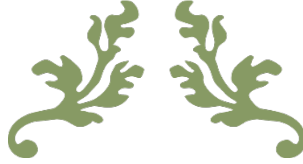

SLD 2017

SINDH LAW DECISIONS

SINDH JUDICIAL ACADEMY

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Mr. Muhammad Shahid Shafiq,LLM,Ph.D Scholar
Mr.Zeshan Manzoor,LL.M,Ph.D Scholar
Mr.Nizmauddin, Librarian SJA.

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SUBJECT INDEX

c) Administration of Justice….

Principle of adverse Order in encroachment cases, the issue as to whether the petitioners No.1 and 2 have encroached upon the public property and their registered leases are liable to be cancelled is determined, no adverse action shall be taken against the petitioners by the respondents.[pg:40]

Civil Procedure Code, (V of 1908)

S.114… Scope of Review It is well settled that review proceedings have to be strictly confined to the scope of Order 47 Rule 1 CPC, which is very limited, and cannot be used as a substitute for a regular appeal. As such, a review will not lie merely due to a Court having taken an erroneous view on a question of fact or law, or on the ground that a different view could have been taken on such a point. [Pg: 24]

Ord.47, R.1 of CPC Furthermore, the term „mistake or error apparent" does not extend to every erroneous decision, but by its very connotation signifies an error which is so evident that its detection does not require any detailed scrutiny and elucidation. An error which is not self-evident and has to be extracted from the record and detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the exercise of power under Order 47 Rule 1 CPC. [Pg:25]

Constitution of Pakistan, 1973

"Art. 199---Writ Jurisdiction in encroachment case--Scope---Disputed question of fact… On the face of it, the dispute presently before us needs evidence and it is well settled that

the factual controversy cannot be decided in the writ jurisdiction.

Criminal Procedure Code (V of 1898)

… S. 497 post arrest bail … refusal…. Cr.PC & S. 375 PPC … medical examination with delay … the case was received at the National Forensic Science Agency on 16.11.2015. While per FIR, rape was committed on 11.09.2015, which means that whatever swab samples were presented to the said DNA Laboratory, they were more than two months old. It is not sure how these samples were preserved in these long period of time since external factors (such as temperature and humidity) and internal factors (other bodily fluids) affect the validity of a sample. Study shows that earlier the 7 samples are collected and tested, the higher the chances of yielding solid results. DNA testing from vaginal swabs can reliably lead to an offender only if the sample is tested within the first 7 days of rape … slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. … Section 375 which shows that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.[pg:34]

…S.497 grant of bail…. Accused is entitled to expeditious access to justice, which includes a right to fair an expeditious trial without any unreasonable and inordinate delay. [pg:34]

Public Confidence in Judicial System…The intention of law is that the criminal case must be disposed of without unnecessary delay it is not difficult to comprehend that inordinate delay in imparting justice is likely to cause erosion of public confidence in the judicial system on one hand and on the other hand it is bound to create a sense of helplessness, despair feeling of frustration and anguish apart from adding to their woes and miseries. [pg:34]

Sec.497…Delay in lodging of FIR in rape cases… As far as arguments of learned counsel for applicant that FIR is delayed, in our view has no weight. As in such a like cases the people / victim(s) / family (is) ever remain under fear, coercion and compulsion and may not dare to *even* disclose the facts to their elders or community people.
Sec.497 Cr.P.C ….False Implication...The huge amount has been shown to have been recovered from the applicant as well as from co-accused and as per charge sheet about 1500000/- have been recovered from all three accused and the said amount being huge was not possible for I.O. or even complainant to arrange and foist against the applicant / accused. In such situation, agony faced by the victim family corroborated by the recovery of extortion money from the applicant and looking to peculiar circumstances of the case, law and order situation in the city we are not inclined to deem it fit case for bail. The offence with which the applicant has been charged falls under prohibitory clause of section 497(i) Cr.P.C. Therefore in our view, instant application is devoid of merits and consequently is dismissed. [pg:34]

Criminal law... Amjad Ali. Appellant Versus The State...

Criminal jurisprudence, purpose... Earthly laws, relating to Criminal Administration of Justice, have never meant to do 'ADAL' but have been framed to maintain a balance thereby attempting to bring peace, harmony and tranquility in a society. The purpose and object of inflicting conviction is either to have reformation or deterrence. A wrongdoer if reformed through punishment can become a fruit for the society which (fruit) however cannot serve its purpose only by making him to rot behind the bars. The concept of reformation, however, does not permit the Court (s) to let hardened criminal (s), on their catch, to seek their release in name of leniency because this shall seriously prejudice the other fold of object of punishment. The other fold of awarding

punishment is to make a hardened criminal an example for other (s) so that a sense must prevail in minds of masses that a criminal shall receive his due if he commits a crime. In short, reformation must never be at the cost of peace, harmony and tranquility of the society as a whole because it is always better to have an evil restrained / confined rather than to leave him (evil) to make whole society a 'hell' … The Criminal Administration of justice shall fail its object and purpose towards society if either of two folds of concept of awarding punishment are ignored by the Court (s) [Pg:108]

Criminal law...
Conviction cannot be based upon probabilities... Conviction recorded merely on probabilities is not sustainable in law. [p.123]

Criminal law.. Mukhtiar Ahmed Siyal vs Piyaro and others
…. Accused, innocent until proved guilty.. It is a legal parlance that every accused is blue-eyed child of law and is presumed to be innocent unless and until he is held guilty by due course of law. [pg;130]

Criminal law.. Mukhtiar Ahmed Siyal vs Piyaro and others
…. Presumption of double innocence.. Maxim exists that error in acquittal is better than the error in conviction and more so, after yielding acquittal dual presumption of innocence is attached with an accused. Furthermore, once an accused is acquitted by a competent Court of law after facing the trial, than he earns the presumption of double innocence which cannot be disturbed slightly unless grave illegality and injustice was established in the impugned order of acquittal. [pg.130]

Criminal law... Abdul Latif vs The State

…. Police employees are good witnesses... it is a settled proposition of law that the police employees are the

competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are the police employees. [pg: 134]

Criminal law.. Feroz Khan Baloch vs First Women Bank & Ors

…. Second or third complaint after previous is withdrawn resulting in acquittal of the respondent.. Once the complaint is withdrawn for whatever reason and if so permitted results in acquittal of the accused, in our opinion, another complaint on identical facts filed by the respondent after a lapse of considerable period, for which no plausible explanation has been furnished, is illegal and uncalled for. [p.141]

Criminal trial..

…. Plea of accused.. The accused is not required to prove his plea / version as the prosecution is *required* therefore, even if the accused fails to establish his plea / version to satisfaction of the Court yet the plea *otherwise* leaves chances of its being *true* if is examined in comparison with prosecution case then the same has to be accepted … the prosecution could not be benefited from the failure or inability of the defence. [73]

Criminal trial...

….. An offence to be proved needs corroboration … It is well settled principle of law mere saying of word from the mouth of the complainant does not constitute any offence unless corroborated by tangible evidence. [73]

Criminal trial...

….. Benefit of doubt … It is settled principle of law that to extend benefit of doubt there is no necessity to gather many circumstances but even if slightest doubt arises out of prosecution case, is sufficient to extend the benefit of doubt to the accused. [73]

Criminal trial..
….. Mitigating circumstances … Mitigating circumstances which could be kept in view while deciding the quantum of punishment. [Pg:109]

Criminal trial.. Pirzada @ Peer .. Appellant
….. Heinous nature of crime should not influence the courts … Mere heinous or gruesome nature of crime in, *no way,* should influence the Court (s) in favour of the prosecution nor should result in relaxing prosecution from its mandatory duty to prove the charge through *unimpeachable* evidence which too beyond shadow of doubt. [pg.94]

Law of evidence.. Pirzada @ Peer .. Appellant

…. Corroborative evidence, defined.. Corroborative evidence means evidence of someone else other than the eye-witness whose evidence is needed to be corroborated... [Pg: 94]

National Accountability Ordinance, 1999
Section 18 (g) and 24(b)….Petitioner/accused named above, nominated in Reference bearing No. 21/2014, under Section 18 (g) and 24(b) of the National Accountability Ordinance, 1999, seeks bail from Court, beside she has made a prayer to quash the aforesaid Reference pending trial before the Accountability Court Sindh at Karachi. [pg;61]

the amount of liability of a borrower has to be determined through judicial disposition by a Civil or Banking Court and once such determination attains finality or is not disputed, the mechanism provided under the NAO, 1999 can be invoked. In the instant case, the quantum of liability has already been determined through a Banking suit mentioned above, therefore, the dicta as laid down in the cited rulings is attracting in all its fours. [pg;61]

loan amount released by the Financial Institution has not been repaid by the petitioner and others, which constitutes an act of "willful default", therefore, it will be unsafe to quash the proceedings of a case *subjudice* before the Accountability Court. So far as bail plea of the Petitioner is concerned, prima facie, the allegations leveled against the Petitioner or in her capacity being Director of the Company to repay the outstanding dues advanced as a loan facility, has been admitted in compromise application in Suit. Suffice it to say that huge decretal amount of financial institution is outstanding against the petitioner and others; they were fully aware about such decretal amount and defaulted willfully, intentionally and deliberately to repay the same. In the mentioned circumstances of the case, the Petitioner is not found entitle for the relief claimed through instant petition including concession of bail.[pg;61]

Pakistan Penal Code (XLV 1860)

S. 375 PPC … testimony of the victim is of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to have any difficulty in adjudicating the matter on prosecutrix's testimony alone.

Post arrest Bail…

bail refused…bail application filed by applicant Roshan Ali Solangi, whereby he seeks his release on post arrest bail in crime No.24 of 2016, for offence punishable under Section 365, 384, 385, 386, 506-B, 342 and 34 P.P.C., read with Section 7 of Anti-Terrorism Act, 1997, registered with P.S. Malir City. The applicant has preferred such application before learned trial Court, but his request has been turned down vide order dated 12.07.2016. The case as reported has already been challaned by police on 10.08.2016 and same is now pending trial before the Court of learned Judge Anti-Terrorism Court-IX, Karachi being Special Case No.414 of 2016 "Re. The State Vs. Zafar Abbas and others."[pg:54]

Sindh Arms Act, 2013…..

Sec.34 (a)… As far as non-association of private witnesses, the complainant has sufficiently explained the same in the FIRs as the incident took place at odd hours of the night, even otherwise, section 34(a) of the Sindh Arms Act, 2013 is very clear in its terms and provides:

"all arrests and searches made under this Act or under any rules shall be executed in line with the provisions of the Code of Criminal of Procedure, 1898, except section 103 of the Code:

Provided that any Police officer or person present on the spot can be witness of search and recovery." [pg:46]

Sindh Public Property (Removal of Encroachment) Act, 2010

Under Section 3, government or any authority or officer authorized by government in this behalf may require a person responsible for encroachment to remove such encroachment together with the structure, if any, raised by him on public property. [pg;39]

2017 SLD 14

Before Zulfiqar Ahmad Khan,J.

Imran...........Petitioner

Versus

The State.......... Respondent

Criminal Bail Application No. 524 of 2016, heard on 2nd May 2016, decided on 30th May 2016

Criminal Procedure Code (V of 1898)…

S. 497 post arrest bail ***…refusal…Cr.PC & S. 375 PPC… medical examination with delay…the case was received at the National Forensic Science Agency on 16.11.2015. While per FIR, rape was committed on 11.09.2015, which means that whatever swab samples were presented to the said DNA Laboratory, they were more than two months old. It is not sure how these samples were preserved in these long period of time since external factors (such as temperature and humidity) and internal factors (other bodily fluids) affect the validity of a sample. Study shows that earlier the 7 samples are collected and tested, the higher the chances of yielding solid results. DNA testing from vaginal swabs can reliably lead to an offender only if the sample is tested within the first 7 days of rape … slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. … Section 375 which shows that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.*** [pg:14]

S. 375 PPC … testimony of the victim is of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought

not to have any difficulty in adjudicating the matter on prosecutrix's testimony alone…. It appears that there is enough material to arrive at the prima facie conclusion that the applicant was involved in the offence, as well as, added with the fear that the applicant, belonging to a relatively influential class, if released on bail at this stage it is most likely that he would intimidate or influence the victim and/or the witnesses. One could also imagine a strong likelihood that in the above circumstances, the victim would make herself scarce and might flee from the justice, I am therefor not inclined to grant bail at this stage. For the aforesaid reasons, this bail application is dismissed. [pg:15]

Pakistan Penal Code (XLV 1860) ….

S. 375 PPC … testimony of the victim is of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to have any difficulty in adjudicating the matter on prosecutrix's testimony alone.[pg:15]

Mr. Samsam Ali Khan, Advocate for the applicant

Ms. Akhtar Rehana, Addl.P.G. for the State

ORDER

Zulfiqar Ahmad Khan, J.- Applicant has moved this bail application being aggrieved and dissatisfied with the Order dated 11.03.2016, passed by the learned IV-Additional Sessions Judge, Karachi (West) in Sessions Case No.2513/2015, arising out of F.I.R No.299 of 2015, under sections 376, 506, 337-A(i)/34 PPC, registered at Police Station Iqbal Market, Karachi (West).

Brief facts of the case are that complainant Anita who resided in a low income community of Karachi, while at home on 11.09.2015 received a call from the accused Imran asking her to come out of her home, whereupon she was taken on a motorcycle driven by Imran to a vacant room, where the

accused committed rape with her and thereafter she was brought by the accused on the same motorcycle to the house of Mst.Bushra, Bhabi of the accused. The complainant informed Mst.Bushra about the rape committed by the accused Imran, on which Mst.Bushra replied that it was good for her and now she will have to marry the accused at all costs. Subsequently, Mst. Sidra, cousin and mother of the accused Imran also came to that house and kept on threatening the complainant to make herself be ready to merry Imran. As the complainant was not ready to marry Imran, she was beaten up, thereafter, the 2 accused Imran and his elder brother Faisal took the complainant on motorcycle and left her near her home but forcibly put petrol in her mouth. They also uttered that if she would have any shame then she should eat something else (poisonous) and die. After reaching home, the complainant not being feeling well, in the morning was brought by her parents through Ambulance to Abbasi Shaheed Hospital for a medical checkup and treatment. During the treatment, ASI of PS Iqbal Market appeared at the hospital and recorded her statement under section 154 CrPC which was incorporated in the FIR book. During investigation, the complainant was medically examined by WMLO who confirmed that the complainant was subjected to rape. The IO let off the accused Mst.Bushra and submitted Challan against the remaining accused. The accused Mst.Margina and Faisal were granted pre-arrest bail on 15.12.2015 and the co-accused Amin also filed request for a post-arrest bail which was dismissed. The present accused also filed a post-arrest bail application in the Sessions Case, however, his counsel at trial stage did not press the said bail application, which was dismissed, as not pressed.

From the impugn order, I note that Mr. Mohammad Khan, learned counsel for the accused in the initial case argued that the two accused were let off during the investigation and two accused namely Faisal and Mst.Margina were granted bail. He added that there was delay

in lodging the FIR, which was not reasonably explained and there were no independent witnesses nor was the statement of the victim recorded during the investigation under section 164 CrPC. According to him the medical certificate was challenged by the accused and the Medical Board had suspended the said medical certificate. He also pointed out that DNA report was not also in favor of the prosecution, hence the case became one of „further enquiry" and prayed that accused Imran be released on bail. These assertions were challenged in the first bail application by the learned DDPP who opposed the grant of bail to the accused 3 on the ground that his previous bail application was dismissed as withdrawn and no fresh ground was shown in that bail application.

In the impugn order the learned Adl. Session Judge refused the bail by recording that the previous bail application, which was filed by the accused (though later withdrawn) is to be treated as dismissed on merits and held that the grounds shown in that initial bail application cannot be pressed in the subsequent bail application. To the learned Judge, the only fresh ground was the decision of Special Medical Board whereby MLC in respect of the complainant Anita that was kept in abeyance/suspended on the DNA report. I however upon examination note that the reason of such abeyance/suspension as provided for in the Annexure D-5 is not on any technical ground, rather it is on the account of victim's unavailability to appear (on the date and time stipulated in the said letter) before the special medical board constituted. One can easily imagine the restrictions imposed on the free movement of a rape victim by domestic and social forces, not to mention the looming threat from the perpetrators of the offence themselves. I therefore will not give much weight to such findings rendering keeping the report in abeyance and/or suspension. However, what is important to note in the said letter of 27.02.2016 is that the Medical Superintendent, Services Hospital, Karachi confirmed that the Board was constituted in respect of MLC No.6625/2015,

dated 12.09.2015 which was in respect of the injuries from petrol intoxication, and not for rape. Thus such abeyance/suspension has no effect on the confirming of rape having been committed. The learned Judge has fully recognized this fact that the medical certificate that was suspended was not in respect of the allegations of rape which has been separately issued by WMLO Dr. Farkhanda Qureshi on 12.09.2015 after the examination of the victim, wherein it was confirmed that rape has been committed upon the victim, it was only in respect of petrol intoxication.

Leveling new round of arguments Mr. Samsam Ali Khan, learned counsel of the accused in the present case posed the following contentions:

(i) The lady was the consenting party and she had accompanied the accused of her own will and, therefore, the accused cannot be convicted for the said offence of rape under section 375;

(i) Results of DNA Test Report dated 27.02.2016 are in favor of the accused; and

(ii) There is a discrepancy between the statements made by the accused in FIR and in that she made before the IO, as well as, all evidence is against the accused, etc.

To me, except for the first two assertions, all other submissions of the learned counsel for the accused seem to be identical to those made before the trail court and the impugned order has addressed them properly. I would therefore start with responding to the first assertion in the following, for which I find it relevant to reproduce full text of section 375 of PPC, as under:

375. Rape: - A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,

(i) against her will;

(ii) without her consent;

(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;

(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) With or without her consent when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. 5 Also of relevance is section 90 which is also reproduced in the following:

90. Consent known to be given under fear or misconception:

A consent is not such a consent as is intended by any action of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

As it could be seen from the special provisions of section 375, "will" and "consent" are differentiated, meaning thereby even if there is a will but no consent, rape will be actualized, and vice versa. To start with, I would thus like to focus on the first ingredient of S.375 being „against her will", which relates to psychological state of the prosecutrix (as compared to „without her consent", which refers to actions and performative). The word „will" implies the faculty of reasoning power of mind that determines whether to do an act or not. There is a fine distinction between an act done „against the will" and „an act done without consent." Every act done „against the will" is obviously „without the consent." But every act „without the consent" is not „against the will." To me clause (1) of Section 375 applies where the woman is in

possession of her senses and therefore, capable of consenting. Courts have explained that the expression „against her will‟ ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition.

Examination of the statement of the victim and the evidence clearly shows that she was not a consenting party, and the rape was committed against her will. Testimony of victim in cases of rape is held to be of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to find any difficulty in convicting the accused on prosecutrix‟s testimony alone as per the cases reported as 2007 SCMR 605 and 2011 PLD 554 SC. 6

With regards the second ingredient of Section 375, being the act done 'without her consent', I note that the term „consent‟ has been given to mean "an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side" by the Stroud's Judicial Dictionary (Fifth Edition - page 510). There is no dispute that an act done with consent always means the act done with free will or done voluntary. In this case, though the victim‟s consent for taking her out of her home was obtained on the basis of some past friendship or allurement with hidden intend, therefore to me, this tainted consent or a consent of this nature which is based on deception and fraud, cannot be termed, prima facie, to conclude that she consent to the sexual act also. Had the victim known that ultimately she would be rapped, there is no doubt in my mind that she would have not refrained herself from leaving home with the accused. Then a question would arise what was the purpose for which she gave consent and left home with him. To me, it was a fraud that was practiced on her and she was deceived, therefor such type of consent is rightly held to be the consent obtained without her consent. Consent obtained by deceitful means, as per the language and intent of S.375 is no consent and comes within the ambit of the ingredients of definition of rape, as well as, qualifies the

exception provided for under Section 90 of being a „vitiated consent‟ given under a „misconception of fact‟.

With regards the second assertion that the DNA Laboratory Report dated 29.01.2016 declared "No human male DNA profile was identified in the vaginal swab", I note from the said report that the case was received at the National Forensic Science Agency on 16.11.2015. While per FIR, rape was committed on 11.09.2015, which means that whatever swab samples were presented to the said DNA Laboratory, they were more than two months old. It is not sure how these samples were preserved in these long period of time since external factors (such as temperature and humidity) and internal factors (other bodily fluids) affect the validity of a sample. Study shows that earlier the 7 samples are collected and tested, the higher the chances of yielding solid results. DNA testing from vaginal swabs can reliably lead to an offender only if the sample is tested within the first 7 days of rape (See: http://www.forensicmag.com/articles/ 2015/01/dna-forensic-testing-and-usedna-rape-kits-cases-rape- and-sexual-assault), therefore the conclusion given in the said report of non-finding of a male DNA from the swab tested after more than two months of rape is not surprising at all. Some foul play is also evident from the fact that the said report suggests that the swab sample has been consumed, leaving no opportunity to challenge the results shown in the said report.

With regards the contention of the learned counsel about missing seminal stains, beside the foregoing reasons of late DNA testing, reference could also be made to Parikhs Textbook of Medical Jurisprudence and Toxicology by C.K. Parikh which describes „sexual intercourse‟ to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. Similar views are also found in Modi in Medical Jurisprudence and

Toxicology (23rd Edition - pages 897) where it is stated that to constitute the offence of rape, it is not necessary that there would be complete penetration of the penis with emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. These views also find consistency with the explanation given in respect of Section 375 which shows that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Now I would like to consider the case-law referred by the learned counsel which is discussed in the following:

(1) Salman Akram Raja and another v/s. Government of Punjab, through Chief Secretary and others (2013 S.C.M.R 203)

This judgment encourages use of DNA technology by the courts. The said case also directs that request for administration of DNA test should be made at the earliest stage of the case. In the present case, there are two medical reports at hand and the one that is undisputed, actually confirms that rape was committed. Discussion on the scientific value of DNA report after delays of more than two months of taking the sample is already presented in the foregoing.

(2) Muhammad Sajid v/s. The State (2000 P.Cr.L.J 1948); Jehangir v/s. The State (1987 P.Cr.L.J 964) and Akbar Ali v/s. The State (2003 P.Cr.L.J 385)

The view expressed in these cases that solitary statement of the victim not being sufficient to warrant conviction of the accused has been reversed in the light of the Apex court

judgments reported as 2007 SCMR 605 and 2011 PLD 554 SC.

(3) Umar Din and another v/s. The State (2007 P.Cr.L.J 1627)

In this case the lady was seen with the accused in public places and it was alleged that she did not make any hue and cry nor sought help from the public. Facts of the case in hand are different. The lady was taken to an isolated place where she was raped. She had no 9 opportunity to make hue and cry, thus the instant case can be distinguished accordingly.

To conclude, in the instant case where the complainant was neither willing nor that she consented for the sexual act forced upon her by the accused, therefore in my view the necessary ingredients which are to be satisfied to bring home the charge under section 376 of the PPC have been satisfied, and in the light of the pronouncements of the Apex Court (2007 SCMR 605 and 2011 PLD 554 SC) holding that the testimony of the victim is of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to have any difficulty in adjudicating the matter on prosecutrix"s testimony alone. It appears that there is enough material to arrive at the prima facie conclusion that the applicant was involved in the offence, as well as, added with the fear that the applicant, belonging to a relatively influential class, if released on bail at this stage it is most likely that he would intimidate or influence the victim and/or the witnesses. One could also imagine a strong likelihood that in the above circumstances, the victim would make herself scarce and might flee from the justice, I am therefore not inclined to grant bail at this stage. For the aforesaid reasons, this bail application is dismissed.

The observations made in this order shall however not affect the decision of the case at any stage of the trial or other proceedings. Adequate medical attention shall be provided to

the victim. MIT-II should liaise with MLO and the victim (if needed) and submit reports in this regard at frequent intervals.

2017 SLD 23

Before: Munib Akhtar & Yousuf Ali Sayeed, JJ

Forte (Private) Limited, Plaintiff
Versus
Azam Khan, Respondent No.1:

Constitutional Petition No. D-6966 of 2016, Date of hearing: 20.01.2017 and 27.01.2017.

a) ***Civil Procedure Code, (V of 1908)…***

S.114... Scope of Review It is well settled that review proceedings have to be strictly confined to the scope of Order 47 Rule 1 CPC, which is very limited, and cannot be used as a substitute for a regular appeal. As such, a review will not lie merely due to a Court having taken an erroneous view on a question of fact or law, or on the ground that a different view could have been taken on such a point.

b) Civil Procedure Code, (V of 1908) …

Ord.47, R.1 of CPC, the term „mistake or error apparent" does not extend to every erroneous decision, but by its very connotation signifies an error which is so evident that its detection does not require any detailed scrutiny and elucidation. An error which is not self-evident and has to be extracted from the record and detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the exercise of power under Order 47 Rule 1 CPC.

Mr. Abdullah Azam, Advocate for plaintiff
Mr. Syed Abid Shirazi, Advocate for respondent.

JUDGMENT

YOUSUF ALI SAYEED, J. The Petitioner has charted a somewhat convoluted course towards invoking the writ jurisdiction of this Court, seeking correctional Orders by way of certiorari in respect of civil proceedings that have ensued before the Courts below.

1. The preceding facts, as relevant for present purposes, are as follows:

(a) The Respondent No.1 filed Civil Suit No.144/2014 against the Petitioner for recovery of Rs.605,200/- in the Court of learned 1st Senior Civil Judge, Karachi East, which was subsequently transferred to the Court of learned IIIrd Senior Civil Judge, Karachi East (the "**Underlying Suit**").

(b) The Petitioner entered appearance in the Underlying Suit through counsel and contested the claim. A written statement was filed and on 24.10.2014 issues were framed, including, on the point of limitation, whether the Underlying Suit was time barred under the law. This is of particular significance as regards the matter at hand.

(c) Thereafter, the Petitioner"s counsel remained continually absent on all dates of hearing subsequent to 25.02.2015, with the consequence that firstly the Petitioner"s right of cross-examination and subsequently the right to lead evidence were struck off vide Orders dated 06.10.2015 and
16.10.2015 respectively.

(d) The Underlying Suit then proceeded to arguments, and on 30.10.2015, in the continued absence of representation on behalf of the Petitioner, the Suit was partially decreed in favour of the Respondent No.1.

(e) On 23.12.2015, beyond the period of limitation for filing of an appeal, the Petitioner filed an application for review under Section 114 read with Order IX Rule 13 of the CPC, praying that the Judgment and Decree, as well as the preceding Orders made on 06.10.2015 and 16.10.2015, as aforementioned, be set aside and that the Underlying Suit be restored to its original position as on 06.10.2015 (the "**Review Application**").

(f) The Review Application was found to be without merit and was dismissed vide Order dated 21.09.2016.

(g) Against such dismissal, the Petitioner filed an application for revision under Section 115 of the

CPC before the learned VIth Additional District & Sessions Judge, Karachi (East), bearing Civil Revision No.120 of 2016, praying that the aforementioned Order dated 21.09.2016 be set aside and the Underlying Suit be dismissed as being time barred; or in the alternative, that the Judgment and Decree dated 30.10.2015 be set aside and the Underlying Suit be restored to its original position as on 06.10.2015 (the "**Revision Application**").

(h) As it transpired, the learned Additional District & Sessions Judge found that no material had been brought on record to show that any irregularity or illegality had been committed while passing Judgment and Decree in the Underlying Suit and, as such, was not inclined to interfere with the Order of 21.09.2016 whereby the Review Application had been dismissed.

(i) Accordingly, vide Order dated 25.11.2016 the Revision Application was also dismissed, and the Petitioner hence proceeded to file the present Petition under Article 199 of the Constitution with prayers substantively similar to that made in revision.

2. In response to our query as to whether recourse by way of the Review Application had been followed due to lapse of the period of limitation for appeal, it was submitted by learned counsel for the Petitioner that an appeal could nonetheless have been filed along with an application for condonation of the period of delay had the Petitioner been so inclined or advised. Needless to say, the merits of this notional argument do not merit

scrutiny, nor is a finding on this point relevant for present purposes.

3. It was further stated by learned counsel that the right of appeal did not of itself preclude the filing of a review, and the decision to assail the Judgment and Decree and preceding Orders passed in the Underlying Suit vide the Review Application rather than through an appeal was one that was consciously taken whilst considering the underlying facts and circumstances. It was submitted that the Petitioner was fortified in its approach as the said Judgment and Decree suffered from „error apparent on the face of the record", which could validly be corrected in exercise of the jurisdiction conferred under Order 47, Rule 1 CPC. Reliance was placed on the Judgment of the Honourable Supreme Court in the case of Syed Arif Shah v. Abdul Hakeem Qureshi, reported at PLD 1991 SC 905, as well as single-bench Judgments of this Court in the cases of Haider Ladhu Jaffar & Another v. Habib Bank Limited through President & 10 Others, reported at 2014 CLC 725, and Jehanzeb Aziz Dar v. Messrs Maersk Line & Others, reported at PLD 2000 Karachi 258 respectively.

4. Whilst the principles laid down in these cited cases are well established, the fact remains that the scope of review under S.114 CPC is far narrower than that of a first appeal, which permits a larger enquiry on a broader plane. As such, grounds that may be taken in such appeal could well be, and often are, beyond the bounds permissible for review.

5. From a perusal of the Review Application as well as arguments advanced at the bar, it is evident that the principal thrust of the Petitioner‟s case for review was that the learned Civil Judge had essentially committed a material irregularity in passing the Judgment and Decree in the Underlying Suit in as much as there had been a complete failure to consider the aspect of limitation, despite a specific issue having been framed in that regard, and that this constituted an error apparent on the face of the record.

6. In furtherance of this argument, it was submitted by learned counsel for the Petitioner that as per the case set up by the Respondent No.1 in terms of the Plaint, all purchase orders were admittedly dated prior to 25.10.2010, and the invoices raised post-delivery were also all admittedly issued prior to 29.11.2010. Hence, the period of limitation of filing a suit, which had to be reckoned as per Articles 52 or 56 of the Limitation Act 1908, expired prior to 29.11.2013. Thus, the Respondent No.1‟s claim was already barred by limitation on 01.02.2014, being the date on which the Underlying Suit was filed. It was submitted that this issue has not been dilated upon by the learned trial Court while dismissing the Review Application, and, in turn, the learned Additional District & Sessions Judge has also failed to consider this point and thus failed to properly exercise his supervisory jurisdiction at the time of disposing off the Revision Application.

7. On the other hand, whilst strongly opposing the Petition, learned counsel for the Respondent No.1 has submitted that the learned Civil Judge has not

committed any illegally or irregularity in passing Judgment and Decree in the Underlying Suit. He pointed out that the learned Civil Judge has quite evidently considered the matter of limitation and recorded a finding in his Judgment dated 30.10.2015 to the effect that "the point of limitation is not related in this case as the same had been filed within time" and thus held that the Underlying Suit had been filed properly and was maintainable in law. Learned counsel for the Respondent No.1 contends that no case for review was therefore made out within the bounds of S.114, and there was accordingly no scope for interference.

8. Learned counsel for the Respondent No.1 has also submitted that, even otherwise, the plea that the Underlying Suit was barred by limitation is baseless in as much payments were being made by the Petitioner on an ongoing basis, with the last payment made being on 06.06.2012. As such, in view of S.20 of the Limitation Act, the Underlying Suit was filed within the 3year period of limitation. In this regard, he has drawn our attention to the relevant finding made by the learned Civil Judge in his Judgment dated 30.10.2015 to the effect that "the cause of action accrued in the month of June, 2012 when the defendant paid a sum of Rs.48,250/- leaving balance a sum of Rs.605,200/- and where after in the month March, 2013 when the defendant failed to make payment which is still continue". He pointed out that this finding as to the cause of action is directly related to the finding on limitation. He also relied on the legal notice and reply thereto with regard to the amount claimed, which correspondence was part of the record.

9. Learned counsel concluded that, as such, it was apparent that the dismissal of the Review Application was absolutely just and proper and did not give rise to any ground for exercise of revisional jurisdiction under S.115, hence the present Petition is misconceived and liable to be dismissed.

10. Having perused the Judgment, we are of the opinion that the argument advanced on behalf of the Petitioner as to there being a failure on the part of the learned Civil Judge to consider the point of limitation is misconceived, in as much as it is evident from a plain reading thereof that a reasoned finding on the matter has quite clearly been recorded in terms of what has been noted by us herein above, as has been recognized in the subsequent Orders of 21.09.2016 and 25.11.2016 disposing off the Review Application and Revision Application respectively, where the scope of review also appears to have been appropriately borne in mind by the learned judicial officers.

11. Confronted with this reality, learned counsel for the Petitioner sought to draw our attention to various documents on record in an endeavor to demonstrate that the dictates of the proviso to S.20 of the Limitation Act 1908 as to a signed acknowledgment had not been met in the facts and circumstances giving rise to the Underlying Suit, and the said section was hence inapplicable for the purpose of computing the period of limitation. In support of this contention he placed reliance on a Judgment of a singlebench of this Court in the case of Muhammad Suleman v. Habib Bank Limited, reported at 1987 MLD 2757, as well as a

judgment of the Indian Supreme Court in the case of Sant Lal Mahton v.
Kamla Prasad & Others, reported at AIR (38) 1951 SC 477.

12. We are afraid that this line of argument, whilst perhaps constituting a viable ground for an appeal, is simply not permissible within the scope of these proceedings, in as much it is beyond the ambit of Order XLVII, Rule 1, C.P.C to delve deeply into the evidence in relation to a claim that there is an error apparent on the face of the record. As per the very case set up by the Petitioner, the Review Application was advanced and could be entertained only on the ground of error apparent on the face of the record and not on any other ground. Such error must be one
that immediately strikes the onlooker and does not require any long-drawn process of reasoning on points where there may conceivably be two reasonable opinions.

13. ***It is well settled that review proceedings have to be strictly confined to the scope of Order 47 Rule 1 CPC, which is very limited, and cannot be used as a substitute for a regular appeal. As such, a review will not lie merely due to a Court having taken an erroneous view on a question of fact or law, or on the ground that a different view could have been taken on such a point.***

14. ***Furthermore, the term „mistake or error apparent" does not extend to every erroneous decision, but by its very connotation signifies an error which is so evident that its detection does not require any detailed***

<u>scrutiny and elucidation. An error which is not self-evident and has to be extracted from the record and detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the exercise of power under Order 47 Rule 1 CPC.</u>

15. We consider it unnecessary to burden this judgment with discussion of earlier decisions where this settled position is set out. Suffice it to mention that various learned Benches of this Court reiterated the same principle in the cases of Dr. Masroor Ahmed Zai v. Province of Sindh through Chief Secretary and 2 Others, reported at 2016 CLC 1861, Engr. Inam Ahmad smani v. Federation of Pakistan & Others, reported at 2013 MLD 1132, Mst. Doda Begum v. Israr Hussain Zaidi & Others, reported at 2014 CLC 1407, and Mian Shiraz Arshad v. VIIIth Civil and Family Judge, Karachi (South), reported at 2009 YLR 1016.

16. In view of foregoing discussion, this Petition is found to be misconceived and hence is dismissed. There will be no order as to costs.

Petition dismisses

2017 SLD 34

Before: Muhammad Ali Mazhar and
Abdul Maalik Gaddi, JJ.

Abdul Rehman………Petitioner

Versus

The Chairman National Accountability
Bureau & others………Respondents

C.P. No.D-354 of 2017 decided on **20th February, 2017.**

Criminal Procedure Code (V of 1898) …..

…S.497 grant of bail…. Accused is entitled to expeditious access to justice, which includes a right to fair an expeditious trial without any unreasonable and inordinate delay.

…S.497…Public Confidence in Judicial System…The intention of law is that the criminal case must be disposed of without unnecessary delay it is not difficult to comprehend that inordinate delay in imparting justice is likely to cause erosion of public confidence in the judicial system on one hand and on the other hand it is bound to create a sense of helplessness, despair feeling of frustration and anguish apart from adding to their woes and miseries. [pg.102]

Mr. Akbar Zameen Khattak, Advocate along with petitioner.

Mr. Akram Jawed, Special Prosecutor, NAB.

Mr. Ahmed Bin Zahid, I.O, NAB.

Mr. Asim Mansoor Khan, DAG.

JUDGEMENT

<u>Muhammad Ali Mazhar, J.</u> The petitioner has applied for pre-arrest bail in NAB. Reference No.9/2014. Initially, the petitioner was not nominated in the reference however by means of supplementary reference he has been implicated as accused No.12. The petitioner was granted interim prearrest bail by this court on 06.02.2017 subject to furnishing solvent surety in the sum of Rs.300,000/- (Rupees Three Lacs) with P.R. bond in the like amount to the satisfaction of the Nazir of this court.

2. In paragraph 11 of the NAB Reference, the role of the present petitioner has been highlighted as under:-

> "That the investigation also revealed that Abdul Rehman (accused No.12) also found involved in this modarba scam as he induced general public to deposit and invest in the business for which he issued modarba agreements and cheques signed by Muhammad Talha (accused No.3)".

3. The learned counsel for the petitioner argued that the petitioner has been falsely implicated by the NAB. No specific role has been assigned against him except a sweeping statement in the reference. The alleged involvement of the petitioner is highly doubtful and matter is required for further inquiry. On perusal of the supplementary reference, it appears that NAB has miserably failed to disclose any account of the petitioner in which the amount has been credited or transferred in any other account. The matter requires further inquiry to prove the guilt of the petitioner. No transaction has been pointed out to demonstrate that any amount was credited

in the account of petitioner or he misappropriated any amount for his own consumption. This is not suffice to prove the guilt that the petitioner allegedly issued modarba agreements and cheques signed by Muhammad Talha. It was further contended that no complaint against the present petitioner was received by the Investigating Officer.

4. The learned Special Prosecutor NAB argued that the petitioner is nominated accused in NAB Supplementary Reference No.09/2014 wherein his role is narrated in the said reference for an offence as defined under Section 9 (a) and punishable under Section 10 of NAO, 1999. Hundreds of complaints were received against the accused persons namely Shafiq-ur-Rehman, Muhammad Inam, Muhammad Talha and others. It was stated in these complaints that the accused persons were receiving huge amount on the pretext of modarba business (Islamic Mode of financing). The accused persons promised to pay huge profits to the investors. The petitioner Abdul Rehman (accused No.12) was also found involved in this modarba scam as he induced general public to deposit and invest in the business for which he issued modarba agreements and cheques signed by Muhammad Talha (accused No.3). He pointed out paragraph No.40 of investigation report in which it is stated that the petitioner was teacher at Jamia Madressa Zia-ul-Quran, Rawalpindi and he used to take deposits from claimants and further used to issue Modarba agreements signed by Muhammad Talha. In paragraph No.41 of the investigation report it is stated that various call-up notices were issued to summon the petitioner but he avoided to appear before the Investigating Officer. In paragraph No.42, it is further stated that sufficient documentary as well as oral evidence is available on record, which establish the involvement of co-accused in commission of offence of cheating public at large and in criminal breach of trust under NAO, 1999.

5. Heard the arguments and perused the record. What we have noticed that in the Reference as well as investigation report and the comments, no specific allegations have been leveled against the present petitioner that some amount was landed in his account. Main allegation against him is that he induced public at large to invest their savings in the Modarba business. Whether the petitioner induced general public against some consideration or he is also equally involved in the offence of cheating general public require evidence. On one hand, the Investigating Officer informed us that some more evidence is to be collected by him but on the other hand the investigation report and comments do not show anything beyond the role assigned to the petitioner in the reference. The I.O also failed to demonstrate as to whether any complaint was received against the accused or he was beneficiary of any amount. Whether he induced the general public or not this crucial aspect requires further inquiry which is required to be considered by the trial court.

6. In the **C.P. No.D-4162 of 2016** while granting bail to the co-accused Moulana Mufti Saifullah Jameel in the same reference, we held that whenever reasonable doubt arises with regard to the participation of an accused person in the crime or about the truth or probability of the prosecution case and the evidence proposed to be produced in support of the charge, the accused should not be deprived of benefit of bail and in such a situation it would be better to keep him on bail than in the jail during the trial. Prosecution in order to make out a case for refusal of bail to an accused is primarily supposed to place on record material on basis of which he is believed to be involved in a non-bailable offence, but in absence of such material the court for the purpose of releasing the accused on bail, instead of dilating upon the facts of the case in details, can dispose of the matter by holding that his detention is unjustified or unreasonable. Reference can be made to **PLD 1996 S.C. 241 & PLD 2002 S.C. 572.** In the

bail order authored by one of us (Muhammad Ali Mazhar-J) in the case of coaccused **Shafiq-ur-Rahman (CP.No-D-3294/29014)** the court held that further inquiry is a question which must have some nexus with the result of the case for which a tentative assessment of the material on record is to be considered for reaching just conclusion. The case of further inquiry pre-supposes the tentative assessment which may create doubt with respect to the involvement of accused in the crime. It is well settled that deeper appreciation of evidence is not permissible at bail stage simultaneously it is also well settled that object of trial is to make an accused to face the trial and not to punish an under trial prisoner. The basic idea is to enable the accused to answer criminal prosecution against him rather than to rot him behind the bar. ***Accused is entitled to expeditious access to justice, which includes a right to fair an expeditious trial without any unreasonable and inordinate delay. The intention of law is that the criminal case must be disposed of without unnecessary delay it is not difficult to comprehend that inordinate delay in imparting justice is likely to cause erosion of public confidence in the judicial system on one hand and on the other hand it is bound to create a sense of helplessness, despair feeling of frustration and anguish apart from adding to their woes and miseries***. Reference: **Ali Anwar Ruk, Abdul Jabbar, Syed Mansoor Ali and Sardar Amin Farooqui reported in 2014 SBLR 766, PLJ 2014 Karachi 251=2014 CrLJ 777, PLJ 2014 Karachi 254=2014 UC 784 and PLJ 2014 Karachi 268.**

7. As a result of above discussion, interim pre-arrest bail granted to the petitioner on 6.2.2017 in NAB Reference No.9/2014 is confirmed on the same terms and conditions. The above findings are tentative in nature and shall not prejudice the case of either party. In addition, the petitioner is also directed to deposit his original valid passport with the Nazir of this court. The I.O informed us that he has already sent a request to the Ministry of Interior for placing the name

of petitioner on ECL. The petitioner shall regularly attend the trial court and in the event of default, the learned trial court may forward the reference to this court immediately for further proceedings. The petition is disposed of.

Petition disposed

2017 SLD 39

Before: Muhammad Ali Mazhar and

Maalik Gaddi,JJ.

Jalil-ur-Rehman & others …….. Petitioners

V S

Province of Sindh & others …..Respondents

Constitution Petition No.D-5891 of 2016 decided on **26.01.2017**

a) Sindh Public Property (Removal of Encroachment) Act, 2010….

Under Section 3 of the Sindh Public Property (Removal of Encroachment) Act, 2010, government or any authority or officer authorized by government in this behalf may require a person responsible for encroachment to remove such encroachment together with the structure, if any, raised by him on public property. While in the explanation attached to this Section, it is further provided that lessee or licensee, who

after the expiry of period of lease or on determination of such lease or license continues to retain unlawfully possession of any public property shall for the purpose of this Section be deemed to be responsible for encroachment.

b) Constitution of Pakistan, 1973…

"Art. 199---Writ Jurisdiction in encroachment case--Scope---Disputed question of fact... On the face of it, the dispute presently before us needs evidence and it is well settled that the factual controversy cannot be decided in the writ jurisdiction.

c) Writ Jurisdiction in encroachment cases…

On the face of it, the dispute presently before us needs evidence and it is well settled that the factual controversy cannot be decided in the writ jurisdiction. Before issuing any notice to the petitioners for removing the encroachment by the respondents, we are at-least not inclined to direct the petitioners to approach the Tribunal,
Basically in this case the crucial element which requires the decision or determination as to whether the petitioners are occupying the public property or they were issued valid leases but this question cannot be decided without proper evidence and for this purpose, the constitution petition is not a proper remedy.

d) Administration of Justice….

Principle of adverse Order in encroachment cases, the issue as to whether the petitioners No.1 and 2 have encroached upon the public property and their registered leases are liable to be cancelled is determined, no adverse action shall be taken against the petitioners by the respondents.

Mr. Shaukat Ali Shaikh, advocate for petitioners

Mr. Iqbal M. Khurram, advocate for respondent No.3

Mr. Osama Aftab, advocate for respondent No.4

Mr. Sibtain Mehmood, AAG

JUDGMENT

Muhammad Ali Mazhar-J. The petitioners have approached this Court for seeking directions against the respondents to adequately compensate them in lieu of their plots as per market value and they may be further restrained not to cause any harassment or taking demolishing action against them.

The brief facts of the case are that the petitioners No.1 and 2 have the leasehold rights. The lease issued by District Officer (Rev), Katchi Abadis, CDGK in favour of the petitioner No.1 for plot No.78, sheet No.2, 136.11 sq.yds., Haji Mureed Goth, Nazimabad, Karachi, is attached at page 13 of the petition, while lease deed of petitioner No.2 issued for plot No.77, sheet No.2, 111.52 sq.yds., Haji Mureed Goth, Nazimabad, Karachi, is attached at page 39.

The leasehold rights by regularizing the unauthorized possession of plots in Katchi Abadis of Karachi were granted for 99 years in the year

2005 to the petitioner No.2 and in 2006 to the petitioner No.1. So far as the petitioner No.3 is concerned, it is admitted that no leasehold rights were granted to him for the plot in his possession, but the learned counsel referred to page 49 of the file, which is merely refugee identity card issued in the name of Kifayatullah as head of family. When we asked the learned counsel to show the relationship of this Kifayatullah with the petitioner No.3, the learned counsel responded that he purchased the plot from Kifayatullah, but no such title document is available on record.

He further pointed out page 61, which is a copy of sale agreement and argued that the petitioner No.3 has purchased the plot from one Maqsood Anwar, who had purchased the plot No.I-160, Liaquatabad No.4, Karachi, measuring 60 sq.yds. from descendants of Kifayatullah.

Learned counsel argued that the respondents are trying to dispossess the petitioners from their plots on the whims that they have encroached the public property Gujjar Nala Express Project of the respondents. He further argued that if respondents want to evict the petitioners, then they have to take action in accordance with law, but not in a summary way to oust the petitioners from their lawful possession. Alternatively, he argued that if the respondents want to disturb the petitioners from their lawful possession, the proper course is to acquire the property against reasonable amount of compensation under provisions of the Land Acquisition Act.

On the contrary, Mr. Iqbal M. Khurram, learned counsel for respondent No.3 has filed the comments of KMC and argued that vide

KMC Resolution 34 dated 05.8.2015 and on the directives of the Chief Minister Sindh/ Minister Local Bodies, the Administrator, KMC chalked out removal of encroachment programme for the alignment of Gujjar Nala and its beds. Therefore, the operation for removal of encroachment was started against only such encroachment, which is found in the alignment of Gujjar Nala, for which all relevant departments/ agencies are providing assistance in the said removal operation. He further referred to the consent order dated 09.12.2016 passed by the Division Bench of this Court in CP No.D-6286/2016 and some other connected petitions in which the counsel for the petitioners, KMC and learned AAG, by consent agreed that the petitioners will approach to the Tribunal constituted under the Sindh Public Property (Removal of Encroachment) Act, 2010, for the determination

as to whether the plots of the petitioners in that case could be declared public property or not.

Learned counsel for KMC submits that this petition may be disposed off in terms of the aforesaid consent order while the learned counsel for petitioners argued that some relevant facts and case law were not discussed in the consent order. He further argued that in the case in hand at-least petitioners No.1 and 2 have leasehold rights in their favour conferred upon them by issuing registered indenture of lease, so in this regard, he referred to the order reported in 2016 CLC Note-2 authored by one of the learned members of same Bench which passed the consent order held that, keeping in view, Section 39 of the Specific Relief Act, registered documents could not be cancelled without intervention of the civil court. He further referred to the judgment of Hon'ble Supreme Court in the case of Amir Jamal & others vs. Malik Zahoor-ul-Haq & others reported in 2011 SCMR 1023, in which it was held that the registered documents could be cancelled on the ground of fraud or otherwise, only by civil court. While dilating upon the niceties of Article 199 of the Constitution of Pakistan, the Apex Court further held in the same Judgment that jurisdiction under Article 199 of Constitution would extend to questions devoid of factual controversy.

Under Section 3 of the Sindh Public Property (Removal of Encroachment) Act, 2010, government or any authority or officer authorized by government in this behalf may require a person responsible for encroachment to remove such encroachment together with the structure, if any, raised by him on public property. While in the explanation attached to this Section, it is further provided that lessee or licensee, who after the expiry of period of lease or on determination of such lease or license continues to retain unlawfully possession of any public property shall for the purpose of this Section be deemed to be responsible for encroachment. While the procedure for eviction and punishment for encroachment is

provided under Sections 5 and 8. Section 11 deals with the bar of jurisdiction and abetment of suits in relation to a dispute that any property is not a public property or that any lease or license in respect of such public property has not been determined for the purposes of this Act. So far as the pending suits before the promulgation of this Act are concerned, it is further provided in Sub-Section (2), all such suits, appeals and applications relating to encroachment and dispute that any property is not a public property or that any lease or license has not been determined shall abet. However, a right has been conferred to all such parties to file a suit before Tribunal for dealing with such disputes.

To a question raised by this Court to the learned counsel for KMC that admittedly the lease was executed in favour of the petitioners No.1 and 2 for the period of 99 years, which is very much in force and not determined by the lessor. On this point, learned counsel for KMC submits that all such leases were cancelled in one stroke by means of resolution No.34 dated 05.8.2015, but neither any copy of such resolution is available on record nor the counsel for KMC stated that on the strength of this resolution any show cause notice was ever issued to any such lessee before taking any alleged action for cancellation.

Learned counsel for KMC further stated that even for removing the encroachment from public property Gujjar Nala, no individual notice was ever issued but a public notice for general public information was published in the newspaper. However, he has not produced any copy of public notice along with the copy of comments.

Be that as it may, on the one hand, the petitioners No.1 and 2 produced the copy of their leases, but on the other hand KMC has raised a dispute in the counter-affidavit that the petitioners have encroached upon public property and the said land is required for alignment of Gujjar Nala. ***On the face of it, the dispute presently before us needs evidence and it is well***

<u>settled that the factual controversy cannot be decided in the writ jurisdiction. Before issuing any notice to the petitioners for removing the encroachment by the respondents, we are at-least not inclined to direct the petitioners to approach the Tribunal</u>, because if the respondents are aggrieved by the encroachment and they want to align Gujjar Nala, it is their responsibility to issue a show cause notice to the lessees to explain as to why they should not be removed from the public property. Basically in this case the crucial element which requires the decision or determination as to whether the petitioners are occupying the public property or they were issued valid leases but this question cannot be decided without proper evidence and for this purpose, the constitution petition is not a proper remedy. So far as the question for the payment of compensation is concerned again this can be done according to law if the property is acquired under the provisions of Land Acquisition Act.

As a result of above discussion, the KMC is at liberty to take action strictly in accordance with law after issuing proper notice to the petitioners. Till such time, the issue as to whether the petitioners No.1 and 2 have encroached upon the public property and their registered leases are liable to be cancelled is determined, no adverse action shall be taken against the petitioners by the respondents. So far as the petitioner No.3 is concerned nothing has been placed on record to show his valid title, however, if he wants to challenge the action against him, he may seek appropriate remedy in accordance with law. The petition is disposed off in the above terms along with pending applications.

Petition disposed

2017 SLD 46

Before; Muhammad Ali Mazhar,
and Adnan-ul-Karim Memon,JJ.

Muhammad Bilal ….Applicant

V S
The State…………Respondent

Crl.Bail Application No.1730/2016 Date of hearing:
28.12.2016 & 29.12.2016

a) Criminal Procedure Code (V of 1898)

Sec.497 Cr.P.C ….False Implication...The huge amount has been shown to have been recovered from the applicant as well as from co-accused and as per charge sheet about 1500000/- have been recovered from all three accused and the said amount being huge was not possible for I.O. or even complainant to arrange and foist against the applicant / accused. In such situation, agony faced by the victim family corroborated by the recovery of extortion money from the applicant and looking to peculiar circumstances of the case, law and order situation in the city we are not inclined to deem it fit case for bail. The offence with which the applicant has been charged falls under prohibitory clause of section 497(i) Cr.P.C. Therefore in our view, instant application is devoid of merits and consequently is dismissed.

b) Sindh Arms Act, 2013…..

Sec.34 (a)… As far as non-association of private witnesses, the complainant has sufficiently explained the same in the FIRs as the incident took place at odd hours of the night, even otherwise, section 34(a) of the Sindh Arms Act, 2013 is very clear in its terms and provides:

"all arrests and searches made under this Act or under any rules shall be executed in line with the provisions of the Code of Criminal of Procedure, 1898, except section 103 of the Code:

Provided that any Police officer or person present on the spot can be witness of search and recovery."

c) **Bail)….***The proviso of section 21(D) of the Anti-Terrorism Act, 1997 which is the governing law clearly stipulates that: - Provided that if there appear reasonable grounds for believing that any person accused of non-bail able offence has been guilty of an offence punishable with death or imprisonment for life or imprisonment for not less than ten years, such person shall not be released on bail."*

Mr. Waqar Alam Abbasi, Advocate for applicant
Mr. Muhammad Iqbal Awan, APG

O R D E R

Adnan-ul-Karim Memon, J:- By this common order the above captioned bail applications are disposed off together as the same are interlinked.

1. The applicant/accused Muhammad Bilal is seeking post arrest bail in Crime No.286/2016 registered for offences under Sections 353, 324, 34 PPC read with section 7 of ATA, 1997 and in Crime No. 287/2016 under section 23(1)(a) of Sindh Arms Act, 2013, of PS Ittehad Town, Karachi.

2. The prosecution case, as set out in the above crimes is that on the complaint of Sub-Inspector Riyasat Ali of PS Ittehad Town, Karachi, the following two FIRs were lodged

against the applicant with respect to the alleged incident that took place on 29.08.2016:-

i. FIR No.286/2016 registered under section 353, 324, 34 PPC read with section 7 of ATA 1997.

ii. FIR No.287/2016 registered under section 23(1)(a) of Sindh Arms Act, 2013.

3. The gist of allegations against applicant is that on 29.08.2016 at about 0030 hours, SIP Riyasat Ali along with his subordinate staff was on patrolling duty, when they reached near Peela School, Qaim Khani Colony, Baldia Town, Karachi, two persons, on seeing the police party opened fire on them with intention to kill. In self defence, the police opened fire, due to which the accused Muhammad Bilal received bullet injury on his left leg. Accused Muhammad Bilal was arrested on the spot by SIP Riyasat Ali whereas due to non-availability of private persons his personal search was conducted and recovered one pistol 30-bore CAL 30- MADE AS CHINA alongwith 04 rounds, in which 03 rounds were loaded with magazine, and one bullet was loaded in chamber from the applicant under mashirnama. The recovered articles were sealed at the spot and taken into custody for (FSL). The police took the injured accused to the Civil Hospital, Karachi for treatment of his leg injury where his Medico Legal Examination was conducted. Investigation Officer prepared mashirnama of place of incident recorded statements of PWs, interrogated accused, got conducted FSL of recovered articles and obtained Medico Legal Report of injured accused Muhammad Bilal.

4. At the conclusion of the investigation, the Investigation Officer submitted the charge-sheet in the trial court, in Crime No.286/2016 and Crime No.287/2016 against accused.

5. The accused Muhammad Bilal moved two bail applications with respect to the above crimes before the Learned Anti-Terrorism Court No. V, Karachi. The learned trial court vide common order dated 22.11.2016 dismissed both the bail applications on the ground that the accused had been arrested on the spot after receiving injury during the encounter with the police.

6. Mr. Waqar Alam Abbasi, learned counsel for the applicant has argued that the applicant has been falsely implicated as he was picked up from his home at night by some persons on 21.08.2016 who were claiming to be government servants, his brother moved applications to the higher authorities through courier. He further argued that the police has concocted the story with malafide intention to involve the accused in the present crime along with co-accused Sajid Aziz, who also went missing on 30.05.2016 and his whereabouts remained unknown to the family, such complaint was moved to the higher authorities by his family members. He further argued that the contents of the memo of arrest reveal that 04 empties of SMG and 02 empties of 30 bore were taken into police custody and on the other hand, it is also mentioned that 11 fires of SMG were made by police in alleged retaliation but only 04 empties were shown to have been recovered from the spot which clearly makes the present case doubtful and requires further inquiry. He further argued that nothing was recovered from the possession of accused and alleged recovery of 30-bore pistol has been foisted upon applicant/accused. He further argued that the physical condition of the applicant is not good and he is not getting proper medical treatment in jail hospital. He also argued that section 324 PPC is not applicable in the present case and the police violated section 34 of Sindh Arms Act, 2013 as no private witness had been cited, so far as the alleged recovery from the possession of applicant is concerned, he emphasized that no specific role has been assigned to the applicant and the

offences are not punishable with death or life imprisonment. He prayed for grant of bail to the accused in both the crimes.

7. During the course of arguments, the learned counsel for the applicant placed on record copies of two judgments i.e. judgment dated 29.06.2016, passed by learned Vth Additional Sessions Judge, Karachi Central, in Sessions Case No. 216/2014 and another judgment dated 23.02.2016, passed by learned Ist Additional Sessions Judge Karachi Central in Sessions Case No.79/2014 and robustly argued that earlier also similar cases were lodged against the applicant but he was acquitted from the charges.

8. Mr. Muhammad Iqbal Awan, learned Assistant Prosecutor General (Sindh) has opposed the grant of bail to the applicant and argued that the accused was arrested from the spot, where the police and the accused had briefly exchanged firing and that he was arrested in injured condition and from his possession, one unlicensed 30 bore pistol was recovered and that the forensic examination report in respect of the recovered articles supports the prosecution case. He further submitted that the accused has a criminal record/history and that earlier he was arrested in FIR No.94/2013 under section 353/324/34 PPC registered with PS Shahra-eNoor Jehan and another FIR No.95/2013 under section 23(1)(a) of Sindh Arms Act, 2013 of AVCC police station Karachi. He further argued that the offences with which the accused has been charged is of terrorism and punishable under section 7 of the Anti-Terrorism Act, 1997 and fall within the prohibitory clause of section 497(1), Cr.P.C. He further argued that the prosecution has collected sufficient incriminating evidence against the applicant and if the bail is granted to the applicant he will continue to undertake the same criminal activities, which will cause harm to the public at large.

9. We have heard the learned counsel for the applicant and the learned APG for the State and have perused the material available on record and carefully considered the submissions advanced by them.

10. We are conscious of the fact that while deciding the bail application, this court has to consider the allegations made in the FIR, statements recorded under Section 161 Cr.P.C., other incriminating material against accused, nature and gravity of charge and pleas raised by the accused.

11. From a bare perusal of the contents of both the FIRs, it transpires that the present accused has been charged with the serious crime of firing at the police force, such an act is defined as an act of terrorism under section 6 of the Anti Terrorism Act, 1997 and the same is punishable under sections 324, 353 PPC read with section 7 of Anti-Terrorism Act, 1997. During the course of arguments, the learned APG invited our attention to the Medico-legal Certificate of the applicant who was brought at hospital on 29.08.2016 at about 01.12 a.m., by Ittehad Town police with the history of fresh fire arm injury over his left thigh and the examination report (FSL) of Forensic Division, Karachi, dated 05.09.2016, in respect of articles i.e., pistols, live bullets and empties recovered from accused persons as well as from the crime scene which report seems to be positive. Police papers further show that statements of prosecution witnesses supported the version of the Complainant. Such incriminating material collected by police during the course of investigation creates ground to proceed against the applicant for trial.

12. So far as the application made by the brother of accused to the learned District & Sessions Judge Karachi West on 21.08.2016, wherein he complained that his brother had been picked up by some persons from his home and the same was forwarded to the Deputy Inspector General of Police for necessary action and report. We have seen the application

placed on record but we are afraid to dilate upon the same as the fate of the inquiry has not been placed on record. So far as the medical ground is concerned and the same has been taken care of by the learned trial court on the application of the applicant.

13. *Applicant has premised his case on the assertion that the Police officials have falsely concocted the case against the accused because of enmity, as the applicant was arrested from his home before the lodging of the FIRs but he has not been able to provide any satisfactory explanation as to how and under what circumstances he sustained a bullet injury on his left thigh and nothing has been placed on record to substantiate his claim of false implication in this case but on the contrary sufficient incriminating material has been collected by the police which prima facie connects applicant in the present crimes.*

14. As far as non-association of private witnesses, the complainant has sufficiently explained the same in the FIRs as the incident took place at odd hours of the night, even otherwise, section 34(a) of the Sindh Arms Act, 2013 is very clear in its terms and provides:

"all arrests and searches made under this Act or under any rules shall be executed in line with the provisions of the Code of Criminal of Procedure, 1898, except section 103 of the Code :

Provided that any Police officer or person present on the spot can be witness of search and recovery."

15. We have carefully considered the submissions of the learned counsel of the applicant and we are of the view that the contentions raised require deeper appreciation of the evidence and we are also conscious of the fact that while deciding the bail application only a tentative assessment has to be made. In this regard, we are fortified with the case-law

reported in the case of Shahzad Ahmed versus the State reported in 2010 SCMR 1221.

16. We have also gone through the judgments in which present applicant was acquitted on the benefit of doubt but his earlier acquittal in similar cases, does not justify grant of bail at this stage. The record clearly reflects that the applicant sustained injury on the spot and he was arrested. So at this stage, there are no reasonable grounds to believe that he is not involved in the alleged offences. The proviso of section 21(D) of the Anti-Terrorism Act, 1997 which is the governing law clearly stipulates that:-

Provided that if there appear reasonable grounds for believing that any person accused of non-bailable offence has been guilty of an offence punishable with death or imprisonment for life or imprisonment for not less than ten years, such person shall not be released on bail."

17. In view of the above facts and circumstances, we are of the opinion that the applicant/accused has not made out a case for grant of bail at this stage. Accordingly both the bail applications are dismissed. The above findings are tentative in nature which shall not prejudice the case of either party at the trial stage.

Application dismiss

2017 SLD 53

Before: Ahmed Ali M. Shaikh, and Muhammad Saleem Jessar, JJ.

Roshan Ali Solangi

Versus

The State

Crl. Bail Application No.1112 of 2016 decided on 04.11.2016

a) Post arrest Bail…

bail refused…bail application filed by applicant Roshan Ali Solangi, whereby he seeks his release on post arrest bail in crime No.24 of 2016, for offence punishable under Section 365, 384, 385, 386, 506-B, 342 and 34 P.P.C., read with Section 7 of Anti-Terrorism Act, 1997, registered with P.S. Malir City. The applicant has preferred such application before learned trial Court, but his request has been turned down vide order dated 12.07.2016. The case as reported has already been challaned by police on 10.08.2016 and same is now pending trial before the Court of learned Judge Anti-Terrorism Court-IX, Karachi being Special Case No.414 of 2016 "Re. The State Vs. Zafar Abbas and others."

d) Delay in lodging of FIR…

As far as arguments of learned counsel for applicant that FIR is delayed, in our view has no weight. As in such a like cases the people / victim(s) / family (is) ever remain under fear, coercion and compulsion and may not dare to even disclose the facts to their elders or community people.

e) False Implication….

Sec.497 CrPc….The huge amount has been shown to have been recovered from the applicant as well as from co-accused and as per charge sheet about 1500000/- have been recovered from all three accused and the said amount being huge was not possible for I.O. or even complainant to arrange and foist against the applicant / accused. In such

situation, agony faced by the victim family corroborated by the recovery of extortion money from the applicant and looking to peculiar circumstances of the case, law and order situation in the city we are not inclined to deem it fit case for bail. The offence with which the applicant has been charged falls under prohibitory clause of section 497(i) Cr.P.C. Therefore in our view, instant application is devoid of merits and consequently is dismissed.[pg;46]

Mr. Ghulam Sarwar Chandio, Advocate for petitioner.
Muhammad Iqbal Awan, Assistant Prosecutor General Sindh.

Abdul Raheem Mengal through Mr. Abdul Latif Shaikh, Advocate.

O R D E R

MUHAMMAD SALEEM JESSAR, J *:* - We intend to dispose of instant bail application filed by applicant Roshan Ali Solangi, whereby he seeks his release on post arrest bail in crime No.24 of 2016, for offence punishable under Section 365, 384, 385, 386, 506-B, 342 and 34 P.P.C., read with Section 7 of Anti-Terrorism Act, 1997, registered with P.S. Malir City. The applicant has preferred such application before learned trial Court, but his request has been turned down vide order dated 12.07.2016. The case as reported has already been challaned by police on 10.08.2016 and same is now pending trial before the Court of learned Judge Anti-Terrorism Court-IX, Karachi being Special Case No.414 of 2016 “Re. The State Vs. Zafar Abbas and others.”

2. The case of prosecution, as unfolded by complainant Abdul Raheem Mengal in his F.I.R. No.24 of 2016, lodged on 08.02.2016 at 2050 hours is that he is a businessman. One Manzoor Shah, being vagabond, had issued threats to him for *Bhatta*. On 18.12.2015 the complainant left his house

alongwith his friend Yaseen for proceeding to his office on his car and when they reached at the corner of Malir Court Road at 1030 hours, two Police Mobiles and Corolla Car intercepted them. The Policemen, duly armed, got him alighted from the car. The complainant found Amanullah Shah, Zahid Shah and their two accomplices to whom he can identify, caught hold of the complainant and made him to sit in their car, whereas his friend was moved inside police mobile. The eyes of complainant were folded with the strip and then they proceeded towards unknown location where the hands of complainant were tied and they were confined in a room. In the night time, they were shifted from one room to another, where they were being slapped as to why they have failed to pay extortion / bhatta money to Manzoor Shah and now they have to pay One Crore else they would be killed. During maltreatment the strip folded on the eyes of the complainant was slipped down he saw one signboard in the room it was ascribed "Mobina Police Station" and found a person was sitting adjacent to him who asked the complainant to hand over mobile phone to make a call at 03008220586 of Manzoor Shah as such call was made on the number. Person who was maltreating the complainant talked with Manzoor Shah and narrated him that they have done the job now he should collect bhatta amount then he switched off the mobile phone and the complainant was confined in the room after about few hours they were shifted to another house where complainant was hearing the voices of some women folks. It is stated in the F.I.R. that during his confinement, Manzoor Shah had been demanding bhatta amount from his family. On one night complaint was taken out in the open area where his stripes were removed from eyes and they saw Manzoor Shah along with family members of the complainant. Manzoor Shah received Rs.68,50,000/- in the shape of hard cash and cheque and handed over the same to two persons sitting in front of him. One of them introduced himself to be Roshan Ali Solangi (applicant), who exposed himself to be DSP besides he introduced other persons to be S.H.O. Zafar Abbas who was

identified by complainant to be the same persons sitting on the chair in the room where "Mobina Police Station" was ascribed. After receiving bhatta amount the culprits directed others to release the complainant on main gate of Sachal Goth. Thereafter he reached at his home. Complainant along with his family remained under panic and fear situation but was encouraged and consoled by his relatives, therefore, he got his case registered in above terms.

3. After registration of F.I.R., police took up investigation and meanwhile arrested the applicant / accused on 23.02.2016 and during investigation applicant / accused paid / returned Rs.3,20,000/- being his share out of the extortion, forcibly collected from the complainant. Police had also recovered Rs.7,00,000/- from co-accused Zafar Abbas and Rs.4,80,000/- from co-accused Manzoor Shah and after completion of legal formalities submitted the charge sheet before competent Court of law having jurisdiction.

4. Learned counsel for applicant has mainly contended that FIR is delayed for about 51 days and the recovery whatever has been shown to have been recovered from the possession of applicant has been foisted upon him by the police with at the behest of complainant. He further submits that applicant is innocent and has been implicated falsely by the complainant, he, therefore, has prayed for his release on bail.

5. Learned A.P.G. duly assisted by Mr. Abdul Latif Shaikh counsel for the complainant has opposed the application on the ground that outlaws have made lives of the citizen miserable as has been done in this case. He further argued that on refusal to pay extortion the complainant was kidnapped and after receiving huge amount as an extortion from him was released and such situation has created a panic atmosphere. He further submitted such frequent activities of

criminals have developed sense of insecurity and terrorism in the minds of the citizen which *prima facie* warrants application of section 7 of the ATA, 1997. He submitted that if criminals may not be nib in the bud then society would have to face much a lot then they are experiencing which would affect it as a whole. He however has opposed the application.

7. We have heard learned counsel for the parties and have gone through the material collected by the investigation officer during investigation and have perused the record made available before us.

8. The police being custodian of law are supposed to guard citizen and their rights by providing legal protection but when under the garb of their lawful worthy duty and status commit terror activities by misusing their official capacity require interception by the competent forum. If they (police) may not be curbed at this stage then every citizen would not only feel insecurity and uncertainty rather will be discouraged while criminals would be encouraged. As per constitutional provisions and law of the land, it is bounden duty of the State to provide legal protection to the citizen, their property and rights but when organs of the State may act contrary to the law then the courts should interfere and direct the State functionaries to act in accordance with law and the Constitution.

9. It appears that applicant is nominated in the F.I.R. Here, it is material to mention that the applicant / accused is a *police official* whose duty *otherwise* is to ensure sense of security and protection among the people, living under his command area. If a police official is charged with such like offence, it shall not only expose such accused *(police official)* to face such charge / allegation but shall also result in hitting the conscious of *people at large* thereby shacking the security which *otherwise* is assured by Government through Law Enforcing Agencies. Thus, there can be no denial to the legal position that the case of such an accused *(police*

official) would not be considered on same pedestal as that of an *ordinary* accused.

10. The perusal of the record shows that huge amount of bhatta / extortion money was recovered from his possession and as per investigation some of the amount was voluntarily paid by the applicant. The applicant / accused has not established or *least* pleaded any specific malafide on part of the complainant or the police which could justify that complainant or the police was so inimical towards the applicant / accused that such huge amount was arranged only to *falsely* involve the applicant / accused. In absence whereof, mere plea of the applicant / accused to have been falsely involved cannot be considered at bail stage because such stage *only* permits consideration of material, collected by the investigation and not of defence plea which *too* tentatively.

11. Further, the role, acted by the applicant / accused in commission of present offence, *prima facie* appear to be falling within meaning of Section 6 and 7 of ATA, 1997 because after kidnapping the complainant, they kept him under their (applicant's and other police officials) confinement and tortured which resulted in obtaining the huge amount from family of the complainant as *extortion*. The place of detention and torture is not alleged to be an ordinary *place* but a *police station.* The name of *police station normally* should result reflecting a *sacred place* where the innocent should step in with confidence, assurance of security and an action against criminal but if one, in *authority,* uses such place for a complete *different* purpose i.e '*heaven for criminal and hell for innocents'* then the person, alleged to be guilty would not be entitled to discretion to be stretched in his favour as *normally* an ordinary person can insist.

12. As far as arguments of learned counsel for applicant that FIR is delayed, in our view has no weight. As in such a

like cases the people / victim(s) / family(is) ever remain under fear, coercion and compulsion and may not dare to *even* disclose the facts to their elders or community people. It be kept in view that in the instant matter the police official (s) were also accused therefore, reluctance to go to police station was also quite believable because it shall require much dare to report against police official (s) at their own place i.e police station. Same is the position in this case as the complainant has clearly contended that he was encouraged by his relatives, therefore, he got his case registered. In this respect, the delay so caused has been explained plausibly and same is not helpful for the applicant. Each case has its own merits and circumstances, therefore, delay in every criminal case cannot be presumed to be fatal for the prosecution case because, mere delay in lodgment of FIR *alone* is not sufficient to claim release on bail.

14. The huge amount has been shown to have been recovered from the applicant as well as from co-accused and as per charge sheet about 1500000/- have been recovered from all three accused and the said amount being huge was not possible for I.O. or even complainant to arrange and foist against the applicant / accused. In such situation, agony faced by the victim family corroborated by the recovery of extortion money from the applicant and looking to peculiar circumstances of the case, law and order situation in the city we are not inclined to deem it fit case for bail. The offence with which the applicant has been charged falls under prohibitory clause of section 497(i) Cr.P.C. Therefore in our view, instant application is devoid of merits and consequently is dismissed.

15. Needless to mention that the observation made hereinabove are tentative in nature and trial Court would not get influence while deciding the case on merits.

The above are the reasons for short order dated 04.11.2016, whereby instant application was dismissed.

Application Dismissed.

2017 SLD 61

Before: Ahmed Ali M. Sheikh, and
Syed Muhammad Farooq Shah,JJ.

Mrs. Seema Sheerazi ………. Petitioner

Versus

National Accountability Bureau … Respondent

C.P. No. D-133 of 2015 Date of hearings 28 .01.2015

a) National Accountability Ordinance, 1999

Petitioner/accused named above, nominated in Reference bearing No. 21/2014, under Section 18 (g) and 24(b) of the National Accountability Ordinance, 1999, seeks bail from this Court, beside she has made a prayer to quash the aforesaid Reference pending trial before the Accountability Court Sindh at Karachi.

the amount of liability of a borrower has to be determined through judicial disposition by a Civil or Banking Court and once such determination attains finality or is not disputed, the mechanism provided under the NAO, 1999 can be invoked. In the instant case, the quantum of liability has already been determined through a Banking suit mentioned above, therefore, the dicta as laid down in the cited rulings is attracting in all its fours.

Dr. Farogh Naseem, Advocate for petitioner.
Mr. Muhammad Altaf, for respondent.

J U D G M E N T

SYED MUHAMMAD FAROOQ SHAH, J.:- Petitioner/accused named above, nominated in Reference bearing No. 21/2014, under Section 18 (g) and 24(b) of the National Accountability Ordinance, 1999, seeks bail from this Court, beside she has made a prayer to quash the aforesaid Reference pending trial before the Accountability Court Sindh at Karachi.

2. Averments of the captioned petition transpire that the Petitioner namely Mrs. Seema Sheerazi wife of co-accused Muhammad Adnan Sheerazi being a Director and guarantor of ***A.H. International Private Limited*** (**company**) borrowed finance facilities from ***Saudi Pak Agricultural and Investment Company (*****the financial institution*****)*** and the company defaulted in its repayment obligations. The financial Institution instituted a Banking Suit bearing No. 38/2006 before this court, on original side, against the company. The said Suit was disposed of by this court on 22.05.2009, by way of compromise. It is averred that the total outstanding amount as alleged in the said Reference is Rs. 250.515 Million, whereas the Personal Guarantees executed by the Petitioner and two others including her husband in respect of the facilities availed from the Financial Institution was amounting to Rs.109,996,093/- (Rupees One Hundred Nine Million Nine Hundred Six Thousand and Ninety Three only) and Rs. 18,732,438/- (Rupees Eighteen Million Seven Hundred Thirty Two Thousand Four Hundred and Thirty Eight Rupees Only). It is further averred by the Petitioner that the financial facility availed by the company was of Rs. 125.665 Million, whereas the Reference has been made for exaggerated and exorbitant amount of Rs. 250.515 Million. On decree of the suit, the

Financial Institution preferred execution application bearing No. 38/2008; the assets of the company and /or defendants including petitioner were auctioned but the sale proceeds according to the contents of the Reference were not forwarded to the Financial Institution, who preferred a Criminal Complaint in the year 2011 in the Banking Court bearing Criminal Complaint No. 86/2011, which is still pending adjudication. The warrants issued against the Petitioner at pervious address of the Petitioner returned unserved as she was no more residing there. It is further stated that notice dated 14.12.2011 under Section 31- D read with Section 5(r) of the NAB Ordinance was issued to the Petitioner at the incorrect address, hence the Petitioner had no knowledge or intimation of the said proceedings. Thereafter, the State Bank of Pakistan was approached by the Financial Institution vide letter dated 25.01.2012 to issue seven days show cause notice under the relevant provisions of the Ordinance on 28.12.2012. It is stated that show cause notices were dispatched to the Petitioner at the incorrect address and, therefore, the Petitioner could not respond to the same as she was not aware of pendency of instant Reference.

3. It is further averred by the Petitioner that she arrived in Pakistan on 06.12.2014, when she was informed at the airport that her name has been placed on Exit Control List, though Petitioner was never aware of the said Reference and was at her mother's residence on 02.01.2015, when the NAB officials arrested her though she is an ailing lady. The Petitioner has setup number of grounds for quashment of proceedings as well as for concession of bail and stated that she has been implicated in the aforesaid Reference malafidely and contrary to the settled principles of law as she did not commit willful default in absence of *mens rea*. It has further been submitted that Petitioner is a housewife and the Financial Institutions has opted for a Criminal Complaint in addition to the instant Reference only to harass and intimidate her, who

is being tried for the same offence twice at different forums which tantamount to double jeopardy.

4. On the other hand, the NAB (Respondent) in parawise comments, by raising preliminary legal objections have vehemently denied the contents of the instant petition and submitted that the Petitioner was Director and Guarantor of A.H. International (Pvt) Ltd, had committed willful default under Section 5(r) of NAO, 1999 and the Reference has been filed by the Respondent on completion of all codal formalities as provided under Section 5(r) and 31-D of NAO, 1999. It is further submitted that filing of Criminal Complaint does not preclude the NAB authorities from filing instant Reference as NAO, 1999 has overriding effect upon all other laws for the time being enforced. It is further submitted that Petition contains disputed, integrated question of facts, which cannot be decided in extraordinary Constitutional jurisdiction of this Court under Article 199 of the Constitution of Pakistan, 1973; more particularly, the petitioner/accused is nominated with specific role, narrated in paragraphs 3 and 4 of the Reference and para-6 of Investigation Report; that the Petitioner/accused being Director and Guarantor of A.H. International Private Limited, availed finance facility of Rs. 125.665 Million alongwith cost of funds total amounting to Rs. 250.515 Million till December, 2014 from Saudi Pak Agricultural and Investment Company by mortgaging their immovable properties and subsequently committed willful default and did not repay the finance facility availed from Saudi Pak Agricultural and Investment Company; that the Petitioner has played vital role in the commission of the offence, *prima facie* involved in cognizable/non bailable offence of corruption and corrupt practices as defined under Section 9(a) (VIII) punishable under Section 10 of NAO 1999 and there appears reasonable ground for believing that she is guilty of the offence, therefore, not entitled for any relief so claimed.

5. We have considered the arguments advanced by learned Counsel for the Petitioner and learned Prosecutor representing the Respondent/NAB. We have also carefully scanned the material brought on record.

6. Mr. Farogh Naseem, learned Counsel very frankly submitted that the Petitioner did not repay the defaulted and decreetal amount to Saudi Pak but she cannot be treated as "*willful defaulter*" under the ordinance, as envisaged under Section 9 (a)(VIII) read with Section 5(r) of the NAO, 1999. Learned counsel submitted that Petitioner is a household and well-educated lady was unaware of the management of the company and never fully participated in its affairs. Beside she has not been served with a mandatory notice as she was no more residing at the address mentioned in the notice/warrants i.e. *resident of Bungalow No. 30 Saba Avenue, Phase-V, Extension, DHA, Karachi.* While placing reliance on the case of ***Khan Asfand Yar Wali v/s Federation of Pakistan*** (***PLD 2001 SC 607***) it was argued that no prosecution for **willful default** shall be launched before the expiry of 30 days, as statutory notice in addition to seven days' notice shall also be served on the alleged defaulter that she has committed any "**willful default**". The report of Governor, State Bank of Pakistan as to the prima facie guilt or innocence will be subject to the final decision of the Accountability Court. The same procedure will be followed with regard to recovery of other dues falling within contemplation of Section 5(r) of the Ordinance.

7. Conversely, learned Additional Prosecutor General representing the Respondent/NAB argued that the petitioner in collusion with two other accused has committed willful default of huge amount and the mandatory notice has duly been served upon her. It is further submitted that the petitioner was fully aware about the compromise decree drawn by this court in suit No. B-38/2006. It is urged that the prosecution have collected the necessary required evidence to connect the Petitioner in connection of the aforesaid offence, who was

admittedly a working Director in the above said company and the loan/financial assistance to the company has not been repaid, despite execution proceedings initiated on agreed decreetal amount in Suit No. B-38/2006 by this Court. Learned Prosecutor submitted that as per **PISCES/IBMS** Data Base Travel History of Petitioner, entries on her passport No. AD-5127462 shows that she had frequently travelled to Abu-Dhabi/Dubai from Pakistan and made as many as fifty four (54) trips, which includes arrival and departure of disputed period, therefore, contention of learned counsel touching the non-service of notice upon her at the mentioned address is not attracting, particularly, the record shows that through a legal notice dated December 14, 2011, the Financial Institution, Saudi Pak Agricultural and Investment Company Ltd., calls upon the Petitioner and others to pay the outstanding decreetal amount of Rs. 125,664,849/- together with cost of funds as allowed by the Court and to return the misappropriated/stolen hypothetic machinery and equipment within 30 days and the said notice has duly been served through *TCS Express and Logistics*, firstly on 17th December, 2011, received by one Mehboob and a show cause notice under Section 31(D) of NAO, 1999 had also been served upon her. The Petitioner being Director of the Company, *M/s A.H. International Pvt. Ltd* was required to call up within seven days, as to why she should not be proceeded against as a "**willful defaulter**" as defined in NAO, 1999; there was sufficient documentary proof that the said notices were delivered on 29.11.2012 through TCS, received by one M. Bakht, subsequent notice was delivered on 29.10.2012 received by the same person and third notice was also delivered on 31.12.2012 received by one Shareef on behalf of the petitioner being her employee/agent, which is sufficient proof of service of legal notice upon the Petitioner.

8. A perusal of record transpire that Saudi Pak Agricultural and Investment Company Ltd had filed a Suit bearing No. B-38/2006 against Petitioner and others for

recovery of Rs. 125,664,849/- alongwith markup, cost of funds, charges, costs till the date of finalization of whole amount. Record shows that on 22.05.2009, the said suit was decreed against the defendants No. 1 to 4 including the petitioner. The decree drawn by this Court in the aforesaid suit shows that the plaintiff (Financial Institution) and defendants No. 1 to 4 (including petitioner) had filed compromise application under Order XXIII Rule 3 CPC, which was allowed, resultantly, the suit against petitioner and others was decreed as prayed for in the plaint alongwith cost of funds from the date of default till finalization in the following terms:-

> ***"That the Defendants No. 1 to 4 jointly and severally do pay to the plaintiff a sum of Rs. 125,664,849/- alongwith cost of funds from the date of default till finalization.***
>
> ***It is hereby further ordered that an injunction be and is hereby granted against the Defendants No. 1 to 4, their employees, agents or any other person or person acting on their behalf from disposing, charging, alienating or transferring the mortgaged property/ hypothecated assets;***
>
> ***It is hereby further ordered and decreed that in default of the payment to the Plaintiff as aforesaid, the mortgaged property of Defendants mentioned in the Schedule below, or a sufficient part thereof, be sold and that for the purpose of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the Mortgaged Property;***
>
> ***It is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction there from of the expenses of the sale) in payment of the amount payable***

> ***to the plaintiff as aforesaid and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff and such costs, charges and expenses as may be payable under Rule 10, together with such subsequent interest/markup as may be payable under Rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908 and that the balance, if any, shall be paid to the defendants or other persons entitled to receive the same.***
>
> ***SCHEDULE OF MORTGAGE PROPERTY***
>
> ***"Land measuring 10-02 acres and situated at Deh Kalo Khohar Taluka Bola Khan District Dadu (Nooriabad Industrial Estate/Spinning Unit of A.H. International (Pvt) Limited)".***

9. It is an admitted fact that the decretal amount could not be finalized hence the Financial Institution has filed a complaint against the Petitioner and others under Section 20(1)(5) and all other enabling provisions of Financial Institution (Recovery of Finance Ordinance, 2001) and other applicable laws with a prayer to admit the complaint against the Petitioner and four others on consideration of facts stated therein, the warrant was issued against all accused including Petitioner, who is wife of co-accused namely Adnan Sheerazi (Guarantor/Accused) and the said case is proceeding against accused persons under Section 20(1)(5) of the Financial Institutions (Recovery of Finance Ordinance 2001). It shall be advantageous to reproduce hereunder the definition of "**willful default**" as defined by Section 5 (r) of NAO, 1999:-

> *"Section 5(r)*
>
> *"Willful default" a person or a holder of public office is said to commit an offence of willful default under this*

Ordinance if he does not pay or continues not to pay, or return or repay the amount due from him to any bank, financial institution, cooperative society,…. Government department statutory body or an authority established or controlled by a Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions, issued or notified by the State Bank of Pakistan, or the bank, financial institution, cooperative society, Government Department, statutory body or an authority established or controlled by a Government, as the case may be, and a thirty days notice has been given to such person or holder of public office.

Provided that it is not willful default under this Ordinance if such person or holder of public office was unable to pay return or repay the amount as aforesaid on account of any willful breach of agreement or obligation or failure to perform 'statutory duty on the part of any bank, financial institution, cooperative society, government department, statutory body or an authority established or controlled by Government;

Provided further that in the case of default concerning a bank or a financial institution a seven days' notice has also been given to such person or holder of public office by the Governor, State Bank of Pakistan;

Provided further that the aforesaid thirty days or seven days' notice shall not apply to cases pending trial at the time of promulgation of the National Accountability Bureau (Amendment Ordinance, 2001)".

10. Mandatory condition prescribed for commencing, initiating or conducting any inquiry, investigation or proceedings, *inter-alia*, in respect of "**willful default**" was a

Reference from Governor, State Bank of Pakistan. The Reference available on the record has duly been made by the Chairman with a reference, in view of Supreme Court's decision in **Khan Asfand Yar Wali's case (PLD 2001 SC 607)**, which laid down the procedure to be followed in pending cases by the Accountability Courts. Provisions of Section 31(D) of the Ordinance reads in the following words:-

> ***"Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from the Governor, State Bank of Pakistan;***
>
> ***Provided that cases pending before any Accountability Court before coming into force of National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan".***

11. We have opportunity of examining the effect of judgment reported as ***PLD 2004 Karachi 638*** in the case of ***Asim Textile Mills Limited v/s. National Accountability Bureau***, it was held that in order to harmonize the provisions of two legislation, the amount of liability of a borrower has to be determined through judicial disposition by a Civil or Banking Court and once such determination attains finality or is not disputed, the mechanism provided under the NAO, 1999 can be invoked. In the instant case, the quantum of liability has already been determined through a Banking suit

mentioned above, therefore, the dicta as laid down in the cited rulings is attracting in all its fours.

12. So far as the contention of Dr. Farough Naseem relating to the principle of double jeopardy is concerned, it is an admitted position that neither the trial before the competent forum has been commenced nor same has been concluded on conviction of the petitioner, therefore, the pre-condition for attracting the principle of double jeopardy that there must have been an earlier trial of the accused seeking protection under second trial for the offences charged is not available. It is also an admitted fact that there was no earlier trial against the petitioner which was culminated on her conviction as Article 13(a) of the Constitution of Pakistan read with section 403 Cr.P.C. and section 26 of the General Clauses Act stipulates that no person can be vexed twice and prosecuted or punished for the same offence. It appears that petitioner was guilty of offence under another enactment, therefore, through same chain of facts she can be tried, convicted and punished under vary offence committed by her as held by the Apex Court in the Case of **Muhammad Nadeem Anwar V/S Security Exchange Commission of Pakistan (2014 SCMR 1376 = 2014 CLD 873).** The learned Prosecutor has rightly contended that there was no earlier trial of the same crime sought to be proved in the second prosecution/trial; as to establish double jeopardy, it was incumbent upon the petitioner to show that earlier trial have been conducted by the Court of competent jurisdiction and the trial have been ended in a judgment of conviction or acquittal. Therefore, the argument of learned counsel touching the principle of double jeopardy is not attracting in the facts and circumstances of the present case.

13. It is not out of context to mention here that the amount of liability of borrower has to be determined through judicial pronouncement by civil or Banking Court and once such determination attains finality or is not disputed, the

mechanism provided under the NAB Ordinance, 1999 can be invoked. For the sake of reference placitem (a) in the case of ***Asim Textile Mills ltd. V.s NAB***(PLD 2004 Karachi 638) is reproduced as under:-

> "*Ss. 25-A & 5(r) ---Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), Ss.7 (4) & 4---Settlement of disputes---Procedure---Amount of liability of a borrower has to be determined through judicial disposition by a Civil or a Banking Court and once such determination attains finality or is not disputed, the mechanism provided under the National Accountability Ordinance, 1999, can be invoked.*"

14. Crux of the aforementioned discussion is that joint and several liabilities of the petitioner being a borrower has been determined through judicial disposition as the compromise decree drawn by this Court in the Banking Suit against the petitioner and three other judgment debtors attained finality; the petitioner and others were jointly and severally held liable to pay sum of Rs.125,664,849/- alongwith cost of the fund from the date of default till finalization, therefore, following the dictum in the case of Asim Textile Mills, mentioned as supra, the mechanism provided under NAO 1999 can be invoked.

15. In view of whatever mentioned above, we reached at the irresistible conclusion that loan amount released by the Financial Institution has not been repaid by the petitioner and others, which constitutes an act of "willful default", therefore, it will be unsafe to quash the proceedings of a case *subjudice* before the Accountability Court. So far as bail plea of the Petitioner is concerned, prima facie, the allegations leveled against the Petitioner or in her capacity being Director of the Company to repay the outstanding dues advanced as a

loan facility, has been admitted in compromise application in Suit No. 38/2006. Suffice it to say that huge decretal amount of financial institution is outstanding against the petitioner and others; they were fully aware about such decretal amount and defaulted willfully, intentionally and deliberately to repay the same. In the mentioned circumstances of the case, the Petitioner is not found entitle for the relief claimed through instant petition including concession of bail. Resultantly, the petition is dismissed. However, the trial Court is directed to expedite the trial and conclude it at an earliest, preferably within a period of three months under intimation to this Court through M.I.T-II.

16. Before parting with the order, it needs not to make clarification that the observations recorded above are tentative in nature and relevant for the purpose of the instant Petition, therefore, the trial court shall not be influenced in any manner whatsoever.

2017 SLD 73

Before: Ahmed Ali M. Sheikh
and Muhammad Saleem Jessar, JJ

Muhammad Umair & others …… Appellants

Vs

The State….. Respondent

Criminal Special Anti-Terrorism Appeal No. 294 of 2015, Appeal No. 295 and 296 of 2015, AppealNo. 297 & 298 of 2015

(a) Criminal trial..

…. Plea of accused.. **The accused is not required to prove his plea / version as the prosecution is *required* therefore, even if the accused fails to establish his plea / version to satisfaction of the Court yet the plea *otherwise* leaves chances of its being *true* if is examined in comparison with prosecution case then the same has to be accepted … the prosecution could not be benefited from the failure or inability of the defence. [73]**

(b) Criminal trial...

….. An offence to be proved needs corroboration … **It is well settled principle of law mere saying of word from the mouth of the complainant does not constitute any offence unless corroborated by tangible evidence. [73]**

(c) Criminal trial...

….. Benefit of doubt … It **is settled principle of law that to extend benefit of doubt there is no necessity to gather many circumstances but even if slightest doubt arises out of prosecution case, is sufficient to extend the benefit of doubt to the accused. [73]**

Mr. Bashir Ahmed Mirani Advocate.
Mr. Muhammad Iqbal Awan, Assistant Prosecutor General Sindh.
Dated of hearing : 23.11.2016
Date of decision : 23.11.2016

J U D G M E N T

Muhammad Saleem Jessar, J: - By this common Judgment, we intend to dispose of five captioned ATA appeals, arose out of one and the same Judgment dated 24.11.2015, rendered by learned Special Judge, Anti-Terrorism Court No.X, Karachi in Special Case No.B-605/2014 emanating from crime

No.376/2014 U/s 353, 324, 34 PPC r/w section 7 ATA, 1997, Special Case No.B-606/2014 emanating from Cr.No.377/2014 U/s 23(1)-A, Sindh Arms Act (hereinafter referred to as Act, 2013), Special Case No.B-607/2014 bearing Crime No.378/2014 U/s 4/5 Explosive Substances Act, 1908 (hereinafter referred as Act, 1908) r/w section 7 of Ant-Terrorism Act 1997 (hereinafter referred to as Act, 1997), Special Case No.B-608/2014 bearing Crime No.379/2014 U/s 23 (1)-A of Sindh Arms Act, 2013 and Special Case No.B-609/2014 U/s 4/5 Explosive Substance Act r/w section 7 ATA, 1997, all registered with P.S. CID Karachi, whereby the appellants Muhammad Umair and Muhammad Owais have been convicted for offence u/s 353, 324, 34 PPC r/w 6(2) (d) punishable u/s 7(b) of ATA, 1997 and sentenced to suffer R.I. for 10 years each, U/s 4/5 Explosive Substance Act r/w 6(2) (ee) and 7(ff) of ATA, 1997 to suffer R.I. for 14 years each. They have also been convicted u/s 23(i) A Sindh Arms Act, 2013 and sentenced to suffer R.I. for 07 years with fine of Rs.20,000/- each, in default to suffer S.I. for six months each. However all the sentences have been ordered to run concurrently in terms of section 397 Cr.P.C besides, benefit of section 382-B Cr.P.C has also been extended to them. The appellants being aggrieved by and dissatisfied with the common Judgment dated 24.11.2015 have assailed same before this court by means instant appeals.

2. The crux of prosecution case as unfolded by complainant SIP Fida Hussain Leghari are that on 09.10.2014 he along with police party left P.S. under D.D entry No.29 at 2200 hours for patrolling during which when they reached within the jurisdiction of Shershah, he received spy information on telephone that five culprits of Lyari Gang war involved in heinous crimes are available near Tiger Kaanta Shershah Road Karachi, proceeded and reached at the pointed place at 12.30 a.m and saw 05 suspicious persons there, who on seeing police party started firing upon them with intention to commit their murder. The police party retaliated the same

and then succeeded to apprehend two culprits while 03 made their escape good. On inquiry, apprehended accused disclosed their names as Umair @ Abid and other as Muhammad Umair. During personal search of accused Muhammad Umair, police recovered one Kalashankov alongwith loaded magazine containing 09 rounds and 01 round in the chamber as well as two Hand Grenades from pocket of his shirt/ kameez. One 30 bore pistol alongwith loaded magazine containing 02 rounds as well as 02 Hand Grenades were recovered from accused Muhammad Owais. Both the accused failed to produce licenses for their respective weapons. They were arrested on the spot and were taken to P.S. alongwith recovered property where FIRs mentioned above were registered.

3. After registration of case, police conducted investigation and after completion of legal formalities submitted charge sheet before the court having jurisdiction. Learned trial court supplied the requisite papers to appellants/convicts in terms of section 265-C Cr.P.C vide receipt at Ex.2 & 3. Learned trial court amalgamated all five cases.

4. After observing codal formalities, the learned trial court framed a joint charge against the appellants at Ex.8 to which they pleaded not guilty and claimed to be tried vide their pleas at Ex.08/A and 08/B.

5. To prove its charge, the prosecution examined P.W.1 complainant SI Fida Hussain Ex.09, who produced Roznamcha entry No.29 at Ex.09/A, Memo of arrest and recovery at Ex.09/B, copies of FIRs No.376/2014, 377/2014, 378/2014, 379/2014 and 380/2014 at Ex.9/C to Ex./09/G, roznamcha entries at Ex.9/H to 09/L, memo of inspection of place of incident at Ex.09/M, P.W.02 ASI (BDU) Syed Laeeq was examined at Ex.10, who produced letter to SSP Special branch at Ex.10/A, Clearance Certificates at Ex.10/B and 10/C, Roznamcha entry No.44 and 47 at Ex.10/D and 10/E, Final inspection Report of hand Grenades at Ex.10/F and

10/G,P.W.03 HC FazalSardar at Ex.11, P.W.04 PI/IO Syed Waqar Ali at Ex.13, who produced Roznamcha entry No.37 and 40 at Ex.13/A and 13/B, Letter dated 11.10.2014 at Ex.13/C, letter dated 12.10.2014 at Ex.13/D, Letter to AIGP dated 30.10.2014 at Ex.13/E, letter to AIGP dated 30.10.2014 at Ex.13/F, Orders of Home Department seeking permission Explosive Substance Act at Ex.13/G & 13/H, Examination Report dated 22.10.2014 at Ex.13/I and then closed its side vide statement Ex.14.

6. Appellants were examined under section 342 Cr.P.C at Ex.15 and 16 whereby they have denied prosecution allegations and claimed to be innocent. They, however, did not examine themselves on oath nor led any defence evidence.

7. After full-dressed trial and having heard prosecution as well as the defence, the learned trial court vide its Judgment dated 24.11.2015 convicted and sentenced the appellants as stated above.

8. Mr. Bashir Ahmed Mirani, learned counsel for the appellants has argued that the appellants were arrested by the police after alleged encounter on 10.10.2014 although police party was equipped with automatic weapons and the appellants allegedly were also armed yet none from police party or even their vehicle had sustained scratch. He further submitted though the weapons were seizure on 10.10.2014 but were sent to Forensic Laboratory on 16.10.2014 and no plausible explanation has been furnished by the police for causing such an inordinate delay. He further submitted that complainant deposed in his statement that mashirnamas / memos and the FIR were drafted by PC Faisal, who has not been made / cited as witness of the proceedings. Learned counsel further argued none of the police personnel had ever deposed regarding the number of fires/ rounds spent /fired during alleged encounter. He further has drawn our attention towards 161 Cr.P.C statements of the P.Ws, nowhere they

have disclosed that they have fired certain number of rounds. His above contention is supported by the record particularly memo of recovery and memo of visiting of place of incident as nowhere it is mentioned that certain number of empties, besides quantity of the empties allegedly fired by the appellants, is mentioned. He further submitted Grenades allegedly secured from the possession of the appellants were without detonator and explosive substance, therefore, same being without explosive material could not have been blasted rather presumption can be drawn that the police in order to strengthen the rope of their false accusation had foisted upon them certain artificial Grenades which do not constitute any offence in terms of section 4 & 5 of the Explosive Substance Act r/w section 6(2) (ee)/ 7 (ff) of ATA, 1997 . He has further focused that the alleged Grenades were not sealed by the complainant on spot nor specific certificate duly issued by the Armor Expert to the effect that the weapons allegedly recovered from the appellants were in working condition or not. Lastly he prayed that prosecution has miserably failed to prove its case beyond any reasonable shadow of doubt against the appellants and the trial court has not appreciated the defence version and the major discrepancies in the prosecution evidence thus has erred by awarding capital punishment to the appellants. According to him, the impugned Judgment being illegal, capricious, scandalous is liable to be set-aside therefore, he submitted that by setting aside the impugned Judgment appellants may be acquitted from all the charges as it is settled *dictum* of law that if slightest doubt arises in the prosecution case, same is sufficient to discard the prosecution allegations and this case is best one in which benefit of doubt can be extended.

9. Mr. Muhammad Iqbal Awan, learned A.P.G appearing for the State after finding such major contradictions and discrepancies in the prosecution evidence particularly after going through the Forensic Laboratory report showing the Grenades being without substance and detonator and in

absence of the particular certificate issued by the Expert, the weapons allegedly recovered were in working condition or not could not controvert the submissions advanced by learned defence counsel. However, he halfheartedly supported the impugned judgment.

10. We have heard learned counsel for the parties and scanned the record anxiously.

11. Before assessment of evidence as well as allegations contained in the FIRs, it will be essential to reproduce the charge as it (*charge)* is joint one, relating and covering main and *off-shoot* cases, which reads as under:-

CHARGE

I, Abdullah Afzal Khan, Judge, Anti-Terrorism Court No.X Karachi, do hereby charge you:-

01. Muhammad Umair son of Meva Khan.

02. Muhammad Owais son of Mansoor Ali.

as follows:-

That on or about 10.10.2014, at about 0030 hours near Tiger Kanta Shershah Road, Karachi you alongwith absconding accused persons namely Hameed Pathan son of Muhammad Munir Khan, Aamir Dollar son of Iqbal, Jamil Changa son of not known being armed with deadly weapons made direct firing upon police party headed by SIP Fida Hussain with intention to take their lives and deterred them from discharging their lawful duties and officials functions and by this act you also created terror, panic, sense of fear and insecurity in the mind of complainant as well as the general public and that thereby, you have committed an offence punishable u/s 353/324/34 PPC r/w 6(d)/7(b) of ATA 1997 and within the cognizance of this Court.

I, further charge you accused ***Muhammad Umair*** *that on the above said date, time and place you were arrested by the same police party after the encounter and* ***01*** *unlicensed* ***Kalashnkov*** *alongwith loaded magazine containing 10 live rounds were recovered from*

your possession in the presence of mashirs as such you have committed an offence punishable u/s 23(i) A Sindh Arms Act and within the cognizance of this court.

I, further charge you accused ***Muhammad Umair*** *that on the above said date, time and place you were arrested by the same police party after the encounter and* ***02 Hand Grenades*** *were recovered from your possession in the presence of mashirs for which you had no legal lawful authority to keep them or possess as such, you have committed an offence punishable u/s 4/5 Explosive Substance Act r/w 6(2) (ee)/7(ff) of ATA, 1997 and within the cognizance of this court.*

I, further charge you accused ***Muhammad Owais*** *that on the above said date, time and place you were arrested by the same police party after the encounter and* ***01*** *unlicensed* ***30 Bore Pistol*** *alongwith loaded magazine containing 03 live rounds were recovered from your possession in the presence of mashirs as such, you have committed an offence punishable u/s 23(i) A Sindh Arms Act and within the cognizance of this court.*

I, further charge you accused ***Muhammad Owais*** *that on the above said date, time and place you were arrested by the same police party after the encounter and* ***02 Hand Grenades*** *were recovered from your possession in the presence of mashirs for which you had no legal lawful authority to keep them or possess as such, you have committed an offence punishable u/s 4/5 Explosive Substance Act r/w 6(2) (ee)/7(ff) of ATA, 1997 and within the cognizance of this court.*

And I hereby direct that you be tried by this court on the aforesaid Charges.

Given under my hand and seal of this court, this 18th day of June, 2015.

Sd/ Judge,

From perusal of aforementioned charges, it will be beneficial to reply categorically to each charge. In first para of the

charge, learned Judge had charged the appellants for making fires upon police party headed by SIP Fida Hussain with intention to take their lives and deterred them from their lawful duties and thereby they allegedly had created terror, panic sense, fear and insecurity in the mind of complainant as well as the general public.

12. The complain offence must have resulted in creating a sense of fear or insecurity in the society and created a serious risk to safety of the public or a section of the public or was designed to frighten the general public and thereby prevent them from coming out and carrying on their trade and daily business and disrupt their civil life. In short, if an offence of less punishment, can well fall within meaning of ***'terrorism'*** while one of *capital punishment* may escape if while determination former is found to have been designed to frighten the general public thereby disrupting *civil life* and same is found missing in *later* case. Reference can well be made to the leading case(s) on this point which is:

'ShoukatBaig v. ShahidJamali' (PLD 2005 SC 530)

> "11. After having gone through the provisions as contained in section 6 of the Act we are of the firm opinion that 'terrorism' means the **use or threat of 'action'** where the 'action' falls within the meaning of subsection (2) of section 6 of the Act and creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby **prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civil life** shall amount to terrorism as enumerated in section 6 of the Act.

13. Per prosecution case the alleged offence had occurred in odd hours of the night when none amongst the public was

available nor had felt any fear or terrorism while observing the existence of appellants as none from public was attracted or even claimed by prosecution to have been there. Neither the appellants had displayed the alleged ammunition and explosives nor it has been established in evidence that in order to create terror and panic situation among the public, the appellants had displayed the same, thereby had committed offence in terms of ATA, 1997 (ibid). Therefore, the first part of the charge in terms of **Subsection (2)(i) of the Section 6 of the Act, 1997** had not been established by the prosecution, therefore, the appellants cannot be punished in terms of section 7(b) of the Act, 1997.

14. As regard allegation of *encounter* , involving attempt to commit Qal-i-Amd and deterring police party from performing its duties, it appears that to prove this the prosecution has relied upon the statement of complainant and the P.Ws who have supported the version of FIR in *toto*. At this point, we would take a pause to *first* say that mere narrating the prosecution story in *too* is never sufficient to hold the *burden* of a conviction because the requirement of law is always that '*no conviction could sustain unless it stands the test of* being **direct, natural and confidence inspiring'.** Each word must *always* be given its due meaning and importance. A *direct* evidence if *otherwise* does not appear to be **'natural'** and **'confidence inspiring or unimpeachable'** shall not be sufficient to convict an accused because Criminal Administration of Justice is based on the maxim, *"it is better that ten guilty persons be acquitted rather than one innocent person be convicted'*. This appears to be the reason, which *now* become a well embedded principle of law, that **'a reasonable doubt'** is always sufficient to acquit the accused'. The reliance can well be placed on the case of *Muhammad Nawaz v. State* 2016 SCMR 267 wherein case of *AyubMasih* (PLD 2002 SC 1048) was referred as:

> *"... 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 Ahmed (PLD 1973 SC 418) that this rule is antitheses 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 Prohphet (p.b.u.h) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."*

Resuming, the discussion what is *quite* evident from perusal of the evidence that though the complainant narrated contents of FIR but such *narration* (evidence) *prima facie* does not appear to be **'natural or confidence inspiring'** for reasons that "despite alleged claim of an *encounter* neither any of the

police officials nor vehicle (police mobile) received a single scratch" although accused persons allegedly made firing with *lethal* weapons, including Kalashnikov. As per allegations, the police party was attacked upon at the hands of the appellants and in order to prove their allegations they were required to collect some tangible evidence yet they have miserably failed to bring concrete material against the appellants. The version of complainant of FIR as well as their respective memos and the statements of the witnesses, nowhere they have uttered a word that in retaliation they had fired certain number of rounds and suffice to say not a single empty spent by the complainant party has been collected by the I.O. during investigation even they have miserably failed to show that they were laced with certain particular weapons. Further to meet their accusation, the presence of the complainant party at relevant place and time was essential and in absence of any scratch or injury on their part, their allegation is baseless and the factum regarding alleged encounter has also not been proved. Besides, arrest of two of the accused persons out of *five* by police without being hurt / injured or having any other reason when other three under same situation made their escape good; non recovery of *empties* from place of incident. These all are *circumstances* which do not let the prosecution story worth believing for a *prudent* mind. Therefore, charge to such an *extent* fails to stand well with the required test. Though, in law failure of defence has never been sufficient to hold one guilty because it is settled principle of law, it is the duty of the prosecution to prove its accusation and the prosecution could not be benefited from the failure or inability of the defence.

15. Further the complainant had deposed before trial court that mashirnamas as well as FIR was drafted by PC Faisal who has not been made as a witness of the occurrence. If memos were drafted by PC Faisal then he should had been with police party at relevant time because the memos as alleged, were prepared on spot but even the presence of PC Faisal has

not been justified either in their departure entry, the memos or FIR. In such situation presumption would be that no offence as alleged had taken place and they have completed all the paper formalities at their police station or least brought serious doubt over manner of happening of the alleged incident which was brought into *black & white* (mashirnama of arrest and recovery). One of PWs namely HC Fazal Sardar who is mashir of the memos of recovery and arrest had deposed in his chief (available at page 113 A of the paper book) as under:-

> *"The recovered Hand Grenades were kept by SIP Fida Hussain in his possession. The memo of arrest and recovery were prepared by SIP Fida Hussain and obtained my signature as well as signature of PC Muhammad Amir on it. I see Ex.9/B and say, it is same, correct and bears my signature"*

16. The above version of an alleged eyewitness not only belies the version of complainant rather supports the defence plea and thus in such a situation we are of the considered view that no such incident has ever occurred in a manner as reported. The above glaring aspect of evidence clearly proves that prosecution has miserably failed to prove its charge against the appellants in terms of first para of the charge and defence, *set forth* by accused, appears to be having much weight. It is necessary to add here that the accused is not required to prove his plea / version as the prosecution is *required* therefore, even if the accused fails to establish his plea / version to satisfaction of the Court yet the plea *otherwise* leaves chances of its being *true* if is examined in comparison with prosecution case then the same has to be accepted. Reliance is placed on the case of Inayat Ali v. Shahzada 2008 SCMR 1565 wherein it is held that:

> "It was held by this Court in the case of Ashiq Hussain alias Muhammad Ashraf v. The

> State PLD 1994 SC 879 that all the factors favouring belief in the accusation must be placed in juxtaposition to the corresponding factors favouring the plea in defence and the total effect should be estimated in relation to the question, viz. is the plea / version raised by the accused satisfactorily established by the evidence and circumstances appearing in the case. If the answer be in affirmative, then Court must accept the plea of the accused and act accordingly. If the answer to the question be in the negative, then the Court will not reject the defence plea as being false but will go a step further to find whether or not there is yet a reasonable possibility of defence plea / version being true. **If the Court finds that although the accused has failed to establish his plea / version to the satisfaction of the Court but his plea might reasonable be true, even then the Court must accept his plea and acquit or convict him accordingly.**

17. Though, it is well settled principle of law that recovery, being a *corroborative* peace of evidence, would be **relevant** only where *primary* evidence i.e ocular account stands well with the test of being **'confidence inspiring'** which is not so in the instant matter. Reference may be made to case of *Muhammad Nawaz* 2016 SCMR 267. However, since prosecution came forward with *independent* charge for such evidence (recovery) therefore, let's examine this too although *legally* such recovery (*off-shoot)* in a joint-charge will not stand independently. The alleged weapons, recovered from possession of the appellants, were not certified by the Forensic

Laboratory or any Expert whether they are in working condition or not.

In this regard reference can be made to the case of Rahim Bux Vs. The State (2010 P Cr. L J 642 (Quetta)). The relevant portion of para 4 of the Judgment of Rahim Bux (ibid) is as under:-

> ***"It is well-settled proposition of law that conviction under section 13-D of Arms Ordinance could not be maintained unless the weapons allegedly recovered were sealed at the spot and the opinion of Forensic/Ballistic Expert is produced on record to prove that the weapons so recovered were, in fact, functional and that the said weapons fell within the category of weapons exclusively triable by the Special Court S.T.A. Reference may be made to case-law reported as "loung through Superintendent Central Prison, Hyderabad v. The State 1999 P Cr. L J 595 and Sajjan v. The State 1998 P Cr. L J 1399".***

In case of Imamuddin v. The State reported as 2005 YLR 845 (Karachi), whereby Divisional Bench of this court had also held as under:-

> ***"12. Next, it would be seen that the KK in question was not sent for any test to ensure that it was in a working condition".***

In case of Riaz Hussain Kalhoro v. The state (2004 P Cr. L J 290) Divisional Bench of this court had also held that in absence of Expert's opinion regarding the weapon was functional or to be the weapon fell to be a Kalashankov therefore, recovery was held doubtful. The relevant portion of Judgment (ibid) reads as under:-

"It is well-settled proposition of law that the conviction under section 13-D, Arms Ordinance could not be maintained unless the weapon allegedly recovered was sealed at the spot and the opinion of Forensic/Ballistic

Expert is produced on record to prove that the weapon so recovered was, in fact, functional and the said weapon fell to be a Kalashnikov. *The non-association of private witnesses is also lacking in this case, as no efforts were made to join the people of public so as to comply with the mandatory provisions of section 103, Cr.P.C as the place of recovery is surrounded by so many houses as stated by the prospection witness."*

So in the light of above Judgments and in view of inherent defect on factual side in prosecution case, we are of the opinion that recovery of alleged KK from the appellants is doubtful and cannot be based for sustaining conviction against them in terms of section 23 (i) (A), Sindh Arms Act, 2013.

19. As far as authenticity of the allegations, perusal of memo of recovery and arrest followed by FIR nowhere it is contended that the alleged Kalashankov was having any folding stand but in his cross, complainant / P.W.1 (at page 69 to 69/A) replied in following terms;-

> *"It is correct that it is not mentioned in Ex.9/A that we were available at Shershah Road. It is correct that I received spy information at about 12:20/22 a.m. It is correct that neither any person got injured nor any property / vehicle got damaged due to exchange of firing. I did not make any fire shots during exchange of firing. It is correct that I did not mention the names of the police officials who made fire shots at the culprits. It is correct that place of incident is situated at thickly populated area but it was night time so, nobody was present at the place of incident. Ex.9/B was prepared by Munshi PC Faisal and his name is not mentioned in Ex.9/B. It is incorrect that I rubbed the numbers of recovered SMG. It is not necessary to mention that number of recovered ammunition whether existing or not on the surface of ammunition. It is correct that recovered SMG is having shoulder*

stand. It is correct that it is not mentioned in Ex.9/B that recovered SMG had shoulder stand. The number ARGES Hdgr-69 existing on the recovered Hand Grenades is not mentioned in Ex.9/B. I had taken 4/5 minutes to prepare Ex.9/B. I do not know the number of duty officer when I reached back at P.S. PC Munshi Faisal drafted all these five FIRs"

20. That P.W 3 HC FazalSardar (Ex.11) was examined before learned trial court and in his examination he had deposed in following terms. The relevant portion of his examination in chief is taken from page 113/A of paper book.

"*The recovered Hand Grenades were kept by SIP Fida Hussain in his possession. The memo of arrest and recovery was prepared by SIP Fida Hussain and obtained my signature as well as signature of PC Muhammad Amir on it. I see Ex.9/B and say, it is same, correct and bears my signature"*.

While P.W. Fida Hussain had deposed (ibid) that the mashirnamas were handed down by Munishi PC Faisal and his such version has categorically been blied by this P.W and throughout his contention HC FazalSardar had not deposed or replied in his cross that PC Faisal was with them and handed down the memos as deposed by P.W. Fida Hussain. In his cross at page 115 of the paper book, he had replied as under;-

" The recovered ammunition was without numbers. The recovered ammunition was local made. The recovered ammunition was in black colour. It is correct to suggest that the number existing on Kalashankov is rubbed but we recovered the same Kalashnkov from the accused persons in rubbed condition. It is correct to suggest that recovered Hand Grenades were not used by the accused persons during police encounter.

21. The perusal of deposition of P.W. FazalSardar reveals, nowhere he had contended that the alleged Hand Grenades were containing particular number on its body although he is the person who allegedly was present at the time of recovery and ammunition but he even is ignorant of entire proceedings.

P.W.4, Inspector Syed Waqar Ali Shah, who was examined by the prosecution at Ex.13 had deposed in his examination in chief, the relevant para is taken from page 119 of the paper book which reads as under:-

> "*I received ammunition, bullets, empties, in sealed conditions while recovered Hand Grenades were in open condition, as well as the custody of both accused persons.*

In his cross at page 121 of paper book had replied as under:-

> *"It is correct to suggest that the recovered Hand Grenades were in open condition and I received the recovered Hand Grenades in carton box.*

The P.W.2 ASI Syed Laiq Shah, BDU (Ex.10) deposed in his examination in chief (page 99 of the paper book) as under:-

> *"On 17.10.2014 I was posted at Bomb Disposal Unit in Sindh South Zone, Karachi as Admin Incharge. On that day, I received a letter from Inspector Syed Waqar Shah of CID/AEC Sindh, Karachi wherein he requested for inspection of recovered Hand Grenades in Crime Nos. 378/2014 and 380/2014. I produce the said letter at Ex.10/A. On 21.10.2014 I went to Police Station at about 1800 hours for inspecting the recovered Hand Grenades. After reaching there, Inspector Waqar Shah handed over four hand Grenades to me. I checked Hand Grenades and found the recovered Hand Grenades as ARGES-69 without detonators and having Green colour made of plastic bodies. I safe sealed the two recovered Hand*

Grenades and returned back the same to Inspector Waqar Shah, and issued such clearance certificate in this regard".

In his cross, he has replied as under:-

"*It is correct that Inspector Waqar Shah handed over recovered Hand Grenades to me in plastic shopper which were not sealed. I defused the said Hand Grenades accordingly. I sealed the recovered Hand Grenades after inspecting them and handed over the same to Inspector Waqar Shah."*

22. Per prosecution case, the alleged weapons as well as Hand Grenades were secured by the police on 10.10.2014 but the examination report of Firearm Examination Unit, Karachi reflects same were received by them on 16.10.2014. The prosecution has no explanation for keeping the ammunition in their custody for about six days although the Forensic Office also situates in the City.

23. The alleged Hand Grenades, as per their cross containing the certain particular number but the same was not mentioned in the seizure memo vide Ex.9/B or in the FIRs even their statements are silent in this regard. The Forensic report is also negative and in such state of affairs it appears that the police in order to get shield from their superiors and to strengthen rope of their false case have cooked up the instant long bulk story which has no independent legs to stand upon. The material collected by the I.O. during investigation is not tangible and in such a situation entire episode of prosecution case is clouded with doubts therefore, conviction cannot be sustained upon a flimsy accusation.

24. As far as the recovery of alleged Hand Grenades is concerned, admittedly same were without detonators and having no explosive substance. Further as per deposition as well as cross of the P.Ws (ibid), it appears that nothing was

recovered from their possession and therefore, no offence in terms of section 4/5 of Explosive Substances Act, 1908 was committed by the appellants.

25. The appellants during trial had took plea that they had no nexus with the present recoveries and the case as alleged but in fact on 06.10.2014, they were present in Eidgah Ground for performing Eid prayers, meanwhile Rangers officials captured them and subsequently kept in their custody for four days. Thereafter they handed over them to police officials who in turn had made demand of Rs.200,000/- as bribe which they could not pay and consequently the police implicated them in these false criminal cases by foisting the ammunition and this is what they have been dragging in the prosecution. While replying to question 8 of their statement u/s 342 Cr.P.C they had also repeated the same plea as above.

26. It is well settled principle of law mere saying of word from the mouth of the complainant does not constitute any offence unless corroborated by tangible evidence. In the instant case entire episode of the prosecution is clouded under doubts in wake of the major discrepancies and contradictions on the point of their being availability at relevant time has caused dent to the prosecution evidence.

27. As far as recovery of Hand Grenades is concerned, the same as deposed by the P.Ws, were without detonators and explosive substance. Per their evidence, the weapons were sealed on spot and non-sealing of the Hand Grenades on spot raises questions as to its veracity. Moreover the Hand Grenades were retained by whom has also not been explained by the prosecution that after its recovery under whose custody, they were lying. The Expert from Bomb Disposal Unit had inspected the Hand Grenades on 21.10.2014 though same were recovered on 10.10.2014 and from 10.10.2014 to 21.10.2014 i.e. the period of about 11 days is also questionable. The Forensic Laboratory reveals that the

weapons viz. KK, pistols and the bullets with empties were received by the Laboratory on 16.10.2014 after the delay of about six days.

28. All above circumstances had proved that neither the incident as alleged, had taken place nor the recoveries, as shown, were effected from the possession of the appellants and all above exercise carried out by the police themselves itself shows to be fake, fabricated and engineered one. It is settled principle of law that to extend benefit of doubt there is no necessity to gather many circumstances but even if slightest doubt arises out of prosecution case, is sufficient to extend the benefit of doubt to the accused. In the instant case in view of the discussion whatever discussed hereinabove and the material placed before us has constrained to hold that the prosecution has miserably failed to prove its charge against the appellants beyond any reasonable shadow of doubt. Consequently all the Spl. Cr. A.T. appeals No.294, 295, 296, 297 and 298/2015 are allowed. The impugned Judgment dated 24.11.2015 is set aside. These are the reasons for our short order dated 23.11.2016, whereby appellants were ordered to be released if not required in any other case.

The Cr. A.T. Appeals No.294, 295, 296, 297 & 298 of 2015 are disposed of in the above terms.

Disposed Of

2017 SLD 93

Present: Ahmed Ali M. Sheikh
and Muhammad Saleem Jessar, JJ

Pirzada @ Peer .. Appellant

Versus

The State .. Respondent

Criminal Special Anti-Terrorism Appeal No. 191 of 2015,
Decided on 27th October, 2016

(a) Law of evidence..

.... Corroborative evidence, defined .. **Corroborative evidence means evidence of someone else other than the eye-witness whose evidence is needed to be corroborated.. [p.25]**

(b) Criminal trial ..

..... Heinous nature of crime should not influence the courts ... **Mere heinous or gruesome nature of crime in, *no way,* should influence the Court (s) in favour of the prosecution nor should result in relaxing prosecution from its mandatory duty to prove the charge through *unimpeachable* evidence which too beyond shadow of doubt. [p.31]**

JUDGMENT

Muhammad Saleem Jessar, J: - Appellant Pirzada alias Peer has assailed his conviction and sentence awarded to him by learned Judge, Anti-Terrorism Court No.5, Karachi in Special Case No.A-157 of 2014, re. State Vs. Pirzada alias Peer,

which is outcome of FIR No.83 of 2014, under section 392, 354, 324, 34 PPC read with Section 7 of Anti-Terrorist Act, 1997 (hereinafter referred to as the "**Act 1997**"), registered with P.S. SITE, Superhighway, Karachi, whereby the Appellant / convict was found guilty of the charge under Section 324, 34 PPC read with Section 6(2)(d) of Act 1997 punishable under Section 7 (1)(b) of Act 1997, hence was convicted and sentenced to undergo R.I. for 10 years and to pay fine of Rs.50,000/- beside compensation of Rs.50,000/- under Section 544-A Cr.P.C. to be paid to injured Mir Muhammad Rind. In case of default whereof the appellant is to undergo S.I. for one year more, however, learned trial Court has extended benefit of Section 382-B Cr.P.C to the appellant.

2. The crux of prosecution case as unfolded in the F.I.R lodged by complainant Umair Siddiqui on 09.04.2014, whereby he had stated that he is salesman in Nestle Dry Milk Company. He (complainant) along with driver Abdul Hameed and guard Atiq had left in a vehicle bearing registration KP-9752; after making supply in Faqeera Goth, Scheme-33, Karachi they were proceedings towards Gulshan-e-Maymar. When at about 1140 hours, they reached at Katcha-Pakka road opposite Areesha Tower Scheme No.33, Karachi, three persons, riding on one motorcycle, came from their behind, who were appearing to be Pathans and were armed with T.T. Pistol, they compelled them to stop their vehicle. Following which on gun point, they robbed cash amount of Rs.5500/- and a mobile phone bearing SIM No.0312-3161165, having IMEA No.011769008117456, from the complainant. Meanwhile, one car duly boarded with police personnel had come from front side. The Police personnel accosted to culprits and asked them to surrender the weapons, but the culprits instead fired upon Police Party boarded in the car aims to commit their Qatl-i-Amd, the Police had also retaliated. Due to exchange of firing, one head constable Mir Muhammad sustained bullet injury on his person at the hands of accused while one of the companions

of the accused persons had also sustained firearm injury and consequently, succumbed to injuries. In the meantime other police mobile headed by SIP / SHO Rana Haseeb Ahmed and ASI Mairaj Anwar together with their staff rushed there. The accused after sustaining injury on his person as bullet had become stuck in his pistol also fired at police mobile with help of his other accomplices. The Police party also fired in their defence and during encounter injured dacoit succumbed to his injuries, while rest two culprits succeeded to make their escape good by taking advantage of bushes. The body search of deceased culprit was conducted in presence of the complainant. The Police secured one 30 bore black brown colored pistol with wooden handle having magazine containing five live rounds and one in its chamber, was in right hand of the deceased accused. The alleged robbed amount of R.5500/- being five denomination notes of Rs.500/- and thirty denomination notes of Rs.100/- were recovered. Besides, one mobile phone of Nokia company, allegedly snatched from the complainant was recovered and one copy of misplacing report of NIC in the name of Qayoom Khan was secured. The complainant recognized the articles. The Police recovered six empties of 30 bore from the scene of offence. After making usual formalities, the complainant came at P.S. together with Police party, where he got his case registered in above terms.

3. The Police after registration of FIR started investigation meanwhile arrested the appellant / convict on 21.04.2014 and after completion of legal formalities submitted the charge sheet before the competent Court of law having jurisdiction.

4. After taking cognizance, learned trial Court had framed the charge against appellant under Section 353, 324, 392, 34 PPC read with Section 7 of Act 1997 and 6(2) of Act 1997, to which the appellant pleaded not guilty and claimed to be tried.

5. To prove its case, the prosecution has examined in all nine (09) witnesses i.e. 1. P.W.-1 / ASI Munawar Ali Ex.6 on 28.01.2015, P.W.2 / injured Head Constable Mir Muhammad Rind Ex.7 on 28.01.2015, P.W.-3 / Abdul Qayoom Siyal / Civil Judge & Judicial Magistrate Ex.8 on 03.03.2015, P.W.-4 / P.C. Hassnain Ali Ex.9 on 18.03.2015, P.W.-5 / ASI Amir Memon Ex.10 on 18.03.2015, P.W.-6 / ASI ManzoorAbbasi Ex.11 on 07.04.2015, P.W.-7 / Dr. Sheeraz Ali on 08.05.2015, P.W.-8 / ASIP Meraj Anwar Ex.15 on 08.05.2015, P.W.-9 / Inspector Peer BuxChandioEx.17 on 01.07.2015 and thereafter prosecution had closed its side of evidence vide statement of SPP Exhibit No.18. The statement of accused was recorded in terms of Section 342 Cr.P.C, whereby the appellant denied allegations and stated that he was arrested by the Rangers on 23.01.2013 along with his real brother and two mohalla people. Such C.P.No.D-534 of 2013 was filed by one Misbah before this Court and is still pending. Per his statement, all above four are still missing and such FIR was also lodged against one Colonel Pervez. He stated further that right from his illegal arrest by the Rangers for about a year, they handed over him to Police and the Police also kept him in confinement for five months and were forcing him to withdraw from the case against the Rangers and after about five months, he was involved in present case. He, however, not examined himself on oath nor led any defense evidence.

6. Learned trial Court, after hearing to the DDP for the State and learned defense counsel for the appellant had convicted and sentenced the appellant in the above terms.

7. Mr. Ajab Khan Khattak, learned counsel for the appellant submitted that appellant is not nominated in the FIR and he has no nexus with the alleged commission of the crime. He further submitted that appellant was taken away by the Rangers much prior to the occurrence of instant incident and according to him; in fact no such incident had taken place. He

further submitted that per the averments of the FIR, there were three eyewitnesses, i.e. the complainant, P.W. / Driver Abdul Hameed and guard Ateeq. He further contended that none amongst the above witnesses of the crime was examined by the learned trial Court, even the identification parade held before the Magistrate, was not conducted in their presence and identification parade was conducted only in presence of the I.O. who arrested the appellant and the injured H.C Mir Muhammad. He further advanced that the evidence of P.W. injured Mir Muhammad is not inspiring confidence as he himself was not aware where he was shifted for his medical treatment and his evidence has totally been belied by the evidence of Medico legal Officer viz. Dr. Sheraz Ali. He further submitted that the alleged robbed amount viz. Rs.5500/- and mobile phone were allegedly recovered from the packet of deceased co-accused Abdul Qayoom. He further submitted that appellant was arrested on 21.04.2014, whereas he was subjected to identification parade on 26.04.2014 and during the intervening period, he remained in custody of the Police, therefore, such identification parade carried no weight in the eye of law. He further submitted that nothing incriminating including alleged offensive weapon have ever been shown to have been recovered from the possession of appellant or has been produced by appellant himself, which may connect him with the commission of alleged offence. In support of his arguments, he has relied upon the following case law: -

1. 2006 SCMR 302.
2. 2011 SCMR 537
3. PLD 2008 Kar 487
4. 2011 SCMR 769.
5. 1997 SCMR 617.

8. On the other hand Mr. Muhammad Iqbal Awan, learned Assistant Prosecutor General Sindh though supported the impugned judgment, but could not controvert the factual

discrepancies available on record as pointed out by learned counsel for the appellant.

9. We have heard arguments and scanned the record as well as evidence adduced by the prosecution anxiously.

10. While perusing the evidence with the valuable assistance of learned counsel for the parties, we have found that entire episode of prosecution case rests upon following set (s) of evidences:-

(i) The *ocular version* based upon the evidence of the complainant Umair Siddiqui, his driver Abdul Hameed and guard Atique and injured P.W. HC Mir Muhammad Rind.

(ii) *Medical evidence* based upon the statement of injured PW HC Mir Muhammad corroborated by the evidence of Medico legal officer / Dr. Sheeraz Ali.

(iii) *Identification parade* held before learned Civil Judge/ Judicial Magistrate in presence of injured PW Mir Muhammad.

11. The peculiar facts, peeping through the record of the case, made us to say *first* that there can be no denial to the well-established principle of law that where the ocular / direct evidence fails, it would *never* be safe to award conviction because all other piece (s) of evidence, except ocular (direct) evidence are *normally* of status of 'corroborative' which are meant to *shoulder* the ocular account. In law, corroborative evidence means evidence of someone else other than the eye-witness whose evidence is needed to be corroborated. According to the Black's Law Dictionary, 9th Edition, corroborating evidence has been defined as follows:-

'Evidence that differs from but strengthens or confirms what other evidence shows (needing support)

The *corroborative* pieces of evidence *alone* cannot hold *conviction* because it *(corroborative evidence)* should but if nothing is there to support / shoulder then purpose of support *(corroborative evidence)* fails. The reliance can *safely* be made to the case of, reported as 2008 SCMR 336 wherein it is held that:

> "Conviction cannot be based on any other type of evidence, howsoever convincing it may be **unless direct or substantive evidence is available**. Even guilt of accused cannot be based merely on high probabilities that may be inferred from evidence in a particular case."

Reverting to the merits of the case, let's take the *ocular* account first. Before penetrating into record, it is necessary to remind that it was not a case of an *attack / assault* upon police party but it (prosecution's case) was that of an attempt of robbery during which injuries were caused which *did* allowed appearance of police at subsequent stage resulting into encounter, therefore, star witnesses of the incident were *indeed* private persons which *list* may include the police official (s) too but shall not stand in same footrace. The one who is stopped and attempted to be robbed shall always be in a better position to identify from the one who only had opportunity of seeing the one under *firing* or running away.

There can be no denial to the legal position that since the burden is always upon prosecution to prove its case which requires it *(prosecution)* to bring its best witnesses into witness box and any failure, *without* a legal justification, would result in hitting the prosecution *itself* as *otherwise* is

explained by Article 129(g) of Qanun-e-Shahadat Order, 1984.

In the instant matter, it is a matter of fact that the star witnesses of the alleged offence viz. Complainant Umair Siddiqui, his driver Abdul Hameed and guard Atique were never produced by the prosecution during *investigation* process i.e 'at time of identification parade' nor were examined during trial *even.* This means that name (s) of these witnesses, as *star witnesses,* remained on chest of prosecution from very beginning i.e lodgment of FIR till the prosecution closed its side which, *in law*, is of no legal value because it is the name of a **'person'** which dresses him into a *'witness'* but claim (words) to have *seen* or *heard* the offence. Such claims turns into *'evidence'* only when the witness steps into *witness box* and his claim is tested by *'cross examination'*. This shall stand clear from a *direct* reference to Article 2(c) (i) of Qanun-e-Shahadat Order, 1984 which defines *'evidence'* as:

> (c) "evidence" includes:---
>
> (i) all statements which the Court permits or **requires to be made before** it by **witnesses**, in relation to matters of fact under inquiry; such statements are called oral evidence; and

The prosecution, *at no material times,* placed any legal justification for not bringing these witnesses into witness box hence failure thereof must have been taken as is permissible by Article 129(g) of Order particularly when the prosecution never parted with status of these witnesses as '*star witnesses'*. Needless to add that permissible presumption is that with-holding evidence would be taken as that if that evidence would have been produced it (evidence) would not have supported the one *legally* required to produce. The benefit whereof *however* was not given by the learned trial Court Judge while holding the scale of '*criminal administration of justice'* which, *no doubt,* revolves round the 'benefit of doubt' which *legally* allows an accused to enjoy

presumption of innocent despite claim of prosecution to hold best evidences to be produced at time of trial.

12. Be as it may, since prosecution also claimed PW HC Mir Muhammad Rind to have received injuries during incident hence his evidence was led as *'eye-witness'*. It needs no much debate that 'mere injuries on a prosecution witness, *at the most,* could only be indicative of his presence at the spot but are not affirmative proof of his credibility and truthfulness. (2007 SCMR 670). Non-production of evidence of private star witnesses had made it obligatory to appreciate the evidence of this witness with more caution and care. To respond properly, it would be advantageous to refer the examination-in-chief of this witness which is:

> "on 09.04.2014 I was posted at P.S. Super highway Industrial Area. On that day, I alonwith ASI Amir Memon, ASI Muhammad Ibrahim Khoso, ASI QurbanKalwar and PC Hasnain went from P.S. at 11.00 a.m. in connection with investigation of crime No.77/2014 U/s 395 PPC. At about 11.40 a.m we reached at Arisha Tower, while we were going on katchapakka road we saw one Suzuki man was being robbed by three persons and one person was shouting to save. We then alighted from our vehicle and asked the culprits to drop the weapon but the culprits started firing upon us. We retaliated and in exchange of firing I received one bullet injury which hit on my chest. I fell down. ASI Amir Memon took me at Agha Khan Hospital. Thereafter I came to know that in that firing one culprit was expired. I remained in the hospital. The present accused was amongst those three persons and ran away from there. My statement was recorded in Hospital.

The above would show that this witness *nowhere* claimed to have seen the *culprits* under firing, being made from either side, rather claimed to have fallen down on receipt of bullet injury. It is also not claim of the witness or prosecution *even* that culprits, including appellant, were *already* known to them. Therefore, words of this witness, lasting his examination-in-chief, while fingering at appellant as one of the *culprit* was never *safe* to believe the appellant as one of the *culprits.* This is so, because this witness even had not participated in the identification parade though legal presumption to *his* extent was to presume his presence at the spot *at least*. Such failure on part of prosecution was also not appreciated properly by learned trial court particularly witness did not specify the period he remained in hospital. It be kept in mind that *identification* parade was conducted on 26.04.2014 while date of incident is **'09.4.2014'** (i.e claim of receipt of injury) hence there came nothing on record to *legally* justify non-participation of this witness in identification parade. The case remained pending before the learned trial court hence this witness had every opportunity to have seen the appellant during such trial as during trial no such *precautions* are observed which the law requires to be kept till production of an *unknown* arrested accused of a crime to *identification* parade therefore, *general* principle of law is that such identification has been held to be *unsafe. Honourable Supreme Court of Pakistan in its Judgment in* the case of Haider Ali v. State (2016 SCMR 1554) has held that:

> *'In that context we have noticed the alleged victim had appeared as PW3 and before recording of her statement the petitioners and their co-accused had repeatedly appeared before the trial court not only at the time of obtaining of their remands but also at the time of distribution of copies of the statements of PW 1 and PW2. It is, thus, quite*

> *evident that the alleged victim had many opportunities to see the petitioners and their co-accused before they were statedly identified by her at the time of making of her statement before the trial court as PW3. Apart from that identification of an accused person before the trial court during the trial* ***has generally been held by this Court to be unsafe*** *and a reference in this ….*

Be that as it may, it needs to be reiterated that where private witnesses though available with prosecution are not produced or do not support then evidence of police official *alone* is *normally* not safe to sustain conviction. Further, the words of happening of robbery; encounter with culprits and receipt of injury does not absolve the prosecution from its *mandatory* obligation which requires the prosecution not only to prove *happening* of an offence but '**happening thereof by the one, sent as accused'** which the prosecution *never* established beyond shadow of *doubts.*

13. Be as it may, let's examine the evidence of said witness with reference to medical evidence. In order to filter the truth behind the screen, it will be essential to reproduce the examination in chief statement / deposition of Medico Legal Officer / Dr. Sheeraz Ali (examiner of said injured) which goes to say as under:-

> Examination-in-chief.
>
> To Mr. NooruallahMakhdoom, DDPP for the State.
>
> On 23.10.2014 I was posted at Abbasi Shaheed Hospital as M.L.O. On the same day at about 2.0 P.M. injured Meer Muhammad son of Moton Khan, aged 45 years was brought with police letter from Super Highway with history of fire arm on 09.04.2014. The condition was conscious and

oriented. Initially he was admitted in Agha Khan Hospital and brought the summery of discharge on the basis and finding I write the M.L. and noted following injuries:-

1. Healed scar present over interior chest wound.
2. Healed scar over right posterior lateral chest exist wound. During injury a development subcontinents emphycseiun with associated phemothorix chest tube incubation on the basis of summery and X-ray the final injury declared as Jara-e-Jaifa. The kind of weapon is fire arm.

I issued ML No.9884, attested copy of the same is produced as Ex.14/A. It is same and bears my signature"

Perusal of deposition of MLO/ Dr.Sheeraz Ali reveals that the injured PW Mir Muhammad had appeared before him on 23.10.2014 in *healed* and *oriented* condition but with claim to have sustained injury on 09.04.2014. Since, it was specific claim of prosecution that the injury on person of said witness was inflicted during incident therefore, it was obligatory upon the prosecution to have produced some material to substantiate that said injured did receive injury on same date which could have been established by producing material of treatment of said injured, provided to him on his reaching to hospital i.e on 09.4.2014. The witness *though* claimed to have remained admitted in Agha Khan hospital on 09.04.2014 but no admission *slip* or name of Doctor, provided first aid treatment to him, was produced nor was examined before trial court even his name has not been mentioned in the challan sheet as witness. Such non-production *again* shall result in presuming against such claim of the prosecution within meaning of Article 129(g) of Order

which *even* hits at the very root of claim of such witness i.e to have received the injury during alleged incident, claimed to have happened on specific date i.e 09.4.2014.

14. Further, as per prosecution claim, the police party, including injured P.W HC Mir Muhammad Rind, had left P.S for investigation of crime No.77/2014 but not a single document either FIR of that crime or entry of their departure was placed on record so as to substantiate such claim *at least.* Thus, it *now* can safely be concluded that evidence of this witness even was not confidence inspiring hence had increased the *dent* in prosecution case, already caused because of failure of non-production of star witnesses of incident. Further, perusal of depositions of PW Hasnain Ali and ASI Amir Memon shows that both have *even* not supported the claim of injured P.W Mir Muhammad regarding leaving police station for investigation of Crime No.77/2014 and manner in which they reached at spot.

15. It is also worth to add here that mere heinousness or gruesome nature of crime should not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused. Reliance can be made to the case of *Azeem Khan v. Mujahid Khan* (2016 SCMR 274) wherein it is held that:

> *"32. It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one. Similarly mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to Judge and make the appraisal of evidence in a laid down manner and to extend the benefit of*

> *reasonable doubt to an accused person* ***being indefeasible and inalienable right of an accused.*** *In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty.*

16. From above case, it *prima facie* insisted that mere heinous or gruesome nature of crime in, *no way,* should influence the Court (s) in favour of the prosecution nor should result in relaxing prosecution from its mandatory duty to prove the charge through *unimpeachable* evidence which too beyond shadow of doubt, which, the so for discussion, permits us to say that prosecution didn't, therefore, it can *safely* be concluded that failure of prosecution to establish its case through direct evidence (ocular one) was / is sufficient to extend the benefit of the doubt because *in law* the accused is not required to prove the case of prosecution as *false* but has to show reasonable *doubts* because the burden remains on prosecution as was held in the case of *Abdul Majeed v. The State* (2011 SCMR 941) as:

> 7. The basic principle of criminal law is that it is the burden of the prosecution to prove its case against the accused beyond reasonable doubt. This burden remains throughout and does not shift to the accused, who is only burdened to prove a defence plea, if he takes one. "

Therefore, examination of other pieces of evidence would not change the legal position which insists that for giving a benefit of doubt it is not necessary that there should be many circumstances, creating doubt but a single reasonable doubt is

sufficient for acquittal of accused. Reference can well be made to the case, reported as 2009 SCMR 230 wherein it is held that:

> *For giving benefit of doubt of a doubt it is not necessary that there should be many circumstances, creating doubts. Single circumstance, creating reasonable doubt in a prudent in mind about the guilt of accused makes him entitled to its benefit not as a matter of grace and concession but as a matter of right.*

17. In consequence of what has been discussed above, it can safely be concluded that prosecution *miserably* failed to prove its case against the appellant hence the impugned judgment dated 26.08.2015 is not based upon sound footings, therefore, is not sustainable. Consequently the appeal filed by appellant Pirzada @ Peer is allowed. The impugned Judgment dated 26.08.2015 \is hereby set-aside. The above are the reasons for our short order dated 27.10.2016, which reads as under:-

> "*"For the reasons to be recorded later on, instant appeal stands allowed. Consequently, sentence awarded to the appellant through impugned Judgment dated 26.08.2015 is set-aside and is acquitted of the charge. Let appellant be released forthwith if not required in any other case"*

Appeal allowed.

2017 SLD 108

Present: Ahmed Ali M. Sheikh
and Muhammad Saleem Jessar, JJ

Amjad Ali s/o Abdul Qayoom .. Appellant

Versus

The State... Respondent

Criminal Special Anti-Terrorism Jail Appeal No. 46 & 47 of 2015, Decided on 5th December, 2016

(a) Criminal law...

…. Criminal jurisprudence, purpose... **Earthly laws, relating to Criminal Administration of Justice, have never meant to do 'ADAL' but have been framed to maintain a balance thereby attempting to bring peace, harmony and tranquility in a society. The purpose and object of inflicting *conviction* is either to have reformation or deterrence. A wrongdoer if reformed through punishment can become a *fruit* for the society which *(fruit)* however cannot serve its purpose only by making him to rot behind the bars. The concept**

of *reformation,* however, does not permit the Court (s) to let *hardened* criminal (s), on their catch, to seek their release in name of leniency because this shall seriously prejudice the other *fold* of object of punishment. The other fold of awarding punishment is to make a *hardened* criminal an *example* for other (s) so that a sense *must* prevail in minds of masses that a *criminal* shall receive his due if he commits a *crime.* In short, reformation must *never* be at the cost of peace, harmony and tranquility of the society as a whole because it is always better to have an *evil* restrained / confined rather than to leave him *(evil)* to make whole society a *'hell'* … The Criminal Administration of justice shall fail its object and purpose towards society if either of *two* folds of concept of awarding punishment are ignored by the Court (s) [p.41, 42]

(b) **Criminal trial..**
….. Mitigating circumstances … Mitigating **circumstances which could be kept in view while deciding the quantum of punishment.**

J U D G M E N T

Muhammad SaleemJessar, J: - By this common Judgment, we intend to dispose of above ATA appeals as all four arises out of one and same Judgment dated 27.02.2015, handed down by learned Special Judge, Anti-Terrorism Court No.VIII, Karachi in New Special Case Nos.31/2014 (old 74/2013), New Special Case Nos.32/2014 (old 75/2013), New Special Case Nos.33/2014 (old 76/2013), which are outcome of Cr. No.532/2013 U/s 384, 385, 386, 34 PPC r/w section 7 of Ant-Terrorism Act 1997 (hereinafter referred to as Act), Crime No.533/2013 and Crime No.534/2013 U/s 23(i) (a) Sindh Arms Act, 2013 all three registered with P.S.

Ferozabad, Karachi, whereby the appellants have been convicted and sentenced to suffer R.I. for seven years on each count and fine of Rs.50,000/- each in default, they shall serve six months more. However the sentences have been ordered to run concurrently in terms of section 397 Cr.P.C besides, benefit of section 382B Cr.P.C has also been extended to them. The appellants being aggrieved by and dissatisfied with the common Judgment dated 27.02.2015 (impugned Judgment) have assailed same before this court by means instant appeals as required by section 25 of the Act r/w section 410 Cr.P.C.

2. The crux of prosecution case, as unfolded by complainant Furqan Abdul Khalique in his FIR No.532/2013, are that he runs his business in the name of “New Whit Flower Uniform” at Block No.11, Gulshan-e-Iqbal, Karachi. On 26.09.2013, he received calls at 2:30 pm at 7:30 pm to 8:00 pm, from cellular mobile No.0311-2082511, the caller introduced his identity as Qureshi Bulla and demanded “Bhatta”(extortion) Rs.200,000/- under threats of killing. On 27.09.2013, he again received 2/3 calls from the said mobile the caller demanded “Bhatta”. The complainant expressed inability to pay such huge amount, and requested for less amount. Lastly, the extortionist/caller agreed to receive Rs.30,000/- and directed the complainant to pay extortion money on 28.09.2013 at 6:30 pm at Allah WaliChowrangi , Tariq Road, Karachi. The complainant under the assistance of the CPLC informed the police of P.s. Ferozabad and went to the pointed place but extortionist did not come over there. After that, he was asked to pay the amount of “Bhatta” at Gulshan, then the complainant including the police officials reached to the above mentioned place and remained there for some time but the culprits didn’t come over there. The complainant again received a call from the said caller and was asked to pay the amount at Parking Area, Hill Park, Karachion 29.09.2013 at 0830 hours. On this, the complainant alongwith CPLC and ASI Israr of P.S. Ferozabad reached the intimated

place, he stood alone there, and officials took position secretly at some distance. After few minutes, two culprits came on motorbike No.KBO-8791 and demanded "Bhatta" on the display of the weapons from him. He gave the "Bhatta" amount Rs.30, 000/- to them. Police encircled them and apprehended both the extortionists on spot. On enquiry, they disclosed their name as Amjad Ali and Bahawal @ Sajid (the appellants). On search of accused Amjad Ali, the recovery of one unlicensed pistol of 30 bore with 05 live bullets from the right fold of his shalwar and extortion money Rs.30,000/- were effected from him. On search of accused Bahawal they had recovered one unlicensed pistol of 30 bore with 04 live bullets from him. They were arrested accordingly, memo of recovery and arrest was prepared, and the properties were sealed separately. Motorcycle was seized U/s 550 Cr.P.C. Accused have disclosed the name of third companion as Shahbaz Hussain s/o Jabbar. Accused were brought to P.S. Ferozabad, the cases were registered respectively. Accused Shahbaz Hussain was arrested. On the completion of the investigation, the challan was submitted against the accused above named under section 384, 385, 386, 34 PPC R/w section 7 of Anti-Terrorism Act, 1997 and so also for an offence U/s 23(1) (a) Sindh Arms Act, 2013 for recovery of the unlicensed weapons.

3. After registration of case, police conducted investigation and after completion of legal formalities submitted charge sheet before the court having jurisdiction. The learned trial court after taking cognizance, supplied the requisite papers to appellants/convicts in terms of section 265-C Cr.P.C vide receipt at Ex.2. The proceedings of oath in terms of 16 of the Act, 1997 was observed at Ex.3. Since the offences of section 23(i) (a) of the Act, 2013 are non-scheduled offences arising out of crime No.533/2013 and 534/2013 have nexus with scheduled offence being Crime No.532/2013, therefore, learned trial court proceeded a joint

trial in terms of section 21(m) and 17 of the Act, 1997 vide its order dated 20.08.2014.

4. After observing codal formalities, the learned trial court framed a joint charge against the appellants on 20.08.2014 at Ex.4 in following terms:-

I, Imdad Hussain Khoso, Judge Ant-Terrorism Court No.VIII at Karachi Central do hereby charge you:

Accused as under;-

1. ***Amjad Ali s/o Abdul Qayoom***
2. ***Bahwal @ Sajjad s/o Ghulam Rasool.***
3. ***Shehbaz Hussain Khan s/o Jawahar Hussain***

That on 26.09.2013 at about 2:30 a.m. you accused in furtherance of the common intention and collaboration with each other made repeated call to the complainant at his cell number 0333-3066127 from mobile number 0311-2082511. Again in between 7:30 to 8:30 pm disclosed your identity as Qureshi Lola and demanded Rs.200, 000/- (two lacs) under serious threats of murder to him and his family.

On 27.09.2013, the complainant had again received 2/3 calls from the same numbers and repeated the demand of money, he told that he cannot be pay huge amount of Rs.200,000/- (two Lacs) and requested to decrease the amount, and you were agreed to receive Rs.30,000/- (thirty thousand). On 28.09.2013 at about 6:00 p.m. he was asked to deliver money at the place of Allah Walla Ground, Tariq road, Karachi. He alongwith the Ferozabad police reached there but nobody had come over there. Thereafter, he was asked to deliver the money at Gulshan Iqbal, he along with police reached there but nobody had arrived there. The complainant had again received a call and asked to pay the money on

29.09.2013 at about 8:30 a.m. at Hill Park, on which he alongwith CPLC and ASIA bdul Sattar and other staff reached Hill Park, Parking Area to pay Rs.30,000/- (thirty thousand). You on one motorbike having registration number KB-8791 Hero, came at the pointed place and received the demanded money from the complainant, in meanwhile the police apprehended you accused Amjad and Bahawal on the spot while you accused Shahbaz escaped away. On personal search of you accused Amjad Ali, the police had recovered extorted money Rs.30, 000/- (thirty thousand) and country made pistol 30 bore loaded magazine with 5 live bullets without number from your possession. One pistol of 30 bore without number loaded with 4 live bullets from you accused Bahawal. Police had seized the recovered weapons and motorcycle and extorted money (Bhatta) on the spot and arrested you in presence of the witnesses/mashirs. As you accused in collaboration of each other have obtained the money from the complainant under fear threats of murder, thereby you have committed an offence punishable under section 384, 385, 386, 34 PPC R/w section 7(H) of the ATA, 1997, within the cognizance of this court.

I further charge you accused Amjad that at the same time, date and place were found in possession of the one pistol of 30 bore without number loaded with 5 bullets without any lawful justification and license and thereby you have committed an offence punishable Under Section 23(i) (A) Sindh Arms Act, 2013 and within the cognizance of this court.

I further charge you accused Bahawal @ Sajjad that at the same time, date and place were found in possession of the one pistol of 30 bore without number loaded with 4 bullets without any lawful

justification and license and thereby you have committed an offence punishable Under Section 23(i) (A) Sindh Arms Act, 2013 and within the cognizance of this court.

And I, hereby direct that you be tried by this court on the above said charge.

This the 20th day of August, 2016.

Sd/ 20/08/2014

(Imdad Hussain Khoso)

Judge

Anti-Terrorism Court No.VIII Karachi.

5. To prove its charge, the prosecution has examined complainant Furqan Abdul Khalique at Ex.9, he produced the application Ex.9/A, memo of arrest at Ex.9/B, statement u/s 154 Cr.P.C at Ex.9/C, FIR at Ex.9/D respectively. P.W.2 Kamran at Ex.10, he produced the memo of recovery at Ex.10/A. P.W.3 ASI Israr Afridi at Ex.11, he produced FIRs at Ex.11/A and B. P.W.4 SIP Muhammad Sachal Ex.12, he produced memo of arrest at Ex.12/A. P.W.5 PC Hussain Bux at Ex.13. P.W.6 Asghar Khan at Ex.14. P.W.7 Inspector Sohail Akhter Ex.15, he produced Call Data at Ex.15/A, FSL report Ex.15/B, Motorcycle verification slip at Ex.15/C. Thereafter the prosecution closed its side vide statement of ADPP at Ex.16.

6. Appellants were examined under section 342 Cr.P.C at Ex.17, 18 and 19 respectively whereby they have denied prosecution allegations and claimed to be innocent. They, however, did not examine themselves on oath nor led any defence evidence.

7. After full-dressed trial and having heard prosecution as well as the defence, the learned trial court vide its Judgment dated 27.02.2015 convicted and sentenced the appellants as under:-

In the result of above discussion, I have reached to the conclusion that the prosecution has successfully proved the involvement of the accused Amjad and Bahawal to connect with the commission of extortion of money "Bhatta" punishable U/s 7(1) (h) of Anti-Terrorism Act, 1997. They are guilty for above said offence and they are convicted and sentenced to suffer R.I. for seven years and fine Rs.50, 000/- each in default, they shall serve six months more. The prosecution has also proved the charge for an offence U/s 23 (1) (a) Sindh Arms Act, 2013 against the accused Amjad and Bahawal respectively beyond any doubt. Accused Amjad is guilty for an offence u/s 23 (1) (a) Sindh Arms Act, 2013 he is convicted in above said offence and sentenced to suffer R.I. for seven years and fine Rs.50,000/-, in default he shall serve six months more. Accused Bahawal is also guilty for an offence of U/s 23 (1) (a) Sindh Arms Act, 2013 he is convicted in above said offence and sentenced to suffer R.I. for seven years and fine Rs.50,000/- in default he shall serve six months more. Accused are first offenders having no history of their involvement to such like cases. They are youth and sole bread earner of their family, thus, court has taken lenient view and ordered that the sentenced (sentences) awarded to the accused in the above said crimes shall run concurrently in view of section 397 Cr.P.C. Reliance is placed on 1997 P Cr. L J 1185, PLJ 2003 Cr. C (Lah) 484, 2011 P Cr. L J 1687 and 2012 P Cr. L J 1028, 2005 MLD 856, 2007 YLR 700, 2009 MLD 1068. Accused are extended benefit of section 382-B Cr.P.C. Accused Amjad and Bahawal are produced in custody, they are remanded back with conviction warrant to serve out the sentence awarded to them. Accused Shahbaz is acquitted from the charge he is present on bail, his bail bond stands cancelled and surety discharged.

8. Learned counsel for the appellants after arguing the matter at some lengthy, have submitted that under the instructions, they would not press the appeals on merits but prayed for taking lenient view as according to them the appellants are first offenders and sole bread earner of their respective family and have remained in Jail for sufficient time and previous non-convicts. In support of their plea, they have placed reliance upon the cases of QasimIjaz V. the State & another (2016 MLD 48), Muhammad Tariq & 2 others Vs. The State & another (2015 P Cr. L J 1326), Mujeebur Rehman V. The State (2014 P Cr. L J 1761), Ghulam Murtaza V. The State (PLD 2009 Lahore 362) and Ameer Zeb V. The State (PLD 2012 380).

9. Mr. Muhammad Iqbal Awan, learned Assistant Prosecutor General Sindh has supported the impugned Judgment and has submitted that the trial court has already taken lenient view therefore, the appellants who were caught red-handed at the spot alongwith extortion amount of Rs.30,000/- do not deserve any leniency. However, he does not controvert the factum as to the appellants are non-previous convict.

10. We have heard the arguments of either side at some length and have scanned the material and jail roll placed on record furnished by Superintendent Central Prison Karachi in terms of his letter dated 02.09.2016 anxiously. Perusal of jail roll reveals total sentence including fine sentence has been shown 08 years. The appellants have served out 02 years 10 months and 19 days without remission upto 08.09.2016 and including remissions they have served out 03 years 03 months and 08 days. The remaining portion of their sentence is 04 years 08 months and 22 days (Since the sentences have been ordered to run concurrently therefore, quantum of sentence would be 07 years not 08 years, hence, per impugned Judgment and after making corrigendum in the Jail roll, the remaining portion of their sentence would be 03 years, 05

months and 22 days upto date) however, conduct of the appellants has also been shown as satisfactory.

11. Since the appellants have not been pressing their appeal (s) on *merits* but have prayed for consideration of *quantum* of punishment by taking lenient view, therefore, we feel it appropriate to elaborate *first* scope and object of 'punishment' and criterion to award punishment (s). We have no hesitation in saying that earthly laws, relating to Criminal Administration of Justice, have never meant to do **'ADAL'** but have been framed to maintain a balance thereby attempting to bring peace, harmony and tranquility in a society. The purpose and object of inflicting *conviction* is either to have reformation or deterrence. A wrongdoer if reformed through punishment can become a *fruit* for the society which *(fruit)* however cannot serve its purpose only by making him to rot behind the bars. The concept of *reformation,* however, does not permit the Court (s) to let *hardened* criminal (s), on their catch, to seek their release in name of leniency because this shall seriously prejudice the other *fold* of object of punishment. The other fold of awarding punishment is to make a *hardened* criminal an *example* for other (s) so that a sense *must* prevail in minds of masses that a *criminal* shall receive his due if he commits a *crime.* In short, reformation must *never* be at the cost of peace, harmony and tranquility of the society as a whole because it is always better to have an *evil* restrained / confined rather than to leave him *(evil)* to make whole society a *'hell'*.

The *tilt* of the scale should always be in favour of concept of *reformation* when it relates to *first offenders and teen-agers* particularly when they are facing charges of offence (s), entailing minor / less punishment and are not *recognized* as *'desperate* or *hardened* offences'. The Criminal Administration of justice shall fail its object and purpose towards society if either of *two* folds of concept of awarding punishment are ignored by the Court (s). Such view

is guided by the case of *<u>Dadullah v. State</u>* (2015 SCMR 856) wherein it is held:

> "9. Conceptually punishment to an accused is awarded on the concept of retribution, deterrence or reformation. The purpose behind infliction of sentence is twofold. Firstly, it would create such atmosphere, which could become a deterrence for the people who have inclination towards crime and; secondly, to work as a medium in reforming the offence. Deterrent punishment is not only to maintain balance with gravity of wrong done by a person but also to make an example for others as a preventive measure for reformation of the society. **<u>Concept of minor punishment in law is to make an attempt to reform an individual wrongdoer.</u>** However, in such like cases, where the appellants have committed a pre-planned dacoity and killed two persons, no leniency should be shown to the culprits. Sentence of death would create a deterrence in the society due to which no other person would dare to commit the offence of murder. If in any proved case lenient view is taken, then peace, tranquility and harmony of society would be jeopardized and vandalism would prevail in the society. The Courts should not hesitate in awarding the maximum punishment in such like cases where it has been proved beyond any shadow of doubt that the accused was involved in the offence. **<u>Deterrence is a factor to be taken into consideration while awarding sentence, specially the sentence of death.</u>** Very wide discretion in the matter of

sentence has been given to the courts, which must be exercised judiciously. Death sentence in a murder case is a normally penalty and the Courts while diverting towards lesser sentence should have to give detailed reasons. The appellants have committed the murder of two innocent citizens and also looted the bank in a wanton, cruel and callous manner. Now a days the crime in the society has reached an alarming situation and the mental propensity towards the commission of the crime with impunity is increasing. Sense of fear in the mind of a criminal before embarking upon its commission could only be inculcated when he is certain of its punishment provided by law and it is only then that the purpose and object of punishment could be assiduously achieved. If a Court of law at any stage relaxes its grip, the **hardened criminal** would take the society on the same page, allowing the **habitual recidivist** to run away scot-free or with punishment not commensurate with the proposition of crime, bringing the administration of criminal justice to ridicule and contempt. Courts could not sacrifice such deterrence and retribution in the name of mercy and expediency. Sparing the accused with death sentence is causing a grave miscarriage of justice and in order to restore its supremacy, sentence of death should be imposed on the culprits where the case has been proved.

12. Reverting to the merits of the case for considering the quantum of sentence, we find that the prosecution does not dispute the claim of the appellants to be *first offenders* (previous non-convict). Such circumstance can well be taken as one of the mitigating circumstances for reducing the sentence, as was done in the case of Niazuddin V. The State (2007 SCMR 206) whereby Honourable Supreme Court of Pakistan while considering the petitioner as a previous non-convict reduced the sentence in the following terms contained in para 6 & 7 of the Judgment:-

> 6. However, coming to the question of sentence we note that it has been conceded by learned A.A.G that **petitioner is a previous non-convict** and there is no other instance of petitioner's involvement in drug trafficking. It has also been brought in evidence that at the time of this arrest he met custodial violence and on that account he received injuries. Perhaps those who arrested him wanted to extract confession for his alleged involvement with some other narcotic dealer. In these circumstances petitioner needs to be given a chance in his life **to rehabilitate himself.**
>
> 7. Accordingly while dismissing the appeal we are persuaded to reduce the sentence of imprisonment of petitioner from 10 years to six years. Order accordingly.

In another case of *Ghulam Muhammad Vs. The State* (2014 YLR 1087), the Divisional Bench of this court while dismissing the appeal of the appellant has held as under

> "For the foregoing reasons, we while dismissing the appeal and maintaining conviction, reduce the sentence awarded to the appellant to one already undergone, however, subject to payment of fine of Rs.2000/- and in default thereof he shall undergo S.I

for one month. He is on bail. His bail bond is cancelled and surety discharged.

13. *Undisputedly,* the offence, with which the appellants were charged, are not of *capital punishment* i.e **'death penalty"** rather were charged with offences, entailing punishment upto Ten *(10)* years which also tilts the case of appellants in seeking leniency thereby letting them a chance of *reformation.*

14. Besides, there are also other *mitigating* circumstances which could be kept in view while deciding the quantum of punishment. As per contents of FIR, the appellants had allegedly sent a sweet-box to complainant containing a chit and bullet and had demanded *'bhatta'* on cell-phone but I.O. did not examine CPLC staff during investigation nor prosecution bothered to examine any of such official so as to prove that as to which of the accused persons the *sim,* used for demanding bhatta, belongs as *initially* it is a case of demand of '*bhatta*'. Further, the motorcycle, allegedly occupied by the appellants, though was seized under memo and was seized under section 550 Cr.PC while observing it to be *stolen* but it was neither made as case property nor was produced before trial court. This fact as is evident in the evidence and in the impugned Judgment as to the property order nowhere its disclosure has been made by the trial court. The alleged weapons, extortion money, sweet box with bullet and chit and the motorcycle were not specifically deposed by the P.Ws during trial, they however, had only deposed to the extent that "the case property present in court is same". Further all the case property mentioned above have not been exhibited properly nor were shown to the appellants at the time of their examination in terms of section 342 Cr.P.C nor particular question was raised to the effect that the property viz which *otherwise* was / is the requirement of law. The official witnesses also had not produced the departure entry to show their movement and the purpose mentioned in the alleged

memo of seizure and recovery or from P.S towards alleged place of recovery although it was claimed by complainant that he *(complainant)* went alongwith police at intimated place on call (s) of *Caller*. Such glaring features of the prosecution evidence have constrained us to take lenient view thereby letting the appellants an *opportunity* of reformation particularly when their behavior inside the *jail* has been reported to be *satisfactory* which may also be taken as one of the step towards reformation. The appellants are in custody from the date of their arrest viz. 29.09.2013 and have undergone more than three years.

15. In view of above facts and legal position (s) and in the light of dicta laid down by apex court in the cases (supra), we, while maintaining the conviction(s), awarded by the trial court in instant case (s), modify sentence (s) awarded to appellants and alter the same to the imprisonment, they have already undergone which shall include sentence awarded to them in case of non-payment of fine with benefit of section 382-B Cr.P.C. The appellants are directed to be released forthwith if not required in any other case.

The Cr. A.T. Appeals No.32, 33, 46, and 47 of 2015 with above modification in the sentences are disposed of alongwith pending applications.

2017 SLD 123

Present: Ahmed Ali M. Sheikh and
Syed Muhammad Farooq Shah, JJ

Abdul Majeed Palari .. Appellant

Versus

The State... Respondent

Criminal Appeal No. 44 of 2013, Heard on 26th March, 2014

(a) Criminal law...

…. Conviction cannot be based upon probabilities... **Conviction recorded merely on probabilities is not sustainable in law. [p.123]**

JUDGMENT

SYED MUHAMMAD FARROOQ SHAH, J.:- Appellant / convict Abdul Majeed Palari son of Abdullah was tried by the Special Judge, Control of Narcotics Thatta, on the charge of having been found in possession of contraband *Charas* quantified 240 grams. On conclusion of the trial, vide judgment dated 07.2.2013, the appellant was convicted and sentenced under section 9(b) of CNS Act to undergo RI for two years and to pay fine of Rs.10,000/- , in default of payment of fine to undergo SI for three months more, with benefit of section 382-B Cr.P.C. The appellant has assailed the impugned judgment through the captioned Appeal and has prayed for his acquittal on the fact and grounds as set forth in the memo of appeal.

2. Succinct story of the prosecution case, as narrated in the FIR (Crime No. 17 of 2011) lodged on 13.9.2011, at Police Station Jhampir, district Thatta, by SHO Rab Nawaz Pathan are that on the said date he proceeded alongwith his subordinate staff for patrolling purpose and when reached at railway crossing, he received spy information that Appellant Abdul Majeed was selling *Charas* near grid station at road side leading from Jhampir to Noriabad. On such information, he proceeded at the pointed place and at 2130 hours, they saw the Appellant, who on seeing the police party tried to escape but he was arrested with the help of staff. On enquiry, he

disclosed his name to be Abdul Majeed Palari (Appellant) and from his personal search one paper bag of brown colour was recovered from side pocket of his shirt which was opened, containing two big pieces of *Charas* and currency notes amounting to Rs. 250/- were also recovered. The *Charas* was weighed at the spot which was 240 grams. It was sealed at the spot. Due to non-availability of public mashir, the Mashirnama was prepared in presence of two police constables and thereafter he was brought at the Police Station where the case was registered under section 9-B CNS Act.

3. On completion of usual investigation, the Appellant was charge sheeted in the court of concerned Magistrate wherefrom it was sent to the learned Sessions Judge/ Special Judge Thatta, for its trial. The copies of police papers in compliance of section 265-C Cr.P.C. were supplied and charge was framed, to which the appellant pleaded not guilty and claimed his trial.

4. At the trial, prosecution in order to prove its case examined complainant SIP Rab Nawaz Pathan, who had also acted as Investigating Officer and produced entry showing departure from Police Station, Mashirnama of recovery and arrest, FIR and Chemical Report as well. PW- 2, PC Muhammad Hassan was also examined and thereafter the prosecution closed its side. Consequently, the statement of appellant under section 342 Cr.P.C. was recorded wherein the appellant has denied the allegations leveled against him and submitted that both PWs are police officials and deposed against him due to enmity. He has also claimed his innocence. Following points for determination framed by the trial court needs consideration:-

> *"Whether on above 13.9.2011 at 2130 hours at pacca road leading Jhimpir to Nooriabad adjacent to Grid Station Jhimpir, Taluka & District Thatta, present accused was found in*

> *possession of Charas quantified 240 grams in two pieces as alleged by the prosecution?"*

5 Arguments heard record perused.

6. A perusal of deposition of both witnesses, examined by the prosecution reveals that the alleged recovery of contraband narcotic was effected at 2130 hours when the property was weighed, sealed and Mashirnama was prepared but the mashir PC Muhammad Hassan has stated that they reached at place of incident at 08:30 p.m. Mashir PC Muhammad Hassan has further deposed that contents of cloth bag were written at Police Station but the complainant deposed that PC Muhammad Hassan had written the contents over the cloth bag in which the alleged recovered property sealed at the place of incident. Mashir PC Muhammad Hassan has further deposed that the SHO/Complainant had himself sewed the cloth bag containing *Charas* with threads with his own hands at the place of incident but the complainant deposed that the cloth bag was already available with him. Above all, it is an admitted position that the contents of the cloth bag viz. crime No. and sections etc. were written at the place of incident prior to the registration of FIR.

7. Prosecution evidence further reveals that the case property viz. two big pieces of contraband Charas were intact at the time of de-sealing in the court at the time of recording evidence. Although, the said narcotics was allegedly received back from Chemical Analyzer and it is surely not attracting to the prudent mind that the Chemical Examiner without de-sealing the bag examined the recovered material. More so, it appears that the alleged recovery was affected on 13.9.2011 but same was received by the office of Chemical Examiner on 17.9.2011 and it is shrouded in mystery that during the intervening period in whose custody the case property was lying, as such tempering with the case property may not be brushed aside, more particularly, the person viz HC Gul Hassan in whose custody the case property was lying during

the intervening period has not been examined by the prosecution.

8. The learned trial court, while examining and scrutinizing the prosecution evidence in para 10 of the impugned judgment, observed that :

> *"10. In cross examination he admitted that he did not ask any driver of vehicle to act as mashir, Charas was wrapped in a Khakhicolourthelhi, the khakhicolourthelhi is present in the court and that he wrote the Mashirnama in the light of headlights of vehicle while sitting. He further admitted that HC-Ghul Hassan took charas for chemical examiner on the direction of WHC. He deposed that he does not know that accused having hotel at Noori Abad where police usually took meal free of cost and on his refusal they implicated the present accused in this case. He denied that property is foisted upon him, nothing has been recovered from accused and that all formalities were completed at Police Station."*

9. In the instant case, specific animosity and ill-will has been alleged against the police officials, therefore, it was incumbent upon the prosecution to prove its case by examining independent persons of the locality but neither the police examined any person of the locality nor accompanied any private person to witness the personal search and recovery of contraband narcotics, having advance information of presence of the appellant at the place of incident, who was allegedly selling the contraband Charas. The only examined marginal witness Mashir PC Muhammad Hassan is subordinate of complainant/ Investigating Officer, has not fully corroborated the deposition of his officer. Even the record does not reveal as to whether any efforts were made to

persuade any person including drivers to act as Mashir of recovery, thus there was flagrant violation of provisions of section 103 Cr.P.C. On the point of joining independent persons of the locality, the reliance may conveniently be paced on the case law reported as **GHULAM HUSSAIN V/S THE STATE (2003 P.Cr.L.J. 7), RIAZ HUSSAIN KALHORO V/S THE STATE (2004 P.Cr.L.J. 90)** and **MUHAMMAD AZIZ V/S THE STATE (PLD 1996 SC 67).** All these facts rendered the alleged recovery of contraband narcotics extremely doubtful.

10. Deposition of both prosecution witnesses is not found in conformity, rather there are many discrepancies in between the evidence of both examined police officials. Suffice is to say that the ocular testimony is not trustworthy, the circumstantial evidence is also not inspiring confidence. It is settled preposition in law that benefit of every doubt is to be resolved in fovour of the accused. The background of enmity definitely existed between the parties.

11. It is not out of context to mention here that for extending benefit of doubt, it is not necessary that there should be many circumstances creating doubt and if there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. In the case of **TARIQ PERVEZ V/S THE STATE (1995 SCMR 1345),** the full bench of the Hon'ble Apex Court, in the middle of paragraph 5 held that:--

> "As such it cannot be said with judicial certainty that the parcel containing sample heroin was sent to the Chemical Examiner. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates

> reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

12. In view of the foregoing, the conviction recorded merely on probabilities by the trial court is not sustainable in law, consequently, the appeal was allowed, resultantly the impugned judgment was set aside by short order dated 26.3.3014 and these are the reasons for above said order.

2017 SLD 129

Present: Ahmed Ali M. Sheikh and Abdul Maalik Gaddi, JJ

Mukhtiar Ahmed Siyal .. Appellant

Versus

Piyaro and others.. Respondent

Criminal Appeal No.D-15 of 2013, Heard and Decided on 01st January, 2015

(a) Criminal law..

…. Accused, innocent until proved guilty.. **It is a legal parlance that every accused is blue-eyed child of law and is presumed to be innocent unless and until he is held guilty by due course of law. [p.]**

(b) Criminal law..

…. Presumption of double innocence.. **Maxim exists that error in acquittal is better than the error in conviction and more so, after yielding acquittal dual presumption of innocence is attached with an accused. Furthermore, once an accused is acquitted by a competent Court of law after facing the trial, than he earns the presumption of double innocence which cannot be disturbed slightly unless grave illegality and injustice was established in the impugned order of acquittal. [p.]**

ORDER

Abdul Maalik Gaddi, J-. Through this criminal acquittal appeal, the appellant has impugned the judgment dated 12.01.2013, passed by learned 5th Additional Sessions Judge, Larkana, in Sessions case No.1242/2004, Re; State Vs. Piyaro and others, culminating from Crime No.33/2003, Police Station Bakrani, registered under Sections 302, 324, 337-H (2), 114, 148, 149 P.P.C; whereby the respondents No.1 and 2 have been acquitted under Section 265-H (i) Cr.P.C.

2. Per case of prosecution, the allegation against the respondents No.1 and 2 is that, respondents No.1 and 2 gave "hakals" to complainant party and made aerial firing, whereas respondent No.2 IllahiBux has also been assigned the role of instigation to principal accused.

3. Since the matter was fixed at Katcha Peshi stage and learned counsel for the appellant was directed to satisfy this Court with regard to maintainability of this appeal in the scenario that appeal has been filed after expiry of appeal period, hence he has been heard.

4. It is inter-alia contended by the learned counsel for the appellant that the learned trial Court did not appreciate evidence available on record while passing the impugned judgment and did not apply its judicious mind. According to learned counsel for the appellant, the learned trial Court has passed the impugned judgment in favour of the respondents No.1 and 2/accused without going through the material on record and facts that complainant and eyewitnesses of the case have produced the ocular evidence against respondents No.1 and 2 and no material contradictions have come on record in between the prosecution witnesses. Learned counsel further contended that at the instigation of respondent No.2 the main culprits have attacked on complainant party.

5. On the point of delay in filing appeal, it is argued by the learned counsel that complainant had no knowledge about the judgment and as and when he came to know about the judgment he filed present appeal with an application under Section 5 of Limitation Act mentioning the reasons for filing the appeal after expiry of appeal period, therefore, he prayed that impugned judgment of acquittal is liable to be set-aside.

6. We have heard the learned counsel for the appellant and perused the record.

7. As per record prosecution in support of its case examined in all ten witnesses, namely, complainant Mukhtiar Ali, P.Ws Nisar Ahmed, Irfan Ali, H.C Hakim Ali, Inspector Assadullah, Dr. Rahim Bux, H.C DhaniBux, P.C Irshad Ali, Dr. Akhtar Ali and ASI Ghulam Mustafa.

8. We have carefully scrutinized the evidence of the aforesaid witnesses only to the extent of case of present respondents No.1 and 2 and have found contradictions on material particulars. Besides, there is no convincing evidence on record showing that present respondents have given "Hakals", made aerial firing and instigated to principal accused for attack on complainant party. Evidence, if any against the respondents also found sketchy and partisan, has rightly been discarded by the Court below. In this regard we are supported with the case of *Haji Amanullah Vs. Munir Ahmed and others*, reported as 2010 SCMR 222, wherein it has been laid down as under:

> "*Entire prosecution evidence being vague, sketchy and partisan, had rightly been discarded by the Courts below. Evidence had been appreciated in its true perspective in accordance with principles laid down by Supreme Court qua appreciation of evidence.*

> *No illegality, infirmity, misreading or non-reading of evidence, could be pointed out warranting interference in the impugned judgment of acquittal, which being unexceptional-able could not be reversed.*"

9. It may be observed that it is a legal parlance that every accused is blue-eyed child of law and is presumed to be innocent unless and until he is held guilty by due course of law. Maxim exists that error in acquittal is better than the error in conviction and more so, after yielding acquittal dual presumption of innocence is attached with an accused. Further more, once an accused is acquitted by a competent Court of law after facing the trial, than he earns the presumption of double innocence which cannot be disturbed slightly unless grave illegality and injustice was established in the impugned order of acquittal. On this aspect of the case we are supported with case of *The State through Advocate General, Peshawar NWFP Vs. Gulla* reported in 2011 P.Cr.L.J 696.

10. Besides, this appeal merits outright dismissal on the ground of limitation alone. The impugned judgment is dated 12.01.2013, while the appeal has been filed on 12.03.2013. Under subsection (2-A) of Section 417 Cr.P.C, 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. Thus the appeal in hand having been filed beyond thirty days, i.e. after two months which is hopelessly barred by time. The explanation furnished by the appellant through application under Section 5 of the Limitation Act, is not convincing as the delay of each day in filing the appeal has not been reasonably explained. Besides, negligent in keeping himself informed about fate of his case is no ground of condonation of delay. Such plea of accused being frivolous and baseless is devoid of merit. Defaulting party while applying for condonation of delay must explain and account for the delay of each day, because on expiry of period of

limitation, a valuable right is created in favour of other party, but in this case appellant failed to do so.

11. The learned counsel for the appellant, during course of arguments has failed to point out any illegality or irregularity in the impugned judgment of the trial Court to the extent of present respondents.

12. In view of the above facts and circumstances, no perversity, illegality and incorrectness have been found in the impugned judgment. Learned trial Court while passing the impugned judgment has appreciated all the points involved in this case. We, therefore, under facts and circumstances of the case find no merit in this criminal acquittal appeal, which stands dismissed alongwith an application filed under Section 5 of the Limitation Act.

Appeal Dismiss

2017 SLD 134

Present: Ahmed Ali M. Sheikh and
Salahuddin Panhwar, JJ

Abdul Latif... Appellant

Versus

The State... Respondent

Criminal Appeal No.D-34 of 2012.

(a) Criminal law...

…. Police employees are good witnesses... ***it is a settled proposition of law that the police employees are the***

competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are the police employees.

J U D G M E N T.

SALAHUDDIN PANHWAR,J- By this criminal jail appeal, the appellant has assailed the Judgment dated 4.5.2012 passed by the Special Judge (CNS), Khairpur in Special Case No.50/2011 (Re-The State v Abdul Latif arising out of Crime No.50/2011 of Police Station, Sorah, registered for offence under Section 9-C Control of Narcotic Substance Act, 1997 whereby convicting the appellant under Section 9(c) CNS Act, 1997 and sentenced him to suffer R.I for six years and to pay a fine of Rs.50,000/- and in case of default in payment of fine, the appellant shall further undergo S.I for three months. The benefit of Section 382-B, Cr.P.C was also extended in favour of the appellant.

2. The relevant facts leading to this appeal are that complainant SIP Irshad Hussain Lashari left Police Station, alongwith ASI Sikander Ali, HC Ghulam Qadir, PC Mir Hassan, PC Alam Khan alongwith DPC Anwaruddin in Government Mobile for patrolling vide DD No.7 at 1100, hours; when they reached at KhatarnakMorr(curve), they saw a person, having black plastic Thelhi in his hand, was standing there,and tried to escape away but was apprehended after 10 to 12 paces;during interrogation, disclosed his name Abdul Latif, and that he is absconder in Crime No.80/2009, under Section 365-A, PPC Police Station, Sorah and in Crime No.37/2009 under Section 399 PPC Police Station, Sorah, thus, he was arrested; due to non-availability of private mashirs, ASI Sikander Ali and HC Ghulam Qadir acted as mashirs. Plastic Thelhi was opened and found eight pieces of Charas and same was weighed at the spot and became 4000 Grams; and same was sealed at the spot. On personal search

Rs.500/- were also recovered from the front pocket of shirt of accused, such mashirnama of arrest and recovery was prepared there in presence of mashirs. Accused and property brought at Police Station, and FIR was lodged.

3. A charge against the appellant was framed to which he pleaded not guilty and claimed trial.

4. It is further revealed that prosecution examined PW Sikandar Ali ASI at Exh.4, who produced mashirnama of arrest and recovery of vardat at Exh.4-A and B; P.W Walidad SIP at Exh.5, who produced the copies of letters at Exh.5-A and B and chemical report at Exh.5-C; P.W Irshad Hussain Lashari SIP/Complainant at Exh.6, who produced copy of roznamcha at Exh.6-A,6-B and FIR at Exh.6-C; Prosecution closed its side by way of statement at Exh.7.

5. It further reveals that the statement of appellant was recorded under Section 342, Cr.P.C, wherein, he denied all the allegations of prosecution and stated that he has been implicated due to enmity with SIP AijazWassan as his brother Muhammad Rafique had made C.P.No.2355/2010 and Misc. Application No.1670/2010, before the Court, therefore, police officials were annoyed and lodged this false case against him and his relatives and produced photocopies of order and newspaper clippings. The opportunity was given to the appellant to examine himself on oath, but he refused and did not lead any defence.

6. The learned counsel for the appellant has inter-alia contended that the appellant is innocent and has been implicated falsely due to enmity with SIP AijazWassan; false case has been registered and property has been foisted upon him; PWs are interested and the police has not taken any independent witness from the vicinity; the police has violated Section 103, Cr.P.C; there are material contradiction in the testimony of PWs. He has relied upon the case of Nazeer

Ahmed v The State (NLR 2008 Criminal 150), Yaseen Gul v State (2011 P.Cr.L.J 345), Muhammad Saeed alias Rashid alias Sheda and another v The State (2011 P.Cr.L.J 454) and AyoobMasih v The State (NLR 2003 Criminal 01).

7. Conversely, the learned APG appearing for the State has argued that there is no material contradiction in the testimony of the PWs; huge quantity of 4000 Grams Charas was recovered from the appellant at the spot; the appellant has not produced any documentary evidence in order to show that there is enmity between him and complainant Irshad Hussain Lashari; whole property was sent to chemical examiner, the report is positive, therefore, conviction awarded by the learned trial Court is legal and in accordance with the law.

8. Heard the learned counsel for the parties and perused the material available on record.

9. We have examined the evidence, the case law and have considered the contention of learned counsel, In the case of Nazeer Ahmed (supra)it is held:--

"the recovery was affected from the Dera of Saifullah, while accused escaped after scaling over the wall. It was night time incident, the appellant was not shown to be owner of Dera from where the recovery of Charas was allegedly affected, and documents were produced by appellant Nazeer Ahmed, which show that some enmity existed between him and police. Under these circumstances benefit of doubt was extended to the appellant.

In the case of AyubMasih (supra), it is held:--

"Pursuant to Section 295 PPC, in which the basic principle was discussed with the rule of benefit of doubt, which is described as a golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. This rule is based on that maxim it will be better then ten guilty persons be acquitted rather than one innocent person be convicted".

In case of Muhammad Saeed alias Rashid alias Sheda and another (supra) it was held that:--

"it is not necessary that there should be a number of circumstances creating doubt in the prosecution case if a simple circumstance creates reasonable doubt in the mind of a man of ordinary prudence about the guilt of an accused, he would be identified to such benefit not as a matter of concession but as a matter of right".

In the case of Yaseen Gul (supra), it is held:--

"That material contradiction in the statement of PWs would be fatal to prosecution case against the accused under Section 9(c).

9. From the bare perusal of above citations it appears that no doubt it is a settled proposition of law that benefit of doubt must be extended in favour of an accused and single material doubt is sufficient to acquit the accused; but it to be seen that whether same proposition of law is applicable in the case in hand. It is also to be seen whether the impugned judgment is based on wrong appreciation of evidence and instant case is not free from reasonable doubt. We have considered all the aspects of the case, applicability of case law and have minutely examined the evidence available on record.

10. PW Sikander Ali while deposing in examination-in-chief has supported the prosecution case on all the aspects which reflects that appellant was absconder in Crime No.80/2009 under Section 365-A.PPC and Crime No.37/2009 under Section 399, 402, PPC of Police Station, Sorah. The appellant was apprehended when he was available on the western side of the road where from he was arrested and recovery of 4000 Grams Charas was affected.

11. PW Irshad Hussain has also deposed that vide Entry No.07 at 1100 hours they went on patrolling, the appellant was apprehended by them and 8 pieces of Charas were recovered

from his exclusive possession, and the same was weighed. Subsequently FIR was lodged.

12. PW Walidad/IO of the case recorded the statements of witnesses interrogated the appellant, sent the samples to Laboratory at Rohri on18.06.2011. During lengthy examination no material contradiction was brought on record nor any major discrepancy found in the prosecution evidence; whole recovered Charas was sent to the chemical examiner on same day; same was reached at Laboratory on next day and by report, it was found that whole property is Charas though counsel for the appellant has taken the plea not only during the trial but also at appeal stage that the appellant was arrested due to enmity with AijazWassan for that the appellant had produced a Cr.Misc.Appln.NO.1670/2010, photographs and order passed on such application. We have also examined all these documents, which apparently filed by one Molvi Muhammad Rafique in the year 2010. Apparently these documents have no nexus with the present case and case pertains to independent proceedings, thus these documents are not helpful to the appellant.

13. Regarding to the contention that no independent witness was associated by the police for that it is a settled proposition of law that the police employees are the competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are the police employees as laid down in the case of Naseer Ahmed v The State (2004 SCMR 1361), Riaz Ahmed v The State (2004 SCMR 988) and Muhammad Haneef v The State (PLD 1996 SC 67).

14. Counsel for the appellant has failed to point out any material contradiction in the prosecution case so as to justify his claim of applicability of golden rule of benefit of doubt. In absence of any material illegality, material contradictions or contradictions in the prosecution case, therefore we are of the

considered opinion that the prosecution prima facie has shifted onus upon the appellant successfully thereby conviction awarded to the appellant is very proper and according to law.

15. Regarding to the quantum of sentence, the learned counsel has contended that harsh punishment has been awarded to the appellant. Such contention carries no weight as the case of _murtaza____________________________________, the criteria has been fixed regarding quantity and conviction in Narcotic cases. We have carefully examined such quantum of sentence. On this point the learned trial Judge has rightly convicted the appellant for six years as whole recovered quantity also was examined, is 4 KGs, therefore, six years conviction is not against the spirit of law, which was maintained by the Honourable Supreme Court.

16. Above are the reasons of our short order dated 04.10.2012 whereby this criminal jail appeal was dismissed.

Appeal dismissed

2017 SLD 140

Present: Mohammad Ather Saeed and
Irfan Saadat Khan, JJ

Feroz Khan Baloch (Applicant)

Versus

First Women Bank & Ors .. Respondent

Criminal Appeal No.30 of 2011, heard on 14th March, 2011

(a) Criminal law..

…. Second or third complaint after previous is withdrawn resulting in acquittal of the respondent.. **Once the complaint is withdrawn for whatever reason and if so permitted results in acquittal of the accused, in our opinion, another complaint on identical facts filed by the respondent after a lapse of considerable period, for which no plausible explanation has been furnished, is illegal and uncalled for.**

O R D E R

IRFAN SAADAT KHAN, J: This Criminal Revision Application has been filed against the order dated 22.01.2011 passed in Criminal Complaint No.46/2009 by the Banking Court No.II at Karachi whereby the application under Section 249-A Cr.P.C., converted into 265-K Cr.P.C., filed by the applicant was dismissed.

2. Briefly stated the facts of the case are that the respondent No.1 through its attorney filed Criminal Complaint under Section 20(1)(b) & (2) of the Financial Institution (Recovery of Finance) Ordinance-2001 (the Ordinance) stating that on 13.02.1996 on the specific request of the applicant the running financing facility was enhanced from Rs.50,00,000/- to Rs.75,00,000/-, which was required by the applicant for manufacturing and export of garments. That the applicant pledged with the respondent shares of various companies as collateral of the running finance facility. That upon verification the said shares were found to be fake and bogus as no such certificate numbers exist in the record of the companies. That as per the respondent the applicant has committed fraud by depositing fake and bogus shares and in the opinion of the respondent he has made himself liable for criminal proceedings.

3. A complaint was filed in 1997 before the Special Court, Offences in Banks at Karachi by the respondent, which was dismissed for non-prosecution on 18.09.1997. Thereafter an another complaint was filed by the respondent No. 01 in 2007 before the Special Court, however the same was withdrawn under the provision of Section 248 of the Cr.P.C on 20.01.2007, on the premise that as an employee of the Bank was also involved alongwith the applicant for committing the said forgery and fraud against the Bank and as the Bank has referred the matter to FIA for recording the statement of the witnesses and for investigation. The present Respondent sought permission to file a fresh complaint implicating one of their employees also, this application was allowed on the same date of filing of the said application by the learned Banking Court. In 2009 however the respondent Bank once again filed a complaint against the applicant before the Special Court for the aforesaid crime. However, the employee of the bank, who was intended to be implicated, was not implicated in the subsequent complaint. Thereafter the present applicant filed an application under Section 249-A Cr.P.C., which was

converted into 265-K Cr.P.C., for acquittal and was dismissed vide order dated 22.01.2011. It is against this order that the present Criminal Revision Application has been filed.

4. The applicant is present in person and has submitted that he is totally innocent as the present complaint was made on the basis of the same allegations in respect of which two previous complaints were preferred by the respondent Bank out of which one was dismissed for non-prosecution and the other was withdrawn by the Bank itself hence the present third complaint was misconceived. He submitted that the matter is quite old and the bank had not produced any positive or concrete evidence of fraud and forgery against him and the order passed by the Banking Court on his application for acquittal by dismissing the same is illegal and uncalled for. While elaborating his submissions the applicant submitted that the fraud if any was committed by one Malik Jahangir Khan, a guarantor, with the connivance of staff of the Bank against whom apparently no action whatsoever has been taken by the Bank. As per the applicant he never went to the Bank for obtaining any running finance and he has also explained his position to the President of Bank and has clarified that the complaint made by the Bank against him is not correct as he had no role to play in the alleged fraud. He also submitted that FIA has already acquitted him and no charge has been found against him hence the complaint against him is simply baseless. In the end he submitted that he may be acquitted from the charges leveled by the bank by allowing this Criminal Revision Application.

5. Mr. Muhammad Arif Khan appeared on behalf of respondent No.1, however, no one appeared on behalf of respondent No.2. He submitted that there is no bar in law for making more than one complaints against any person who has committed fraud with the Bank and there is also no bar in the law with regard to the proposition that if one complaint has been dismissed or withdrawn no second complaint could be

filed in this regard. He submitted that the Banking Court has given an exhaustive and detailed order for dismissing the application under Section 249-A Cr.P.C. filed by the applicant and the applicant has failed to point out any illegality in the said order. He further submitted that this Criminal Revision Application being devoid of any merits is liable to be dismissed. In support of his above contentions the learned Counsel has relied upon Abdul Rasheed Janjua Vs The State (2003 YLR 2211), Muhammad Amin Vs M. Ilyas Dadoo (2008 YLR 2824) and Zahoor Vs Said-ul-Ibrar (2003 SCMR 49).

6. In the interest of justice, we asked Mr. Saifullah, A.A.G., and Mr. Saleem Akhtar, A.P.G., sitting in the Court to assist the Court on this issue and they have assisted the Court quite ably and we appreciate their efforts in this regard.

7. We have heard the applicant, learned counsel representing respondent No.1 and the learned amicus curie and have also perused the record and the decisions relied upon by the Counsel representing the Respondent No. 01.

8. It is seen from the record that first complaint was made by the respondent against the applicant in 1997 but the same was not pursued and the same was dismissed for non-prosecution on 18.09.1997. Thereafter an another complaint was filed, which was withdrawn by giving a specific application, under Section 248 Cr.P.C., which is available at page-195 of the file, by mentioning that the complainant may be allowed to withdraw the complaint with the permission to file a fresh complaint by joining Miss Seema Zaman as co-accused in the said complaint. However it is quite strange on the part of the Bank that when they filed the third complaint the same was only against the present applicant. At this juncture we would like to quote herein below Section 248 & 249-A of Cr.P.C., which reads as under:-

> ***"248. Withdrawal of complaint****. If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.*
>
> ***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".*

9. Perusal of Section 248 Cr.P.C. reveals that a complainant at any time before the final order is passed make an application for withdrawal of his complaint and the Magistrate may permit him to withdraw the same and shall thereupon acquit the accused. Meaning thereby the acquittal of the accused person is a sine qua-non of the said complaint and withdrawal of the complaint has to result in acquittal of accused baring re-trial. It is also to be noted that it is the discretion of the Magistrate to allow the complainant to withdraw the said complaint and the Magistrate even has the authority to refuse such withdrawal, keeping in view the facts of the case. It is noted from the record that the application for withdrawal of the complaint was a voluntary act on the part of the respondent Bank and filing of the subsequent complaint is nothing but the revival of the previous complaint, which was withdrawn by the respondent itself.

10. The Banking Court has allowed the withdrawal of the complaint on the specific application made by the Bank and

the subsequent filing of the complaint on the identical issue, in our opinion, amounts to revival of the old complaint. As explained above withdrawal of complaint under Section 248 Cr.P.C. results in acquittal of the accused as in the said Section it has specifically been mentioned "shall thereupon acquit the accused" meaning thereby that it is mandatory upon the Magistrate/Judge, while allowing the said permission for withdrawal of the complaint, to acquit the accused keeping in view the facts of the case.

11. Now coming to the facts of the present case, the first complaint was filed in the year 1997 and after a lapse of two years another complaint was filed in the year 1999, which subsequently was withdrawn after a lapse of nine years. However yet another complaint was filed in the year 2009 and no plausible reason was given by the respondent for filing the third complaint except by stating that as the matter was being investigated by the FIA authorities hence the pervious complaint was withdrawn. However when the learned Counsel for the bank was asked to produce the report of the FIA the learned counsel candidly conceded that no such report is available with him.

12. We have further noted that the previous complaint filed in 1998 was withdrawn with the specific request that fresh complaint will be filed after joining Miss. Seema Zaman, an employee of the Bank, as co-accused in the complaint. However in the third complaint, i.e. the present complaint, which was filed after two years, the same was only against the present applicant. It is also seen that the complaint was filed on the report of the FIA however as per the applicant, which was not denied by the Counsel of the Bank, the FIA authorities have subsequently acquitted the applicant. However, it is quite strange on the part of the Bank that inspite of making categoric statement that they will implead Miss Seema Zaman as co-accused in the fresh complaint but have

filed the third complaint only against the present applicant, which also creates doubt in this regard.

13. We were able to lay our hands on a decision given by Single Bench of the Lahore High Court in somewhat similar circumstances, in the decision reported as Mazhar Hussain Vs. The State (PLJ 1993 Cr.C. Lah. 16) wherein the learned Judge while deciding a Criminal Revision Petition observed as under:-

> "*Furthermore, the dismissal of the earlier complaint, on withdrawal by the complainant/Respondent No. 2, falls under the provisions of Section 248 Cr. P.C which is as follows:-*
>
> > *If a complainant, at any time before a final order is passed in any case under this chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.*
>
> *As the perusal of the above Section makes it clear that a withdrawal of the complaint on the satisfaction of the Court results in the acquittal of the accused, and such an acquittal bars the retrial of the acquitted accused in accordance with the provisions of sub-section (1) of Section 403 Cr. P.C. as contended by the learned counsel for the petitioners. A perusal of the said section leaves no doubt about the relevancy of the*

said contention, and for reference it is being reproduced herein below:-

> *Section 403.-(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor one the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237.*

5. Therefore, pursuant to the above discussion, as the acquittal of the petitioners vide order dated 21.09.1986 whereby earlier complaint in respect of the same offences as is the subject matter of the instant complaint remains in force, the impugned order dated 11.01.1987 is not sustainable in law and is hereby set aside, and the present Criminal Revision Petition is accordingly allowed and disposed of".

14. Article 13 of the Constitution of Islamic Republic of Pakistan also clearly stipulates that no person should be vexed twice. If the facts of the case are examined it will be seen that the applicant has been made the victim to once again face the trial after the withdrawal of the complaint by the Respondent, though for any reason. In our view the law in this regard is

quite clear that no body should be punished twice for the same offence. Filing of the third complaint on identical facts amounts to implicating the applicant on a matter in respect of which the complaint filed by the bank was already withdrawn with a conscious application of mind.

15. We, therefore, in view of the above facts have come to the conclusion that the third complaint filed against the present applicant is wholly misconceived and illegal as firstly no plausible explanation has been given by the counsel appearing on behalf of the respondent Bank that how a complaint, after a lapse of two years, after the withdrawal of the second application has been filed and that too without adhering to the previous commitment made by the Bank and secondly in view of the fact that withdrawal of complaint under Section 248 Cr.P.C., if allowed, results in acquittal of the accused. Hence once the complaint is withdrawn for whatever reason and if so permitted results in acquittal of the accused, in our opinion, another complaint on identical facts filed by the respondent Bank after a lapse of considerable period, for which no plausible explanation has been furnished, is illegal and uncalled for. In view of what has been stated above this Criminal Revision Application is allowed and the impugned order is set aside.

16. Above are the reasons for our short order dated 14.03.2011 announced in Court after hearing the learned Counsel by which we have allowed the Criminal Revision Application and set aside the impugned order.

Application set aside