thereby that corrosive substance i.e. acid was poured on the dead body of the above named lady.

10. Another point before the Court is that when a harm is caused to a dead body, through a corrosive substance, even then the accused shall be dealt with, under the above mentioned provisions or otherwise.

"Hurt" has been defined, in Section 332, PPC, in the following words:--

"332. Hurt. (1) Whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables, disfigures, defaces or dismembers any organ or the body or part thereof of any person without causing his death, is said to cause hurt."

11. Plain reading of the said provision suggests that if hurt is caused to a living human being, only then it shall be considered as an injury and punishable accordingly. Therefore, it can safely be said that if a corrosive

substance is thrown on a dead body, it does amount to hurt, as defined under Section 332 or 336-A, PPC and punishable under Section 336-B, PPC.

12. In the situation in hand, as stated above, the acid has been poured on the dead body, so that its identity may be concealed. Therefore at the most offence under Section 201, PPC may be applicable and Section 336, PPC would not attract, and as such the case does not come, within jurisdiction of the Anti-Terrorism Court.

13. As result of what has been discussed above, the instant writ petition is ***accepted***, the impugned order dated 15.02.2017 is ***set-aside*** and reversed. Meaning thereby that application under Section 23 of the Act, moved on behalf of the petitioner, is *allowed*, with a direction to the learned Judge Anti-Terrorism Court, Dera Ghazi Khan, to transfer the file of the case to the Court of ordinary jurisdiction.

(Y.A.) Petition accepted

2018 Y L R Note 18
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
SHER AFZAL and others---Appellants
Versus
The STATE and others---Respondents

Criminal Appeal No.91-J and Criminal Revision No.199 of 2016, heard on 20th April, 2017

Penal Code (XLV of 1860)---

----Ss.302, 148 & 149---Qatl-i-amd, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---Prosecution case was that the accused-appellant and co-accused armed with fire-arms had committed murder of the deceased---Ocular account was furnished by witnesses including complainant---Said witnesses stated the details of occurrence with the specific role attributed to each accused---Record showed that five accused persons were implicated in the case---Co-accused, in view of role and charge, as narrated by the witnesses, was convicted and sentenced to death---Co-accused filed appeal against his conviction and sentence, which was allowed and acquitted by disbelieving the eye-witnesses---Eye-witnesses having already been disbelieved about involvement of co-accused, for believing them against the accused-appellant, some strong and independent corroboration was required, which in the present case was missing---If evidence of eye-witnesses were excluded from the account, except absconsion of accused-appellant, nothing against him was available on the record---Mere absconsion could not be considered as a proof of guilt of the accused---Circumstances and facts made the case and the charge against the accused-appellant doubtful, benefit of which would resolved in favour of accused-appellant, not as a matter of grace or concession but as of right---Accused-appellant was acquitted in circumstances by setting aside conviction and sentence recorded by the Trial Court. [Paras. 2, 4, 5, 6 & 7 of the judgment]

Muhammad Akram v. The State 2012 SCMR 440; Rasool Muhammad v. Asal Muhammad and another 1995 SCMR 1373 and Muhammad Khan and another v. The State 1999 SCMR 1220 rel.

Raja Ghaneem Aabir Khan for Appellants.
Sheikh Istajabat Ali, Deputy Prosecutor General for the State.
Raja Muhammad Nasrullah Waseem for the Complainant.
Date of hearing: 20th April, 2017.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.--This single judgment shall decide the above captioned matters, as both are outcome of same judgment dated 03.05.2.016, passed by the learned Additional Sessions Judge, Jhelum, whereby in case FIR No. 16, dated 30.01.2010, registered under sections 302/ 148/149, P.P.C., at Police Station Chotala, District Jhelum, Sher Afzal (hereinafter referred to as the appellant), was convicted under section 302(b), P.P.C. and sentenced to imprisonment for life, with compensation of Rs.2,00,000/-, payable to legal heirs of the deceased, failing which to further undergo simple imprisonment for six months. The benefit of section 382-B, Cr.P.C., was also extended in favour of the appellant.

2. The above mentioned case was registered, with the precise allegations, that the appellant as well as his co-accused, namely Shahzad alias Shadu, Abdul Waheed, Ibrar, Mazhar Hussain and Talib Hussain had attacked at Rajjab Hussain (hereafter referred to as the deceased) and caused him following injuries:--

i) Shahzad alias Shadu (murdered during trial) made a burst of Kalashnikov, which landed at pelvis of the deceased.

ii) Sher Afzal alias Sheri (present appellant), with 244 bore rifle, had caused injury on left shin of the deceased.

iii) Abdul Waheed (co-accused sentenced to death by the trial court, but acquitted in appeal), with 24 bore rifle had caused injury on left thigh and knee of the deceased.

iv) Ibrar (co-accused acquitted by the learned trial court, with 30 bore pistol, had caused an injury on left wrist of the deceased.

v) Mazhar Hussain and Talib Husain (co-accused) since acquitted by the learned trial court), while armed with firearms, remained with him at the spot.

The alleged prosecution story was that the above named accused, while committing the above mentioned role, were seen by Rashid Mehmood complainant (PW-12) and Abid Husain (PW-13).

3. As stated above, Shahzad alias Shadu (co-accused) was murdered during the trial, hence trial to his extent was abated. Ibrar and Mazhar Hussain (co-accused), having the above mentioned role and charge, were acquitted, through judgment dated 07.05.2012, passed by the Additional Sessions Judge, Jhelum, whereas Talib Hussain co-accused, with the charge mentioned above, was relieved by the learned Trial Court, through judgment dated 26.10.2010.

4. Abdul Waheed co-accused, having the above mentioned allegations, role and charge, through judgment dated 07.05.2012, passed by the learned Trial Court, was convicted and sentenced to death. He had challenged his conviction, before this court, through Crl. Appeal No. 238/2012, whereas the State had forwarded Murder Reference bearing No. 49/2012. Both were decided by a learned Division Bench of this court on 25.05.2016, whereby the appeal was accepted and the above named convict was acquitted of the charge, under the following reasons and grounds:--

> "According to the prosecution, what brought the deceased in the company of eye-witnesses, at the venue was a proposed settlement/compromise with the accused at their residence and in this backdrop, he confronted the appellant and co-accused at 8:25 p.m. in the month of January; it related to a case of robbery registered at the instance of the appellant wherein the deceased was a nominated accused. The manner in which the deceased was allegedly induced to visit his opponent at an odd hour of night for the stated purpose is far from being plausible and even if it is believed to have actually happened, there was no occasion for Shahzad alias Shadu co-accused to inquire from the appellant about his identity. Equally unbelievable is the receipt of multiple fire shots by the deceased with an automatic weapon while he was statedly grappling with the appellant as the latter could not possibly escape consequence thereof; Sher Afzal alias Sheri co-accused as well as the appellant were alleged to have made burst fire shots on to the deceased, hardly needed when he was already hit Shahzad alias Shadu, so was absolutely unnecessary and purposeless for Ibrar accused to hit the deceased with a single shot of

30-caliber pistol. Presence of Rashid Mehmood (PW-11) and Abid Hussain (PW-12) so as to witness the occurrence and leave the spot unscathed is also outside the ambit of probability of their presence at the scene. Shifting of the deceased to DHQ Hospital Rawalpindi by the witnesses when he was already lying dead is yet another intriguing aspect of the case. Argument that occurrence did not take place as alleged seemingly is not entirely beside the mark as the circumstances referred to above admit a real possibility suggestive of a situation incompatible with the story related in Ex.PL. Acquittal of Mazhar Hussain, Ibrar Hussain and Talib Hussain co-accused, warrants a more cautious and careful scrutiny of prosecution evidence qua the appellant as Ibrar Hussain accused is assigned an effective shot to the deceased."

5. From the above mentioned findings, it is clear that the above named eye-witnesses, were disbelieved. In this way, when the alleged eye-witnesses have already been disbelieved qua involvement of the above named co-accused, then for believing them against the appellant, some strong and independent corroboration is required, which in the present case is missing. In this regard, reliance may be made to the case titled "Muhammad Akram v. The State" reported as 2012 SCMR 440, wherein the august Supreme Court of Pakistan has held as under:--

> "Except for the oral statements of eye-witnesses there is nothing on record which could establish the presence of both the eye-witnesses at the spot and as their presence at the spot appears to be doubtful, no reliance could be placed on their testimonies to convict the appellant on a capital charge. Since the same set of evidence has been disbelieved qua the involvement of Muhammad Aslam, a such, the same evidence cannot be relied upon in order to convict the appellant on a capital charge as the statements of both the eye-witnesses do not find any corroboration from any piece of independent evidence."

6. The learned Prosecutor as well as the learned counsel for the complainant have frankly conceded that if the above named eye-witnesses are excluded from the account, then except absconsion of the appellant, nothing else against him is available on the record. It has been held by the superior courts of the country in a number of judgments that mere absconsion could not be

considered as a proof of guilt of an accused. If any case law is needed to fortify this view, reference could be made to the case of "Rasool Muhammad v. Asal Muhammad and another" (1995 SCMR 1373), where the Hon'ble Supreme Court of Pakistan observed as under:--

> "Furthermore, disappearance of a person named as a murderer/culprit after the occurrence, is but natural, whether named rightly or wrongly. Abscondence per se is not a proof of the guilt of an accused person."

7. All the above mentioned facts and circumstances, to my mind, have made the prosecution case and the charge against the appellant highly doubtful and as such he is entitled to due benefit, not as a matter of grace or concession, but as of right. In this regard, I am fortified by the dictum laid down in the case titled "Muhammad Khan another v. The State" reported as 1999 SCMR 1220 relevant para whereof reads as under:--

> "It is axiomatic and universally recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be unsafe to rely on the ocular evidence which has been moulded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct perspective."

8. Resultantly, the impugned judgment ending into conviction and sentence of the appellant could not be termed as justified. Consequently, the appeal in hand is accepted, the impugned judgment is set aside and the appellant is acquitted of the charge, while extending him the benefit of doubt. He is in custody, hence it is directed that be leased forthwith, if is not required to be

detained in any other case. The disposal of the case property shall be as directed by the learned Trial Court, in the impugned judgment.

9. As a consequence, the Crl. Revision No. 199/2016, for enhancement of sentence of the appellant Sher Afzal, filed by the complainant (Rashid Mahmood), for the foregoing reasons, is without substance, hence dismissed.

JK/S-43/L Appeal accepted.

2018 Y L R 985

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

Mst. PARVEEN AKHTAR and 4 others---Petitioners

Versus

JUDICIAL MAGISTRATE SECTION 30 and another---Respondents

Crl. Misc. No.1056-Q of 2017, heard on 6th June, 2017.

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

----Ss. 200, 204 & 561-A---Private complaint---Issuance of process against accused---Summoning of accused by trial Court to face trial---Powers and jurisdiction of High Court---Scope---Powers and jurisdiction of High Court under S. 561-A, Cr.P.C. were discretionary in nature and were exercised only if the Court was satisfied that no adequate remedy was provided by law---Exercise of powers under S. 561-A Cr.P.C. was an exception and not a rule. Chaudhary Munir v. Mst. Surriya and others PLD 2007 SC 189 rel.

(b) Criminal trial---

----Two versions---Scope---When there were two versions of an incident, one version put forward by one party and counter version by its adversary; Trial Court while assessing evidence brought on record by the parties had to keep both versions in juxtaposition and then arrive at a final conclusion.

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

----Ss. 561-A, 200 & 204---Penal Code (XLV of 1860), Ss. 337-F(i), 427, 447, 506, 147 & 149---Private complaint---Issuance of process against accused---Summoning of accused by Trial Court to face trial---Powers and jurisdiction of High Court---Scope---Respondent had filed a private complaint against the petitioners and six others---Trial Court had summoned the petitioners and the others to face the trial---Petitioners contended that respondent had filed the private complaint as a counter blast of FIR got lodged by the petitioners and as such the complaint was not maintainable---Validity---Filing of complaint, recording cursory evidence in it and then on the basis of available evidence, order for summoning of an accused, could not be termed as abuse of process of law---Such like proceedings could not be challenged under S. 561-A, Cr.P.C. but it might be called in question, through a revision petition and that too, before the revisional court of first instance---

Petitioners, instead of adopting the legal mode of challenging the summoning order, through a revision petition before the competent court, had sought quashing of the said order by way of petition under S. 561-A, Cr.P.C., which was not competent and maintainable, thus dismissed in limine.

Syed Zulfiqar Abbas Naqvi for Petitioners.
Sheikh Istajabat Ali Deputy Prosecutor General for the State.
Date of hearing: 6th June, 2017.

ORDER

MUHAMMAD TARIQ ABBASI, J.--This petition, filed under section 561-A, Cr.P.C. carries the following relief:--

> "It is therefore, respectfully prayed that the instant petition may ordered to be accepted and the order dated 10.04.2017 may ordered to be set aside, in the best interest of justice."

2. Brief facts of the case are that the respondent No.1 has filed a private complaint under sections 337-F(i)/427/ 447/506/147/149, P.P.C., against the petitioners and six others in which the learned Judicial Magistrate Section-30, Jand, District Attock, through order dated 10.04.2017, has summoned the petitioners and the others, named in the complaint, to face the trial. Hence the petition in hand.

3. Arguments heard. Record perused.

4. It is noted that the petitioners have invoked the jurisdiction of this Court under section 561-A, Cr.P.C. The said powers and jurisdiction are discretionary in nature and are exercised only if the Court is satisfied that no adequate remedy is provided by law. The principles and law enunciated by the august Supreme Court of Pakistan has narrowed down the scope of the exercise of power under the above mentioned provision to an extent that the same can only be exercised sparingly and under extraordinary and exceptional circumstances. Exercise of powers under section 561-A, Cr.P.C. is an exception and not a rule. The Apex Court in a number of cases had laid down a criteria for interference of the High Court, in exercise of its jurisdiction under section 561-A, Cr.P.C. which are summarized as under:--

(i) The said provision should never be understood to provide an additional or an alternate remedy nor could the same be used to over-ride the express provision of law.

(ii) The said provision can ordinarily be exercised only where no provision exists in the Code to cater for a situation or where the Code offers no remedy for the redress of a grievance.

(iii) The inherent powers can be invoked to make a departure from the normal course prescribed only in exceptional cases of extraordinary nature and reasons must be offered to justify such a deviation.

The Hon'ble Supreme Court of Pakistan while dealing with the question of exercise of jurisdiction under the above mentioned provision of law, in the case titled "Chaudhary Munir v. Mst. Surriya and others" reported as PLD 2007 Supreme Court 189, held as under:--

> "....The powers as conferred upon High Court in section 561-A, Cr.P.C. being extraordinary in nature must be exercised sparingly with utmost care and caution and it should not be exercised in a casual and cursory manner because inherent jurisdiction as conferred upon the High Court pursuant to the provisions as enumerated in section 561-A, Cr.P.C. are neither "alternative" nor "additional" in its character and is to be rarely invoke only in the interest of justice so as to seek redress of grievances for which no other procedure is available and that the provisions should not be used to obstruct or divert the ordinary course of criminal procedure."

5. The contention of the learned counsel for the petitioners that the respondent No. 1 has filed the private complaint as a counter blast of FIR No. 194 dated 12.12.2012 got lodged by the petitioners' party and as such, the said complaint is not maintainable, is also without any substance because it is well settled proposition that when there are two versions of an incident, one version put forward by one party and counter version by its adversary, the trial Court while assessing evidence brought on record by the parties has to keep both versions in juxtaposition and then arrive at a final conclusion.

6. The mere claim of innocence by an accused could never be considered sufficient to justify such a departure from normal procedure because if this is so permitted then every accused would opt to stifle the prosecution and to have his guilt or innocence determined under section 561-A, Cr.P.C. The

result would be decisions of criminal trials in a summary and cursory manner rendering the trials as a superfluous activity. This never was and could never been the intention of the law maker in adding section 561-A to the Code. Inherent powers can be invoked to make a departure from the normal course prescribed by law only and only in exceptional cases of extraordinary nature so that the powers meant to prevent the abuse of process of law, are not abused, themselves.

7. Reverting back to the present case, filing of a private complaint, recording cursory evidence in it and then on the basis of available evidence, order for summoning of an accused, could not be termed as abuse of process of law. In this way, such like proceedings, could not be challenged under section 561-A, Cr.P.C, rather may be called in question, through a revision petition and that too, before the revisional court of first instance. The petitioners, instead of adopting the above mentioned legal mode of challenging the summoning order, through a revision petition before the competent court, are seeking quashing of the said order by way of the instant petition under Section 561-A, Cr.P.C, which being not competent and maintainable, is dismissed in limine.

JK/P-14/L Revision dismissed.

2019 C L C Note 27

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

Malik ZAHEER ABBAS---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No. 1970 of 2013, decided on 15th May, 2014.

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

----S. 15---Ejectment of tenant---Wilfull default in payment of monthly rent---Scope---Oral tenancy agreement---Scope---Petitioner/tenant contended that Rent Tribunal had wrongly dismissed his application to contest the ejectment petition filed by the respondent/landlord---Respondent contended that from the very beginning of the tenancy the petitioner was irregular towards payment of monthly rent---Validity---Record revealed that the Rent Tribunal had dismissed the application of the petitioner to contest the ejectment petition on the ground that he (petitioner) had failed to give any proof regarding payment of the monthly rent---In case of oral agreement, the tenancy was from month to month and when not extended/accepted by the landlord, the same would have been terminated---Findings of the Rent Tribunal were on the basis of correct appreciation and evaluation of the available material and the law on the subject---High Court observed that when the matter in shape of an appeal came before the District Court, again both the parties were heard, the facts and circumstances of the case were re-visited, law on the subject was considered and as no defect in the order passed by the Rent Controller was found, the appeal was dismissed---No illegality or infirmity having been noticed in the concurrent findings passed by the two Courts below, constitutional petition was dismissed accordingly.

Sh. Muhammad Matee-ur-Rehman for Petitioner.

Naureen Kausar Mughal for Respondent No.3.

ORDER

MUHAMMAD TARIQ ABBASI, J.---By way of this writ petition, the order dated 15.1.2013, passed by the learned Special Judge (Rent), Rawalpindi and the judgment dated 31.8.2013 passed by the learned Additional District Judge, Rawalpindi have been called in question.

2. Through the above mentioned order, in an ejectment petition, filed by the respondent No. 3 against the petitioner, the application for leave to contest, moved by the petitioner, has been dismissed. Whereas through the above mentioned judgment, an appeal preferred by the petitioner against the above said order of the learned Rent Tribunal has also been turned down.

3. Arguments heard and record perused.

4. The record shows that the respondent No. 3 had filed the ejectment petition, against the petitioner, in respect of the house described in the petition. The grounds were that the house was obtained by the petitioner from respondent No. 3 in the month of August, 2011 on monthly rent of Rs.6,000/-; that from the very beginning, the petitioner was irregular towards payment of the monthly rent and ultimately from May, 2012, he failed to make the payment of the monthly rent, despite the fact that in the month of August, 2012, the tenancy had expired.

5. The petitioner appeared before the learned Rent Tribunal and filed an application, whereby he sought leave to contest the ejectment petition. But the learned Rent Tribunal had dismissed the same through the order dated 15.1.2013, on the grounds that the petitioner had failed to give any proof regarding payment of the rent as claimed in the ejectment petition and that in case of oral agreement, the tenancy was from month to month and when nor extended or accepted, by the respondent No. 3, it had been terminated.

6. It has been observed that the above mentioned findings of the learned Rent Tribunal were on the basis of correct appreciation and evaluation of the material available before it and the law on the subject. When the matter in shape of an appeal came before the learned Additional District Judge, again both the parties were heard, the facts and circumstances of the case were re-visited and law on the subject was considered and as no defect in the order passed by the Special Judge (Rent) was found, the appeal was dismissed.

7. No defect of any nature in the order/judgment passed by the learned courts below could be pointed out or observed, hence the said concurrent findings are not interferable in writ jurisdiction and as such the writ petition in hand is dismissed.
MQ/Z-7/L Petition dismissed.

2019 P Cr. L J 883
[Lahore (Rawalpindi Bench)]
Before Muhammad Tariq Abbasi, J
ASAD NAWAZ---Petitioner
Versus
ZULFIQAR AFZAL KHAN and others---Respondents

Criminal Revision No. 191 of 2017, heard on 21st December, 2017.

Criminal Procedure Code (V of 1898)---
----S. 540---Qanun-e-Shahadat (10 of 1984), Arts. 132 & 133---Penal Code (XLV of 1860), S. 302---Re-examination of witness before cross-examination---Petitioner was aggrieved of order passed by Trial Court allowing reexamination of witness prior to cross-examination---Validity---Procedure prescribed through S. 540, Cr.P.C. and Arts. 132 & 133 of Qanun-e-Shahadat, 1984 was quite different---Court was empowered under S. 540, Cr.P.C. that while realizing appropriate and necessary, could call and examine a person or re-examine a witness who had already been examined---Mode and order was not provided under S. 540, Cr.P.C. under which examination of a witness should be carried out---Provisions of Art. 132 of Qanun-e-Shahadat, 1984 defined classes of examination and Art. 133 of Qanun-e-Shahadat, 1984 prescribed mode by which examination-in-chief, cross-examination, re-examination and re-cross-examination should be recorded---Trial Court was justified in allowing re-examination of witness but its intention to re-examine witness prior to cross-examination by defence was not as per requirements---High Court directed that firstly, cross-examination of witness be got conducted and thereafter he should be re-examined and if defence wanted to re-cross examine him, same be allowed---Petition was disposed of accordingly.

Malik Waheed Anjum for Petitioner.

Sh. Istajabat Ali, D.P.P. with Dil Pazeer, ASI for the State.

Tanvir Iqbal Khan for Respondent No.1.

Date of hearing: 21st December, 2017.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition calls in question, the order dated 09.09.2017, passed by the learned Additional Sessions Judge, Hassan Abdal, District Attock, whereby while accepting

application under section 540, Cr.P.C., moved by the prosecution, re-examination of Dr. Ishtiaq Hussain (PW-6) has been allowed.

2. The learned counsel for the petitioner has argued that act of the learned trial court, for allowing re-examination of the above named witness, prior to cross-examination by the defence i.e. petitioner's party, being against the procedure and law, could not be appreciated, hence may be set aside.

3. The learned counsel appearing on behalf of respondent No. 1 has contended that section 540, Cr.P.C. fully empowers a court to re-examine a witness, hence the impugned order, whereby re-examination of the above named PW-6 has been directed, is quite in accordance with law. The learned Prosecutor has supported the contentions made by the learned counsel for respondent No. 1.

4. Arguments of all the sides have been heard and the record has been perused.

5. During the trial, in case FIR No. 76, dated 14.03.2015, registered under sections 302/34, P.P.C., at Police Station Saddar Hassan Abdal, District Attock, examination-in-chief of Dr. Ishtiaq Hussain as PW-6, was recorded on 10.04.2017 and cross-examination was reserved for 17.04.2017. Thereafter, on 02.05.2017, the prosecution, through an application under section 540, Cr.P.C., had sought re-examination of the above named witness, on the grounds that a statement, allegedly made by the deceased Irfan Afzal Khan (then injured), before the Police, in the hospital was signed by the said doctor, hence to bring the said fact and the statement on the record, his re-examination was necessary. The learned trial court, through the impugned order, had allowed the above said application and granted the requisite permission.

6. In Criminal Procedure Code, 1898 (hereinafter referred to as the Code), Section 540 deals with a procedure, under which a person can be called and recorded as a witness. The said provision reads as under:-

"540. Power to summon material witness or examine persons present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or

examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

7. In Qanun-e-Shahadat Order, 1984 (hereinafter referred to as the Order), there are Articles 132 and 133, which prescribe order and mode of examination of a witness. For guidance, the above mentioned Articles are reproduced herein below:-

"132. Examination-in-chief, etc. (1) The examination of a witness by the party who calls him shall be called his examination-in-chief.

(2) The examination of a witness by the adverse party shall be called his cross-examination.

(3) The examination of a witness subsequent to the cross-examination by the party who called him, shall be called his re-examination."

"133. Order of examination. (1) 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.

(2) The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examinations and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine that matter."

8. Bare reading of the above mentioned three provisions clearly suggest that procedure, prescribed through section 540 of the Code and Articles 132 and 133 of the Order, is quite different. Section 540 of the Code, empowers a court that it, while realizing appropriate and necessary, can call and examine a person or re-examine a witness, who has already been examined. The said provision does not provide the mode and order, under which examination of a witness should be carried on. Whereas, Article 132 of the Order defines classes of examination and Article 133 prescribes the modes by which examination-in-chief, cross-examination, re-examination and re-cross examination should be recorded.

9. In the matter in hand, the examination-in-chief of the above named doctor has been recorded as PW-6. Thereafter, the learned trial court has felt that he should be re-examined, so that certain proceedings and documents relating to him may come on the record. The order of the learned trial court, for allowing re-examination of the above said witness is quite justified, but its intention to re-examine the witness, prior to cross-examination by the defence is not as per the requirement and order, prescribed, through the above mentioned Articles. Therefore, it is directed that firstly, cross-examination of the witness be got conducted and thereafter he should be re-examined and if the defence wants to re-cross-examine him, it be allowed.

10. Disposed of in the above mentioned terms.

MH/A-11/L Order accordingly.

2019 P Cr. L J 1241

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

Ch. ABID MEHMOOD---Appellant

Versus

Mirza ZAFAR JAVED and others---Respondents

Criminal Appeal No. 1041 and Criminal Miscellaneous No. 1-M of 2018, heard on 5th March, 2019.

Criminal Procedure Code (V of 1898)---

----Ss. 249-A, 417(2A) & 493---Appeal against acquittal---Power of Magistrate to acquit accused at any stage---Public Prosecutor to conduct prosecution---Delay in filing appeal against acquittal by Trial Court---Condonation of delay---Hearing on application under S. 249-A, Cr.P.C. without notice to complainant---Effect---Appellant assailed judgment of Trial Court whereby it acquitted respondents while allowing application under S. 249-A, Cr.P.C.---Appeal against acquittal was barred by time and appellant sought condonation of delay on the sole ground that no notice to the appellant or his witnesses was served and as such he remained unaware of passing of impugned judgment---Validity---Trial Court, after hearing Public Prosecutor as well as counsel for accused, had pronounced the judgment, hence the procedure prescribed under S. 249-A, Cr.P.C. was duly complied with---Under S. 493, Cr.P.C., it was only Public Prosecutor who had to conduct the prosecution and if there was any private counsel, engaged by the complainant, he was required to act under the instructions of the Public Prosecutor---Stance of the appellant that he should have been given notice was of no legal value---No reason, cause or justification to condone the delay was made out---Appeal, being barred by time, was dismissed.

Rizwan Haider Afzal and Malik Mushtaq Ahmad for Appellant.

Afzal Khan Jadoon for Respondents Nos. 1 to 3.

Date of hearing: 5th March, 2019.

ORDER

MUHAMMAD TARIQ ABBASI, J.---Although, in the instant appeal, filed in terms of section 417(2A), Cr.P.C., against acquittal of Mirza Zafar Javed, Mirza Waqas and Mirza Muhammad Bilal (hereinafter referred to as the respondents), through judgment dated 26.09.2018, delivered by Sumaira Alamgir, learned Judicial Magistrate 1st Class, Rawalpindi, respondents Nos. 2 and 3 have been summoned, but it has been observed that the appeal is time barred and for condonation of delay, an application bearing No. 01-M/2018, has also been preferred. Therefore firstly, it would be seen whether the delay in filing the appeal, requires condonation or otherwise.

2. The judgment in question was passed on 26.09.2018, whereby in an application under section 249-A, Cr.P.C., moved by the respondents, the learned A.D.P.P. as well as counsel for the respondents were heard and thereafter, the said application was allowed and consequently, the respondents were acquitted of the charge.

3. The appellant had applied for attested copies of the judgment on 11.12.2018 i.e. after 02 months and 15 days, which were supplied on the same day and thereafter, the appeal was filed on 17.12.2018.

4. Section 417(2-A), Cr.P.C., prescribes a period of thirty days, for filing an instant like appeal, but the appeal in hand has been preferred, with a delay of about 01 month and 20 days. In the application i.e. Crl. Misc. No. 01-M/2018, condonation of delay has been sought, on the sole ground, that no notice to the appellant or his witnesses was ever served and as such he remained unaware of passing of the impugned judgment. The said stance is totally unjustified, because through an order dated 14.02.2017, passed in Crl. Misc. No. 232-B/2017, with consent of the parties, a direction to the learned trial court, for early decision of the case was given, in the following words:-

> "However, with the concurrence of both the parties, learned trial court is directed to conclude the trial expeditiously, preferably within three months of the copy of receipt of this order. In order to

comply with this direction the trial court may proceed with the trial on day to day basis under intimation to this Court through Deputy Registrar (Judl.)."

Thereafter, a number of opportunities were given to the appellant, to lead his evidence and even to procure attendance of the appellant and his witnesses, non-bailable warrants of arrest were also issued. Therefore, it could not be presumed that the appellant remained unaware of pendency of the case, in the trial court.

5. Furthermore, as per section 249-A, Cr.P.C., to invoke jurisdiction under it, the Prosecutor and the accused should be heard. The said provision reads as under:-

"249-A. Power of Magistrate to acquit accused at any stage. Nothing in this Chapter shall be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if after hearing the prosecutor and the accused and for reasons to be recorded, he considers that the charge is groundless or that there is no probability of the accused being convicted of any offence."

6. The learned trial court, after hearing the learned Prosecutor as well as counsel for the respondents/accused, had pronounced the judgment, hence the prescribed procedure was duly complied with. Even otherwise, according to section 493, Cr.P.C., it is only the Public Prosecutor, who shall conduct the prosecution and if there is any private counsel, engaged by the complainant, he should act under instructions of the Public Prosecutor. For convenience, the above said enactment is reproduced hereinbelow:-

"493. Public Prosecutor may plead in all Courts in cases under his charge. Pleaders privately instructed to be under his direction. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct prosecution, and the pleader so instructed shall act therein, under his directions."

In this way, even in the light of the above said provision, the alleged stance of the appellant, that he should have been given notice, is of no legal value.

7. Due to the reasons mentioned above, there is no reason, cause or justification, to condone the delay, hence the request made through Crl. Misc. No. 01-M/2018, is declined. Consequently the appeal being hopelessly time barred, is dismissed.

SA/A-42/L Appeal dismissed.

PLJ 2019 Cr.C. 184

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

MAJID ALI KHAN--Petitioner

versus

STATE and 14 others--Respondents

Crl. Rev. No. 375 of 2013, decided on 22.1.2015.

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

----Ss. 234 & 439--Joint trial of criminal cases--Revision petition--Petitioner is neither an accused nor he has any concern with the occurrence, alleged in the said matters but erroneously through the impugned order, joint trial of the petitioner, in the above said matters has also been ordered which is not acceptable under the law--Plain reading of the above mentioned provision indicates that joint trial of cases could be held when Accused in all the cases should be the same, Offences should be of same kind, and Number of cases should not exceed three--Joint trial under the above mentioned provision would only be permissible, if the above mentioned requirements are fulfilled--Joint trial is not permissible--Revision petition was allowed. [Pp. 185 & 186] A, B, C & D 2013 YLR 548, *ref*.

Mr. Muhammad Masood Bilal, Advocate for Petitioner.

Mr. Muhammad Ali Shahab, DPG for State.

Date of hearing: 22.1.2015.

ORDER

This criminal revision is directed against the order dated 4.11.2013, passed by the learned Special Judge, Anti-Corruption, Multan whereby joint trial of FIR No. 340/2011 registered at Police Station Jalalpur Pirwala, district Multan and FIRs No. 6/2012 and 53/2012, both registered at Police Station Anti Corruption Establishment, Multan has been ordered.

2. It is contended by the learned counsel for the petitioner that in FIRs No. 06 of 2012 and 53 of 2012, petitioner is neither an accused nor he has any concern with the occurrences, alleged in the said matters but erroneously through the impugned order, joint trial of the petitioner, in the above said matters has also been ordered which is not acceptable under the law.

3. Arguments heard. Record perused.

4. Section 234 of the Criminal Procedure Code, 1898 provides joint trials of cases. Said Sections reads as under:--

234. Three offences of same kind within one year may be charged together. (i) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, and number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same Sections of the Pakistan Penal Code or of any special or local law:

Provides that, for the purpose of this section, an offence under Section 379 of the Pakistan Penal Code shall be deemed to be an offence of the same kind as an offence punishable under Section 380 of the said Code, and that an offence punishable under any Sections of the Pakistan Penal Code or of any special or local law shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

Plain reading of the above mentioned provision indicates that joint trial of cases could be held under the following circumstances:--

1. **Accused in all the cases should be the same.**
2. **Offences should be of same kind.**
3. **Number of cases should not exceed three.**

5. It has been observe that in the above mentioned case FIR No. 340/2011 there are fourteen accused, including the present petitioner. Whereas, in the other FIRs Nos. 6/2012 and 53/2012, the petitioner is not an accused. Joint trial under the above mentioned provision would only be permissible, if the above mentioned requirements are fulfilled. Applying the above mentioned criteria to the facts of the instant matter, it is observed that when the panel of accused is different and separate challans have been submitted in respect of each FIR then the joint trial of accused is a patent illegality and violation of Section 234, Cr.P.C. Reliance in this respect may be made to the case of *"Amjad Ali and another Versus The State and another"* (2013 YLR 548).

6. For the foregoing reasons, the situation in hand does not qualify the above mentioned requirements, hence joint trial is not permissible. Consequently, the instant revision petition is allowed, the impugned order is set-aside with a direction that trial of case FIR No. 340/2011 be conducted separately, whereas the above mentioned other cases may be tried jointly.

(K.Q.B.) Revision allowed

PLJ 2019 Lahore 521 (DB)

[Multan Bench, Multan]

***Present*: MUHAMMAD TARIQ ABBASI AND MUJAHID MUSTAQEEM AHMED, JJ.**

BASHIR AHMAD--Appellant

versus

ADDITIONAL SESSIONS JUDGE/EX-OFFICIO JUSTICE OF PEACE, TAUNSA SHARIF, DISTRICT D.G. KHAN and 4 others etc.--Respondents

I.C.A. No. 305 of 2018, decided on 6.5.2019.

Law Reforms Ordinance, 1972 (XII of 1972)--

----S. 3--Theft of Electricity—Registration of FIRs--Pre-arrest bails were granted on basis of payment of deduction bills--Bills were found as bogus—Petitions for lodging FIRs—Allowed--Filling of W.P.--Dismissed--Challenge to--Learned Sessions Judge, Dera Ghazi Khan is directed to ask concerned Additional Sessions Judge, Tounsa Sharif, to take up matter in question and if it is found that appellant and others, by filing false documents, had obtained unjustified concession of extraordinary relief of pre-arrest bail, then not only said concession should be withdrawn, but SHO of concerned Police Station should also be asked to entertain above said application of SDO MEPCO, Tounsa Sharif and take criminal action, against nasty(s), as warranted under law--Intra Court Appeal was disposed of. [P. 522] A

Syed Jaffer Tayyar Bukhari Advocate for Appellant.

Mr. Amjad Ali Ansari, AAG, for Respondents.

Mr. Amir Aziz Qazi, Advocate for Respondent No. 5.

Date of hearing : 6.5.2019.

ORDER

This Intra Court Appeal, filed under Section 3 of Law Reforms Ordinance, 1972, calls in question, the order dated 25.09.2018, passed by the learned Single Judge in Chamber, in Writ Petition No. 13715 of 2018, whereby the said petition has been dismissed in *limini*.

2. An application was moved by the S.D O. MEPCO, Tounsa Rural Sub-Division, Tounsa Sharif, District Dera Ghazi Khan, before the *Ex-officio* Justice of Peace, Tounsa Sharif, whereby registration of a criminal case, under Sections 419/420/468/471 PPC, against the appellant and others was sought, on the grounds that FIRs No. 195/2017, 230/2017, 234/2017,

252/2017, 04/2018, 10/2018, 18/2018 and 19/2018, for theft of electricity, were registered against the present appellant and others, named in the application; all had applied for pre-arrest bail before the learned Additional Sessions Judge, Tounsa Sharif, when on 24.02.2018, the appellant and others had contended that they had paid the deduction bills, issued to them and submitted the same in the Court and the Court had confirmed pre-arrest bail of the appellant and others. It was further contended in the application, that on verification, the above said bills, alleged and submitted by the appellant and others, before the Court, were found as bogus, hence criminal action against them was required. The Ex-officio Justice of Peace, through order dated 11.09.2018, had directed the SHO of Police Station City Tounsa Sharif, to record statement of the SDO MEPCO, Taunsa Sharif and proceed in accordance with law.

3. The above mentioned direction of the Ex-officio Justice of Peace, was challenged by the appellant, through Writ Petition No. 13175/2018, which was taken up on 25.09.2018, but dismissed in *limini*.

4. The stance of the learned counsel for the appellant is that no forged document was prepared by the appellant or anybody else and that true documents were filed in the Court, hence the application for registration of criminal case was totally unjustified and that even otherwise, it was the learned Court, where the documents were tendered, to look into the situation and then proceed in accordance with law.

5. Consequently, the learned Sessions Judge, Dera Ghazi Khan is directed to ask the concerned Additional Sessions Judge, Tounsa Sharif, to take up the matter in question and if it is found that the appellant and others, by filing false documents, had obtained unjustified concession of extraordinary relief of pre-arrest bail, then not only the said concession should be withdrawn, but the SHO of the concerned Police Station should also be asked to entertain the above said application of SDO MEPCO, Tounsa Sharif and take criminal action, against the nasty(s), as warranted under the law.

6. All the above mentioned proceedings should be completed within a fortnight, with intimation to Deputy Registrar (Judicial) of this Court.

7. **Disposed of.**

(MMR) Appeal disposed of

PLJ 2019 Cr.C. 585

[Lahore High Court, Rawalpindi Bench]

Present: **MUHAMMAD TARIQ ABBASI, J.**

RAB NAWAZ--Petitioner

versus

MUBRI KHAN etc.--Respondents

Crl. Rev. No. 127 of 2018, heard on 30.1.2019.

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

----S. 250/367--Pakistan Penal Code, (XLV of 1860), Ss. 380/411/448--Acquittal in criminal trial--Show-cause notice--Compensation--Verbal order--Proceeding of no value--If a Magistrate, on finalization of a criminal trial, comes to conclusion that accusation/ charge, against an accused was false, frivolous or vexatious, then he, in addition to an order of acquittal of an accused, may ask the complainant of the case to pay compensation, upto Rs. 25,000/- to such an accused--There is no separate finding of the learned Magistrate, whereby the accusation, leveled by the petitioner, has been declared as false, frivolous or vexatious--Similarly, no express show cause notice has been issued to the petitioner and even no reply from him has been sought or received--Petitioner was orally asked for the compensation, but he had failed to make any justification--The said procedure, adopted by the Magistrate, orally, could not be appreciated, because the judicial system does not allow oral criminal proceedings as every act of a Court, should be express and unambiguous--Proceedings in question, ending into imposition of the compensation, to the petitioner, of no legal value--Resultantly, the revision petition is allowed.

[Pp. 587, 588, 589 & 590] A, B, C, D, E & F

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

----S. 250--Pre-requisites, to be followed by a Magistrate:

i) There should be acquittal of an accused;

ii) The Magistrate should be of the opinion that the accusation/charge was false, frivolous or vexatious;

iii) The complainant should be called to show cause that why he should not pay compensation to acquitted accused(s);

iv) The Magistrate should record, any cause made by the complainant;

v) The Magistrate should consider the cause and then record an opinion that cause is unjustified and the accusation/charge was false. [P. 588] B

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

----S. 24-A--Verbal order and proceeding of a Court or authority, could not be given any legal value. Even if an order or proceeding by a competent authority is written, but not signed, it is nothing in the eye of law. Section 24-A of General Clauses Act, 1897 provides that any order or direction, given by any authority, office or person must be express i.e. in written form. A written order and proceeding identify their author and recipient. Written form is the only medium, that brings to fore the reason behind an order or proceeding, which may undergo accountability of judicial review. Therefore, an order or proceeding to be in writing is integral to rule of law. Verbal Order has no legal existence and as such does not constitute an order, as envisaged u/S. 367, Cr.P.C. [P. 589] E

1998 SCMR 611; 2007 SCMR 1328 *ref.*

Raja Muhammad Faisal Ghani Janjua, Advocate for Petitioner.

Mr. Umer Hayat Gondal, Additional Prosecutor General for State.

Malik Ihsan Haider, Advocate for Complainant.

Date of hearing: 30.01.2019.

JUDGMENT

This revision petition calls in question, the judgment dated 01.03.2014 and order dated 09.02.2018, respectively passed by the learned Judicial Magistrate Section-30, Talagang and learned Additional Sessions Judge, Talagang, District Chakwal.

2. Through the judgment, in a case, got registered by the petitioner, against Mubri Khan, Muhammad Kamran, Ahmed Khan, and Muhammad Sher ***(hereinafter referred to as the respondents),*** through FIR No. 28, dated 11.04.2011, under Sections 380/448/411, PPC, at Police Station Lawa, Tehsil Talagang, District Chakwal, not only the respondents were acquitted of the charge, but the petitioner was also directed to pay compensation of Rs. 25,000/- to them, as provided under Section 250, Cr.P.C. Whereas through the order, an appeal preferred by the petitioner, challenging imposition of the above said compensation, upon him, has been dismissed.

3. The above mentioned case was got lodged, by the petitioner, against the respondents, with the precise charge, that they while armed with lethal weapons, had entered into a 'Haveli', belonging to the petitioner and stolen away the articles, lying therein. The trial was held in the Court of learned Magistrate Section-30, Talagang and finally, the judgment dated 01.03.2014 was pronounced, whereby not only the respondents were acquitted of the charge, but the petitioner was also burdened under Section 250, Cr.P.C. and directed to pay compensation of Rs. 25,000/- to the respondents.

4. There is no denial of the fact that if a Magistrate, on finalization of a criminal trial, comes to the conclusion that accusation/charge, against an accused was false, frivolous or vexatious, then he, in addition to an order of acquittal of an accused, may ask the complainant of the case to pay compensation, upto Rs. 25,000/- to such an accused. For reference, the above said provision is reproduced hereunder:

> *"**250. False frivolous or vexatious accusations.** (1) If in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate, by whom the case is heard [xxxxx] acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may by his order of [xxxxx] acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show-cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or if such person is not present direct the issue of a summons to appear and show cause as aforesaid.*
>
> *(2) The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious, may for reasons to be recorded, direct that compensation to such amount not exceeding [twenty five thousand rupees] or if the Magistrate is a Magistrate of the third class not exceeding [two thousand and five hundred] rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.*

[(2-A) The compensation payable under sub-section (2) shall be recoverable as an arrear of land revenue.]

(2-B) When any person is imprisoned under sub-section (2A), the provisions of Sections 68 and 69 of the Pakistan Penal Code shall, so far as may be, apply.

(2-C) No person who has been directed to pay compensation under the section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him:

Provided that any amount paid to an accused person under this section shall be taken into account, in awarding compensation to such person in any subsequent civil suit relating to the same matter.]

(3) A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal form the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) When an order for payment of compensation to an accused person is made, in case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.

*[(5)*****]"*

5. A plain reading of the provision mentioned above, suggests certain pre-requisites, to be followed by a Magistrate, which can be summed as under:

i) There should be acquittal of an accused;

ii) The Magistrate should be of the opinion that the accusation/charge was false, frivolous or vexatious;

iii) The complainant should be called to show cause that why he should not pay compensation to acquitted accused(s);

iv) The Magistrate should record, any cause made by the complainant;

v) The Magistrate should consider the cause and then record an opinion that cause is unjustified and the accusation/charge was false.

6. In the matter in hand, admittedly, there is no separate finding of the learned Magistrate, whereby the accusation, leveled by the petitioner, has been declared as false, frivolous or vexatious. Similarly, no express show cause notice has been issued to the petitioner and even no reply from him has been sought or received. In the judgment of the learned Magistrate, it is mentioned that the petitioner was orally asked for the compensation, but he had failed to make any justification. The said procedure, adopted by the Magistrate, orally, could not be appreciated, because the judicial system does not allow oral criminal proceedings as every act of a Court, should be express and unambiguous.

7. Verbal order and proceeding of a Court or authority, could not be given any legal value. Even if an order or proceeding by a competent authority is written, but not signed, it is nothing in the eye of law. Section 24-A of General Clauses Act, 1897 provides that any order or direction, given by any authority, office or person must be express i.e. in written form. A written order and proceeding identify their author and recipient. Written form is the only medium, that brings to fore the reason behind an order or proceeding, which may undergo accountability of judicial review. Therefore, an order or proceeding to be in writing is integral to rule of law. Verbal Order has no legal existence and as such does not constitute an order, as envisaged under Section 367, Cr.P.C. If any case law in this regard is needed, reference may be made to the dictum laid down in the cases titled *"Zahid Hussain and another*

versus The State" reported as 1998 SCMR 611 and *"Capital Development Authority through Chairman and another versus Mrs. Shaheen Farooq and another"* reported as 2007 SCMR 1328. The relevant portion of 2007 SCMR 1328, reads as under:

> ***"Verbal order has no sanctity in law and such orders are alien to the process of the law and the Courts. All orders passed and acts performed, particularly, by the State/public functionaries and adversely affecting anyone must be in writing, as Section 24-A(1) of the General Clauses Act, 1897 envisages that the powers shall be exercised reasonably, fairly and justly and subsection (2) further makes it necessary that the authority passing orders shall, so far as necessary or appropriate, give reasons for making the orders and unless the order is in writing, the reasons and fairness etc. thereof cannot be ascertained/ adjudged."***

8. The foregoing reasons, have made the proceedings in question, ending into imposition of the compensation, to the petitioner, of no legal value. Resultantly, the revision petition in hand is **allowed,** the impugned judgment of the learned Magistrate towards imposition of compensation to the petitioner and the order dated 09.02.2018, passed by the learned Additional Sessions Judge, Talagang, District Chakwal are set aside.

(K.Q.B.) Petition allowed

PLJ 2019 Cr.C. 1355

[Lahore High Court, Rawalpindi Bench]

***Present* : MUHAMMAD TARIQ ABBASI, J.**

ANAM SHAHZAD --Appellant

versus

STATE and others--Respondents

Crl. Appeal No. 413 of 2017, heard on 11.2.2019.

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

----S. 410--Pakistan Penal Code, (XLV of 1860), Ss. 302/324/148/149--Conviction and sentence--Challenge to--Appreciation of evidence--Acquittal of--In formal FIR u/S. 302/34 PPC, police investigated case and found other accused persons to be innocent, hence declared them so--Feeling aggrieved, complainant filed private complaint wherein same story was reiterated appellant and her co-accused were summoned to fact trial--Formal charge sheet was framed and it was denied by accused--Non-correspondence of evidence with findings and observations made by doctor--It was not clarified that how complainants gained knowledge about availability of deceased in house of accused--**Held** : Facts and circumstances of case are sufficient to hold prosecution case and charge against appellant highly doubtful--**Further held:** It is an admitted principle and prosecution of law that prosecution should establish its case and prove charge against and accused beyond shadow and all reasonable doubts, even a slightest doubt would entitle and accused due benefit of acquittal, not as a matter of grace or concession but as of right--Appeal accepted and conviction was set aside. [P. 1360] A

2012 SCMR 440, *ref.* 1995 SCMR 1345, *rel*.

Barrister Osama Amin Qazi, Advocate for Appellant.

Mr. Umer Hayat Gondal, Additional Prosecutor General for State.

Syed Tanvir Suhail Shah, Advocate for Complainant.

Date of hearing : 11.2.2019

JUDGMENT

By way of this appeal, *Mst.* Anam Shahzad (hereinafter referred to as the appellant) has called in question the judgment dated 18.05.2017, passed by the learned Sessions Judge, Jhelum, whereby in a private complaint, filed under Section 302/34, PPC, by Muhammad Latif ***(hereinafter referred to as the complainant),*** against her as well as *Mst.* Abida Parveen, Shahid Javed and Nauman *alias* Mani, she has been

convicted under Section 302(b) PPC, for committing murder of Muhammad Sheraz ***(hereinafter referred to as the deceased)*** and sentenced for imprisonment for life, with compensation of Rs. 10,00,000/-, payable to legal heirs of the deceased, failing which to undergo simple imprisonment for six months, alongwith benefit of Section 382-B, Cr.PC.

2. Initially, the matter was reported to the Police by the complainant, through *fard biyan* (Ex.PD), with the contentions that marriage of his son namely Muhammad Shahzad, was solemnized with the appellant; on 19.08.2016, Muhammad Shahzad came at Jhelum, but called back by the appellant; at about 7.00 PM, the appellant had called Muhammad Sheraz deceased, in the house of *Mst.* Abida Parveen (co-accused since acquitted), hence the deceased told him (complainant), that as per calling of the appellant, he was going to the house of *Mst.* Abid Parveen (co-accused since acquitted); during the night, the phone of the deceased was found off, hence the complainant became worried, who at about 2:30 AM (mid-night), alongwith Nauman Younas (PW-11) and Bilal Younas, reached at the house of *Mst.* Abida Parveen (co-accused since acquitted), where they found dead body of the deceased, lying in a room and the appellant was removing the snare (phanda) from his neck, who on seeing them, fled away thereafter *Mst.* Abida Parveen and Shahid Javed (co-accused since acquitted) also fled away; Muhammad Sheraz was done to death, as character of the appellant was not fair and the deceased used to abstain her from such like activities.

3. On the basis of the above said complaint, formal FIR (Ex.PD/1) bearing No. 163, dated 20.08.2016, under Section 302/34, PPC, at Police Station Civil Lines, District Jhelum was registered. The Police had investigated the case and found *Mst.* Abid Parveen, Shahid Javed and Nauman *alias* Mani (co-accused since acquitted) to be innocent, hence declared them so.

4. Feeling aggrieved, the complainant had filed the private complaint (Ex.PL), wherein the above mentioned story was reiterated. The appellant and her co-accused (since acquitted) were summoned to face the trial. Formal charge against the all was framed on 09.02.2017, which was denied and trial was claimed, hence the prosecution evidence was summoned and recorded. During the trial, as many as eleven persons were recorded as PWs, whereas two as CWs. The material witnesses, with gist of their evidence were as under:--

i) ***PW-1 Dr. Hammad Mehmood,*** *had conducted postmortem examination of dead body of Muhammad Sheraz on 20.08.2016 and prepared the report (Ex.PA) and pictorial diagram (Ex.PA/1 & PA/2). As many as six injuries on different parts of body of the deceased were noticed and Injury No. 1, found on the neck was declared as fatal and cause of death. The probable time between the injury and death was 20 to 30 minutes, whereas between death and postmortem examination as 12 to 24 hours.*

ii) ***PW-10 Muhammad Latif,*** *complainant had narrated almost the same story, as was described by him, in the fard biyan (Ex.PD) and private complaint (Ex.PL).*

iii) ***PW-11 Nauman Younas,*** *had tried to support version of the complainant (PW-10).*

iv) ***CW-1 Mazhar Hussain Shah ASI and CW-2 Ikram Hussain SI*** *were Investigating Officers of the case, who during their respective proceedings, had performed the functions and prepared the documental, fully highlighted in their statements.*

5. On completion of the prosecution evidence, the appellant and her co-accused were examined, as required under Section 342, Cr.PC, during which questions arising out of the prosecution evidence were put to them, but they had denied almost all such questions, while pleading their innocence and false involvement in the case. The question ***"Why this case against you and why the PWs deposed against you?"*** was replied by the appellant in the following words:--

> ***"I contracted love marriage with Muhammad Shahzad son of the complainant/real brother of the deceased due to which the complainant and his whole family became inimical towards me and they used to quarrel with me, therefore, I alongwith my husband was shifted to a rented house in Jhelum and then to Dongi AJ&K. The deceased Sheraz was involved in immoral and illegal activities and was also an addict. He also had relations with persons of bad repute. Due to his immoral and illegal activities, some unknown persons committed his murder at some unknown place and that is why his motorcycle was recovered from the area of PP: Kala Gujran, PS: Sadar, Jhelum. Neither I was present in Jhelum at the time of alleged occurrence nor I committed the same, due to***

which my husband Shahzad did not join the funeral ceremony of his deceased brother Sheraz as we were not aware of his death. As I have contracted love marriage with son of the complainant, therefore, I was falsely implicated in this case and all the P.Ws have deposed against me due to said grudge because they were interse related. I am innocent."

At that time, the appellant had opted to lead evidence in her defence, but not to make statement under Section 340(2) Cr.PC. But thereafter, through statement dated 09.05.2017, she had refused to produce any evidence in her defence. Finally, the impugned judgment was pronounced, in the above mentioned terms. Consequently, the appeal in hand.

6. Arguments advanced by learned counsel for the appellant as well as learned Prosecutor, assisted by the learned counsel for the complainant have been heard and record has also been perused.

7. The complainant's stance was that his son was done to death on 20.08.2016, at about 2:30 a.m. (mid-night). At the time of post-mortem examination of dead body of the deceased on 20.08.2016 at 8:30 a.m, the doctor (PW-1) declared the time between death and post-mortem examination as 12 to 24 hours. If 12 hours are considered, then time of the alleged occurrence becomes 8:30 p.m. of 19.08.2016, whereas if 24 hours time is taken into account, then the death had occurred on 8:30 a.m. on 19.08.2016. In this way, the time of death, described by the complainant, in *fard biyan* (Ex.PD), private complaint (Ex.PL) as well as during statement before the learned trial Court does not correspond with the above mentioned findings and observations, made by the doctor.

8. According to the doctor (PW-1) as well as the post-mortem report (Ex.PA), the dead body was received in the mortuary on 20.08.2016, at about 6:00 a.m., whereas the Police had provided the complete documents to the doctor at 8.30 a.m. The above mentioned delay, regarding non-provision of necessary documents by the Police, to the doctor was a clear indication that time was consumed in introducing unjustified evidence and documents. In the complaint (Ex.PD) before the Police, the complainant had got written that he alongwith Nauman Younas (PW-11) had directly gone to the house of *Mst.* Abida Parveen (co-accused since acquitted). In the said document, it was not clarified that how they had gained knowledge about availability of the deceased, in the said house. During evidence before the Court, the complainant (PW-10) had contended that as motorcycle of the deceased was found parked, in front of house of Abida Parveen (co-accused since

acquitted), hence they went inside the house, whereas version of Nauman Younas (PW-11) was that at about 1:40 a.m. a shopkeeper had indicated them about house of the above named lady accused. The complainant (PW-10) had not disclosed about any information, made to them, by any shopkeeper, whereas PW-11 never stated about parking of motorcycle of the deceased at any place. Furthermore, it is not appealable to a prudent mind that at 1:40 a.m., any shop was functional and its shopkeeper had met the complainant's party and informed it about any house. The complainant (PW-10) as well as Nauman Younas (PW-11) were not residents of the vicinity, where house of Abida Parveen was situated, hence their alleged availability at the house during odd hours of the night, had made them as chance witnesses.

9. Admittedly, the room in question, was having only one door, therefore it is not believable that the present appellant was seen by the complainant and his above named companion (PW-11), while performing the above stated alleged function, but despite that, she was allowed to cross the door, where the complainant and the above named other witness were standing and both remained silent spectators. It is also not believable that after the alleged departure of the appellant, from the spot, her co-accused (since acquitted) also left the place, but the complainant's party again remained silent spectators. The said conduct of the complainant (PW-10) and the above named other witness (PW-11) had made their presence at the spot, highly improbable.

10. The house in question was of *Mst.* Abida Parveen, who alongwith Shahid Javed and Nauman *alias* Mani, has been acquitted of the charge, as the above named witnesses have been disbelieved to their extent. Therefore, believing witnesses qua the appellant, strong independent corroboration is required, which is missing in the case in hand. In this regard, reference may be made to the case titled *"Muhammad Akram versus The State"* reported as 2012 SCMR 440, wherein the august Supreme Court of Pakistan has held as under:--

> ***"Except for the oral statements of eye-witnesses there is nothing on record which could establish the presence of both the eye-witnesses at the spot and as their presence at the spot appears to be doubtful, no reliance could be placed on their testimonies to convict the appellant on a capital charge. Since the same set of evidence has been disbelieved qua the involvement of Muhammad Aslam? as such, the same evidence cannot be relied***

upon in order to convict the appellant on a capital charge as the statements of both the eye-witnesses do not find any corroboration from any piece of independent evidence."

11. The facts and circumstances highlighted above, are sufficient enough to hold the prosecution case and charge against the appellant highly doubtful. It is an admitted principle and proposition of law, that the prosecution should establish its case and prove charge, against an accused, beyond shadow of all reasonable doubts and even a slightest doubt would entitle an accused, due benefit of acquittal, not as a matter of grace or concession, but as of right. In this regard reliance may be placed upon the dictum laid down by the august Supreme Court of Pakistan in the case titled *"TARIQ PERVAIZ Vs. THE STATE"* reported as 1995 SCMR 1345, wherein it has been held as under:

"If a simple 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 or concession, but as a matter of right."

The same view has been reiterated in a subsequent judgment titled *"Ayub Masih Vs. The State"* reported as, PLD 2002 SC 1048, whereby it has been directed that while dealing with a criminal case, the golden principle of law ***"it is better that ten guilty persons be acquitted, rather than one innocent person be convicted"*** should always be kept in mind.

12. Resultantly, the appeal is ***allowed***, impugned judgment towards conviction and sentence of *Mst.* Anam Shahzad appellant is set aside and she is acquitted of the charge, while extending her the benefit of doubt. The appellant is in custody, therefore it is directed that she be released from the jail, if not required to be detained in any other case. The disposal of the case property shall be as directed by the learned trial Court, in the impugned judgment.

(Z.A.S.) Appeal accepted

PLJ 2019 Cr.C. 1490

[Lahore High Court, Rawalpindi Bench]

***Present* : MUHAMMAD TARIQ ABBASI, J**

NADEEM AKHTAR--Appellant

versus

STATE--Respondent

Crl. Appeal No.83-J of 2016, heard on 18.3.2019

Criminal Procedure Court, 1898 (V of 1898)

----S. 410--Pakistan Penal Code, (XLV of 1860), Ss. 302(b)/324/148/149--Convicted U/s 302(b) and sentenced to life imprisonment with compensation--Challenge to--Appreciation of evidence--Benefit of doubt--Acquittal of--As per complaint, occurrence took place at about 5.40 p.m. whereas complaint was got lodged at about 7.00 p.m.--FIR was chalked out at 07.20 p.m.-Post mortem report shows occurrence of death at 5.30 p.m. whereas dead body was received in dead house at 6.00 p.m. and documents from police were received by Doctor at 06.30 p.m. whereas autopsy was conducted at 6.45 p.m.--Neither learned Prosecutor for state nor learned counsel for complainant are in a position to give any explanation that how prior to reporting matter to police and registration of police papers were prepared and handed over to Doctor and even post mortem examination was conducted and completed--**Further held** : Fact is a clear sign that after autopsy whole of proceedings including drafting complaint, registration of FIR and preparation of other documents were concocted which had made alleged prosecution story and charge against appellant highly doubtful--**Held** : It is well settled principle of law that even a single doubt in prosecution story makes an accused entitled for due benefit of acquittal not as a matter of grace or concession but as of right--Appeal accepted and conviction was set aside. [Pp. 1491, 1492] A & B

Barrister Usama Amin Qazi, Advocate for Appellant.

Mr. Muhammad Sharif Ijaz, District Public Prosecutor for State.

Mr. Muhammad Ilyas Siddiqui, Advocate for Complainant.

Date of hearing : 18.3.2019.

JUDGMENT

Muhammad Tariq Abbasi, J.--This appeal is directed, against the judgment dated 28.04.2016, passed by the learned Sessions Judge, Attock, whereby in case FIR No.431, dated 26.11.2012, registered under Sections

302/324/148/149, PPC, at Police Station Saddar Attock, District Attock, Nadeem Akhtar **(hereinafter referred to as the appellant),** was convicted under Section 302(b), PPC and sentenced to imprisonment for life, alongwhith compensation of Rs.2,00,000/-, payable to legal heirs of deceased, failing which to further undergo S.I. for six months, with benefit to Section 382-B, Cr.PC, whereas his co-accused, namely, Mumtaz, *Mst.* Bushran and Tauqeer Ahmad, were acquitted of the charge.

2. The precise charge, against the appellant was that he by firing had done Ghulam Habib **(thereinafter referred to as the deceased),** to death.

3. The trial was held in the Court of learned Sessions Judge, Attack, and finally through the impugned judgment, the appellant was convicted and sentenced in the above mentioned terms. Consequently, the appeal in hand.

4. The arguments advanced by the learned counsel for the appellant, the learned Prosecutor, assisted by learned counsel for the complainant, have been heard and the record has been perused.

5. As per complaint (Ex.PH), made by Muhammad Ismail (PW-8), the occurrence had taken place on 26.11.2012 at about 05:40 p.m., whereas the complaint was got lodged at about 07:00 p.m. and the FIR (Ex.PH/1) was chalked out at 07:20 p.m. The post-mortem report (Ex.PB) shows that the death had occurred on 26.11.2012 at 05:30 p.m. whereas the dead body was received in dead house at 06:00 p.m., the documents from the police were received by the doctor (PW-5) at 06:30 p.m. and autopsy was conducted at 06:45 p.m. The above mentioned time given in the post mortem report about receipt of the dead body, in the hospital, the documents from the police and conducting autopsy are prior to make the complaint (Ex.PH) and registration of the FIR (Ex.PH/1).

6. Neither the learned Prosecutor for the State nor the learned counsel for the complainant are in a position to give any explanation that how prior to reporting the matter to the police and registration of the FIR, the police papers were prepared and handed over to the doctor and even post mortem examination was conducted and completed. The said fact is a clear sign that after the autopsy, whole of the proceedings, including drafting the complaint

(Ex.PH), registration of FIR (Ex.PH/1) and preparation of the other documents were concocted, which fact had made the alleged prosecution story and the charge, against the appellant, highly doubtful.

7. It is a well settled principle of law that even a single doubt in the prosecution story makes an accused entitled for due benefit of acquittal, not as a matter of grace or concession, but as of right. In this regard, I am fortified by the dictum laid down by the august Supreme Court of Pakistan in cases titled '*Ayub Masih Versus The State'* reported as (PLD 2002 Supreme Court 1048) and '*Tariq Pervez Versus The State'* reported as 1995 SCMR 1345, wherein it is held that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. In the case of *Ayub Masih* (Supra), while quoting a saying of the Holy Prophet (PBUH) ***'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent'***, and making reference to the maxim, ***'It is better that ten guilty persons be acquitted rather than one innocent person be convicted'***, the Hon'ble Supreme Court observed as under:--

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

8. Resultantly, the instant appeal is ***accepted***, the impugned judgment is set-aside and the appellant, namely, ***Nadeem Akhtar*** is ***acquitted*** of the charge, while extending him the benefit of doubt.

The appellant is in custody, hence be released forthwith, if not required to be detained in any other case. The disposal of the case property shall be as directed by the learned trial Court, in the impugned judgment.

(Z.A.S.) Appeal accepted

PLJ 2019 Cr.C 1522 (DB)
[Lahore High Court, Lahore]
***Present*: MALIK SHAHZAD AHMAD KHAN AND MUHAMMAD TARIQ ABBASI, JJ.**
MUQADAS BIBI--Appellant
versus
STATE etc.--Respondents

Crl. Appeal No. 224710 of 2018, heard on 20.6.2019

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

----S. 9(c)--Sentence--Recovery of four packets of *charas*--Lady accused--Conviction was altered from Section 9(c) to 9(b) Act--Validity--Consequently, after calculating and reducing 1/3rd of sentence of appellant, same becomes *"Rigorous imprisonment for 10 months, alongwith fine of Rs.6,000/-, in default whereof to further suffer simple imprisonment for 02 months and 10 days"* and resultantly, appellant is awarded above mentioned sentence, with benefit of Section 382-B Cr.PC--With alteration/modification in conviction and sentence of appellant, appeal is dismissed. [P. 1524] B & C

Sentence--

----Sentencing policy--Female accused--Gender--Furthermore, as per above mentioned sentencing policy, a women and a child, because of their gender and tender age, are to be awarded 1/3rd lesser sentence of imprisonment, fine and sentence in default of payment of fine, than normal sentence prescribed above. [P. 1524] A

Rai Zameer-ul-Hassan, Advocate for Appellant.
Mr. Nisar Ahmad Virk, Deputy Prosecutor General for State.
Date of hearing : 20.6.2019.

JUDGMENT

Muhammad Tariq Abbasi, J.--By way of this appeal, Muqadas Bibi ***(hereinafter referred to as the appellant)***, has called in question the judgment dated 18.05.2018, passed by the learned Additional

Sessions Judge/Judge CNS, Pindi Bhattian, District Hafizabad, whereby in case FIR No. 372, dated 30.06.2017, registered under Section 9(c) of the Control of Narcotic Substances Act, 1997 ***(hereinafter referred to as the Act)***, at Police Station Jalalpur Bhattian, District Hafizabad, she has been convicted under Section 9(c) of the Act and sentenced to rigorous imprisonment for 04 years and 04 months, alongwith fine of Rs. 20,000/-, in default whereof to further undergo simple imprisonment for four months, with benefit of Section 382-B Cr.PC.

2. The appellant was challaned to the Court, with the precise charge of recovery of four packets of *'charas'*, each weighing 01 kilogram, thus total weighing 04 kilograms, from her possession. She had denied the charge and claimed the trial, hence prosecution witnesses namely Rai Muhammad ASI, Nazia Lady Constable, Asif Javed Head Constable, Amjad Hussain SI and Muhammad Yaqoob SI were summoned and recorded as PW-1, PW-2, PW-3, PW-4 and PW-5 respectively. Thereafter, the appellant was examined under Section 342 Cr.PC, during which the questions emerging from the prosecution evidence were put to her, but she had denied almost all such questions, while pleading her innocence and false involvement in the case with *malafide*. The appellant did not opt to lead any evidence in her defence or to make statement under Section 340(2) Cr.PC. On completion of all the proceedings, the impugned judgment was passed, in the above mentioned terms. Consequently, the appeal in hand.

3. Arguments advanced by learned counsel for the appellant as well as learned Prosecutor have been heard and the record has been perused.

4. As per the complaint (Ex.PC), made by Amjad Hussain SI (PW-4), four packets of '*charas*' were recovered from the appellant and that 50 grams of '*charas*' was separated from each of the packets, as sample. But during statement before the learned trial Court, the said witness, had made following admissions:--

> ***"It is correct that recovered charas is wrapped in white shopper. It is correct that one packet of charas is in four small pieces which are separately wrapped in a shopper. Those four small pieces are in different shape and size. Similarly remaining packets also consist of 03/04 slices and are packed in separate shoppers. It is correct that I***

have taken sample from one piece from each packet. It is correct that I have taken sample from one of the four pieces from each packet."

5. From the above mentioned admission of PW-4, it has been confirmed on the record that the recovered narcotic was consisting of many pieces. In such like situation, according to the law, laid down by the august Supreme Court of Pakistan in the case titled *"Ameer Zeb versus The State"* reported as PLD 2012 Supreme Court 380, it was necessary for the PW-4, to separate sample, from each piece and prepare separate sample parcels, but instead of adopting the said procedure, the above mentioned sample parcels, total weighing 200 grams, were prepared and sent to the Punjab Forensic Science Agency, Lahore, where they were analyzed and report (Ex.PE)was made, whereby contents of the said parcels were found as *charas*. Weight of each piece is not known to anyone, therefore according to the procedure laid down in the above said case law, weight of the sample parcels should be taken into account. When the said weight is considered, the case of the appellant falls within the ambit of Section 9(b) of the Act and as such he should be dealt with, for the said offence.

6. Resultantly, conviction of the appellant is altered from Section 9(c) to 9(b) of the Act. As per sentencing policy, promulgated through the judgment reported as "PLD 2009 Lahore 362", the possession of 200 grams of *charas*, prescribes the following sentence:--

"Rigorous imprisonment for 01 year and 03 months, alongwith fine of Rs.9,000/-, in default whereof to suffer simple imprisonment for 03 months and 15 days.

Furthermore, as per above mentioned sentencing policy, a women and a child, because of their gender and tender age, are to be awarded 1/3rd lesser sentence of imprisonment, fine and sentence in default of payment of the fine, than the normal sentence prescribed above.

7. Consequently, after calculating and reducing 1/3rd of the sentence of the appellant, the same becomes *"Rigorous imprisonment for 10 months, alongwith fine of Rs.6,000/-, in default whereof to further suffer simple imprisonment for 02 months and 10 days"* and resultantly, the

appellant is awarded the above mentioned sentence, with benefit of Section 382-B Cr.PC. The disposal of the case property shall be as directed by the learned Trial Court, in the impugned judgment.

8. With the above mentioned alteration/modification in conviction and sentence of the appellant, the instant appeal is **dismissed.**

(S.A.B.) Appeal Dismissed

PLJ 2019 Cr.C. (Note) 10

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI, J.**

MUHAMMAD RAFIQUE *alias* Kali--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 1059-B of 2018, decided on 8.3.2018.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 324/34--Post arrest bail--Grant of--Further inquiry--Only one fire arm injury on the above said non vital part of the PW has been assigned to the petitioner--Injury has not yet been declared and as such presumption would be that it was simple in nature--Applicability of Section 324, PPC, against the petitioner, shall be seen during the trial, which fact has made the case against the petitioner as of further inquiry--Petitioner is behind the bars, hence no more required for further investigation--No previous criminal history is available in the record, as such he can rightly be termed as a first offender--Post arrest bail allowed. [Para 4 & 5] A

Mr. Faisal Aziz Chaudhry, Advocate for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor General for Respondents.

Mr. Fakhar Raza Malana, Advocate for Complainant.

Date of hearing: 8.3.2018

ORDER

Through the instant petition, the petitioner, namely, Muhammad Rafique @ Kali seeks post arrest bail in case FIR No. 365, dated 4.9.2017, registered under Sections 324/34, PPC, at Police Station Saddar Mianchannu, District Khanewal.

2. As per FIR the petitioner while firing with a pistol had caused an injury on left thigh of Muhammad Mumtaz PW.

3. Arguments heard. Record perused.

4. Only one fire arm injury on the above said non vital part of the above named PW has been assigned to the petitioner. The injury has not yet been declared and as such presumption would be that it was simple in nature. In this way, applicability of Section 324, PPC, against the petitioner, shall be seen during the trial, which fact has made the case against the petitioner as of further inquiry.

5. The petitioner is behind the bars since 26.10.2017, hence no more required for any further investigation, in this case. His no previous criminal history is available in the record, maintained by the police and as such he can rightly be termed as a first offender.

6. Consequently, the petitioner in hand is ***allowed*** and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount, to the, satisfaction of the learned trial Court.

(K.Q.B.) Bail allowed

PLJ 2019 Cr.C. (Note) 24

[Lahore High Court, Multan Bench]

***Present*: MUHAMMAD TARIQ ABBASI AND ANWAARUL HAQ PANNUN, JJ.**

ALLAH BACHAYA and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 6172-B of 2018, decided on 8.11.2018.

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

----S. 497(2)--Punjab Food Authority Act, 2011, S. 22-A--Punjab Drugs Act, 1976, S. 23--Forest Act, S. 24-A--Post arrest bail--Grant of--Further inquiry--Petitioners along with their co-accused were found in possession of adulterated milk, injurious to health being transported while one of the petitioner was driving the vehicle and other was helper, whereas the owner had fled away--Adulterated milk was transported in a vehicle being driven and looked after by the petitioners under the command of owner of the milk, therefore, presently it is difficult to assess whether the petitioners had any mens-rea for committing the offence as they were under the command of the owner who had fled away and were performing their services against consideration, renders the case of the petitioners one of further inquiry--Post arrest bail granted.

[Para 2 & 3] A & B

Mr. Muhammad Ajmal Kanju, Advocate for Petitioners.

Mr. Shahid Aleem, Addl. Prosecutor General for State.

Date of hearing: 8.11.2018.

ORDER

After having been unsuccessful before the subordinate Court, the petitioners Allah Bachaya son of Muhammad Nawaz and Malko Khan son of Sadiq through the instant petition seek their release on post arrest bail in case FIR. No. 613/2018 dated 16.09.2018, under Section 22A, of Punjab Food Authority Act, 2011, (amended 2016), 23 of Punjab Drugs Act, 1976, (amended 2018) read with Section 24-A of the Forest Act, registered at Police Station Mumtazabad, District Multan wherein it has been alleged that the petitioners along with their co-accused were found in possession of adulterated milk, injurious to health being transported while one of the petitioners was driving the vehicle and other was helper, whereas the owner had fled away.

2. On Court query, that as to how Section 23 of Punjab Drugs Act, 1976 as amended 2018 and Section 24-A. Forest Act are attracted in this case, learned Prosecutor has frankly stated that it has wrongly been mentioned in the FIR.

3. Allegedly, the adulterated milk was transported in a vehicle being driven and looked after by the petitioners under the command of owner of the milk therefore, presently it is difficult to assess whether the petitioners had any mens-rea for committing the offence as they were under the command of the owner who had fled away and were performing their services against consideration, renders the case of the petitioners one of further inquiry. In these circumstances, we are persuaded to accept this petition and direct release of the petitioners on post arrest bail subject to furnishing their bail bonds in the sum of Rs. 50,000/- each with one surety each in the like amount to the satisfaction of the learned trial Court.

(M.A.I.) Bail granted

PLJ 2019 Cr.C. (Note) 130

[Lahore High Court, Rawalpindi Bench]

Present **: MUHAMMAD TARIQ ABBASI AND SAYYED MAZAHAR ALI AKBAR NAQVI, JJ**

SAJJAD HAIDER --Appellant

versus

STATE--Respondent

Crl. Appeal No.376 of 2017, decided on 6.12.2017.

Control of Narcotic Subtances Act, 1997 (XXV of 1997)--

----Ss. 48 & 9(c)--Appeal--Petition for superdari of vehicle was declined--Allegation of recovery of *charas*--Out of vehicle contraband *charas* weighing 7-KGs and 260-grams was recovered and in this regard offence under Section 9(c) of Control of Narcotic Substances Act, 1997, was registered at Police Station which is pending adjudication before trial Court--Stance of appellant is that he is lawful owner of vehicle, which stands registered against his name in relevant record--Admittedly registration of case in name of appellant has also been verified by Investigating Officer--According to version of appellant, he is involved in business of 'Rent-A-Car' and subject vehicle was given to accused of case FIR offence under Section 9(c) of Control of Narcotic Substances Act, 1997, Police Station on rent after due receipt, which is also available on record--This aspect is also denied by other side--For foregoing reasons, Court allow this appeal as a consequence whereof custody of vehicle Toyota Corolla silver colour handed over to appellant temporarily subject to furnishing surety bonds in sum of Rs. 15,00,000/- with one surety in like amount to satisfaction of trial Court and after valid receipt.

[Para 6 & 8] A & C

Control of Narcotics Substances Act, 1997 (XXV of 1997)--

----S. 74--Proviso--Scope of--Custody of vehicle--Wherein it has been categorically, held that if owner of vehicle is not accused of case and has no knowledge that his vehicle would be used for trafficking narcotics, provisions of Section 74 of CNSA, 1997, shall not create any bar for giving vehicle to him on temporary custody. [Para 7] B

2010 SCMR 1181, *ref*.

Barrister Osama Amin Qazi, Advocate for Appellant.

Mr. Naveed Ahmed Warraich, DDPP for State.

Date of hearing : 6.12.2017.

ORDER

Through the instant appeal filed under Section 48 of the Control of Narcotic Substances Act, 1997, the appellant has assailed the vires of impugned order dated 29.03.2017, passed by learned Additional Sessions Judge, Taxilla, District Rawalpindi; whereby his petition seeking superdari of vehicle Toyota Corolla silver colour bearing registration No. QIL-059 was declined.

2. Facts of the case succinctly required for determination of the lis in hand are that on 11.11.2016 during the course of investigation in case FIR No.659/2016, dated 01.01.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, Police Station Saddar Wah, accused Faqeer Hussain after making disclosure led towards Mala Kand Stop where a vehicle Toyota Corolla silver colour bearing registration No.QIL-059 was standing in which one Amir Khan son of Bakhsh was sitting. On search from the vehicle contraband *charas* weighing 7-KGs and 260-grams was recovered and in this regard case FIR No.661/2016, dated 11.11.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, was registered at Police Station Saddar Wah. The vehicle was taken into custody by the police. The petitioner being real owner of the vehicle applied for its superdari, which was declined by the learned trial Court *vide* impugned order. Hence, this appeal.

3. At the very outset learned counsel appearing on behalf of the appellant submits that the impugned order has been passed by the learned trial Court in a stereotype manner without adverting to real facts of the case and material available on record. Further contends that the appellant is lawful owner of vehicle Toyota Corolla silver colour bearing registration No. QIL-059. Next submits that as a matter of fact appellant runs the business of Rent-A-Car in the name and style of *'Bala Hissar Rent-A-Car, Peshawar"* who gave the subject vehicle on rent to Amir Khan accused *vide* receipt dated 11.11.2016. Adds that neither the appellant has any concern whatsoever with the alleged traffic king of the narcotic substance nor he is accused in the case. It is vehemently argued that as the appellant has no concern with the case, therefore, keeping in view the pronouncement of Apex Court in the case of *Allah Pitta vs. The State* (2010 SCMR 1181) he is entitled to possession of the vehicle. Submits that the condition of the vehicle while lying at Police Station is deteriorating day-by-day. Learned counsel further submits that the

appellant is ready to furnish surety to the satisfaction of the learned trial Court with the undertaking to produce it during the course of trial as and when required.

4. On the other hand, learned DDPP vehemently opposes the contentions raised on behalf of the appellant mainly due to bar contained in Section 74 of the Control of Narcotic Substances Act, 1997. He further submits that if the vehicle is given on superdari to the appellant and the same is stolen it may prejudice the prosecution case during the course of trial.

5. We have considered the arguments advanced by learned counsel for the parties and gone through the record available on file.

6. Record available on file reveals that during the course of investigation in case FIR No.659/2016, dated 01.01.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, Police Station Saddar Wah, on the disclosure of the accused of that case, Investigating Officer conducted raid at Mala Kand Stop from where vehicle Toyota Corolla silver colour bearing registration No. QIL-059 was taken into possession and at that time one Amir Khan son of Bakhsh was sitting in the vehicle. Out of the vehicle contraband *charas* weighing 7-KGs and 260-grams was recovered and in this regard case FIR No. 661/2016, dated 11.11.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, was registered at Police Station Saddar Wah, which is pending adjudication before the learned trial Court. The stance of the appellant is that he is lawful owner of the vehicle, which stands registered against his name in the relevant record. Admittedly the registration of the case in the name of the appellant has also been verified by the Investigating Officer. According to version of the appellant, he is involved in the business of 'Renat-A-Car' and the subject vehicle was given to Amir Khan accused of case FIR No.661/2016, dated 11.11.2016, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, Police Station Saddar Wah on rent on 11.11.2016 after due receipt, which is also available on record as Annexure-D. This aspect is also denied by the other side.

7. As far as bar contained in Section 74 of the Control of Narcotic Substances Act, 1997, as raised by leaned DDPP is concerned, the same has been deliberated by august Supreme Court of Pakistan in the case of *Allah Ditta vs. The State* (2010 SCMR 1181) wherein it has been

categorically, held that if the owner of the vehicle is not accused of the case and has no knowledge that his vehicle would be used for trafficking the narcotics, the provisions of Section 74 of CNSA, 1997, shall not create any bar for giving the vehicle to him on temporary custody. Relevant portion of the judgment is reproduced as under:--

> *"---S. 74, Proviso—Scope—Proviso of S. 74 of the Control of Narcotic Substances Act, 1997, does not prohibit the release of vehicle involved in the trafficking of narcotics to its owners, who is not connected in any way with the commission of the crime or the accused and was unaware that his vehicle was being used for the crime."*

Therefore while examining the case in hand on the touchstone of guidelines given in the pronouncement of the Apex Court referred to above, we are of the considered view that it is a fit case where the appellant is entitled to temporary custody of the vehicle.

8. For the foregoing reasons, we allow this appeal as a consequence whereof custody of vehicle Toyota Corolla silver colour bearing registration No.QIL-059 is handed over to the appellant temporarily subject to furnishing surety bonds in the sum of Rs. 15,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court and after valid receipt. It is made clear that before handing over custody of the vehicle to the appellant, its relevant pictures would be taken and placed on the record. Moreover, the appellant shall produce the vehicle as and when directed/required during the course of trial, without fail.

(A.A.K.) Appeal allowed

2019 Y L R 1175

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi and Raja Shahid Mehmood Abbasi, JJ

AHMED KHAN alias AHMED QAIS and others---Appellants

Versus

The STATE and others---Respondents

Criminal Appeal No.484 of 2017, heard on 14th January, 2019.

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

----Ss.9(c) & 15---Recovery of narcotics---Benefit of doubt---Secondary evidence---Principle---Accused persons were arrested for carrying 5 kilograms of heroin---Trial Court convicted accused persons and sentenced them to imprisonment for 7 years along with fine---To substantiate proceedings of raid, recovery of narcotics and arrest of accused persons, complainant/ investigating officer did not appear before Trial Court and such fact was fatal for prosecution and sufficient to demolish entire structure of prosecution case---Secondary evidence could be led through another witness who must remain associated with actual witness and was acquainted with his handwriting and signatures---Neither circumstances requiring to lead secondary evidence were brought on record nor witness who was produced as secondary evidence remained associated with complainant/ investigating officer and was not acquainted with his handwriting and signatures--- Prosecution witness appearing as secondary evidence never worked with complainant/investigating officer and witness had not seen any document prepared by him---Prosecution failed to substantiate proceedings allegedly carried out by complainant/ investigating officer---Prosecution had alleged that complainant/investigating officer was responsible for concocting false FIRs against innocent persons who was removed from service---Such allegation of prosecution also discredited complaint against accused persons---High Court set aside conviction and sentence awarded by Trial Court to accused persons and they were acquitted of the charge---Appeal was allowed in circumstances.

State v. Muhammad Rafeeque 1984 PCr.LJ 961 and Muhammad Akram v. The State 2012 SCMR 440 rel.

(b) Criminal trial---

----Benefit of doubt---Principle---Prosecution was to establish its case and prove charge against accused beyond shadow of reasonable doubts---Even a slightest doubt entitles an accused due benefit of acquittal not as a matter of grace or concession but as of right.

Tafiq Pervaiz v. The State 1995 SCMR 1345 and Ayub Masih v. The State PLD 2002 SC 1048 rel.

Raja Aamir Abbas for Appellant.

Syed Intikhab Hussain Shah, Special Prosecutor ANF for the State.

Date of hearing: 14th January, 2019.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---By way of this appeal, Ahmed Khan alias Ahmed Qais and Awais Khan (hereinafter referred to as the appellants) have challenged the judgment dated 11.05.2017, passed by the learned Judge Special Court (CNS), Rawalpindi, whereby in case FIR No. 70, dated 18.05.2015, registered under Sections 9(c)/14/15 of the Control of Narcotic Substances Act, 1997 (hereinafter referred to as the Act), at Police Station ANF RD North, Rawalpindi, they have been convicted and sentenced as under:--

Ahmed Khan @ Ahmed Qais

i) Under Section 9(c) of the Act --- simple imprisonment for 07 years, along with fine of Rs.50,000/-, in default whereof to further undergo simple imprisonment for 07 months.

ii) Under Section 15 of the Act --- simple imprisonment for 07 years, with fine of Rs.50,000/-, in default whereof to further undergo simple imprisonment for 07 months.

Awais Khan

i) Under Section 9(c) of the Act --- simple imprisonment for 06 years, along with fine of Rs.30,000/-, in default whereof to further undergo simple imprisonment for 06 months.

ii) Under Section 15 of the Act --- simple imprisonment for 07 years, with fine of Rs.50,000/-, in default whereof to further undergo simple imprisonment for 07 months.

It was directed that benefit of Section 382-B, Cr.P.C. would be available to the appellants.

2. The matter was reported to the Police by Shakeel Ahmed Inspector, through complaint (Ex.PA/1-2), which resulted into registration of the FIR (Ex.PA), on the grounds that he received an information that Muhammad Saleem and Akif Shuaib, along with their companions, namely Ahmed Khan @ Ahmed Qais and Awais Khan (appellants) would smuggle a huge quantity of narcotics to a foreign country and that for the said purpose, the appellants would bring narcotics in the office of Kings Cargo Company, situated at 79-Jinnah Avenue, Airport Housing Society, Rawalpindi, hence a raiding party was constituted and checking was started; at about 8.40 PM, a car registration No. CU-130/ICT, arrived at the office of above said Cargo Company; two persons de-boarded the vehicle and while taking two shoppers, from its dickey, started moving towards gate of the company; on pointation of the informer, the persons were apprehended, who told their names as Ahmed Khan alias Ahmed Qais and Awais Khan (appellants); the shopping bag, which was being carried by Ahmed Khan alias Ahmed Qais (appellant), was checked and from it, three packets of heroin, each weighing 01 kilogram, were recovered; from the shopping bag, lying in the hand of Awais Khan (appellant), two packets of heroin, each weighing 01 kilogram emerged; the complainant separated 10 grams from each of the packets, for the purpose of chemical analysis and prepared 05 sealed sample parcels, whereas 02 sealed parcels of the remaining quantity were also prepared and all the parcels were taken into possession, through recovery memo (Ex.PB); during personal search of the appellants, the articles and the documents were recovered and secured through memos Ex.PC and PD.

3. The prosecution had alleged that thereafter, on pointation of the appellants, 4300 Ecstasy tablets, weighing 720 grams were also recovered from a vehicle registration No. BC-3636, parked at House No. 156, Street No. 01, Phase-II, Bahria Town, Rawalpindi, where Alamgir Khan and Mushtaq (co-accused since acquitted) were available, hence the said narcotic, along with the vehicle was secured, through memo Ex.PE-1.

4. The case was investigated and the appellants as well as their co-accused, namely Alamgir Khan and Mushtaq (since acquitted) were challaned to the court. Formal charge against the all was framed on 12.10.2015, which was denied and trial was claimed, hence the prosecution witnesses namely Syed Mehboob Hussain Shah Head Constable, Wajid Hameed SI, Muhammad Tauqeer Shahzad Constable and Umair Fahim SI were summoned and recorded, as PW-1, PW-2, PW-3 and PW-4 respectively. On completion of the prosecution evidence and closure of the case, the appellants and their co-accused (since acquitted) were examined under Section 342 Cr.P.C. during which the questions arising out of the prosecution evidence were put to them, but they had denied almost all the questions, while pleading their innocence and false involvement in the case, with mala fide. The questions "Why this case against you and why the PWs have deposed against you?" were replied by the appellants in the following similar words:--

> "It is false case. Inspector Shakeel has made this bogus case against us, because earlier on, he had removed house hold articles worth Rs.03 Crors, from our house regarding which FIR has been lodged and said Inspector Shakeel had also demanded huge amount, which was denied hence he falsely involved us in the instant case and had abducted us on 15.05.2015. Hence, on his instruction PWs have falsely deposed against me."

The appellants opted to lead evidence in their defence and also to make statements under Section 340(2), Cr.P.C. Consequently, the appellants had made statements on oath and also got examined Adnan Ayub, Aamir Jahangir Khan, Haroon Aitimad and Wajid Gul, as DW-1, DW-2, DW-3 and DW-4 respectively. During the evidence of the DWs, documents were also brought on the record, as Mark DA/1-3, Mark-DB/1-2 and Ex.DW-4/A. Finally, the impugned judgment was passed, whereby the appellants were convicted and sentenced in the above mentioned terms, whereas their above named co-accused were acquitted of the charge. Consequently, the appeal in hand.

5. Arguments advanced by the learned counsel for the appellants as well as the learned Prosecutor ANF, have been heard and record has been perused.

6. The complainant namely Shakeel Ahmed, Inspector ANF, who allegedly:-

i) received the above mentioned information;

ii) arranged raiding party;

iii) apprehended the appellants and recovered narcotics;

iv) separated samples;

v) prepared sealed parcels and took the same into possession, through recovery memo (Ex.PB);

vi) secured the articles, document and cash, recovered during personal search of the appellants vide memos (Ex.PC and Ex.PD);

vii) took into possession the vehicle registration No. CE-130/ICT, by way of memo (Ex.PE);

viii) recovered the Ecstasy tablets weighing 720 grams and secured the same as well as the vehicle No. BC-3636, through memo (Ex.PE-1); and

ix) drafted the complaint (Ex.PA/1-2);

to substantiate the above said proceedings, did not appear before the learned trial court, which fact is fatal for the prosecution and sufficient to demolish the entire structure of the prosecution case. If any case law in this regard is needed, reference may be made to the case titled "State v. Muhammad Rafeeque" reported as 1984 PCr.LJ 961, relevant portion whereof reads as under:--

"in addition to this neither I.O nor police Official who recorded the FIR and conducted investigation were examined by prosecution at trial and consequently respondent was seriously prejudiced and in our opinion trial was vitiated on this ground, as well."

7. The stance of the prosecution was that the complainant was responsible to book different persons in different FIRs, hence criminal proceedings against him were in progress, wherein he was a proclaimed offender, which were the reasons of his non-association in the case in hand and that to bring on the record, the proceedings conducted by him, secondary evidence had been led, through Umair Fahim (PW-4). To lead secondary evidence, certain pre-requisites should be fulfilled. Some of them are that the concerned witness should either be:-

i) not alive;

ii) incapable to make a statement;

iii) out of reach of the court; or

iv) his whereabouts are not known to anyone.

8. In any of the above stated situations, secondary evidence can be led, through another witness, who must remain associated with the actual witness and must be acquainted with his hand-writing and signatures. In the situation in hand, neither any of the above mentioned circumstances has been brought on the record nor the PW-4 remained associated with Shakeel Ahmed Inspector and as such was not acquainted with his hand-writing and signatures as the PW-4 had frankly conceded that previously he never worked with Shakeel Ahmed Inspector and that no document prepared by the Inspector was seen by him. In this way, it can safely be said that the prosecution has failed to substantiate the above said proceedings, allegedly carried on by Shakeel Ahmed Inspector. Furthermore, the prosecution stance remained that Shakeel Ahmed Inspector was responsible for concocting false FIRs, against innocent persons, hence under due proceedings, he had been removed from service. By saying so, the prosecution had also discredited the above named complainant.

9. The prosecution version was that Rs.7000/- were recovered from the appellant Ahmed Khan alias Ahmed Qais, Rs.5000/- from Awais Khan appellant, whereas Rs.2000/- each from Alamgir Khan and Mushtaq (co-accused since acquitted). But during the trial, three currency notes of denomination of Rs.5000/- each, whereas two notes of Rs.500/- each, have

been produced and got exhibited. The said fact also speaks a volume about the proceedings, carried on by the above named Inspector.

10. The defence stance was that Shakeel Ahmed Inspector (complainant) had taken away the articles valuing Rupees three crore, from the house of the appellant's party, hence an FIR No. 21, dated 28.01.2016 under Sections 380/ 381A/506(ii), P.P.C., at Police Station Lohi Bher, Islamabad had been registered against him. Tauqeer Shahzad (PW-3) had showed his ignorance about installation of tracker system in the vehicle Registration No. CU-130/ICT or CCTV cameras at Bahria Town, Rawalpindi, but during evidence of Haroon Aitimad (DW-3), it was confirmed on the record that in the above said vehicle, the above mentioned system was installed and that according to their data, from 16.05.2015 to 18.05.2015, the car remained parked at F-11/3, Islamabad and that thereafter, it came at Gulzar-e-Quaid, Rawalpindi. In the evidence led by Aamir Jahangir Khan (DW-2), it had come on the record that CCTV cameras were installed in Bahria Town and according to the footage of the cameras on 17.05.2015, black coloured car, along with two double door vehicles, entered in the said Town. The above mentioned evidence, led by the above said DWs, coupled with the documents, tendered by them, had cast a serious doubt into the alleged story, narrated in the complaint (Ex.PA/1-2). The statements of PW-3 and PW-4 qua Alamgir Khan and Mushtaq (co-accused since acquitted) had been disbelieved by the learned trial court and as such for believing their testimony, to the extent of the appellants, strong corroboration was required, which was missing in the file. In this regard, reference may be made to the case titled "Muhammad Akram v. The State" reported as 2012 SCMR 440, wherein the august Supreme Court of Pakistan has held as under:-

> "Except for the oral statements of eye-witnesses there is nothing on record which could establish the presence of both the eye-witnesses at the spot and as their presence at the spot appears to be doubtful, no reliance could be placed on their testimonies to convict the appellant on a capital charge. Since the same set of evidence has been disbelieved qua the involvement of Muhammad Aslam, as such, the same evidence cannot be relied upon in order to convict the appellant on a capital charge as the statements of

both the eye-witnesses do not find any corroboration from any piece of independent evidence."

11. The facts and circumstances highlighted above, have made the alleged prosecution story and charge against the appellants, highly doubtful. It is an admitted principle and proposition of law, that the prosecution should establish its case and prove charge, against an accused, beyond shadow of all reasonable doubts and even a slightest doubt would entitle an accused, due benefit of acquittal, not as a matter of grace or concession, but as of right. In this regard reliance may be placed upon the dictum laid down by the august Supreme Court of Pakistan in the case titled "Tariq Pervaiz v. The State" reported as 1995 SCMR 1345, wherein it has been held as under:--

"If a simple 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 or concession, but as a matter of right."

The same view has been reiterated in a subsequent judgment titled "Ayub Masih v. The State" reported as PLD 2002 SC 1048, whereby it has been directed that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind.

12. Resultantly, the appeal is allowed, impugned judgment towards conviction and sentence of the appellants is set aside and they are acquitted of the charge, while extending them the benefit of doubt. The appellants are in custody, therefore it is directed that they be released from the jail, if not required to be detained in any other case. The vehicles in question be returned to the rightful owner(s), whereas the articles and cash, recovered during personal search of the appellants and secured through memos (Ex.PC and Ex.PD), be handed over to the respective appellants and the narcotics be destroyed, in accordance with law.

MH/A-10/L Appeal allowed.

2020 M L D 548

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi and Raja Shahid Mahmood Abbasi, JJ

STATE through Prosecutor General Punjab---Appellant

Versus

NASEEB SHAH and 5 others---Respondents

Criminal Appeal No. 58 of 2014, heard on 25th September, 2019.

Explosive Substances Act (VI of 1908)---

----Ss. 4, 5 & 7---Anti-Terrorism Act (XXVII of 1997), Ss. 7 & 19(8-B)---Criminal Procedure Code (V of 1898), S. 417---Act of terrorism---Attempt to cause explosion or making or keeping explosive with intent to endanger life or property, making or possessing explosives under suspicious circumstances---Appeal against acquittal---Restriction on trial of offences---Failure of prosecution to apply for consent of Provincial Government---Effect---Accused persons were charged under S. 5 of Explosive Substances Act, 1908---Sanction of the Provincial Government under S. 7 of Explosive Substances Act, 1908 for holding trial was mandatory and a condition precedent for prosecution of the accused persons---Entire proceedings, in the absence of requisite sanction/permission, were void and without jurisdiction---Word "shall" used in S. 7 of Explosive Substances Act, 1908 left no room for any departure therefrom---Section 19(8-B), Anti-Terrorism Act, 1997, however, made a relaxation to the effect that if sanction was applied but not granted by the competent authority within 30 days then the due proceedings towards initiation of trial could be carried on---Section 19(8-B), Anti-Terrorism Act, 1997 required the request for prosecution to have been made---When there was mention of receipt of consent or sanction within thirty days, it impliedly indicated to sending and seeking consent/sanction---No such request having been made, prosecution and trial under S. 7 of Explosive Substances Act, 1908 and S. 19(8-B) of Anti-Terrorism Act, 1997 was not competent and possible---Such fact alone was sufficient to give premium of acquittal to the accused persons---Impugned judgment was not open to any exception and as such did not warrant any interference---Appeal against acquittal was dismissed.

Naveed Ahmed Warraich, DDPP with Sohail, Inspector for the State.
Rao Abdur Raheem for Respondents Nos. 4 and 5.
Respondent No.3 has since died.

Date of hearing: 25th September, 2019.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Through this appeal, the State has challenged acquittal of the respondents, recorded through judgment dated 20.12.2013, passed by the learned Judge, Anti Terrorism Court-II, Rawalpindi Division, Rawalpindi.

2. Notices to the respondents were issued and in consequence thereof respondents Nos. 4 and 5 had entered appearance. It has been reported that respondent No. 3 has died, whereas non-bailable warrants of arrest issued, against the remaining respondents have been received back with the reports that they were Afghani, hence returned to their native country.

3. Under the above mentioned circumstances as the appeal can be decided on the basis of arguments of the State as well as the respondents in attendance, therefore, it is being disposed of.

4. The respondents were booked in case FIR No. 82 dated 15.2.2013, registered under Sections 4/5/6 of Explosive Substances Act, 1908, Section 7 of Anti Terrorism Act, 1997 and 13 of the Arms Ordinance XX, 1965 at Police Station Taxila, District Rawalpindi, with the precise allegations of possessing Explosive material. They were challaned to the Court and trial was held before the learned Judge, Anti Terrorism Court No.II, Rawalpindi Division, Rawalpindi and finally through the above mentioned judgment they were acquitted of the charge.

5. The offence under Section 5 of the Explosive Substances Act, 1908 was charged against the respondents but according to Section 7 of the said Act, prior permission for prosecution by the competent authority was required. The above mentioned provision reads as under:--

"7. Restriction on trial of offences. No Court shall proceed to the trial of any person for an offence against this Act except with the

consent of * * * the [Provincial Government] [to which intimation shall be sent within two days of the registration of the case:]

[Provided that if the consent is neither received nor refused within sixty days of the registration of case the Government such consent shall be deemed to have been duty given.]"

It is crystal clear from the bare reading of the above mentioned provision of law that sanction for prosecution for holding trial under Explosive Substances Act is mandatory and a condition precedent for prosecution, of the respondents, under section 5 of the said Act. In absence of the requisite sanction/permission, entire proceedings taken would be void and without jurisdiction. The word "shall" used in above mentioned section leaves no room for any departure therefrom. Although, Section 19(8-B) of Anti Terrorism Act, 1997 makes a relaxation to the effect that if sanction is applied but not granted by the competent authority within 30-days, then the due proceedings towards initiation of trial may be carried on. For ready reference the said provision is reproduced herein below:--

"19. Procedure and Powers of [Anti Terrorism Court.

[(1)

[(1A)

(2)

(3)

[(4)

(5)

(6)

[(7)

(8)

[(8-A)

(8-B) Notwithstanding anything contained in section 7 of the Explosive Substances Act, 1908 (VI of 1908), or any other law for the time being in force, if the consent or sanction of the appropriate authority, where required, is not received within thirty days of the submission of challan in the Court, the same shall be deemed to have been given or accorded and the Court shall proceed with the trial of the case.]"

From the above mentioned provision, one thing is clear that request for prosecution should have been made. When there is mention of receipt of consent or sanction within thirty days, it impliedly indicates to sending and seeking consent/sanction. Admittedly, in the instant case no such request has been made and as such under Section 7 of the Explosive Substances Act, 1908, as well as Section 19(8-B) of Anti Terrorism Act, 1997, prosecution and trial was not competent and possible.

6. The above mentioned fact alone was sufficient to give premium of acquittal to the respondents and as such learned trial Court on the basis of said ground, coupled with others, fully detailed in the impugned judgment, had rightly awarded the said premium to the respondents. In this way, the impugned judgment, being well reasoned and call of the day is not open to any exception and as such does not warrant any interference.

7. Due to the reasons mentioned above, the appeal in hand being devoid of any force or merit is dismissed. Consequently, notices issued to the respondents are withdrawn.

SA/S-84/L Appeal dismissed.

2020 M L D 1132

[Lahore]

Before Muhammad Tariq Abbasi and Sardar Ahmad Naeem, JJ

MUHAMMAD ASIF---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No.112-J and Murder Reference No.165 of 2011, decided on 29th September, 2015[*].

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

----Ss. 302(b) & 460---Qatl-i-amd, person jointly concerned in lurking house-trespass or house-breaking by night---Appreciation of evidence---Benefit of doubt---Night time occurrence---No source of light---Scope---Accused was charged for committing murder of the deceased---In the FIR, neither any person as accused was nominated nor features of any accused were given or any source of light at the spot was described---One month after the alleged occurrence, the complainant mentioned in his subsequent application that he identified one of the accused, who entered in his house and by firing, done his brother to death and that the witnesses told him the particulars of the accused---No feature of the accused was given in the FIR and in the subsequent application, it was not mentioned that on the basis of which feature, the accused was identified---Grounds taken in the said application were nothing but an afterthought concoction---No source of light at the spot was described in the FIR, and the complainant, during cross-examination, had admitted that no source of light on the roof of the house was available, then his stance that he had identified the accused to be the person, who, on the roof of the house, had fired and caused injury to his brother, which resulted into his death, was surely a false statement---Admittedly, no test identification parade was held and if for a moment, it was presumed that the complainant had identified the appellant, even then he, for the purpose of test identification parade, should have been brought before witnesses, but without any reason, cause or justification, the said exercise was not done---Circumstances established that the prosecution had failed to bring home the appellant beyond shadow of all reasonable doubts---Appeal against conviction allowed, in circumstances.

Tariq Pervaiz v. The State 1995 SCMR 1345 and Ayub Masih v. The State PLD 2002 SC 1048 rel.

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

----Ss. 302(b) & 460---Qatl-i-amd, person jointly concerned in lurking house-trespass or house-breaking by night---Appreciation of evidence---Benefit of doubt---Contradiction in the statement of witnesses---Effect---Accused was charged for committing murder of the deceased---Complainant, in his statement had contended that he had seen the appellant at a Adda, whereas the version of witness was that at that time, he along with the complainant was available in the commission shop of a person, who never came forward to fortify the above said contention---Appeal against conviction was allowed, in circumstances.

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

----Ss. 302(b) & 460---Qatl-i-amd, person jointly concerned in lurking house-trespass or house-breaking by night---Appreciation of evidence---Benefit of doubt---Crime empty recovered from the spot---Reliance---Scope---Accused charged for committing murder of the deceased---Nothing incriminating could be recovered from accused during his physical remand---Empty of .30 bore pistol, collected from the spot was not sent to any Laboratory and as such its benefit could not be given to the prosecution.

Aiyan Tariq Bhutta and Saqib Jillani for Appellant.

Mehmood Ahmad Chadhar for the Complainant.

Malik Muhammad Jaffer, Deputy Prosecutor General for the State.

Date of hearing: 29th September, 2015.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This judgment shall decide the above captioned Criminal Appeal as well as the Murder Reference, as both are outcome of single judgment dated 15.3.2011, passed by the learned Additional Sessions Judge, Sambrial, District Sialkot, whereby in case FIR No. 301, dated 12.6.2007 , registered under Sections 460/302, P.P.C., at Police Station Sambrial, District Sialkot, Muhammad Asif (hereinafter referred to as the appellant) was convicted and sentenced as under:--

i) Under Section 302(b), P.P.C. -- death, with compensation of Rs.3,00,000/-, payable to legal heirs of the deceased, otherwise to undergo simple imprisonment for six months.

ii) Under Section 460, P.P.C. - rigorous imprisonment for ten years.

2. The precise facts, as per the application (Ex.PH), moved by Muhammad Amjad, complainant (PW-5), which resulted into registration of the FIR (Ex.PA), were that during the night between 11/12.6.2007, when the complainant, along with his family members was sleeping at the roof of

house, suddenly three unknown accused, armed with firearms, came there and got them awoken; Qaisar Mehmood (hereinafter referred to as the deceased), when obstructed the dacoits, they started abusing him and during scuffle, one dacoit fell down in the crop and the others started firing; a fire shot hit on the abdomen of Qaisar Mehmood and he became seriously injured; in the meanwhile, two dacoits, who were available in the courtyard, while firing, came on the roof and thereafter fled away; Qaisar Mehmood in an injured condition was shifted to Civil Hospital, Sialkot, from where he was referred to Lahore, but succumbed to the injuries. Thereafter, the complainant (PW-5) on 11.7.2007 again moved an application (Ex.P), with the contention that on the said date at about 10.00 AM, when he along with Ghulam Qadir (PW not produced) and Liaqat Ali (PW-8) was available at Adda Sahuwala, one of the dacoits, who had done Qaisar Mehmood to death by firing, passed on a motor cycle and identified by him; the above named PWs told the complainant that the said accused was the appellant, hence he was nominated and arrested. The case was investigated, when the appellant was found to be involved, hence challaned to the court. Formal charge against him was framed on 27.5.2009, which was denied and trial was claimed, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as 13 witnesses. The gist of evidence led by the material witnesses was as under:-

i) PW-3 Dr. Iftikhar Ahmad had conducted postmortem examination of the dead body of Qaisar Mehmood on 12.6.2007 and prepared the postmortem report (Ex.PD) and pictorial diagrams (Ex.PD/1 and Ex.PD/2), when an incised stitched wound on left lumber region, having blackening around the margins and another stitched wound on right lumber region of the deceased were noticed. The injury No. 1 was caused by firearm and sufficient to cause death.

ii) PW-5 Muhammad Amjad was the complainant as well as an eye witness of the alleged occurrence, who narrated almost the same facts as were disclosed by him in above mentioned complaint (Ex. PH) and subsequent application (Ex.PJ).

iii) PW-6 Mst. Aasia Bibi and PW-7 Mst. Uzma Bibi the witnesses of the alleged occurrence, firstly had supported the version narrated in the FIR and thereafter contended that on 9.8.2007, the appellant was identified by them, in the lock-up of the Police Station, being

one of the dacoits, who by firing committed murder of the deceased.

iv) PW-8 Liaqat Ali, stated that on 11.7.2007, when he along with Muhammad Amjad complainant (PW-5) and Ghulam Qadir (PW not produced) was available at Adda Sahuwala, the appellant passed from the said place on a motor cycle and identified by the complainant to be one of the accused, who entered in his house and done his brother Qaisar Mehmood to death.

v) PW-13 Muhammad Arif, S.I. had investigated the case, during which carried on the proceedings and prepared the documents, fully detailed in his statement.

3. On completion of the prosecution evidence, the appellant was examined under Section 342, Cr.P.C., during which the questions arising out of prosecution evidence were put to him, but he denied almost all such questions, while pleading his innocence and false involvement in the case with mala fide. The question "Why this case against you and why the PWs have deposed against you?"' was answered by him in the following words:- "It is correct that complainant Amjad was abroad and after one year, he returned to Pakistan. Deceased Qaisar Mehmood had developed illicit relations with Mst. Uzma, wife of complainant. On fateful night, Uzma Bibi and deceased Qaisar Mehmood were present at the roof of their house in naked position and on seeing them in such objectionable position, complainant Amjad Mehmood made a fire, which landed on the deceased. The story of illicit relation between deceased and Mst. Uzma was very well published in Mohallah and I was also informed by deceased in order to suppress the fact of aforesaid illicit relationship and that of murder of deceased by complainant, he concocted this false story and implicated me in this occurrence. It is pertinent to mention that co-accused Shamas Din was also arrested by the Police and was subsequently bailed out. The complainant after grabbing his house, effected compromise with said co-accused and due to compromise, no proceedings were initiated against said co-accused. PWs are interested witnesses because they are closely related to the complainant. Police did not investigate the case on merits due to their having been in league with the complainant and thus wrongly challaned me in this case."

He did not opt to lead any evidence in his defence or make statement under Section 340(2), Cr.P.C. Finally, the impugned judgment was passed in the above mentioned terms. Consequently, the matters in hand.

4. The learned counsel for the appellant has argued that it was a dark night occurrence, but with mala fide, while concocting a false story and introducing false witnesses, the appellant was roped in the case; the alleged identification of the appellant, in the Police Station by PWs-6 and 7 was not acceptable under the law; no incriminating were recovered from the appellant; the prosecution case and the charge against the appellant was not established and proved, hence he was entitled to acquittal and as such the impugned judgment could not be termed justified.

5. On the other hand, the learned Deputy Prosecutor General, assisted by the learned counsel for the complainant, has opposed the appeal, while supporting the impugned judgment, resulting into conviction of the appellant to be well-reasoned and call of the day, hence not interferable.

6. Arguments of all the sides have been heard and the record has also been perused.

7. The occurrence had taken place during the night between 11/12.6.2007. At the time of reporting the matter to the Police through application (Ex.PH) and registration of the FIR (Ex.PA), neither any person, as accused was nominated nor features of any assailant were given or any source of light at the spot was described. After about a month of the alleged occurrence, the appellant had moved the above mentioned subsequent application (Ex.PJ), with the above mentioned contentions. In the said subsequent application (Ex.PJ), it was contended that when the complainant had identified the appellant to be one of the accused, who entered in his house and by firing, done his brother to death, Liaqat Ali (PW-8) and Ghulam Qadir (PW not produced) told him the particulars of the appellant. When in the FIR, no feature of the accused was given and in the subsequent application (Ex.PJ), it was not mentioned that on the basis of which feature, the appellant was identified to be an accused of the occurrence, then the grounds taken in the said application were nothing, but an after-thought concoction. As stated above, in the FIR, no source of light at the spot was described and the complainant (PW-5), during cross-examination had admitted that no source of light on the roof of the house was available, then his stance that he had identified the appellant to be the person, who, on the roof of the house, had fired and caused injury to Qaisar Mehmood, which resulted into his death, was surely a false stance.

8. Admittedly, no test identification parade was held and if, for a moment, it is presumed that the complainant had identified the appellant, even then he, for the purpose of test identification parade, should have

been brought before Mst. Aasia Bibi (PW-6) and Mst. Uzma Bibi (PW-7), but without any reason, cause or justification, the said exercise was not done. When there was no hurdle in conducting the test identification parade, in the prescribed manner, then the alleged identification of the appellant by the above named ladies, in the Police Station was a false proceedings, hence should not be given any weight.

9. The complainant (PW-5), in his statement had contended that he had seen the appellant at Adda Sahuwala, whereas the version of Liaqat Ali (PW-8) was that at that time, he along with the complainant was available in the commission shop of Muhammad Akram, who never came forward to fortify the above said alleged contention.

10. The appellant remained on physical remand, but no incriminating could be recovered from him, hence the empty of .30 bore pistol, collected from the spot was not sent to any laboratory and as such had not given any benefit to the prosecution.

11. All the above mentioned facts and circumstances, lead us to the conclusion that the prosecution has failed to bring home the charge against the appellant, beyond shadow of all reasonable doubts. Admittedly in such like situation, the appellant deserves benefit of doubt, not as a matter of grace or concession, but as of right. In this regard, reference may be made to the case titled "Tariq Pervaiz v. The State" reported as 1995 SCMR 1345. This view has further been reiterated in the case titled "Ayub Masih v. The State" reported as PLD 2002 SC 1048, whereby it has been held that while dealing with a criminal case, the golden principle of law "it is better that ten guilty persons be acquitted, rather than one innocent person be convicted" should always be kept in mind.

12. Resultantly, the above captioned Criminal Appeal No. 112- J of 2011 is accepted, the, impugned judgment is set aside and the appellant namely Muhammad Asif is acquitted of the charge, while extending him the benefit of doubt. He is in custody, hence be released forthwith, if not required to be detained in any other matter. The disposal of the case property shall be as directed by the learned Trial Court. As a consequence, Murder Reference No. 165 of 2011 is answered in negative and death sentence awarded by the learned Trial Court to Muhammad Asif appellant is not confirmed.

JK/M-62/L Appeal accepted.

2020 M L D 1384

[Lahore]

Before Muhammad Tariq Abbasi, J

DOST MUHAMMAD---Petitioner

Versus

The STATE and others---Respondents

Criminal Revision No. 24174 of 2019, heard on 31st January, 2020.

Juvenile Justice System Act (XXII of 2018)---

----S. 8---Age, determination of---Determination of age on the basis of medical examination report---Scope---Petitioner assailed order passed by Trial Court whereby request made by petitioner for ossification test of the accused was declined---Petitioner had got registered an FIR under S.302, P.P.C., against the accused for committing qatl-i-amd---Police had found the accused as minor, hence while declaring him so, had submitted the challan in the court constituted under the Juvenile Justice System Act, 2018---Section 8 of Juvenile Justice System Act, 2018 carried two steps: First was to be adopted by the Investigating Officer, whereas the other by the court---Where the accused claimed to be juvenile or from appearance he seemed so then the Investigating Officer or the court had to make an inquiry to that effect, which could include a medical report---Investigating Officer had only relied upon the documents produced before him by the accused---One of such documents was admittedly incorrect but even then no effort was made by Investigating Officer for medical examination of the accused---Even the Trial Court had failed to resolve the controversy in question---Revision petition was allowed, accordingly.

Naseem Ullah Khan Niazi for Petitioner.

Sana Ullah, Deputy Prosecutor General and Dr. Anwar Gondal, Additional

Prosecutor General for the State.

Date of hearing: 31st January, 2020.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition, calls in question the order dated 05.04.2019, of the learned Sessions Judge, Khushab, whereby request made by the petitioner, for ossification test of respondent No.2 namely Muhammad Ikram (hereinafter referred to as the respondent), has been declined.

2. The petitioner had got registered FIR No. 310, dated 28.09.2018, under Section 302, P.P.C., at Police Station Quaidabad, District Khushab, against the respondent for committing 'qatl-e-amd' of Qamar Hayat. The Police had found the respondent as minor, hence while declaring him so, had submitted the challan in the court, constituted under The Juvenile Justices System Act, 2018 (hereinafter referred to as the Act).

3. The petitioner while declaring the above mentioned findings of the Police, to be against the required procedure and based upon incorrect documents, had requested the learned trial court, that to reach at just and fair conclusion, ossification test of the respondent may be got conducted, but the said learned court, through the impugned order, had declined such a request.

4. Section 8 of the Act, deals towards determination of age of an accused, which reads as under:-

> "8. Determination of age.---(1) Where a person alleged to have committed an offence physically appears or claims to be a juvenile for the purpose of this Act, the officer-in-charge of the police station or the investigation officer shall make an inquiry to determine the age of such person on the basis of his birth certificate, education certifications or any other pertinent documents. In absence of such documents, age of such accused person may be determined on the basis of a medical examination report by a medical officer.
>
> (2) When an accused person who physically appears to be juvenile for the purpose of this Act is brought before a Court under Section 167 of the Code, the Court before granting further detention shall record its findings regarding age on the basis of available record

including the report submitted by the police or medical examination report by a medical officer."

5. The above mentioned provision carries two steps. First is to be adopted by investigation officer, whereas other by the Court. At both the occasions, if an accused claims himself to be juvenile or from appearance, he seems so, then the investigation officer or the court shall make an inquiry to this effect, which may include a medical report, made by a medical officer.

6. In the matter in hand, the investigation officer had only relied upon the documents produced before him, by the respondent. One of such documents, was admittedly incorrect, but even then, no effort by the investigation officer was made, for medical examination of the respondent. Even the learned court, where challan against the respondent had been submitted, had failed to resolve the controversy in question and order for the above mentioned examination.

7. It has further been noticed that the investigation officer, on one hand, had alleged the respondent to be a juvenile, whereas on the other hand, he had failed to comply with the mandatory requirements of Section 7 of the Act, which is as follows:-

"7. Investigation in juvenile cases.---(1) A juvenile shall be interrogated by a police officer not below the rank of Sub Inspector under supervision of Superintendent of Police or SDPO.

(2) The investigation officer designated under subsection (1) shall be assisted by a probation officer or by a social welfare officer notified by the Government to prepare social investigation report to be annexed with the report prepared under Section 173 of the Code."

The report under Section 173, Cr.P.C., filed in the juvenile court does not suggest that the respondent was interrogated under the supervision of Superintendent of Police or the SDPO concerned, with assistance of the Probation Officer or Social Welfare Officer, notified by the Government, for the purpose.

8. Under the above mentioned circumstances, it would be appropriate that for determination of age of the respondent, his medical examination should be got conducted.

9. Resultantly, the revision petition in hand is allowed, the order in question is set aside and reversed. Meaning thereby, that the above mentioned request of the petitioner, is acceded to, with a direction to the Medical Superintendent of DHQ Hospital, Khushab, to constitute a medical board, for determination of age of the respondent and submit the report, with the learned trial court, which in the light of such a report, shall proceed with the matter, in accordance with law.

SA/D-3/L Revision allowed.

2020 P Cr. L J Note 19
[Lahore]
Before Muhammad Tariq Abbasi, J
ZAIN-UL-ABIDEEN---Petitioner
Versus
ADDITIONAL SESSIONS JUDGE and 7 others---Respondents

Writ Petition No. 13446 of 2016, heard on 26th June, 2019.

Criminal Procedure Code (V of 1898)---

----S. 561-A---Penal Code (XLV of 1860), Ss. 365-B, 336, 337-A(ii), 337-F(iii) & 376---Anti-Terrorism Act (XXVII of 1997), S. 6---Kidnapping, abducting or inducing woman to compel for marriage etc., Itlaf-i-Salahiyat-i-Udw, shajjah-i-mudihah, mutalahimah and rape---Quashing of order---Objection raised by the petitioner that the case was triable by Anti-Terrorism Court, was overruled---Validity---Record showed that the alleged occurrence towards abduction of sister of the petitioner and causing her injuries by throwing acid upon her was committed on 01.09.2008---At that time, neither any penal clause for hurt through corrosive substance, including acid, was available in the Penal Code, 1860 nor in Third Schedule of the Anti-Terrorism Act, 1997, any such offence was described, because Ss. 336-A & 336-B were inserted in P.P.C. from 28.11.2011---Offence of hurt through corrosive substance was included in the Schedule of Anti-Terrorism Act, 1997 on 05.09.2012---Circumstances clearly showed that at the time of commission of the alleged occurrence, neither the said provisions of P.P.C., regarding hurt by corrosive substance were on the statute book nor in the Schedule of the Anti-Terrorism Act, 1997, any such offence was included---Accused could not be tried and punished for an offence which at the time of commission of occurrence was not made punishable---No retrospective effect to a penal provision could be given---Circumstances established that the objection of the petitioner before the Trial Court, for sending the case to Anti-Terrorism Court, was unjustified and as such rightly turned down, through the order in question---Constitutional petition having no force or merit, was dismissed accordingly.

Muhammad Fazal and others v. Saeedullah Khan and others 2011 SCMR 1137 and Khizar Hayat v. The State 2012 SCMR 1066 rel.

Syed Munawar Hussain Abid for Petitioner.

Zafar Hussain Ahmad, Assistant Advocate-General and Amjad Rafique, Additional Prosecutor-General with Qalab Abbas, ASI for the State.

Ch. Muhammad Lehrasab Khan Gondal for Respondent No. 7.

Date of hearing: 26th June, 2019.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---The instant Constitutional Petition, challenges the vires of an order dated 05.10.2015, passed by the learned Additional Sessions Judge, Mandi Bahauddin, whereby an objection raised by the present petitioner, that the case was triable by Anti-Terrorism Court, hence may be transmitted there, has been over ruled.

2. An FIR No. 392, dated 06.09.2008, under sections 365-B/ 336/337A(ii)/337F(iii)/376, P.P.C., at Police Station Saddar, District Mandi Bahauddin, was got lodged by the present petitioner, namely Zain-ul-Abideen, with the contentions that Azhar Hussain, present respondent No. 7 (hereinafter referred to as the respondent) and his two brothers namely Mazhar and Sajid (co-accused since acquitted) had abducted his sister Mst. Samia Khanam and they while sprinkling acid, had also caused injuries to her.

3. The respondent and his above named brothers (since acquitted), were found to be involved, hence challan against all, was prepared and forwarded to the Sessions Court, Mandi Bahauddin and entrusted to an Additional Sessions Judge of the said district. At that time, the respondent was a proclaimed offender, hence the proceedings, to the extent of his above named co-accused were carried on, during which the present petitioner as well as the above named lady, had got recorded their statements as PW-1 and PW-2 respectively, whereby both had exonerated the co-accused of the charge. Consequently, through judgment dated 03.01.2009, the above named co-accused were acquitted of the charge.

4. The respondent, who at the time of above mentioned proceedings, was a proclaimed offender, was arrested later on, hence the trial to his extent had commenced in the court of learned Additional Sessions Judge, Mandi Bahauddin, when an objection was raised from the petitioner's side

that as during the occurrence, acid was thrown upon the above named lady, hence offence, being described in third Schedule of the Anti-Terrorism Act, 1997, was triable by Anti-Terrorism Court and as such the case may be forwarded to the said forum. But the learned trial court, through the order in question, had refused to allow the objection and accept the request.

5. The alleged occurrence towards abduction of Mst. Samia Khanam and causing her the injuries by throwing acid upon her was committed on 01.09.2008. At that time, neither any penal clause for hurt through corrosive substance (including acid) was available in the Pakistan Penal Code, 1860 nor in third Schedule of the Anti-Terrorism Act, 1997, any such offence was described, because sections 336-A and 336-B, were inserted in the Pakistan Penal Code, through amendment dated 28.11.2011, whereas in the above said Schedule, the offence of hurt through corrosive substance was included on 05.09.2012.

6. From the above mentioned, it is clear that at the time of commission of the alleged occurrence, neither the above mentioned provisions of P.P.C., regarding hurt by corrosive substance were in field nor in the above said Schedule of the Anti-Terrorism Act, 1997, any such offence was included.

7. Article 12 of the Constitution of Islamic Republic of Pakistan, 1973, protects every citizen of Pakistan, against retrospective punishment. The said Article reads as under:-

12. Protection against retrospective punishment.---(1) No law shall authorize the punishment of a person---

(a) for an act or omission that was not punishable by law at the time of the act or omission; or

(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

(2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence."

8. All the above mentioned, lead to the conclusion that an accused could not be tried and punished for an offence, which at the time of commission of occurrence, was not made punishable, as retrospective effect to a penal provision could not be given. If any case law is needed, to fortify this view, reference can be made to the cases "Muhammad Fazal and others v. Saeedullah Khan and others" (2011 SCMR 1137) and "Khizar Hayat v. The State" (2012 SCMR 1066).

9. Consequently, permission could not be granted, for trial of the respondent, for offence of hurt by acid throwing, described in the above said provisions and the Schedule. In this way, the objection of the petitioner before the learned trial court, for sending the case to Anti-Terrorist Court, was totally unjustified and as such rightly turned down, through the order in question.

10. Resultantly, the writ petition in hand, having no force or merit, is dismissed.

JK/Z-11/L Petition dismissed.

2020 P Cr. L J 350

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi and Raja Shahid Mehmood Abbasi, JJ

TARIQ MEHMOOD---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 958 of 2017, heard on 30th October, 2018.

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

----S. 9(c)---Possession of narcotics---Appreciation of evidence---Benefit of doubt---Contradictory statements of witnesses---Scope---Accused was convicted by Trial Court for possession of 1110 grams of heroin---Complaint had mentioned that 60 grams were separated as sample and prepared two sealed parcels, one of the sample and other of the remaining quantity---Complainant during his statement before Trial Court deposed that his stance in the complaint regarding preparation of two sealed parcels was incorrect---Moharrar admitted that in his statement recorded under S. 161, Cr.P.C., he had not mentioned that two sealed parcels were delivered to him---Investigating officer admitted that he had not mentioned in any statement that he handed over the parcel of remaining recovered heroin to Moharrar---Facts and circumstances showed that prosecution case and the charge against the accused could not be proved beyond shadow of doubt---Appeal was accepted and impugned judgment was set aside.

(b) Criminal trial---

----Benefit of doubt---Scope---Accused is entitled for due benefit of acquittal not as a matter of grace or concession but as a matter of right.

Ayub Masih v. The State PLD 2002 SC 1048 and Tariq Pervez v. The State 1995 SCMR 1345 rel.

(c) Criminal trial---

----Benefit of doubt---Scope---Single circumstance creating reasonable doubt in a prudent mind about the guilt of accused will entitle him to such benefit, not as a matter of grace or concession but as a matter of right.

Ayub Masih v. The State PLD 2002 SC 1048 and Tariq Pervez v. The State 1995 SCMR 1345 rel.

(d) Criminal trial---

----Administration of justice---Mistake of Court in releasing a criminal is better than its mistake in punishing an innocent.

Ayub Masih v. The State PLD 2002 SC 1048 rel.

(e) Criminal trial---

----Administration of justice---High Court observed that it was better that ten guilty persons be acquitted rather than one person innocent be convicted.

Ayub Masih v. The State PLD 2002 SC 1048 rel.

Barrister Osama Amin Qazi for Appellant.

Umar Hayat Gondal, Additional Prosecutor-General with Waqas, SI for the State.

Date of hearing: 30th October, 2018.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---Tariq Mehmood (hereinafter referred to as the appellant), has challenged the judgment dated 25.09.2017, passed by the learned Sessions Judge/Judge CNS, Chakwal, whereby in case FIR No. 88, dated 22.04.2017, registered under section 9(c) of the Control of Narcotic Substances Act, 1997 (hereinafter referred to as the Act), at Police Station Saddar District Chakwal, he was convicted under section 9(c) of the Act and sentenced to R.I. for 06 years, along with fine of Rs.30,000/-, in default whereof to further undergo S.I. for 06 months, with benefit of section 382-B, Cr.P.C.

2. The appellant was challaned to the Court, with the precise charge of recovery of 1110 grams of Heroin from his possession. He had denied the charge and claimed the trial, hence the prosecution witnesses namely Muhammad Adeel Safdar ASI (PW-1), Muhammad Saleem Constable (PW-2), Muhammad Shafique H.C. (PW-3), Muhammad Husnain Shah S.I. (PW-4) and Gulzar Hussain S.I. (PW-5) were summoned and recorded.

3. On completion of the prosecution evidence and closure of the case, the appellant was examined under section 342, Cr.P.C., during which the questions arising out of the prosecution evidence, were put to him but he had denied almost all such questions, while pleading his innocence and false involvement, in the case with mala fide. He did not opt to lead any evidence in his defence or to make statement under section 340(2), Cr.P.C. Finally, the impugned judgment was passed, in the above mentioned terms. Consequently, the appeal in hand.

4. Arguments heard. Record perused.

5. The prosecution stance was that out of recovered narcotic weighing 1110 grams, Gulzar Hussain S.I. (PW-5) separated 60 grams as sample and while preparing two sealed parcels, one of the sample and other of the

remaining quantity had taken the same into possession, through a recovery memo; PW-5 subsequently had handed over the above said parcels to Muhammad Hasnain Shah S.I/I.O (PW-4), who had deposited them with Muhammad Saleem Moharrar (PW-2).

6. Gulzar Hussain S.I/complainant during his statement as PW-5 deposed as under:-

> "I did not take shopping bag of white colour separately into possession. Volunteered, said Heroin was packed in said shopping bag, which remained packed in the shopping bag and we did not take Heroin out of it. Complaint Exh.P.4/1 is in my handwriting. It is correct that it is mentioned in complaint that "sample and remaining Charas were made into two separate parcels and were sealed with". Volunteered, mistakenly it is so written."

The above said deposition of the PW-5 means that his stance in the complaint Exh.PA/1, regarding preparation of two sealed parcels, one of the sample and the other of the remaining quantity was incorrect.

7. Muhammad Saleem Moharrar (PW-2) had admitted that in his previous statement under section 161, Cr.P.C. (Exh.DA), it was not mentioned that two sealed parcels were delivered to him and that in the said statement the word "Heroin" was written after cutting the word "Charas" and that there was cutting of date from 22.04.2017 to 24.04.2017.

8. Muhammad Husnain Shah S.I/I.O. during statement before the learned trial Court as PW-4, had made the following admissions:-

> "It is correct that I was duty bound to record the statement of Morarrar regarding every article or parcel which I had handed over to him. It is correct that I have not mentioned in any statement that I handed over the parcel of remaining recovered Heroin to Moharrir,"

9. The facts and circumstances highlighted above, lead to the conclusion that the prosecution case and the charge against the appellant could not be proved beyond shadow of all reasonable doubts. In such like situation an accused is always entitled for due benefit of acquittal not as a matter of grace or concession but as a right. In this regard, we are fortified by the dictum laid down by the august Supreme Court of Pakistan in cases titled Ayub Masih v. The State reported as (PLD 2002 Supreme Court 1048) and Tariq Pervez v. The State reported as 1995 SCMR 1345, wherein it is held that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such

benefit not as a matter of grace or concession, but as of right. In the case of Ayub Masih (Supra), while quoting a saying of the Holy Prophet (PBUH) 'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent', and making reference to the maxim, 'it is better that ten guilty persons be acquitted rather than one innocent person be convicted', the Hon'ble Supreme Court observed as under:-

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

10. Resultantly, the instant appeal is accepted, the impugned judgment is set-aside and the appellant, namely, Tariq Mehmood is acquitted of the charge, while extending him the benefit of doubt. The appellant is in custody, hence be released forthwith, if not required to be detained in any other case. The disposal of the case property shall be as directed by the learned trial Court, in the impugned judgment.

SA/T-20/L Appeal accepted.

2020 P Cr. L J 1358

[Lahore (Rawalpindi Bench)]

Before Muhammad Tariq Abbasi, J

GUL ASIF---Petitioner

Versus

The STATE and others---Respondents

Criminal Revision No. 184 of 2019, heard on 6th November, 2019.

Criminal Procedure Code (V of 1898)---

----S. 265-D---Framing of charge---Scope---Petitioner assailed order passed by Trial Court whereby it deleted the offences under Ss. 367-A, 377 & 511, P.P.C. and referred the matter to Judicial Magistrate for trial of other offences under Ss. 337-A(i) & 337-L(2), P.P.C.---Prosecution case was that the victim was going to his school when the respondents/accused persons abducted him on gun-point, took him near a shrine and demanded him to remove his pants, on his refusal, they started beating him; he raised hue and cry, which attracted prosecution witnesses, whereupon accused persons fled away---Section 265-D, Cr.P.C. indicated that the court, for the purpose of framing a charge, had to consult the police report, complaint, other documents, statements filed by prosecution and nothing else---Complaint, FIR and statements under S. 161, Cr.P.C. showed prima facie attraction of offences under Ss. 376-A, 377 & 511, P.P.C. but the Trial Court while ignoring the same had deviated from the powers given under S. 265-D, Cr.P.C.---Revision petition was allowed and the Trial Court was directed by the High Court to take up the file and carry on the proceedings warranted under the law.

Malik Muhammad Iqbal for Petitioner.

Ghulam Abbas Gondal, DPG with Abid Hayat, ASI for the State.

Ahsan Hamid Lillah for Respondents Nos. 2 to 5.

Date of hearing: 6th November, 2019.

JUDGMENT

MUHAMMAD TARIQ ABBASI, J.---This revision petition calls in question the order dated 18.06.2019 of the learned Additional Sessions Judge, Talagang, District Chakwal, whereby during proceedings in case FIR No. 23, dated 23.02.2019, registered under sections 337A(i)/ 337-L(2)/367-A/377/511 P.P.C., at Police Station Taman, District Chakwal, the offences under sections 367-A/377/511, P.P.C., have been deleted and for trial of the other offences under sections 337A(i)/ 337-L(2), P.P.C., the matter has been referred to the Judicial Magistrate.

2. The above mentioned case was got lodged by the present petitioner namely Gul Asif, against the respondents namely Noor Hassan, Muhammad Tariq, Ameer Hussain and Aziz (hereinafter referred to as the respondents), with the contentions that on 23.02.2019, at about 8:00 a.m., when Noman Asif PW was going to his school, the respondents on gun-point, while picking and throwing him in a vehicle, had taken him, near shrine of Baba Sheikh Ismail, where they demanded him to remove the pant, but he refused, whereupon they started beating him; he raised hue and cry, which attracted Imam Din and Ashiq Hussain PWs, whereupon the respondents fled away.

3. After registration of the FIR, the investigation was started, during which Noman Asif victim had got recorded a statement under section 161, Cr.P.C., whereby he had fully nominated and implicated the respondents to be the persons, who had forcibly lifted him from a place and taken to the above mentioned other, where, for the purpose of sodomy, had removed his pant, but when he refused and resisted, all had beaten him. This witness had also stated that when due to his hue and cry, Imam Din and Ashiq Hussain PWs arrived at the spot, the respondents fled away, whereupon a shalwar was provided to him and he while wearing it, returned home. The Police had completed the proceedings and submitted the report under section 173, Cr.P.C. But the learned trial court had behaved in the above stated manner.

4. Section 265-D, Cr.P.C., relates to the material, which at the time of framing of charge, should have been perused and considered by the trial court. The said provision reads as under: -

"265-D. When charge is to be framed. If, after perusing the police report or, as the case may be, the complaint, and all other documents and statements filed by the prosecution, the Court is of opinion that there is ground for proceedings with the trial of the accused it shall frame in writing a charge against the accused."

5. The above mentioned provision indicates that for the purpose of framing a charge, the Court should consult the police report, complaint, the documents and the statements filed by the prosecution and nothing else. On the basis of the said material, the Court has to decide whether cognizance is to be taken by it or not.

6. Furthermore, the prosecution agency, under the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006, enjoys the power to delete or add an offence, according to the facts and evidence collected, by the police, before submitting report under section 173, Cr.P.C., to the Court. Under the said law, it is the District Prosecutor to scrutinize the available record/evidence and applicability of an offence against an accused. At that stage, an offence can be deleted or added by the said forum.

7. In this case, when the Prosecution Agency while scrutinizing and analyzing, the material on the record and holding applicability of offences under sections 337-A(i)/337-L(2)/367-A/377/511, P.P.C. had forwarded the report under section 173, Cr.P.C. to the learned trial Court, then why and how the said learned Court had deleted the offences under sections 367-A/377/511, P.P.C. No explanation or answer to the said question is available in the order under revision.

8. As stated above, in the matter in hand, the complaint, FIR and statements under section 161, Cr.P.C., showing prima facie attraction of

the offences under sections 367-A/377/511, P.P.C., against the respondents were available before the Court, but it while ignoring the same and passing the order under revision had deviated from the powers given under the above stated section 265-D of Cr.P.C.

9. Resultantly, the revision petition in hand is allowed, impugned order is set aside, with a direction to the learned Additional Sessions Judge, Talagang, to take up the file and carry on the proceedings, warranted under the law.

SA/G-6/L Petition allowed.

2020 P Cr. L J 1438

[Lahore]

Before Muhammad Tariq Abbasi and Ch. Mushtaq Ahmad, JJ

FAWAD HASSAN FAWAD---Petitioner

Versus

FEDERATION OF PAKISTAN and others---Respondents

Writ Petition No. 74858 of 2019, heard on 21st January, 2020.

Constitution of Pakistan---

----Art. 199--- National Accountability Ordinance (XVIII of 1999), S. 9---Corruption and corrupt practices---Bail, grant of---Scope---Accused sought post arrest bail in a case lodged by National Accountability Bureau (NAB)---Held; NAB had failed to substantiate the grounds of arrest---National Accountability Bureau had alleged that the accused had acquired huge assets disproportionate to his known sources of income but no such assets in the name of accused were highlighted in the reference---National Accountability Bureau had alleged that the accused had no significant sources of income but his dependents owned a property worth Rs. 500 million but in the reference value of the property was stated to be Rs. 78.5 million and nothing was brought on record to prove that it was purchased or acquired through any amount, paid by accused---NAB had alleged that 14 Bank accounts were being maintained by accused and his family members but reference was silent to that extent---Family members of the accused were arrayed as accused in the reference, without any arrest---Accused was arrested without any cogent and convincing evidence/material---Accused was in confinement for about 01 year and 07 months without any progress in the case---Even the charge was not framed---Accused could not be kept behind the bars for indefinite period---Post-arrest bail was allowed, in circumstances.

Ashtar Ausaf Ali, Azam Nazir Tarrar, Barrister Asad Rahim Khan, Muhammad Amjad Pervaiz and Salman Sarwar Rao for Petitioner.

Syed Faisal Raza Bukhari, Special Prosecutor NAB with Usman Iftikhar, Assistant Director, NAB, Lahore/I.O. for the State/NAB.

Date of hearing: 21st January, 2020.

ORDER

MUHAMMAD TARIQ ABBASI, J.---By way of instant writ petition, the petitioner, namely, Fawad Hassan Fawad seeks his release on bail, in Accountability Reference No.21 of 2019.

2. The petitioner, during pendency of an inquiry, was arrested by the NAB on 05.07.2018, on the basis of following grounds and allegations:-

"Following facts form basis for immediate arrest of the accused:-

a. That accused Fawad Hassan Fawad being public office holder, acquired huge assets disproportionate to his known sources of income.

b. That the accused through his family members has executed a deed for purchase of commercial plot amounting to Rs.500 Million approx in Rawalpindi which, prima facie, is disproportionate to his known sources of income.

c. That dependent of the accused (his wife), sister-in-law and the brother of the accused have no significant sources of income yet they are the owners of Messrs Fehmida Yaqoob Construction (FYC) Company (Pvt.) Ltd. which owns a 15-floor plaza "The Mall" Rawalpindi worth Rs.5 Billion (approx), which is prima facie, disproportionate to known sources of income of the accused.

d. The accused maintains more than 14x bank accounts in his own name and in the name of his dependents/benamidars, having credit inflow of over Rs. 50 Million, which does not commensurate with his disclosed source of income.

e. That accused was given fair chance to explain sources of funds used for acquisition of assets however he could not offer any plausible explanation.

f. That arrest of the accused is essential to procure further evidence, detection of hidden assets, relevant incriminating material and recovery of crime proceeds."

3. Consequently, the petitioner for his release on bail had preferred a Writ Petition No.229141 of 2018 and decided on 14.02.2019, as dismissed.

4. Thereafter the petitioner for the same relief had approached the august Supreme Court of Pakistan, through Civil Petition No.648-L of 2019. By that time a reference was filed, against the petitioner and he had

also alleged delay in trial, hence through order dated 03.12.2010, the petition was withdrawn with the following reasons and grounds:-

> "Upon reconsideration the learned counsel for the petitioner wishes to withdraw this petition so as to advise the petitioner to approach the High Court again on two stated fresh grounds for bail, i.e. filing of a Reference against the petitioner and delay in conclusion of his trial. This petition is, therefore, disposed of as having been withdrawn."

Consequently, the petition in hand has been preferred on the grounds alleged in the petition and reiterated during the arguments.

The record shows that during the proceedings, subsequent to the inquiry, the NAB had failed to substantiate the above mentioned grounds of arrest, due to the following reasons:-

i) In Para (a), of the grounds of arrest, it was alleged that the petitioner had acquired huge assets, disproportionate to his known sources of income but no such asset, in the name of the petitioner could be dug out and highlighted in the reference.

ii) In ground (b), value of the property was described as 500 Million but in the reference it was stated as 78.5 million and nothing had been brought on the record that it was purchased or acquired, through any amount, paid by the petitioner.

iii) According to ground (c), Mst. Rubab Hassan (wife), Waqar Hassan (brother) and Mst. Anjum Hassan (sister-in law/ BHABHI) of the petitioner, being owner of Messrs Fehmida Yaqoob Construction (FYC) Company (Pvt.) Ltd, owned a plaza, known as "The Mall" Rawalpindi, worth Rs.5 Billion. Firstly no concern or nexus of the petitioner with the above mentioned company and the plaza has been established on the record and secondly the NAB while assessing whole of the assets of the petitioner and his family members as 1089 Million had rebutted the above said price, of the property.

iv) In ground (d), 14 bank accounts, maintained by the petitioner and his family members were alleged but the reference is silent to that extent.

5. Admittedly, in the reference no evidence had been annexed, suggesting any property, in the name of the petitioner. Similarly, there was no cogent or convincing evidence, on the record that the petitioner had

purchased any property from any vendor and got it transferred, in name of his above named relatives as benamidar.

6. Undisputedly, the above named relatives of the petitioner are directors/share holders, in the above said company (FYC) as well as another known as "Messrs Sprint Services (Pvt.) Ltd.", who are also owners of certain assets but they had categorically alleged that they had acquired the assets by their own means and not through the petitioner, in any manner whatsoever. Furthermore, the NAB has badly failed to bring on the record, any evidence to the effect that actually for purchase of the above said properties, the payments were made to the vendors by the petitioner.

7. The above named relatives of the petitioner, having the above mentioned properties have also been arrayed as accused, in the reference, without any arrest and as such they are appearing in proceedings of the reference, while at large. But the petitioner without cogent and convincing evidence/material, regarding any link or nexus, with the above mentioned business/properties, owned by the above named co-accused has been arrested even at inquiry stage.

8. On one hand, the above mentioned facts and circumstances are before the Court, whereas on the other hand, confinement of the petitioner for the last about 01 year and 07 months, without any progress in the case has been noticed. As till date even charge has not been framed, against the petitioner and his co-accused. Consequently, the petitioner could not be kept, behind the bars for an indefinite period.

9. For what has been discussed above, the writ petition in hand is allowed and it is directed that the petitioner be released on bail subject to his furnishing bail bonds in the sum of Rs.1,00,00,000/- (Rupees ten million only), with two sureties each, in the like amount, to the satisfaction of the learned Trial/Duty Accountability Court, Lahore.

SA/F-13/L Bail granted.

P L D 2020 Lahore 337

Before Muhammad Tariq Abbasi and Mujahid Mustaqeem Ahmed, JJ

SARDAR KHAN---Petitioner

Versus

The STATE and another---Respsondents

Writ Petition No.1095 of 2017, decided on 9th May, 2019.

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

---S. 397---Sentence of offender already sentenced for another offence---Concurrent sentences---Scope---Petitioner was awarded sentences of imprisonment for life and imprisonment for four years in two different trials/appeals however, no order for concurrent running of sentences was made---Petitioner was convicted and sentenced simultaneously and even his appeals were decided at the same time, however, while converting his death sentence into imprisonment for life appropriate orders for concurrent running of sentences escaped notice of the court---High Court directed that sentence of imprisonment for life and sentence of imprisonment for four years shall run concurrently---Constitutional petition was allowed.

Juma Khan and another v. The State 1986 SCMR 1573; Javaid Shaikh v. The State 1985 SCMR 153 and Mst.Zubaida v. Falak Sher and others 2007 SCMR 548 ref.

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

----S. 397---Sentence of offender already sentenced for another offence---Concurrent sentences---Scope---Section 397, Cr.P.C. contemplates that sentences awarded to a person in a subsequent trial would commence at the expiration of imprisonment for which he had been previously sentenced, however, discretion has been left with the court to direct concurrent running of sentence awarded in a subsequent trial---Command of law for consecutive sentences is general rule while discretion for concurrent sentences is discretionary power of the court.

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

----S. 397---Sentence of offender already sentenced for another offence---Concurrent sentences---Time for making such order---Scope---Appropriate order within the meaning of S.397, Cr.P.C. ought to be made at the time of deciding the case or appeal but if, for any reason or due to some inadvertent omission, direction could not be issued at that time there is no embargo that the same cannot be passed afterwards---Court can exercise discretionary power at any time to direct that sentences in two different trials would run concurrently.

Sajjad Ikram and others v. Sikandar Hayat and others 2016 SCMR 467 and Mst. Shahista Bibi and another v. Superintendent, Central Jail, Mach and 2 others PLD 2015 SC 15 rel.

Faiz Ahmed and another v. Shafiq-ur-Rehman and another 2013 SCMR 583; Shah Hussain v. The State PLD 2009 SC 460 and Ishfaq Ahmad v. The State 2017 SCMR 307 ref.

Ch. Muhammad Ashfaq Khan for Petitioner.

Amjad Ali Ansari, A.A.G. with Mudassar Ayyub, Assistant Superintendent, Jail.

ORDER

As a result of trial in case F.I.R. No. 316 dated 23.12.1996 under Articles 3/4 of the Prohibition (Enforcement of Hadd) Order 1979 rcad with Section 9(c) of the Control of Narcotic Substances Ordinance, (Ordinance No. XCIV) of 1996 registered at Police Station Tulamba, Distt. Khanewal for recovery of two kilograms charas Sardar Khan, petitioner was convicted under Section 9(c) of the Ordinancc No. XCIV of 1996 by the learned Addl. Sessions Judge, Mianchannu and sentenced to suffer four years' R.I. and a fine of Rs.4000/- in default of payment of which to further undergo four months' S.I. vide judgment dated 1.12.2005. It so happened that during investigation of above said case F.I.R. No.316/1996 the petitioner also made disclosure and then got recovered 110 kilograms charas as a result of which F.I.R. No. 317 dated 23.12.1996 under Section 9(c) of the Ordinance No.XCIV of 1996 was also chalked out against him and he was simultaneously tried in the the said case also, which culminated into his conviction by the learned Addl. Sessions Judge, Mianchannu who sentenced him to death with a fine of Rs.50,000/- or in default thereof to undergo imprisonment for one year vide judgment dated 1.12.2005.

2. The petitioner assailed his above convictions and sentences by way of filing two separate appeals i.e. Cr. Appeal No. 751 of 2005 against conviction in trial of case F.I.R. No. 316 of 1996 which was however, dismissed by this Court vide order dated 18.6.2009 having become infructuous by flux of time whereas in the other one i.e. Cr.Appeal No. 752 of 2005 against his conviction in case F.I.R. No.317/1996, his conviction was maintained by dismissing the appeal on merits but sentence of death was converted to that of imprisonment for life by this Court vide judgment dated 18.6.2009 while extending benefit of Section 382-B, Cr.P.C.

3. Feeling dissatisfied with the judgment passed by this Court in case F.I.R. 317/1996 the petitioner approached the apex Court by way of filing Jail Petition No. 939 of 2009. However, the same could not find favour and leave to appeal was declined by the Hon'ble Supreme Court vide order dated 1.3 2010.

4. By filing this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the petitioner prays for order for concurrent running of both the sentences awarded to him in above said two cases.

5. Relying on the provisions of Section 397 read with Section 35 Cr.P.C. 1898 learned counsel for the petitioner has contended that mandate of law required that the Court while awarding sentences of imprisonment ought to have passed appropriate orders for concurrent running of the sentences but the same has not been done as a result of which the petitioner is bound to undergo a sentence of about 29 years which is not intent of the legislature and consequently prays that sentences of imprisonment in both the cases be directed to run concurrently.

6. Conversely, learned Law Officer has vehemently opposed the petition on the ground that under Section 397, Cr.P.C. relief sought by the petitioner could be granted only by the trial/appellate court at the time of passing judgments of conviction and this constitutional petition cannot be substituted for the said forums and further that the petitioner was convicted and sentenced in two different trials/appeals for the commission of two different offences and as such the sentences awarded to the petitioner should run consecutively.

7. We have given our anxious consideration to the arguments advanced by both sides and relevant law on the subject.

8. Though the sentences of imprisonment for life and imprisonment for four years were awarded on conviction in two different trials/appeals, yet they pertain to one and the same person i.e. the petitioner. Section 397, Cr.P.C. contemplates that sentences awarded to a person in a subsequent trial would commence at the expiration of imprisonment for which he had been previously sentenced, however, discretion has been left with the court to direct concurrent running of sentence awarded in a subsequent trial. It would be advantageous to reproduce relevant portion of said provision which runs as under:

"397. Sentence on offender already sentenced for another offence. When a person already undergoing a sentence of imprisonment or

imprisonment for life, is sentenced to imprisonment, or impreisonment for life, such imprisonment, or imprisonment for life shall commence at the expiration of the imprisonment, or imprisonment for life to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence."

It is manifest from above quoted premision of law that command of law for consecutive sentenc is is general rule while direction for concurrent sentences is discretionary power of the court. Although appropriate order within the meaning of Section 397, Cr.P.C. ought to be made at the time of deciding the case or appeal but if, for any reason or due to some inadvertent omission, direction could not be issued at that time there is no embargo that the same cannot be passed afterward. In the safe administration of criminal justice, the court can exercise discretionary power at any time to direct that sentences in two differerd trials would run concurrently. While expounding this provision of law in the case titled Sajjad Ikram and others v. Sikandar Hayat and others (2016 SCMR 467) the Hon'ble Supreme Court held as under:

"12. The aggregate of punishment of imprisonment for several offences at one trial were deemed to be a single sentence. However, the position of an accused person is different who while already undergoing a sentence of imprisonment for life, is subsequently convicted and sentenced in another trial. Such subsequent sentence in view of section 397 Cr.P.C. would commence at the expiration of imprisonment for life for which he had been previously sentenced but even then in such cases, the said provision expressly enables the Court to direct that the subsequent sentence would run concurrently with the previous sentence. It is clear from section 397, Cr P.C. that the Court, while analyzing the facts and circumstances of every case, is competent to direct that sentences in two different trials would run concurrently. In that eventuality, the Court has wide power to direct that sentences in one trial would run concurrently. The provision of section 397, Cr.P.C. confers wide discretion on the Court to extend such benefit to the accused in a case of peculiar nature like the present one. Thus extending the beneficial provision in favour of the appellant, would clearly meet the ends of justice (emphasis supplied by us)

In the present case the 'petitioner was convicted and sentenced simultaneously and even his appeals were decidad at the same time. ft appears that while converting sentence of death into imprisonment for life passing appropriate orders for concurrent running of sentences escaped notice of this Court as it was not brought to its notice, that the petitioner was also convict of case F.I.R.No. 316 of 1996. Thus, to our mind, it would be in the fitness of things that benefit of this provision should be extended in favour of the petitioner in order to meet the ends of justice. Steering thought in this regard have been gathered from cases Juma Khan and another v. The State (1986 SCMR 1573), Javaid Shaikh v. The State (1985 SCMR 153) and Mst. Zubaida v. Falak Sher and others (2007 SCMR 548) So far as contention of learned Law Officer that the relief sought by the petitioner could be granted only by the trial/appellate Court at the time of passing judgments of conviction and this constitutional petition cannot be substituted for the said forums and that the petitioner was convicted and sentenced in two different trials/appeals for the commission of two different offences and as such the sentences awarded to the petitioner should run consecutively, is concerned, obserations of the Hon'ble Supreme Court in case Mst. Shahista Bibi and another v. Superintendent, Central Jail, Mach and 2 others (PLD 2015 SC 15), may be referred which are to the following effect:

> "8. Besides the provisions of section 35, Cr.P.C. the provisions of section 397, Cr.P.C. altogether provide entirely a different proposition widening the scope of discretion of the Court to direct that sentences of imprisonment or that of life imprisonment awarded at the same trial or at two different trials but successively, shall run concurrently. Once the Legislation has conferred the above discretion in the Court then in hardship cases, Courts are required to seriously take into consideration the same to the benefit of the accused so that to minimize and liquidate the hardship treatment, the accused person is to get and to liquidate the same as far as possible. In a situation like the present one, the Court of law cannot fold up its hands to deny the benefit of the said beneficial provision to an accused person because denial in such a case would amount to a ruthless treatment to him/her and he/she would certainly die while undergoing such long imprisonment in prison. Thus, the benefit conferred upon the appellant/ appellants through amnesty given by the Government, if the benefit of directitq the

sentences to run concurrently is denied to hint/them, would be brought at naught and ultimately the object of the same would be squarely defeated and that too, under the circumstances when the provision of S.397, Cr.P.C. confers wide discretion on the Court and unfettered one to extend such benefit to the accused in a case of peculiar nature like the present one. Thus construing the beneficial provision in favour of the accused would clearly meet the ends of justice and interpreting the same to the contrary would certainly defeat the same.

'9. It is also hard and fast principle relating to interpretation of criminal law, which curtails the liberty of a person that it should be construed very strictly and even if two equal interpretations are possible then the favourable to the accused and his liberty must be adopted and preferred upon the contrary one.

Reliance is also placed on cases Faiz Ahmed and another v. Shafiq-ur-Rehman and another (2013 SCMR 583), Shah Hussain v. The State (PLD 2009 SC 460) and Ishfaq Ahmad v. The State (2017 SCMR 307).

9. Resultantly, this petition is accepted and it is directed that sentence of imprisonment for life awarded to the petitioner by this Court vide judgment dated 18.6.2009 passed in Cr. Appeal No. 752 of 2005 shall run concurrently with the sentence of imprisonment for four years awarded to the petitioner by the learned trial Court vide judgment dated 1.12.2005 passed in tria1 of case FIR No.316 of 1996 of Police Station Tulamba, Distt. Khanewal, subject matter of Cr. Appeal No.751 of 2005.

SA/S-81/L Petition accepted.

PLJ 2020 Cr.C. (Note) 45

[Lahore High Court, Multan Bench]

Present: **MUHAMMAD TARIQ ABBASI AND ASLAM JAVED MINHAS, JJ.**

IJAZ AHMAD--Appellant

versus

STATE--Respondent

Crl. A. No. 521 of 2003, heard on 17.6.2015.

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

----S. 9(c)--Conviction and sentence--Challenge to--Recovery of charas--Sample was 20-grams but its ingredients were not confirmed, meaning thereby that recovered contraband was not confirmed to be charas--Proceedings towards obtaining second sample due to specific reasons were also objectionable, hence not established and as such prosecution story towards recovery of charas from accused was doubtful--**Held:** It is an axiomatic and universally recognized principle of law that conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in prosecution case must be resolved in favour of accused--If a simple circumstance creates reasonable doubt, in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. [Para 12] A, B & C

1999 SCMR 1220 and 1995 SCMR 1345.

Sh. Abdul Samad, Advocate for Appellant.

Mr. Muhammad Abdul Wadood, Deputy Prosecutor General for State.

Date of hearing: 17.6.2015.

JUDGMENT

Muhammad Tariq Abbasi, J.--This appeal is directed against the judgment dated 11.6.2003, passed by the learned Sessions Judge, Dera Ghazi Khan, whereby in case FIR No. 226, dated 31.10.2001 registered under Article 3/4 Prohibition of (Enforcement of Hadd) Order IV, 1979 and Section 9(c) of CNSA, 1997 at Police Station B-Division, Dera Ghazi Khan, the appellant was convicted under Section 9(c) of the act ibid and sentenced to RI for seven years and fine of Rs. 50,000/-, in default to further undergo SI for six months, with benefit of Section 382-B, Cr.P.C.

2. The precise facts as per complaint (Ex.PA) and the FIR (Ex.PA/1) were that on 31.10.2001 at about 9:25 a.m. when the police party headed

by Ijaz Hussain Bukhari, Inspector (PW-7) and other police officials were on patrolling and available at Eid Gha Road, a spy information was received that the appellant was selling narcotic in a plot situated behind Sabzi Mandi; a raid was conducted at the above mentioned place when the appellant while holding a shopping bag was found there, hence over powered; the shopping bag was checked and from it 2-KGs of Charas was recovered; PW-7 separated 20-Grams of narcotic as sample and while preparing two sealed parcels one of the sample and the other of the remaining quantity (P-1) had taken the same into possession through recovery memo. (Ex.PB), which was attested by Talib Hussain SI (PW-5) and Muhammad Bilal Head-constable (PW-6).

3. The matter was investigated when the appellant was found to be involved, hence challaned. Charge against him was framed on 27.8.2002, to which he pleaded not guilty and claimed the trial, hence the prosecution witnesses were summoned and recorded. The prosecution had got examined as many as eight witnesses, namely, Ghulam Qasim, Head-Constable (PW-1), Riaz Hussain Head-constable (PW-2), Ghulam Shabbir Constable (PW-3), Ghulam Akbar, Head-Constable (PW-4), Talib Hussain, SI (PW-5), Muhammad Bilal, Head-Constable (PW-6), Ijaz Hussain Bokhari, Inspector (PW-7) and Adnan Mushtaq Bhatti, Civil Judge/Magistrate 1st Class (PW-8). During the statements of above named witnesses the complaint (Ex.PA), FIR (Ex.PA/1), recovery memo. of Charas (Ex.PB), rough site-plan (Ex.PC), report of Chemical Examiner dated 12.11.2001 (Ex.PD), report of Chemical Examiner dated 27.12.2001 (Ex.PE), an application moved by the police to the Magistrate (Ex.PF), previous statements of the witnesses (Ex.DA & Ex.DB) were also brought on the record.

4. After examination of the prosecution witnesses, the case for the prosecution was closed, where-after the appellant was examined under Section 342 Cr.PC, during which the questions arising out of the prosecution evidence were put to him and he denied almost all such questions, while pleading his innocence and false involvement in the case with *mala-fide*. The

question *"Why this case against you and why the PWs have deposed against you"?* was replied by the appellant in the following words:

> ***"I am innocent. Nothing was recovered from me. Alleged recovered charas was planted by Ijaz Hussain Bokhari at the behest of Nasrullah Babar Inspector who has close terms with Ijaz Bokhari Inspector/SHO. Due to inimical terms with Nasrullah Babar Inspector I have been falsely involved in this case by Ijaz Hussain Bokhari SHO. I was arrested front my shop situated at General Bus Stand Muslim Town D.G Khan. All the PWs are police officials and they have deposed against me on the asking of Ijaz Hussain Bokhari SI/SHO."***

5. At that time, he opted to lead evidence in his defence but not to make statement under Section 340(2), Cr.P.C. On 10.5.2003, the appellant got recorded his statement that he did not want to produce any evidence in defence. On completion of the proceedings, the impugned judgment was passed in the above mentioned terms. Consequently, the appeal in hand.

6. The learned counsel for the appellant has argued that the appellant was innocent and falsely involved in the case with *mala-fide;* neither he was having any narcotic nor recovered from his possession and the alleged recovery was a planted one; false plantation was evident from the report of the Chemical Examiner (Ex.PD) when contents of the sample parcel were not confirmed, where-after false proceedings were again carried on and a false sample parcel was prepared and another favourable report was procured; the prosecution case and the charge against the appellant was not at-all proved, hence he was entitled for acquittal but while ignoring all the norms of natural justice, as a result of misreading and non-reading of evidence available on the record, the impugned judgment was passed, hence not sustainable in the eye of law.

7. On the other hand, learned Deputy prosecutor General has vehemently opposed the appeal while supporting the impugned judgment towards conviction of the appellant to be well reasoned and call of the day.

8. Arguments of both the sides have been heard and the record has been perused.

9. In the complaint (Ex.PA) and the FIR (Ex.PA/1) as well as during statement of Ijaz Hussain Bukhari, Inspector/complainant (PW-7) it was mentioned that out of above mentioned recovered contraband, 20-grams were separated for chemical analysis by Ijaz Hussain Bukhari Inspector (PW-7) and made into a sealed parcel which alongwith the main quantity was taken into possession, through recovery memo. (Ex.PB), attested by Talib Hussain SI (PW-5) and Muhammad Bilal Head-constable (PW-6). But when the above mentioned witnesses entered in the witness box, had failed to narrate the weight of the sample allegedly taken at the spot. The said sample parcel had reached in the office of Chemical Examiner, Multan on 10.11.2001 *i.e.* after ten days and when checked, its ingredients were not confirmed, hence a second sample was requisitioned. According to the prosecution story PW-7 wrote an application (Ex.PF) to Magistrate (PW-8), who summoned the case property and while desealing the parcel, separated sample and sent to the Laboratory from where another report (Ex.PE) was made that the contents , of the parcel were *Charas*.

10. According to the Magistrate (PW-8) fresh sample was taken by him on 24.12.2001 and alongwith a letter, handed over to Ghulam Qasim Constable (PW-1) for its dispatch in the office of Chemical Examiner. When Ghulam Qasim (PW-1) entered in the witness-box, categorically stated that the above said fresh parcel was delivered to him by the Moharir of the police station on 25.12.2001 and deposited in the Laboratory on 26.12.2001. He categorically refused that the said parcel was handed over to him by any Judicial Magistrate. In this way, transmission of

second sample parcel as alleged by the prosecution could not be proved and established.

11. It has been noticed that at the time of preparation of the second parcel, the appellant was in custody but neither he nor anybody else on his behalf was invited to join into the proceedings of taking out of the second sample. Even the alleged proceedings of taking the second sample were not reduced into any writing and this fact was admitted on the record during statement of the Magistrate (PW-8). In this way, preparation and transmission of second sample parcel, which resulted into the report (Ex.PE) was not proved and established, hence the above said report could not be given any value.

12. As stated above earlier sample was 20-grams but its ingredients were not confirmed, meaning thereby that the recovered contraband was not confirmed to be Charas. The proceedings towards obtaining second sample due to the a hove mentioned reasons were also objectionable, hence not established and as such the prosecution story towards recovery of the Charas from the appellant was doubtful. It is an axiomatic and universally recognized principle of law that conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. We are fortified by the dictum laid down in the case *"Muhammad Khan and another versus The State"* (1999 SCMR 1220), wherein the Hon'ble Supreme Court of Pakistan, has held as under:

> ***"It is an axiomatic and universally recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in the prosecution case must be resolved in favour of the accused. It is, therefore, imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion. Where the evidence examined by the***

prosecution is found inherently unreliable, improbable and against natural course of human conduct, then the conclusion must be that the prosecution failed to prove guilt beyond reasonable doubt. It would be unsafe to rely on the ocular evidence which has been molded, changed and improved step by step so as to fit in with the other evidence on record. It is obvious that truth and falsity of the prosecution case can only be judged when the entire evidence and circumstances are scrutinized and examined in its correct respective".

It has been further held by the Hon'ble Supreme Court of Pakistan in the case *"Tariq Pervaiz vs. The State"* (1995 SCMR 1345) that, if a simple circumstance creates reasonable doubt, in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right.

13. Resultantly, the appeal in hand is accepted, the impugned judgment is set-aside and the appellant, namely, Ijaz Ahmed is acquitted of the charge, while extending him the benefit of doubt. He, by way of suspension of sentence is on bail, hence his bail bonds are discharged. The disposal of case property shall be as directed by the learned trial Court.

(A.A.K.) Appeal accepted

PLJ 2020 Cr.C. (Lahore) 974 (DB)

Present: **MUHAMMAD TARIQ ABBASI AND SYED SHAHBAZ ALI RIZVI, JJ.**

SHAUKAT ALI and another--Appellants

versus

STATE etc.--Respondents

Crl. A. No. 1804 of 2011 and M.R. No. 48 of 2012, heard on 25.5.2016.

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

----Ss. 302(b) & 34--Sentence--Challenge to--Lalkara--Day-light occurrence--No chance of deliberation--Ocular account--Fire-arm injuries on different parts of body--Motive--Alleged motive was opposition of deceased against accused in election--No detail of any election was brought on record--Alleged motive could not be proved and rightly held so by trial Court--Real cause, resulting into death of deceased at hands of accused was still shrouded in mystery--Impugned judgment towards conviction of accused for charge u/S. 302(b), PPC being result of correct appreciation and evaluation of material available on record was quite justified--Conviction of accused awarded by trial Court was maintained.

[Pp. 979 & 980] B, D & F

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

----Ss. 302(b) & 34--Sentence--Challenge to--Day-light occurrence--Closely related inter se--Relationship--Validity--Both witnesses were closely related inter se as well as with deceased, but no previous grudge or enmity with accused could be established on record, therefore, no reason cause or justification to discard testimony on basis of mere relationship which otherwise was trustworthy and confidence inspiring. [P. 978] A

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

----S. 302(b) & 34--Sentence--Day-light occurrence--No chance of deliberation--Recovery of pump action gun--Quantum of sentence--Validity--Recovery of such kind of weapon from accused to neither any recovery memo tendered in evidence nor any witness was made any statement about alleged recovery--No empty collected from spot, for comparison was sent to Lab and as such alleged recoveries had become inconsequential--Alleged motive could not be established, both accused made on fire shot at deceased and recovery of weapon from them hade gone inconsequential. [P. 979 & 980] C & E

M/s. Muhammad Ahsan Bhoon and Zafar Iqbal Chohan, Advocates for Appellants.

Rana Muhammad Shafique, Deputy District Public Prosecutor for State.

Mr. Munir Hussain Bhatti, Advocate for Complainant.

Date of hearing: 25.5.2016.

JUDGMENT

Muhammad Tariq Abbasi, J.--This judgment shall decide the above captioned Criminal Appeal and the Murder Reference, as both are outcome of same judgment dated 01.11.2011, passed by the learned Sessions Judge, Faisalabad, whereby in case FIR No. 111, dated 05.03.2007, registered under Section 302/34, PPC, at Police Station Dijkot, District Faisaiabad, Shaukat.Ali and Shakeel Ahmad (hereinafter referred to as the appellants) were convicted under Section 302(b), PPC and sentenced to death, with compensation of Rs. 50,000/- each, payable to legal heirs of the deceased and recoverable as arrears of land revenue.

2. The matter was reported to the Police by Muhammad Mushtaq (PW-2) through *'fard biyan'* (Ex.PB), with the contentions that on 5.3.2007, he alongwith his son Muhammad Ashfaq (***hereinafter referred to as the deceased***), brother Muhammad Ahmad (PW-3) and Iftikhar Ahmad (PW not examined), in order to proceed to Gojra, were standing at the bus stop; at about 1.30 pm, when the deceased was listening a phone, the appellants while armed with .12 bore repeater guns, attracted there; Shakeel Ahmad appellant raised a '*laIkara*' that the deceased should not go alive, whereupon Shaukat Ali appellant, fired at the deceased, hitting on his back, as a result of which he fell down; Shakeel appellant also fired, which hit on chest of the deceased; thereafter both the accused made firing and the fire shots hit on different parts of the body of the deceased; the complainant party due to fear did not come near and the accused while firing and raising *lalkaras*', that they had taken revenge of opposition of votes from the deceased, fled away. The deceased succumbed to the injuries at the spot; the occurrence was committed on the abetment of Muhammad Sadiq and Tariq Mehmood (co-accused since acquitted); on the basis of the above mentioned complaint, the-formal FIR (Ex.PA) was chalked out.

3. The case was investigated and challan was submitted in the Court. The formal charge against the appellants was framed on 6.7.2010, which was denied and trial was claimed, hence the prosecution witnesses were summoned and recorded; the prosecution had got examined as many as 19 witnesses. The material witnesses, with gist of their evidence were as under:

i) ***PW-2 Muhammad Mushtaq, complainant*** *as well as an eye-witness of the occurrence, had deposed the same facts, as were narrated by him in the complaint (Ex.PB).*

ii) ***PW-3 Muhammad Ahmad,*** *another eye-witness of the occurrence, had supported and corroborated the version of the complainant (PW-2) in all its four corners.*

iii) ***PW-4 Dr. Pervaiz Akhtar*** *had conducted post-mortem examination of dead body of Ashfaq deceased and prepared the post-mortem report (Ex.PD) and pictorial diagram (Ex.PD/1), Following injuries on the dead body, were noticed:-*

a) *A lacerated wound 5.05 cm x 4.05 cm x DNM on the left side close to sternum, 6 cm above and lateral to the above nipple.*

b) *Multiple wounds of exit on the right side of neck measuring each 3/4 cm x 3/4 cm at the area between 6 cm x 4 cm.*

c) *A lacerated wound of entry 2 cm x 3 cm on the left side of chest, 3 cm from the nipple.*

d) *Multiple wound of exit 6 in number on the right lateral side of chest at the area between 7 cm x 4 cm.*

e) *A lacerated wound of firearm entrance 5 cm x 3 cm on the right side of chest 1 cm below the right nipple.*

f) *Multiple wounds of Firearm injury 6 in number on the back of right side of chest, below the scapular bone of area between 7x4 cm.*

g) *Multiple wounds of firearm entrance 4 in number on the back of right side of abdomen at the area between 8 cm x 3.05cm.*

h) *Multiple wounds of exit 4 in number at the area between 4 cm x 3.05 cm on the right side of abdomen 3-1/2 cm from the umbilicus.*

i) *A wound of fire-arm entrance 4 cm x 3 cm on the left side of penis.*

j) *A wound of firearm exit 4 in number on the medial side of left buttock at the area between 5 cm x 3 cm.*

According to the witness, all the injuries were anti-mortem in nature, caused by fire-arms and cause of immediate death.

iv) ***PW-12 Sarfraz Khan, SI and PW-14 Muhammad Hussain, SI*** *had investigated the case, during which carried on the proceedings and prepared the documents, fully detailed in their statements.*

4. On conclusion of the prosecution evidence and closure of the case, the appellants were examined under Section 342, Cr.P.C., during which the questions arising out of prosecution evidence were put to them, but they denied almost all such questions, while pleading in their innocence and false

involvement in the case with *mala fide*. The question ***"Why this case against you and why the PWs have deposed against you?"*** was answered by both as under:

"I and my co-accused who is my real brother also, are quite innocent, we have no concern whatsoever with the commission of alleged offence. I was not present in the village on the date of occurrence rather I was available at the house of my in law about 20 miles away from the alleged place of event. Similarly my co-accused was also not present at the place of occurrence and he was also in his house. Deceased was also known as Januu notorious character of the village and was source of evils like money extorting and teasing of girls. He was done to death by some one unknown person or persons neither we nor the complainant are so call the eye-witnesses were present at the time of murder. On the other side complainant party was having grudge against us because two years back a fight took place between us and the complainant's side in which the leg of the deceased was fractured as result of cross firing. Besides 2/3 times quarrels arose between us and the boys of the complainant party prior to the present occurrence. Further we have no concern with the election as none from us ever contested the election of any public office, so there was no motive with us to commit the murder of deceased. Anyhow complainant or witnesses who are related to each was having motive to falsely implicate us as accused while playing in the hands of political personalities of the village/area."

They did not opt to lead evidence in their defence or make statements under Section 340(2), Cr.P.C. Finally, the impugned judgment was passed in the above mentioned terms. Consequently, the appeal in hand.

5. The learned counsel for the appellants have argued that the appellants are innocent and falsely involved in the case; neither the eye-witnesses were available at the spot nor they had seen the occurrence and they had become false witnesses; statements of eye-witnesses being full of material contradictions, were not believable, but the learned trial Court had erred in not considering the said aspect; the alleged motive was not proved and established and rightly observed so by the learned trial Court; no empty was sent to the laboratory, hence the alleged recoveries of weapons from the appellants were inconsequential, but the learned trial Court had failed to give any consideration to the said fact; the prosecution case and the charge against the appellants was not established and proved; hence they were entitled to acquittal and as such the impugned judgment could not be termed as valid and justified.

6. On the other hand, the learned Deputy District Public Prosecutor, assisted by the learned counsel for the complainant, has vehemently opposed the

appeal, while supporting the impugned judgment to be well-reasoned and call of the day.

7. Arguments of all the sides have been heard and record has been perused.

8. It was a day light occurrence and promptly reported to the Police, hence no chance of any deliberation or consultation. Muhammad Mushtaq complainant and Muhammad Ahmad, when entered in the witness box as PW-2 & PW-3 respectively, categorically deposed that in their presence and within their view, the appellants armed with firearms, attracted at the spot and by firing, caused injuries to Muhammad Ashfaq, resulting into his death at the spot. Both the witnesses were cross-examined by the defence at length, but their statements could not be contradicted. Admittedly, both the witnesses were closely related inter se as well as with the deceased, but their no previous grudge or enmity, with the appellants could be established on the record, therefore, no reason cause or justification to discard their testimony on the basis of mere relationship, which otherwise is trustworthy and confidence inspiring. In this regard, reliance can be placed on the case titled *"Ijaz Ahmad versus The State"* reported as 2009 SCMR 99, wherein the august Supreme Court of Pakistan has held as under:

"... mere relationship of a witness with any of the parties would not dub him as an interested witness because interested witnesses is one who has, of his own, a motive to falsely implicate the accused, is swayed away by a cause against the accused, is biased, partisan, or inimical towards on account of the occurrence, by no stretch of imagination can be regarded as an "interested witnesses". In the wake therefore, it proceeds that merely because the witnesses are kith and kin, their evidence cannot be rejected, if otherwise it is trustworthy."

9. The above mentioned ocular account gained support from the medical evidence, led by Dr. Pervaiz Akhtar (PW-4), post-mortem report (Ex.PD) and pictorial diagram (Ex.PD/1), when the above mentioned fire-arm injuries on different parts of the body of the deceased, resulting into immediate death were observed. In this way it can safely be held that the ocular account is in line with the medical evidence.

10. During statements of the above named eye-witnesses, it came on the record that their houses were situated at a distance of 02 acres from the spot. Both had satisfactorily explained and justified their presence at the spot and witnessing of the occurrence. In this way, the above mentioned arguments with regard to non-availability of the witnesses at the spot and not seeing the occurrence, are nothing, but bald contentions, hence discarded. The alleged motive was opposition of the deceased, against the appellants in some

election. No detail of any such election has been brought on the record. In this way, the alleged motive could not be proved and rightly held so by the learned trial Court, in the impugned judgment. Therefore, the real cause, resulting into death of the deceased at the hands of the appellants is still shrouded in mystery.

11. The recovery of .12 bore pump action gun from Shaukat Ali appellant and securing it through memo (Ex.PG) has been alleged. The recovery of such kind of weapon from Shakeel Ahmad appellant has also been stated, but neither any recovery memo has been tendered in evidence, nor any witness has made any statement about the alleged recovery. Furthermore, no empty collected from the spot, for comparison was sent to the laboratory and as such the above mentioned alleged recoveries have become inconsequential.

12. For what has been discussed above, we are of the view that the impugned judgment, towards conviction of the appellants for charge under

Section 302(b), PPC, being result of correct appreciation and evaluation of the material available on the record, is quite justified, hence does not requires any interference. As about quantum of sentence to the appellants, it is stated that as observed above, the alleged motive could not be established; both the appellants made one fire shot at the deceased and recovery of the weapons, from them have gone inconsequential, which facts, in the light of the law laid down in the cases titled *"Hasil Khan versus The State and others"* reported as 2012 SCMR 1936 and *"Naveed alias Needu and others versus The State and others"* (2014 SCMR 1464), are valid grounds for giving premium to the appellants in quantum of their sentence.

13. Resultantly, the conviction of the appellants awarded by the learned trial Court, through the impugned judgment is maintained, but their ***death sentence*** is altered to ***imprisonment for life.*** The appellants shall be entitled to the benefit of Section 382-B, Cr.P.C. The above mentioned amount of compensation prescribed by the learned Trial Court will remain the same but in case of its non-payment, the appellants would further undergo simple imprisonment for six months, each. The disposal of the case property shall be as directed by the learned trial Court, in the impugned judgment.

14. With the above mentioned modification in sentences of the appellants, the ***Criminal Appeal No. 1804 of 2011*** is ***dismissed,*** whereas ***Murder Reference No. 48 of 2012*** is answered in Negative and death sentence of the appellants Shaukat Ali and Shakeel Ahmad is ***not confirmed.***

(S.A.Q.) Order accordingly

PLJ 2020 Cr.C. (Lahore) 986

Present: **MUHAMMAD TARIQ ABBASI, J.**

GHULAM FAREED--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 3705-B of 2020, decided on 3.2.2020.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-A(i), 337-F(i), 337-F(v), 337-L(2), 148 & 149--Bail before arrest, confirmed--Medical report--Jurh-ghayer--Jaifah hashimah--Punishable--Injury on hands--Non-vital part--Ulterior motive--Further inquiry--Opinion of medical board had made applicability of Section 337-F(v), PPC as of further inquiry and probe making the accused entitled to relief calimed for, as possibility of his false involvement to achieve ulterior motive could not be ruled out--Bail was confirmed. [P. 987] A

Syed Afzal Shah Bukhari, Advocate for Petitioner.

Mr. Sana Ullah, Deputy Prosecutor General for State.

Ch. Sajjad Hussain, Advocate for Complainant.

Date of hearing: 3.2.2020.

ORDER

Through this petition, the petitioner seeks pre-arrest bail in case FIR No. 704, dated 09.10.2019, registered under Sections 337-A(i),337-F(i),337-F(v),337-L(2)/148/149, PPC at Police Station Baseerpur, District Okara.

2. As per FIR, the petitioner has caused injuries on right hand of Ahmed Ali, complainant and left arm of Ashiq Hussain, PW.

3. The injury on right hand of the complainant has been found as *jurh-ghayr-jaifah-damihah,* hence punishable under Section 337-F(i), PPC, which offence is bailable in nature. The first medical examiner had declared the injury of Ashiq Hussain PW *jurh-ghayr-jaifah-hashimah* and as such punishable under Section 337-F(v), PPC. The petitioner had questioned the above said injury of Ashiq Hussain

PW before a Medical Board, which had carried on the due proceeding and then framed the following opinion:

"The District Standing Medical Board is of the opinion that the possibility of fabrication regarding injury No. 1 cannot be ruled out."

4. The above mentioned opinion of the Medical Board had made applicability of Section 337-F(v), PPC, as of further inquiry and probe, making the petitioner entitled to the relief claimed for, as possibility of hjs false involvement to achieve some ulterior motive could not be ruled out.

5. Resultantly, the petition in hand is allowed and ad-interim pre-arrest bail already granted to the petitioner **is confirmed** subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount to the satisfaction of the learned trial Court.

(S.A.Q.) Bail confirmed

PLJ 2020 Cr.C. (Note) 112
[Lahore High Court, Rawalpindi Bench]
Present: **MUHAMMAD TARIQ ABBASI, J.**
Mst. **TAZEEM AKHTAR--Appellant**
versus
STATE--Respondent

Crl. A. No. 313 of 2013, heard on 2.5.2016.

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

----Ss. 302(b) & 34--Conviction & sentence--Challenge to--False implication--Non attribution of firing--Benefit of doubt--Acquittal of--Admittedly, the appellant had not made any firing nor she had committed any overt act, resulting into injury and death of Muhammad Ifrat--Only role assigned to her was that she provided a 12-bore gun to her husband Muhammad Baloch co-accused, who made firing, resulting into an injury and death of Muhammad Ifrat--Prosecution stance that she had provided 12-bore gun to her husband Muhammad Baloch, did not appeal to a prudent mind, because when the above mentioned weapon was available at the spot and within access of Muhammad Baloch, there was no occasion for the appellant to provide it to him--In this way possibility of false involvement of the appellant, under a wider net could not be ruled out--All the above mentioned facts and circumstances, to my mind, have made the case against the appellant doubtful--There is no denial of the fact that even a slightest doubt in the prosecution case, makes an accused entitled for due benefit as of right--Appeal accepted. [Para10 & 12] A & B

Mr. Arshad Mahmood Janjua, Advocate for Appellant.
Sh. Istajabat Ali, D.P.G for State.
Mr. Tariq Mehmood Butt, Advocate for Complainant.
Date of hearing: 2.5.2016.

JUDGMENT

This appeal is directed against the judgment dated 27.06.2013, passed by the learned Additional Sessions Judge Jhelum, whereby in case FIR No. 144, dated 09.10.2011, registered under Section 302/34, PPC, at Police Station Domeli, District Jhelum, Mst. Tazeem Akhtar **(hereinafter referred to as the appellant)**, was convicted under Section 302(b) read with Section

34, PPC and sentenced to imprisonment for life and compensation of Rs. 1,00,000/-, payable to legal heirs of the deceased, failing which to further undergo S.I. for six months, with benefit of Section 382-B, Cr.P.C.

2. The precise allegations, against the appellant, as per record are that on 09.10.2011 at about 01:30 p.m, when Muhammad Ifrat (**hereinafter referred to as the deceased**), was laying *'Lanter'* of his house, whereas the appellant alongwith her husband Muhammad Baloch (co-accused murdered during the occurrence), was available at roof of the house, a quarrel between both the parties started, during which the appellant brought .12-bore gun and handed it over to her husband Muhammad Baloch, who with it made a fire shot, which hit on left side of chest of Muhammad Irfat (deceased), who later on died in the hospital.

3. On the basis of the above mentioned complaint, the formal FIR was chalked out. During the occurrence Muhammad Baloch co-accused was also murdered, hence on the basis of statement made by the appellant, a cross-version was registered against Muhammad Ifrat (deceased), Muhammad Anwar, Waqas and Peeran Ditta.

4. The appellant was challaned to the Court and formal charge against her was framed, which was denied, hence the prosecution witnesses were summoned and recorded.

5. The prosecution had got examined as many as 11 witnesses, where-after the appellant was examined under Section 342, Cr.P.C, during which the questions arising out of the prosecution evidence, were put to her but she denied almost all such questions, while pleading her innocence and false involvement, in the case with malafide. She did not opt to lead any evidence in her defence or to make statement under Section 340(2), Cr.P.C. Finally the impugned judgment was passed in the above mentioned terms. Consequently, the appeal in hand.

6. The learned counsel for the appellant has argued that the appellant was innocent but while concocting a false story she was robed in the case; admittedly she did not fire at the deceased, rather her husband namely Muhammad Baloch was attributed firing at the deceased but erroneously on the basis of presumption, she was convicted and sentenced; the prosecution case and the charge against the appellant was not at all established and

proved, hence she was entitled to acquittal, therefore the impugned judgment towards her conviction and sentence could not be termed as justified.

7. The learned Deputy Prosecutor General, assisted by learned counsel for the complainant has vehemently opposed the appeal while supporting the impugned judgment to be well reasoned and call of the day.

8. Arguments of all the sides have been heard and the record has been perused.

9. The occurrence took place over construction of a house by Muhammad Ifrat (deceased). During the occurrence Muhammad Baloch with a .12-bore gun made firing and caused an injury on left side of chest of Muhammad Ifrat, which proved fatal and consequently he died in the hospital. When Muhammad Ifrat sustained injuries at the hands of Muhammad Baloch, his companions allegedly attacked at Muhammad Baloch and while inflicting spade and clubs blows caused him the injuries, which resulted into his death.

10. Admittedly, the appellant had not made any firing nor she had committed any overt act, resulting into injury and death of Muhammad Ifrat. The only role assigned to her was that she provided a .12-bore gun to her husband Muhammad Baloch co-accused, who made firing, resulting into an injury and death of Muhammad Ifrat. The prosecution stance that she had provided .12-bore gun to her husband Muhammad Baloch, did not appeal to a prudent mind, because when the above mentioned weapon was available at the spot and within access of Muhammad Baloch, there was no occasion for the appellant to provide it to him. In this way possibility of false involvement of the appellant, under a wider net could not be ruled out.

11. According to the statement of the I.O. (PW-11), when he attended the spot, found Muhammad Baloch and the appellant, lying on roof of the house, in unconscious condition.

12. All the above mentioned facts and circumstances, to my mind, have made the case against the appellant doubtful. There is no denial of the fact that even a slightest doubt in the prosecution case, makes an accused entitled for due benefit as of right. In this regard, am fortified by the dictum laid down by the august Supreme Court of Pakistan in the cases

titled *"Ayub Masih Versus The State"* reported as PLD 2002 SC 1048, and *"Taria Pervaiz Versus The State"* reported as 1995 SCMR 1345, wherein it is held that if a simple circumstance creates reasonable doubt in a prudent mind about guilt of an accused, then he will be entitled to such benefit not as a matter of grace or concession, but as of right. In the case of *"Ayub Masih* (Supra), while quoting a saying of the Holy Prophet (PBUH) ***'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent"***, and making reference to the maxim, ***'It is better that ten guilty persons be acquitted rather than one innocent person be convicted'***, the Hon'ble Supreme Court observed as under:--

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

13. Resultantly, the appeal in hand is accepted, the impugned judgment is **set-aside** and the appellant namely **Mst.Tazeem Akhtar** is acquitted of the charge, while extending her the benefit of doubt. She is one bail, her surety stands discharged. The disposal of the case property shall be as directed by the learned trial Court.

(M.M.R.) Appeal accepted

PLJ 2020 Cr.C. (Lahore) 1155

[Rawalpindi Bench, Rawalpindi]

Present: MUHAMMAD TARIQ ABBASI, J.

RAHEEL MOHY-UD-DIN--Petitioner

versus

STATE etc--Respondents

Crl. Misc. No. 319-B of 2020, decided on 5.3.2020.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail after arrest, grant of--Further inquiry--Dishonoured of cheque--On one hand, stance has been alleged in FIR, whereas on other hand, agreements between parties are in file showing certain other facts and circumstances--In a civil suit filed by petitioner against complainant a written statement has been submitted under which certain payments by petitioner, to complainant have been admitted--Above mentioned facts and circumstances are sufficient to hold case of petitioner, as of further inquiry within meaning of S. 497(2) Cr.P.C--Offence charged against petitioner does not fall

within prohibitory clause of Section 497 Cr.P.C. and in such like cases basic rule is bail and refusal an exception--No exceptional circumstance is available before Court on basis of which bail of petitioner may be refused--Petitioner is lying in jail, hence no more required to police for purpose of any further investigation--As per record maintained by police, he is previously a non-convict.

[P. 1156] A & B

Syed Akhlaq Ahmad, Advocate for Petitioner.

Mr. Ghulam Abbas Gondal, Deputy Prosecutor General for State.

Mr. Muhammad Waqas Siddique, Advocate for Complainant.

Date of hearing: 5.3.2020.

ORDER

Through this petition, the petitioner seeks post arrest bail in case FIR No. 233 dated 21.06.2019, registered under Section 489-F, PPC at Police Station Mograh, Rawalpindi.

2. As per FIR, the petitioner had borrowed Rs. 22,00,000/-, from the complainant and towards its return executed a cheque of the said amount, in favour of the complainant but dishonoured.

3. On one hand, the above mentioned stance has been alleged in the FIR, whereas on the other hand, agreements between the parties are in the file showing certain other facts and circumstances. A In a civil suit filed by the petitioner against the complainant a written statement has been submitted under Paragraphs Nos. 7, 8 & 9 of which certain payments by the petitioner, to the complainant have been admitted.

4. The above mentioned facts and circumstances are sufficient to hold the case of the petitioner, as of further inquiry within the meaning of sub-section (2) of Section 497, Cr.P.C. Furthermore, the offence charged against the petitioner does not fall within the prohibitory clause of Section 497, Cr.P.C. and in such like cases basic B rule is bail and refusal an exception. No exceptional circumstance is available before the Court on the basis of which bail of the petitioner may be refused. The petitioner is lying in the jail, hence no more required to the police for the purpose of any further investigation in this case. As per record maintained by the police, he is previously a non-convict.

5. Resultantly, the petition in hand is allowed and the petitioner is admitted to bail, subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only), with one surety, in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) Bail allowed.